

MAINTENANCE CASE LAW UPDATE – 2005 through 2009

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INITIAL DIVORCE CASES

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

[IRMO Heroy](#), (1st Dist., September 17, 2008)

Heroy serves as a primer in reviewing the life regarding maintenance in long term marriage cases with a significant lifestyle [\$35,000 permanent maintenance award affirmed.] Of significance was the completing experts submitting reports and testifying as to lifestyle. The case overall is 53 pages in length with the discussion on maintenance in its various aspects summarizing the law.

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

[IRMO Bratcher](#), No. 4-07-0621 (4th Dist., June 27, 2008)

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

The appellate court commented:

Under the trial court's order, Lela will receive monthly income of approximately \$14,000, consisting of \$8,193 rental income on the Fort Jesse Road property and \$5,845 interest at 8% on the lump-sum payment, plus perhaps some income from

her anticipated work as a realtor... David will receive monthly income of approximately \$27,000, ... If maintenance is factored in, Lela will have monthly income of \$26,500 and David will have monthly income of \$14,500.

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

That is not true in the present case where the parties had acquired several millions of dollars in assets and Lela was awarded half of those assets. Lela was not "saddle[d] *** with the burden of her reduced earning potential" (*Hart*, 194 Ill. App. 3d at 853, 551 N.E.2d at 745)--she was awarded assets totaling more than the value of the business. It is true that Lela will never generate the income that David does, but there is no need for Lela to work. In some cases, the family business may constitute almost all of the assets and it may be necessary to award that business to the operator of the business and compensate the other spouse through maintenance. That is not true in the present case where Lela was awarded substantial assets, including a \$876,759 lump-sum payment, similar to maintenance in gross. Lela made important contributions to the business in its early years, but she has been compensated for those contributions.

The appellate court then stated:

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

The court then concluded:

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

Comment: *Heroy* and *Bratcher* provide an interesting point and counter-point in cases involving a long term marriage. There exists a fundamentally different judicial philosophy with the 1st District affirmance in *Heroy* compared to the reversal in the 4th District's *Bratcher* decision.

Thornley - Authority and Propriety to Award Maintenance in Gross in Short Term Marriage Case Where No Maintenance Requested:

IRMO Thornley, 361 Ill. App. 3d 1067; 838 N.E.2d 981; 298 Ill. Dec. 88 (Fourth Dist., 2005)

The trial court did not abuse its discretion when it made an uneven distribution of the marital assets and debts in favor of wife, who during short marriage assisted husband in obtaining chiropractic degree. Further, although there was no specific request for maintenance by wife in petition, she did not explicitly waive it and an award of \$18,000 maintenance in gross was not in error.

Awan and Parveen - Reviewable Maintenance

IRMO Awan, (3rd Dist., February 17, 2009)

Mr. Awan and Ms Parveen were married in 1977 in Pakistan. They later immigrated to the United States, and Mr. Awan obtained degrees in veterinary medicine. The couple did not have children and moved several times during the marriage. Ms Parveen had earned a degree in Pakistan before moving to the United States, but did not obtain any additional education and did not work during the marriage. She claimed that this was at the insistence of Mr. Awan.

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

Walker - Permanent Maintenance Award Affirmed / Life Insurance Security

IRMO Walker, (4th Dist., November 26, 2008)

Walker held that the trial court did not err in its award of permanent maintenance. The ex-husband first argued that the permanent maintenance award was against the manifest weight of the evidence because the award was based on an inflated figure for his net income. The husband's income was variable because of bonuses. At the hearing on the motion to reconsider, the trial court indicated it made its decision on maintenance based on David's income of \$204,000 versus Barbara's income of \$37,000. The appellate court stated, "While the trial court did not make an express finding as to David's credibility, the court clearly rejected David's testimony that the bonus was a one-time occurrence." The appellate court stated:

Permanent maintenance should be awarded where a spouse is not employable or is only employable at a lower income as compared to the spouse's previous standard of living. *In re Marriage of Schiltz*, 358 Ill. App. 3d 1079, 1084, 833 N.E.2d 412, 415-16 (2005). A spouse should not be required to lower the standard of living

established in the marriage as long as the payor spouse has sufficient assets to meet his needs and the needs of his former spouse. *In re Marriage of Drury*, 317 Ill. App. 3d 201, 207, 740 N.E.2d 365, 369 (2000).

In this case the wife was a teacher and earned approximately \$2,500 and she testified to monthly expenses of \$3,500. The trial court ordered the husband to pay \$2,000 per month in permanent maintenance for April and May 2007, then \$3,000 per month through May 2014. Beginning in May 2014, the ex-wife will receive between \$800 and \$1,300 from her Teacher's Retirement Fund. For this reason, the court reduced the ex-husband's maintenance obligation to only \$1,640 per month starting May 2014. The appellate court noted the 26 year marriage.

Another significant holding was that the trial court did not err in requiring the husband to maintain life insurance as security for the maintenance obligation. The appellate court noted:

This court has previously held that a trial court does not have the authority to order a payor of maintenance to keep an insurance policy on his life as security for maintenance. *In re Marriage of Clarke*, 125 Ill. App. 3d 432, 439, 465 N.E.2d 975, 979 (1984).

The appellate court stated in striking language:

While the Dissolution Act does not contain language specifically authorizing a trial court to order security for maintenance, the legislature did not specifically prohibit such an order. Therefore, this court will not presume that an order requiring a payor to keep a life-insurance policy as security for maintenance violates the Dissolution Act's requirement that the obligation to pay maintenance terminate upon the death of either party. See *Vernon*, 253 Ill. App. 3d at 788, 625 N.E.2d at 827... In light of this liberal construction, sections 503 and 504 are sufficiently broad to allow the trial court to award a form of security for a maintenance obligation, not necessarily limited to life insurance.

Because of the importance of this holding, the specifics of the trial court's decision are noted:

In the present case, the trial court ordered David to maintain Barbara as the sole beneficiary on his employer-issued insurance policy during the time he was obligated to pay maintenance. If life insurance were no longer available to David through his employer, the court required that David purchase life insurance and maintain Barbara as the sole beneficiary. The court also ordered that in such an instance, David could deduct the cost of the insurance policy from the monthly maintenance payment to Barbara.

The appellate court then quoted with approval the language from the trial court's decision:

In a particular case, the trial court may appropriately limit how long the policy must be kept in force. A court may appropriately order the use of a term policy, not a whole-life policy, although another solution may be to recognize the asset value of the whole-life policy in the division of assets. In fact, the court here recognized the gross disparity of income, Barbara's bare-bones budget, David's putting away \$1,000 a month in a 401K, and the parties' lifestyle. The court balanced the equities,

accounted for contingencies, and adjusted maintenance down for college expenses and retirement. The court recognized that maintenance ends upon death and chose to secure that maintenance with life insurance, stating, "My biggest concern about maintenance is, ma'am, if I were to award you the maintenance and he would, unfortunately, walk out here and get hit by a car, the maintenance is gone, because it ends upon his death."

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unfortunately, walk out here and get hit by a car, the maintenance is gone, because it ends upon his death."

Accordingly, we now have a conflict between the Third District's January 2008 [Ellinger](#) decision and the Fourth District *Walker* decision. The Fourth District emphasized, "We hereby abandon *Clarke* and adopt the reasoning of *Vernon*." We should anticipate that this issue may be taken up by the Illinois Supreme Court. Also note that one Justice, Justice Turner, specifically dissented regarding the life insurance issue.

Initial Permanent Maintenance Award Reversed in 24 Year Marriage Case with Disparity in Incomes:

[IRMO Schiltz](#), 358 Ill. App. 3d 1079; 833 N.E.2d 412; 295 Ill. Dec. 579 (Third Dist., 2005)

The trial court abused its discretion when it awarded permanent maintenance of \$800 per month to wife who had worked throughout the 24 yr. marriage and was capable of earning income consistent with the standard of living achieved during the marriage. The trial court had emphasized that the permanent award was subject to modification. The appellate court concentrated on one of the factors which I have stressed in my writings, i.e., the opportunity cost of missed job or career opportunities due to the marriage -- often due to raising children. The appellate court stated that absent any evidence that wife sacrificed her earning capacity or career in order to support the husband's career or needs of the family, there should not have been an award of permanent maintenance despite the two to one income differential. The husband worked loading trucks earning \$49,000 per year and wife worked as clerk at an insurance company earning \$24,000 per year. A key quotation stated, " In this case, the trial court's award of permanent maintenance provided Pamela with little incentive to procure training or skills to attain self-sufficiency. However, rehabilitative maintenance would provide Pamela with such an incentive. See [Selinger](#), 351 Ill. App. 3d 611; 814 N.E.2d 152; 286 Ill. Dec. 502."

Maintenance in Gross -- Total Payments Over Time and No Other Termination Language:

[IRMO Michaelson](#), 359 Ill. App. 3d 706; 834 N.E.2d 539; 295 Ill. Dec. 958 (First Dist., 2005)

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

of the MSA had provided:

Husband shall be obligated to pay to Wife, as and for spousal support, the sum of \$45,000 per year, beginning at such time that Husband becomes an attending physician, post residency, for a period of eight (8) years, for a total of Three Hundred Sixty Thousand (\$360,000) Dollars. Said spousal support shall be paid to Wife in ninety six (96) equal monthly installments of Three Thousand Seven Hundred Fifty (\$3,750.00) Dollars.

The maintenance payment(s)/obligation provided for by this agreement shall terminate completely, only after the payment of all monies due to Wife are paid in full, regardless of any other changed circumstances of the parties.

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

The appellate court stressed the fact that the agreement totals the maintenance to be paid over time. It also stressed the fact that by the terms of the MSA, the maintenance was to terminate completely only after payment of all monies due. Perhaps this was an award for maintenance in gross. At a minimum, however, there should have been no finding of 508(b) attorney's fees, contempt, etc. The ex-husband's argument was, in part, that the agreement was ambiguous and that there was no way he would have agreed to a provision for maintenance in gross which would not terminate on his ex-wife's remarriage, where the parties had lived together for only six years following their marriage. Regarding the fee issue, the ex-husband contented that the fee award was improper because only \$2,000 of the \$9,640 in fees were related to enforcement. In affirming the fee award, the trial court used language akin to a sanctions ruling which stated, "He had no reasonable basis for his petition to terminate or modify maintenance."

MODIFICATION, REVIEW AND TERMINATION

Date of Termination of Unallocated Maintenance Was Not Retroactive to Wife's Remarriage / Dictum Suggesting that Maintenance Does Not Automatically Terminate on Date of Conjugal Cohabitation

[IRMO Elenewski](#), 357 Ill. App. 3d 504; 828 N.E.2d 895; 293 Ill. Dec. 585 (Fourth Dist., 2005).

A July 2000 award for unallocated maintenance provided that it "shall be reviewable" upon the wife's remarriage, her living on a conjugal basis with another man, or expiration of 72 consecutive months of payments. In August 2003, the former husband filed a petition to terminate his unallocated maintenance payments alleging conjugal cohabitation prior to April of 2002. The ex-wife admitted the living arrangement from May of 2002 and in the ex-husband

later learned that his ex-wife had remarried in June of 2002. The ex-husband filed a second petition to retroactively modify the unallocated maintenance payments retroactive to the date of the ex-wife's remarriage. In June of 2004, the trial court entered its order providing that the ex-wife had a "vested right in the unallocated support of \$3,500 up to the date the ex-husband filed his original petition. The husband appealed and the appellate court affirmed.

The language of the decision is instructive:

If this case involved only termination of maintenance on the basis of continuing conjugal cohabitation, we would have little difficulty affirming the trial court's order that termination was effective only as to installments accruing after notice of the filing of the motion for modification or termination. We have held that, despite the language of section 510(c), maintenance may be terminated on the basis of continuing conjugal cohabitation only upon the filing of a petition to terminate. *** This case, however, also involved a remarriage, on June 27, 2002. The trial court did not use that date here because of the language in the order of October 3, 2000, that "the amount of support shall be reviewable" upon Loretta's remarriage, et cetera. The trial court concluded that language fit within the provision of section 510(c) that maintenance be terminated as of the date of remarriage "[u]nless otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court." 750 ILCS 5/510(c). The order of October 3, 2000, was prepared by Loretta's attorney, was approved by John's attorney, and appears to be a written agreement between the parties as referred to in section 510(c). A further complication is in this case in that John is not simply seeking to terminate an award of maintenance but an unallocated award of both maintenance and child support. Child support clearly cannot be reduced prior to the filing of the motion for modification.

The appellate court then stated that, "When child support and maintenance are unallocated, we lose the certainty of a specific amount of child support. That is done for the benefit of the payor, who is thereby allowed to deduct child support. One of the fundamental aspects of child support is that modifications cannot be retroactive. The recipient of child support is entitled to believe the ordered payments are definite until a court tells her otherwise." While the court mentioned the fact that it did not condone the ex-wife's conduct as to her failure to notify her ex-husband as to her remarriage, under the facts of the case maintenance was determined to be properly terminated as of the date of the filing of the ex-husband's petition.

Comment by Gunnar J. Gitlin: [A historical article which was well drafted is the David King Journal of the DuPage County Bar Association reviewing the Gray \(2nd Dist., 2000\) and Snow \(Third Dist., 2001\) decisions as to the issue of automatic termination on conjugal cohabitation.](#)

The *Elenewski* court approved of its 1994 decision in *IRMO Frasco* and did not approve of the Third District's *Snow* decision or the Second District's *Gray* decision.

***Reynard* - Petition to Increase Maintenance**

[*IRMO Reynard*](#), 883 N.E.2d 535, 378 Ill.App.3d 997 (4th Dist., January 16, 2008)

The trial court did not abuse its discretion when it refused to increase former wife's maintenance payment after parties' youngest child graduated from college and former husband remarried. The trial court properly weighed evidence and concluded that there had been insufficient evidence of material change in parties' circumstances because husband incurred loans in order to pay for child's education, had substantial capital improvements expenses as result of deferring maintenance to home, and had spouse with her own set of expenses. In addition, although the wife lost her tenant, she increased her investment income.

Abrell - Petition to Decrease Permanent Maintenance Award Based upon Wife's Job Shortly After Close of Proofs and Small Reduction Only

IRMO Abrell, No. 4-06-0974 (Fourth Dist., November 19, 2008)

In *Abrell*, the appellate court stated:

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

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

With the award of maintenance of \$1,250 per month, Jacquie's gross income was \$31,608 per year while John's yearly gross income was \$57,000 after payment of maintenance. Although neither party was able to maintain the standard of living enjoyed during the marriage, John would be able to come closer than Jacquie. While both had health issues, John had a law degree and many years of work experience in the legal field. Jacquie had a high school education and had been out of the work force for approximately 17 years. Jacquie was 60 years old. Her prospects for increasing her standard of living through employment are not good.

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

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

Conjugal Cohabitation – Date of Termination is Not Retroactive / Possibility of Award of Permanent Maintenance Even Though Petition Filed After Expiration of Three Year Term

[*IRMO Thornton*](#), (Third Dist., April 17, 2007) (posted May 8, 2007).

This case represents a remarkable “about-face” by the Third District Illinois appellate court – in an opinion I had previously criticized. In this case the ex-wife appealed the trial court’s order granting the **oral request** of her former spouse to terminate his obligation to pay maintenance. The appellate court stated:

In the original opinion issued in this appeal, we affirmed the trial court on all three issues. *In re Marriage of Thornton*, No. 3-05-0722 (August 9, 2006). We now vacate that Opinion and, for the reasons that follow, we reaffirm our decision in [*Snow*](#) [also a Third District decision] reverse the trial court’s order finding the obligation to pay maintenance had abated, and remand the matter for consideration of respondent’s requests for extended, increased and permanent maintenance and petitioner’s responsibility of compliance with the other debts and obligations he had pursuant to the judgment of dissolution and its included marital settlement agreement.

In *Thornton* the ex-wife had testified that she had allowed the petitioner’s brother to move in "out of the goodness of her heart" because "he did not have a place to stay [and] was in essence, homeless." She testified that the brother stayed and slept in the basement and that they led separate lives. She denied that there was at any time any romance or conjugal relationship between them. The appellate court stated in a significant decision:

The instant case does, however, directly raise the issue of whether a spouse who has been ordered by the court to pay maintenance can cease such payments unilaterally without benefit of a petition and a determination that there had, in fact, been "conjugal cohabitation." We believe, contrary to the decision in [*Gray*](#), that such unilateral action is contrary to the Illinois Marriage and Dissolution of Marriage Act and flies in the face of extensive and long-standing family case law.

The Third District appellate court explained:

That is, section 510(a) allows modification only as to installments accruing after the due notice provided by the filing of a motion. By contrast, section 510(c) provides that the obligation to make future maintenance payments is automatically terminated when one of these three particular events occurs. See 750 ILCS 5/510(c) (West 2002). Logic compels us to conclude that section 510(c) creates an exception to section 510(a)’s limitation of relief to installments after the filing of the motion or petition, **but does not establish an exemption from the obligation to file a petition in order to conform the court’s order to present circumstances...** It can thus be seen that any modification or enforcement of the judgment of dissolution entered in the State of Illinois must be initiated by the

filing of a petition and notice.

Application of Conjugal Cohabitation Factors to Case: The appellate court in this case noted the six factors as recited in several cases including the 2006 *Susan* decision. It noted that there was no evidence as to any of these factors and consequently, no evidence that there ever was a *de facto* husband and wife relationship. The appellate court found no evidence of a resident, continuing conjugal relationship.

Timeliness of Wife's Petition for Additional Maintenance: The next question was the timeliness of the ex-wife's petition because the underlying MSA (incorporated into the divorce judgment) was one in which the ex-husband was ordered in March 2001 to maintenance of \$275 per month 30 months (through to September 2003). In 2004, the ex-wife filed a petition alleging a complete failure to pay any of the maintenance payments and seeking payment of the previously required past maintenance and extended, increased and permanent maintenance. At hearing, the court found the arrearage and the ex-husband apparently made an oral motion to find that maintenance terminated by operation of law due to a conjugal relationship. The appellate court noted that therefore there was no petition to invoke the court's power to consider termination of maintenance on the basis of conjugal cohabitation.

As to the filing after the 30 month period, the critical language of the underlying MSA had stated, "The maintenance shall be reviewed at the end of this period, to determine whether it should continue and, if so, to what extent." Because of this language, the appellate court found that the trial court had jurisdiction to consider the ex-wife's petition for permanent maintenance.

Termination of Maintenance -- *De Facto* Married Relationship Found to Constitute Resident, Continuing Conjugal Basis Despite Separate Finances and Property -- Distinction Between *De Facto* Marriage and Need

IRMO Susan, 367 Ill. App. 3d 926; 856 N.E.2d 1167; 306 Ill. Dec. 72 (Second Dist., 2006)

In 2000 dissolution of marriage proceedings the husband was required to pay monthly maintenance to his wife. The ex-husband petitioned to terminate maintenance in April 2005, alleging that his former wife was residing on a continuing conjugal basis with her boyfriend. The appellate court noted that there are six factors the court may consider when determining if a relationship is a *de facto* marriage: courts look to the totality of the circumstances and consider the following factors: "(1) the length of the relationship; (2) the amount of time the couple spends together; (3) the nature of activities engaged in; (4) the interrelation of their personal affairs; (5) whether they vacation together; and (6) whether they spend holidays together." *In re Marriage of Sunday*, 354 Ill. App. 3d 184, 189 (2004).

The testimony and evidence at trial showed that ex-wife and her boyfriend had been together for over three years at the time of the hearing, and the evidence demonstrated that they spent nearly every night together during their relationship. The evidence also showed that the two took many trips together and spent virtually all holidays together. However, the evidence indicated that ex-wife and her boyfriend did not commingle funds or provide each other with monetary support.

They also completely maintained separate residences, bank accounts, and expenses.

What is surprising about this case is the complete lack of financial support by the boyfriend as well as maintaining two separate residences. The ex-wife maintained that "[m]aintenance is predicated upon a need for support by the spouse who is to receive maintenance" and, thus, "the most important question that arises in all termination of maintenance cases" is "whether the relationship has materially affected the recipient spouse's need for support." However, the appellate court rejected this argument and noted that, "The import of the fourth factor [the interrelation of their personal affairs] is not whether the new *de facto* spouse financially supports the recipient, but rather whether their personal affairs, including financial matters, are commingled as those of a married couple would typically be." The court in *Susan* states that commingling of funds is merely an indicator of a married relationship.

The court also notes a distinction between a proceeding under Section 510(a) and Section 510(c). A proceeding under (a) allows for modification *or* termination, while a proceeding under (c) only allows modification. Thus, need is a consideration under subpart (a) but not subpart (c):

Further, though it is true that "[m]aintenance is predicated upon a need for support by the spouse who is to receive maintenance" (*Sappington*, 106 Ill. 2d at 467), section 510(c) makes no reference to any of the factors underlying an award of maintenance. Section 510(a), on the other hand, explicitly incorporates the factors to be considered in awarding maintenance. 750 ILCS 5/510(a--5) (West 2004) ("the court shall consider the applicable factors set forth in [section 504(a)]" of the Act, which lays out the factors to be considered in awarding maintenance). Thus, the rationale underlying an award of maintenance, including the recipient spouse's need for support, is expressly made relevant in a proceeding under section 510(a), but not in one under section 510(c).

Comment: My review of the original *Thornton* decision stated, "*Thornton* and *Susan* are difficult to reconcile with one another. The [original] *Thornton* focuses upon the financial aspect of the relationship with the case stating, "we also place great significance in this type of financial interrelation." *Susan* de-emphasized the financial relationship. While it states that the fourth factor does not focus simply on financial matters but on "whether their personal affairs, including financial matters, are commingled." As a practical matter, it is very difficult to give advice to an individual who is paying maintenance and it is believed that the former spouse is engaging in a resident, continuing, conjugal relationship. Keep in mind that this is one of the few areas where the case law supports what might be considered as "self-help", i.e., stopping making payments toward maintenance if it is believed that this will not suggest to maintenance receiving spouse that a petition to find that maintenance should have terminated. One issue in these self-help cases is proving when the relationship stopped. One piece of advice is to have the client in situations such as this create a separate account with the funds for maintenance in it so that if the court finds that there is no conjugal cohabitation, that the maintenance paying spouse is in a position to comply with the order. Keep in mind also that if the maintenance paying spouse loses, then each missed payment is a judgment and entitled to 9% interest.

Maintenance Payor Did Not Have to Show Change in Circumstances Where Maintenance Review Sought Even Where Potential Relief Included Termination of Payments:

IRMO Golden, 358 Ill. App. 3d 464; 831 N.E.2d 1177; 294 Ill. Dec. 852 (Second Dist., 2005).

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

The appellate court noted that, " Effective January 2004, our legislature amended section 510(a) of the Act, deleting the phrase 'and, with respect to maintenance, only upon a showing of a substantial change in circumstances.' See 750 ILCS 5/510(a)." The language of Section 510(a-5) then provides that, "An order for maintenance may be modified **or terminated** only upon a showing of a substantial change in circumstances. In all such proceedings, as well as in proceedings in which maintenance is being reviewed, the court shall consider the applicable factors set forth in subsection (a) of Section 504 and the following factors..." (Emphasis added.) The case stated:

Turning to whether the agreement in this case contemplated a review of maintenance, we note that the agreement mentions both modification and review. The agreement further proscribes that neither modification nor review can occur before three years. However, with respect to the potential for a review hearing, the agreement states that review shall occur "no sooner than" 36 months after the first payment. We believe that the use of the phrase, "no sooner than," indicates that the parties contemplated that a review would in fact occur at some time after the 36 months passed. Therefore, we find that the agreement authorized respondent to bring a petition for review after the 36 months had passed.

We find it important to point out that the characterization of the hearing that is the subject of this case was made more difficult by the inartful drafting of the agreement.

The court also cited Illinois case law which emphasized that when the court sets a review, good drafting will advise the parties who has the burden of going forward, who has the burden of proof, and what issues will be addressed. The case states that if rehabilitate

maintenance is ordered, an appropriate agreement or judgment would provide that maintenance would continue only if the recipient has shown "good faith in seeking education or employment or proves the need for continued maintenance." If pleadings are required, this should be stated. The majority then stated, " In this case, the parties' agreement, which was incorporated into the judgment, did not attempt to limit the scope of the review proceedings. Thus, we find that the parties' intent, and the intent of the court, was that a general review of maintenance could occur after the 36-month time period had passed."

Maintenance Which is Reviewable Within Four Years Does Not Terminate at End of Period:

[*IRMO Rodriguez*](#), 359 Ill. App. 3d 307; 834 N.E.2d 71; 295 Ill. Dec. 846 (Third Dist., 2005)

In this 1999 judgment, maintenance was "reviewable within four years." Slightly more than four years after the divorce decree, the ex-husband moved to terminate the withholding order claiming he had satisfied his maintenance obligation. The trial court concluded that it lacked jurisdiction to review maintenance, ordered termination of withholding order for maintenance and ordered wife to reimburse the ex-husband for the overpayment. The appellate court reversed the trial court's orders and found that the provision for review of maintenance made it rehabilitative maintenance, which was reviewable at any time until court has conducted a hearing. Once again the appellate court stated, "We agree with the court in *IRMO Culp*, when it stated that in setting review hearings it would be preferable for the court to advise the parties who has the burden of going forward, who has the burden of proof, and what issues will be addressed. *IRMO Culp*, 341 Ill. App. 3d 390, 396-97, 792 N.E.2d 452, 457 (2003). Nevertheless, it is our view that anytime the court provides for maintenance reviewable after a time specified, the court retains jurisdiction to review the maintenance until one or both of the parties petitions for review. Upon review the trial court can consider whether maintenance should continue and if so, whether the amount should be increased or decreased. Until a party petitions for review, the maintenance award shall continue as ordered."

[*Wojcik v. Wojcik*](#), 362 Ill. App. 3d 144; 838 N.E.2d 282; 297 Ill. Dec. 795 (Second Dist., 2005)

1. **Consideration of VA Benefits as to Maintenance Issue:** The case then addresses the entire issue of maintenance in light of the case law. The trial court stated that, while "the *Crook* case may under certain circumstances result in inequities, as commented on by the Illinois Supreme Court, there is no reason for this Court to seek inequities by ignoring the reality of the benefits received by [Paul] on the issue of his right to receive maintenance from [Karen]." The ex-husband argued that the trial court's consideration of his receipt of disability benefits in ruling upon his petition for maintenance violated federal preemption principles. The appellate court then commented that, "the reviewing courts of numerous other states have held that a trial court may properly treat a veteran's present and future disability benefits as income in determining the veteran's

obligation to pay alimony or maintenance." "These courts have held that the anti-attachment provisions of section 5301(a)(1) do not shield a veteran's benefits from being considered in an alimony or maintenance proceeding because a spouse seeking maintenance is not a "creditor" under the statute but is instead seeking family support. The appellate court as to the maintenance issue concluded, "In our view, these authorities provide a compelling basis for concluding that a trial court may consider a former spouse's present and anticipated disability benefits in determining the issue of maintenance.

2. **General Reservation of Maintenance and Judicial Notice:** Another issue in the case was the court's general reservation of the entire maintenance awards -- until the statutory termination events (remarriage, conjugal cohabitation). This case was based upon a physician's testimony that the husband's disability may subside sufficiently to allow him to return to employment. The appellate court then somewhat gratuitously stated, "in light of our discussion above, the trial court properly could have considered Paul's disability income in determining his present ability to pay maintenance. However, Karen has not filed a cross-appeal, and thus we will not disturb the trial court's finding that, as of the date of trial, Paul was unable to pay maintenance. Nonetheless, given Karen's need, we hold that it was appropriate for the trial court to reserve the issue of maintenance." The appellate court, however, did reserve the general reservation of maintenance and ruled that it should have set a review, etc., at a time certain. The appellate court noted that the trial court erred in denying his request to take judicial notice of the VA decision -- which included a written determination that he was permanently disabled." The appellate court then determined that this error was harmless. The appellate court stated that the "adjudication was a final and conclusive determination of Paul's right to receive VA disability benefits." The appellate court stated, "While the trial court certainly should have considered the materials contained in Paul's VA file, including the VA's written adjudication, the trial court was not bound to accept the VA's findings as its own."

Unallocated Maintenance Provision Providing for Reviewable Unallocated Maintenance After Time Certain Did Not Place Burden on Obligor / Contested Maintenance Awards are Always Modifiable

[*IRMO Blum*](#), (Second Dist., October 17, 2007 - modified opinion of November 20, 2007) (Lake County)

In *Blum*, commencing April 1, 2000, the wife received unallocated maintenance of \$5,000 monthly "per month for a total of 61 consecutive months." The MSA provided, "Judy's right to receive maintenance and Steven's obligation to pay maintenance after April 30, 2005 is reviewable. Maintenance shall not terminate without a court order." In January 2005, the Husband filed a petition to terminate maintenance after April 30, 2007 urging that he was paying \$55,000 per year in for college expenses and that his wife was an attorney who should be able to support herself. Prior to trial the ex-husband moved to "reset" his maintenance obligation and

the trial court pending hearing made several changes to the amount of maintenance. The ex-husband's maintenance payments had increased as a result of yearly increases in his bonuses from \$94,834 in 2000 to \$103,335 in 2004.

The ex-husband's income increased from \$282,000 in 2000 to \$330,000 in 2004. The ex-husband stipulated that he had the ability to pay maintenance to his ex-wife. After the divorce the ex-wife sought to develop a practice in immigration law. Between 2000 and 2004, she represented nine clients working two days per week. She testified that she worked independently for other attorneys doing generally "scut work." From 2000 to 2005, Judy did not make a profit in her law practice. Finally in May of 2005, she closed her downtown office and opened a small office in Northbrook. She testified that she started working 30 to 35 hours a week and had five new clients since opening her office. This case involved vocational experts for both the ex-husband and the ex-wife. The decision makes interesting reading regarding the income generating capacity of the ex-wife.

The trial court entered an order providing that the ex-husband was to pay maintenance of \$3,500 per month for three additional years without review. The court's order stated, "This order is non-modifiable as to the duration and amount and cannot be changed if there is a change in circumstances nor is it subject to any review by this court." The order provided that the ex-wife was to share in the ex-husband's year end bonus for 2005 only. The appellate court commented that the average of the maintenance payments per year had been \$8,600 monthly. On appeal the ex-wife urged in part that the trial court erred in reducing her maintenance payments and by making the payments non-modifiable. The appellate court reversed the trial court.

The appellate court first noted that in *Golden* the appellate court had held that in a general maintenance review the moving party does not bear the burden of proving a substantial change in circumstances. On appeal the ex-wife urged that her former husband bore this burden based upon the language in the agreement and specifically referring to the use of the word "reviewable." The appellate court stated:

We must reject the interpretation advanced by Judy, as it would indeed eliminate the 61-month period from the contract.... The MSA, while not a model of unambiguous drafting, clearly provides that: (1) Judy would receive unallocated support and maintenance of \$5,000 per month (plus a percentage of Steven's various bonuses) for 61 months; (2) after the end of that period, maintenance would be reviewable; and (3) the monthly payments and share of bonuses would continue until the occurrence of one of six specified events. Judy seeks to read these provisions to mean that the 61-month period is irrelevant, and that either during or after this period maintenance could not be modified unless one of the six factors were shown. We cannot accept this interpretation, as it makes the parties' identification of the 61-month period meaningless.

Next the appellate court reviewed the maintenance award in terms of whether the trial court abused its discretion. The appellate court commented, "Although the trial court did not find that Judy's efforts were not reasonable, the court's comments show that it viewed Judy's efforts negatively, describing Judy's 25-to-30-hour-per-week schedule as "less than part-time" and her efforts overall as 'minimal at best'." The appellate court disagreed. The Blum court stated that

the ex-wife's standard of living declined substantially since the divorce. The appellate court noted that since the divorce the ex-husband's assets and income had increased – even taking into account the amounts he was spending on college for his boys. The appellate court remanded the case for a new determination of a maintenance award, retroactive to the May 1, 2005 consistent with its decision.

The *Blum* court next ruled that pursuant to Section 502(f) only the parties to a marital settlement agreement may make a maintenance obligation non-modifiable and that pursuant to Section 510(a-5), all awards of maintenance are otherwise modifiable. Regarding the argument that the award was maintenance in gross, the appellate court noted that this is only an option for the court in initial divorce decrees. Finally, the decision has language that could be used by the prospective maintenance recipient regarding the requirement for a review in quoting from cases such as *Selinger*. Nevertheless, the ultimate ruling of the appellate court in this regard was more of a double negative, i.e, that on remand without agreement the trial court cannot make an award of maintenance non-modifiable. The appellate court did not state that the trial court would err if it failed to set a review.

Characterization of Provisions in MSA as Property Versus Maintenance:

IRMO Dundas, 355 Ill. App. 3d 423; 823 N.E.2d 239; 291 Ill. Dec. 229 (Second Dist., 2005).

The trial court properly refused to terminate former husband's obligation to pay \$200 per month to former wife until car loan was paid in full based on his assertion that wife was living with her boyfriend on a continuing conjugal basis, because former husband's obligation was not maintenance but was part of property division. What was noteworthy was the fact that the parties' marital settlement agreement labeled the payments as maintenance. The appellate court stated:

When we examine the substance of the agreement, we cannot conclude that the agreement's terms unambiguously provided that the monthly payments were maintenance because the terms in the agreement are susceptible to two different, yet equally plausible, interpretations. ***

Here, as in *Rowden*, other than the car payments, both parties waived any claim to maintenance. Further, the payments went to pay off the car that petitioner was awarded, and the evidence revealed that there was a large outstanding balance on that loan. Thus, the agreement, which the trial court accepted, gave petitioner the car without burdening her with paying a disproportionate share of the total cost of the car. Moreover, the agreement to make monthly payments was specifically linked to the amount of the car loan and its duration, and respondent was required to make payments directly to the holder of the loan. Even though respondent was not obligated to pay the entire amount of each installment, he was responsible

for a specific portion of it, and his obligation terminated when the loan was paid in full.

Because there was no petition in bankruptcy involved, precedent from Bankruptcy Court was considered inapposite.

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

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