2015 / 2016 ILLINOIS MAINTENANCE GUIDELINES

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Maintenance Guidelines 2015:

PA 98-961: PA 98-961.
P.A. 99-90.

Language of Illinois Maintenance Guidelines

§504 – Maintenance Amendments

I will focus on an understanding of what the 2015 maintenance guidelines provide (as tweaked by the family law rewrite)– to understand the critical importance of what this law *presumes*.

Section 504(a) is amended by adding the title "Entitlement to maintenance." Then it adds before the statutory factors that the court considers in awarding maintenance – the so called a(1) through (12) factors the language: ". The court shall first determine whether a maintenance award is appropriate, ..."

The existing statute then lists the relevant factors that include (1) to (12).

The critical language in the maintenance guidelines is b-1 to b-4.5 and provides:

"(b-1) **Amount and duration of maintenance**. *If the court determines that a maintenance award is appropriate*, the court shall order maintenance in accordance with either paragraph (1) or (2) of this subsection (b-1):

(1) **Maintenance award in accordance with guidelines**. In situations when the combined *gross* income of the parties is *less than $250,000* and ~~no multiple family situation exists~~[1] the payor has no obligation to pay child support or maintenance or both from a prior relationship, maintenance *payable after the date the parties' marriage is dissolved* shall be in accordance with subparagraphs (A) and (B) of this paragraph (1), unless the application of the guidelines would be inappropriate.

(A) The ***amount*** of maintenance under this paragraph (1) shall be calculated by taking 30% of the payor's gross income minus 20% of the payee's gross income. The amount calculated as maintenance, however, when added to the gross income of the payee, may not result in the payee receiving an amount that is in excess of 40% of the combined gross income of the parties.

(B) The ***duration*** of an award under this paragraph (1) shall be calculated by multiplying the length of the marriage by whichever of the following factors applies:

~~0-5 years (.20);~~
~~5-10 years (.40);~~
~~10-15 years (.60); or~~
~~15-20 years (.80).~~
~~15-20 years (.80).~~[2]

5 years or less (.20);
more than 5 years but less than 10 years (.40);

[1]The phrase " no multiple family situation exists" was patently ambiguous.

[2]Because of this ambiguity, the Family Law Study Committee changed this language.

10 years or more but less than 15 years (.60);
or 15 years or more but less than 20 years (.80).

For a marriage of 20 or more years, the court, in its discretion, shall order either permanent maintenance or maintenance for a period equal to the length of the marriage.

(2) **Maintenance award not in accordance with guidelines**. Any non-guidelines award of maintenance shall be made after the court's consideration of all relevant factors set forth in subsection (a) of this Section.

(b-2) **Findings**. In each case involving the issue of maintenance, the court shall make specific findings of fact, as follows:

(1) the court shall state its reasoning for awarding or not awarding maintenance and shall include references to each relevant factor set forth in subsection (a) of this Section; and

(2) *if the court deviates* from otherwise applicable guidelines under paragraph (1) of subsection (b-1), it shall state in its findings the amount of maintenance (if determinable) or duration that would have been required under the guidelines and the reasoning for any variance from the guidelines.

(b-3) **Gross income**. For purposes of this Section, the term "gross income" means all income from all sources, within the scope of that phrase in Section 505 of this Act.

(b-4) **Unallocated maintenance**. Unless the parties otherwise agree, the court may not order unallocated maintenance and child support in any dissolution judgment or in any post-dissolution order. In its discretion, the court may order unallocated maintenance and child support in any pre-dissolution temporary order.
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§505(a)(3) – Child Support Guidelines Amendments re Maintenance as a 505(a)(3) Deduction in Determining Child Support

There will also be amendments to Section 505(a)(3) providing that maintenance paid to the spouse / former spouse of this marriage is a statutory deduction when determining support. So, once effective, there will be a new subsection (g-5) following the deduction for prior obligations of support or maintenance actually paid per court order:

(g-5) Obligations pursuant to a court order for maintenance in the pending proceeding actually paid or payable under Section 504 *to the same party* to whom child support is to be payable;

Recall that (g) had provides that there is a deduction simply for, " Prior obligations of support or maintenance actually paid pursuant to a court order."

So, child support in cases where maintenance is paid actually goes substantially down. In most cases involving less than long term marriages, maintenance awards based upon the guidelines will involve **substantially higher awards**. (The exception is long term marriage cases where the court would have otherwise come much closer to income equalization). But even where the court deviates from the support guidelines (and perhaps orders less maintenance than per the guidelines), child support will be reduced.

Problems with the Amendments: There are many problems with this Act – which has an effective date of January 1, 2015. These include:

- **On the Nature of Presumptions**: Proponents of the Illinois maintenance guidelines have indicated that the maintenance guidelines are permissive in nature – providing a guidepost that the court could choose to follow. But consider the case law involving the nature of the child support guidelines on which the maintenance guidelines are based. They are not permissive but *presumptive*. For example, a recent case (*IRMO Pratt*, 2014 IL App (1st) 130465) addressing the nature of the support guidelines stated:

> The guidelines create a rebuttable presumption that child support conforming to the guidelines is appropriate. This presumption also applies in modification proceedings. If a deviation is sought, the party seeking the deviation bears the burden of showing a *compelling reason* to justify the deviation. [citations omitted.]

So, these guidelines do more than merely setting forth a starting point. They set forth a starting point resulting in the necessity of showing a compelling reason to justify a deviation.

- **Amount in Illinois Guidelines is Not Tied To the Length of the Marriage**: In the better drafted maintenance guidelines (in those few areas that have guidelines), maintenance amounts depend on the length of the marriage with the percentages being higher as the marriage is longer. With the Illinois guidelines the amount would be the same if the marriage were one year or 41 years. This is because these guidelines were based on what has been referred to as the AAML Guidelines – even though the AAML has never formally adopted these guidelines. Instead, the AAML was deliberate in avoiding the term Guidelines and using the term *Considerations*. See: Rethinking Alimony: The AAML's Considerations for Calculating Alimony".

  Regarding the length of the maintenance, assume a ten year marriage. The length of alimony in Illinois would be the longest as compared to any other state or county guideline that had a duration formula. Also, Illinois exceeded the caps for awards in those states that had caps.

  - **Sophisticated Maintenance Guidelines – Would Likely Have Been Too Complex to Pass Legislative Muster – Even if Relatively Easy for Divorce Professionals to Handle**: It is suggested that if there were guidelines they should have been far more comprehensive in order to better ensure fairness in those cases where the guidelines are followed. The benchmarks used to determine the finite length of maintenance at 5, 10, 15 and 20 years are arbitrary. See further discussion below.

- And they should have provided for lower percentages when the marriage was of shorter length. This was the *sine quo non* of Illinois case law involving maintenance awards after the passage of the Illinois Marriage and Dissolution of Marriage Act (IMDMA). See, e.g., *Gitlin on Divorce: A Guide to Illinois Matrimonial Law*. Any guidelines that were more sophisticated had increased the amount of maintenance depending upon the length of the marriage. Length of the marriage, among other things, was to have been a statutory factor in setting the amount of maintenance. But it is not a factor in this formula.

- **Length of Presumptive Awards through to Date of Filing:**

Maintenance Guidelines: Length

Years 1-7		Years 8-14		Years 15-20	
Marriage Yrs	Years Mn	Marriage Yrs	Years Mn	Marriage Yrs	Years Mn
1	0.2	8	3.2	**15**	12
2	0.4	9	3.6	16	12.8
3	0.6	**10**	6	17	13.6
4	0.8	11	6.6	18	14.4
5	2	12	7.2	19	15.2
6	2.4	13	7.8	**20**	20/Indefinite
7	2.8	14	8.4		

- Note the dramatic presumptive leaps once the percentages go up in terms of the length of maintenance – especially at 10 years and 15 years where the length of maintenance goes from 3.6 to 6 years and from 8.4 to 12 years, due to a mere one day change.

- **Change to Statute to Refer to Commencement Date Throughout** The 2016 amendments to the maintenance guidelines have a negative public policy incentive, i.e., that one would need to file divorce within certain time frames to reduce one's length of maintenance.

  Legislation that encourages filing for divorce filings is generally considered to be contrary to public policy. But the alternative may have been equally bad: legislation that initially had provided an incentive to delay divorce proceedings also has significant negatives.

- **Maintenance as a §505(a)(3) Deduction in Determining Net for Support / Above the Line Adjustment in Determining the Adjusted Gross Income for Taxes**: Maintenance is an above the line adjustment deduction when determining net income for child support. But maintenance is also a tax deduction in determining net income – a different sort of deduction. Keep in mind how these deductions work. The so called §505(a)(3) deduction – maintenance as paid is a deduction in determining support – is like health insurance premiums in that it lowers the amount of support that must be paid. *So the maintenance guidelines will lower child support in all cases where maintenance is awarded*.

  As stated, when maintenance terminates, guideline child support should *theoretically* increase. There may be tax problems with tying into a termination of maintenance an automatic increase in child support, in terms of it being a contingency potentially related to a minor. A discussion of this is beyond the topic of this. But the question is how to address the fact that these maintenance guidelines impact child support.

- **Definition of Income as Same for Support and Maintenance Purposes Despite Public Policy for Support and Maintenance Differing**: The maintenance guidelines borrow the same general language regarding deviations from the support guidelines. And the guidelines define gross income as income "from all sources" consistent with the child support guidelines. Accordingly, per *Rogers* and its progeny, we generally including one time income as income.

  Under *Rogers* and the case law that follows it, presumptively one time income such as gifts or loans is included as income. Only then can the court deviate from the support guidelines – if there is a compelling reason to justify the deviation.

- Compare the amendments adoption of the definition of income to a recent case where the Illinois appellate court pointed to the reason that income for maintenance purposes should be treated somewhat differently than income for support purposes. Maintenance is based on the historical lifestyle (the lifestyle established during the marriage), while the child is entitled to share, in part, in post-decree good fortune of the payor of support. See, e.g., *IRMO Micheli*, 2014 IL App (2d) 121245 (July 2014). *Micheli* involved a 24 year marriage and the trial court awarded maintenance of $3,700 per month plus 20% of future bonuses. The appellate court ultimately ruled that the percentage should be capped. The appellate court stated:

  > On remand, the trial court should recalculate the monthly maintenance amount or at least cap the amount from John's future bonuses. If the trial court determines that $3,700 per month is inadequate to meet Ellen's needs and maintain her standard of living during the marriage, it may add a capped portion of John's future bonuses.

So one additional query is whether a case such as this would remain "good law."

- **What Constitutes Income – Choice Not to Include AAML Language re Imputing Income**: The AAML Considerations contained differently language regarding defining income as compared to the Illinois guidelines. They provided, "Gross Income" is defined by a state's definition of gross income under the child support guidelines, *including actual and imputed income*." As stated, the Illinois maintenance guidelines define "gross income" as "income from all sources, within the scope of that phrase in Section 505 of this Act." The problem is that imputing income to the maintenance recipient is not consistent with Illinois child support case law. Illinois case law for child support essentially imputes income to the payor due to "bad faith" termination of employment or reduction in the payor's income. But there would be a different public policy in imputing a certain income level to a prospective maintenance recipient, even if, for example she or he is "underemployed" or unemployed – even though this underemployment or unemployment may not be in bad faith. Addressing this complication at greater length is beyond the scope of this article.

- ***Presumptive* Elimination of Maintenance Reviews in Initial Awards**: Consider the history of Illinois case law following the enactment of the IMDMA in 1977. When reviewing Illinois appellate cases as a whole, the first trend was to reverse cases where maintenance was for a set period of time with no review. Many of those cases involved fact patterns with medium term marriage cases – with the case law ruling that it was error to set a fixed term maintenance when it would be speculation to determine the less monied spouse would be sufficiently "rehabilitated." But there is nothing within the maintenance guidelines addressing maintenance reviews – even though, based upon Illinois case law, these reviews are the preferred approach when awarding maintenance that is not fixed term (often involving short term marriages) or indefinite maintenance. In fact, the guidelines presumptively set maintenance at specific terms. This brings up two questions if the court is following the guidelines;

  - Can the court award maintenance with a review date – which may have been the usual scenario prior to the enactment of these amendments?

  - Is maintenance generally modifiable during its term, as to length and amount?

  The answer to the first question of whether the court can set a date following the guidelines, the answer, unfortunately, would be no. The guidelines simply provide for a set term and the court would have a "safe harbor" by following the guidelines and the presumptive specific term.

The answer to the second question about the modifiability of maintenance during its term is that maintenance should be modifiable during its term – both as to length and amount – considering the Latin maxim is "*expressio unius est exclusio alterius*" – (the expression of one means the exclusion of the other).

It is *permissible* for the court in marriages of less than ten years (defined through to the commencement) to set maintenance for a fixed term with there being a "permanent termination" at the end of the term. What that means is that further maintenance would be barred *ab initio* – from the date maintenance is ordered – beyond the set term. The implication is that when the court has not set maintenance at a fixed term with a permanent termination, during its term maintenance should be modifiable as to amount and length.

- **David Hopkins Summary – A Starting Place**: David Hopkins presented on November 12, 2014, for the McHenry County Bar Association. As much as anyone, David was significant responsible for the passage of these guidelines. So, both the official commentary as well as David's article are of note.

David writes:

> It is anticipated that an important effect of the new maintenance guidelines will be that parties, attorneys, ,and judges will all have a common *starting point* to begin analysis and that, as a result, there will be far more consistency and predictability for maintenance awards. This anticipated result does not compromise the role of skilled attorneys in advocating for deviations in appropriate cases.

David suggests that the guidelines would operate as a starting point similar to considering an equal division of the marital estate. This is not necessarily how the maintenance guidelines were written (because there is no presumption in Illinois of a equal property division). But it does reflect the intent of those who were responsible for drafting the guidelines.

- **The Double Dipping Problem**: An area where David Hopkins and I agree is on the double dipping problem. Hopkins writes:

> > It is beyond the scope of this article to fully explore cases that inconsistently address the concept of "gross income." The effect of P A 98-961, of course, is to make clear that the same term under both the maintenance and child support Sections is to now be construed consistently. *As to troublesome precedents, a statutory resolution is surely the soundest course*. Thus, the ISBA Family Law Section Council now has a new task on which to focus.

The goal is to essentially put pressure on the Illinois support guidelines to enact an income shares model and one that would do away with the current problem with Illinois law in allowing a double dip regarding property and support (and now maintenance)– even though this is contrary to practice and the general conception of "fairness" as troublesome as that word may be to some.

The Law of Unintended Consequences: The goal of the statute was to create greater uniformity in maintenance awards. The goal was recognize that "downstate" many believed that awards of maintenance were less than generous and to force higher awards and for a longer period of time. But they were also designed with the belief that individuals could not "afford" to litigate over maintenance

and therefore create a one size fits all solution might be helpful. But, obviously, we do not have the same problems in collaborative practice. Already the process (when it results in an agreement) tends to be less expensive than traditional adversarial divorce. We collaborative professionals have the opportunity to understand that guidelines (an inside the box solution) are not appropriate for maintenance if our negotiations are not to be in the shadow of the law.

Rather than promote more settlements on the issue of maintenance, the result will likely be the opposite due to the nature of how these guidelines were drafted. There are two groups of negative unintended consequences that can occur:

> A negative, unexpected detriment occurring in addition to the desired effect of the policy. An example is that while irrigation schemes provide people with water for agriculture, they can increase waterborne diseases that have devastating health effects..
>
> A perverse effect contrary to what was originally intended (when an intended solution makes a problem worse). This has been dubbed the "cobra effect," after an anecdote about how a bounty for killing cobras in British India caused people to breed cobras.

The law of unintended consequences as a result of this legislation will be to create:

- More incentive to argue against rote application of the guidelines;
- More incentives toward litigation;
- More incentives in arguing against an award of any maintenance award;
- Additional child support litigation with payor's trying to conform support awards to the guidelines including a §505(a)(3) deduction for current maintenance;
- Arguments regarding what constitutes income based upon the division among the districts, etc., regarding such issues as double dipping in the sense of considering income once for the purposes of property settlement and a second time for the purposes of support and, in the near future, maintenance. See: Double Dipping and Determining Child Support by Gunnar Gitlin.
- Far fewer awards of maintenance reviews.

Hypotheticals:

I took hypothetical gross amounts of $200,000 and $50,000 for the payor and recipient. Under the so called AAML Considerations and the Illinois guidelines, the result was the highest – $50,000 per year. In that case, I also assumed two children and applied the child support guidelines while providing that the maintenance paid was a deduction per 505(a)(3) in determining net (similar to health insurance). The result was that after paying support the payor husband in that hypothetical would have a net of $76,000 while the wife would have a net of $102,000. As a result if the guidelines were followed the support recipient had a net income after payment of tax and after consideration of maintenance (and allowing the maintenance adjustment in determining tax) of 133% of the payor's net income after support.

In that case, used the same assumptions – two children – except that the gross incomes of the husband and wife were $100,000 and $25,000 (exactly half the amount in the first scenario). The result was that after paying support the payor husband in that hypothetical would have a net of $39,000 while the wife

would have a net of $56,500. As a result if the guidelines were followed the support recipient had a net income after payment of tax and after consideration of maintenance (and allowing the maintenance adjustment in determining tax) of 144% of the payor's net income after support.

Conclusion and Three Largest Problems: Because of the language of the legislation, there will be an unintended consequence of greatly complicating matters and leading to more court battles rather than greater predictability. We collaborative divorce professionals have a unique opportunities understand the likely backlash of this one size fits all law.

The three largest problems with the maintenance amendments are:

1. **Amounts in Shorter Term Marriages Where Support Is Being Paid**: The fact is that presumptive guideline maintenance awards – where there is also an award of child support (in shorter or medium term marriages) – will often result in the payor spouse finding it difficult to live.

2. **Maintenance Reviews – What Had Been the Mainstream Approach to "Rehabilitative" Maintenance Awards**: The presumptive elimination of maintenance reviews in the court's initial awards, i.e., without deviating from the maintenance guidelines (of course there is no impact on currently existing reviewable maintenance orders in terms of the fact that there will be a review, etc, – but the big question in these cases will be whether the maintenance guidelines re length and amounts will apply.

3. **Length of Maintenance in Medium Term Marriages**: There are multiple problems with the length of marriage including the length simply not providing a sufficient incentive for what has traditionally been considered "rehabilitative maintenance – especially in cases over ten years and under 20 years. For example, with a 17 year marriage, the length being 13.6 years is simply not in keeping with reasonable norms.

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