

VALUATION OBSERVATIONS

*Some practical observations from a practicing
business appraiser.*

VLC

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TOO MUCH INCOME

Nice problem to have - for most of us. But, when it comes time to determine child support, high income cases become problematic. The first step, as we discussed in previous months, is to determine how much income is really there, remembering that income tax returns are only the starting point. Then, we go to the statutorily prescribed guideline worksheet. If the combined income of both the parents is above \$150,000, it is not as straight-forward as we may prefer.

“High income” refers to a combined parental income above \$150,000, which is the figure at which the guideline table ends. The calculations for families when the parents’ combined income exceeds \$150,000 are still not available in the statute, even after statutory revision in 2001. The guidelines provide three distinct tiers of the parties’ annual aggregate gross income: (1) less than \$6,600; (2) between \$6,600 and \$150,000; and (3) greater than \$150,000. For the first tier, less than \$6,600; the court is to determine the appropriate child support on a case-by-case basis considering qualitative factors and considering the calculation worksheet as a guide. That is, the court is not required to apply the worksheet results. For the second tier, between \$6,600 and \$150,000, the court must use and apply the worksheet. Any deviation must be explained. For the final tier, above \$150,000, the court once again determines the appropriate child support on a case-by-case basis and is not required to apply the calculation worksheet.

So what happens when you are faced with high income? Use of the worksheet in this tier is directed to calculating a hypothetical child support amount that is equivalent to the amount an obligor would pay if the couple had an aggregate gross income of \$150,000 or more, commonly referred to as “the \$150,000-equivalent”. In this third tier, the court is bound by three requirements: (1) set the child support amount based on the qualitative needs and standard of living of the children and parents; (2) ensure that the amount set is not less than the \$150,000-equivalent, unless awarding that amount would be inappropriate (i.e., would be too much); and (3) if it is decided that the \$150,000-equivalent is inappropriate or unjust (i.e. awards less), then journalize the justification for that decision. The \$150,000-equivalent serves the intended purpose of constituting the minimum child support award, below which the court cannot go without explanation.

This is not to say that the award is to be capped at this amount. The prior version of the statute required the court to “extrapolate”, or use the same fixed percentage of income in the Guidelines at the \$150,000 level for each number of children to calculate the amount of support for incomes above the Guidelines. For example, at \$150,000 combined income, the guideline support to be allocated as child support is \$15,218, which equates to 10.1% of the combined income. The court then had to apply the same 10.1% to the combined incomes above \$150,000 in a case with one child. For a combined income of \$550,000,

child support would be \$55,550 to be allocated to the parents, rather than the \$15,218 that is listed at the \$150,000 income level. There was a rebuttable presumption that the percentage applied resulted in the correct amount of child support. The court was free to award more or less than the extrapolated amount, so long as it provided reasons for deviating from the extrapolated amount.

The revised statute requires that high income cases be determined on a case-by case basis, considering the needs and the standard of living of the children who are the subject of the child support order and of the parents. The court shall compute a basic combined child support obligation that is no less than the obligation that would have been computed according to the applicable worksheet for a combined gross income of one hundred fifty thousand dollars (e.g. \$15,218 to be allocated for one child), unless determined that it would be unjust or inappropriate and would not be in the best interest of the child, obligor, or obligee to order that amount.

So what factors are considered when determining whether a deviation from the guidelines is appropriate? Section 3119.23 provides the following guidance.

1. Special and unusual needs of the children.
2. Obligations for handicapped children who are not offspring from the marriage under consideration.
3. Other court-ordered payments.
4. Extended parenting time.
5. Additional employment obtained after a child support order is issued in order to support a 2nd family.
6. The financial resources and earning ability of the child.
7. Disparity in income between parties or households.
8. Benefits that either parent receives from remarriage or shared living expenses with another person.
9. Amount of taxes paid by one or both of the parents.
10. Significant in-kind contribution from a parent, including, but not limited to, direct payment for lessons, sports equipment, schooling, or clothing.
11. The relative financial resources, other assets and resources, and needs of each parent.
12. The standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage.
13. The physical and emotional condition and needs of the child.
14. The need and capacity of the child for an education and the educational opportunities that would have been available to the child had the circumstances requiring a court order for support not arisen.
15. The responsibility of each parent for the support of others.
16. And the catch all – Any other relevant factor.

The parents may agree to assign a monetary value to any of the factors listed. If the court does grant a deviation, it shall then specifically state in the order the facts that are the basis for the deviation. Let's take a look at some examples.

In *Rex v. Rex, 2004-Ohio-997*, the 8th District Court deviated upwards, specifically noting the disparity in income between the parties. The father's sale of his company generated over \$2.7 million dollars. The court stated that the guideline amount would have deprived the minor child of a much higher standard of living which would have been available had the parties remained married. Once the judge exercises his discretion to deviate from the child support guidelines, so long as the relevant factors are considered and explained, there are no mandatory inclusions in the calculations.

Although the 9th District Court declined to deviate upwards in *Zeitler v. Zeitler, 2004-Ohio-5551*, after a lengthy discussion of the proper criteria, the court concluded “There was ample evidence to show that the children want for very little.” The court considered the disparity in incomes, benefits to the parents from new living arrangements, significant contributions by the individual parents, and the appropriate standard of living. The father had active visitation and invested significant money towards their standard of living and well-being, such as vacations, clothing, laptop computers, bicycles, go-carts, musical instruments and lessons, braces, parochial school tuition, contributions to college funds, and even offered to pay for the children to vacation with the mother, if she would merely document the costs. In short, he had never refused a request.

In *Kendall v. Kendall, 2005-Ohio-1777*, the 6th District Court found that the needs of the children and their prior standard of living merited the court considering appellant’s income in excess of \$150,000. The father was an emergency room physician earning in excess of \$200,000. The mother, with only a high school education, quit working to become a homemaker and the children’s primary caretaker. After the divorce, she began cleaning houses, earning \$800. The court stated: “Based on his income and his personal and living expenses, he has extraordinary discretionary income after payments of his taxes, social security, child and spousal support. His children are living since separation modestly in stark contrast to their prior life style. Their standard of living currently is dependent on their mother receiving both child and spousal support, the latter terminating in the not too distant future. The mother’s maximum earning ability was \$7.21 per hour based on her lack of education. There are concerns about her health. She has no discretionary income now.” The Court effectively extrapolated the amount of support.

Nothing in the new version of the statute prohibits the court from using extrapolation to determine the amount of support due in high income cases (\$55,550 as in the example above). It merely no longer mandates the court to use this method. Furthermore, the statute does not require any explanation of its decision unless it awards less than the amount awarded for combined incomes of the \$150,000-equivalent (\$15,218 as in the example above).

Remember the purpose – the best interests of the children. The Court has great latitude to deviate from the basic guideline support worksheet if it determines that the worksheet amount would be unjust, inappropriate, and not in the best interest of the children.

If you would like additional information, or have a question, please do not hesitate to call.

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Terri Lastovka is the founder of Valuation & Litigation Consulting, LLC. Her practice focuses on business valuations and litigation consulting in the areas of domestic relations, gift and estate tax, probate, shareholder disputes, economic damages, and forensic accounting. She draws from a wide range of experiences, including public accounting, law, banking, and CFO. She has received extensive training from the American Society of Appraisers in the area of business valuation and works closely with members of the bar to effectuate practical settlements. Terri also serves as the Director of Legal & Finance for Journey of Hope, a grass roots non-profit organization providing financial support to cancer survivors.