

Is your client's ex unwilling to get work or deliberately taking a lesser-paying job to avoid paying support or maintenance? Here are some resources and remedies available to litigants seeking support from an unemployed or underemployed obligor.

As the economic downturn persists, more and more divorce practitioners represent clients who seek support from obligors who are unemployed or underemployed (i.e., they earn less than they could). Fortunately for these obligees, the Illinois legislature and the courts have created remedies designed to compel payors to meet their full obligation as parents and providers. Here's a quick look at some of the most helpful.

Job Diaries: A Record of Obligators' Efforts to Find Work

Every parent has a duty to support his or her child and is not relieved of that obligation merely because he or she chooses to remain unemployed.¹ Indeed, every child has the right to the "physical, mental, emotional and monetary support of his or her parents."²

The Illinois Child Support Enforcement Division, under the direction of the Illinois Department of Healthcare and Family Services, uses the "job diary" as a tool in the collection of unpaid child support. An unemployed noncustodial parent is statutorily required to seek gainful employment and create a contemporaneous record of his or her efforts. Job diaries are frequently ordered by the courts.³

Job Diaries and Maintenance Recipients

Job diaries can and should be used in maintenance as well as child support cases. Interestingly, they can help your case whether you represent an obligee seeking an award of maintenance from an unemployed

Maintenance, Support and Underemployed Payors

by **Burton S. Hochberg**
Chicago, Illinois

Kimberly A. Cook
Chicago, Illinois

payor, spouse or an obligor trying to set, reduce, or terminate maintenance for a payee spouse capable of gainful employment.

The Illinois Marriage and Dissolution of Marriage Act (IMDMA) created time-limited rehabilitative maintenance to encourage the payee spouse to obtain the skills or training necessary to become self-sufficient.⁴ Further, Illinois case law establishes an affirmative obligation for every payee spouse to become financially sufficient.⁵

This "affirmative obligation" is subject to interpretation and generally falls within the sound discretion of the court based on the facts and circumstances of the case. For example, a 32 year-old unemployed college graduate married for eight years will likely have a greater affirmative obligation to become self-sufficient than a stay-at-home mom in her 50s who has been out of the work force for 20 years. Nevertheless, the practitioner should consider the use of the job diary as a strategic tool in developing the case for or against maintenance.

Carefully Analyze the Diary Entries

A payee in a divorce, child-support, or maintenance action should always ask the court to require the payor (obligor) to maintain a job diary if unemployment is a factor. The order requiring the diary should specify that it include a date or dates for production and the following details at a minimum: the name, telephone number, and address of employer; the name of contact person or interviewer; the date of contact or interview;



■ **Burton S. Hochberg**



■ **Kimberly A. Cook**

the position applied for; salary information; and follow-up notes and results. It should also be verified or under oath.

The Illinois Child Support Enforcement Division, under the direction of the Illinois Department of Healthcare and Family Services, uses the "job diary" as a tool in the collection of unpaid child support.

Once a job diary has been ordered, the payee's attorney should vigilantly follow up. If the payor fails to produce or comply with the specifications of the diary as ordered by the court, the payee's attorney may ask the court to hold the payor in contempt. The payee's attorney should carefully analyze the diary to ensure that the payor is making a good faith effort to not only keep up the diary but actually to secure employment.

Because the job diary is required by court order, the information provided by the unemployed payor can—and should—be used as evidence against him at trial. For example, if the payor testifies in a deposition or at trial that he or she has been unable to find work despite good faith efforts, the payee's attorney should use the job diary where appropriate to refute that testimony.

Imputing Income to a Underearning Spouse

In response to the growing number of petitions for child-support modification—and particularly the dubious claims of some obligors seeking a decrease—some courts have imputed income to unemployed payors for purposes of determining their support obligation.

Under 750 ILCS 5/505(a)(2) of the IMDMA, the court may deviate from support guidelines set forth in section 5/505(a)(1) after considering relevant factors and specifying the reasons for the deviation. It is well-established that courts have the authority to compel parties to provide support at a level commensurate with their earning potential.⁶ In several cases, the court has imputed income to a voluntarily unemployed or underemployed obligor, looking to his prior income to determine earning potential.⁷

The Three Conditions

Before the court can impute income to the unemployed obligor, it must find at least one of the requisite conditions: the obligor must be (1) voluntarily unemployed, be (2) attempting to evade a support obligation, and/or have (3) unreasonably failed to take advantage of employment opportunity.

In *In Re Marriage of Adams*, the payor father quit his job and moved to Germany to live with this

(Article continues on the next page)

Maintenance, Support and Underemployed Payors, (continued)

girlfriend without first obtaining employment. The court imputed income based on findings that he was voluntarily unemployed and his prior income reflected his earning potential.⁸

The court has also imputed income where the motivation for underemployment is an attempt to evade a support obligation. In *In re Marriage of Sweet*, the trial court concluded that the payor's self-employment produced little income and he either willfully misrepresented his income or refused to support his children. The appellate court held that without a good-faith effort to satisfy his support obligation, the trial court properly imputed additional income based on his earning potential.⁹

Courts also require obligors to take advantage of reasonable employment opportunities. In *In re Marriage of Hubbs*, the appellate court upheld a support award based on imputed income based on the obligor's rejection of a job opportunity that would have paid him a salary commensurate with that earned during the marriage.¹⁰

Courts make clear that at least one of the three requisite conditions must be met before they will impute income. In *In re Marriage of Gosney*, the trial court abused its discretion by imputing income where none of the conditions existed.¹¹

Income Averaging

Where it is difficult for the obligee to determine the obligor's net income, courts sometimes allow averaging past earnings to determine the obligor's net income or to impute income for purposes of making a support award. In *In re Marriage of Nelson*, the court used an average of the obligor's previous three years of

earnings to determine net income because the annual amount had fluctuated widely.¹²

However, using income information dating back too many years may be an abuse of discretion. In *In re Marriage of Schroeder*, the court held that data six years old does not reflect the current circumstances of the parties. Using it would thus violate a key purpose of the Act, which is to make reasonable provision for spouses and minor children during and after the marriage.¹³

Also, the court will not impute income based on an average or the earning potential of the obligor where a good-faith, voluntary change in employment lowers his or her earning capacity or where circumstances beyond the payer's control have affected income. The critical consideration is whether the employment change was made in good faith and not to evade support responsibilities.¹⁴

Assets As Well As Income: 5/503(g) Trusts

Courts have also considered obligors' assets in addition to their income in setting both maintenance and child support, including the obligor's nonmarital property. Where the obligor is voluntarily or involuntarily unemployed or underemployed, the court may set aside property in a trust pursuant to 750 ILCS 5/503(g) of the IMDMA for the support, maintenance, education and general welfare of the child.¹⁵

Even if the obligor is in jail, his or her support obligation is not automatically relieved. In *In re Marriage of Hari*, the trial court was found to have the discretion to set aside the incarcerated obligor's nonmarital assets in a trust to secure payment of child support.¹⁶

Using Vocational Experts to Show Earning Potential

Since the introduction of rehabilitative maintenance, the courts have allowed evidence supplied by vocational experts to help show employment

capacity and earning potential. For instance, in *In re Marriage of Peterson*, the trial court did not abuse its discretion in awarding the wife maintenance based on the testimony of her vocational expert regarding her earning capacity.¹⁷

Vocational experts help determine the obligor's highest level of employment capability and the appropriate imputed income range based on a variety of factors. They are vital to effective discovery because they know what pertinent job—or education-related information and documentation obligors often omit.

Without a vocational expert, attorneys are often forced to rely on outdated information and assumptions or inaccurate statistics. With the help of a vocational expert, the attorney can accurately depict the evaluatee's capabilities and earning potential to allow the court to impute income.

Conclusion

Attorneys should use all available resources to win support for their clients, even—indeed, especially—when the obligor is unemployed or underemployed. Because support is a material issue in most cases, lawyers must take the time to explore the available resources and remedies and choose the right ones for their clients.

1. *In re Marriage of Reimer*, 387 Ill App 3d 1066, 1075, 902 NE2d 132, 139 (3d D 2009).
2. Illinois Parentage Act, 750 ILCS 45/1—45/1.1.
3. 750 ILCS 45/15.1(a).
4. IMDMA, 750 ILCS 5/504.
5. *In Re Marriage of Wade*, 158 Ill App 3d 255,269, 511 NE2d 156, 166 (4th D 1987).
6. *In re Marriage of Sweet*, 316 Ill App 3d 101, 106, 735 NE2d 1037, 1041 (2d D 2000).
7. *In re Marriage of Adams*, 348 Ill App 3d 340, 344, 809 NE2d 246, 249 (3d D 2004).
8. *Id.*
9. *Sweet* at 10708, 735 NE2d at 1043.
10. *Hubbs*, 363 Ill App 3d 696, 706, 843 NE2d 478, 488 (5th D 2006).
11. *Gosney*, 394 Ill App 3d 1073, 1078, 916 NE2d 614, 619 (3d D 2009).
12. *Nelson*, 297 Ill App 3d 651, 655, 698 NE2d 1084, 1087 (3d D 1998).
13. *Schroeder*, 215 Ill App 3d 156, 161, 574 NE2d 834, 837 (4th D 1991).
14. *Id.*
15. IMDMA, 750 ILCS 5/503(g).
16. *Hari*, 345 Ill App 3d 1116, 804 NE2d 144 (4th D 2004).
17. *Peterson*, 319 Ill App 3d 325, 342, 744 NE2d 877, 890 (1st D 2001).

~ **Burton S. Hochberg** has practiced law for more than 36 years and has concentrated on matrimonial law for the past 23 years. He has significant expertise in the areas of real estate and business valuation, child support, child custody, and maintenance. An experienced trial attorney handling major litigation, he is licensed to practice in Illinois and Florida and has been designated as one of the nation's top matrimonial lawyers by The Best Lawyers in America.

~ **Kimberly A. Cook** is an associate at SCHILLER DUCANTO & FLECK LLP and concentrates her practice on litigation of complex family matters. She received her Bachelor's degree from Spelman College and her Juris Doctor from The Catholic University of America—Columbus School of Law. Kimberly is a member of the Illinois State Bar Association, Chicago Bar Association, Cook County Bar Association and Delta Sigma Theta Sorority, Inc.