

Amended Memorandum in Opposition

FAMILY LAW SECTION

FLS #6-B

May 22, 2014

S. 7266
A.9606

By: Sen. Bonacic
By: M of A Weinstein
Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: 60 days after becoming law

AN ACT to (a) amend the Domestic Relations Law (“DRL”) and the Family Court Act in relation to the amount and duration of maintenance/spousal support.

LAW AND SECTIONS REFERRED TO: DRL §§ 236, 248, FCA § 412

THE FAMILY LAW SECTION OPPOSES THIS BILL

The Family Law Section of the New York State Bar Association (“the Section”) (with almost 3,000 members) strongly opposes this bill regarding Temporary and Permanent Maintenance Awards (the “Bill”) for the following reasons:

1. The durational formula of maintenance in the Bill, as reflected in the below chart, will result in awards that significantly exceed the length of maintenance typically granted by New York courts and agreed upon by spouses in negotiated agreements:

Years of Marriage	Maintenance Length
0 UP TO AND INCLUDING 5 YEARS	30% of marriage length
MORE THAN 5, UP TO AND INCLUDING 7.5 YEARS	40% of marriage length
MORE THAN 7.5, UP TO AND INCLUDING 10 YEARS	50% of marriage length
MORE THAN 10, UP TO AND INCLUDING 12.5 YEARS	60% of marriage length
MORE THAN 12.5, UP TO AND INCLUDING 15 YEARS	70% of marriage length
MORE THAN 15, UP TO AND INCLUDING 17.5 YEARS	80% of marriage length
MORE THAN 17.5, UP TO AND INCLUDING 20 YEARS	90% of marriage length
MORE THAN 20, UP TO AND INCLUDING 25 YEARS	100% of marriage length
MORE THAN 25 YEARS	NONDURATIONAL

2. Further, the formula is arbitrarily based solely on the length of the marriage. The New York State Law Revision Commission (the “Commission”) studied this issue in depth and recommended in its Final Report on Maintenance Awards in Divorce Proceedings dated May 15, 2013 that the duration of final maintenance be left to the sound discretion of the court based on a variety of relevant factors, such as the length of the marriage, the time necessary for the recipient to obtain gainful employment, the normal retirement ages of the parties, and their health and ages. The adoption of the formula approach to the duration of post-divorce maintenance contained in the Bill will spur more litigation, increase costs to litigants and overburden an already burdened court system.
3. In addition, the durational formula does not provide for the termination of maintenance upon the retirement of the payor spouse. Thus, for example, the formula would require a 60 year old payor spouse married for 25 years to pay lifetime maintenance despite his or her retirement and the lack of any income other than investment income from retirement accounts divided in the divorce (investment income which the payee spouse presumably receives as well).
4. The Bill’s income “cap” of \$300,000 of payor’s income is too high and will lead to inequitable results, particularly where the payor has a significant child support obligation as well. The Commission recommended using the same “cap” as found in the Child Support Standards Act (“CSSA”), which was \$136,000 at the time, and which has now been increased to \$141,000. We similarly believe that to avoid inequity, the appropriate “cap” is \$141,000.

By way of example of such unjust results, we have attached four scenarios. In each scenario, we assumed the existence of two young children who will receive child support based on the CSSA formula, and \$15,000 in annual child care costs (except that Scenario 4 assumes \$5,000 in annual child care costs). Per the CSSA, we charged the non-custodial parent with his or her pro-rata share of this expense and awarded it to the custodial parent as additional child support. We ignored unreimbursed medical expenses and the cost of medical insurance, even though they are mandatory CSSA add-on expenses to be paid pro-rata by the parties based on their respective incomes.

- a) In Scenario I, John earns \$130,000, Mary earns \$45,000, and she has residential custody of the parties’ two children. Applying the Bill’s maintenance guidelines formula and the CSSA, John would be left with only **\$36,294** in after-tax funds for his own support and household expenses, while Mary would have **\$94,390** in after-tax funds for her and the two children (\$79,390 after \$15,000 child care payment, leaving her with 69% of the after-tax cash after child care is paid).

- b) In Scenario II, Mary earns \$150,000, John earns \$70,000, and he has residential custody of the parties' two children. After application of the maintenance guidelines and CSSA formula, Mary would be left with only **\$47,508** in after-tax cash for her own support and household expenses, while John would have **\$110,595** in after-tax funds for him and the two children (\$95,595 after \$15,000 child care payment, leaving him with 67% of the after-tax cash after child care is paid).
- c) In Scenario III, Jane earns \$200,000, Joe earns \$100,000, and he has residential custody of the parties' two children. After application of the maintenance guidelines and CSSA formula, Jane would be left with only **\$66,738** in after-tax cash for her own support and household expenses, while Joe would have **\$140,376** in after-tax funds for him and the two children (\$125,376 after \$15,000 child care payment, leaving him with 65% of the after-tax cash after child care is paid).
- d) In Scenario IV, Joe earns \$50,000, Jennifer earns \$15,000, and she has residential custody of the parties' two children. After application of the maintenance guidelines and CSSA formula, Joe would be left with only **\$17,664** in after-tax cash for his own support and household expenses, while Jennifer would have **\$42,343** in after-tax funds for her and the two children (\$37,343 after \$5,000 child care payment, leaving her with 68% of the after-tax cash after child care is paid).

Given all the above, on behalf of our members throughout the State whose full-time work includes the representation of mothers and fathers in child support matters (not all of which are litigated), we urge you to reconsider this Bill, which may have detrimental consequences for many hard-working New Yorkers who support their families to the best of their ability, but who also are entitled to support themselves.

Based on the foregoing, the Family Law Section **STRONGLY OPPOSES** this legislation.

Memorandum prepared by: Benjamin E. Schub, Esq.

Chair of the Section: Pamela M. Sloan, Esq.

SCENARIO I

AFTER-TAX CASH - HIGHLIGHTS (Annual Amounts)

Last Name: Doe

2014

	John	Mary
1 Salary	130,000	45,000
2 Self-Employment Income	0	0
3 Interest and Dividends	0	0
4 Other Cash Income	0	0
5 Total Cash Income	130,000	45,000

SUPPORT

6 Child Support Paid	(34,876)	0
7 Spousal Spt (Maintenance/Alimony)	(23,410)	23,410
8 Non-Taxable Maintenance	0	0

DEDUCTIONS FROM CASH

9 Federal Income Tax	(20,179)	(3,272)
10 Soc Sec/Self Employment Tax	(9,139)	(3,443)
11 State & Local Income Tax	(6,102)	(2,181)
12 Retirement Contributions	0	0
13 Other Cash Items	0	0
14 Cash Before Child Support Received	36,294	59,514
15 Child Support Received	0	34,876
16 Cash to Meet Living Expenses	36,294	94,390
17 Required Cash (Budget)	0	0
18 Over/Under Budget	36,294	94,390
19 Share of Total Cash	27.8%	72.2%

Comments:

Assumes 2 children, \$15,000 in annual child care expenses. \$34,876 of child support includes John's pro rata share of child care expenses.

SCENARIO II

AFTER-TAX CASH - HIGHLIGHTS (Annual Amounts)

Last Name: Doe

2014

	Mary	John
1 Salary	150,000	70,000
2 Self-Employment Income	0	0
3 Interest and Dividends	0	0
4 Other Cash Income	0	0
5 Total Cash Income	150,000	70,000

SUPPORT

6 Child Support Paid	(40,617)	0
7 Spousal Spt (Maintenance/Alimony)	(17,441)	17,441
8 Non-Taxable Maintenance	0	0

DEDUCTIONS FROM CASH

9 Federal Income Tax	(26,923)	(8,485)
10 Soc Sec/Self Employment Tax	(9,429)	(5,355)
11 State & Local Income Tax	(8,082)	(3,623)
12 Retirement Contributions	0	0
13 Other Cash Items	0	0
14 Cash Before Child Support Received	47,508	69,978
15 Child Support Received	0	40,617
16 Cash to Meet Living Expenses	47,508	110,595
17 Required Cash (Budget)	0	0
18 Over/Under Budget	47,508	110,595
19 Share of Total Cash	30.0%	70.0%

Comments:

Assumes 2 children, \$15,000 in annual child care expenses. \$40,617 of child support includes Mary's pro rata share of annual child care expenses.

SCENARIO III

AFTER-TAX CASH - HIGHLIGHTS (Annual Amounts)

Last Name: Doe

2014

	Jane	Joe
1 Salary	200,000	100,000
2 Self-Employment Income	0	0
3 Interest and Dividends	0	0
4 Other Cash Income	0	0
5 Total Cash Income	200,000	100,000

SUPPORT

6 Child Support Paid	(52,038)	0
7 Spousal Spt (Maintenance/Alimony)	(20,528)	20,528
8 Non-Taxable Maintenance	0	0

DEDUCTIONS FROM CASH

9 Federal Income Tax	(39,125)	(18,107)
10 Soc Sec/Self Employment Tax	(10,154)	(7,650)
11 State & Local Income Tax	(11,417)	(6,433)
12 Retirement Contributions	0	0
13 Other Cash Items	0	0
14 Cash Before Child Support Received	66,738	88,338
15 Child Support Received	0	52,038
16 Cash to Meet Living Expenses	66,738	140,376
17 Required Cash (Budget)	0	0
18 Over/Under Budget	66,738	140,376
19 Share of Total Cash	32.2%	67.8%

Comments:

Assumes 2 children, \$15,000 in child care expenses. \$52,038 of child support includes Jane's pro rata share of child care expenses.

SCENARIO IV

AFTER-TAX CASH - HIGHLIGHTS (Annual Amounts)

Last Name: Doe

2014

	Joe	Jennifer
1 Salary	50,000	15,000
2 Self-Employment Income	0	0
3 Interest and Dividends	0	0
4 Other Cash Income	0	0
5 Total Cash Income	50,000	15,000

SUPPORT

6 Child Support Paid	(12,615)	0
7 Spousal Spt (Maintenance/Alimony)	(10,159)	10,159
8 Non-Taxable Maintenance	0	0

DEDUCTIONS FROM CASH

9 Federal Income Tax	(4,000)	5,717
10 Soc Sec/Self Employment Tax	(3,825)	(1,148)
11 State & Local Income Tax	(1,737)	0
12 Retirement Contributions	0	0
13 Other Cash Items	0	0
14 Cash Before Child Support Received	17,664	29,728
15 Child Support Received	0	12,615
16 Cash to Meet Living Expenses	17,664	42,343
17 Required Cash (Budget)	0	0
18 Over/Under Budget	17,664	42,343
19 Share of Total Cash	29.4%	70.6%

Comments:

Assumes 2 children, \$5,000 in annual child care expenses. \$12,615 of child support includes Joe's pro rata share of child care expenses.