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Multiple Flaws Abound in New Interim Spousal Support Statute

Lee Rosenberg

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Instead of simply passing the simple no-fault legislation we desperately needed, the Legislature handed the people of the State of New York and its over-burdened court system a hodgepodge which will make matrimonial litigation more costly and take longer to resolve. In particular, the interim spousal support law, which appears to have been part of the quid pro quo for no-fault's passage, is a combination of an interim support bill and a final support bill rushed haphazardly into one. As a result, factors that can only relate to final support and be determined at the conclusion of trial when equitable distribution has also been had, are interjected, causing inherent conflict and inconsistency throughout the statute's text.

Until remedial action is taken, lawyers, clients and courts (both on the trial and appellate level) will be sorting this out for the foreseeable future.¹ Fortunately, in the first published decision dealing with the temporary maintenance statute, Justice Jeffrey Sunshine, in *Scott M. v. Ilona M.*,² has taken reasoned and logical steps to fashioning a decision that takes into account some of the statute's flaws rather than using the easy, unjust and formulaic approach.³

Statutory Background

In October, 2010, four new statutes went into effect: No Fault Divorce,⁴ Interim Maintenance,⁵ Counsel Fees,⁶ and Child Support Modification.⁷ With the same belated stroke of the Legislature's pen which finally permitted no fault divorce to be enacted, the Legislature (a) enacted a counsel fee statute that many (at least in the Second Department) considered unnecessary and perhaps less effective given existing case precedent; (b) enacted a child support modification statute which will be fodder for more litigation; (c) and enacted the interim maintenance statute.⁸

Under the prior statute (which still applies to cases commenced prior to Oct. 12, 2010), pendente lite awards were designed to ensure that a needy spouse is provided with funds for his or her support and reasonable needs.⁹ The court considers the parties' pre-separation standard of living,¹⁰ then balances the factors set forth in DRL Section 236 (B)(6) such as the financial status of the respective parties, their age, health, necessities and obligations, the nature and duration of the marriage, the present and future capacity of each of the parties to be self-supporting, the tax consequences to the parties and the income that the parties are capable of earning by honest efforts.¹¹ The award was designed to be

accommodation between the reasonable needs of the moving party, and the financial ability of the other spouse. This has changed under the new interim support statute.

Under the new interim maintenance statute, the court must apply the statutory guidelines unless the parties opt out in a properly compliant written agreement or if the court deems the guidelines to result in an "unjust or inappropriate finding." The guideline amount is determined in two parts:

(1) A mathematical calculation based upon income up to \$500,000 of the payor's income; and

(2) A calculation on income over \$500,000 after the mathematical calculation has first been made on income up to \$500,000 based upon consideration of 19 factors set forth. The court must set forth the factors considered in its order. These are the same factors to be considered on deviation where the presumptive calculation is deemed "unjust or inappropriate,"¹² with the addition of two additional factors.

Calculation Up to \$500,000

The statute states: "The court shall determine the guideline amount of temporary maintenance in accordance with the provisions of this paragraph after determining the income of the parties:

(1) Where the payor's income is up to and including the income cap (\$500,000):

(a) the court shall subtract twenty percent of the income of the payee from thirty percent of the income up to the income cap of the payor.

(b) the court shall then multiply the sum of the payor's income up to and including the income cap and all of the payee's income by forty percent.

(c) the court shall subtract the income of the payee from the amount derived from clause (b) of this subparagraph.

(d) the guideline amount of temporary maintenance shall be the lower of the amounts determined by clauses (a) and (c) of this subparagraph; if the amount determined by clause (c) of this subparagraph is less than or equal to zero, the guideline amount shall be zero dollars."¹³

The statute is applicable and shall be applied unless the parties have entered into a valid agreement entered into in the manner set forth in the statute. Similar to the requirements of the Child Support Standards Act (CSSA), the provisions of any such agreement are not waiveable by either party or counsel.¹⁴

Such agreement: (1) "*Shall* include a provision stating that the parties have been advised of the provisions of this subdivision, and that the presumptive award provided for therein results in the correct amount of temporary maintenance."

(2) "In the event that such agreement or stipulation *deviates* from the presumptive award of temporary maintenance, the agreement or stipulation *must* specify the amount that such presumptive award of temporary maintenance would have been *and* the reason or reasons that such agreement or stipulation does not provide for payment of that amount." (Emphasis added.)¹⁵

The court shall, however, retain discretion with respect to temporary, and post-divorce maintenance awards pursuant to this section even where agreements are entered into. Any court order incorporating a validly executed agreement or stipulation which deviates from the presumptive award of temporary maintenance shall set forth the court's reasons for such deviation. Seventeen factors are included in the statute for deviation purposes, and 19 factors are considered on income over \$500,000, including the catch-all "any other factor" the court considers "just and proper." The difference again is that the first two of the 19 factors are excluded on the list of 17 for deviation.

The Factors

If the presumptive amount is deemed unjust or inappropriate by the court or there is income over \$500,000, the following "factors" come into effect:

- the length of the marriage; (not included on deviation);
- the substantial differences in the incomes of the parties; (not included on deviation);
- the standard of living of the parties established during the marriage;
- the age and health of the parties;
- the present and future earning capacity of the parties;
- the need of one party to incur education or training expenses;
- the wasteful dissipation of marital property;
- the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- 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;
- the availability and cost of medical insurance for the parties;
- 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;
- the inability of one party to obtain meaningful employment due to age or absence from the workforce;
- the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;
- the tax consequences to each party;
- marital property subject to distribution pursuant to subdivision five of this part;

- the reduced or lost earning capacity of the party seeking temporary maintenance as a result of having forgone or delayed education, training, employment or career opportunities during the marriage;
- 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
- any other factor which the court shall expressly find to be just and proper.

While the recipient of an interim award (particularly where the payor is a W-2 wage earner) will no doubt benefit from this new law, it does not factor in child support issues or payment of household expenses. Is the recipient supposed to pay for everything in the house from this money? Is the payor supposed to stop paying those bills?

What about all the double counting of housing, child care, and medical insurance between this law and the child support law? How did the Legislature manage to give some bizarre consideration to premarital arrangements and adults, including in-laws? How do adult children factor in when the legal obligation for support ends at 21? How did the Legislature factor in marital property when this is an interim provision and marital property has not yet been determined?¹⁶ Clearly, this sloppy amalgam of a permanent support bill and an interim support bill, failed to consider the interplay of basic matrimonial concepts.

'Scott M. v. Ilona M.'

In his analysis of the statutory morass before him, Justice Sunshine states,

The new statute poses significant challenges for courts. It dramatically changes the philosophy and purposes of pendente lite support. No longer is the standard to tide over the "more" needy spouse, see Yecies v. Yecies, 108 AD2d 813 (2d Dept. 1985), Valente v. Valente, 269 AD2d 389 (2d Dept. 2009), Iannone v. Iannone, 31 AD3d 713 (2d Dept. 2006) (the purpose of a pendente lite award is to "tide over the more needy party, not to determine the correct ultimate distribution"). The standard is a shift in resources pretrial by automatic calculation. The basis for the majority of deviations enunciated in the statute are difficult to determine pretrial and pre-discovery. At the earliest stage of the litigation (pendente lite) the court is required to consider factors some of which can only be established after a full trial and or extensive discovery.

The court goes on to undertake the mandatory calculation and notes that "the presumptive amount of temporary maintenance" of \$37,016.14 (which is \$3,097 per month) "would be unjust and inappropriate" because the court must consider (1) the existence and duration of the pre-divorce joint household of both parties and (2) the child care expense obligation of the parties. "This determination cannot be made in a vacuum. In the case at bar and under the formula enunciated by the recent legislation, the shift in resources from the payor spouse to the payee spouse results in the payor spouse having a substantial reduction in resources and thus cannot maintain his pre-separation household."

Justice Sunshine did not think that the catch-all "any other factor" was sufficient authority in and of itself to permit deviation as the court, without more, should not rely on that language only as a "basis for the Court to re-write" the legislative intent, since a resource shift is the clear intent of the statute. That having been said, the court in its analysis applied "simple mathematics and common sense,"

understanding that application of the formula would result in an order which was unjust and "recognizing that the purpose of a pendente lite award is no longer to 'tide over the more needy party.'" The court deviated from the statute "in order for the plaintiff to meet his pre-divorce household expenses and taking into account the parties' expenses, child care costs and net available resources."

Maintenance was then reduced to two-thirds of what it would have been under the statute. Further, in undertaking its calculation, the court, using the parties' gross incomes, less FICA, Medicare, and New York City tax, then factored in the maintenance award for purposes of the child support calculation which was capped at \$130,000 in combined parental income. Child support "add ons" were then awarded.

The wife did not ask for payment of carrying charges as part of her application, but given the court's consideration of the parties' expenses in fashioning the award, the court did not specifically address that anomaly in the statute, although it would appear appropriate that the awards should not be duplicative. Also, the court did not address the housing component innate in the child support award so as to avoid a double counting of same, but it may be that since the court awarded child support on the income only up to \$130,000, such double counting is avoided.

What still remains is that all of the many permutations and combinations which will result in deviation must still be explored. What is also interesting in Justice Sunshine's analysis of the parties' post-interim award resources is that the spouse with the greater income may no longer be the "monied spouse" for purposes of the now "rebuttable" presumption on pendente lite counsel fees due to the support statute's "resource shifting." Thus, while counsel fees were awarded to the wife, application of the statute, even on deviation, actually served to rebut the statutory presumption.

Conclusion

While the expressed intent of the newly enacted statutes is to benefit the "non-monied" spouse, the practical result is that in many cases, the convoluted provisions, particularly of the maintenance law, will cause more litigation, more court time, more resentment, and more motion practice—because the monied spouse will not be able to live with the result; because the statute itself is in conflict with other provisions of law; because application of the "factors" beyond straight percentages will be contested; because every motion for temporary spousal support will (and should) be met with a cross motion to among other things ask the court to deviate from the formula for a variety of reasons, including the need to avoid double counting of carrying charges and child support. It is clear that the Legislature incorrectly applied final support principles to interim awards, but while the issue is being studied, we are still faced with a statute that is absurd in its content and application.

We will not be able to figure this all out for at least a year or two when the appellate courts start hearing all of the appeals that will result or until the law revision committee helps re-write the statute. In the interim, litigants, attorneys and courts alike, are left with a mess that should not have been passed in the first place. Whether one agrees or disagrees with the actual result in *Scott M. v. Ilona M.*, Justice Sunshine's refusal to simply take the easy way out and apply an inherently unjust formulaic approach engendered by a grossly flawed piece of legislation should set the example.

Lee Rosenberg is a partner at *Saltzman Chetkof & Rosenberg* in Garden City. He is a Fellow of the *American Academy of Matrimonial Lawyers* and can be reached at Lrosenberg@scrllp.com.

Endnotes:

1. The statute requires the Law Revision Commission to undertake preliminary and final reviews of the state's maintenance laws.
2. 2011 NY Slip Op. 21026 (Sup. Court Kings County); "Judge Deviates From Formula Under New Divorce Laws," D. Wise, NYLJ, Feb. 1, 2011 at 1, col 3.
3. The reported decision in *Scott M.* states that the action was commenced on Sept. 3, 2010, which would pre-date the new interim maintenance statute's effective date of Oct. 12, 2010. The action was actually commenced on Oct. 15, 2010, with the September date being a typographical error.
4. DRL §170(7); effective Oct. 12, 2010.
5. DRL §§236B(5-A), 6 and (6-A); effective only as to actions commenced on or after Oct. 12, 2010.
6. DRL §§237(a) and (b); effective only as to actions commenced on or after Oct. 12, 2010.
7. DRL §§236B(9)(b) and 236B(7); effective only as to orders and agreements entered on or after Oct. 14, 2010. This statute has a counterpart under the Family Court Act at FCA §461.
8. There is no corresponding provision in the Family Court Act so that the maintenance formula is only available in proceedings commenced under the Domestic Relations Law.
9. *Iannone v. Iannone*, 31 AD3d 713 (2d Dept. 2006); *Pascale v. Pascale*, 226 AD2d 439 (2d Dept. 1996).
10. *Ash v. Ash*, 262 AD2d 436 (2d Dept. 1999); *Kesten v. Kesten*, 234 AD2d 427 (2d Dept. 1996); *Polito v. Polito*, 168 AD2d 440 (2d Dept. 1990).
11. DRL§236(B)(6); *Campion v. Campion*, 264 AD2d 705 (2d Dept. 1999); *Lloyd v. McGrath*, 246 AD2d 630 (2d Dept. 1998).
12. The statute does not say that the percentages may be used on income over \$500,000. It only says the factors are to be considered on income which exceeds the \$500,000 cap. If the lowest calculation on income up to \$500,000 results in a finding of \$0.00, there shall be no award.
13. A maintenance calculator and worksheet is currently available on the Office of Court Administration website in the "Divorce Resources" section under "Temporary Maintenance Tools":
<http://www.nycourts.gov/divorce/>.
14. DRL §236B(5-a)(f).
15. DRL §236B(5-a)(f).
16. The legislative memorandum is also horribly flawed. It misapplies its reference to: (a) the American Academy of Matrimonial Lawyers recommendations, which does not discuss an application of the guidelines to interim awards; (b) the adoption of guidelines in California, when there is no uniformity and each county decides individually whether or not to adopt guidelines; and (c) the Pennsylvania

guidelines (231 PA Code Rule 1910.16-4), which although it addresses its use on interim awards, factors in child support obligations and adjusts for "other expenses."