VOLUNTARY IMPOVERISHMENT

BAMC Family Law Section

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I. Relevant Cases

Barton v. Hirshberg, 137 Md.App. 1, 767 A.2d 874 (2001)

Bracone v. Bracone, 16 Md. App. 288 (1972)

Colburn v. Colburn, 15 Md. App. 503, 292 A.2d 121 (1972)

Digges v. Digges, 126 Md.App. 361, 730 A.2d 202 (1999)

Dunlap v. Fiorenza, 128 Md. App. 357, 738 A.2d 312 (1999)

Durkee v. Durkee, 144 Md. App. 161, 787 A.2d 94, *cert. denied*, 370 Md. 269, 805 A.2d 266 (2002)

Goldberg v. Goldberg, 96 Md. App. 771, 626 A.2d 1062 (1993)

Goldberger v. Goldberger, 96 Md. App. 313, 624 A.2d 1328 (1993)

Gordon v. Gordon, 174 Md. App. 583, 923 A.2d 149 (2007)

Guarino v. Guarino, 112 Md. App. 1, 684 A.2d 23 (1996)

Harbom v. Harbom, 134 Md. App. 430, 760 a.2d 272 (2000)

In re Joshua W., 94 Md. App. 486, 617 A.2d 1154 (1993)

John O. v. Jane O., 90 Md. App. 406, 601 A.2d 149 (1992)

Link v. Link, 35 Md. App. 684 (1977)

Long v. Long, 141 Md. App. 341, 785 A.2d 818 (2001)

Malin v. Mininberg, 153 Md. App. 358, 837 A.2d 178 (2003)

Moore v. Tseronis, 106 Md. App. 275, 664 A.2d 427 (1995)

Petitto v. Petitto, 147 Md. App. 280, 808 A.2d 809 (2002)

Petrini v. Petrini, 336 Md. 453, 648 A.2d 1016 (1994)

Reuter v. Reuter, 102 Md. App. 212, 649 A.2d 24 (1994)

Rivera v. Zysk, 136 Md. App. 607, 766 A.2d 1049 (2001)

Rock v. Rock, 86 Md. App. 598, 587 A.2d 1133 (1991)

Sowers v. Reed, 119 Md. App. 600, 705 A.2d 158 (1998)

Sczudlo v. Berry, 129 Md. App. 529, 743 A.2d 268 (1999)

Stull v. Stull, 144 Md. App. 237, 797 A.2d 809 (2002)

Wagner v. Wagner, 109 Md. App. 1, 674 A.2d 1 (1996)

Wills v. Jones, 340 Md. 480, 667 A.2d 331 (1995)

II. **Discussion**

Maryland recognizes that where a party has "voluntarily impoverished" himself or herself, the voluntarily impoverished party's potential income or capacity to earn money will be attributed to such party for purposes of determining the voluntarily impoverished party's obligation to pay, or entitlement to receive, alimony or child support. John O. v. Jane O., 90 Md. App. 406, 601 A.2d 149 (1992); Colburn v. Colburn, 15 Md. App. 503, 292 A.2d 121 (1972); See also Link v. Link, 35 Md. App. 684 (1977); and Bracone v. Bracone, 16 Md. App. 288 (1972).

Under the Maryland Child Support Guidelines, “income” includes “potential income of a parent, if the parent is voluntarily impoverished,” F.L. §12-201(b)(2). However, a determination of potential income may not be made for a parent who “is unable to work because of a physical or mental disability” or “is caring for a child under the age of 2 years for whom the parents are jointly and severally responsible.” F.L. §12-204(b)(2).

The Court in John O., 90 Md. App. at 421, stated that "in the context of a divorce proceeding, the term 'voluntarily impoverished' means: freely, or by an act of choice, to reduce oneself to poverty or deprive oneself of resources with the intention of avoiding child support or spousal obligations ... Some of the factors to be considered in determining whether a party is voluntarily impoverished include:

(1) his or her current physical condition;
(2) his or her respective level of education;
(3) the timing of any change in employment or other financial circumstances relative to the divorce proceedings;
(4) the relationship between the parties prior to the initiation of divorce proceedings;
(5) his or her efforts to find and retain employment;
(6) his or her efforts to secure retraining if that is needed;
(7) whether he or she has ever withheld support;
(8) his or her past work history;

(9) the area in which the parties live and the status of the job market there; and
(10) any other considerations presented by either party."

In Goldberger v. Goldberger, 96 Md. App. 313, 624 A.2d 1328 (1993), a child support case, the Court of Special Appeals broadened the definition of "voluntary impoverishment" by stating that a finding of "intent" to avoid child support obligations is not a prerequisite to a determination of "voluntary impoverishment."**1** The Court of Special Appeals held that "for purposes of the child support guidelines, a parent shall be considered 'voluntarily impoverished' whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources." Goldberger, 96 Md. App. at 327, 624 A.2d at 1335 (1993). The Court of Special Appeals upheld the trial court's finding that the husband/father had voluntarily impoverished himself, notwithstanding that he had been impoverished since before his children were born:

> In defining the term "voluntary impoverished" in *John O. v. Jane O*., we never intended to limit the obligation of a spouse who is voluntarily impoverished, for any reason, to pay child support. A parent who chooses a life of poverty before having children and makes a deliberate choice not to alter that status after having children is also "voluntarily impoverished." Whether the voluntary impoverishment is for the purpose of avoiding child support, or because the parent simply has chosen a frugal lifestyle for another reason, doesn't affect that parent's obligation to the child. Although the parent can choose to live in poverty, that parent can not obligate the child to go without the necessities of life . . . The law requires that parent to alter his or her previously chosen lifestyle if necessary to enable the parent to meet his or her support obligation.

1 The Court in *Goldberger* noted that "[t]he issue of voluntary impoverishment most often arises in the context of a parent who reduces his or her level of income to avoid paying support by quitting, retiring or changing jobs. The intent of the parent in those cases is often important in determining whether there has been voluntary impoverishment. Was the job changed for the purpose of avoiding the support obligation and, therefore, voluntary, or was it for reasons beyond the control of the parent and thus involuntary?"

The Court, in Goldberger, declared that "[t]o determine whether a parent has freely been made poor or deprived of resources the trial court should look to the factors enunciated in John O. v. Jane O."

In Wills v. Jones, 340 Md. 480, 667 A.2d 331 (1995), the Court of Appeals held that a prisoner's incarceration may constitute a material change of circumstance if the effect on the prisoner's ability to pay child support is sufficiently reduced due to incarceration. The Court further held that a prisoner is not "voluntarily impoverished" unless he or she committed a crime with the intent of going to prison or otherwise becoming impoverished.**2** The Court of Appeals examined the language and legislative history of the child support guidelines and concluded that "a parent's support obligation can only be based on potential income when the parent's impoverishment is intentional." The Court of Appeals stated that the inquiry into the parent's intent adopted in John O. is "too narrow." The question is "whether a parent's **impoverishment** is voluntary, not whether the parent has voluntarily avoided paying child support. The parent's intention regarding support payments, therefore, is irrelevant. It is true that parents who impoverish themselves 'with the intention of avoiding child support . . . obligations' are voluntarily impoverished." *John O.*, supra, 90 Md. App. at 421. But, as the court recognized in *Goldberger*, supra, 96 Md. App. at 326-27, a parent who has become impoverished by choice is 'voluntarily impoverished' regardless of the parent's intent regarding his or her child support obligations."

2 In *Sowers v. Reed*, 119 Md. App. 600, 705 A.2d 158 (1998), the appellate court remanded the case to determine the incarcerated parent's ability to pay child support while incarcerated, and to determine any arrearage. The Court of Special Appeals stated that it was doubtful that "this was an appropriate case to apply the 'voluntary impoverishment' theory."

In Wills v. Jones, the Court of Appeals went on to discuss the meaning of "voluntariness" of an action and the meaning of "voluntary." The Court stated:

> We have addressed the question of "voluntariness" at length in the context of whether an employee left her past employment voluntarily, and therefore should be barred from collecting unemployment benefits. *Allen v. Core Target Y. Prog*., 275 Md. 69, 338 A.2d 237 (1975). There, as here, the term "voluntarily" was not defined by the statute. Id. At 77. After reviewing the common usage of "voluntary" as defined in a dictionary, we found that
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> > the phrase "due to leaving work voluntarily" has a plain, definite and sensible meaning, free of ambiguity; it expresses a clear legislative intent that to disqualify a claimant from benefits the evidence must establish that the claimant, by his or her own choice, intentionally, of his or her own free will, terminated the employment.
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> Id. at 79. Following this definition, we found that an employee who had been discharged from her job because she was unable or unwilling to perform it properly could not be said to have left "voluntarily." Id. at 80.; see also *Sinai Hospital of Baltimore, Inc. v. Department of Employment & Training*, 308 Md. 28, 34-35, 522 A.2d 382 (1987) (quoting Allen's definition of "voluntary" in a similar context).
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> Our inquiry here is similar to that made in the unemployment context. In *Allen*, we noted that "if an employee is discharged for any reason, other than perhaps for the commission of an act which the employee **knowingly intended** to result in his discharge, it cannot be said that his or her unemployment was due to 'leaving work voluntarily.'" *Allen, supra*, 275 Md. at 79. (emphasis added). Thus, misconduct on the part of an employee is not sufficient to deem a subsequent termination of employment "voluntary" even if the employee's termination was a foreseeable result of the misconduct. See *id*. at 80. To determine whether Jones's impoverishment is "voluntary," a court must similarly ask whether his current impoverishment is "by his . . . own choice, intentionally, of his . . . own free will." *Allen, supra*, 275 Md. at 79. The contention that Jones's incarceration and subsequent impoverishment should be considered "voluntary" because he made the free and conscious choice to commit a crime stretches the meaning of the word beyond its acceptable boundaries. Jones's incarceration can only be said to be "voluntary" if it was an intended result . . . . For these reasons, we hold that a prisoner is only "voluntarily impoverished" as a result of incarceration if the crime leading to incarceration was committed with the intention of becoming incarcerated or otherwise impoverished.

Moreover, the Court must make a specific finding of voluntary impoverishment under F.L. §12-201(b)(2) if a parent's potential income**3** is to be considered for purposes of calculating child support. Once a "voluntarily impoverished" determination has been made, to determine potential income the trial court must consider:

1) age;
2) mental & physical condition;
3) assets;
4) educational background, special training or skills;
5) prior earnings;
6) efforts to find & retain employment;
7) status of job market in area where parent lives;
8) actual income from any source;
9) any other factor bearing on parent's ability to obtain funds for child support.

After the court determines the amount of potential income to attribute to the parent, the court should calculate the amount of support by using the standardized worksheet authorized in Family Law §12-203(a) and the schedule listed in Family Law §12-204(e). Once the guideline support figure is determined, the court must then determine whether the presumptive correctness of the guideline support figure has been overcome by evidence that application of the guidelines would be unjust or inappropriate. Md. Code Ann., Fam. Law §12-202(a)(2).

The issues of a specific finding that a party is voluntarily impoverished, and the findings regarding the factors related to potential income are left to the sound discretion of the trial judge. The trial court's factual findings will not be disturbed unless they are clearly erroneous, *In re Joshua W.*, 94 Md. App. 486, 491, 617 A.2d 1154 (1993), and rulings based on those findings must stand unless the court abused its discretion. *John O.*, 90

3 MD. FAM. LAW CODE ANN. Sec. 12-201(f) defines "potential income" as "income attributed to a parent determined by the parent's employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community."

Md. App. 406, 423, 601 A.2d 149 (1992). In *Reuter v. Reuter,* 102 Md. App. 212, 649 A.2d 24 (1994), the Court of Special Appeals acknowledged that some degree of speculation necessarily exists in any determination of "potential income." The appellate court stated that:

> So long as the court's factual findings are not clearly erroneous, Maryland Rule 8-131 (d), the amount calculated is "realistic," *Goldberger*, 96 Md. App. at 328, and the figure is not so unreasonably high or low as to amount to abuse of discretion, the court's ruling may not be disturbed. John O., 90 Md. App. at 423.

In *Guarino v. Guarino,* 112 Md. App. 1, 14-15 n. 4, 684 A.2d 23 (1996), the Court of Special Appeals stated that "[t]he voluntary impoverishment discussion contained in *John O. v. Jane O.*, 90 Md. App. 406, 601 A.2d 149 (1992), pertains to child support. See §12-201(b)(2) of the Family Law Art. This Court has, however, prior to the passage of §12-201(b)(2), used the concept in the context of alimony awards. See *Colburn v. Colburn*, 15 Md. App. 503, 514-16, 292 A.2d 121 (1972)." Thus, a trial court is to undertake the same analysis of the voluntary impoverishment issue in an alimony and child support case.

In *Guarino*, after 33 years of marriage, Ms. Guarino, who was in her fifties, left the couple's marital residence in August 1994. For 15 years prior to her departure she had worked with husband in their corporation, Guarino Corporation. When she left home, her paychecks from the corporation ceased. She lacked financial resources to obtain housing so she resided with her father in Pennsylvania and with other family and friends in Maryland. Marsha Lee Keene, a vocational rehabilitation expert, testified that based on her review of wife's resume, discussion with husband, and perusal of the job market, wife, who had a 12th grade education, was qualified for positions paying between "upper $20,000, low $30,000," but that wife's health condition would affect her employability and

that she did not have an employer ready to hire wife. In his July 28, 1995 Opinion and Order, the chancellor rejected Mr. Guarino's voluntary impoverishment argument:

> Continuing her employment with the defendant's company does not appear to have been an option for the [wife]. Given the [wife's] health, the lack of a permanent place to live and her limited work experience, Ms. Keene's assessment of her employability appears to be overly optimistic. The [wife's] resume . . . does suggest that somewhere down the line she should be able to secure employment. There is nothing, however, to indicate that the [wife] has created her present financial situation in order to obtain alimony pendente lite from the [husband]. After considering the ten factors set out in *John O. v. Jane O*. . . . the Court is of the opinion that the [wife] at the present time is not voluntarily impoverishing herself. She has a need for alimony *pendente lite*.

The Court of Special Appeals held that "[w]e perceive no basis for parting with the chancellor's decision."

In *Wagner v. Wagner*, 109 Md. App. 1, 674 A.2d 1 (1996), Ms. Wagner was found to have voluntarily impoverished herself by voluntarily changing jobs, reducing her annual income from $60,000 to $20,000, and transferring her home to her parents for minimal consideration. The trial court concluded that:

> After considering all evidence presented in light of the holding in *Goldberger v. Goldberger* . . . , the Court concludes that [Ms. Wagner] voluntarily impoverished herself to avoid paying child support. She transferred the only asset which she had to her parents in exchange for minimal consideration. Further, even assuming RKE were a profitable company, the employment contract which she signed called for her to receive an amount equal to one-third of her average income for the prior four years. Considering [Ms. Wagner's] history of attempting to avoid th[e] court's orders, the Court concludes that this period of "employment" with RKE amounted to an intentional effort to avoid paying child support . . ..

The Court then imputed an income of $59,962, representing the annual income she received for the years 1989 to 1992. The Court of Special Appeals stated that

> the relevant inquiry, as clarified by the Court of Appeals in *Wills* is whether Ms. Wagner brought about her impoverishment intentionally and of her own free will . . . The fact that the trial court concluded that Ms. Wagner

impoverished herself with the intention of avoiding paying child support is of no consequence, as the *Wills* Court determined that parents who act so as intentionally to avoid their child support obligations are within the class of persons who are considered voluntarily impoverished under the statute. What the *Wills* Court went on to say was that this was not a mutually exclusive class – that is, parents who impoverish themselves for reasons not related to their existing child support obligations, if any, will also fall within the class of persons for whom income will be imputed in accordance with the factors outlined in the statute.

Therefore, we discern neither error nor abuse of discretion with the trial court's finding that Ms. Wagner impoverished herself and that that impoverishment -- brought about in large part by her substantially decreased employment condition – was brought about intentionally. She was, thus, properly considered to be voluntarily impoverished as contemplated by the statute. The trial court did not abuse its discretion in imputing to her an income commensurate with those positions that Ms. Wagner previously held and that, the court believed, were still attainable.

In *Harbom v. Habom*, 134 Md. App. 430, 760 A.2d 272 (2000):

In the case sub judice, the issue of voluntary impoverishment was never raised at trial, nor was the possibility of attributing potential income to appellee in calculating child support. Assuming, however, that the issue has not been waived, we find that the trial court did not abuse its discretion in not ruling that appellee was voluntarily impoverished.

"[A] parent shall be considered 'voluntarily impoverished' whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources." Goldberger v. Goldberger, 96 Md. App. 313, 327, 624 A.2d 1328 (1993) (emphasis added). Evidence was presented at trial that appellee had turned down substitute teaching jobs repeatedly, had failed to return on the second day of a permanent job that was offered to her, and had limited the schools she was considering to those with schedules identical to her daughters' school. Appellee testified, however, that she had taken these actions to provide emotional support to her daughters following the divorce and that they were in a fragile state. The trial court granted appellee more than one year of rehabilitative alimony because it found that it was unreasonable to expect her to gain employment before then. The court also found that "it would be in the children's best interest for [appellee] to wait until the following school year." The court explicitly concluded that appellee's lack of employment was due to circumstances beyond her control.

In *Rock v. Rock,* 86 Md. App. 598, 587 A.2d 1133 (1991), the Court of Special Appeals held that it was not an abuse of discretion to decline to attribute income to Ms. Rock in determining the amount of child support. The Court considered the wife's care of the parties' three years old and five years old children, the cost of day care and transportation if wife were to work, one of the children's then poor health, and the wife's inability at the time to retain viable employment.

In *Moore v. Tseronis*, 106 Md. App. 275, 664 A.2d 427 (1995), Mr. Moore was an auto technician who had earned approximately $35,000 at the time of the parties' 1990 divorce. Mr. Moore had agreed to pay child support of $600 month. In 1993 Mr. Moore moved to Garrett County because his second wife wanted to return to her childhood home. Mr. Moore acknowledged that he knew that the economy in Garrett County was not as strong as Baltimore's economy. Mr. Moore's actual earnings at the time of the hearing were $16,120 as an auto mechanic. Mr. Moore filed a motion to reduce child support. The trial court found that Mr. Moore had voluntarily impoverished himself in that he "knowingly and voluntarily elected a life-style that would make it difficult, if not impossible, to meet his support obligation." The Court of Special Appeals reversed, opining that it does "not believe, however, that a court can restrict a parent's choice of residence in order to insure that he or she remains in or moves to the highest wage earning area. While a parent must take into consideration his or her child support obligation when making job and location choices, such considerations should not be immobilizing." The appellate court found that Mr. Moore's reasons for the move and his pursuit of employment at his new location did not indicate an intention to impoverish himself or to choose a life-style of ease or indolence. The Court of Special Appeals also found that the amount of income attributed

to Mr. Moore was not a realistic assessment of his current earning capacity. “In the absence of any evidence to indicate that appellant’s old job in Baltimore or one comparable to it in wages paid would be available to him if he moved back to Baltimore, it is preposterous to deem that he now has potential income of $37,000 per year, especially while living in Garrett County.”

In *Reuter v. Reuter,* 102 Md. App. 212, 649 A.2d 24 (1994), the trial court did not err in reviewing Mr. Reuter’s income over a five year period to determine his potential income after a finding of voluntary impoverishment had been made. The statutory provision concerning verification of parents’ income for the prior three years does not apply to or restrict the court’s determination of a voluntarily impoverished parent’s potential income. Family Law Art., §12-203. The case was remanded for the trial court to make specific findings concerning Mr. Reuter’s potential income. The appellate court stated that “[m]erely setting out a string of numbers, however, does not provide a rational basis for even the level of permissible speculation under the circumstances.” An additional issue was Ms. Reuter’s income. The trial court did not attribute full time employment income to Ms. Reuter. A clinical psychologist who testified that the parties’ minor child had emotional difficulties opined that it would not be in the minor child’s best interest to be in day care full days. The appellate court held that the trial court did not err in concluding that Ms. Reuter was not required to work full-time. “In effect, the court ruled that Mrs. Reuter was not voluntarily impoverished, notwithstanding her part-time employment. For the reasons we noted above, the court did abuse its discretion in reaching that conclusion. (Note 5)

In *Goldberg v. Goldberg*, 96 Md. App. 771, 626 A.2d 1062 (1993), Mr. Goldberg’s adjusted income during the period 1984 to 1988 had ranged from approximately $575,000

to $1,000,000 annually; his income in 1989 (the parties' 1st year of separation) was approximately $300,000 and in 1990 was approximately $200,000. The parties were divorced in March, 1992. The trial court found that he had the ability to earn in excess of $400,000 per year. Mr. Goldberg argued that income was erroneously attributed to him and that specific findings are necessary to support a conclusion that he voluntarily impoverished himself. The appellate court rejected his argument, noting that the trial court did not find the Mr. G. had voluntarily impoverished himself, but rather found that his "skill, knowledge and talent in financial manipulation make it probable that [Mr. Goldberg] will continue to be financially successful and earn an income comparable to the average earned in the years 1984 to 1990, which is in excess of $400,000 a year." The underlying facts involve complicated financial dealings and concealment of income by Mr. Goldberg.

In *Sczudlo v. Berry*, 129 Md. App. 529, 743 A.2d 268 (1999), the Court of Special Appeals held that a father's loss of employment paying $170,00 per year was a change of circumstances warranting modification of his child support obligations. The case was remanded for the trial court to consider the temporary nature of his unemployment, determining his potential income had he accepted a position commensurate with his education and experience. The court held that the proscription against imputing income when impoverishment is not intentional is inapplicable in a case where the adjusted combined income exceeds $10,000 per month.

In *Barton v. Hirschberg*, 137 Md. App. 1, 767 A.2d 874 (2001), the trial court determined that the father had been involuntarily terminated from his employment and that he was not voluntarily impoverished. The parties' income continued to exceed the guideline ceiling and there was no evidence that the minor child had experienced a

decrease in his standard of living. The CSA upheld the trial court's determination not to consider certain assets of the father that could have been sold to produce more money for child support. The CSA, in *dicta*, stated the following:

> Our holding in this case should not be interpreted to mean that the assets of a party will never come into play when making a determination regarding child support. For example, if a parent voluntarily decreases his or her income in order to avoid support payments, a court may find that a parent has become voluntarily impoverished, and impute income based on assets readily adaptable to income production. Alternatively, in instances where the income of a parent is not adequate to provide support to a child sufficient to meet the standard of living established during the marriage, and the parent has assets that could be converted into income-producing assets, a court might look to the parent's assets to determine above-the-guidelines support . . . [T]he mere ownership of non-income-producing assets alone, constitutes a basis for reliance upon those assets in determining child support. Moreover, the decision to devote assets to capital growth, rather than income production, should be within the discretion of a parent, as long as the children are provided reasonable support, consistent with that provided during the marriage or other relationship. It would be an unwise proposition, indeed, for a court to direct that a parent expend or convert his or her investments to provide support for children at a level above the guidelines, when the parent had consistently . . . sought to utilize those assets for capital growth or other legitimate purposes which were not income-producing.

In *Long v. Long*, 141 Md. App. 341, 785 A.2d 818 (2001), the Court of Special Appeals could not determine from the trial court's decision whether it found the husband/father was voluntarily impoverished to avoid his support obligation or had intentionally concealed income that he earned. The CSA opined that supporting evidence of actual or potential income was necessary in order to determine that appropriate income to impute to a parent who refused to offer evidence of his income. At trial, he invoked his Fifth Amendment privilege against compelled self-incrimination when asked whether he had filed income tax returns for 1998 and 1999. The trial court inferred that he had not filed the tax returns, and further inferred that this failure to disclose was intended to keep full income information from the court. The trial court erred when it found that he had

voluntarily impoverished himself based solely on the inference drawn from his invocation of his privilege. The case was remanded to the trial court to clarify the evidence relied on to impute present income of $93,000, which was an amount he had earned several years before trial.

In *Petitto v. Petitto*, 147 Md. App. 280, 808 A.2d 809 (2002), the Court of Special Appeals found no error in the trial court's finding that the custodial mother, who worked only part-time in Air Force Reserve was voluntarily impoverished, where evidence indicated that mother voluntarily chose not to pursue full-time employment although she had no physical, mental, or emotional problems that prevented her from doing so, that there was no young child in the home (see FL § 12-204(b)(2)(ii)) or one with special needs, and that mother had academic background, including a master's degree, that suggested she could find full-time employment. The Court rejected the mother's contention that because she did not work full-time during the marriage, and she is the custodial parent, she should not be forced to obtain full-time employment. The CSA stated that the mother "has the option of not working outside the home. But it was altogether fair and reasonable for the court to recognize that [the mother] is employable, so as to warrant the court's decision to impute a reasonable wage to her" and that "there is no merit to [the mother's] claim that her ' continued part-time employment status, which is unchanged from during the marriage, coupled with the presence in her home of her high school aged daughter,' is a 'valid reason for her to continue to work only part[-]time.'" *Id*., 147 Md. App. at 316-17, 808 A.2d at 830. The CSA found neither error nor abuse of discretion in the trial court's determination that the mother apparently would be able to earn as much as she did in 1977 ($26,156), if she chose to do so, rather than "choos[ing] a lifestyle of ease"

as she apparently has done. Relying on *Barton v. Hirshberg*, 137 Md.App. 1, 767 A.2d 874 (2001), the court also imputed income to the mother based on her average investment earnings from 1997 to 1999, i.e. approximately $1,990 per month from her investments.

In *Durkee v. Durkee*, 144 Md. App. 161, 797 A.2d 94 (2002), the father lost his $100,000 per year job prior to the parties' separation. He decided to start his own business rather than looking for a job and the evidence indicated he could have found employment in the field of computer science. Certainly, there are many instances when a spouse experiences an earnings decline during the marriage, for any number of reasons, and those circumstances may contribute to the break up of the marriage. There is no reason why a court could not find voluntary impoverishment, based on appropriate criteria, merely because a spouse happens to suffer an income reduction prior to separation.

In *Stull v. Stull*, 144 Md. App. 237, 797 A.2d 809 (2002), the father was fired from a job for falsifying work records, but no criminal charges were filed. The father's only attempt to find employment was to become a real estate agent. This CSA stated that the father's unemployment can only be said to be "voluntary" if it was an intended result of his conduct.

In *Gordon v. Gordon*, 174 Md. App. 583, 923 A.2d 149 (2007), Ms. Gordon had resigned her $100,000+ a year position after she was reprimanded for poor performance. She consulted with Mr. Gordon about her decision and sought work that would provide her with some flexibility, located within reasonable proximity to the home and her pre-school age son. She became employed with a company earning an annual salary of $50,000 plus commission, but this was reduced to $25,000 plus commission. She continued looking for some alternative employment. The trial court considered "the entire context" and did not

fault Ms. Gordon's decision to leave her employment. The trial court did not consider her action to be "done for purposes of this litigation"; but rather "as a career move, and it may be that there were other motivations other than the best career move, or the best monetary career move, for her, but I don't think [that] amounts to voluntary impoverishment." The Court of Special Appeals held that the trial court was not clearly erroneous in determining that Ms. Gordon was not voluntarily impoverished.

Malin v. Mininberg, 153 Md. App. 358, 837 A.2d 178 (2003).

TRIAL COURT ERRED IN FINDING THAT HUSBAND, A FORMER ANESTHESIOLOGIST, HAD VOLUNTARILY IMPOVERISHED HIMSELF BY LEAVING HIS MEDICAL CAREER AND ENROLLING IN BUSINESS SCHOOL TO PURSUE AN MBA DEGREE

A PARENT'S CHILD SUPPORT OBLIGATION SHOULD NOT BE USED TO SHACKLE THE PARENT BY PREVENTING HIM OR HER FROM MAKING A NEEDED LIFESTYLE CHANGE, BASED ON VALID REASONS, PARTICULARLY WHERE THE PARENT IS ABLE TO PROVIDE REASONABLE CHILD SUPPORT

Murray Malin (born in 1958) and Marcie Mininberg (born in 1969) were married in November 1996, separated in November 1999, and their only child, Samuel, was born July 25, 1998. Five-day divorce trial occurred in July 2001.

Malin was a 38-year-old practicing anesthesiologist at the time of marriage. Malin had a history of substance abuse dating to 1987, when he was a medical resident. He reported that he remained sober from 1987 until 1999. He testified that, after his relapse in 1999 (which culminated in his arrest on November 3, 1999 "for writing a prescription using another doctor's name for a person that didn't exist"), he eventually decided it was not in his interest to remain in medicine. Therefore, he decided to pursue a new career in business, and enrolled as a full-time student in graduate school in an effort to secure an MBA degree.

Malin receives $10,000 a month in non-taxable disability benefits from three insurance policies. Although he owned these policies prior to the marriage, some of the premiums were paid during the marriage. Two of the policies permit him "to enjoy the benefits" so long as he is unable to "practice anesthesiology." The third policy pays no benefits if he does any kind of work, and one policy has a five-year limit.

Neither party presented any expert testimony concerning the parties' employment opportunities.

The Circuit Court for Montgomery County (Johnson, J.) found that Malin, by leaving the medical profession and living on his $10,000 monthly disability benefits (which were non-taxable) while pursuing his career change, had voluntarily impoverished himself. The trial court ordered Malin to pay $1,500 monthly child support for his son, who had substantial educational and medical needs.

The CSA extensively analyzed the issue of voluntary impoverishment at 153 Md. App. at 393-407, and discussed/cited **Family Law Article §12-201(f)** ("Potential income" means income attributed to a parent determined by the parent's employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community); the seminal case of ***Wills v. Jones***, 340 Md. 480, 667 A.2d 331 (1995) (a parent shall be considered "voluntarily impoverished" whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources; "voluntary" means that "the action [must] be both an exercise of unconstrained free will and that the act be intentional." In determining whether

a parent is voluntarily impoverished, the question is whether a parent's impoverishment is voluntary, not whether the parent has voluntarily avoided paying child support; an incarcerated parent cannot be deemed voluntarily impoverished unless he or she committed a crime with the intent of going to prison or otherwise becoming impoverished); and almost a dozen other important voluntary impoverishment cases including: *Middleton v. Middleton*, 329 Md. 627, 620 A.2d 1363 (1993); *John O. v. Jane O*., 90 Md. App. 406, 601 A.2d 149 (1992); ***Goldberger v. Goldberger***, 96 Md. App. 313, 624 A.2d 1328, *cert. denied*, 332 Md. 453, 632 A.2d 150 (1993) (a parent is required to "alter his or her . . . lifestyle if necessary to enable the parent to meet his or her support obligation." In addition to enumerated factors in FL §12-202(f), court may consider other factors, including: 1) his or her current physical condition; 2) his or her respective level of education; 3) the timing of any change in employment or financial circumstances relative to the divorce proceedings; 4) the relationship of the parties prior to the divorce proceedings; 5) his or her efforts to find and retain employment; 6) his or her efforts to secure retraining if that is needed; 7) whether he or she has ever withheld support; 8) his or her past work history; 9) the area in which the parties live and the status of the job market there; and 10) any other considerations presented by either party – citing *John O. v. Jane O*.; ***Moore v. Tseronis***, 106 Md. App. 275, 664 A.2d 427 (1995) (auto mechanic father relocated from Baltimore City to Garrett County when he remarried, resulting in drop in annual earnings from $37,491 to $16,000 annually; CSA reversed trial court finding of voluntary impoverishment: "We do not believe, however, that a court can restrict a parent's choice of residence in order to insure that he or she remains in or moves to the highest wage earning area. While a parent must take into consideration his or her child support obligation when making job

and location choices, such considerations should not be immobilizing." Father was not attempting to shirk child support obligations, but merely wanted to move to a more rural environment and abide by second wife's wishes); *Wagner v. Wagner*, 109 Md. App. 1, 674 A.2d 1, *cert. denied*, 343 Md. 334, 681 A.2d 69 (1996); ***Digges v. Digges***, 126 Md.App. 361, 730 A.2d 202, *cert. denied*, 356 Md. 17, 736 A.2d 1065 (1999) (successful lawyer convicted of mail fraud, incarcerated two years and disbarred; CSA affirmed finding of voluntarily impoverishment as he had waited for more than a year after his release from prison to start a part-time graduate program and made little effort to secure employment – "[T]he evidence was sufficient to show that the primary cause of appellant's impoverishment was not his incarceration nor the loss of his law license but his total lack of interest or effort in attempting to find and secure regular, gainful employment."); ***Sczudlo v. Berry***, 129 Md. App. 529, 743 A.2d 268 (1999); ***Durkee v. Durkee***, 144 Md. App. 161, 787 A.2d 94, *cert. denied*, 370 Md. 269, 805 A.2d 266 (2002); ***Stull v. Stull***, 144 Md.App. 237, 797 A.2d 809 (2002) (father terminated from employment for falsifying documents should not be considered to be unemployed voluntarily unless the unemployment was an intended result of his conduct); and ***Petitto v. Petitto***, 147 Md. App. 280, 808 A.2d 809 (2002).

Guided by the foregoing principles, the Court of Special Appeals held that, based on the record, the trial court erred in concluding that Malin was voluntarily impoverished. There was no evidence that he gave up his medical career to avoid his duty of parental support; his relapse and criminal conduct were not "with the intention of becoming incarcerated or otherwise impoverished." *Wills*, 340 Md. at 497; see *Stull*, 144 Md. App. at 249. Malin's criminal misconduct is comparable to the father in *Stull*, where the conduct

was deemed insufficient to support a finding of voluntary impoverishment. Malin's reason for seeking a new career path in business was at least as valid as the decision of the father in *Moore*, who decided, for personal reasons, to relocate to a depressed economic area.

The trial court seemed to fault Malin "for making a reasoned decision to extricate himself from a career in medicine, because the pressures of such work, coupled with the access to drugs that it affords, make the career detrimental to his health. Under these circumstances, where [Malin] had a legitimate ground to relinquish his medical career, and pursued retraining at a time when he could afford to do so because of his sizeable insurance benefits, we cannot sustain the court's finding of voluntary impoverishment. In effect, the court would consign [Malin] to a career in medicine, despite the potential adverse impact on his health and freedom, solely because a medical career *might* yield greater earnings. A decision on that basis is a short term answer to a long term problem; surely it is not a solution." Malin, 153 Md. App. at 403. The CSA went on to say that "a parent's child support obligation should not be used to shackle the parent by preventing him or her from making a needed lifestyle change, based on valid reasons, particularly when, as here, the parent is able to provide reasonable child support." *Id*., 153 Md.App. at 404.

Moreover, the CSA said that absent any evidence as to Malin's earnings potential in medicine, the trial court was not in a position to determine that Malin would earn more by remaining in medicine than from retraining for a career in business; Malin's retraining may actually result in a more secure economic future for the parties' child than would be obtained from Malin's employment in a low level medical position.

Although the amount of child support Malin was ordered to pay may be reasonable under the circumstances, award could not be sustained due to the error in finding him voluntarily impoverished.

Voluntary Impoverishment: Potential Income

Malin v. Mininberg, 153 Md. App. 358, 837 A.2d 178 (2003)
TRIAL COURT ERRED IN FAILING TO MAKE A DETERMINATION OF POTENTIAL INCOME TO IMPUTE TO A VOLUNTARILY IMPOVERISHED PARENT

Once a finding of voluntary impoverishment is made, the court is required to determine a parent's "potential income" by considering FL §12-202(f), and several other factors including: 1) age; 2) mental and physical condition; 3) assets; 4) educational background, special training or skills; 5) prior earnings; 6) efforts to find and retain employment; 7) the status of the job market in the area where the parent lives; 8) actual income from any source; 9) any other factor bearing on the parent's ability to obtain funds for child support. *Malin*, 153 Md. App at 406; *Petitto*, 147 Md. App at 317-18.

Although the trial court had acknowledged its obligation to make a finding of potential income, the court never actually attributed any potential income to Malin. As the case was an above Guidelines case, the trial court merely said its finding of voluntary impoverishment was a "*de minimus* [factor] in the calculation." This error would also require a remand.

Child Support: Potential Income: Parent Able to Work Greater Hours

Malin v. Mininberg, 153 Md. App. 358, 837 A.2d 178 (2003)
TRIAL COURT, ON REMAND, SHOULD CONSIDER WHETHER TO IMPUTE ADDITIONAL INCOME TO MOTHER BASED ON HER WORK SCHEDULE OF JUST FIFTEEN HOURS A WEEK

Ms. Mininberg was 27 years old at the time of the parties' 1996 marriage. She graduated law school in 1994, but had failed Bar examination twice and decided not to take the exam a third time because, after working for an attorney for 9 mos. she realized that she "didn't enjoy the practice of law … at all"; it was "too stressful . . . . " When the parties met in 1995, Ms. Mininberg was working at a jewelry store. In summer of 1996, Ms. Mininberg began working part-time for her father, a physician; she was paid $30 an hour for a variety of office and bookkeeping duties, earning about $1,800 biweekly. At the time of trial, Ms. Mininberg was working fifteen hours per week, and the trial judge attributed $1,950 in monthly income to her.

CSA said the trial court's ruling amounted to an approval of Ms. Mininberg's decision in July 2000 to reduce her hours of work from 30 to 15. Ms. Mininberg claimed the reduction was necessitated by the demands of caring for the parties' disabled child. However, CSA said that some of the difficulties are not necessarily of an ongoing nature. The appellate court recognized that, in a particular case, a court may, with good reason, determine that it is appropriate for a single parent to remain at home, or work part-time, or pursue a less lucrative career path, so that the parent can be available to meet the varying needs of a disabled child; however, the trial court did not determine that, because of the child's condition, it was unreasonable to expect Ms. Mininberg to work more than 15 hours a week. On

remand, trial court is to determine Ms. Mininberg's work capacity in light of her personal circumstances and the relevant statutory factors under FL §12-201(f). If the court determines that she is able to increase her work hours, then it should impute income to her consistent with that determination, and calculate the parties' child support obligations accordingly.