New York Law - Child Support Awards[1]

Presumption that Basic Child support Obligation is Correct Amount of Support - Domestic Relations Law §240(1-b)

"Child support" is defined as a sum to be paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated child under the age of twenty-one years.[2]

Domestic Relations Law §240(1-b) and Family Court Act §413(1)(a), commonly referred to as the Child Support Standards Act ("CSSA"), require the Court to award, as child support, the sum of the "Basic Child Support Obligation" that is calculated from the application of the child support formula, unless the Court finds that a variation of the support amount is appropriate because the non-custodial parent's share of the basic child support obligation is unjust or inappropriate. This requires counsel to calculate the "basic child support obligation." It is defined in Domestic Relations Law §240(1-b)(b)(1) to "mean the sum derived by adding the amounts determined by the application of Subparagraphs Two and Three of Paragraph (c) of this Subdivision except as increased pursuant to Subparagraphs Four, Five, Six and Seven of such Paragraph."[3]

The Court of Appeals explained the application of the statute in Cassano v Cassano.[4] as follows:

"[S]tep one of the three step method is the court's calculation of the "combined parental income" ... Second, the court multiplies that figure, up to the income cap (now the amount set forth in Social Services Law 111-i), by a specified percentage based upon the number of children in the household 17% for one child and then allocates that amount between the parents according to their share of the total income ..."Third, where the combined parental income exceeds the income cap (now the amount set forth in Social Services Law 111-i)[5] . . . the statute provides that "the court shall

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[2] Domestic Relations Law §240(1-b)(b)(2); Family Court Act §413 (1)(b)(2).

[3] Domestic Relations Law §240(1-b)(b)(1). Family Court Act §413 (1)(b)(1).

[4] 85 N.Y. 2d 649, 652, 628 N.Y.S.2d 10 (1995).

[5] Laws of 2009, Chapter 343 enacted the "Child support modernization act" which amended the provisions of the Child Support Standards Act to raise the cap on

determine the amount of child support for the amount of the combined parental income in excess of such dollar amount through consideration of the factors set forth in paragraph (f) of this subdivision and/or the child support percentage" . . . After completing this three step statutory formula, under the CSSA the trial court must then order the non custodial parent to pay a pro rata share of the basic child support obligation, unless it finds that amount to be "unjust or inappropriate" based on a consideration of the "paragraph (f)" factors (Domestic Relations Law § 240[1][b][f]) . . . Where the court finds the amount derived from the three step statutory formula to be "unjust or inappropriate" it must order payment of an amount that is just and appropriate (Domestic Relations Law § 240[1 b][g]). If the court rejects the amount derived from the statutory formula, it must set forth in a written order "the amount of each party's pro rata share of the basic child support obligation" and the reasons the court did not order payment of that amount (Domestic Relations Law § 240[1 b][g])."

There is a presumption that the "basic child support obligation is the correct amount of support.[6] This presumption is based on the premise that both parents are equally responsible for the support of their children with a proportion of their income. The only payment that is ordered, however, is from the non-custodial parent to the

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combined parental income to $130,000 effective January 31, 2010, and to provide for the adjustment of the $130,000 cap every two years to reflect changes in the Consumer Price Index. The child support percentages of payments that non-custodial parents are obligated to make toward child support remains the same. Domestic Relations Law § 240 (1-b) (2) and Family Court Act § 413 (1) (c) (2) were each amended to provide that the court shall multiply the combined parental income up to the amount set forth in Social Services Law 111-i, (2) (b). Social Services Law 111-i (2)(b) provides that the combined parental income amount to be reported in the child support standards chart and utilized in calculating orders of child support in accordance with Domestic Relations Law § 240 (1-b) (2) and Family Court Act § 413 (1) (c) (2) shall be one hundred thirty thousand dollars; and that beginning January 31, 2012 and every two years thereafter, the combined parental income amount shall increase by the product of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars. These amendments became effective on January 31, 2010.

[6] See Cassano v. Cassano, 85 NY2d 649, 628 NYS2d 10 (1995).
In Simmons v Williams, AD2d , 689 NYS2d 570 (2d Dept.,1998) the second department held that the CSSA creates a rebuttable presumption that child support has been correctly determined. The presumption may be rebutted if the court finds that application of the statutory support formula would be unjust or inappropriate.
In Matter of Steuben County Dept of Social Services, 171 AD2d 1023, 569 NYS2d 32 (4th Dept,1998) the court held that there is a presumption that the standard of support calculated pursuant to the formula "is reasonable and appropriate."

custodial parent, who is also presumed to be making a similar contribution.

The court is required to calculate the basic child support obligation and the non-custodial parent's share of the basic child support obligation and to order the non-custodial parent to pay his or her pro rata share of the "basic child support obligation" in the same proportion as the non-custodial parent's income is to the combined parental income.[7]

Guidelines – Where Basic Child Support Obligations Unjust or Inappropriate - Domestic Relations Law §240(1-b)

Where the court finds that the non-custodial parent's pro-rata share of the basic child support obligation is unjust or inappropriate, the court must order the non-custodial parent to pay such amount as it finds to be just and appropriate.[8] In making such a determination, the court must base its award upon consideration of the following factors:

(1). The financial resources of the custodial and non-custodial parent, and those of the child;
(2). The physical and emotional health of the child, and his/her special needs and aptitudes;
(3). The standard of living the child would have enjoyed had the marriage or household not been dissolved;
(4). The tax consequences to the parties;
(5). The non-monetary contributions that the parents will make toward the care and well-being of the child;
(6). The educational needs of either parent;
(7). A determination that the gross income of one parent is substantially less than the other parent's gross income;
(8). The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the action and whose support has not been deducted from income and the financial resources of any person obligated to support such children. This factor may only apply, however, if the resources available to support such children are less than the resources available to support the children who

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[7] New York Family Court Act §413(1)(f); New York Domestic Relations Law §240(1-b)(f).

[8] New York Family Court Act §413(1)(f) and (g); New York Domestic Relations Law §240(1-b)(f) and (g).

are subject to the action;[9]
(9). Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent is exercising visitation; or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and
(10). Any other factors that the court determines are relevant in each case. The court may not make such a finding on the basis that the non-custodial parents' share exceeds the portion of public assistance grant which is attributable to a child or children.[10]

In reaching its determination, the Court is required to set forth in a written decision the factors it considered and the reasons for the level of support. This formal explanation may not be waived by either party or counsel.[11]

The Basic Child Support Obligation--Defined.

The "basic child support obligation" is defined in Domestic Relations Law §240(1-b)(b)(1) to "mean the sum derived by adding the amounts determined by the application of Subparagraphs Two and Three of Paragraph (c) of this Subdivision except as increased pursuant to Subparagraphs Four, Five, Six and Seven of such Paragraph."[12]

The Sum Derived by Adding Amounts of Domestic Relations Law §240(1-b) Subparagraphs (c)(2) and (3)

In order to arrive the sum derived by adding the amounts determined by the application of Subparagraphs Two and Three of Paragraph (c) you must refer to Domestic Relations Law §240(1-b)(c)(2) and (3), which provide:

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[9] Family Court Act §413(1)(b)(5)(vii)(D); Domestic Relations Law §240(1-b)(b)(5)(vii)(D).

[10] Family Court Act §413(1)(b); Domestic Relations Law §240(1-b)(b).

[11] FCA 413(1)(g); DRL 240(1-b)(g).

[12] Domestic Relations Law §240(1-b)(b)(1).

(2) The Court shall multiply the combined parental income up to the income cap set forth in social services law 111-i, [13] by the appropriate child support percentage and such amounts shall be prorated in the same proportion as each parent's income is to the combined parental income.

(3) Where the combined parental income exceeds the dollar amount set forth in Subparagraph Two of this Paragraph, the Court shall determine the amount of child support for the amount of the combined parental income in excess of such dollar amount through consideration of the factors set forth in Paragraph (f) of this Subdivision and/or the child support percentage.

Increased pursuant to Domestic Relations Law §240(1-b) Subparagraphs (c) (4), (5), (6) and (7)

In order to determine the amount increased pursuant to Subparagraphs Four, Five, Six and Seven of Paragraph (c) you must refer to Domestic Relations Law §240(1-b) (c) (4), (5), (6) and (7), which provide:

(4) Where the custodial parent is working, or receiving elementary or secondary education, or higher education or vocational training which the Court determines will lead to employment, and incurs child care expenses as a result thereof, the Court shall determine reasonable child care expenses and such child care expenses, where incurred, shall be prorated in the same proportion as each parent's income is to the combined parental income. Each parent's pro rata share of the child care expenses shall be separately stated and added to the sum of Subparagraphs Two and Three of

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[13] Soc. Serv. Law § 111-i (2) (b) provides:

The combined parental income amount to be reported in the child support standards chart and utilized in calculating orders of child support in accordance with subparagraph two of paragraph (c) of subdivision one of section four hundred thirteen of the family court act **and** subparagraph two of paragraph (c) of subdivision one-b of section two hundred forty of the domestic relations law as of January thirty-first, two thousand fourteen shall be one hundred forty-one thousand dollars; provided, however, beginning January thirty-first, two thousand sixteen and every two years thereafter, the combined parental income amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the current combined parental income amount and then rounded to the nearest one thousand dollars.

this Paragraph.

(5) the court shall determine the parties' obligation to provide health insurance benefits pursuant to this section and to pay cash medical support as provided under this subparagraph.

(i) "Cash medical support" means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by a parent through an employer or organization, including such employers or organizations which are self insured, or through other available health insurance or health care coverage plans, and/or for other health care expenses not covered by insurance.

(ii) Where health insurance benefits pursuant to subparagraph one and clauses (i) and (ii) of subparagraph two of paragraph (c) of subdivision one of this section are determined by the court to be available, the cost of providing health insurance benefits shall be prorated between the parties in the same proportion as each parent's income is to the combined parental income. If the custodial parent is ordered to provide such benefits, the non-custodial parent's pro rata share of such costs shall be added to the basic support obligation. If the non-custodial parent is ordered to provide such benefits, the custodial parent's pro rata share of such costs shall be deducted from the basic support obligation.

(iii) Where health insurance benefits pursuant to subparagraph one and clauses (I) and (ii) of subparagraph two of paragraph (c) of subdivision one of this section are determined by the court to be unavailable, if the child or children are determined eligible for coverage under the medical assistance program established pursuant to title eleven of article five of the social services law, the court shall order the non-custodial parent to pay cash medical support as follows:

(A) In the case of a child or children authorized for managed care coverage under the medical assistance program, the lesser of the amount that would be required as a family contribution under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law for the child or children if they were in a two-parent household with income equal to the combined income of the non-custodial and custodial parents or the premium paid by the medical assistance program on behalf of the child or children to the managed care plan. The court shall separately state the non-custodial parent's monthly obligation. The non-custodial parent's cash medical support obligation under this clause shall not exceed five percent of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

(B) In the case of a child or children authorized for fee-for-service coverage under the medical assistance program other than a child or children described in item (A) of this clause, the court shall determine the non-custodial parent's maximum annual

cash medical support obligation, which shall be equal to the lesser of the monthly amount that would be required as a family contribution under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law for the child or children if they were in a two-parent household with income equal to the combined income of the non-custodial and custodial parents times twelve months or the number of months that the child or children are authorized for fee-for-service coverage during any year. The court shall separately state in the order the non-custodial parent's maximum annual cash medical support obligation and, upon proof to the court that the non-custodial parent, after notice of the amount due, has failed to pay the public entity for incurred health care expenses, the court shall order the non-custodial parent to pay such incurred health care expenses up to the maximum annual cash medical support obligation. Such amounts shall be support arrears/past due support and shall be subject to any remedies as provided by law for the enforcement of support arrears/past due support. The total annual amount that the non-custodial parent is ordered to pay under this clause shall not exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

(c) The court shall order cash medical support to be paid by the non-custodial parent for health care expenses of the child or children paid by the medical assistance program prior to the issuance of the court's order. The amount of such support shall be calculated as provided under item (A) or (B) of this clause, provided that the amount that the non-custodial parent is ordered to pay under this item shall not exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less, for the year when the expense was incurred. Such amounts shall be support arrears/past due support and shall be subject to any remedies as provided by law for the enforcement of support arrears/past due support.

(iv) Where health insurance benefits pursuant to subparagraph one and clauses (I) and (ii) of subparagraph two of paragraph (c) of subdivision one of this section

are determined by the court to be unavailable, and the child or children are determined eligible for coverage under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law, the court shall prorate each parent's share of the cost of the family contribution required under such child health insurance plan in the same proportion as each parent's income is to the combined parental income, and state the amount of the non-custodial parent's share in the order. The total amount of cash medical support that the non-custodial parent is ordered to pay under this clause shall not exceed five percent of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

(v) In addition to the amounts ordered under clause (ii), (iii), or (iv), the

court shall pro rate each parent's share of reasonable health care expenses not reimbursed or paid by insurance, the medical assistance program established pursuant to title eleven of article five of the social services law, or the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law, in the same proportion as each parent's income is to the combined parental income, and state the non-custodial parent's share as a percentage in the order. The non-custodial parent's pro rata share of such health care expenses determined by the court to be due and owing shall be support arrears/past due support and shall be subject to any remedies provided by law for the enforcement of support arrears/past due support. In addition, the court may direct that the non-custodial parent's pro rata share of such health care expenses be paid in one sum or in periodic sums, including direct payment to the health care provider.

(vi) Upon proof by either party that cash medical support pursuant to clause (ii), (iii), (iv), or (v) of this subparagraph would be unjust or inappropriate pursuant to paragraph (f) of this subdivision, the court shall:

(A) order the parties to pay cash medical support as the court finds just and appropriate, considering the best interests of the child; and

(B) set forth in the order the factors it considered, the amount calculated under this subparagraph, the reason or reasons the court did not order such amount, and the basis for the amount awarded.

(6) Where the Court determines that the custodial parent is seeking work and incurs child care expenses as a result thereof, the Court may determine reasonable child care expenses and may apportion the same between the custodial and non-custodial parent. The non-custodial parent's share of such expenses shall be separately stated and paid in a manner determined by the Court.

(7) Where the Court determines, having regard for circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special or enriched education for the child is appropriate, the Court may award educational expenses. The non-custodial parent shall pay educational expenses, as awarded, in a manner determined by the Court, including direct payment to the educational provider.

Non-Recurring Payments From Extraordinary Sources -Domestic Relations Law §240(1-b)(e)

The Court may also direct a payment with regard to "non-recurring payments for extraordinary sources." Domestic Relations Law §240(1-b)(e) provides that "[w]here 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: (1) Life insurance policies; (2) Discharges of indebtedness; (3) Recovery of bad debts and delinquency amounts; (4) Gifts and inheritances; and (5) Lottery winnings, 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."[14]

Doing the Calculation - Determine Combined Parental Income

In applying the formula to determine the amount of child support, the Court is required to first determine the "Combined Parental Income" of both parents. The "combined parental income" is the sum of the parents "incomes."[15]

Doing the Calculation - Income Defined

"Income" is defined in Domestic Relations Law §240(1-b)(b)(5), as including, but not limited to, the amounts determined by the application of clauses (i) to (vi), as reduced by the application of clause (vii). In order to understand exactly this means and what is included in "income," each clause must be examined individually.

"Income" includes gross (total) income as should have been or should be reported in the most recent federal income tax return. If an individual files his/her federal income tax return as a married person filing jointly, that person is required to prepare a form, sworn to under penalty of law, disclosing his/her gross income individually.[16]

Doing the Calculation - Investment income

In addition, "income" also includes investment income reduced by sums expended in connection with such investment, to the extent not already included in gross income. [17]

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[14] Domestic Relations Law §240(1-b)(e)

[15] Domestic Relations Law §240(1-b)(b)(5).

[16] Domestic Relations Law §240(1-b)(b)(5)(i).

[17] Domestic Relations Law §240(1-b)(b)(5)(ii).

Doing the Calculation - Voluntarily Deferred Income

In addition, the Domestic Relations Law provides that `"income" includes the amount of income or compensation voluntarily deferred and income received, if any, from the following sources:

(A) workers' compensation,
(B) disability benefits,
(C) unemployment insurance benefits,
(D) social security benefits,
(E) veterans benefits,
(F) pensions and retirement benefits,
(G) fellowships and stipends, and
(H) annuity payments, to the extent not already included in gross income.
(I) alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, in which event the order or agreement shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse. However, the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with Domestic Relations Law §236[B][9][b][2]. In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior to the effective date of subdivision (I), the provisions of this subdivision (I) shall not, by themselves, constitute a substantial change of circumstances pursuant to Domestic Relations Law §236[B][9][b]. [18]

Doing the Calculation - "Imputed income"

The Domestic Relations Law provides that in awarding child support, the Court, in the exercise of its discretion, may attribute or impute income to either parent from any resources as may be available to the parent, including, but not limited to: non-income-producing assets; [19] meals, lodging, memberships, automobiles, or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use or which expenditures directly or indirectly confer personal economic benefits; fringe benefits provided as part of compensation for employment; and money, goods, or services provided by relatives

[18] Domestic Relations Law §240(1-b)(b)(5)(iii). Subdivision (I) became effective January 24, 2016.

[19] Domestic Relations Law §240(1-b)(b)(5)(iv)(A).

and friends; [20] and based on the parent's former resources or income, if the Court determines that a parent has intentionally reduced resources or income in order to reduce or avoid the parent's obligation for child support.[21]

Domestic Relations Law § 240 authorizes the court to impute income to a parent for purposes of fixing child support, where the parent "receives money, goods or services from a relative or a friend". [22] An order increasing child support was affirmed by the Appellate Division where it was established that the father received money, goods and services from his present wife. [23] It held that the increase was proper, in light of his allegedly reduced income, his failure to supply requested financial information regarding his businesses and discrepancies between those financial records which he did supply and his income tax return. However, in another case Huebscher v Huebscher,[24] an action for divorce where the wife was apparently honest with the court, the First Department held that plaintiff's testimony that defendant wife's mother had provided the couple with annual gifts during the course of their marriage, coupled with other evidence of her past generosity, was an improper basis upon which to impute income to the wife for purposes of establishing the proper level of child support, as it assumed that the gift-giving by her mother would continue in futuro. The court held that "since the mother had no legal obligation, this "income" source should not have been taken into account."[25]

The calculation of a parties' earning potential must have some basis in law and fact, and an award based on imputed or attributed income will be reversed where there is no evidence or factual basis for it in the record .[26]

Doing the Calculation - Additions to Income

In addition, to the extent not already included in gross income, the following self-employment deductions attributable to self-employment carried on by the taxpayer are included in "income":

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[20] Id.; See Tesler v. Tesler, 228 A.D.2d 491, 644 N.Y.S.2d 316 (2d Dept. 1996).

[21] Domestic Relations Law §240(1-b)(b)(5)(iv). See Darling v. Darling, 220 A.D.2d 858, 632 N.Y.S.2d 252 (3d Dep't 1995).

[22] Id.; See Tesler v. Tesler, 228 A.D.2d 491, 644 N.Y.S.2d 316 (2d Dept. 1996).

[23] Ladd v. Suffolk County DSS, 199 A.D. 2d 393, 605 N.Y.S. 318 (2d Dep't 1993)

[24] 206 A.D.2d 295, 614 N.Y.S.2d 524 (1st Dept.,1994)

[25] See discussion of imputed income in Section 10-12, supra.

[26] Petek v. Petek, 239 A.D.2d 327, 657 N.Y.S.2d 738 (2d Dept. 1997)

(A) any depreciation deduction greater than depreciation calculated on a straight-line basis for the purpose of determining business income or investment credits, and

(B) entertainment and travel allowances deducted from business income to the extent said allowances reduce personal expenditures.[27]

Doing the Calculation - Deductions from Income

The following are deducted from "income":

(A) unreimbursed employee business expenses except to the extent these expenses reduce personal expenditures.

(B) alimony or maintenance actually paid to a spouse not a party to the instant action pursuant to court order or validly executed written agreement,

(C) alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, in which event the order or agreement must provide for a specific adjustment in the amount of child support payable upon the termination of alimony or maintenance to such spouse. However, the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with Domestic Relations Law§ 236[B][9][b][2]. In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior to January 24, 2016, the provisions of this subclause shall not, by themselves, constitute a substantial change of circumstances pursuant to Domestic Relations Law§ 236 [B][9][b].

(D) child support actually paid pursuant to court order or written agreement on behalf of any child for whom the parent has a legal duty of support and who is not subject to the instant action,

(E) public assistance,

(F) supplemental security income,

(G) New York city or Yonkers income or earnings taxes actually paid, and

[27] Domestic Relations Law §240(1-b)(b)(5)(vii)

(H) federal insurance contributions act (FICA) taxes actually paid.[28]

Doing the Calculation - Multiply Combined Income by “Child Support Percentage”

After arriving at the “combined parental income,” that sum is multiplied by the appropriate "child support percentage."[29]

Doing the Calculation - The Child Support Percentage

The "child support percentage" is defined as:

• Seventeen percent of the combined parental income for one child;

• Twenty-five percent of the combined parental income for two children;

• Twenty-nine percent of the combined parental income for three children;

• Thirty-one percent of the combined parental income for four children; and

• No less than thirty-five percent of the combined parental income for five or more children.

Where there are five or more children, the court must exercise its discretion as to the amount of the child support percentage.[30]

Doing the Calculation - Each parties share of the Basic Child Support Obligation

The court is then required to calculate the basic child support obligation and the non-custodial parent’s share of the basic child support obligation and to order the non-custodial parent to pay his or her pro rata share of the "basic child support obligation" in the same proportion as the non-custodial parent’s income is to the combined parental income.[31]

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[28] Domestic Relations Law §240(1-b)(b)(5)(iii).

[29] Domestic Relations Law §240(1-b)(b)(3)

[30] Domestic Relations Law §240(1-b)(1)(b)(3).

[31] Domestic Relations Law §240(1-b)(1)(c)(2).

The Court must multiply the combined parental income up to the income cap set forth in social services law 111-i, [32] by the appropriate child support percentage and such amounts must be prorated in the same proportion as each parent's income is to the combined parental income.[33]

Where the combined parental income exceeds the income cap the Court must determine the amount of child support for the amount of the combined parental income in excess of that amount through consideration of the ten factors set forth in Domestic Relations Law §240(1-b)(f) and/or the child support percentage.[34]

Doing the Calculation - Who is the Non-Custodial Parent?

The Child Support Standards Act ("CSSA") states that the custodial parent shall pay sums of money to the non-custodial parent but does not define who is the custodial parent, nor address joint custody or shared custody situations. Defining the term "joint custody" is difficult because the term "custody" is not defined by the cases or statutes. It has been said that "joint legal custody," which is sometimes called "divided custody" or "joint decision making," gives both parents a shared responsibility for and control of a child's upbringing. It may include an arrangement between the parents whereby which they alternate physical custody of the child. [35]

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[32] Soc. Serv. Law § 111-i (2) (b) provides:

The combined parental income amount to be reported in the child support standards chart and utilized in calculating orders of child support in accordance with subparagraph two of paragraph (c) of subdivision one of section four hundred thirteen of the family court act **and** subparagraph two of paragraph (c) of subdivision one-b of section two hundred forty of the domestic relations law as of January thirty-first, two thousand fourteen shall be one hundred forty-one thousand dollars; provided, however, beginning January thirty-first, two thousand sixteen and every two years thereafter, the combined parental income amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the current combined parental income amount and then rounded to the nearest one thousand dollars.

[33] Domestic Relations Law §240(1-b)(1)(c)(2)

[34] Domestic Relations Law §240(1-b)(1)(c)(3).

[35] Braiman v Braiman, 44 NY2d 584, 407 NYS2d 449 (1978).

In Bast v Rossoff,[36] the parents agreed that there would be “joint custodial decision making” and they had "shared time allocation." The father had his daughter with him from Wednesday evening until Sunday evening during alternate weeks, and from Wednesday evening until Thursday morning during the other weeks. The Court of Appeals held that "in shared custody situations child support should be calculated as it is in any other case." It found that the CSSA applies to cases of shared custody. In New York "shared custody" includes several situations, including joint decision making, joint legal custody or shared physical custody of the child. The Court of Appeals explained that the method for determining the "basic child support obligation" was set forth by it in Cassano v Cassano, [37] and quoted directly from that case.

Where the parties have “shared custody” and there is no “custodial parent” the court will treat the parent with the higher income as the non-custodial parent for the purposes of fixing child support. In Baraby v Baraby, [38] the Appellate Division held that where there was no "primary" custodial parent when the parents equally share time with the children, the parent with the greater income should be considered the non-custodial parent.

Each Parties Share of Basic Child Support Obligation - Unjust or Inappropriate

Unless the Court finds that the non-custodial parent’s pro rata share of the basic child support obligation is unjust or inappropriate, after considering ten factors enumerated in Domestic Relations Law §240(1-b)(f)(1)–(10), it must order the non-custodial parent to pay his or her pro rata share of the basic child support obligation. [39]

The Statutory Factors in Domestic Relations Law §240(1-b)(f)

In determining whether the non-custodial parent’s contribution to “basic child support obligation” is “unjust or inappropriate,” the Court must consider the following factors:

(1). The financial resources of the custodial and non-custodial parent, and those of the child;

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[36] 91 NY2d 723, 675 NYS2d 19 (1998)

[37] 85 NY2d 649, 652

[38] 250 AD2d 201, 681 N.Y.S.2d 826 (3d Dept., 1998)

[39] Domestic Relations Law § 240(1-b)(f)

(2). The physical and emotional health of the child and his/her special needs and aptitudes;

(3). The standard of living the child would have enjoyed had the marriage or household not been dissolved;

(4). The tax consequences to the parties;

(5). The non-monetary contributions made by the parents toward the care and well-being of the child;

(6). The educational needs of either parent;

(7). A determination that there exists comparative financial circumstances between the parents which reflects a wide disparity in gross income between the spouses;

(8). The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support other than the child of the instant action, and whose support has not been deducted from income pursuant to Domestic Relations Law §240(1-b)(b)(5) (vii) (D)), and the financial resources of any person obligated to support such children. However, that this factor may apply only if the resources available to support the children are less than the resources available to support the children who are subject to the instant action.

(9). Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation, provided that the custodial parent's expenses are substantially reduced as a result thereof; and

(10). Any other factors the Court determines are relevant in each [40]

Add-ons - Child Care - Domestic Relations Law §240(1-b)(c)(4) and Domestic Relations Law §240(1-b)(c)(6).

The sum derived by the application of the formula must be increased where the custodial parent is working or receiving education or vocational training which will lead to employment. It is increased by the amount of the non-custodial parent's pro rata share of "reasonable child care expenses." The "reasonable child care expenses" must be prorated in the same proportion as each parent's income is to the "combined

[40] Domestic Relations Law §240(1-b)(f)(1-10).

parental income." Each parties pro rata share of the child care expenses must be separately stated. [41]

When the Court determines that the custodial parent is "seeking work" and incurs child care expenses as a result of seeking work, in its discretion it may determine "reasonable child care expenses" and apportion them between the custodial and the non-custodial parent. There is no requirement that the "reasonable child care expenses" be prorated in the same proportion as each parent's income is to the "combined parental income." The Court has discretion to direct the manner of the payment.[42]

Add-ons - Health Care Not Covered by Insurance - In General - Domestic Relations Law 240(1-b) (c) (5)

Where health insurance benefits are determined by the court to be available, the cost of providing health insurance benefits must be prorated between the parties in the same proportion as each parent's income is to the combined parental income. If the custodial parent is ordered to provide such benefits, the non-custodial parent's pro rata share of such costs must be added to the basic support obligation. If the non-custodial
parent is ordered to provide the benefits, the custodial parent's pro rata share of such costs must be deducted from the basic support obligation. [43]

"Cash medical support" means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by a parent through an employer or organization, including employers or organizations which are self insured, or through other available health insurance or health care coverage plans, and/or for other health care expenses not covered by insurance. [44]

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[41] Domestic Relations Law §240(1-b)(c)(4).

[42] Domestic Relations Law §240(1-b)(c)(6).

[43] Domestic Relations Law 240(1-b) (c) (5) (ii), as added by Laws of 2009, Ch 215 § 2. Family Court Act §413 (1) (c) (5)(ii), as added by Laws of 2009, Ch 215 § 1.

[44] Domestic Relations Law §240 (1-b), (c) (5), as added by Laws of 2009, Ch 215 § 2. Family Court Act §413 (1) (c), (5)), as added by Laws of 2009, Ch 215 § 1.

Where health insurance benefits are determined by the court to be unavailable, the court must order the non-custodial parent to pay cash medical support.[45] In addition, the court must pro rate each parent's share of reasonable health care expenses not reimbursed or paid by insurance, the medical assistance program, or the state's child health insurance plan, in the same proportion as each parent's income is to the combined parental income. The court must state the non-custodial parent's share as a percentage in the order.[46]

The non-custodial parent's cash medical support obligation may not exceed five percent of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.[47]

If either party establishes that cash medical support would be unjust or inappropriate pursuant to Domestic Relations Law §240 (1-b) (f), the court must order the parties to pay cash medical support as the court finds just and appropriate, considering the best interests of the child. [48]

Add-ons - Education Expenses - Domestic Relations Law §240(1-b)(c)(6)

The Court, in its discretion, may make an award directing the non-custodial parent to pay the costs of present or future post secondary, private, special or enriched education for the child. There is no requirement that the costs of present or future post secondary, private, special or enriched education for the child be prorated in the same proportion as each parent's income is to the "combined parental income." The non--custodial parent must pay such expenses in the manner determined by the Court. [49]

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[45] Domestic Relations Law §240 (1-b), (c)(5)(v)(C), as added by Laws of 2009, Ch 215, §2. Family Court Act §413 (1) (c)(5)(v)(C), as added by Laws of 2009, Ch 215, §1. Section 8-5 for a more complete discussion of cash medical support.

[46] Domestic Relations Law § 240 (1-b), (c) (5) (v), as added by Laws of 2009, Ch 215, §2. Family Court Act §413 (1) (c)(5)(v), as added by Laws of 2009, Ch 215, §1.

[47] Domestic Relations Law §240 (1-b), (c) (5), as added by Laws of 2009, Ch 215, §2. Family Court Act §413 (1) (c)(5), as added by Laws of 2009, Ch 215, §1.

[48] Domestic Relations Law §240 (1-b), (c) (5) (vi)(A), as added by Laws of 2009, Ch 215, §2. Family Court Act §413, subdivision 1 (c)(5)(vi)(A), as added by Laws of 2009, Ch 215, §1.

[49] Domestic Relations Law §240(1-b)(c)(6).

Calculation of minimum payment

"Self-support reserve" is defined as: "one hundred thirty-five percent of the poverty income guidelines amount for a single person as reported by the federal department of health and human services." The self-support reserve amount is revised each March 1st to reflect the annual updating of the poverty income guidelines amount as reported by the Department of Health and Human Services. [50]

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[50] Family Court Act §413(1)(b) (6); Domestic Relations Law §240(1-b)(6). Both sections provide that the court retains "discretion with respect to child support pursuant to this section."

The commissioner of social services is required to publish a child support standards chart each year which must include: (i) the revised poverty income guideline for a single person as reported by the federal department of health and human services; (ii) the revised self-support reserved as defined in Domestic Relations Law §240; (iii) the dollar amounts yielded through application of the child support percentage as defined in Domestic Relations Law §240 and Family Court Act §413 ; and (iv) the combined parental income amount. See Social Services Law §111-i 2 (a).

The chart must be published on an annual basis by April first of each year and in no event later than forty-five days following publication of the annual poverty income guideline for a single person as reported by the federal department of health and human services. See Social Services Law §111-i 2 (c). The 2014 poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services is $11,670 and the self-support reserve is $15,755.

The Child Support Standards Chart may be downloaded from https://www.childsupport.ny.gov/dcse/child_support_standards.html

As of January 31, 2014 the combined parental income amount is $141,000. The adjusted combined parental income amount will be announced and available at January 31st (until such time as the revised Child Support Standards Chart is released for applicable years).

See https://www.childsupport.ny.gov/child_support_standards.html for the current amount of the statutory cap on the "combined parental income", the self-support reserve and the poverty income guidelines amount.

The 2016 poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services is $11,880 and the 2016 self-support reserve is $16,038. The Combined Parental Income Amount: $143,000. [51]

Where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation must be twenty-five dollars per month. However, if the court finds that the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of the child support as the court finds just and appropriate. The finding that the basic child support obligation is unjust or inappropriate must be based upon consideration of the factors set forth in Domestic Relations Law §240(1-b)(f) and Family Court Act §413(1)(f). [52]

The factors in Domestic Relations Law §240(1-b)(f) and Family Court Act §413(1)(f) are: (1) The financial resources of the custodial and non-custodial parent, and those of the child; (2) The physical and emotional health of the child and his/her special needs and aptitudes; (3) The standard of living the child would have enjoyed had the marriage or household not been dissolved; (4) The tax consequences to the parties; (5) The non-monetary contributions that the parents will make toward the care and well-being of the child; (6) The educational needs of either parent; (7) A determination that the gross income of one parent is substantially less than the other parent's gross income; (8) The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to subclause (D) of clause (vii) of subparagraph five of paragraph (b) of this Domestic Relations Law §240(1-b)and Family Court Act §413(1), and the financial resources of any person obligated to support such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action; (9) Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended

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[51] See https://www.childsupport.ny.gov/child_support_standards.html (last accessed June 7, 2016) for the current amounts.

[52] Domestic Relations Law § 240 (1-b)(d); Family Court Act, § 413 (1)(d), as amended by Laws of 2011, Ch 436. (Effective November 15, 2011, Laws of 2011, Ch 436, § 3.)

visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and (10) Any other factors the court determines are relevant in each case. The court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation, and may order the non-custodial parent to pay an amount pursuant to Domestic Relations Law §240(1-b)(e) and Family Court Act §413(1)(e). In such case Family Court and Supreme Court are authorized to order payment of an amount it deems to be just and appropriate.[53]

Where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation must be fifty dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater. [54] This amount is in addition to any amounts that the court may, in its discretion, order in accordance with subparagraphs four, five, six and/or seven of paragraph (c) of Domestic Relations Law § 240 (1-b)(d) and Family Court Act § 413 (1)(d). [55]

Determining How Much Income to Apply Statutory Percentage to Where Combined Parental Income is in Excess of the income cap

There is no fixed rule to enable a court to determine whether and how much income in excess of the income cap set forth in social services law 111-i, [56] should be

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[53] Domestic Relations Law § 240 (1-b)(d); Family Court Act, § 413 (1)(d), as amended by Laws of 2011, Ch 436. (Effective November 15, 2011, Laws of 2011, Ch 436, § 3.)

[54] Domestic Relations Law § 240 (1-b)(d) and Family Court Act, § 413 (1)(d) (Laws of 2011, Ch 436.) (Effective November 15, 2011, Laws of 2011, Ch 436, § 3.)

[55] Laws of 2011, Ch 436. (Effective November 15, 2011, Laws of 2011, Ch 436, § 3.)

[56] Soc. Serv. Law § 111-i (2) (b) provides:

The combined parental income amount to be reported in the child support standards chart and utilized in calculating orders of child support in accordance with subparagraph two of paragraph (c) of subdivision one of section four hundred thirteen of the family court act **and** subparagraph two of paragraph (c) of subdivision one-b of section two hundred forty of the domestic relations law as of January thirty-first, two thousand fourteen shall be one hundred forty-one thousand dollars; provided, however, beginning January thirty-first, two thousand sixteen and every two years thereafter, the combined parental income amount shall increase by the sum of the average annual

considered by the court in determining combined parental income. Some courts have held that in “high income cases” child support should be based upon the actual needs of the child rather than a statutory percentage.[57] These cases involved decisions after trial.

The court is required to calculate the basic child support obligation and the non-custodial parent’s share of the basic child support obligation and to order the non-custodial parent to pay his or her pro rata share of the "basic child support obligation" in the same proportion as the non-custodial parent’s income is to the combined parental income.[58]

The Court must multiply the combined parental income up to the income cap set forth in social services law 111-i, [59] by the appropriate child support percentage and such amounts must be prorated in the same proportion as each parent’s income is to the combined parental income.[60]

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percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the current combined parental income amount and then rounded to the nearest one thousand dollars.

[57] See 8-26, infra.

[58] Domestic Relations Law §240(1-b)(f).

[59] Soc. Serv. Law § 111-i (2) (b) provides:

The combined parental income amount to be reported in the child support standards chart and utilized in calculating orders of child support in accordance with subparagraph two of paragraph (c) of subdivision one of section four hundred thirteen of the family court act **and** subparagraph two of paragraph (c) of subdivision one-b of section two hundred forty of the domestic relations law as of January thirty-first, two thousand fourteen shall be one hundred forty-one thousand dollars; provided, however, beginning January thirty-first, two thousand sixteen and every two years thereafter, the combined parental income amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the current combined parental income amount and then rounded to the nearest one thousand dollars.

[60] Domestic Relations Law §240(1-b)(c)(2).

Where the combined parental income exceeds the income cap set forth in social services law 111-i, [61] the Court must determine the amount of child support for the amount of the combined parental income in excess of that amount through consideration of the ten factors set forth in Domestic Relations Law §240(1-b)(f) and/or the child support percentage.[62]

In Cassano v Cassano,[63] the Court of Appeals stated that where combined parental income exceeds the income cap [now the amouont set forth in Social Services Law 111-i] the statute provides that "the court shall determine the amount of child support for the amount of the combined parental income in excess of such dollar amount through consideration of the factors set forth in paragraph (f) of this subdivision and/or the child support percentage". The "paragraph (f)" factors include the financial resources of the parents and child, the health of the child and any special needs, the standard of living the child would have had if the marriage had not ended, tax consequences, nonmonetary contributions of the parents toward the child, the educational needs of the parents, the disparity in the parents' incomes, the needs of other nonparty children receiving support from one of the parents, extraordinary expenses incurred in exercising visitation and any other factors the court determines are relevant.

In Cassano,[64] the Court of Appeals stated that as to combined parental income over the income cap (now the amount set forth in Social Services Law 111-i), the

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[61] Soc. Serv. Law § 111-i (2) (b) provides:

The combined parental income amount to be reported in the child support standards chart and utilized in calculating orders of child support in accordance with subparagraph two of paragraph (c) of subdivision one of section four hundred thirteen of the family court act **and** subparagraph two of paragraph (c) of subdivision one-b of section two hundred forty of the domestic relations law as of January thirty-first, two thousand fourteen shall be one hundred forty-one thousand dollars; provided, however, beginning January thirty-first, two thousand sixteen and every two years thereafter, the combined parental income amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the current combined parental income amount and then rounded to the nearest one thousand dollars.

[62] Domestic Relations Law §240(1-b)(c)(3).

[63] 85 N.Y.2d 649, 651 N.E.2d 878 (1985)

[64] Cassano v Cassano, 85 N.Y.2d 649, 651 N.E.2d 878 (1985)

statute explicitly affords an option: the court may apply the factors set forth in section 413(1)(f) " and/or the child support percentage" (Family Ct. Act § 413[1][c] [3]). Pertinent as well to income above the income cap is the provision that the court may disregard the formula if "unjust or inappropriate" but in that event, must give its reasons in a formal written order, which cannot be waived by either party (Family Ct. Act § 413[1][g]). In its view, "and/or" should be read to afford courts the discretion to apply the "paragraph (f)" factors, or to apply the statutory percentages, or to apply both in fixing the basic child support obligation on parental income over the income cap. Some record articulation of the reasons for the court's choice to apply the percentage is necessary to facilitate that review. The stated basis for an exercise of discretion to apply the formula to income over the income cap should, in sum and substance, reflect both that the court has carefully considered the parties' circumstances and that it has found no reason why there should be a departure from the prescribed percentage.

Child Support - Based on Actual Need in High Income Cases

All of the Appellate Divisions have adopted the rule that in high income cases the child support award should be based on the childs needs and standard of living.

In Anonymous v. Anonymous,[65] the trial court fixed child support in an amount necessary to enable the child to significantly enjoy the aspects of the parties marital standard of living consistent with the social milieu in which she was raised. The First Department commented that "...we note that consideration of the child's actual needs with reference to the prior standard of living continues to be appropriate in determining an award of child support on parental income in excess of $80,000.00" [now the amount set forth in Social Services Law§ 111-i]. The Court referred to Gluckman v Qua,[66] where the Third Department held that the children's needs is one of the factors to be considered if the court decides to deviate from the statutory percentage in excess of the income cap.

In Brim v Combs, [67] the Second Department stated: "...in calculating the award of child support to the mother under Family Court Act § 413, the Support Magistrate erred in basing the award in part on the amount of child support the father paid for his other child by a different woman, particularly where no evidence was presented as to that child's expenses, resources, and needs. To this end, in high income cases, the appropriate determination under Family Court Act § 413(f) for an award of child support on parental income in excess of $80,000 [now the amount set forth in Social Services

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[65] 286 A.D.2d 585 (1st Dept 2001)

[66] 253 AD2d 267.

[67] 25 A.D.3d 691, 808 N.Y.S.2d 735 (2 Dept.,2006).

Law§ 111-i] should be based on the child's actual needs and the amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties". [68]

In Culhane v. Holt,[69] the First Department stated: ""[I]n high income cases, the appropriate determination under [FCA § 413(1)(f)] for an award of child support on parental income in excess of $80,000 should be based on the child's actual needs and the amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties"...[70] Contrary to petitioner's contention, Matter of Cassano v. Cassano, 85 N.Y.2d 649, 628 N.Y.S.2d 10, 651 N.E.2d 878 [1995] does not hold otherwise. Accordingly, on remand, Family Court should consider the appropriate level of child support in light of the child's actual needs."

In Matter of Michelle M., [71] the Appellate Division stated: " In cases such as this, where the combined parental income is well in excess of $80,000 [now the amount set forth in Social Services Law§ 111-i], it is proper to consider and base the award upon the child's " 'actual reasonable needs' " (Anonymous v. Anonymous, 222 A.D.2d 305, 306). Although children must generally be permitted to share in a noncustodial parent's enhanced standard of living and a court is not permitted to make an award based solely on their actual needs, we may consider the child's needs in determining an award of child support on income exceeding the $80,000 cap."

Child Support Award - Court May Consider Partial Tax Year Income Information

In determining the income of the parties the court is also permitted to consider current income figures for the tax year not yet completed.[72]

Child Support Award - Overtime

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[68] Citing Anonymous v. Anonymous, 286 A.D.2d 585, 729 N.Y.S.2d 890.

[69] 28 A.D.3d 251, 813 N.Y.S.2d 400 (1 Dept 2006).

[70] Citing Matter of Brim v. Combs, 25 A.D.3d 691, 808 N.Y.S.2d 735, 736 (2006), citing Anonymous v. Anonymous, 286 A.D.2d 585, 729 N.Y.S.2d 890 (2001).

[71] 42 A.D.3d 882, 839 N.Y.S.2d 892 (4 Dept. 2007).

[72] Matter of Taraskas v. Rizzuto, 38 AD3d 910 (2d Dept. 2007); Matter of Culhane v. Holt, 28 AD3d 251, 252 (1 Dept 2006); Matter of Kellogg v. Kellogg, 300 A.D.2d 996 (4 Dept 2002); Moran v Grillo, 44 A.D.3d 859843 N.Y.S.2d 674 (2 Dept. 2007).

It has been held that overtime pay should be included in the calculation of income. [73] However, it has also been held that under the circumstances of the case it was proper not to include it in income.[74]

Gross (total) income defined after January 24, 2016

The statutory provisions for child support were amended reflect the fact that spousal maintenance is money no longer available as income to the payor, but constitutes income to the payee, so long as the order or agreement for such maintenance lasts. [75]

Family Court Act § 413(1)(b)(5)(iii) and Domestic Relations Law § 240(1-b)(5)(iii) were amended to add a new subclause (I) to each that requires that alimony or spousal maintenance actually paid to a spouse who is a party to the action must be added to the recipient spouse's income, provided that the order contains an automatic adjustment to take effect upon the termination of the maintenance award. [76] According to the New York

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[73] Kellogg v. Kellogg, 300 A.D.2d 996 (4th Dept, 2002).

[74] Taraskas v Rizzuto, 38 AD3d 910 (2 Dept. 2007).

[75] Laws of 2015, Ch 387, approved October 26, 2015, effective January 24, 2016.

[76] Family Court Act § 413(1) (b)(5)(iii) and Domestic Relations Law § 240(1-b)(5)(iii) as amended by Laws of 2015, Ch 387, approved October 26, 2015, effective January 24, 2016.

Subdivision (I) reads as follows:

(I) alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, in which event the order or agreement shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse; provided, however, that the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with subdivision three of section four hundred fifty-one of this article. In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior to the effective date of this subclause, the provisions of this subclause shall not, by themselves, constitute a substantial change of circumstances pursuant to paragraph (a) of subdivision three of section four hundred fifty-one of this article.

Assembly Memorandum in Support of Legislation this addition would be based upon an amount already paid, e.g., an amount reported on the recipient spouse's last income tax return, and would not simply be an estimate of future payments. [77]

At the same time Family Court Act § 413 (1)(b)(5)(vii)(C) and Domestic Relations Law § 240(1-b)(5)(vii)(C) were amended to specify that alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action, pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, must be deducted from income prior to applying the provisions of Domestic Relations Law §240 (1-b) (5). In such event the order or agreement must provide for a specific adjustment, in accordance with Domestic Relations Law §240 (1-b) (5), in the amount of child support payable upon the termination of alimony or maintenance to such spouse. [78]

The specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with Family Court Act § 451(3) or Domestic Relations Law § 236[B] (9)(b)(2). In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior January 24, 2016, these provisions shall not, by themselves, constitute a

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[77] See New York Assembly Memorandum in Support of Legislation, Laws of 2015, Ch 387.

[78] Family Court Act § 413(1) (b)(5)(vii) and Domestic Relations Law § 240(1-b)(5)(vii) as amended by Laws of 2015, Ch 387, approved October 26, 2015, effective January 24, 2016.

Subdivision (C) reads as follows:

(C) alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, in which event the order or agreement shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse; provided, however, that the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with subdivision three of section four hundred fifty-one of this article. In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior to the effective date of this subclause, the provisions of this subclause shall not, by themselves, constitute a substantial change of circumstances pursuant to paragraph (a) of subdivision three of section four hundred fifty-one of this article.

substantial change of circumstances pursuant to Family Court Act §451 (3) (a) or Domestic Relations Law § 236[B] (9)(b)(2).[79]

This is intended to clarify that, where spousal maintenance payments are deducted from the payor's income, the order must contain a specific provision adjusting the child support amount automatically upon the termination of the spousal maintenance award. [80]

According to the New York Assembly Memorandum in Support of the amendment this relieves the custodial parent of the burden of moving for a modification of the child support order upon the termination of maintenance, but leaves open the possibility for either or both parties to seek a modification of the automatic adjustment if, at the point where maintenance terminates, the income of either of the parties has changed in an amount that would qualify for modification under Family Court Act § 451(3)(b)(ii) or Domestic Relations Law § 236 [B](9)(b)(2)(ii), e.g., in excess of 15% or a lapse of three years or more.[81]

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[79] Family Court Act § 413(1) (b)(5)(vii) and Domestic Relations Law § 240(1-b)(5)(vii) as amended by Laws of 2015, Ch 387, approved October 26, 2015, effective January 24, 2016.

[80] See New York Assembly Memorandum in Support of Legislation, Laws of 2015, Ch 387.

[81] See New York Assembly Memorandum in Support of Legislation, Laws of 2015, Ch 387.