

The Imputation of Income: Whether and When

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The imputation of income to either a payor or payee spouse has become an increasingly common issue in matrimonial cases.

In some cases, the imputation of greater income (and, correspondingly, a higher support award) is sought with regard to a payor spouse who is presently unemployed and/or allegedly underemployed.

In virtually every case involving an unemployed recipient of alimony, arguments are made that income should be imputed to that person often without regard to their age, their work history or the parties' respective roles throughout the marriage.

A "cottage industry" of employment and vocational experts have sprung up to support or defend the imputation of income claims and defenses.

This article will offer the proposition that such testimony is, as a matter of law, irrelevant and should be barred by the Trial Court.¹

¹ This article will not address the sufficiency of employability or vocational evaluation testimony on the basis of the expertise of the evaluator, the necessity of providing a proper foundation to support such opinion testimony and/or the validity of the methodology used by some employability/vocational experts. Experience, however, shows that, in fact, many such expert's conclusions are "naked opinions" neither supported by proper foundation or reached by way of established and acknowledged methodology. Such issues are a subject for another day and another article. Suffice to say that counsel should always examine employment and vocational expert reports with a critical eye to determine whether or not they are premised upon a sound factual foundation and utilize a reliable methodology.

Fifty Years Before Our Supreme Court

The imputation of income in the context of alimony/child support issues has been before our Supreme Court in varying factual contexts, but with remarkable consistency in concept over fifty years.

Three cases (Bonanno v. Bonanno, 4 N.J. 268 (1950), Khalaf v. Khalaf, 58 N.J. 63 (1971) and Caplan v. Caplan, 182 N.J. 250 (2005)) best exemplify our high Court's consideration of this issue at twenty and thirty-five year intervals over the past fifty-five years.

In Bonanno, *Supra*, the Court considered whether it should impute income to an unemployed payor. In an opinion which obviously predated our current divorce code by over twenty years and which cites to now archaic doctrines such as "the Married Woman's Act,"² the Court held that:

"while the husband's current income is the primary fund looked to for his wife's support... his earning capacity or prospective earnings... his ability to earn... are relevant matters to be considered"³ (emphasis added)

Citing to an even earlier case, Robins v. Robins, 106 N.J. Eq. 198 (1930), the Court held that:

"If it were not otherwise, a husband, by deliberate intent or disinclination to work, might defeat or avoid his marital obligation of support."

Thus, as will be discussed further, it has long been (75 years per Robins and 50+ years per Bonanno) a tenant of our law that the Court may impute income to a payor who was "disinclined" to work.

² Then N.J.S. 37:2-1.

³ Bonanno, page 275.

Some twenty-one years later, our high Court considered the imputation of income with regard to a recipient of alimony.

In Khalaf v. Khalaf, *Supra*,⁴ citing Bonanno, *Supra*,⁵ the court addressed whether income should be imputed to Mrs. Khalaf (the recipient of alimony) because she had a “potential capacity” to earn.⁶

The facts of Khalaf were that the parties had been married for approximately thirty years. Mrs. Khalaf had not worked outside the home for approximately twenty-six years, except to own and operate a yarn shop which she “pursued as a hobby.” Mr. Khalaf was a dentist earning sufficient income to maintain an eleven room family residence, two cars and a country club membership.

The Court held, under those circumstances, that, contrary to Mr. Khalaf’s assertions, Mrs. Khalaf should not have income imputed to her. They observed that she did not work before the divorce, that she is entitled to maintain the marital lifestyle and that Mr. Khalaf’s income was reasonably able to maintain the marital lifestyle.⁷

The Court stated that:

“dealing with a woman who for twenty-six years of her life had been married to the defendant and who had geared her whole lifestyle to maintaining her household and rearing a family.”

⁴ 58 N.J. 63 (1971).

⁵ Khalaf, page 67.

⁶ Khalaf, page 69.

⁷ Khalaf, page 69.

The Court then concluded that they should not “... turn back the clock and ask her to get a job and develop a career.”⁸

In 2005, the high Court considered the case of Caplan v. Caplan.⁹ Although Caplan is the most instructive decision to date on “above guidelines child support,” it also contains an extensive discussion of the imputation of income.

Under the facts of Caplan, the payor husband was admittedly able to meet his support obligations with unearned income and without the imputation of earned income. However, the Court concluded that it was unfair to use only unearned income in consideration of a person’s ability to pay child support since one or both parents would thereby have the ability to decrease their respective responsibility for the children’s needs by simply not working and avoiding imputation of income principals finding that Mr. Caplan was “unemployed voluntarily.”¹⁰ The Court concluded that:

“... the imputation of income to one or both parents who have voluntarily remained underemployed or unemployed, without just cause, will promote a fair and just (result).¹¹ (emphasis added).

Thus, in three distinctly different factual contexts over the span of fifty-five years, our Supreme Court has seemingly grounded any consideration of imputing income to a party on whether or not the person’s underemployment is “deliberate” (Bonanno), consistent with or a continuation of the marital status quo and not a voluntary divorce related reduction in income (Khalaf) and involuntary (Caplan).

⁸ Khalaf, page 70.

⁹ Caplan v. Caplan, 182 N.J. 250 (2005).

¹⁰ Caplan, page 267.

¹¹ Caplan, page 268.

The guidance of these three Supreme Court beacons spaced two decades and three decades apart, is that the underlying consideration as to whether income should be imputed to either a payor or a payee depends upon good faith, voluntariness and status quo.

The Appellate Division

There are a variety of Appellate Division cases on the imputation of income. See, for example, Lynn v. Lynn, 165 N.J. Super. 328 (App. Div. 1979); Mowery v. Mowery, 38 N.J. Super. 92 (App. Div. 1955); Bencivenga v. Bencivenga, 254 N.J. Super. 328 (App. Div. 1992) and Dorfman v. Dorfman, 315 N.J. Super. 511 (App. Div. 1998).

Dorfman, *Supra*, and Bencivenga, *Supra*, seem, however, to best exemplify a continuation of the underlying premise enunciated by our Supreme Court in Bonanno, Khalaf and Caplan above.

In Dorfman, the payor husband was an accountant whose partnership in and employment by an accounting firm was terminated post-judgment. The husband made an application to modify an existing support order which the Trial Court denied by observing that he had “earned between \$90,000 and \$120,000 in the past 5 years” and, therefore, imputed “about \$100,000 a year”¹² to him.

The Appellate Division found that “the flaw in imputing an annual gross income... to defendant (was) the lack of a finding by the motion judge that defendant was... voluntarily underemployed.”¹³ (emphasis added)

¹² Dorfman, page 516.

¹³ Dorfman, page 516.

The Court cited to Appendix IX-A regarding the Child Support Guidelines provision that:

“If the court finds that either parent is, without just cause, voluntarily underemployed or unemployed, it shall impute income to that parent.” (emphasis added)

The Court held that:

“such (voluntary underemployment) is requisite, before considering imputation of income”¹⁴ (emphasis added)

In Bencivenga, *Supra*, a mother of the children was paying support to her former husband, the father of the children. The mother had remarried and was now the stay at home mother of two children of her second marriage. Her first husband sought an order imputing income to the wife and compelling her to continue the payment of child support to the children of her first marriage.

The Appellate Division held that “consideration must be given to the reasons for the unemployment.”¹⁵

The Court then went on that “employment as a mother and care giver is different in quality from voluntary unemployment.”¹⁶

Although not citing the Supreme Court’s 1971 decision in Khalaf, the concept of a person choosing to be unemployed in order to be a full-time parent and caretaker of children is very similar in Khalaf and Bencivenga. Although considering persons in opposite roles (in Khalaf, the recipient, and in Bencivenga, the payor).

¹⁴ Dorfman, page 516, emphasis added.

¹⁵ Bencivenga, page 36.

¹⁶ Bencivenga, page 36.

The common concept is that absence from the job market due to child care responsibilities is not the type of “voluntary” unemployment which justifies an imputation of income.

The Trial Courts

There are two instructive reported Trial Court decisions written ten years apart by then Judge Conrad Krafte. In Arribi v. Arribi, 186 N.J. Super. 116 (Ch. Div. 1982), Judge Krafte considered a payor’s application for a modification of the child support as a result of unemployment. Judge Krafte observed that the “pervading philosophy” in such cases is clear:

“One cannot find himself in, and choose to remain in, a position where he has diminished or no earning capacity and expect to be relieved of or to be able to ignore the obligations of support to one’s family.”¹⁷ (emphasis added)

Ten years later, Judge Krafte considered the imputation of income to a recipient spouse in Gertcher v. Gertcher, 262 N.J. Super. 176 (Ch. Div. 1992). Citing Bonanno, *Supra*, and his earlier decision in Arribi, *Supra*, Judge Krafte found that the Court should impute income to a voluntarily unemployed recipient spouse the same as it would to a voluntarily unemployed payor.

In both cases, the determinative analysis was voluntary versus involuntary unemployment.

The Extension of Intention and Voluntariness to Unearned Income.

In 1999, our Supreme Court in Miller v. Miller, 160 N.J. 408 (1999), increased a payor’s unearned income by imputing a higher rate of return on his investment portfolio.

In 2005, the Appellate Division was asked to consider a “Miller imputation” in Overbay v. Overbay, ____ N.J.S. ____ (App. Div. 2005). The Court, much as our Supreme Court

¹⁷ Arribi, page 970.

Appellate Division Courts have done with regard to earned income, explored Mrs. Overbay's motivation. Finding that there was no showing that she had deliberately manipulated her investments so as to reduce her income and enhance her alimony, the Appellate Division did not impute additional unearned income to Mrs. Overbay finding that "there is no suggestion that she had avoided more aggressive investment strategy solely to reduce her earnings."¹⁸

What Can Be Derived From an Analysis of This Long, Factually Varied, But Remarkably Consistent, History of Supreme Court, Appellate Division and Trial Court Cases

Addressing the Imputation of Income to Both Payors and Recipients of Support?

_____ First, the threshold consideration in any imputation of income consideration must be a person's motivation taken in the context of the marital history/status quo.

_____ Persons who have abstained from or surrendered employment to serve, instead, as a homemaker and caretaker for children, may not be considered voluntarily unemployed and, therefore, as a matter of law, may not have income imputed to them.

For the recipient spouse, support for this proposition can best be found in Khalaf, *Supra*, in which the Supreme Court observed that it could not now "turn back the clock" and ask a person who had devoted her life to be a spouse, homemaker and caretaker of children to obtain employment.

On the payor's side of the analysis, the Appellate Division in Bencivenga, *Supra*, clearly states that "employment as a mother and care giver is not voluntary unemployment"¹⁹ and, therefore, cannot give rise to an imputation of income.

¹⁸ Overbay, page ____.

¹⁹ Dorfman, page 36.

Second, motivation, status quo and voluntariness versus involuntary considerations are equally applicable to earned and unearned income. The Court's rationale in Overbay, *Supra*, unequivocally supports the concept that the Miller imputation of unearned income to a person's asset portfolio must be analyzed and implemented in the context of the party's motivation and past practices.

Finally, what should be expected of competent trial counsel when faced with or making an imputation of income argument?

It is surely the person seeking an imputation of income to the opposing party (regardless of whether that party is the payor or recipient of alimony or support) who must establish that the opposing party is voluntarily underemployed or unemployed. If there has been a history of that party being out of active employment, proofs should be proffered demonstrating that the parties had the expectation or agreement that the person would return to outside employment as the children attained a certain age or schooling milestone, that the terminated/unemployed person has or has not made diligent efforts to seek re-employment even if in an alternative field and/or that the decreased earnings capacity is not consistent with the marital history and is, instead, a litigation related tactic.

When representing the person who has not worked outside the home and has, instead, been the full-time spouse and/or caretaker of the children, the relevant concepts in the above-referenced holdings should be analyzed in the factual context of the particular case. If, in fact, the opposing party has sufficient income to pay an appropriate amount of support and the supported party has never been expected to seek outside employment (Mrs. Khalaf), a request for that party to submit themselves to an employment evaluation may be resisted as a matter of law on a pretrial motion in limine. If the facts are not sufficiently undisputed to support a pretrial ruling

barring a claim of imputation, a motion should be made at the conclusion of trial testimony to strike the expert's report and any arguments asserting an imputation of income if evidence is not presented which would distinguish the matter from the above-referenced holdings.