THE BASICS OF NEW YORK MATRIMONIAL PRACTICE

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• Introduction
• Why learn about matrimonial law?
  o Questions are frequent
  o Can have impact on other areas of the law:
    ▪ Corporate
    ▪ Real estate
    ▪ Tax
    ▪ Trusts & Estates
    ▪ Others
  o Everyone knows a potential client
• Seminar Overview
  • Sources of Law
  • Causes of Action for Divorce
  • Spousal Support
  • Custody
  • Child Support
  • Equitable Distribution
  • Pendente Lite Motions
  • Domestic Violence
  • Counsel Fees

• Main Sources of Matrimonial Law:
  o New York
    ▪ Domestic Relations Law
    ▪ Family Court Act
    ▪ General Obligations Law
    ▪ CPLR
  o Federal Law
    ▪ Tax Law (26 U.S.C.)
    ▪ Judicial Law (28 U.S.C.)
    ▪ Social Security Law (42 U.S.C.)
    ▪ Labor Law (29 U.S.C.)
- **Grounds for Divorce** (DRL 170):
  - Cruel and inhuman treatment
  - Abandonment
  - Adultery
  - Imprisonment
  - Fraud
  - Separation agreement
  - Irreconcilable differences

- **Spousal Support:**
  - Found in Section 236 of the DRL and Section 412 of the Family Court Act
  - Types of Support
    - Maintenance is available in addition to equitable distribution
      - Permanent (Non-durational) maintenance
        - Paid for an indefinite duration
      - Durational maintenance
        - For a period of years
        - Often rehabilitative
    - An award of maintenance may be modified upon changes of circumstances
      - Substantial hardship if originally set by the court
      - Extreme hardship if set by agreement
    - Factors pertaining to maintenance
      1. the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;
      2. the length of the marriage;
      3. the age and health of both parties;
      4. the present and future earning capacity of both parties;
      5. the need of one party to incur education or training expenses;
      6. the existence and duration of a pre-marital joint household or a pre-divorce separate household;
      7. acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in Section four hundred fifty-nine-a of the Social Services Law;
(8) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;

(9) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;

(10) the presence of children of the marriage in the respective homes of the parties;

(11) 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;

(12) the inability of one party to obtain meaningful employment due to age or absence from the workforce;

(13) the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment;

(14) the tax consequences to each party;

(15) the equitable distribution of marital property;

(16) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(17) the wasteful dissipation of marital property by either spouse;

(18) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(19) the loss of health insurance benefits upon dissolution of the marriage, and the availability and cost of medical insurance for the parties; and

(20) any other factor which a court could expressly find to be just and proper.

- **Pendente Lite Maintenance**
  - Spousal support paid during the pendency of the litigation for divorce
  - New temporary maintenance statute
    - Applies to incomes up to $542,000 per year
      - (a) the court shall subtract twenty percent of the income of the payee from thirty percent of the income up to the income cap of the payor.
(b) the court shall then multiply the sum of the payor’s income up to and including the income cap and all of the payee’s income by forty percent.

(c) the court shall subtract the income of the payee from the amount derived from clause (b) of this subparagraph.

(d) the guideline amount of temporary maintenance shall be the lower of the amounts determined by clauses (a) and (c) of this subparagraph; if the amount determined by clause (c) of this subparagraph is less than or equal to zero, the guideline amount shall be zero dollars.


### Temporary Spousal Maintenance Guidelines Calculator (Includes Low Income Adjustment)

<table>
<thead>
<tr>
<th>I. INCOME</th>
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<tbody>
<tr>
<td>1. Plaintiff</td>
<td></td>
<td></td>
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<tr>
<td>2. Defendant</td>
<td></td>
<td></td>
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<tr>
<td>Income Over $24K</td>
<td></td>
<td></td>
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<tr>
<td>3. Plaintiff</td>
<td>$0.00</td>
<td></td>
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<tr>
<td>4. Defendant</td>
<td>$0.00</td>
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<tr>
<th>II. CALCULATIONS</th>
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<tr>
<td>Income (up to $524,000):</td>
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<tr>
<td>5. Plaintiff</td>
<td>$0.00</td>
<td></td>
</tr>
<tr>
<td>6. Defendant</td>
<td>$0.00</td>
<td></td>
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<tr>
<td>Basic Calculation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. Calculation A</td>
<td>$0.00</td>
<td>30% of Payor’s Income minus 20% of Payee’s Income</td>
</tr>
<tr>
<td>8. Calculation B</td>
<td>$0.00</td>
<td>40% of Combined Income minus Payee’s Income</td>
</tr>
<tr>
<td>9. Guideline Amount</td>
<td>$0.00</td>
<td>The Guideline Amount is the Lesser of Line 7 and Line 8 or zero if Line 8 is less than or equal to 0</td>
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<tr>
<td>Low Income Calculation (if Applicable):</td>
<td></td>
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<tr>
<td>10. Payor Income minus Guideline Amount</td>
<td>$0.00</td>
<td>Where the guideline amount would reduce the payor’s income below the self-support reserve (35,512); the award is the payor’s income minus the self-support reserve. If Line 11 equals zero, there is no adjustment for low income.</td>
</tr>
<tr>
<td>11. Low Income Award</td>
<td>$0.00</td>
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<tr>
<th>III. AWARD</th>
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<tr>
<td>PAYOR:</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>12. Annual Amount</td>
<td>$0.00</td>
<td></td>
</tr>
<tr>
<td>13. Monthly Payment</td>
<td>$0.00</td>
<td></td>
</tr>
<tr>
<td>14. Bi-Weekly Payment</td>
<td>$0.00</td>
<td></td>
</tr>
<tr>
<td>15. Weekly Payment</td>
<td>$0.00</td>
<td></td>
</tr>
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- Income Exceeds $524,000: If the payor’s income exceeds $524,000, the court considers the 19 factors set forth in DRL §236 Part B(5-A)(C)(2)(A) in determining any additional award of temporary maintenance based on the income above $524,000. See Page 2 for a list of these factors.
- Adjustment of Award: The court may adjust the award if it finds the award is unjust or inappropriate based on consideration of 17 factors set forth in DRL §236 Part B(5-A)(E)(1). See Page 8 for a list of these factors.

- Factors applied above $524,000 in income:
  1) the standard of living of the parties established during the marriage;
  2) the age and health of the parties;
  3) the earning capacity of the parties;
  4) the need of one party to incur education or training expenses;
  5) the wasteful dissipation of marital property;
  6) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
7) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
8) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
9) the availability and cost of medical insurance for the parties;
10) 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 or ability to obtain meaningful employment;
11) the inability of one party to obtain meaningful employment due to age or absence from the workforce;
12) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;
13) the tax consequences to each party;
14) marital property subject to distribution pursuant to subdivision five of this part;
15) the reduced or lost earning capacity of the party seeking temporary maintenance as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;
16) the contributions and services of the party seeking temporary maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
17) any other factor which the court shall expressly find to be just and proper.

- Termination of maintenance
  - Death of either party
  - Remarriage of the recipient
  - Cohabitation and holding one’s self out as another’s spouse

- Tax Treatment (26 USC Sec. 71, 215): Maintenance (alimony) is taxable to recipient and deductible to the payor if:
  - The payment is made to a spouse or on behalf of a spouse under a divorce or separation agreement;
  - The instrument does not designate the tax treatment as a payment which is not includable in gross income and not allowable as a deduction.
  - The parties are not members of the same household if legally separated by a divorce or separate maintenance decree.
  - The payor is not liable to continue making the payments after the death of the payee nor must the payor be obligated to make substitute payment after the death of the payee.
Note that amounts are disallowed to the extent that reductions in alimony are related to contingencies involving the child such as the happening of a contingency (e.g., a child reaching a certain age, marrying, dying, leaving school) or an event associated with a contingency of a client that is child related. An unallocated pendent lite order or agreement (if reduced to a writing) is taxable to the recipient and tax deductible to the payor. *Kean v Commissioner*, 407 F. 3rd 186 (3rd Cir. 2005).

**Custody and Parenting Time:**
- Types of custodial arrangements:
  - Joint Legal Custody of minor child to both parties.
  - Sole Legal Custody to one parent with parenting time for the noncustodial parent.
  - Legal Custody – Who makes major decisions? Provisions for consultations between the parents in making major decisions regarding the health, education and general welfare of the child.
  - Residential Custody – Where and when does the child spend time?
  - Note: sole custody is generally awarded in NY if parties do not agree

**Child Support:**
- Pursuant to Guidelines.
- Use of traditional factors for high incomes.
- Statutory Factors for determining child support: See DRL Secs. 236, 240, Family Ct. Act Sec. 413
- Guidelines are based on percentage of income, number of children
  - 1 child: 17%
  - 2 children: 25%
  - 3 children: 29%
  - 4 children: 31%
  - 5 children: 35%
- Pro-rated according to total incomes
- Mandatory application up to $136,000 in annual income
- Terminates at age 21
- Numerous enforcement mechanisms
  - Income execution (CPLR 5240-41)
  - Entry of judgment (DRL 244)
  - Interstate enforcement (Fam. Ct. Act)
  - International enforcement (Hague Convention)
  - Loss of licenses

**Equitable Distribution:**
- See DRL 236, Part B. The statutory factors:
  - (a) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
  - (b) the duration of the marriage and the age and health of both parties;
(c) the need of a custodial parent to occupy or own the marital residence
and to use or own its household effects;
(d) the loss of inheritance and pension rights upon dissolution of the
marriage as of the date of dissolution;
(e) any maintenance;
(f) any equitable claim, to interest in, or direct or indirect contributor
made to the acquisition of such marital property by the party not having title,
including joint efforts or expenditures and contributions and services as a spouse,
parent, wage earner and homemaker, and to the career or career potential of the
other party;
(g) the liquid or non-liquid character of all marital property;
(h) the probable future financial circumstances of each party;
(i) the impossibility or difficulty of evaluating any component asset or any
interest in a business, corporation or profession, and the economic desirability of
retaining such asset or interest intact and free from any claim or interference by the
other party;
(j) the tax consequences to each party;
(k) the wasteful dissipation of assets by either spouse;
(l) any transfer or encumbrance made in contemplation of a matrimonial
action without fair consideration; and
(m) any other factor which a court could expressly find to be just and
proper.

- NY values certain intangible assets, such as licenses and degrees
- NY may take tax consequences into account in valuing asset, but
generally if a sale is imminent or inevitable
- Generally, no capital gain tax on spousal transfers (26 USC 1041)

**Miscellaneous Jurisdictional Issues:**
- New York Family Court has concurrent jurisdiction over certain types of
cases, such as support, domestic violence and custody, but has no
Supreme Court also has jurisdiction over matters arising out of the Family
Court Act.
- Civil Court has concurrent jurisdiction over breaches of marital contracts
where amount in controversy is less then $25,000 and no injunctive relief
is sought
- Criminal Court can entertain certain domestic violence prosecutions
- Federal jurisdiction rare
  - International enforcement
  - Palimony

**Counsel fees:**
- NY follows a rebuttable presumption in favor of payment of
interim fees by the moneyed spouse (Dom. Rel. Law §237)
- Available on interim and final basis