

**THE IMPUTATION OF INCOME AND ITS IMPACT
UPON THE DEPENDENT SPOUSE - A HISTORICAL
ANALYSIS FROM KHALAF TO THE PRESENT**

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I. INTRODUCTION

Due to the downturn in the economy¹, many of our clients are faced not only with the possibility of their own job loss but, in the case of a dependent spouse, also the loss of income of the primary wage earner of the family. This can have a devastating impact upon family dynamics, and can open up a multitude of issues, one of the most important being the necessity of imputing income to one, or both, spouses. This article will focus on the imputation of income to the dependent spouse, and whether trends in current case law can be gleaned to ascertain and understand how Courts are treating dependent spouses and whether they are being treated fairly.

Imputation of income to dependent spouses has been extremely contested over the last forty (40) years. Examining the historical progression of New Jersey decisions, various trends can be seen. As discussed below, current New Jersey case law seems to favor the imputation of income to the dependent spouse, whereas previously Courts were loath to impute income to a dependent spouse. Whether such a trend is fair or equitable is difficult to determine, as it depends on one's subjective definition of fairness. Is it fair and equitable to impute income to a dependent spouse who has not

¹ It should be noted that on June 26, 2009, the Appellate Division in Piscitelli v. Classic Residence, 408 N.J. Super. 83 (App. Div. 2009), specifically confirmed that Courts can take judicial notice of the severe economic downturn and the unemployment situation facing the country.

worked for twenty-six (26) years? Is it fair and equitable to impute income to a dependent spouse who is caring for young children? Is it fair and equitable to impute income to a dependent spouse who has not worked for twenty-six (26) years and is caring for young children? An individual's subjective viewpoint on these or other fact patterns should have little impact upon a Court's ultimate determination.

In lieu of subjective viewpoints, what certainly can and should be used to present an argument either for or against imputation of income is an examination of the trends in New Jersey case law surrounding the imputation of income. This article will analyze the case law and, in connection therewith, identify trends surrounding the imputation to dependent spouses. That being said, the authors will not offer an opinion whether such trends are fair to the dependent spouse, and will leave such conclusions to the reader.

II. HISTORICAL ANALYSIS

A. Case Law Regarding Imputation of Income

In 1971, trends surrounding the imputation of income to dependent spouses began to emerge. In that year, the New Jersey Supreme Court, in Khalaf v. Khalaf, 58 N.J. 63, 275 A.2d 132 (1971), was faced with the issue of whether to impute income to an unemployed wife in a divorce after twenty-six (26) years of marriage. In this matter, the dependent spouse sued for maintenance and child support, her husband acknowledged that he had "abandoned" her, and the dependent spouse had no independent source of income for the entirety of the marriage. Id. at 66.

In rendering its decision, the New Jersey Supreme Court asserted as follows with regard to her claim for support:

“[s]he did not need to work before her husband wrongfully left her, and she is entitled to carry on as if still married in this regard as long as her husband’s means are reasonably able to meet these needs.” Id. at 69-70.

The New Jersey Supreme Court further opined that:

“we are dealing with a woman who for twenty-six years of her life had been married to the defendant and who had geared her whole life style to maintaining her household and rearing a family.” Id. at 70.

In a sign of the times, the Court wrote, “plaintiff led the kind of life which one would expect of the wife of a prosperous suburban family.” Id. at 66, and ultimately held that, based upon the length of the marriage and the dependent spouse’s devotion to the marriage, that they could not “now turn back the clock and ask her to get a job and develop a career.” Id. at 70. Accordingly, the New Jersey Supreme Court chose not to impute any income to the dependent spouse.

Whether one deems such a decision to be fair to the dependent spouse, or unfair to the supporting spouse, depends on each individual’s own personal opinion or bias. However, the fact remains that as of 1971, the New Jersey Supreme Court decided not to impute income to a dependent spouse after a long-term marriage in which she had not been employed, thus establishing a guidepost to ascertain whether a trend will emerge.

Fast forward seven (7) years. In 1978, the New Jersey Appellate Division was

faced with the question of whether to reduce child support in connection with a supporting spouse's career change that resulted in a temporary, but substantial, reduction in income. In Lynn v. Lynn, 165 N.J. Super. 328, 341-42, 398 A.2d 141 (N.J. App. Div. 1979), the supporting spouse earned \$110,000 in his last year as an oncologist, subsequently ended his practice, and began a three-year psychiatry residency at a salary of \$17,000 per year. Id. at 333.

Although the Appellate Division did find that the supporting spouse's career change was made in good faith and was not designed to avoid his child support obligation, it also noted that:

“We do not believe that [the father's] decision to change the course of his medical career should impact so abruptly upon his young children as to require their support to be gauged by an income of \$110,000 in one year and \$17,000 in the next.” Id. at 341.

The Appellate Division further confirmed that had the family remained intact, it doubted that the supporting spouse would have utilized only his \$17,000 income to support his children, and “almost certainly” would have utilized savings. Id. at 341-42. Thus, the Appellate Division chose to impute additional income to the supporting spouse during his three (3) years of diminished salary, and found that the existing award of child support was not excessive given this imputation. Id. at 342. Although this Appellate Division decision does not technically involve the imputation of income to a dependent spouse, it would appear that a trend toward the “protection” of the dependent spouse continued following the New Jersey Supreme Court's initial decision

in Khalaf.

This initial trend toward the protection of the dependent spouse continued to be evident after the Lynn decision. Specifically, the Appellate Division, in 1982, was faced with the issue of whether the desire for re-employment in the same field (after a layoff), justifies non-payment of child support due to continued unemployment. In Arribi v. Arribi, 186 N.J. Super. 116, 118, 451 A.2d 969 (N.J. App. Div. 1982), the supporting spouse was laid off from his accounting job and eight (8) months later remained unemployed as he looked only for a new job in an accounting field and, lacking a college degree, did not succeed. Id. at 117. After analyzing these factors, the Court opined:

“one cannot find himself in, and choose to remain in, a position where he has diminished or no earning capacity and expect to be relieved of or to be able to ignore the obligations of support to one’s family.... The [father] cannot be content with waiting for the ‘right’ job to appear when he is obligated to pay support for his child.” Id. at 118.

In refusing to excuse the unemployed father from his child support obligations, the Court implied that it would impute income to him for a job outside of his preferred accounting field. Specifically, the Court directed the Defendant to report to the Bergen County Probation Department Job Bank, and directed the Defendant to obtain gainful employment through same, or through independent means. Id. As was the case in the decisions set forth above, the Arribi Court was apparently utilizing its equitable power to ensure that the dependent spouse did not suffer as a direct result of the failure of the supporting spouse to garner income and/or employment.

Trends, like the tide, are subject to a constant ebb and flow. What initially began as a trend toward the protection of the dependent spouse, appeared to change drastically approximately twenty years following the New Jersey Supreme Court's determination in Khalaf. Whether this was due to a redeveloped social consciousness surrounding the role of the dependent spouse in society, or a less paternalistic judiciary, remains to be seen. However, the trends in these current cases seem to denote that inroads were being laid to arguments in favor of the imputation of income to dependent spouses, regardless of length of marriage or surrounding circumstances.

The trend in the overall protection of the dependent spouse by the judiciary took a few steps backward approximately eight (8) years after the Arribi decision. In 1991, the Appellate Division was faced with the issue of whether income should be imputed as a result of investment income. In Aronson v. Aronson, 245 N.J. Super. 354, 356, 585 A.2d 956 (N.J. App. Div. 1991), the dependent spouse collected an inheritance and invested most of it in trust. At the same time, the dependent spouse continued to receive spousal support, which resulted in the supporting spouse's filing an application to modify his support obligation based upon changed circumstances. Id. at 356.

The dependent spouse took the position that as the income generated from the inheritance was maintained in investments, that she did not have the cash on hand and still needed the full alimony payments. Id. at 360. In analyzing the dependent spouse's position, the Appellate Division held that the income generated from the investment of the inheritance should be considered for the imputation of income. Id. at 364. The

Appellate Division went on to confirm:

“To the extent that income is generated by a dependent spouse’s inheritance or by any other asset, that income is crucial to the issue of that spouse’s ability to contribute. This is true whether the spouse chose to actually receive the income or whether, at his or her option, it is plowed back into the inheritance. The issue is not actual receipt of funds but access to them.” Id.

As a result, the Appellate Division held that despite the dependant spouse not actually receiving this money, and despite its being reinvested into the Trust, she had the ability to receive this money, and it should be imputed as income to the dependent spouse for support purposes. With this decision, a new guidepost was set and the New Jersey judiciary was beginning to take a more expansive stance with regard to the imputation of income.

In the case of Stiffler v. Stiffler, 304 N.J. Super. 96 (Ch. Div. 1997), the Court was faced with the issue of the extent to which an exempt asset can be considered when fashioning an alimony award. In Stiffler, the payer spouse utilized a significant inheritance to purchase a new home, and thereby, invested these monies in a manner which did not produce income, as distinguished from the Appellate Division case of Aronson, discussed above. The Court, therefore, had to struggle with the position of whether to impute income on these monies which were used and converted to real estate.

The Court ultimately held that income should be imputed on this non-income producing asset, for if it were not imputed therefrom, “litigants would have a perfect

blueprint for evading Aronson.” Namely, litigants could invest their inheritances in non-income producing assets, such as real estate, thereby foreclosing the Court’s ability to impute income therefrom. The Trial Court in this matter took the position that such a conclusion would be inequitable, and contrary to both logic and sound public policy. Id. at 102.

However, the Court did stress that this does not confirm that the entirety of the inheritance should be considered for purposes of imputing income, as each case’s particular circumstances must be evaluated to determine whether it is reasonable to consider some, all, or none of the inherited monies for purposes of imputing income. Id. at 103. By way of example, the Court noted that if an individual were riddled with debt, and utilized a substantial portion of the inheritance to pay down this debt, it would be inappropriate for the Court to impute income from those monies, as the reduction of debt would improve the individual’s cash flow and would, for all intents and purposes, benefit both parties equally. Id.

Based upon the foregoing, the Court noted that the parties had previously sold their marital residence and both were left with a need for a residence. As such, the Court deemed the supporting spouse’s utilization of the inherited monies reasonable, but did note that he purchased of a home that was valued well in excess of the value of the marital home, so it would be reasonable to impute income on the funds utilized to increase his lifestyle. The Court ultimately imputed income to the supporting spouse on that excess portion of the inherited monies. Id. at 103.

The imputation of income flowing from inherited monies invested in non-income producing assets was also addressed by the Appellate Division, in the case of Connell v. Connell, 313 N.J. Super. 426, 432, 712 A.2d 1266 (N.J. App. Div. 1998). In Connell, the dependent spouse filed an application seeking to increase child support from the supporting spouse after he received an inheritance. Id. at 429. In opposition to this application, the supporting spouse argued that as this inheritance income was invested in real estate, which was a non-income producing asset, that it should not be considered when determining child support. The Appellate Division disagreed and held that:

“[t]he voluntary choice of the father placing his inheritance in a non-income producing asset should not result in exclusion of that asset from consideration in the child support equation.” Id.

It would appear, therefore, that the Appellate Division was neither favoring, nor disfavoring the dependent spouse in these two (2) decisions involving investment income. In all actuality, and what certainly is warranted given the Court’s *parens patriae* jurisdiction, it appears the Court was supporting the best interests of the children and ensuring that they would receive the appropriate level of child support, regardless of whether this favored or disfavored the interests of the dependent or supporting spouse.

The issue of investment income was ultimately presented to the New Jersey Supreme Court in the 1999 case Miller v. Miller, 160 N.J. 408, 424 (1999). In this matter, the supporting spouse, who had lost his lucrative financial services job, but still maintained significant investments which resulted in income of approximately \$137,500 per year, sought a reduction in alimony due to changed circumstances. Id. at 416.

In analyzing the supporting spouse's investments, the Court noted that despite his stock actually yielding 1.6 percent interest, given the supporting spouse's sophisticated investment skills, he could have earned a greater return through higher-yield investments. Id. at 423-24. All things considered, the New Jersey Supreme Court treated investment income as tantamount to employment income, and held that:

"in the present case, it is appropriate to impute a reasonable income from [the husband's] investments comparable to a prudent use of his investments, like his human capital." Id. at 424.

The Court further explained that:

"there is no functional difference between imputing income to the supporting spouse earned from employment versus that earned from investment. In both instances, the supporting spouse is required to earn more from an 'asset,' either his or her human capital in the form of employment or his or her investment capital, or risk having more income imputed to him or her." Id. at 423.

Since the supporting spouse chose to invest in a manner that produced less income than higher-yield investment options, the Court imputed income to him, like imputing income to a person who is voluntarily underemployed, because he or she has the capacity to earn more with better employment. In further explaining its decision, the Court noted that they did "not intend to deprive [the husband] of the opportunity to control his investment options. We simply require the imputation of a more reasonable income from those investments...." Id. at 425.

It should be noted that this decision, although cutting against the interests of the supporting spouse in this case, could have significant and substantial impact upon a

dependent spouse in a different case. Based upon this determination, although the Supreme Court argued that they were not attempting to control an individual's investments, in actuality, this is what occurred. Although a dependent spouse could invest monies in ultra-conservative money market accounts earning a minimal return, he or she would nevertheless be penalized by the Court through the imputation of a higher interest rate and imputed income. Additionally, in discussing notions of fairness, how is such a position fair in the current economic climate? In fact, had a dependent spouse invested their monies in a manner which promoted risk and increased possible return pursuant to the Miller decision, he or she could be financially worse off given the later downfall of the stock market.

It is posited that the Miller decision, although seemingly in favor of the dependent spouse, actually resulted in a catch-22 in which the dependent spouse could be in a no-win situation. Had the dependent spouse invested his/her money in the manner posited by Miller, some would have been lost in the economic downturn of the economy. And had the dependent spouse invested his/her money in a risk-averse manner, and managed to preserve the monies despite the downturn in the market, pursuant to Miller, he/she still would have had income imputed based upon the possibility of earning greater income on the investments.

Luckily, the logical extrapolation of Miller was addressed and rectified in the Appellate Division case of Overbay v. Overbay, 376 N.J. Super. 99 (App. Div. 2005), in which the Trial Court imputed income to the ex-wife of \$80,000.00 per year by

attributing a 7.4 percent rate of return on her inherited assets. The dependent spouse specifically argued that the Trial Court misapplied the Miller decision, and that by investing assets in this fashion would risk capital in a “completely unacceptable fashion” and specifically referenced the “debacle with Enron, WorldCom and Global Crossing”. Id. at 105.

The Appellate Division, after entertaining the dependent spouse’s argument, agreed. They noted that by rigidly applying the formula posited by the Supreme Court in Miller, the Trial Court eliminated the dependent spouse’s ability to control her investment options and forced her to pursue a more aggressive and riskier investment strategy. The Appellate Division noted that the dependent spouse testified that it was important for her to “maintain the principal”, “invest it safely”, and to ensure that she had money to meet her health expenses. Id.

As such the Appellate Division noted as follows:

“The lesson to be learned from *Miller* is that when a spouse with underearning investments has the ability to generate additional earnings – without risk of loss or depletion of principal – but fails to do so, it is fair for a Court to impute a more reasonable rate of return to the underearning assets, comparable to a prudent use of investment capital.” Id. at 111.

The Appellate Division thereby held that the Trial Court erred not only by failing to explain why it was appropriate to impute additional earnings to the dependent spouse’s inheritance, but also by utilizing an unrealistic rate of return on the inherited monies held by the dependant spouse. The Appellate Division reversed and remanded

the matter back to the Trial Court and indicated that Mrs. Overbay was not required to put her capital at risk, or to jeopardize her inheritance, by pursuing an investment strategy that is neither reasonable nor prudent. It would appear that the catch-22 which was created through the lock-step reading and interpretation of the Miller decision was remedied by the Appellate Division's decision in Overbay and the Court's acceptance that the imputation of a specific rate of return is a fact based and case by case based analysis.

The issue of imputation of income to a housewife again reached the Appellate Division in the 1992 case Bencivenga v. Bencivenga, 254 N.J. Super. 328, 330, 603 A.2d 531 (N.J. App. Div. 1992). In this matter, the parties' two (2) children resided with the father, while the mother maintained visitation rights but did not provide support for their children. The mother subsequently remarried, had two (2) children with her new husband, and decided to stop working. The father ultimately filed an application requesting that the mother provide child support for their children, claiming that his circumstances had changed as the living expenses for both him and the parties' children had increased substantially.

The Chancery Division denied the father's application, holding that the mother should not have to return to work because she had two young children in her new marriage. In a decision which would appear to be diametrically opposed to the New Jersey Supreme Court's reasoning in the Khalaf, the Appellate Division reversed and held that:

“A parent who voluntarily leaves the world of gainful employment, for however a good reason, does not thereby foreclose inquiry into the need for child support and the responsibility of that parent to supply it.” Id. at 331.

The Appellate Division instructed the lower Court to conduct a thorough examination of all circumstances of the parties, including assets, earning capacity, child care alternatives, and opportunities to pursue part-time employment. Id. at 331-32. Thus, in this context, it would appear that despite the mother’s remarrying and raising two (2) children, the Court would still consider the imputation of income to her, even on a part-time basis. As with the case in Aronson, this decision seems to confirm the newly evolving trend, namely that the New Jersey judiciary was more apt to impute income to a housewife or dependent spouse, and thus a more “progressive” stance with regard to the imputation of income.

The imputation of income to a temporarily unemployed custodial mother was addressed in the 1992 decision in Gertcher v. Gertcher, 262 N.J. Super. 176, 177, 620 A.2d 454 (N.J. Ch. Div. 1992). In this case, the dependent spouse sought child support and alimony from the supporting spouse after she was fired from her job. Id. at 177. In an opinion which drastically differed from the New Jersey Supreme Court’s initial decision in Khalaf, the Court imputed income to the unemployed custodial mother holding that:

“One of the strongest indicators of a party’s ability to earn is the salary which he or she was recently earning, especially when a party has been unemployed for only a brief period of time.... The Courts have recognized that when parties suffer temporary fiscal setbacks the loss may not be shifted to the

children.” Id.

As evident by the Gertcher decision, New Jersey’s legal landscape was trending against its initial protection and fostering of the interests of the dependent spouse. This trend continued in a 1998 decision concerning the imputation of income to a spouse in a child support setting. In Dorfman v. Dorfman, 315 N.J. Super. 511, 514, 719 A.2d 178 (N.J. App. Div. 1998), the supporting spouse was involuntarily terminated from his employment with an accounting firm that paid approximately \$100,000 per year, and subsequently found new employment in a similar field at a salary of \$60,000 per year. Id. at 514.

After considering the supporting spouse’s request to modify child support based upon his reduced income, the Chancery Division denied his request and imputed annual income of \$100,000 based upon his prior income. Although initially supporting the interests of the dependent spouse, the Appellate Division reversed. Specifically, the Appellate Division held that the lower Court failed to find that the supporting spouse “was, without just cause, voluntarily underemployed. Such a finding is requisite, before considering imputation of income.” Id.

In declaring that “Inherent in a finding of ‘underemployment’ is the notion the obligor is intentionally failing to earn that which he or she is capable of earning,” the Appellate Division concluded the father was not underemployed because he had been involuntarily terminated and had immediately sought a new position. Id. at 517.

Based upon this premise, the Appellate Division rejected the imputation of income following the supporting spouse's loss of employment.

As set forth previously, it would appear that the initial trend in promoting and fostering the interests of the dependent spouse has shifted dramatically, and the Dorfman decision is evidence of same. The Chancery Division, in initially imputing income to the supporting spouse, was apparently following the reasoning and holdings of the Appellate Division in Bencivenga, and the Chancery Division in Gertcher. Nevertheless, the Appellate Division, in trending away from the fostering of the rights of the dependent spouse, required that a Court find that any such job loss, or voluntarily underemployment, must be without just cause prior to imputing income.

Therefore, when analyzing this trend further, and attempting to ascertain whether the Dorfman decision, although in theory would cut against the interests of the dependent spouse, would in practicality either support or impair those interests, it is imperative to ascertain how the New Jersey judiciary analyzed the determination of whether a spouse was "voluntarily underemployed" for purposes of imputing income. In the 2001 Appellate Division case, Golian v. Golian, 344 N.J. Super. 337, 341, 781 A.2d 1112 (N.J. App. Div. 2001), the Appellate Division did just that.

In Golian, the Appellate Division discussed the standard for determining whether a spouse was unemployed or underemployed for purposes of imputing income. In discussing this issue, the Appellate Division confirmed the Dorfman holding and reiterated that "Income may be imputed to a party who is voluntarily

unemployed or underemployed. This requires intentional conduct without just cause.” Id. at 341.

In Golian, the dependent spouse was unemployed and not working due to a disability and sought spousal support from her husband. Id. at 340-41. In rendering its decision, the Trial Court held that because the dependent spouse failed to submit the required proof confirming that she was disabled and failed to prove she was unemployed without just cause, it would impute income to her for purposes of calculating alimony. Id. at 340. Certainly, if the decision had remained as it stood, this unequivocally would have trended against the interests of the dependent spouse.

However, the Appellate Division reversed, finding that although the burden to show the disability would normally be on the person asserting disability, the fact that the dependent spouse had been adjudicated disabled by the Social Security Administration established a presumption of a disability based on the determination of an administrative agency. Id. at 341-42. Thus, the burden of persuasion shifted to the husband to demonstrate that the dependent spouse was not actually unemployable, and the Appellate Division remanded the case to provide the husband the opportunity to meet this burden. Id. at 342-43.

The burden of proof, and the shifting burden of persuasion with regard to imputing income in matters involving dependent spouses receiving social security disability, was further elucidated in Judge Selser’s well-reasoned and artfully drafted decision of Wasserman v. Parciasepe, 377 N.J. Super. 191, 871 A.2d 781 (N.J. Ch. Div.

2004). In this matter, the Trial Court was faced with the proposition of what degree of proof was required to overcome a presumption of unemployability as it relates to spousal support. The Court ultimately held that as the evidential fact of disability was well supported by the adjudication of the Social Security Administration which had reviewed multiple medical records and physician exams, and that clear and convincing evidence would be required to refute such a presumption of unemployability. Id. at 196.

The Trial Court in Wasserman, in finding that the supporting spouse met her burden in providing clear and convincing evidence, which came in the form of her own medical expert (a nephrology specialist) and vocational expert, held that the burden of persuasion was met and the ultimate burden of proof remained on the dependent spouse. Although this case does not specifically set forth the burden the dependent spouse would need to meet in the event the payer spouse offered such clear and convincing evidence, it would appear, through the reading of this decision, that the analysis is essentially foreclosed and that no additional proof would need to be elucidated for the dependent spouse, as the dependent spouse previously met their initial burden by being adjudicated disabled and receiving SSD payments. It would appear that the only issue left to be determined by the Trial Court is the amount of income to be imputed to the dependent spouse, following the supporting spouse's meeting of the burden of persuasion to provide clear and convincing evidence. The Court, in this matter, ultimately imputed income to the disabled dependent spouse in

an amount and form as recommended by the supporting spouse's vocational expert. Id.

Such a decision confirms the Court's willingness to impute income to the dependent spouse, and the trend away from the initial paternalism of the judiciary in protecting the dependent spouse. Additionally, as will be discussed briefly later in this article is the utilization of a vocational expert to offer clear and convincing evidence in the shifting burden of persuasion. The vocational expert's testimony was a crucial factor in the Court's ultimate determination to impute income to the dependent spouse. As a practical matter, therefore, it would appear that the utilization of a vocational expert, in this limited scenario, is imperative in fostering and promoting the interests of your client.

So, what would happen if supporting spouse were to meet his burden and demonstrate that the dependent spouse was able to work? If the supporting spouse were able to meet this burden, and show this substantial change in circumstances, how does the New Jersey judiciary treat such applications? As previously discussed, in Wasserman, the Court imputed income and ultimately reduced the supporting spouse's alimony obligation. However, what standards do the Courts follow, and how do these standards evidence the trends in imputing income to a dependent spouse?

The Appellate Division described the standard for establishing a substantial change in circumstances sufficient to modify support, based upon a career change, in Storey v. Storey, 373 N.J. Super. 464, 468-69, 862 A.2d 551 (N.J. App. Div. 2004). In Storey, the Appellate Division held that:

“In order to obtain a reduction in alimony based on current earnings, an obligor who has selected a new, less lucrative career must establish that the benefits he or she derives from the career change substantially outweigh the disadvantages to the supported spouse.” Id. at 468-469.

Additionally, the decision to change careers must be deemed “reasonable” under the circumstances. Id. at 469. Unless the career change is “reasonable” and its advantages to the supporting spouse “substantially outweigh” the disadvantages to the supported spouse, the Court will impute income to the supporting spouse. Id. In analyzing this issue, the Appellate Division listed the factors which should be considered in the ultimate determination of whether a career change is reasonable for purposes of modifying the supporting spouse’s alimony obligation:

1. The reasons for the career change;
2. Disparity between prior and present earnings;
3. Efforts to find work at comparable pay;
4. The extent to which the new career draws or builds upon education, skills, and experience;
5. The availability of work;
6. The extent to which the new career offers opportunities for enhanced earnings in the future;
7. Age and health; and
8. The former spouse’s need for support. Id. at 470.

In Storey, the supporting spouse lost his \$100,000 per year computer hardware job due to a reduction in force, and one (1) month later decided to change careers. Specifically, he decided to enter the profession of massage therapy earning income of \$300 per week. Id. at 468. Subsequent to this career change, the supporting spouse sought a reduction in his child support obligation, and therefore, had the burden of demonstrating that his decision to change careers was “reasonable” and that the

advantages to him substantially outweighed the disadvantages to the supported spouse. Id. at 473.

In analyzing the supporting spouse's career change in light of the factors set forth above, the Appellate Division concluded that the career choice was not reasonable. Id. at 475. Thus, the Appellate Division upheld the trial Court's imputation of \$60,000 income to the supporting spouse, and the ultimate reduction in alimony in accordance with that salary, which was based upon prevailing wages for computer service technicians. Id. at 468. However, it stands to be noted that the Appellate Division still upheld some reduction in support, and the imputation of a lesser income based upon the supporting spouse's job loss. Isn't this contrary to the prior discussed decisions of Gertcher and Dorfman? As this job loss was not deemed reasonable, would it not have been more practical to impute income based upon the supporting spouse's prior income of \$100,000.00, as was accomplished in Gertcher? Aren't the children suffering from this reduced child support based upon the supporting spouses unreasonable career change from a computer technician to a massage therapist? These and a host of other questions certainly remain, and only further confirm the judiciary's trend against protecting the interests of the dependent spouse, and in case of the Appellate Division's decision in Storey, the interests of the children.

B. Court Rules Regarding Imputation of Income

It should be noted that it is not just the New Jersey legal landscape which evidences the trend against the protection of the dependent spouse, but the New Jersey

Court Rules as well. Specifically, within the New Jersey Child Support Guidelines, contained at Appendix IX-A of the New Jersey Court Rules, paragraph 12, provides that:

“[i]f 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....” Pressler, Current N.J. Court Rules, Appendix IX-A (2009).

This provision of the New Jersey Court Rules confirms the trends set forth above, and the slow denigration of the protection of the rights and interests of the dependent spouse. In Dorfman, the Appellate Division stated that if a spouse is voluntarily unemployed, the Court’s finding that the voluntary unemployment is without just cause “is requisite, before considering imputation of income.” 315 N.J. Super. at 516. The Appellate Division in Golian in 2001, citing Dorfman, wrote that income “may” be imputed to a party who is voluntarily unemployed or unemployed. Golian, 344 N.J. Super. at 341.

These decisions, and the trend toward the imputation of income to the dependent spouse and, thus, the elimination of the initial protections for the dependent spouse, was further elucidated by the New Jersey Supreme Court in Caplan v. Caplan, 182 N.J. 250, 268, 864 A.2d 1108 (2005). In Caplan, the New Jersey Supreme Court held that income “may” be imputed to a parent to provide child support if the parent, “without just cause, is voluntarily unemployed or underemployed.” Id. at 268.

The Caplan Court, citing the New Jersey Child Support Guidelines, asserted that

in determining whether to impute income, the Trial Court must first find whether there is just cause for voluntary unemployment, and consider the following:

1. The employment and earning capacity of that parent had the family remained intact;
2. The reason for and intent behind the voluntary underemployment or unemployment;
3. The extent other assets are available to pay support; and
4. The ages of any children in the parent's household as well as child-care alternatives. Id.

While the guidelines suggest imputing income if a spouse is voluntarily unemployed or underemployed, the use of the word "may" by the Courts indicates that the imputation is permitted but not absolutely mandatory. See id.; Golian, 344 N.J. Super. at 341. This permissive argument for imputation both can weigh for or against the interests of the dependent spouse. However, it is submitted that in many post-judgment modification applications, it is the supporting spouse who is seeking the modification based upon loss of employment, change in income, or other income-related change in circumstances. Through the New Jersey Supreme Court's holding that such ultimate imputation is not mandatory, certainly this would weigh against the interests of the dependent spouse who was seeking to impute income to the supporting spouse.

The guidelines and case law further confirm that imputation for voluntary unemployment or underemployment should be considered only after a determination that there is no just cause for the unemployment or underemployment. See Dorfman, 315 N.J. Super. at 516. Further, the Appellate Division in Storey, although considering

alimony and not child support, wrote in regard to analyzing underemployment due to a career change,

“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.’ ... Each case requires a careful evaluation of ‘reasonableness’ and ‘relative advantages’ under the totality of the circumstances.” 373 N.J. Super. at 472.

Additionally, Rule 5:6A states, “The guidelines may be modified or disregarded by the Court only when good cause is shown.” Rule 5:6A; Caplan, 182 N.J. at 264. “Good cause shall consist of a) the considerations set forth in Appendix IX-A, or the presence of the 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.” Rule 5:6A; Caplan, 182 N.J. at 264. Further, the determination of good cause lies within “the sound discretion of the Court.” Rule 5:6A; Caplan, 182 N.J. at 264.

It is respectfully submitted that “the sound discretion of the Court” weighs heavily against the interests of the dependent spouse. However, how do such trends evidence themselves in practical matters? How would these trends come into play in confined fact-patterns? As will be discussed below, and as will hopefully be evident following the discussion of these practical concerns, the eroding of the interests of the dependent spouse has concluded, and current judiciary trends are diametrically opposed to the New Jersey Supreme Court’s initial holding in Khalaf.

III. PRACTICAL CONCERNS

As set forth above, looking at the trends in the New Jersey legal landscape begs the question of how the New Jersey judiciary would address the imputation of income in various circumstances.

A. Should we impute income when children are young and not yet in school?

In evaluating the reasons and relative advantages for a career change resulting in a reduced salary, the Storey Court in 2004 cited N.J.S.A. 2A:34-23b, which provides factors the Courts should consider when determining alimony. 373 N.J. Super. at 471. N.J.S.A. 2A:34-23b(7) lists “parental responsibilities for the children” as one factor in awarding alimony, and the Storey Court wrote that the “need to care for a child” is a reason “related to ability to obtain or perform work” and is thus “entitled to significant weight” in examining a parent’s career choice. Id. The Storey Court also mentioned other factors in evaluating a career change such as lack of work in one’s field, a health condition, and loss of professional license. Id. As a result, it is clear that the New

Jersey Courts should consider a dependent spouse's need to care for a young child as an important factor, along with other factors, when deciding whether to impute income to him or her. See id.

The Bencivenga Court in 1992 considered the imputation of income to a non-working mother who was caring for two young children from her second marriage while her former husband cared for the two children of her first marriage. 254 N.J. Super. at 330. In denying the former husband's motion for an order requiring the mother to contribute to child support, the trial judge had explained, "defendant [mother] now has two infants 2 years and 3 months. She cannot be required to be reemployed at this time." Id. at 331. The Appellate Division, however, disagreed that caring for two young children, without consideration of other factors, was sufficient to deny imputation of income. Specifically, the Appellate Division held that "all of the circumstances of the parties and the children," including assets, earning capacity, child care alternatives, and opportunities to pursue part-time employment should be considered. Id. The Bencivenga decision indicates that despite needing to care for young children, other factors that are to be considered could weigh against this factor and, as was the case in Bencivenga, income may still be imputed.

Whether the children are in school could also affect the imputation of income. The Storey Court noted that the "need to care for a child" should be factored into alimony, while the Bencivenga Court listed "child care alternatives" as a consideration

in analyzing the fairness of imputing income. Storey, 373 N.J. Super. at 471; Bencivenga, 254 N.J. Super. at 330. Further, the Caplan Court stated:

“When imputing income to a parent who is caring for young children, the parent's income share of child-care costs necessary to allow that person to work outside the home shall be deducted from the imputed income.” 182 N.J. at 265.

Presumably, once the child is at school during the day, there would be less need to care for the child and child care costs should be reduced; thus, when the children enter school, the imputed income should increase. See id. The above notwithstanding, it is still readily apparent that based upon this trend in imputing income to the dependent spouse, that Courts are now more willing to impute income, even should the dependent spouse be required to care for young children.

B. What is the most important factor when imputing income to the dependent spouse?

So, despite the apparent trend that Courts are more apt to impute income to a dependent spouse, do certain factors lend themselves to the possibility of overcoming this trend? Do Courts sometimes fall back on their former paternalistic nature, and attempt to protect the dependent spouse? Certainly, as set forth above, this trend is malleable, and is clearly subject to the facts of a given case. So, despite the case law above and the trend seen, are there factors that you can rely upon to make it less likely to have income imputed to a dependent spouse contrary to this trend? On the other side of the spectrum, are there factors that will make it more likely to have income imputed and which support the trend set forth above? Some of these factors, and their

impact upon the Court's ultimate determination, and whether same supports this trend, or whether it turns this purported trend on its head, will be discussed below.

C. Degree

In Robertson v. Robertson, 381 N.J. Super. 199, 207, 885 A.2d 470 (N.J. App. Div. 2005), the Appellate Division upheld a trial Court's decision to issue a permanent alimony award to the dependent spouse, and the lower Court's refusal to impute income from potential employment to the dependent spouse. In upholding the lower Court's decision, the Appellate Division set forth that the dependent spouse only had an associate's degree, while the supporting spouse had a bachelor's degree. Id. at 207.

According to the Appellate Court:

“the education and skills of the wife differ markedly from those of the husband ... making it unrealistic to assume that she will ever be able to maintain a comparable lifestyle on her earnings alone.” Id.

As confirmed by the Appellate Court, the dependent spouse's lower level of education was an indispensable factor in determining whether income should be imputed for purposes of spousal support. However, it must be noted that although several factors were considered, as is specifically required by statute, the Robertson Court seemed to place most focus and emphasis on not only the dependent spouse's lower level of education, but also on the dependent spouse's long absence from the workplace. Id.

D. Work experience

As set forth above, the Robertson Court focused greatly upon the dependent spouse's long absence from the workplace and, as such, her lack of work experience. Certainly, work experience is another important factor when imputing income to a dependent spouse. In an unpublished 2009 opinion, Cadauid v. Nieto, 2009 WL 972842 (N.J. App. Div. 2009), the Appellate Division upheld the trial Court's decision to not impute income to a non-working mother. The Appellate Court wrote:

“Given the mother's limited potential earning capacity and lack of prior work experience, [along with other factors], there are reasonable grounds for the judge's decision not to impute net positive earnings to the mother.” Id. at 4.

Lack of work experience was also a factor in another unpublished opinion of the Appellate Division, Donahue v. Donahue, 2005 WL 2897350 (N.J. App. Div. 2005). In Donahue, the Appellate Court upheld a decision to not impute income to the wife, noting, “[w]hile college educated, [wife] had no particular career training and no significant work experience.” Id. The trial Court had said that even if it imputed \$15,000 to the wife as requested by the husband, this would have been offset by the need for child care. Id. at 6.

Equally interesting is the recent unreported decision of Oki v. Oki, A-2986-08T1 (N.J. App. Div. 2010), in which the Courts were faced with the position of whether to impute income to a dependent spouse due to her previously working two (2) jobs. In this matter, during the marriage, the supporting spouse worked two (2) jobs: one as a teacher and the other as a social counselor at a county hospital. During the marriage,

his total wages were approximately \$80,000.00, of which over \$55,000.00 was attributable to his teaching position. Likewise, the dependent spouse also was employed as a teacher and her salary was comparable and over \$55,000.00 per year.

During the marriage, it should be noted, the dependent spouse also worked two (2) jobs. Specifically, prior to becoming a teacher, the dependent spouse worked concurrently as an adjunct professor at Kean University, and also tutored young children. This ended when the dependent spouse commenced working as a full-time teacher.

The Trial Court, in rendering its decision, awarded the dependent spouse permanent alimony, considered the income of the supporting spouse from his second job, and refused to impute income to the dependent spouse from income she might earn during the summer months when she did not work.

On Appeal, the Appellate Division confirmed that the Trial Court properly included income from the supporting spouse's second job for alimony calculation purposes, and that the income earned from same was certainly relevant to the proper determination of the ultimate alimony award. However, in a twist which clearly is contrary to the trends set forth in this article, the Appellate Division refused to impute income to the dependent spouse for a summer job and confirmed that despite the dependent spouse having worked two (2) jobs during the marriage, that they would not impute income to the dependent spouse for either a second job or summer employment. Furthermore, the Appellate Division noted that the supporting spouse failed to cite any

authority supporting his premise that a teacher who does not work during the summer is “underemployed.”

How does such a decision fit into the overall trend set forth within this article? The fact of the matter is that it does not. Despite the availability of the dependent spouse to earn income during the summer months, and despite the dependent spouse garnering salary during the marriage from tutoring, income from such services were not imputed to the dependent spouse. Yet, the supporting spouse, who garnered a comparable salary from his employment as a teacher, was compelled to continue to work two (2) jobs so as to support the dependent spouse. As this matter was ultimately remanded for a plenary hearing on the alimony issue, it remains to be seen what the ultimate result will be. However, if fairness and equity are to govern our Court, it is respectfully submitted that such a determination certainly is not fair to the supporting spouse, and provides the dependent spouse with a windfall which is contrary to the tenets of the Family Part.

E. Absence from the job market

The Robertson Court, in addition to reviewing the dependent spouse’s degree, focused on the wife’s absence from the job market. 381 N.J. Super. at 207-08. In Robertson, the Appellate Division upheld the trial Court’s decision to not impute income to the wife, among other reasons because she had not been in the workplace from 1992 to the time of the case, 2005. Id. The Appellate Court quoted the trial Court in explaining its affirmation of the decision:

“The wife’s financial situation is not [as] fortunate [as her husband’s] because she sacrificed valuable time away from the marketplace in order to attend to the family.... She can obtain jobs in the marketplace, but it is improbable that, without considerable effort to make up for lost time, she will be able to earn enough income to live at a standard of living enjoyed during the marriage.” Id.

and emphasized that the time spent caring for the children instead of working was “valuable” “lost” time, resulting in a permanent alimony award without an imputation of income to her. Id. It would appear that this factor, which was also discussed at length in the New Jersey Supreme Court’s decision in Khalaf, is imperative in an ultimate determination whether income should be imputed to a dependent spouse. However, although this decision would seemingly buck the trend of imputing income to dependent spouse, the case law which followed abided by that trend.

In an unpublished 2006 opinion, Garfinkel v. Garfinkel, 2006 WL 1549756 at *7 (N.J. App. Div. 2006), the Appellate Division reversed a trial Court’s imputation of full-time income to a wife who had completed her master’s degree in clinical psychology but had not yet obtained her license at time of trial, although she anticipated obtaining it shortly thereafter. The Appellate Court reversed the imputation of income for several reasons, including:

“[the wife] had not held a full-time job and had not worked in a school setting since before the children were born, and she never earned the level of income imputed to her during the marriage.... [Also,] she had never worked as a clinical psychologist, had no experience and no prospective employers.” Id.

The Appellate Court ultimately remanded the case to the trial Court to consider these factors, as well as the possibility of the wife's working less than full-time, in determining the proper imputation of income. Id.

F. Ages of children

The Supreme Court of New Jersey in Caplan mentioned the "ages of any children in the parent's household" as a factor in determining whether a parent has just cause to be voluntarily unemployed. 182 N.J. at 268. The Appellate Division in Robertson, in upholding an award of permanent alimony to the wife, noted that "it is anticipated that the amount of the alimony award will be reduced in the future as the result of the projected full-time employment of the wife when the oldest child reaches the age of sixteen." 381 N.J. Super. at 208. The Appellate Court quoted the trial Court, which had asserted that the husband could later apply for a modification of alimony:

"It is anticipated that there will be a change in circumstance when, for example, full time income is imputed to the wife when the oldest child turns 16 years of age." Id.

Thus, it appears that Courts are likely to impute income if the children are older. See Caplan, 182 N.J. at 268; Robertson, 381 N.J. Super. at 208. However, it stands that Courts will still impute income when there are young children, and will impute a greater level of income as the children age. Is this fair to the dependent spouse? Is it reasonable to expect a housewife, who remains to care for children, immediately possesses the ability to garner a heightened income when her children reach some arbitrary age? When viewed in connection with the prior factors and case law, the

answer would appear to be no. However, as the case law set forth above confirms, the trend in imputing income to the dependent spouse continues nevertheless.

G. Discussion during marriage

The Robertson Court emphasized that the wife had stopped working upon the birth of her first child “with the husband’s consent.” 381 N.J. Super. at 207. Specifically, the Trial Court noted that:

“the wife functioned as the primary caretaker for the children and homemaker for the husband throughout the marriage, thereby foregoing any earning capacity she may have had during this period and freeing the husband to achieve significant business success.” Id.

Additionally, with regard to the supporting spouse’s consent to stop working, the Trial Court set forth as follows:

“The wife took care of the home and reared the children full time, and there is not any dispute over the fact that she has been an excellent mother. The husband and the wife agreed that she would stay home full time to take care of the children. But because the husband was not burdened with taking care of three children full time, he was able to devote his time and energy to his career and now earns a high income.” Id. at 208.

These statements show the importance of the fact that the wife’s decision to stop working was agreed upon and consent to by both husband and wife, and significant benefits inured to the husband based upon their joint agreement that the wife would not work. Thus, the Appellate Division found the agreement during the marriage that the wife would not work to be an important factor, and upheld the Trial Court’s award of permanent alimony to the wife. See id. This decision harkens back to the New

Jersey Supreme Court's initial decision in Khalaf, which confirms that absence from the job market, and an ultimate agreement to stay home and care for the children, were dispositive in the imputation of income.

H. What level of income should be imputed to a dependent spouse?

So, if the judiciary is more likely than not going to follow the current trend and impute income to a dependent spouse, what level of income should be imputed to a dependent spouse?

I. No degree, no work experience, and housewife

The New Jersey Supreme Court in Khalaf in 1971 imputed no income to a woman who did not work for most of her 26 years of marriage. 58 N.J. at 69-70. The Court did not identify her level of education, but noted that she had no substantial employment experience. Id. at 70. The Court emphasized the length of the marriage and time as a housewife, and asserted, "different considerations might govern were this marriage of short duration." Id.

J. Degree, no work experience, and housewife

In Donahue, the Appellate Division in 2005 upheld a trial Court's imputation of zero income to the wife who had a college degree but lacked career training and significant work experience since she stayed at home to raise the children. 2005 WL 2897350 at *6. In Garfinkel, the Appellate Division in 2006 reversed a trial Court's imputation of full-time income to a wife with a master's degree in clinical psychology who was not yet working as she was in the process of obtaining her license. 2006 WL 1549756 at *7. The Garfinkel Court remanded the case to the trial Court to reevaluate

the imputation of income, considering that the wife had not worked since before her children were born and she had no experience in clinical psychology. Id.

K. Degree, prior work experience, and housewife

In a 2008 unpublished opinion, Kozlovsky v. Kozlovsky, 2008 WL 4963803 at *7-8 (N.J. App. Div. 2008), the Appellate Division upheld the imputation of income to a wife, divorced after less than two months while pregnant, who had a college degree and prior work experience as an insurance broker. The Appellate Court explained, “This was a marriage of extremely short duration, and there is no basis to conclude that the parties intended that she would be a stay-at-home mom, especially early in her career and in light of her significant qualifications and prior employment history.” Id. at *8. The wife had voluntarily chosen to be a stay-at-home mother and to home school her child. Id. at *7. The trial Court imputed income based on the salary of a preschool teacher, and the Appellate Court affirmed. Id. at *7-8.

L. Degree, current work (part-time), and housewife

In a 2005 unpublished opinion, Pugmire v. Pugmire, 2005 WL 3369516 at *3 (N.J. App. Div. 2005), the Appellate Division upheld a trial Court’s imputation of zero income to a wife who had graduated from a nursing program, had worked full-time in a four-month nurse residency program, and wished to instead work part-time, two (2) nights per week, in order to care for her children. The part-time position would allow her to spend substantial time with the children and would obviate the need for day

care. Id. The Court held that the wife's reasons for part-time constituted "just cause" to not impute income. Id.

The Appellate Division did impute income in the 2008 unpublished opinion, Smith v. Smith, 2008 WL 2484863 at *2 (N.J. App. Div. 2008). In Smith, the custodial wife worked part-time as a registered nurse after her divorce. Id. The trial Court ruled that she could work full-time and imputed income for full-time hours at the same hourly wage she was earning at part-time hours. Id. The Appellate Division affirmed, writing, "the record in this case provides ample support for the conclusion that plaintiff had both the ability and opportunity to obtain full-time employment as a registered nurse." Id.

IV. CONSIDERATIONS TO BE MADE WHEN IMPUTING INCOME

A. New Jersey Occupational Wage Guideline

You have made the ultimate determination to either attempt to refute or support the imputation of income to a dependent spouse. Where do you turn? How do you go about doing so? Before running out and hiring an employability expert, the first place that one should start is the New Jersey Occupational Wage Guidelines. Pursuant to R. 5:6A, the Court Rule which references Appendix IX-A of the New Jersey Court Rules, confirms that if a parent is, without just cause, voluntarily underemployed or unemployed, that income can be imputed based on potential employment and earning capacity. Specifically, the Court is to consider the parties' work history, qualifications, education and job opportunities, and can impute income based upon the parties' former

income, or the average earnings for the occupation as reported by the New Jersey Department of Labor. See Pressler, 2010 N.J. Court Rules, p. 2392.

So, it would appear that if you have a dependent spouse that has a prior work history and a supportive educational background that the New Jersey Department of Labor Occupational Wage Guidelines would be the first place to turn. In fact, their website can be located at www.state.nj.us/labor, and provides a wealth of information as to employment and wages in our state. Furthermore, Lizanne Ceconi, Esq. offers an excellent practice tip in her article from the 2005 Family Law Symposium, "The Balancing Act of Imputing Income". Namely, upon obtaining this occupational wage data, there is no impediment to requesting that the Court take judicial notice of the information obtained from the New Jersey Department of Labor website pursuant to the New Jersey Rule of Evidence 201. She further confirmed that reported and unreported cases have relied upon this information or suggested that parties utilize this information absent expert testimony.

Such an issue was seen in the unreported decision of Hurley v. Hurley, 2005 WL 3071548 (N.J. App. Div. 2005). In this matter, the Trial Court properly considered, according to the Appellate Division, the New Jersey Department of Labor occupational wage guidelines. Id. at 7. However, the Trial Court apparently decided to not follow the guidelines and imputed a greater income to the dependent spouse based upon her prior work history and prior earning history. The Appellate Division reversed, and noted that although it understood the Trial Court's methodology, the record provided

to the Court contained no evidence to support the position that the dependent spouse could earn the income imputed based upon her prior work history, and that the dependent spouse had not worked for sixteen (16) years. As such, the Appellate Division remanded to the Family Court to recalculate the amount of earned income to be imputed to the defendant.

As the Hurley case clearly demonstrates, the utilization of a dependent spouse's prior work history, absence from the job market, prior income earned, and qualifications provide great weight in attempting to utilize the occupational wage guidelines. However, what happens if your dependent spouse has no or limited work experience, educational background, qualifications or similar limiting information which would make the New Jersey Department of Labor Occupational Wage Guidelines less than useful? In such a scenario, should the imputation of income at any level to the dependent spouse be a contested issue, it would appear that the utilization of an employability/vocational expert would be where you would have to turn.

B. Vocational Expert

A vocational expert can be of great assistance when there is an issue of a dependent spouse's ability to work, and in what capacity. Such an expert provides a thorough analysis, or is supposed to, of all the factors which would impact an individual's ability to secure employment and garner income. These include, but are certainly not limited to, education, work history, career options, absence from the job market, and/or any other factors which the employability expert deems relevant to the

overall analysis. Upon meeting with the individual, such an expert will ultimately render a report on the ultimate employability of the spouse, and their opinion as to what income the spouse will be able to garner given the considerations above.

This begs the question, what sort of scrutiny is such a report subject to? As confirmed in the United States Supreme Court decision in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), the acceptable methodology for assessment of expert opinion, and thus the opinions of vocational experts, must be based upon both relevant and reliable evidence.

Such a finding provides an attorney with a great opportunity to question the ultimate findings and determinations of an employability report. Specifically, one such question is what information that expert utilized when rendering their ultimate determination. Is the employability expert utilizing outdated information which is neither reliable nor relevant? Could the employability expert be utilizing information which is incomplete? Is any such information available to a vocational expert so as to ensure that they are in compliance with the requirements of Daubert?

Such questions lead to other relevant avenues of cross-examination such as whether the methodology utilized by the vocational expert can be independently tested or are scientifically reliable. Is such independent testing possible when vocational evaluations are more of a social science and less of a physical science such as biology or physiology? Additionally, are the methods utilized subject to peer-review and commonly utilized and accepted in the field of vocational evaluations?

Such questions and topics of inquiry are absolutely necessary when evaluating the credibility and admissibility of a vocational report. Equally important is to ascertain whether such experts have had their reports deemed inadmissible by the Court as either net opinions or because of Daubert standards. Such knowledge would provide an attorney with a treasure trove of material within which to cross-examine a purported vocational expert and their report. Similarly, if you are the proponent of the testimony of the vocational expert, it is imperative that upon readying your matter for trial that such answers are known and that there are no surprises. Just imagine the look on your client's face when the vocational expert you proposed, and who they spent countless hours with and countless dollars on, is barred from testifying and their report is deemed inadmissible. This cannot occur, and knowing the answers to these questions will help you not only bolster your expert's credibility, but support your underlying attempts to impute the level of income set forth therein, if applicable.

C. Inability to Achieve/Maintain The Imputed Income

What then occurs if income is imputed to your client subsequent to a trial, and they cannot earn the level of income that was imputed to them? What happens if your client agreed upon an imputed income and they subsequently are unable to earn the level of income to which they agreed? Is there any fundamental difference in the overall analysis? Is there any fundamental difference if the income were imputed to the working spouse (during the marriage), or the non-working spouse (during the marriage)? Although many of these questions have gone unanswered by the New

Jersey judiciary, modifications of support obligations following an imputation of income are plentiful; and included below is a recent and prime example.

In the Appellate Division case of Donnelly v. Donnelly, 405 N.J. Super. 117 (App. Div. 2009), the Court was faced with the position of whether a denial of a supporting spouse's request to reduce support based upon his purported inability to earn the income which was fixed within the PSA, was addressed. Specifically, within the parties' PSA, the supporting spouse's income was fixed at \$185,000.00 per year based upon the expert who was retained to evaluate the supporting spouse's income and law practice. Approximately one (1) year following the entry of the PSA, the supporting spouse moved to reduce his support obligations, claiming he was not earning at the \$185,000.00 level he agreed upon within the PSA.

Based upon these allegations, the Trial Court conducted a plenary hearing to address the supporting spouse's purported change in economic circumstances. At the hearing, the Trial Court specifically inquired into the supporting spouse's purported income reduction, but noted that during this time period, the supporting spouse bought a new automobile, purchased a new home, remarried and spent approximately \$15,000.00 on his wedding and honeymoon.

Based upon these assets and circumstances, the Trial Court viewed the dependent spouse's income in being in the range of \$140,000.00, and cited to the case of Larbig v. Larbig, 384 N.J. Super. 17 (App. Div. 2006), in noting that the supporting spouse's decline in business was not of a permanent nature. Id. at 123. Based upon the

foregoing, the Trial Court denied the supporting spouse's request to downwardly modify his support obligation. This decision was not appealed by the supporting spouse; but rather, a subsequent application was filed approximately nine (9) months later, in which the supporting spouse again requested a downward modification to his support obligations.

In the supporting spouse's second application to reduce his support obligation, he specifically confirmed that his income was only \$38,700.00 for year 2007 as of September 24, 2007, and anticipated that he would only earn approximately \$50,000.00 for the year in full. Id. at 124. The supporting spouse further confirmed that he was forced to sell his law firm to his partner, which he submitted evidenced his inability to pay support. However, the Court noted that this actually improved his economic circumstances as it allowed the supporting spouse to pay down debts and eliminate current alimony and child support arrearages. Id. at 124.

Most importantly, however, the Trial Court noted that within the supporting spouse's Case Information Statement, filed in connection with his second modification application, the supporting spouse listed current expenses of \$11,354.00 per month, evidencing his failure to exert any effort to curtail his lifestyle despite his alleged reduced income. After hearing oral argument on the second application, the Trial Court denied the supporting spouse's application. Specifically, the Trial Court confirmed that the supporting spouse was attempting to have his ex-wife and children bear the brunt of his luxurious lifestyle, which was untenable given his argument alleging dwindling

resources. In rendering its ultimate decision, the Appellate Division confirmed that the alleged reduction in income was only part of the overall circumstances, and that the Court was to consider what was equitable and fair in all the circumstances, and thereby affirmed the Trial Court's denial of the supporting spouse's modification application.

As seen in Donnelley, the supporting spouse agreed to an imputed income of \$185,000.00, as evidenced through his execution of the PSA. This notwithstanding, and despite the Trial Court believing that his income decreased to approximately \$140,000.00, or approximately a 20% reduction in his income, the Trial Court still would not modify the supporting spouse's supporting obligation. Specifically, as confirmed by the Appellate Division, this was only one (1) factor to consider, and the fact that the supporting spouse was still living a "lavish lifestyle", his former spouse and children should not suffer due to same.

It is, therefore, imperative that when looking to modify your client's support obligation following an agreed upon imputed income, or when seeking a denial of a modification application following an imputation of income, that you understand that the analysis of the individual's income is just one (1) issue to consider. It is imperative, as confirmed by both the Trial Court and Appellate Division in Donnelly, to consider other facts, including the current circumstances of the supporting spouse, whether additional debts were incurred, and other lifestyle choices made, when analyzing such an application. As set forth by Judge Diamond, in his well-reasoned and articulate decision in Donnelly:

“If you don’t have it, you cut back. Even though it may hurt – you got to cut back.... You can’t afford it, you bite the bullet, you do what you got to do, but you have obligations to your children and to your ex-wife, but by doing what you have done here for whatever your reasons were, you can’t come here and – and cry wolf...” Id. at 129.

This decision brings us back full circle to the initial practical concern set forth above. Specifically, pursuant to R. 5:6A, the Court Rule which references Appendix IX-A of the New Jersey Court Rules, it is confirmed that if an individual is voluntarily underemployed, income can be imputed, with the Court considering the parties’ work history, qualifications, education and job opportunities, former income, or the average earnings for the occupation as reported by the New Jersey Department of Labor. See Pressler, 2010 N.J. Court Rules, p. 2392. Although income was not imputed to the supporting spouse in Donnelley, the Court’s reliance upon the multitude of factors which go into not only the imputation of income, but also the modification of a support obligation, was readily apparent.

IV. CONCLUSION

So, is there an ultimate trend in the imputation of income to the dependent spouse? As the case law above seems to denote, and as the history seems to confirm, the answer must be a resounding yes. Courts are currently much more apt to impute income to a dependent spouse than they were forty (40) years ago. This continues to beg the question: Is this fair to the dependent spouse? Is it fair to impute income to a mother caring for young children as was evident in Bencivenga? Is it fair to impute income to a temporarily unemployed mother as was evident in Gertcher? Is it fair to

impute full-time employment to a mother who was working part-time to support her children and mitigate against the substantial costs of day care as was evident in Smith?

A review of the case law surrounding the imputation of income and its impact upon dependent spouses reveals a trend toward the imputation of income to dependent spouses. This being said, it must be stressed that each and every case is fact sensitive. As seen in the Practical Concerns section above, many specific factors have lead Courts to buck this trend and not impute income to the dependent spouse. It is, therefore, extremely important to analyze the facts of your case, and see whether same fits this trend, or rallies against it. In either scenario, knowledge of the case law and how same either supports or detracts against the facts of your case, is critical.

CHRONOLOGICAL CASE LISTING WITHIN THE ARTICLE AND SUMMARIES

1. Khalaf v. Khalaf, 58 N.J. 275 (1971) – New Jersey Supreme Court refused to impute income to an unemployed wife after a twenty-six (26) year marriage, and had not worked during the marriage.

2. Lynn v. Lynn, 165 N.J. Super. 328 (App. Div. 1979) – After supporting spouse changed careers, despite confirmation that the career change was in good faith, the Appellate Division imputed income to supporting spouse and refused to reduce his support obligation.

3. Arribi v. Arribi, 186 N.J. Super. 116 (App. Div. 1982) – The Appellate Division set forth that the supporting spouse cannot just look for a job in his field, and must seek to obtain gainful employment to meet their support obligations.

4. Aronson v. Aronson, 245 N.J. Super. 354 (App. Div. 1991) – The Appellate Division held that income from investments can be imputed for support purposes. Noted that it was not the actual receipt of the monies which was at issue, but access to these monies.

5. Stiffler v. Stiffler, 304 N.J. Super. 96 (Ch. Div. 1997) – The Trial Court held that even if inheritance was held in a non-income producing asset, income can be imputed to the full amount, a portion, or none, depending on the unique circumstances of each case.

6. Connell v. Connell, 313 N.J. Super. 426 (App. Div. 1998) – The Appellate Division held that even if inheritance was held in non-income producing asset, income could be imputed and it should be considered when determining child support.

7. Miller v. Miller, 160 N.J. 408 (1999) – New Jersey Supreme Court imputed a more reasonable income from the supporting spouses investments, as spouse chose to invest in a manner that produced less income than higher-yield investment options.

8. Overbay v. Overbay, 376 N.J. Super. 99 (App. Div. 2005) – Appellate Division confirmed that lock-step interpretation of the Miller decision, concerning imputation of income on investment assets, needs to be evaluated on a case by case basis.

9. Bencivenga v. Bencivenga, 254 N.J. Super. (App. Div. 1992) – The Appellate Division set forth that a mother of two (2) children from a subsequent marriage, did not foreclose inquiry into the imputation of income to her for purposes of

determining support for her prior children who resided with their father.

10. Gertcher v. Gertcher, 262 N.J. Super. 176 (Ch. Div. 1992) – The Trial Court noted that a dependent spouse’s temporary job loss should not be born by the children, and income would be imputed to the dependent spouse for support purposes.

11. Dorfman v. Dorfman, 315 N.J. Super. 511 (App. Div. 1998) – The Appellate Division reversed the trial Courts imputation of income to the supporting spouse, after he was involuntarily terminated and subsequently obtained new employment at a reduced earnings.

12. Golian v. Golian, 344 N.J. Super. 337 (App. Div. 2001) – The Appellate Division imputed income to a dependent spouse as she failed to prove she was disabled and unemployed without just cause.

13. Wasserman v. Parciasepe, 377 N.J. Super. 191 (Ch. Div. 2004) – The Trial Court confirmed that the opponent of evidential fact, namely the presumption of unemployability based upon a confirmed disability, would need to provide clear and convincing evidence to refute same.

14. Storey v. Storey, 373 N.J. Super. 464 (App. Div. 2004) – Appellate Division set forth standard for establishing a substantial change in circumstances warranting modification in cases involving a career change.

15. Caplan v. Caplan, 182 N.J. 250 (2005) – The Supreme Court set forth standards to consider whether a spouse is voluntarily unemployed or underemployed without just cause.

16. Robertson v. Robertson, 381 N.J. Super. 199 (App. Div. 2005) - The Appellate Division refused to impute income to dependent spouse who had an associate's degree.

17. Cadavid v. Nieto, 2009 WL 972842 (N.J. App. Div. 2009) - The Appellate Division refused to impute income to a non-working mother based upon spouse's limited potential earnings and lack of prior work experience.

18. Donahue v. Donahue, 2005 WL 2897350 (N.J. App. Div. 2005) - The Appellate Division upheld a decision not to impute income to the wife, as despite being college educated, the dependent spouse had no career training and no work experience. Additionally, and equally important, the Court noted that even if a meager amount were imputed to wife, it would have been offset by the cost and need for child care.

19. Oki v. Oki, A-2986-08T1 (N.J. App. Div. 2010) - The Appellate Division refused to impute income to a dependent spouse, who was employed as a teacher, from income she could earn during the summer, despite the fact that she previously worked two (2) jobs during the marriage.

20. Garfinkel v. Garfinkel, 2006 WL 1549756 (N.J. App. Div. 2006) - The Appellate Division reversed the trial Courts imputation of income on a full-time basis, as wife never work full-time in a school setting, had no experience and no prospective employers, and remanded the matter to the Trial Court to ascertain the proper imputation of income.

21. Kozlovsky v. Kozlovsky, 2008 WL 4963808 (N.J. App. Div. 2008) – The Appellate Division upheld the imputation of income to wife, divorced after less than two (2) months and while pregnant, who had a college degree and prior work experience as an insurance broker.

22. Pugmire v. Pugmire, 2005 WL 3369516 (N.J. App. Div. 2005) – The Appellate Division upheld the Trial Court’s imputation of zero income, as wife’s part-time position would allow her to spend time with the children and obviate the need for day care.

23. Smith v. Smith, 2008 WL 2484862 (N.J. App. Div. 2008) – The Appellate Division affirmed the Trial Court’s imputation of full-time employment income to wife who was working part-time as a registered nurse, as wife had both the ability and opportunity to obtain full-time employment.

24. Hurley v. Hurley, 2005 WL 3071548 (N.J. App. Div. 2005) – The Appellate Division confirmed that the New Jersey Department of Labor Occupational Employment Statistics Survey can be considered as an appropriate source to impute income.

25. Donnelly v. Donnelly, 405 N.J. Super. 117 (App. Div. 2009) – The Appellate Division upheld the Trial Court’s denial of the supporting spouse’s modification application following his agreement to an income of \$185,000.00 within the parties’ PSA.

26. Larbig v. Larbig, 384 N.J. Super. 17 (App. Div. 2006) - The Appellate Division case which discusses whether a decline in business is of a permanent nature so as to warrant the modification of support obligations.