In re Marriage of Bardzik (9/15/08 - 165 Cal.App.4th 1291)

This case found that the moving party has the burden of showing ability and opportunity to earn imputed income, or lack thereof. It also set forth guidelines for imputation of income.

At disso, husband and wife earned similar salaries as deputy sheriffs, and custody of two children was 50/50. As a result child support was set at zero. Wife received $1,000 per month from State for special needs child.

Wife remarried and had two children from the new relationship. She retired at age 42 (after 20 years of service) and her income dropped from $7,325 to $2,577 per month. Husband filed OSC to modify custody and guideline child support. Wife filed a similar motion seeking the same custody change to Husband. Husband also sought and received the $1,000 per month in State aid.

At trial, husband presented no evidence as to wife's post-retirement ability or her ability to return to her old job. Trial court refused to impute income without evidence and made a guideline order that required husband to pay wife $388 per month child support. Husband appealed and the Court of Appeal affirmed, holding that the moving party in an imputation of income case has the burden of proof on the issues of ability and opportunity to work.

The Court traced the evolution of the imputation of income rules back to 1869, and noted that the 3-prong test of ability, willingness and opportunity (*In re Marriage of Regnery,* 1989*)* became a 2-prong test of simply ability and opportunity (*In re Marriage of Destein,* 2001).

The Court noted the unusual circumstances of the zero child support order which allowed wife to retire with impunity because it forced husband to be the moving party. Had there been a child support order in effect, wife would have been the moving party and the burden would have been on her to show her inability to earn what she was earning before she retired.

The opinion discussed the types of evidence that are sufficient to meet the burden of proof in imputation cases, including evidence of ability (e.g. resume, education, past job performance, past earning, expert testimony, vocational testimony) and opportunity (e.g. want ads, employment agencies, etc.)

The Court stressed that it is not the moving party's burden to prove that the other party can actually get a job, only that she has the ability and that work is available, offering that "This rule is grounded in the common sense proposition that you can lead someone to a want ad but you can't make them apply for the job."

The Court added that "Readers need only use a little imagination to think of all the ways that a parent with both ability to do a job and the opportunity to get it could subtly sabotage a job application or interview."