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Judge Deviates From Formula Under New Divorce Laws

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By reducing a monied spouse's maintenance obligations, a Brooklyn Supreme Court justice, in a ruling of apparent first impression, has applied a "deviation" authorized in one of two newly passed laws designed to put divorcing couples on a level economic playing field.

To correct the harsh application of two new laws governing awards of maintenance and counsel fees pendente lite, Justice Jeffrey Sunshine ([See Profile](#)) applied a deviation authorized in one statute and reduced by one third the maintenance obligation of the husband, identified as Scott M. in [the decision](#). The judge also shaved \$3,000 from counsel fees the husband will have to pay to cover his wife's legal fees.

Bruce J. Wagner, the head of the Family Law Section of the New York State Bar Association, said the ruling is the first to address measures that can be taken by judges to mitigate severe results under the new laws.

Justice Sunshine's ruling showed that he "was not going to be shackled for the sake of applying a formula," but instead was going to apply the powers he has under the laws to "recognize the economic realities of the parties," added Mr. Wagner, a partner at McNamee, Lochner, Titus & Williams in Albany, who is not involved in this case.

The two laws were enacted in July as companion measures to passage of no-fault divorce ([NYLJ, July 2, 2010](#)). All three laws went into effect on Oct. 12.

The statute regarding award of maintenance set forth a detailed formula for calculating the "presumptive" amount of interim maintenance awards.

The new law, codified at Domestic Relations Law §235B[5-a], however, sets forth 19 factors for determining whether to authorize "deviation" from the presumptive award because it would be "unjust or inappropriate."

In approving a one-third reduction from the \$37,000 yielded by the statutory formula, Justice Sunshine looked to two factors: the parties pre-divorce situation and the existence of substantial child support obligations.

The presumptive award should be reduced to \$24,000 annually to enable Scott M. to meet his "pre-divorce household expenses and take into account the parties expenses, child care costs and net available resources," Justice Sunshine concluded.

Scott M. a vice president at a major financial institution, had annual earnings of \$156,000 and Ilona M., a production assistant, earned \$34,000 a year. They have a 3-year-old daughter, for whom they pay \$1,700 a month for child care.

Application of the statutory formula would have left Scott M. with \$39,000 in disposable funds after paying his share of child support and maintenance. Ilona M. by contrast would have had twice as much disposable income, \$78,000, according to Justice Sunshine's analysis.

By lowering Scott M.'s maintenance payments, Justice Sunshine's ruling narrowed the divorcing couple's relative economic positions to \$51,000 for Scott M. and \$67,000 for Ilona M.

With respect to counsel fees pendente lite, the new law amended DRL §237 to create a "rebuttable presumption" that counsel fees should be awarded to the "less monied spouse."

That presumption is rebutted by operation of child support and interim maintenance requirements, Justice Sunshine ruled.

Even with the one-third deviation in the maintenance award, he noted Ilona M. will have "more resources for her and her child than [Scott M.] will."

"The Court cannot decide that just because one party 'earns more' than the other that they automatically become the 'monied spouse,'" he concluded.

Joseph E. Soffey of Soffey & Soffey in Garden City represented Scott M.

Ilona M. was represented by Juan P. Luciano of Bukh & Associates in Brooklyn.

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