NEW YORK CITY BAR

COMMITTEE ON MATRIMONIAL LAW

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Re: Calculation of the spousal maintenance "cap" and duration of spousal maintenance orders in Family Court (F.C.A. §412; D.R.L. §§236B(5-a), 236B(6))

Dear Ms. Fink:

I am writing on behalf of the Matrimonial Law Committee of the New York City Bar Association (the "Matrimonial Committee"), to provide feedback on the Office of Court Administration's ("OCA's") proposal in the January 2016 Report of the Family Court Advisory and Rules Committee regarding duration of spousal support orders entered in Family Court (new or modified proposal number 7). We encourage OCA to include the proposal in its legislative program for 2017 with some modifications discussed below.

While we recognize the desire of the Family Court Support Magistrates to be able to limit duration in the case of very short marriages, OCA's proposal from 2016 should be modified because it offers no guidance regarding how the Support Magistrates will determine duration. The broad discretion implied by the proposal's language is a step backward from the carefully-crafted advisory duration schedule that was included in the maintenance statute passed last year and is applicable in Supreme Court (A.7645/S.5578, codified as ch. 269 of the Laws of 2015). In addition, the 2016 proposal flies in the face of the well-settled principle that as long as parties are still married, there is a continuing obligation to support a spouse.

With absolute discretion and no statutory test to tell Support Magistrates how to decide duration, the 2016 proposal would make it once again impossible for parties to predict what to expect in these cases and will result in extremely inconsistent orders. That proposal contains no reference to the extensively-negotiated advisory schedule now in DRL § 236B(6)(f). Moreover, by directing courts to "consider[] the length of the marriage," the proposal raises the issue of how one determines the length of a marriage that has not yet ended. The initiation of a spousal support case in Family Court does not legally constitute the end of a marriage under current

applicable law. There are many parties who remain married for a significant period of time after a spousal support order is entered.

The 2016 proposal further omits the factors, now listed in DRL § 236B(6)(e)(1), that must be considered to set the duration of post-divorce maintenance under the DRL. Instead, it directs courts only to consider the length of the marriage. Those omissions could be particularly harmful to disabled spouses and those whose ability to obtain employment has been negatively affected by domestic violence or other actions of the payor spouse. Such parties often need support for longer periods than the length of their marriages alone would suggest, a consideration acknowledged by the inclusion in DRL § 236(B) of an extensive list of additional factors to consider, beyond mere length of the marriage.

Furthermore, under the current law, the payor already has the remedy of filing for divorce if he or she does not want to continue paying spousal support. In the divorce proceeding, the court can order a final maintenance award that includes a determination of duration.

The 2016 proposal also leaves open the question of the interplay between spousal support in Family Court and temporary or final orders of maintenance in Supreme Court. It is unclear whether this proposed change would permit a payee to collect spousal support until the Family Court order ends and then go to Supreme Court to seek temporary and final maintenance in a subsequent divorce. The proposal also does not address whether the Supreme Court should consider the duration of spousal support under a Family Court order to determine whether or for how long maintenance should be paid thereafter.

Thus, the 2016 proposal lacks clarity in two fundamental respects: first, how duration should be determined in Family Court; and, second, how the Supreme Court should treat the final order of spousal support.

If the objective is to create a means for Support Magistrates to consider length of marriage when deciding the duration of spousal support orders, then we recommend that the 2017 legislative program include several changes to the 2016 draft language:

- Since the parties are still married, all references to considering "length of the marriage" should be changed to considering the "length of time the parties have been married."

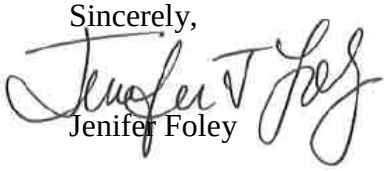
- The legislation should direct family court judges setting the duration of a spousal support order to consider, to the extent they are applicable, the factors that would be considered in specifying duration of post-divorce maintenance – which are listed in DRL § 236B subd. 6(e)(1) and 6(f)(4).

- The legislation should also amend DRL § 236B subd. 5-a(f) and 6(f)(4) to say that when setting the duration of temporary or post-judgment maintenance in a matrimonial action, courts will consider the existence and duration of a spousal support order if any.

We have no objection to the amendments to the DRL in the 2016 proposal, which would provide that various cost-of-living adjustments are made at the same time.

The Matrimonial Committee would be happy to work with you on drafting modified language that would include the above changes. At your convenience, please feel free to contact me, Amanda Norejko or Matthew A. Feigin if you would like to discuss the 2017 program further. Thank you for your consideration.

Sincerely,



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