

Imputed Income: More Than Meets the Eye

By Jeffrey L. Catterson

One of the first questions we hear from a prospective client is “How much am I going to have to pay in support” or “How much is he/she going to pay me?” While we have statutory formulas for the court to utilize to calculate maintenance and child support obligations/entitlements, before the court can employ these calculations it must first determine the appropriate incomes for the parties. Significantly, a court need not rely upon a party’s own account of his or her finances, but may impute income based upon the party’s past income or demonstrated future potential earnings. *See Steinberg v. Stein-*

berg, 59 A.D.3d 702, 874 N.Y.S.2d 230 (2d Dept. 2009). Where a party’s account of their income is not believable, the court may impute a true or potential income higher than alleged by that party. *See Lilikakis v. Lilikakis*, 308 A.D.2d 435, 436, 764 N.Y.S.2d 206 (2d Dept. 2003). Notably, the court may impute income to a party based on his or her employment history, future earning capacity, educational background, or money received from friends and relatives. *See Matter of Collins v. Collins*, 241 A.D.2d 725, 727, 659 N.Y.S.2d 955 (3d Dept. 1997). Additionally, when ad-



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addressing child support, the court’s award can be based on the needs of the child where the court finds that the payor’s representations regarding his/her income are not credible. *See*, DRL §240[1-b][k]; *see also Lew v. Lew*, 82 A.D.3d 1171, 920 N.Y.S.2d 230 (2d Dept. 2011). The court’s ability to impute additional income to a party is applicable to both maintenance and child support determinations. Indeed, it is well-settled that in determining income for purposes of calculating temporary maintenance, it is within the court’s authority to impute income to a

party based upon that party’s past earnings and earning capacity when the record does not reflect a party’s actual income or earning potential. *See Bittner v. Bittner*, 296 A.D.2d 516, 745 N.Y.S.2d 559 (2d Dept. 2002), *Zabzhanskaya v. Dinhofer*, 274 A.D.2d 476, 710 N.Y.S.2d 639 (2d Dept. 2000), *Gaetano D. v. Antoinette D.*, 37 Misc.3d 990, 955 N.Y.S.2d 752 (Sup. Ct., Westchester Cnty. 2012); *Nerayoff v. Rokhsar*, 168 A.D.3d 1071, 93 N.Y.S.3d 96 (2d Dept. 2019) (where the Second Department held that the trial court properly exercised its discretion in imputing \$210,000 in annual income to plaintiff and \$70,000 in annual income to defendant

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for purposes of calculating maintenance and child support, based upon their skills, educational backgrounds, and employment histories as court need not rely upon party's own account of finances, but may impute income based on his/her employment history, future earning capacity, educational background, or money received from friends and relatives).

However, a party is not bound by their prior earnings if they provide a competent basis for the court to deviate from such historical data. *See Balaj v. Balaj*, 136 A.D.3d 672, 25 N.Y.S.3d 244 (2nd Dept. 2016) (where the Second Department held that the trial court properly imputed of only \$150,000 annual income to plaintiff for purposes of child support where, although his previous earnings were much higher in past, he provided credible evidence of downturn in his field of employment). The evidence

that is to be submitted to convince the court to deviate from historical earnings should be more than just that party's testimony. This additional evidence can consist of a vocational expert, statistical data from the industry/profession and medical testimony.

Absent such credible evidence, which is the burden of the proponent to establish and customarily requires corroborating evidence other than solely a party's own testimony, the court will be within its discretion to impute income greater than a party's representation. *See Rudish v. Rudish*, 150 A.D.3d 1291, 56 N.Y.S.3d 191(2nd Dept. 2017) (where the Second Department affirmed the trial court's exercise of discretion in imputing income of \$65,000 per year to the husband for child support purposes where, although husband testified that stress, depression, and anxiety impeded his ability to

work, he presented no medical evidence to substantiate these claims and failed to meet burden of establishing that he diligently sought to obtain employment commensurate with his qualifications and abilities, and the evidence presented at trial demonstrated that he received financial and other assistance from family members and friends); *Zappin v. Comfort*, 155 A.D.3d 497, 65 N.Y.S.3d 30 (1st Dept. 2017) (where the First Department held that the trial court properly imputed income to the father based on his income in 2014 where, even if he was terminated from his position at his law firm because of negative publicity he received after he had been sanctioned during underlying proceedings, his unemployment resulted from his own misconduct at trial, not from court's conduct in sanctioning him/publicly releasing sanctions order).

Clearly, the Appellate Departments provide the trial courts with broad discretion in determining a party's income. It is the asserting party's burden to make certain the record contains sufficient evidence to support the deviation from either the reported income for imputation or from historical earnings / skill set to avoid an imputation.

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