LAW AND THE FAMILY

"Invalid Child Support Agreements"

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The Child Support Standards Act ("CSSA") was enacted in 1989 as Domestic Relations Law ("DRL") 240(1-b) and Family Court Act ("FCA") 413(1)(b). It requires the Courts to award child support in accordance with a statutory formula, and comply with its other provisions unless the parties "opt out" by executing a written agreement. The statute specifically provides that the parties may agree that the child support standards are not applicable to validly executed agreements or stipulations voluntarily entered into between the parties.

DRL 236 (B)(3) requires that a child support agreement be in writing, and signed and acknowledged in the form to entitle a deed to be recorded in order to be "valid and enforceable" in a matrimonial action.

The 1992 amendments to DRL 240(1-b)(h) and FCA 413(1)(b)(h) of the CSSA mandate that an agreement which opts out of the CSSA contain a provision that the parties have been advised of the provisions of DRL 240(1-b)(h) and FCA 413(1)(b)(h) and that the "basic child support obligation" provided in DRL 240 (1-b) and FCA 413(1)(b) "would presumptively result in the correct amount of child support to be awarded." In the event that the Agreement or Stipulation deviates from the "basic child support obligation," the Agreement or Stipulation must specify the amount that the "basic child support obligation" would have been and the reason or reasons that the Agreement or Stipulation does not provide for payment of that amount. This provision may not be waived by either party or counsel.

Thus, an opting-out agreement must provide (1) that the parties have been made aware of the CSSA, (2) that they were aware that application of the CSSA guidelines would result in the calculation of the presumptively correct amount of support, (3) the amount of the presumptively correct support that would have been calculated pursuant to the CSSA, and (4) the parties' reasons for their departure from the guidelines. Even an agreement which does not opt-out is required to provide that the parties have been made aware of the CSSA and that they were aware that application of the CSSA guidelines would result in the calculation of the presumptively correct amount of support.

The CSSA requires that any Court order or judgment incorporating a validly executed agreement or stipulation which deviates from the "basic child support obligation" must set forth the Court's reasons for such deviation.

The failure to include a required provision in an "opting-out" agreement is fatal and will render it unenforceable. The law does not permit parties to waive their rights without a thorough understanding of that which they stand to lose. This was firmly established in 1992 in Sloam v. Sloam, where the Court held that a finding that either party was unaware of the CSSA would invalidate a child support agreement that doesn't comply with its mandate.

Cases decided after the 1992 amendments to the CSSA make it clear that our public policy is to protect children from inadequate support awards and agreements. To this end it has been made more difficult to opt-out of the CSSA, both by statute and court interpretation of the CSSA. For example, in Cohen v. Rosen, the parties 1983 separation agreement, which was incorporated in and survived their divorce, provided that the father would waive his rights to the marital home in exchange for a wavier by the mother of maintenance and child support arrearages and for reduced child support. The Appellate Division affirmed an order which directed the father to pay 66% of his daughter's college education, holding that the determination of post secondary education expenses is an addition to the "basic child support obligation," and that the court could modify the judgment because the agreement contained no provision for the post secondary education of the parties' children.

In Bill v Bill the Second Department held that the child support provision of a stipulation of settlement which does not award the custodial parent child care expenses is not an effective waiver and may not be enforced where it indicates neither that the parents were aware of the provisions of the CSSA nor that they were knowingly

waiving them. The parties 1992 open court stipulation of settlement, which was incorporated into their judgment of divorce, provided that the wife would have custody of the two children with the husband paying $325 a week in child support. It did not contain a statement that the parties had been advised of the provisions of the CSSA and it neglected to set forth that the husband's child support obligation had been calculated in accordance with the statutory formula. Likewise it failed to explain why it deviated from that amount. It did not state that the parties were aware of the noncustodial parent's statutory obligation to pay a pro rata share of child care expenses and made no provision for the division of such costs. Before entering the proposed judgment the court added a handwritten provision stating that "the basic child support obligation in this case is $ 28,750 per year and the noncustodial parent's pro rata share of the basic support obligation as set forth in the parties settlement stipulation is neither unjust nor inappropriate." After the entry of the judgment of divorce the wife commenced a proceeding to require the husband to pay a share of the child care costs. The court held that while an agreement need not expressly state that each potential supplement to the basic child support obligation has been considered, compliance with DRL 240(1-b)(h) demands, at a minimum, that an agreement demonstrate that the parties have been fully informed of the provisions of the statute and the application of the guidelines in their individual circumstances. It also mandates that the parties reach an agreement upon what their respective support obligations under the CSSA would be.

Recent decisions from the Second Department demonstrate that the validity of a child support agreement will be called into question when counsel fails to comply with the obvious, as well as the not so clear, requirements of the CSSA.

In Lepore v Lepore the parties' stipulation of settlement, set forth on the record at a hearing did not recite that the parties had been made aware of the CSSA, that they were aware that application of the CSSA guidelines would result in the calculation of the presumptively correct amount of support, the amount of the presumptively correct support that would have been calculated pursuant to the CSSA, and the parties' reasons for their departure from the guidelines. The Supreme Court denied the plaintiff's motion to set aside its provisions, because it was of the opinion that she was aware of the provisions of the CSSA at the time she entered into the stipulation. The Second Department held that a party's awareness of the requirements of the CSSA is not the dispositive consideration. DRL § 240(1-b)(h) requires specific recitals which were not included in the

parties' stipulation. It held that the child support provisions of the stipulation were not enforceable and had to be vacated.

In Campbell v Campbell, the oral stipulation which was incorporated into the divorce judgment failed to include provisions stating the amount of child support that defendant would be obligated to pay pursuant to the CSSA. The Appellate court held that the provisions of the stipulation and judgment pertaining to child support were invalid.

In Schaller v Schaller, a support proceeding, the parties' separation agreement provided that the father's child support obligation was to be computed "in accordance with the Child Support Standards Act." The agreement, as modified on November 27, 1996, stated that the father's earnings were $62,000 in 1995, and that his basic child support obligation under the CSSA was equal to $328 per week for the parties' three children. On August 18, 1997, the parties modified the agreement to provide that the father's earnings were $62,374, and his basic child support obligation was $347.85 per week. They agreed to deviate from the CSSA in that the father would pay only $328 a week, instead of $347.85, for four years because he would be paying the mother maintenance during that same period. The agreement, as modified, was incorporated but not merged in the judgment of divorce entered in September 1997. In October 1998 the mother brought a proceeding for an upward modification of child support. The evidence adduced at the hearing revealed that the father's gross income for 1995 was actually about $90,000 including overtime, and that he earned approximately the same amount every year thereafter.

The Hearing Examiner concluded that the child support provision of the parties' agreement was unfair, granted the petition, and found that the father's child support obligation under the CSSA guidelines was $465 a week, retroactive to October 20, 1998. The Family Court overruled the Hearing Examiner on the ground that the mother's remedy was to move in the Supreme Court to vacate the separation agreement on the ground of fraud. However, the mother's petition sought only an upward modification of support.

The Appellate Division held that the father's child support obligation set forth in the agreement did not comply with the CSSA guidelines since his obligation should have been calculated based upon his "gross (total) income as should have been or should be reported in the most recent Federal income tax return." Therefore, the parties' children were not receiving the presumptively correct amount of child support. It stated that parties are permitted to "opt out" of the

provisions of the CSSA provided the decision is made knowingly. Where the agreement deviates from the basic child support obligation, the agreement must specify what the basic child support obligation would have been under the CSSA, and the reason the agreement does not provide for payment of that amount. The father failed to establish that the mother was aware of the correct amount of child support, based on his income of about $90,000, and that she knowingly agreed to a lesser amount. Moreover, the agreement did not set forth what the CSSA result would have been if it was calculated based on the father's true income in accordance with the statute.

The Appellate Division held that since the child support provision of the parties' agreement violated the CSSA, it was unenforceable, and that the Hearing Examiner properly granted the mother's petition for an upward modification based on the CSSA guidelines.

Thus, a separation agreement or stipulation which contains incorrect income information and, therefore, does not set forth what the CSSA formula amount would be based on the party's actual incomes, in accordance with the statutory requirements, will be held to be void.

Care must be exercised by counsel in doing these calculations.