

Sealed

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,  
PENNSYLVANIA

ORIGINAL

MARGARET R. SCAIFE,

FAMILY DIVISION

Plaintiff,

No. FD06-002384-001

**TRIAL BRIEF OF DEFENDANT  
RICHARD M. SCAIFE**

RICHARD M. SCAIFE,

Filed On Behalf of Richard M.  
Scaife, Defendant

Defendant

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ALLEGHENY COUNTY

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.

**TRIAL BRIEF ON BEHALF OF  
DEFENDANT RICHARD M. SCAIFE**

Defendant Richard M. Scaife (sometimes hereinafter referred to as "Husband"), by his undersigned counsel, respectfully submits this Trial Brief with regard to four key legal issues that have arisen in this action:

**Introduction**

The duty of spousal support is an obligation, arising from the marital relationship, to provide for the care, maintenance and financial needs of a dependent spouse. *E.g., Musko v. Musko*, 548 Pa. 378, 383, 697 A.2d 255, 257 (1997). 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).

To fashion an award of support, the Court must first ascertain the parties' disposable income and apply the support guidelines' mechanical formula to that

income. Second, the court must examine the factors listed in Pa. R. Civ. P. 1910.16-5 to determine whether a departure from the guideline amount is required. (A more thorough discussion is found in our earlier trial memorandum on this point).

While the amount produced by mechanical application of the guidelines is presumptively the correct amount of support, that presumption may be rebutted.

As the legislature directed in the statute:

A written finding or specific finding on the record that the application of the guideline would be inappropriate or unjust in a particular case shall be sufficient to rebut the presumption in that case, provided that the finding is based upon criteria established by the Supreme Court by general rule.

23 Pa. C.S. §4322(b).

This case presents unique challenges simply because Husband's income is so large. Factors that in any other case would be utterly trivial are magnified many times. Failing to deal, not just appropriately, but precisely, with any one of those factors could produce a result that no one, viewing the case objectively, could accept as just.

For example, a preliminary application of the 40% guideline formula produced an order of temporary support that amounts to \$8.7 million a year – an amount that can support Wife's current lifestyle *three times over*, as evidenced by the fact that Wife has built up millions of dollars in savings in the past 13 months. The temporary order produces an amount so large that just the *income* from it, invested at 5%, is greater each year than the salary of the President of the United States. Obviously, what has been occurring over the past 13 months

cannot rationally be described as spousal support. It is tangibly, objectively, unjust.

The possibility of continuing or compounding the injustice in this case is only made worse by the fact that Wife, her expert Richard Brabender, and her counsel, are palpably overreaching in their proposed measurement of Husband's income, as discussed in detail in this Brief.

### Discussion

**I. Trust corpus distributed to Husband from his mother's 1965 Trust is not included in income pursuant to *Humphreys* and *Jacobs*.**

Under the provisions of 23 Pa. C.S. §4302 and Pa. R. Civ. P. 1910.16-2(b), monthly gross income expressly includes "*income* from an interest in an estate or trust." *Id.* (emphasis added). However, neither the *corpus* of an inheritance nor of a gift is income for support purposes. *Humphreys v. DeRoss*, 567 Pa. 614, 624, 790 A.2d 281, 287 (2002); *Jacobs v. Jacobs*, 884 A.2d 301, 307 (Pa. Super. 2005).

Under the provisions of the 1965 Trust (Family Trust No. 3) created by Husband's mother, Sarah Mellon Scaife, Husband is entitled to receive not only the income produced by the trust, but also may demand five percent (5%) of trust corpus each year. In the present case, Wife's expert, seeking to inflate the amount of income available for support, has included *both* the 1965 Trust income *and* principal distributions in Husband's income, although that expert admits that the Trust distributions are either a gift or an inheritance.

The drafters of the Domestic Relations Code could easily have included language in Section 4302 including “all distributions from an estate or trust” in income. That they chose instead to limit the rule to “*income* from an interest in an estate or trust” cannot be ignored. *Humphreys*, 567 Pa. at 620, 790 A.2d at 285 (“In light of the fact that the legislature specifically included “income from an interest in an estate or trust” but did not include the principal of an inheritance or trust, it is logical to assume that the legislature did not intend to include the principal”). This is consistent with the Superior Court’s earlier holding in *Hoag v. Hoag*, 435 Pa. Super. 428, 646 A.2d 578 (1994), that the corpus of a trust, even if the payor spouse has the ability to withdraw it, is not income for the purposes of support.

Husband’s expert, David Kaplan, has correctly excluded distributions of principal from the 1965 Trust in calculating Husband’s income and the Court should adopt Kaplan’s approach on this issue.

**II. Trust distributions from Husband’s Charitable Remainder Unitrust are similarly not included in income.**

In a similar vein, Brabender overreaches in his method of attributing income to Husband from the Charitable Remainder Unitrust (“CRUT”). The CRUT was created by Husband in 1996. Transcript of 2/12/07, pp. 58-59. He funded it with approximately \$122 million that had been distributed to him in the form of 909,000 shares of stock of an insurance company from the 1958 Family Trust No. 1. Transcript of 1/29/07, p. 69. The CRUT is irrevocable – Husband will receive 8% of the CRUT’s value annually during his lifetime, and thereafter

the remainder will go to two charitable foundations. Transcript of 1/29/07, pp. 35, 64-65. Husband's 8% annual distribution is not affected by the CRUT's performance – he receives 8% of its value each year regardless of whether the trust increases in value more or less than 8%, or declines in value. *Id.*, pp. 66-67.

To date, Husband has not received back \$122 million from the CRUT. He is merely receiving back what he gave to the trust at the outset. This fact, together with the provision that Husband's annual distribution is wholly unrelated to the performance of the trust, is consistent with the CRUT trustees' designation of Husband's distribution as consisting of principal, not income. Under *Humphreys v. DeRoss*, 567 Pa. 614, 624, 790 A.2d 281, 287 (2002), this distribution is not to be included in Husband's income for support purposes.

Wife's expert, on the other hand, included the entire \$11 million distribution from the CRUT in 2005 in his calculation of Husband's income, even though this amount, by his own measure, includes \$7.7 million in capital gains that date back to Husband's mother's lifetime. Brabender Report, p. 5; Transcript of 2/12/07, pp. 58-59; Transcript of 4/23/07, p. 196. In fact, the change in asset value of the CRUT in 2005, apart from dividend income, was exclusively a capital loss. Brabender has not merely overreached by including the CRUT at all in his analysis, he has in addition inflated his analysis of the CRUT by attributing gains from 1958 (and earlier) to Husband's 2005 income. This is plainly improper, as Brabender's failure to cite any authority for this extraordinary treatment tacitly admits.

**III. Money that Husband paid to cover business losses of Tribune-Review Publishing Co. are proper deductions from income under *Pape, Fennell and McAuliffe*.**

Husband is a professional investor. He owns a large number of shares of stock in publicly traded corporations. He owns real estate and other kinds of property from which he earns rent and royalties. And he owns two Subchapter S corporations that are engaged in the publishing industry.

Beginning in 1992 (i.e., virtually throughout the marriage), Husband has used funds, including funds that he has received from the 1935 Trust, to cover losses incurred by one of those corporations – Tribune-Review Publishing Co. – to establish the Pittsburgh Tribune-Review as, initially, a start-up business, and to allow the corporation to continue its operations. Wife was aware of these investments at all times. Indeed, for 10 years during the marriage she was a member of the Board of Directors of the corporation. She knew that Husband and his management team were actively working throughout these years to reduce costs and increase the circulation and ultimately the profitability and value of the corporation.

From 2000 until 2004 alone, the amount Husband invested in Tribune-Review Publishing Company exceeded \$130 million. In 2005, Husband personally funded a further \$18 million to cover operating losses and preserve his investment. This was less than the amount he invested in any of the preceding five years. See, Brabender Report, Schedule 8; See also Exhibit FF. Wife's expert himself acknowledged that Tribune-Review Publishing Company

has substantial value, Transcript of 1/29/07, p. 124, and that increasing that value is important – “an indication of success” – independent of any annual operating profits. *Id.*, p. 123.

Brabender, however, did not reduce Husband’s income to reflect the \$18 million investment. Brabender acknowledged that Tribune-Review Publishing Co. was operated as a bona fide business, *see*, Transcript of 1/29/07, p. 102, , and that the investments were not made in order to defeat Husband’s support obligation. *Id.*, p. 108. Brabender further admitted that his personal opinion (contradicted by Husband’s testimony) that the Tribune-Review was not one of Husband’s investments was not a basis for his decision to ignore the \$18 million loss. *Id.*, pp. 103-05.

Brabender initially put forward five reasons why he did not deduct this business loss from Husband’s income. He has since retracted two of them (insufficient time spent in the business, *id.*, pp. 98-99; and, as noted above, the opinion that it’s not a business or investment, *see*, Transcript of Testimony of 1/29/07, pp. 103-05). He is left now with three arguments that are contrary to clear Pennsylvania law.

First, and fundamentally, Brabender suggests that “there is no provision under [statute, rule or case law] to take into account a loss in the calculation of disposable income.” *Id.*, p. 99. Of course, this Court in *Pape v. Amoni*, FD 04-3402 (Allegh. Co. Nov. 22, 2004) (slip opinion) (attached), previously held exactly the opposite: that the funding of losses reasonably necessary to preserve a

business is a legitimate deduction against income, so long as there is no effort to defeat a support obligation.

In *Pape*, the husband sought to exclude from his income almost \$1.3 million that he transferred to one of his businesses to supply its working capital needs. He had previously invested \$500,000 in that business and did not want to abandon that earlier investment. This Court upheld the deduction, based upon the following analysis:

Applicable Pennsylvania case law does require consideration of whether a major cash outlay or retaining business earnings is done to defeat a support obligation or whether it is a prudent and necessary business decision. See *Fennell v. Fennell*, 753 A.2d 866 (Pa. Super. 2000) and *McAuliffe v. McAuliffe*, 613 A.2d 20 (Pa. Super. 1992).

Based upon the evidence presented, the hearing officer concludes that father's transfer of \$1,293,961 to Pittsburgh Mack Sales and Service, Inc. was a sound and necessary business decision and was not done to defeat a support obligation. That being so, the hearing officer accepts Mr. Kaplan's analysis and finds father's net disposable income to be \$15,128 per month.

*Pape v. Amoni*, slip op. at 2.

The facts in the present case are even more compelling than those in *Pape v. Amoni*, as Husband in the present case expended a smaller amount in 2005 (\$18 million) to preserve a larger prior investment (over \$130 million). In *Pape*, the Husband expended a larger amount (over \$1 million) to preserve a smaller prior investment (\$500,000). Furthermore, the deduction from income of the business loss in *Pape* resulted in a far more substantial reduction in net monthly income – from approximately \$111,000 to \$15,128 (an 86% reduction) – whereas the deduction of Husband's business losses in this case would reduce

his monthly income from approximately \$2.7 or \$3 million before the deduction, to approximately \$1.2 or \$1.5 million after the deduction – a reduction of roughly 50%.

Quite simply, in the calculation of “net income from business,” Pa. R. Civ. P. 1910.16-2(a); *see also* 23 Pa. C.S. §4302, losses actually incurred by the business and replenished by the payor spouse are deductible from income. The sole requirements for the deduction of such losses are (1) real monetary losses and not fictitious accounting entries such as “depreciation,” *see, e.g., Heisey v. Heisey*, 430 Pa.Super. 16, 633 A.2d 211 (1993) *McAuliffe v. McAuliffe*, 418 Pa.Super. 39, 613 A.2d 20 (1992); *Cunningham v. Cunningham*, 378 Pa. Super. 280, 548 A.2d 611 (1988); *and Flory v. Flory*, 364 Pa.Super. 67, 527 A.2d 155 (1987),<sup>1</sup> (2) that they were “necessary to maintain or preserve” the business, *Fennell v. Fennell*, 753 A.2d 866, 869 (Pa. Super. 2000) (citing *McAuliffe v. McAuliffe*, 418 Pa. Super. 39, 44, 613 A.2d 20, 23 (1992),<sup>2</sup> and (3) that they not be created for the purpose of shielding income from support obligations. *Fennell, supra; McAuliffe, supra*. At trial in the present case, Wife did not contest any of these three controlling factors.

Brabender’s attempt to argue that Pennsylvania law contains no provision for deducting business losses from income may be an inarticulate attempt to

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<sup>1</sup> This case law contradicts as well Brabender’s remarkable assertion that there is no basis in Pennsylvania law for a distinction between business losses that the payor spouse funds and losses that go unfunded. In fact there is just such a distinction, and it is precisely that real, funded losses may be deducted, while unfunded or paper losses may not.

<sup>2</sup> On this issue, a fact recognized to have great significance is that, here, the expenses paid by Husband have been a “long-standing practice of the corporation and ... had been a business decision.” *Fennell*, 753 A.2d at 869. *Compare, McAuliffe*, 418 Pa. Super. at 44, 613 A.2d at 23 (finding that “recent discretionary cash outlays” were not shown to be necessary for the business) (emphasis added).

refer to a number of Pennsylvania cases, including *Newcomer v. Newcomer*, 325 Pa. Super. 536, 540, 473 A.2d 197, 200 (1984), and *Commonwealth v. Testa*, 226 Pa. Super. 585, 587, 323 A.2d 199, 200 (1974), which contain the statement that “[o]ne cannot avoid support by staying with a losing enterprise.” This quotation ultimately traces back to the case of *Commonwealth ex rel. Wills v. Bonetti*, 190 Pa. Super. 335, 154 A.2d 404 (1959). In that case, the defendant asked to have his support obligation suspended, and all arrearages eliminated, because his one-man contracting business “has failed, with liabilities far in excess of his assets.” 190 Pa. Super. at 337, 154 A.2d at 405. The Superior Court noted that there were substantial questions of the defendant’s credibility and that he had been trying for years to avoid the duty of support. This case is simply not apposite to the present facts. Furthermore, in neither of the two later cases citing *Bonetti* did the observation have any impact on the outcome of the case. In both of those cases, the quotation of *Bonetti* was the purest *obiter dicta*, as both courts vacated the relevant support order due to an inadequate record.<sup>3</sup>

In a similar vein, the case of *Berry v. Berry*, 898 A.2d 1100, 1107 (Pa. Super. 2006) does *not* stand for the proposition that every business expense a support obligor pays must generate a profit in order to be deductible as a loss. (Indeed, the interpretation of *Berry* as proposed by Plaintiff here is nonsensical – it would result in a complete inability, ever, to deduct a business loss). The Superior Court in *Berry* stated:

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<sup>3</sup> One other such case, a 1987 trial court opinion from the Court of Common Pleas of Carbon County, Pennsylvania, appears to have been vacated by an unpublished opinion of the Superior Court. See, *Soberick v. Soberick*, 383 Pa. Super. 673, 550 A.2d 255 (1988) (table).

In determining monthly gross income for support purposes, Rule 1910.16-2(a)(2) provides that income includes "net income from business..." Pa.R.C.P., Rule 1910.16-2(a)(2), 42 Pa.Cons.Stat. Ann. The use of the word "net" in the rule specifically implies that there are acceptable business deductions. For instance, provided with the appropriate itemizations, unreimbursed business expenses, when used to increase income, may be deductible from gross income, although it must be proven on a case-by-case basis.

*Berry*, 898 A.2d at 1107.

Quite simply, the cases call into question whether a payor spouse can avoid earning a living at all by claiming that the sole source of income is a failed business. They have nothing to do with whether the vast productivity of Husband's investment portfolio in the present case is to be viewed in light of both its real gains and real losses, or whether Wife can convince the Court to see its gains only. We believe her attempt to overreach in this manner should and will fail.

Unable to show that Husband's Tribune-Review business losses should be excluded under the factors identified in existing Pennsylvania law, Wife and her expert, Brabender, argue that those losses should be ignored for two reasons that find *no support* in Pennsylvania law. First, they argue that the losses should be ignored because the money Husband used to fund them was received by him from a trust created by his mother. This is completely irrelevant as shown by Wife's failure to cite *any authority* to support it.

The funds Husband used to replace these business losses and continue the operations of the corporation were *his funds*. Parties in divorce are perfectly entitled to have separate estates. And they are entitled to prove deductions from

income as provided by law. The fact that a party chooses to pay a deductible item (e.g., a large income tax liability) from one source rather than another has never been viewed as determinative on the deductibility of an expense, nor is there any reason to do so. Husband's Tribune-Review losses do not become non-deductible merely because of the source he chooses to use to repay those losses. Similarly, the form in which he makes that repayment, either a contribution of equity or the making of a loan, does not change the fact that Husband has repaid the losses and has reduced his available cash flow by doing so. He is entitled to deduct these expenses from his "net income from business," Pa. R. Civ. P. 1910.16-2(a).

**IV. A downward departure from the guideline formula is required in this case to avoid an unjust result.**

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.

Lest there be any doubt that downward departures are available in high income cases, or on the contrary whether only upward departures are available in low income cases, the *Mascaro* opinion 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.

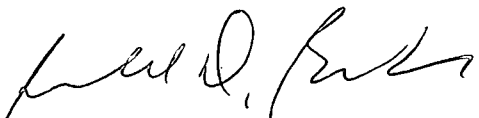
The record in this case is abundantly clear that a mechanical application of the guideline formula will fund more than three of Wife's lifestyles. This is confirmed by the fact that Wife is already amassing millions of dollars in savings from the temporary support amount of \$725,000 per month. This is accomplishing something far different from spousal support, even at the rare lifestyle level of these parties.

While it may be true that parties in this elevated income stratum have "unusual needs" in maintaining their accustomed "standard of living," *cf.* Pa. R. Civ. P. 1910.16-5(b)(1,7), 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, goes far beyond that legitimate purpose, even at an appropriately elevated level. It amounts to a continuing transfer of property, much more akin in its results 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 unrecognizable as a living allowance, 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.

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,  
PENNSYLVANIA

STACEY PAPE,	)	FAMILY DIVISION
	)	
Plaintiff,	)	FD04-3402
	)	
v.	)	
	)	
ROBERT M. ARNONI,	)	
	)	
Defendant.	)	
	)	

EXPLANATION

Mother seeks support for the parties' daughter Mia, age 14 months. Her petition is retroactive to April 6, 2004. Given the incomes of the parties, a *Melzer* analysis is required. Mother has custody of the child for eight days and father has custody of her for six days out of every 14 day period.

A. Mother's Income

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The parties stipulate that mother's net disposable income available for support is \$13,575 per month.

B. Father's Income

The parties dispute father's net income available for support. Timothy Taylor, mother's expert, found father's net disposable income to be \$111,475 per month (Exhibit 2 as adjusted by his testimony concerning a tax overpayment). David Kaplan, father's

expert, found father's net income available for support to be \$15,128 per month (Exhibit S).

There are two major differences between the analyses of the experts. One is in the area of perquisites and that is really not a dispute since Mr. Taylor testified that, had he known about the perquisites, he would have added them to father's net disposable income as Mr. Kaplan did.

The other dispute concerns father's receipt of \$1,143,200 from his business Armoni Development Ltd. and his subsequent transfer of \$1,293,961 to his other business, Pittsburgh Mack Sales and Service, Inc. He testified that he had earlier invested \$500,000 in Pittsburgh Mack Sales and Service, Inc. and that in 2003 he faced the unpleasant choice of either making a major cash infusion to keep the business afloat or doing nothing and losing his original \$500,000 investment when the struggling business failed, which he felt it would do if it did not have the funds to sustain the operations of the business and supply its working capital needs. Mr. Taylor considers father's motivation irrelevant and testified that he would have excluded \$1,293,961 from father's income only if there was a bank document requiring a shareholder contribution of funds.

Applicable Pennsylvania case law does require consideration of whether a major cash outlay or retaining business earnings is done to defeat a support obligation or whether it is a prudent and necessary business decision. See *Fennell v. Fennell*, 753 A.2d 866 (Pa.Super. 2000) and *McAuliffe v. McAuliffe*, 613 A.2d 20 (Pa.Super.1992).

Based upon the evidence presented, the hearing officer concludes that father's transfer of \$1,293,961 to Pittsburgh Mack Sales and Service, Inc. was a sound and necessary business decision and was not done to defeat a support obligation. That being

so, the hearing officer accepts Mr. Kaplan's analysis and finds father's net disposable income to be \$15,128 per month.

C. The Child's Reasonable Needs

At trial mother asserted reasonable needs for their 14-month-old child Mia of \$9,382 per month (Exhibit 4). At an earlier conciliation (July 2004) she asserted that the child's reasonable needs were \$5,253 (Exhibit G). Mr. Kaplan analyzed receipts and bank statements mother produced in discovery and found that her documented historical expenditures for Mia totaled \$2,543 per month (Exhibit V). Father testified that his expenditures for Mia when she is in his custody (6/14 of the time) is \$2,195 per month (Exhibit P). His shelter costs, where he resides with his three children from his marriage an unknown percentage at the time and Mia 6/14 of the time, are \$4,449 per month (Exhibit Q). If all of the children lived there 100% of the time, Mia's share would be 20% or \$890 per month. However, given that Mia is there slightly less than half of the time, the hearing officer assigns \$445 as Mia's share of common household expenses in ~~father's house bringing his total for Mia to \$2,640 per month. Father is paying \$7,500 per~~ month to meet the needs of his wife and three children (Exhibit F) and common sense suggest that a 14-month-old infant could not possibly have reasonable needs that exceed those of four people. Mother asserts that Mia's share of common expenses is 50%. However, Mia's share is not 50% but is instead 29% given that mother's son Shane also resides there (6 out of 14 days). This makes the percentage of common expenses in mother's household as follows:

Mother	50%
Shane	21%
Mia	29%

Mother's asserted condominium expenses of \$793 per month might be reasonable if she actually paid them, but the evidence she submitted in support of condo expenses reveals that her expenditures total \$492 per month. That being so, \$143 or 29% is Mia's share of condo expenses.

Mother asserts that her expenses at Snowberry Circle are \$4,933 per month. Given that there were no demonstrated expenditures by mother for maintenance, grass cutting, or insurance and given that Mia does not read the newspaper, the hearing officer finds mother's actual expenditures for Snowberry Circle to be the most accurate measure of her reasonable needs in connection with that property. Those expenditures total \$3,908 per month and Mia's 29% share is \$1,133 per month. Mother produced proof of only \$428 per month spent on counsel fees (Exhibit V). However, she credibly testified that she owes counsel fees. Therefore, the hearing officer sets her counsel fee expense at \$800 per month and assigns 100% of that expense to the child. She deletes dues of \$1,000 because it is not occurring and adjusts vacations to \$100 per month since the condo expense is a form of vacation. With these adjustments, the category marked "~~other~~" (now excluding counsel fees) on mother's budget totals \$1,698 and Mia's 29% share is \$492 per month.

The remaining category on mother's budget is labeled "baby" and she asserts monthly expenses of \$3,387 in that category, 100% of which would be the child's expense. Mother offered no evidence that she has an obligation to provide the nanny with 35 hours of work per week. Instead, she testified that she has custody of Mia 8/14 of the time. The hearing officer therefore concludes that mother needs the nanny 23 hours per week which is 8/14 of a 40 hour work week and that her monthly nanny expense is \$797

(\$8 x 23 hours x 52 weeks ÷ 12 months). The hearing officer deletes play equipment/fence because mother testified that that expense is only projected. With these adjustments, her total expenses in the "baby" category are \$1,712 per month.

This makes Mia's expenses in mother's home \$4,480 per month as follows:

Condo	\$ 143
Snowberry Circle	\$ 1,133
Counsel fees	\$ 1,000
Other (without counsel fees)	\$ 492
Baby	<u>\$ 1,712</u>
Total	\$ 4,480

As previously noted, father's expenses for Mia are \$2,640 per month. (Much of this difference is because the common expenses are prorated among more people in father's house, thus reducing Mia's share.)

A *Melzer* analysis requires a determination of each parent's reasonable needs before determining child support. Unfortunately, based upon the way the evidence was presented, it is not possible to do that for several reasons such as:

- What is mother's obligation for son Shane's expenses?
- How much of father's \$1,596 monthly membership cost is reasonable and necessary?
- How much of father's \$1,000 per month charitable contribution is reasonable and necessary?
- Does father have any reasonable and necessary clothing expenses other than for Mia?
- Does mother?

However, knowing the parent's net incomes and Mia's expenses in each household, it is possible to enter an appropriate child support order as follows:

Incomes

\$ 15,128	Father's net income (53%)
<u>\$ 13,575</u>	Mother's net income (47%)
\$ 28,703	Total

Mia's Expenses

\$ 2,640	Expenses in father's household
<u>\$ 4,480</u>	Expenses in mother's household
\$ 7,120	Total

Father's 53% share: \$3,774  
Mother's 47% share: \$3,346

Therefore, father owes mother \$1,134 per month child support for their 14-month-old child. With that payment father is paying \$3,774 and mother is paying \$3,346 as follows:

<u>Father</u>	<u>Mother</u>
\$ 2,640	\$ 4,480
<u>\$+1,134</u>	<u>\$- 1,134</u>
\$ 3,774	\$ 3,346

Father shall provide health insurance for Mia and pay 53% of her unreimbursed medical expenses after the first \$250 per year.

  
Patricia G. Miller, Esq.


**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **Trial Brief of Defendant Richard M. Scaife** was served by Hand Delivery, this 28<sup>th</sup> day of June, 2007, on the following:

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