# Child Support Guidelines: Closing the "Cap" Trap

By Robert Z. Dobrish

In the 1980s there was a significant debate and no agreement in the matrimonial communities of the United States regarding the cost of raising a child and the manner in which that cost should be determined and allocated between separating parents. Federal regulations required each state to come up with a formulaic approach, which they did.

New York adopted its Child Support Standards Act (CSSA) in 1989 and was among the states that chose a family income percentage approach (a designated percentage of combined family income as being allocable to the support of children). Since 1989, the amount at which the formula is capped has been tweaked. Originally, the combined income of the family to which a percentage would be applied was "capped" at $80,000. Since then it has risen to $148,000. Because most divorce cases involve family income of less than $150,000, capping the income at $148,000 means that most matters will be decided using a strict formulaic approach. Only the remainder will be subject to discretionary, subjective standards.

In *Cassano v. Cassano,*[1] a 1995 decision written by then Chief Judge Judith S. Kaye, the Court of Appeals explained the manner in which the Child Support Standards Act was meant to be applied. At that time, the Act (which had been created to achieve some predictability in awards) was six years old, yet there was still significant uncertainty, particularly as it pertained to cases where combined parental income exceeded the "cap." Over 20 years have passed since Judge Kaye clearly and succinctly laid out the mechanism for achieving the appropriate child support number. Nevertheless, there is still significant confusion among practitioners and judges as to the correct manner for arriving at the number.

The methodology laid out in the statute and by the Court of Appeals is relatively simple to state. If the family income is at or below the specified amount of combined parental income (presently $148,000), you apply the presumptive formula—calculating the combined income to that amount multiplied by the governing percentage (17 percent for one child, 25 percent for two, 29 percent for three, 31 percent for three, and 35 percent for four or more), multiplied again by the pro-rata shares of the combined parental income for the custodial and non-custodial parents. Above that statutory amount, there is a three-step process to be followed: determine the family income, determine the portion of the family income necessary to support the appropriate lifestyle for the child(ren) and allocate the responsibility in proportion to the income of each parent by either using the formula (up to a different "cap") or arriving at the number through an analysis of statutory factors or a combination thereof. In any event, there is a requirement that there be some articulation of the methodology. In very high income cases, the court will also apply the demonstrated "needs" of the child to determine the proper amount of child support. Reviewing the cases that have been decided by appellate courts over the years, one finds that there continue to be problems. However, there is enough history to understand where the problems lie and, maybe, to clarify the law for those who are still confused.

While the statute reads clearly—the formula must be applied to combined family income up to $148,000 and thereafter the amount is to be determined as referenced above—on the formula to some stated amount, on the factors, or some combination of both—it has not consistently been applied that way. Perhaps because analyzing, determining and explaining how one gets to the resulting numbers is a difficult task, some judges have ruled that the child support formula should only go up to the "cap" unless there are special circumstances.[2] Other judges have decided that there should be a higher cap whenever there is greater income, but impose a limited range of caps based on heuristic methods.[3] Most others properly look specifically to the needs that are demonstrated.

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As a result of the differing interpretations of statutory language, there are child support cases that still go every which way—the very blight that the legislation was designed to eliminate. Some judges and some jurisdictions are believed to "cap" at a certain number without regard to the specific facts of the case. Lawyers often negotiate their settlements by arguing whether a court would "cap" say at $300,000 or $400,000, without regard to the particular circumstances and the available evidence. Such reason-

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ing does not comport with the purpose and intention of the statute.

A review of the appellate cases (and some of the lower court decisions which address the issue) demonstrates that there is, nevertheless, some method to this madness. The well-reasoned decisions explain that in coming to the child support amount where family income exceeds the basic "cap" amount ($148,000), one needs to look at the situation of the family in terms of available income and lifestyle. In so doing, one must also consider the weight of the evidence that has been offered to demonstrate the appropriateness of the claim, as well as extenuating circumstances, which have been adequately shown to impact on the award one way or another.

Thus, in the recently decided First Department case *MM v. DM*,[4] the court affirmed a *$650,000* cap because the Referee "properly considered the lifestyle enjoyed by the children during the marriage which included country club membership, theater and other entertainment and luxury vacations." In addition, defendant in that case failed to show any actual expenses that supported his contention that the child support was higher than what was necessary to ensure that the children have an "appropriate lifestyle." At trial, plaintiff proved that the children's needs were at a certain level and that defendant was capable of earning at a level that could support those needs.[5] In another First Department case, *Klauer v. Abeliovich*,[6] a similar showing was made of a "luxurious lifestyle" and the court approved an *$800,000* cap. This high cap was calculated in order to achieve an appropriate contribution to support from a non-custodial parent who was responsible for earning only 10.5 percent of the family's combined $2.0 million income. In both cases, the trial court backed into the cap by first calculating what the payor should be contributing in dollars and then establishing the cap.

A lower court case in the First Department, *Sykes v. Sykes*,[7] established a fairly high cap—$600,000—which was achieved following a detailed analysis of proven costs of a "financially exalted life" and judicial reductions in those costs resulting in a monthly payment of $8,500 (17 percent of $600,000) together with 100 percent of very significant child support add-ons. There the father "was earning over $10 million per year" and the mother had significant income achieved through her equitable distribution award and eight (8) years of spousal maintenance.

In the Second Department, where higher cap cases at the appellate level have not been similarly found, one finds cases with caps up to only $400,000.[8] In *Doscher v. Doscher*,[9] the appellate court reduced the trial court's $600,000 cap to $360,000, reasoning that the evidence did not support the higher result. Similarly, in a case involving the rapper, "50 Cent," the Second Department in *Jackson v. Tompkins*,[10] affirmed a basic child support award of $6,750 per month (which would have been achieved with a $475,000 cap), but failed to mention a cap. There, the Support Magistrate discredited many of the mother's claimed expenses. The award was considered to be sufficient, with the appellate court finding no basis to overturn the Support Magistrate's Determination. Compare this, however, with *Brim v. Combs*[11]—involving Sean Combs—in which the claims of the mother's expenses were not contested and a monthly award of $35,000 was reduced to $19,148.74 based upon "needs" and which otherwise would have been the result of a $1.4 million cap.

In the Third Department, a $500,000 cap is reported in a case where the father earned $10 million. The court reasoned that despite a high standard of living there was limited evidence presented at trial as to the child's needs.[12]

What can be seen from these cases is that the key to obtaining high child support must be established at the trial level through a demonstration of needs and an ability to meet those needs. The recipient must present evidence to show a standard of living (where there is one to present) or evidence of real needs. The payor, who has sufficient income to pay what is requested, must present evidence that the child(ren) do not need what is being requested and/or that there are other circumstances to be considered that mitigate against a higher award.

It is immaterial whether the number selected is achieved through a cap on income or a determination of needs. The result proves to be the same. The required explanation of reasoning may be slightly different in that it might be presumed that utilization of a higher cap requires less of a justification than a mathematical determination of needs and is therefore less susceptible to a successful appeal. What must be digested by attorneys is that where there is a case with family income over the statutory "cap" there is a need to prepare the facts, understand the issues and present the case effectively. What must be digested by judges is that if needs are demonstrated and availability to meet those needs is clear, there is, in fact, no cap.

## Endnotes

1. 85 N.Y.2d 649 (1995).
2. *See, e.g., Ryan v. Ryan,* 110 A.D.3d 1176 (3d Dep't 2013).
3. *See, e.g., Peterson v. Peterson*, 125 A.D. 3d 1234 (2d Dep't 2015); *Ciampa v. Ciampa*, 47 A.D.3d 745 (2d Dep't 2008); *Lazar v. Lazar*, 124 A.D. 3d 1242 (4th Dep't 2015).
4. 159 A.D.3d 562 (1st Dep't 2018).
5. The author was counsel to the plaintiff in both the trial and appeal of that case. Defendant, whose annual earnings had been reduced to $360,000 at the time of trial, was found to have imputed income of $1,625,000 based on the proof adduced at trial.
6. 149 A.D.3d 617 (1st Dep't 20 17).
7. 43 Misc. 3d 1220 (Sup. Ct., N.Y. Co., Cooper, J. 2014).
8. *Beroza v. Hendler,* 109 A.D.3d 498 (2d Dep't 2013) (a case where parental income was over $700,000).
9. 137 A.D.3d 962 (2d Dep't 2016).
10. 65 A. D. 3d 1148 (2d Dep't 2009).
11. 25 A.D.3d 691 (2d Dep't 2006).
12. *Bean v. Bean,* 53 A.D.3d 718 (3d Dep't 2008).