IMPUTATION OF INCOME

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General Principles: Imputed Income Based on Earning Capacity and Prior Experience

A court need not rely upon a party's own account of his/her finances for purposes of maintenance, but rather may impute income based upon the party's employment history, future earnings capacity, and educational background. ***Kessler v. Kessler***, 118 A.D.3d 946 (2nd Dept., 2014).

In ***Carney v. Carney***, 54 Misc.3d 947 (Sup. Ct., Monroe Co., 2016) (Dollinger, J.), the court found that imputation of based on what an individual can do now; not what they did "decades ago".

In ***Gorelik v. Gorelik***, 71 A.D.3d 730 (2nd Dept., 2010), the appellate court found that the Court need not rely upon a party's own account of finances, but may impute income to a party based upon his or her past income or demonstrated earning potential. Child support is to be determined by a parents' ability to provide for children rather than their current economic situation. Here, the Supreme Court properly imputed $105,000 in annual income to the plaintiff husband based upon his own testimony and evidence adduced at the hearing. Also, the Court properly declined to give collateral estoppel effect to the finding made in Bankruptcy Court order as to his financial circumstances absent identity of issues actually litigated and decided between those proceedings and action herein.

In ***Pfister v. Pfister***, 146 A.D.3d 1135 (3rd Dept., 2017), the husband appealed from a June 2015 Supreme Court judgment which directed him to pay child support of $340 per week for 2 children and maintenance of $200 per week for 3 years. On appeal, the Third Department affirmed, noting that the Supreme Court properly imputed income of $44,447 per year to the wife and $85,000 per year to the husband, based upon the husband's ownership of a property maintenance business in which he claimed earnings of $63,000 in 2010 and $43,000 in 2013, which earnings he stated declined post-commencement. The wife has two Master's degrees, is a certified school counselor, and earned $18,000 in 2010 from part-time work; she disclosed 2013 income of $16,000, but the evidence established that she also worked a second part-time job, earning approximately $2,125 per month. Both parties had received Chapter 7 Bankruptcy discharges. Supreme Court found that the husband earned more than $120,000 per year until 2009, when he began to change the way he kept his financial records, and that he historically

paid for the family's expenses through the business accounts. Further, the Court astutely observed that the husband's income similarly decreased during the prior action for a divorce and that the business's profits were "extremely disproportionate to [the husband's] net income." As for the wife, the Supreme Court emphasized her advanced degrees and rejected her argument that she should not be required to work full time. The Appellate Division found no abuse of discretion in Supreme Court's determination to impute income to the wife according to her actual earnings derived from the two part-time jobs, consistent with the findings of the Bankruptcy Court.

In ***Matter of Taylor v. Benedict***, 136 A.D.3d 1295 (4th Dept., 2016), the father appealed from a July 2014 Family Court order, denying his objections to a Support Magistrate order, which granted the mother's petition for upward modification of child support. On appeal, the Fourth Department affirmed, noting that the father "testified that he was currently unemployed, but that he had worked for a company 'off and on' for over five years, making $10 per hour, and that he did not have any medical disabilities preventing him from working." The Appellate Division held that Family Court properly determined that the Support Magistrate correctly imputed income to the father of $20,800 per year.

In ***Horn v. Horn***, 145 A.D.3d 666 (2nd Dept., 2016), contrary to the defendant's contention, the Supreme Court providently exercised its discretion in imputing income to the father in the sum of $90,000 per year. A trial court is not bound by a party's own account of his or her finances, but may impute income based upon the party's past income and demonstrated future potential earnings. Here, the court properly imputed income to the defendant based upon his skills, education, employment history, and financial resources.

In ***Matter of Watson v. Maragh***, 147 A.D.3d 769 (2nd Dept., 2017), the father is appealing a Family Court order denying his objections to an order directing him to pay child support to the mother. The Second Department affirmed the order, finding that the Support Magistrate correctly determined that the mother was the custodial parent for child support purposes and properly exercised discretion in imputing income to the mother based on her past employment.

In ***Fruchter v. Fruchter***, 29 A.D.3d 942 (2nd Dept., 2006), the appellate court found the plaintiff's contention that the Supreme Court improperly imputed income to him in determining his pendente lite child support obligations is without merit. "A court may determine a child support obligation on the basis of a party's earning potential, rather than the party's current economic situation". Here, the Supreme Court properly imputed an annual income of $160,000 to the plaintiff given his past employment history and his present ownership of a successful, growing business.

In ***Spreitzer v. Spreitzer***, 40 A.D.3d 840 (2nd Dept., 2007), the appellate court found that the defendant's contention that the trial court erroneously imputed income to her for the purpose of calculating her child support obligation is without merit. In determining a party's child support obligation, "a court need not rely upon the party's account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential". Here, the court properly imputed an annual income to the defendant since the evidence at trial demonstrated that she was capable of earning $78,000 a year based on her degree, her nurse practitioner license, the facts adduced at trial, and the testimony of the expert who valued her degree and license. Given

its opportunity to assess witness credibility, the court did not err in imputing that amount to the defendant. The record supports the determination of the court that the defendant's earning potential exceeds her actual income reported on her 2004 income tax returns.

When imputing income, a court may in the exercise of its discretion, consider "[w]hat he or she is capable of earning, based upon prevailing market conditions and prevailing salaries paid to individuals with the party's credentials in his or her chosen field." ***Dougherty v. Dougherty***, 131 A.D.3d 916 (2nd Dept., 2015)

Courts are not bound by husband's account of his finances and will look at past income and earning potential as a mortgage consultant. ***Diaz v. Diaz***, 129 A.D.3d 658 (2nd Dept., 2015)

Lack of Good Faith Effort to Find Employment Commensurate with Education/Experience

In ***Matter of Muok v. Muok***, 138 A.D.3d 1458 (4th Dept., 2016), the father appealed from a March 2015 Family Court order, which denied his objections to a Support Magistrate Order. On appeal, the Fourth Department modified, on the facts and law, by granting the father's objections to the extent of imputing income to the mother of $20,000, in addition to her Social Security income, and remitted to Family Court. The parties have three children, one living with the father and two living with the mother. The Appellate Division agreed that Family Court "erred in determining that the Support Magistrate did not abuse her discretion in imputing annual income to the mother of $20,000, which included $13,164 that she received in Social Security income." The Court noted: "the mother was 65 years old and had not worked since 2007, when she closed a Montessori school that she opened. The record further establishes that the mother has a bachelor's degree and an MBA, and that she graduated from law school but did not pass the bar exam and was therefore not admitted to the practice of law. The mother testified that, prior to the hearing, she sought only jobs as an attorney, for which she is not qualified. Thus, the mother has not sought employment for which she is qualified since 2007 ***." The Fourth Department concluded: "The record is sufficient for us to determine that, based upon her education and experience, the mother has the ability to earn income in the amount of $20,000 per year, exclusive of the Social Security income."

In ***Matter of Napoli v. Koller***, 140 A.D.3d 1070 (2nd Dept., 2016), the father appealed from a May 2015 Family Court order denying his objections to a February 2015 Support Magistrate Order, which after a hearing, imputed $46,609 in CSSA income to him. On appeal, the Second Department affirmed, holding that the Support Magistrate "properly imputed income to the father based upon his prior income, his training, his choice to pursue only part-time employment, and his current living arrangement, in which he did not pay rent."

Imputed Income Must Have Some Basis in Law and Fact

As it was in ***D'Amico v. D'Amico***, 66 A.D.3d 951 (2nd Dept., 2009), while a court may determine the child support obligation based upon a party's earning potential, rather than his/her claimed economic situation, the calculation must have some basis in law and fact. In this case, the matter was remitted for a recalculation of plaintiff's child support obligation as there was no evidence in the record that plaintiff could actually earn an imputed income amount of $2,000 per month.

Similarly, in ***Mongelli v. Mongelli***, 68 A.D.3d 1070 (2nd Dept., 2009), the appellate court held that while a court need not rely on a party's own reported income and may impute income based on a party's past income or demonstrated earning potential, its determination must be based in law and fact. Here, the Court failed to properly consider that plaintiff's opportunities to earn overtime compensation at his job lessened in recent years and that home improvement jobs he performed on the side were for family and friends, with no showing of profit earned therefrom. The plaintiff's child support obligation was modified by the Appellate Division, who applied the statutory percentage of 25% for 2 children to the parties' combined parental income of $97,201.57, resulting in the plaintiff's child support obligation for his pro rata 67% share of the combined income to be $1,356.77 monthly.

In ***McAuliffe v. McAuliffe***, 70 A.D.3d 1129 (3rd Dept., 2010), the plaintiff husband married the defendant wife in 1976. During the marriage, the husband earned an engineering degree and has been employed since early in the marriage, and the wife earned an undergraduate degree and worked in administrative and sales positions until taking care of her children in 1992, when she began working part time as a self-employed consultant and trainer. While the husband had a 20-year history of substantial earnings in computer sales and services to support Supreme Court's conclusion to impute $120,000 annual income to him, the record did not support the Supreme Court's conclusion that $50,000 annual income should be imputed to the wife. The wife was not employed outside the home at the time of trial. Supreme Court properly rejected her claim that she was completely incapable of gainful employment as the record revealed that the wife began working in sales and account management positions in 1981, earning $18,831, which increased to $51,300 in 1990 and reached a high point of $91,939 in 1991; but she thereafter left employment to care for her children. Wife's social security and tax records showed that she had no earnings other than $2,344 in 1995 and approximately $28,000 in 2004. Supreme Court relied upon expert opinion that the wife could earn $60,000 annually; however, this amount was not determined by the evaluator himself, but rather from a report prepared by Sheldon Grand of Forensic Rehabilitation Services and Grand did not testify. Expert opinion, to be properly admitted as evidence, must be generally based upon facts found in the record or facts personally known to the witness, derived from a professionally reliable source or from a witness subject to cross-examination. No determination can be made regarding whether Grand's opinion meets the requirements, and thus precludes reliance on his assessment of wife's salary potential. While the wife is capable of gainful employment and achieved significant earnings prior to 1993, her lack of meaningful earnings thereafter makes it speculative to impute more than minimal wage income to her given her age and health. The matter is remitted for recalculation, including the husband's resulting child support determination.

In ***Rohme v. Burns***, 79 A.D.3d 756 (2nd Dept., 2010), the appellate court recognized that where a party's account is not credible, the court may impute an income higher than claimed. However, "in exercising the discretion to impute income to a party, a Support Magistrate is required to provide a clear record of the source from which the income is imputed and the reasons for such imputation" (*Matter of Kristy Helen T. v. Richard F.G., Jr.*, 17 A.D.3d 684, 685, 794 N.Y.S.2d 92). Where the Support Magistrate fails to specify the sources of income imputed and the actual dollar amount assigned to each category, the record is not sufficiently developed to allow appellate review (*id.* at 685, 794 N.Y.S.2d 92; *see Matter of Sena v. Sena*, 61 A.D.3d 980, 981, 878 N.Y.S.2d 759; *Matter of Genender v. Genender*, 40 A.D.3d 994, 995, 836 N.Y.S.2d 291)."

Unemployment/Underemployment

In ***Abruzzo v. Jackson***, 137 A.D.3d 1017 (2nd Dept., 2016), the father appealed from an April 2015 Family Court order which denied his objections to a February 2015 Support Magistrate order which, after a hearing, imputed income to him of $62,400 per year (based upon a prior hourly wage of $30, over an assumed 40-hour work week) and directed him to pay $173 per week in child support. On appeal, the Second Department affirmed. The father contended that he was currently unemployed, had "never earned $30 per hour on a 40 hour work week basis", and that his current annual income was only $18,060. Family Court determined that the father had been intentionally underemployed and declined to rely on his income as reported on his most recent tax returns. The family court properly imputed income to the father based on a calculation of the father's hourly wage in a 40-hour work week, despite the father's claims that he was never employed at that rate and number of hours per week.

In ***Bustamante v. Donawa***, 119 A.D.3d 559 (2nd Dept., 2014), the appellate court affirmed an imputation of income to the father based on his earning capacity after he left his employment. "While a parent is entitled to attempt to improve his vocation, his children should not be expected to subsidize his decision."

Job Loss

In ***Fein v. Fein***, 113 A.D.3d 647 (2nd Dept., 2014), the wife appealed from a December 2012 Supreme Court judgment which, upon a decision of the Court after trial, directed the husband to pay child support in the sum of only $450 per week and maintenance in the sum of only $346.15 per week for three years. On appeal, the Second Department affirmed. The parties were married in 1993 and have three children born in 1994, 1996 and 1998, respectively. The husband was a trader in the financial industry before losing his job in late 2009 and the wife stayed home with the children. The divorce action was commenced in March 2009 and came to trial in June 2011. The Appellate Division rejected the wife's contentions that the Supreme Court abused its discretion by imputing an annual income of only $125,000 to the husband for child support purposes. The Second Department recognized that Supreme Court considered the husband's current employment situation, his future earning capacity and the evidence presented relating to additional streams of income. The Appellate Division also found the Supreme Court properly imputed an annual income of $65,000 to the wife. The Second Department also rejected the wife's contention that Supreme Court abused its discretion by applying the $130,000 statutory cap to child support, and held that the same was supported by the record. With regard to maintenance, the award was affirmed, given Supreme Court's consideration of Defendant's college education and the fact that she was capable of seeking employment.

Account of Finances Lack of Credibility

A court may impute income for purposes of determining maintenance where a party's account of his/her finances is not believable. ***Lamparillo v. Lamparillo***, 116 A.D.3d 924 (2nd Dept., 2014) In this case, the Supreme Court had the discretion to impute income to the defendant based on information he provided in his bankruptcy petition.

In ***Sena v. Sena***, 65 A.D.3d 1244 (2nd Dept., 2009), the appellate court found that a Support Magistrate may impute income to a party in calculating the child support obligation where a party's account of his finances is not credible. The Family Court was found to have providently exercised its discretion in imputing income to the father for purposes of determining his basic child support obligation and his *pro rata* share of child care expenses where the father testified that he earned $350 per week, but did not submit any pay stubs, and further testified that he was paid in cash. The father also claimed various business expenses from gross business income, including "commission" to an assistant. Here, the father's 2006 federal income tax return indicated that he was an independent contractor who had paid more than $28,000 in business expenses for a 10-month period, which was inconsistent with his contention that he earned $350 per week. Family Court did not err in basing child support award on father's gross business income as reported on 2006 federal income tax return.

In ***Abizadeh v. Abizadeh***, 137 A.D.3d 824 (2nd Dept., 2016), the trial court's determination of child support was supported by the record. The trial court properly imputed income to both parties based on its "well supported" findings that the parties were not credible and that the documentary evidence submitted at trial was unconvincing as well as evidence regarding the parties' receipt of income from other sources, including family members.

As it was reiterated in ***Kasabian v. Chichester***, 72 A.D.3d 1141 (3rd Dept., 2010), a parent's obligation to provide child support is determined by his or her ability to provide support, and not their current financial situation. A court is not bound by a party's own account of income, but may impute income based upon his or her past employment experience and future earning capacity. The respondent herein only provided documentation for 2007, indicating that he had no personal income, and testified that he has had no income since 1999 and that he only filed 2007 tax returns in order to receive economic stimulus check. The testimony at the hearing concerned respondent's association with various businesses involving buying and selling cars, wherein respondent disclaimed any income or financial benefit from companies currently "owned" by his children, petitioner or his fiancée, but which he previously owned. Support Magistrate determined that respondent had earning capacity with having a commercial driver's license and imputed annual income to him of $38,690, which was the average amount earned by general freight trucker established by statistics from U.S. Department of Labor. Support Magistrate's determination was not an abuse of discretion.

In ***Gafycz v. Gafycz***, 148 A.D.3d 679 (2nd Dept., 2017), contrary to the defendant's contention, the Supreme Court did not err in imputing income to the father in the sum of $85,000 in calculating the amount of child support arrears owed to the plaintiff. "In determining a party's child support obligation, a court need not rely on a party's own account of his or her finances. Rather, the court may impute income to a party based on the party's past income, demonstrated earning potential, or based upon money, goods, or services provided by relatives and friends (*see* Family Court Act §413[1][b][5][iv][D]; Matter of Genender v. Genender, 51 AD3d 669)." Here, the Supreme Court found that the defendant was deliberately evasive about his finances, his income was not, as he claimed, limited to workers' compensation benefits resulting from an on-the-job injury, and he had been secreting assets. The appellate court found that the lower court's credibility determination is entitled to deference. The record supports the court's determination to impute income to the defendant in the sum of $85,000, and it declined to disturb its determination on the issue of child support arrears.

In ***Westenberger v. Westenberger***, 23 A.D.3d 571 (2nd Dept., 2005), the appellate court found that the Family Court was entitled to impute income to the father in calculating his child support obligation for 2 children, where his reported income on his income tax returns was suspect.

In ***G.K. v. L.K.***, 27 Misc.3d 1239(A) (Sup. Ct., Kings Co., 2010) (Sunshine, J.), the trial court found that during the marriage, the parties' sole source of income was the husband's employment in the construction industry. The husband filed tax returns as married filing separately for the years 2006 and 2007. At the time the trial testimony concluded, he had yet to file a tax return for the year 2008. In 2006, the husband's adjusted gross income, as reported on his tax return, was $20,000. His reported adjusted gross income on his 2007 tax return was $15,000. However, it is undisputed that the husband used funds from his business (W.C.S. Corporation) to pay for many, if not all, family and personal expenses during the marriage. Based upon dramatic inconsistencies in the husband's documentary evidence, his hearing testimony and the video tape of him working in his business while collecting unemployment benefits and after the business was allegedly defunct, the trial court determined that the husband lacked credibility. The trial court also determined that it was clearly evident that the husband's account of his finances was not believable and that he concealed his true income. Furthermore, it was clear from the bank records and admissions of the husband that the business paid an

extensive amount of his personal expenses (citing the Second Department case of *Beroza v. Hendler* {71 AD3d 615}), further justifying the imputation of income. In consideration of the parties' lifestyle and evidence of the use of business funds by the husband, the trial court determined that the husband continued to maintain an interest in the business and therefore imputed to him an income in the amount of $58,610.00. The trial court rejected the husband's contention that he no longer had any interest in WCS Corp. due to the fact that he used the business monies for personal expenses. It also rejected his claim that difficult financial crisis had resulted in there being no construction jobs for WCS Corp. The Court noted that the surveillance video entered into evidence unequivocally refuted the husband's position. Accordingly, the trial court found that the husband's income of $58,610.00 listed on his own first affidavit, which he refuted, was a reasonable estimate of the husband's income. Careful to stress that a decision to impute income is "not entered lightly", the trial court underscored that it had the ability to observe these parties and consider the totality of their testimony. In adjudging their credibility, the trial court reiterated the husband's perpetual purposeful intent to shield all financial assets from the wife's reach. It also noted that since the husband's employment income and his unemployment income earned at the same time would constitute an illegal act, the court cannot fix support based upon both sources.

Adverse Inference Based on Incomplete Disclosure

In ***Charpie v. Charpie***, 271 A.D.2d 169 (1st Dept., 2000), the defendant asserted that his annual income was $183,000; however, the plaintiff provided substantial basis for her assertion that his income was actually far greater, particularly in view of their lifestyle during the marriage. The court noted that defendant's statement of net worth did not report the total value of his estate, marital and separate property, inasmuch as the numerous businesses he owned had not been valued. Moreover, those assets whose value he acknowledged, totaled approximately $300,000. Because the defendant's statement of net worth was incomplete, the court found it appropriate to apply an adverse inference on the issue of his finances. Under the circumstances, the court found good reason to acknowledge the possibility that defendant's wealth is substantial, far in excess of the funds to which the plaintiff had access.

In ***Glass v. Glass***, 233 A.D.2d 274 (1st Dept., 1996), the trial court properly drew an adverse inference with regard to the husband's financial condition, and gave little weight to the husband's self-imposed tax liabilities. The husband was barred from complaining the support award exceeded his ability to pay, in light of the husband's failure to provide requested financial documentation, including his income tax return for a certain year or an estimate thereof and a complete net worth statement.

In ***Roach v. Roach***, 193 A.D.2d 660 (2nd Dept., 1993), having failed to submit a statement of net worth or to otherwise more fully disclose information critical to the assessment of his net worth, the appellate court sustained a finding that the defendant may not now be heard to complain that the court erred in drawing an adverse inference against him with respect to his financial condition.

Expenses Exceed Income

In ***DeSouza-Brown v. Brown***, 71 A.D.3d 946 (2nd Dept., 2010), the appellate court found that the Supreme Court properly imputed income to the defendant of $100,000 per annum. Among other things, the defendant's expenses listed in his Statement of Net Worth far exceeded his income as reported on his tax returns, and he lived in a two-bedroom apartment in a luxury apartment building for $2,340 per month. Additionally, the defendant had been employed for 12 years by a major bank when his job was eliminated and he failed to demonstrate that he diligently sought new employment commensurate with his qualifications and experience.

In ***Matter of Scheppy v. Kelly-Scheppy***, 145 A.D.3d 903 (2nd Dept., 2016), the mother appealed from a December 2015 Family Court order which denied her objections to a September 2015 Support Magistrate order, rendered after a hearing and which directed her to pay $139 weekly in child support. The Second Department affirmed, holding that the Support Magistrate "properly imputed income to the mother based upon her prior and current income, and her savings account assets," and noting that her monthly expenses were more than 3 times greater than her stated monthly income and "she did not submit any evidence to show that these monthly expenses were not being paid in a timely manner".

In ***DeVries v. DeVries***, 35 A.D.3d 794 (2nd Dept., 2006), the appellate court found that the plaintiff's contention that the trial court erroneously imputed income to him for the purposes of calculating his child support obligation is without merit. The court properly imputed income to the plaintiff since the evidence showed that he earned and spent well in excess of the income reported on his tax returns.

In ***Khaimova v. Mosheyev***, 57 A.D.3d 737 (2nd Dept., 2008), the defendant husband represented to the Supreme Court that his annual income was $12,000. Based upon his testimony and an examination of his tax returns and sworn expenses from his Statement of Net Worth, which indicated that he had monthly expenses as great as $6,000, the court concluded that his testimony regarding his yearly income was disingenuous. The court imputed an annual income to the defendant in the sum of $30,000, based upon his financial documentation and significant expenses in excess of his purported income.

Income/Expenses of Shareholder Disguised as Income/Expenses of a Corporation

In ***E.D. v. J.D.***, 42 Misc.3d 1204(A) (Sup. Ct., Westchester Co., 2013) (Duffy, J.), the issue was whether the income of a corporation, as to which the husband was the sole shareholder, should be imputed to him for purposes of calculating maintenance and child support. The parties were divorce in February 2005 and a February 2004 stipulation was incorporated but not merged into the judgment of divorce. The present application sought a recalculation of child support and maintenance and a money judgment for arrears owed from 2007 through 2012. The agreement obligated the husband to pay the wife, as maintenance and child support, 66% of his after-tax earned income up to $200,000. Earned income was defined as monies and/or stocks and/or options received for personal services, including, without limitation, compensation from salary, commissions, bonuses, partnership draw, distributions made to the partnership, corporation,

limited liability, "S" corporation, non-profit corporation or business entity income, and further included income from an interest in any entity from which he receives or had received compensation for personal services. The only pre-tax funds that were excluded from the husband's earned income were retirement contributions in a percentage amount of 5% or less of his income from employment. The Supreme Court found: "the credible evidence showed that Defendant deliberately reduced his personal income by giving himself an artificially low salary and yet was able to maintain his pre-Corporation standard of living by characterizing his personal expenses such as rent, travel, and food, as business expenses, in Order to reduce his child support and maintenance obligation. Such acts by Defendant warrant the imputation of income to him." Supreme Court found that the husband was the sole shareholder, board member and officer of a corporate entity which he established in 2007, and that he makes all decisions relating to the corporation, including what purchases should be made and what he should pay himself as salary. Supreme Court noted that the "most glaring evidence of the Defendant's co-mingling the Corporation's assets with his own personal needs is his use of corporate money to pay his legal team in defense of this action." Supreme Court performed the calculations required by the agreement, imputed amounts of income to Defendant for the years in question and found that the former wife was entitled to additional maintenance and child support payments for the years 2008-2012 in the sum of $282,244.

In ***Beroza v. Hendler***, 71 A.D.3d 615 (2nd Dept., 2010), the parties were divorced by 2008 judgment, with the husband being directed to pay $4,833.33 in monthly child support based on an imputed annual income of $259,100. The appellate court found that the Supreme Court properly imputed annual income to the husband based upon the undisputed evidence that his businesses paid virtually all of his personal expenses so that his actual earnings greatly exceeded the amount of income which he reported on his income tax returns. However, since the Supreme Court failed to set forth the parties' pro rata share of child support and adequately explain the application of the precisely articulated 3-step method of calculating child support pursuant to CSSA, the matter was remitted for a recalculation of child support. [*Parenthetical note: the firm of Gassman Baiamonte Betts, P.C. represented the wife at trial and on appeal. During the trial, the Husband, who was an equine veterinarian and surgeon and operated a polo club in West Hills, acknowledged that virtually all of his personal expenses were paid by his businesses, including: all auto lease payments, insurance, gas, vehicle service and maintenance regardless of personal use; all utilities for his personal residence located on the business property including electricity and telephone; the expenses of the children's nanny; all insurance premiums, including personal life and homeowners'; all credit card expenditures, including movie tickets, groceries, drug store items, gym membership, sports equipment, clothing and accessories, liquor, deli and marina charges; all personal meals and entertainment for himself and, for himself and his children during periods of visitation because, in his words, he is "on call 24-7"; costs for his son's treating doctors and evaluators; his monthly child support; and over $120,000 in professional legal fees and costs pertaining to the matrimonial litigation, including attorneys, forensic accountants, law guardian, real estate appraisers and mental health professionals.*]

In ***Matter of McKenna v. McKenna***, 137 A.D.3d 1464 (3rd Dept., 2015), the father appealed from a January 2014 Family Court order which granted child support to the mother. The parties have 2 children. After a hearing, the Support Magistrate imputed approximately $18,000 in income to the father, in addition to his 2011 reported income of $22,553. Family Court denied the father's objections to the Support Magistrate's imputation of income. The Appellate Division affirmed, noting that "the father is the sole owner of a small corporation and resides in a portion of the business property at no personal cost. He does not pay rent for such personal living space and all of the occupancy costs, as well as his personal expenses – including utilities, cable, Internet, cell phone, groceries and vehicle insurance – are paid out of his corporate account. Under such circumstances, Family Court acted well within its discretion in imputing $1,000 per month to the father for the benefit derived from the company-provided living expenses." The Third Department also held that Family Court properly imputed income based upon increased depreciation, given the testimony of the mother's accountant, who calculated straight line depreciation, and concluded that the father had claimed $4,761 in excess of straight line depreciation year 2011.

Respective Resources

In ***Marlinski v. Marlinski***, 111 A.D.3d 1268 (4th Dept., 2013), the appellate court found that the lower court did not err in vacating the child support and maintenance provisions of the parties' October 2009 stipulation wherein the parties agreed to impute $15,000 to the wife since the wife did not fully disclose her financial assets, resulting in an agreement which was so inequitable as to be manifestly unfair to the husband. Although the wife had not been employed outside of the home since the birth of the parties' children, she inherited large sums of money during the course of the marriage, failed to disclose her significant stock earnings (over $48,000 by October 2009), and had adjusted gross income of $121,901 for 2009. The wife's contention that the court erred in imputing $50,000 annual income to her is without merit as the court did not abuse its discretion in considering wife's gross income reported in the most recent federal income tax return, investment income and other resources available to her.

Justice Sconiers dissents stating that the court erred in imputing $50,000 annual income to the wife based solely on the wife's recent and indisputably short-term success investing in the stock market and record is devoid of proof that the wife was aware of the extent of her capital gains as of October 21, 2009 stipulation. Justice Sconiers indicated that the claimant never earned more than $18,000 a year from her employment and has not worked outside the home since 1994. "The only reasonable conclusion based on this record is that the wife's capital gains in 2009 were a fluke resulting from a rapidly rising market. Given her losses in 2010, it is clear that the wife was about as likely to repeat her 2009 success as someone who wins the lottery or has a lucky streak at a casino. As a result, the court also abused its discretion in imputing an annual income of $50,000 to the wife based on nothing more than one year of capital gains income."

Children's Needs and Expenses

A court is not bound by father's testimony and can award support upon evidence of the children's needs and expenses. ***Toumazatos v. Toumazatos***, 125 A.D.3d 870 (2nd Dept., 2015)

Gifts From or Expenses Paid by Third Parties

In the ***Matter of Geller v. Geller***, 133 A.D.3d 599 (2nd Dept., 2015), the father appealed from an August 2014 Family Court order, which denied his objections to a May 2014 Support Magistrate Order, which, in turn, after a hearing, granted his 2012 petition for downward modification of child support from $930 to $650 per week, based upon emancipation of 2 of the parties' 4 children. On appeal, the Second Department affirmed. The parties were divorced in August 2011. The Support Magistrate imputed income to the father for various bills paid by the father's employer, and determined that his pro rata share of the basic child support obligation was $447 per week, but deemed this amount to be "unjust or inappropriate", in light of the financial support the father received from his girlfriend. The Support Magistrate deviated from the CSSA, and set the father's child support obligation at $650 per week. The Appellate Division noted that the father's employer paid certain of his expenses, including his car payment of $850 per month and held that the Support Magistrate properly imputed income to him. The Second Department further found that "the father testified that he resides with his girlfriend, and does not financially contribute to any of their household expenses. Accordingly, in light of the financial support the father receives from his girlfriend, the Support Magistrate providently exercised her discretion in deviating from the presumptively correct amount of child support and directing the father to pay $650 per week."

In ***Matter of Kiernan v. Martin***, 108 A.D.3d 767 (2nd Dept., 2013), the mother appealed from a June 2012 Family Court Order which denied her objections to a March 2012 support magistrate order, which, in turn, directed her to pay the father the principal sum of $28,210 in arrears for college expenses and to pay 67% of the subject children's future college expenses. On appeal, the June 2012 Order was reversed, on the facts, and in the exercise of discretion, so much of the 2012 Order as directed her to pay the aforesaid principal sum of arrears and to pay 67% of the future college expenses. and remitted the matter to Family Court for a new determination as to college expenses, following a report from the support magistrate on the amount of money the father received from his family members for the subject children's college expenses. The Second Department held that while the record supports the determination that the mother should share in the college expenses of the children, it found that the support magistrate improvidently exercised her discretion by failing to impute additional income to the father for money he received from his family for the subject children's college expenses. The father's testimony established that the funds he received from his family for college expenses were not loans that he was obligated to repay.

When imputing income, a court can consider money received from friends and relatives. ***Badwal v. Badwal***, 126 A.D.3d 736 (2nd Dept., 2015).

When imputing income, a court can consider fringe benefits provided as part of compensation for employment such as expenses covered by the employer, for e.g., car payments. A court can also consider such benefits as financial support that a noncustodial parent receives from residing with a girlfriend if he does not contribute to their household expenses. ***Matter of Geller v. Geller***, 133 A.D.3d 599 (2nd Dept., 2015).

FCA §437-a and SSD

In ***Matter of Anthony S. v. Monique F.B.***, 148 A.D.3d 596 (1st Dept., 2017), the mother appealed from a February 2016 Family Court order which awarded her child support of $388 per month. On appeal, the First Department reversed, on the law and the facts, vacated the award and remanded for a new child support determination. The Appellate Division held that Family Court "improvidently exercised its discretion in not imputing to the father as income the $500 per month he was earning from his part-time employment in 2012 solely on the basis of Family Court Act §437-a, which bars the Family Court from requiring a recipient of social security disability benefits to engage in certain employment related activities." The First Department held that FCA§437-a "is not dispositive in this case where the father had been employed during the pendency of his social security disability benefits application and did not show that he was unable to continue to be employed in any capacity after he began receiving benefits."

Imputed Income – Reduced on Appeal

In ***Matter of D'Andrea v. Prevost***, 128 A.D.3d 1166 (3d Dept., 2015), the father appealed from a March 2014 Family Court order which denied his objections to a Support Magistrate order. The parties were divorced and had 2 children. Pursuant to year 2011 orders, the parties shared custody and neither was directed to pay basic child support to the other. In May 2013, the mother petitioned to modify upon the ground that the parties were no longer sharing custody and that the children were residing with her. Following a hearing, the Support Magistrate imputed $54,000 of annual income to the father and established his child support obligation [not stated, but CSSA would be about $480 biweekly]. On appeal, the Third Department modified on the law, and reversed the imputed income finding. The Appellate Division rejected "the father's contention that Family Court was required to determine that he had deliberately reduced his income in order to reduce or avoid his child support obligation in order to impute income to him." The Court noted that the father testified that he had "the equivalent to a Bachelor's degree from Organizational Leadership and Communication in Criminal Justice" and earned about $54,000 in 2010 working as an assistant dean of students at a secondary school; he then lost his job at the school and in 2011, he received about $50,000 as a part-time police officer and from unemployment insurance. The Third Department further found: "In 2012, the father's reported income ($56,556) reflected his salary from employment in the amount of $28,350, unemployment insurance benefits and the sum that he withdrew from his pension. At the

hearing, the father explained that he was employed by a youth and family services agency earning $1,373 biweekly but that, one month earlier, his hours had been reduced from full time to 10 hours a week due to the termination of one of the agency's contracts. In addition, he testified that he worked approximately one shift each month for the police department." The Appellate Division concluded: "In our view, the record supports Family Court's determination to impute income to the father, but not the amount imputed. The Support Magistrate found that the father had the ability to earn $54,000 per year based on his wages at the school in 2010. *** At best, however, the evidence of the father's work history was limited; the record includes no evidence with regard to the type of work that the father is trained to do, nor does it provide any basis to conclude whether, based on the father's educational background, he or one similarly situated has the ability to obtain a job earning $54,000 per year. *** Based on the record evidence, we conclude that the father's child support obligation should be calculated based on the income he reported on his 2013 financial disclosure affidavit ($1,373 biweekly). Utilizing this amount, the father's child support obligation is reduced to $310 biweekly. In addition, the father's pro rata share for unreimbursed health-related expenses is reduced to 35%."

In ***Zwick v. Kulhan***, 226 A.D.2d 734 (2nd Dept., 1996), the appellate court sustained the mother's objections only to the extent of reducing the amount of child support to $340.70 per month, the amount of child support arrears to $5,777.30, and the amount of child care arrears to $1,337.60, and by reducing the mother's pro rata share of child support, child care expenses and health care expenses to 32%. The Hearing Examiner properly imputed $26,000 as income to the mother based on her prior work history. The mother stopped working in July or August 1992 in order to pursue certain legal matters, including her appeal of a separate order granting custody of the parties' child to the father. Moreover, the $26,000 figure is supported by the record. "Child support is determined by the parents' ability to provide for their child rather than their current economic situation. [citations omitted] An imputed income amount is based, in part, upon a parent's past earnings, actual earning capacity, and educational background." The record reveals that the mother earned $13,000 in 1992 after working only part of the year. In addition, the mother has a Master's Degree in English, was previously employed as an elementary school teacher, and was a licensed real estate broker and insurance broker. However, the Hearing Examiner was found to have improperly exercised its discretion by also imputing as income to the mother $23,618 her family paid to cover the mother's expenses during 1993. By combining this figure with the $26,000 and thus imputing a total income to the mother of $49,618, the Hearing Examiner essentially doubled the mother's annual earnings to be considered in calculating child support. Moreover, there is no evidence in the record indicating that the mother ever earned that amount in the past.

Imputation of Income Declined

In ***Matter of Justin v. Justin***, 120 A.D.3d 1417 (2nd Dept., 2014), the mother appealed from an October 2013 Family Court order, which denied her objections to an August 2013 Support Magistrate order, which, after a hearing, granted the father's petition for a downward modification of his child support obligation. On appeal, the Second Department affirmed, finding that "the Support Magistrate properly concluded that the father satisfied his burden of demonstrating a substantial change in circumstances warranting a downward modification of his support obligation. Under the circumstances of this case, the Support Magistrate properly declined to impute income to the father based on his income while he was serving in the Army. On this record, the father's choice not to re-enlist was not undertaken to affect a reduction in his income "in order to reduce or avoid [his] obligations for child support' (Family Ct Act §413[1][b][5][v])."

In ***Hurley v. Hurley***, 71 A.D.3d 1470 (4th Dept., 2010), the Referee had discretion to impute income to the plaintiff father for purposes of calculating child support based upon his prior employment experience. The record shows that prior employment for the father ended when his employer terminated part of the business in which he was employed. The father did not significantly decrease his income by starting his own business, rather than accept similar employment from another employer. Here, the referee did not abuse his discretion in refusing to impute additional income to the father.

In ***McLoughlin v. McLoughlin***, 74 A.D.3d 911 (2nd Dept., 2010) the appellate court found that a Court need not only rely upon a party's own account of finances for child support purposes, but rather may impute income based upon a party's past income or demonstrated earning potential. However, while the Supreme Court imputed yearly income of $100,000 to the plaintiff based upon his prior earnings as a photographer and from the sale of real estate, it did not make findings of fact concerning the impact of his stroke, suffered during the pendency of the action, upon his ability to earn income in the future. Supreme Court also did not explain why it did not impute income to defendant in making a child support determination where the defendant reported that her health was good and listed her occupation as a part-time travel agent and homemaker on her statement of net worth. Defendant reported $2,536 income per year from employment as a part-time travel agent. Supreme Court imputed $30,000 income per year to defendant in determining the parties' *pendente lite* support obligations. Defendant represented in 2004 that she earned approximately $10,000 the previous year working part-time as a travel agent and as a receptionist for an exercise studio. Matter remitted.

Statutory Discretion Inherent in Child Support Standards Act

The CSSA vests within the court the discretion to "attribute or impute income from, such other resources as may be available to the parent". This clause specifies four potential sources of imputed income, but it also makes clear that the court is not limited to these when exercising its discretion in this area. The four enumerated sources are:

(1) non-income producing assets;

(2) meals, lodging, memberships, automobiles or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use, or which expenditures directly or indirecly[1] confer personal economic benefits;

(3) fringe benefits provided as part of compensation for employment; and

(4) money, goods, or services provided by relatives and friends.