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REPORT TO THE NEW YORK STATE LAW REVISION COMMISSION BY THE DOMESTIC VIOLENCE COMMITTEE, FAMILY COURT & FAMILY LAW COMMITTEE, MATRIMONIAL LAW COMMITTEE AND SEX & LAW COMMITTEE

On behalf of the New York City Bar Association, this report is submitted by the Domestic Violence Committee, Family Court and Family Law Committee, Matrimonial Law Committee and Sex and Law Committee in connection with the charge contained in Chapter 371 of the Laws of New York, 2010. The statute has given the Law Revision Commission the important task of reviewing and assessing the economic consequences of divorce on the parties; reviewing the maintenance laws of the state, including their impact and effectiveness; and making recommendations to the legislature. The committees are comprised of a broad cross-section of matrimonial and family law practitioners, representing low, middle and high income earners in both Family and Supreme Court.

Divorcing couples deserve a legal system that is responsive to their concerns. There are many ways our court system could be designed to address the myriad issues that arise when a marriage breaks down. Over the years, statutory and case law developments have attempted to address conceptual and cultural shifts and remedy inequities or inefficiencies. Some of these laws and precedents have worked well, while others may require further adaptation of the legal system to better serve the needs of future litigants. Several of these changes, such as marriage equality, no-fault divorce, and temporary maintenance guidelines, are so new that their effect on the legal system is just beginning to be examined.

In this report, we seek to illuminate a few areas that we believe merit examination by the Law Revision Commission. We believe that these issues are crucial to a thorough assessment of not only the maintenance laws of the state, but also, the overall economic consequences of divorce.

First, we recommend that the temporary maintenance guidelines enacted as new section 5-a of Part B of section 236 of the Domestic Relations Law be made applicable to spousal support cases in Family Court, in much the same way that the Child Support Standards Act is contained in both the Domestic Relations Law and the Family Court Act; second, we recommend that, as part of its charge, the Commission take a critical look at the concept of "enhanced earning capacity" in equitable distribution as it relates to final maintenance awards; third, we suggest statutory changes to the temporary maintenance guidelines - changes that we believe should be made immediately in order to make the statute fully workable; and, fourth, we discuss other issues examined by the committees in the course of preparing this report, not

necessarily to make recommendations, but more to present the various points of view expressed by committee members.

The New York City Bar Association is grateful for this opportunity to share information and observations about the current laws and their implications for litigants in matrimonial and family law matters. We hope this report provides helpful guidance to the Commission as it continues to examine New York State's matrimonial laws, and we urge the Commission to make recommendations that will promote the overall principles of fairness and efficiency in our courts.

I. Maintenance Guidelines Should be Extended to Spousal Support Proceedings in Family Court

In 2010, Part B of Section 236 of the Domestic Relations Law ("DRL") was amended to add a new subdivision 5-a, which establishes guidelines for determining temporary maintenance awards. One purpose of this bill was to provide consistency and predictability in calculating awards. However, by amending only the DRL, the bill widened the inconsistency between awards of spousal support in Family Court and awards of temporary maintenance in Supreme Court. We recommend that guidelines for temporary maintenance in matrimonial cases also apply to spousal support awards in Family Court, because the predictability of guidelines would benefit Family Court litigants, judges, and attorneys.[1]

Awards of spousal support in Family Court can be sought by a married individual who has not yet divorced. Generally, litigants who seek spousal support in Family Court are pro se, and often low-income. However, no guidelines govern the award of spousal support in Family Court; the court "may", in its discretion, award a "fair and reasonable" sum. FCA § 412. As a result of this ambiguous statutory guidance, many Family Court litigants do not obtain spousal support since they cannot afford counsel who can demonstrate that spousal support is warranted. Thus, those individuals most in need of support following separation from their spouse are often the least likely to receive it. The use of guidelines may prove most beneficial in these cases.

Current law already creates myriad interconnections between Supreme Court and Family Court, and between spousal support and maintenance. A Family Court award of spousal support is valid until a divorce decree is entered. In a matrimonial action, a court may choose to leave a Family Court support order untouched, or it may preempt the existing order by issuing an award of temporary maintenance. When different legal standards govern spousal support versus temporary maintenance, it is very possible for parties to face wildly different support obligations depending on whether a spousal support order was sought first. The divide among the Appellate Divisions over whether the Family Court is divested of its jurisdiction

[1] A proposed amendment to section 412 of the family court act that would effectuate this change is annexed as Appendix A.

over a pending spousal support action if a matrimonial action is commenced further exacerbates the likelihood of unpredictable and inconsistent awards.[2]

Spousal support today is rooted in the same antiquated notions underlying the now-rejected concept of alimony and should be revised to reflect the current role of marriage as an economic partnership. There is no jurisdictional bar to incorporating the maintenance guidelines into the Family Court Act ("FCA"). Although the Family Court is not empowered to decide equitable distribution, it is not foreclosed from relying on an analysis of assets and liabilities of the parties in deciding spousal support. Indeed, the Family Court applies the DRL and/or case law developed thereunder when issuing maintenance after a referral from the Supreme Court and when modifying maintenance awards previously issued by the Supreme Court.

Thus, for the sake of consistency and awarding support to those who need it most, we recommend the use of spousal support guidelines in Family Court.

Background

Family Court was created in 1963 to "centralize all family matters in one court."[3] However, the Supreme Court maintained exclusive jurisdiction over matrimonial actions. The term "matrimonial action" includes "actions for an annulment or dissolution of a marriage, for a divorce, for a separation, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce, for a declaration of the validity or nullity of a marriage, and to proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce."[4]

Family Court is a court of limited jurisdiction and may exercise only those powers specifically granted to it by the state constitution or by statute.[5] The state constitution grants the Family Court exclusive original jurisdiction over "the support of dependents except for support incidental to actions and proceedings in this state for marital separation, divorce, annulment of marriage or dissolution of marriage."[6] FCA Section 115 provides that the court's

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[2] See *Wolinsky v. Wolinsky*, 133 A.D.2d 768, 520 N.Y.S.2d 57 (2d Dept. 1987); *Roy v. Roy*, 109 A.D.2d 150, 491 N.Y.S.2d 202 N.Y.S.2d (3d Dept. 1985) (Family Court will not be divested of jurisdiction, so long as there was no matrimonial action at the time the support petition was filed); but see *Montes v. Montes*, 54 A.D.2d 627, 387 N.Y.S.2d 602 (1st Dept. 1976) (when the petitioner brought a support action in Family Court and later brought a divorce action in Supreme Court, the Family Court lacked jurisdiction during the pendency of the matrimonial action unless the Supreme Court referred the matter to Family Court or there was a showing that the spouse was likely to become in need of public assistance or care).

[3] Despina Hartofillis & Kimberly McAdoo, *Separate but Not Equal: A Call for the Merger of the New York Sate Family and Supreme Courts*, 40 COLUM. J.L. & SOC. PROBS. 657, 658 (2006-07).

[4] DRL § 236(B)(2).

[5] See *Donne v. Pace*, 74 Misc.2d 127, 344 N.Y.S.2d 398 (1973).

[6] N.Y. Constitution, Art. VI, § 13.

exclusive original jurisdiction over support proceedings shall be governed by the procedures of Article 4. Although a support order should originate in Family Court, the Supreme Court has concurrent jurisdiction over any matter within the jurisdiction of the Family Court.[7] Proceedings may be commenced in Supreme Court to enforce an order of the Family Court.[8]

Under this jurisdictional scheme, spousal support is granted in Family Court and governed by Article 4 of the FCA, which gives the court discretion to award a "fair and reasonable" amount of spousal support. Temporary maintenance is granted by the Supreme Court during the pendency of a matrimonial action, and is governed by DRL Section 236(B), which now imposes the use of guidelines unless a deviation from the guidelines is warranted. Maintenance may only be granted by the Supreme Court, unless it refers the issue to Family Court (which, in practice, is rarely done). Although a Family Court order for spousal support may be valid until the completion of a divorce action, a Supreme Court temporary maintenance award preempts any pre-existing spousal support order.

The state constitution grants the Family Court conditional jurisdiction over certain matters – the condition being that the Supreme Court has referred the matter to Family Court. Such matters include: "actions and proceedings for marital separation, divorce, annulment of marriage and dissolution of marriage, applications to fix temporary or permanent support and custody, or applications to enforce judgments and orders of support and of custody, or applications to modify judgments and orders of support and of custody which may be granted only upon the showing to the family court that there has been a subsequent change of circumstances and that modification is required."[9] Consistent therewith, Article 4 of the FCA grants the Family Court concurrent jurisdiction with the Supreme Court when a matter has been "referred" to it.[10]

In addition, FCA Section 466 grants the Family Court jurisdiction to modify a maintenance award issued by the Supreme Court.

Specifically with respect to property, the state constitution does not grant the Family Court jurisdiction over matters related to property. However, when the Supreme Court refers to the Family Court any matter enumerated in Article VI, Section 13(c), the Family Court is

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[7] N.Y. Constitution, Art. VI, §§ 7, 13.

[8] See *Green v. Montgomery*, 95 N.Y.2d 693, 723 N.Y.S.2d 744, 746 N.E.2d 1036 (2001).

[9] N.Y. Constitution, Art. VI, § 13.

[10] For some matters the Family Court only has jurisdiction if there has been an express referral by the Supreme Court, but other matters are deemed "referred" if the Supreme Court is silent as to jurisdiction. FCA Section 464(a) states "[i]n a matrimonial action in the supreme court, the supreme court on its own motion or on motion of either spouse may refer to the family court an application for temporary or permanent support, or for maintenance or a distribution of marital property." Although, as a matter of practice, maintenance cases are not typically referred from Supreme Court to Family Court, a referral may occur when public assistance is involved. Indeed, FCA Section 464 (b) provides that in the absence of a Supreme Court maintenance order and explicit referral, the Family Court may award maintenance to "a spouse who is likely to become in need of public assistance or care."

not limited by its usual jurisdictional constraints and may decide the matter "with the same powers possessed by the supreme court."[11] For example, in *Collins v. Carella*,[12] the court held that the Family Court was empowered to decide matters related to possession of property that were directly pertinent to the issue of support because the issue of support was expressly referred to Family Court in the parties' amended separation agreement. Thus, the Family Court did not exceed its jurisdiction in granting the former wife possession of the house, since the award was "part and parcel of the necessary support of the family." In *Hendricks v. Hendricks*,[13] the court noted that although the Family Court is without power to divide property in support proceedings that are not incident to a matrimonial action, the Family Court may enforce an order directing the conveyance of property when the Supreme Court decree was silent as to its enforcement. The Family Court may use any of the methods of enforcement available to the Supreme Court under DRL § 234 and CPLR § 5107.

As demonstrated above, there are myriad interconnections between Family Court and Supreme Court and between spousal support and maintenance. This alone provides good reason to have the same standards governing the awards in each court. There is nothing in the law that precludes changing FCA 412 from a "fair and reasonable" standard to a guideline methodology. Indeed, the state constitution grants exclusive jurisdiction of support proceedings to Family Court.

Spousal support guidelines would benefit low-income litigants and Family Court judges by providing an efficient and predictable way of awarding spousal support to the needy party. We support the extension of support guidelines to Family Court proceedings.

II. The Commission Should Review the Issue of Enhanced Earning Capacity

Since 1980 when the Equitable Distribution Law (DRL § 236 Part B) went into effect, the courts and therefore, divorcing couples and their attorneys have been faced with the determination of what constitutes assets subject to distribution; title no longer being determinative. See DRL §236 Part B(1)(c). When the statute was enacted not only were the courts faced with title no longer being the determinative factor in distributing assets, but also, the new notion of maintenance or support for a spouse no longer being the familiar concept of alimony but rather "rehabilitative maintenance." The strong presumption was that support for a spouse would be only for short periods of time to permit the spouse to "get back on his/her feet" and it was based on the spouse's short term needs. Against this background of mandated short maintenance awards (versus the permanent alimony awards which were in effect under the old law) the courts were faced with the prospect that non-monied or non-working spouses were receiving little support, and if the couple lacked tangible assets to divide (i.e., a house, liquid funds or a business operated by the monied or working spouse) rather than intangible assets (i.e., degrees, licenses or professional practices which could not be sold but which were

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[11] N.Y. Constitution, Art. VI, § 13.

[12] 251 A.D.2d 850, 676 N.Y.S.2d 696 (3d Dept. 1998).

[13] 89 Misc. 2d 1052 (Fam. Ct. Onondaga Co. 1977).

developed or obtained during the marriage), they would also receive little if any assets on which to live. In response to this perceived inequity in the law, the courts developed the concept of enhanced earning capacity as an asset to be divided in equitable distribution. See *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985); *Elkus v. Elkus*, 169 A.D. 134 (1st Dept. 1991) and their progeny. As the Court of Appeals noted, "marital property" as defined by the DRL has been found "to include a wide range of intangible interests which in other contexts might not be recognized as divisible property at all." *DeJesus v. DeJesus*, 90 N.Y.2d 643, 647 (1997).

Early on the courts struggled with the concept of Enhanced Earning Capacity to try to capture the notion that by obtaining a degree or license or developing a professional career or a professional practice which could not be readily sold, the titled spouse's income would go up and that this ability to earn money constituted an asset. The courts adopted the notion that this Enhanced Earning Capacity (in essence reducing a projected income stream into present value) – since no longer used for alimony or its replacement maintenance – should be an asset to be distributed. It was adopted as a means to address perceived inequities caused by the new statute. See *O'Brien*.

Now approximately twenty-five years after O'Brien and thirty years after the advent of the Equitable Distribution Law, and with a history of the courts and individuals struggling to implement the notion of Enhanced Earning Capacity while trying to avoid the double counting or "double-dipping" or even "triple-dipping" into an income stream caused by the competing notions of reducing a projected income stream into present value and then distributing the resulting value as a marital asset while trying to use the same income stream to gauge maintenance and then award child support, we face a crossroads. The charge facing the Law Revision Commission is a welcome opportunity to analyze whether this state should continue to apply this concept. Similar to where we stood before passage of no-fault divorce, New York now finds that it is one of the last states to use the concept of Enhanced Earning Capacity as an asset. And, to further complicate matters, the concept of Enhanced Earning Capacity as an asset is not recognized by the bankruptcy courts, which creates potential conflicts for New York State residents.

In practice, the use of the Enhanced Earning Capacity concept is difficult and costly to implement. The concept of Enhanced Earning Capacity as an asset asks experts to project into the future based on current income or potential income and reduce this projected income into present value. In theory this should be an easy task. As history has shown, this is, in fact, a difficult, imprecise and costly endeavor.[14] It requires assumptions on assumptions: first, project the earnings (especially hard with newly acquired skills, degrees or licenses when hypothetical figures must be used); second, project work-life expectancies, real earnings growth, inflation rates, and taxes; and, third, determine the appropriate interest rates to be used to reduce the figure to present value. As we have seen in recent years of economic upheaval,

[14] The very nature of the enhanced earning capacity model requires the use of experts, who can command $15,000 - $20,000 or even more per case. The courts are not equipped and are not permitted to undertake the independent analysis and calculations required to develop the enhanced earning capacity figure. See *Gainer v. Gainer*, 111 AD2d 308, 489 NYS2d 297 (2nd Dept. 1985). This adds to the costs incurred by the litigants since there is no way out unless they choose not to divide this court created asset.

these assumptions often do not pan out. The result of this analysis is that the payor is held to the resulting number (often paid at the time of the divorce judgment) even if the actual income is not reached or the employment life is reduced (this is true even if the results were not due to the actions of the titled spouse). Thus, the payor may be forced to stay in work or employment positions even if it is not a good decision (or sometimes even if it is an unhealthy decision) just in order to pay off the award or the results of the award which cannot be modified.[15]

Further, as noted previously, there are problems of double-dipping or triple-dipping into the income stream – the attorneys and parties and ultimately the courts are asked to determine what income is related to the Enhancing Earning Capacity asset and thus distributed between the spouses at the time the divorce is granted and what is "just income" not factored into the Enhanced Earning Capacity analysis for purposes of maintenance or child support.

With the current statutory move to income based support, first with the Child Support Standards Act (DRL §240 1-b; FCA §413) and now with income-based temporary maintenance guidelines, as well as the current move toward non-rigid application of rehabilitative maintenance, it is time for the judicially created concept of Enhanced Earning Capacity as an asset to be reassessed and re-evaluated. In light of these recent changes, we believe that the Commission is in a unique position to analyze - and should analyze as part of its charge to examine the economic consequences of divorce - whether the use of Enhanced Earning Capacity is still necessary to correct perceived inequities in the law. There may be better ways to provide for equity between divorcing spouses that take into account actual earnings and provide for a mechanism to modify awards under certain changes in circumstance that are based upon facts rather than conjecture.

III. In Order to be Workable, the Temporary Maintenance Guidelines of DRL 236 (Part B) (5-a) Need to be Amended Without Delay

Without drawing any conclusions at this stage as to whether the newly enacted temporary maintenance guidelines should be made permanent, the Committees are of the view that certain amendments to the law are necessary – and should be enacted as soon as possible - if the guidelines are to work within the parameters of a *pendente lite* award of temporary maintenance. The new law has shifted the award of temporary maintenance from one based on need and preserving the status quo to one based on income, yet certain provisions contained in the law do not – and cannot – effectuate that change because they more properly belong as part of a final post-divorce maintenance determination. Thus, we attempted to harmonize the new law with the realities faced by judges trying to determine at a very early stage of the proceeding an appropriate *pendente lite* award.

A copy of our proposed amendments to the temporary maintenance guidelines (including comments providing each amendment's justification) appears at Appendix B.

[15] Equitable Distribution awards are final awards not subject to further modification in order to fulfill the public policy of definitive divorce decrees.

IV. Other Issues to Consider

Although the committees did not reach consensus on the following three issues, we thought it might be helpful to convey the various points of view that were expressed during our group meetings. Please note, however, that our reference to these provisions is for informational purposes only – it should not be interpreted as a recommendation that these provisions be either retained or repealed.

(1) The temporary maintenance guidelines require consideration of "the existence and duration of a pre-marital joint household". Some members of the group believe that this is an important addition to the law and recognizes modern-day reality. Proponents also stress that this provision is important to protect the lesser-monied spouse, particularly in those cases where the withholding of marriage is used as a means of control. However, other members of the group are concerned that this can be interpreted as fundamentally altering when the obligations of marriage begin and that it will lead to litigation in the many cases where people live together before getting married, in essence, recognizing the equivalent of a common law marriage. Further, in light of the passage of the Marriage Equality Law, the existence of pre-marriage living arrangements among same-sex couples who were unable to marry in New York takes on new significance in this context.

(2) The temporary maintenance guidelines require consideration of "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". Proponents of this provision believe that it enables the court to consider the unpaid efforts of primary caretakers, whose responsibilities may inhibit their ability to earn income in the workforce and who may lack the resources required to hire outside help. However, other members of the group are concerned that this provision could be read to require a judge to consider the post-divorce arrangements for care of someone other than a minor child. In their view, this would greatly expand post-divorce familial responsibilities to over-age children and elderly parents in a way that is not supported by case law. Some recommended modifying the provision so that it is clearly applicable only to care provided during the course of the marriage.

(3) The temporary maintenance guidelines require consideration of "the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment". Proponents of this provision believe that, because educational expenses are discretionary and not often ordered as part of a divorce settlement or judgment for low to middle income families, this provision enables the court to consider the contributions to education made by the primary caretaker when calculating maintenance. Opponents believe it is duplicative of considerations already in place under the CSSA and, should such a provision remain, it should be amended to provide that when these expenses are no longer necessary, maintenance shall be recalculated. Further, we recommend that the calculation of temporary maintenance be made *before* child support is calculated and that temporary maintenance be included as part of the payee's income (see Appendix A, n. 1; Appendix B; n. 1).

Thank you for your consideration of this report. Please let us know if we can be of any further assistance to the Commission.

Respectfully,

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APPENDIX A TO THE NEW YORK CITY BAR ASSOCIATION'S OCTOBER 2011 REPORT TO THE LAW REVISION COMMISSION

The New York City Bar Association recommends that Domestic Relations Law 236 Part B (5-a), with appropriate modifications, become new Family Court Act 412 so that spousal support cases can be determined using a guideline methodology. Below, we have annotated DRL 236 Part B (5-a) to show modifications that we believe would need to be made before those provisions could become new FCA 412. Insertions are underlined and deletions are bracketed. All references to "temporary maintenance" in the DRL language have been changed to "spousal support" here.

This change would also require deletion of FCA 416(a), as described below.

Section 1. Suggested modifications to section 236 Part B (5-a) of article 13 of the domestic relations law in order to become new section 412 of part 1 of article 4 of the family court act:

a. Except where the parties have entered into an agreement pursuant to **[**subdivision three of this part providing for maintenance**]** <u>section 425 of this article providing for support</u>, the court shall make its award for **[**temporary maintenance**]** <u>spousal support</u> pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

(1) "Payor" shall mean the spouse with the higher income.

(2) "Payee" shall mean the spouse with the lower income.

(3) "Length of marriage" shall mean the period from the date of marriage until the date of commencement of action.

(4) "Income" shall mean:

(a) income as defined in the child support standards act and codified in section two hundred forty of **[**this article**]** <u>the domestic relations law</u> and section four hundred thirteen of **[**the family court act**]** <u>this article</u>;[1] and

[1] We recommend that the Child Support Standards Act (CSSA) be amended in both the FCA and the DRL to provide that the calculation of spousal support be made before child support is calculated and that spousal support be included as part of the payee's income.

[(b) income from income producing property to be distributed pursuant to subdivision five of this part.][2]

(5) "Income cap" shall mean up to and including five hundred thousand dollars of the payor's annual income; provided, however, beginning January thirty-first, two thousand twelve and every two years thereafter, the payor's annual income amount shall increase 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.

(6) "Guideline amount of [temporary maintenance] spousal support " shall mean the sum derived by the application of paragraph c of this subdivision.

[(7) "Guideline duration" shall mean the durational period determined by the application of paragraph d of this subdivision.][3]

(8) "Presumptive award" shall mean the guideline amount of the [temporary maintenance] spousal support award [for the guideline duration] prior to the court's application of any adjustment factors as provided in subparagraph one of paragraph e of this subdivision.[4]

(9) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of [this article] the domestic relations law and section four hundred thirteen of [the family court act] this article.

c. The court shall determine the guideline amount of [temporary maintenance] spousal support in accordance with the provisions of this paragraph after determining the income

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[2] This factor is not relevant to an award of spousal support in family court since there is no distribution until a divorce is granted.

[3] We note that this provision gives the judge discretion over the duration of the spousal support award. However, spousal support is typically of an unlimited duration; awards cease upon issuance of a divorce decree or application to end or modify support. Therefore, we recommend deletion of this provision.

[4] Spousal support awards are typically of unlimited duration, and thus the reference to “for the guideline duration” should be deleted.

of the parties. This determination shall be made prior to any determination of child support under the Child Support Standards Act.[5]

(1) Where the payor's income is up to and including the income cap:

(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] spousal support 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.

(2) Where the income of the payor exceeds the income cap:

(a) the court shall determine the guideline amount of [temporary maintenance] spousal support for that portion of the payor's income that is up to and including the income cap according to subparagraph one of this paragraph, and, for the payor's income in excess of the income cap, the court shall determine any additional guideline amount of [temporary maintenance] spousal support through consideration of the following factors:

(i) the length of the marriage;

(ii) the substantial differences in the incomes of the parties;

(iii) the standard of living of the parties established during the marriage;

(iv) the age and health of the parties;

(v) the present and future earning capacity of the parties;

(vi) the need of one party to incur education or training expenses;

(vii) the wasteful dissipation of marital property;[6]

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[5] See App. A, n. 1.

[6] Reference to "marital property" may need to be clarified in the family court context because asking a Support Magistrate to make a determination as to what is "marital property" may exceed the Support

(viii) the transfer or encumbrance made in contemplation of a [matrimonial action] support proceeding without fair consideration;[7]

(ix) the existence and duration of a pre-marital joint household [or a pre-divorce separate household;][8]

(x) 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;

(xi) the availability and cost of medical insurance for the parties;[9]

(xii) 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;[10]

(xiii) the inability of one party to obtain meaningful employment due to age or absence from the workforce;

Magistrate's authority as defined in FCA 439. For example, where marital property produces income, the Support Magistrate may consider the effect of the income stream without ever making a determination as to whether the property in question is "marital" property. We suggest considering whether the language should be changed to distinguish between marital property and income-producing property.

[7] The term "matrimonial action" must be deleted because parties seeking spousal support have not commenced a matrimonial action in Supreme Court. The phrase should be replaced to appropriately reflect the circumstances under which parties seek spousal support, such as "in contemplation of a support proceeding."

[8] We recommend the phrase "pre-divorce separate household" be deleted because parties seeking spousal support have not commenced a divorce action. Oftentimes, parties seeking spousal support would be living in separate households, but separation is not required to obtain spousal support. See also comment regarding use of the phrase "pre-marital joint household" at Point IV of the Report ("Other Issues to Consider").

[9] The relationship of this factor to FCA 416, which governs orders relating to insurance benefits, must be examined. In the child support context, section FCA 413(1)(c)(5) states "The court shall determine the parties' obligation to provide health insurance benefits pursuant to section four hundred sixteen of this part and to pay cash medical support as provided under this subparagraph" and then goes into detail regarding specific calculations. It may be necessary to expand on this factor in new Section 412 by explaining how the obligations under Section 416 should be considered in calculating the support award.

[10] See discussion of this provision in Point IV of the Report ("Other Issues to Consider").

(xiv) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;[11]

(xv) the tax consequences to each party;

(xvi) **[**marital property subject to distribution pursuant to subdivision five of this part;**]**[12]

(xvii) the reduced or lost earning capacity of the party seeking **[**temporary maintenance**]** spousal support as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;

(xviii) the contributions and services of the party seeking **[**temporary maintenance**]** spousal support as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and

(xix) any other factor which the court shall expressly find to be just and proper.

(b) In any decision made pursuant to this subparagraph, the court shall set forth the factors it considered and the reasons for its decision. Such written order may not be waived by either party or counsel.

(3) Notwithstanding the provisions of this paragraph, where the guideline amount of **[**temporary maintenance**]** spousal support would reduce the payor's income below the self-support reserve for a single person, the presumptive amount of the guideline amount of **[**temporary maintenance**]** spousal support shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no **[**temporary maintenance**]** spousal support is awarded.

d. **[**The court shall determine the guideline duration of spousal support by considering the length of the marriage. Spousal support shall terminate upon the

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[11] See discussion of this provision in Point IV of the Report ("Other Issues to Consider").

[12] Equitable distribution is not an appropriate consideration for spousal support awards in family court.

issuance of the final award of spousal support or the death of either party, whichever occurs first.**]**[13]

e. (1) The court shall order the presumptive award of **[**temporary maintenance**]** <u>spousal support</u> in accordance with paragraphs c and d of this subdivision, unless the court finds that the presumptive award is unjust or inappropriate and adjusts the presumptive award of **[**temporary maintenance**]** <u>spousal support</u> accordingly based upon consideration of the following factors:

(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;[14]

(f) the transfer or encumbrance made in contemplation of a **[**matrimonial action**]** <u>support proceeding</u> without fair consideration;[15]

(g) the existence and duration of a pre-marital joint household **[**or a pre-divorce separate household;**]**[16]

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[13] Spousal support awards typically endure while the marriage continues, so the concept of guideline duration may not apply. Moreover, the reference to a "final award" does not make sense in the spousal support context. We suggest the following language as a replacement:

> "Spousal support is of indefinite duration and shall terminate upon court order, issuance of a divorce decree or death or either party, whichever occurs first. Either party may petition the Family Court to modify or terminate spousal support. "

[14] Reference to "marital property" may need to be clarified in the family court context because asking a Support Magistrate to make a determination as to what is "marital property" may exceed the Support Magistrate's authority as defined in FCA 439. For example, where marital property produces income, the Support Magistrate may consider the effect of the income stream without ever making a determination as to whether the property in question is "marital" property. We suggest considering whether the language should be changed to distinguish between marital property and income-producing property.

[15] The term "matrimonial action" must be deleted because parties seeking spousal support have not commenced a matrimonial action in Supreme Court. The phrase should be replaced to appropriately reflect the circumstances under which parties seek spousal support, such as "in contemplation of a support proceeding."

[16] We recommend the phrase "pre-divorce separate household" be deleted because parties seeking spousal support have not commenced a divorce action. Oftentimes, parties seeking spousal support would be living in separate households, but separation is not required to obtain spousal support. <u>See</u> also,

(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;[17]

(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; [18]

(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;[19]

(m) the tax consequences to each party;

(n) **[**marital property subject to distribution pursuant to subdivision five of this part;**]**[20]

(o) the reduced or lost earning capacity of the party seeking **[**temporary maintenance**]** spousal support as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;

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comment regarding use of the phrase "pre-marital joint household" at Point IV of the Report ("Other Issues to Consider").

[17] See App. A, note 9.

[18] See discussion of this provision at Point IV of the Report ("Other Issues to Consider").

[19] See discussion of this provision at Point IV of the Report ("Other Issues to Consider").

[20] Equitable distribution is not an appropriate consideration for spousal support awards.

(p) the contributions and services of the party seeking [temporary maintenance] spousal support 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.

(2) Where the court finds that the presumptive award of [temporary maintenance] spousal support is unjust or inappropriate and the court adjusts the presumptive award of [temporary maintenance] spousal support pursuant to this paragraph, the court shall set forth, in a written order, the amount of the unadjusted presumptive award of [temporary maintenance] spousal support, the factors it considered, and the reasons that the court adjusted the presumptive award of [temporary maintenance] spousal support. Such written order shall not be waived by either party or counsel.

(3) Where either or both parties are unrepresented, the court shall not enter a [temporary maintenance] spousal support order unless the unrepresented party or parties have been informed of the presumptive award of [temporary maintenance] spousal support.

f. A validly executed agreement or stipulation voluntarily entered into between the parties in an action commenced after the effective date of this subdivision presented to the court for incorporation in an order 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] spousal support. In the event that such agreement or stipulation deviates from the presumptive award of [temporary maintenance] spousal support, the agreement or stipulation must specify the amount that such presumptive award of [temporary maintenance] spousal support would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount. Such provision may not be waived by either party or counsel. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the presumptive award of [temporary maintenance] spousal support provided such agreements or

stipulations comply with the provisions of this subdivision. [The court shall, however, retain discretion with respect to temporary, and post-divorce maintenance awards pursuant to this section.][21] Any court order incorporating a validly executed agreement or stipulation which deviates from the presumptive award of [temporary maintenance] spousal support shall set forth the court's reasons for such deviation.[22]

g. When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order the [temporary maintenance] spousal support award based upon the needs of the payee or the standard of living of the parties prior to [commencement of the divorce action] the filing of the support petition, whichever is greater.[23] Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered or obtained evidence.

h. In any action or proceeding for modification of an order of [temporary maintenance] spousal support existing prior to the effective date of this subdivision, brought pursuant to this article, the [temporary maintenance] spousal support guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

i. [In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in

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[21] This sentence must be changed or deleted because the Family Court does not issue temporary or post-maintenance divorce awards.

[22] We recommend that the provisions of this section be implemented through the use of appropriate form stipulations and worksheets. In addition, we suggest the insertion of a separate section to address temporary orders of support issued during the pendency of the spousal support case in Family Court. In that context, the requirements of this section would be unduly burdensome on the litigants and the court. In the case of temporary support orders, we recommend that the parties be required to come to the preliminary conference with completed income worksheets, which can also include a portion addressing deviation and any agreement to deviate.

[23] The language "prior to the commencement of the divorce action" must be changed because parties seeking spousal support have not commenced a divorce action in Supreme Court. We recommend this clause be replaced with appropriate language, such as "the standard of living prior to the filing of the support petition, whichever is greater."

subdivision six of section two hundred fifty-three of **[**this article**]** the domestic relations law, on the factors enumerated in this subdivision.**]**[24]

§ 2. Section 416 of Article 4 of the family court act is amended to read as follows:

§ 416. **[**Elements of support;**]**[25] **[**provisions**]** Provisions for accident, life and health insurance benefits. (a) **[**The court may include in the requirements for an order for support the providing of necessary shelter, food, clothing, care, medical attention, expenses of confinement, the expense of education, payment of funeral expenses, and other proper and reasonable expenses.**]**[26]

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[24] Remarriage is not a consideration for spousal support orders in family court, as parties remain married.

[25] We recommend "Elements of support" be deleted from the title of this section because we are recommending subsection (a) be deleted. The remaining subsections refer to provisions for life and health insurance.

[26] We recommend subsection (a) be deleted in its entirety because the elements of spousal support will be set forth in new Section 412 and the elements of child support set forth in Section 413.

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APPENDIX B TO THE NEW YORK CITY BAR ASSOCIATION'S OCTOBER 2011 REPORT TO THE LAW REVISION COMMISSION

DOMESTIC VIOLENCE COMMITTEE
MATRIMONIAL LAW COMMITTEE
SEX AND LAW COMMITTEE

PROPOSED AMENDMENTS TO TEMPORARY MAINTENANCE GUIDELINES CONTAINED IN CHAPTER 371 AND ENACTED AS NEW SECTION 5-A OF PART B OF SECTION 236 OF THE DOMESTIC RELATIONS LAW, WITH COMMENTS

STATE OF NEW YORK

2011-2012 Regular Sessions

AN ACT to amend the domestic relations law, in relation to providing for temporary maintenance awards, and revising the factors for final maintenance awards.

Section 1. Subdivision 5-a of Part B of section 236 of the domestic relations law is amended as follows:

5-a. Temporary maintenance awards. 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 shall make its award for temporary maintenance pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

(1) "Payor" shall mean the spouse with the higher income.

(2) "Payee" shall mean the spouse with the lower income.

(3) "Length of marriage" shall mean the period from the date of marriage until the date of commencement of action.

(4) "Income" shall mean:

(a) income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act;[1] and

[(b) income from income producing property to be distributed pursuant to subdivision five of this part.**]**[2]

(5) "Income cap" shall mean up to and including five hundred thousand dollars of the payor's annual income; provided, however, beginning January thirty-first, two thousand twelve and every two years thereafter, the payor's annual income amount shall increase 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.

(6) "Guideline amount of temporary maintenance" shall mean the sum derived by the application of paragraph c of this subdivision.

(7) "Guideline duration" shall mean the durational period determined by the application of paragraph d of this subdivision.[3]

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[1] ***Comment and recommended amendment to CSSA:*** We do not object to the new law's usage of the definition of "income" from the Child Support Standards Act (CSSA); however, further clarification is required. We recommend that the CSSA be amended in both the family court act and the domestic relations law to (i) include temporary maintenance as part of the payee's income, and (ii) provide that the calculation of temporary maintenance needs to be made before child support is calculated, which is consistent with paragraph (c) below.

[2] ***Comment and recommended deletion:*** This factor is not relevant to an award of temporary maintenance since there is no distribution until a divorce is granted. Further, the concept of income-producing property is part of the calculations already contained within the definition of "income" under the Child Support Standards Act, which is incorporated in the new law.

[3] ***Comment:*** We note that this provision gives the judge discretion over the duration of the temporary award of maintenance – discretion that did not previously exist in the context of temporary awards (in contrast to permanent awards of maintenance). However, in recognition of the possibility that, under certain circumstances, a judge may need to cease the payment of temporary maintenance under the new law, we have not suggested a deletion as necessary to effectuating the new law.

(8) "Presumptive award" shall mean the guideline amount of the temporary maintenance award for the guideline duration prior to the court's application of any adjustment factors as provided in subparagraph one of paragraph e of this subdivision.

(9) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

c. 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. This determination shall be made prior to any determination of child support under the Child Support Standards Act. All or part of the temporary maintenance amount may be paid to third parties in satisfaction of the obligation as directed by the court of by agreement of the parties:[4]

(1) Where the payor's income is up to and including the income cap:

(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.

(2) Where the income of the payor exceeds the income cap:

(a) the court shall determine the guideline amount of temporary maintenance for that portion of the payor's income that is up to and including the income cap according to subparagraph one of this paragraph, and, for the payor's income in

[4] ***Comment and recommended insertion of new language:*** Since the new law shifts the award of temporary maintenance from a needs-based/status quo analysis to an income-based analysis, it should explicitly allow the judge and the parties the discretion to address ongoing expenses by direct payment to third parties.

excess of the income cap, the court shall determine any additional guideline amount of temporary maintenance through consideration of the following factors:

(i) the length of the marriage;

(ii) the substantial differences in the incomes of the parties;

(iii) the standard of living of the parties established during the marriage;

(iv) the age and health of the parties;

(v) the present and future earning capacity of the parties;

(vi) the need of one party to incur education or training expenses;

(vii) the wasteful dissipation of marital property;

(viii) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(ix) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(x) 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;

(xi) the availability and cost of medical insurance for the parties;

(xii) 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;

(xiii) the inability of one party to obtain meaningful employment due to age or absence from the workforce;

[(xiv) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;**]**[5]

[(xv)**]** <u>(xiv)</u> the tax consequences to each party;

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[5] ***Comment and recommended deletion:*** This provision appears in paragraph (e)(1)(l) as a factor that can be considered by the court in determining whether a deviation from the presumptive guideline amount is appropriate. We recommend that it be deleted from the list of factors that must be considered by a judge in determining the above-the-guideline amount of temporary maintenance to be paid by payors earning over $500,000 per year. In addition, this issue is considered by the court when it makes a determination regarding child support.

[(xvi) marital property subject to distribution pursuant to subdivision five of this part;**]**[6]

[(xvii)**]** (xv) 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;

[(xviii)**]** (xvi) 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

[(xix)**]** (xvii) any other factor which the court shall expressly find to be just and proper.

(b) In any decision made pursuant to this subparagraph, the court shall set forth the factors it considered and the reasons for its decision. Such written order may not be waived by either party or counsel.

(3) Notwithstanding the provisions of this paragraph, where the guideline amount of temporary maintenance would reduce the payor's income below the self-support reserve for a single person, the presumptive amount of the guideline amount of temporary maintenance shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no temporary maintenance is awarded.

d. The court shall determine the guideline duration of temporary maintenance by considering the length of the marriage. Temporary maintenance shall terminate upon the issuance of the final award of maintenance or the death of either party, whichever occurs first.

e. (1) The court shall order the presumptive award of temporary maintenance in accordance with paragraphs c and d of this subdivision, unless the court finds that the presumptive award is unjust or inappropriate and adjusts the presumptive award of temporary maintenance accordingly based upon consideration of the following factors:

(a) the standard of living of the parties established during the marriage;

(b) the age and health of the parties;

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[6] ***Comment and recommended deletion:*** Equitable distribution cannot be a consideration when awarding temporary maintenance. It appropriately appears as part of the "post-divorce maintenance awards" section of the new law. See App. B, n. 2.

(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;**]**[7]

[(o)**]** (n) 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)**]** (o) 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)**]** (p) any other factor which the court shall expressly find to be just and proper.

(2) Where the court finds that the presumptive award of temporary maintenance is unjust or inappropriate and the court adjusts the presumptive award of temporary

[7] ***Comment and recommended deletion:*** See App. B, n. 6.

maintenance pursuant to this paragraph, the court shall set forth, in a written order, the amount of the unadjusted presumptive award of temporary maintenance, the factors it considered, and the reasons that the court adjusted the presumptive award of temporary maintenance. Such written order shall not be waived by either party or counsel.

(3) Where either or both parties are unrepresented, the court shall not enter a temporary maintenance order unless the unrepresented party or parties have been informed of the presumptive award of temporary maintenance.

[f. A validly executed agreement or stipulation voluntarily entered into between the parties in an action commenced after the effective date of this subdivision presented to the court for incorporation in an order 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. 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. Such provision may not be waived by either party or counsel. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the presumptive award of temporary maintenance provided such agreements or stipulations comply with the provisions of this subdivision. The court shall, however, retain discretion with respect to temporary, and post-divorce maintenance awards pursuant to this section. 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.**]**[8]

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[8] ***Comment and recommended deletion:*** While perhaps appropriate for final orders, this requirement is unduly burdensome and goes far beyond what is required under the CSSA with respect to temporary orders. We suggest that the paragraph be deleted in its entirety and, as an alternative, that the parties be required to come to the preliminary conference with completed temporary maintenance worksheets, which can also include a portion addressing deviation and any agreement to deviate.

[g.] f. When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order the 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. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered or obtained evidence.

[h.] g. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of this subdivision, brought pursuant to this article, the temporary maintenance guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

[i. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in this subdivision.] [9]

§ 2. This act will take effect immediately.

[9] ***Comment and recommended deletion:*** Barriers to remarriage only relate to final orders of maintenance. Since temporary orders of maintenance will only be valid during the pendency of the divorce case, the parties would not be in a position to remarry before the divorce is final.