

Post-Marital Income and Dividing Resources of Twenty-First Century Families

by Jill Laurie Goodman¹

Flex-time. Part-time. Stepping off track. On ramping. The mommy penalty. The daddy bonus. These are the catch phrases used to capture the realities of families struggling to divide the work of earning paychecks, raising children, and administering households in the face of increasing work weeks and the demands of caring for a younger generation - and, often, an older one as well.

Maintenance. Equitable distribution. Child support. These are the names for remedies New York Domestic Relations Law provides when the negotiated solutions to doing all of the work of being a family end in divorce. Add to these post-marital income guidelines, a new kind of award, proposed to replace maintenance.

The use of post-marital income guidelines, sometimes called maintenance or spousal guidelines, is a fairly recent approach to the problem of allotting marital resources, although counties in California have used the concept since the 1970s. The guidelines approach relies on numbers produced by formulas as starting points (and only starting points) for discussing what in the distant past was called alimony. These initial numbers are functions of the amounts the parties earn and the length of time the parties were married. In form and structure, the scheme follows the Child Support Standards Act, after which it is patterned.²

Post-marital income has many advantages, among them administrative ones. It would provide greater predictability and consistency in awards as well as a mechanism by which middle and lower income women would gain access to a kind of remedy that now is outside the reach of those who cannot afford extensive litigation. Perhaps even more importantly, however, the concept of post-marital income speaks directly to the dilemmas of families functioning in an imperfect world, the world of stepping off track and mommy penalties.

The assumption underlying maintenance, often characterized as "rehabilitative," is that divorcing husbands and wives, for the most part, should make their peace with fallout of past decisions made about paid and unpaid labor in their marriages. A bit of dividing marital assets, if there happen to be any (and in most cases there are not), and maybe, a couple of years of maintenance and, the theory goes, people should go their separate ways.

This approach, however, presupposes families existing in a world in which decisions about divvying up the work of living together in marital partnerships are made unconstrained by the pull of traditional sex roles and lingering gender bias. Such is most emphatically not the case, as we all know just from looking around at friends and co-workers (and often our own families, in spite of our best intentions to do things differently). Women commonly, although not universally, still do the lion's share of the work within the home, whether or not they have paid jobs, and women continue to sacrifice

advancement in the workplace for flexibility to care for households, children, and the elderly. They, for the most part, are the ones who cut back on the hours they work, take jobs that allow leave (often unpaid) to care for sick children, turn down promotions to jobs that require business travel, and leave paid employment for a few years when children are young. Often, when they decide to return full throttle to the workplace, they find their paths blocked in ways they never expected. Even highly qualified women find "on ramping" surprisingly difficult.³

The cumulative effects of these decisions on women's economic status are devastating. Over their prime working years, women who are employed make only 38% of what men make.⁴ They face retirement with fewer resources, less in the way of pensions, and far lower expectations from Social Security.⁵

The reasons families continue to configure themselves into old patterns are complex. The stay-at-home dad and the mom who works 60 hours a week still contradict societal norms. Eyebrows still are raised when a man asks for paternity leave, while a woman with an infant who works the bruising schedule of her male colleagues still risks censure. The realities of the mommy penalty and the daddy bonus play a role as well. Unlike men, women lose on average 5% of their earning capacity for each child they bear.⁶ Laboratory experiments have demonstrated that these disparities in the values placed on mothers in the workplace, as compared to men and childless women, are functions of perceptions rather than subtle differences in work ethic or product.⁷ Both the mommy penalty and the daddy bonus have been documented in the legal profession as well as elsewhere.⁸

The negotiated trade offs husbands and wives make in their lives often work magnificently for intact families, but, when marriages end, the results may be devastating for women's economic prospects and for the children who are usually in their mother's custody following a divorce.

Post-marital income awards would right some of the imbalance in the financial prospects of those who do more of marital partnerships' domestic work at the expense of paid employment. These awards, under the proposal put forth in recently New York State,⁹ would not equalize incomes. At most the lower earning spouse post-divorce would have 40% of the combined income of the parties, leaving the higher earning spouse with 60%. Nor would the awards necessarily last forever. Awards made at the termination of short marriages would end soon, while awards made at the end of longer marriages, like the effects of diminished participation in the paid workforce, would last longer. These awards, however, would bring divorcing spouses' incomes closer, at least for some period of time in reasonable proportion to the length of the marriage.

Putting in place post-marital income guidelines would not solve all of the problems of splitting assets of *Continued on page 15*

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a marriage nor right all the inequities that follow from taking lower paying jobs in exchange for time with a family. It would, however, be a direct and nuanced response to the realities of modern men and women performing their daily balancing acts as they live their lives in twenty-first century families.

1. Jill Laurie Goodman is counsel to the New York State Judicial Committee on Women in the Courts and Co-Chair of the Lawyers Committee Against Domestic Violence. The views expressed in this article are her own rather than those of her institutional affiliations.
2. For a more detailed description of the proposal, see www.DivorceReformNY.org.
3. Sylvia Ann Hewlett and Carolyn Buck Luce, "Off Ramps and On Ramps: Keeping Talented Women on the Road to Success," *Harv. Business Rev.* (March 2005), at 3-4.
4. Stephen Rose and Heidi Hartmann, "Still a Man's Labor Market: The Long-Term Earnings Gap," Institute for Women's Policy Research (2004).
5. James T. Bond, Ellen M. Galinsky, Marcie Pitt-Catsouphes & Michael A. Smyer, "The Diverse Experiences of Older Men and Women in the Workforce," a collaboration of the Families and Work Institute and the Center on Aging & Work/Workplace Flexibility (Nov. 2005) available at <http://familiesandwork.org/site/research/reports/BCFWI-DiverseEmploymentExperiences.pdf>.
6. Shelley J. Correll, Stephen Benard, and In Paik, "Getting a Job: Is There a Motherhood Penalty?" 112 *Amer. J. of Sociology* 1297 (2007).
7. *Id.* at 1309-27.
8. Neil H. Buchanan, "Why Do Women Lawyers Earn Less than Men? Parenthood and Gender in a Survey of Law School Graduates," Draft paper, October 2, 2008, copy available at <http://ssrn.com/abstract=1280464>.
- 9 See www.DivorceReformNY.org.

The New York Women's Bar Association thanks the author for submitting the article, but takes no position at this time on this issue.

