ALIMONY & POST-SEPARATION SUPPORT

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A. Procedural Considerations

I. Parties must be separated in order to file for post-separation support and/or alimony.

II. There cannot be a post-divorce judgment claim made for post separation support or alimony unless NCGS 50-11(d) is applicable.

III. There must be a dependent spouse and a supporting spouse and the orders that are derived from an award of PSS/alimony must reflect those determinations.

IV. Once a dependent spouse, always a dependent spouse.

V. PSS can be done by testimony and/or affidavit. Alimony requires a full trial with testimonial evidence.

VI. Personal jurisdiction is determined under UIFSA, codified as N.C. Gen. Stat. 52C et. seq.

B. Arguing for Alimony/PSS: What Works and What Doesn't

I. Length of Marriage
II. Financial (reasonable needs)
III. Accustomed standard of living
IV. Income and earning abilities
V. Homemaker, contributions, etc.
VI. Debt obligations
VII. Dependent Spouse & Supporting Spouse
VIII. Duration of the marriage
IX. Ability to Pay
X. Marital Misconduct
    I. Significance of Fault (Reality vs. Misconception)
    II. Illicit Sexual Behavior
XI. Taxes
XII. Catchall factor

C. Imputed Income & the Bad Faith

This is simply the bad faith quagmire that often appears in cases where one of the parties does not want his or her true income (or earning capacity) to be utilized for support determinations. While there are a myriad of fact patterns that could encompass the voluntary impoverishment situation, the use of North Carolina cases with specifics is a good way to demonstrate how the use of bad faith in imputing income is utilized in North Carolina.

One of the very first reported cases in North Carolina regarding imputing income was **Davidson v. Davidson**, 289 N.C. 625, 127 S.E. 682 (1925). In **Davidson**, a physician appealed the trial court's ruling that he had to pay his wife $100 a month in alimony pendente lite. The Court reversed the trial court's order based upon its findings but stated that spousal support "may be based on the husband's earnings, or his earning capacity, although he is not possessed of money or property. *Id*. At 627, 127 S.E. at 684.

The **Davidson** decision seemingly set the standard for income imputation for over three decades. However, in 1960, along came **Sguros v. Sguros**, 252 N.C. 408, 114 S.E. 2d 79 (1960). In **Sguros**, the husband (obligor) was making a salary of $10,800 at a tobacco company in Winston-Salem. The obligor voluntarily left this job to take a professor job at the University of Miami. The obligor specified in his affidavit that the opportunities for career advancement as a professor were greater than at his technician job at the tobacco company. There was no other evidence regarding the reason for the job change. Based on that, the Court stated that "so long as he [obligor] acted in good faith" he had the right to take a job even with a salary reduction. *Id* at 411, 113 S.E. 2d. At 82. A decade and a half later, the Court, in **Bowes v. Bowes**, 287 N.C. 163, 214 S.E. 2d. 40 (1975), found that the trial court did not have proper findings to impute income on a self-employed businessman who owned a construction company that was facing financial hardships. The Court, expanding on the rulings in **Sguros** and **Conrad v. Conrad**, 252 N.C. 412, 113 S.E. 2d 912 (1960), stated that in order for the earning capacity of a party to be utilized in a support case, there has to be an "deliberate attempt on the part of the supporting spouse to avoid his financial family responsibilities by refusing to seek or to accept gainful employment; by willfully refusing to secure or take a job; by deliberately not applying himself to his business; by intentionally depressing his income to an artificial low; or by intentionally leaving his employment to go into another business." Id. At 171, 214 S.E. 2d at 45. In **Beall v. Beall**, 290 N.C. 669, at 674, 228 S.E.2d 407, at 410 (1976), the Court added an additional consideration by finding that a party's "excessive spending because of a disregard of his marital obligation to provide reasonable support" could be a basis for imputing income. Interestingly enough, the Court found that the obligor in **Beall** was ordered to pay support that was beyond his ability to pay, based in part on the trial court's use of excessive expenses put forth by the other party.

However, the first case that provides a working list of factors for consideration came in **Wolf v. Wolf**, 151 N.C. App. 523, 566 S.E. 2d 516 (2002). In **Wolf**, the obligor made demands on his employer to rename his bonus pay as an expense, he lied about his expenses, he did not disclose his bankruptcy to his supervisor and he made unreasonable demands for business trips. Given that series of events, the trial court found that this led to an "entirely predictable termination." In denying Mr. Wolf's request to modify his support payments, the Court set forth reasons why modification can be denied on the "basis of an individual's earning capacity instead of his actual income when the evidence presented to the trial court shows that a husband has disregarded his marital and parental obligations by: (1) failing to exercise reasonable capacity to earn; (2) deliberately avoiding family's financial responsibilities; (3) acting in deliberate disregard of support

obligations; (4) refusing to seek or keep gainful employment; (5) willfully refusing to secure or take a job; (6) deliberately not applying oneself to one's business; (7) intentionally depressing income; or (8) intentionally leaving employment to go into another business." *Id.* At 526-527, 566 S.E. 2d at 518-519. The Court has allowed a trial court's findings that a Mother was acting with "naïve indifference" as to needs of the children and that her indifference was intentional and willful avoidance of her support obligations to her children. **Roberts v. McAllister**, 174 N.C. App. 369, 378, 621 S.E. 2d 191, 198 (2005).

Did the **Roberts** case create a new standard by which the intent of the party with imputed income is not a requisite? No. While the Court in **Roberts** latched on to the catchy phrase from the trial court, it still came to the core issue of the party's intent. So, does the intent of the party whom support is being imputed still need to be considered? Yes. "Evidence of a voluntary reduction in income is insufficient, without more, to support a finding of deliberate income depression or bad faith…A party is not deemed to be acting in bad faith only because he is unemployed by choice. **Pataky v. Pataky**, 160, N.C. App. 289, at 307, 585 S.E. 2d 404, at 416 (2003). Instead, the court must hear competent evidence and based its decisions on findings related to the proscribed intent of the party who is being imputed income. "The dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligations." **Wolf** at 526, S.E. 2d 518.

Knowing that the intent of the party against whom an earning capacity case is being made is essential, we should have no issues proving it, correct? Unfortunately, the answer is no. As to proving the requisite intent, the facts of the case will determine the best methods to do so. However, examples provided in prior cases demonstrate that objective proof through circumstantial evidence is more likely to win the earning capacity argument unless you are fortunate enough to have a party's subjective intent given to you on a silver platter via a party admission. Who carries the burden of proof in the earning capacity case? Is it the party asking for income to be imputed or is it the party against whom an imputed income is being sought? The answer is not so clear. In one reported case that involved modification of support, the Court placed the burden on the non-custodial parent to prove that she was acting in good faith in order to receive the reduction in child support. **Mittendorff v. Mittendorff**, 133 N.C. App. 343, 515 S.E. 2d 464 (1999). However, that burden of proof depended more on the *relief sought*, namely the request for modification of a prior support order and the associated burden of proof on the party seeking a modification of support. The same principle was applied in **King v. King**, 153 N.C. App. 181, 568 S.E. 2d 864 (2002) and also in the **Andrews** case. In a case involving modification of a prior support order, there has to be a showing of a substantial change in circumstances to warrant the modification. The decrease in income for an obligor as a substantial change in circumstances hinges on why the decrease occurred, namely whether the decrease was voluntary or involuntary. If the decrease was voluntary and substantial, there still has to be a substantial decrease in the needs of the child(ren) if dealing with child support modification. *See* **Armstrong v. Droessler**, 177 N.C. App. 673, 630 S.E. 2d. 19, (2006). In those cases, it was the burden of showing the substantial change in circumstances that doomed the non-prevailing parties as opposed to

not showing good faith. If the preceding cases dealt with initial support determinations, it remains likely that no such burden of showing good faith would have been put on the party against whom imputed income was being sought. Put differently, the cases do not stand for a universal rule on the proper burden of proof in the earning capacity case. The best rule of thumb is to make or defend your case (depending on your side) instead of relying on protection through some procedural maneuver unless you can use the burden requirements in the modification case as outlined above.

What is the best way to show earning capacity? In a child support case, the North Carolina Child Support Guidelines allow for a parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community to be considered except if no such evidence exists, the court can impute minimum wage for a 40-hour work week. If you are using past employment as the measure, should you enlist the aid of a vocational expert? Also, what effects do the economic and political forces cause? Is that something that a vocational expert will be needed to testify about or can the judge take judicial notice of the recession? Perhaps more importantly, can your client even afford to use a vocational expert? For spousal support cases, there are no equivalent guidelines. Ultimately, much like proving intent as described above, the specific facts of the case at hand will determine which route is best to take in imputing income. While I could go on for pages on end on all the different facts and circumstances that could or could occur, I believe that there are a series of classic scenarios that most likely will trigger the earning capacity rule in a case.

What if a party is voluntarily unemployed or underemployed? As you recall from above, the fact that an individual is voluntarily unemployed is not sufficient to impute income. Instead, it all depends on the specifics reasons and intent of the party against who imputed income is being sought. For instance, if a party voluntarily quit his or her job and has not taken efforts to secure a job where they otherwise could, the court could determine the bad faith through the inaction In **King,** a noncustodial Mother voluntarily quit her job as a real estate agent or otherwise worked on a sporadic basis with her realty group despite being praised by her employer. The Mother provided no credible explanation as to her actions but instead based its decision on her excessive absences from her work.

What about if someone quits his or her job due to physical or mental disabilities? For child support, the Guidelines are clear that income cannot be imputed to a parent who is physically or mentally incapacitated. For spousal support issues, there are no clear directions. However, does that mean that you are out of luck? Not necessarily. What if the party who is disabled could secure private disability benefits, Social Security Disability benefits, military disability benefits, Veterans Affairs (VA) disability, FERS disability, etc. and is not taking such action? Again, it will depend on whether the disabled party is actively and intentionally trying to avoid paying support obligations.

What if a party is unemployed due to misbehavior or poor performance at work? Perhaps the party is unemployed due to a criminal conviction or dishonorable discharge? One example of where a criminal conviction results in unemployment is where an

individual loses credentials enabling him or her to maintain employment status. For instance, an individual who loses his or her applicable security clearance may be separated from a federal government job. Likewise, a service member who has a security clearance revoked due to poor credit history, less than honorable acts or being dishonorably discharged from the military could cause unemployment. The unemployment will still be considered a voluntary unemployment if the termination resulted from the fault of the unemployed party. The **Wolf** decision above is a clear example of this.

Does that mean that every instance of being fired will result in imputed income? The answer is no. Not every case where an individual is unemployed should require imputed income. A significant factor that the trial court should examine is whether the unemployment occurred by voluntary versus involuntary actions of the unemployed party. Is the party unemployed due to layoffs at the local manufacturing plant that had all of its jobs outsourced to China, an information technology worker whose firm involuntary separated its employees in order to hire out the services in Mumbai, India or a government employee who was released because of budget cuts? In those situations, it could be a harder case to impute income if the unemployment was due to an entity's internal workforce change or external market forces. This may be especially true given the current state of the economy. However, the court should also consider the post-termination actions of the unemployed party in seeking new employment.

What if the unemployed party quit his or her job to get further education or to perhaps delve into a new type of work? Again, it depends on the circumstances present in the case. Is there a hard and fast rule? In **State ex Rel Godwin v. Williams**, 163 N.C. App. 353, 593 S.E. 2d 123 (2004), a trial court's use of earning capacity against a father in a child support case was reversed and remanded where the obligor was a college student making less income that the imputed minimum wage. In **Pataky**, the obligor father was not acting in bad faith when he quit his job to go back to school when he maintained an adequate level of support for his children. Does **Pataky** put an obligation on a noncustodial parent to provide "adequate support" during his or her period of time as a student or does that only come into play if there is a previous order and a modification is being requested? The best defense, it would seem, to combat an earning capacity argument against a student is that the student is acting in good faith in pursing education in the anticipation of better job opportunities. Again, part of that depends on the intent of the student and perhaps also the type of degree being pursued in comparison to the status quo. As to a party switching his or her job, I would cry [the factors in] **Wolf** to the Court, especially if the change in careers had a foreseeable reduction in pay as witnesses in the **Andrews** decision. However, the central focus should remain on why the party changed jobs as opposed to the income differential. In the **Andrews** case, for example, the change in income did not result in the finding of bad faith but rather the *reasons* (or lack thereof) for the change in employment.

Lastly, say that a party is unemployed due to having minor children or insists that he or she has historically been a homemaker. Does that argument hold any weight? In a child support case, the Guidelines state that income cannot be imputed for a parent who is

caring for a child under the age of three years and for whom child support is being determined. The operative words in the preceding sentence are *under the age of three years **and** for whom child support is being determined.* If the parent staying home does not have a situation matching that scenario, then the possibility of imputing income should exist. In the **Roberts** decision, the Court imputed income to the stay at home mother despite her contentions as to why she should stay home instead of work. The key aspects in that case were that the three month old child that the mother had was fathered by her second husband. Also, the Court agreed with the trial court in finding that the "naïve indifference" of her children's needs equated to the necessary intent and deliberate disregard of her support obligations. Again, the earning capacity case will be determined on the facts in play and the intent of the unemployed/underemployed party. I will say that from my experiences in trial courts across many jurisdictions, the fact that a party is unemployed due to being lazy has never turned out good for them.

C. Enforcement Options

i. *Contempt versus Breach of Contract*

1. Walters case 307 N.C. 381 (1983)
2. Contempt remedies – See N.C.G.S. 5A
3. Breach remedies – Apply Contract Law
    a. Damages
    b. Specific Performance
    c. Contracted remedies

ii. *Garnishment & Wage Withholding*

1. PSS/Alimony

a. See N.C.G.S. 50-16.7

i. Alimony or postseparation support shall be paid by lump sum payment, periodic payments, income withholding, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property, as the court may order. The court may order the transfer of title to real property solely owned by the obligor in payment of lump-sum payments of alimony or postseparation support or in payment of arrearages of alimony or postseparation support so long as the net value of the interest in the property being transferred does not exceed the amount of the arrearage being satisfied. In every case in which either alimony or postseparation support is allowed and provision is also made for support of minor children, the order shall separately state and identify each allowance.

ii. (b) The court may require the supporting spouse to secure the payment of alimony or postseparation support so ordered by means of a bond, mortgage, or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the supporting spouse to execute an assignment of wages, salary, or other income due or to become due.

iii. (c) If the court requires the transfer of real or personal property or an interest therein as a part of an order for alimony or postseparation support as provided in subsection (a) or for the securing thereof, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228. ***ALSO, see N.C.G.S. 50-17 regarding writ of possession.***

iv. (d) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for alimony or postseparation support as in other cases.

v. (e) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 and Article 9 of Chapter 110 of the General Statutes, shall be available in actions for alimony or postseparation support as in other cases, and for such purposes the dependent spouse shall be deemed a creditor of the supporting spouse.

vi. (f) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for alimony or postseparation support as in other cases.

vii. (g) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in actions for alimony or postseparation support as in other cases.

viii. (h) A dependent spouse for whose benefit an order for the payment of alimony or postseparation support has been entered shall be a creditor within the meaning of Article 3A of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

ix. (i) A judgment for alimony or postseparation support obtained in an action therefor shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past-due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

x. (j) Any order for the payment of alimony or postseparation support is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A of the General Statutes.

xi. Notwithstanding the provisions of G.S. 1-294 or G.S. 1-289, an order for the periodic payment of alimony that has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for alimony until the appeal is decided if justice requires.

xii. (k) The remedies provided by Chapter 1 of the General Statutes Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for alimony and postseparation support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 16 of Chapter 1C of the General Statutes.

xiii. (l) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available.

xiv. (l1) The dependent spouse may apply to the court for an order of income withholding for current or delinquent payments of alimony or postseparation support or for any portion of the payments. If the court orders income withholding, a notice of obligation to withhold shall be served on the payor as required by G.S. 1A-1, Rule 4, Rules of Civil Procedure. Copies of the notice shall be filed with the clerk of court and served upon the supporting spouse by first-class mail.

Can somebody use Child Support Enforcement (CSE) to initial award of PSS/Alimony? No.

Can somebody use CSE to enforce spousal support? Yes.

NC Gen. Stat. § 110-130.2. Collection of spousal support. (by CSE)

Spousal support shall be collected for a spouse or former spouse with whom the absent parent's child is living when a child support order is being enforced under this Article. However, the spousal support shall be collected: (i) only if there is an order establishing the support obligation with respect to such spouse; and (ii) only if an order establishing the support obligation with respect to the child is being enforced under this Article. The Child Support Enforcement Program is not authorized to assist in the establishment of a spousal support obligation

When does the income withholding take effect for spousal support? (by CSE)

In the enforcement of alimony or postseparation support orders pursuant to G.S. 110 130.2, an obligor shall become subject to income withholding on the earlier of:

a. The date on which the obligor fails to make legally obligated alimony or postseparation payments; or
b. The date on which the obligor or obligee requests withholding.

2. **Consumer Credit Protection Act 15 U.S.C. § 1673(b).**
    a. **(2)** The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed—
    b. **(A)** where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and
    c. **(B)** where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;
        1. except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.

D. Support Modification Procedures and Tactics

Spousal Support Modification…➔ § 52C-2-206(c). Enforcement and modification of support order by tribunal having continuing jurisdiction. A tribunal of this State which lacks continuing, exclusive jurisdiction over a spousal support order may not serve as a responding

tribunal to modify a spousal support order of another state. See also **N.C.G.S. 52C-2-205**… A tribunal of this State issuing a support order consistent with the law of this State has continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation. A tribunal of this State may not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state.

E. Support Termination: When and How

i. Spousal Support
   1. Order
      a. Death of either party
      b. Cohabitation
      c. Remarriage
      d. Term as set out in order (usually)
      e. PSS
         i. Date specified in order
         ii. Entry of alimony order awarding or denying it
         iii. Dismissal of alimony claim*
            1. Does this mean must file alimony with PSS? No, see N.C.G.S. 50-16.2(A) regarding "in an action brought under Chapter 50 which can include ED, custody, child support.
            2. Does this mean that PSS as stand alone is not permissible?
            3. What if file alimony and PSS and then dismiss alimony?
            4. Through in N.C.G.S. 50-19 to confuse it even more since that presupposes all claims as independent.
         iv. If PSS claim with no alimony claim pending, at entry of absolute divorce.
         v. Termination under N.C.G.S. 50-16.9
   2. Contractual
      a. Depends on the specified terminating factors in agreement.
      b. Patterson v. Patterson, 2015 NC Court of Appeals Case

F. Former Spouse and Child Medical Benefits and Former Spouse Continued Health Care

FORMER SPOUSE

i. 20/20/20
ii. 20/20/15
iii. Continued Health Care Benefit Program

   1. Requirements for Former Spouse - Eligibility
   2. How long does it last?
   3. Does it cost?