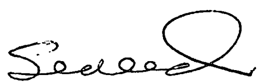

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ORIGINAL

MARGARET R. SCAIFE,	FAMILY DIVISION
Plaintiff,	Case No. FD 06-002384-001
v.	
RICHARD M. SCAIFE,	**PLAINTIFF'S TRIAL MEMORANDUM REGARDING COMPLEX SUPPORT**
Defendant.	

FILED ON BEHALF OF:

MARGARET R. SCAIFE,
Plaintiff

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FOR THIS PARTY:

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ALLEGHENY COUNTY

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RICHARD M. SCAIFE,	)	
Defendant.	)	

PLAINTIFF'S TRIAL MEMORANDUM REGARDING COMPLEX SUPPORT

AND NOW, comes the Plaintiff, Margaret R. Scaife (hereinafter, "Wife"), by and through her attorneys, Gary G. Gentile, Esquire and Goldberg, Gruener, Gentile, Horoho & Avalli, P.C. and William Pietragallo, II, Esquire and Pietragallo, Bosick and Gordon, and files the within Plaintiff's Trial Memorandum Regarding Complex Support.

SHORT BACKGROUND

Wife and the Defendant, Richard M. Scaife (hereinafter, "Husband"), were married on June 1, 1991, having been involved in a relationship for 10 years prior thereto. There were no children born of this marriage, although both parties have children from prior marriages.
The parties separated in December of 2005. Wife was forced to abandon the marriage after confirming that Husband had engaged in an adulterous relationship with [redacted]
Thereafter, Wife secured counsel to establish support and other terms of separation. Wife filed a Support Complaint on February 10, 2006. An Interim Order of Support for $725,000 per month was entered, based upon a reasonable interpretation of the very limited financial evidence

and/or principal beneficiary. Both parties agree that Husband is the only beneficiary to ever get one penny out of the many trusts, even though there are a number of beneficiaries. Both parties acknowledge that the trustees of the 1935 Trust, as well as the other trusts, are Husband's attorneys, his friends and his advisors, and not one of them has ever denied Husband any request he has made for distributions from the trusts. Ever. Both parties agree that the asset value of the trusts total about $1.4 billion.

Husband cannot and does not dispute that in 2005, he received distributions in excess of $45 million. Wife's expert, Richard Brabender, Esquire, in his rebuttal testimony on April 23, 2007, presented a trial aid to the court depicting the various trusts and the distributions from each trust. Husband and Wife agree on these sources and, except for minor differences, Husband and Wife agree that Husband received over $45 million of distributions in 2005, [2] as well as $18 million which passed through the sub-trust.

Wife's expert concludes that the $45 .0 million of the total distributions are includable in Husband's pre-tax gross disposable income. (Tr. 4/23/07, p. 46). So how can it be that Husband-- even though he agrees on the $45 million figure, cites the same case law and statutory authority as Wife's expert, and uses the same source documents and methodology to analyze the data as Wife's expert -- posits that Husband had only $16.0 million of gross disposable income in 2005? (Tr. 4/23/07, p. 46). Husband attempts to make over $30 million of gross disposable income disappear through the misapplication, misinterpretation and omission of the relevant judicial and statutory authority. The result is an illusion which creates the type of fictitious portrayal of financial resources which the same case law cited by Husband admonishes against.

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amounts reported on the tax returns to determine if the amounts were actually received by Husband. Husband's expert performed did a similar exercise. (Tr. 4/23/07, p. 54).

[2] On the trial exhibit, the designation "RLT" represents the Revocable Living Trust into which all distributions from the various trust sources are deposited. The top line of the chart, including the $18 million from the 1935 Trust

DISPOSABLE INCOME

Husband wants this Court to believe that Wife is overreaching in the determination of Husband' disposable income available for support. Husband wants this Court to believe that Wife's expert indiscriminately includes distributions in Husband's disposable income that are not considered "income" under the Pennsylvania Support Guidelines and case law. This is simply untrue.

Wife's expert determined Husband's disposable income by applying the definitions and commonalities of disposable income gleaned from an analysis of the case law and the statutes. While Husband's expert pays lip service to case law regarding what constitutes income available for support, he does not apply it. Instead, he contorts the common sense reading of the case law to **limit** Husband's disposable income, not to define it.

A comprehensive review of Pennsylvania case law produces the following inescapable conclusion: no matter what it is called, no matter how it is labeled, cash flow received by Husband, and to any support payor, is generally included in net disposable income if it is actual, liquid, available, guaranteed and historic, not fictitious or "phantom," and indicative of future cash flow. (*See*, 23 Pa.C.S.A. Section 4302 [income includes, *inter alia*, "... other entitlements to money or lump sum awards, regardless of source...; .... and any form of payment due and collectible by an individual regardless of source."]. *See also*, Pa.R.C.P. 1910.16-2(a)(8); Calabrese v. Calabrese, 452 Pa.Super. 497, 682 A.2d 393 (1996) [the calculation of income for support must "reflect the actual available financial resources of the payor spouse"]; Fennell v. Fennell, 2000 Pa. Super. 166, 753 A.2d 866, 868 (2000) [funds actually available or received are income]; McAuliffe v. McAuliffe, 418 Pa.Super. 39, 613 A.2d 20 (1992), *citing* Cunningham v.

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appearing on the right side of the top line of the trial aid, is $63.0 million RLT is synonymous with **gross disposable income for purposes of the trial aid.**

Cunningham, 378 Pa. Super. 280, 548 A.2d 611 (1988) [income must reflect actual available financial resources; "cash flow" ought to be considered]; Fichthorn v. Fichthorn, 368 Pa.Super. 305, 533 A.2d 1388 (1987) [bonuses which the payor had historically received were included in his income for support]; MacKinley v. Messerschmidt, 2002 Pa.Super. 361, 814 A.2d 680 (2002) [payor's entitlement to access funds determinative of inclusion in income for support]; Heisey v. Heisey, *supra,* [actual financial condition must be determined; all income from whatever source is to be evaluated as well as financial resources and property interests for purposes of calculation support]; Fitzgerald v. Kempf, 2002 Pa. Super. 233, 805 A.2d 529 (2002) [actual monthly income must be based on the reality of the financial situation]; Spahr v. Spahr, ___ Pa. Super. ___, 869 A.2d 548 (2005) [corporate distributions made to relieve or reimburse party for tax liability are income for purposes of support]; Darby v. Darby, ___ Pa.Super. ___, 686 A.2d 136 (1996)[money available to pay off existing debts is available for payment of support]).

The $45 million of cash flow meets each one of these requirements. In order to reduce his net disposable income from $45 million to $16 million, Husband eliminates $11 million of cash flow from a Charitable Remainder Unitrust ("CRUT") and $1.6 million of cash flow from the 1965 Trust, despite the fact that each satisfies all of the foregoing requirements. Moreover, Husband has admitted that each of the requirements has been met and will continue to be met in the future. In addition, Husband has attempted to reduce the $45 million of cash flow by an $18 million contribution of funds from the 1935 Trust to the Tribune Review, despite the fact that this $18 million has no impact whatsoever on the $45 million which the parties agree is available to Husband. Thus, Husband has made the $30 million elephant disappear. Or has he?

$11 MILLION FROM THE CRUT

In 1996, Husband established a CRUT with funds from the Scaife Family 1958 Trust

established by Sarah Mellon Scaife, Husband's mother. (Tr. 1/29/07, p. 62). Husband is the individual non-charitable lifetime beneficiary of the CRUT. At Husband's death, the funds in the CRUT are to be distributed to two named charities. (Tr.1/29/07, pp. 35, 64-65). Husband, as the lifetime non-charitable beneficiary, receives a fixed, guaranteed distribution of 8% of the value of the CRUT assets each and every year during his lifetime. (Tr. 1/29/07, pp.66-67, 2/12/07, p. 34, 4/23/07, p. 81). In 2005, the distribution was $11.0 million.

It is undisputed that Husband's 8% entitlement is fixed and guaranteed, no matter how the trust assets perform. (Tr. 1/29/07, p. 66, tr. 2/12/07, p. 63, tr. 4/23/07, p. 66). If the trust made money or lost money in 2005 - it didn't matter. Husband's entitlement for that year was written in stone as of January 1, 2005. (Tr. 1/29/07, p. 68). The 8% distribution that Husband received could be more or less than the income earned by the CRUT that year.(Tr. 2/12/07, p. 38). If the CRUT made a 20% return in one year, Husband would still receive 8% of the value of the CRUT, and the remaining income would be reinvested as trust corpus. (Tr. 2/12/07, p. 39). It is undisputed that Husband has received this 8% distribution from the CRUT every year since the CRUT was established. (Tr. 4/23/07, p.67).

This $11 million distribution to Husband meets the definition of disposable income as set forth in the statute. It is "an entitlement[s] to money ...., regardless of source" and/or "any form of payment due and collectible by an individual regardless of source" as provided in 23 Pa.C.S.A. Section 4302. It is actual, available, historic, guaranteed, predictable, and real, all commonalities of income available for support as provided in the above case law. It also satisifies any common sense definition of disposable income. Wife correctly includes the CRUT money in Husband's disposable income.

Husband does not include the CRUT money. On direct, Husband's expert testified

extensively that he relied on the PNC trust statements as the "best evidence" for the determination of whether the distribution was income to Husband. (Tr. 2/12/07, p. 243). In his report, Husband's expert states that "based upon the trust accountings, these distributions to Mr. Scaife have been determined by the trustees to represent principal distributions from the trust corpus." (Mr. Kaplan's report, p. 14). Since the trustees label the distribution as "principal," Husband excluded the payment under Husband's reading (although flawed) of Humphreys v. DeRoss, 567 Pa. 614, 624, 790 A.2d 282, 287 (2002). Husband's expert didn't stop there. Since Husband's expert referenced no family law authority whatsoever to look to the trust statements as the "best evidence," he attempted to give the trustees and the statements credibility by testifying to this Court that the trustees relied on the Principal and Income Act, 20 Pa.C.S.A. Section 8101, *et. seq.* to make their determination. However, Wife's expert, on cross-examination, set the record straight that the Principal and Income Act, by its very terms, does not apply to a unitrust, such as the CRUT. Contrary to Husband's expert's testimony, the PNC trust statements were not based on the Principal and Income Act, because the Act does not apply to a CRUT. [3]

Not surprisingly, now, in Husband's Trial Brief, there is **not one mention** of the PNC trust statements or the Principal and Income Act. The "best evidence" is, apparently, no longer best, or evidence at all. Husband has abandoned the "best evidence" argument and the Principal and Income Act.

Husband's fallback argument appears to be that the CRUT distribution is a return of Husband's "own money." This claim is preposterous. It is undisputed that Husband funded the

[3] By its terms, the Act specifically excludes unitrusts (such as the CRUT), because such unitrusts distribute a straight percentage of the portfolio value each year, and the allocation between income and principal is irrelevant. (Wife's Exhibit 30, tr. 4/23/07, pp. 74-80).

CRUT in 1996 with 909,000 shares of General RE stock. (Tr. 2/12/07, p. 33). The shares were originally held in the 1958 Trust and were distributed to Husband very shortly before he irrevocably contributed them to the CRUT in 1996. There can be no doubt that the General RE stock was distributed from the 1958 Trust, where it had been held for almost 40 years, to Husband for the sole purpose of establishing the CRUT, which had ownership of the stock proceeds for the past ten years and will continue the asset until Husband's death. Husband's argument is weak and elevates form over the substance. Further, Husband ignores his own expert's testimony that when Husband contributed the shares to the CRUT, he gave up all control and ownership of the shares to the trustees of the CRUT. (Tr. 2/12/07, p. 33), and retained the right to receive only an 8% distribution. <u>Husband did not retain the right to the underlying trust assets</u>. Husband's expert also admitted that when Husband established the CRUT, there were "some tax benefits" to him. (Tr. 2/12/07, p. 48). This is an understatement. Husband received a $122 million charitable deduction! Now, Husband claims it's still his money.

With no authority to support his burden to prove that the $11 million CRUT money should not be deemed income to Husband for support purposes, Husband argues that Wife's expert disregarded the fact that $7.7 million of the distribution represents capital gains that date back to Husband's mother's lifetime. (See Husband's Trial Brief, p. 6). Wife's expert did not disregard this fact. Wife's expert correctly concluded that the capital gains are relevant only for tax purposes, and have no economic impact on what Husband actually receives from the CRUT. In his report, Husband's expert asserts that it is necessary to analyze the "actual portion of realized capital gains attributable to the years 2004 and 2005. This calculation is appropriate because the determination of Mr. Scaife's disposable income will be used to establish a current and prospective Support Order." (Mr. Kaplan's report, p. 19). Husband's expert would be

correct if a one- time capital gain could so distort Husband's disposable income so that it would not be indicative of future years' income. However, in the context of a CRUT, which guarantees Husband an 8% payout, there is no possibility of such a distortion in Husband's income. Thus, the tracing of capital gains is irrelevant.

Husband has provided this Court no statute, case law or other sound basis for excluding the $11 million CRUT funds from Husband's income. It meets the statutory definitions. It is actual, real, guaranteed, indicative of future income, and available, as provided in the case law. The income must be included. In light of the fact that Husband was able to convert a discretionary income interest in the 1958 Trust into a guaranteed 8% interest in the CRUT, while enjoying a $122 million tax deduction, his attempt to exclude the CRUT distribution from his net disposable income clearly illustrates which party has a penchant for overreaching.

$18 MILLION FOR A "SECOND VOICE"

In another about-face, Husband has abandoned his primary reason for deductibility of the $18 million loss of the Tribune Review from Husband's disposable income. Husband's expert hammered the "profit motive" argument throughout his direct testimony and cross-examination. (Tr. 2/12/07, p. 107, p. 114, p.115, p.117, p.127, p.132, p.137, p.259, p. 260, p.280). There are no less than three pages of Husband's expert's report devoted to "profit motive," IRC Section 183, and Husband's expert's profit motive litmus test. (Mr. Kaplan's report, pp. 34-36). There are no less than 10 references in these three pages to "profit motive," "profit," "engaged in for profit," and "engaged in for the production of income."

Now, in Husband's Trial Brief, there is not one mention of "profit motive," "profit" or IRC Section 183. Husband's counsel attempted to characterize Husband's expert's reference to a "profit motive" and Section 183 as strictly rebuttal testimony. How Husband's counsel can

make this argument, given Husband's expert's report and direct testimony, both containing multiple references to "profit motive" and Section 183, is incredible.

Husband now argues – as another fallback – that the Tribune Review is simply another of Husband's investments, and, as such, should be treated as any other of his investments. The following undisputed facts, however, distinguish Husband's "investment" in the Tribune Review from any of his other investments:

1. Husband is the sole shareholder of the Tribune-Review Publishing Company which publishes the Tribune Review.

2. Husband unequivocally stated that his primary motive in founding the Tribune Review to give the people of Pittsburgh a "second voice."

3. Husband unequivocally indicated that his primary motive for continuing to direct funds to subsidize the Tribune Review's staggering losses is to provide the people with a "second voice."

4. The Tribune Review has lost money every single year since its inception 1992 – a 16 year track record of losses.

5. Husband could recall no other investment he has ever made that has suffered losses for 16 consecutive years.

6. Husband insists on remaining as the Chairman of the Board of the Tribune Review, despite 16 consecutive years of losses under his leadership, thereby ensuring that it is his own voice that is Pittsburgh's "second voice."

7. Husband's total annual cash flow from the Tribune Review is $24,000.

8. Since inception, the Tribune Review has suffered aggregate losses of **$244 million.**

9. The Tribune Review's losses from 2002 through 2006 have increased significantly:

2002	$19,942,553
2003	23,060,256
2004	21,351,394
2005	26,562,562
2006	29,000,000

10. The Tribune Review's budgeted losses for 2007 exceed $30 million.

11. Financial projections for the Tribune Review report continued losses for the entire term of the projections.

12. The Tribune Review has never performed a break-even analysis to determine if a scenario even exists pursuant to which the Tribune Review could be profitable.

13. Husband is unaware and unconcerned as to the magnitude of the Tribune Review's losses.

14. Husband is unaware and unconcerned as to whether any updated projections have been prepared for the Tribune Review.

15. Husband is unaware and unconcerned that the contributions from the 1935 Trust to the Tribune Review have been increasing.

16. Husband is unaware of how much money is transferred from the 1935 Trust to the Tribune Review each month.

17. Husband does not receive any financial data prior to the contribution of funds from the 1935 Trust to the Tribune Review.

18. Husband has never considered abandoning the Tribune Review, despite the

harrowing record of losses.

Husband's argument that he should be permitted to deduct from his disposable income the $18 million loss from his "investment" is incredible, given that Husband himself does not treat the Tribune Review the same as the other investments in his portfolio. If he did, the Tribune Review would have been gone long ago. In fact, if his real investments performed like the Tribune Review, Husband would be penniless instead of a billionaire, and attempting to collect support from Wife.

Having abandoned the "profit motive" and Section 183 standards,[4] Husband now struggles for a standard to hold onto. Unable to cite any case law that supports his position, Husband simply throws out familiar case law names with the hope that somehow referencing those familiar names long enough will be sufficient, regardless of the fact that they do not support Husband's position. [5]

The "Necessary to Maintain and Preserve" Requirement

Husband references Fennell and McAuliffe as support for the requirement that an expense that is "necessary to maintain and preserve" the business must be excluded from net disposable income. Wife does not dispute that this language appears in those cases. Wife also does not dispute that this is a requirement in scrutinizing the deductibility of a business expense or the retention of income. However, neither of these cases, or any other, stands for the proposition for which Husband cites them. No other case under Pennsylvania law stands for the

[4] Wife cannot be overly critical of Husband's abandonment of these arguments. Any reasonable person would never find that Husband runs the Tribune Review to make money.

[5] Husband also cites Pa.R.C.P. 1910-16.2(a), and the definition of "income" in 23 Pa.C.S.A. for the proposition that if "net income from business" is includable in income for support, then "losses" from business, if replenished by the payor spouse, are deductible from income. (See Husband's Trial Brief, p. 10). This is a tremendous leap in statutory interpretation and is simply incorrect. As Husband argued on page 5 of his Trial Brief regarding the provision in the Rule and statute related to income from an estate, the drafters of the Domestic Relations Code could easily have included reference to "net losses from business" had they chose to do so. They did not. The Rule and the statute do not support Husband's position.

proposition that losses incurred by an entity which was neither founded nor maintained to produce disposable income for Husband, that has never produced income, and by all reasonable estimates, will never produce income, are deductible for disposable income purposes. Moreover, the facts of the cited decisions differ in two key respect from those of the instant case. First, the dispute in each of the cited cases was whether profits earned by the entity which were retained or expended by the entity should be included in disposable income. These are not the facts in Husband's case. Secondly, in each of the cases cited by Husband, the business owner/spouse received either profits or substantial compensation from the entity.

Husband does not need, nor has he ever needed, to maintain and preserve the *Tribune-Review* as his source of income to support himself and his family, or because it is his source of gainful employment. Husband ignores that inherent in any judicial scrutiny as to whether an expense or loss is "necessary to maintain and preserve" a business, is the fundamental presumption **that the maintenance and preservation of this business is related to such party's ability to generate income and support his/her family, or is the source of such party's gainful employment.** If this fundamental presumption is not present, the expenses/losses incurred for the maintenance and preservation of a business would have no interest to the support courts of this Commonwealth.

In McAuliffe, *supra*, cited by Husband, the payor was self-employed by McAuliffe Asphalt Paving, Inc., and he sought to deduct cash outlays which the court determined were not necessary to "preserve and maintain" his business **which was his source of income** for himself and his family. In Lehman v. Lehman, 636 A.2d 1172, 1173 (Pa.Super. 1994), the Court stated that only taxes and other payments commonly seen as a cost of "gainful employment" may be subtracted from gross income in the determination of disposable income. In Williams v.

Williams, 175 Pa.Super. 409, 104 A.2d 499 (1954), a case more recently cited by the Pennsylvania Superior Court in many cases, such as McAuliffe and Labar, the Superior Court confirmed that the business expense must be to preserve and maintain an income-producing entity: "[i]f, for the purpose of complying with a court order, a [payor] is compelled to expend or exhaust his capital, without opportunity to **maintain and preserve that which makes his business possible, it will eventually work to the detriment of both the parties** (emphasis added)." *Id.*

Husband summarily dismisses the holding in Berry v. Berry, 898 A.23d 1100 (Pa.Super. 2006) as irrelevant. However, the Court in Berry clearly echoes Williams, that "provided with the appropriate itemizations, unreimbursed business expenses, **when used to increase income**, may be deductible from gross income...."(emphasis added). In light of Husband's own admissions regarding his motive for funding the Tribune Review, even Husband's expert was constrained from asserting that the funding was to increase Husband's income. Again, the holding in Berry is simply common sense. The funding of an entity or expense which does not and will not produce disposable income cannot be deducted from disposable income.

Year after year, Husband funnels money from the 1935 Trust to the *Tribune Review*, but, undeniably, it is not to "maintain and preserve" a business which he depends upon for his income and support, nor is it to keep a business in operation which he depends on for his gainful employment. Since such expenses are not to maintain and preserve an income source, then they are personal, charitable or not legitimate business expenses which, as such, have no relevance in the determination of Husband's disposable income. Coffey v. Coffey, 575 A.2d 587. 589-90 (Pa.Super. 1990). *See also*, Berry, *supra.* Had Husband elected to operate the Tribune Review in the context of a charitable foundation, this disagreement wouldn't exist, but substantively, the

result would be identical.

Husband relies upon Pape v. Arnoni, FD 04-3402, a local decision, in support of his position. The distinction between the business in Pape, and the Tribune Review, highlight the reasons why the Tribune Review loss is not deductible:

1. The Tribune Review has lost money every year for 16 years. Pittsburgh Mack Sales and Services, Inc. ("Mack") lost money only 2-3 years after years of profitability.

2. Husband's motive in founding the Tribune Review was to give Pittsburgh a "second voice." Mr. Arnoni's motive, as indicated in his trial testimony, was to make money.

3. Despite the Tribune Review's mounting losses, Husband continues to own the Tribune Review. Mr. Arnoni sold his losing business.

4. Husband voluntarily directs the 1935 Trust funds to the Tribune Review. Mr. Arnoni executed personal guarantees which compelled him to contribute funds to Mack.

5. Husband is using his children's trust funds from the 1935 Trust -- $244 million to be exact, and growing – to fund the Tribune Review, thereby having no impact on Husband's economic condition. Mr. Arnoni used his own personal money which had a significant impact on his net disposable income.

The businesses in Husband's case and Mr. Arnoni's case are easily distinguishable on the facts and those distinctions actually emphasize the reasons to exclude the Tribune Review losses from the determination of Husband's income.

The "Actual" and "Real" Requirement

For all of the reasons set forth above, it is abundantly clear that the Tribune Review losses, regardless of the source of funding, are not deductible in arriving at Husband's net disposable income. In addition, however, Husband did not even use his own funds to subsidize

the Tribune Review's losses. Rather, he sought and received funds from the 1935 Trust established by his mother and of which his issue are the ultimate beneficiaries.

Husband cites Heisey, McAuliffe, Cunningham and Flory to support his position. Again, Wife does not dispute that these cases provide that the business expense, to be deductible, must be actual and real. However, as in the "maintain and preserve" cases cited by Husband, none of these cases stands for the proposition that losses incurred by an entity which was neither founded nor maintained to produce disposable income for Husband, that has never produced income, and by all reasonable estimates, will never produce income, are deductible for disposable income purposes. Husband ignores the fact that the money to "fund" the losses of the Tribune Review, as Husband calls it, although admittedly "actual" and "real," comes exclusively from the 1935 Trust and not from Husband's own funds otherwise available for support. Wife did not include the 1935 Trust contributions to the Tribune Review in Husband's income available for support, since the contribution of the funds and the use of the funds by the Tribune Review had no impact on Husband's actual disposable income. Whether Husband does or does not funnel money from the 1935 Trust into the *Tribune-Review* will have no impact whatsoever on Husband's remaining $45 million of disposable income or on Husband's lifestyle.

Husband failed to include the 1935 Trust contributions to the Tribune Review in Husband income, yet he seeks to deduct the Tribune Review losses, producing an absurd result in light of the fact that the entire transaction has no impact on Husband's disposable income. Under Husband's theory, the more money contributed from the 1935 Trust to the Tribune Review, the lower Husband's income, despite the fact that Husband's $45 million cash flow is utterly unaffected by the flow of funds from the 1935 Trust to the Tribune Review. Under Husband's view, if the Tribune Review had lost another $16 million in 2005, Husband would have had no

disposable income, his $45 million cash flow notwithstanding. In Labar v. Labar, 557 Pa. 54, 731 A.2d 1252 (1999), the Pennsylvania Supreme Court stated that "Cunningham stands for the proposition that deductions ....that do not represent actual reductions in the support obligor's personal income, will not be allowed in the disposable income calculation. Such reasoning is sound." Labar, 731 A.2d at 1255.

Husband also claims the 1935 Trust funds were actually his funds. (Husband's Trial Brief, p. 12-13). This claim is not supported by the facts. Essentially, Husband is using his children's money to fund the Tribune Review losses. Husband argues that the funds are his because he temporarily parks the funds in his revocable living trust – the capital contribution subtrust – for a matter of minutes, before transferring them to the Tribune Review. The substance of the transaction is that, month after month, the funds were transferred to the Tribune Review. Further, there can be no doubt that the 1935 Trust funds were earmarked specifically and solely for the Tribune Review by the trustees. If Husband's expert truly believed that the funds were distributed without restriction, then $18.0 million should be added to Husband's disposable income. Husband could buy a boat, or use it for his own support. (Tr. 4/23/07, p. 175).

Husband argues that the source of the funds to contribute to the Tribune Review is irrelevant to the deductibility scrutiny as long as the ultimate use of the funds is a legitimate deduction, such as income taxes. (Husband's Trial Brief, p. 12). However, income taxes are clearly a permitted deduction under the Pennsylvania Support Guidelines for the determination of a spouse's disposable income. In fact, income taxes are deductible for purposes of the disposable income determination even if the spouse did not pay them. In the instant case, both the source of the funds and the destination of the funds are unrelated to Husband's income in any

way.

Thus, not only are the Tribune Review losses not deductible because the Tribune Review is not now, and will never be, a source of Husband's disposable income, but also because the source of the funding of those losses is not Husband's disposable income, but rather the 1935 Trust.

THE GUARANTEED, UNDISPUTED 5% DISTRIBUTION

Husband is an income beneficiary of the following non-CRUT trusts: the 1935 Trust, the 1958 Trust, the 1961 Trust, and the 1965 Trust, and the revocable trust, called the agency account. (Tr. 1/29/07, pp. 225, 226). The 1965 Trust differs from the other trusts in that it is an irrevocable trust in which Husband has a unilateral power to appoint an amount equal to 5% of the trust corpus to himself annually. (Tr. 1/29/07, p. 57). The value of the 1965 Trust at the end of 2005 was $26 million, held at PNC. (Tr. 1/29/07, p. 57).

As Husband's expert testified, the 5% corpus distribution must be distributed to Husband if he requests. (Tr. 1/29/07, p. 237). Husband has an absolute right to receive the principal distribution. The trustees do not have the discretion to reject Husband's request for the 5% corpus distribution. (Tr. 1/29/07, p. 237). Husband has requested the 5% distribution in each year since 1965.

Pennsylvania Rules of Civil Procedure 1910-16.2(a)(8), and the definition of "income" in 23 Pa.C.S.A., include "...other entitlements to money or lump sum awards, without regard to source....", and "any form of payment due to and collectible by an individual regardless of source." Additionally, the 5% distribution meets the essential criteria from the case law for inclusion of a payment stream in Husband's disposable income: it is actual, liquid, historic, guaranteed, consistent, available, and indicative of future cash flow to Husband. *See, supra.*

Wife includes this 5% guaranteed payment in Husband's income.

Husband does not. Husband excludes it as principal from an inheritance or trust, citing Humphreys v. DeRoss, *supra,* and Jacobs v. Jacobs, ____ Pa. Super. ___, 884 A.2d 301, 307 (2005). In Humphreys, the Pennsylvania Supreme Court found that a one-time, lump sum inheritance of a house, and the proceeds from the sale thereof, was not income for support purposes. The Court reasoned that including the inheritance in DeRoss' income "ignores the economic reality that DeRoss is not similarly situated to a person with a monthly cash flow of $5,586.00." Humphreys, 70 A.2d at 286. The Court further stated that an inheritance "is likely to be used to make purchases, investments and savings, and not for meeting living expenses." The Court in Jacobs used a similar rationale in excluding a lump-sum gift from income.

However, the 5% principal distribution is distinguished from the inheritance in Humphreys and the gift in Jacobs. Husband has an absolute right to receive it, unlike a gift or inheritance. Further, Husband uses the distribution to pay for the trappings of his lifestyle. If Husband uses it to support himself, then the funds should also be made available to Wife for her support. A more meaningful reading of both Humphreys and Jacobs indicates that the factors set forth by the Court would compel the conclusion of Husband's 5% withdrawal right in his disposable income.

WHAT HUMP?

The elephant is now in full view, as it always has been. The illusion has failed.

HUSBAND'S REQUEST FOR A DOWNWARD DEVIATION

When all else fails, Husband requests a downward deviation. Husband argues that a deviation is required to avoid an "unjust or inappropriate" result from application of the

Guidelines to determine support.[6] Understandably, Husband does not argue in his brief that the support award is "unjust or inappropriate" **to him.** But Husband wants this Court to believe that it is.

In Mascaro v. Mascaro, 569 Pa. 255, 803 A.2d 1190 (2002), the Pennsylvania Supreme Court stated that

> [d]etermining spousal support solely on the parties' net incomes treats similarly situated persons similarly, which is the goal expressed in Section 4322 of the Divorce Code (Support Guidelines). Allowing for deviations from the presumptive amount of the support by permitting the trier of fact to consider the factors set forth in Rule 1910.16-5 prevents the goal of uniformity from leading to an *unreasonably harsh result where findings of fact justify the amount of the deviation. (emphasis added).*

Mascaro, 569 A.2d at 266.

Wife does not dispute that Mascaro permits the trier of fact to consider testimony regarding the "unreasonably harsh result" that a guideline determination of spousal support may create, and deviate from the guideline amount if supported by the testimony. However, Wife recalls no testimony from Husband that payment of a guideline support amount to Husband would be an "unreasonably harsh result" to him. Husband argues that four of the nine deviation factors set forth in Pa.R.C.P. 1910.16-5(b) are relevant in the instant case. Husband testified to none of them.

What Husband is attempting to do, through the disguise of arguing the deviation factors, is convince the Court that a guideline support amount provides Wife with more support than she needs. First, Wife's needs are not relevant pursuant to an award for spousal support or APL under Mascaro: "....reasonable needs of a spouse are not a proper consideration when calculating spousal support or APL." Mascaro, 569 Pa. at 269. Secondly, even if relevant, which it is not,

[6] Pa.R.C.P. 1910.16-4(a), Part IV provides that spousal support or APL, without dependent children, is 40% of the difference between the parties' net monthly incomes. This Guideline amount is the presumptive amount of support.

Husband elicited no testimony from Wife as to whether she "needs" a guideline support award or not. In his closing argument and Trial Brief, Husband baldly states to the Court that Wife has amassed a savings of over a million dollars from her interim support award, presumably to sway this Court that Wife is being overpaid. This is both incorrect and irrelevant. Further, Husband failed to inquire whether federal and state income taxes have been paid by Wife. In fact, the fund is little more than an account for the payment of such taxes, and does not represent an accumulation of wealth.

CONCLUSION

For all the reasons cited above, Margaret R. Scaife, Plaintiff/Wife herein, respectfully requests that this Honorable Court enter an award of spousal support/alimony pendente lite, consistent with the above.

Respectfully submitted,

By:______________________________
Gary G. Gentile, Esquire

By:______________________________
William Pietragallo, II, Esquire
Attorneys for Defendant, Margaret R. Scaife

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARGARET R. SCAIFE,	)	FAMILY DIVISION
	)	
Plaintiff,	)	
	)	
v.	)	NO.: F.D. 06-002384-001
	)	
RICHARD M. SCAIFE,	)	
	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of *Plaintiff's Trial Memorandum Regarding Complex Support* was served upon the parties named below via hand delivery this 2nd day of July, 2007:

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Family Court Facility
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Pittsburgh, PA 15219

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