

Blood from a Stone: Finding and Determining Income in These Tough Economic Times

David H. Levy, Kevin R. Yeanoplos, Leslie Dawson, Kenneth G. Raggio, and James Godbout

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Precis: All jurisdictions have their methods of identifying and capturing resources for determination of both spousal support and child support. This program will emphasize the practical ways of identifying income as well as some of the challenges in doing so. In addition to the discussion in the article and in the live presentation, materials to help focus and aid the practitioner in this endeavor are included.

I. Identity of Income

- A. Broad definition - Internal Revenue Code § 61, R.R.1.61-1.**
 - 1. See attached Seigneur / Yeanoplos article.
 - 2. Many jurisdictions approach income for support as income from any source unless specifically excluded. This still leaves questions regarding what is considered "income" versus "liquidation of assets".
 - 3. Caveat – Very important to understand the statutory definition and case law defining income in the practitioner's local jurisdiction.
- B. Examples of Statutory Definitions**
 - 1. Texas definition of net resources for child support - Texas Family Code § 154.062 *et seq.*
 - a. Broad definition of income
 - b. Income excludes specific types of cash receipts (welfare payments, child support, net resources of a new spouse, etc)
 - c. Reduces income for taxes incurred on that income, health insurance, mandatory retirement contributions and union dues.
 - d. Rental income is reduced for mortgage payments but not depreciation.
 - e. Self-employment income is defined consistently with business principles and federal tax law.
 - f. Income includes capital gains distributions but not return of capital.
 - g. Specifically allows imputation of income to party unemployed or underemployed intentionally, and deemed income attributable to use of assets that do not currently produce income.

2. California annual net disposable income - Family Code § 4059, 4320
 - a. Broad definition of income.
 - b. Income excludes specific types of cash receipts (child support, public assistance).
 - c. Reduces income for taxes incurred on that income, health insurance, mandatory retirement contributions and union dues.
 - d. No specific discussion statutory definition of rental income. However, case law indicates depreciation is not an allowable deduction for child support purposes.¹
 - e. Allows expenses "required for the production of income" against self-employment/business income.
 - f. No statutory guideline for capital gains. Traditionally have been excluded, however, a recent case indicates the Courts are beginning to allow².
 - g. Specifically allows imputation of income to party if it is the best interest of the children.
 3. Illinois definition of income for child support - Family Code §505
 - a. Broad definition of income.
 - b. Does not exclude specific types of cash receipts.
 - c. Reduces income for taxes incurred on that income, health insurance, mandatory retirement contributions and union dues.
 - d. No statutory definition of rental income.
 - e. Allows deduction for "necessary expenses for the production of income" (including debt repayment) against self-employment/business income.
 - f. No statutory guideline for capital gains – assume included.
 - g. No statutory allowance for imputation of income.
- C. What's traditionally not included in the definition of support
1. Capital gains from sale of property
 2. Cash from loans
 3. Gifts
 4. Public assistance
 5. Child support

II. Identity of Business Income - Not necessarily the "taxable income"

- A. Only expenses "required for the production of income" are generally allowed against gross income
- B. Non-taxable benefits from employment
- C. Business owner perquisites – travel & entertainment; meals; automobile use; cell phone; continuing education; etc

¹ Asfaw v. Woldberhan (2007) - 147 Cal.App.4th 1442

² In re: Marriage of Pearlstein (2006) – 137 Cal.App.4th 1361

1. May be allowed for tax reporting purposes but disallowed for determining income available for support
- D. Partnerships and S Corporations - taxable income versus distributions
 1. Consider the taxable income to determine the proper taxes to deduct from income.
 2. Consider the distributions for actual cash flow purposes.
 3. Consider the party's ability to withdraw cash from the entity – may be considered additional cash flow available for support.
- E. Requirement to retain income in business for prudent reserve
- F. Requirement to retain income for expansion

II. Unusual or Wacky Income

- A. Gifts
 1. Recurring versus sporadic?
 2. California case considered gifts that are recurring in nature.³
 3. Illinois case also upheld consideration of gifts as income for support.⁴
- B. Proceeds from Loans
 1. Consider draws on lines of credit used for lifestyle?
- C. Forgiveness of Loans
 1. Purchase money mortgage?
 2. Line of credit used for lifestyle?
- D. Inheritance
 1. Requirement to liquidate to support children?
 2. Imputation of reasonable rate of return on principal?
- E. Capital Gains
 1. Recurring versus sporadic?
 2. Separate gain from return of capital?
 3. Consider capital losses?
- F. Stock options
 1. Timing of income - when vested or exercised?
 2. Determining amount of income?
 3. Consider subsequent decreases in value of stock?
- G. Bonuses
 1. Formulary versus discretionary?
 1. Pay percentage of bonus as additional support?
 2. Consider party's ability to manipulate bonus from year to year?
- H. One Time Receipt Items - i.e. lottery winnings
 1. Requirement to liquidate to support children?
 2. Imputation of reasonable rate of return on principal?
- I. Barter
 1. How to identify?
 2. How to quantify?

³ In re Marriage of Alter (2009) – 171 Cal.App.4th 718

⁴ In re Marriage of Rogers (2003) – 8025 N.E.2d 1247

- J. Personal Injury Awards
 - 1. Recent Maryland case excluded personal injury awards from the definition of income.⁵
 - 2. California case indicates that generally personal injury awards are not “income” – just an attempt to make the party whole. The Court ruled however, that it had the discretion to consider a portion of personal injury awards as income for support based on facts and circumstances.⁶

- III. Negatives affecting income
 - A. Legitimate loss of job
 - B. Legitimate diminishment of income
 - C. Addressing temporary versus permanent nature of income loss
 - D. Requirements for imputation of income for personal services
 - 1. California case indicates that it must be shown a party has the ability and opportunity to earn – jobs must be available.⁷

- IV. Cash
 - A. How to quantify
 - B. How to identify unreported cash situations

- V. Ethical considerations
 - A. How to address income not reported on tax returns
 - B. Saddling a spouse with an unrealistic support obligation

- VI. Consequences of Income in Court
 - A. How is it to be determined
 - B. Income for tax purposes versus income for support
 - C. Time period to consider
 - D. Impact of sworn testimony in open Court
 - E. Reductions or Increases of ordered amounts – factors required for modifications
 - F. Abatement of support

Appendix:

Texas Family Code § 154.062 “Net Resources”

Texas Family Code § 8.055 “Amount of Maintenance”

California Family Code § 4058 – “Annual Gross Income”

California Family Code § 4059 “Annual Net Disposable Net Income; Computation”

California Family Code § 4320 “Considerations in Order in Spousal Support”

Illinois Family Code §505 – “Child Support; Contempt; Penalties”

Article, *Show Me the Money*, Ronald L. Seigneur and Kevin R. Yeanoplos, ABA Family

⁵ Roseman v. Salsbury, Clements, Beckman, Marder & Adkins, LLC (2010) – NEED SITE

⁶ In re Marriage of Heiner (2006) – 136 Cal.App.4th 1514

⁷ In re Marriage of Bardzik (2008) – 165 Cal.App.4th 1291

Law Section, *Family Advocate Magazine*, Spring 2009
Article, *Income for Support in a Down Economy*, Leslie Dawson, AICPA