

TRENDS IN MAINTENANCE (ALIMONY) AWARDS IN ILLINOIS - 2016 – A FOCUS ON THE STATUTORY CHANGES

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Introduction

Over the years, I have written on the trends in maintenance cases. And in January 1, 2015 and January 1, 2016 Illinois law regarding maintenance awards has been comprehensively changed from a law that was based on the facts and circumstances of the case to presumptions. Using those simplistic presumptions, one needs to know only several numbers: 30% gross of payor; 20% gross of recipient; 40% cap; \$250,000 combined gross as well as one phrase, “no obligation to pay child support or maintenance or both from a prior relationship.”

Prior to the 2015 and 2016, I had provided a review of case law and trends reflected from that case law. Because the maintenance guidelines were designed only to provide a “starting place” – even though they actually provide a rebuttable presumption – and because the guidelines have two important exceptions, it is critical to still understand Illinois case law prior to the maintenance guidelines.

I will now separate out from this article the discussion of the case law prior to the enactment of the maintenance guidelines with the discussion of the statutory law changes over the years. Nevertheless, this article will address the larger trends shown by those cases.

Before the maintenance guidelines were enacted, one could see trends demonstrated by a comprehensive review of Illinois family law maintenance. As I wrote the trend has been toward indefinite maintenance awards in long term marriage cases where there is a significant income disparity and “opportunity cost” due to the marriage. This was, in a sense, codified into law with the 2015 maintenance guidelines presuming essentially indefinite maintenance in cases over 20 years where one receiving any award of maintenance and where the guidelines do apply

While most Illinois lawyers use the term permanent maintenance, I prefer the term “indefinite” maintenance. It is more accurate. Permanent maintenance awards issued by the court are always modifiable on a substantial change in circumstances. And they terminate on the statutory events in §510(c) of the Illinois Marriage and Dissolution of Marriage Act (the IMDMA). Illinois lawyers use the term permanent maintenance because is the language of IMDMA. It provides as amended effective January 1, 2016:

[T]he court may grant a ~~temporary or permanent~~ maintenance award for either spouse in amounts and for periods of time as the court deems just, without regard to marital misconduct, ~~in gross or for fixed or indefinite periods of time~~, and the maintenance

may be paid from the income or property of the other spouse after consideration of all relevant factors...

But the cases are legion which address the fact that permanent maintenance awards are not permanent but are always modifiable.

Section 504 and Amendments: After originally analyzing the case, law I wondered how Illinois moved from a state where awards of maintenance were clearly inadequate in long term marriage cases to a state where the awards have become more and more generous? Consider the changes to the IMDMA over the years. All of the changes until the 2016 amendments were designed to make maintenance awards more and more generous to the potential maintenance recipient.

Before 1977, in Illinois divorce cases, property was awarded in accordance with the way title was held regardless of whether it was acquired during the marriage. In October of 1977 the Illinois Marriage and Dissolution of Marriage Act came into effect and with it new concepts of awards of alimony (maintenance) and distribution of property. The significant change sought to be brought about by the IMDMA was to rely on property distribution as a means of sustaining the economically dependent spouse, rather than awards of alimony. As a result the prevalent form of maintenance awards was for a short period of time, with the maintenance award either to terminate at the end of a short period of time, or at the end of the fixed period of time, typically two or three years, with the maintenance to be reviewed by the court. This scheme, on its face, seemed desirable because divorce should sever all possible ties between the parties, and the dependent spouse should be more secure if the means of support belonged to the dependent spouse, rather than the former spouse.

Section 504 is the maintenance statute of the Illinois Marriage and Dissolution of Marriage Act. There have been two key rewrites to the maintenance section. First, we had Public Act 87-881 (which became law effective January 1, 1993). The pre-1993 version of Section 504 stated that one qualified for maintenance if the person “lacked sufficient property, including marital property apportioned to him, to provide for his reasonable needs.” The other significant statutory amendments in the 1993 amendments included a new and a revised factors. The legislation added a factor – which remains factor (4):

any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having foregone or delayed education, training, employment, or career opportunities due to the marriage

The 1993 amendments also changed what is now factor (6) by additional language to the “appropriate education, training and employment” factor. The additional 1993 language states that the court should consider, “whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek.”

The final significant change in 1993 was what is now factor 12 – the factor which considers the “contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse.”

Thus, prior to 1993 the relevant factors of Section 504 were:

- 1) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extend to which a provision for support of a child living with the party includes a sum for that party as custodian; [See factors 1 through 3]
- 2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; Substantial Amendments in 1993].
- 3) the standard of living established during the marriage; [No change in 1993]
- 4) the duration of the marriage; [No change in 1993]
- 5) the age and the physical and emotional condition of both parties; [No change in 1993]
- 6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and [Deleted in 1993]
- 7) the tax consequences of the property division upon the respective economic circumstances of the parties. [Added via Public Act 82-556 but not changed in 1993].

Through to 2015/16 the factors in maintenance awards are:

- (1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance as well as all financial obligations imposed on the parties as a result of the dissolution of marriage; [amended in 2016]
- (2) the needs of each party;
- (3) **the realistic present and future earning capacity of each party**; [amended in 2016 to for some reason add the word “realistic.”]
- (4) **any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having foregone or delayed education, training, employment, or career opportunities due to the marriage**; [New statutory factor in 1993].
- (5) any impairment of the realistic present or future earning capacity of the party against whom maintenance is sought; [a new statutory factor in 2016]
- (6) ~~(5)~~ The time necessary to enable the party seeking maintenance to acquire **appropriate** education, training, and employment, [Before 1993 was “to acquire **sufficient** education and training to find appropriate employment] / **and whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment**; [portion in red is reflects the 1993 amendments; 2016 amendments in conformity with eliminating the term custody throughout the statute.]
- (7)~~(6)~~ the standard of living established during the marriage; - No change in 1993 or 2016.
- (8)~~(7)~~ the duration of the marriage; - No change in 1993 or 2016.
- (9) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and the needs of each of the ~~(8) the age and the physical and emotional condition of both parties~~; [No Change in 1993 but expanded
- (10) all sources of public and private income including, without limitation, disability and retirement income; [added 2016].
- (11)~~(9)~~ the tax consequences of the property division upon the respective economic

- circumstances of the parties; - SAME
- (12)~~(10)~~ **contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;** [New statutory factor in 1993].
- (13)~~(11)~~ any valid agreement of the parties; and
- (14)~~(12)~~ **any other factor that the court expressly finds to be just and equitable.** [Catch all was a new statutory factor in 1993].

In 1993 Section 504 was amended with the “lack sufficient property” portion being omitted. The amendment suggested the philosophic acceptance of the fact that in many cases distribution of marital property will not result in the generation of sufficient income to adequately support a needful spouse. The other 1993 amendments provide the spouse seeking maintenance more statutory ammunition in urging a longer or larger award of maintenance.

Removing the 1993 amendments for the sake of focusing on the 2016 changes, the current factors that have been changed in determining maintenance awards are:

(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance as well as all financial obligations imposed on the parties as a result of the dissolution of marriage;

(3) the realistic present and future earning capacity of each party;

(5) any impairment of the realistic present or future earning capacity of the party against whom maintenance is sought;

(6) ~~(5)~~ the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or any parental responsibility arrangements and its effect on the party seeking ~~is the custodian of a child making it appropriate that the custodian not seek employment;~~

(9) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and the needs of each of the ~~(8) the age and the physical and emotional condition of both parties;~~

(10) all sources of public and private income including, without limitation, disability and retirement income;

The next changes to Illinois maintenance law involved reviews and modifications to maintenance. Just as the law has become more generous to the spouse who is receive maintenance in terms of initial awards, so has the law changed regarding maintenance review and modification.

Section 510(a)(5): Section 510 of the IMDMA adds a new provision, Section (a-5), which provides:
(a-5) An order for maintenance may be modified or terminated only upon a showing

of a substantial change in circumstances. In all such proceedings, as well as in proceedings in which maintenance is being reviewed, the court shall consider the applicable factors set forth in subsection (a) of Section 504 and the following factors:

- (1) any change in the employment status of either party and whether the change has been made in good faith;
- (2) the efforts, if any, made by the party receiving maintenance to become self-supporting, and the reasonableness of the efforts where they are appropriate;
- (3) any impairment of the present and future earning capacity of either party;
- (4) the tax consequences of the maintenance payments upon the respective economic circumstances of the parties;
- (5) the duration of the maintenance payments previously paid (and remaining to be paid) relative to the length of the marriage;
- (6) the property, including retirement benefits, awarded to each party under the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage **and the present status of the property**;
- (7) the increase or decrease in each party's income since the prior judgment or order from which a review, modification, or termination is being sought;
- (8) the property acquired and currently owned by each party after the entry of the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage; and
- (9) any other factor that the court expressly finds to be just and equitable.

There is an unexplored area of Section 510(a-5)(6) which is the impact of the language which allows the court to consider the present status of the property when there is a review of maintenance. Until the amendments to Section 510(a-5), the law in Illinois was the good fortune of the maintenance paying spouse after a divorce should not, of itself, be a basis for increasing maintenance. (*Arnold v. Arnold*, 332 Ill.App.586 (1st Dist. 1947)). Based on the changes, where maintenance is modified, the court might consider the post-decree good fortune of the obligor based upon his (or her) current asset base when modifying maintenance (contrary to this decision).

The Spreadsheets and the Trend to Indefinite Maintenance in Long Term Marriage Cases

Next, I analyzed all the significant Illinois maintenance cases decided since the passage of the IMDMA. Virtually of these cases since 1987 were reported in the charts in spreadsheets alphabetical order. Reviewing those spreadsheets and the separate article, look at the cases on a year-to-year basis to keep in mind that in 1994 the Illinois Supreme Court amended Rule 23 to provide, effectively, each appellate court district could publish only a certain number of opinions and the rest of the decisions would have to be disposed of under Rule 23. Effectively it cut the published opinions in family law in less than half.

I had written:

The danger of breakdown marriages based upon length is it tends to promote a belief that there are certain magic lines where it is significantly more likely that maintenance

would be indefinite. This is not true. The experience of reviewing the case law in its entirety is that maintenance award should be viewed across the spectrum.

Unfortunately, with the 2015 maintenance guidelines, this predicted danger has become enacted within the presumptions.

When you review the separate detailed article breaking down case law, you will see that what was a complex determination made on fact by fact basis, now becomes a one-size-fits all solution where only several figures need to be known for a presumptive maintenance award.

The spreadsheet reports on the following factors:

- B. Name of Case
- C. Ill.App. Case citation
- D. District of Case
- E. Year of case
- F. Gitlin on Reports No. for Research Purposes
- G. Length of marriage
- H. Age of Payor
- I. Age of Recipient
- J. Party Appealing Maintenance Award
- K. Issue Appealed from
- L. Education of Maintenance Recipient (usually Wife)
- M. Net Marital Estate in dollars - where known
- N. Percentage of Marital Estate to Maintenance Recipient
- O. Non-Marital Property of Payor of Maintenance
- P. Non-Marital Property of Recipient of Maintenance
- Q. Payor's Gross Income
- R. Payor's Net or Estimated Net Income
- S. Recipient's income
- T. Investment Income of Maintenance Recipient
- U. Amount of maintenance awarded in terms of dollars and percentage of obligor's net income
- V. Total number of children
- W. Total number of minor children
- X. Maintenance award per month (either as result of appellate court remand or affirmation of trial court's award)
- Y. Maintenance as a Percentage of the Payor's Net Income
- Z. Duration of Maintenance, e.g. permanent, number of years, etc.
- AA. Whether the maintenance award is to be reviewed or terminated after a certain time
- BB. Where significant, rationale of court in relation to maintenance

Reviewing the cases I spotted a trend toward long term maintenance that commenced in the mid 1980s. Taking a somewhat arbitrary starting point, I used 1988 for the first year in which I analyzed permanent maintenance awards in long term marriages cases (which I defined as more than 20 years in length). And perhaps not coincidentally [but unfortunately] the Illinois maintenance guidelines adopted that somewhat arbitrary benchmark.

As discussed above, I recently created two subgroups of cases involving long term marriages. This was done because the greatest number of maintenance cases reported involved marriages whose length was 20 to 29 years in length.

Reviewable Maintenance (Maintenance for a Fixed Period)

There were several cases where, for long term marriages, the appellate court affirmed short term, terminable maintenance. Most of these cases involved unique fact patterns as is discussed above. There is a discernable trend in maintenance subject to review and maintenance for a fixed duration with a termination date. The appellate courts have, in several instances, affirmed a long term award for a long term marriage. There is also a trend for the appellate courts to hold there was error in setting maintenance for a time certain and to terminate at the end of that time certain, in long term marriage cases where the recipient has been out of the work force. For example, the appellate court reversed a one year award for a twenty year marriage and held it was speculative to assume the recipient can achieve the marital standard of living in one year.

Overall Statistics Showing Amounts of Maintenance Increased with Length of the Marriage – The Concept of Rehabilitative Maintenance was an Inaccurate Concept

From my research system, *Gitlin on Divorce Reports*, we have statistics going back through 1987. What we saw was that maintenance awards went substantially up as the marriages were longer in length. The results were dramatic with the average maintenance results for marriages of 10 years long and under having averages of perhaps 11% while for marriages of more than 30 years, the result was perhaps more than 30% of the payor's net income. But the maintenance guidelines provided that the presumptive award was 30% of the payor's gross income. One can see that these awards are far more than what one would have seen based upon the awards prior to the guidelines.

I have also commented that one of the trends in maintenance which is not capable of being statistically reported is the flip side of permanent maintenance, that is, the appellate courts had essentially stopped believing in the concept of "rehabilitative" maintenance. First, the term "rehabilitative" had not been and still is not a statutory term. Second, it is not a descriptive term because the term means to restore a person to a former capacity, but that is hardly ever the case in awards of maintenance.

The first attack on rehabilitative maintenance was where the award was for a fixed number of years. These awards were struck down by the review courts on the basis that it was speculative to assume the recipient would be "rehabilitated" at the end of the term of maintenance.

When considering maintenance awards and whether to urge that it is appropriate to vary from the guidelines, consider The Gitlin Law Firm's lifestyle maintenance spreadsheet. In negotiations the recipient should urge lifestyle amount as an objective criterion for determining maintenance which is consistent with the statutory framework. However, if this amount exceeds what the amount would be likely to award, the lifestyle amount should be reduced to a reasonable amount.

The first step in the maintenance formula is to determine the parties' anticipated net incomes following the divorce. Divide the combined net income by two. Note that often the net incomes following the divorce may be lower than the parties' net income before the divorce. This is because the parties will not have the advantage of filing under the status married, filing jointly. Assume the parties during the marriage equally shared in this income for their lifestyle purposes. For the purpose of illustration assume the total family net income is \$100,000. This amount resulted from husband's contributions of \$80,000 and wife's contributions of \$20,000. Next, deduct the projected net income of the recipient from employment and assets from the lifestyle amount to determine the amount maintenance that wife should receive to live at the lifestyle of the parties during the marriage. Assume further that as a result of the settlement the wife will receive assets valued at \$200,000. If the house, car, and personal property constitute \$100,000, only \$100,000 would be available for investment purposes. The amount of net income from investments should be calculated upon the highest return for low risk tax free interest e.g., tax-free municipal bonds. At an eight percent rate of interest, wife's projected net income from employment would be \$8,000. Deducting this amount from the lifestyle amount results in an annual maintenance obligation of \$2,000 (See Appendix A). Finally, adjust the lifestyle amount for the amount of taxes which wife must pay on the maintenance. Thus, if wife is in an **effective** 18 percent tax bracket, she would incur tax of \$3,960 on the maintenance and husband would be required to pay wife \$2,163 per month maintenance.

Conclusion: The Illinois maintenance guidelines contained one step forward but more steps backward in the development of the law in Illinois. The step forward was bringing more uniformity regarding indefinite maintenance awards in long term marriage cases where there is an income disparity. But it does so at a time when more and more women are in the workforce. In a sense it is solving a problem that had already been solved by the breadth and depth of Illinois case law

The negative is the simplistic nature of the formula [one needs to know only several numbers: 30% gross of payor; 20% gross of recipient; 40% cap; \$250,000 combined gross as well as one phrase, "no obligation to pay child support or maintenance or both from a prior relationship] is such that the amounts of maintenance ignores what had been the critical factor – the length of marriage. As a result maintenance awards in many cases are far beyond what had been – and is – reasonable regarding the presumptive awards where child support is also required or where the marriage was relatively shorter in duration.

The second step backward was presumptively eliminating maintenance reviews because the guidelines set maintenance for a set period of time (except where there is permanent maintenance). The preference for maintenance reviews in appropriate cases was one of the best trends shown by Illinois cas law over the years. By simply tying in a presumptive length of maintenance with the length of the marriage [now until the date of filing] we presumptively ignore one of the best aspects of what had been ingrained in Illinois law – the preference for maintenance reviews where it would be speculative to set maintenance for a set period.

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