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Case Law Review: Maintenance Review: In re Marriage of Kuper

Maintenance Review–Main Holdings: 1) Third District bases former husband's income not on employment income (where obligor retired but who received substantial inheritances) but on expenses in his financial affidavit. 2) Appellate court rules that the maintenance guidelines do not apply post-decree where they were not in effect at the time of the divorce. But the appellate court affirmed the trial court's application of the guidelines to his "income" based on his overall expenditures listed in his affidavit.
In re Marriage of Kuper, (2019 IL App (3d) 180094)

The Facts: The parties were divorced in December 2013 following a 28-year marriage. The marital settlement agreement divided the marital estate equally and required the husband to pay to his wife maintenance of $974 per month and the award was reviewable in July 2016. In August 2016, the former wife filed her petition to modify or extend maintenance. The parties had two children, who at the time of the trial on the maintenance review were ages 27 and 24. They were then living with the former wife and each was contributing $100 monthly to their expenses.

The former wife had two years of college but without an associates degree. At the time of the maintenance review, she was employed Didoughs Pretzel and had been there for five years. She earned $10.25 per hour, an increase from her initial pay of $9.35 per hour. She worked 40 hours a week but did not have insurance. She was last insured in 2009. She had applied for other jobs but was not granted interviews.

Her monthly income consisted of her employment earnings, maintenance payments, and her portion of her former husband's Caterpillar pension. Based upon the budget portion of her financial affidavit, she had a surplus of $820 per month,[1] which she deposited into a savings account. The account had a balance of $4,220. She had total assets of $530,553, including her investment and retirement accounts.

The former husband testified that he had remarried. His new wife had three children: ages 20, 22 and 25. The 22-year old was in college and lived with the ex-husband and his wife during school breaks. Regarding the facts of the case applicable to the former husband the appellate court recited:

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[1]But note that she did not list in her affidavit the cost of health insurance since she testified she could not afford it.

> LaVern retired from Caterpillar after 15 years in the maintenance department. He had started experiencing physical difficulties, received unsatisfactory performance reviews, and because he was planning to retire at the age of 60, he left. LaVern's physical difficulties included hand and arm tingling, which negatively affected his fingers, high blood pressure, diabetes, cataracts and depression, all of which impacted his ability to work. He officially retired on July 14, 2016, and began receiving his pension and profit sharing on August 1, 2016. At the time of his retirement, he had been earning $56,000 per year, plus overtime and profit sharing.

At trial the former husband testified that his gross income had dropped from $74,545 in 2016 to $0 in 2017 due to his retirement. His monthly income was now $1,613 and his individual expenses were $4,193 for a deficit of $2,579. But his assets were $1.9 million due to his inheritance of $1.1 million from his mother who died April 2013 and an uncle who dies May 2013. He testified that he had to withdraw $25,000 from his accounts prior to trial to meet monthly expenses. He paid his new wife's expenses, including maintenance of her prior home. He also paid tuition and college expenses for her daughter and tuition for her son, despite these payments requiring him to utilize sums from his investment accounts and inheritances.

The Trial Court's Decision: In January 2018, the trial court entered an order denying the former husband's petition to terminate maintenance and granted the ex-wife's petition, increasing maintenance in its amount and making the award "permanent." In reaching its decision, the court found that despite the loss of employment income the former husband had an increased ability to pay maintenance. The appellate court calculated the former husband's monthly income as $14,114 based on his pension payments and the amount he spent each month. The court considered that the funds the former husband had received from the inheritances were assets that provided his ability to pay an increased amount in maintenance to his former wife. Additionally, the court considered that former husband was paying his new wife's expenses and supporting her children.

The trial court found the former wife in need of maintenance in that without maintenance her surplus of $50 per month would not allow her to meet her needs. The court calculated a monthly maintenance amount of $3,767 and made the award retroactive to January 1, 2017. In doing so, the trial court applied the maintenance guidelines that were not in existence at the time of the divorce. The former husband appealed and the appellate court affirmed in part and reversed in part.

Four Main Issues on Appeal: This case addressed four critical issues involved in maintenance review cases: 1) whether the wife's asset base should be considered as to her ability to live at the lifestyle during the marriage; 2) how to calculate income; 3) whether the trial court erred in considering the husband's inheritances since he had received them prior to the divorce; and 4) the law that applies given the changes to Illinois statutory law. When reading this case, note the dissent regarding the majority's "method of accounting" to calculate income. This case presents a

warning flag regarding financial affidavits in cases where cash flow is not based upon employment income.

Exhaust Assets: The first issue was the former wife's asset base as the former husband urged that she had sufficient assets to sustain her at the marital lifestyle, especially given her testimony as to an economic surplus. The appellate court stated: "A former spouse is not required to exhaust all of her assets in order to meet her basic needs. *In re Marriage of Lichtenauer*, 408 Ill. App. 3d 1075, 1087 (2011)." This is discussed further below.

How to Calculate Income for Support Purposes: This case next addressed how to define income for maintenance purposes when an individual is retired and living off of largely non-marital assets.

The following are quoted verbatim because it reflects the appellate court's noting case law that does not consider certain withdrawals to constitute income. Yet the trial court affirmed an expansive view of what constitutes income based upon the former husband's affidavit.

> Illinois courts have interpreted what qualifies as income under the Act. The money a payor husband voluntarily contributed to his IRA was considered income. *In re Marriage of Plotz*, 229 Ill. App. 3d 389, 393 (1992). Withdrawals from a self-funded individual retirement account (IRA) do *not* constitute income but the interest and/or appreciation earnings from the IRA was considered income. *In re Marriage of O'Daniel*, 382 Ill. App. 3d 845, 850 (2008). A reverse stock split resulting in a capital loss was *not* considered income for child support purposes where payor husband used the proceeds from the involuntary stock sale to purchase a replacement asset. *In re Marriage of Anderson & Murphy*, 405 Ill. App. 3d 1129, 1136 (2010). Money withdrawn from a savings account during payor husband's period of unemployment was *not* characterized as income for child support calculation. *In re Marriage of McGrath*, 2012 IL 112792, ¶ 14. Stock that had vested was income for child support purposes. *In re Marriage of Schlei*, 2015 IL App (3d) 140592, ¶ 19.

Obligations to a payor husband's former wife take precedence over obligations arising from the ex-husband's new marriage. *Gregory v. Gregory*, 52 Ill. App. 2d 262, 268 (1964). A paying spouse's remarriage and expenses incurred in setting up a new household are not proper factors for the court's consideration in determining whether to modify or terminate maintenance. *Pierce v. Pierce*, 69 Ill. App. 3d 42, 45 (1979). A payor's voluntary acceptance of nonlegal obligations are not to be considered in deciding whether maintenance should be modified or terminated. *In re Marriage of Rushing*, 258 Ill. App. 3d 1057, 1062 (1993).

The appellate court then applied the facts of the case and stated:

> In calculating LaVern's income, *the trial court used the monthly expenditures*

> *LaVern listed on his financial affidavit to calculate his income*. It found LaVern's income as follows: $728.25 from his Caterpillar retirement benefits; $6,605.90, the amount LaVern paid monthly to maintain three homes; $6,770 in other monthly payments, including $1,085 for entertainment, dining out and hobbies; $960 for gifts; $375 for donations; and $3,025 for his stepchildren's tuition and expenses for a total monthly income of $14,114.15. Using these figures, the court found LaVern's annual income was $169,370. On his affidavit, LaVern listed his net monthly income at $1,613.37 and *his* living expenses at $4,192.58 for a monthly shortage of $2579.21. LaVern testified he withdrew funds from his investment accounts to make up the shortfall and meet his monthly expenses. The trial court expressly stated it did not consider LaVern's withdrawals as additional income and rejected Rita's argument that LaVern's income was $181,812, which represented all the withdrawals he took from his various investment accounts. The trial court relied on the inheritances LaVern received and the financial opportunities those assets provided him in calculating his income. We find it did not abuse its discretion in determining LaVern's monthly income to be $14,114.15.

Of note is the fact that the new wife's income was less than $1,000 annually.

Consideration of Former Husband's Inheritances: The former husband argued that his inheritances had been previously considered at the time of the divorce and therefore should not be considered for the purpose of an upward modification of maintenance. The appellate court commented:

> LaVern complains the inheritances were considered by the court in the property distribution. However, LaVern's financial affidavits do not include any reference to the stock, real estate, accounts and funds he inherited.[2]

It is likely the husband might have had a better argument had the division of the marital estate been significantly tipped in the former wife's favor. The appellate court commented on the equal property distribution and the fact that the time of trial his investment accounts "topped $1.9 million and were supplemented by substantial inheritances." Accordingly, the appellate court appears to have relied upon the former husband's "increasing wealth" post-decree. (¶ 15).

Applicable Law: The following are quoted in full regarding the applicable law given how important this issue is to future litigation.

> The trial court increased ex-husband's obligation based on its calculation of ex-husband's income; although it should not have used the amended guidelines,

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[2]Query: Does this reference to the affidavits refer to the pre-decree or post-decree affidavits?

> the amount the court awarded in accord with the guidelines was appropriate based on the statutory factors.
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> Based on the plain language of section 510 of the Act, we agree with LaVern and the *Harms* court[3] [2018 IL App (5th) 160472] that section 504(b-1)(1) *[the maintenance guidelines*] does not apply to post-dissolution maintenance modification on review. The statute dictates that the statutory factors are to be considered to assist the court in fashioning an appropriate amount when it is modifying maintenance and the guideline formula applies to new maintenance orders. Had the legislature meant for the maintenance formula under section 504(b-1)(1) to be used to calculate modified maintenance amounts, it would have referred to the section 504(b-1)(1) formula in section 510(a-5) along with the direction to the section 504(a) factors. Here, the trial court incorrectly used the amended guidelines to determine a maintenance amount. The Harms court chose not to remand the matter to the trial court for a recalculation of the maintenance award using only the factors set forth in sections 510(a-5) and 504(a) because it determined it was within the court's discretion to award maintenance that was consistent with the amended guidelines. We believe, however, the better approach is to remand this matter to the trial court for a determination of maintenance to Rita in an amount based on the factors set forth in section 504(a) rather than the inapplicable formula set out in section 504(b-1)(1).

Recall that the 2018 *Harms* decision had based its decision on the language of Sections 510(a-5) and 504. Section 510(a-5) was amended in 2019 [Pub. Act 100-923] to provide:

> The court may grant a petition for modification that seeks to apply the changes made to Section 504 by this amendatory Act of the 100th General Assembly to an order entered before the effective date of this amendatory Act of the 100th General Assembly only upon a finding of a substantial change in circumstances that warrants application of the changes. The enactment of this amendatory Act of the 100th General Assembly itself does not constitute a substantial change in circumstances warranting a modification.

Harms had emphasized that in ruling on a petition to modify maintenance, courts must consider "the applicable factors set forth in subsection (a) of Section 504" as well as several additional factors listed in subsection (a-5) of section 510. § 510(a-5). Yet Section 510 [still] does not refer

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[3]"At issue in this appeal is whether the new guidelines are applicable in proceedings to modify maintenance that was ordered before the amendment went into effect. We hold that they are not." See also language at ¶ 28, "We reach this conclusion after consideration of the language of two pertinent statutes—section 504 of the Dissolution Act, which governs initial awards of maintenance, and section 510, which governs petitions to modify maintenance or child support. See id. §§ 504, 510."

to subsection (b-1) of section 504, which contains the guidelines. And *Harms* had commented that the legislature had amended Section 510 four times [now five times] since the guidelines went into effect.[4]

The Dissent: Justice Schmidt dissented and I would tend to somewhat side with the dissent more than the majority. The key quotes from the dissent are:

> In determining LaVern's monthly income, the trial court calculated LaVern's income based on his "pension payments *and the amount he spent each month*." (Emphasis supplied by dissent) Supra ¶ 8. Taking judicial notice of the existence of the federal bankruptcy courts and the number of bankruptcy attorneys advertising on television, I conclude using the amount one spends to determine income is an irrational method.
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> The method that the trial court used in determining LaVern's monthly income is set forth by the majority. Supra ¶ 25. It determined income by looking at how much LaVern was spending.

The dissent concluded, simply:

> I would reverse and remand with instructions to the trial court to use an acceptable accounting method of calculating LaVern's monthly income for purposes of determining maintenance.

The court found it unlikely that Rita would ever be able "to fully support herself through employment with the standard of living established during the marriage" but also found that no evidence had been presented as to the standard of living and that the factor did not apply.

Comments: Our takeaways from this case:

- **Party Not Required to Exhaust Assets**: While we have a line of cases that stands for the proposition that a party is not required to exhaust assets to be a candidate for continuing maintenance, there are few cases that stand as starkly for this position. The actual quote was:

  > However, a former spouse requesting maintenance should not be required to dissipate assets or impair capital if the other spouse has sufficient assets

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[4]See Pub. Act 99-90, § 5-15 (eff. January. 1, 2016); Pub. Act 99-764, § 5 (eff. July 1, 2017); Pub. Act 100-15, § 5 (eff. July 1, 2017); Pub. Act 100-201, § 705 (eff. Aug. 18, 2017); and Pub. Act 100-923 (eff. January 1, 2019).

> to meet both his needs and the needs of the former spouse.
> *Lichtenauer v. Lichtenauer,* 408 Ill. App. 3d 1075, 1075 (3rd Dist. 2011)

Lichtenauer brings to mind the discussion by the Illinois Supreme Court in *In re Marriage of Heroy, 2017 IL 120205,* involving attorney fee and the ability/inability to pay standard (relating to whether being required to pay may undermine one's "financial stability." Also see *In re Hasabnis*: "The law is clear that a spouse is not required to be reduced to poverty nor sell or impair assets for self-support where the other spouse has the financial ability to pay sufficient maintenance while meeting his own needs." *In re Hasabnis*, 322 Ill. App. 3d 582, 584 (1st Dist. 2001). Yet in this case the former wife was yet in poverty so the real question would be the degree she may be required to impair assets given the fact that there was a dearth of proof as to whether the former husband by his potentially artificially high lifestyle was impairing his own asset base.

- **The Absence of Proof a Marital Lifestyle**: The case discusses the critical importance of (re)establishing the lifestyle in a case with a marital settlement agreement. This is a difficult thing to prove post-decree and may not be done merely on income. Yet in the absence of proofs, the court appellate court ruled that the trial court properly avoided considering this critical statutory factor. I have seen trial judges within maintenance review or modification cases disallow lifestyle evidence. In cases that were tried this decision would be proper as the matter would be res judicata. But in cases involving a marital settlement agreement, the proper recourse would be an extended offer of proof regarding marital lifestyle.

  It is well for one in the former wife's position to anticipate the needs based defense as to her own affidavit and the surplus and the case law that might counter this. Thus one case states:

  > The record supports the trial court's findings. When the IMDMA refers to the "needs" of the spouse seeking maintenance (see 750 ILCS 5/504(a)(2) (West 1998)), it does not necessarily mean minimum needs. *In re Marriage of Gunn*, 233 Ill. App. 3d 165, 175 (1992) (upholding a maintenance award that resulted in $ 800 monthly surplus for the wife). The court's award of maintenance resulted in Shabnum having a surplus of income, but that does not automatically mean the court abused its discretion. See *In re Marriage of Fields*, 288 Ill. App. 3d 1053, 1062 (1997).
  > *In re Hasabnis*, 322 Ill. App. 3d 582, 592 (1st Dist. 2001)

- **Hoisted on Your Own Affidavit**: Affidavits are a doubled edged sword and in this case the former husband may have been impaled on a sworn of his own making: his own financial affidavit apparently reflecting not only his own expenses but those of his new wife and her family.

- **First in Time Rule**: The case cites the historical case law involving both child support and maintenance that might be called "first families first." Yet this rule was upended in terms of the child support "multi-family adjustment" provisions of Section 505(a)(F)(I). In the child support arena, Illinois law now allows for a multi-family adjustment without court order under income shares. Thus, Illinois law now allows essentially equal slices of the cash flow pie rather than follow a first family first rule for suppose purposes.

See Child Support *Gitlin on Divorce* Sections:

- § 17-1[l] "Obligor's Increased Expenses Because of Remarriage, Cohabitation, Etc."
- § 10-3[f] "Obligor's Support of More Than One Family" and § 10-3[i][6]
- "Adjustments to Gross Income: Support Obligation for Children Not Shared with Other Parent …"

Maintenance Modification:

"§ 17-2[b] Modifiability of Maintenance Awards."

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