

Fluctuating or Undeterminable Income

What do you do when the parent who is supposed to pay support has income that fluctuates wildly from season to season or from year to year? In some cases you can look at several years worth of income, compute an average, and then do the child support calculations based on that average.¹ In one case, a non-custodial father worked different hours each week. The court went back over ten years worth of income to find the average number of hours worked and used that number as a basis for child support.² This isn't done the same way in all counties in Illinois. In fact, in some counties they won't even let you do income averaging.³ Technically, it comes down to where you live in Illinois that determines whether you can do income averaging and, if so, how far back in time you can go to draw sample years of income.

Fluctuating Incomes and Percentage Awards: Illinois law requires that all child support orders state the amount of child support as a dollar amount⁴ – that is, a specific number. Child support orders may not simply say, for example, "28% of all income shall be paid as child support." The order **MUST** express a specific dollar amount as the child support award.

So, what can you do if the obligor's (the non-custodial parent who has to pay child support) income sometimes includes things like bonuses or commissions or large amounts of overtime pay. Typically, in a divorce or child support case, a non-custodial parent will ask their employer to hold off on bonuses and commissions and will often shun overtime work until after the court considers the issue of child support. The effect is to reduce their income and, consequently, reduce the amount of the child support award. Then, of course, as soon as the child support order is entered, they talk with the employer and the bonuses, commissions, and overtime start up again. In the past, such schemes have helped non-custodial parents improperly avoid their full obligations of child support.

There are a few solutions to these support-avoiding tricks. There is a small clause in the law⁵ that permits the court – in certain situations – to require that the parent paying support pay a percentage of his or her income. That means that whenever the commissions or bonuses come in, or when the overtime is worked, the obligor has to pay over a stated percentage of each payment. Better yet, the payment can be taken directly out of their paycheck and sent to the custodial parent. Talk with our attorneys to learn how to obtain and enforce "percentage child support awards."

Income Averaging: Although not specifically permitted or defined in Illinois law, courts may resort to income averaging when one's income fluctuates or is undeterminable. The problem with income averaging, of course, is that unscrupulous obligors may go to great lengths to minimize current income and project greatly reduced future income in the hopes of minimizing the child support obligation. In one famous case⁶ the obligor showed three years of income as: 1) \$102,600, 2) \$112,000, and for the year the divorce case went forward, only \$24,900. The court refused to accept the current year's projected income (\$24,900) because the projection was too unreliable.

Most judges employ a rule of thumb by which they will look back a certain number of years⁷, but no more, and average the obligor's income for that multi-year period. Looking at a period that is too short doesn't allow enough data for the court to discern long-term or significant trends. On the other hand, using data from a period that is too great probably reaches too far back in time. The data "cannot reflect the current circumstances of the parties to enable the court to comport with (or deviate from) the [statutory] guidelines."⁸

Obligor's Duty to Report New Job or Increase in Income: Uniform Child Support orders are written up on standardized forms. They are the same in every courthouse in every county. Those forms require the obligor (the person paying support) to "notify the clerk of the circuit court in writing of any change of name, address, employment status, or daytime telephone number within 2 weeks of such change."⁹

In one case, the obligor lost his job and asked the court to "abate" his support obligation; that is, to put it on hold so that he didn't have to make any payments. The court allowed the request. When the obligor found work, he didn't notify the court. The court allowed the recipient parent to go back to court years after the child was emancipated – nearly twenty years after the support obligation had been abated – to collect. In fact, because the obligor never alerted to the court to his new income after the abatement, the court retroactively set support. Got that? The child

was already emancipated when the court reached back in time almost twenty years to retroactively set the amount of support and allow the recipient parent to begin garnishments.¹⁰

Although Illinois law requires the obligor to notify the court of changes in employment status, it does not require the obligor to notify the parent receiving support. What the law lacks in common sense, however, can sometimes be made up for by good, sharp lawyering. A well crafted court order can impose on the obligor the duty to notify the recipient of any change in income, employment, or other financial status. Illinois courts have enforced orders that required obligors to notify the recipient parent of any increase in income. In one famous case¹¹ the (then unemployed) obligor father was order to pay \$20 per week in child support – AND to inform the recipient mother of any change in his employment. The father eventually got work but never obeyed the court's order to inform the mother of his change in income. The mother waited fifteen years – the children had all been emancipated -- before complaining to the court. The father argued that it was unfair to go back and increase child support after fifteen years; especially now that the children were all emancipated. The Appellate Court disagreed and ordered the retroactive increase in support going all the way back to his first change in income.

Where Income is Impossible to Determine Revert to the "Needs of the Child:" In some cases, the obligor's income can be literally impossible to determine with any accuracy. In such circumstances, Illinois law permits the court to ignore the statutory guidelines and to simply establish child support based on the "reasonable needs of the child."¹²

"Imputing" Income to the Obligor: In some cases a parent paying child support will structure his or her income and benefits in an attempt to mask total compensation. To prevent an obligor from unfairly evading or minimizing the child support obligation, Illinois law permits judges to "impute" the value of benefits and perks and include it as part of the obligor's income. An employer-provided car, or employer-subsidized housing, even company cell-phones, should all probably be considered as income when calculating child support. In one case, a divorced father had access to a company-owned hunting lodge. He and his new family used the lodge about half the time. The court concluded that the use of the company-provided lodge was a form of "income" and included the value of the use of the lodge as part of his income when determining child support.¹³

In other cases the parent paying child support will find a supporter or a support network that will permit the obligor to give up working for a living. With no income, it can seem that there is no way to collect. A savvy attorney, however, can make a strong argument that the deadbeat's support network is really a form of income and the support network should be garnished, just like an employer.

This article was written by the law office of Cowell Taradash, P.C., whose attorneys are familiar with the latest court decisions, recent changes in the law and even the tendencies of many judges. We can help. Contact us at 866.987.6723 or info@illinoisdivorce.com.