

## **Alimony Buffet, What's on the Menu?**

### **MAINTENANCE OVERVIEW AND TAX CONSEQUENCES**

**BARRY A. SCHATZ, ESQ.**

**KAREN P. HITZEMAN, ESQ.**

KALCHEIM, SCHATZ & BERGER

161 N. CLARK STREET; SUITE 2800

CHICAGO, ILLINOIS 60601

(312) 782-3456

email: bschatz@ksbfamilylaw.com

### ***INTRODUCTION:***

Maintenance, or the furnishing by one person to another, for his or her support, of the means of living, or food, clothing, shelter<sup>1</sup>, is one of the most complex aspects of the divorce process – or -- one of the meatiest selections at the buffet table. Of course, there are a variety of cuts of maintenance that range from very lean (temporary maintenance) to prime (permanent maintenance). However, before one selects a particular choice, numerous factors must be carefully weighed and considered, such as, the amount and basis for the award, the duration of the award, whether or not the award will be fixed or reviewable, and if so, the conditions, whether precedent or subsequent, and the tax impact thereon. This article provides a general overview of the various types of maintenance (also known as alimony), the methodologies utilized by the courts in various jurisdictions to determine a maintenance award and the resulting income tax ramifications.

Typically, the level of property awarded to the spouse seeking support, along with the income generated from that property distribution, is directly relevant to the determination of the amount and duration of a maintenance award. Following a divorce, maintenance is awarded to one spouse when he or she is unable to meet the costs of living from his or her individual income from all sources. The overwhelming theory employed by courts when dividing property in a

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<sup>1</sup> Black's Law Dictionary, 953 (6<sup>th</sup> Ed. 1990).

dissolution proceeding is that property should be divided equitably, or, in just proportions. This concept is based on the theory that marriage is a shared enterprise or a partnership.<sup>2</sup> Although property may be awarded in lieu of maintenance, maintenance is not awarded in lieu of property.<sup>3</sup>

The determination of a maintenance award is governed by state statute and case law. The amount and duration of a maintenance award are within the trial court's discretion and generally will be reversed only if the appellate court determines that the decision was an abuse of discretion.<sup>4</sup> The majority of state statutes governing maintenance may be broken down into two parts: the first portion of the majority of statutes contains a statement granting the court the discretion to award specific types of maintenance for a set amount and for a specific time period; and the second portion of the statutes often contains a list of factors that the court may or must consider in making its determination.<sup>5</sup> In fact, the overwhelming majority of states, 41, require the trial court to examine specific factors before making a maintenance award.

The first portion of the statutes set forth the specific types of maintenance that are available (i.e., permanent maintenance or alimony in gross payable either in a lump sum or in installments) and the duration of the maintenance awards (i.e., lifetime, for a fixed period or

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<sup>2</sup> *Goller v. Goller*, 758 S.W.2d 505 (Mo. Ct. App. 1988); *In re Marriage of Komnick*, 84 Ill.2d 89, 417 N.E.2d 1305 (1990); *Lacey v. Lacey*, 173 N.W.2d 142, 45 Wis.2d 378 (1970); *In re Marriage of Mahaffey*, 206 Ill.App.3d 859, 564 N.E.2d 1330 (5th Dist. 1990); *In re Marriage of Kennedy*, 214 Ill.App.3d 172, 573 N.E.2d 1357 (1st Dist. 1991).

<sup>3</sup> *In Re Marriage of Brackett*, 309 Ill.App.3d 329, 722 N.E.2d 287 (1999).

<sup>4</sup> *Ellis v. Ellis*, 75 Ark.App. 173, 57 S.W.3d 220 (2001); *Kiniry v. Kiniry*, 71 Conn.App. 614, 803 A.2d 352 (2002); *In re Marriage of Carpenter*, 286 Ill.App.3d 969, 677 N.E.2d 463, 222 Ill.Dec. 260 (5th Dist. 1997). *But cf.*, *In Re Marriage of De Cenzo*, 433 So.2d 1316 (3d Dist. Fla. 1983)(holding that the classification of alimony as rehabilitative, rather than permanent, presents question of law, and application of correct legal rule is not matter of discretion; review, is thus not restricted to abuse of discretion.).

<sup>5</sup> "Awarding maintenance is a two-step process. First the trial court must find that the spouse seeking maintenance lacks sufficient income, either through property or employment, to provide for her reasonable needs. (*citation omitted*). If the threshold question is not answered in the affirmative, then the inquiry must end. *In Re Marriage of Holden*, 81 S.W.3d. 217,(Ct.App. So. Dist. 2002). If the threshold question in answered in the affirmative, then the inquiry continues with an analysis of Missouri's factors.

subject to conditions such as death, remarriage, cohabitation or reviewable subject to a spouse obtaining gainful employment). Additionally, it is typically this portion of the statute that deals with whether or not a spouse's fault or misbehavior is to be considered. Surprisingly, more than half of the states (29) require a consideration of fault in determining maintenance. The second portion of the statutes typically include the list of factors the courts are required to consider in making a maintenance determination. This article examines first the types of maintenance awards available, the various structures surrounding both the amount and duration of the award, and the tax consequences associated with maintenance awards. The remainder of the article is followed by a full discussion of the various factors used in the maintenance determination process and case law interpreting these factors.

#### ***MAINTENANCE AND TAXATION:***

The taxability and deductibility of maintenance payments are governed by sections 71 and 215 of the Internal Revenue Code ("IRC"). For alimony or maintenance payments to be deductible to the payor and taxable to the payee, they must meet all of the elements set forth in section 71 of the IRC. Just to meet the criteria for maintenance under a state statute is not enough if any of the IRC requirements are missing. Set forth in the Appendix of this article includes a copy of the relevant sections of the IRC. Generally, the requirements may be summarized as follows:

- (1) The alimony payment must be received pursuant to a divorce or separation agreement (including a valid interim support order) (i.e., there must be a legal obligation to make the payments). A voluntary payment or payments made pursuant to an oral agreement from one spouse to the other will not qualify as deductible support.

- (2) The payments must be made in cash or in a cash equivalent, including checks or money orders payable upon demand. The transfer of services or property between spouses (including transfer of a third-party debt instrument or an annuity contract) do not qualify as alimony. Notwithstanding, it is possible for payments made to a third party on behalf of the payee-spouse, rather than to him or her directly, to qualify, so long as the parties' intentions for the payment to qualify as alimony are reflected in a divorce or separation instrument. For example, if a spouse pays the rent on behalf of the other spouse, the payment to the landlord may qualify if the foregoing conditions are met.
- (3) The payee spouse and the payee spouse are not members of the same household at the time the payments are made. Physical separation within a single dwelling unit is not sufficient. However, there are some important exceptions to this requirement, such as interim support orders. Payments under a temporary support order can qualify as alimony even if the parties are living together when the payments are made.
- (4) The obligation to make payments must terminate upon the payee-spouse's death, and there must be no liability to make any payment (in cash or property) as a substitute for the alimony.
- (5) The parties may not file a joint income tax return with each other, even if they are considered legally married under state law.
- (6) If any portion of the payment is considered to be child support, even if it is not actually designated as such in the divorce or separation instrument, then that portion cannot be treated as taxable alimony.

The tax laws require a recalculation and inclusion of income by the payor and deduction by the payee of previously paid alimony, to the extent that the amount of such payments is affected by the recomputation rule. Additionally, the tax laws require the payor spouse to include the excess amount in gross income in the payor's third post-separation year. The purpose of these rules is to prevent payors whose divorces occur near the end of the year from attempting to disguise making property settlements as deductible maintenance at the beginning of the next year. The actual provisions are found at Section 71(f)(1-6) of the IRC.

The way the rule work is as follows. The payee is allowed a deduction for the excess amount in computing adjusted gross income in the payee's third post-separation year. There are two calculations for determining the recapture. The first calculation compares the second year payments to the third year payments. If the amount paid in the third year, plus fifteen thousand dollars, is less than the amount paid in the second year, the excess amount will be recaptured. The second calculation compares the first year to the adjusted average of the second and third years. Payments in the second and third years will be reduced by any recapture from the first calculation. The second and third year payments are averaged and if that average, plus fifteen thousand dollars, is less than the payments in the first year, the excess amount will be recaptured.<sup>6</sup>

There are three (3) exceptions to the recapture provisions:

- 1) where payments cease because of the death of either party or remarriage of the payee;
- 2) where payments are pursuant to a temporary order for support; or
- 3) where payments fluctuate outside of the payor's control because they are a percentage or a fixed portion or portions of income or compensation received by the payor.<sup>7</sup>

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<sup>6</sup> Melvyn B. Frumkes, **Divorce Taxation Handbook: A Practical Guide for Lawyers, Judges & Accountants** 81-82 (2d Ed. 1997).

<sup>7</sup> Id. at 83.

For a thorough examination of the tax issues associated with alimony/maintenance payments, including a discussion of the potential dangers and possible solutions associated with recapture issues, See Melvyn B. Frumkes, **Divorce Taxation Handbook: A Practical Guide for Lawyers, Judges & Accountants** (2d Ed. 1997).

***TYPES OF MAINTENANCE AWARDS AND DURATION:***

The primary goal of the dissolution of marriage statutes is to terminate the financial interdependence of former spouses, if possible.<sup>8</sup> If, however, one spouse is unable to support themselves with their awarded property following the dissolution, the court may award some type of maintenance to supplement that spouse. Depending on various factors, such as the spouse's age, health and educational status, to list just two, the court may award maintenance to enhance that spouses' income level.

Typically, the goal of a maintenance award is to provide for the needs and the necessities of life for a former spouse as they were established during the marriage of the parties.<sup>9</sup> Another common goal of maintenance awards is to allow a former spouse the time and resources to achieve self-sufficiency.<sup>10</sup> However, although financial independence is important, the courts note that "financial independence does not mean the ability to merely meet one's minimum

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<sup>8</sup> *In re Marriage of Lee*, 246 Ill.App.3d 628, 646, 615 N.E.2d 1314, 1327 (1993).

<sup>9</sup> *See In Re Marriage of Tarkow*, 805 So.2d 854 (2d Dist. Fla. 2001)

<sup>10</sup> *In re Marriage of Keip*, 266 Ill.Dec. 157, 773 N.E.2d 1227 (5<sup>th</sup> Dist. 2002), *citing In re Marriage of Kusper*, 195 Ill.App.3d 494, 500, 552 N.E.2d 1023, 1026 (1990).

requirements, but entails the ability to earn an income which will provide a standard of living similar to that enjoyed during the marriage.”<sup>11</sup>

Set forth below are the first sections of two state statutes, followed by a thorough analysis of the types of maintenance available and surrounding case law.

**Florida Statute:**

- (1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitation or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. *The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded.* In all dissolution actions, the court shall include findings of fact relative to the factors enumerated in subsection (2) supporting an award or denial of alimony.<sup>12</sup>

**Illinois Statute:**

- a) In a proceeding for dissolution of marriage or legal separation or declaration of invalidity of marriage or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a temporary or permanent maintenance award for either spouse in amounts and for periods of time as the court deems just, without regard to marital misconduct, in gross or for fixed or indefinite periods of time, and the maintenance may be paid from the income or property of the other spouse after consideration of all relevant factors, including: ...<sup>13</sup>

As set forth in the sample statutes above, maintenance may be awarded in any amount and for any time period the court deems just. Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (“IMDMA”) provides that maintenance may be “in gross or fixed or for indefinite periods

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<sup>11</sup> *In Re Marriage of Sisul*, 234 Ill.App.3d 1038, 1039-40, 600 N.E.2d 86, 88 (1992).

<sup>12</sup> *Fla. Stat. Ann.* 61.08(1) (emphasis added to illustrate types and duration of maintenance and the consideration of fault in the determination of a maintenance award).

<sup>13</sup> 750 ILCS 5/504(a). (emphasis added).

of time.” Thus, the court may award maintenance in gross payable either in a lump sum or in installments; rehabilitative maintenance for either a fixed time period or for an indefinite time period, or permanent maintenance. In determining the type of maintenance to award a spouse, the trial court must balance the realistic ability of the spouse to support himself or herself in some approximation of the standard of living enjoyed during the marriage against a goal of independence.

### **1. Maintenance in Gross:**

An award of “maintenance in gross” is a fixed sum of money that may be taxable or tax-free. Maintenance in gross is not an inflexible device and may be paid either in a lump sum or in a specified number of periodic installments; the determinative characteristic is that the amount may not be modified for any reason.<sup>14</sup> If the maintenance in gross is payable in a lump sum, by law, it would be tax free to the recipient.

When it is determined that non-modifiable maintenance in gross is appropriate, it is important to include the actual term in the order or agreement. A settlement agreement that was held not to be in gross provided: The Husband shall pay to the Wife the sum of \$606.00 per month as transitional maintenance for a period of ten (10) years at which time maintenance shall terminate and the Wife shall be forever barred from any claim of maintenance.<sup>15</sup> In *In Re the Marriage of Harris*, the court noted that the agreement did not use the words “maintenance in gross.” Instead, it mentioned “transitional maintenance.” Since that term was not defined in either the state or federal statute, and the phrasing in the statute is “in gross *or* for fixed or indefinite periods of time,” the parties’ agreement was simply for a fixed period of time and could be modified or terminated.<sup>16</sup> The court modified by extending the maintenance.

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<sup>14</sup> *Schlosser v. Schlosser*, 241 Ill.App.3d 49, 608 N.E.2d 569, 181 Ill.Dec. 496 (3d Dist. 1993); *Lindsay v. Lindsay* 115 Ariz. 322, 565 P.2d 199 (App. Div.1 1977).

<sup>15</sup> *In re Marriage of Harris*, 284 Ill.App.3d 389, 672 N.E.2d 383, 384, 219 Ill.Dec. 875 (4th Dist. 1996).

<sup>16</sup> *Id.*



## **2. Temporary or Interim Maintenance:**

Temporary, *pendente lite*, or interim maintenance is mechanism which allows one spouse to receive support during the pendency of the dissolution proceeding.<sup>17</sup> Temporary maintenance awards may be tax deductible for the payor and includeable in the payee's income for tax purposes, so long as there is compliance with the requirements set forth in sections 71 and 215 of the IRC.<sup>18</sup> Of course, the temporary or interim support payments must be made pursuant to a formal court order known as a *pendent lite order* – or – a decree requiring a spouse to make payments for the support or maintenance of the other spouse. Temporary orders may also be unallocated support for a spouse and children, the taxability/deductibility depends upon compliance with IRC code sections.

It is important to note that temporary support orders are not subject to the recomputation provisions of the IRC and as a financial strategy may be utilized at the end of a case. This can be accomplished by increasing the amount of temporary support in a tax deductible order and utilizing these additional funds to either pay outstanding bills or provide additional funds to the payee. This could assist the payee in the payment of outstanding bills, including attorney's fees and costs. The practitioner could also allocate a portion of the bill for attorney's fees for the services rendered in connection with the production of income. The itemized bill needs to conform with IRC Section 212.

## **3. Unallocated Maintenance and Child Support:**

Unallocated maintenance and child support is a mechanism which allows all of the family support to be tax deductible to the payor (who is typically in a higher tax bracket) and taxable to

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<sup>17</sup> It is important to note that the term "temporary maintenance" is also used in reference to rehabilitative maintenance or any maintenance which is not permanent in nature. Here, we are using it to refer to maintenance during the divorce proceedings.

<sup>18</sup> See discussion of tax issues supra at page 3.

the payor spouse (who is usually in a lower tax bracket) thereby providing more after tax dollars for family support. The key tax issue related to the unallocated support concept is known as the “contingency rule.” The contingency rule requires that a payment may not be reduced on the happening of a contingency related to a child of the payor, or at a time which can clearly be associated with such contingency. A “contingency related to a child” precludes alimony treatment for that amount and includes reductions tied to the child’s death or marriage, the child’s attaining a specified age or income level, leaving school, leaving the custodial parent’s home, attaining full-time employment or becoming otherwise emancipated as defined by state law. The denial of alimony treatment is premised on whether a reduction is scheduled to occur upon the happening of an event related to a child, regardless of whether the event is likely to occur.

When drafting an unallocated support provision, it is important to be careful not to make a specific reference to a child-related contingency. However, merely not making specific reference to a contingency is not in and of itself sufficient to ensure that no portion of a support payment will be characterized as child support. In order to prevent recharacterization of the payments, it is necessary to avoid a reduction at a time associated with the occurrence of a child-related contingency. Avoiding this trap is made easier by the fact that there are only two situations in which payments that would otherwise qualify as alimony will be presumed to be reduced at a time clearly associated with the occurrence of a contingency related to a child. Those two occurrences are known as “the six month rule” and “the multiple reduction rule” and are summarized as follows:

- a) **Six Month Rule:** The six month rule occurs when the payments are to be reduced not more than six months before or after the date on which a child reaches age 18, 21 or the age of majority under state law.
- b) **Multiple Reduction Rule:** The multiple reduction rule applies only if the parties have more than one child. The presumption arises when reductions

occur within a certain timeframe. If the payments are reduced on two or more occasions which occur not more than one year before or after a different child of the parties reaches a certain age, then a presumption arises that the amount of the reduction is child support. The age at which the reduction occurs must be between 18 and 24, inclusive (although it does not have to be a whole number of years), and must be the same for each of the parties' children.

One way to avoid having a problem is to negotiate the date for any reduction in payment without designating the specific amount to be reduced upon the occurrence of a condition. Another way is to reduce the payment at some fixed time without regard to any closely related child events.

Another key factor to remember when drafting the unallocated support clause in an agreement is that the amount can not be designated as "non-modifiable" because of the child support component of the award. It is against public policy to limit the payment of any amount of child support.

#### **4. Permanent Maintenance**

When former spouses have grossly disparate earning potential or are employed only at a low income, the goal of financial independence may not be achievable because of a spouse's inability to maintain the standard of living achieved during the marriage. In these circumstances, permanent maintenance is the appropriate type of maintenance to be awarded by the court.<sup>19</sup> It is anticipated that an award of permanent maintenance will not terminate until the death of the payee or payor and in the event of the payee's remarriage or cohabitation, unless otherwise agreed upon. Permanent maintenance, although generally reviewable, does not always have to be.

Permanent maintenance may be appropriate when one spouse has no realistic prospect of obtaining employment following a long marriage, especially where a spouse has been insulated

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<sup>19</sup> *In re Marriage of Harlow*, 251 Ill.App.3d 152, 621 N.E.2d 929, 190 Ill.Dec. 476 (4th Dist. 1993).

from developing his or her skills or career.<sup>20</sup> Personal or career sacrifices of one spouse during the period of marriage where the other spouse achieves superior earning power often weighs in favor of an award of permanent maintenance.<sup>21</sup> Courts often focus on a spouse's homemaker contribution and recognize that permanent maintenance is especially suitable for wives who have children, raised and supported the family and have sacrificed their own career opportunities on behalf of a husband who was pursuing his education or establishing himself in his career.<sup>22</sup>

Although many practitioners may believe that the modern trend is moving away from awarding permanent maintenance, permanent maintenance is still a main course on the buffet table. In an Illinois case decided in September 2002, *In Re the Marriage of Keip*, the Appellate court reversed the trial court's award of one year of maintenance as an abuse of discretion and awarded the spouse permanent maintenance.<sup>23</sup> The court in the *Keip* case pointed to the impairment suffered to the wife's earning capacity due to her domestic duties consisting of raising four children during the course of the parties' 22 year marriage. The court noted that the decision that the wife sacrifice any career to be available at home for the parties' children was a joint decision which reflected a family choice and one that she should not be penalized for.<sup>24</sup>

*In re Marriage of Minnear*,<sup>25</sup> a five hundred dollar per month permanent maintenance award was affirmed for a 19 year marriage where there were two children from the marriage, the wife was 40 years old, the husband was 41 years old, and the wife's net income was \$1,086 per month compared to the husband's \$1,920 net income per month.

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<sup>20</sup> *In re Marriage of Pearson*, 236 Ill.App.3d 337, 603 N.E.2d 720, 177 Ill.Dec. 650 (1st Dist. 1992).

<sup>21</sup> *Young v. Young*, 677 So.2d 1301 (5th Dist. 1996).

<sup>22</sup> *In re Marriage of Rubinstein*, 145 Ill.App.3d 31, 40, 495 N.E.2d 659, 99 Ill.Dec. 212 (1986).

<sup>23</sup> 266 Ill.Dec. 157, 773 N.E.2d 1227 (5<sup>th</sup> Dist. 2002).

<sup>24</sup> *Id.*, at 1231.

<sup>25</sup> 287 Ill.App.3d 1073, 223 Ill.Dec. 405, 679 N.E.2d 856 (4th Dist. 1997)

In *Sullivan v. Sullivan*,<sup>26</sup> a Tennessee case decided in September 2002, the appellate court affirmed the trial court award of alimony in futuro (permanent maintenance) of \$3,500 to the wife until death, remarriage or age 65. The court noted that “[i]n light of the length of this marriage, the work histories of the parties, their educational backgrounds, age and health status, we believe the award of alimony in futuro is appropriate.”<sup>27</sup>

In a recent Minnesota case, *Paehlke v. Paehlke*,<sup>28</sup> the court awarded the wife permanent maintenance after a nineteen year marriage with no children. The court found that appellant historically earned three or four times more than respondent and that respondent was unlikely to find a higher-paying job due to her age (50), lack of meaningful post-high-school education, and frequent job changes. The court further found that respondent lacked liquid assets to provide for her reasonable needs because the property she received through the parties' stipulation either could not be used without tax consequences and penalties or was already earmarked to pay her attorney fees and pay off her credit cards. As a result, the court held:

In view of the limited career options available to [respondent], the disparate earnings of the parties, the length of the parties' marriage, the middle class standard of living established during the marriage, this court's determination that [appellant] has the ability to meet his own needs while contributing to the support of [respondent], and having carefully considered the parties' health and all of the other factors enumerated at Minn.Stat. § 518.552, the Court finds that [respondent] is entitled to an award of [permanent] spousal maintenance.<sup>29</sup>

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<sup>26</sup> 2002 WL 2023125 (Tenn.Ct.App.) (Sept. 5, 2002).

<sup>27</sup> *Id.*

<sup>28</sup> 2002 WL 1968730 (Minn.App.) (Aug. 27, 2002).

<sup>29</sup> *Id.* (The trial court also awarded that the wife's maintenance extend beyond the husband's death. The appellate court reversed that portion of the decision.)

A spouse seeking permanent maintenance has the burden of proving the necessity for it.<sup>30</sup> While permanent poor health of the proposed recipient spouse may be a basis for permanent maintenance, it was error for the trial court to make the award permanent when the wife did not present medical or lay testimony to prove that the medical condition she complained about was permanent.<sup>31</sup>

## **5. Rehabilitative Maintenance**

The purpose of rehabilitative alimony is to provide an economically disadvantaged spouse support for a period of time so that he or she may become and remain self-sufficient.<sup>32</sup> Rehabilitative alimony is intended to promote the self-sufficiency of the disadvantaged spouse by allowing him or her to acquire additional job skills, education, or training. Where the court has determined that economic rehabilitation is not feasible and long-term support is therefore necessary, the court may award permanent, or in futuro, alimony.<sup>33</sup>

The court may award rehabilitative maintenance for a set period of time, which may be either fixed or indefinite. Rehabilitative maintenance may or may not be reviewable. The most important issue about reviewability is which party, the payee or payor, has the burden to extend the maintenance or whether the support would terminate unless extended.

### **a. Fixed Period of Time**

Historically, the purpose for providing maintenance for a specified period of time was to provide an incentive for the spouse receiving maintenance to use this time in diligently trying to

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<sup>30</sup> *In re Marriage of Gunn*, 233 Ill.App.3d 165, 598 N.E.2d 1013, 174 Ill.Dec. 381 (5th Dist. 1992).

<sup>31</sup> *In re Marriage of Girrula*, 219 Ill.App.3d 164, 578 N.E.2d 1380, 161 Ill.Dec. 734 (5th Dist. 1991).

<sup>32</sup> *Loria v. Loria*, 952 S.W.2d 836, 838 (Tenn.Ct.App.1997); *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001).

<sup>33</sup> *Crabtree v. Crabtree*, 16 S.W.3d 356, 359 (Tenn.2000). In Tennessee, for example, the statute expresses a preference for an award of rehabilitative alimony. Tenn. Code Ann. § 36-5-101(d)(1)(2000); *Crabtree*, 16 S.W.3d at 358.

obtain the necessary skills to become self-sufficient.<sup>34</sup> The objective of rehabilitative maintenance is to enable a formerly dependent spouse to become financially independent.<sup>35</sup>

*In re Marriage of Ward*<sup>36</sup>, the court found that rehabilitative maintenance of \$1,000 per month for 18 months was reasonable when the wife had both a bachelor's degree in economics, philosophy, an MBA, had started a business, and at one time had held a job paying \$20,000 per year.

Likewise, an award of \$235 per month for three years was proper when the parties were married for 12 years during which the wife was mainly a homemaker, the wife had obtained a degree in accounting just before the dissolution and was earning \$23,000 as a CPA, the husband earned \$105,000 annually, and both parties were in good physical and emotional condition.<sup>37</sup>

Although the court must base its award on evidence and not speculation, if the court has evidence of the educational background, pursuits and income at the time of dissolution, the court may set a specific time period for the maintenance. *In re Marriage of Booth*<sup>38</sup>, the court was required to set maintenance for at least 36 months when that was the earliest time that the wife might obtain her nursing degree and the children would reach school age.

**b. Indefinite Period of Time**

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<sup>34</sup> *In re Marriage of Wolf*, 180 Ill.App.3d 998, 536 N.E.2d 792, 129 Ill.Dec. 742 (1st Dist. 1989).

<sup>35</sup> *In Re Marriage of Lenkner*, 241 Ill.App.3d 15, 608 N.E.2d 897, 181 Ill.Dec. 646 (4th Dist. 1993).

<sup>36</sup> 267 Ill.App.3d 35, 641 N.E.2d 879, 204 Ill.Dec. 449 (2d Dist. 1994).

<sup>37</sup> *In re Marriage of Phillips*, 244 Ill.App.3d 577, 615 N.E.2d 1165, 186 Ill.Dec. 108 (4th Dist. 1993).

<sup>38</sup> 255 Ill.App.3d 707, 627 N.E.2d 1142, 194 Ill.Dec. 500 (4th Dist. 1993).

If the information is less certain that the spouse will be able to be self-supporting, then maintenance should be awarded for an indefinite period of time, especially when it appears that any employment may be at an income considerably lower than the standard of living.<sup>39</sup>

The courts frequently deal with future uncertainty by setting maintenance at a specific level to be reviewed later and revised if needed. In *In re Marriage of Sisul*,<sup>40</sup> the court was ordered to change an order for a fixed period of maintenance requiring the wife to file for an extension after one year to a reviewable order for a longer period of time. Instead of a fixed time of 36 months' maintenance with no review for a wife with a medical condition and a record that was speculative as to her ability to improve her earnings in the future, the appellate court in *In re Marriage of Pearson*<sup>41</sup>, ordered a full review of the need for future maintenance after 36 months had expired.

#### ***FACTORS APPLIED BY THE COURTS:***

The second, but most important part of the maintenance analysis involves the analysis of the various factors involved in a particular case to determine whether or not a maintenance award should be granted. As mentioned above, forty-one states have specific factors listed within their statutes. The states that do not<sup>42</sup>, typically have developed factors within their case law<sup>43</sup>.

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<sup>39</sup> *In re Marriage of Werries*, 247 Ill.App.3d 639, 616 N.E.2d 1379, 186 Ill.Dec. 747 (4th Dist. 1993); *In re Marriage of Dunseth*, 260 Ill.App.3d 816, 633 N.E.2d 82, 198 Ill.Dec. 620 (4th Dist. 1994).

<sup>40</sup> 234 Ill.App.3d 1038, 600 N.E.2d 86, 175 Ill.Dec. 463 (3d Dist. 1992).

<sup>41</sup> 236 Ill.App.3d 337, 603 N.E.2d 720, 177 Ill.Dec. 650 (1st Dist. 1992).

<sup>42</sup> The states that do not have factors enumerated within their respective statutes are: Alabama, Arkansas, District of Columbia, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, and Wyoming.

<sup>43</sup> See *Christians v. Christians*, 637 N.W.2d 377, 381, 2001 SD 142 (S.D.2001) ("Factors considered in deciding alimony are: 1) length of the marriage; 2) respective earning capacity of the parties; 3) their respective age, health and physical condition; 4) their station in life or social standing; and 5) relative fault."); *Primus v. Primus*, 768 A.2d 543, 545 (D.C.2001) (noting that a court should consider "certain primary factors" both in deciding whether to award alimony at all and in determining the amount of the award.)



Set forth below are the second portions of the Florida maintenance statute and of the Illinois maintenance statute, followed by a brief overview of some of the key factors.

**Florida statute:**

- (2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including, but not limited to:
- a. The standard of living established during the marriage.
  - b. The duration of the marriage.
  - c. The age and the physical and emotional condition of each party.
  - d. The financial resources of each party, the nonmarital and the marital assets and liabilities distributed to each.
  - e. When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.
  - f. The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.
  - g. All sources of income available to either party.

The court may consider any other factors necessary to do equity and justice between the parties.<sup>44</sup>

**Illinois Statute:**

The following factors are considered:

- ... (1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance;
- (2) the needs of each party;
- (3) the present and future earning capacity of each party;
- (4) any impairment of the present and future earning capacity of the party seeking

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<sup>44</sup> *Fla. Stat. Ann.* 61.08(2).

- maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;
- (5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment and whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment;
  - (6) the standard of living established during the marriage;
  - (7) the duration of the marriage;
  - (8) the age and physical and emotional condition of both parties;
  - (9) the tax consequences of the property division upon the respective economic circumstances of the parties;
  - (10) contributions and services by the party seeking maintenance to the education, training, career, or career potential, or license of the other spouse;
  - (11) any valid agreement of the parties; and
  - (12) any other factor that the court expressly finds to be just and equitable.<sup>45</sup>

The majority position is that no one factor is controlling in determining whether spousal maintenance should be awarded. Furthermore, nothing in the statutes require that the factors must be given equal weight; the trial court is required only to consider the relevant factors and to strike a reasonable balance.<sup>46</sup>

The court must consider the statutory factors in determining whether maintenance is necessary and if so, how much maintenance should be awarded. The court, only after finding that the spouse seeking maintenance lacks sufficient property to provide for a party's reasonable needs and is either unable to support herself through appropriate employment or is otherwise

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<sup>45</sup> 750 ILCS 504(a).

<sup>46</sup> *In re Marriage of Miller*, 231 Ill.App.3d 480, 595 N.E.2d 1349, 172 Ill.Dec. 679 (3d Dist. 1992).

without sufficient income, may issue a maintenance order. Below is a brief overview of some of the key factors involved in the consideration of a maintenance award.

***Analysis of Key Factors:***

1. **Income and Property of Each Party**

The financial circumstances of both parties, including their incomes from employment and investments, including property apportioned to him, whether marital or non-marital, is always considered when the court decides whether to award maintenance. For example, in Illinois, when considering a request for maintenance, the court must first determine whether the spouse seeking maintenance “lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs.” The court should not rule on the issue of maintenance until it determines the financial impact the assignment of nonmarital property and the division of marital property will have on the maintenance applicant. If the property awarded to the spouse pursuant to the judgment of dissolution of marriage will provide sufficient income to maintain the otherwise financially independent spouse in the lifestyle he or she had before the divorce, then the court should not award maintenance.

The Illinois statute, like the majority of other maintenance statutes, specifically refers to income without defining it. However, the income definition may be found elsewhere, as in Illinois. Section §706 of the IMDMA broadly defines income as:

any form of periodic payment to an individual, regardless of source, including but not limited to: wages, salary, commission, compensation, compensation as an independent contractor, workers’ compensation, disability, annuity and retirement benefits, lottery prize awards, insurance proceeds, vacation pay, bonuses, profit-sharing payments and any other payments, made by any person, private entity, federal or state government, any unit of local government, school district or any entity credited by Public Act; however, “income” excludes:

- (a) Any amounts required by law to be withheld, other than creditor claims, including, but not limited to, federal, State and local taxes, Social Security and other retirement and disability contributions;
- (b) Union dues;
- (c) Any amounts exempted by the Federal Consumer Credit Protection Act;
- (d) Public assistance payments; and
- (e) Unemployment insurance benefits except as provided by law.

After the amount and source of income is determined, the next level for the court to determine is the payor's "net income" for purposes of setting an amount of support whether maintenance, child support or unallocated maintenance and child support. The definition of net income applied by the courts is found within the child support provision of IMDMA §505(a)(3). This section defines net income for purposes of application of the minimum child support guidelines as the total income from all sources, minus the following deductions:

- (a) Federal income tax (properly calculated withholding or estimated payments);
- (b) State income tax (properly calculated withholding or estimated payments);
- (c) Social Security (FICA payments);
- (d) Mandatory retirement contributions required as a condition of employment;
- (e) Union dues;
- (f) Dependent and individual health/hospitalization insurance premiums;
- (g) Prior obligations of support or maintenance paid pursuant to a court order;
- (h) Expenditures for repayment of debts that represent reasonable and necessary expenses for the production of income...The court shall reduce net income in determining the minimum amount of support to be ordered only for the period that such payments are due and shall enter an order containing provisions for its self-executing modification upon termination of such payment period.

The distribution of property to each spouse is first considered before deciding whether to award maintenance.<sup>47</sup> In some instances, the trial court has barred maintenance because of a

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<sup>47</sup> *Brown v. Brown*, 241 Ill.App.3d 305, 608 N.E.2d 967, 181 Ill.Dec. 716 (3d Dist. 1993).

large property award.<sup>48</sup> If a spouse's income varies substantially from year to year and is suspiciously low in the year the divorce commences, the trial court may average that spouse's income over a period of years to determine a present average net income. The Illinois appellate court recently affirmed a \$650 a month maintenance award and found reliable the trial court's averaging of the husband's income over a three year period where the husband's income could not be determined by the trial court since he was less than candid about his income. *In re Marriage of Severino*.<sup>49</sup> Although the husband had only reported income of \$116,000 for the year of the divorce, he had purchased a \$1 million home and in the same year purchased a Ferrari. Based on the evidence of the husband's spending and incredible testimony, the appellate court determined that the maintenance award was not an abuse of discretion.

In a Florida case<sup>50</sup>, one spouse attempted to rely upon loans received from the other spouse's family as income, that was used to enhance the parties' lifestyle. The court held that sporadic loans from relatives used to support the family's activities **could not** be considered reliable income when evaluating family's standard of living in determining alimony award.<sup>51</sup>

## **2. The Parties' Needs and Standard of Living**

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<sup>48</sup> See, e.g., *In re Marriage of Andrew*, 258 Ill.App.3d 924, 628 N.E.2d 221, 194 Ill.Dec. 724 (1st Dist. 1993) (when property allotted to wife exceeded \$1 million, denial of maintenance was affirmed); *In re Marriage of Werries*, 247 Ill.App.3d 639, 616 N.E.2d 1379, 186 Ill.Dec. 747 (4th Dist. 1993) (when wife would not need to sell her assets to live since she was awarded all furniture, money to buy house, and maintenance of \$1,500 monthly for two years and \$1,200 monthly for the next two and had little debt, maintenance award was sufficient); *In re Marriage of Harding*, 545 N.E.2d 459, 469, 136 Ill.Dec. 935, 945 (1st Dist. 1989), (the appellate court denied maintenance to the wife when her assets produced \$62,748 in income, and her yearly expenses (including her daughter) were \$50,404); *In re Marriage of Byrne*, 179 Ill.App.3d 944, 535 N.E.2d 14, 128 Ill.Dec. 800 (1st Dist. 1989), (the Court held that the wife's petition for maintenance was properly denied in light of evidence that she had income from business and tax-free income from a trust in the amount of \$80,000, and that she owned a co-op valued at over \$400,000).

<sup>49</sup> *In re Marriage of Severino*, 298 Ill.App.3d 224, 698 N.E.2d 193 (2d Dist. 1998).

<sup>50</sup> *Thilem v. Thilem*, 662 So.2d 1314, 20 Fla. L. Weekly D2367(3d. Dist. 1995).

<sup>51</sup> *Id.*

Assuming the court has found the property apportioned to the applicant is insufficient to independently generate income sufficient to provide support, the court begins to analyze the next factors. Two important and interrelated factor of analysis are the parties' needs and the standard of living enjoyed by the parties during their marriage<sup>52</sup>. The trial courts have wide latitude in determining reasonable needs and is not **necessarily** limited to the factors listed in the statute.<sup>53</sup> Maintenance may be appropriate when a spouse is not able to meet everyday needs even if the spouse is employed.<sup>54</sup> In a case where the parties lived frugally during the marriage, minimum needs were not applied where a spouse's superior earning power justifies additional maintenance and a resulting surplus of income.<sup>55</sup>

The court evaluates each parties' needs and does not place greater emphasis on the needs of the party from whom maintenance is sought. Courts have held that an award of maintenance is warranted when the court finds that the spouse seeking maintenance lacks sufficient property, including marital property, to provide for her reasonable needs and is unable to support herself in the standard of living established during the marriage.<sup>56</sup> The spouse need not be reduced to poverty before maintenance is appropriate and a spouse is not required to sell of his or her assets

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<sup>52</sup> *Hausman v. Hausman*, 330 So.2d 833 (3d. Dist.1976)(Where head of family, by furnishing money over period of years, establishes certain financial standard of living, in absence of sufficient evidence to contrary, it may be inferred that he has financial ability to enable him to continue to maintain his spouse in substantially same manner of living.).

<sup>53</sup> *In re Marriage of Mohr*, 260 Ill.App.3d 98, 631 N.E.2d 785, 197 Ill.Dec. 563 (4th Dist. 1994).

<sup>54</sup> *Paehlke*, 2002 WL 1968730 (Minn.App.) (Aug. 27, 2002);*In re Marriage of Swanson*, 275 Ill.App.3d 519, 646 N.E.2d 215 (4th Dist. 1995).

<sup>55</sup> *In re Marriage of Fields*, 288 Ill.App.3d 1053, 681 N.E.2d 166 (4th Dist. 1997).

<sup>56</sup> *In re Marriage of Martin*, 223 Ill.App.3d 855, 585 N.E.2d 1158 (4th Dist. 1992).

to maintain the standard of living attained during the marriage.<sup>57</sup> However, a party does have an obligation to generate income from or use assets if possible and practical.<sup>58</sup>

*In re Marriage of Tietz, supra*, the court affirmed a maintenance award to a wife who had a trust valued at \$1,250,000, where although the assets were substantial, the trust only generated a net yearly income of \$29,000, an amount that would not permit the wife to support herself in the manner commensurate with the standard of living established during the marriage. On the other hand, *In re Marriage of Werries, supra*, the court found that the wife was not entitled to an increased amount of maintenance when there did not appear to be a need for her to sell her assets to live as the parties had lived during the marriage.<sup>59</sup>

### **3. Homemaker Contribution:**

The court's consideration of a spouse's contribution to the home is very significant and often pivotal in its determination between permanent and rehabilitative maintenance.<sup>60</sup> The importance of the homemaker contribution is based on the overall theory of marriage as a partnership. *In re the Marriage of Drury*<sup>61</sup>, where the trial court's award of \$600 per month for 36 months was modified to a permanent maintenance award. The court noted that wives who have undertaken to have children, raise and support the family, and who have lost or been substantially impaired in maintaining their skills for continued employment during the years that

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<sup>57</sup> *In re Marriage of Tietz*, 605 N.E.2d 676, 178 Ill.Dec. 876 (4th Dist. 1992).

<sup>58</sup> *In re Marriage of Thornton*, 89 Ill.App.3d 1078, 1088, 412 N.E.2d 1336, 1344 (1980).

<sup>59</sup> *See also, In Re Marriage of Chamberlain*, 615 N.W.2d 405 (Ct.App.2000).

<sup>60</sup> *Gray v. Gray*, 658 So.2d 607, 20 Fla. L. Weekly D1691 (2d Dist. 1995)(Key factor in determining whether to award permanent maintenance is whether the parties' agreed that the wife should leave her employment and function solely as a homemaker, caring for their minor children on a full-time basis.).

<sup>61</sup> 317 Ill.App.3d 201, 740 N.E.2d 365 (4<sup>th</sup> Dist. 2000).

the husband was growing in his career, economically deserve financial consideration for being a homemaker. The court, quoting from *In re the Marriage of Hart*<sup>62</sup>, stated:

Marriage is a partnership, not only morally, but financially. Spouses are coequals, and homemaker services must be recognized as significant when the economic incidents of divorce are determined. Petitioner should not be penalized for having performed her assignment under the agreed-upon division of labor within the family. It is inequitable upon dissolution to saddle petitioner with the burden of her reduced earning potential and to allow respondent to continue in the advantageous position he reached through their joint efforts.<sup>63</sup>

This language is echoed throughout the majority of states which consider the factor of a homemaker contribution in the award of maintenance.<sup>64</sup> All factors listed either within a state statute or garnered from a state's case law carry significant weight on a case by case basis. Although the various factors tend to overlap, such as age of the spouse and duration of the marriage, and the court's analysis may seem to focus on one more significant factor than the rest, all the factors are of equal importance and should not be overlooked. All cases are decided on the facts of the case. Know your facts in making the proper legal argument in favor of or in defending a request for maintenance.

### **Enforcing Maintenance Provisions:**

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<sup>62</sup> 194 Ill.App.3d 839, 551 N.E.2d 737 (4<sup>th</sup> Dist. 1990).

<sup>63</sup> 317 Ill.App.3d at 205, 740 N.E.2d at 367-68.

<sup>64</sup> *Dean v. Dean*, 793 So.2d 1121 (Fla.App. 5 Dist.2001)("How shall the material wealth of a marriage which is being dissolved be divided when one partner, the wife, has contributed her time to the marital home and children of the parties while the husband has pursued the accumulation of material goods. The evolution of the law of alimony that we have reviewed in length shows that today the contributions of each party to the accumulation of material assets must be considered in dissolving the marital partnership. Either spouse may contribute either by working in the market place or as working as a homemaker."); *Zeigler v. Zeigler*, 635 So.2d 50, 53-4 (1<sup>st</sup> Dist. 1994) (The disparate earning power of the parties is a significant factor in determining whether permanent or temporary support is appropriate. Further, "[i]n situations where the superior earning power of one spouse is achieved during a period when the other spouse is out of the job market as a result of an agreement that the nonworking spouse will care for the children, the courts of this state have reversed awards of temporary support in lieu of permanent alimony.")



The most common mechanism for the enforcement of a maintenance provision is, of course, litigation, typically involving a Petition for Rule to Show Cause. However, one resourceful mechanism to assist your client in obtaining past due maintenance is through the use of a qualified domestic relations order ("QDRO"). The QDRO, in this situation, can be utilized to attach a pension for enforcement of support. For example, in a recent Indiana case, *Hogle v. Hogle*<sup>65</sup>, the Husband-payor was over \$375,000 in arrears. The wife reduced the arrears to money judgments by writs of attachment, and she then sought enforcement via a QDRO. The Indiana court held that the writs satisfied the technical requirements of a QDRO under ERISA and permitted the use of a QDRO to satisfy the arrearage. It is important to note that courts initially did not permit the use of a QDRO to enforce support obligations because the courts were viewing the QDRO as an unlawful modification of a property division.<sup>66</sup> However, the current trend is toward the permissibility of a QDRO to enforce court orders<sup>67</sup> and should be considered a viable option when enforcing your client's rights. The practitioner should, however, be mindful of the income tax ramifications of enforcement. The retirement funds, if received by the new alternate payee, is taxable to the payee. In some instances, different tax rates may apply if the asset liquidated were securities. The issue revolves around when the securities are being sold and by whom. Real estate is another issue, be mindful of basis issues. The amount of the income taxes should be computed and, dependent upon rates, either possibly be added to the amount of the arrears, or compared to the income tax ramifications of how the receipt of the maintenance would have been treated if received by payor.

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<sup>65</sup> 732 N.E.2d 1278 (Ind.2000).

<sup>66</sup> See, *Hoy v. Hoy*, 29 Va.App. 115, 510 S.E.2d 253 (1999) and *DeSantis v. DeSantis*, 714 So.2d 638 (Fla.DCA 1998).

<sup>67</sup> See Laura W. Morgan, *Using QDROs to Enforce Spousal and Child Support*, 16 Amer. Jnl. Fam. Law 1, 5 (Spring 2002).

***CONCLUSION:***

In sum, the alimony buffet is for the hardy of appetite. The theories of maintenance, the types of maintenance, the income tax implications of each arrangement and the considerations that a court employs to arrive at a maintenance determination and enforcement of orders, all must be digested carefully, as well as slowly, to avoid weighty problems.