# Non-Compliance with the Opt-Out Provisions of the CSSA

*An in-depth review of case law relating to this all-important issue.*

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Pursuant to the Child Support Standards Act (ACSSA), codified in Domestic Relations Law (DRL) ‘ 240, an agreement or stipulation providing for the payment of direct child support that deviates from the CSSA guidelines must specify the presumptively correct amount of child support that would have been arrived at by application of the provisions of the CSSA, and the reason or reasons for the deviation. Pursuant to the statute, this requirement may not be waived by either party or their counsel.

Recent cases have dealt with this statutory requirement as applied to provisions of agreements pertaining to certain “add-on” expenses and those pertaining to future adjustments of child support. These cases have also discussed certain remedies the courts may employ when faced with agreements that fail to comply with the opt-out requirements of the CSSA and the timing of challenges based on a failure to comply with these requirements.

## Educational Expenses

In *Cimons v. Cimons*, 53 AD3d 125 (2nd Dept. 2008), the Appellate Division, Second Department, addressed the issue of whether a provision of the parties’ stipulation of settlement relating to the responsibility for college expenses for the parties’ children was enforceable. In *Cimons*, the father brought a post-judgment application to vacate the child support provisions of the stipulation of settlement, asserting that the stipulation failed to comply with the opt-out

provisions of the CSSA. The lower court granted the father's application and vacated those provisions of the stipulation relating to the payment of basic child support. However, it denied that portion of his application for an order vacating separate provisions of the stipulation relating to the payment of college expenses for the parties' children. The father appealed.

The Appellate Division affirmed, holding that the parties' non-compliance with the CSSA deviation provisions did not render unenforceable the separate provisions of the stipulation relating to the payment of college expenses. The court held that, unlike childcare expenses and unreimbursed health care expenses, education expenses under the CSSA are not directly connected to the basic child support calculation. Therefore, the parties' non-compliance with the CSSA opt-out provisions did not require the vacatur of the separate provisions relating to the payment of college expenses. The court noted that education expenses are treated differently from child care and health care expenses under the CSSA in that, in the absence of an agreement to pay education expenses, the determination as to whether or not such expenses will be paid is within the court's discretion, while the court is required to direct the payment of child care and health care expenses in proportion to the respective incomes of the parties.

The holding in *Cimons* stands for the general proposition that non-compliance with the CSSA opt-out language with respect to provisions of an agreement for the payment of basic child support will not necessarily require the vacatur of separate provisions related to the payment of college expenses. However, the court in *Cimons* discussed certain exceptions to this rule. The court stated that the entirety of a stipulation with respect to child support should be considered in determining whether the parties' agreement evinces that trade-offs were made that involved the basic child support figure. In such a situation, expenses that are not directly connected to the CSSA calculation, or even to child support, may be so closely intertwined with the basic child support provision as to require vacatur. *See Farca v. Farca*, 271 AD2d 482 (2nd Dept. 2000); *Lepore v. Lepore*, 276 AD2d 677 (2nd Dept 2000). It is noteworthy that under the foregoing line of cases cited by the court in *Cimons*, including *Farca* and *Lepore*, an otherwise valid stipulation of settlement may be vacated and set aside in its entirety for non-compliance

with the CSSA opt-out provisions where the court finds that the other provisions of the stipulation, such as those relating to college expenses, maintenance or equitable distribution, are closely intertwined with the child support provisions which have been determined to be invalid.

The *Cimons* court, citing *Toussaint v. Toussaint*, 270 AD2d 338 (2nd Dept. 2000), stated that where the provisions relating to the payment of college expenses "are directly connected to the CSSA calculation," any non-compliance with the CSSA which warrants the vacatur of the basic child support provisions of an agreement may also warrant the vacatur of any related provision with respect to the payment of college expenses. The court noted that in *Toussaint*, the agreement recited a list of obligations, including college and health care expenses, and the non-custodial parent had agreed to pay the total expense for these obligations. Therefore, it was determined in *Toussaint* that the education expense provisions of the agreement were not separate from all the other child support aspects of the agreement. In view of the fact that the parties' agreement with respect to child support failed to comply with the CSSA opt-out provisions, the education expense provisions were vacated along with those relating to basic child support.

## Health Care Expenses

A provision of an agreement or stipulation that deviates from the CSSA with respect to the apportionment of the payment of uninsured health care expenses is unenforceable if such provision fails to comply with the requirements of D.R.L. ' 240(1-B)(h). *See Jessup v. LaBonte*, 289 AD2d 295 (2nd Dept. 2001). In *Jessup*, the Appellate Division, Second Department, held that a provision of the parties' stipulation of settlement that required the wife to pay one-half the uninsured health care expenses for the parties' children was invalid and unenforceable. The court found that neither the stipulation of settlement, nor the judgment of divorce incorporating the stipulation, "complied with the relevant statutory requirements for a valid opt-out agreement." Therefore, the court reversed an order dismissing the wife's cause of action to modify the provisions of the divorce judgment relating to the payment of unreimbursed medical expenses

and remitted the matter to the lower court to determine the amount of the wife's obligation to pay a prorated share of such expenses in accordance with the CSSA.

A provision for the payment of uninsured health care expenses may also be invalidated on the basis that the provision is "directly connected" to provisions for the payment of basic child support, which have been determined to be invalid based on the failure to comply with the opt-out provisions of D.R.L. ' 240(1-B)(h). *See Baranek v. Baranek,* 54 AD3d 789 (2nd Dept. 2008).

In view of the foregoing, if an agreement or stipulation deviates from the CSSA with respect to the responsibility for uninsured health care expenses under the CSSA, the agreement should contain a provision reciting what the parties' respective pro rata shares of such obligation would be under the CSSA and the reasons for providing for a different amount. In the absence of such language, the health care provision may be determined to be unenforceable, even if the balance of the agreement with respect to child support complies with the CSSA guidelines.

## Cost of Living Adjustment Provisions

In *Fasano v. Fasano,* 43 AD3d 988 (2nd Dept. 2007), the Appellate Division addressed the issue of whether a cost of living adjustment (COLA) provision of the parties' separation agreement was enforceable. There, the parties' separation agreement, executed in 1993, provided for annual increases in the father's child support obligation in the event of an increase in the cost of living as reflected in the Consumer Price Index for the New York Metropolitan area. The separation agreement had been incorporated, but not merged, into a judgment of divorce entered into in 1994. In response to the mother's application for enforcement of the child support provisions of the separation agreement and judgment of divorce, the husband filed a cross-motion seeking an order declaring the child support provisions of the separation agreement to be invalid and unenforceable for failure to comply with DRL ' 240(1-b)(h). The lower court denied the husband's cross-motion and he appealed.

The Appellate Division held that while the basic child support provisions of the agreement complied with the statute and were, therefore, enforceable, the COLA provision failed to comply

with DRL ‘ 240(1-b)(h). The court found that the annual increases in the child support obligation permitted under the COLA provision represented potential deviations from the basic child support obligation and, therefore, could be interpreted as providing for an opting out of the CSSA guidelines. Because the separation agreement failed to state the parties’ reasons for deviating from the CSSA guidelines with respect to the potential COLA increases, the COLA provision violated DRL ‘ 240(1-b)(h). Consequently, it held that the provision should have been set aside by the lower court. Based on this holding, the Appellate Division, in a companion appeal (*see Fasano v. Fasano*, 43 AD3d 990 (2nd Dept. 2007)), vacated those portions of an order that had granted the wife approximately $68,000 in child support arrears based on the COLA provisions, and an upward modification of child support based on these same provisions.

There are several noteworthy aspects of the *Fasano* case. First, as a practical matter, the holding makes it clear that even if an agreement initially provides for the payment of child support at a level calculated in accordance with the provisions of the CSSA, if the agreement also contains a provision for the adjustment of child support by a methodology other than that specified in the statute, the agreement or stipulation should go a step further. It should set forth, in accordance with DRL ‘ 240(1-b)(h), the amount of the basic child support obligation as calculated under the statute, and an acknowledgment that the adjustment may result in a child support obligation other than that provided for by application of the CSSA and the reason or reasons for the deviation (*i.e.*, an adjustment in the amount of child support to take into account inflation).

## Post-Judgment Challenges Permitted

Another interesting aspect of *Fasano* is the timing of the challenge to the agreement. In *Fasano*, the claim that the agreement was unenforceable was made more than ten years after the agreement had been incorporated into the judgment of divorce. As set forth above, a validly executed agreement or stipulation containing child support provisions, which is presented to the court for incorporation in an order or judgment, must comply with the requisite statutory language regarding child support. Therefore, under the statute, the inquiry as to whether the agreement complies with DRL ‘ 240(1-b)(h) should take place at the time the judgment of

divorce incorporating the provisions of the agreement is presented to the court for signature. If the court finds that the agreement fails to comply with the CSSA, then the court can refuse to incorporate the agreement into the judgment and, pursuant to DRL ‘ 240(1-b)(h), retain jurisdiction over the issue of child support.

The argument can be made that once the court passes on the validity of an agreement by incorporating it into a judgment of divorce, the issue of compliance with DRL ‘ 240(1-b)(h) of the child support provisions is *res judicata* and, therefore, a post-judgment challenge on this basis should not be permitted. However, there are numerous reported cases in which a post-judgment challenge based on non-compliance with ‘ 240(1-b)(h) has been permitted. *See Baranek v. Baranek*, 54 AD3d 789 (2nd Dept. 2008); *Fasano v. Fasano, supra*; *Jefferson v. Jefferson*, 21 AD3d 879 (2nd Dept. 2005); *Luisi v. Luisi*, 6 AD3d 398 (2nd Dept. 2004); *Weimer v. Weimer* 281 AD2d 989 (4th Dept. 2001). For example, in *Fasano*, the judgment of divorce specifically stated that the parties’ agreement complied with the CSSA. Notwithstanding that the issue of the validity of the child support provisions was raised by the husband in the context of a post-judgment enforcement proceeding approximately 10 years after the entry of the judgment of divorce, and not on direct appeal from judgment, the Appellate Division permitted the challenge and held that the COLA provisions were unenforceable. As a result, the court vacated all of the arrears that had accrued pursuant to the invalid provisions of the agreement.

Similarly, in *Baranek v. Baranek, supra,* the Appellate Division held, in a plenary action commenced by the payor spouse to set aside a stipulation of settlement, which had been incorporated into a judgment of divorce, that the child support provisions of the parties’ stipulation of settlement were not enforceable and had to be vacated. The court found that the amount of basic child support pursuant to the applicable CSSA guidelines was $861 per month, which was less than the $900 per month agreed to by the parties, and that the stipulation did not contain the recitals required by DRL ‘ 240(1-b)(h). The court held that the defects could not be rectified by the recitals contained in the finding of fact and conclusions of law, and the judgment of divorce.

## Conclusion

In view of the foregoing, a party who has defaulted with respect to the payment of child support may be permitted to mount a successful post-judgment challenge to an agreement or stipulation even after substantial arrears have accrued and even in the absence of any other valid basis to set aside the agreement, such as fraud, overreaching, unconscionability or duress. Non-compliance with the CSSA opt-out provisions may also serve as a basis for overturning other non-child support provisions of the agreement or stipulation, if the court finds that these other provisions are significantly "intertwined" with the issue of child support. Therefore, it is critical that the matrimonial practitioner ensure that the agreement or stipulation comply with the opting-out provisions of the CSSA with respect to all elements of child support, including add-on expenses and any provision pertaining to the adjustment of the level of child support in the future.

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