

TRENDS IN MAINTENANCE (ALIMONY) AWARDS IN ILLINOIS - 2010

Gunnar J. Gitlin

The Gitlin Law Firm, P.C.
Woodstock, Illinois
July 11, 2010

Introduction

As a lawyer whose divorce practice is primarily in McHenry County, Kane County and Lake County, Illinois, I have found that in these conservative counties it is often helpful for me to demonstrate to judges and lawyers alike that maintenance awards should not necessarily be based upon a “rule of thumb.” Instead, there are trends that can be demonstrated by a comprehensive review of Illinois family law maintenance. The most striking recent cases are the 2008 First District's *Heroy* decision and the 2010 Fourth District's *Nord* decision.

Trend Cases In Past 10 Years: The trend is toward permanent maintenance in long term marriages. This trend is well illustrated by many cases this past 10 years including the 1999 *Grunsten* decision; the 2000, *Drury* decision; the 2002 *Keip* decision, the 2003 *Culp* decision, the 2004 *Selinger* decision, the 2008 *Heroy* decision, and the 2010 *Nord* decision.

IRMO Grunsten, 304 Ill.App.3d 12, 237 Ill.Dec. 342, 709 N.E.2d 597, (1st Dist., 1999), involved a 21 year marriage case where the appellate court reversed the trial court's award of maintenance of \$1,538 per month and directly awarded permanent maintenance of \$4,800 per month. In *Grunsten*, the wife was 52 years of age, had a college degree in fine arts and her salary from her last employment was \$22,000.

IRMO Drury, 317 Ill.App.3d 201, 251 Ill.Dec. 284, 740 N.E.2d 365 (4th Dist. 2000), was a 29 year marriage case where the appellate court reversed the trial court's maintenance award in terms of length and the appellate court awarded permanent maintenance. The wife in *Drury* was earning \$30,000 and husband was earning \$77,000 and the appellate court ruled that the trial court erred in awarding maintenance for three years subject to review.

IRMO Keip, 332 Ill.App.3d 876, 266 Ill.Dec. 157, 773 N.E.2d 1227 (5th Dist. 2002), ruled that permanent maintenance should have been awarded in a twenty-two year marriage case with a significant income disparity and where other factors favored a long term award. In *Keip*, there were four children and two minor children with the husband earning a gross income of \$98,000 and the wife earning a net income of \$14,568. The appellate court ruled it was error to award maintenance for one year with no review. The appellate court required maintenance to be in the amount of 10% of the husband's net income (doubling the amount) and requiring the maintenance award to be permanent. The marital estate had a negative net worth.

IRMO Culp, 341 Ill.App.3d 390, 792 N.E.2d 452, 275 Ill.Dec. 221 (4th Dist, 2003), involved the

trial court's review of a rehabilitative maintenance award and the question of whether it was permissible for the trial court to award permanent maintenance at the review hearing. Citing the *Drury* case (above), the appellate court suggested:

We conclude the agreement between the parties for Susan to receive very modest maintenance, which was labeled rehabilitative maintenance, was akin to an agreement for temporary maintenance, which would be thoroughly reviewed when the financial circumstances of the parties would be clear and child support had terminated. This is consistent with the trial court's approach.

IRMO Selinger, (4th Dist., 2004), also demonstrates trend toward permanent maintenance awards – even where the wife had a professional degree. The parties in *Selinger* were married for 25 years and had two children. At the time of the divorce, the wife was 45 years old and husband was 46. The parties had two children, ages 20 and 14 at the time of the divorce. The husband's gross monthly base income was \$7,115 (\$92,500 per year) and he received bonuses in the past two years which had averaged \$8,250. There was also income from a side job as alderman of \$11,735 per year. Finally, the husband received significant income for expenses incurred in a job as a lobbyist. The evidence indicated that the wife earned \$36,870 per year in her job as a registered nurse. The husband was ordered by the trial court to pay \$1,267 per month child support and \$4,560 per year for parochial school for the minor child. The trial court divided the net marital estate virtually equally with the husband received property with a net value of \$68,990 and the wife received \$69,647. Additionally, the parties were to net the amount of \$30,000 of additional funds from the sale of the marital residence. There was no non-marital estate. The above estate did not include the value of retirement accounts. The trial court awarded the wife \$400 per month maintenance for a period of nearly four years (three years, eleven months) – when the youngest child would graduate from high school. There was no review stated explicitly at the end of this period. The wife appealed both the amount of the maintenance award and the duration.

The *Selinger* court stated:

The evidence showed Pamela does not need time to obtain either education or training to be employable. She already attained those goals during the marriage and was employed. She may be able to earn more once she no longer has the time constraints imposed by helping Garret complete his schooling, but this is not guaranteed. However, in addition to the assumption that a position as nurse supervisor would be available to Pamela now or in the near future, the evidence on what she could earn in that position would still leave her with an income less than half of what Thomas makes.

Pamela has a lower earning potential than Thomas. He should be commended for his success in working his way up the corporate ladder, but he was assisted in that climb by Pamela's willingness to take on the responsibility for managing the household and caring for the parties' children and her not entering the workforce until a much later time. This deferral of her working life led Pamela to have a vastly disparate earning potential compared to that of Thomas.

"Marriage is a partnership, not only morally, but financially. Spouses are coequals, and homemaker services must be recognized as significant when the economic incidents of divorce are determined. Petitioner should not be penalized for having performed her assignment under the agreed-upon division of labor within the family. It is inequitable upon dissolution to saddle petitioner with the burden of her reduced earning potential and to allow respondent to continue in the advantageous position he reached through their joint efforts." *In re Marriage of Hart*, 194 Ill. App. 3d 839, 853, 551 N.E.2d 737, 745 (1990) (Steigmann, J., specially concurring).

In a striking comment the appellate court then declared:

While the current maintenance award is clearly reviewable and subject to extension (or shortening), the financial situations of the parties, in view of the standard of living during their marriage, indicates the need for an award of permanent maintenance. Spouses with disparate earning potentials may warrant an award of permanent maintenance. See *In re Marriage of Neuman*, 295 Ill. App. 3d 212, 216, 693 N.E.2d 876, 880 (1998). Upon dissolution of marriage, the "optimal goal of the maintenance act is for the dependent former spouse to become financially independent. However, under circumstances involving former spouses with grossly disparate earning potentials, this goal is often not achievable in light of the dependent former spouse's entitlement to maintain the standard of living established during the marriage." *In re Marriage of Lenkner*, 241 Ill. App. 3d 15, 25, 608 N.E.2d 897, 904 (1993). While the goal of financial independence remains, it is to be measured in terms of the standard of living established during the marriage. "Where there is a disparity in the earning powers of the former spouses, and the dependent former spouse cannot earn an income sufficient to become financially independent at the standard of living established during the marriage, the dependent former spouse may be entitled to continue to receive maintenance, if the payor spouse is in a position to provide it, even though this does not accomplish the goal of severing the economic ties of the former spouse." (Emphasis in original.) *Lenkner*, 241 Ill. App. 3d at 27, 608 N.E.2d at 905-06.

Even where, as in this case, a former spouse has a good job with a decent income, the reasonable needs of that spouse are still to be measured by the standard of living the party seeking maintenance enjoyed during the marriage, and a permanent maintenance award is justified where the spouse has employment skills but there is a discrepancy between her probable future income and the amount of income that would provide the standard of living she enjoyed while married. *In re Marriage of Simmons*, 87 Ill. App. 3d 651, 659-60, 409 N.E.2d 321, 327 (1980).

Countering the assertion that the wife would be free to pursue additional income, etc., once the youngest son graduated high school, the appellate court ruled:

This was a 25-year marriage. Pamela worked for three years at the beginning of the

marriage doing office work while Thomas finished college and started his career. She did not enter the workforce again for 10 years, while she performed her duties as homemaker and mother. During that time, Thomas advanced in his career with CILCO. Pamela now has a lower potential for increased earnings than does Thomas and, after the dissolution of their marriage, will no longer be able to share in the increases Thomas has received due to his rise in the company. Pamela will have housing needs due to the sale of the marital residence that will not be covered by the equity she obtains from its sale nor does she have any source of income other than her salary.

The trial court's finding she does not need maintenance after August 2005 is not supported by the evidence either in terms of meeting her reasonable needs or in terms of maintaining some semblance of the standard of living the parties had attained during their marriage. Therefore, the maintenance award terminating in August 2005 is an abuse of discretion, **and we find maintenance should be permanent.**

The appellate court also reversed the trial court's award of the amount of maintenance increasing it from \$400 to a still relatively low figure of \$600 monthly.

[*IRMO Heroy*](#), (1st Dist., September 2008), serves as a recent primer in reviewing the trend toward permanent maintenance awards in long term marriage cases. And it perhaps a record setting case in terms of the amount of maintenance since the appellate court affirmed the trial court's \$35,000 monthly maintenance awards. 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.

Like *Heroy*, [*IRMO Nord*](#) involved a generous maintenance award – but this one involving a more traditional pattern in which the wife had a high school education, the husband was a physician and the wife had been out of the work-force during the marriage for 30 years.

The parties were married in 1972, the children were adults at the time of trial, and at the time of trial the husband was age 57 and the wife was age 58. The husband was a physician practicing in the field of obstetrics and gynecology. The wife had stopped working in 1980 to care for the parties' two children.

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

According to the parties' tax returns, the ex-husband's total gross income was \$994,507 in 2002, \$1,162,517 in 2003, \$1,655,786 in 2004, \$1,669,178 in 2005, \$1,576,942 in 2006, and \$898,827 in 2007. In addition, petitioner's exhibits show Daniel's total gross income for 2008 was \$813,031. As

a result, his average income for 2002 to 2008 was over \$1 million. Regarding the husband's argument that the court should not have considered capital gains as income, the appellate court noted the trial court's findings that it had concluded that the last two years were the best representation of the husband's income and that it had given the husband the benefit of the doubt in this regard – because these years had no significant capital gains income.

IRMO Walker, (4th Dist., November 2008), also reflects the trend toward permanent maintenance. 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.

IRMO Abrell, No. 4-06-0974 (Fourth Dist., November 19, 2008), represents one more recent maintenance case where the trial court awarded permanent maintenance. In this case even though the ex-wife became employed shortly after the close of proofs, the trial court reduced maintenance only nominally. And the appellate court affirmed.

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.

Section 504 and Amendments: Before 1977, in Illinois divorce cases, property was awarded in accordance with the way title was held regardless of whether it was acquired during the marriage. In October of 1977 the Illinois Marriage and Dissolution of Marriage Act came into effect and with it new concepts of awards of alimony (maintenance) and distribution of property. The significant change sought to be brought about by the IMDMA was to rely on property distribution as a means of sustaining the economically dependent spouse, rather than awards of alimony. As a result the prevalent form of maintenance awards was for a short period of time, with the maintenance award either to terminate at the end of a short period of time, or at the end of the fixed period of time, typically two or three years, with the maintenance to be reviewed by the court. This scheme, on its face, seemed desirable because divorce should sever all possible ties between the parties, and the dependent spouse should be more secure if the means of support belonged to the dependent spouse, rather than the former spouse.

Section 504 is the maintenance statute of the Illinois Marriage and Dissolution of Marriage Act. The significant re-write to the maintenance section was in Public Act 87-881 (which became law effective January 1, 1993). The pre-1993 version of Section 504 stated that one qualified for maintenance if the person "lacked sufficient property, including marital property apportioned to him, to provide for his reasonable needs." The other significant statutory amendments in the 1993 amendments included new or revised factor. There is a new factor – factor (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 foregone or delayed education, training, employment, or career opportunities due to the marriage

The amendments also added to factor (5) additional language to the "appropriate education, training and employment" factor. The additional language states that the court should consider,

“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.” The final significant change is the 10th factor which considers the “contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse.”

Thus, prior to Public Act 87-881, the relevant factors of Section 504 were:

- 1) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extend to which a provision for support of a child living with the party includes a sum for that party as custodian; SEE CURRENT FACTORS 1 THROUGH 3.
- 2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; SUBSTANTIAL REVISIONS.
- 3) the standard of living established during the marriage; SAME
- 4) the duration of the marriage; SAME
- 5) the age and the physical and emotional condition of both parties; SAME
- 6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and DELETED
- 7) the tax consequences of the property division upon the respective economic circumstances of the parties. SAME (Added via Public Act 82-556).

The current relevant factors in maintenance awards are:

- (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 foregone or delayed education, training, employment, or career opportunities due to the marriage; NEW STATUTORY FACTOR
- (5) the time necessary to enable the party seeking maintenance to acquire **appropriate** education, training, and employment, [previously was “to acquire **sufficient** education and training to find appropriate 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; REVISED PORTION / NEW PORTION
- (6) the standard of living established during the marriage; - SAME
- (7) the duration of the marriage; - SAME
- (8) the age and the physical and emotional condition of both parties; - SAME
- (9) the tax consequences of the property division upon the respective economic circumstances of the parties; - SAME
- (10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse; NEW - 1993
- (11) any valid agreement of the parties; and
- (12) any other factor that the court expressly finds to be just and equitable.

In 1993 Section 504 was amended with the “lack sufficient property” portion being omitted. The amendment suggested the philosophic acceptance of the fact that in many cases distribution of marital property will not result in the generation of sufficient income to adequately support a needful spouse. The other 1993 amendments provide the spouse seeking maintenance more statutory ammunition in urging a longer or larger award of maintenance.

The newest changes to maintenance involve reviews and modifications to maintenance. Just as the law has become more generous to the spouse who is receive maintenance in terms of initial awards, so has the law changed regarding maintenance review and modification.

New Provisions of Section 510: Section 510 of the IMDMA adds a new provision, Section (a-5), which provides:

(a-5) 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:

- (1) any change in the employment status of either party and whether the change has been made in good faith;
- (2) the efforts, if any, made by the party receiving maintenance to become self-supporting, and the reasonableness of the efforts where they are appropriate;
- (3) any impairment of the present and future earning capacity of either party;
- (4) the tax consequences of the maintenance payments upon the respective economic circumstances of the parties;
- (5) the duration of the maintenance payments previously paid (and remaining to be paid) relative to the length of the marriage;
- (6) the property, including retirement benefits, awarded to each party under the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage **and the present status of the property**;
- (7) the increase or decrease in each party's income since the prior judgment or order from which a review, modification, or termination is being sought;
- (8) the property acquired and currently owned by each party after the entry of the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage; and
- (9) any other factor that the court expressly finds to be just and equitable.

There is an unexplored area of Section 510(a-5)(6) which is the impact of the language which allows the court to consider the present status of the property when there is a review of maintenance. Until the amendments to Section 510(a-5), the law in Illinois was the good fortune of the maintenance paying spouse after a divorce should not, of itself, be a basis for increasing maintenance. (*Arnold v. Arnold*, 332 Ill.App.586 (1st Dist. 1947)). It is arguable in cases where maintenance is modified, the court might consider the post-decree good fortune of the obligor based upon his (or her) current asset base when modifying maintenance (contrary to this decision).

What is a Trend?

How do we measure trends in Illinois divorce law? Unfortunately there are no statistics kept on what happens at the trial court level. The only reliable statistic is what happens in the appellate courts. What we have examined, therefore, are the appellate court opinions on maintenance where we could determine certain factors, such as the duration of the marriage, the percentage of net income of the award, etc.

Significant maintenance cases decided since the passage of the IMDMA and virtually all of the significant cases since 1987 are reported herein in the charts in alphabetical order.

If you look at the cases on a year-to-year basis keep in mind that in 1994 the Illinois Supreme Court amended Rule 23 to provide, effectively, each appellate court district could publish only a certain number of opinions and the rest of the decisions would have to be disposed of under Rule 23. Effectively it cut the published opinions in family law in about half.

Long Term Marriage Cases: There are 48 cases of marriages of more than 20 years in length analyzed with the newest including *Culp, Keip Drury* (discussed above), *Brackett*, (involving a reversal of an award of rehabilitative maintenance – the appellate court required permanency and a higher amount) and *Grunsten* (the appellate court reversed a permanent award as to amount and increased from \$1,500 to \$4,800 monthly).

I have now broken down the cases involving marriages of more than 20 years into two subgroups: cases where the marriage is between 20 and 29 years (32 cases) and cases where the marriage is 30 years or more (16 cases).

Shorter Term Marriage Cases: There were 36 cases in which the marriages were of 20 years or less that are analyzed, with the most recent cases including *Hasabnis* (a remarkable case involving an award which was probably in excess of the husband's net income despite a marriage of only three years in length); *Gattone* (another remarkable three year marriage case – this time where the appellate court affirmed an award of maintenance of 40% of the husband's net income where the wife gave up her job to marry her husband and the husband had a sizeable non-marital estate); and *Minear* (the Illinois Supreme Court case discussed below).

Permanent Maintenance -- The Research Project

Dates: Cases were taken from 1980 to the current date.

Courts: Illinois appellate courts and the Illinois Supreme Court.

Number of Cases in Research Body: 87

Elements of Case Reported in Spreadsheets:

- B. Name of Case
- C. Northeastern Report Citation
- D. District of Case
- E. Year of case
- F. Gitlin on Reports No. for Research Purposes
- G. Length of marriage
- H. Age of Payor
- I. Age of Recipient
- J. Party Appealing Maintenance Award
- K. Issue Appealed from
- L. Education of Maintenance Recipient (usually Wife)
- M. Net Marital Estate in dollars - where known
- N. Percentage of Marital Estate to Maintenance Recipient
- O. Non-Marital Property of Payor of Maintenance
- P. Non-Marital Property of Recipient of Maintenance
- Q. Payor's Gross Income
- R. Payor's Net or Estimated Net Income
- S. Recipient's income
- T. Investment Income of Maintenance Recipient
- U. Amount of maintenance awarded in terms of dollars and percentage of obligor's net income
- V. Total number of children
- W. Total number of minor children
- X. Maintenance award per month (either as result of appellate court remand or affirmation of trial court's award)
- Y. Maintenance as a Percentage of the Payor's Net Income
- Z. Duration of Maintenance, e.g. permanent, number of years, etc.
- AA. Whether the maintenance award is to be reviewed or terminated after a certain time
- BB. Where significant, rationale of court in relation to maintenance

**Permanent Maintenance and
Discussion Re Long Term Marriage Cases**

Reviewing the cases I spotted a trend toward long term maintenance that commenced in the mid 1980s. Taking a somewhat arbitrary starting point, I used 1988 for the first year in which I analyzed permanent maintenance awards in long term marriages cases (which I defined as more than 20 years in length). As discussed above, I recently created two subgroups of cases involving long term marriages. This was done because the greatest number of maintenance cases reported involved marriages whose length was 20 to 29 years in length.

I did not include in my statistics the following cases which involved unique fact patterns:

- *Clabault*: because the award was remanded both as to length and amount and it was not possible to assess the length of the maintenance award on remand.

- *Dunlap*: because of the nature of the award. While *Dunlap* might be considered to be a trend toward what would be a permanent award, but one in which the award was reduced upon the retirement of the payor, I did not consider this case as one to analyze as permanent or not.
- *Harding* (554 N.E.2d 459, 1989) and *Jones* (543 N.E.2d 119, 1989): because each was pre-Zells and the percentages were likely affected by this fact.
- *Hasabnis*: because the the award of maintenance in gross was likely more than 100% of the husband's net income – which was likely influenced significant by his non-marital estate of nearly \$1 million.
- *Kennedy*: because this was an unallocated support and maintenance award and one in which there was a 70/30 distribution of the marital estate -- the distribution favoring the wife. (30 year 1991 decision).
- *Orlando*: because it involved an awards of 2/3rds of the marital estate to the wife while the husband had a relatively small income (\$29,000). (42 year marriage 1991).
- *Vernon*: because the husband appealed and therefore the issue on appeal was not the length of maintenance. (30 years marriage 1993 decision).
- *Ward*: because the wife had an MBA and was not a typical maintenance case.

Thus, there were then 28, twenty year or more cases to examine for permanent versus non-permanent awards. Of those 28 cases, there were 16 cases in which the award as a result of the appeal was a permanent maintenance award or an indefinite maintenance award. Thus, in approximately 57% of these cases which represent more typical long-term marriage fact patterns, there was a permanent maintenance award!

Analyzing those cases involving marriages of 30 years in length, I excluded three cases leaving thirteen cases reviewed. Eight of these resulted in an award of permanent maintenance. Therefore, in cases involving marriages of more than 30 years in length, the result was a permanent maintenance award in more than 60% of these cases.

Charles – 20 Year Marriage Case with Significant Opportunity Cost Re Raising Children – Instructions to Consider Permanency: A “trend” case is IRMO Charles, 284 Ill.App.3d 339, 219 Ill.Dec. 742, 672 N.E.2d 57 (4th Dist. 1996). *Charles* held it may be appropriate to award permanent maintenance where there has been a 20-year marriage, the parties had two children, the wife had been the primary caregiver of the children, and the wife recently earned a bachelor's degree, but she had not worked outside the home for a number of years while husband was a physician. This case was noteworthy because the appellate court found the award of maintenance to be inadequate, but then instructed that on remand there should be a reconsideration not only for the amount of maintenance, but also whether permanent maintenance

would be appropriate.

Drury – 29 Year Marriage Case With Permanent Award: Another trend case is *Drury*, discussed above, where the appellate court reversed the award of rehabilitative maintenance. The *Drury* court opined that case law favored an award of permanent maintenance reviewing significant factors: 1) significant disparity in the present and future earning capacities of the parties; 2) Lawrence (husband) had the opportunity to continue and advance his career during the marriage because of Phyllis' (wife's) contributions to the family; (3) Phyllis (wife) will not be able to enjoy a standard of living similar to the one she enjoyed during the marriage; 4) she will be forced to sell her limited assets to meet her needs; 5) Lawrence is able to contribute to Phyllis' needs while still meeting his own; and 6) the 29-year marriage was of significant duration. *Drury* quoted the 2000 *Mayhall* case with approval.

Mayhall – 14 Year Marriage Case With Permanent Maintenance Award: *Mayhall* 311 Ill.App.3d 765, 244 Ill.Dec. 227, 725 N.E.2d 22 (4th Dist., 2000), was a case involving only a 14 year marriage in which the appellate court awarded indefinite maintenance and commented: "In the present case, we cannot say it was improper to place the burden of proof on Edward to show that a substantial change of circumstances has occurred in order to terminate or reduce maintenance. Tammy has incentive to improve her economic situation even without a limited period of maintenance." The quote which relies on the opportunity cost of the wife's having raised the children, etc., stated, "There is no question but that Illinois courts give more consideration to permanent maintenance to wives who have undertaken to have children, raise and support the family and who have lost or been substantially impaired in maintaining their skills for continued employment during the years when their husband has been getting his education and becoming established."

It is curious that *Mayhall* comments:

In the situation where a woman in her 40's marries a wealthy man and their marriage is dissolved when she is in her 60's, a court may logically conclude that she should continue at the standard of living of the marriage for the rest of her life, even though she has not been particularly disadvantaged by the marriage, that is to say, even though there are no marriage-conditioned needs, and even though there is no marital property. "[M]an, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life." Letter from Justice Oliver Wendell Holmes to William James (April 1, 1907), as published in M. Lerner, *The Mind and Faith of Justice Holmes* 417-18 (1953). **The present case is, of course, much different, not involving a 20-year marriage, and not involving a woman in the final years of her life, but a woman with perhaps 30 or 35 years left in her working career.**

Nevertheless, the appellate court affirmed the indefinite maintenance award.

Grunsten – Permanent Maintenance Where 21 Year Marriage and Significant Evidence of Wife's Depression – Amount Increased By More than Three Times Trial Court's

Award: The *Grunsten* trial court awarded the wife permanent maintenance of \$1538 per month. The appellate court reversed and made its own award of \$4,800 per month. The wife was fifty-two years old **with a college degree in fine arts**. From the time of her graduation from college in 1964 until 1990 she was employed as a photography stylist and a booking subagent for models. Her salary when she left her last employment in 1990 was \$22,000. The husband's salary at the time of the divorce was over \$275,000 per year. The trial court recognized, in its decision, the husband's income provided the parties with a "luxurious" lifestyle.

The wife's expense affidavit at the trial was for \$11,664 per month which the trial court rejected calling it "the Paul Bunyon of all income and expense affidavits." It included \$450 for a professional dogwalker to escort her pet to dog shows. The expense affidavit the wife filed five months after the divorce proceedings started sought temporary support of \$4,800 per month. The trial court noted the property award gave the wife very little in the way of income producing property. The wife's treatment by a psychiatrist for depression was an issue on which the appellate court disagreed with the trial court. The trial court found the wife's physician who testified on her behalf "to be the most pathetic witness it had ever seen." The undisputed testimony, however, was that the wife had been treated for depression during the course of the marriage and at one point before the start of the divorce proceedings, the wife was incurring as much as \$800 per month in psychiatric costs. The trial court, however, found the wife was in good health and employable and her reasonable medical expenses should be no more than \$300 per month. The trial judge did not "see why she couldn't go back to (the modeling industry) at \$22,000 per year."

The appellate court stated: "Although a trial judge may be free to disregard psychiatric testimony, he may not do so based upon his own prejudices where the testimony offered of psychiatric illness has substantial foundation." (Citation omitted.) The evidence showed the wife had been treated by her physician for twelve years during the marriage and she was being treated for depression at the time of the proceedings. Her treating physician testified that if she returned to her previous work it would be very damaging to her self esteem.

Gattone – 4 Year Marriage Case With Generous Maintenance Award – 6 Years of Maintenance and Disproportionate Distribution Given Opportunity Cost of Older Wife: A case showing the significance of what I refer to as the "opportunity cost" of the marriage, that is, what is given up for the marriage is *In Re Gattone*, 317 Ill.App.3d 346, 739 N.E.2d 998 (2d Dist. 2000), GDR 01-11. *Gattone* held that despite the fact that marriage was only four years long, the trial court did not abuse its discretion by ordering maintenance for six years at \$1,000 per month and distributing estate 74%/26% favoring wife. The rationale for the generous decision (to the wife) was that she gave up her job in Wisconsin at beginning of the marriage and her husband had a non-marital estate of \$800,000.

Culp – Trial Court Properly Modified Rehabilitative Maintenance Award to Provide for Permanent Maintenance: Trial court was affirmed when post-judgment maintenance review in which \$100 per week rehabilitative maintenance resulted in \$1,400 per month permanent maintenance because wife could not support herself commensurate with the standard of living established during the marriage despite having two jobs. Section 510 of the IMDMA adds a new provision, §510(a-5), regarding the standards to use in modification of maintenance. The

discussion of the case law as to the ability of the trial court to change the character of the award is significant.

The husband relied upon *In re Marriage of Cantrell*, 314 Ill. App. 3d 623, 732 N.E.2d 797 (2nd Dist. 2000). In *Cantrell*, the wife was awarded rehabilitative maintenance to be reviewed after four years. At the scheduled maintenance review, the trial court extended maintenance for two years, subject to review at the end of that time. At the second review hearing (after two years had elapsed), the trial court awarded the recipient permanent maintenance despite the fact she had merely requested a continuation of rehabilitative maintenance. The Second District appellate court vacated the award of permanent maintenance, holding (along with other reasons) the trial court erred in exceeding the relief requested in the former wife's pleadings. The appellate court was instructive when it stated:

When trial courts set review hearings, it would be preferable for the court to advise the parties who has the burden of going forward, who has the burden of proof, and what issues will be addressed. For example, if time-limited maintenance--whether temporary or rehabilitative--will continue only if the recipient shows good faith in seeking education or employment or proves the need for continued maintenance, then the parties should be so advised. Neither party should be required to guess what the court will consider at the review hearing. If pleadings are required, that should be noted as well. In this case, the parties agreed no further pleadings would be necessary.

Non-Trend Case – *Reynard* – 33 Year Marriage Case with Maintenance for 10 Years at 20% of Net Income. In *Reynard*, 344 Ill.App.3d 785, 801 N.E.2d 591, 279 Ill.Dec. 917 (4th Dist. 2003), GDR 04-25, the Fourth District appellate court affirmed a maintenance award to wife of \$1,600 monthly for ten years in a case involving a 33 year marriage. The appellate court found that the wife's request for \$3,750 monthly maintenance, purportedly to equalize parties' incomes, would adversely affect husband's ability to meet his own needs. The wife received 52% of the marital assets valued at \$346,495. The husband's monthly net income from all sources, including interest and dividend payments per his affidavit was \$7,973. Other factors which weighed against a more generous maintenance award were the fact that the wife had a small non-marital estate (valued at approximately \$50,00), the wife was “young and healthy,” the court found that her domestic duties did not “substantially impair her earning capacity,” she had no house or car payment and she had no debt. This case is a worthwhile counter-point to some of the cases involving generous maintenance awards in that it reaffirms that income equalization is not required. What is noteworthy is that this case involved a close decision with one justice dissenting. Justice Myerscough argued:

Although Illinois law does not require an equalization of net disposable income in large-income cases (*Claydon*, 306 Ill. App. 3d at 902, 715 N.E.2d at 1205-06), the needs of the parties must still be met where possible. While this couple did not live an extravagant lifestyle so they could afford to send their children to college, they enjoyed substantial income, which should not be retained in large part by Charles, especially where, here, it was because of Mary Anne's sacrifices and significant contributions to the family during the parties' long marriage that Charles is able to

have a greater earning capacity than does Mary Anne. As the majority points out "[i]t is inequitable upon dissolution to saddle a party with the burden of her reduced earning potential and to allow the other party to continue in the advantageous position he reached through their joint efforts" (slip op. at 11), and that is what the trial court did in this case.

Amount of Maintenance Awards in Terms of Percentage of Net Income: Of the long term marriage cases, and excluding the business valuation cases that were pre-*Zells*, the lowest awards were at approximately 20% of the payor's net income. (The *Drury* case was not included in this analysis because the wife only contested the length of the maintenance award – not the amount. The *Marthens* case was not included since the amount of maintenance was low because of the significant award of child support -- 40% child support award). The highest two awards were 69% and 49% of the obligor's net income (with the award of 69% being in a case in which the appellate court suspected income manipulation). The average amount of the maintenance award in terms of percentages of those cases where the marriage was more than 20 but less than 30 years was approximately 31% of the payor's income. Those cases which were considered in this average are indicated in bold. The average maintenance award in those cases where the marriage was 30 years or over was an award of 38% of the payor's net income.

Length of Marriage: The average length of marriage with those cases of more than 20 years was 27 years.

Reviewable Maintenance (Maintenance for a Fixed Period)

There were several cases where, for long term marriages, the appellate court affirmed short term, terminable maintenance. Most of these cases involved unique fact patterns as is discussed above. There is a discernable trend in maintenance subject to review and maintenance for a fixed duration with a termination date. The appellate courts have, in several instances, affirmed a long term award for a long term marriage. There is also a trend for the appellate courts to hold there was error in setting maintenance for a time certain and to terminate at the end of that time certain, in long term marriage cases where the recipient has been out of the work force. For example, the appellate court reversed a one year award for a twenty year marriage and held it was speculative to assume the recipient can achieve the marital standard of living in one year.

Overall Statistics

From my research system, *Gitlin on Divorce CD-ROM Reports*, we have statistics going back through 1987. Here is what I found:

Marriages of Less than Fifteen Years: Often there is no award of maintenance or the maintenance award is relatively modest. The percentages were 12, 13, 15, 16, 17, 19, 19, 25, 26. The highest award was *Mohr* which was a permanent maintenance award in which the wife was in poor health and also was 58 years of age. This was a unique case because the wife's maintenance award from a prior marriage was considered. The other high award (25% of the obligor's net income) also involved an elderly maintenance recipient considering the relatively short length of

the marriage. See, Mayzner. Lloyd, Madoch, and Chapman also involved relatively unique fact patterns – in each case there was a relatively short term marriage but the wife in each case was disabled. In the averages, I did not include those cases in which a party was disabled or the unique fact pattern in Mohr.

Thus, of the more mainstream cases, the high was 19% and the low was 12% of the payor's net income with the average being 15.8% of the payor's net income.

Note that the Gattone case also appears to be somewhat of a trend case, demonstrating the movement toward permanent maintenance cases. Gattone involved a generous maintenance award, both in terms of the length of time and the amount. There were unique factors in Gattone including the age of the wife, the fact that she gave up her job in Wisconsin and sold her Wisconsin residence for the sake of the marriage. However, the case is significant because it was a four year marriage case in which the appellate court affirmed an award of permanent maintenance.

Marriages of Between Fifteen to Twenty Years: The maintenance awards were a low of 9% of the payor's net income and a high of 35% of the payor's net income. The percentages were 9, 15, 15, 24, 29, 35. The 9% award was a 1984 case and thus was not considered as a trend case. On this basis the average maintenance award was 25% of the payor's net income. However, the Wolf case was one in which the husband who was the maintenance recipient was disabled. This is not a typical fact pattern. Thus, the average maintenance award was 19.7% of the payor's net income for those cases which addressed more typical fact patterns. Thornton was not considered in the averages because it involved an unallocated award of maintenance and child support.

Any time the Supreme Court accepts a family law case it is instructive. Miner is an example of a "trend" case since this case was published after the 1993 amendments. This case is important because it involved a 19 year marriage. Wife had a net income of \$1,000 monthly while husband had a net income of approximately \$3,000 monthly. There were two children, one of whom was a minor. A significant comment of the appellate court decision was that, "maintenance is granted to a spouse to enable that spouse to maintain the lifestyle enjoyed prior to dissolution or an approximation of that standard of living. The fact that the wife was not awarded custody of the eldest child was not relevant for this purpose."

Marriages of Greater than 20 Years (see above): In approximately 55% of the cases considered there was a permanent maintenance award. The average amount of the maintenance award in terms of percentages was 30% of the payor's income. The average length of marriage with those cases of more than 20 years was 27 years. The average property distribution was 55% of the net marital estate to the less monied spouse.

Comments

Standard of Living During the Marriage: One of the trends in maintenance which is not capable of being statistically reported is the flip side of permanent maintenance, that is, the appellate courts stopped believing in the concept of “rehabilitative” maintenance. First, the term “rehabilitative” is not a statutory term. Second, it is not a descriptive term because the term means to restore a person to a former capacity, but that is hardly ever the case in awards of maintenance.

The first attack on rehabilitative maintenance was where the award was for a fixed number of years. These awards were struck down by the review courts on the basis that it was speculative to assume the recipient would be “rehabilitated” at the end of the term of maintenance.

Attached is a copy of The Gitlin Law Firm’s lifestyle maintenance spreadsheet as Exhibit A. In negotiations the recipient should urge lifestyle amount as an objective criterion for determining maintenance which is consistent with the statutory framework. However, if this amount exceeds what the amount would be likely to award, the lifestyle amount should be reduced to a reasonable amount.

The first step in the maintenance formula is to determine the parties’ anticipated net incomes following the divorce. Divide the combined net income by two. Note that often the net incomes following the divorce may be lower than the parties’ net income before the divorce. This is because the parties will not have the advantage of filing under the status married, filing jointly. Assume the parties during the marriage equally shared in this income for their lifestyle purposes. For the purpose of illustration assume the total family net income is \$100,000. This amount resulted from husband's contributions of \$80,000 and wife's contributions of \$20,000. Next, deduct the projected net income of the recipient from employment and assets from the lifestyle amount to determine the amount of maintenance that wife should receive to live at the lifestyle of the parties during the marriage. Assume further that as a result of the settlement the wife will receive assets valued at \$200,000. If the house, car, and personal property constitute \$100,000, only \$100,000 would be available for investment purposes. The amount of net income from investments should be calculated upon the highest return for low risk tax free interest e.g., tax-free municipal bonds. At an eight percent rate of interest, wife's projected net income from employment would be \$8,000. Deducting this amount from the lifestyle amount results in an annual maintenance obligation of \$2,000 (See Appendix A). Finally, adjust the lifestyle amount for the amount of taxes which wife must pay on the maintenance. Thus, if wife is in an **effective** 18 percent tax bracket, she would incur tax of \$3,960 on the maintenance and husband would be required to pay wife \$2,163 per month maintenance.

Conclusion: Finally, the courts of review are realizing that some people who qualify for maintenance simply do not have the ability to generate sufficient income through employment to live at anywhere close to the lifestyle they enjoyed during the marriage and therefore permanent maintenance is appropriate.

G:\Docs\Maint Trends outline2.wpd

Attachments:

- *Spreadsheet Re Marriages of Less than 20 Years in Length;*
- *Spreadsheet Re Marriage of 20 Years to 29 Years in in Length; and*
- *Spreadsheet Re Marriages of More than 30 Years in Length*