Direction to the Law Revision Commission

By, Henry S. Berman

Recent legislation enacted by our State has sent to the Law Revision Commission the task of reviewing our divorce laws, in part:

1. To review and assess the economic consequences of divorce on the parties, and

2. To review the maintenance laws of the State and determine the impact of these laws on post-marital economic disparities and the effectiveness of such laws in achieving the policy goals of ensuring that the economic consequences of a divorce are fairly and equitably shared by the divorcing couple.

While one might devote significant time trying to analyze the directions given above, there are some facts that appear obvious to both attorneys and laymen. One is that, absent significant wealth and earning capacity, the economic consequences of divorce on parties is negative. Their limited assets are divided. Their income - be it one working spouse or both - that barely covered their expenses and lifestyle as an intact family, now must be allocated in a fashion that allows both of them to live, albeit generally in a reduced lifestyle. Into this mix must be factored the legal costs attendant to obtaining the divorce, the division of property and the fixing of support, which is even more significant when there are children.

Those of us who have practiced in this field for a long time know about the differences in the law before and after the enactment of the concept of "Equitable Distribution" of property in 1980. In 1980, we stopped calling spousal support alimony, which before then was a lifetime award, terminating only on death or remarriage. At that time, we adopted the concept of maintenance, which was designed to allow partners to dissolve their partnership and get on with their lives, with some - albeit not permanent - support. Thereafter, in 1989, we enacted the child support standards act.

Experienced practitioners know that the real problem has always been, and continues to be, the attempt to apply a uniform law, even one containing factors that are designed to individuate the application of that law, to cases at every level of the economic spectrum. Truth be told, while there are certainly anomalies in our case law, such as the treatment of enhanced earning capacity as an asset, our statutes - governing fixing maintenance, dividing marital assets and defining those assets - provide assistance to those trying to deal with the issues of divorce, and do justice, so long as the parties have significant assets and income *i.e.*, the economic wherewithal to go through the process. Although I note that the enactment of a formulaic approach to maintenance is, in essence, an indirect criticism of the ability of our courts appropriately to decide cases on their unique facts.

The real issue, and what, in my view, has fostered calls for a formulaic approach to maintenance, is how the existing laws are applied, and the cost of applying them to cases with little in the way of assets and income. I suspect that attorneys who represent people with significant assets and income, and attorneys who represent people with insignificant assets and income, could probably agree on a formula for post-divorce maintenance along the percentage lines of the recently enacted temporary maintenance formula, if we could agree on a reasonable cap to which the formula should apply. In addition, we might agree that once income is over the cap (the cap might be both an income- and an asset-driven cap), the formula should not apply at all, and factors should be determinative. This approach is somewhat different from the existing temporary maintenance law, which applies the formula up to a cap and then applies factors to income over the cap.

Whether the cap is the same as that for child support standards, *i.e.*, $130,000, or perhaps somewhat higher, *e.g.*, as much as $200,000, so as to cover about 96% of the population, is not terribly significant if the concept is acceptable. I also suspect that agreement among attorneys may very well be achievable to overturn legislatively the *O'Brien* case and the treatment of enhanced earning capacity as an asset, if the terminating events of maintenance are modified.

In reality, whether or not a consensus can be reached is, as I see it, based on a fundamental question that needs to be answered: Is the true aim of those who advance a formulaic approach to provide a mechanism wherein those with limited assets and income have a formula, both as to maintenance and child support, that allows them to determine the appropriate award under the law and avoid legal expense, or do they have a different goal or agenda? If their goal is the former, a stated cap, as described above, applied to a formula works and answers their need. We are, then, well on our way to achieve their goal, while protecting the rights of those with significant assets and income to secure a more subjective result that uses factors and not a formula (notwithstanding the other issues to be addressed, including, as indicated, the enhanced earnings issue and, moreover, a recognition that the formulaic approach to temporary maintenance may not be wise for its recipients.)

However - and in my mind this is "the $64,000 question" (while I am dating myself, it is, perhaps, not so bad since it means I have seen the development of our divorce laws over the last forty years) - am I ignoring the true goal of at least some of the proponents of formulas, namely, that both assets and income be shared.? Is their true goal that, upon the termination of the marriage, both assets and income, in the form of post-divorce income sharing of the parties, be shared, thereby continuing the partnership, albeit not necessary equally?

Such an approach is not one that protects the lower economic group, but one that proclaims a new policy: that marriage, even if terminated, creates obligations that can run forever. This policy has been referred to by some commentators as a redistribution of wealth. Clearly, such an approach would entail reneging on the understanding reached when Equitable Distribution was enacted. But, more significantly, this policy would again alter our laws of support and compel

litigation in virtually every case, as people tried to prove that factors, rather than formulas, should be applied both to support and the division of property. To suggest that this approach would discourage divorce might be an understatement; it certainly would encourage prenuptial agreements in any case in which a party anticipated creating serious wealth or income.

So where does that lead us? I believe it is to determine if a consensus can be forged among enough interest groups that will compel the legislature to enact the kind of legislation we should support, *i.e.,*:

- Eliminate enhanced earning capacity as an asset;
- Create a formula for post-divorce maintenance in an amount that applies only if combined income is less than $130,000 to $200,000;
- Decree that if income exceeds the cap, the formula does not apply to any of the income, either the amount below or the amount above the cap, or if the income exceeds the cap, apply the formula to income up to the cap and mandate that it cannot be applied above the cap, and that only factors can be relied upon for that excess income;
- Agree that, regardless of the income, if the marital assets exceed a certain amount, the formula would have no application, since in those cases there are significant assets to divide that can also earn income, and;
- Agree not to apply the formula on temporary applications, as it hurts the very group we are trying to protect.

The foregoing is hardly exhaustive, but it is a starting point for discussion

October 2010