

**THE NEW YORK STATE LAW REVISION COMMISSION**  
**PRELIMINARY REPORT**  
**ON**  
**MAINTENANCE AWARDS IN DIVORCE PROCEEDINGS**

**May 11, 2011**

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## Table of Contents

<b>I.</b>	<b>Introduction .....</b>	<b>5</b>
<b>II.</b>	<b>Update on Maintenance Awards under New York Law .....</b>	<b>7</b>
<b>A.</b>	<b>Amendment Regarding Post-Divorce Maintenance .....</b>	<b>7</b>
<b>B.</b>	<b>Amendment Regarding Temporary Maintenance .....</b>	<b>8</b>
<b>(i)</b>	<b>Application of the formula when payor's gross income is \$100,000, and payee's gross income is \$40,000 .....</b>	<b>10</b>
<b>(ii)</b>	<b>Origin of the formula .....</b>	<b>13</b>
<b>(a)</b>	<b>American Academy of Matrimonial Lawyers .....</b>	<b>13</b>
<b>(b)</b>	<b>New York's Adoption of the AAML Formula .....</b>	<b>15</b>
<b>C.</b>	<b>Decisions Regarding Presumptive Awards of Temporary Maintenance ...</b>	<b>17</b>
	<i>Scott M. v. Ilona M.</i> .....	18
	<i>C.K. v. M.K.</i> .....	21
	<i>Margaret A. v. Shawn B.</i> .....	22
	<i>A.C. v. D.R.</i> .....	24
	<i>Jill G. v. Jeffery G.</i> .....	26
	<i>J.H. v. W.H.</i> .....	27
<b>D.</b>	<b>Related Issues .....</b>	<b>28</b>
<b>(i)</b>	<b>Child Support Awards .....</b>	<b>28</b>
<b>(ii)</b>	<b>Award of Attorneys' Fees .....</b>	<b>28</b>
<b>(iii)</b>	<b>Tax Consequences .....</b>	<b>30</b>
<b>E.</b>	<b>Anecdotal Concerns about Section 236B(5-a) of the Domestic Relations Law .....</b>	<b>31</b>
<b>IV.</b>	<b>Preliminary Steps for Maintenance Study .....</b>	<b>35</b>
<b>A.</b>	<b>Case Law .....</b>	<b>35</b>
<b>B.</b>	<b>Collaboration with the Office of Court Administration .....</b>	<b>35</b>
<b>(i)</b>	<b>Data Drawn from Nine Counties .....</b>	<b>35</b>
<b>(ii)</b>	<b>UCS 111A Questionnaire and Certificate of Dissolution of Marriage .....</b>	<b>36</b>
<b>V.</b>	<b>Developments in Other Jurisdictions .....</b>	<b>37</b>
<b>A.</b>	<b>Florida .....</b>	<b>37</b>
<b>B.</b>	<b>Massachusetts .....</b>	<b>40</b>
<b>C.</b>	<b>Virginia .....</b>	<b>43</b>
<b>D.</b>	<b>Pennsylvania .....</b>	<b>45</b>
<b>VI.</b>	<b>Conclusion .....</b>	<b>45</b>

<b>Appendix A</b>	<b>Law Revision Commission June 11, 2010 Preliminary Report On Maintenance Awards (Excerpt, History of Maintenance in New York)</b>
<b>Appendix B</b>	<b>Two Letters from American Academy of Matrimonial Lawyers</b>
<b>Appendix C</b>	<b>Demographic Information for Albany, Bronx, Erie, Jefferson, Kings, Nassau, New York, Onondaga, and Westchester Counties</b>
<b>Appendix D</b>	<b>UCS 111A and UCS 111</b>
<b>Appendix E</b>	<b>Certificate of Dissolution of Marriage</b>
<b>Appendix F</b>	<b>Administrative Order</b>

## I. Introduction

The New York State Law Revision Commission<sup>1</sup> submits this Preliminary Report concerning the award of maintenance in matrimonial proceedings, as called for by Chapter 371 of the Laws of 2010 which directed the Commission, to among other things:

review the maintenance laws of the state, including the way in which they are administered to determine the impact of these laws on post marital economic disparities and the effectiveness of such laws and their administration in achieving the state's policy goals and objectives of ensuring that the economic consequences of a divorce are fairly and equitably shared by the divorcing couple . . . .<sup>2</sup>

Prior to the Governor's signing of Chapter 371, the Commission had conducted a review of section 236B of the Domestic Relations Law governing maintenance awards at the request of the Honorable Helene Weinstein, Chair of the New York State Assembly Judiciary Committee. That review led to a Commission Report issued on June 11, 2010.<sup>3</sup>

In that Report, we concluded that a full study of all maintenance related issues was necessary given the complexity of each of the elements of a maintenance award (eligibility,

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<sup>1</sup> The Law Revision Commission was created by Chapter 597 of the Laws of 1934, which enacted Article 4-A of the Legislative Law. It consists of the chairpersons of the Committees on the Judiciary and Codes of the Senate and Assembly, as members *ex officio*, and five members appointed by the Governor, each for a term of five years. In its 77 years of existence, the Commission has undertaken numerous studies, developed recommendations for change and crafted proposed legislation on a wide variety of subjects. The Commission's primary office is currently located at Albany Law School. Background information about the Commission can be viewed at its website: <http://www.lawrevision.state.ny.us>.

<sup>2</sup> Laws of 2010, c. 371 §6-a. Chapter 371 provides that "The law revision commission is hereby directed to: (1) review and assess the economic consequences of divorce on the parties; (2) review the maintenance laws of the state, including the way in which they are administered to determine the impact of these laws on post marital economic disparities, and the effectiveness of such laws and their administration in achieving the state's policy goals and objectives of ensuring that the economic consequences of a divorce are fairly and equitably shared by the divorcing couple; and (3) make recommendations to the legislature, including such proposed revisions of such laws as it determines necessary to achieve these goals and objectives."

<sup>3</sup> The 2010 Report reviewed the history of maintenance awards. That history will not be repeated here but can be found at Appendix A for readers not familiar with it. The entire report can be found at the Commission's website, [www.lawrevision.state.ny.us](http://www.lawrevision.state.ny.us).

amount and duration), and that consideration should be given to the impact of the enactment of a no-fault divorce law on the role of fault in maintenance awards.

While substantial anecdotal evidence exists of problems of unpredictability and inconsistency with court awards – problems that appear to fall hardest on low income and middle income spouses who may or may not be represented by counsel – we found that there is insufficient empirical data from which to draw meaningful conclusions about maintenance awards generally, and that a complete study must include an empirical analysis of current practices in New York and an analysis of how various maintenance formulas used in other states would compare with the calculation of awards in New York.

In the summer of 2010, three major statutory changes were made to the Domestic Relations Law: the addition of no-fault divorce (§170(7)),<sup>4</sup> changes to temporary and post-divorce maintenance (§236B(5-a)),<sup>5</sup> and the addition of a rebuttable presumption of an award of attorneys' fees to the spouse with less money (§237(1)).<sup>6</sup>

This Report discusses the 2010 amendments to section 236B of the Domestic Relations Law regarding temporary and post-divorce maintenance awards, and includes a brief description of our work thus far.

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<sup>4</sup> Chapter 384 of the Laws of 2010.

<sup>5</sup> Chapter 371 of the Laws of 2010.

<sup>6</sup> Chapter 329 of the Laws of 2010.

## **II. Update on Maintenance Awards under New York Law**

In addition to directing the Commission to undertake a study of maintenance awards, Chapter 371 amended the provisions of section 236B of the Domestic Relations Law governing awards of post-divorce maintenance and temporary maintenance.

### **A. Amendment Regarding Post-Divorce Maintenance**

As of October 13, 2010, in awarding post-divorce maintenance, the court must consider additional factors to the ones already listed in section 236B(6) of the Domestic Relations Law:<sup>7</sup>

- 1) the need of one party to incur education or training expenses;
- 2) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- 3) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment;
- 4) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continue to inhibit a party's earning capacity;
- 5) the inability of one party to obtain meaningful employment due to age or absence from the workforce;
- 6) the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment; and
- 7) the equitable distribution of marital property.<sup>8</sup>

The Sponsor's Memorandum in support of the bill that became Chapter 371 states that these

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<sup>7</sup> Those factors are: "the income and property of the respective parties including marital property distributed pursuant to [equitable distribution]; the duration of the marriage and the age and health of both parties; the present and future earning capacity of both parties; the ability of the party seeking maintenance to become self-supporting and if applicable, the period of time and training necessary therefor; 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; the presence of children of the marriage in the respective homes of the parties; the tax consequences to each party; 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; the wasteful dissipation of marital property by either spouse; any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration and any other factor that the court finds to be just and proper."

<sup>8</sup> According to section 236B(6)(a)(7), these 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."

three factors were added “to better reflect divorcing couple’s life circumstances.”<sup>9</sup>

A competing proposal pending in the Legislature regarding post-divorce maintenance would have used a formula to determine such awards.<sup>10</sup> Although this alternative did not become law, its formula for post-divorce maintenance made its way into Chapter 371 as the presumptive method for determining temporary maintenance.

#### **B. Amendment Regarding Temporary Maintenance**

The more significant change made by Chapter 371 is the addition of subdivision 5-a to section 236B of the Domestic Relations Law regarding an award of temporary maintenance.<sup>11</sup>

Prior to this change, a court could award temporary maintenance, to wit:

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.<sup>12</sup>

An award of temporary maintenance was “designed to insure that the needy spouse is provided with sufficient funds to meet his or her reasonable needs pending trial.”<sup>13</sup> As many

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<sup>9</sup> Sponsor’s Memorandum available at <http://nyslrs.state.ny.us/nyslbdcl/menuget1.cgi>.

<sup>10</sup> A. 10984 and S. 7740-A.

<sup>11</sup> The amendment did not address the spousal support obligation during marriage contained in section 412 of the Family Court Act. Section 412 provides that “[a] married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties.” One commentator describes the failure to amend 412 as “exacerbating the illogical dichotomy between the Domestic Relations Law and the Family Court Act.” Professor Merrill Sobie, 2010 West Supplementary Practice Commentaries to McKinney’s Family Court Act §412 (2011 Electronic Update).

<sup>12</sup> Dom. Rel. L. §236B(6), as amended by Chapter 371 of the Laws of 2010.

<sup>13</sup> *Belfiglio v. Belfiglio*, 99 A.D.2d 462, 469 N.Y.S.2d 978 (2<sup>nd</sup> Dept. 1984). See also, Timothy Tippins, 2 New York Matrimonial Law and Practice §17:18 (2010).



lawyers have told us, the goal of temporary maintenance has always been to preserve the status quo.

Under new subdivision 5-a, unless there is an agreement between the parties, an award of temporary maintenance is determined by applying a formula to the parties' respective incomes when there is "an income gap such that the less-monied spouse's income is less than two thirds of the more monied spouse's income."<sup>14</sup> Income is defined in the same way as income for determining child support.<sup>15</sup> Under section 236B (5-a), income for determining temporary maintenance also includes any income from property that is subject to equitable distribution.<sup>16</sup>

The formula applies to the first \$500,000 of the annual income of the spouse with the higher income, referred to as the payor spouse.<sup>17</sup> Where the payor's income exceeds \$500,000,

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<sup>14</sup> Sponsor's Memorandum, A. 10984B/S. 8390 available at <http://nyslrs.state.ny.us/nyslbdcl/menuget1.cgi>. The amendment generated some commentary. *See, e.g.*, Karen M. Platt and Alton L. Abramowitz, *The New Temporary Maintenance Guidelines*, 12 New York Family Law Monthly 3 (April 1, 2011); Henry S. Berman, *Direction to the Law Revision Commission*, 22 Domestic Law Review 5 (Westchester County Bar Ass'n Family Law Section March 2011); Elliot D. Samuelson, *New York Matrimonial Law Enters the Modern World*, 42 Family Law Rev. 1 (New York State Bar Association Fall 2010); Henry S. Berman, *Equitable Distribution of Marital Property and Post-Divorce Income Standards: Have We Lost Our Way?*, Westchester Co. Bar Ass'n Newsletter 1 (Dec. 2010), Timothy M. Tippins, *Temporary Maintenance: New Rules New Problems*, N.Y.L.J. (Nov. 4, 2010), p. 3, col. 1; Joel Stashenko, *No-Fault Companion Bill Raises New Concerns*, N.Y.L.J. (Aug. 16, 2010). *See also* Timothy M. Tippins, *The Divorce Reform Legislation – Parsed for Perspicuity* (MatLaw Systems 2010).

<sup>15</sup> Dom. Rel. L. §236B(5-a)(b)(4)(a), as amended by Chapter 371 of the Laws of 2010 (hereinafter cited as Dom. Rel. L. §236B(5-a)).

<sup>16</sup> Dom. Rel. L. §236B (5-a)(b)(4)(b).

<sup>17</sup> Dom. Rel. L. §236B (5-a)(b)(1).

defined as the “income cap,”<sup>18</sup> the court must apply the formula to the first \$500,000,<sup>19</sup> and consider a list of 19 factors in deciding whether an additional award is warranted.<sup>20</sup> If the court decides to award maintenance that exceeds the presumptive amount, it must issue a written explanation of its reasons.<sup>21</sup>

In applying the formula, the court is required to perform three calculations. The first calculation determines the adjusted gross income of each party. After the court determines the parties’ respective incomes, the court must apply two different calculations to determine the presumptive award. The lower result of the two calculations is the presumptive award. The example below illustrates these calculations.

**(i) Application of the formula when payor’s gross income is \$100,000, and payee’s gross income is \$40,000**

**Calculation #1:** deduct from gross income Federal Insurance Contribution Act (FICA) and Medicare taxes,<sup>22</sup> New York City or City of Yonkers income tax where

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<sup>18</sup> Dom. Rel. L. §236B (5-a)(b)(5). The income cap is subject to adjustment every two years beginning on January 31, 2012 “by the product 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 two year period rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.” *Id.*

<sup>19</sup> Dom. Rel. L. §236B(5-a)(c)(1).

<sup>20</sup> Dom. Rel. L. §236B (5-a)(c)(2)(a)(i)-(xix).

<sup>21</sup> Dom. Rel. L. §236B (5-a)(c)(2)(b).

<sup>22</sup> The 2011 employee tax rate for social security is 4.2%, withheld from the first \$106,800 in wages. *See* Internal Revenue Service, (Circular E), Employer’s Tax Guide for use in 2011, Publication 15, Cat. No. 10000W, at 19. The wage base limit is unchanged from 2010, but the employee tax rate has been lowered from the 6.2% in effect in 2010. *See* Internal Revenue Service, (Circular E), Employer’s Tax Guide for use in 2011, Publication 15, Cat. No. 10000W, at 18. The 2010 and 2011 employee tax rate for Medicare remains at 1.45%, withheld on all covered wages. *See* Internal Revenue Service, (Circular E), Employer’s Tax Guide for use in 2011, Publication 15, Cat. No. 10000W, at 19, Internal Revenue Service, (Circular E), Employer’s Tax Guide for use in 2010, Publication 15, Cat. No. 10000W, at 18. There is no wage base limit for Medicare tax. *See* Internal Revenue Service, (Circular E), Employer’s Tax Guide for use in 2011, Publication 15, Cat. No. 10000W, at 19.

applicable, and other permissible deductions.<sup>23</sup> For purposes of this example, no such deductions were made.

**Result            \$100,000 (H)            \$40,000 (W)**

**Calculation #2:**       subtract 20% of payee's income from 30% of payor's income

                         .30 x \$100,000 = \$30,000  
minus .20 x \$ 40,000 = \$ 8,000  
**Result                            \$22,000**

**Calculation #3:**       a) add payee's income and payor's income (up to and including \$500,000 cap)  
                              b) multiply result by 40%  
                              c) subtract payee's income from that amount

                              \$100,000  
         plus       40,000  
Subtotal       \$140,000  
                              x.40  
Sub Total       \$56,000  
         Minus       \$40,000  
**Result       \$16,000**

The lesser of the two calculations, \$22,000 and \$16,000, is the presumptive amount.

**Presumptive Amount:**       **\$16,000/\$1,333 a month**

**Post Award Income:**       Payor's post-award income: \$84,000;<sup>24</sup>  
   Payee's post-award income: \$56,000.<sup>25</sup>

For this example, no subsequent tax consequences for either party were taken into account.

If the guideline amount of temporary maintenance reduces the payor's income below the

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<sup>23</sup> Dom Rel. L. § 240(1-b)(b)(5)(vii)(G) and (H).

<sup>24</sup> \$100,000 - \$16,000.

<sup>25</sup> \$40,000 + \$16,000.

self-support reserve for a single person (currently \$14,702),<sup>26</sup> the presumptive amount of temporary maintenance is the difference between the payor's income and the self-support reserve.<sup>27</sup> If the payor's income is below the self-support reserve, there is a rebuttable presumption that no temporary maintenance is awarded.<sup>28</sup>

If the court determines that the presumptive maintenance award is unjust or inappropriate, the court may adjust the award based on its consideration of a list of 17 deviation factors.<sup>29</sup> A written explanation of the reasons for any deviation is required.<sup>30</sup>

If one of the parties defaults or the court is not presented with sufficient information about a party's gross income to perform the necessary calculations, "the court shall order the

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<sup>26</sup> The self-support reserve in New York for 2011 is 135% of the federal poverty level. The 2011 poverty threshold for a single individual is \$10,890. *See* The 2011 HHS Poverty Guidelines, available at <http://aspe.hhs.gov/poverty/11poverty.shtml>; Child Support Standards Chart (New York State Office of Temporary and Disability Assistance, Division of Child Support Enforcement April 1, 2011), available at [https://www.childsupport.ny.gov/dcse/pdfs/cssa\\_2011.pdf](https://www.childsupport.ny.gov/dcse/pdfs/cssa_2011.pdf).

<sup>27</sup> Dom. Rel. L. §236B (5-a)(c)(3).

<sup>28</sup> *Id.*

<sup>29</sup> The factors include: (a) the standard of living of the parties established during the marriage; (b) the age and health of the parties; (c) the earning capacity of the parties; (d) the need of one party to incur education or training expenses; (e) the wasteful dissipation of marital property; (f) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; (g) the existence and duration of a pre-marital joint household or a pre-divorce separate household; (h) 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; (i) the availability and cost of medical insurance for the parties; (j) 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 or ability to obtain meaningful employment; (k) the inability of one party to obtain meaningful employment due to age or absence from the workforce; (l) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment; (m) the tax consequences to each party; (n) marital property subject to distribution pursuant to subdivision five of this part; (o) the reduced or lost earning capacity of the party seeking temporary maintenance as a result of having foregone or delayed education, training, employment or career opportunities during the marriage; (p) the contributions and services of the party seeking temporary maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and (q) any other factor which the court shall expressly find to be just and proper. Dom. Rel. L. §236B (5-a)(e)(1).

<sup>30</sup> Dom. Rel. L. §236B (5-a)(e)(2). The written decision cannot be waived by either party. *Id.*

temporary maintenance award 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.”<sup>31</sup>

The duration of the temporary award depends on the length of the marriage.<sup>32</sup>

The Office of Court Administration has posted a worksheet and calculator on its website to assist parties in making these calculations.<sup>33</sup>

Several recent cases which have raised issues about the formula’s application will be discussed in Part II (C).

**(ii) Origin of the Formula**

**(a) American Academy of Matrimonial Lawyers**

The formula contained in section 236B(5-a) is based on the recommendations of the American Academy of Matrimonial Lawyers (AAML).<sup>34</sup> In its 2007 Report, *Considerations When Determining Alimony, Maintenance and Support*,<sup>35</sup> the AAML offered guidelines for determining the *amount* of an award of post-divorce maintenance, and its *duration*, that apply

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<sup>31</sup> Dom. Rel. L. §236B (5-a)(g). This award can be increased if the court is presented with newly discovered or obtained evidence. *Id.*

<sup>32</sup> Dom. Rel. L. §236B (5-a)(d). Length of the marriage is defined as “the period from the date of marriage until the date of commencement of action.” Dom. Rel. L. §236B (5-a)(b)(3). Some commentators suggest that the relevance of the length of the marriage in determining the duration of *temporary* maintenance is not clear since the award covers the period from the commencement of the divorce proceeding until the final order. *See* Anecdotal Concerns about Section 236(5-a) of the Domestic Relations Law *infra* at p. 31.

<sup>33</sup> Temporary Maintenance Guidelines Worksheet, available at <http://www.nycourts.gov/divorce/TMG-Worksheet.PDF>; Temporary Maintenance Guidelines Calculator, available at <http://www.nycourts.gov/divorce/calculator.pdf>.

<sup>34</sup> Sponsor’s Memorandum, A. 10984B/S. 8390, available at <http://nyslrs.state.ny.us/nyslbdcl/menuget1.cgi>.

<sup>35</sup> The Report was approved by the AAML Board of Governors on March 9, 2007. The AAML Report is available at <http://www.divorcereformny.org/pdf/AAML.pdf>.

after eligibility for an award has been determined in accordance with existing state law.<sup>36</sup> The application of the formula to determine amount and duration seems to subsume the question of eligibility, however. Once the application of the formula yields an award, it is not clear how the recipient party could be persuaded that he or she was not eligible for it.

The AAML formula is as follows:

The *amount* of the award is to be calculated by taking 30% of the payor's gross income minus 20% of the payee's gross income not to exceed 40% of the combined gross income of the parties.

The *duration* of the award is to be calculated by multiplying the length of the marriage by the following factors: (0-3) .3, (3-10) .5, (10-25) .75, over 25 years, permanent alimony.

The calculation does not apply when the combined gross income of the parties exceeds \$1,000,000 a year.

The report did not discuss the formula's application to temporary maintenance.

Recognizing that the application of the formula to determine amount or duration may not reflect the "unique circumstances of the parties," the AAML recommended deviation factors to address common situations in which adjustments are appropriate.<sup>37</sup>

The Commission has not been advised whether statistically significant data were employed by the AAML when it devised the formula. Arthur E. Balbirer, Esq., a member of the committee that developed the formula, described the process as a collaborative effort to produce

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<sup>36</sup> AAML Report (emphasis added).

<sup>37</sup> AAML Report (a spouse is primary caretaker of a dependent minor or disabled adult child; a spouse has pre-existing order(s) of support, court-ordered payment of debts or other obligations, or unusual special needs; a spouse's age, health; a spouse has given up a career or a career opportunity or otherwise supported the career of the other spouse; a spouse has received a disproportionate share of the marital estate; there are unusual tax consequences; circumstances make the result inequitable; or the parties have agreed otherwise.).

a range of reasonable alimony awards using a variety of incomes.<sup>38</sup>

The Commission is endeavoring to accumulate relevant information on the development of the AAML formula.

Two statements in the AAML Report suggest ambiguity in the AAML's intent regarding how the formula should be applied. First, the AAML Report states that "these recommendations are ones that [the AAML] hopes [its] members can utilize in advocating a fair result for their clients."<sup>39</sup> This observation seems to suggest the formula could be a "starting point for negotiations."<sup>40</sup>

But the AAML Report goes on to say that "it is further hoped that the approach outlined here will be adopted by judicial officers and legislatures as they attempt to provide consistent, predictable and equitable results."<sup>41</sup> This seems to suggest the formula could be treated as advisory within a jurisdiction<sup>42</sup> or applied to create a presumptive award by statute.

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<sup>38</sup> April 25, 2010 Telephone conversation between Arthur Balbirer, Esq. of the AAML and Rose Mary Bailly, Esq., and Barbara Hancock, Esq., Law Revision Commission staff. The participants in the AAML committee were Marlene Eskin Moses, Esq. (Tennessee), Co-Chair; Barbara Ellen Handschu, Esq. (New York), Co-Chair; Michael Albano, Esq. (Missouri); Arthur E. Balbirer, Esq. (Connecticut); Gaetano Ferro, Esq. (Connecticut); James T. McLaren, Esq. (South Carolina); Joanne Ross Wilder, Esq. (Pennsylvania); Thomas Wolfrum, Esq. (California); and Mary Kay Kisthardt, Esq. (Missouri), Reporter. AAML Report.

<sup>39</sup> AAML Report.

<sup>40</sup> Mary Kay Kisthardt, Reporter for the AAML Report, *Re-thinking Alimony: the AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. Am. Acad. Matrim. Law. 61, 79 (2008).

<sup>41</sup> AAML Report.

<sup>42</sup> See *Boemio v. Boemio*, 414 Md. 118, 994 A.2d 911 (2010)(holding that a trial court had not erred in consulting the AAML Guidelines as an aid when determining the amount and duration of an alimony award pursuant to the Maryland statute. The High Court stated that "[w]e believe that *if* the guidelines reasonably direct the court to a fair and equitable award without supplanting or frustrating any one of the twelve enumerated statutory considerations, a court may refer to them as an aid in translating its statutorily mandated analysis into a dollar amount. 414 Md. at 132, 994 A.2d at 919)(emphasis in original).).

This ambiguity is underscored that a statement from the President of the AAML New York Chapter who has advised us that “[t]he Board of Governors for the American Academy of Matrimonial Lawyers did *not* approve the report as a guideline of any kind.”<sup>43</sup>

Our final report will attempt to uncover information that will clarify the AAML’s intent.

**(b) New York’s Adoption of the AAML Formula**

In New York, the AAML formula first appeared in a 2008 Assembly Bill as the presumptive method for calculating final or post-divorce maintenance awards based on the payor’s income, up to \$1,000,000.<sup>44</sup> The judge’s discretion to award alimony based on traditional factors was limited to that portion of the payor’s income that exceeded the \$1,000,000 cap or to cases where the court found the formula’s result to be unjust or inequitable.<sup>45</sup> The bill contained a separate guideline to determine the duration of an award of final maintenance by applying a percentage to the length of the marriage, beginning at 30% for a marriage of 5 years or less, and increasing to 100% for a marriage of 20 to 25 years. If the marriage was more than 25 years, the award was permanent.<sup>46</sup> Under the bill, the death of either party ended the

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<sup>43</sup> April 6, 2011, Letter from Christopher Mattingly, Esq., President of AAML New York Chapter, to Rose Mary Bailly, Esq., Executive Director of the Law Revision Commission (citing letter of June 11, 2008 to Allan D. Mantel, the then president of the New York Chapter of AAML from James A. Hennenhoefler, then President of the AAML)(emphasis in the original). Both letters are attached as Appendix B.

<sup>44</sup> A. 10466, Section 1.

<sup>45</sup> *Id.* (The court was to consider seventeen specific factors and one catchall factor if income in excess of the cap was considered in a determination of the amount of an award. A written decision setting forth the factors considered and the reasons for its decision was required. If the court found the presumptive award unjust or inappropriate, it could adjust the award based upon consideration of eleven factors and one catchall factor. A written order setting forth the presumptive award, the factors considered, and the reasons for adjustment was required.).

<sup>46</sup> *Id.* (The percentages were as follows: 0 up to and including 5 years (30%); over 5 years up to and including 7.5 years (40%); over 7.5 years up to and including 10 years (50%); over 10 years up to and including 12.5 years (60%); over 12.5 years up to and including 15 years (70%); over 15 years up to and including 17.5 years (80%); over 17.5 years up to and including 20 years (90%); over 20 years up to and including 25 years (100%) over 25 years, permanent.).



maintenance obligation, but remarriage of the payee spouse did not.<sup>47</sup>

As noted earlier, the presumptive formula appeared again in 2010 post-divorce maintenance bills pending in both houses, this time with an income cap of \$500,000.<sup>48</sup> During the legislative process, the provision applying the formula in the post-divorce awards was deleted, and a provision was added applying the formula to temporary maintenance awards.<sup>49</sup> While consideration of the duration of the award was retained, the calculation to determine duration was eliminated.<sup>50</sup> The amended bill passed both houses and was enacted into law as Chapter 371. Chapter 371 became effective on October 13, 2010.

### **C. Decisions Regarding Presumptive Awards of Temporary Maintenance**

Few decisions on temporary maintenance have been reported since the October 2010 effective date of section 236B(5-a), in part because the law is so recent and in part because under court rules applicable to contested matrimonial actions, a period of about 4 months generally elapses between the date of service of the summons and complaint and the court's decision regarding temporary maintenance.<sup>51</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> S. 7740-A and A. 10984.

<sup>49</sup> A. 10984-B and S. 8390.

<sup>50</sup> *Id.*

<sup>51</sup> See N.Y. CLS Uniform Rules, Trial Cts. § 202.16(d)(No later than 45 days from the date of service of the summons and complaint, the plaintiff must file a request for judicial intervention, unless both parties file a notice of no necessity with the court, in which case the request for judicial intervention must be filed no later than 120 days from the date of service.) A preliminary conference must be held within 45 days after the action has been assigned. The court's order sets the time and date for the conference, and specifies the papers to be exchanged. Applications for pendente lite relief may be considered at the preliminary conference. N.Y. CLS Uniform Rules, Trial Cts. § 202.16(f)(2)(i). A motion for pendente lite maintenance should be made before or at the preliminary conference, and is to be determined within 30 days after the motion is submitted for decision. N.Y. CLS Uniform Rules, Trial Cts. § 202.16(k)(1)&(6).

Whether intentionally or not, all of the cases raise questions about the application of the formula.<sup>52</sup> Some of the decisions call into question the calculation of the presumptive award of temporary maintenance. *See, e.g., Scott M. v. Ilona M.*,<sup>53</sup> *C.K. v. M.K.*,<sup>54</sup> *Margaret A. v. Shawn B.*,<sup>55</sup> and *AC v. DR.*<sup>56</sup>

Other cases, by simply adopting the presumptive amount for temporary maintenance without adjustment, raise issues about the relationship between a formulaic approach to temporary maintenance, and other decisions about child support, attorneys' fees, carrying charges, and tax consequences that are made by the court during the pendency of the divorce proceeding. *See, e.g., J.H. v. W.H.*<sup>57</sup>; and *Jill G. v. Jeffery G.*<sup>58</sup>

*Scott M. v. Ilona M.* addressed the issue of whether the court's award of temporary maintenance should deviate from the presumptive award when the application of the statutory formula transformed the payor spouse into the spouse with less money than the payee spouse.

A brief examination of the application of the formula, together with child support for the couple's only child, illustrates how the 44-year old husband's income of \$155,590.00 was reduced to \$39,398.77, and the 34-year old wife's income of \$33,705.36 was increased to

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<sup>52</sup> *See, e.g.,* Bruce J. Wagner, *Matrimonial Update*, Albany County Bar Ass'n Newsletter 15 (May 2011); Lee Rosenberg, *Multiple Flaws Abound in New Interim Spousal Support Statute*, N.Y.L.J. (Feb.25, 2011).

<sup>53</sup> 31 Misc.3d 353, 915 N.Y.S.2d 834 (Sup. Ct. Nassau Co. 2011)(Sunshine, Jeffrey S., J.).

<sup>54</sup> --- N.Y.S.2d ---, 2011 WL 1563792 (Sup. Ct. Rockland Co. 2011)(Weiner, Alfred, J.).

<sup>55</sup> --- N.Y.S.2d ---, 2011 WL 893015 (Sup. Ct. Westchester Co. 2011)(Connolly, Francesca, J.).

<sup>56</sup> --- N.Y.S.2d ---, 2011 WL 1137739 (Sup. Ct. Nassau Co. 2011)(Falanga, Anthony, J.).

<sup>57</sup> 31 Misc.3d 1203(A), 2011 WL 1158653 (Sup. Ct. Kings Co. 2011)(Thomas, Delores J., J.).

<sup>58</sup> 31 Misc.3d 1209(A), 2011 WL 1364481 (Table)(Sup. Ct. Nassau Co. 2011)(Janowitz, Norman, J.).

\$78,309.55.<sup>59</sup>

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<sup>59</sup> The details of the calculation are set out in the decision. 31 Misc.3d 353, 915 N.Y.S.2d 834.

**Husband**

Adjusted gross income      \$143,677.77

Less temporary maintenance   \$ 37,016.14

Less child support obligation   \$ 17,193.80**Total**                                **\$ 89,467.83**

Less Federal tax obligation    \$ 24,553.80

Less State tax obligation       \$ 9,644.06**Net Income**                        **\$ 55,269.97**Less pro-rata childcare         \$ 15,871.20**Final Net**                            **\$ 39,398.77****Wife**

Adjusted gross income      \$30,435.93

Plus temporary maintenance   \$37,016.14

Plus child support award       \$17,193.80**Total**                                **\$84,645.87**

Less Federal tax obligation    \$ 730.08

Less State tax obligation       \$ 1,077.44**Net Income**                        **\$82,830.35**Add-on pro-rata child care     \$ 4,528.80**Final Net**                            **\$78,309.55**

The court concluded that the shift of approximately \$40,000 in income from the husband to the wife was not a sufficient basis, without more, to allow the court to deviate from the presumptive award.<sup>60</sup> It recognized that the underlying intent of section 236B(5-a) is economic, namely “a shift in resources pre-trial by automatic calculation,”<sup>61</sup> and represents a dramatic change in the philosophy of temporary maintenance from the traditional standard of tiding over the “more” needy spouse.<sup>62</sup>

It was further noted in *Scott M.* that a court’s inclination to do equity by adjusting the shift in resources is not an adequate reason to deviate from the formula, because the court’s ability to adjust the result of the formula is not free-standing. Rather it is anchored to the

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<sup>60</sup> 31 Misc.3d at 363, 915 N.Y.S.2d at 841.

<sup>61</sup> 31 Misc.3d at 361, 915 N.Y.S.2d at 840.

<sup>62</sup> *Id.*, 915 N.Y.S.2d at 840.

deviation factors set out in section 236B(5-a)(e)(1)(a)-(q).<sup>63</sup> The court concluded that information about some of the factors cannot be known at the early stage of litigation when temporary maintenance is sought.<sup>64</sup> It also concluded that deviation factor (q) in section 236B(5-a)(e)(1)(“any other factor which the court shall expressly find to be just and proper”) could not support a simple readjustment.<sup>65</sup> While such language might appear “to invite a deviation based upon a resource shift, the legislative intent of the statute is consistency in maintenance awards. Granting a deviation just because there is a resource shift would be inconsistent with the statutory intent.”<sup>66</sup>

After considering the statutory factors upon which an adjustment to the presumptive award could be made, the court decided to adjust the award based on the pre-divorce joint household expenses of both parties and a contractual child care obligation of the parties.<sup>67</sup> According to the court, the shift in resources left the payor spouse unable to meet and maintain his pre-divorce household expenses and the court’s role was “to devise an award that will consider the existence of a pre-divorce household.”<sup>68</sup> After reviewing the monthly expenses of both parties, the court adjusted the temporary maintenance award by one-third, from \$37,016.14 to \$24,677.42.<sup>69</sup> As a result, the net amount of resources was increased for the husband from the

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<sup>63</sup> 31 Misc.3d at 363, 915 N.Y.S.2d at 841.

<sup>64</sup> 31 Misc.3d at 361, 915 N.Y.S.2d at 39.

<sup>65</sup> *Id.*, 915 N.Y.S.2d at 841.

<sup>66</sup> *Id.*, 915 N.Y.S.2d at 841.

<sup>67</sup> *Id.*, 915 N.Y.S.2d at 841.

<sup>68</sup> 31 Misc.3d at 363, 915 N.Y.S.2d at 842.

<sup>69</sup> 31 Misc.3d at 365, 915 N.Y.S.2d at 843.

presumptive result of \$39,398.77 to \$50,973.09 and was reduced for the wife from the presumptive result of \$78,309.55 to \$66,735.23.<sup>70</sup>

*C.K. v. M.K.*<sup>71</sup> involved the consideration of deviation factor (q) referred to in *Scott M.* Factor (q) is “any other factor which the court shall expressly find to be just and proper” as a reason for deviating from the presumptive award. In calculating the presumptive award, the court determined that after the appropriate deductions, the husband’s income was \$146,818, and the wife’s income, \$127,936.<sup>72</sup> Applying the formula, the court concluded that the presumptive award was zero.<sup>73</sup> After comparing the wife’s 2009 W-2, showing income, and her net worth statement, which showed no income, the court concluded that the wife’s income on her W-2 was a bookkeeping matter relating to the husband’s business -- a matter that the husband did not dispute -- and that she did not have income “in the traditional sense.”<sup>74</sup> The court concluded that an award of no maintenance would be unjust and unfair and awarded temporary maintenance of \$2,000.<sup>75</sup>

It is not clear if, in calculating the award, the court took into consideration the husband’s agreement to provide \$2,000 per month for child support, pay the mortgage on the marital residence, pay the wife \$1,732.24, and pay all automobile expenses for the family, including the wife’s car and gas credit card, the cost of the necessary evaluations in this action, and the family’s

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<sup>70</sup> 31 Misc.3d at 366, 915 N.Y.S.2d at 843.

<sup>71</sup> --- N.Y.S.2d ---, 2011 WL 1563792 (Sup. Ct. Rockland Co. 2011).

<sup>72</sup> --- N.Y.S.2d ---, 2011 WL 1563792, at 1.

<sup>73</sup> --- N.Y.S.2d ---, 2011 WL 1563792, at 2.

<sup>74</sup> --- N.Y.S.2d ---, 2011 WL 1563792, at 3.

<sup>75</sup> --- N.Y.S.2d ---, 2011 WL 1563792 at 3.

health insurance expenses.<sup>76</sup>

*Margaret A. v. Shawn B.*<sup>77</sup> addressed the issue of how to calculate the income of an unemployed spouse in order to apply the formula. The wife, listed as a homemaker on the parties' 2009 tax return, sought temporary maintenance as well as payment of additional costs, including expenses for the marital residence, medical insurance and expenses, and preschool tuition for one of the children.<sup>78</sup> Her husband opposed the application because he had been unemployed since October 2010 when he was terminated from his position as a vice-president of a company.<sup>79</sup>

The court found the husband's claims about his search for work unconvincing and determined that he had failed to meet his burden of showing that he had been diligently searching for employment "commensurate with his qualifications and experience."<sup>80</sup> In calculating the temporary maintenance award, the court looked to the calculation of child support when the parent is unemployed, given that the definition of income under 236B(5-a) is the same as that for child support.<sup>81</sup> Noting that a child support obligation is "a function of the income that is, or

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<sup>76</sup> --- N.Y.S.2d ---, 2011 WL 1563792 at 1. The husband also agreed to pay the carrying charges on the couple's vacation property in which he would have exclusive occupancy.

<sup>77</sup> --- N.Y.S.2d ---, 2011 WL 893015 (Sup. Ct. Westchester Co. 2011).

<sup>78</sup> --- N.Y.S.2d ---, 2011 WL 893015, at 1.

<sup>79</sup> --- N.Y.S.2d ---, 2011 WL 893015, at 2.

<sup>80</sup> --- N.Y.S.2d ---, 2011 WL 893015, at 3 (citing *Paul v. Paul*, 67 A.D.3d 757, 758, 888 N.Y.S.2d 198 [2d Dept 2009]).

<sup>81</sup> Dom. Rel. L. §236B (5-a)(b)(4).

should have been, reflected on the party's most recently filed income tax return,"<sup>82</sup> the court concluded that the husband's income was \$256,909.00, the amount reflected on the parties' 2009 return.<sup>83</sup>

The court observed that "[c]onsidering the defendant's past employment history and earning capacity, even though the defendant is currently unemployed, this is an appropriate amount of income to be imputed to him in determining his child support and temporary maintenance obligations."<sup>84</sup> Using the 2009 income, the court calculated the presumptive maintenance award to be \$74,609.00 per year.<sup>85</sup>

The court also directed the husband to pay \$50,486.00 annually as temporary child support, calculating it on all the 2009 income, not just the income up to the child support guidelines cap of \$130,000.<sup>86</sup> The court's decision was based on "[t]he standard of living enjoyed by the children during the marriage, the economic reality of raising a family in Westchester County, the educational background of the parties, and the disparity in the parents' income . . . ."<sup>87</sup>

Additionally, the court directed the husband to maintain current medical and dental insurance coverage for the wife and children and any life insurance policy naming the wife as

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<sup>82</sup> --- N.Y.S.2d ---, 2011 WL 893015, at 3 (citing *Wallach v. Wallach*, 37 AD3d 707, 708 [2d Dept 2007]).

<sup>83</sup> --- N.Y.S.2d ---, 2011 WL 893015, at 4.

<sup>84</sup> --- N.Y.S.2d ---, 2011 WL 893015, at 4.

<sup>85</sup> --- N.Y.S.2d ---, 2011 WL 893015, at 4.

<sup>86</sup> --- N.Y.S.2d ---, 2011 WL 893015, at 4.

<sup>87</sup> --- N.Y.S.2d ---, 2011 WL 893015, at 4.



beneficiary and to pay all “unreimbursed medical, dental, and other healthcare expenses, including psychological, psychiatric, therapy, and prescription expenses.”<sup>88</sup> The husband was allowed to take the tax exemptions for the children in light of the shift in resources to his spouse.<sup>89</sup>

This case raises the issue of whether the application of a formula which predicts a result is useful in a situation where there apparently is no income out of which to pay the award. The rigid application of a formula at this early stage of the litigation where unemployment is an issue can lead to harsh results. Although the court also applied the child support formula to the 2009 income, it could have chosen to consider the reasonable needs of the children because it has the discretion to do so for a temporary award.<sup>90</sup>

*A.C. v. D.R.*<sup>91</sup> involved the relationship between a court order directing one spouse to pay charges for real and personal property and services furnished to the other spouse and carrying charges for the residence occupied by the other spouse pursuant to section 236B(8)(b) of the Domestic Relations Law,<sup>92</sup> and an order awarding to the same spouse presumptive temporary maintenance under section 236B(5-a).

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<sup>88</sup> --- N.Y.S.2d ---, 2011 WL 893015, at 5.

<sup>89</sup> --- N.Y.S.2d ---, 2011 WL 893015, at 5.

<sup>90</sup> *C.K. v. M.K.*, --- N.Y.S.2d ---, 2011 WL 1563792, at 3 (Sup. Ct. Rockland Co. 2011)(noting that temporary child custody is to ensure “the reasonable needs of the children in [the parent’s] custody.”).

<sup>91</sup> --- N.Y.S.2d ---, 2011 WL 1137739 (Sup. Ct. Nassau Co. 2011).

<sup>92</sup> Section 236B(8)(b) of the Domestic Relations Law authorizes the court to direct payment to the other spouse for, among other things, “interest payments, insurances, taxes, repairs or other carrying charges on premises occupied by the other spouse . . . .” In this case, the husband had been ordered to pay “real estate taxes, gas electric, telephone including cell, water, homeowner’s, automobile, umbrella, medical and disability insurance, cable TV and Internet, alarm, domestic help, gardening and landscaping, snow removal, sanitation and exterminating.”

The husband had commenced an action for divorce prior to the effective date of the new law.<sup>93</sup> The wife commenced her own action for a no-fault divorce after the effective date which allowed her to take advantage of the temporary maintenance formula.<sup>94</sup> The wife sought a presumptive yearly award of temporary maintenance. The presumptive award was \$148,297.00 based on the application of the formula to the husband's income capped at \$500,000.00 and the wife's dividend income of \$8,516.00.<sup>95</sup> She also sought "payment of all the carrying charges for the parties' home, her automobile, medical, dental and life insurance and unreimbursed medical expenses" and "child support, educational expenses and related relief."<sup>96</sup>

At a preliminary conference, the husband stipulated to paying all the carrying charges on the marital residence totaling \$7,274.00 per month (\$87,288.00 a year) and the court so ordered the stipulation.<sup>97</sup>

In light of this so-ordered agreement, the court concluded that "the blind application of the mathematical formula for temporary maintenance is unjust and inappropriate as the sums paid for carrying charges are no longer available as a maintenance source."<sup>98</sup> It therefore recalculated the husband's income, deducting the carrying charges in addition to FICA and Medicare taxes from the husband's full income of \$529,857.00. The recalculated income for the payor spouse

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<sup>93</sup> --- N.Y.S.2d ---, 2011 WL 1137739, at 1.

<sup>94</sup> --- N.Y.S.2d ---, 2011 WL 1137739, at 1-2.

<sup>95</sup> --- N.Y.S.2d ---, 2011 WL 1137739, at 4.

<sup>96</sup> --- N.Y.S.2d ---, 2011 WL 1137739, at 4, 15.

<sup>97</sup> --- N.Y.S.2d ---, 2011 WL 1137739, at 4.

<sup>98</sup> --- N.Y.S.2d ---, 2011 WL 1137739, at 15.

was \$441,569.00, and the presumptive maintenance award based on the recalculated income was \$130,767.50,<sup>99</sup> a reduction of \$17,529.50 from the presumptive award of \$148,297.00.

The court also expressed the view that “the statute requires some remedial language as strict application in almost every case will not effectuate the statute’s purpose and will result in awards that are unjust and inappropriate, thus requiring consideration of the 17 factors enumerated in the statute.”<sup>100</sup>

Several reported cases have found the presumptive award sufficient, but in so doing have raised additional questions. In *Jill G. v. Jeffery G.*,<sup>101</sup> the presumptive monthly award of \$10,783.33 was based on the husband’s income of \$500,000 (a combination of a fixed salary of \$220,000 and bonuses) and the wife’s income of \$103,000. The husband did not dispute the presumptive award.<sup>102</sup> Plaintiff wife sought an adjustment increasing temporary maintenance, claiming the deviation was required by the extraordinary medical expenses of one of their three children, who had cerebral palsy.<sup>103</sup>

The court found that the award was just and appropriate<sup>104</sup> given that the income of both parties, as well as funds available to the child with the disability from his Infant Compromise

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<sup>99</sup> --- N.Y.S.2d ---, 2011 WL 1137739, at 15. *Compare J.S. v. J.S.*, 857 NYS 2d 427, 432 (Sup. Ct., Nassau Co., 2008)(the court ordered the husband to pay carrying charges on the marital home and the lease and insurance on the wife’s automobile as non-taxable interim maintenance totaling \$3,450 per month. Then, finding a shortfall of \$1,313 per month between the wife’s remaining expenses and available income, the court ordered this amount to be paid as non-taxable interim maintenance.).

<sup>100</sup> --- N.Y.S.2d ---, 2011 WL 1137739, at 11-12.

<sup>101</sup> 31 Misc.3d 1209(A), 2011 WL 1364481 (Sup. Ct. Nassau Co. 2011).

<sup>102</sup> 31 Misc.3d 1209(A), 2011 WL 1364481, at 2.

<sup>103</sup> 31 Misc.3d 1209(A), 2011 WL 1364481, at 2.

<sup>104</sup> 31 Misc.3d 1209(A), 2011 WL 1364481, at 3.

Order, were sufficient to meet the expenses both parties had listed in their statements of net worth,<sup>105</sup> although the court observed that the expenses listed by both parties were to a large extent duplicative.<sup>106</sup>

In addition to paying \$10,783.33 in monthly temporary maintenance, the husband was also directed to pay 100% of the costs of the wife and the children for “future unreimbursed medical, dental, psychotherapeutic, optometrist, drug and pharmaceutical bills,” 100% of the charges of the wife’s car, 50% of the expenses of a second car used for the benefit of the child with the disability, and 50% of all carrying charges for the marital residence.<sup>107</sup> Although these costs were in addition to the temporary maintenance, the court did not subtract any of them from the husband’s income prior to calculating the temporary maintenance as the court had done in *Margaret A.*

The statutory silence about the relationship between a presumptive award under section 236B(5-a) and orders pursuant to section 236B(8)(b) has already led to inconsistent results.

In *J.H. v. W.H.*,<sup>108</sup> the court found the presumptive maintenance award need not be adjusted after calculating the award based on the parties’ W-2 income statements.<sup>109</sup> At issue was whether income from two jointly owned rental properties should be included in calculating the respective parties’ incomes. The wife sought to have 50% of the income attributed to each

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<sup>105</sup> 31 Misc.3d 1209(A), 2011 WL 1364481, at 2.

<sup>106</sup> 31 Misc.3d 1209(A), 2011 WL 1364481, at 2.

<sup>107</sup> 31 Misc.3d 1209(A), 2011 WL 1364481, at 4.

<sup>108</sup> 31 Misc.3d 1203(A), 2011 WL 1158653 (Sup. Ct. Kings Co. 2011).

<sup>109</sup> 31 Misc.3d 1203(A), 2011 WL 1158653, at 2.

spouse.<sup>110</sup> The husband claimed that the rental incomes were insufficient to pay the mortgages on the properties and should not be included without also recognizing the related expenses of the properties.<sup>111</sup> The court concluded that the rental income should not be used as part of the calculation because credible evidence demonstrated that the expenses associated with the properties exceeded the rental income.<sup>112</sup>

#### **D. Related Issues**

##### **(i) Child Support Awards**

As noted above, temporary child support awards are implicated in several of these cases. However, the courts have used inconsistent methods to calculate the awards. For example, in *Scott M.*,<sup>113</sup> the court used the payor's income minus the maintenance award and the payee's income without regard to the maintenance award to calculate the award. On the other hand, in *Jill G. v. Jeffery G.*,<sup>114</sup> the court used the income of the payor minus the maintenance award and the payee's income increased by the maintenance award.

##### **(ii) Award of Attorneys' Fees**

The presumptive maintenance award also raises questions about an award of interim attorneys' fees. Section 237(1) of the Domestic Relations Law regarding the award of attorneys' fees creates a rebuttable presumption that such fees will be awarded to the spouse with less

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<sup>110</sup> 31 Misc.3d 1203(A), 2011 WL 1158653, at 3.

<sup>111</sup> 31 Misc.3d 1203(A), 2011 WL 1158653, at 3.

<sup>112</sup> 31 Misc.3d 1203(A), 2011 WL 1158653, at 4.

<sup>113</sup> 31 Misc.3d 353, 915 N.Y.S.2d 834.

<sup>114</sup> 31 Misc.3d 1209(A), 2011 WL 1364481.

money “to enable [that] party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties.”<sup>115</sup> If an award is appropriate, it must be made “pendente lite,” during the pendency of the proceeding, “to enable adequate representation from the commencement of the proceeding.”<sup>116</sup>

Three of the cases discussed earlier found that the application of the presumptive maintenance award rebutted the presumption that the payor spouse was the monied spouse for purposes of awarding attorneys’ fees. In *Scott M.*, the husband’s gross income was substantially greater than that of his wife; however, “the reallocation of financial resources” accomplished through the application of section 236B (5-a) rebutted the presumption that the husband was the monied spouse for purposes of an award of attorneys’ fees.<sup>117</sup> While the court noted that the wife’s obligation to support both her and her child was greater than the husband’s obligation to support himself, and that the child support cannot be considered income, the court found that it could not decide that “just because one party ‘earns more’ than the other that they automatically become the ‘monied spouse.’”<sup>118</sup> The court awarded the wife interim attorneys’ fees of \$5,000, reduced from the \$10,000 she sought.

In *Margaret A. v. Shawn B.*,<sup>119</sup> the court also held that the application of the presumptive

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<sup>115</sup> N.Y. Dom. Rel. L. §237(1).

<sup>116</sup> N.Y. Dom. Rel. L. §237(1).

<sup>117</sup> 31 Misc.3d 353, 915 N.Y.S.2d 834 (Sup. Ct. Nassau Co. 2011).

<sup>118</sup> 31 Misc.3d at 369, 915 N.Y.S.2d at 846.

<sup>119</sup> --- N.Y.S.2d ---, 2011 WL 893015 (Sup. Ct. Westchester Co. 2011).

award to the wife rebutted the presumption that the husband was the monied spouse, citing *Scott M.*, and awarded the wife \$5,000 instead of the \$7,500 she requested.

The court in *J.H. v. W.H.*<sup>120</sup> also noted that the presumptive award of maintenance to the wife rebutted the presumption and further stated that “this is not a case where assets and income are without limits.”<sup>121</sup> It declined to award interim attorneys’ fees after noting that the parties’ savings accounts were similar and that there was no other income to be considered.<sup>122</sup>

By contrast, in *Jill G. v. Jeffery G.*,<sup>123</sup> the court awarded attorneys’ fees to the wife without discussing whether the presumption had been rebutted, and apparently without considering that each party had savings of \$250,000.<sup>124</sup>

### (iii) Tax Consequences

The court's calculations in *Scott M.* demonstrate the full impact on the parties’ respective financial pictures for the current tax year when maintenance, child support, child support add-ons, and income taxes are all taken into account.<sup>125</sup> In that case, the parties’ respective tax burdens, \$34,197.86 for the husband and \$1,807.52 for the wife, contributed to the wide disparity in the resources available to support the separate households.<sup>126</sup>

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<sup>120</sup> 31 Misc.3d 1203(A), 2011 WL 1158653 (Sup. Ct. Kings Co. 2011).

<sup>121</sup> 31 Misc.3d 1203(A), 2011 WL 1158653, at 7.

<sup>122</sup> 31 Misc.3d 1203(A), 2011 WL 1158653, at 7.

<sup>123</sup> 31 Misc.3d 1209(A), 2011 WL 1364481 (Sup. Ct. Nassau Co. 2011).

<sup>124</sup> The source of the savings was a joint account from which they each withdrew an equal share. 31 Misc.3d 1209(A), 2011 WL 1364481, at 2.

<sup>125</sup> 31 Misc.3d 353, 915 N.Y.S.2d 834.

<sup>126</sup> 31 Misc.3d at 365, 915 N.Y.S.2d at 843.

The other decisions by and large do not provide as full a picture of these tax consequences. However, virtually all of them recognize that there may be tax benefits to the parties arising out of the award of temporary maintenance but that those benefits will not be realized, if at all, until some future time.<sup>127</sup>

**E. Anecdotal Concerns about Section 236B(5-a) of the Domestic Relations Law**

Between July 2010 and May 2011, we held numerous lengthy interviews with judges, representatives from the American Academy of Matrimonial Lawyers, the Family Law Section of the New York State Bar Association, the Post Marital Income Coalition, the Women's Bar Association of the State of New York, and other practitioners representing high income professionals, middle income clients, and "W-2" wage earners.<sup>128</sup> The primary focus of our discussions has been presumptive temporary maintenance awards although we have discussed the broader scope of our study as well.

Reactions to the application of a formula to either temporary or post-divorce maintenance have been mixed.

Some practitioners were pleased that their clients were receiving awards under circumstances where it was unlikely they would have under prior law. They viewed the formula as a way to insure access to awards for individuals who do not have sufficient resources to litigate the often complicated issues underlying an award.

Some practitioners suggested certain amendments to section 236B(5-a):

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<sup>127</sup> See, e.g., *Scott M. v. Ilana M.*, 31 Misc.3d 353, 915 N.Y.S.2d 834 (Sup. Ct. Kings Co. 2011).

<sup>128</sup> We also received written memoranda from the Family Law Section of the New York State Bar Association and the Women's Bar Association of the State of New York, copies of which are on file at the Commission's office at 80 New Scotland Avenue, Albany, New York 12208.



- ✓ clarify factor (q) in section 236B(5-a)(e)(1) (“any other factor which the court shall expressly find to be just and proper”) so that it cannot be used to avoid the application of the formula.
- ✓ limit the duration of an award in a short-term marriage to prevent payment that continues for a period longer than the marriage.
- ✓ eliminate reference to income from income producing property to be distributed pursuant to equitable distribution, which is not relevant in calculating income for an award of temporary maintenance.
- ✓ eliminate factors:

consideration of a pre-marital joint household as a factor in awarding maintenance because New York is not a common law marriage state.

care of stepchildren, disabled adult children, or parents or in-laws, since this could be an attempt to expand child support beyond age 21, or to expand support to unrelated children and adults.

the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment, because these child-related expenses are included in the child support as add-ons to the guideline amount, and, if included here as well, would lead to duplicate awards.

marital property subject to distribution pursuant to subdivision five, because evidence of the existence and value of such property is generally not available prior to discovery.

Other practitioners voiced concerns about the application of a formula to either temporary or post-divorce maintenance.

Concerns regarding a formula for temporary maintenance are summarized as follows:

- ✓ guidelines should provide a definition of what temporary maintenance is designed to cover.
- ✓ the formula does not address the actual needs of the parties to maintain the status quo pending the outcome of the divorce proceedings and reduces the court’s flexibility.

- ✓ determining a spouse's unrecorded or under-reported income is difficult at the commencement of the proceeding so the award may not properly reflect actual available income.
- ✓ expenses reported by the parties tend to be fairly accurate and thus a better guide for setting temporary maintenance.
- ✓ the court should continue to consider reasonable needs and earning capacities of the spouses so that application of guidelines does not create a windfall to certain payees or create a hardship to payor spouses, especially custodial spouses, who may be unable to meet their and their children's reasonable needs.
- ✓ the application of the formula to income producing property during the pendency of the proceeding forces the court to decide whether to use the property for support or preserve it for equitable distribution.
- ✓ treatment of income from jointly owned property during the pendency of the proceeding needs to be clarified.
- ✓ evidence of certain statutory factors which could support an adjustment to the presumptive amount is generally not available prior to discovery and trial.
- ✓ if the presumptive award is too high, the court may be unable to order the payment of additional money to pay actual expenses such as the mortgage.
- ✓ the tax consequences to both parties need to be clarified.
- ✓ the use of a formula for temporary maintenance often creates unrealistic economic expectations which will inhibit settlements.
- ✓ using a formula for temporary maintenance will inhibit any reductions in final awards.
- ✓ using a formula for temporary maintenance will contribute to delays in the proceedings because if the awards are high the payee spouse will have no incentive to bring the matter to a conclusion.
- ✓ consider eliminating the formula altogether whenever combined income exceeds the cap.

Concerns regarding a formula for post-divorce maintenance are summarized as follows:

- ✓ using a formula fails to take into account the varying costs and standards of living

across the state; right now upstate practitioners see the presumptive awards as too high and downstate practitioners see the presumptive awards as too low.

- ✓ the payor's eventual retirement needs to be considered in how the payment of a post-divorce award will play out.
- ✓ the standard for modification of a presumptive award needs to be changed because the current standard of "undue hardship" is difficult to satisfy and will likely be more so where a formula dictates the award.
- ✓ neither side should be able to use a formulaic result as a way to bankrupt the other spouse.
- ✓ the guideline should be advisory rather than presumptive.
- ✓ if a presumptive formula were to continue, its application should be capped at \$130,000 – the same amount as the child support guideline, subject to adjustment according to the cost of living index or in tandem with the child support guidelines.
- ✓ if the income is above the cap, the factors should be used to determine the entire award, and the formula should have no application.
- ✓ guidelines should be advisory, rather than mandatory; mandatory application will discourage payee spouses from increasing their earned income.
- ✓ where the assets in a case exceed a certain threshold, the formula should not be applied given the ability to earn investment returns on such assets.
- ✓ In considering duration of maintenance, courts should consider the parties' reasonable retirement ages and financial resources, including retirement benefits.

Many attorneys thought that concerns about inequitable and unpredictable results are more appropriate in cases where the parties' income and assets are more limited as opposed to those cases involving substantial assets and income, since the latter cases tend to have significantly more variables and options for a court to consider when dividing assets and awarding maintenance and child support. Consequently, there should be a way to resolve the termination of marriage with limited assets and one or two working spouses with limited income,

in an expeditious and reasonably inexpensive manner, both as to cost and time. In such a matter, the parties should be able to determine how to fix their financial obligations to each other and their children.

#### **IV. Preliminary Steps for Maintenance Study**

In addition to our meetings with various judges and practitioners that focused on the changes in temporary maintenance awards, we are examining the broader issue of maintenance awards as required by Chapter 371. With this in mind, we have taken on two initiatives: the first is to review reported decisions regarding temporary and final maintenance and the second is to analyze data on current maintenance awards across the state.

##### **A. Case Law**

We are in the process of reviewing reported appellate and trial court decisions awarding or denying temporary and/or final maintenance during the past 14 years. The information contained in these decisions is often incomplete. It is unclear to what extent we will be able to draw any meaningful conclusions from the decisions.

##### **B. Collaboration with the Office of Court Administration**

To obtain a picture of maintenance awards across the state, we are working in collaboration with the Office of Court Administration using questionnaires and other information provided by divorcing parties in nine counties.

##### **(i) Data Drawn from Nine Counties**

It has been agreed that information drawn from the questionnaires described in (ii) below will be collected from the following 9 counties: Albany, Bronx, Erie, Jefferson, Kings, Nassau,

New York, Onondaga, and Westchester.<sup>129</sup> Demographic information including the population,<sup>130</sup> number of divorces,<sup>131</sup> median income,<sup>132</sup> per capita personal income,<sup>133</sup> and percentage of people below the poverty rate<sup>134</sup> for each of the counties is contained in Appendix C.

**(ii) UCS 111A Questionnaire and Certificate of Dissolution of Marriage**

The information regarding awards in these counties will be obtained from the responses to two documents provided by the divorcing parties in each county: 1) a UCS 111A questionnaire, which is based in part on the UCS-111, a form required to be submitted to the

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<sup>129</sup> An empirical study of equitable distribution awards in New York, Onondaga, and Westchester during the period from 1980 through 1990, the decade following the enactment of equitable distribution, was published in 1996. See Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. Rev. 401 (1996).

<sup>130</sup> The population data is for the year 2009 collected from the Census Bureau. See *State and County Quick Facts*, <http://quickfacts.census.gov/qfd/states/36/36047.html>.

<sup>131</sup> The divorce data was obtained for the year 2008. See *Vital Statistics of New York State 2008*, available at [http://www.health.state.ny.us/nysdoh/vital\\_statistics/2008/](http://www.health.state.ny.us/nysdoh/vital_statistics/2008/). This information is obtained by the Bureau of Production Systems Management (BPSM) of the New York State Department of Health from dissolution of marriage certificates recorded in county clerks' offices as required by statute, N.Y. Pub. Health L. § 4139. Notably, the form requires inclusion of information about who commenced the action, the grounds for divorce, the race of the parties and their education. This information is labeled as confidential. A copy of a dissolution of marriage certificate is included in Appendix E. See N.Y. Dom. Rel. L. §235(3).

<sup>132</sup> The median income data is for the year 2009 collected from the Census Bureau. See *State and County Quick Facts*, <http://quickfacts.census.gov/qfd/states/36/36047.html>.

<sup>133</sup> The per capita personal income data is for the year 2006. Personal Income Per Capita by County of Residence, NYS: 1998-2006, 2009 New York State Statistical Yearbook, available at [http://www.rockinst.org/nys\\_statistics/2009/C/](http://www.rockinst.org/nys_statistics/2009/C/).

<sup>134</sup> The number of persons below the poverty rate is for the year 2009, collected from the Census Bureau. See *State and County Quick Facts* <http://quickfacts.census.gov/qfd/states/36/36047.html>. The federal poverty rate for 2009 for a single individual was \$10,830; for two individuals, \$14,750. The 2009 Poverty Guidelines for the 48 Contiguous States and the District of Columbia, available at <http://aspe.hhs.gov/poverty/09poverty.shtml>.

court in all divorce proceedings where child support has been ordered;<sup>135</sup> and 2) the Certificate of Dissolution of Marriage.<sup>136</sup> The information is being collected pursuant to an Administrative Order.<sup>137</sup> The information is subject to an agreement between the Commission and the OCA that protects the confidentiality of the information. As of the date of this report, over 1,000 questionnaires have been collected.

## **V. Developments in Other Jurisdictions**

Several trends regarding the law of maintenance seem to be emerging across the country. These include efforts to identify a rationale for awarding maintenance or alimony, and the use of various formulas intended to provide predictability and consistency in maintenance awards, trends which we discussed in our June 2010. We will continue to study how other states address maintenance awards as we consider what our recommendations will be regarding New York law.

In addition to the changes in New York law discussed above, there have been noteworthy initiatives in the states that we had specifically discussed in our June 2010 Report, namely Florida, Massachusetts, and Virginia, and Pennsylvania.

### **A. Florida**

Florida's pre-2011 alimony statute provided for the award of rehabilitative or permanent alimony.<sup>138</sup> Chapter 2010-199, effective January 1, 2011, amended the statute to add

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<sup>135</sup> The UCS 111A questionnaire was a result of the collaboration of the Office of Court Administration and Commission staff. Copies of the UCS 111A and the UCS 111 are attached here as Appendix D.

<sup>136</sup> The Certificate of Dissolution is attached here as Appendix E.

<sup>137</sup> A copy of the Administrative Order is attached as Appendix F.

<sup>138</sup> Fla. Stat. §61.08(1) (amended by ch. 2010-199) ("[T]he court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded.").

bridge-the-gap and durational alimony to the prior statutory alternatives, and provided explanations of each of the forms of alimony.

Bridge-the-gap alimony allows a party to make a transition from being married to being single by assisting with legitimate identifiable short-term needs.<sup>139</sup>

Rehabilitative alimony assists a party in establishing the capacity for self-support through either the redevelopment of previous skills or credentials; or the acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials.<sup>140</sup>

Permanent alimony meets the needs of a party who lacks the financial ability to meet his or her needs as they were established during the marriage after a marriage of long duration, a marriage of moderate duration if such an award is appropriate upon consideration of certain factors, or a marriage of short duration if there are exceptional circumstances.<sup>141</sup>

Durational alimony, which may be awarded when permanent alimony is inappropriate, is economic assistance for a set period of time following a marriage of short or moderate

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<sup>139</sup> Fla. Stat. §61.08(5). An award may not exceed two years, and terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award of bridge-the-gap alimony is not modifiable in amount or duration. *Id.*

<sup>140</sup> Fla. Stat. §61.08(6)(a). Any order awarding rehabilitative alimony must include a specific and defined rehabilitative plan. Fla. Stat. §61.08(6)(b). The award may be modified or terminated based upon a substantial change in circumstances, upon noncompliance with the rehabilitative plan, or upon completion of the rehabilitative plan. Fla. Stat. § 61.08(6)(c).

<sup>141</sup> Fla. Stat. §61.08(8). An award of permanent alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award may be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship. *Id.*

duration.<sup>142</sup>

The statute establishes presumptions for a short-term, moderate-term, and long-term marriage which are then used in determining when durational and permanent alimony can be awarded.<sup>143</sup>

The amended statute retains the requirement that the court first determine eligibility by making a specific factual determination that a party has an actual need for alimony, and that the other party has the ability to pay alimony.<sup>144</sup> In determining the proper type and amount of alimony, the court must consider all relevant factors, including, but not limited to, a statutory list of ten factors.<sup>145</sup>

A further amendment to the statute is pending in both houses of the Florida legislature.<sup>146</sup> 2011 Florida House Bill 1475/Senate Bill 1978 would impose stricter standards before awarding permanent alimony for marriages of moderate and short duration, and allow awards of durational alimony for marriages of long duration if the court finds there is no ongoing need for support.<sup>147</sup>

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<sup>142</sup> Fla. Stat. §61.08(7). The award terminates upon the death of either party or upon the remarriage of the party receiving alimony. The amount of an award of durational alimony may be modified or terminated based upon a substantial change in circumstances . . . . However, the length of an award of durational alimony may not be modified except under exceptional circumstances and may not exceed the length of the marriage. *Id.*

<sup>143</sup> A short-term marriage is a marriage having a duration of less than 7 years, a moderate-term marriage is a marriage having a duration of greater than 7 years but less than 17 years, and long-term marriage is a marriage having a duration of 17 years or greater. The length of a marriage is the period of time from the date of marriage until the date of filing of an action for dissolution of marriage. Fla. Stat. §61.08(4).

<sup>144</sup> Fla. Stat. §61.08(2).

<sup>145</sup> Fla. Stat. §61.08(2).

<sup>146</sup> HB 1475 reported out of the Judiciary Committee and was released to the House calendar on April 14, 2011; SB 1978 was referred to the Committee on Children, Families and Elder Affairs on the same date. [www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=46559&SessionId=66](http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=46559&SessionId=66).

<sup>147</sup> 2011 Florida House Bill 1475/Senate Bill 1978.



Under current law, permanent alimony is the only option for a long-term marriage.<sup>148</sup> The bill also provides that “the award of alimony . . . may not leave the payor with significantly less net income than the net income of the recipient unless there are written findings of exceptional circumstances.”<sup>149</sup>

## **B. Massachusetts**

Massachusetts’s current law provides that, in awarding alimony, the court must consider a number of factors.<sup>150</sup> An award of alimony is permanent.<sup>151</sup>

A new legislative proposal with 132 co-sponsors is under consideration to change the statute, and as of late April was pending in the Joint Committee on the Judiciary.<sup>152</sup>

Massachusetts Senate Bill No. 665, the Alimony Reform Act of 2011, was drafted by the Legislative Task Force on Alimony Reform, created by the Joint Committee on the Judiciary.<sup>153</sup>

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<sup>148</sup> See Fla. Stat. §61.08(8).

<sup>149</sup> 2011 Florida House Bill 1475/Senate Bill 1978.

<sup>150</sup> Mass. Ann. Laws ch. 208, §34 (“[T]he court . . . shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, the opportunity of each for future acquisition of capital assets and income, the nature and value of the property to be so assigned, the present and future needs of any dependent children of the marriage. . . . The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.”).

<sup>151</sup> See Barbara von Hauzen, *Should Permanent Alimony be Eliminated?: an Examination of an Unresolved Conundrum*, mslaw.edu/News/Reformer/winter09.pdf (advocating for judgments tailored for special circumstances, such as no alimony awarded for short term marriages, and rehabilitative alimony for midrange marriages).

<sup>152</sup> See The Alimony Reform Act of 2011, available at [www.malegislature.gov/Bills/187/Senate/S00665/](http://www.malegislature.gov/Bills/187/Senate/S00665/).

<sup>153</sup> See Massachusetts Bar Association, *MBA votes to support landmark alimony reform bill; The Alimony Reform Act of 2011 will set time limits on alimony*, press release, January 24, 2011; Women’s Bar Association, *Women’s bar association announces support of key alimony legislation*, press release, January 28, 2011.

The bill is supported by the Massachusetts Bar Association and the Women's Bar Association, among others.<sup>154</sup>

Senate Bill No. 665 establishes four categories of alimony: transitional alimony, reimbursement alimony, rehabilitative alimony, and general term alimony.<sup>155</sup>

Transitional alimony, a periodic or one-time payment, allows the payee to transition to an adjusted lifestyle or new location as a result of the divorce.<sup>156</sup> It may be awarded after a marriage of not more than five years.<sup>157</sup>

Reimbursement alimony, a periodic or one-time payment, compensates the payee for economic or noneconomic contribution to the financial resources of the payor, such as enabling the payor to complete an education or training.<sup>158</sup> It may be awarded after a marriage of not more than five years.<sup>159</sup>

Rehabilitative alimony, a periodic payment, provides support to a payee who is expected to become economically self-sufficient by a predicted time, such as re-employment or completion

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<sup>154</sup> See Massachusetts Bar Association, *MBA votes to support landmark alimony reform bill; The Alimony Reform Act of 2011 will set time limits on alimony*, press release, January 24, 2011.

<sup>155</sup> See The Alimony Reform Act of 2011 §4, available at [www.malegislature.gov/Bills/187/Senate/S00665/](http://www.malegislature.gov/Bills/187/Senate/S00665/).

<sup>156</sup> See *id.*

<sup>157</sup> See *id.* Transitional alimony terminates upon the death of the recipient or no later than three years after the date of the parties' divorce. The court may require the payor to provide security for payment of sums due if the payor should die during the alimony term. *Id.*

<sup>158</sup> See *id.*

<sup>159</sup> See *id.* Reimbursement alimony terminates upon the death of the recipient or on a date certain. *Id.*

of job training.<sup>160</sup>

General term alimony is periodic payment of support to a recipient spouse who is economically dependent.<sup>161</sup> The duration of general term alimony is subject to a cap depending on the length of the marriage, for marriages of twenty years or less.<sup>162</sup> The court may award alimony for an indefinite length of time for marriages of twenty years or longer.<sup>163</sup> General term alimony terminates when either spouse dies, the recipient remarries, or the payor reaches full retirement age. It is suspended, reduced, or terminated upon the cohabitation of the recipient with another person in a common household for a continuous period of at least three months.<sup>164</sup>

In determining the appropriate form of alimony and in setting the amount and duration of alimony, the court must consider nine factors.<sup>165</sup>

Except for reimbursement alimony, or when circumstances warrant deviation for other forms of alimony, the amount of alimony is not to exceed the recipient's need or 30 - 35% of the difference between the parties' gross incomes.<sup>166</sup>

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<sup>160</sup> See *id.* Rehabilitative alimony terminates upon the remarriage of the recipient, the occurrence of a specific future event, or the death of either spouse. The court may require the payor to provide security for payment of sums due if the payor dies during the alimony term. *Id.*

<sup>161</sup> See *id.*

<sup>162</sup> See *id.* For a marriage of 5 years or less, the duration of the award can be no greater than 50% of the number of months of the marriage. For longer marriages, the awards are capped as follows: ten years or less, but more than five years, no greater than 60% of the months of the marriage; fifteen years or less, but more than ten years, no greater than 70% of the number of months of the marriage; and twenty years or less, but more than fifteen years, no greater than 80% of the number of months of the marriage. *Id.*

<sup>163</sup> See *id.*

<sup>164</sup> See *id.*

<sup>165</sup> See *id.*

<sup>166</sup> See *id.*

The court may deviate from duration and amount limits for general term alimony and rehabilitative alimony upon consideration of nine grounds.<sup>167</sup>

Enactment of the bill will be deemed a material change of circumstance that warrants modification of existing alimony awards if they exceed the durational limits set forth in the bill.<sup>168</sup> A time line provided in the bill describes how long a payor must wait after the effective date of the law before filing a modification action.<sup>169</sup>

If the payor remarries, the income and assets of the payor's spouse will not be considered in a redetermination of alimony in a modification action.<sup>170</sup>

Income from a second job or overtime work is presumed immaterial to alimony modification if the party works more than a single full-time equivalent position, and the second job or overtime began after the initial order was entered.<sup>171</sup>

### **C. Virginia**

Since 1981, Fairfax County, Virginia has employed spousal support guidelines in an effort to promote settlement and provide more consistent results in support litigation.<sup>172</sup> The

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<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

<sup>169</sup> See *id.* For a marriage of 5 years or less, the waiting period is one year; for a marriage of more than 5 but less than 10 years, the waiting period is two years; for a marriage of more than 10 but less than 15 years, the waiting period is 3 years; and for a marriage of more than 15 but less than 20 years, the waiting period is 3 ½ years. Regardless of the length of the marriage, a payor who is eligible for full Social Security benefits, or who will become eligible for such benefits within 3 years after the act takes effect, may file for modification one year after the act takes effect. *Id.*

<sup>170</sup> See *id.*

<sup>171</sup> See *id.*

<sup>172</sup> See Fairfax Bar Association 2010 Circuit Court Practice Manual (7<sup>th</sup> ed.) at 1.

guideline, adopted by the county's Bar Association, Circuit Court and Juvenile and Domestic Relations District Court, was revised in 1988 when the state's child support guideline was enacted, and then adjusted slightly in 1991 to provide higher support when there is low or no child support, and lower support when child support is high.<sup>173</sup> In 2007, the Virginia General Assembly adopted the Fairfax County guideline for pendente lite spousal support awards statewide.<sup>174</sup>

The guideline provides two formulas. If there is no child support between the parties, the presumptive amount of pendente lite spousal support is 30% of the payor's gross income less 50% of the payee's gross income.<sup>175</sup> If the parties have minor children in common, the presumptive award is 28% of the payor's income less 58% of the payee's income.<sup>176</sup> If both spousal support and child support are to be determined, the court must determine the amount of pendente lite spousal support, and adjust the parties' incomes by the spousal support before applying the child support guideline.<sup>177</sup>

The amount of an award resulting from the application of the formula is presumed to be the correct amount of spousal support.<sup>178</sup> The court may deviate from the presumptive amount for good cause shown, including any relevant evidence pertaining to the parties' current financial

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<sup>173</sup>     *See id.*

<sup>174</sup>     *See* Va. Code Ann. §16.1-278.17:1.

<sup>175</sup>     Va. Code Ann. §16.1-278.17:1(C).

<sup>176</sup>     *Id.*

<sup>177</sup>     Va. Code Ann. §16.1-278.17:1(B).

<sup>178</sup>     Va. Code Ann. §16.1-278.17:1(A).

circumstances that indicates that the amount is inappropriate.<sup>179</sup>

The formula applies only when the parties' combined monthly gross income does not exceed \$10,000.<sup>180</sup> For families with higher income, the Bar Association guidelines suggest that the guideline amount "may not be a reasonable indication of the appropriate support, and in these higher-income situations it is more appropriate to consider the actual needs of the recipient in establishing proper support."<sup>181</sup>

#### **D. Pennsylvania**

Pennsylvania law requires that child and spousal support be awarded pursuant to a statewide guideline.<sup>182</sup> That statute further provides that the guideline shall be "established by general rule by the Supreme Court, so that persons similarly situated shall be treated similarly."<sup>183</sup>

The court rule governing the pendente lite support guidelines<sup>184</sup> was recently amended to require the court to "consider the duration of the marriage from the date of marriage to the date of final separation."<sup>185</sup> This language was moved from Rule 1910.16-5, which deals with deviation from the guideline amounts. The explanatory comment accompanying the rule says:

The primary purpose of this provision is to prevent the unfairness that arises in a short-term marriage when the obligor is required to pay support over a substantially

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<sup>179</sup> Va. Code Ann. §16.1-278.17:1(D).

<sup>180</sup> Va. Code Ann. §16.1-278.17:1(E).

<sup>181</sup> Fairfax Bar Association 2010 Circuit Court Practice Manual (7<sup>th</sup> ed.) at 2-3.

<sup>182</sup> 23 Pa. C.S. §4322(a).

<sup>183</sup> *Id.*

<sup>184</sup> 231 Pa. Code Rule 1910.16-1. The formulas for child support and pendente lite spousal support are set forth in 231 Pa. Code Rule 1910.16-4.

<sup>185</sup> 231 Pa. Code Rule 1910.16-1(c).

longer period of time than the parties were married and there is little or no opportunity for credit for these payments at the time of equitable distribution.<sup>186</sup>

## **VI. Conclusion**

The 2010 amendment to 236B of the Domestic Relations Law has sparked intense debate over whether a formula should be used to calculate temporary maintenance and raised many questions that we will consider as we continue our examination of the impact of both temporary and post-divorce maintenance awards on income disparities. Courts and practitioners are urged to send us any decisions and comments on temporary and post-divorce maintenance awards under the new law to assist us in our study.

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<sup>186</sup> 2010 Explanatory Comment, 231 Pa. Code Rule 1910.16-1.

## **Appendix A**



***Selection from THE NEW YORK STATE LAW REVISION COMMISSION PRELIMINARY REPORT ON MAINTENANCE AWARDS IN DIVORCE PROCEEDINGS (June 11, 2010)***

**II. New York**

**A. Historical Background**

Historically, alimony (the predecessor to maintenance in New York and elsewhere) formally entered New York's statutory law in 1813.<sup>1</sup> The statute provided for an award of alimony for a non-adulterous wife, a limitation that was ultimately eliminated.<sup>2</sup> Alimony was "viewed as a substitution for a husband's duty to support his wife,"<sup>3</sup> rather than an award of assets to which she had title.<sup>4</sup> When a wife was awarded alimony, she was entitled to support until her death or remarriage.<sup>5</sup> In determining the size of the award, courts looked primarily to the wife's needs and the husband's station in life.<sup>6</sup> The court also considered the husband's degree of fault and the wife's financial contribution to the marriage.<sup>7</sup>

While there is little evidence to suggest that the law gave a significant economic advantage to women,<sup>8</sup> alimony was viewed as "a divorced wife's primary economic entitlement"<sup>9</sup> until well into the 20<sup>th</sup> century. By the 1970s, however, the limitations of New York's alimony statute had become clear.<sup>10</sup> The statute focused on the net needs of the dependent spouse and the ability of the other spouse to meet those needs but failed to address the potential of rehabilitation,

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<sup>1</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 431, n. 213 (1988)(citing 1813 Laws of New York). Historically, alimony was connected to the husband's obligation to support his wife during the marriage and was available through the ecclesiastical courts as part of a separation. Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 428, n. 205 (1988). *See also*, Mary Kay Kisthardt, Barbara Ellen Handschu, *Setting Alimony: Prevailing Theories, Factors Courts Consider, Tips for Addressing the Issue*, 20 NO. 7 Matrim. Strategist 1, 1 (2002); J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 Calif. L. Rev. 1091, 1095 (1992).

<sup>2</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 430, n. 213 & 442-43 (1988).

<sup>3</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 431 (1988).

<sup>4</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 431 (1988).

<sup>5</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 431 (1988).

<sup>6</sup> Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev. 621, 627 (1991).

<sup>7</sup> Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev. 621, 627 (1991).

<sup>8</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 433 (1988).

<sup>9</sup> Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev. 621, 628 (1991).

<sup>10</sup> Timothy Tippins, *I New York Matrimonial Law and Practice* 6-3 (1984-2004).

namely, “fostering the future financial independence of a divorced spouse . . . .”<sup>11</sup>

## **B. Divorce Reform**

Advocates for divorce reform turned their attention to equitable distribution of marital assets as the major path to economic independence for the divorcing wife, with alimony playing a subordinate role.<sup>12</sup> When divorce reform occurred in 1980, marriage was viewed as an economic partnership to which both parties contribute as spouse, wage earner or homemaker, and from which assets acquired during the marriage would be distributed equitably.<sup>13</sup> At the same time, alimony was renamed “maintenance”<sup>14</sup> to demonstrate that the purpose of a post divorce support award was to allow a spouse an opportunity to achieve financial independence.<sup>15</sup> One commentator has observed that “[t]he new law’s operating premise [was that] that the dissolution of a marriage in this State is to be regarded as the winding up of a partnership, and . . . [also the] rehabilitating or supporting [of] a dependent spouse, i.e., one whose marketable skills, and therefore independence, have been sacrificed during the course of the marriage for the role of a

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<sup>11</sup> Timothy Tippins, I New York Matrimonial Law and Practice 6-3 (1984-2004). For example, in *Lewis v. Lewis*, 37 A.D.2d 725, 323 N.Y.S.2d 864 (2<sup>nd</sup> Dep’t 1971), the wife, employed during the marriage as a practical nurse at a salary of \$6,000, decided to return to college upon dissolution of the marriage, to obtain a Bachelor of Science degree in nursing. The trial court awarded alimony to assist her; however, the Appellate Division reversed, stating that the husband “should not be compelled to support [the wife] as she voluntarily left her well-paying position to seek a college degree and is therefore capable of being ‘self-supporting’ within the meaning of section 236 of the Domestic Relations Law.” 37 A.D.2d 725, 725, 323 N.Y.S.2d 864, 865. As one commentator notes, “[t]he fact that the wife’s ‘well-paying position’ yielded an annual income of approximately \$6,000 per year and her reasonable needs may have changed dramatically as a result of the marital breakup were simply not within the judicial purview in rendering an alimony determination.” Timothy Tippins, I New York Matrimonial Law and Practice 6-3 (1984-2004).

<sup>12</sup> Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev. 621, 629 (1991). Advocates saw property distribution as a fairer alternative to alimony because courts awarded alimony infrequently, and when awards were made, the payor spouse frequently did not pay. *Id.* at 629-630. This shift also reflected a compromise by surrendering long term alimony for an immediate award of equitable distribution. Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 446 (1988).

<sup>13</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 445 & n. 279 (1988).

<sup>14</sup> Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev. 621, 639 (1991). With the promulgation of the Uniform Marriage and Divorce Act (UMDA), alimony acquired the name “maintenance” on a national level. Mary Kay Kisthardt, *Re-thinking Alimony: the AAML’s Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. Am. Acad. Matrim. Law. 61, 65-66 (2008)(citing UMDA § 308, 9A U.L.A. 147, 347 (1987)).

<sup>15</sup> Timothy Tippins, I New York Matrimonial Law and Practice 6-3 - 6-4 (1984-2004). See Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 456-57 (1988)(indicating that the focus on rehabilitative maintenance arose out of the inaccurate perception that pre-1980 alimony awards were excessively generous and they should be curtailed.). In 1986, the law was amended to clarify that long term maintenance awards were to be considered. Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev. 621, 641 & n. 80 (1991).

homemaker.”<sup>16</sup> Not long after the 1980 reform, it had become apparent that the goal of rehabilitative maintenance was working against women who had been out of the work force during long term marriages and thus had no realistic hope of obtaining employment after a divorce. Thus, in 1986, the law was amended to recognize that “economic rehabilitation was not always possible and placed equal emphasis on the importance of achieving equity between the parties [by making the statute’s primary focus] the standard of living of the parties established during the marriage.”<sup>17</sup>

### **C. Current Law – Domestic Relations Law § 236B**

As noted on page 3 of this Report, three issues are considered in awarding maintenance under section 236B of the Domestic Relations Law: eligibility, amount and duration. Eligibility is based on the parties’ standard of living established during the marriage, the reasonable needs of the party lacking sufficient property and income, and the financial ability of the other party to meet those needs.<sup>18</sup> The court may also award interim or temporary maintenance during the pendency of the action.<sup>19</sup>

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

- (1) the income and property of the respective parties including marital property distributed pursuant to [equitable distribution];
- (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) contributions and services of the party seeking maintenance as a spouse, parent, wage

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<sup>16</sup> Timothy Tippins, 1 New York Matrimonial Law and Practice 6-6 (1984-2004)(citing Conner v. Conner, 97 A.D.2d 88, 468 N.Y.S.2d 482 (2<sup>nd</sup> Dept. 1983)) (“[a]bsent agreement to the contrary, under the Partnership Law the rule is that, after repayment of whatever property he brought into the partnership, i.e., contributions of capital or advances, a partner is entitled to share equally in the profits and surplus earned through the efforts of all partners with such contributions. The distribution is equal and final. Rehabilitation is unavailable. No partner is entitled to remuneration for services rendered. A partner, therefore, has no claim to the specific performance of services of another partner, nor to damages for their loss, even though he may have sacrificed some of his more lucrative skills in order to advance the interests of the partnership (e.g., by performing administrative chores), thus enabling the other partner to enhance his marketable skills. Nor does a partner have a claim to another partner’s future labors on the theory that such constitutes good will in which all partners must share upon dissolution.”)(citations omitted).

<sup>17</sup> Alan D. Scheinkman, New York Practice Series - New York Law of Domestic Relations §15.3 (West 2009).

<sup>18</sup> Dom. Rel. Law §236B(6)(a).

<sup>19</sup> Dom. Rel. Law §236B(6)(a).

- 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;<sup>20</sup> and
- (12) any other factor which the court shall expressly find to be just and proper.

These statutory factors are sufficiently nuanced to allow the court to consider the individual circumstances of the marriage. In making an award, the court must set out the factors upon which it relies.<sup>21</sup>

Although divorce in New York is still fault based, the statute is silent as to whether fault should be considered in determining maintenance. Commentators have suggested that the twelfth factor is a “wild card” that allows the court in its discretion to consider fault.<sup>22</sup> The decisions of the New York courts reflect a division on how to treat fault.<sup>23</sup> The First and Second Department generally do not consider fault; the Third Department considers fault as a factor; and the Fourth Department generally only considers egregious fault.<sup>24</sup>

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<sup>20</sup> The loss of health insurance was added as a factor to be considered in awarding maintenance in 2009. L.2009, c. 229, amending N.Y. Dom. Rel. L. §236B(6).

<sup>21</sup> Alan D. Scheinkman, New York Practice Series - New York Law of Domestic Relations §15.1 (West 2009).

<sup>22</sup> Alan D. Scheinkman, New York Practice Series - New York Law of Domestic Relations §15.17 (West 2009); Isabel Marcus, Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State, 37 Buff. L. Rev. 376, 448, n. 284 (1988).

<sup>23</sup> Alan D. Scheinkman, New York Practice Series - New York Law of Domestic Relations §15.17 (West 2009).

<sup>24</sup> Alan D. Scheinkman, New York Practice Series - New York Law of Domestic Relations §15.17 (West 2009). *See also* Marsha Garrison, Good Intentions Gone Awry, 57 Bklyn L. Rev. 621, 639 (1991)(what constitutes egregious fault depends on the court). *See generally* Harriet Newman Cohen and Tim James, Egregious to a Fault: When does Bad Behavior Affect Financial Determinations? New York Law Journal, July 28, 2008.

## **Appendix B**

AMERICAN ACADEMY  
**AAML**  
OF MATRIMONIAL LAWYERS

NEW YORK CHAPTER

**OFFICERS**

**President**

Christopher S.  
Mattingly  
42 Delaware Avenue  
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Buffalo, New York 14202

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Joan Adams  
David Aronson  
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Robert Z. Dobrish  
Nancy D. Kellman  
Judith Poller  
Stephen W. Schlissel  
Eleanor B. Alter  
Thomas Cassano  
Pamela Sloan  
Heidi E. Harris  
Harold A. Mayerson  
Ronnie Ann Gouz  
Henry S. Berman

April 6, 2011

**VIA EMAIL & U.S. MAIL**

Rose Mary Bailly, Esq.  
Executive Director of the New York State Law Review Commission  
80 New Scotland Avenue  
Albany, New York 12208

RE: Maintenance Guidelines

Dear Ms. Bailly:

First and foremost, if there is anything you require concerning the issue of the maintenance guidelines please do not hesitate to contact me. The members of the New York Chapter are most interested in assisting the Law Review Commission in any fashion possible in this matter. I have been given some information by my fellows that I will pass on to you and will certainly obtain any other information you require.

Attached hereto please find a copy of a letter received by Allan D. Mantel, Esq., (The President of the New York Chapter of the American Academy of Matrimonial Lawyers at that time) dated June 11, 2008 from the then President of the National American Academy of Matrimonial Lawyers, James H. Hennenhoefter, Esq., regarding a report concerning maintenance guidelines from the AAML/ALI Commission on March 9, 2007. In that regard it is noted that the Board of Governors for the American Academy of Matrimonial Lawyers did not approve the report as a guideline of any kind. It is specifically noted that it was not intended that the report be used for legislation. It was approved as a tool and reference point when the issue of spousal support was discussed for settlement purposes.

It is my understanding that the reporter for this was Professor Mary K. Kisthardt at the University of Missouri-Kansas City School of Law (816-235-2373 or [kisthardtm@unkc.edu](mailto:kisthardtm@unkc.edu)). Professor Kisthardt may

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Allan E. Mayefsky  
(Board of Governors)  
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(Board of Governors)

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Susan Bender

**Counsel**

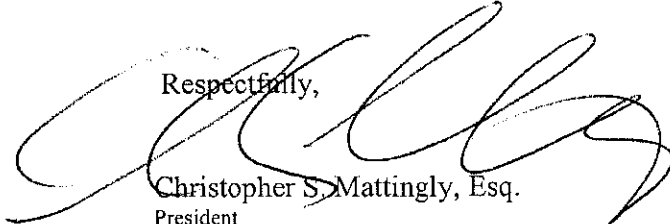
Elliott Scheinberg

AMERICAN ACADEMY OF  
MATRIMONIAL ATTORNEYS  
New York Chapter  
Page 2

be able to shed light on how they arrived at the formula and duration concerning permanent maintenance. It is my understanding that there may have been other calculations preformed by the state bar also.

We have established a subcommittee of the New York Chapter of the American Academy of Matrimonial Lawyers to address the issue of permanent maintenance guidelines and would welcome an opportunity to discuss this matter with you.

Respectfully,

A handwritten signature in black ink, appearing to read "Chris Mattingly", is written over the typed name.

Christopher S. Mattingly, Esq.

President

American Academy of Matrimonial Lawyers | NY Chapter

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American Academy  
 of Neurology

Allan D. Mantel  
President, New York Chapter  
AAML  
405 Lexington Avenue  
New York, NY 10174

Dear Mr. Mantel:

The purpose of this letter is to respond to your letter dated June 5, 2008. Appended hereto are the Minutes of the Board of Governors meeting when the AAML adopted the AAML/ALI Commission Report.

As you can see:

1. In accepting the AAML/ALI Commission Report on March 9, 2007, the AAML did not approve the report as a guideline of any kind.
2. It was the intention of the Board of Governors of the AAML to approve the report and that the report be used as a tool in settlement or resolution of family law cases as a factor in any spousal support determination and no more. It was intended that the report not be the basis for any legislation.
3. The report and its contents was approved as a tool and a reference point when the issue of spousal support is addressed. The AAML has never endorsed any guideline or any legislation proffering a guideline related to spousal support.

The report was specifically adopted by the Board of Governors of the AAML as a consideration when determining alimony/spousal support/maintenance to be utilized with any other factors related to spousal support.

[illegible]




Allan D. Mantel  
June 11, 2008  
Page 2 of 2

It is my hope that this letter clarifies the AAML's position when the report was adopted.

If you have any further questions, please do not hesitate to contact me.

Sincerely,



James A. Hennenhoefer  
President, AAML

JAH/dk  
Enclosure

cc: Guy Ferro, Immediate Past President  
Vicki West, Executive Director

## **Appendix C**

**DEMOGRAPHICS**  
**for**  
**Selected Counties in New York State**

County <sup>1</sup>	Population <sup>2</sup>	Divorces <sup>3</sup>	MHI <sup>4</sup>	PPCI <sup>5</sup>	% Below Poverty <sup>6</sup>
Albany <sup>7</sup>	298,284	732	\$59,245	\$42,228	12.3
Bronx <sup>8</sup>	1,397,287	2,415	\$35,108	\$24,631	27.3
Erie <sup>9</sup>	909,247	2,164	\$48,427	\$34,786	14
Jefferson <sup>10</sup>	118,719	515	\$44,263	\$33,463	14.6
Kings <sup>11</sup>	2,567,098	5,394	\$43,172	\$30,023	21.1
Nassau <sup>12</sup>	1,357,429	2,421	\$94,856	\$62,,278	4.9
New York <sup>13</sup>	1,629,054	10,375	\$68,402	\$110,292	16.9
Onondaga <sup>14</sup>	454,753	1,186	\$50,586	\$35,751	11.7
Westchester <sup>15</sup>	955,962	2,307	\$79,195	\$70,519	8.4

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<sup>1</sup> A map of New York State Counties from the 2009 New York State Statistical Yearbook is attached hereto.

<sup>2</sup> U.S. Census Bureau, State and County Quick Facts 2009, available at <http://quickfacts.census.gov/qfd/states/36/36001.html>.

<sup>3</sup> Table 48: Dissolutions of Marriage by County of Decree and Type of Decree, New York State 2009, Vital Statistics of New York State 2009, available at [http://www.health.state.ny.us/nysdoh/vital\\_statistics/2009/table48.htm](http://www.health.state.ny.us/nysdoh/vital_statistics/2009/table48.htm).

<sup>4</sup> Median Household Income, U.S. Census Bureau, State and County Quick Facts 2009, available at <http://quickfacts.census.gov/qfd/states/36/36001.html>.

<sup>5</sup> Personal Per Capita Income 2006, Personal Income Per Capita by County of Residence, NYS: 1998-2006, 2009 New York State Statistical Yearbook, available at [http://www.rockinst.org/nys\\_statistics/2009/C/](http://www.rockinst.org/nys_statistics/2009/C/).

<sup>6</sup> U.S. Census Bureau, State and County Quick Facts <http://quickfacts.census.gov/qfd/states/36/36047.html>. As of 2009, in New York State, 14.2% of the population fell below the poverty line.

<sup>7</sup> A metropolitan area.

<sup>8</sup> A borough of New York City.

<sup>9</sup> A metropolitan area in western New York with 4 correction facilities operated by the Department of Corrections.

<sup>10</sup> A rural area in western New York with 2 correction facilities operated by the Department of Corrections and a US Army base, Fort Drum.

<sup>11</sup> A borough of New York City.

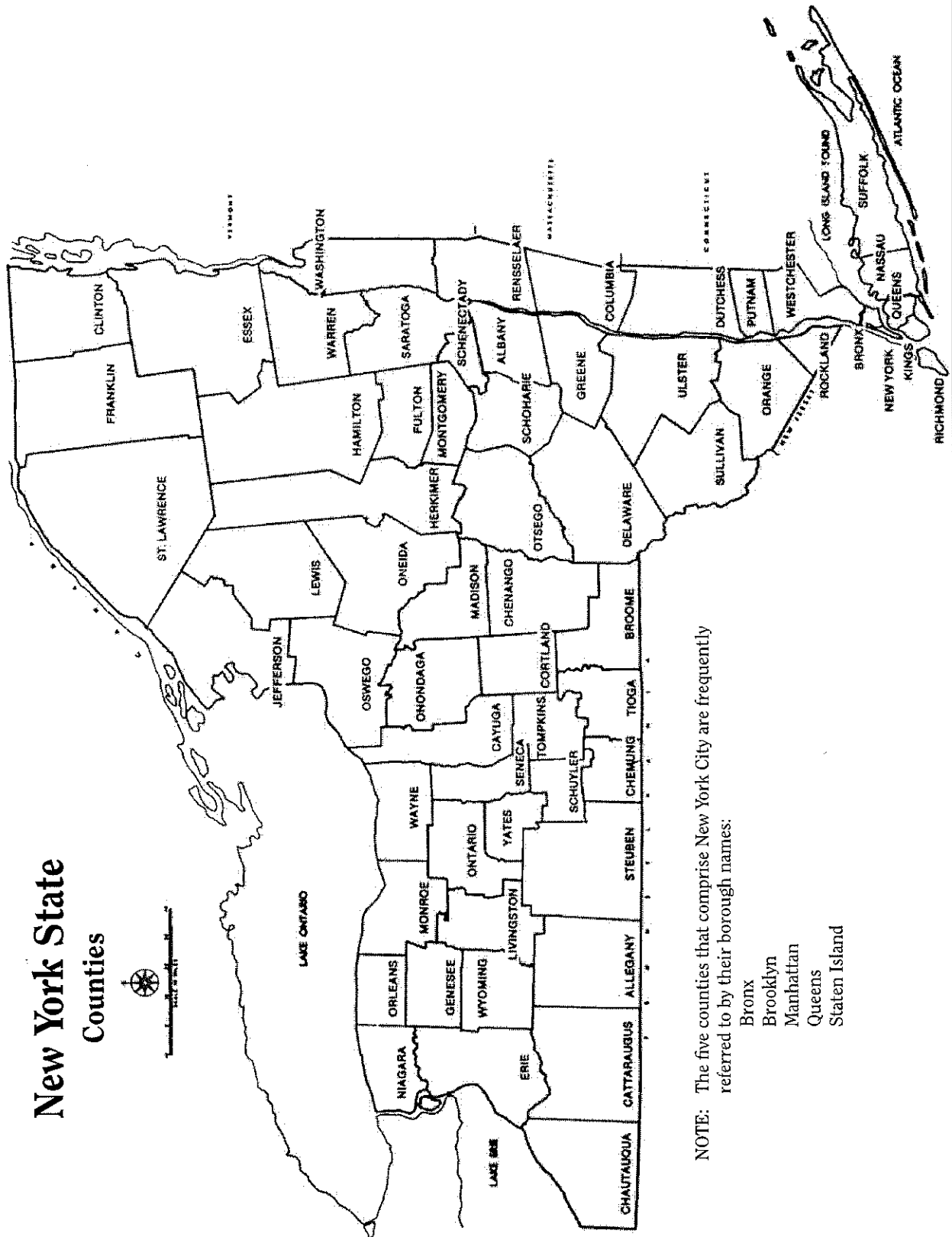
<sup>12</sup> A suburb of New York City.

<sup>13</sup> A borough of New York City also known as Manhattan.

<sup>14</sup> Includes the metropolitan area of Syracuse.

<sup>15</sup> A suburb of New York City with 3 correctional facilities operated by the NYS Department of Corrections.

# New York State Counties



NOTE: The five counties that comprise New York City are frequently referred to by their borough names:

- Bronx
- Brooklyn
- Manhattan
- Queens
- Staten Island

## **Appendix D**

## Special UCS-111A

Pursuant to an Order of the Chief Administrator of the Courts in each of the counties listed below this form UCS-111A must be completed for each final order granted pursuant to Article 4 or 5 of the Family Court Act and DRL §236B, §240 and §246. It includes questions required pursuant to Judiciary Law §216. Additional data is being collected for the New York State Law Revision Commission which is studying New York State's maintenance laws pursuant to DRL 236B(a). Identifying information will not be made public; data will be reported in aggregate form only.

Please answer all questions.

Do not use pens or markers with ink that soaks through the paper.

Use a No. 2 pencil or blue or black ink.

Do not fold, tear or mutilate this form.

Make solid marks that fill the circle completely.

Make no stray marks on this form.

INCORRECT MARKS



CORRECT MARK



PLEASE PRINT ALL WRITTEN ANSWERS

County

☐ Albany

☐ Erie

☐ Kings

☐ New York

☐ Westchester

☐ Bronx

☐ Jefferson

☐ Nassau

☐ Onondaga

Index Number

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Date Matter Commenced

MO	DAY	YEAR
<input type="radio"/> JAN		
<input type="radio"/> FEB		
<input type="radio"/> MAR		
<input type="radio"/> APR		
<input type="radio"/> MAY		
<input type="radio"/> JUNE		
<input type="radio"/> JULY		
<input type="radio"/> AUG		
<input type="radio"/> SEPT		
<input type="radio"/> OCT		
<input type="radio"/> NOV		
<input type="radio"/> DEC		

Date of Final Order

MO	DAY	YEAR
<input type="radio"/> JAN		
<input type="radio"/> FEB		
<input type="radio"/> MAR		
<input type="radio"/> APR		
<input type="radio"/> MAY		
<input type="radio"/> JUNE		
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<input type="radio"/> AUG		
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Date of Marriage

MO	DAY	YEAR
<input type="radio"/> JAN		
<input type="radio"/> FEB		
<input type="radio"/> MAR		
<input type="radio"/> APR		
<input type="radio"/> MAY		
<input type="radio"/> JUNE		
<input type="radio"/> JULY		
<input type="radio"/> AUG		
<input type="radio"/> SEPT		
<input type="radio"/> OCT		
<input type="radio"/> NOV		
<input type="radio"/> DEC		

1. Please indicate whether this divorce was:

☐ Contested

☐ Uncontested

**MAINTENANCE:**

a. Was maintenance awarded?

b. Awarded to

c. Amount Determined by

d. Was formula used to determine amount?

e. If formula was used, was it adjusted?

f. Annual maintenance amount.

g. Mark correct annual amount category.

If award varies, mark average annual amount.

**2. Temporary Maintenance**

2a. ☐ No → Go to 3 ☐ Yes → Go to 2b.

2b. ☐ Wife ☐ Husband

2c. ☐ Settlement ☐ Judge

2d. ☐ Yes ☐ No ☐ Don't Know

2e. ☐ Yes ☐ No ☐ Don't Know

2f. \$

2g. ☐ Less than \$ 15,000

☐ \$ 15,000 - \$ 24,999

☐ \$ 25,000 - \$ 49,999

☐ \$ 50,000 - \$ 74,999

☐ \$ 75,000 - \$ 99,999

☐ \$100,000 - \$149,999

☐ \$150,000 or more

**3. Final Maintenance**

3a. ☐ No → skip to 5—next page ☐ Yes → Go to 3b.

3b. ☐ Wife ☐ Husband

3c. ☐ Settlement ☐ Judge

3d. ☐ Yes ☐ No ☐ Don't Know

3e. ☐ Yes ☐ No ☐ Don't Know

3f. \$

3g. ☐ Less than \$ 15,000

☐ \$ 15,000 - \$ 24,999

☐ \$ 25,000 - \$ 49,999

☐ \$ 50,000 - \$ 74,999

☐ \$ 75,000 - \$ 99,999

☐ \$100,000 - \$149,999

☐ \$150,000 or more



DO NOT WRITE IN THIS AREA

00194

#### 4. For Final Maintenance Awards Only:

4a. Begin date

MO	DAY	YEAR
<input type="radio"/> JAN		
<input type="radio"/> FEB		
<input type="radio"/> MAR	0 0 0 0	
<input type="radio"/> APR	1 1 1 1	
<input type="radio"/> MAY	2 2 2 2	
<input type="radio"/> JUNE	3 3 3 3	
<input type="radio"/> JULY	4 4 4 4	
<input type="radio"/> AUG	5 5 5 5	
<input type="radio"/> SEPT	6 6 6 6	
<input type="radio"/> OCT	7 7 7 7	
<input type="radio"/> NOV	8 8 8 8	
<input type="radio"/> DEC	9 9 9 9	

4b. Fixed end date (if any)

MO	DAY	YEAR
<input type="radio"/> JAN		
<input type="radio"/> FEB		
<input type="radio"/> MAR	0 0 0 0	
<input type="radio"/> APR	1 1 1 1	
<input type="radio"/> MAY	2 2 2 2	
<input type="radio"/> JUNE	3 3 3 3	
<input type="radio"/> JULY	4 4 4 4	
<input type="radio"/> AUG	5 5 5 5	
<input type="radio"/> SEPT	6 6 6 6	
<input type="radio"/> OCT	7 7 7 7	
<input type="radio"/> NOV	8 8 8 8	
<input type="radio"/> DEC	9 9 9 9	

#### 4c. When does final maintenance terminate?

- ☐ Remarriage  
☐ Death  
☐ Other, explain \_\_\_\_\_

#### STATUS OF SPOUSES

#### 5. Is husband currently employed?

- ☐ Yes - Specify Occupation: \_\_\_\_\_  
☐ No - Years not employed: ☐ Less than 1 ☐ 1 - 5 ☐ 6 - 10 ☐ More than 10

#### 6. Is wife currently employed?

- ☐ Yes - Specify Occupation: \_\_\_\_\_  
☐ No - Years not employed: ☐ Less than 1 ☐ 1 - 5 ☐ 6 - 10 ☐ More than 10

#### 7. Current health status of husband:

- ☐ Good ☐ Fair ☐ Poor

#### 8. Current health status of wife:

- ☐ Good ☐ Fair ☐ Poor

#### CHILDREN AND CHILD SUPPORT

#### 9. Are there un-emancipated children either born to or adopted by both parents before or during the marriage?

- ☐ Yes → continue to 9a. ☐ No → skip to 11

9a. How many live majority of time with father?

- ☐ 0 ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ More than 5

9b. How many live majority of time with mother?

- ☐ 0 ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ More than 5

9c. How many share equal time with both parents?

- ☐ 0 ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ More than 5



**10. Annual child support obligation:**

☐ By father

☐ By mother

☐ None → Skip to Question 11

10a. Annual child support amount \$ \_\_\_\_\_

Mark appropriate response below

☐ Less than \$ 15,000

☐ \$ 25,000 - \$ 49,999

☐ \$ 75,000 - \$ 99,999

☐ \$150,000 or more

☐ \$ 15,000 - \$ 24,999

☐ \$ 50,000 - \$ 74,999

☐ \$100,000 - \$149,999

10b. Number of children subject to the child support order.

☐ 0

☐ 1

☐ 2

☐ 3

☐ 4

☐ 5

☐ More than 5

10c. Additional Child Support Obligations. Mark all that apply.

☐ None

☐ Education

☐ Child Care

☐ Other

☐ Medical/Medical Insurance

10d. Did the court make a finding that the child support award varied from the Child Support Award Act amount?

☐ Yes → Mark all that apply

☐ No → Skip to 11

☐ Financial resources of parents/child

☐ Educational needs of either parent

☐ Physical/emotional health of child;

☐ Substantial differences in gross income of parents

special needs or aptitudes

☐ Needs of other children of non-custodial parent

☐ Child's expected standard of living had

☐ Extraordinary visitation expenses of non-custodial parent

household remained intact

☐ Other, specify: \_\_\_\_\_

☐ Tax consequences

☐ Non-monetary contribution toward

care and well-being of child

**PROPERTY, DEBT, FINANCIAL  
OBLIGATIONS AT TIME OF FINAL ORDER**

For questions 11, 12, 13 and 14a write in the dollar amount and also mark the correct summary category. If the item does not apply or there was no value mark 0.

0. Zero/None

a. \$ 1 - \$ 14,999

b. \$ 15,000 - \$ 24,999

c. \$ 25,000 - \$ 49,999

d. \$ 50,000 - \$ 74,999

e. \$ 75,000 - \$ 99,999

f. \$100,000 - \$149,999

g. \$150,000 - \$500,000

h. More than \$500,000

**11. Individual Income and Property:**

Annual gross income

Amount

\$ \_\_\_\_\_

Category

(a)(b)(c)(d)(e)(f)(g)(h)

Value of property not divided

Amount

\$ \_\_\_\_\_

Category

(a)(b)(c)(d)(e)(f)(g)(h)

Wife's

\$ \_\_\_\_\_

(a)(b)(c)(d)(e)(f)(g)(h)

\$ \_\_\_\_\_

(a)(b)(c)(d)(e)(f)(g)(h)

**12. Divided Property and Debt  
Not including marital home.**

Value of divided property

Amount

\$ \_\_\_\_\_

Category

(a)(b)(c)(d)(e)(f)(g)(h)

Value of divided debt

Amount

\$ \_\_\_\_\_

Category

(a)(b)(c)(d)(e)(f)(g)(h)

Awarded to Husband

Awarded to Wife

0. Zero/None  
a. \$ 1 - \$ 14,999  
b. \$ 15,000 - \$ 24,999

c. \$ 25,000 - \$ 49,999  
d. \$ 50,000 - \$ 74,999  
e. \$ 75,000 - \$ 99,999

f. \$100,000 - \$149,999  
g. \$150,000 - \$500,000  
h. More than \$500,000

13. Other financial obligations. Mark all that apply.

- ☐ Husband to wife \$ \_\_\_\_\_ (0 a b c d e f g h)
- ☐ Wife to husband \$ \_\_\_\_\_ (0 a b c d e f g h)
- ☐ Husband - child support other children \$ \_\_\_\_\_ (0 a b c d e f g h)
- ☐ Wife - child support other children \$ \_\_\_\_\_ (0 a b c d e f g h)

14. Was marital home

☐ Owned → Continue to 14a

☐ Rented → Slip to 16

14a. Equity in the home at date of valuation or divorce.

\$ \_\_\_\_\_ (0 a b c d e f g h)

14b. If home was/will be sold, state allocation:

\_\_\_\_\_ % to Husband

\_\_\_\_\_ % to Wife

14c. If home will be sold after occupancy, what is the duration of occupancy?

- ☐ Up to 3 years  
☐ 4 to 5 years  
☐ 6 to 10 years

☐ Other, state number of years and/or explain: \_\_\_\_\_

14d. If not sold, how was marital home divided?

	Husband	Wife	Joint
ownership	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
mortgage assumed by	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
costs of property maintenance assumed by	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
occupancy	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

15. Was a professional license or degree divided?

☐ Yes → Continue to 15a

☐ No

15a. Type of license:

☐ Medical

☐ Attorney

☐ Other

15b. Value of license

\$ \_\_\_\_\_

MAIL COMPLETED FORM TO:  
Office of Court Administration  
Office of Court Research  
25 Beaver Street, Room 975  
New York, NY 10004

PLEASE DO NOT FOLD, STAPLE, FAX OR SCAN THIS FORM



**CHILD SUPPORT SUMMARY FORM  
SUPREME AND FAMILY COURT**

**COMPLETE FORM FOR EACH BASIC CHILD SUPPORT OBLIGATION ORDER<sup>1</sup>**

- A. Court:**    ☐ Supreme            ☐ Family
- B. County:** \_\_\_\_\_
- C. Index #/Docket #:** \_\_\_\_\_
- D. Date Action Commenced:**  
\_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_
- E. Date Judgment/Order Submitted or Signed:**  
\_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_
- F. # Of Children Subject to Child Support Order:**  
\_\_\_\_\_
- G. Annual Gross Income:**  
1. Father: \$ \_\_\_\_\_ Mother: \$ \_\_\_\_\_
- H. Amount of Child Support Payment:**  
1. By Father: \$ \_\_\_\_\_ annually    2. By Mother: \$ \_\_\_\_\_ annually
- I. Additional Child Support:**  
(Circle as many as appropriate)
- |                      |                      |
|----------------------|----------------------|
| <u>By Father:</u>    | <u>By Mother:</u>    |
| 1. Medical/Med. Ins. | 1. Medical/Med. Ins. |
| 2. Child Care        | 2. Child Care        |
| 3. Education         | 3. Education         |
| 4. Other             | 4. Other             |
- J. Did the court make a finding that the child support award varied from the Child Support Standards Act amount? (Circle one)**  
1. Yes            2. No

**K. If answer to "J" was yes, circle court's reason(s):**

1. Financial resources of parents/child.
2. Physical/emotional health of child: special needs or aptitudes.
3. Child's expected standard of living had household remained intact.
4. Tax consequences.
5. Non-monetary contribution toward care and well-being of child.
6. Educational needs of either parent.
7. Substantial differences in gross income of parents.
8. Needs of other children of non-custodial parent.
9. Extraordinary visitation expenses of non-custodial parent.
10. Other (specify):  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**L. Maintenance/Spousal Support: (Circle one)**

1. None    2. By Father    3. By Mother

**M. Value of Maintenance/Spousal Support:**

\$ \_\_\_\_\_ annually

**SUPREME COURT ONLY**

**N. Allocation of Property:**

\_\_\_\_\_ % To Father    \_\_\_\_\_ % To Mother

<sup>1</sup> Defined by FCA 413(2) and DRL §240(1-b)(b)(2): "Child Support" shall mean a sum to be paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated child under the age of twenty-one years.

**NEW YORK STATE UNIFIED COURT SYSTEM  
SUPPORT SUMMARY FORM: FAMILY & SUPREME COURT**

**INSTRUCTION SHEET**

Prepare one report for each proposed judgment or final order granted pursuant to Article 4 or 5 of the Family Court Act and DRL §240 and §236 B(9)(b) which includes a provision for child support (including modification of order).

**SUBMIT COMPLETED FORM TO:**

**Office of Court Administration  
Office of Court Research  
25 Beaver Street, Room 975  
New York, New York 10004**

**GENERAL INSTRUCTIONS:    →    ALL ITEMS MUST BE ANSWERED**

- If a number or amount in dollars is required and the answer is none, write 0.
- If a certain item is not applicable, write NA.
- If the information is unknown or not known to the party filling out the form, write UK.
- "mm/dd/yy" means "month/day/year".

**SPECIAL INSTRUCTIONS FOR PARTICULAR ITEMS:**

- G. Use gross income figures from the last complete calendar year. Do not include maintenance or child support as income.
- H. If the child support award is calculated weekly, multiply it by 52 for the annual amount; if biweekly, multiply it by 26, if monthly, multiply it by 12.
- M. If the maintenance award is calculated weekly, multiply it by 52 for the annual amount; if biweekly, multiply it by 26; if monthly, multiply it by 12. If the maintenance award calls for decreasing or increasing amounts (for example, a certain amount for five years and half that amount for another three years), then provide the average of the awards (total amount for all years divided by the number of years).

**NOTE:**        THIS INFORMATION IS CONFIDENTIAL AND WILL BE USED FOR STATISTICAL PURPOSES ONLY.  
IT WILL NOT BE RETAINED IN THE CASE FILE.

## **Appendix E**

LOCAL INDEX NUMBER

STATE FILE NUMBER

New York State  
Department of Health

## CERTIFICATE OF DISSOLUTION OF MARRIAGE

TYPE, OR  
PRINT IN  
PERMANENT  
BLACK INK

4

9

11

15

23

HUSBAND	1. HUSBAND - NAME: FIRST MIDDLE LAST				1A. SOCIAL SECURITY NUMBER	
	2. DATE OF BIRTH Month Day Year		3. STATE OF BIRTH (COUNTRY IF NOT USA)		4A. RESIDENCE: STATE	
	4B. COUNTY		4C. LOCALITY (CHECK ONE AND SPECIFY) <input type="checkbox"/> CITY OF <input type="checkbox"/> TOWN OF <input type="checkbox"/> VILLAGE OF			
	4D. STREET AND NUMBER OF RESIDENCE (INCLUDE ZIP CODE)				4E. IF CITY OR VILLAGE, IS RESIDENCE WITHIN CITY OR VILLAGE LIMITS? YES <input type="checkbox"/> NO <input type="checkbox"/> IF NO, SPECIFY TOWN:	
5A. ATTORNEY - NAME				5B. ADDRESS (INCLUDE ZIP CODE)		
WIFE	6A. WIFE - NAME: FIRST MIDDLE LAST				6B. MAIDEN	
	6C. SOCIAL SECURITY NUMBER					
	7. DATE OF BIRTH Month Day Year		8. STATE OF BIRTH (COUNTRY IF NOT USA)		9A. RESIDENCE: STATE	
	9B. COUNTY		9C. LOCALITY (CHECK ONE AND SPECIFY) <input type="checkbox"/> CITY OF <input type="checkbox"/> TOWN OF <input type="checkbox"/> VILLAGE OF			
9D. STREET AND NUMBER OF RESIDENCE (INCLUDE ZIP CODE)				9E. IF CITY OR VILLAGE, IS RESIDENCE WITHIN CITY OR VILLAGE LIMITS? YES <input type="checkbox"/> NO <input type="checkbox"/> IF NO, SPECIFY TOWN:		
10A. ATTORNEY - NAME				10B. ADDRESS (INCLUDE ZIP CODE)		
11A. PLACE OF THIS MARRIAGE - CITY, TOWN OR VILLAGE				11B. COUNTY		
11C. STATE (COUNTRY IF NOT USA)						
12A. DATE OF THIS MARRIAGE Month Day Year		12B. APPROXIMATE DATE COUPLE SEPARATED Month Year		13A. NUMBER OF CHILDREN EVER BORN ALIVE OF THIS MARRIAGE (SPECIFY)		
13B. NUMBER OF CHILDREN UNDER 18 IN THIS FAMILY (SPECIFY)						
DECREE	14A. I CERTIFY THAT A DECREE OF DISSOLUTION OF THE ABOVE MARRIAGE WAS RENDERED ON Month Day Year				14B. DATE OF ENTRY Month Day Year	
	14C. TYPE OF DECREE - DIVORCE, ANNULMENT, OTHER DISSOLUTION (SPECIFY)					
	14D. COUNTY OF DECREE				14E. TITLE OF COURT	
	14F. SIGNATURE OF COUNTY CLERK V					

## CONFIDENTIAL INFORMATION

HUSBAND	15. RACE: WHITE, BLACK, AMERICAN INDIAN, OTHER (SPECIFY)		16. NUMBER OF THIS MARRIAGE - FIRST, SECOND, ETC. (SPECIFY)		17. IF PREVIOUSLY MARRIED HOW MANY ENDED BY A. DEATH NUMBER _____ NONE <input type="checkbox"/> B. DIVORCE OR ANNULMENT NUMBER _____ NONE <input type="checkbox"/>		18. EDUCATION: INDICATE HIGHEST GRADE COMPLETED ONLY ELEMENTARY: 0 1 2 3 4 5 6 7 8 HIGH SCHOOL: 9 10 11 12 COLLEGE: 1 2 3 4 5+ 00 01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17																		
	19. RACE: WHITE, BLACK, AMERICAN INDIAN, OTHER (SPECIFY)		20. NUMBER OF THIS MARRIAGE - FIRST, SECOND, ETC. (SPECIFY)		21. IF PREVIOUSLY MARRIED HOW MANY ENDED BY A. DEATH NUMBER _____ NONE <input type="checkbox"/> B. DIVORCE OR ANNULMENT NUMBER _____ NONE <input type="checkbox"/>		22. EDUCATION: INDICATE HIGHEST GRADE COMPLETED ONLY ELEMENTARY: 0 1 2 3 4 5 6 7 8 HIGH SCHOOL: 9 10 11 12 COLLEGE: 1 2 3 4 5+ 00 01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17																		
23. PLAINTIFF - HUSBAND, WIFE, OTHER (SPECIFY)				24. DECREE GRANTED TO HUSBAND, WIFE, OTHER (SPECIFY)				25. LEGAL GROUNDS FOR DECREE (SPECIFY)																	
26. SIGNATURE OF PERSON PREPARING CERTIFICATE V																									
ATTORNEY AT LAW																									

NOTE: Social Security Numbers of the husband and wife are mandatory. They are required by New York State Public Health Law Section 4139 and 42 U.S.C. 666(a). They may be used for child support enforcement purposes.

DOH-2168 (5/2000)

## **Appendix F**

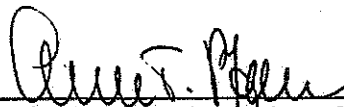
ADMINISTRATIVE ORDER OF THE  
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me by, inter alia, sections 212 of the Judiciary Law and 214 of the Family Court Act, and consistent with the legislative design, set forth in L. 2010, c. 371, §3, to undertake a comprehensive review of our State's maintenance laws, I hereby direct that the attached form Special UCS-111A be completed for each judgment of divorce granted pursuant to Domestic Relations Law §§236B, 240, and 246, in Supreme Court proceedings in the following counties:

Albany, Bronx, Erie, Jefferson, Kings, Nassau, New York, Onondaga, and Westchester.

Completion of this form shall satisfy any requirement to otherwise complete Form UCS-111 (Child Support Summary Form: Supreme and Family Court) in the proceeding.

This order shall take effect on April 1, 2011, and shall remain in effect until further order.

  
\_\_\_\_\_  
Chief Administrative Judge of the Courts

Dated: March 22, 2011

AO/ 446 /11