

**Law Revision Commission Roundtable Meeting**  
**Study of Maintenance Awards in Matrimonial Proceedings**  
**Albany Law School**  
**October 25, 2011**  
**10:25 AM – @ 3:00 PM**

Present: Peter J. Kiernan, Chairman  
Professor Michael J. Hutter, John E. Ryan, Esq., John A. Cirando, Esq.,  
Professor Jay C. Carlisle II

Rose Mary Bailly, Esq., Barbara S. Hancock, Esq.

Hon. Rachel Adams, Jane Aoyama-Martin, Esq., Susan Bender, Esq., Diane C. Caroll, Esq., Robert Kirkman Collins, Esq., Antoinette Delruelle, Esq., Briana Denney, Esq., Kathleen Donelli, Esq., Catherine Douglass, Hon. Laura E. Drager, Steven J. Eisman, Esq., Laurel Eisner, T. Kevin Fahey, Esq., Nadia Gareeb, Esq., Professor Marsha Garrison, Jill Laurie Goodman, Esq., Michelle L. Haskin, Esq., Robert J. Jenkins, Esq., Elena Karabatos, Esq., Allan Everett Mayefsky, Esq., Hon. Sondra M. Miller, Amanda Norejko, Esq., Patrick C. O'Reilly, Esq., Lee Rosenberg, Esq., Emily Ruben, Esq., Laura Russell, Esq., Ellen C. Schell, Esq., Frederic P. Schneider, Esq., Benjamin E. Schub, Esq., Philip C. Segal, Esq., Hon. Jacqueline Silberman, Pamela Sloan, Esq., Eric A. Tepper, Esq., Hon. Sharon S. Townsend, Joan Warren, Esq., Shannon Wong.

*Temporary maintenance formula*

Participants described a dichotomy in how the formula has affected low and high income cases.

Before the new statute, for divorcing couples with low income, maintenance was the one area of uncertainty. Child support was and is determined by formula, and equitable distribution of any assets is fairly straightforward; in any event, there was rarely a need for a trial if the only assets were a house and a pension. By contrast, maintenance, including *pendente lite* maintenance, was unpredictable. It was hard to counsel low income clients on what to expect, and clients could rarely afford to go to trial. Now, however, the new guidelines provide predictability, and cases are generally resolving much quicker than before the statute went into effect. Even at the preliminary conference, the parties now have a framework for discussion.

By contrast, for higher income couples, the formula has created uncertainty and often impeded settlement. A persistent problem is how to deal with the ongoing expenses or “carrying charges” of the household or households while the divorce action is proceeding. Before the new statute, the expenses would be assigned to one or both parties, to assure that the status quo could be maintained while the various issues were being sorted out. Now, however, there is uncertainty as

to whether the formula amount is to cover the carrying charges, and that the recipient is to pay these expenses, or if the carrying charges are over and above the formula and to be covered by the payor. Some judges have chosen to revert to the old approach. Secondly, when the parties' financial picture is not straightforward, such as when income derives from a small business or pass-through entity, or when there are substantial assets and/or complex tax issues, the income-based approach of the formula presents difficulties to the judge, who, at a very early stage of the proceedings, must figure out what's real income and what isn't, before the discovery process has even begun. Thirdly, when the judge deems that the formula produces an unjust result, the statute requires the judge to weigh the deviation factors and write a lengthy and detailed decision, adding a new burden on the judicial system. Overall, participants observed that in the higher-income context, the guidelines have introduced a lot of uncertainty. Several mentioned that widespread misunderstandings among the general public have created the perception that the statute entitles the payee spouse to a percentage of the payor's income, regardless of expenses or need, thus hardening the payee against settlement. Generally, participants felt that a better policy goal for *pendente lite* higher income cases should be on maintaining the status quo through a primary emphasis on allocating expenses, and preserving flexibility and discretion in determining the need for maintenance over and above the payment of expenses.

In light of the above concerns, it was suggested that a different cap for the application of the statute be adopted. Currently, the formula applies when the monied spouse has income of \$500,000 or less, with factors applied for income in excess of that amount. A cap adjusted downward to \$130,000 (as in the child support standards act) or \$200,000 (to capture approximately 95% of joint filers) in joint income would preserve the formula for the population for which it appears to be well-suited. When the parties' joint income is above the cap, the statute could mirror the approach of the child support standards act, and allow the court to apply the formula, or instead to apply the traditional needs-based approach. A similar argument emerged later, during discussion of final maintenance. (See below).

Participants pointed out that if the guidelines applied to final maintenance, rather than to temporary maintenance, the issue of what to do about carrying charges would go away, because the court could go back to making sure that the core expenses were taken care of during the pendency of the action.

Participants agreed that the guidelines are of significant benefit to the victim of domestic violence in a divorce proceeding. Before the guidelines, the victim had to be the one to make a request for support, while the abusive partner would refuse to pay anything at all. With the guidelines, however, it is no longer the victim making a request, but the State of New York saying, "This is what this person is entitled to." There is no longer a question of pressure on the victim not to ask.

Participants identified drafting errors with several of the deviation factors. A few are duplicative of each other. Equitable distribution is a concern with respect to final maintenance, but is not in play at the time of *pendente lite* maintenance. The factor requiring the court to consider the

length of the marriage should be retained, so that a very short marriage cannot produce a lengthy temporary maintenance award.

### *Final maintenance*

Participants discussed final maintenance guidelines. Among the advantages: final maintenance guidelines would eliminate the problem identified in the context of temporary maintenance, about not having sufficient information about the parties' incomes to apply a formula properly. By the time the parties have reached the stage of discussing final maintenance, they and the court know as much as they are going to about the parties' financial positions. A formula would be good for setting expectations, and bring predictability.

In an uncontested divorce, the couple do not see a judge, and often do not have lawyers. Thus, when they are doing the divorce on their own, having a legislative statement about what's appropriate could go a long way toward promoting settlement. Generally, the point of a guideline is to solve most problems, and to preserve judicial discretion for where it is most useful. Other advantages and disadvantages in the final maintenance context closely mirror those expressed in the discussion about temporary maintenance.

The overall assessment was that guidelines are helpful for low income clients, and inappropriate for higher income clients, for the reasons expressed in the discussion about temporary maintenance. If the guideline were to have a cap of \$130,000 like the Child Support Standards Act, or \$200,000, to capture 95% of joint filers, it would affect the vast majority of divorcing couples.

Some participants expressed concern that final maintenance guidelines and deviation factors might not necessarily bring predictability when applied in court, because judges who work outside matrimonial parts may lack the experience and expertise to deal with discretionary factors. Others disagreed, feeling that guidelines would be helpful to a non-dedicated matrimonial judge.

It would be important to make sure that there are deviation factors, to take into account circumstances such as illness, etc. One size will never fit all marriages.

Numerous participants cited the Child Support Standards Act as a model for an equivalent approach in final maintenance. When the parties' joint income falls below a cap, the formula applies; when it exceeds the cap, a set of factors applies. Using such an approach would also be beneficial because there is a large body of CSSA case law to work from, so the courts would not be starting from scratch. And, like CSSA, the final maintenance guideline could be employed to inform the parties and the court at the temporary maintenance stage, without necessarily binding them in the event that the parties were able to agree to an effective means to maintain the status quo.

There was no agreement as to whether guidelines should be mandatory or advisory. Advocates

for mandatory guidelines felt that to make them advisory would mean a loss of consistency and predictability for low income clients who are cannot afford to bring their concerns to court. Others felt that mandatory guidelines would unduly tie judges' hands.

Several participants cautioned that, if the guidelines include a formula for determining duration of maintenance, the effect of retirement must be considered. One concern is to avoid double dipping. Since the payor's pension would have been divided with the payee as part of equitable distribution, it would not be right to require him or her to pay the same amount of maintenance from his or her half of the pension, while the payee is also collecting benefits from the other half of the pension. Another concern is to avoid forcing the payor spouse to continue working indefinitely, lest the reduced retirement income be insufficient to keep up with maintenance payments that were appropriate on pre-retirement income. Yet another is the recognition that upon reaching the age of 62, the payee spouse is eligible to collect Social Security. Participants cautioned that retirement may occur at very different times in a person's career, from 40 to early 60s or later, and that a very young retiree who embarks on a new career might actually be looking at enhanced, not reduced, income, and that a worker may have to retire early for health or other reasons. However, if retirement becomes a trigger for modification of maintenance, our already overburdened courts would be facing an increased workload. Generally, any statute addressing duration of maintenance should not encourage the parties to come to court every time there is a change of circumstances. Several states, including Massachusetts, have addressed the issue of retirement in their maintenance statutes.

Participants discussed what would be an appropriate cap to use. The goal would be to make the guidelines work for the majority of the population without harming the much smaller number of parties whose complex circumstances are a poor fit for the guidelines. Many thought tying the cap to the \$130,000 used in the CSSA would work well; it helps the parties understand that both formulas apply to the same pot of income, while using different caps for the two could prove confusing. Others thought \$130,000 was too low, and recommended \$200,000 in order to include 95% of the population according to tax department statistics on joint filers.

#### *Cases which should not qualify for temporary or final maintenance*

Participants disagreed as to whether maintenance should be awarded for short term, childless marriages. Historically, maintenance has been the exception, rather than the rule; long term maintenance is awarded when a couple has been married for a long time and there is a large income disparity. It is almost never awarded in childless marriages. Some participants said that maintenance should not be ruled out for the short term childless marriage, giving the example of immigrants who have made changes in their lives, lost their licenses to practice their profession when they left their home country, or made other sacrifices or compromises for the sake of the marriage.

### *The purpose of maintenance*

There was no consensus on the purpose for awarding maintenance. Participants pointed out that the factors, both here and in other jurisdictions, provide a combination of supportive and compensative purposes.

### *Termination of maintenance*

Most participants felt that remarriage of the payee should terminate maintenance, except in those circumstances where the maintenance is designed to reimburse the payee for contributions to the other's career. Several said that the first spouse should not be subsidizing the payee's second marriage. Others felt that remarriage should be a trigger for reconsideration.

### *Enhanced earnings: O'Brien v. O'Brien, 66 N.Y.2d 576 (1985)*

New York is the only state with the *O'Brien* rule, which stems from the Court of Appeals, not from a statute. Mrs. O'Brien worked 8 years to put her husband through medical school, and the couple divorced soon thereafter. Because the statute would have terminated any maintenance award upon the payee's remarriage (and Mrs. O'Brien was planning to remarry), the court fashioned a rule that treated Dr. O'Brien's enhanced earnings as equitable distribution, so the payments would not have to end before Mrs. O'Brien's contribution could be reimbursed.

Thus, under New York's O'Brien rule, professional degrees count for equitable distribution. O'Brien involves establishing an asset based on a future income flow, valued on an income stream going forward. The rule creates all kinds of problems. O'Brien increases costs, delay, and uncertainty. Courts are valuing an income stream that is yet to be earned. The person is forever bound by what an expert says. At each step of valuing the income stream, there are assumptions made, and they are far from scientific certainty. It means that the payor spouse has to keep earning, and can't change her mind about his or her career.

On some cases, each side spends over \$25,000 for valuations.

Participants pointed out the effect of the recession on *O'Brien* cases. No one can still assume that everyone is going to keep making money at the same or higher level. But the recession is causing difficulty in valuing anything in any meaningful way. Sometimes jobs simply disappear. .

One participant described a workaround sometimes employed in settlements in the 4<sup>th</sup> department. Someone comes in with a dollar number for enhanced earnings. That amount is amortized over a fixed number of years, and termed maintenance, with the specification that it does not terminate on remarriage.

Suggestions from the participants included:

Substitute maintenance for the distribution of the license. Rather than creating the fiction of an asset comprised of enhanced earnings, specify that reimbursement maintenance continues upon remarriage or cohabitation, and does not terminate.

Limit *O'Brien* to the facts of *O'Brien*, where all the couple has is the newly earned license.

Avoid double counting income if reimbursement maintenance coexists with a maintenance formula.

There was a consensus that *O'Brien* is an example of hard cases making bad law. There are other models for reimbursing a spouse for contributions to the marriage, for example, Massachusetts's new reimbursement alimony provision. It applies after a short marriage of no more than five years. It terminates on death or a date certain. The state's maintenance formula does not apply to reimbursement alimony, which is calculated based on the spouse's contribution, and is severable from any other maintenance debt.

*Family Court act: clarify the applicability of maintenance rules*

### **Family Court Act: Clarify the applicability of new temporary maintenance rules**

Several participants spoke in favor of applying the temporary maintenance rules in family court, citing substantial overlap in the type of cases, and the need for consistency. Other reasons given included:

1. Many who file in family court don't want to get divorced. They stay married in order to qualify for benefits such as family health insurance, and should not be deprived of support merely because of this choice.
2. It is easier to file in family court; there is no filing fee, for example, and one can serve process by mail. For financial reasons, the poor and working poor are precluded from filing in Supreme Court.
3. An Article 4 order is always temporary, and can and should be reexamined in Supreme Court after commencement. It does not make sense to have different rules.
4. Support magistrates have said it would be helpful to have guidelines to inform their decisions. For advising clients, in supreme court since the legislation passed, it is fairly simple to be able to say, this is what the law says. It is hard to advise someone what to do in family court.
5. Let family court determine income tax exemptions. Some exemptions can go to waste at low income cases.

Other participants worried that if support magistrates are inclined to apply the law formulaically, but one party wanted to apply the factors. This would lead to objection after objection on whether

exceptions were properly applied. It was suggested that the Law Revision Commission reach out to support magistrates who have been applying the CSSA, to learn how they base their decisions in family court.

End

Audio:                   There is an audio recording of the October 25, 2011 meeting