MAINTENANCE CASE LAW UPDATE: 2004 through 2016

(See Separate Outline for Case Law Update re Cohabitation Case Law)

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Case law in Illinois on the topic of spousal support remains critically important – even in light of the maintenance guidelines. This is because the maintenance guidelines only create a presumption. They are not mandatory. And there are notable exceptions to the guidelines. This outline does not include the summary of the case law regarding termination of maintenance due to resident, continuing, conjugal cohabitation because this is part of a separate outline.

INITIAL DIVORCE CASES

Indefinite Maintenance Cases in Long Term Marriage:

Time Limited Award Reversed

***Shen* – Time Limited Maintenance Award Reversed and Indefinite Maintenance Award Affirmed**

IRMO Shen, 2015 IL App (1st) 130733 (June 2015), Paragraph 79-86.

In initial divorce proceedings the trial court abused its discretion in ordering that wife's maintenance would terminate on her 66th birthday. The evidence showed that the wife would not be able to support herself and would require permanent maintenance. Interestingly, the appellate court's decision included a provision for review if the wife's income attained at least $45,000 and the appellate court affirmed this portion of the decision.

There was an excellent discussion regarding maintenance at paragraph 84.

> The four common types of maintenance included in a final judgment are: (i) permanent maintenance (indefinite in duration); (ii) rehabilitative maintenance for a fixed term (terminates on the term's end or the occurrence of some event); (iii) rehabilitative maintenance (subject to a set review date); and (iv) maintenance in gross (specific, nonmodifiable sum, usually in lieu of property). "Permanent" does not mean everlasting; a better description would be "indefinite." An award of permanent maintenance may be modified or terminated either by agreement or as provided in section 510(c) of the Act. See *In re Marriage of Culp*, 341 Ill. App. 3d 390, 397 (2003) (burden of proving change in circumstances to justify termination or modification on paying party); *In re Marriage of Dunseth*, 260 Ill. App. 3d 816, 833 (1994) (permanent maintenance appropriate "where it is evident the recipient spouse is either unemployable or employable only at an income considerably lower than the standard of living established during the marriage").
>
> The judgment specifically states that Janet is to receive "permanent maintenance," but the trial court included a termination event—her sixty-sixth birthday when "she is eligible for full social security benefits"—in addition to the statutory events. See 750 ILCS 5/510(c).
>
> The parties agree that the maintenance arrangement ordered by the trial court, as a matter of law, does not constitute maintenance in gross. See *In re Marriage of Freeman*, 106 Ill. 2d 290, 298 (1985). We agree. What distinguishes maintenance in gross is its definite sum and vesting date. See *In re Marriage of D'Attomo*, 2012 IL App (1st) 111670, ¶ 24 Instead the parties, again in agreement, assert that the trial court ordered permanent maintenance, but erroneously deviated from the statutory termination events by providing that Janet's maintenance end on her becoming fully entitled to social security benefits. We agree.

The appellate court then referenced the *Walker* case holding that permanent maintenance may be reduced when the wife was nearly eligible for retirement benefits as teacher where total amount of her cash flow from remained substantially unchanged. But the appellate court stated:

> Here, however, the trial court terminates maintenance without knowing anything about Janet's or Feng's financial circumstances at the time Janet reaches age 66, many years in the future. Terminating in this manner violates section 510(c), as a matter of law. Whether permanent maintenance is still required when Janet becomes social security eligible should be a matter to be decided at that time and

> not now. Trial judges cannot gaze into a crystal ball and foresee what the future holds for the parties. This explains why permanent maintenance is always modifiable or terminable should there occur a substantial change in circumstances.

Regarding maintenance in gross, note that PA 99-90:

> the court may grant a 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 510(a-6) provides:

> (a-6) In a review under subsection (b-4.5) of Section 504 of this Act, the court may enter a fixed-term maintenance award that bars future maintenance only if, at the time of the entry of the award, the marriage had lasted 10 years or less at the time the original action was commenced.

***Dea* (2013) – Maintenance Award Reversed Because of Failure to Consider Recipient's Social Security Disability Payments and Payor's Ability to Meet Her Own Living Expenses**

IRMO Dea,, 2013 IL App (1st) 122213 (November 12, 2013).

In this 22-year marriage, Husband is disabled and Wife works full-time. The parties separated three years before Wife filed for divorce. They have two, emancipated children. Wife is 58 years old. Although she worked as waitress while caring for the children during the marriage, she since became employed full time in the IT department of a law firm where she earning an annual gross salary of $78,000 plus overtime.

Husband is 59 years old, and he worked as a truck driver for BP Amoco during the marriage. Husband suffers from multiple sclerosis and depression, and he stopped working the same year the parties separated. Husband receives social security disability benefits, and also draws upon his retirement plans. Husband lives in the marital residence with no mortgage. Wife lives in a condominium she purchased after the parties separated. Husband has approximately $385,000 in retirement plans (consisting of a defined benefit, cash balance retirement plan and a defined contribution savings plan), about half of which is his non-marital property. Wife has approximately $30,000 in a 401(k) plan.

The parties each filed a Cook County Financial Disclosure Statement. I have rounded their reported figures. Husband listed his net monthly income as $3,400, consisting of $1,500 from disability payments and $1,900 from pension and retirement plans. But the disability income is not included on his tax return because it is nontaxable. Husband's monthly living expenses were $3,800. Wife listed her net monthly income as $4,700, consisting of wages and overtime. Wife's monthly living expenses were $4,800.

The trial court found that Wife's financial status had improved through her efforts of self-sufficiency, whereas Husband's financial status declined due to his disability. The trial court

held that, without maintenance, Husband would be unable to meet his needs considering the standard of living during the marriage. The trial court awarded Husband indefinite maintenance from Wife in the amount of $1,600 per month. Wife appealed.

The First District reversed and remanded the case for a new trial. The issues were (1) whether the trial court abused its discretion because it failed to consider Husband's nontaxable social security disability payments for purposes of meeting his living expenses and establishing the maintenance award, and (2) whether the trial court's maintenance award was an abuse of discretion because it causes Wife's monthly expenses to significantly exceed her net monthly income.

First, as to whether disability benefits should be considered for purposes of maintenance, the Court stated:

> It is well established in Illinois that social security benefits cannot be divided directly or used as an offset during state dissolution proceedings. *In re Marriage of Rogers*, 352 Ill. App. 3d 896,898 (2004). However, this court has held that such a restriction does not apply to *maintenance* awards, and social security benefits may be considered in determining maintenance awards. *Id.* at 899; see *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 164-65 (2005).

Here, the record was clear that the trial court failed to consider the social security disability payments received by Husband as a source of money available to him to meet his living expenses. Instead, the trial court only relied on Husband's adjusted gross income from his tax return, which doesn't include the nontaxable social security disability benefits.

The omission was significant — Husband's adjusted gross income on his tax return was $20,600, when in fact his total income from all sources was actually $42,500. The key question for the appellate court was whether the disability income is available to Husband for his living expenses, regardless of whether it is taxable. Since the trial court failed to consider the disability payments, its maintenance award was reversed. The Court held that the trial court abused its discretion in excluding Husband's nontaxable social security disability payments from consideration in determining the amount of money available to him to meet his needs and in determining a maintenance award.

Regarding the second issue, Wife argued that the trial court abused its discretion because the maintenance award causes her monthly expenses to significantly exceed her net monthly income and Husband does not need the award to meet his monthly expenses. According to his disclosure statement, Husband only required an additional amount of $395 per month to meet his monthly expenses. Yet, the maintenance award of $1,600 per month apparently gave Husband a $1,200 monthly surplus, whereas it caused a $1,300 monthly deficit to Wife. The Court stated:

> While section 504(a) of the Act sets out certain factors as a guide for determining appropriate maintenance, the court must also be guided by reason and reality. It is sometimes not possible for each of the parties, individually, to maintain exactly the standard of living which they enjoyed collectively during the marriage. The amount of income which each party has to meet his basic living expenses is an important

factor for the court to consider. *Marriage of Dea*, 2013 IL App (1st) 122213, ¶27.

> Here, the record did not support, nor did the trial court explain, awarding Husband maintenance significantly in excess of his stated monthly expenses, especially since the maintenance pushes Wife's obligation beyond her monthly income. Wife is expected to spend $1,300 more than she takes in each month to comply with the court's maintenance award. Under these circumstances, Wife's ability to pay maintenance is a significant factor that must be considered. The Court held that the trial court abused its discretion in awarding Husband permanent maintenance of $1,600 per month.

The Appellate Court reversed and remanded with instructions to specifically consider all of Husband's social security disability payments and the money available to Husband when compared to his expenses, and Wife's income when compared to her expenses, in determining an appropriate maintenance award.

***Price* (2013) Indefinite Maintenance Award of $7,500 monthly affirmed / Income Averaging Not Necessary for Trial Court to Follow Despite Fluctuations**
IRMO Price, 2013 IL App (4th) 120155 (March 22, 2013)
In *Price* the appellate court affirmed a permanent maintenance award of $7,500 per month. The first ruling was that the trial court's determination of the husband's net income was not against the manifest weight of the evidence. The husband had argued that the court should have applied income averaging rather than including as his income for maintenance purposes business income, which was variable and relatively recent.

A good quote from the decision had stated:

> As this court has recently stated, " '[i]ncome' for tax purposes is not synonymous with 'income' for determining *** support." *In re Marriage of Bradley*, 2011 IL App (4th) 110392, ¶ 44, 961 N.E.2d 980. "The purpose of the two calculations are different. While the Internal Revenue Code is concerned with reaching an amount of taxable income, the support provisions in the Dissolution Act are concerned with reaching the amount of *** income" for determining support.

Regarding business income the trial court had the court acknowledged (1) the husband's testimony he does not actually receive the rental money from the business – Sand Valley Sand and Gravel – and (2) the income tax returns were not representative of exactly what transpired within the parties' businesses because both parties testified the businesses paid various personal expenses for the parties and the parties loaned money to the various businesses. The finding regarding the husband's net income was that it was a net of $300,000 per year. The appellate court approved the language from the trial court's decision, "In addition, the court noted even if it were to set aside the evidence and accepted Melvin was spending $10,871 per month in expenses and debt retirement as documented in his amended financial affidavit, he still had an income in excess of $25,000 per month with which to meet his expenses."

Next, the appellate court approved of the amount of maintenance award of $7,500 per month.

The appellate court stated:

> At the time of the proceedings, Jill was 61 years of age and had a high school education. Following high school graduation, she worked for some time as a cashier at Zayres department store and later as an officer manager. Shortly before giving birth to their first daughter, Jill terminated her employment with Zayres. She then began working part-time for the parties' business that eventually became known as Mel Price Company, Inc. After the birth of their second daughter, Jill began working full-time for the parties' businesses, in addition to taking care of the home, the parties' biological daughters, and Melvin's daughter from a prior marriage. Jill continued working for the parties' businesses until 2007, at which time she was receiving an annual salary of $62,000 and benefits, including health insurance, a company car with some gas furnished, a company phone, and an employee pension plan. At the time of the hearing, Jill was unemployed and had not attempted to seek employment elsewhere. ¶ 32 The parties were married for 34 years. During the lengthy marriage, the parties enjoyed a high standard of living. They spent over $1 million on toys, collectibles, dolls, and other items without debt. They owned condominiums in Florida and took several vacations every year paid for from the businesses' funds.

Husband's argued that the rationale of *IRMO Bratcher* should have applied. The appellate court stated:

> This case is distinguishable from *Bratcher*. In *Bratcher*, this court—in a divided decision—reversed an ex-wife's award of maintenance where she had not only been awarded $1,634,719 in marital assets, but she was also receiving $8,193 per month in proved rental income and nearly $5,845 in interest income derived from a $876,759 lump-sum payment and had potential for making additional income as a realtor. This court noted the ex-wife's income combined with the maintenance awarded would have resulted in the ex-wife receiving $12,000 more per month than the ex-husband. Here, the only income-producing property awarded to Jill was the Voorhees Street property, which had a limited-term lease generating $550 in monthly rent or $6,600 per year, whereas Melvin was awarded all of the parties' businesses and all the assets of those businesses, which, according to the most recent year for which tax returns were available, grossed over $1.7 million.

The appellate court also looked to approval at the *IRMO Nord* decision:

> In *Nord*, this court upheld the ex-wife's permanent maintenance award of $17,000 per month based on a number of factors also present in the instant case, including the long duration of the parties' marriage, the parties' lifestyle during the marriage, and the fact the ex-wife was only employable at a minimum-wage job and the ex-husband had greater present and future potential to earn income and acquire assets. *Nord*, 402 Ill. App. 3d at 303-04.

***Branklin* (2012) -- Permanent Maintenance of $3,000 Per Month Affirmed Where Husband**

Earned Gross of $400,000 and Wife $75,000 But Statute re Life Insurance to Secure Maintenance Must be Followed

IRMO Branklin, 2012 IL App (2d) 110203 (March 12, 2012)

The trial court awarded the wife $3,000 per month permanent (read indefinite) maintenance. The former husband appealed arguing his former wife should not have been awarded any maintenance while she contended in her cross-appeal that the amount was not enough and she should have been awarded $7,000 monthly. I keep statistics on divorce cases involving maintenance awards with the spreadsheets broken down based on the length of the marriage. The relevant statistics in this case are:

Years of Marriage Until Filing Divorce Petition: 26

Years of Marriage Until Divorce: 29

Range of Net Estate Awarded Wife: $605,340 and $800,100 (with the range due to competing valuations of the present value of the wife's TRS benefits.

Range of Assets Awarded Husband: $574,000 to $1.8 M (with the range due to competing valuations of husband's medical practice - with husband urging a value of only $57,000 for his practice while the wife's expert valued the practice at $960,000). But the husband also received the marital residence with a net negative equity between $234,000 and $334,000.

Husband's Gross Earnings 2010: $400,000 (orthodontist). Specifically, salary as found by appellate court of $364,000, rental income of $30,000 and certain other perqs.

Wife's Gross Earnings 2010: $75,000 (tenured teacher)

Age of Husband: 58 years old.

Age of Wife: 55 years old.

Health of Parties: The husband had a recent heart attack.

Because this is a published opinion helping develop the law on an important subject, I will quote from the maintenance discussion at length:

> ¶ 11 During the last years of the marriage, the parties had a combined annual income of approximately $500,000 and they had assets that, based on some valuations, were worth more than $2.5 million. This enabled the parties to enjoy a high standard of living. They lived in a home that originally cost $1.3 million. Both parties were able to enjoy traveling on Gary’s airplane.
>
> ¶ 12 The record is clear that Karen would not be able to maintain the standard of living she was accustomed to without some assistance from Gary. Expenses for Karen’s reasonable monthly needs as found by the trial court, were between $6,608 and $7,108,which exceeded her monthly income of $6,333. Further, as Gary’s monthly income, based on his salary alone, was $30,667, he was able to pay maintenance without greatly affecting his own standard of living. Gary argues that the parties’ standard of living during the marriage should be given minimal weight because the parties were living beyond their means during the marriage. The primary example Gary cites is the $1.3 million home that the parties bought and for which he is still personally obligated to pay over $800,000. Gary’s argument is unpersuasive. Although the parties might have been living beyond their means during the marriage, we believe it would be inequitable to saddle Karen alone with a reduced standard of living, especially since Gary earns over $30,000 a month and continues to live in the expensive home that, he now

> complains, the parties should never have purchased.
>
> ¶ 13 We also reject Gary's argument that Karen should not have been awarded maintenance because she has a job that pays a good salary of $75,000 and had already been awarded marital assets that were worth over $600,000. Gary contends that maintenance should be awarded only if the dependent spouse needs assistance to become financially independent. See *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 652 (2008). Based on Karen's income and assets, Gary argues that maintenance was because she was already financially independent.
>
> ¶ 14 We do not disagree with the principle that Gary cites from *Heroy*. However, whether one is able to meet her reasonable needs and become financially independent is still set in the context of what the standard of living was during the marriage. See *In re Marriage of Culp*, 341 Ill. App. 3d 390, 398 (2003) (reasonable needs must be viewed in light of the standard of living established during the marriage); *In re Marriage of Tietz*, 238 Ill. App. 3d 965, 972 (1992) ("[t]he benchmark for determination of maintenance is the reasonable needs of the spouse seeking maintenance in view of the standard of living established during the marriage"). Here, the assets that Karen received in the MSA were generally not income-producing. Other than the $55,000 in cash, which could produce some interest income, the assets she was awarded could not help her offset the expenses for her monthly needs. Cf. *In re Marriage of Bratcher*, 383 Ill. App. 3d 388 (2008) (trial court's decision to award maintenance to wife was improper in light of $1.6 million in assets that were awarded to wife, many of which were income-producing). Further, Karen's salary, although significant at $75,000, was not high enough by itself to allow her to maintain the same standard of living she enjoyed during the marriage as part of a household that had a $500,000 annual income. Thus, we agree with the trial court that Karen could not meet her reasonable needs, in view of the standard of living established during the marriage, without some assistance from Gary.

After discussing the financial affidavit of the wife, her needs, etc., the appellate court stated:

> ¶ 17 Based on the trial court's comments , it is apparent that it agreed with Gary's assertion that many of the expenses that Karen listed in her financial affidavit were inflated. The trial court took that into consideration when it lowered Karen's monthly expenses to what it believed they really were. Nonetheless, it is also apparent that the trial court found that Karen's standard of living would be reduced in comparison to what it was during the marriage if it set maintenance only at a level that met her current needs. As set forth above, it was appropriate for the trial court to consider not only Karen's current needs but also how much maintenance was necessary to allow her to enjoy a standard of living comparable to that she enjoyed during the marriage. Culp, 341 Ill. App. 3d at 398.

Next the appellate court rejected the argument that maintenance should not be permanent, in part, based upon the husband's health. The appellate court stated:

In so ruling, we find Gary's reliance on *Bratcher*, *Murphy*, and *In re Marriage of Haas*, 215 Ill. App. 3d 959 (1991), to be misplaced. In *Bratcher*, the reviewing court found that monthly maintenance of $12,500 for 111 months was inappropriate because *the wife had been awarded substantial assets ($1.6 million*, the same as her husband). *Bratcher*, 383 Ill. App. 3d at 388. These assets provided her a monthly income of approximately $14,000. Further, the monthly maintenance award was improper because it made the wife's monthly income ($26,500) substantially higher than the husband's ($14,500). Id. at 389. Here, the assets that Karen was awarded were generally not income-producing. Also, the maintenance award did not create a situation where her monthly income was higher than Gary's.

¶ 22 In *Murphy*, following a *10-year-marriage*, the wife was awarded $826,000 in marital and nonmarital assets, some of which were income-producing. She was also awarded $15,000 a month in maintenance for four years. On appeal, the wife argued that she should have received monthly maintenance of $46,000 and for a longer period of time in order to maintain the standard of living that she enjoyed during the marriage. The reviewing court rejected her argument, finding that her expenses were inflated because she sought to enjoy the same perks (flying on jets, traveling on yachts) that she did when she was traveling with her husband on business. *Murphy*, 359 Ill. App. 3d at 304. The reviewing court explained that there was no requirement that the parties are to permanently maintain the same standard of living. Id. at 306. Here, Karen and Gary were married substantially longer than the parties in *Murphy*, and, compared to the wife in *Murphy*, Karen was awarded relatively few income-producing assets and was awarded maintenance at a substantially lower rate, although for a longer period of time. Moreover, despite Gary's insistence to the contrary, based upon his ability to pay, the trial court did not abuse its discretion in ordering that he pay maintenance in order to help Karen approximate the standard of living that she enjoyed during the marriage. *Culp*, 341 Ill. App. 3d at 398.

¶ 23 In *Haas*, the wife received $80,468 in marital assets and the husband received $72,964 in marital assets. The wife's annual gross income was approximately $14,524 while the husband's was $49,000. The trial court awarded the wife maintenance of $600 per month, to be reviewed in 18 months. On appeal, the wife argued that her maintenance award should have been higher and for a longer duration. The reviewing court found that permanent maintenance was not justified, because the wife had been employed throughout the marriage and seemingly had the potential to become self-sufficient. *Haas*, 215 Ill. App. 3d at 964. Further, the reviewing court found that $600 a month in maintenance was sufficient to allow the wife to maintain her standard of living. Id. at 964-65. Here, in contrast, as set forth above, Karen did not have the ability to meet her reasonable needs, based on the standard of living established during the marriage, without some assistance from Gary.

Regarding the wife's argument that award came no where close to equalizing income, the appellate court stated:

> There is no requirement under either the Dissolution Act or Illinois case law that requires the equalization of incomes. *In re Marriage of Reynard*, 344 Ill. App. 3d 785, 791 (2003). There is also no such prohibition. Id. Thus, whether a trial court should equalize the parties' incomes (or more equally apportion them, as Karen argues in this case) is a matter for the trial court's discretion. For the reasons set forth above, we do not believe that the trial court abused its discretion in setting the maintenance award at $3,000. In arguing that their incomes should have been more equally apportioned, Karen minimizes Gary's health concerns as well as the likelihood that his employment income would be dropping due to his age. Thus, although Gary's current income indicated that he could pay Karen more in maintenance, there was not the same certainty with regard to Gary's future income. As we believe that the trial court properly considered Gary's current income, Karen's needs, and the impact of Gary's impending reduced employment income, we do not believe that the trial court abused its discretion in not setting the maintenance award at a higher level.

Life Insurance to Secure Maintenance: Regarding the life insurance issue, the appellate court based its decision on the case law before the January 1, 2012 amendments but still reversed the trial court's disallowance of life insurance to secure maintenance. The court commented:

> ¶ 33 We also note that, effective January 1, 2012, the Illinois General Assembly modified the Dissolution Act to specifically allow the trial court discretion in ordering a maintenance award to be secured by life insurance. Section 504(b-7)(f) of the Dissolution Act now provides: "An award ordered by a court upon entry of a dissolution judgment or upon entry of an award of maintenance following a reservation of maintenance in a dissolution judgment may be reasonably secured, in whole or in part, by life insurance on the payor's life on terms as to which the parties agree, or if they do not agree, on such terms determined by the court ***." Pub. Act 97-608, § 5 (eff. Jan. 1, 2012).

Regarding following the earlier Second District opinion, the Second District appellate court stated, "Although the trial court was bound to follow this court's decision in *Feldman*, we are not." It followed the reasoning in *IRMO Walker*, 386 Ill. App. 3d 1034, 1049 (2008). But clearly the decision was influenced by the change in the statutory law when it stated:

> Accordingly, since the trial court did not consider the merits of Karen's argument that her maintenance award be secured by a life insurance policy, we vacate that part of the trial court's decision and remand with directions that it exercise its discretion in determining whether Gary should purchase life insurance to secure his maintenance obligations to Karen and, if so, in what amount and under what terms it should be ordered. See Pub. Act 97-608, §5 (eff. Jan. 1, 2012).

***Rogers* – *(2004)* – Current Social Security Benefits May be Considered in Awarding Maintenance**

***IRMO Rogers*, 352 Ill. App. 3d 896 (4th Dist. 2004). (This is not the Supreme Court *Rogers* child support decision).**

Trial court may consider disparity in current social security benefit payments for the purpose of awarding maintenance. The trial court did not abuse its discretion when it considered total income of both disabled husband and disabled wife, after lengthy marriage, and ordered husband to pay one half of his pension and $900 per month in maintenance based, in part, on husband's greater social security income, because there is no prohibition against considering social security income when determining issue of maintenance. The husband cited the Supreme Court's 2004 *Crook* decision and the appellate court stated:

> The calculation of a maintenance award is another matter. None of the cases Jerry cites involve the award of maintenance, only the division of property. *Crook* commented on the fact that because Congress reserved the authority to amend or repeal provisions of the Social Security Act, the United States Supreme Court has held that social security beneficiaries have a "noncontractual interest" in social security benefits and that those benefits are not to be considered as an accrued property right. *Crook*, 211 Ill. 2d at 442. *** We see no reason for a court to ignore the circumstance that one party is currently receiving a social security benefit of $1,321 per month while the other is receiving $216 per month.

***Lichtenauer* (2011) – Imputing Income: Placing Live-in Girlfriend on Payroll Earning $120k per Year Factor Considered Contrived Arrangement and Factor in Determining Permanent Maintenance Award**

IRMO Lichtenauer, 408 Ill. App. 3d 1075 (Third Dist, 2011)
The parties were married 1976 (a marriage of more than 33 years) and the divorce petition was filed in 2005 (which was dismissed but immediately refiled in 2007). The husband appealed the permanent maintenance award of $1,850 per month. The evidence at trial showed that the husband sold his interest in his business during the course of the divorce proceedings. Just before dissolving the business the husband started a new business called Correct Electric. After selling the business he became an employee of the new business. His live-in girlfriend became the president of the new business, Correct Electric and she earned a salary of $120,000 a year, "in spite of having no previous corporate executive experience or qualifications for this position." The husband was also the major shareholder, and the shareholder's agreement allowed his female companion to transfer her shares in the company to Earl at any time without the other shareholders' approval. The husband claimed no financial interest in Correct Electric beyond the approximate $70,000 annual salary he received as an employee. The trial court found this to be a contrived arrangement and the appellate court affirmed.

The wife had been working full time earning $15.70 per hour as an office coordinator. She earned an annual salary of $31,000. Regarding the wife's health the appellate court noted that she had been:

> diagnosed with Crohn's disease and spasmodic dysphonia, which is a neurological disorder that affects her vocal chords and intermittently interferes with her speaking ability. Joanne said she receives Botox treatments on her vocal chords for that condition. She stated that Crohn's disease is an autoimmune disease that affects her intestines, for which she has received intravenous

> treatments at the hospital every eight weeks for the last year and a half. Joanne testified to prescription medications that she also takes regularly.

Regarding the husband's income situations the trial court found:

> In the instant case, the court found that, factoring in Earl's ability to earn income and the opportunity he passed up, specifically his girlfriend's position with the company earning over $120,000 per year, the court could award maintenance to Joanne imputing $120,000 per year as Earl's ability to produce income.

The appellate court stated:

> Having determined the trial court correctly decided permanent maintenance was appropriate, we turn to Earl's contention that he did not have the ability to pay maintenance in the amount ordered by the court in this case. The case law provides that the ability of the maintenance-paying spouse to contribute to the other's support can be properly determined by considering both current and future ability to pay ongoing maintenance. In *Smith*, a case which is factually similar to the case at bar, the parties were married for 34 years and the 52-year-old wife had little prospect of earning an adequate salary to meet her needs. In that case, the husband voluntarily reduced his income by retiring during the pending divorce proceedings in an attempt to avoid paying maintenance. *Smith*, 77 Ill. App. 3d at 862.
>
> In that case, the court held:
>
> > "In our view, the word 'ability' indicates that we should consider the level at which the maintenance-paying spouse is able to contribute, not merely the level at which he is willing to work. Thus, we hold that it was appropriate for the trial court to look at the husband's prospective income, as well as his current actual income, in setting the level of maintenance, particularly where the difference between actual and potential income is a result of totally voluntary retirement." *Smith*, 77 Ill. App. 3d at 862.
>
> In *Smith*, the court considered the circumstances surrounding the husband's retirement as it related to the divorce proceedings and found that his motives for retirement were called into question. *Smith*, 77 Ill. App. 3d at 862-63. In that case, the trial court determined that the husband chose to resign his position as president of a company during the pendency of a dissolution of marriage proceeding to become a consultant which reduced his income by 50%. *Smith*, 77 Ill. App. 3d at 862-63. On appeal, the court upheld the trial court's determination that the husband had the ability to pay more maintenance than his current retirement income would seem to allow based on his position at his previous employment. *Smith*, 77 Ill. App. 3d at 863. Regarding Earl's current and prospective ability to pay maintenance, the record reveals that Earl was healthy at the time of the divorce. He voluntarily opted to sell his share of the Cipher and

Baum Signs businesses during the pendency of the divorce. First, the trial judge noted that Earl was not under any requirement to buy into the new business, Correct Electric, after selling his ownership interest in Cipher and Baum Signs. Next, the court observed that, while Earl voluntarily chose not to buy shares in the new corporation himself, Earl voluntarily brought his girlfriend, Mauk, into the new business by loaning her money to become the majority shareholder in the new corporation that would ultimately compensate Earl as an hourly employee. The court found that Mauk's "ascension in the presidency of this company or the person who was running this company was somewhat contrived."

The appellate court then stated:

> It is well established in Illinois, "[i]n order to impute income, a court must find that one of the following factors applies: (1) the payor is voluntarily unemployed ***; (2) the payor is attempting to evade a support obligation ***; or (3) the payor has unreasonably failed to take advantage of an employment opportunity." *IRMO Gosney*, 394 Ill. App. 3d 1073, 1077 (2009); *IRMO Rogers*, 213 Ill. 2d 129 (2004).
>
> The court found the second factor to be present, specifically that Earl was attempting to evade a support obligation based on the "contrived" structure of the Correct Electric corporation and the salary paid to Earl's girlfriend, the named president of Correct Electric. As to the third factor, the court found that Earl passed up the opportunity to have held his girlfriend's position as president of the company, earning over $120,000 per year. Consequently, the court awarded maintenance after imputing $120,000 of his girlfriend's annual salary to Earl when considering Earl's present and potential ability to produce income.

Comment by Gunnar J. Gitlin: I had a very similar fact pattern a number of years ago in a case involving the principal of a closely held business.

***Nord* (2010) - Permanent Maintenance: Award of Permanent Maintenance of $17,000 a Month Affirmed**

IRMO Nord,402 Ill.App.3d 288 (4th Dist., 2010)

The parties were married in 1972 and accordingly this was a long term marriage case – 37 years until the 2009 divorce – in which the children were adults at the time of trial, the husband was age 57 and the wife was age 58. The husband was a physician practicing in the field of obstetrics and gynecology. The wife (Kathleen) was a high school graduate and ceased working in 1980 to care for the parties' two children, so she had not worked outside the home for nearly 30 years.

The figures for property – both marital and non-marital – are important in considering the extraordinarily generous maintenance award:

Nord Marital Estate Calculations	H's Value	Wf's Value	Average
H's Non-Marital	$350,000	$350,000	$350,000

W's Non-Marital	$501,443	$474,020	$487,732
H's Marital	$449,263	$513,078	$481,171
Wife's Marital Property	$1,961,543	$1,880,274	$1,920,909
Husband's Total Property	$799,263	$863,078	$831,171
Wife's Total Property	$2,462,976	$2,354,294	$2,408,635
Overall Marital Estate	$2,410,806	$2,393,352	$2,402,079
Overall Both Marital and Non-Marital	$3,262,239	$3,217,372	$3,239,806
Percentage Marital Estate Wife	81.4%	78.6%	80.0%

The parties reserved the key issue which was that of maintenance. Regarding the *$17,000* monthly permanent maintenance award, the husband contended that (1) his resources were insufficient to pay the maintenance award, (2) $17,000 per month was not necessary for Kathleen's reasonable expenses, (3) his actual expenses were not considered, (4) Kathleen received the bulk of the marital assets, and (5) $5,000 per month for 60 months would adequately support Kathleen.

According to the parties' tax returns, the ex-husband's total gross income was $994,507 in 2002, $1,162,517 in 2003, $1,655,786 in 2004, $1,669,178 in 2005, $1,576,942 in 2006, and $898,827 in 2007. In addition, petitioner's exhibits show Daniel's total gross income for 2008 was $813,031. As a result, his average income for 2002 to 2008 was over $1 million. Regarding the husband's argument that the court should not have considered capital gains as income, the appellate court noted the trial court's findings that it had concluded that the last two years were the best representation of the husband's income and that it had given the husband the benefit of the doubt in this regard – because these years had no significant capital gains income.

When we consider how generous this award is, keep in mind the following quote:

> In this case, the parties lived an extravagant lifestyle. They enjoyed luxury automobiles such as Mercedes, Lexus, Jaguar, Porsche, and Rolls-Royce. Kathleen routinely shopped at stores such as Saks Fifth Avenue and Neiman Marcus. The parties had employed multiple servants at both their Bloomington and Guadalajara homes. The parties regularly entertained friends and dignitaries in their home. They also traveled and vacationed in Australia, New Zealand, Europe, Mexico, Africa, and Japan.

The appellate court then stated:

> The parties were married for approximately 34 years before the initiation of these proceedings. While Kathleen received a larger portion of the marital estate (between $1,888,274 and $1,961,543) than Daniel (between $449,263 and $513,078), Daniel has the greater present and future potential to earn income and acquire assets. Kathleen, who was 58 years old at the time of the hearing, has a high school education, little job experience, and has not worked outside the home in 30 years. The trial court based its maintenance award on Daniel's 2007 and 2008 average income of approximately $800,000 per year. The court awarded Kathleen $17,000 per month, or $204,000 per year in maintenance. Thus, Kathleen's maintenance represents approximately 25.5% of Daniel's income.

In response to Daniel's argument that Kathleen should not have been awarded permanent maintenance, but should have been awarded rehabilitative maintenance, the appellate court stated:

> We note permanent maintenance is not limited to spouses who are unemployable. See *Heroy*, 385 Ill.App.3d at 652-53 (affirming a maintenance award to the ex-wife who had a law degree and earning potential of more than $100,000 per year). Permanent maintenance is also appropriate where a souse is "only employable at a lower income as compared to the spouse's previous standard of living." *Walker*, 386 Ill.App.3d at 1044. "In lengthy marriages in which the recipient of maintenance served as caregiver for the children, '"[t]here is no question but that Illinois courts give consideration to a more permanent award of maintenance to wives who have undertaken to *** raise and support the family."'"

The comment by H. Joseph Gitlin to the ***Gitlin on Divorce Report*** of this decision states:

> Daniel's lawyer may have blown it when the closing arguments questioned Kathleen's inability to obtain a job, asking:
>
> > is it so unreasonable that [Kathleen] work half the hours that her husband works? I mean, I'm not even asking her to work the amount of hours he works. *** Is it so unreasonable to ask that she work at least part of the time when she's in good health and she's the exact same age as [Daniel]?
>
> Here we had a physician who was earning a gross of $800,000 a year, married for 34 years [to date of separation] to a 58-year old wife who had nothing beyond her high school education. Daniel's lawyer's argument that this 58-year old wife, married for 37 years, should get a job is a bit like the young man who was found guilty of murdering his parents and asking the judge for mercy because he is an orphan.
>
> The court worked with gross, rather than net income for the husband. This makes a little more sense in high income cases where there is a cut off for FICA and where there is an income tax deduction for payment of maintenance.

***Heroy* (2008) - Generous Permanent Maintenance Award Permissible Despite Wife's Educational Background / Trial Court Not Required to Make Specific Findings re Cash flow from Assets Awarded to Spouse**

IRMO *Heroy*, 385 Ill. App. 3d 640 (1st Dist. 2008)

Heroy serves as a primer in reviewing the life regarding maintenance in long term marriage cases with a significant lifestyle [$35,000 permanent maintenance award affirmed.] The parties were married in September 1980. The divorce case was filed in September 2003 (23 years to the filing date). At the time of their marriage both parties had obtained a law degree and had established professional career – the wife as a full time law librarian and the husband as a practicing lawyer. There were three children born during the marriage. After the birth of their second child, the wife quit her job. The husband continued to work during the marriage and was the primary source of income. The husband had transferred to Bell Boyd in 1997 and thereafter named as an equity partner. Despite his high earnings he had testified at trial that he anticipated a 30% to 40% decrease in compensation due to fundamental changes in the bankruptcy business.

Of significance was the completing experts submitting reports and testifying as to lifestyle. The case overall is 53 pages in length with the discussion on maintenance in its various aspects summarizing the law. Portions of the case to review in an appropriate case include the degree to which potentially income producing assets should be considered by the court in its maintenance award and the retroactivity of a maintenance award. In this case the trial court awarded retroactivity. The appellate court ruled:

> David, however, suggests that in the event that the trial court's retroactive temporary maintenance award is proper, the award should have been funded from the marital estate prior to the property division, rather than from David's postdivision share. We agree. The $6,000 that Donna received in temporary maintenance during the dissolution proceedings was funded by the marital estate and thus, we find that the $4,500 in monthly retroactive temporary maintenance should similarly come from the parties' marital estate.

The case is also significant due to the 55/45 property division as well as a relatively generous maintenance award.

***Bratcher* (2008) - Maintenance: In Case Involving Long Term Marriage and Large Estate with Husband Receiving Business: Trial Court Improperly Attempted to Equalize Income**

IRMO *Bratcher*, 383 Ill.App.3d 388 (4th Dist. 2008)

Bratcher involved a 34 year marriage in which each party received property valued at approximately $1.6 million and the husband was ordered to pay maintenance of $12,500 per month for a period of 111 months. The appellate court reversed and remanded. The husband was awarded his heating and air conditioning business valued at $1.3 million. The husband was ordered to pay a structured property settlement of $876,759.

The appellate court commented:

> Under the trial court's order, Lela will receive monthly income of approximately

> $14,000, consisting of $8,193 rental income on the Fort Jesse Road property and $5,845 interest at 8% on the lump-sum payment, plus perhaps some income from her anticipated work as a realtor... David will receive monthly income of approximately $27,000, ... If maintenance is factored in, Lela will have monthly income of $26,500 and David will have monthly income of $14,500.

The appellate court compared the *Rubeinstein* decision and stated:

> That is not true in the present case where the parties had acquired several millions of dollars in assets and Lela was awarded half of those assets. Lela was not "saddle[d] *** with the burden of her reduced earning potential" (*Hart*, 194 Ill. App. 3d at 853)--she was awarded assets totaling more than the value of the business. It is true that Lela will never generate the income that David does, but there is no need for Lela to work. In some cases, the family business may constitute almost all of the assets and it may be necessary to award that business to the operator of the business and compensate the other spouse through maintenance. That is not true in the present case where Lela was awarded substantial assets, including a $876,759 lump-sum payment, similar to maintenance in gross. Lela made important contributions to the business in its early years, but she has been compensated for those contributions.

The appellate court then stated:

> Lela's earning capacity would probably be greater if she had worked continuously outside the home after the parties' marriage, but it would never have approached David's. Lela was not "disadvantaged by the marriage in comparison to" David. Equalization of incomes might be appropriate even though neither spouse has been disadvantaged by the marriage, where the parties have been married for many years, they have few assets, and both have been employed with one spouse earning more than the other. Again, that is not the situation here. It is not necessary to equalize the income of these parties so that they may continue at the standard of living enjoyed during the marriage. This case involved sufficient assets to make a substantial award to Lela, and the lump-sum distribution eliminated any inequality between the parties.

The court then concluded:

> The trial court abused its discretion in its award of maintenance. The trial court properly provided for Lela by its division of marital property. Where it is possible to do so, a division of property that adequately provides for the parties is preferable to an award of maintenance. Lela has the advantage of certainty with the lump-sum payment; it cannot be modified or terminated in the future. **The fact that David could afford to pay some maintenance is not a reason for ordering him to do so.**

Comment: *Heroy* and *Bratcher* provide an interesting point and counter-point in cases involving

a long term marriage. There exists a fundamentally different judicial philosophy with these two cases when we consider the 1st District affirmance in *Heroy* compared to the reversal in the 4th District's *Bratcher* decision. The query is how we reconcile the Fourth District's decisions in *Bratcher* versus *Nord*.

***Keip* (2002) – Permanent Maintenance Award Should Have Been Ordered in 22 Year Marriage Case with Significant Income Disparity and Other Factors Favoring Long Term Award**

IRMO Keip, 332 Ill.App. 3d 876 (5th Dist. 2002)
In 22 year marriage case in which there were four children (two minor children) with the husband earning a gross income of $98,000 and the wife earning a net income of $14,568, it was error to award maintenance for one year with no review. The appellate court required maintenance to be in the amount of 10% of the husband's net income (doubling the amount) and requiring the maintenance award to be permanent. The marital estate had a negative net worth.

***Drury (2000)* – Maintenance - Permanent Maintenance where 29 year Marriage with Four Children**

IRMO Drury, 317 Ill.App.3d 201 (4th Dist. 2000)
Where wife was earning $30,000 and husband was earning $77,000, trial court erred in awarding maintenance for three years. Appellate court opined that case law favored an award of permanent maintenance after reviewing the significant factors: 1) the significant disparity in the present and future earning capacities of the parties; 2) Lawrence had the opportunity to continue and advance his career during the marriage because of Phyllis' contributions to the family; (3) Phyllis will not be able to enjoy a standard of living similar to the one she enjoyed during the marriage; 4) she will be forced to sell her limited assets to meet her needs; 5) Lawrence is able to contribute to Phyllis' needs while still meeting his own; and 6) the 29-year marriage was of significant duration.

Maintenance Review Cases:

***O'Brien* (2009) – Three Years with Review OK Where Wife had BA in business administration in 14 Year Marriage**

IRMO O'Brien, 393 Ill. App. 3d 364 (2d Dist. 2009)
Maintenance award for three years with review was not abuse of discretion for woman with a BA in business administration, where the parties were married in 1992 (14 year marriage until date of divorce), their two children were born in 1992 and 1999 and where the wife as the primary caretaker of the children. It was 11 years until the date of the filing of the petition for dissolution of marriage.

***Awan and Parveen* (2009) - Reviewable Maintenance Proper Despite 20+ Year Marriage Where No Children of Marriage**

IRMO Awan, 902 N.E.2d 777 (3rd Dist., 2009)
Mr. Awan and Ms Parveen were married in 1977 in Pakistan. They later immigrated to the

United States, and Mr. Awan obtained degrees in veterinary medicine. The couple did not have children and moved several times during the marriage. Ms Parveen had earned a degree in Pakistan before moving to the United States, but did not obtain any additional education and did not work during the marriage. She claimed that this was at the insistence of Mr. Awan.

The parties began divorce proceedings in 2001. The court entered an order dissolving the marriage in 2004 but did not enter an order addressing the remaining issues of maintenance or other issues until 2006. Both parties appealed the court's 2006 order. Ms Parveen appealed from the of reviewable maintenance award while Mr. Awan cross-appealed, objecting to any award of maintenance. The ex-husband argued any award of maintenance would not give his ex-wife the incentive to become self sufficient, which was his theme throughout the litigation (in that she chose not to work). The appellate court noted that the reviewable maintenance award provides Ms Parveen the incentive to become self-sufficient. If she did not make a reasonable effort to do so, the court could terminate maintenance. On the other hand, if Ms Parveen made reasonable efforts to obtain employment and become self sufficient but was still unable to do so, the court could extend the reviewable maintenance or make maintenance permanent.

***Schiltz (2005)* – Permanent Maintenance Award Reversed in 24 Year Marriage Case with Disparity in Incomes Where No Opportunity Cost**

IRMO Schiltz, 358 Ill. App. 3d 1079 (Third Dist., 2005)

The trial court abused its discretion when it awarded permanent maintenance of $800 per month to wife who had worked throughout the 24 yr. marriage and was capable of earning income consistent with the standard of living achieved during the marriage. The trial court had emphasized that the permanent award was subject to modification. The appellate court concentrated on one of the factors which I have stressed in my writings, i.e., *the opportunity cost of missed job or career opportunities due to the marriage* -- often due to raising children. The appellate court stated that absent any evidence that wife sacrificed her earning capacity or career in order to support the husband's career or needs of the family, there should not have been an award of permanent maintenance despite the two to one income differential. The husband worked loading trucks earning $49,000 per year and wife worked as clerk at an insurance company earning $24,000 per year. So the ratio of net incomes was less than two to one not considering the tax deductibility of maintenance to the husband. A key quotation stated, " In this case, the trial court's award of permanent maintenance provided Pamela with little incentive to procure training or skills to attain self-sufficiency. However, rehabilitative maintenance would provide Pamela with such an incentive. See *Selinger*, 351 Ill. App. 3d 611." This is a rare Illinois case involving a long term marriage where the appellate court ruled that the trial court abused its discretion in rendering a permanent maintenance award.

MAINTENANCE IN GROSS CASE LAW:

Initial Divorce Cases

***D'Attomo (2012)* – Trial Court Could Provide for Maintenance in Gross Rather than Rehabilitative Maintenance**

In re Marriage of D'Attomo, 2012 Ill. App. (1st) 111670 (September 26, 2012)
The wife in *D'Attomo* was awarded a 60/40 property distribution. In addition, the court awarded her a lump-sum maintenance award of $36,000 payable at $1,000 monthly for 36 months. The parties had been married since 1996 and both were practicing lawyers before the marriage. Betsy earned her B.A., in business administration in 1990 and her J.D., in 1993. The appellate court noted that the marriage was 11 years long until the date of filing. While the appellate court cited case law holding that periodic maintenance is the preferred form and an award of maintenance in gross is appropriate only in exceptional circumstances, the based upon *Marriage of Freeman*, 106 Ill. 2d 290 at 296 (1985), the trial court is authorized to award maintenance in gross if found to be appropriate and just in an appropriate case. In this case involving the wife, a lawyer, who was planning to start a new career owning a bakery, the appellate court affirmed the maintenance in gross award.

***Blum (2009)* – Illinois Supreme Court – Trial Court Erred in Holding Maintenance Award Was Non-Reviewable and Non-Modifiable**
IRMO Blum v. Koster, 235 Ill. 2d 21 (Ill. 2009)
The two issues relating to maintenance were: whether the trial court erred in modifying Judy Koster's periodic maintenance and whether the trial court erred in providing that its maintenance award was nonmodifiable and nonreviewable.

The original divorce involved a poorly worded provision for unallocated maintenance:

"Judy shall receive as the unallocated maintenance and support for her and the minor children, commencing April 1, 2000, the sum of Five Thousand Dollars ($5,000.00) per month for a total of sixty-one (61) consecutive months. Judy's right to receive maintenance and Steven's obligation to pay maintenance after April 30, 2005 is reviewable. Maintenance shall not terminate without a court order. This award is based on Steven's gross monthly income of Thirteen Thousand Three Hundred Thirty Three Dollars and thirty three cents ($13,333.33) and the fact that Judy is presently unemployed. In addition to the aforesaid, Judy shall also receive thirty eight and one-half percent (38½%) of the gross amount of any bonus received by Steven during this time frame. In addition, $3,600.00 per year shall be paid by Steven to Judy from these bonus checks for the first 24 months of said bonus payments at the rate of an additional $1,200.00 in addition to her percentage for each bonus payment. Each payment shall be made at the time Steven receives his bonus check, but the total must be paid on or before December 31st of each year. The total amount of these additional payments is $7,200.00. Said monthly payments and percentage of Steven's bonus will continue until the first to occur of the following events:
A. The death of Judy Koster;
B. The remarriage of Judy Koster;
C. Judy Koster's cohabitation with an adult male on a resident continuing conjugal basis;
D. The death of Steven Blum;
E. The change of custody of one or more of the minor children upon a showing of substantial change in circumstances;
F. Upon a showing of a substantial change in circumstances which shall not include the attainment of majority or other emancipatory event of one or more of the minor children."

Under a separate provision within the same section of the marital settlement agreement, Judy agreed to make "reasonable efforts to become economically self-sufficient."

Keep in mind that this language was not the result of an agreement (which would have been permissible) but the result of a contested hearing, i.e., non-modifiability is generally dependent on the agreement of the parties per the language of Section 502(f).

I liked the language of the Supreme Court where it states:

> As the appellate court in this case noted, the parties' marital settlement agreement is "not a model of unambiguous drafting." Nor does the agreement state whether one party bears the burden of showing whether maintenance and support should continue, be modified, or be terminated after the initial 61-month period.

In reducing maintenance, the trial court's post-decree order further provided:

> "This is in full and complete satisfaction of STEVEN BLUM's obligation to pay maintenance to JUDY KOSTER and other than the aforesaid payments, she shall be forever barred from seeking maintenance from the Petitioner. This Order is nonmodifiable as to duration and amount and can not be changed if there is a change in circumstances nor is it subject to any review by this Court."

The appellate court found the trial court's reduction of the ex-wife's maintenance was not supported by the evidence. It also determined that the trial court exceeded its statutory authority in making its award of maintenance nonmodifiable.

The Supreme Court stated:

> The parties' marital settlement agreement here specifically provides for maintenance "reviewable" after the 61-month period. In viewing the agreement as a whole, we find that the parties agreed to a general review of maintenance. Thus, Steven did not have the burden of proving a substantial change in circumstances. Rather, the trial court was required to consider the factors in sections 504(a) and 510(a–5) (750 ILCS 5/504(a), 510(a–5) in determining whether to modify or terminate Judy's maintenance. Accordingly, the trial court had discretion to continue maintenance without modification, to modify or terminate maintenance, or to change the maintenance payment terms. See *In re Marriage of Golden*, 358 Ill. App. 3d 464, 471 (2005).
>
> It is clear from the marital settlement agreement that maintenance was intended to be temporary and rehabilitative. [Case cited and summary of case omitted]. Further, the initial award was for both maintenance and support, although it did not allocate specific amounts for each.

In a decision that is excellent reading, the Supreme Court reserved the appellate court decision and upheld the trial court's decision where the trial court reduced the maintenance obligation of

the ex-husband.

The next issue was whether the trial court could make the post-decree remaining maintenance obligation non-reviewable and non-modifiable. The Supreme Court concluded:

> From a practical view, the obvious need for modifiability is summed up in a phrase: "life changes." The only certainty in life is the probability of life's ever-changing nature in the lives of divorced spouses. To conclude otherwise simply defies common sense and life experiences. For the preceding reasons, we affirm the appellate court's holding that the trial court erred in ordering Judy's maintenance award nonmodifiable and nonreviewable, absent express agreement by the parties.

***Thornley* (2005) - Authority and Propriety to Award Maintenance in Gross in Short Term Marriage Case Where No Maintenance Requested**

IRMO Thornley, 361 Ill. App. 3d 1067 (Fourth Dist., 2005)
The trial court did not abuse its discretion when it made an uneven distribution of the marital assets and debts in favor of wife, who during short marriage assisted husband in obtaining chiropractic degree. The marriage was two years to the date of separation and four years to the date of divorce. In the petition, the wife requested an order awarding her an equitable share of the marital property and "denying maintenance to the [p]etitioner and [r]espondent."
The appellate court noted that while there was no specific request for maintenance by wife in petition, she did not explicitly waive it and an award of $18,000 maintenance in gross was not in error.

The interesting aspect of this case was the potential waiver argument. The appellate court commented:

> The supreme court recently refused to allow a spouse to retract her waiver of maintenance simply because the circuit court did not accept her valuation of her ex-husband's dental practice. *In re Marriage of Schneider*, 214 Ill. 2d 152, 172, (2005). In *Schneider*, however, there was a clear waiver of maintenance, along with a stipulation as to gross and net income from the dental practice. Schneider, 214 Ill. 2d at 156. The ex-wife did not dispute that she had waived maintenance, arguing instead that the court abused its discretion in failing to sua sponte declare her waiver of maintenance unconscionable when it excluded good will and/or accounts receivable from the valuation of the dental practice. *Schneider*, 214 Ill. 2d at 172.
>
> In the present case, however, no formal waiver of maintenance occurred, only a suggestion to the trial court in the pleadings that it was best to resolve the matter by a distribution of property rather than an award of maintenance. The suggestion did not deprive the court of its discretion to award maintenance. The parties were aware that an award of maintenance was possible. Even if the pleadings were not technically correct, a pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs. 735 ILCS 5/2-616(c).

Post-Divorce Cases Involving Maintenance in Gross (or Property) Versus Modifiable Maintenance

***Bohnsack* (2012) – Language of MSA Provided for Modifiable Maintenance Despite Annual Payments of $10k for Six Year Term**

IRMO Bohnsack, 2012 IL App (2d) 110250 (March 29, 2012)
The MSA had provided:

> Mark shall pay to Deb $10,000 in maintenance for 6 years, beginning on January 1, 2006[,] and the last payment ending on January 1, 2011. Mark shall pay this money to Deb twice a year, with a payment of $5[,]000 on January 1 and a payment of $5[,]000.00 on June 1st of every year, with the last year being 2011.

Four years later, the former wife filed a petition to modify her maintenance award, seeking an increase due to a substantial change in circumstances. The trial court granted the petition to increase and awarded $3,000 monthly. In a post-trial motion and on appeal the former husband argued that the maintenance was maintenance in gross so it was non-modifiable. The trial court disagreed and the appellate court affirmed the ruling of the trial court.

The appellate court found that the language of the MSA was "ambiguous at best." While the ex-husband argued that maintenance was maintenance in gross because of definitive amount and set vesting dates. The appellate court disagreed that the cases the former husband cited were on point because each case provided a specific total sum to be paid to the recipient. The string cite from the appellate court's decision as paraphrased states:

> *IRMO Freeman*, 106 Ill. 2d at 294 (1985) (the modified judgment specifically labeled the $27,000 the husband was to pay to the wife as maintenance in gross);
>
> *IRMO Michaelson*, 359 Ill. App. 3d at 708 (2005) (settlement agreement provided that the husband was to pay the wife " 'a total of Three Hundred Sixty Thousand ($360,000) Dollars' " and that the maintenance provisions were to terminate " 'only after the payment of all monies due to Wife are paid in full' ");
>
> *IRMO Hildebrand*, 166 Ill. App. 3d at 797 (1988) (settlement agreement awarded the wife the specific sum of $12,000 in maintenance);
>
> *IRMO Burgstrom*, 135 Ill. App. 3d 854, 857 (1985) (order provided a specific sum that the husband was to pay to the wife).

The appellate court then reasoned:

> Although petitioner contends that the total sum is easily calculable, the lack of a specifically stated total sum differentiates the present case from those found to involve maintenance in gross and lends credence to the position that the maintenance award was for periodic maintenance over a fixed period. See *IRMO Harris*, 284 Ill. App. 3d 389, 390, 392 (1996) (holding that a settlement

agreement that provided that the husband was to pay the wife $606 per month for 10 years but did not provide for a specific total sum was for periodic maintenance for a fixed period rather than maintenance in gross).

Comment: Had the parties intended non-modifiable maintenance, what could have occurred in this case would be for the former husband to bring a motion for declaratory judgment seeking a finding that the MSA provisions were ambiguous. The proper ruling would have been that the terms were maintenance. Then the former husband could have focused on any evidence beyond the four corners of the MSA indicating the agreement for maintenance in a fixed amount. It seems that the former husband only argued the language of the MSA without offering such extrinsic evidence.

Michaelson (2005) **– Maintenance in Gross -- Total Payments Over Time and No Other Termination Language**

IRMO Michaelson, 359 Ill. App. 3d 706 (First Dist., 2005) The trial court properly treated a provision in the MSA as maintenance in gross, dismissed the former husband's petition to modify and awarded the wife attorney's fees pursuant to Section 508(b) of IMDMA for defense of ex-husband's petition as well as prosecution of petition for rule to show cause because the ex-husband had no justifiable reason to refuse to make the maintenance payments. Despite wife's alleged remarriage or cohabitation, the provision in the MSA requiring husband to stop paying maintenance only upon full payment of total sum to wife takes obligation outside potential §510(c) termination. Because I am critical of the trial and appellate court decisions, I will quote from the language of the MSA. The termination language of the MSA had provided:

> Husband shall be obligated to pay to Wife, as and for spousal support, the sum of $45,000 per year, beginning at such time that Husband becomes an attending physician, post residency, for a period of eight (8) years, for a total of Three Hundred Sixty Thousand ($360,000) Dollars. Said spousal support shall be paid to Wife in ninety six (96) equal monthly installments of Three Thousand Seven Hundred Fifty ($3,750.00) Dollars.
>
> The maintenance payment(s)/obligation provided for by this agreement shall terminate completely, only after the payment of all monies due to Wife are paid in full, regardless of any other changed circumstances of the parties.

The agreement also provided, "Modification. The provisions of this agreement may be modified or rescinded by the written consent of both parties; however, the parties agree that they will not petition the court for a modification unless there is a substantial change in circumstances of the parties."

The appellate court stressed the fact that the agreement totals the maintenance to be paid over time. It also stressed the fact that by the terms of the MSA, the maintenance was to terminate completely only after payment of all monies due. Perhaps this was an award for maintenance in gross. At a minimum, however, there should have been no finding of 508(b) attorney's fees, contempt, etc. The ex-husband's argument was, in part, that the agreement was ambiguous and that there was no way he would have agreed to a provision for maintenance in gross which

would not terminate on his ex-wife's remarriage, where the parties had lived together for only six years following their marriage. Regarding the fee issue, the ex-husband contented that the fee award was improper because only $2,000 of the $9,640 in fees were related to enforcement. In affirming the fee award, the trial court used language akin to a sanctions ruling which stated, "He had no reasonable basis for his petition to terminate or modify maintenance."

***Dudas (2005)* – Characterization of Provisions in MSA as Property Versus Maintenance**
IRMO ***Dundas***, 355 Ill. App. 3d 423 (Second Dist., 2005).
The trial court properly refused to terminate former husband's obligation to pay $200 per month to former wife until car loan was paid in full based on his assertion that wife was living with her boyfriend on a continuing conjugal basis, because former husband's obligation was not maintenance but was part of property division. What was noteworthy was the fact that the parties' marital settlement agreement labeled the payments as maintenance. The appellate court stated:

> When we examine the substance of the agreement, we cannot conclude that the agreement's terms unambiguously provided that the monthly payments were maintenance because the terms in the agreement are susceptible to two different, yet equally plausible, interpretations. ***
>
> Here, as in *Rowden*, other than the car payments, both parties waived any claim to maintenance. Further, the payments went to pay off the car that petitioner was awarded, and the evidence revealed that there was a large outstanding balance on that loan. Thus, the agreement, which the trial court accepted, gave petitioner the car without burdening her with paying a disproportionate share of the total cost of the car. Moreover, the agreement to make monthly payments was specifically linked to the amount of the car loan and its duration, and respondent was required to make payments directly to the holder of the loan. Even though respondent was not obligated to pay the entire amount of each installment, he was responsible for a specific portion of it, and his obligation terminated when the loan was paid in full.

Because there was no petition in bankruptcy involved, consideration of bankruptcy case law was deemed inapposite.

Comment: The entire issue could have been avoided had the parties simply stated in their marital settlement agreement that the payments would not terminate due to the statutory termination events. However, the drafting was probably designed anticipating the possibility that the husband would attempt to discharge the obligation in bankruptcy.

MODIFICATION, REVIEW AND TERMINATION CASES

Modifications Cases:

McLauchlan (2012) - Trial Court Properly Did Not Terminate Maintenance Award Where Former Husband Did Not Modify His Standard of Living / But Trial Court Improperly Considered Withdrawals from Retirement Accounts in Calculating Maintenance When Wife Waived Any Interest in Original Divorce

IRMO McLauchlan, 2012 IL App (1st) 102114 (March 13, 2012)
The issues on appeal were whether the trial court abused its discretion in failing to terminate the maintenance award and whether the trial court erred when it included withdrawals from the former husband's retirement accounts as income in calculating maintenance and his arrearage. The appellate court affirmed in part and reversed and remanded in part.

Regarding the issue of terminate of maintenance, the appellate court stated:

> David argues that maintenance payments to Patricia should be terminated due to the change in his employment status and his dwindling retirement accounts. Furthermore, Patricia has the home in Florida, as well as $600,000 in investments and $100,000 in savings from which to draw income. The trial court took these factors into account, as well as the factors listed in sections 504(a) and 510(a-5). It acknowledged David's change in employment status, and found credible Mr. DiGiovanni's testimony that David did not voluntarily quit his job at Locke, Lord, Bissell & Liddell. It also found a substantial decrease in David's earnings. *However, the trial court noted that "[r]espondent has not modified his standard of living to accommodate his change in job status" and "has no impairment in his present or future earning capacity and he has the ability to earn significantly greater future income than respondent*." Patricia on the other hand, due to the length of the marriage, lacked the education and job experience to earn substantial income. Therefore, the court did not terminate maintenance but instead modified it downward to 20% of David's gross income from all sources. The sources include, but are not limited to, David's interest in his father's revocable trust, retirement accounts, and the McLauchlan Law Group LLC, from January 1, 2009, to date. The trial court considered the relevant factors and the record supports its decision to modify, rather than terminate, maintenance. (emphasis added.)

The key next issue was how to determine his "gross income" referred to in the MSA and whether the trial court was correct that it included his IRA withdrawals. Instructively, the appellate court stated:

> This court's precedents set out in *In re Marriage of Munford*, 173 Ill. App. 3d 576 (1988), are instructive here. The parties in *Munford* executed a property settlement agreement, which was incorporated into the dissolution of marriage judgment. Solomon Munford was ordered to pay his ex-wife, Jessye, $300 per month as maintenance. As part of the property settlement, Jessye was awarded financial assets worth $29,500, as well as a " 'Vacation Key Plan' " in Lake Geneva, Wisconsin, and all the furnishings and fixtures contained in the marital home. In turn, Jessye agreed to pay Solomon $3,500 for his interest in their joint property and she "waived '*any and all claims* that she may have in and to Solomon's pension and/or profit sharing plans.' " (Emphasis in original.) *Munford*, 173 Ill. App. 3d at 577.

The ultimate decision was that:

> Therefore, we hold the record supports the trial court's determination to modify David's maintenance obligation. However, the trial court's finding that "gross income" includes monies drawn from David's retirement benefits when modifying maintenance was improper. We hold that absent fraud, coercion or misrepresentation, where the parties have entered into a property settlement agreement wherein each has waived any and all interests in and to the retirement plan(s) of the other party, the parties are bound to the terms of their agreement. Under such circumstances neither Illinois case law nor section 504(a) permits the trial court to consider withdrawals from retirement accounts when deciding whether to modify maintenance and in setting the amount of a new maintenance award. Allowing the trial court to do so violates the parties' original intent when contracting and represents a modification of the parties' property settlement agreement rather than a modification of maintenance provisions of the dissolution judgment based on a substantial change in circumstances.

Anderson (2011) **– While Substantial Change in Circumstances Shown Trial Court Improperly Considered Maintenance Recipient's Potential Eligibility for Public Assistance**
IRMO Anderson, (1st Dist., March 31, 2011)
This case involved a 37 year marriage and a Husband who was 80 years old and unable to work due to health issues. The former husband had been unemployed at the time of the 1999 divorce and the evidence showed that his asset based was substantially reduced from the time of the divorce. The appellate court noted that, "In *Connors*, 303 Ill. App. 3d at 226, the court found that in a modification proceeding, parties are allowed to present only evidence which goes back to the latest petition for modification to avoid relitigating matters already settled." Regarding the issue of living on assets and an increase in reported gross income due to retirement account withdrawals, the appellate court stated:

> "While his social security benefits have increased by $400 a month since 1999, the rest of his income consists mostly of withdrawals from his retirement funds, which are being depleted as he makes those withdrawals and according to petitioner, will last only for two years from the time of the hearing... Furthermore, while it appears that petitioner is still withdrawing the same amount from his Morgan Stanley account for himself as he did in 1999, he testified that because of the losses that he suffered during the market decline, his funds would last only two years after the date of the hearing. *** In contrast, petitioner in this case showed that over the course of 10 years, the value of his retirement account, which is one of his main sources of income, decreased from over $200,000 in 1999 to $63,000 in 2009. Unlike the facts in *Dunseth*, the record here does not indicate that petitioner's source of income merely "dipped" or decreased temporarily due to the payment of special costs or temporary circumstances. Moreover, petitioner testified that he has removed his money from the market and invested it in cash and government securities, and is therefore unlikely to benefit from a potential market recovery, even if and when such a recovery may come about.

The appellate court then summarized:

> In this case, respondent has not shown why a distinction should be made between a substantial change in income and a similar change in the value of an account from which income is derived. In this case, the record indicates that petitioner's Morgan Stanley account was worth at least $200,000 at the entry of the last order, and that its value decreased to $63,000 at the time of the hearing on his motion to terminate maintenance. It is also apparent from the record that petitioner relies on that account to make his maintenance payments and for his own support. Thus, even if the value of petitioner's Morgan Stanley account may have been uncertain and subject to fluctuation, that did not preclude petitioner from seeking termination of his maintenance obligation if he could no longer rely on that account as a source of income to make those payments. Additionally, respondent's assertion that petitioner's income has increased since 1999 is misleading because, as noted above, his income consists largely of withdrawals from his retirement account.

Note the discussion of the *IRMO Waller* decision regarding the retirement of the ex-husband at age 63 and the fact that the former husband was not successful in trying to terminate maintenance – in part since there were "bad facts."

> Respondent's reliance on *In re Marriage of Waller*, 253 Ill. App. 3d 360, 362 (1993), is misplaced. In *Waller*, the court found that the maintenance payor's retirement at age 63 was not a substantial change in circumstances that would justify termination of maintenance where he had refused employment, albeit at a lower rate of pay, and was in good health. In denying his motion to terminate maintenance, the trial court noted that while it was contemplated at the time of the judgment of dissolution that the former husband would retire, it had no provisions for reduction or termination of maintenance. It also noted that former husband lived in a house owned by his current wife and owned another house with no mortgage while the former wife had a mortgage on her condominium. In affirming the trial court's denial, the reviewing court found that the former husband
>
> > Had not reached the customary retirement age,
> > He was in good health, and
> > His resignation was under his control. (citations omitted).

But the trial court erred in this case in terminating maintenance in assuming that the ex-wife would potentially be eligible to receive public welfare assistance so as to enable her to live in an assisted living facility. The appellate court stated:

> Neither of the parties nor the court has introduced any authority to permit a court to rely upon the receipt of public welfare benefits as a substitute for spousal maintenance. In perspective, such reliance would allow a spouse to use public welfare as a substitute or supplement to his own spousal obligation and to the recipient's spousal entitlement. While we have found a dearth of authority on this subject in Illinois, other jurisdictions have addressed this question as to and

> disallow the use of public welfare entitlements as a substitute for a spouse's maintenance obligations. See *Remick v. Remick*, 456 A.2d 163, 167-68, 310 Pa. Super. 23, 32- 33 (1983); *Safford v. Safford*, 391 N.W.2d 548, 550 (Minn. Court. App. 1986); 27B C.J.S. Divorce §612 (2005).

Regarding the issue of potential public welfare benefits the appellate court concluded:

> Thus, the trial court abused its discretion in taking into account that respondent may be eligible for public assistance, even though it acknowledged that her eligibility was uncertain. More significantly, the trial court abused its discretion in assuming that public assistance can be a substitute for a spousal obligation.

Comment: There are cases also involving second jobs and termination of maintenance which is also a mainstream issue. 17 ALR 5th, 143.

***Reynard* (2008) - Former Husband's Petition to Increase Maintenance Properly Denied**
IRMO Reynard, 378 Ill.App.3d 997 (4th Dist., 2008)
The trial court did not abuse its discretion when it refused to increase former wife's maintenance payment after parties' youngest child graduated from college and former husband remarried. The trial court properly weighed evidence and concluded that there had been insufficient evidence of material change in parties' circumstances because husband incurred loans in order to pay for child's education, had substantial capital improvements expenses as result of deferring maintenance to home, and had spouse with her own set of expenses. In addition, although the current wife lost her tenant, she increased her investment income.

***Abrell* (2008) - Petition to Decrease Permanent Maintenance Award Based upon Wife's Job Shortly After Close of Proofs and Small Reduction Only**
IRMO Abrell, 386 Ill. App. 3d 718 (4th Dist. 2008)
In *Abrell*, the appellate court stated:

> While the goal after dissolution is for a dependent spouse to become self-supporting, this "does not mean the ability to merely meet one's minimum requirements, but entails the ability to earn an income which will provide a standard of living similar to that enjoyed during the marriage."

The court noted that the marriage lasted more than 20 years and that there was no significant income producing property or non-marital holdings. The husband earned approximately $72,000 per year while his ex-wife earned $16,608 at her then-current job at SIU School of Medicine. The trial court in this case reduced maintenance from $1,500 to $1,250 monthly where wife obtained employment shortly after the close of proofs in the case. The appellate court stated:

> With the award of maintenance of $1,250 per month, Jacquie's gross income was $31,608 per year while John's yearly gross income was $57,000 after payment of maintenance. Although neither party was able to maintain the standard of living enjoyed during the marriage, John would be able to come closer than Jacquie.

> While both had health issues, John had a law degree and many years of work experience in the legal field. Jacquie had a high school education and had been out of the work force for approximately 17 years. Jacquie was 60 years old. Her prospects for increasing her standard of living through employment are not good.

The appellate court denied the husband's appeal and ruled:

> The initial maintenance award to Jacquie covered her living expenses. The reduced award in addition to her salary does not provide her luxuries but will help get her closer to the standard of living she enjoyed during the marriage. Further, the reduced award of maintenance still leaves John with enough income to meet his living expenses.

***Turrell (2002)* – Petitioning Party Has Burden of Proof: Maintenance Not Reduced**
IRMO Turrell, 335 Ill.App. 3d 297 (2d Dist. 2002)
The party petitioning for modification of maintenance has the burden of proof. The trial court abused its discretion on the obligor's petition to reduce maintenance in allowing a reduction based upon its finding that the mother failed to offer evidence to support her claim that her Lyme's disease prohibited her from being employed. The appellate court held that the obligor alone bore the burden of showing that a substantial change in circumstances justified reducing maintenance. The recipient did not have the burden to prove she was entitled to continued maintenance.

The evidence in this regard focused on the former wife's health:

> The marital settlement agreement incorporated into the dissolution judgment acknowledged that she is afflicted with Lyme disease and was receiving Social Security disability payments. The agreement provided that the issue of maintenance was reviewable after five years and that "[t]he payment of additional maintenance *** shall be dependent upon the Wife's employability, health, and needs at that time." At the hearing, Virginia testified that she continues to receive disability and is unable to work as a nurse because she experiences short-term memory loss and fatigue. Dr. Jones also testified that Virginia is unable to work because of her symptoms. Dr. Jones acknowledged, however, that he is not Virginia's treating physician. Virginia further testified that she home-schools Sam due to his cognitive deficits and other symptoms caused by the Lyme disease.
>
> After hearing the evidence, the trial court found there was no medical evidence to support Virginia's claim that she is unable to work. In so doing, the court improperly placed the burden of proof on Virginia and erred as a matter of law. Graham petitioned the court to terminate his maintenance obligation. As the party seeking the modification, he had the burden of demonstrating a substantial change in circumstances. In re Marriage of Neuman, 295 Ill. App. 3d 212, 214 (1998). Thus, he was required to show a substantial change in circumstances that would justify reducing his maintenance obligation. Contrary to the trial court's ruling, Virginia did not have the burden of proving that she remained physically unable

to work.

Based on our review of the record, Graham did not meet his burden. He did not establish a substantial change in Virginia's health that would enable her to return to work, nor did he establish a substantial change in his own financial circumstances that would support reducing his maintenance obligation. We hold, therefore, that the reduction in maintenance was an abuse of discretion. Likewise, the two-year limit on Graham's maintenance obligation cannot stand. There is no guarantee that Virginia's condition will have improved by end of the two-year period. Certainly a review of the maintenance issue would be appropriate. Upon remand the court may in its discretion determine if and when such a review should take place.

Unallocated Maintenance:

***Romano* (2012) – "Maintenance as Substitute for Child Support" -- Trial Court Cannot Award "Unallocated Maintenance" that Would Not Normally be Modifiable When Child Emancipates**
IRMO Romano, 2012 IL App (2d) 091339 (March 21, 2012)

Maintenance as Substitute for Child Support: I have grouped this case together with the unallocated maintenance cases because of the effect of modifiability on the appellate court decision.

At the time of the entry of the Judgment, there was only one minor child subject to child support. The trial court first granted $6,000 per month maintenance and $6,000 monthly child support. There were also percentage portions if the husband's gross income were over $550,000 per year. The trial court reconsidered this overall scheme and stated, "The unintended consequence of the award is to suggest that at Alexander's emancipation only the maintenance should continue. Based upon the length of the marriage and the earning capacity of each party, the court will award Cynthia with periodic maintenance of $15,000 per month and sets [sic] child support at zero. [Daniel] will pay additional maintenance in the amount of 40% of any income over $550,000 per year. The downward deviation on child support is approved based upon the amount of maintenance Cynthia will receive and the assets set aside for her. Should the maintenance terminate while Alexander remains unemancipated then child support will be set at the then-existing guidelines or any deviation a court deems appropriate." §126.

The husband argued that while the award was modifiable, he would be required to show a substantial change in circumstances and that the child's emancipation would be an already anticipated event. The ex-wife argued that the entire award was tax deductible to him (unallocated) and was proper. The appellate court agreed with the husband. The appellate court stated, "Although an award of unallocated maintenance and child support, attendant with any federal income tax benefits, may be made under the Act (see *Belluomini*, 104 Ill. App. 3d at 307-08), we conclude that the trial court's maintenance order in this case did not constitute an

unallocated award." The appellate court explained that if the award were truly an unallocated maintenance award, the husband would be able to seek a modification of on the child's emancipation:

> Here, the trial court stated in its December 12, 2009, letter opinion that it was reconsidering the awards of maintenance and child support because "[t]he unintended consequence of the award is to suggest that at Alexander's emancipation only the maintenance award should continue." *In other words, the trial court did not intend Alexander's emancipation to have any effect on Cynthia's maintenance award, and any attempt by Daniel to seek modification upon Alexander's emancipation would be futile*. Since the award crafted by the trial court contravenes the statutory right to modify child support (see *Gleason*, 266 Ill. App. 3d at 468), it cannot be considered unallocated support. As such, we vacate the award and remand the matter to the trial court for a determination of the proper amounts of maintenance and child support. (emphasis added).

***Kincaid* (2012) - Unallocated Maintenance: When Modifying Unallocated Maintenance During its Term a Determination of Net Income is Required Because of the Support Component**

IRMO Kincaid, 2012 IL App (3d) 110511 (July 3, 2012)

The former husband argued that the trial court erred in increasing his unallocated support payments based on his gross income. He contended that the trial court was required to determine his net income before increasing his support payments, which consisted of both child support and
maintenance. The appellate court ruled:

> We need not decide whether a trial court must consider a payor's gross income or net income when awarding maintenance because Brian was ordered to pay unallocated support, which is both child support and maintenance. See *Gleason*, 266 Ill. App. 3d at 468. While a court is not explicitly required to consider a payor's net income when making a maintenance award, a court is required to do so when making an award of child support. Compare 750 ILCS 5/504(a) (West 2010) ("income"), with 750 ILCS 5/505(a)(1) (West 2008) ("net income"). Since unallocated support is always comprised of some child support, we believe that a trial court must always determine the payor's net income, as that term is defined in section 505(a)(3) of the Act, before awarding unallocated support.
>
> Here, the trial court increased Brian's unallocated support obligation based on his gross income. Since the trial court failed to consider Brian's net income, we reverse the court's order increasing Brian's unallocated support obligation and remand for the trial court to determine Brian's net income. The court may then order Brian to pay an unallocated support award based on that amount.

***Struer (2011)*-- Retroactive Support Should be Given to Date of Termination of Unallocated**

Support
IRMO Struer, (1st Dist., May 11, 2011)
Struer held that when unallocated maintenance terminated the former husband had notice consistent with the provisions of §510(a) of the IMDMA (based on case law) that his child support obligation would commence. Accordingly, child support should have been retroactive to the date that his unallocated support had terminated rather than on the date the ex-wife had specifically moved to set child support. This case is good reading for exceptions to the requirement for filing a petition for modification of support. This includes case law involving petitioning for custody without mentioning child support and other somewhat unusual fact patterns.

***Doermer* (2011) – Unallocated Maintenance is Non-Modifiable When there is only a Maintenance Component -- After the Child Reaches the Age of Majority**
IRMO Doermer, 2011 IL App (1st) 101567, (August 16, 2011, Corrected September 6, 2011)
The trial court did not err in ultimately granting the former-husband's 2-619.1 motion to dismiss his former wife's "petition for extension of maintenance." Under the marital settlement agreement the father paid unallocated support of $5,785 per month. The 1999 MSA had the following non-modifiability clause:

> "RICHARD's obligation to pay and KATHLEEN's right to receive maintenance shall terminate upon the first to occur of the following events: a) payment of unallocated maintenance and child support for eighty-four (84) consecutive months (seven consecutive years) following entry of a Judgment for Dissolution of Marriage; b) the death of KATHLEEN; c) the remarriage of KATHLEEN; or d) [t]he cohabitation of KATHLEEN with another adult person on a residential conjugal basis. Thereafter, KATHLEEN shall be forever barred from receiving maintenance and thereafter KATHLEEN shall have the right to receive child support only until such time as CAITLIN attains an 'emancipation event' as hereinafter stated."

The 2005 modifications to the MSA terms provided:

> A. [Richard] shall continue to pay unallocated maintenance and child support to [Kathleen] until January 31, 2006 in the sum of $5860.00 per month; and
> B. Thereafter, commencing February 1, 2006 and through July 16, 2009, the sum of $5000.00 per month payable in two equal installments on the 1st and 15th of each month as unallocated maintenance and support.
> 2. Article III, paragraph 2 shall remain in force and effect except the provision for the amount and length of payment amended as provided in paragraphs A and B above.
> 3. The parties acknowledge the fact that the minor child of the parties, to wit, Caitlin Doermer, will be attending a private facility, known as Culver Academy, and as such, will not be spending all of her time in the residence of [Kathleen]. [Kathleen] shall have no obligation to pay any costs associated with Culver Academy.
> 4. This Order is entered predicated upon that information.

> 5. All other provisions of the [m]arital [s]ettlement [a]greement shall remain in full force and effect."

In June 2009, the former wife filed a petition for extension of maintenance -- requesting that the duration of her support award be extended because an alleged substantial change in her circumstances affected her "ability to support herself and the daughter's minority status." The daughter had become the age of majority and emancipated in July 2009.

The former husband argued that the parties' MSA deprived the circuit court of the authority to grant an extension of maintenance after Caitlin's emancipation. He cited an October 2009 Illinois Supreme Court decision (*Blum v. Koster*, 235 Ill. 2d 21 (2009)), for support. The appellate court found that because maintenance only was being sought beyond July 2009, that there was essentially no child support component and therefore the *Blum* decision controlled.

The appellate court stated:

> Based on the plain language of the marital settlement agreement, we find that it was the parties' intent for Richard to make unallocated maintenance and child support payments to Kathleen until July 16, 2009, when Caitlin turned 18 years old and became emancipated.

Comment: There is a problem with this case. When you have an unallocated maintenance case you need to make absolutely certain to ensure that the payor can deduct the payments, that it terminated six months before or after the child turns age 18.

Tax law provides that a payment will be treated as specifically designated as child support to the extent that the payment is reduced either:
On the happening of a contingency relating to a child, or
At a time that can be clearly associated with the contingency.

There is a presumption that the payment terminates due to a contingency related to a child if the payments are reduced 6 months before or after the date the child will reach 18, 21, or local age of majority -- in Illinois age 18.

But there is only a three year window to amend tax returns. So this is a case of poor drafting of the MSA.

<u>Termination Cases</u>:

[See Separate Outline for Conjugal Cohabitation Cases]

***Kolessar* (2012) – In Agreed Orders Involving A Unilateral Reduction in Unallocated Maintenance Statutory Interest is Mandatory Unless Clearly Waived**
IRMO Kolessar and Signore, 2012 IL App (1st) 102448 (January 17, 2012)
The key issue in this case involved statutory interest once the former husband unilaterally

reductions of his unallocated maintenance obligation. The former wife urged on appeal that the trial court erred in finding that the imposition of statutory interest on the arrearages was discretionary, relying on *Finley v. Finley*, 81 Ill. 2d 317 (1980). The appellate court first commented:

> In *Illinois Department of Healthcare & Family Services ex rel. Wiszowaty v. Wiszowaty*, 239 Ill. 2d 483 (2011), the supreme court clarified its ruling in *Finley*, finding that it "stands for the proposition that, where *there are no controlling statutes* defining unpaid support payments as judgments or providing for interest, interest may be awarded *** as a discretionary matter." (Emphasis in original.) *Wiszowaty*, 239 Ill. 2d at 489.

To try to distinguish *Wiszowaty* the former husband pointed out that at issue in this case were agreed orders:

> Such an order represents "a recitation of an agreement between the parties and is subject to the rules of contract interpretation." *In re Marriage of Tutor*, 2011 IL App (2d) 100187, ¶ 13. They are not "judicial determination[s] of the parties' rights." *In re Haber*, 99 Ill. App. 3d 306, 309 (1981). Furthermore, agreed orders are "conclusive on the parties and can be amended or set aside *** only upon a showing that the order resulted from fraudulent misrepresentation, coercion, incompetence of one of the parties, gross disparity in the position or capacity of the parties, or newly discovered evidence." *Haber*, 99 Ill. App. 3d at 309. Signore argues that the orders intended to "address and finalize" all issues pertaining to his petitions for modification and the fact that they were silent on the issue of interest evidenced the parties' intent to preclude an interest award.

The appellate court rejected this argument and stated that the "agreed order, however, must reflect an 'intentional relinquishment' of that right" and that "mere silence is not enough." The appellate court concluded as to the interest issue:

> Here, the agreed orders were silent on the issue of statutory interest pertaining to the arrearages. Since the Marriage Act requires that interest be paid on orders for child support, and the agreed orders at issue did not contain an explicit waiver by Kolessar of her right to the statutory interest, the trial court erred in failing to award interest on the arrearages.

Maintenance Review Versus Modification

Maintenance Review

***Heasley* (2014) – Trial Court Erred in Limiting Maintenance Following Second Review in Case Involving Excellent Discussion of Case Law**
IRMO Heasley, 2014 IL App (2d) 130937 (December 2014)
The former wife appealed the trial court's order terminating her former husband's obligation to

pay maintenance following the second review of maintenance following the divorce decree. The appellate court agreed with the former wife that the trial court failed to recognize the limited scope intended for the second review. Accordingly, the appellate court vacated and remanded.

Following a 23 year marriage, the parties were divorced in 2007. The divorce involved an evidentiary hearing on contested issues. At the time of the divorce the parties were ages 45 and 44. There was an obligation to pay child support for the minor child. The provisions of the judgment regarding maintenance provided:

> "7. *** [Respondent] is fully employed, earning $91,208 per year and [petitioner] is employed part time earning approximately $12,000 per year. Due to the length of the marriage and other appropriate [s]tatutory factors, the Court finds that maintenance should be awarded from [respondent] to [petitioner] in the amount of $1,050 per month, and the Court further finds that there may be a review of said maintenance after 24 months upon petition by either party. The Court expects [petitioner] to either seek full time employment, or seeking [sic] additional schooling. ***
> 8. ***
>
> > B. *** The maintenance shall terminate upon the death of [petitioner], her remarriage, or other appropriate statutory factors. Maintenance is reviewable upon petition by either party on or after 24 months of maintenance payments from [respondent] to [petitioner], and the Court may, upon appropriate proofs, review maintenance after appropriate hearing.

In December 2009, the former husband sought his first review where filed a motion to modify maintenance asking that maintenance be terminated or reduced because his former wife had a sufficient time to become financially independent. The evidence indicated that the former wife was a graduate from Penn state in 1982 with an associates degree in architectural engineering. Before the birth of their daughter the wife worked full time with a civil engineering firm where she did drafting. After her daughter's birth, she worked part time and then briefly full time. Her full time salary had been $38,000. She quit working outside the home three years after her daughter's birth.

Note that in June 2005 while the divorce case was pending, the trial court directed the wife to find employment in her field of training. She received a job working part time earning $12,000 at the time of the divorce. The appellate court noted, "There is no dispute in this appeal that advances in the architectural industry have rendered petitioner's 1982 associate's degree obsolete."

There was testimony at the time of the original divorce about the her financial condition and inability to fund her education. She had been awarded the house. Her equity at the time of the first review was $100,000. In the divorce, she received a $125,000 IRA. Between withdrawals and market decreases the value of the IRA was $72,000 at the time of the first review. She had not used any money from the IRA to fund further education. She claimed that her debts had been "mounting" since the dissolution and that she depended on loans from family members.

During that first review hearing the former wife testified to her employment as bank teller. She testified regarding her attempts to advance herself at the bank where she worked. The former husband's current salary was $96,000 at the time of the initial review.

> After petitioner finished her testimony, the court engaged the parties in a lengthy dialogue as to the proper course regarding maintenance. Counsel for respondent remarked that he wished to call respondent to testify. The court indicated that respondent's testimony likely would make no difference, given the court's present inclination on the issue. Elaborating, the court expressed its belief that petitioner had made a good-faith effort to become financially independent and that respondent's maintenance obligation should not terminate until his retirement, barring a substantial change in circumstances ***

Part of that discussion stated:

> I think maintenance in the amount that's currently set, it's an appropriate amount. Her income has gone up a little bit, but so has yours. But I'm not going to make it permanent any more. *** I don't think there's any sense coming back in a couple of years, because I don't know what more I can do now than tell you get a job, work 40 hours a week, at the highest level you can. As best I can tell, you're there now. I don't think you're going to be satisfied being there. Even if your maintenance is terminated, it's not high enough for you just to sit back and rest on the [$]18,000 a year. It's always going to be in your best interest to try and make as much money as you can for yourself, even if it may result in your maintenance being terminated[,] because it's not enough for you to live on. And if you have the ability to make more money and be self-sufficient, I would think that you would do that, because the maintenance isn't enough to live on Easy Street. So I don't know that there's anything to come back for me to review in the case. I would say, I guess, that you're both eligible for retirement at age 65. ***
>
> I would think maintenance should terminate, in this case, at the age of 65, period. And I would think that it should be subject to modification under the terms of Section 510 [of the Illinois Marriage and Dissolution of Marriage Act. *** Retirement seems a logical cutoff date of 62, and I would hope that it would end before then."

Based on the court's remarks the former husband asked for a continuance to decide whether to present evidence. The court continued the matter and in November 2010 there was an order denying the petition to modify and providing, "The Court directs [petitioner] to remain fully employed and to seek out promotions and better job opportunities so as to increase her income." The court continued the matter to June 2012 for review of maintenance, at which time the court would "increase, decrease or leave the same amount."

The matter was later transferred to a different judge and in May 2012 the former husband filed a new motion to modify maintenance. The former wife filed a motion to increase maintenance. In September 2012, the court entered an order terminating child support. The stipulated facts were:

> Petitioner's current salary was $21,000 and respondent's was $120,000—both having increased since the June 2010 review. Petitioner was still employed as a bank teller at FNB, and her salary in that position would "top[] out somewhere" around $22,000 to $23,000. Since the June 2010 review, petitioner had taken no classes outside FNB. She had, however, continued to take in-house classes at FNB, including all the "word processing, all the accounting classes." Petitioner was also participating in a three-year "training program" with the goal of becoming "more of a bank administrator," such as a personal banker or branch manager. Petitioner was being "as active and as involved as [she] possibly [could] for any promotion that [would come] [her] way."

In December 2012, the trial court issued a written order providing that maintenance would terminate in 18 months. The appellate court first recognized that, in a maintenance review proceeding, "there is no threshold requirement of *** a substantial change in circumstances." See *In re Marriage of Golden*, 358 Ill. App. 3d 464, 471-72 (2005) (in a maintenance review, there is no requirement of a change in circumstances).

The trial court made many finding of facts against the former wife such as, "Petitioner has financial business ability and had an opportunity to re-enroll in college and chose not to."

Regarding case law involving rehabilitative maintenance the appellate court recited case law as:

> "Rehabilitative maintenance is appropriate if evidence shows a potential for future employability at an income that allows approximately the same standard of living established during the marriage." *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 340 (1999). "Inherent in the concept of rehabilitative maintenance is the optimal goal that after a period of renewing or developing skills, or reentering the job market, the dependent former spouse will be able to become self-sufficient through his or her own income." *In re Marriage of Lenkner*, 241 Ill. App. 3d 15, 20 (1993).

The appellate court then quoted from the law regarding maintenance reviews at Section 510(a-5). The court distinguished between modification and review proceedings. Because of how well drafted this summary is, it will be quoted from at length:

> Courts have construed section 510(a-5) as distinguishing between review proceedings and modification proceedings. See *Blum v. Koster*, 235 Ill. 2d 21, 35-36 (2009); *Golden*, 358 Ill. App. 3d at 469 ("[R]eview proceedings and modification proceedings are separate and distinct mechanisms by which reconsideration of maintenance can occur."). A review proceeding occurs as a result of a prior court order for reconsideration of maintenance: "The power of the court *** includes the authority to award time-limited maintenance with a provision for review. [Citation.] The purpose of a time limit on the award is generally intended to motivate the recipient spouse to take the steps necessary to attain self-sufficiency. [Citation.] At the end of the specified time period, the court determines whether the maintenance award should be extended. [Citation.]" *In re Marriage of Rodriguez*, 359 Ill. App. 3d 307, 312 (2005).

> Where there is no such provision for review, a motion to reconsider maintenance initiates a modification proceeding rather than a review proceeding. See *Golden*, 358 Ill. App. 3d at 469 ("Review proceedings *** are held pursuant to prior court orders while modification proceedings can be initiated by the parties without prior order of the court."). As section 510(a-5) provides, maintenance will not be altered in a modification proceeding absent proof by the movant of a substantial change in circumstances. This threshold of proof is not required, however, in review proceedings. *Blum*, 235 Ill. 2d at 35-36; *Golden*, 358 Ill. App. 3d at 471-72

Review proceedings can be *general or limited*. See *Blum*, 235 Ill. 2d at 32; *Golden*, 358 Ill. App. 3d at 470 ("Review proceedings regarding maintenance can encompass various issues."). A general review of maintenance will involve consideration of all factors in section 510(a-5). See *Blum*, 235 Ill. 2d at 31-32. Limited review involving fewer statutory factors is possible. See id. at 32 ("The factors set forth in section 510(a-5) are inapplicable when the parties have otherwise agreed on the terms of modification and termination of maintenance in a written marital settlement agreement approved by the court, pursuant to section 502 [of the Act (750 ILCS 5/502 (West 2012))]); *Golden*, 358 Ill. App. 3d at 470 ("[T]he trial court can define the scope of the review, including limiting the review to certain issues."). A trial court that orders a review proceeding is encouraged to notify the parties of any limitations the court intends to set on that review:

> "When trial courts set review hearings, it would be preferable for the court to advise the parties who has the burden of going forward, who has the burden of proof, and what issues will be addressed. For example, if time-limited maintenance—whether temporary or rehabilitative—will continue only if the recipient shows good faith in seeking education or employment or proves the need for continued maintenance, then the parties should be so advised. Neither party should be required to guess what the court will consider at the review hearing." (Emphasis omitted.) *In re Marriage of Culp*, 341 Ill. App. 3d 390, 396-97 (2003).

The appellate court then determined that the reconsideration of maintenance was a review proceeding because it was done pursuant to the direction of the November 2010 order following the first review of maintenance. Then the appellate court considered, "how, if at all, the court intended to limit the scope of the second review. "Generally, the intention of the court is determined by the language in the order entered, but where the language of the order is ambiguous, it is subject to construction." *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 512 (2001). An ambiguous order "should be interpreted in the context of the record and the situation that existed at the time of [its] rendition." Id. The relevant sources include "pleadings, motions and issues before the court; the transcript of proceedings before the court; and arguments of counsel." *In re Marriage of Lehr*, 317 Ill. App. 3d 853, 858 (2000).

The appellate court next stated:

> The trial court's November 18, 2010, order provided for review of maintenance in 18 months. The court gave only the following guidance as to what would be its

> concern at the next review: “The Court directs [petitioner] to remain fully employed and to seek out promotions and better job opportunities so as to increase her income.” Petitioner could reasonably interpret this as the sole criterion by which the trial court, at the next review, would judge her efforts toward self-sufficiency.

The court then reasoned:

> At the September 2012 review, the trial court specifically faulted petitioner for failing to pursue educational opportunities “from 2005 to 2012[, i.e., to the date of the second review].” Construing the November 18 order, we see no requirement that petitioner seek further education.

The court concluded, “Here, the court failed to recognize the limited scope of review authorized in the November 18, 2010, order.” Accordingly, the appellate court vacated the trial court’s judgment and remanded for a review consistent with the terms of the November 18, 2010 order.

***DiGiovanni* (2012) - Unallocated Maintenance Award Properly Reduced on Emancipation, Imputing Income to the Former Wife, and Focusing on Evidence from Date of Earlier Modification Order Forward / Income Averaging**

IRMO S.D. and N.D., 2012 IL App (1st) 101876

The parties had been married for 25 years and were divorced in January 2005. The case had an original filing date of November 13, 2012 and then a posting date of the “corrected” opinion on December 5th. The parties in the originally posted decision were listed as [S.D.] and Nick decision were DiGiovanni. The names were redacted in the corrected decisions.

The marital settlement agreement had provided for unallocated child support and maintenance to be paid for five years (when it would be reviewable) in the amount of $20,000 per month. The MSA recited that the amount was based on his average gross income for the years 2001 through 2003 of $974,000. In 2007 the former husband filed a petition to modify and following a hearing and finding of a substantial change in circumstances, the unallocated maintenance was reduced in July of 2007 to $14,500 monthly. The judgment further provided that the unallocated payments "shall be reviewable provided [S.D.] files a Petition within 30 days of the minor child's (Sam's) graduation from high school. Failure of [S.D.] to file such a petition timely, shall terminate any further maintenance obligations of [N.D.] to [S.D.]." The order further modified terms so that [N.D.] was responsible for 100% of Sam's boarding school expenses.

In June of 2008, the former wife filed a “Petition to Extend Maintenance.” Her petition alleged that her son had voluntarily withdrawn from high school in order to avoid being expelled because of misconduct. Her petition alleged that t he was eligible to take the GED and could potentially earn his GED within 30 days of the filing of the petition. The petition sought an extension of maintenance "both temporarily and permanently." The petition also sought a modification of maintenance payments "so that [S.D.]'s after tax cash monthly flow is at least $35,000."

In August 2008, the former husband filed his own petition to modify support based on a

substantial change in circumstances, including Sam's emancipation, a substantial reduction in his income, and his former wife's rehabilitation and ability to obtain gainful employment. Although the trial court initially determined that it would only allow evidence gathered from the July 2007 order to the present to show a substantial change in circumstances, it allowed (as it was required to do so as not create reversible error) an off of proof regarding testimony and evidence relating to the standard of living she and [N.D.] enjoyed during their marriage. At a hearing in February 2009, [N.D.]'s counsel made a request for a temporary reduction in support due to Sam's emancipation. The trial court reduced the monthly support payment from $14,500 to $12,000 per month, subject to reconsideration at the close of proofs.

There was a hearing over 8 days conducted between February 2009 to August of that year. The former wife presented vocational expert Deborah Gordon. This expert testified that the average income for all social workers in the area was $37,500 per year. She concluded, based on her research and the fact petitioner had a degree in social work from the University of Chicago, that she potentially could earn between $18,000 and $44,000 per year.

The former wife also presented Cathy Belamonte Newman as a lifestyle expert. The decision stated:

> Belamonte testified that she gathered information and prepared a report showing "a numerical picture of *** what [S.D.]'s lifestyle would be like today had it remained the same as what she enjoyed during the marriage." She stated that she sought documentation from the current time period as well as from the period just preceding the divorce. Belamonte acknowledged that "the documentation that I was seeking to do that assignment the way that I would typically do it was not available. The records had been destroyed and *** I was not able to obtain them from [the attorneys'] office or from [S.D.]." Instead, Belamonte interviewed petitioner and petitioner provided "a large amount of anecdotal information" including pictures from trips, travel documents, and invitations to social events.

The evidence was that the former husband was a partner at Lock Lord Bissell & Liddell, LLP. He stated that his average income for 2006, 2007, and 2008 was $685,700, a 29.6% decrease from the income used to calculate support in the MSA. He also testified that his income for 2009 from January 1through June 15 was $158,172 and he expected his total income for 2009 would further decrease.

The evidence was that the former wife received a master's degree in social work from the University of Chicago. She was not currently working because to practice independently she needs to pass the licensed clinical social worker (LCSW) examination. She was eligible to take the examination. She acknowledged that the a penalty clause of the MSA was negotiated by the parties to reduce the chance of future litigation. The court also found that the former wife had assets worth in excess of $1 million, including the marital home.

The former husband also hired a vocational expert. His expert testified that current licensed clinical social work jobs in Illinois ranged from $38,000 to $81,000 and [S.D.] was qualified for these positions. She concluded that [S.D.] could earn a mid-$50,000-per-year salary.

In June 2010, the trial court issued an order granting [N.D.]'s petition and denying [S.D.]'s petition. It also found reasonable the inference that "the parties considered all the relevant statutory factors in determining the appropriate unallocated maintenance obligation agreed to between the parties." The trial court then stated: "[a] review of the record shows that not only is [she] seeking an extension of the current $14,500 per month unallocated support obligation, but [she] is requesting that [N.D.]'s obligation be increased by 175% of the $20,000" agreed to in the MSA and four times the $12,605 [S.D.] claimed she needed to support her lifestyle in 2004 according to her affidavit dated August 5, 2004. It found that her request for this sum to support her alone "ignores the fact that the Court found $14,500 monthly unallocated maintenance *** was sufficient to meet the reasonable financial needs of both" [S.D.] and her minor child. It noted that neither party appealed the prior order and further found that "there is no credible evidence contained in the record of this cause which would justify anything remotely near what [S.D.] has requested." The court acknowledged that the July 19, 2007 order required petitioner to file a petition to review support upon Sam's graduation from high school, but the order did not condone a request to increase support "without having a factual basis for such a request."

The trial court concluded that [S.D.]'s "testimony of her purported pre-decree lifestyle [was] not credible as it [was] based on incomplete, inaccurate and unreliable information. Additionally, her testimony is impeached by her representations predecree of her financial needs." The court also gave little weight to Belamonte's testimony since it was based on the same incomplete and unreliable information.

The trial court imputed $37,500 of income to the former wife finding that she did not make a good faith effort to obtain her license (LCSW). Regarding changed circumstances, the trial court found both that the son had been emancipated but that the former husband's income decreased 24% since the unallocated support award. The court found an award of permanent maintenance was appropriate. It further found that $10,000 per month would meet [S.D.]'s reasonable monthly needs and also imputed the annual sum of $37,500 (or $3,125 per month) as "a reasonable sum [petitioner] could generate being employed as a LCSW." Therefore, [N.D.]'s permanent monthly maintenance obligation to [S.D.] would be $6,875 per month. The court applied the award retroactive to February 9, 2009.

Review versus Modification – Substantial Change Not Necessary: The former wife appealed and the appellate court affirmed. The former wife first contended her petition was a petition for review and not one for modification. Accordingly, she urged that she did not need to show a substantial change in circumstances. The appellate court agreed that she was not required to show a substantial change because the hearing was actually a review hearing. The appellate court found that the trial court's error was harmless where it addressed changes in circumstances because it used the same analytical process that courts use in reviewing maintenance generally under the standards of Sections 504(a) and 510(a-5).

The appellate court noted that the former husband (by agreement) was responsible for 100% of the son's college expenses. The appellate court then stated:

> In light of the fact that $14,500 per month was found to meet [S.D.]'s needs before Sam's emancipation, the trial court determined that $10,000 per month was a reasonable sum to meet [S.D.]'s present needs. It also reduced the amount by

> $3,125 per month to reflect the income imputed to her. Therefore, [N.D.]'s monthly obligation to [S.D.] would be $6,875. Although the court found that [S.D.] was rehabilitated, it acknowledged that [N.D.] "will always have a greater earning ability than" petitioner. Considering the statutory factors, the trial court determined "that an award [of] permanent maintenance is appropriate." The trial court did not abuse its discretion in awarding [S.D.] $6,875-per-month permanent maintenance.

The appellate court then stated, “Although the agreement did not refer to [S.D.]'s maintenance as rehabilitative, the provisions of the agreement when viewed together suggest such an intent by the parties. See *Blum*, 235 Ill. 2d at 35.

Proof of Lifestyle During Marriage: A fascinating aspect of the case involves the issue of the *res judicata* potential affect of the order modifying downward the maintenance obligation and whether the former wife could go back to the divorce in establishing lifestyle, etc. The appellate decision stated in a carefully worded and limited decision:

> The trial court took judicial notice of the parties' MSA and the July 2007 order, and the fact that both necessarily took into account the parties' standard of living during the marriage. **The trial court did not err in stating that evidence of the parties' lifestyle during the marriage was *res judicata***. Notwithstanding, upon [S.D.]'s attorney's insistence, the trial court did allow [S.D.] to testify as to the standard of living she enjoyed during the marriage and to present the testimony of Belamonte, although it concluded that it did not find her testimony credible. We find no error here. [Emphasis added.]

Income Averaging to Determine Maintenance: The appellate court then contains an excellent discussion regarding income averaging discussing the *Schroeder*, 215 Ill. App. 3d 156 (1991) which held that the income data did not show a "definitive pattern of economic reversal" justifying the use of income averaging (there six years was used and the appellate court found the income history to be too old to be reliable). In contrast, in *IRMO Elies*, 248 Ill. App. 3d 1052, 1060-61 (1993), the first district appellate court found that using the income average from the past three years was an appropriate method for determining available income for maintenance and support given the facts of that case. The appellate court stated, “We choose to follow *Elies* and find that the trial court did not err in utilizing income averaging to determine [N.D.]'s available income for maintenance.”

***Virdi* – 2014 Trial Court Properly Did Not Consider Former Husband’s Income Withdrawals from his Retirement Account as Income Given Facts of the Case**

IRMO Virdi, 2014 IL App (3d) 130561 (June 24, 2014)

The parties were married in 1970 and petitioned for dissolution of marriage in 1993. A judgment of dissolution was entered in 1998, which included an award of maintenance to the wife. In August 2011, the trial court granted the former husband’s petition to modify maintenance from $10,000 a month to $1,500 a month. The appellate court upheld that decision on unpublished decision. *IRMO Virdi*, 2013 IL App (3d) 120546-U. While that appeal was pending, the former wife filed a petition to modify the $1,500-a-month maintenance award, arguing that a substantial

change in circumstances had occurred since that award was imposed. The trial court denied her petition to modify. The former wife appealed raising two issues: (1) that the trial court abused its discretion in denying her petition to modify maintenance; and (2) the court should award her attorney fees incurred for the present appeal. The appellate court affirmed.

The key issue was a substantial change in circumstances. The appellate court reviewed the facts claimed:

> Narveen claims that a substantial change in circumstances has occurred because she made withdrawals from her retirement account from $219,000 down to $2,500. In addition, Prem continues to withdraw from his retirement account in the amount of $10,000 a month. However, those changes do not constitute a change in circumstances sufficient to result in a modification of maintenance. Narveen's decision to withdraw from her retirement account was a result of her own lack of financial planning. As the court noted in its initial dissolution judgment, maintenance was initially ordered in anticipation of Prem's retirement. "[W]e are reluctant to find a 'substantial change in circumstances' where the trial court contemplated and expected the financial change at issue." Reynard, 378 Ill. App. 3d at 1005. From 2000 to at least September 2009, Narveen was receiving $10,000 a month in maintenance, some of which could have been used to plan for the inevitable reduction in maintenance that would accompany Prem's retirement.

The appellate court also commented:

> In addition, Narveen has not pursued avenues to become self-sufficient. Instead, she has continued to operate the Club and the Institute at a consistent loss, and drained her retirement account to pay the property taxes. Although a party should not have to liquidate assets in order to survive (In re Marriage of Keip, 332 Ill. App. 3d 876, 882 (2002)), the assets in question here operate at a loss and Narveen can no longer afford them. When determining maintenance payments, a court should consider whether a party's situation is necessary or incurred by choice. See *Reynard*, 378 Ill. App. 3d at 1007. Narveen's commitment to community service is laudable, but the Act does not countenance that Prem should subsidize her community service 15 years after the dissolution of their marriage. By analogy, a court would not find a change in circumstances to necessitate an increase in maintenance if a petitioner were to give all his or her assets to charity.

In a key passage the appellate court stated:

> Narveen also points to the distributions Prem has begun taking from his IRA as proof of a change in circumstances. However, Prem's distributions do not qualify as income for the purpose of calculating maintenance. The initial distribution of property took into account the parties' existing retirement accounts. In the years following, Prem chose to supplement his saving by investing his income, while Narveen used her savings to support a business that has not made any profit in over 20 years.

And the appellate court addressed the nest-egg in terms of the property award that the former wife had received:

> The purpose of the Act is to make the division of property the primary means of providing for the future needs of both parties. *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 338 (1999). In the present case, the initial dissolution order provided Narveen with $1.7 million in property. That property has dwindled as a result of Narveen's choice to continue operating the Club at a loss rather than pursuing activities that would provide her an income. Narveen also failed to keep up with the property taxes on her various properties. In addition, for nearly 10 years, Narveen was receiving annual maintenance payments in six figures, which could have been used to prepare for her retirement. That is, Narveen's current situation is the product of her own financial mismanagement and choice. At dissolution, the court awarded her $1.7 million in assets. Additionally, since then Prem has paid her well over $1 million in maintenance. This amounts to a very comfortable "life jacket." She elected to throw off her life jacket and ride a sinking ship into the deepest abyss in the sea. Prem used the assets awarded him in the dissolution wisely; Narveen did not. Prem cannot be held to account for Narveen's business failures 20 years after the divorce.

***Bolte* (2012) – Maintenance Modification: Trial Court Improperly Terminated Award of What Had Been Called Rehabilitative Maintenance**

IRMO Bolte, 2012 IL App (3d) 110791

Seven years before the divorce, the parties learned that the wife, Sue, suffered from myasthenia gravis, a progressive, disabling disease that causes respiratory, circulatory and motor skill problems. Following 27 years of marriage, the court entered the divorce judgment in April 1998 incorporating the parties' MSA. The agreement provides, in relevant part:

> "The Petitioner shall pay the sum of $2,000.00 per month to the Respondent as for *rehabilitative* maintenance, deductible as maintenance payment to the Petitioner and as income to the Respondent, as and for *rehabilitative* maintenance. Said sum shall begin on the 1st day of May, 1998 and shall continue bi-weekly thereafter each month following the entry of the judgment of Dissolution of Marriage, with said notice to the Petitioner's employer.
>
> All maintenance shall be terminated upon the death of either party, or the Respondent's remarriage and/or cohabitation with a person of the opposite sex on a continuing conjugal basis and *may be reviewable upon the Petitioner's retirement*." (Emphases supplied.)

The agreement also includes a waiver, which states: "Except as otherwise specifically provided herein *** the parties are forever barred from asserting any claims against one another *** whether by way of maintenance." (Emphasis in appellate court decision). ~

The former husband retired at age 59 in June 2010. He testified that he took the early retirement to secure more favorable postretirement healthcare benefits. Later, he petitioned the court to

terminate or reduce his maintenance payments to Sue. The former wife countered with a petition seeking permanent maintenance and the ex-husband brought a motion to strike that pleading urging that it was barred due to the waiver language quoted above. On July 28, 2011, the trial court found that Sue was barred from seeking permanent maintenance, but it granting her 10 days' leave to amend her pleadings to state a cause upon which proper relief could be granted and preserving the previously scheduled evidentiary review hearing on September 2, 2011. The appellate then states:

> At the evidentiary hearing, Sue's treating physician of 10 years, Dr. Charles Bruyntjens, testified to Sue's condition over vigorous objection from Terry's counsel. Bruyntjens explained that myasthenia gravis is a disease where Sue's neuromuscular system does not connect, resulting in a decreased or total inability to swallow or eat, and a lack of functioning of the facial and voluntary muscles, including respiratory muscles. A decreased functioning in the respiratory muscles sometimes requires Sue to be hospitalized and placed on life support. Bruyntjens further testified that any strenuous activity, stress and infections can cause her muscles to work harder, and then give out entirely. This included any repetitive movement, including that of the type required at a doctor's office. In his medical opinion, Dr. Bruyntjens stated that Sue was unable to maintain any kind of gainful employment at the time, and her condition and symptoms would be ongoing for the rest of her life. Following the doctor's testimony, evidence was elicited from both Sue and Terry as to their respective incomes, assets and debts. The trial court terminated Terry's maintenance obligation in its October 12, 2011, order.

The trial court reasoned that the diagnosis and prognosis were known nearly seven years before the time the parties entered into their marital settlement agreement. The court found that rehabilitative maintenance was necessarily temporary in nature, placing the burden on Sue, as payee, to "seek appropriate employment and the capability to perform employment." The court referenced Sue's testimony, indicating her only efforts to become self sufficient were in seeking employment within her previous profession as a nurse, ignoring the possibility of finding work she was capable of performing in some other position.

Regarding the decision reached by trial court the appellate court stated:

> The court interpreted Sue's pleadings as a request to reform the contract and change the agreed upon rehabilitative maintenance to permanent maintenance nearly 13 years after the fact. The court declined such reformation, noting that in reaching an agreement specifically for rehabilitative maintenance, the parties ostensibly believed that Sue had a realistic likelihood of being able to work and improve her earning capacity before Terry retired. Moreover, the court would not allow reformation where the valid and enforceable marital settlement agreement contained a waiver provision prohibiting both parties from asserting additional claims for maintenance or property. It concluded that on the day the parties entered into the agreement, Sue made a knowing and voluntary relinquishment of all remaining rights against Terry for permanent maintenance or property.

The critical portion of the appellate court's decision stated:

> Here, the trial court's recitation of the definition of "rehabilitative" is unpersuasive. We are of the view that if it walks like a duck and talks like a duck, it is a duck, notwithstanding the fact that it is wearing a cap and sunglasses. In honing in on the word "rehabilitative," the trial court locked in on the cap and sunglasses while refusing to look and see what was wearing them. Certainly, neither the parties nor the court could have reasonably believed that it would take Sue nearly 20 years to rehabilitate. At the time the judgment of dissolution was entered, Terry was 45 years old and the maintenance award was reviewable upon his retirement. If Terry had retired at 65, that would be 20 years of "rehabilitative" maintenance. Even in taking an early retirement at 59, Terry continued to pay Sue to "rehabilitate" for 14 years. If actions speak louder than words, then Terry's continued payment until his retirement screams that he did not view this as rehabilitative maintenance. The trial court's construction of this maintenance agreement flies in the face of the traditional understanding of rehabilitative maintenance, where the underlying policy is "to sever all financial ties between the former couple in an expeditious, but just, manner and make each spouse independent of the other as soon as practicable." *In re Marriage of Carpenter*, 286 Ill. App. 3d 969, 973 (1997) (citing *In re Marriage of Ward*, 267 Ill. App. 3d 35, 42 (1994)).

After reviewing certain case law the appellate court stated:

> The holding in *Blum* supports the proposition that the label attached to a maintenance award has to be viewed contemporaneously with all other provisions of the marital settlement agreement to determine the parties' intent. Terry and Sue essentially described and agreed to a permanent maintenance award labeled as rehabilitative maintenance. Placing the adjective "rehabilitative" in front of the term "maintenance" does not necessarily render it rehabilitative. This is especially true when it was to continue without limitation for a contemplated period of 20 years, at which point it could be reviewed to determine if an increase, reduction, or complete termination was warranted. The parties knew that Sue's condition would deteriorate and that her likelihood of returning to the workforce in any meaningful capacity was slim. Indeed, Sue was already receiving social security disability benefits at the time of dissolution. In agreeing to such an award, it is clear the parties realized Sue would never be able to support herself or maintain the standard of living to which she had become accustomed during the marriage.
>
> Perhaps even more telling is the fact that Terry and Sue did not agree on a fixed period when the award would terminate or become reviewable. Rehabilitative maintenance is generally paid for a fixed period after which it terminates, thereby presumably allowing the recipient to become "rehabilitated" and able to support herself. This agreement contained no such provision. It did not state that after a certain amount had time lapsed, the parties would come back to court to determine if Sue had been diligently seeking appropriate employment in an effort to become self-sufficient. It did not state that Sue's maintenance award would automatically terminate after a definite number of years. Instead, the parties agreed that upon Terry's retirement (anticipated at the time to be nearly two

decades later), they could petition the court to review the award and presumably make a determination about the parties' relative financial needs. Common sense dictates that an award of maintenance that would terminate only upon death, remarriage, or cohabitation and first reviewable on a date anticipated to be 20 years down the road is not, and was not, rehabilitative maintenance. This is especially true when the parties to the agreement knew that the recipient of the award has an incurable, progressively debilitating disease.

While the trial court based its decision on certain waiver language, the appellate court stated that:

> We find the trial court's characterization of the waiver provision erroneous based on the preceding analysis of the maintenance award and the terms of the agreement itself. The parties agreed to permanent maintenance, and such awards can be reviewed, modified and terminated. See *In re Marriage of Selinger*, 351 Ill. App. 3d 611, 617 (2004). The waiver provision provides, "[e]xcept as otherwise provided herein *** the parties are forever barred from asserting any claims against one another *** whether by way of maintenance." (Emphasis added.) The parties did, in fact, "otherwise provide" for maintenance within the marital settlement agreement. The waiver provision is inapplicable.

Golden (2005) – <u>Maintenance Payor Did Not Have to Show Change in Circumstances Where Maintenance Review Sought Even Where Potential Relief Included Termination of Payments</u>

IRMO Golden, 358 Ill. App. 3d 464 (Second Dist,. 2005).
Golden addresses the issue of whether maintenance was a review or a modification in a case where the language in the marital settlement agreement was ambiguous as to the nature of the maintenance payments in terms of burden of proof, etc. The MSA stated that "[m]aintenance shall be non-modifiable for three years and may only be reviewed no sooner than thirty-six (36) months after the first payment." Approximately three years later, respondent petitioned to review or terminate maintenance. After hearing the trial court found that the ex-husband did not have to prove a substantial change in circumstances. Based upon its reading of the provisions of Section 510(a-5), the Second District appellate court affirmed (with a dissent).

The appellate court noted that, " Effective January 2004, our legislature amended section 510(a) of the Act, deleting the phrase 'and, with respect to maintenance, only upon a showing of a substantial change in circumstances.' See 750 ILCS 5/510(a)." The language of Section 510(a-5) then provides that, "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..." (Emphasis added.) The case stated:

> Turning to whether the agreement in this case contemplated a review of maintenance, we note that the agreement mentions both modification and review. The agreement further proscribes that neither modification nor review can occur before three years. However,

> with respect to the potential for a review hearing, the agreement states that review shall occur "no sooner than" 36 months after the first payment. We believe that the use of the phrase, "no sooner than," indicates that the parties contemplated that a review would in fact occur at some time after the 36 months passed. Therefore, we find that the agreement authorized respondent to bring a petition for review after the 36 months had passed.
>
> We find it important to point out that the characterization of the hearing that is the subject of this case was made more difficult by the inartful drafting of the agreement.

The court also cited Illinois case law which emphasized that when the court sets a review, good drafting will advise the parties who has the burden of going forward, who has the burden of proof, and what issues will be addressed. The case states that if rehabilitate maintenance is ordered, an appropriate agreement or judgment would provide that maintenance would continue only if the recipient has shown "good faith in seeking education or employment or proves the need for continued maintenance." If pleadings are required, this should be stated. The majority then stated, " In this case, the parties' agreement, which was incorporated into the judgment, did not attempt to limit the scope of the review proceedings. Thus, we find that the parties' intent, and the intent of the court, was that a general review of maintenance could occur after the 36-month time period had passed."

Rodriguez (2005) **– Maintenance Which is Reviewable Within Four Years Does Not Terminate at End of Period**

IRMO ***Rodriguez***, 359 Ill. App. 3d 307 (Third Dist., 2005)

In this 1999 judgment, maintenance was "reviewable within four years." Slightly more than four years after the divorce decree, the ex-husband moved to terminate the withholding order claiming he had satisfied his maintenance obligation. The trial court concluded that it lacked jurisdiction to review maintenance, ordered termination of withholding order for maintenance and ordered wife to reimburse the ex-husband for the overpayment. The appellate court reversed the trial court's orders and found that the provision for review of maintenance made it rehabilitative maintenance, which was reviewable at any time until court has conducted a hearing. Once again the appellate court stated:

> We agree with the court in *IRMO Culp*, when it stated that in setting review hearings it would be preferable for the court to advise the parties who has the burden of going forward, who has the burden of proof, and what issues will be addressed. *IRMO Culp*, 341 Ill. App. 3d 390, 396-97 (2003). Nevertheless, it is our view that anytime the court provides for maintenance reviewable after a time specified, the court retains jurisdiction to review the maintenance until one or both of the parties petitions for review. Upon review the trial court can consider whether maintenance should continue and if so, whether the amount should be increased or decreased. Until a party petitions for review, the maintenance award shall continue as ordered.

OTHER MAINTENANCE CASE LAW

Amount of Maintenance:

***Dowd* (2013) – Cap on Bonuses for Payment of Maintenance was Proper**
IRMO Dowd, 2013 IL App (3d) 120140 (June 20, 2013)
This case did not address the issue of whether maintenance should have been indefinite or subject to review. The husband in that case had been employed as director of operations for City Beverage Illinois and had been employed by City Beverage, since 1984. His base salary from 2006 through 2010 had been $150,000, but in April 2011, it increased to $165,000. According to the husband's testimony, he earned $290,000 in total gross income for 2010, including $145,000 in gross bonuses. He testified that he had been eligible *to receive a bonus of up to $100,000 each year*.

The trial court provided that the husband would pay $6,100 per month as maintenance for the next five years and reviewable thereafter. In addition, the court decided that Sharon should receive 50% of Michael's annual bonuses up to $50,000, 20% of his annual bonuses between $50,001 and $100,000, and no portion of his annual bonuses above $100,000.

The former wife appealed urging that the trial court abused its discretion by awarding her only 20% of Michael's bonuses between $50,001 and $100,000 per year, and failing to award her any share of Michael's bonuses exceeding $100,000. The appellate court affirmed. The fixed monthly amount of maintenance was $6,100 and neither party appealed that portion of the judgment. The appellate court noted, "With regard to Michael's annual bonuses, the trial court noted it had reviewed this case "very seriously" and developed a graduated approach to Michael's bonuses as an incentive to encourage Michael to maintain his productivity because he would enjoy a larger share of his bonuses." The appellate court then commented, "Based on our careful review of the record, we conclude the court's decision to allow maintenance to be based on a fixed amount plus a graduated percentage of Michael's annual bonus involved a thoughtful, well-reasoned approach, that was fair to each party. Therefore, we conclude the trial court did not abuse its discretion in this case."

***Wojcik* (2005) – Consideration of VA Benefits**
Wojcik v. Wojcik, 362 Ill. App. 3d 144 (Second Dist., 2005)

Wojcik addressed consideration of VA benefits in awarding maintenance. The trial court had stated that while "the *Crook* case may under certain circumstances result in inequities, as commented on by the Illinois Supreme Court, there is no reason for this Court to seek inequities by ignoring the reality of the benefits received by [Paul] on the issue of his right to receive maintenance from [Karen]." The ex-husband argued that the trial court's consideration of his receipt of disability benefits in ruling upon his petition for maintenance violated federal preemption principles. The appellate court then commented that, "the reviewing courts of numerous other states have held that a trial court may properly treat a veteran's present and future disability benefits as income in determining the veteran's obligation to pay alimony or maintenance." "These courts have held that the anti-attachment provisions of section 5301(a)(1) do not shield a veteran's benefits from being considered in an alimony or maintenance proceeding because a spouse seeking maintenance is not a "creditor" under the statute but is instead seeking family support. The appellate court VA maintenance issue concluded, "In our view, these authorities provide a compelling basis for concluding that a trial court *may consider*

a former spouse's present and anticipated disability benefits in determining the issue of maintenance.

***Wojcik* (2005) – Improper General and Indefinite Reservation of Maintenance**
Another issue in the case was the court's general reservation of the entire maintenance award -- until the statutory termination events (remarriage, conjugal cohabitation). The husband argued that because he had been found to be permanently disabled no maintenance should have been awarded. However, the appellate court found that the trial court properly reserved maintenance due, in part, on the testimony of a physician's that the husband's disability may subside sufficiently to allow him to return to employment.

But the appellate court reversed the general / indefinite reservation of maintenance:

> While we conclude that no abuse of discretion occurred in the trial court's decision to reserve ruling upon the issue of maintenance, we do believe that the manner in which the trial court reserved the matter was *impermissibly open-ended and vague*. When utilizing a "reserved-jurisdiction" approach to maintenance, this court has cautioned against reserving jurisdiction for excessively long or short periods of time. See *Marriott*, 264 Ill. App. 3d at 41. Previously, we disapproved of a reservation of maintenance for five years, finding that such a lengthy period tended to protract the litigation and did not encourage the dependent spouse to move towards self-sufficiency. See *In re Marriage of Scafuri*, 203 Ill. App. 3d 385, 397 (1990). Conversely, we have indicated that too brief a period of reserved jurisdiction would encourage the supporting spouse to delay efforts to become gainfully employed or otherwise improve his or her financial condition. *Marriott*, 264 Ill. App. 3d at 41.
>
> Here, the trial court placed no specific time period upon its reserved jurisdiction. Instead, the trial court ordered Paul to make annual reports to Karen about the status of his disability. This process was to continue until the parties' deaths or retirement, or upon Karen's remarriage or cohabitation. We believe that such a process is excessively protracted and vague and will almost certainly result in contention between the parties and future protracted litigation. We also believe that such a reservation will result in the difficulties previously noted by this court in *Scafuri* and *Marriott*. We thus vacate the trial court's order reserving jurisdiction over the issue of maintenance and remand the case with instructions that the trial court set a specific date to hold a hearing to rule upon the issue of Karen's request for maintenance. See *Marriott*, 264 Ill. App. 3d at 41. In setting a hearing date, the trial court shall select a reasonable time period based upon the principles above. At the time the trial court conducts such a hearing, it must also determine the parties' incomes in conformity with the governing law detailed above.

***Walker* (2008) - Life Insurance to Secure Maintenance - But See New Statutory Law**
IRMO *Walker*, 899 N.E.2d 1097 (4th Dist. 2008)
Walker is discussed above regarding the permanent maintenance award. *Walker* held that the trial court did not err in requiring the husband to maintain life insurance as security for the maintenance obligation. The legislation (effective January 1, 2012), has since been amended to specifically allow insurance to secure maintenance. So, this discussion will be limited to

instructive elements regarding the decision. The appellate court quoted with approval the language from the trial court's decision:

> In a particular case, the trial court may appropriately limit how long the policy must be kept in force. A court may appropriately order the use of a term policy, not a whole-life policy, although another solution may be to recognize the asset value of the whole-life policy in the division of assets. In fact, the court here recognized the gross disparity of income, Barbara's bare-bones budget, David's putting away $1,000 a month in a 401K, and the parties' lifestyle. The court balanced the equities, accounted for contingencies, and adjusted maintenance down for college expenses and retirement. The court recognized that maintenance ends upon death and chose to secure that maintenance with life insurance, stating, "My biggest concern about maintenance is, ma'am, if I were to award you the maintenance and he would, unfortunately, walk out here and get hit by a car, the maintenance is gone, because it ends upon his death."

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Updated: May 26, 2016
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