Post-Divorce Maintenance Awards Under the Current Law
By Joel R. Brandes

Since the 1960's New York's spousal support statutes have changed substantially. From 1962 until 1980, former Domestic Relations Law **§**236 (Added L.1962, c. 313, § 10.) was the controlling statutory provision regarding alimony awards which were predicated upon the public policy that a spouse was entitled to be supported in accordance with **"**standard of living of the parties established during the marriage" where it was economically feasible. Alimony was awarded to faithful wives, not husbands. A wife found guilty of grounds for divorce was denied alimony. Property distribution was governed by the common law rules of property.

On July 19, 1980, the Equitable Distribution Law was enacted and it did away with the common law property rules. For the first time in New York history, marital property was equitably distributed. Alimony was replaced with **"**maintenance.**"** (Domestic Relations Law **§**236 (B)(6); Laws of 1980, Chapter 281, eff July 19, 1980). The public policy behind maintenance awards was that it was geared to **"**reasonable needs**"** and the ability to pay. However, Domestic Relations Law **§**236 (B)(6) was amended in 1986 to remove the **"**reasonable needs and ability to pay**"** basis for maintenance and to substitute the former test of **"**standard of living of the parties established during the marriage.**"** (Laws of 1986, Chapter 844).

From 2010 until 2016 Domestic Relations Law §236 (B)(6) [a] provided that the court may order maintenance, in any matrimonial action, 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. (See Domestic Relations Law § 236 (B)(6) [a], Laws of 2010, Ch 371)**.**

In 2015, in exchange for the legislature eliminating "enhanced earning capacity" as marital property for purposes of equitable distribution, the maintenance provisions of the Domestic Relations Law were amended to adopt a formula approach to maintenance awards. The statute is not based upon any public policy. The legislative memorandum in support of the law acknowledges that it was a compromise among lawyers belonging to different interest groups in an attempt to address their sometimes conflicting concerns. (See Laws of 2015, Ch. 269, effective January 23, 2016; NY Legis Memo 269 (2015)).

Under the 2015 amendment, the application of the appropriate formula is intended to result in the "post-divorce maintenance guideline obligation" which may be adjusted upward or downward by the Court where its application is found to be unjust or inequitable.

The application of the post-divorce maintenance guidelines is mandatory in making maintenance awards matrimonial actions, except where the parties have entered into an agreement pursuant to Domestic Relations Law §236(B)(3) providing for maintenance.

Domestic Relations Law §236(B)(6), titled “post-divorce maintenance awards”, defines the “post-divorce maintenance guideline obligation” as the guideline amount of post-divorce maintenance and the guideline duration of post-divorce maintenance. (Domestic Relations Law § 236 (B)(6)(b)(7)). The statute defines “payor” as the spouse with the higher income. “Payee” means the spouse with the lower income. “Income” is income as defined in the child support standards act, without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action and without subtracting spousal support and income from income-producing property distributed or to be distributed pursuant to Domestic Relations Law §236 (B). (Domestic Relations Law §236 (B)(6) (b)).

The “Income Cap” is based upon the average annual percentage changes in the consumer price index for all urban consumers and is determined and published by the Office of Court Administration. It was $184,000 of the payor’s annual income in 2020. It increases every two years on March 1st, (Domestic Relations Law §236(B) (6)(b)(4)). As of March 1, 2022, the “Income cap” of the maintenance payor for temporary and post-divorce maintenance is $204,000.

Domestic Relations Law § 236 (B)(6) contains formulas for the court to determine the guideline amount of post-divorce maintenance where child support will be paid for children of the marriage and where the payor is also the non-custodial parent. The formula is as follows:

(a) Subtract 25% of the payee's income from 20% of the payor's income.
(b) Multiply the sum of the payor's income and the payee's income by 40%.
(c) Subtract the payee's income from the amount derived by (b).
(d) Determine the lower of the two amounts derived by (a) and (c).
(e) The guideline amount is the amount determined by (d).

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

There is also a formula 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 is the custodial parent. The formula is as follows:

(a) Subtract 20% of the payee's income from 30% of the payor's income.
(b) Multiply the sum of the payor's income and the payee's income by 40%.
(c) Subtract the payee's income from the amount derived by (b).
(d) Determine the lower of the two amounts derived by (a) and (c).
(e) The guideline amount is the amount determined by (d).

If the amount determined by (d) is less than or equal to zero, the guideline amount of post-divorce maintenance is zero dollars. (Domestic Relations Law § 236 (B)(6) [c][2].)

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. (Domestic Relations Law § 236 (B)(6) [f]).

The court must order the post-divorce maintenance guideline obligation up to the "income cap", unless the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate, based upon consideration of any one or more of the 15 factors listed in Domestic Relations Law §236 [B][6][e][1][(a)-(o). They 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; (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. (See Domestic Relations Law §236(B)(6)(e)(1) (a - o)).

If the court finds that the guideline amount is unjust or inappropriate and adjusts the amount of post-divorce maintenance 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. (Domestic Relations Law §236(B)(6)(e)(2)).

"Self-support reserve" means the self-support reserve as defined in the child support standards act and codified in Domestic Relations Law § 240. (Domestic Relations Law §236(B)(6)(b)(9)). 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. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no post-divorce maintenance shall be awarded. (Domestic Relations Law § 236 (B)(6) [g]).

Where the payor's income exceeds the income cap, the court must determine the guideline amount of post-divorce maintenance pursuant to the formulas referred to in the preceding paragraphs and perform the calculations for the income of the payor up to and including the income cap. 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 15 factors set forth in Domestic Relations Law §236 [B][6][e][1] [(a)-(o)]. **(**Domestic Relations Law § 236 **[**B][6][d][2]).

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 15 factors in Domestic Relations Law §236(B)(6)(e)(1) [(a)-(o)], and the court adjusts the guideline amount of post-divorce maintenance 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. (Domestic Relations Law §236(B)(6)(e)(2)).

The court may determine the duration of post-divorce maintenance in accordance with an advisory schedule that is based upon the length of the marriage, but it is not required to use the advisory schedule. Whether or not it utilizes the advisory schedule, in determining the duration of post-divorce maintenance it must consider the factors listed in Domestic Relations Law §236(B)(6)(e)(1)(a)–(o) and must set forth, in a written decision or on the record, the factors it considered. When determining the duration of post-divorce maintenance, the court must take into consideration anticipated retirement assets, benefits, and retirement eligibility age of both parties if ascertainable at the time of decision. If not ascertainable at the time of the decision, the actual full or partial retirement of the payor with a substantial diminution of income is a basis for a modification of the award. (Domestic Relations Law §236 (B) (6) (f))((1)(2) & (4)).

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. (Domestic Relations Law § 236 [B][6}(f)(3)).

As best as we can ascertain, there are only 9 reported Appellate decisions involving the current post-divorce maintenance guidelines law, and in only 2 of them was the guideline amount of maintenance increased.

Decrease in Guideline Maintenance - Maintenance Denied

In Hughes v Hughes, 200 A.D.3d 1404, 161 N.Y.S.3d 350 (3d Dept.,2021) the Appellate Division held that maintenance is appropriate where the marriage is of long duration, and the recipient spouse has been out of the workforce for a number of years, has sacrificed her or his own career development or has made substantial noneconomic contributions to the household or to the career of the payor. Plaintiff (husband) and defendant (wife) were married in July 2013 and were the parents of a son (born in 2014). In January 2018, the husband commenced the action for divorce. The Appellate Division rejected the husband's argument that Supreme Court erred in failing to award him post-divorce maintenance. The parties, who married in July 2013, were 40 years old at the time of trial and in good health. At the time the action was commenced both parties were gainfully employed. The husband testified to earning $8.25 per hour plus commissions working 37 to 40 hours per week with occasional overtime. His W–2 statements from 2017 and 2018 reflected an increase in his income from $36,110.73 in 2017 to $41,3100.41 in 2018. He currently earned between $2,100 to $3,100 per month. The wife's earnings in 2018 were estimated to be $101,740,2 an increase from $82,475 in 2017. The wife testified that, throughout the marriage, the husband was often unemployed and at times received unemployment, and she often worked two jobs to support the family. The wife testified to having $63,000 in student loan debt. During this marriage of relatively short duration, the wife's earnings were consistently higher but their incomes were proportionally the same as when they first married. The wife was saddled with student loan debt. The husband's income was stable and he demonstrated an ability to earn extra income to supplement his current employment when necessary. Supreme Court, considered the wife's efforts to assist the husband in getting a better job and giving him ample opportunity to go to school and better his career, which he refused. The husband had not sacrificed anything in his career by virtue of the marriage and provided no assistance to enhance the wife's career. It saw no abuse of discretion in the Supreme Court's denial of maintenance to the husband.

In King v King --- N.Y.S.3d ----, 202 A.D.3d 1383 (3 Dept., 2022) the court calculated the presumptive post-divorce maintenance obligation and then, after reviewing the statutory factors in Domestic Relations Law § 236(B)(6)(e)(1), determined that the post-divorce maintenance award was unjust and inappropriate, and declined to award maintenance to the wife. The Appellate Division affirmed. It found that in articulating its reasoning for deviating from the presumptive maintenance amount, the court ultimately relied on the length of the marriage and the length of time the parties lived apart, the present and future earning capacity of the parties, the existence and duration of a premarital joint household or a pre-divorce separate household and equitable distribution of the marital property (Domestics Relations Law § 236[B][6][e][1][a]-[o]). The court also determined that the wife could support herself through her Social Security income and food stamps, her ownership of the marital residence, her support from family and friends, and her ability to work. This deviation was supported by the record, especially considering that the wife conceded that the spousal support payments were for the mortgage and the mortgage had since been paid in full.

In F.L., v. J.M., 173 A.D.3d 428, 105 N.Y.S.3d 379 (1st Dept., 2019) Supreme Court, inter alia, valued the marital portion of the defendant husband's stock options and restricted stock units at $ 252,974 and distributed 40% to plaintiff wife, valued the marital funds at $ 410,696.82, and declined to award plaintiff post-divorce maintenance, imputed income of $ 831,710 to defendant husband and imposed an income cap of $ 400,000 for the purpose of determining child support. The Appellate Division held that the court properly declined to award the plaintiff post-divorce maintenance because she held a doctorate in computer science and was working full-time as a data scientist. The duration of the pendente lite maintenance was one of the factors the court considered in determining that further maintenance was not warranted.

In Hofman v Hofman, 173 A.D.3d 531, 104 N.Y.S.3d 614 (1st Dept.,2019) the Appellate Division held, inter alia, that the denial of post-divorce maintenance to the wife was supported by the record, which showed that her distributive award would generate cash flow sufficient to render her self-supporting.

Increase in Guideline Maintenance

In Louie v Louie --- N.Y.S.3d ----, 2022 WL 959399, 2022 N.Y. Slip Op. 02172 (3d Dept.,2022) the wife contended on appeal that Supreme Court abused its discretion in failing to award her post-divorce maintenance. The trial testimony established that this was a 44–year marriage and both parties were retired, with the husband having retired in 1999 and the wife in 2016. The proof demonstrated that the wife earned approximately $31,582 per year and the husband earned approximately $117,000. The wife paid for a family health insurance plan through her former employer, and the husband and the wife also had Medicare. The parties' pre-divorce standard of living was very comfortable. Given the lengthy term of the marriage, the significant disparity between the parties' incomes, and the unlikelihood that the wife would be able to close that gap despite her receiving additional assets from the equitable distribution of the marital property, as a majority of the husband's income was from his separate property, it found that the husband should pay the wife monthly maintenance of $2,139 for a period of 20 years, retroactive to the commencement of the divorce action – April 2019.

In Headwell v Headwell, 198 A.D.3d 1130, 156 N.Y.S.3d 491 (3 Dept., 2021) Supreme Court declined to credit the far from compelling account of the husband as to how his income as a commercial airline pilot would precipitously decline from his historic earnings, instead finding that, between those earnings and rental income from a second home that was to be his separate property, he would earn at least $300,000 a year moving forward. Supreme Court imputed annual income to the wife of $58,800 to reflect the amount that she would be able to earn if she began working full time at her longstanding part-time job, a reasonable expectation given that her role as the primary caregiver for the parties' children was easing as their youngest child neared adulthood

Supreme Court set forth a basis for imputation that was supported by the record and then articulated how the statutory factors justified an amount of maintenance that was an upward adjustment from the guideline obligation for a period within the guideline range. The Appellate Division saw no abuse of discretion in its direction that the husband pay maintenance to the wife of $2,800 a month for nine years.

Guideline Maintenance affirmed

In Harris v Schreibman, 200 A.D.3d 1117, 160 N.Y.S.3d 349 (3 Dept., 2021) Supreme Court awarded the wife, under the statutory guidelines, maintenance of $1,963.92 monthly, or $23,567 annually, for 3 years and 10 months. The court explicitly stated that it considered the factors in Domestic Relations Law § 236(B)(6)(e) and declined to deviate from the guidelines. The husband first argued that the wife was not a candidate for maintenance because the wife had the education, skills, and work history to be self-sufficient. Although the wife was earning substantially less money than she did in her previous employment, the record reflected that she lost her job through no fault of her own and was reluctant to take a position that would require her to commute to New York City or travel a lot, taking her away from the children. The husband testified that this was the same reason that he ran for the judgeship to which he was elected, a position that paid less than half of what he was previously earning while working as a partner in a New York City law firm. The Appellate Division held that it seemed unjust and inappropriate to penalize the wife for making the decision to earn significantly less money for the same reason as the husband. Additionally, although the wife was arguably self-sufficient, the court properly considered the standard of living that the parties established during the marriage in determining that the maintenance award was not unjust or inappropriate. As such, it did not discern an abuse of discretion in Supreme Court awarding the wife maintenance under the statutory guidelines. Nor did it find an abuse of discretion in the Supreme Court ordering maintenance for 3 years and 10 months, which is the maximum length of time under the advisory schedule. The record reflected that, in its findings of fact and conclusions of law, the court noted, among other things, the ages of the parties, the length of the marriage, information regarding the children, the parties' educational levels, and past and current careers and incomes. In awarding maintenance and setting the duration, the court expressly stated that it considered the factors in Domestic Relations Law § 236(B)(6)(e) and detailed the factors it found most compelling. Thus, because the court provided a "reasoned analysis of the factors it ultimately relied upon in awarding maintenance" and setting its duration, it declined to disturb the maintenance award.

Guideline Duration of Maintenance affirmed

In Bell–Vesely v Vesely, 180 A.D.3d 1272, 120 N.Y.S.3d 487 (3 Dept.,2020) the Appellate Division held that the duration of a maintenance award will not be disturbed so long as the statutory factors and the parties' pre-divorce standard of living were properly considered. It rejected the wife's contention that the Supreme Court erred in determining the duration of maintenance to be seven, instead of eight, years. The seven-year term was presumably based on the formula for post-

divorce maintenance set forth in Domestic Relations Law § 236(B)(6)(f). Under that formula, where, as here, the parties are married for 20 years, the duration can be set at between 30–40% of the term – which would allow a maximum duration of eight years. However, the duration of a maintenance award pursuant to this formula is discretionary, "and the award will not be disturbed so long as the statutory factors and the parties' pre-divorce standard of living were properly considered." Here, the seven-year award fell within the statutory range, review of the record reflected that the court considered relevant statutory factors, including the earning capacity and the standard of living of the parties (*see* Domestic Relations Law § 236[B][6][f]).

Conclusion

The amount and duration of a maintenance award are addressed to the sound discretion of the trial court, and will not be disturbed provided that the statutory factors and the parties' pre-divorce standard of living are considered. The court need not articulate every factor it considers, but it must provide a reasoned analysis of the factors it ultimately relies upon in awarding or declining to award maintenance.

Since the enactment of the current law, which became effective in January 2016 there have been only nine reported appellate decisions involving post-divorce maintenance, and in only two of them has there been an upward adjustment of maintenance from the guideline obligation. It appears to us from our experience, that, in general, most courts are applying the guideline formula as a matter of course, without deviation. As the appellate decisions we have discussed reveal, the guidelines approach appears to have resulted in a "one size fits all" application of the statute.

Joel R. Brandes practices matrimonial law in New York City concentrating on appeals. He is the author of a new twelve-volume treatise, Law and the Family New York, 2021- 2022 Edition, and Law and the Family New York Forms, 2021 Edition (five volumes), both published by Thomson Reuters, and the New York Matrimonial Trial Handbook (Bookbaby). He can be reached at joel@nysdivorce.com or at his website at www.nysdivorce.com.