Durational Maintenance Advisory Guidelines: How Advisory Are They?

By Lee Rosenberg, Editor-in Chief

In negotiating spousal support or requesting an award of spousal maintenance from the court, we now start with the maintenance guidelines set forth in the Domestic Relations Law.[1] The statute provides for a presumptive calculation on the amount of spousal support and addresses duration. The durational aspect as relates to final maintenance contains both advisory guidelines and factors.

In *Renzi v. Renzi*,[2] decided on June 9, 2023 by the Appellate Division, Fourth Department, the court addressed the maintenance determination issued by the trial court and found error in the trial court's application of the statute. The trial court awarded final maintenance in the sum of $5,700 per month — an amount in excess of the presumptive statutory award — until the husband reached the age of 67. The decision was entered upon the husband's default, yet the appellate court determined it should review the maintenance award without first considering the need to vacate the default, as maintenance was subject to contest below.[3] What is most significant in the appellate court's determination is that it held the trial court erred in awarding maintenance beyond the "advisory" guidelines without addressing the statutory factors.[4] It would then appear that the Fourth Department has held that if the trial court does not consider the factors, it must apply the durational guidelines which are only supposed to be discretionary considerations and not mandatory.

The Fourth Department's decision holds,

> On appeal, the husband contends that Supreme Court erred in awarding the wife maintenance above the presumptive amount under Domestic Relations Law § 236(B)(6) without following the requirements of that statute. We agree and *further conclude that the court erred in awarding maintenance for a period of time in excess of the recommendation set forth in the advisory schedule in* Domestic Relations Law § 236(B)(6)(f)(1) *without adequately demonstrating its reliance on the relatively relevant statutory factors* enumerated in DRL *§* 236(B)(6)(e) (*see* § 236[B][6][f][2]). (emphasis added)

The appellate court sent the matter back to the trial court for redetermination of the amount and duration of maintenance. A determination, however, that a court is required to

adhere to the advisory recommendations on duration if it does not set forth its reliance on relevant statutory factors is not contemplated by the statute. Use of the factors is.

Statutory History

The maintenance guidelines, as are set forth in Domestic Relations Law § 236B(5-A) for temporary maintenance and 236B(6) for permanent maintenance, first crossed our paths in 2010.[5] At that time, the convoluted temporary maintenance provisions created many issues in their application[6] and considered income up to $500,000 in establishing the amount of support. The initial version of the statute applied the formulaic calculation on the temporary support amount only and factors on final awards. Also, it did not have advisory durational guidelines — only the statutory factors for the court to consider on amount and duration. Further review by the New York State Law Revision Commission was also directed to occur.[7]

Ultimately, a substantial revamp occurred in 2015, effective as of January 23, 2016, which initially saw both temporary and permanent maintenance subject to application of the formula up to the first $175,000 of the payor's income.[8] Considering biennial increases as provided by the statute, that number is currently at $203,000.

The maintenance statute does not permit the court to apply the presumptive calculation formula above the cap as the Child Support Standards Act permits. On income over the maintenance cap, or in the event the court would determine the amount to be unjust or inappropriate, the court must look to the statutory factors, but cannot apply the formula. Also,

unlike child support, the parties may enter into agreements with regard to both temporary and permanent maintenance that comport with or deviate from the presumptive amounts, without being required to set forth the presumptive calculations and reasons for any deviation.

Upon amendment of the guidelines in 2015, in addition to the use of the formula to determine the amount for both temporary and final support, the change in the statutory cap and other modifications, including addressing child support in the calculations, durational advisory guidelines were now included after much deliberation and compromise by and among many bar groups with varying views on the subject. This compromise was brought together as part of an informal working group through the Matrimonial Practice Advisory and Rules Committee. Notably, the Sponsor's Memorandum on the 2015 amendment specifically stated (as did the Report of the Matrimonial Practice Advisory and Rules Committee),[9]

> Durational formula for post-divorce maintenance is *advisory*, and the durational periods contain ranges to afford courts *more discretion*. The advisory durational formula in this measure contains more realistic durations for payment of post-divorce maintenance than were included in the maintenance guidelines legislation nearly enacted last spring (see Senate 7266-A/Assembly 9606-A (2013-14))[10] (emphasis added).

Those advisory and discretionary durational guidelines are first referenced as follows: "Guideline duration of post divorce maintenance" shall mean the durational period by the application of paragraph f of this subdivision.[11]

That provision, *inter alia*, states,

> f. The duration of post-divorce maintenance may be determined as follows:
>
> (1) The court *may* determine the duration of post-divorce maintenance in accordance with the following advisory schedule:
>
> Length of Marriage
>
> Percentage of Length of Marriage
>
> That for Which Maintenance Payable
>
> 0 to 15 years 15% to 30%
>
> 15 years to 20 years 30% to 40%
>
> More than 20 years 35% to 50%
>
> (2) In determining the duration of post-divorce maintenance, *whether or not the court utilizes the advisory schedule*, it shall consider the factors listed in subparagraph one of paragraph e of this subdivision and shall set forth, in a written decision or on the record, the factors it considered. Such decision shall not be waived by either party or counsel. Nothing herein shall prevent the court from awarding non-durational maintenance in an appropriate case (emphasis added).

In determining the length of the marriage, the statute provides that the "'[l]ength of marriage' shall mean the period from the date of marriage until the date of commencement of action."[12]

The statute itself permits the court to make use of the advisory durational guidelines or not. The statute provides for factors to be considered when the court is determining the length of spousal support *and* for the court to set forth those factors in writing or on the record as a matter of mandate, as the court "*shall* set forth, in a written decision or on the record, the *factors* it considered. Such decision *shall not be waived* by either party or counsel" (emphasis added).

Nowhere in the statute does it state that the advisory guidelines must be mandatory applied or that they must be applied at all. The statute also does not provide that use of the advisory guidelines is presumptive. Their use or non-use is entirely discretionary. The durational guidelines are just as the statute says, "advisory." There is no requirement in the statute that a court or a litigant must apply the advisory durational guidelines or risk reversable error.

The trial court in *Renzi* did not make use of the factors in determining the amount of support when it did not strictly apply the formula to calculate the presumptive amount nor did it apply the factors in determining the duration of support, and so for those reasons the appellate court had basis for review and remittance. The thought, however, that it would have been proper for the trial court to have set duration by using the advisory guidelines only, and leave it at that, is misplaced. The advisory guidelines are often an easy way out and can be a very useful tool and guidepost for courts and practitioners, but they are not always the be-all and end-all. While the appellate court may not have intended to phrase that aspect of its decision to make that implication, that is how it may be interpreted, and caution should be taken.

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Endnotes

1. DRL § 236B(5-A) and (6).
2. 2023 NY Slip Op. 03092 (4th Dept 2023).
3. "While no appeal lies from a judgment entered upon the default of the appealing party (*see* CPLR 5511), an appeal from such a judgment brings up for review 'those matters which were the subject of contest before the Supreme Court'" (*Bottini v. Bottini*, 164 A.D.3d 556, 558, 82 N.Y.S.3d 604, quoting *Sarlo–Pinzur v. Pinzur*, 59 A.D.3d 607, 607–608, 874 N.Y.S.2d 499). Here, the issue of whether the defendant's default should be vacated was the subject of contest in the Supreme Court and, thus, may be reviewed on appeal (*see Yi Jing Tan v. Liang*, 160 A.D.3d 786, 787, 75 N.Y.S.3d 68), *Merlino v. Merlino*, 171 A.D.3d 911 (2nd Dept 2019).
4. The trial court also did not "set forth what it found the wife's income to be or set out the presumptive amount of maintenance owed under the statutory formula." Further, it failed to "set forth the factors it considered and the reasons for its decision in writing or on the record. . ."
5. Signed August 3, 2010 effective October 12, 2010.
6. *See,* e.g, *Khaira v. Khaira*, 93 AD3d 194 (1st Dept 2012).
7. DRL § 236B(6-A). Final Report issued May 15, 2013, https://nyslawrevision.files.wordpress.com/2014/07/final-may-15-2013-report-on-maintenance-awards.pdf.
8. The enactment also created the use of the support calculation formula in Family Court Act 412 which, given that Family Court may not grant a divorce, does not contain limitations of duration except if the parties enter into an agreement, the parties divorce in a matrimonial proceeding or a party dies.
9. https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2015-MatrimonialCourt-ADV-Report.pdf.
10. New York Sponsors Memorandum, 2015 A.B. 7645.
11. DRL § 236B(6)(b)(6).
12. DRL § 236B(5-A)(b)(3); DRL § 236B(6)(b)(8). The statute does permit the court to consider, however, in its factors, a pre-marital joint household or a predivorce separate household. DRL § 236B(5-A)(h)(1)(f); DRL § 236B(6)(e)(1)(f).