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Note

Heeding the Call of *Cassano v. Cassano*: The Need to Amend the Child Support Standards Act

I. Introduction

In 1989, the New York Legislature enacted the New York Child Support Standards Act [hereinafter CSSA]¹ with the intent to provide guidelines that would ensure uniformity and equity in the calculation and awarding of child support, and to ensure that children would share in the economic status of both their parents.² Child support calculations are based on combined parental income [hereinafter CPI],³ a pro rata share of

1. L. 1989, ch. 567 (codified at N.Y. DOM. REL. LAW §§ 236, 240 and at N.Y. FAM. CT. ACT § 413). Technically, "CSSA" refers only to the Child Support Standards Act of 1989, L. 1989, ch. 567. "CSSA," however, is commonly understood to refer to the statutes that were amended in 1989 (primarily N.Y. DOM. REL. LAW § 240 and N.Y. FAM. CT. ACT § 413) as well as to all subsequent amendments to the same statutes. That practice is followed here. See Judith Reichler, *Budget Bill Includes Changes in Child Support Laws*, 207 N.Y. L.J. 1 (1992). See also N.Y. DOM. REL. LAW § 236 (L. 1980, ch. 281 (amended 1989)) (McKinney Supp. 1995); N.Y. DOM. REL. LAW § 240 (L. 1962, ch. 313 (amended 1989, 1990, 1992, 1993, 1994)) (McKinney Supp. 1995); N.Y. FAM. CT. ACT § 413 (L. 1962, ch. 686 (amended 1989, 1990, 1992, 1993, 1994)) (McKinney Supp. 1995). See *infra* notes 73-75, 91.

2. See MEMORANDUM OF ASSEMBLYWOMAN HELENE WEINSTEIN, NEW YORK STATE LEGISLATIVE ANNUAL 248 (1989) [hereinafter WEINSTEIN]; GOVERNOR'S APPROVAL MEMORANDUM, NEW YORK STATE LEGISLATIVE ANNUAL 249 (1989) [hereinafter GOVERNOR'S MEMORANDUM]. See also discussion *infra* part II.C. In 1989, the rate of dissolution of marriage in New York State was 3.4 per 1,000 population. See BUREAU OF BIOMETRICS, N.Y. STATE DEP'T OF HEALTH, VITAL STATISTICS OF NEW YORK STATE 98 (1992) [hereinafter BUREAU OF BIOMETRICS].

3. CPI refers to the total income of both parents including, but not limited to, gross income as reported on the most recent tax return, additional investment income, additional deferred income, workers' compensation, social security, unemployment insurance benefits and disability benefits, less specified deductions

which is assigned to each parent and designated as their support obligation.⁴ When total CPI is equal to or below \$80,000, statutory percentage calculations are automatically applied to determine the amount of child support.⁵ As to CPI exceeding \$80,000, courts are afforded wide discretion to consider enumerated statutory alternatives in calculating child support obligations based on this income.⁶ A problem arises from the fact that the statutory language does not clarify whether courts must justify using CPI above \$80,000 as part of the basis of child support obligations, or whether CPI above \$80,000 is presumptively part of the basis of child support obligations.⁷ As a result, courts have treated CPI above \$80,000 differently and results have varied.⁸

The New York Court of Appeals addressed this problem in *Cassano v. Cassano*,⁹ where it dealt with the issue of whether a court must articulate reasons for basing a child support award on the application of the statutory percentages to income above \$80,000.¹⁰ The court of appeals held that the percentage calculations could be presumptively applied to income above \$80,000, and articulated the proper statutory interpretation to be applied in an attempt to settle conflicts among the lower courts.¹¹ However, the court also reiterated that lower courts retain discretion to address such income using the statutory percentages, enumerated statutory factors, or some combination of both.¹² As a result of the dual nature of the court's opinion, practition-

including, but not limited to, public assistance, supplemental security income and FICA taxes actually paid. See DOM. REL. LAW § 240(1-b)(b)(4), (5); FAM. CT. ACT § 413(1)(b)(4), (5).

4. See DOM. REL. LAW § 240(1-b); FAM. CT. ACT § 413(1). See also discussion *infra* part II.C.

5. See DOM. REL. LAW § 240(1-b)(c)(2); FAM. CT. ACT § 413(1)(c)(2). See *infra* note 79.

6. See DOM. REL. LAW § 240(1-b)(c)(3), (f); FAM. CT. ACT § 413(1)(c)(3), (f). See *infra* note 80.

7. See discussion *infra* part II.E.

8. See discussion *infra* part II.E.

9. 85 N.Y.2d 649, 651 N.E.2d 878, 628 N.Y.S.2d 10 (1995). See discussion *infra* part III.B.

10. 85 N.Y.2d at 654, 651 N.E.2d at 881, 628 N.Y.S.2d at 13.

11. See *id.* See also discussion *infra* part III.B.

12. 85 N.Y.2d at 655, 651 N.E.2d at 882, 628 N.Y.S.2d at 14. See discussion *infra* part III.B.

ers and families may expect continued inconsistencies in lower court decisions.¹³

This Note will examine child support calculations prior to the CSSA and compare child support awards subsequent to its enactment. Further, this Note will explore the impact of *Cassano* on calculations of child support and will argue the need for amendment of the CSSA.

Part II of this Note discusses how child support awards were calculated prior to the passage of the CSSA, and explains the developments which led to its enactment. Part II also presents a general overview of the CSSA and discusses various reactions of practitioners and commentators as to the foundation of the CSSA and the effect of its enactment. Part II concludes by exploring practitioners' assumptions and lower courts' treatment of CPI above \$80,000 prior to *Cassano*.

Part III introduces *Cassano* and explains its procedural history and the unanimous holding. Part III also discusses practitioners' reactions to the decision and concludes with a discussion of lower courts' calculations of child support awards subsequent to the decision. Part IV analyzes the decision in *Cassano* and illustrates that, while *Cassano* was certainly a step in the right direction, in that it attempted to clarify statutory interpretation, the decision nonetheless leaves the door open for continued inconsistencies in lower court awards of child support.

This Note concludes that the CSSA should be amended to eliminate the \$80,000 cap, after which courts would calculate child support awards by applying the appropriate statutory percentage to the total CPI. The resulting obligations could then be reviewed in light of the enumerated statutory factors, as a

13. See discussion *infra* part IV. Obviously, the issues surrounding child support calculations and awards are of great interest to our society. In 1994, there were 4.4 million single, divorced parents in the United States. See CENSUS BUREAU, U.S. DEPT OF COMMERCE, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1994 20 (1994). In 1992, New York State recorded 57,683 divorces, at least 26,132 of which involved children. See BUREAU OF BIOMETRICS, *supra* note 2, at 103. "Divorce accounted for 98.8% of all dissolution of marriages in New York State in 1992." *Id.* at 92. The dissolution of marriage rate in New York for 1992 was 3.2 per 1,000 population. See *id.* at 98. Further, the dissolution rate of marriages in New York State from 1970-1992 did not fall below 3.0 per 1,000 population. See *id.*

safeguard against unjust or inappropriate awards. This approach is superior to that left in place by *Cassano* as it would better serve legislative intent by (1) ensuring predictability by absolutely defining the point at which statutory factors would first be considered, (2) ensuring equitable results by allowing discretion when individual circumstances warrant, and (3) ensuring that children would share in the economic status of both parents.

II. Background

A. *The Calculation of Child Support Prior to the CSSA*

Prior to the implementation of formulaic child support guidelines, and absent agreement of the parties, "New York . . . relied on court discretion for the determination of [child] support awards" ¹⁴ Courts calculated child support awards based on consideration of general statutory factors found in either the Domestic Relations Law ¹⁵ or the Family Court Act. ¹⁶ As a result, "child support orders were often based upon a determination of what portion of the non-custodial parent's income, after expenses had been met, could be made available to share

14. Peter Leehy, Note, *The Child Support Standards Act and the New York Judiciary: Fortifying the 17 Percent Solution*, 56 BROOK. L. REV. 1299, 1304 (citing I. ELLMAN ET AL., FAMILY LAW 355 (1986)).

15. See DOM. REL. LAW §§ 236, 240 (McKinney 1986), amended by L. 1989, ch. 567. DOM. REL. LAW § 236 contained the child support provisions of the "Equitable Distribution Law" (L. 1980, ch. 281) and covered a broader range of matrimonial actions than DOM. REL. LAW § 240. See Alan D. Scheinkman, *Supplementary Practice Commentary*, DOM. REL. LAW § 240 at 641 (McKinney 1986). The Equitable Distribution Law "generally cleansed the Domestic Relations Law, the Family Court Act, the General Obligations Law, and other chapters of out-moded distinctions based solely upon gender." Alan D. Scheinkman, *Supplementary Practice Commentary*, DOM. REL. LAW § 236 at 140 (McKinney 1986). Specifically, the Equitable Distribution Law altered "the considerations to be taken into account in determining the issue of child support *Id.* at 142. Effectively, the child support provisions of DOM. REL. LAW § 236 were superimposed over the similar provisions of DOM. REL. LAW § 240. See Scheinkman, *supra*, DOM. REL. LAW § 240, at 641.

Courts calculated child support awards by examining (1) the financial resources of the parents and the child, (2) the child's physical and emotional health and vocational needs, (3) the standard of living the child would have had if the marriage had not dissolved, (4) the tax consequences to the parties, and (5) non-monetary contributions of the parents towards the care of the child. See DOM. REL. LAW § 236 (7)(a)(1)-(5) (McKinney 1986).

16. See FAM. CT. ACT § 413 (McKinney 1986), amended by L. 1989, ch. 567.

in providing for the expenses the custodial parent had for the child."¹⁷

Because the courts were vested with wide discretion when calculating child support awards, courts disagreed over what factors should be given more weight in their computations of such awards. The following cases illustrate the discrepancies that existed between courts' approaches to calculating child support prior to enactment of the CSSA.

In *Tornese v. Tornese*,¹⁸ the plaintiff challenged the amount of child support, alimony and counsel fees awarded by the New York State Supreme Court, Westchester County in its judgment of divorce.¹⁹ The New York State Appellate Division, for the Second Department, deferred to the trial court's discretion to determine the amount of the awards based upon a "balancing of the various aspects of the marital relationship."²⁰ In *Kaplan v. Kaplan*,²¹ however, the Second Department, seemed to focus more on the financial resources of the non-custodial parent. There, the husband and wife were both practicing physicians with a CPI of \$127,500.²² The husband appealed an order directing him to pay \$600 per week in child support.²³ Although he conceded that amount of child support was necessary to maintain the children's pre-existing standard of living, the husband claimed that he could not afford the amount awarded since he had remarried and his expenses totaled more than 97% of his net income.²⁴ In response to his arguments, the court reduced the husband's child support obligation to \$400 per week.²⁵

The plaintiff in *Moran v. Moran*²⁶ appealed from a judgment of divorce which awarded plaintiff custody of her three children and \$145 per week in child support.²⁷ She argued,

17. Judith Reichler & Carol Lefcourt, *The New Child Support Standards Act*, 62 N.Y.S. B.J. 36, 37 (Feb. 1990).

18. 55 A.D.2d 602, 389 N.Y.S.2d 385 (2d Dep't 1976).

19. See *id.* at 602, 389 N.Y.S.2d at 386.

20. *Id.*

21. 77 A.D.2d 891, 430 N.Y.S.2d 692 (2d Dep't 1980).

22. See *id.* at 891, 430 N.Y.S.2d at 693.

23. See *id.*

24. See *id.* at 892, 430 N.Y.S.2d at 693.

25. See *id.*

26. 81 A.D.2d 740, 438 N.Y.S.2d 421 (4th Dep't 1981).

27. See *id.* at 740-41, 438 N.Y.S.2d at 422.

among other things, that the award of child support was inadequate.²⁸ The New York State Appellate Division, for the Fourth Department, affirmed²⁹ and stated that "[t]he fixing of the amount of child support is discretionary with the trial court upon its balancing of the various aspects of the marital relationship and in the best interests of the child."³⁰

In *Iacobacci v. Iacobacci*,³¹ the New York State Appellate Division, for the Second Department, focused on the importance of maintaining the children's pre-separation standard of living. There, the wife appealed from an order which denied her cross motion for temporary child support.³² The appellate court noted that the divorce proceeding had been stayed³³ and that the husband had reduced monthly payments to his wife and four children.³⁴ The appellate court reversed and awarded temporary child support of \$1000 per month because it was "clear that the [husband had] not continued to support and maintain his family in the same style and manner as he did before" the divorce action was instituted.³⁵

The husband in *Parry v. Parry*,³⁶ an attorney,³⁷ appealed from a divorce judgment which ordered him to pay \$150 per week in child support.³⁸ The parties had stipulated at trial that the wife, a real estate agent,³⁹ would have custody of their two children.⁴⁰ The New York State Appellate Division, for the Fourth Department, upheld the child support award as properly calculated based on the trial court's discretion "to weigh the relative financial positions of the parties, to evaluate the testimony and determine what is in the best interests of the children."⁴¹

28. See *id.* at 741, 438 N.Y.S.2d at 422.

29. See *id.* at 741, 438 N.Y.S.2d at 423.

30. *Id.* at 740, 438 N.Y.S.2d at 422-23.

31. 84 A.D.2d 759, 443 N.Y.S.2d 768 (2d Dep't 1981).

32. See *id.*

33. See *id.*

34. See *id.*

35. *Id.*

36. 93 A.D.2d 989, 461 N.Y.S.2d 616 (4th Dep't 1983).

37. See *id.* at 990, 461 N.Y.S.2d at 617.

38. See *id.* at 990, 461 N.Y.S.2d at 618.

39. See *id.* at 990, 461 N.Y.S.2d at 617.

40. See *id.*

41. 93 A.D.2d at 990, 461 N.Y.S.2d at 618.

In *Stevens v. Stevens*,⁴² the husband challenged a divorce judgment which directed him to pay \$240 per week in child support for his three children.⁴³ The New York State Appellate Division, for the Third Department, noted that the trial court, in calculating its child support award, failed to consider the special physical, emotional or educational needs of the children, the tax consequences to the parties as a result of the award and the nonmonetary contributions of each party toward the children's care.⁴⁴ The appellate court remitted the matter to the trial court for a new determination of child support due to the "trial court's nonobservance of the statutory directive that it address all five factors pertinent to child support awards."⁴⁵

B. *Development of the CSSA*

In 1984, Congress enacted the Child Support Enforcement Amendments,⁴⁶ which provided incentives for state governments to enforce child support orders.⁴⁷ In this legislation, Congress addressed the issue of inconsistent and inadequate child support awards set by the courts and mandated that states institute numerical guidelines that courts could opt to use in their discretionary awards of child support.⁴⁸

In 1985, the U.S. Department of Health and Human Services (HHS) issued a report, authored by Dr. Robert G. Williams, intended to assist the states in developing these child support guidelines.⁴⁹ The report included a discussion of the cost of raising children,⁵⁰ based primarily on research done by Thomas J. Espenshade for the National Institutes for Child Health and

42. 107 A.D.2d 987, 484 N.Y.S.2d 708 (3d Dep't 1985).

43. See *id.* at 987, 484 N.Y.S.2d at 709.

44. See *id.* at 989, 484 N.Y.S.2d at 710.

45. *Id.* See DOM. REL. LAW §§ 236, 240 (McKinney 1986); FAM. CT. ACT § 413 (McKinney 1986). The statutory factors are discussed *supra*, note 15.

46. Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified at 42 U.S.C. §§ 602-71).

47. See Leehy, *supra* note 14, at 1303. Incentives included payments to states equal to a percentage of total support collected annually and special project grants to promote improvements in interstate enforcement. See 42 U.S.C. §§ 658, 655.

48. Leehy, *supra* note 14, at 1303.

49. See ROBERT G. WILLIAMS, PH.D., U.S. DEPT OF HEALTH AND HUMAN SERVICES, DEVELOPMENT OF GUIDELINES FOR ESTABLISHING AND UPDATING CHILD SUPPORT ORDERS: INTERIM REPORT (1985).

50. See *id.* at 8-37.

Human Development.⁵¹ Williams stated "there is no absolute 'cost' of raising a child. Expenditures on a child within a household are inextricably dependent on the level of total household expenditures. As overall household income increases, additional income is allotted to children as well as adults."⁵² Further, according to Williams, "expenditures on children increase with increases in family income as parents use some of their discretionary income to enhance the children's standard of living as well [as their own]."⁵³ Additionally, Williams stated "there is considerable evidence that the proportion of family consumption devoted to a child declines very little, if at all, as household consumption increases. Thus, the 'cost' of a child can be accurately depicted as a proportion of family income consumption."⁵⁴

Williams then explained the differences between consumption spending and household income: "[a]s income increases, total family consumption declines as a proportion of income because of progressive federal and state income taxes and because savings increase with the level of household income. Consequently, as gross income increases, Espenshade shows expenditures on children declining as a proportion of gross income."⁵⁵ Using Espenshade's calculations as a starting point, Williams concluded that for families with a gross income of \$50,000 and above, 12.8% of that amount would be spent on one child, 19.8% would be spent on two children, and 24.8% would be spent on three children.⁵⁶

Williams' report also included an analysis of different model guideline formulas that various states were either al-

51. See *id.* at 15-16. See THOMAS J. ESPENSHADE, NAT'L INST. FOR CHILD HEALTH AND HUMAN DEVELOPMENT, *INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES* (1984).

52. WILLIAMS, *supra* note 49, at 9.

53. *Id.* at 18.

54. *Id.* at 9 (emphasis in the original).

55. *Id.* at 18. Williams also recalculated Espenshade's figures using net income as a base, to illustrate that expenditures on children decrease as a proportion of net income as well. See WILLIAMS, *supra* note 49, at 33. See also ESPENSHADE, *supra* note 51.

56. See WILLIAMS, *supra* note 49, at 35. Williams derived his calculations by combining Espenshade's research with the CONSUMER EXPENDITURES SURVEY (1972-73) and with CURRENT POPULATION REPORTS, SERIES P-60, No. 145 (1983). See WILLIAMS, *supra* note 49, at 35. See also ESPENSHADE, *supra* note 51.

ready using or considering at that time,⁵⁷ specifically discussing whether these formulas reflected his research conclusion.⁵⁸ Williams cited Wisconsin's formula⁵⁹ as one approach that conflicted with his research, and explained "[b]ecause the Wisconsin formula is designed as a constant percentage of gross income, it also has the effect of setting orders as an increasing percentage of net income, as obligor income rises."⁶⁰ Williams,

57. See WILLIAMS, *supra* note 49, at 76-94. There were three conceptual models which served as the basis of child support formulas: (1) "Cost Sharing" where the dollar amount of the child's needs is determined and apportioned between the parents based on their respective incomes; (2) "Income Sharing" where a proportion of parental income (either gross or net) is allocated to the children (and the proportion may vary depending on the number of children and the level of parental income); (3) "Income Equalization" where, in order to equalize standards of living between the separate households, the parental income is allocated between the households based on the number of persons in each. See WILLIAMS, *supra* note 49, at 53. Williams selected four specific formulas: (1) the "Delaware Melson Formula," a hybrid cost sharing/income sharing approach; (2) the "Washington State Uniform Child Support Guidelines," an income sharing formula; (3) the "Wisconsin Percentage of Income Standard," also an income sharing formula; (4) the "Cassetty Model," an income equalization formula. See *id.* at 54 n.56 and accompanying text.

58. See WILLIAMS, *supra* note 49, at 76-94. Williams compared the Delaware, Washington and Wisconsin formulas, and the Cassetty Model, with "a new guideline, termed the Income Shares model, developed by project staff as an example of an approach that is consistent with the economic evidence, underlying objectives and principles, and treatment of particular factors discussed in [his] report." *Id.* at 54. See *supra* note 57. See also *supra* notes 52-56 and accompanying text.

59. See *supra* note 57. Wisconsin's formula is based on gross income. See WILLIAMS, *supra* note 49, at 59 (citing LINDA REIVITZ, SECRETARY, WISCONSIN DEPT OF HEALTH AND SOCIAL SERVICES, PERCENTAGE OF INCOME STANDARD FOR SETTING CHILD SUPPORT AWARDS (Memorandum to members of the Wisconsin Judiciary) (1983)). Williams further explained Wisconsin's formula:

Child support orders are established with reference only to the gross income of the obligor and the number of children to be supported. The percentages of obligor gross income allocated to child support are: 17[%] for one child, 25[%] for two children, 29[%] for three children, 31[%] for four children [and] 34[%] for five or more children. The payment obligation is not adjusted for the income of the custodial parent. The standard assumes that each parent will expend the appropriate proportion of income on the child or children and that the custodial parent's share is spent directly on the child. If custody of the child or children is reversed, the same formula is applied to the new non-custodial parent.

Id. at 59-60.

60. WILLIAMS, *supra* note 49, at 102-03. "As income increases, federal and state taxes consume increasing percentages of gross income, lowering the relative proportion of net income. Thus, at higher income levels, increasing percentages of net income are required for child support to maintain the constant percentage of gross income set in the Wisconsin formula." *Id.* at 86.

however, went on to say that "even though the findings of recent economic studies suggest that expenditures on children in intact households fall as a proportion of either gross or net income (as income increases), states may wish to structure the child support objective differently."⁶¹ Williams concluded:

[I]t is important for states, in initiating the developmental process, to establish objectives for a desirable pattern of results to be obtained from a formula. These objectives should reflect the state's social values for the proper role of child support. States should then select a basic conceptual model for child support that most closely matches those objectives.⁶²

Three years later, the Federal Family Support Act [hereinafter FSA] of 1988⁶³ reiterated that states must develop child support guidelines, and required courts to calculate child support awards in strict accordance with these guidelines.⁶⁴ Although the New York State Legislature had already seen bills introduced that addressed development of such guidelines,⁶⁵ the CSSA was finally enacted in response to this congressional mandate.⁶⁶

61. *Id.* at 103.

62. *Id.*

63. Pub. L. No. 100-485, 102 Stat. 2343 (1988) (codified at scattered sections of 42 U.S.C.). Portions of the FSA are mirrored in 45 C.F.R. § 302.56 (1992). See NANCY S. ERICKSON, NATIONAL CENTER ON WOMEN AND FAMILY LAW, INC., CHILD SUPPORT MANUAL FOR ATTORNEYS AND ADVOCATES at 215 n.81 (1992). See also 45 C.F.R. § 302.56.

64. See Leehy, *supra* note 14, at 1303-04.

65. Governor's program bill #208, S. 3733-a, 209th Leg., Reg. Sess. (1986); Governor's program bill #55R, A. 6931, 210th Leg., Reg. Sess. (1987).

66. See Sanford S. Dranoff et al., *Legislation: Child Support Standards Act, in NEGOTIATING, DRAFTING, AND MODIFYING MARITAL AGREEMENTS 1990*, at 75 (PLI N.Y. Law Course Handbook Series No. 62, 1990). See *supra* note 1. Legislators took heed of this mandate:

More than equity now demands enactment of child support standards. Under the recently enacted federal welfare reform legislation, the Family Support Act of 1988, P.L. No. 100-485, each state must establish binding child support standards applicable in all cases. These standards must be in effect by October, 1989. New York has already been threatened with up to \$133 million in federal sanctions if child support standards are not in effect by that date.

WEINSTEIN, *supra* note 2, at 248.

C. *Discussion of the CSSA*

1. *Legislative History*

Legislative sponsors of the bill stated that the CSSA would ensure more equitable and adequate child support awards by "setting forth a method in statute that yields a specific sum for the support award, and by establishing a presumption that the specific sum will be awarded unless to do so would be unjust or inappropriate."⁶⁷ The sponsors further stated that the CSSA, with its "recognition of the need for judicial discretion where unique circumstances are present, will promote greater state-wide uniformity in child support actions."⁶⁸ Former New York State Governor Mario Cuomo, in his Approval Memorandum,⁶⁹ voiced similar concerns about the inequities of child support awards. Cuomo stated "[c]ourts have ordered child support arbitrarily, and orders, although they have varied widely, almost uniformly have been too low."⁷⁰ The Governor explained that the CSSA promotes fairness in child support awards because the formula is based on parental income and, therefore, "children will share in the economic status of both their parents."⁷¹ Governor Cuomo stressed that affluent parents should contribute according to their means and, to this end, the CSSA "places no limit on the amount of parental income to which the formula may be applied, and mandates application of the formula to the first \$80,000 of parental income."⁷²

2. *The CSSA's formula*

The CSSA amended, in relevant part, Domestic Relations Law sections 236⁷³ and 240,⁷⁴ and section 413 of the Family Court Act.⁷⁵ The CSSA provided a formula, modeled after Wis-

67. WEINSTEIN, *supra* note 2, at 248.

68. *Id.* at 248.

69. GOVERNOR'S MEMORANDUM, *supra* note 2, at 249.

70. *Id.* at 250.

71. *Id.*

72. *Id.*

73. DOM. REL. LAW § 236 (L. 1980, ch. 281), amended by L. 1989, ch. 567, §§ 4-5 (McKinney Supp. 1995).

74. DOM. REL. LAW § 240 (L. 1962, ch. 313), amended by L. 1989, ch. 567, §§ 6-7 (McKinney Supp. 1995). For subsequent amendments, see *infra* note 91.

75. FAM. CT. ACT § 413 (L. 1962, ch. 686), amended by L. 1989, ch. 567, § 8 (McKinney Supp. 1995). For subsequent amendments, see *infra* note 91.

consin's child support guidelines legislation,⁷⁶ for calculating child support awards in all child support proceedings. To calculate the "basic child support obligation,"⁷⁷ the court must first calculate the CPI.⁷⁸ Then, the CPI up to \$80,000 is multiplied by the appropriate child support percentage.⁷⁹ If the CPI exceeds \$80,000, the court must apply the formula to the first \$80,000 of CPI and then determine the child support obligation for the CPI above \$80,000 "through consideration of [various] factors set forth⁸⁰ . . . and/or the child support percent-

76. See Dranoff et al., *supra* note 66, at 77 n.4. See 1985 Wisconsin Act 29. For a discussion of the Wisconsin formula, see WILLIAMS, *supra* notes 49, 59 and accompanying text.

77. DOM. REL. LAW § 240(1-b)(b)(1); FAM. CT. ACT § 413(1)(b)(1).

78. See DOM. REL. LAW § 240(1-b)(c)(2); FAM. CT. ACT § 413(1)(c)(2). See *supra* note 3.

79. See DOM. REL. LAW § 240(1-b)(c)(2); FAM. CT. ACT § 413(1)(c)(2). The child support percentage to be applied varies according to the number of children:

(i) seventeen percent of the [CPI] for one child; (ii) twenty-five percent of the [CPI] for two children; (iii) twenty-nine percent of the [CPI] for three children; (iv) thirty-one percent of the [CPI] for four children; and (v) no less than thirty-five percent of the [CPI] for five or more children.

DOM. REL. LAW § 240(1-b)(b)(3); FAM. CT. ACT § 413(1)(b)(3). As to the source of the statutory percentage figures:

The figures used in the formulas were first developed by researchers in Wisconsin, who analyzed studies on the costs of children and the rates that resources are shared in two-parent and single-parent families. Based on their information, a percentage of income was determined which reflected the percentage that would be likely to be shared with children by their parents.

The best estimate of the researchers was that the first child consumes 20-30% of family income, with each subsequent child costing about half as much as the previous one. These percentages were reduced for a number of reasons. First, they were reduced based on the potential additional earnings capacity of the custodial parent. Second, they were reduced to account for the non-custodial parent's additional expenses and the cost for normal visitation. Lastly, it was felt that such high rates might encourage non-support. While none of these reasons for a lower percentage defined an exact percentage amount, they struck a balance of conflicting objectives: providing adequately for the children and assuring fairness to both parents.

Reichler & Lefcourt, *supra* note 17, at 40 n.7. See *supra* notes 57-60 and accompanying text.

80. DOM. REL. LAW § 240(1-b)(c)(3); FAM. CT. ACT § 413(1)(c)(3). The factors to be used as a basis for variation from the formula are set forth in paragraph (f) of the statutes and are substantially as follows: (1) The financial resources of both parents and of the child; (2) The child's physical and emotional health and his/her special needs and aptitudes; (3) The standard of living the child would have enjoyed had the marriage not dissolved; (4) The tax consequences to the parties; (5) The parents' non-monetary contributions toward the care and well-being of the

age.”⁸¹ The resulting calculations based on CPI are then divided between the parents “in the same proportion as each parent’s income is to the [CPI].”⁸²

3. *The Statutory “Cap”*

Since the CSSA treats CPI above \$80,000 differently from income below that amount, \$80,000 of CPI is commonly considered the “dividing line” or “cap” in the statute.⁸³ While the Association of the Bar of the City of New York [hereinafter NYCBA] believed income “caps” in child support guideline legislation were necessary to ensure adequate and consistent child support awards,⁸⁴ the NYCBA supported an income “cap” of \$100,000.⁸⁵ The NYCBA stated that “[r]esearchers have indeed reported that inadequate support may be a greater problem in upper-income than in lower-income families.”⁸⁶ The NYCBA cited “[a] California research project . . . [which] determined that the greatest downward mobility following divorce was experienced by middle and upper-middle-class women and their children.”⁸⁷ The NYCBA concluded “a \$100,000 cap [would]

child; (6) The educational needs of either parent; (7) A determination that one parent’s gross income is substantially less than the other parent’s gross income; (8) The needs of the non-custodial parent’s children who are not subject to the instant action and for whom the non-custodial parent is providing support; (9) If the child is not on public assistance, extraordinary expenses incurred by the non-custodial parent in exercising visitation, or in extended visitation if the custodial parent’s expenses are substantially reduced as a result; (10) Any other factors the court determines are relevant. DOM. REL. LAW § 240(1-b)(f); FAM. CT. ACT § 413(1)(f).

81. DOM. REL. LAW § 240(1-b)(c)(3); FAM. CT. ACT § 413(1)(c)(3). The percentages that could be applied here are identical to the ones applied to CPI below \$80,000. See *supra* note 79.

82. DOM. REL. LAW § 240(1-b)(c)(2), (f); FAM. CT. ACT § 413(1)(c)(2), (f). If the non-custodial parent’s pro-rata share is found to be unjust or inappropriate in light of the “paragraph (f)” factors, the court shall reduce the non-custodial parent’s support obligation. See DOM. REL. LAW § 240(1-b)(f), (g); FAM. CT. ACT § 413(1)(f), (g).

83. See DOM. REL. LAW § 240(1-b)(c)(2), (3); FAM. CT. ACT § 413(1)(c)(2), (3).

84. See COMMITTEE ON STATE LEGISLATION, ASSOCIATION OF THE BAR OF THE CITY OF N.Y., SUPPLEMENTARY REPORT ON CHILD SUPPORT GUIDELINES LEGISLATION 527 (1989) [hereinafter ASSOCIATION OF THE BAR].

85. See *id.*

86. *Id.* at 528.

87. *Id.* (citing LENORE WEITZMAN, *THE DIVORCE REVOLUTION* 334 (1985)). “The [California] researchers found that men with incomes over \$50,000 were required to pay approximately half as much of their net incomes in alimony and child support as men with incomes under \$10,000.” ASSOCIATION OF THE BAR, *supra* note 84,

provide maximal flexibility to upper-income families in planning post-divorce obligations, while ensuring that children at all income levels share in their parents' standard of living,"⁸⁸ and "[a] lower cap . . . would seriously jeopardize the central goals of child support guidelines by reintroducing unpredictability in the support allocation process and the risk of inadequate awards."⁸⁹

4. *Amendments to the CSSA*

The CSSA, nevertheless, specified an \$80,000 cap, and this provision has not been amended.⁹⁰ Several other CSSA provisions have been amended;⁹¹ the 1992 Amendments of section 240(1-b)(g) of the Domestic Relations Law and of section 413(1)(g) of the Family Court Act are most relevant to this discussion.⁹² Prior to the 1992 amendments, if a court deviated from the presumptive statutory guideline calculation of child support based on a finding that an unjust or inappropriate amount would be awarded, it was required to state the statutory factors considered in reaching that conclusion, as well as the "reasons for the level of support."⁹³ Under the amended statute, however, "the court must set forth both the presumptive amount and the 'reasons the court did not order the pre-

at 528 n.7 (citing WEITZMAN, *supra*, at 267). "Researchers in Ohio and Vermont have similarly reported that divorced men paid proportionately less support as their incomes increased." ASSOCIATION OF THE BAR, *supra* note 84, at 528 (citing Robert E. McGraw et al., *A Case Study in Divorce Law Reform and Its Aftermath*, 20 J. FAM. L. 443, 479 (1981)). See also, James B. McLindon, *The Economic Disaster of Divorce for Women*, 21 FAM. L. Q. 351, 369-72 (1987); Heather Ruth Wishik, *Commentary: Economics of Divorce*, 20 FAM. L. Q. 79, 97 (1986).

88. ASSOCIATION OF THE BAR, *supra* note 84, at 528.

89. *Id.*

90. See DOM. REL. LAW § 240(1-b)(c)(2), (3); FAM. CT. ACT § 413(1)(c)(2), (3).

91. DOM. REL. LAW § 240(1-b)(g), (l) and FAM. CT. ACT § 413(1)(g), (l), *amended* by L. 1990, ch. 818, §§ 7, 8, 10, 11; DOM. REL. LAW § 240(1-b)(g), (h) and FAM. CT. ACT § 413(1)(g), (h), *amended* by L. 1992, ch. 41, §§ 145, 146, 147, 148; DOM. REL. LAW § 240(1-b) (l), § 240(2)(c) and FAM. CT. ACT § 413(1)(j), (l), § 413(3), *amended* by L. 1993, ch. 59, §§ 18, 21, 23, 24; DOM. REL. LAW § 240(2)(b) and FAM. CT. ACT § 413 (3)(c), *amended* by L. 1994, ch. 170, §§ 362, 367 (McKinney Supp. 1995).

92. See DOM. REL. LAW § 240(1-b)(g) and FAM. CT. ACT § 413(1)(g), *amended* by L. 1992, ch. 41, §§ 145, 147.

93. See Reichler, *supra* note 1, at 1 (citing DOM. REL. LAW § 240(1-b)(g); FAM. CT. ACT § 413(1)(g)).

sumptive amount.”⁹⁴ While “[t]his may seem like a subtle difference, . . . the amendment is aimed at assuring that deviations [from presumptive guideline amounts] will be limited and that reasons be stated as to why the presumptive amount was not ordered.”⁹⁵

D. *General Reactions to the CSSA*

Some commentators expressed seemingly favorable reactions to the CSSA. For example, one pair of commentators noted that child support awards calculated pursuant to the CSSA would reflect its new focus: “[The CSSA] shift[s] the emphasis 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.”⁹⁶ Another commentator stressed that the CSSA promotes fairness and predictability in child support calculations: “The CSSA attempts to reduce the arbitrariness of child support awards by using a pre-set formula, with allowances for adjustment if the formulaic method is shown to be unjust or inappropriate.”⁹⁷

Other commentators reacted less favorably to the CSSA and questioned, for example, whether there would ever be a situation in which the statutory percentages were not automatically applied: “[The] extensive burden of financial data necessary to deviate from the guidelines may result in strict ap-

94. Reichler, *supra* note 1, at 1 (citing L. 1992, ch. 41, § 145, *amending* DOM. REL. LAW § 240(1-b)(g); L. 1992, ch. 41, § 147, *amending* FAM. CT. ACT § 413(1)(g)).

95. Reichler, *supra* note 1, at 1. Reichler further explained:

[T]he U.S. Department of Health and Human Services had this to say about the additional requirements: “[T]he requirements for findings rebutting the guidelines amount are intended to limit the circumstances under which deviations will be allowed.

Deviations from the guidelines amount should occur only in a limited number of cases . . . and then only when judges or other officials can justify them.”

Id. (citing 56 Fed. Reg. 22,335 at 22,347 (1991)). “Comments that accompanied the federal regulations state that ‘[t]aken as a whole, the grounds for rebuttal may not be inconsistent with the best interests of the child. This will ensure that the child’s best interests are a primary consideration in any decision to deviate from the guidelines amount’” *Id.* (citing 56 Fed. Reg. at 22,346).

96. Reichler & Lefcourt, *supra* note 17, at 44.

97. Douglas J. Besharov, *Supplementary Practice Commentary 1992*, FAM. CT. ACT § 413 at 21-22 (McKinney Supp. 1995).

plication of the percentages.”⁹⁸ Another commentator discussed the possible ramifications of presumptive application of the statutory percentages: “[M]any attorneys fear that judges will mechanically apply the percentages ‘all the way up,’ resulting in a \$75,000.00 child support award being imposed on a two-child non-custodial parent who has statutory income of \$300,000.00.”⁹⁹

Commentators also questioned the derivation of the statutory percentages. One commentator stated that while the CSSA statutory percentages are based on a childrearing cost analysis by Jacques Van der Gaag,¹⁰⁰ they do not reflect the actual results of the Van der Gaag study.¹⁰¹ Commentator Leehy explained that the CSSA formulaic guideline percentages “are 32[%] below [V]an der Gaag’s estimate for the first child, 33[%] below that for the second, 41[%] below that for the third, and 44[%] below that for the fourth.”¹⁰² Van der Gaag’s figures, however, presumably include the cost of child care and extraordinary medical care;¹⁰³ the CSSA treats those costs as add-ons.¹⁰⁴ Nevertheless, Leehy believes this difference is not enough to justify such a drastic discrepancy between the study and the adopted percentages.¹⁰⁵ Leehy concluded “[s]ince the CSSA formulation fails to mirror the totality of childrearing costs in postdivorce households, the guidelines cannot alone provide a standard of living for children in divided households equivalent to that enjoyed in the preseparation home.”¹⁰⁶ Nancy Erickson, writing for the National Center on Women and Family Law,¹⁰⁷ agreed, stating “guidelines based on studies of expenditures in two-parent, two-income homes tend to underestimate the amount actually needed by the custodial parent to

98. Dranoff et al., *supra* note 66, at 89 (citing Dr. Doris Jones Freed & Joel R. Brandes, *New Legislation on Child Support Standards*, 202 N.Y. L.J. at 3 (1989)).

99. Dranoff et al., *supra* note 66, at 90.

100. See Leehy, *supra* note 14, at 1318 (citing JACQUES VAN DER GAAG, INSTITUTE FOR RESEARCH ON POVERTY, ON MEASURING THE COSTS OF CHILDREN (1982)).

101. See Leehy, *supra* note 14, at 1320.

102. Leehy, *supra* note 14, at 1319. See VAN DER GAAG, *supra* note 100.

103. See Leehy, *supra* note 14, at 1320. See also VAN DER GAAG, *supra* note 100.

104. DOM. REL. LAW § 240(1-b)(c)(5), (6); FAM. CT. ACT § 413(1)(c)(5), (6).

105. See Leehy, *supra* note 14, at 1320.

106. *Id.* at 1324.

107. See ERICKSON, *supra* note 63.

raise the children, since a one-parent family has additional expenses not considered by guidelines developers."¹⁰⁸ Erickson also stressed that many economic studies disagree with Espenshade's conclusion that the percentage of income spent on children decreases as income increases.¹⁰⁹

Erickson also strongly criticized the CSSA's use of a statutory cap:

Many state guidelines currently specify a maximum level of income to which they apply. Above that maximum, the court is directed either to disregard the guidelines altogether or to revert to the use of discretion with regard to whether *extra* child support should be ordered (and, if so, how much) in addition to the guidelines amount on the income below the maximum. All of these guidelines are out of compliance with the federal statutes and regulations and will have to be changed in order for the states to avoid penalties.¹¹⁰

Erickson cited a statement from the HHS which specified that states are not allowed to use "caps" to exempt categories of income from application of the statutory child support guidelines.¹¹¹ According to Erickson, the HHS stated:

108. *Id.* at 20-21. Erickson lists examples of these additional expenses, including: (1) the cost of hiring someone to do chores that were done by the other parent during the marriage; (2) the single parent's increased reliance on "convenience" foods which are generally more expensive than cooking meals "from scratch"; (3) babysitter costs. See ERICKSON, *supra* note 63, at 21.

109. See ERICKSON, *supra* note 63, at 195 n.38 (citing Philip Eden, *Critique of Interim Report, Development of Guidelines for Establishing and Updating Child Support Orders*, by Robert G. Williams, in CRITICAL ISSUES, CRITICAL CHOICES: SPECIAL TOPICS IN CHILD SUPPORT GUIDELINES DEVELOPMENT 105 (Women's Legal Defense Fund, 1986); Nancy Polikoff, *Looking for the Policy Choices Within an Economic Methodology: A Critique of the Income Share Model*, in ESSENTIALS OF CHILD SUPPORT GUIDELINES DEVELOPMENT: ECONOMIC ISSUES AND POLICY CONSIDERATIONS 27 (Women's Legal Defense Fund, 1987); William Terrell, *Child Support Expenditure Estimates for Child Support Guidelines*, in ESSENTIALS OF CHILD SUPPORT GUIDELINES DEVELOPMENT: ECONOMIC ISSUES AND POLICY CONSIDERATIONS 65 (Women's Legal Defense Fund, 1987)). See WILLIAMS, *supra* note 49 and accompanying text. See also ESPENSHADE, *supra* note 51 and accompanying text.

110. ERICKSON, *supra* note 63, at 215 (citing DOM. REL. LAW § 240(1-b)(c)(2)) (emphasis in the original). See DOM. REL. LAW § 240(1-b)(c)(2); FAM. CT. ACT § 413(1)(c)(2). Erickson also stated that "additional support for the proposition that income 'caps' are contrary to federal regulations is [45 C.F.R.] § 302.56(c)(1), which requires that state guidelines must, as a minimum, 'take into consideration all earnings and income of the absent parent.'" ERICKSON, *supra* note 63, at 215 n.81. See 45 C.F.R. § 302.56, *supra* note 63.

111. See ERICKSON, *supra* note 63, at 214.

[S]ection 467(b) of the [Family Support] Act clearly requires guidelines to be used as a rebuttable presumption in *any* judicial or administrative proceeding for the award of child support. Therefore, while *States may not simply exempt an entire category of cases with incomes above or below a specific dollar level from application of the guidelines*, the application of the guidelines in those cases may be rebutted as unjust or inappropriate on a case by case basis *However, we caution States that criteria for rebuttal may not be designed to exclude an inordinate number of cases from application of the guidelines, because to do so would clearly contravene the intent of the statute that guidelines be the norm, not the exception for determining support awards.*¹¹²

E. *Treatment of CPI Above \$80,000 Prior to Cassano*

1. *Practitioners' Assumptions*

Practitioners considered the CSSA to be "one part mathematical formula, one part discretionary."¹¹³ "In the trade, the equation [was] well known. Mathematical calculations applied up to \$80,000; discretion over \$80,000."¹¹⁴ The prevailing wisdom held that the CSSA's presumptive numerical formula "does not apply to that portion of the combined incomes that exceeds \$80,000. For such moneys, the court is required to examine the 'actual needs' of the children in determining what portion, if any, of the excess income should be applied to child support."¹¹⁵

2. *Inconsistencies Among the Lower Courts*

While practitioners seemingly agreed on what role CPI above \$80,000 would play in the calculation of child support awards, lower courts did not agree on their treatment of such income. Some courts would not consider CPI over \$80,000 in their calculations of child support awards unless warranted under the circumstances, and such justification was usually grounded in consideration of the child's actual needs. Other

112. *Id.* at 214-15 (citing 56 Fed. Reg. at 22,343 (1991)) (emphasis in the original). See FSA, *supra* note 63 and accompanying text.

113. Joel R. Brandes & Carole L. Weidman, *The Changes in Calculating Child Support*, N.Y. L.J. May 23, 1995 at 3.

114. *Id.*

115. Douglas J. Besharov with Ira Lichtiger, *Supplementary Practice Commentary 1993*, FAM. CT. ACT § 413, at 18 (McKinney Supp. 1995).

courts, however, were quicker to apply the statutory percentage to CPI above \$80,000, focusing less on the child's actual needs.

a. *Application of Statutory Formula If Warranted by Child's Actual Needs*

In *Reiss v. Reiss*,¹¹⁶ the defendant husband appealed from a judgment ordering him to pay \$634.10 per week for the support of the parties' four-year-old son.¹¹⁷ The husband's annual income exceeded \$80,000.¹¹⁸ The New York State Appellate Division, for the Second Department remitted for a new determination as to child support,¹¹⁹ because "the trial court's award of over \$32,000 per year in child support was excessive under the circumstances presented."¹²⁰ The appellate court concluded that the trial court's application of the statutory percentages to CPI above \$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."¹²¹

The combined income of the parties in *Harmon v. Harmon*¹²² equaled approximately \$169,500.¹²³ There, the wife was a "highly educated, experienced and credentialed speech and hearing pathologist and educational administrator";¹²⁴ the husband was a partner in a prestigious law firm.¹²⁵ The trial court calculated child support for the parties' son by applying the appropriate statutory percentage (17%) to the total CPI.¹²⁶ The husband challenged the trial court's award of over \$35,000 per year as "patently excessive for a [twenty]-year-old child living away at college for most of the year."¹²⁷ The New York State Appellate Division, for the First Department agreed with the husband and remanded for a new determination of child sup-

116. 170 A.D.2d 589, 566 N.Y.S.2d 365 (2d Dep't 1991).

117. *See id.* at 590, 566 N.Y.S.2d at 367.

118. *See id.*

119. *See id.* at 591, 566 N.Y.S.2d at 367.

120. *Id.* at 590, 566 N.Y.S.2d at 367.

121. *Id.* at 591, 566 N.Y.S.2d at 367.

122. 173 A.D.2d 98, 578 N.Y.S.2d 897 (1st Dep't 1992).

123. *See id.* at 101, 578 N.Y.S.2d at 898-99.

124. *Id.* at 101, 578 N.Y.S.2d at 898.

125. *See id.* at 101, 578 N.Y.S.2d at 899.

126. *See id.* at 110, 578 N.Y.S.2d at 904.

127. *Id.* at 110, 578 N.Y.S.2d at 904.

port.¹²⁸ The court opined that “a child is not a partner in the marital relationship, entitled to a ‘piece of the action,’”¹²⁹ and that “to apply blindly the statutory formula to the parties’ aggregate income over \$80,000 without any express findings or record evidence of the child’s actual needs would constitute both an abdication of the judicial responsibility and a trespass upon the right of parents to make lifestyle choices for their children.”¹³⁰

In *Chasin v. Chasin*,¹³¹ where the parties’ CPI equaled \$166,763,¹³² the plaintiff wife retained custody of their two children.¹³³ The trial court had calculated the child support award by applying the appropriate (25%) statutory percentage to the total CPI,¹³⁴ whereupon the husband contended that the amount of the award was excessive and contrary to the mandates of the CSSA.¹³⁵ The New York State Appellate Division, for the Third Department agreed and set aside the award of child support.¹³⁶ The court concluded that “[t]he blind application of the statutory formula to the [CPI] over \$80,000 without any express findings of the children’s actual needs constitutes an abdication of judicial responsibility and renders meaningless the statutory provision setting a cap on strict application of the formula.”¹³⁷

The parties in *Holmes v. Holmes*¹³⁸ had a CPI of \$96,147.¹³⁹ There, the family court agreed with the Hearing Examiner that the statutory percentage should apply to the total CPI¹⁴⁰ and the husband was ordered to pay \$236 per week for the support

128. *Harmon*, 173 A.D.2d at 111, 578 N.Y.S.2d at 904.

129. *Id.*

130. *Id.*

131. 182 A.D.2d 862, 582 N.Y.S.2d 512 (3d Dep’t 1992).

132. *See id.* at 863, 582 N.Y.S.2d at 514.

133. *See id.* at 862, 582 N.Y.S.2d at 514.

134. *See id.* at 863, 582 N.Y.S.2d at 514.

135. *See id.*

136. *See id.*

137. *Chasin*, 182 A.D.2d at 863, 582 N.Y.S.2d at 514 (citations omitted).

138. 184 A.D.2d 185, 592 N.Y.S.2d 72 (3d Dep’t 1992).

139. *See id.* at 186, 592 N.Y.S.2d at 73.

140. *See id.* A “Hearing Examiner” is defined generally as “a civil service employee of an administrative agency whose responsibility is to conduct hearings on matters within the agency’s jurisdiction.” BLACK’S LAW DICTIONARY 721 (6th ed. 1990).

of his two children.¹⁴¹ The husband argued on appeal that the Hearing Examiner's calculation of child support was "unjust."¹⁴² The New York State Appellate Division, for the Third Department reversed¹⁴³ and held "the Hearing Examiner's application of the child support percentages to that portion of the parties' [CPI] exceeding \$80,000 was an improvident exercise of discretion."¹⁴⁴ The court concluded that although the Hearing Examiner determined there was no reason not to apply the statutory percentage to the total CPI,¹⁴⁵ the award was improper since the Hearing Examiner failed to make express findings as to the children's actual needs.¹⁴⁶

The plaintiff wife in *Kessinger v. Kessinger*¹⁴⁷ challenged the trial court's award of \$316.48 per week for the support of the parties' infant children.¹⁴⁸ There, the parties' CPI equaled \$203,674,¹⁴⁹ \$177,748 of which was attributable to the husband.¹⁵⁰ The New York State Appellate Division, for the Third Department agreed with the wife that the trial court "applied an incorrect standard and made insufficient findings in its determination to limit application of the statutory formula to the \$80,000 cap"¹⁵¹ The court instructed that where the CPI is greater than \$80,000, the trial court should first apply the statutory percentage to the total CPI¹⁵² and then balance that sum against the children's actual needs, the preseparation standard

141. *See Holmes*, 184 A.D.2d at 186, 592 N.Y.S.2d at 73.

142. *Id.*

143. *See id.* at 188, 592 N.Y.S.2d at 74.

144. *Id.*

145. *See id.*

146. *See id.* *See also* *Panossian v. Panossian*, 201 A.D.2d 983, 607 N.Y.S.2d 840 (4th Dep't 1994) (family court erred when it applied the statutory percentage to CPI above \$80,000 without express findings as to child's actual needs); *Colley v. Colley*, 200 A.D.2d 839, 606 N.Y.S.2d 796 (3d Dep't 1994) (child support award set aside based on application of the statutory percentage to CPI above \$80,000 and remitted for hearing as to the parties' financial circumstances and the children's actual needs); *Smith v. Smith*, 197 A.D.2d 830, 602 N.Y.S.2d 963 (3d Dep't 1993) (strict application of the statutory percentages to CPI below \$80,000 is improper absent express findings as to the children's actual needs).

147. 202 A.D.2d 752, 608 N.Y.S.2d 358 (3d Dep't 1994).

148. *See id.* at 752-53, 608 N.Y.S.2d at 359-60.

149. *See id.* at 754, 608 N.Y.S.2d at 360.

150. *See id.*

151. *Id.*

152. *See id.*

of living and the parties' financial circumstances.¹⁵³ The appellate court concluded that if upon balancing these factors the support award is determined to be unjust or inappropriate, the court should then consider the statutory factors¹⁵⁴ and establish the appropriate level of child support.¹⁵⁵

The Third Department took a similar position in *Faber v. Faber*.¹⁵⁶ There, although the parties' CPI exceeded \$80,000,¹⁵⁷ the trial court calculated the child support award by applying the appropriate statutory percentage (17%) only to the CPI below \$80,000.¹⁵⁸ The plaintiff wife appealed the trial court's award of \$136 per week for child support¹⁵⁹ and the New York State Appellate Division, for the Third Department held that the trial court improperly based its child support award on CPI up to \$80,000 without any findings as to CPI above \$80,000.¹⁶⁰ The appellate court explained that the trial court should have considered the child's actual needs, and should then have examined the CPI above \$80,000, if necessary, in light of those needs.¹⁶¹

In *Nicholas v. Cirelli*,¹⁶² the husband earned in excess of \$110,000 per year.¹⁶³ The wife had successfully petitioned for an increase in child support to \$262 per week for the parties' son,¹⁶⁴ which the husband then appealed.¹⁶⁵ The wife had no income, was not employed outside the home, was the mother of four children and was "unable to adequately provide for [her son's] increased needs."¹⁶⁶ The New York State Appellate Division, for the Third Department said the award was not excessive¹⁶⁷ and upheld the trial court's application of the statutory

153. See *Kessinger*, 202 A.D.2d at 754, 608 N.Y.S.2d at 360-61.

154. See DOM. REL. LAW § 240(1-b)(f); FAM. CT. ACT § 413(1)(f). See also *supra* note 80.

155. See *Kessinger*, 202 A.D.2d at 754, 608 N.Y.S.2d at 361.

156. 206 A.D.2d 644, 614 N.Y.S.2d 771 (3d Dep't 1994).

157. See *id.* at 646, 614 N.Y.S.2d at 773.

158. See *id.*

159. See *id.*

160. See *id.*

161. See *id.*

162. 209 A.D.2d 840, 619 N.Y.S.2d 171 (3d Dep't 1994).

163. See *id.* at 841, 619 N.Y.S.2d at 172.

164. See *id.* at 840, 619 N.Y.S.2d at 171.

165. See *id.*

166. *Id.*

167. See *id.* at 841, 619 N.Y.S.2d at 172.

percentage to only the first \$80,000.¹⁶⁸ The court concluded “there was no basis to vary from the presumptively applicable statutory formula” since the husband did not prove the award was unjust or inappropriate.¹⁶⁹

The parties in *Riseley v. Riseley*¹⁷⁰ were divorced in 1988. The divorce judgment awarded the wife custody of the parties’ two children,¹⁷¹ and ordered the husband to pay “base” support of \$250 per week plus additional support based on a proportion of earnings above his 1988 “base” salary, plus half the cost of the children’s undergraduate education.¹⁷² In September, 1989 after one of the children came to live with him, the husband unilaterally reduced his child support payments.¹⁷³ In March, 1990, the husband successfully petitioned for a modification of the divorce judgment.¹⁷⁴ The trial court replaced the “base” support obligation with an amount calculated by applying the statutory percentage for one child (17%) to the CPI up to \$80,000,¹⁷⁵ but left in effect the divorce judgment’s other support provisions.¹⁷⁶ On appeal, the New York State Appellate Division, for the Third Department held that the trial court erred in its calculation of child support under the CSSA.¹⁷⁷ The appellate court articulated three bases for its reversal:

First, [the] [s]upreme [c]ourt incorrectly segmented defendant’s support obligation, fixing basic support in accordance with the CSSA but leaving in effect the remaining support provisions of the judgment of divorce. Because a support award under the CSSA is intended to satisfy all of a child’s basic requirements, there is a substantial likelihood that [the] [s]upreme [c]ourt’s determination made duplicate provision for certain of [one child’s] needs. Second, [the] [s]upreme [c]ourt considered only support for [one child], giving no consideration to [the other child’s] needs and the fact that defendant was providing for them. Third, although [the] [s]upreme [c]ourt recites in its written decision that it con-

168. See *Nicholas*, 209 A.D.2d at 841, 619 N.Y.S.2d at 172.

169. *Id.*

170. 208 A.D.2d 132, 622 N.Y.S.2d 387 (3d Dep’t 1995).

171. See *id.* at 133, 622 N.Y.S.2d at 388.

172. See *id.* at 133-34, 622 N.Y.S.2d at 388.

173. See *id.* at 134, 622 N.Y.S.2d at 388.

174. See *id.*

175. See *id.* 208 A.D.2d at 134, 622 N.Y.S.2d at 388.

176. See *Riseley*, 208 A.D.2d at 134, 622 N.Y.S.2d at 388.

177. See *id.*

sidered [one child's] actual needs and the [statutory] factors . . . , there is serious question as to whether the statutory mandate was actually fulfilled. Significantly, our review of the record discloses no evidence from which [the child's] needs could be determined or such as would have permitted intelligent consideration of most of the statutory factors.¹⁷⁸

Further, the appellate court reiterated its approach to calculating child support awards, stating that trial courts should first apply the statutory percentage to CPI up to \$80,000 and the resulting amount should stand if it is sufficient in light of careful consideration of the children's needs.¹⁷⁹ The court specified that if the resulting amount is not sufficient to meet the children's needs, the trial court should order additional support by applying the statutory percentage to some or all of the CPI above \$80,000 and/or by considering the enumerated statutory factors.¹⁸⁰ Significantly, the appellate court also clarified *Kessinger*:¹⁸¹

[That] decision . . . should not be read to create a presumption in favor of an application of the statutory percentage [to CPI above \$80,000]. There is no presumption in favor of either approach and courts should determine on a case-by-case basis whether (1) to apply the statutory percentage to some or all of the income over the \$80,000 cap, making specific findings of the children's actual needs, or (2) to determine the level of support based upon a consideration of the statutory factors.¹⁸²

178. *Id.* at 134-35, 622 N.Y.S.2d at 388 (citations omitted). See *supra* note 80.

179. See *Riseley*, 208 A.D.2d at 135, 622 N.Y.S.2d at 389. See also *Rochler v. Rochler*, 215 A.D.2d 831, 626 N.Y.S.2d 312 (3d Dep't 1995) (where CPI is less than \$80,000, a finding that the basic support obligation exceeds the child's actual needs may be relevant in determining whether that obligation is unjust or inappropriate); *Montagnino v. Montagnino*, 208 A.D.2d 631, 617 N.Y.S.2d 354 (2d Dep't 1994) (upheld application of statutory percentage to CPI above \$80,000 in light of parties' circumstances and the child's specific needs); *Slankard v. Chahinian*, 204 A.D.2d 529, 611 N.Y.S.2d 300 (2d Dep't 1994) (directed trial court to make express findings as to child's actual needs before considering CPI above \$80,000 in calculating child support award).

180. See *Riseley*, 208 A.D.2d at 135, 622 N.Y.S.2d at 389. See also *supra* note 80.

181. See *Kessinger*, 202 A.D.2d 752, 608 N.Y.S.2d 358 (3d Dep't 1994). See also *supra* notes 147-55 and accompanying text.

182. *Riseley*, 208 A.D.2d at 135 n.1, 622 N.Y.S.2d at 389 n.1 (citation omitted). See *supra* note 80.

Two months later, in *Eaton v. Eaton*,¹⁸³ the Supreme Court, Appellate Division, Third Department affirmed the trial court's calculation of child support.¹⁸⁴ There, both parties appealed an order directing the husband to pay \$560 biweekly for the support of their three children.¹⁸⁵ The trial court initially applied the statutory percentage (29%) to the first \$80,000 of CPI.¹⁸⁶ Then, after having considered the statutory factors, the parties' financial circumstances, the children's preseparation standard of living and their actual needs, the trial court awarded additional support based on a discretionary 7% of CPI above \$80,000.¹⁸⁷

The husband in *Costanza v. Costanza*¹⁸⁸ challenged an order directing him to pay \$760 per week support for the parties' one child.¹⁸⁹ There, the parties' CPI equaled \$183,397,¹⁹⁰ \$153,338 of which was attributable to the husband.¹⁹¹ The Supreme Court, Appellate Division, Fourth Department found the trial court's award of approximately \$40,000 per year in child support to be excessive.¹⁹² The appellate court postulated that while the trial court could properly consider the child's preseparation standard of living in calculating the award, the award was improper when balanced against the child's actual, reasonable needs.¹⁹³

b. *Child's Actual Needs Not the Determining Factor*

The New York State Supreme Court, New York County, in *Steel v. Steel*,¹⁹⁴ compared calculations of child support awards before and after the CSSA.¹⁹⁵ The court stated that pre-CSSA,

183. 214 A.D.2d 933, 626 N.Y.S.2d 286 (3d Dep't 1995).

184. *See id.* at 934, 626 N.Y.S.2d at 287.

185. *See id.* at 933, 626 N.Y.S.2d at 287.

186. *See id.* at 933, 626 N.Y.S.2d at 286. The parties' total CPI equaled \$103,124. *See id.*

187. *See id.* at 933-34, 626 N.Y.S.2d at 287. *See supra* note 80 for a discussion of the statutory factors.

188. 213 A.D.2d 1044, 625 N.Y.S.2d 762 (4th Dep't 1995).

189. *See id.* at 1045, 625 N.Y.S.2d at 763.

190. *See id.* at 1045, 625 N.Y.S.2d at 763.

191. *See id.*

192. *See id.* at 1046, 625 N.Y.S.2d at 763.

193. *See id.*

194. 152 Misc. 2d 880, 579 N.Y.S.2d 531 (Sup. Ct. N.Y. County 1990).

195. *See id.* at 882, 579 N.Y.S.2d at 533.

courts would commonly calculate child support by adding up costs attributable to the children and then allocating these costs between the parents, a method which "almost invariably relegated the child to the standard of living of the custodial parent alone."¹⁹⁶ The court continued:

Any further use of this so-called "cost-allocation" approach would be in direct conflict with the CSSA, which does not attempt to provide merely for the "costs" of caring for a child, or even the "needs" of the child (unless there is special need shown), but is grounded on the principle that the parents' income and *standard of living* should be shared by the child. Under the CSSA, the court is constrained to the extent possible, to provide that the child will have a standard of living appropriate to the income of both parents.¹⁹⁷

In *Steel*, the mother had custody of the parties' four children.¹⁹⁸ The parties' CPI equaled approximately \$175,500,¹⁹⁹ \$149,081 of which was attributable to the father.²⁰⁰ The court chose to calculate its child support award solely by applying the statutory percentage to the total CPI "[s]ince the amount of child support indicated by application of the percentage [was] not manifestly too little or too much."²⁰¹ The supreme court concluded that children "should not have to live at a standard that is significantly lower than that enjoyed by the noncustodial parent."²⁰²

In *Brown v. Brown*,²⁰³ the defendant husband allegedly physically and verbally abused his wife and their three children during the three years prior to the action.²⁰⁴ Subsequent to obtaining orders of protection, the wife sued for divorce.²⁰⁵ The husband never answered or appeared, either to contest the divorce or in response to a summons for an evidentiary hearing regarding custody and child support.²⁰⁶ The New York State Supreme Court, Nassau County awarded the wife custody of the

196. *Id.*

197. *Id.* (emphasis in the original).

198. *See id.* at 881, 579 N.Y.S.2d at 532.

199. *See id.* at 883, 579 N.Y.S.2d at 533.

200. *See Steel*, 152 Misc. 2d at 883, 579 N.Y.S.2d at 533.

201. *Id.* at 884, 579 N.Y.S.2d at 534.

202. *Id.* at 886, 579 N.Y.S.2d at 535.

203. 204 N.Y. L.J. 30 (1990) (Sup. Ct. Nassau County 1990).

204. *See id.*

205. *See id.*

206. *See id.*

children and ordered the husband to pay \$492 per week child support.²⁰⁷ The court reached that amount by applying the statutory percentage to the total CPI (\$106,734) and stated simply that it was within its discretion to do so.²⁰⁸

III. *Cassano v. Cassano*²⁰⁹

A. *Facts and Procedural History*

Maryann and Dominick Cassano divorced in 1986.²¹⁰ Maryann was awarded custody of their two children and her ex-husband was ordered to pay \$125 per week in child support.²¹¹ In 1989, Maryann petitioned for an increase in child support for the non-emancipated child, pursuant to the newly enacted CSSA.²¹² The Hearing Examiner, after an evidentiary hearing, "found a substantial increase in the parties' financial circumstances warranting increased child support"²¹³ and ordered the father to pay an additional \$93 per week in child support, for a total of \$218 per week.²¹⁴ The Hearing Examiner calculated the award based on the total CPI of \$99,944, 64.4% of which was attributable to the father.²¹⁵ The total CPI was multiplied by the applicable statutory percentage (17%) and the father was

207. *See id.*

208. *See id.* The CPI was an approximation since the only information the court had as to the husband's current income was a 1983 W-2 statement. *See id.* *See also* De Bernardo v. De Bernardo, 180 A.D.2d 500, 580 N.Y.S.2d 27 (1st Dep't 1992) (in a decision one month after *Harmon*, 173 A.D.2d 98, 578 N.Y.S.2d 897 (1st Dep't 1992), the court applied the appropriate statutory percentage to the total CPI of \$133,000 and explained only that the CSSA affords the option of doing so); *Rosen v. Rosen*, 204 N.Y. L.J. 31 (1990) (Sup. Ct. Kings County 1990) (acknowledged courts' discretion to apply statutory percentage to CPI above \$80,000, and stated that to do so in the case at bar was appropriate). *Contra Harmon*, *supra* notes 122-30 and accompanying text.

209. 85 N.Y.2d 649, 651 N.E.2d 878, 628 N.Y.S.2d 10 (1995).

210. *See id.* at 651, 651 N.E.2d at 879, 628 N.Y.S.2d at 11.

211. *See id.* at 651, 651 N.E.2d at 879-80, 628 N.Y.S.2d at 11-12. Note that the child support award was calculated prior to enactment of the CSSA. *See discussion infra* part II.A.

212. *See* 85 N.Y.2d at 651, 651 N.E.2d at 880, 628 N.Y.S.2d at 12. *See discussion infra* part II.C.

213. *Cassano*, 85 N.Y.2d at 651, 651 N.E.2d at 880, 628 N.Y.S.2d at 12.

214. *See id.* The father was also ordered to pay 64.4% of the child's private school costs and unreimbursed medical expenses. *See id.*

215. *See id.*

ordered to pay 64.4% of that amount.²¹⁶ Subsequently, in Queens County Family Court, the father argued that the Hearing Examiner's application of the statutory percentage to the CPI above \$80,000 was improper because the Hearing Examiner failed to set forth reasons for doing so.²¹⁷ The family court stated that the CSSA permitted courts to determine child support awards by applying the statutory percentages to CPI above \$80,000, without having to set forth reasons for the award.²¹⁸ The family court concluded there was no cause to interfere with the Hearing Examiner's discretion and upheld the modified child support award.²¹⁹ The New York State Appellate Division, for the Second Department subsequently affirmed the modification.²²⁰ While the appellate court agreed with the father that the trial court was required to state its reasons for upholding the application of the statutory percentage to CPI above \$80,000,²²¹ it concluded that this requirement was satisfied by the trial court's reliance on the Hearing Examiner's recommendations.²²² The New York Court of Appeals unanimously affirmed.²²³

B. *Decision of the New York State Court of Appeals*

The New York Court of Appeals addressed the issue of whether a "court must articulate a reason for its award of child support on [CPI] exceeding \$80,000 when it chooses simply to apply the statutory percentage."²²⁴ The court initially discussed the development of the CSSA and stressed the legislative objectives underlying its enactment.²²⁵ One such objective, noted the

216. *See id.*; DOM. REL. LAW § 240(1-b)(c)(3); FAM. CT. ACT § 413(1)(c)(3). *See also supra* note 79.

217. *See Cassano*, 85 N.Y.2d at 651-52, 651 N.E.2d at 880, 628 N.Y.S.2d at 12.

218. *See id.* at 652, 651 N.E.2d at 880, 628 N.Y.S.2d at 12.

219. *See id.*

220. *Cassano v. Cassano*, 203 A.D.2d 563, 612 N.Y.S.2d 160, 161 (2d Dep't 1994).

221. *See id.*

222. *See id.*

223. *Cassano v. Cassano*, 85 N.Y.2d 649, 656, 651 N.E.2d 878, 882, 628 N.Y.S.2d 10, 14 (1995).

224. *Id.* at 654, 651 N.E.2d at 881, 628 N.Y.S.2d at 13.

225. *See id.* at 652, 651 N.E.2d at 880, 628 N.Y.S.2d at 12. *See* WEINSTEIN, *supra* note 2; GOVERNOR'S MEMORANDUM, *supra* note 2. *See also* discussion *supra* part II.C.

court, was to shift emphasis “from a balancing of the expressed needs of the child and the income available to the parents after expenses²²⁶ to the total income available to the parents and the standard of living that should be shared with the child.”²²⁷ The overall goal of the CSSA, according to the court, was to ensure that child support awards would be more uniform, predictable and equitable, while at the same time allowing courts to use discretion when unique circumstances warrant.²²⁸ The court then examined how child support awards are calculated pursuant to the CSSA and explained that in calculating the child support obligation on CPI over \$80,000 the CSSA explicitly gives a court the option, based on its discretion, to apply the “paragraph (f)” factors,²²⁹ the applicable statutory percentage, or both.²³⁰ Further, the court stated that because this discretion “is subject to review for abuse, some record articulation of the reasons for the court’s choice to apply the percentage is necessary to facilitate that review.”²³¹ To this end, according to the court of appeals, if a court chooses to apply the statutory percentage to CPI above \$80,000, it will satisfy the articulation of reasons required by simply stating that, after considering the parties’ circumstances, there are no reasons why the percentage should not apply.²³² The court concluded that “[d]efendant’s in-

226. See, e.g., *Kaplan*, *supra* notes 21-25 and accompanying text; *Parry*, *supra* notes 36-41 and accompanying text; *Stevens*, *supra* notes 42-45 and accompanying text.

227. *Cassano*, 85 N.Y.2d at 652, 651 N.E.2d at 880, 628 N.Y.S.2d at 12 (quoting *Reichler & Lefcourt*, *supra* note 17, at 44). See, e.g., *Steel*, *supra* notes 194-202 and accompanying text.

228. See *Cassano*, 85 N.Y.2d at 652-53, 651 N.E.2d at 880, 628 N.Y.S.2d at 12 (citing *WEINSTEIN*, *supra* note 2, and GOVERNOR’S MEMORANDUM, *supra* note 2).

229. See *supra* note 80.

230. See 85 N.Y.2d at 655, 651 N.E.2d at 882, 628 N.Y.S.2d at 14. The court noted that its interpretation is consistent with the CSSA’s objectives. See *id.* The court also articulated the CSSA’s “three-step method” for calculating the basic child support obligation: (1) calculate CPI; (2) multiply the CPI up to \$80,000 by the appropriate statutory percentage and allocate that amount between the parents (based on their share of CPI); (3) to CPI exceeding \$80,000, apply the “paragraph (f)” factors or the applicable statutory percentage or some combination of both. See *id.* at 653, 651 N.E.2d at 880-81, 628 N.Y.S.2d at 12-13. See also DOM. REL. LAW § 240(1-b)(c)(3), (f); FAM. CT. ACT § 413(1)(c)(3), (f); discussion of legislative objectives, *supra* part II.C.

231. *Cassano*, 85 N.Y.2d at 655, 651 N.E.2d at 882, 628 N.Y.S.2d at 14 (citations omitted).

232. See *id.*

sistence on an elaboration of needs-based reasons . . . rolls back the calendar to pre-1989 law"²³³ and held that here, application of the statutory percentage to the CPI above \$80,000 was justified since the record indicated no reason why it should not apply.²³⁴

C. *The Aftermath of Cassano: Cases and Commentary*

Clearly, according to commentators, the court of appeals' ruling in *Cassano*²³⁵ "allows judges to apply the [statutory] formula in high income cases based simply on a finding that there is no reason to depart from it."²³⁶ Nevertheless, in subsequent cases the lower courts have hesitated to exercise that option. In *Orofino v. Orofino*,²³⁷ the plaintiff wife argued that the New York State Supreme Court, Ulster County, incorrectly calculated its child support award. The trial court had granted plaintiff a divorce and awarded her custody of the parties' children.²³⁸ The court determined that the parties' CPI equaled \$139,926, 60% of which was attributable to the husband, and ordered him to pay \$299 per week in child support.²³⁹ In reaching that amount, the trial court applied the appropriate statutory percentage (25%) to the first \$80,000 of CPI, and then applied a reduced percentage (10%) to the remaining CPI above \$80,000.²⁴⁰ The New York State Appellate Division, for the Third Department upheld the trial court's calculation of child support,²⁴¹ based on the fact that the "[s]upreme [c]ourt considered the financial situation of both parties and determined that the financial resources of [the custodial parent] and the children will be more than sufficient to meet their needs."²⁴²

233. *Id.*

234. *See id.*

235. 85 N.Y.2d at 849, 651 N.E.2d at 878, 628 N.Y.S.2d at 10. *See supra* notes 224-34 and accompanying text.

236. Gary Spencer, *Child Support Rules Interpreted: Use of Law's Formula Needs No Explanation*, 213 N.Y. L.J., May 10, 1995, at 1. *See Brandes & Weidman, supra* note 113.

237. 215 A.D.2d 997, 627 N.Y.S.2d 460 (3d Dep't 1995).

238. *See id.* at 997, 627 N.Y.S.2d at 461.

239. *See id.* at 998-99, 627 N.Y.S.2d at 462.

240. *See id.* at 999, 627 N.Y.S.2d at 462.

241. *See id.*

242. *Id.* at 999, 627 N.Y.S.2d at 462.

In *Jones v. Reese*,²⁴³ the appellant mother challenged a judgment of the New York State Family Court, Albany County which ordered the father to pay \$1787 per month for the support of their child.²⁴⁴ The Hearing Examiner had originally set child support at \$2700 per month²⁴⁵ but the family court reduced that amount, finding that it exceeded the child's needs.²⁴⁶ The family court relied on *Chasin*²⁴⁷ and held that the CSSA should apply to CPI above \$80,000 if justified by the child's actual needs.²⁴⁸ The mother argued on appeal that the CSSA "is grounded on the principle that the parents' income and their standard of living should be shared by the child."²⁴⁹ The Supreme Court, Appellate Division, Third Department agreed and held that the trial court's reduction of the award was contraindicated in light of *Cassano*.²⁵⁰

In *Straker v. Straker*,²⁵¹ the plaintiff wife appealed from a judgment of the New York State Supreme Court, Nassau County which ordered the husband to pay \$900 per month for child support.²⁵² The New York State Appellate Division, for the Second Department upheld the trial court's discretionary refusal to apply the statutory percentage to CPI above \$80,000.²⁵³ According to the appellate court, the trial court properly considered the statutory factors, the financial circumstances of the parties, the children's best interests and the requirements of justice.²⁵⁴

243. 217 A.D.2d 783, 629 N.Y.S.2d 311 (3d Dep't 1995).

244. See *id.* at 783-84, 629 N.Y.S.2d at 311-12.

245. See *id.* at 784, 629 N.Y.S.2d at 312.

246. See *id.* at 783-84, 629 N.Y.S.2d at 312.

247. 182 A.D.2d 862, 582 N.Y.S.2d 512 (3d Dep't 1992). See *supra* notes 131-37 and accompanying text.

248. See *Jones*, 217 A.D.2d at 783, 629 N.Y.S.2d at 312.

249. *Id.* at 784, 629 N.Y.S.2d at 311.

250. See *id.* at 784, 629 N.Y.S.2d at 312. See also *Cassano*, 85 N.Y.2d 649, 651 N.E.2d 878, 628 N.Y.S.2d 10, *supra* notes 224-34 and accompanying text.

251. 219 A.D.2d 707, 631 N.Y.S.2d 767 (2d Dep't 1995).

252. See *id.* at 707, 631 N.Y.S.2d at 768.

253. See *id.*

254. See *id.* See DOM. REL. LAW § 240(1-b)(c)(3), (f); FAM. CT. ACT § 413(1)(c)(3), (f). See also *Lucille Ann D. v. David F. K.*, 219 A.D.2d 874, 632 N.Y.S.2d 909 (4th Dep't 1995) (upheld trial court's child support award based on CPI above \$80,000, because the trial court fully explained that its reason for doing so was grounded in its consideration of the statutory "paragraph (f)" factors); *Prystay v. Avildsen*, 220 A.D.2d 337, 632 N.Y.S.2d 570 (1st Dep't 1995) (Hearing Exam-

IV. Analysis

Prior to the enactment of the CSSA, child support awards were calculated based primarily upon a court's discretion.²⁵⁵ As a result, discrepancies arose between lower court awards due to the difference in factors considered, and the weight given to each, in calculating child support awards.²⁵⁶ There was not only a lack of uniformity of these awards among the lower courts,²⁵⁷ but also a lack of predictability as to how each court would calculate the child support obligation in any given circumstance.²⁵⁸ Enactment of some form of child support guidelines was certainly necessary in order to provide a level of uniformity, predictability and equity in child support awards.

In response to a federal mandate,²⁵⁹ the New York Legislature promulgated the CSSA²⁶⁰ which established presumptive guidelines for courts to use in their determinations of child support obligations.²⁶¹ The underlying legislative purpose of the CSSA was to ensure a higher level of consistency and adequacy of child support awards, as well as to enable children to share in their parents' wealth.²⁶² In light of these stated legislative goals, however, the success of the CSSA was, at best, limited. For families with CPI of \$80,000 or less, the CSSA indeed pro-

iner properly considered the statutory "paragraph (f)" factors in awarding child support based on CPI above \$80,000). See *supra* note 80.

255. See Leehy, *supra* note 14. See discussion *supra* part II.A.

256. See illustrative cases, *supra* notes 18-45 and accompanying text.

257. Compare Kaplan v. Kaplan, 77 A.D.2d 891, 430 N.Y.S.2d 692 (2d Dep't 1980) (focus on financial resources of non-custodial parent) with Moran v. Moran, 81 A.D.2d 740, 438 N.Y.S.2d 421 (4th Dep't 1981) (child support calculated by balancing various aspects of marital relationship and should be in the best interests of the child) and Stevens v. Stevens, 107 A.D.2d 987, 484 N.Y.S.2d 708 (3d Dep't 1985) (trial court must consider all statutory factors). See *supra* notes 21-30, 42-45 and accompanying text.

258. Compare Iacobacci v. Iacobacci, 84 A.D.2d 759, 443 N.Y.S.2d 768 (2d Dep't 1981) (importance of maintaining children's pre-separation standard of living) with Kaplan v. Kaplan, 77 A.D.2d 891, 430 N.Y.S.2d 692 (2d Dep't 1980) (focus on financial resources of non-custodial parent) and Tornese v. Tornese, 55 A.D.2d 602, 389 N.Y.S.2d 385 (2d Dep't 1976) (balance various aspects of the marital relationship). See *supra* notes 18-25, 31-35 and accompanying text.

259. See Federal Family Support Act of 1988, *supra* note 63 and accompanying text.

260. See *supra* note 1.

261. See discussion *supra*, part II.C.

262. See WEINSTEIN, *supra* note 2; GOVERNOR'S MEMORANDUM, *supra* note 2. See also discussion *supra* part II.C.

vided uniformity, predictability and equity in child support awards by mandating application of the appropriate statutory percentage to the total income.²⁶³ For families with CPI above \$80,000, however, the resulting awards of child support remained inconsistent among the lower courts,²⁶⁴ and many awards were contrary to the legislative goal of enabling children to share in the standard of living of their parents.²⁶⁵

Unpredictable, inconsistent, inequitable awards of child support to families with CPI above \$80,000 persisted because the CSSA afforded three options for courts to consider in calculating child support obligations on CPI above \$80,000: (1) consider the enumerated statutory factors (one of which is "any other factors the court determines are relevant") and decide what, if any, percentage should be applied to that income; (2) choose to simply apply the appropriate statutory percentage to that income; (3) utilize some combination of both of these options.²⁶⁶ Therefore, courts were able to favor whichever option reflected their individual interpretations of the purpose of child support awards.

As a result, child support awards were extremely varied.²⁶⁷ Regardless of the legislative intent underlying the CSSA, many

263. See DOM. REL. LAW § 240(1-b)(c)(2); FAM. CT. ACT § 413(1)(c)(2). See also discussion *supra* part II.C.

264. Compare *Harmon v. Harmon*, 173 A.D.2d 98, 578 N.Y.S.2d 897 (1st Dep't 1992) (to apply statutory percentage to CPI above \$80,000 without express findings as to child's actual needs constitutes abdication of judicial responsibility) with *De Bernardo v. De Bernardo*, 180 A.D.2d 500, 580 N.Y.S.2d 27 (1st Dep't 1992) (applied statutory percentage to CPI above \$80,000 because CSSA affords the option of doing so). See *supra* notes 122-30, 208 and accompanying text. See also discussion, *supra* part II.E.

265. See, e.g., *Costanza v. Costanza*, 213 A.D.2d 1044, 625 N.Y.S.2d 762 (4th Dep't 1995); *Harmon v. Harmon*, 173 A.D.2d 98, 578 N.Y.S.2d 897 (1st Dep't 1992); *Chasin v. Chasin*, 182 A.D.2d 862, 582 N.Y.S.2d 512 (3d Dep't 1992). See *supra* notes 122-37, 188-93 and accompanying text. See also discussion of CSSA's legislative history, *supra* part II.C.

266. See DOM. REL. LAW § 240(1-b)(c)(3), (f); FAM. CT. ACT § 413(1)(c)(3), (f). For a listing of the "paragraph (f)" factors, see *supra* note 80.

267. Compare, e.g., *Reiss v. Reiss*, 170 A.D.2d 589, 566 N.Y.S.2d 365 (2d Dep't 1995) (application of statutory percentage to CPI above \$80,000 improper when balanced against parties' financial circumstances and reasonable support requirements of the child) and *Holmes v. Holmes*, 184 A.D.2d 185, 592 N.Y.S.2d 72 (3d Dep't 1992) (must be express findings of children's actual needs) with *Steel v. Steel*, 152 Misc. 2d 880, 579 N.Y.S.2d 531 (Sup. Ct. N.Y. County 1990) (focus on maintaining child's pre-separation standard of living) and *Brown v. Brown*, N.Y. L.J., July 16, 1990, at 30 col. 2 (Sup. Ct. Nassau County 1990) (within court's dis-

appellate courts apparently believed that child support should be awarded only to the extent necessary to provide for what the court determined to be the child's actual needs.²⁶⁸ Consequently, trial court awards of child support based on application of the statutory percentage to CPI over \$80,000 were often overruled if the appellate court found no indication of express findings as to the child's actual needs.²⁶⁹

The New York Court of Appeals in *Cassano*²⁷⁰ reiterated the impropriety of courts' reliance on needs-based justification for child support awards based on CPI above \$80,000.²⁷¹ In *Cassano*, the court emphasized that one of the underlying legislative goals of the CSSA was to ensure that children would share in the standard of living of both their parents,²⁷² and stated that an "insistence on an elaboration of needs-based reasons . . . rolls back the calendar to pre-1989 law."²⁷³ More importantly, the court held that lower courts may properly apply the statutory percentage to CPI above \$80,000 by simply articulating that, after consideration of the parties' circumstances, there is no reason why the percentage should not apply.²⁷⁴ This holding effectively reversed the prevailing presumption that application of the statutory percentage to CPI above \$80,000 must be justified: whereas before *Cassano* the presumption was that the statutory percentage did not apply to CPI above \$80,000 unless circumstances warranted,²⁷⁵ *Cassano* clearly indicates that the statutory percentage is presumed to apply to income above \$80,000 unless circumstances evince it should not apply.²⁷⁶ *Cassano*, then, effectively shifts the burden of proof to the party opposing application of the percentages to CPI above \$80,000,

cretion to apply statutory percentage to CPI above \$80,000). See *supra* notes 116-21, 138-46, 194-208 and accompanying text.

268. See illustrative cases *supra* notes 116-93 and accompanying text.

269. See illustrative cases *supra* notes 122-46 and accompanying text.

270. 85 N.Y.2d 649, 651 N.E.2d 878, 628 N.Y.S.2d 10 (1995).

271. See discussion *supra* part III.B.

272. See *Cassano*, 85 N.Y.2d at 652, 651 N.E.2d at 880, 628 N.Y.S.2d at 12. See also discussion *supra* part III.B.

273. 85 N.Y.2d at 655, 651 N.E.2d at 882, 628 N.Y.S.2d at 14. See discussion *supra* part III.B.

274. See 85 N.Y.2d at 655, 651 N.E.2d at 882, 628 N.Y.S.2d at 14. See discussion *supra* part III.B.

275. See Besharov with Lichtiger, *supra* note 115 and accompanying text. See also illustrative cases *supra* notes 116-93 and accompanying text.

276. See discussion *supra* part III.B.

making it more likely that children affected by the separation will continue to share in the total parental income.²⁷⁷

In reaching the *Cassano* decision, however, the court of appeals necessarily reaffirmed the various statutory options which afford courts discretion in their treatment of CPI above \$80,000.²⁷⁸ Herein lies the problem with the holding in *Cassano*: on one hand, the court held that the statutory percentages presumptively apply to CPI above \$80,000 unless there are reasons why they should not;²⁷⁹ on the other hand, the court held that lower courts could opt not to apply the statutory percentages to CPI above \$80,000 and instead consider the statutory factors in calculating the child support award.²⁸⁰ In other words, there is a presumption that the statutory percentage applies to CPI above \$80,000, if the court chooses that option to calculate the child support obligation. If a court chooses the other option, however, the presumption effectively is that the statutory percentage applies only to CPI up to \$80,000, and any additional child support award will be at the court's discretion after consideration of the statutory factors. Because courts are free to choose either option, according to *Cassano*, families and practitioners cannot predict which party will have the burden of proof in their case. Not only is such unpredictability blatantly unfair, but nonuniformity of child support awards will likely persist as courts continue to exercise their options. Furthermore, when courts choose the latter option where the percentage presumptively applies only to the first \$80,000 of CPI (and the burden of proof is on the proponent of application of the percentages to CPI above \$80,000), it becomes less likely that children in these situations will continue to share in the standard

277. This resulting shift in the burden of proof is conducive to achieving the CSSA's legislative goal that children should share in the standard of living of both parents. See discussion *supra* part II.C.

278. See *Cassano*, 85 N.Y.2d at 655, 651 N.E.2d at 882, 628 N.Y.S.2d at 14. The court of appeals explained that, in calculating child support on CPI above \$80,000, courts may apply the appropriate statutory percentage or the statutory "paragraph (f)" factors or both. See *id.* See also discussion *supra* part III.B. For a listing of the "paragraph (f)" factors see *supra* note 80. See also DOM. REL. LAW § 240(1-b)(c)(3), (f); FAM. CT. ACT § 413(1)(c)(3), (f).

279. See 85 N.Y.2d at 655, 651 N.E.2d at 882, 628 N.Y.S.2d at 14. See also discussion *supra* part III.B.

280. See 85 N.Y.2d at 655, 651 N.E.2d at 882, 628 N.Y.S.2d at 14. See also discussion *supra* part III.B.

of living of both parents. Clearly, these results are contrary to the legislative goals underlying the CSSA.²⁸¹

The court of appeals in *Cassano* was constrained by both the statutory language²⁸² and the narrow issue before it. The issue in *Cassano* was whether a court must articulate needs-based reasons for calculating its child support award by applying the statutory factors to CPI above \$80,000.²⁸³ In reaching its decision, the court had to address the statutory options available to courts in situations where CPI exceeds \$80,000²⁸⁴ in order to explain that the statutory percentage could be presumptively applied.²⁸⁵ The confusion generated by the court's reasoning could hardly have been avoided in light of the statutory \$80,000 cap and the various statutory provisions addressing it.²⁸⁶ The court was bound by the statutory language which expressly affords courts choices when addressing CPI above \$80,000.²⁸⁷ In articulating the proper interpretation of this language,²⁸⁸ the court necessarily addressed all the statutory options in order to avoid rewriting the statute. Ironically, the decision in *Cassano* effectively eliminates the statutory cap, stating that the statutory percentage may presumptively apply to CPI above \$80,000.²⁸⁹

Unfortunately, the existence of the statutory cap and the accompanying statutory options as to CPI above \$80,000,²⁹⁰ coupled with the reasoning in *Cassano*,²⁹¹ leaves the door open for courts to presumptively apply the statutory percentage only to CPI up to \$80,000.²⁹² Consequently, while *Cassano* facially ap-

281. See discussion *supra* part II.C.

282. See DOM. REL. LAW § 240(1-b)(c)(3), (f); FAM. CT. ACT § 413(1)(c)(3), (f).

283. See *Cassano*, 85 N.Y.2d at 654, 651 N.E.2d at 881, 628 N.Y.S.2d at 13.

284. See *id.* at 655, 651 N.E.2d at 882, 628 N.Y.S.2d at 14. See *supra* note 278.

285. See 85 N.Y.2d at 655, 651 N.E.2d at 882, 628 N.Y.S.2d at 14.

286. See DOM. REL. LAW § 240(1-b)(c), (f); FAM. CT. ACT § 413(1)(c), (f).

287. See DOM. REL. LAW § 240(1-b)(c)(3); FAM. CT. ACT § 413(1)(c)(3).

288. See *Cassano*, 85 N.Y.2d at 655, 651 N.E.2d at 882, 628 N.Y.S.2d at 14.

289. See *id.*

290. See DOM. REL. LAW § 240(1-b)(c), (f); FAM. CT. ACT § 413(1)(c), (f). See also note 80 *supra* and discussion *supra* part II.C.

291. See discussion *supra* part III.B.

292. See *Orofino v. Orofino*, 215 A.D.2d 997, 627 N.Y.S.2d 460 (3d Dep't 1995); *Straker v. Straker*, 219 A.D.2d 707, 631 N.Y.S.2d 767 (2d Dep't 1995); *Lucille Ann D. v. David F. K.*, 219 A.D.2d 874, 632 N.Y.S.2d 909 (4th Dep't 1995); *Prystay v.*

pears to have settled the discrepancies between the courts,²⁹³ it inherently allows lower court awards of child support to continually vary. Some courts will choose to apply the statutory percentage to CPI above \$80,000, while others will choose instead to apply the statutory factors or some combination of both. Indeed, the few relevant cases subsequent to *Cassano* illustrate that families and practitioners can expect only continued inconsistencies in lower court calculations of child support obligations.²⁹⁴

The answer to this problem lies in amending the CSSA to eliminate the \$80,000 cap, after which courts would calculate basic child support obligations²⁹⁵ by applying the appropriate statutory percentage to the total CPI. The resulting amount would then be reviewed in light of the "paragraph (f)" factors to determine whether that amount is unjust or inappropriate.²⁹⁶ The presumption would therefore be clear; the party in favor of reducing the award would have the burden of convincing the court why, in light of the "paragraph (f)" factors, the obligation should be less than its presumptive amount.

This solution is especially appropriate in view of the presumption shift following *Cassano* and its effective elimination of the statutory cap.²⁹⁷ Further, eliminating the statutory \$80,000 cap would help to achieve the legislative goals underlying the CSSA.²⁹⁸ Children would be more likely to share in their parents' wealth, since courts would have no choice but to presumptively apply the statutory percentage to the total CPI. If the resulting amount was unjust or inappropriate in light of the "paragraph (f)" factors,²⁹⁹ the court could adjust the amount. Since courts would therefore retain discretion to compensate for

Avildsen, 220 A.D.2d 337, 632 N.Y.S.2d 570 (1st Dep't 1995). See also notes 237-42, 251-54 *supra* and accompanying text.

293. See discussion *supra* part II.E.

294. See *supra* notes 237-54 and accompanying text.

295. See DOM. REL. LAW § 240(1-b)(b)(1), (c); FAM. CT. ACT § 413(1)(b)(1), (c).

296. See DOM. REL. LAW § 240(1-b)(f); FAM. CT. ACT § 413(1)(f). For a listing of the "paragraph (f)" factors, see *supra* note 80. See also discussion *supra* part II.C.

297. See discussion *supra* parts III.B and IV.

298. See WEINSTEIN, *supra* note 2 and GOVERNOR'S MEMORANDUM, *supra* note 2. See also discussion *supra* part II.C.

299. See DOM. REL. LAW § 240(1-b)(f); FAM. CT. ACT § 413(1)(f). For a listing of the "paragraph (f)" factors, see *supra* note 80.

circumstances individual to each case, equitable results would be achieved. Additionally, if the cap were eliminated, the point at which the court's discretion would first apply would be absolutely defined. In every case, then, the court's discretion would come into play only after the statutory percentage had been applied to the total CPI. More importantly, practitioners and families would know, in every case, which party has the burden of proof, what that party has to show, and at what point its burden begins. Simple fairness then, if nothing else, dictates that the CSSA's statutory cap must be eliminated.

V. Conclusion

The legislative goals underlying the enactment of the CSSA have not been fully realized. When calculating a child support obligation based on CPI above \$80,000, courts retain substantial discretion regarding the treatment of such income. As a result, families and practitioners cannot accurately predict the amount of child support which may be awarded by lower courts. Additionally, these awards may not result in the children sharing fully in their parents' standard of living.

The New York Court of Appeals' decision in *Cassano* was a step in the right direction. There, the court stated it is proper for lower courts to presumptively apply the statutory percentage to CPI above \$80,000, if they so choose. The court also stressed the impropriety of a needs-based analysis in calculating child support obligations, since requiring that child support awards be justified in light of the child's actual needs runs contrary to the goals of the CSSA. But the *Cassano* court did not go far enough to address the problem. Unfortunately, the court's reasoning was necessarily constrained by the narrowness of the issue and the presence of the statutory cap, which resulted in the court's reaffirmation of a lower court's discretion to utilize various statutory options when calculating child support obligations on CPI above \$80,000. As a result, courts may still choose whether or not to presumptively apply the statutory percentage to CPI above \$80,000 when they calculate child support awards. For example, based on *Cassano*, a court that has applied the statutory percentage to income up to \$80,000 could then consider the "paragraph (f)" factors and properly decide not to address CPI above \$80,000 at all. Or, a court could properly

decide to apply the statutory percentage to total CPI. The problem is, because the courts retain such wide discretion as to their treatment of CPI above \$80,000, calculations of child support obligations will continue to be at least unpredictable and perhaps even inequitable.

The solution is to amend the CSSA to eliminate the \$80,000 cap. Elimination of the cap is a crucial prerequisite to full attainment of the legislative goals which underscore the CSSA: predictability and equity in child support awards. Elimination of the cap would increase the predictability of child support awards by absolutely defining the point at which the court's discretion applies. Additionally, it would define the burden of proof by clarifying and unifying the presumptive treatment of CPI above \$80,000. At the same time, courts would retain discretion to adjust the presumptive award should the amount be unjust or inappropriate, thereby ensuring equitable outcomes. Finally, while uniformity of child support awards may not always be achieved, uniformity is not necessarily a desirable goal. Uniformity does not accommodate individual circumstances, so uniform results may be contrary to equitable results. Uniformity's main function, however, is to ensure predictability. Elimination of the cap would do just that, allowing practitioners and families to finally be sure of how New York courts will calculate child support awards.

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