

# **New York State's New Maintenance Legislation**

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The New York Legislature recently passed a bill essentially providing for a complete overhaul of the law in the State of New York pertaining to maintenance under Domestic Relations Law ' 236 and spousal support under Family Court Act ' 412. The legislation was signed into law by Governor Cuomo late last month. The new legislation provides, among other things, for: 1) modification of the current temporary maintenance statute; 2) the determination of the amount of post-divorce maintenance and spousal support based on specific formulas set forth in the statutes; 3) proposed guidelines for the duration of post-divorce maintenance awards based on the duration of the marriage; and 4) the elimination for purposes of equitable distribution of the enhanced earning capacity attributable to advanced degree and professional licenses and degrees for purposes of equitable distribution.

## **The Formula on Payor's Annual Income Up to \$175,000**

The proposed legislation provides that for purposes of determining maintenance, "income" shall mean income as defined under the Child Support Standards Act (Domestic Relations Law ' 240[1-b]; Family Court Act ' 413[1]) without subtracting maintenance paid to the spouse in the instant action or proceeding. The new bill provides for two sets of calculations based on the respective incomes of the parties. The calculations are applicable to a cap of the first \$175,000 of the payor's income. The income cap is subject to adjustment every two years based on increases in the cost of living.

The first set of calculations is applicable where the maintenance payor is also the non-custodial parent paying child support. Step one of the formula involves calculating 20% of the maintenance payor's income up to \$175,000, less 25% of the payee's income. The second step involves calculating 40% of the total of payor's income up to \$175,000 plus the payee's income, and then subtracting from this sum the payee's total income. The lesser of these two amounts represents the guideline presumptive amount of post-divorce maintenance on the payor's income up to \$175,000.

The second set of calculations is applicable where the maintenance payor is not a non-custodial parent paying child support. When this is the case, step one of the formula involves calculating 30% of the maintenance payor's income up to \$175,000, less 20% of the payee's income. The second step involves calculating 40% of the total of payor's income up to \$175,000 plus the payee's income, and then subtracting from this sum the payee's total income. The lesser of these two amounts also represents the guideline presumptive amount of post-divorce maintenance on the payor's income up to \$175,000 where the payor spouse is either the custodial parent or there are no unemancipated children of the marriage.

By way of example, assuming an income for the payor spouse of \$140,000 and \$40,000 for the payee spouse, the formulas above would result in the following maintenance obligations:

### **Payor with child support obligation**

#### ***First calculation***

20% of payor's income of \$140,000 = \$28,000

25% of payee's income of \$40,000 = \$10,000

\$28,000 less \$10,000 = \$18,000

#### ***Second calculation***

Payor's income of \$140,000 plus payee's income of \$40,000 = \$180,000

40% of \$180,000 = \$72,000 less payee's income of \$40,000 = \$32,000

Guideline amount is \$18,000, which is the lesser of two calculations

### **Payor without child support obligation**

#### ***First calculation***

30% of payor's income of \$140,000 = \$42,000

20% of payee's income of \$40,000 = \$8,000

\$42,000 less \$8,000 = \$34,000

#### ***Second calculation***

Payor's income of \$140,000 plus payee's income of \$40,000 = \$180,000

40% of \$180,000 = \$72,000 less payee's income of \$40,000 = \$32,000

Guideline amount is \$32,000, which is the lesser of the two calculations.

As demonstrated by the foregoing, applying the foregoing formulas may result in a payor of maintenance who is also under a child support obligation to the payee spouse having a presumptive maintenance obligation less than that of an individual with the same income who does not have a child support obligation to the payee spouse.

### **Deviation from the Guidelines**

The court is required to award the amount of maintenance determined pursuant to the aforesaid guidelines unless it finds that such an award would be unjust or inappropriate based on consideration of any one or more of specific factors set forth in the legislation. These factors, as they apply to post-divorce maintenance awards, are as follows: 1) The age and health of the parties; 2) The present and future earning capacity of the parties, including a history of limited

participation in the workforce; 3) The need of one party to incur education or training expenses; 4) The termination of a child support award before the termination of the maintenance award when the calculation of maintenance was based upon child support being awarded which resulted in a maintenance award lower than it would have been had child support not been awarded; 5) The wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration; 6) The existence and duration of a pre-marital joint household or a pre-divorce separate household; 7) 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 459-a of the Social Services Law; 8) The availability and cost of medical insurance for the parties; 9) 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; 10) The tax consequences to each party; 11) The standard of living of the parties established during the marriage; 12) The reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage; 13) The equitable distribution of marital property and the income or imputed income on the assets so distributed (This factor is not part of the amendments to the Family Court Act regarding spousal support and the amendment to the Domestic Relations was pertaining to temporary maintenance awards.); 14) 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 (This factor is not part of the amendments to the provision of the Domestic Relations Law pertaining to temporary maintenance.); and 15) Any other factor that the court shall expressly find to be just and proper. If the court determines that the post-divorce maintenance guideline obligation is unjust or inappropriate and adjusts the obligation accordingly, it must set forth in a written decision or on the record, the unadjusted post-divorce maintenance guideline obligation, the factors it considered, and the reasons it adjusted the post-divorce maintenance obligation. The requirement to do so cannot be waived by either party or counsel.

## **Maintenance on Payor's Income in Excess of \$175,000 Per Year**

The new bill vests discretion with the court whether to award additional post-divorce maintenance with respect to the payor's income in excess of \$175,000 per year. In making such a determination, the court is required to consider certain enumerated factors in the statute. These are the same factors set forth above which the court must consider in deciding whether to deviate from the guidelines in determining maintenance on the payor's income up to \$175,000 per year. Unlike the Child Support Standards Act (D.R.L. ' 240), the maintenance legislation does not provide that the court may determine maintenance on income in excess of the cap based on the statutory formula and/or the factors set forth in the statute.

## **Duration of Post-Divorce Maintenance Awards**

The bill also provides guidelines for the determination of the duration of post-divorce maintenance awards based on the length of the parties' marriage. In view of the fact that spousal support as determined in Family Court by its nature is for an indefinite duration until the marriage is terminated, the bill's amendments to the Family Court Act do not contain corresponding provisions regarding the duration of the award.

The bill provides that the court may consider the following advisory schedule in setting the duration of maintenance:

### ***Percent of the Length of the Marriage for Which Length of the Marriage: Maintenance Will be Payable***

Up to and including 15 years: 15% to 30%

More than 15 up to and including 30%-40%: 20 years

More than 20 years: 35%-50%

It is noteworthy that the foregoing schedule is merely advisory in nature and that there is no presumption/duration as to post-divorce maintenance awards. However, the bill does provide that

whether or not the court utilizes the advisory schedule, it shall consider the factors listed in the statute (the same factors set forth above to be considered for deviation from the guidelines and for maintenance based on the payor's income in excess of \$175,000) and set forth in a written decision or on the record, the factors it considered in setting the duration of maintenance. This provision also cannot be waived by either party or counsel.

With respect to the duration of maintenance, the bill further provides that nothing contained therein shall prevent the court from awarding non-durational maintenance in an appropriate case. However, the legislation provides no guidance as to when non-durational maintenance may be appropriate.

The legislation states that in determining the duration of post-divorce maintenance, the court shall take into consideration anticipated retirement assets, benefits and retirement eligibility age of both parties if ascertainable at the time of the decision. Thus, it is clear that under the provisions of the bill, the anticipated retirement age of the payor spouse may be utilized as a basis for determining the duration of a post-divorce maintenance award, notwithstanding that application of the aforesaid advisory guidelines would in a particular case result in a maintenance award of a much longer duration.

### **Interplay of Maintenance and Child Support**

The new legislation specifically provides that both temporary and post-divorce maintenance awards shall be calculated before child support because the amount of maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation. In this respect, the legislation abrogates a line of cases in which it has been held that although a prospective maintenance award is properly deducted from the payor's income for purposes of determining child support, it should not be included in the payee's income. *See Lee v. Lee*, 18 A.D3d 508, 795 N.Y.S.2d 283 (2nd Dept. 2005) (trial court erred in considering maintenance to be received by the wife as her income for purposes of performing the CSSA calculations); *see also Frost v. Frost*, 49 A.D.3d 1150, 854 N.Y.S.2d 621

(2nd Dept. 2008). The rationale for this rule is that prospective maintenance does not fall within the definition of “income” as set forth in the CSSA, which defines income as gross (total) income as should have been or should be reported in the most recent federal income tax return. *See Harrison v. Harrison*, 255 A.D.2d 490, 680 N.Y.S.2d 624 (2nd Dept. 1998).

Thus, under the new legislation, it would appear that maintenance payments now should be included in the maintenance payee’s income for purposes of calculating child support. This will not only impact the calculation of the parties’ respective pro rata obligations for so called child support “add-on expenses such as child care and healthcare expenses, it may also result in a situation where a non-custodial parent who is the recipient of maintenance is required to pay child support based on the prospective maintenance award.

### **Enhanced Earning Capacity**

Another aspect of the new legislation is that it amends Domestic Relations Law 236(B)(5)(d)(7) to provide as follows: “[t]he court shall not consider as marital property subject to equitable distribution the value of a spouse’s enhanced earning capacity attributable to a license, degree, celebrity goodwill, or career enhancement. However, 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.” This provision of the legislation effectively overrules the holding in the seminal case of *O’Brien v. O’Brien*, 66 N.Y.2d 576 (1985) in which the New York’s highest court, the Court of Appeals, held that the value of the enhanced earning capacity attributable to a professional license or advanced degree earned during the marriage was properly considered a marital asset subject to equitable distribution.

The value of the enhanced earning capacity attributable to an advanced degree or license is established through expert testimony. An interesting aspect of the current legislation is that it mandates that the court, in determining issues of equitable distribution, consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity

of the other spouse. Therefore, it would seem that notwithstanding the fact that the enhanced earning capacity in and of itself will no longer be subject to equitable distribution, expert testimony to establish level of enhanced earnings may still be required in order for the court to take into consideration this factor as mandated by the new legislation.

## **Conclusion**

The new legislations represents a complete overhaul of the law with respect to how post-maintenance and spousal support awards are determined in New York State. In view of the fact that issues of maintenance and spousal support will now be determined by a formula in most cases, it would seem at first glance that the law will provide for more predictability with respect to the resolution of these issues. However, considering the complexity of the legislation, it remains to be seen whether this will be the case or whether attempts to implement the law and comply with its mandates will have a contrary result and engender additional litigation.

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