The Use of Vocational Experts in Support Cases

by
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I. "Earning Capacity" and Imputing Income as a Matter of Law

Every state's child support guidelines contain a provision allowing the court to consider a parent's "earning capacity" or "potential income," as opposed to actual earnings, either as an item of income[1] or as a deviation factor[2] when the parent is volunta-

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1 ALA. R. JUD. ADMIN. R. 32(B)(1) (income means ability to earn if unemployed or underemployed); Alaska Civ. R. Civ. P. 90.3(a)(4) (the court may calculate child support based on a determination of the potential income of a parent who voluntarily and unreasonably is unemployed or underemployed); Ariz. Child Support Guidelines 5(E) (court may attribute income to parent whose earnings are reduced as a matter of choice and not for reasonable cause); CAL. FAM. CODE § 4058(b) (court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children); COLO. REV. STAT. § 14-10-115((5)(b) (if a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income); Del. Fam. Ct. R. Civ. P. R. 501(a) (income includes earning capacity); D.C. CODE § 16-916.01(d)(10) (the judicial officer may impute income to a parent and calculate the child support obligation based on the imputed income); FLA. STAT. ANN. § 61.30(b) (income shall be imputed to an unemployed or underemployed parent when it is voluntary); GA. CODE ANN. §19-6-15(b)(1) (income includes imputed income); Haw. Child Support Guidelines V(J)(3) (a parent's income will be determined according to his or her income capacity in the local job market); Idaho R. Civ. P. 6(c)(6), 6(c)(1) (if a parent is voluntarily unemployed or underemployed, child support shall be based on gross potential income); 750 ILL. COMP. STAT. § 5/505(a)(3.2) (if a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income); Ind. Child Support Guidelines 3(A)(3) (if a court finds a parent is voluntarily unemployed or underemployed without just cause, child support shall be calculated based on a determination of potential income); Kan. Child Support Guidelines

II.F.1.B. (when a parent is deliberately unemployed, although capable of working, employment potential and probable earnings shall be used); KY. REV. STAT. § 403.212(2)(d) (if a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income); LA. REV. STAT. § 9.315.11(if a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of income earning potential); 19–A ME. REV. STAT. § 2001(5)(D) (gross income may include the difference between the amount a party is earning and that party's earning capacity when the party voluntarily becomes or remains unemployed or underemployed, if sufficient evidence is introduced concerning a party's current earning capacity); MD. FAM. CODE § 12-201(b)(2) (income includes potential income if a parent is voluntarily impoverished); Mass. Child Support Guidelines II(H) (court may consider potential earning capacity); Mich. Child Support Formula Manual 2.01(G) (when a parent is voluntarily unemployed or underemployed, or has an unexercised ability to earn, income includes the potential income that a parent could earn, subject to that parent's actual ability); MINN. STAT. ANN. § 518A.32 (if a parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis, or there is no direct evidence of any income, child support must be calculated based on a determination of potential income); Mo. Form 14, Comment H (court may impute income if a parent is unemployed or underemployed); Admin. R. Mont. 37.62.106 (it is appropriate to impute income to a parent when the parent is unemployed, underemployed, fails to produce sufficient proof of income, has an unknown employment status, or is a student); Neb. Sup. Ct. R. 4-204 (if applicable, earning capacity may be considered in lieu of a parent's actual, present income); NEV. REV. STAT. § 125B.080(8) (if a parent who has an obligation for support is willfully underemployed or unemployed to avoid an obligation for support of a child, that obligation must be based upon the parent's true potential earning capacity); N.H. REV. STAT. § 458-C:2(IV)(a) (the court, in its discretion, may consider as gross income the difference between the amount a parent is earning and the amount a parent has earned in cases where the parent voluntarily becomes unemployed or underemployed); N.J. Rules, App. IX (one of the factors to be considered in determining child support is the earning ability of each parent); N.M. STAT. ANN. § 40–4–11.1(C)(1) ("income" means actual gross income of a parent if employed to full capacity or potential income if unemployed or underemployed); N.Y. DOM. REL. LAW § 240(1-b) (court shall consider an amount imputed as income based upon the parent's former resources or income, if the court determines that a parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support); N.C. Child Support Guidelines (1)(3) (if the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income); N.D. ADMIN. CODE § 75-02-04.1-01(4)(b) (income includes imputed income based upon earning capacity); OHIO REV. CODE § 3119.01(C)(5)(b) (income includes potential income); OKLA. STAT. tit. 43, § 118B(D) (court may

rily[3] unemployed or underemployed.[4] Similarly, every state al-

impute income in appropriate circumstances); Or. Admin. Reg. 137-050-0715 (income means actual or potential gross income); Pa. R. Civ. P. 1910.16–2(d)(4) (if the trier of fact determines that a party to a support action has willfully failed to obtain or maintain appropriate employment, the trier of fact may impute to that party an income equal to the party's earning capacity); R.I. Fam. Ct. Admin. Order 2017-01 (court may impute income); S.C Child Support Guidelines sec. 3(A)(5) (if the court finds that a parent is voluntarily unemployed or underemployed, it should calculate child support based on a determination of potential income); Tenn. Comp. R. & Regs. 1240–2–4–.03(a)(2) (earning capacity may be used on finding that a parent is willfully and voluntarily underemployed or unemployed); TEX. FAM. CODE § 154.066 (if the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment, the court may apply the support guidelines to the earning potential of the obligor); UTAH CODE § 78B-12-203(8) (income includes imputed income); VT. STAT. tit. 15, § 653(5)(a)(iii) (income includes the potential income of a parent who is voluntarily unemployed or underemployed); VA. CODE ANN. § 20-108.1(B)(3) (court shall consider: "imputed income" to a party who is voluntarily unemployed or voluntarily underemployed); WASH. REV. CODE § 26.19.071(6) (court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed); W. VA. CODE ANN. § 48-6-301(b)(4) (court shall consider the income-earning abilities of each of the parties); Wis. Admin. Code Dept. Child. & Fam. 150.03(1) (support is based on gross income that includes income that exceeds the parent's actual income and represents the parent's ability to earn); WYO. STAT. § 20-2-303(a)(ii) (gross income also means potential income of parents who are voluntarily unemployed or underemployed). All cites are current through 2018.

2 Conn. Reg. 46b-215a-5c(b)(1)(B); Iowa Child Support Guidelines R. 9.11(4); MISS. CODE ANN. § 43-19-103; S.D. COD. LAWS § 25-7-6.10(6); TEX. FAM. CODE § 154.123(b)(5).

3 "Voluntarily" in this context does not necessarily mean done for the purpose of avoiding support. In many states, a "voluntary" action, resulting in the imputation of income, can be undertaken for the best of reasons. Some states temper this position by requiring that the voluntary action be undertaken for the purpose of avoiding the support obligation before imputing income. *Compare* Paddock v. Paddock, 577 A.2d 1087 (Conn. App. Ct. 1987) (the trial court may impute income where a party voluntarily quits or avoids employment in his/her field); *In re* Marriage of Ilas, 12 Cal. App. 4th 1630, 16 Cal. Rptr. 2d 345 (1993) (where the father quit his job to go back to school, the trial court would impute income, regardless of his motives and the long-term gain); Thilem v. Thilem, 662 So. 2d 1314 (Fla. Dist. Ct. App. 1995) (unemployment is voluntary in the absence of physical or mental incompetence or other uncontrollable circumstance); Wollschlager v. Veal, 601 So. 2d 274 (Fla. Dist. Ct. App. 1992) (the trial court will impute income to a father who quit his job to go to medical school; while his decision may be beneficial in the long run, the immediate ef-

fect was to divest the children of needed support); McLauchlin v. McLauchlin, 580 So.2d 812 (Fla. Dist. Ct. App. 1991) (the trial court imputed income of $35,000 to the father to determine his support obligations, where he left his $35,000 per year job in the attorney general's office in order to enter private practice; it made no difference to the court that the father's long-term financial gain might be improved by the move); Billings v. Billings, 560 N.E.2d 553 (Ind. Ct. App. 1990) (the husband quit his lucrative job as a journeyman electrician to become self-employed in own corporation; the difference in actual earnings would be imputed); Rutledge v. Rutledge, 293 N.W.2d 651 (Mich. Ct. App. 1980) (a voluntary change of employment, even in the absence of bad faith, is not an adequate reason to modify support; where an attorney quit his job as a public defender to start his own practice, and went from $24,000 to $2,500 in income, the trial court would impute income); Caldwell v. Caldwell, 579 So. 2d 543 (Miss. 1991) (the father's voluntary decision to reduce his income did not relieve him of his support obligation); Luker v. Luker, 861 S.W.2d 195 (Mo. Ct. App. 1993) (the trial court will impute $30,000 per year where the obligor quit his job to start his own business; his motives were irrelevant); *In re* Marriage of Stanley, 793 S.W.2d 487 (Mo. Ct. App. 1990) (a decline in income due to the voluntary breakup of an accounting partnership and the start of a new accounting firm did not justify a change in support); Schulze v. Schulze, 469 N.W.2d 139 (Neb. 1991) (the husband's employment as a nurse's aide at a substantially lower income did not constitute a change in circumstances, even where the husband could have continued to earn greater income as painter); Maidman v. Maidman, 82 A.D.3d 577, 919 N.Y.S.2d 25 (N.Y. App. Div. 2011) (the trial court was within its discretion in imputing more than $300,000 per year in income to the husband, in calculating his monthly *pendente lite* spousal and child support obligation, where he left a lucrative position with a family owned business in which he earned approximately $400,000 per year to start his own private law practice); Rock v. Cabral, 616 N.E.2d 218 (Ohio 1993) (the trial court would impute income to the mother who had an accounting degree but worked as a weaver; she was underemployed, and her motives were irrelevant); *In re* Adoption of Wagner, 690 N.E.2d 959 (Ohio Ct. App. 1997) ("a parent is not justified in electing a lifestyle that would assure his or her inability to pay child support as ordered"); *In re* Marriage of McKeever, 583 P.2d 30 (Or. Ct. App. 1978) (although the decision to become a Christian Evangelical may be made in good faith, a parent cannot eliminate income at the expense of his/her children); Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993) (the critical inquiry is whether the decision to lower earnings is voluntary), *with* Thomas v. Thomas, 589 So. 2d 944 (Fla. Dist. Ct. App. 1991) (where a spouse reduces his or her income to avoid compliance with a support order and is not acting in good faith, modification of orders will be denied); Nab v. Nab, 757 P.2d 1231 (Idaho Ct. App. 1988) (where a parent in bad faith voluntarily worsens his or her financial condition, income may be imputed); *In re* Marriage of Gosney, 916 N.E.2d 614 (Ill. App. Ct. 2009) (to impute income to a noncustodial parent for child support purposes, a court must find that (1) the payor is voluntarily unemployed, (2) the payor is attempting to evade a support obligation, or (3) the payor has

unreasonably failed to take advantage of an employment opportunity; if none of these factors is in evidence, the court may not impute income); *In re* Marriage of Ross, 824 N.E.2d 1108 (Ill. App. Ct. 2005) (the crucial consideration in a child support modification case, to determine if a decision to voluntarily change employment was made in good faith, is whether the change was prompted by a desire to evade financial responsibilities for supporting the children or to otherwise jeopardize their interests); Hines v. Hines, 602 N.E.2d 902 (Ill. App. Ct. 1992) (a change in employment must be made in good faith to avoid imputation of income); *In re* Marriage of Schuster, 586 N.E.2d 1345 (Ill. App. Ct. 1992) (the key question is the good faith of the obligor); *In re* Marriage of Stone, 507 N.E.2d 900 (Ill. App. Ct. 1987) (the "crucial consideration" is whether the change in status is prompted by a desire to evade responsibility for support); *In re* Marriage of Singer, 674 N.W.2d 682 (Iowa Ct. App. 2003) (the father did not improperly reduce the income he could have earned for child support purposes by taking a job as a physician at a clinic, which paid less than a hospital job or consulting job, where the father noted that some higher-paying positions required extensive work hours and performance of high-risk surgery and were based in undesirable locations, while in contrast his clinic position required him to maintain fewer than forty office hours per week); Keplinger v. Keplinger, 839 S.W.2d 566 (Ky. Ct. App. 1992) (to impute income, the trial court must find bad faith; it is not enough to merely show a party voluntarily left a paying job); Redmon v. Redmon, 823 S.W.2d 463 (Ky. Ct. App. 1992) (the trial court will impute income only where there is an intent to interfere with the support obligation); Richardson v. Richardson, 590 So. 2d 1302 (La. Ct. App. 1991) (voluntariness is not the test for modification, unless the decrease in income is contrived in order to establish a basis for modification of support); Nazar v. Nazar, 505 N.W.2d 628 (Minn. Ct. App. 1993) (without evidence of bad faith, it is improper to consider earning capacity); *In re* Marriage of Casey, 984 S.W.2d 894 (Mo. Ct. App. 1999) (the trial court should not impute income when the record does not establish an attempt to evade parental responsibilities); Wagner v. Wagner, 636 N.W.2d 879 (Neb. 2001) (where the father changed employment in good faith, that is, without intention to lower child support, income will not be imputed); Minnear v. Minnear, 814 P.2d 85 (Nev. 1991) (the statute requires a finding that the parent is willfully underemployed for the specific purpose of avoiding a support obligation); Kennedy v. Kennedy, 421 S.E.2d 795 (N.C. Ct. App. 1992) (capacity to earn may be considered only if there is a finding that the decrease in earnings was deliberate and undertaken to avoid support obligations); Greer v. Greer, 399 S.E.2d 399 (N.C. Ct. App. 1991) (capacity to earn may be considered only if there is a finding that the decrease in income was deliberate and undertaken in order to avoid support obligations); Adkins v. Adkins, 656 S.E.2d 47 (W. Va. 2007) (absent a showing that a child support obligor effectuated a dismissal from his place of employment for the express purpose of avoiding or affecting child support payments, an involuntary termination, including those that are for cause, and which involve intentional conduct, does not come within the statutory purview of voluntary action required to invoke specific statutory provisions concerning attri-

bution of income based on an obligor's prior level of income). Roellig v. Roellig, 431 N.W.2d 759 (Wis. 1988) (where there is evidence that the obligor is "shirking" obligations, income may be imputed); *See* LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 5.06 (2d ed. 2013 and Supp. 2017).

[4] *See generally* MORGAN, *supra* note 3, at ch. 5; Lewis Becker, *Spousal and Child Support and the Voluntary Reduction of Income Doctrine*, 29 CONN. L. REV. 647 (1997); David W. Griffin, *Earning Capacity and Imputing Income for Child Support Calculations: A Survey of Law and Outline of Practice Tips*, 26 J. AM. ACAD. MATRIM. LAW. 365 (2014); Elizabeth Trainor, Annotation, *Basis for Imputing Income for Purpose of Determining Child Support Where Obligor Spouse Is Voluntarily Unemployed or Underemployed*, 76 A.L.R. 5TH 191 (2000).

This type of imputation of income, i.e., imputing income "as a matter of law," should be distinguished from imputing income when a court disbelieves the evidence of income and finds "as a matter of fact" that a party is earning more than he claims. In the latter case, the court is saying, "You have claimed you earn X. I don't believe you. I think you actually earn Y." In the former case, the court is saying, "You have claimed you earn X. I believe you. But you *could earn* Y with your best efforts." *Cf., e.g.,* Silberman v. Silberman, 670 So. 2d 1109 (Fla. Dist. Ct. App. 1996) (the court drew a distinction between imputation as a matter of fact and as a matter of law; in the former case, imputation is a matter of the court making its own determination of what income actually is); Bromson v. Dep't of Revenue, 710 So. 2d 154 (Fla. Dist. Ct. App. 1998) (the trial court did not "impute" income to a father when it found that his earnings were more than he represented them to be, and thus the failure to find voluntary unemployment or underemployment was not error; the court simply made a factual determination as to what his true income was); Weiss v. Frick, 693 N.E.2d 588 (Ind. Ct. App. 1998) (the trial court called the husband's income projections "incredible" and thus imputed income); Cormier v. Cormier, 112 So. 3d 1073 (La. Ct. App. 2013) (the trial court did not err in rejecting, as unreliable, the ex-husband's undocumented wage reduction for child support purposes; the ex-husband worked a 14-day on-and-off schedule offshore, it was not until after trial commenced that the ex-husband stated he was no longer working offshore and his salary was $40,000.00 less per year, and the trial court was dubious of this new arrangement); M.C. v. T.K., 973 N.E.2d 130 (Mass. 2012) (imputation of income is appropriate, when determining a child support award, where a party has made vague, misleading, or untruthful entries on a financial statement); Sena v. Sena, 65 A.D.3d 1244, 885 N.Y.S.2d 738 (N.Y. App. Div. 2009) (the court imputed income to the father and based his child support and child care obligations on his gross business income as reported on federal income tax return); Kristy Helen T. v. Richard F.G., Jr., 17 A.D.3d 684, 794 N.Y.S.2d 92 (N.Y. App. Div. 2005) (the child support magistrate is permitted to impute income in calculating child support obligation where it finds that a party's account of his or her finances is not credible); Scott G.F. v. Nancy W.S., No. H–04–015, 2005 WL 1314432 (Ohio Ct. App. June 3, 2005) (unreported tip

lows the consideration of "earning capacity" for spousal support.[5]

Most of the statutes do not explicitly define earning capacity or state how earning capacity is to be determined.[6] In a nutshell,

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income of $10,000 was properly imputed to the mother's income in a child support proceeding to determine the father's child support obligation; the mother acknowledged she often did not report yearly tip income received in her job as a hair stylist); Huger v. Huger, No. 0303-96-3 (Va. Ct. App. Feb. 18, 1997) (the court drew a distinction between imputation as a matter of fact and as a matter of law). *See generally* Annotation, *Attributing Undisclosed Income to Parent or Spouse for Purposes of Making Child or Spousal Support Award*, 70 A.L.R. 4TH 173 (1989) (collecting cases where the court attributes income to an obligor based on belief or disbelief of income evidence).

[5] *E.g.*, CAL. FAM. CODE § 4320(a) (in fashioning an alimony award, court must consider "the earning capacity of each party," including "marketable skills of the supported party"); CONN. GEN. STAT. § 46b-82(a); FLA. STAT. ANN. § 61.08(2)(e); GA. CODE ANN. § 19-6-5(a)(7); 750 ILL. COMP. STAT. § 5/504(a); IOWA CODE ANN. § 598.21; MASS. GEN. LAWS ANN. ch. 208, § 53(f); N.H. REV. STAT. ANN. § 458:19; N.J. STAT. ANN. § 2A:34-23(b); 23 PA. CONS. STAT. ANN. § 3701(b)(1); S.C. CODE ANN. § 20-3-130(C)(4); UTAH CODE ANN. § 30-3-5(8)(a)(ii).

In 2001, Robert Kirkman Collins noted that there were more than sixty factors contained in alimony statutes; earning capacity appears in the majority of these statutes. Robert Kirman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 34 (2001). If the factor is not in the statute, it is often covered in the case law. *See* MARIAN F. DOBBS, DETERMINING CHILD AND SPOUSAL SUPPORT §§ 3:58–3:60 (2017 ed.); Carolyn Puzella, *Earning Capacity as a Factor to Be Considered in Ordering Spousal Support*, 11 J. CONTEMP. LEGAL ISSUES 319 (1997). For a California focused discussion, see Nicole Jacobs, *Earning Capacity of the Supporting Spouse*, 22 J. CONTEMP. LEGAL ISSUES 167 (2014-2015); Susan W. Miller & Gloria H. Spungin, *Economic Independence: Vocational Assessments and Spousal Support*, 7 L.A. LAW. 20 (1984); Erika Oliver, *Earning Capacity of the Supported Spouse*, 22 J. CONTEMP. LEGAL ISSUES 179 (2014-2015).

[6] *Cf.* Ala. R. Jud. Admin. 32(B)(5) ("In determining the amount of income to be imputed to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earning level of that parent, based on that parent's recent work history, education, and occupational qualifications, and on the prevailing job opportunities and earning levels in the community."); Alaska R. Civ. Pro. 90.3(a)(4) (potential income will be based upon the parent's work history, qualification, and job opportunities); Del. Child Support Rules R. 501(c) (to determine earning capacity, a court may examine earnings history, employment qualifications, and the current job market); FLA. STAT. ANN. § 61.30(2)(b) (the employment potential and probable earnings level of the parent shall be determined based upon his or her recent

work history, occupational qualifications, and prevailing earnings level in the community if such information is available); Idaho R. Civ. Pro. 6(c)(6), 6(c)(1)(A) (determine employment potential and probable earnings level based on the parent's work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community); 750 ILL. COMP. STAT. § 5/505(a)(3.2) (a determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor's work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community); Ind. Child Support Guidelines 3(a)(3) (a determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor's work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community); Iowa Child Support Guidelines Rule 9.11(4) (a determination of earning capacity may be made by determining employment potential and probable earnings level based on work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community); Kan. Child Support Guidelines II.F.1.b. (employment potential and probable earnings may be based on the parent's recent work history, occupational skills, and the prevailing job opportunities in the community); KY. REV. STAT. § 403.212(2)(d)(potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community); LA. REV. STAT. § 9:315.11 (imputed income shall be based on, inter alia, employment and earnings history, job skills, educational attainment, record of seeking work, the local job market, the availability of employers willing to hire the parent, and prevailing earnings level in the community); Mich. Child Support Formula Manual 2.01(G)(2) (potential income is based on, inter alia, prior employment experience and history, education level and any special skills or training, availability of opportunities to work in the local geographical area, the prevailing wage rates in the local geographic area, and evidence that the parent is able to earn the imputed income); MINN. STAT. ANN. § 518A.32 (potential income shall be based on the parent's probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community); Mo. Form 14, Comment H (a court or administrative agency shall consider all relevant factors, including the parent's probable earnings based on the parent's work history during the three years, or such time period as may be appropriate, immediately before the beginning of the proceeding and during any other relevant time periods, the parent's occupational qualifications, the parent's employment potential, and the available job opportunities in the community); Admin. R. Mont. 37.62.106 (earning potential shall be based on the parent's recent work and earnings history, occupational, educational, and professional qualifications, existing job opportunities and associated earning levels in the community or the local trade area, record of seeking work, employment barriers, and the availability of employers willing to hire the parent); OHIO REV. CODE § 3119.01(C)(11) (imputed income shall be based on the parent's

earning capacity represents "the income the spouse is reasonably capable of earning based upon the party's age, health, education, marketable skills, employment history, and the availability of employment opportunities."[7] It is important here to note the qualifier "reasonably." A parent or spouse is generally not required to relocate[8] or to switch careers[9] to maximize income. In

prior employment experience, education, availability of employment in the geographic area in which the parent resides, prevailing wage and salary levels in the geographic area in which the parent resides, the parent's special skills and training, and whether there is evidence that the parent has the ability to earn the imputed income); Neb. Sup. Ct. Rule 4-204 (court shall consider work history, education, occupational skills, and job opportunities); OKLA. STAT. tit. 43, § 118B(D)(2) (court should consider, inter alia, the past and present employment of the parent, and the education, training, and ability to work of the parent); Or. Admin. Reg. 137-050-0715 ("Potential income" means the parent's ability to earn based on relevant work history, including hours typically worked by or available to the parent, occupational qualifications, education, physical and mental health, and employment potential in light of prevailing job opportunities and earnings levels in the community); Pa. R. Civ. P. 1910.16–2(d)(4) (party's age, education, training, health, work experience, and earnings history are factors which shall be considered in determining earning capacity); R.I. Fam. Ct. Admin. Order 2017-01 (if the court decides to impute income, the court shall consider employment history and earnings, job skills, educational attainment, employment barriers, record of seeking work, local job market, the availability of employers will to hire the party, and prevailing earnings level in the local community); Tenn. Comp. R. & Regs. 1240–2–4–.03(a)(2) (court shall consider the party's past and present employment, education, and training); UTAH CODE § 78B-12-203(8) (court shall consider employment opportunities, work history, occupational qualifications, educational attainment, employment barriers and background factors, and prevailing earnings and job availability for persons of similar backgrounds in the community); WASH. REV. CODE § 26.19.071(6) (potential income shall be based upon parent's work history, education, health, and age, or any other relevant factors); W. VA. CODE ANN. § 48-6-301(b)(4) (income earning ability is based on, inter alia, educational background, training, employment skills, work experience, and length of absence from the job market); Wis. Admin. Code Dept. Child & Fam. 150.02 (earning capacity is based on, inter alia, the parent's education, training and recent work experience, earnings during previous periods, and the availability of work in or near the parent's community).

7 *In re* Marriage of Simpson, 4 Cal. 4th 225, 234, 14 Cal. Rptr. 2d 411, 416, 841 P.2d 931, 936 (1992).

8 Many of the guidelines, as noted *infra* note 6, look to the prevailing wages and income in the local community. *See* Broga v. Broga, 166 So. 3d 183 (Fla. Dist. Ct. App. 2015) (the prevailing income in the community, not income that could have been earned from a relocation, is to be used in establishing the

amount of imputed income for purposes of calculating child support); Smith v. Smith, 872 So. 2d 397 (Fla. Dist. Ct. App. 2004) (the evidence was insufficient to support a finding that the husband was deliberately underemployed and capable of earning more income; the trial court's imputation of income would thus be reversed, where the only evidence regarding the issue was the husband's speculation that he would "suspect it's possible" in other states to earn more income); Stebbins v. Stebbins, 754 So. 2d 902 (Fla. Dist. Ct. App. 2000) (the prevailing income in the community, not the income one could earn on relocation, is the standard for determining income capacity); *In re* Marriage of Blum, 526 N.W.2d 164 (Iowa Ct. App. 1994) (the fact that there may be more lucrative employment opportunities outside of the community does not obligate a support obligor to move and forgo a parent-child bond); Goss v. Goss, 673 So. 2d 1366 (La. Ct. App. 1996) (the record did not support the assertion that the father could earn more if he relocated, so he was not obliged to do so); Wrenn v. Lewis, 818 A.2d 1005 (Me. 2003) (the trial court erred in imputing income to an unemployed father based on the job opportunities in other regions of the country); Moore v. Tseronis, 664 A.2d 427 (Md. Ct. Spec. App. 1995) (the support obligor was not bound to live in Baltimore to maximize his earnings, but he could live where he chose); Kuchinski v. Kuchinski, 551 N.W.2d 727 (Minn. Ct. App. 1996) (when imputing income to a person who has moved and established new residence, the relevant "community" is where the person lives, not the former residence); *In re* Marriage of Lowe, 860 S.W.2d 813 (Mo. Ct. App. 1993) (when imputing income, income must be based on evidence of the salary levels within a reasonable distance of home); Elrom v. Elrom, 110 A.3d 69 (N.J. Super. Ct. App. Div. 2015) (because the children were young, it was reasonable to limit the wife's employment search to New Jersey, though she had been an attorney in New York City); Ibrahim v. Aziz, 953 A.2d 508 (N.J. Super. Ct. App. Div. 2008) (the trial court was without basis to impute to the Egyptian father income of $680 per week based on New Jersey wages, since the father was not voluntarily underemployed by virtue of his returning to Egypt where he earned $86 per month; the father was only in the United States on a visitor visa, and it would be contrary to public policy to impute income that the father could earn only if he violated his visa restrictions); Quintana v. Eddins, 38 P.3d 203 (N.M. Ct. App. 2002) (so long as a parent is working full time in an area of expertise in a location reasonably accessible to the child, the court may not impute income); Nelson v. Nelson, 547 N.W.2d 741 (N.D. 1996) (the trial court applied North Dakota's rule that the relevant community for purposes of imputing income is within 100-mile radius of home, i.e., "commuting distance"); Marsh v. Marsh, 664 N.E.2d 1353 (Ohio Ct. App. 1995) (the trial court must consider the relevant job market, not what the obligor previously earned overseas); Brown v. Brown, No. CA2008-08-021, 2009 WL 1278430 (Ohio Ct. App. May 11, 2009) (there was no abuse of discretion in the trial court's failing to find that the husband was voluntarily underemployed, where the husband, who was a doctor, had a contract with a hospital with a guaranteed income of $250,000, the husband's income dropped drastically when his privileges were suspended based on a dispute with the hospital, and the husband chose to re-

main in the area, rather than relocate, even though he was unable to find similar employment at four other local hospitals); Fisher v. Fisher, 462 S.E.2d 303 (S.C. Ct. App. 1995) (the court imputed income based on the earnings level in the community where the obligor lived); DuBois v. DuBois, 956 S.W.2d 607 (Tex. Ct. App. 1997) (when the husband moved to a new town, it was incumbent upon the wife to show his earning capacity in the new town, not the old town; it would be a violation of the husband's Fourteenth Amendment liberty interests to force him to remain in a particular town to maximize his earning capacity); Budnick v. Budnick, 595 S.E.2d 50 (Va. Ct. App. 2004) (the trial court was not required to impute $40,000 in annual income to the wife, for purposes of calculating the husband's child support obligation in a divorce action, due to the wife's refusal to accept a job transfer to a different geographical area); Reece v. Reece, 470 S.E.2d 148 (Va. Ct. App. 1996) (when determining earning capacity, the obligor does not have a duty to relocate to maximize earnings); *but see* Leiffer v. Leiffer, No. 1035-96-2, 1997 WL 117952 (Va. Ct. App. Mar. 18, 1997) (in an alimony case, the trial court imputed income to the husband who lost a job with Sears due to downsizing, refused to relocate to Minnesota or New York (which would have paid $102,000), and took a job in Nashville that paid much less); Ready v. Ready, 76 P.3d 836 (Wyo. 2003) (court properly imputed income where the father chose to reside in an economically depressed area where work in his former profession was not available).

Courts seem willing to allow relocation without imputation of income if the purpose of the relocation, and consequent reduction in income due to the job market in the new location, was to foster the parent-child relationship. *See* Kondamuri v. Kondamuri, 852 N.E.2d 939 (Ind. Ct. App. 2006) (where the husband adjusted his schedule to accommodate his child's schedule, and there was no evidence that the husband manipulated his work schedule to avoid paying child support, it was error to impute income to the husband); Abouhalkah v. Sharps, 795 N.E.2d 488 (Ind. Ct. App. 2003) (a father who voluntarily left his employment as a chemist, when his employer relocated out of state, in order to remain close to his children's home, was not voluntarily underemployed); Gordon v. Gordon, 923 A.2d 149 (Md. Ct. Spec. App. 2007) (where the mother took a pay cut to take a job that provided her with some flexibility and that was located within a reasonable proximity to her home and her three-year-old son, the trial court would not impute income); *In re* Marriage of Graham, 87 S.W.3d 893 (Mo. Ct. App. 2002) (a mother who worked as a part-time hairdresser to give herself flexibility to meet her children's schedules should not have additional income imputed); Smith v. McCarthy, 143 A.D.3d 726, 38 N.Y.S.3d 588 (N.Y. App. Div. 2016) (the father, who resided in Pennsylvania, had been laid off from his job in aviation electronics through no fault of his own, had accepted a job in his field in Delaware but had left it shortly afterward because it was several hours away from his home and his former wife had refused to relocate with their four children to that state; the court determined that there would be no imputation of income); Spreeuw v. Barker, 682 S.E.2d 843 (S.C. Ct. App. 2009) (the trial court was not required to impute income to the mother for purposes of determining child support, despite the father's claim that she left

some states, courts will also not impute income from overtime or a second job.[10] A party's earning capacity is a precise dollar amount,[11] to be determined by an evidentiary hearing and sufficient facts on the record.[12]

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her job to take a low-paying job in another town; the motivation for the mother's resignation and move was to be closer to the children when the father's wife moved out of the father's residence, employment was not available in the mother's field in the new community, and the mother continued to search for appropriate employment); *but see* Colorado *ex rel.* Cerda v. Walker, 32 P.3d 628 (Colo. App. 2001) (where the father quit his job in California to move to Colorado to be closer to the child, the trial court properly imputed income to the father).

9 *See* Castaldi v. Castaldi, 968 So.2d 713, 715 (Fla. Dist. Ct. App. 2007) ("best efforts" to find employment do not include retraining and further education); Sandlin v. Sandlin, 972 N.E.2d 371 (Ind. Ct. App. 2012) (the guidelines do not require or encourage parents to make career decisions based strictly upon the size of potential paychecks); Smith v. Smith, 969 S.W.2d 856 (Mo. Ct. App. 1998) (the court should not interfere in the marital relationship to mandate what employment a spouse should pursue); Stewart v. Stewart, 866 S.W.2d 154 (Mo. Ct. App. 1993) (in a concurring/dissenting opinion, one justice raised the "spectre of the 13th amendment" in forcing one's spouse into accepting whatever job is available); Fogel v. Fogel, 168 N.W.2d 275 (Neb. 1969) (no person should be "frozen" into an occupation because of a support obligation); *In re* P.J.H., 25 S.W.3d 402 (Tex. Ct. App. 2000) (when imputing income, the court must keep in mind a parent's right to pursue his or her own happiness); Sellers v. Sellers, 549 N.W.2d 481 (Wis. Ct. App. 1996) (a spouse has, to some extent, the same right to choose a career path that might realize less annual income than other career paths that might be available); *but see* Lopez v. Ajose, No. 4863/01 (N.Y. Sup. Ct. Apr. 5, 2005) (the trial court imputed income to the husband on the basis of being a bar admitted attorney, though he had never registered with the state bar and had quit his law firm shortly after passing the bar exam); *In re* Marriage of Johnson, 370 P.3d 526 (Or. Ct. App. 2016) (where the wife indicated her willingness to undergo retraining and further education, the court could impute income to wife on that basis); Robinson v. Tyson, 461 S.E.2d 397 (S.C. Ct. App. 1995) (the trial court imputed income on a law career the husband *could have* pursued but did not after law school).

10 *E.g.,* Ariz. Child Support Guidelines ¶ 5(A).

11 *E.g.,* Tanzman v. Meurer, 70 A.3d 13 (Conn. 2013) (when a trial court has based an alimony or child support award on a party's earning capacity, the court must determine the specific dollar amount of the party's earning capacity).

12 Beaudoin v. Beaudoin, 24 P.3d 523 (Alaska 2001) (because the father offered evidence that the mother was employable but chose not to work, the father's claim of voluntary underemployment required an evidentiary hearing); Parsons v. Brake, 975 So. 2d 1161 (Fla. Dist. Ct. App. 2008) (the trial court failed to make sufficient findings to support the imputation of income, where

the court did not address occupational qualifications, the prevailing earnings in the community, or physical ability to work); Bimonte v. Martin-Bimonte, 679 So. 2d 18 (Fla. Dist. Ct. App. 1996) (the judgment was rendered improper by the absence of the requisite factual findings to support the imputation of income to the husband pursuant to the child support guidelines); Seilkop v. Seilkop, 575 So. 2d 269 (Fla. Dist. Ct. App. 1991) (it is error to impute income without a sufficient factual finding of what amounts the court is imputing and from what sources or bases the court derives its figures); Pettit v. Pettit, 612 N.E.2d 1090 (Ind. Ct. App. 1993) (the party to whom income is to be imputed is entitled to an evidentiary hearing); Bononno v. Sherman, No. A-2509-02T5 (N.J. Super. Ct. App. Div., Oct. 18, 2002) (the trial judge erred in imputing income to the unemployed homemaker defendant and ordering her to pay a portion of her daughter's college expenses without holding a plenary hearing and making sufficient factual findings); *In re* Rossino, 899 A.2d 233 (N.H. 2006) (the court was required to hold a hearing to determine whether the former husband was physically incapacitated before the court could consider whether he was voluntarily underemployed for purposes of imputing income to him); Moffre v. Moffre, 29 A.D.3d 1149, 815 N.Y.S.2d 315 (N.Y. App. Div. 2006) (the court's imputation of income to the mother in the amount of $40,000 per year as the amount she could earn if she were employed as a secretary was speculative and unsupported by the record); Spilovoy v. Spilovoy, 488 N.W.2d 873 (N.D. 1992) (it was error to impute income to a stay-at-home mom where there was no evidence or specific findings as to what her income could be); Lewis v. Lewis, 734 S.E.2d 322 (S.C. Ct. App. 2012) (the family court abused its discretion in imputing income to an unemployed husband in the amount of $34,800 per year for the purposes of establishing his child support obligation in a divorce proceeding; the court made no finding as to whether the husband was at fault in losing his job, whether he was voluntarily unemployed, or whether he put forth his best efforts to gain employment equal to his capabilities; the court failed to address the necessary factors delineated by the child support guidelines concerning recent work history, occupational qualifications, prevailing job opportunities and earning levels in the community, and there was nothing in the record to suggest how the court arrived at the annual income figure); Bell v. Bell, 312 P.3d 951 (Utah Ct. App. 2013) (the trial court's findings were inadequate to support its order imputing $1,260 per month to the wife as income, for child support purposes in a divorce proceeding; the evidence showed that the wife could teach music in her home and earn $65 per month, per student; the evidence did not establish the length of lessons or the number of lessons wife would need to provide to earn $65 per month, per student; and the wife was the primary caregiver for the parties' severely disabled child); Mir v. Mir, 571 S.E.2d 299 (Va. Ct. App. 2002) (the trial court erred in imputing income to the father where the record was devoid of any evidentiary basis for the court's finding that the husband could earn $5,600 per month; the wife never requested an imputation of income, there was no evidence established that he ever made that much money and even if some imputation were appropriate, the wife failed in her burden to show the available jobs that would allow the amount awarded);

II. The Earning Capacity Factors

As noted above,[13] earning capacity or potential is generally determined the following factors:

* the party's employment and earnings history;[14]

Brooks v. Rogers, 445 S.E.2d 725 (Va. Ct. App. 1994) (the wife failed to present evidence that the husband could have earned a greater amount or engaged in conduct to his economic disadvantage, and therefore income would not be imputed).

13 *See supra* note 6.

14 *E.g.,* K.T. v. F.P.T., 716 So. 2d 1235 (Ala. Civ. App. 1998) (trial court did not err by imputing to an engineer based on his earnings history); *In re* Marriage of Jaeger, 883 P.2d 577 (Colo. Ct. App. 1994) (earning capacity is based on the average income of three years prior to a drop in earnings); *In re* Marriage of Elmer, 936 P.2d 617 (Colo. App. 1997) (the father's entire employment history, including his stints as a mechanic, was relevant in determining his earning capacity); Scariti v. Sabillon, 16 So. 3d 144 (Fla. Dist. Ct. App. 2009) (the court's imputed income to the mother was consistent with what she testified she had earned in the past); Knight v. Knight, 746 So. 2d 1117 (Fla. Dist. Ct. App. 1999) (the trial court imputed salary of $250,000 to the husband, based on his salary in his medical practice before his bankruptcy); Abdella v. Abdella, 693 So. 2d 637 (Fla. Dist. Ct. App. 1997) (earning capacity is to be determined by the salary of the last job that the party left voluntarily, not the last job from which the party was terminated); Lascaibar v. Lascaibar, 658 So. 2d 170 (Fla. Dist. Ct. App. 1995) (imputing yearly income of $50,000 to the father was error, where the evidence of his work history showed he was capable of earning much more than he was currently earnng); Neal v. Meek, 591 So. 2d 1044 (Fla. Dist. Ct. App. 1991) (earning capacity should be determined by work history and prior qualifications*);* Salser v. Salser*, 75* N.E.3d 553 (Ind. Ct. App. 2017) (the trial court had no basis to impute to the mother twice her historical earnings); Carmichael v. Siegel, 754 N.E.2d 619 (Ind. Ct. App. 2001) (the trial court's lack of consideration of the mother's work history could not support imputation of income); Gonzales v. Gonzales, 474 N.W.2d 581 (Iowa 1991) (in assessing earning capacity, a court must look not to what a person might have done or could have done with his or her life, but what that person actually has done); Rutland v. Rutland, 121 So. 3d 776 (La. Ct. App. 2013) (the wages earned prior to voluntary underemployment is the best estimate of earning potential for purposes of calculating child support); Osborn v. Osborn, 724 So. 2d 1121 (Miss. Ct. App. 1998) (the husband's earnings history in the construction field, rather than his current unemployment income, would be considered, where the husband had regularly experienced brief periods of unemployment); Arthur v. Arthur, 148 A.D.3d 1254, 48 N.Y.S.3d 813 (N.Y. App. Div. 2017) (an annual imputed income of $109,512 for the husband was proper, where the court considered the husband's 40–year employment history, his master's degree in finance, and his recent salaries in the public sector); Howland v. Howland, 900 A.2d 922 (Pa. Super. Ct. 2006) (imputation to the mother of earnings of $15,837.00 was too

* the party's educational history;[15]

low, given the mother's educational background and employment history); Atkinson v. Atkinson, 616 A.2d 22 (Pa. Super. Ct. 1992) (earning capacity must be based on the party's work record and employability); *In re* Marriage of Betram, 981 S.W.2d 820 (Tex. Civ. App. 1998) (the salary from the last job, rather than the commissions from a new job, were indicative of earning capacity); Hill v. Hill, 869 P.2d 963 (Utah Ct. App. 1994) (the trial court should impute income based on earnings history); Niemiec v. Virginia Dep't of Soc. Serv. *ex rel.* Niemiec, 499 S.E.2d 576 (Va. Ct. App. 1998); Opitz v. Opitz, 173 P.3d 405 (Wyo. 2007) (income could be imputed to the husband based on his prior income when he worked as an automobile painter, where the husband was well-qualified to be an automobile painter by his prior experience, job history, and training, and the husband never suggested that he quit this type of job because his body could not do it).

15 *E.g.,* Werblood v. Birnbach, 678 A.2d 1 (Conn. App. Ct. 1996) (the husband's earning capacity was determined by fact that both the husband and the wife had doctoral degrees, the husband had more years of postdoctoral work, yet the husband made less than others in his profession with comparable levels of experience); Hinton v. Smith, 725 So. 2d 1154 (Fla. Dist. Ct. App. 1998) (where the wife was supposed to complete a two-year course to earn an accounting decree, but she failed to finish, the court held it was appropriate to impute income, but only at what she could earn with her present credentials, not what she could earn if she had the degree; thus, the expert testimony about prevailing earnings for persons with a degree she did not have was not probative); DeBoer v. DeBoer, 669 N.E.2d 415 (Ind. Ct. App. 1996) (the court could impute income to the wife at the minimum wage level, where the wife had a high school diploma, work experience, good health, and a history of volunteering at a children's school; this case contains an excellent discussion of why it is necessary to impute income); Alexander v. Alexander, 893 N.E.2d 1285 (Mass. App. Ct. 2008) (the trial judge did not abuse his discretion in imputing an annual income of $120,000 to the wife for the purposes of child support where the judge explicitly found that the wife was capable of resuming her prior career with reasonable effort, given her "distinguished education" and prior work experience); Berger v. Berger, 747 N.W.2d 336 (Mich. Ct. App. 2008) (the trial court abused its discretion by failing to impute true earning capacity of $50,000 to the wife, where the wife testified that she could earn $50,000 as a nurse or assistant professor, and she had completed her education and was highly employable); Voinescu v. Kinkade, 270 S.W.3d 482 (Mo. Ct. App. 2008) (the trial court's failure to consider that the wife was capable of full-time employment and of contributing to the support of a child was an abuse of discretion; the evidence established that the wife was qualified to work as an internist and there were internist positions available in and around her local community, and, despite the fact that there were no positions available in her specialty as a nephrologist, the wife expressed her intention to find suitable employment in the area if the court denied her relocation proposal); Rivers v. Rivers, 21 S.W.3d 117 (Mo. Ct. App. 2000) (the husband's earning potential should have

* the party's occupational qualifications, skills, and training;[16]

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been based on his law degree, even though he was a nonpracticing consultant); Pfister v. Pfister, 146 A.D.3d 1135, 47 N.Y.S.3d 140 (N.Y. App. Div. 2017) (the wife had two master's degrees and was a certified school counselor; the trial court emphasized her advanced degrees and rejected her argument that she should not be required to work full time); Decker v. Decker, 148 A.D.3d 1272, 48 N.Y.S.3d 827 (N.Y. App. Div. 2017) (the trial court did not abuse its discretion in imputing $125,000 of annual income to the father, after finding that he possessed a master's degree in civil and environmental engineering and that his past employment history demonstrated that he could earn well in excess of the imputed amount); K. v. B., 13 A.D.3d 12, 784 N.Y.S.2d 76 (N.Y. App. Div. 2004) (the trial court properly imputed annual income of $60,000 to the husband, where the husband possessed both an architect's and real estate broker's license and he had extensive training and experience in both fields); McCauley v. McCauley, 659 N.Y.S.2d 722 (N.Y. Sup. Ct. 1997) (the trial court's imputed income to the ex-husband based on the wife's earnings was appropriate, because both had the same professional degrees and relative experience); Keller v. Keller, No. 04CA0084, 2005 WL 1523860 (Ohio Ct. App. June 29, 2005) (where the father had a four-year liberal arts degree and military experience as a helicopter pilot, but he made $27,000 per year in the field of photography, the trial court properly imputed income); *but see* Petersen v. Petersen, No. 02COA059, 2003 WL 21805614 (Ohio Ct. App. Aug. 5, 2003) (the court's use of a median income figure for elementary school teachers, rather than an entry-level salary figure, was an abuse of discretion when determining the mother's imputed income where the mother had an undergraduate degree in elementary education but she had never worked as a teacher); *In re* Marriage of Peterson, 906 P.2d 1009 (Wash. Ct. App. 1995) (though the husband held a law degree, he had never practiced law but was a bail bondsman; it was error to impute income as though he were a practicing attorney).

16 *E.g.,* Gripshover v. Gripshover, 246 S.W.3d 460 (Ky. 2008) (imputation of income to the wife of $18,000 per year, which was nearly twice what the wife had earned during any of her prior four years of work, was an abuse of discretion; the wife was over 50 years old and had not worked outside the home except as a part-time housecleaner for nearly 20 years, she lived in a community that did not demand housecleaning services, she had a tenth grade education, and she had health problems); Bullard v. Briem, 969 S.W.2d 880 (Mo. Ct. App. 1998) (imputation of income at minimum wage not sufficient, given the party's past earnings, technical education, and skills); Walker v. Walker, 936 S.W.2d 244 (Mo. Ct. App. 1996) (evidence that the husband could "weld a little" and that there were welding jobs available paying $7.00 per hour was not sufficient evidence to impute earnings where there was no evidence that the husband possessed the necessary qualifications for a job); Schroeder v. Schroeder, 924 S.W.2d 22 (Mo. Ct. App. 1996) (earning capacity is what he or she could earn by the use of his or her best efforts to gain employment suitable to his or her capabilities); Wagner v. Wagner, 898 S.W.2d 649 (Mo. Ct. App. 1995) (the trial

* the prevailing job opportunities and earning levels in the community, and the availability of employers who will to hire this party.[17]

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court may impute income to a spouse according to what the spouse could earn by the use of best efforts suitable to his or her capabilities); Elrom v. Elrom, 110 A.3d 69, 77 (N.J. Super. Ct. App. Div. 2015) (the trial court found that the father "attempted to portray himself as lacking the skills and education to sustain a salary in the $250,000.00 range, when all the evidence is to the contrary"); Torgerson v. Torgerson, 669 N.W.2d 98 (N.D. 2003) (the imputation of the salary of an experienced farm manager was not proper for the former husband, a self-employed farmer, absent evidence that the husband possessed the necessary qualifications of an experienced farm manager or was earning significantly less than the prevailing amounts earned in the community by similarly situated persons); Novinger v. Smith, 880 A.2d 1255 (Pa. Super. Ct. 2005) (the trial court abused its discretion in holding the father to an earning capacity of $40,000 based on his job as a welder that he had held for only one year, more than four years ago, for which he was unqualified and had no formal training); Tenery v. Tenery, 955 S.W.2d 337 (Tex. App. 1997) (although the obligor had real net income of $196 per month, the evidence showed he was a skilled mechanic with an earning capacity of $4,000 per month); Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993) (where a party has highly unique and specialized skills, the trial court should first consider earnings in the profession in general, and then make adjustments for the party's unique skills).

17 *E.g.,* Berryhill v. Reeves, 705 So. 2d 505 (Ala. Civ. App. 1997) (the imputation of income of $9.00 per hour was sustained, where the evidence showed that the husband had been offered a job at that rate); State *ex rel.* Dunnavant v. Dunnavant, 676 So. 2d 1329 (Ala. Civ. App. 1996) (it was error to impute income to the husband where there was testimony that there was no job available); *In re* Marriage of Eggers, 131 Cal. App. 4th 695, 32 Cal. Rptr. 3d 292 (Cal. Ct. App. 2005) (a parent's earning capacity supposes an opportunity to work, which means an employer who is willing to hire); Rabbath v. Farid, 4 So. 3d 778 (Fla. Dist. Ct. App. 2009) (no evidence was presented regarding current, prevailing earnings level and any potential source of income in the husband's current community; thus, imputing income would be improper); Harbus v. Harbus, 874 So. 2d 1230 (Fla. Dist. Ct. App. 2004) (the evidence did not support the trial court's decision to impute income of $48,000 per year to the mother, where the only local job the mother ever had paid $33,000 per year, and there was no evidence of her occupational qualifications or earnings level in the prevailing job market in the community); Owen v. Owen, 867 So. 2d 1222 (Fla. Dist. Ct. App. 2004) (the imputation of income to the mother was not warranted when the only evidence presented by the husband addressed the national median salary for electrical engineers, and there was no evidence as to the availability of jobs, or salary payable for jobs, in the area in which the wife resided, or in any particular community); Tarnawski v. Tarnawski, 851 So. 2d 239 (Fla. Dist. Ct. App. 2003) (the trial court should not have imputed income to the wife of $20 per hour for a 40-hour work week, where was no evidence of

A party can him or herself present evidence as to employment and earnings history and educational history and attainment. A party usually cannot, however, present sufficient evidence as to his or her occupational qualifications, skills, and training in a meaningful way, i.e., a way that allows a court to determine that this party is qualified for a particular job. Further, a party usually cannot present evidence as to the prevailing job opportunities and earnings levels in the community, and that there is a particular employer that will hire this party for a particular job at a particular salary[18] (unless of course, the party has a job offer). All this is necessary for the court to make sufficient

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the prevailing wages in the community for work or the availability of suitable positions); Miller v. Miller, 72 N.E.3d 952 (Ind. Ct. App. 2017) (the trial court was required to consider the prevailing job opportunities and earning levels in the community, in addition to the husband's work history and occupational qualifications, when determining the amount of income to impute to the husband for child support purposes); *In re* Marriage of Schultz, 672 N.W.2d 334 (Iowa Ct. App. 2003) (the trial court appropriately declined to impute the mother's past income to the mother, where there were little or no jobs in her area of expertise); Rathbun v. Rathbun, 889 N.W.2d 855 (N.D. 2017) (the trial court was required to take into consideration the father's employment opportunities when deciding his motion to modify his child support obligation filed after he lost his consulting job in the oil fields, the oil industry had changed dramatically in the state, and it was unrealistic to conclude that job opportunities with similar earnings to what the father was making were available at the time of the hearing); Kjos v. Brandenburger, 552 N.W.2d 63 (N.D. 1996) (the evidence was insufficient to impute income where there was no evidence of what work was available or the amounts earned in the community by persons of similar qualifications); State v. Cunningham, 200 P.3d 581 (Or. Ct. App. 2009) (the trial court erred in imputing income where there was no evidence in the record relating to the prevailing job opportunities and earnings levels in the community for the type of work that the father was qualified to do); Broadhead v. Broadhead, 655 S.E.2d 748 (Va. Ct. App. 2008) (the court must consider all of the relevant factors, particularly whether the father's efforts to find a position were reasonable and whether other positions in the Richmond area were available to the father, utilizing his education and experience, at a pay level comparable to his former positions with Capital One and CitiFinancial).

18 *E.g., In re* Marriage of Bardzik, 165 Cal. App. 4th 1291, 83 Cal. Rptr. 3d 72 (Cal. Ct. App. 2008) (the father failed to present evidence, such as the mother's resume, want ads for persons with the credentials of the mother, opinion testimony that a person with the mother's credentials could readily secure a job with a given employer, or pay scales correlating the mother's ability and opportunities with the income to be imputed, to establish the mother's ability and opportunity to earn income).

findings of fact.[19] This is where the vocational expert comes in: to give specific testimony that there is a specific position or positions that this specific person is qualified for, with his or her specific work history and educational attainments, for a specific salary or wage, and has a specific likelihood of being hired.[20]

III. Using the Vocational Expert

A. *Who Is a Vocational Expert*

1. Persons who advertise themselves as such;[21]
2. Recruiters or headhunters;
3. Operators of temporary employment agencies;
4. College placement advisors;

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19 *E.g.,* CAL. FAM. CODE § 4331 (the court may, on the motion of a party, appoint a vocational expert); St. Cyr v. St. Cyr, 137 A.3d 332 (Md. Ct. Spec. App. 2016) (if necessary, the court should exercise its power under Md. Rule 5–706 to appoint a vocational rehabilitation expert); Harte v. Hand, 81 A.3d 667 (N.J. Super. Ct. App. Div. 2014) (the father's expert's vocational economic report was inadmissible pursuant to the "net opinion rule" in a child support dispute, where in preparing the report, the expert relied on the father's expressed desire to enter the short-haul trucking field and conducted no independent evaluation of his true earning capacity).

20 *See generally* MARIAN F. DOBBS, DETERMINING CHILD & SPOUSAL SUPPORT §§ 2:53, 2:55 (2017 ed.); Edward M. Mazze & Candace E. Mazze, *Putting a Vocational Expert to Work in a Divorce Case*, 36 Fam. Advoc. 26, 26–30 (Winter 2014) (describing the expertise of vocational experts and the process by which they determine the earning capacity of the parties) (this excellent article is the basis for much of Section III(B), infra); Roberta G. Stanley & Kenneth A. Gordon, *Working with the Vocational Expert*, 29 FAM. ADVOC. 14 (Spring 2007); Ngan Tran, *Use of Vocational Experts in Determining Alimony Awards*, 20 J. CONTEMP. LEGAL ISSUES 237 (2011-2012); Brett R. Turner, *Earning Capacity and Spousal Support: The Uses and Abuses of Vocational Evidence in Divorce Cases*, 14 DIVORCE LITIG. 213 (Dec. 2002) (noting that "determining income capacity is a field which particularly requires experience and personal contacts - factors which trial judges are not equipped to develop").

21 Certifications in the area include Certified Rehabilitation Counselor (CRE) and Certified Vocational Evaluator (CVE). Referral organizations include the American Board of Vocational Experts, Technical Advisory Service for Attorneys, Best Lawyers Preferred Expert Database, and online directories of expert witnesses from bar associations.

5. Anyone else who knows the market and can testify as to necessary facts (although some kind of board certification is preferable).[22]

A vocational expert is obviously not someone who is unable to testify about the current job market. For example, in *In re* Marriage of Cecilia and David W.,[23] the issue was the continued support for an adult disabled child. The trial court qualified the child's psychologist, Charles Hogan, Ph.D., as an expert witness on the adult child's health issues and how they impacted him day-to-day. The mother, father, and child also testified. Hogan's testimony covered the child's conditions, education, daily life, and potential capacity for work. The testimony regarding whether the child was unable to find work and be self-supporting, "the critical issue here," was sparse. The court noted that Hogan was not a vocational expert and had not researched whether the child could get a job in San Diego, the appropriate geographic area. The child had simply never been assessed as to whether he could get a job, and without that testimony, the court was unable to make the proper determinations as to the child's employability.

B. *What Qualifications Should the Vocational Expert Possess*

1. Knowledge of the relevant job market;[24]

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22 *E.g.,* CAL. CIV. CODE § 4800(f) (for purposes of this section, "vocational training consultant" means an individual with sufficient knowledge, skill, experience, training, or education relating to interviewing, the testing and analysis of work skills, the planning of courses of training and study, the formulation of career goals, and the assessment of work market to qualify as an expert in vocational training under section 270 of the Evidence Code).

23 241 Cal. App. 4th 1277, 194 Cal. Rptr. 3d 559 (Cal. Ct. App. 2015).

24 Castaldi v. Castaldi, 968 So. 2d 718, 715 (Fla. Dist. Ct. App. 2007) (the trial court did not have to accept the vocational expert's report where it was insufficient regarding local pay rates and did not identify jobs the wife could obtain without further training); A.S. v. D.S., 165 So. 3d 247 (La. Ct. App. 2015) (the trial court's refusal to accept the testimony of a father's expert witness, a vocational rehabilitation counselor who was allegedly an expert in the field of wage surveys, in the mother's petition to set child support against the father, was not an abuse of discretion; while the witness testified that he was qualified by numerous state and federal courts, he failed to provide any details as to which courts had accepted his qualifications and when this acceptance occurred, the witness testified that he had used wage surveys in connection with his work but was unfamiliar with the Louisiana Occupational Employment Wage Survey,

2. Knowledge of this particular party and his or her qualifications and education;[25]
3. A willingness to consider the facts without dogma;[26]

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and the trial judge noted that a vocational rehabilitation counselor was not qualified to discredit or explain why the Survey should not be used in the case, or to testify about how economic conditions impacted the father's ability to find work); Hoffman v. Hoffman, 423 S.W.3d 869 (Mo. Ct. App. 2014) (the expert researched the availability and salary ranges of sales jobs in the St. Louis and Midwest regions, testifying that there were two local job postings for sales engineers in the packaging industry and Monster.com listed around 700 sales jobs in the St. Louis metropolitan area).

[25] *E.g.*, Bryant v. Bryant, 102 A.3d 883 (Md. Ct. Spec. App. 2014) (the trial court was free not to credit the husband's vocational expert's testimony that the wife could obtain full time employment for $104,000 per year, when he never interviewed the wife and did not limit his research to the wife's specific area of expertise); Ulin v. Polansky, 983 N.E.2d 714 (Mass. App. Ct. 2013) (the wife's expert's testimony was found to be "unreliable" because his opinions were not tied to the wife's specific circumstances or geographic location); Poling v. Poling, 2013-Ohio-5141, 2013 WL 6157245 (Ohio Ct. App. Nov. 21, 2013) (unreported) (the vocational expert's opinion was based on faulty assumptions regarding the appellee's current employment and her level of education; more significantly, the expert did not believe that the appellee suffered from any physical limitations or medical conditions that could limit her ability to sustain the type of employment for which he believes she is qualified, but the trial court found that, even if appellee could overcome her 13–year absence from the workforce, her lack of a bachelor's degree in nursing, and her continuing parental responsibilities, the appellee's current health issues would present a significant obstacle to such employment); Vanderzon v. Vanderzon, 402 P.3d 219 (Utah Ct. App. 2017) (the vocational expert's report addressed the wife's "potential and probable earnings" based on employment possibilities the vocational expert identified as specifically within the wife's capabilities); Seng Xiong v. Vang, 904 N.W.2d 814 (Wis. Ct. App. 2017) (tying wife's lack of fluency in English to her probable inability to obtain work other than in a specialty Asian market, the vocational expert opined that, given the wife's limited English language skills, it was "highly unlikely she would be able to perform similar work in the general labor market," and concluded that the wife's future employment opportunities were limited to "unskilled manual labor").

[26] As noted in Mazze & Mazze, *supra* note 20, at 28 the opinions expressed by the expert should be unbiased, not the opinion of the attorney or party, and not in conflict with the expert's previous testimony or any publication or presentation of the expert. *See also* Harte v. Hand, 81 A.3d 667 (N.J. Super. Ct. App. Div. 2014) (the father's expert vocational economic report was inadmissible pursuant to the "net opinion rule" in a child support dispute, where in preparing the report, the expert relied on father's expressed desire to enter the short-haul trucking field and conducted no independent evaluation of his true earning capacity).

4. An ability to work with the client;
5. An ability to communicate the methodology, findings, opinions, and conclusions simply and persuasively.[27]

The expert testimony must meet the general standard for admissibility established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Kumho Tire Co., Ltd. v. Carmichael*.[28] If these standards have not been met, the court may disregard the expert testimony.[29]

The vocational expert obtains this requisite knowledge of the individual by a thorough interview of the individual to be assessed, focusing on the statutory factors, i.e., education, job history, talents, and skills.[30] The vocational expert also may administer an aptitude test, the most common of which are the Strong Interest Inventory, Career Interest Profiler, and General Aptitude Test Battery.

The vocational expert should then preliminarily match up the aptitudes with specific career options. Career descriptions with their necessary qualifications can be found the *The Dictionary of Occupational Titles*, *The Occupational Outlook Hand-*

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27 If there are any weaknesses or limitations in the methodology used, the vocational expert should make this clear as well.

28 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). The four factors to consider when evaluating expert testimony are: (1) testability: whether the theory can be tested; (2) peer review: whether the theory or technique has been subjected to peer review and publication; (3) error rate: whether the technique has a known of potential error rate; and (4) general acceptance: whether the scientific community has accepted the theory. *Id.*at 595.

In *Kumho Tire Co., Ltd. et al. v. Carmichael et al.*, 526 U.S. 137 (1999), the Supreme Court expanded *Daubert* nonscientific testimony in cases where the methodology used did not meet the *Daubert* standard, but the expert's opinion had a reliable basis in the knowledge and experience of the expert's discipline. *See generally* STEVEN N. PESKIND, THE FAMILY LAW TRIAL EVIDENCE HANDBOOK ch. 13 (ABA 2013).

29 Gillette v. Gillette, 226 So. 3d 958, 960 (Fla. Dist Ct. App. 2017) (the former wife presented a vocational expert who testified that the former husband could be employed in various fields and earn significantly more than he presently earned; the court, however, found the expert had "little credibility" and noted various deficiencies in the testimony and the methodology presented by the expert).

30 *E.g.,* Broemer v. Broemer, 109 So. 3d 284 (Fla. Dist Ct. App. 2013) (the former wife underwent a personal interview and vocational evaluation, including a physical examination and aptitude tests).

book, *Career Guides to Industries*, and *Occupational Projections and Training Data*, published by the Bureau of Labor Statistics of the U.S. Department of Labor.

The vocational expert must then match up the appropriate possible job with *specific* jobs that are available in the appropriate geographical market, based on independent research.[31] From this, the vocational expert can then opine on employability, and ultimately what the individual's "earning capacity" may be.

C. *Examining a Vocational Expert*

As with other experts, the testimony of the vocational expert should start with his or her qualifications, the requirements to complete his or her academic degree, experience in determining earning capacity and employability, treatises and publications relied on in forming an opinion, the accuracy and timeliness of any survey used, and industry and professional standards.[32]

The vocational expert should then move on to address the methodology the expert used in the specific case, outlined above. The testimony should be clear, simple, and persuasive. Assuming the expert is qualified, cross-examination will try to undermine the methodology used as to each of the required statutory findings.

Bad testimony that can be easily undermined may be illustrated by the following fallacies (or false syllogisms).

Fallacy 1 (Overgeneralization; Affirming the Consequent): (1) all successful family law attorneys have J.D.s; (2) this husband

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31 Middleton v. Middleton, 79 So. 3d 836 (Fla. Dist. Ct. App. 2012) (the expert identified current open job positions with several companies and opined the wife would be employable within the labor market; the expert spoke to prospective employers, outlining the wife's last date of work, her education, her work history, and her physical restrictions, to reach her conclusions); Heller v. Heller, 960 N.E.2d 1055 (Ohio Ct. App. 2011) (the vocational expert noted specific employment possibilities in order to opine as to the wife's possible salary); Mukerji v. Mukerji, 89 Va. Cir. 506 (Fairfax Cty. 2013) (the vocational expert refuted the notion that there were no jobs available for the husband by naming specific companies that were looking for individuals with the husband's experience and skills); *cf.* Morgan v. Morgan, 99 A.3d 554 (Pa. Super. Ct. 2014) (the expert could not testify as to what the wife would earn as a salary after a few years of being in a new job; the expert could only testify as to what the wife could earn when she was hired).

32 Mazze & Mazze, *supra* note 20, at 29.

has a J.D.; (3) therefore, this husband can be a successful family law attorney.

The problem here is that the expert is not looking at *all* the qualifications for a successful family law attorney. To be a successful family law attorney does not require *only* a J.D. It requires education and experience, an ability to communicate with clients, and a host of other factors.

Fallacy 2 (Hasty Generalization): (1) There are ten open positions for apprentice bakers; (2) those hired as apprentice bakers have high school degrees; (3) the husband in this case has a high school degree; (4) therefore, this husband can obtain a job as an apprentice baker.

The problem here is that the expert failed to consider all the qualifications for apprentice baker, and the expert also failed to consider the competition in the job market and that what appears to be a qualification may not be. It is possible that having a high school education is not per se a requirement for apprentice baker, but in the relevant job market, there were twenty applicants for apprentice baker. The employer thus decided to take the applicants who not only met the minimum qualifications, but also met unstated qualifications that would not otherwise be necessary if the job market were not as tight.

This demonstrates the necessity of not only knowing the qualifications, but also knowing the job market. The expert should also have examined who did *not* get hired as an apprentice baker. If all those who were *not* hired had the same qualifications as the husband in this case, that would be an indication that minimum requirements are not enough.

Fallacy 3 (Incomplete Comparison): (1) There is a want ad for a teaching position in the local newspaper; (2) the ad states that a college degree is required; (3) the wife in this case has a college degree; (3) therefore, this wife can get this teaching position.

The problem here is that want ads are notoriously unreliable as a predictor of being hired.[33] Want ads only scratch the surface

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[33] Want ads and the Bureau of Labor Statistics reports are usually not sufficient, because they do not predict who will be hired. Iglesias v. Iglesias, 711 So. 2d 1316 (Fla. Dist. Ct. App. 1998) (newspaper want ads are not sufficient to

of requirements for a job, and usually do not state *all* the requirements for the job. Again, it would be wise for the expert to look at who wasn't hired, and who was last hired for a similar job to discover what the unstated requirements actually are.

Fallacy 4 (Historian's Fallacy): (1) Hospitals are desperate for nurses; (2) this wife is a nurse; (3) therefore, this wife can work as a nurse.

The problem here is that the expert overlooked the actual job requirements that the wife may not be able to fulfill. For example, does the job require long shifts, night work, heavy lifting? The expert also overlooked factors pertaining to the wife that the courts usually consider, such as the wife's health, her age, or whether she has young children and thus can't work the required shifts.[34]

Fallacy 5 (Incomplete Comparison): (1) Refresher courses in nursing take one year; (2) the wife is a former nurse and can handle the working conditions of the job; (3) therefore, the wife can work as a nurse again.

The problem here is that while the expert opined that the wife could meet the requirements of the working conditions of a job as a nurse, the expert did not explain the requirements for the retraining. Is the retraining program available in the wife's community? What is the cost of the training? What are the ad-

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show earning capacity, since they do not show this person would be hired or what the terms of employment were); Khaja v. Husna, 777 S.E.2d 781 (N.C. Ct. App. 2015) (the trial court erred by taking judicial notice of the Bureau of Labor statistics and relying so heavily upon these statistics for its finding of fact regarding the wife's earning capacity when there was no other evidence); *but see In re* Marriage of LaBass, 56 Cal. App. 4th 1331, 66 Cal. Rptr. 2d 393 (Cal. Ct. App. 1997) (in determining earning capacity, newspaper want ads were admissible to show the range of salaries available); Reller v. Argenziano, 360 P.3d 768 (Utah Ct. App. 2015) (the court did not err in using Bureau of Labor statistics when imputing income).

34 *See, e.g.,* Vanderzon v. Vanderzon, 402 P.3d 219 (Utah Ct. App. 2017) (while the wife complained that the expert did not address her barriers to employment, the expert report listed the wife's perceived barriers, including her mandatory volunteer commitments at her children's schools, child care needs, the jobs she could qualify for not offering her enough money, re-entering the work force after a lengthy employment gap, the added stress of being a working mother, and being able to pursue more education).

mission requirements? If an expert is going to talk about retraining, he or she must talk about that knowledgeably as well.[35]

Fallacy 6: (1) There are positions available in the area for computer sales people; (2) a college degree is required; (3) most applicants with a college degree obtain the job; (4) this wife has a college degree; (5) therefore, this wife will be hired.

The problem here is similar to the problem in Fallacies 1 and 2 above. The expert did not delve into all the qualifications for the job. But most importantly, the expert failed to discuss the wife's overall qualifications for a job that is specialized - in this case, computer sales expertise. A college degree is likely the minimum requirement. For a salesperson, the wife needs to be a "people person," i.e., outgoing. Is the wife introverted or depressed? Also, does the wife have any background in computers, the specific product? The expert needs to tie this job to this party.

Fallacy 7: (1) There is a bank teller position open; (2) a college degree is required; (3) this spouse has a college degree, is trustworthy, and likes finance; (4) one in ten applicants is hired; (5) therefore, this spouse has a 10% change of being hired.

The problem here is that the expert hasn't explained who is hired and who isn't hired, i.e., who the ten percent are and who the ninety percent are. With more information, it is possible that this spouse has a much greater than 10% change of being hired, or has a zero percent change of being hired.

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35 Berger v. Berger, 201 So.3d 819 (Fla. Dist. Ct. App. 2016) (the expert testified that the wife "*could* earn a starting teachers [sic] salary of $39,000.00 with benefits in a period of approximately two years"; the record showed, however, that the wife never taught school, nor did she have teaching credentials at the time of trial, and she would need extensive training to earn $39,000, which the wife was unlikely to achieve given her age at the time of trial). *Cf.* Brennan v. Brennan, 184 So.3d 583 (Fla. Dist. Ct. App. 2016) (the husband's vocational expert opined that there were numerous open positions in speech pathology for which the former wife was qualified despite her long absence from the work force; the expert also testified that the majority of the entry-level positions for which the former wife would be qualified pay in the range of $47,000 to $50,000 per year; although the court imputed an amount of income that is higher than the former wife had ever historically earned, appellate court declined "to disturb the trial court's decision to impute an entry-level wage to the former wife in a field in which she is qualified and *can obtain immediate employment*").

Conclusion

The increasing sophistication of parties to divorce actions has led to innovative ways parties disguise assets and income. To maximize assets, savvy litigators understand the principles of waste and dissipation. To maximize (or minimize) income, litigators should also understand the principles of earning capacity and how best to use a vocational expert in the preparation of an income case.