

Amendments to 2010 Temporary Maintenance Statute

1 The People of the State of New York represented in Senate and Assembly, do
2 enact as follows:

3 Section 1. Part B of section 236 of the domestic relations law is amended by
4 adding a new subdivision 5-a to read as follows:

5 5-a. Temporary maintenance awards. a. Except where the parties have
6 entered into an agreement regarding temporary maintenance, ~~pursuant to~~
7 ~~subdivision three of this part providing for maintenance,~~¹ in any matrimonial
8 action the court shall make its award for temporary maintenance pursuant to
9 the provisions of this subdivision.

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

11 (1) "Payor" shall mean the spouse with the higher income.

12 (2) "Payee" shall mean the spouse with the lower income.

13 ~~(3) "Length of marriage" shall mean the period from the date of marriage until~~
14 ~~the date of commencement of action.~~²

15 ~~(4) (3) "Income" shall mean: (a) income as defined in the child support~~
16 ~~standards act and codified in section two hundred forty of this article and~~
17 ~~section four hundred thirteen of the family court act; and~~

18 ~~—(b) income from income producing property to be distributed pursuant to~~
19 ~~subdivision five of this part.~~³

¹ This change simply cleans up the statutory language.

² References to the length of marriage and the duration of an award were inadvertently included in this legislation. These concepts are left over from earlier drafts that applied to permanent, not temporary, maintenance. They have no relevance to an award of temporary maintenance, which lasts until the end of the litigation, when a permanent order substitutes for the temporary one.

³ References to equitable distribution (found in subdivision five of this part) were inadvertently included in this legislation. They are left over from earlier drafts that applied to permanent, not temporary, maintenance. The amount of equitable distribution and the income derived from it are facts to be established during the litigation. They are not known at the onset of litigation when temporary maintenance is awarded.

1 ~~(5)~~ (4) "Income cap" shall mean up to and including five hundred thousand
2 dollars of the payor's annual income; provided, however, beginning January
3 thirty-first, two thousand twelve and every two years thereafter, the payor's
4 ~~annual~~ income cap⁴ amount shall increase by the product of the average
5 annual percentage changes in the consumer price index for all urban consumers
6 (CPI-U) as published by the United States department of labor bureau of labor
7 statistics for the two year period rounded to the nearest one thousand dollars.
8 The office of court administration shall determine and publish the income cap.

9 ~~(6)~~ (5) "Guideline amount of temporary maintenance" shall mean the sum
10 derived by the application of paragraph c or d of this subdivision.

11 ~~(7)~~ "Guideline duration" shall mean the durational period determined by the
12 application of paragraph c or d of this subdivision.⁵

13 ~~(8)~~ "Presumptive award" shall mean the guideline amount of the
14 temporary maintenance award for the guideline duration prior to the court's
15 application of any adjustment factors as provided in subparagraph one of
16 paragraph e of this subdivision.⁶

17 ~~(9)~~ (6) "Self-support reserve" shall mean the self-support reserve as defined
18 in the child support standards act and codified in section two hundred forty of
19 this article and section four hundred thirteen of the family court act.

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

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

⁴ This is a minor technical change that corrects the existing language.

⁵ References to duration of awards are left over from earlier drafts of this legislation that applied to permanent, not temporary, maintenance awards. *See* note 2, *supra*.

⁶ The term "presumptive award" refers to an award encompassing the guideline amount plus a durational amount. Since the concept of duration does not apply to interim awards, the term is unnecessary. *See* note 2, *supra*. The term has been stricken throughout the statute and the term "guideline amount of temporary maintenance" had been substituted.

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

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

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

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

11 ~~—(2) Where the income of the payor exceeds the income cap:~~

12 ~~—(a) the court shall determine the guideline amount of temporary~~
13 ~~maintenance for that portion of the payor's income that is up to and including~~
14 ~~the income cap according to subparagraph one of this paragraph, and, for~~
15 ~~the payor's income in excess of the income cap, the court shall determine any~~
16 ~~additional guideline amount of temporary maintenance through consideration~~
17 ~~of the following factors:~~

18 ~~—(i) the length of the marriage;~~

19 ~~—(ii) the substantial differences in the incomes of the parties;~~

20 ~~—(iii) the standard of living of the parties established during the marriage;~~

21 ~~—(iv) the age and health of the parties;~~

22 ~~—(v) the present and future earning capacity of the parties;~~

23 ~~—(vi) the need of one party to incur education or training expenses;~~

24 ~~—(vii) the wasteful dissipation of marital property;~~

25 ~~—(viii) the transfer or encumbrance made in contemplation of a matrimonial~~
26 ~~action without fair consideration;~~

27 ~~—(ix) the existence and duration of a pre-marital joint household or a pre-~~
28 ~~divorce separate household;~~

1 ~~—(x) acts by one party against another that have inhibited or continue to inhibit~~
2 ~~a party's earning capacity or ability to obtain meaningful employment. Such acts~~
3 ~~include but are not limited to acts of domestic violence as provided in section~~
4 ~~four hundred fifty-nine a of the social services law;~~
5 ~~—(xi) the availability and cost of medical insurance for the parties;~~
6 ~~—(xii) the care of the children or stepchildren, disabled adult children or~~
7 ~~stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit~~
8 ~~a party's earning capacity or ability to obtain meaningful employment;~~
9 ~~—(xiii) the inability of one party to obtain meaningful employment due to age or~~
10 ~~absence from the workforce;~~
11 ~~—(xiv) the need to pay for exceptional additional expenses for the child or~~
12 ~~children, including, but not limited to, schooling, day care and medical~~
13 ~~treatment;~~
14 ~~—(xv) the tax consequences to each party;~~
15 ~~—(xvi) marital property subject to distribution pursuant to subdivision five of~~
16 ~~this part;~~
17 ~~—(xvii) the reduced or lost earning capacity of the party seeking temporary~~
18 ~~maintenance as a result of having foregone or delayed education, training,~~
19 ~~employment or career opportunities during the marriage;~~
20 ~~—(xviii) the contributions and services of the party seeking temporary~~
21 ~~maintenance as a spouse, parent, wage earner and homemaker and to the career~~
22 ~~or career potential of the other party; and~~
23 ~~—(xix) any other factor which the court shall expressly find to be just and~~
24 ~~proper.⁷~~

⁷ New paragraphs c and d, which take the place of paragraph c in the existing legislation, substitute a cleaner, simpler means of explaining the method of calculating guideline amounts of temporary maintenance. Functionally this new version is the same as the existing legislation. Courts are still directed to look to a set of factors to determine the amount of an award for income over the income cap; however, with these changes, the set of factors is the same set that is used when courts consider whether a guideline amount of temporary maintenance is unjust or inappropriate (new paragraph g, old

1 c. When the payor's income is lower than or equal to the income cap, the court
2 shall determine the guideline amount of temporary maintenance as follows:

3 (1) The court shall subtract twenty percent of the payee's income from thirty
4 percent of the payor's income.

5 (2) The court shall then multiply the sum of the payor's income and the payee's
6 income by forty percent.

7 (3) The court shall subtract the payee's income from the amount derived from
8 clause (2) of this subparagraph.

9 (4) The court shall determine the lower of amounts derived by clauses (1) and
10 (3) of this subparagraph.

11 (5) The guideline amount of temporary maintenance shall be the amount
12 determined by clause (4) of this subparagraph except that, if the amount
13 determined by clause (4) of this subparagraph is less than or equal to zero, the
14 guideline amount of temporary maintenance shall be zero dollars.

15 d. When the payor's income exceeds the income cap, the court shall
16 determine the guideline amount of temporary maintenance as follows:

17 (1) The court shall perform the calculations set forth in subsections (1)
18 through (4) of paragraph c for the total incomes of payor and payee.

19 (2) The court shall perform the calculations set forth in subsections (1)
20 through (4) of paragraph c for the incomes of payor and payee up to and
21 including the cap.

22 (3) The guideline amount of temporary maintenance shall be either:

23 (a) the calculation derived from (1) of this paragraph or

24 (b) the amount derived from (2) of this paragraph plus an
25 amount that the court shall determine by consideration of the factors set forth in
26 paragraph g (1).

paragraph f). Courts will have one additional piece of information when they make this determination, i.e., the amount of the basic calculation for the entire income as well as for the income under the income cap.

1 ~~(b)~~ (4) In any decision made pursuant to subsection (3)~~(b)~~ of paragraph
2 d, the court shall set forth the factors it considered and the reasons for its
3 decision. Such written order may not be waived by either party or counsel.

4 ~~e~~ (3) Notwithstanding the provisions of this paragraph, where the
5 guideline amount of temporary maintenance would reduce the payor's
6 income below the self-support reserve for a single person, the presumptive
7 amount of the guideline amount of temporary maintenance shall be the
8 difference between the payor's income and the self-support reserve. If the
9 payor's income is below the self-support reserve, there is a rebuttable
10 presumption that no temporary maintenance is awarded.

11 ~~d, f~~ ~~The court shall determine the guideline duration of temporary~~
12 ~~maintenance by considering the length of the marriage.~~ ⁸ Temporary
13 maintenance shall terminate upon the issuance of the final award of
14 maintenance, discontinuance or dismissal of the action for divorce, ⁹ or the death
15 of either party, whichever occurs first.

16 ~~e, g~~ (1) The court shall order the ~~presumptive award~~ guideline amount of
17 temporary maintenance in accordance with paragraphs c and d of this
18 subdivision unless the court finds that the ~~presumptive award~~ guideline
19 amount of temporary is unjust or inappropriate and adjusts the ~~presumptive~~
20 ~~award~~ guideline amount of temporary maintenance accordingly based upon
21 consideration of the following factors:

- 22 (a) the standard of living of the parties established during the marriage;
- 23 (b) the age and health of the parties;
- 24 (c) the earning capacity of the parties;
- 25 (d) the need of one party to incur education or training expenses;

⁸ References to the length of marriage and the duration are left over from earlier drafts that applied to permanent, not temporary, maintenance. *See* note 2, *supra*.

⁹ This is a technical change that makes clear what was probably assumed.

1 ~~(e) the wasteful dissipation of marital property;~~¹⁰
2 ~~—(f) the transfer or encumbrance made in contemplation of a matrimonial action~~
3 ~~without fair consideration;~~¹¹
4 ~~—(g) the existence and duration of a pre-marital joint household or a pre-divorce~~
5 ~~separate household;~~¹²
6 ~~(h)~~ (e) acts by one party against another that have inhibited or continue to
7 inhibit a party's earning capacity or ability to obtain meaningful employment.
8 Such acts include but are not limited to acts of domestic violence as provided in
9 section four hundred fifty-nine-a of the social services law;
10 ~~(i)~~ (f) the availability and cost of medical insurance for the parties;
11 ~~(j)~~ (g) the care of ~~the~~ children or stepchildren, disabled adult children or
12 stepchildren, elderly parents or in-laws ~~made~~ provided during the course of the
13 marriage¹³ that has inhibited or continues to inhibit a party's earning
14 capacity or ability to obtain meaningful employment;
15 ~~(k)~~ (h) the inability of one party to obtain meaningful employment due to age
16 or absence from the workforce;

¹⁰ References to equitable distribution and related concepts such as marital property are left over from earlier drafts that applied to permanent, not temporary, maintenance. *See* note 3, *supra*.

¹¹ Determining whether there has been a transfer or encumbrance made in contemplation of a matrimonial action without fair consideration cannot be done easily at the onset of the litigation when awards of temporary maintenance are made. These transfers and encumbrances are relevant to permanent, not temporary, maintenance.

¹² The existence of a premarital joint household or pre-divorce separate household is relevant only to the duration of an award, a concept that was left over from earlier drafts that applied to permanent, not temporary, maintenance. *See* note 2, *supra*.

¹³ The wording of the existing statute apparently left some doubt about whether care-taking relevant to an award of temporary maintenance must have taken place during the marriage or whether it might be anticipated. The change makes clear that it is only a history of care-taking that matters for these awards.

1 ~~—(l) the need to pay for exceptional additional expenses for the child or~~
2 ~~children, including, but not limited to, schooling, day care and medical~~
3 ~~treatment;~~¹⁴
4 ~~(m) (i) the tax consequences to each party;~~
5 ~~—(n) marital property subject to distribution pursuant to subdivision five of this~~
6 ~~part;~~¹⁵
7 ~~(o) (j) the reduced or lost earning capacity of the party seeking temporary~~
8 ~~maintenance as a result of having foregone or delayed education, training,~~
9 ~~employment or career opportunities during the marriage;~~
10 ~~—(p) (k) the contributions and services of the party seeking temporary~~
11 ~~maintenance as a spouse, parent, wage earner and homemaker and to the career~~
12 ~~or career potential of the other party; and~~
13 ~~(q) (l) any other factor which the court shall expressly find to be just and~~
14 ~~proper.~~

15 (2) Where the court finds that the ~~presumptive award of temporary~~
16 ~~maintenance guideline amount of temporary maintenance~~ is unjust or
17 inappropriate and the court adjusts the ~~presumptive award of temporary~~
18 ~~maintenance guideline amount of temporary maintenance~~ pursuant to this
19 paragraph, the court shall set forth, in a written order, the amount of the
20 unadjusted the ~~presumptive award of temporary maintenance guideline~~
21 ~~amount of temporary maintenance~~, the factors it considered, and the reasons
22 that the court adjusted the ~~presumptive award of temporary maintenance~~
23 ~~guideline amount of temporary maintenance~~. Such written order shall not be
24 waived by either party or counsel.

¹⁴ The Child Support Standards Act makes provisions for these expenses, so this provision is unnecessary.

¹⁵ References to equitable distribution and the related concept of marital property are left over from earlier drafts that applied to permanent, not temporary, maintenance. *See* note 3, *supra*.

1 (3) Where either or both parties are unrepresented, the court shall not enter a
2 temporary maintenance order that adjusts the amount of the award from the
3 guideline amount of temporary maintenance unless the court informs ¹⁶
4 unrepresented party or parties ~~have been informed~~ of the ~~presumptive~~
5 ~~award of temporary maintenance~~ guideline amount of temporary
6 maintenance.

7 ~~f. A validly executed agreement or stipulation voluntarily entered into~~
8 ~~between the parties in an action commenced after the effective date of this~~
9 ~~subdivision presented to the court for incorporation in an order shall include a~~
10 ~~provision stating that the parties have been advised of the provisions of this~~
11 ~~subdivision, and that the presumptive award provided for therein results~~
12 ~~in the correct amount of temporary maintenance. In the event that such~~
13 ~~agreement or stipulation deviates from the presumptive award of temporary~~
14 ~~maintenance, the agreement or stipulation must specify the amount that such~~
15 ~~presumptive award of temporary maintenance would have been and the~~
16 ~~reason or reasons that such agreement or stipulation does not provide for~~
17 ~~payment of that amount. Such provision may not be waived by either party or~~
18 ~~counsel. Nothing contained in this subdivision shall be construed to alter the~~
19 ~~rights of the parties to voluntarily enter into validly executed agreements or~~
20 ~~stipulations which deviate from the presumptive award of temporary~~
21 ~~maintenance provided such agreements or stipulations comply with the~~
22 ~~provisions of this subdivision. The court shall, however, retain discretion~~
23 ~~with respect to temporary, and post-divorce maintenance awards pursuant~~
24 ~~to this section. Any court order incorporating a validly executed agreement~~
25 ~~or stipulation which deviates from the presumptive award of temporary~~
26 ~~maintenance shall set forth the court's reasons for such deviation.~~ ¹⁷

¹⁶ These additions clarify the meaning of the subsection.

¹⁷ This provision unduly burdens temporary awards.

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

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

13 ~~(j) In any decision made pursuant to this subdivision the court shall, where~~
14 ~~appropriate, consider the effect of a barrier to remarriage, as defined in~~
15 ~~subdivision six of section two hundred fifty three of this article, on the factors~~
16 ~~enumerated in this subdivision.~~¹⁸

17 § 2. This act will take effect immediately.

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¹⁸ Remarriage and therefore barriers to remarriage are not an issue at the onset of the litigation when awards of temporary maintenance are made. Like a number of other provisions, this was left over from earlier versions of this legislation that applied to permanent, not temporary awards.