

**May 6, 2010 Hearings of the New York State Senate
On Divorce Reform**

Testimony of Antoinette Delruelle, Senior Attorney at the New York Legal Assistance Group.

Good afternoon and thank you for the opportunity to share this testimony about divorce reform.

NYLAG strongly supports no fault divorce after the custody and financial issues in the case have been resolved, counsel fees for lower income spouses, and post-marital income guidelines (PMI).

1. NYLAG

Founded in 1990, NYLAG is a nonprofit law office providing comprehensive legal services to low-income New Yorkers who would otherwise be unable to afford or receive legal help. We provide services to individuals with issues such as family and matrimonial actions, public benefits, immigration, home care, health care, elder abuse, advance directives, eviction and foreclosure prevention, consumer law, special education and more.

NYLAG employs over 95 professionals and facilitates the work of over 800 volunteer attorneys, paralegals, law students, and interns. NYLAG sees clients in the main office in Manhattan as well as at 50 intake sites located in courts, hospitals, and community-based organizations throughout the City and Long Island. NYLAG has long-standing mutual referral relationships with some 275 health and human service organizations citywide.

The Matrimonial & Family Law Unit (FLU) provides legal services on a myriad of family law issues including divorces (contested and uncontested), orders of protection, child custody and visitation, spousal and child support and paternity. In addition to direct representation, we also provide free legal consultations on our intake line. In the past year, we received on our intake line 1,071 calls about divorces, a third of which included issues involving maintenance.

NYLAG represents the working poor, immigrants and prioritize victims of domestic violence victims who have more complex legal needs than other litigants. NYLAG's funding allows us to represent litigants who would not qualify for services from Legal Services Corporation or the Legal Aid Society, which are only allowed represent people who are at 150% to 200% of the Federal Poverty Guidelines. For instance, a mother of two children who earns \$40,000 per year, \$3,380 above 200% of the Federal Poverty Guidelines and owns a house with her husband (an illiquid asset), would be eligible for NYLAG's services.

36% of the population of New York City is foreign-born (Mayor's Office to Combat Domestic Violence.) NYLAG's family and matrimonial practice reflects this number in that 32% of the clients we advised on our intake line in 2009 are immigrants. Immigrants need the support of their spouses even more than spouses who are born in the US. Speaking no or little English, their education not recognized in the US and with fewer connections to the job market, they will have more difficulties finding employment. If they are undocumented, the search for employment is even harder and they will have no safety net since they are not eligible for any public benefits. It is extremely difficult for someone born here to fight for maintenance without a lawyer, but it is literally impossible for an immigrant.

I will describe below how our clients are affected by the current maintenance laws and how PMI and attorneys' fees, combined, would render awards predictable, consistent and fair.

3. PMI leads to consistency, predictability and fairness

A. Consistency

Currently, awards of maintenance are inconsistent. Below is a table with the kind of awards that NYLAG attorneys obtained for its clients in the past two years. Only one of the wives had an income and all were the primary care takers of the minor children. All of these awards were the results of litigation, lengthy discovery and negotiations by equally zealous advocates.

Although no two cases are ever exactly alike, there were no unusual facts in these cases - such as a disability - that would account for the differences in awards.

Length of marriage	H income	W income	Maintenance	Length of maintenance
8 years	\$86,000	\$0	\$1,000/month \$800/month	for 4 years + for 4 years: total 8 years
2 years	\$80,000	\$0	\$780/month	18 months
12 years	\$88,000	\$21,840	\$86/month	lifetime
23 years	\$41,000	\$0	\$225/month \$350/month	for 2 years + for 2 years: total 4 years
6 years	\$54,000	\$0	\$1,500/month	while action is pending (pendente lite)
8 years	\$60,000	\$0	\$1,200/month	pendente lite

The pendent lite awards are particularly striking in that the longer marriage (8 years instead of 6) with the higher earner (\$60,000 instead of \$54,000) was granted \$300 less per month. In both of these cases, who came from the same borough, the judges did not cite any factors other than the needs of the non-monied spouse and the means of the monied spouse which would justify the difference in outcomes.

With PMI, the results would be more consistent, both in terms of the amount of maintenance and its length. PMI would not take away judges' judicial discretion, to the contrary. Judges would have a basis to start their analysis instead of spending time guessing an amount. PMI works the way the Child Support Standards Act work. Although many were against the Child Support Standards Act (CSSA) before it became law, no reputable attorney practicing this area of the law today would come back to the days where child support awards varied from court to court. PMI would have the same unifying effect as the CSSA.

B. Predictability

The inconsistent awards mean that parties cannot predict when they can obtain maintenance, how much and for how long. When parties cannot predict what will happen at trial, they have three options: they litigate, they abandon their claim, or they settle for much less than what they need. All of these are happening with maintenance in our courts today.

Litigation is unfortunately not possible for many litigants in divorce actions. Attorneys fees are high and few judges order the higher income spouse to pay the attorney's fees of the other party. This is why NYLAG strongly support the attorneys' fees bill, which must apply to non-profit, free legal services organizations. (See below.)

Many litigants abandon their claims for maintenance. We see this in both types of divorces: the complex divorces with a myriad of issues, and the divorces where the only issue is maintenance.

i. Complex divorces:

A litigant too poor to hire a privately retained attorney, too rich to qualify for fee legal services or 18b attorneys in custody and orders of protection, and too unlucky to find an attorney at NYLAG, or through In Motion, might borrow or spend every dime she has litigating custody and her order of protection. Child support will be decided because the matrimonial judge cannot sign a divorce judgment without it. The grounds are most likely going to be settled by the parties at the first preliminary conference, as there is heavy pressure from the bench and attorneys to settle grounds. She can also expect to receive half of her husband's pension and half of the equity in the house. No one, on the other hand, will be able to make predictions about maintenance. As a result, she will abandon her claim for maintenance and her standard of living will decrease or she and her children might fall into poverty. If she can't borrow money to pay a privately retained attorney, she

might give up on maintenance immediately and agree to receive less in equitable distribution, in an attempt to settle custody and her order of protection.

ii. Uncontested divorces:

In these simpler cases, the lack of predictability and the expectation of lengthy litigation discourage scores of needy spouses from asking for maintenance. The difference between a protracted divorce ending with an uncertain outcome and an uncontested divorce within three or four months is just too stark. Most of these litigants decide that it is not worth the time and effort, forego maintenance and end up living in poverty.

NYLAG does not receive funding for these “maintenance only cases.” There is no court appointed counsel for maintenance, even if the litigant is a public charge. As we are unable to help these litigants, we often advise them to ask for maintenance in the Family Court. The Family Court is a free and much easier forum for litigants without attorneys: clerks help them file petitions and support magistrates take a more hands-on approach with the vast majority of their unrepresented litigants. However, support magistrates in Family Court can only issue non-durational maintenance which means that the spouse is ordered to pay maintenance only until further order from the Supreme Court. The paying spouse usually files for divorce promptly to terminate the maintenance award or at least to shorten its duration. The spouse who is still unrepresented but now facing the Supreme Court where self-representation is much more challenging, will most likely abandon her claim for maintenance.

C. Fairness

Often, even with a strong attorney, clients receive paltry amounts of maintenance. Due to the uncertainty of the result and the cost of litigation, most maintenance awards are settled, often based on the award issued while the action was pending (“pendent lite”.)

Many of the pendent lite awards come from the bench without a written decision or are settled after conferences where judges or their court attorneys relay to the parties what the judge is inclined to grant based on the motion papers filed by the parties. Although we cannot always decipher how judges decide the amount of maintenance, we often see that judges first calculate the child support pursuant to CSSA, then deduct the child support and all of the higher earner's taxes from his/her income to see what how much money is left. Then, judges award maintenance so that the parties' net incomes are equal. This result is not fair to the custodial parent who has to support herself/himself plus two or three children on the same amount as the other – now single - party.

When maintenance is granted after trial, a rare occasion, judges write their maintenance awards by following the correct steps: first, they distribute marital property if there is any; second, they decide what the maintenance should be; third, they deduct the maintenance from the higher earner's income; fourth, they calculate child support based on the higher earner's new income (after payment of maintenance). In that respect, PMI is calculated in the exact same sequence as maintenance under our current laws.

Still, in most of the families we see, there is no equitable property to distribute, and maintenance is the only stream of income. It is not divided however. Courts will only give small maintenance awards for fairly short duration during which the spouse is supposed to be "rehabilitated", but which falls short of its goal. PMI would result in a more just award, which does not punish the spouse who stayed at home and does not reward the higher earning spouse with an increased standard of living to the detriment of the other.

4. Attorneys' fees

Unfortunately, like other free legal services, NYLAG can only represent a tiny portion of all of the litigants who fall within our eligibility requirements. This is why NYLAG strongly support the attorneys' fees bill.

PMI and attorneys' fees are going hand in hand. PMI result in predictable outcomes, which in turn lowers or even annihilates the need for attorneys' fees. With PMI, parties are much more likely to settle their support issue or obtain an order from the judge without the need for an attorney just, as thousands of parents settle or obtain orders of child support in Family and Supreme Court every year.

5. Conclusion

Current maintenance laws yield inconsistent, unpredictable and unfair awards. They encourage the worst litigation, costing time and money and causing lasting emotional harm. Together with the attorneys' fee bill, PMI will achieve better results for families, more consistent, predictable and just awards.

NYLAG strongly urges the State legislators to address comprehensive divorce reform, including no fault divorces after all of the custody and financial issues have been resolved, PMI and attorneys' fees.