LAW AND THE FAMILY

Support Awards: 'Cassano' Revisited

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SOON AFTER the enactment of the Child Support Standards Act (CSSA), child support awards, in cases where the combined parental income was in excess of $80,000, were limited by the "blind application rule" espoused in *Chasin v. Chasin*.1 This rule prohibited the automatic application of the statutory formula to combined parental income in excess of $80,000, absent a showing of the child's actual needs. The court reasoned that its failure to require such a showing would constitute an abdication of its judicial responsibility.

> The Court of Appeals seemed to reject the "blind application" rule in *Cassano v. Cassano* 2 when it held 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. Or did it?
> A "three step method" for determining the "basic child support obligation" was outlined *Cassano v. Cassano*:
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> [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 $80,000, by a specified percentage based upon the number of children in the household -- 17 percent for one child -- and then allocates that amount between the parents according to their share of the total income ....
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> Third, where the combined parental income exceeds $80,000 ... 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" ....
> 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]).

In *Cassano* the Court of Appeals stated that the purpose of the CSSA is to replace " ... a needs-based discretionary system with a precisely articulated, three-step method for determining child support," and that the enactment of the statute "signalled a new era in calculating child support awards." The emphasis changed, "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 Court held that the provision allowing the court to disregard the formula, if its application would be "unjust and inappropriate," was pertinent to income over $80,000 as well as under $80,000. It noted that if the court disregards the formula, the reasons must be set forth in a formal written order, which cannot be waived by either party. It stated that courts have 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. The Court's discretion is subject to review for abuse, and some record articulating 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.
> *Cassano* was first followed in *Jones v. Reese*,[3] where the Third Department held that Family Court did not err in fixing child support for the parties' infant son at $3,532 a month, based on the combined parental income of both parties exceeding $80,000. The petitioner earned $22,370 per year and the respondent, a physician, earned $293,182 per year. The Appellate Division held that *Cassano* requires that the application of the CSSA percentage in computing the award of child support under FCA 413[1][f] must be based on the combined income of the parents, not the needs of the child.
> Recently, in *Glucman v. Qua*,[4] the Third Department held that the "blind application" rule was consistent with *Cassano*. It concluded that although

a court is not permitted to make an award based solely on the children's actual needs, such is an appropriate factor to be considered when determining an award of child support on income in excess of $80,000.
The parties' two-year marriage ended in divorce in December 1985. Their two children resided with petitioner. Respondent initially paid child support of $100 a week. In December 1990 petitioner obtained an upward modification to $210 per week. In April 1996 another petition for upward modification was filed, alleging a change of circumstances in that respondent's income had increased; there had been a substantial increase in the children's expenses; and that petitioner had lost her part-time job. Respondent's income had increased from $43,088 in 1990 to $260,221 in 1995, as a result of his success as a restaurateur.
Petitioner's application was first denied by the Hearing Examiner, "for failure of proof" after a hearing. The Hearing Examiner concluded that petitioner's expenses had decreased between 1990 and 1996, that she had voluntarily reduced her income by failing to reapply for the part-time job, and that she was able to meet the children's needs. The Hearing Examiner declined to find that the increase in respondent's income was adequate basis upon which to modify his child support obligation. Petitioner filed objections with Family Court, which remitted the matter to the Hearing Examiner to calculate the parties' combined parental income and to reconsider whether child support should be modified pursuant to *Cassano* and *Jones v. Reese*.
The Hearing Examiner then determined that the parties' combined parental income was $288,650.89, calculating the annual incomes of petitioner and respondent at $28,429 and $260,221 respectively. The Hearing Examiner again noted that petitioner's expenses had actually decreased and that the children's needs were being met, but determined that an upward modification was warranted in view of the dramatic increase in respondent's income. She then applied the appropriate child support percentage [25 percent] to all income, including income in excess of $80,000, on the ground that there was no proof offered as to why the Court should vary from the formula. This resulted in a $65,052 annual child support obligation.
Following objections by respondent, Family Court again remitted the matter to the Hearing Examiner to explain why the CSSA percentage was applied to the parental income in excess of $80,000. Respondent successfully moved for a rehearing, in which the Hearing Examiner determined that the parties' combined parental income was $370,558, recalculating the annual incomes of petitioner and respondent to be $37,794 and $332,764, respectively. Since respondent failed to establish any reason for her to vary from Family Court Act 413(1)(f), the Hearing Examiner found that it was in the children's best interest to apply the CSSA percentage to all of the combined parental income. This resulted in a $83,200 annual child support obligation. Respondent filed objections with Family Court, which were rejected.

Upward Modification

The Third Department held that, contrary to respondent's contention, the substantial increase in his income between 1990 and 1996 provided the necessary change in circumstances warranting an upward modification of child support.5 It also held that the Hearing Examiner erred in calculating his income and in failing to adequately articulate the reasons for applying the CSSA percentage to the parties' combined parental income in excess of $80,000.

The appellate court initially found that the record did not substantiate the Hearing Examiner's finding that respondent's annual income should include the increased value of his stock portfolio, because the capital gains allegedly realized by respondent during this period was "paper only" income. As respondent earned a substantial salary from the operation of his restaurant, the court concluded that an award of child support based on his income, excluding the unrealized gains, would hardly be unjust or inappropriate, especially since there was no evidence that he was attempting to avoid his child support obligation through calculated investment strategies. It therefore excluded that amount in computing respondent's income, reducing his income for the purpose of calculating child support to $244,827.

The court agreed with respondent that the Hearing Examiner failed to sufficiently articulate the reasons for applying the statutory formula to the combined parental income in excess of $80,000. It noted that in *Cassano* the Court of Appeals held that the language of FCA 413(1)(f) "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." However, the *Cassano* court emphasized that, when a court chooses to apply the statutory percentage to combined parental income over $80,000, it is required to provide "some record articulation" of its reasons in order to facilitate appellate review. In addition to providing a record articulation for deviating or not deviating from the statutory formula, a court must relate that record articulation to the statutory factors.

Here, the Hearing Examiner recited the statutory factors in her decision without relating them to the ultimate facts upon which she relied. Moreover, upon its relation of the factors outlined under the statute to the facts of this case, the court concluded that the Hearing Examiner's application of the statutory 25 percent to the income above $80,000 was an abuse of discretion, resulting in an excessive award. In its view, "a reduced percentage of 15 percent to the income in excess of $80,000 bears a more reasoned corollary between the statutory factors and the parties' circumstances."

Adequate Resources

The court outlined the factors it considered in rejecting a strict application of the statutory formula to the parties' income over $80,000 and discussed the factors set forth in FCA 413[1-b][f]. It found that, although respondent

earned substantially more than petitioner, petitioner had adequate financial resources at her disposal, including rental property, investments, a catering business and a working spouse who earned $48,000 per year. The children were healthy and had no special needs. Petitioner had no educational needs of her own. The Appellate Division deemed it relevant that respondent was responsible for providing health insurance for the children and that his increased income over the years was not based on a windfall but was the direct result of his personal efforts to succeed.

While there was no doubt that respondent's success would have permitted the children to enjoy a higher standard of living had the parties remained married, the court believed that an increase in child support to $43,842 a year permitted them to enjoy an appropriately enhanced standard of living. It noted that 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, the children's needs are an appropriate factor to be considered when determining an award of child support on income in excess of $80,000. It held that the mere fact that the children would have enjoyed an enhanced standard of living had the parties remained married does not necessarily mean that the statutory formula should be blindly applied on all income over $80,000. To do so would constitute an abdication of judicial responsibility rendering meaningless the statutory provision setting a cap on a strict application of the formula, particularly in cases where the combined parental income substantially exceeds $80,000.

In a footnote, the Third Department explained that *Cassano* had been misconstrued by the Hearing Examiner, whose holding that child support is not limited by need was apparently based on a misreading of *Cassano* where the Court of Appeals, in discussing the purpose of the CSSA generally, noted that there was a shift from a needs-based determination to a determination based on parental income. It determined that the Court of Appeals observation of the statute's general objectives should not be misread to completely eliminate an analysis of the children's needs as one of many factors to be considered by a court should it choose to deviate from the statutory percentage on income in excess of $80,000.

Although petitioner outlined the purported needs of her teenage children, it was clear to the court that these needs did not require annual child support in excess of $83,000. It found that the $65,052 per year of child support petitioner was receiving as of the second hearing was more than either petitioner or her current spouse earned and was sufficient to cover all of petitioner's household expenses as outlined in her financial statement. It emphasized that petitioner testified that she had no idea how she would spend $65,000 per year on her children, and her current spouse testified that the child support would be used to paint and restore the couple's house.

Notes

(1) 182 AD2d 862
(2) 85 NY2d 649 (1995)
(3) 224 AD2d 783, 642 NYS2d 378 (3d Dept, 1996)
(4) AD2d , NYS2d NYLJ, 4-7-99 P. 25, Col. 3 (3d Dept, 1999)
(5) Citing *Matter of Klein v. Klein*, 251 AD2d 733, 674 NYS2d 142, 144
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