

SB390 Senator Kelly FAV Testimony.pdf

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Position: FAV



THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

February 7th, 2024

Testimony in Support of SB390

Family Law – Child Support - Actual Income

Dear Chairman Smith, Vice Chair Waldstreicher, and Members of the Committee:

This legislation is necessary to provide an equitable solution in child support determinations by giving Courts the discretion to weigh, compare and consider both the taxable and non-taxable earned income of each parent in the same manner.

According to Maryland Code, Family Law Article § 12-201, the Courts must consider the “Actual Income” in determining the income of each parent for child support purposes. However, the income the Court considers for child support is gross earned income and not non-taxable earned income.

In other words, non-taxable earned income of a parent is not presently “grossed up” to be in alignment with the earned taxable income of the other parent due to Maryland case law.

Specifically, the Maryland Appellate Courts have made it clear that the trial Courts do not have discretion to adjust a party’s income except as allowed by statute. See Ruiz v. Kinoshita, 239 Md. App. 395 (2018) and Lemly v. Lemly, 102 Md. App. 266 (1994).

SB 390 will add language to the definition of “Actual Income” to address the tax which would be paid on non-taxable earned income by a parent, thereby giving the Courts the discretion necessary to weigh and compare the earned income of both parents in an equitable manner.

To further clarify this additional language, the Family Law Section Council (“FLSC”) of the Maryland State Bar Association has requested a friendly amendment:

(xvii) for a parent with non-taxable, earned income from an employer, the amount of federal, state, and local taxes and FICA, including any additional Medicare taxes, that would be withheld if the earned income were taxable.

This amendment is acceptable as it will provide a clear guidance to the trial Courts as to the type of non-taxable earned income and the types of taxes that should be included in the calculation to “gross-up” earned non-taxable income for child support purposes.

For the reasons stated above, I urge a favorable committee report with the amendment.

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Uploaded by: Michelle Smith

Position: FWA

To: Members of The Senate Judicial Proceedings Committee

From: Family Law Section Council (FLSC)

Date: February 6, 2024

Subject: Senate Bill 390:
Child Support – Actual Income

Position: FAVORABLE with Amendment

The Maryland State Bar Association (MSBA) Family Law Section Council **supports Senate Bill 390 Child Support –Actual Income, with a suggested amendment.**

This testimony is submitted on behalf of the Family Law Section Council (“FLSC”) of the Maryland State Bar Association (“MSBA”). The FLSC is the formal representative of the Family Law Section of the MSBA, which promotes the objectives of the MSBA by improving the administration of justice in the field of family law and, at the same time, tries to bring together the members of the MSBA who are concerned with family law legal issues and in reforms and improvements in such laws through legislation or otherwise. The FLSC is charged with the general supervision and control of the affairs of the Section and authorized to act for the Section in any way in which the Section itself could act. The Section has over 1,200 attorney members.

Maryland Code, Family Law Article § 12- 201 defines the term “Actual Income” to provide Courts with a list of types of income that must be considered when determining the income of each parent for child support determinations. The income the Court considers for child support determinations is gross income, not income net of taxes. If one parent of a minor child earns non-taxable income, that earned income would be compared to gross earned income from the other parent which would have various amounts deducted for Federal, State, Local and FICA taxes. Moreover, the algorithm in the child support guidelines assumes the figures utilized are gross, taxable income. Thus, in the circumstances in which one parent earns taxable income and one parent earns non-taxable income, the parents’ incomes are presently not being compared in an equitable fashion without a “gross-up” of the nontaxable earned income. This is the case for parents who are using the Maryland child support guidelines and for parents with a combined income figure that places them above the guideline tables.

By way of example, the World Bank is an employer located in Washington DC, by which some Maryland parents are employed and thus, they are paid non-taxable income. For child support cases involving such parents, many family law attorneys argue for a “gross-up” of the non-taxable earned income to add in the taxes which would be deducted from that earned income if it were taxable. This is a common practice in settlements in counties such as Montgomery and Prince Georges that border Washington DC. The “gross-up” of the non-taxable earned income is permitted by Courts under the child support statute in Washington DC. See District of Columbia Code Annotated, DC ST § 16-916.01.

However, a similar “gross-up” methodology is not permitted in child support cases in our Maryland Courts. The Maryland appellate Courts have expressly held that the trial Court lacks the discretion to adjust a party’s income except as expressly allowed by statute. See *Ruiz v. Kinoshita*, 239 Md. App. 395 (2018) and *Lemley v. Lemley*, 102 Md. App. 266 (1994). The FLSC believes it is good policy, in the best interest of Maryland children, for the legislature to provide such authority to the Courts with regard to non-taxable earned income.

Senate Bill 390 adds language to the definition of “Actual Income” to address the tax which would be paid on non-taxable income earned by a parent. The FLSC agrees with this concept; however, we suggest a friendly amendment to the current language to the following:

(xvii) for a parent with non-taxable, earned income from an employer, the amount of federal, state and local taxes and FICA, including any additional Medicare taxes, that would be withheld if the earned income were taxable.

The FLSC believes this language offers a more clear definition to the trial Courts as to the type of non-taxable earned income at issue and the components which would be added back into the non-taxable income in order to “gross-up” that figure. Though, we are cognizant that the facts of many cases will necessitate expert testimony on this issue, at least the Court will be provided with clear direction from the legislature and non-represented litigants will be provided with some detail as to how the non-taxable earned income can be more properly compared to taxable earned income.

For the reason(s) stated above, the MSBA Family Law Section Council **supports Senate Bill 390 and urges a favorable committee report with the suggested amendment.**

Should you have any questions, please contact Michelle Smith at 410-280-1700 or msmith@lawannapolis.com or Lindsay Parvis at 240-399-7900 or lparvis@jgllaw.com.