Current Trends and Strategies in Illinois Family Law

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Recent Trends in Illinois Family Law: Maintenance Guidelines, Same-Sex Marriage, and Attorney Fees

Family law in Illinois, as well as elsewhere in this country, is an ever-changing landscape. One of the hottest topics in Illinois involves passage of S.B. 3231, establishing guidelines for maintenance/alimony. Effective January 1, 2015, the Illinois General Assembly modified the Illinois Marriage and Dissolution of Marriage Act to provide for guidelines for the awarding of maintenance. Previously, there were no such guidelines in this area.

Another major trend both in Illinois and in the rest of the nation revolves around same-sex marriages. By the time you read this, I fully expect the United States Supreme Court to have ruled on whether states are able to prevent same-sex marriages. I am certain that the US Supreme Court will declare that states cannot ban same-sex marriages anywhere in the United States based on the Equal Protection Clause of the Constitution.

Finally, a disturbing trend has been creeping into Illinois law regarding Illinois attorneys' fees and "leveling the playing field."

The New Spousal Maintenance Rules for Determining Alimony

In 2014, the Illinois General Assembly passed S.B. 3231, which became effective January 1, 2015, amending the maintenance provisions of the Illinois Marriage and Dissolution of Marriage Act, Section 504.[1] This new legislation established guidelines relative to a guidelines formula for calculating the amount and the length of a maintenance award if the court determines that maintenance is appropriate. The complete text of the new legislation is set forth in Appendix H. While the new legislation does not amend the criteria for the court to consider as to whether there should be an award of maintenance in the first place, *see* Entitlement to Maintenance. The statute now has provisions on the "Amount and duration of maintenance."[2]

It should be noted that the statutory factors that applied before the passage of the current statute, which aid in determining whether maintenance

[1] Illinois Marriage and Dissolution of Marriage Act § 504.
[2] 750 ILCS 5/504(a); 750 ILCS 5/505 (b-1 to b-7).

should be awarded in the first place, have not changed. The court can grant either temporary or permanent maintenance for either spouse in amounts and for periods as the court deems just, not taking into consideration any marital misconduct. Also, the maintenance award can be awarded either in a gross amount or for a fixed or indefinite period, and the maintenance may be paid from the income or property of the payor spouse.

The factors that the court is to consider in determining whether there should be an award of maintenance include:

- The income and property of each spouse
- The needs of each party
- The present and future earning capacity of each party
- Any impairment of the person seeking the maintenance due to domestic duties
- The time required to acquire appropriate education and training to earn a living
- The standard of living during the marriage
- The length of the marriage
- The age and physical and emotional condition of both parties
- Any tax consequences with respect to division of property
- The contributions and services by the party seeking maintenance to the marriage
- Any valid pre-nuptial or post-nuptial agreements

The court is not allowed to order unallocated maintenance and child support. Of course, the parties can agree to such an arrangement, but the court cannot order it. One advantage that we have been using for years in awarding unallocated maintenance and child support is found in a situation where the breadwinner is not the custodial parent of the children. Typically, in these situations, the husband is working while the wife stays at home to raise the children, and she has no other income. In those circumstances, it is advantageous, from a tax point of view, to award unallocated maintenance and child support.

An unallocated maintenance and child support award is simply an amount with no distinction as to how much is maintenance and how much is child

support; this allows the payor—typically the husband—to deduct what he pays to the wife from his taxes. At the same time, the wife must include those payments as income on her tax return; whereas, if she received only child support, those payments would not be includable in her taxable income, and only the maintenance would be taxable to her. Maintenance is always considered taxable income, and the same rule applies to unallocated support.

The reasoning behind this rule involves different tax brackets: because the payor is typically in a higher tax bracket, he or she can deduct the payments to the recipient, who is in a lower tax bracket or may not be paying any tax at all based on the number of exemptions he or she has and any other available itemized deductions. Thus, the tax savings can be passed on for the benefit of the family.

New Guidelines

The new formula used in applying maintenance guidelines in a family law case is both simple and complex. It is important to keep in mind that the new maintenance guidelines are just that—guidelines—and a court can deviate from those guidelines by either increasing or decreasing the amount of maintenance. Should a court choose to deviate from the statutory guidelines, it may do so after consideration of all of the relevant entitlements to the maintenance factors listed in §5/504(a).[3]

When awarding guideline maintenance, the court is required to make a finding stating the reason for the guideline award with reference to the specific relevant Section 504(a). If the court deviates from those guidelines, it must state in its findings the amount of maintenance (if determinable) and duration required under the guidelines and the reasons for the variance. (*See* 750 ILCS §5/504(b-2).)[4] The inclusion of the Section 504(b-2) findings requirement is apparently to give a court of review insight into why a trial court followed or chose not to follow maintenance guidelines.

It is obvious to me that the legislators who proposed this legislation believed that current maintenance awards by trial courts were often

[3] 750 ILCS 5/504(a).
[4] 750 ILCS 5/504(b-2).

arbitrary and difficult to overturn on appeal, given the standards for review and abuse of discretion or against the manifest weight of the evidence. Perhaps there was also a movement afoot to ensure that appellate attorneys had full employment. Unlike child support guidelines that were enacted in all states in this country because of an underlying federal mandate (loss of federal aid to a state unless child support guidelines were enacted), there was no such federal compulsion for this piece of legislation. As happens all too frequently in family law cases, a litigant believes, rightly or wrongly, that his divorce went poorly and that he might convince his representative to "fix" the law to right that litigant's perceived inequity. As is discussed further in this section, the fix may, in fact, create many more problems than anticipated.

The Amount and Duration of Maintenance Formula

Amount: Once the court considers all of the relevant factors specified in Section (a), Entitlement to Maintenance, and determines that a spouse is in fact entitled, then the court needs to look at the requirements specified in Sections (b-1) through (b-7) of Section 5/504[5] in setting an amount and duration.

First, the guidelines apply only when the combined annual gross income of both spouses is less than $250,000 and no multiple family situations exist, §5/504(b-1)(1).[6] If the couple's incomes equal a qualifying number, then the amount of maintenance is calculated by subtracting 20 percent of the recipient's gross income from 30 percent of the payor's gross income; however, the maintenance award, when added to the recipient's gross income, may not result in the recipient's total gross income to be in excess of 40 percent of the combined gross income of both spouses, §5/504(b-1)(1)(A).[7] The exact language in the statute does not specify what is to occur if that combined maintenance (as determined by the formula) plus the recipient's gross exceeds the combined 40 percent of gross; however, a fair interpretation would be that the formula maintenance award is reduced so as not to exceed 40 percent of the combined incomes.

[5] 750 ILCS 5/504(b-1 to b-7).
[6] 750 ILCS 5/504(b-1)(1).
[7] JE: 750 ILCS 5/504(b-1)(1)(A).

Duration: The duration of the maintenance awarded under the formula specified in §5/504(b-1)(1)(A) is to be calculated by multiplying the length of the marriage by statutorily specified factors (percentages):

Duration of Marriage	Factor (percentage)
0-5 years	20%
5-10 years	40%
10-15 years	60%
15-20 years	80%

If the marriage is more than twenty years in duration, the statute gives the court discretion to order either permanent maintenance—which is permanent only in the sense that there is no fixed termination date; however, it is modifiable pursuant to §750 ILCS 5/510)—or for a period equal to the length of the marriage, §5/504(b-1)(1)(B).[8]

Unanswered Issues: The statute sets the length of the marriage as a determining factor for the duration of maintenance. But at what point do you determine the length of the marriage: the date the Petition for Dissolution was filed or the date of entry of the Judgment for Dissolution of Marriage? A hint may be Section (b-4) dealing with fixed-term maintenance in marriages of less than ten years that uses language "cases commenced before the tenth anniversary of the marriage."

Also, at what point do you apply the different percentages? Five years can be 20 percent or 40 percent. If the formula results in a percentage greater than 40 percent, does the court limit the award to 40 percent, or does it find the statute does not apply?

Will a court still use guidelines in high-income divorces (more than $250,000 combined) under a theory that even though the statute does not technically apply, the statute still provides a rational way to calculate amount and duration? It is my opinion that at the very least, in high-income cases, the court will follow the duration guidelines (for example, a marriage in excess of twenty years will result in permanent maintenance).

[8] 750 ILCS 5/510; 750 ILCS 5/504(b-1)(1)(B).

A suggested strategy, if you represent a spouse seeking maintenance in a high-income marriage, is to argue the statutory guidelines for both the amount and duration, on the likelihood that a reviewing court would not reverse a trial court using the guidelines as a model.

Another unanswered issue involves multiple family situations. What happens if there is a multiple family, but the maintenance payor is not under any support order or obligation to the other family? What if the potential maintenance recipient is receiving child support from a prior marriage—do those funds count in the formula? What about reviews of maintenance under Section 510—will the new guidelines apply? How does this new law apply to rehabilitative or reviewable maintenance? Do those types of maintenance still exist? Do guidelines apply to reviewable maintenance when the time comes to review? Many unanswered questions are raised under this new statute, especially in areas of post-judgment proceedings, which I shall leave to the fertile minds of practitioners to consider.

The new statute does not modify the determination of whether maintenance is appropriate in the first place. In all cases, the court first needs to determine whether a maintenance award is appropriate after considering all relevant factors, which have not changed from the previous law. If the court determines that a maintenance award is appropriate, the court will order maintenance and then look to the new statute for guidance. The new statute mandated the court must state its reasons for awarding or not awarding maintenance, and it is required to refer to the relevant statutory factors. Also, if the court deviates from the statutory guidelines, it is required to state its reasons for doing so. Should the court order a deviation from guidelines, the new law requires the court to state what the amount of maintenance and the duration would have been if the guidelines had been followed, together with the reasons for any variances from those guidelines.

Same-Sex Marriages

In 2013, the Illinois General Assembly passed the Illinois Religious Freedom Protection and Civil Union Act,[9] which provided for civil

[9] Illinois Religious Freedom Protection and Civil Union Act, 750 ILCS 75/1 *et seq.* JE: Note to DE – I am showing this effective in 2011, with amendments for some sections in 2014: Illinois Religious Freedom Protection and Civil Union Act, 750 ILCS &ss; 75/1 et seq.

unions—but obviously, civil unions do not have the same legal effect as marriage. The state law allowing for civil unions affected only certain aspects of life for same-sex couples in Illinois; it did not apply to the filing of federal income tax returns or other federal law-related issues. In February 2014, a federal court in Chicago declared Illinois' ban on same-sex marriages unconstitutional. As of June 1, 2014, all counties in Illinois have issued marriage licenses to same-sex couples. Today, same-sex couples can now get married and enjoy all of the privileges that heterosexual couples have—and that is important both from an equal protection under the law point of view and from a fairness point of view.

At this time, there is no advantage to entering into a civil union when same-sex couples can enter into a marriage. But if you are getting a divorce, it does not matter whether you are in a civil union or a marriage; when a civil union dissolves, you can still divide the partners' property, as it is considered marital property. The same factors also apply when setting maintenance, attorneys' fees, and child support. From a divorce lawyer's point of view, there is no significant difference between a civil union and a same-sex marriage in this state.

Currently there is a growing acceptance, both in Illinois and in the rest of the country, of same-sex marriages; whereas, previously, same-sex relationships were illegal in many states. In addition to Illinois, many state laws banning same-sex marriages have now been declared unconstitutional, and the issue is, as I write this, before the US Supreme Court. I do not intend to go further into this subject because by the time you read this, the Supreme Court will have ruled on the matter, and I anticipate the Court will declare that same-sex marriages cannot be banned in any states.

Paternity

I have not seen any recent significant changes under the law with respect to genetic testing in family law cases. For many years, we have been able to identify the biological mother and father of a child to an almost 99.9 percent degree of certainty with respect to either the inclusion or the exclusion of a person as a biological parent. Genetic testing has evolved to such a high degree of medical certainty that courts readily accept test results, and there are few, if any, challenges to the DNA test results.

Leveling the Playing Field

So-called leveling the playing field legislation is an attempt by the legislature in Illinois to allow a non-moneyed spouse's attorney's fees to be paid by the moneyed spouse so that the non-moneyed spouse has the same access to legal services as the moneyed spouse. The non-moneyed spouse can petition for temporary, interim, or permanent attorney fees to be paid by the other side. The statute says that these payments are, in effect, a pre-distribution of the marital estate to allow equal access to legal services.

I believe that there have been some unfortunate inequities stemming from this statute because it was based on the assumption that the moneyed spouse was also going to be paying for his or her own attorney's fees out of the marital assets. In fact, there has been a case where a court has ordered the disgorgement of attorney fees even though those fees were not paid by the spouse but were actually a gift to him from his family. In the case of *In re Marriage of Earlywine* (Illinois, 2013) the Illinois Supreme Court affirmed an appellate court ruling affirming the trial court's order requiring the husband's attorneys to disgorge 50 percent of the $8,000 retainer they were paid by the husband's parents that had been designated as "an advance payment retainer." The appellate court held that the plain language of the law[10] permits a trial court to order disgorgement of retainers previously paid to an attorney in the event it finds both parties lack the ability and financial resources to pay reasonable attorneys' fees and costs. Further, allowing a party to use an "advance payment retainer" would defeat the purpose of leveling the playing field.

The Supreme Court agreed and found in this case that the advance payment retainer was set up specifically to circumvent the level the playing field rules and that these types of retainers in divorce cases are subject to disgorgement. In my opinion, both the appellate court and the Supreme Court failed to take into account two factors: first, that the funds being disgorged were not "marital property" and never could be considered as a pre-distribution of marital funds and, second, that there is no mention as to whether the $8,000 retainer paid had been depleted. If in fact the $8,000 had been expended, a disgorgement order would require an attorney to pay

[10] 750 ILCS 501(c-1)(3); 750 ILCS 5/501(c-1)(3).

money out of his own pocket, taking the attorney's property in violation of due process.

The entire "level the playing field" argument is based on a naïve assumption that life is fair. Allowing courts to divide marital property is one thing, while attempting to divide non-marital property or third parties' property is entirely another. In the *Earlywine* case, the husband's parents paid his attorney directly, and it can be assumed they never would have done so if they had known that half the money paid was going to be ordered to be paid to their daughter-in-law's attorney.

Key Decisions in Illinois Family Law Cases

Custody

Doctrine of Equitable Adoption in the Context of Child Custody: *In re Parentage of Scarlett Z.-D.*, 2015 IL 117904 (March 19, 2015),[11] DuPage County

A Slovakian woman and an American man were engaged to be married in 2001. During a visit to Slovakia in 2003, the woman met a young orphan girl, and the couple decided to bring her into their lives. Under Slovakian adoption law, the man could not adopt the girl because he was neither Slovakian nor married to a Slovakian, so the couple decided that the woman would adopt the girl. The man financially supported the adoption and traveled multiple times to Slovakia during the yearlong process. After the adoption was completed and the three returned to the United States, they lived together as a family, with the man paying all family expenses; the girl referred to him as "Daddy." However, the couple never married, and the man neither domesticated the Slovakian adoption in Illinois nor attempted to adopt the girl under Illinois law.

When the couple broke off their engagement in 2008, the mother took the girl with her. The man filed a petition for declaration of parental rights, alleging that he was the girl's *de facto*, equitable, and psychological parent, and that he stood *in loco parentis* to her. In his six-count petition, he sought in Count I a declaration of parentage and an order granting him and the

[11] *In re Scarlett Z.-D.*, 2015 IL 117904, 390 Ill. Dec. 123, 28 N.E.3d 776 (Ill. 2015).