

# Working Under the New Guidelines For Spousal Maintenance

*"New York is not all bricks and steel....It is the place where all the aspirations of the Western World meet to form one vast master aspiration..."*  
—H.L. Mencken.

After almost five years of battling amongst the sometimes warring factions of matrimonial and family law attorneys, and hard on the heels of attempts by the courts of this state to navigate the muddied waters created by the temporary maintenance guidelines [DRL §236(B)(5-a)], the New York State Legislature passed a bill (A 7645; S 5678 of 2015), designed to bring clarity and consistency to the determination of temporary and, for the first time, post-divorce maintenance awards in divorce and spousal support proceedings, while still providing the courts with complete flexibility to exercise their discretion where strict application of these yet-to-be-tested guidelines would have an unfair result.

The new legislation is the culmination of months of negotiation and compromise by an informal group of attorneys convened from various organizations,<sup>2</sup> who were brought together by Justice Jeffrey S. Sunshine, chair of the Chief Administrative Judge's Matrimonial Practice Advisory and Rules Committee. Over the course of several months, the group met to address the oftentimes competing concerns of low-income earners, domestic violence victims, middle-class families, and the wealthy. As a result of significant collaboration, the group crafted a bill, based on what they



By  
Alton L.  
Abramowitz



And  
Elena  
Karabatos

believed to be reasonable and fair compromises, which became part of the 2015 legislative package of the Office of Court Administration. Having passed both the Senate and Assembly, it is hoped that the bill will soon be signed into law by Governor Andrew Cuomo.

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mula for post-divorce maintenance, which previously was determined entirely on a discretionary basis by the courts, centered upon consideration of various enumerated statutory factors. In addition, there were no guidelines (either advisory or mandatory) to assist courts in determining the appropriate duration of post-divorce maintenance. As a result, under preexisting law, the only "predictable" element of advice given by practitioners to their clients about post-divorce maintenance was that there was no real, reliable manner of "predicting" the amount and duration of such an award post-trial, leaving lawyers and litigants alike effectively "reading tea leaves" in order to guess at outcome scenarios too varied and numerous to describe.

Importantly as well, the new statute significantly changes the formula by which courts calculate the presumptively correct amount of temporary maintenance to award, by reducing the amount of the payor's income to which the formula applies. In the prior statute, that "cap" was initially \$500,000 (adjusted, pursuant to a built-in cost of living adjustment, to \$543,000 as of the present date). The new statute lowers that income cap to \$175,000, and that cap would now apply to both temporary and post-divorce maintenance.

The new legislation is purposely designed to avoid the potential for double-counting of income in the determination of maintenance awards where the payor spouse is also obligated to pay child support. In addition, while not mandatory, the statute's advisory durational guidelines permit attorneys to advise their clients, with some level of predictability, about the length of time during post-divorce when maintenance might be paid.

Notwithstanding the changes to the current maintenance law, the new law—by providing factors upon which to base deviations from the guidelines' formulas—preserves a court's flexibility in determining the amount of both temporary and post-divorce spousal maintenance awards, affording attorneys the opportunity to argue that the guidelines should not be rigidly applied, and that a more individualized analysis may be necessary.

## The Ability to Deviate

Under the new statute, when determining maintenance awards, courts must apply a formula based on a percentage of the parties' respective incomes, with a cap on the payor's income of \$175,000 (subject to a COLA provision which adjusts the cap every two years beginning Jan. 1, 2016). After applying the formula, the court retains the discretion to not only deviate up or down from the "presumptive guideline amount," but also to adjust the award in high-income cases where the payor

ALTON L. ABRAMOWITZ is a senior partner at Mayerson Abramowitz & Kahn. ELENA KARABATOS is a partner at Schissel Ostrow Karabatos. They took part in the process of developing the new guidelines discussed in this article, in their roles as chair of the Family Law Section of the New York State Bar Association and president of the New York chapter of the American Academy of Matrimonial Lawyers, respectively. JEANINE M. ROONEY, an associate at Schissel Ostrow, assisted in the preparation of this article.

## Guidelines

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spouse's income exceeds the cap, providing practitioners with the opportunity to exercise their persuasive skills in the courthouse and at the negotiating table. The statutory cap need not be viewed as a limit, but rather, as a jumping off point for those situations where a strict application of the guidelines would be unfair or inappropriate.

Obviously, when the payor spouse has not appeared in the action, or has defaulted in providing financial disclosure, or the court is presented with what it finds is insufficient or inconsistent evidence to determine each party's true income, the court cannot apply the formula to determine the presumptive amount of maintenance. Instead, the spouse seeking maintenance need only establish his or her needs and the standard of living prior to the commencement of the action.

The new statute expressly provides that maintenance shall be calculated prior to child support because the amount of maintenance awarded must be subtracted from the payor's income and added to the payee's income as part of the child support calculation. This is intended to provide a more realistic and accurate reflection of the parties' respective incomes for child support purposes, and to ensure that the payor's income is not double-counted as being, in part, available to pay both child and spousal support.

In addition, with respect to the calculation of post-divorce maintenance, the new guidelines include in the definition of income "income from income-producing property distributed or to be distributed" in the action, in order to properly account for the redistribution of income based upon the reallocation of assets between the parties.

After the incomes of each party are determined, the guidelines provide two different formulas to calculate the presumptive amount of both temporary and post-divorce

maintenance, depending on whether the maintenance payor is paying child support to the recipient spouse or not. The prior version of the temporary maintenance statute provided only one formula to apply in all situations; this new two-tiered approach takes into consideration the fact that a payor spouse who is paying child support has less income available to pay maintenance.

The determination of the presumptive amount of maintenance does not necessarily end the inquiry, however. Recognizing that each case has a unique set of facts which may require an individualized determination which varies from the presumptive maintenance award, the guidelines provide attorneys with the opportunity to convince the court that it should make adjustments to that award based on consideration of one or more of the numerous factors set forth in the statute, where the attorney for a spouse believes that the presumptive amount of maintenance is "unjust or inappropriate."

The court may adjust the presumptive award, provided that it sets out the specific factor(s) it considered in a written decision or on the record, along with the unadjusted amount and the reasons for the deviation from that amount, an explanation that cannot be waived by either party. This ability to deviate from the presumptive maintenance amount preserves judicial flexibility to take into account the particular circumstances of those matters in which strict application of the formula will not sufficiently address the parties' needs. (Similarly, the guidelines preserve judicial flexibility where the payor's income is above the income cap, as the court is authorized to award any additional maintenance it deems appropriate, so long as it considers one or more of the statutory factors and provides its analysis in writing or on the record.)

One significant basis for an adjustment of the presumptive award amount in post-divorce maintenance determinations

(and also where a party seeks modification of a future temporary maintenance award) is the termination of a child support award prior to the expiration of the maintenance term, where the maintenance award was lower than it would have been had child support not been awarded. This factor, alone, can be a basis for a deviation from the presumptive amount of maintenance, and is expressly included in the new legislation to ensure that the payee spouse is awarded an adequate amount of maintenance to support himself or

representing the payor spouse bring to the court's attention any ongoing expenses that his or her client will continue to pay for the family—e.g., mortgage, real estate taxes, home equity loan, insurance, health and psychological care, etc. This new element is a major step in avoiding the uncertainty and potential confusion on the part of practitioners—and, at times, the courts—about whether the temporary maintenance award derived by application of the original temporary maintenance calculations was intended to cover such basic

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herself, particularly when a child who lives with the payee spouse becomes emancipated shortly into the maintenance period.

Presumably, given the ability to take into account the termination of a child support award at the time that post-divorce maintenance is being calculated in the first instance, the courts will (if appropriate) fashion a two-tiered award at the conclusion of a divorce action in order to avoid the necessity for the parties to return to court when the child support award has expired.

### New Elements in the Statute

A new feature of the statute is the requirement that, in determining temporary maintenance awards, the court "consider and allocate, where appropriate, the responsibilities of the respective spouses for the family's expenses during the pendency of the proceeding." Notably, this is not a discretionary factor when determining whether to adjust the presumptive amount of maintenance. Rather, it is a statutory requirement. Thus, it is imperative that the attorney

household expenses, or whether a payor spouse could (or, indeed, should) be directed to pay those expenses above and beyond the amount determined by the formula.

Another important aspect of the new legislation is that the court must consider the parties' anticipated retirement assets, benefits and respective retirement eligibility ages, if ascertainable at the time of decision. If such retirement information is not ascertainable at that time, then the actual retirement of the payor spouse, if accompanied by a substantial diminution of income, is a basis for a modification of the award. This new provision is significant because it specifically offers attorneys the unique basis to advocate for a higher, lower or staged maintenance award based on future changes to a party's financial circumstances.

In addition to setting guidelines for determining the amount of maintenance, the new bill provides guidelines for fixing the duration of maintenance awards. The court is required to consider the length of the marriage (the period from the date of marriage until the date of commencement of the action)

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when determining the duration of temporary maintenance. However, a temporary maintenance award must terminate no later than the issuance of a judgment of divorce or the death of either party, with courts having the discretion to impose further limits. (Note—caution will need to be exercised to ensure the income tax deductibility of such awards.)

The guidelines now set out an advisory durational formula for post-divorce maintenance based on the length of the marriage. However, because the formula is purely "advisory," the court is still able to—and should—consider the other enumerated factors in the statute to determine the duration of maintenance (or whether non-durational maintenance is appropriate) on a case-by-case basis. Notwithstanding, a post-divorce maintenance award must terminate on the earlier to occur of the death of either party, or the payee's valid or invalid marriage, or pursuant to DRL §236(B)(9)(b) (modification), or DRL §243 (remarriage or cohabitation), thus ensuring that the payments will be income tax deductible by the payor and taxable to the payee under the Internal Revenue Code and New York state tax law.

Another critical component of the new legislation—and perhaps one of its most significant—is its modification of the factors for the court to consider when determining equitable distribution of marital assets.<sup>4</sup> The new statute eliminates a long-standing precedent requiring a court to assign a value and then to distribute a spouse's "enhanced earning capacity" arising from a license, degree, celebrity goodwill, or career enhancement earned during the marriage. Nevertheless, the new law specifically mandates that the court, when determining an award of equitable distribution, consider the other spouse's direct or indirect contributions to the acquisition of the title holder's enhanced earning capacity. (It is anticipated that there will be litigation over whether enhanced earning capacity will still need to be valued. Presumably, the better view

is that a valuation will no longer be necessary in the interests of judicial economy and flexibility.)

### Effect—and Effective Date

The guidelines do not impact the parties' right to enter into validly executed agreements which deviate from the formula and/or the factors, but it applies only to agreements entered into after the statute's effective date. Notably, the new legislation will not constitute a change of circumstances warranting a modification of prior agreements (or prior maintenance orders).

The revisions to the Temporary Maintenance Guidelines are effective and apply to actions commenced 30 days after the bill becomes law, and all other provisions take effect only as to actions commenced 120 days after the statute becomes law.

### Conclusion

Confucius is credited with saying "I can try a lawsuit as well as other men, but the most important thing is to prevent lawsuits."<sup>5</sup> It was the intent of the proponents and creators of the guidelines to limit litigation by providing lawyers and litigants alike with the tools to settle their disputes over spousal support outside of the courthouse and to limit the in-court contentiousness of those cases that have to be heard by a judge. The practitioner would be wise to keep these goals in mind.

1. Uncle Anthony's Unabridged Analogies (Quotes and Proverbs for Lawyers and Lecturers), Thomas J. Vesper, Thomson Reuters West 2008.

2. Sandra Rivera and Michelle Haskins, represented the Women's Bar Association of the State of New York; Alton Abramowitz and Eric Tepper represented the Family Law Section of the New York State Bar Association; Elena Karabatos represented the New York Chapter of the American Academy of Matrimonial Lawyers; and Emily Ruben and Kate Wurmfeld represented the NYS Maintenance Standards Coalition.

3. The new legislation also modifies DRL §243 to make it gender neutral.

4. DRL §236(B)(9)(d).

5. "Uncle Anthony's Unabridged Analogies (Quotes and Proverbs for Lawyers and Lecturers)," Thomas J. Vesper, Thomson Reuters West 2008.