



## Matrimonial and Family Law Practice Group

### Maintenance Law in New York State - Finally Settled or as Unsettled as Ever?

Syracuse, New York

#### I. Introduction

Governor Cuomo signed Bill No. A076452<sup>1</sup> into law on September 25, 2015. This new legislation brings a number of significant changes to the Domestic Relations Law ("DRL"), the body of law governing divorces in New York State. Among the changes: (1) for the first time, there are statutory guidelines for determining post- divorce spousal maintenance (also referred to sometimes as "alimony"); (2) already existing, temporary (payable during the pendency of the divorce) maintenance guidelines have been adjusted significantly; (3) the presumptive income "cap" for both temporary and post- divorce maintenance has been reduced considerably; and (4) the "enhanced earnings" considerations formerly applied to add additional marital assets subject to equitable distribution have been eliminated as an asset to be valued and distributed. Enhanced earnings are instead considered in determining a spouse's equitable share of other existing assets.

The bulk of the new legislation takes effect 120 days from its signing, **January 23, 2016**. But, changes to the formula previously used to calculate temporary maintenance have already taken effect.<sup>2</sup> Since the statute has not yet taken effect, it is impossible to predict its impact, especially on moderate and high-income earners. There is a chance that the reduced cap will benefit high- income earners. It may not, however, because it may become more routine for judges to simply deviate using statutory guideline factors, thus making the process much less predictable than before. Those with moderate income may lose out as well. Although the new statute may not result in a lower payment for these earners, it could simultaneously increase the length of time maintenance is owed.

It is equally unclear what the effect of the amendment's changes to enhanced earnings will be. The amendment means that, instead of enhanced earnings adding to the "pie" eligible for equitable distribution, those earnings will instead become a factor when considering the size of the "slice" that is taken for the contributing spouse. Whether that becomes a difference without a distinction remains to be seen.

#### II. Discussion

##### **A. Post-Divorce Maintenance**

The new statute introduces a statutory formula to be used in calculating a "presumptively correct" temporary and post- divorce maintenance award. The formula is similar to the one currently used for calculating temporary maintenance. Previously, there was no formula for post-divorce maintenance. The formula considers the earnings (less Social Security and Medicare Tax) of the higher-wage-earner, who becomes the "payor." It also considers the earnings (less Social Security and Medicare Tax) of the lower-wage-earner, who becomes the "payee." What the formula does not consider is any income that exceeds a statutory income "cap." The new cap is \$175,000. This is a **considerable reduction** from the current cap, applicable to temporary maintenance only, of \$541,000.00.

If there is no income above the cap, then the guideline amount produced by the formula is presumed to be the correct amount and therefore what should be awarded. If, instead, there is income above the cap, there are additional factors that must be taken into consideration, which are addressed in more detail below.

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<sup>1</sup> (Same as Senate S05678).

<sup>2</sup> Nothing in the new legislation requires it to be applied to cases filed before its effective date. It may have some impact on those cases nonetheless, as discussed below.



The new formula for both post-divorce and temporary maintenance will now be as follows:

**a) Where the Payor is the non-custodial parent, and is paying child support:<sup>3</sup>**

- i. Subtract 25% of the payee's income from 20% percent of the payor's income.
- ii. Multiply the sum of the payor's income and the payee's income by 40%
- iii. Subtract the payee's income from the amount derived in (ii)
- iv. Whichever amount is lower between (i) or (iii) becomes the guideline amount.

**b) Where there is no child support or the payor is the custodial parent:**

- i. Subtract 20% of the payee's income from 30% of the payor's incomes
- ii. Multiply the sum of the payor's income and the payee's income by 40%
- iii. Subtract the payee's income from the amount derived in (ii)
- iv. Whichever amount is lower becomes the guideline amount.

If there is any income in excess of the \$175,000 cap, then the court must do the following: (1) calculate the "guideline amount" below the cap; and then (2) deviate from that amount only if the Court deems appropriate, in its discretion. The court must then consider a number of guideline "factors," and rely on one or more of those factors before deviating from the amount that the formula determines. Among those factors the court may consider are: (1) the age and health of the parties; (2) the present or future earning capacity of the parties; (3) acts by one party against another that have inhibited or continue to inhibit the other's earning capacity (including domestic violence); and (4) the availability and cost of medical insurance for the parties.<sup>4</sup>

If there is child support being paid, and the payor is the noncustodial parent, maintenance must be calculated prior to child support. The amount of maintenance paid is then to be both deducted from the payor's income in calculating his or her child support and added to the payee's income in calculating child support.

**B. Temporary Maintenance**

Under the amended statute, the guideline amount for temporary maintenance will be calculated in the same manner as post-divorce maintenance. The result is a considerable change to the structure that is currently in place for temporary maintenance. Among other things, first and foremost, there is a significant reduction in the cap, from \$541,000.00 to \$175,000.00. The court is now also directed to use the length of the marriage in calculating the duration of temporary maintenance. Under the amended statute, courts are also expressly allowed to order temporary maintenance that expires before the action has been resolved (and, thus, before post-divorce maintenance sets in).

**C. Example Showing The Potential Effect Of The Reduced Cap On Moderate To High Wage-Earners**

Assume that the payor has income (minus allowable deductions) of \$300,000 and that the payee has income (minus allowable deductions) of \$40,000. Assume also that there are no children of the marriage. Under the current statute, temporary maintenance would be as follows:

1. Subtract 20% of payee's income from 30% of the payor's income.
  - $\$40,000 (.20) = \$8,000$
  - $\$300,000 (.30) = \$90,000$
  - $\$90,000 - \$8,000 = \$82,000.$
2. Multiply the sum of the payor's income and the payee's income by 40%
  - $\$340,000 (.40) = \$136,000.$
3. Subtract the payee's income from the amount derived in (ii)
  - $\$136,000 - \$40,000 = \$96,000.$
4. Whichever amount is lower between (1) or (3) becomes the guideline amount.
  - $\$82,000.$

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<sup>3</sup>Under the amended statute, the formula will now differ depending on whether child support is being paid. This distinction is now also built into the post-divorce maintenance formula. This means that, under the amended statute, child support payments will result in a lower maintenance award, assuming that the payor is also the non-custodial parent.

<sup>4</sup>The court may also use these same guideline factors to depart from the guideline formula amount where income is lower than the cap. If the court departs from the formula in such a case, it may do so only after determining that the formula amount is either unjust or inappropriate. The court must then set forth its findings in writing or on the record.



The "guideline amount" becomes \$82,000 per year, roughly \$1,577 per week. Currently, this amount would be ordered as temporary maintenance, unless it is deemed "unjust or inappropriate." The reason for modifying it would also need to be set forth in a separate written order on the record. This guideline amount is also usually ordered as post-divorce maintenance, even though the Judge is under no statutory obligation to do so.

With the lower cap, the guideline amount changes as follows:

1. Subtract 20% of payee's income from 30%<sup>5</sup> of the payor's income.
  - \$40,000 (.20) = \$8,000
  - \$175,000 (.30) = \$52,500
  - \$52,500 - \$8,000 = \$44,500.
2. Multiply the sum of the payor's income and the payee's income by 40%
  - \$215,000 (.40) = \$86,000.
3. Subtract the payee's income from the amount derived in (ii)
  - \$86,000 - \$40,000 = \$46,000
4. Whichever amount is lower between (1) or (3) becomes the guideline amount.
  - \$44,500.

Under the new statute, the "guideline amount" for temporary maintenance is reduced from \$82,000 per year, roughly \$1,577 per week, to \$44,500 per year, roughly \$856 per week. The new statute requires that this guideline amount be used for post-divorce maintenance as well.

#### D. Length Of Post-Divorce Maintenance

Post-divorce maintenance does not last forever, but the current law does not provide for how long it should last. In Central and Western New York, the duration of the typical post-divorce maintenance award is often a period amounting to 1/4 to 1/3 of the length of the marriage. The amended statute now imposes an advisory schedule for calculating duration, which the court need not follow, but which creates guideposts that will most certainly be tempting to use in most cases:

Length of Marriage	Percent of Length of Marriage Maintenance is payable
up to and including 15 years	15% to 30%
more than 15 and up to and including 20 years	30% - 40%
more than 20 years	35% - 50%

Regardless whether the court uses this advisory schedule, it must also set forth in a written decision, or on the record, which "statutory factors" (the same used in calculating the amount of maintenance), if any, it considered in determining the length. All decisions on duration, even those that fall within this schedule, must now be explained by the court in a written decision or on the record.

The court has the additional task of considering whether to provide for changes to maintenance in the event of a party's retirement. If such considerations are impossible, or speculative, relief may be had at the time of retirement upon application to the court.

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<sup>5</sup>This assumes no child support has been ordered or the payor is the custodial parent. If there is child support and the payor is not the custodial parent, then the 20%, 30% factors change to 25% and 20%, respectively, under the new statute.



#### E. Enhanced Earnings

Currently, a spouse's "enhanced earning capacity," achieved through licenses, degrees, or similar accomplishments during the marriage, may be monetized and added to the pool of assets subject to equitable distribution. This is the result primarily of the Court of Appeals' landmark decision in *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985).

The amendment specifically provides that the court "shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity . . . ." This purports to eliminate the *O'Brien* enhanced earning analysis. However, the amendment goes on to provide that, "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." The result is that, while enhanced earnings can no longer be added into the pool of assets subject to equitable distribution, they are (note the statute's use of the word, "shall") to be considered in accounting for the percent of that pool of assets to which each spouse is entitled. In other words, an enhanced earnings argument under the amended statute might result in the contributing spouse receiving a larger share of the asset pool in anticipation of the enhanced earnings for which the other spouse will be eligible in the future.

#### III. Conclusion

The amendment reflects an effort to increase the certainty of post-divorce maintenance awards absent a factors-based analysis that justifies a different result. It accomplishes this goal by imposing a formula for arriving at a presumptively correct amount. It remains to be seen whether courts will adopt the idea that this correct amount should control as the fair one, and whether the suggested term of payments is fair as well.

It is also unclear what the effect of the amendment's changes to enhanced earnings will be. The amendment means that, instead of enhanced earnings adding to the "pie" eligible for equitable distribution, it will now only be a factor when considering the size of the "slice" that is taken for the contributing spouse. An interesting question may arise when there are very few, or no, assets of the marriage other than the degree. In such a case, it is not immediately obvious what a party has to gain by arguing enhanced earnings, because there is nothing more to gain from the pie. Otherwise, the incentive is as apparent as it ever was.

In the coming months and years, it will be interesting to see if this legislative effort has resulted in more certainty or less; more litigation or less; a sense of greater "fairness" or less; to payors and payees alike.



#### Bousquet Holstein PLLC ♦ Matrimonial and Family Law Practice Group

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Steven A. Paquette

During this emotionally charged time, areas outside the matrimonial law field often require simultaneous resolution. Our matrimonial team has expertise and experience in matters involving valuation and tracing of assets, valuation of closely held business, executive compensation and benefit plans, tax planning and complex support arrangements. The firm's breadth of experience and resources in areas including employee benefits, trust and estates, tax planning and advocacy, business transactions, bankruptcy, and other substantive areas allow us to provide a comprehensive set of options to our matrimonial clients. In a divorce setting, these issues must often be determined against the backdrop of significant custody, visitation and support issues. Our child-centric approach insures that each solution is handled with compassion. Each solution is as unique as the individuals involved.



Ryan S. Suser

During our initial meeting we work together with our clients to assess the best method for resolving matrimonial difficulties. Oftentimes negotiation is better for everyone, but sometimes it is not. We are prepared to negotiate an agreement using traditional attorney driven negotiations, or to enter into a contract to work collaboratively with other trained collaborative counsel. When necessary, we are prepared to use the Court system to resolve disputes, especially when the parties have been polarized by the split in their relationship in a way that may require the help of the Courts, or where urgent circumstances do not allow for negotiated resolutions of certain issues.

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