The New Spousal Support
By Joel R. Brandes

A spouse in need of support may commence a matrimonial action in the Supreme Court and seek an award of maintenance in that action, or she may bring an independent action for spousal support in the Supreme Court, or a proceeding for spousal support in the Family Court.

Spousal support which is awarded pursuant to Article 4 of the Family Court Act[1] has been largely undefined as a concept. In contrast to maintenance, which may be awarded in a matrimonial action where the court grants[2] or refuses to grant the relief requested by the other spouse,[3] spousal support may be awarded in a matrimonial action where the court does not grant the relief requested by the other spouse, and in an independent action in Supreme Court for support under Article 4 of the Family Court Act, [4] in addition to a Family Court support proceeding

---

[1] See Family Court Act § 412

[2] Domestic Relations Law § 236 [B] [8][b]

[3] Id.

[4] See Kagen v. Kagen, 21 N.Y.2d 532, 289 N.Y.S.2d 195 (1968)

In Kenyon v Kenyon, 155 A.D.2d 825, 548 N.Y.S.2d 97 (3d Dept., 1989) at trial, plaintiff withdrew her action for a separation, leaving only the action seeking to set aside an antenuptial agreement, which included an application for support and maintenance. The Appellate Division held that since there was no longer a matrimonial action pending, the provisions of Domestic Relations Law § 236(B) were inapplicable. Thus, plaintiff's application for support was viewed as one for spousal support under Family Court Act article 4. The Court noted that although Family Court is the appropriate forum for such a proceeding where no matrimonial action is pending, Supreme Court had jurisdiction to consider the matter (see, Kagen v. Kagen, 21 N.Y.2d 532).The Court noted that in contrast to the definition of maintenance in the context of a matrimonial action there is no provision for a definite period or duration of spousal support.

In Levy v Levy 65 A.D.3d 1295, 885 N.Y.S.2d 761 (2d Dept., 2009) the Appellate Division found that Supreme Court's award of spousal support in the amount of $150 per week was appropriate, based upon a consideration of the parties' respective circumstances at the time of their presentation to the court, including the defendant's needs and the plaintiff's means. However, the court erred in imposing a durational limit on the award. In this case, the husband did not pursue his cause of action for divorce, and it was dismissed by order of the Supreme Court. Since there no longer was a matrimonial action pending, the defendant's application for support was properly viewed as one for spousal support under Family Court Act § 412, rather than under the provisions of Domestic Relations Law § 236(B). There is no durational provision in the

Until it was amended in 2016, former Family Court Act § 412 provided that **"a** married person was chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties.[5] Family Court Act § 412 specified "the circumstances of the respective parties" as the factors to be considered by a court in awarding spousal support. [6] There was no statutory requirement that the factors considered be enumerated in the court's decision.[7]

Although Family Court Act §412 appeared to limit the support obligation to a spouse who was "possessed of sufficient means or able to earn such means" a respondent in a spousal support proceeding was prima facie presumed to have sufficient means to support his or her spouse.[8]

Courts were not required to apply the provisions and standards of Domestic Relations Law §236 [B][6] to awards of spousal support, made pursuant to Family Court Act § 412.[9] The Appellate Division decisions[10] had held that, in a Family Court Act article 4 support proceeding, the Family Court could refer to Domestic Relations Law § 236 [B][6] to reach a determination of the amount of support to be paid. However, it

---

Family Court Act on spousal support, as there is in the case of maintenance in the context of a matrimonial action. To the same effect see Nizolek v Nizolek, 93 A.D.3d 934, 939 N.Y.S.2d 759 (3d Dept, 2012).

[5] Family Court Act § 412

[6] The relevant factors to be considered upon an application for spousal support under former Family Court Act § 412 were discussed in Polite v. Polite, 127 A.D.2d 465, 467–468, 511 N.Y.S.2d 275 (1st Dept., 1987) and Bruno v. Bruno, 50 A.D.2d 701, 375 N.Y.S.2d 442 (3d Dept.,1975).

[7] See CPLR 4213, subd. [b].

[8] Family Court Act § 437 (A respondent is prima facie presumed in a hearing under section four hundred thirty-three and section four hundred fifty-four to have sufficient means to support his or her spouse and children under the age of twenty-one years.)

[9] Byrum v Byrum, 110 Misc.2d 628, 442 N.Y.S.2d 894 (Fam.Ct 1981)

[10] Burke v White, 126 A.D.2d 838, 510 N.Y.S.2d 759 (3d Dept.,1987); Matter of Mastrogiacomo v Mastrogiacomo, 49 A.D.2d 708149 A.D.2d 708, 540 N.Y.S.2d 325 (2d Dept 1989)

was not required to do so. [11] It was held that while the Family Court is required to provide a reasoned analysis for its decision,[12] where it considers the factors listed in the Domestic Relations Law, it was not required to articulate on the record an analysis of each of the factors set forth in Domestic Relations Law § 236[B][6][a]. [13]

In proceedings under former Family Court Act § 412 support was awarded on a "means" basis. This meant that a spouse could be required to provide for support if possessed of sufficient means or able to earn such means, having due regard to the "circumstances of the respective parties. It was held that this required a delicate balancing of each party's needs and means. The determination of a spouse's support obligation depended on the particular circumstances of the case, including each spouse's financial means, a spouse's need to have money to live on after payments were made, the duration of the marriage, and each spouse's ability to be self-supporting. [21] An award of spousal support under Family Court Act § 412 was broadly "determined by evaluating the assets, earning potential and circumstances of the parties involved".[14]

There was and still is no durational limit in the Family Court Act on spousal support. [15]

Until the enactment of the equitable distribution system in July 1980,[16] a spouse guilty of misconduct constituting grounds for divorce was not entitled to support under Family Court Act §412. Family Court Act §412 was not amended when the equitable distribution law was enacted and the former case law has never been distinguished or overruled. Notably, the Third Department has held that marital misconduct may be a relevant consideration in awarding spousal support under Family Court Act § 412 depending upon the facts and circumstances of the case.[17]

---

[11] Matter of Mastrogiacomo v Mastrogiacomo, supra; Sweet v. Sweet, 75 A.D.3d 744, 905 N.Y.S.2d 331 (3d Dep't 2010).

[12] See CPLR 4213 [b]

[13] Burke v White, 126 A.D.2d 838, 510 N.Y.S.2d 759 (3d Dept.,1987)

[21] Stratienco v. Stratienco, 61 A.D.3d 767 (2d Dept., 2009)

[14] Nizolek v. Nizolek, 93 A.D.3d 934, 939 N.Y.S.2d 759 (3d Dep't 2012)

[15] Blisko v Blisko, 149 A.D.2d 127, 128-29, 544 N.Y.S.2d 670, 671 (2d Dept, 1989); Forbush v Forbush (1985, 4th Dept) 115 App Div 2d 335, 496 NYS2d 311; Levy v. Levy, 65 A.D.3d 1295, 885 N.Y.S.2d 761 (2d Dep't 2009)

[16] Stratienco v. Stratienco, 61 A.D.3d 767 (2d Dept., 2009)

[17] Nicit v. Nicit, 160 A.D.2d 1197, 555 N.Y.S.2d 205 (3d Dep't 1990) (citing Stevens v. Stevens, 107 A.D.2d 987, 988, 484 N.Y.S.2d 708)

The New Spousal Support

Effective January 23, 2016 Family Court Act § 412 was amended to make it almost identical to Domestic Relations Law § 236 [B][6][a]. Family Court Act § 412 as amended reflects a substantial change in the Legislature's approach to spousal support. The previous spousal support provision gave the court great leeway, directing only in general terms that a married person, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, having due regard to the circumstances of the respective parties. The 2015 amendment to Family Court Act § 412 creates a substantial presumptive entitlement to spousal support.

Family Court Act § 412, subdivision 1 provides that a married person is chargeable with the support of his or her spouse and, except where the parties have entered into an agreement providing for support,[18] the court, upon application by a party, shall make its award for spousal support pursuant to the provisions of Article 4.

Family Court Act § 412, subdivision 2 contains the same definitions of "payor", "payee", "income", "income cap", "guideline amount of spousal support", "self-support reserve" and "agreement" as provided in Domestic Relations Law § 236[B][3].

Family Court Act § 412, subdivision 3 contains a provision identical to that in Domestic Relations Law § 236[B][6] for the court to calculate the guideline amount of spousal support where the payor's income is lower than or equal to the income cap.

Family Court Act § 412, subdivision 4(a) provides that the court shall perform the calculations set forth in subdivision 3 for the income of the payor up to and including the income cap; and for income exceeding the cap, the amount of additional spousal support awarded, if any, is within the discretion of the court which must take into consideration any one or more of the 14 factors set forth in Family Court Act § 412 (6)(a). Subdivision 4(a) is identical to Domestic Relations Law § 236[B][6] in providing that where the guideline amount of spousal support would reduce the payor's income below the self-support reserve for a single person, the guideline amount of spousal support shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there shall is a rebuttable presumption that no spousal support is awarded.

Family Court Act § 412, subdivision (6) (a) provides that the court shall order the guideline amount of spousal support up to the income cap in accordance with Family Court Act § 412 (3), unless the court finds that the guideline amount of spousal support is unjust or inappropriate, which finding shall be based upon consideration of any one or

[18] Pursuant to Family Court Act § 425

more of 14 factors set forth in Family Court Act § 412 (6)(a), and adjusts the guideline amount of spousal support accordingly based upon its consideration of the 14 factors.[19]

Conclusion

The Supreme Court may award maintenance or spousal support. In awarding maintenance there are several factors that the court may consider, including barriers to remarriage, which are not part of the spousal support calculation. Maintenance can have a durational limit. In contrast, there is no durational limit on spousal support, and a respondent in a spousal support proceeding is prima facie presumed to have sufficient means to support his or her spouse.[20] The family court act creates a presumptive entitlement to support. There is no such entitlement in a matrimonial action. As we have seen, these statutes are procedurally similar, but, as a practical matter, they are far from the same.

[19] Family Court Act § 412 (6)(a) (Laws of 2015, Ch. 269, § 7, effective January 23, 2016.)

[20] Family Court Act § 437 provides that a respondent is prima facie presumed in a hearing under section four hundred thirty-three and section four hundred fifty-four to have sufficient means to support his or her spouse and children under the age of twenty-one years.

The statutory presumption is a presumption of fact, which the respondent can overcome by offering contrary evidence. Dayouze S. v. Daniel S., 126 Misc. 2d 32, 480 N.Y.S.2d 985 (Fam. Ct. 1984).