THE CHILD SUPPORT STANDARDS ACT

by

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Support Magistrate
Rensselaer County Family Court
Troy

1. What is Income? Is Maintenance in the Pro Ratas?

FCA § 413(1)(b)(5), DRL § 240(1-b)(b)(5).

a. Income is the "gross (total) income as should have been or should be reported in the most recent federal income tax return."

i. The Family Court Act does not prohibit "reliance upon partial information from a tax year not yet completed." Kellogg v Kellogg, 300 A.D.2d 996 (4th Dept., 2002); Culhane v. Holt, 28 A.D.3d 251 (1st Dept., 2006); Lynn v. Kroenung, 97 A.D.3d 822 (2nd Dept., 2012); Armstrong v. Armstrong, 72 A.D.3d 1409 (3rd Dept., 2010)

ii. Where a party provides credible evidence that the overtime would not be available in the current tax year, it is proper to base an obligation on the base pay only. Taraskas v. Rizzuto, 38 A.D.3d 910 (2nd Dept., 2007); Kellogg v. Kellogg, 300 A.D.2d 996 (4th Dept., 2002)

b. To the extent not already included on the income tax return:

i. Investment income reduced by sums expended in connection with such investment

Cassara v. Cassara, 1 A.D.3d 817 (3rd Dept., 2003) (Rental property); Mullen v. Just, 288 A.D.2d 476 (2nd Dept., 2001) (Investment property)

ii. Voluntarily deferred income

Contributions to retirement accounts are income for child support purposes. Cerami v. Cerami 44 A.D.3d 815 (2 Dept., 2007); Ballard v. Davis, 259 A.D.2d 881 (3rd Dept., 1999)

iii. Workers' compensation

iv. Disability benefits

v. Unemployment insurance benefits

vi. Social Security benefits

The receipt of Social Security Disability Benefits by the custodial parent on behalf of the child is not income to the custodial parent nor does it reduce the non-custodial parent's obligation. Graby v. Graby, 87 N.Y.2d 605 (1996); McDonald v. McDonald, 112 A.D.3d 1105 (3rd Dept., 2013)

vii. Veterans benefits

viii. Pensions and retirement benefits

ix. Fellowships and stipends

x. Annuity payments;

c. The Court may impute income from the following:

i. Non-income producing assets

Income can be imputed non income-producing assets when a parent maintains finances in a form that limits the income they produce. Marlinski v. Marlinski, 111 A.D.3d 1268 (4th Dept. 2013); Cupkova-Myers v. Myers, 63 A.D.3d 1268 (3rd Dept., 2009)

ii. 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

Basic Allowances for Housing (BAH) and Subsistence (BAS) available to members of the armed forces are income. Massey v. Evans, 68 A.D.3d 79 4th Dept., 2009)

iii. Fringe benefits provided as part of compensation for employment

Employer-provided automobile insurance, gas and oil payments, vehicle maintenance and repair costs, and personal expense allowance are income. Skinner v. Skinner, 241 A.D.2d 544 (2nd Dept., 1997)

iv. Money, goods, or services provided by relatives and friends

Court should impute to father money he receives from his family for the children's college expenses that were not loans that he was obligated to repay. Kiernan v. Martin 108 A.D.3d 767 2nd Dept., 2013)

Financial support from family should be imputed to non-custodial parent. Rohme v. Burns, 92 A.D.3d 946 (2nd Dept. 2012)

v. An amount imputed as income based upon the parent's former resources or income, if the court determines that a parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support;

A court can impute an ability to pay support that exceeds the amount that would have been fixed based upon current income even in the absence of a finding that the respondent intentionally reduced his or her income to avoid a child support obligation. Lutsic v. Lutsic, 245 A.D.2d 637 (3d Dept. 1997).

The court was justified in not imputing to non-custodial parent income from her prior employment where there was no evidence that she was terminated from that employment for cause. The court properly used her income from her most recent employment. Smith v. Smith, 116 A.D.3d 1139 (3rd Dept., 2014)

Where the non-custodial parent's expenses, as outlined in his statement of net worth, exceeded his claimed income by more than $100,000 the Court should have imputed an additional $100,000 in income to him. Turco v. Turco, 117 A.D.3d 719 (2nd Dept., 2014).

It is appropriate to impute prior income where father voluntarily left his employment to "improve his vocation" The "children should not be expected to subsidize his decision." Bustamante v. Donawa, 987 N.Y.S.2d 889 (2nd Dept., 2014)

vi. The following self-employment deductions:

(1) Depreciation deduction greater than that calculated on a straight-line basis

Where the court determines that there is a deduction in excess of that calculated on a straight-line basis, the court must calculate the straight line depreciation and add only the difference to income. Grosso v Grosso, 90 A.D.3d 1672 (4th Dept., 2011)

(2) Entertainment and travel allowances to the extent that they reduce personal expenditures.

Court should not have added back entertainment expenses claimed by father where mother failed to demonstrate that the expenses were personal in nature. Grosso v Grosso, 90 A.D.3d 1672 (4th Dept., 2011)

d. Deductions from income

i. Unreimbursed business expenses

The Court properly refused to deduct unreimbursed business expenses as the father failed to submit evidence sufficient to support his claim regarding those expenses. Castillo v. Castillo 302 A.D.2d 458 (2nd Dept., 2003)

ii. Alimony or maintenance paid to a non-party spouse;

iii. Alimony or maintenance paid to the party spouse provided that the order provides for a specific adjustment of child support upon the termination of the alimony or maintenance obligation;

(1) The Appellate Divisions are split on whether a payor is entitled to a deduction from income if the agreement/order does not provide for an increase when maintenance terminates. The 1st and 4th Depts have held that the payor is not entitled to a reduction. Schmitt v. Schmitt, 107 A.D.3d 1529 (4th Dept., 2013); Jarrell v. Jarrell, 276 A.D.2d 353 (1st Dept., 2000). The 2nd and 3rd Depts have held that the payor is entitled to the deduction. Nichols v. Nichols, 19 AD3d 775 (3rd Dept., 2005); Lee v. Lee, 79 A.D.3d 473 (2nd Dept.2005). But see Alecca v. Alecca, 111 A.D.3d 1127 (3rd Dept., 2013) (Where maintenance outlasts child support, deduction of maintenance from income for child support purposes is not required)

(2) The Appellate Divisions are also split on whether maintenance is income to the payee-spouse. The 1st and 3rd Depts have held that the maintenance is income to the payee. Hughes v. Hughes, 79 A.D.3d 473 (1st Dept., 2010); Nichols v. Nichols, 19 AD3d 775 (3rd Dept., 2005). The 2nd and 4th Depts have held that the maintenance is not income unless and until it is included in the prior year's tax return. Lee v. Lee, 79 A.D.3d 473 (2nd Dept.2005); Huber v Huber, 229 A.D.2d 904 (4th Sept., 1996).

iv. Child support paid to other children;

Where father had a prior order but was currently residing with payee of the support, the prior obligation should not be deducted from income. Ranallo v. Ranallo, 301 A.D.2d 605 (2nd Dept., 2003); Mary V.B. v. James X.S., 226 A.D.2d 714 (2nd Dept., 1996).

v. Public Assistance;

vi. Supplemental Security Income (SSI);

vii. NYC or Yonkers tax;

viii. FICA (7.65% on all earned income up to $117,000 (2014) plus 1.45% of earned income above $117,000)

e. Distributive awards, even when based upon enhanced earning capacity resulting from a professional license obtained during the marriage, are not deducted from the payor's income or added to the payee's income. Holterman v. Holterman, 3 N.Y.3d 1 (2004).

2. Over the Cap

The "three step process"

a. Determine the combined parental income

b. Multiply the combined parental income up to the $141,000 cap by the child support percentages and determine each parent's pro rata share

i. Effective January 31, 2016, and every two years thereafter, the "$141,000 cap" will increase based upon changes in the Consumer Price Index. SSL § 111-i(2).

ii. Cap History:

September 15, 1989 - January 30, 2010	$80,000
January 31, 2010 - January 30, 2012	$130,000
January 31, 2012 - January 30, 2014	$136,000
January 31, 2014 -	$141,000

iii. The cap in effect at time of commencement of proceeding or action applies throughout. Beroza v Hendler, 109 A.D.3d 498 (2nd Dept., 2013); Parsick v Rubio, 103 A.D.3d 898 (2nd Dept. 2013); Ryan v. Ryan; 110 A.D.3d 1176 (3rd Dept., 2013)

c. Determine the amount of additional support for the income exceeding $141,000 by applying the factors listed in section FCA § 413(1)(f) or DRL § 240(1-b)(f) (the "f factors") and/or the child support percentage.

i. Cassano v. Cassano, 85 N.Y.2d 649 (1995).

ii. The needs of the children should be taken into consideration when making an award on the income above the Cap. Erin C. v. Peter H. , 66 A.D.3d 451 (1st Dept. 2009); Matter of Brim v Combs, 25 A.D.3d 691 (2nd Dept., 2006); Bean v. Bean, 53 A.D.3d 718 (3rd Dept. 2008). But see Parsick v Rubio, 103 A.D.3d 898 (2nd Dept. 2013).

Selected Recent Cases

Beroza v Hendler, 109 A.D.3d 498 (2nd Dept., 2013);

> "[I]n considering the relevant paragraph (f) factors, including the affluent lifestyle which the children undisputedly enjoyed during the parties' marriage, commensurate with the parties' education and net combined annual parental income of $736,414, we find that $400,000 is an appropriate cap to the parties' combined annual parental income for purposes of calculating the plaintiff's support obligation pursuant to the statutory percentage."

Parsick v Rubio, 103 A.D.3d 898 (2nd Dept. 2013);

> "If a child's lifestyle may be maintained by the amount awarded in the temporary support order, a similar award may be made as the final order, and more of the income over the "cap" ($130,000) may be considered to achieve that level of support The appellate court found that the children's needs would be met, and their lifestyle maintained, with an award based upon applying the child support percentage to the first $260,000 of combined parental income ($1,025 per week)."

Marcklinger v Liebert, 88 A.D.3d 1114 (3rd Dept., 2011);

> "[A]lthough petitioner faults respondent for not submitting evidence of the child's needs, application of the CSSA "creates a rebuttable presumption that the guidelines contained therein will yield the correct amount of child support" and, if petitioner believed that his presumptive pro rata share was unjust or inappropriate, it was his burden to establish such."

Ripka v. Ripka, 77 A.D.3d 1384 (4th Dept., 2010);

> Contrary to plaintiff's contention, the court was not required to explain the reasons for its discretionary application of the $80,000 cap . . ., particularly in light of its finding that defendant's pro rata share of child support was appropriate and plaintiff's failure to contend that the amount of child support awarded was insufficient."

3. Variance

a. Percentages must be used unless the court finds that the order would be unjust or inappropriate. FCA § 413(1)(f), DRL § 240(1-b)(f). The court must review the following factors in making such a determination:

i. The financial resources of the custodial and non-custodial parent, and those of the child;

> Deviation granted. Kelly v. Kelly, 90 A.D.3d 1295 (3rd Dept. 2011)
>
> Distributive awards may be considered. Holterman v Holterman, 3 N.Y.3d 1 (2004)
>
> Orders of less than $25 monthly may be made in the case of low-income parents. Broome County Dept. of Social Services v. Meaghan XX., 111 A.D.3d 1174 (3rd Dept., 2013)

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

iii. The standard of living the child would have enjoyed had the marriage or household not been dissolved.

iv. The tax consequences to the parties;

> Smith v. Smith 116 A.D.3d 1139 (3rd Dept., 2014)

v. Non-monetary contributions the parents will make toward the well-being of the child;

vi. The educational needs of either parent.

vii. A determination that the gross income of one parent is substantially less than that of the other;

Smith v. Smith 116 A.D.3d 1139 (3rd Dept., 2014)

viii. The needs of other children of the non-custodial parent whose support has not been deducted from income, provided that the resources available to support such children are less than the resources available to support the subject children.

Smith v. Smith 116 A.D.3d 1139 (3rd Dept., 2014).

In reaching the threshold determination of whether this section applies, the non-custodial parent's resources should not be considered. The comparison is between the other resources available to the children that the non-custodial parent is supporting and the resources available to the children that the custodial parent is supporting. Gardner v Maddine, 112 A.D.3d 926 (2nd Dept., 2013); Hudgins v Blair, 74 A.D.3d 1199 (2nd Dept., 2010)

ix. Extraordinary expenses incurred in visitation;

Costs of providing suitable housing, clothing and food for children during custodial periods do not qualify as extraordinary expenses so as to justify a deviation. Ryan v. Ryan, 110 A.D.3d 1176 (3rd Dept., 2013).

Where the lower-earning parent has the child for fewer overnights than the higher-earning parent, the factor cannot be used to require the higher-earning parent to pay support to the lower-earning parent. Rubin v. Della Salla, 107 A.D.3d 60 (1st Dept.,2013)

x. Any other factor the court deems relevant.

b. Recent decisions:

. Variance granted based on difference in income, custodial parent's tax benefits, and extended visiting time.

Gardner v. Maddine; 112 A.D.3d 926 (2nd Dept., 2013).

Ryan v. Ryan, 110 A.D.3d 1176 (3rd Dept., 2013).

Rubin v. Della Salla, 107 A.D.3d 60 (1st Dept.,2013).

4. 2010 Modification Amendments

a. The"Low Income Support Obligation and Performance Improvement Act" (L.2010, c. 182) amended FCA § 451 and DRL § 236-B(9) to add new subdivisions which spell out with specificity the burdens for modifying a support obligation.

i. a "court may modify an order of child support, *including an order incorporating without merging an agreement or stipulation of the parties,* upon a showing of a substantial change in circumstances."

ii. "Incarceration shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment."

(1) This section specifically overrules Knights v. Knights, 71 N.Y.2d 865 (1988), at least insofar as it precludes modification based on incarceration.

(2) One Family Court has held that this section does not apply to initial support determinations, but only to modifications. Commissioner of Social Services ex rel. Donna M.W. v. Jessica M.D., 31 Misc.3d 490 (Fam.Ct., Franklin Cty, 2011).

iii. Three years have passed since the order was entered, last modified or adjusted

iv. There has been a change in *either* party's gross income by 15% or more since the order was entered, last modified, or adjusted. In the event of a reduction in income, the reduction must be involuntary and must be accompanied by diligent attempts to find suitable employment.

(1) The parties may opt out of either or both of these two grounds.

b. Pursuant to the enabling legislation, the changes took effect 90 days after enactment (October 13, 2010). They apply to orders *entered* on or after the effective date of October 13. Where an order incorporates an unmerged agreement, then these sections only apply only if the unmerged agreement was executed on or after October 13, 2010.

i. In other words, the prior case law – the leading cases are Boden v. Boden, 42 N.Y.2d 210 (1977) and Brescia v. Fitts; 56 N.Y.2d 132 (1982) – still applies to agreements entered into prior to October 13, 2010. See, Overbaugh v. Schettini, 103 A.D.3d 972 (3rd Dept., 2013) (The higher burden applies even when the pre 10/13/10 agreement only incorporated, without modifying, a Family Court order); Dimaio v. Dimaio, 111 A.D.3d 933 (2nd Dept., 2013).

ii. Where the underlying order predated 10/13/10, incarceration is not a basis to modify the order. Baltes v. Smith, 111 A.D.3d 1072 (3rd Dept., 2013).

5. Pendente Lite Applications

a. Courts considering applications for pendente lite child support are not required to apply the CSSA. Vistocco v Jardine, 116 A.D.3d 842 (2nd Dept., 2014).

b. "However, under some circumstances, particularly where sufficient economic data is available, an award of temporary child support that deviates from the level that would result if the provisions of the CSSA were applied may constitute an improvident exercise of discretion, absent the existence of an adequate reason for the deviation." Davydova v Sasonov, 109 A.D.3d 955 (2nd Dept., 2013); Rubin v Della Salla, 78 A.D.3d 504 (1st Dept., 2010)

c. A portion of the payments made toward maintaining the marital residence should offset the award of retroactive support. Hymowitz v. Hymowitz, 119 A.D.3d 736 (2nd Dept., 2014).

d. The court which makes the pendente lite order must determine the arrears due under the

order. The Family Court later hearing the case is not the appropriate forum to determine the payments due under the temporary order made by the Supreme Court. Fixman v Fixman, 102 A.D.3d 783 (2nd Dept. 2013).

The Maintenance Deduction

"alimony or maintenance actually paid or to be paid to a spouse that 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, provided the order or agreement provides 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 . . ."

- Husband's CSSA income is $200,000
- Wife has no income
- Parties have 2 children
- Supreme Court is inclined not to make an order of child support which automatically adjusts the support when spousal maintenance ends

How do these rules affect child support computations in the four departments?

I. INCOME

1. Plaintiff	$200,000.00	TO START OVER ----------> CLEAR FORM
2. Defendant	$0.00	

Income Over 543K

3. Plaintiff	$0.00
4. Defendant	$0.00

II. CALCULATIONS

Income (up to $543,000):

5. Plaintiff	$200,000.00	
6. Defendant	$0.00	

Basic Calculation:

7. Calculation A	$60,000.00	30% of Payor's Income minus 20% of Payee's Income
8. Calculation B	$80,000.00	40% of Combined Income minus Payee's Income
9. Guideline Amount	$60,000.00	The Guideline Amount is the Lesser of Line 7 and Line 8; or zero if Line 8 is less than or equal to 0

Low Income Calculation (If Applicable):

10. Payor Income minus Guideline Amount	$140,000.00	
11. Low Income Award	$0.00	Where the guideline amount would reduce the payer's income below the self-support reserve (15,512); the award is the payor's income minus the self-support reserve. If Line 11 equals zero, there is no adjustment for low income.

III. AWARD

PAYOR:	Plaintiff
12. Annual Amount	$60,000.00
13. Monthly Payment	$5,000.00
14. Bi-Weekly Payment	$2,307.69
15. Weekly Payment	$1,153.85

4th Dept		
H	$200,000	100%
W	$0	0%
Comb.	$200,000	
25% of $141,000		$35,250
H's Share (100%)		$35,250
25% of $59,000		$14,750
H's Share (100%)		$14,750
Full Boat		$50,000

3rd Dept		
H	$140,000	70%
W	$60,000	30%
Comb.	$200,000	
25% of $141,000		$35,250
H's Share (70%)		$24,675
25% of $59,000		$14,750
H's Share (70%)		$10,325
Full Boat		$35,000

1st Dept		
H	$200,000	77%
W	$60,000	23%
Comb.	$260,000	
25% of $141,000		$35,250
H's Share (77%)		$27,115
25% of $119,000		$29,750
H's Share (77%)		$22,885
Full Boat		$50,000

2nd Dept		
H	$140,000	100%
W	$0	0%
Comb.	$140,000	
25% of $140,000		$35,000
H's Share (100%)		$35,000
Full Boat		$35,000