

Post Divorce Maintenance Guidelines in Actions Commenced on or after January 23, 2016 - In General¹

Domestic Relations Law § 236 [B][6] was amended in 2015 by establishing post-divorce maintenance guidelines and a statutory formula for determining the guideline amount of post-divorce maintenance awards, with factors for deviation upward or downward, where the award is unjust or inappropriate.²

The application of the post-divorce maintenance guidelines is mandatory. In any matrimonial action the court must make its award for post-divorce maintenance pursuant to the provisions of Domestic Relations Law § 236[B] [6], except where the parties have entered into an agreement pursuant to Domestic Relations Law § 236 [B] [3] providing for maintenance.³

There are two formulas to be used in calculating maintenance: one where child support will be paid and where the post-divorce maintenance payor is also the non-custodial parent for child support purposes; and one where child support will not be paid, or where it will be paid but the post-divorce maintenance payor is the custodial parent for child support purposes.⁴

¹ Copyright © 2016, Joel R. Brandes, All rights reserved.

² Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B][1][a], Domestic Relations Law §236 [B][5][d][7], Domestic Relations Law §236 [B][6], Domestic Relations Law § 248, Domestic Relations Law §236 [B][9][b][1], and Family Court Act § 412, effective January 23 , 2016. Laws of 2015, Ch 269 amended Domestic Relations Law § 236 [B] [5-a], effective October 25, 2015. See Laws of 2015, Ch 269, Section 8, which reads as follows:

8. This act shall take effect on the one hundred twentieth day after it shall have become a law and shall apply to matrimonial actions and family court actions for spousal support commenced on or after such effective date; provided however that section three of this act shall take effect on the thirtieth day after it shall have become a law and shall apply to matrimonial actions commenced on or after such effective date. Nothing in this act shall be deemed to affect the validity of any agreement made pursuant to subdivision 3 of part B of section 236 of the domestic relations law or section 425 of the family court act prior to the effective date of this act.

³ Domestic Relations Law § 236[B] [6] [a].

⁴ Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B] [1] [a], and Domestic Relations Law §236 [B] [6], effective January 23, 2016.

Those formulas are as follows:

a. With child support where the post-divorce maintenance payor is also the non-custodial parent for child support purposes: (i) subtract 25% of the maintenance payee's income from 20% of the maintenance payor's income; (ii) multiply the sum of the maintenance payor's income and the maintenance payee's income by 40% and subtract the maintenance payee's income from the result; (iii) the lower of the two amounts will be the guideline amount of maintenance;⁵

b. Without child support, or with child support but where the post-divorce maintenance payor is the custodial parent for child support purposes: (i) subtract 20% of the maintenance payee's income from 30% of the maintenance payor's income; (ii) multiply the sum of the maintenance payor's income and the maintenance payee's income by 40% and subtract the maintenance payee's income from the result; (iii) the lower of the two amounts will be the guideline amount of maintenance.⁶

An income cap of \$175,000 cap applies to post-divorce maintenance awards.⁷ The definition of income for post-divorce maintenance was modified to include income from income-producing property that is being equitably distributed.⁸

Factors the court may consider in post-divorce maintenance awards now include termination of child support,⁹ and income or imputed income on assets being equitably distributed.¹⁰

There is an "advisory" durational formula for determining the duration of post-divorce maintenance awards.¹¹ However, nothing prevents the court from awarding non-durational, post-divorce maintenance in an appropriate case.¹² In determining the duration of maintenance, the court is required to consider anticipated retirement assets,

⁵ Domestic Relations Law § 236[B] [6] [c].

⁶ Domestic Relations Law § 236[B] [6] [d].

⁷ Domestic Relations Law § 236[B] [6] [b] [4].

⁸ Domestic Relations Law § 236[B] [6] [b] [4].

⁹ Domestic Relations Law § 236[B][6][e][1][d].

¹⁰ Domestic Relations Law § 236[B][6][e][1][m].

¹¹ Domestic Relations Law § 236[B][6][f][1].

¹² Domestic Relations Law § 236[B][6][f][2].

benefits and retirement eligibility age, if ascertainable at the time of the decision.¹³

The court may adjust the guideline amount of maintenance up to the income cap, upward or downward, where it finds that the guideline amount of maintenance is unjust or inappropriate after consideration of one or more factors, which must be set forth in the court's written or on the record decision. Where there is income over the cap, additional maintenance may be awarded after consideration of one or more factors, which must be set forth in the court's decision or on the record.¹⁴

The amendment requires one variation from the calculation of income under the Child Support Standards Act for purposes of calculating maintenance, namely that alimony or maintenance actually paid or to be paid to a spouse that is a party to the action should not be deducted from income.¹⁵ This variation from the calculation of income under the Child Support Standards Act was necessary because otherwise the formula becomes circular by requiring deduction of the very amount that is being calculated.¹⁶

Domestic Relations Law §236 [B] [1] [a] was amended to change the word “recipient” to “payee” in the definition of maintenance. It reads as follows: “The term “maintenance” shall mean payments provided for in a valid agreement between the parties or awarded by the court in accordance with the provisions of subdivisions five-a and six of this part, to be paid at fixed intervals for a definite or indefinite period of time, but an award of maintenance shall terminate upon the death of either party or upon the payee’s valid or invalid marriage, or upon modification pursuant to paragraph B of subdivision nine of this part or section two hundred forty-eight of this chapter.”¹⁷

7-14 Post Divorce Maintenance Guidelines – Mandatory Application

¹³ Domestic Relations Law § 236[B][6][f][4].

¹⁴ Domestic Relations Law § 236[B][6][e].

¹⁵ Domestic Relations Law § 236[B][6][b][3].

¹⁶ Domestic Relations Law § 236[B][6][b][3]. See New York Assembly Memorandum in Support of the legislation (Bill No. A07645)

¹⁷ Domestic Relations Law §236 [B][1][a] as amended by Laws of 2015, Ch 269, § 1, effective January 23 , 2016, to substitute the word “payee” for recipient.

Domestic Relations Law § 236[B] [6][e][1] provides that “the court shall order the post-divorce maintenance guideline obligation up to the income cap¹⁸ “in accordance with paragraph c of this subdivision,”¹⁹ unless the court finds that the post-divorce

¹⁸ "Income cap" means up to and including \$175,000 of the payor's annual income. However, beginning January 31, 2016 and every two years thereafter, the income cap amount will increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the united states department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration is required to determine and publish the income cap. Domestic Relations Law § 236[B][6][b][4]

¹⁹ To determine the post-divorce maintenance guideline amount, Domestic Relations Law § 236 [B][6] (c) requires the court to compare two calculations of the spouses' annual incomes, up to an income cap on the payor's income. They are:

A. Where the Payor's income is lower than or equal to the income cap
I. Where child support is paid and where the maintenance payor is also the non custodial parent for child support purposes the following calculation is done:

- (a) subtract 25% of the payee's income from 20% of the payor's income;
- (b) multiply the sum of the payor's income and the payee's income by 40%;
- (c) subtract the payee's income from the result;
- (d) determine the lower of these two amounts.

The guideline amount of post-divorce maintenance is the amount determined by Domestic Relations Law § 236[B][6][c][1][d]. However, if the amount determined by Domestic Relations Law § 236[B][6][c][1][d] is less than or equal to zero, the guideline amount of post-divorce maintenance is zero dollars.

If child support will be paid for children of the marriage but the payor is the custodial parent, post-divorce maintenance must be calculated prior to child support because the amount of post-divorce maintenance must be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

II. Where the payor's income exceeds the income cap, the court must determine the guideline amount of post-divorce maintenance as follows.

The court must perform the calculations set forth in Domestic Relations Law § 236[B][6][c] for the income of the payor up to and including the income cap;

maintenance guideline obligation is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the post-divorce maintenance guideline obligation accordingly based upon such consideration.”²⁰

In any matrimonial action the court must make its award for post-divorce maintenance pursuant to the provisions of Domestic Relations Law § 236[B] [6], except where the parties have entered into an agreement pursuant to Domestic Relations Law § 236 [B] [3] providing for maintenance.²¹

7-15 Post Divorce Maintenance Guidelines - Definitions

The following definitions appear in Domestic Relations Law § 236 [B] [6] [b].

"Agreement" has the same meaning as in Domestic Relations Law § 236 [B] [3].²²

"Guideline amount of post-divorce maintenance" means the dollar amount derived by the application of Domestic Relations Law § 236[B] [6], paragraph c or d.²³

"Guideline duration of post-divorce maintenance" means the durational period determined by the application of Domestic Relations Law § 236[B] [6] [f].²⁴

"Post-divorce maintenance guideline obligation" means the guideline amount of post-divorce maintenance and the guideline duration of post-divorce maintenance.²⁵

For income exceeding the cap, the amount of additional maintenance awarded, if any, is within the discretion of the court which must take into consideration any one or more of the factors set forth in Domestic Relations Law § 236[B] [6][e][1]

²⁰ Domestic Relations Law § 236[B] [6][e][1]

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

²² Domestic Relations Law § 236[B][6][b][10].

²³ Domestic Relations Law § 236[B][6][b][5].

²⁴ Domestic Relations Law § 236[B][6][b][6].

²⁵ Domestic Relations Law § 236[B][6][b][7].

Under the guidelines "Payor" means the spouse with the higher income.²⁶
"Payee" means the spouse with the lower income.²⁷

"Length of marriage" means the period from the date of marriage until the date of commencement of action.²⁸

"Income cap" means up to and including \$175,000 of the payor's annual income. However, beginning January 31, 2016 and every two years thereafter, the income cap amount will increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States Department of Labor Bureau of Labor Statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration is required to determine and publish the income cap.²⁹

7-16 Post Divorce Maintenance Guidelines - Determine the Income of the Parties – Inclusions in Income

The court must first determine the income of the parties before determining the guideline amount of post-divorce maintenance.³⁰

"Income" means: (a) income as defined in Domestic Relations Law § 240 and Family Court Act § 413 without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the action pursuant to Domestic Relations Law § 240 [1-b] [b][5][vii][c] and Family Court Act § 413[b][5][vii][c] and without subtracting spousal support paid pursuant to Family Court Act § 412;³¹ and (b) income from income-producing property distributed or to be distributed pursuant to Domestic Relations Law § 236[B][5].³²

"Income" is defined in Domestic Relations Law §240(1-b)(b)(5), as "including, but not limited to, the amounts determined by the application of clauses (i) to (vi), as

²⁶ Domestic Relations Law § § 236[B][6][b][1]

²⁷ Domestic Relations Law § § 236[B][6][b][2]

²⁸ Domestic Relations Law § 236[B][6][b][8].

²⁹ Domestic Relations Law § 236[B][6][b][4]

³⁰ McCauley v Drum, 217 AD2d 829, 629 NYS2d 838 (3d Dept., 1995)

³¹ Domestic Relations Law § 236[B][6][b][3][a].

³² Domestic Relations Law § 236[B][6][b][3][b].

reduced by the application of clause (vii).³³ In order to understand exactly this means and what is included in “income,” each clause must be examined individually.

“Income” includes gross (total) income as should have been or should be reported in the most recent federal income tax return. If an individual files his/her federal income tax return as a married person filing jointly, that person is required to prepare a form, sworn to under penalty of law, disclosing his/her gross income individually.³⁴

In addition, “income” also includes investment income reduced by sums expended in connection with such investment, to the extent not already included in gross income.³⁵

In addition, “income” includes the amount of income or compensation voluntarily deferred and income received, if any, from the following sources:

- (A) workers' compensation,
- (B) disability benefits,
- (C) unemployment insurance benefits,
- (D) social security benefits,
- (E) veterans benefits,
- (F) pensions and retirement benefits,
- (G) fellowships and stipends,
- (H) annuity payments, to the extent not already included in gross income,³⁶ and
- (I) alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, in which event the order or agreement shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse; provided, however, that the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with subparagraph two of paragraph b of subdivision nine of part B of section two hundred thirty-six of this article. In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior to the effective date of this subclause, the provisions of this subclause shall not, by themselves, constitute a substantial change of circumstances pursuant to

³³ Domestic Relations Law §240(1-b)(b)(5),

³⁴ Domestic Relations Law §240(1-b)(b)(5)(i).

³⁵ Domestic Relations Law §240(1-b)(b)(5)(ii).

³⁶ Domestic Relations Law §240(1-b)(b)(5)(iii).

paragraph b of subdivision nine of part B of section two hundred thirty-six of this article.³⁷

At the discretion of the court, the court may attribute or impute income to a parent from other resources as may be available to the parent, including, but not limited to:

(A) non-income producing assets,

(B) meals, lodging, memberships, automobiles or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use, or which expenditures directly or indirectly confer personal economic benefits,

(C) fringe benefits provided as part of compensation for employment, and

(D) money, goods, or services provided by relatives and friends.³⁸

Income includes an amount imputed as income based upon the parent's former resources or income, if the court determines that a parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support.³⁹

In addition, to the extent not already included in gross income, the following self-employment deductions attributable to self-employment carried on by the taxpayer are included in "income":

(A) any depreciation deduction greater than depreciation calculated on a straight-line basis for the purpose of determining business income or investment credits, and

(B) entertainment and travel allowances deducted from business income to the extent said allowances reduce personal expenditures.⁴⁰

10:17 The 2015 Amendments - Post Divorce Maintenance Awards – Guidelines - Determine the Income of the Parties--Deductions from Income

³⁷ Subdivision (l) was added by Laws of 2015, Ch 387, § 1, effective January 24,

³⁸ Domestic Relations Law §240(1-b)(b)(5)(iv)

³⁹ Domestic Relations Law §240(1-b)(b)(5)(v).

⁴⁰ Domestic Relations Law §240(1-b)(b)(5)(vi).

The following are deducted from “income”:

(A) unreimbursed employee business expenses except to the extent these expenses reduce personal expenditures,

(B) alimony or maintenance actually paid to a spouse not a party to the instant action pursuant to court order or validly executed written agreement,

(C) alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, in which event the order or agreement shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse; provided, however, that the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with subparagraph two of paragraph b of subdivision nine of part B of section two hundred thirty-six of this article. In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior to the effective date of this subclause, the provisions of this subclause shall not, by themselves, constitute a substantial change of circumstances pursuant to paragraph b of subdivision nine of part B of section two hundred thirty-six of this article.⁴¹

(D) child support actually paid pursuant to court order or written agreement on behalf of any child for whom the parent has a legal duty of support and who is not subject to the instant action,

(E) public assistance,

(F) supplemental security income,

(G) New York city or Yonkers income or earnings taxes actually paid, and

(H) federal insurance contributions act (FICA) taxes actually paid.⁴²

⁴¹ Subdivision (vii) (C), was amended by Laws of 2015, Ch 387, § 2 to replace with a new subdivision (C), effective January 24, 2016.

⁴² Domestic Relations Law §240(1-b)(b)(5)(vii).

7-17 Post Divorce Maintenance Guidelines - Calculation of the Post -Divorce Maintenance Guideline Amount

To determine the post-divorce maintenance guideline amount, the court must compare two calculations of the spouses' annual incomes, up to an income cap of \$175,000⁴³ on the payor's income.⁴⁴

A. Where the Payor's income is lower than or equal to the income cap.. Where child support is paid and where the maintenance payor is also the non custodial parent for child support purposes the following calculation is done:

- (a) subtract 25% of the payee's income from 20% of the payor's income;⁴⁵
- (b) multiply the sum of the payor's income and the payee's income by 40%;⁴⁶
- (c) subtract the payee's income from the result;⁴⁷
- (d) determine the lower of these two amounts.⁴⁸

The guideline amount of post-divorce maintenance is the amount determined by Domestic Relations Law § 236[B] [6] [c] [1] [d]. However, if the amount determined by Domestic Relations Law § 236[B][6][c][1][d] is less than or equal to zero, the guideline

⁴³ Domestic Relations Law § 236[B] [6][b] [4].

Beginning January 31, 2016 and every two years thereafter, the income cap will increase by the product of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the united states department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars. The office of court administration is required to determine and publish the income cap.

⁴⁴ See Domestic Relations Law § 236[B][6][b], [c] and [d].

⁴⁵ Domestic Relations Law § 236[B][6][c][1][a].

⁴⁶ Domestic Relations Law § 236[B][6][c][1][b].

⁴⁷ Domestic Relations Law § 236[B][6][c][1][c].

⁴⁸ Domestic Relations Law § 236[B][6][c][1][d].

amount of post-divorce maintenance is zero dollars.⁴⁹

If child support will be paid for children of the marriage but the payor is the custodial parent, post-divorce maintenance must be calculated prior to child support because the amount of post-divorce maintenance must be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.⁵⁰

II. Where the payor's income exceeds the income cap, the court must determine the guideline amount of post-divorce maintenance as follows.

The court must perform the calculations set forth in Domestic Relations Law § 236[B] [6] [c] for the income of the payor up to and including the income cap;⁵¹

For income exceeding the cap, the amount of additional maintenance awarded, if any, is within the discretion of the court which must take into consideration any one or more of the factors set forth in Domestic Relations Law § 236[B] [6][e][1].⁵²

The factors in Domestic Relations Law § 236[B] [6] [e] [1] are:

- (a) the age and health of the parties;
- (b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;
- (c) the need of one party to incur education or training expenses;
- (d) the termination of a child support award before the termination of the maintenance award when the calculation of maintenance was based upon child support being awarded which resulted in a maintenance award lower than it would have been had child support not been awarded;
- (e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;

⁴⁹ Domestic Relations Law § 236[B] [6][c][1][e].

⁵⁰ Domestic Relations Law § 236[B][6][c][1][f].

⁵¹ Domestic Relations Law § 236[B][6][d][1].

⁵² Domestic Relations Law § 236[B][6][d][2].

- (f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (g) 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;
- (h) the availability and cost of medical insurance for the parties;
- (i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;
- (j) the tax consequences to each party;
- (k) the standard of living of the parties established during the marriage;
- (l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage;
- (m) the equitable distribution of marital property and the income or imputed income on the assets so distributed;
- (n) the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
- (o) any other factor which the court shall expressly find to be just and proper.⁵³

7-18 Post Divorce Maintenance Guidelines - Post- Divorce Maintenance Guideline Obligation Award - Unjust or Inappropriate

The court must order the post-divorce maintenance guideline obligation⁵⁴ up to the income cap in accordance with Domestic Relations Law § 236[B] [6] [c], unless the court finds that the guideline amount of post-divorce maintenance is unjust or inappropriate based upon consideration of any one or more of the factors in Domestic

⁵³ Domestic Relations Law § 236[B] [6][e][1][a-o].

⁵⁴ See Domestic Relations Law § 236[B][6][b][7] for the definition of the term “post-divorce maintenance guideline obligation.”

Relations Law § 236[B] [6] [e] [1], and the court adjusts the guideline amount of post-divorce maintenance accordingly based upon such considerations.⁵⁵

The factors in Domestic Relations Law § 236[B] [6] [e] [1] are:

- (a) the age and health of the parties;
- (b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;
- (c) the need of one party to incur education or training expenses;
- (d) the termination of a child support award before the termination of the maintenance award when the calculation of maintenance was based upon child support being awarded which resulted in a maintenance award lower than it would have been had child support not been awarded;
- (e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;
- (f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (g) 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;
- (h) the availability and cost of medical insurance for the parties;
- (i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;
- (j) the tax consequences to each party;
- (k) the standard of living of the parties established during the marriage;
- (l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the

⁵⁵ Domestic Relations Law § 236[B] [6][e][1]

marriage;

(m) the equitable distribution of marital property and the income or imputed income on the assets so distributed;

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

(o) any other factor which the court shall expressly find to be just and proper. Domestic Relations Law § 236[B] [6][e][1].⁵⁶

7-19 Post Divorce Maintenance Guidelines - Required Statement of Factors and Reasons Where Guideline Amount is Unjust or Inappropriate

Where the court finds that the guideline amount of post-divorce maintenance is unjust or inappropriate based upon consideration of any one or more of the factors in Domestic Relations Law § 236[B] [6][e][1], and the court adjusts the guideline amount of post-divorce maintenance accordingly the court must set forth, in a written decision or on the record, the guideline amount of post-divorce maintenance, the factors it considered, and the reasons that the court adjusted the guideline amount of post-divorce maintenance. The decision, which may be on the record, or in writing, may not be waived by either party or counsel.⁵⁷

7-20 Post Divorce Maintenance Guidelines - Duration of Post-Divorce Maintenance

The court may, but is not required to determine the duration of post-divorce maintenance in accordance with the following advisory schedule:

Length of the marriage ⁵⁸	percent of the length of the marriage for which maintenance will be payable
0 up to and including 15 years	15% - 30%

⁵⁶ Domestic Relations Law § 236[B] [6][e][1] [a-o]

⁵⁷ Domestic Relations Law § 236[B] [6][e][2].

⁵⁸ See Domestic Relations Law § 236[B][6][b][8] for the definition of the term “length of marriage.”

More than 15 up to and including 20 years 30% - 40%

More than 20 years 35% - 50%⁵⁹

In determining the duration of post-divorce maintenance, whether or not the court utilizes the advisory schedule, it must consider the factors listed in Domestic Relations Law §236[B][6][e][1] and must set forth, in a written decision or on the record, the factors it considered. The decision may not be waived by either party or counsel. Nothing shall prevent the court from awarding non-durational maintenance in an appropriate case.⁶⁰

The factors in Domestic Relations Law § 236[B] [6][e][1] are:

- (a) the age and health of the parties;
- (b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;
- (c) the need of one party to incur education or training expenses;
- (d) the termination of a child support award before the termination of the maintenance award when the calculation of maintenance was based upon child support being awarded which resulted in a maintenance award lower than it would have been had child support not been awarded;
- (e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;
- (f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (g) 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

⁵⁹ Domestic Relations Law § 236[B] [6][f][1]

⁶⁰ Domestic Relations Law § 236[B] [6][f][2]

Services law;

- (h) the availability and cost of medical insurance for the parties;
- (i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;
- (j) the tax consequences to each party;
- (k) the standard of living of the parties established during the marriage;
- (l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage;
- (m) the equitable distribution of marital property and the income or imputed income on the assets so distributed;
- (n) the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
- (o) any other factor which the court shall expressly find to be just and proper.⁶¹

When determining the duration of post-divorce maintenance, the court must take into consideration anticipated retirement assets, benefits, and retirement eligibility age of both parties if ascertainable at the time of decision. If not ascertainable at the time of decision, the actual full or partial retirement of the payor with substantial diminution of income is a basis for a modification of the award.⁶²

7-21 Post Divorce Maintenance Awards Guidelines - The Twenty Factors in Domestic Relations Law § 236[B][6][e][1]

The factors in Domestic Relations Law § 236[B] [6] [e] [1] are not a consideration for the court where the Payor's income is lower than or equal to the income cap, unless the court finds that the guideline amount of spousal support is unjust or inappropriate,

⁶¹ Domestic Relations Law § 236[B] [6][e][1][a-o].

⁶² Domestic Relations Law § 236[B] [6][f][4].

based up a consideration of these factors, and adjusts the guideline amount accordingly.⁶³

The court must order the post-divorce maintenance guideline obligation up to the income cap in accordance with Domestic Relations Law § 236[B] [6] [c], unless the court finds that the guideline amount of post-divorce maintenance is unjust or inappropriate based upon consideration of any one or more of the factors in Domestic Relations Law § 236[B] [6] [e] [1], and the court adjusts the guideline amount of post-divorce maintenance accordingly based upon such considerations.⁶⁴ In such case the court must set forth, in a written decision or on the record, the guideline amount of post-divorce maintenance, the factors it considered, and the reasons that the court adjusted the guideline amount of post-divorce maintenance.⁶⁵

The factors in Domestic Relations Law § 236[B] [6] [e] [1] are also a consideration for the court in determining the post-divorce maintenance obligation and in determining the duration of post-divorce maintenance, where the Payor's income exceeds the income cap.

Where the payor's income exceeds the income cap, the court must determine the guideline amount of post-divorce maintenance by performing the calculations set forth in Domestic Relations Law § 236[B] [6] [c] for the income of the payor up to and including the income cap.⁶⁶ For income exceeding the income cap, the amount of additional maintenance awarded, if any, is within the discretion of the court which must take into consideration any one or more of the factors set forth in Domestic Relations Law § 236[B] [6][e][1].⁶⁷

In determining the duration of post-divorce maintenance, whether or not the court utilizes the advisory schedule, the court must consider the factors listed in Domestic Relations Law §236[B] [6] [e] [1] and must set forth, in a written decision or on the record, the factors it considered.⁶⁸

⁶³ Domestic Relations Law § 236[B] [6] [e] [1].

⁶⁴ Domestic Relations Law § 236[B] [6][e][1]

⁶⁵ Domestic Relations Law § 236[B] [6] [e] [2].

⁶⁶ Domestic Relations Law § 236[B] [6] [d] [1].

⁶⁷ Domestic Relations Law § 236[B][6][d][2]

⁶⁸ Domestic Relations Law § 236[B] [6][f][2]

Former factor (2) the length of the marriage,⁶⁹ was removed and subsumed in the provision for the duration of Post-Divorce maintenance. The court is not required to, but may determine the duration of post-divorce maintenance in accordance with an advisory schedule which is based upon the length of the marriage.⁷⁰

Former factor (8), the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;⁷¹ former factor (10), the presence of children of the marriage in the respective homes of the parties;⁷² former factor (12), the inability of one party to obtain meaningful employment due to age or absence from the workforce;⁷³ and former factor (13), the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment;⁷⁴ were removed from the maintenance statute in 2015. There does not appear to be any reason why the court cannot consider these former factors under the “catch-all” factor (o).⁷⁵

7-22 Post Divorce Maintenance Guidelines - Duration of Post-Divorce Maintenance - The Retirement Factor

In addition to the enumerated factors in Domestic Relations Law §236 [B][4][e][1][a-o], when determining the duration of post-divorce maintenance, the court must take into consideration anticipated retirement assets, benefits, and retirement eligibility age of both parties if ascertainable at the time of decision. If the anticipated retirement assets,

⁶⁹ See former Domestic Relations Law §236 [B][6][a] [2], as amended by Laws of 2010, Ch 371, §2. The 2010 Amendment deleted “duration” and added “Length”. This factor was formerly part of factor 2 and became factor (2).

⁷⁰ See former Domestic Relations Law § 236[B] [6][f][1]], as amended by Laws of 2010, Ch 371, §2.

⁷¹ See former Domestic Relations Law §236 [B][6][a] [8], as amended by Laws of 2010, Ch 371, §2. This factor was formerly factor (4).

⁷² See former Domestic Relations Law §236 [B][6][a] [10], as amended by Laws of 2010, Ch 371, §2. This factor was formerly factor (6).

⁷³ See former Domestic Relations Law §236 [B][6][a] [12], as added by Laws of 2010, Ch 371, §2. This was formerly factor (9).

⁷⁴ See former Domestic Relations Law §236 [B][6][a] [13], as added by Laws of 2010, Ch 371, §2.

⁷⁵ Domestic Relations Law §236 [B][6][e][1](o) as added by Laws of 2015, Ch 269, effective January 23 , 2016.

benefits, or retirement eligibility age of both parties is not ascertainable at the time of the decision, the actual full or partial retirement of the payor with substantial diminution of income is a basis for a modification of the post-divorce maintenance award.⁷⁶

7-23 Post Divorce Maintenance Guidelines - Self-Support Reserve--Rebuttable Presumption that No Maintenance is Awarded

The "Self-support reserve" means the self-support reserve as defined in the child support standards act and codified in Domestic Relations Law § 240 and Family Court Act § 413.⁷⁷

The "Self-support Reserve" as defined in the child support standards act and codified in Domestic Relations Law § 240 and Family Court Act § 413 is 135% of the "poverty income guidelines" amount for a single person amended as reported by the Federal Department of Health and Human Services. On March 1st of each year, the self-support reserve is revised to reflect annual updating of the guidelines.⁷⁸

The 2016 poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services is \$11,880 and the 2016 self-support reserve is \$16,038. The Combined Parental Income Amount: \$143,000.⁷⁹

The poverty income guidelines for a single person are published annually by the Federal Department of Health and Human Services. The Social Services Law requires the Commissioner of Social Services to publish, on March 1 of each year in department regulations, the revised self-support reserve, as defined in Family Court Act §413 and Domestic Relations Law §240, to reflect the annual updating of the poverty income guidelines amount for a single person as reported by the Federal Department of Health and Human Services.⁸⁰

Where the guideline amount of post-divorce maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount

⁷⁶ Domestic Relations Law § 236[B] [6][f][4].

⁷⁷ Domestic Relations Law § 236 [B][6][b] [9].

⁷⁸ See Domestic Relations Law §240 [1-b][b] [6].

⁷⁹ See https://www.childsupport.ny.gov/child_support_standards.html (last accessed June 7, 2016) for the current amounts.

⁸⁰ Social Services Law §111-I (2), as added by Laws of 2015, Ch 343, effective December 24, 2015.

of the post-divorce maintenance is the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no post-divorce maintenance is to be awarded.⁸¹

⁸¹ Domestic Relations Law § 236 [B][6][c][1][g].