

Family Law Section

Memorandum in Support

FLS #3 - OCA 2015-64

May 14, 2015

A. 7645

By: M. of A. Weinstein

Assembly Committee: Judiciary

Effective Date: 120th day after it shall have become a law

AN ACT to (a) amend the Domestic Relations Law (“DRL”) and the Family Court Act (“FCA”) in relation to the duration and amount of maintenance and spousal support.

SECTION OF LAW REFERRED TO: DRL §§ 236, 248, FCA § 412

THE FAMILY LAW SECTION SUPPORTS THIS BILL

Introduction

The Matrimonial Practice Advisory and Rules Committee to the Chief Administrative Judge has proposed a bill (the “Bill”) amending DRL § 236B and FCA § 412 to provide for temporary and final maintenance/spousal support guidelines. The Bill additionally provides an advisory schedule for the duration of post-divorce maintenance, eliminates the equitable distribution of enhanced earnings capacity (such as licenses and degrees) attained during the marriage, and modifies DRL § 248 regarding the termination of maintenance to make it gender neutral.

Analysis

As reflected in the Office of Court Administration’s Memorandum in Support, the Bill is a compromise measure resulting from a number of meetings initiated by Justice Jeffrey Sunshine, the Chair of the Advisory Committee. These meetings brought together a number of interested organizations to arrive at a reasonable compromise bill addressing the concerns of the poverty communities, the domestic violence communities, families with middle class economics and wealthier families.

Under the Bill, the income cap for the formula portion of temporary maintenance awards will be lowered from \$543,000 to \$175,000 of the payor’s income, which we believe is a more appropriate income cap given the objective of the Bill to address the concerns of all New York State residents impacted by maintenance awards. The same \$175,000 cap will apply to post-divorce maintenance awards, as well as spousal support awards under FCA § 412. There would be two formulas (summarized in the Office of Court Administration’s Memorandum in Support) – one where the payor is also paying child support to his or her spouse and one where child support is not being paid. This two-tiered approach ensures that a maintenance payor who is also paying child support would have a lower maintenance obligation than one without the additional child support obligation.

Opinions expressed are those of the Committee preparing this resolution and cannot represent those of the entire New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

Where the guideline amount of maintenance up to the cap is unjust or inappropriate, the court may adjust the maintenance/spousal support award appropriately after consideration of one or more factors, which are required to be set forth in the court's decision or on the record. Similarly, where there is income over the cap, additional maintenance/spousal support may be awarded after consideration of one or more factors, which are required to be set forth in the court's decision or on the record. As with the Child Support Standards Act (DRL § 240(1-b) *et seq.*), the application of these "deviation" factors where appropriate, both in cases subject to the income cap or in higher income cases, would afford New York courts greater latitude and discretion in setting maintenance awards.

Under the Bill, maintenance would terminate upon the death or remarriage of the payee. The Bill contains an advisory durational formula for post-divorce maintenance awards which contains ranges to afford courts more discretion in setting an appropriate maintenance duration.

The Family Law Section believes that the advisory durational formula in the Bill contains more realistic durations of post-divorce maintenance than previously-introduced maintenance guidelines bills, and endorses it as a guide to courts subject to the specific circumstances of each case. In determining the duration of maintenance, the court is required to consider anticipated retirement assets, benefits and retirement eligibility age, thus vesting courts with suitable discretion to set an appropriate duration of maintenance. Actual or partial retirement will be a ground for modification assuming it results in a substantial diminution of income. As such, there is a reasonable mechanism in place for a retired maintenance payor experiencing financial hardship to seek redress from the court.

Given that, as set forth above, the courts of New York State would still retain considerable discretion in the setting of appropriate maintenance awards, as well as in the modification of such awards, the Bill is a substantial improvement over previously-proposed maintenance guidelines bills.

Finally, ever since the O'Brien case was decided by the New York Court of Appeals in 1985,¹ New York has inappropriately treated licenses, certifications and other educational attainments during a marriage (called enhanced earning capacity, or "EEC") as assets subject to equitable distribution. The Family Law Section has long advocated the legislative abolishment of the treatment of EEC as a marital asset, and the Bill appropriately effectuates this change.

Based on the foregoing, the Family Law Section **SUPPORTS** this legislation.

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Chair of the Section: Alton L. Abramowitz, Esq.

PREPARED BY FAMILY LAW SECTION COMMITTEE ON LEGISLATION

¹ O'Brien v. O'Brien, 66 N.Y.2d 576 (1985).