

# LEGAL UPDATE WINTER 2011

*From the Law Offices of*

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***Wishing you and your families a very happy and healthy new year.***

***This issue will focus on the impact of the changes in New York State matrimonial law as it relates to the passage of No-Fault Divorce.***

## ***Recent Changes in Matrimonial Law***

The New York State Legislature made several changes in the Domestic Relations Law during the latter portion of 2010. These changes which are summarized below, pertain to issues of grounds for divorce, equitable distribution, final maintenance and temporary maintenance.

### **1. Grounds For Divorce**

Effective as of October 12, 2010, the legislature adopted no fault divorce which eliminated the need for one of the spouses to have grounds and to prove fault as a prerequisite to obtaining a divorce in New York State. Thus, while spouses are still entitled to plead grounds for divorce if they wish, one may now obtain a divorce without having to

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claim or prove that the other spouse engaged in any misconduct or wrongdoing.

The newly amended statute provides that an action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage based upon the fact that:

“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.”

This adoption of no fault divorce has led to several questions and issues which are unresolved at the current point in time.

For example,

A. Is there a defense to the no fault divorce grounds and can they be contested, i.e. can the defendant spouse state that the marriage has not in fact broken down irretrievably by demonstrating that the parties recently went on a vacation to Hawaii, that they get along splendidly and that they continue to engage in sexual relations?

B. Can a divorce action be commenced based upon the new no fault law, or must one wait until all issues of custody, child support, equitable distribution, et al have

been fully resolved prior to asserting a claim for a divorce under the no fault law?

## **2. New Factors For Final Awards of Maintenance:**

The legislature added 9 new factors for the Court to take into consideration when determining final awards of maintenance. There are therefore now 20 factors to be taken into consideration.

### **These 9 new factors are as follows:**

- (1) the length of the marriage;
- (2) the need of one party to incur education or training expenses;
- (3) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (4) 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;
- (5) 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;
- (6) the inability of one party to obtain meaningful employment due to age or absence from the workforce;
- (7) the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment;
- (8) the equitable distribution of marital property;
- (9) the loss of health insurance benefits upon dissolution of the marriage, and the availability and cost of medical insurance for the parties.

## **3. New Factor For Equitable Distribution:**

The legislature also added one new factor for the Court to consider when rendering awards of equitable distribution.

This new factor is the loss of health insurance benefits upon dissolution of the marriage.

## **4. New Temporary Maintenance Statute:**

In all divorce actions commenced after October 12, 2010, the Court must provide for an award of temporary maintenance to the less monied spouse under certain circumstances, unless the parties choose to opt out of the provision.

For example, the following guidelines and factors will be utilized by the Court in determining whether or not there will be an award of temporary maintenance:

A. The temporary maintenance guidelines will only result in an award where there is an income gap between the two parties such that the less monied spouse's income is less than two thirds of the more monied spouse's income.

B. With limited exceptions, the needs of the spouses and the standards of living of the spouses are not applicable.

C. Unless the parties opt out, the Court must apply the guidelines unless their application would be unjust or inappropriate. The guideline amount is the presumptive amount to be awarded. The award by the Court must be contained in a written Order.

D. If the Court finds that the presumptive award is unjust or inappropriate, the Court must adjust the award upon a consideration of the factors set forth in the statute.

E. The guideline amount is determined upon the income as set forth in the Child Support Standards Act plus income derived from income producing assets that are subject to equitable distribution.

F. The guideline amount is determined in two parts:

i. A mathematical calculation based upon income up to \$500,000.00 of the payor's income; and

ii. A calculation on income in excess of \$500,000.00 after the mathematical calculation has first been made on income up to \$500,000.00 based upon consideration of the statutory factors. The Court must set forth the factors it considered in its order.

G. If the lowest calculation on income up to \$500,000.00 results in a finding of \$0.00, there shall be no award of temporary maintenance.

H. The mathematical calculation is as follows:

i. 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 payee.

ii. 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.

iii. The Court shall subtract the income of the payee from the amount derived from clause ii above.

iv. The guideline amount of temporary maintenance shall be the lower of the amounts determined by clauses i and iii. If the amount determined by clause iii is less than or equal to zero, the guideline amount shall be zero.

## *Profile of The Firm*

**Russell I. Marnell** is admitted to the bars of New York, California, Nevada, Florida, the United States Tax Court and Federal District Court. He has litigated over two hundred trials including those involving complex custody, equitable distribution, child support, maintenance, and all issues involving family law. Mr. Marnell is the past chairman of the Nassau County Bar Association Matrimonial Committee's Child Custody Sub-Committee. He is currently a member of The Matrimonial Committees of The Nassau and Suffolk County Bar Associations. Mr. Marnell is a member of the prestigious New York Family Law American Inns of Court, is a fellow of The American Academy of Matrimonial Lawyers, and is a Nassau County Family Court Law Guardian. He is also the current Chair of the Attorneys/Accountants Committee. Mr. Marnell has published numerous articles on various matrimonial and family law topics, is a frequent lecturer on these subjects, and has appeared on several television and radio programs. Mr. Marnell has obtained an MBA in accounting and has passed the CPA examination. Finally, he is "AV" rated by Martindale-Hubbell\*\* (An AV rating shows that a lawyer has reached the height of professional excellence. He or she has usually practiced law for many years, and is recognized for the highest levels of skill and integrity.)

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**Scott R. Schwartz**, the firm's Senior Associate, is a 1992 graduate of The Hofstra University School of Law. He is currently a member of The Matrimonial Committees of The Nassau and Suffolk County Bar Associations as well as The Nassau County Bar Association Child Custody Sub-Committee. Mr. Schwartz is also a member of the prestigious New York Family Law American Inns of Court. He has drafted articles published in The New York Law Journal as well as other legal publications. Several cases on which Mr. Schwartz has worked have been published in New York State case reporters. Mr. Schwartz concentrates in complex divorce, family law and custody matters, has argued cases before New York State's Appellate Division, and is admitted to both the New York State and District of Columbia Bars.

**Susan P. Marnell**, who is of counsel to the firm, concentrates on estate planning, drafting of wills, trusts and related documents, estate administration and guardianship matters. Her practice also includes counseling elderly clients and their families on Medicaid, Medicare, tax and legal issues, including the use of durable powers of attorney, living trusts, health care proxies and living wills and real estate matters. Mrs. Marnell holds a J.D. from Hofstra University and is a member of the Estate Planning and Elder Law sections of the New York State, Nassau County and Suffolk County Bar Associations. Mrs. Marnell has been appointed as a court evaluator and guardian ad litem in numerous guardianship and probate matters.

**Bruce W. Albert**, of counsel, has been engaged in the practice of family law in New York City, Long Island and Westchester as a sole practitioner and counsel to other firms for more than 35 years. He is an adjunct professor at Hofstra University Law School and regularly lectures at local professional organizations and schools, authors articles and has appeared on national television to speak on family matters. Mr. Albert is admitted to the United States District Court for the Eastern District of New York and is a Master, Executive Committee member, and secretary-treasurer of the prestigious national New York Family Law American Inns of Court. He is also a member of the Nassau County Bar Association and the Matrimonial and Ethics Committees, as well as the Speakers Bureau. Bruce W. Albert is a New York State Court appointed Arbitrator and has been appointed as a Referee and Neutral Evaluator in matrimonial cases.

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- Matrimonial, divorce, and all other family law matters
- Wills, estate planning, probate of wills and estate litigation

The Law Offices of Russell I. Marnell, P.C. is a fully staffed, computerized law firm which has capably met the legal needs of the Long Island community and New York City for more than 20 years. We welcome the opportunity to handle all of your legal problems. In the event we do not handle the type of law in question, we would be more than happy to refer your case to a qualified law firm to assure that your problems are handled properly and professionally.

The information in this newsletter is presented as general information and is not to be construed as legal advice to apply to any person or particular situation. Please keep in mind that the law is constantly changing and therefore you should always consult an attorney for legal advice based on the individual circumstances of your situation.

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