

FAMILY LAW UPDATE

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IMPUTING INCOME TO A PARENT FOR CHILD SUPPORT PURPOSES



When a parent is voluntarily unemployed, under-employed or has an unexercised ability to earn income, the court can impute income to that party for purposes of determining who should pay child support and in what amount.

Imputed income is the potential income that a parent could earn based upon that parent's actual ability to earn. A court will evaluate the following factors to determine whether to impute income to a parent and in what amount:

- a) prior employment experience and history, including reasons for termination;
- b) education level and any special skills or training;
- c) physical and mental disabilities that may

affect the ability to obtain or maintain gainful employment;

- d) availability for work;

- e) availability of opportunities to work in the local geographical area;

- f) the prevailing wage rates in the local geographical area;

- g) whether the parent has diligently sought appropriate employment;

- h) evidence that the parent in question is able to earn the imputed income;

- i) personal history, including the present marital status and present means of support;

- j) the presence of the parties' children in the parent's home and its impact on that parent's earnings;

- k) whether there has been a significant reduction in income compared

to the period that preceded the filing of the initial complaint or the motion for modification.

The court cannot base its calculation on more than a 40 hour work week nor can it include potential overtime or shift premiums in its calculation of a parent's potential income. Interest earned or which could be earned on an inheritance or gifts can also be considered by the court as income. When determining a potential investment return, the court must impute a reasonable rate of return. The court cannot impute additional income to a parent who has elected not to work additional hours or who refuses to work overtime, provided that the parent is employed on a full-time basis (35 or more hours per week).

CHILD SUPPORT - IMPUTED INCOME

Where there was no indication that the former wife had the actual ability and likelihood of earning a potential in-

come because of her duties as mother and home school teacher to the parties' four children, two of whom had

special needs, the court refused to impute income to her. *Wieringa v. Wieringa*, Mich. App. No. 288475 (June 2009).

HUSBAND'S INHERITANCE TREATED AS MARITAL PROPERTY

Husband's inherited property consisted of income-producing properties. For almost 15 years before Husband's father's death, Husband and Wife began caring for Husband's father. Husband's father moved into a new house with the parties and their children. Although Wife's relationship with Husband's father was

strained, she cared for him, checked on him two to four times a day and cooked his meals. She also supervised his caregivers. The care which Wife provided for Husband's father allowed Husband and Wife to avoid the cost of a full-time caregiver or nursing facility for Husband's father and Husband was free to manage

his father's income-producing properties and financial affairs. Wife's efforts preserved and increased the value of Husband's inheritance. The property which Husband inherited from his father was included in the marital estate. *Deyo v. Deyo*, Mich. App. No. 274311 (June 17, 2008).

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COHABITATION

When the parties' divorce judgment provided that Husband's obligation to pay his former Wife's spousal support would end if she cohabited with a non-related male, the determination of whether she was cohabitating with a non-related male involved an analysis of three factors:

1) whether the man and woman are actually living together;

2) whether the living arrangement is of "sustained duration;" and

3) whether residential and incidental day-to-day living expenses are shared.

If a former wife's relationship with a non-related male is more accurately characterized as a committed, long-distance dating relationship involving regular overnights together and not two people "living together as partners in life" or "dwelling together in the manner of husband and wife," the former Wife is not cohabiting with a non-

related male. In this case, the non-related male maintained a separate residence in another state, did not keep personal items at ex-wife's home, did not regularly receive mail at ex-wife's home, did not share personal property with ex-wife, was not financially interdependent with ex-wife, and did not hold himself and ex-wife out to the public as living together. *Smith v. Smith*, Mich. App. 278 Mich App 198 (2008).

“LOMBARDO HEARINGS”

Legal custody of a minor child can be either awarded to one parent (sole custody) or both parents (joint custody). A parent who is awarded sole legal custody of the minor children has the authority to make important decisions affecting the welfare of the child. When parties share joint legal custody, they share this decision-making authority. Examples of important areas of decision-making are the child's education, religious upbringing, psychological and medical treatment and changing the primary residence of the minor child.

On occasion, parents who share joint legal custody of their child are not always able to agree upon important decisions which affect their child's welfare. In those instances, the court will make the decision after applying the “best interest of the child” factors of the Michigan Child Custody Act.

Judicial hearings on these factors are called “Lombardo hearings,” named after the leading case of that name. At a “Lombardo hearing,” testimony and documentary evidence is presented and the court



considers and evaluates the evidence on each applicable “best interest of the child” factor relevant to the issue. When the requested relief will not alter the child's established custodial environment, the burden of proof on the party requesting the relief is to show by a preponderance of the evidence (i.e., that it is more likely than not) that the requested relief would be in the best interest of the child.

SPOUSAL SUPPORT

○ Even though Wife was at fault for the breakdown of the marriage, a trial court can award appropriate spousal support to achieve “equity”. The parties previously enjoyed a middle-class standard of living, and there was a wide disparity in incomes between Husband and Wife. Wife did not have a college degree or significant work experience and would not be able to

maintain a “middle-class standard of living” without immediately invading her share of the marital assets. *Kettlewell v. Kettlewell*, Mich. App. No. 275028 (April 15, 2008).

○ A trial court awarded minimal spousal support for only three years to Wife even though it was a 21-year marriage, there was a disparity in income and concerns over the Wife's health. During the marriage, the parties had

been living well beyond their means. Wife refused to take advantage of the four-year period in which the parties were contemplating divorce to better herself, to further her education or to gain marketable employment skills. Wife also refused to cooperate with Husband to list the expensive marital home for sale while the divorce was pending. *Reano v. Reano*, Mich. App. No. 276509 (May 27, 2008).

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thanks to our
clients and
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their referrals.***

Please note that the information contained in this newsletter is not intended to be legal advice because space does not permit comprehensive treatment of all factual and legal issues involved. Consult with your attorney for specific legal advice.

PRENUPTIAL AGREEMENT DECLARED VOID

A postnuptial agreement was unenforceable because it anticipated and encouraged the divorce. Husband filed for divorce approximately eight months after Wife signed the agreement. Husband and Wife were not living separately at the time the postnuptial agreement was negotiated and signed. The postnuptial agreement was prepared by Husband's attorney. In the agreement, Wife relinquished all of her interest in the marital property in the event of a divorce. The postnuptial agreement put Husband in a favorable position to file for divorce and was void because it was against public policy. *Wright v. Wright*, Mich. App. No. 281918 (April 22, 2008).

CHANGE OF RESIDENCE – 100-MILE LIMIT MEASURED “AS THE CROW FLIES”

The statutory 100-mile limit on a change in the legal residence of a minor child from the current residence to a new residence without court approval is to be measured by calculating the distance “on a straight line.” The measurement is a “radial” measurement not “road miles.” If the move to the proposed home is within 100 radial miles of the existing custodial home, there is no violation of the statute. *Bowers v. Vandermeulen-Bowers*, 278 Mich App 287 (2008).

INCREASE IN VALUE OF HUSBAND'S VEHICLE TREATED AS MARITAL ASSET

The court held that the increase in value of Husband's motor vehicle (a 1974 MG) during the marriage was a marital asset. *Smith v. Carrick*, Mich. App. No. 274282 (April 24, 2008).

CHILD OBTAINS PERSONAL PROTECTION ORDER AGAINST PARENT

A child who has reached the age of 18 can obtain a personal protection order against his divorced parent when the child has told that parent that he does not wish further contact and the parent persists in harassing the child. *Hayford v. Hayford*, Mich. App. No. 276176 (June 10, 2008).



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