

**DEFINING INCOME FOR CALCULATING SPOUSAL SUPPORT:  
NEW STRATEGIES FOR A NEW MILLENNIUM**

- A. Direct income. Forms of income where monies are received directly by a party.
1. The Uniform Child Support Definition.  
Salaries, wages, commissions, advances, bonuses, dividends, severance pay, pensions, interest, honoraria, trust income, annuities, return on capital, social security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, prizes including lottery winnings, and alimony or separate maintenance received.
  2. The I.R.S. Definition.  
§61 of Internal Revenue Code defines gross income as "all income from whatever source derived including (but not limited to) the following items:
    - (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
    - (2) Gross income derived from business;
    - (3) Gains derived from dealings in property;
    - (4) Interest;
    - (5) Rents;
    - (6) Royalties;
    - (7) Dividends;
    - (8) Alimony and separate maintenance payments;
    - (9) Annuities;
    - (10) Income from life insurance and endowment contracts;
    - (11) Pensions;
    - (12) Income from discharge of indebtedness;
    - (13) Distributive share of partnership gross income;
    - (14) Income in respect of a decedent; and
    - (15) Income from an interest in an estate or trust."
- B. Indirect and Imputed Income. Forms of income where non-cash benefits are being received, deferred or transferred in lieu of current income.
1. Deferred Compensation
    - (1) Example: Husband asks his employer to defer any bonus or raise until after the divorce.  
  
Solution: If there is a history of bonuses have the decree provide for division of future bonuses attributable to specified tax years.
  2. Undistributed Profits

- a. Example: Husband elects to retain earnings in the corporation rather than distribute them as dividends or wages.

Solution: Impute husband's income using those earnings as if they were received by him as income.

- b. See Perlenfein and Perlenfein, 114 OrApp 588, 836 P2d 171 (1992)(court concluded that because husband was a minority shareholder in company the retained profits and earnings were NOT included in his income for purposes of child support.)

### 3. Stock Options

- a. Example: Wife works for a major corporation and has received options but has elected not to exercise them.

Solution: See Murray v. Murray, 710 N.E. 2nd 718 (1999) attached.

### 4. Benefit derived from non-taxable income

- a. Example: Husband is on disability and receives \$3,000 per month in non-taxable disability payments. Should support be based on \$3,000/mo. or what gross amount would generate \$3,000 in taxable income.

Solution: Put on evidence of the gross needed to generate \$3,000 after taxes and ask the court to make findings that are consistent. Then base support on that gross amount.

### 5. Employee benefits

- a. Over the Table

- 1) Vehicles payments, gas, maintenance and insurance: Add back the value of these benefits as gross income.
- 2) Employer paid life, health, disability or other insurance: Add back the value of these benefit premiums.
- 3) Use of vacation homes, sports tickets, country clubs, etc.

- b. Under the Table

- 1) Cash payments from employers (usually in trade occupations) not reflected in paystub or W-2: Difficult to prove but often there is a pattern established in the marriage.

CAVEAT: Raising the issue in court and under oath may subject both parties to a tax audit and penalties.

- 2) Example: Husband runs a restaurant and has a scheme where he taps one till and then enters the "after-tap" balance into the other register before printing a final tape for tax purposes. As a result the register tape matches the tax returns but it is actually short \$400 per day resulting in about \$100,000 in undeclared income.

Solution: Impute the undeclared income by establishing evidence thru witnesses and often double sets of books. See above CAVEAT.

- 3) Example: Husband trades his roofing services with plumbers, electricians, etc.

Solution: Impute the average value of the services received. If there has been remodeling and appliance repairs, offer evidence of the work done and the value thereof. See above CAVEAT.

## 6. Potential Income

- a. Example: Wife elects to work part time (24 hours per week) as a nurse even though full time work is available.

Solution: Establish her potential income by extrapolating her hourly wage to a 40 hour week.

- b. Example: Husband runs a business and keeps his salary low by intentionally overinvesting in materials, improvement etc.

Solution: Hire an accountant to establish a reasonable wage for that type of business by analyzing the cash flow, rates of return, etc. When businesses are valued the value is adjusted when the wages are over or under a reasonable level and that adds validity to the concept of potential income.

However, where one spouse's business expenses are within the parameters of comparable salaries and customary business expenses, a claim that such expenditures are dissipation of income or assets for the same by an aggrieved spouse has failed in other jurisdictions. See In re Marriage of Calisoff, 176 Ill.App.3d 721, 531 N.E.2d 810 (1988) and In re Marriage of Aud, 142 Ill.App.3d 320, 491 N.E.2d 894 (1986).

- c. Example: Wife has quit her job because her new Husband/boyfriend makes enough income to support the family.

Solution: Impute her prior income or argue the same rebuttal factors as in child support relating to income of a domestic associate.

- d. Example: Wife does not work but will receive a large amount of liquid assets in dissolution which will generate income.

Solution: Establish through expert testimony or otherwise a reasonable return on investment and investment rate to establish a monthly income.

- e. Caselaw: See Sigler and Sigler, 133 OrApp 68, 889 P2d 1323 (1995)(“Court may forecast person’s potential income as basis for calculating appropriate spousal and child support.”)

## 7. Overtime Income

- a. Example: Husband previously worked overtime prior to the divorce proceeding however, he has not received any overtime for the past 6 months to a year.

Solution: Average prior overtime earnings for previous years and establish that overtime may fluctuate but that it has been available in the past.

- b. Caselaw: See Sigler and Sigler, 133 OrApp 68, 889 P2d 1323 (1995) Crump and Crump, 138 OrApp 362, 908 P2d 839 (1995).
- c. See also In re Simpson, 274 CalRptr 911 (1990)(court stating incomes for purposes of support should be based upon “reasonable standard of living for the parties given what [husband] would have earned had he worked at *reasonable human pace.*” Emphasis added.)

## 8. Equitable (“Fault”) Income

- a. Example: A party is buying the family business from his parents. In anticipation of the divorce he “undoes” the sale and returns the business to his parents remaining on salary as an employee at 25% of the gross income he would have had as an owner.

Solution: Establish evidence of what the income had been to the spouse or to the prior owners and ask the court to set support on the prior income (i.e. the phantom income).

- b. Example: A party quits his job as fulfillment of a threat that “if you seek spousal support I will quit my job and move.”

Solution: Ask the court to establish his income as the income he had prior

to quitting his job (i.e. prior income).

- c. See Christensen and Christensen, 123 OrApp 412, 415, 859 P2d 1192 (1993) ( where the court found that husband's significant reduction in salary and income shortly before the final trial was suspicious in that he was the sole shareholder in the company and none of his employees had a drop in their incomes.)
- d. Dissipation remedy: The Arizona Supreme Court in Martin v. Martin, 156 Ariz. 452, 752 P.2d 1038, 1042 (1988), used consideration of dissipation of income and assets as a factor "in making a suitable award of spousal maintenance." The Martin court cautioned that only after the trial court has determined that a spouse is entitled to maintenance "that excesses in dealing with the common property can be considered to establish the appropriate amount to be paid for maintenance."

9. The tax consequences of spousal support.

- a. Spousal support is taxable to the payor and deductible to the payee. Therefore the disposable income to the payee is less than the amount of support received

J. Presenting Income information in a format the Judge can visualize.

1. Charts. Income Comparison charts are a way for the court to easily visual a marital history of one parties career being subordinate to a spouses by comparing historical incomes.



2. Matrix. Setting up a matrix comparing different support options allows a judge to easily visualize the disparities in a parties income for purposes of setting spousal support.

**Marion County Case#**

Assumptions

Respondent's Wage	\$21,000	Current claimed		
Petitioner's Estimated income	\$2,500			
	28.76%		spousal support tax rate	33.95%
Petitioner's estimated tax rate				
Respondent's estimated tax rate	34.71%		spousal support tax rate	44.38%

<b>Basic Income Comparison</b>		Spousal Support level \$8,000		Spousal Support level \$7,000	
		Petitioner	Respondent	Petitioner	Respondent
Wages		\$2,500		\$2,500	
Wages			\$21,000		\$21,000
Less Taxes		(\$719)	(\$7,289)	(\$719)	(\$7,289)
<b>NET AFTER-TAX WAGES</b>		\$1,781	\$13,711	\$1,781	\$13,711
Proposed Spousal Support		\$8,000	(\$8,000)	\$7,000	(\$7,000)
Proposed Child Support		\$ 521.15	(\$521)	\$ 570.47	(\$570)
<b>TOTALS</b>		\$10,302	\$5,190	\$9,351	\$6,140
Tax cost of spousal support		(\$2,716)		(\$2,377)	
Tax benefit of deductibility of spousal support			\$3,550.40		\$3,106.60
	<b>NET</b>	\$7,586	\$8,740	\$6,975	\$9,247
		Spousal Support level \$4,000		Spousal Support level \$3,000	
<b>Basic Income Comparison</b>		Petitioner	Respondent	Petitioner	Respondent
Wages		\$2,500		\$2,500	
Wages			\$21,000		\$21,000
Less Taxes		(\$719)	(\$7,289)	(\$719)	(\$7,289)
<b>NET AFTER-TAX WAGES</b>		\$1,781	\$13,711	\$1,781	\$13,711
Proposed Spousal Support		\$1,225	(\$1,225)	\$1,273	(\$1,273)
Proposed Child Support		\$ 718.43	(\$718)	\$ 767.74	(\$768)
<b>TOTALS</b>		\$3,724	\$11,768	\$3,822	\$11,670
Tax cost of spousal support		(\$415.78)		(\$432.20)	
Tax benefit of deductibility of spousal support			\$543.51		\$564.97
	<b>NET</b>	\$3,308	\$12,311	\$3,390	\$12,235

D. Sample Trial Memoranda Arguments.

**SAMPLE TRIAL MEMORANDUM ARGUMENT #1**

I.

**WIFE SHOULD BE AWARDED INDEFINITE SPOUSAL SUPPORT AND CHILD SUPPORT BASED ON HUSBAND'S DEMONSTRATED EARNING CAPACITY AND THEIR DISPARITY IN INCOMES WITH THE COURT RECOGNIZING THAT HUSBAND ENGAGED IN FRAUDULENT ACTS IN ORDER TO ARTIFICIALLY LOWER HUSBAND'S INCOME FOR PURPOSES OF THIS LITIGATION**

The award of spousal support is not at issue. Husband's petition, in paragraph nine, asks the court to award reasonable spousal support for a reasonable time. The dispute is over the amount and duration. To set spousal and child support at a reasonable level, the Court must first determine the earning capacity of Husband. In this case, the court must focus on more than the actual wages of Husband because the fraudulent acts taken by Husband and his family have allowed Husband to manipulate his income and income capacity for support purposes.

1. Equitable analysis.

The same analysis which applies to a transfer of assets to the parents *in avoidance of property division* also applies to the transfer of income capacity. Just as the court in Clayton v. Clayton 569 A.2d 1077, 1078 (Vt. 1989), rejected the Husband's claim that the voided stock sale was not marital, this court should not permit Husband to benefit legally by his acquiescence and participation in his and his parents' manipulation of the parties income especially where, as here, there appears to be no rational business purpose for the action.

2. Factors in calculating income.

**If Husband cannot be permitted to insulate the asset from a claim of Wife, then he should also not be permitted to insulate the potential income.**

ORAR 137-50-340 is an appropriate starting place to review the factors to be considered in determining income. Under this rule, gross income includes: salaries, wages, bonuses, dividends, and other factors. ORAR 137-50-340 goes further, addressing self-employed individuals or individuals who own closely held businesses. ORAR 137-50-330(2)(a) also addresses rebuttal criteria which allow for departure from the guideline level of child support. From the administrative rules, the Court must then look at ORS 107.105(1)(d)(D) which addresses the "earning capacity" of each party. When these factors are construed together, the Court can understand the significance of the unique facts of this case.

Husband worked for the family business since 1988 with one goal: to purchase the business. Wife supported his long hours and commitment to this goal. Around 1991, Husband began managing the business and in the fall of 1993, the sale of the business to Husband was consummated. Prior to the sale, Husband's salary and bonuses were approximately \$46,500 per year. Husband also had outside employment from his own business.

**After the sale, Husband was authorized by the corporation, in writing, to receive up to \$120,000 per year; \$35,000 in salary and another \$85,000 in**

**dividends. He was also authorized to take out \$800 per month (\$9,600 per year) as lease payments to himself.** In fact, upon Husband's purchase of the business, he began drawing approximately \$90,000 per year by taking \$5,000 per month in dividend income in addition to his salary for a monthly income of \$7,483 per month. This income level was continued each and every month until he filed for divorce. Then, and only then, actions were taken to hide his true income.

First, Husband and Third-Party Respondents jointly and retroactively canceled the sale of the business and pretended it had never occurred. *They even jointly and retroactively altered the corporate records so that the dividend payments were now labeled as loans.* Second, the corporation continued to pay him more than his new "reduced" salary by making continual "loans." Third, they told the Wife that he no longer owned the business.

The flaw in the scheme was that Husband was current in his business purchase payments. He had honored every term of the purchase and sale agreement and there was no legitimate business reason to terminate the sale. In deposition, the Third-Party Respondents conceded that the reason was the pending divorce and that is why Husband continues to run the business.

By retroactively terminating the sale, that marital asset would purportedly be removed from the asset division equation as would the income it produced. The corporation even "recast" the \$5,000 per month of income (i.e., dividend payments) as "loans" creating debt from what had clearly been marital income. As a result, Husband hoped to dramatically lower his spousal and child support exposure. *The Court should not encourage or ratify such fraudulent actions.*

It is undisputed that the Third-party Respondent sold the business to Petitioner. It is undisputed that Petitioner was current on his purchase obligations at the time of the retroactive termination. It is undisputed that the sale agreement had no provision that would authorize the retroactive termination of the agreement under those facts. It is also undisputed that the retroactive termination was done in contemplation of and timed to coincide with this divorce. It is clear how much gross income was anticipated by the sale agreement.

In the interest of equity, the Court should set Husband's earning capacity at \$6,000 per month (\$72,000 per year) which is only 60% of the \$120,000+ income he was authorized to receive under the sale agreement and is 80% of the exact amount he was paying himself at the time he fraudulently transferred the business back to his parents.

This \$72,000 per year figure is more than supported by the corporation's own tax returns. In 1992, In-Law Roofing paid officers \$106,843. In 1993, it paid officers \$116,685 or over \$140,000 if you add Husband's wage to the 1993 figure. In 1994, when the business was sold, Husband and the Third parties contemplated an income package of over \$120,000/year of which an annualized \$90,000 per year was actually paid.

An income range of \$90,000 to \$129,600 was the minimum income level all the parties anticipated for Husband when the business was purchased and that is supported by the evidence, the depositions, and the sale agreement. Wife concedes that a portion of that income was to be expended to the parents for the purchase of the business but that purchase would have also increased the equity stake in the business.

It would still have been gross income to Husband. Certainly, \$72,000 per year is a

reasonable wage for the president, manager and chief operating officer of the business.

*The only reason Husband's income is not at that level at this time is because of the fraudulent and retroactive termination of the business sale.*

3. Statutory Authority related to the duration of spousal support.

This case presents the classic facts contemplated by the legislature and the courts in establishing a basis for permanent support.

- \* The parties have been married 16 years.
- \* The Wife will have custody of three minor children.
- \* Wife has assisted Husband advance in his career including the purchase of the family business.
- \* Wife has been a mother and the homemaker since the birth of the parties' first child.
- \* Wife has no job skills other than being a waitress.
- \* Wife requires education and retraining to compete in the current marketplace.
- \* Wife will never be able to recover her lost earning capacity and receive wages comparable to Husband earning capacity.

## SAMPLE TRIAL MEMO ARGUMENT #2

The most significant factor in determining the amount and duration of support has routinely been held to be the disparity in the parties' earning capacities. Even where both parties work, a large disparity often justifies indefinite support.

In 1992, Husband earned approximately \$170,000 including almost \$100,000 in gross income from his employer (not including his deferred bonus) compared to Wife's approximately \$25,000 from all sources, including her half of interest/dividend income and all of the rental income. See Exhibit 2. When all income sources are included, the Husband earns almost 7 times as much as Wife and over 5 times Wife when wage income alone is considered. *This huge disparity in the parties' incomes will continue for the rest of their working lives.*

"Spousal support must be based on the situation as it exists at the time of the hearing." Milford and Milford, 98 OrApp 586, 587, 779 P2d 630, 631 (1989).

However, the court clearly has the authority to forecast Husband's earning capacity for purposes of spousal support. Furlong and Furlong, 120 OrApp 105, 108, 852 P2d 233, 234 (1993). Courts are only restricted in situations where the facts are so speculative that an informed prediction cannot be made as to future earnings of a party which is not the case here. Furlong, 120 OrApp at 108, 852 P2d at 234.

At the temporary hearing Husband improperly argued that his yearly bonuses should not be included in his gross income for purposes of calculating his support obligation, yet the bonuses are part of his pay package, having been paid in each of the past 7 years. See Exhibit 8. The amount of historically-received bonuses has consistently been included in the gross income of the spouse receiving the bonus in the context of child support calculations. Adcock and Adcock, 138 OrApp. 23, 905 P2d 1185 (1995); Tofte and Tofte, 134 OrApp. 449, 895 P2d 1387 (1995). By analogy, there is no reason not to include the amount of historically received bonuses in the calculation of Husband's true gross income for spousal support

purposes.

Husband has a high paying job as General Manager of Portland Acme Co. while Wife earns her income almost exclusively from work at her bookkeeping service. This business earns a modest yearly income, which is far less than Husband's monthly salary and yearly bonuses.

**It is important to note that Husband has income "opportunities" due to his experience and connections which will never be available to wife.** He has partnerships with engineers and his employers which arise from, and are likely to continue to arise from, the career he has built during the marriage.

SAMPLE TRIAL MEMORANDUM ARGUMENT #3

Husband urges the court to accept that his monthly income is \$21,000 per month. Which he bases on his current earnings. It may not be coincidence that husband's gross income has decreased significantly during the parties separation. Husband argues that the court should disregard his past earnings yet accepting husband's position would completely ignore his historical earnings during the marriage. The parties separated in 1997 and it is during that time that husband's income has taken a shift downward. Prior to that time Husband's income was hundreds of thousands of dollars higher. This drop in income is further suspect in view of Husband's threats to Wife to close his business if the business valuation or spousal support were too high.

If the court is willing to accept husband's representations regarding his income then support should be set such that if his income does exceed \$21,000 per month wife would receive additional spousal support. Wife proposes that she receive a percentage of any income husband receives above \$21,000. If the court adopts his reduced level of income at \$21,000. See Attached exhibit 1.

Husband has also recently taken the position that he may sell his business. This approach is nothing more than husband following through with threats he has made throughout this 2 year divorce. Husband has repeatedly told wife that if the business was valued too high, he would just sell it and eliminate his high income and ability to pay spousal support. That position now is nothing more than him making good on those threats to wife. The court should decline to allow husband to use this tactic as a method of reducing his income. Even if husband were to sell this business, he could very easily start a similar business immediately after the divorce earning the same income. More importantly, his earning capacity is established regardless of any threat of sale.