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REPORT ON THE USE OF A PRESUMPTIVE FORMULA APPROACH TO DETERMINE MAINTENANCE AWARDS IN DIVORCE CASES

INTRODUCTION

The question of whether to use a presumptive formula to calculate maintenance in divorce proceedings is controversial. The ongoing debate highlights the tension between a desire for consistent and predictable maintenance awards, on the one hand, and a respect for individual facts and circumstances and judicial discretion, on the other hand, while necessarily acknowledging that at certain income levels, retaining counsel is neither realistic nor desirable.

This statement was developed by the Executive Committee of the New York City Bar Association after receiving and reviewing extensive information and input from the Association committees with the greatest expertise in this area. We hope our recommendations are helpful in moving this debate forward.

BACKGROUND

Passage of No-Fault Divorce

In 2010, New York adopted no-fault divorce, something the City Bar supported. At the time, there was significant advocacy by certain groups to tie the passage of no-fault to the creation of a new system for calculating how post-divorce maintenance (f/k/a alimony) was being awarded to lesser-monied spouses. This was meant to address, in part, the potential loss of negotiating power that would be borne by the lesser-monied spouse in a no-fault divorce case. Some argued that maintenance should no longer be determined based on a judge's analysis of a long list of individualized factors because it led to highly divergent, unpredictable and often unjust awards; instead, they argued maintenance should be calculated using an income-based formula that could be adjusted by the court if application of the formula led to an unjust or inappropriate award.

In response to this concern, the 2010 legislation that established no-fault divorce also created guidelines – essentially a formula[1] - that would govern an award of temporary maintenance[2] in cases

[1] The calculation is as follows: the presumptive guideline amount of temporary maintenance (on an annual basis) equals 30% of the payor's income minus 20% of the payee's income, or 40% of combined income minus the payee's income, whichever is less.

[2] Temporary maintenance is awarded *pendente lite* and is in effect pending the resolution of the divorce proceeding (at which time the court will impose a final maintenance amount, which can differ from the temporary award).

where the payor's income is less than $524,000.[3] It is commonly understood that although the no-fault provision effectuated a permanent change in the law, the guidelines provision did not represent the final word on the matter. In fact, the legislation establishing the no-fault law included a section charging the NYS Law Revision Commission (LRC) with developing recommendations for permanently reforming New York's maintenance laws.

Since the temporary guidelines went into effect, they have been criticized, on the one hand, as being unworkable, inflexible and yielding unjust results, and applauded, on the other hand, as providing consistency, efficiency and predictability (particularly in cases involving lower-income parties).

2011 City Bar Report to the LRC

In anticipation of the LRC carrying out its legislative mandate, the City Bar issued a report in 2011 that made certain recommendations to the LRC.[4] In sum, we recommended:

(1) that technical corrections be made to the temporary maintenance guidelines in order to make them workable;

(2) that guidelines be used in spousal support proceedings in family court (where they could be particularly useful); and

(3) that the LRC take a critical look at the concept of "enhanced earning capacity" under *O'Brien*[5] and recommend a better way to provide for equity between divorcing spouses when considering the contributions of one spouse towards the educational and professional endeavors of the other spouse.

The City Bar stands by these recommendations. We do not revisit them in this report.

The LRC Report and Pending Legislation

In May 2013, after conducting extensive research, surveying and roundtable discussions, the LRC issued its final report ("LRC Report"). In sum, the LRC agreed with the three recommendations described above and, on the more controversial points, it recommended as follows:

[3] Where the payor's income exceeds the cap amount, the formula applies to the amount of income below the cap and the court applies discretionary factors to the amount of income above the cap.

[4] The report was drafted by an inter-committee working group and ultimately agreed to by the following committees: Domestic Violence, Family Court and Family Law, Sex and Law and Matrimonial Law. The report reflected where the committees were able to reach consensus; it did not purport to take positions on the more controversial issues. *Available at* http://www2.nycbar.org/pdf/report/uploads/20072191-ReporttoLRConNYStateMaintenanceLaws.pdf.

[5] *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985) (licenses, certifications and other educational training attained during a marriage [referred to as "enhanced earning capacity"] should be valued as an asset subject to equitable distribution).

(1) the use of a formula to determine temporary maintenance should be continued and adopted for use in determining final awards; however, recognition should be given to the differences between cases with limited assets and income on the one hand and cases involving substantial assets and income on the other;

(2) the income cap for application of the presumptive maintenance formula should be the parties' combined adjusted gross income of $136,000, which matches the cap found in the Child Support Standards Act, with the cap geared to biennial adjustment and with the maintenance award subject to adjustment if it is unjust or inappropriate based on the circumstances[6]; and

(3) the duration of the maintenance payments should be subject to a factor test based on considerations such as the length of the marriage, the length of time necessary for the payee spouse to acquire education, training and employment, retirement age, and any barriers to entry or reentry into the workforce faced by the payee spouse.

At around the same time as the release of the LRC Report, a bill was introduced (and later amended) in the Assembly to make changes to the maintenance statute.[7] In some respects, A.6728-B followed the LRC Report; however, it differed in three key respects:

(1) it used an income cap of $300,000 (payor's income only);

(2) it provided that the duration of maintenance would be subject to a formula based on the length of the marriage;[8] and

(3) it provided that maintenance would no longer automatically terminate upon remarriage but instead would continue, though it could be modified or terminated by court order if the circumstances of the remarriage warrant it.[9]

It is not the purpose of this statement to take a formal position on A.6728-B.

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[6] *Final Report on Maintenance Awards in Divorce Proceedings*, N.Y.S. Law Revision Commission, May 15, 2013, pp. 16-23, particularly pp. 20-23, *at* http://www.lawrevision.state.ny.us/Final%20May%2015%202013%20Report%20on%20Maintenance%20Awards.pdf. While the LRC believed it was highly beneficial to have the maintenance guideline cap match the CSSA cap, it also opined that the levels were too low, stating "going forward, that consistent approach should be maintained, ideally at an increased level." *Id.* at p. 23. In support, the LRC cited two recent policy initiatives including in New York's "middle class" families earning up to $300,000. *Id.* at n. 42.

[7] A.6728-B, 236th Session (N.Y. 2013)

[8] E.g., if the marriage lasted between 5 – 7.5 years, the maintenance award would be payable for a period of time equivalent to 40% of the length of the marriage; if the marriage lasted between 10 – 12.5 years, the award would be payable for a period of time equivalent to 60% of the length of the marriage.

[9] The remarriage question was not addressed in the LRC Report.

RECOMMENDATIONS

There is much to be gained by enhancing the uniformity and predictability of maintenance awards in divorce proceedings, including reducing the amount of costly litigation. To that end, the City Bar supports a formula/guidelines approach to presumptively determine the amount of maintenance where the combined adjusted gross income of the parties is less than $300,000 (the "Income Cap"), with the understanding that either or both of the parties may seek a deviation from the guidelines when the result is believed to be unjust or inappropriate.

With respect to cases above the Income Cap, the parties are more likely to have – and be able to afford - legal representation and the higher level of assets and income will raise more issues for judges to consider. Therefore, where income exceeds the Income Cap, the parties should be able to argue the facts and circumstances of their respective positions concerning the appropriate maintenance to be awarded.

For the same reasons, the City Bar supports a formula/guidelines approach to presumptively determine the duration of maintenance payments, but only in cases below the Income Cap, and with the understanding that the parties can seek a deviation from the durational formula when it yields an unjust or inappropriate result. In cases where the Income Cap is exceeded, the parties should be able to argue the facts and circumstances of their respective positions concerning the appropriate duration of the maintenance award.

By way of example, we contrast two hypothetical cases below:

Case 1 involves a combined adjusted gross income of $250,000. The guidelines would apply to <u>both</u> the amount and duration of maintenance, but an aggrieved party would be able to seek a deviation if s/he believes the guidelines have produced an unjust or inappropriate result.

Case 2 involves a combined adjusted gross income of $500,000. The guidelines determining the <u>amount</u> of maintenance would apply to the first $300,000 (with a right to seek a deviation); beyond the guideline amount, the parties would be able to argue facts and circumstances as to whether maintenance should be increased. The question of <u>duration</u>, in its entirety, would be based on a multi-factor test and left to the court's discretion.

We support the current law's treatment of remarriage or retirement vis-à-vis maintenance awards, *i.e.*, the law should continue to provide that maintenance terminates upon the occurrence of either event. However, we believe the law should be amended to include a mechanism whereby the payee spouse may petition a court to seek continuation of maintenance based on the facts and circumstances surrounding either the retirement or the remarriage. If, for example, the payee's remarriage does not work a substantial change in his or her financial condition, then s/he should not be barred from asking a court to consider whether maintenance should continue.

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