Testimony of Jill Laurie Goodman,

Co-Chair of the Lawyers Committee Against Domestic Violence,

Before the New York State Senate

May 6, 2010

Thank you for the opportunity to speak with you today about matrimonial reform. I am here on behalf of the Lawyers Committee Against Domestic Violence, a group of 150 lawyers in the metropolitan area whose practices include advocacy on behalf of domestic violence victims. The Lawyers Committee Against Domestic Violence has been a strong proponent of divorce reform for many years. Systematic abuse by a spouse often leaves a victim weakened economically as well as other ways, and many victims, including those with children, flee their abusers, literally, with the clothes on their backs, so financial settlements in divorces are a critical concern for those representing domestic violence victims.

I will discuss principally one particular reform: the proposal for post-marital income guidelines. [1] Briefly, guidelines are a means of helping judges trying cases, as well as litigants attempting to settle them, reach fair and workable resolutions of the financial issues that are so important to victims of abuse as well as other divorcing spouses. The proposed guidelines address what is now called maintenance.

I am particularly pleased to be speaking at hearings that address not just one isolated measure but comprehensive reform. We all know that divorce in New York

---

[1] An appendix to this testimony lays out the case for post-marital income guidelines more fully.

takes too long and costs too much. The costs are both financial and emotional, and they are borne by families already in crisis. Increasing awards of interim attorneys' fees, one of the reforms being considered, will help level the playing field for some divorcing spouses. No fault divorce, the other of these reforms, is seen, rightly, as a means of shortening the process and diminishing conflict and acrimony.

But post-marital income guidelines may well have a greater impact on divorcing families than either of these other proposals. Most settlement discussions and most litigation address not grounds for divorce but money. Grounds matter only until the divorce happens and then they become largely irrelevant; the way assets and access to future income are divided can have profound impacts on people's lives for many years to come. Divorcing couples fight hard about money, with good reason, and it is those battles that lie at the heart of the nasty, expensive, and lengthy litigation that so plagues the New York State Courts that hear divorces.

The real battleground for financial issues is maintenance. Child support is determined by guidelines, similar to the proposed post-martial income guidelines, and these guidelines make child support claims fairly easy to resolve. The law on equitable distribution is clear enough to allow parties, for the most part, to anticipate how courts will rule. That leaves maintenance, for which outcomes are unpredictable and inconsistent. Attorneys trying to advise clients face a fairly incoherent body of law; cases with similar facts all too often reach divergent results. Spouses who may well be entitled to substantial maintenance and who may badly need maintenance for basic economic security have two choices: they can engage in the ritualized battle that is litigation or they can abandon their claim. In fact, many litigants have no real choice; litigation is expensive, and without considerable means or the luck to find an attorney to represent them without charging a fee, maintenance is mirage. Making interim attorneys fees more readily available would help some divorcing spouses but would do nothing to solve the problem of the terrible costs of divorce. Those who choose to litigate risk consuming the very assets needed by post-divorce households.

Using Post-marital Income Guidelines

The post-marital income guidelines clarify and simplify rules for dividing one particular asset of marital partnerships: future streams of income. These are the assets now reached, albeit haphazardly, by maintenance.

Calculating post-marital income awards would require a series of orderly steps. First, judges would look at numbers produced by two statutory formulas, one for the dollar amount of the award and one for duration for which the award would be paid. The formula for the dollar amount is a function of the incomes of the two parties, and the formula for the duration is a function of the time the parties have been married. Then, with these numbers as starting points, judges would decide whether in particular cases deviations from these initial numbers are appropriate. The legislation lists factors to guide judges but, in the end, the decision would be, as it is now, judicial. Judges would be required to explain their reasons for deviating in writing, as they must now for deviations from child support standards guidelines.

A statutory cap limits the impact of the legislation on couples with high incomes, whose divorces usually involve a somewhat different and complex set of financial considerations. A statutory floor protects low income spouses and frees them from post-marital income obligations.

Under the proposed legislation, not every divorce would result in a post-marital income award. The formula produces numbers above zero only when there is a substantial difference between the incomes of the two spouses. A spouse with an income that is above 40% of the combined income of both spouses would receive no award. Also, judges may decide that a deviation is appropriate and order no award, and, of course, divorcing couples are free to arrive at settlements without post-marital income awards.

Nor would awards necessarily last for a long time. Under the guidelines, short marriages would produce short awards. Post-marital income obligations in long marriages might be indefinite, but this is no change from the current statutory scheme, which allows nondurational maintenance awards. Judges would be able to vary the duration of the awards, as well as the amounts, and parties could craft their own the duration clauses in their agreements. Also, existing provisions in the Domestic Relations Law for modifying awards would allow judges to decrease or end post-martial income payments. For example, if a recipient of a post-marital income award remarries and the remarriage results in a substantial change in the recipient's economic outlook, a judge could modify the post-marital income award or eliminate it altogether.

Creating a Sound Basis for Matrimonial Awards

Post-martial income guidelines not only would create a clearer, simpler way of calculating awards and more consistent, predictable, and equitable results but also a sounder basis for deciding cases. Maintenance as it exits today is an anomaly. It is at odds with equitable distribution, which, when it was adopted as a remedy in the 1980 comprehensive divorce reform legislation, introduced into New York law the modern concept of marriage as a financial partnership. Although maintenance was also part of the 1980 divorce reforms, the legislature failed to take the logical step of drawing on the concept of marital partnerships in fashioning it. Instead the legislature simply tinkered with the old remedy of alimony, which was based on the traditional obligation of a husband to support his wife. The 1980 reforms renamed alimony maintenance; made it gender neutral rather than available only to a wife; allowed awards regardless of marital fault rather than only to a wife innocent of marital fault; and introduced durational awards that would last for a prescribed numbers of years rather than ending only on the remarriage of the former spouse receiving alimony or the death. These were substantial reforms but they incorporated into the new remedy of maintenance the outdated concept a status-based remedy.

Enacting post-martial income guidelines legislation would take New York matrimonial law into the twenty-first century by making the concept of an economic marital partnership the basis for both of the major financial remedies in the Domestic Relations Law. Subject to this way of thinking about marriages would be what are now called "marital assets," and therefore subject to equitable distribution, and future streams of income (in fact, the principal asset of most marriages), which are available currently to pay maintenance.

Post-marital income awards, viewed as a remedy for the break up of a marital partnership, can reasonably be understood as compensation for lost opportunities that flow from the divisions of labor that characterize most marriages. Commonly, even today, one spouse devotes more energy to a building a career and maximizing earning potential while the other spouse takes more responsibility for caring for the non-financial needs of the family. When children arrive, these divisions of labor become more pronounced, as one spouse cuts back on hours on the job, leaves the paid workforce, or simply adjusts career expectations to accommodate the need to be home at a fixed hour. These arrangements may work well for every one as long as the marriage lasts, but if the marriage dissolves the spouse who took prime responsibility for the family instead of devoting time to increasing earning potential may be left for the foreseeable future with greatly lowered financial expectations. Missed job opportunities are not easily recaptured. Lower income, less seniority, and smaller pension may follow spouses for the rest of their lives. On the other side of the ledger, the economic benefits for spouses who have devoted intense energies to a career also are often permanent.

Looked at from a slightly different perspective, the proposal for post-marital income guidelines recognizes that in a marital partnership the financial interests of spouses merge over time. Spouses forego some opportunities and embrace others because they are married, and their decisions about work and family inevitably are different from what they might have been were they single. When a marriage ends, partners are not merely older, and they have not merely given up the chance for different marital partners or an unencumbered life. They have had years or decades of making decisions based on assumptions about an on-going and presumably enduring relationship. When assumptions about the permanence of marital bonds prove false, financially disadvantaged spouses have good reason to expect to be able tap into shared assets, including future streams of income built during years of an economic partnership.

Conclusion

No single bill will solve all problems for New York's divorcing couples, and post-marital income guidelines are no magic bullet. Even with post-marital income guidelines in place, courts will have to resolve questions about the size of parties' incomes and the viability of claims for deviations from formula results, and some spouses will still try to turn the legal system into a tool for vindication or revenge. But the three reforms that are the subject of these hearings together will create a framework for making divorces in New York move more smoother and reach more equitable results for many, if not most, New Yorkers.

Appendix to testimony of Jill Laurie Goodman before the
New York State Senate
May 6, 2010

THE CASE FOR POST-MARITAL INCOME GUIDELINES

Completing the Divorce Reforms of 1980

In 1980, major reforms to New York's divorce laws created two new remedies: equitable distribution and maintenance.[1] Equitable distribution, which calls for dividing a couple's property on divorce, introduced into New York law the idea that marriage creates an economic partnership. Maintenance, the successor to traditional alimony, made periodic, post-marital payments from one spouse to another gender neutral and available to either party without regard to marital fault.[2] Like their counterparts in many jurisdictions at the time, proponents of New York's reform legislation believed that equitable distribution would be the principal means of untangling divorcing couples' assets. Short-term maintenance, necessary in some cases to "rehabilitate" a spouse who had been out of the workforce during the marriage,

---

[1] L. 1980 Ch. 281. This legislation also expanded New York's highly restrictive grounds for divorce beyond adultery to include, for example, abandonment and cruel and inhuman treatment, and introduced conversion divorces, which allow couples who have signed a separation agreement to get a divorce after a year's time without alleging fault.

[2] Memorandum from the Executive Chamber, June 19, 1980, in relation to Assembly Bill No. 6200-A: "The bill recognizes that the marriage relation is also an economic partnership. Upon its dissolution, property accumulated during the marriage should be distributed . . . In addition, it permits awards of maintenance to be made to meet the reasonable needs of a party without regard to gender."

along with a spouse's share of marital assets, were assumed to be an adequate substitute for traditional alimony in most cases.[3]

Although promising in theory, this scheme failed to work as its architects intended. The problems start with the reliance on equitable distribution, which presupposes divorcing couples have assets they can divide at the end of a marriage. In fact, most couples accumulate few assets of any substance that are available to divide, equitably or otherwise.[4] The principal investment of most marital partnerships is not in what New York law considers marital assets but rather in an income stream. The few marital assets divorcing couples do have, such as pensions, tend to be nonliquid. [5] This is not surprising, given the financial resources of most New York State households. The median income for New York families, according to census data, is about $52,000 a year. Fewer than one-fifth of the state's families enjoy incomes over $100,000; and only 3.5%

---

[3] *See, e.g.*, Uniform Marriage and Divorce Act, 308, 9A Unif. L. Ann. 161 (1979), which rejected traditional alimony in favor of the rehabilitative model, an approach that found wide-spread acceptance; Marygold S. Melli, "Whatever Happened to Divorce?" 2000 *Wis. L. Rev.* 637, 640-41 (2000); Mary Frances Lyle and Jeffrey L. Levy, "From Riches to Rags: Does Rehabilitative Alimony Need to Be Rehabilitated?" 38 *Family L. Q.* 3, 10-12 (2004).

[4] J. Herbie DiFonzo and Ruth C. Stern, "Addicted to Fault: Why Divorce Reform Has Lagged in New York," 27 *Pace L. R.* 559, 597 (2007); Theresa Glennon, "Still Partners? Examining the Consequences of Post-dissolution Parenting," 41 *Fam. L. Q.* 105, 109 (2007); Ira Mark Ellman, "The Maturing Law of Divorce Finances: Toward Rules and Guidelines," 33 *Fam. L.Q.* 801, 809 (1999); Joan Williams, "Is Coverture Dead? Beyond a New Theory of Alimony," 82 *Geo. L. J.* 227, 232 (1994); Marsha Garrison, "Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes," 57 *Brooklyn L. Rev.* 621, 657-667 (1991).

An empirical study of divorce in New York found that the median value of couples' marital assets in contested divorces in New York was about $24,000. Marsha Garrison, "Good Intentions Gone Awry," *supra*, at 662. In 2008 dollars, this sum would be about $50,000.

[5] Marsha Garrison, "Good Intentions Gone Awry," *supra* note 8, at 667.

of families have incomes over $200,000. (Census data lump together all households with over $200,000 in income.) [6]

Rehabilitative maintenance, too, has failed to fulfill its promise; it has not served as a bridge to security and stability for vulnerable family members. Like equitable distribution, it is based on false assumptions. For rehabilitative maintenance to function as contemplated, differences between the economic positions of husbands and wives cannot be too disparate and spouses who have been unemployed or underemployed during a marriage must have access to employment that will provide a reasonable income and a standard of living close -- or close enough -- to what was enjoyed during the marriage.

However, women, particularly married women and women with children, remain in significantly weaker positions economically than men. Although women participate in the paid workforce in fairly large numbers,[7] married women's income typically is only 35% of total households' income, and that percentage has increased only slightly in the three and a half decades since 1970.[8] This disparity is a function of

---

[6] Census Data, found at http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_2000_SF3_U_DP3&ds_name=DEC_2000_SF3_U&geo_id=04000US36 (visited June 3, 2008).

[7] The percentage of mothers in the labor force with children under 18 peaked in 2000 at 73% and since then has fallen to 71%. U. S. Dept. of Labor, *Women in the Labor Force: A Data Book* at 1 (Sept. 2007). *See also*, "Women Are Now Equal As Victims of Poor Ecnomy," *NYTimes*, July 22, 2008, p. col. 1.

[8] U.S. Dept. of Labor, "*Women in the Labor Force,* supra note 11, at 1. In 1970 married women's income, on average, made up 27% of family incomes. That percentage has increased only 8% in thirty-five years. *Id.*

the still-common traditional division of labor within most marital partnerships. Women continue to do the bulk of unpaid labor in the home, both housework and child care, even when they work in the paid labor force.[9] When children are born, often mothers cut back on work hours, make sure they have the flexibility to stay home with sick children, forgo promotions that make undue demands on their family life, take jobs closer to home, or leave the labor force altogether.[10] The majority of women take at least one year off from paid employment during their prime earning years,[11] and returning to the workforce is surprisingly difficult.[12] Often women find their way

---

[9] According to a recent *New York Times* article, women in the United States do twice as much housework and four or five times as much child care as their husbands with surprisingly little variation between families in which wives stay home to care for children and households and families in which both partners work full-time. Wives, on the average, spend 31 hours a week on housework while husbands spend 14 hours; when both husband and wife work full-time, wives still perform 28 hours of housework while husbands do 16 hours. When women stay at home with children, they spend 15 hours a week caring for children, while their husbands spend a mere 2 hours on childcare. When both are full-time wage earners, women log 11 hours of child care, compared to 3 hours for men. This division of labor differs little from the allocation of work in traditional families 50 or even 90 years ago. Lisa Belkin "When Mom and Dad Share It All," *New York Times Magazine*, June 15, 2008.

[10] Lina Guzman, "Effects of Wives' Employment on Marital Quality," Center for Demography and Ecology, University of Wisconsin, National Survey of Families and Households, Working Paper No. 85 (2000).

[11] Stephen Rose and Heidi Hartmann, "Still a Man's Labor Market: The Long-Term Earnings Gap," Institute for Women Policy Research, at iii (2004). The headline of a recent Allstate Insurance Co. advertisement, which appeared in both the *Atlantic Monthly* and the *New Yorker* in the spring of 2008, states in large print "The average women spends *11 years out of the workforce* taking care of family" (emphasis in the original).

[12] Sylvia Ann Hewlett and Carolyn Buck Luce, "Off Ramps and On-Ramps: Keeping Talented Women on the Road to Success," *Harv. Business Rev.* at 3-4 (March 2005**).** Recognizing the challenges in trying to reenter the work force after a hiatus caring for children, this Association's Committee on Women in the Profession and Committee on Career Advancement and Management along with the National Association of Women's Lawyers, On-Ramp Program Planning Committee sponsored a program entitled, "What to do When 'Mom' (or 'Dad') is on Your Resume."

blocked altogether, and if they do find work they discover a huge price tag for the gap in their work history.[13] Even a single year out of the workforce has large and lasting implications on future earning capacity.[14] Helping to push women out of the work force and lowering their incomes when they do stay employed or return to the paid labor force is the well-documented "mommy penalty," which has been estimated at a 10% drop in income per child.[15] As one study of the gap in lifetime earnings of men and women found: "The more years that children are present the more women have: fewer years in the paid labor force, more years with low working hours, and lower annual earnings when they work."[16] For men, marriage and having children have the

---

[13] A study of highly-qualified women found that 43% of the women with children spent some time out of the workforce, that 93% of those who had done so wanted to return, that only 74% of those who wanted to return were able to do so, and that only 40%of those who returned were able to find full-time jobs in their fields. Women lose 37% of their earning power when they are out of the work force three or more years. Hewlett and Luce, "Off Ramps and On-Ramps," *supra* note 16, at 2-4.

[14] *Id.* at 4.

[15] Deborah Anderson, Melissa Binder and Kate Krause, "The Motherhood Wage Penalty: Which Mothers Pay It and Why," 92 *The Amer. Economic Rev*. 354, 355 (2002). The penalty cannot be explained by lower levels of commitment or fewer hours worked by mothers. A laboratory experiment, in which subjects were shown resumes that were identical except for the job applicant's name (gendered names were used) and a reference to outside activities that showed (or didn't show) the applicant's involvement in PTA work (signaling that it was the resume of a parent), found devastating discrimination against mothers, but not against fathers, who experience a "daddy bonus." Mothers were deemed less employable, less committed, less competent, and worth less on the job than non-mothers. Fathers, on the other hand, received boosts in all categories. Shelley J. Correll, Stephen Benard, and In Paik, "Getting a Job: Is There a Motherhood Penalty?" 112 *Amer. J. of Sociology* 1297, 1309-27 (2007).

[16] Stephen Rose and Heidi Hartmann, "Still a Man's Labor Market" *supra* note 15, at 26 (2004). According to economists Rose and Hartmann, women workers in their prime earning years make only 38% of what men earn. *Id.* at iii. The average woman, they found, earned $273,592 during the fifteen years highest earning years, while the average man made $722,693. *Id.* at 9.

opposite effect; married men have higher incomes than unmarried men, and fathers have higher incomes than childless men.[17]

Women's economic weakness relative to men is masked during marriage, when both spouses enjoy the benefits of household resources and the advantages of marital divisions of labor, but divorce brings the economic inequalities to the front. The post-divorce financial landscape is often bleak for women. According to US Census data, 21% of women but only 9% of men live in poverty directly following a divorce.[18]

The failure of New York's divorce reform legislation to protect financially weaker spouses was recognized early, and, in 1986, the legislature amended the 1980 law to address precisely this problem.[19] Advocates for changes to the 1980 legislation criticized awards of short-tem maintenance to spouses ending long marriages and awards made at mere subsistence level; they sought a more equitable result for women who forgo education, careers, and paid work as part of mutual decisions for the benefit of the marital partnership and yet at divorce bear the entire burden of permanently lost earning capacity.[20] The Governor's memo on the legislation noted that under existing

---

17 *Id.* at 27.

18 US Census Bureau, Household Economic Studies, "Number, Timing, and Duration of Marriages and Divorces: 1996" (2002) at 14. Looked at from a somewhat different angle, after a divorce men fare better than women: 73%of recently divorced men have incomes at least twice the poverty level, while only 52% of women are that well off. *Id.*

19 L. 1986 Ch. 884.

20 *See, i.e.*, Letter in Support of A 10567 from Member of the Assembly May Newburger, July 1, 1986. For a description of problems identified early with the 1980 law on maintenance, *see* "Report of the New York Task Force on Women in the Courts, 15 *Fordham Urban L. J.* 11, 74-77 (1986-87).

law the "unfairness and undue hardship to economically dependent spouses," and concluded that "dependent spouse[s] and children . . . should not . . . be left economically impoverished as a result of our divorce laws."[21]

Although well-intentioned, the 1986 amendments have had little impact. In fact, judicial awards of maintenance were significantly higher from 1980-83, before the amendments were passed, than they were from 1987-90, after the legislature tried to correct the widely-perceived inequities in the law.[22] The duration of awards, too, seems to have decreased in the years since 1986.[23]

Making Divorce Cheaper, Faster, and Less Acrimonious

Not only has maintenance failed to provide a mechanism for helping spouses who face financial crises when their marriages end, but laws on maintenance also have contributed to divorce that, in the words of New York State Chief Judge Judith S. Kaye, "takes too long and costs too much – too much money, too much agony."[24] The current maintenance law's vague and even contradictory provisions create ideal conditions for long, bruising, and costly battles. Judges are asked to determine whether one party has "sufficient property and income" to provide for the "reasonable needs" of the other

---

[21] Memorandum filed with Assembly Bill Number 10567-A from the Executive Chamber, Aug. 2, 1986.

[22] Marsha Garrison, "How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision-Making," 74 *North Carolina L. R*. 401, 469-70 (1996).

[23] *See* Elliot C. Samuelson, "When and Under What Circumstances Should Non-Durational Maintenance Be Awarded," *Family L. Rev*., Vol. 40, No 2. at 1, 3 (2008).

[24] Hon. Judith S. Kaye, Chief Judge of the State of New York, *State of the Judiciary: 2006*, at 7.

party with no guidance about what might be "sufficient" or "reasonable" or what to do if the needs are found reasonable and the means deemed insufficient.[25] The long list of other factors for possible consideration, such as the marital standard of living, only muddies the waters further. Case law has done little to refine or clarify the broad statutory language.[26]

Unsurprisingly, given the lack of statutory or judicial guidance, financial outcomes in divorces are inconsistent and unpredictable. Looking at the national scene, the American Law Institute's Principles of Family Dissolution decried "[t]he vague standards governing alimony in most existing law [that] yield inconsistent and unpredictable adjudication"[27] and noted that guidelines had solved a similar problem with child support.[28] An empirical study of New York divorces reviewed case files and

---

[25] DRL Sec. 236 (6).

[26] In a recent issue of the *NYSBA*'s *Family Law Review*, a commentator complained about one case in particular and about maintenance decisions in general: "The appellate court failed to state any facts of the case, including but not limited to the length of the marriage, ages of the party, respective incomes of the parties, the extent and value of marital assets. . . The decision below is not reported. <u>This trend in the Appellate Division of failing to state key facts causes problems for the matrimonial practitioner to use the case as precedent</u>" (emphasis added). *NYSBA Family L. Rev.*, Vol. 40. No.1 at 33 (Spring 2008). The writer's lament echoes the conclusion of an empirical study of New York divorce outcomes that found that the opinions of appellate courts reviewing maintenance "do not evidence clear, consistent guidance to trial courts. . . . Sometimes, indeed the court offered no reasoning for altering the duration of [maintenance] at all. " Marsha Garrison, "How Do Judges Decide Divorce Cases?" *supra* note 26, at 503-04 (1996).

[27] The American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations, sec. 5. 02 (d).

[28] *Id.*

found "confused, inconsistent and unexplained results,"[29] and concluded that "[l]ike cases did not receive like treatment."[30] Recently, a Matrimonial Commission appointed by Chief Judge Judith S. Kaye noted the "significant frustration and dissatisfaction . . . by the public and the bar respecting the award of maintenance and the perception that these awards vary unpredictably from court to court … often resulting in feelings of injustice and unequal treatment."[31] Numerous commentators have criticized maintenance schemes similar to New York's law for their failure to provide guidance, which in turn makes settlement difficult and contentious litigation more likely.[32]

---

[29] Marsha Garrison, "Good Intentions Gone Awry," *supra* note 8, at 739.

[30] *Id.* at 739-40.

[31] *See The Matrimonial Commission's Report to the Chief Judge of the State of New York: 2006* at 66 (Feb. 2006). Although the Matrimonial Commission considered maintenance guidelines without reaching a consensus, the Commission reported "the Commission was largely in agreement that the issue [of maintenance] deserved greater attention [and] urges that this matter be addressed in the immediate future." *Id.*

[32] Twila Larkin, "Guidelines for Alimony: The New Mexico Experiment," 38 *Fam. L. Q.* 29 (2004) ("Family lawyers generally agree that alimony is the largest single impediment to settling divorce cases… . Because alimony settlements and awards are so unpredictable, attorneys cannot advise clients as to outcome. Alimony cases end up being among the most appealed."); Susan Elgin, "Alimony? It all Depends," 35 *Md B J.* 30 (2002) ("The evolution of Maryland law has not brought certainty to whether or not alimony will be awarded in any particular case. If it is awarded, it is difficult to predict how much alimony is to be paid and for how long."); Robert Kirkman Collins, "The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony," 24 *Harv. Women's L. J.* 23 (2001) ("Of the three financial issues raised by divorce – asset division, child support, and spousal maintenance – the question of alimony is typically the least predictable and the most contentious."); Ira Mark Ellman, "The Maturing Law of Divorce Finances: Toward Rules and Guidelines," 33 *Fam. L. Q.* 801, 813 (1999) ("Both local judges and attorneys (in Maricopa County) believed that alimony disputes were a disproportionate source of litigation as a result of this unpredictability.").

Indeed one observer characterized this general lack of legislative direction as having "a pathological effect on the settlement process."[33]

In efforts to achieve greater consistency, predictability, and equity, various states and jurisdictions have experimented with maintenance, alimony, or spousal support guidelines. California led the way. Beginning in 1977 with Santa Clara, California counties have adopted guidelines for use in setting interim awards; although judges make final awards using a statutory list of factors, the final awards often follow closely the amounts of interim awards.[34] Pennsylvania enacted statutory guidelines for interim support in 1989 when it passed its version of the child support guidelines.[35] Recently, New Mexico's Supreme Court issued an order authorizing the publication and distribution of alimony guidelines and encouraging their use in New Mexico's formal settlement process.[36] In 2005, Canada adopted "informal, voluntary and advisory" guidelines for permanent awards of spousal support, which are intended to develop into presumptions.[37] Other jurisdictions, as disparate as Maricopa County, Arizona;

---

33 Robert Kirkman Collins, "The Theory of Marital Residuals," *supra* note 36, at 25 (2001).

34 Twila Larkin, "Guidelines for Alimony," *supra* note 36, at 38-39; Canada Dept. of Justice, *Developing Spousal Support Guidelines: Beginning the Discussion, Background Paper* at 37 (Dec. 2002).

35 PA Divorce Code, Section 4322 (a), cited in *Mascaro v. Mascaro*, 569 PA 255, 259; 803 A.2d 1186, 1189 (2002).

36 The Supreme Court of the State of New Mexico, *In The Matter of the Report of the Alimony Guidelines Statewide Pilot Project Committee and Adoption of Alimony Guidelines for the State Courts of New Mexico,* No. 07-8500, April 16, 2007.

37 Canada Dept. of Justice, *Spousal Support Advisory Guidelines: A Draft Proposal*, at 5 (Jan. 2005). "The proposed advisory guidelines will not be legally binding, operating more like persuasive law reforms. Initially the advisory guidelines might simply serve as another tool in

Johnston County, Kansas; and Fairfax, Virginia, also have tried guidelines and found them useful.[38]

Opening the Courthouse Doors

Post-marital income guidelines also would increase New Yorkers' access to justice. Guidelines would open the courthouse door to moderate and low-income litigants, who cannot afford the expensive litigation necessary to establish a right to maintenance under the existing laws' vague and confusing provisions. People without substantial resources — that is, most New Yorkers, since only 7.5% of households in New York have incomes above $150,000 a year[39] — can afford lawyers to represent them, if at all, in only the simplest divorces. Lawyers at Legal Aid, Legal Services, and the various legal services organizations in New York that represent litigants in divorce cases confront daily the immensity of the need for matrimonial representation that they themselves cannot provide. Without the means to litigate, many, if not most, litigants who might be entitled to maintenance give up their claims and pursue uncontested divorces or settle their cases so they can leave their marriage without depleting family

---

determining spousal support. . . . Over time, as they prove their usefulness, they may become an accepted starting point from which parties will have to give reasons for any departure." *Id.* at 21.

[38] Twila Larkin, "Guidelines for Alimony," *supra* note 34, at 45-51.

[39] Put another way, about three times as many New York families have incomes under $25,000 (22.2%) a year as have incomes above $150,000 (7.5%). Census Data, found at http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_2000_SF3_U_DP3&ds_name=DEC_2000_SF3_U&geo_id=04000US36 (visited June 3, 2008).

coffers.

A study of actual divorce outcomes in New York confirms that being willing and able to engage in robust litigation is the best way to get an award of maintenance. This study found that, although going to trial did not increase the chances of getting an equitable distribution award, litigants who went to trial were four times as likely to get an award of maintenance as those who settled.[40]

Conclusion

Guidelines are not a panacea. They will not solve all of the problems faced by divorcing couples, their lawyers, and the courts trying to resolve the financial equities of dissolving marital partnerships. Some parties will be recalcitrant, income in some will remain difficult to calculate, and making a case for deviations from the formula numbers may generate contention. But for many, if not most, divorcing couples, post-marital income guidelines will make their cases easier to settle and the dissolution of the marriages faster, cheaper, less acrimonious, and more fair.

[40] Marsha Garrison, "How Do Judges Decide Divorce Cases?" *supra* note 36, at 467 (1996).