

ORIGINAL

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARGARET R. SCAIFE,

Plaintiff,

RICHARD M. SCAIFE,

Defendant

FAMILY DIVISION

No. FD06-002384-001

DEFENDANT'S MOTION FOR  
EVIDENTIARY RULING

Filed On Behalf of Richard M.  
Scaife, Defendant

  
Counsel of Record For This Party:

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10/10/06 10:00 AM  
MARGARET R. SCAIFE  
RICHARD M. SCAIFE

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARGARET R. SCAIFE,

FAMILY DIVISION

Plaintiff,

No. FD06-002384-001

v.

RICHARD M. SCAIFE,

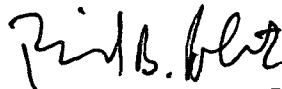
Defendant.

NOTICE OF PRESENTATION

PLEASE TAKE NOTICE that the within Defendant's Motion for Evidentiary Ruling will be presented to the Honorable Alan D. Hertzberg on Monday, November 20, 2006 at 1:30 p.m. or as soon thereafter as the Court may permit.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Defendant's Motion For Evidentiary Ruling was served this 13<sup>th</sup> day of November, 2006 via First Class Mail, postage prepaid on Gary Gentile, Esquire, Goldberg Gruener Gentile Horoho & Avalli, Suite 230 Grant Building, 310 Grant Street, Pittsburgh, PA 15219 and William Pietragallo, II, Esquire, Pietragallo, Bosick & Gordon, 38<sup>th</sup> Floor, One Oxford Centre, 301 Grant Street, Pittsburgh, PA 15219.



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H. Yale Gutnick  
Reid B. Roberts  
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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARGARET R. SCAIFE,

Plaintiff,

v.

RICHARD M. SCAIFE,

Defendant.

FAMILY DIVISION

No. FD06-002384-001

**DEFENDANT'S MOTION FOR EVIDENTIARY RULING**

Defendant Richard M. Scaife (hereinafter "Husband"), by his undersigned counsel, respectfully submits the following Motion for Evidentiary Ruling:

**Background and Factual Allegations**

1. With the present Motion, Husband seeks an evidentiary ruling assisting the Master in conducting the support hearing in this case. Specifically, Husband seeks an order instructing the Master that Husband is entitled to offer evidence under Pa. R. Civ. P. 1910.16-5 (1, 3, 5 and 7) concerning the parties' special needs, other income and assets, and standard of living, in support of Husband's argument that a downward departure from the support guidelines is required in this case to avoid an unjust and inappropriate result.
2. Husband is not asking this Court to pre-judge his departure argument before the hearing, but merely to direct that Husband is entitled to offer appropriate evidence in support of it.

3. This is an action for spousal support. As this court is aware, it is not merely a "high income" case.

4. To give some context, our Supreme Court's most important high income spousal support case to date, *Mascaro v. Mascaro*, 569 Pa. 255, 803 A.2d 1186 (2002), involved a husband whose net monthly income was \$52,000. In the present case, husband's net monthly income may exceed 10 times that amount.

5. In the ordinary spousal support case – even in the ordinary "high income" case – factors such as the assets, other income, and standard of living of the parties may have, on the facts therein, only a trivial effect on the outcome.

5. At the income levels in the present unique case, much is magnified (and magnified greatly), including the effect of various factors under the support guidelines on the justice and fairness of the outcome.

6. For example, during 8 months under the interim award in the present case, Plaintiff/wife has been unable to spend all of the three-quarters-of-a-million-dollars per month support award, and instead has accumulated \$2,290,970.61 to her new National City checking and savings accounts.

7. In fact, the evidence will show that the application of the guidelines without a downward departure will result in an award that Plaintiff can not, under any circumstances, spend as a living allowance. The evidence will show that Plaintiff will inevitably amass, from support alone, a personal fortune. This is not the purpose of spousal support. The purpose of spousal support is to assure a reasonable living allowance to the party requiring support. *Krakovsky v. Krakovsky*, 400 Pa.Super. 260, 266, 583 A.2d 485, 488 (1990). Clearly, where the facts in a particular case show that

the mechanical application of the guidelines will wholly overwhelm the purpose of support, a departure under Rule 1910.16-5 is called for.

8. Using mechanical spousal support to cause Wife to amass a fortune beyond any possible (much less reasonable) living allowance is the functional equivalent of giving Plaintiff *two separate equitable distributions* from Husband – one of which will be awarded, not on factors relevant to equitable distribution, but on mechanically applied factors relevant to the ordinary spousal support case.

9. It is for this reason that the support guidelines permit – and permit in circumstances just like those in this case – a downward departure from the mechanical calculation.

#### **Memorandum of Law**

Both the support guidelines, and the provisions of the Divorce Code establishing those guidelines, provide that “there shall be a rebuttable presumption” that the guideline amount of support is correct. 23 Pa. C.S. § 4322(b); Pa. R. Civ. P. 1910.16-1(d). Both the statute and the Rules also provide that the presumption “shall” be rebutted if the Court makes a written finding that the guideline amount “would be unjust or inappropriate.” *Id.*

The factors to be considered in determining whether to depart from the guideline amount are set forth in Rule 1910.16-5(b):

In deciding whether to deviate from the amount of support determined by the guidelines, the trier of fact shall consider:

- (1) unusual needs and unusual fixed obligations;
- (2) other support obligations of the parties;

- (3) other income in the household;
- (4) ages of the children;
- (5) assets of the parties;
- (6) medical expenses not covered by insurance;
- (7) standard of living of the parties and their children;
- (8) in a spousal support or alimony pendente lite case, the period of time during which the parties lived together from the date of marriage to the date of final separation; and
- (9) other relevant and appropriate factors, including the best interests of the child or children.

Pa. R. Civ. P. 1910.16-5(b).

In child support cases where the parties' combined net monthly income exceeds the highest amount shown in the guidelines, courts are instructed to perform a "*Melzer*" analysis, deriving its name from the case of *Melzer v. Witsberger*, 505 Pa. 462, 480 A.2d 991 (1984). This involves, *inter alia*, a determination of the "reasonable expenses of raising the children involved, based upon the particular circumstances – the needs, the custom, and the financial status – of the parties." *Melzer*, 505 Pa. at 471, 480 A.2d at 995. In such high-income cases, the top guideline support amount merely serves as a presumptive *minimum* amount of child support.

The *Melzer* rule does not apply, however, to spousal support. *Mascaro v. Mascaro*, 569 Pa. 255, 803 A.2d 1186 (2002). Under *Mascaro*, courts in spousal support cases are to determine the parties' net monthly incomes and perform the relevant support calculation. *Mascaro*, 569 Pa. at 266, 803 A.2d at 1193. The resulting figure is the presumptive amount of spousal support. But that is not the end of the

analysis: the presumption is rebuttable if the court makes a written finding that the application of the guideline would be unjust or inappropriate pursuant to the factors set forth in Rule 1910.16-5. *Id.*

Allowing for deviations from the presumptive amount of support by permitting the trier of fact to consider the factors set forth in Rule 1910.16-5 prevents ... an unnecessarily harsh result where findings of fact justify the amount of the deviation.

*Mascaro*, 569 Pa. at 265, 802 A.2d at 1193.

The Master in the present case has expressed uncertainty whether downward departures are available in high income cases, or on the contrary whether only upward departures are available in low income cases. See Transcript of October 30, 2006 hearing, pp. 127-29 (attached hereto). The *Mascaro* opinion, however, makes the answer clear. *Mascaro* itself, of course, the very case that instructs courts to consider deviations under Rule 1910.16-5, was a high income case. In its instructions to the lower court on remand *in that case*, the Supreme Court directed that the trial court consider the mechanical calculation "*with an upward or downward modification* pursuant to the factors set forth in Rule 1910.16-5." *Mascaro*, 569 Pa. at 266, 803 A.2d at 1193 (emphasis added).

It could not be more clear: in a high income case, the trial court is fully empowered to consider a downward modification based on the Rule 1910.16-5 factors.

In her Pretrial Statement, Plaintiff cites *Ball v. Minnick*, 538 Pa. 441, 648 A.2d 1192 (1994) for the alleged proposition that "the fact that the recipient's actual reasonable needs can be met at a support level that is less than the guideline support is an 'impermissible basis for deviating from the guidelines.'" Plaintiff's Pretrial Statement, pp. 18-19 (emphasis omitted). Of course, the fact that *Ball v. Minnick* was a child

support case, and that the Rules themselves expressly state that a *Melzer* analysis *must* be applied in high-income child support cases, is sufficient reason to doubt that *Ball v. Minnick* really stands for the proposition that Plaintiff says it does. For additional reasons to doubt, one need only read the case of *Ball v. Minnick*, which was, in fact, a **low income** case. The trial court there had reduced the amount of support below the guidelines so as not to raise the existing standard of living of the mother's household, which included another adult and a child of whom the payor was not the father. It was in that context that the Supreme Court cautioned that the child support guidelines are not to be departed from on some thought that impoverished children don't "need" the guideline amount in order to subsist.

The Supreme Court made clear, however, that a different analysis would apply in high income cases, involving an "unusually high standard of living." *Ball v. Minnick*, 538 Pa. at 450, 648 A.2d at 1197.

In the present case, four of the relevant factors set out in Rule 1910.16-5 establish clearly that an award of the guidelines amount of spousal support here is both unjust and inappropriate. The relevant factors are: (1) unusual needs; (3) other income in the household; (5) the assets of the parties; and (7) the standard of living of the parties.

The record in this case will be abundantly clear that Wife *cannot possibly* expend the guideline amount of support no matter how lavishly she chooses to live, and indeed, under the current interim award, based on the guidelines, she has been accumulating enormous sums of cash (factor 5) each month – sums that are themselves becoming a substantial source of income (factor 3).

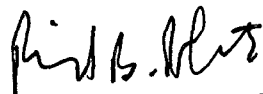
While it may be true that parties in this elevated income stratum have “unusual needs” (factor 1) in maintaining their accustomed “standard of living (factor 7),” it must be remembered that “[t]he purpose of an order of spousal support is to assure a reasonable living allowance to the party requiring support.” *Krakovsky v. Krakovsky*, 400 Pa.Super. 260, 266, 583 A.2d 485, 488 (1990).

A support award in the present case that is based on blind application of the guidelines, however, where Wife cannot possibly spend the entire amount of the award in maintaining her lifestyle, goes far beyond providing a “living allowance” even at an elevated level. It amounts to a continuing transfer of property, much more akin to equitable distribution. Yet, equitable distribution has a different purpose (“effectuating economic justice between the parties and achieving a just determination of their property rights”, *E.g., Schenk v. Schenk*, 880 A.2d 633, 639 (Pa. Super. 2005)) from spousal support. Equitable distribution is to be determined based on an entirely different set of factors, 23 Pa.C.S.A. § 3502(a), and is limited in scope to marital property. *Id.*

To refuse a downward deviation from the guidelines, where the known result will be to increase Wife’s *savings* by hundreds of thousands of dollars *every month* is plainly an “unjust [and] inappropriate result” that demands a downward deviation from the guidelines, in order accurately and rationally to reflect the parties’ income, assets, needs and lifestyle.

Wherefore, Husband respectfully requests an Order directing that Husband be permitted to offer evidence in support of the factors set forth in Rule 1910.16-5.

STRASSBURGER MCKENNA  
GUTNICK & POTTER



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H. Yale Gutnick  
Reid B. Roberts  
Ronald D. Barber

Monday Afternoon,

October 30, 2006.

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THE COURT: Let me say that I spent the lunch hour reading Mascaro and reading Terpack and I think it is clear that her expenses are irrelevant. I think it is the 40 percent rule and I don't think it is even a close call. The factors that seem to be at play are if your client -- if that was a hardship for him, I think those kind of factors are relevant, but I haven't heard those from her.

MR. ROBERTS: Can I then ask because we do have an expert who has a report that deals with historical spending and because I think that respectfully this would be reversible error that we at least be allowed to make our record so that in the event that the appellate court or Judge Hertzberg, whoever, doesn't agree that at least our record has been made with regard to that issue.

THE COURT: Well, do you have --

MR. GENTILE: I tell you why that's not necessary and I think it is prejudicial to us. If the court deemed you to be wrong and that

Janet M. Barto  
Official Court Reporter

1 would mean if Judge Hertzberg decided to  
2 overrule Mascaro, he would have -- there would  
3 be a remand like we have been before for you to  
4 take that evidence and we would then be put on  
5 notice to be prepared to present budgetary  
6 evidence as well. We would have a chance to do  
7 that. But now they put in that evidence, Judge  
8 Hertzberg for some reason decides to accept it,  
9 we have no evidence at all, no impeachment, no  
10 rebuttal, nothing regarding this same subject.  
11 It is going to get remanded anyway.

12 THE COURT: Look, given whatever next day  
13 of trial you have, it seems to me you can go to  
14 motions to Judge Hertzberg and get an opinion  
15 from him.

16 MR. ROBERTS: Well, the only thing is as  
17 to what Gary said, that curiously they had this  
18 Deutsch case ready to go, I mean this issue of  
19 them not having --

20 THE COURT: No, they --

21 MR. ROBERTS: It really is disingenuous.

22 THE COURT: I'm not deciding on the basis  
23 of notice or lack of notice, I'm deciding on  
24 the basis of Mascaro.

25 MR. ROBERTS: Well, but Mascaro does -- it

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1 clearly says that the court -- I mean so here's  
2 my question then. If that were correct then  
3 under what circumstances would one have the  
4 opportunity to rebut the presumption if not to  
5 also include the language that says that we are  
6 allowed to argue that the result would be harsh  
7 and unjust and unfair.

8 THE COURT: The unusual needs and unusual  
9 fixed obligations, to me that goes to if she  
10 had some unusual needs that would take it above  
11 40 percent or if he had some unusual needs that  
12 would mean that 40 percent was a hardship.

13 MR. ROBERTS: But why then does the  
14 deviation statute also include standard of  
15 living of the parties. You can argue that from  
16 both sides too, that either the 40 percent  
17 doesn't give the payee enough money to be able  
18 to meet their standard of living or that the  
19 40 percent results in what it is like in this  
20 case, would be five times the lifestyle that  
21 the recipient would otherwise have, and  
22 that's -- I mean it is clearly a delineated  
23 point.

24 THE COURT: I hear you. I'm telling you  
25 what I think, okay. But this witness that you

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Plaintiff,

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v.

RICHARD M. SCAIFE,

Defendant.

ORDER

AND NOW, this 20 day of November, 2006, upon consideration of Defendant's Motion for Evidentiary Ruling, it is hereby ORDERED and DECREED that the Motion is GRANTED. The Master in the within spousal support hearing shall permit Defendant to offer evidence relating to the factors set forth in Pa. R. Civ. P. 1019.16-5, in support of Defendant's request for a downward deviation from the support guidelines.

*The undersigned is not, by signing this order, indicating any proclivity on the ultimate issue of applicability of a guideline deviation.*

By the Court:

Alan Hefberg, J.