

THE PRACTITIONER

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Support Checks

Earning-Capacity Standard May Be Imputed Even When Payor Spouse Acts in Good Faith

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Reaffirming decisions that uphold a trial court's wide discretion to impute income based on ability to earn, two recent cases go a step further by holding that earning capacity can be imputed to a supporting spouse in any situation, including when the record is void of any evidence of a supporting spouse's deliberate refusal to maintain or seek gainful employment. *Marriage of Padilla*, 45 Cal.Rptr.2d 555 (1995); *Marriage of Stephenson*, 46 Cal.Rptr.2d 8 (1995).

Although nothing in California's statutory guidelines places a limit on the court's discretion to use earning capacity to determine support, courts have traditionally employed the earning-capacity standard only in cases where there was evidence of a supporting spouse's deliberate or bad-faith attempts to shirk financial responsibilities by willfully terminating or refusing to seek or accept gainful employment, deliberately allowing a business to flounder or fail, intentionally depressing income to an artificial low or purposely leaving employment to go into another business. See *Marriage of Philbin*, 19 Cal.App.3d 115, 119 (1971).

In *Marriage of Meegan*, 11 Cal.App.4th 156, 160 (1992), the court adhered to *Philbin* and held that absent a finding of bad faith, it could not impose an earning-capacity standard to determine support. In *Meegan*, the husband's decision to enter a monastery was found to be in good faith. Accordingly, the trial court granted the husband's request to terminate his spousal support obligations.

Contrary to *Philbin*, *Meegan* and their progeny, the currently emerging trend of case law takes a more liberal approach in applying the earning-capacity standard for determining appropriate child and spousal support amounts.

Marriage of Ilas, 12 Cal.App.4th 1630 (1993), was one of the first cases to hold that the consideration of earning capacity is not limited to situations in which a supporting spouse is depressing income in bad faith or deliberately attempting to avoid support responsibilities. *Ilas* ruled that an earning-capacity standard can be imposed even when a court determines that a supporting spouse's decision to terminate employment or change career paths was made in good faith.

In *Ilas*, the husband's income decreased as a result of his decision to terminate his employment and enroll in medical school. In denying *Ilas'* request for a decrease in spousal and child support obligations, the court held that the husband did not have the "right to divest him-

self of his earnings at the expense of the former Mrs. Ilas and his two minor children." *Id.* at 1639.

Ilas and *Meegan* can be distinguished because their facts and circumstances differ. In *Ilas*, the wife continued to need support at the time the modification request was made, and the husband continued to have an obligation to pay child support. In *Meegan*, there was no issue of child support and the wife was employed and financially independent at the time of the modification.

Padilla and *Stephenson* continue the trend of liberal use of the earning-capacity standard.

In *Padilla*, the sole issue before the court was child support. The mother sought to increase the father's obligations, while the father sought a decrease. The trial court ultimately increased the father's obligation, based upon his previous income, even though he had quit his job to start his own business. The father appealed, and the California Court of Appeal affirmed the trial court's decision.

The *Padilla* court found that *Philbin* should not be read narrowly to hold that a parent's earning capacity in determining child support can only be used when the supporting spouse's actions are motivated by a deliberate attempt to shirk financial responsibilities. Relying on *Marriage of Regenercy*, 214 Cal.App.3d 1367 (1989), the *Padilla* court used the following three-prong test to determine the appropriateness of using the earning-capacity standard:

■ Was there an ability to work, given such factors as age, occupation, skills, education, health background and experience and qualifications?

■ Was there a willingness to work, exemplified through good-faith efforts, due diligence and meaningful attempts to secure employment?

■ Was there an opportunity to work, i.e., was there an employer willing to hire?

The emerging trend is to take a liberal approach to earning capacity in determining support obligations.

By broadly interpreting *Philbin*, in conjunction with the Regenercy test and public policy, the *Padilla* court found that the father had quit a long-term, well-paying job within weeks of the first support hearing because he wanted the freedom of self-employment and a chance for greater financial reward. Notwithstanding the six-month period that the trial court gave the father to start the business, he was still "in the red" financially, had become delinquent on his child support obligations and did not know when his financial condition would improve.

The court found that while the father's actions may have been sincere and in good faith, the result was essentially the same. No matter what his reasons, his children's needs remained unfulfilled. Perhaps most telling of its intent, the court stated: "[O]nce persons become parents, their desires for self-realization, self-fulfillment, personal job satisfaction and other commendable goals must be considered in context of their responsibilities to provide for their children's reasonable needs. If they decide they wish to lead a simpler life, change professions or start a business, they may do so, but only when they satisfy their primary responsibility: providing for the adequate and reasonable needs of their children."

Thus, according to *Padilla*, while a parent may be free to change jobs, pursue other careers or take a lesser paying job in pursuit of a simpler life-style, and even while this does not

necessarily equal a bad faith finding of the parent's attempt to shirk financial obligations, that decision nevertheless will be weighed against the parent's ability to support a child's reasonable needs. Assuming those needs can be met by the supporting parent's potentially lower income, support may be reduced. Conversely, if the parent's decision, even if in good faith, results in an inability to continue to support the child's reasonable needs, then the court can and may impute income. The child's

interest remains the court's top priority and child support remains a parent's primary obligation, which must be taken into account when modification is considered.

Within weeks of *Padilla*, *Stephenson* reversed a trial court's order reducing spousal support after the husband's early retirement and held that the appropriate support amount should not be based upon the existence of bad faith, but rather on all the factors set forth in Family Code Section 4320 (circumstances to be considered when ordering spousal support), which necessarily include earning capacity. The court explained that a reduction of employment income does not alone warrant a decrease in support obligations. According to *Stephenson*, when a supporting spouse elects to retire early and not seek reasonably remunerative available employment, the court can impute income using the earning-capacity standard when determining whether a support order should be modified.

In *Stephenson*, there was substantial evidence that the husband's retirement was involuntary and reasonable. However, what may have played an important role in the court's decision were the wife's health problems, which required her to use medication to control her constant pain. Consequently, any employment efforts on her part were only modestly fruitful, and were compounded by lack of capital to start up and carry on a business.

The Court of Appeal concluded that earning capacity can properly be imputed to a supporting spouse, given the spouse's obligation to provide support and the general notion that a supporting spouse must make reasonable efforts to obtain employment that would generate a reasonable income, under the circumstances, to meet continuing support obligations. The court found that even when a supporting spouse can show a change in circumstance, which is required prior to modification of spousal support obligations, a change in actual income does not necessarily entitle the supporting spouse to modification.

In dicta, however, the court softened its stringent approach, explaining, "We do not imply a supporting spouse who is eligible for retirement having obtained retirement age must continue working to provide spousal support at the current level. What continuing support obligation is reasonable is governed by an evaluation of the totality of the surrounding circumstances unique to each individual case including earning capacity."



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