## LAW AND THE FAMILY

The Changes in Calculating Child Support

By Joel R. Brandes and Carole L. Weidman

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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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Joel R. Brandes and Carole L. Weidman have law offices in New York City

and Garden City. They co-authored, with the late Doris Jonas Freed and

Henry H. Foster, Law and the Family, New York (Lawyers' Co-Operative

Publishing Co., Rochester, N.Y.) and co-author the annual supplements.