

# **Earning Capacity and Imputing Income for Child Support Calculations: A Survey of Law and Outline of Practice Tips**

by  
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## **I. Evolution of the Use of Earning Capacity/ Imputed Income to Calculate Child Support**

### *A. Introduction*

The law regarding the awards of child support based on an obligor's earning capacity rather than actual earnings has developed both in courtrooms and legislative chambers throughout the country, and as it has developed, a number of trends have emerged in statutes and child support guidelines, and the case law interpreting them. As a matter of public policy, a parent's duty to provide financial support for a child is well established. In the analysis of whether to base a support obligation on earning capacity as opposed to actual earnings, the difficulty does not arise when the question asked is *whether* support is due – the answer will nearly always be “yes.” The difficulty in the analysis is wrapped up in the multi-factorial question of how a court should balance the child's best interests in receiving an appropriate level of support against the other needs of the child which are also provided by the parent(s), and while doing so, how should a court consider and acknowledge that society has generally concluded that there is more to life than working solely to maximize income?

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The analysis is complicated indeed. In a strict analysis that has as its goal maximizing financial support for a child, the parents' motives, intentions, explanations, and excuses would play no role in what would be a pure analysis of how to maximize the support available for a child by always asking, to the exclusion of everything else, "what are these parents capable of earning?" However, practically speaking, such a process would be burdensome, inexact and time-consuming, and likely would not enjoy wide public acceptance, when most people would ask the common sense question: "why not base this on what I'm actually earning?"

The analysis of whether to base support on actual earnings or on an earning capacity can be viewed on a continuum which spans from easier to decide, to more difficult to decide, when the fundamental obligation to support is placed in juxtaposition to the many and varied reasons why a person may not be earning at full capacity. Consider this range of obligors who may appear before the court: the nefariously-motivated obligor who by action or inaction intentionally seeks to avoid the payment obligation by restricting or avoiding income (easy to utilize earning capacity), to the less-culpable example of the high-flying executive who decides to cut back because he is "burned out" (less easy), to the individual who decides to return to school for the purpose of attaining higher education and the possibility of better compensation in the future (even less easy), to the parent who is trying to balance income responsibilities against parenting responsibilities and the need to be at home (difficult to decide whether actual income or earning capacity is appropriate), to the individual who has steadily worked and consistently earned for forty-five years and is now ready for retirement (getting easier to use actual income depending on other factors such as age and health), to the individual who becomes disabled and simply is unable to maintain gainful employment (easy to use actual income).

Practitioners know that the stories and explanations for reduced or lesser income abound along the continuum from what might not seem acceptable to what may appear to pass muster. If courts do not adopt a purely strict approach, and the reasons why a party's income is less than what might be expected count for anything in the calculus of whether to apply earning capacity, then the challenge becomes how to create predictable and useful

methodologies or standards for assessing which “reasons” for earning less than full capacity will be acceptable and which will not.

Judges and support magistrates are constantly confronted with everything from heart-wrenching stories to those which may seem less believable to those which clearly are ill-motivated and gain little traction. How do courts decide? What matters? This article will explore the emergence of courts’ use of earning capacity in the support analysis, review historical case law, compare statutory and child support guidelines’ treatment of earning capacity in different jurisdictions, examine emerging trends and courts’ current treatment of earning capacity, and, finally, offer some practice tips for the practitioner who may be confronted with prosecuting or defending an earning capacity case.

#### B. *Historical Case Law*

Following the lead of other state courts before it, the Connecticut Supreme Court appears to have first considered the issue of earning capacity as the basis for awarding family support in the 1967 case of *Yates v. Yates*.<sup>1</sup> The court divided this question into two parts: first, earning potential, and second, voluntary and deliberate reduction in earnings. As to the defendant’s “future prospects or high earning potential,” the court noted that “the determination of an award of this nature is controlled by no fixed standard. It is for the trial court to decide whether . . . the payor has wilfully restricted his earning capacity so as to deny his child the reasonable support which it is his duty to supply.”<sup>2</sup> In *Yates*, the payor was a doctor and rather than working as a general practitioner, had taken a position as a researcher upon his relocation to New York. His ex-wife raised the question of whether he was earning at his full capacity. However, despite the claims by the ex-wife, there was no evidence of a voluntary reduction in earnings by the payor, who was earning in New York essentially the equivalent of what he had been earning prior to relocating from Arkansas.<sup>3</sup> Nevertheless, the *Yates* court found error and remanded the case for further proceedings because

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<sup>1</sup> 235 A.2d 656 (Conn. 1967).

<sup>2</sup> *Id.* at 659.

<sup>3</sup> *Id.*

there were insufficient facts at trial regarding the parties' financial abilities.

The *Yates* court noted that its consideration of the issue of earning capacity was based largely on the Supreme Court of Wisconsin decision in *Knutson v. Knutson*.<sup>4</sup> In that case, the trial court found that the defendant moved away from Wisconsin and took a job elsewhere with the goal of reducing his income and thereby preventing the plaintiff from obtaining a substantial alimony award:

That the defendant wilfully left the state of Wisconsin to practice his profession in New Mexico, and that said movement on the part of the defendant was for the express purpose of intentionally decreasing his earnings in order to attempt to prevent the plaintiff from obtaining a substantial allowance for alimony, and had said defendant continued his practice in Wisconsin, his gross income would have continued at the rate that the same was for the years 1958 and 1959.

Defendant made certain admissions in his adverse examination before trial which would support the foregoing finding with respect to his reason for leaving Wisconsin. In such a situation, a court is not required to determine alimony on the basis of the husband's present income. In a proper case the amount of alimony may be based upon earning capacity or prospective earnings.<sup>5</sup>

The *Knutson* court in turn relied on the Pennsylvania Superior Court's holding in *Appleton v. Appleton*: "This appellee cannot wilfully now choose to retire from gainful employment and deny his wife the alimony it is his duty to attempt to supply."<sup>6</sup> The *Yates* court also relied on the Missouri Court of Appeals decision in *Weiss v. Weiss*, which held that where a husband voluntarily reduced his earning on the eve of trial, it was proper to measure his capacity to support his family by considering his former earnings.<sup>7</sup>

The Connecticut Supreme Court provided further guidance about assigning an earning capacity for purposes of awarding alimony and support in *McKay v. McKay*.<sup>8</sup> In that case, the defendant claimed there was error in assigning him an earning capacity of \$15,000. The Connecticut Supreme Court affirmed on the ba-

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<sup>4</sup> 111 N.W.2d 905 (Wis. 1961).

<sup>5</sup> *Id.* at 907.

<sup>6</sup> 155 A.2d 394, 396 (Pa. Super. Ct. 1959).

<sup>7</sup> 392 S.W.2d 646 (Mo. Ct. App. 1965).

<sup>8</sup> *See* 381 A.2d 527 (Conn. 1977).

sis that the defendant was a graduate of the Massachusetts Institute of Technology, had been a professional engineer for twenty-two years, had earned \$19,000 in 1974, and as of 1976, had formed a corporation that allowed him complete control in setting his own salary. Moreover, he had even testified that the “average salary in the area for a person with his education, training, and experience was \$15,000” per year. That was considered sufficient evidence to support the trial court attributing to him the same earning capacity to which he had testified.

The Connecticut Supreme Court reiterated that under appropriate circumstances, a trial court may base an unallocated support award on earning capacity rather than earned income in *Miller v. Miller*.<sup>9</sup> In *Miller*, the defendant had been employed for more than twenty years with only a fourteen month period of unemployment, and in fact he had been employed at the commencement of the divorce action and then voluntarily left that employment after the action started. The supreme court held that the trial court did not abuse its discretion in considering the defendant’s earning capacity. There was no necessity that the trial court find that the defendant willfully reduced his earnings in an attempt to limit support payments. Rather, it was sufficient that the earnings were “voluntarily depleted so as to deprive the spouse of financial support.”<sup>10</sup>

The Connecticut Supreme Court in *Beede v. Beede* ruled similarly that it was appropriate for a trial court to rely on a party’s earning capacity when the financial evidence is unclear.<sup>11</sup> “Faced with conflicting testimony and the defendant’s inadequate financial records, the trial court reasonably concluded that the defendant could afford to pay \$1,500 a month [for alimony and child support] based on his \$24,000 annual income from half-time employment and the retention of his business and substantial assets.”<sup>12</sup>

As courts initially addressed earnings reductions or restrictions in the context of support orders, concepts began to emerge

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<sup>9</sup> 436 A.2d 279, 280 (Conn. 1980).

<sup>10</sup> *Id.* at 281 (citations omitted).

<sup>11</sup> *See* 440 A.2d 283 (Conn. 1982) (holding that a trial court has broad discretion in domestic relations cases and declining to find that the trial court abused its discretion when it took earning capacity into account).

<sup>12</sup> *Id.* at 286.

and take shape: (1) duty to support; (2) obligation to earn (at some level); (3) a look at obligors' intentions both as to avoidance of payment as well as earning at full capacity; and (4) what evidence was necessary for a court to act.

### C. *Statutory Support for the Use of Earning Capacity in Support Determinations*

There is ample legislative support throughout the United States for the use of earning capacity in the determination of both child support and spousal support. With the proliferation of child support guidelines and the formalized collection of child support by the states, the notion of earning capacity and imputation of income based on earning capacity has been codified into states' statutes and regulations setting forth their particular guidelines schemes. For example, the following statutory language can be found (in each case emphasis is added):

1. In California, "[t]he court may, in its discretion, *consider the earning capacity* of a parent in lieu of the parent's income, consistent with the best interests of the children."<sup>13</sup>
2. In New York, "an amount *imputed as income* based upon the parent's former resources or income, if the court determines that a parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support."<sup>14</sup>
3. In Texas, "[i]f 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."<sup>15</sup>
4. In Florida, "[m]onthly *income shall be imputed* to an unemployed or underemployed parent if such unemployment or underemployment is found by the court to be voluntary on that parent's part, absent a finding of fact by the court of physical or mental incapacity or other circumstances over which the parent has no control. In the event of such voluntary unemployment or underemployment, the employment potential and probable earnings level of the parent shall be determined based upon his or her recent work history, occupational qualifications, and prevailing earnings level in the community if such information is available."<sup>16</sup>

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<sup>13</sup> CAL. FAM. CODE § 4058(b) (2014).

<sup>14</sup> N.Y. DOM. REL. LAW § 240-1-b(v) (2014).

<sup>15</sup> TEX. FAM. CODE ANN. § 154.066(a) (West 2013).

<sup>16</sup> FLA. STAT. § 61.30(2)(b) (2014).

This theme of inclusion of earning capacity in support statutes carries on throughout a survey of various state support statutes. It is clear that unemployment and underemployment, and corresponding findings of earning capacity and imputation of income, are a well-entrenched aspect of the determination and collection of support throughout the country.

D. *The Role of Intent in Determining Whether Income Should Be Imputed*

1. *Intention to Avoid Payment Obligation Versus Intention to Restrict Earnings*

On the questions of the payor's intent to reduce or eliminate income—or to deprive the recipient of support—it is important to note how the courts have generally shifted the analysis from requiring a specific intention to avoid the support obligation to a more generalized look at whether a party is earning at or near full capacity. The *Yates* court discussed this in terms both of a willful intent to deny the recipient of support as well as a voluntary avoidance of earning income at full capacity.<sup>17</sup> Other courts have sometimes couched the analysis in terms of “avoiding” payment of a support obligation. The more specific intent of trying to deprive the recipient of support appeared to be at the center of the courts' reasoning in *Knutson*<sup>18</sup> and *Appleton*.<sup>19</sup> Yet, intention to avoid payment of a support obligation does not appear to have been a significant consideration in *McKay*. What appeared important to the court was that the evidence demonstrated that the payor was earning below his capacity and that he had some level of control over that issue.<sup>20</sup>

The Connecticut Supreme Court appeared to provide some guidance on the question of which of these factors must be considered in *Miller*, where it stated that there was no need to find an attempt to limit support payments.<sup>21</sup> The voluntary depletion of income for any reason was clearly sufficient by that point. *Beede* then offered an early pragmatic lesson: the court was will-

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<sup>17</sup> *Yates*, 235 A.2d at 659.

<sup>18</sup> *Knutson*, 111 N.W.2d at 907.

<sup>19</sup> *Appleton*, 155 A.2d at 396.

<sup>20</sup> *McKay*, 381 A.2d at 527.

<sup>21</sup> *Miller*, 436 A.2d at 281.

ing to impute income when the financial circumstances and potential (versus actual) earnings were unclear, and what evidence was available did not provide clear guidance to the court.<sup>22</sup> Intention to avoid the payment obligation did not seem to be included in the calculation at all, except that perhaps the court took a dim view of the fact that the payor did not produce adequate financial records serving to persuade the court that the payor was earning to full capacity.<sup>23</sup>

A similar dichotomy exists in other jurisdictions. In Texas, a split among the courts of appeals had resulted in two lines of decisions – one line holding that a court was required to make a finding that a party’s unemployment or underemployment was for the primary purpose of avoiding a child support obligation,<sup>24</sup> and the other line holding that there is no statutory requirement that the court consider whether the obligor’s voluntary unemployment was for the primary purpose of avoiding child support.<sup>25</sup>

In *Iloff v. Iloff*,<sup>26</sup> the Texas Supreme Court resolved this conflict, holding that the Texas Family Code section<sup>27</sup> authorizing the court to set child support based on earning capacity contained no reference to intention to avoidance of child support. “The Legislature did not include in the statute any mention of “purpose,” “design,” or even “intent” to avoid or reduce child

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<sup>22</sup> *Beede* 440 A.2d at 286.

<sup>23</sup> *Id.* For an interesting discussion of three “tests” to determine whether intention to avoid a support obligation should be part of the analysis, as well as an excellent review of categories of cases confronted by courts, the author commends the reader to the following article: Lewis Becker, *Spousal and Child Support and the “Voluntary Reduction of Income” Doctrine*, 29 CONN. L. REV. 647, 658 (1997), which discusses three approaches a court might take as a matter of public policy: (1) the “good faith test,” (2) the “strict rule test,” and (3) the intermediate test,” which cover the extremes from a laissez faire treatment of the obligor’s intentions (as long as they are in “good faith”), to the other end of the spectrum which ignores any actual income and looks only to theoretical earning capacity.

<sup>24</sup> The so-called “*DuBois*” line of cases adopted by twelve of the fourteen Texas courts of appeals. *DuBois v. DuBois*, 956 S.W.2d 607 (Tex. App. 1997).

<sup>25</sup> The so-called “*Hollifield*” line of cases. *Hollifield v. Hollifield*, 925 S.W.2d 153 (Tex. App. 1996).

<sup>26</sup> 339 S.W.3d 74 (Tex. 2011).

<sup>27</sup> TEX. FAM. CODE § 154.066(a) (2013).

support.”<sup>28</sup> In the view of the court, the absence of “avoidance” language in the statute steered the analysis solely to the question of whether the obligor had made a choice to earn below capacity, either by underemployment or unemployment. There was no requirement that a court determine the *reason* for the choice to earn below capacity; the only necessary finding was that the obligor had chosen to earn below capacity.

The court then set forth the clarifying standard serving to resolve the split of appellate authority. “While the trial court may *consider* whether the obligor is attempting to avoid child support by becoming or remaining unemployed or underemployed as a factor in its child support determination, *such proof is not required for a court to be able to set child support based on earning potential*. However, in certain cases, such evidence may be especially relevant or even dispositive of the matter.”<sup>29</sup>

A movement away from intention to avoid payment of child support and toward a more generalized avoidance of earning at full capacity is evident in other jurisdictions as well. In the California case of *In re Marriage of Hinman*,<sup>30</sup> the court utilized a two-prong test, consisting of first, ability to work, and second, opportunity to work, which means an employer who is willing to hire.<sup>31</sup> The court applied that test to conclude that an unemployed mother caring for three children from a new relationship was susceptible to imputation of income based on earning capacity for support purposes, to support the five children who were the issue of her dissolved marriage to the custodial father. Of interest is that a third prong was articulated—namely “willingness” to work—but that prong ultimately did not become part of the test utilized by the court. It appears that “willingness to work” represents a slippery slope down which many an imputed income analysis would be doomed to oblivion, had it been incorporated.

It is important to note that courts have applied the analysis of ability to earn to both the non-custodial (payor) spouse as well as the custodial (recipient) spouse. While the focus is naturally

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<sup>28</sup> *Iliff*, *supra* note 26, at 80.

<sup>29</sup> *Id.* at 81 (emphasis added).

<sup>30</sup> 64 Cal. Rptr. 2d 383 (Cal. Ct. App. 1997).

<sup>31</sup> *Id.* at 387 (citing *In re Marriage of Regnery*, 263 Cal. Rptr. 2d 243, 245 (Cal. Ct. App. 1989)).

upon the obligor, it is axiomatic that *both parents* have an obligation to contribute to the financial support of the child. This dual obligation is reflected in statutory language, in child support guidelines and throughout the case law. In *Larrison v. Larrison*,<sup>32</sup> the New Jersey appellate court remanded and directed that the trial court determine whether the trial court should impute income to an unemployed stay-at-home custodial mother with one child in preschool and another in grade school, based on her earning capacity. Similarly, in *Broadhead v. Broadhead*, the Virginia Court of Appeals imputed income to both parties.<sup>33</sup> The father appealed but the mother did not, conceding that it was appropriate to impute income given her voluntary departure from her job. The father pressed his appeal, claiming that the court had improperly found that he had voluntarily departed from an earlier job. The court of appeals remanded, but for a different reason: while the father was correct that his earlier departure should properly have been characterized as involuntary, the trial court had failed to consider whether he was *currently* underemployed.<sup>34</sup>

The straightforward way to keep the concept of joint responsibility for financial support squarely in focus is to recall that in every child support case, the practitioner should (or must) complete a child support guidelines worksheet. These forms, while showing some differences from state to state, invariably require *both* parents' incomes to be listed and considered.

The issue of whether an intention to avoid a support obligation is a prerequisite for attribution of an earning capacity has continued to be a question with which the courts have grappled. Clearly, if there is evidence that a party has willfully reduced income to evade a support obligation, it is "especially appropriate" that a court base its support award on earning capacity.<sup>35</sup> But the absence of an intention to avoid payment of a support obligation will not necessarily preclude application of an earning capacity analysis. The more generally accepted approach is that intention to avoid is *not* a necessary predicate finding. "While it also is especially appropriate for the court to consider whether

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<sup>32</sup> 919 A.2d 852 (N.J. Super. Ct. App. Div. 2007).

<sup>33</sup> See 655 S.E.2d 748, 751 (Va. Ct. App. 2008).

<sup>34</sup> See *id.* at 753.

<sup>35</sup> *E.g.*, *Schmidt v. Schmidt*, 429 A.2d 470, 473 (Conn. 1980).

the defendant has willfully restricted his earning capacity to avoid support obligations . . . we never have required a finding of bad faith before imputing income based on earning capacity.”<sup>36</sup> *Weinstein v. Weinstein* seems to remove the question of nefarious intent from the equation altogether.<sup>37</sup>

The appellate court ruling in *Weinstein* also shows a more practical, rather than punitive, approach:

[T]hat line of cases instructs us that the court may consider earning capacity from employment when the evidence shows that the reported amount of earnings is unreasonable. Thus, for example, when a person is, by education and experience, capable of realizing substantially greater earnings simply by applying himself or herself, the court has demonstrated a willingness to frame its orders on capacity rather than actual earnings. . . . *McKay* instructs us, as well, that a court may frame a support order based on a party’s earning capacity if a person who fails to disclose any earnings has a history of earnings and the evidence supports the court’s conclusion that his loss of earnings is unreasonable.<sup>38</sup>

This interpretation of *McKay* and related cases is based more on a consideration of the totality of the evidence and whether the income (or lack thereof) being claimed is “unreasonable.” Application of an earning capacity is framed by an inquiry into what a person is reasonably capable of earning under all of the circumstances, rather than making the inquiry as a response to an obligor’s avoidance of an obligation of support.

## 2. *Changes in Circumstances Within and Outside the Control of the Obligor*

Despite the shift away from the need to demonstrate an intention to avoid payment as a factor in triggering an earning capacity review, and toward the more general approach of simply looking at whether a party is earning at full capacity, other circumstances frequently arise in the support setting that cannot easily be subjected to the general analysis. In these instances, a more “equitable” or balanced analysis must be undertaken. One such example is in cases involving retirement, which are usually

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<sup>36</sup> *Weinstein v. Weinstein*, 911 A.2d 1077, 1083 (Conn. 2007) (citations omitted).

<sup>37</sup> *See id.*

<sup>38</sup> *Weinstein v. Weinstein*, 867 A.2d 111, 116 (Conn. App. Ct. 2005) (citations omitted), *rev’d on other grounds*, 911 A.2d 1077 (Conn. 2007).

brought before the court by way of a motion to modify support. In Connecticut, modifications of alimony and child support are authorized by Connecticut General Statute section 46b-86(a), which requires a threshold showing of a substantial change in circumstances to modify such an award.<sup>39</sup> After that initial element is proven, the court will engage in a consideration of what, if any, modification should occur. Retirement would certainly appear to constitute a “substantial change in circumstances” for those who were previously employed. It also raises questions of voluntariness as well as whether someone who has retired is fulfilling his or her earning capacity or in fact even has any remaining earning capacity. This is a very difficult area for a practitioner to provide any dependable advance advice to a client; if the party does not retire, there will be no change in circumstances and therefore no ability to prosecute a motion for modification, but on the other hand, if the party does retire, there can be no certainty that the court will accept that the person has no ongoing earning capacity; such a conclusion may result in an imputation of income as the basis of a support award. Of course, in the second example, the job is already gone, given that the party had retired – and now there is no income from which to pay the imputed support order. Query whether motions seeking advisory opinions from the court might be the answer to this quandary.

In *Simms v. Simms* a recipient of alimony claimed on appeal that the trial court “improperly found that the payor had no earning capacity when the evidence established that he voluntarily had retired and he had the ability to work if he so chose.”<sup>40</sup> The Connecticut Supreme Court was not persuaded, and cited the trial court’s findings of the payor’s advancing age, poor health, a loss of income from the business anyway, and that he had not sold his business to avoid his obligations to the alimony recipient. The supreme court stated:

Indeed, the plaintiff does not appear to contend that the defendant sold the business for the purpose of avoiding his obligations to her, but contends only that it would be *possible* for the defendant to work if he so chose. The plaintiff provides no authority for the proposition that the trial court must impute income to a party of reasonable retirement

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<sup>39</sup> CONN. GEN. STAT. § 46b-86(a) (2014).

<sup>40</sup> 927 A.2d 894, 899-900 (Conn. 2007).

age and in declining health for purposes of § 46b-86 if the party has any ability to work, however limited.<sup>41</sup>

A similar analysis of the parties' actions and a balancing of the equities appeared to permeate the trial court ruling where child support was a focus in *Dolan v. Dolan*.<sup>42</sup> The judge stated: "The issue for this Court is to determine whether the plaintiff intentionally and willfully retired or resigned his lucrative job in order to circumvent his divorce obligations."<sup>43</sup> The court allowed parol evidence from the payor to explain that his written termination agreement, which stated that he was "resigning" from employment, was actually a graceful way for the payor and his employer to characterize the payor's involuntary termination, at the time when the financial markets were crashing and many individuals employed on Wall Street were similarly put out of work. The court credited the payor's efforts to find new employment and as a result of these considerations, the court refused to assign an earning capacity to the payor, instead utilizing his current income as the basis for a new support award.<sup>44</sup>

A practitioner representing a recipient of support where the nature and voluntariness of a job loss is an issue should be prepared to conduct a full-court press in terms of discovery to determine the circumstances surrounding the departure from employment, including potentially the deposition of the payor's employer. Moreover, evidence of prevailing economic conditions and even expert testimony from a vocational expert may be helpful in demonstrating whether efforts to obtain replacement employment are, in fact, reasonable.

In consideration of these court rulings, how good faith, voluntariness or other equitable considerations may figure into the question of pure earning capacity are uncertainties with which practitioners must grapple. Certainly, where a party has reduced income with the specific intent to deprive the other party or the

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<sup>41</sup> *Id.* at 900 n.9.

<sup>42</sup> *See Dolan v. Dolan*, No. FSTFA030194138S., 2012 WL 2362412 (Conn. Super. Ct. May 30, 2012). In the interest of full disclosure, Rutkin, Oldham & Griffin L.L.C. tried this case post judgment, but was not involved pendente lite or in the drafting of the parties' separation agreement, the language of which was in issue post-judgment.

<sup>43</sup> *Id.* at \*3.

<sup>44</sup> *Id.* For a similar treatment of a payor's termination, *see Broadhead v. Broadhead*, 655 S.E.2d 748, 753-54 (Va. Ct. App. 2008).

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parties' children of support, that removes the equitable considerations involved in the retirement and legitimate job loss cases, casts the actual income figure into doubt, and puts the analysis squarely in the realm of imputing income according to earning capacity. Given the universal view that child support is in the child's best interests and therefore must be a first priority payment, when those in need of support are deprived of that support by the deliberate actions of the payor, it is appropriate that the same consideration of earning capacity apply.

In any case, it seems clear that the notion of capability to earn at a certain level will creep into the court's analysis. For example, while the question of "intent to avoid a support obligation" may not be in the equation, the circumstances of an individual who has been laid off from work clearly implicate his or her ability to obtain employment and generate income. A person may have been laid off due to an economic downturn which will also affect re-employment and income-generating opportunities. Indeed, the general child support statutory requirements set forth in a sampling of states all provide that the parties' current circumstances must be considered:

Section 61.30 of the Florida Statutes provides, for example, "[t]he trier of fact may order payment of child support which varies, plus or minus 5 percent, from the guideline amount, after considering all relevant factors, including the needs of the child or children, age, station in life, standard of living, *and the financial status and ability of each parent.*"<sup>45</sup> Texas provides a similar broad review of the parties overall circumstances, by requiring consideration of "the ability of the parents to contribute to the support of the child" as well as "any other reason consistent with the best interest of the child, taking into consideration the circumstances of the parents."<sup>46</sup>

Connecticut General Statutes section 46b-84(d), contains another example of a statutory directive to consider the broad circumstances of the parents and the minor child by addressing a panoply of factors which include the parents' abilities to provide support, their earning capacity, job skills, and ability to obtain

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<sup>45</sup> FLA. STAT. § 61.30(1)(a) (2014) (emphasis added).

<sup>46</sup> TEX. FAM. CODE ANN. § 154.123(b) (17) (West 2013).

employment.<sup>47</sup> Moreover, Connecticut General Statutes section 46b-215(a)(1) provides, in relevant part,

The Superior Court or a family support magistrate may make and enforce orders for payment of support against any person who neglects or refuses to furnish necessary support to such person's spouse or a child under the age of eighteen or as otherwise provided in this subsection, *according to such person's ability to furnish such support*.<sup>48</sup>

The practical reality of trial work in this area is that judges are very interested in learning and understanding the circumstances and particulars of a job loss or income reduction.<sup>49</sup>

#### E. *Imputing Income to Capital Investments*

Courts have demonstrated a high level of interest in imputing earning capacity not only to the “human capital” of parties in the form of their ability to earn, but also to the earning capacity that might be attributed to “investment capital” in the form of stocks, bonds, real estate and other investments. Since these financial investments are a source of income, it stands to reason that the question will be raised as to whether they are “earning” at their full capacity.

In *In re Marriage of Schlafly*,<sup>50</sup> the father objected to the court's imputation of a 3 percent rate of return on his stock portfolio, claiming that in actuality, his portfolio only earned approximately 1.6 percent annually. The father's claim was that the court was required to use actual income received, and had no authority to impute additional income. The appeals court disagreed, saying,

The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children. . . This earning capacity doctrine “embraces the ability to earn from capital as well as labor. [I]n assessing earning capacity, a trial court may take into account the earnings from invested assets . . . . Just as a parent cannot shirk his parental obligations by reducing his earning capacity through unemployment or underemployment, he cannot shirk the obligation to support his child by *underutilizing* income-producing assets.”<sup>51</sup>

<sup>47</sup> CONN. GEN. STAT. § 46b-84(d) (2014) (emphasis added).

<sup>48</sup> *Id.* § 46b-215(a)(1) (emphasis added).

<sup>49</sup> See *infra* Section II Practice Tips for more on this topic.

<sup>50</sup> 57 Cal. Rptr. 3d 274 (Cal. Ct. App. 2007).

<sup>51</sup> *Id.* at 278 (emphasis in original; internal citations omitted).

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The court then made a noteworthy assertion drawing attention to the broad overlay of children's best interests as an overarching consideration in support matters, appearing to trump parents' own plans and priorities. With regard to the support statute defining gross income for support purposes, the court stated, "[s]ection 4058 is unmistakably clear that the only qualification to the discretionary imputation of income is that it be consistent with the children's best interest."<sup>52</sup>

In *Kay v. Kay*,<sup>53</sup> the New York Court of Appeals found that the evidence justified a finding that the husband's true income was much higher than his reported income. The husband had significant investment assets in the form of real estate and securities, most of which were in a stock that did not produce dividend income of any material amount but rather had been selected for its "growth" potential. The payor's income for support purposes appeared to be below what might reasonably be expected. In imputing an earning capacity to his investments, the court stated,

Interesting and closer in point are those cases wherein our courts have considered the income a husband is capable of earning by honest efforts, given his education and opportunities . . . . By analogy, the husband here may be required to *make his considerable assets earn income which, by an objective standard, is commensurate with at least a conservative estimate of what they are capable of producing, and, when he fails to do so, he may be treated as though he had*; his decision to let them grow for his own future benefit is not one which the courts are obliged to honor in all circumstances. The husband is not required to finance his alimony and support payments in precisely this fashion if he is able to meet them by other means, but we note that he may not place such a possible source of income "off limits" here, as he argued he may do.<sup>54</sup>

In *Miller v. Miller*,<sup>55</sup> the Supreme Court of New Jersey made short measure of the question of whether investment assets are subject to imputation of a rate of return beyond actual earnings.

Given that both income earned through employment and investment income may be considered in a court's calculation of an alimony award, it follows that there is no functional difference between imputing income to the supporting spouse earned from employment versus

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<sup>52</sup> *Id.* See also *In re Marriage of Destein*, 91 Cal. App. 4th 1385, 1394-96 (2001).

<sup>53</sup> 339 N.E.2d 143 (N.Y. 1975).

<sup>54</sup> *Id.* at 637 (emphasis added).

<sup>55</sup> 734 A.2d 752 (N.J. 1999).

that earned from investment. In both instances, the supporting spouse is required to earn more from an “asset,” either his or her human capital in the form of employment or his or her investment capital, or risk having more income imputed to him or her.<sup>56</sup>

The court went on to direct that on remand, the use of an “A” rated corporate bond rate of return “not inconsistent with the rate of return that our and other courts have imputed to a supporting spouse’s investments and other capital assets,”<sup>57</sup> would be appropriate.

The foregoing demonstrates that courts throughout the country are prepared to look to any potential source of income, including investment income, to craft a support order. While most commonly, the courts will look to actual income, they have not hesitated to make a calculation of “investment return” earning capacity to impute to capital investments a reasonable rate of return.<sup>58</sup>

F. *A Look at the Tension Between Support Awards, Custody, and the Best Interests of the Child*

Despite the clear trend toward removing intention to avoid a child support obligation and focusing instead upon the restriction of income following from a party’s intentional choices, in cases of imputed income and earning capacity, there exists a subset of cases in which the courts have had to come to terms with the tension between parental decisions arguably made with an eye toward the best interests of the children in the custodial setting, and the diminution of income as a consequence of those decisions. Several states have wrestled with variations on this theme; in each of the following cases, the court gave weight to the considerations of the best interests of the child and other factors best characterized as within the realm of reasonable conduct or societal expectations, rather than strictly analyzing whether the obligor was earning to full capacity.

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<sup>56</sup> *Id.* at 760.

<sup>57</sup> *Id.*

<sup>58</sup> For an extremely thorough and comprehensive analysis of how a court may perhaps undertake the calculation of a reasonable rate of return on investment assets, and an equally comprehensive listing of the evidence that a practitioner might consider presenting in such a case, see the following unreported case: *Fox v. Fox*, No. FSTFA 03-0197091S, 2011 WL 1565891 (Conn. Super. Ct. Mar. 29, 2011).

A case recently decided by the Connecticut Supreme Court illustrates the point. In *Mohamradu v. Olson*,<sup>59</sup> a payor of alimony and child support moved from Florida to Connecticut allegedly to be able to be closer to and spend more time with his child. The consequence of the move was increased contact with his child and a reduction in his earnings. The trial court denied the payor's motion to reduce his support payments, stating that the reduction of income was the result of the payor's voluntary decision. Following the case of *Sanchione v. Sanchione*,<sup>60</sup> which held that a party cannot claim a change in circumstances if the change is voluntarily self-inflicted, the court found that the payor was unable to prove the predicate substantial change in circumstances necessary for the court to even consider modifying the child support order. The Connecticut Appellate Court affirmed the trial court and on appeal, the Connecticut Supreme Court reversed, reasoning that while the payor's conduct was in fact "voluntary" (in that he moved from Florida to Connecticut), it was not "culpable." The court stated,

To summarize our holding in this case, a court that is confronted with a motion for modification under §46b-86(a) must first determine whether the moving party has established a substantial change in circumstances. In making this threshold determination, if a party's voluntary action gives rise to the alleged substantial change in circumstances warranting modification, the court must assess the motivations underlying the voluntary conduct in order to determine whether there is *culpable* conduct foreclosing a threshold determination of a substantial change in circumstances. If the court finds a substantial change in circumstances, then the court may determine what modification, if any, is appropriate in light of the changed circumstances.<sup>61</sup>

Other jurisdictions similarly have shifted the earning capacity analysis away from the focused and dispassionate question of whether the obligor is earning up to his or her capacity and toward an analysis of the nature of the obligor's conduct as that conduct affects earnings. Whether earning at full capacity can undermine the children's best interests or otherwise fray the fabric of the family (even as it exists in its non-intact form) are considerations weighed in the cases addressing questions such as

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<sup>59</sup> 81 A.3d 215 (Conn. 2013).

<sup>60</sup> 378 A.2d 522 (Conn. 1977).

<sup>61</sup> *Mohamradu*, 378 A.2d at 684 (emphasis in original).

“how much work is too much work?” and “when is it better to earn less but benefit the child more?”

In *In re Marriage of Lim & Carrasco*,<sup>62</sup> the court took up the question of whether and to what extent an imputation of income must be tempered by the best interests of the children. In *Lim*, the mother, a partner in a law firm, was also caring for the parties' child. She and her law partners had reached an agreement that she would bill approximately 1,600 hours per year, rather than 2,000 or more that had been her pattern previously – and her compensation was adjusted downward accordingly. The father sought an order imputing to the mother the income associated with her prior pattern of billings. The court considered the question of what constitutes a reasonable work regimen and whether maximizing work hours in pursuit of maximized compensation is in the best interests of the children. In determining whether an order based on earning capacity should be measured by the work regimen engaged in by the payor spouse during the marriage, the court concluded that, “earning capacity generally should not be based upon an extraordinary work regimen, but instead upon an objectively reasonable work regimen as it would exist at the time the determination of support is made.”<sup>63</sup> The court then stated,

Moreover, we reiterate that this court has determined that “no authority permits a court to impute earning capacity to a parent unless doing so is in the best interest of the children. By explicit statutory direction, the court’s determination of earning capacity must be ‘consistent with the best interest of the children’” . . . . We determine that substantial evidence supports the trial court’s implicit finding that it was not in the children’s best interest to impute earning capacity to Lim based on her previous income as a full-time law partner.<sup>64</sup>

Another example of how courts have had to balance competing factors when deciding an earning capacity analysis is illustrated by *In re Marriage of Simpson*.<sup>65</sup> In *Simpson*, the payor had been a stage hand for approximately sixteen years. He historically had worked a considerable number of hours, sometimes accumulating time at the superhuman rate of up to sixteen hours

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<sup>62</sup> 154 Cal. Rptr. 3d 179 (2013).

<sup>63</sup> *Id.* at 775 (citing *In re Marriage of Simpson*, 841 P.2d 931 (Cal. 1992)).

<sup>64</sup> *Id.* at 777 (internal citations omitted).

<sup>65</sup> *Simpson*, 841 P.2d at 931 (Cal. 1992).

per day. The mother sought a support order on the basis of the father's earning capacity and historical work pattern, rather than his actual hours worked at the time of trial, and the trial court agreed. On appeal, the court overturned the order imputing income to the father on the basis that a court entering an earning capacity order must base it upon a neutral and even-handed analysis of what would constitute a reasonable work schedule based on facts in existence at the time the court enters the order.<sup>66</sup>

In *In re Marriage of Bardzik*,<sup>67</sup> the California Court of Appeal took up the interesting question of a 42 year old mother who legitimately retired after twenty years of service as a deputy sheriff. There are other interesting facts as well: the father was the primary custodian of the parties' special needs child and the parties shared 50-50 parenting time of their other child. Yet the existing order required the father to pay child support to the mother due to the disparity in their earnings. The father sought to have income attributed to the mother. The decision makes clear that courts will consider a variety of factors in deciding whether to apply an earning capacity analysis, not the least of which is whether for *legitimate* reasons, a party makes a decision to alter his or her lifestyle. In clarifying certain dicta contained in *In re Marriage of Padilla*,<sup>68</sup> the *Bardzik* court stated,

That dicta was simply too broad: It confused the legitimate attempt to attain some balance in one's life and maybe even actually spend some *time* with one's children with self-indulgent shirking. As noted above, the discretionary and best interest elements in Family Code section 4058, subdivision (b) certainly temper any such proposition. Indeed, to the degree that the "self-realization" dicta from *Padilla* can be read as standing for an inflexible income-ratchet rule (a payor parent can never change positions without having child support calculated on the last and highest income level) we think, on reconsideration, that such a rule is in conflict with the test of earning capacity announced by our Supreme Court in *In re Marriage of Simpson*, . . . as well as our First District colleagues' decision in *Everett*. Both decisions, we think, correctly perceived that the discretion inherent in Family Code section 4058 is not a one-way street requiring a squeeze-the-last-drop workaholism from either parent.<sup>69</sup>

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<sup>66</sup> *Id.* at 936.

<sup>67</sup> 83 Cal. Rptr. 3d 72 (2008).

<sup>68</sup> 45 Cal. Rptr. 2d 555 (1995).

<sup>69</sup> *Id.* (internal quotations and citations omitted).

Thus courts have moved from an initial position of requiring a showing that the obligor intended to avoid the payment of a support obligation, to a more generalized requirement that an intention to earn less than one is capable of earning is sufficient, to taking into account and balancing the variety of what might be termed “legitimate” reasons why a person may be earning at a rate below full capacity.

#### G. *What Exactly Is Earning Capacity?*

When a court discusses “earning capacity” what exactly is it talking about? How can lawyers describe to clients what they mean when they engage the clients in a discussion about whether they – or the party on the other side of the support equation – are earning up to their capacity?

In *In re Marriage of Cheriton*, the California Court of Appeal put it this way, “[F]or purposes of determining support, ‘earning capacity’ represents the income the spouse is reasonably capable of earning based upon the spouse’s age, health, education, marketable skills, employment history, and the availability of employment opportunities.”<sup>70</sup> In other words, earning capacity is what a person could earn based on their current circumstances, their experience and other common sense considerations that would add up to an ability to generate income.

In Connecticut, the courts have defined earning capacity as follows:

[E]arning capacity is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health . . . . Thus, for example, when a person is, by education and experience, capable of realizing substantially greater earnings by applying himself or herself, the court has demonstrated a willingness to frame its orders on capacity rather than actual earnings.<sup>71</sup>

In the California support case of *Mendoza v. Ramos*,<sup>72</sup> another quite similar definition of earning capacity emerges:

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<sup>70</sup> 111 Cal. Rptr. 2d 755 (Cal. Ct. App.2001) (quoting *Simpson*, 841 P.2d at 936).

<sup>71</sup> *Weinstein v. Weinstein*, 934 A.2d 306, 311 (Conn. App. Ct. 2007).

<sup>72</sup> 105 Cal. Rptr. 3d 853 (Cal. Ct. App. 2010).

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Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer willing to hire . . . When the ability to work or the opportunity to work is lacking, earning capacity is absent and application of the standard is inappropriate. When the payor is *unwilling* to pay and the other two factors are present, the court may apply the earnings capacity standard to deter the shirking of one's family responsibilities.<sup>73</sup>

The definition of earning capacity is quite consistent across the various jurisdictions and the three prong test set forth in *Regnery* provides guidance to the practitioner regarding the type of evidence a court will find relevant to the inquiry.

H. *What Evidence Is Necessary for and Supports a Ruling Based on Earning Capacity?*

The Connecticut Supreme Court in *Schmidt* queried what evidence would properly uphold a support award based on earning capacity. The court considered that evidence of income once earned or typically earned by someone in a profession was appropriate.<sup>74</sup> But because there was no evidence and no finding of any specific amounts earned by the payor, the award was reversed as lacking a factual basis.<sup>75</sup> A mere assertion or argument by counsel regarding earning capacity is insufficient and would be grounds for reversal if it were the sole basis for an award of child support.<sup>76</sup> The question, then, is what is the appropriate basis for an earning capacity award so that not only will the trial court be persuaded to make such award, but it will be sustainable on appeal?

One way of proving earning capacity is by reference to former earnings. Another can be to examine a party's lifestyle and expenses.<sup>77</sup> In *Carasso v. Carasso*, the payor claimed that he was incurring weekly expenses of \$2,852 while only generating weekly income of \$2,327. The trial court examined evidence of

<sup>73</sup> *Id.* at 857 (citing *Regnery*, 214 Cal. App. 3d at 1372-73).

<sup>74</sup> *Schmidt*, 429 A.2d at 473.

<sup>75</sup> *Id.*

<sup>76</sup> *See* *Prial v. Prial*, 787 A.2d 50, 54 (Conn. App. Ct. 2001).

<sup>77</sup> *Carasso v. Carasso*, 834 A.2d 793 (Conn. App. Ct. 2003).

the payor's lifestyle, including a Mercedes Benz automobile, a six bedroom home, employment of a maid and gardener, as well as his ability to pay expenses at a level otherwise inconsistent with his claimed income, and used that evidence to impute income to the payor. "Lifestyle and personal expenses may serve as the basis for imputing income where conventional methods for determining income are inadequate."<sup>78</sup> The *Carasso* court looked to other jurisdictions that similarly utilized evidence of lifestyle as the basis for imputing income to a payor.<sup>79</sup> In *McCormick v. McCormick*, the Supreme Court of Vermont sustained a trial court having imputed income to a payor in an amount equal to his expenses, after the evidence showed a significant apparently unexplained disparity between his income and expenses.<sup>80</sup> The *McCormick* court in turn found guidance from both Massachusetts and Minnesota courts in basing its imputation of income on the lifestyle of the payor.<sup>81</sup>

An instructive list of what evidence will support an earning capacity award is found in the Connecticut Appellate Court's decision in *Rozsa v. Rozsa*.<sup>82</sup> In that case, the appellate court affirmed the trial court's "ample findings," which included:

- 1) The plaintiff was healthy.
- 2) The plaintiff had a bachelor of arts degree in accounting, as well as a bachelor of arts degree in mathematics and a master of business administration degree in finance.
- 3) The plaintiff had been a licensed certified public accountant for more than twenty-five years.
- 4) The plaintiff worked for various companies, eventually earning salaries between \$120,000 and \$175,000 per year.
- 5) The plaintiff started his own accounting practice part-time, to which he eventually transitioned full-time in 1998.
- 6) In 2006, the plaintiff's ordinary business income from his accounting practice was \$43,715.
- 7) The plaintiff also had a 50% interest in U.S. Limousine Service, Inc., from which he received a \$40,000 per year salary and medical benefits for himself and his family.

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<sup>78</sup> *Id.* at 797.

<sup>79</sup> *Id.*

<sup>80</sup> *McCormick v. McCormick*, 621 A.2d 238, 240 (Vt. 1993).

<sup>81</sup> *Id.*, citing *Thomsen v. Thomsen*, 429 N.E.2d 372, 373 (Mass. App. Ct. 1981); *Johnson v. Fritz*, 406 N.W.2d 614 (Minn. Ct. App. 1987).

<sup>82</sup> 977 A.2d 722 (Conn. App. Ct. 2009).

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- 8) The plaintiff also received income from property development and other investments.
- 9) The defendant hired an expert to analyze the plaintiff's net disposable income and net disposable cash flow for 2001 through 2005 (records for 2006 and 2007 were not initially available). The expert's report showed net disposable income of the plaintiff was \$117,460 in 2005 with an average of \$100,156 for 2001-2005.<sup>83</sup>

The defendant's use of an expert in *Rozsa* helped support the finding of a substantial annual net disposable income reflective of the husband's earning capacity. The step of hiring a vocational or financial expert to testify about prevailing economic conditions, employment opportunities, specific skills and educational foundation, can provide a significant advantage. In cases with smaller litigation budgets, it may be sufficient to introduce into evidence documents such as prior years' tax returns, W-2's, 1099's and other tax-related filings. Even the expenses on a financial affidavit, shown together with banking records, can be used to prove ability to pay and lifestyle, thus demonstrating an earning capacity that might be attributed to a party.

In *Mendoza*, the California Court of Appeal provided insight not only into the evidence that must be adduced, but also made it clear who bears the burden of proof:

The party seeking to have income imputed bears the burden of demonstrating opportunity to earn that income: the burden "cannot be met by evidence establishing merely that a spouse continues to possess the skills and qualifications that had made it possible to earn certain salary in the past—even where it was undisputed that the spouse had voluntarily left that prior position . . . . It is not sufficient to demonstrate only what the party had been making before the loss of income; the moving party must also adduce evidence of vocational abilities and employment opportunities . . . . The evidence in the record in this case, far from demonstrating that Ramos could find employment, shows only that she was unable to do so and was forced to seek public assistance. (Compare *In re Marriage of LaBass and Munsee* [moving party demonstrated credentialed, job opportunities, and salary.]) *Mendoza* introduced no evidence that Ramos had the skills or opportunity to earn the income he sought to have the court impute to her, and, accordingly, failed to meet his burden of proof.<sup>84</sup>

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<sup>83</sup> *Id.* at 726-33.

<sup>84</sup> *Mendoza*, 182 Cal. App. 4th at 685-686 (citing *In re Marriage of Berger*, 170 Cal. App. 4th 1070, 1079 (2009)); *In re Marriage of Bardzik*, 165 Cal. App. 4th at 1295; *In re Marriage of LaBass and Munsee*, 56 Cal. App. 4th 1331, (1997).

In keeping with the trend in other areas of the law, it becomes clear that the detailed evidence necessary to meet a proponent's burden of proof may best be presented by way of an expert witness. Although evidence of earning capacity and employability can be cobbled together from a variety of sources, having an expert available to tie it all together and help the court fill in the blanks could be invaluable, especially in more complicated cases. If it can be afforded, it is the better practice to have such economic, vocational and regional employment opportunity data available from an expert.<sup>85</sup>

### I. *Some Mechanical Considerations for Imputation of Income*

The question of how and where the earning capacity actually fits into the child support calculation process can vary from state to state. How does a practitioner derive an earning capacity and also comply with the requirement of the submission of a child support guidelines worksheet? At what point does earning capacity come into play? While the practical reality may not lead to results that differ measurably, there are variations in how states treat earning capacity. In some instances, earning capacity is introduced into the calculation at the outset; in other states, earning capacity is only considered under the guidelines deviation criteria, after the calculation of the presumptive amount of support. In Florida, the child support guidelines provide, within the section authorizing the initial determination of the parents' income, that with narrow exceptions, "[m]onthly income shall be imputed to an unemployed or underemployed parent if such unemployment or underemployment is found by the court to be voluntary on that parent's part."<sup>86</sup> California similarly includes earning capacity in its definition of annual gross income of the parents. "The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children."<sup>87</sup>

Yet in other states, earning capacity is only brought into the equation at a later stage. In Connecticut for example, a parent's earning capacity is a specific criterion that may serve as the basis

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<sup>85</sup> See *infra* Section II Practice Tips for additional considerations regarding the use of vocational and employability experts.

<sup>86</sup> FLA. STAT. ANN. § 61.30 (2) (West 2012).

<sup>87</sup> CAL. FAM. CODE § 4058 (1992).

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for a *deviation* from the presumptive support amounts set forth in the Connecticut Child Support Guidelines.<sup>88</sup> Earning capacity is also one of the specific criteria considered in awarding child support under Connecticut General Statutes section 46b-84(d).<sup>89</sup> However, recent case law suggests that application of the criteria enumerated under section 46b-84(d) serves as a secondary part of the analysis after initial application of the criteria leading to the presumptive amounts set forth under the guidelines.<sup>90</sup>

An essential aspect of prosecuting or defending any child support case in Connecticut is the necessity to file a Child Support Guidelines worksheet, as demonstrated in the case of *Shaulson v. Shaulson*.<sup>91</sup> The trial court found that a payor had an earning capacity of \$900,000 per year based on an average of recent years' earnings, which it then used to calculate an unallocated award of alimony and support. The payor of support then challenged the court's unallocated support order of \$40,000 per month, subsequently modified to \$30,000 per month on appeal, claiming that the trial judge failed to apply the guidelines and the awards were inequitable, particularly in light of other orders dividing the marital assets. However, the payor had failed to file the required Child Support Guidelines worksheet. The failure to submit a child support guidelines worksheet ultimately meant the demise of the appeal, because the appellate court declined to even review his claim on that basis.<sup>92</sup> The Connecticut Child Support Guidelines provide presumptive guidance as to the amount of an award of child support, and recent case law has granted them ever-increasing prominence requiring strict adherence while eschewing the exercise of judicial discretion to depart from those guidelines.<sup>93</sup> Similar mechanical processes exist in Texas<sup>94</sup> and Florida<sup>95</sup> which mandate the determination of a pre-

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<sup>88</sup> CONNECTICUT COMMISSION FOR CHILD SUPPORT GUIDELINES, CHILD SUPPORT AND ARREARAGE GUIDELINES § 46b-215a-3(b)(1)(B) (2005).

<sup>89</sup> CONN. GEN. STAT. § 46b-84(d) (2011).

<sup>90</sup> See *Maturo v. Maturo*, 995 A.2d 1, 16-17 (Conn. 2010).

<sup>91</sup> 9 A.3d 782 (Conn. App. Ct. 2010).

<sup>92</sup> *Id.*

<sup>93</sup> *Tanzman v. Meurer*, 70 A.3d 13 (Conn. 2013); see also *Dowling v. Szymczak*, 72 A.3d 1 (Conn. 2013); *Tuckman v. Tuckman*, 61 A.3d 449 (Conn. 2013).

<sup>94</sup> TEX. FAM. CODE §§ 154.125 *et. seq.* (2013).

<sup>95</sup> FLA. STAT. § 61.30 (6) (2012).

sumptive amount of child support and provide that the court may exercise its discretion in deviating from presumptive amounts.

The *Tuckman* case is treated by practitioners as a case of first impression on a related aspect of imputation of income. The treatment of pass-through earnings of an S corporation is an area requiring great sophistication, in that reported income for tax purposes frequently bears no relationship to actual distributions of cash actually available for use by an owner of the S Corporation. The law clearly requires a court to base child support and alimony orders on the available net (as opposed to gross) income of the parties, yet the Connecticut Supreme Court had never provided guidance on how to treat pass-through earnings of a party. The earnings of an S corporation are reported as individual income by the S corporation's stockholders. However, in any given fact pattern, for a variety of reasons including, by way of example, the distinction between cash and accrual accounting or whether an S corporation has retained a portion of its earnings for growth, reinvestment or otherwise, a stockholder likely does not receive as available cash an amount equal to the earnings of the S corporation.

In *Tuckman*, the Connecticut Supreme Court looked to several other jurisdictions, and incorporated the language set forth in the leading case of *J.S. v. C.C.* in Massachusetts, which stated that,

the better reasoned decisions require a case-specific, factual inquiry and determination . . . . We follow the lead of these cases, and similarly conclude that a determination whether and to what extent the undistributed earnings of an S corporation should be deemed available income to meet a child support obligation must be made based on the particular circumstances presented in each case. Such a fact-based inquiry is necessary to balance, inter alia, the considerations that a well-managed corporation may be required to retain a portion of its earnings to maintain corporate operations and survive fluctuations in income, but corporate structures should not be used to shield available income that could and should serve as available sources of child support funds.<sup>96</sup>

Likewise, in *Zold v. Zold*,<sup>97</sup> the Florida District Court of Appeal took a similar view that the determination of whether the financial results and performance of an S corporation are being

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<sup>96</sup> *Id.* at 498 (quoting *J.S. v. C.C.*, 912 N.E.2d 933 (Mass. 2009)).

<sup>97</sup> 880 So.2d 779 (Fla. Dist. Ct. App. 2004).

manipulated by a shareholder in the support setting must be made by reference to corporate law and partnership common law concepts of trust, good faith, and the confidential relationships that can exist in a business setting:

When a corporation has more than one shareholder, an officer/shareholder has a fiduciary duty to all shareholders. The corporation is not the personal piggy bank for any one shareholder simply because that shareholder may have a controlling interest in the corporation and is also the chief executive officer. Financial responsibilities to creditors and employees must be satisfied before distributions to shareholders take place if a corporation is to remain viable. Once the distributions are found to be possible, the distributions must be pro-rata in accordance with the percentage ownership of the capital stock of the corporation. Court ordered obligations in marital litigation should not place an ex-marital partner in the position of having to breach a corporate fiduciary obligation in order to avoid the possibility of a court finding that partner contemptuous.”<sup>98</sup>

The practice tip here is to provide evidence to the court of “actually available income” from the S corporation to the stockholder. This will likely come in the form of expert testimony from the certified public accountant representing the S Corporation. Mere reference to the “income” stated on tax returns will not be sufficient and likely will encourage the court to draw a conclusion that there is more cash available for distribution and payment of expenses than actually exists.

### *J. Conclusion*

The law on earning capacity has traveled the road from being a “specific intent” driven determination of whether the payor was seeking to avoid the support payment obligation, to a more generalized determination of whether the parent has, by action or inaction, caused a circumstance the consequence of which is that the parent is not earning at or near capacity (without any need to demonstrate an intention to avoid payment). As the case law has developed and the goal of protecting the child’s best interests has come into focus as an essential element of an earning capacity analysis, the courts have begun to consider additional factors and subtleties in the analysis. The modern approach balances the desire to maximize the child’s financial support against other considerations affecting the child’s best interests. The en-

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<sup>98</sup> *Id.* at 781.

tire analysis reflects changing views and public policy on important considerations such as retirement, child rearing and the rights of individuals to plan and arrange their lives in ways they deem fit, rather than having those choices and factors rendered meaningless by the singular goal of maximizing financial support for the child. As with so many areas of law, this area is alive, vibrant and seemingly reflects societal views about what is important, while scrupulously viewing all of those factors under the microscope of what is in the best interests of the child.

## **II. Practice Tips - Prosecuting or Defending Earning Capacity Cases**

### *A. How to Prosecute a Case – Representing the Recipient Spouse*

When a practitioner is faced with having to prepare and prosecute an earning capacity case, there are many steps to take and much information and documentation to gather and organize. While there is no particular order in gathering the following information, the preparation should begin with a comprehensive look at the circumstances of the obligor's departure from employment, since that information is likely the most current.

As the information is being gathered, it is important to make a distinction between voluntary ("I quit") and involuntary ("you're fired" or "we're downsizing") job loss. In other words, make sure to keep a close eye on what the evidence shows about whether the employee caused or contributed to the job loss or the employee is a victim of circumstance such as economic downturn, merger, or right-sizing.

Another type of job loss can be termed "constructive termination," which is job loss or resignation arising when an employee becomes aware of fraud, corrupt practices, insider or self-dealing or similar circumstances, or is subjected to workplace harassment or some other set of facts potentially mandating a departure from the position, and after making reasonable efforts to address the circumstances, feels that he or she is left with no choice but to resign. In such a circumstance, it may be argued that the departure from employment is voluntary. Moreover, depending upon the people or the circumstances, they may be quite reluctant to discuss the specifics of their departure – possibly be-

cause of fear of increased difficulties in finding new employment within their niche of employment specialization or possibly because of fear of reprisal. Cases of this nature are extremely difficult to prosecute *or* defend, because the former employees are typically extraordinarily circumspect in the recitation of what they know and even less willing to be placed under oath to tell their story in a public setting. In this instance, it is important to gather as much evidence as possible demonstrating that the employee took steps internally to address the issue prior to departing the job. Are there internal emails addressing the employee's concerns? Did he or she seek a correction in the activity? Was a report made up the chain of command? Was it brought to the attention of the Board of Directors? Was a whistleblower action commenced? This type of evidence can be extraordinarily helpful in defending an action and the absence of such evidence can provide a window of opportunity to raise doubt if the practitioner is prosecuting a case for earning capacity.

At times, layoffs can be disguised as "resignation" or "retirement." As was seen in the *Broadhead* and *Dolan* cases cited earlier, "you're fired" might reflect other facts and an involuntary termination can easily become "we will be happy to call it a resignation in order to make it easier for you to find work – but you have to give us a release." The lesson for the practitioner is that when you are confronted with such an explanation, *it is absolutely essential* to conduct discovery at *both the party level and the employer level*. Make sure that you obtain the entire human resources file from the employer; and be sure to get the employee's entire record – emails, letters, notes, drafts of severance agreements, etc. Take steps to depose the employee's boss, the human resources person involved in the termination, the employee's attorney if there was outside representation, etc. The goal is to determine whether the evidence – the documentation and the explanations – match the claim made by the now-unemployed obligor.

Follow up to determine whether there was a severance package – get all particulars – and then compare those facts to available tax returns to find out whether there was a continuation of salary or a lump sum payment covering a period of months of normal employment income. Find out whether other expenses were covered as well. Were there trailing rights or vesting periods

from prior grants or awards which may have been lost or converted? Were there restricted stock awards, pension or other rights that were near to vesting but did not vest due to employment ending? At the time of the job loss, did the employee attempt to get an exception and obtain the full value of those rights as part of the severance agreement?

Determine whether the employer offered job placement assistance and, if so, the nature of the assistance and whether the employee utilized that assistance as fully as possible. If not and the assistance remains available, this can be used to demonstrate a lack of initiative in seeking reemployment. Was there placement counseling? Was the employee allowed use of the corporate premises or retain his or her email address for the purposes of job seeking? Was there a referral to a headhunter, placement agency, or similar assistance; was resume writing assistance provided, were there interviewing skills workshops? In all these instances, ask the same question: did the employee take advantage of these benefits? If not, bring this to the attention of the court as you seek to have income imputed to the obligor on the basis of his or her earning capacity.

The next step is to gather the earnings history of the party. Get the employee's tax returns for the past five years, along with W-2's, K-1's, and 1099's. For a self-employed obligor who claims a reduction of income, very closely analyze the Schedule C from the federal tax return. Is there current period depreciation? While depreciation reduces gross taxable income, it is not a cash outlay and this amount should be added back into the net income. Are there any personal expenses hidden in entertainment, travel, etc.? Would a court reasonably conclude that the travel and entertainment expenses were related to the production of income? Look at business banking records, credit card records, the balance sheet, income statement, cost of goods sold and be observant to determine whether there have been changes year over year. If there are changes, for example, higher cost of goods sold in a year with a claim of lower revenue, this bears further investigation. Keep an eye out for the payment of personal expenses inside the business. Always be mindful that perquisites are income. For example, in Connecticut, the Child Support Guidelines definition of gross income includes, "employment perquisites and in-kind compensation such as food, shelter or

transportation provided on a recurrent basis in lieu of or in addition to salary or wages.”<sup>99</sup>

It is good practice to depose the company CPA. This is an important step not to skip – the CPA will be able to shed light on what the “true” level of compensation is and moreover, you may as well find out what he or she is going to say, since there is a good chance that person will be called to testify.

Equally important in prosecuting an earning capacity case is ascertaining and understanding the employment history of a party. In my practice, when I am prosecuting an earning capacity case, I get the entire history of the party’s employment and place it on a timeline with earnings comparisons highlighted. *Actually make a chart* – an aid to the court – this can be very effective in bringing the judge over to your view of the world. “Now Mr. Smith, drawing your attention to the timeline chart, isn’t it true that in 1985, you were employed at Acme Corp. earning \$80,000 per year as the Assistant Controller . . . then in 1997 you left Acme and joined Brent Industries as Controller, earning \$110,000 per year. You stayed at Brent for ten years, by which time you were earning \$175,000 per year. You then left to become the CFO of Maximum Productions, at an annual salary of \$275,000 base plus guaranteed bonus of \$100,000. Is all of this correct?” This chart shows many things: job stability, career growth, increasing compensation, willingness to change jobs and locations – in other words, employment success and flexibility. A sudden claim of inability to gain employment must be measured against past historical performance.

A nice touch is to subpoena the employment file from each previous job – it will include the obligor’s resume, which will be a glowing statement of the person’s capabilities.

Next, direct your attention to the employee’s efforts at re-employment or employment at appropriate levels of income. Subpoena emails from all of the obligor’s email accounts, including accounts at the former employer, which may have provided placement assistance. File a request for production directed toward job applications, interactions with headhunters, placement agencies, etc. Find out how “urgently” the candidate is seeking

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<sup>99</sup> CONNECTICUT COMMISSION FOR CHILD SUPPORT GUIDELINES, *supra* note 88, § 46b-215a-1 11(vi).

employment – is the resume getting tweaked? Sent out frequently? Is there a grid or spreadsheet tracking resumes sent, phone calls made, notes sent, follow-ups, etc.? A serious job-seeker will be doing these things. Look into job fairs – is there evidence of the employee searching for such events? Did he/she attend?

Has there been networking with people who could assist in job placement? Is the employee reaching out to former employers? Colleagues? Friends from business school? What about evidence of rejected offers of employment – have there been offers that were rejected because they were “beneath” the candidate? What were the terms and when were the offers made? Depose the headhunter(s) to find out more about the urgency being demonstrated. Learn about the “market” and learn about the headhunter’s success/scoreboard – the headhunter may be the problem!

Another tool to use in the prosecution of an earning capacity case is to demonstrate the various employment opportunities available to the individual who is the subject of the earning capacity analysis. Frequently, support statutes contain as one factor “earning capacity”; others may additionally recite “employability” as a factor to be considered.<sup>100</sup> The use of a vocational expert in this setting can be extremely helpful. The vocational expert does much more than gather “help wanted” ads. The expert will investigate and report on the health of the regional economy and job market, determine the subject party’s skill set and experience. For example, “Your Honor, this gentleman has worked in stock brokerage for fifteen years. He has a history of developing possible new accounts – in his past job he cold called and those cold calls translated into 60 new accounts per month over a four year period. This level of employee can earn \$100,000 per year and these jobs are available. His claim that he is only able to work as a bartender is without merit.”

The vocational expert does more; he or she will analyze the party’s re-employment efforts, analyze employment opportuni-

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<sup>100</sup> See, e.g., FLA. STAT. § 61.30 (stating that courts should consider “recent work history, occupational qualifications and prevailing earnings in the community”). See also CONN. GEN. STAT. § 46b-84(d) (considering, among various factors, “occupation, earning capacity. . .vocational skills and employability”).

ties and then match the party to appropriately available jobs. The testimony of a vocational expert can be compelling.

The process of utilizing a vocational expert is worth discussing. The first step of course is to contact the expert and clear any conflicts of interest. The next step is to solicit cooperation from opposing counsel regarding whether the unemployed or underemployed party will consent to a vocational evaluation. In absence of cooperation, file a motion to compel, seeking a court order that the party submit to a vocational evaluation and cooperate in all reasonable respects with the requests by the evaluating expert for meetings, completion of questionnaires and provision of other documents and information. If the motion to compel is denied, you can still proceed as follows: Have your vocational expert provide his or her questionnaires to you. (Normally, there are two questionnaires – one for completion by your client, relating everything they can recall about their (ex) spouse's employment history, education, experience, etc., and a second for completion by the party being evaluated). Utilizing the questionnaires, prepare interrogatories, requests for production or requests for admission, setting forth the questions/information provided by the client spouse and the vocational expert. Serve these discovery documents on the unemployed party.

As an alternative to the preceding paragraph, notice the deposition of the unemployed party. Have the vocational expert present at the deposition, either by agreement (or seek a court order permitting attendance). During the deposition, have the vocational expert feed questions to you. In either instance, for the purpose of presenting your motions to the court, liken the process to the provisions of (at least in Connecticut) the rules of practice authorizing independent medical examinations in personal injury cases, where both independent physicians as well as vocational experts are widely utilized.<sup>101</sup> Finally, be sure to properly and timely serve a disclosure and notice of expert, setting forth the existence the expert and the expert's opinions, bases of opinions, etc. in accordance with your applicable rules of practice.

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<sup>101</sup> CONN. PRAC. BOOK § 13-11. For similar rules in other states, *see, e.g.*, N.Y. CIVIL PRAC. LAW AND RULES § 3012 and FLA. RULES OF CIV. PRO. R. 1.360.

Finally, gather and organize information pertaining to the age, health and education of the party who is the subject of the earning capacity analysis. A retirement at 65 faced with a heart condition is not the same as a retirement at 45 in order to pursue a better tennis game. Know your opposing party's education, background, specific training, job-related training, certifications, etc. Is there a Series 7 license authorizing the individual to work in the securities industry? Have there been continuing education courses? All of this adds to the foundation as you build your case. Likewise, pin down information on the lifestyle of the party. Is he or she living the life of a worried, unemployed job seeker or a devil-may-care spendthrift? This information informs the court about whether to impute income to the party based on earning capacity.

*B. How to Defend a Case – Gather Information on the Following:*

When confronted with the challenge of defending the earning capacity case, it is intuitive that much of the information needed for prosecuting such a case will be helpful in defending such a case. Make sure to get information about the circumstances of the party's departure from employment. Was the departure voluntary? If your client seeks your advice as to whether he or she should leave his or her existing employment – either by voluntary resignation or a reduction of income, it is essential to counsel the client on the potential consequences of imputation of income. If the job loss is a *fait accompli*, gather all information available on the circumstances of the job loss and marshal any argument that may support an involuntary firing or a constructive termination argument. In addition, have the client immediately engage in serious and persistent re-employment activities (see below).

If the job loss was involuntary, gather all documentation demonstrating the involuntary nature of the departure – downsizing, merger, economic circumstances, how many others were fired, were entire divisions let go, were layoffs in waves, was a large contract or customer lost, etc. If the party was fired “for cause,” it is important to determine the circumstances of the firing, get the employee's entire HR file, and consult with the

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party's employment attorney regarding the employee's rights arising from that fact pattern.

If the job loss was a constructive termination, use the same analysis as with prosecuting a case – except when defending, have your client immediately complete an affidavit setting forth the circumstances surrounding the decision to leave the employment: the corrupt practices, harassment, other pertinent facts and the employee's actions demonstrating that the employee truly had no choice but to resign. Your client must be prepared to testify as to these elements. Depending on the facts of the case, the practitioner may need to seek to seal the courtroom if there is proprietary or publicly traded information that may emerge. If the layoff was by mutual agreement disguised as “resignation” or “retirement,” the client must be prepared to show that the “retirement” was in actuality a “firing” but that his former employer offered the opportunity to “soften the blow” by calling it something else. In this instance, secure evidence and documentation from both the party and the former employer – notes of meetings, letters, agreement, termination package, benefits, etc. Did the employer offer job placement assistance? Demonstrate the nature of the assistance provided and show that it was fully utilized. Make sure the client takes full advantage of any and all job placement services offered by the employer and it cannot be emphasized enough that the client must keep meticulous records, documenting every step, every effort, every detail of the client's daily efforts to gain replacement employment. When the party is testifying in defense of the job loss, be sure to demonstrate use of severance package funds to meet support obligations.

Be sure that you understand and can explain the timing of the job departure. Was it to “avoid” a support obligation, for example, one party files a motion seeking support or the court enters an order of support and shortly thereafter, the obligor “loses” his job or his income is “severely reduced,” versus sixteen months after entry of the order, with never a missed or late payment, the payor loses his job. If the facts support this distinction, be sure to draw attention to the circumstances and demonstrate the distinction.

Be certain to introduce evidence of the client's efforts at re-employment or employment at appropriate levels of income. It is essential as a first step that the practitioner immediately coun-

sels the client to diligently seek re-employment within his/her appropriate area of experience and training. Gather and organize all emails – to friends, connections, networking contacts, formal applications, sending resumes, etc. Obtain and organize copies of all job applications and records of any interviews, including rejection letters. The point is to fastidiously document *everything*— all interactions with headhunters, placement agencies, attendance at job fairs, etc. As well, gather documentation and evidence of your client’s efforts to “re-tool” or develop additional skills to enhance employability.

Any offers of employment should also be collected, showing terms, conditions, including relocation, periods of probation, required training and the like.

It is recommended that a vocational evaluator be utilized in the defense of an earning capacity case as well. The expert can testify about and demonstrate the lack of available work or jobs commensurate with the experience and training of the client. In addition, the expert can shed light on the regional economy and the status of job market being faced by the client. Finally, the vocational expert for the client in the defense of an earning capacity case will be of assistance to rebut claims by the other side, when claims are raised regarding “available work” for the client. Under the appropriate circumstances, the expert could testify that a particular job is not something for which the client would be hired.

Prepare evidence on factors that may contribute to limiting the client’s employability: your client’s health, child care responsibilities, age, education, a narrow employment niche (for example – a career in specialty commodities such as natural gas, metals, or other similar limited employment experience throughout the client’s entire career) to provide evidence that it would be unreasonable to expect that party to completely change careers. For example, the CFO of a specialty commodities company could not reasonably be expected to become the CFO of a hospital, without working knowledge and experience of medical reimbursement laws and the like.

Finally, analyze the client’s earnings history – while this may not control an imputation analysis based on trends in the economy, it can be helpful. Average annual income leading up to the market crash in 2008 was a nice marker for what someone

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“might” earn. However, the economy changed rapidly, and those annual averages went right out the window. Take steps to address the other side’s desire to use annual averages. Drill down into your client’s business segment, employment niche, etc.

Use of the foregoing practice pointers can be of tremendous assistance in navigating the prosecution or defense of an earning capacity case. Given that so many of the cases turn on the particulars of the parties’ facts and circumstances, the collection and presentation of evidence supporting your client’s interpretation of events can make the difference in the outcome of the case.