

The Proper Way to Determine Spousal Maintenance

There's no need to change the law.

By Carl M. Palatnik

There has been much discussion, even recent proposed legislation (See New York State Assembly Bill A10446), over whether Domestic Relations Law (DRL) § 236(B)(6)(a), the statute defining the basis and supporting factors for determining spousal maintenance awards in New York, is difficult to apply and should be replaced with a statute that uses a formula to calculate both the amount and duration of maintenance.

DOMESTIC RELATIONS LAW § 236(B)(6)(A)

According to the current statute, maintenance awards should be based on the following considerations: 1) the pre-divorce standard of living of the parties; and 2) their respective needs and paying abilities. As stated in DRL § 236(B)(6)(a):

Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court may order temporary maintenance or maintenance 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 or 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 In determining the *amount and duration* of maintenance the court shall consider:

- the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;
- 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 therefore;
- 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 of encumbrance made in contemplation of a matrimonial action without fair consideration; and
- any other factor which the court shall expressly find to be just and proper. (Emphasis added.)

CRITICISM OF THE EXISTING STATUTE

Criticism of the statute as it now stands has centered largely on seeming inconsistencies in the amounts and durations of maintenance awards in apparently similar cases. The perception is that such awards may be unfair or inequitable. The apparent lack of predictability caused by such inconsistencies suggests that the existing guidelines may be difficult to apply, making the statute a potential impediment to reaching settlement agreements. These problems are compounded by the difficulty and expense associated with revisiting and altering unworkable support levels post-divorce.

It has been argued that using a formula to calculate maintenance would be faster, simpler, less expensive, more consistent and predictable and easier to administer. This has been the impetus for the aforementioned proposed legislation.

While these arguments appear to be compelling, Alton L. Abramowitz, in a recently published series of articles in this newsletter, has eloquently pointed out major flaws in the proposed legislation. (See "Reconstructing Alimony and Spousal Maintenance," "New York's Post-Marital Compensation Guidelines" and "Changing the Post-Marriage Compensation Guidelines" in the September, October and November 2008 issues of *New York Family Law Monthly*.)

In this article, we discuss the following questions:

- What is the cause of the apparent inconsistencies in the application of the current statute?
- Is the statute too difficult to reasonably or accurately apply?
- Is the proposed legislation, despite its own set of flaws, a better solution because its determinations are more consistent, predictable and easier to apply?

PERSONAL ECONOMIC FORECASTING

Economic forecasting has proven to be a reliable and powerful tool for gaining insights into personal finance issues. It has helped millions of people gain clear understandings of their current financial positions and cash flow, plan for college or retirement, take control over and manage their personal finances, identify and mitigate potential financial risks and constraints, set reasonable long-term financial goals

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for themselves and predictably work toward achieving them.

Divorce financial planning, a relatively new financial planning area of specialization that applies the principles and methods of personal financial planning, including economic forecasting, to the divorce process, has benefited clients greatly, providing valuable insights into the long-term consequences of alternative outcomes. It has helped divorce financial planners analyze the needs and paying abilities of the divorcing parties in different post-divorce contexts and helped clients anticipate and avoid potential problems and develop insights into the workability of alternative settlement scenarios. Economic forecasting has been successfully utilized in tens of thousands of divorce cases throughout the country and assisted courts in arriving at context-dependent equitable distribution and spousal maintenance awards dependent upon the unique facts of each case. It is a valuable tool for helping divorcing parties negotiate workable and equitable out-of-court settlements, thus avoiding the vagaries of going to court.

The following case study illustrates how economic forecasting, a tool that is routinely used in the personal financial planning process, can provide insights into needs and paying abilities and their context-dependence.

For purposes of clarity, I have defined alternative contexts as alternative ways in which property and debt could be divided and alternative ways of sharing or distributing income and expenses. Budgets based on pre-divorce standard of living would, for example, be associated with different needs and paying abilities than budgets contained in so-called "bare-bones" contexts. I call attention to these variables because needs and paying abilities and the marital standard of living form the basis of the current statute. Tax consequences, the rehabilitative concept of maintenance and many of the other supporting factors in the current statute can also be taken into consideration in the economic forecasting process.

In the following case study, the facts are:

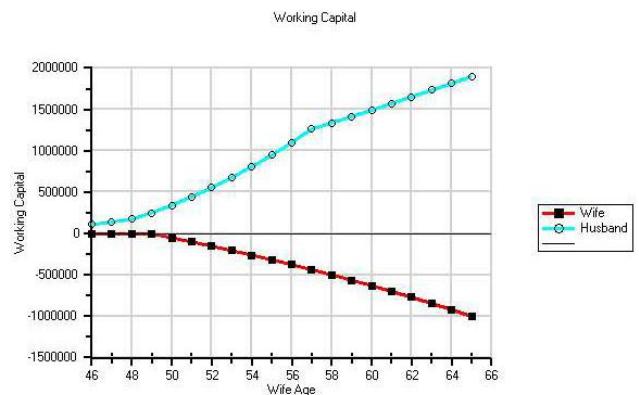
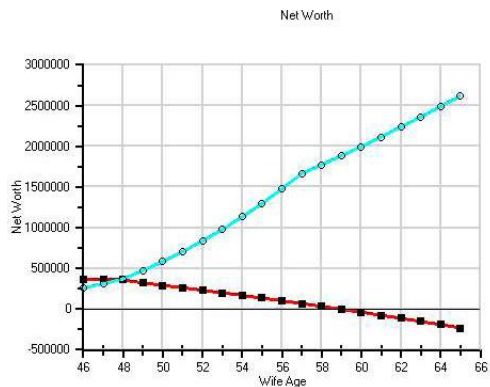
- The husband and wife have been married for many years and have two pre-college-age children living at home;
- The husband earns substantially more than the wife;
- The wife left college many years ago but plans to go back to finish her degree, which should increase her future earning potential;
- The wife plans to continue working at her current job while attending school; the couple jointly own a home that has grown substantially in value during their marriage and has a large unrealized capital gain, and there is about \$100,000 remaining on the mortgage;
- The husband has accumulated a significant amount of retirement assets over the years;
- The wife has only a small amount of retirement assets, not sufficient for her to retire on; and
- The couple have about \$100,000 in investment assets.

THE HUSBAND'S PROPOSITION

The husband has proposed to help the wife go back to school by paying her college costs. He will also pay maintenance of \$3000 per month while she is in school. He will pay child support based on the statutory guidelines until the children become emancipated or, if full-time college students, reach age 22. He agrees to divide the marital estate equally.

The wife is concerned about whether she will be able to maintain a decent standard of living for herself and the children after the divorce. She would like to keep the house. She is also concerned about whether she will have enough money to retire on.

Economic forecasts of the husband's proposal are shown in the figures in the chart below (spreadsheets containing the supporting data are not shown).



In this scenario, the wife keeps the house and associated mortgage, her retirement assets and a small portion of her husband's retirement assets. The husband keeps the majority of his retirement assets and the joint investment assets. Basic assumptions regarding taxes, cost of living, changes in income and expenses, and appreciation rates of retirement and other assets are also made. Their budgets are based on verified historical expenses in a Lifestyle Analysis or contained in their respective Statements of Net Worth.

The first chart, labeled Net Worth, incorporates these assumptions and projects changes in Net Worth as a function of the wife's age. Likewise, the figure labeled Working Capital projects changes in the parties' respective Working Capital. The expenses used in the analysis, as illustrated in the charts, are based on the historical data contained in substantiated Statements of Net Worth, i.e., are reflective of the standard of living established during the marriage. Superimposed on this is the husband's proposal to pay the wife child and spousal support, with the wife assuming complete ownership of the house and its associated obligations in exchange for a portion of her rights to her husband's pension. The specific values displayed in the figures are not as significant as the trends. The calculated values become less predictable over time, as underlying parameters continue to evolve. Nevertheless, trends, especially in the early years, are highly predictable under a given set of economic circumstances.

As shown, the husband's Net Worth and Working Capital increase consistently and substantially in this scenario. This is largely due to his high salary, which greatly exceeds his expenses. In contrast, the wife's Net Worth and Working Capital begin decreasing immediately and continue to decline. The underlying data show that her expenses far exceed her income. She cannot afford to maintain the house. She has no initial Working Capital, her husband having kept all of the investment assets. The figures shown assume she begins drawing on her retirement assets, paying associated income taxes and penalties, and the equity in her home, her only other asset. These are merely stopgap measures and further weaken her financial position.

The figures (and spreadsheets) clearly indicate that this proposal is affordable to the husband and in keeping with the husband's paying abilities. However, it also clearly shows that the wife does not have sufficient income to pay her expenses in this scenario, and the proposal is therefore incompatible with the wife's needs. Since pre-divorce standard of living and the respective needs and paying abilities of the parties form the basis for the statute, these economic forecasts of the long-term financial consequences of the husband's proposal provide important insights to the court concerning his proposal.

ALTERNATIVE SCENARIOS

The above analysis of the hypothetical husband's proposal for dividing his and his wife's marital property shows

that what at first might look like a fair division of property can turn out badly for one party. The husband's proposal identifies significant issues that need to be addressed to potentially arrive at a more workable and equitable outcome and suggests potential ways to help the parties (or the court) do so. Where possible, these scenarios also attempt to take into consideration the parties' respective long-term goals.

A judge looking at the figures and the underlying data should be able to conclude that the amount and duration of support in the husband's proposal are insufficient. In a typical case, a judge would be given information such as this on a couple of alternative scenarios; for example a scenario proposed by the wife or a scenario in which everything is split down the middle. Each of these scenarios will provide insight into the respective needs and paying abilities of the parties in the context of that particular scenario. This information should help the judge arrive at an equitable outcome that takes into account the pre-divorce standard of living and meets the needs and paying abilities of the parties in the context of that outcome.

In this case study, several alternative scenarios can be shown to be workable for both the husband and the wife, all of which involve additional amounts and durations of maintenance. All of these scenarios use the historical data contained in the Statements of Net Worth and are thus intimately related to the pre-divorce standard of living. The calculated needs and paying abilities are context-dependent and provide insights into the long-term financial

consequences, equitability and workability of each of the respective alternatives.

One such scenario might utilize a significantly larger amount of spousal maintenance over a more extended period of time. This would initially enable the wife to pay her bills and thus meet her needs. However, the husband's income drops significantly when he retires, and he will be severely negatively impacted if he continues to pay support at such high levels at that time. If he stops making such payments at that time, the wife's financial position begins to rapidly deteriorate. This analysis clearly shows that the house must eventually be sold or the wife must find an alternative and increased source of income.

A third possible scenario might involve an intermediate level of support, until the husband retires, at which time the house will be sold and the proceeds transferred to the wife.

I believe that a judge armed with this information should be able to make more equitable and predictable decisions regarding both equitable distribution and support. Currently, this information is not typically made available to the court in New York. Although these amounts and durations of maintenance are context dependent and vary with each scenario, the analyses clearly show that the husband can afford to make significantly higher maintenance payments and still wind up in a strong financial position.

Unfortunately, unless the wife is able to increase her income substantially, or some other unforeseen event occurs, she appears to be unable to keep the house. None of the additional scenarios is workable if the husband transfers his equity in the house to the wife, and she continues to make payments similar to those associated with the current mortgage (assuming she can qualify for a loan).

The scenarios involving increased levels of maintenance, which termi-

nate upon the husband's retirement, with the house being sold jointly (saving substantial amounts of capital gains taxes) and the proceeds of the sale being transferred to the wife have the advantage of allowing the wife to live in the marital home for an extended period of time. They also enable her to keep a larger share of the husband's retirement assets and the joint investment assets, as well as continue to maintain a decent standard of living, thus solving other problems identified in the initial analysis.

LIFESTYLE ANALYSIS: THE NEW JERSEY MODEL

Although economic forecasting often uses data reflective of the marital standard of living, New Jersey has, since the landmark case of *Crews v. Crews*, 164 N.J. 11 (2000), relied extensively on lifestyle analysis to determine appropriate amounts and durations of alimony (maintenance). The Lifestyle Analysis differs from the Statement of Net Worth in that it is usually based on three or more years of financial data and is potentially more reflective of the standard of living established during the marriage.

Unlike New Jersey, lifestyle analysis in New York has been historically used to impute income, but it can also be helpful in making maintenance determinations. But there is no need to change New York's law in order to make lifestyle analysis a part of maintenance decisions in New York. Economic forecasting analyses should simply be routinely presented to the court for use in maintenance determinations in most cases. When historical data contained in the Statement of Net Worth (the previous year's data) is not reflective of the marital standard of living enjoyed in the marriage, a rigorous Lifestyle Analysis covering a more extended period of time might also be helpful to the court.

Another potential benefit of a lifestyle analysis, especially for an analysis prepared rigorously, is that it can provide a foundation on which the court

can rely for future determinations, such as those involving motions for post-divorce modification based on changes in circumstances.

PROPOSED LEGISLATION VS. THE STATUS QUO

"Simpler" and "more consistent" do not necessarily equate with better. Problems associated with inconsistent or unpredictable application of Domestic Relations Law § 236(B)(6)(a), the statute defining the basis and supporting factors for determining spousal maintenance awards in New York, are more likely due to the fact that the data and analyses routinely made available to the courts and upon which they must base their decisions are often unreliable, inadequate or otherwise flawed.

To fix the problem, analyses must be routinely presented to the court that provide insights into pre-divorce standard of living and context-dependent needs and paying abilities. Although much of the underlying data for such analyses may currently be available to courts, it is often not organized or analyzed with this specific purpose of making spousal maintenance determinations in mind. Furthermore, the results of these analyses are context-dependent. If the data and analyses are not presented to the court in a context-dependent fashion, the court is likely to arrive at inconsistent and unpredictable results or throw up its hands and opt for the easy way out – a consistent and predictable formula that is flawed and associated with inequitable determinations.

Proven methodologies exist that can help the courts easily make consistent, predictable and workable decisions regarding maintenance: economic forecasting and lifestyle analysis. These methodologies also provide additional benefits and insights. Rather than amend the statute in a way that is clearly flawed, analyses based on these methodologies should be routinely applied — even required — by the court. Replacing the existing

statute, simply for the sake of consistency and predictability, with one involving a formula that is flawed and does not take into account the unique aspects of each case, does not lead to more equitable or workable outcomes. It is an unnecessary work-around that substitutes one set of problems for another.



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