

Family Practice

Corporate or Partnership 'Retained Earnings' as Income Under Child Support Guidelines

by Laura W. Morgan

The determination of each parent's income is the primary focus of all states' child support guidelines, for it is the determination of income that dictates the presumptive child support award. 45 C.F.R. § 302.56(c)(1) (child support guidelines must be based on, at least, income and earnings of absent parent).

As stated by one authority,

Child support guidelines presumptively establish a child's needs based on the child's parents' income. Thus, the guidelines have shifted the evidentiary focus from proving the needs of the children to establishing the parents' income.

Laura W. Morgan, *Child Support Guidelines: Interpretation and Application* §2.03[a] at 2-7 (Supp. 2001). See also Lynn Gold-Biken & Linda Ann Hammond, "Determination of Income," in *Child Support Guidelines: The Next Generation* 29 (U.S. Department of Health and Human Services, Office of Child Support Enforcement 1994) ("The most important piece of information is the income of the party. The definition of what constitutes income is crucial to the development of an accurate and equitable formula"); Center on Child and the Law of the American Bar Association, *Evaluation of Child Support Guidelines, Volume I: Findings and Conclusions* (Executive Summary) at ES-2 (Office of Child Support Enforcement, Dep't of Health and Human Services 1996) ("One of the first steps in any child support case is the determination of income"); Center on Children and the Law of the American Bar Association, *Evaluation of Child Support Guidelines, Volume II: Findings of State Guideline Reviews, State Guideline Studies, and Unstructured Interviews* (Executive Summary) at ES-3 (Office of Child Support Enforcement, Dep't of Health and Human Services 1996) ("Income is the driving factor behind every child support calculation, and accurate information is vital to arriving at an appropriate order").

Because "income" is the driving force behind child support guidelines calculation, much attention has been paid to how "income" is defined. All state child support guidelines have defined "income" with a number of underlying principles in mind. The most important of these principles is that the definition of "income" must be as expansive as possible, taking into consideration all available funds.

Consonant with the principle that "income" for child

support guidelines must take into consideration all available funds, all state guidelines determine a parent's income not only on what the parent actually earns, but on the parent's earning capacity. See generally L. Morgan, *Child Support Guidelines: Interpretation and Application* §2.04[a] at 2-46 (Supp. 2001) ("Every child support guideline has a provision that allows the court to consider the 'earning capacity' of a party where that party is voluntarily underemployed or unemployed. Such consideration of earning capacity in the absence of true earnings is termed imputing income").

Child support guidelines generally define "income" for a self-employed person as follows:

For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, "gross income" means gross receipts minus ordinary and necessary expenses required for self-employment or business operation ... Income and expenses from self-employment or operation of a business shall be carefully reviewed to determine an appropriate level of gross

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Miles Mason Sr.

From the Chair

Already, our Family Law Section has had a very successful year. *The Alimony Bench Book* is complete and going to all Family Law Section members across the state. Important debates for changes in child support and alimony law have begun. Our December seminar resulted in excellent attendance and reviews.

Uniform laws are being reviewed for consideration by the Tennessee Bar Association. None of these successes would be possible without Lynn Pointer, our TBA Section coordinator, Rachel Allen, and Kathleen Caillouette, coordinating our seminar, and Allan Ramsaur, our TBA Executive Director, providing the leadership, direction and support we need as a section to grow and improve our profession for the benefit of our clients.

The Alimony Bench Book is an excellent legal resource I have already used, recently reviewing and updating my pattern MDA Rehabilitative Alimony provision. Like seeing a great movie more than once, after reading the *Alimony Bench Book* twice, I still find something new each time. Its substance is serious and organized.

The Alimony Bench Book is being sent to all section members as a section membership benefit. The book will be made available to TBA members-at-large for a modest cost. Amy Amundsen worked with many special authors to complete this outstanding legal resource. I promise you one thing: after reading the *Alimony Bench Book*, you will hope your opposing counsel have not read it before you.

Great debates. Everyone I have spoken with believes child support, alimony, and other family law should be changed in some meaningful way. For example, talk is getting louder for child support guidelines to consider income of the obligee. Others are unhappy with the current developments and trends in alimony and even Parenting Plan law. The TBA Family Law Section is *the* place for debate and

developing changes for the future. Attendance for our section's teleconference meeting in December was not proportional to the amount of interest in these issues. These debates are important. Your opinion has been requested. Please join us.

Thank You. The TBA Family Law Section's seminar "Law Practice Management & Preparing Your Accountant & Psychologist Expert Witnesses" received great attendance and excellent reviews from the attendees in Knoxville, Nashville, and Memphis. Randy Kessler, Esq., Kessler & Schwartz, from Atlanta, shared many important practice development and management trade secrets. Attendees learned why Randy Kessler's reputation is growing as one of the premier family law attorneys in the United States. In every city, Rebecca Caperton, Ph.D., Memphis, led very lively and informative discussions about controversial topics in the custody evaluation and treatment universe. Rob Vance, CPA, Memphis, provided attendees with several new financial concepts to consider when looking at existing case law which will benefit every practice. Finally, Barry Gold, Esq., Chattanooga, our section's chair-elect, reviewed family law practice specific ethics rules and his practice management tips and traps. The very substantive seminar presentation materials book is still available from the TBA. Contact Lynn Pointer at (800) 899-6993. Please join me in thanking our speakers.

Proposed New Uniform Laws for Tennessee. Members of the Tennessee Bar Association Family Law Section have a unique and important opportunity to serve the bar and citizens of the state by improving Tennessee's laws. We still need volunteers to review certain uniform laws available from the National Conference of Commissioners on Uniform State Laws and consider whether the Tennessee Bar Association should propose these laws as part of its legislative initiative. The proposed laws and contact information for the chairs of each project are as follows:

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The Future of Human Cloning

Part 2 of 2

by Beth A. Townsend, Esq.
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The first part of this article appeared in the November issue of *Family Practice*.

Legislative Response

In 1997, former President Clinton issued a directive that banned the use of federal funds for human cloning, called for a private sector moratorium on cloning, and directed the National Bioethics Advisory Commission (NBAC) to study and report on the subject. NBAC concluded that it would not be acceptable to create a child using SCNT because "current scientific information indicates this technique is not safe to use in humans at this time ... it would pose a risk of hormonal manipulation in the egg donor; multiple miscarriages in the birth mother; and possibly severe developmental abnormalities in any resulting child." NBAC recommended governmental prohibition of any attempt to create a child through SCNT but also concluded that legislation should be drafted so as not to interfere with other areas of scientific research.

Thus far, Congress' proposed legislation has followed the specific recommendations of NBAC, for the most part. An extreme position was advanced by the Human Cloning Prohibition Act that Congress failed to pass in February 1998, which would have criminalized SCNT research altogether. Embryonic stem cell research is legal, although President Bush has restricted federal funding to approximately 60 pre-existing cell lines. In July of last year, the House of Representatives passed a measure criminalizing both therapeutic and reproductive human cloning, with the support of nine members of the U.S. House from Tennessee. Although Senator Frist called on the Senate to move quickly to outlaw human cloning, the Senate voted in December to defer debate.

Policymakers are currently considering whether to ban SCNT research altogether, both for human reproductive and for therapeutic purposes. Several bills have been introduced in Congress that propose banning cloning itself or prohibiting

federal funding for cloning technology. Although the United States has never banned an area of scientific exploration or technology by federal legislation, human cloning may become an exception.

Looking towards the Future

We would be mistaken to assume that the scientific community remains far from achieving safe and successful human reproductive cloning. The clear scientific implication of cloning experiments to date is that success may be far less remote than originally thought.

In March of last year, an international consortium of scientists led by Dr. Panayiotis Zavos, an infertility specialist in Kentucky and president/CEO of Zavos Diagnostic Laboratories Inc., announced that they intended to perform human SCNT to allow infertile couples to have children. Without screening, for every 100 nuclear transplant embryos, only one or two will result in healthy developmentally normal offspring. To avoid the developmental abnormalities observed in unscreened animal experiments, they proposed conducting extensive screening protocols on the nuclear transplant embryos. Dr. Zavos claims that, if the screening protocols he advocates are used, the calculable rate of developmental abnormality following SCNT can be reduced to three percent or less, the baseline rate observed in offspring produced by natural sexual reproductive conception.

Despite foreseeable scientific and technological progress, it is very possible that human reproductive cloning may never be performed. It remains to be determined whether we will see the fruits of stem cell research. Whatever the legislative results, there will undoubtedly be constitutional challenges in our courtrooms. There is hardly a more controversial and sensitive subject matter than human cloning and reproductive freedom. ■

Beth A. Townsend practices family law as an associate with Marlene Eskind Moses, in the association of Eisenstein, Moses & Mossman in Nashville. Townsend received her law degree from Vanderbilt University in 1998 and her bachelor of arts degree, cum laude, from Duke University in 1995.



Network for Health Insurance Continuation

It is likely that family practice lawyers don't tend to characterize divorce as a life-threatening event: but it can be just that, especially if a non-working spouse has a pre-existing medical condition. For example when the husband of a stay-at-home wife, mother and grandmother decided to tell her he was going to leave her before her first cancer surgery, it meant that she would be losing not only a marriage of over 30 years, but health insurance as well. She would have been eligible for the company's COBRA plan, with elevated cost, for three years. After which her only option would be the federally mandated HIPPA policy with rates as high as \$1000 to \$1,500 per month, with high deductible and reduced coverage. If she could not afford the \$12,000 to \$18,000 per year premium she would be without medical coverage that would ensure her treatment. Divorce can be a life-threatening event.

The same can be said of widowhood and any other circumstance that leaves a person suddenly without the health insurance he or she has depended upon. In an effort to increase their bottom line, insurance companies drop widowed and divorced people from their rolls, in many cases increasing the ranks of the uninsurable. The Network for Health Insurance Continuation, a not for profit organization, in conjunction with the Women's Political Caucus is working to protect this segment of the Tennessee population. Though this legislation affects only a small portion of the population, it is the portion that needs it the most.

Two years ago State Rep. Carol Chumney drafted a bill similar to one that had been Massachusetts's law for two decades. The new bill would allow widowed and divorced persons to remain on the group insurance plans of their for-

mer spouses with premiums at the group rate until remarriage or becoming eligible for Medicare. Besides Massachusetts, at least seven other states have passed similar laws. Chumney's bill passed three House committees and went to the Senate as S.B. 1295. It was assigned to the Senate Judiciary Committee. In spite of weekly lobbying by the Memphis citizens, it remained at the bottom of the Judiciary Committee agenda, subject to heavy pressure from insurance lobbyists.

Currently the Network for Health Insurance Continuation (NHIC) is rewriting the bill for presentation this year. NHIC has joined forces with Hadassah, The League of Women Voters, and Women's Political Caucus, Memphis chapter of the National Association for the Mentally Ill, The Tennessee Breast Cancer Coalition and many other organizations across the state.

NHIC and Hadassah will be sending a contingent to Nashville on Feb. 26 to advocate for this bill and meet with legislators. This bill that Rep. Chumney and Senator Norris are sponsoring has the support of other state legislators.

Knowing that many attorneys who practice Family Law might have a special affinity for the issues addressed by the pending legislation, NHIC would be pleased to have as many representatives of that group as possible join us both in our visit to Nashville and to advance this life saving legislation. Please contact Executive Director Patricia Thompson at the Network for Health Insurance Continuation at 901-309-0144 or 901-270-3131. ■

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Child Support Guidelines Update

by Stuart Wilson-Patton

Gallaher Update

The controversy surrounding the Guidelines' treatment of children living in the paying parent's home who are not under a court order will soon be resolved by the Tennessee Supreme Court. Currently, the Guidelines do not allow a deduction from the paying parent's income for support voluntarily paid to such children prior to calculating the amount of support owed to children who are under a court order. In three separate opinions last year, the Eastern and Western Sections of the Tennessee Court of Appeals held that the Guidelines' failure to allow any such deduction violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Gallaher v. Elam*, 2002 WL 121610 (Tenn. Ct. App., E.S. filed Jan. 29, 2002) *appeal granted* July 1, 2002, oral argument Jan. 8, 2003; *Whiton v. Whiton*, 2002 WL 1585630 (Tenn. Ct. App., E.S. filed July 18, 2002) *perm. to appeal pending*; *Thompson v. Hulbert*, 2002 WL 1838131 (Tenn. Ct. App., W.S. filed Aug. 9, 2002) *perm. to appeal pending*. On Jan. 8, oral argument was presented to the Tennessee Supreme Court in Knoxville in the *Gallaher* case. The Supreme Court has delayed ruling on the applications for permission to appeal in the *Whiton* and *Thompson* cases, presumably, because these cases will be resolved by the court's ruling in the *Gallaher* case. A decision in *Gallaher* is expected in the next several months.

DHS Guidelines Task Force

At the suggestion of the Legislature, DHS has convened a Child Support Guidelines Advisory Task Force to review the existing Guidelines and make recommendations on any

desirable changes. The Task Force is composed of attorneys, judges, legislators, child support professionals, and father's rights advocates. The Task Force has met four times and has compiled a list of potential issues for consideration. These issues include: (1) whether Tennessee should adopt an income shares or Melson formula model or should just modify its current percentage of obligor income model; (2) whether children not subject to a court order should be considered in calculating support; (3) whether step-parent income should be considered in calculating support; (4) whether an adjustment should be made for shared parenting; (5) whether there should be a guaranteed minimum income level for paying parents; (6) whether an adjustment should be made for travel expenses related to visitation, and (7) whether an adjustment should be made for high income cases. The Task Force has heard presentations from nationally recognized Guidelines experts Robert Williams and Laura Morgan on how child support awards under Tennessee's Guidelines compare with awards under other states' Guidelines and a comparison of how the three major Guidelines models apply to the same factual patterns. The Task Force has also heard a presentation on the history of Tennessee's Guidelines from the former DHS officials who promulgated them. The Task Force is scheduled to meet on the second Monday of each month through June. ■

Wilson-Patton is a senior counsel for the Tennessee Attorney General's Office. He is a 1986 Honors graduate of the University of Tennessee College of Law. He is a member of the TBA Family Law Code Commission and of the TBA Family Law Section's Executive Council.

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'Retained Earnings' as Income *continued from page 1*

income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes[.]

Clearly, then, all income from a closely held corporation is income to the support obligor. That income is defined as gross receipts less ordinary and necessary expenses. Further, "income" for child support is not necessarily the same as "income" for taxes. In the case of closely held corporations, subchapter S corporations, and partnerships, do "retained earnings" that appear as income on a tax return but are not collected by the parent still "income" for child support?

The overwhelming majority of states that have addressed this issue have applied held that when the parent is a *minority shareholder* in a closely held or subchapter S corporation, and therefore does not control the decision on distribution of earnings, then the retained earnings of the corporation cannot be attributed to him/her as income. The rationale behind these decisions is that parents should not be allowed to manipulate corporate assets and earnings to shield legitimate income from child support. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998) (allowing a deduction from income for retained earnings of subchapter S corporation would encourage shareholders to favor their own long-term financial interests in their corporations over their children's need for support by keeping most of shareholder income as retained earnings); *Kelley v. Kelley*, 656 So. 2d 1343 (Fla. DCA 1995) (parent cannot avoid child support by being under compensated by closely held family business); *Riepenhoff v. Riepenhoff*, 64 Ohio App. 3d 135, 580 N.E.2d 846 (1990) (retained earnings should not be used as a subterfuge to avoid obligations). See generally L. Morgan, *Child Support Guidelines: Interpretation and Application* §2.03[e][20][i] at 2-52 to 2-54 (Supp. 2001); Annotation, *Divorce and Separation: Attributing Undisclosed Income to Parent or Spouse for Purposes of Making Child or Spousal Support Award*, 70 A.L.R.4th 173 §§ 4-7 (1989 & Supp. 2002).

If, however, a parent has no control over the distribution of earnings, then obviously the possibility of this kind of manipulation is not present. In that case, the court will not consider the retained earnings as income to the parent. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998) (appellate court affirmed chancellor's decision to exclude from income retained earnings where father was 25% owner); *McHugh v. McHugh*, 702 So. 2d 639 (Fla. 4th DCA 1997) (husband as 10% shareholder did not have control over decision to retain earnings); *In re Marriage of Heck*, 2000 WL 1724588 (Iowa Ct. App. Nov. 20, 2000) (father's role as 25.5% minority shareholder does not permit him to determine whether corporate earnings are retained or distributed; it would not be equitable to attribute those earnings to the father in these circumstances); *In re Marriage of Waite (Greenlee)*, 21 Fam. L. Rep. (BNA) 1529 (Mont. Sup. Ct. September 8, 1995) (profits retained by partnership to pay debt would not be considered, where there was no evidence father had choice of use of funds); *Fennell v. Fennell*, 753 A.2d 866 (Pa. Super. 2000) (father's proportional share of retained earnings of subchapter S corporation were not income for child support, where

father was minority shareholder who could not control whether profits were retained or distributed); *Laird v. Laird*, ___ N.W.2d ___, 2002 WL 1813377 (S.D. August 7, 2002) (ex-husband's retained earning from bank, of which he was shareholder and director, were considered asset rather than income, since decision of whether to pay dividends from retained earnings was not made exclusively by husband and all of bank's retained earnings were not available for distribution by law); *Mitts v. Mitts*, 39 S.W.3d 142 (Tenn. Ct. App. 2000) (retained earnings of gold and country club in which husband was minority stockholder would not be calculated as income for support, where husband did not have ability to manipulate his reported income as a sole shareholder would, because distribution of corporation's income was within control of majority shareholder). See also *Lee v. Lee*, 2000 WL 1459825 (Va. Ct. App. Oct. 3, 2000) (refusing to create hard rule on retained earnings, instead holding each case would be considered on its facts); *Weis v. Weis*, 215 Wis. 2d 135, 572 N.W.2d 123 (Ct. App. 1997) (retained earnings would not be considered where father had no control over their distribution).

Further, some cases have held that where there is a legitimate business reason for the retention of the earnings, then the retained earnings will not be considered. *Roberts v. Wright*, 117 N.M. 294, 871 P.2d 390 (Ct. App. 1994) (mother's corporate earnings retained by company would not be income where they were used for normal operating costs); *Taylor v. Taylor*, 118 N.C. App. 356, 455 S.E.2d 422 (1995); *Fitzgerald v. Sharum*, 857 P.2d 92 (Okla. Ct. App. 1993); *Labar v. Labar*, 557 Pa. 54, 731 A.2d 1252 (1999); *Muir v. Muir*, 841 P.2d 736 (Utah Ct. App. 1992); *Lendman v. Lendman*, 157 Wis. 2d 606, 460 N.W.2d 781 (Ct. App. 1990).

Where a party is a majority shareholder and thus has control over the distribution of profits, or where there is simply no business explanation for the retained earnings other than to increase personal assets at the expense of income, then the retained income of a corporation can be considered income. *Pannell v. Pannell*, 64 Ark. App. 262, 981 S.W.2d 531 (1998) (retained earnings were income because father had 100% control); *Merrill v. Merrill*, 587 N.E.2d 188 (Ind. Ct. App. 1992) (retained earnings of pharmacy owned 100% by father was income to him); *Campbell v. Campbell*, 682 So. 2d 312 (La. Ct. App. 1996) (husband was 100% shareholder of construction company); *Roth v. Roth*, 406 N.W.2d 77 (Minn. Ct. App. 1987) (chiropractor was 100% shareholder); *Morgan v. Ackerman*, 964 S.W.2d 865 (Mo. Ct. App. 1998) (husband owned 100% of closely held corporation); *Boudreau v. Benitz*, 827 S.W.2d 732 (Mo. Ct. App. 1992); *Kuhn v. Bovier*, 268 A.D.2d 806, 701 N.Y.S.2d 748 (3d Dep't 2000) (imputation of income to former husband was warranted, where corporation had retained earnings for which there was no explanation); *Cauble v. Cauble*, 133 N.C. App. 390, 515 S.E.2d 708 (1999) (retained earnings considered, where father held 51% of stock and profits were available); *Quamme v. Bellino*, 540 N.W.2d 142 (N.D. 1995) (husband was majority shareholder and retained earnings as salary to new wife); *Williams v. Williams*, 74 Ohio App. 3d 838, 600 N.E.2d 739 (1991) (50% shareholder voluntarily reduced salary to accumulate earnings; retained earnings

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How to Become a Family Law Specialist

by Marlene Eskind Moses

The Tennessee Commission on Continuing Legal Education and Specialization certifies attorneys as specialists in 11 areas of the law including family law. Tennessee's certification process includes two steps: first, the attorney must be certified in the appropriate field by the appropriate national agency; second, the attorney must apply to the commission, meet additional requirements, and be certified.

The appropriate national agency for family law certification is the National Board of Trial Advocacy. Founded in 1977, the National Board of Trial Advocacy's mission was to create an objective set of standards illustrating an attorney's experience and expertise in the practice of trial law. The National Board of Trial Advocacy screens applicants based on the following criteria: doc-

umentation of trial experience, judicial and peer references, documentation of participation in continuing legal education, evaluation of legal skills, a report of all disciplinary matters brought before any official body, and the completion of a written examination.

Becoming a Board Certified Family Law Trial Advocate denotes enhanced skills in family law trial practice and substantiates true quality. Currently, there are eight attorneys board certified as family law trial advocates in the state of Tennessee. If you would like to join the ranks, please contact: Roberta Hugus, Executive Director National Board of Trial Advocacy, Phone: (508) 384-6565, Fax: (508) 384-8022, e-mail: rhugus@nbta.org to begin the process. ■

Marlene Eskind Moses graduated from Tulane University with a bachelor of arts and a masters of social work. She has been in private practice working mainly in the areas of family law, mediation and arbitration in family law, and probate law having graduated from the Nashville School of Law in 1980. She is a principal in the association of Eisenstein, Moses, & Mossman.



From the Chair *continued from page 2*

1. Interstate Enforcement of Domestic Violence Protection Orders Act, Committee Chair: Amy Amundsen, Memphis, TN, (901) 526-6701, amundsenaj@aol.com, <http://www.law.upenn.edu/bll/ulc/uiedvoa/final01.htm> http://www.nccusl.org/nccusl/uniformact_why/uniformacts-why-uiedvpoa.asp

2. 2001 Amendments to the Uniform Interstate Family Support Act, Committee Chair: Scott Rosenberg, Nashville, scottrosenberg@jis.nashville.org, <http://www.law.upenn.edu/bll/ulc/uifsa/final2001.htm> <http://www.law.upenn.edu/bll/ulc/uifsa/memo201.htm>

3. Uniform Custodial Trust Act, Committee Chair: Patrick Mason, Memphis, TN, (901) 763-4436, patmason@bellsouth.net, <http://www.law.upenn.edu/bll/ulc/fnact99/ucta87.htm> http://www.nccusl.org/nccusl/uniformact_why/uniformacts-why-ucta.asp

4. Uniform Child Witness Testimony by Alternative Methods Act, Committee Chair: Barry Gold, Chattanooga, TN, (423) 756-6400, bgold@mbgplaw.com

If you are interested in serving on one or more committees, contact the committee chair or Lynn Pointer at Lpointer@tnbar.org. Committees are now being formed.

Next Year's Planning. Have you thought about getting more involved with the TBA Family Law Section, but do not know how? Do you have a seminar idea or article you want to write and plan? Do you think the Family Law Section is missing the boat on an important issue? Barry Gold, Chattanooga, is your chair-elect, and will lead the section beginning June 2003. Planning for next year's activities begins now. Call Lynn Pointer, TBA Section Coordinator at (800) 899-6993, to offer your thoughts and volunteer your efforts for *your* Family Law Section. ♦

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would be attributed as income); *Ochs v. Nelson*, 538 N.W.2d 781 (S.D. 1994) (80% shareholder); *Sandusky v. Sandusky*, 1999 WL 734531 (Tenn. Ct. App. Sept. 22, 1999) (solely owned company's accumulation of retained earnings can be considered when setting support); *Bailey v. Bailey*, 954 P.2d 962 (Wyo. 1998) (100% owner).

In a minority of decisions, the courts have refused to apply the control/legitimate reinvestment test, and held that retained earnings are income. *Hubbard v. Hall*, 739 So. 2d 498 (Ala. Civ. App. 1999); *Martinez v. Martinez*, 761 So. 2d 433 (Fla. 3d DCA 2000); *In re Perlenfein*, 316 Or. 16, 848 P.2d 604 (1993).

The rationale for the majority rule distinguishing between retained earnings that are income for income for tax purposes on the one hand and income for child support purposes on the other hand was explained recently in *In re Marriage of Brand*, 44 P.3d 321 (Kan. 2002):

Few courts rely solely on personal income tax returns to determine the amount of income available for purposes of calculating support. Taxable income of a Subchapter S corporation which is attributable to a shareholder does not reflect actual income received as a cash distribution. There is no presumption that an individual's share of a Subchapter S corporation's income should be included as income for purposes of calculating child support. Individual inquiry on a case-by-case basis is necessary to ensure that the appropriate amount of income is considered "received" when determining

"Domestic Gross Income" for the self-employed.

44 P.3d at 328. Consequently, it would be inequitable to attribute to the shareholder income that he did not receive and had no choice of receiving.

While there is general agreement that retained earnings are not income to a minority shareholder, there is little agreement as to who holds the burden of proof on this issue. In one case, the court suggested that when one parent is a minority shareholder or partner, it is the other parent's burden to show that the earnings are not retained for a legitimate reason. *Bleth v. Bleth*, 607 N.W.2d 577 (N.D. 2000). There is, however, law to the contrary, that it is up to the shareholder to show that the earnings were reinvested for a legitimate purpose. *Hubbard v. Hall*, 739 So. 2d 498 (Ala. Civ. App. 1999); *In re Marriage of Stenshoel*, 72 Wash. App. 800, 866 P.2d 635 (1993). ■

Laura W. Morgan is the author of Child Support Guidelines: Interpretation and Application (Aspen Law & Business 1996 & Supps., 2001), the leading treatise on child support in the United States. She owns and operates Family Law Consulting in Charlottesville, Va., which provides research and writing assistance to family law attorneys nationwide. She may be reached at goddess@famlawconsult.com

