PAVED WITH GOOD INTENTIONS?
THE INEQUITABLE EFFECT OF THE NEW STATUTORY MAINTENANCE GUIDELINES

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The application of the laws regarding property distribution and spousal support upon divorce in New York has long been at a point of crisis. Lengthy delays in resolution of divorce cases, inadequate resources directed at families in conflict, and rising legal cost all contribute to the problem. Like so many crises that beset our country, it is purely man-made. The solutions, generally the passage of yet more laws and administrative rules, often serve to further damage the divorce process.

The passage, in 2010, of new mandatory temporary support provisions, which results in a transfer of wealth from a spouse making more money to one making less, without any reference to need or equity, highlights the complete abrogation of the thoughtful application of the law in favor of the rote application of formula which is completely inapplicable in many circumstances. This makes resolution of contentious divorces even more difficult than in the past.

This statute, meant to address a perceived “inconsistency in maintenance awards” which purportedly injured dependent spouses, primarily women, instead often results in the mandate that a higher earning custodial parent, which in many low and middle income families is a custodial mother, must pay a portion of their earnings to their lesser earning spouse and simultaneously support their children during the often difficult and expensive divorce process. This “wealth transfer” empowers the recipient of this legislative largesse to delay the divorce proceeding and to take unreasonable positions, hindering the resolution process. The New
York State Legislature has in recent years been exploring further adjustments to the Domestic Relations Law, including a permanent maintenance guidelines statute, which could lead to the return of the long discredited alimony model, while requiring wealth transfers merely because parties are married, without reference to need or equity. While recent legislative hearings have focused on limiting permanent support guidelines to lower income couples, nevertheless such a result would undermine the innovative Equitable Distribution statute for many New York residents, and will cause even greater and unnecessary pain to couples divorcing in New York.

In 1980, the New York State Legislature completely revamped the laws regarding division of marital property in New York, replacing a somewhat Neanderthal system where each party kept the property in their respective names, and any transfer of wealth was limited to alimony payments from the earnings of the monied spouse to the non-monied spouse. The new law, instituting a system of equitable distribution, permitted the courts to conduct a broad analysis of the property acquired during the marriage, and distribute the marital property in an equitable manner in accordance with a number of specified, and quite reasonable, factors. Thus, each party would share appropriately in the marital property, based upon their needs, their respective contributions, the length of the marriage, and other fair and rational factors. Alimony was eliminated, replaced instead by the concept of maintenance, which requires one spouse to make payments from their own income to the other spouse only where the recipient genuinely needed the support, or required support for a period of rehabilitation to obtain education or otherwise re-enter the job-force.

Changes in gender roles and the prevalence of two working spouses proved the wisdom of this statute. Upon the dissolution of a marriage, each partner was awarded their appropriate
share of the property obtained during the marriage, and wealth transfer in the form of maintenance was awarded on where a genuine need existed (for example, when one parent left the workforce for many year to raise a child, or for older or ailing spouses who could not rejoin the workforce). All in all, the system worked fairly well. It is a complicated and time-consuming process, but little different in many ways from addressing the breakup of a business. Any ongoing needs of one spouse, or any unfairness necessitated by the nature of the parties’ property, could be addressed by either a distributive award or an award of maintenance, determined on a case by case basis. There were anecdotal tales of unfair results, some accurate and some the product of disgruntled litigants who, while lacking a factual right to a result, felt they had a moral right to receive more or pay less. But overall, the system did result in generally fair awards which reflected the parties’ specific economics and needs.

The determination by the Court of Appeals, commencing with the landmark O’Brien case, that certain inchoate assets such as professional degrees and licenses were marital property, did spark some uncertainty and wide swings with regard to awards in this area. While this approach was meant to remedy a circumstance where a spouse devoted their labor and income to assisting the other spouse with obtaining such credentials, knee-jerk application by the lower courts of the O’Brien analysis led to professionals such as doctors and lawyers being required to pay substantial amounts representing their lifetime earnings attributable to their studies and professional accomplishments in the form of distributive awards, often without significant contribution by the other spouse. Professionals were essentially granted the right to labor in their professions, and the other spouse rewarded with a distributive award representing the fruits of that labor merely by having married a nascent professional. The pendulum ultimately swung in
the opposite direction when courts, somewhat belatedly, recognized that the mere status of being married did not entitle a spouse to a substantial share of the other spouse’s post-divorce earnings. Recognition of the factor of contribution to the asset by the non-titled spouse, and recognition that an “equitable” distribution can mean a small percentage or none at all, led to a balancing of the equities and fair and reasonable results. In short, the public had reasonable assurances that competent counsel and courts with knowledge of the proper application of Domestic Relations Law Section 236 B could achieve a fair and rational division of property and appropriate provisions for support.

In 2010, the New York Legislature, responding to political pressure from groups opposed to a “no-fault” divorce law which was already too many years late in coming, compromised by adding a piece of legislation to mollify those groups; this assured that the leverage afforded by blocking a divorce by demanding a trial on one of the limited grounds for divorce provided by the prior statute would be replaced by the assurance of wealth transfer regardless of the equities. It was naively believed by some groups as well as members of the legislature that “no fault” divorce was injurious to women and that mandatory support guidelines would benefit women, despite the advocacy of a number of women’s organizations to the contrary.¹ The result was a statute which grants the presumptive right to receive monthly payments by any spouse earning one-third less than the other spouse, up to an income cap of $500,000.00 (adjusted every two years to reflect the CPI). Thus, a spouse earning $200,000.00 is entitled to support from a spouse earning $300,000.00 for the duration of the litigation (which can last for two to three years).

¹The October 2, 2013 New York Law Journal reports that during a recent Senate Judiciary Committee hearing on temporary maintenance, Sen. Ruth Hassell-Thompson, a sponsor of the bill, stated that the current maintenance guidelines and the $500,000 income cap were adopted in 2010 with the idea of protecting the interests of as many women as possible as the state was feeling its way through the introduction of no-fault divorce.
years). This has led to the absurd result of young investment bankers earning six figures demanding and receiving maintenance from their slightly higher earning investment banker spouses.

Domestic Relations Law § 236(B)(5–a) reflects a substantial change in the Legislature's approach to temporary maintenance:

The previous spousal maintenance provision gave the court great leeway, directing only in general terms that it order maintenance “in such amount as justice requires,” considering the parties' standard of living during the marriage, the reasonable needs of the non-monied spouse and the monied spouse's ability to pay, and with regard to a list of factors such as the parties' respective earning capacities (former Domestic Relations Law § 236[B][6] ). Courts applying that provision observed that pendente lite maintenance was awarded to “tide over the more needy party, not to determine the correct ultimate distribution and to ensure that a needy spouse is provided with funds for his or her support and reasonable needs”. Khaira v. Khaira, 93 A.D.3d 194, 938 N.Y.S.2d 513 (1st Dept. 2012)[citations omitted].

The First Department in Khaira goes on to explain the new statute:

The new provision, rather than aiming merely to “tide over” the non-monied spouse, creates a substantial presumptive entitlement. In an effort to provide “consistency and predictability in calculating temporary spousal maintenance awards” (Assembly Memorandum in Support, 2010 McKinney's Session Laws of NY, at 1943), the Legislature created formulas for the court to apply to the parties' reported income, as it did when it enacted the Child Support Standards Act (Domestic Relations Law § 240[1–b]; Family Court Act § 413). Further, the statute requires the court to explain any deviation from the result reached by the formula.

In short, the mere fact that one spouse earns more than another spouse creates an entitlement, without any further exploration of whether the resulting wealth transfer is necessary. The provision requiring a court to explain any deviation is the operative bar to any rational assessment of a maintenance award: the few judges assigned to the matrimonial parts often have neither the time nor the inclination to engage in extensive written analysis, and thus will in many
cases simply apply the guidelines calculations. Most temporary awards (called “pendente lite orders”) are a compendium of stock clauses setting forth the standard legal basis and inserting specific numbers where necessary. These are not “bespoke” decisions; rather they are essentially “fill in the blank” orders which provide specific detail only in necessary circumstances.

Previously, the courts would examine the lifestyle and needs of the parties in fashioning a temporary award. Now, in order to deviate either way from the guidelines two separate analyses must be made, one under the guidelines and one based on the specific facts of the case. Many courts will simply not engage in that level of effort considering the number of cases assigned to them. Under the prior law, the courts were required to review specific and relevant factors.

Under the new structure, the courts simply apply a “one size fits all” formula which produces a consistent result based solely on the parties’ respective incomes; consistent, but by no means fair or equitable in many cases.

The results of the temporary guidelines can be quite startling. To take a real life example, the analysis of a recent matter involving two academics, one in administration and one in a teaching position, resulted in the custodial wife with one child, earning approximately $300,000.00 per year, having an obligation under the maintenance guidelines to the non-custodial husband earning approximately $70,000.00 per year. The amount called for under the guidelines is approximately $6,400.00 per month, requiring the custodial mother to pay the non-custodial father $76,000.00 per year in support during the proceedings, plus the husband’s counsel fees, and to shoulder the vast bulk of the support for the parties’ child. The husband’s stated expenses were $6,775.00 per month, so the total short fall between his earnings and his expenses was a mere $892.00 per month; that differential would have been the concern under the
old law. In this example, the maintenance guidelines, however, award a windfall of $5,500.00 per month at the expenses of the other spouse, who in this case was also the custodial parent. While it may be thought that this example is a rare state of affairs, it is, in actuality, not that unusual. Indeed, in those cases in the author’s current caseload in which maintenance is a factor, nearly every spouse paying maintenance is a woman, and the bulk are custodial parents of one or more children.

The 2011 Preliminary Report on Maintenance by the New York Law Revision Commission illustrates the circumstances where one spouse earns $100,000.00 and one earns $40,000.00, resulting in a payment of $1,666.00 and a reduction of the payor’s income to $84,000.00 and an increase in the recipient’s income to $56,000.00. Depending upon whether there are children of the marriage, and what the custody arrangements may be, this award could be fair, or a disaster for the custodial parent. There is also no reference to the upkeep of the family home or the payment of other family debt, so that a non-custodial parent may be paying child support, maintenance and a mortgage, and may now be responsible for obtaining their own housing in addition to paying the debt on the marital home where the children reside with the custodial parent. In short, the presumed “consistency” of payments based solely on income represents no consistency at all, as each case requires individual analysis to obtain an appropriate result.

In other states, the pendulum is swinging in the other direction, with equally unfortunate results. In Florida, for example, their legislature is considering banning permanent alimony altogether and severely limiting the amount and duration of temporary alimony. While this legislation would produce the opposite damage from the New York maintenance statute, it shares
the goal of the New York law in removing discretion and rational analysis from the hands of the courts, and substituting a blind and brutal calculation which applies regardless of the facts of the individual matter. As in many areas of American life, we are substituting thought and individual analysis with the application of raw data. One can easily extrapolate from this trend a scenario where matrimonial courts can be replaced by computers. Feed in the raw income numbers, and rules which apply the political determination of a state legislature as to what result is desired, and out will spring a number based upon a consistent formula. Whether that result actually applies in each individual case is meaningless.

This author concludes that the law does not require further micro management by the Legislature. The problem is not the law - the problem is the failure of the judicial system in implementing a most serviceable statute. That failure is caused by the usual suspects: lack of funds, lack of resources, and lack of proper training of both the bench and the bar. It is worth noting that in New York City, the largest city in America, there are generally only four judges assigned to matrimonial matters in each of New York and Brooklyn, and two in the other Boroughs. Matters involving the family are the most likely instances where individuals will intersect with the State civil court system. Clearly, the courts are stymied in giving individual attention to those who need it, but as the largest consumer of judicial services, families in crisis deserve more than the mere rote application of formula. Courts do not need to be divested of their discretion; they need the resources to exercise that discretion. Such resources include more judges assigned to matrimonial matters, more programs available to families to intervene and help mediate the divorce process, and better training of judges and lawyers in efficiently disposing of matrimonial cases. Much lip service has been devoted to the “Family” in recent
years, but as the New York and Florida examples demonstrate, a more thoughtful approach must be taken to avoid unnecessary damage to families negotiating the process of divorce.