Maintenance Awards in Actions Commenced Prior to January 23, 2016[1]

Maintenance Awards - The Original Ten Factors - Domestic Relations Law §236(B)(6)(a)

The Equitable Distribution Law of 1980 listed ten factors for the court to consider in making a maintenance award. The original ten factors that the court was required to consider in determining the amount and duration of maintenance were enumerated in Domestic Relations Law §236(B)(6)(a). [1]

The prior standard of living of the parties was set forth in original factor (6) and could be considered "where practical and relevant." The qualifying language was added to indicate that although the maintenance of the prior standard of living may be ideal, it is impossible to attain in most situations unless the parties are extremely wealthy or extremely poor. Two homes may not be maintained as cheaply as one.

The 1986 amendment to the Equitable Distribution Law of 1980 altered the basic structure of the 1980 statute and introduced some old and new concepts as factors for the setting of maintenance.[3]

Perhaps the most significant aspect of the 1986 amendment was the deletion of the "reasonable needs and ability to pay" basis for maintenance and the substitution in its place of the old and rejected test of "standard of living of the parties established during the marriage." In the 1980 statute, this had been one of the ten factors (factor (6)) to be considered "where practical and relevant," but was subordinate to the general objective of meeting "reasonable needs and ability to pay."

The court was required to consider, in determining the amount and duration of maintenance, Eleven factors. [4]

In 2009 Domestic Relations Law §236 [B][6][a] was again amended to add an additional factor applicable to any action or proceeding commenced on or after the effective date of September 14, 2009.[5]

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[1] Laws of 1980, Chapter 281, effective July 19, 1980.

[3] Laws of 1986, Chapter 884, most of which became eff August 2, 1986, the remainder on September 1, 1986.

[4] Domestic Relations Law §236(B)(6)(a).

[5] See Laws of 2009, Ch 229, § 4.

Domestic Relations Law § 236 [B][6][a] was amended in 2010. [8] The 2010 amendments took effect on October 12, 2010 and apply to matrimonial actions commenced on or after the effective date.[17] In actions commenced on or after October 12, 2010 the court must consider twenty factors in determining the amount and duration of maintenance. [18] The statute provides:

In determining the amount and duration of maintenance the court shall consider:

(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;

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[8] Laws of 2010, Ch 371, effective October 12, 2010.

[17] Laws of 2010, Ch 371, § 6.

[18] Laws of 2010, Ch 371, §2. The amendments took effect immediately except for sections one, two and four, which all take effect on October 12, 2010, and apply to matrimonial actions commenced on or after the effective date of such sections. Laws of 2010, Ch 371, § 6.

(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 the court shall expressly find to be just and proper.[19]

Maintenance Award Based Upon Standard of Living, Reasonable Needs and Circumstances of the Case

Except where the parties have entered into an agreement providing for maintenance, pursuant to Domestic Relations Law §236 [B][3], in any matrimonial action the court may order 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 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. [20]

The order must be effective as of the date of the application therefor. Any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid. [21]

Burden of Proof - Maintenance Awards - Factors Considered in Actions Commenced Prior to October 12, 2010 - Domestic Relations Law §236(B)(6)(a).

In actions commenced prior to October 12, 2010 the Domestic Relations Law requires the court to consider the following guidelines or factors in setting the amount and duration of maintenance:

(1) The income and property of the respective parties including marital property distributed pursuant to subdivision five of this part.

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[19] Domestic Relations Law §236(B)(6)(a).

[20] Domestic Relations Law §236[B][6][a]

[21] Domestic Relations Law §236[B][6][a]

Factor (1) has a direct bearing on the reasonable needs of the respective parties. If the party seeking maintenance has no reasonable needs because she or he has sufficient income or property, including the share of marital property distributed in the case, ordinarily no maintenance should be awarded.

Factor (1) in combination with original factor (10) [which was moved to factor (12) in 2009] has also been used to restore the status quo ante by the First Department in Wilson v Wilson,[22] where, despite a short childless marriage, it was deemed equitable to provide the wife with sufficient means so that she could get back to her premarital standard of living.

Although only marital property is distributed under Domestic Relations Law §236(B)(5)(d), separate property is a factor to be considered under §236(B)(5)(d)(1). The respective estates of the parties also is relevant to maintenance awards under factor (1). For example, if there is little marital property to distribute, maintenance must be utilized to achieve an equitable result. If there is ample marital property to distribute, no maintenance may be necessary.

(2) The duration of the marriage and the age and health of both parties.

Factor (2), relating to the duration of the marriage and to the age and health of both parties, directs the court's attention to the future financial security of the parties. There is sufficient flexibility under Domestic Relations Law §236(B) so that the court, where it is possible, may adjust equitable distribution and maintenance to achieve the best future financial security for both parties.

Factors (1) and (2) also tie in with original factor (8), (now factor 9), for property distribution, the "probable future financial circumstances of each party." Particularly where there is a long marriage, or a sick or disabled spouse, the combination of these factors become a paramount consideration for the amount and duration of maintenance. Where it is needed, permanent rather than durational maintenance should be awarded. So too where maintenance is utilized to reimburse a working spouse who enabled the partner to obtain professional or advanced training, as in O'Brien v O'Brien. [23]

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[22] Wilson v Wilson (1984, 1st Dept) 101 App Div 2d 536, 476 NYS2d 120, app dismd, motion dismd 63 NY2d 768, 481 NYS2d 688, 471 NE2d 460. The court said: "Although this is a marriage of short duration, and there are no issue of the marriage, she is entitled, at the least, to be restored to the extent possible to the economic situation which pre-existed the marriage."

[23] O'Brien v O'Brien (1985, 2d Dept) 106 App Div 2d 223, 485 NYS2d 548, mod on other grounds, ctfd ques ans 66 NY2d 576, 498 NYS2d 743, 489 NE2d 712, on remand (2d Dept) 120 App Div 2d 656, 502 NYS2d 250, later proceeding (2d Dept) 124 App Div 2d 575, 507 NYS2d 719.

Equalization of income or future income is not mandated by the Equitable Distribution Law, and it does not have a "grandmother's clause" entitling a needy spouse to a life subsidy. However, where it is obvious that permanent maintenance is essential for the future financial security of a dependent spouse, courts should not hesitate to grant and enforce it. Perhaps New York courts have become so enamored with "rehabilitative maintenance" that in some instances they have shied away from awarding permanent maintenance.

(3) The present and future earning capacity of both parties.

Original factors (3) and (4) related directly to the duration of maintenance, and whether it is to be permanent or for an interim period. Factor (3) required the court to take into consideration "the present and future earning capacity of both parties. Thus, trial courts could now take into account the future earning capacity of the obligor as well as that of the recipient. The speculation and prediction as to future income is mandated, and instead of having to await a substantial change in circumstances, and then seeking an upward modification, the recipient may get a bonus in advance.

(4) The ability of the party seeking maintenance to become self-supporting, and, if applicable, the period of time and training therefor.

The present and future capacity of the party seeking maintenance to be self-supporting, and the time necessary for training to reenter the job market, was an especially important consideration in short marriages where the parties are relatively young. In most cases, unless other factors come into play, maintenance was not intended to be awarded to young persons who are employed or employable, or, if awarded, it was intended to be on an interim basis for a period of retraining. In this regard, Domestic Relations Law §236(B)(9)(b), dealing with modification of prior orders or judgments, protects the recipient who is unable to find a suitable job or any job at all, by permitting an extension of time or permanent maintenance.

A person seeking maintenance may submit "general testimony" regarding a medical condition only where the effect of that condition on the person's ability to work is readily apparent without the necessity of expert testimony–other wise medical records or expert testimony is necessary.[24] The Fourth Department has held that a decision of

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[24] In Knope v Knope, --- N.Y.S.2d ----, 2013 WL 474529 (N.Y.A.D. 4 Dept.) the Appellate Division concluded that the record did not support the Referee's finding that plaintiff was "unable to work to support herself financially," now or at any point in the future. At the hearing, plaintiff testified that she suffered from certain medical conditions that prevented her from being able to work or to seek job training in the United States, including dizziness, depression, stress, constant tinnitus, and a complete loss of hearing in one ear. Although a person seeking maintenance may submit "general testimony" regarding a medical condition where the effect of that condition on the person's "ability to work is readily apparent without the necessity of expert testimony" (Battinelli v. Battinelli, 174 A.D.2d 503, 504), that was not the case here. Thus, plaintiff was required

the Social Security Administration may serve as some evidence of a disability, but it is not prima facie evidence thereof.[25] However, the Second Department has held it is error to admit into evidence a determination of the Social Security Administration on the issue of a party's disability.[26]

Original factor (4) read: "the period of time and training necessary to enable the person having need to become self-supporting." The 1986 revision eliminated the former reference to "having need" and may imply that the amount awarded should be sufficient to maintain the former living standard and thus to dispense with need for postdivorce employment.

(5) 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.

Original factor (5), under the 1986 revision, became new factor (6) and remained as factor (6) after the 2009 amendment. New factor (5) added in 1986, 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, was not contained in the 1980 statute and remained as factor (5) after the 2009 amendment. (It was moved to factor (9) as a result of the 2010 amendment.) It mandates a consideration of the housemaker's lost opportunities when the homemaker role was adopted during the marriage. There is no set off for board, room, and fringe

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to submit medical records or expert testimony, which she failed to do. Instead, plaintiff offered a letter from the Social Security Administration that referenced another letter allegedly declaring that plaintiff would have been eligible for disability benefits if she was a United States citizen. A decision of the Social Security Administration may serve as some evidence of a disability, but it is not prima facie evidence thereof . Here, there was no decision in the record, and the letter submitted by plaintiff only referenced a decision. That letter did not indicate the nature, extent or permanence of plaintiff's disability, or the basis for the alleged determination by the Social Security Administration that plaintiff was disabled.

[25] Knope v Knope, supra; Matter of Frenke v. Frenke, 267 A.D.2d 238, 238.

[26] In Grasso v Grasso, --- N.Y.S.2d ----, 2008 WL 193262 (N.Y.A.D. 2 Dept.) the Appellate Division found that that while the husband correctly contended that the court improperly admitted into evidence and relied upon a determination of the Social Security Administration as to the wife's disability, there was other sufficient admissible evidence which supported the finding that the wife was totally disabled.

benefits, nor is it material why the homemaker alternative was adopted during the particular marriage at a time when most wives were in the labor force.[27]

(7) The presence of children of the marriage in the respective homes of the parties.

Original factor (5) was "the presence of children of the parties in the homes of the respective parties." It became factor (6) in 1986 and remained as factor (6) after the 2009 amendment. (It was moved to factor (10) as a result of the 2010 amendment). Courts have differed on the application of factor (6) where there are young children in the home and the custodial parent chooses not to work outside the home. Some judges may feel that the custodial parent should have that option; others, noting that the majority of mothers have outside jobs, are less sympathetic, unless the other parent has ample resources.

(7) The tax consequences to each party.

The tax consequences to the parties was still listed as factor (7) after the 2009 amendment (It was moved to factor (14) in the 2010 amendment). This is an important

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[27] Compare Cappiello v Cappiello (1985) 66 NY2d 107, 495 NYS2d 318, 485 NE2d 983, and Wilson v Wilson (1984, 1st Dept) 101 App Div 2d 536, 476 NYS2d 120, app dismd, motion dismd 63 NY2d 768, 481 NYS2d 688, 471 NE2d 460. Cappiello denied compensation for "lost earnings" but Wilson considered them in setting rehabilitative maintenance.

In Cappiello v Cappiello (1985, 1st Dept) 110 App Div 2d 608, 488 NYS2d 399, affd 66 NY2d 107, 495 NYS2d 318, 485 NE2d 983, it was held that Supreme Court, New York County had committed error in awarding the wife $25,000, "representing the amount she could have earned during the short period of time that the parties were living together." It had been an 8 month marriage and had as a practical matter ended after 2 months. The Appellate Court found that the portion of the award representing compensation for possible lost earnings "is not authorized under the equitable distribution law and is inconsistent with the denial of any maintenance to the plaintiff. Nor did the record disclose any basis to conclude that she was in any way precluded from working or requested not to work during that period of time. As a matter of fact, she stopped working shortly after the marriage and devoted herself to skiing." Considering the plaintiff's income producing capabilities as well as her comparatively minimal contribution to the household with no responsibilities for child care, it was held that the amount of the maintenance award was unjustified. Insofar as standard of living was concerned, the court noted that the plaintiff's standard of living improved as a result of the marriage, but that where the marriage is of such short duration there is no issue, and where the plaintiff is relatively young and capable of self-support, "this factor is of limited weight."

factor where there are alternatives in setting up maintenance and equitable distribution. In both pretrial negotiations and in contested cases, counsel are expected to provide a detailed tax analysis of alternative plans settling the financial incidents of divorce.

(8) 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.

Factor (8) was unchanged by the 1986 amendment. This factor was Original factor (8) and remained as factor (8) after the 2009 amendment. (It was moved to factor (16) in the 2010 amendment.) This factor has become the focal point for tactics and controversies on the maintenance issue where one party claims that the services and contributions of the homemaker were minimal or nonexistent, i.e., "negative contributions," and the homemaker claims they were substantial. The decisions indicate that the length of the marriage and the presence or absence of children tend to shape the court's attitude in applying this factor.[28] This factor covers contributions as a spouse, parent, wage earner, and homemaker, and deals with the career and career potential of the other party. In contested cases this factor is usually the most controversial item, and the division of marital property and the amount and duration of maintenance sometimes depends upon the resolution of this issue. The unusually competent wife is rewarded, while the incompetent wife will have fewer equities.

"Contributions to the career or career potential of the other party" may not have received the attention it deserves. In addition to providing a base for the student spouse/working spouse situation so that maintenance (or property allocation) may be utilized for reimbursement purposes, this language ties in with the rule in Hickland v Hickland[29] which is that it is the earning potential of the obligor, not what he deigns to earn, which affects the standard of support. This rule is well established in New York and has been followed in numerous cases. In addition, although courts have been

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[28] Compare Lesman v Lesman (1982, 4th Dept) 88 App Div 2d 153, 452 NYS2d 935 (minimal contributions) and Conner v Conner (1983, 2d Dept) 97 App Div 2d 88, 468 NYS2d 482 (maximum contributions), and see the strange case of Kobylack v Kobylack (1981) 110 Misc 2d 402, 442 NYS2d 392, mod on other grounds (2d Dept) 96 App Div 2d 831, 465 NYS2d 581, revd on other grounds 62 NY2d 399, 477 NYS2d 109, 465 NE2d 829, on remand (2d Dept) 111 App Div 2d 221, 489 NYS2d 257. New York courts appear to be reluctant to award other than rehabilitative maintenance where there were no children during a short marriage. See Cappiello v Cappiello (1985, 1st Dept) 110 App Div 2d 608, 488 NYS2d 399, affd 66 NY2d 107, 495 NYS2d 318, 485 NE2d 983 (short childless marriage where wife was said to devote her life to skiing); and Rubin v Rubin (1984, 2d Dept) 105 App Div 2d 736, 481 NYS2d 172 (wife played bridge and tennis).

[29] Hickland v Hickland (1976) 39 NY2d 1, 382 NYS2d 475, 346 NE2d 243, cert den 429 US 941, 50 L Ed 2d 310, 97 S Ct 357, later proceeding (3d Dept) 56 App Div 2d 978, 393 NYS2d 192, later proceeding (3d Dept) 77 App Div 2d 683, 430 NYS2d 15, later proceeding (3d Dept) 100 App Div 2d 643, 472 NYS2d 951.

reluctant to force an obligor to invade capital in order to pay alimony or maintenance, in a proper case that may become necessary. [30]

(9) The wasteful dissipation of marital property by either spouse.

Original factor (9) was "the wasteful dissipation of family assets by either spouse," (It was changed to “the wasteful dissipation of marital property by either spouse” in 1986. It was unchanged in 2009. (It was moved to factor (17) in the 2010 amendment.) It set forth the one kind of marital fault that clearly is relevant under the new law. The dissipation of family assets by a spendthrift husband or an overly extravagant wife should be more relevant to equitable distribution than to maintenance, but for some unknown reason it was originally listed for the latter and not for the former. The 1986 amendment changed factor (9) to read: "(9) the wasteful dissipation of marital property by either spouse." The change is confusing. Former factor (9) referred to the wasteful dissipation of "family assets" rather than to "marital property." It is not clear why the change was made, but perhaps it was made in order to emphasize that the economic fault of the wage earner or moneyed spouse was a factor to be considered. Presumably, it was intended that factor (9) be expanded to cover not only family assets, as such, but also to include individually owned separate property in the title holder’s name, which in the event of divorce, may be denominated as "marital property."

Whalen v Whalen[31] is a leading case on dissipation of family assets by a spouse who was a born loser at gambling, and such fault was expressly recognized as "egregious" in Blickstein v Blickstein.[32]

Apparently, new factor (9) was intended to expand the economic factor of dissipation so as to cover not only family assets, as such, but also to include individually owned separate property in the title holder’s name, which in the event of divorce, may be denominated as "marital property." Prior case law recognized that family assets could not be transferred where the transfer was fraudulent. [33]

(10) Any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration.

This was added as new factor (10) in 1986. It restates existing case law although there had been some disagreement as to the granting of injunctive relief.

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[30] Kay v Kay (1975) 37 NY2d 632, 376 NYS2d 443, 339 NE2d 143.

[31] Whalen v Whalen, N.Y.L.J., Sept. 24, 1981 (Nassau Co).

[32] Blickstein v Blickstein (1984, 2d Dept) 99 App Div 2d 287, 472 NYS2d 110.

[33] See Hickland v Hickland (1976) 39 NY2d 1, 382 NYS2d 475, 346 NE2d 243. The factor is superfluous unless it relates back to the time before a divorce was in the offing.

(11) the loss of health insurance benefits upon dissolution of the marriage.[34]

The loss of health insurance benefits upon dissolution of the marriage" was added in 2009. It was also added as a factor to be considered by the court in making a property distribution in Domestic Relations Law §236 [B][6][d][5] .

(12) Any other factor which the court shall expressly find to be just and proper.

This was original catchall factor (10). It was moved to factor (11) in 1986 and to factor (12) in 2009. (It became factor (20) in 2010.) It covers any equitable consideration that may have been overlooked in setting up the statutory criteria. Courts have and probably will continue to differ on whether marital fault comes within this factor, or is irrelevant, or whether some kinds of marital fault are pertinent while others are irrelevant. As in the case of equitable distribution, and in setting child support, the factors considered and the reasons for decision must be set forth by the court. Although "marital misconduct" amounting to grounds for divorce or legal separation was an automatic bar to alimony or exclusive possession of the marital home under former Domestic Relations Law §236, "marital misconduct" is unmentioned in Domestic Relations Law §236 [B] as a specific factor for the court to consider. At the court's discretion, however, at least serious marital misconduct may be considered under catchall factor (12) and weighed and balanced along with the other enumerated factors.

Burden of Proof - Maintenance Awards – Guidelines or Factors in Actions Commenced on or after October 12, 2010 - The Twenty Factors - Domestic Relations Law §236(B)(6)(a)

In determining the amount and duration of maintenance the court must consider the following factors:

(1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part; [2054]

(2) the length of the marriage; [2055]

(3) the age and health of both parties; [2056]

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[34] See Laws of 2009, Ch 229. The amendments apply to any action or proceeding commenced on or after the effective date of September 14, 2009.

[2054] See discussion in Section 12-6

[2055] See discussion in Section 12-6

[2056] See discussion in Section 12-6

(4) the present and future earning capacity of both parties; [2057]

(5) the need of one party to incur education or training expenses;[2058]

This factor (5) is similar to factor (8) "the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor. "[2059] This factor can be construed as requiring the court to consider the monied spouses need to incur education or training expenses to further his or her education or career, as well as the need of the non-monied spouse to incur education or training expenses.

(6) the existence and duration of a pre-marital joint household or a pre-divorce separate household.[2060]

This factor (6) would permit the court to consider the existence and duration of the parties pre-divorce separate households as a factor in awarding maintenance. It is unclear exactly how this factor will be interpreted by the courts in making a maintenance award. One reasonable construction is for the court to consider the contributions made by one spouse to support the other spouses household during the period of the parties pre-divorce separation. The court may consider such contributions as a factor in reducing the level and length of the final maintenance award, or may consider the lack of such contributions in increasing the level or length of the final maintenance award.

Factor (6) also permits the court to consider the existence and duration of a joint household before the parties were married appears to be inconsistent with the intent of the equitable distribution law to treat "marriage" as an "economic partnership". The consideration of events prior to the marriage, was specifically omitted from the original 1980 legislation because it is not a factor related to the economic partnership created by the marriage.

It is unclear exactly how this factor (6) will be interpreted by the courts in making a maintenance award. In a marriage of substantial duration this factor would not have very much weight.

(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

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[2057] See discussion in Section 12-6

[2058] Domestic Relations Law § 236 [B][6](5) (added as a new factor).

[2059] Formerly factor 4,

[2060] Domestic Relations Law § 236 [B][6](6) (added as a new factor).

not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

This factor (7) brings economic fault and domestic violence into the maintenance equation, stating it another way. There are many acts by one party acts by one party against the other that a court could construe as inhibiting or continuing to inhibit a party's earning capacity or ability to obtain meaningful employment. For example, one spouse may attempt to disrupt the others business or business relationships. A spouse may interfere with the other spouses ability to study for a degree or license exam. In addition, the acts that inhibit or continue to inhibit a party's earning capacity include, but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law.[2061] These acts include an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, menacing, reckless endangerment, kidnaping, assault, attempted assault, or attempted murder.[2062]

(8) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor; [2063]

(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; [2064]

(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.[2066]

Factor (11), the care of children is similar to factor (10) 'the presence of children of the marriage in the respective homes of the parties." [2067] The acts that inhibit or

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[2061] Domestic Relations Law § 236 [B][6](7) (added as a new factor)

[2062] See Social Services Law § 459-a.1.

[2063] See discussion in Section 12-6

[2064] See discussion in Section 12-6

[2066] Domestic Relations Law § 236 [B][6] (11) (added as a new factor)

[2067] Formerly factor 6.

continue to inhibit a party's earning capacity include the care of the children or stepchildren, disabled adult children or stepchildren, and elderly parents or in-laws.

This factor (11) can be construed as authorizing a party to stay home to care for his or her adult children or parents at the expense of the monied spouse. While the legislature probably intended that this factor apply to children, disabled children, stepchildren and elderly in-laws of the present marriage it can also be construed to require the court to consider a party's need to care for stepchildren, disabled children or in-laws of an earlier or later marriage. Requiring a spouse to indirectly contribute to the support of a person he or she is not legally obligated to support appears to be inherently unfair and contrary to the public policy enunciated in the Domestic Relations Law and Family Court Act.[2068]

(12) the inability of one party to obtain meaningful employment due to age or absence from the workforce.[2069]

This factor is similar to factors (3) the age and health of both parties; [2070] and (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." [2071] It allows the court to award maintenance to a spouse due to age or absence from the work force, something which it could already do under factors (3) and (9).

(13) the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment.[2072]

Factor (13) giving the court discretion to award additional maintenance or extending its duration because of exceptional additional child support expenses,

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[2068] See Family Court Act § 415 which limits a parents obligation to support his child to children under that age of 21. The original section included required a parent to support a husband, wife, father, mother, grandparent or child and "child" had no age limit. Grandparents were excluded in 1965 (Laws of 1965, Ch. 674) and the responsibility to support an adult child above the age of twenty-one) was deleted in 1974 [Laws of 1974, Ch. 937].

[2069] Domestic Relations Law § 236 [B][6] (12) (added as a new factor)

[2070] Formerly part of factor 2.

[2071] Formerly factor 5

[2072] Domestic Relations Law § 236 [B][6] (3) (added as a new factor)

including but not limited to, schooling, day care and medical treatment[2073] appears to constitute impermissible “double dipping”. This factor (13) allows the court to award maintenance for child support expenses covered by the and the Child Support Standards Act and Domestic Relations Law §240 (1-b) (c) (5) (6) and (7).[2074]

(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 the court shall expressly find to be just and proper.

[2073] Domestic Relations Law § 236 [B][6] (3) (added as a new factor)

[2074] Domestic Relations Law § 240 (1-b) (c) (5) (6) and (7) provide: (5) The court shall determine the parties' obligation to provide health insurance benefits pursuant to section four hundred sixteen of this part and to pay cash medical support as provided under this subparagraph.

(6) Where the court determines that the custodial parent is seeking work and incurs child care expenses as a result thereof, the court may determine reasonable child care expenses and may apportion the same between the custodial and non-custodial parent. The non-custodial parent's share of such expenses shall be separately stated and paid in a manner determined by the court.

(7) Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent shall pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider.

Burden of Proof - Maintenance Awards - Effect of a Barrier to Remarriage - Domestic Relations Law §236(B)(6)(d) .

The maintenance provisions of the Domestic Relations Law require the court to "consider the effect of a barrier to remarriage" upon the enumerated factors which the court must consider in awarding maintenance. The amendments appear to be for the sole purpose of attempting to do what Domestic Relations Law §253 was unable to do; compel an unscrupulous Jewish husband to give his wife a Jewish divorce --a matter well beyond the authority of any civil court.

Domestic Relations Law §236(B)(6) (d) provides as follows: "d. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph a of this subdivision."

Domestic Relations Law §253 requires a party to a proceeding to annul a marriage, or for a divorce, to allege under oath that he or she has taken, or will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce. The section applies only to a marriage solemnized in this state or in any other jurisdiction by a person specified in Domestic Relations Law §11(1). [2082]

Regarding the "sworn statements" prescribed by Domestic Relations Law §253, "barrier to remarriage" includes, without limitation, any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act. Nothing in the section defining "barrier to remarriage". . . "shall be construed to require any party to consult with any clergyman

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[2082] Domestic Relations Law §253(1).

Domestic Relations Law §11(1) lists the following persons:

A clergyman or minister of any religion, or by the senior leader, or any of the other leaders, of The Society for Ethical Culture in the City of New York, having its principal office in the borough of Manhattan, or by the leader of The Brooklyn Society for Ethical Culture, having its principal office in the borough of Brooklyn of the City of New York, or of the Westchester Ethical Society, having its principal office in Westchester county, or of the Ethical Culture Society of Long Island, having its principal office in Bronx county, or by the leader of any other Ethical Culture Society affiliated with the American Ethical Union.

or minister to determine whether there exists any such religious or conscientious restraint or inhibition." It is not deemed to be a "barrier to remarriage" within the meaning of this section if the restraint or inhibition cannot be removed by the party's voluntary act. Nor shall it be deemed a "barrier to remarriage" if the party must incur expenses in connection with removal of the restraint or inhibition and the other party refuses to provide reasonable reimbursement for such expenses.[2083]

"All steps solely within his or her power" may not be construed to include application to a marriage tribunal or other similar organization or agency of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination."[2084] It appears that taking all steps to remove a "barrier to remarriage" does not require an application to the religious tribunal to dissolve the marriage, only an appearance to accept the religious dissolution.[2085]

Nothing in Domestic Relations Law §253 "should be construed to authorize any court to inquire into or determine any ecclesiastical or religious issue." The truth of any statement submitted pursuant to Domestic Relations Law §253 "shall not be the subject of any judicial inquiry," except that any person who knowingly submits a false sworn statement under Domestic Relations Law §253 is guilty of knowingly filing a false sworn statement, punishable in accordance with §210.40 of the Penal Law.

Standard of Living During Marriage - Domestic Relations Law §236 (B)(6)(a) .

The 1986 amendments to the Equitable Distribution Law revitalized the importance of the standard of living during marriage as a significant factor for

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[2083] Domestic Relations Law §253.

[2084] Domestic Relations Law §253(6), which also provides as follows:

"As used in sworn statements prescribed by this section "barrier to remarriage" includes, without limitation, any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act. Nothing in this section shall be construed to require any party to consult with any clergyman or minister to determine whether there exists any such religious or conscientious restraint or inhibition. It shall not be deemed a "barrier to remarriage" within the meaning of this section if the restraint or inhibition cannot be removed by the party's voluntary act. Nor shall it be deemed a "barrier to remarriage" if the party must incur expenses in connection with removal of the restraint or inhibition and the other party refuses to provide reasonable reimbursement for such expenses."

[2085] Domestic Relations Law §253.

determining maintenance. That test was changed from one factor among several to a new role as the predicate for maintenance and now serves as a primary objective, where possible, for courts to attain. The "adequacy" of a given award of maintenance may be determined by reference to the standard of living maintained while the parties were living together.[2086]

The 1986 standard as to prior standard of living is to be the objective "whether the party in whose favor 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." In other words, the new maintenance short circuits the former policy that stressed reasonable needs and ability to pay. Conceivably, under the new concept, a spouse may be ordered to pay maintenance to the other party who has adequate property and income to get along if he or she tightens his or her belt but who does not have enough resources to continue to live in luxury, and such may be done regardless of the means and income of the obligor and his lifestyle.

The legislature intended that the pre-divorce standard of living be a mandatory factor for the courts consideration in determining the amount and duration of the maintenance award. A finding of a wife's ability to become self-supporting with respect to some standard of living in no way obviates the need for the court to consider the pre-divorce standard of living; and does not create a per se bar to lifetime maintenance. Correspondingly, a pre-divorce "high life" standard of living guarantees no per se entitlement to an award of lifetime maintenance. "The lower courts must consider the payee spouse's reasonable needs and pre-divorce standard of living in the context of the other enumerated statutory factors, and then, in their discretion, fashion a fair and equitable maintenance award accordingly. . . ." [2087]

Duration of Maintenance - Domestic Relations Law §236 (B)(6)(a)

Rules have been established regarding the duration of maintenance awards. [2088] Every case must be determined on its unique facts. Durational maintenance is more commonly awarded where the spouse seeking support is relatively young and healthy and is not required to care for young children.

In Sperling v Sperling, the Appellate Division observed:

[2086] See Domestic Relations Law §236(B)(6)(a), as amended by Laws 1986, Ch. 844

[2087] Hartog v Hartog (1995) 85 NY2d 36, 623 NYS2d 537, 647 NE2d 749.

[2088] Sperling v Sperling (1991, 2d Dept) 165 App Div 2d 338, 567 NYS2d 538.

"Where lifetime maintenance has been awarded, the recipient spouse has almost invariably been older than Charlotte, often in impaired health. Furthermore, the supporting spouse was in far better financial condition than Raymond. Thus, lifetime maintenance was directed in Reingold v Reingold, 143 AD2d 126 [wife, 52, never worked, husband earned over $100,000 per year]; Iacobucci v Iacobucci, 140 AD2d 412 [husband owned a successful insurance business, wife never worked] Formato v Formato, 134 AD2d 564 [wife, 46, had no business skills, husband earned $72,000 per year]; Jones v Jones, 133 AD2d 217 [wife, 50, had psychiatric problems; husband earned $58,000 a year]; Shahidi v Shahidi, 129 AD2d 627 [husband's expectations were promising, wife had limited potential earning capacity]; Kerlinger v Kerlinger, 121 AD2d 691 [wife, 50, no special skills, no high school diploma]; Delaney v Delaney, 114 AD2d 312 [wife, 47, husband, president of Consolidated Edison, earned $100,000 a year]; Murphy v Murphy, 110 AD2d 688 [wife, 47, no special skills or training] and Antis v Antis (1985, 2d Dept) 108 App Div 2d 889, 485 NYS2d 770 [wife mentally ill and severely disfigured, husband earned $49,700]; but cf., Pottala v Pottala, 112 AD2d 553, where the spouse seeking support is relatively young and healthy, however, and is not required to care for young children, durational maintenance has more commonly been awarded. See, Eli v Eli, 123 AD2d 819; Coffey v Coffey, 119 AD2d 620; Armando v Armando, 114 AD2d 875; Hillman v Hillman, 109 AD2d 777; see also, Behan v Behan, 163 AD2d 505)." [2089]

The more realistic function of durational maintenance is to allow the recipient spouse an opportunity to achieve independence. Thus, the award should be in an amount and for a time period sufficient to give him/her a reasonable period of time in which to learn or update work skills and to enter the employment market with a view to being self-supporting. Equity "requires that the parties' marital standard of living must be considered in gauging the ability of the recipient spouse to become self-supporting, and the amount of maintenance to be awarded. For example, while a recipient spouse with earning capacity of $20,000 per year may be considered self-supporting in a given case, that same income may be deemed insufficient in the case of a spouse who had enjoyed a higher marital standard of living. [2090]

A time limit for maintenance should be imposed only in order to enable a party to obtain training so as to become sufficiently self-supporting to achieve the standard of living to which he or she has become accustomed in the past or otherwise to allow such person to restore earning capacity to a previous level.[2091]

[2089] Sperling v Sperling (1991, 2d Dept) 165 App Div 2d 338, 567 NYS2d 538.

[2090] Sperling v Sperling (1991, 2d Dept) 165 App Div 2d 338, 567 NYS2d 538.

[2091] Brownstein v Brownstein (1990, 1st Dept) 167 App Div 2d 127, 561 NYS2d 216, app den 77 NY2d 806, 569 NYS2d 610, 572 NE2d 51.

Lifetime maintenance is appropriate only where a spouse is incapable of future self-support or has clearly subordinated a career to act as homemaker and parent, has no obvious skills or training or is mentally or physically ill. An award of rehabilitative maintenance, on the other hand, is intended to allow a spouse "an opportunity to achieve economic independence." [2092]

Effect of McSparron and Grunfeld Cases Upon Maintenance Award

In Grunfeld v Grunfeld [2093] the Supreme Court ordered the defendant to pay maintenance of $15,000 per month until the sale of the marital home one year after the younger child was to enter college, in 2000. Thereafter, maintenance was to be reduced to $8,500 per month. The court valued defendant's law practice as of the date of commencement of the matrimonial action, using the "excess earnings" method, to be $2,581,760. The Supreme Court also determined the value of defendant's license to practice law for equitable distribution purposes. To avoid double counting, since defendant's income in excess of "reasonable compensation" had already been considered in determining the value of defendant's interest in the practice, the court excluded that portion of defendant's future earnings from consideration. The sum of the license's bare value and enhanced earnings potential was found to be $1,547,000.

The Appellate Division modified directing that the one-half of the value of defendant's professional license - $773,500 - should also have been distributed to plaintiff. The court held that the reduction of maintenance from $15,000 to $8,500 per month should begin following full payment of the distributive award. The Court of Appeals modified the order of the Appellate Division because it double counted defendant's income in ordering that plaintiff should receive both undiminished maintenance and the full distributive award of one-half the value of plaintiff's law license. [2094]

The Court of Appeals noted that, in contrast to passive income-producing marital property having a market value, the value of a professional license as an asset of the marital partnership is a form of human capital, which is dependent upon the future labor of the licensee. The asset is totally indistinguishable and has no existence separate from the projected professional earnings from which it is derived. To the extent that those same projected earnings used to value the license also form the basis of an award of maintenance, the licensed spouse is being charged twice with distribution of

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[2092] Harmon v Harmon 173 AD2d 978 , 578 NYS2d 897 (1st Dept.,1992).

[2093] Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

[2094] Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

the same marital asset value, or with sharing the same income with the non-licensed spouse.[2095]

In Grunfeld, when setting the level of maintenance, Supreme Court included as part of defendant's earning capacity the projected earnings derived from his professional license. The court also used the same earnings attributable to the law license to determine the present value of the license as a marital asset. The Court of Appeals held that, to comply with McSparron,[2096] Supreme Court had to reduce either the income available to make maintenance payments or the marital assets available for distribution, or some combination of the two. "Once a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout." It stated that where license income is considered in setting maintenance, a court can avoid double counting by reducing the distributive award based on that same income. It also noted that there may be cases where it is more equitable to avoid double counting by reducing the maintenance award. Where the license is likely to retain its value in the future but the non-licensed spouse may only be entitled to receive maintenance for a short period of time, it may be fairer actually to distribute the value of the license as marital property rather than to take the license income into consideration in determining the licensed spouse's capacity to pay maintenance." [2097]

The Court of Appeals held that on the face of the Appellate Division's decision, by ordering full distribution of plaintiff's share of defendant's license without any adjustment of maintenance, the court engaged in double counting of income, which was inconsistent with McSparron. Therefore, it remitted the matter to the Supreme Court to recalculate the required reduction in the license distributive award, in accordance with McSparron and its opinion.[2098]

The Court of Appeals also pointed out that Courts have the discretion to value "active" assets, such as a professional practice, on the commencement date, while "passive" assets such as securities, which could change in value suddenly based on market fluctuations, may be valued at the date of trial. It noted that "Such formulations, however, may prove too rigid to be useful in particular cases. Thus, they should be regarded only as helpful guideposts and not as immutable rules of law."[2099]

[2095] Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

[2096] McSparron v McSparron, 87 NY2d 275, 639 NYS2d 265 [1995]

[2097] Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

[2098] Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

[2099] Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

Imputed Income

In Kay v Kay[2100] a pre-equitable distribution action for a divorce the husband, a salesman, owned real estate and securities estimated at almost a million dollars, two thirds of it in IBM stock, from which he derived an income of $10,000. Most of his real estate investments were financed by the IBM stock. During the marriage he told his wife that his only income was earned as a salesman. He denied her many basic household necessities because he "could not afford them". At the trial the husband testified that his expenditures for himself and his family were $28,000 a year. Evidence at the trial revealed that his employer supplied him with a car, used by himself and his family. The husband's testimony was that his net income was $28,000 per year after taxes, his gross income being $67,000 for which he gave a confusing explanation by saying it was spent for business needs. The husband's evidence was also ambiguous as to $13,000 listed as a business expense for tax purposes but described by the husband as necessary "gratuities" in connection with his job.

In Kay, the Court of Appeals noted that the evidence justified a finding that the husband's true income was much higher than his reported $28,000 per year, and while he was entitled to plead self incrimination when asked about deductions he labeled gratuities, the court was not required to allow the deduction. It stated that faced with evidence that tends to obscure rather than clarify a husbands true financial status a court is entitled to make an award based upon the wife's proof of her needs. The Court distinguished the criteria for fixing alimony from those for child support, noting that child support is to be made "out of the property of either or both of its parents" and "as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child." It stated that the father's resources, rather than his net income, were the limit upon a child support award where he can afford more than he earns, and the interests of the child justify it. The court held that if it were necessary for the husband to utilize his capital or other assets for alimony or child support, they would not be exempt, because he voluntarily maintained his finances in a form that limited the income they produced.[2101]

In Hickland v Hickland,[2102] another pre-equitable distribution case, the husband, an engineer, with annual earnings in excess of $45,000 persuaded his wife to let him try full-time farming as an occupation. This was an experiment and the wife agreed to it expecting that it would provide them with a living. After putting the plan into effect, the parties continued to live in the marital residence and the farming, which took place at Argyle Farm, became a losing proposition. After a tractor accident, the husband hired someone to run the farm and devoted himself to freelance management consulting. The trial court was unable to ascertain the husband's exact consulting income because he

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[2100] (1975) 37 NY2d 632, 376 NYS2d 443, 339 NE2d 143.

[2101] Kay v Kay (1975) 37 NY2d 632, 376 NYS2d 443, 339 NE2d 143.

[2102] 39 N.Y.2d 1,346 N.E.2d 243, 382 N.Y.S.2d 475 (1976).

failed to file income tax returns for the last few years of the marriage. However, his testimony established it at not less than $35,000 net annually until the year in which separation proceedings, were begun. During negotiations for a separation agreement the husband decided to abandon an outgoing consulting assignment which would have paid him approximately $20,000 for 10 weeks' work. He insisted that he had become a full-time farmer and refused all offers of consulting employment ever since.
During the same time, the husband entered into a contract with his sister, where he turned over to her title to all of his real estate, including the marital residence and Argyle Farm, along with various stocks and bonds which he then owned. In exchange, his sister forgave a small loan and guaranteed him the use of a car and its related expenses, all the food he needed from the farm, a remodeled house on it to live in rent free, $15,000 in benefits to each of his children upon his death, a college education for his minor son, and a percentage of any possible profits from the farm and the securities. He agreed to manage the farm and the stock portfolio without salary. At trial he asserted he was a subsistence farmer with no income from which to pay alimony to his wife.
The Court of Appeals found that the husband deliberately stripped himself of income for reasons which went beyond the needs of a reasonable occupational choice. It found that he was capable of earning a substantial income, and his arrangement with his sister appeared to be an impermissible attempt to avoid his obligation to his wife. The court held that the husband could not avoid his obligations by relying on his wife's acquiescence in his plan to take up farming, noting that he never actually put his plan into full practice while the marriage was viable, but only after the parties had already separated.[2103]

The Court of Appeals held that :"

> It is the actual marital standard of living, realistically appraised, which provides the basis for an award of alimony where the husband can afford to maintain that standard, unless he can present genuine reasons, vocational or otherwise, upon which the court could justify a lesser award (***). So measured, the husband's proof here fell far short of showing that his lack of income was either unavoidable or the result of a plan to which the wife was irrevocably committed. Under such circumstances, a husband is under an obligation to use his assets and earning powers if these are required in order to meet his obligation to maintain the marital standard of living...." [2104]

Under the Equitable Distribution Law ("EDL") the prior standard of living is again the objective that the court should try to reach when awarding maintenance. The

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[2103] Hickland v Hickland, 39 N.Y.2d 1,346 N.E.2d 243, 382 N.Y.S.2d 475 (1976)

[2104] Hickland v Hickland, 39 N.Y.2d 1,346 N.E.2d 243, 382 N.Y.S.2d 475 (1976)

general rule is that income will be imputed to a spouse for purposes of awarding maintenance in an amount sufficient to meet the objective of the pre-separation standard of living, based upon a finding of a past demonstrated earnings potential; [2105] past earnings, actual earning capacity and educational background; [2106]

[2105] Rocanello v Rocanello, 678 NYS2d 385 (AD 2nd Dept 1998)

[2106] Junkins v Junkins, 238 A.D.2d 480, 656 N.Y.S.2d 650 (2d Dep't,1997)

receipt of perquisites of cash and other company benefits;[2107] and where a spouse voluntarily maintains his/her assets in a form which limits the income they produce. [2108]

Income may not be attributed to a spouse's former occupation or business where the spouse's proof shows that his lack of income was either unavoidable or the result of a plan to which the other spouse was irrevocably committed.[2109]

Imputation of income may be based upon the testimony of an expert regarding a party's ability to earn an income.[2110]

The calculation of a parties' earning potential must have some basis in law and fact, and an award based on imputed or attributed income will be reversed where there is no evidence or factual basis for it in the record . [2111] Thus, it was held by the Appellate Division that the trial court erred in imputing income to the husband of $60,000 per year, where it made no finding that he voluntarily reduced his income to avoid paying child support and the wife did not present any proof concerning the husband's tax returns or business practices.[2112] Where the Supreme Court determined that the husband's annual income included at least $10,000 in unreported cash and $5,000 for the use of a company vehicle provided by the family the Appellate Division reversed its findings because, although there was evidence that he received cash from his father, there was no proof regarding the amount. The record contained no indication whether the money represented occasional gifts to the husband from his father or regular compensation from his employer. The Appellate Division held that absent proof of the nature or amount of the cash received there was no basis for imputing the unreported cash income to the husband. And as there was no evidence that he used

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[2107] Isaacs v Isaacs , AD2d, 667 NYS2d 740 (AD 1st Dept. 1998); Brown v Brown, 239 A.D. 2d 535, 657 N.Y.S.2d 764 (2d Dep't, 1997).

[2108] Kay v Kay, supra.

[2109] Hickland v Hickland, supra

[2110] In Lago v Adrion,--- N.Y.S.2d ----, 2012 WL 833203 (N.Y.A.D. 2 Dept.), the Appellate Division held that Supreme Court properly imputed $80,000 in annual income to the plaintiff based upon her education and experience, and the testimony of the defendant's expert. Imputation of income may be based upon the testimony of an expert regarding a party's ability to earn an income.

[2111] Petek v. Petek, 239 A.D.2d 327, 657 N.Y.S.2d 738 (2d Dep't 1997)

[2112] Martusewicz v. Martusewicz, 217 A.D.2d 926, 630 N.Y.S.2d 156 (4th Dep't 1995).

his company vehicle for his personal needs the trial court improperly imputed additional income to him. [2113]

[2113] Marino v Marino, 229 A.D.2d 971, 645 N.Y.S.2d 252 (4th Dep't 1996).