Chapter 15

Maintenance

15-1. Maintenance Awards – Actions Commenced Between July 19, 1980 and October 12, 2010 - Historical Perspective - Domestic Relations Law §236(B) (6) (a)

Domestic Relations Law §236[B][1], as originally enacted in 1980,[1] defined "maintenance" as "payments provided for in a valid agreement between the parties or awarded by the court, to be paid at fixed intervals for a definite or indefinite period of time, to meet the reasonable needs of a party to the matrimonial action, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, or upon modification of the final judgment pursuant to section two hundred forty-eight of this chapter."[2] The object of maintenance was to meet the reasonable needs of a party to the matrimonial action.

The Equitable Distribution Law of 1980 listed ten factors for the court to consider in determining the amount and duration of maintenance. They were enumerated in Domestic Relations Law §236(B) (6) (a). [3] The factors were: (1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part; (2) the duration of the marriage and the age and health of both parties; (3) the present and future capacity of the person having need to become self-supporting; (4) the period of time and training necessary to enable the person having need to become self-supporting; (5) the presence of children of the marriage in the respective homes of the parties; (6) the standard of living established during the marriage where practical and relevant; (7) the tax consequences to each party; (8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party; (9) the wasteful dissipation of family assets by either spouse; and (10) any other factor which the court shall expressly find to be just and proper. [4]

1 Laws of 1981, Ch.281. See Volume 3B, Chapter 19, Law and the Family New York, 2d Edition Revised, for a comprehensive discussion of maintenance awards.

2 NY Dom Rel Law §236 [B]

3 Laws of 1980, Chapter 281, effective July 19, 1980.

4 NY Dom Rel Law §236 [B]

Domestic Relations Law §236[B] [6] was amended in 1986.[5] The most significant aspect of the 1986 amendment was the replacement of the "reasonable needs and ability to pay" basis for maintenance with the former basis of "standard of living of the parties established during the marriage."

The 1986 amendment to Domestic Relations Law §236 [B][6][a], provided, in part, that "[e]xcept where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the respective parties.[6]

The 1986 amendment also added new and revised factors for determining the amount and duration of maintenance .Those factors were: (1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part; (2) the duration of the marriage and age and health of both parties; (3) the present and future earning capacity of both parties; (4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor; (5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage; (6) the presence of children of the marriage in the respective homes of the parties; (7) the tax consequences to each party; (8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party; (9) the wasteful dissipation of marital property by either spouse; (10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and (11) any other factor which the court shall expressly find to be just and proper.

The 1986 amendment to Domestic Relations Law §236[B][1][a] defined the term 'maintenance' as "...payments provided for in a valid agreement between the parties or awarded by the court in accordance with the provisions of subdivision six of this part, to be paid at fixed intervals for a definite or indefinite period of time, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, or upon modification pursuant to paragraph (b) of subdivision nine of section two hundred thirty-six of this part or section two hundred forty-eight of this chapter."[7]

In 1992 Subdivision d. was added to Domestic Relations Law §236 [B] requiring that in any decision made pursuant to Domestic Relations Law §236 [B] the court must, where appropriate, consider the effect of a barrier to remarriage, as defined in Domestic Relations Law §236 [B][6] on the factors enumerated in Domestic Relations Law §236 [B][6] [a]. [8]

5 Laws of 1986, Chapter 884, eff Aug 2, 1986, amended NY Dom Rel Law §236 [B]

6 Laws of 1986, Chapter 884, eff Aug 2, 1986, amended NY Dom Rel Law §236 [B]

7 Domestic Relations Law §236[B][6], Laws of 1986, Chapter 844

8 Laws of 1992, Ch. 415; NY LEGIS 415 (1992)

In 2009 the "loss of health insurance benefits upon dissolution of the marriage" was added as factor to be considered by the court in making a maintenance award and in making a property distribution.[9] Two new factors were added to Domestic Relations Law §236 [B][6] [a]: factor (10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and factor (11), the loss of health insurance benefits upon dissolution of the marriage.[10]

Domestic Relations Law §236(B)(6)(a), as it existed after the 2009 amendment, and prior to the 2010 amendments [11] to Domestic Relations Law §236 [B][6][a],contained the following factors for the court to consider in determining the amount and duration of maintenance: 1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part; (2) the duration of the marriage and the age and health of both parties; (3) the present and future earning capacity of both parties; (4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor; (5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage; (6) the presence of children of the marriage in the respective homes of the parties; (7) the tax consequences to each party; (8) the contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party; (9) the wasteful dissipation of marital property by either spouse; (10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; (11) the loss of health insurance benefits upon dissolution of the marriage; (12) any other factor which the court shall expressly find to be just and proper.

15-2. Post-Divorce Maintenance Awards - Actions Commenced Between October 12, 2010, and January 22, 2016 – The 2010 Amendments to Domestic Relations Law § 236 [B] [6] [a]

Domestic Relations Law § 236 [B] [6] [a] was amended in 2010. [12] The 2010 amendments took effect on October 12, 2010, and apply to matrimonial actions commenced on or after the effective date [13] up to and including January 22, 2016. [14]

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9 Domestic Relations Law §236[B] [6] [a] [11], as added by Laws of 2009, Ch 229. The amendments applied to any action or proceeding commenced on or after the effective date of September 14, 2009. See Laws of 2009, Ch 229, §4.

10 Laws of 2009, Ch 229. NY LEGIS 229 (2009)

11 Domestic Relations Law §236[B] [6]; Laws of 2010, Ch 371, §2. The amendments took effect immediately except for sections one, two and four, which all took effect on October 12, 2010, and apply to matrimonial actions commenced on or after the effective date of such sections. Laws of 2010, Ch 371, §6.

12 Laws of 2010, Ch. 371, effective October 12, 2010.

13 Laws of 2010, Ch. 371, § 6.

14 Laws of 2015, Ch. 269 amended Domestic Relations Law §236 [B][1][a], Domestic Relations Law §236 [B][5][d][7], Domestic Relations Law §236 [B][6], Domestic Relations Law § 248, Domestic Relations Law §236 [B][9][b][1], and Family Court Act § 412, effective January 23 , 2016. Laws of 2015, Ch. 269 amended Domestic Relations Law § 236 [B] [5-a], effective October 25, 2015. See Laws of 2015, Ch. 269, Section 8, which reads as follows:

8. This act shall take effect on the one hundred twentieth day after it shall have become a law and shall apply to matrimonial actions and family court actions for spousal support commenced on or after such effective date; provided however that section three of this act shall take effect on the thirtieth day after it shall have become a law and shall apply to matrimonial actions commenced on or after such effective date. Nothing in this act shall be deemed to affect the validity of any agreement made pursuant to subdivision 3 of part B of section 236 of the domestic relations law or section 425 of the family court act prior to the effective date of this act.

As amended in 2010 Domestic Relations Law § 236 [B] [6] [a] provides that "[e] xcept where the parties have entered into an agreement providing for maintenance, pursuant to Domestic Relations Law §236 [B][3], in any matrimonial action the court may order maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties." [15]

The order must be effective as of the date of the application therefor. Any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid. [16]

The 2010 amendments split former factor (2) into new factors (2) and (3): (2) the length of the marriage;[17] and (3) the age and health of both parties. [18] The amendments added 6 factors for the court to consider in determining the amount and duration of a maintenance award. Thus, in actions commenced on or after October 12, 2010, the court must consider twenty (20) factors in determining the amount and duration of maintenance.[19] Domestic Relations Law § 236 [B] [6] [a] as amended in 2010 provides that in determining the amount and duration of maintenance the court shall consider:

(1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;

(2) the length of the marriage;

(3) the age and health of both parties;

(4) the present and future earning capacity of both parties;

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

(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 four hundred fifty-nine-a of the social services law;

(8) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;

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15 Domestic Relations Law §236[B][6][a]

16 Domestic Relations Law §236[B][6][a]

17 Deleted "duration"; added "Length"; formerly part of factor 2; now factor 2.

18 Formerly part of factor 2.

19 Laws of 2010, Ch. 371, §2. The amendments took effect immediately except for sections one, two and four, which all take effect on October 12, 2010, and apply to matrimonial actions commenced on or after the effective date of such sections. Laws of 2010, Ch. 371, § 6.

(9) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;

(10) the presence of children of the marriage in the respective homes of the parties;

(11) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity;

(12) the inability of one party to obtain meaningful employment due to age or absence from the workforce;

(13) the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment;

(14) the tax consequences to each party;

(15) the equitable distribution of marital property;

(16) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(17) the wasteful dissipation of marital property by either spouse;

(18) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(19) the loss of health insurance benefits upon dissolution of the marriage, and the availability and cost of medical insurance for the parties; and

(20) any other factor which the court shall expressly find to be just and proper.[20]

15-3. Post-Divorce Maintenance Awards - Actions Commenced Between October 12, 2010, and January 22, 2016 - Standard of Living during Marriage.

The 1986 amendments to the Equitable Distribution Law revitalized the importance of the standard of living during the marriage as a significant factor in determining maintenance. That test was changed from one factor among several to a new role as the predicate for maintenance and serves as a primary objective, where possible, for courts to attain. The "adequacy" of a given award of maintenance may be determined by reference to the standard of living maintained while the parties were living together.[21]

The 1986 standard as to the prior standard of living is the objective "whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the

20 Domestic Relations Law §236(B) (6) (a), as amended by Laws of 2010, Ch. 371, effective October 12, 2010.

21 See Domestic Relations Law §236(B)(6)(a), as amended by Laws 1986, Ch. 844

other party has sufficient property or income to provide for the reasonable needs of the other." In other words, the 1986 maintenance statute short circuited the former policy that stressed reasonable needs and ability to pay.

The legislature intended that the pre-divorce standard of living be a mandatory factor for the court's consideration in determining the amount and duration of the maintenance award. A finding of a wife's ability to become self-supporting with respect to some standard of living in no way obviates the need for the court to consider the pre-divorce standard of living and does not create a per se bar to lifetime maintenance. Correspondingly, a pre-divorce "high life" standard of living guarantees no per se entitlement to an award of lifetime maintenance. "The lower courts must consider the payee spouse's reasonable needs and pre-divorce standard of living in the context of the other enumerated statutory factors, and then, in their discretion, fashion a fair and equitable maintenance award accordingly. . . ." [22]

15-4. Post-Divorce Maintenance Awards – Actions Commenced Between October 12, 2010, and January 22, 2016 - The Twenty Factors

In determining the amount and duration of maintenance the court must consider the following factors:

Factor (1), the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part.

This factor has a direct bearing on the reasonable needs of the respective parties. If the party seeking maintenance has no reasonable needs because she or he has sufficient income or property, including the share of marital property distributed in the case, ordinarily no maintenance should be awarded. Although only marital property is distributed under Domestic Relations Law §236(B) (5) (d), separate property is a factor to be considered under §236(B) (5) (d) (1). The respective estates of the parties also are relevant to maintenance awards under factor (1). For example, if there is little marital property to distribute, maintenance must be utilized to achieve an equitable result. If there is ample marital property to distribute, no maintenance may be necessary.

Factor (2), the length of the marriage, and factor (3) the age and health of both parties.

These factors direct the court's attention to the future financial security of the parties. There is sufficient flexibility under Domestic Relations Law §236(B) so that the court, where it is possible, may adjust equitable distribution and maintenance to achieve the best future financial security for both parties. These factors tie in with original factor (8), (now factor 9), for property distribution, the "probable future financial circumstances of each party". Particularly where there is a long marriage, or a sick or disabled spouse, the combination of these factors become a paramount consideration for the amount and duration of maintenance. Where it is needed, permanent rather than durational maintenance should be awarded. So too where maintenance is utilized to reimburse a working spouse who enabled the partner to obtain professional or advanced training. Equalization of income or future income is not mandated by the Equitable Distribution Law, and it does not have a "grandmother's clause" entitling a needy spouse to a life subsidy. However, where it is obvious that permanent maintenance is essential for the future financial security of a dependent spouse, courts should not hesitate to grant and enforce it.

Factor (4) the present and future earning capacity of both parties.

22 Hartog v Hartog (1995) 85 NY2d 36, 623 NYS2d 537, 647 NE2d 749.

Trial courts can take into account the future earning capacity of the obligor as well as that of the recipient. The speculation and prediction as to future income are mandated, and instead of having to wait for a substantial change in circumstances, and then seek an upward modification, the recipient may get a bonus in advance.

Factor (5) the need of one party to incur education or training expenses.[23]

This factor (5) is similar to factor (8) "the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor. "[24] This factor can be construed as requiring the court to consider the monied spouse's need to incur education or training expenses to further his or her education or career, as well as the need of the non-monied spouse to incur education or training expenses.

Factor (6), the existence and duration of a pre-marital joint household or a pre-divorce separate household.[25]

Factor (6), which permits the court to consider the existence and duration of a joint household before the parties were married in awarding maintenance, appears to be inconsistent with the basic premise of the equitable distribution law to treat "marriage" as an "economic partnership." The consideration of events prior to the marriage, was specifically omitted from the original 1980 legislation because it is not a factor related to the economic partnership created by the marriage. However, it has been held that this factor was a consideration in determining the duration of maintenance.[26]

One reasonable construction involving a pre-divorce separate household is for the court to consider the expenses incurred by each of the spouses for the upkeep and maintenance of their separate households while living apart prior to the commencement of the action for a divorce, as well as the financial contributions of a spouse to the cost of the other party's pre-divorce separate household.

Factor (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 four hundred fifty-nine-a of the social services law.

This factor (7) brings economic fault and domestic violence into the maintenance equation, stating it another way. There are many acts by one party against the other that a court could construe as inhibiting or continuing to inhibit a party's earning capacity or ability to obtain meaningful employment. For example, one spouse may attempt to disrupt the others business or business relationships. A spouse may interfere with the other spouse's ability to study for a degree or license exam. In addition, the acts that inhibit or continue to inhibit a party's earning capacity include, but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of

23 Domestic Relations Law § 236 [B] [6] (5) (added as a new factor).

24 Formerly factor 4,

25 Domestic Relations Law § 236 [B] [6] (6) (added as a new factor).

26 In Kaprov v Stalinsky, 145 A.D.3d 869, 44 N.Y.S.3d 123--- N.Y.S.3d ----(2d Dept., 2016) the Appellate Division held that in arguing that the maintenance award was out of proportion to the duration of the marriage, the husband failed to recognize that, pursuant to the version of Domestic Relations Law ' 236(B)(6)(a) in effect at the time of the commencement of this action, one of the factors a court should take into account in deciding the amount and duration of a maintenance award is Athe existence and duration of a pre-marital joint household@ (Domestic Relations Law ' 236[B][6][a][6]). The wife testified that the couple lived together from 1984 to 2010, approximately 26 years. Thus, an 11Byear award of maintenance was not out of proportion with the duration of the joint household. The maintenance award was appropriate for the wife to become self-supporting given the factors involved, including the duration of the pre-marital joint household, as well as the wife=s age, absence from the workforce, reduced earning capacity, and limited education (see Domestic Relations Law ' 236[B][6][a]).

the social services law.[27] These acts include an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, menacing, reckless endangerment, kidnapping, assault, attempted assault, or attempted murder.[28]

Factor (8), the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor.

This factor (8) is similar to factor (5) the need of one party to incur education or training expenses. [29] The present and future capacity of the party seeking maintenance to be self-supporting, and the time necessary for training to reenter the job market, was an especially important consideration in short marriages where the parties are relatively young. In most cases, unless other factors come into play, maintenance was not intended to be awarded to young persons who are employed or employable, or, if awarded, it was intended to be on an interim basis for a period of retraining. In this regard, Domestic Relations Law §236(B)(9)(b), dealing with modification of prior orders or judgments, protects the recipient who is unable to find a suitable job or any job at all, by permitting an extension of time or permanent maintenance.

A person seeking maintenance may submit "general testimony" regarding a medical condition only where the effect of that condition on the person's ability to work is readily apparent without the necessity of expert testimony; otherwise, medical records or expert testimony is necessary.[30] The Fourth Department has held that a decision of the Social Security Administration may serve as some evidence of a disability, but it is not prima facie evidence thereof.[31] However, the Second Department has held it is error to admit into evidence a determination of the Social Security Administration on the issue of a party's disability.[32]

Factor (9), reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage.

This was the former factor (5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage.

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27 Domestic Relations Law § 236 [B][6](7) (added as a new factor)

28 See Social Services Law § 459-a.1.

29 See discussion of factor (5) above.

30 In Knope v Knope, 103 A.D.3d 1256, 959 N.Y.S.2d 784 (4th Dept., 2013) the Appellate Division concluded that the record did not support the Referee's finding that plaintiff was "unable to work to support herself financially", now or at any point in the future. At the hearing, plaintiff testified that she suffered from certain medical conditions that prevented her from being able to work or to seek job training in the United States, including dizziness, depression, stress, constant tinnitus, and a complete loss of hearing in one ear. Although a person seeking maintenance may submit "general testimony" regarding a medical condition where the effect of that condition on the person's "ability to work is readily apparent without the necessity of expert testimony" (Battinelli v. Battinelli, 174 A.D.2d 503, 504), that was not the case here. Thus, plaintiff was required to submit medical records or expert testimony, which she failed to do. Instead, plaintiff offered a letter from the Social Security Administration that referenced another letter allegedly declaring that plaintiff would have been eligible for disability benefits if she was a United States citizen. A decision of the Social Security Administration may serve as some evidence of a disability, but it is not prima facie evidence thereof. Here, there was no decision in the record, and the letter submitted by plaintiff only referenced a decision. That letter did not indicate the nature, extent or permanence of plaintiff's disability, or the basis for the alleged determination by the Social Security Administration that plaintiff was disabled.

31 Knope v Knope, supra; Matter of Frenke v. Frenke, 267 A.D.2d 238, 238.

32 In Grasso v Grasso, 47 A.D.3d 762, 851 N.Y.S.2d 213 (2d Dept., 2008) the Appellate Division found that that while the husband correctly contended that the court improperly admitted into evidence and relied upon a determination of the Social Security Administration as to the wife's disability, there was other sufficient admissible evidence which supported the finding that the wife was totally disabled.

This factor mandates a consideration of the housemaker's lost opportunities when the homemaker role was adopted during the marriage. There is no set off for room, board and fringe benefits, nor is it material why the homemaker alternative was adopted during the particular marriage at a time when most wives were in the labor force.[33]

Factor (10), the presence of children of the marriage in the respective homes of the parties.

Courts have differed on the application of this factor where there are young children in the home and the custodial parent chooses not to work outside the home. Some judges may feel that the custodial parent should have that option; others, noting that the majority of mothers have outside jobs, are less sympathetic, unless the other parent has ample resources.

Factor (11), the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity.[34]

Factor (11), the care of children is similar to factor (10) the presence of children of the marriage in the respective homes of the parties. [35] The acts that inhibit or continue to inhibit a party's earning capacity include the care of the children or stepchildren, disabled adult children or stepchildren, and elderly parents or in-laws.

This factor (11) can be construed as authorizing a party to stay home to care for his or her adult children or parents at the expense of the monied spouse. While the legislature probably intended that this factor applies to children, disabled children, stepchildren and elderly in-laws of the present marriage it can also be construed to require the court to consider a party's need to care for stepchildren, disabled children or in-laws of an earlier or later marriage. Requiring a spouse to indirectly contribute to the support of a person he or she is not legally obligated to support appears to be inherently unfair and contrary to the public policy enunciated in the Domestic Relations Law and Family Court Act.[36]

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33 Compare Cappiello v Cappiello (1985) 66 NY2d 107, 495 NYS2d 318, 485 NE2d 983, and Wilson v Wilson (1984, 1st Dept.) 101 App Div. 2d 536, 476 NYS2d 120, app dismd, motion dismd 63 NY2d 768, 481 NYS2d 688, 471 NE2d 460. Cappiello denied compensation for "lost earnings" but Wilson considered them in setting rehabilitative maintenance.

In Cappiello v Cappiello (1985, 1st Dept.) 110 App Div. 2d 608, 488 NYS2d 399, affd 66 NY2d 107, 495 NYS2d 318, 485 NE2d 983, it was held that Supreme Court, New York County had committed error in awarding the wife $25,000, "representing the amount she could have earned during the short period of time that the parties were living together." It had been an 8 month marriage and had as a practical matter ended after 2 months. The Appellate Court found that the portion of the award representing compensation for possible lost earnings "is not authorized under the equitable distribution law and is inconsistent with the denial of any maintenance to the plaintiff. Nor did the record disclose any basis to conclude that she was in any way precluded from working or requested not to work during that period of time. As a matter of fact, she stopped working shortly after the marriage and devoted herself to skiing." Considering the plaintiff's income producing capabilities as well as her comparatively minimal contribution to the household with no responsibilities for child care, it was held that the amount of the maintenance award was unjustified. Insofar as standard of living was concerned, the court noted that the plaintiff's standard of living improved as a result of the marriage, but that where the marriage is of such short duration there is no issue, and where the plaintiff is relatively young and capable of self-support, "this factor is of limited weight".

34 Domestic Relations Law § 236 [B][6] (11) (added as a new factor)

35 Formerly factor 6.

36 See Family Court Act § 415 which limits a parents obligation to support his child to children under that age of 21. The original section required a parent to support a husband, wife, father, mother, grandparent or child and "child" had no age limit. Grandparents were excluded in 1965 (Laws of 1965, Ch. 674) and the responsibility to support an adult child above the age of twenty-one was repealed in 1974 [Laws of 1974, Ch. 937].

Family Court Act § 415 provides:

Factor (12), the inability of one party to obtain meaningful employment due to age or absence from the workforce.[37]

This factor is similar to former factors which are now factors (3) the age and health of both parties; [38] and (9) "reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage." [39] It allows the court to award maintenance to a spouse due to age or absence from the workforce, something which it could already do under factors (3) and (9).

Factor (13), the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care, and medical treatment.[40]

Factor (13), giving the court discretion to award additional maintenance or extending its duration because of exceptional additional child support expenses, including but not limited to, schooling, day care , and medical treatment[41]appears to constitute impermissible "double dipping". This factor (13) allows the court to award maintenance for child support expenses covered by the Child Support Standards Act and Domestic Relations Law §240 (15-b) (c) (5) (6) and (7).[42]

Factor (14), the tax consequences to each party.

This is an important factor where there are alternatives in setting up maintenance and equitable distribution. In both pretrial negotiations and in contested cases, counsel is expected to provide a detailed tax analysis of alternative plans settling the financial incidents of divorce.

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415. Duties to support recipient of public assistance or welfare and patients in institutions in the department of mental hygiene

Except as otherwise provided by law, the spouse or parent of a recipient of public assistance or care or of a person liable to become in need thereof or of a patient in an institution in the department of mental hygiene, if of sufficient ability, is responsible for the support of such person or patient, provided that a parent shall be responsible only for the support of his child or children who have not attained the age of twenty-one years. In its discretion, the court may require any such person to contribute a fair and reasonable sum for the support of such relative and may apportion the costs of such support among such persons as may be just and appropriate in view of the needs of the petitioner and the other circumstances of the case and their respective means. Step-parents shall in like manner be responsible for the support of children under the age of twenty-one years. (L.1962, c. 686. Amended L.1965, c. 674, § 1; L.1966, c. 256, § 46; L.1974, c. 937, § 4; L.1977, c. 777, § 4.)

37 Domestic Relations Law § 236 [B][6] (12) (added as a new factor)

38 Formerly part of factor 2.

39 Formerly factor 5

40 Domestic Relations Law § 236 [B][6] (3) (added as a new factor)

41 Domestic Relations Law § 236 [B][6] (3) (added as a new factor)

42 Domestic Relations Law § 240 (1-b) (c) (5) (6) and (7) provide:

(5) The court shall determine the parties' obligation to provide health insurance benefits pursuant to section four hundred sixteen of this part and to pay cash medical support as provided under this subparagraph.

(6) Where the court determines that the custodial parent is seeking work and incurs child care expenses as a result thereof, the court may determine reasonable child care expenses and may apportion the same between the custodial and non-custodial parent. The non-custodial parent's share of such expenses shall be separately stated and paid in a manner determined by the court.

(7) Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent shall pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider.

Factor (15), the equitable distribution of marital property.

This factor appears to merely restate factor (2).

Factor (16) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party.

This factor has become the focal point for tactics and controversies on the maintenance issue where one party claims that the services and contributions of the homemaker were minimal or nonexistent, i.e., "negative contributions", and the homemaker claims they were substantial. The decisions indicate that the length of the marriage and the presence or absence of children tend to shape the court's attitude in applying this factor.[43] This factor covers contributions as a spouse, parent, wage earner, and homemaker, and deals with the career and career potential of the other party. In contested cases, this factor is usually the most controversial item, and the division of marital property and the amount and duration of maintenance sometimes depend upon the resolution of this issue. The unusually competent spouse is rewarded, while the incompetent spouse will have fewer equities.

"Contributions to the career or career potential of the other party" may not have received the attention it deserves. In addition to providing a base for the student spouse/working spouse situation so that maintenance (or property allocation) may be utilized for reimbursement purposes, this language ties in with the rule in Hickland v. Hickland[44] which is that it is the earning potential of the obligor, not what he deigns to earn, which affects the standard of support. This rule is well established in New York and has been followed in numerous cases. In addition, although courts have been reluctant to force an obligor to invade capital in order to pay alimony or maintenance, in a proper case that may become necessary. [45]

Factor (17), the wasteful dissipation of marital property by either spouse;

This factor sets forth the one kind of marital fault that clearly is relevant under the law. The economic fault of the wage earner or moneyed spouse is a factor to be considered just as the dissipation of family assets by a spendthrift husband or an overly extravagant wife. It specifically covers only family assets, as such, not individually owned separate property in the title holder's name.

Whalen v Whalen[46] is a leading case on dissipation of family assets by a spouse who was a born loser at gambling, and such fault was expressly recognized as "egregious" in Blickstein v Blickstein.[47]

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43 Compare Lesman v Lesman (1982, 4th Dept.) 88 App Div. 2d 153, 452 NYS2d 935 (minimal contributions) and Conner v Conner (1983, 2d Dept.) 97 App Div. 2d 88, 468 NYS2d 482 (maximum contributions), and see the strange case of Kobylack v Kobylack (1981) 110 Misc. 2d 402, 442 NYS2d 392, mod on other grounds (2d Dept.) 96 App Div. 2d 831, 465 NYS2d 581, revd on other grounds 62 NY2d 399, 477 NYS2d 109, 465 NE2d 829, on remand (2d Dept.) 111 App Div. 2d 221, 489 NYS2d 257. New York courts appear to be reluctant to award other than rehabilitative maintenance where there were no children during a short marriage. See Cappiello v Cappiello (1985, 1st Dept.) 110 App Div. 2d 608, 488 NYS2d 399, affd 66 NY2d 107, 495 NYS2d 318, 485 NE2d 983 (short childless marriage where wife was said to devote her life to skiing); and Rubin v Rubin (1984, 2d Dept.) 105 App Div. 2d 736, 481 NYS2d 172 (wife played bridge and tennis).

44 Hickland v Hickland (1976) 39 NY2d 1, 382 NYS2d 475, 346 NE2d 243, cert den 429 US 941, 50 L Ed 2d 310, 97 S Ct 357, later proceeding (3d Dept.) 56 App Div. 2d 978, 393 NYS2d 192, later proceeding (3d Dept.) 77 App Div. 2d 683, 430 NYS2d 15, later proceeding (3d Dept.) 100 App Div. 2d 643, 472 NYS2d 951.

45 Kay v Kay (1975) 37 NY2d 632, 376 NYS2d 443, 339 NE2d 143.

46 Whalen v Whalen, N.Y.L.J., Sept. 24, 1981 (Nassau Co).

47 Blickstein v Blickstein (1984, 2d Dept.) 99 App Div. 2d 287, 472 NYS2d 110.

Factor (18), the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration.

This factor restates existing case law although there had been some disagreement as to the granting of injunctive relief. Prior case law recognized that family assets could not be transferred where the transfer was fraudulent. [48]

Factor (19), the loss of health insurance benefits upon dissolution of the marriage, and the availability and cost of medical insurance for the parties.

This factor is self-explanatory.

Factor (20), any other factor which the court shall expressly find to be just and proper.

This factor was original catchall factor (10). It was moved to factor (11) in 1986 and to factor (12) in 2009. It became factor (20) in 2010. It covers any equitable consideration that may have been overlooked in setting up the statutory criteria. Courts have and probably will continue to differ on whether marital fault comes within this factor, or is irrelevant, or whether some kinds of marital fault are pertinent while others are irrelevant. As in the case of equitable distribution, and in setting child support, the factors considered and the reasons for the decision must be set forth by the court. Although "marital misconduct" amounting to grounds for divorce or legal separation was an automatic bar to alimony or exclusive possession of the marital home under former Domestic Relations Law §236, "marital misconduct" is unmentioned in Domestic Relations Law §236 [B] as a specific factor for the court to consider. At the court's discretion, however, at least serious marital misconduct may be considered under catchall factor (20) and weighed and balanced along with the other enumerated factors.

15-5. Post-Divorce Maintenance Awards - Actions Commenced Between October 12, 2010, and January 22, 2016 - Duration of Maintenance

Rules have been established regarding the duration of maintenance awards. [49]

Every case must be determined on its unique facts. Durational maintenance is more commonly awarded where the spouse seeking support is relatively young and healthy and is not required to care for young children.

In Sperling v Sperling, the Appellate Division observed:

"Where lifetime maintenance has been awarded, the recipient spouse has almost invariably been older than Charlotte, often in impaired health. Furthermore, the supporting spouse was in far better financial condition than Raymond. Thus, lifetime maintenance was directed in Reingold v Reingold, 143 AD2d 126 [wife, 52, never worked, husband earned over $100,000 per year]; Iacobucci v Iacobucci, 140 AD2d 412 [husband owned a successful insurance business, wife never worked] Formato v Formato, 134 AD2d 564 [wife, 46, had no business skills, husband earned $72,000 per year]; Jones v Jones, 133 AD2d 217 [wife, 50, had psychiatric problems; husband earned $58,000 a year]; Shahidi v Shahidi, 129 AD2d 627 [husband's expectations were promising, wife had limited potential earning capacity]; Kerlinger v Kerlinger, 121 AD2d 691 [wife, 50, no special skills, no high school diploma]; Delaney v Delaney, 114 AD2d 312 [wife, 47, husband, president of Consolidated Edison, earned $100,000 a year]; Murphy v

48 See Hickland v Hickland (1976) 39 NY2d 1, 382 NYS2d 475, 346 NE2d 243. The factor is superfluous unless it relates back to the time before a divorce was in the offing.

49 Sperling v Sperling (1991, 2d Dept.) 165 App Div. 2d 338, 567 NYS2d 538.

Murphy, 110 AD2d 688 [wife, 47, no special skills or training] and Antis v Antis (1985, 2d Dept) 108 App Div 2d 889, 485 NYS2d 770 [wife mentally ill and severely disfigured, husband earned $49,700]; but cf., Pottala v Pottala, 112 AD2d 553, where the spouse seeking support is relatively young and healthy, however, and is not required to care for young children, durational maintenance has more commonly been awarded. See, Eli v Eli, 123 AD2d 819; Coffey v Coffey, 119 AD2d 620; Armando v Armando, 114 AD2d 875; Hillman v Hillman, 109 AD2d 777; see also, Behan v Behan, 163 AD2d 505)." [50]

The more realistic function of durational maintenance is to allow the recipient spouse an opportunity to achieve independence. Thus, the award should be in an amount and for a time period sufficient to give him/her a reasonable period of time in which to learn or update work skills and to enter the employment market with a view to being self-supporting. Equity "requires that the parties' marital standard of living must be considered in gauging the ability of the recipient spouse to become self-supporting, and the amount of maintenance to be awarded. For example, while a recipient spouse with earning capacity of $20,000 per year may be considered self-supporting in a given case, that same income may be deemed insufficient in the case of a spouse who had enjoyed a higher marital standard of living. [51]

A time limit for maintenance should be imposed only in order to enable a party to obtain training so as to become sufficiently self-supporting to achieve the standard of living to which he or she has become accustomed in the past or otherwise to allow such person to restore earning capacity to a previous level.[52]

Lifetime maintenance is appropriate only where a spouse is incapable of future self-support or has clearly subordinated a career to act as homemaker and parent, has no obvious skills or training or is mentally or physically ill. An award of rehabilitative maintenance, on the other hand, is intended to allow a spouse "an opportunity to achieve economic independence".[53]

15-6. Post-Divorce Maintenance Awards - Actions Commenced Between October 12, 2010, and January 22, 2016 - Imputed Income[54]

The leading cases dealing with the imputation of income to a spouse in a matrimonial action are Kay v Kay[55] and Hickland v Hickland, [56] two pre-equitable distribution cases.

In Kay v Kay[57] an action for a divorce the husband, a salesman, owned real estate and securities estimated at almost a million dollars, two-thirds of it in IBM stock, from which he derived an income of $10,000. Most of his real estate investments were financed by the IBM stock. During the marriage, he told his wife that his only income was earned as a salesman. He denied her many basic household necessities because he "could not afford them." At the trial, the husband testified that his expenditures for himself and his family were $28,000 a year. Evidence at the trial revealed that his employer supplied him with a car, used by himself and his family. The husband's testimony

50 Sperling v Sperling (1991, 2d Dept.) 165 App Div. 2d 338, 567 NYS2d 538.

51 Sperling v Sperling (1991, 2d Dept.) 165 App Div. 2d 338, 567 NYS2d 538.

52 Brownstein v Brownstein (1990, 1st Dept.) 167 App Div. 2d 127, 561 NYS2d 216, app den 77 NY2d 806, 569 NYS2d 610, 572 NE2d 51.

53 Harmon v Harmon 173 AD2d 978, 578 NYS2d 897 (1st Dept., 1992).

54 See Chapter 13 for an extended discussion of imputed income in child support cases.

55 (1975) 37 NY2d 632, 376 NYS2d 443, 339 NE2d 143.

56 39 N.Y.2d 1,346 N.E.2d 243, 382 N.Y.S.2d 475 (1976).

57 (1975) 37 NY2d 632, 376 NYS2d 443, 339 NE2d 143.

was that his net income was $28,000 per year after taxes, his gross income being $67,000 for which he gave a confusing explanation by saying it was spent for business needs. The husband's evidence was also ambiguous as to $13,000 listed as a business expense for tax purposes but described by the husband as necessary "gratuities" in connection with his job.

In Kay, the Court of Appeals noted that the evidence justified a finding that the husband's true income was much higher than his reported $28,000 per year, and while he was entitled to plead self-incrimination when asked about deductions he labeled gratuities, the court was not required to allow the deduction. It stated that faced with evidence that tends to obscure rather than clarify a husband's true financial status a court is entitled to make an award based upon the wife's proof of her needs. The Court distinguished the criteria for fixing alimony from those for child support, noting that child support is to be made "out of the property of either or both of its parents" and "as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child." It stated that the father's resources, rather than his net income, were the limit upon a child support award where he can afford more than he earns, and the interests of the child justify it. The court held that if it were necessary for the husband to utilize his capital or other assets for alimony or child support, they would not be exempt because he voluntarily maintained his finances in a form that limited the income they produced.[58]

In Hickland v Hickland,[59] the husband, an engineer, with annual earnings in excess of $45,000 persuaded his wife to let him try full-time farming as an occupation. This was an experiment and the wife agreed to it expecting that it would provide them with a living. After putting the plan into effect, the parties continued to live in the marital residence and the farming, which took place at Argyle Farm, became a losing proposition. After a tractor accident, the husband hired someone to run the farm and devoted himself to freelance management consulting. The trial court was unable to ascertain the husband's exact consulting income because he failed to file income tax returns for the last few years of the marriage. However, his testimony established it at not less than $35,000 net annually until the year in which separation proceedings, were begun. During negotiations for a separation agreement, the husband decided to abandon an outgoing consulting assignment which would have paid him approximately $20,000 for 10 weeks' work. He insisted that he had become a full-time farmer and refused all offers of consulting employment ever since.

During the same time, the husband entered into a contract with his sister, where he turned over to her title to all of his real estate, including the marital residence and Argyle Farm, along with various stocks and bonds which he then owned. In exchange, his sister forgave a small loan and guaranteed him the use of a car and its related expenses, all the food he needed from the farm, a remodeled house on it to live in rent free, $15,000 in benefits to each of his children upon his death, a college education for his minor son, and a percentage of any possible profits from the farm and the securities. He agreed to manage the farm and the stock portfolio without salary. At trial, he asserted he was a subsistence farmer with no income from which to pay alimony to his wife. The Court of Appeals found that the husband deliberately stripped himself of income for reasons which went beyond the needs of a reasonable occupational choice. It found that he was capable of earning a substantial income, and his arrangement

58 Kay v Kay (1975) 37 NY2d 632, 376 NYS2d 443, 339 NE2d 143.

59 39 N.Y.2d 1,346 N.E.2d 243, 382 N.Y.S.2d 475 (1976).

with his sister appeared to be an impermissible attempt to avoid his obligation to his wife. The court held that the husband could not avoid his obligations by relying on his wife's acquiescence in his plan to take up farming, noting that he never actually put his plan into full practice while the marriage was viable, but only after the parties had already separated.[60]

The Court of Appeals held that:

" It is the actual marital standard of living, realistically appraised, which provides the basis for an award of alimony where the husband can afford to maintain that standard unless he can present genuine reasons, vocational or otherwise, upon which the court could justify a lesser award ... So measured, the husband's proof here fell far short of showing that his lack of income was either unavoidable or the result of a plan to which the wife was irrevocably committed. Under such circumstances, a husband is under an obligation to use his assets and earning powers if these are required in order to meet his obligation to maintain the marital standard of living...." [61]

Under the1986 amendments the prior standard of living is again the objective that the court should try to reach when awarding maintenance. The general rule is that income will be imputed to a spouse for purposes of awarding maintenance in an amount sufficient to meet the objective of the pre-separation standard of living, based on a finding of a past demonstrated earnings potential; [62] past earnings, actual earning capacity and educational background; [63] receipt of perquisites of cash and other company benefits;[64] and where a spouse voluntarily maintains his/her assets in a form which limits the income they produce. [65]

Income may not be attributed to a spouse's former occupation or business where the spouse's proof shows that his lack of income was either unavoidable or the result of a plan to which the other spouse was irrevocably committed.[66]

Imputation of income may be based upon the testimony of an expert regarding a party's ability to earn an income.[67]

The calculation of a parties' earning potential must have some basis in law and fact, and an award based on imputed or attributed income will be reversed where there is no evidence or factual basis for it in the record. [68] Thus, it was held by the Appellate Division that the trial court erred in imputing income to the husband of $60,000 per year, where it made no finding that he voluntarily reduced his income to avoid paying child support and the wife did not present any proof concerning the husband's tax returns or business practices.[69] Where the Supreme Court determined that the husband's annual income included at least $10,000 in unreported cash and $5,000 for

60 Hickland v Hickland, 39 N.Y.2d 1,346 N.E.2d 243, 382 N.Y.S.2d 475 (1976)

61 Hickland v Hickland, 39 N.Y.2d 1,346 N.E.2d 243, 382 N.Y.S.2d 475 (1976)

62 Rocanello v Rocanello, 678 NYS2d 385 (AD 2nd Dept 1998)

63 Junkins v Junkins, 238 A.D.2d 480, 656 N.Y.S.2d 650 (2d Dep't, 1997).

64 Isaacs v Isaacs, AD2d, 667 NYS2d 740 (AD 1st Dept. 1998); Brown v Brown, 239 A.D. 2d 535, 657 N.Y.S.2d 764 (2d Dep't, 1997).

65 Kay v Kay, supra.

66 Hickland v Hickland, supra

67 In Lago v Adrion, 93 A.D.3d 697, 940 N.Y.S.2d 287 (2d Dept.,2012), the Appellate Division held that Supreme Court properly imputed $80,000 in annual income to the plaintiff based upon her education and experience, and the testimony of the defendant's expert. Imputation of income may be based upon the testimony of an expert regarding a party's ability to earn an income.

68 Petek v. Petek, 239 A.D.2d 327, 657 N.Y.S.2d 738 (2d Dep't 1997)

69 Martusewicz v. Martusewicz, 217 A.D.2d 926, 630 N.Y.S.2d 156 (4th Dep't 1995).

the use of a company vehicle provided by the family the Appellate Division reversed its findings because, although there was evidence that he received cash from his father, there was no proof regarding the amount. The record contained no indication whether the money represented occasional gifts to the husband from his father or regular compensation from his employer. The Appellate Division held that absent proof of the nature or amount of the cash received there was no basis for imputing the unreported cash income to the husband. And as there was no evidence that he used his company vehicle for his personal needs the trial court improperly imputed additional income to him. [70]

In exercising the discretion to impute income to a party, a court is required to provide a clear record of the source from which the income is imputed and the reasons for such imputation. [71] Where the Court fails to specify the sources of income imputed and the actual dollar amount assigned to each category, the record is not sufficiently developed to allow appellate review and the imputation of income will be vacated.[72]

Income has been imputed where a party has received money, goods, or services from a relative, such as the fathers' present wife in light of his allegedly reduced income, his failure to supply requested financial information regarding his businesses and discrepancies between those financial records which he did supply and his income tax return. [73] However, in another case Huebscher v Huebscher,[74] an action for divorce where the wife was apparently honest with the court, the First Department held that plaintiff's testimony that defendant wife's mother had provided the couple with annual gifts during the course of their marriage, coupled with other evidence of her past generosity, was an improper basis upon which to impute income to the wife for purposes of establishing the proper level of child support, as it assumed that the gift-giving by her mother would continue in futuro. The court held that "since the mother had no legal obligation, this "income" source should not have been taken into account".[75] It has been held that a court may properly impute income to a spouse based upon a pattern of gifts from a relative, but not from sporadic gifts from a relative.[76] It was not an abuse of discretion to refuse to impute income from gifts given to plaintiff by her mother during the two years preceding the trial, to assist with her day-to-day needs and payment of bills during the time when defendant left his employment and, subsequently, the marital home, as well as during the pendency of this action when defendant failed to provide support for plaintiff and the children, where plaintiff testified that there was no agreement that her mother continue to give her such sums of money. Considering the

70 Marino v Marino, 229 A.D.2d 971, 645 N.Y.S.2d 252 (4th Dep't 1996).

71 Matter of Kristy Helen T. v. Richard F.G., Jr., 17 A.D.3d 684, 685, 794 N.Y.S.2d 92). Rohme v. Burns, 79 A.D.3d 756, 757, 912 N.Y.S.2d 652, 653–54 (2d Dept., 2010).

72 Id. at 685, 794 N.Y.S.2d 92; see Matter of Sena v. Sena, 61 A.D.3d 980, 981, 878 N.Y.S.2d 759; Matter of Genender v. Genender, 40 A.D.3d 994, 995, 836 N.Y.S.2d 291).

73 Ladd v. Suffolk County DSS, 199 A.D. 2d 393, 605 N.Y.S. 318 (2d Dep't 1993)

74 206 A.D.2d 295, 614 N.Y.S.2d 524 (1st Dept.,1994)

75 See discussion of imputed income in maintenance cases in Sections 16-4, 16-13 and 19-6.

76 Rostropovich v. Guerrand-Hermes, 18 A.D.3d 211, 211, 794 N.Y.S.2d 42, 43 (1st Dept., 2005) (income imputed to husband who received pattern of gifts from father but gifts wife received from her father were sporadic and not imputed); See also Rooney v. Rooney, 938 N.Y.S.2d 724, 725, 92 A.D.3d 1294, 1295, (4 Dept.,2012) ("We also reject defendant's contention in appeal No. 3 that, in * calculating the amount of child support, the Referee erred in failing to impute income to plaintiff based on cash gifts that she received from her mother (see Domestic Relations Law ' 240[1Bb][b][5][iv][D]). The evidence at trial supported the Referee's finding that the cash gifts were sporadic in nature, rather than regular and expected (see Rostropovich v. Guerrand Hermes, 18 A.D.3d 211, 794 N.Y.S.2d 42").

timing and discretionary nature of the gift-giving, the decision not to impute these funds as income was not an abuse of discretion.[77]

15-7. Post-Divorce Maintenance Awards - Actions Commenced Between October 12, 2010, and January 22, 2016 - Effect of McSparron and Grunfeld Cases

In Grunfeld v Grunfeld [78] the Supreme Court ordered the defendant to pay maintenance of $15,000 per month until the sale of the marital home one year after the younger child was to enter college, in 2000. Thereafter, maintenance was to be reduced to $8,500 per month. The court valued defendant's law practice as of the date of commencement of the matrimonial action, using the "excess earnings" method, to be $2,581,760. The Supreme Court also determined the value of defendant's license to practice law for equitable distribution purposes. To avoid double counting, since defendant's income in excess of "reasonable compensation" had already been considered in determining the value of defendant's interest in the practice, the court excluded that portion of defendant's future earnings from consideration. The sum of the license's bare value and enhanced earnings potential was found to be $1,547,000.

The Appellate Division modified directing that the one-half of the value of defendant's professional license - $773,500 - should also have been distributed to plaintiff. The court held that the reduction of maintenance from $15,000 to $8,500 per month should begin following full payment of the distributive award. The Court of Appeals modified the order of the Appellate Division because it double counted defendant's income in ordering that plaintiff should receive both undiminished maintenance and the full distributive award of one-half the value of plaintiff's law license. [79]

The Court of Appeals noted that, in contrast to passive income-producing marital property having a market value, the value of a professional license as an asset of the marital partnership is a form of human capital, which is dependent upon the future labor of the licensee. The asset is totally indistinguishable and has no existence separate from the projected professional earnings from which it is derived. To the extent that those same projected earnings used to value the license also form the basis of an award of maintenance, the licensed spouse is being charged twice with the distribution of the same marital asset value, or with sharing the same income with the non-licensed spouse.[80]

In Grunfeld, when setting the level of maintenance, Supreme Court included as part of defendant's earning capacity the projected earnings derived from his professional license. The court also used the same earnings attributable to the law license to determine the present value of the license as a marital asset. The Court of Appeals held that to comply with McSparron,[81] Supreme Court had to reduce either the income available to make maintenance payments or the marital assets available for distribution, or some combination of the two. "Once a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout." It stated that where license income is considered in setting maintenance, a court can avoid double

77 Noble v. Noble, 78 A.D.3d 1386, 911 N.Y.S.2d 252 (3 Dept., 2010); See also Mayle v Mayle, 299 A.D.2d 869, 750 N.Y.S.2d 256 (4th Dep't 2002) (error to impute income to husband based on living expenses provided to him by his girlfriend.).

78 Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

79 Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

80 Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

81 McSparron v McSparron, 87 NY2d 275, 639 NYS2d 265 (1995).

counting by reducing the distributive award based on that same income. It also noted that there may be cases where it is more equitable to avoid double counting by reducing the maintenance award. Where the license is likely to retain its value in the future but the non-licensed spouse may only be entitled to receive maintenance for a short period of time, it may be fairer actually to distribute the value of the license as marital property rather than to take the license income into consideration in determining the licensed spouse's capacity to pay maintenance." [82]

The Court of Appeals held that on the face of the Appellate Division's decision, by ordering full distribution of plaintiff's share of defendant's license without any adjustment of maintenance, the court engaged in double counting of income, which was inconsistent with McSparron. Therefore, it remitted the matter to the Supreme Court to recalculate the required reduction in the license distributive award, in accordance with McSparron and its opinion.[83]

The Court of Appeals also pointed out that Courts have the discretion to value "active" assets, such as a professional practice, on the commencement date, while "passive" assets such as securities, which could change in value suddenly based on market fluctuations, may be valued at the date of trial. It noted that "Such formulations, however, may prove too rigid to be useful in particular cases. Thus, they should be regarded only as helpful guide-posts and not as immutable rules of law."[84]

15-8. Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 - In General

Domestic Relations Law § 236 [B][6] was amended in 2015 by establishing post-divorce maintenance guidelines and a statutory formula for determining the guideline amount of post-divorce maintenance awards, with factors for deviation upward or downward, where the award is unjust or inappropriate. [85]

The definition of income for post-divorce maintenance was modified to include income from income-producing property that is being equitably distributed.[86]

The amendment requires one variation from the calculation of income under the Child Support Standards Act for purposes of calculating maintenance, namely that alimony or maintenance actually paid or to be paid to a spouse that is a party to the action should not be deducted from income. [87] This variation from the calculation of

82 Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

83 Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

84 Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

85 Laws of 2015, Ch. 269 amended Domestic Relations Law §236 [B][1][a], Domestic Relations Law §236 [B][5][d][7], Domestic Relations Law §236 [B][6], Domestic Relations Law § 248, Domestic Relations Law §236 [B][9][b][1], and Family Court Act § 412, effective January 23 , 2016. Laws of 2015, Ch. 269 amended Domestic Relations Law § 236 [B] [5-a], effective October 25, 2015. See Laws of 2015, Ch. 269, Section 8, which reads as follows:

8. This act shall take effect on the one hundred twentieth day after it shall have become a law and shall apply to matrimonial actions and family court actions for spousal support commenced on or after such effective date; provided however that section three of this act shall take effect on the thirtieth day after it shall have become a law and shall apply to matrimonial actions commenced on or after such effective date. Nothing in this act shall be deemed to affect the validity of any agreement made pursuant to subdivision 3 of part B of section 236 of the domestic relations law or section 425 of the family court act prior to the effective date of this act.

86 Domestic Relations Law § 236[B] [6] [b] [4].

87 Domestic Relations Law § 236[B] [6] [b] [3].

income under the Child Support Standards Act was necessary because otherwise, the formula becomes circular by requiring deduction of the very amount that is being calculated.[88]

Domestic Relations Law §236 [B] [1] [a] was also amended to change the word "recipient" to "payee" in the definition of maintenance. It reads as follows: "The term "maintenance" shall mean payments provided for in a valid agreement between the parties or awarded by the court in accordance with the provisions of subdivisions five-a and six of this part, to be paid at fixed intervals for a definite or indefinite period of time, but an award of maintenance shall terminate upon the death of either party or upon the payee's valid or invalid marriage, or upon modification pursuant to paragraph B of subdivision nine of this part or section two hundred forty-eight of this chapter."[89]

The introductory paragraph to former Domestic Relations Law §236 [B] [6] [a] provided, before listing the twenty statutory factors that the court was required to consider: a. **"**Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court may order maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties. Such order shall be effective as of the date of the application therefor, and any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid. In determining the amount and duration of maintenance the court shall consider:**"**

Domestic Relations Law §236 [B] [6] [a] as amended in 2015, removed most of that provision, and now provides that: **"**Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action, the court, upon application by a party, shall make its award for post-divorce maintenance pursuant to the provisions of this subdivision.**"**

The 2015 amendment to Domestic Relations Law §236 [B][6][a] eliminated the words **"**... in any matrimonial action the court may order maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties. Such order shall be effective as of the date of the application therefor, and any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid.**"**

It appears from the elimination of the words **'**[s]uch order shall be effective as of the date of the application therefor ..., that the court is no longer required to make the award of maintenance retroactive to the date of application, or give the payor credit for temporary maintenance that has been paid, but that the matter of retroactivity

88 Domestic Relations Law § 236[B] [6] [b] [3]. See New York Assembly Memorandum in Support of the legislation (Bill No. A07645)

89 Domestic Relations Law §236 [B] [1] [a] as amended by Laws of 2015, Ch. 269, § 1, effective January 23, 2016, to substitute the word "payee" for recipient.

is a matter of discretion, as it was prior to 1986, when the court had the discretion to make the award retroactive nunc pro tunc, to the date of the commencement of the action. The amended statute does not prohibit the court from awarding retroactive maintenance to the date of the commencement of the action. Nor does it prevent the court from directing the method by which retroactive maintenance is to be paid, such as in one sum or periodic sums. Nor does it prevent the court from exercising its discretion to take into account any amount of temporary maintenance which has been paid.[90]

The application of the post-divorce maintenance guidelines is mandatory. In any matrimonial action the court must make its award for post-divorce maintenance pursuant to the provisions of Domestic Relations Law § 236[B] [6], except where the parties have entered into an agreement pursuant to Domestic Relations Law § 236 [B] [3] providing for maintenance. [91]

There are two formulas to be used in calculating maintenance: one where child support will be paid and where the post-divorce maintenance payor is also the non-custodial parent for child support purposes; and one where child support will not be paid, or where it will be paid but the post-divorce maintenance payor is the custodial parent for child support purposes. [92]

The court must award the post-divorce maintenance guidelines obligation up to the income cap in accordance with Domestic Relations Law § 236[B] [6] [c], unless the court finds that the post-divorce maintenance guidelines obligation is unjust or inappropriate based upon consideration of any one or more of the factors in Domestic Relations Law § 236[B] [6] [e] [1] [a-o] and adjusts the post-divorce maintenance guidelines obligation accordingly.[93] An income cap of $178,000, which is adjusted every two years, applies to post-divorce maintenance awards. [94]

Where the payor's income exceeds the income cap, the court must perform the calculations set forth in Domestic Relations Law § 236[B] [6] [c] for the income of the payor up to and including the income cap.[95] For income exceeding the income cap, the amount of additional maintenance awarded, if any, is within the discretion of the court which must take into consideration any one or more of the factors set forth in Domestic Relations Law § 236[B] [6][e][1]. [96]

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90 In Mittman v. Mittman, 263 A.D. 384, 386, 33 N.Y.S.2d 211, 213 (1st Dep't 1942) the Appellate Division said:" A court of equity has the discretionary power to require that payments of permanent alimony begin as of the time of the commencement of the action. It was so decided many years ago by the Court of Appeals in McCarthy v. McCarthy, 143 N.Y. 235, 38 N.E. 288 (1894). See, also Harris v. Harris, 259 N.Y. 334, 337, 182 N.E. 7 (1932); Forrest v. Forrest, 25 N.Y. 501, 518, 1862 WL 4782 (1862); Burr v. Burr, 10 Paige 20. While it thus appears that in an action for divorce or separation a final decree may in the discretion of the court provide that alimony be payable nunc pro tunc as of the time of the commencement of the action (see Harris v. Harris, 259 N.Y. 334, 337, 182 N.E. 7 (1932)), such discretion should be exercised cautiously and with a proper regard for the circumstances in each particular case." To the same effect see also Abrusci v. Abrusci, 79 A.D.2d 980, 980, 434 N.Y.S.2d 722, 722-23 (2d Dep't 1981).

91 Domestic Relations Law § 236[B] [6] [a].

92 Laws of 2015, Ch. 269 amended Domestic Relations Law §236 [B] [1] [a], and Domestic Relations Law §236 [B] [6], effective January 23, 2016.

93 Domestic Relations Law § 236[B] [6] [e] [1]

94 Domestic Relations Law § 236[B][6][b][4]

95 Domestic Relations Law § 236[B] [6] [d] [1].

96 Domestic Relations Law § 236[B] [6] [d] [2]

Domestic Relations Law § 236[B] [6] [e] [1] [97] lists fifteen statutory factors for consideration by the court in determining maintenance awards. [98] The factors the court may consider in post-divorce maintenance awards now include termination of child support,[99] and income or imputed income on assets being equitably distributed. [100] Former factor (2), the length of the marriage,[101] was removed and subsumed in the provision for the duration of Post-Divorce maintenance. Former factor (8), the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefore; [102] former factor (10), the presence of children of the marriage in the respective homes of the parties; [103] former factor (12), the inability of one party to obtain meaningful employment due to age or absence from the workforce; [104] and former factor (13), the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment;[105] were removed from the maintenance statute in 2015.

There is an "advisory" durational formula for determining the duration of post-divorce maintenance awards.[106] However, nothing prevents the court from awarding non-durational, post-divorce maintenance in an appropriate case.[107] In determining the duration of maintenance, the court is required to consider anticipated retirement assets, benefits, and retirement eligibility age, if ascertainable at the time of the decision.[108]

15-9. Post-Divorce Maintenance Guidelines in Actions Commenced on or after January 23, 2016 – Definitions – Income Cap

The following definitions appear in Domestic Relations Law § 236 [B] [6] [b]:

"Agreement" has the same meaning as in Domestic Relations Law § 236 [B] [3].[109]

"Guideline amount of post-divorce maintenance" means the dollar amount derived by the application of Domestic Relations Law § 236[B] [6], paragraph c or d. [110]

"Guideline duration of post-divorce maintenance" means the durational period determined by the application of Domestic Relations Law § 236[B] [6] [f]. [111]

"Post-divorce maintenance guideline obligation" means the guideline amount of post-divorce maintenance and the guideline duration of post-divorce maintenance. [112]

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97 Domestic Relations Law § 236[B] [6] [d] [2]

98 L.2015, c. 269, §§ 1, 2, 4, 5, eff. Jan. 23, 2016.

99 Domestic Relations Law § 236[B] [6] [e] [1] [d].

100 Domestic Relations Law § 236[B] [6] [e] [1] [m].

101 See former Domestic Relations Law §236 [B] [6] [a] [2], as amended by Laws of 2010, Ch. 371, §2. The 2010 Amendment deleted "duration" and added "Length." This factor was formerly part of factor 2 and became factor (2).

102 See former Domestic Relations Law §236 [B] [6] [a] [8], as amended by Laws of 2010, Ch. 371, §2. This factor was formerly factor (4).

103 See former Domestic Relations Law §236 [B] [6] [a] [10], as amended by Laws of 2010, Ch. 371, §2. This factor was formerly factor (6).

104 See former Domestic Relations Law §236 [B] [6] [a] [12], as added by Laws of 2010, Ch. 371, §2. This was formerly factor (9).

105 See former Domestic Relations Law §236 [B] [6] [a] [13], as added by Laws of 2010, Ch. 371, §2.

106 Domestic Relations Law § 236[B] [6] [f] [1].

107 Domestic Relations Law § 236[B] [6] [f] [2].

108 Domestic Relations Law § 236[B] [6] [f] [4].

109 Domestic Relations Law § 236[B] [6] [b] [10].

110 Domestic Relations Law § 236[B] [6] [b] [5].

111 Domestic Relations Law § 236[B] [6] [b] [6].

112 Domestic Relations Law § 236[B] [6] [b] [7].

Under the guidelines "Payor" means the spouse with the higher income. [113] "Payee" means the spouse with the lower income.[114]

"Length of marriage" means the period from the date of marriage until the date of commencement of the action. [115]

For purposes of maintenance awards "Income cap" originally meant up to and including $175,000 of the payor's annual income. However, beginning January 31, 2016, and every two years thereafter, the income cap amount increases by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the united states department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration is required to determine and publish the income cap. [116]

As of January 31, 2016 the income cap of the maintenance payor for temporary and final (post-divorce) maintenance increased from $175,000 to $178,000 per year.[117]

15-10. Post-Divorce Maintenance Awards -Actions Commenced on or after January 23, 2016 – Mandatory Application

Domestic Relations Law § 236[B] [6][e][1] provides that 'the court shall order the post-divorce maintenance guideline obligation up to the income cap[118] in accordance with Domestic Relations Law § 236[B] [6][c],[119] unless the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the factors in Domestic Relations Law § 236[B] [6][e][1] [a-o], and adjusts the post-divorce maintenance guideline obligation accordingly based upon such consideration. [120]

113 Domestic Relations Law § § 236[B][6][b][1]

114 Domestic Relations Law § § 236[B][6][b][2]

115 Domestic Relations Law § 236[B] [6] [b] [8].

116 Domestic Relations Law §236[B] [6] [b] [4]; Laws of 2015, Ch 269, §§1, 2, 3, 4, and 5, effective January 23, 2016; Domestic Relations Law §236[B] [5-a] [b] [5]; Laws of 2015, Ch 269, §§1, 2, 3, 4, and 5, effective January 23, 2016.

117 By Administrative Order A/O 12/16, Revised Instructions and Forms for Use in Matrimonial Actions in Supreme Court were adopted effective January 31, 2016. The revised forms reflect the increase in the annual income cap of the maintenance payor for temporary and final (post-divorce) maintenance from $175,000 to $178,000 per year based on CPI increases as required by the 2015 Maintenance Guidelines Law (L. 2015, ch. 269), and clarify instructions regarding use of the UD-Packet forms. See http://www.nycourts.gov/divorce/legislationandcourtrules.shtml (last accessed April 1, 2017)

118 Domestic Relations Law § 236[B] [6] [b] [4].

119 To determine the post-divorce maintenance guideline amount, Domestic Relations Law § 236 [B] [6 (c) requires the court to compare two calculations of the spouses' annual incomes, up to an income cap on the payor's income. The court must perform the calculations set forth in Domestic Relations Law § 236[B] [6] [c] for the income of the payor up to and including the income cap. For income exceeding the cap, the amount of additional maintenance awarded, if any, is within the discretion of the court which must take into consideration any one or more of the factors set forth in Domestic Relations Law § 236[B] [6][e][1]

120 Domestic Relations Law § 236[B] [6][e][1]

15-11. Post-Divorce Maintenance Guidelines in Actions Commenced on or after January 23, 2016 - Determine the Income of the Parties – Inclusions in Income

The court must first determine the income of the parties before determining the guideline amount of post-divorce maintenance. [121]

"Income" means income as defined in Domestic Relations Law § 240 and Family Court Act § 413 without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the action pursuant to Domestic Relations Law § 240 [1-b] [b][5][vii][c] and Family Court Act § 413[b][5][vii][c] and without subtracting spousal support paid pursuant to Family Court Act § 412;[122] and income from income-producing property distributed or to be distributed pursuant to Domestic Relations Law § 236[B][5].[123]

"Income" is defined in Domestic Relations Law §240 (1-b)(b)(5), as "including, but not limited to, the amounts determined by the application of clauses (i) to (vi), as reduced by the application of clause (vii)."[124] In order to understand exactly this means and what is included in "income", each clause must be examined individually.

"Income" includes gross (total) income as should have been or should be reported in the most recent federal income tax return. If an individual files his/her federal income tax return as a married person filing jointly, that person is required to prepare a form, sworn to under penalty of law, disclosing his/her gross income individually. [125]

In addition, "income" also includes investment income reduced by sums expended in connection with such investment, to the extent not already included in gross income.[126]

In addition, "income" includes the amount of income or compensation voluntarily deferred and income received, if any, from the following sources:

(A) workers' compensation,

(B) disability benefits,

(C) unemployment insurance benefits,

(D) social security benefits,

(E) veterans benefits,

(F) pensions and retirement benefits,

(G) fellowships and stipends,

(H) annuity payments, to the extent not already included in gross income, [127] and

(I) alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed

121 McCauley v Drum, 217 AD2d 829, 629 NYS2d 838 (3d Dept.,1995)

122 Domestic Relations Law § 236[B] [6] [b] [3] [a].

123 Domestic Relations Law § 236[B] [6] [b] [3] [b].

124 Domestic Relations Law §240(1-b) (b) (5).

125 Domestic Relations Law §240(1-b) (b) (5) (i).

126 Domestic Relations Law §240(1-b) (b) (5) (ii).

127 Domestic Relations Law §240(1-b) (b) (5) (iii).

written agreement, in which event the order or agreement shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse; provided, however, that the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with subparagraph two of paragraph b of subdivision nine of part B of section two hundred thirty-six of this article. In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior to the effective date of this subclause, the provisions of this subclause shall not, by themselves, constitute a substantial change of circumstances pursuant to paragraph b of subdivision nine of part B of section two hundred thirty-six of this article.[128]

At the discretion of the court, the court may attribute or impute income to a parent from other resources as may be available to the parent, including, but not limited to:

(A) non-income producing assets,

(B) meals, lodging, memberships, automobiles or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use, or which expenditures directly or indirectly confer personal economic benefits,

(C) fringe benefits provided as part of compensation for employment, and

(D) money, goods, or services provided by relatives and friends. [129]

Income includes an amount imputed as income based upon the parent's former resources or income if the court determines that a parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support.[130]

In addition, to the extent not already included in gross income, the following self-employment deductions attributable to self-employment carried on by the taxpayer are included in "income":

(A) any depreciation deduction greater than depreciation calculated on a straight-line basis for the purpose of determining business income or investment credits, and

(B) entertainment and travel allowances deducted from business income to the extent said allowances reduce personal expenditures. [131]

15-12. Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 –Determine the Income of the Parties--Deductions from Income

The following are deducted from "income":

(A) unreimbursed employee business expenses except to the extent these expenses reduce personal expenditures,

(B) alimony or maintenance actually paid to a spouse not a party to the instant action pursuant to court order or validly executed written agreement,

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128 Subdivision (I) was added by Laws of 2015, Ch. 387, § 1, effective January 24, 2016.

129 Domestic Relations Law §240(1-b) (b) (5) (iv).

130 Domestic Relations Law §240(1-b) (b) (5) (v). It appears that the legislature intended that the word "parent" was intended to mean "person" and the words "child support" were intended to mean "maintenance".

131 Domestic Relations Law §240(1-b) (b) (5) (vi).

(C) alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, in which event the order or agreement shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse; provided, however, that the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with subparagraph two of paragraph b of subdivision nine of part B of section two hundred thirty-six of this article. In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior to the effective date of this subclause, the provisions of this subclause shall not, by themselves, constitute a substantial change of circumstances pursuant to paragraph b of subdivision nine of part B of section two hundred thirty-six of this article.[132]

(D) child support actually paid pursuant to court order or written agreement on behalf of any child for whom the parent has a legal duty of support and who is not subject to the instant action,

(E) public assistance,

(F) supplemental security income,

(G) New York city or Yonkers income or earnings taxes actually paid, and

(H) federal insurance contributions act (FICA) taxes actually paid.[133]

15-13. Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 - Calculation of the Post - Divorce Maintenance Guideline Amount

To determine the post-divorce maintenance guideline amount, the court must compare two calculations of the spouses' annual incomes, up to the income cap [134] on the payor's income.[135]

For purposes of maintenance awards "Income cap" originally meant up to and including $175,000 of the payor's annual income. However, beginning January 31, 2016, and every two years thereafter, the income cap amount increases by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the united states department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration is required to determine and publish the income cap. [136]

As of January 31, 2016 the income cap of the maintenance payor for temporary and final (post-divorce) maintenance increased from $175,000 to $178,000 per year.[137]

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132 Subdivision (vii) (C), was amended by Laws of 2015, Ch. 387, § 2 to replace it with a new subdivision (C), effective January 24, 2016.

133 Domestic Relations Law §240(1-b) (b) (5) (vii).

134 Domestic Relations Law § 236[B] [6] [b] [4].

135 See Domestic Relations Law § 236[B]] [6] [b], [c] and [d].

136 Domestic Relations Law §236[B] [6] [b] [4]; Laws of 2015, Ch 269, §§1, 2, 3, 4, and 5, effective January 23, 2016; Domestic Relations Law §236[B] [5-a] [b] [5]; Laws of 2015, Ch 269, §§1, 2, 3, 4, and 5, effective January 23, 2016.

137 By Administrative Order A/O 12/16, Revised Instructions and Forms for Use in Matrimonial Actions in Supreme Court were adopted effective January 31, 2016. The revised forms reflect the increase in the annual income cap of the maintenance payor for temporary and final (post-divorce) maintenance from $175,000 to $178,000 per year based on CPI increases as required by the 2015 Maintenance Guidelines Law (L. 2015, ch. 269), and clarify instructions regarding use of the UD-Packet forms. See http://www.nycourts.gov/divorce/legislationandcourtrules.shtml (last accessed April 1, 2017)

I. Where the Payor's income is lower than or equal to the income cap, child support is paid and where the maintenance payor is also the non-custodial parent pursuant to the Child Support Standards Act for child support purposes the following calculation is done:

(a) subtract 25% of the payee's income from 20% of the payor's income; [138]

(b) multiply the sum of the payor's income and the payee's income by 40%;[139]

(c) subtract the payee's income from the result; [140]

(d) determine the lower of these two amounts. [141]

The guideline amount of post-divorce maintenance is the amount determined by Domestic Relations Law § 236[B] [6] [c] [1] [d]. However, if the amount determined by Domestic Relations Law § 236[B][6][c][1][d] is less than or equal to zero, the guideline amount of post-divorce maintenance is zero dollars. [142]

If child support will be paid for children of the marriage but the payor is the custodial parent, post-divorce maintenance must be calculated prior to child support because the amount of post-divorce maintenance must be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation. [143]

Notwithstanding the provisions of this subdivision, where the guideline amount of post-divorce maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of post-divorce maintenance is the difference between the payor's income and the self-support reserve. [144]

If the payor's income is below the self-support reserve, there is a rebuttable presumption that no post-divorce maintenance is awarded. [145]

II. Where child support will not be paid for children of the marriage, or where child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act the following calculation is done:

(a) subtract 20% of the payee's income from 30% of the payor's income. [146]

(b) multiply the sum of the payor's income and the payee's income by 40%.[147]

(c) subtract the payee's income from the result. [148]

(d) determine the lower of these two amounts. [149]

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138 Domestic Relations Law § 236[B] [6] [c] [1] [a].
139 Domestic Relations Law § 236[B] [6] [c] [1] [b].
140 Domestic Relations Law § 236[B] [6] [c] [1] [c].
141 Domestic Relations Law § 236[B] [6] [c] [1] [d].
142 Domestic Relations Law § 236[B] [6] [c] [1] [e].
143 Domestic Relations Law § 236[B] [6] [c] [1] [g].
144 Domestic Relations Law § 236[B] [6] [c] [1] [f].
145 Domestic Relations Law § 236[B] [6] [c] [1] [f].
146 Domestic Relations Law § 236[B] [6] [c] [2] [a].
147 Domestic Relations Law § 236[B] [6] [c] [2] [b].
148 Domestic Relations Law § 236[B] [6] [c] [2] [c].
149 Domestic Relations Law § 236[B] [6] [c] [2] [d].

The guideline amount of post-divorce maintenance is the amount determined by Domestic Relations Law § 236[B] [6] [c] [2] [d], except that, if the amount determined by Domestic Relations Law § 236[B] [6] [c] [2] [d] is less than or equal to zero, the guideline amount of post-divorce maintenance shall be zero dollars. [150]

If child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act, post-divorce maintenance must be calculated prior to child support because the amount of post-divorce maintenance must be subtracted from the payor's income pursuant to this subdivision and added to the payee's income pursuant to this subdivision as part of the calculation of the child support obligation. [151]

Notwithstanding the provisions of this subdivision, where the guideline amount of post-divorce maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of post-divorce maintenance is the difference between the payor's income and the self-support reserve. [152]

If the payor's income is below the self-support reserve, there is a rebuttable presumption that no post-divorce maintenance is awarded. [153]

III. Where the payor's income exceeds the income cap, the court must determine the guideline amount of post-divorce maintenance as follows:

The court must perform the calculations set forth in Domestic Relations Law § 236[B] [6] [c] for the income of the payor up to and including the income cap.[154] For income exceeding the income cap, the amount of additional maintenance awarded, if any, is within the discretion of the court which must take into consideration any one or more of the factors set forth in Domestic Relations Law § 236[B] [6][e][1]. [155]

The court must set forth the factors it considered and the reasons for its decision in writing or on the record. Such decision, whether in writing or on the record, may not be waived by either party or counsel. [156]

15-14. Post-Divorce Maintenance Guidelines - Actions Commenced on or after January 23, 2016 - Self-Support Reserve

The "Self-support reserve" means the self-support reserve as defined in the child support standards act and codified in Domestic Relations Law § 240 and Family Court Act § 413. [157]

The "Self-support Reserve" as defined in the child support standards act and codified in Domestic Relations Law § 240 and Family Court Act § 413 is 135% of the "poverty income guidelines'" amount for a single person amended as reported by the Federal Department of Health and Human Services. On March 1st of each year, the self-support reserve is revised to reflect annual updating of the guidelines. [158]

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150 Domestic Relations Law § 236[B] [6] [c] [2] [e].
151 Domestic Relations Law § 236[B] [6] [c] [2] [f].
152 Domestic Relations Law § 236[B] [6] [c] [2] [g].
153 Domestic Relations Law § 236[B] [6] [c] [2] [g].
154 Domestic Relations Law § 236[B] [6] [d] [1].
155 Domestic Relations Law § 236[B] [6] [d] [2]
156 Domestic Relations Law § 236[B] [6] [d] [3]
157 Domestic Relations Law § 236 [B] [6] [b] [9].
158 See Domestic Relations Law §240 [1-b] [b] [6].

As of June 1, 2017 the combined parental income ammount was $143,000, the self-support reserve was $16,281 and the poverty income guidelines amount for a single person was $12,060. [159]

The poverty income guidelines for a single person are published annually by the Federal Department of Health and Human Services. The Social Services Law requires the Commissioner of Social Services to publish, on March 1 of each year in department regulations, the revised self-support reserve, as defined in Family Court Act §413 and Domestic Relations Law §240, to reflect the annual updating of the poverty income guidelines amount for a single person as reported by the Federal Department of Health and Human Services. [160]

15-15. Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 - Divorce Maintenance Guideline Obligation Award Unless Unjust or Inappropriate

The court must order the post-divorce maintenance guideline obligation[161] up to the income cap in accordance with Domestic Relations Law § 236[B] [6] [c], unless the court finds that the guideline amount of post-divorce maintenance is unjust or inappropriate based upon consideration of any one or more of the factors in Domestic Relations Law § 236[B] [6] [e] [1], and the court adjusts the guideline amount of post-divorce maintenance accordingly based upon such considerations. [162]

The factors in Domestic Relations Law § 236[B] [6] [e] [1] are not a consideration for the court where the Payor's income is lower than or equal to the income cap, unless the court finds that the guideline amount of spousal support is unjust or inappropriate, based up a consideration of these factors, and adjusts the guideline amount accordingly. [163]

For income exceeding the income cap, the amount of additional maintenance awarded, if any, is within the discretion of the court which must take into consideration any one or more of the factors set forth in Domestic Relations Law § 236[B] [6][e][1]. [164]

In determining the duration of post-divorce maintenance, whether or not the court utilizes the advisory schedule, the court must consider the factors listed in Domestic Relations Law §236[B] [6] [e] [1] and must set forth, in a written decision or on the record, the factors it considered. [165]

15-16. Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 - The Fifteen Factors in Domestic Relations Law § 236[B] [6] [e] [1]

The factors in Domestic Relations Law § 236[B] [6] [e] [1] are:

(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;

159 See https://www.childsupport.ny.gov/child_support_standards.html (last accessed June 1, 2017) for the current amounts.

160 Social Services Law §111-I (2), as added by Laws of 2015, Ch. 343, effective December 24, 2015.

161 See Domestic Relations Law § 236[B]] [6] [b] [7] for the definition of the term "post-divorce maintenance guideline obligation".

162 Domestic Relations Law § 236[B] [6][e][1]

163 Domestic Relations Law § 236[B] [6] [e] [1].

164 Domestic Relations Law § 236[B][6][d][2]

165 Domestic Relations Law § 236[B] [6][f][2]

(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. Domestic Relations Law § 236[B] [6] [e] [1]. [166]

Former factor (2), the length of the marriage,[167] was removed and subsumed in the provision for the duration of Post-Divorce maintenance. Former factor (8), the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor; [168] former factor (10), the presence of children of the marriage in the respective homes of the parties; [169] former factor (12), the inability of one party to obtain meaningful employment due to age or absence from the workforce; [170] and former factor (13), the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment;[171] were removed from the maintenance statute in 2015. There does not appear to be any reason why the court cannot consider these former factors under the "catch-all" factor (o). [172]

166 Domestic Relations Law § 236[B] [6][e][1] [a-o]

167 See former Domestic Relations Law §236 [B] [6] [a] [2], as amended by Laws of 2010, Ch. 371, §2. The 2010 Amendment deleted "duration" and added "Length." This factor was formerly part of factor 2 and became factor (2).

168 See former Domestic Relations Law §236 [B] [6] [a] [8], as amended by Laws of 2010, Ch. 371, §2. This factor was formerly factor (4).

169 See former Domestic Relations Law §236 [B] [6] [a] [10], as amended by Laws of 2010, Ch. 371, §2. This factor was formerly factor (6).

170 See former Domestic Relations Law §236 [B] [6] [a] [12], as added by Laws of 2010, Ch. 371, §2. This was formerly factor (9).

171 See former Domestic Relations Law §236 [B] [6] [a] [13], as added by Laws of 2010, Ch. 371, §2.

172 Domestic Relations Law §236 [B] [6] [e] [1] (o) as added by Laws of 2015, Ch. 269, effective January 23, 2016.

15-17. Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 - Required Statement of Factors and Reasons

Where the court finds that the guideline amount of post-divorce maintenance is unjust or inappropriate based upon consideration of any one or more of the factors in Domestic Relations Law § 236[B] [6][e][1], and the court adjusts the guideline amount of post-divorce maintenance accordingly the court must set forth, in a written decision or on the record, the guideline amount of post-divorce maintenance, the factors it considered, and the reasons that the court adjusted the guideline amount of post-divorce maintenance. The decision, which may be on the record, or in writing, may not be waived by either party or counsel. [173]

Where the payor's income exceeds the income cap, the amount of additional maintenance awarded, if any, is within the discretion of the court which must take into consideration any one or more of the factors in Domestic Relations Law § 236[B] [6] [e] [1], and must set forth the factors it considered and the reasons for its decision in writing or on the record. Such decision, whether in writing or on the record, may not be waived by either party or counsel. [174]

In determining the duration of post-divorce maintenance, whether or not the court utilizes the advisory schedule, it must consider the factors listed in Domestic Relations Law § 236[B] [6] [e] [1] and must set forth, in a written decision or on the record, the factors it considered. Such decision shall not be waived by either party or counsel. [175]

15-18. Post -Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 - Duration of Post-Divorce Maintenance and Retirement Factor

The court may, but is not required to determine the duration of post-divorce maintenance in accordance with the following advisory schedule:

Length of the marriage[176]	Percent of the length of the marriage for which maintenance will be payable
0 up to and including 15 years	15%—30%
More than 15 up to and including 20 years	30%—40%
More than 20 years	35%—50%. [177]

In determining the duration of post-divorce maintenance, whether or not the court utilizes the advisory schedule, it must consider the factors listed in Domestic Relations Law §236[B] [6] [e] [1] and must set forth, in a written decision or on the record, the factors it considered. The decision may not be waived by either party or counsel. Nothing shall prevent the court from awarding non-durational maintenance in an appropriate case. [178]

In addition to the enumerated factors in Domestic Relations Law §236 [B][4][e][1][a-o], when determining the duration of post-divorce maintenance, the court must take into consideration anticipated retirement assets,

173 Domestic Relations Law § 236[B] [6] [e] [2].

174 Domestic Relations Law § 236[B] [6] [e] [1].

175 Domestic Relations Law § 236[B] [6] [f] [2].

176 See Domestic Relations Law § 236[B]] [6] [b] [8] for the definition of the term "length of marriage".

177 Domestic Relations Law § 236[B] [6][f][1]

178 Domestic Relations Law § 236[B] [6][f][2]

benefits, and retirement eligibility age of both parties if ascertainable at the time of decision. If the anticipated retirement assets, benefits or retirement eligibility age of both parties is not ascertainable at the time of the decision, the actual full or partial retirement of the payor with substantial diminution of income is a basis for a modification of the post-divorce maintenance award. [179]

15-19. Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 - Retroactivity of Maintenance Awards

The introductory paragraph to former Domestic Relations Law §236 [B] [6] [a] provided, before listing the twenty statutory factors that the court was required to consider: a. "Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court may order maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties. Such order shall be effective as of the date of the application therefor, and any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid. In determining the amount and duration of maintenance the court shall consider:"

Domestic Relations Law §236 [B] [6] [a] as amended in 2015, removed most of that provision, and now provides that: "Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action, the court, upon application by a party, shall make its award for post-divorce maintenance pursuant to the provisions of this subdivision."

The 2015 amendment to Domestic Relations Law §236 [B][6][a] eliminated the words "... in any matrimonial action the court may order maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties. Such order shall be effective as of the date of the application therefor, and any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid."

It appears from the elimination of the sentence that begins with the words "Such order shall be effective as of the date of the application therefor ...", that the court is no longer required to make the award of maintenance retroactive to the date of application, or give the payor credit for temporary maintenance that has been paid, but that the matter of retroactivity is a matter of discretion, as it was prior to 1986, when the court had the discretion to make the award retroactive nunc pro tunc, to the date of the commencement of the action. The amended statute does not prohibit the court from awarding retroactive maintenance to the date of the commencement of the action. Nor does it prevent the court from directing the method by which retroactive maintenance is to be paid, such as

179 Domestic Relations Law § 236[B] [6] [f] [4].

in one sum or periodic sums. Nor does it prevent the court from exercising its discretion to take into account any amount of temporary maintenance which has been paid.[180]

15-20. Post-divorce Maintenance Awards - Effect of a Barrier to Remarriage - Domestic Relations Law §236 (B) (6) (o).

The maintenance provisions of the Domestic Relations Law require the court to "consider the effect of a barrier to remarriage" upon the enumerated factors which the court must consider in awarding maintenance.[181]

Domestic Relations Law §236(B)(6) (d) provides as follows: "d. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph a of this subdivision."

Domestic Relations Law §253 (6) defines "barrier to remarriage"[182] as including, without limitation, any religious or conscientious restraint or inhibition of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act.[183]

Domestic Relations Law §253 requires a party to a proceeding to annul a marriage, or for a divorce, to allege under oath that he or she has taken, or will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce. The section applies only to a marriage solemnized in this state or in any other jurisdiction by a person specified in Domestic Relations Law §11(1). [184]

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180 In Mittman v. Mittman, 263 A.D. 384, 386, 33 N.Y.S.2d 211, 213 (1st Dep't 1942) the Appellate Division said:" A court of equity has the discretionary power to require that payments of permanent alimony begin as of the time of the commencement of the action. It was so decided many years ago by the Court of Appeals in McCarthy v. McCarthy, 143 N.Y. 235, 38 N.E. 288 (1894). See, also Harris v. Harris, 259 N.Y. 334, 337, 182 N.E. 7 (1932); Forrest v. Forrest, 25 N.Y. 501, 518, 1862 WL 4782 (1862); Burr v. Burr, 10 Paige 20. While it thus appears that in an action for divorce or separation a final decree may in the discretion of the court provide that alimony be payable nunc pro tunc as of the time of the commencement of the action (see Harris v. Harris, 259 N.Y. 334, 337, 182 N.E. 7 (1932)), such discretion should be exercised cautiously and with a proper regard for the circumstances in each particular case." To the same effect see also Abrusci v. Abrusci, 79 A.D.2d 980, 980, 434 N.Y.S.2d 722, 722-23 (2d Dep't 1981).

181 Domestic Relations Law §236[B] [6][o]

182 Domestic Relations Law §253 (6).

183 In Megibow v. Megibow, 161 Misc. 2d 69, 612 N.Y.S.2d 758 (Sup 1994), the court held that Domestic Relations Law §253 was applicable to the wife's motion to compel the husband to furnish her with a Jewish religious divorce. The husband contended that the parties' marriage was solemnized by a Rabbi affiliated with the Reform Branch of Judaism and that since the tenets of reformed Judaism do not require its adherence to obtain a Get, he need not be required to give the former wife a Get. The Supreme Court disagreed, holding that while reformed Judaism may not require that a Get be issued to dissolve a religious marriage performed by one of its clergy, the withholding of this voluntary act of giving a Get by the former husband would, by statutory definition, constitute a barrier to remarriage if the former wife perceived herself to require a Get in order to remarry. It directed the former husband to co-operate in all phases of obtaining a get on behalf of the former wife.

184 Domestic Relations Law §253(1).

Domestic Relations Law §11(1) lists the following persons: A clergyman or minister of any religion, or by the senior leader, or any of the other leaders, of The Society for Ethical Culture in the City of New York, having its principal office in the borough of Manhattan, or by the leader of The Brooklyn Society for Ethical Culture, having its principal office in the borough of Brooklyn of the City of New York, or of the Westchester Ethical Society, having its principal office in Westchester county, or of the Ethical Culture Society of Long Island, having its principal office in Bronx county, or by the leader of any other Ethical Culture Society affiliated with the American Ethical Union.

The law prohibits the entry of a judgment of annulment or divorce unless such a statement has been filed by the plaintiff.[185] The statute prevents the filing of a final judgment of annulment or divorce if the clergyman or minister who solemnized the marriage certifies in a certified statement that, to his or her knowledge, the plaintiff has failed to take all steps within the plaintiff's power to remove all barriers to the spouse's remarriage, if the clergyman or minister is alive and able to testify at the time when final judgment would be entered.[186]

Domestic Relations Law §253 only applies where a party wants a divorce or annulment. Domestic Relations Law §253 (2) requires that a party to a marriage defined in Domestic Relations Law §253 (1), who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint: (i) that, to the best of his or her knowledge, that he or she has taken or that he or she will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision. It does not require a defendant to make such a sworn statement if he opposes a divorce or annulment, or does not seek a divorce or annulment.

Nothing in the section defining "barrier to remarriage. . . shall be construed to require any party to consult with any clergyman or minister to determine whether there exists any such religious or conscientious restraint or inhibition." It is not deemed to be a "barrier to remarriage" within the meaning of this section if the restraint or inhibition cannot be removed by the party's voluntary act. Nor shall it be deemed a "barrier to remarriage" if the party must incur expenses in connection with the removal of the restraint or inhibition and the other party refuses to provide reasonable reimbursement for such expenses.[187]

"All steps solely within his or her power" may not be construed to include application to a marriage tribunal or other similar organization or agency of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination."[188] It appears that taking all steps to remove a "barrier to remarriage" does not require an application to the religious tribunal to dissolve the marriage, only an appearance to accept the religious dissolution.[189]

Nothing in Domestic Relations Law §253 "should be construed to authorize any court to inquire into or determine any ecclesiastical or religious issue." The truth of any statement submitted pursuant to Domestic Relations Law §253 "shall not be the subject of any judicial inquiry", except that any person who knowingly submits

185 Domestic Relations Law §253 (3).

186 Dom Rel Law §253(8).

187 Domestic Relations Law §253.

188 Domestic Relations Law §253(6) also provides as follows:

"As used in sworn statements prescribed by this section "barrier to remarriage" includes, without limitation, any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act. Nothing in this section shall be construed to require any party to consult with any clergyman or minister to determine whether there exists any such religious or conscientious restraint or inhibition. It shall not be deemed a "barrier to remarriage" within the meaning of this section if the restraint or inhibition cannot be removed by the party's voluntary act. Nor shall it be deemed a "barrier to remarriage" if the party must incur expenses in connection with removal of the restraint or inhibition and the other party refuses to provide reasonable reimbursement for such expenses."

189 Domestic Relations Law §253.

a false sworn statement under Domestic Relations Law §253 is guilty of knowingly filing a false sworn statement, punishable in accordance with §210.40 of the Penal Law.

The Appellate Divison has held that a judgment which, inter alia, awarded the plaintiff maintenance of $100 per week for five years, which would be increased to $200 per week if the defendant did not provide a Get to the plaintiff within 60 days, was proper because it was intended to adjust for the adverse economic consequences which would result to her from the defendant=s refusal to grant her a Get.[190] A husband who failed to remove the barriers to his wife's remarriage, as required by Domestic Relations Law §253, was directed to pay lifetime maintenance as a consequence of the failure to remove the barriers.[191] Another husband was denied maintenance as a consequence of his failure to do so.[192]

15-21. Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 -Unrepresented Parties

Where either or both parties are unrepresented, the court may not enter a maintenance order unless the court informs the unrepresented party or parties of the post-divorce maintenance guideline obligation.[193]

190 Mizrahi-Srour v Srpur, 138 A.D.3d 801, 29 N.Y.S.3d 516 (2d Dept., 2016).

191 In Gindi v. Gindi, 5/7/2001 N.Y.L.J. 31, (col. 3), the wife sought permanent maintenance from the husband because he refused to give her a Get. The parties were married in February 1999. They separated in June, 1999 and the action for divorce was commenced in November 1999. There were no children of this marriage. Plaintiff was 22 years old and defendant was 32 years old. The parties were both Orthodox Jews and part of the Sephardic Jewish community in Brooklyn. The court found that under Orthodox Jewish law the marital ties between a husband and wife are severed only once the husband gives the wife a document known as a Get. The granting of the Get is virtually solely in the control of the husband. If he refuses to deliver the Get to the wife she is not permitted to remarry within the Jewish faith. She may not even date. A woman who is caught in the position of not receiving a Get is referred to as an "agunah" or "chained." A wife who has a husband who refuses to give a Get may, under Orthodox Jewish law, attempt to have the husband summoned to a religious tribunal or Beth Din. Once at the Beth Din the tribunal can hear testimony and determine if a Get should be given. However, the tribunal itself cannot give the Get, it still must come from the husband. This procedure gives tremendous power to a husband in a divorce proceeding. Without the husband's consent the wife is not be free to remarry. Defendant refused to give plaintiff a Get. Therefore, plaintiff would never be able to remarry within her community. The Court found that this would put a tremendous economic burden on plaintiff, given her limited education and limited work experience. It was questionable whether plaintiff would be able to support herself given her tangible and intangible resources. Her economic future would clearly be limited due to the fact that she would be unable to remarry within her community, or if she decided to remarry, she would be ostracized from her community, her family and her support network. The Court held that in order for plaintiff to be financially viable she should not be required to leave her community to remarry. The Defendant was directed to pay to plaintiff $500 per week maintenance, to continue until either party dies or plaintiff remarries.

192 In Mojdeh M. v. Jamshid A., 36 Misc. 3d 1209(A), 954 N.Y.S.2d 760 (Sup 2012) the wife testified that she was a Muslim and if she did not obtain a religious divorce she would be unable to remarry. Although she would be divorced in accordance with secular law, she would not be considered a single woman within her religious community. She further testified that in the event she were to travel to Iran that her husband, or then ex-husband, could withhold his permission for her to leave Iran. The court credited the wife's testimony that she made arrangements for the parties to meet at a local mosque to address the religious divorce but that the husband simply did not respond. The husband's only testimony regarding the religious divorce was that he needed to speak to his attorney. The court found that the husband's refusal to give the wife a religious divorce, thereby removing barriers to her remarriage, was a basis to exercise its discretion under Domestic Relations Law 236[B] [5] [h] to disproportionately distribute marital assets. The husband was given 45 days to take any necessary steps to remove any barriers to the wife's remarriage. The Court directed that in the event that the husband failed to comply, he would forfeit his maintenance and equitable distribution award.

193 Domestic Relations Law §236[B] [6] [g], as added by Laws of 2015, Ch 269, effective January 23, 2016.

15-22. Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 - Opting Out of Domestic Relations Law §236[B] [6]

Nothing contained in Domestic Relations Law §236[B] [6] may be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the post-divorce maintenance guideline obligation.[194]

15-23. Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 - Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 - In Case of Default or Where Insufficient Evidence

When a payor has defaulted and/or the court makes a finding at the time of trial that it was presented with insufficient evidence to determine income, the court must order post-divorce maintenance based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. The order may be retroactively modified upward without a showing of change in circumstances upon a showing of substantial newly discovered evidence. [195]

15-24. Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 -Effect of Guidelines upon Modification of Post-Divorce Maintenance

Post-divorce maintenance may be modified pursuant to Domestic Relations Law §236[B] [9].[196]

In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of Domestic Relations Law §236[B] [6] [k], [197] brought pursuant to Article 13 of the Domestic Relations Law, the guidelines for post-divorce maintenance set forth in Domestic Relations Law §236[B] [6] will not constitute a change of circumstances warranting modification of the support order.[198]

In any action or proceeding for modification where the parties have entered into an agreement providing for maintenance pursuant Domestic Relations Law §236[B] [3], which was entered into prior to the effective date of this provision,[199] brought pursuant to Article 13 of the Domestic Relations Law, the guidelines for post-divorce maintenance set forth in Domestic Relations Law §236[B] [6] will not constitute a change of circumstances warranting modification of the agreement.[200]

In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of Domestic Relations Law §236[B] [6][m], [201] brought pursuant to Article 13 of the Domestic

194 Domestic Relations Law §236[B] [6] [h], as added by Laws of 2015, Ch 269, effective January 23, 2016.

195 Domestic Relations Law §236[B] [6] [i], as added by Laws of 2015, Ch 269, effective January 23, 2016.

196 Domestic Relations Law §236[B] [6] [j], as added by Laws of 2015, Ch 269, effective January 23, 2016.

197 Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B] [1] [a], and Domestic Relations Law §236 [B] [6] effective January 23, 2016. See Laws of 2015, Ch 269, Section 8.

198 Domestic Relations Law §236[B] [6] [k], as added by Laws of 2015, Ch 269, effective January 23, 2016.

199 Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B] [1] [a] and Domestic Relations Law §236 [B] [6], effective January 23, 2016. See Laws of 2015, Ch 269, Section 8 which provides, in part, "Nothing in this act shall be deemed to affect the validity of any agreement made pursuant to subdivision 3 of part B of section 236 of the domestic relations law or section 425 of the family court act prior to the effective date of this act."

200 Domestic Relations Law §236[B] [6] [l], as added by Laws of 2015, Ch 269, effective January 23, 2016.

201 Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B] [1] [a] and Domestic Relations Law §236 [B] [6], effective January 23, 2016.

Relations Law, the guidelines for post-divorce maintenance set forth of Domestic Relations Law §236[B] [6] [c],[d] and [e] will not apply.[202]

In any action or proceeding for modification where the parties have entered into an agreement providing for maintenance pursuant to Domestic Relations Law §236[B] [3], which was entered into prior to the effective date of Domestic Relations Law §236[B] [6][n],[203] brought pursuant to Article 13 of the Domestic Relations Law, the guidelines for post-divorce maintenance set forth in Domestic Relations Law §236[B] [6] [c], [d] and [e] will not apply.[204]

15-25. Post-Divorce Maintenance Awards - Actions Commenced on or after January 23, 2016 -Termination of Post-Divorce Maintenance

Post-divorce maintenance terminates upon the death of either party, or upon the payee's valid or invalid marriage, or upon modification pursuant to Domestic Relations Law §236[B] [9] [b] or Domestic Relations Law §248.[205]

15-26. Special Relief - In General

Special Relief is defined as a direction to a spouse to maintain life, health, accident, medical and dental insurance for his spouse and/or children. It is available in any matrimonial action. The insurance may be in effect during a period of time fixed by the Court. The insurance must end upon the termination of the spouse's obligation to pay maintenance, child support, a distributive award, or when the beneficiary remarries or predeceases the insured.[206]

Special relief may include a direction to (1) purchase, maintain or assign a policy of insurance for health and hospital care and related services for either spouse or children; Insurance cannot be for longer than party is obligated to pay maintenance, child support or a distributive award; (2) purchase, maintain or assign a policy of insurance on the life of either spouse and designate either spouse or children of the marriage as irrevocable beneficiary.[207]

Domestic Relations Law §236, Part B, Subdivision 8(a) was enacted to compensate for the earlier inadequacies of the law. It permits the court, in the absence of an agreement, to order insurance protection for the family. The husband or father, for example, may be ordered by the court to "purchase, maintain, or assign" insurance coverage on his life, naming the wife and children as irrevocable beneficiaries. Likewise, the statute authorizes the court to require a spouse to maintain or obtain medical, health and hospital insurance for the protection of the family. Once the husband's obligation to pay maintenance and/or child support is ended, however, he is free to cancel the policies or to name other beneficiaries.

202 Domestic Relations Law §236[B] [6] [m], as added by Laws of 2015, Ch 269, effective January 23, 2016.

203 Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B] [1] [a] and Domestic Relations Law §236 [B] [6], effective January 23, 2016. See Laws of 2015, Ch 269, Section 8.

204 Domestic Relations Law §236[B] [6] [n], as added by Laws of 2015, Ch 269, effective January 23, 2016.

205 Domestic Relations Law §236[B] [6] [f] [3], as added by Laws of 2015, Ch 269, effective January 23, 2016.

206 See New York Domestic Relations Law §236[B][8]

207 See New York Domestic Relations Law §236[B][8]

The need for health, hospital and similar insurance coverage is doubtless. In the case of both maintenance and child support, in the absence of an agreement to the contrary, since the support obligation ceases upon the death of the obligor, it is not a charge against the estate.[208]

The life insurance provisions of subdivision 8(a) make certain, among other things, that the payment of maintenance, distributive awards, and child support are made as ordered. If under subdivision 8(a) children are required to be designated as the beneficiaries of life insurance, such designation ceases when they reach majority and another beneficiary may be named in their place. If under that section the wife is required to be designated as the beneficiary of the husband's policy, the designation may be revoked if she remarries or predeceases the insured.

It has been held that where a spouse is denied an award of maintenance, an award of special relief, such as life insurance, would be inappropriate because there is no reason for the insurance coverage.[209]

15-27. Special Relief - Life Insurance

Domestic Relations Law §236, Part B, subdivision 8, authorizes the court to make an order directing a party to purchase, maintain or assign life insurance on his or her life and to provide health insurance on both interrim applications and in the final judgment in a matrimonial action. Cases in which the court has ordered a spouse to maintain or obtain life insurance are discussed below.

In Merrick v. Merrick,[210] Justice Saxe made a temporary order in which he directed the husband to post security of $220,000 or about one year's temporary support, to be held by the wife as receiver, and directed that if security were not posted, the wife was entitled to submit a further order to the court providing for sequestration of the husband's assets. Justice Saxe also directed the husband to obtain life insurance coverage of $1 million, naming the wife as irrevocable beneficiary. He noted that DRL § 236(B)(8)(a) authorizes the court to direct a party to obtain life insurance and to designate the other spouse as irrevocable beneficiary and that the statute was enacted to remedy the prior law under which courts were not authorized to order insurance coverage. [211] "The purpose of subdivision 8(a), therefore, is to make certain that the payment of maintenance, distributive awards, and child support are made as ordered. He noted that the statute had been applied to pendente lite support awards as well as final determinations.

In Sullivan v. Sullivan,[212] the parties were married in 1958 and separated in 1982. In 1983, the husband commenced a divorce action in Westchester County. In 1987, after trial, the Supreme Court dismissed the action, since the husband failed to establish grounds for divorce while awarding the wife $8,000 per month maintenance. In 1987, the husband again sued for divorce this time in Illinois. He was granted a divorce in 1989 on grounds of irreconcilable differences. The husband then brought an action in New York for equitable distribution and for a downward modification of the Supreme Court's prior maintenance award. Justice Saxe directed the husband to name the wife as beneficiary of an insurance policy on his life in the amount of $1 million. In this case, the court

208 DRL §240; See, e.g., Byrne v Byrne, 201 Misc. 913, 112 NYS2d 569; Lund v. Lund, 196 Misc. 136, 91 NYS2d 698; Re Van Ardsdale's Will, 190 Misc. 968, 75 NYS2d 487.

209 Rothbaum v Rothbaum (1989, 2d Dept.) 155 AppDiv2d 650, 548 NYS2d 242.

210 154 Misc.2d 559, 585 NYS2d 989 (Sup.Ct., NY Co., 1992)

211 Citing Foster, Freed & Brandes, Law and the Family, 2d Ed. 12:1, p.490.

212 155 Misc.2d 440, 588 NYS2d 232 (Sup. Ct., NY Co., 1992)

had previously made an order requiring the husband to pay $8,000 per month lifetime maintenance to the 58-year-old wife. Justice Saxe concluded that the insurance was appropriate because the wife would still have a right to equitable distribution if the husband died during the pendency of the proceedings and that her monthly maintenance payments would stop immediately upon the husband's death, without her having any clear-cut immediate entitlement to funds with which to continue to support herself, as it was not clear that any ultimate entitlement to equitable distribution would be sufficient to support her.

In Zerilli v. Zerilli,[213] the Appellate Division simply stated that in view of the wife's lack of income and assets, the trial court should have granted the parts of her omnibus motion seeking from her husband life insurance coverage pendente lite.

In Kalnins v. Kalnins,[214] the parties married in 1972 and the husband abandoned his wife in 1981. Before that the wife suffered permanent brain damage in an auto accident. The action was commenced in April 1986. The husband, who earned $83,000 a year in 1986, was directed to pay $3,500 per month permanent maintenance to his 43-year-old wife. He was awarded all of the marital assets (valued at $411,753). In light of the high permanent maintenance obligation he was directed to buy a single premium annuity and bridge life insurance to assure payments of $3,500 a month for the wife when he retires at age 65 (cost $150,000) or a $750,000 life insurance policy for plaintiff, and medical insurance for plaintiff until she was entitled to Medicaid.

In Price v. Price,[215] the Appellate Division stated that the husband should have been directed to obtain and keep in effect a life insurance policy for the benefit of the children, given the husband's age and the age of his children.

In Delaney v. Delaney,[216] the Appellate Division held that the divorced wife, rather than the infant children of the parties, should be properly designated as beneficiaries of the divorced husband's life insurance policies because the wife would be otherwise unprotected if her husband predeceased her. Additionally, the children would not be disadvantaged by such a ruling since it appeared that they had been and would continue to be well provided for.

In Bofford v. Bofford, [217] the Appellate Division held that the daughter and wife, who received a distributive award from the husband in the matrimonial action, were entitled to have the husband maintain a life insurance policy on his life for their benefit that was to be in the amount of the unpaid balance of the distributive award.

15-28. Special Relief - Health Insurance

Notably, few appellate decisions discuss the health insurance questions, and not one reported case mentions employer-provided health insurance coverage.

Shafer v. Shafer [218] held that there was no reason to require the defendant-husband to go to the expense of buying a new health policy since the plaintiff-wife already had insurance coverage for their child through her employment.

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213 2d Dept., 110 AD2d 634, 487 NYS2d 373.

214 New York Law Journal, Nov. 16, 1989, p.23, col.3, Sup.Ct., NY Co., (Baer, J.).

215 2d Dept. 113 AD2d 299, 496 NYS2d 455, later proceeding (2d Dept.) 496 NYS2d 464, later proceeding (2d Dept.) 496 NYS2d 689

216 1st Dept., 114 AD2d 312, 494 NYS2d 4.

217 2d Dept., 117 AD2d 643, 498 NYS2d 385.

218 1st Dept., 96 AD2d 790, 466 NYS2d 17.

In Jerkovich v. Jerkovich, [219] the husband appealed from portions of a judgment of Special Term that directed him to name his children as dependents on his health insurance policy without specifying when the coverage may be terminated. The Appellate Division modified the judgment, holding that while Supreme Court was expressly authorized to direct the husband to maintain both his health insurance policy and his life insurance policy for the benefit of his minor children, it had erred in failing to fix the duration of such policies.

219 2d Dept., 100 AD2d 575, 473 NYS2d 507.