

Chicago Daily Law Bulletin®

Volume 161, No. 231

In divorce cases, maintenance accords need to be well-drafted

Maintenance is an issue that frequently arises in many divorces. Typically, maintenance is a factor in cases where one spouse has historically been the primary breadwinner and the other spouse has either not been employed outside the home or has been underemployed. The various types of maintenance include temporary, permanent, rehabilitative, reviewable, in gross and unallocated.

In Illinois, the three most common forms awarded are permanent, rehabilitative and reviewable. Permanent (or indefinite) maintenance usually applies in long-term marriages and is for the duration of the payee's life, subject to terminating events such as death of either party, remarriage or cohabitation of the maintenance recipient (750 ILCS 5/510(c)). See *In re Marriage of Price*, 2013 IL App 120155, 986 N.E.2d 235 (2013). The label "permanent," however, is really a misnomer since at any time the payor spouse may ask to stop paying maintenance (i.e., retirement, loss of employment).

Rehabilitative maintenance is for a fixed period with the expectation being that the time allotted will allow the recipient spouse to be able to support him or herself (i.e., re-education and re-employment). See *In re Marriage of Claydon*, 306 Ill.App.3d 895, 715 N.E.2d 1201 (1999). This form of maintenance commonly terminates either after the fixed period or earlier due to a triggering event such as death, remarriage or cohabitation (750 ILCS 5/510(c)).

Finally, the most common form of maintenance awarded is called reviewable maintenance, which is also for a specified period of time after which the recipient spouse may ask the court to determine whether or not he or she should

be entitled to a longer period of maintenance and, if so, in what amount. See *In re Marriage of Awan*, 388 Ill.App.3d 204, 902 N.E.2d 777 (2009).

The factors for the court to consider include age, health, lack of education or experience, the standard of living established during the marriage and the efforts the payee spouse has made to seek employment (750 ILCS 5/504(a)). This form of maintenance also terminates on the death, remarriage or cohabitation of the recipient (750 ILCS 5/510(c)).

Reviewable maintenance and rehabilitative maintenance are modifiable if there are changes in circumstance.

Unlike child support, where guidelines have been in effect for many years, historically there have been no maintenance guidelines in place. As a result, a fact-specific approach was applied to each situation.

However, the maintenance section of the Illinois Marriage and Dissolution of Marriage Act will be amended effective Jan. 1 to provide that when the combined gross earnings of the parties is less than \$250,000, both the

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amount and duration of maintenance will be determined by application of guidelines. See 750 ILCS 5/504(b-1)).

Since the amendments do not address situations where gross earnings exceed \$250,000, it remains unclear in those cases whether a purely fact-specific approach or a derivation of the new formulaic approach will be fol-

MODERN FAMILY



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lowed. Either way, it will be up to the individual judges hearing these matters.

Under the new statute, in marriages of less than 10 years, the court may grant maintenance for a fixed period and may also designate the termination of the period during which the maintenance is to be paid as a "permanent termination," the effect of which is that maintenance is barred after the ending date of

the petition for review, who will have the burden of proof and what standard will be used to evaluate the determination. Since in many cases the language in the agreement is less than precise, the outcome in many of those cases has not been predictable.

In a recent Illinois case, the marital settlement agreement provided that the husband shall pay maintenance to the wife in the amount of \$6,200 per month for 60 months at which time maintenance shall be reviewable upon the filing of a petition prior to the termination of the maintenance.

The husband made his 60th payment in April 2014 and stopped paying maintenance. In June 2014, the wife filed a petition to review maintenance, alleging that the husband's maintenance obligation had not terminated.

Finding that the agreement was ambiguous as to whether the maintenance became reviewable at the 60-month mark (according to the wife) or terminable (according to the husband), the appellate court construed the ambiguity against the husband, who drafted the agreement, and determined that under the terms of the marital settlement agreement the maintenance became reviewable after 60 months and did not terminate. Therefore, the wife's petition for a review was not time-barred. *In re Marriage of Kuyk*, 2015 IL App (2d) 140733 (2015).

While the new maintenance statute may clarify certain issues where the combined income is less than \$250,000 and the marriage duration is more than 20 years, the court's recent decision in *Kuyk* appears to be a reminder to all attorneys drafting agreements that precise language must be incorporated into every reviewable maintenance agreement. As the new statute unfolds, perhaps clarity will emerge.