New York Law Journal

WWW.NYLJ.COM

An ALM Publication

VOLUME 247—NO. 84

WEDNESDAY, MAY 2, 2012

Outside Counsel

Expert Analysis

Temporary Maintenance Status in Practice

The Temporary Maintenance Statute, codified in Domestic Relations Law Section 236B (5-a), changed the landscape for calculating interim maintenance (support for the less-monied spouse during the pendency of divorce proceeding) for all actions commenced on or after Oct. 12, 2010. Prior to its enactment, courts determined interim maintenance on a case-by-case basis with an eye toward "tiding over the needy spouse" considering the family's standard of living during the marriage. Now, in an effort to create "consistency and predictability," shift resources pre-trial by automatic calculation, and to make it easier for pro se litigants, courts are required to follow a number of steps when determining interim maintenance:

1. First, the court determines each spouse's income using the same definition as in the Child Support Standards Act (CSSA): gross income less FICA and New York City taxes. The spouse with the higher income is the "payor" spouse, and the spouse with the lower income the "payee" spouse.

2. The court then performs two different calculations using the parties' incomes, capping the payor's income at $500,000 for both calculations, and the two figures are compared.

3. The payee is entitled to the lower of the two calculated figures unless the court finds that "it would be unjust or inappropriate" based on 17 factors.

4. If the payor's income is above $500,000, the court must decide whether additional maintenance is appropriate by considering 19 factors.

5. Finally, if the resulting guideline amount would reduce the payor's income below the self-support reserve ($14,620 a year in 2010), then the award is equal to the payor's income minus the self-support reserve.

Although the statute is verbose (1,915 words to be precise), it creates more questions than it provides answers. For example, it does not specify whether the payee's expenses should be paid by the payee out of the maintenance award or paid by the payor in addition to the award; whether temporary maintenance is taxable to the payee and deductible by the payor; or how temporary maintenance interacts with temporary child support. Further ambiguity arises from the factors courts must analyze in determining whether the presumptive award is "unjust or inappropriate," or whether additional maintenance is appropriate when

ALLAN E. MAYEFSKY *is the managing partner of Aronson, Mayefsky & Sloan.* ALYSSA A. ROWER *is an associate at the firm. They may be contacted at mayefsky@amsllp.com and rower@amsllp.com, respectively.*

By **Allan E. Mayefsky**

And **Alyssa A. Rower**

the payor's income exceeds the $500,000 cap.

Since the statute's enactment, trial courts have attempted to resolve these questions, sorting through the statute's muddy language and interpreting the ambiguities. Recently, in *Khaira v. Khaira*,[1] the Appellate Division, First Department, addressed the statute and answered the question of who is responsible for funding certain direct expenses. Nonetheless, and as detailed below, many questions still remain.

For all actions commenced on or after Oct. 12, 2010, courts are required to follow a number of steps when determining interim maintenance.

Expenses

One significant issue unanswered by the statute is whether the payee's expenses should be paid by the payor on top of the temporary maintenance award or whether the payee should pay certain direct expenses out of his or her temporary maintenance award. In many cases, this issue has considerable financial impact, because the payee's living expenses previously paid directly by the payor can be considerable.

Trial courts have interpreted this question in different ways. Some have deducted direct expenses from the temporary maintenance award. For example, in *Valentin v. Valentin*,[2] the husband, who earned approximately $77,000 annually, voluntarily paid approximately $1,000 a month in expenses for the marital residence that the wife resided in. The Queens County Supreme Court deducted the majority of these carrying charges from the payor's temporary maintenance obligation, concluding that it would be "unjust and inappropriate" to direct him to pay the carrying charges in addition to the temporary maintenance award.

In *J.V. v. G.V.*,[3] while the Supreme Court, Nassau County, did not specifically deduct the payee wife's direct expenses from the temporary maintenance award, the fact that the husband was voluntarily paying all of the carrying charges for the marital residence (in which the wife resided) and all of the children's expenses was a factor that weighed heavily in the court's decision to reduce the temporary maintenance by one-half because the presumptive award was "unjust and inappropriate."

Some trial courts have directed the payor to pay the payee's direct expenses in addition to the temporary maintenance award, often when the payor's income exceeded the $500,000 cap. For example, in *S.B. v. G.B.*,[4] the husband, who reported annual income of $862,138, was directed to pay, in addition to temporary maintenance calculated at the cap of $500,000 and interim child support, the wife's apartment carrying costs, utilities, and the children's expenses. The Supreme Court, New York County, did not deduct these direct expenses from the temporary maintenance award (but also did not award any additional maintenance on the payor's income above $500,000).

Alternately, in *H.K. v. J.K.*,[5] another New York County Supreme Court case, the court ordered the payee wife to pay her expenses, including unreimbursed medical, therapy, and apartment expenses, out of her temporary maintenance award. Like the payor in *S.B.*, the payor husband in *H.K.* had income exceeding the $500,000 cap—his most recently filed tax return reported income of $1,017,387. As explained below, however, while the wife had to pay her own expenses, the court ordered the husband to pay additional maintenance equal to the wife's rent, due to his income over $500,000.

Even when a payor's income is below the $500,000 cap, however, some courts have held that the payor should be responsible for the payee's expenses over and above the temporary maintenance award. For example, in *S.C. v. J.R.C.*,[6] the husband, who earned $105,000 annually, was ordered to pay the presumptive amount of maintenance to the wife, who earned approximately $44,000, plus an additional $300 a month toward the carrying charges of the marital residence. In *S.G. v. P.G.*,[7] the court imputed $125,000 in income to the husband, whose reported income varied widely, and ordered him to pay $2,000 a month in interim maintenance (slightly less than the calculated guideline amount) in addition to the carrying charges for the marital residence and the family's unreimbursed medical expenses.

In *Khaira*, the First Department addressed this issue and noted that: "…in the absence of a specific reference to the carrying charges for the marital residence, we consider it reasonable and logical to view the formula adopted by the new maintenance provision as covering all of the spouse's basic living expenses, including housing costs as well as the costs

of food and clothing and other usual expenses." Therefore, the court held that, while it may be appropriate to direct payment above the guideline amount in certain situations, the court must make and explain that determination and cannot simply treat the payee's direct expenses as "add-ons."

Taxes

Another question unanswered by the statute: Should temporary maintenance be tax deductible from the payor's income, and treated as taxable income by the payee? The majority of courts have answered this question in the affirmative. For example, in *Khaira*, the trial court made the monthly unallocated spousal and child support tax deductible to the payor. Similarly, in *Margaret A. v. Shawn B.*,[8] the Supreme Court, Westchester County, ordered that the temporary maintenance would be tax deductible to the payor and taxable as income to the payee. In *J.H. v. W.H.*,[9] however, it can be inferred that the Supreme Court, Kings County, did not make the maintenance taxable, because the court's chart of the financial consequences to each party deducted the maintenance from the payor's column after deducting federal taxes and did not include any taxes in the payee's column.

Child Support

Another significant issue is how temporary maintenance interacts with temporary child support. In *Margaret A.*, the court, in calculating the payor's child support obligations, deducted the temporary maintenance award from his income, but did not consider it income to the payee. The Supreme Court of Kings County in *Scott M. v. Ilona M.,*[10] did likewise, reasoning that "since no prior order existed and, therefore, the monies were not reportable in the most recent tax year, [temporary maintenance] is not counted as income."

Some courts have ignored the temporary maintenance guidelines altogether when calculating temporary child support. For example, in *S.C. v. J.R.C.*, the Supreme Court, Nassau County, did not apply the CSSA or evaluate the husband's obligations under the temporary maintenance statute in awarding child support of $1,000 a month.

In determining the responsibility for add-on expenses, the court in *Margaret A.* determined that, "considering the shift in financial resources to the plaintiff [wife] due to the temporary maintenance award," each party was responsible for 50 percent of the children's reasonable add-on expenses, including education and extracurricular activities, but not including unreimbursed medical expenses, for which the father was 100 percent responsible (without explaining its reasoning for treating unreimbursed medical expenses differently).

On the other hand, the court in *S.B. v. G.B.* ordered the husband to pay 100 percent of the children's add-on expenses even though the wife was receiving temporary maintenance of $12,500 a month. The shift in financial resources in *S.B.*, however, where the payor's income well-exceeded the $500,000 cap, was much less dramatic than the shift in *Margaret A.*

"Unjust and Inappropriate"

When determining what is "unjust and inappropriate," courts, tasked with considering 17 factors, have various interpretations. In *J.V. v. G.V.*, [11] the Supreme Court of Nassau County concluded that the presumptive award was unjust and inappropriate and reduced it by one-half, even though the payor husband earned in excess of $500,000. The facts of that case were somewhat unique. The husband was the primary caretaker of the parties' three children, who refused to have any contact with the wife, an alleged drug abuser. The husband lived in the marital residence with the children and voluntarily paid all carrying charges and all expenses for the children, which totaled approximately $300,000 each year.

In *C.K. v. M.K.,*[12] a case with a much less dramatic fact pattern, the Supreme Court of Rockland County concluded that the guideline maintenance amount of $0 was unjust and inappropriate and changed it to $2,000 when the payee's income used to calculate the award was "attributed" to her from the payor's business but not received by her in the traditional sense.

In *Scott M. v. Ilona M.*, the court, noting the "significant challenges" posed by the statute, concluded that the presumptive award of $3,097 was "unjust and inappropriate" because of two factors: (i) the pre-divorce joint household of both parties; and (ii) the child care expense obligation of the parties. The court remarked that the shift in resources from the payor to the payee resulted in the payor having a substantial reduction in resources, but that this financial resource shift, in and of itself, was not a basis for the court to re-adjust the calculation. The court stated: "Granting a deviation just because there is a resource shift would be inconsistent with the statutory intent." Nonetheless, the court did take this resource shift into account when reducing the presumptive award by one-third because there were other factors justifying deviation from the presumptive award.

> One significant issue unanswered by the statute is whether the payee's expenses should be paid by the payor on top of the temporary maintenance award or whether the payee should pay certain direct expenses out of his or her temporary maintenance award.

In *Margaret A.*, the court imputed $257,000 of income to the payor, an unemployed father with three children, and did not consider it unjust or inappropriate to order him to pay temporary maintenance of $75,000 and child support of $50,000. In imputing income to the husband, the court noted that, other than conclusory, self-serving statements, the husband failed to show what specific efforts he had made to find a job. Even if the father did earn the income the court imputed to him, however, after the support awards, he would be left with significantly less than his wife. Yet the court did not deviate from the presumptive award despite the significant shift in resources.

Payor Spouse's Income

When the payor's income exceeds $500,000, the court "shall determine any additional guideline amount of temporary maintenance" through consideration of 19 statutory factors (the 17 "unjust and inappropriate" factors plus two additional ones). There have been only a few cases dealing with high-earning families. As discussed above, in *J.V. v. G.V.*, the court did not consider the payor's income above $500,000, but rather reduced the presumptive award. In *S.B. v. G.B.*[13] the Supreme Court, New York County, found that an additional award of maintenance was not appropriate because the husband was paying direct expenses for the wife, the wife received money from her family that she had not been fully forthcoming about, and the wife's and the children's needs would be met by the maintenance award in combination with child support.

In *H.K. v. J.K.*, the court took a different approach by increasing the temporary maintenance from $12,500 to $17,500 per month based on, among other factors, the duration of the marriage, the standard of living, and the health and earning potentials of the spouses. The court, however, held the wife responsible for her own expenses, including her housing expenses and unreimbursed medical expenses. Thus, although the *H.K.* court ordered a higher maintenance award than the *S.B.* court, the wife in *S.B.* ended up with more on a net basis because the husband was responsible for virtually all of her fixed expenses.

After *Khaira*, however, it seems unlikely that the *S.B.* decision would stand, and the court's approach in *H.K.* will more likely be the one trial courts take going forward in high income cases.

Conclusion

Although courts have made progress in interpreting the statute and developing a body of case law that will help practitioners and judges navigate the issues going forward, many questions remain. Indeed, it seems we are far from achieving the "consistency and predictability" in temporary maintenance awards that the Legislature desired and it remains to be seen whether we ever will. Perhaps we should return discretion to trial judges for interim purposes because application of a formula in the interim is too difficult and requires too much variation. The Legislature should then focus on a proper formula for permanent maintenance.

1. 2012 NY Slip Op 00850 (1st Dept., Feb. 7, 2012).
2. 936 N.Y.S.2d 62 (Sup. Ct. Queens, July 11, 2011).
3. 33 Misc.3d 1212A (Sup. Ct. Nassau, Aug. 22, 2011).
4. 314737/10, NYLJ 1202514542256, at *1 (Sup. Ct. N.Y. Aug. 12, 2011).
5. 32 Misc.3d 1226A (Sup. Ct. N.Y., June 27, 2011).
6. 930 N.Y.S.2d 177 (Sup. Ct. Nassau, June 8, 2011).
7. 936 N.Y.S.2d 61 (Sup. Ct. Nassau, Aug. 10, 2011).
8. 921 N.Y.S.2d 476 (Sup. Ct. Westchester, March 15, 2011).
9. 930 N.Y.S.2d 175 (Sup. Ct. Kings, March 18, 2011).
10. 31 Misc.3d 353 (Sup. Ct. Kings Jan. 27, 2011),
11. 202926/2010, NYLJ 1202514545936, at *1 (Sup. Ct. Nassau, Aug. 22, 2011).
12. 923 N.Y.S.2d 817 (Sup. Ct. Rockland, Feb. 15, 2011).
13. 314737/10, NYLJ 1202514542256, at *1 (Sup. Ct. N.Y., Aug. 12, 2011).

Reprinted with permission from the May 2, 2012 edition of the NEW YORK LAW JOURNAL © 2012 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-05-12-07