

## AMOUNT OF SUPPORT

The best interest of the child is the primary consideration in the determination of child support. *Tex. Fam. Code Ann. §153.002.*

### Net Resources.

Resources for the purpose of establishing child support liability include:

- 100 percent of all wage and salary income and other compensation for personal services (including commissions, overtime pay, tips and bonuses;
- self-employment income;
- net rental income (defined as rent after deducting operating expenses and mortgage payments, but not including noncash items such as depreciation);
- retirement benefits;
- pensions;
- trust income;
- capital gains;
- any other income actually received. *Tex. Fam. Code Ann. §154.062(b);* see *In re: L.R.P.*, 98 S.W.3d 312 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2003, no pet.) **(college-student’s father’s net resources include support by paternal grandparents of child.**

Income can be attributed to an obligor from the following employment benefits: expense accounts, mobile phones provided by the company, internet service at home, gas expense reimbursements, car repairs, car insurance, country club dues, frequent flier miles, reimbursable meals, performance bonuses or prizes, pre-tax plans for daycare and medical payments.

### Deemed Income.

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. *Tex. Fam. Code Ann. §154.067(a).* The court must 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, are offset against the income attributed to the property. *Tex. Fam. Code Ann. §154.067(a).*

### Minimum Wage Presumption.

In the absence of evidence of the wage and salary income of a party, the court must presume that the party has wages or salary equal to the federal minimum wage for a 40-hour week. *Tex. Fam. Code Ann. §154.068; Panozzo v. Panozzo*, 904 S.W.2d 780 (Tex. App.-- Corpus Christi 1995, no writ);

### **Net Resources of a New Spouse.**

The court may not add any portion of the net resources of a new spouse to the net resources of an obligor or obligee in order to calculate the amount of child support to be ordered. *Tex. Fam. Code Ann. §154.069(a); In Interest of Knott*, 118 S.W.3d 899 (Tex. App.–Texarkana 2003, no pet.) (the statutory method for calculating child support was not designed to impose a duty on an obligor’s spouse to support the obligor’s children using the income of the obligor’s spouse)

### **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. *Tex. Fam. Code Ann. §154.066; Reyes v. Reyes*, 946 S.W.2d 627 (Tex. App.–Waco 1997, no writ) (evidence supports holding obligor underemployed even if incarcerated); *Kish v. Kole*, 874 S.W.2d 835 (Tex. App.–Beaumont 1994, no writ) (child support award appropriately based on voluntarily underemployed father’s earning potential); see *DuBois v. DuBois*, 956 S.W.2d 607 (Tex. App.–Tyler 1997, no writ); *In Interest of P.J.H.*, 25 S.W.3d 401 (Tex. App.–Fort Worth 2000, no pet.) (because the court could reasonably have concluded that the appellant could earn considerably more money had he either kept his former position or sought employment with a business that would pay him a salary, the trial court did not abuse its discretion in holding that the appellant was intentionally underemployed); *In re S.B.C.*, 952 S.W.2d 15 (Tex. App.–San Antonio 1997, no pet.) (obligor who quit his job to go to law school was voluntarily unemployed); *In re: E.A.S.*, 123 S.W.3d 565 (Tex. App.–El Paso 2003, no pet); *Hardin v. Hardin*, 161 S.W.3d 14 (Tex. App.–Houston [14<sup>th</sup> Dist.] 2004.

However, for a court to find that a parent is intentionally underemployed or unemployed under Section 154.066, there must be evidence that the parent reduced his or her income for the purpose of decreasing his or her child support obligation. *In Interest of Z.B.P.*, 109 S.W.3d 772 (Tex. App.–Fort Worth 2003, no pet.) (the court found no evidence that the mother was voluntarily unemployed in order to avoid child support payments). The obligee has the burden to prove that the obligor could earn more than what he is currently earning. *Dubois v. Dubois*, 956 S.W.2d 607 (Tex. App.–Tyler 1997, no writ)(no proof of intentional underemployment); *In re David*, 30 S.W.3d 609 (Tex. App.–Texarkana 2000, no pet. h).

In *Tenery v. Tenery*, 955 S.W.2d 337 (Tex. App.–San Antonio 1997, no writ), the father became unemployed three months prior to the divorce hearing after 10 years of lucrative employment. At the time of the divorce, his monthly income was \$980, which would require a monthly child support amount of \$196 based on the guidelines. The appellate court upheld the trial court’s order for the father to pay \$550 per month, holding that the obligor’s unemployment required a deviation from the guidelines and that the award of \$550 was assessed based on use of the guidelines to the obligor’s

earning potential.

In *Gaxiola v. Garcia*, 169 S.W.3d 426 (Tex. App.–El Paso 2005), the court held that there was no evidence of intentional underemployment on the part of the obligor who simply moved from Phoenix to El Paso and earned less money. In that case, the court upheld the reduction of the obligee’s child support payments.

In representing an obligee who is claiming that the obligor is intentionally unemployed or underemployed, evidence should be presented to show that: (1) the obligor is intentionally unemployed; (2) with the intent to avoid his or her child support obligations; and (3) he or she can earn a specific amount higher than that which is currently being earned.

#### **H. Fluctuating Income**

In determining an obligor’s gross income, it has been held that the use of an adjusted average of a party’s income averaged over several years is not an abuse of discretion. In *Re Sanders*, 159 S.W.3d 797 (Tex. App.–Amarillo 2005, no pet.). Averaging was also done in *Norris v. Norris*, 56 S.W.3d 333 (Tex. App.–2001, no pet.), where the obligor had income swings in various years and the court averaged the income to calculate likely future income.

In *Knight v. Knight*, 131 S.W.3d 535 (Tex. App.–El Paso 2004, no pet.), the court upheld a child support order based on income figures for 1998. At the time of the divorce in 2001, the wife only had 1998 tax records for the husband which showed a \$60,000 annual income. The father did not appear for trial and his attorney presented no evidence. The father unsuccessfully argued on appeal that in the absence of evidence concerning current income, the trial court was required to calculate support based on minimum wage. See also *Cameron v. Cameron*, 158 S.W.3d 680 (Tex. App.–Dallas 2005, no pet.).

#### **I. Child Support Guidelines.**

The guidelines for the support of a child set forth in the Family Code are intended to guide the court in determining an equitable amount of child support. *Tex. Fam. Code Ann. §154.069(b)*. The amount of a periodic child support payment established by the child support guidelines 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. *Tex. Fam. Code Ann. §154.122(a)*. A court may determine that application of the guidelines would be unjust or inappropriate under the circumstances. *Tex. Fam. Code Ann. §154.122(b)*. If that conclusion is reached, the court must have a specific reason to justify it. *Tex. Fam. Code Ann. §154.130*.

The guidelines for the support of a child are specifically designed to apply to situations in which the obligor’s monthly net resources are \$6,000 or less. *Tex. Fam. Code Ann. §154.125(a)*. If the obligor’s monthly net resources are \$6,000 or less, the

court must apply the following schedule in rendering the child support order, *Tex. Fam. Code Ann. §154.125(b)*.

### **Deviation from Guidelines**

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. *Tex. Fam. Code Ann. §154.123(a)*; *Lide v. Lide*, 116 S.W.3d 147 (Tex. App.–El Paso 2003, no pet.) (support order in excess of guidelines upheld); *Hodson v. Keiser*, 81 S.W.2d 363 (Tex. App.–El Paso 2002, no pet.) (deviation from guidelines was supported by the evidence).

In *Hodson v. Keiser*, the mother and father agreed at the time of the divorce that the father would pay \$1,000 per month in child support. The father filed a motion to modify and his child support was decreased to \$495 per month. After much litigation, allegations of family violence and intervention by the Texas Department of Protective and Regulatory Services, the court found that the father's net resources had decreased and that pursuant to the guidelines, child support should be \$368.28 per month. However, the court set child support at \$699.40, plus additional support of \$331.14. The court stated that the evidence rebutted the presumption that the guidelines would be in the best interest of the children and that application of the guidelines would be unjust or inappropriate. The findings of fact contained a history of family violence and a history of physical and emotional abuse by the father toward the mother and the children. The court held that the age and needs of the children, including the need for therapy due to the father's behavior warranted the deviation from the guidelines. *Hodson v. Keiser*, 81 S.W.2d 363 (Tex. App.–El Paso 2002, no pet.).

An obligor's behavior may cause the court to determine that use of the child support guidelines is not appropriate. *In re L.R.P.*, 98 S.W.3d 312 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2003, pet. dismissed). In *L.R.P.*, a student was ordered to pay \$400 in child support when the court found that he was receiving a fixed amount of income from his parents, received a partial athletic scholarship, took a loan to pay \$3,500 for an attorney and took a vacation to New Orleans for Mardi Gras a week before the child support hearing. The court deviated from the guidelines in assessing child support.

2. **Specific Dollar Amounts for Child Support**

3. **Factors**

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

- the child's age and needs;
- the parent's ability to contribute to the support of the child;
- any financial resources available for the support of the child;

- the amount of time of possession of and access to a child;
- the amount of the obligee's net resources;
- child care expenses incurred by either party in order to maintain gainful employment;
- whether either party has the managing conservatorship or actual physical custody of another child;
- the alimony or spousal maintenance actually and currently being paid or received by a party;
- the expenses for a child for education beyond secondary school;
- whether the obligor or obligee has an automobile, housing, or other benefits furnished by his or her employer, another person, or a business entity;
- the amount of other deductions from the wage or salary income and from other compensation for personal services of the parties;
- provision for health care insurance and payment of uninsured medical expenses;
- special or extraordinary educational, health care, or other expenses of the parties or child;
- the cost of travel necessary to exercise possession of and access to a child;
- positive or negative cash flow from any real and personal property and assets, including a business and investments;
- debts or debt service assumed by either party; and
- any other reason consistent with the best interest of the child, taking into consideration the circumstances of the parents. *Tex. Fam. Code Ann. §154.123(b); Lide v. Lide*, 116 S.W.3d 147 (Tex. App.–El Paso 2003, no pet.)(there was evidence to support the trial court's variation from the guidelines). In *Lide*, the court held that Section 154.123(b)(3) mandates that in determining whether application of the guidelines would be unjust or inappropriate, the court *shall* consider "any financial resources available for the support of the child." There was evidence that the father had a contract to sell his vet business for \$250,000 cash and a 10-year payout on a \$200,000 note. The court found this was some evidence to support the trial court's variation from the guidelines and upheld a child support award of \$2,500 per month even though the amount would be \$1,664 applying the guidelines. *See also In re E.A.S.*, 123 S.W.3d 565 (Tex. App.–El Paso 2003, no pet.).

The list of factors for the trial court to consider in deviating from the guidelines is not exclusive. *Laprade v. Laprade*, 784 S.W.2d 490 (Tex. App.–Fort Worth 1990, writ denied) (IRS tax credits may be considered). Further when an obligor has net resources in excess of \$6,000 per month the list of factors above do not apply since §154.126(a) of the Family Code specifically addresses this situation. This statute provides that a court "may order additional amounts of child support as appropriate, depending on the income

of the parties and the proven needs of the child.” *Tex Fam. Code §154.126(a)*.

In determining whether application of the child support guidelines would be unjust or inappropriate under the circumstances, the court must consider evidence of all relevant factors including the expense for a son or daughter for education beyond secondary school. *Tex. Fam. Code Ann. §154.123(b)(9)*.

## IX. MODIFICATION OF CHILD SUPPORT

### A. Grounds for Modification.

#### 1. Statutory Grounds

Except as provided below, the court may modify a child support order if:

- a. the circumstances of the child or a person affected by the order have materially and substantially changed since the earlier of the date of the order's rendition; or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based; or
- b. it has been three years since the order was rendered or last modified and the monthly amount of the child support award under the order differs by either 20 percent or \$100 from the amount that would be awarded in accordance with the child support guidelines. *Tex. Fam. Code Ann. §156.401(a); McGuire v. McGuire*, 4 S.W.3d 382 (Tex. App.–Houston [1st Dist.] 1999, no pet.) (Obligor successfully obtains reduction in child support after going into business that yields less income—under-employment allegation to be evaluated by trial court); *Lindsey v. Lindsey*, 965 S.W.2d 589 (Tex. App.–El Paso 1998, no pet.) (support modified based on reduction of obligee's income by almost 50 percent).

However, as of 2005, if the parties agree to an order under which the amount of child support differs from the amount that would be awarded in accordance with the child support guidelines, the court may modify the order only if the circumstances of the child or a person affected by the order have materially and substantially changed since the date of the order's rendition. *Tex. Fam. Code Ann. §156.401(a-1)*.

#### 2. Effective Date for Modification

A support order may be modified only as to obligations accruing after the earlier of the date of service of citation or an appearance in the suit to modify. *Tex. Fam. Code Ann. §156.401(b); In re J.G.Z.*, 963 S.W.2d 144 (Tex. App.–Texarkana 1998, no writ) (increased support modification is retroactive to date of motion to modify, not date of temporary order). The time frame which the court must consider to determine if there has been a change in circumstances to warrant a modification of support is the time between the rendition of the order sought to be modified and the service on, or the appearance of, the respondent on the petition to modify. *In Interest of G.J.S.*, 940 S.W.2d 289 (Tex. App.–San Antonio 1997, no writ); *In re Daniel R. Naylor*, 160 S.W.3d 292 (Tex. App.–Texarkana 2005, no pet.) (trial court did not abuse its discretion in not retroactively applying the modification back to the time the petition was served). The effective date of the modified order is within the broad discretion of the trial court. *Id.*

In *Naylor*, the court held that the trial court had the broad range from the date of service of citation to the date of the final hearing to apply the modification retroactively. *Id.*

Retroactive modification of support payments must be pled to be granted. *Huckaby v. Lawdermilk*, 709 S.W.2d 331 (Tex. App.–Eastland 1986, no writ).

### 3. Material and Substantial Change of Circumstances

The material and substantial change in circumstances must have taken place since the rendition of the last order. *Tex. Fam. Code Ann. §154.401*. The party seeking the change has the burden of proof, which is a preponderance of the evidence, to show the requisite change in circumstances since the entry of the original order. *Hammond v. Hammond*, 898 S.W.2d 406 (Tex. App.–Fort Worth 1995, no writ); *Vernon v. Vernon*, \_\_\_ S.W.3d \_\_\_ (Tex. App.–El Paso 2005)(father failed to establish that his current net resources justified further reduction in his child support); *London v. London*, \_\_\_ S.W.3d \_\_\_ (Tex. App.–Houston [14<sup>th</sup> Dist] 2005)(mother failed to present sufficient evidence to support the a material and substantial change in circumstances sufficient to support modifying support). Evidence must be introduced showing a different financial condition of the parties both at the time of the initial order and at the time of the modification action. *Farish v. Farish*, 921 S.W.2d 538 (Tex. App.–Beaumont 1996, no writ); *Stofer v. Linville*, 662 S.W.2d 783 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1983, no writ) (father’s current status of wealth was irrelevant without a comparison to status at the time of the decree); but see *Thomas v. Thomas*, 895 S.W.2d 895 (Tex. App.–Waco 1995, writ denied). It is not necessary to show a change in the child’s needs in a child support modification action. *McCain v. McCain*, 980 S.W.2d 800 (Tex. App.–Fort Worth 1998, no pet.).

Small changes in a parent’s net resources and mere assertions of change, without proof, will not support a child support modification. *Payne v. Dial*, 831 S.W.2d 457 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1992, no writ); *Baker v. Baker*, 719 S.W.2d 672 (Tex. App.–Fort Worth 1986, no writ); see *Royer v. Royer*, 98 S.W.3d 284 (Tex. App.–Beaumont 2003, no pet.). An involuntary reduction in income will warrant a modification of child support as long as it is substantial and not merely a temporary situation. *Tucker v. Tucker*, 908 S.W.2d 530 (Tex. App.–San Antonio 1995, writ denied).

In the recent case of *Hardin v. Hardin*, 161 S.W.3d 14 (Tex. App.–Houston [14<sup>th</sup> Dist.] 2004, the court upheld the trial court’s denial of a father’s reduction in child support. In *Hardin*, the father was ordered to pay \$800 per month in child support. Less than two months after the decree was signed, he filed a petition to modify, seeking a reduction in child support. He argued that a material and substantial change in circumstances warranted a decrease in child support as his income decreased from \$65,000 per year as he was laid off from his job, his unemployment compensation ended, and he had a debilitating injury in a car accident. The mother, however, presented evidence that the father was intentionally unemployed because he did not want to pay

child support in retaliation for her asking for a withholding order and asking the attorney general's office to enforce the support order against him. The trial court found that the father failed to meet his burden of proving a material and substantial change in circumstances or to find that he was not intentionally unemployed. The *Hardin* court also upheld an award of attorney's fees to the mother as they were "necessaries" to the children and in this case had a relationship to the needs of the child.

Evidence only of an obligor's financial condition at the time of the modification trial is insufficient to support a finding of material and substantial change in the obligor's circumstances. Evidence of the obligor's income at the time of the last order must be shown *London v. London*, 94 S.W.3d 139 (Tex. App.–Houston [14<sup>th</sup> Dist] 2002, no pet.); *London v. London*, \_\_\_\_ S.W.3d \_\_\_\_ (Tex. App.–Houston [14<sup>th</sup> Dist] 2005). There must be evidence to show how the obligor's former financial circumstances compare to his present financial condition. *Hammond v. Hammond*, 898 S.W.2d 406 (Tex. App.–Fort Worth 1995, not writ); *London v. London*, 94 S.W.3d 139 (Tex. App.–Houston [14<sup>th</sup> Dist] 2002, no pet.) (evidence of the financial circumstances of each party or the children's needs at the time of the prior support order is required). Further, a parent's duty to support is not limited to his or her earnings and financial ability is also a consideration in setting child support. *In re P.J.H.*, 25 S.W.3d 402 (Tex. App.–Fort Worth 2000, no pet.). Financial Information Statements that were used at the time of the prior order should be reviewed.

A parent's testimony showing a substantial increase in a child's designated expenses can be sufficient to show a material and substantial change in circumstances. *Matter of Marriage of Hamer*, 906 S.W.2d 263 (Tex. App.–Amarillo 1995, no writ).

a. Intentional Unemployment or Underemployment

Regardless of a change in an obligor's employment status, the court may consider the obligor's earning potential if the court finds that the obligor is intentionally unemployed or underemployed. *Terry v. Terry*, 920 S.W.2d 423 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1996, no writ). See Section IV.G. of this paper for further information regarding intentional unemployment or underemployment.

c. Effect of Guidelines.

The court may consider the child support guidelines for single and multiple families, *Tex. Fam. Code Ann* §§154.121 *et seq.*, to determine whether there has been a material or substantial change of circumstances that warrants a modification of an existing child support order if the modification is in the best interest of the child. *Tex. Fam. Code Ann. §156.402(a)*. If the amount of support contained in the order does not substantially conform with the guidelines for single and multiple families under Chapter 154 of the Family Code, the court may modify the order to substantially conform with the guidelines if the modification is in the best interest of the child. *Tex. Fam. Code Ann. §156.402(b)*.

The fact that a court has the power to modify a support order does not mean that the court must do so. The movant must still prove a material and substantial change in circumstances. A prior child support order not in compliance with the guidelines does not automatically establish a material and substantial change in circumstances. *Farish v. Farish*, 921 S.W.2d 538 (Tex. App.–Beaumont 1996, no writ).

A court may consider other relevant evidence in addition to the factors listed in the guidelines in determining the amount of the modification. *Tex. Fam. Code Ann §156.402(b)*.

e. Net Resources of New Spouse.

The court may not add any portion of the net resources of a new spouse to the net resources of an obligor or obligee in order to calculate the amount of child support to be ordered in a suit for modification. *Tex. Fam. Code Ann §156.404(a)*. Further, the court may not subtract the needs of a new spouse, or of a dependent of a new spouse, from the net resources of the obligor or obligee in a suit for modification. *Tex. Fam. Code Ann. §156.404(b)*.

i. Increased Age.

Increased age alone will not support a modification of support. However, the needs accompanying the child's growth, together with the obligor parent's increased income and the inflation rate, can be sufficient evidence to support an increase in child support. *Cole v. Joliet*, 804 S.W.2d 199 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1991, writ dismissed w.o.j.).