EXPERT OPINION

Child Support Caps and Calculations: Is There Still a Need for 'Needs'?

Prior to the Child Support Standards Act, there was a wide disparity of child support awards due to a lack of clear standards and formulas. In 1995, the Court of Appeals stepped in to provid guidance, offering two ways to calculate an award: One is by setting a cap and the other is by demonstrating proven costs. Authors Robert Dobrish and Lee Rosenberg offer their thoughts on this hot-button issue of why judges seem to favor the cap method over the other.

April 15, 2024 at 10:00 AM

By Robert Z. Dobrish and Lee Rosenberg | April 15, 2024 at 10:00 AM

First, a little history. Child support guidelines were promulgated in 1989 as the Child Support Standards Act (CSSA). Their stated purpose was to eliminate the wide disparity of child support awards which resulted due to a lack of clear standards and formulas. The federal government created financial disincentives to those states which failed to enact a formulaic approach by a certain date and New York was no exception to the desire to accept such funding.

Prior to the CSSA's passage, New York child support awards were without continuity or clear guideposts—"predictable inconsistency" if you will—and based on various kinds of proof. High income cases were no exception. Even after the CSSA's passage—purposefully altering a "needs-based" approach in favor of an "income-based" approach, high income cases continued to be governed by the established needs of the child/ren.

Some of the noteworthy cases include "*Duff v. Perlman,"* in which the wife of Revlon heir Ronald Perleman sought an extravagant support award for the parties' very young child, but where the trial court awarded child support of $12,825 per month on costs established at $13,500 per month [See *Anonymous v. Anonymous*, NYLJ, 12/9/99 (Sup Court NY County (Weissberg, J.); *Anonymous v. Anonymous*, 286 AD2d 585 (1st Dept. 2001), lv. denied at 97 NY2d 611 (2002). The court also directed Perelman to pay 100% of the child's educational, medical, extracurricular and camp costs, and up to $60,000 per year for nannies employed by Duff. Duff had sought $132,000 per month in child support.].

Another noteworthy case is *Brim v. Combs*, 25AD3d 691 (2nd Dept. 2006) lv denied 6 NY3d 713 (2006), where an award of $15,000/month was ultimately granted to the mother of Sean Combs' child given that the rapper/entrepreneur refused to provide financial information and defaulted. [The court used the "needs" of the child as set forth in the mother's financial disclosure affidavit to reduce the amount of child support awarded by the lower court to be paid by Combs on income over the then initial "cap" of $80,000. "In high income cases, the appropriate determination under Family Court Act §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 that amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties"].

In *Murad v. Jagger*, NYLJ, 9/11/00 at 24, col 5 Rolling Stones' front-man, Mick Jagger, was ordered to pay significant child support because he had voluntarily provided the mother of his out-of-wedlock child with a $10,000 per month apartment.

In all these cases the petitioners had each been able to demonstrate a high-end lifestyle and significant child related costs which sometimes also served to limit extravagant demands.

Following the passage of the CSSA, there was confusion, particularly as to how any cap would be set. Cases defining "high income" were also all over the map. 2000's *Kosovsky v. Zahl,* 272 AD2d 59 (1st Dept. 2000) led the way in the First Department. ($300,000 cap on $550,000 total income). Other cases followed:

Ciampa v. Ciampa, 47 AD3d 745 (2nd Dept. 2008), combined income capped at $250,000.

Bean v. Bean, 53 AD3d 718 (3rd Dept. 2008), first $500,000 of over $1,000,000 in parental income used.

Cerami v. Cerami, 44 AD3d 815 (2nd Dept. 2007), the court used a $225,000 "cap" on combined parental income.

Quinn v. Quinn, 61 AD3d 1067 (3rd Dept. 2009), where husband earned $1.1 million per year, the court applied the statutory percentage over $80,000 and then using subdivision (f) factors applied 8% to the income over $80,000 as the basis upon which to award support.

DeVries v. DeVries, 35 A.D.3d 794 (3rd Dept. 2006) the court calculated child support based upon $300,000 in imputed income.

Lee v. Lee, 18 AD3d 508 (2nd Dept. 2005), where the husband earned $240,000 the court used $200,000 in combined income for purposes of computing the child support obligation.

Mairs v. Mairs, 61 AD3d 1204 (3rd Dept. 2009), 35% of entire combined income (approx $350,000) with seven children

Kaplan v. Kaplan, 21 AD3d 993 (2nd Dept. 2005), the court capped the income at $300,000 where the father earned in excess of $400,000.

Jordan v. Jordan, 8 AD3d 444 (2nd Dept. 2003) combined income capped at $200,000 rather than the actual $415,621.

Moschetti v. Moschetti, 237 AD2d 888 (3rd Dept. 2000), the court used 20% of the combined income over the first $80,000 which totaled $163,250 ($32,650) to calculate child support. (Total income of $243,250, support capped upon $112,650.)

Quinn v. Quinn, 61 AD3d 1067 (3rd Dept. 2009), where father earning $1,100,000, and two children, court applied 8% to all income over $80,000 for child support.

M.A. v. K.A., NYLJ 12/14/07 at 31, col 1, the court awarded child support using the entire combined parental income of $713,447 (the husband/payor's income was 63 % of the combined income)

In the early years of the CSSA, the cap was primarily based on zip codes, lifestyle and judicial proclivities ranging, for the most part, in the 200-500K area. Results in these cases were unpredictable except that the awards became predictably lower than much of what had been decided before.

The Court of Appeals stepped in to provide early needed guidance with *Cassano v. Cassano,* 85 NY2d 649 (1995). [The case originated out of Family Court, Queens County with a decision by the Hearing Examiner on Oct. 10, 1990. The judge denied objections on Feb. 15, 1991. The Second Department modified on April 24, 1994 (203 D2d 563 (2nd Dept. 1994) before the matter was ultimately heard by the Court of Appeals.]

Cassano established the "three-step" method of calculating child support and made it (theoretically) clearer that there were two ways to calculate an award. One was by setting a cap, the other required a discussion of the proven costs of raising a child.

Despite the fact that *Cassano* laid out the framework for how to use the new methodology, judges seemed reluctant to decide cases using anything other than the cap method. Thus, even in cases where there was extensive testimony regarding the costs of raising a child, judges somehow felt that they were less apt to be reversed if they used the cap method.

Thus in *MM v. DM*, 159 AD3d 562 (1st Dept. 2018), the First Department affirmed the use of the income cap established in the Special Referee's 100 page-long decision which referenced the extensive testimony and cross examination regarding child raising costs. Yet after making a determination of what those actual costs were, the referee did a mathematical calculation backing into a cap, which in that case was $650,000. Since there were three children, the child support amount was $15,708.33, almost exactly the amount that the referee had determined was the amount proved to have been required.

In 2018, co-author, Robert Dobrish wrote an article for the Family Law Review called "Closing the Cap Trap*"* laying out what the issues were and explaining the two ways in which child support could be determined. In 2021, co-author, Lee Rosenberg, the editor-in-chief of the Family Law Review, wrote a follow-up editorial, "The CSSA 'Cap' in Theory and Recent Practice" reviewing the cases that had been decided during the three years following the publication of that article. Both of these articles concluded that nothing had changed other than that lower awards were being given out in unpredictable fashion. Judges could provide reasons for using a cap even in cases where the parties' income was significantly over the cap amount. Appellate decisions following the Court of Appeals in *Bast v. Rosoff,* 91 NY2d 723 (1998) made it clear that New York law (unlike, say, California) did not make allowances for adjusting the CSSA formula due to the parents having a shared custody agreement.

Why is it that there are so few cases post-*Cassano* where a court makes its determinations about child support using the demonstration of costs rather than utilizing the "cap" method? Why is it that courts that do receive evidence of costs and consider them in the determination then back into the caps? The reason has to be that judges are writing their decisions in a way that they believe will be affirmed if appealed. Clearly it is easier to give reasons for using a particular cap than it would be to fully explain what went into the calculation of costs and thereby invite appeals based on minor mathematical errors.

The cost of raising a child has been the subject of numerous studies. The now nine-year old USDA Center for Nutrition Policy and Promotion study, *2015 Expenditures on Children by Families*, estimated the costs to be $233,610 *through age 17*. Accordingly, it does not include college costs. In the "Urban Northeast," the cost was $264,090. Clearly, families that have more money spend more money on their children. Families in more affluent neighborhoods spend more money on their children. Nevertheless, until recently the caps were consistently set at under $500,000 with anything over that amounting to an exception.

Indeed, when the Legislature was faced with drafting the Child Support Standards Act, there was significant discussion and analysis of those costs. Just as all unhappy families are unhappy in their own way, different families spend different amounts on child support. Nevertheless, as it is said in Texas, every child is only entitled to two ponies—so there needs to be some cap beyond where the court will not go. Using a cap, therefore, is more in line with utilizing the broader brush, formulaic approach. And that is what the use of a cap does.

A clear example of this is found in *E.A. v. J.A.,* 75 Misc 3d 1235, (Sup Court, NY County 2022), decided by Justice Ariel D. Chesler. E.A., involving a motion for pendente lite for spousal maintenance and child support where the parties lived privileged lives. The court was provided with evidence of significant wealth and spending, which justified awarding support above the statutory cap. The court established $800,000 as the cap—citing *Klauer v. Abeliovich,* 149 AD3d 617

(1st Dept. 2017) (which was an $800,000 cap in a one-off situation where the payor spouse earned much less than the payee). *Klauer* was, and still is, the most generous cap number given by an appellate court. (Here it should be noted that under *Cassano*, there is no need to utilize a cap if there is evidence of spending beyond the cap).

Interestingly, Justice Chesler proceeded to alter the cap result, finding it high in E.A. One needs to wonder why the cap was not set at $750,000 or $825,000 if there had to be a cap, or why there could not have been a range in the first place. It is important to understand the methodology and reasoning of Chesler's decision.

He set a cap and then modified the result based upon the evidence of expenditures. Although it is not exactly what *Cassano* laid out—to use one or the other technique—it makes infinite sense. Essentially, he decided that families at that level of wealth and spending ordinarily spend about $800,000 on their living expenses (excluding purchases of e.g. cars, real estate, art, jewelry and savings). He then applied the formula to the cap and modified the resulting number to the specific needs which had been proven. It seems to work.

In so many cases judges are presented with facts that prove expenditures on living expenses. Those proven expenses can take the place of a cap (according to *Cassano*). But in many cases judges apply a cap, but do not consider the proven expenses beyond the cap. Other judges apply a cap automatically depending upon the circumstances but do not adjust the result based on the particular facts of the case. This results in determinations that are ultimately too low. Of course, courts will also fix the basic support using a lower "cap" and then make use of the "add ons" to secure additional support.

If judges are cautious about utilizing actual numbers because of the potential for appeals, perhaps the answer is to establish a range of possibilities, , e.g., $500,000 – $600,000 and then come up with numbers that are within that range.

As in all cases, some form of predictability is needed so that counsel and client can have some idea of the ranges and limitations which a court will use in formulating its determinations. This way, guidance and guidelines can be provided by court to counsel and counsel to client, with the appropriate evidence adduced at trial.

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