

DRAFT Proposed Amendment to DRL 236, Part B, Subdivision 6

INTERIM MAINTENANCE AND POST-MARITAL INCOME OBLIGATION

December 24, 2008

6. Interim Maintenance and Post-Marital Income Obligation.

a. INTERIM MAINTENANCE

Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for alimony, maintenance or post-marital income, in any matrimonial action the court may order interim maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor interim maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties. Such order shall be effective as of the date of the application therefore, and any retroactive amount of interim maintenance due shall be paid in one sum or periodic sums, as the court shall direct.

b. POST-MARITAL INCOME

(1) Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for alimony, maintenance or post-marital income, the court shall make its award for post-marital income pursuant to the provisions of this paragraph.

(2) For purposes of this subdivision, the following definitions shall be used:

(a) "Post-marital income obligation" shall mean the sum derived by adding the amounts determined by the application of subparagraphs (ii) and (iii) of paragraph (3) (a) of this subdivision for the durational period determined by the application of subparagraph (i) of paragraph (3)(b) of this subdivision.

(b) "Post-marital income" shall mean a sum to be paid pursuant to a final court order or decree dissolving or annulling a marriage, declaring the nullity of a marriage, or a valid agreement, between the parties, by one party to the other.

(c) "Income" shall mean:

(i) all forms of income as defined in the Child Support Standards Act and codified in DRL 240 and Family Court Act, Section 413;

(ii) income from income producing property distributed or to be distributed pursuant to DRL 236 B (5)

(d) "Cap" shall mean combined income of the parties of one million dollars annually, increased or decreased on March 1st of each year by any change in the cost of living as defined in the annual Consumer Price Index-All Urban Consumers, New York, New York-Northeastern New Jersey, as published by the Bureau of Labor Statistics of the U.S. Department of Labor.

(e) "Self-support reserve" shall mean the self-support reserve as is defined in the Child Support Standards Act and codified in DRL 240 and Family Court Act, Section 413.

- (f) "Payor" shall mean the spouse with the higher income.
- (g) "Payee" shall mean the spouse with the lower income.

(3) The amount and duration of the post-marital income obligation for parties with incomes at or below the cap shall be determined in accordance with the provisions of this paragraph:

- (a) The amount shall be determined as follows:
 - (i) The court shall determine the income of each party.
 - (ii) The court shall subtract twenty percent of the income of the payee from thirty percent of the income of the payor.
 - (iii) The court shall then determine forty percent of the combined income of the payor and payee.
 - (iv) The court shall calculate the difference between the amount derived from (iii) and the income of the payee.
 - (v) The amount shall be the lower of the amounts determined by (ii) and (iv).
- (b) The duration shall be determined as follows:
 - (i) The court shall determine the duration of the award of post-marital income in accordance with the following schedule:

Length of the Marriage	% of the Length of the Marriage for Which Post-Marital Income Will Be Payable
0 to 5 years	30%
more than 5, less than 7.5 years	40%
more than 7.5, less than 10 years	50%
more than 10, less than 12.5 years	60%
more than 12.5, less than 15 years	70%
more than 15, less than 17.5 years	80%
more than 17.5, less than 20 years	90%
more than 20, less than 25 years	100%
more than 25 years	permanent

- (ii) Notwithstanding the provisions of subparagraph (i) of this subdivision, the post-marital income obligation shall terminate upon the death of either party.
- (c) The court shall order the post-marital income obligation in accordance with paragraph (a) through (b) of this subdivision, unless the court finds that the post-marital income

obligation is unjust or inappropriate and adjusts the post-marital income accordingly based upon consideration of the following factors:

- (i) The age and health of the parties;
- (ii) The future earning capacity of the parties;
- (iii) The wasteful dissipation of marital property;
- (iv) The transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (v) The existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (vi) Acts by one party against another that constitute egregious fault likely to shock the conscience.
- (vii) The availability and cost of medical insurance for the parties;
- (viii) The care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity;
- (ix) The inability of one party to obtain meaningful employment due to age or absence from the workforce;
- (x) The need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment;
- (xi) The tax consequences to each party;
- (xii) The equitable distribution of the marital property;
- (xiii) Any other factor which the court shall expressly find to be just and proper.

(d) Where the court finds that the post-marital income obligation is unjust or inappropriate and the court adjusts the post-marital income obligation pursuant to this subdivision, the court shall set forth, in a written order, the amount of the unadjusted post-marital income obligation, the factors it considered, and the reasons that the court adjusted the post-marital income obligation. Such written order may not be waived by either party or counsel.

(e) Where either or both parties are unrepresented, the court shall not enter a post-marital income obligation order or judgment unless the unrepresented party or parties have been informed of the presumptive amount of such post-marital income obligation.

(4) The post-marital income obligation for parties whose income is above the cap shall be ordered by the court in such amount as justice requires.

(a) The court will take into consideration the following factors in setting post-marital income pursuant to this subdivision:

- (i) The standard of living of the parties established during the marriage;
- (ii) The age and health of the parties;
- (iii) The present and future earning capacity of the parties;
- (iv) The duration of the marriage;
- (v) The need of one party to incur education or training expenses;
- (vi) The extreme differences in the incomes of the parties;
- (vii) The wasteful dissipation of marital property;
- (viii) The transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

- (ix) The existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (x) Acts by one party against another that constitute egregious fault likely to shock the conscience.
- (xi) The availability and cost of medical insurance for the parties;
- (xii) The care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity;
- (xiii) The inability of one party to obtain meaningful employment due to age or absence from the workforce;
- (xiv) The need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment
- (xv) The tax consequences to each party;
- (xvi) The equitable distribution of the marital property;
- (xvii) The reduced or lost lifetime earning capacity of the party seeking post-marital income as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;
- (xviii) The contributions and services of the party seeking post-marital income as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party;
- (xiv) Any other factor which the court shall expressly find to be just and proper.

(b) In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision. Such written order may not be waived by either party or counsel.

(c) The post-marital income obligation shall terminate upon the death of either party.

(5) Notwithstanding the provisions of paragraph (3) of this subdivision, and where there are no unemancipated children of the marriage under the age of 21, and where the annual amount of the post-marital income obligation would reduce the payor's income below the poverty income guidelines amount for a single person as reported by the federal Department of Health and Human Services, there shall be a rebuttable presumption that the post-marital income obligation shall be twenty-five dollars per month or the difference between the payor's income and the self-support reserve, whichever is greater.

(6) Notwithstanding the provisions of paragraph (3) of this subdivision, and where there are no unemancipated children of the marriage under the age of 21, and where the annual amount of the post-marital income obligation would reduce the payor's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal Department of Health and Human Services, the post-marital income obligation shall be fifty dollars per month or the difference between the payor's income and the self-support reserve, whichever is greater.

(7) Notwithstanding the provisions of paragraph (3) of this subdivision, and where there are unemancipated children of the marriage under the age of 21, and where the annual amount of the post-marital income obligation would reduce the payor's income below the

poverty income guidelines amount for a single person as reported by the federal Department of Health and Human Services, no post-marital income shall be awarded.

(8) Notwithstanding the provisions of paragraph (3) of this subdivision, and where there are unemancipated children of the marriage under the age of 21, and where the annual amount of the post-marital income obligation would reduce the payor's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal Department of Health and Human Services, no post-marital income shall be awarded.

(9) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include a provision stating that the parties have been advised of the provisions of this subdivision, and that the post-marital income provided for therein would presumptively result in the correct amount of post-marital income. In the event that such agreement or stipulation deviates from the post-marital income obligation, the agreement or stipulation must specify the amount that such post-marital income obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount. Such provision may not be waived by either party or counsel. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the post-marital income obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to post-marital income pursuant to this section. Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the post-marital income obligation shall set forth the court's reasons for such deviation.

(10) In addition to financial disclosure required in section two hundred thirty-six of this article, the court may require that the income and/or expenses of either party be verified with documentation including, but not limited to, past and present income tax returns, employer statements, pay stubs, corporate, business, or partnership books and records, corporate and business tax returns, and receipts for expenses or such other means of verification as the court determines appropriate. Nothing herein shall affect any party's right to pursue discovery pursuant to this chapter, the Civil Practice Law and Rules, or the Domestic Relations Law.

(11) When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order the post-marital income obligation based upon the standard of living of the parties prior to commencement of the divorce action. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered or obtained evidence..

(12) Post-marital income may be modified pursuant to paragraph (b) of subdivision 9 of Section 236 of this part.

(13) In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of this paragraph, brought pursuant to this article, the post-marital income standards set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.