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**SENATE STANDING COMMITTEE ON JUDICIARY**

Senator John J. Bonacic, Chair

Senator Ruth Hassell-Thompson, Ranking Member

**PUBLIC HEARING ON SPOUSAL MAINTENANCE AWARDS**

September 24, 2013

11:00 pm

Legislative Office Building, Hearing Room A

Albany, NY

**WITNESS LIST**

**1. Law Revision Commission**

Rose Mary Bailly, Esq.

*Executive Director, NYS Law Revision Commission*

Peter Kiernan, Esq.

*Chair, NYS Law Revision Commission*

**2. New York State Bar Association**

Judge Matthew F. Cooper

Supreme Court, Civil Branch, New York County

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*Partner, Aronson Mayefsky & Sloan, LLP*

**3. Women's Bar Association of the State of New York**

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*President, Women's Bar Association*

Dolores Gebhardt, Esq.

*Partner, McCarthy Fingar, LLP*

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**SUBMITTED ORAL  
TESTIMONY**

**TESTIMONY**  
**OF**  
**PETER J. KIERNAN, CHAIR**  
**NEW YORK STATE LAW REVISION COMMISSION**  
**AND**  
**ROSE MARY BAILLY, EXECUTIVE DIRECTOR**  
**NEW YORK STATE LAW REVISION COMMISSION**  
**SENATE JUDICIARY COMMITTEE**  
**TUESDAY, SEPTEMBER 24, 2013**

**Testimony of Peter J. Kiernan**  
**Chair of the New York State Law Revision Commission**

Mr. Chairman, Members of the Committee,

I am Chair of the NYS Law Revision Commission. I am accompanied by Rose Mary Bailly, the Executive Director of the Commission.

Thank you for inviting us to testify about the Law Revision Commission's report on maintenance awards in divorce proceedings which was issued in May of this year.

In 2010, as part of the no-fault divorce legislation, the Commission was directed by the legislature to study New York's maintenance laws and to make recommendations that would alleviate the problems of inconsistency and unpredictability of maintenance awards, particularly temporary awards made in pending divorce cases.

Inconsistency and unpredictability reduce the likelihood of settlement, increase the cost of obtaining a divorce, and make divorce proceedings especially burdensome for low income families. They strain the court system which processes over 50,000 divorce actions annually. We found, however, that these valued objectives only were partially achieved.

I would like to discuss briefly what we saw as the big ideas and themes in the 2010 legislative package and our 2013 report. Rose Mary will discuss matters of important detail. The biggest idea was adoption of a formulaic approach to determining awards. As part of the 2010 legislative package, section 236B of the Domestic Relations Law was amended to add a new section 236B(5-a) providing that an award of temporary maintenance (pendente lite maintenance) would be based on the application of a formula to the income of the parties, up to \$500,000 of income of the spouse with the higher income. This formulaic approach was an enormous departure from prior law.

When the 2010 legislative no fault divorce package was promulgated, I was serving as Counsel to the Governor. (I had no idea then that I was going to be appointed Chair of the Law Revision Commission). I was very aware of the lobbying campaign that accompanied the legislation. The fundamental advocacy was for spousal justice which primarily was advocacy for women's rights. There was no resistance to that goal and virtually no opposition to the legislation. Many thought that a formulaic approach could achieve the goals of the legislation. But since a formula was a huge departure from existing law, it was wise for the legislature to ask the Law Revision Commission to review its early implementation.

After a thorough, data driven, non-ideological, nonpartisan analysis, which Ms. Bailly will describe, we found that up to a certain level of income, the formulaic approach to determine temporary maintenance awards works very well.

In circumstances where there is little marital income and not many marital assets, the formula tends to produce quick decisions and awards, uses court time very efficiently, keeps costs low and leads to rapid settlements of the entire divorce proceedings. More importantly, it leads to just results and an empowerment of spouses, usually women, who theretofore did not have bargaining leverage or the means to access judicial relief, and thus were denied even the opportunity for justice. Whether the underlying issue was spousal abuse or spousal dominance or spousal fear, the surety that an impartial formula would be applied quickly and inexpensively encouraged those who otherwise would have forsaken their rights. Of this there is no doubt and we salute the advocates of such spouses who also were the advocates of the legislation.

But, the Commission also found that as the level of marital income becomes more substantial and where the amount and kind of marital assets are greater and more complex, a formula begins to lose effectiveness and becomes counterproductive. While greater income

levels suggest that there may be equal access to lawyers, higher education levels, and enhanced bargaining power of the respective spouses, the more important fact is that, when assets are complex, involving houses, investment vehicles, mélanges of debt and equity, often accompanied with tax structuring and estate considerations, a two dimensional formula is not apt.

Equally significant, domestic relations professionals and judges advised us that an inapt formula makes efficient settlements less likely and litigation more likely. Experienced professionals and experienced judges know how to settle complex financial matters and they should be encouraged to do so without artificial restraint.

We concluded that an income cap of \$500,000, below which the formula would apply and above which it would not, was neither realistic nor helpful. Based on data, we recommend that the formula income cap be set at the same level as the Child Safety Standards Act, which level is indexed to the Consumer Price Index. Thus, there would be a consistent formula for ascertaining both child support and temporary maintenance, rather than two different formulas being applied to the same assets of the same family. There also would be less forum shopping, i.e., there would be no difference from the Family, Civil, County or Supreme Courts in the application of each formula. The objectives of consistency and clarity, along with efficiency, would be served.

The data indicates that about 78% of all joint income tax filers in New York State make less than the current Child Safety Standards Act income tax cap which today is \$136,000. Thus, more than 75% of married tax payers would remain subject to the formula.

The Commission also applied the same data driven, non-ideological, nonpartisan common sensible approach to other issues such as duration of marriage factors and whether

judges should be mandated to write elaborate explanations whenever they decided to deviate from a formulaic guideline. On the latter point, we think judges should be judges because we saw evidence that if judges were forced to explain in writing their every deviation from a formulaic guideline, they would be inclined not to deviate in order to save time and avoid what they consider non-essential tasks even though justice may require deviation.

Members of the Committee, the legislature made an important step when it embraced no fault divorce. In doing so it shed centuries of arbitrariness and artificialities. Courts are not the best place to sort out the tangled and sometimes tortured emotions of a marriage and human nature. Formulas also can be artificial and arbitrary especially when the facts to which formulas are applied are not linear, and when numerical values are a function of different time frames, events, judgments and interconnections. Emphatically, formulas are not driven by ideology and they should not be applied to serve ideology.

Thank you.



**Testimony of Rose Mary Bailly**

**Executive Director of the New York State Law Revision Commission**

As Peter mentioned in his testimony, the no fault legislative package created a formula for the determination of temporary maintenance; it did not, however, make any changes to the determination of post divorce maintenance, leaving in place a set of statutory factors applied in the court's discretion. Thus, at the current time, we have two different approaches to maintenance awards in New York: (1) a temporary maintenance award presumptively based on a formula designed to promote consistency and predictability, and (2) a post divorce maintenance award based on a set of statutory factors designed to promote nuanced treatment of the parties' individualized circumstances. The scope of the Commission's work included considering whether to adopt a formulaic approach for post divorce awards. As Peter noted, the information we received indicated that both approaches had merit depending on the level of income and assets and the complexity of the marital estate.

The Commission's work leading up to its report had three aspects: research of case law and statutes in other jurisdictions; collection, review, and analysis of data from divorce proceedings in nine counties across the state; and formal meetings and informal discussions with judges and practitioners, bar associations, and other types of organizations representing individuals of various incomes across the state.

At the time we were conducting our study, several other states or counties within some states were considering, or had adopted, informal formulas to aid in settlement negotiations for their clients. Only a handful of states had adopted a statutory formula. What the formulas all had in common, whether adopted formally or informally, was that attorneys with expertise in the nature and frequency of maintenance awards in their states used anecdotal evidence as well as

reported decisions to craft formulas, including income caps, which would mirror a range of results they presumed would be an appropriate starting point for their clients' negotiations.

Thus, the application of formulas in other states provided minimal guidance for how New York should proceed.

As part of our study we collected, reviewed and analyzed data from over 7,000 divorce proceedings in nine diverse counties across the state: Albany, Bronx, Erie, Jefferson, Kings, Nassau, New York, Onondaga, and Westchester. This data gathering, done in collaboration with the Office of Court Administration, delayed our study beyond its original deadline because we thought it important that as much information as possible be brought to bear on our conclusions. We hoped to learn, among other things, the relationship between any maintenance awards, and the length of the marriage, the health of the parties, their respective incomes and the presence of unemancipated children. We also hoped to learn of any differences in the amount of awards prior to and after the enactment of the temporary maintenance formula. Assisting us in this work was the Senior Dean of Academics and Administration, and a Professor of Economics at the Maxwell School of Syracuse University.

Despite the large number of surveys collected and a thorough examination of the data, the paucity of information provided made it difficult to draw any statistically significant conclusions. Three things can be reported, however: 1) overall, awards were more likely where there were unemancipated children, the husband's income was higher than his spouse, his health was good, and the marriage was a long one; 2) if a formula like the temporary maintenance formula was used to calculate a final maintenance award, 56% of cases reporting no award would have benefitted; and 3) the responses containing information about the parties' income and employment revealed a pattern of low income and service industry jobs, information

consistent with statistical data available on those counties which is supplied in our report.

Over the course of our study, the Commissioners together and individually, and the Commission staff of 2 attorneys conducted formal and an informal outreach to bar associations, judges, and practitioners. We held numerous lengthy interviews with individual judges in New York, representatives from the American Academy of Matrimonial Lawyers, the Family Law Section of the New York State Bar Association, the Post Marital Income Coalition, the Women's Bar Association of the State of New York, and other practitioners representing high income professionals, middle income clients, and W-2 wage earners. Many interested parties submitted written materials, including the American Academy of Matrimonial Lawyers, the Women's Bar Association, the Family Law Section of the New York State Bar Association, the Suffolk County Bar Association, the New York Legal Assistance Group, and Lawyers Committee Against Domestic Violence.

We hosted a roundtable discussion at Albany Law School on October 25, 2011 at which we heard from all stakeholders about the current law regarding maintenance awards, problems and concerns about the interpretation of the law, and suggestions for change. At its conclusion there appeared to be a consensus on the broad outlines of our approach, namely the application of the formula on income up to a certain level, and the application of statutory factors on income in excess of that cap.

The Commission's recommendations are detailed in our report; however, I would like to conclude with a few remarks about three of them: duration of post divorce maintenance awards, "increased earning capacity" as a marital asset, and section 412 of the Family Court Act.

#### **Duration of an award of post-divorce maintenance**

Determining how to provide direction for the judiciary regarding the duration of an award

for post-divorce income proved to be challenging because neither the case law developed by New York appellate courts nor the statutes of other jurisdictions offered a clear rationale for deciding the duration of an award. Case law in New York did not necessarily rely on the length of the marriage in making awards. Formulas for duration formulas adopted in other jurisdictions offer a variety of solutions, including but not limited to the length of the marriage. Maricopa County, Arizona which did have a range for duration of an award discontinued it. The New Mexico Supreme Court declined to adopt a duration formula as “ too arbitrary and lacking in consideration of discrete facts. . . [rather it] should be left open to negotiation.

Thus, the Commission concluded that the court should be guided by set of discrete factors in determining the duration of an award: the length of the marriage, the length of time necessary for the party seeking maintenance to acquire sufficient education or training to enable that party to find appropriate employment, the normal retirement age of each party as defined by the Internal Revenue Code and the availability of retirement benefits, and any barriers facing the party with regard to obtaining appropriate employment such as child care responsibilities, health, or age.

#### **“Increased earning Capacity” as a Marital Asset**

The Commission encountered virtual unanimous consensus for eliminating one party’s “increased earning capacity” as a marital asset in equitable distribution under section 326B(5). Rather any spousal contribution to the career or career potential of the other party should be addressed in an award of post-divorce maintenance.

#### **Spousal Support under Family Court Act § 412**

The different treatment of spousal support under the Domestic Relations Law and the Family Court Act should not be allowed to continue. The provisions of a revised temporary

maintenance statute in the Domestic Relations Law should be mirrored in section 412 of the Family Court Act. A person who needs but is not receiving support from his or her spouse has two legal options: initiate a divorce proceeding and move for temporary maintenance under section 236 or, alternatively, bring a support action in Family Court pursuant to section 412. A party may choose the section 412 route for many understandable reasons. The facts and circumstances of the spouse are identical regardless of the forum, the needed relief is identical, but because the statutes diverge in the manner of determining an award, the results may be totally different. This conflict should be corrected.

Thank you.

September 24, 2013.



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September 10, 2013

Dear State Assembly Members:

I am the Chair of the Family Law Section of the New York State Bar Association (with almost 3,000 members) and write on behalf of our Section in connection with Assembly Bill No. A06728. We wrote to you in June to voice our opposition to this Bill, and outlined the reasons for that opposition.

Since then, our Section's Legislation Committee prepared comments on the Proposed Bill, and a corresponding memorandum in support of why those comments should be implemented in the Bill, both of which were approved by our Executive Committee. Our Section's annotated Bill is attached at "Tab 1" and the Memorandum in Support is attached at "Tab 2."

You will see that our Section's work comports with the "Final Report on Maintenance Awards in Divorce Proceedings" that was issued by The New York State Law Revision Commission on May 15, 2013. That Report is attached at "Tab 3" for your convenience.

We urge you to read our Section's work in conjunction with the Law Revision Commission's thoughtful, considered Report before voting on any bill concerning Maintenance. We continue to maintain that the Bills introduced in the Assembly and the Senate in the Spring are ill-conceived and likely to hurt many of your divorced/divorcing, hard-working constituents who support their families to the best of their ability, but who also are entitled to support themselves.

Thank you for your consideration.

Respectfully,

Pamela M. Sloan, Esq.  
Chair, Family Law Section  
NYSBA

## Memorandum in Opposition

### FAMILY LAW SECTION

FLS # 3

June 13, 2013

A. 6728-A

By: M. of A. Paulin  
Assembly Committee: Judiciary  
Effective Date: Immediately

**AN ACT** to (a) amend the Domestic Relations Law (“DRL”) and the Family Court Act in relation to temporary and final maintenance awards; (b) repeal Domestic Relations Law § 248; and (c) abolish the equitable distribution of enhanced earnings in matrimonial actions.

#### **THE FAMILY LAW SECTION OPPOSES THIS BILL**

This Bill (the “Bill”) primarily seeks to correct flaws in the temporary maintenance guidelines codified in DRL § 236B (5-a), and to establish guidelines for post-divorce maintenance awards in matrimonial actions. The Bill was originally introduced on April 17, 2013, nearly one month before the issuance of the New York State Law Revision Commission Final Report on Maintenance Awards in Divorce Proceedings on May 15, 2013 (the “Law Revision Commission Report” or “Report”). The Bill was amended on June 10, 2013, presumably in response to the Law Revision Commission Report, to provide for the lowering of the income cap on temporary and final maintenance awards in matrimonial actions from \$500,000 of the parties’ combined income to \$300,000 of payor income exclusively, and to abolish the equitable distribution of enhanced earning capacity in matrimonial actions, effectively repealing the Court of Appeals decision in O’Brien v. O’Brien.<sup>1</sup> However, the Bill is fundamentally flawed for a number of reasons, including but not limited to its failure to lower the income cap to a reasonable amount of income (the Law Revision Commission suggested \$136,000 of the parties’ combined income), the arbitrariness of its proposed schedule for the duration of post-divorce maintenance award, and its attempted repeal of DRL § 248 in order to extend maintenance awards after the remarriage of a maintenance payee.

<sup>1</sup> O’Brien v. O’Brien, 66 N.Y.2d 576 (1985)

**The Section OPPOSES the Bill for the following reasons:**

First, the Family Law Section fully endorses the Law Revision Commission Report, the recommendations of which are contrary to this proposed legislation. In its Report, the Law Revision Commission recommended an income cap of \$136,000 of the combined income of the parties with respect to temporary and post-divorce maintenance awards – the identical cap found in the Child Support Standards Act (the “CSSA”). The Law Revision Commission noted that such a cap would effectuate the same legislative intent that led to the adoption of the CSSA guidelines; namely, to “include the vast majority of New Yorkers” and to leave “only exceptional income cases to potentially be determined outside of the presumptively correct CSSA percentages.”<sup>2</sup> The Law Revision Commission further rejected a specific durational schedule for post-divorce maintenance awards, stating that neither the formulas of other jurisdictions or New York appellate cases provide clarity in determining the duration of final maintenance, and that “[t]he results were clearly driven by the facts of the case but not necessarily by the length of the marriage.”<sup>3</sup>

Second, the Bill’s income cap with respect to the proposed temporary and post-divorce maintenance guidelines would apply to \$300,000 of the payor’s income alone, with no consideration of the payee’s income. This proposed cap is far too high and would severely limit the flexibility and discretion of the court to fashion appropriate maintenance awards in higher income cases depending on the circumstances of each case. In its original direction to the Law Revision Commission, the Legislature cited “serious concerns” that the implementation of New York State’s maintenance laws has not produced equitable results, and that maintenance awards are inconsistent and unpredictable. However, such concerns are relevant where the parties’ income and assets are more limited, as opposed to those cases where the parties have substantial assets and income, since the latter cases tend to have significantly more variables and options for a court to consider when dividing assets and awarding maintenance and child support.

As noted in the Law Revision Commission Report, in year 2008, 94.8% of individual income tax return filers (including those filing joint returns) reported income of less than \$200,000; as such, there is no logical reason to impose a high cap of \$300,000 of payor income on maintenance awards, particularly when the purported chief reason for the cap is to protect “low and middle income parties.”<sup>4</sup>

Third, the Bill’s durational schedule for post-divorce maintenance awards is arbitrary and capricious since it is based on only one variable; namely, the length of the marriage. This schedule is based on the erroneous presumption that all maintenance recipients who are married for a certain length of time will require the same duration of maintenance. Nothing could be further from the truth. The court’s determination with regard to the duration of a post-divorce maintenance award has always been a complex analysis left to the discretion of the court based on a variety of factors. In fact, the Law

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<sup>2</sup> Law Revision Commission Report, p. 20, citing Memorandum in Support, Laws of 2009, c. 343.

<sup>3</sup> Id., p. 27.

<sup>4</sup> Quote taken from Memo in support of the Bill.



Revision Commission recommended a number of factors to be considered by the courts in considering the length of a maintenance award; i.e., the length of the marriage, the time necessary for the recipient to acquire sufficient training to locate appropriate employment, the normal retirement age of each party as defined by the Internal Revenue Code and the availability of retirement benefits, and any barriers facing the recipient in obtaining appropriate employment.<sup>5</sup> Notwithstanding the Bill's provisions permitting a court to deviate from the guideline duration of post-divorce maintenance awards, the durational presumption established by the guidelines is a cookie cutter approach that will perpetrate injustices on both payors and payees of post-divorce maintenance awards, as these parties will be forced to engage in expensive litigation to rebut this presumption.

Fourth, the Bill seeks to repeal DRL § 248 (which provides for the termination of post-divorce maintenance awards upon remarriage), and provides that the court may only terminate a post-divorce maintenance award upon remarriage if there is a substantial change in the financial circumstances of the payee (or in the case of a separation agreement, a demonstration of extreme hardship), or the "actual retirement" of the payor provided it results in a substantial change in financial circumstances. Once again, after the payee's remarriage, the maintenance payor is relegated to costly litigation where, inequitably, the burden of proof will be on him or her to demonstrate why maintenance should be terminated, notwithstanding the public policy of this state, as codified in Family Court Act § 412, that "a married person is chargeable with the support of his or her spouse . . ." The courts will be left to struggle with the possibility that upon a maintenance recipient's remarriage, there will be two individuals chargeable by law with the support of the maintenance payee – his or her new spouse and former spouse. Moreover, under the Bill's provisions, a payor could likely be left in the unfair position of indirectly supporting the payee's new spouse, or having to commence expensive litigation to remedy that inequity. With respect to a payor's ability to seek modification upon his or her "actual retirement" if he or she can demonstrate a substantial change in financial circumstances, no definition of "actual retirement" is provided, and the Bill would unfairly force a retired payor, typically on a limited budget due to retirement, to return to court and spend down his or her savings in order to remedy an inequity.

Fifth, the Bill provides that the guidelines for post-divorce maintenance (including amount and duration) will apply to any proceeding for a modification of an order of maintenance or alimony existing prior to the effective date of the law. This retroactive application of the Bill to maintenance awards issued prior to its effective date would result in a substantial inequity to the payor spouse, particularly where the maintenance, child support and equitable distribution awards in a matrimonial action were part and parcel of an overall financial settlement, or where tax considerations resulted in a particular allocation of maintenance, child support and equitable distribution. Moreover, it is questionable how a court could possibly apply the Bill's durational schedule for post-divorce maintenance awards to a modification proceeding years after the conclusion of a matrimonial action, as the payee has already received maintenance for a certain number of years.

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<sup>5</sup> Law Revision Commission Report. pp. 27-28.

Finally, ever since the O'Brien case was decided by the New York Court of Appeals in 1985, New York has inappropriately treated licenses, certifications and other educational training attained during a marriage (called enhanced earning capacity, or "EEC") as assets subject to equitable distribution.

While we endorse the Bill's elimination of EEC as a marital asset subject to equitable distribution, a change in the law which was recommended by the Law Revision Commission<sup>6</sup> as well as our Family Law Section and other bar groups, the Bill is otherwise too flawed for this Committee to approve its passage. If the intent of the Bill is to ensure the application of temporary and post-divorce maintenance guidelines to the vast majority of litigants, to increase the predictability of maintenance awards, and to control the costs of maintenance litigation, the same \$136,000 cap on combined income utilized in the CSSA should be utilized for maintenance guidelines. As drafted, the Bill will cause a significant increase in support litigation, particularly in higher income cases. Indeed, under the proposed maintenance guidelines, support litigants will seek to litigate the issue of precisely what income above and below the proposed \$300,000 cap of payor income should be considered by the court in maintenance determinations, especially where child support issues and/or other financial considerations are relevant.

Based on the foregoing, the Family Law Section **OPPOSES** this legislation.

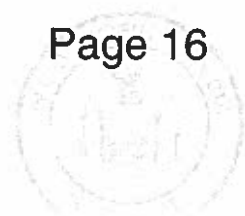
Memorandum prepared by: Benjamin E. Schub, Esq.

Chair of the Section: Pamela M. Sloan, Esq.

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<sup>6</sup> Law Revision Commission Report, pp. 7-8.

# TAB 1



## PROPOSED BILL

AN ACT to amend the domestic relations law and the family court act, in relation to modifications of temporary maintenance awards and maintenance obligations; ~~and repealing section 248 of the domestic relations law, relating thereto~~

**The People of the State of New York, represented in Senate and Assembly, do enact as follows:**

Section 1. Subdivision 5-a of part B of section 236 of the domestic relations law, as added by chapter 371 of the laws of 2010, is amended to read as follows:

5-a. Temporary maintenance awards.

a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court shall make its award for temporary maintenance pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

(1) "Payor" shall mean the spouse with the higher income.

(2) "Payee" shall mean the spouse with the lower income.

(3) "Length of marriage" shall mean the period from the date of marriage until the date of commencement of a matrimonial action.

(4) "Income" shall mean income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

(5) "Income cap" shall mean up to and including ~~three one hundred thirty six thousand~~ three one hundred thirty six thousand dollars of the "combined parental income" as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act ~~payor's annual income~~; provided, however, beginning January thirty-first, two thousand fourteen and every two years thereafter, the income cap amount shall increase by the product of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

(6) "Guideline amount of temporary maintenance" shall mean the dollar amount derived by the application of paragraph c or d of this subdivision.

(7) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

c. Where the ~~payor's~~ combined parental income of the parties is lower than or equal to the income cap, the court shall determine the guideline amount of temporary maintenance as follows:

(1) The court shall subtract twenty percent of the payee's income from thirty percent of the payor's income.

(2) The court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(3) The court shall subtract the payee's income from the amount derived from subparagraph two of this paragraph.

(4) The court shall determine the lower of amounts derived by subparagraphs one and three of this paragraph.

(5) The guideline amount of temporary maintenance shall be the amount determined by subparagraph four of this paragraph except that, if the amount determined by subparagraph four of this paragraph is less than or equal to zero, the guideline amount of temporary maintenance shall be zero dollars.

d. Where the payor's combined parental income of the parties exceeds the income cap, the court shall determine the guideline amount of temporary maintenance as follows:

~~(1) The court shall perform the calculations set forth in subparagraphs one through four of paragraph c of this subdivision for the total incomes of payor and payee.~~

~~(2) The court shall perform the calculations set forth in subparagraphs one through four of paragraph c of this subdivision for the combined parental income of payor of the parties up to and including the income cap and for the income of payee.~~

~~(3) The guideline amount of temporary maintenance shall be either:~~

~~(a) the calculation derived from subparagraph one of this paragraph; or~~

~~(b) the amount derived from subparagraph ~~two~~one of this paragraph plus an amount of temporary maintenance for the combined parental income of the parties in excess of the income cap that the court shall determine by through consideration of the factors set forth in subparagraph one of paragraph h. of this subdivision.~~

~~(34) In any decision made pursuant to clause (b) of subparagraph ~~three~~two of this paragraph, the court shall set forth the factors it considered and the reasons for its decision in writing. Such written decision may not be waived by either party or counsel.~~

e. Notwithstanding the provisions of this subdivision, where the guideline amount of temporary maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of temporary maintenance shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no temporary maintenance is awarded.

~~f. In no event shall the duration of temporary maintenance as provided in this subdivision exceed the length of marriage. The court shall determine the duration of temporary maintenance by considering the length of the marriage.~~

g. Temporary maintenance shall terminate upon the issuance of the determination of post-divorce maintenance, ~~or~~ the death of either party, or an order of the court modifying the temporary maintenance award based on a substantial change in circumstances, whichever occurs first.

h. (1) The court shall order the guideline amount of temporary maintenance in accordance with paragraphs c, ~~and d~~ and e. of this subdivision, unless the court finds that the guideline amount of temporary maintenance is unjust or inappropriate and adjusts the guideline amount of temporary maintenance accordingly based upon consideration of the following factors:

~~(a) The age and health of the parties;~~

~~(b) The present or future earning capacity of the parties, including the history of limited participation in the workforce;~~

~~(c) The need of one party to incur education or training expenses;~~

~~(d) The wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;~~

~~(e) The existence and duration of a pre-marital joint household or a pre-divorce separate household;~~

(f) ~~a~~Acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four-hundred fifty-nine-a of the social services law;

(g) ~~t~~The availability and cost of medical insurance for the parties;

(h) ~~t~~The care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity

(i) ~~t~~The need to pay for exceptional additional expenses for the child or children not already considered in determining child support pursuant to the child support standards act, including, but not limited to, schooling, day care and medical treatment;

(j) ~~t~~The tax consequences to each party;

(k) The need of the party seeking temporary maintenance to maintain the standard of living of the parties established during the marriage;

(l) ~~t~~The reduced or lost earning capacity of the payee as a result of having foregone or delayed; education, training, employment or career opportunities during the marriage; and

(m) ~~a~~Any other factor which the court shall expressly find to be just and proper.

(2) Where the court finds that the guideline amount of temporary maintenance is unjust or inappropriate and the court adjusts the guideline amount of temporary maintenance pursuant to this paragraph, the court shall set forth, in a written decision, the guideline amount of temporary maintenance, the factors it considered, and the reasons that the court adjusted the guideline amount of temporary maintenance. Such written decision shall not be waived by either party or counsel.

(3) Where either or both parties are unrepresented, the court shall not enter a temporary maintenance order unless the court informs the unrepresented party or parties of the guideline amount of temporary maintenance.

i. When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine income, the court shall order the temporary maintenance award based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered or obtained evidence.

j. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of this subdivision, brought pursuant to this article, the temporary maintenance guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

k. The court may allocate the responsibilities of the respective spouses for the family's expenses during the pendency of the action or proceeding; however, the temporary maintenance award is presumed to be the limits of the payor's financial obligations towards the payee during the pendency of the action or proceeding other than maintaining certain insurance coverages, if appropriate.

l. The temporary maintenance order shall not prejudice the rights of either party regarding a post-divorce maintenance award.

§ 2. Subdivision 6 of part B of section 236 of the domestic relations law, as amended by chapter 371 of the laws of 2010, is amended to read as follows:

6. Post-divorce maintenance awards. a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court shall make its award for post-divorce maintenance pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

(1) "Payor" shall mean the spouse with the higher income.

(2) "Payee" shall mean the spouse with the lower income.

(3) "Income" shall mean:

(i) income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act, except that temporary maintenance paid pursuant to subdivision five-a of this part and spousal support paid pursuant to section four hundred twelve of the family court act, shall not be deducted from payor's income; and

(ii) income from income-producing property distributed or to be distributed pursuant to subdivision five of this part.

(4) "Income cap" shall mean up to and including ~~three-one hundred thirty six~~ thirty six thousand dollars of the ~~payor's annual~~ "combined parental income" as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act ~~income~~; provided, however, beginning January thirty-first, two thousand fourteen and every two years thereafter, the income cap amount shall increase by the product of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

(5) "Guideline amount of post-divorce maintenance" shall mean the dollar amount derived by the application of paragraph c or d of this subdivision.

~~(6) "Guideline duration of post-divorce maintenance" shall mean the durational period determined by the application of paragraph e of this subdivision.~~

~~(67) "Post-divorce maintenance guideline obligation" shall mean the guideline amount of post-divorce maintenance and the guideline duration of post-divorce maintenance.~~

(8) Length of marriage shall mean the period from the date of marriage until the date of commencement of action.

(79) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

c. Where the ~~payor's combined parental income~~ of the parties is lower than or equal to the income cap, the court shall determine the guideline amount of post-divorce maintenance as follows:

(1) The court shall subtract twenty percent of the payee's income from thirty percent of the payor's income.

(2) The court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(3) The court shall subtract the payee's income from the amount derived from subparagraph two of this paragraph.

(4) The court shall determine the lower of amounts derived by subparagraphs one and three of this paragraph.

(5) The guideline amount of post-divorce maintenance shall be the amount determined by subparagraph four of this paragraph except that, if the amount determined by subparagraph four of this paragraph is less than or equal to zero, the guideline amount of post-divorce maintenance shall be zero dollars.

(6) Notwithstanding the provisions of this subdivision, where the guideline amount of post-divorce maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of post-divorce maintenance shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no post-divorce maintenance is awarded.

d. Where the payor's income combined parental income of the parties exceeds the income cap, the court shall determine the guideline amount of post-divorce maintenance as follows:

~~(1) The court shall perform the calculations set forth in subparagraphs one through four of paragraph c of this subdivision for the total incomes of payor and payee.~~

(12) The court shall perform the calculations set forth in subparagraphs one through four of paragraph c. of this subdivision for the combined parental income of payor the parties up to and including the income cap ~~and for the income of payee.~~

(23) The guideline amount of post-divorce maintenance shall be either:

(a) the calculation derived from subparagraph one of this paragraph; or

(b) the amount derived from subparagraph ~~two~~ one of this paragraph plus an amount of post-divorce maintenance for the combined parental income of the parties in excess of the income cap that the court shall determine by through consideration of the factors set forth in subparagraph one of paragraph f. of this subdivision.

(34) In any decision made pursuant to clause (b) of subparagraph ~~three~~ two of this paragraph, the court shall set forth the factors it considered and the reasons for its decision in writing. Such written decision may not be waived by either party or counsel.

e. The guideline duration of post-divorce maintenance shall be determined by the court based upon consideration of the following factors:

(1) the income and property of the respective parties, including marital property distributed pursuant to subdivision five of this part;

(2) the length of marriage;

(3) the age and health of both parties;

(4) the present and future earning capacity of both parties;

(5) the ability of the party seeking post-divorce maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;

(6) the normal retirement age of each party as defined by the Internal Revenue Code and the availability of retirement benefits; and

(7) any barriers facing the party seeking post-divorce maintenance with regard to obtaining appropriate employment, such as child care responsibilities, health or age.

(8) The direct or indirect contributions of the party seeking maintenance toward his or her spouse's enhanced earning capacity attained during the parties' marriage in the form of a license, degree or other formal educational achievements or formal training.

The court shall set forth, in a written decision, the relevant factors it considered in determining the duration of the post-divorce maintenance award. Such written decision shall not be waived by either party or counsel.



as follows:

~~(1) The court shall determine the guideline duration of post-divorce maintenance in accordance with the following schedule:~~

<del>Length of the Marriage</del>	<del>% of the Length of the Marriage for which Maintenance Will Be Payable</del>
<del>0 up to and including 5 years</del>	<del>30%</del>
<del>more than 5, up to and including 7.5 years</del>	<del>40%</del>
<del>more than 7.5, up to and including 10 years</del>	<del>50%</del>
<del>more than 10, up to and including 12.5 years</del>	<del>60%</del>
<del>more than 12.5, up to and including 15 years</del>	<del>70%</del>
<del>more than 15, up to and including 17.5 years</del>	<del>80%</del>
<del>more than 17.5, up to and including 20 years</del>	<del>90%</del>
<del>more than 20, up to and including 25 years</del>	<del>100%</del>
<del>more than 25 years</del>	<del>nondurational</del>

~~(2) Notwithstanding the provisions of subparagraph (1) of this paragraph, post-divorce maintenance shall terminate upon the death of the payor or payee.~~

f. (1) The court shall order the post-divorce maintenance guideline obligation in accordance with paragraphs c, and d of this subdivision, unless the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate and adjusts the post-divorce maintenance guideline obligation accordingly based upon consideration of the following factors:

- (a) The age and health of the parties;
- (b) The present or future earning capacity of the parties, including the history of limited participation in the workforce;
- (c) The need of one party to incur education or training expenses;
- (d) The wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;
- (e) The existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (f) Acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
- (g) The availability and cost of medical insurance for the parties;
- (h) The care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;
- (i) The need to pay for exceptional additional expenses for the child or children not already considered in determining child support pursuant to the child support standards act, including, but not limited to, schooling, day care and medical treatment;

(j) The tax consequences to each party;  
(k) The need of the party seeking post-divorce maintenance to maintain the standard of living of the parties established during the marriage;

(l) The reduced or lost earning capacity of the payee as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;

(m) The equitable distribution of marital property;

(n) The contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and

(o) Any other factor which the court shall expressly find to be just and proper.

(2) Where the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate and the court adjusts the post-divorce maintenance guideline obligation pursuant to this paragraph, the court shall set forth, in a written decision, the unadjusted post-divorce maintenance guideline obligation, the factors it considered, and the reasons that the court adjusted the post-divorce maintenance obligation. Such written decision shall not be waived by either party or counsel.

g. Where either or both parties are unrepresented, the court shall not enter a maintenance order or judgment unless the court informs the unrepresented party or parties of the post-divorce maintenance guideline obligation.

h. A validly executed agreement or stipulation voluntarily entered into between the parties in an action commenced after the effective date of the chapter of the laws of two thousand thirteen which amended this subdivision presented to the court for incorporation in an order or judgment shall include a provision stating that the parties have been advised of the provisions of this subdivision, and that the post-divorce maintenance guideline obligation provided for therein would presumptively result in the correct amount of post-divorce maintenance. In the event that such agreement or stipulation deviates from the post-divorce maintenance guideline obligation, the agreement or stipulation must specify the amount that such post-divorce maintenance guideline obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount. Such provision may not be waived by either party or counsel. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the post-divorce maintenance guideline obligation provided such agreements or stipulations comply with the provisions of this subdivision. Any court order incorporating a validly executed agreement or stipulation which deviates from the post-divorce maintenance guideline obligation shall set forth the court's reasons for such deviation.

i. When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine income, the court shall order the post-divorce maintenance based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered or obtained evidence.

j. Post-divorce maintenance may be modified pursuant to paragraph b of subdivision nine of this part.

k. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of a chapter of the laws of two thousand thirteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

l. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of a chapter of the laws of two thousand thirteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in paragraphs c, and d of this subdivision shall not apply.

m. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph f of this subdivision.

~~§ 3. Subparagraph 1 of paragraph b of subdivision 9 of part B of section 236 of the domestic relations law, as amended by chapter 182 of the laws of 2010, is amended to read as follows:~~

~~(1) Upon application by either party, the court may annul or modify any prior order or judgment as to maintenance, upon a showing of the payee's inability to be self-supporting, the termination of child support awarded pursuant to section two hundred forty of this article, or a substantial change in circumstances including financial hardship, remarriage of the payee if the remarriage results in a substantial change in financial circumstances, and actual retirement of the payor if the retirement results in a substantial change in financial circumstances. Where, after the effective date of this part, a separation agreement remains in force no modification of a prior order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines. The court shall not reduce or annul any arrears of maintenance which have been reduced to final judgment pursuant to section two hundred forty four of this article. No other arrears of maintenance which have accrued prior to the making of such application shall be subject to modification or annulment unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears and the facts and circumstances constituting good cause are set forth in a written memorandum of decision. Such modification may increase maintenance nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount of maintenance due shall, except as provided for herein, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. The provisions of this subdivision shall not apply to a separation agreement made prior to the effective date of this part.~~

§ 4. Section 412 of the family court act, as amended by chapter 281 of the laws of 1980, is amended to read as follows:

§ 412. Married person's duty to support spouse.

a. A married person is chargeable with the support of his or her spouse and, except where the parties have entered into an agreement pursuant to section four hundred twenty-five of this article providing for support, the court shall make its award for spousal support pursuant to the provisions of this part.

b. For purposes of this section, the following definitions shall be used:

(1) "Payor" shall mean the spouse with the higher income.

(2) "Payee" shall mean the spouse with the lower income.

(3) "Income" shall mean income as defined in the child support standards act and codified in section two hundred forty of the domestic relations law and section four hundred thirteen of this part.

(4) "Income cap" shall mean up to and including ~~three-one~~ three one hundred thirty six thousand dollars of the ~~payer's annual combined parental income of the parties~~; provided, however, beginning January thirty-first, two thousand fourteen and every two years thereafter, the income cap amount shall increase by the product of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

(5) "Guideline amount of spousal support" shall mean the sum derived by the application of subdivision c or d of this section.

(6) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of the domestic relations law and section four hundred thirteen of this part.

c. Where the ~~payer's combined parental income of the parties~~ is lower than or equal to the income cap, the court shall determine the guideline amount of spousal support as follows:

(1) The court shall subtract twenty percent of the payee's income from thirty percent of the payor's income.

(2) The court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(3) The court shall subtract the payee's income from the amount derived from paragraph two of this subdivision.

(4) The court shall determine the lower of amounts derived by paragraphs one and three of this subdivision.

(5) The guideline amount of spousal support shall be the amount determined by paragraph four of this subdivision except that, if the amount determined by paragraph four of this subdivision is less than or equal to zero, the guideline amount of spousal support shall be zero dollars.

d. Where the ~~payer's combined parental income of the parties~~ exceeds the income cap, the court shall determine the guideline amount of spousal support as follows:

(1) ~~The court shall perform the calculations set forth in paragraphs one through four of subdivision e of this section for the total incomes of payor and payee.~~

(12) The court shall perform the calculations set forth in paragraphs one through four of subdivision c of this section for the combined parental income of ~~payor~~ the parties up to and including the income cap ~~and for the income of payee.~~

(23) The guideline amount of spousal support shall be either:

(a) the calculation derived from paragraph one of this subdivision; or

(b) the amount derived from paragraph ~~two-one~~ of this subdivision plus an amount of spousal support for the combined parental income in excess of the income cap that the court shall determine by-through consideration of the factors set forth in paragraph one of subdivision f, of this section.

(34) In any decision made pursuant to subparagraph (b) of paragraph ~~three-two~~ of this subdivision, the court shall set forth the factors it considered and the reasons for its decision in writing. Such written decision may not be waived by either party or counsel.

e. Notwithstanding the provisions of this section, where the guideline amount of spousal support would reduce the payor's income below the self-support reserve for a single

person, the guideline amount of spousal support shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no spousal support is awarded.

f. (1) The court shall order the guideline amount of spousal support in accordance with subdivisions c. and d. of this section, unless the court finds that the guideline amount of spousal support is unjust or inappropriate and adjusts the guideline amount of spousal support accordingly based upon consideration of the following factors:

- (a) ~~¶~~The age and health of the parties;
- (b) ~~¶~~The present or future earning capacity of the parties, including the history of limited participation in the workforce;
- (c) ~~¶~~The need of one party to incur education or training expenses;
- (d) ~~¶~~The wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a support proceeding without fair consideration;
- (e) ~~¶~~The existence and duration of a pre-marital joint household or a pre-support proceedings separate household;
- (f) ~~a~~Acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
- (g) ~~¶~~The availability and cost of medical insurance for the parties;
- (h) ~~¶~~The care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;
- (i) ~~¶~~The need to pay for exceptional additional expenses for the child or children not already considered in determining child support pursuant to the child support standards act, including, but not limited to, schooling, day care and medical treatment;
- (j) ~~¶~~The tax consequences to each party;
- (k) ~~¶~~The need of the party seeking spousal support to maintain the standard of living of the parties established during the marriage;
  - (l) the reduced or lost earning capacity of the payee as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;
  - (m) the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
  - (n) any other factor which the court shall expressly find to be just and proper.

(2) Where the court finds that the guideline amount of spousal support is unjust or inappropriate and the court adjusts the guideline amount of spousal support pursuant to this subdivision, the court shall set forth, in a written decision, the guideline amount of spousal support, the factors it considered, and the reasons that the court adjusted the guideline amount of spousal support. Such written decision shall not be waived by either party or counsel.

(3) Where either or both parties are unrepresented, the court shall not enter a spousal support order unless the court informs the unrepresented party or parties of the guideline amount of spousal support.

g. When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine income, the court shall order the spousal support award based upon the needs of the payee or the standard of living of the parties prior to commencement of the spousal support proceeding, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered or obtained evidence.

h. In any action or proceeding for modification of an order of spousal support existing prior to the effective date of the chapter of the laws of two thousand thirteen which amended this section, brought pursuant to this article, the spousal support guidelines set forth in this section shall not constitute a change of circumstances warranting modification of such spousal support order.

~~§ 5. Paragraph a of subdivision 1 of part B of section 236 of the domestic relations law, as amended by chapter 371 of the laws of 2010, is amended to read as follows:~~

~~a. The term "maintenance" shall mean payments provided for in a valid agreement between the parties or awarded by the court in accordance with the provisions of subdivisions five a and six of this part, to be paid at fixed intervals for a definite or indefinite period of time, but an award of maintenance shall terminate upon the death of either party or upon modification pursuant to paragraph (b) of subdivision nine of section two hundred thirty six of this part.~~

§ 65. Subparagraph 7 of paragraph d of subdivision 5 of part B of section 236 of the domestic relations law, as amended by chapter 281 of the laws of 1980 and as renumbered by chapter 229 of the laws of 2009, is amended to read as follows:

(7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party. The court shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement. However, in arriving at an equitable division of marital property or the duration of any post-divorce maintenance award, the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse.;

~~§ 7. Section 248 of the domestic relations law is REPEALED.~~

§ 86. This act shall take effect on the sixtieth day after it shall have become a law.

# TAB 2



# Family Law Section

## Memorandum in Support of Proposed Maintenance Bill

August 29, 2013

**MEMORANDUM NO. 0101**

**PREPARED BY FAMILY LAW SECTION EXECUTIVE COMMITTEE**

**TITLE OF PROPOSED BILL:** An act to amend the domestic relations law and the family court act, in relation to modifications of temporary maintenance awards and maintenance obligations

**PURPOSE OF PROPOSED BILL:** To revise Assembly Bill A6728B sponsored by Assemblywoman Paulin (the "Paulin Bill") so that it conforms to the position of the New York State Bar Association Family Law Section and the recommendations of the Law Revision Commission.

**JUSTIFICATION:** This proposed bill amends the Paulin Bill to adopt the material recommendations of the New York State Law Revision Commission Final Report on Maintenance Awards in Divorce Proceedings dated May 15, 2013 (pp. 27-28) (the "LRC Report"), as well as the relevant recommendations of the New York State Bar Association's Family Law Section as reflected in its Report to the Law Revision Commission dated November 22, 2010. The Family Law Section believes that the Paulin Bill in its current form is fundamentally flawed for a number of reasons, including but not limited to its failure to lower the income cap to a reasonable amount of income (the Law Revision Commission recommended \$136,000 of the parties' combined income), the arbitrariness of its proposed schedule for the duration of post-divorce maintenance award, and its attempted repeal of DRL § 248 in order to extend maintenance awards after the remarriage of a maintenance payee.

**SUMMARY OF PROVISIONS OF PROPOSED BILL:**

Section 1. Regarding temporary maintenance, the Paulin Bill is amended to provide an income cap of \$136,000 of combined parental income for the guideline calculation of temporary maintenance. Where the combined parental income exceeds \$136,000, the court is required to determine the amount of temporary maintenance by applying the formula to the first \$136,000 of combined parental income, and has discretion to award additional temporary maintenance for the combined parental income above the income cap through consideration of the factors listed in paragraph h. of subdivision (5-a). This Section further clarifies that (a) the duration of temporary maintenance cannot exceed the duration of the marriage, which is a concern with respect to marriages of brief duration; and (b) temporary maintenance shall terminate upon an order of the court modifying the award based on a substantial change in circumstances (in addition to death



or a post-divorce maintenance award). Additional language has been added to factor (k) in paragraph h. to reflect *the need of the party seeking temporary maintenance* to maintain the standard of living established during the marriage. Paragraph k. regarding the court's authority to allocate the responsibilities of the respective spouses for the family's expenses during the proceeding has been revised to clarify that other than maintaining certain insurance coverages, the temporary maintenance award is presumed to be the limits of the payor's financial responsibilities towards the payee. See *Kharia v. Khaira*, 93 A.D.3d 194 (1<sup>st</sup> Dept. 2012).

Section 2. With respect to post-divorce maintenance awards, the Paulin Bill is amended to include the same \$136,000 income cap discussed above to the post-divorce maintenance guidelines award, as well as the same discretionary application of the factors to combined income above \$136,000. The durational formula of the post-divorce maintenance guidelines award has been eliminated in favor of a number of factors to be considered by the court – these include the factors cited by the LRC Report and other relevant factors currently contained in the statute (DRL § 236B(6)). The Paulin Bill is further amended to indicate that post-divorce maintenance shall terminate upon remarriage.

Section 3. The provisions of the Paulin Bill amending DRL § 236B(9) regarding a payor's ability to modify the post-divorce maintenance award after remarriage of the payee or after the payor's retirement have been stricken as unnecessary given the termination of maintenance upon remarriage.

Section 4. Section 412 of the Family Court Act, as amended by chapter 281 of the laws of 1980, is amended to mirror the above provisions of temporary maintenance (DRL § 236B(5-a)).

Section 5. The Paulin Bill amended DRL § 236B(1) to provide that a maintenance award shall not terminate upon the recipient's valid or invalid marriage. This amendment has been stricken.

Section 6. The Paulin Bill eliminated the equitable distribution of enhanced earnings capacity. Language has been added to reflect that the court shall consider such enhanced earning capacity with respect to the duration of a post-divorce maintenance award.

Section 7. The Paulin Bill's repeal of Section 248 of the DRL has been stricken.

Section 8. Provides for the effective date.

**EFFECTIVE DATE:** This act shall take effect on the sixtieth day after it shall become a law.

Memorandum prepared by: Henry S. Berman, Esq. and Benjamin E. Schub, Esq. (edited by Florence Fass, Esq.)

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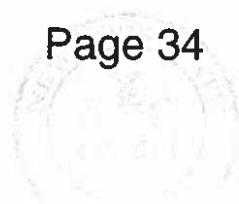
Opinions expressed are those of the Section preparing this resolution and cannot represent those of the entire New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

Chair of the Section: Pamela M. Sloan, Esq.

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# TAB 3



**THE NEW YORK STATE LAW REVISION COMMISSION**

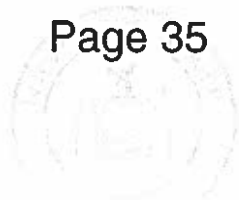
**FINAL REPORT**

**ON**

**MAINTENANCE AWARDS IN DIVORCE PROCEEDINGS**

**May 15, 2013**

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New York State Law Revision Commission  
80 New Scotland Avenue  
Albany, New York 12208  
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Professor Michael J. Hutter  
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*Ex Officio Members of the Commission*

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Hon. Helene E. Weinstein, Chairwoman, Assembly Judiciary Committee  
Hon. Michael F. Nozzolio, Chairman, Senate Codes Committee  
Hon. Joseph R. Lentol, Chairman, Assembly Codes Committee

*Commission Staff*

Rose Mary Bailly, Esq., Executive Director  
Barbara S. Hancock, Esq., Counsel (retired 1/2/2013)

## ACKNOWLEDGMENTS

The Commission would like to thank the many judges, attorneys, representatives from various bar associations and other organizations, and additional experts who graciously gave us their time, provided information and materials, and supported our efforts over the past several years.

The Commission would also like to thank Professor Robert M. Pitler of Brooklyn Law School, and former Chairman of the Law Revision Commission. Professor Pitler oversaw the Commission's work on New York's maintenance law from the study's inception until he retired from the Commission in December 2010.

Our special thanks go to Elissa Krauss at the Office of Court Administration (OCA) for her insight and that of her colleagues into developing the UCS-111A which was used to collect data about divorces in nine counties around the state. We also thank Brett Archambault, Michael Bouchard, Linda Dunlap-Miller, Warren Klein, Frank Mahoney, Jacqueline Mattia, John W. McConnell, Daniel J. Mc Cormick, Molly Menge, Chip Mount, Deborah Seep, Peter Sorrento, Ronald Younkens, and all the other individuals behind the scenes at OCA for their help in collecting data about maintenance awards in New York State.

We would also like to thank the attorneys and other individuals who completed the UCS-111A questionnaires and the court personnel who collected them on our behalf. Our data collection would not have been possible without their good will, and interest in, and support of our work.

For their assistance with examination of the collected data, we owe thanks to Michael J. Wasylenko, Senior Associate Dean for Academics and Administration, and Stuart Rosenthal,

Professor of Economics, Maxwell School of Syracuse University; Professor Deborah Lawrence, Russell Sage Colleges; Emily Ekland, Esq., Albany Law School; and Katherine Heeks and Shari Rolnick, Albany Law School, Class of 2013.

We appreciate the courtesies extended to us by Albany Law School, Brooklyn Law School, and the law firm of Shiff Hardin throughout the time of our study.

Our particular thanks go to Mary Wood, Head of Public Services, and Robert Emery, Part-Time Librarian, of the Schaffer Law Library at Albany Law School, who assisted us in locating reference materials that helped us in our preparation of this report.

Thank you also to Professor Deborah Kearns and Leslie Granger, Esq. of Albany Law School; Rebecca Fantauzzi and Jennifer M. Lee, Albany Law School, Class of 2011, and Carmen J. Barber, Alex Hill, Fariyah Hossain, Matt Jackson, Andrea A. Long, Alan J. Sacks, and Peter M. Stecker, Albany Law School Class of 2013, for their invaluable assistance in completing this Report. And Michele Monforte and Lee Lounsbury for their invaluable editing.

## Executive Summary

New York's current maintenance statutes mirror two approaches to maintenance awards. The temporary maintenance statute requires the application of a formula designed to create consistent and predictable results. The final maintenance statute, based on the application of a series of statutory factors, is designed to promote nuanced treatment of the parties' individualized circumstances.

These two desires, individualized treatment for each marriage on the one hand, and predictability and consistency of awards on the other, are difficult to reconcile because the goals "point the policy makers in different directions. Predictable results follow best from clear, determinate, easily applied rules. Individualized results generally are associated with open-ended standards allowing judges to respond to the infinite variety of individual circumstances that these cases present."<sup>1</sup> Our study was an effort to strike a balance between these two approaches.

We have concluded that this balance can be struck by taking into account the differences between cases with limited assets and income on the one hand, and cases involving substantial assets and income on the other. In the former, the court has fewer options in granting awards and it is less likely that either party is represented by counsel; in the latter, the court has more variables to consider, more options in crafting relief, and both parties are more likely to have counsel.

Thus, the starting point for all parties should be a formula for combined income at or below \$136,000, a level that reflects the income of a majority of New Yorkers and which allows

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<sup>1</sup> American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* 1-2 (2002).



individuals with income at or below that level to determine their financial obligations to each other and their children upon divorcing in a reasonably inexpensive and expeditious manner. Where the parties' combined income exceeds \$136,000, the court maintains its discretion by applying a set of statutory factors to that excess income. The court also retains discretion when the application of the formula would be unjust or inappropriate given the parties' situation.

Based on our study, the Commission recommends changes to awards of temporary maintenance and final maintenance as described below.

**A. Temporary Maintenance Awards under the Domestic Relations Law**

The Commission recommends that a mathematical formula be continued in the calculation of a presumptive award of temporary maintenance, that the formula be amended to provide that the formula be applied to the parties' combined adjusted gross income of \$136,000, and that the income guideline be geared to biennial adjustment in the statute.

The application of the formula establishes a presumptive showing of need and an ability to pay. If the parties' combined adjusted gross income exceeds \$136,000, the Commission recommends that the mathematical formula apply to that portion of the parties' combined income which is at or less than \$136,000, and that the court be guided by a set of statutory factors in considering an additional award based on income that exceeds the guideline amount.

The adoption of the income guideline of \$136,000, geared to biennial adjustments, was influenced by the income levels of the majority of New Yorkers, a consideration that also influenced the income guideline adopted in the Child Support Standards Act.

If the court finds that the presumptive award is unjust or inappropriate based on the circumstances of the parties, the court must be able to adjust the presumptive award guided by

certain factors. These factors include any award under current section 236B(8) of the Domestic Relations Law to cover necessities, and any amounts that one party has paid to or on behalf of the other party voluntarily and without court order.

The court should also consider whether parties who have established and maintained separate households prior to the commencement of, or during, the matrimonial action have demonstrated an actual need.

If the court adjusts the presumptive award based on these and other proposed statutory factors, it must provide an explanation in writing or orally on the record.

In all cases, the court must allocate the responsibilities of each party for the family's current expenses during the pendency of the matrimonial action.

The duration of an award of temporary maintenance will generally match the duration of the divorce proceeding. The court must, however, set a date certain for the termination of the award so that the duration of the award does not exceed the length of a short term marriage.

## **B. Post-Divorce Income Awards under the Domestic Relations Law**

### **1. Relationship between assets and a post-divorce income award**

Section 236B(6) currently provides that in awarding final maintenance, the court shall consider, among other things, the property of the respective parties including marital property distributed pursuant to equitable distribution. The Commission recommends the continuation of the requirement that the court consider the parties' assets in making any award of post-divorce income from one party to the other.

Based on a widespread consensus, the Commission recommends, however, that one

party's "increased earning capacity"<sup>2</sup> no longer be considered as a marital asset in equitable distribution under section 326B(5), and that any spousal contribution to the career or career potential of the other party be addressed in an award of post-divorce income. The concept of an "increased earning capacity" has created much dissatisfaction and litigation because of the asset's intangible nature, the speculative nature of its "value" as well as the costs associated with valuations, and problems of double counting increased earnings in awards of post-divorce income and child support.

## **2. Calculation of an award of post-divorce income**

The Commission recommends that a mathematical formula be used to calculate a presumptive award of post-divorce income from one party to the other based on the parties' combined adjusted gross income of \$136,000.

In awarding post-divorce income, the court can adjust the presumptive award based on a set of statutory factors if it finds that the presumptive award is unjust or inappropriate based on the circumstances of the parties.

If the parties' combined adjusted gross income exceeds \$136,000, the Commission recommends that the mathematical formula apply to that portion of the parties' combined income which is at or less than \$136,000, and that the court be guided by a set of factors in considering whether an additional award is justified based on any excess income.

## **3. Duration of an award of post-divorce income**

The Commission recommends that the duration of any post-divorce income award be based on consideration of the length of the marriage, the length of time necessary for the party

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<sup>2</sup> See *O'Brien v. O'Brien*, 66 N.Y. 2d 576 (1985).

seeking post-divorce income to acquire sufficient education or training to enable that party to find appropriate employment, the normal retirement age of each party as defined by the Internal Revenue Code and the availability of retirement benefits, and any barriers facing the party seeking post-divorce income with regard to obtaining appropriate employment, such as child care responsibilities, health, or age. The court must state the basis for the duration of the award in its decision granting the award.

### **C. Support Awards under the Family Court Act**

Section 412 of the Family Court Act provides that:

A married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties.

Professor Merrill Sobie notes in his McKinney's Practice Commentaries to section 412 that the omission of an amendment to section 412 as part of Chapter 371 exacerbated "the illogical dichotomy between the Domestic Relations Law and the Family Court Act."<sup>3</sup>

We recommend that the provisions of a revised temporary maintenance statute in the Domestic Relations Law be mirrored in section 412 of the Family Court Act governing spousal support awards.

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<sup>3</sup> Professor Merrill Sobie, 2010 West Supplementary Practice Commentaries to McKinney's Family Court Act §412 (2011 Electronic Update). Laws of 2010, c. 371, among other things, added a new subdivision 5-a to section 236 of the Domestic Relations Law to provide for the calculation of temporary maintenance in accordance with a formula.

## I. Introduction

The New York State Law Revision Commission submits this Report concerning the award of maintenance in matrimonial proceedings, as called for by Chapter 371 of the Laws of 2010 which directed the Commission to, among other things:

review the maintenance laws of the state, including the way in which they are administered to determine the impact of these laws on post marital economic disparities and the effectiveness of such laws and their administration in achieving the state's policy goals and objectives of ensuring that the economic consequences of a divorce are fairly and equitably shared by the divorcing couple . . . .<sup>4</sup>

Much controversy surrounds the topic of maintenance. Awards of maintenance have been “a source of much inconsistency among trial courts, unhappiness among litigants, and conflict among critics.”<sup>5</sup> Some commentators have suggested that “a list of factors [for awarding maintenance that is found in virtually all statutes] with no indication of relative weight and no over-arching guideline other than the vague admonition to be fair is virtually the same as providing no factors.”<sup>6</sup> Most family law attorneys agree that spousal support presents the largest

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<sup>4</sup> Laws of 2010, c. 371 §6-a. Chapter 371 provides that “The law revision commission is hereby directed to: (1) review and assess the economic consequences of divorce on the parties; (2) review the maintenance laws of the state, including the way in which they are administered to determine the impact of these laws on post marital economic disparities, and the effectiveness of such laws and their administration in achieving the state's policy goals and objectives of ensuring that the economic consequences of a divorce are fairly and equitably shared by the divorcing couple; and (3) make recommendations to the legislature, including such proposed revisions of such laws as it determines necessary to achieve these goals and objectives.”

<sup>5</sup> Megan A. Drefchinski, Comment, *Out with the Old and In with the New: An Analysis of Illinois Maintenance Law Under the Uniform Marriage and Divorce Act and a Proposal for Its Replacement*, 23 N. Ill. U. L. Rev. 581, 613 (2003).

<sup>6</sup> Marti E. Thurman, *Maintenance: a Recognition of the Need for Guidelines*, 33 U. Louisville J. Fam. L. 971, 971 (1995)(citing Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 Tul. L. Rev. 1165, 1196 (1986)).

impediment to settling divorces, and support cases are among the cases most appealed.<sup>7</sup>

The unsettled issue of maintenance inconsistency and unpredictability impacts family law by increasing the cost of obtaining a divorce, the emotional strain on the parties and the burden on the court system. The likelihood of settlement is minimal because of the uncertainty of predicting maintenance awards from case to case. Moreover, litigating a divorce case with maintenance as a contested issue is expensive and becomes especially burdensome for low-income families.<sup>8</sup>

The 2010 introduction of a formula to establish a presumptive award of temporary maintenance gave rise to more controversy in New York. Attorneys for middle and low income clients reported that the formula introduced consistency among awards for clients in similar circumstances and resulted in awards in cases where clients would have previously abandoned their claims. On the other hand, attorneys whose clients have substantial assets found themselves involved in expensive litigation seeking relief from the application of the formula. Furthermore, advocates on all sides expressed several concerns about the new statute, among them, the presence of factors irrelevant to a determination of temporary maintenance and the failure of the formula to account for awards for necessities under section 326B(8) of the Domestic Relations Law.

Hence, the significant frustration and dissatisfaction over maintenance awards acknowledged in the 2006 Report of New York State's Matrimonial Commission to Chief Judge Kaye (Miller Commission Report) continued, albeit of a different nature.<sup>9</sup>

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<sup>7</sup> Jennifer L. McCoy, Spousal Support Disorder: an Overview of Problems in Current Alimony Law, 33 Fla. St. U. L. Rev. 501, 502 (2005); Marti E. Thurman, Maintenance: a Recognition of the Need for Guidelines, 33 U. Louisville J. Fam. L. 971, 972 (1995).

<sup>8</sup> Marti E. Thurman, Maintenance: a Recognition of the Need for Guidelines, 33 U. Louisville J. Fam. L. 971, 972-73 (1995).

<sup>9</sup> MATRIMONIAL COMMISSION REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 66 (2006), <http://www.courts.state.ny.us/reports/matrimonialcommission>.

The Miller Commission's recommendation that "the issue deserved greater attention, study and research"<sup>10</sup> is understandable in a court system which presides over a large number of divorces. In 2009, the most recent year for which records are available in New York,<sup>11</sup> 50,310 marriages ended in dissolution,<sup>12</sup> 49,816 through a divorce proceeding.

## II. The Law Revision Commission's Work

Between July 2010 when we were directed to undertake this study and the end of 2012, we held numerous lengthy interviews with judges in New York, representatives from the American Academy of Matrimonial Lawyers, the Family Law Section of the New York State Bar Association, the Post Marital Income Coalition, the Women's Bar Association of the State of New York, and other practitioners representing high income professionals, middle income clients, and W-2 wage earners. Some interested parties also submitted written materials to the Commission.

We hosted a roundtable discussion at Albany Law School on October 25, 2011 at which we heard from all stakeholders about the current law regarding maintenance awards, problems and concerns about the interpretation of the law, and suggestions for change.<sup>13</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> On its website, the New York State Department of Health maintains records of marriage dissolutions by duration of the marriage, number of children under 18 years of age, type of decree, and county where dissolution was granted. See [http://www.health.ny.gov/statistics/vital\\_statistics/2009/](http://www.health.ny.gov/statistics/vital_statistics/2009/). This information is obtained by the Bureau of Production Systems Management (BPSM) of the New York State Department of Health from dissolution of marriage certificates recorded in county clerks' offices as required by statute. N.Y. Pub. Health L. § 4139.

<sup>12</sup> Vital Statistics, NYS Department of Health, Table 48: Dissolutions of Marriage by County of Decree and Type of Decree New York State - 2009, available at [http://www.health.ny.gov/statistics/vital\\_statistics/2009/table48.htm](http://www.health.ny.gov/statistics/vital_statistics/2009/table48.htm).

<sup>13</sup> The minutes of the meeting and a recording of the event are available at the Commission's website: <http://www.lawrevision.state.ny.us/mtgs.php>.

We researched maintenance statutes in other states and Canada, including the use of formulas which have been adopted formally or informally in some states and localities, as well as legislative initiatives in Massachusetts and Florida.<sup>14</sup> We pursued two additional avenues of investigation in New York. The first was the collection and analysis of data on maintenance awards in nine counties around the state: Albany, Bronx, Erie, Jefferson, Kings, Nassau, New York, Onondaga, and Westchester.<sup>15</sup> The second was an analysis of reported appellate court decisions in which the duration of final maintenance awards was described.<sup>16</sup>

We considered a wealth of information and many variables in reaching our conclusions, including statistics on the income of New Yorkers maintained by the New York State Tax Department as well as statistics on the income of individuals residing in the nine counties from which we collected data.

#### A. Data from Nine New York Counties

In collaboration with the Office of Court Administration (OCA), we gathered information about divorces and maintenance awards in the nine counties using a form known as a UCS-111A – a modified version of the UCS-111 questionnaire used statewide to obtain information about child support awards.<sup>17</sup> A total of 7,302 of the collected questionnaires were used for purposes of

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<sup>14</sup> Our initial work in this area is discussed in our May 2011 Preliminary Report, available at <http://www.lawrevision.state.ny.us/mas.php>.

<sup>15</sup> See discussion at pp 13-16.

<sup>16</sup> See discussion at pp 26-27.

<sup>17</sup> Copies of the UCS 111 (2001 version) and UCS 111A are attached here as Appendix A. The 2001 version of the UCS 111 was used as the template for the UCS 111A. The UCS 111 was amended in 2011. The information was collected pursuant to an Administrative Order (Appendix B) and is subject to an agreement between the Commission and OCA which protects the personal information provided. The collection began in April 2011 and ended by February 2012.



analysis.

**1. The Law Revision Commission's Concerns**

The Commission was interested to learn the relationship, if any, between any award of temporary or final maintenance and the parties' length of marriage, the status of their health, their respective incomes, and the presence of un-emancipated children. The Commission was also interested to see the difference, if any, between awards of temporary maintenance before and after the enactment of chapter 371 of the laws of 2010, and what effect the application of a formula like the one for temporary maintenance would have on final maintenance awards. Finally, the Commission was concerned about the relationship between a lack of final maintenance awards and the impoverishment of a spouse after a divorce.

**2. The Responses**

No statistically significant conclusions could be derived from the responses to the questionnaire. Our personal review of all 7,302 questionnaires revealed that the responses provided varying degrees of information. A small number of responses provided detailed information about the parties' specific jobs with specific salaries, and specific amounts of any awards made. A greater number provided no information. The vast majority of the responses were incomplete in many particulars. However, the following information can be reported.

**A. Length of Marriage**

The divorces by length of marriage across the responses were relatively evenly divided among categories of fewer than 5 years, 5-10 years, 11-20 years and greater than 20 years.

**B. Awards**

Temporary maintenance awards were reported in 213 cases. Final maintenance awards



were reported in 468 cases. Awards of both temporary and final maintenance were reported in 124 cases. Two of those cases reported that the husband received both temporary and final maintenance. 107 cases reported that the wife received both temporary and final maintenance. The remaining cases reported awards but not the recipients.

Overall, it appeared that the likelihood of an award was higher when the husband's income was higher, children were present, the husband earned more than his spouse, the parties were married for a longer period of time, the husband's health was good, and the parties lived in Erie, Onondaga, or Westchester counties.<sup>18</sup>

#### **C. Pre-2012 and post-2010 Temporary Maintenance Awards**

It was difficult to draw any conclusions about the effect of the change in the law. Awards were made in 417 cases where the application of the formula would have created a presumptive award but the data did not indicate whether the formula was used. Awards were made in 51 cases where the application of the formula would not have created a presumptive award.

#### **D. Application of a Formula for Final Maintenance Awards**

If a formula similar to the temporary maintenance formula was used to calculate final maintenance, it appeared that a majority of cases where no award was actually made would be entitled to a presumptive award. Of 5,932 cases providing some information about the parties' income but reporting no award, the application of the formula would indicate an award in 3,349 cases (56 percent).

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<sup>18</sup> More information about the reported awards is provided at Appendix C.

**E. Poverty and a Lack of a Maintenance Award**

The information was insufficient to allow any observations about that relationship.

**3. Conclusion**

Although the data was thoroughly examined, the paucity of information provided in the responses made it difficult to draw conclusions. The one item that seems significant, however, is the fact that 56 percent of cases where no final award was made would have benefitted from an award through the application of the formula.

**III. The Law Revision Commission's Recommendations**

New York's current maintenance statutes mirror two approaches to maintenance awards. The temporary maintenance statute under section 236B(5-a) of the Domestic Relations Law requires the application of a formula designed to create consistent and predictable results. The final maintenance statute under section 236B(6) of the Domestic Relations Law, which is based on the application of a series of statutory factors, is designed to promote nuanced treatment of the parties' individualized circumstances.

These two desires, individualized treatment for each marriage on the one hand, and predictability and consistency on the other, are difficult to reconcile because the goals "point the policy makers in different directions. Predictable results follow best from clear, determinate, easily applied rules. Individualized results generally are associated with open-ended standards allowing judges to respond to the infinite variety of individual circumstances that these cases present."<sup>19</sup> Our study was an effort to strike a balance between these two approaches.

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<sup>19</sup> ALI, *Principles of the Law of Family Dissolution: Analysis and Recommendations* 1-2 (2002).

Based on the information we gathered, we have concluded that this balance can be struck by taking into account the differences between cases with limited assets and income on the one hand and cases involving substantial assets and income on the other. In the former, the court has fewer options in granting awards and it is less likely that either party is represented by counsel; in the latter, the court has more variables to consider, more options in crafting relief, and both parties are more likely to have counsel.

Thus, the starting point for all parties should be a formula for combined income at or below \$136,000, a level of income that reflects the income of a majority of New Yorkers and which allows individuals with income at or below that level to determine their financial obligations to each other and their children upon divorcing in a reasonably inexpensive and expeditious manner. Where the parties' combined income exceeds \$136,000, the court would apply a set of statutory factors to the income in excess of the guideline giving the court flexibility in considering parties' more abundant resources and individual circumstances.

Thus, the Commission recommends the continuation of a formula for awards of temporary maintenance, the adoption of a formula for final maintenance or post-divorce income, and the preservation of the court's flexibility to address situations where the parties' income exceeds the formula's income guideline or the presumptive award is unjust or inappropriate given the parties' situation.

**A. The Formula**

The formula contained in section 236B(5-a) is based on a recommendation of the

American Academy of Matrimonial Lawyers (AAML).<sup>20</sup> In its 2007 Report, *Considerations When Determining Alimony, Maintenance and Support*,<sup>21</sup> the AAML offered guidelines for determining the *amount* of an award of post-divorce maintenance, and its *duration*.<sup>22</sup>

The AAML formula was developed through the collaborative effort of a committee of members of the AAML which endeavored to produce a range of reasonable alimony awards using a variety of incomes.<sup>23</sup>

The AAML formula first appeared in New York in a 2008 Assembly Bill as the presumptive method for calculating final or post-divorce maintenance awards based on the payor's income, up to \$1,000,000.<sup>24</sup> The judge's discretion to award maintenance based on traditional factors was limited to that portion of the payor's income which exceeded the \$1,000,000 cap or to cases where the court found the formula's result to be unjust or inequitable.<sup>25</sup> Under the bill, the death of either party ended the maintenance obligation, but

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<sup>20</sup> Sponsor's Memorandum, A. 10984B/S. 8390, available at <http://nysirs.state.ny.us/nyslbdcl/menuget1.cgi>.

<sup>21</sup> The Report was approved by the AAML Board of Governors on March 9, 2007. The AAML Report is available at <http://www.divorcereformny.org/pdf/AAML.pdf>.

<sup>22</sup> AAML Report (emphasis added).

<sup>23</sup> April 25, 2010 Telephone conversation between Arthur Balbirer, Esq. of the AAML and Rose Mary Bailly, Esq., and Barbara Hancock, Esq., Law Revision Commission staff. The participants in the AAML committee were Marlene Eskin Moses, Esq. (Tennessee), Co-Chair; Barbara Ellen Handschu, Esq. (New York), Co-Chair; Michael Albano, Esq. (Missouri); Arthur E. Balbirer, Esq. (Connecticut); Gaetano Ferro, Esq. (Connecticut); James T. McLaren, Esq. (South Carolina); Joanne Ross Wilder, Esq. (Pennsylvania); Thomas Wolfrum, Esq. (California); and Mary Kay Kisthardt, Esq. (Missouri), Reporter. AAML Report.

<sup>24</sup> A. 10446 (2008).

<sup>25</sup> *Id.* (The court was to consider eighteen specific factors and one catchall factor if income in excess of the cap was considered in a determination of the amount of an award. A written decision setting forth the factors considered and the reasons for its decision was required. If the court found the presumptive award unjust or inappropriate, it could adjust the award based upon consideration of sixteen factors and one catchall factor. A

remarriage of the payee spouse did not.<sup>26</sup>

The formula appeared again in a 2010 post-divorce maintenance bill pending in both houses.<sup>27</sup> Eventually the bill was amended to delete the formula in the post-divorce income awards, and apply it instead to temporary maintenance awards.<sup>28</sup> The income cap was reduced to \$500,000, and while consideration of the duration of the award was retained, the formula to calculate duration was eliminated.<sup>29</sup> The amended version of the bill passed both houses and was enacted into law as Chapter 371 which became effective on October 13, 2010.

It appears that the formula adopted by the AAML and the modified version in New York were arrived at in much the same way as formulas adopted formally or informally in other states and localities. Attorneys with expertise in the nature and frequency of maintenance awards made in their states used anecdotal evidence as well as reported decisions to craft a formula which would mirror a range of results they presumed would be an appropriate starting point for their clients.

The Commission does not suggest that the formula's methodology be disturbed; however, given both the patterns observed in the collected data about parties' income as well as statistics about the income of the vast majority of New Yorkers, the Commission recommends that the

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written order setting forth the presumptive award, the factors considered, and the reasons for adjustment was required.)

<sup>26</sup> *Id.*

<sup>27</sup> S. 7740-A/A. 10984-A (2010).

<sup>28</sup> A. 10984-B (2010).

<sup>29</sup> *Id.*

income guideline up to and including \$500,000 of the higher income spouse be reduced.

**B. Income Guideline of \$136,000**

Both data available on the income of New Yorkers and the consensus of stakeholders suggests that the current income guideline of \$500,000 is set too high.

The Commission proposes a guideline of up to and including \$136,000 of the parties' combined adjusted gross income, adjusted by statute biennially in accordance with the consumer price index for all urban consumers (CPI-U).<sup>30</sup> A number of considerations influenced the Commission's proposal: a recognition of the diversity of income levels between upstate and downstate, the current income guideline of the Child Support Standards Act which is based on the parties' combined income, information about New Yorkers' income available from various sources, and a belief that applicable guidelines for maintenance and child support should be consistent with one another to avoid confusion and unnecessary complexity.

The Commission recognized that income levels vary across the state; it concluded, however, that attempting to set variable guidelines based on the parties' location was unworkable. The Commission was therefore guided by the income guideline in the Child Support Standards Act -- \$136,000 adjusted by statute biennially in accordance with the CPI-U, and the approach adopted by the Legislature in setting that guideline -- namely to include the vast majority of New Yorkers and leave "only exceptional income cases to potentially be determined outside of the presumptively correct CSSA percentages."<sup>31</sup> The Commission looked

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<sup>30</sup> The guideline would be adjusted every two years based on the product of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars.

<sup>31</sup> Memorandum in Support, Laws of 2009, c. 343.

at data collected by the New York State Tax and Finance Department which indicated that in 2008, 94.8% of persons filing individual tax returns in New York, including couples filing joint tax returns, reported income of less than \$200,000.<sup>32</sup> In the same year, 14.2% of individual filers reported income of between 100,000 and 199,000.<sup>33</sup> The remaining 80.6% reported income of less than 100,000.<sup>34</sup>

In 2008, the Fiscal Policy Institute reported that as of 2004-2006, the top fifth percentile of New Yorkers reported income of \$148,192; breaking that percentile down further, the average family income of the 80-95 percentile was \$108,875, and the average family income of the top 5 percentile was \$262,679.<sup>35</sup>

On a related note, an analysis of 2005 New York tax returns shows that the top 20% of individual filers reported more of their income from dividends, business income and capital gains than they did from wages, and among the top 5%, the amount reported from wages was even less.<sup>36</sup>

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<sup>32</sup> See Statistical Tables, Analysis of 2008 Personal Income Tax Returns (April 2011), available at [http://www.tax.ny.gov/pdf/stats/stat\\_pit/pit/analysis\\_of\\_2008\\_personal\\_income\\_tax\\_returns.pdf](http://www.tax.ny.gov/pdf/stats/stat_pit/pit/analysis_of_2008_personal_income_tax_returns.pdf). Colorado's guideline of \$75,000, for example, is based on "review of Department of Revenue information stating that 80 percent of joint income tax filers in Colorado had adjusted gross income of \$75,000 or less." Albert M. Bonin, *New Temporary Formulaic Spousal Maintenance in Colorado: an Overview*, 30-AUG Colo. Law. 87 (2001).

<sup>33</sup> See Statistical Tables, Analysis of 2009 Personal Income Tax Returns (June 2012), available at [http://www.tax.ny.gov/pdf/stats/stat\\_pit/pit/analysis\\_of\\_2009\\_personal\\_income\\_tax\\_returns.pdf](http://www.tax.ny.gov/pdf/stats/stat_pit/pit/analysis_of_2009_personal_income_tax_returns.pdf).

<sup>34</sup> See Statistical Tables, Analysis of 2009 Personal Income Tax Returns (June 2012), available at [http://www.tax.ny.gov/pdf/stats/stat\\_pit/pit/analysis\\_of\\_2009\\_personal\\_income\\_tax\\_returns.pdf](http://www.tax.ny.gov/pdf/stats/stat_pit/pit/analysis_of_2009_personal_income_tax_returns.pdf). Colorado's cap of \$75,000, for example, is based on "review of Department of Revenue information stating that 80 percent of joint income tax filers in Colorado had adjusted gross income of \$75,000 or less." Albert M. Bonin, *New Temporary Formulaic Spousal Maintenance in Colorado: an Overview*, 30-AUG Colo. Law. 87 (2001).

<sup>35</sup> *Pulling Apart in New York: An Analysis of Income Trends in New York State* 4, 9, 13 (Fiscal Policy Institute 2008), available at [http://www.fiscalspolicy.org/PullingApartInNewYork\\_April2008.pdf](http://www.fiscalspolicy.org/PullingApartInNewYork_April2008.pdf).

<sup>36</sup> *Pulling Apart in New York: An Analysis of Income Trends in New York State* 17 (Fiscal Policy Institute 2008), available at [http://www.fiscalspolicy.org/PullingApartInNewYork\\_April2008.pdf](http://www.fiscalspolicy.org/PullingApartInNewYork_April2008.pdf).



Income information for our 9 counties – the median income,<sup>37</sup> per capita personal income,<sup>38</sup> and percentage of people below the poverty rate<sup>39</sup> – is consistent with the statewide data maintained by the tax department. The income data, as well as other demographic information about the nine counties, including the population,<sup>40</sup> and number of divorces,<sup>41</sup> is included in this report at Appendix D.

Furthermore, in our review of questionnaires where responses included specific information about employment and salary, we observed that the majority of responses indicated employment in service industry jobs for modest wages, consistent with the income data of those counties.

Thus, the information collected by the Commission suggested that the income of the majority of New Yorkers does not exceed \$200,000 and a large number of individuals have income substantially less than that amount. Because the Commission intended that the guideline cover the incomes of the majority of New Yorkers, and because different conclusions can be

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<sup>37</sup> The median income data is for the year 2009 collected from the Census Bureau. *See State and County Quick Facts*, <http://quickfacts.census.gov/qfd/states/36/36047.html>.

<sup>38</sup> The per capita personal income data is for the year 2006. Personal Income Per Capita by County of Residence, NYS: 1998-2006, 2009 New York State Statistical Yearbook, available at [http://www.rockinst.org/nys\\_statistics/2009/C/](http://www.rockinst.org/nys_statistics/2009/C/).

<sup>39</sup> The number of persons below the poverty rate is for the year 2009, collected from the Census Bureau. *See State and County Quick Facts* <http://quickfacts.census.gov/qfd/states/36/36047.html>. The federal poverty rate for 2009 for a single individual was \$10,830; for two individuals, \$14,750. The 2009 Poverty Guidelines for the 48 Contiguous States and the District of Columbia, available at <http://aspe.hhs.gov/poverty/09poverty.shtml>.

<sup>40</sup> The population data is for the year 2009 collected from the Census Bureau. *See State and County Quick Facts*, <http://quickfacts.census.gov/qfd/states/36/36047.html>.

<sup>41</sup> The divorce data was obtained for the year 2008. *See Vital Statistics of New York State 2008*, available at [http://www.health.state.ny.us/nysdoh/vital\\_statistics/2008/](http://www.health.state.ny.us/nysdoh/vital_statistics/2008/). This information is obtained by the Bureau of Production Systems Management (BPSM) of the New York State Department of Health from dissolution of marriage certificates recorded in county clerks' offices as required by statute. N.Y. Pub. Health L. § 4139. Notably, the form requires inclusion of information about who commenced the action, the grounds for divorce, the race of the parties and their education. This information is labeled as confidential. A copy of a dissolution of marriage certificate is included in Appendix E. *See* N.Y. Dom. Rel. L. §235(3).

reached about the amount of income a majority of New Yorkers earns,<sup>42</sup> the Commission chose to adopt the number reflected in the CSSA guideline, the purpose of which is closely analogous to the maintenance award guideline. The Commission also concluded that when income guidelines are to be applied in both maintenance and child support awards, they should be consistent with one another to avoid unnecessary confusion and complexity, and that going forward, that consistent approach should be maintained, ideally at an increased level.<sup>43</sup>

**C. Adjusted Gross Income Subject to the Guideline**

States vary as to the use of adjusted gross income or net income after taxes for calculating maintenance. New York currently uses adjusted gross income in its formulas for awards of both temporary maintenance and child support. There was some indication that net income might be more representative of what is available for temporary maintenance after consideration of the payor's tax liability at the time of the award. The Commission concluded, however, that using net income for calculating temporary maintenance would result in inconsistencies in the application of the child support statute, would be potentially burdensome because obtaining accurate numbers could delay the resolution of the proceeding, and that net income was more subject to manipulation, even with the potential for readjustment at the time of the final order and judgment.

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<sup>42</sup> In its 2013 session, the New York State Legislature has considered middle class families to include those whose income exceeds the CSSA guideline of \$136,000, as reflected the new child tax credit of \$350 for families with income between \$40,000 and \$300,000 (*Governor Cuomo and Legislative Leaders Announce early Passage of 2013-14 Budget*, available at <http://www.governor.ny.gov/press/03292013-2013-14-budget>) and the extension of progressive tax relief to families whose incomes are around \$300,000 (*Fair and Equitable Tax Code Extended in 2013-2014 New York State Budget*, News Release Assembly Speaker Sheldon Silver, available at <http://assembly.state.ny.us/Press/20130328b/>).

<sup>43</sup> See note 42.

**D. The Relationship Between Awards for Temporary Maintenance and Post-Divorce Income and Section 236b(8) Awards<sup>44</sup>**

Section 236B(8)(b) of the Domestic Relations Law provides in part that:

In any action where the court has ordered temporary maintenance, maintenance, distributive award or child support, the court may direct that a payment be made directly to the other spouse or a third person for real and personal property and services furnished to the other spouse, or for the rental or mortgage amortization or interest payments, insurances, taxes, repairs or other carrying charges on premises occupied by the other spouse, or for both payments to the other spouse and to such third persons . . . .<sup>45</sup>

The Commission proposes that any 236B(8) awards be taken into account when awarding temporary maintenance or post-divorce income to ensure that the recipient of such awards is not receiving a windfall at the expense of the payor, as would otherwise be the case.

The Commission's proposal is consistent with concerns expressed by stakeholders and by the courts.<sup>46</sup> The Appellate Division's statement in *Khaira v. Khaira* is particularly persuasive,<sup>47</sup>

[I]n the absence of a specific reference to the carrying charges for the marital residence,

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<sup>44</sup> N.Y. Dom. Rel. Law §236(8), "Special Relief in Matrimonial Actions" with respect to all maintenance awards.

<sup>45</sup> N.Y. Dom. Rel. Law §236(8)(b).

<sup>46</sup> *Khaira v. Khaira*, 93 A.D.3d 194, 938 N.Y.S.2d 513 (1st Dept. 2012); *A.C. v. D.R.*, 32 Misc.3d 293, 927 N.Y.S.2d 496 (N.Y. Sup. Ct. Nassau Co. 2011). *See also Klein v. Klein*, 296 A.D.2d 533, 745 N.Y.S.2d 569 (2<sup>nd</sup> Dept. 2002)(To the extent that payments for the upkeep of the marital residence, unreimbursed medical expenses, and automobile expenses can be allocated to child support or maintenance, the husband was held entitled to a credit for these payments as against pendente lite arrears.).

<sup>47</sup> 93 A.D.3d 194, 938 N.Y.S.2d 513 (1st Dept. 2012).

we consider it reasonable and logical to view the formula adopted by the new maintenance provision as covering all the spouse's basic living expenses, including housing costs as well as the costs of food and clothing and other usual expenses.

It is true that before the enactment of the new maintenance provision, it was a common practice to award spousal support partly in direct cash payments and partly in payments to third parties. This was often not only eminently reasonable, but also the most expedient way of covering payment of the necessities, and protecting the home as a marital asset. However, we believe that the new approach of calculating spousal support payments to the non-monied spouse by means of a formula is intended to arrive at the amount that will cover all the payee's presumptive reasonable expenses. By calculating the guideline amount and then simply adding the direct mortgage payment on top of that, the motion court awarded more than the amount reached by the formula, without providing the required explanation.<sup>48</sup>

**E. Duration of Post Divorce Income Awards**

Determining how to provide direction for the judiciary regarding the duration of an award for post-divorce income proved to be challenging because neither the case law developed by New York appellate courts nor the statutes of other jurisdictions offered a clear rationale for deciding the duration of an award.

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<sup>48</sup> 93 A.D.3d at 200, 938 N.Y.S.2d at 517.

## 1. Statutes in Other Jurisdictions and Other Formulas

Duration formulas adopted in other jurisdictions offer a variety of solutions, one of which is to limit the duration of an award based on the length of the marriage.<sup>49</sup> The AAML proposal<sup>50</sup> and an informal guideline in New York's Erie County do likewise.<sup>51</sup>

One state, Kansas, limits the duration of maintenance to a fixed maximum of 121 months.<sup>52</sup>

Several jurisdictions define guidelines for a range of duration, on an informal, advisory basis.<sup>53</sup> Maricopa County, Arizona did have a range for the duration of an award but discontinued it.<sup>54</sup> The New Mexico Supreme Court has declined to adopt a durational guideline, because "a durational factor [is] too arbitrary and lacking in consideration of discrete facts. . . [T]he duration of alimony payments should be left open to negotiation."<sup>55</sup>

<sup>49</sup> Maine: See 19-A M.R.S. § 951-A(2)(A)(1) and (2)); Utah: See Utah Code Ann. § 30-3-5(8)(h); Delaware: See 13 Del. C. § 1512(d); Texas: See Tex. Fam. Code §§ 8.054(a)(1)(A)-(C), 8.054(b); 8.051(2). When the AAML formula first appeared in New York in a 2008 Assembly Bill, A. 10446, the bill contained a separate guideline to determine the duration of an award of final maintenance by applying a percentage to the length of the marriage, beginning at 30% for a marriage of 5 years or less, and increasing to 100% for a marriage of 20 to 25 years. If the marriage was more than 25 years, the award was permanent. The percentages were as follows: 0 to 5 years (30%); 5 to 7.5 years (40%); 7.5 to 10 years (50%); 10 to 12.5 years (60%); 12.5 to 15 years (70%); 15 to 17.5 years (80%); 17.5 to 20 years (90%); 20 to 25 years (100%).

<sup>50</sup> AAML Report.

<sup>51</sup> A copy of the Erie County guideline is attached as Appendix F.

<sup>52</sup> See K.S.A. § 23-2904.

<sup>53</sup> Erie County: *Informal Maintenance Formula*, on file with the Commission; Maricopa County: see *Spousal Support Guidelines*, reprinted at Mark W. Armstrong et al., 12 *Arizona Family Law Rules Handbook* 926 (2012); Canada: Carol Rogerson and Rollie Thompson, *Spousal Support Advisory Guidelines* 60 July 2008. "[G]iven the ages of the parties in the cases covered by the rule of 65, there will likely be significant changes in the amount of support ordered upon the retirement of one or both of the spouses." *Id.* at 62. The Canadian guidelines consider any periods of interim support as part of the duration of maintenance. *Id.* at 60.

<sup>54</sup> Email from Kathy Sekardi, Senior Court Policy Analyst, Arizona Supreme Court, to Barbara S. Hancock, October 19, 2012. On file with the Commission.

<sup>55</sup> See New Mexico Supreme Court, *In the Matter of the Report of the Alimony Guidelines Statewide Pilot Project Committee and Adoption of Alimony Guidelines for the State Courts of New Mexico*, No. 07-8500, April 16, 2007 (adopting the Statewide Alimony Guidelines and Commentaries), 46 State Bar of New Mexico Bar Bulletin 20, at 4 (December 10, 2007), [www.nmbar.org/Attorneys/lawpubs/BB/bb2007/BB121007.pdf](http://www.nmbar.org/Attorneys/lawpubs/BB/bb2007/BB121007.pdf).

After reviewing the various formulas for duration of final awards in other jurisdictions, we found no discernible theme or pattern, and thus choosing a solution from any one of them would be an arbitrary decision. Given that result, we then turned to reported appellate cases in New York which addressed the duration of awards made, hoping to find a pattern or theme, such as the length of the marriage, that would account for the duration of the award.

## 2. Appellate Cases

We examined 109 New York appellate cases in which the duration of maintenance was at issue. Of those, only 67 cases provided some information such as the length of the marriage or the age and/or health status of the payee. From those we hoped to understand the reason for the duration of the award.<sup>56</sup> However, the cases offered no discernible pattern of the duration of the awards established by the courts. The results were clearly driven by the facts of the case but not necessarily by the length of the marriage.

Thus, neither New York appellate cases nor the formulas of other jurisdictions provide clarity in determining the duration of final maintenance. The Commission concluded nevertheless that some guidance in the statute to assist the parties and the courts in resolving the duration of a post-divorce award was preferable to none.

The Commission therefore recommends that duration of any post-divorce income award be based on a consideration of the length of the marriage, the length of time necessary for the party seeking post-divorce income to acquire sufficient education or training to enable that party to find appropriate employment, the normal retirement age of each party as defined by the

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<sup>56</sup> Seventy-nine were from 2007 through 2012; the remaining 30 were from 1983 to 1990. We wanted to see if the older and newer cases showed different approaches to duration.

Internal Revenue Code and the availability of retirement benefits, and any barriers facing the party with regard to obtaining appropriate employment such as child care responsibilities, health, or age. The court must state the basis for the duration of the award in its decision granting the award.

#### **IV. Other Concerns**

From our discussions with stakeholders, and our review of the written submissions and case law, the Commission makes the following additional recommendations.

##### **A. Certain provisions should be eliminated from the current temporary maintenance statute:**

1. the reference to income from income producing property to be distributed pursuant to equitable distribution, which is not relevant in calculating income for an award of temporary maintenance.<sup>57</sup>
2. the reference to marital property subject to distribution pursuant to section 236(5) as unrelated to a determination of temporary maintenance.<sup>58</sup>
3. consideration of the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment, because these child-related expenses are included in the child support

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<sup>57</sup> N.Y. Dom. Rel. Law § 236B(5a)(b)(4)(b).

<sup>58</sup> N.Y. Dom. Rel. Law § 236B(5a)(e)(n).



as add-ons to the guideline amount, and, if included here as well, would lead to duplicate awards.<sup>59</sup>

4. consideration of marital property subject to distribution pursuant to subdivision five, because evidence of the existence and value of such property is generally not available prior to discovery.<sup>60</sup>

**B. Certain additions should be made to the current temporary maintenance statute:**

1. the requirement that the court allocate the responsibilities of the respective spouses for the family's current expenses during the pendency of the proceeding.
2. the requirement that the court limit the duration of an award in a short-term marriage to prevent payment of temporary maintenance that continues for a period longer than the marriage.
3. the recalculation of the award of temporary maintenance, with costs and interest at

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<sup>59</sup> N.Y. Dom. Rel. Law § 236B(5a)(2)(xiv).

<sup>60</sup> N.Y. Dom. Rel. Law § 236B(5a)(2)(xiv).



the time of the final order and judgment if either party provides incorrect information regarding his or her income.

4. the statement that any temporary maintenance order does not prejudice the rights of either party regarding a post-divorce income award.

**V. Update Spousal Support in Section 412 of the Family Court Act.**

Section 412 of the Family Court Act provides that:

A married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties.

The statute, unamended, dates back almost one century (with the exception of constitutionally required amendment to render the section gender neutral). The provision has thus become increasingly outdated and inequitable. On the other hand, Domestic Relations Law Section 236, which is limited to dissolution of marriage actions, has been revised on multiple occasions to address contemporary standards and needs, culminating in Chapter 371. As noted by Professor Merrill Sobie in his Practice Commentaries to section 412, the omission of an amendment to section 412 as part of Chapter 371 exacerbated “the illogical dichotomy between

the Domestic Relations Law and the Family Court Act.”<sup>61</sup>

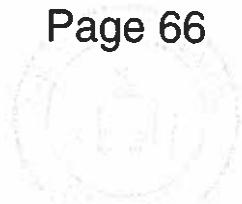
A person who needs but is not receiving support from his spouse has two legal options: initiate a divorce proceeding and move for temporary section 236 maintenance or, alternatively, bring a support action in Family Court pursuant to section 412. The plaintiff may choose the section 412 route for many understandable reasons, including religious principles, the hope for a reconciliation, or the practical difficulties of obtaining pro-se litigant matrimonial relief (it is far easier and swifter to prosecute a support case in Family Court than a matrimonial case in Supreme Court). The facts and circumstances of the spouse are identical regardless of the forum, the needed relief is identical, but because one statute provides a specific formula while the companion statute provides only a very incomplete, generalized and highly discretionary remedy, the results may be totally different.

We recommend that the provisions of a revised temporary maintenance statute in the Domestic Relations Law be mirrored in section 412 of the Family Court Act governing spousal support awards and that appropriate amendments be made to section 416 of the Family Court Act relating other requirements when spousal support is ordered consistent with the changes to section 412.

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<sup>61</sup> Professor Merrill Sobie, 2010 West Supplementary Practice Commentaries to McKinney's Family Court Act §412 (2011 Electronic Update).

**APPENDIX A**



**CHILD SUPPORT SUMMARY FORM  
SUPREME AND FAMILY COURT**

**COMPLETE FORM FOR EACH BASIC CHILD SUPPORT OBLIGATION ORDER<sup>1</sup>**

A. Court:  Supreme  Family

B. County: \_\_\_\_\_

C. Index #/Docket #: \_\_\_\_\_

D. Date Action Commenced:

\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_

E. Date Judgment/Order Submitted or Signed:

\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_

F. # Of Children Subject to Child Support Order:

\_\_\_\_\_

G. Annual Gross Income:

1. Father: \$ \_\_\_\_\_ Mother: \$ \_\_\_\_\_

H. Amount of Child Support Payment:

1. By Father: \$ \_\_\_\_\_ annually  
2. By Mother: \$ \_\_\_\_\_ annually

I. Additional Child Support:  
(Circle as many as appropriate)

By Father: By Mother:

- |                      |                      |
|----------------------|----------------------|
| 1. Medical/Med. Ins. | 1. Medical/Med. Ins. |
| 2. Child Care        | 2. Child Care        |
| 3. Education         | 3. Education         |
| 4. Other             | 4. Other             |

J. Did the court make a finding that the child support award varied from the Child Support Standards Act amount? (Circle one)

1. Yes      2. No

K. If answer to "J" was yes, circle court's reason(s):

1. Financial resources of parents/child.
2. Physical/emotional health of child: special needs or aptitudes.
3. Child's expected standard of living had household remained intact.
4. Tax consequences.
5. Non-monetary contribution toward care and well-being of child.
6. Educational needs of either parent.
7. Substantial differences in gross income of parents.
8. Needs of other children of non-custodial parent.
9. Extraordinary visitation expenses of non-custodial parent.
10. Other (specify):

L. Maintenance/Spousal Support: (Circle one)

1. None    2. By Father    3. By Mother

M. Value of Maintenance/Spousal Support:

\$ \_\_\_\_\_ annually

**SUPREME COURT ONLY**

N. Allocation of Property:

\_\_\_\_\_ % To Father      \_\_\_\_\_ % To Mother

<sup>1</sup> Defined by FCA 413(2) and DRL §240(1-b)(1)(2): "Child Support" shall mean a sum to be paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated child under the age of twenty-one years.

NEW YORK STATE UNIFIED COURT SYSTEM  
SUPPORT SUMMARY FORM: FAMILY & SUPREME COURT

INSTRUCTION SHEET

Prepare one report for each proposed judgment or final order granted pursuant to Article 4 or 5 of the Family Court Act and DRL §240 and §236 B(9)(b) which includes a provision for child support (including modification of order).

**SUBMIT COMPLETED FORM TO:**

Office of Court Administration  
Office of Court Research  
25 Beaver Street, Room 975  
New York, New York 10004

**GENERAL INSTRUCTIONS:** → **ALL ITEMS MUST BE ANSWERED**

- If a number or amount in dollars is required and the answer is none, write 0.
- If a certain item is not applicable, write NA.
- If the information is unknown or not known to the party filling out the form, write UK.
- "mm/dd/yy" means "month/day/year".

**SPECIAL INSTRUCTIONS FOR PARTICULAR ITEMS:**

- G. Use gross income figures from the last complete calendar year. Do not include maintenance or child support as income.
- H. If the child support award is calculated weekly, multiply it by 52 for the annual amount; if biweekly, multiply it by 26, if monthly, multiply it by 12.
- M. If the maintenance award is calculated weekly, multiply it by 52 for the annual amount; if biweekly, multiply it by 26; if monthly, multiply it by 12. If the maintenance award calls for decreasing or increasing amounts (for example, a certain amount for five years and half that amount for another three years), then provide the average of the awards (total amount for all years divided by the number of years).

**NOTE:** THIS INFORMATION IS CONFIDENTIAL AND WILL BE USED FOR STATISTICAL PURPOSES ONLY.  
IT WILL NOT BE RETAINED IN THE CASE FILE.

Printed in an Order of the State Administration of the County Clerk of the County of New York... UCR-111A... This is a self-administered questionnaire... for the New York State Family Division Commission...

Please answer all questions. Do not use pens or markers with ink that soaks through the paper. Use a No. 2 pencil or blue or black ink. Do not fold, tear or mutilate this form. Make solid marks that fill the circle completely. Make no stray marks on this form.

STATE OF NEW YORK COUNTY OF NEW YORK... COUNTY OF NEW YORK... COUNTY OF NEW YORK...

County:  Albany  Broome  Cayuga  Chemung  Hamilton  Herkimer  Madison  Montgomery  Orleans  Otsego  Schoharie  Warren  Yates  New York  Westchester

Index Number, Date Matter Commenced (MO, DAY, YEAR), Date of Final Order (MO, DAY, YEAR), Date of Marriage (MO, DAY, YEAR)

1. Please indicate whether this divorce was:  Contested  Uncontested

MAINTENANCE: 1. Was maintenance awarded? 2. Awarded to: 3. Amount Established by: 4. Was a former spouse ever in arrears? 5. If former's wife/husband, was it enforced? 6. Amount of arrears awarded? 7. Awarded whole, marital or separate property?

2. Temporary Maintenance: 1. Start Date - End Date: 2. Awarded to: 3. Amount Established by: 4. Was former ever in arrears? 5. Amount of arrears awarded:

3. Final Maintenance: 1. Start Date - End Date: 2. Awarded to: 3. Amount Established by: 4. Was former ever in arrears? 5. Amount of arrears awarded:



**4. For Final Maintenance Awards Only:**

**1. How long was the marriage?**

YEARS	MONTHS	DAYS
0	0	0
0	1	0
0	2	0
0	3	0
0	4	0
0	5	0
0	6	0
0	7	0
0	8	0
0	9	0
1	0	0
1	1	0
1	2	0
1	3	0
1	4	0
1	5	0
1	6	0
1	7	0
1	8	0
1	9	0
2	0	0
2	1	0
2	2	0
2	3	0
2	4	0
2	5	0
2	6	0
2	7	0
2	8	0
2	9	0
3	0	0
3	1	0
3	2	0
3	3	0
3	4	0
3	5	0
3	6	0
3	7	0
3	8	0
3	9	0
4	0	0
4	1	0
4	2	0
4	3	0
4	4	0
4	5	0
4	6	0
4	7	0
4	8	0
4	9	0
5	0	0
5	1	0
5	2	0
5	3	0
5	4	0
5	5	0
5	6	0
5	7	0
5	8	0
5	9	0
6	0	0
6	1	0
6	2	0
6	3	0
6	4	0
6	5	0
6	6	0
6	7	0
6	8	0
6	9	0
7	0	0
7	1	0
7	2	0
7	3	0
7	4	0
7	5	0
7	6	0
7	7	0
7	8	0
7	9	0
8	0	0
8	1	0
8	2	0
8	3	0
8	4	0
8	5	0
8	6	0
8	7	0
8	8	0
8	9	0
9	0	0
9	1	0
9	2	0
9	3	0
9	4	0
9	5	0
9	6	0
9	7	0
9	8	0
9	9	0
10	0	0
10	1	0
10	2	0
10	3	0
10	4	0
10	5	0
10	6	0
10	7	0
10	8	0
10	9	0

**2. How long was the marriage (if any)?**

YEARS	MONTHS	DAYS
0	0	0
0	1	0
0	2	0
0	3	0
0	4	0
0	5	0
0	6	0
0	7	0
0	8	0
0	9	0
1	0	0
1	1	0
1	2	0
1	3	0
1	4	0
1	5	0
1	6	0
1	7	0
1	8	0
1	9	0
2	0	0
2	1	0
2	2	0
2	3	0
2	4	0
2	5	0
2	6	0
2	7	0
2	8	0
2	9	0
3	0	0
3	1	0
3	2	0
3	3	0
3	4	0
3	5	0
3	6	0
3	7	0
3	8	0
3	9	0
4	0	0
4	1	0
4	2	0
4	3	0
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4	5	0
4	6	0
4	7	0
4	8	0
4	9	0
5	0	0
5	1	0
5	2	0
5	3	0
5	4	0
5	5	0
5	6	0
5	7	0
5	8	0
5	9	0
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6	2	0
6	3	0
6	4	0
6	5	0
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7	3	0
7	4	0
7	5	0
7	6	0
7	7	0
7	8	0
7	9	0
8	0	0
8	1	0
8	2	0
8	3	0
8	4	0
8	5	0
8	6	0
8	7	0
8	8	0
8	9	0
9	0	0
9	1	0
9	2	0
9	3	0
9	4	0
9	5	0
9	6	0
9	7	0
9	8	0
9	9	0
10	0	0
10	1	0
10	2	0
10	3	0
10	4	0
10	5	0
10	6	0
10	7	0
10	8	0
10	9	0

**3. When does that maintenance award end?**

Remarriage

Death

Other explain \_\_\_\_\_

**STATUS OF SPOUSES**

- 5. Is husband currently employed?**  Yes - Specify Occupation \_\_\_\_\_
- No - Years not employed:  Less than 1  1 - 5  6 - 10  More than 10
- 6. Is wife currently employed?**  Yes - Specify Occupation \_\_\_\_\_
- No - Years not employed:  Less than 1  1 - 5  6 - 10  More than 10
- 7. Current health status of husband:**  Good  Fair  Poor
- 8. Current health status of wife:**  Good  Fair  Poor

**CHILDREN AND CHILD SUPPORT**

- 9. Are there un-emancipated children either born to or adopted by both parents before or during the marriage?**
- Yes - Specify in (b):
- No - Specify in (c):
- (b) How many children are there?  0  1  2  3  4  5  More than 5
- (c) How many children are there?  0  1  2  3  4  5  More than 5
- (d) How many children are there?  0  1  2  3  4  5  More than 5

10. Annual child support obligation:

By law

By court

None or does not apply

10a. Annual child support amount:

10b. Annual payment responsibility:

- Less than \$ 15,000
- \$ 15,000 - \$ 24,999

- \$ 25,000 - \$ 49,999
- \$ 50,000 - \$ 74,999

- \$ 75,000 - \$ 99,999
- \$ 100,000 - \$ 149,999

\$150,000 or more

10c. Total yr of children subject to the state support order:

0  1  2  3  4  5  More than 5

10d. The following list applies to the child support order apply:

- None
- Child care
- Medical/dental expenses
- Education
- Other

10e. Did the court order a finding that the child support order is not in the best interest of the child?

Yes - mark all that apply  No - mark 011

- Financial resources of the parent
- Financial resources of the child
- Child's needs or condition
- Child's educational needs or future
- The parent's income
- How much the child's parent would pay if not ordered to pay

- Educational needs of the parent
- Educational differences in parents
- Health of the child or of the parent
- Other reasons why the order is not in the best interest of the child
- Other: \_\_\_\_\_

**PROPERTY, DEBT, FINANCIAL OBLIGATIONS AT TIME OF FINAL ORDER**

For questions 11, 12, 13 and 14a write in the dollar amount and also mark the correct summary category. If the item does not apply or there was no value mark 0.

- 0. Zero/None
- a. \$ 1 - \$ 14,999
- b. \$ 15,000 - \$ 24,999

- c. \$ 25,000 - \$ 49,999
- d. \$ 50,000 - \$ 74,999
- e. \$ 75,000 - \$ 99,999

- f. \$100,000 - \$149,999
- g. \$150,000 - \$500,000
- h. More than \$500,000

11. Individual Income and Property:

11a. Total income for year:

Answer:

\$ \_\_\_\_\_

Category: \_\_\_\_\_

11b. Total net worth at time of final order:

Answer:

\$ \_\_\_\_\_

Category: \_\_\_\_\_

12. Divided Property and Debt Not including marital home.

12a. Value of divided property:

Answer:

\$ \_\_\_\_\_

Category: \_\_\_\_\_

12b. Value of divided debt:

Answer:

\$ \_\_\_\_\_

Category: \_\_\_\_\_



- 0. Zero/None
- a. \$ 1 - \$ 14,999
- b. \$ 15,000 - \$ 24,999

- c. \$ 25,000 - \$ 49,999
- d. \$ 50,000 - \$ 74,999
- e. \$ 75,000 - \$ 99,999

- f. \$100,000 - \$149,999
- g. \$150,000 - \$500,000
- h. More than \$500,000

13. Other financial obligations. Mark all that apply.

- Husband to wife \$ \_\_\_\_\_ (0) (1) (2) (3) (4) (5) (6) (7) (8) (9)
- Wife to husband \$ \_\_\_\_\_ (0) (1) (2) (3) (4) (5) (6) (7) (8) (9)
- Husband - child support or other children \$ \_\_\_\_\_ (0) (1) (2) (3) (4) (5) (6) (7) (8) (9)
- Wife - child support or other children \$ \_\_\_\_\_ (0) (1) (2) (3) (4) (5) (6) (7) (8) (9)

14. Was marital home  Owned - Continue to 15a  Rented - Go to 15b

14a. Equity in the home as of 12/31/99 on the last day of the year \_\_\_\_\_ (0) (1) (2) (3) (4) (5) (6) (7) (8) (9)

14b. If home was sold by joint, state following: \$ to Husband \_\_\_\_\_ % to Wife \_\_\_\_\_

14c. If home was not sold after 12/31/99, state number of years on the mortgage \_\_\_\_\_  
 1-5 years  6-10 years  11-15 years

14d. If not sold, how was marital home divided?

	Husband	Wife	Joint
Joint title	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Exchange of interests	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
One or both parties could have obtained by	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
voluntary	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

15. Was a professional license or degree divided?  Yes - Continue to 15a  No

15a. Type of license  Judicial  Attorney  Other

15b. Value of license \_\_\_\_\_

MAIL COMPLETED FORM TO:  
 Office of Court Administration  
 Office of Court Research  
 25 Beaver Street, Room 975  
 New York, NY 10004

PLEASE DO NOT FOLD, STAPLE, FAX OR SCAN THIS FORM

13727

**APPENDIX B**



ADMINISTRATIVE ORDER OF THE  
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me by, inter alia, sections 212 of the Judiciary Law and 214 of the Family Court Act, and consistent with the legislative design, set forth in L. 2010, c. 371, §3, to undertake a comprehensive review of our State's maintenance laws, I hereby direct that the attached form Special UCS-111A be completed for each judgment of divorce granted pursuant to Domestic Relations Law §§236B, 240, and 246, in Supreme Court proceedings in the following counties:

Albany, Bronx, Erie, Jefferson, Kings, Nassau, New York, Onondaga, and Westchester.

Completion of this form shall satisfy any requirement to otherwise complete Form UCS-111 (Child Support Summary Form; Supreme and Family Court) in the proceeding.

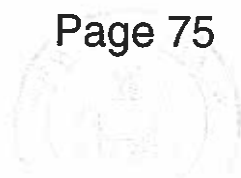
This order shall take effect on April 1, 2011, and shall remain in effect until further order.

  
\_\_\_\_\_  
Chief Administrative Judge of the Courts

Dated: March 22, 2011

AO/ 446 /11

## APPENDIX C



## Appendix C

### 1. Length of Marriage

Of the 7,302 questionnaires, 6,411 had usable data on the number of years of marriage. The divorces by length of marriage across the responses were relatively evenly divided among categories of fewer than 5 years, 5 - 10 years, 11 - 20 years and greater than 20 years. 1,809 divorces were reported in marriages of fewer than 5 years; 1,827 divorces in marriages between 5 and 10 years; 1,757 divorces in marriages of between 11 and 20 years; and 1,018 divorces in marriages of more than 20 years. The fact that responses included the length of marriage did not necessarily mean, as noted above, that all responses reported on whether or not they received temporary or final maintenance awards.

### 2. Total Awards

Temporary maintenance awards were reported in 213 cases. Final maintenance awards were reported in 468 cases.

Awards of both temporary and final maintenance were reported in 124 cases. Two of these cases reported that the husband received both temporary and final maintenance. 107 cases reported that the wife received both temporary and final maintenance. The remainder reported awards but not the recipients.

#### A. Temporary maintenance awards

Of the 213 awards, 9 cases reported an award was made to the husband and 188 awards were made to the wife. A greater share of temporary awards were made in marriages of 11 to 20 years and 20 plus years.

##### (i) Awards to the husband

###### a. Income of the parties

In the 9 awards made to husbands, 2 cases reported the husband's income in the range of \$1 to \$14,999, 2 cases reported the husband's income in the range of \$15,000 to \$24,999; and 2 cases reported the husband's income in the range of \$25,000 to \$49,000; in all of these these cases, wife's income was reported in the range of \$50,000 to \$74,999 or higher.

One husband reported income in the range of \$150,000 to \$500,000 and the wife's income was reported in the same range. The remainder did not report the parties' income.

###### b. Health of the husband

In 7 cases reporting awards, the husband's health was reported as "good"; in these same cases, the wife's health was also reported as "good". In 2 cases, the husband's health was reported as "fair" but the wife's health was reported as "good". The remainder did not report on the parties' health.

###### c. Presence of children

In 6 cases where the husband received an award, no children were involved; in 1 case, the children lived with the husband. In 2 cases, the children live with the wife. The remainder did not report on the presence of children.



**(ii) Awards to the wife**

**a. Income of the parties**

In the 188 awards made to the wife, 25 cases reported the wife's income in the range of \$1 to \$14,999; 22 cases reported her income in the range of \$15,000 to \$24,999, and 21 cases reported her income in the range of \$25,000 to \$49,000. In all of these cases, the husband's income was reported in the range of \$25,000 to \$49,999 or higher.<sup>1</sup>

Four cases reported the wife's income in the range of \$50,000 to 74,999; 1 case reported the wife's income at a range of \$75,000 to \$99,999, and 1 case reported income at a range of \$150,000 to 500,000. In all these cases, the husband's income was reported to be of \$75,000 to \$99,999 or higher.<sup>2</sup>

**b. Health of the wife**

In 156 cases reporting awards, the wife's health was reported as good; in 9 of these awards, the husband's health was reported as worse than the wife's health. In 25 awards, the wife's health was reported as fair or poor and in each instance, the husband's health was reported as the same as the wife's health. The remainder did not report on the parties' health.

**c. Presence of children and child support**

In 61 cases no children were involved; in 15 cases, the children live with the husband; in 24 cases, the children shared equal time with each parent. In 99 cases, the children live with the wife. The remainder did not report on the presence of children.

25 cases reported no child support; 120 cases reported child support by the father; 7 cases reported child support by the mother. 25 cases reported child support by both parents. The remainder did not report on child support.

**(iii) Settlement or judgment**

127 cases reported that the awards were settlements; 67 cases reported that they were judicial decisions; 16 cases reported that they did not know how the award was reached. The remainder did not respond to this question.

73 cases reported that the divorce was contested; 40 reported that the divorce was uncontested. The remainder did not report on that question. 25 cases reported that the awards were determined by formula; 113 cases reported that the awards were not determined by formula; 48 cases reported not knowing how the award was determined. The remainder did not respond.

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<sup>1</sup> Ten cases reported income in the range of \$25,000 to 49,000; 19 cases reported income in the range of \$50,000 to \$74,999; 9 cases reported income in the range of \$75,000 to 99,999; 15 cases reported income in the range of \$100,000 to \$149,999; 12 cases reported income in the range of \$150,000 to \$499,999; 3 cases reported income at more than \$500,000.

<sup>2</sup> 1 case reported the husband's income to be in the range of \$75,000 to \$99,999; 1 case reported the husband's income to be in the range of 100,000 to \$149,999; 3 cases reported income in the range of \$150,000 to \$499,999; 1 case reported the husband's income to be more than \$500,000.

**B. Final maintenance awards**

Final maintenance was awarded 469 times, mainly in marriages of 10 to 20 years, and marriages of 20 years or more.

**(i) Awards to the husband**

Of the 469 awards, 22 awards were made to the husband.

**a. Income of the parties**

In the 22 awards made to husbands, 8 cases reported the husband's income in the range of \$1 to \$14,999, 2 cases reported the husband's income in the range of \$15,000 to \$24,999; and 1 case reported the husband's income in the range of \$25,000 to \$49,999; in all of these cases, the wife's income was reported in the range of \$25,000 to \$49,999 or higher.

One case reported the husband's income in the range of \$50,000 to \$74,999; 1 case reported the husband's income in the range of \$100,000 - \$149,999; 2 cases reported the husband's income in the range of \$150,000 - \$500,000. In 3 of these cases, wife's income was reported either in the range of \$150,000 - \$500,000, or over \$500,000. One case did not report the wife's income.

**b. Health of the husband**

18 cases reported the husband's health as good and in all but 1 case reported the wife's health as also good. In that one case, the wife's health was reported as poor. Two cases reported the husband's health as fair while reporting the wife's health as good. 2 cases reported the husband's health as poor while reporting that the wife's health was good.

**c. Presence of children**

In 8 cases, there were no unemancipated children. One case reported that the children lived with the husband. 8 cases reported that the children live with the wife. 5 cases reported that the children spent equal time with both parents.

**(ii) Awards to the wife**

441 awards were reported as made to the wife.

**a. Income of the parties**

In the 441 awards made to the wife, 85 cases reported the wife's income to be in the range of \$1 to \$14,999, and in all of those cases the husband's income was reported to be in the range of \$1 to \$14,999 or higher.

71 cases reported the wife's income to be in the range of \$15,000 to \$24,999, and in all of those cases the husband's income was reported to be in the range of \$25,000 to \$49,999 or higher.

85 cases reported the wife's income to be the range of \$25,000 to \$49,999 and in all of these cases except one, the husband's income was reported in the range of \$25,000 to \$49,999 or higher. The exception reported that the husband's income was lower, in the range of \$15,000 to \$24,999.

Of the remaining cases, 26 reported the wife's income to be in the range of \$50,000 to \$74,999; 7 reported the wife's income to be in the range of \$75,000 to 99,999; 2 reported the wife's income to be in the range of \$100,000 to \$149,999; 4 reported the wife's income to be in the range of \$150,000 to \$500,000; 1 reported the wife's income to be greater than \$500,000.

In one of the awards where the wife's income was reported to be in the range of \$50,000 to \$74,999, the husband's income was also reported to be in that range. In the other cases, the husband's income was reported to be in the range of \$75,000 to \$99,999 or higher.<sup>3</sup>

**b. Health of the wife**

In 370 awards, the wife's health was reported as good; in 9 of these awards, the husband's health was reported as worse than the wife's health; in all the rest of those cases, the husband's health was reported to be the same as the wife's health. In 54 awards, the wife's health was reported as fair or poor and in each instance, the husband's health was reported as the same as the wife's health. In one case, the husband's health was reported as worse than the wife's health; in the remaining 53 cases, the husband's health was reported as the same or better than the wife's

**c. Presence of children**

In 113 cases, there were no unemancipated children. 38 cases reported that the children lived with the husband. 247 cases reported that the children live with the wife. 67 cases reported that the children spent equal time with both parents.

**(iii) Settlement or Judgment**

431 cases reported that they were determined by settlement; 23 cases reported that they were arrived at by a judge and 5 cases did not know how the award was reached.

149 cases reported that the divorce was contested; 142 cases reported that the divorce was uncontested. 32 cases reported that the awards were determined by formula; 340 cases reported that the awards were not determined by formula; 76 cases reported not knowing how the award was determined.

56 cases reported no child support; 295 cases reported child support by the father; 18 cases reported child support by mother. 56 cases reported child support by both parents.

**3. Monetary Amount of Award**

Only 142 questionnaires reported the size of the award. The average amount of the awards reported was \$29,119.

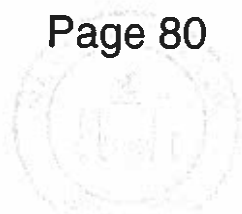
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<sup>3</sup> Five cases reported the husband's income to be in the range of \$75,000 to \$99,999; 10 cases reported the husband's income to be in the range of 100,000 to \$149,999; 18 cases reported the husband's income in the range of \$150,000 to \$499,999; 6 cases reported the husband's income to be more than \$500,000.

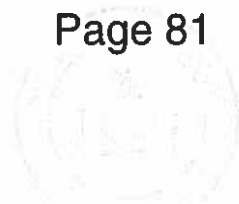


1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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**APPENDIX D**



**DEMOGRAPHICS**  
**for**  
**Selected Counties in New York State**



County <sup>1</sup>	Population <sup>2</sup>	Divorces <sup>3</sup>	MHI <sup>4</sup>	PPCI <sup>5</sup>	% Below Poverty <sup>6</sup>
Albany <sup>7</sup>	298,284	732	\$59,245	\$42,228	12.3
Bronx <sup>8</sup>	1,397,287	2,415	\$35,108	\$24,631	27.3
Erie <sup>9</sup>	909,247	2,164	\$48,427	\$34,786	14
Jefferson <sup>10</sup>	118,719	515	\$44,263	\$33,463	14.6
Kings <sup>11</sup>	2,567,098	5,394	\$43,172	\$30,023	21.1
Nassau <sup>12</sup>	1,357,429	2,421	\$94,856	\$62,278	4.9
New York <sup>13</sup>	1,629,054	10,375	\$68,402	\$110,292	16.9
Onondaga <sup>14</sup>	454,753	1,186	\$50,586	\$35,751	11.7
Westchester <sup>15</sup>	955,962	2,307	\$79,195	\$70,519	8.4

<sup>1</sup> A map of New York State Counties from the 2009 New York State Statistical Yearbook is attached hereto.

<sup>2</sup> U.S. Census Bureau, State and County Quick Facts 2009, available at <http://quickfacts.census.gov/qfd/states/36/36001.html>.

<sup>3</sup> Table 48: Dissolutions of Marriage by County of Decree and Type of Decree, New York State 2009, Vital Statistics of New York State 2009, available at [http://www.health.state.ny.us/nysdoh/vital\\_statistics/2009/table48.htm](http://www.health.state.ny.us/nysdoh/vital_statistics/2009/table48.htm).

<sup>4</sup> Median Household Income, U.S. Census Bureau, State and County Quick Facts 2009, available at <http://quickfacts.census.gov/qfd/states/36/36001.html>.

<sup>5</sup> Personal Per Capita Income 2006, Personal Income Per Capita by County of Residence, NYS: 1998-2006, 2009 New York State Statistical Yearbook, available at [http://www.rockinst.org/nys\\_statistics/2009/C/](http://www.rockinst.org/nys_statistics/2009/C/).

<sup>6</sup> U.S. Census Bureau, State and County Quick Facts <http://quickfacts.census.gov/qfd/states/36/36047.html>. As of 2009, in New York State, 14.2% of the population fell below the poverty line.

<sup>7</sup> A metropolitan area.

<sup>8</sup> A borough of New York City.

<sup>9</sup> A metropolitan area in western New York with 4 correction facilities operated by the Department of Corrections.

<sup>10</sup> A rural area in western New York with 2 correction facilities operated by the Department of Corrections and a US Army base, Fort Drum.

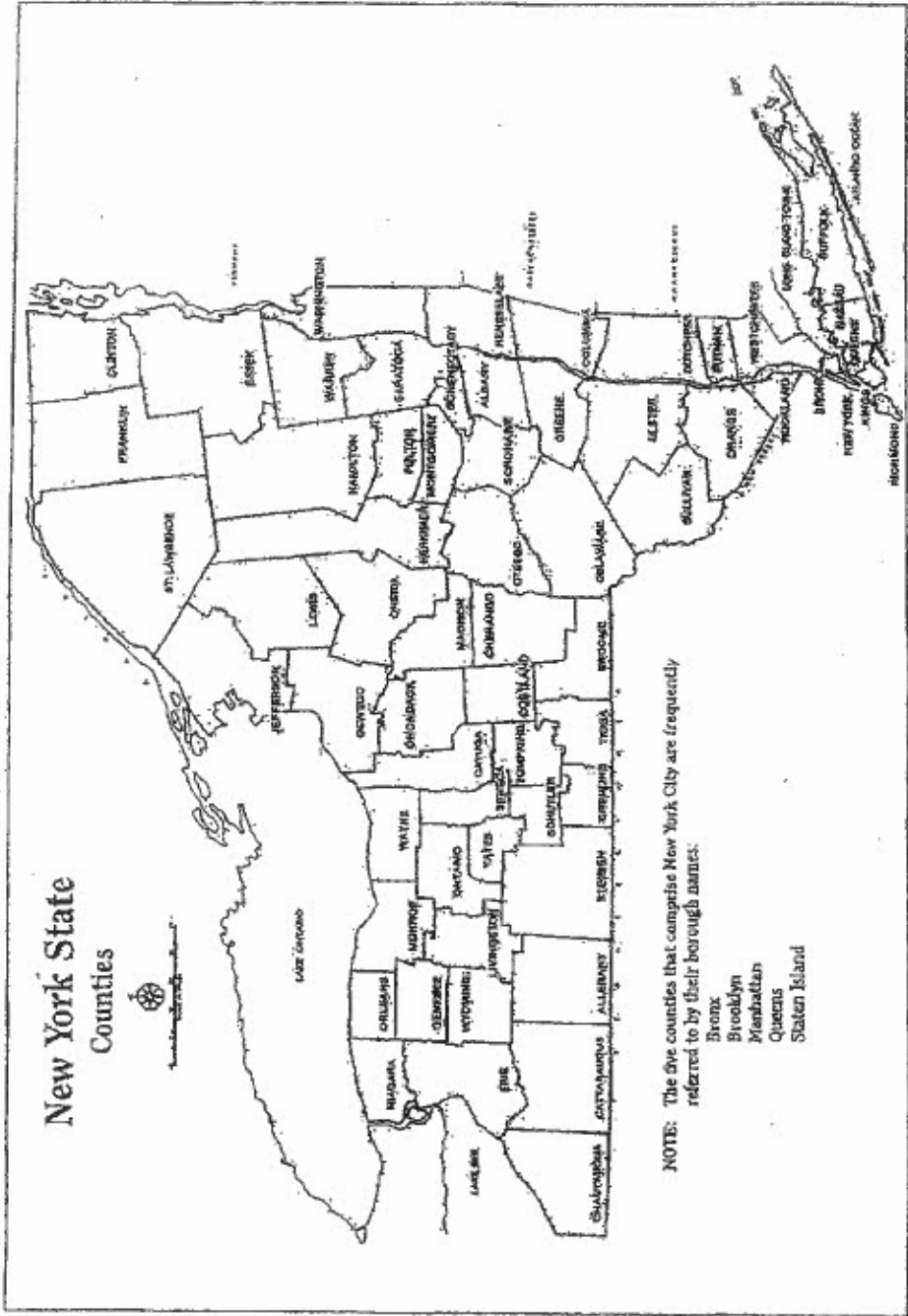
<sup>11</sup> A borough of New York City.

<sup>12</sup> A suburb of New York City.

<sup>13</sup> A borough of New York City also known as Manhattan.

<sup>14</sup> Includes the metropolitan area of Syracuse.

<sup>15</sup> A suburb of New York City with 3 correctional facilities operated by the NYS Department of Corrections.



LOCAL INDEX NUMBER

STATE FILE NUMBER

New York State Department of Health CERTIFICATE OF DISSOLUTION OF MARRIAGE

TYPE OF PARTIES PERMANENT BLACK BOX

Main form containing fields for Husband (1-6), Wife (7-6), Date of Marriage (11), Date of Decree (15), and County Clerk Signature (28).

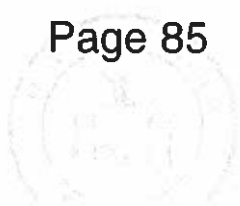
CONFIDENTIAL INFORMATION

Confidential Information section with fields for race (19, 20), number of marriages (24, 25), previous marriages (21, 22), education (23), and grounds for divorce (26).

NOTE: Social Security Numbers of the husband and wife are mandatory. They are required by New York State Public Health Law Section 4139 and 42 U.S.C. 668(a). They may be used for child support enforcement purposes.

DOH-2156 (5/2000)

**APPENDIX F**



ERIE COUNTY

INFORMAL MAINTENANCE FORMULA

LENGTH OF MARRIAGE	% INCOME DIFFERENTIAL	DURATION OF MAINTENANCE
1 - 5 Years	15 %	$\frac{1}{4}$ - $\frac{1}{2}$ Term of Marriage
6 - 11 Years	20 - 25 %	$\frac{1}{4}$ - $\frac{1}{3}$ Term of Marriage
12 - 25 Years	30 %	$\frac{1}{4}$ - $\frac{1}{2}$ Term of Marriage
25 + Years	35 - 40 %	Until S. S. or Pension

Using the Formula:

1. Determine the number of years in the Marriage (Column I)
2. Multiply the Income Differential of the Marriage Partners by the percentage in Column II to give the dollar amount of Maintenance
3. Use the proportions in Column III to Determine the Number of Years Maintenance Required to be Paid

EXAMPLE:

H & W married for 7 years; W earns \$60,000 per year and H earns \$20,000 per year; H is seeking maintenance

1. The term of the marriage is 7 years and the income differential is \$40,000; multiply that differential (\$40,000) by the percentage from column II (20 - 25 %) to arrive at maintenance, i.e. \$8,000 - \$10,000
2. The duration of maintenance is the product of the term of the marriage in Column I (1 - 5 years) multiplied by the percentage set forth in Column III ( $\frac{1}{4}$  -  $\frac{1}{2}$  term) to arrive at the number of years, i.e.  $1\frac{1}{4}$  -  $2\frac{1}{4}$  years
3. Therefore, for this example, the total amount of maintenance is \$8,000 - 10,000 per year for a term of  $1\frac{1}{4}$  -  $2\frac{1}{4}$  years

**Testimony of Matthew F. Cooper, J.S.C., Before Senate  
Standing Committee on Judiciary, September 24, 2013**

Good morning Senators. It is an honor to be heard on the important issue of statutory maintenance. My name is Matthew Cooper and I am a New York State Supreme Court Justice. For the last four years I have sat in a matrimonial part in New York County hearing only divorces. As some of you may know from having read a front-page article that appeared in the New York Law Journal on September 10, 2013, New York County, with only 8% of the state's population, handles almost 30% of the divorces filed in New York State. We have by far the largest volume of cases statewide – cases which often involve parties who live in boroughs outside of Manhattan and counties outside of New York City.

Thus, my colleagues and I have been able to see with great



clarity the impact that the temporary maintenance statute has had on matrimonial practice and our ability to be effective, fair judges. Moreover, I believe that the experience I have had dealing on a daily basis with the guidelines gives me an excellent vantage point from which to evaluate the Proposed Bill that you are now considering, which, among other things, will, by and large, apply the temporary maintenance formula to final maintenance awards.

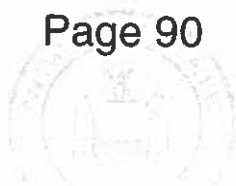
I fully realize that the Legislature had the best of intentions when it enacted the temporary maintenance statute. The concern, quite admirably, was making sure that a divorcing spouse, generally assumed to be the wife and the parent who has or had primary responsibility for the care of the children, would receive adequate support from her husband, the spouse more often thought of as having the higher income and being the

non-custodial parent. Unfortunately, the temporary maintenance statute has failed in its mission, and instead of leading to consistent, predictable, equitable and fair outcomes, it has only resulted in interminable litigation, especially in higher income cases, where courts have had to struggle mightily with the statute so as to avoid making temporary maintenance awards that inequitable, unfair, and in fact, illogical.

What might be surprising to hear is that in a good percentage of the temporary maintenance cases that have come before me, the party demanding support is the husband. In many of these cases, the husband, who without good reason has worked on a limited basis and has contributed little to the household during the course of the marriage either financially or as a homemaker, is the one invoking the statute as giving him the “right” to collect thousands of dollars in monthly

maintenance from his wife.

In one particularly memorable case, the husband, a retired dentist, had left his wife of more than 30 years, a practicing doctor, to live with his girlfriend, who happened to be the much younger daughter of his wife's best friend. Relying on the formula, the husband's attorney insisted that the plain language of the law required the wife, the monied spouse, pay the husband, the non-monied spouse, \$7,000 a month, regardless of the fact that the money would be used to finance the husband's new life with his live-in girlfriend. Because "chutzpah" is not one of the 19 factors to be considered when deviating from the guidelines, I had no legal reason to deny the husband's application. It was only by focusing on the shamelessness of his behavior that I was able to convince the husband to back off from his claim.



Similarly, there was the case where the husband with an MBA decided that rather than work in finance he'd prefer to volunteer in a yoga studio. He too, when you apply the guidelines, would be entitled to a huge amount of maintenance from his hard working wife under the statutory guidelines, even if common sense tells us he deserves little or nothing.

Even where the wife is the non-monied spouse, the financial circumstances of the parties are often such that it is impossible to apply a formula to the situation. As the Appellate Division's decision in *Khaira v Khaira* makes clear, the obligation to pay for schooling, mortgages, medical expenses and the like makes it extremely difficult to be constrained by a calculation when an individualized, customized solution is needed.

The fact is that maintenance, both temporary and

permanent, is far more complicated, nuanced, and dependent on personal factors than child support. Child support is always necessary and appropriate, no matter what the financial or personal circumstances; maintenance is not. Yet guidelines statutes make it a presumption that maintenance must be paid simply because one spouse has more income than the other. The end result is that judges like me are required to spend hours upon hours – especially in high income and complex financial cases – writing decisions to justify deviating from the formula so as to reach an amount that is fair and sensible. These are valuable hours that could be far better spent dealing with the myriad of pressing problems – whether those involving the agonizing issues involved with raising children in the context of divorce or those involving financial matters like equitable distribution – that matrimonial judges struggle to make time to

hear.

Senators, I urge you to give serious consideration to the May 15, 2013, New York State Law Revision Commission Final Report on Maintenance Awards. As a judge who witnesses every day the difficulties inherent with the temporary maintenance statute, and who can readily foresee the problems that will be created by extending the guidelines to permanent maintenance, I am in complete agreement with almost all the Commission's sensible and realistic recommendations, including capping the formula at \$136,000, the current cap for child support. That would be a great starting point for turning well-intentioned but highly flawed legislation into a truly workable tool that will benefit the judicial process and the litigants the courts exist to serve.

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Testimony on behalf of Women's Bar Association of the State of New York

(WBASNY)

to

New York State Senate Judiciary Committee

Hearing on Statutory Spousal Maintenance Calculations in New York

State

Presented by

Donna Frosco, WBASNY President

September 24, 2013

**PRESIDENT**

Donna E. Frosco

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On behalf of the almost 4,000 members of the Women's Bar Association of the State of New York ("WBASNY"), thank you for the opportunity to come before you today to present testimony regarding spousal maintenance calculations. WBASNY's members are private practitioners, public interest attorneys, State and Federal judges and law professors. Since our formation in 1980, the mission of our association has been, and continues to be, the advancement of women in society and women in the legal profession and the equal administration of justice with a focus on issues relevant to women, children and families. A significant number of our members are leading attorneys in the field of matrimonial and family law.

On March 16, 2011, WBASNY issued its official Report to the Law Revision Commission (the "Commission") regarding temporary and post-judgment maintenance guidelines. A copy of the WBASNY Report is attached hereto.

On May 15, 2013, the Commission issued its Final Report on Maintenance Awards in Divorce Proceedings.

WBASNY appreciates the significant time and effort that was required in this task and commends the Commission on its well-reasoned and thoughtful recommendations concerning temporary and post-divorce





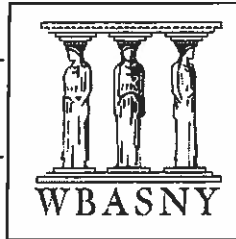
maintenance. WBASNY further notes that the Commission met with stakeholders to learn and listen to the bench and bar about these guidelines.

After reviewing the Commission Report, WBASNY has concluded that it will adhere to its position as expressed in our March 16, 2011 Report, which is as follows:

- 1. The existing temporary maintenance guidelines provided by Domestic Relations Law §236 (B)(5-a) should be repealed and replaced by the prior language of DRL §236 (B)(6), which provided that temporary maintenance awards, if any, should be based upon the parties' marital standard of living.**

In this respect, WBASNY disagrees with the recommendations of the Commission's Report. WBASNY's rationale is:

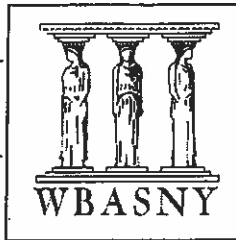
First, case law has consistently held that temporary maintenance should maintain the financial status quo while the parties work with the court's assistance to permanently resolve their marital dispute. The temporary award, if any, should consider the reasonable needs of both parties and the children. Those needs are determined by each party's respective sworn statement of net worth, which, pursuant to Court Rules, must be completed and exchanged before the Preliminary Conference. This approach is based on each family's economic reality. Because each



family's resources and expenses are unique, each family's temporary maintenance award will be uniquely tied to those resources and expenses.

In contrast, the current statute and the Commission's recommendation compel the courts to rigidly apply a mathematical formula to the parties' respective incomes. Rather than considering the financial resources and expenses unique to each family, this approach is nothing more than income shifting without regard to what each party may actually need, or what other financial resources the family may actually have. This approach also fails to consider that the parties' true incomes may be difficult to determine at this very early point in a matrimonial action.

Second, application of the mathematical formula in all cases can lead to unfair results. In lower-income cases, the payor spouse may be left with insufficient funds to meet his or her own needs. In higher-income cases, particularly those in areas of this State where the cost of living is significantly higher, application of the formula can lead to the payee spouse being unable to pay his or her rent. It should be noted that the Appellate Courts' long-standing rule is that modification of temporary maintenance awards is the exception, and that the remedy for a perceived inequity is a speedy trial...something that most matrimonial practitioners will tell you is largely a fiction due to the court's crowded docket.



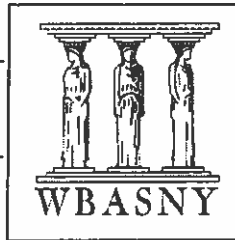
2. **WBASNY concurs with the LRC Report that if a formula is to be applied, the income cap should mirror that of the Child Support Standards Act, which is currently \$136,000 of combined parental income, with increases every two years since 2012 based on the Consumer Price Index.**

The cap in the 2010 statute is \$500,000 of the payor's income only. There is no justification for this or for any income cap that exceeds \$136,000. As previously stated, the actual incomes of the parties are often difficult to determine early in the case. Further, use of such a high cap fails to consider the reasonable needs of the payor and the payee. It will lead to temporary awards that polarize the parties' positions and make the ultimate settlement of the case that much more difficult.

While the 2010 legislation provides for a number of factors that courts must consider if it determines that the application of the formula is unjust or inappropriate, it is WBASNY's position that this will lead to more costly litigation and delay. Indeed, the 2010 legislation requires that a written decision be issued in every case where the factors are considered.

Moreover, as the Commission Report and a New York State Bar Association Report noted, in 2008, 94.8% of individual income tax return filers (including those filing joint returns) reported income of less than \$200,000. Therefore, there is no logical reason to apply a cap of \$500,000, particularly when the purported reason for the cap is to protect

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low and middle income families.

**3. WBASNY believes that with regard to post-divorce maintenance, application of a formula should be advisory.**

In this regard, WBASNY does not agree with the LRC's recommendation. While the mandatory application of the Child Support Standards Act formula to combined parental income has generally resulted in reasonable and equitable child support awards, the same rationale does not apply to spousal maintenance. This is because children cannot go to work. They depend on their parents to provide for their needs. Most parents, on the other hand, are capable of contributing to their own support.

**4. WBASNY believes that in determining post-divorce maintenance awards, the courts should continue to retain the discretion to consider the reasonable needs and the earning capacities of both spouses.**

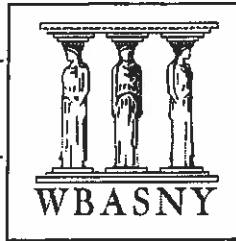
The rigid application of the formula, even one where the income cap is \$136,000 of combined income, to every case is likely to lead to inequitable and unwanted results. We offer as an example the case of Havell v. Islam, a 2002 decision of the Appellate Division, First Department. In that case, in response to his wife's request for a divorce,

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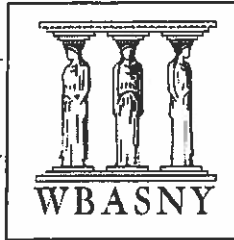
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Mr. Islam beat Ms. Havell nearly to death with a barbell in the presence of three of their six minor children. After trial, due to his egregious act, Mr. Islam was awarded only 4.5% of the parties' \$13 million marital estate, and the trial judge's decision and order deftly implies that the court was not happy about awarding even that.

While the major issue in Havell v. Islam was the propriety of an equitable distribution award in the face of unimaginable domestic violence, Mr. Islam was unemployed and Ms. Havell's income exceeded \$830,000. Under the current statutory framework for temporary maintenance, Ms. Havell, the monied spouse, would have to pay Mr. Islam \$150,000 per year in temporary maintenance.

Under the Commission's recommendation for post-divorce maintenance, Ms. Havell would be required to pay maintenance to the man who tried to murder her on her income up to \$136,000 – or at least \$3,400 per month. Another example is the case in which the non-custodial parent is capable of working but refuses to do so. Under the current and suggested maintenance guidelines, the custodial parent not only bears most of the responsibility for child-rearing, but must also work to pay maintenance to the former spouse because the law requires it, thus leaving fewer financial resources available for the children's needs. The non-custodial spouse has little incentive to return to the workforce.



- 5. WBASNY believes that if there is to be a formula for calculating maintenance, that formula should be applied to the non-custodial payor parent's income *after* deducting that parent's child support obligation.**

Any other result would require the same income stream to be used twice, which is unfair and inequitable to the payor spouse.

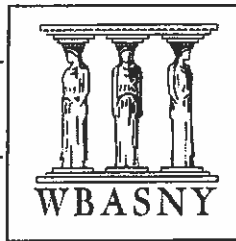
- 6. WBASNY agrees with the Commission Report that in determining the duration of maintenance, the courts should consider not only the length of the marriage, but the parties' reasonable retirement ages and financial resources, including retirement benefits.**

In many marriages, one of the largest assets is often the parties' retirement benefits. If these are equally divided in equitable distribution, the parties will have nearly identical incomes post-retirement, and thus little or no need for an award of spousal maintenance.

- 7. WBASNY agrees with the LRC Report that the consideration and distribution as a marital asset of a party's enhanced earning capacity as a result of licenses and degrees earned during the marriage should be abolished.**

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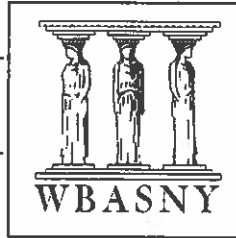
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The treatment of enhanced earning capacity as a marital asset was established in the 1985 case of O'Brien v. O'Brien, which is a perfect example of good facts making bad law. The O'Brien case has led to costly litigation and inequitable results, since a party's enhanced earning capacity is intangible and its valuation is often speculative. New York is the only state that considers enhanced earning capacity to be a marital asset. Instead, WBASNY agrees with the Commission that the contributions of a spouse to the other spouse's career should be considered in an award of post-divorce maintenance.

Thank you for your time today and for providing us with this opportunity to assist the Committee in this important work. I would be happy to answer any questions you may have.



**Women's Bar**



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March 16, 2011

New York State Law Revision Commission  
80 New Scotland Avenue  
Albany, NY 12208

On behalf of the Women's Bar Association of the State of New York ("WBASNY"), I am enclosing our Report to the Law Review Commission ("LRC") with respect to "temporary maintenance guidelines" found in subdivision §236B 5-a of the Domestic Relations Law ("DRL") applicable to matrimonial actions commenced on or after October 12, 2010 and post-divorce maintenance awards, currently being reviewed by the LRC.

As you may know, WBASNY has over 3600 members throughout the State, consisting of private practitioners, public interest attorneys, State and Federal judges, and law professors. Since our formation in 1980, WBASNY has remained committed to our mission purpose: the advancement of women in society and women in the legal profession. A significant number of our members are leading attorneys in the field of family and matrimonial law.

We look forward to receiving your response to our Report, and the opportunity to discuss it with you further.

Very truly yours,

Deborah Weisman-Estis  
President, WBASNY



**TO: Deborah W. Estis, President, WBASNY  
Annette G. Hasapidis, Co-Chair Legislative Committee  
Hon. Sondra Miller, Co-Chair, Family & Matrimonial Law Committee  
Michelle Haskin, Co-Chair, Family & Matrimonial Law Committee  
Susan Moss, Co-Chair, Family & Matrimonial Law Committee**

**FROM: Kathleen Donelli**

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At its Executive Committee Meeting on March 9, 2011, the Women's Bar Association of the State of New York ("WBASNY") voted unanimously in favor of WBASNY sending the following Memorandum to the Law Revision Commission ("LRC") in connection with "temporary maintenance guidelines" found in subdivision §236B 5-a of the Domestic Relations Law ("DRL") applicable to matrimonial actions commenced on or after October 12, 2010 and post-divorce maintenance awards, currently being reviewed by the LRC.

## WBASNY's Report to the Law Revision Commission

By this memorandum, the Women's Bar Association of the State of New York ("WBASNY") seeks to offer its input to the Law Revision Commission ("LRC") with respect to "temporary maintenance guidelines" found in subdivision §236B 5-a of the Domestic Relations Law ("DRL") applicable to matrimonial actions commenced on or after October 12, 2010 and post-divorce maintenance awards, currently being reviewed by the LRC.

- 1. The "temporary maintenance guidelines" in DRL §236B 6-a should be repealed and replaced with the prior language of DRL §236B(6), providing, among other things, that temporary maintenance should be awarded to pay for the reasonable needs of the payee and payor spouses based on the spouses' marital standard of living.**

### **Rationale**

- (a) Case law has consistently held that the purpose of *pendente lite* support is to maintain the spouses' financial status quo during their matrimonial action. In sharp contrast, the current temporary maintenance guidelines compels courts to determine the presumptive temporary maintenance by applying a mathematical formula to the spouses' incomes, as defined in the Child Support Standards Act ("CSSA"). It is unclear as to how, or by whom, the family's expenses are to be paid or if temporary child support is to be awarded in addition to temporary maintenance.
  - (b) While spouses can demonstrate their reasonable needs at the beginning of the matrimonial action by submitting Statements of Net Worth, it is often difficult for courts to correctly determine the spouses' incomes at the beginning of the matrimonial action. For example, spouses may pay their personal expenses through their business or have unreported income or non-recurring income.
  - (c) The reasonable needs and financial resources of the spouses must be considered, in addition to the parties' incomes. For example, if the parties' incomes are insufficient to pay for their reasonable expenses during the pendency of the matrimonial action, their financial resources, such as marital and/or separate property, may be needed to pay necessary expenses.
- 2. A post-divorce maintenance formula should be applied to combined spousal income not to exceed the CAP set forth in the CSSA, which is currently \$130,000.**

### **Rationale**

The goals of enacting post-divorce maintenance guidelines are to make maintenance awards more predictable, consistent and equitable so that spouses with limited incomes and assets can resolve the issue of maintenance in an inexpensive and expeditious manner. However, if the combined spousal income exceeds the CSSA CAP, maintenance should not be based on a formula but instead should be based on the factors set forth in DRL §236B(6).

### **3. Application of a formula to determine post-divorce maintenance should be advisory.**

As indicated on the attached "Preliminary Chart illustrating types of Post-Marital Income formulas," only one state, Colorado, has enacted "mandatory" maintenance guidelines, while in 13 states (and Canada) application of a formula is "advisory."

### **Rationale**

While the mandatory application of the CSSA formula to combined parental income up to \$130,000 has generally resulted in reasonable and equitable child support awards, the same rationale does not apply to the mandatory application of a post-marital maintenance formula because children, unlike spouses, do not have any earning capacity and the financial resources parents devote to their children are more often determined by the extent of the parents' financial resources, as opposed to the children's reasonable needs.

### **4. In determining post-divorce maintenance, courts should continue to consider the reasonable needs and the earning capacities of both spouses.**

### **Rationale**

- a) The reasonable needs of families differ greatly. The application of guidelines should not create a windfall to certain payees as it may greatly exceed their actual needs on a temporary basis nor should it create a hardship to payor spouses who may be unable to meet their own needs or the needs of the children. The payor spouse may be a custodial parent or may be a parent who has equal custody but is determined to be a non-custodial parent on the basis of their incomes. That payor parent may also be residing in the former marital residence with the children and unable to pay for the household expenses, including the mortgage, taxes and heat/electric.
- b) The mandatory application of a post maintenance formula to the parties' incomes as defined by the CSSA will discourage unemployed or underemployed spouses from increasing their earned income, even if such spouse's earned income or increased earned income is needed to meet the reasonable needs of the family. A custodial payor spouse with two children and

an annual income of \$50,000 would be required to pay the unemployed noncustodial spouse \$15,000 annual maintenance, even if the noncustodial spouse has been found guilty of domestic violence.

- 5. A maintenance guideline formula should be applied to the noncustodial payor's gross income after deducting the payor's basic child support obligation. Maintenance should remain tax deductible to the payor and taxable to the payee.**

It is unfair to compute the noncustodial payor's maintenance obligation on income that the payor will pay the payee as basic child support because the same income stream should not be doubly tapped.

- 6. In determining the duration of maintenance, in addition to the length of the marriage, courts should consider the parties' reasonable retirement ages and financial resources, including their retirement benefits.**

#### **Rationale**

In many marriages, the largest or sole asset may be the retirement benefits. If those benefits are equally divided, then once the income stream no longer exists as the result of retirement, the parties will have similar or identical income streams.

- 7. The treatment of a spouse's enhanced earning capacity ("EEC") as a result of licenses and degrees earned during the marriage as a "marital asset" subject to equitable distribution established by the Court of Appeals in *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985) should be legislatively abolished. New York is the only state to utilize this concept which has proven costly in time, legal and accountant fees and is often inequitable.**

(See rationale in NYSBA's 11/22/10 Report to the LRC)

Memorandum approved by: Vote of WBASNY's Executive Committee taken March 9, 2011.

President of WBASNY: Deborah W. Estis, Esq.

Preliminary Chart illustrating types of Post-Marital Income formulas  
 By: Andrew Ford (aford3@pride.hofstra.edu)

<u>Location</u>	<u>Mandatory v. Advisory</u>	<u>Income v. Need v. S.O.L. based</u>	<u>Tax Implications</u>	<u>Relation to Child Sup.</u>	<u>Temporary v. Permanent</u>
<b>Nevada</b> <sup>1</sup> (Tonapah formula)	Advisory (primarily used by counsel in settlement negotiations)	Based on <u>net income</u> with weighed factors		Child Support calculated first.	Permanent
<b>California</b> (various counties) <sup>2</sup>	This is the formula "generally" used	Based on <u>net income</u> . (40% of payor's income minus 50% of payee's income)		Child Support calculated first. Subtract from net income before calculating	Temporary
<b>Arizona</b> (Maricopa) <sup>3</sup>	Advisory—Adopted by local court	<u>Gross income</u> . Difference in income is multiplied by marital duration factor	Specifies that the court should consider unusual tax situations when making determination	Child Support calculated after spousal support	Temporary and Permanent
<b>Kansas</b> (Johnson County) <sup>4</sup>	Advisory—developed by bar association	Use <u>gross income</u>		Differing formulas if have children.	Permanent
<b>Pennsylvania</b> <sup>5</sup>	Rebuttable suggestion (set by statute)	Use of net income (40% of difference)	Allowed to deviate for various reasons including "other and relevant factors," which can include tax implications	Calculate child support first.	Temporary (often influence permanent orders)

<sup>1</sup> Todd L. Torvinen, *The So-Called 'Tonapah Formula' for Alimony Explained*, 17(2) NEV. FAM. L. REPT. 9(2002) available at <http://nvbar.org/Sections/FamilyLaw/NFLR/sept2002.pdf>.  
<sup>2</sup> Superior Court of California, County of Santa Clara, Family Court Local Rules: Rule 3-spousal, child and partner support available at <http://www.sccsuperiorcourt.org/family/rule3.3.htm#B>; see also Twila B. Larkin, *Guidelines for Alimony: The New Mexico Experiment*, 38 Fam. L.Q. 29, 39 (2005)  
<sup>3</sup> Superior Court of Arizona, Maricopa Family Court Department, Spousal Maintenance Guidelines, 8 Ariz. Legal Forms 2(2009).  
<sup>4</sup> Johnson County Bar Association Family Law Bench Bar Committee, *Family Law Guidelines: for Family Law Practice in Johnson County, Kansas* (2001) available at [http://www.whrlawfirm.com/JoCO\\_FamilyLawGuidelines.pdf](http://www.whrlawfirm.com/JoCO_FamilyLawGuidelines.pdf).  
<sup>5</sup> The New Mexico Experiment, *supra* note 2.

Preliminary Chart illustrating types of Post-Marital Income formulas  
 By: Andrew Ford (aford3@pride.hofstra.edu)

<b>Virginia</b> (Fairfax <sup>6</sup> )	Advisory	Calculate with <u>gross income</u> (two formulas one for with child, one for no children)		Calculate child support first.	Temporary, but often used for permanent orders as well
<b>Colorado</b> <sup>7</sup>	Mandatory	Calculate with net income (only if combined 75,000 or more gross)		Calculate child support first.	Temporary
<b>Kaufman Alimony Guidelines<sup>8</sup></b> (Michigan, Kentucky, Florida, Washington and Maryland)	Advisory	Based upon <u>net income</u> . Each factor weighed by computer program	The computer program takes into account local tax laws	The computer program takes into account child support laws	Permanent
<b>Canada</b> <sup>9</sup>	Advisory	Use <u>Gross income</u> One formula if there are children and another if no children	'Gross up' child support and deduct from payor's income to reflect tax consequences	Calculate child support first	Temporary and permanent
<b>New Mexico</b> <sup>10</sup>	Advisory (primarily used by counsel in settlement negotiations)	<u>Gross income</u> . Formula depends on whether there is a child support order		Calculate spousal support first. Then adjust income for child support.	Permanent

<sup>6</sup> The Divorce Spousal Support Calculator: An alimony Formula Resource (2010) available at <http://www.kelseytrask.com/Docs/SpousalSupport.pdf>.

<sup>7</sup> COLO. REV. STAT. §14-10-114 (2010)

<sup>8</sup> Kaufman Center for Family Law, Theory Supporting the Kaufman Alimony Guidelines available at

<sup>9</sup> Canada Department of Justice, Developing Social Support Guidelines in Canada: Beginning the Discussion available at <http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/ss-pae/4.html>.

<sup>10</sup> Statewide Alimony Guideline Committee, Alimony Guidelines and Commentaries (2010) available at [http://www.collinsattorneys.com/docs/revised\\_alimony\\_guidelines.pdf](http://www.collinsattorneys.com/docs/revised_alimony_guidelines.pdf).

**Testimony by the Legal Aid Society before the New York State Senate Judiciary Committee on  
the Issue of Spousal Maintenance Calculations and in Support of A-6728-B**

**September 24, 2013**

**Interest and Expertise of the Legal Aid Society**

The Legal Aid Society is the oldest and largest provider of legal assistance for low-income families and individuals in the United States. The Society's Civil Practice operates 16 neighborhood offices and City-wide units servicing residents of all five boroughs of New York City, providing comprehensive legal assistance in housing, public assistance, immigration, family law and other civil areas of primary concern to low-income New Yorkers. The Society's Family Law and Domestic Violence Practice provides legal representation regarding, custody, orders of protection, child support, divorce, economic justice and immigration remedies for immigrant survivors of domestic violence. Our Family Law and Domestic Violence Project staff often works in close collaboration with other areas of the Society's Civil Practice to comprehensively address the myriad legal issues faced by immigrant survivors of domestic violence, in particular access to housing, public assistance and health care. Our Family and Domestic Violence staff also works in close collaboration with many community-based organizations to provide comprehensive services to our clients.<sup>a</sup> The Legal Aid Society's Family Law and Domestic Violence Program Staff plays a leadership role in the Lawyer's Committee Against Domestic Violence (LCADV), a coalition of over 100 lawyers from the greater New York City area whose work supports victims of domestic violence and their children. Members

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<sup>a</sup> These organizations include the New York Asian Women's Center, Sakhi for South Asian Women, the Violence Intervention Program, the Safe Homes Project, Project Hospitality, WHEDCO, Barrier Free Living, Garden of Hope, and the Arab American Family Support Center.



of our staff helped found the New York State Maintenance Standards Coalition<sup>b</sup>, a group of approximately 35 organizations throughout the State which are dedicated to promoting economic justice for women and children who currently fall into poverty after divorce.

The Legal Aid Society's Family Law and Domestic Violence practice handles approximately 1000 cases per year. However, this number reflects only a small percent of the indigent and low-income New Yorkers who seek our Family and DV services annually. A study we conducted shows that limited resources force us to turn away 8 of every 9 clients who seek help from the Society's Civil Practice. One of the many reasons we strongly support the enactment of post-divorce maintenance standards for both amount and duration, as will be explained in greater detail below, is that it will provide a mechanism whereby even unrepresented non-monied spouses will be able to secure support post-divorce in much the same way they now obtain child support. This testimony is offered on behalf of our clients, New Yorkers at or below 200% of the poverty level (and mostly below 150% of the poverty level), as well as for the thousands of low- and moderate-income New Yorkers who are unable to access our limited resources.

We are grateful for the opportunity to testify before the Senate Judiciary Committee on the issue of maintenance standards and the dire need for both durational and amount post-divorce maintenance standards to bring economic justice to thousands of divorcing women and their children by providing consistency, predictability and fairness.

### **The Law Revision Commission Report**

The Law Revision Commission's Final Report on Maintenance Awards in Divorce Proceedings<sup>c</sup> offers a welcome contribution to the public discussion of New York State's maintenance

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<sup>b</sup> For more information about New York State Maintenance Standards Coalition, including a list of member organizations, see [DivorceReformNY.org](http://DivorceReformNY.org)



laws. It acknowledges the wisdom of a more structured framework for judicial decision-making, endorses the concept of standards for both temporary and post-divorce maintenance, and advances the possibility for much-needed reform.

While the Commission deliberated, a bill was introduced into the New York State Assembly (A. 6728) amending the current temporary maintenance standards law and adopting standards for post-divorce maintenance; a “same as” bill was introduced into the New York State Senate (S. 5168). After the report came out, the bill was amended in the Assembly (A-6728-B)(“bill”). This bill offers a thoughtful and balanced approach to maintenance that includes some but not all of the recommendations of the Commission.

### **The Principle of Standards for Temporary and Post-Divorce Maintenance**

The Final Report, like the bill introduced into the Legislature, adopts the concept of standards not just for temporary maintenance, which has been a part of New York State law since 2010, but also for post-divorce maintenance. The establishment of interim maintenance standards dramatically improved the landscape for divorcing couples with litigated cases in New York State. Lawyers representing low- and moderate-income clients report that clients, who in spite of great need would have been unable to undertake the litigation necessary for interim maintenance awards under the vague provisions of the previous law, have been receiving temporary maintenance. What’s more, they report that the issue of interim maintenance is often resolved on the first court appearance without the need for lengthy and costly motion practice. This is a change for the better for all New Yorkers engaged in contested matrimonial cases. Interim standards have introduced consistency and predictability into the process of awarding what is a critical remedy for many divorcing spouses. Interim standards have

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<sup>c</sup> The New York State Law Revision Commission, Final Report on the Maintenance Awards in Divorce Proceedings (May 15, 2013) (hereinafter Final Report).



allowed parties and their lawyers to anticipate eventual court-ordered awards and thus settle cases without litigation. They also have provided help to litigants entitled to interim maintenance but unable to pay the steep costs of litigating to secure often badly-needed financial awards. Attached as **Exhibit A** to this testimony is a compilation of case histories assembled by members of The Lawyer's Committee Against Domestic Violence, which illustrate the benefits of the current interim standards. The Commission recognized the value of extending these benefits to determinations of post-divorce maintenance.

The proposed bill along with the temporary maintenance statute enacted in 2010 together provide the statutory structure necessary to make these ideas workable laws.

#### **Standards for Duration for Post-Divorce Litigation**

An essential feature of the proposed post-divorce maintenance legislation is a method for calculating the presumptive amount of an award, necessarily including standards for both amount and duration, available before spouses embark on litigation. Unfortunately, the Commission report recommends using standards to calculate only the dollar amount, not the duration. This approach would do nothing to solve the very problems that the Commission recognizes in its report and that standards are designed to address. In fact, adopting the Commission's recommendation would effectively gut the maintenance standards legislation of its greatest potential strength: predictability, consistency and fairness.

Without standards for duration, litigants would have information about only one portion of the maintenance award: the dollar amount. Duration would remain a wild card, and the range of possibilities for the total award would be tremendous. The possible differences between an award for one year or less and twenty or more would dwarf the very limited certainty of a formula-calculated dollar amount.

Predictability and consistency, which support settlements and help parties avoid litigation, would be the principle victims of adopting the Commission's recommendation. Under current law, the duration of maintenance awards follows no discernable patterns, as the Commission's report acknowledges,<sup>d</sup> and litigation, often very expensive, is necessary to establish an award. Without standards for duration of maintenance, litigation would remain necessary.

The portions of the Domestic Relations Law (DRL §§236B(1)(a) & 248) which provide for the termination of maintenance on the payee's remarriage should be repealed. Although continuing maintenance post-remarriage is a departure from New York law (as new legislation often is), the idea of marriage has changed and so should the legal outcomes when marriages end in divorce.

DRL § 248, which provides for termination of a wife's support if she remarries, is a vestige of repudiated ideas about marriage. Until the twentieth century, marriage legally was a union of unequals: a subservient wife without the right to own property and a husband with an obligation to support his dependent wife. In contrast, New York law now views marriage as an economic partnership of equals. Alimony, available only to a wife and only if she was not the fault party in the divorce, has evolved into maintenance that is available to either spouse without regard to fault. DRL § 248, which refers to payments for "the support of the wife," is a relic of an earlier age.

It is illogical and inconsistent to circumscribe a payee's life choices with a rule that eliminates maintenance on remarriage. Maintenance under the bill, like equitable distribution, is awarded as a way of resolving financial issues at the break up of a marital partnership. Like equitable distribution, maintenance should be available without strings that restrict the payee's ability to start new relationships and create new families. Individuals currently leave marriages with assets attributable in some way to a former spouse that may help support a new spouse. A cash award of marital assets can

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<sup>d</sup> *Id.* at 27.

be used to buy a house that becomes a new marital residence. An equitable distribution award of a portion of pension that is available on the retirement of a former spouse is paid whether or not the recipient has remarried in the years since the divorce. Enhanced earning capacity awards may be paid in installments, and those payments do not cease if the recipient marries. Social security benefits based on a marriage that has ended continue after the remarriage of the beneficiary.

Retirement is far too speculative and vague a concept to use as a termination point for maintenance. Using retirement – or worse, the normal or full retirement age as defined by federal law – as a factor in setting the duration of maintenance ignores the reality of retirement today. Retirement is an increasingly murky concept. When people begin to collect social security or pensions, they may continue to work at either a job they have had for many years or a new job, either part-time or full-time. Some people with sufficient assets may find little or no diminution of income as they age even when they leave the workforce. Reaching full social security retirement age (which is somewhere between 66 and 67 depending on date of birth) changes the income of only a limited number of people, and it may well increase the income of a payor.<sup>e</sup> Few of the variables that will determine when and how income shifts as people age are known or predictable at the time of a divorce. Current law realistically and wisely provides modifications of awards when incomes actually change. Attached as **Exhibit B** is a one page information sheet on this issue prepared by the New York State Maintenance Standards Coalition.

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<sup>e</sup> Reaching full retirement age is not a magic point. Many, if not most, people will find their income remains the same. Either they will have started receiving social security earlier because they needed the income or they will wait to collect benefits to take advantage of larger monthly checks. Only if a payor decides to accept social security at full retirement *and* leaves employment at the same time will the payor have a decrease in income at full retirement age. If the payor decides to accept social security at full retirement age and his or her employment status remains the same, the payor's income will actually increase.

### **Treatment of Increased Earning Capacity (“O’Brien” Assets)**

The Commission’s recommendation for legislating a reversal of *O’Brien v. O’Brien*<sup>f</sup> and eliminating increased earning capacity from consideration as a marital asset has merit only as part of comprehensive legislation on maintenance standards similar to the bill pending in the Legislature. While *O’Brien* has been much-maligned, the *O’Brien* court succeeded in finding an equitable solution to a problem created by a gap in existing remedies under the Domestic Relations Law. The most important asset of a marital partnership is often a future flow of income, and under *O’Brien* spouses who sacrifice their career opportunities to build their spouses’ earning capacity can tap into future income. The proposed legislation on post-divorce maintenance standards builds into its structure consideration of the decreased earning capacity of one spouse and increased earning capacity of the other.

Enacting comprehensive maintenance standards before or with legislation overruling *O’Brien* is essential for an additional reason. An award under New York State’s equitable distribution is an absolute obligation without duration; remarriage has no effect on the award. However, under current law the remarriage of a former spouse receiving maintenance cuts off rights to future payments. If maintenance awards are to be a substitute for equitable distribution of the marital assets identified in *O’Brien*, maintenance awards too must continue regardless of the marital status of the payee spouse.

### **The Income Cap**

The Commission recommends cutting drastically the cap on the income to which both temporary and post-divorce maintenance standards would apply. Current law sets the income cap at \$500,000 of a payor’s income. The Commission suggests reducing this cap to \$136,000 of a family’s

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<sup>f</sup> 66 NY 2d 576 (1985).



income, less than a third of where it is now. The Commission rests its case for this huge reduction on the use of the \$136,000 figure in the Child Support Standards Act. While the Commission asserts that child support and maintenance are “closely analogous,”<sup>§</sup> in fact, they are very different remedies with very different purposes.

A better approach than adopting a figure that just happens to be used elsewhere in family law would be to look at the purposes of the maintenance standards legislation. Chief among these is short-circuiting litigation to avoid the expenses that were necessary in temporary maintenance cases before 2010 and that remain necessary in post-divorce maintenance cases.

The cost of litigating a maintenance claim without standards can be very high. New York attorneys generally bill at least \$250 per hour and often far higher. In Manhattan, divorce attorneys often charge \$800 per hour and above. The attorneys fees required for a case that might well be settled with maintenance standards but that would require litigation if standards were not available will often exceed \$40,000 per couple. This financial blow hits a family in crisis, when members may have additional expenses involved in the break up of a household into two separate homes.

In fact, the Commission concedes, albeit quietly, that the \$136,000 income cap is too low. At the end of its discussion on income caps, the Final Report, while insisting on the wisdom of yoking the maintenance standards income cap to the child support standards income cap, suggests that both should be maintained “ideally at an increased level.”<sup>h</sup> The Report then drops a footnote to recent New York State legislation that defines middle class families eligible for certain kinds of tax relief as families

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<sup>§</sup> Final Report at 5.

<sup>h</sup> Final Report at 23.

with incomes as high as \$300,000.<sup>1</sup> And, the current bill prudently adopts \$300,000 of the payor's income as the cap.

### **Interim Awards for Specific Purposes**

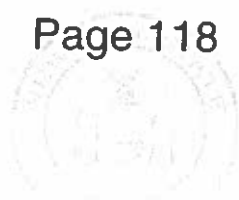
The Commission recommends that courts continue to have the authority to fashion temporary awards that include not just general maintenance payments but also payments for specific purposes and to third parties. The Commission also suggests that courts take these specific payments into account when making temporary maintenance awards. This recommendation affirms current judicial practice under DRL § 236(8)(b).

Judicial flexibility in creating interim relief is important. No single solution is suitable for all litigants. Judges, for example, often confront the problem of allocating carrying charges when one spouse remains in the marital home (often with the children) while the divorce is litigated. Requiring the residential spouse to pay some or all of the mortgage and related costs from a temporary maintenance award may be appropriate in some cases. However, these kinds of payments serve dual purposes. They assure shelter for one spouse, but they also preserve an important marital asset for the benefit of both spouses. Judges should be able to shape interim orders taking into account both purposes as well as the resources available to the parties to pay what may be quite high expenses.

Since 2010, when the temporary maintenance standards legislation went into effect, Judges have crafted solutions when both maintenance under the temporary standards and specific awards under DRL § 236b(8) have been made. Sometimes, but not always, Judges have deducted some or all of the specific awards from the guideline amount and sometimes they have not. Allowing Judges to continue to find solutions and develop law is the best approach.

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<sup>1</sup> *Id.* at 23, n.42.



### **Limits on Judicial Discretion and Flexibility in Temporary Maintenance**

The Commission makes two recommendations that would require Judges to make determinations in situations in which they are now free to fashion appropriate remedies when problems present themselves. The first would require Judges to allocate responsibility for family expenses in all cases. Currently Judges are free to specify which spouse should pay which bills when and if it is necessary and only for expenses for which there might be some dispute. Requiring Judges to make this kind of determination in all cases and for all expenses would create a tremendous burden on the judiciary. The second of these recommendations would require Judges to determine an appropriate duration for temporary maintenance for all short marriages. Again, under the existing law Judges can and do limit the duration of maintenance when they deem it is right. Requiring them to make this determination for all short marriages would make additional, often unnecessary, work for Judges. Where, as in these situations, existing laws are working they should not be disturbed.

### **Fixes to the Temporary Maintenance Statute**

The Commission recommends eliminating references to certain income, assets, and expenses that are determined during the course of litigation and thus impossible to take into account at the start of a case, when temporary awards are made. The temporary maintenance statute has worked very well. These minor technical changes will make the legislation's purposes more explicit without altering the substance of its provisions. The bill pending in the Assembly incorporates many of the Commission's suggestions, refining, streamlining and clarifying the temporary maintenance standards law.

### **Conforming Family Court Spousal Support Provisions to the Temporary Maintenance Law.**

The Commission recommends incorporating into the provisions of the Family Court Act on spousal support the interim maintenance standards of the Domestic Relations Law and the pending bill does that. This makes available to vulnerable spouses who go, often unrepresented, to Family Court



seeking support, the same kind of consistent and predictable results that maintenance standards provide to divorcing couples.

**The Need For Post-Divorce Maintenance Standards:  
Promoting Economic Justice**

**Access for Low- and Moderate-Income Spouses:**

Currently, establishing a right to post-divorce maintenance is so complicated that it requires lengthy, expensive litigation. Most prejudiced by the existing law are moderate- and low-income spouses who cannot afford to litigate. Over 75% of divorces in New York State are uncontested divorces. A typical uncontested divorce will be between a home health worker earning \$15,000 per year and a State employee earning \$70,000 per year. If they have children, the Child Support Standards Act will proscribe the exact amount of child support the custodial parent will receive. If they own a home or if there is a pension, equitable distribution law will provide clear guidance on the division of that property. But, under current law there is no predictability whatsoever regarding what, if any, maintenance a court would award. In large numbers of situations like this, the home health worker will simply walk away from any maintenance award at all, understanding correctly that the cost of litigating for such an award would be prohibitive and the outcome far from certain. So, non-resourced spouses are forced to give up legitimate claims simply because they lack the resources to pursue their cases in courts. Yet maintenance is often necessary for households to avoid financial instability that disrupts lives and subjects families to hardship and stress. Using the formulas for amount and duration contained in the bill will be simple enough so that even litigants without access to lawyers could obtain post-divorce maintenance in much the same way they currently obtain child support awards.

**Greater Equity:**

Decisions, large and small, made over the course of the marriage often have the effect of sacrificing one spouse's ability to earn money for the benefit of the entire family. Who should work longer hours to advance a career? Who should work part-time to be available for the needs of the children? And so forth. Disparities continue to exist between women's and men's earning power and setting standards for maintenance awards would introduce greater equity. We need a fairer means of addressing these disparities as part of matrimonial reform. For most couples divorcing in New York, the only asset of the marriage is the ability of one of the spouses to earn significantly more money than the other. Post-divorce maintenance standards for amount and duration will provide remedies for these spouses since they have no assets of significance to divide.

**Predictability and Consistency:**

Awards made under New York's existing post-divorce maintenance statute differ widely for families that appear remarkably similar. Unlike equitable distribution, child support and now interim maintenance, which can be predicted with some degree of accuracy, lawyers do not know how to advise their clients about post-divorce maintenance. Post-divorce maintenance remains the "wild card" in negotiations, impeding settlement, encouraging litigation or, most disturbing of all, forcing non-monied spouses to simply give up. Post-divorce maintenance standards would provide much needed predictability and consistency while at the same time providing courts with the discretion to deviate from the standards in limited circumstances where equity and fairness would dictate adjustments.

**The Impact on Our Clients:**

In addition to the case stories (Exhibit A) demonstrating the positive impact of the interim maintenance standards on low- and moderate-income non-monied spouses, the following description

of one family's plight in the absence of post-divorce standards underscores the need for passage of the bill.

Sarah Allen (not her real name) telephoned Legal Aid seeking advice about a possible divorce. She was 24 years old and had been married for six years. Her husband, Martin Allen, was considerably older than she. She had not graduated from high school; he has a college education and worked for the Board of Education, earning an adjusted gross income of \$60,000 a year. The couple had two young children, a 4-year-old and 2-year-old. Mr. Allen had been physically violent to her, and Ms. Allen wanted to leave him. The Allens lived in a two-bedroom apartment that rented for \$1,600 a month. They had no marital property to speak of.

Ms. Allen called to get advice about what would happen if she filed for divorce. Her biggest concern was financial. When an attorney at Legal Aid explained to Ms. Allen that her husband would owe her child support of no more than \$15,000 per year and that there was no way to predict what post-divorce maintenance, if any, the court would award her, she decided against a divorce. The economic uncertainty was simply too great – even given the violent and potentially dangerous atmosphere she would have to endure for the financial security she needed for herself and her young children.

*With Standards for amount and duration:*

The Legal Aid attorney would have been able to tell Ms. Allen that she could likely expect to receive an annual award of approximately \$18,000 for two years and five months. This would have been enough to allow her time to complete high school and get a job while staying in her apartment and paying minimal living expenses. She would also have been able to count on monthly child support payments of \$875 or \$10,500 a year for a total yearly income of \$28,500 for the household consisting of herself and the two children. When the post-divorce maintenance ended in two years and five months, Mr. Allen's child support obligation would increase to \$15,000 a year.

During the two years and five months when both post-marital income and child support were paid, the household income for Ms. Allen and her two children would be \$28,500 per year, not quite two times the poverty standards. The household income of Mr. Allen alone would be \$31,500, over three times the poverty standards for a household of one.

With post-divorce maintenance standards for amount and duration, Ms. Allen, much more certain of what resources she could count on post-divorce, may well have decided to seek a divorce from her husband so that she and her children could live without violence.

## SUMMARY OF HOUSEHOLD INCOME LEVELS – ALLEN FAMILY

### Outcome without maintenance:

<b>Household with custodial parent and two children</b>	<b>Household with non-custodial parent</b>
\$0	\$60,000
+ 15,000 child support	- 15,000 child support
<b>Total \$15,000</b>	<b>\$45,000</b>
(20% <u>below</u> poverty standards) )	(4.1 times poverty standards)

### Outcome with proposed amount and duration standards:

<b>Household with custodial parent and two children</b>	<b>Household with non-custodial parent</b>
\$0	\$60,000
+ 10,500 child support	-10,500 child support
+ 18,000 maintenance (for 2 yrs, 5 mos.)	- 18,000 maintenance (for 2yrs. 5 mos.)
<b>Total \$28,500</b>	<b>\$31,500</b>
(1.6 times poverty standards)	<u>(3.0 times poverty standards)</u>

## **Conclusion**

The bill currently pending in the New York State Assembly is carefully-crafted legislation that would complement the existing temporary maintenance law. It will provide much-needed consistency and predictability about post-divorce financial status while preserving flexibility for Judges to make nuanced, individualized determinations when necessary. Where the bill differ from Commission recommendations, the bill's approach and solutions are better and more likely to help New York families navigate the break up of a marriage.

December 21, 2011

**INTERIM MAINTENANCE GUIDELINES CASE HISTORIES**  
**Compiled by Members of the**  
**Lawyers Committee Against Domestic Violence**

The cases summarized here were litigated by attorneys at inMotion, The Legal Aid Society, The Legal Project, New York Legal Assistance Group, Pace Women's Justice Center, and Sanctuary for Families as well as attorneys in private practice. In some cases identifying facts have been changed to protect client confidentiality.

**December, 2011**

Our client was 62 years old and in the hospital on a two-week stay when her husband of 19 years left her. He is 53 years old and a member of the Teamster's Union. He works fixing boilers. Last year, he made about \$80,000. Our client's sole income is a \$698 monthly Social Security check.

Our office first met the wife when she was fighting an eviction proceeding in housing court. Her husband had abandoned the marital apartment and instructed the landlord to put her name on the lease. We commenced a divorce, requested a stay of the housing court proceeding, and asked for temporary maintenance.

On the return date of the motion, the husband had documentation showing that he had been laid off (he works for his cousin) and that his only income was unemployment compensation. We argued that even if the husband's allegation that he was out of work was true, there was still a disparity in income that the guidelines were designed to address. We asked the judge to calculate temporary maintenance based on husband's unemployment, subject to retroactive adjustment after discovery and trial. The judge ordered the husband to pay the guideline amount. Without the temporary maintenance statute, the judge would have accepted the argument that the husband should not have to pay anything since he claimed that "he was only receiving unemployment."

**October, 2011**

A case from Bronx County. The wife is 54 and prior to the marriage she had had been a nurse. However, she has been out of the workforce for many years. She was a housewife and raised the children, all now emancipated. The husband is a physician with both a private practice and a hospital staff position. He earns approximately \$500,000. The parties always lived very frugally, and they do not own their home. The

marital residence is a rental apartment. All marital assets are titled to the husband. The wife was subjected to severe abuse during the marriage, including one instance where the husband broke her arm. Recently, the husband decided that he no longer wanted to be married and moved out of the marital residence. He then filed for divorce.

The wife's attorney made a motion for *pendente lite* relief, including maintenance and counsel fees. At the hearing on the motion, opposing counsel indicated that he had explained the temporary maintenance guidelines statute to his client and readily consented to the relief requested. It was clear that had this application been made prior to the enactment of the statute, there would have been aggressive opposition. The award of temporary maintenance was calculated under the guidelines, and the amount agreed upon was in conformity with the presumptive amount. (There was no additional award made to cover the rent on the apartment).

#### October, 2011

We represent the husband in a case in which the parties have been married 30 years. They have a 19-year-old son. The couple purchased a co-op that is the marital residence. The wife used her separate property for the down payment and the husband has paid the mortgage and maintenance, \$2,766 total monthly, throughout the marriage. The husband earns approximately \$97,000. The wife has been on Social Security Disability since 2003 and her income is \$17,982 annually. The wife's attorney filed an Order to Show Cause seeking maintenance. Using the temporary maintenance and the child support standards calculations, she sought \$1,235 monthly in maintenance and \$697 monthly for basic child support. The parties used the temporary maintenance guidelines in negotiations and agreed that the husband would pay to the wife a total of \$1,840 monthly for support for her and support of her child. The husband also agreed to continue paying the mortgage until the house is sold.

Our best case scenario, if the court were to accept our argument that \$14,934 should be deducted from husband's income because of additional expenses he pays for the child (attorneys fees, psychiatrist, tutoring, medical, etc), he would still have to pay approximately \$1,000 in maintenance and \$760 in child support- total \$1,760. Their best case scenario, our client would pay about \$1,235 spousal and \$700 child support (\$1,935 total). The wife agreed to sell the co-op (which the husband wanted). We agreed to \$1,840 as total support (in the middle of \$1,760 and \$1,935) and husband would pay mortgage until house sold.

### **October, 2011**

Our client and his wife are both civil servants at the United Nations. She earns about \$150,000. He earns close to \$210,000. There are two children. The wife asked for interim maintenance, although she would not be entitled to any under the guidelines. We agreed that no interim maintenance would be paid although the husband will continue to pay half of the mortgage on the marital home where the wife resides with one child (the other is in college).

### **September, 2011**

In 2010, Mr. F., a fifty-four year old mail room employee earning over \$36,000 annually, informed his sixty-three year old wife of thirty years that he planned to stop paying rent, that they would be evicted, and she should make plans to "go her own way." Ms. F. had income of \$595 monthly from SSA. She had applied for SSA when she had lost her part-time employment, and Mr. F refused to buy her food or give her money for transportation or necessities. Because they were living together, Ms. F. was not eligible for public assistance and/or food stamps.

Ms. F filed for divorce in February 2011 and made a motion for interim relief, including temporary maintenance using the guidelines in the new law. The Court set temporary maintenance at \$157.61 weekly, the guidelines amount, because of the imminent eviction after which Ms. F would not be living with Mr. F. By working with a community agency, Ms. F found Senior Affordable Housing, so with the interim maintenance Ms. F was able to meet her basic needs. At a hearing on the issue of permanent maintenance, the sole issue in the case, Mr. F. argued that he had never given Ms. F money throughout the marriage, so why should he have to do so now. However, because of the interim maintenance guidelines, we were able to negotiate a good final maintenance award. Before the interim guidelines went into effect, the Court would just have looked at Mr. F's low income and felt that he really could not afford maintenance and missed the dire situation of the totally un-resourced spouse.

### **August, 2011**

In 2006, Mr. R, a New York City police officer, abandoned the home he shared with his wife and their younger child to live with another woman. He left his wife not only with the burden of maintaining a household for herself and her daughter but with debt for the family car, which Ms. R cannot even drive, and cell phone bills. Ms. R obtained an order of child support from Family Court in 2008, and a combined order of child and spousal in 2010. The 2010 order set spousal support at \$285 a month or \$3,420 a year.



Mr. R filed for divorce in February, 2010, but he did not serve the divorce summons until December. At the time, Mr. R earned about \$90,000 a year, while Ms. R had about \$20,000 in yearly earnings. Their daughter was emancipated a month later, so the child support order was eliminated. Ms. R was left with her own earnings and the spousal support award, which together were insufficient to meet her basic needs.

Ms. R's attorney made a motion for interim relief arguing that since Ms. R. did not receive notice of the divorce action until after the effective date of the new interim maintenance legislation, temporary maintenance should be based upon the guidelines in the new law. The court agreed, vacated the Family Court award, and set temporary maintenance at \$2,007 per month or an additional \$24,084 a year. With this money, Ms. R. can meet her expenses, maintain her household, and work towards paying off the debt left in her name after her husband filed for bankruptcy.

#### **August, 2011**

In 2008 Ms. A married her husband in their home country of Guyana. At the time, Ms. A lived with her 13-year-old daughter, whom she had raised by herself. The daughter's father resided in a different country and had never supported her. For the first year of the marriage, Ms. A stayed in Guyana while Mr. A returned to New York City where he had lived for many years. Mr. A visited Ms. A frequently and sent her money each month. When Ms. A and her daughter joined Mr. A in New York, Ms. A found work as a home health aide. However, problems immediately developed. Mr. A physically and verbally abused Ms. A. Among other things, he would deny her sleep and food. His drinking became a serious issue, and Ms. A's daughter was subjected to drunken rages at all hours of the night. When Ms. A asked her husband to find treatment for his alcoholism and counseling for the abuse, he sued for divorce. Ms. A had been in New York less than a year.

After the divorce was filed, the family continued to live together. Although Mr. A demanded that Ms. A and her daughter move out of his apartment, Mr. A refused to pay maintenance and Ms. A could not possibly find an apartment without financial help. Ms. A had earned about \$10,000 the previous year; Mr. A earns \$65,000 a year working for the MTA. However, Mr. A's abusive behavior escalated, and Ms. A and her daughter were forced to seek refuge in a domestic violence shelter.

Sanctuary for Families, representing Ms. A, filed a motion for interim maintenance. Ms. A needed support from the husband to be able to afford permanent housing after she had stayed the maximum time allowed in the shelter (135 days). While Ms. A continued to work as a home health aide part-time, she would need a second job, full-time employment, and/or an LPN certification to earn enough money to support herself and her daughter.

Although the divorce was filed prior to the effective date of the interim maintenance legislation, the Court indicated that it would consider the interim maintenance guidelines when it made its decision. Under the guidelines, the monthly payment would have been more than \$1,300. The husband's counsel insisted that Mr. A could pay no more than \$400 per month. A conference with the judge's court attorney resulted in a settlement granting the client 15 months of maintenance, starting at \$1,000 for the first three months and then decreasing to \$800 per month for three months, then to \$550 per month for six months, then to \$300 per month for three months.

This maintenance will allow Ms. A to pay rent on an apartment for herself and her daughter, who is an excellent student, and to obtain the training she needs to get a better-paying job in the health care field. In the experience of lawyers at Sanctuary for Families, prior to the enactment of the interim maintenance guidelines a woman like Ms. A would have been told that she could not get any maintenance for a marriage that was this short, especially when she could work.

#### **June, 2011**

In May of 2011, after four years of marriage to a very physically abusive man, our client left the marital apartment with the couple's two-year old son. She filed for an Order of Protection in Family Court, and then, deciding that there was no hope for the marriage, she filed for divorce. At the time, her only income was unemployment compensation. Her husband, who works for the New York City Department of Sanitation, refused to make voluntary contributions to support her or their child.

We sought temporary maintenance under the guidelines. On the first court date, the husband appeared late and asked for time to find an attorney. The judge adjourned the case for a month. On the adjourned date, the husband did not appear nor did he submit opposition to the motion. We asked for an order on default, and the Court granted the motion and ordered the husband to pay the guideline amount of temporary maintenance. Without the guidelines, this never would have happened; the case would have been adjourned again.

With the temporary maintenance, the wife is able to send the child to a daycare center where he can socialize with other children two days a week, and she can begin to support herself as she looks for an apartment. At the present time, she is living with her parents and is now able to contribute to her and her child's living expenses.

**May, 2011**

An upstate reduced-fee legal services program has a client whose income is just under \$19,000. Her husband's income is just under \$89,000. They have two children, and they have been married for ten years.

Upon commencement of the divorce proceeding, the wife's attorney made a motion for interim relief, which the husband opposed. The judge awarded temporary maintenance of \$824 bi-weekly, based on the interim maintenance guidelines, and child support of \$587 bi-weekly, which was arrived at by adding the temporary maintenance to the wife's income and subtracting it from the husband's income, and then doing the Child Support Standards Act calculations. This resulted in pre-tax income of about \$55,000 for the wife and two children and \$52,000 for the husband. The Court also awarded the wife \$5,000 in attorney's fees. This temporary relief will allow the wife to litigate this matter appropriately and to support her household until the matter is resolved. Prior to the enactment of the new statutes there would have been no temporary maintenance and no attorney fees awarded.

**May, 2011**

Mrs. O, a victim of domestic violence, had been married for 20 years, during which time she and her husband had a comfortable, middle-class life. They have two children, a 12 year old and an 8 year old who is so severely disabled that she receives all nutrients through a feeding tube and has no hope of ever being able to walk or talk.

Mrs. O was never privy to any financial information and never worked outside the house during the marriage. Mr. O owns his own business (known for cash income) and claims he has been selling off assets for years to pay the household bills. Although Mr. O refused to pay temporary maintenance, he was meeting his obligations under a \$175/week (\$753 a month) temporary child support order issued in Family Court. The Family Court matters were consolidated with a divorce case in Supreme Court.

At the preliminary conference, Mr. O's attorney said this client refused to pay any temporary maintenance. Mr. O's purported income tax returns from 2007-2009 show income ranging from \$22,000-\$45,000 per year. However, based on the family's lifestyle (4 bedroom house in a nice neighborhood) and Mr. O's expensive tastes (cars, dinners out, parties, Rolex watch), it was clear that his income was much higher.

We filed a motion by order to show cause for temporary maintenance arguing for application of the guidelines based on an imputed income of \$200,000, and in the alternative, asking for interim support based on needs. We requested \$5,000 per month in interim maintenance and an upward modification of temporary child support from

\$175/week (\$753 a month) to \$2,900 per month for a total of \$7,900 per month. The judge decided that because she did not have enough information to determine Mr. O's gross income, she would order temporary maintenance based either on Mrs. O's needs or the standard of living of the parties before the couple separated, whichever was greater.

The judge found that Mrs. O's reasonable needs were \$7,300 per month. Temporary child support remained the same, \$175/week (\$753 a month). The total payments are \$8,053 a month, only \$153 off from the amount we requested using the interim maintenance guidelines. Although the judge said that her decision was based on Mrs. O's needs, the amounts are very close, and we believe the interim guidelines strongly influenced the judicial reasoning and the outcome, which was very good for our client.

### May, 2011

Ms. P, a native of France now in her late thirties, met her husband while vacationing in Greece. Ms. P eventually moved to New York, and she married her husband in 2001. The couple has two children, ages 8 and 10.

Ms. P, an artist, did not graduate from high school, and English is not her first language. Besides sporadic attempts to market her art work, Ms. P has not earned money since her marriage. Mr. P holds multiple degrees and is a teacher in the NYC school system. He earns about \$90,000 per year.

The marriage was marred by Mr. P's emotional abuse. Mr. P controlled the family finances, and he was suspicious of Ms. P's every move. At various times before and after he filed for divorce, he hacked into Ms. P's email accounts. He refused to provide money to Ms. P for incidental items for herself or their children, forcing her to beg whenever she needed something for the household.

When Mr. P sued Ms. P for divorce in 2009 the parties still lived together in the marital residence with the children. The situation was fraught with stress, and, as the litigation dragged on, it became increasingly difficult for Ms. P to live under the same roof as her abuser. Without access to family financial resources, however, she had no choice. Approximately one year into the litigation, the older child was diagnosed with cancer, creating more difficulties. At one point, court intervention was necessary to keep Mr. P from blocking Ms. P's visits to her hospitalized child.

Early in the litigation, Ms. P was awarded \$100 per week in temporary maintenance, but Mr. P refused to make the payments unless Ms. P gave him with receipts to substantiate expenditures. Several applications to the court were required because Mr. P insisted on deciding which expenses should be covered by the \$100 provided to

Ms. P. Mr. P is adamant that Ms. P is not entitled to any financial settlement, although he has a pension and substantial savings accrued during the marriage. Mr. P has used every device he can find to delay the conclusion of the litigation.

Recently, Ms. P made the difficult decision to move out of the marital residence. Ms. P reluctantly ceded custody of the children to Mr. P, and Mr. P. provided Ms. P with an advance payment towards equitable distribution. With this money, Ms. P could move out of the marital home. However, despite diligent efforts (including attending GED classes and various workshops), Ms. P was unable to find a job. Mr. P refused to "pay a penny more" to Ms. P, who was now in danger of losing her recently-acquired housing.

A motion for a modification of the interim award was made. Although the case had been commenced before the interim maintenance guidelines went into effect, Ms. P's attorney proposed that the court should use the guidelines and award Ms. P \$485 per week.

At oral argument, the judge refused to decide the motion. He did, however, affirm the accuracy of the guideline calculation. After much discussion, the judge indicated that he was inclined to grant the application under the guidelines but would consider a downward modification to take into consideration that Mr. P's role as custodial parent. The judge told the husband that he had the power to award the full amount requested and strongly encouraged the parties to settle on a reasonable amount, i.e., \$325 per week. The parties ultimately agreed, and the motion was adjourned for two months for a report on Ms. P's efforts to find employment.

With the modified award, Ms. P is able to stay in her new home and does not have to move to a shelter, or, worse, back in with her abuser. The guideline calculation played an absolutely critical role in Mr. P's agreement.

### **February, 2011**

In 2007 Ms. B., a \$10 an hour medical assistant, married Mr. B., a truck delivery man in the Teamsters Union, who was earning about \$36,000 a year. The couple have two children, born in 2009 and 2010. Mr. B. became increasingly violent as Ms. B's attention was shared with their infants, and he was excluded from their rental apartment pursuant to a Criminal Order of Protection. Ms. B's family helped her provide for herself and the babies. In the past, Ms. B. had not pursued the prosecution of assaults because of financial concerns – she no longer had any income and had to care for two infants.

Ms. B wanted a divorce and we filed shortly after the effective date of the interim guidelines and immediately moved for temporary maintenance and child support.

Because of the formula, Ms. B. was able to settle the motion the first day she appeared in court, without wasting judicial resources. The clear numbers made the settlement easy. On consent, Ms. B. was awarded temporary support of weekly payments of \$231.00 in maintenance and \$135.00 in child support. She was able to be safe, pay her bills with some help from her family, and arrange to go back to school on weekends when Mr. B. had the children under the supervision of his sister. The divorce case settled shortly after using the same amounts for permanent maintenance and child support with an agreement that the maintenance award would end after two years because of the short duration of the marriage.

If we had not had the guidelines at the commencement of the case, we might still be arguing the *pendent lite* motion. The guidelines helped lead to a just and fair agreement and the case was concluded within three months.

#### February, 2011

Mrs. L is a 29 year old woman with cognitive disabilities. She has been married to Mr. L for almost 6 years and separated for about a year ago. The couple have two children, ages 1 and 3. Mr. L earns approximately \$55,000 per year according to documents submitted to the court, although he claims he only has an annual income of only \$30,000. Mrs. L has not been employed but has an SSD award of \$700 per month. Throughout the relationship, Mr. L has physically abused Mrs. L and has ruled her life. He had complete control over the family finances, and he forced Mrs. L to drop out of school.

Family Court petitions for custody and support were pending when the pro se husband filed for divorce. Mrs. L obtained full custody of both children, and Family Court had issued a temporary support order for the children only (not the wife) in the amount of \$384.00 biweekly. The parties agreed to try to resolve the Family Court support issues before proceeding with the divorce, but the husband filed an RJL and asked for a preliminary conference.

At the preliminary conference in Supreme Court, we raised the issue of temporary maintenance (orally, not by written motion), and the husband said that he wasn't going to pay it. The court attorney referee told the husband that there was a formula for temporary maintenance, so he could either pay that amount or he could expect me to file a motion in the divorce, at which time he would have to pay the formula amount plus attorneys' fees. We showed the husband the calculation for temporary maintenance and child support, which came to biweekly payments of \$341.86 and \$199.42, respectively, for a total biweekly award of \$541.28. After much discussion, the husband agreed to this amount. It is very unlikely that he would have agreed to any

interim maintenance at all without the interim maintenance guidelines and the court attorney referee's involvement.

### **February, 2011**

Legal Aid represented Mrs. D, an immigrant from Ghana, who spoke very little English. During her marriage she had endured severe domestic violence, both physical and emotional, at the hands of her husband. When she first came to Legal Aid, she already had an order of protection from Family Court. Her husband had moved out of the marital residence, stopped paying bills and now refused to provide any support for her or her two young children. She and children were on the verge of being evicted. Mrs. D was a home health worker earning approximately \$13,500 annually, and Mr. D. earned approximately \$44,200 per year.

We began a divorce case simultaneously with an order to show cause seeking interim maintenance and interim child support. On the first return date of the motion (held three weeks after the case was filed), following a conference with the judge's law clerk, the judge issued an order on consent requiring Mr. D to pay approximately \$400 biweekly interim maintenance and \$400 biweekly interim child support – the exact amounts required by the new interim maintenance guidelines and the child support standards act. In addition, the judge ordered Mr. D to pay all of the rental arrears on the apartment immediately to avoid his family's imminent eviction.

Mrs. D now has enough money to pay the household bills and take care of her children. Without the new interim guidelines law, it is highly unlikely that Mrs. D would have been awarded anything more than minimal interim maintenance. Rather than agreeing to the amount required by the new law, the husband's attorney would have argued, almost certainly successfully, that Mrs. D is working, that Mr. D does not make that much, that he has to pay child support, and that he'll have nothing to live on.

### **December, 2010**

Mrs. J met her Legal Aid attorney several years ago when the attorney provided legal information to a group of domestic violence survivors at a community-based organization, a monthly part of Legal Aid's Domestic Violence Project outreach. She was then 75 years old and was still living with her husband. She had been the victim of extreme violence and a cruel campaign of intimidation for over 30 years. During the last 20 of those years her husband had forced her to sleep on the bare floor of their dining room. If she tried to sleep on the couch or even on a rug he would destroy the couch or rug.

Several months after the attorney met Mrs. J, Mr. J threatened Mrs. J with a machete, and Mrs. J's adult children finally persuaded her to leave the marital residence. She then came to Legal Aid to discuss the possibility of a divorce. This meeting took place over a year before the matrimonial reform legislation had been passed in New York State providing for interim maintenance guidelines and no fault divorce. Mrs. J had never worked outside of the home. Mr. J, now retired, had been a Teamster and had significant pension income. Early in their marriage, the parties had purchased a home - the home Mrs. J finally fled after the machete incident - but the title was in Mr. J's name alone. Mrs. J's adult children were supporting her both financially and emotionally. However, Mrs. J was reluctant to begin a divorce because she felt that pleading cruel and inhuman treatment would be like poking a hornet's nest with a stick. She feared a long and involved court battle over maintenance. We could provide her with no sense of how much maintenance she could expect because of the unpredictability and inconsistency of the existing maintenance laws.

Once matrimonial reform legislation went into effect in October, 2010, however, Mrs. J decided to ask for a divorce using the new no fault ground. We began the action simultaneously with an Order to Show Cause seeking interim maintenance pursuant to the new guidelines law. On the very first court appearance, with the assistance of the judge's law clerk, we resolved the interim maintenance motion. Mr. J's attorney was able to persuade his client that based on the new law he really had no choice but to pay the exact guidelines amount - an amount that would, for the first time, enable Mrs. J to support herself without having to rely on the kindness of her adult children.

This result would have been highly improbable, if not impossible, without the interim maintenance guidelines. At best, we might have been able to negotiate a minimal interim maintenance award, but most likely the court would have been persuaded by the husband's argument that Mrs. J had managed to survive without his support for two years so no interim maintenance was necessary to preserve the status quo.

#### **November, 2010**

Legal Aid, representing a low income victim of domestic violence in a divorce, made a motion for interim maintenance and interim child support. The husband earned approximately \$60,000 per year and the wife, our client, earned approximately \$6,000 per year. The couple had three children, ages 20, 14 and 10. The 20 year old was working part time. All three lived with their mother.

On the first return date of the motion, the judge's law clerk met with counsel and the parties and quickly did the maintenance and child support guidelines calculations. Although the husband did not consent, the Judge immediately ordered interim maintenance pursuant to the guidelines (approximately \$1,200 per month) as well as



interim child support (approximately \$700 per month) with a slight downward deviation to take into account the eldest child's income of approximately \$1,000 per month.

Without the interim maintenance guidelines, it is unlikely that our client would have received anything more than a couple of hundred dollars a month in interim maintenance.

## Why Decisions About Modifying Maintenance Awards Should Be Made at the Time of Retirement, Not at the Time of a Divorce

Retirement may change the economic status for a former spouse paying maintenance and, after examining the entire financial picture, a judge may decide that modifying an order is the right thing to do. However, decisions about decreasing maintenance need to be made when a payor spouse retires, with the facts about the particular circumstances of the parties at that time. When judges try to anticipate the date of retirement or make assumptions about its effects on the parties years in advance, they will often guess wrong.

**Predicting, years in advance, the financial status of two people at retirement is very difficult.**

- **People are retiring later.** The number of people in the United States working past age 65 has doubled in the past 15 years. Currently 18.5% of Americans 65 and older remain in the work force.<sup>1</sup>
- **Retirement has become a fluid concept.** With the increase in the number of older people working, retirement no longer has the fixed meaning that it had in the past. Many people used to retire, quit work, and live on their pensions, assets, and social security checks. Now, with people working past retirement age and after the time when they collect social security or pensions, defining retirement has become difficult.
- **When people work past retirement their income may decrease little or none.** Modifying a maintenance award on retirement only makes sense if the payor's income decreases. When a paycheck supplements a pension or a social security check, total income may change little or even increase. If a payor's income doesn't decrease on retirement, the reason for modification evaporates.

**Women, and particularly those who have been wives and mothers, are vulnerable to financial hardship in old age. Cutting maintenance may spell economic disaster for them.**

- **Older women are less likely to have pensions than men and when they do have pensions, their pension income is less.** Only 36% women, compared 52% men, have any income from pensions, and women's pensions are on the average \$5,700 a year less than men's pension income.<sup>2</sup>
- **Older women are more dependent on Social Security, even though the amount they receive is less than men.** Social Security is the total source of income for 77% of elderly women, but only 59% of older men. Women's payments average \$4500 less a year than men's.<sup>3</sup>
- **Older Women have considerably less total income than men.** The average in income for older women from all sources is \$25,041; for men, it is \$43,432.<sup>4</sup>

<sup>1</sup> Working Late, by Choice of Not, NY TIMES (May 9, 2012).

<sup>2</sup> Wider Opportunities for Women, Doing Without: Economic Insecurity and Older Americans (March 2012).

<sup>3</sup> Social Security: Especially Vital to Women and People of Color. Institute for Women's Policy Research (Jan. 2011).

<sup>4</sup> Id. at 6-7.

**New York State Senate Judiciary Committee**

**Hearing on Spousal Maintenance Calculations—September 24, 2013**

**Written Testimony of the New York Legal Assistance Group (NYLAG)**

Good afternoon and thank you for the opportunity to share this testimony about Spousal Maintenance. NYLAG strongly supports the Maintenance Standards proposed in A-6728—B (hereinafter “the Bill”) as outlined below.

**1. NYLAG**

Founded in 1990, NYLAG is a nonprofit law office providing comprehensive free legal services to low-income New Yorkers who would otherwise be unable to afford or receive legal help. We provide services to individuals with issues such as family and matrimonial actions, public benefits, immigration, home care, health care, elder abuse, advance directives, eviction and foreclosure prevention, consumer law and special education.

NYLAG employs over 210 paid professionals, as well as leverages the services of over 1,000 volunteer attorneys and law student interns. In addition to our main office in Manhattan, NYLAG sees clients at 76 intake sites located in courts, hospitals, and community-based organizations throughout New York City, Westchester and Long Island. NYLAG also has long-standing mutual referral relationships with almost 300 health and human service organizations citywide. Through these partnerships, the agency served over 60,000 people last year alone.

The Matrimonial & Family Law Unit provides free legal services on a myriad of family law issues including divorces (contested and uncontested), orders of protection, child custody and visitation, spousal and child support and paternity. We prioritize victims of domestic violence who have more complex legal needs than other litigants. In addition to direct



representation, we also provide free legal consultations. In the past year, NYLAG provided direct legal services to 6,530 women and their families on family law matters.

## **2. NYLAG's clients**

Most of NYLAG's family law clients are victims of domestic violence. Because the agency does not accept federal funding, it is able to serve not only abject poor domestic violence victims, but also lower middle class and working poor victims who cannot afford private attorneys, as well as undocumented immigrant victims. For example, a mother of two children who earns \$42,000 per year (\$2,940 above 200% of the Federal Poverty Guidelines) and owns a house with her husband (an illiquid asset) would not qualify for assistance from federally-funded agencies, but would be eligible for NYLAG's services.

According to the Mayor's Office to Combat Domestic Violence, 36% of the population of New York City is foreign-born. NYLAG's family and matrimonial practice reflects this number in that one third of our clients are immigrants. These clients face great challenges as many speak little to no English, have minimal formal education, face significant hurdles to finding employment, and thus need the financial support of their moneyed spouse.

The following case examples illustrate the importance of a) extending and applying the current formula used to calculate temporary awards to final awards, b) a formula for duration, which doesn't automatically end at retirement, and c) an income cap that is at least \$300,000 of the payor's income.

## **3. Case Example**

Mr. and Ms. X were married in a Caribbean country in 1988. A year later, Mr. X moved to the United States when Ms. X was almost due with their second child. She and their children came to the U.S. a year later. Mr. X obtained immigration status and worked first as a security

guard before eventually becoming a bus driver with the MTA, earning up to \$90,000 per year with overtime and the security of a pension. Ms. X took care of the children and maintained the home, working off the books occasionally and then for a short time, as a home health aide earning \$20,000 per year.

Throughout their 23-year-long marriage, Mr. X repeatedly physically assaulted his wife, and had her committed involuntarily to a mental hospital, based on fabricated allegations. The hospital released her after a few days stating she didn't suffer from any mental illness. At the same time, Mr. X refused to sponsor his wife for immigration status, allowing him to maintain power and control.

Ms. X's situation was further complicated when she injured her back as a result of a fall, making it impossible to lift patients as her job required. While she could perform other, less physically challenging jobs, most of these positions require a minimum level of education and Ms. X did not even have a high school diploma. A 55-year-old immigrant with no formal education, who also suffers from diabetes and thyroid issues in addition to wearing a back brace is unlikely to find meaningful employment. As a result, maintenance from her moneyed husband was even more critical to the survival of Ms. X.

A few months after her fall, Ms. X became homeless and had no money to support herself. Soon after the divorce started, with NYLAG as counsel, the judge ordered temporary maintenance pursuant to the formula. Before temporary maintenance was passed, it would have been near impossible for her to argue for and obtain this award on her own. Now, even without an attorney, she still could obtain a temporary maintenance award by filing a motion on her own.

When arguing over the final award, NYLAG requested the Court apply the temporary formula of \$1,900 per month for twenty three years, the length of the marriage, which is what the

Bill would provide. Mr. X. proposed \$500 per month for five years. The discrepancy of their positions highlights the necessity of a uniform standard.

Two years and a trial later, Ms. X received a maintenance award for the exact same amount as the temporary award, \$1,900 per month but for only ten years.

#### **4. Duration**

In addition to providing a formula for the amount of final maintenance, the Bill also provides for a formula to determine the duration of the award. This is critical to promoting consistency and predictability, as well as a fair result.

The formula relies on the length of the marriage as the guiding factor, which is the factor most considered by courts in fashioning awards based on the current law. The reason for this is that the longer the marriage, the greater the economic partnership. In most families, the only asset to divide is the stream of income of the moneyed spouse, which was obtained with the support of the spouse who took care of the home and the children. Like other aspects of equitable distribution, the Bill provides for durational awards that reflect the contributions made during the marriage. The other factors currently considered by the courts in determining duration, such as education and work experience, are strongly correlated to the length of the marriage.

In our case, Ms. X had been the primary caregiver of the parties' children and took care of the home for 23 years of marriage, while her husband was able to cultivate a successful career. Ms. X's inability to support herself after the marriage ended was directly related to the length of time she was neither in school nor working outside the home.

Without the formula for duration contained in the Bill, the court awarded only ten years of maintenance for Ms. X. As a result, when the maintenance ends, Ms. X will have to survive

on \$12,000.00 per year in social security benefits through her husband (the equivalent of approximately half of his benefits) since she did not work long enough to contribute sufficiently to her own social security, barely above the federal poverty guidelines of \$11,490.00 per year. By contrast, her husband will receive \$25,000.00 per year in social security benefits (as estimated on-line on the social security administration website), as well as \$37,500.00 per year in pension benefits (based on NYCERS projection website) for a total of \$62,500.00 per year. After 23 years of contributions to her marriage, Ms. X deserves better than this result.

In addition, the portion of the bill addressing retirement is correct in that the duration of a final maintenance award should not automatically terminate at retirement age. Rather the issue should be determined in a subsequent modification based on an actual change of circumstance. Often, the courts end maintenance payments at social security retirement age, assuming that the payor will stop working at that time and that his/her income will decrease. However, people often work well past the age of retirement. Some, like New York City municipal workers like Mr. X, receive generous pensions after twenty years of service and then are employed by private entities, earning more than before they retired. Therefore, the decision to end maintenance should be made when we actually know the circumstances surrounding the payor's retirement.

#### **5. CAP**

Finally, in calculating a final maintenance award, NYLAG strongly supports the use of the \$300,000 CAP contained in the Bill, which should address the needs of middle and low income families who would benefit from the consistency and predictability the standards provide and whose financial circumstances are straightforward enough to work well within the framework.

The Law Revision Commission suggests that the cap should be the same as for child support (\$136,000.00 of combined income), but child support is an obligation that both parents share while maintenance, by definition, is the support that the more moneyed spouse pays to the less moneyed spouse. The Law Revision Commission, however, states that the cap should be "*ideally at an increased level*" and points out that \$300,000 is the amount that recent New York State Legislation uses to define middle class families eligible for certain kinds of tax relief.

Furthermore, the reason to apply the formula up to \$300,000 is that even at that level of income, many people are W-2 wage earners, with few assets other than a home and a pension or retirement account. Those couples are ideally situated to utilize the formula for calculating the amount and duration of a maintenance award. Finally, couples with \$300,000 or less will be unable to cover the costs of counsel fees without sacrificing income that could otherwise be used to maintain the two households, child care costs, school tuition or retirement.

As explained above, NYLAG represents and counsels clients who are above the poverty guidelines and see higher income cases as a result, including cases where the moneyed spouse may have significant income, but the non-moneyed spouse has no access to it post-separation.

In one such case example, where NYLAG consulted and where a divorce action has yet to be commenced, Mr. S. works as a consultant for a large financial services corporation and earns approximately \$280,000 a year. Ms. S came to the United States from Russia, has no extended family here and stayed home to raise the couple's four children. Mr. S was emotionally abusive to Ms. S throughout their twenty-year marriage, regularly threatening that if she ever left him, she would be destitute and he would take the children away from her because she is not a citizen. Thanks to the current maintenance standards, Ms. S will be able to obtain a temporary award. However, without standards for final maintenance, Ms. S will not be able to afford to



litigate at all. This will render her unable to support her new household, which includes four children, except with whatever Mr. S is willing to agree to as part of a settlement. Even if Ms. S is able to find counsel, the couples' income will be substantially depleted to cover the cost of the litigation, greatly impacting Mr. S's ability to cover the maintenance award, let alone the cost of health insurance for the whole family, child support for the younger children, and school tuition for the older children. Most importantly, the unpredictability may prevent Ms. S from being able to make the decision to leave her abusive marriage, exposing her and her children to further harm.

Going back to the case of Ms. X, it took two years to litigate: over a dozen court appearances, three days of depositions, five days of trial. We estimate that the experienced attorney worked on Ms. X's case for at least 100 hours. If the other party had to spend a similar amount, it would have required approximately 200 hours to litigate. Private attorneys' fees in New York City start at \$250 per hour for a recently admitted attorney. Had Ms. X not received NYLAG's services, this couple would have had to spend at least a staggering \$50,000 to litigate the maintenance issue alone.

Unfortunately, most people in New York do not receive free counsel. New York State does not provide a right to state paid counsel in divorces, child support, maintenance and equitable distribution cases. Almost all of the funding available to free legal services organizations for family law matters is given to represent victims of domestic violence, but this is not sufficient to represent all of those in need. If there is no domestic violence, the chances of being represented for free are almost non-existent. Attorneys in corporate firms who want to do *pro bono* work shy away from contested divorces for a simple reason: they are incredibly time consuming. Although the law currently allows the court to order a party to pay the attorney's

fees of the non-moneyed spouse, this remedy is often elusive in practice. Private attorneys require high retainer fees upfront and are often averse to taking the risk of not being able to collect fees from an adverse party.

Many New Yorkers fall into the category described in Ms. S's case, where there is significant income and a house, an illiquid asset, which are not accessible to her. This couple would benefit from the maintenance standards contained in the Bill and avoid the need to engage in prohibitively expensive litigation. In cases where the income is up to \$300,000 and the financial circumstances are more complex, such as where there are multiple sources of income, hidden income or substantial assets, the courts are still free to deviate to craft a more appropriate award than the standards might otherwise provide.

## **6. Conclusion**

Temporary maintenance guidelines have largely achieved consistency and predictability in temporary awards, resulting in the ability to settle cases and secure critical financial support for our clients. Extending those guidelines to final awards, as well as applying a formula for duration and raising the cap to \$300,000, is essential to promote that same consistency to final awards for the majority of new Yorkers. For these reasons, and the ones stated above, NYLAG strongly supports A-6728—B.

**SUBMITTED WRITTEN  
TESTIMONY**

**JOHN J. BONACIC**  
SENATOR, 42ND DISTRICT

**CHAIR**  
**COMMITTEES ON**  
JUDICIARY

RACING, GAMING & WAGERING

DEPUTY REPUBLICAN CONFERENCE LEADER  
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HOUSING, CONSTRUCTION  
& COMMUNITY DEVELOPMENT  
MENTAL HEALTH  
RULES

**SENATE STANDING COMMITTEE ON JUDICIARY**

Senator John J. Bonacic, Chair  
Senator Ruth Hassell-Thompson, Ranking Member

**PUBLIC HEARING ON SPOUSAL MAINTENANCE AWARDS**

September 24, 2013

11:00 pm

Legislative Office Building, Hearing Room A  
Albany, NY

**WRITTEN TESTIMONY SUBMISSIONS**

- 1. Professor Merrill Sobie**  
Pace University School of Law
- 2. Professor Marsha Garrison**  
Brooklyn Law School
- 3. Amanda Norejko, Esq.**  
Sanctuary for Families



## COMMENTS

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To: Senate Judiciary Committee  
Hearing on Spousal Maintenance Calculations

From: Prof. Merrill Sobie  
Pace Law School

Thank you for the opportunity to submit written comments concerning the important issue of spousal maintenance and support. The New York State Law Revision Commission should be commended for proposing thoughtful revisions to the current statutory scheme. The Judiciary Committee should be applauded for convening the hearing and seriously considering the commission proposal.

My expertise is Family Court practice. I author the McKinney's Commentaries to the Family Court Act, publish a Family Court Practice treatise, and have lectured on almost every aspect of Family Court proceedings. I shall therefore direct my comments to that aspect of the Commission's proposal.

A person who needs support or maintenance from his or her spouse may file a divorce action in Supreme Court and move for temporary maintenance pursuant to Domestic Relations Law Section 236. Alternatively, she may file an action in Family Court requesting spousal support pursuant to Family Court Act Section 412. The facts of the case are identical; and the financial need is identical. However, because DRL Section 236 and FCA Section 412 are vastly different, the results may be vastly different.

FCA Section 412 has been unamended for almost one century (with the exception of a constitutionally required amendment to render the section gender neutral). The statute hence reflects a century old philosophy; spousal support is not a legal right, but, rather, a discretionary award, ie. the Court "may" order. The section is also generalized;

the provision fails to incorporate standards or criteria to determine the need for support or, upon showing need, the level of support.

On the other hand, DRL Section 236 prescribes a detailed mathematical formula and specific criteria to determine support (or maintenance). Compounding the dichotomy is the fact that a party may first seek support pursuant to FCA Section 412 and subsequently request temporary or permanent maintenance pursuant to DRL Section 236. In fact, both inconsistent proceedings may take place in Family Court (Family Court possesses direct jurisdiction to determine Section 412 cases and may determine Section 236 cases upon referral from Supreme Court). Same parties, same judge, different result.

The dichotomy is irrational and senseless. There are several reasons why an individual may proceed via one section or the sister provision. Neither party should consequently be prejudiced. FCA Section 412 should be substantially identical to the maintenance provisions of DRL Sections 236. The same cause of action should achieve a similar result. Indeed, for child support purposes the Legislature has wisely done just that. FCA Section 413 and DRL Section 240 are virtually identical; a child support award is hence not dependent on the whim of the party who chooses the forum.

In summary, my plea is that FCA Section 412 not be again overlooked. The provisions of the DRL should be reflected in the FCA, as recommended by the Commission.

Respectfully submitted,

Merril Sobie  
Pace Law School

**COMMENTS ON NEW YORK STATE LAW REVISION COMMISSION FINAL  
REPORT ON MAINTENANCE AWARDS IN DIVORCE PROCEEDINGS**

By Marsha Garrison, Suzanne J. & Norman Miles Professor of Law,  
Brooklyn Law School.

Spousal maintenance is an important statutory entitlement for divorcing New Yorkers. The current spousal maintenance provisions are so vague and discretionary as to produce highly disparate and unpredictable outcomes. They inhibit settlement. They contribute to post-divorce animosity by failing to provide guidance on a fair outcome.

Revision of New York's temporary maintenance rules was a useful step forward. The temporary maintenance rules do provide real guidance to divorcing couples. They thus promote consistency and settlement. The standards themselves are reasonable in that they focus on disparity in income, the factor that New York courts have traditionally viewed as most important in determining the award of maintenance.

It is illogical to employ predictable standards for temporary, but not permanent, maintenance. By and large, the legislative recommendations of the Law Revision Commission are sensible and fair. They could be improved in two ways which I will address below. But the Commission is to be commended, and most of its recommendations should be adopted. More specific comments follow.

### **I. Why Reform Is Needed**

Current law governing the award, duration, and value of maintenance is incapable of providing fair and predictable outcomes.

#### *A. For Many Divorcing Couples, Spousal Maintenance Is the Only Means of Ensuring Post-Divorce Equity*

Many divorcing couples lack substantial assets. When I studied divorce in three New York counties two decades ago, the median net value of marital assets subject to division was only \$18,266, or \$41,116 in 2013.<sup>1</sup> And this was a sample in which contested cases—the wealthiest segment of the total divorce pool—were substantially overrepresented. Despite the overrepresentation of relatively wealthy couples, eighteen percent of the total sample had *negative* net worth, i.e., their debts exceeded their assets.<sup>2</sup>

There is nothing unusual about my mid-1980s divorce sample. The scarcity of marital property was first reported in 1956 in a pioneering study of divorce in Detroit, Michigan; forty percent of the divorcing couples surveyed in this study had no property beyond household possessions, and only eighteen percent had property worth \$4000 or more.<sup>3</sup> The same phenomenon was “rediscovered” by several other researchers looking at divorce outcomes in other states during the same time period in which I was looking at divorce in New York.<sup>4</sup> For couples who lack substantial assets, child support and spousal maintenance are the only means of alleviating the hardship and injustice which highly disparate incomes may produce.

### *B. Current Maintenance Law Produces Highly Inconsistent and Unpredictable Outcomes*

The current, highly discretionary maintenance law produces highly disparate and unpredictable outcomes. Indeed, New York's spousal maintenance rules are so imprecise that even litigated cases may be altogether unpredictable. As part of my study of divorce in New York, I examined every single trial-court decision on spousal maintenance and property division reported during the first decade of practice under New York's 1984 Equitable Distribution Law, some 383 in total. Some entitlement choices were highly predictable. Eighty-three percent of alimony-award decisions, for example, could be predicted with information on the percentage of family income earned by the wife, the value of her income, marital duration, the value of net marital property, and the husband's job status; indeed, eighty percent of the decisions could be predicted based simply on the wife's percentage of family income – the factor on which the temporary maintenance standards thus, appropriately, focus.<sup>5</sup> But other maintenance decisions were highly unpredictable: with respect to the length of a durational maintenance award, not a single litigant characteristic enumerated in the statute as relevant to the decision was significantly correlated with the maintenance-award period, and only one percent of the variation in durational periods could be predicted on the basis of *any* information in the case records.<sup>6</sup>

Not only were maintenance decisions unpredictable, but some of the most important predictive variables were extra-statutory factors that should not affect case outcome. For example, at the trial-court level, the most significant predictive variables for determining whether a spousal maintenance award was permanent or durational were marital duration—relevant under the statutory formula—and the political party of the judge who made the decision, a factor that should be altogether irrelevant.<sup>7</sup> Similarly, the value of the maintenance award was more strongly predicted by the appellate division in which the case was decided than it was by either spouse's income or the value of the net marital property.<sup>8</sup> Similarly, the Law Revision Commission found that awards of maintenance were more likely in Erie, Onandaga and Westchester counties than in the other counties it studied.

### *C. Current Maintenance Law Inhibits Settlement and Promotes Perceived Inequity*

Unpredictable standards inhibit settlement. Divorcing couples reach—or fail to reach—agreement about property division and spousal maintenance by bargaining “in the shadow of the law”: their negotiations are informed by their understanding of a likely resolution if the case were to go to trial. But when legal rules are highly discretionary and imprecise, they cast a blurred shadow that impairs each spouse's ability to determine his or her legal entitlements and reach a mutual understanding about those entitlements. The costs of such indeterminacy are magnified when a divorcing couple begins negotiations with different preconceptions about their marital history, needs, and relative contributions. These different perspectives can easily produce fixed, and highly divergent, views of a “fair deal.” Without clear legislative standards against which to test those views, divorce negotiations can easily degenerate into a continuation of the marital conflicts that led to divorce.

Divorce lawyers can, of course, offer litigants some information about likely case outcome, but consulting such experts takes time. It also consumes money—far more money than many divorcing couples can afford. Indeed, for the typical divorcing couple ---married



for only a few years and with marital assets consisting of a used car, household goods, limited home equity, and a small bank account—the price of legal representation may well exceed any loss in post-divorce entitlements that lawyer representation could have averted. We lack data on the number of unrepresented divorce litigants in New York, but in many states, at least one divorce litigant is unrepresented in three-quarters or more of all divorce cases.<sup>9</sup> The 2006 Matrimonial Commission Report also notes that, in meetings with New York matrimonial judges and other experts, “the problem that was universally highlighted as a substantial barrier to the efficient, effective and timely movement of contested matrimonial cases is the number of individuals representing themselves. . . .”<sup>10</sup>

Moreover, if the outcome of litigation is highly uncertain, not even divorce experts can offer clear advice about what constitutes a good or bad negotiated settlement. Nor does a litigant have any capacity to judge whether his or her attorney has negotiated a good deal or a bad one. Indeed, the attorney herself may not know whether she has negotiated a good or bad deal; her capacity to judge success will of necessity be confined to what she learns from reported cases, her own practice experience, and her observations. And if the reported cases fail to reveal clear and consistent patterns, her own limited set of cases and observations will offer the only “norm” available, a norm that may be normal nowhere else.

## **II. Most of the Law Revision Commission’s Proposals Should Be Adopted**

### *A. The Extension of the Temporary Maintenance Formula to Permanent Maintenance*

As the Law Revision Commission notes, it is illogical to employ a clear numerical guideline to temporary maintenance and to leave the calculation of permanent maintenance to judicial discretion. This partial attempt to improve predictability and equity is doomed to failure. Only an approach that takes into account of both maintenance determinations is capable of ensuring genuinely consistent results that can also promote settlement.

The formula employed by the temporary maintenance law relies heavily on one recommended by the American Academy of Matrimonial Lawyers (AAML) and which is based on its members’ wide experience in divorce across the nation. The formula thus rests on a consensus among experts about fair outcomes. It is easy to use and produces like presumptive results in cases with similar spousal incomes. It should thus promote both consistency and settlement. There is every reason to simply extend the formula to permanent maintenance.

### *B. The Proposed Income Cap Is Fair and Appropriate*

The Commission urges that the formula contained in the temporary maintenance statute should presumptively apply only to the first \$136,000 of spousal income, adjusted for inflation.

This recommendation would produce consistency between the statutory provisions regarding child support and spousal maintenance. It is not obvious why the caps should be different. Moreover, New York courts already have expertise in applying discretionary factors to income above \$136,000 in the child support context. Use of the same approach in spousal maintenance cases thus would likely produce reasonably consistent outcomes.

*C. The Commission's Approach to Maintenance Duration Could Be Improved*

The Commission declines to recommend a formula for the calculation of maintenance duration, recommending instead consideration of the length of the marriage, the time necessary for the supported party to obtain education or training, the normal retirement age of the parties, and "any barriers" facing the party seeking post-divorce income with regard to obtaining appropriate employment. The Commission's failure to recommend a formula appears to rest on the failure of both New York appellate courts and the statutes of other jurisdictions to offer "a clear rationale for deciding the duration of an award."

The lack of a clear rationale is, of course, the very reason that numerical guidelines are desirable for calculating the value of an award. Current New York case law is just as useless in discerning a clear rationale on value as it is with respect to duration.

Moreover, because the factors suggested by the Commission – like the factor list that currently governs the calculation of a maintenance award's value – point in different directions, the result is almost certain to be unpredictable and disparate outcomes. It's not obvious that consistency in monthly payment values produces fair results when it is coupled with disparate periods over which those payments will be made.

The Commission's proposal would thus be greatly improved with a presumptive durational value scheme. To reflect the fact that we may lack consensus on an appropriate duration in many cases, legislation could, as in the Canadian Province of Ontario, establish a presumptive floor and ceiling on duration rather than a fixed number.<sup>11</sup> Certainly such a scheme should rely heavily on marital duration; this factor has historically been the most significant factor in determining whether a ward was permanent or durational; it is a primary determinant of maintenance duration under virtually all existing guidelines.

There is, of course, no magic formula that will work in all cases. But this is also true with respect to maintenance value. Logically, there is no difference with respect to the difficulty of formulating guidelines in these two decision making areas. Nor is there any logical difference in the pressing need for guidelines in these two contexts if we are to avoid disparate outcomes and promote fair, equitable settlements.

*D. The Commission's Proposal for Eliminating Enhanced Earning Capacity as Distributable Marital Property Should Be Coupled with a Clear Reimbursement Maintenance Provision*

The Commission recommends the elimination of enhanced earning capacity as an asset subject to distribution at divorce and urges that spousal contributions to the career should "be addressed in an award of post-divorce income."

The Commission's recommendations reflect longstanding concerns about the necessarily speculative value of enhanced earning capacity, the cost of the valuation process, the possibility of "double counting," and the likely impact of all these difficulties in increasing divorce expense and delay. All other states have rejected the New York approach to enhanced earning capacity, and for the modest group of individuals affected by

New York's distinctive approach, the concerns identified by the Commission are real and deserve attention. The elimination of enhanced earning capacity as an asset subject to division undeniably makes sense.

However, the Commission's recommendation that spousal contributions should "be addressed in an award of post-divorce income" is vague. It would be markedly improved with legislation that establishes a fairly definite entitlement to so-called "reimbursement alimony." California, for example, *requires* reimbursement "for community contributions to education or training of a party that substantially enhances the earning capacity of the party. The amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made."<sup>12</sup> Providing even more detailed guidance, the legislature has specified that the amount to be reimbursed "shall be reduced or modified to the extent circumstances render such a disposition unjust, including, but not limited to . . .":

- (1) The community has substantially benefited from the education, training, or loan incurred for the education or training of the party. There is a rebuttable presumption, affecting the burden of proof, that the community has not substantially benefited from community contributions to the education or training made less than 10 years before the commencement of the proceeding, and that the community has substantially benefited from community contributions to the education or training made more than 10 years before the commencement of the proceeding.
- (2) The education or training received by the party is offset by the education or training received by the other party for which community contributions have been made.
- (3) The education or training enables the party receiving the education or training to engage in gainful employment that substantially reduces the need of the party for support that would otherwise be required.<sup>13</sup>

The statute also explicitly excludes educational loans from marital liabilities, assigning these debts to the spouse whose education the loan financed.<sup>14</sup>

The California statute is sufficiently precise that litigants can ascertain the likely value of their obligations and entitlements. Such precision is highly desirable.

Thus, while the Commission's recommendation is sound – as far as it goes – it could be greatly improved with a clear formula for the availability and calculation of reimbursement alimony.

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<sup>1</sup> See Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 662 tbl. 12 (1991) [hereinafter *Good Intentions*]; Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401 (1996) [hereinafter *Discretionary Decision Making*]; U.S. INFLATION CALCULATOR, <http://www.usinflationcalculator.com/>.

<sup>2</sup> See *Good Intentions*, *supra* note 1, at 659, tbl. 8.

<sup>3</sup> See WILLIAM J. GOODE, *AFTER DIVORCE* 217 (1956).

<sup>4</sup> See BARBARA BAKER, *FAMILY EQUITY AT ISSUE: A STUDY OF THE ECONOMIC CONSEQUENCES OF DIVORCE ON WOMEN AND CHILDREN* (1987); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985); James B. McLendon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987).

<sup>5</sup> See *Discretionary Decision Making*, *supra* note 1, at 483-84 tbl.27, 486. All published trial court decisions on alimony and property distribution were included; sources of published decisions included, in addition to the official

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and West reporters, the *New York Law Journal* and the *Family Law Reporter*, a publication of the Family Law Section of the New York State Bar Association. Appellate decisions were utilized to expand the sample: if the trial court's decision on property distribution and alimony could be determined either from an appellate decision or the record on appeal, the case was included in the sample. Since the records on appeal of appellate cases decided in 1990 were unavailable at the time data collection terminated in August, 1992, only trial decisions could be obtained for the year 1990. The number of 1990 decisions included in the study was thus smaller than the total for each earlier year.

<sup>6</sup> See *id.* at 489.

<sup>7</sup> See *id.* at 488-89 tbl.29.

<sup>8</sup> See *id.* at 494 tbl.31.

<sup>9</sup> See Deborah J. Chase, *Pro Se Justice and Unified Family Courts*, 37 FAM. L.Q. 403, 403 (2003) (surveying reports).

<sup>10</sup> MATRIMONIAL COMMISSION OF THE STATE OF NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (February 2006), available at <http://www.nycourts.gov/reports/matrimonialcommissionreport.pdf> [hereinafter *Matrimonial Commission Report*].

<sup>11</sup> See Government of Canada Dep't of Justice, Spousal Support Advisory Guidelines 2008, <http://www.justice.gc.ca/eng/rp-pr/fl-fj/spousal-epoux/spag/p3.html#a335>.

<sup>12</sup> CAL. FAM. CODE § 2641(b)(1) (Deering 2006).

<sup>13</sup> CAL. FAM. CODE § 2641(c) (Deering 2006).

<sup>14</sup> CAL. FAM. CODE § 2641(b)(2) (Deering 2006).



**Written Testimony for the New York State Senate Public Hearing  
on Spousal Maintenance Calculation**

**September 24, 2013**

Sanctuary for Families is the largest nonprofit in New York State dedicated exclusively to serving domestic violence victims and their children. Each year, Sanctuary helps thousands of victims and their children build safe lives by offering a range of high quality services to meet their complex needs. These services include clinical, legal, shelter, children's and economic empowerment services. Sanctuary also works to end domestic violence and its far-reaching impact through outreach, education, and advocacy. In the past year, Sanctuary provided direct services to over 10,000 victims and their children and engaged in extensive outreach, training, public education and advocacy, connecting with nearly 20,000 community members last year.

Through our work with clients, we have learned that it is impossible to break the cycle of violence in the lives of our clients and their children without addressing their economic circumstances and providing the assistance they need to break their legal ties to abusive spouses through divorce while obtaining the necessary financial support. In a domestic violence case in which an abuser exercises power and control over the victim, the abusive spouse may have used threats, intimidation and violence to dictate the career and educational decisions of the victim, leaving him or her in a state of financial dependency that can have long-lasting effects on the victim's future earning capacity. Sanctuary for Families believes that a formula approach to determine maintenance awards as proposed in Assembly

Bill A-6728-B would help our clients overcome the income disparities that often result from their spouse's economic abuse. We would like to thank the Senators for the opportunity to provide input regarding this important aspect of matrimonial litigation.

Domestic violence victims are often forced to make impossible choices between enduring continued violence or becoming impoverished without the financial support of their abusers. Without access to the financial support they need after divorce, victims remain vulnerable to further abuse and exploitation. Most low to moderate income New Yorkers cannot afford to pay the high cost of litigating maintenance in a contested divorce matter. Furthermore, our clients' experiences have taught us that prolonged litigation is a way in which batterers can continue to abuse their victims. A maintenance formula that allows parties, counsel, and the Courts to determine the presumptive amount and duration of maintenance will allow simpler and more equitable resolution of the financial issues in their cases. With final orders of maintenance seen as a "wild card" due to the lack of discernible standards for determining amount and duration, batterers are unlikely to agree to a settlement that provides adequate maintenance, preferring to engage in excessive and abusive litigation.

Case History: Perkins Family

Lorraine Perkins (not her real name), a 52-year-old client of Sanctuary for Families, had been married to her husband, John Perkins, for 31 years. The couple had two adult children. During the marriage, the client stayed home as a full-time mother until her children reached the ages of 13 and 15. She then entered the workforce as a secretary, earning minimum wage. For the last seven years, both parties had been employed by the same company. Ms. Perkins earned approximately \$22,000, and Mr. Perkins earned approximately

\$50,000 annually. In her request for an interim maintenance award to carry her through until the divorce was final, she asked for \$500 per month or \$6,000 a year. Ms. Perkins badly needed the money. She had fled the marital home to escape abuse, and her husband had sold all of her possessions, including furniture, at a yard sale. At the time of the application, their daughter was 20 years old and Ms. Perkins was also seeking child support until the daughter reached the age of 21. The judge granted Ms. Perkins child support of \$160 per week (\$8,320 a year) and reserved a ruling on maintenance until the daughter turned 21 and the father would be free of child support obligations. After the child support order ended, the judge granted Ms. Perkins interim maintenance of \$250 a month or \$3,000 a year. Mr. Perkins was adamant that he would not settle the case for more than \$250 per month for one year. He could not be convinced to settle the issue of maintenance because nobody could show him a law that definitively established what the appropriate numbers should be.

The parties had a grueling four-day trial on the sole issue of maintenance at a considerable expenditure of judicial resources. It also created hardships for Ms. Perkins, who already had taken off substantial time from her job for court appearances. Fortunately, Ms. Perkins had the benefit of free legal services from Sanctuary for Families, so she could wage the fight for maintenance she badly needed without incurring counsel fees that she would be unable to pay.

At trial, Mr. Perkins called the parties' adult son to the witness stand after intimidating him into testifying, which Ms. Perkins and her counsel saw in the hallway. Her son's testimony was very traumatic for Ms. Perkins and, ultimately, his testimony was helpful to neither party. In addition, as Mr. Perkins chose to proceed unrepresented at trial, Ms. Perkins had to endure several hours of cross-examination by her abusive husband.

Many months after the four-day trial, Ms. Perkins received the Court's decision .She was awarded maintenance of \$550.00 per month (\$6600 annually) for ten years. At age 62, she will have to rely on Social Security and whatever she can save during the next ten years toward retirement. If the current formula used for temporary maintenance were applied to the amount and the proposed durational formula in A, Ms. Perkins would be entitled to non-durational maintenance in the amount of \$566.66 per month, or \$6,800 per year, more than twice what she was awarded under the court's *pendente lite* order prior to the passage of the temporary maintenance statute and more than she received after trial. It would provide her with an annual income of \$28,800, while her former husband's annual income would be \$43,200. The award would last until the parties' actual retirement when it could be modified if the parties' incomes changed significantly upon retirement. Also, importantly, with a maintenance formula in place, the parties would probably have avoided the trial, and the attendant waste of judicial time, financial hardship to Ms. Perkins, and opportunity for Mr. Perkins to continue his abuse of Ms. Perkins through the trial process.

To achieve meaningful divorce reform, we need a statute that includes a formula for determining both the amount and duration of post-divorce maintenance awards in place of the current multi-part test that courts use to determine final awards of maintenance. Using formulas for calculating post-marital income would allow even litigants without access to lawyers and those filing uncontested divorces to obtain this relief. Setting guidelines would provide more equity between the parties after the dissolution of the marriage. Decisions made over the course of a marriage often have the effect of sacrificing one spouse's ability to earn money for the benefit of the entire family. Disparities continue to exist between women's and men's earning power, and this is especially true in cases of domestic violence,



where economic abuse is widely used to control the victim. In families where there are fewer assets than debts to divide, the only resource available to support the parties post-divorce is the income of the breadwinner spouse. When faced with years of continuing litigation wherein abusers can use the legal process to continue to harass their victims, many victims choose to walk away with nothing.

Too often, courts have deemed the needs of the payee to be far more austere than those of the payor despite the fact that the parties enjoyed the same standard of living during the marriage. A determination of “actual needs” of the payee is highly subjective and leads to prolonged litigation about minute details of each spouse’s budget in which the court is asked to decide which personal expenses are priorities. Such paternalism toward non-monied litigants should not be encouraged to continue. In addition, courts frequently underestimate how challenging it can be to find employment sufficient to support one’s household after a significant absence from the workforce. Women who leave their jobs to care for young children often find their earning capacity significantly diminished when they attempt to return to a career after a lengthy hiatus.<sup>1</sup>

An important feature of Assembly Bill A-6728-B that is critically important is that maintenance should not automatically terminate upon the payee’s remarriage. Although this provision is a departure from current New York matrimonial law, the way our laws recognize marriage has changed significantly. Until the twentieth century, marriage legally was a union of unequals: a subservient wife without the right to own property and a husband with an obligation to support his dependent wife. Alimony was only payable to the wife

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<sup>1</sup> See Shelly J. Correll, Stephen Benard & In Paik, *Getting a Job: Is there a Motherhood Penalty?*, Am. J. of SOCIOLOGY 1297 (2007); Jessica Aron, CENTER FOR AMERICAN PROGRESS, LIFETIME LOSSES: THE CAREER WAGE GAP, 1 (Dec. 2008); “The Earning Penalty for Part-Time Work: An Obstacle to Equal Pay,” Report by the Joint Economic Comm., Rep. Carolyn Maloney, Chair (April 20, 2010).

when she was not at fault in causing the dissolution of the marriage and would end when a new husband took over the responsibility of supporting her. In contrast, New York law now views marriage as an economic partnership of equals where fault is no longer a necessary factor and the contributions of both parties to the relationship are considered to have value. There is no logical reason why a spouse's right to collect maintenance earned as a result of her participation in the marital partnership should terminate because she has begun a new relationship after the divorce.

There are a number of myths surrounding the maintenance formula in A-6728-B. Here are some facts explaining why these arguments against a standardized calculation for maintenance are misguided:

**Myth:** The temporary maintenance statute does not provide judges the opportunity to allocate which spouse is responsible for paying the carrying charges on marital properties.

**Fact:** The temporary maintenance guidelines provision of the DRL does not prevent judges from separately directing how the family's living expenses are to be paid during the pendency of the divorce action. DRL 236(B)(8)(b), which remained unchanged upon adoption of the October 12, 2010 revisions to the DRL, provides the court with the discretion to direct payments related to carrying charges as it sees fit. The language of the statute is broad, stating that "in any action where the Court has ordered temporary maintenance, permanent maintenance, distributive award or child support, the court may direct that a payment be made directly to the other spouse or a third person for real and personal property and services furnished to the other spouse, or for the rental or mortgage amortization or interest payments, insurances, taxes, repairs or other carrying charges on premises occupied by the other spouse, or for both payments to the other spouse and to such third persons." In short,

the courts are still possessed of the necessary discretion to determine how carrying charges are paid under the same provision that they used to grant such relief prior to the enactment of the new DRL provision regarding temporary maintenance. Nothing prevents courts from first determining temporary maintenance and then allocating payments for carrying charges based upon the parties' new respective incomes.

**Myth:** The fact that it is difficult for courts to always determine the true and complete income of spouses at the outset of a matrimonial action means that the temporary maintenance statute does not work.

**Fact:** While it may be accurate that there are some cases where the true incomes of the litigants cannot be determined prior to financial discovery, the absence of definitive income in a subset of cases does not provide an adequate reason to remove this form of relief in cases where the incomes of the parties can be established. Moreover, the statute provides for exactly these circumstances in § 236B (5-a)(g), which allows the court to make an order of temporary support based upon the needs of the payee or the standard of living of the parties prior to the commencement of the divorce action if there is insufficient evidence to determine the payor's gross income. Pendente lite applications in matrimonial actions are usually made prior to completion of discovery since their purpose is to provide interim awards prior to a final determination or settlement of the financial issues. The income numbers considered by the court will frequently go up or down once all the evidence is available to the parties and the court. This does not change whether a formula is provisionally applied to them or not. This statute does not alter the way courts handle cases in which party's income cannot be determined. Therefore, this argument does not provide a rational basis for eliminating the temporary maintenance formula.

**Myth:** The CSSA cap of \$136,000 makes sense as the cap for maintenance as well.

**Fact:** First, the current \$136,000 cap for the CSSA is very low in comparison<sup>2</sup> to many other states with comparable or even lower median household incomes. Adjusting for inflation, it does not provide the same level of support as the prior \$80,000 cap provided at the time of its enactment in 1989. In fact, many New York judges routinely award child support up to much higher income levels than the statutory cap. Therefore, as a preliminary matter, the CSSA cap itself should be raised. Second, the child support cap has a different purpose from the maintenance formula cap. While child support is about providing for the needs of the children, maintenance is required to ensure greater parity between two parties to an economic partnership who would otherwise emerge from that partnership in significantly different financial circumstances. One party would be penalized with a lower standard of living after divorce as a result of both parties' joint decisions about their respective careers or, in domestic violence cases, decisions made by the abuser about the victim's education and employment.

**Myth:** If maintenance is awarded according to the statutory calculations, there will not be enough money left over for child support.

**Fact:** The Child Support Standards Act's calculations assume that both parents will be using the appropriate percentage of their respective incomes to pay for the needs of the children.

It is an inaccurate and offensive assumption that payees (more often women) would only use the money they receive in maintenance on themselves and not to help support their

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<sup>2</sup> Minnesota's cap is \$180,000, New Jersey \$187,200, Connecticut \$208,000, Washington D.C. \$240,000, Idaho \$300,000, North Carolina also \$300,000, Oregon \$360,000, New Mexico \$360,000, Maine \$400,000, and Utah \$1,200,000; Delaware, Hawaii, Montana, Wisconsin, Illinois and California essentially have no caps. *See* Lori W. Nelson, High-Income Child Support, 45 Family Law Quarterly 191 (2011).

children. A maintenance formula may place more money in the home where the children most frequently reside. Custodial parents are often the parent that sacrificed a career and are therefore not capable of earning as much as their spouses. Our experience with clients at Sanctuary for Families reveals that clients who are custodial parents are spending much more than the CSSA percentages of their income to ensure that their children's needs are met. If the Court finds that the strict application of the formula would prevent both parties from meeting their basic needs as well as those of the children while the children are in their care, there are deviation factors that can be invoked to adjust the final award.

**Myth:** Maintenance duration based upon the length of the marriage cannot work because maintenance should always end when the payor reaches "retirement age."

**Fact:** Setting termination of maintenance at "retirement age" ignores the reality of retirement today. When people begin to collect social security or pensions, they may continue to work at either a job they have had for many years or a new job, either part-time or full-time. Some people with sufficient income-producing assets may find little or no diminution of income when they leave the workforce. Reaching full social security retirement age (which is somewhere between 66 and 67 depending on date of birth) changes the income of only a limited number of people, and it may well increase the income of a payor. Few of the variables that will determine when and how income shifts as people age are known or predictable at the time of a divorce. Current law realistically and wisely provides modifications of awards when incomes actually undergo significant change.

**Myth:** A formula for calculating maintenance would be sufficiently effective if it was merely advisory rather than mandatory.

**Fact:** Meaningful reform requires standards, not just advisory guidelines. The mandatory application of a formula has generally resulted in reasonable and equitable results with respect to child support for decades. There is no reason why the same cannot be true for maintenance. If the formula is merely advisory, attorneys will still be unable to offer their clients any satisfactory guidance on possible outcomes to expect. Parties will receive different outcomes based merely upon whether their case is pending before a judge who likes using the guidelines or one who does not, yielding inconsistent results to otherwise similarly-situated parties. This unpredictability would continue the current practice of excessive litigation over maintenance that prolongs the divorce process.

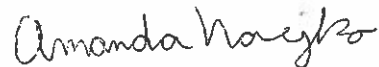
**Myth:** Maintenance formulas create a disincentive for the payee to obtain employment.

**Fact:** There is nothing about the application of a maintenance formula that discourages a payee from obtaining employment, especially when it is necessary to meet the needs of the family. By giving a fixed amount with a fixed duration, the payee will not be penalized for supplementing her income by obtaining employment during the period in which maintenance is being paid. Once the divorce is concluded and the financial issues decided, it will be incumbent upon both parties to plan accordingly for their respective futures. This need for future financial planning does not change with a conversion of the method for determining support. Furthermore, if the court finds that during the pendency of the divorce action, a non-monied spouse is attempting to keep his or her income artificially low for purposes of collecting a higher amount of maintenance, income can be imputed to that party upon proof of a higher earning capacity than he or she claims. There is extensive existing caselaw supporting imputation of income rather than blind reliance upon the

representations of the parties and maintenance calculation legislation does nothing to alter that body of precedent.

Sanctuary for Families urges the Senate to pass legislation with the provisions included in Assembly Bill A-6728-B. Thank you to the New York State Senate for conducting a hearing on this important issue.

Respectfully submitted,



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