

The Practitioner Family Law

New Calculation

Bonus and Overtime Pay in Determining Support

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The recent decision in *County of Placer v. Andrade*, 55 Cal.App4th 1393 (1997), held that overtime and bonus pay must be included in calculating the amount of a child or spousal support award.

Prior to *Andrade*, the accepted rule was that the payor spouse's past overtime pay was not considered in calculating the support amount. However, *Andrade* has changed this standard by requiring the trial court to consider the payor's past earnings, including occasional overtime and bonus pay.

Until very recently, the payor spouse's gross income used to calculate the support amount was based on his or her "normal" work schedule. *Marriage of Simpson*, 4 Cal.4th 225 (1992). The normal work schedule meant income earned without overtime.

In *Simpson*, soon after a temporary spousal and child support order was issued, Mr. Simpson, who worked as a stagehand, switched from the theater to television. As a stagehand in theater work Simpson had been able to earn significantly more income. He frequently was able to work two or three jobs each day, including nights and weekends, for an average of 16 hours a day.

His reported theater income showed that Simpson earned \$61,000 in 1986, \$62,000 in 1987 and \$70,695 in 1988. He also earned approximately \$5,446 per month from January 1, 1989, to July 31, 1989. The trial court determined the temporary support amount based on this reported income.

Shortly after the temporary support order was issued, however, Simpson switched jobs to television work and his income dropped to approximately \$2,200 per month. At trial, Simpson testified that he switched jobs because theater work required him to work long hours, including nights and weekends, and was overly stressful for him. He testified that television work allowed him to work normal eight-hour days, enabling him to spend more time with his daughter.

The trial court ordered the permanent support amount based on Simpson's earning capacity — around \$60,000 — rather than his actual earnings at the time of trial because the court reasoned that Simpson had voluntarily reduced this ability to earn without justification in order to purposefully reduce his income.

Simpson petitioned the California

Supreme Court for review after the Court of Appeal affirmed the trial court's decision. Simpson contended that the trial court erred in fixing his earning capacity at the \$60,000 amount because he achieved that level of income only by working excessive overtime.

The court, relying on *Marriage of Smith*, 225 Cal.App.4th 469 (1990), stated that earning capacity generally should not be based upon an extraordinary work regimen but instead upon an "objective reasonable work regimen" as it would exist at the time the determination of support is made.

The *Simpson* court reversed the judg-

erred in excluding Andrade's bonus and overtime earnings from his income for the purpose of determining his child support obligation.

In a broad reading of California Family Code Section 4058, the California Court of Appeal held that the annual gross income of the parent included "income from whatever source derived," including predictable bonus and overtime pay. The court stated that, based on the broad definition of "income from whatever source derived," overtime pay was not excluded from calculating the payor's "annual gross income."

The court went on to state that the

assumption underlying the above calculations was that past income was a good measure of future income. The court, however, did recognize that there were exceptions to this assumption — where the past income does not accurately reflect future income, the trial court may use its discretion to adjust the monthly net disposable income figure.

The trial court may also use its discretion to consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the child.

The appellate court reasoned that in the present case, Andrade's overtime and bonuses, although sporadic, were predictable. Andrade had earned bonus and overtime pay for the 2½-year periods preceding the support hearing. The court reasoned that, based on his past earnings, Andrade was likely to again receive overtime and bonus pay.

The court went on to state that "absent a determination that the monthly net disposable income figure does not accurately reflect [Andrade's] ... prospective earnings, it was error for the court to exclude overtime and bonuses in its calculation." According to the court, a trial court can disregard past bonus and overtime pay from the calculation only if it determines that the payor parent is unlikely to receive them in the future.

The holding in *Andrade* opens the door for family law practitioners to request spousal and child support based on the payor spouse's inflated income, which includes overtime and bonus pay. When there is evidence to show that overtime and bonus pay has predictably been available to the payor spouse in the past and is likely to reoccur, the trial court must consider the extra pay in calculating the support amount.

In defense, the payor spouse, to avoid a support order based on annual gross income including past earned overtime and bonus pay, must present to the court admissible evidence showing that future overtime or bonus pay is unlikely. Additionally, the payor spouse can testify that he is no longer willing to accept voluntary overtime. At that point, the trial court has the discretion to consider the payor parent's earning capacity in determining the support amount.

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ment of the Court of Appeal, stating that the trial court failed to establish that Simpson's earning capacity was based on an objective reasonable work regimen.

Based upon *Simpson*, the general consensus among family law practitioners was that overtime income would derive from an excessive work regimen and thus would not be considered in calculating the support amount.

The holding in *Andrade*, however, modifies this consensus. In *Andrade*, Placer County filed a complaint against Andrade to establish paternity and child support. At the support hearing, Andrade indicated to the trial court that his monthly gross income was \$1,837. Placer County argued that Andrade's monthly gross income, including his overtime and bonuses, was higher, presenting evidence that it averaged \$2,287 in 1994, \$2,318 in 1995 and \$2,617 during the first six months of 1996. Andrade's counsel argued that his overtime should not be calculated into his earnings because it was "speculative" and that his overtime had been recently cut back to almost nothing due to his employer's merger.

The trial court determined that Andrade's gross income was \$1,924 per month, stating that, based on *Simpson*, the court was "not going to force overtime ... especially in the situation where it varies from month-to-month." The court went on to state that, pursuant to Andrade's regular work schedule (as reflected in his pay stubs), he worked a regular, full-time work period. The court did recognize that Andrade had occasional overtime, bonuses and even double time but was unwilling to include said pay into calculating his child support obligations under *Simpson*. The court stated that "we don't force people to work second jobs."

Placer County appealed the trial court's decision, claiming that the court

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