

What a Difference a Year Makes: Changes to the Spousal Support Law and the End of *O'Brien*

By Lee Rosenberg



At the end of 2014's New York State Legislative Session, leaders of the Matrimonial Bar fought off what was intended to be a *fait accompli* on the passage of formulaic maintenance guidelines which made the much-criticized temporary guidelines worse and would have compounded the existing morass with an even worse set of final support guidelines includ-

ing onerous durational mandates, as well as other serious flaws. The problems with that proposed legislation,¹ and vociferous opposition, were well documented,² but the air remained filled with the feeling that legislation in this area was inevitable. A year later—some five years after the also-maligned temporary support statute was initially passed³—we have a new statute,⁴ passed by the Legislature on June 24, 2015 and signed by Governor Andrew M. Cuomo on September 25, 2015. That law is a product of foresight, pro-activism, and compromise which corrects prior drafting errors, eliminates flaws in the temporary support statute, creates a template for fairness, supports judicial discretion, allows for good lawyering, and finally eliminates the concept of enhanced earning capacity fabricated nearly 30 years ago out of the quagmire of the *O'Brien*⁵ case.

Certainly there have been already some fine discourses already published on the impact and meaning of the new law by many of our respected colleagues.⁶ The major aspects are also referenced in this issue's *Recent Legislation, Decisions and Trends in Matrimonial Law* column. Without necessarily reinventing the wheel then, the essential changes brought about by the statute will, of course, be discussed below and no doubt going forward. Not to be overlooked, however, are two very salient points:

1. That we as lawyers have an obligation to, and actually can, create positive change and have the ability to continue to shape this area of law for the good of the bar, the bench, and the public.
2. That the need to preserve judicial discretion and not relegate our system of justice to cookie-cutter/one-size-fits-all formulas for the sake of political expediency or otherwise remains an important and noble goal.

The enactment of this new law serves both of these purposes in exemplary fashion.

Guidance with the Preservation of Judicial Discretion

In *Osborn v. Bank of the United States*,⁷ Chief Justice John Marshall wrote of the court's discretion,

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

Over 200 years before *Osborn*, Justice Edward Coke opined on the concept in *Rooke's Case*,⁸

Discretion is a science of understanding, to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their men's will and private affections.

Far more recently in *Human Dimension in Appellate Judging: a Brief Reflection on a Timeless Concern*,⁹ Judge Judith S. Kaye, discussing views on discretion, including those of Chief Judges Benjamin N. Cardozo and Charles D. Breitler, stated,

To my mind, the mere statement of the proposition that human values must be abjured by appellate judges exposes its fallacy: how but by the application of some measure of human understanding and contemporary experience could a judge today resolve the unprecedented legal issues that crowd the court dockets? Even if the law were declared dead, always to remain static, the problems confronted by the courts are people's problems, and the infinite ingenuity of the human mind seems never to concoct the identical situation twice. Immediately there is judicial handtailoring to be done, often requiring choices among sound

alternatives, simply to fit existing precedents to the very next suit.

The pull and tug between discretion and *stare decisis* has existed for some time.¹⁰ Discretion is needed to address the realities of each individual matter while simultaneously precedents provide the previously charted courses and directives through which subsequent litigants, lawyers, and judges must navigate—predictability with flexibility. Discretion is, of course then, not unfettered. In the soon to be obsolete *O'Brien* case, the Court of Appeals *without precedent* used the reforms of DRL §236B to create the fiction of enhanced earning capacity to right a perceived wrong—asserting that such relief was within the statute’s intent, but without considering the impact of the real world.

Reform of section 236 was advocated because experience had proven that application of the traditional common-law title theory of property had caused inequities upon dissolution of a marriage. The Legislature replaced the existing system with equitable distribution of marital property, an entirely new theory which considered all the circumstances of the case and of the respective parties to the marriage (Assembly Memorandum, 1980 N.Y.Legis. Ann., at 129-130). Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker (*id.*, at 130; see, Governor’s Memorandum of Approval, 1980 McKinney’s Session Laws of N.Y., at 1863). Consistent with this purpose, and implicit in the statutory scheme as a whole, is the view that upon dissolution of the marriage there should be a winding up of the parties’ economic affairs and a severance of their economic ties by an equitable distribution of the marital assets. Thus, the concept of alimony, which often served as a means of lifetime support and dependence for one spouse upon the other long after the marriage was over, was replaced with the concept of maintenance which seeks to allow “the recipient spouse an opportunity to achieve independence” (Assembly Memorandum, 1980 N.Y.Legis. Ann., at 130).

The determination that a professional license is marital property is also consistent with the conceptual base upon which the statute rests.¹¹

Notably, the *O'Brien* court eschewed the idea of rehabilitative maintenance or reimbursement for direct

financial contributions instead of the award of the “EEC,” finding that “(t)he statute does not expressly authorize retrospective maintenance or rehabilitative awards and we have no occasion to decide in this case whether the authority to do so may ever be implied from its provisions (but see, *Cappiello v. Cappiello*, 66 N.Y.2d 107, 495 N.Y.S.2d 318, 485 N.E.2d 983).” Of course, those concepts are now well within the lexicon. Further, even in concurrence, Judge Bernard S. Meyer warned of the potential for unfairness in its decision and urged legislative reconsideration—an act that waited nearly 30 full years to occur.

The equitable distribution provisions of the Domestic Relations Law were intended to provide flexibility so that equity could be done. But if the assumption as to career choice on which a distributive award payable over a number of years is based turns out not to be the fact (as, for example, should a general surgery trainee accidentally lose the use of his hand), it should be possible for the court to revise the distributive award to conform to the fact. And there will be no unfairness in so doing if either spouse can seek reconsideration, for the licensed spouse is more likely to seek reconsideration based on real, rather than imagined, cause if he or she knows that the nonlicensed spouse can seek not only reinstatement of the original award, but counsel fees in addition, should the purported circumstance on which a change is made turn out to have been feigned or to be illusory.¹²

So, in the enactment of the new law, the interim and final support aspects of the statute, *inter alia*, have brought the cap upon which the presumptive calculations are to be made down from the present \$543,000 to \$175,000 of the payor’s income¹³—an amount which encompasses the income of over 90% of New York residents; it takes into consideration the payment of child support by altering the percentages if child support is also being paid; it requires the court to consider carrying charge expenses; it permits support to be awarded where income is over the cap as well as the ability to deviate up to the cap based on *discretionary* factors which are already familiar—including the contributions and services of the payee as a spouse, parent, wage earner and homemaker *and to the career or career potential of the other party*; it defines the length of the marriage as date of marriage to the date of commencement of the action; it provides for maintenance to be calculated before child support as the maintenance will be subtracted from the payor’s income and added to the payee’s income when computing child support; it addresses what is to happen if the payor of child support is also the recipient of maintenance; it provides *discretion* in the length of temporary maintenance and that all such spousal support will terminate upon death and post-divorce remarriage; it provides for modification which

may be based on the retirement of the payor spouse and allows for the consideration of retirement assets and eligibility age of both parties on a final award; it permits agreements to be entered into without having to spell out calculations or reasons for the parties' own deviation from the presumptive or advisory amounts; it permits the court to issue a decision on the record as well as in writing; it provides for reasonable and *discretionary* percentages for duration of support which are advisory only in nature and requires the court to consider the listed factors in its decision; it permits non-duration maintenance in an appropriate case.

The new law also brings the Family Court Act in line with the Domestic Relations Law; makes the remarriage provisions of DRL §248 for support termination gender neutral; and, of course, brings our long statewide nightmare of enhanced earning capacity to an end—at least for those whose *new actions are commenced* within the enactment dates of the law—120 days post-enactment for all aspects except temporary maintenance, which is 30 days therefrom. The law does not apply to actions already commenced or commenced outside the enactment periods.

A Pro-Active Effort to Effectuate Positive Legislative Change

As with the legislative enactments of 2010 and the attempt to foist additional bad law upon New York's populace last year, misguided and misunderstood Bills were proposed last-minute and under the radar. They were presented to most of the matrimonial bar as *fait accompli* under the guise of altruism, but without any of the underlying facts and law to lend support to their provisions. The 2014 attempt to "correct" 2010's interim support law, and add even more ill-conceived provisions and onerous mandates, was beaten back with a vengeance up to the 11th hour. What arose from that battle was a coalition of all concerned and on all sides of the issue. Listening to each other and using facts and fairness, it created its own proposal under the auspices of the Chief Administrative Judge's Matrimonial Practice Advisory and Rules Committee chaired by Hon. Jeffrey S. Sunshine.

The coalition of the New York State Bar Association Family Law Section (Chair Alton L. Abramowitz and Eric Tepper), the New York State Maintenance Standards Coalition (Emily Ruben and Kate Wurmfeld), the Women's Bar Association of the State of New York (Sandra Rivera and Michelle Haskin), and the New York Chapter of the American Academy of Matrimonial Lawyers (Elena Karabatos) with Justice Sunshine analyzed, compromised, discussed, debated, and crafted this Legislation with the goal of reaching common ground that no Legislator would have independently fashioned. In essence, we as matrimonial/family lawyers did what we encourage our

clients to do in settling cases—chart our own course and fashion our own remedy. It is a template to be proud of and encouraged. We have the ability and a voice to right wrongs before they occur—if we are vigilant and proactive. It is the power we have as lawyers when we present arguments at court and the greater power we have as Bar Associations when we band together.

The Result

What we then have—subject, of course, to good lawyering and fair judging—is an amalgam of statutory guidance and real-life-based discretion which was sorely needed, all born of a pro-active effort to fashion good law for the common benefit. Just what the doctor (O'Brien notwithstanding) ordered.

Endnotes

1. S7266/A9606 (2014).
2. See Joel Stashenko, *Maintenance Bill's Formulaic Approach Drew Opposition*, NYLJ July 7, 2014; Sophia Hollander, *Legislator Seeks to Fix New York State's Divorce Law*, Wall Street Journal, June 11, 2013; New York State Law Revision Commission, *Final Report on Maintenance Awards in Divorce Proceedings*, May 15, 2013.
3. See *Khaira v. Khaira*, 93 AD3d 194 (1st Dept 2012); Lee Rosenberg, *Multiple Flaws Abound in New Interim Spousal Support Statute*, NYLJ Feb. 25, 2011; Timothy M. Tippins, *Temporary Maintenance: New Rules, New Problems*, NYLJ Nov. 4, 2010; Elliot D. Samuelson, *New York Matrimonial Law Enters the Modern World*, 42 Family Law Review 2 (Fall 2010); Joel Stashenko, *No-Fault Companion Bill Raises New Concerns*, NYLJ Aug. 16, 2010.
4. Ch. 269 Laws of the State of New York (2015).
5. *O'Brien v. O'Brien*, 66 NY2d 576 (1985).
6. See e.g., A. Abramowitz and E. Karabatos, *Working Under the New Guidelines for Spousal Maintenance*, NYLJ (August 21, 2015); S. Eisman and H. Simon, *State Legislature Passes Landmark Bill on Spousal Support*, NYLJ (July 16, 2015); Nancy E. Gianakos, *Post-No-Fault Maintenance Awards: Will Predictability of Results Trump Equity*, 47 Family Law Review 1 (Spring 2015).
7. 22 U.S. 738 (1824).
8. 5 Co. Rep. 99b (1598).
9. Cornell Law Review, Vol. 73 at 1007 (1988).
10. See Benjamin N. Cardozo, *The Nature of the Judicial Process*, The Stores Lectures Delivered at Yale University, New Haven Yale University Press (1921).
11. *O'Brien v. O'Brien*, 66 NY2d 576 (1985).
12. *O'Brien v. O'Brien*, 66 NY2d 576 (1985), Meyer, J. (concurring).
13. Subject to CPI increases as under the existing child support and maintenance law.

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