

Memorandum in Opposition

FAMILY LAW SECTION

FLS #6-C

June 16, 2014

A.9606-A
S. 7266-A

By: M of A Weinstein
By: Senator Bonacic
Assembly Committee: Judiciary
Senate 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 duration and amount payable for temporary and post-divorce maintenance, and spousal support.

RULE & SECTION OF LAW REFERRED TO: DRL §§ 236, 248, FCA § 412

THE FAMILY LAW SECTION OPPOSES THIS BILL

Executive Summary:

This amended bill (the “Amended Bill”) is inherently flawed because the newly proposed \$200,000 cap on payor’s income is virtually meaningless due to the way in which the cap is structured. Under the Amended Bill, courts can simply ignore the \$200,000 income cap and award a guidelines amount of maintenance on the full incomes of the parties without having to explain their reasoning in a written decision. Thus, the \$200,000 income cap is illusory, and the Amended Bill will encourage more litigation in cases above the income cap, since payee spouses will litigate their presumptive right to a guidelines amount of support. There is a simple solution to the above problem. **The Amended Bill should be re-written to mirror the CSSA language of the Child Support Standards Act (the “CSSA”); that is, where the payor’s income exceeds the income cap, the court shall determine the amount of maintenance (temporary and final) for the amount of payor’s income in excess of the income cap through consideration of the factors set forth in the statute, and shall set forth, in a written order, the factors it considered and the reasons for its decision to exceed the income cap.** Furthermore, the modified durational formula of maintenance in the Amended Bill would still result in awards that significantly exceed the length of maintenance typically granted by New York courts or agreed upon by spouses in negotiated agreements. A suggested alternative durational formula is set forth below.

Analysis

The Family Law Section of the New York State Bar Association (“the Section”) (with almost 3,000 members) strongly opposes the Amended Bill¹ regarding Temporary and Permanent Maintenance Awards for the following reasons:

1. Guidelines amount of maintenance: the newly proposed \$200,000 income cap on payor’s income in the Amended Bill is virtually meaningless because of an inherent flaw in the way the cap is structured.² Under the Amended Bill, where the payor’s income exceeds the newly-proposed \$200,000 income cap, the court may either (a) award the guideline amount of support³ based on the total incomes of the payor and payee; or (b) award the guideline amount of support based on the capped \$200,000 of payor’s income and the income of the payee, plus an amount determined by consideration of the deviation factors enumerated in the Amended Bill. If the court chooses not to award maintenance on the total incomes of the parties (i.e., without writing a decision explaining the factors it considered), it must set forth in a written decision an explanation of the reasons for its decision and the factors it considered.

Thus, an award of maintenance calculated on the full incomes of both parties is considered a “guidelines” amount of support not requiring a written decision by the court. Only where the court decides not to award the guidelines amount on the total incomes of both parties is a written decision required based on the enumerated deviation factors.

As such, the Amended Bill in its current form is an invitation to the courts to ignore the \$200,000 income cap and award a guidelines amount of maintenance on the full incomes of the parties without having to explain their reasoning in a written decision (i.e., because it is easier and less time consuming). Moreover, the Amended Bill will encourage more litigation in cases above the income cap, since payee spouses will litigate their presumptive right to a guidelines amount of support.

In stark contrast, under the CSSA, the court may not award any child support on the combined parental income over the current \$141,000 cap without a written decision explaining its reasons, based on the deviation factors found in the statute.

¹ The prior bill was A9606 (same as S7266).

² The Family Law Section strongly supports a meaningful cap on the income utilized in the formula for the reasons expressed in our prior Memorandum in Opposition FLS#6-B dated May 22, 2014.

³ i.e., the lesser of: a) 30% of payor’s income less 20% of payee’s income, or b) 40% of the combined income less the payee’s income.

There is a simple solution to the above problem. **The Amended Bill should be re-written to mirror the CSSA language; that is, where the payor’s income exceeds the income cap, the court shall determine the amount of maintenance (temporary and final) for the amount of payor’s income in excess of the income cap through consideration of the factors set forth in the statute, and shall set forth, in a written order, the factors it considered and the reasons for its decision to exceed the income cap.**

In its current form, the Amended Bill will encourage more litigation in cases where the payor spouse earns in excess of \$200,000, while the above suggested revision to the bill will not prejudice those earning less than the income cap.

2. Modified Durational Formula: Notwithstanding the slight decrease in the duration of maintenance from the prior version of the original bill (i.e., A9606/S7266), the modified durational formula of maintenance in the Amended Bill, as reflected in the below chart, would still result in awards that significantly exceed the length of maintenance typically granted by New York courts or agreed upon by spouses in negotiated agreements:

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

The Family Law Section opposes a durational formula based solely on the length of the marriage, and believes that the duration of final maintenance should 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. However, if a presumptive durational formula in New York State is going to be adopted, we would recommend the percentages reflected in the below chart, which maintenance must terminate upon retirement of the payor spouse.

NYSBA Family Law Section Recommended Duration

Years of Marriage	Maintenance Length
0 UP TO AND INCLUDING 5 YEARS	Discretionary based on factors
MORE THAN 5, UP TO AND INCLUDING 10 YEARS	20%-50% of marriage length
MORE THAN 10, UP TO AND INCLUDING 15 YEARS	25%-50% of marriage length
MORE THAN 15, UP TO AND INCLUDING 20 YEARS	30%-50% of marriage length
MORE THAN 20, UP TO AND INCLUDING 25 YEARS	40%-50% of marriage length
MORE THAN 25 YEARS	50% of marriage length, or more in the discretion of the court. If award exceeds 50% of marriage length, court must state factors relied upon in a written decision.
ALL MAINTENANCE MUST TERMINATE UPON RETIREMENT OF PAYOR SPOUSE	

The modified durational formula in the Amended Bill fails to provide for the termination of maintenance upon the retirement of the payor spouse. Rather, the Amended Bill would force a retired payor spouse to resort to litigation to demonstrate a substantial change in financial circumstances in order to modify his or her maintenance obligation. This inequity in the Amended Bill would leave the payor spouse no choice but to spend down his or her limited retirement funds in court proceedings in an attempt to modify support. A final bill, to be fair and equitable, must provide for the termination of maintenance upon the retirement of the payor spouse.

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

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PREPARED BY FAMILY LAW SECTION COMMITTEE ON LEGISLATION