High Income Earner Update: The Other Holding in *Macilwaine*

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When *Marriage of Macilwaine*[1] was published near the end of last year, the family law community gathered around to hear the key holding in the case: stock options are to be counted as income for child support purposes when sellable, regardless of whether the party holding the options chooses to sell them. Practitioners should take note that the case also marks the third decision in three years to address the calculation of child support when one parent is an extraordinarily high income earner. *Macilwaine* gives us some much-needed guidance on how to reconcile the apparent discrepancy between the last two holdings regarding the relevance of the support recipient's historic expenses.

Your Potential Client Might be an Extraordinarily High Income Earner

Suppose you are meeting with your potential new client, Mary. She's a recording artist, you've heard she is very popular. Mary is meeting with you to discuss custody and support for her two children she had with her longtime boyfriend Andrew. After going over the custody and visitation plan that will work for her during her upcoming world tour, you open up your preferred guideline support calculation software and ask Mary about her income. Mary says, "About a million." As you divide a million dollars by 12 months to determine her monthly income, Mary corrects you, "A million dollars *per month*--not *per year*."

Mary is what we call an "extraordinarily high income earner." For over 30 years, case law has recognized that some parents have such extraordinarily high income that the mathematical formula we use to calculate child support would lead to support amounts far in excess of what the recipient could possibly spend on his or her child. When you tell Mary that her guideline child support payment will be approximately $90,000 per month, you can expect her to ask, "How is Andrew going to spend $90,000 on our children every month?" While Mary's question is a sound one, is it relevant to the inquiry?

Deviation from Guideline Support under Family Code Section 4057(b)

Courts are required to use the guideline formula to set child support except for in special circumstances provided for in the Family Code.[2] Fortunately for Mary, one of those special circumstances is when one parent has an extraordinarily high income, and the mechanical application of the support formula would result in an improper shifting of wealth between unmarried or divorcing parties. After all, whatever Andrew doesn't spend on their children, he is likely to spend on himself or save for a time when the children have reached the age of majority.

This concept has been codified in Family Code section 4057, which provides that a court may deviate from guideline child support if it finds, among other factors, "The parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children."[3] Unless Mary and Andrew can agree on the needs of their children, we must look to case law for how we establish those needs.

Determining the Needs of Children of Wealthy Parents

Case law makes clear that a child's "needs" in this context are relative to the wealth of the child's parents,

as opposed to the child's bare necessities.[4] However, there is no particular method for establishing the child's needs. Practitioners and trial courts have struggled with the relevance of the historic expenses of each party in determining the child's needs and the appropriate amount of support when the guideline is not used.

Several early cases on this topic focused on the relevance of the high earner's expenses in determining the needs of a child. Both *White v. Marciano*[5] and *Johnson v. Superior Court*[6] approved of limitations on discovery into the lifestyle of the high earner. In those cases, the payors had indicated that they could pay any reasonable amount of child support. As the court explained in Johnson, "lifestyle should be evaluated based on the financial resources available to the payor parent, not whether he or she lives in a manner consistent with extravagance or frugality."[7] Under these rulings, if the support recipient has basic financial information regarding the payor's income, they are not permitted to engage in further discovery.

However, information regarding the lifestyle of the payor parent can be important in some cases. Family Code section 4053 contains principles to be followed by courts when setting child support. Subsection (g) provides, "Child support orders in cases in which both parents have high levels of responsibility for the children should reflect the increased costs of raising the children in two homes and should minimize significant disparities in the children's living standards in the two homes." In order to minimize significant disparities between the two homes, doesn't the court need to know how the child lives in each home? How do we reconcile this code subsection with the line of cases which allow for a limitation on discovery on high earners?

The cases that approved limitations on discovery into the high earner's lifestyle all have one fact in common: the minor child was spending little to no time in the custody of the high earner. Subsection (g) of section 4053 begins by identifying that this factor only applies in cases where both parents have significant custody time with the children. Applying this to our potential client Mary, if Mary never has any contact with the children, then it stands to reason that Andrew might not need access to how much Mary spends on vacations and dinners out because their children are not sharing in those experiences with her. However, if Mary has significant amounts of custody time, then Andrew should be able to do discovery into how the children live in her care in order to support his request for amounts of child support necessary for the children to have at least comparable experiences with him.

In addition to determining the high earner's lifestyle, discovery can also be used to impeach the high earner's testimony regarding the child's needs. Impeachment of the high earner is especially impactful because the high earner bears the initial burden of proof to establish what the child's needs are. After all, they are the party seeking a deviation from guideline child support.

Let's say Andrew files a parentage case and request for child support for the parties' two children. Andrew requests that the court order child support of $90,000 per month and attaches a computer printout of the guideline calculation. The guideline support calculation is presumptively correct and the court is required to use it unless Mary rebuts that presumption.[8] Mary must show that, "application of the formula would be unjust or inappropriate in the particular case [because] . . . (3) The parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children."[9]

In order to establish that the guideline amount of support would exceed the needs of the children, Mary must establish what the needs of the children are. Mary will either testify about the needs of the children or offer expert testimony regarding those needs. Assuming Andrew conducted discovery of Mary's expenses related to the care of the children, that information can form the basis for some powerful impeachment of the evidence offered by Mary. For example, if Mary offers evidence that the children's needs are met with $12,000 per month, this evidence can be rebutted by discovery responses demonstrating that Mary in fact spends $23,000 per month on the needs of the children.

Macilwaine and the Historic Expenses of the Support Recipient

The more recent high earner cases have focused on the relevance of the recipient's historic expenses in determining the needs of the children. Once the court has determined that the payor is an extraordinarily high income earner and the payor puts on their case for the children's needs, the recipient puts on their case as to why the support amount advocated by the payor parent is not enough to meet the child's needs at the payor's standard

of living. The recipient might testify or offer their own expert witnesses regarding the needs of the children. At that point, the payor parent will want to impeach the recipient with evidence of how much recipient parent spends on the children each month.

Is the court allowed to consider the historic expenses of the recipient parent of child support in determining the children's needs? Does the fact that Andrew spends $12,000 per month on the children's expenses mean that the court should keep the support order close to that amount instead of the $90,000 per month that Andrew is requesting? A recent trio of cases provides some answers.

In *S.P. v. F.G.*,[10] the trial court found the father of the child to be an extraordinarily high income earner, which is not surprising given his net worth of over $400 million, and annual income in excess of $4,000,000. Guideline support was calculated at $40,882 per month, which the court found exceeded the needs of the parties' daughter. From that point, the parents were worlds apart, with the mother requesting no less than $35,000 per month in child support, and father arguing that he should keep paying the $10,000 per month that he had voluntarily paid leading up to the hearing.

The trial court ordered monthly support of $14,840 plus certain expenses of the child. In its written order, the trial court explained that the mother had offered no evidence that the child's needs haven't been met by father voluntarily paying $10,000 per month but clarified that mother does not carry the burden to prove that needs are not met. The trial court found that the continuation of father's payment arrangement with mother for several years is "some evidence" of the parties' belief that the child's needs were being met by the voluntary payment of approximately $10,000 per month.

The court of appeals affirmed the trial court, holding that it is not an abuse of discretion to consider historical expenses or payments as "some evidence" of the child's reasonable needs, so long as the court does not use historical expenses to define needs. This holding begs the question: What can the historical expenses be considered for if not to define the needs of the child?

In *Y.R. v. A.F.*,[11] a case decided only four months after *S.P. v. F.G.*, mother requested guideline child support for the parties' daughter, which her expert witness calculated at $25,325 per month. Father argued that he was an extraordinarily high income earner and that guideline support would be excessive. His argument to the trial court focused on mother's expenses as recited in her Income and Expense Declaration, and the fact that mother only needed about $7,000 in child support to bridge the gap between her income and historic expenses. Before ruling, the trial court stated that mother's Income and Expense Declaration shows her expenses never exceed $9,000 per month. The trial court made no mention of father's expenses for himself and his other children, who lived with him.[12]

The court found that father was an extraordinarily high income earner, that guideline child support is $25,325, and that the guideline amount "would exceed the child's reasonable needs." The trial court ordered father to pay $8,500 in support, plus the majority of the child's add-on expenses, including 100% of private school tuition.

The court of appeals reversed, finding;

> the court repeatedly indicated it had reviewed [mother's] income and expense declaration and assured itself that the amount awarded would allow her to pay her existing expenses . . . . The assumption that a child's 'historic expenses' define his or her needs is erroneous in the case of wealthy parents, because it ignores the well-established principle that the child's need is measured by the parent's current station in life.[13]

The court acknowledged the holding in *S.P. v. F.G.*, but does not address how courts and attorneys should reconcile S.P.'s reference to historic expenses being used as "some evidence" of the child's needs. Did *Y.R.* disapprove of *S.P.*? After *Y.R.*, are there circumstances in which the trial court should consider historical expenses?

Marriage of Macilwaine brings much needed clarity on this issue. In *Macilwaine*, the trial court found that father was a high income earner.[14] The appellate court affirmed that determination, but reversed the trial court as to the method for setting support for the parties' four minor children.

The trial court found that the children enjoy an exceedingly high standard of living, and that they lack nothing, as judged in light of their father's station in life. Based on these findings, the trial court relied on the mother's historic expenditures in determine the children's needs and set support in accordance with those expenditures. In reversing, the appellate court emphasized precedent that held that "children are entitled to the standard of living *attainable* by the parent's income."[15] The standard of living attainable at father's income is

not limited to what mother can afford to spend under the current support order.

The court also explained that the cost of meeting the needs of the supported child must be independently determined. It cannot be reverse engineered by dividing the costs of running a household by the number of people who live in that household, as that math would still be dependent on the historic expenses of the child, improperly limiting the child's needs to what was spent on the child in the historic scenario.[16]

The court addressed the decisions in *S.P. v. F.G.* and in *Y.R. v. A.F.* throughout its analysis. In a footnote, the court gave guidance on how these two decisions can be reconciled regarding the proper use of the recipient's historic expenses by trial courts. The court noted that a trial court may look to past expenses to determine the cost of a need, but first must independently decide that the need exists.[17]

Turning back to Mary, if the court evaluates the needs of Mary's children, the court can determine, for example, that the children need to live in a nice home during time with each of their parents, and that Andrew's home for the children should be in the South Bay area of Los Angeles and have a swimming pool. If one of the parents currently rents a suitable home with a pool in that location, the court can use the past expense of that rental to determine the cost of the child's housing needs in setting child support. However, the court cannot skip the critical step of making an independent determination of the needs of the children before using historical data to assign a dollar value to needs which are already being paid.

Conclusion

Cases involving extraordinarily high income earners often require extensive preparation and trial time, including the use of expert witnesses to rebut the presumption that the guideline formula is correct, and offer competing evidence regarding the needs of the children. Mary will have the initial burden to establish that she is an extraordinarily high income earner, which requires that she offer evidence of the guideline amount, evidence of the children's needs, and persuade the court that guideline support would exceed the children's needs making a guideline award unjust. Andrew will attempt to discredit Mary's evidence of the children's needs and establish a higher figure, either to prove that guideline does not exceed the children's needs, or concede that Mary is a high income earner, but that the monthly child support figure should be higher than what Mary has proposed.

In representing Mary, make sure she understands the complexity of this litigation and the attendant costs, and hopefully she will work to seek a middle ground on child support and avoid the costly litigation that otherwise is necessary for the court to make the requisite findings to arrive at a below guideline figure.

Endnotes

1 *In re* Marriage of Macilwaine, 26 Cal. App. 5th 514, 536 (2018).

2 Cal. Fam. Code § 4052.

3 Cal. Fam. Code § 4057(b)(3).

4 White v. Marciano, 190 Cal. App. 3d 1026, 1032 (1987).

5 *Id.*

6 Johnson v. Super. Ct., 66 Cal. App. 4th 68 (1998).

7 *Johnson*, 66 Cal. App. 4th at 76.

8 Cal. Fam. Code § 4057.

9 Cal. Fam. Code § 4057 (b).

10 S.P. v. F.G., 4 Cal. App. 5th 921 (2016).

11 Y.R. v. A.F., 9 Cal. App. 5th 974 (2017).

12 Father is married and has three children living with him, two of whom are minors.

13 *Y.R.*, 9 Cal. App. 5th at 986 (citations omitted).

14 The court used an unprecedented method of making this determination, using income statistics for father's community to identify him as an extraordinarily high income earner.

15 *Macilwaine*, 26 Cal. App. 5th at 536.

16 *Id.*

17 *Id.* at 537, n. 29.