

The Practitioner Family Law

Imputing Income

Support Award Takes Into Account Earnings From Assets

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For one of the parties to own rental property or stocks that produce little or no income is not uncommon in a child-support case. The recent Court of Appeal case of *In re Marriage of Dacumos*, 76 Cal.App.4th 150, appears to be one of the first reported cases to consider treatment of these assets in connection with child support.

The parties were married in 1989 and separated in 1991. Since separation, the father apparently had been voluntarily paying \$650-per-month child support. In 1996 he decreased his payments without any explanation to \$350 per month. The mother requested that the court order child support.

The father argued that the \$350 was the most he could pay for several reasons. He had been laid off from work as an engineer and suffered numerous health problems. At that time, he was working part-time for a law office and was unable to work as an engineer.

His income-and-expense declaration stated that his income was a little more than \$2,000 per month. His income included a small amount of net income from rental property. He had rented out the rental property for \$1,000 per month. However, following a vacancy, he rented it out for \$500 or \$750 per month. The rent exceeded the expenses of the property by only about \$1,000 per year. The court ordered him to pay \$400 per month support and \$76 per month for the child's school tuition.

At the trial in 1998, the court increased child support to \$832 per month. The mother also requested the court to find that the father was \$7,616 in arrears. The parties resolved all other issues by agreement.

At the time of the trial, the mother had two jobs: a full-time job as a nurse, at which she earned about \$67,423 per year, and part-time job, at which she earned about \$5,599 per year. She argued that the only reason she had the second job was that the father was not paying child support, so the income from the second job should not count in her income for support.

The father claimed that his expenses were greater than his income. He earned \$9,400 per month from his law-office job. However, he owned two rental properties that lost money. He rented out the first for \$550 per month and lost about \$2,000 in a year. He rented the second for \$375 per month and lost more than \$11,000 that year.

The court agreed with the wife and excluded the income from her second job from the support determination. With respect to father's income, the court imputed monthly employment income to him of \$2,000, based on his 1994 monthly income of \$4,000. The

court also imputed income to him of \$2,900 per month, which consisted of distributions from his pension and imputed rental income. The imputed rental income resulted from consideration of the fair market rental value of the rental properties and the father's net equity in the properties of about \$200,000 to \$250,000.

The appellate opinion discussed several issues raised on appeal but certified for publication only the section discussing imputing income in connection with the rental properties. The father argued that no provision of the child-support guideline allows the court to

impute income based on assets as opposed to imputing income based on earnings from employment.

imputed definition of earning capacity is not appropriate in determining child support. The court examined several statutes and legislative intent. With respect to the statutes, the court stated that the child-support guideline defines "income" broadly as "income from whatever source derived." Family Code Section 4058(a). Similarly, the court held that term "earning capacity" is broader than the ability to earn from work. The court held that it may mean "something (as wages or dividends) earned as compensation for labor or the use of capital" and that "earn" means to "bring in by way of return."

The court stated that the legislative intent supports this broad interpretation and cited several statutes that demonstrate that the Legislature intended consideration of all sources of imputed income. Family Code Section 4053(c) provides that, in determining child support, the state's top priority is the interests of the children. Section 4053(a) provides that a parent's first and principal obligation is to support a child according to the parent's circumstances and station in life. Section 4053(l) provides that child-support orders must ensure that children receive sufficient support.

In light of this case, a party seeking support should examine carefully all of the assets of the other party. In opposing a request for support to be imputed based on assets, a party should argue as much as possible that satisfying the goals of the child-support guideline and legislative intent without imputing the income is possible. In the *Dacumos* case, the father took the extreme position that he had no income to pay support. He was also in arrears. These two factors probably heavily influenced the court to impute income based on the assets. A party in the father's position should anticipate that the court will impute income based on assets and present expert evidence as to the income the assets can produce to minimize any imputed income.

In a situation in which a party has a stock portfolio invested primarily for capital appreciation instead of income, a party seeking additional support may argue that the court should impute a reasonable rate of return to the entire value of the portfolio. A party should not seek capital appreciation at the expense of the children in the form of lower child support. Further, the party who pays support completely controls the investment decisions, and the payor should not reduce support by seeking capital appreciation. By excluding non-income-producing assets from child support, a party paying support essentially can defer the gains as much as possible until support is completed.

On the other hand, the party paying support can argue that, as the stocks sell, assuming they are, the capital gain will be part of the support calculation. *Dacumos* can be distinguished on the grounds that, unlike a rental property with below-market rent, stock investments do not represent an underuse of capital. Instead, stock investments are a reasonable use of funds. Moreover, arguing that the Legislature intended that all parents paying support to forego investing in stocks would be too much of a stretch.

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The only section that allows the court to base support on imputed income as compared to actual income is Family Code Section 4058(b), which provides as follows: "The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." The issue was interpreting the phrase "earning capacity" in this section in terms of whether it was limited to earnings from work.

The court concluded that the phrase "earning capacity" should include imputed income based on assets. Without stating that this was a case of first impression, the court did not cite any other case to support its conclusion. The court first held that prior opinions that considered earning capacity were limited to imputing income based on work and were not meant to prohibit imputing income based on assets.

The court stated that the cases that have considered the definition of "earning capacity" have all followed the definition set forth in *In re Marriage of Regnery*, 214 Cal.App.3d 1367 (1989). That definition is as follows: "Earning capacity is composed of (1) the ability to work, including factors such as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire."

The court distinguished *Regnery* and the cases that followed it by reasoning that in those cases "there was no issue as to whether earning capacity could be based on income from sources other than work." Since those cases did not consider the present issue, the court reasoned that they were not authority to exclude earning capacity based on assets.

The court also reasoned that the test for earning capacity adopted by *Regnery* is that used in the law of worker's compensation. The court held that such a lim-

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