

Summer 2020

## "I Can't Afford to Leave Him" Divorcing a Spouse with Superior Financial Resources

Cyn Haueter

Follow this and additional works at: <https://repository.uchastings.edu/hwj>

---

### Recommended Citation

Cyn Haueter, *"I Can't Afford to Leave Him" Divorcing a Spouse with Superior Financial Resources*, 31 *Hastings Women's L.J.* 237 (2019).

Available at: <https://repository.uchastings.edu/hwj/vol31/iss2/7>

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in *Hastings Women's Law Journal* by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact [wangangela@uchastings.edu](mailto:wangangela@uchastings.edu).

---

---

████████████████████

# “I Can’t Afford to Leave Him” Divorcing a Spouse with Superior Financial Resources

*By Cyn Haueter*

## I. INTRODUCTION

Current research shows that approximately half of all marriages will end in divorce within twenty years.<sup>1</sup> People divorce for a variety of reasons, ranging from the benign to the scandalous, but adoption of no-fault divorce laws in all fifty states indicates the government-recognized importance of the ability to leave an unhappy marriage.<sup>2</sup> Along with rising divorce rates, the past few decades have seen an increase in the cost of contested divorces,<sup>3</sup> as well as concerns over how married individuals without independent means can afford them.

Part II of this note examines the social and economic impact of divorce on women, who are more likely to be the more economically disadvantaged partners in heterosexual marriages,<sup>4</sup> thus demonstrating the importance of access to legal representation in marital dissolutions. Part III discusses the issues that spouses lacking financial resources face in hiring a lawyer for divorce proceedings. Part IV offers background on court-mandated fee shifting and pendente lite attorney’s fees in particular. Part V compares the statutes and practices of pendente lite fee shifting in California, a community property state, and New York, an equitable distribution state. Finally, Part VI concludes this note with suggestions on how states might improve their statutes in the interest of fairness and justice.

---

1. Casey E. Copen et al., *First Marriages in the United States: Data from the 2006-2010 National Survey of Family Growth*, 49 NATIONAL HEALTH STATISTICS REPORT 1, 7 (2012) (This average divorce rate is nearly identical to divorce rates calculated in the 1970s).

2. Lauren Guidice, Note, *New York and Divorce: Finding Fault in a No-Fault System*, 19 J.L. & POL’Y 787, 788 (2011).

3. See *infra* Part III.

4. This note focuses primarily on heterosexual marriages where the husband is the primary breadwinner, controls the couple’s liquid assets, or is otherwise in a financially advantageous position to wife. This is not intended to marginalize LGBTQ marriages, but rather reflects the currently available academic research and case law. This note also does not consider the impact of premarital or post-marital agreements on divorce legal fees.

## II. THE SOCIAL AND ECONOMIC IMPACT OF DIVORCE

In heterosexual marriages, many women have limited access to financial resources at the point of dissolution or divorce. In 2017, approximately half of married women worked outside the home.<sup>5</sup> Women who do work earn less than their male counterparts of comparable experience and education,<sup>6</sup> and husbands out-earn their wives in over two-thirds of marriages.<sup>7</sup> This disparity in pay is often attributed to social and cultural bias, as well as time spent on domestic responsibilities.<sup>8</sup> Women have fewer opportunities to accrue wealth because they generally perform more of the childrearing and homemaking duties than their partners, regardless of who works outside the home.<sup>9</sup> Reduced earning capacity, combined with the fact that most married people have joint bank accounts,<sup>10</sup> creates a situation where women are at greater risk of financial abuse during marriage or at the outset of divorce.<sup>11</sup> As a result, a disproportionate percentage of women may lack the capital to hire a competent lawyer to initiate or defend a divorce action.

---

5. *Employment Characteristics – Families*, BUREAU OF LABOR AND STATICS (April 19, 2018), <https://www.bls.gov/news.release/famee.htm> [<https://perma.cc/W3VP-9E64>]. For further research on parental workforce participation, see Gretchen Livingston, *Stay-at-Home Moms and Dads Account for About One-in-Five U.S. Parents*, PEW RESEARCH CENTER (Sept. 24, 2018), <https://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents/> [<https://perma.cc/UM3Z-SQ5Q>], and Joseph Chamie, *Despite Growing Gender Equality, More Women Stay at Home than Men*, YALEGLOBAL ONLINE (Jan. 25, 2018), <https://yaleglobal.yale.edu/content/more-women-stay-home-men> [<https://perma.cc/2ZM6-UJ23>].

6. *Pay Equity and Discrimination*, INSTITUTE FOR WOMEN'S POLICY RESEARCH (last visited Mar. 22, 2019), <https://iwpr.org/issue/employment-education-economic-change/pay-equity-discrimination/> [<https://perma.cc/EGB7-P5A4>].

7. Kim Parker and Renee Stepler, *Americans See Men as the Financial Providers, Even as Women's Contributions Grow*, PEW RESEARCH CENTER (Sept. 20, 2017) <https://www.pewresearch.org/fact-tank/2017/09/20/americans-see-men-as-the-financial-providers-even-as-womens-contributions-grow/> [<https://perma.cc/G8E4-UE8U>].

8. Joseph Chamie, *Women More Educated Than Men But Still Paid Less*, YALEGLOBAL ONLINE (Mar. 6, 2014), <https://yaleglobal.yale.edu/content/women-more-educated-men-still-paid-less> [<https://perma.cc/UBS5-3Q4V>].

9. *Chore Wars: Men, Women and Housework*, NATIONAL SCIENCE FOUNDATION, [https://www.nsf.gov/discoveries/disc\\_images.jsp?cntn\\_id=111458](https://www.nsf.gov/discoveries/disc_images.jsp?cntn_id=111458) [<https://perma.cc/LP54-V5YD>]; see generally Rebecca M. Horne et al., *Time, Money, or Gender? Predictors of the Division of Household Labour Across Life Stages*, 78 SEX ROLES 731, 739 (2018).

10. Fenaba R. Addo and Sharon Sassler, *Financial Arrangements and Relationship Quality in Low-Income Couples*, 54 FAM RELAT. 408, 410 (2010); Andrew Plepler, Note, *2018 Better Money Habits Millennial Report*, BANK OF AMERICA 1, 8 (2018), <https://bettermoneyhabits.bankofamerica.com/content/dam/bmh/pdf/ar6vnl9-boa-bmh-millennial-report-winter-2018-final2.pdf>.

11. See Arianne Renan Barzilay, *Power in the Age of In/Equality: Economic Abuse, Masculinities, and the Long Road to Marriage Equality*, 51 AKRON L. REV. 323 (2017).

Women, especially those with children, experience disproportionately negative financial outcomes from divorces.<sup>12</sup> Divorce is a significant factor in why families descend into poverty.<sup>13</sup> Women perform the majority of the domestic labor both before and after divorce, which is not fully valued in settlement proceedings.<sup>14</sup> They are also more likely to retain primary custody of their children after a divorce.<sup>15</sup> Those who work after divorce are still impacted by pay disparity,<sup>16</sup> and often do not earn at their full capacity due to increased responsibilities as a single parent.<sup>17</sup> Women who have joint custody with the children’s father also experience a negative economic and professional impact.<sup>18</sup> Men, on the other hand, may realize a financial benefit to divorce.<sup>19</sup> Even when ordered to pay divorce settlement or child support, they are less encumbered with childcare and chores, which allows them to continue to work at their current earning potential.<sup>20</sup> This disparity between partners after divorce is a life-changing outcome for many women.

Courts and commentators have recognized the importance of equal access to legal representation in dissolution proceedings.<sup>21</sup> Studies indicate that people who receive legal assistance, whether from a legal clinic or attorney, are more likely to be “satisfied with the court system and the outcome than those who did not.”<sup>22</sup> This is because lawyers are experienced at navigating the court system, negotiating with opposing counsel, and devising legal strategies to maximize the odds of receiving a satisfactory outcome. For divorce proceedings in particular, an experienced attorney can be crucial in equitable settlements and custody arrangements, thus mitigating the damage that many women without adequate representation or guidance experience.<sup>23</sup> In addition to individual

---

12. Stanford L. Bracer, *The Gender Gap in Standard of Living After Divorce: Vanishing Small?* 33 FAM. L.Q. 111, 113 (1999); Tess Wilkinson-Ryan and Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW AND INEQUALITY 109, 109 (2008).

13. Monica A. Fennell, *Using State Legal Needs Studies to Increase Access to Justice for Low-Income Families*, 48 FAM. CT. REV. 619, 622 (2010).

14. Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 753 (1993); Wilkinson-Ryan, *supra* note 12, at 128–29.

15. Matthew D. Bramlett and William D. Mosher, *First Marriage Dissolution, Divorce, and Remarriage: United States*, 323 ADVANCE DATA 1, 2 (2001).

16. *Pay Equity and Discrimination*, *supra* note 6.

17. *Id.*; Wilkinson-Ryan, *supra* note 12, at 129.

18. Wilkinson-Ryan, *supra* note 12, at 129.

19. Bramlett, *supra* note 15.

20. *Id.*

21. See Kingston White, *A Call for Regulating Third-Party Divorce Litigation Funding*, 13 J.L. FAM. STUD. 395 (2011); Bibeane Metsch-Garcia, *Eliminating Financiers from the Equation: A Call for Court-Mandated Fee Shifting in Divorces*, 113 MICH. L. REV. 1271 (2015).

22. Fennell, *supra* note 13, at 619.

23. Wilkinson-Ryan, *supra* note 12; Bramlett, *supra* note 15.

outcomes, access to effective counsel also has the potential to set beneficial precedent and change laws, which impacts future divorce proceedings.<sup>24</sup> Despite the importance of effective counsel, court-appointed attorneys are generally not available for divorces, leaving parties responsible for their own representation.<sup>25</sup>

### III. HIRING AND PAYING A LAWYER

Spouses who lack liquid assets or other financial resources have limited options and face obstacles in securing divorce attorneys. Legal costs vary by region and complexity of the case. An average mediated divorce costs approximately \$5,000, while the average litigated divorce can range between \$15,000 and \$30,000.<sup>26</sup> These costs can increase drastically when the divorce is contentious or the marital assets are valuable.<sup>27</sup> The Model Rules of Professional Conduct, which are adopted in some form by many jurisdictions, forbid attorneys from accepting contingency fees in domestic relation matters which result in alimony, support, or other property settlements.<sup>28</sup> Attorneys are also specifically precluded from taking contingency fees in divorce cases.<sup>29</sup> The purpose of this is to ensure that attorneys do not over-litigate a family matter in order to receive a larger settlement for their client and therefore a larger fee for themselves. Since contingency fees are not available, if a spouse cannot afford an attorney at cost the alternatives are generally limited to pro-bono legal services, pro se representation, or seeking alternative means to pay the cost of attorney's fees. Insufficient legal representation can lead to unfavorable divorce settlements, which then contributes to the continued financial inequality in divorced couples.

---

24. See *Breitbart-Napp v. Napp*, 216 Ariz. 74 (2007). The contentious divorce proceedings between Stacey Breitbart-Napp and David Napp inspired the Arizona legislature to change A.R.S. § 25-324 (LexisNexis 2010) to award a spouse attorney costs and fees when the other spouse files a petition for attorney fees in bad faith. Ms. Breitbart-Napp went on to found Balance Point Funding, LLC, a divorce financing firm. *Why Balance Point Was Founded*, BALANCE POINT FUNDING, LLC., <http://www.balancepointfunding.com/our-story.html> [<https://perma.cc/6NUB-9NH5>].

25. See generally Darrin Hurwitz and Sarah K. Eddy, *Thirty-First Annual Review of Criminal Procedure*, 90 GEO. L.J. 1579; Bruce Andrew Green, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COL. L. REV. 366 (1981); 3 CRIMINAL CONSTITUTIONAL LAW § 13.01; 32 A.L.R.5th 31.

26. Leah Hoffman, *To Have and To Hold*, FORBES (Nov. 7, 2006), [https://www.forbes.com/2005/02/24/cx\\_lh\\_0224legaldivorce.html#79402e4215f9](https://www.forbes.com/2005/02/24/cx_lh_0224legaldivorce.html#79402e4215f9) [<https://perma.cc/7P62-35WU>].

27. *Johnson v. Chapin*, 12 N.Y.3d 461, 467 (2009) (Finding that the trial court was reasonable in awarding the wife \$100,000 in counsel fees in light of the husband's estimated \$2,000,000 annual income compared to the wife's limited assets.).

28. MODEL CODE OF PROF'L CONDUCT r. 1.5(d) (AM. BAR ASS'N, 2019) [<https://perma.cc/QA7D-5CH7>].

29. *Id.*

### A. Pro Bono and Low-Cost Legal Representation

Pro bono representation and other low-cost legal services are not a viable option in most divorces.<sup>30</sup> Family law matters like divorce and child custody are one of the primary legal needs of low-income people.<sup>31</sup> State reports show these needs are not adequately met by low-cost resources.<sup>32</sup> Legal clinics and pro bono attorneys have limited capacity because they often lack financial resources and personnel.<sup>33</sup> Potential clients can face long delays while waiting for legal assistance.<sup>34</sup> Many organizations that provide free services have qualification thresholds tied to the United States poverty rate that review a client’s income and assets to determine qualification.<sup>35</sup> These thresholds generally disqualify spouses who are not impoverished but who nonetheless cannot sustain a private legal action. Also, low-cost or fixed-rate divorce attorneys often require payment at the time of service.<sup>36</sup> While the amounts owed may be lower than traditional hourly rates, it can still be an insurmountable barrier for those with limited funds. Low-cost legal options are an important resource, but the limitations of such programs can mean that they are unlikely to fully meet the needs of economically disadvantaged spouses.

### B. Paying for Divorce with Loans

When faced with the prospect of self-representation in divorce, particularly when the opposing party has hired counsel, a spouse without liquid assets may turn to a variety of resources to pay for a lawyer. Personal loans from banks, credit unions, or online lenders are common options,<sup>37</sup> as are informal loans from friends and family.<sup>38</sup> The divorce financing industry emerged in the last decade as a controversial means for cash-

---

30. See generally Fennell, *supra* note 13.

31. *Id.* at 621.

32. *Id.*

33. *Id.* at 624.

34. *Id.*

35. *Frequently Asked Questions*, BAY AREA LEGAL AID (last accessed March 22, 2019), <https://baylegal.org/get-help/appointment-faqs/> [<https://perma.cc/ZT82-YRCT>]; *Client Intake Form*, PRO BONO PROJECT, [https://static1.squarespace.com/static/51ba1be6e4b0306d8e877d46/t/59720c7c86e6c056871dc051/1500646524740/\\*\\*EDITABLE+Intake+Form.pdf](https://static1.squarespace.com/static/51ba1be6e4b0306d8e877d46/t/59720c7c86e6c056871dc051/1500646524740/**EDITABLE+Intake+Form.pdf) [<https://perma.cc/43F8-TEZS>]; *Frequently Asked Questions*, LEGAL AID SOCIETY OF SOUTHWEST OHIO, LLC (last visited Mar. 22, 2019), <https://www.lascinti.org/get-help/frequently-asked-questions/> [<https://perma.cc/9MSJ-5ZRN>].

36. *Fixed Fee Divorce*, MY COLLABORATIVE TEAM, <https://www.mycollaborativeteam.com/fixe-fee-divorce/> [<https://perma.cc/ZX8A-DYKS>]; *Fees and Services*, FAMILY AND CHILDREN’S LAW CENTER [<https://perma.cc/E67T-TNZC>].

37. Steve Nicastro, *Where to Get a Personal Loan*, NERDWALLET, (Mar. 19, 2019) [<https://perma.cc/2JBK-MSS7>].

38. *Why Balance Point Was Founded*, BALANCE POINT FUNDING, LLC, <http://www.balancepointfunding.com/our-story.html> [<https://perma.cc/6NUB-9NH5>].

strapped spouses to fund divorce proceedings.<sup>39</sup> Despite the plethora of apparent options, the reality of securing funds for divorce is still an obstacle for many.

Personal loans from financial institutions are a well-known option for people who need capital. Divorcing spouses can apply at traditional banks,<sup>40</sup> credit unions,<sup>41</sup> or through online financiers.<sup>42</sup> These options all require credit checks, which determine the monthly payments, interest rates, and eligibility.<sup>43</sup> It is unclear how the other spouse's control of marital assets may impact the loan process. Economically disadvantaged spouses without credit or with low credit scores face high interest and payments, or even denial of the loan. Even those who are able to get personal loans may struggle with the monthly loan payment on top of their ordinary living expenses – now magnified by the sudden removal of the other spouse's income.<sup>44</sup> In addition to the general financial difficulties associated with receiving and repaying a loan, the compounding costs of divorce on top of living expenses is a prime example of why many divorced women and children are at risk of poverty.<sup>45</sup>

Another option for financing a divorce is to solicit contributions from family and friends.<sup>46</sup> The traditional method for this is to directly request contributions from personal connections. However, online platforms for requesting donations from friends and strangers alike for a multitude of causes have developed over the past decade.<sup>47</sup> Requests for divorce donations can be found on popular crowdfunding websites like GoFundMe.<sup>48</sup> In 2016, the platform PlumFund, which provides crowdfunding registries for weddings, retirement, and baby showers,<sup>49</sup>

---

39. See White, *supra* note 21.

40. *Personal Loans*, WELLS FARGO BANK, <https://www.wellsfargo.com/personal-credit/personal-loan/> [<https://perma.cc/9GCP-VKGX>].

41. *Personal Loans*, UNIFY FEDERAL CREDIT UNION, <https://www.unifyfcu.com/personal-loans> [<https://perma.cc/7YQ3-5AGD>]; *Personal Loans*, ALLIANT CREDIT UNION, <https://www.alliantcreditunion.org/borrow/get-a-credit-union-personal-loan> [<https://perma.cc/QW3K-8CLD>].

42. *Personal Loans*, SOCIAL FINANCE, INC., <https://www.sofi.com/personal-loans/> [<https://perma.cc/48FA-B6NB>].

43. Nicastro, *supra* note 37.

44. Brett R. Turner, *Division of Debts Upon Divorce*, 20(6) *EQUITABLE DISTRIBUTION J.* 61, 66 (2003).

45. Fennell, *supra* note 13, at 622.

46. *Why Balance Point Was Founded*, *supra* note 38.

47. Devin Thorpe, *What is Crowdfunding?*, *FORBES* (June 25, 2018), <https://www.forbes.com/sites/devinthorpe/2018/06/25/what-is-crowdfunding/#46e3c12e65c5> [<https://perma.cc/4NCY-U3MK>].

48. *Koharik's Divorce*, *GOFUNDME.COM*, Dec. 5, 2018 [<https://perma.cc/JLB2-JFFQ>]; *Help for Divorce*, *GOFUNDME.COM*, Jan. 12, 2019 [<https://perma.cc/QBG6-KDZ5>]; *JennyAnn's Divorce Lawyer Fund*, *GOFUNDME.COM*, May 26, 2018 [<https://perma.cc/DV2X-SLQ9>].

49. *Id.*

added a Divorce Registry to its website.<sup>50</sup> This service allowed users to create a wish list for contributions of goods, cash, and legal fees.<sup>51</sup> However, relying on donations to pay for a divorce attorney is a risky endeavor. It requires either that personal connections are willing and able to contribute, or that strangers on the internet are sufficiently moved by the cause to donate. Relying on the purported generosity of strangers should be a last-ditch effort to acquire the necessary divorce financing, as it is not a consistent or reliable option.

### C. Divorce Funding

Along with crowdfunding, the past decade has seen the rise—and fall—of divorce funding firms in the United States. Sometimes referred to as “divorce loans,” these companies finance the economically disadvantaged spouse in a process that is more analogous to investing than to traditional loans.<sup>52</sup> These companies evaluate the potential divorce settlement that the client spouse could receive with a well-funded legal team, then decide whether to advance legal fees and living expenses.<sup>53</sup> The companies are then repaid with interest out of the divorce proceeds.<sup>54</sup>

Divorce financing is not accessible to the majority of economically disadvantaged spouses, as the business model requires high-value settlements. In 2018, the median household income in the United States was \$61,937.<sup>55</sup> The criteria that Balance Point Funding, LLC considered in evaluating potential clients were whether marital assets exceeded \$2,000,000, whether the client signed a premarital or postmarital agreement, and whether the necessary divorce expenses exceeded \$200,000.<sup>56</sup> Other divorce funding companies, such as BBL Churchill and New Chapter Capital, did not disclose their requirements, but the client

---

50. Maria Carter, *The Latest Trend in Crowdfunding is the ‘Divorce Registry’*, WOMEN’S DAY (May 3, 2016), <https://www.womansday.com/relationships/dating-marriage/a54762/crowdfund-divorce/> [https://perma.cc/7RVU-SVLP]; Zephyr Hill, *Did You Know You Can Crowdfund Your Divorce?* DIVORCE MAGAZINE (Nov. 1, 2016), <https://www.divorcemag.com/blog/did-you-know-you-can-crowdfund-your-divorce> [https://perma.cc/7HZX-8X8E]; Rachel Cao, *On Plumfund, you can crowdfund your honeymoon . . . and your divorce*, CNBC (Aug. 7, 2017), <https://www.cnbc.com/2017/08/07/on-plumfund-you-can-crowdfund-your-honeymoon-and-your-divorce.html> [https://perma.cc/K39N-CAWT].

51. *Divorce Registry*, PLUMFUND, <https://www.plumfund.com/divorce-registry/> [https://perma.cc/8X5Z-ECUW].

52. White, *supra* note 21, at 396; Metsch-Garcia, *supra* note 21, at 1272.

53. White, *supra* note 21, at 400; Metsch-Garcia, *supra* note 21, at 1277.

54. White, *supra* note 21, at 399; Metsch-Garcia, *supra* note 21, at 1274.

55. Gloria G. Guzman, *Household Income: 2018*, U.S. CENSUS BUREAU (Sept. 2019), <https://www.census.gov/content/dam/Census/library/publications/2019/acs/acsbr18-01.pdf> [https://perma.cc/A8GV-56FX].

56. *For Attorneys*, BALANCE POINT FUNDING, LLC, <http://www.balancepointfunding.com/for-attorneys.html> [https://perma.cc/S2NC-5TCL].

testimonials shared with the press indicate similarly lofty standards which most couples would not be able to meet.<sup>57</sup>

The emergence of third-party divorce funding was met by concerned reactions from legal professionals. The practice appeared to be circumventing the ethical rules forbidding contingency fees in divorces.<sup>58</sup> While divorce funders are not legal entities and therefore are not bound by the same ethical rules as attorneys, the same concerns that led to the ban on attorneys accepting contingency fees for divorce matters are still relevant. The practice runs the risk of financiers improperly influencing the divorce proceedings to negotiate a larger settlement, even if contrary to the wishes of their client.<sup>59</sup> There are also concerns that the level of involvement of the divorce funding companies violates attorney-client privilege. While a traditional loan simply requires that the borrower make the monthly loan payments on time, some divorce funding companies became more involved in the cases they financed.<sup>60</sup> BBL Churchill required clients to allow their attorneys to disclose “all reasonable information required in order to assess this application.”<sup>61</sup> Balance Point Funding used in-house investigators to locate potential marital assets and provided a case manager for each client.<sup>62</sup> Balance Point Funding also asserted that a “Beverly Hills lawyer” had confirmed that its business practices met “the ethical standards by which lawyers are bound.”<sup>63</sup> However, these assurances did not hold up when challenged. A New York court held that the communications between Balance Point Funding and its clients were not subject to any privilege and were therefore discoverable.<sup>64</sup>

While divorce financing firms have not proven to be as harmful as previously feared, their near-disappearance calls into question the sustainability and ethics of the industry. The website for BBL Churchill is

---

57. Paul Sullivan, *Divorce Funding Firms Help Spouses Expecting Big Payouts*, N.Y. TIMES (Feb. 28, 2015), <https://www.nytimes.com/2015/02/28/your-money/divorce-funding-firms-help-spouses-expecting-big-payouts.html> [<https://perma.cc/S62A-D3LV>]; Julia Marsh, *New York's Divorce 'Fixer' Helps Soon-to-Be Ex-Wives Fight for Big Settlements*, N.Y. POST (July 8, 2013), <https://nypost.com/2013/07/08/new-yorks-divorce-fixer-helps-soon-to-be-ex-wives-fight-for-big-settlements/> [<https://perma.cc/YKC9-NS7Z>].

58. MODEL CODE OF PROF'L CONDUCT, *supra* note 28; White, *supra* note 21, at 401; Metsch-Garcia, *supra* note 21, at 1274.

59. Metsch-Garcia, *supra* note 21, at 1281.

60. *Id.* at 1282.

61. *Id.*

62. *Our Approach*, BALANCE POINT FUNDING, LLC, <http://www.balancepointfunding.com/approach.html> [<https://perma.cc/SYX5-APY7>].

63. *For Attorneys*, *supra* note 56.

64. *Cohen v. Cohen*, 2015 U.S. Dist. LEXIS 21319 at 16 (S.D.N.Y. January 30, 2015).

no longer functional,<sup>65</sup> social media activity ended in 2016,<sup>66</sup> and phone calls to the company were not returned at time of publication.<sup>67</sup> Balance Point Funding’s website is still in operation, but emails to the listed addresses were undeliverable and the phone number was out of service. New Chapter Capital appears to be the only divorce financier still in business.<sup>68</sup> While the industry has not proven particularly successful in the long run, the rise of divorce financiers is an important indicator for the legal profession. Their business model required divorcing clients with entitlements to marital property but without the means to pay for a strong attorney. Unilateral control of marital assets can handicap divorce proceedings for people of any level of wealth.<sup>69</sup>

#### IV. COURT-MANDATED ATTORNEY’S FEES

Court-mandated fee shifting has been posited as the legal mechanism to facilitate equitable access to representation in divorces.<sup>70</sup> Ordinarily, the U.S. holds parties to litigation responsible for their own legal fees, absent a statutory or contractual exception.<sup>71</sup> Court-mandated fee shifting is a common statutory exception,<sup>72</sup> and usually entails awarding fees and costs to the prevailing party at the conclusion of litigation.<sup>73</sup> However, awarding attorney’s fees at the end of a divorce does not help spouses with limited assets. The aforementioned ethical codes prevent attorneys from entering into contingency fee agreements for domestic matters resulting in financial settlements.<sup>74</sup> Even legal clinics may require some payment at the time of service. Disadvantaged spouses would still need the financial resources to hire a lawyer and pay them during the divorce proceedings.

---

65. “GoDaddy Domain,” BBLCHURCHILL.COM, <http://bblchurchill.com/?reqp=1&reqr=Ml5jLt==> [<https://perma.cc/E9TC-M4P8>].

66. @BBLChurchill, TWITTER (Jan. 29, 2016) <https://twitter.com/BBLChurchill/status/693117681138946048>

67. Despite multiple attempts, the author was unable to reach BBL Churchill for comment.

68. Telephone Interview with Nicole Noonan, CEO, New Chapter Capital (Mar. 2, 2018). Ms. Noonan confirmed that Balance Point Funding, LLC and BBL Churchill were no longer in operation, and she was not aware of any other divorce financing firms.

69. See *supra* Part II(A).

70. See White, *supra* note 21, at 398; Metsch-Garcia, *supra* note 21.

71. Colorado Insurance Guaranty Association v. Sunstate Equipment Company, LLC, 405 P.3d 320, 346 (2006); Town of Milton Bd. of Health v. Brisson, 202 Vt. 121, 132 (2016); Gilbert v. Master Washer & Stamping Co., Inc., 87 Cal. App. 4th 212, 216 (2001); Stewart Douglas Hendrix, “Better You Than Me:” *Shifting Attorney’s Fees in Divorce Actions*, 34 U. LOUISVILLE J. FAM. L. 671, 672 (1995-1996).

72. Jan Maiden, *Winning By Financial Attrition: A Study of Attorney Fees Under California Family Code Sections 2030 and 2032*, 38 CAL. W. L. REV. 311, 314 (2001).

73. See generally 38 A.L.R.3d 1384 (2019); 35 A.L.R.4th 12 (2019); 118 A.L.R. Fed. 1 (2019); 119 A.L.R. Fed. 433 (2019).

74. MODEL CODE OF PROF’L CONDUCT, *supra* note 28.

Fortunately, courts and legislators have long recognized this problem with post-verdict attorney's fees.<sup>75</sup> As far back as the late nineteenth century, courts would order the husband, who under common law controlled the marital assets, to provide funds to his wife at the outset of court proceedings so that she could adequately litigate the divorce.<sup>76</sup> This era of male control meant that married men were almost always ordered to pay for their wives divorce attorneys.<sup>77</sup> As women gained social, political, and financial independence within the marital unit and in society as a whole, these fee shifting provisions began to change.<sup>78</sup> States responded by individually evaluating the property ownership and assets of divorcing spouses petitioning for attorney's fees.<sup>79</sup> Statutes and court rules were enacted to authorize the courts to order the financially controlling spouse to pay for the litigation fees of the other.<sup>80</sup>

Today, all fifty states have a method for financially disadvantaged spouses to access attorney's fees before or during dissolution.<sup>81</sup> Spouses lacking economic parity often receive inferior legal representation.<sup>82</sup> This can have a serious impact on the spouses who are "poor and primary caregivers," who also are predominantly women.<sup>83</sup> The fee award is intended to place both spouses on equal footing and allow them to litigate with similar strength and resources.<sup>84</sup> Ordering one spouse to pay the other's legal fees has the additional benefit of discouraging the economically advantaged spouse from over-litigating minor issues,<sup>85</sup> or drawing out proceedings to drain the other's resources.<sup>86</sup> Instead, the paying spouse may be motivated to behave fairly, collaborate, or compromise.<sup>87</sup> These mechanisms have been called temporary attorney's fees, interim counsel fees, or pendente lite alimony.<sup>88</sup> Along with the

---

75. *Ex parte Winter*, 70 Cal. 291, 292 (1886).

76. *Hendrix*, *supra* note 71, at 672; *see generally* *Ex parte Winter*, 70 Cal. at 292; *Mudd v. Mudd*, 98 Cal. 320 (1893); *Loveren v. Loveren*, 100 Cal. 493 (1893); *Lacey v. Lacey*, 108 Cal. 45 (1895); *Beadleston v. Beadleston*, 103 N.Y. 402 (1886); *McBride v. McBride*, 8 N.Y.S. 448 (1890); *McCarthy v. McCarthy*, 137 N.Y. 500 (1893); *Poillon v. Poillon*, 75 A.D. 536 (1902); *Herrman v. Herrman*, 88 A.D. 76 (1903).

77. *Hendrix*, *supra* note 71, at 672.

78. *Id.* at 691.

79. *Id.*

80. *Maiden*, *supra* note 72, at 314.

81. *Id.*

82. *Maiden*, *supra* note 72, at 324; *O'Shea v. O'Shea*, 93 N.Y.2d 187, 190 (1999).

83. *Maiden*, *supra* note 72, at 324. *See also supra* Part I.

84. *See K.C. v. J.C.* 25 N.Y.S.3d 798 (2015); *Bieler v. Bieler* 130 Colo. 17, 19 (1954).

85. *Maiden*, *supra* note 72, at 330.

86. *Crocker C. v. Anne R.* 28 N.Y.S.3d 286 (2016).

87. *O'Shea v. O'Shea*, 93 N.Y.2d 187, 193 (Court of Appeals 1999).

88. *See generally* D.C. CODE § 16-911(a) ("During the pendency of an action for legal separation, divorce, [or] the termination of a domestic partnership ... the court may require the spouse or domestic partner to pay pendente lite alimony to the other spouse or domestic partner."), FLA. STAT. § 61.16(1) ("The trial court shall have continuing jurisdiction to make

variation in terminology, jurisdictions vary in how they evaluate the financial situation of the spouses, and whether fee shifting is required for parity and justice.<sup>89</sup>

## V. A COMPARISON OF PENDENTE LITE ATTORNEY’S FEES IN CALIFORNIA AND NEW YORK

States handle pendente lite divorce fees in a variety of ways. Some restrict the payments to attorney’s fees, while others include expert witnesses, accountants, and other professionals.<sup>90</sup> States like Alabama, Mississippi, and New Hampshire do not have statutory authority for fee shifting but have inferred the authority from other statutes and thus created the precedent for such authority.<sup>91</sup> California has some statutory factors that allow a large degree of judicial discretion in determining whether temporary fees should be awarded.<sup>92</sup> New York, in contrast, recently shifted away from the nebulous “as justice requires” standard to create a rebuttable presumption of fee shifting to the financially advantaged parties.<sup>93</sup> While both systems have their proponents and detractors, New York’s laws appear to be more likely to facilitate actual parity between divorcing parties and discourage financially abusive litigation strategies.

### A. California, a Community Property State

The purpose of community property systems is to recognize that spousal labor “contributes to the acquisition of family wealth.”<sup>94</sup> In community property jurisdictions like California, married people form a legal partnership and property acquired during the marriage by the labor of either spouse belongs equally to both.<sup>95</sup> This jointly owned property is called community property.<sup>96</sup> Each spouse has a fully vested one-half interest in each community property asset from the moment of acquisition.<sup>97</sup> Spouses can also have separate property, which belongs to only one of them.<sup>98</sup> Separate property is generally property owned prior to

---

temporary attorney’s fees and costs awards reasonably necessary to prosecute or defend an appeal on the same basis and criteria as though the matter were pending before it at the trial level.”), 13 DEL. C. § 1512(a) (“The Court may award interim alimony to a dependent party during the pendency of an action for divorce or annulment.”).

89. *Id.*

90. *See generally* Hendrix, *supra* note 71.

91. Hendrix, *supra* note 71, at 688.

92. *Id.* at 683.

93. *Id.* at 687; N.Y. CLS Dom. Rel. §237(a) (LexisNexis 2020).

94. JO CARRILLO, COMMUNITY PROPERTY IN A NUTSHELL, 12 (4th ed. 2018).

95. 11 Witkin Summary of Cal. Law (11th Cmty. Prop. § 1.

96. CAL. FAM. CODE § 760 (LexisNexis 2019).

97. CAL. FAM. CODE § 751 (LexisNexis 2019).

98. CAL. FAM. CODE § 770 (LexisNexis 2019).

---

---

marriage, acquired by gift or inheritance, and any income and profits from separate property.<sup>99</sup>

The characterization of property as either community or separate is crucial in marital dissolutions, because community property is jointly owned.<sup>100</sup> Spouses are free to divide assets as they see fit in a marital contract or in divorce settlement negotiations.<sup>101</sup> However, if they are unable to reach an agreement, the court must divide community property equally between spouses.<sup>102</sup>

1. The Statutory Requirements for Pendente Lite Attorney's Fees in California

While California prefers that marital dissolutions be settled out of court, many divorces become adversarial proceedings.<sup>103</sup> Spouses frequently find themselves on unequal financial footing at the point of dissolution in spite of community property laws.<sup>104</sup> This disparity is often due to one spouse's management and control of the marital finances, unequal division of domestic labor, and differences in employment and income before and during marriage.<sup>105</sup> The characterization of property as community or separate and subsequent division of community property is often hotly contested in divorce litigation.<sup>106</sup> The mere existence of this vested property interest is not sufficient for divorcing partners to have economic parity and access to comparable counsel.

To ensure that both parties have access to representation regardless of who had actual control of the marital finances, California enacted Family Code sections 2030 and 2032. Section 2030(a) states:

In a proceeding for dissolution [or] nullity of marriage, or legal separation of the parties ... the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party ... to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.

---

99. *Id.*

100. 11 Witkin Summary of Cal. Law (11th Cmty. Prop. § 6.

101. *In re Marriage of Cream*, 13 Cal. App. 4th 81, 87 (1993).

102. *Id.*; CAL. FAM. CODE § 2550 (LexisNexis 2019).

103. CAL. FAM. CODE § 2013 (LexisNexis 2019).

104. CAL. FAM. CODE § 751 (LexisNexis 2019).

105. *See supra* Part I.

106. *See generally* CARRILLO, *supra* note 94, at 281–381; Peter M. Moldave, *The Division of the Family Residence Acquired with a Mixture of Separate and Community Funds*, 70 CALIF. L. REV. 1263–64 (1982).

Section 2032 adds:

(a) The court may make an award of attorney’s fees and costs under Section 2030...where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.

(b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party’s case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320.<sup>107</sup> The fact that the party requesting an award of attorney’s fees and costs has resources from which the party could pay the party’s own attorney’s fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.<sup>108</sup>

These statutes authorize the court to order the economically advantaged spouse to pay reasonable counsel fees necessary for the other party to maintain or defend against a divorce proceeding.<sup>109</sup> However, in practice, the statutes do not guarantee that the disadvantaged spouse will receive the fees necessary to afford legal representation.<sup>110</sup> Despite the laudable legislative intentions, the imprecise standards of fee shifting means that many spouses are not able to get the assistance they require.

In order to award temporary attorney’s fees under California Family Code sections 2030 and 2032, the court must find that the requesting spouse needs financial assistance to support the divorce action, the awarded fees are just and reasonable, and the other spouse is able to pay the fees in addition to their own.<sup>111</sup> When a spouse requests temporary fees, the court begins with a “needs assessment.”<sup>112</sup> It compares the relative assets and obligations of the spouses to determine whether the requesting spouse

---

107. CAL. FAM. CODE § 4320 (LexisNexis 2019) (specifying the factors to be considered in awarding spousal support).

108. CAL. FAM. CODE § 2032 (LexisNexis 2019).

109. CAL. FAM. CODE § 2030 (LexisNexis 2019); *id.*

110. Maiden *supra* note 72, at 324.

111. CAL. FAM. CODE § 2030 (LexisNexis 2019); CAL. FAM. CODE §2032(a) (LexisNexis 2019).

112. CAL. FAM. CODE §2030(a) (LexisNexis 2019).

requires additional resources to acquire robust legal representation for the divorce proceeding.<sup>113</sup> The relevant statutes give broad judicial discretion to determine whether a spouse is in need, with two primary limitations. First, the statute requires that spousal and child support not be considered in determining whether a party can afford the costs of divorce litigation.<sup>114</sup> The purpose of these support payments is to pay for the living expenses of the economically disadvantaged spouse and their dependent children,<sup>115</sup> and it would therefore be unjust to expect a person to use those resources to finance the divorce proceedings. Second, the court cannot require the requesting spouse to completely exhaust their own resources in order to be considered in need.<sup>116</sup> The laws specify that “disparity in access and ability to pay” are the preconditions for an award of attorney’s fees,<sup>117</sup> and having assets that could be used to pay for a lawyer is not a complete bar to receiving an additional fee award.<sup>118</sup> For example, a husband with \$2,000,000 in assets compared to his wife’s \$40,000,000 was awarded \$700,000 in attorney’s fees.<sup>119</sup> This standard ensures that when one spouse’s assets pale in comparison to the others, the spouse with less can still receive pendente lite fees to allow them to litigate the divorce on equal footing.

The fees awarded to the spouse in need must be just and reasonable.<sup>120</sup> Fees cannot be based on the economically advantaged spouse’s own legal costs.<sup>121</sup> Instead, the court weighs the need of the requesting spouse and the relevant aspects of the divorce proceedings to determine what fees are reasonably necessary. The complexity, nature, and difficulty of the divorce are the primary factors in determining reasonableness.<sup>122</sup> A contested divorce that involves extensive assets, disputes over custody, division of closely-held businesses, or tracing of intermingled funds generally involves more discovery and expert witnesses than divorces without complex issues of fact or law, and would therefore reasonably require a larger award of interim fees.<sup>123</sup> The difficulty of a divorce can be exacerbated by a party’s noncooperation, over-litigation, failure to make necessary disclosures, and other tactics designed to impede or draw out litigation.<sup>124</sup> Courts may

---

113. CAL. FAM. CODE §2032(b) (LexisNexis 2019); *In re Marriage of Kelso*, 67 Cal. App. 4th 374, 385 (1998).

114. *In re Marriage of Hatch*, 169 Cal. App. 3d 1213, 1220 (1985).

115. *Id.*

116. Maiden *supra* note 72, at 317.

117. CAL. FAM. CODE § 2030(a)(2) (LexisNexis 2019).

118. CAL. FAM. CODE § 2032(b) (LexisNexis 2019).

119. *In re Marriage of O’Connor*, 59 Cal. App. 4th 877, 880-81 (1997).

120. CAL. FAM. CODE §2032 (LexisNexis 2019).

121. *In re Marriage of Keech*, 75 Cal. App. 4th 860, 869 (1999).

122. *Id.*; Maiden, *supra* note 72, at 320.

123. *See generally* CARRILLO, *supra* note 94, at 505-06.

124. Maiden, *supra* note 72, at 320.

determine the reasonableness of awards in light of such actions.<sup>125</sup> For example, in a case where the husband evaded service for over two years and then filed for divorce in the Isle of Jersey to force his wife to incur exorbitant legal fees, the court found that an award of \$750,000 was reasonable and just.<sup>126</sup> Courts have also reduced or denied awards of attorney’s fees when the requesting spouses are found responsible for causing difficulty.<sup>127</sup> This discretionary factor could be a saving grace in contentious divorces where the financially advantaged spouse attempts to use their superior resources to the detriment of the disadvantaged spouse.

The third prong in awarding attorney’s fees is determining that the economically advantaged spouse has the ability to pay the award in addition to their own attorney’s fees.<sup>128</sup> It would be an abuse of discretion for a court to order a party to pay an award to their spouse that they could not afford, even when the spouse has a demonstrable need.<sup>129</sup> The primary means of determining the ability to pay is to consider the circumstances outlined in California Family Code section 4320.<sup>130</sup> These include the earning capacity of the spouses, their standard of living, the parties’ financial obligations, and the role of the requesting spouse in facilitating the academic and professional advancement of the other spouse.<sup>131</sup> However, these factors are only applied “to the extent relevant,” and the court may consider other factors that it finds pertinent to the inquiry.<sup>132</sup>

## 2. The Impact of Judicial Discretion

Trial courts “enjoy broad discretion” in awarding fees in marital dissolutions.<sup>133</sup> However, this discretion cannot be arbitrary and capricious, and instead must be guided by legal principles to effectuate the purpose of the law and promote justice.<sup>134</sup> A trial court’s decision to award or deny fees can only be overturned when the decision is so unreasonable that it is found to be an abuse of discretion.<sup>135</sup> Furthermore, California courts are required to consider the statutory factors outlined in sections 2030 and 2032, and failure to do so also constitutes an abuse of judicial discretion.<sup>136</sup> But when the statutory factors are imprecise and vague,

---

125. *Id.*

126. *In re Marriage of Kozen*, 185 Cal. App. 3d 1258, 1265 (1986).

127. *In re Marriage of Huntington*, 10 Cal. App. 4th 151, 1524 (1992).

128. CAL. FAM. CODE § 2030(a) (LexisNexis 2019).

129. *In re Marriage of Keech*, 75 Cal. App. 4th 860, 869 (1999)

130. *In re Marriage of Ciprari*, 32 Cal. App. 5th 83, 111 (2019).

131. CAL. FAM. CODE § 4320 (LexisNexis 2019).

132. CAL. FAM. CODE § 2032 (LexisNexis 2019).

133. *In re Marriage of Cheriton*, 92 Cal. App. 4th 269, 314 (2001).

134. *In re Marriage of Jovel*, 49 Cal. App. 4th 575, 587 (1996).

135. *Id.* at 587–88.

136. *See In re Marriage of Tharp*, 188 Cal. App. 4th 1295, 1313-14 (2010) (finding that the trial court’s failure to make a needs-based analysis before denying attorney fees was an abuse of discretion); *In re Marriage of Braud* 45 Cal. App. 4th 797, 827 (1996) (finding that

spouses requesting temporary fees see inconsistent and unpredictable results.<sup>137</sup>

The nebulous statutory language and dearth of objective criteria in determining whether to award temporary attorney's fees was likely intended to afford the courts flexibility and discretion in delicate and fact-intensive family law matters. However, the result is that trial courts issue unreliable awards.<sup>138</sup> When pendente lite fees are not consistently granted, attorneys cannot rely on receiving payment, and therefore are likely to be less willing to take underfunded spouses as clients. This creates a barrier for economically disadvantaged spouses to hire representation and properly litigate the divorce, which is contrary to the legislative intent behind these fee shifting provisions.<sup>139</sup>

While the California legislature's good intentions are obvious, the unintended contrary outcome in application of interim attorney's fees leaves a number of divorcing spouses in a vulnerable position where they are unable to afford competent representation. This perpetuates the cycle of unfavorable divorce outcomes for people with fewer resources than their spouse.<sup>140</sup>

#### **B. New York, An Equitable Division State**

The practice of equitable division applies community property principles to civil property jurisdictions upon the dissolution of a marriage.<sup>141</sup> All property acquired during marriage is considered marital property, although it is separately owned by the titled spouse until the marriage ends by death or dissolution.<sup>142</sup> Similar to the community property system, marital property is subject to division between spouses during divorce, while separate property is retained by the owning spouse.<sup>143</sup> However, while community property is divided equally between spouses,

---

the trial court abused discretion by failing to consider the disproportionate assets before awarding the wife a small percentage of the requested attorney fees).

137. Maiden, *supra* note 72, at 326.

138. *Id.* at 324.

139. 2010 Cal ALS 352, 2010 Cal AB 939, 2010 Cal Stats. ch. 352 ("Faced with crowded family law calendars and the rising numbers of self-represented litigants, as over 70 percent of litigants in family law are unrepresented, many courts have adopted local rules and procedures in an attempt to more efficiently process the high volume of family law cases. While some of these rules and procedures have been innovative, others have created barriers to litigants getting their day in court, particularly litigants who are unrepresented. These barriers include drastically reducing live testimony in family law, which the California Supreme Court found, in its landmark decision *Elkins v. Superior Court*, 41 Cal.4th 1337 (2007), deprives family law litigants of due process protections. Access to justice requires that parties be able to appropriately address the court and present their cases.").

140. *See supra* Part I.

141. CARRILLO, *supra* note 94, at 102.

142. N.Y. CLS Dom Rel § 236(b) (LexisNexis 2019).

143. 48A NY Jur Domestic Relations § 2709.

marital property is divided equitably.<sup>144</sup> The court considers factors such as the current and future financial circumstances of the spouses, the length of the marriage, contributions to a spouse’s career potential, and the custodial spouse’s interest in the marital residence when dividing what percentage of which assets would be fair and just for each spouse to receive.<sup>145</sup> If both spouses contribute equally to a marriage, an equitable division would be as equal in value as possible.<sup>146</sup> While this often means awarding spouses sole ownership of different assets of comparable value, it also can be met by absolving one spouse of a marital debt. In a case where the primary marital asset was a home encumbered by a substantial mortgage, it was equitable to award the wife sole ownership because she also became solely responsible for the repayment of the mortgage.<sup>147</sup> Additionally, if a spouse does not contribute to the joint marital assets, either by not working or by keeping their assets wholly separate, the court could refuse to award them any interest in marital property.<sup>148</sup>

Equitable dissolution creates much more uncertainty in the potential division of property upon divorce due to the fact-intense inquiry into whether each spouse has earned a portion of the marital assets. Unlike a community property jurisdiction, the non-titled divorcing spouse does not have a vested interest in any marital property, so the basis for fee shifting is not tied to the idea of an existing property right. Instead, the state has recognized the financial imbalance that the marital ownership system has created and provides a resource to navigate dissolution more fairly.

#### **A. The Statutory Requirements for Pendente Lite Attorney’s Fees in New York**

New York courts have shifted attorney’s fees in divorce actions since the late nineteenth century.<sup>149</sup> The practice is currently codified in Domestic Relations Law section 237, which states,

In any action or proceeding brought ... for a divorce ... the court may direct either spouse ... to pay such sum or sums of money directly to the attorney of the other spouse to enable that spouse to carry on or defend the action or proceeding as, in the court’s discretion, justice requires, having

---

144. *Giokas v Giokas*, 73 A.D.3d 688, 689 (2010) (“While the distribution of marital property must be equitable, there is no requirement that the assets be split evenly.”).

145. N.Y. CLS Dom Rel § 236(b)(5) (LexisNexis 2019).

146. *Steinberg v. Steinberg*, 59 A.D.3d 702, 703 (2009); *cf. Puglisi v. Puglisi*, 16 A.D.3d 477, 477 (2nd Dept., 2005) (awarding the wife’s pension solely to her and the Cape Cod home solely to the husband due to the “separate economic existences” during their marriage).

147. *Taylor v Taylor*, 140 A.D.3d 944, 946 (2016).

148. *Alper v Alper*, 77 A.D.3d 694, 696 (Second 2010) (finding that the wife made little to no contribution to the marital assets, as she spent all her income on herself and her child from a prior marriage, and therefore was not entitled to a share of any marital assets).

149. *Griffin v. Griffin*, 47 N.Y. 134, 140-41 (Court of Appeals 1872).

regard to the circumstances of the case and of the respective parties. There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded ... pendente lite, so as to enable adequate representation from the commencement of the proceeding.<sup>150</sup>

This replaced New York Civil Practice Act section 1169 and eliminated the requirement that the requesting spouse prove their financial need to receive temporary counsel fees.<sup>151</sup> The purpose of the new law was to enable a "financially disabled spouse" to properly litigate a divorce proceeding.<sup>152</sup> However, the law initially still required that the requesting spouse prove that "justice requires" the award.<sup>153</sup> In 2010, the legislature added the rebuttable presumption that "the less monied spouse" would be awarded pendente lite fees.<sup>154</sup> The purpose of this change was to remove the burden of proof from the economically disadvantaged spouse and instead place it on the one with superior resources.<sup>155</sup>

Determining which spouse is less monied and if the presumption has successfully been rebutted still requires a "review [of the] financial circumstances of both parties together with the circumstances of the case."<sup>156</sup> The judicial procedure for awarding pendente lite counsel fees is outlined in the New York Codes, Rules, and Regulations.<sup>157</sup> Of note, the regulations require that the spouses have a preliminary conference in which they exchange statements of net worth, paycheck stubs, state and federal income tax returns, life insurance policies, and other financial documents.<sup>158</sup> The less monied spouse's attorney must provide an affidavit detailing the hourly rates of the attorney and any anticipated experts.<sup>159</sup> If unrepresented by

---

150. N.Y. CLS Dom. Rel. §237(a).

151. 3 NYCP: MA §34.06(e); *De Cabrera v. Cabrera-Rosete*, 70 N.Y.2d 879, 881 (1987); *see also* *Anonymous v. Anonymous*, 213 A.D.2d 183, 183-84 (1995).

152. *Ravel v. Ravel*, 161 A.D.2d 547, 550 (1990); *see also* *Kaufman v. Kaufman*, 131 A.D.3d 939, 944-45 (2015) (finding that a court may award temporary attorney fees to a nonmonied spouses if there is significant financial disparity between them); *cf.* *Ranieri v. Ranieri*, 146 A.D.2d 34, 47 (App. Div. 1989) (finding that the court should have denied an award of interim counsel fees because the requesting spouse has sufficient independent means to pay for an attorney).

153. Sponsor Memo. (D. Weinstein) A.7569A, 233d Leg. (NY 2010).

154. N.Y. CLS Dom. Rel. §237(a).

155. Sponsor Memo. (D. Weinstein) A.7569A, 233d Leg. (NY 2010).

156. *Id.*

157. 22 NYCRR § 202.16 (2019) ("This section shall be applicable to all contested actions and proceedings ... in which a judicial determination may be made with respect to alimony, *counsel fees pendente lite*, maintenance, custody and visitation, child support, or the equitable distribution of property.").

158. *Id.* § 202.16(f).

159. *Id.* § 202.16(k).

counsel, the requesting spouse must prove that they cannot afford representation.<sup>160</sup> Failure to meet the disclosure requirements can lead to a denial of the requested fees.<sup>161</sup>

### **B. The Impact of Judicial Discretion**

Just like in California, New York trial courts are afforded broad discretion when awarding temporary attorney’s fees, and appellate courts still generally defer to a trial court’s discretion.<sup>162</sup> However, the procedures created by the statutes and regulations provide fairly clear guidelines and streamlines the process of requesting and receiving the necessary pendente lite fees. The courts have held that the presumption of awarding attorney’s fees to the economically disadvantaged spouse is rebutted by simply showing that the spouse does not in fact have inferior financial resources. In a recent case, the court upheld a \$3,000 award of temporary attorney’s fees to the wife when, after paying taxes and court-ordered maintenance fees, the husband’s annual net worth was only \$9,000 more than the wife’s.<sup>163</sup> The court found that despite the small disparity between their liquid assets, the husband had not successfully rebutted the presumption that she was less monied and was therefore entitled to pendente lite fees.<sup>164</sup> In a contrary case, the court found that a wife’s accumulations of thousands of dollars of savings while receiving maintenance payments and also working a well-compensated job put her on comparable financial grounds to her husband and therefore rebutted the presumption that she was entitled to additional pendente lite counsel fees as the less monied spouse.<sup>165</sup> Therefore, a simple comparison of the parties’ respective assets is sufficient to determine which party is eligible for attorney’s fees. Additionally, the list of financial documents the parties are required to disclose in the preliminary conference eliminate the need for costly discovery and provide the court with a clear “apples-to-apples” comparison.<sup>166</sup>

The standards established by the pendente lite presumption is beneficial to both spouses with limited financial resources and the attorneys who represent them. It creates more predictability for whether a requesting spouse may receive the award, and it allows attorneys to engage with poorer clients with the understanding that the court will ensure that the attorneys will be fairly compensated for their work. In determining the amounts of the awards, the courts retain more discretion when considering the

---

160. *Id.*

161. *Hughes v. Hughes*, 208 A.D.2d 502, 502 (Second Dept. 1994) (finding that the wife was not entitled to pendente lite fees because the affidavit provided by her counsel did not include time records or information regarding the work performed to date).

162. 3 NYCP: MA 34.06[h].

163. *E.J.L. v. K.L.L.*, 38 Misc. 3d 389, 406 (2012).

164. *Id.*

165. *Macaluso v. Macaluso*, 145 A.D.3d 1295, 1298 (2016).

166. 22 NYCRR § 202.16(f) (March 29, 2019).

complexity of the case and the behavior of the parties.<sup>167</sup> Awards can be altered as a consequence for a party's behavior. In one case, the husband engaged in protracted litigation, obstructed discovery, and moved to exclude his ex-wife from the tennis club where they were both members.<sup>168</sup> In light of his behavior, the appellate court increased the amount of the award to the wife from \$20,000 to \$90,000 in attorney's fees.<sup>169</sup> In another case, the court ordered counsel fees to be paid out of a husband's separate property rather than the marital assets where he attempted to abuse his spouse financially and emotionally through scorched-earth litigation tactics.<sup>170</sup> These factors ensure that both parties in the divorce have a clearer understanding of the possible outcomes when courts order pendente lite fees.

## VI. A CALL FOR MEASURED JUDICIAL DISCRETION

The key distinction in the application of pendente lite attorney's fees in California and New York is that California's statutory factors offer the trial court a significant amount of judicial discretion, while New York's rebuttable presumption of need significantly limits it. When trial courts weigh imprecise and potentially extensive factors to determine if a requesting spouse has sufficient need, they are being asked to determine "the parties' past conduct, present needs, and future life circumstances."<sup>171</sup> Family law, particularly divorce cases, give trial courts more discretion than any other field of private law.<sup>172</sup> This can lead to unpredictable results, where outcomes appear to diverge from the stated standards.<sup>173</sup>

Judicial discretion can be very beneficial. It allows for nuanced decisions that consider the individual circumstances of the parties, and it can adapt more easily as justice requires. However, the flexibility comes at a fairly high cost. When a legal standard is not easily discernable, it impedes pro se litigants and less experienced counsel from discerning its meaning and significance to the case, and generally requires legal expertise—and the accompanying billable hours—to distill into a rule.<sup>174</sup> The degree of discretion creates a barrier to justice for those who cannot afford legal representation in their divorce and allows those with superior resources to exploit their former partner. These overall costs may be too great to continue with the current degree of judicial discretion.

---

167. *Macaluso*, 145 A.D.3d at 1298.

168. *Culen v. Culen*, 157 A.D.3d 930, 933 (2018).

169. *Id.*

170. *Schussler v. Schussler*, 109 A.D.2d 875, 877-878 (1985).

171. Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 409-10 (1996).

172. *Id.* at 411.

173. *Id.* at 506.

174. *Id.* at 516.

When authorizing pendente lite counsel fees, legislatures should seek to establish moderate rules that create consistent outcomes. New York’s rebuttable presumption is a model statute that blends clearly delineated standards with limited judicial discretion. It allows both divorcing spouses and their attorneys a in which to predict whether they might receive interim fees, and the discretion allows judges to adapt the amount for the needs, complexity, and behaviors specific to the case.

\*\*\*