LAW AND THE FAMILY

"Additional Awards for Child Support"

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FOR SOME TIME NOW, family law commentators have participated in fashioning elaborate formulas to simplify the notoriously complex Child Support Standards Act. Lawyers have fumbled with the calculations largely because of legislative shortcomings in clarifying and defining the act. With never-ending twists and turns, attorneys take great comfort every so often in coming across case law that helps solve the seemingly endless mysteries of the CSSA. Weary matrimonial lawyers take comfort from some recent cases on the subject of additional child support awards.

The CSSA provides that where a parent is or may be entitled to receive non- recurring payments from "extraordinary sources," which are not otherwise considered as income, the court may allocate a portion of it to child support. [FN1] This provision is mandatory. It is not appended to the basic child support obligation. It is in addition to any support award that may be made. These "extraordinary sources" include, but are not limited to, life insurance policies [FN2]; discharge of indebtedness [FN3]; recovery of bad debts and delinquency amounts [FN4]; gifts and inheritances, and lottery winnings. [FN5] Of course if the non-recurring payments from extraordinary sources are considered as income, they cannot be parlayed into a double hit but will be excluded from the application of this provision.

Either or Both Parents

Unlike other support provisions, the CSSA does not confine orders of this nature to the noncustodial parent. [FN6] Either or both parents may be directed to make such payments. Entitlement is not automatic. Once the court is convinced that a child is entitled to a piece of the pie, and exercises its discretion to award additional child support, discretion is at the heart of it. The court must exercise its discretion with regard to the amount and method of such payments. It may direct that the amount be paid in one payment or several payments. This provision is new to New

York law. It authorizes the court to direct a parent to make a "lump sum" child support payment that would, like all child support payments, be non-deductible to the payor.

In DSS v. LaBarge,In DSS v. LaBarge, [FN7] the Family Court held that a $1.3 million personal injury award did not qualify as a nonrecurring payment. In endorsing respondent's interpretation, the court reiterated that the statute specifically defines a nonrecurring payment as only including sources not otherwise considered as income. All of respondent's current income, from which child support was paid, was derived from income generated by the investment of the award.

The court found no authority to order a distribution of the underlying asset, since adequate income existed from which child support was being paid. In laboring to be consistent with legislative intent, the court noted that receipt of compensatory damages in a personal injury award is intended to put the injured party in the position in which he was before he was injured and that a portion of the award is for past lost wages and pain and suffering. The court reasoned that this distinguishes the personal injury award, and makes it less likely that the Legislature meant to include it as a one-time nonrecurring payment.

In S.G. v. D.M. [FN8] the petitioner and his current spouse reached a settlement agreement as "compensation for his personal injury, pain and suffering and the spouse's loss of consortium claims which occurred as a result of an automobile accident." He was guaranteed $533,000 with an expected payout of $1 million. The payment schedule included an initial payout, monthly benefits and substantial disbursements in the future. The Hearing Examiner refused to include in income the proceeds of the personal injury settlement, in calculating the amount of child support, declaring the funds did not constitute income pursuant to Family Court Act (FCA) Sec. 413 (1)(b)(5).

The Family Court agreed with the respondent that the Legislature intended to provide the courts with the discretion to include as income items other than those specifically enumerated. It found that the portion of the petitioner's settlement that provided him with payments of $1,350 a month from Oct. 1, 1995, for life, could be considered as income for the support of the children.

Nonrecurring Payments

The court held that the nonrecurring payment that he received pursuant to the settlement was not "income." Relying on LaBarge, the court concluded that it was not permitted to allocate for the support of the child a portion of

the "non-recurring payment" from extraordinary sources that otherwise would be considered as income.

In Kramler v. Kramler, [FN9] the Second Department held that while distributive awards are not specifically included in "income" for purposes of calculating the basic child support obligation, they appeared to fall, if at all, within the category of nonrecurring payments. This type of payment offers the Supreme Court the option of allocating a portion of the nonrecurring payment to child support, without the affirmative obligation to do so.

In Bryant v. Bryant, [FN10] decided last month, the Third Department provided further guidelines. Petitioner and respondent had two children. They separated in August 1994 and subsequently stipulated that they would have joint custody of the children with primary physical custody to petitioner.

During the child support hearing, ample testimony was given to explore the parties' finances thoroughly. Among the families' treasures was an inheritance that respondent received, which was valued at $400,000.

The Hearing Examiner ordered, among other things, that respondent pay $115 a week in child support, together with an additional $100 payable to the petitioner in two installments, representing an award of additional child support pursuant to Family Court Act Sec. 413[1] [e]. Respondent was also required to maintain health and dental insurance for the children, at a about $25 to $35 a week, and, to continue such insurance for petitioner until the parties were divorced.

Family Court modified the Hearing Examiner's decision, directing that $75,000 be placed in a trust for the parties' minor children, with the income from the trust to be distributed in quarterly installments to defray the cost of supporting the children. Petitioner was named as trustee and was permitted to invade the principal in a sum equal to one-eighteenth the amount until the youngest child attained majority. Petitioner was required to provide an annual accounting. No further restrictions were placed on the trust. Petitioner received the remaining $25,000 outright.

On appeal, respondent contented that Family Court erred in directing that the children be awarded a share of his inheritance as additional child support. He argued that the lump-sum distribution ordered by Family Court was not permitted and that the court erred in failing to treat the money generated by his inheritance as "income" for purposes of calculating his basic child support obligation.On appeal, respondent contented that Family Court erred in directing that the children be awarded a share of his inheritance as additional child support. He argued that the lump-sum

distribution ordered by Family Court was not permitted and that the court erred in failing to treat the money generated by his inheritance as "income" for purposes of calculating his basic child support obligation.

The Third Department while seemingly rejecting respondent's arguments, agreed that a court awarding additional child support pursuant to FCA Sec. 413(1)(e) should consider the impact that a lump-sum award would have on the affected parent. The appellate court pointed out that the statute does not preclude such an award and makes clear that the manner of payment is a matter committed to the court's discretion. [FN11]

The court found merit to respondent's claim that the $100,000 awarded as additional child support was inappropriate. It represented a significant portion of respondent's overall inheritance, and Family Court's decision to provide for a lump-sum distribution, although permissible, required respondent to liquidate substantial assets. It also found merit to respondent's contention that Family Court erred in failing to consider the tax consequences of a lump- sum award and that the valuation figure adopted by it was erroneous.

Family Court also mistakenly failed to consider whether the additional expense in providing health and dental insurance for the children warranted deviation from the basic child support obligation imposed by the statute. Respondent's basic child support obligation came to $115 a week, while the cost of providing health and dental insurance for the children cost $25 to $35 per week. In view of petitioner's then impending loss of employment, it had no quarrel with Family Court's directive that respondent obtain and bear the cost of such insurance for the children. It held, however, that health insurance premiums are not proper add-ons to the basic child support obligation. [FN12]

Family Court missed the mark when it failed to consider this additional expense in determining whether respondent's basic child support obligation was fair and just and, having failed to do so, the court's award of child support was fundamentally flawed.

At oral argument of the appeal it was brought to light that the parties' son was residing with respondent. The Third Department remitted the matter for a new hearing on child support, including consideration of an award of additional support, and it offered Family Court "some guidance in this regard."

The court recalled that FCA Sec. 413 (1)(e) provides that "where a parent is or may be entitled to receive non-recurring payments from extraordinary sources not otherwise considered as income pursuant to this section, including but not limited to *** [g]ifts and inheritances *** the court, in

accordance with paragraphs (c), (d) and (f) of this subdivision may allocate a proportion of the same to child support, and such amount shall be paid in a manner determined by the court."

It pointed out that the statute contemplates reference to FCA Secs. 413(1)(c), (d) and (f). Thus, Family Court may, in exercise of its discretion, allocate a portion of a respondent's inheritance to child support provided the award "does not run afoul" of those sections. When the court taps into "extraordinary sources," it has a host of considerations under those sections.

Among the factors to be looked at are the parties' combined parental income and their pro rata basic child support obligation; whether such an award would reduce respondent's income below the poverty level or self-support reserve; and whether such an award would be unfair or unjust in light of the basic support obligation already imposed.

The court said that should Family Court determine that an additional award of support was warranted and that a lump-sum payment was appropriate, the court should give careful thought to the impact such an award would have on respondent and consider whether, in light of whatever assets respondent may hold, the award could be fashioned in such a manner as to avoid invading the principal.

Significantly, in a footnote, the court expressly rejected counsels' assertion that such an award may be made without any regard to the actual needs of the children, because FCA Sec. 413(1)(e) did not stand for the proposition that a child is automatically entitled to share in any economic windfall that my come the way of his or her noncustodial parent. While the facts of the case may establish that an award of additional support is justified, the mere fact that respondent inherited a sizeable sum of money does not, standing alone, provide an adequate basis for such an award.

In the final analysis, any award of additional support must consider a number of relevant factors including, among others the parties' respective standards of living and the actual needs of the children. In another footnote the court observed that any outright grant of funds to petitioner, such as the $25,000 previously awarded by Family Court as additional child support, would be looked upon with disfavor by it.

FN1. FCA Sec. 413 (1)(e); Domestic Relations Law Sec. 240(1-b)(c).

FN2. FCA Sec. 413 (1)(e)(1); DRL Sec. 240 (1-b)(c)(1).

FN3. FCA Sec. 413 (1)(e)(2); DRL Sec. 240 (1-b)(c)(2).

FN4. FCA Sec. 413 (1)(e)(3); DRL Sec. 240 (1-b)(c)(3).

FN5. FCA Sec. 413 (1)(e)(3); DRL Sec. 240 (1-b)(c)(3).

FN6. FCA Sec. 413 (1)(e); DRL Sec. 240 (1-b)(c).

FN7. Erie County DSS v. LaBarge, 159 Misc2d 806 (1993).

FN8. 171 Misc2d 169 (Fam. Ct., 1996).

FN9. 199 AD2d 901 (3d Dept. 1993).

FN10. 663 NYS2d 401 (3d Dept. 1997).

FN11. Citing 2 Foster, Freed and Brandes, Law and the Family Sec. 2:12.5, at 450 [2d ed. 1996 supp.,] noting that Family Court Act Sec. 413 (1)(c) "authorizes the court to direct a parent to make "lump sum" child support payments."

FN12. Citing Matter of Eastburn v. Eastburn, 222 AD2d 898, 900; Matter of Gray v. Gray, 199 AD2d 644, 645; Chasin v. Chasin, 182 AD2d 862, 863.

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