Presented:
University of Texas School of Law
2009 Parent-Child Relationships:
Critical Thinking for Critical Issues

January 29-30, 2009
Austin, Texas

CHILD SUPPORT AND THE FAILING ECONOMY

Bruce D. Bain

Bruce D. Bain
Bain, Files, Jarrett,
Bain & Harrison, P.C.
109 West Ferguson
Tyler, Texas 75702
903-595-3573
Fax 903-597-7322

bbain@bain-files.com
www.bain-files.com

Bruce D. Bain

Bain, Files, Jarrett, Bain & Harrison, P.C.
109 W. Ferguson
Tyler, Texas 75702
(903) 595-3573
(903) 597-7322 fax
bbain@bain-files.com

PERSONAL – *The important stuff first*

Married to Martha for 16 wonderful years and full time father of three boys as homework helper, diorama assistant, reader listener, video game time arbitrator with binding, unappeallable authority, multi-sport assistant coach resulting in great memories.

AREAS OF PRACTICE

Complex divorces and child custody cases. Protection of separate property and pursuit of reimbursement and/or economic contribution claims through tracing. Grandparent and third party conservatorship claims. Interstate custody conflicts and international compacts.

LECTURER & AUTHOR

Economic Torts – SBOT Marriage Dissolution - 2008
Ethics: Paralegal and You – SBOT Marriage Dissolution Boot Camp – 2007
Economic Contribution and Valuation – Texas College for Judicial Studies - 2007
Post Judgment Issues – SBOT Ultimate Trial Notebook: Family Law – 2006
Motions in Limine – SBOT Family Law Basic Training – 2005
New Grievance Procedures – Smith County Bar Assoc. - 2004
When Disaster Strikes – SBOT Advanced Family Law 2003
Recent Cases and Legislation - Smith County Bar Assoc., Family Law Section – 2002, 2003
Current Issues in Family Law – Tyler Area Association of Legal Professionals - 2003
Texas Private Schools: Family Law Issues and School Responsibility - 2002
Economic Contribution – Smith County Bar Assoc. - 2002
Economic Contribution – Texas Panhandle Family Law Assoc. - 2002
Modification of Custody – SBOT – Pro Bono Project - 2001
The New Discovery Rules – Smith County Bar Assoc. - 1998

PROFESSIONAL ASSOCIATIONS

Board Certified – Family Law – Texas Board of Legal Specialization - 2001- present
Texas Academy Family Law Specialists – Member (Prior Board of Director)
Texas Pattern Jury Charge – Family 2001- current
SBOT – Family Law Practice Manual Committee – 2006 - 2008
SBOT Grievance Committee – District 2A - 2003 – current (past Chairman)
Unauthorized Practice of Law Committee – Texas Supreme Court – 2001 - current
Smith County Bar Association – President 2005-2006; Vice President 2004-2005; Secretary 2002-2003; Director 2001-2002
Smith County Bar Foundation – President 2007-2008; Director, 2005-2007

EDUCATION & ACCOLADES

South Texas College of Law – J.D.; University of Mississippi – B.B.A.
My boys actually like spending time with me (well, at least I think they do.)

Table of Contents

CHILD SUPPORT
AND
THE FAILING ECONOMY

I. INTRODUCTION

We know the percentages; we know the chart; we know how to arrive at net resources; and we know about "guideline support." But what may not be fresh in our thoughts is what to do when the 'guideline' numbers result in the client's jaw hitting the floor.

This paper start with the current status of under-employment or intentional unemployment, and will also focus on how to get more child support for your client and how to have your client pay less child support; how to find and prove other sources of income and how to demonstrate that there is just nothing left to give; and how to consider new issues in you presentment to the court on why the guidelines should not apply – either to increase or decrease the number.

I won't spend extra time on child support for disabled children (other than the substantially same argument for a variance from guidelines); receipt of social security by obligor; retroactive support for a 'newly discovered' dad. Similarily, the how to collect the child support or enforce it is also left to another paper and the presentation following this one.

At the end of the paper and presentation, I hope to have you considering new ways to protect your client's interest (the bottom line) as well as a few gentle reminders of the oft forgotten basics.

My sincere appreciation is extended for the opportunity and honor provided to me by Angela Pence England and the entire planning committee for asking me to present this paper.

II. BIG PICTURE THOUGHTS

When the court is dealing with a modification of child support, the old standard was the good faith test that was predictable and easy to apply. It looked to the reason the obligor had a change in income and did the change occur in good faith. The text book example is if an obligor leaves his job to enter a religious order – such as becoming a minister. Certainly you would expect a decrease in pay and it would be hard to say he did it for the sole purpose of decreasing his child support obligation. But this test unjustifiably maximized the value of one party's freedom of decision while disregarding the children's interest. The opposite extreme was a strict review that the obligor's child support amount would not decrease regardless of reduction in income, unless the change of employment was initiated solely by the employer. Something that is happening more and more now with the current economy.

Currently the courts are looking to the totality of the circumstances – was the reduction in income based on decision of the obligor or third party; by what percentage of reduction is the income; for how long is the reduction expected to last; what is the obligor's other income items or total assets; and what is the current status of the children. These items all require that the guideline support calculations take a back seat and the lawyers become creative in utilizing

specific facts of the case as well as the "wild card statute" (TEX. FAM. CODE § 154.123) to vary from the guidelines child support.

III. UNDEREMPLOYMENT

If the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment, the court may apply the support guidelines to the earning potential of the obligor. TEX. FAM. CODE § 154.066. "A parent who is qualified to obtain gainful employment cannot evade his support obligation by voluntarily remaining unemployed or underemployed." *Tenery v. Tenery*, 955 S.W.2d 337, 340 (Tex.App.-San Antonio 1997, no pet.). In order to find a parent intentionally underemployed, the evidence must show that the parent reduced his income for the purpose of decreasing his child support payments. *In re P.J.H.*, 25 S.W.3d 402, 405-06 (Tex.App.-Fort Worth 2000, no pet.). The requisite intent may be inferred from such circumstances as the parent's education, economic adversities, business reversals, business background, and earning potential. *In re Davis*, 30 S.W.3d 609, 617 (Tex.App.-Texarkana 2000, no pet.); *In re P.J.H.*, 25 S.W.3d at 406.

At the same time, the court must keep in mind a parent's right to pursue his or her own happiness. *Zorilla v. Wahid*, 83 S.W.3d 247, 253 (Tex.App.-Corpus Christi 2002, no pet.); *DuBois v. DuBois*, 956 S.W.2d 607, 610 (Tex.App.-Tyler 1997, no pet.). This review of the obligor's choice is important and timely in today's economy. Is it a new job because of being fired or laid off; is it a new job because the 'writing was on the wall' regarding a future termination; is it a new job because the obligor has remarried to a wealthy spouse; or is it a new job because the obligor is just flakey? The new job may be due to the obligor's conduct – being fired for inappropriate on the job behavior such as sexual harassment.

Once the obligor has offered proof of his current wages, the obligee bears the burden of demonstrating that the obligor is intentionally underemployed. *Zorilla*, 83 S.W.3d at 253; *DuBois*, 956 S.W.2d at 610.

Intentional underemployment has been construed to mean a "voluntary choice by the obligor." *In re D.S.*, 76 S.W.3d 512, 520 (Tex.App.-Houston [14th Dist.] 2002, no pet.); *Baucom v. Crews*, 819 S.W.2d 628, 633 (Tex.App.-Waco 1991, no writ.). Where an obligor voluntarily becomes underemployed, the essential question is whether the reduction was effectuated with a design to reduce child support payments. *In re Davis*, 30 S.W.3d at 616; *DuBois*, 956 S.W.2d at 610. And of course, no obligor will stand up and say, "I changed jobs to get out of paying child support," but it can be inferred by review of the circumstances. *Id.*

The duty to support a child is not limited to a parent's ability to pay from current earnings but extends to his or her financial ability to pay from any and all sources that might be available. *In re Z.B.P.*, 109 S.W.3d 772, 783 (Tex.App.-Fort Worth 2003, no pet.); *In re P.J.H.*, 25 S.W.3d at 406. Thus, if a parent's actual income is significantly less than what he or she could earn because of intentional unemployment or underemployment, the trial court may apply the child support guidelines to that parent's earning potential. TEX. FAM. CODE § 154.066; *Logan v. Logan*, No. 02-05-00068-CV, 2006 WL 2167164, at *6 (Tex.App.-Fort Worth 2006, no pet.) (mem.op.).

A parent who is qualified to obtain gainful employment cannot evade his or her support obligation by voluntarily remaining unemployed or underemployed. *Logan*, 2006 WL 2167164,

at *6; *Eggemeyer v. Eggemeyer*, 535 S.W.2d 425, 427-28 (Tex.Civ.App.-Austin 1976), aff'd, 554 S.W.2d 137 (Tex.1977). Therefore, a trial court may order a parent to pay child support beyond the amount the parent's income would ordinarily indicate under the guidelines if the parent could potentially earn more money but has intentionally chosen not to. *See* TEX. FAM. CODE § 154.066; *Beach v. Beach*, No. 05-05-01316-CV, 2007 WL 1765250, at *3 (Tex.App.-Dallas June 20, 2007, no pet.) (mem.op.). Similarly, if the wages of the obligor have decrease, either through a reduction in force by the employer (arguably not his fault) or because of a change of jobs by choice, still consider that other sources of income may be reviewed and the nature of the obligor's assets – can they imputed to be income producing.

The flip side is there has been support that a finding of voluntary underemployment was an abuse of discretion when the obligor was a high school dropout with a GED, expected to earn minimum wage, and remained unemployed to take care of her children and elderly parents. *In re Z.B.P.*, 109 S.W.3d 772, 783 (Tex.App.-Ft. Worth – 2003, no writ.)

IV. FINDINGS BY THE COURT – GET THEM WHILE YOU CAN

If you obtain an adverse ruling on the child support number, you must comply with both the Texas Family Code as well as the Texas Rules of Civil Procedure to support any appeal. *See* TEX. FAM. CODE § 154.130 and TEX. R. CIV. PRO. §§ 296 and 297. If the trial court does not fulfill its obligation at first by filing its findings, then a gentle reminder is need. Tex. R. Civ. Pro. 297. The failure make a timely request or to file a notice of past due findings of fact waives the right to complain about the trial court's failure to file findings of fact and conclusions of law. S*ee Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227, 232 (Tex.App.-Houston [14th Dist.] 2000, no pet). Either one of these failures can result in waiver of the right to complain about the trial court's failure to file the findings of fact and conclusions of law. *Curtis*, 20 S.W.3d at 232; see also Tex.R. Civ. P. 297.

It is obviously helpful for the court to articulate its findings of fact and conclusions of law, but in the lack of any such production, the appellate court may presume that the trial court found all necessary facts to support its judgment. *See Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 252 (Tex.App.-Houston [14th Dist.] 1999, pet. denied). The appellate court may imply findings that support the judgment. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002).

Separate from the Texas Rules of Civil Procedure, when you have a child support number that is detrimental to your client, this unhappy client may seek to challenge the support order and should request findings allowed under the TEX. FAM. CODE § 154.130, which provides:

§ 154.130. Findings in Child Support Order

(a) Without regard to Rules 296 through 299, Texas Rules of Civil Procedure, in rendering an order of child support, the court shall make the findings required by Subsection (b) if:

(1) a party files a written request with the court not later than 10 days after the date of the hearing;

(2) a party makes an oral request in open court during the hearing; or

(3) the amount of child support ordered by the court varies from the amount computed by applying the percentage guidelines.

(b) If findings are required by this section, the court shall state whether the application of the guidelines would be unjust or inappropriate and shall state the following in the child support order:

"(1) the monthly net resources of the obligor per month are $_____;

"(2) the monthly net resources of the obligee per month are $_____;

"(3) the percentage applied to the obligor's net resources for child support by the actual order rendered by the court is _____%;

"(4) the amount of child support if the percentage guidelines are applied to the portion of the obligor's net resources that does not exceed the amount provided by Section 154.125(a), Family Code, is $_____;

"(5) if applicable, the specific reasons that the amount of child support per month ordered by the court varies from the amount stated in Subdivision (4) are: _____; and

"(6) if applicable, the obligor is obligated to support children in more than one household, and:

"(A) the number of children before the court is _____;

"(B) the number of children not before the court residing in the same household with the obligor is _____; and

"(C) the number of children not before the court for whom the obligor is obligated by a court order to pay support, without regard to whether the obligor is delinquent in child support payments, and who are not counted under Paragraph (A) or (B) is _____."

(c) The application of the guidelines under Section 154.129 does not constitute a variance from the child support guidelines requiring specific findings by the court under this section.

By its terms, the statute requires the trial court provide findings upon request in contested hearings in which "the amount of the support is set or modified by the court.

V. "WHAT IS" VERSUS "WHAT MIGHT BE"

Certain themes appear throughout the various types of voluntary reduction-of-income cases. Two of these themes are: What degree of protection for the recipient parent is mandated by a reasonablness standard (i.e., how much of a financial "hit" is "reasonable") and, to a lesser degree, whether more protection should be given to a support obligation established by an agreement between the parties. Another theme is how much weight should be given to the fact that the party seeking imputation of income had previously acquiesced in the other party's choice – either of job change or investment choice. There is considerable equity in the argument that when one party acquiesced to the change, they should not to be allowed to renege during a divorce for the purpose of imputing income.

Some other states decisions reject or ignore the concept of prior acquiescence. (Rejecting: *See Smith v. Smith*, 737 So. 2d 641,645 (Fla. Dist. Ct. App. 1999). Ignoring: *Goldberger v. Goldberger*, 624 A.2d 1328, 1332-34 (Md. Ct. Spec.App. 1993), cert. denied. 632 A.2d 150 (Md. 1993); *Sellers v. Sellers*, 549 N.W 2D 481,485 (Wis. Ct. App.. 1996), rev. denied 555 NW2d 816 (Wis. 1996).

Below are a several hypotheticals that may occur.

A. Return to School

In some cases, a party quits a job or takes a lower-paying job because of a potential long-range economic advantage. For example, a party may have returned to school, enrolled in job training, or accepted a job with long-range economic benefits. These cases become difficult because they pit legitimate freedom of choice against adequate support to the children.

As in retirement cases, courts tend to apply some version of a reasonableness. A key factor will be the extent to which the interests of the obligee and children are affected, i.e., what type of financial hit occurs. If the return to school decision was made during a marriage, it is difficult for the obligee to urge higher income potential. But in a modification situation, if the obligor then decides to go back to school, he has a greater chance of suffering the change of lifestyle and child support not being reduced.

Courts also should be sensitive to: (1) how likely the economic gain is (or how realistic the educational objectives); and (2) how likely it is that an economic gain will offset the short-term reduction in support. *See In re Marriage if Little*, 975 P.2d 108 (Ariz. 1999) (en banc). *See also, Overbey v. Overbey*, 698 So. 2d 811 (Fla. 1997). The latter is especially important since children may suffer from the short-term reduction in support and be unable to reap the long-term benefits.

This potential change in income may be somewhat offset by the utilization of stair stepped child support. As an example, the court orders one dollar amount for child support for a set period of time (such as for one semester), then an increase in dollar amount of child support for another set period of time, then a final dollar amount after school is expected to be completed.

B. Retirement

Generally speaking, the courts will look to the overall reasonableness of the retirement when it is volitional and not the result of ill health. The court should consider the obligor's age, health, and motivation for retirement, type of work previously performed, the age of the children of the obligor, the age at which others in substantially the same line of work typically retire; and the needs of the children. Some other states have reviewed the above items. Compare *Pimm v. Pimm*, 601 So.2d 534 (Fla. 1992) with *Deegan v. Deegan*, 603 A.2d 542 (N.J. Super. Ct. App. Div. 1992) for differing perspectives on how much weight to give each element.

The downturn in the current economy will be a reason to not look with suspicion on early retirement. *But see Rogers v. Rogers* 746 So.2d 1176, 1179 (Fla. Dist. Ct. App. 1999) *Bassette v. Bartolucci*, 652 N.E.2d 623, 624-26(Mass. App. Ct. 1995.)

And what about retirement from the military? If after twenty years, the soldier or sailor retires and begins receiving his retirement pay. Does the new child support go solely off the retirement monthly income number, even if the obligor could go back to work in another field?

C. Caregiving

A recurrent problem is how to treat a party's decision to care for children rather than earn income outside the home. Courts and child support guidelines seem unsympathetic to an absolute right to forgo employment in favor of child care. Although Texas child support guidelines do not differentiate the age of the child for whom the parent is caring as voluntary unemployment the implication of other states' provisions is that in all other cases a parent may not refuse

employment to care for a child (unless, presumably, the child has special needs or appropriate child care is unavailable).

At least some judicial opinions seem to be in philosophical agreement. *See*, for example, *Snader v. Dudley*, 1999WL 971065 at *2 (Del. 1999); *Terpstra v. Terpstra*, 588 NE.2d 592, 595 (Ind. Ct. App. 1992); *In re Marriage if Mackey*, 940 P.2d 1112, 1114 (Colo. Ct. App. 1997); *Brody v. Brody*, 432 S.E.2d 20,22 (Va. Ct. App. 1993*); In re Marriage if Wright*, 896 P.2d 735,737 (Wash. Ct. App. 1995). This comparative lack of value for child care is surprising, both because of the importance of child care and because our own spousal support statute list a custodial parent's status (i.e., at home with the children or working outside the home) as a factor to be considered, thus affording child care high value.

A more appropriate test might be to evaluate the caregiver's decision to forgo employment in light of other factors, such as the age of the child (giving special deference to preschool-age children.) *See In re Marriage of Hinman*, 64 Cal. Rptr. 2d 383, 390 (Cal. Ct. App. 1997.) Any hardship to the obligor by not considering the caregiver's earning potential, any detrimental economic affect on the child caused by the caregiver's lack of employment, and whether the noncaregiving parent had previously acquiesced to the caregiver's unemployment. For a helpful general discussion, *see Stanton v. Abbey*, 874 S.W.2d 493, 499 (Mo. Ct. App. 1994).

The caregiver issue also arises when the child is not the child of both parties (e.g., when the wife remarried, had a child, and gives up employment to care for that child). Although the positive value of child care is still present, is it fair to the other party to compute a support obligation that disregards the reduction of income sustained by the caregiving parent? Some other courts and child support guidelines treat such child care as a voluntary reduction of income for imputation purposes. (*See, e.g., Canning v. Juskalian*, 597 NE. 2d 1074, 1077-78 (Mass. App. Ct. 1992); *Bailey v. Bailey*, 724 So. 2d 335,338 (Miss. 1998); *In re Marriage if Pollard*, 991 P.2d 1201, 1204-05 (Wash. Ct. App. 2000). Others seem to make no distinction between first and second-family caregiving responsibilities. *E.g., Atkinson v. Atkinson*, 616 A.2d 22, 23-24 (Pa. Super. Ct. 1992).

D. Quality of Life

Even with the looming question of the current uncertain economic future, some may chose (or claim) a decrease in income based on quality of life reasons. Be it based on religion, desire for public service, less mentally or physically demanding work, or to spend more time with the family. The reasons are numerable, the result is the same – obligor is desiring to pay less.

VI. OTHER INCOME

Imputation of income can result not only from underemployment but from under-utilization of assets. In determining, party's income for child support purposes, courts may consider income the asset produces and income the asset could have produced had it been used differently *See, e.g., In re Marriage of Dacumos*, 9C Cal. Rpt. 2d 159, 161 (Cal. Ct. App, 1999); *Bartlett v. Bartlett*, 599 A.2d 14, 19 (Conn. 19901*); Miller v. Miller*, 734 A.2d 752, 760-61 (N.J. 1999); *Stiffler v. Stiffler*; 698A.2d 549, 552-53 (N.J. Super. Ct. Ch. Div. 1997); *Sizemore v. Sizemore*, 1994 WL 558917 at *3 (Ohio Ct. App. 1994); *Porter v. Bego*, 488 S.E.2d 443, 449 (W. Va. 1997); *In re Paternity of Brad Michael L.*, 564 N.W2d 354, 362 (Wis. Ct. App. 1997).

The issues are similar to those in an underemployment case: whether the asset has been underutilized and whether the owner's good faith is a complete defense or whether to focus on the reasonableness of the asset's use and the precise amount of its underutilization. As an example, if the obligor's investments were in growth stocks rather than in an income category, he would have only an increase in capital and no dividends, or in other words high equity and no income. The court should impute a rate of return based on possibly the Moody's Composite Index on A-rated corporate bonds. The rate of return for long-term bonds provides a prudent balance between investment risk and return.

Consider if the obligor loaned money to his own or another business at 10 percent with interest deferred until other debts were paid. The financial condition of the borrower could be such that interest would not be paid for a long time. The court could impute income at a rate of ten percent on the theory that that number was an appropriate rate for that particular type of investment. *See also Brock v. Brock,* 690 So.2d 737, 741 (Fla. Dist. Ct. App. 1997), discussing factors to be considered in determining whether to impute income and how much when a party is charged with having underproductive investments.

Texas's own child support guidelines may provide guidance regarding the rate of return that can be imputed. If retroactive support is deemed to earn six percent interest, why can not that interest rate be an argument for the minimum return for underutilized assets?

When reviewing the use of an asset that may be income earning, the reasonableness of its use should not be based on whether the asset was used to produce the greatest possible income, but on whether its use was reasonable in light of the circumstances. *See, e.g., In re Marriage of Clarke,* 950 S.W2d 11, 13 (Mo. Ct. App. 1997). Using an asset based on a decision that was reasonable when made, but might have been better in hindsight, should not result in the imputation of income. And recall that a court may impute income on dissipated assets, such as income producing property that was sold and now is an non-incoming producing asset. The example is that rental income or business interest is sold and the proceeds are invested in growth stocks. *See* TEX. FAM. CODE § 154.067.

VII. IT'S IN THE CODE

As I began preparation for this paper, perusal of the Family Code was my starting point. WOW … lots of good stuff in there. Below is a synopsis of some of the more mundane as well as profound items of which you should not forget when preparing your client's case.

A. § 154.061. Computing Net Monthly Income

(a) Whenever feasible, gross income should first be computed on an annual basis and then should be recalculated to determine average monthly gross income.

Don't let the obligor wiggle out of providing you complete information. A lack of production can lead to the court's assumption that the obligor makes maximum monthly amounts and apply the cap. *In re J.D.N.* 183 S.W.3d 128 (Tex. Dallas – 2006, no pet.) And if you are the obligor, produce a series of income numbers to show that the annual averages are in your favor.

B. § 154.062. Net Resources

….

(b) Resources include:

(1) 100 percent of all wage and salary income and other compensation for personal services (including commissions, overtime pay, tips, and bonuses);

(2) interest, dividends, and royalty income;

(3) self-employment income;

(4) net rental income (defined as rent after deducting operating expenses and mortgage payments, but not including noncash items such as depreciation); and

(5) all other income actually being received, including severance pay, retirement benefits, pensions, trust income, annuities, capital gains, social security benefits, unemployment benefits, disability and workers' compensation benefits, interest income from notes regardless of the source, gifts and prizes, spousal maintenance, and alimony.

(c) Resources do not include:

(1) return of principal or capital;

(2) accounts receivable; or

(3) benefits paid in accordance with aid for families with dependent children.

(d) The court shall deduct the following items from resources to determine the net resources available for child support:

(1) social security taxes;

(2) federal income tax based on the tax rate for a single person claiming one personal exemption and the standard deduction;

(3) state income tax;

(4) union dues; and

(5) expenses for the cost of health insurance or cash medical support for the obligor's child ordered by the court under Section 154.182.

(e) In calculating the amount of the deduction for health care coverage for a child under Subsection (d)(5), if the obligor has other minor dependents covered under the same health insurance plan, the court shall divide the total cost to the obligor for the insurance by the total number of minor dependents, including the child, covered under the plan.

OR

(e) In calculating expenses for health insurance coverage for an obligor's child under Subsection (d)(5), if the obligor has other minor dependents covered under the same health insurance plan, the court shall divide the total cost to the obligor for the insurance by the total number of minor dependents, including the child, covered under the plan.

One of the most often neglected items for rental income is the deduction from the obligor's monthly numbers the amount for the mortgage payments on the rental property. *See* subpart (4). You will add in the monthly rental income and also add in the deprecation as shown on the tax returns, but then deduct the mortgage payment to substantially reduce the number.

C. § 154.065. Self-Employment Income

(a) Income from self-employment, whether positive or negative, includes benefits allocated to an individual from a business or undertaking in the form of a proprietorship, partnership, joint venture, close corporation, agency, or independent contractor, less ordinary and necessary expenses required to produce that income.

(b) In its discretion, the court may exclude from self-employment income amounts allowable under federal income tax law as depreciation, tax credits, or any other business expenses shown

by the evidence to be inappropriate in making the determination of income available for the purpose of calculating child support.

This section allows the most tweaking or creative argument in arriving at numbers. Section (b) specifically allows, and I would argue encourages, the court to exclude from any reduction in monthly calculations the typical claimed income deductions found on Schedule E of the parties' tax return.

D. § 154.066. Intentional Unemployment or Underemployment

If the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment, the court may apply the support guidelines to the earning potential of the obligor.

See discussion above.

E. § 154.067. Deemed Income

(a) When appropriate, in order to determine the net resources available for child support, the court may assign a reasonable amount of deemed income attributable to assets that do not currently produce income. The court shall also consider whether certain property that is not producing income can be liquidated without an unreasonable financial sacrifice because of cyclical or other market conditions. If there is no effective market for the property, the carrying costs of such an investment, including property taxes and note payments, shall be offset against the income attributed to the property.

(b) The court may assign a reasonable amount of deemed income to income-producing assets that a party has voluntarily transferred or on which earnings have intentionally been reduced.

F. § 154.069. Net Resources of Spouse

(a) The court may not add any portion of the net resources of a spouse to the net resources of an obligor or obligee in order to calculate the amount of child support to be ordered.

(b) The court may not subtract the needs of a spouse, or of a dependent of a spouse, from the net resources of the obligor or obligee.

Recall that even community property that is subject to the sole management of the spouse of the obligor should not be included within the net resource calculations. *In re J.C.K.,* 143 S. W 3d 131 (Tex.App.-Waco, 2004, no pet.); see also *In re Knott*, 118 S.W.d3d 899 (Tex.App-Texarkana 2003, no pet.) What the court can decide and include within the calculations is separate from what is discoverable.

G. Presumption of the Guidelines

We are aware that the default for Texas child support is 'guideline support' – find net resource and apply the correct percentage to arrive at the presumed number. But that is not enough during the troubled financial times. Begin the 'new' calculations with the statutes' language. The guidelines are intended to "guide the court."

§ 154.121. Guidelines for the Support of a Child

The child support guidelines in this subchapter are intended to guide the court in determining an equitable amount of child support.

Then the court has the ability to exercise its judgment to do what is best for the children.

§ 154.122. Application of Guidelines Rebuttably Presumed in Best Interest of Child

(a) The amount of a periodic child support payment established by the child support guidelines in effect in this state at the time of the hearing is presumed to be reasonable, and an order of support conforming to the guidelines is presumed to be in the best interest of the child.

(b) A court may determine that the application of the guidelines would be unjust or inappropriate under the circumstances.

If you want the guideline support number, urge the court that your proposed number is in fact the guideline support calculations which is presumed to be in the children's best interest and the court can save judicial resources and time by adopting your proposed number. If you are the obligee, urge the court that the Texas Family Code encourages the court to review the numbers and provides the judge the discretion to set the child support number. To do otherwise would make the judge merely a scrivener and take away its inherent authority.

H. The Wild Card - § 154.123. Additional Factors for Court to Consider

(a) The court may order periodic child support payments in an amount other than that established by the guidelines if the evidence rebuts the presumption that application of the guidelines is in the best interest of the child and justifies a variance from the guidelines.

(b) In determining whether application of the guidelines would be unjust or inappropriate under the circumstances, the court shall consider evidence of all relevant factors, including:

(1) the age and needs of the child;

(2) the ability of the parents to contribute to the support of the child;

(3) any financial resources available for the support of the child;

(4) the amount of time of possession of and access to a child;

(5) the amount of the obligee's net resources, including the earning potential of the obligee if the actual income of the obligee is significantly less than what the obligee could earn because the obligee is intentionally unemployed or underemployed and including an increase or decrease in the income of the obligee or income that may be attributed to the property and assets of the obligee;

(6) child care expenses incurred by either party in order to maintain gainful employment;

(7) whether either party has the managing conservatorship or actual physical custody of another child;

(8) the amount of alimony or spousal maintenance actually and currently being paid or received by a party;

(9) the expenses for a son or daughter for education beyond secondary school;

(10) whether the obligor or obligee has an automobile, housing, or other benefits furnished by his or her employer, another person, or a business entity;

(11) the amount of other deductions from the wage or salary income and from other compensation for personal services of the parties;

(12) provision for health care insurance and payment of uninsured medical expenses;

(13) special or extraordinary educational, health care, or other expenses of the parties or of the child;

(14) the cost of travel in order to exercise possession of and access to a child;

(15) positive or negative cash flow from any real and personal property and assets, including a business and investments;

(16) debts or debt service assumed by either party; and

(17) any other reason consistent with the best interest of the child, taking into consideration the circumstances of the parents.

VIII. VARIOUS "WHAT ABOUT…"

If there is rental income, don't forget to add back into the net resources the depreciation normally taken on Schedule E. If you represent the owner of rental property, you should deduct principal payments that do not appear on the tax return.

Municipal bonds' income does not usually appear on tax return because it is a tax free distribution but it is definitely income.

Distributions from deferred compensation plans, such as IRAs and pensions, should be considered, and urged that it is either a one time event or should be averaged into the net resources.

Disability payments are usually tax free if paid for by the recipient and may not be reported.

Partnerships K-1s are not actually the money received.

Closely held corporation's retained earnings can hide income that otherwise would be wages.

Medical savings accounts and payments for employer-paid or subsidized child care are sources of income.

IX. CONCLUSION

The bottom line is that the judge will want to provide for the children. If you provide a rational that establishes why the children will not be harmed and that the parents are being treated with some modicum of equality, then your numbers may well be utilized.