

Marital Lifestyle: Is It Still the Most Important Factor in Setting Maintenance?

By Adam W. Schneid

The 2015 Session Laws of New York Chapter 269¹ imposed wholesale changes to post-divorce maintenance (“2015 Amendment”). Domestic Relations Law (DRL) § 236 was amended to provide a guidelines calculation for awards of post-judgment maintenance.² Those guidelines are now well known and operate to streamline post-judgment maintenance awards where the payor spouse earns income up to the income cap.³ Where the payor’s income exceeds the income cap, the amount of additional maintenance awarded, if any, is based on the 15 factors set forth in DRL § 236B(6)(e).



The Impact of the 2015 Amendment

While *Hartog* previously operated to emphasize the importance of the marital standard of living, it must now be read to *minimize* the importance of the marital standard of living. The 2015 Amendment *removed* the reference to the marital standard of living from the preamble of the maintenance factors and demoted the consideration to one of the enumerated factors. While *Hartog* held that the escalation of the lifestyle factor into the preamble caused marital lifestyle to have outsized significance, the demotion of the factor back into the list of enumerated factors must now reduce the importance of marital lifestyle. But, since most families have income at, or below, the income cap, the removal of the lifestyle factor from the preamble will have minimal impact. For those families, maintenance will predominantly be set at the guideline obligation. The reality is, and always was, that the lifestyle consideration never actually controlled the award of maintenance for families of modest means. This is because “[s]imple mathematics and common sense dictate that it costs more to maintain two households than one.”⁸ Families of modest means simply do not have sufficient resources to maintain both parties’ standard of living after a divorce.

Where the payor’s income substantially exceeds the income cap, the demotion of the lifestyle factor will have enormous significance. The 2015 Amendment not only decreased the importance of the marital lifestyle, it increased the importance of the distribution of assets when setting maintenance. Prior to the 2015 Amendment, factor “15” was “the equitable distribution of marital property.” Factor “15” was replaced with factor “m” which is “the equitable distribution of marital property *and the income or imputed income on the assets so distributed.*”⁹ The consideration of income or imputed income on distributed assets is now also part of the definition of income in DRL § 236B(6)(b)(3)(b). Thus, because the references to income and imputed income now appear twice, that consideration will have an outsized consideration. It is premature to fully understand how courts will interpret the meaning of imputed income on distributed assets. A practitio-

The 1986 Amendment and the *Hartog* Effect

While most practitioners’ focus has been on the applicability of the post-divorce guidelines, the changes to the maintenance *factors* should also result in a profound shift in post-divorce maintenance. Beginning in 1986, DRL § 236 directed courts to award maintenance having regard for the “standard of living” the parties established during the marriage. The 1986 amendments to DRL § 236 removed the standard of living *factor* from the then lengthy list of enumerated factors and added it instead to the *preamble* of the maintenance section.

In *Hartog v. Hartog*,⁴ the Court of Appeals examined the legislative history of § 236 and the import of removing the lifestyle factor from the list of enumerated maintenance factors and moving it to the preamble. *Hartog* explained that the legislative “history makes clear that the purpose of the amendment was to ‘require[] the court to consider the marital standard of living’ in making maintenance awards.”⁵ By removing the predivorce standard of living from the other enumerated factors it “has been placed by the Legislature in a markedly distinct category”⁶

As a result of the 1986 amendment as interpreted by *Hartog*, the pre-commencement standard of living became the backbone of the maintenance analysis serving as the lens under which the 20 other enumerated factors were determined. For more than 20 years, *Hartog*’s emphasis on the standard of living of the marriage continued to be reiterated by all four Appellate Departments.⁷

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ner may now argue that rental income should be imputed to the assets (homes, cars, boats, securities, etc.) being distributed. Certainly to the extent courts interpret the current statutory framework to increase the income of the less monied spouse through such imputation, and minimize the need to consider the marital lifestyle, this combined shift may reduce maintenance awards.

A Look to the Future

Despite the 2015 Amendment, *Hartog* has not yet been cited for the proposition that the 2015 Amendment is intended to de-emphasize the marital standard living. The majority of decisions citing *Hartog* following the 2015 Amendment with respect to the marital standard of living relate to matters commenced before the effective date of the amendment.¹⁰ Certainly matters commenced following the 2015 Amendment have gone to trial, but the change in the consideration of the marital standard of living has not yet been compared to the prior iteration of the law in a publicly available decision.¹¹ Instead, to the extent decisions rely on the statutory factors modified by the 2015 Amendment, those decisions do not give an indication how the change in the law resulted in a change in outcome.

For example, in *Allison B. v. Edwards A.*,¹² a decision on a *pendente lite* motion in a matter filed after the effective date of the 2015 Amendment, the decision notes the parties' high standard of living but does not provide an indication as to how the outcome differed from the prior version of the statute. In *Barlik v. Barlik*,¹³ the court considered the high standard of living during the marriage in awarding temporary maintenance. While the decision suggests the standard of living controlled the award of temporary maintenance, the award was for a period of four months based on a short duration marriage. In *Al E. v. Joann E.*,¹⁴ the standard of living factor was one of several factors relied upon in awarding temporary maintenance.

While these recent decisions may stand for the proposition that the 2015 Amendment will not alter maintenance awards, such an interpretation is likely shortsighted. Certainly a change in the law *should* cause different outcomes. While it remains to be seen how the 2015 Amendment will be interpreted when analyzed under *Hartog*, the current statutory language *should* produce different maintenance awards as compared to the prior version of the statute.

Endnotes

- 1 A7645; S5678.
- 2 See DRL section 236B(6).
- 3 The current cap on the payor's income is \$184,000. See <https://www.nycourts.gov/divorce/legislationandcourtrules.shtml>.
- 4 85 N.Y.2d 36 (1995).
- 5 *Hartog*, *Id.* at at 51.
- 6 *Id.*
- 7 See *Cohen v. Cohen*, 120 A.D.3d 1060, 1064 (1st Dep't 2014) ("the determination of maintenance is within the sound discretion of the trial court upon consideration of the relevant factors enumerated in Domestic Relations Law § 236(B)(6)(a) and the parties' pre-divorce standard of living"); *Naik v. Naik*, 125 A.D.3d 734, 734 (2d Dep't 2015) ("In awarding maintenance, the court must consider the reasonable needs of the recipient spouse and the pre-separation standard of living in the context of the other factors enumerated in Domestic Relations Law § 236(B)(6)(a)"); *Orioli v. Orioli*, 129 A.D.3d 1154, 1155 (3d Dep't 2015) ("The amount and duration of a maintenance award is left to the sound discretion of the trial court that has considered the statutory factors and the parties' pre-divorce standard of living"); *Belkhir v. Amrane-Belkhir*, 118 A.D.3d 1396, 1397 (4th Dep't 2014) ("In deciding whether to award maintenance, the court "must consider the payee spouse's reasonable needs and pre-divorce standard of living in the context of the other enumerated statutory factors.").
- 8 *Scott M. v. Ilona M.*, 31 Misc. 3d 353, 363 (Kings Co. Sup. Ct. 2011).
- 9 DRL section 236B(6)(e)(m) (emphasis added).
- 10 See *S.M. v. M.R.*, 56 Misc.3d 1219(A), No.50/2013 (Rich. Co. Aug. 29, 2017) (citing to *Hartog* for the proposition that the "court is directed to consider the parties' established standard of living"); *D.D. v. A.D.*, 56 Misc.3d 1201(A), No. 5****/** (Richmond Co. Sup. Ct. June 16, 2017) (citing *Hartog* for importance of standard of living in setting maintenance for case commenced in 2013); *Maddaloni v. Maddaloni*, 142 A.D.3d 646 (2d Dep't 2016) (affirming maintenance award for matter commenced prior to 2015 Amendment; citing the standard of living of the parties as a factor in setting maintenance without specifying whether it is given the same or greater weight as other maintenance factors); *T.S. v. J.S.*, 54 Misc.3d 1202(A), No. 6718/2012 (Orange Co. Sup. Ct. April 7, 2016) (citing *Hartog* in matter commenced in 2012 for proposition that pre-divorce standard of living is an essential component in setting maintenance); *B.C. v. R.C.*, 50 Misc.3d 1228(A), No.xxxxx/12 (Kings Co. Sup. Ct. Feb. 24, 2016) (2012 matter citing *Hartog* for proposition that pre-separation standard of living must be considered in context of statutory factors); *E.R.S. v. B.C.S.*, 51 Misc.3d 1210(A), No. XX/16 (West. Co. Sup. Ct. March 31, 2016) (citing *Hartog* in connection with pre-2015 Amendment factors).
- 11 See *Shine v. Shine*, 148 A.D.3d 1665 (4th Dep't 2017) (affirming maintenance award and stating court "properly considered plaintiff's reasonable needs and pre-divorce standard of living in the context of the other enumerated statutory factors set forth in the statute" without identifying when the underlying matter was commenced (citations and internal quotations omitted)).
- 12 54 Misc.3d 1226(A), No. 305190/16 (N.Y. Co. Sup. Ct. March 9, 2017).
- 13 56 Misc. 3d 1221(A), No. 10314/2016. (Queens Co. Sup. Ct. Aug. 31, 2017).
- 14 55 Misc. 3d 1212(A), No. XXXX (Kings Co. Sup. Ct. April 18, 2017).