

Cohen, Wolf buy
UI building for
new law offices



Cohen and Wolf, P.C.
 cordially invites you to celebrate
 the opening of its new office
 in the former United Illuminating Building
 115 Broad Street, Bridgeport, Connecticut
 Thursday, November 17, 1983 4:30 to 7:30 PM

Has COVID-19 Changed the Landscape of Earning Capacity in Family Cases?

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COVID-19 has caused important changes to the legal landscape in just a few months, and these changes are likely to affect clients for many months to come. Courts continue to operate at reduced capacity, and many issues that are important to individual clients are not being heard by courts at present. Eventually courts will hold evidentiary hearings and judges will once again decide issues on the merits of a case, but the impacts of the COVID-19 pandemic on the income, finances, and earning capacity of divorcing spouses, and on court ordered support obligations remain to be seen.

In family cases, many parties are facing financial distress from the economic consequences of the pandemic. We expect to find that litigants in divorce cases and post-judgment alimony and child support modification cases may be underemployed or unemployed, and these situations will raise many fact-based questions about whether a person's termination was unavoidable or whether he or she is intentionally depressing his or her income to avoid (or seek a downward modification of) an existing support order. In some instances, parties will look to our courts to make financial orders based on the other party's earning capacity rather than their actual earnings. But earning capacity may look very different as COVID-19 changes the job market in the tri-state area, litigants are laid off or furloughed, and working remotely becomes the "new normal."

What is Earning Capacity?

Pursuant to Connecticut law, the trial court in a dissolution of marriage action is required to consider the occupation of each of the parties. But the court must also consider both parties' earning capacity, vocational skills, education and employability in determining whether to award alimony and if so, the amount and duration of those payments. The same factors are relevant to the distribution of property between divorcing spouses. When a court considers modifying alimony following a divorce, these factors are also often at issue.

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A trial court in a dissolution of marriage case may, under appropriate circumstances, base financial awards upon the earning capacity of the parties, rather than on actual earned income. Although a court may consider a party's earning capacity, it is only appropriate to consider this factor where there is evidence of that party's previous earnings. To determine the earning capacity of a party that has been out of the work force for an extended period, the court must have evidence to support a specific earning capacity. In some cases, that evidence takes the form of prior earnings – tax returns, pay stubs, and other documentation. In other cases, one party may believe that the other has intentionally accepted a position where his or her earnings are below his or her maximum earning potential or has failed to make good faith efforts to obtain employment at an appropriate level. In these cases, it is common for parties to engage earning capacity experts to provide the court with specific findings about what a litigant might be expected to earn in the workforce. These experts evaluate a host of factors: the party's educational background and training, his or her skill set, volunteer opportunities in which he or she may be involved, and available positions in the workforce, to try to “match” a party to various appropriate job opportunities.

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The full impact of COVID-19 on family support orders is uncertain at this time. An earning capacity determination largely hinges upon the factual evidence presented. Case law can provide guidance in terms of how the court may use earning capacity in the determination of financial awards, but not in terms of a bright line rule of what type of evidence must be presented. Each case stands on its own.

As the COVID-19 crisis fades, certain traditions of the workplace have changed, and further changes may be forthcoming. While jobs in a litigant's immediate geographical area may have been the most relevant for earning capacity inquiries in the past, the expansion of remote work possibilities may broaden the list of available jobs that unemployed litigants can be expected to consider. On the other hand, layoffs, downsizing, and employee furloughs may leave more litigants unemployed or underemployed than ever before. In these instances, a party who had a robust earning capacity (or earnings) several years ago may suddenly be in a more precarious financial situation. Your lawyer can carefully develop facts that may help to support an earning capacity argument in an appropriate situation, or help you to defend against such a finding if you are the spouse who finds yourself responding to an earning capacity allegation.

Although the legal standard for establishing earning capacity has not been changed by the COVID-19 pandemic, our expectation is that our courts will be faced with new factual challenges in this area of the law for which litigants and their lawyers should be prepared.

Cohen and Wolf's family law group is well-versed in this area of the law, and our attorneys have worked successfully to litigate and resolve earning capacity cases, including using experienced experts to

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prosecute and defend these cases. If you have questions about earning capacity or any other family law issue, please reach out to one of our family law attorneys for a discussion.

PRACTICE AREAS

Family Law