



## *Fox Rothschild Podcast*

### **Texas Family Law Podcast Series: Child Support**

*Featuring Laura S. Hayes, Erin Garza and Jamie-Lee Denton of Fox Rothschild LLP*

**Laura Hayes:** Hi and welcome to episode number five of the Fox Texas Family Law podcast. I'm Laura Hayes, your host. I'm a partner in the Dallas Office at Fox Rothschild. I'm here today with both of my associates, Erin Garza and Jamie-Lee Denton. We are going to talk about child support issues, how to calculate it in Texas, but also how creative alternatives to child support can be accomplished by agreement of the parties.

The first thing I will talk about is how to calculate child support in Texas—this is one of the biggest questions I get. Texas is based on a percentage of the paying party's income. There are some states where child support is calculated using the resources of both parents, but in Texas it is just the paying party's resources. It is calculated using the net income, so you take the person's gross income, you take out taxes and you take out payments for health insurance, and you get to a net number. Then, for child support purposes, that net number is calculated into 20 percent for one child, 25 percent for two children, and 30 percent, etc. for three children. There is a cap on the net resources. That cap is \$9,200 a month. So if the net resources of the paying party are more than \$9,200, the child support calculation stops at that \$9,200. In other words, even if a party makes \$10,000 in net resources, child support is still calculated based on if they earned a net income of \$9,200. What that means is, the max guideline amount for one child for the paying party would be \$1,840, and for two children it is 25 percent of that \$9,200, which is \$2,300. For three children, it would be 30 percent of that \$9,200, which would be \$2,760 per month.

That is the basics of child support. That being said, if someone makes more than that income, that does not mean that you cannot get more child support. That just means that is how it is calculated on a monthly basis, according to the family code. There are other ways to get more child support if someone makes a significant amount of money, or other alternatives that we are going to talk about today. Those are the basics for calculating child support under the family code.

**Jamie-Lee Denton:** One thing that people ask is how child support is affected by the parenting schedule. The answer on that is that it is not, by Texas law or by statute. Child support can be affected by the parenting schedule if the parents agree themselves to do so. Child support can also be where each parent pays 50/50 of the fees, or the child expenses, so technically there is really no set child support.

**Laura Hayes:** With those types of arrangements, sometimes the court can rule on that depending on the parenting schedule, and sometimes those agreements on child support can be done by agreement of the parties. Generally, the court, if there is an agreement of the parties to pay no child support or pay some kind of alternative child support that is not based on the guidelines, the parties will have to agree that modifications from the guidelines is in the best interest of the children. Sometimes the court looks at it. You can go into different courts and if the parties make about the same amount of money and the court orders a 50/50 schedule, then sometimes the judge will say no child support. Other times, courts will do an offset. Other times, even if it a 50/50 schedule for whatever reason, they will make the paying party pay the amount under the Texas child support guidelines. It is all a case-by-case basis, but the court does follow the Texas child support guidelines. Even if there is an agreement of the parties, they will actually look at it and make sure the agreement is in the best interest of the children.

**Jamie-Lee Denton:** Laura, you mentioned an offset. An offset is where the court looks at the child support guidelines for mom and for dad, and then it offsets to see who is going to be paying the remaining child support. For example, if dad makes \$1,000, and mom makes \$500, then dad is going to end up paying the remaining \$500 in child support.

**Laura Hayes:** Right, so the child support calculator says that the dad is going to pay \$1,000 in child support, and the mom's child support calculator says that she would have to pay \$500. Then the court would offset that and just say, "OK, dad you then have to pay \$500 to mom as an offset child support amount." In lieu of saying, the guidelines said \$1,000 and making dad pay the \$1,000 per month. The court can offset it based on the parties' income, especially if there is a big disparity in income between the parties. The court will sometimes look at that, and if there is no other agreement. Sometimes, for example, the parties agree that one parent is going to pay all of the unreimbursed medical expenses and all the extra-curricular expenses, and then the offset would not take place because the child is provided for in another way. The offset does occur in some cases.

I want to segue into some different kinds of agreements parties can make about child support, especially when there are higher net worth cases, or where one party makes significantly more than the other party does. There are a lot of creative ways that people can make agreements for child support, or put them in the court orders. What the parties sometimes don't understand coming into these cases is that, if the court order is one parent to pay the other parent that covers all the expenses. Some people leave the divorce and say, "I want dad to have to pay 50 percent of the baseball expenses." No, according to the court, the child support covers all that – whatever the payment is, that is it. The parents can only do everything else by agreement. So if both parents agree to pay the baseball, or cheerleading expenses, that's fine, but otherwise it's covered by the child support. People do not necessarily recognize that in the beginning, and they think, "Oh, I'm going to get X number of dollars in child support," but they think the other parents also is going to have to pay half of other expenses, but that is not the case. There are different creative ways you can cover those expenses and think ahead about other things—

college planning, cars, even big events like weddings. Erin is going to talk to us a little about that.

**Erin Garza:** Right, exactly Laura. You touched on it, but child support is really intended to cover the basic needs of the child—food, accommodation, if they have health care expenses, those sort of things. If you have a child in baseball, or cheerleading, or any other extra-curricular activities, or even if you want to consider how to best prepare them for the experiences they are going to encounter in college after the child support obligation technically terminates. Those are things to be thinking about before you get the decree officially drafted and signed off on by the court.

To kind of take it one point at a time, something we have seen become a big thing in cases, is planning for educational expenses that come up. This can be high school educational expenses, especially in areas like Dallas-Fort Worth where you have several private schools that children often attend, and other the options that parents like to take advantage of as well leading into college tuition and other expenses your child will encounter at that stage of their life as well. We actually have a CLE coming up next week where we will be discussing how educational expenses interact with lawyers and other experts, such as financial planners, and how you can work together with different professions to really accomplish your goal there.

One of the ways we have seen this is to come to an agreement on a 529 plan, for example. Laura, you and I recently handled a case where we were dealing with an individual who had entered into an agreement with her ex before the decree was drafted that each party would contribute a certain amount to the 529 plan for their children. It is important to note that when you are doing this, you want to make sure that there are certain things set out before the decree is signed. You want to know how much money you want your ex to contribute to this 529 plan, what is the expectation there. You also want to clarify, for your benefit and your children's benefit, who is the account owner on that 529 plan, and what rights do they have to manage that account. Something individuals may not realize, and where a financial planner may come into play as well, is the funds in a 529 plan are intended to be used for educational expenses—tutoring, private school, college tuition—but they can technically be used for non-educational expenses subject to a tax penalty. If mom has a 529 plan setup for her two children, dad is the account owner and he takes funds out of that 529 plan and uses them for non-educational expenses, that is something mom probably isn't going to like too much. Technically, it is OK under the law as long as he pays a tax penalty. If you want it specifically set in the decree that that is not permissible, that is something you need to discuss with attorneys such as Laura, Jamie-Lee or myself, to make sure that we get the proper language in there to protect you and ultimately to protect your child's interest.

**Laura Hayes:** Just to jump in a little bit and clarify, the family court does not have the jurisdiction to order anybody to pay for their children's education after 18 years old, but a lot of parents want to set aside those funds. That is fine, if both parties want to. When you are talking

about 529 plans and those kind of contributions being in the decree, it has to be done by agreement of the parties and it's not necessarily done by a judge ordering that. The judge does not have jurisdiction to order that. A lot of people want to set aside those expenses and want to make sure both parents are contributing to that early on as part of the divorce, so if they come to that agreement that's great. You're right, you do have to figure out who is going to control the account, what can the funds be used for, and should there be an accountant at any point for use of these accounts, and all of these things have to be thought of in advance. What happens if one party agrees to contribute a certain amount, but actually does not do that.

**Erin Garza:** Right. There are several implications, especially when you are talking about 529 plans. Drawing it back to even activities such as sports teams, travel teams, other things that your children may enjoy doing before a divorce comes to the table and that they want to continue to do even after their parents are divorced. You want to make sure that you are planning for those activities with your spouse. It is not the court's obligation to order that any parents pay for these activities. The judge cannot say, "mom, you're ordered to pay X amount. Dad, you're ordered this amount for so and so's baseball travel team, or summer camp, church camp, whatever it might be." As Laura mentioned, these are activities that the parties need to agree to in advance that there will be funds explicitly set aside so that the kids get to continue participating.

**Laura:** Right. One question I get a lot is when the parties find out what the child support is under the Texas family code, is well that is not going to cover the expenses. Well, that is probably true, but that is where you have to really think about it early on in a negotiation. What other expenses does your child need—if you are already in tutoring, or in counseling, or in travel teams for sports, or piano lessons, or whatever the case may be. Those things add up and, yeah, the monthly child support does not always cover those. So if you can get your soon to be ex-spouse, or the other parent, to agree to those things in writing it's a lot easier.

Some of these expenses you don't know at the time, but planning ahead for if these expenses come up they have to be done by agreement so that if one of the children becomes interested in one of these more expensive activities, the parties can talk about it in the future. Either do it by agreement, or the party willing to try out that activity realizes they may be responsible for 100 percent of those costs and should take that into consideration before enrolling the child. Summer camps and all of these things, raising kids is not an inexpensive endeavor. So really planning ahead and thinking about these expenses, especially if the case is going on when the children are younger and parents may not have the experience to think about these things ahead. It is really important to set aside provisions in an agreement for how these major expenses can be taken care of in the future.

We are going to talk about is there an ability to set aside things for larger purchases—what happens when the child turns 16, are both parents going to buy a car, is only one parent going to buy the car, who will be responsible for the insurance? Again, these things are not covered by

the child support and the court does not have jurisdiction to order a party to pay for a car for a child. These are important and very expensive things, and so having this conversation between parents early on sometimes helps make it less painful when it comes to the reality of that expense.

**Erin Garza:** I think that is an advantage of working with an attorney. Really having a good conversation at the outset of any divorce process where your attorney can advise you on what you are supposed to be looking for going forward. When your kid turns 16, do they need a car? Is your child most likely going to get married one day? Probably, hopefully so, if that is what they would like—how are you going to plan for those big expenses, like you mentioned?

**Laura Hayes:** Right. A lot of parties, if you can get these agreements in place during the process of the divorce, it is a whole lot easier to just wait until it actually occurs. If you are divorced and the child is 10 and you have not thought about who is going to buy a car six years later, you're kind of out of luck. It either falls on you because the other party will not agree, or the child doesn't get a car because the money hasn't been set aside and there is not enough money. If you think about them in advance, even though it is hard when you are arguing over custody, possession, and child support for a six year old, it is hard to think about what might happen ten years down the road, but all these kids are going to eventually have these major expenses. It is easier to think about it ahead if you can, instead of waiting for the last minute and it is much more difficult, especially if the other party won't agree.

**Jamie-Lee Denton:** That brings up a good question, Laura. I feel like listeners of the podcast are curious. What happens with the child support if the parent paying the child support happens to pass away unexpectedly? Does the child support obligation go away, or is there still some sort of mechanism put in place to ensure that the child continues to receive the funds that they need for their basic needs as well as any other expenses that had been agreed to previously.

**Laura Hayes:** Sure. If the paying party passes away before the child turns 18 and graduates from high school, the formbook language says that it remains the obligation of the parent's estate. That means that you can get the child support from the parent's estate, but that assumes that the parent's estate actually has the funds to pay for it. Not everybody does. You do have the funds at the time of the divorce, for example, but then at the time of the death there is no money. People truly do not know the other person's finances. So one thing that we try to negotiate a lot of times is that the paying parent—sometimes both parents, but always the paying parent—will maintain a life insurance policy until the child turns 18 and graduates from high school. In the event of an untimely death, there are funds that for sure will cover the remainder of the child support expenses. Some parents do agree to have the life insurance in place until they turn 18 and graduate from high school. Some keep that in place until the child is much older. That can only be done by agreement; it cannot be done by the trial court. To cover those expenses in case one of the parents dies early while the child is still in college, there is

then money to pay for college or those kinds of things. Life insurance provisions are really key to making sure there are funds in case something tragic happens.

**Erin Garza:** It is always good to know that that is an option, and there are other creative child support solutions that you can explore once you do consult an attorney. There are also situations in which child support may need to be modified. Jamie-Lee, I think you were going to talk to us a little bit about that.

**Jamie-Lee Denton:** The Texas family code does provide grounds for modification of child support. There are certain hoops that have to be jumped through. The court has to find that the circumstances of the child, or the person affected by the order, have materially and substantially changed. That can look at a parent starts making a ton more or a ton less and that is the parent paying child support, for example. Another part of that is that it has been three years since the order was rendered, or last modified, and the monthly amount of child support under the order differs from either 20 percent, or \$100 within the amount that would be awarded by the Texas guidelines.

As you can imagine, the expenses for court may not make it worth it for someone to go fight this and to try to get \$100 less child support. There will be hearings and once someone wants to contest something, the other party is going to say, "Well, I don't really like the possession schedule, so let's try to modify that." Then it just becomes a whole other court process.

**Laura Hayes:** Right. I think that further reiterates what Erin and I were talking about a few minutes ago, is that you really need to think about these things ahead of time, even if it may be difficult, or it may seem far off. Modification, yes it is possible, but as you said oftentimes, it ends up being more expensive than the amount you receive. Yay you got a couple more hundred dollars, or even a couple more thousand dollars a month, but how much did you spend in attorneys' fees to get that couple thousand dollars, or couple hundred dollars extra? Really thinking about these things early on is really important because you can modify, but it's difficult, it's expensive, and then when someone wants to modify one part of the prior orders, generally the other side is going to want to modify something else. It turns into a giant expense.

But circumstances do change, you may have a party who is making a significant amount of money at the time of the divorce, or the original court order in the suit affecting child relationship, and then they lose their job, or bankruptcy happens, or COVID happens—a lot of people lost their jobs and that was unexpected. We did notice a rise last year in the modifications because of job or income related losses due to COVID. The court is still dealing with some of those and it's determined on a case-by-case basis, but again if you're the one losing your job, you are obligated to continue paying whatever the court order says until such times as it is modified. If you are the paid parent and you lose your job, you really need to consider filing, or discuss the pros and cons of filing or not filing for that job loss. If it is going to be short term, it may not make sense to file, but it really is a case-by-case consideration.

Modifications, when you file them, you can request that the child support modification be retroactive to the date of filing, or the date the other party was served. So, for example, if you don't end up going to trial for a year, you can ask the court to modify that reduced amount of child support, or the increased amount, depending on what side you're on, back to the date of filing a year prior. Again, the time, the expense, associated with modifications may not be worth it, but something to consider.

**Jamie-Lee Denton:** Something to talk to your lawyer about.

**Laura Hayes:** Exactly. Then, of course, the same thing applies when you have an enforcement action. If you have a party who doesn't pay child support and you want to go after them, yes, you can get judgements, but again the time and expense associated with getting the enforcement and getting the judgement is really something you need to talk to a lawyer about to weigh the pros and cons and whether you want to go through a private lawyer like us, or you want to go through the attorney general's office. There are ways to enforce child support as well when the parent is not paying.

**Jamie-Lee Denton:** And that also depends on how fast you want it to move. If you want to go through the attorney general's office, they are not being paid by you so they are going to move a little slower, they have a lot to handle. Whereas your private attorney, you're paying, so we're kind of on your schedule. We are going to make it happen on your timeline. I think those are things people should consider.

**Laura Hayes:** That is absolutely right. There is a lot to consider when child support, even though the family code makes it seem very simple with here is the calculation, it is not, as we talked about today, quite that simple. There are a lot of considerations over and above what the family code says and that can be done by agreement, or by court order, depending on the case,

**Jamie-Lee Denton:** Does anyone have a new family law movie, or show?

**Laura Hayes:** No, I should have thought about it before we came today, I did not think about it. There's a lot going on.

**Erin Garza:** The Parent Trap—has someone used that yet?

**Laura Hayes:** Yes, that is a good one. Technically, there are two versions so that does count—the older version and the newer version.

**Erin Garza:** All right, the newer version is what I'm claiming.



**Laura Hayes:** Perfect. Great, well thank you guys for joining me today to talk about child support.