



SUFFOLK ACADEMY OF LAW
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NEWLY ENACTED MAINTENANCE RULES

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NEWLY ENACTED MAINTENANCE GUIDELINES LEGISLATION
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The maintenance guidelines bill passed the Assembly on June 15, 2015 with just one dissenting vote (A 7645). It passed the Senate unanimously on June 24, 2015 (S 5678). The legislation was signed into law by Governor Cuomo on September 25, 2015 (Chapter 269, Laws of 2015). The following is a summary of key provisions of the new legislation:

- **Effective Date and Applicability:**

Temporary Maintenance Guidelines—30 days after the act becomes law and applies to actions commenced on or after the effective date.

Specifically, 30 days from signing was Sunday, October 25, 2015. Therefore, the temporary maintenance provisions are applicable to matrimonial actions commenced on or after Monday, October 26, 2015.

All other provisions (Post-Divorce maintenance, Family Court spousal support, elimination of enhanced earning capacity)—120 days after the act becomes law and applies to matrimonial actions and Family Court spousal support proceedings commenced on or after the effective date. 120 days

from signing is Saturday, January 23, 2016. Therefore, all of these remaining provisions will be applicable to matrimonial actions commenced on or after Monday, January 25, 2016.

Note—Nothing in the act affects the validity of agreements made prior to the effective date of the legislation.

Nothing in the act prohibits parties from entering into validly executed agreements which deviate from the maintenance guidelines.

Unlike the CSSA which contains strict requirements for agreements which deviate from the child support guidelines, the new maintenance guidelines legislation contains no such provisions. Thus, where parties enter into separation or marital settlement agreements which deviate from the maintenance guidelines, there is no requirement that the parties set forth calculations in their agreements. The statute is intended to be “user friendly” to the drafters of settlement agreements (however, see discussion hereafter concerning the requirements where at least one party is unrepresented).

Further, there is no requirement that settlement agreements set forth the reason for deviation from the guidelines. This is the case for both temporary and post-divorce maintenance. Therefore, judges are not required to scrutinize agreements for “compliance” with the maintenance guidelines legislation (unlike child support provisions which deviate from the CSSA guidelines).

The existence of the new statute, itself, will not constitute a change of circumstances warranting modification of maintenance awards made prior to the effective date of the new legislation, whether by court order or the parties’ agreement. Further, the existence of the statute, itself, does not

change the standard for modification of maintenance awards made in unmerged agreements (extreme hardship).

- **Elimination of Enhanced Earning Capacity:**

DRL 236 B (5) (d) (7) is amended to provide the following:

“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.”

Caveat: The new legislation states that, in determining equitable distribution, the court shall consider a spouse’s direct or indirect contributions during the marriage towards the other spouse’s development of enhanced earning capacity.

Thus, while enhanced earning capacity no longer will be a marital asset, it can be a “factor” for equitable distribution. However, it is not intended that experts be engaged to “value” the enhanced earning capacity unlike in the past when enhanced earning capacity was an asset subject to distribution.

In addition, and as will be more fully noted later, a spouse’s contributions to the career or career potential of the other party can be a factor both for deviating from the maintenance guidelines (presumably upwards) or for making a maintenance award on income in excess of the cap.

- **Definition of Income:**

For purposes of maintenance guidelines, “income” shall mean income as defined in the CSSA but without subtracting maintenance paid to a party spouse in the instant action or proceeding.

In addition, for post-divorce maintenance, the term “income” also includes “income from income-producing property distributed or to be distributed” in the action.

Hypothetically, if an investment account is being distributed as part of equitable distribution, the investment income which each party will be receiving should be factored into each party’s income calculation for purposes of post-divorce maintenance. The same is true for other income producing property which will be distributed (example--rental real estate).

Practice Tip—At the time of trial, consider presenting expert testimony from a tax professional as to what each party’s income from income producing assets is anticipated to be, post-trial, under different distribution scenarios. Depending on which party an attorney is representing, it might be prudent to request that more income producing assets be shifted to the other party if that would affect the ultimate post-divorce maintenance calculation.

- **Determine Maintenance Before Child Support:**

The statute expressly states that maintenance (temporary or post-divorce) shall be calculated **prior to** 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 child support calculation.

In the past, there has been confusion in computing child support as to whether to both subtract maintenance from payor’s income AND add the maintenance back into the recipient’s income since the definition of income under the CSSA is linked to the last filed income tax return. If maintenance is added to recipient’s income for the child support calculation, at a minimum, the add-on percentages are affected (for such things as child care and health-related expenses). The amount of the base

child support obligation could also be affected. The new maintenance guidelines legislation expressly states that the maintenance shall be subtracted from payor's income **and** added to the payee's income as part of the child support calculation.

Further, another piece of legislation (A 7637 and S 5691) made the same clarification, provided, there is an automatic adjustment in the amount of child support upon the termination of maintenance. That bill was entitled "An act to amend the family court act and the domestic relations law, in relation to spousal maintenance and child support in supreme and family court." It passed both the Assembly and the Senate and was signed into law by Governor Cuomo on October 26, 2015. Those provisions will be effective 90 days from signing or at approximately the same date as the effective date of the remainder of the provisions of the new maintenance guidelines legislation.

- **Guidelines Also Applicable To Spousal Support:**

The new legislation establishes guidelines for both temporary maintenance and post-divorce maintenance. Based on the recommendation of the Law Revision Commission, the guidelines also apply to Family Court spousal support proceedings. The same formulas apply for temporary maintenance, post-divorce maintenance and family court spousal support.

The new legislation continues existing case law providing that Family Court spousal support awards are non-durational in nature and continue until the parties enter into an agreement for spousal support, the issuance of a judgment of divorce or other order in a matrimonial action, or the death of either party, whichever first occurs.

Notwithstanding the above, the new legislation expressly states that Family Court may modify a prior Family Court spousal support order upon a showing of a “substantial change in circumstances.” FCA 412 (10).

- **Cap:**

The income cap for temporary maintenance is lowered from the previous \$543,000 to \$175,000 of the payor’s income. The \$175,000 cap also applies to post-divorce maintenance and spousal support.

There is a COLA provision which adjusts the cap every 2 years beginning January 31, 2016.

Unlike the CSSA which takes into consideration “combined parental income,” the new maintenance guidelines only apply to the payor’s income up to the \$175,000 cap.

- **Two Sets of Formulas:**

- A. **For Income Below the Cap:**

Where the payor’s income is lower than or equal to the income cap (\$175,000), there are two different maintenance formulas. One formula is used where no child support is being paid by the maintenance payor to the recipient spouse. For this formula, there either are no unemancipated children or the maintenance payor is also the custodial parent for child support purposes.

A different maintenance formula is used where the maintenance payor is also the non-custodial parent paying child support to the recipient spouse.

- **Where the Maintenance Payor Is Also the Non-Custodial Parent Paying Child Support To the Recipient Spouse:**

Step 1—20% of Payor's income up to \$175,000 MINUS 25% of Payee's income.

Step 2— Payor's income up to \$175,000 PLUS Payee's income X 40% MINUS Payee's income.

Step 3—The lower of the two amounts above is the guidelines figure.

Hypothetical:

Payor, the non-custodial parent, has \$100,000 in income as defined in the statute (after subtracting social security and Medicare taxes). Payee, the custodial parent, has \$50,000 in income (after subtracting social security and Medicare taxes).

Step 1--\$100,000 x 20% = \$20,000

\$ 50,000 x 25% = \$12,500

\$20,000 - \$12,500 = **\$7,500**

Step 2--\$100,000 + \$50,000 = \$150,000 x 40% =\$60,000

\$60,000 - \$50,000 = **\$10,000**

Step 3—Compare the two figures above. The lower figure (\$7,500) is the guidelines amount.

- **Where No Child Support Is Being Paid By the Maintenance Payor to the Recipient Spouse:**

But for the amount of the income cap, this is the same formula used in the previous temporary maintenance guidelines.

Step 1—**30%** of Payor’s income up to \$175,000 MINUS **20%** of Payee’s income.

Step 2— Payor’s income up to \$175,000 PLUS Payee’s income X 40% MINUS Payee’s income.

Step 3—The lower of the two amounts above is the guidelines figure.

Hypothetical:

Payor has \$100,000 in income, as defined in the statute (after subtracting social security and Medicare taxes). Payee has \$50,000 in income (after subtracting social security and Medicare taxes). There either are no unemancipated children or the payor is the custodial parent-- so no child support is being paid by the payor to the payee.

Step 1--\$100,000 x 30% = \$30,000
\$ 50,000 x 20% = \$10,000

\$30,000 - \$10,000 = **\$20,000**

Step 2--\$100,000 + \$50,000 = \$150,000 x 40% =\$60,000
\$60,000 - \$50,000 = **\$10,000**

Step 3—Compare the two figures above. The lower figure (\$10,000) is the guidelines amount.

Note---The Office of Court Administration is in the process of preparing a “maintenance calculator” which will be available at OCA’s website (www.nycourts.gov/divorce). Judges, attorneys and members of the public will be able to access the online calculator. A version is also being prepared

which combines both maintenance and child support calculations. As a word of caution, a maintenance calculator is only as good as the data inputted into it. Therefore, a “worksheet” will be available online by which “income” can first be determined, per the definition of income in the CSSA. Once the adjusted income figure is determined (for example, after subtracting social security and Medicare withholdings), the “adjusted” income figure for each person can be inserted into the actual calculator.

Practice Tip—Prior to the preliminary conference, consider filling out the work sheet and performing the calculations on the calculator. The work sheet and actual calculations can be printed off the website and retained for the file and also presented to the court at the preliminary conference. Having actual numbers on hand at the preliminary conference may facilitate settlement discussions and potentially obviate the need for motion practice.

B. For Income Above the Cap:

Where the payor’s income exceeds the \$175,000 cap:

Step 1—First, determine the guidelines amount up to and including the \$175,000 cap using the appropriate formula (see above).

Step 2—For income above the cap, the amount of additional maintenance, if any, shall be within the discretion of the court taking into consideration **one or more** of the numerous factors set forth in the statute. These are also the “deviation factors” (see discussion below).

The court shall set forth the factors it considered and the reasons for its decision in writing or on the record. This requirement may not be waived by either party or counsel. There are “13” factors for temporary maintenance and “15” for post-divorce maintenance.

The following are the 13 temporary maintenance factors which are to be considered in determining the amount of maintenance, if any, on the payor’s

income exceeding the \$175,000 cap or where there is to be an adjustment or “deviation” in the guidelines amount:

(A) The age and health of the parties;

(B) the present or future earning capacity of the parties, including a history of limited participation in the workforce;

(C) the need of one party to incur education or training expenses;

(D) the termination of a child support award during the pendency of the temporary maintenance award when the calculation of temporary maintenance was based upon child support being awarded and which resulted in a maintenance award lower than it would have been had child support not been awarded;

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

(F) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(G) 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;

(H) the availability and cost of medical insurance for the parties;

(I) 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;

(J) the tax consequences to each party;

(K) 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 forgone or delayed education, training, employment or career opportunities during the marriage; and

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

The following are the 15 post-divorce maintenance factors which are to be considered in determining the amount of maintenance, if any, on the payor's income exceeding the \$175,000 cap or where there is to be an adjustment or "deviation" in the guidelines amount:

(A) The age and health of the parties;

(B) the present or future earning capacity of the parties, including a history of limited participation in the workforce;

(C) the need of one party to incur education or training expenses;

(D) 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;

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

(F) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(G) 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;

(H) the availability and cost of medical insurance for the parties;

(I) 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;

(J) the tax consequences to each party;

(K) 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 forgone or delayed education, training, employment or career opportunities during the marriage;

(M) the equitable distribution of marital property and the income or imputed income on the assets so distributed;

(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.

All of the 13 temporary maintenance factors are included in the 15 post-divorce maintenance factors. The 2 post-divorce maintenance factors which are not included as part of the temporary maintenance factors are items “(M)” and “(N).”

Practice Tip—Factor “(N)” deals, in part, with contributions of the payee spouse to the other’s career or career potential. To the extent that the payee contributed to what previously would have been enhanced earning capacity (degree, license, certification, etc), an argument could be made for a higher maintenance award on income above the cap---or for an upward deviation in the maintenance guidelines amount on income below the cap.

Note—For Family Court spousal support awards, the same post-divorce maintenance factors are used for determining the spousal support on payor’s income exceeding the cap or where there is an adjustment or “deviation” in the guidelines amount, with the exception of the equitable

distribution factor (“M”). Thus, there are “14” factors for Family Court spousal support awards.

Under the new legislation, a court is required to set forth a reason for whatever it does for income above the cap. Therefore, whether it awards additional maintenance on the payor’s excess income or not, the court must set forth a rationale for its decision based upon consideration of one or more of the deviation factors. The intent of the statute is not that temporary or post-divorce maintenance simply be “capped” at \$175,000 of the payor’s income regardless of the extent of payor’s income. Rather, the intent is that courts use their discretion in making maintenance awards on the excess income through a factor-based analysis tailored to the facts of the case.

Note—while a court must give its rationale for whatever maintenance it awards on the payor’s excess income, there is no such requirement for written settlement agreements or stipulations placed on the record. Settlement agreements need not set forth a rationale or “deviation factors” where payor’s income exceeds the cap.

It is important not to think of the maintenance guidelines in the same terms as the Child Support Standards Act. For child support, formula-based calculations must still be made on income exceeding the CSSA cap. This is not the case with the new maintenance legislation. There is nothing in the statute that says that the formula should be used for any income above the cap. The determination of the amount of maintenance on the payor’s excess income is intended to be **factor based only**, with no formulaic calculations.

- **Deviation from Guidelines:**

The court shall award the guideline amount of temporary or post-divorce maintenance or spousal support up to the \$175,000 cap in accordance with the appropriate formula unless it finds that the guideline amount is “unjust or inappropriate.” The finding of “unjust or inappropriate” shall be based

upon consideration of any one or more of numerous factors set forth above. The “deviation” factors are the same factors which are used for determining the amount of maintenance on payor’s income exceeding the cap.

Where the court finds that the guideline amount is unjust or inappropriate and where it adjusts the amount, the court shall set forth, in a written decision or on the record, the guideline amount, the factors it considered, and the reasons the court adjusted the guideline amount. The requirement that this be done on the record or in writing shall not be waived by either party or counsel. However, as previously noted, if the parties settle their case and enter into an agreement which deviates from the guidelines amount, they do not need to set forth the factors considered or the reason for the deviation.

Practice Tip---A deviation from the maintenance guidelines up to the cap is not limited to a lower award than the amount required by the appropriate formula. In an appropriate case, an upward adjustment may be appropriate.

As previously noted, where one spouse contributed towards the other’s attainment of what previously was considered “enhanced earning capacity,” an upward adjustment in post-divorce maintenance may be appropriate. Further, if the formula which results in less maintenance is used because child support is also being paid and the child support ends prior to the termination of the maintenance obligation, an upward deviation may be appropriate. Any of the factors can be cited as a reason for deviating from the maintenance guidelines.

- **Low Income Adjustment:**

Where the guidelines amount of temporary or post-divorce maintenance would reduce the payor’s income below the self-support reserve for a

single person (currently \$15,890), there is an adjustment in the guideline amount. Specifically, in these low income cases, the guideline amount will 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 or post-divorce maintenance shall be paid.

- **Unrepresented Party:**

Where either or both parties is unrepresented, the court shall not make a maintenance order unless it informs the unrepresented party of the temporary or post-divorce guideline obligation. If you represent a party and the other side is unrepresented, the best practice is to insert the guideline obligation in the marital settlement agreement. That way, when the divorce judgment is submitted to the judge, the court will have "complied" with the notice requirement by virtue of incorporating the settlement agreement into the Judgment of Divorce.

The Office of Court Administration is currently working on a notice form which will be part of OCA's uncontested divorce packet. The form which is being developed will arguably meet the statute's notice requirement if attached to the divorce summons or provided to the unrepresented party at a preliminary conference or at some point during the course of the matrimonial action, prior to signing of an order or judgment.

- **Default or Insufficient Evidence of Income:**

Where a payor has defaulted, or where the court is presented with insufficient evidence to determine income, the maintenance award shall be based upon the **needs** of the payee or the parties' **standard of living** prior to the commencement of the divorce action, **whichever is greater**. The award may be retroactively modified upward, without a showing of a

change in circumstances, upon presentation of newly discovered evidence.

- **Temporary Maintenance—Allocation of Expenses:**

In determining temporary maintenance, the court shall consider and allocate, where appropriate, the parties' respective responsibilities for the family's expenses during the pendency of the action.

The statute clearly intends that, in every case where temporary maintenance is ordered, the court shall determine which spouse will pay the carrying charges on the marital residence and the household expenses—and the manner in which those expenses are to be allocated between the parties.

If you represent that payor spouse, and the guidelines amount is being ordered, request the court to direct the payee to be responsible for the household carrying charges and other expenses. Conversely, if the payor is already paying some portion of the carrying charges and household expenses, argue that there should be a downward adjustment in the temporary maintenance award.

- **Temporary Maintenance—Duration:**

Temporary maintenance shall terminate no later than the issuance of a judgment of divorce or the death of either party. Supreme Court has the power to limit the duration of temporary maintenance.

Further, the temporary maintenance award shall not prejudice the rights of either party regarding a post-divorce maintenance award.

- **Post-Divorce Maintenance—Duration:**

The statute sets forth an **advisory** durational schedule for post-divorce maintenance tied to the length of the marriage.

The “length of the marriage” is defined as running from the date of the marriage until the date of commencement of the divorce action.

In determining the duration of post-divorce maintenance, the court must set forth, in writing or on the record, the factors it considered. This is true, regardless of whether or not it follows the advisory schedule. These are the same 15 factors previously set forth above which are used in determining the amount of maintenance on income above the cap or when deviating from the guidelines amount.

Note—there is no such requirement for attorneys or litigants who settle their case with a written settlement agreement or a stipulation on the record. Thus, parties who settle their case do not need to set forth a reason for the duration of the post-divorce maintenance, even where the duration varies from the advisory schedule.

The following is the advisory schedule for post-divorce maintenance:

| <u>Length of the Marriage</u> | <u>Percent of the Length of the Marriage For Which Post-Divorce Maintenance Will Be Payable</u> |
|--------------------------------------|--|
| Zero to 15 Years | 15% to 30% |
| More than 15 to 20 years | 30% to 40% |
| More than 20 years | 35% to 50% |

Importantly, the statute also states the following:

“Nothing herein shall prevent the court from awarding non-durational maintenance in an appropriate case.”

Hypothetical Durations of Post-Divorce Maintenance Per the Advisory Schedule:

| <u>Length of Marriage</u> | <u>Range of Duration</u> |
|----------------------------------|---------------------------------|
| 3 years | .45 years to .9 years |
| 5 years | .75 years to 1.5 years |
| 10 years | 1.5 years to 3 years |
| 13 years | 1.9 years to 3.9 years |
| 16 years | 4.8 years to 6.4 years |
| 20 years | 6.0 years to 8.0 years |
| 23 years | 6.9 years to 9.2 years |
| 25 years | 7.5 years to 10 years |
| 28 years | 9.8 years to 14 years |
| 30 years | 10.5 years to 15 years |
| 35 years | 12.25% years to 17.5 years |

• **Termination of Post-Divorce Maintenance:**

Maintenance terminates upon the:

- a. death of either party, or
- b. upon the payee's valid or invalid marriage, or

- c. upon modification pursuant to DRL 236 B 9 b (traditional modification grounds), or
- d. upon modification pursuant to DRL 248 (cohabitation).

- **Retirement and Maintenance:**

In determining the **duration** of post-divorce maintenance, the court shall take into consideration:

- anticipated retirement assets;
- benefits; and
- the retirement eligibility ages of both parties if ascertainable at the time of the decision.

If not ascertainable at the time of the decision, the actual **full or partial retirement** of the payor with a substantial diminution of income shall be a basis for modification of maintenance.

Note--This modification provision regarding retirement only applies to maintenance awards which are made after trial, not pursuant to an agreement.

Another section of the new maintenance legislation states the following:

“Upon application of either party, the court may annul or modify any prior order or judgment made after trial as to maintenance, upon a showing of the payee’s inability to be self-supporting or upon a showing of a substantial change in circumstance including financial hardship or upon actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances.”

Practice Tip—It remains to be seen how courts will deal with the link between post-divorce maintenance and retirement. If the payor is close to retirement at the time of trial, it would seem that retirement assets and

benefits and retirement eligibility ages would be more easily “ascertainable” than if anticipated retirement is years away. Depending on which party you represent, consider putting in proof at trial concerning the anticipated retirement age and what each party will likely receive in the way of benefits at the time of retirement.

If you represent the payee and the payor subsequently moves to modify maintenance on the grounds of retirement, argue that the payor’s retirement assets and benefits and retirement eligibility ages were “ascertainable” at the time of trial. Also argue that payor will not have a substantial diminution in income if that is the case. Conversely, if you represent the payor, argue that payor’s retirement assets and benefits and retirement eligibility ages were not easily ascertainable at the time of trial and that, further, that payor will, in fact, have a substantial diminution in income as a result of retirement. Also try to argue that your client’s full or partial retirement will result in a “substantial change in financial circumstances.”

As previously noted, the existence of the new statute does not open the door to modification of prior maintenance awards, whether arising by court order or the parties’ agreement. In addition, the statute does not change the standard for modification of maintenance awards made in unmerged agreements (extreme hardship).

It is extremely difficult to modify maintenance, either up or down, if the provisions are found in an agreement which is incorporated but not merged into a Judgment of Divorce. Therefore, even if a party retires, it is difficult to modify the maintenance provisions of an unmerged agreement given the “extreme hardship” standard.

Depending on which party you represent, consider changing the modification standard in the agreement, itself, to something other than “extreme hardship.” Alternatively, depending on the facts of the case and which party is being represented, consider “merging” the maintenance provisions into the Judgment of Divorce. Clients should be made aware of the risks and benefits of the various options and certainly made aware of the applicable modification standard prior to settling their cases.

In addition, if a party, in the future, moves to modify a maintenance award made prior to the effective date of the new statute, the guidelines shall not apply. This is true whether the maintenance obligation arose in an agreement or by court order after trial.

- **DRL 248 Made Gender Neutral**

DRL 248 was modified to provide that a court may modify maintenance upon proof that the “payee” is holding “himself or herself” out as the spouse of another person, although not married to such other person. Under prior law, the statute was not gender neutral although case law interpreted it as such. Under DRL 248, it is still very difficult to modify maintenance on the grounds of cohabitation as it is difficult to prove that a party is holding himself or herself out as the spouse of another person although not married to such person.

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Eric A. Teppner is a partner in Gordon, Teppner & DeCoursey, LLP. Mr. Teppner graduated from Hamilton College with a B.A. degree, *magna cum laude*, in 1979, and from George Washington University Law School with a Juris Doctor degree, with honors, in 1982. He has been selected by his peers for inclusion in "The Best Lawyers in America," for the 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015 editions. He was named the Family Law "Lawyer of the Year" in the Albany area by Best Lawyers for 2013. He is also listed in the 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015 New York Super Lawyers-Upstate Edition. In 2011, he was named one of the top 10 divorce lawyers in New York State by Avvo, as published in *Arrive Magazine*. Of the top ten divorce lawyers in New York State, he was the only one selected from north of Westchester County

Mr. Teppner is admitted to the New York and Massachusetts Bars, and to the U.S. District Court for the Northern District of New York and the District of Massachusetts. In June 2014, he was appointed by the Hon. A. Gail Prudenti to serve on the Matrimonial Practice Advisory and Rules Committee chaired by the Hon. Jeffrey A. Sunshine. He is the only representative from the 4th Judicial District appointed to the Committee. He serves on both the legislation and rules subcommittees for the Matrimonial Practice Advisory and Rules Committee and has worked extensively on the issue of maintenance guidelines. He served on the predecessor statewide Matrimonial Practice Advisory Committee for the Office of Court Administration since 1999.

Mr. Teppner serves on the Executive Committee of the New York State Bar Association, Family Law Section, and currently serves as one of the four elected officers of the section. In 2012, he was elected Financial Officer and in 2014, he became Secretary. He co-chaired the Family Law Section's Committee on Substantive Law Related to the Family, and also served on the Family Law Section's ethics hot line. He also served on the CLE Committee for the New York State Bar Association. He is a member of the Saratoga County Bar Association, and chairs the matrimonial committee for the Schenectady County Bar Association. He is also a member of the Capital District Women's Bar Association.

Mr. Teppner has lectured extensively, and written course material on family law, divorce, and matrimonial issues for New York State Bar Association CLE programs throughout New York State. He has also lectured on matrimonial law at Judicial Education Seminars ("judge school")

on many occasions throughout the years. He has also lectured on matrimonial law to court attorneys for the Office of Court Administration. Mr. Tepper has lectured on matrimonial law to the Appellate Division, Third Department. Mr. Tepper has also lectured on matrimonial law to the New York State Supreme Court Justices' Association. He has lectured on newly enacted divorce and family law legislation at a legislative continuing legal education program for the New York State Senate, New York State Assembly and staff counsel. He has lectured for the New York State Council on Divorce Mediation, Business Law Institute, Capital District Women's Bar Association, Schenectady County Legal Professionals, Schenectady County Bar Association and the Nassau County Bar Association Matrimonial Committee.

Mr. Tepper was a founding member of the Board of Directors of the New York Chapter of the Association of Family and Conciliation Courts ("AFCC"). He also served on the Board of Directors for the Center for Community Justice. In 2012, he joined the Board of Directors of The Giving Circle, a non-profit organization which performs charitable work in Saratoga Springs, surrounding communities and in Africa. Since 2003, Mr. Tepper has served on the Editorial Board for the Lexis/Nexis publication on New York Matrimonial Actions.

A COMPREHENSIVE LOOK AT THE NEW MAINTENANCE GUIDELINES STATUTE

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A COMPREHENSIVE LOOK AT THE NEW MAINTENANCE GUIDELINES STATUTE¹

New York State has passed a new law which brings clarity and consistency to a method of determining both temporary and post-divorce maintenance awards in matrimonial actions, while still providing the Courts with flexibility to exercise their discretion in appropriate cases. This new law was signed by Governor Andrew Cuomo on September 25, 2015.

I. DETERMINING THE AMOUNT OF MAINTENANCE

(Note: the following provisions apply to both temporary and post-divorce maintenance determinations, except as otherwise specified.)

Except where the parties have entered into an agreement providing for maintenance, the Court in a matrimonial action, upon application by a party, shall make its award of temporary maintenance in accordance with DRL § 236(B)(5-a) and its award of post-divorce maintenance in accordance with DRL § 236(B)(6).

A. Income Cap

- Under the new statute, when determining maintenance awards, the Court shall first apply one of two formulas based on the parties' respective incomes, with a cap on the Payor's income of \$175,000. This is a significant reduction from the current statute's cap of \$543,000.

¹ Thank you to Jeanine M. Rooney, Esq. for her assistance in the preparation of these materials.

- The income cap is subject to a Cost of Living Adjustment, which adjusts the amount of the cap every two years beginning January 1, 2016.
- For purposes of maintenance guidelines, "income" shall mean income as defined in the CSSA without subtracting maintenance paid to a party spouse in the instant action or proceeding. For post-divorce maintenance only, in determining income, the Court shall also include income from income-producing property distributed or to be distributed.

B. Calculations where Payor's income is below or equal to the income cap

1. Formula to be used where the Payor is also paying child support to the Payee

- Step 1: Calculate 20% of the Payor's income (up to \$175,000) and subtract 25% of the Payee's income.
- Step 2: Calculate 40% of the parties' combined income (capping the Payor's income at \$175,000) and subtract the Payee's income.
- Step 3: Compare the resulting amounts from Steps 1 and 2. The lesser amount will be the presumptive amount of maintenance.
- Notably, the new statute expressly provides that maintenance shall be calculated prior to child

support because the amount of maintenance awarded 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.

2. Formula to be used where the Payor is NOT paying child support to the Payee

(i.e., in situations where there are either no unemancipated children or the maintenance Payor is also the custodial parent for child support purposes)

- Step 1: Calculate 30% of the Payor's income (up to \$175,000) and subtract 20% of the Payee's income.
- Step 2: Calculate 40% of the parties' combined income (capping the Payor's income at \$175,000) and subtract the Payee's income.
- Step 3: Compare the resulting amounts from Steps 1 and 2. The lesser amount will be the presumptive amount of maintenance.

C. Calculations where Payor's income is above the income cap

- Where the Payor's income exceeds the income cap, the Court shall first determine the guideline amount using one of the two formulas set forth above, capping the Payor's income at \$175,000.
- Then, it is within the Court's discretion whether to award any additional maintenance based on the amount of

income exceeding the cap. In making such a determination, the Court shall consider "any one or more" of a list of factors enumerated in the statute.

II. ABILITY TO DEVIATE

- Notwithstanding the formulas set forth above, the new statute still provides the Court with flexibility to deviate from the presumptive amount of both temporary and post-divorce maintenance. Thus, the Court may, in its discretion, adjust the award of maintenance in situations where:
 - (i) the payor's income exceeds the statutory cap of \$175,000; or
 - (ii) the Court finds that the guideline amount of maintenance would be "unjust or inappropriate".
- If the Court chooses to do so, it SHALL consider any "one or more" [*emphasis added*] of a list of factors set forth in the statute.
- When the Court awards an additional amount of maintenance for income above the cap, the Court shall set forth, either in writing or on the record, the factor(s) it considered and the reasons for the deviation. This requirement may not be waived by either party or counsel.
- When the Court determines that the guideline amount of maintenance would be "unjust or inappropriate", the Court

shall set forth, either in writing or on the record, the factor(s) it considered, the reasons for the deviation, and also the guideline amount of maintenance. This requirement may not be waived by either party or counsel.

A. Temporary Maintenance Factors (DRL § 236(B)(5-a)(h)(1))

- (1) The age and health of the parties;**
- (2) The present or 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 during the pendency of the temporary maintenance award when the calculation of temporary maintenance was based upon child support being awarded and 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; and
 - (13) Any other factor which the Court shall expressly find to be just and proper.
- When determining temporary maintenance, in addition to considering the factors, the new statute also requires the Court to consider and allocate, where appropriate, the parties' respective responsibilities for payment of the family's expenses during the pendency of the action.

B. Post-Divorce Maintenance Factors (DRL § 236(B)(6)(e)(1)

- (1) The age and health of the parties;
- (2) The present or 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* *(note: income from income producing assets is also included in the definition of "income" for*

*** These factors do not apply to temporary maintenance.**

calculating the guideline amount of post-divorce maintenance);

(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* (*note: this is also a factor in determining equitable distribution of marital property*); and

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

- The new law expressly provides that in any decision made pursuant to the post-divorce maintenance guidelines, the Court shall consider the effect of a barrier to remarriage on the foregoing deviation factors.

C. Determining maintenance where Payor defaults or income information is not available

- In situations where the Payor has defaulted, or the Court is otherwise presented with insufficient evidence to determine income, the maintenance award shall be based upon the needs of the Payee or the parties' standard of living prior to the commencement of the divorce action, whichever is greater.
- For temporary maintenance, such an award may be retroactively modified upward without a showing of a change in circumstances upon a showing of newly discovered evidence. For post-divorce maintenance, there must be a showing of *substantial* newly discovered evidence.

III. DURATION OF MAINTENANCE

A. Duration of Temporary Maintenance

- Temporary maintenance shall terminate no later than the issuance of a judgment of divorce or the death of either party, with discretion to the Court to impose further limits.

B. Duration of Post-Divorce Maintenance

- A new feature introduced by the statute is its provision for an *advisory* durational formula for post-divorce maintenance based on the length of the marriage (defined as the period from the date of marriage until the date of commencement of the action), as follows:

| Length of Marriage | Percent of the Length of the Marriage for Which Maintenance will be Payable |
|-------------------------|---|
| 0 – 15 years | 15% - 30% |
| More than 15 – 20 years | 30% - 40% |
| More than 20 years | 35% - 50% |

- In determining the duration of post-divorce maintenance, whether or not the Court utilizes the advisory schedule, the Court SHALL also consider the deviation factors enumerated in the statute.
 - The factor(s) the Court considered in determining the duration of maintenance shall be set forth either in a

written decision or on the record. This requirement cannot be waived by either party or counsel.

- The new statute also now requires the Court to consider, when determining the duration of post-divorce maintenance, 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.
- The new statute does NOT prevent the Court from awarding non-durational maintenance in an appropriate case.
- Notwithstanding the foregoing, post-divorce maintenance shall terminate upon the earlier to occur of the death of either party, the Payee's valid or invalid marriage, or pursuant to DRL § 236(B)(9) (modification) or DRL § 248 (remarriage or cohabitation).

IV. OTHER CONSIDERATIONS APPLICABLE TO BOTH TEMPORARY AND POST-DIVORCE MAINTENANCE

A. Unrepresented Parties

- Where either or both parties are unrepresented, the Court shall inform the unrepresented party or parties of the guideline amount of maintenance.

B. Agreements

- The new statute does NOT:
 - impact the parties' rights to voluntarily enter into agreements or stipulations that deviate from the presumptive award of maintenance; or
 - affect the validity of agreements, stipulations or Orders providing for maintenance made prior to the effective date of the new statute.

C. Modification

- The new statute does NOT constitute a change of circumstances warranting modification of an Order or an agreement providing for maintenance that existed prior to the effective date of the new maintenance guidelines.
- DRL § 236(B)(9)(b)(1)
 - The new law clarifies that modification of maintenance orders/judgments under this statute applies only to orders/judgments made after trial;
 - deletes as a basis for modification the termination of an award of child support; and
 - adds as a basis for modification actual full or partial retirement of the Payor if the retirement results in a substantial change in financial circumstances.

D. Effect of Temporary Award on Post-Divorce Award

- The new law expressly provides that the temporary maintenance award shall not prejudice the rights of either party regarding a post-divorce maintenance award.

E. Effective Dates

- The revisions to the temporary maintenance guidelines go into effect on Sunday, October 25, 2015 (effectively, Monday, October 26, 2015), and apply only to actions or proceedings commenced on or after that date.
- The revisions to the post-divorce maintenance guidelines go into effect as of Saturday, January 23, 2016 (effectively Monday, January 25, 2016), and apply only to actions or proceedings commenced on or after that date.

V. ELIMINATION OF ENHANCED EARNING CAPACITY AS AN ASSET

- The new law amends DRL § 236(B)(5)(d)(7) by explicitly eliminating a long-standing legal precedent requiring a Court to assign a value to a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement earned during the marriage and then distribute that "asset".
- However, the new law still requires the Court to consider the other spouse's direct or indirect contributions to the acquisition

of such enhanced earning capacity as a factor when making an award of equitable distribution.

- This aspect of the new law goes into effect as of Saturday, January 23, 2016 (effectively Monday, January 25, 2016), and applies only to actions or proceedings commenced on or after that date.

VI. ADDITIONAL CHANGES UNDER THE NEW STATUTE

- **DRL § 248**
 - The new law makes this statute for modification of maintenance awards based on the Payee spouse's remarriage or cohabitation gender neutral.
- **FCA § 412**
 - The new law now mandates that the Family Court, upon application by a party, make an award for spousal support in accordance with the guidelines set forth in the statute, which mirror those provided for temporary and post-divorce maintenance set forth above.
 - However, the new statute provides that, unless modified, any order for spousal support under the FCA shall continue until: (i) the earlier to occur of a stipulation or agreement between the parties in writing or on the record; (ii) the issuance of a

judgment of divorce or other order in a matrimonial proceeding; or (iii) the death of either party.

- The Family Court may modify an order of spousal support based on a substantial change in circumstances.**
- These changes go into effect on Saturday, January 23, 2016 (effectively Monday, January 25, 2016), and apply only to actions or proceedings commenced on or after that date.**

DIVORCE LAW

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..."
—F.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 muddled 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,² who were brought together by Justice Jeffrey S. Sussman, 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
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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.

Most significantly, in a watershed change, the legislation sets forth guidelines in the form of a for-

In a watershed change, the legislation sets forth guidelines in the form of a formula for post-divorce maintenance, which previously was determined entirely on a discretionary basis by the courts.

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

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Guidelines

Continued from page 3

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

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.

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

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

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)

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 §248 (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.⁴ 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."⁵ 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 Litigators), Thomas J. Vesper, Thomson Reuters West 2003.

2. Sandra Rivera and Michelle Heston, 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 Wernick represented the NYS Maintenance Standards Coalition.

3. The new legislation also modifies DRL §236 to make it gender neutral.

4. DRL §236(b) (5) (d).

5. Uncle Anthony's Unabridged Analogies (Quotes and Proverbs for Lawyers and Litigators), Thomas J. Vesper, Thomson Reuters West 2003.

Elena Karabatos

Areas of Practice

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Education

Tufts University, BA

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Elena is a partner in the matrimonial firm of Schlissel Ostrow Karabatos, PLLC. She is President of the New York Chapter of the American Academy of Matrimonial Lawyers. She is a member of the Attorney for the Children Advisory Committee for the Tenth Judicial District. Elena is a member of the Matrimonial Practice Advisory and Rules Committee for the New York State Office of Court Administration. Elena is a member of the Executive Committee of the Family Law section of the New York State Bar Association and was a member of the Nassau County Bar Association Delegation for the New York State Bar Association House of Delegates (2009-2012). Elena is a member of the New York Family Law American Inn of Court.

Elena is active in the Nassau County Bar Association (NCBA) where she is the Treasurer and a member of the Executive Committee. She was Chair of the Matrimonial Law Committee of the NCBA (2009-2011) for which she received the NCBA Directors' Award 2010-2011 for outstanding service as Chair. She served as the chairperson of the Child Custody Sub-Committee and the co-chairperson of the Appellate Practice Sub-Committee of the NCBA. Elena has also served as a member of the Judiciary Committee of the NCBA, and on various Task Forces for the NCBA, such as Lawyer Advertising, Request for Judicial Intervention Form Revisions, and Membership. She was appointed by the presiding Justice of the Appellate Division to a special committee of the Nassau County Courts to make recommendations to the court system for the establishment of model custody litigation practices. She is a co-author, with partner Stephen W. Schlissel, of the second edition of *Separation Agreements and Marital Contracts* (Michie 1997). She attended the Trial Advocacy Institute of the American Bar Association Family Law Section.

Elena is a member of the adjunct faculty of Hofstra Law School. She frequently lectures on a wide range of family law topics, regarding custody and parenting issues as well as financial issues, for various organizations such as the New York State, New York County and Nassau County Bar Associations, New York County Lawyer's Association, Nassau Academy of Law, the Practicing Law Institute, The National Business Institute, Office of Court Administration-Judicial Seminars, Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, as well as various other organizations. For many years, Elena served as the course chairperson for the continuing legal education program on Matrimonial Litigation and Equitable Distribution at Fordham Law School, where she lectured on various topics.

Elena is an experienced negotiator of settlements and trial lawyer. She is certified in advanced mediation by the Straus Institute of Dispute Resolution and by the Association of the Bar of the City of New York in mediating custody and visitation matters. She has been a facilitator and lecturer for the Nassau County P.E.A.C.E. (Parental Education and Custody Effectiveness) program. Elena has been selected for inclusion in "Best Lawyers in America" and "New York Super Lawyers" in the area of Family Law. She has been recognized by "Ten Leaders" in the field of Matrimonial and Divorce Law, Long Island, and she has also been recognized in the "Who's Who in Women in Professional Services" for the Long Island Business News.

Elena is a member of the Planning Board for the Village of Sands Point, New York. Elena received a BA from Tufts University in 1983 and her JD from Brooklyn Law School in 1986. Elena is married to Bryan Skarlatos, a partner in the law firm Kostelanetz & Fink, LLP.

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HON. ANDREW A. CRECCA

Andrew A. Crecca is the Supervising Judge of the Matrimonial Parts in the Tenth Judicial District, Suffolk County, New York. In addition to his duties as Supervising Judge, he is the presiding Justice of Suffolk County's Integrated Domestic Violence Court, and has served in that position since January of 2007. He was first elected to the bench in 2004 as a County Court Judge and presided over felony criminal cases in a dedicated trial part. In January of 2007 he was appointed an Acting Justice of the Supreme Court. In 2010 he was elected Justice of the New York State Supreme Court for the 10th Judicial District.

Prior to his time on the bench Justice Crecca served as a County Legislator, and maintained a private law practice concentrating in matrimonial and family law. He also served as an Assistant District Attorney in the New York County District Attorney's office from 1989 to 1994. He received his undergraduate degree from Marist College in 1986, and his law degree from St. John's University School of Law in 1989.

Justice Crecca has lectured throughout the United States and internationally on domestic violence issues, problem solving courts, matrimonial and family law, as well as on court operations. He serves as a faculty member to the *National Judicial Institute on Domestic Violence*, the *New York State Judicial Institute*, the *National Council of Juvenile and Family Court Judges*, the *Suffolk Academy of Law*, and as an Adjunct Professor at *Touro Law School*. He has also held the position of Adjunct Assistant Professor of political science at *Hofstra University*.

As an active member of the *Suffolk County Bar Association*, Justice Crecca serves as Co-Chair of its Law Student Committee and has served on its Board of Directors and as chair of the Bench Bar Committee. In 2011 Justice Crecca was appointed and continues to serve as a member of the Chief Administrative Judge's *Matrimonial Practice Advisory & Rules Committee* for New York State.

Justice Crecca is also a member of the *Alexander Hamilton American Inn of Court*, the *National Council of Juvenile & Family Court Judges*, the *New York State Association of Supreme Court Justices* and the *Suffolk County Matrimonial Bar Association*.

In addition to his judicial duties, Justice Crecca has contributed to the community through participation in not-for-profit organizations such as the *Hauppauge Youth Organization*, the *Cleary School for the Deaf*, and other charitable organizations.

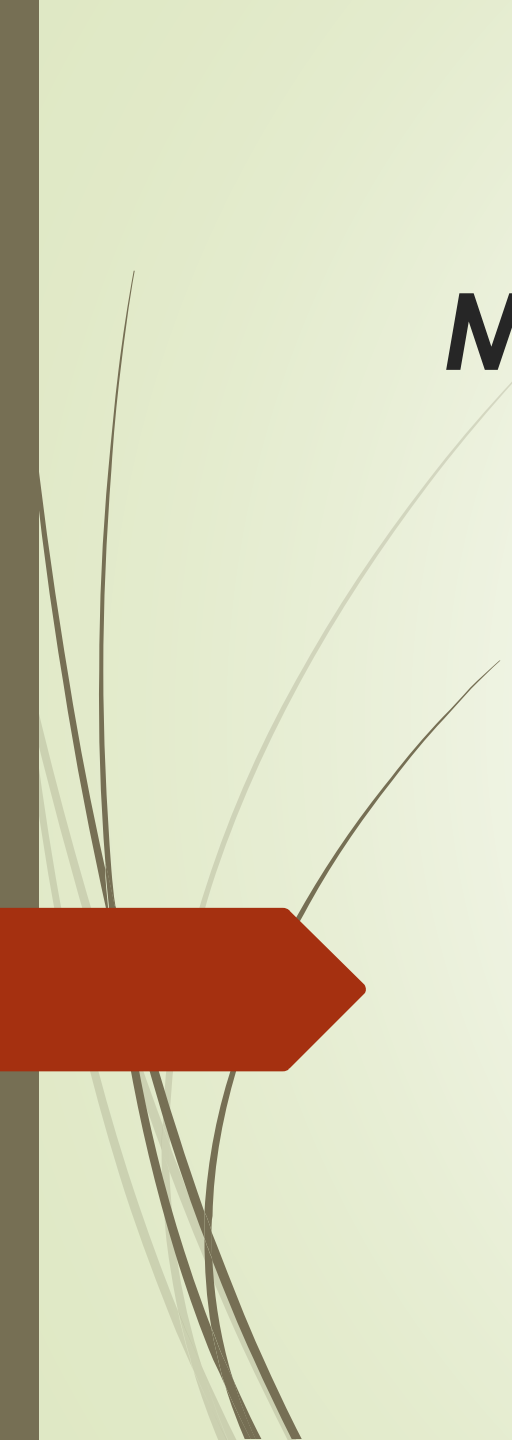
Justice Crecca lives on Long Island with his wife Donna and their two boys.

NEWLY ENACTED MAINTENANCE GUIDELINES LEGISLATION CHAPTER 269, LAWS OF 2015

presented by the
SUFFOLK ACADEMY OF LAW
Suffolk County Bar Association
December 1, 2015

Faculty: **Eric Tepper, Esq.** *Gordon, Tepper & DeCoursey, LLP, Glenville, NY*
 Elena Karabatos, Esq. *Schlissel Ostrow Karabatos, PLLC, Garden City, NY*

Moderator: **Hon. Andrew A. Crecca** *New York State Supreme Court*



NEWLY ENACTED MAINTENANCE GUIDELINES LEGISLATION CHAPTER 269, LAWS OF 2015

presented by the
SUFFOLK ACADEMY OF LAW
Suffolk County Bar Association
OCTOBER 26, 2015

Examples Prepared by Eric Tepper, Esq.

Where the Maintenance Payor Is the Non-Custodial Parent Paying Child Support To Recipient Spouse:

Step 1:

20% of Payor's income up to \$175,000 MINUS 25% of Payee's income.



Step 2:

Payor's income up to \$175,000 PLUS Payee's income X 40% MINUS Payee's income.

Step 3:

The lower of the two amounts above is the guidelines figure.

(continued on next slide)



Where the Maintenance Payor Is the Non-Custodial Parent Paying Child Support To the Recipient Spouse:

Hypothetical:

Payor, the non-custodial parent, has \$100,000 in income as defined in the statute (after subtracting social security and Medicare taxes).

Payee, the custodial parent, has \$50,000 in income (after subtracting social security and Medicare taxes).

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Where the Maintenance Payor is the Non-Custodial Parent Paying Child Support to the Recipient Spouse:

Step 1: $\$100,000 \times 20\% = \$20,000$
 $\$ 50,000 \times 25\% = \$12,500$
 $\$20,000 - \$12,500 = \$\underline{7,500}$

Step 2: $\$100,000 + \$50,000 = \$150,000 \times 40\% = \$60,000$
 $\$60,000 - \$50,000 = \$\underline{10,000}$

Step 3: Compare the two figures above.
 The lower figure ($\underline{\$7,500}$) is the guidelines amount.

Where No Child Support Is Being Paid By the Maintenance Payor to the Recipient Spouse:

But for the income cap, this is the same formula used in the prior temporary maintenance guidelines statute.

Step 1:

30% of Payor's income up to \$175,000 MINUS 20% of Payee's income.

Step 2:

Payor's income up to \$175,000 PLUS Payee's income X 40% MINUS Payee's income.

Step 3:

The lower of the two amounts above is the guidelines figure.

(Continued on next slide)

Where No Child Support Is Being Paid By the Maintenance Payor to the Recipient Spouse:

Hypothetical:

- Payor has \$100,000 in income, as defined in the statute (after subtracting social security and Medicare taxes).
- Payee has \$50,000 in income (after subtracting social security and Medicare taxes).
- There are either no unemancipated children or the payor is the custodial parent-- so no child support is being paid by the payor to the payee.

(Continued on next slide)

Where No Child Support Is Being Paid By the Maintenance Payor to the Recipient Spouse:

Step 1:

$$\$100,000 \times 30\% = \$30,00$$

$$\$ 50,000 \times 20\% = \$10,000$$

$$\$ 30,000 - \$10,000 = \$ \underline{20,000}$$

Step 2:

$$\$100,000 + \$50,000 = \$150,000 \times 40\% = \$60,000$$

$$\$60,000 - \$50,000 = \$ \underline{10,000}$$

Step 3:

Compare the two figures above.

The lower figure (\$10,000) is the guidelines amount.

Temporary Maintenance Factors

Where Income Exceeds \$175,000 or Where There Is An Adjustment of the Award (*Deviation Factors*):

- (A) The age and health of the parties;
- (B) the present or future earning capacity of the parties, including a history of limited participation in the workforce;
- (C) the need of one party to incur education or training expenses;
- (D) the termination of a child support award during the pendency of the temporary maintenance award when the calculation of temporary maintenance was based upon child support being awarded and which resulted in a maintenance award lower than it would have been had child support not been awarded;

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Exceeds \$175,000 or Deviation Factors *(continued)*:

- **(E) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;**
- **(F) the existence and duration of a pre-marital joint household or a pre-divorce separate household;**
- **(G) 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;**
- **(H) the availability and cost of medical insurance for the parties;**

Exceeds \$175,000 or Deviation Factors *(continued)*:

- (I) 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;
- (J) the tax consequences to each party;
- (K) 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 forgone or delayed education, training, employment or career opportunities during the marriage; and
- (M) any other factor which the court shall expressly find to be just and proper.

Post-Divorce Maintenance Factors

Where Income Exceeds \$175,000 or Where There is An Adjustment of the Award (Deviation Factors):

- (A) The age and health of the parties;
- (B) the present or future earning capacity of the parties, including a history of limited participation in the workforce;
- (C) the need of one party to incur education or training expenses;
- (D) 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;
- (E) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;
- (F) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

Exceeds \$175,000 or Deviation Factors (continued):

- **(G) 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;**
- **(H) the availability and cost of medical insurance for the parties;**
- **(I) 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;**
- **(J) the tax consequences to each party;**
- **(K) the standard of living of the parties established during the marriage;**

Exceeds \$175,000 or Deviation Factors (continued):

- (L) 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;
- (M) the equitable distribution of marital property and the income or imputed income on the assets so distributed;
- (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.



ADVISORY SCHEDULE DURATION OF POST-DIVORCE MAINTENANCE

| <u>Length of the Marriage</u> | <u>% of the Length of the Marriage For Which Post-Divorce Maintenance Will Be Payable</u> |
|--|--|
| Zero to 15 Years | 15% to 30% |
| More than 15 to 20 years | 30% to 40% |
| More than 20 years | 35% to 50% |