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Memorandum in Opposition

FAMILY LAW SECTION

FLS # 3-A

May 1, 2014

S. 6473
A. 6728-B

By: Sen. Hassell-Thompson
By: M. of A. Paulin
Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to (a) amend the Domestic Relations Law ("DRL") and the Family Court Act in relation to temporary and final maintenance awards; (b) repeal Domestic Relations Law § 248; and (c) abolish the equitable distribution of enhanced earnings in matrimonial actions.

THE FAMILY LAW SECTION OPPOSES THIS BILL

This Bill (the "Bill") primarily seeks to correct flaws in the temporary maintenance guidelines codified in DRL § 236B (5-a), and to establish guidelines for post-divorce maintenance awards in matrimonial actions. The Family Law Section believes that the Bill in its current form is fundamentally flawed and must be amended prior to final passage and enactment into law. The Section urges that any bill addressing this issue should include among its provisions the recommendatons outlined below.

The Bill should be amended to adopt the material recommendations of the New York State Law Revision Commission Final Report on Maintenance Awards in Divorce Proceedings dated May 15, 2013 (pp. 27-28) (the "LRC Report"), as well as the relevant recommendations of the New York State Bar Association's Family Law Section as reflected in its Report to the Law Revision Commission dated November 22, 2010.

The Family Law Section opposes this Bill for a number of reasons, including but not limited to its failure to lower the income cap to a reasonable amount of income (the Law Revision Commission recommended $136,000 of the parties' combined income), the arbitrariness of its proposed schedule for the duration of post-divorce maintenance award, and its attempted repeal of DRL § 248 in order to extend maintenance awards after the remarriage of a maintenance payee.

With regard to temporary maintenance, the Bill should be amended to provide an income cap of $136,000 of combined parental income for the guideline calculation of temporary maintenance. The Law Revision Commission noted that such a cap would

effectuate the same legislative intent that led to the adoption of the CSSA guidelines; namely, to "include the vast majority of New Yorkers" and to leave "only exceptional income cases to potentially be determined outside of the presumptively correct CSSA percentages." The proposed $300,000 cap of payor's income alone is far too high and would severely limit the flexibility and discretion of the court to fashion appropriate maintenance awards in higher income cases depending on the circumstances of each case. As noted in the Law Revision Commission Report, in year 2008, 94.8% of individual income tax return filers (including those filing joint returns) reported income of less than $200,000; as such, there is no logical reason to impose a high cap of $300,000 of payor income on maintenance awards, particularly when the purported chief reason for the cap is to protect "low and middle income parties. Where the combined parental income exceeds $136,000, the court should be required to determine the amount of temporary maintenance by applying the formula to the first $136,000 of combined parental income; and have discretion to award additional temporary maintenance for the combined parental income above the income cap through consideration of the factors listed in paragraph h of subdivision (5-a). It should be further clarified that (a) the duration of temporary maintenance cannot exceed the duration of the marriage, which is a concern with respect to marriages of brief duration; and (b) temporary maintenance shall terminate upon an order of the court modifying the award based on a substantial change in circumstances (in addition to death or a post-divorce maintenance award). Additional language should be added to factor (k) in paragraph h to reflect *the need of the party seeking temporary maintenance* to maintain the standard of living established during the marriage. Paragraph k regarding the court's authority to allocate the responsibilities of the respective spouses for the family's expenses during the proceeding should be revised to clarify that other than maintaining certain insurance coverages, the temporary maintenance award is presumed to be the limits of the payor's financial responsibilities towards the payee. See Kharia v. Khaira, 93 A.D.3d 194 (1st Dept. 2012).

With respect to post-divorce maintenance awards, the Bill should be amended to include the same $136,000 income cap discussed above to the post-divorce maintenance guidelines award, as well as the same discretionary application of the factors to combined income above $136,000. A higher cap would be too restrictive and unfair in cases where the parties have substantial assets and income, since there are significantly more variables and options for a court to consider when dividing assets and awarding maintenance and child support. The durational formula of the post-divorce maintenance guidelines award should be eliminated in favor of a number of factors to be considered by the court – these include the factors cited by the LRC Report and other relevant factors currently contained in the statute (DRL § 236B(6)). The Bill also should be amended to indicate that post-divorce maintenance shall terminate upon remarriage.

The provisions of the Bill amending DRL § 236B(9) regarding a payor's ability to modify the post-divorce maintenance award after remarriage of the payee or after the payor's retirement should be stricken as unnecessary given the termination of maintenance upon remarriage.

Section 412 of the Family Court Act, as amended by chapter 281 of the laws of 1980, should be amended to mirror the above provisions of temporary maintenance (DRL § 236B(5-a)).

The Bill amends DRL § 236B(1) to provide that a maintenance award shall not terminate upon the recipient's valid or invalid marriage. This section should be stricken.

The Bill eliminated the equitable distribution of enhanced earnings capacity. Language should be added to reflect that the court shall consider such enhanced earning capacity with respect to the duration of a post-divorce maintenance award.

The Bill would repeal Section 248 of the DRL,which provides for the termination of post-divorce maintenance awards upon remarriage. Thus, under the Bill's provisions, a payor could be left in the unfair position of indirectly supporting the payee's new spouse, or having to commence expensive litigation to remedy that inequity. Moreover, the public policy of this state, as codified in Family Court Act § 412, is that "a married person is chargeable with the support of his or her spouse . . ." The courts should not be left to struggle with the possibility that upon a maintenance recipient's remarriage, there will be two individuals chargeable by law with the support of the maintenance payee – his or her new spouse and former spouse. As such, the provisioin that would repeal Section 248 should be stricken from the bill.

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

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