"All" income included when calculating child support

By Jason G. Adess, Berger|Schatz

Recent Illinois decisions have clarified the procedure trial courts are required to follow when considering non-recurring income in child support cases. Notwithstanding Section 505 of the Illinois Marriage and Dissolution of Marriage Act's clear and unambiguous definition of net income as "the total of all income from all sources" less deductions permitted by statute, many courts have shared the view that "all" doesn't always mean all if the result would be inequitable. For instance, the court in *In re the Marriage of Miller*, 231 Ill.App.3d 480, 595 N.E.2d 1349 (3d Dist. 1992), held:

> While non-recurring income may properly be included in calculating net income for purposes of child support, this is not an inflexible rule and the trial court has the discretion to exclude such income. To hold otherwise could lead to absurd results, as where a party's income is artificially inflated by a large capital gain on the sale of a residence. Id. at 483-84.

The Illinois Supreme Court in *In re Marriage of Rogers*, 213 Ill.App.3d 129, 820 N.E.2d 386 (2004), flatly rejected the concept of excluding any income from the initial calculation of net income when setting child support. In *Rogers*, the former husband appealed the trial court's ruling that gifts and loans he had received from his family throughout his adult life constituted income for purposes of calculating child support. The Supreme Court affirmed the trial court's decision stating that the definition of income in Section 505 is expansive and that the statute did not provide a basis to exclude gifts from income. The court took particular note of the former husband's own testimony that the gifts and loans "represent a steady source of dependable annual income...he has received each year over the course of his adult life." Id. at 134.

The *Rogers* court held that in other cases the issue of whether income was non-recurring was relevant, but procedurally the income must first be included in the calculation of net income. Once net income is calculated, the trial court should then determine whether the relevant factors warrant a deviation from the child support guidelines.

Of additional note, the *Rogers* decision did not address whether loans fall within the definition of income because the "loans" claimed by the former husband were in name alone. He had never repaid any of the money received from his family and there was no evidence that repayment would ever occur. The court's election not to address this issue seems to suggest that when an individual receives legitimate loans supported with competent evidence, such as a promissory note executed contemporaneously with the loan and a history of repayment, the loan proceeds may not be included in the calculation of the recipient's net income for child support purposes.

Several appellate court decisions have followed on the heels of *Rogers*, each employing the strict inclusion of income in child support calculations. For instance, in *In re the Marriage of Colangelo*, 355 Ill.App.3d 383, 822 N.E.2d 571 (2d Dist. 2005), the trial court entered a judgment awarding the husband stock options at an "unknown" value because they had yet to be exercised (the judgment predated the amendment to Section 503 providing for the allocation of stock options). In addition, the court ordered the husband to pay child support, including 20 percent of his net income from bonuses/commission/overtime.

Thereafter, the former wife filed a Petition for Rule to Show Cause alleging that her former husband had received shares of stock under a compensation agreement and had failed to provide her with 20 percent of the stock as child support. The husband answered that the stock in question was received by exercising the options awarded to him in the judgment, and therefore constituted marital property already divided and was not subject to inclusion in the calculation of child support. The trial court agreed and denied the wife's Petition.

The appellate court reversed, finding that stock bonuses did not fall within any permissible deduction from the calculation of net income defined by 505(a)(3). In support of its ruling, the court cited *In re Marriage of Klomps*, 286 Ill.App.3d 710, 676 N.E.2d 686 (5th Dist. 1997), which held that retirement benefits constituted income for child support purposes even though the same retirement benefits had been divided as marital property.

Similarly, in *In re Marriage of Lindman*, 356 Ill.App.3d 462, 824 N.E.2d 1219 (2d Dist. 2005), the former husband appealed when the trial court included his receipt of non-recurring disbursements from an individual retirement account as income when calculating his child support obligation. The *Lindman* court appeared particularly dismissive of the former husband's claims because he had obtained prior reductions in his child support payments while he was receiving the retirement funds, resulting in his child support payments decreasing while his income increased. In affirming the trial court decision the court reiterated the holding in *Rogers* that child support must be set based on income at the time of determination and not on future possibilities:

Few, if any, sources of income are certain to continue unchanged year in and year out. People can lose their jobs, interest rates can fall, business conditions can wipe out profits and dividends. Accordingly, the relevant focus under section 505 is the parent's economic situation at the time the child support calculations are made by the court. If a parent has received payments that would otherwise qualify as 'income' under the statute, nothing in the law permits those payments to be excluded from consideration merely because like payments might not be

forthcoming in the future. Id. at 468 (quoting *Rogers* at 138).

See also *Einstein v. Nijim*, 358 Ill. App.3d 263, 831 N.E.2d 50 (4th Dist. 2005), which held that non guaranteed bonus income was included for child support purposes. In *Einstein*, the court cited the obligor's testimony that his bonus was "usually a sure thing" and finding that if the income stream came to an end, the non custodial parent could seek to modify the child support order pursuant to Section 510(a). Id. at 271.

The import of the *Rogers* decision appears to be more procedural than substantive. Trial courts continue to possess the discretion to avoid the inequity envisioned by the *Miller* court through deviations from the child support guidelines, while abiding by the mandate of Section 505 to include all income from all sources when calculating the net income of the obligor.

However, it is noteworthy that none of the post-*Rogers* appellate decisions have reversed the trial court's refusal to deviate from the guidelines in cases involving non-recurring income. In large measure that pattern appears to be the result of the relatively extreme facts of the cases. For instance, in *Colangelo* a deviation from the guidelines would have resulted in the former spouse receiving none of her former husband's stock options as property and depriving her of child support from the options upon exercise. Similarly, the *Lindman* court was not likely to entertain a deviation in light of its view that the husband had received prior unwarranted decreases of his child support payments. While these decisions appear to be fact driven, the emerging trend steers away from deviations from the child support guidelines in cases involving non recurring income.

These cases have important implications for the practitioner. When drafting marital settlement agreements, particularly those providing for child support as a percentage of the obligor's income, it is essential that if certain income sources are intended by the parties to be excluded from the calculation of child support (such as income from the sale of assets already equitably divided) that language be included in the Agreement explicitly providing for such an exclusion.