

The 2010 Divorce Reform Amendments

By Joel R. Brandes, Bari Brandes Corbin and Evan B. Brandes¹

The 2010 Session of the legislature has resulted in legislation that is intended to bring significant reform New York's divorce process, increase the amount of temporary maintenance awards, and compel New York court to promptly make counsel and expert fee awards to the non-monied spouse. The purpose of this article is to provide the reader with a clear and concise explanation of the 2010 Divorce Reform Amendments, including the new Temporary Maintenance Guidelines which are codified in new Domestic Relations Law § 236 [B][5-a]. However, it does not contain an extensive discussion of the Temporary Maintenance Guidelines. **For a comprehensive discussion of the Temporary Maintenance Guidelines we refer you to the "Guide to the Temporary Maintenance Guidelines", written by Joel R. Brandes, which comes with The New York Divorce and Family Law™ Temporary Maintenance Calculator.**²

¹ Joel R. Brandes, is the President of Joel R. Brandes Consulting Services, Inc., Jersey City, New Jersey and Ft. Lauderdale, Florida. He authored Law and the Family New York, Second Edition, Revised (Thomson-West) and co-authored Law the Family New York Forms (Thomson-West). He is the publisher of "New York Divorce and Family Law", at www.nysdivorce.com and www.brandeslaw.com. He received his B.A. from Queens College of the City University of New York, his J.D. from Brooklyn Law School and his LL.M. from New York University School of Law.

Bari Brandes Corbin maintains her offices for the practice of law in Laurel Hollow, New York. She is co-author of Law and the Family New York, Second Edition, Revised, Volumes 5 & 6 (Thomson-West). She received her B.A. from Colgate University and her J. D. from Emory University School of Law.

Evan B. Brandes maintains his office for the practice of law in New York, New York. He received his J.D. and M.S.E.L. from Vermont Law School and his LL.M. from University of Miami School of Law.

² **The New York Divorce and Family Law™ Temporary Maintenance Calculator automatically generates a detailed report showing each step of the temporary maintenance calculation required by the new law. As you enter the parties incomes into the program, the " income entry" screen calculates the "presumptive amount" of temporary maintenance, so that you can try a range of scenarios and immediately see the outcome. Each provision of the law is explained to you in a separate on-screen "Guide to the Temporary Maintenance Guidelines" written by Joel R. Brandes.**

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Laws of 2010, Ch 384, effective October 12, 2010, amended Domestic Relations Law § 170 to add subdivision 7. It adopts the “irretrievably broken” no-fault divorce ground for New York. However, a divorce may not be granted until all of the major ancillary issues are resolved by the parties or the court.

Laws of 2010, Ch 371, effective October 12, 2010, amends Domestic Relations Law § 236 [B][6] to add a subdivision 5-a. It revises the process for setting awards of temporary maintenance during the pendency of a matrimonial action, by creating a formula and list of factors that presumptively govern such awards. It amends Domestic Relations Law § 236 [B][1][a] to update the definition of “maintenance” by cross-referencing it to Domestic Relations Law § 236 [B] [6] subdivision 5-a and amends Domestic Relations Law § 236 [B][6] to add 5 new factors for the court to consider in determining the amount and duration of “post-divorce “maintenance.

Laws of 2010, Ch 329, as amended by Laws of 2010, Ch 415, effective October 12, 2010) amended Domestic Relations Law §§ 237 and 238 to create a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. It adds actions to obtain maintenance or distribution of property after a foreign judgment of divorce to the actions for which such fees shall be awarded. In exercising the court's discretion, the court is required to seek to assure that each party is adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis pendente lite, so as to enable adequate representation from the commencement of the proceeding. In addition the court is authorized to order expert fees to be paid by one party to the other to enable the party to carry on or defend the action. The parties and their attorneys are also required to submit an affidavit to the court with financial information to enable the court to make its determination. The monied spouse is now required to disclose how much he has agreed to pay and how much he has paid his attorney. The affidavit must include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. In addition, Domestic Relations Law § 238 was also amended to add to the actions for which such fees shall be awarded “actions to enforce a court order”.

Domestic Relations Law § 170

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Domestic Relations Law § 170 was amended³ to allow a judgment of divorce to be granted to either a husband or a wife without assigning fault to either of the parties. A divorce can only be granted after the major ancillary issues have been resolved. Section 170 of the Domestic Relations Law was amended by adding subdivision 7 allowing a divorce where a marriage is “irretrievably broken”, for a period of at least six months, provided that one party has so stated under oath. It would appear that the verified complaint should suffice for this purpose. The statute does not define the terms “irretrievably broken, nor does it eliminate the five year statute of limitations in Domestic Relations Law § 210. The judgment can only be granted after the following ancillary issues have been resolved: the equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and expert fees and expenses, and custody and visitation with the infant children of the marriage.

Section 170 (7) of the domestic relations law provides as follows:

(7) The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties or determined by the court and incorporated into the judgment of divorce.

Domestic Relations Law § 236 [B][1][5-a]

Domestic Relations Law § 236 [B][1] was amended by adding a new subdivision 5-a establishing a process for determining the presumptive amount of temporary maintenance awards, with factors for deviation, where the award is unjust or inappropriate. Laws of 2010, Ch 371, §1 . 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.

The application of the temporary maintenance guidelines (“TMG”) is mandatory. In any matrimonial action the court must make its award for temporary maintenance pursuant to the provisions of Domestic Relations Law § 236[B], [5-a], except where the parties have entered into an agreement pursuant to Domestic Relations Law 236 [B][3]

³ Laws of 2010, Ch 384, § 1, effective October 12, 2101. See Laws of 2010, Ch 384, § 2.

providing for maintenance. Domestic Relations Law § 236[B],[5-a][a]. The application temporary maintenance guidelines will only result in a maintenance award when there is an income gap between the two parties so that the payee's income (the less-monied spouse) income is less than two thirds of the payor's income (more monied spouse). For example, if the payor's annual income is \$90,000 a year, the TMG will only result in an award if the payee's annual income is less than \$60,000.

To determine the temporary maintenance guideline amount, the court must compare two calculations of the spouses' annual incomes, up to an income cap of \$500,000⁴ on the payor's income. For both of these calculations, any income of the payor that exceeds \$500,000 is not included.

Calculation (1): 30% of the payor's income minus 20% of the payee's income,

OR

Calculation (2): 40% of the combined income of the two spouses. The payee's income is then subtracted from this figure.

The sum of this calculation is the Presumptive award. The court must select the lesser of these two figures as the temporary maintenance guideline amount.

The court must order the presumptive award of temporary maintenance, unless the court finds that the presumptive award is unjust or inappropriate. Domestic Relations Law § 236 [B][5-a][e][1].

Where the court finds that the presumptive award is unjust or inappropriate, it may adjust the presumptive award of temporary maintenance accordingly based upon consideration of 17 factors.

If the payor has an annual income exceeding \$500,000⁵, the judge may adjust

⁴ Beginning January 31, 2010 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. Domestic Relations Law § 236[B], [5-a][b][5].

⁵ Beginning January 31, 2010 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

the amount based upon the additional income over \$500,000. The court must consider 19 factors to determine any additional amount of temporary maintenance on the payor's income above the \$500,000 cap.

The duration of the temporary award is determined solely by considering the length of the marriage. Historically, temporary awards were made during the entire pendency of the action. This new language indicates that it was the intention of the legislature to give the court discretion to award temporary maintenance for a limited period of time, rather than for the entire pendency of the action.

The temporary maintenance guidelines also include protections for individuals whose annual income is less than the self-support reserve.

Domestic Relations Law § 236 [B][1][5-a] provides:

5-a. Temporary maintenance awards.

a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court shall make its award for temporary maintenance pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

- (1) "Payor" shall mean the spouse with the higher income.
- (2) "Payee" shall mean the spouse with the lower income.
- (3) "Length of marriage" shall mean the period from the date of marriage until the date of commencement of action.
- (4) "Income" shall mean:
 - (a) income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act; and
 - (b) income from income producing property to be distributed pursuant to subdivision five of this part.
- (5) "Income cap" shall mean up to and including five hundred thousand dollars of the payor's annual income; provided, however, beginning Janu-

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. Domestic Relations Law § 236[B], [5-a][b][5].

ary thirty-first, two thousand twelve and every two years thereafter, the payor's annual income amount shall 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 shall determine and publish the income cap.

(6) "Guideline amount of temporary maintenance" shall mean the sum derived by the application of paragraph c of this subdivision.

(7) "Guideline duration" shall mean the durational period determined by the application of paragraph d of this subdivision.

(8) "Presumptive award" shall mean the guideline amount of the temporary maintenance award for the guideline duration prior to the court's application of any adjustment factors as provided in subparagraph one of paragraph e of this subdivision.

(9) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

c. The court shall determine the guideline amount of temporary maintenance in accordance with the provisions of this paragraph after determining the income of the parties:

(1) Where the payor's income is up to and including the income cap:

(a) the court shall subtract twenty percent of the income of the payee from thirty percent of the income up to the income cap of the payor.

(b) the court shall then multiply the sum of the payor's income up to and including the income cap and all of the payee's income by forty percent.

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

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

(2) Where the income of the payor exceeds the income cap:

(a) the court shall determine the guideline amount of temporary maintenance for that portion of the payor's income that is up to and including the income cap according to subparagraph one of this paragraph, and, for the payor's income in excess of the income cap, the court shall determine any additional guideline amount of temporary maintenance

through consideration of the following factors:

- (i) the length of the marriage;
- (ii) the substantial differences in the incomes of the parties;
- (iii) the standard of living of the parties established during the marriage;
- (iv) the age and health of the parties;
- (v) the present and future earning capacity of the parties;
- (vi) the need of one party to incur education or training expenses;
- (vii) the wasteful dissipation of marital property;
- (viii) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (ix) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (x) acts by one party against another that 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;
- (xi) the availability and cost of medical insurance for the parties;
- (xii) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment;
- (xiii) the inability of one party to obtain meaningful employment due to age or absence from the workforce;
- (xiv) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;
- (xv) the tax consequences to each party;
- (xvi) marital property subject to distribution pursuant to subdivision five of this part;
- (xvii) the reduced or lost earning capacity of the party seeking temporary maintenance as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;
- (xviii) the contributions and services of the party seeking temporary maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
- (xix) any other factor which the court shall expressly find to be just and proper.

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

(3) Notwithstanding the provisions of this paragraph, where the guideline amount of temporary maintenance would reduce the payor's income below the self-support reserve for a single person, the presumptive amount of the guideline amount of temporary maintenance shall be 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 temporary maintenance is awarded.

d. The court shall determine the guideline duration of temporary maintenance by considering the length of the marriage. Temporary maintenance shall terminate upon the issuance of the final award of maintenance or the death of either party, whichever occurs first.

e. (1) The court shall order the presumptive award of temporary maintenance in accordance with paragraphs c and d of this subdivision, unless the court finds that the presumptive award is unjust or inappropriate and adjusts the presumptive award of temporary maintenance accordingly based upon consideration of the following factors:

(a) the standard of living of the parties established during the marriage;

(b) the age and health of the parties;

(c) the earning capacity of the parties;

(d) the need of one party to incur education or training expenses;

(e) the wasteful dissipation of marital property;

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

(g) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(h) 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;

(i) the availability and cost of medical insurance for the parties;

(j) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment;

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

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

(m) the tax consequences to each party;

- (n) marital property subject to distribution pursuant to subdivision five of this part;
- (o) the reduced or lost earning capacity of the party seeking temporary maintenance as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;
- (p) the contributions and services of the party seeking temporary maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
- (q) any other factor which the court shall expressly find to be just and proper.

(2) Where the court finds that the presumptive award of temporary maintenance is unjust or inappropriate and the court adjusts the presumptive award of temporary maintenance pursuant to this paragraph, the court shall set forth, in a written order, the amount of the unadjusted presumptive award of temporary maintenance, the factors it considered, and the reasons that the court adjusted the presumptive award of temporary maintenance. Such written order shall not be waived by either party or counsel.

(3) Where either or both parties are unrepresented, the court shall not enter a temporary maintenance order unless the unrepresented party or parties have been informed of the presumptive award of temporary maintenance.

f. A validly executed agreement or stipulation voluntarily entered into between the parties in an action commenced after the effective date of this subdivision presented to the court for incorporation in an order shall include a provision stating that the parties have been advised of the provisions of this subdivision, and that the presumptive award provided for therein results in the correct amount of temporary maintenance. In the event that such agreement or stipulation deviates from the presumptive award of temporary maintenance, the agreement or stipulation must specify the amount that such presumptive award of temporary maintenance would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount. Such provision may not be waived by either party or counsel. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the presumptive award of temporary maintenance provided such agreements or stipulations comply with the provisions of this subdivision. The court shall, however, retain discretion with respect to temporary, and post-divorce maintenance awards pursuant to this section. Any court order incorporating a validly executed agreement or stipulation which deviates from the presumptive award of temporary maintenance

nance shall set forth the court's reasons for such deviation.

g. When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order the temporary maintenance award based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered or obtained evidence.

h. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of this subdivision, brought pursuant to this article, the temporary maintenance guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

i. 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 this subdivision.

Domestic Relations Law § 236 [B][1][a]

Domestic Relations Law § 236 [B][1][a] was amended to update the definition of "maintenance" by cross-referencing it to Domestic Relations Law § 236 [B] subdivision 5-a.

Domestic Relations Law § 236 [B][1][a] now provides 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 recipient's valid or invalid marriage, or upon modification pursuant to paragraph (b) of subdivision nine of section two hundred thirty-six of this part or section two hundred forty-eight of this chapter."⁶

⁶ 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.

Domestic Relations Law § 236 [B][6]

Domestic Relations Law § 236 [B][6] was amended to add as factors for the court to consider in determining the amount and duration of maintenance: the need of one party to incur education or training expenses; the existence and duration of a pre-marital joint household or a pre-divorce separate household; the presence of children of the marriage in the respective homes of the parties; 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; and the inability of one party to obtain meaningful employment due to age or absence from the workforce.

The title of this section was amended from "Maintenance " to " Post-divorce Maintenance Awards", which might lead the reader to make the erroneous assumption that the section is only applicable to divorce proceedings, and not applicable to maintenance awards in other proceedings, such as annulment or dissolution, in which they maintenance awards are also authorized.

Domestic Relations Law § 236 [B][6], now entitled " Post-divorce Maintenance Awards" ⁷ provides as follows:

6. a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, 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. Such order shall be effective as of the date of the application therefor, and 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. 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;⁸

⁷ Formerly titled "Maintenance"

⁸ Deleted "duration"; added "Length"; Formerly part of factor 2; now factor 2.

- (3) the age and health of both parties;⁹
- (4) the present and future earning capacity of both parties;¹⁰
- (5) the need of one party to incur education or training expenses;¹¹
- (6) the existence and duration of a pre-marital joint household or a pre-divorce separate household;¹²
- (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;¹³
- (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;¹⁴
- (10) the presence of children of the marriage in the respective homes of the parties;¹⁵
- (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;¹⁶
- (12) the inability of one party to obtain meaningful employment due to age or absence from the workforce;¹⁷
- (13) the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment;¹⁸
- (14) the tax consequences to each party;

⁹ Formerly part of factor 2.

¹⁰ Formerly factor 3.

¹¹ Added new factor

¹² Added new factor

¹³ Formerly factor 4

¹⁴ Formerly factor 5

¹⁵ Formerly factor 6

¹⁶ Added new factor

¹⁷ Added new factor

¹⁸ Added new factor

- (15) the equitable distribution of marital property;¹⁹
- (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;²⁰
- (17) the wasteful dissipation of marital property by either spouse;²¹
- (18) The transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;²²
- (19) the loss of health insurance benefits upon dissolution of the marriage²³, and the availability and cost of medical insurance for the parties²⁴; and
- (20) any other factor which the court shall expressly find to be just and proper.²⁵

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

c. The court may award permanent maintenance, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, or upon modification pursuant to paragraph [(b)] B of subdivision nine of ²⁶ this part or section two hundred forty-eight of this chapter.

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 § 237

¹⁹ Formerly factor 7

²⁰ Formerly factor 8

²¹ Formerly factor 9

²² Formerly factor 10

²³ Formerly factor 11

²⁴ Added the following new Language: “and the availability and cost of medical insurance for the parties”

²⁵ Formerly factor 12

²⁶ Deleted “section two hundred thirty-six of”

Domestic Relations Law § 237 was amended to create a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. It adds actions to obtain maintenance or distribution of property after a foreign judgment of divorce to the actions for which such fees shall be awarded. In exercising the court's discretion, the court is required to seek to assure that each party is adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis pendente lite, so as to enable adequate representation from the commencement of the proceeding. provide for a presumption of counsel fees to a non-monied spouse. In addition the court is authorized to order expert fees to be paid by one party to the other to enable the party to carry on or defend the action. The parties and their attorneys are also required to submit an affidavit to the court with financial information to enable the court to make its determination. The monied spouse is now required to disclose how much he has agreed to pay and how much he has paid his attorney. The affidavit must include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses

Prior law placed an onus upon the party in a matrimonial action seeking counsel fees pendente lite, to show why the interests of justice require it. In addition, Judges appeared reluctant to order pendente lite counsel fee awards in matrimonial actions under the current statute. The Assembly Memorandum in support of this amendment indicates that given the importance of pendente lite counsel fees, and the frequency of financial imbalance between parties to matrimonial proceedings, it is inappropriate to place the burden upon a non-monied spouse to justify it. This amendment requires that in a matrimonial action an order for pendente lite counsel fees and expenses should be granted at the outset of the case to ensure adequate representation of the less monied spouse from the commencement of the proceeding, and it is left to the affected parties to show why, in the interests of justice, the order should not be made. Nothing precludes an award of counsel fees to a nonprofit legal service organization where such organization provides legal services without charge to a party who is eligible for counsel fees. In addition, the amendment is not intended to preclude a court's discretionary power to award counsel fees for services and expenses incurred before the action begins.²⁷

Domestic Relations Law §237 provides ²⁸ as follows:

²⁷ See NY Legis Memo., Laws of 2010, Ch. 329.

²⁸ Laws of 2010, Ch 329, § 1, effective October 12, 2010. Laws of 2010, Ch 329, §3 as amended by Laws of 2010, Ch 415, § 1 and applicable to actions and proceedings commenced on or after such effective date.

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against a spouse who was the defendant in any action outside the State of New York and did not appear therein where such spouse asserts the nullity of such foreign judgment, (5) to obtain Maintenance or distribution of property following a foreign judgment of divorce, or²⁹ (6) to enjoin the prosecution in any other jurisdiction of an action for a divorce, the court may direct either spouse or, where an action for annulment is maintained after the death of a spouse, may direct the person or persons maintaining the action, to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse to enable the other party³⁰ to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties.³¹ There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.³² Any applications for³³ fees and

²⁹ added "to obtain maintenance or distribution of property following a foreign judgment of divorce, or "

³⁰ Deleted "such sum or sums of money" and added " counsel fees and fees and expenses of experts" ; deleted "that spouse" and added " the other party"

³¹ Deleted "Such direction must be made in the final judgment in such action or proceeding, or by one or more orders from time to time before final judgment, or by both such order or orders and the final judgment; provided, however, such direction shall be made prior to final judgment where it is shown that such order is required to enable the petitioning party to properly proceed "

³² Added: " There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and

expenses may be maintained by the attorney for either spouse in his own name in the same proceeding. Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section. ³⁴

(b) Upon any application to enforce,³⁵ annul or modify an order or judgment for alimony, maintenance, distributive award, distribution of marital property ³⁶ or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty of this article³⁷ provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct a spouse or parent to pay³⁸ counsel fees and fees and expenses of experts directly to the attorney of the other spouse or parent to enable the other party to carry on or defend³⁹ the application or proceeding by the other spouse or parent as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. ⁴⁰ There shall be a

their respective attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. “

³³ Deleted “[counsel]”

³⁴ Added: “Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section. “

³⁵ Added: “enforce”

³⁶ Added:”maintenance, distributive award, distribution of marital property “

³⁷ Added: “of this article”

³⁸ Deleted: “[such sum or sums of money for the prosecution or the defense of]”

³⁹ Added: “counsel fees and fees and expenses of experts directly to the attorney of the other spouse or parent to enable the other party to carry on or defend”

⁴⁰ Deleted: “[With respect to any such application or proceeding, such direction may be made in the order or judgment by which the particular application or

rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement, between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.⁴¹ Any applications for⁴² fees and expenses may be maintained by the attorney for either spouse in counsel's own name in the same proceeding.⁴³ Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.⁴⁴

proceeding is finally determined, or by one or more orders from time to time before the final order or judgment, or by both such order or orders and the final order or judgment]

⁴¹ Added: "There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement, between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses."

⁴² Deleted: [counsel]

⁴³ Deleted: [Representation by an attorney pursuant to paragraph (b) of subdivision nine of section one hundred eleven-b of the social services law shall not preclude an award of counsel fees to an applicant which would otherwise be allowed under this section.]

⁴⁴ Added: "Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would

Domestic Relations Law § 238

Domestic Relations Law § 238 was amended⁴⁵ to create a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. It adds actions to obtain maintenance or distribution of property after a foreign judgment of divorce to the actions for which such fees shall be awarded and provides that such actions shall also include actions to enforce a court order. In exercising the court's discretion, the court is required to seek to assure that each party is adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis pendente lite, so as to enable adequate representation from the commencement of the proceeding. In addition the court is authorized to order expert fees to be paid by one party to the other to enable the party to carry on or defend the action. The parties and their attorneys are also required to submit an affidavit to the court with financial information to enable the court to make its determination. The monied spouse is now required to disclose how much he has agreed to pay and how much he has paid his attorney. The affidavit must include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses

Prior law placed an onus upon the party in a matrimonial action seeking counsel fees pendente lite, to show why the interests of justice require it. In addition, Judges appeared reluctant to order pendente lite counsel fee awards in matrimonial actions under the current statute. The Assembly Memorandum in support of this amendment indicates that given the importance of pendente lite counsel fees, and the frequency of financial imbalance between parties to matrimonial proceedings, it is inappropriate to place the burden upon a non-monied spouse to justify it. This amendment requires that in a matrimonial action an order for pendente lite counsel fees and expenses should be granted at the outset of the case to ensure adequate representation of the less monied spouse from the commencement of the proceeding, and it is left to the affected parties to show why, in the interests of justice, the order should not be made. Nothing precludes an award of counsel fees to a nonprofit legal service organization where such organization provides legal services without charge to a party who is eligible for counsel fees. In addition, the amendment is not intended to preclude a court's discretionary power to award counsel fees for services and expenses

otherwise be allowed under this section.”

⁴⁵ Laws of 2010, Ch 329, § 2, effective October 12, 2010 and applicable to actions and proceedings commenced on or after such effective date. Laws of 2010, Ch 329, §3 as amended by Laws of 2010, Ch 415, § 1.

incurred before the action begins.⁴⁶

Section 238 of the domestic relations law provides as follows:

238. Expenses in enforcement and modification⁴⁷ proceedings. In any action or proceeding to⁴⁸ enforce or modify any provision⁴⁹ of a judgment or order entered in an action for divorce, separation, annulment⁵⁰, declaration of nullity of a void marriage, declaration of validity or nullity of a judgement of divorce rendered against a spouse who was the defendant in any action outside the state of new york and did not appear therein where such spouse asserts the nullity of such foreign judgment, or an injunction restraining the prosecution in any other jurisdiction of an action for a divorce,⁵¹ or in any proceeding pursuant to section two hundred forty-three, two hundred forty-four, two hundred forty-five, or two hundred forty-six of this article⁵², the court may in its discretion require either party to pay⁵³ counsel fees and fees and expenses of experts directly to the attorney of the other party to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires having regard to the circumstances of the case and of the respective parties. There shall be a rebuttable

⁴⁶ See NY Legis Memo, Laws of 2010, Ch. 329.

⁴⁷ Added: "and modification "

⁴⁸ Deleted: [compel the payment of any sum of money required to be paid by]

⁴⁹ Deleted: [compel the payment of any sum of money required to be paid by];
Added: " enforce or modify any provision of "

⁵⁰ Deleted: [or]

⁵¹ Added: " Declaration of validity or nullity of a judgement of divorce rendered against a spouse who was the defendant in any action outside the state of new york and did not appear therein where such spouse asserts the nullity of such foreign judgment, or an injunction restraining the prosecution in any other jurisdiction of an action for a divorce, "

⁵² Added: "of this article"

⁵³ Deleted: [the expenses of the other in bringing, carrying on, or defending such action or proceeding]

presumption that counsel fees shall be awarded to the less monied spouse.⁵⁴ In any such action or proceeding, applications for⁵⁵ fees and expenses may be maintained by the attorney for the respective parties in counsel's own name and in counsel's own behalf. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their representative attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.⁵⁶

⁵⁴ Added: "counsel fees and fees and expenses of experts directly to the attorney of the other party to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires having regard to the circumstances of the case and of the respective parties. There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse."

⁵⁵ Deleted: [counsel]

⁵⁶ Added: "In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their representative attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section."