

Imputed income in Matrimonial Actions
By Joel R. Brandes

The term “imputed income” is an income tax concept. “Imputed income” has been defined as “the benefit one receives from the use of one's own property, the performance of one's services, or the consumption of self-produced goods and services.” (Black’s Law Dictionary (11th ed. 2019)). The “imputed income” doctrine was first applied by the Court of Appeals in calculating maintenance awards in *Kay v Kay* and *Hickland v Hickland*. Since that time, it has been extended by statute to child support awards and the case law dealing with imputed income is equally applicable to both types of cases.

In *Kay v Kay*, (37 NY2d 632, 376 NYS2d 443 (1975)) 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. He testified that his gross income was \$67,000 and his net income was \$28,000 per year after taxes. He gave a confusing explanation for the difference saying it was spent for business needs. His evidence was 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. Evidence at the trial revealed that his employer supplied him with a car, used by himself and his family; the husband testified that his expenditures for himself and his family were \$28,000 a year. The Court of Appeals held that the evidence justified a finding that the husband's true income was much higher than his reported \$28,000 per year. 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.” 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*, (39 N.Y.2d 1, 382 N.Y.S.2d 475 (1976)) the husband, an engineer, with annual earnings over \$45,000 persuaded his wife to let him try full-time farming as an occupation. The wife agreed to it expecting that it would provide them with a living. The farming, which took place at Argyle Farm, became a losing proposition. The husband hired someone to run the farm and devoted himself to freelance management consulting. During negotiations for a separation agreement, the husband 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 to pay alimony to his wife. 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, which he never actually put into full practice while the marriage was viable, but only after the parties had already separated. The husband's proof 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. It held that 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.

Maintenance

A party's maintenance obligation is determined by his or her ability to provide support, rather than the party's current financial situation. (*Bell–Vesely v Vesely*, 180 A.D.3d 1272, 120 N.Y.S.3d 487, 490–91, (3 Dept., 2020)). In determining a party's maintenance obligation, a court need not rely upon a party's own account of his or her finances, but may exercise its discretion by imputing income. (*Hickland v. Hickland*, *supra*; *Hughes v Hughes*, 2021 N.Y. Slip Op. 05765, 2021 WL 4896914, at *2 (3 Dept., 2021)).

Income may be imputed to a spouse for purposes of awarding maintenance, based on a finding of a past demonstrated earnings potential (*Rocanello v Rocanello*, 254 A.D.2d 269, 678 NYS2d 385 (2nd Dept 1998); past earnings, actual earning capacity, and educational background (*Lennox v. Weberman*, 109 A.D.3d 703, 703, 974 N.Y.S.2d 3 (1st Dept. 2013); receipt of perquisites of cash and other company benefits (*Isaacs v Isaacs*, 246 A.D.2d 428, 667 NYS2d 740 (1st Dept. 1998); *Brown v Brown*, 239 A.D. 2d 535, 657 N.Y.S.2d 764 (2d Dep't, 1997)); and where a spouse voluntarily maintains his or her assets in a form which limits the income they produce. (*Kay v Kay*, *supra*.)

However, 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. (*Hickland v Hickland*, *supra*)

Child Support

In contrast, the imputed income doctrine was enacted as part of the Child Support Standards Act. (Domestic Relations Law §240(1-b)).

The Domestic Relations Law provides, in part, 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 non-income-

producing assets; 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; fringe benefits provided as part of compensation for employment; and based on 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. (Domestic Relations Law §240(1-b) (b) (5) (iv) and (v)).

Child support is determined by the parent's ability to provide for their child rather than their current economic situation. (*Kalish v. Kalish*, 289 A.D.2d 202, 733 N.Y.S.2d 717 (2d Dep't 2001); *Goddard v. Goddard*, 256 A.D.2d 545, 682 N.Y.S.2d 423 (2d Dep't 1998)).

In determining a parent's child support obligation, the Court is not required to rely upon the party's own account of his or her finances. As in the case of maintenance awards, the Court may impute income based on that party's past income or demonstrated earning potential (*DeSouza-Brown v. Brown*, 71 A.D.3d 946, 947, 897 N.Y.S.2d 228, 231 (2d Dept., 2010)), his education and experience, his employment history, and what he or she is capable of earning, based upon market conditions and salaries paid to individuals with the same credentials in his chosen field. (*Lago v. Adrion*, 93 A.D.3d 697, 940 N.Y.S.2d 287 (2d Dep't 2012)).

Imputation of income may be based upon the testimony of an expert regarding a party's ability to earn an income. (*Lago v. Adrion*, supra)

Income may be imputed based upon a party's lack of credibility. (*Rohme v. Burns*, 92 A.D.3d 946, 939 N.Y.S.2d 532 (2d Dep't 2012)); *Huddleston v. Rufrano*, 98 A.D.3d 1046, 951 N.Y.S.2d 179 (2d Dep't 2012)). In *Murphy-Artale v. Artale*, (219 A.D.2d 587, 632 N.Y.S.2d 19 (2d Dep't 1995)), the Appellate Division held that as husband's 1992 reported income was found not to be credible, the court was not bound by the actual reported income and should have used the husband's actual earning capacity, as determined, for example, by averaging his reported income for the 5 years immediately preceding 1992.

A court is not required to find that a parent deliberately reduced his or her income to avoid a child support obligation before imputing income to that parent. A court may properly find a true or potential income higher than that claimed by a parent where that party's account of his or her finances is not credible. (*Sharlow v. Sharlow*, 77 A.D.3d 1430, 908 N.Y.S.2d 287 (4th Dep't 2010); *Rohme v. Burns*, 79 A.D.3d 756, 757, 912 N.Y.S.2d 652, 653–54 (2d Dept., 2010)).

Courts have imputed income based upon financial disclosure affidavit discrepancies (*Safran v. Nau*, 123 A.D.3d 460, 999 N.Y.S.2d 4 (1st Dep't 2014));, a party's receipt of cash payments (*Andre v. Brumaire*, 299 A.D.2d 355, 750 N.Y.S.2d 314 (2d Dep't 2002)); attempts to hide income (*Gleicher v. Gleicher*, 303 A.D.2d 549, 756 N.Y.S.2d 624 (2d

Dep't 2003)); a party's failure to provide the documentation required by 22 NYCRR §202.16(k) (*LeCrichia v. LeCrichia*, 82 A.D.3d 599, 920 N.Y.S.2d 40 (1st Dep't 2011)); where personal expenses are claimed as business expenses by a party or paid for out of a party's business account (*Wesche v. Wesche*, 77 A.D.3d 921, 909 N.Y.S.2d 764 (2d Dep't 2010)); and voluntarily deferred income. (*Cerami v. Cerami*, 44 A.D.3d 815, 845 N.Y.S.2d 67 (2d Dep't, 2007)).

The court may impute income from any source that is not reported on an income tax return. (*Pulver v. Pulver*, 40 A.D.3d 1315, 837 N.Y.S.2d 369 (3d Dep't 2007)). Courts have based the amount of income imputed to a party upon the income of the party's business or corporation (*Scammacca v. Scammacca*, 15 A.D.3d 382, 790 N.Y.S.2d 482 (2d Dep't 2005); upon the minimum wage, and upon statistics as to the average earnings of a person in a particular trade or profession (*Kasabian v. Chichester*, 72 A.D.3d 1141, 898 N.Y.S.2d 293 (3d Dep't 2010)).

Domestic Relations Law § 240(1-b) (b) (5) (iv) 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, goods, and services from his present wife. (*Ladd v. Suffolk County DSS*, 199 A.D. 2d 393, 605 N.Y.S. 318 (2d Dep't 1993)). 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.

A court may properly impute income to a spouse based upon a pattern of gifts from a relative, but not from sporadic gifts from a relative. (*Rostropovich v. Guerrand-Hermes*, 18 A.D.3d 211, 211, 794 N.Y.S.2d 42, 43 (1st Dept., 2005); See also *Rooney v. Rooney*, 938 N.Y.S.2d 724, 725, 92 A.D.3d 1294, 1295, (4 Dept.,2012)).

In *Huebscher v Huebscher*, (206 A.D.2d 295, 614 N.Y.S.2d 524 (1st Dept.,1994)) the First Department held that plaintiff's testimony that the 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, 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". In *Noble v. Noble*, 78 A.D.3d 1386, 911 N.Y.S.2d 252 (3 Dept., 2010) it was not an abuse of discretion to refuse to impute income from gifts given to the plaintiff by her mother during the two years preceding the trial to assist with her day-to-day needs and payment of bills as well as during the pendency of this action when defendant failed to provide support for plaintiff and the children. The plaintiff testified that there was no agreement that her mother continue to give her such sums of money (See also *Mayle v Mayle*, 299 A.D.2d 869, 750 N.Y.S.2d 256 (4th Dep't 2002) (error to impute income to husband based on living expenses provided to him by his girlfriend.)).

Maintenance and Child support - Basis in Law and Fact

While a court may impute income for purposes of maintenance awards based upon earning potential, the calculation of the party's earning potential must have some basis in law and fact. A determination to impute income will be rejected where the amount imputed is not supported by the record, or the imputation was an improvident exercise of discretion. (*Weiss v Nelson*, 196 A.D.3d 722, 152 N.Y.S.3d 143 (2d Dept.,2021)). Income may be attributed to a party as long as the court articulates the basis for imputation and the record evidence supports the calculations. A court may impute income “where there is clear and undisputed evidence of a party's actual income during the pendency of the proceeding”. (*Bell–Vesely v Vesely*, (180 A.D.3d 1272, 120 N.Y.S.3d 487 (3 Dept., 2020))).

In *Marino v Marino*, 229 A.D.2d 971, 645 N.Y.S.2d 252 (4th Dep't 1996) 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. The Appellate Division reversed its findings because, 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. It 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. As there was no evidence that he used his company vehicle for his personal needs the trial court improperly imputed additional income to him.

The rule has been stated several ways with regard to child support. It has been held that the exercise of the discretion to impute income for child support purposes "must have some basis in law and fact." (*Petek v. Petek*, 239 A.D.2d 327, 657 N.Y.S.2d 738 (2d Dep't 1997)). A court imputing income is required to provide a clear record of the source from which the income is imputed and the reasons for the imputation and the resultant calculations. (*Kristy Helen T. v. Richard F.G., Jr.*, 17 A.D.3d 684, 685, 794 N.Y.S.2d 92 (2d Dep't 2005)). Where the Court fails to specify the sources of income imputed and the actual dollar amount assigned to each category the award will be vacated. (see *Matter of Sena v. Sena*, 61 A.D.3d 980, 981, 878 N.Y.S.2d 759 (2d Dept.,2009)).

In *Rosenberg v. Rosenberg*, 44 A.D.3d 1022, 845 N.Y.S.2d 371 (2d Dep't 2007) the Support Magistrate incorrectly attributed income to the father's personal cellular phone as he failed to specify “the actual dollar amount assigned to each category, and the resultant calculations.

In *Tuchman v Tuchman*, 2022 N.Y. Slip Op. 00454 (2 Dept., 2022) the Appellate Division reversed the imputation of income to the wife. It held that “the imputed income figure must be rationally based.” It found that the imputed income amount was entirely speculative, based upon assumptions as to the plaintiff's purported investment return from her distributive award, unsupported by evidence in the record. It was undisputed that the plaintiff left the workforce 30 years earlier at the defendant's request. For that reason, annual income should not have been imputed to the plaintiff in determining child

support.

Conclusion

A maintenance or child support award based on imputed income must have a basis in law and fact. There must be sufficient admissible evidence in the record to support the conclusion that the party could earn or will receive the amount imputed. The Court must provide a clear record of the source of the imputed income, the reasons for the imputation, and the resultant calculations. Awards that do not meet these criteria will be reversed on appeal.

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