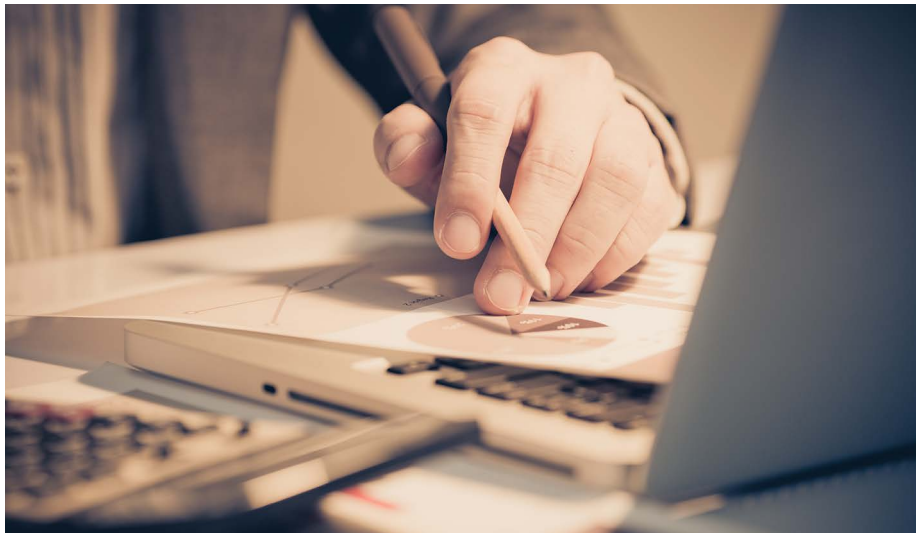
Mandatory Income Imputation —
When "Discretion" Isn't Discretionary

by Samuel A. Leven



In 1988, Virginia responded to a federal mandate by adopting our child support guidelines.[1] The guidelines were meant to simplify and make more uniform the determination of child support across Virginia. While most family law practitioners would likely say this effort has largely succeeded, a large chunk of child support cases seem to be consumed with the question of what to do about a parent who is not earning as much as they should be.

The Virginia Code has always allowed for exceptions to be made to the child support guidelines; after all, the guidelines are only afforded a "rebuttable presumption" of being correct in any given case.[2] In order to rebut the presumption, the General Assembly has given courts a list of factors that can be considered as a basis to "deviate" from the guidelines amount.[3] Among the factors a court is allowed to consider when deciding whether to deviate is "imputed income" to a parent who is "voluntarily unemployed or voluntarily under-employed."[4] Additionally, courts are expressly forbidden from imputing income to a parent if that parent is the custodial parent, the child is not in school, child care is not reasonably available, and the costs of child care are not being included in the child support calculation.[5]

"Mandatory" Imputation Is Born

Figuring out when, whether, and how to impute income proved a challenge to the courts, but in 1994 the court of appeals made an interesting logical leap in the *Hamel* case when it concluded that the language of Code § 20-108.1(B)(3) forbidding imputation of income to a parent meeting the four conditions outlined above *implicitly required* trial courts to impute income to *any* voluntarily unemployed or under-employed parent who did *not* meet those four conditions.[6]

With the *Hamel* decision, the concept of "mandatory" imputation of income was born, and continued to be expanded upon for several years thereafter. One notable example came in 1996 when the court of appeals faced a father who had left his job as a pharmacist in order to attend medical school and become a doctor. The court found that his reduction

in income during medical school was voluntary unemployment, and subsequently it was mandatory to impute income, regardless of any good faith in his employment decision.[7]

In 1998, the court of appeals again emphasized that "a trial court determining child support is required to impute income to a parent who is found to be voluntarily underemployed,"[8] but the issue did not return to the court for about a decade afterwards. Then, in 2008, the court of appeals handled a case that had arisen under pre-2006 law (a point that will be important shortly), and found that it needed to determine whether or not the father was voluntarily underemployed, because if he were, the court would be "required to impute income."[9]

"Mandatory" Imputation Dies — Then Comes Roaring Back to Life

In 2006, the General Assembly amended Code Section 20-108.1(B)(3) to add a requirement that "any consideration of imputed income based on a change in a party's employment shall be evaluated with consideration of the good faith and reasonableness of employment decisions made by the party."[10] Then, in 2013, another addition was tacked on to the end of that new line stating, "including [a decision] to attend and complete an educational or vocational program likely to maintain or increase the party's earning potential."[11] Those provisions remain in place today.[12]

In 2015, the issue finally returned to the court of appeals when it decided the *Murphy* case, and it looked like mandatory imputation was gone forever.[13] In the *Murphy* case, the mother took a job with a substantially reduced income in order to allow her to have more flexibility with her schedule so as to have more visitation time with her children.[14] The court of appeals in this case expressly found that the 2006 amendments had essentially overturned the mandatory imputation rules, as a trial court was now required to consider the good faith and reasonableness of a parent's employment decisions.[15] In the *Murphy* case specifically, this meant the trial court was within its discretion by refusing to impute income to the mother when her voluntary underemployment was reasonable and done in good faith.[16]

The court of appeals did not just stop there, however. It in fact began its legal analysis by criticizing, fairly harshly, the entire mandatory imputation rule.[17] The court directly challenged the *Hamel* opinion, which it considered as the root of the mandatory imputation rule, by asserting the *Hamel* court misconstrued the meaning of a prior opinion on which *Hamel* had been based.[18]

With the court of appeals having issued a published opinion strongly repudiating the mandatory imputation rule, challenging its underpinnings, and asserting that it had been overruled by statutory amendment, you would have been forgiven for believing that the rule was dead and gone. However, this state of affairs did not last long.

Just one week after the court of appeals issued its decision in *Murphy*, it issued another published opinion in *Niblett*.[19] That case gave us a much less sympathetic parent than *Murphy*'s mother trying to spend more time with her kids. *Niblett* involved a father who was convicted of a felony and sentenced to three years' incarceration as a result of his adulterous sexual conduct with a minor female that had been residing with the family.[20]

In the *Niblett* case, the trial court found that the father's unemployment was the result of his voluntary act (namely his criminal conduct), but nonetheless chose not to impute income.[21] The court of appeals reversed, and amongst the reasons it gave for its reversal was a finding that *Murphy* was limited to cases with "evidence of good faith and reasonableness," and that absent such evidence, the prior precedents regarding mandatory imputation remained binding.[22]

So, one week after the court of appeals seemed to do away with mandatory imputation, the court brought it back, at least where there is not "evidence of good faith and reasonableness."

Applicability to Spousal Support

The court of appeals has never directly addressed the question of whether or not this mandatory imputation rule applies to spousal support as well, and given that the *Hamel* opinion is based, at least in part, on a provision from the deviation factors for child support, there would be some sense in thinking

the rule does not apply to spousal support. There are a couple reasons to think, however, that a court looking at this rule may well apply it to spousal support.

First, the court of appeals has expressly held, generally speaking at least, that it can be an error for a trial court to impute income for child support and not for spousal support.[23] Second, in an unpublished decision in 2008, the court of appeals reversed a trial court for failing to impute income for spousal support, and expressly cited the *Hamel* case and its mandatory imputation rule in its opinion doing so.[24] However, this case rests on questionable footing as, not only was it unpublished, but it was also reversed by the court of appeals acting *en banc* when the *en banc* court found that the husband had not actually established that the wife was voluntarily unemployed (and thus did not address the question of mandatory imputation).[25]

Nonetheless, keeping these two cases in mind, there is at least some history to suggest that the court of appeals will treat a spousal support case similarly to a child support case when it comes to mandatory imputation.

Current Law and Unresolved Questions

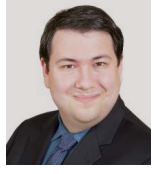
It seems clear from the interplay of *Niblett* and *Murphy* that the old rules regarding mandatory imputation do not apply when a parent's employment choices were the result of good faith and reasonableness, and do apply when they were not. Nonetheless, there are several areas of unresolved questions (after all, *Niblett* and *Murphy* are less than two years old — not much time for any follow-up case law to develop) that may be worth considering and even litigating. For example:

- Must a parent's employment decisions be *both* in good faith *and* reasonable to avoid mandatory imputation, or may a trial court exercise discretion so long as it finds either good faith *or* reasonableness?
- Are "good faith" and "reasonableness" to be defined by an objective standard, or a subjective one? Can someone, for example, avoid mandatory imputation even if they left their higher paying job solely in order to reduce their child support obligation if their decision nonetheless proves to work out in the children's best interests?
- *May* a court still impute income if "good faith" and "reasonableness" are found and mandatory imputation does not apply? If so, when would it constitute an abuse of discretion to do so, or an abuse of discretion not to?
- When and to what extent does the mandatory imputation apply and not apply in the context of spousal support?

The rules for mandatory imputation of income are still developing, and with the recent opinions announced by the court of appeals in 2015 this is likely to be a matter that will be litigated for some time. In the end, this is yet one more way that even our "simple" post-guidelines child support laws are never really that simple.

Endnotes:

1 1988 Va. Acts of Assembly, Ch. 907
2 Va. Code § 20-108.2(A)
3 Va. Code § 20-108.1(B)
4 Va. Code § 20-108.1(B)(3)
5 Id.
6 *Hamel v. Hamel*, 18 Va. App. 10, 12-13, 441 S.E.2d 221, 222 (1994)
7 *Virginia Dep't of Soc. Servs., Div. of Child Support Enforcement ex rel. Ewing v. Ewing*, 22 Va. App. 466, 470 S.E.2d 608 (1996)
8 *Niemiec v. Virginia Dep't of Soc. Servs., Div. of Child Support Enforcement ex rel. Niemiec*, 27 Va. App. 446, 451, 499 S.E.2d 576, 579 (1998)
9 *Broadhead v. Broadhead*, 51 Va. App. 170, 179, 655 S.E.2d 748, 752 (2008)
10 2006 Va. Acts of Assembly, Ch. 785
11 2013 Va. Acts of Assembly, Ch. 276
12 See Va. Code § 20-108.1(B)(3)
13 *See Murphy v. Murphy*, 65 Va. App. 581, 779 S.E.2d 236 (2015)
14 *Id.*, 65 Va. App. at 585, 592, 779 S.E.2d at 237, 241
15 *Id.*, 65 Va. App. at 590-91, 779 S.E.2d at 240
16 *Id.*, 65 Va. App. at 592, 779 S.E.2d at 241
17 *Id.*, 65 Va. App. at 586-90, 779 S.E.2d at 238-40
18 *Id.*, 65 Va. App. at 587, 779 S.E.2d at 238-39
19 *Niblett v. Niblett*, 65 Va. App. 616, 779 S.E.2d 839 (2015)
20 *Id.*, 65 Va. App. at 622, 779 S.E.2d at 842
21 *Id.*, 65 Va. App. at 623, 779 S.E.2d at 842
22 *Id.*, 65 Va. App. at 627, 779 S.E.2d at 844 n.2
23 *Blackburn v. Michael*, 30 Va. App. 95, 102-03, 515 S.E.2d 780, 784 (1999) ("because the trial court explicitly found that wife was voluntarily underemployed and therefore imputed income to her for the purpose of evaluating a request for modification of child support, it was error, in this case, for the trial court not to impute income to the wife for the purpose of evaluating husband's motion to modify spousal support.")
24 *McKee v. McKee*, Record No. 0739-07-1, p. 7, 2008 Va. App. LEXIS 51, *12 (2008)(unpublished)
25 *McKee v. McKee*, 52 Va. App. 482, 492, 664 S.E.2d 505, 510 (2008) (en banc)



Samuel A. Leven has been practicing law since 2010 with The Baldwin Law Firm LLC in Oakton. He serves on the Fairfax Bar Association's Circuit Court Committee (and Domestic Relations Subcommittee), Lawyer Referral Service Committee, and is currently serving as vice-chair of the Legislative Committee. He is also a member of the Family Law Section of the Virginia Trial Lawyers Association and the bars of the District of Columbia and the United States Supreme Court.