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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY  
ESSEX COUNTY  
CHANCERY DIVISION, FAMILY PART  
DOCKET NO. FD-07-2392-07

RAQUEL S. FERRER,

Plaintiff,

v.

DENNIS COLON,

Defendant.

**APPROVED FOR PUBLICATION**

**June 9, 2020**

**COMMITTEE ON OPINIONS**

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Decided: December 24, 2019

Elena K. Weitz, for plaintiff (Grayson and Associates, LLC, attorneys)

Andrew B. Vallejos, for defendant.

PASSAMANO, J.S.C.

This matter comes before the court on applications filed by both parties seeking relief concerning child support and custody. This opinion addresses that part of plaintiff's application seeking an upward modification in child

support.<sup>1</sup> In particular, the court considers whether, for purposes of calculating child support, the court may find a parent to be underemployed, and impute to that parent income based on available overtime, where the available overtime is greater than the amount of overtime the parent had worked in the past.<sup>2</sup>

Defendant answers this question in the affirmative. Defendant claims that plaintiff works some, but not all, available overtime and, therefore, she should be considered underemployed. Defendant would have the court impute income to plaintiff based on available overtime, without regard to the income that plaintiff earned in the past from overtime and any second jobs.

Plaintiff takes the opposite position, arguing that she is fully employed and that there is no basis for imputing income. Plaintiff asserts that for purposes of calculating child support, the court should look to her salary plus an additional amount based on what she actually earned in the past from overtime and second jobs.

The court has considered the parties' written submissions, the testimony and factual proffers made during the summary proceeding, and oral argument

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<sup>1</sup> The court previously placed on the record its oral opinion and entered an order addressing all other issues.

<sup>2</sup> This question has not been addressed in any published opinion from the New Jersey Courts.

of counsel. The court finds that the record is sufficient for the court to rule on the matters at issue without further hearings.

Following are the court's findings of fact and conclusions of law.

I.

While the parties were never married to one another, they were involved in a relationship that resulted in the birth of one child. That child, a son, was born in August 2006. Plaintiff is the child's mother; defendant is the father.

Pursuant to prior court orders, defendant pays child support in an amount calculated pursuant to the "guidelines set forth in Appendix IX of [the Court] Rules" (Guidelines). R. 5:6A. Child support was last addressed by the court in an order dated February 24, 2011 (February 2011 Order). Plaintiff now seeks an increase in support.

Certain changes have taken place since entry of the February 2011 Order. For one, both parties' incomes have increased. In addition, when the support obligation in the February 2011 Order was calculated, defendant received an "other dependent deduction" for his other minor children. As those children are now adults, the deduction is no longer available.

With respect to their incomes, both plaintiff and defendant work for the City of Newark, New Jersey full time as police officers. Each of them receives a salary and earns additional income through overtime and second jobs. For

purposes of the applications now before the court, the parties stipulated to defendant's weekly income (including overtime) and to the amounts that each of them pays in mandatory retirement plan contributions and union dues. The only matter in dispute is plaintiff's income.

Plaintiff posits that for purposes of child support, and in accordance with the Guidelines, her income is an amount calculated using her salary plus the average of what she earned in the past from overtime and second jobs.<sup>3</sup> For his part, defendant admits that plaintiff would be correct - if one were to consider only plaintiff's salary and the overtime and second jobs that she actually worked. Defendant contends, however, that the framework of analysis should not be so limited. According to defendant, plaintiff had available to her overtime beyond the amount she actually worked. Defendant asks that the court find plaintiff to be underemployed and impute to her income based on the available overtime.

For the reasons set forth herein, the court finds that for child support purposes plaintiff's income is her salary plus an additional amount based on the average of her prior earnings from overtime and second jobs. The court finds no basis to impute to plaintiff any additional income.

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<sup>3</sup> The stipulated amounts and plaintiff's income, as calculated by her, were provided to the court in a draft Guidelines worksheet.

## II.

Under New Jersey law, “parents are expected to support their children until they are emancipated, regardless of whether the children live with one, both, or neither parent.” Burns v. Edwards, 367 N.J. Super. 29, 39 (App. Div. 2004). Child support is necessary to ensure that parents provide for the “basic needs” of their children. Pascale v. Pascale, 140 N.J. 583, 590 (1995).

In setting child support, the court looks to the Guidelines and the best interests of the child. See Caplan v. Caplan, 182 N.J. 250, 266 (2005).

Emphasizing the importance of the support obligation, the Appellate Division held that:

“it is settled that the best interests of the child [are] the greatest and overriding consideration in any family court matter.” Monmouth County Div. of Soc. Servs. v. G.D.M., 308 N.J. Super. 83, 88, 705 A.2d 408 (Ch. Div. 1997) (citing Wilke v. Culp, 196 N.J. Super. 487, 489, 483 A.2d 420 (App. Div. 1984)). Accordingly, enforcing the parental duty to support children is “an inherent part of the 'best interests of the child' rubric which underlies our family courts.” Ibid. Accordingly, “a parent is obliged to contribute to the basic support needs of an unemancipated child to the extent of the parent's financial ability[.]” Martinetti v. Hickman, 261 N.J. Super. 508, 513, 619 A.2d 599 (App. Div. 1993).

[Colca v. Anson, 413 N.J. Super. 405, 414 (App. Div. 2010).]

Rule 5:6A provides that “[t]he guidelines set forth in Appendix IX of these Rules shall be applied when an application to establish or modify child support is considered by the court.” The Guidelines are designed to result in a fair allocation of the parents’ responsibility to provide appropriate support for their children. Caplan, 182 N.J. at 267. The support obligation in the February 2011 Order was set in accordance with the Guidelines. “There is a rebuttable presumption that the child support award calculated in accordance with the guidelines is [correct] . . . .” Burns, 367 N.J. Super. at 45.

A.

A child support obligation may be modified where there is a change in circumstances. Lepis v. Lepis, 83 N.J. 139, 157-58 (1980). In this case, the court finds two changed circumstances. First, both parties’ incomes have increased. This constitutes a change in circumstances. Isaacson v. Isaacson, 348 N.J. Super. 560, 579 (App. Div. 2002). Second, defendant is no longer entitled to the other dependent deduction that he received when the support obligation was set. This too constitutes a change in circumstances. J.B. v. W.B., 215 N.J. 305, 327 (2013).

Having found a change in circumstances, the court now addresses calculation of a modified support obligation.

B.

In order to calculate the appropriate level of support, the court must have an accurate assessment of each party's income. Caplan, 182 N.J. at 265. In this case, defendant's income is stipulated; plaintiff's is contested. With respect to plaintiff's income, defendant takes the position that plaintiff should be considered underemployed for not working available overtime and that income should be imputed to her. Plaintiff takes a contrary position. Plaintiff asserts that she is fully employed and that for child support purposes, her income is her salary plus an additional amount based on her past earnings from overtime and second jobs.

In Carter v. Carter, the Appellate Division noted that the Guidelines include overtime in the provision concerning "sporadic income."

Although overtime pay is a factor to be included in any financial analysis, the judge must consider whether the receipt of overtime income is sporadic. Cf. Pressler, Current New Jersey Court Rules, Appendix IX-B, 2029-30, 2047-48 (instructing that, for the purpose of determining child support, "overtime pay" is deemed "sporadic income" requiring the inclusion in the gross income calculation "the average ... on the prior 12 months or first receipt whichever time is greater").

[Carter v. Carter, 318 N.J. Super. 34, 50-51 (App. Div. 1999).]

Specifically, the provision in the Guideline concerning “sporadic income,” which includes overtime and second jobs, states that:

a. If income from any source is sporadic or fluctuates from year-to-year (e.g., seasonal work, dividends, bonuses, royalties, commissions), the amount of sporadic income to be included as gross income shall be determined by averaging the amount of income over the previous 36 months or from the first occurrence of its receipt whichever time is less.

b. For overtime pay or income from a second job, the average is based on the prior 12 months or first receipt whichever time is greater.

c. The court may exclude sporadic income if the party can prove that it will not be available in an equivalent amount in the future.

[Child Support Guidelines, Pressler & Verniero, Current N.J. Court Rules, Appendix IX-B to R. 5:6A at 4, [www.gannlaw.com](http://www.gannlaw.com) (2020).]

Defendant asks the court to impute income based on available overtime, without regard to plaintiff’s past earnings from overtime and second jobs. In doing so, defendant asks the court to go outside of the provision in the Guidelines that provides the procedure for calculating income where a party has overtime or a second job. While the court has some discretion to disregard or modify the Guidelines, doing so requires a showing of good cause. In particular, the Rules provide that:

The guidelines may be modified or disregarded by the court only where good cause is shown. Good

cause shall consist of a) the considerations set forth in Appendix IX-A, or the presence of other relevant factors which may make the guidelines inapplicable or subject to modification, and b) the fact that injustice would result from the application of the guidelines. In all cases, the determination of good cause shall be within the sound discretion of the court.

[R. 5:6A.]

The court now considers whether defendant has shown good cause to disregard the provisions concerning “sporadic income” and impute income to plaintiff.

i.

The court has the power to impute income to a party. Ibrahim v. Aziz, 402 N.J. Super. 205 (App. Div. 2008). “Our case law has consistently held that when a parent, without just cause, is voluntarily unemployed or underemployed, income may be imputed to that parent to provide for the child's needs.” Caplan, 182 N.J. at 268; Schochet v. Schochet, 435 N.J. Super. 542, 549 (App. Div. 2014) (income may be imputed where a party “is, without just cause, voluntarily underemployed or unemployed”).

The Appellate Division has held that “underemployment” means the person “is intentionally failing to earn that which he or she is capable of earning.” Dorfman v. Dorfman, 315 N.J. Super. 511, 516 (App. Div. 1998). If “a [person] is not earning to his or her true potential and capacity then an

imputation of income based upon that potential is appropriate.” Stiffler v. Stiffler, 304 N.J. Super. 96, 101 (Ch. Div. 1997).<sup>4</sup>

With respect to imputing income, Paragraph 12 of Appendix IX-A to the Guidelines provides as follows:

12. Imputing Income to Parents. The fairness of a child support award resulting from the application of these guidelines is dependent on the accurate determination of a parent's net income. If the court finds that either parent is, without just cause, voluntarily underemployed or unemployed, it shall impute income to that parent according to the following priorities:

a. impute income based on potential employment and earning capacity using the parent's work history, occupational qualifications, educational background, and prevailing job opportunities in the region. The court may impute income based on the parent's former income at that person's usual or former occupation or the average earnings for that occupation as reported by the New Jersey Department of Labor (NJDOL);

b. if potential earnings cannot be determined, impute income based on the parent's most recent wage or benefit record (a minimum of two calendar quarters) on file with the NJDOL (note: NJDOL records include wage and benefit income only and, thus, may differ from the parent's actual income); or

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<sup>4</sup> The court cites Stiffler, a trial court opinion, as persuasive, not binding, authority.

c. if a NJDOL wage or benefit record is not available, impute income based on the full-time employment (40 hours) at the prevailing New Jersey minimum wage.

In determining whether income should be imputed to a parent and the amount of such income, the court should consider: (1) what the employment status and earning capacity of that parent would have been if the family had remained intact or would have formed, (2) the reason and intent for the voluntary underemployment or unemployment, (3) the availability of other assets that may be used to pay support, and (4) the ages of any children in the parent's household and child-care alternatives. The determination of imputed income shall not be based on the gender or custodial position of the parent...

[Pressler & Verniero, Appendix IX-A to R. 5:6A at 12.]

As detailed in the authorities cited above, while the court has the power to impute income, in order to do so, the court must first find that a party is underemployed or unemployed. Defendant contends that the court may find that plaintiff is “voluntarily underemployed” for not working all available overtime, without regard to her past practices. The court disagrees.

First, under the Guidelines, income is calculated using the average of the party’s past income from overtime or second jobs. There is no requirement that the court find that in the past the person had worked all available overtime.

Moreover, the framework set out in the Guidelines serves to protect both the interests of the child, and of the parents. By using the amount of overtime earned in the past, a party cannot improperly reduce his or her support obligation simply by working less. At the same time, as Subsection c of Paragraph 12 allows a party the opportunity to show that overtime in amounts worked in the past will not be available in the future, the parties are protected from having their support obligation set on an inflated level of income.<sup>5</sup>

Lastly, while there are published opinions from the Appellate Division where income is imputed beyond full-time employment, they do so in a manner that considers the parties' past practices. See Elrom v. Elrom, 439 N.J. Super. 424, 437-38 (App. Div. 2014); Storey v. Storey, 373 N.J. Super. 464, 472-73 (App. Div. 2004).

In Elrom, the defendant asserted that the trial court erred in imputing to him income beyond his full-time employment. The defendant made that argument notwithstanding that he had a history of additional earnings. In affirming the trial court, the Appellate Division held that:

In light of all of this evidence, we reject as factually unsubstantiated and legally insufficient the notion imputation does not apply when determining this defendant's income because he held a full-time

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<sup>5</sup> Neither party contends either that plaintiff has not in the past earned consistent levels of income from overtime and second jobs, or that those levels will not be available in the future.

position. We determine the evidence supports the judge's findings that defendant's field of expertise, as well as his employment and salary history, demonstrate a substantial earning capacity, well in excess of his last documented base salary of \$120,000 per year, and provided a sound basis to impute additional income.

[Elrom, 439 N.J. Super. at 437-38.]

Similarly, in Storey, the Appellate Division held that:

In the end, the competing interests implicated by a career change resulting in reduced income cannot be resolved by simply inquiring whether the precipitating event was “voluntary” or “involuntary,” and then relying on present income if “involuntary.” Elimination of an alimony obligation is not the “silver lining” in every “cloud” of involuntary termination. Each case requires a careful evaluation of “reasonableness” and “relative advantages” under the totality of the circumstances.

To clarify and illustrate the point, we distinguish Dorfman v. Dorfman, 315 N.J. Super. 511, 719 A.2d 178 (App. Div. 1998), a case in which an accountant, following termination by his firm, accepted lower paying work as an accountant after a concerted effort to find the same work at comparable pay. An obligor who makes that showing demonstrates that he or she is working at capacity in employment consistent with skills and experience; stated differently, that obligor establishes that he or she is not voluntarily underemployed in the new job. Id. at 516-17, 719 A.2d 178 (proofs established a prima facie case for modification). In such cases, absent evidence undermining the supporting spouse's proofs, there is no need for further inquiry and alimony should be recalculated based on current financial circumstances. This conclusion is mandated

by a well-established principle, i.e., support orders are based on the obligor's ability to pay. See Bonanno v. Bonanno, 4 N.J. 268, 275, 72 A.2d 318 (1950). In contrast, where a layoff is followed by a shift to a job that does not draw on prior skills and experience, the obligor must explain that choice with reference to other options explored and efforts to find work with comparable pay. See, e.g., Grimes v. Grimes, 408 Pa. Super. 158, 596 A.2d 240, 242-43 (1991) (accepting as valid the obligor's desire to leave dangerous work in the coal mines, the court found no adequate explanation of efforts to find work at comparable pay before selecting work at one-half prior earnings). It is not enough to show some job, any job.

[Storey, 373 N.J. Super. at 472-73.]

Under the Guidelines and opinions from the Appellate Division in Elrom, and Storey, a party cannot manipulate his or her income so as to improperly reduce their support obligation. Nor may a party shield from the support calculation income earned beyond his or her full-time employment.

This does not mean, however, that the “sporadic income” provision may be disregarded and income imputed simply on a showing that overtime was available beyond amounts worked in the past. In ensuring that parents fulfill their obligation to support their children, the Guidelines and opinions from the Appellate Division recognize that the amount of the support obligation must take into account the obligor’s past earnings and present ability to pay. See id. at 472.

The court finds that defendant has not shown good cause to modify or disregard the provisions of the Guidelines concerning overtime and second job income. For purposes of the modified support obligation, plaintiff's income will be calculated using her salary and an amount based on the average of her past earnings from overtime and second jobs.

### III.

An order will issue in accordance with this opinion.