LAW AND THE FAMILY

The Changes in Calculating Child Support

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CREATED ON JULY 17, 1989, the child support guidelines law, commonly known as the ``Child Support Standards Act'' (CSSA)*1 was, until recently, one part mathematical formula, one part discretionary. In the trade the equation is well known. Mathematical calculations applied up to $80,000; discretion over $80,000. Hold everything because the Court of Appeals has just changed things.

The 1989 legislation brought us a new era in child support awards. The CSSA adopts a rebuttable presumption containing a numerical formula for determining the level of child support. The application of the formula is based on a percentage of the combined gross income of the parents and the number of children to be supported. First, the court calculated the ``combined parental income''*2 and then it was multiplied by the appropriate child support percentage. Parenthetically, the ``child support percentage'' is defined as: 17 percent of the combined parental income for one child; 25 percent of the combined parental income for two children; 29 percent of the combined parental income for three children; 31 percent of the combined parental income for four children; and no less than 35 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.*3

Discretion and Obligations

The public policy enunciated in CSSA Sec.1 is clearly aimed at establishing guidelines that permit judicial discretion while setting forth minimum and meaningful standards of obligation in which both parents share the responsibility of child support. The Assembly memorandum suggests the law is premised on two basic concepts. First, both parents have a responsibility to contribute to the economic wellbeing of their children and to provide support, regardless of their level of income. Secondly, children must be protected to the greatest extent possible from the reduced living standards naturally resulting from parents maintaining two separate households.

In doing the calculation, Domestic Relations Law (DRL) Sec.240, Subdivision 1-b (c)(2), directs the court to multiply the combined parental income up to $80,000 by the appropriate child support percentage, thereafter prorating between parents in the same proportion as each parent's income is to the combined parental

income. The CSSA requires the non-custodial parent to pay as child support a prorata share of the ``basic child support obligation'' unless the court finds that a variation of the support amount is appropriate because it is otherwise unjust or inappropriate. In reaching its determination, the court must weigh 10 factors, thereafter setting 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.

As to the combined parental income in excess of $80,000 DRL Sec.240, Subdivision 1b(c)(3) 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.'' (emphasis supplied)

The factors 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 already been deducted from income, 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 noncustodial 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 case.

Combined Parental Income

One of the more controversial issues attached to this law was the implementation of the formula approach across the board to the entire combined parental income. The issue was engendered by the decision in In Re JT*4 where the petitioner's income was $20,041 and the respondent's income as a baseball player was $358,152 based on 1989 income figures.

The hearing examiner found the combined parental income was 94 percent respondent's and 6 percent petitioner's and awarded petitioner child support for her 6-yearold child in the amount of 17 percent ($60,000) of the entire combined parental income. The decision was unusual in that the court directed that $500 was to be paid each week for the child's ``current needs and expenses'' and

thebalance of $34,000 to be put into a CD or savings account to provide for the child's future educational expenses.

Soon after this decision a flurry of decisions followed concluding that the court should not blindly apply the statutory formula to the combined parental income in excess of $80,000 without considering the child's actual reasonable needs.*5

A forerunner of these decisions is Chasin v. Chasin*6 where the Supreme Court directed the husband to pay, among other things, child support, health insurance premiums, uninsured medical/dental expenses and 78 percent of the children's college costs. The Appellate Division, Third Department, held that the child support award was excessive and that the Supreme Court did not follow the mandates of the CSSA. Without comment or reasoning, a flat 25 percent was applied to the parties' combined gross annual income of $166,763, including that which exceeded $80,000. The Supreme Court allocated 78 percent as the husband's share of child support and 22 percent as the wife's share.

The Appellate Division held that this was in error, stating that the blind application of the statutory formula to the combined parental income over $80,000 without any express findings of the children's actual needs constituted an abdication of judicial responsibility and rendered meaningless the statutory provision setting a cap on strict application of the formula.

In Reiss v. Reiss,*7 the Appellate Division, Second Department, held, among other things, that the trial court's award of more than $32,000 a year in child support was excessive. The court simply held that the record revealed that the application of the statutory percentage set forth in DRL Sec.240(1-b)(b)(3)(i) to the portions of defendant's annual income that exceeded $80,000 constituted an improvident exercise of discretion when measured against the parties' respective financial circumstances and the reasonable support requirements of the parties' son.

No Blind Application

Harmon v. Harmon*8 has been the leading case on the subject. There the Supreme Court directed the husband to pay $582 per week child support for the parties' son until the child entered college. In arriving at child support figures, the trial court applied the CSSA and applied the formula without explanation to the combined parental income in excess of $80,000. For the period from Sept. 4, 1990, through the son's 21st birthday, the Supreme Court awarded the wife $437 a week for the son.

The Appellate Division, First Department, remanded, directing the court to take evidence on the approximate amount of child support in accordance with the CSSA and to calculate the obligations of the parties in accordance with it. It held that the child-support formula should not be blindly applied to the parental income in excess of $80,000 without giving consideration to the child's actual needs. The court pointed out that where the combined parental income exceeds $80,000, there is discretion allowed to the court.

In such cases, the court may determine the amount of child support with respect to the amount of income in excess of $80,000 either through consideration of the statutory factors set forth in DRL Sec.240(1-b)(f) and/or the child support percentage. Thus, the court, under either the ``standard of living the child would have

enjoyed had the marriage or household not been dissolved'' or the catch-all, ``[a]ny other factors the Court determines are relevant in each case,'' provision (id., Sec.Sec.240[1-b][f][3] and [10]), is able to consider the child's ``actual reasonable needs'' in determining the amount of child support for the amount of the combined parental income in excess of $80,000.''

The court concluded a blind application of the statutory formula to the parties' aggregate income over $80,000 without any express findings or record evidence of the child's actual needs constituted an abdication of the court's judicial responsibility and a trespass upon the right of parents to make lifestyle choices for their children. Although entitled to support in accordance with the pre-separation standard, a child is not a partner in the marital relationship, entitled to a ``piece of the action.'' Accordingly, the matter was remanded to take evidence on the appropriate amount of child support in accordance with the CSSA and to calculate the obligations of the parties in accordance with it.*9

`Cassano'

Against this background, the Court of Appeals held on May 9, in a revolutionary opinion in Cassano v. Cassano, that under the facts of that case, absent extraordinary circumstances, the child support percentage should be applied to the combined parental income in excess of $80,000.*10 In Cassano v. Cassano*11 the Appellate Division, Second Department, modified an order of the Family Court, which, after a hearing, directed the former husband to pay 64.4 percent of his son's private school tuition; directed him to pay all unreimbursed health expenses for the child; and upwardly modified child support to $218 per week, based on combined parental income of $99,964.

The father argued before the Family Court that the Hearing Examiner erred in applying the statutory percentage to income in excess of $80,000 without setting of the reasons for the particular award. The Family Court concluded that this was permissible under the statute and, absent good cause, refused to interfere with the hearing examiners exercise of discretion. The Appellate Division confirmed the father's position that Family Court was required to state reasons for the award of child support on combined parental income exceeding $80,000 but found that the requirement was satisfied by the Hearing Examiner's in-depth consideration of the parties' circumstances and affirmed the award.

The court granted the father's objection to that portion of the order which directed him to pay 64.4 percent of his son's private school tuition. The Appellate Division found that the Family Court erred in directing the father to pay 64.4 percent of his son's private schooling but sustained the child support award. The husband in Cassano also argued that it was error for Family Court to require him to pay his share of future unreimbursed medical expenses because the law had been that ``open ended'' awards were improper. The Appellate Division rejected this argument, noting that the various cases that had been cited for that proposition reflected the state of the law that existed before the enactment of Family Court Act Sec.413(1)(c)(5) and DRL Sec.240(1-b)(c)(5) and to the extent that they conflicted with its holding were no longer valid.

The Court of Appeals affirmed the order of the Appellate

Division in a written opinion by Judge Kaye. In its decision the Court cited the policy behind the CSSA to replace `` . . . a needs-based discretionary system with a precisely articulated, threestep method for determining child support'' and that the enactment of the statute ``signalled a new era in calculating child support awards.'' It noted that the emphasis was ``to shift from a balancing of the expressed needs of the child and the income available to the parents after expenses to the total income available to the parents and the standard of living that should be shared with the child.''

The [limited] question before the Court was ``whether the Court must articulate a reason for its award of child support on parental income exceeding $80,000 when it chooses simply to apply the statutory percentage.'' The Court focused on the language of DRL Sec.240, Subdivision 1-b(c)(3), which 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.''

Significantly, it held that the provision allowing the court to disregard the formula if ``unjust and inappropriate'' was pertinent to income over $80,000, as well as under $80,000. The court noted, however, if it disregards the formula reasons must be set forth in a formal written order, which cannot be waived by either party.*12

The court noted that the parties' arguments for and against requiring an elaboration of reasons where the statutory percentage is applied to income exceeding $80,000 centered on the term ``and/or.'' The statutes' overall objectives must be considered in determining the meaning of that term. In rejecting the father's argument that a reason must be stated for the child support award that relates to the needs of the child the court concluded such a reading of the statute would roll ``back the calendar to pre-1989 law.''

The court reasoned: ``In our 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 $80,000. That interpretation is consistent with the language of the section and the objectives of the Child Support Standards Act.''

The court cautioned that the exercise of discretion by the court is subject to review for abuse, and that some record articulation of the reasons for the court's choice to apply the percentage to the combined parental income over $80,000 is necessary to facilitate that review. ``The stated basis for an exercise of discretion to apply the formula to income over $80,000 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.'' The court determined that as there was ``no extraordinary circumstances present'' application of the statutory percentage to the income above the $80,000 was justified and not an abuse of discretion.

The court also rejected the defendant's argument that it was error for Family Court to require him to pay his share of future unreimbursed medical expenses because the law had been that ``open ended'' awards were improper. The Court of Appeals held that the argument was meritless in light of the act's specific provisions which require the Court to apportion health care expenses.*13

notes

(1) See Laws of 1989, Ch 567.
(2) FCA 413 (1)(b)(4)-(5).
(3) FCA 413(1)(b)(3); DRL 240(1-b)(b)(3).
(4) In Re J.T., New York Law Journal, Nov. 7, 1989, p.27, Col.3, Fam. Ct. Suffolk Co., (Silverman, H.E.).
(5) FCA 413(1)(c)(3); DRL Sec.240(1-b)(c)(3).
(6) 1992, 3d Dept. 182 AD2d 862, 582 NYS2d 512, related proceeding (AD3d Dept.) 600 NYS2d 324.
(7) 1991, 2d Dept. 170 AD2d 589, 566 NYS2d 365, app dismd without op 78 NY2d 908, 573 NYS2d 469, 577 NE2d 1061 and app den 79 NY2d 758, 584 NYS2d 446, 594 NE2d 940.
(8) 1992, 1st Dept. 173 AD2d 98, 578 NYS2d 897.
(9) See also Kessinger v. Kessinger, 202 AD2d 752, 608 NYS2d 358 (3d Dept. 1994) and Faber v. Faber, ---- AD2d ---- , 614 NYS 771 (3d Dept., 1994)
(10) ---- NY2d ---- , ---- NYS2d ---- , NYLJ, May 10, 1995, p.25, col. 1. The propriety of the award of private school costs was not before the court. (11) 203 App Div 2d 563, 612 NYS2d 160 (2d Dept. 1994).
(12) Citing FCA Sec.413[1][g].
(13) See Family Court Act 413 (1)(c)(5) and DRL Sec.240(1-b)(c)(5).

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