

FAMILY LAW

N.Y.'s Proposed Maintenance Guidelines

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On June 24, 2015, in a 146-1 vote, the New York State Senate passed Bill A-7645-2015,¹ a "sweeping revision" to the state's Domestic Relations Law (DRL).² Touted by some as the hard-won solution to long overdue issues with the current temporary maintenance formula and the post-divorce maintenance laws, others will find the new legislation to be problematic.

This article analyzes the new maintenance guidelines that the Bill presents through the lens of New York's heralded divorce law reforms enacted since the advent of the equitable distribution law in 1980 and illustrates the workings of the new legislation.

The 2015 Legislation

The new legislation will apply to actions commenced 120 days after it becomes law, except for the amended temporary maintenance formulas which will apply to actions commenced 30 days after the Bill becomes law. Gov. Andrew M. Cuomo must sign or veto the Bill within 10 days of receipt, or it becomes law by default. For purposes of this article, the current law is called, "the old law."

New York: A Reform Leader

Over the last 35 years, New York state has been at the forefront of family law reform, reflecting changes in society's generally accepted principles. The 1980



reforms culminating in the enactment of DRL §236 part B (popularly known as "the equitable distribution law"), "embraced the modern concept of marriage as an economic partnership."³ Its aim was to "eradicate financial inequities suffered by divorcing women" by equitably distributing marital property between parties regardless of who held title.⁴ It also provided for maintenance determined by a number of factors, including contributions by one spouse to the career of the other.

In 1985, the New York State Court of Appeals in *O'Brien v. O'Brien* went a step further and created a new class of marital property, stating that "an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions and non-financial contributions made by caring for

the home and family."⁵ This permitted a spouse's enhanced earning capacity (EEC) arising from a license, degree, celebrity goodwill or career enhancement to be valued as intangible property subject to equitable distribution upon divorce. The intent of *O'Brien* was to compensate fairly spouses who made sacrifices for the career advancement of the other. The Bill legislatively repeals *O'Brien*.⁶

In 2010, Subdivision 5-a was added to DRL §236 part B. The Sponsor Memorandum for the 2010 legislation acknowledged that "the greatest asset of the marriage is frequently the income of the more-moned spouse. The less-moned spouse often invests time and energy supporting his or her spouse's career, raising the children and taking care of the home."⁷ The 2010 Sponsor Memorandum

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also provided the following justification for the enactment of a numeric formula approach to calculating temporary maintenance and the then \$500,000 income cap:

Current law is based on an unprioritized list of factors and does not provide adequate guidance on how to consider each of these factors, resulting in varying monetary and durational awards for couples with similar incomes and similar length of marriage. This lack of consistency and predictability in maintenance awards undermines confidence in the judicial system and encourages costly litigation by impeding the settlement of cases.⁸

The essence of the 2010 reforms and the vast body of jurisprudence preceding them echoed the social reality, notably, the role of the less-earning or non-earning spouse as an essential contributing partner to the success of the marriage and family as well as to the financial success of the higher-earning spouse. For parties with income over the then \$500,000 cap (currently \$543,000 as a result of COLA), the courts used factors, including standard of living during the intact marriage and a needs test.

How the Bill's Formulas Work

The Bill lowers the income cap for the purposes of calculating temporary as well as post-divorce maintenance from \$543,000 to \$175,000, and modifies the maintenance formulas. Unjust maintenance awards derived by application of the new guideline formulas will be ameliorated by a return to a factors analysis. By lowering the cap to \$175,000, numerous cases will be funneled back into the factors analysis that the 2010 legislation was enacted precisely to avoid, as more payees will face unjust results under the new formulas than before.

There are two mandatory alternatives that must be considered in calculating maintenance guideline amounts using the new formulas. The first applies where child support will be paid to the maintenance recipient; the second applies where it will not. Maintenance is calculated prior to child support.

Where the maintenance payee is the custodial parent for child support purposes, maintenance is calculated as follows: (1) subtract 25 percent of the payee's income from 20 percent of the payor's income; (2) multiply the sum of the payor's income

and the maintenance payee's income by 40 percent and subtract the maintenance payee's income from the result; (3) the lower of the two amounts will be the guideline amount of maintenance. When the maintenance payor is the custodial parent for child support purposes, or there are no children: (1) subtract 20 percent of the payee's income from 30 percent of the payor's income, (2) multiply the sum of the maintenance payee's income and the maintenance payee's income by 40 percent and subtract the maintenance payee's income from the result; (3) the lower of the two amounts will be the guideline amount of maintenance.

In order to determine guideline maintenance, spouses must calculate what their respective incomes are under the definition laid out in the Child Support Standards Act (CSSA).⁹ The CSSA definition of income requires the deduction of Federal Insurance Contributions Act (FICA) taxes and New York City or Yonkers income taxes actually paid to be deducted in order to determine the "income" of both parents. Because the CSSA definition of income requires parties to determine their income net of local taxes, the new guideline maintenance formulas require parties to determine their FICA, Medicare and, if applicable, any New York City or Yonkers income taxes in order to arrive at the proper amount of income to use for the maintenance calculation. Then, maintenance must be calculated. For parties with child support obligations, the calculation of local taxes must then be performed a second time for both parties in order to determine the income on which child support will be determined. Counsel will need a working knowledge of local income tax rules, which will vary throughout the state, in order to determine maintenance and child support accurately or to hire an accountant to assist.

As an additional tax consideration, because the lower income cap and modified formulas will produce lower maintenance amounts, there will often be a tax windfall to the government. In many cases, a higher earning payor spouse will be taxed at a higher income tax rate than the lower earning payee will have paid if receiving higher maintenance. This issue will be of particular sensitivity in cases where the parties' total cash flows are barely sufficient or insufficient to support the post-separation lifestyle and every dollar

paid to the taxing authorities will deprive the parties of critical cash resources.

Two Scenarios

For discussion purposes, we present two alternative scenarios illustrating the application of the guideline formulas under the new legislation. In both scenarios, we will assume that the parties have two children (requiring the use of the child support adjusted maintenance formula and the CSSA calculation); that they reside with the mother; and that the parties live in New York City. We have further assumed that the payor-husband will not have additional income tax deductions that reduce his New York City income tax liability.

The Middle Class Earner Scenario. The first calculation illustrates a maintenance computation for a husband who earns \$100,000 annually and a wife who earns \$30,000 annually. In this case, both parties are below both the new and old income caps. However, because of the different percentages used in the new and old formulas, the resulting guideline maintenance under the Bill will differ from the presumptive maintenance under the old law. First, pursuant to the CSSA definition of income, the parties' respective FICA, Medicare, and New York City income taxes are calculated based on each of their annual incomes, without consideration of any maintenance. In this case, the husband's \$100,000 is reduced to approximately \$88,800, and the wife's \$30,000 is reduced to approximately \$26,700 by the taxes that each will pay on his and her respective incomes. We multiply the husband's income of \$88,800 by 20 percent (the appropriate formula when child support will be paid), resulting in a figure of approximately \$17,800. The wife's income of \$26,700 is then multiplied by 25 percent, resulting in \$6,700. The wife's \$6,700 is then subtracted from the husband's \$17,800, resulting in indicated guideline maintenance of \$11,085 per year (or \$924 per month).

For the second calculation, the parties' combined income (pursuant to the CSSA definition) of \$115,500 is multiplied by 40 percent, equaling approximately \$46,200. After subtracting the wife's \$26,700 income, indicated guideline maintenance is \$19,498 (or \$1,624 per month). Following the Bill's instruction to select the lower of the two indicated figures, guideline maintenance will be \$11,085 per year (or \$924 per month)

to be paid by the husband to the wife as presented in Chart 1.¹⁰

Applying the old law's calculations to the same couple would result in presumptive maintenance of \$22,000 per year (\$1,833 per month), as shown in Chart 2.¹¹

This amounts to a difference between the old law and new Bill of approximately \$11,000 per year, \$916 per month.

The Higher Income Earner Scenario. To demonstrate the effect of the new income cap and formulas on higher-earning spouses, we have assumed a husband who earns \$1,750,000 annually, and a wife who earns \$75,000 annually, with the same family make-up and conditions as the examples above.

As above, pursuant to the CSSA definition of income, the parties' FICA, Medicare, and New York City income taxes will be determined to arrive at the proper figure to calculate income for maintenance purposes. This calculation will reduce the husband's income from \$1,750,000 to approximately \$1,650,700 and the wife's income to approximately \$66,600. Due to the \$175,000 income cap, all of the husband's income over \$175,000, i.e., approximately \$1,475,700 (\$1,650,000 - \$175,000 = \$1,475,700), will be ignored in calculating the guideline maintenance. The husband's capped income of \$175,000 will be multiplied by 20 percent (because the maintenance formula applicable to child support applies), resulting in \$35,000 per year. The wife's income of \$66,600 (net of FICA, Medicare, and city income taxes) will be multiplied by 25 percent, resulting in \$16,700 per year. The wife's \$16,700 income will then be subtracted from the husband's \$35,000 resulting in indicated guideline maintenance of \$18,339 per year (or \$1,528 per month).

Next, the parties' combined income (pursuant to the CSSA definition) of approximately \$241,600 will be multiplied by 40 percent (the husband's capped income of \$175,000 plus the wife's after-tax income of \$66,600 = \$241,600; the husband's deductible taxes under the CSSA are considered before application of the \$175,000 income cap), resulting in a figure of approximately \$96,700. After subtracting the wife's \$66,600 from the \$96,700, indicated guideline maintenance will be \$30,013 (or \$2,501 per month). Choosing the lesser of the two indicated amounts, the guideline amount under the formula for the husband who earns \$1,750,000 annually will be only \$18,339 per year (or \$1,528 per month),

as presented in Chart 3.¹² For comparison, the presumptive temporary maintenance under the old law is \$147,900 per year (or \$12,325 per month). Therefore, the lower guideline maintenance under the new legislation is nearly \$130,000 in pre-tax annual maintenance from what otherwise would have been the wife's presumptive temporary maintenance award. Chart 4 illustrates that calculation under the old law.¹³

The remarkable result of the new legislation, that guideline maintenance for a \$1,750,000 per year earner, will amount to \$18,339 as compared to the presumptive \$147,900 per year under the old law (a \$129,561 reduction), suggests that untold numbers of divorcing spouses where the breadwinner payor's income is in excess of the \$175,000 income cap will be returned to the factors analysis approach—and the vagaries and inconsistencies that will necessarily flow therefrom—something the formula approach in the old law was tasked to eliminate in 2010.

The Change in the Duration of Maintenance Awards. The "advisory schedule" that has been added for calculating the duration of post-divorce maintenance drastically reduces the oft-quoted "rule of thumb" that there could be one year of post-divorce spousal maintenance for every two years of marriage. The new advisory "rules of thumb" in longer marriages will be:

- **for zero to 15 years of marriage**, the advisory percentage of length of marriage maintenance awarded is **15 to 30 percent**;
- **for >15 years to 20 years** of marriage, the advisory percentage of length of marriage maintenance awarded is **30 to 40 percent**;
- **for >20 years**, the advisory percentage of length of marriage maintenance awarded is **35 to 50 percent**.

The court is also required to consider anticipated retirement assets, benefits and retirement eligibility, age, income and imputed income on equitable distribution assets and the other factors listed in new DRL §236B 6 E 1(a)-(o) when considering maintenance duration. Actual or partial retirement will be a ground for modification of maintenance if a party seeking modification can prove that retirement will result in a substantial diminution of income. The court is not precluded from awarding non-durational post-divorce maintenance where appropriate.

Conclusion

The Bill reflects a different agenda than that espoused when New York enacted the equitable distribution laws and the reforms engrafted thereon through legislation as recently as 2010 and case law, including *O'Brien*.¹⁴ It remains to be seen whether the governor will sign the Bill. In the meanwhile, family law practitioners will be well advised to consider whether it is in our clients' best interests to file before the Bill may become law or to wait and see whether the Bill actually does become law. The fate of our have and have not clients may depend on such strategic planning.

Endnotes:

1. A.B. A7654-2015, 2015-16 Gen. Assemb., Reg. Sess. (N.Y. 2015) [hereinafter 2015 Legislation], available at http://assembly.state.ny.us/leg/?default_fld=&bn=A07645&term=&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y (same as S5678-2015).

2. Sophia Hollander, "New York State Legislature Passes Alimony Overhaul," *THE WALL STREET JOURNAL*, (June 24, 2015), available at <http://on.wsj.com/1JkFi6J>.

3. Brooke Grossman, "The Evolution of Equitable Distribution in New York," 62 *N.Y.U. ANN. SURV. AM. L.* 607, 607 (2007) (quoting purpose of 1980 enactment of DRL §236 part B).

4. *Id.*

5. 66 N.Y.2d 576 (1985).

6. The new legislation does amend the factor on equitable distribution found at DRL §236 part B (5)(d)(7), by adding: "... in arriving at an equitable division of marital property, 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. A.B. A10985B, 2009-10 Gen. Assemb. Reg. Sess. (N.Y. 2010), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A10984&term=2009&Summary=Y&Action=s=Y&Votes=Y&Memo=Y&Text=Y.

8. *Id.*

9. DRL §240(1-b)(b)(5); FCA §413(1)(b)(5).

10. <http://nylawyer.nylj.com/adgifs/decisions15/072015charts.pdf>, at Chart 1.

11. *Id.* at Chart 2.

12. *Id.* at Chart 3.

13. *Id.* at Chart 4.

14. 66 N.Y.2d 576 (1985).