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For Wealthy Parents, an Increase in Income May Not Trigger Increased Child Support

By Kimberley Keyes | June 21, 2017

[Child Support](#) [Family Law](#) [Alimony](#) [Modification](#)

Massachusetts divorce attorney Kimberley Keyes reviews the challenge of modifying child support for high-income parents.



It is no secret that the Massachusetts Child Support Guidelines provide custodial parents with the right to seek an increase in child support through a Complaint for Modification when the Guidelines formula calls for an increase. What is less known is that Guidelines only apply to the first \$250,000 in combined gross income earned by the parents. A recent Appeals Court case illustrates that when combined income exceeds \$250,000 per year, a party seeking an increase in

child support must present stronger proof than an increase in the paying party's salary.

In the [unpublished opinion](#), the Massachusetts Appeals Court held that a Probate and Family Court judge abused her discretion by increasing a father's child support, where the mother failed to present proof of a change in circumstances beyond the growth in the father's compensation. For some, the case may raise questions about the fairness of the Guidelines, where lower-earning parents regularly pay more than 20% of their pretax income as child support while higher-earning parents pay a much smaller fraction of their earnings in support of their children.

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Child Support Guidelines: A \$250,000 Per Year Limit in Income

When the most recent version of the Massachusetts Child Support Guidelines went into effect, they included the following language:

These guidelines are calculated up to a maximum combined available annual gross income of the parties of \$250,000. In cases where combined available income is over \$250,000, the guidelines should be applied on the first \$250,000 in the same proportion as the Recipient's and Payor's actual income as provided on line 1h of the child support guidelines worksheet. In cases where income exceeds this limit, the Court should consider the award of support at the \$250,000 level as the minimum presumptive order. The child support obligation for the portion of combined available income that exceeds \$250,000 shall be in the discretion of the Court.

In the aftermath of the 2013 Guidelines, many family law attorneys asked: what about cases when one parent earns \$500,000? After all, a non-custodial father of two children who earns \$50,000 per year pays base child support of \$261 per week under the Guidelines, which amounts to 27% of his pretax income. Meanwhile, a father of two who earns \$500,000 per year pays \$965 per week in child support under the Guidelines, equal to just 14% of his income. If the father earns \$1 million per year, he still pays \$965 per week – an amount equal to \$50,180 for the custodial mother to live on, and equal to just 7% of the father's annual income.

The [2013 Child Support Task Force](#) that prepared the Guidelines did offer a suggestion:

The Task Force was urged by the bar to provide guidance on how to calculate child support when the combined available income exceeds \$250,000. Public input suggests that a lack of guidance leads to inconsistency in results throughout Massachusetts. In an effort to alleviate any inconsistency, **the Task Force suggests** that in cases where combined available income exceeds \$250,000, the guidelines support amount should be applied on the first \$250,000 and then applied to the combined available income above \$250,000 (\$4,808 weekly) in the same proportion for both the recipient's and payor's income as provided on line 1h of the Child Support Guidelines Worksheet.

In short, the Task Force suggests that the percentage of income was earmarked for child support under the Guidelines for the first \$250,000 in income should be applied to all income over \$250,000 per year. Thus, if a father of two pays 14% of his gross income as child support under the Guidelines on his first \$250,000 per year in income, then the Task Force suggests that 14% of the father's income over \$250,000 per year should also be paid as income.

There was only one problem with the Task Force's idea. It is the phrase: "the Task Force suggests..." Because the Task Force's "suggestion" was only included in Task Force's background report, and not the Child Support Guidelines themselves, Massachusetts judges were free to ignore the Task Force's suggestion for income over \$250,000. It is fair to say that most judges have done just that, ignoring the Task Force's suggestion while approaching child support for income over \$250,000 by employing a variety of inconsistent, often arbitrary methods and approaches.

Modification Judge Increases Child Support for High-Income Father

Von Rekowsky dealt with the [divorce of a wealthy family](#) with two children. At the time of the divorce, the father earned a base salary of \$400,000 per year. However, bonuses and other perks significantly boosted his earnings, which fluctuated wildly – he earned between \$1.1 million and nearly \$4.7 million a year during the marriage. Because of the father's variable income, the order at the time of the divorce called for father to pay \$2,000 per week in child support plus \$1,500 per week in alimony.

Almost two years after the divorce trial, the father's position changed at his firm, and his salary dropped to \$275,000. He sought to modify his support

obligations by reducing his child support and [ending his alimony payments](#), which had expired under [§49\(b\)](#) of the Alimony Reform Act (ARA). The husband's modification was heard by [Hon. Patricia A. Gorman](#) of the Middlesex Probate & Family Court.

Following the modification trial, Judge Gorman ended the alimony payments consistent with the alimony duration limit provisions of the AR. Instead of reducing the child support payments, however, the judge increased the father's child support by \$1,500 per week – the same amount the father previously paid in alimony. Notably, the modification judge entered the new child support order *sua sponte*, which means the judge entered the order without the mother specifically requesting an increase in child support as part of any counterclaim. The basis for the increase in the judge's findings was that the father's lifestyle had improved when he bought a multi-million-dollar house and hired a nanny, and because the children were getting older and would see their expenses increase.

Modifying Above-Guidelines Child Support Requires More than an Increase in Income

After the father appealed, the Massachusetts Appeals Court determined the modification judge had abused her discretion by increasing the father's child support obligation.

The Court noted that for child support orders falling within the Guidelines (i.e. for combined income of less than \$250,000), a party can obtain a modification any time a change in either party's income makes the current child support "inconsistent" with a Guidelines order. To modify child support above the Guidelines, the Appeals Court stressed, there must be "a material change of circumstances since the entry of the earlier judgment." While this change "may be in the parties' respective lifestyles or financial resources, or in the needs of the children," there must be a showing that this change is real, with supporting evidence. Additionally, when it came to increasing above-Guidelines child support, another question becomes important: is there a material disparity in lifestyle between each parents' household:

Even if the noncustodial parent is capable of providing a greater financial contribution toward the children's needs... an increased capacity [does not] [compel] an increase in child support, at least where the increased capacity has not resulted in a material disparity in the parties' respective lifestyles.'

Thus, even if a parent has seen a steep increase in his or her earnings, the party seeking to increase child support may fail if he or she is unable to translate the other party's increased in earnings into evidence of a "material disparity" between the lifestyles each parent can provide the children. (How one might define a "material disparity" between wealthy parents who both spend significantly on their children is left largely unaddressed in the decision.)

What Makes a Material Change in Circumstances?

It is notable that other Massachusetts decisions have suggested that the [termination of child support can be grounds for a corresponding increase in alimony](#). In [Pickering v. Mendes \(2017\)](#), for example, the Appeals Court held as follows:

[T]he husband argues that the judge erred in increasing his alimony obligation because the wife failed to show a material change in circumstances, pointing out that the loss of child support was not unexpected. However, the loss of child support may be considered in an action to modify the amount of alimony.

If the loss of child support is a material change in circumstances that warrants an increase of alimony, it seems logical that the opposite could have been true in the recent [Appeals Court case](#), where Judge Gorman increased the Wife's child support by \$1,500 while eliminating an alimony order in the same amount. However, the Appeals Court seemed to take a dim view of this argument, holding as follows:

[T]here is no indication in the record that the mother is unable to meet the children's reasonable needs under the original child support order, especially given that she possesses substantial assets, which the divorce judge noted would be available to her as an additional source of income.

Instead, the Court appeared to focus on two kinds of evidence that the mother would have needed to show in order to justify an increase in child support:

- **Facts Proving a Disparity in Lifestyles Between the Households** – The Appeals Court bemoaned the absence of simple economic evidence such as "each home's square footage, amenities, furnishings, and the like." The opinion suggests that increasing an above-Guidelines child support requires parties to provide measurable evidence of differences in lifestyles, such as one party having a larger house or greater "discretionary spending", which the

Court defined as weekly expenses not including fixed housing costs, like a monthly mortgage. Other lifestyle evidence would presumably include comparing the spending between two parties on costly travel, vacations and luxury purchases.

- **A Substantial Gap in Assets Between the Parties** – Throughout the decision., the Court repeatedly made reference to the record being “undisputed that both parties possessed substantial assets at the time of the modification trial — the father having a total net worth of approximately \$10 million, and the mother having a total net worth of approximately \$8.9 million.” A major factor in the Court’s analysis was the similar level of assets held by the parties. Presumably, if the father’s net worth has substantially exceeded mother’s, this would have provided fertile grounds for the mother’s requested increase in child support.
- **Actual Evidence of Increased Costs of the Children** – Here, the Appeals Court was critical of the judge’s assumption that the “children will ‘continue to have increased expenses’ as they grow older”. Looking again at the actual financial conditions of the parties, the Court noted that “[i]nsofar as the children’s expenses may increase at some point in the future, the father is already obligated under the divorce judgment to cover one hundred percent of their uninsured medical and extracurricular expenses. The father has also generously funded separate 529 accounts for the children to cover their future educational expenses.”

A major takeaway from the Appeals Court decision in [Von Rekowsky](#) is the Court’s insistence that the mother present comprehensive evidence of the financial disparities between the parties, rather than mere assumptions. For example, the judge had seen a lifestyle change for the father because he had bought a new home and hired a nanny, but the Court suggests she overlooked the more telling financial data that showed the husband’s discretionary income had actually fallen since the divorce. The Court was also critical of an erroneous finding by the modification judge that the father’s weekly expenses had doubled since the divorce, where the increase came almost entirely from alimony and child support payments. Similarly, the judge’s rationale that aging children typically have more costs also did not hold up – there was simply no evidence that these *particular* kids were in need of more money.

The Appeals Court ultimately held that the absence of concrete evidence presented by the wife should have prevented the modification judge from increasing child support payments to the wife without being asked to do so.

The case highlights the needs for family law attorneys to bring the hard data to modification hearings.



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SJC: Child Support Not a Vehicle of Equalizing Household Income

For additional insight into modifying child support in high-income cases, the Supreme Judicial Court's decision in [MC v. TK \(2012\)](#) provides a useful overview:

Where the parties' combined gross income exceeds the maximum level at which the guidelines are strictly applicable, a judge has discretion to adjust upward from the "minimum presumptive level of support," i.e., the award applicable at the maximum combined income level.

....

Of particular relevance to the issues before us are the principles that responsibility for **child support** should be calculated "in proportion to, or as a percentage of," income, and that, where one parent has a higher standard of living, a child is entitled to enjoy that higher standard. 2006 guidelines, preamble. See *id.* at II.D.2 (judge may adjust **child support** amount "after taking into consideration the parties' actual time sharing with the children and the relative resources, expenses, and living standards of the two households"). See also [Smith v. Edelman, 68 Mass.App.Ct. 549, 554 \(2007\)](#) (judge may consider "material disparity in the standard of living in the respective parents' households" in fashioning award of **child support**); [Brooks v. Piela, 61 Mass.App.Ct. 731, 737 \(2004\)](#) (children's needs defined in part by parents' standard of living).

Nothing in the guidelines or in our decisional law, however, espouses the view that **child support** should be used to equalize living standards in the parental households through a mechanistic equalization of the parties' incomes. See, e.g., [Pearson v. Pearson, 52 Mass.App.Ct. 156,](#)

[160-161 \(2001\)](#)(rejecting “pure income-sharing approach”). Cf. [Smith v. Edelman, supra](#)(goal of maintaining standard of living of family as though it had remained intact has limits; increase in **child support** based solely on increase in income of noncustodial spouse “may have the effect of constructively distributing the noncustodial parent’s estate, and is accordingly disfavored”). Rather, the formulas set forth in the guidelines allow a child to benefit from one parent’s higher income and avoid a “gross disparity” of standard of living, while eschewing equalization.

In [MC v. TK](#), the SJC offered several other types of evidence from which a judge could decide that a disparity in households existed. For example, the SJC suggested that evidence of a difference in parents’ respective abilities to provide “clothing, shoes, toys, strollers, furniture and toiletries” for the child might constitute a gross disparity. Meanwhile, the SJC noted that “both parties enjoyed frequent vacations and travel with the child, owned or leased expensive vehicles, and otherwise exhibited the indicia of upper-middle class living.” Further, the Court noted:

The father testified without contradiction that, when the child was in his household, he paid for “everything that is important to her well-being and development from clothing and toiletries and potty training to vacations, to swimming lessons, to yoga lessons, to music lessons, to museum memberships, to a school facility” that she attended on rainy days. The mother’s financial statements and testimony similarly reflect that she incurred expenses for the purchase of expensive clothing for herself and the child, and for vacations with the child in places such as the Grand Cayman Islands and Marco Island in Florida.

So how does a party seeking an increase in above-Guidelines child support prove their case by showing a gross disparity in lifestyles? There seem to be three main ways: (1.) showing a major disparity in actual housing arrangements based on the square footage of each party’s home and major amenities, (2.) showing a major disparity in assets and/or net worth, such that one parent has significantly more resources to draw upon, and/or (3.) a major disparity on spending on discretionary items, such as travel, vacations, expensive clothes and consumer goods, particularly as such expenditures relate to the children.

Alimony Reform Act: A Hidden Factor in High Income Child Support Guidelines Cases?

It is a poorly kept secret amount Massachusetts family law attorneys that the state's Alimony Reform Act (ARA), which became effective in 2012, has profoundly affected how child support is calculated for many high-income families. Prior to the ARA, Massachusetts judges regularly entered above-Guidelines child support orders in lieu of alimony in divorce cases, largely because Massachusetts law was so unclear on how much alimony should be paid to a former spouse prior to the ARA.

The alimony formula set forth in the ARA changed how high-income child support was calculated by giving judges a clear alternative to determining child support for parents whose combined incomes exceeded \$250,000 per year. As a result, it has become standard practice in Massachusetts for judges to calculate child support based on the first \$250,000 per year in combined income of the parents, then use the alimony formula contained in the ARA to calculate alimony based on all combined income above \$250,000 per year earned by the parties.

There is only one problem with using child support and alimony interchangeably, as so many Massachusetts now do. The durational limits set forth in the ARA limit the [duration of alimony](#) based on the length of the parties' marriage. (For example, under the ARA, if spouses are married for ten years, then the duration of alimony is limited to 7.1 years' worth of payments.) In contrast, the duration of child support is based on the emancipation of the parties' children, which may come as late as a child's 23rd birthday. In short, in many cases, the duration of child support and alimony orders are not in sync, and it is common for either child support or alimony to drop away years ahead of the other.

As we become further removed from the ARA's enactment, we should expect to see an increase in cases like *Von Rekowsky*, where the durational limits under the ARA cause alimony to end long before child support. As noted above, the Appeals Court has repeatedly held that the [termination of child support can be grounds for seeking an increase in alimony](#) – with the increase in alimony essentially “replacing” the lost child support. However, as *Von Rekowsky* makes clear, the opposite argument – i.e. that child support should be increased to “replace” lost alimony – is often more difficult to prove.

The difficult balancing act between child support and alimony for high-income parties is often compounded by the reflexive habits of judges and attorneys, who tend to favor a combination of child support and alimony, even in cases where alimony will end far in advance of the children's emancipation, and

child support under the Guidelines will prove insufficient to cover the children's needs once alimony ends.

Will the \$250,000 Guidelines Limit Change in 2017?

Readers of this blog know that [the 2017 Massachusetts Child Support Task Force](#) held public meeting last year in preparation of the issuance of a new Child Support Guidelines Task Force Report that is scheduled to be released any day now in June, 2017. The Task Force Report will contain a draft of the new Massachusetts Child Support Guidelines, which will go into effect in August of 2017.

It is possible that the Task Force will recommend an increase in the combined gross income affected by the Guidelines above the current cap of \$250,000 per year. Indeed, by the time you read this blog, it quite likely that the Task Force's report will be published, with ample coverage in this Blog.

About the Author: [Kimberley Keyes](#) is a Massachusetts divorce lawyer and Massachusetts family law attorney for Lynch & Owens, located in [Hingham](#), Massachusetts and [East Sandwich](#), Massachusetts. She is also a mediator for [South Shore Divorce Mediation](#).

Schedule a consultation with [Kimberley Keyes](#) today at (781) 253-2049 or send [her an email](#).

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