

## THE IMPACT OF PROPERTY DISTRIBUTION ON MAINTENANCE AWARDS

BY ATTORNEY BARRY A. SCHATZ  
KALCHEIM, SCHATZ & BERGER  
161 N. CLARK STREET; SUITE 2800  
CHICAGO, ILLINOIS 60601  
(312) 782-3456  
email: bschatz@ksbfamilylaw.com

### **I. The level of property awarded to one spouse, along with the income generated from that property distribution may be directly relevant to the determination of the amount and duration of a maintenance award.**

A. In order to understand the impact that property division has on the court's determination of the amount and duration of maintenance, it is useful to have a basic knowledge of the court's approach to property division.

1. In dividing marital property, the court's principal task is to effectuate a division of property which is "equitable."<sup>1</sup> Equitable division of property does not necessarily mean "equal." See In re the Marriage of Lloyd, 401 N.E.2d 328; 81 Ill.App.3d 311 (5<sup>th</sup> Dist. 1980); see also, Alston v. Alston, 331 Md. 496, 629 A.2d 70 (1993); Hariston v Hariston, 454 A.2d 1369 (D.C. 1983).

---

<sup>1</sup> It should be noted that the equitable distribution theory of property division is followed by a majority of states. Other theories include the "legal title theory," where property is divided based on the legal title of the property; "community property," where courts are required to divide property upon divorce equally or equitably; and "contract theory," where courts divide property upon divorce pursuant to a contract entered into between the parties: ie., antenuptial and post-nuptial agreements.

2. The process applied by the court is fully within its discretion.<sup>2</sup> Courts are not restricted by any rigid rules of law, but must consider all factors relevant to a particular case - with the ultimate goal of reaching an equitable result specifically tailored to the facts of the particular case.
3. The equitable distribution theory of property division is based on shared enterprise theory or partnership theory. See, 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); In re Marriage of Kennedy, 214 Ill.App.3d 172, 573 N.E.2d 1357 (1st Dist. 1991). Each partner/spouse has an interest in the property of the marriage (or the property of the partnership), but their respective interests are not necessarily equal. Generally, each party's interests should be more or less proportionate to their respective contributions to the creation of the marital assets. Lacey v. Lacey, 173 N.W.2d 142, 45 Wis.2d 378 (1970). Courts consider not only the financial contributions to the particular marital asset, but contributions to the marriage as a whole (ie., homemaker contributions).<sup>3</sup>

---

<sup>2</sup> Courts have broad discretion to divide marital property in "just proportions" and without regard to marital misconduct considering all the relevant factors in a particular case. In re Marriage of Aschwanden, 82 Ill.2d 31, 441, N.E.2d 238 (1980).

<sup>3</sup> There are two basic limiting factors relative to the marital partnership theory. The first limiting factor is the concept that more marital property should be awarded to the spouse whose financial needs are greater. This factor is directly related to the issue of maintenance and will be discussed more fully hereinbelow. The second limiting factor is consideration of spousal misconduct. This factor is the minority view and except when the marital misconduct is extremely egregious when coupled with dissipation of marital assets, the marital misconduct, is rarely applied.

4. Typically, courts review the “equitable distribution factors” which are set forth in its statute or case law.<sup>4</sup> Although worded differently in each state, the factors considered by the court generally include contributions (both economic and non-economic) made to the marital assets, contributions made to the payment of expenses, duration of the marriage, and age and health of each spouse, etc. By way of example, below are the factors considered under the Rhode Island statute:

15-5-16.1 Assignment of property.

(a) **In addition to or in lieu of an order to pay spousal support**

made pursuant to a complaint for divorce, the court may assign to either the husband or wife a portion of the estate of the other. In determining the nature and value of the property, if any, to be assigned, the court after hearing the witnesses, if any, of each party shall consider the following:(1) The length of the marriage;(2) The conduct of the parties during the marriage;(3) The contribution of each of the parties during the marriage in the acquisition, preservation, or appreciation in value of their respective estates; (4) The contribution and services of either party as a homemaker; (5) The health and age of the parties; (6) The amount and sources of income of each of the parties; (7) The occupation and

---

<sup>4</sup> Some states treat these factors as permissive, other states have made them mandatory, and some states have a combination of both permissive and mandatory factors. For example, the Florida statute lists nine mandatory factors, Fla.Stat.Ann. Section 61.075(1)(West Supp.1993), while Texas presents nine discretionary factors in its case law, see Murff v. Murff, 615 S.W.2d 696 (Tex.1981). The Massachusetts statute sets forth a combination of mandatory and permissive factors. Mass.Gen.Laws Ann. Ch. 208, section 34 (West Supp. 1993).

employability of each of the parties; 8) The opportunity of each party for future acquisition of capital assets and income; (9) The contribution by one party to the education, training, licensure, business, or increased earning power of the other; (10) The need of the custodial parent to occupy or own the marital residence and to use or own its household effects, taking into account the best interests of the children of the marriage; (11) Either party's wasteful dissipation of assets or any transfer or encumbrance of assets made in contemplation of divorce without fair consideration; and (12) Any factor which the court shall expressly find to be just and proper.

While no one factor is considered more important than the rest, the courts should balance the factors and accord the weight it sees fit after a full review of the evidence.

5. Property division is used as a means of providing further support for an economically dependent spouse. Goller v. Goller, 758 S.W. 2d 505,508 (Mo.Ct.App. 1988), quoting Kravskopf: A theory for just division of marital property in Missouri 41 Mo.L.Rev. 165, 165 (1976).

In Alaska, the Supreme Court has repeatedly held that a spouse's support should be met through a property division. Farrel v. Farrel, 819 P.2d 896 (1991).

“[O]ne of the primary purposes of equitable distribution is to remove the need for alimony by placing both spouses on as sound a financial footing as possible. Gilboe v. Gilboe, 789 P.2d 343 (Alaska 1990)

“If the Court can avoid permanent alimony by awarding one spouse more marital property it would seem to be in both parties’ interest.”

Unfortunately, in low asset cases, the trend appears to be against long-term maintenance.

## II. MAINTENANCE

### A. Types of Maintenance

Generally, the amount and duration of a maintenance award are within the sound discretion of the trial court and will be reversed only if the decision was an abuse of discretion. In re Marriage of Carpenter, 286 Ill.App.3d 969, 677 N.E.2d 463, 222 Ill.Dec. 260 (5th Dist. 1997). IMDMA requires the trial court to consider all of the relevant factors but does not require that all of the factors be given equal weight as long as a balance is struck that is reasonable under the circumstances. In re Marriage of Miller, 231 Ill.App.3d 480, 485, 595 N.E.2d 1349, 1353, 172 Ill.Dec. 679 (1992). The amount of spousal support should be based upon need, not an equalization of parties income. In re Marriage of Clayden, 306 Ill.App3d 895, 715 N.E.2d 1201 (1991)

Maintenance may be awarded in any amount and for any time period the court deems just. In re Marriage of Marcello, 247 Ill.App.3d 304, 617 N.E.2d 289, 187 Ill.Dec. 81 (1st Dist. 1993). There is no set, objective standard for setting maintenance because of the wide variation in the standard of living of parties throughout the state. Whether to use a dollar amount or a percentage, and the type and duration of the order, must be decided on a case-by-case basis. In re Marriage of Gunn, 233 Ill.App.3d 165, 598 N.E.2d 1013, 174 Ill.Dec. 381 (5th Dist. 1992). Property may be awarded in lieu of maintenance, however, it is not

proper to award maintenance in lieu of property. In Re Marriage of Brackett, 309 Ill.App.3d 329, 722 N.E.2d 287 (1999).

IMDMA §504(a) provides that maintenance may be “in gross or fixed or indefinite periods of time.” Thus, the court chooses among maintenance in gross, 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. While the act seeks to terminate the financial entanglement of the parties, it does not eliminate the parties’ standard of living established during the marriage as a factor in determining whether maintenance is appropriate and if so, what type of maintenance should be awarded. Lenkener, 241 Ill.App.3d 15, 26, 608 N.E.2d 897, 905, 181 Ill.Dec. 646, 654 (1993).

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

An award of maintenance in gross is a fixed sum of money that may be taxable or taxfree. 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. Schlosser v. Schlosser, 241 Ill.App.3d 49, 608 N.E.2d 569, 181 Ill.Dec. 496 (3d Dist. 1993).

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. In re Marriage of Harris, 284 Ill.App.3d 389, 672 N.E.2d 383, 384, 219 Ill.Dec. 875 (4th Dist. 1996). The Harris court noted that the agreement did not use the words “maintenance in gross.” Instead, it mentioned “transitional maintenance.” Since that term is not used in the 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.

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

In re Marriage of Pearson, 236 Ill.App.3d 337, 603 N.E.2d 720, 177 Ill.Dec. 650 (1st Dist. 1992), notes that 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 from developing his or her skills or career. In re Marriage

of Rubinstein, 145 Ill.App.3d 31, 40, 495 N.E.2d 659, 99 Ill.Dec. 212 (1986), recognized 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. In re Marriage of Harlow, although she had an associates degree, the court awarded permanent maintenance to a wife who was over 50, had been responsible for the marital home and the children during the parties 32 year marriage and had little chance of maintaining the standard of living obtained during the marriage. Similarly, In re Marriage of Carpenter, 286 Ill.App.3d 969, 677 N.E.2d 463, 222 Ill.Dec. 260 (5th Dist. 1997), the wife had spent a 27-year marriage taking care of the family, did not develop her career potential, and had little ability at age 51 to ever be able to support herself in a manner near the standard of living enjoyed during the marriage, an award of permanent maintenance was held to be appropriate.’

In re Marriage of Minnear, 287 Ill.App.3d 1073, 223 Ill.Dec. 405, 679 N.E.2d 856 (4th Dist. 1997), 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.

Noting that the facts presented a classic case for permanent maintenance, the appellate court In re Marriage of Kerber, 215 Ill.App.3d 248, 574 N.E.2d 830, 158 Ill.Dec. 717 (4th Dist. 1991), reversed a reviewable award of \$600 monthly and made it permanent as the marriage was long and the wife had limited resources to meet her needs, had only a high school education, was trying to enter the workforce late in life, and had limited skills.

Permanent maintenance was also held to be appropriate in Vendredi v. Vendredi, 230 Ill.App.3d 1061, 598 N.E.2d 961, 174 Ill.Dec. 329 (1st Dist. 1992), for a 50-year-old wife without formal education who had gross earnings of \$8,000 annually and had temporary maintenance of \$10,000 annually at the time of trial. The husband who was seeking to pay her rehabilitative maintenance earned \$120,000 annually. It was obvious, given the wife's attempts to seek employment and the limited job opportunities available to her, that the wife was never going to reach the financial and employment security enjoyed by the husband. Based on these facts, the court entered a permanent maintenance award of \$3,000 monthly.

A spouse seeking permanent maintenance has the burden of proving the necessity for it. In re Marriage of Gunn, 233 Ill.App.3d 165, 598 N.E.2d 1013, 174 Ill.Dec. 381 (5th Dist. 1992). While permanent poor health of the proposed recipient spouse may be a basis for permanent maintenance, In re Marriage of Girrula, 219 Ill.App.3d 164, 578 N.E.2d 1380, 161

Ill.Dec. 734 (5th Dist. 1991), 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.

### **3. Rehabilitative Maintenance**

The court may award rehabilitative maintenance for a short period of time, which may be either fixed or indefinite. IMDMA §504(a). Although the word “rehabilitative” to describe an award of support for a short duration is not in the statute, the courts use it to describe maintenance that is awarded when there is a possibility of future employment at a reasonable level. The goal of rehabilitative maintenance is to enable a spouse to obtain skills so the court can then sever the financial ties between the parties and make them independent as soon as possible, In re Marriage of Carpenter, 286 Ill.App.3d 969, 677 N.E.2d 463, 222 Ill.Dec. 260 (5th Dist. 1997); In re Marriage of Ward, 267 Ill.App.3d 35, 641 N.E.2d 879, 204 Ill.Dec. 449 (2d Dist. 1994) (trial court should consider when spouse’s future employability will provide for approximately similar standard of living.)

#### **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 obtain the necessary skills to become self-sufficient. In re Marriage of Wolf, 180 Ill.App.3d 998, 536 N.E.2d 792, 129 Ill.Dec. 742 (1st Dist. 1989). The objective of rehabilitative maintenance is to enable a

formerly dependent spouse to become financially independent. In re Marriage of Lenkner, 241 Ill.App.3d 15, 608 N.E.2d 897, 181 Ill.Dec. 646 (4th Dist. 1993).

In re Marriage of Ward, 267 Ill.App.3d 35, 641 N.E.2d 879, 204 Ill.Dec. 449 (2d Dist. 1994), 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 and philosophy and an MBA, had started a business, and at one time had held a job paying \$20,000 per year. 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. In re Marriage of Phillips, 244 Ill.App.3d 577, 615 N.E.2d 1165, 186 Ill.Dec. 108 (4th Dist. 1993).

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, 255 Ill.App.3d 707, 627 N.E.2d 1142, 194 Ill.Dec. 500 (4th Dist. 1993), 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**

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. 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).

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, 234 Ill.App.3d 1038, 600 N.E.2d 86, 175 Ill.Dec. 463 (3d Dist. 1992), 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. Instead of a fixed time of 36 months' maintenance for a wife with a medical condition and a record that was speculative as to her ability to improve in the future, the appellate court in In re Marriage of Pearson, 236 Ill.App.3d 337, 603 N.E.2d 720, 177 Ill.Dec. 650 (1st Dist. 1992), ordered a full review of the need for future maintenance after 36 months had expired.

B. Maintenance Agreements:

An important drafting note: if you intend for maintenance to terminate with no right to review, make sure that your agreement states it explicitly. In In re Marriage of Carpel, 232 Ill.App.3d 806, 597 N.E.2d 847 (4<sup>th</sup> Dist. 1992), the Appellate court ruled that the trial court had jurisdiction to entertain a wife's petition for an extension of maintenance even though the original judgment did not explicitly authorize a review of maintenance. A number of suggested maintenance termination and review provisions are as follows:

**1. Burden of Seeking Maintenance Review**

- a. To Put the Burden of Obtaining a Review of Maintenance on the Recipient Spouse: Wife shall have the right to seek a review of her right to receive maintenance upon filing of a proper petition in a Court of competent jurisdiction within sixty (60) days prior to the termination of maintenance pursuant to paragraph \_\_\_\_\_. If Wife fails to file a Petition to review maintenance within 60 days prior to the termination of her maintenance pursuant to paragraph \_\_\_\_\_, Wife shall be barred from seeking any further maintenance from Husband.
- b. To Put the Burden of Obtaining a Review of Maintenance on the Payor Spouse: Upon the termination of \_\_\_\_\_ months, during which time Wife's right to receive maintenance shall not be subject to modification, Husband will have the right to Petition the Court to modify his obligation to pay maintenance to the Wife upon filing a proper petition in a Court of competent jurisdiction. For so long as Husband does not file a petition to review Wife's right to

receive maintenance, Husband's obligation to pay maintenance pursuant to paragraph \_\_\_\_\_ shall continue in full force and effect.

- c. Neutral Review Provisions: Upon the expiration of \_\_\_\_ months, during which time the Wife's right to receive maintenance shall not be subject to modification, either party may seek a review of Wife's right to receive maintenance upon filing of a proper petition in a Court of competent jurisdiction. Until such time as either party obtains a modification upon review of Wife's right to receive maintenance, Husband shall continue paying maintenance pursuant to paragraph \_\_\_\_\_.

**2. Additional Limiting Provisions:**

- a. Recipient Spouse's Income Not Relevant to Right to Receive Maintenance Following Review: The parties acknowledge that Wife is seeking employment in the field of \_\_\_\_\_. In the event that Wife does obtain employment as a \_\_\_\_\_, or in any other field, Wife's income from her separate employment shall not, standing alone, constitute a "change in circumstances" which would entitle Husband to seek a reduction or termination of his maintenance obligation on review.
- b. Recipient Spouse's Income Determinative of Modification or Termination of Maintenance on Review: In the event that the Wife obtains employment during the period of time Husband is required to pay maintenance, Wife's income from her employment shall constitute a "change in circumstances" which should entitle

Husband to seek a review of his obligation to pay maintenance to Wife, and Husband will be entitled to a “dollar for dollar” reduction in his maintenance obligation to Wife. In other words, if Wife obtains a job paying \$2,000 per month during a time when Husband’s maintenance obligation is \$5,000 per month, then Husband will be entitled to a reduction in his monthly maintenance obligation from \$5,000 to \$3,000 per month. Once such a reduction has taken place, Wife shall not be entitled to seek a subsequent increase in her maintenance as a result of any change in her employment income.

- c. Provision Allowing Payor, But Not Recipient, To Seek Review of Maintenance: Wife’s right to receive maintenance pursuant to paragraph \_\_\_\_ shall not be subject to any increase or extension for any reason whatsoever, and Wife shall not be entitled to file any petition for modification on review. In the event that Husband experiences a catastrophic event which significantly impacts his ability to pay support (such as an unforeseeable disability or an involuntary loss of income), Husband will have the right to seek a modification of his maintenance obligation.
- d. Provision Barring Any Modification Or Review: Husband’s obligation to pay, and Wife’s right to receive, maintenance pursuant to paragraph \_\_\_\_ is non-modifiable and non-reviewable, as set forth in 750 ILCS 5/502(f).

The Illinois Marriage and Dissolution of Marriage Act (IMDMA) §504 sets forth the factors to be considered by the court in determining if maintenance should be awarded. In 1993 and 1999, the maintenance section of the IMDMA was modified. Although at first glance the revisions appear to completely overhaul the maintenance provision, in fact, IMDMA §504(a)(3), (4), (5), (10), (12) represent the only actual changes made to the statute. These additional provisions permit the court to consider the impairment of the homemaker's own earning capacity due to a commitment to domestic duties or delayed education, training, employment or career opportunities due to the marriage.

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 without sufficient income, may issue a maintenance order. The propriety of a maintenance award as well as the duration and amount, are determined based on the following factors set out in IMDMA §504:

- 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:

- (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 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.

Illinois follows the majority position that no one factor is controlling in determining whether spousal maintenance should be awarded. Chapman v. Chapman, 285 Ill.App.3d 377, 674 N.E.2d 432, 220 Ill.Dec. 889 (3d Dist. 1996). Furthermore, nothing in the statute requires 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. In re Marriage of Miller, 231 Ill.App.3d 480, 595 N.E.2d 1349, 172 Ill.Dec. 679 (3d Dist. 1992).

C. Income and Property of Each Party

The financial circumstances of both parties, including their incomes and property, both marital and non-marital, must be considered when the court decides whether to award maintenance. IMDMA §504(a)(1). Pursuant to section 504(a)(1), 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.

Although the statute refers to income, the term is not defined without §504.

However, IMDMA §706 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. Brown v. Brown, 241 Ill.App.3d 305, 608 N.E.2d

967, 181 Ill.Dec. 716 (3d Dist. 1993). In some instances, the trial court has barred maintenance because of a large property award. 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); In re Marriage of Andrew, 628 N.E.2d 221, 194 Ill.Dec. 724 (1st Dist. 1993), (the appellate court affirmed the trial court's determination that the property award in excess of one million dollars was itself sufficient to provide for the needs of the dependent spouse, and therefore did not award maintenance).

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, No. 3-97-738 (2d Dist. filed July 20, 1998). 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.

D. The Parties' Needs

Assuming the court has found the property apportioned to the applicant is insufficient to independently generate income sufficient to provide support, the next factor for the court to consider is the needs of each party. IMDMA §504(a)(2). The trial court has wide latitude in determining reasonable needs and is not **necessarily** limited to the factors listed in the statute. In re Marriage of Mohr, 260 Ill.App.3d 98, 631 N.E.2d 785, 197 Ill.Dec. 563 (4th Dist. 1994). Maintenance may be appropriate when a spouse is not able to meet everyday needs even if the spouse is employed. In re Marriage of Swanson, 275 Ill.App.3d 519, 646 N.E.2d 215, 212 Ill.Dec. 62 (4th Dist. 1995). 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. In re Marriage of Fields, 288 Ill.App.3d 1053, 681 N.E.2d 166, 224 Ill.Dec. 184 (4th Dist. 1997), (an award of maintenance when added to the wife's employment income that exceeded the amount the evidence showed as being her expenses was affirmed by the appellate court.

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. In re Marriage of Martin, 223 Ill.App.3d 855, 585 N.E.2d 1158 (4th Dist. 1992). 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 to maintain the standard of living attained during the marriage. In re Marriage of Tietz, 605 N.E.2d 676, 178 Ill.Dec. 876 (4th Dist. 1992). However, a party does have an obligation to generate income from or use assets if possible and practical. In re Marriage of Thornton, 89 Ill.App.3d 1078, 1088, 45 Ill.Dec. 612, 620, 412 N.E.2d 1336, 1344 (1980).

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.

E. Modification of Support

In an interesting decision in New Jersey, a copy of which is attached to the end of this article, the New Jersey Supreme Court in In Re Marriage of Miller, 734 A.2d

752, 160 N.J. 408 (1999) imputed income to an ex-husband's investments in a post-judgment hearing on modification of alimony. When the parties got divorced, each party received approximately \$1,000,000 in property. The wife also received monthly alimony of \$3,750, plus half of the husband's first \$300,000 of any bonus, provided the maximum alimony would not exceed \$200,000 annually.

At the time of the divorce, the husband's income consisted of salary of \$150,000 and annual bonus which peaked at \$1,100,000.

Three years after the divorce, the husband became ill and his job responsibilities changed. Although his salary remained at \$150,000, he did not receive annual bonuses. Husband sought to modify the maintenance based upon a substantial change in circumstances. Husband's job was ultimately terminated, and he sought to modify the support. The trial court reduced support from \$200,000 to \$48,000 per year. The trial court found the husband's net worth was \$6,561,644, of which \$4,500,000 was liquid. Of the husband's portfolio, \$1,500,000 was invested in municipal bonds which yielded \$87,500 of tax-free income and \$3,000,000 was invested in growth stocks which generated approximately \$50,000 of dividends. The wife's income was \$40,000 from employment, and she had a portfolio of \$723,801, plus a house worth \$425,000.

The issues was whether the husband's \$6,500,000 portfolio could earn him more than \$137,000 on total liquidity. The husband contended that in computing the potential yield of his investments, that it is an overly complicated task that the courts should not undertake. He further argued that the court should only

consider his liquid assets and not his total investment portfolio. The New Jersey Supreme Court determined that income could be imputed from investments in excess of that which was actually received. The court's cited a 1918 and 1920 case in imputing income. The court's logic, in the midst of a bull market, is instructive.

Given that both income earned through employment and investment income may be considered in a court's calculation of an alimony award, it follows that there is no functional difference between imputing income to the supporting spouse earned from employment versus that earned from investment. In both instances, the supporting spouse is required to earn more from an "asset," either his or her human capital in the form of employment or his or her investment capital, or risk having more income imputed to him or her. The rationale supporting the imputation of income that could be earned from employment is that the supporting spouse could be investing his or her human capital in a more productive way by obtaining employment consistent with his or her marketable skills and training, or obtaining more or better employment, market conditions permitting, in the case of underemployed support spouses. See, e.g., Harris, supra, 235 N.J. Super. at 439-40, 563, A.2d 64; Arribi v. Arribi 186 N.J. Super 116, 118, 451 A2d 969 (Ch.Div.1982).

The supporting spouse could invest his substantial capital assets to yield more than the approximately 1.6 percent interest he is currently earning on his growth stock investments. Doing so would not require that plaintiff deplete his considerable principal; it only means that plaintiff could invest his principal

differently in higher yield investment options available to him, much in the same way that an underemployed spouse could obtain a higher paying job available to him to make a more productive use of his human capital. In this case, plaintiff's sophisticated investment skills are to him what Luciano Pavarotti's voice is to him: the "asset" that is capable of \*424 earning a significant amount of money. In other cases, the use of an investment broker will lead to the same results because the supporting spouse still makes the ultimate investment decision.

It is appropriate to impute a reasonable income from plaintiff's investments comparable to a prudent use of his investments, like his human capital. The question that remains, however, is what rate of return should be applied to plaintiff's investment decisions. Either a fixed or a variable rate can be used. We prefer a variable rate because it is more equitable in that it accommodates market fluctuations. A variable rate, however, must be ascertainable by reference to a formula or a fixed index.

We conclude that the fairest solution for imputing income to plaintiff's investments under the present circumstances is to impute a rate of return based on long-term corporate bonds. This rate should be based upon Moody's Composite Index on A-rated \*425 Corporate Bonds.<sup>5</sup> Although historically stocks have performed better than bonds, it would not be equitable to impute the average annual twelve percent growth rate of stocks to plaintiff's investments because of the inherent risks involved in stock market investments. The rate on long-term A-

---

<sup>5</sup> Agencies like Standard & Poor's and Moody's generally rate bonds in two broad categories: investment grade and speculative grade.

rated corporate bonds, on the other hand, provides a prudent balance between investment risk and investment return.

On remand, the trial court should use Moody's Composite Index on A-rated Corporate Bonds to impute the average long-term corporate bond rate of return over of the preceding five years.<sup>6</sup> Thus, the average rate for the last five calendar years was 7.7%.

The husband got financially punished because this was an era when interest rates were higher and the bull market was raging. It proves that whether it is the stock market or life in general, timing is everything.

In another post-decree modification case, the Supreme Court of Vermont in the case of In re Marriage of Clark, 779 A.2d 42 (2001), distinguished the Miller decision. A copy of this opinion is attached to this article. Although this case involved an increase in child support, the Vermont Supreme Court found that the Wife, who was seeking the increase, shouldn't be penalized for her poorly performing stocks and that additional income should not be imputed when the stocks were not generating income.

It is interesting to note that in Vermont., the amount of child support is based upon gross incomes of the parties and the definition of gross income provides that “[i]ncome at the current rate for long-term \*46 United States Treasury Bills shall

---

<sup>6</sup> If for some unforeseeable reason the required information cannot be obtained from Moody's within a reasonable time, the trial court should direct counsel to use another comparable source such as Lehmann Brothers' Five-Year Average on T-Bonds Index.

be imputed to *nonincome producing assets* with an aggregate fair market value of \$10,000.00 or more.” *Id.* (emphasis added).

The magistrate declined to impute income to mother for stocks that father contended were performing poorly because he concluded that mother’s investments were income-producing assets. Here, it is undisputed that mother’s investments are *income producing assets*, Thus, because the statute only applies to *nonincome producing assets*, father’s argument fails.

It is not the role of the judiciary to second guess personal investment decisions or to micromanage investment portfolios. And while we note that, “[i]n a given set of circumstances, the court may determine that it is appropriate to require a parent to reinvest or liquidate certain assets to provide for his or her children,” this is not such a case. Ogborn v. Hiltz, 262 A.D.2d 857, 692 N.Y.S.2d 490, 492 (1999) (quoting Webb v. Rugg, 197 A.D.2d 777, 602 N.Y.S.2d 716, 718 (1993)).

There was a nine page dissenting opinion which supported the imputation of income and discusses how courts should measure reasonable rates of return on capital investments.

### **III. Conclusion**

Regardless of the statutory language or interpretation of existing case law, there is an interrelationship between the amount of property awarded, the income, if any that property can generate, and the needs of the spouse seeking maintenance. The general rule is to quantify the property awarded to a spouse and determine if it is sufficient to provide for a party’s reasonable needs consistent with the standard of living enjoyed by the parties. Each case is fact based. In the average divorce case, the marital property

usually consists of a house encumbered by a mortgage, small savings, and retirement accounts. Under these set of facts, even if one party was awarded all the marital property, it would be insufficient consideration for a waiver of maintenance. When combined, these ill-liquid assets will not generate sufficient income to independently support and maintain a spouse. The purpose of dividing marital assets is equitable in nature. The right to maintenance is probably the largest unquantified asset of the marriage, and if it is bargained away, there should be sufficient consideration given. All Marital Settlement Agreements need to contain clear and concise language setting forth what the parties intend when maintenance is awarded or reserved. If maintenance is awarded, the type should be characterized (i.e., in gross, permanent, rehabilitative or reserved). The terms of payment, the amount, the duration of the time period, and the events that maintenance are terminable or defeasible should be specified. If maintenance is reserved, the reason or conditions should be stated, and the reservation should be for a specific period. In distributing property, courts should seek as much finality as is possible so that each party knows what they are going to receive and can plan accordingly. Unfortunately, most marital estates are insufficient to enable parties to live without one party receiving maintenance.