

# **INCOME AVERAGING FOR CHILD SUPPORT AND MAINTENANCE – CASE LAW SUMMARY**

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## **1. Introduction:**

A method of determining income for the purpose of paying either child support or maintenance referenced by the judge in our several pretrial conferences is income averaging. There is a significant body of Illinois case law which looks favorably upon averaging income in appropriate cases. While most of the income averaging cases were decided before the legislature changed the child support statute to allow a base plus a percentage, there are many cases where a base plus a percentage simply is not workable. And given the 2015 maintenance statutory amendments, the case law for support regarding income averaging is far more critical than ever. This is because income for maintenance is defined the same for child support.

### **a. Review of Cases:**

***Nelson***: In *IRMO Nelson*, 297 Ill.App.3d 651 (3d Dist. 1998), the appellate court held that when child support obligor has fluctuating annual income, trial court properly determined child support by averaging obligor's net income over three consecutive years. The appellate court in *Nelson* commented favorably on the *IRMO Freesen* and *IRMO Elies* cases, discussed below. The *Nelson* three year figures were \$43,000 in 1996, \$74,000 in 1995, and \$91,000 in 1994.

***Freesen***: A similar ruling regarding income averaging was made in *Freesen*, 275 Ill.App.3d 97 (4th Dist. 1995). The *Freesen* court held that where there are income fluctuations, it is appropriate to consider prior years of income. *Freesen* stated:

“Income need not fluctuate wildly before it is appropriate for the trial court to consider prior years of income in determining prospective income. We also note that there is no iron-clad rule requiring a trial court to consider only the last three years of income in arriving at net income for child support purposes. At least the three prior years should be used to obtain an accurate income picture. Beyond that, however, it must be left to the discretion of the trial court, as facts will vary in each case. While a court should not base net income findings upon the mere possibility of future financial resources, neither should it rely upon outdated information which no longer reflects prospective income.”

At least three prior years of income should be used. *Freesen* represented a trend to consider an

income averaging approach because earlier case law suggested the use of such an approach should be limited to very unusual circumstances.

**Elies**: In *Elies*, 248 Ill.App.3d 1052 (1st Dist. 1993), the appellate court affirmed an award of child support based upon 3 year averaging where the income fluctuated significantly and reliability was not disputed.

**Schroeder**: *IRMO Schroeder*, 215 Ill.App.3d 156 (4th Dist. 1991), held that deviations from current reliable current income data require a compelling showing of a definitive pattern of economic reversals. These cases break down as follows:

**Carpel**: The 1992 case of *In re Marriage of Carpel* also involved income averaging, but that case does not establish clear income averaging guidelines. It appeared *Carpel* was a three year averaging award in a case involving a lawyer. *Carpel* stated:

“In a case such as this, the trial court should consider the supporting parent’s previous income when trying to determine his prospective income. However, a court should not base its net income finding on the mere possibility of future financial resources (*Harmon*, 210 Ill. App. 3d at 96) or on outdated data that no longer reflect prospective income. (*In re Marriage of Schroeder* (1991), 215 Ill. App. 3d 156, 161-62.)”

**DiFatta**: *IRMO DiFatta*, 306 Ill.App.3d 656 (2d Dist. 1999), presented a new wrinkle regarding the income averaging cases. *DiFatta* held that where child support obligor is paid by the hour and his average hours of employment fluctuate significantly from year to year, a court may average the number of hours worked for the past ten years in determining net income for child support purposes. The *DiFatta* court approved the trial court's income averaging for ten years. That is a long time and sets an Illinois court of review record for the number of years for which a court can income average.

**Garrett**: A 2003 income averaging case not based on the most recent three years where the recent reductions in income for a professional were atypical is [\*IRMO Garrett\*](#). In *Garrett*, the husband was a self-employed physician who earned a net income in 1993 earned a net income of approximately \$175,000. In 1999 the former wife filed a petition to increase child support. The trial court in the modification proceedings found that there had been a trend toward growth in the ex-husband’s income from the time of the divorce. The ex-husband on appeal argued that the 2000 projected net income figure of \$164,836 should have been used in applying the statutory guidelines. The appellate court after approving of the language in *Freesen* that income does not need to wildly fluctuate for the court to income average commented that, “We agree with the trial court’s decision to average the net income of the previous three years because the income amounts varied significantly from year to year. Specifically, the court found [the ex-husband’s] 1999 net income to be \$240,034; his 1999 net income to be \$237,897 and his 2000 net income to be \$164,836. **Further, considering the fact that the court found the reduction in [the ex-**

husband's] gross income from 1999 to 2000 (the time this action was pending) atypical and unexplained by [the ex-husband's] testimony, the court would have been justified in excluding the 1999 to 2000 income altogether and substituting 1997's income of \$197,497, thereby resulting in an even higher averaged income." The last sentence of the discussion was dictum but is interesting dictum considering the fact that this is the first Illinois case which addresses the possibility of ignoring the most recent annual income figure in an income averaging approach where it is thought that there may be a degree of income manipulation for the most recent year.

**Hubbs:** A 2006 income averaging case is *IRMO Hubbs*, 363 Ill. App. 3d 696 (Fifth Dist., 2006). *Hubbs* applies income averaging when income from new employment is uncertain and where a certain level of income is imputed based upon a decision to take a job with more speculation as to commissions versus a job with a certain income. The appellate court held that the trial court did not err in imputing to the husband a base gross income of \$115,000 (based upon an average of the past three years of his previous employment.) In addition, the husband was required to pay 13% of the gross income above this amount. The husband urged that the trial court erred in imputing income to him based upon his previous employment. On the income averaging issue the appellate court stated:

Where it is difficult to ascertain the net income of a noncustodial spouse, the circuit court may consider past earnings in determining the noncustodial spouse's net income for purposes of making a child support award. *IRMO Karonis*, 296 Ill. App. 3d 86, 92 (2<sup>nd</sup> Dist., 1998) [*Karonis* held that where it is difficult to ascertain exact amount of child support obligor's income and his credit application/financial statement stated an income of \$110,000, whereas he testified to an income of only \$13,000, the trial court's assessment that the obligor's net income was \$40,000 per year was affirmed.] Using an average income for the previous three years of employment is a reasonable method for determining net income where income has fluctuated widely from year to year. *IRMO Nelson*.

What is interesting is that in *Hubbs* there was income averaging based upon a past job in light of the uncertain nature of the income from the current job. In the husband's current job, his ultimate income would be based upon commissions. He received an advance of \$7,500 monthly and these advances were loans which would then have to be repaid from commissions. The husband was responsible for all expenses related to the production of his income. The husband urged that the trial court should have determined his net income to be \$2,367 per month. The appellate court applied the facts of the case to its decision as follows:

Mark's income for the previous three years was \$133,000, \$114,009, and \$169,319, respectively. Mark also testified that he had recently rejected a job offer that would have paid him a salary of \$120,000 a year. We believe that based on the evidence in this case, the circuit court acted properly in imputing Mark's gross income at \$115,000. This figure is slightly below his average income for the

previous three years and slightly below a salary that he could have earned had he accepted another position. Although the circuit court could have required Mark to pay a percentage of his net income to Peggy, we believe that it acted properly in determining gross income to be \$115,000.

**Price:** *IRMO Price*, 2013 IL App (4th) 120155, addressed the husband's argument that for maintenance purposes the trial court should have applied income averaging rather than including in his income business income, which was variable and relatively recent. A good quote from the decision had stated:

As this court has recently stated, "[i]ncome' for tax purposes is not synonymous with 'income' for determining \*\*\* support." *In re Marriage of Bradley*, 2011 IL App (4th) 110392, ¶ 44, 961 N.E.2d 980. "The purpose of the two calculations are different. While the Internal Revenue Code is concerned with reaching an amount of taxable income, the support provisions in the Dissolution Act are concerned with reaching the amount of \*\*\* income" for determining support.

**S.D.:** *In re Marriage of S.D.*, 2012 IL App (1st) 101876, ¶43 followed *In re Marriage of Elies* and finding that the trial court did not err in using income averaging to determine available income for maintenance.

**Evanoff:** *In re Marriage of Evanoff*, 2016 IL App (1st) 150017. The husband argued that the trial court abused its discretion in failing to take into account the prior three years of the wife's income. *Id.* ¶ 29. The appellate court disagreed, stating that income averaging is within the trial court's discretion and that the parties stipulated to the wife's income. *Id.* ¶¶ 28-29. Thus, the case stated:

At oral argument, Tomasek specifically argued such an averaging was required by Illinois case law. See *In re Marriage of Nelson*, 297 Ill. App. 3d 651, 655 (1998) (finding that under the circumstances using a three-year income averaging was appropriate for determining husband's child support obligation); *In re Marriage of Freesen*, 275 Ill. App. 3d 97, 103-04 (1995); *In re Marriage of Garrett*, 336 Ill. App. 3d 1018 (2003). However, Tomasek's argument is misplaced; income averaging is left to the sound discretion of the court. All the cases cited by Tomasek recognize this. See *Nelson*, 297 Ill. App. 3d at 655 (findings of the trial court as to net income will not be disturbed absent an abuse of discretion); *Freesen*, 275 Ill. App. 3d at 103 (net income is reviewed under an abuse of discretion); *Garrett*, 336 Ill. App. 3d at 1024 (a trial court's finding of net income is within the discretion of the trial court). Accordingly, even if there had been no stipulation, Tomasek's argument that the trial court must use income averaging is misplaced. It is within the discretion of the trial court to do so.

b. **Income Averaging Cases Executive Summary:**

These cases break down as follows:

- ☞ Three year averaging OK even where income does not fluctuate wildly - *Freesen*
- ☞ Three year averaging OK where income fluctuates significantly - *Elies, Nelson* and *Garrett*.
- ☞ Six year weighted average improper. - *Schroeder*
- ☞ 10 years averaging **of hours** worked permissible when hours fluctuate significantly. *DiFatta*.
- ☞ **Three year averaging does not necessarily have to be the last three years where there is evidence of what some lawyers call “sudden income deficiency syndrome.”** *Garrett*.
- ☞ Whether to income average is within the trial court’s sound discretion. *Evanoff*.

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