

2017-2018 SURVEY OF ILLINOIS LAW: FAMILY LAW

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I. INTRODUCTION

2017 and 2018 marked the adjudication and adoption of an abundance of new case law and statutory amendments following the 2016 overhaul to the Illinois Marriage and Dissolution of Marriage Act.¹ These two years specifically marked several major revisions to the Illinois spousal maintenance and child support statutes and accompanying formulas. Illinois family law practitioners are now tasked with the challenge of applying the statutory amendments and following the guidance provided by these new case law updates to aid their clients in the practice of family law.

This Article seeks to help family law practitioners and judges keep abreast of the most significant recent legislative changes and cases related to family law. Highlights of legislative changes related to family law are presented in Section II, including substantial changes to the Illinois child support and spousal maintenance laws. This Section is followed by a general summary of select family law-related cases in Section III from 2017 and 2018. This Article is not meant as an in-depth analysis of the referenced topics, but instead, should serve as a springboard for practitioners and judges to understand the key changes in the field of family law over the past two years.

II. SELECTED LEGISLATIVE CHANGES

This section will explore statutory amendments in four areas of family law from 2017 and 2018. It will first discuss major changes to calculations of child support and maintenance, then discuss codification of the

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¹ Act effective Jan. 1, 2016, 2015 Ill. Laws P.A. 099-0090 (amended at 750 ILL. COMP. STAT. 5/).

Collaborative Process Act and amendments to the companion animals statute.

A. Child Support: Public Act 100-0015 (House Bill 3982, modified by Trailer Bill, Senate Bill 69)

There are two primary models of child support in the United States: the Percentage of Income model and the Income Shares model.² The Percentage of Income model is the minority approach, wherein a state applies a percentage certain to the obligor's income without considering the costs to raise a child or the recipient's income.³ The Income Shares model is used in the majority of states, and considers both parents' incomes and uses a statutory table to determine the percentage of the obligor's income based upon average costs to raise a child.⁴ July 1, 2017 marked a drastic shift in the Illinois child support statute from the former "percentage of income" model to a "income shares model."⁵ The new Income Shares model uses a table (the Schedule of Basic Child Support Obligations ("BCSO Schedule"))⁶ developed by the Illinois Department of Healthcare and Family Services (HFS) based on economic data that calculates the amounts parents who live together in Illinois spend on their children's needs, based on the combined family incomes and size of the family. This table will be updated and maintained by HFS based on estimates for child-rearing expenses, including housing costs, food, transportation, entertainment, clothing, out-of-pocket medical expenses, and ordinary education expenses.⁷ It should be noted that under several circumstances described below, the child support amount under the amended statute is drastically lower than under the Percentage of Income model. However, the statute clearly provides that the enactment of the bill by itself would not constitute a substantial change in circumstances for purposes of modifying child support.⁸

² *Child Support Guideline Models by State*, NAT'L CONF. ST. (Aug. 15, 2017), <http://www.ncsl.org/research/human-services/guideline-models-by-state.aspx>.

³ Margaret Bennett, Nancy Chausow Shafer, & Pamela Loza, *The New Income Shares Child Support Guidelines*, 104 Ill. B.J. 26, 27 (2016).

⁴ *Id.* at 28.

⁵ *Id.* at 27.

⁶ *Income Shares Schedule Based on Net Income*, ILL. DEP'T. HEALTHCARE & FAM. SERVS., <https://www.illinois.gov/hfs/SiteCollectionDocuments/IncomeSharesScheduleBasedonNetIncome.pdf> (last visited Feb. 20, 2019).

⁷ *Income Shares FAQ's*, ILL. DEP'T. HEALTHCARE & FAM. SERVS., <https://www.illinois.gov/hfs/SiteCollectionDocuments/INCOMESHARESFAQ.pdf> (last visited Feb. 20, 2019).

⁸ 750 ILL. COMP. STAT. 5/510 (a)(2) (2018); *see generally* In re Marriage of Salvatore, 2019 IL App (2d) 180425.

i. Definition of “Income” For Child Support Calculation

Like the Percentage of Income model, the Income Shares model also uses “net income” to calculate a party’s child support obligation. The drafting committee hoped to use net income to fit with long-established Illinois case law and because it more accurately reflected actual income available for child support and expenses. Section 505 of the Illinois Marriage and Dissolution of Marriage Act, as amended by Public Act 100-0015, defines net income as gross income (income from all sources) minus either the “standardized tax amount” or the “individualized tax amount.”⁹ The standardized tax amount is the default rule, based on the total of federal and state income taxes for a single person claiming the standard tax deduction, one personal exemption, and the applicable number of dependency exemptions and Social Security and Medicare tax calculated at the FICA rate.¹⁰ HFS has issued a “gross-to-net” income table that computes net income under the “standardized tax amount” approach.¹¹ Alternatively, parties can ask to use the “individualized tax amount” approach under three circumstances: (1) by agreement/stipulation to the amount of tax deduction, (2) after evidentiary hearing; or (3) after summary hearing, based on taxes set forth in the parties’ Financial Affidavits, tax returns, or other financial statements after full and complete disclosure pursuant to local court rules.¹² As the name suggests, the “individualized tax amount” takes into account parties’ actual tax deductions. Parties should consider an “individualized tax amount” approach where one or both parties has many itemized deductions. An “individualized tax amount” approach allows for a more accurate calculation of a party’s net income based on his or her specific deductions that would not otherwise be accounted for when using the “standardized tax amount” approach.

For parties who have business income, the amended Section 505 defines “net business income” as “gross receipts minus ordinary and necessary business expenses required to carry on in the trade or business.”¹³ The statute carves out several additional caveats to this definition. First, the accelerated component of depreciation and any inappropriate or excessive business expenses shall be excluded for purposes of determining net income.¹⁴

⁹ 750 ILL. COMP. STAT. 5/505 (a)(3)(B) (2018).

¹⁰ *Id.* § 5/505.

¹¹ *Gross to Net Income Conversion Table Using Standardized Tax Amount*, ILL. DEP’T. HEALTHCARE & FAM. SERVS., <https://www.illinois.gov/hfs/SiteCollectionDocuments/img4101534500001.pdf>. (last visited Feb. 20, 2019).

¹² *Id.* 750 ILL. COMP. STAT. 5/505 (a)(3)(E)(I)(II)(III) (2018).

¹³ 750 ILL. COMP. STAT. 5/505 (2018).

¹⁴ *Id.* § 5/505(a)(3.1)(A).

Second, any in-kind payments or reimbursements shall be considered income if they are significant and reduce personal living expenses.¹⁵ These may include a company car, reimbursed meals, free housing, or housing allowances.¹⁶

For parties who are paying maintenance to their spouse for the current case pursuant to a court order, the amended statute provides that this maintenance payment must also be subtracted from the obligor's income and included in the recipient's income for purposes of calculating net income.¹⁷ Similarly, maintenance actually paid to a former spouse pursuant to a court order must also be deducted from a party's gross income for purposes of calculating child support.¹⁸

Finally, under the amended statute, there are two articulated exclusions to "gross income" for purposes of calculating child support. First, benefits derived from means-tested public assistance programs (including TANF, SSI, SNAP, and food stamps) are not included as gross incomes.¹⁹ Second, benefits and income that are received for other children living in the household are also not included as income (including survivor benefits, foster care payments).²⁰ However, Social Security Disability and retirement payments paid for the benefit of a child are included in a parent's gross income, but the parent is entitled to a credit for the amount paid.²¹

ii. *Codification of Imputation of Income*

The Illinois courts have long recognized the concept of imputing income to a spouse under certain circumstances.²² The seminal case of *In re Marriage of Gosney*²³ set forth that in order for a court to impute income to a party, the court must find that the payor is either voluntary unemployed or underemployed, is attempting to evade a child support obligation, or has unreasonably failed to take advantage of an employment opportunity.²⁴ The amended statute now codifies these three factors and provides that courts should calculate child support based on a parent's income potential and probable earnings level.²⁵ The statute further addresses the specific

¹⁵ *Id.* § 5/505(a)(3.1)(B).

¹⁶ *Id.*

¹⁷ *Id.* § 5/505(a)(3)(B).

¹⁸ *Id.* § 5/505(a)(3)(F)(II).

¹⁹ *Id.* § 5/505(a)(3)(A)(i).

²⁰ *Id.*

²¹ *Id.* § 5/505(a)(3)(A)(ii).

²² See *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 916 N.E.2d 614 (2009); *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 735 N.E.2d 1037 (2d Dist. 2000).

²³ *Gosney*, 394 Ill. App. 3d at 1077, 916 N.E.2d at 618.

²⁴ *Id.*

²⁵ See generally 750 ILL. COMP. STAT. 5/505(a)(3.2) (2018).

circumstance where a party has insufficient work history to determine their probable earnings level. The statute now provides that if there is insufficient work history, there is a rebuttable presumption that a parent's potential income is 75% of the most recent U.S. Department of Health and Human Services Federal Poverty Guidelines for a family of one person.²⁶ The enactment of this new section of the statute may lead to the increased use of occupational expert testimony as to a party's income and earnings potential based on their educational background and prior work experience.

iii. Applying the Income Shares Model

750 ILCS 5/505(a)(1.5) as amended breaks down steps of how to apply the Income Shares model to future child support cases. First, a court should determine each parent's net monthly income using either the standardized or individualized tax amounts described above.²⁷ Next, the court should add the parties' monthly net incomes together to determine the combined monthly net income of the parties.²⁸ Next, using the BCSO Schedule, the court should choose the corresponding amount from the schedule based on the parties' combined monthly net incomes and number of children.²⁹ Finally, the court should calculate each parent's percentage share of the basic child support obligation.³⁰ If the payor parent has 146 or more overnights with his or her child (the "shared parenting" scenario), then the statute provides a few additional steps for a court to take, which are further discussed herein.³¹

iv. Additional Contribution to Children's Expenses Under the Income Shares Model

Section 505 of the Illinois Marriage and Dissolution of Marriage Act, as amended by Public Act 100-0015, further provides for division and consideration of four additional categories of children's expenses in addition to child support: (1) extracurricular and school expenses;³² (2) child care

²⁶ *Poverty Guidelines*, U.S. DEP'T. HEALTH & HUM. SERVS., <https://aspe.hhs.gov/poverty-guidelines> (last visited Mar. 27, 2019).

²⁷ 750 ILL. COMP. STAT. 5/505(a)(1.5) (2018).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* § 5/505(a)(3.8).

³² *Id.* § 5/505(a)(3.6).

expenses;³³ health insurance;³⁴ and unreimbursed health care expenses.³⁵ These expenses can be included in the monthly child support amount or paid separately. In practice, it is a good idea for attorneys with clients who know the other parent has a history of not paying for expenses/activities to consider lumping these additional expenses in with the child support payment so that the whole payment would be subject to a Notice of Income Withholding and Uniform Order of Support served upon the party's employer. The potential downside of trying to lump all of these expenses into child support are that there would not be an automatic vehicle for reimbursement of expenses as the children get older and their expenses become greater. It may also be difficult to estimate on a monthly basis what these expenses are if, for example, a child is involved in a great deal of seasonal activities with varying costs or if a parent only requires child care during certain months of the year due to their employment.

For a child's extracurricular and school expenses, which are defined as expenses "intended to enhance the educational, athletic, social, or cultural development of the child", the statute provides that a court may order either or both parents to contribute to the reasonable school and extracurricular activity expenses incurred.³⁶ In practice, the respective percentage contributions to the foregoing expenses are taken in proportion to the parties' respective net incomes as defined above.

The statute specifically defines "child care expenses" as "actual expenses reasonably necessary to enable a parent or non-parent custodian to be employed, to attend educational or vocational training programs, to improve employment opportunities, or to search for employment."³⁷ If a parent is temporarily unemployed or attending an educational program, child care expenses shall be based on prospective expenses to be incurred upon the parent's return to employment.³⁸ These expenses include deposits for securing placement in a child care program, cost of before or after school care, or cost of camps when school is not in session.³⁹ The statute specifically excludes child care expenses incurred during a parent's parenting time for reasons outside of employment, education, or other vocational training.⁴⁰ The statute specifically provides that these expenses shall be prorated in proportion to each parent's percentage share of the combined net

³³ *Id.* § 5/505(a)(3.7).

³⁴ *Id.* § 5/505(a)(4).

³⁵ *Id.* § 5/505(a)(4)(B).

³⁶ *Id.* § 5/505(a)(3.6).

³⁷ *Id.* § 5/505(a)(3.7).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* § 5/505(a)(3.7)(B).

income.⁴¹ Like child support itself, the statute provides that contribution to child care expenses may be modifiable upon a substantial change in circumstances. Specifically, the party incurring child care expenses shall notify the other party within fourteen days of any change of the amount that would affect the annual amount.⁴²

The statute treats payment of health insurance premiums differently depending on whether the payor or payee is responsible for payment of the premiums.⁴³ First, the statute specifically provides that a court “may order either” parent to obtain health, dental, and vision insurance for the child, regardless if they have the majority of parenting time or not.⁴⁴ The covering parent shall be required to submit proof of continued coverage annually to the other parent.⁴⁵ To determine how payment of health insurance affects the child support obligation, the covering parent must first determine the actual amount of the premium attributable to the child(ren) who are subject of the order.⁴⁶ In practice, frequently it is easiest for the covering parent to find out how much it would cost to cover the parent alone, and how much it costs to cover both the parent and the child. The difference can be considered the premium payment attributed to the child. At some companies, the Human Resources/Payroll departments have a further breakdown. Once the premium is determined, it is added to the Basic Child Support Obligation. Then, if the payor parent is paying the premium for any type of health insurance, “the amount calculated for the [payee’s] share of the . . . premium . . . shall be deducted from the payor’s share of the total support obligation.”⁴⁷ “If the [payee parent] is paying for private health insurance [only], the child support obligation shall be increased by the [payor’s] share of the premium payment.”⁴⁸

Finally, the statute provides that a court “may order either or both parents to contribute to the reasonable health care needs of the child not covered by insurance”⁴⁹ Similar to extracurricular activities, in practice, the respective percentage contributions to the foregoing expenses is taken in proportion to the parties’ respective net incomes as defined above.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* § 5/505(a)(4).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* § 5/505(a)(4)(E).

⁴⁸ *Id.*

⁴⁹ *Id.* § 5/505(a)(4)(B).

v. *Deviation from Child Support Guidelines*

The amended statute specifically provides that there is a “rebuttable presumption” that the amount of the award that would result from applying the new guidelines is the correct amount.⁵⁰ That being said, if a Court or parties find reason to deviate from guidelines, they must include written findings in the agreement specifying reasons for deviation.⁵¹ The statute articulates two potential reasons for deviation as payment of extraordinary medical expenses necessary to preserve the life of a child or parent, or payment of expenses for a child with special medical or developmental needs. Another common situation for deviation not articulated in the statute is in a high-income case where a court seeks to avoid a “windfall” payment to a parent that well exceeds the needs of the children being supported.⁵²

In the event the combined net incomes of the parties exceeds the combined net incomes of the highest level of the BCSO schedule,⁵³ a court may use its discretion to determine the amount of child support.⁵⁴ However, the Basic Child Support Obligation used shall not be less than the highest level of combined net income on the BCSO schedule for the applicable number of children.⁵⁵

vi. *Consideration of “Split” and “Shared” Parenting Scenarios*

The amended statute further considers two unique situations: “split parenting” and “shared parenting.”⁵⁶ The statute defines “split” physical care where each parent has physical care of at least one child where there is more than one child.⁵⁷ For parents who have a split parenting schedule, the statute provides that courts should use two separate spreadsheets to calculate what

⁵⁰ *Id.* § 5/503(a)(3.3).

⁵¹ See *In re Marriage of Fisher*, 2018 IL App (2d) 170384, discussed *infra*.

⁵² See *In re Marriage of Singleteary*, 293 Ill. App. 3d 25, 28, 687 N.E.2d 1080, 1082 (1st Dist. 1997); *In re Marriage of Charles*, 284 Ill. App. 3d 339, 347, 672 N.E.2d 57, 63 (4th Dist. 1996); *In re Marriage of Harmon*, 210 Ill. App. 3d 92, 97, 568 N.E.2d 948, 951 (2d Dist. 1991).

⁵³ *Income Shares Schedule Based on Net Income*, ILL. DEP’T. HEALTHCARE & FAM. SERVS., <https://www.illinois.gov/hfs/SiteCollectionDocuments/IncomeSharesScheduleBasedonNetIncome.pdf> (lasted visited Feb. 20, 2019) (the schedule indicates the highest level of combined net incomes is \$30,024.99/month).

⁵⁴ 750 ILL. COMP. STAT. 5/505(a)(3.5).

⁵⁵ *Income Shares Schedule Based on Net Income*, ILL. DEP’T. HEALTHCARE & FAM. SERVS., <https://www.illinois.gov/hfs/SiteCollectionDocuments/IncomeSharesScheduleBasedonNetIncome.pdf> (last visited Feb. 20, 2019) (For example, the current highest Basic Child Support Obligation for one child is \$2,241 per month for the highest combined adjusted net income level of \$30,024 per month.).

⁵⁶ Act effective July 1, 2017, 2017 Ill. Laws. P.A. 100-0015 § 5/505 (a)(3.8), (a)(3.9) (amending 750 ILL. COMP. STAT. 5/505).

⁵⁷ *Id.*

each parent would owe to the other.⁵⁸ Support on each spreadsheet shall be calculated as if that child was the only child of the parties.⁵⁹ The parties shall then subtract the lesser obligation from the greater and the parent who owes the greater obligation will be ordered to pay the difference.⁶⁰ For example, say Dad has the majority of time with Alice and Mom has the majority of time with Bob. The court would complete one child support calculation for Alice and one for Bob. Say, based on these calculations, Mom owes Dad \$100 per month in child support for Alice, and Dad owes Mom \$250 per month in child support for Bob. This means Dad owes the greater obligation. Overall, Dad would then owe \$150 per month to Mom for child support (the difference between his \$250 obligation and Mom's \$100 obligation).

On the other hand, "shared" physical care is where the payor parent has possession of the minor child for 146 or more overnights a year.⁶¹ For parents who have "shared physical care," there are a few additional steps courts need to take beyond those described above.⁶² First, following the statute, a court must multiply the basic support obligation by 1.5.⁶³ The court must then determine each parent's share of the adjusted "shared care" basic child support obligation "based on the parents' percentage share of the combined net incomes."⁶⁴ Then the court shall multiply each parent's portion of the shared care support obligation by the percentage of time the *other parent* spends with the child.⁶⁵ The respective obligations are then offset and the parent who owes more child support pays the difference of the amounts.⁶⁶ These additional steps take into account and give credit to the fact that the payor spouse does exercise a substantial amount of parenting time with the minor child.

This adjustment to the formula for "shared parenting time" unfortunately effectively creates a significant drop where child support is at times significantly lower if the payor spouse reaches the 146-overnight threshold. As a result, many parents are fighting for additional time for the sole purpose of reducing their child support obligation and "counting overnights" in court. A drafting committee has been created to try to address this drop, such that it is a more gradual reduction in support as overnights

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Act effective July 1, 2017, 2017 Ill. Laws. P.A. 100-0015 § 5/505 (a)(3.8) (amending 750 ILL. COMP. STAT. 5/505).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

increase.⁶⁷ For now, it is important for attorneys to first, consider asking about parenting time schedules early on in their representation and second, consider running several scenarios illustrating support calculations where the parent has less than 146 overnights or 146 or more overnights.

vii. Multi-Family Adjustment

The amendments to 750 ILCS 5/505 address a final common scenario where a parent is supporting another child outside of the parties' relationship or marriage.⁶⁸ This commonly occurs where one or both parents get re-married and have children with their new spouse. In a scenario where a party is requesting a multi-family adjustment, the amended statute instructs a court to:

[D]educt from the parent's net income the amount of financial support actually paid by the parent for the child or 75% of the support the parent should pay under the child support guidelines (before this adjustment), *whichever is less*, unless the court makes a finding that it would cause economic hardship to the child. *The adjustment shall be calculated using that parent's income alone.*⁶⁹

There are two key points to recognize when calculating the adjustment: first, the amount of financial support actually paid by the parent needs to be calculated to determine what number should be used for the deduction.⁷⁰ This means that a parent seeking this deduction will have to estimate how much is spent per month for the child who is not a party to the proceedings.⁷¹ Typically, this is not considered on a party's mandated Financial Affidavit, so practitioners may need to advise their clients to conduct this additional analysis. Second, the adjustment specifically only considers the income of the parent seeking a deduction, not the income of the new spouse or other child's parent.⁷² It should be noted that this restriction only seems to limit consideration of a new spouse's income for purposes of calculating the amount for this specific adjustment, not when calculating child support as a whole. It appears that a court may therefore still consider the income of a

⁶⁷ Illinois State Bar Association, Family Law Section Council, Child Support and Maintenance Sub-Committee.

⁶⁸ *Id.* § 5/505 (a)(3)(F)(I).

⁶⁹ *Id.* § 5/505 (a)(3)(F)(I)(ii).

⁷⁰ *See generally id.* § 5/505 (a)(3)(F).

⁷¹ *Id.*

⁷² *Id.*

parent's new spouse in other relevant scenarios, including deciding whether to deviate from guidelines when ordering support.⁷³

B. Spousal Maintenance

2018 marked two drastic changes to the Illinois spousal maintenance law.⁷⁴ The first related to the income “cap” for application of maintenance guidelines,⁷⁵ the calculation of the duration of maintenance,⁷⁶ and “credits” for temporary maintenance.⁷⁷ The second change amended the formula for calculating the amount of maintenance⁷⁸ in the aftermath of the passage of the Tax Cuts and Jobs Act.⁷⁹

1. Public Act 100-0520 (House Bill 2537; Senate Bill 570)⁸⁰

Public Act 100-0520 codified the first major change to the Illinois maintenance statute (750 ILCS 5/504) which became effective on January 1, 2018.⁸¹ The Act contained three primary amendments: (1) increasing the income “cap” under which the presumptive guidelines apply;⁸² (2) eliminating the former “cliffs” for duration of maintenance;⁸³ and (3) giving discretion to the court to “credit” a payor spouse for temporary maintenance paid during a dissolution of marriage proceeding.⁸⁴

First, the former iteration of Section 504 provided that a court should apply the maintenance guidelines set forth therein if the combined gross annual income of the parties was less than \$250,000.⁸⁵ Public Act 100-0520 amended this “cap” to \$500,000.⁸⁶ For courts, this means judges will now be required to make an express finding if they decide to deviate from guidelines in all cases where the combined gross annual income of the parties

⁷³ See *In re Marriage of Drysch*, 314 Ill. App. 3d 640, 645, 732 N.E.2d 125, 129 (2d. Dist. 2000); *In re Marriage of Keown*, 225 Ill. App. 3d 808, 813, 587 N.E.2d 644, 647 (4th Dist. 1992).

⁷⁴ Act effective June 1, 2018, 2017 Ill. Laws. P.A. 100-0520 § 5/504 (amending 750 ILL. COMP. STAT. 5/504).

⁷⁵ *Id.* § 5/504 (b-1)(1).

⁷⁶ *Id.* § 5/504 (b-1)(1)(B)(1).

⁷⁷ *Id.* § 5/504 (b-1)(1)(B)(1.5).

⁷⁸ *Id.* § 5/504 (b-1)(1)(A-1).

⁷⁹ Act effective Jan. 1, 2019, 2018 Ill. Laws. P.A. 100-0923 § 5/504 (b-1)(1)(A-1) (amending 750 ILL. COMP. STAT. 5/504).

⁸⁰ *Id.* § 5/504.

⁸¹ *Id.*

⁸² *Id.* § 5/504 (b-1)(1).

⁸³ *Id.* § 5/504 (b-1)(1)(B).

⁸⁴ *Id.* § 5/504 (b-1)(1.5).

⁸⁵ *Id.* § 5/504 (b-1)(1).

⁸⁶ *Id.*

is less than \$500,000.⁸⁷ Likewise, practitioners should take care to write a reason for deviation in all settlement agreements or proposed judgments if the couple earn a combined gross annual income of less than \$500,000.⁸⁸

Next, the Act removed the “cliffs” for duration of maintenance under the former 750 ILCS 5/504.⁸⁹ Section 504 formerly provided that the duration of a maintenance obligation would increase every five years a couple was married by increasing a multiplier by which the number of years a couple was married would be multiplied as follows:

Five Years or Less: x 0.2
More than 5 years but less than 10 years: x 0.4
10 years or more but less than 15 years: x 0.6
15 years or more but less than 20 years: x 0.8
20 or more years: Permanent maintenance or maintenance equal to length of marriage.⁹⁰

As a direct result of these “cliffs,” practitioners would often advise clients to wait until the next multiplier kicked in if they were close to the next factor. Under the amended statute, the legislature sought to “smooth out” these cliffs. Using ten to fifteen years of marriage as an example, the duration of the maintenance award shall now be calculated as the length of the marriage (through date of filing), multiplied by:

10 years or more but less than 11 years: 0.44
11 years or more but less than 12 years: 0.48
12 years or more but less than 13 years: 0.52
13 years or more but less than 14 years: 0.56
14 years or more but less than 15 years: 0.60
15 years or more but less than 16 years: 0.64⁹¹

To understand how this amendment affects a spouse in practice, imagine you have a client who has a fourteen-year marriage and who is otherwise eligible to receive maintenance from their spouse. If that client filed under the former statute, they would be entitled to receive eight years, five months of maintenance (100.8 months; 168 months x 0.6). If they waited one year (so it was a fifteen-year marriage), they would be entitled to receive twelve years of maintenance (144 months; 180 months x 0.8). Under the amended statute, if your client filed at fourteen years, they would again be

⁸⁷ *Id.* § 5/504 (b-2).

⁸⁸ *See generally id.* § 5/504 (b-1).

⁸⁹ *See id.* § 5/504 (b-1)(1)(B)(1).

⁹⁰ *Id.* § 5/504 (b-1)(1) (B)(1).

⁹¹ *Id.*

entitled to eight years, five months of maintenance (168 months x 0.6). However, if they wait until their fifteenth anniversary, now they would only be entitled to receive nine years, seven months (115.2 months; 180 x 0.64). This demonstrates the reduced incentive to wait until the next five-year mark.

Finally, Public Act 100-0520 addressed the issue of whether payment of temporary maintenance during a divorce proceeding should be credited towards a payor spouse's final maintenance obligation.⁹² The prior iteration of Section 504 was silent on this issue, but Judges commonly found a credit was appropriate.⁹³ The Act added language to Section 504 to explicitly provide that courts now have discretion to order that any temporary maintenance paid by a party can be considered as a "corresponding credit" to the duration of maintenance a party owes.⁹⁴ This amendment helps discourage a receiving party from "dragging out" a case to receive additional maintenance. The changes made by Public Act 100-0520 as set forth above remain unchanged by Public Act 100-0923, discussed below.

2. Public Act 100-0923 (Senate Bill 2289)

The "Tax Cuts and Jobs Act" was signed into law in December 2017.⁹⁵ As it applies to family law, the Act provided that starting with agreements executed on January 1, 2019, spousal maintenance will no longer be taxable to the payee (includable in a payee's income) or deductible to a payor.⁹⁶ However, the inclusion/deductibility impact still applies to judgments entered through December 31, 2018 and modifications of those existing judgments unless specifically agreed to otherwise in writing.⁹⁷ This effectively means that there are now two different formulas for calculating the amount of maintenance depending on when the final judgment is entered. The drafting committee for Public Act 100-0923 (effective January 1, 2019) hoped to adjust the new maintenance formula to avoid the two formulas otherwise yielding substantially dissimilar results.⁹⁸

⁹² *Id.* § 5/504 (b-1)(1)(B) (1.5).

⁹³ *Id.* § 5/504 (b-1)(1)(B).

⁹⁴ *Id.* § 5/504 (b-1)(1)(B) (1.5).

⁹⁵ Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified as amended of the Internal Revenue Code of 1986).

⁹⁶ *Id.* at 2090.

⁹⁷ Act effective Jan. 1, 2019, 2018 Ill. Laws. P.A. 100-0923 § 5/504 (b-4) (amending 750 ILL. COMP. STAT. 5/504).

⁹⁸ Nancy Chausow Shafer, *Maintenance Without the Alimony Deduction*, 25 DOCKET 8, 9 (Aug. 2018).

i. New Maintenance Formula

Under the pre-2019 maintenance formula, the amount of maintenance was calculated by taking thirty percent of a payor's gross income minus twenty percent of a recipient's gross income, capped at forty percent of the parties' combined gross incomes.⁹⁹ This formula was based on the premise under federal tax law that maintenance would be deductible to the payor and included in the payee's income.¹⁰⁰ Due to the changes in taxation of maintenance created by the "Tax Cuts and Jobs Act,"¹⁰¹ applying that same formula moving forward would result in many unanticipated consequences when calculating maintenance. Specifically, depending on the parties' respective tax brackets, the resulting maintenance amount would possibly be higher or lower than under the old formula. Accordingly, a committee was formed to consider alternatives to the formula.¹⁰² The goal of Public Act 100-0923 was to draft a new maintenance formula accounting for the loss of tax savings while equitably allocating the reduction of cash available to both parties.¹⁰³ The committee members performed over five hundred computations using different percentages at different income levels to try to avoid to the extent possible, unintended and inequitable results under the new formula.¹⁰⁴ The resulting new maintenance amount guidelines formula instructs courts to take one-third (33.33%) of a payor's net income, minus one-quarter (25%) of the recipient's net income.¹⁰⁵ Under this new formula, maintenance will now be capped at forty percent (40%) of the parties' combined net incomes, not gross incomes.¹⁰⁶

Arguably the biggest difference in the formula is the fact that it now uses net income, rather than gross income. The Act defers to the definition of "net income" in the recently amended child support statute as described above.¹⁰⁷ This means family law attorneys in practice will again have to determine whether to use an "individualized tax amount" or "standardized tax amount" approach for calculating net income for the parties.

Public Act 100-0923 also introduced one additional caveat regarding the amount of maintenance as it relates to child support. Specifically, the Act now provides that a court may, in its discretion, deviate from either the

⁹⁹ 750 ILL. COMP. STAT. 5/504 (2012).

¹⁰⁰ Shafer, *supra* note 98.

¹⁰¹ Tax Cuts and Jobs Act, Pub. L. No. 115-97 (2017) (codified as amended of the Internal Revenue Code of 1986).

¹⁰² Shafer, *supra* note 98, at 2.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Act effective Jan. 1, 2019, 2018 Ill. Laws. P.A. 100-0923 § 5/504 (b-1)(1)(A-1) (amending 750 ILL. COMP. STAT. 5/504(b-1)(1)(A)).

¹⁰⁶ *Id.*

¹⁰⁷ 750 ILL. COMP. STAT. 5/505 (a)(3)(B) (2019).

maintenance or child support guidelines if application of the guidelines “results in a combined maintenance and child support obligation that exceeds [fifty percent] of the payor’s net income.”¹⁰⁸ This amendment is in line with the general purpose of support being commensurate to the standard of living established during a marriage.

iii. Prerequisite Finding of Appropriateness of Maintenance Award

The prior iteration of the Illinois maintenance statute ambiguously provided that a court should “determine” if maintenance is appropriate in a given case.¹⁰⁹ Public Act 100-0923 revised this language by explicitly providing that a “court shall first make a finding as to whether a maintenance award is appropriate.”¹¹⁰ The Act further emphasizes that a court should reach the step of applying the maintenance formula “only if” it first finds maintenance is appropriate.¹¹¹ These revisions clarify that a court must first look at relevant factors enumerated in Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act and find that based on analyzing said factors, maintenance is appropriate. These factors remain unchanged, including, but not limited to: 1) “the income and property of each party”; 2) “the needs of each party”; 3) the realistic present and future earning potential of each party and any impairments thereto; 4) “duration of the marriage,” and 5) “the standard of living established during the marriage.”¹¹² Public Act 100-0923 adds one final emphasis on this prerequisite finding by adding that “[u]nless the court finds that a maintenance award is appropriate, it shall bar maintenance as to the party seeking maintenance regardless of the length of the marriage at the time the action was commenced.”¹¹³ This amended language seems to indicate that even if the parties have disparate incomes with a longer term marriage, if other factors weigh in favor of a court finding maintenance is not appropriate, the lower income spouse may still be barred from receiving maintenance entirely.

¹⁰⁸ 750 ILL. COMP. STAT. 5/504 (b-1) (2019).

¹⁰⁹ Act effective June 1, 2018, 2017 Ill. Laws. P.A. 100-0520 § 5/504 (a) (amending 750 ILL. COMP. STAT. 5/504).

¹¹⁰ Act effective Jan. 1, 2019, 2018 Ill. Laws. P.A. 100-0923 § 5/504 (b-1)(1)(A-1) (amending 750 ILL. COMP. STAT. 5/504).

¹¹¹ *Id.*

¹¹² *Id.* § 5/504 (a)(1), (2), (3), (7), (8).

¹¹³ *Id.* § 5/504 (b-1).

iii. Types of Maintenance

The previous version of the maintenance statute referred to fixed-term, indefinite, and reviewable maintenance, but did not contain any definition of these terms. The amendments to Section 504 add definitions for these three types of maintenance and provide that a court must specify what type of maintenance they are awarding in future Judgments.¹¹⁴ First, the Act defines “fixed-term maintenance” as maintenance that will be paid for a period with a fixed termination date.¹¹⁵ At the completion of the fixed period, the recipient spouse shall be barred from receiving any additional maintenance.¹¹⁶ In contrast, “indefinite maintenance” does not have a designated termination date and shall continue until further modification or termination upon other statutory factors.¹¹⁷ Finally, if a court finds “reviewable maintenance” is appropriate, it shall designate a period of maintenance for a specified term, but shall also state that maintenance is reviewable.¹¹⁸ Upon review of this maintenance award, a court will still consider the factors under Section 510 of the Illinois Marriage and Dissolution of Marriage Act, including any increases or decreases in the parties’ incomes, any attempts made by the recipient spouse to become self-sufficient, and the duration of maintenance payments previously paid relative to the length of marriage.¹¹⁹

C. Collaborative Process Act¹²⁰ and Illinois Supreme Court Rule 294¹²¹

The Collaborative Process Act, which became effective on January 1, 2018, marked a momentous step for collaborative divorce professionals across Illinois. Collaborative practice markets itself as an alternative to litigation and is practiced in all fifty states.¹²² When parties decide to engage in the collaborative practice, they sign a written participation agreement and choose a team of professionals, including attorneys for each party, a financial

¹¹⁴ *Id.* § 5/504 (b-2)(3).

¹¹⁵ *Id.* § 5/504 (b-4.5)(1).

¹¹⁶ Although fixed-term maintenance sets an end date for maintenance, maintenance could also terminate earlier upon one of the statutory termination factors set forth in 750 ILL. COMP. STAT. 5/504 (remarriage of the recipient spouse, death of either spouse, or cohabitation on a continuing, conjugal cohabitation).

¹¹⁷ *Id.* § 5/504 (b-4.5)(2).

¹¹⁸ *Id.* § 5/504 (b-4.5)(3).

¹¹⁹ 750 ILL. COMP. STAT. 5/510 (2018).

¹²⁰ Collaborative Process Act, 2017 Ill. Laws P.A. 100-0205 (codified at 750 ILL. COMP. STAT. 90/).

¹²¹ ILL. SUP. CT. R. 294 (eff. July 1, 2018).

¹²² *What Makes Collaborative Practice Unique?*, INT’L ACAD. COLLABORATIVE PROFLS., <https://www.collaborativepractice.com/sites/default/files/What%20Makes%20Collaborative%20Practice%20Unique.pdf> (last visited Feb. 20, 2019).

neutral, and at least one mental health professional.¹²³ These professionals engage in a series of meetings with the clients to help them negotiate their final settlement agreement and Allocation Judgment. Collaborative practice differs from mediation in that a mediator serves as a neutral professional who facilitates communication and negotiation between the parties directly.¹²⁴ In collaborative practice, collaborative lawyers still act as advocates for their clients and help draft final agreements for the parties to enter in court.¹²⁵ The financial and mental health professionals help address other needs of the parties and highlight other considerations to create a more well-rounded and tailored agreements to meet the parties' needs. The idea behind the process is to give the parties a voice and greater control to negotiate the terms of the agreement. Prior to the adoption of the Collaborative Process Act, collaborative practice was not codified into Illinois law as a recognized conflict resolution model. The passage of the Act codified collaborative practice, both for future clients as well as for Judges in Court. The Act helps support the idea that lawyers can serve as "active settlement advisors" and use mediation skills to help parties reach an agreement, without following them into a litigation process.¹²⁶

To initiate the collaborative process, all professionals and clients must first sign a participation agreement. This participation agreement provides that each party will be actively engaged and committed to the collaborative process and each person must agree to discharge their lawyer if the process fails or is terminated.¹²⁷ The collaborative process will terminate if one party notifies the other that the process has ended, if a party asks the court to resolve the proceeding, or a lawyer withdraws their representation.¹²⁸

Illinois Supreme Court Rule 294 was adopted on June 8, 2018, and went into effect on July 1, 2018. The Rule was adopted as a companion to the Collaborative Process Act and disqualifies an attorney engaged in the collaborative process from representing their client in a dissolution proceeding if the collaborative process fails.¹²⁹ The Rule further affirmatively mandates a lawyer who was previously engaged in the

¹²³ *How Collaborative Divorce Works*, COLLABORATIVE INST. ILL., <https://collablawil.org/how-collaborative-divorce-works/> (last visited Feb. 20, 2019).

¹²⁴ Brian James, *What is Divorce Mediation*, MEDIATE, <https://www.mediate.com/articles/jamesB1.cfm> (last visited Apr. 4, 2019).

¹²⁵ Sandra Crawford, *Collaborative Law: A Brief Overview*, 105 ILL. BAR J. 28 (2017).

¹²⁶ Rhys Saunders, *A Separate Peace*, 106 ILL. BAR J. 12 (2018).

¹²⁷ Debra Braselton, *Collaborative Divorce*, 13(2) THE CATALYST (Jan. 2008), <https://www.isba.org/committees/women/newsletter/2008/01/collaborativedivorce>.

¹²⁸ *Collaborative Principles & Guidelines*, COLLABORATIVE INST. ILL., <https://collablawil.org/principles-and-guidelines/> (last visited Nov. 25, 2018).

¹²⁹ Saunders, *supra* note 126.

collaborative process to withdraw their representation if the collaborative process fails and imputes the disqualification of one lawyer in a firm to all other lawyers in the firm.¹³⁰ This means that if one lawyer from a firm is disqualified from representing a client due to termination of the collaborative process, all other lawyers will be disqualified as well.

D. Companion Animals¹³¹

Although the statutory amendment regarding companion animals is arguably less “significant” to practitioners than the changes to the Illinois child support and maintenance statutes, the notable adoration of people of their pets warrants a short section discussing this point of potential additional litigation. This amendment codifies and recognizes the rising trend of humans treating their dogs as their “children.”¹³² Under the statute, an attorney can now present their client with an option to essentially draft an “allocation judgment” for their dogs to allocate ownership of and responsibility for any pets owned by the parties. Like an allocation judgment for a child, this judgment can go into great detail, including allocating responsibility for daily decisions and medical and health related issues, prescriptions, allocation of “parenting time,” division of veterinary costs, and the right of first refusal.

If the parties are unable to reach an agreement, the amendment provides that “[e]ither party may petition or move for the temporary allocation of sole or joint possession of and responsibility for a companion animal jointly owned by the parties.”¹³³ If a party files such a Petition, the court shall consider the “well-being” of the companion animal.¹³⁴ Presumably this analysis will be similar to the analysis of what is in the best interests of a child. Additionally, the amendment also provides that if a court finds a companion animal is a “marital asset”, it shall allocate sole or joint ownership of and responsibility for the companion animal to one or both parties.¹³⁵

The foregoing legislative changes from 2017 and 2018 are supplemented by recent cases that provide additional guidance to family law practitioners.

¹³⁰ ILL. SUP. CT. R. 294 (eff. July 1, 2018).

¹³¹ Ownership of Companion Animal, Pub. Act 100-0422 (codified as 750 ILL. COMP. STAT. 5/452, 750 ILL. COMP. STAT. 5/501, 750 ILL. COMP. STAT. 5/502, and 750 ILL. COMP. STAT. 5/503).

¹³² Laura Entis, *Pets Are Basically People*, FORTUNE (Sept. 7, 2016), <http://fortune.com/2016/09/07/pets-are-basically-people/> (last visited Apr. 4, 2019).

¹³³ 750 ILL. COMP. STAT. 5/503 (2018).

¹³⁴ *Id.*

¹³⁵ *Id.*

III. SELECTED CASE LAW UPDATES

In addition to the changes in law articulated above, 2017 and 2018 also led to substantial guidance in various areas of family law, including spousal maintenance, child support, attorneys' fees, and enforcement of premarital agreements.

A. Spousal Maintenance

This section explores 2017-2018 case law exploring issues related to spousal maintenance, including considerations as to what is considered "income" for purposes of calculating maintenance, cohabitation as a terminating factor for maintenance, and review and extension of maintenance.

1. *In re Marriage of Bernay*¹³⁶

In the Second District case of *In re Marriage of Bernay*,¹³⁷ the appellate court analyzed the appropriateness of a maintenance award commensurate to a party's "standard of living."¹³⁸ In reversing the trial court's decision, the appellate court first noted the trial court failed to consider the long-supported policy that a spouse is entitled to maintain a "reasonable approximation of the standard of living established during the marriage."¹³⁹ The appellate court highlighted that in a previous unpublished order,¹⁴⁰ it had already made various observations and findings as to the parties' standard of living during the marriage.¹⁴¹ Applying the analysis from *In re Marriage of Shen*,¹⁴² the court found the trial court abused its discretion by not considering if the payor spouse had sufficient assets to meet his or her needs and the needs of the former spouse.¹⁴³ Following *Bernay*, practitioners facing similar cases should examine assets outside of a party's income that may still be used to

¹³⁶ *In re Marriage of Bernay*, 2017 IL App (2d) 160583.

¹³⁷ *Id.*

¹³⁸ *Id.* ¶ 7.

¹³⁹ *Id.* ¶ 17 (quoting *In re Marriage of Dunseth*, 260 Ill. App. 3d 816, 833, 633 N.E.2d 82, 95 (4th Dist. 1994)).

¹⁴⁰ *In re Marriage of Bernay*, No. 2-06-0697 (2007) (unpublished order under Supreme Court Rule 23).

¹⁴¹ *Bernay*, 2017 IL App (2d) 160583, ¶ 23.

¹⁴² *In re Marriage of Shen*, 2017 IL App (2d) 160583.

¹⁴³ *Bernay*, 2017 IL App (2d) 160583, ¶ 23 (quoting *In re Marriage of Shen*, 2015 IL App (1st) 130733, ¶ 87).

sustain the receiving party's standard of living established during the marriage.¹⁴⁴

3. *In re Marriage of Brill*¹⁴⁵

The Second District appellate court further guided future maintenance determinations by defining whether financial assistance received from a party's parents shall be considered as part of that party's gross income for maintenance purposes.¹⁴⁶ In *Brill*, the appellant argues that pursuant to *In re the Marriage of Rogers*¹⁴⁷, financial assistance from parents should be considered as income to a party.¹⁴⁸ However, the court rejected this argument, finding that unlike *Rogers*, there was no evidence that the payee's parents provided her with financial assistance every year of her entire adult life.¹⁴⁹ Instead, the evidence presented showed that the payee's parents only began supporting her after the parties separated and there was no evidence presented that the financial assistance would continue in the future.¹⁵⁰ The Second District further distinguished *Rogers* by noting the difference in statutory schemes for deviation between child support and maintenance.¹⁵¹ The Second District expressly limited the application of *Rogers* for cases where a party receives financial assistance from friends and family on a recurring and continuing basis, and suggests that the factual circumstances surrounding the assistance will determine whether a finding for deviation may be supported.¹⁵²

4. *In re Marriage of Ruvola*¹⁵³

The Second District case of *In re Marriage of Ruvola* dealt with imputation of income and again considered whether checks received from a party's parent constituted "income" for maintenance purposes.¹⁵⁴ In *Ruvola*, Petitioner payor spouse was ordered to pay maintenance to Respondent

¹⁴⁴ See *In re Marriage of Cramsey* 2018 IL App (4th) 170742-U, ¶ 68 (Unpublished Opinion) (determining that farmland farming equipment could be considered as assets that allowed payor to sustain his needs and his former spouse's needs).

¹⁴⁵ *In re Marriage of Brill*, 2017 IL App (2d) 160604.

¹⁴⁶ *Id.* ¶ 21.

¹⁴⁷ *In re Marriage of Rogers*, 213 Ill.2d 129, 820 N.E.2d 386 (2004).

¹⁴⁸ *Brill*, 2017 IL App (2d) 160604, ¶ 36.

¹⁴⁹ *Id.* ¶ 37.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* ¶ 39.

¹⁵² *Id.* ¶ 37.

¹⁵³ *In re Marriage of Ruvola*, 2017 IL App (2d) 160737.

¹⁵⁴ *Id.* ¶ 18.

recipient spouse.¹⁵⁵ On appeal, Petitioner argued that the trial court improperly imputed income to him based on finding he was voluntarily underemployed.¹⁵⁶ In affirming the trial court's decision, the appellate court relied upon Petitioner's testimony about his educational and work background as well as his job diary entries evidencing attempts at seeking gainful employment.¹⁵⁷ First, Petitioner testified that he graduated from college with a degree in chemistry, worked in the field of chemistry for many years, and received various promotions.¹⁵⁸ However, following these jobs, he became extremely depressed and attempted to commit suicide.¹⁵⁹ Following this attempt, Petitioner held on-and-off part-time positions at State Farm Insurance, the local park district, and Sal's Pizzeria, but had never gone back to his prior income level.¹⁶⁰ Next, in looking at the Petitioner's job diary and stated job efforts, the appellate court noted Petitioner's "lack of earnestness" in his job search.¹⁶¹ The court highlighted that Petitioner was unemployed for 2011 and 2014, with no explanation.¹⁶² Further, despite being under court order to persistently seek employment, Petitioner's job diary showed that he only pursued a handful of job leads from family and friends, cold-call canvassed a strip mall once, and made two cold calls to Harley Davidson and the Jupiter police department.¹⁶³ Although Petitioner claimed that his mental health problems contributed to his inability to seek employment, the appellate court ultimately found Petitioner presented no evidence that his condition had a negative impact on his job search and testified that he was still capable of employment and that he intended to look for work. Accordingly, the court affirmed the trial court's imputation of income to Petitioner.¹⁶⁴

Petitioner also argued that the trial court erred in failing to consider checks Respondent received from her father as part of her income for purposes of calculating maintenance.¹⁶⁵ Respondent testified that in addition to her current salary, she received a weekly check from her father for \$255.¹⁶⁶ Respondent argued that these checks were not her salary, but rather, "gifts"

¹⁵⁵ *Id.* ¶ 6.

¹⁵⁶ *Id.* ¶ 24.

¹⁵⁷ *Id.* ¶¶ 25, 34, 35.

¹⁵⁸ *Id.* ¶ 25.

¹⁵⁹ *Id.* ¶ 27.

¹⁶⁰ *Id.* ¶¶ 33-35.

¹⁶¹ *Id.* ¶ 44.

¹⁶² *Id.*

¹⁶³ *Id.* ¶ 34.

¹⁶⁴ *Id.* ¶ 45.

¹⁶⁵ *Id.* ¶¶ 12, 18.

¹⁶⁶ *Id.* ¶ 14.

from her father.¹⁶⁷ The appellate court first turned to the plain language of 750 ILCS 5/504(b-3), which defines “gross income” as “income from all sources.”¹⁶⁸ The court then referred back to the holding of *In re Marriage of Rogers*, where the Illinois Supreme Court held that annual gifts that the payor spouse received from his father constituted “income” under Illinois child support law.¹⁶⁹ Unlike in the *Brill* case discussed above, here the court found the analysis in *Rogers* should also be applied to the Illinois maintenance law and the checks received from Respondent’s father should be included in her income.¹⁷⁰ The holding in this case again emphasizes the need to look at the specific circumstances surrounding payments received from friends or family to determine whether they should be included in a party’s income for support purposes.

4. *In re Marriage of Van Hovel*¹⁷¹

The Fourth District Appellate Court case of *In re Marriage of Van Hovel* considered the appropriateness of a trial court’s award of maintenance from 2012 to 2016 to Wife and imputation of income to Husband.¹⁷² In 2014, the trial court entered a Judgment for Dissolution of Marriage reserving the issue of maintenance for future determination.¹⁷³ Also, in 2014, Husband lost his employment as a Bloomington police officer due to his own misconduct in violation of police department policy.¹⁷⁴ Thereafter, Husband started his own tree removal and trimming business.¹⁷⁵ In August 2016, Wife moved in with her boyfriend and started living with him on a continuing, conjugal basis.¹⁷⁶ Then in February 2017, the parties entered into a Marital Settlement Agreement, again reserving the issue of maintenance.¹⁷⁷ In January 2018, the trial court finally entered an order, awarding retroactive maintenance to Wife from August 2012, when Wife filed her Petition for Dissolution of Marriage, through August 2016.¹⁷⁸ To support its order, the trial court noted the disparity in the parties’ incomes

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* ¶ 18.

¹⁶⁹ See 750 ILL. COMP. STAT. 5/505(a)(3)(2017); *In re Marriage of Rogers*, 357 Ill. App. 3d 828, 829 N.E.2d 386 (2nd Dist. 2004).

¹⁷⁰ *Ruvola*, 2017 IL App (2d) 160737, ¶ 20.

¹⁷¹ *In re Marriage of Van Hovel*, 2018 IL App (4th) 180112.

¹⁷² *Id.*

¹⁷³ *Id.* ¶ 7.

¹⁷⁴ *Id.* ¶ 10.

¹⁷⁵ *Id.* ¶ 11.

¹⁷⁶ *Id.* ¶ 16.

¹⁷⁷ *Id.* ¶ 8.

¹⁷⁸ *Id.* ¶ 16.

supported an award of maintenance.¹⁷⁹ The trial court further imputed income to Husband, finding he chose to violate department policy during a time where the marriage was dissolving, and therefore, placed both his, and his Wife's, livelihood at risk.¹⁸⁰

On appeal, the Fourth District agreed with Husband's argument that the trial court abused its discretion by awarding retroactive maintenance to Wife.¹⁸¹ First, the Fourth District noted that Wife never specified what type of maintenance she was seeking and never sought a hearing on temporary maintenance during the pendency of the case.¹⁸² In fact, at the time of the final hearing, there were no pleadings on file seeking retroactive maintenance.¹⁸³ Second, throughout the five years the case remained pending, maintenance had repeatedly been reserved.¹⁸⁴ Finally, the Wife was already cohabitating with her boyfriend on a continuing, conjugal basis on the date maintenance was finally awarded to her.¹⁸⁵ Based on the foregoing, the Fourth District held the trial court's award was essentially a "redistribution" of property after the parties had already distributed their property via a Marital Settlement Agreement and reversed the trial court's decision as to the maintenance award to Wife.¹⁸⁶

Husband further argued the trial court abused its discretion in deciding to impute his police officer salary to him after he was terminated.¹⁸⁷ The Fourth District agreed with Husband and reversed the trial court's decision.¹⁸⁸ Specifically, no evidence was presented to indicate Husband had similar law enforcement jobs available to him, or that he had any likelihood of being so employed after his termination.¹⁸⁹ Therefore, he had not unreasonably failed to take advantage of an available employment opportunity.¹⁹⁰ The Fourth District expressly rejected the trial court's logic that Husband failed to take advantage of an employment opportunity by failing to retain his previous employment.¹⁹¹ Instead, the Fourth District specified that this factor for imputing income only applies to circumstances

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* ¶ 17.

¹⁸¹ *Id.* ¶ 26.

¹⁸² *Id.* ¶ 31.

¹⁸³ *Id.* ¶ 33.

¹⁸⁴ *Id.* ¶ 32.

¹⁸⁵ *Id.* ¶ 36.

¹⁸⁶ *Id.* ¶ 47.

¹⁸⁷ *Id.* ¶ 2.

¹⁸⁸ *Id.* ¶ 45.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

arising after the loss of employment from which the trial court seeks to impute income.¹⁹²

5. *In re Marriage of Walther*¹⁹³

Following the decision made in *In re Marriage of Miller*,¹⁹⁴ it was unclear under what circumstances a court would still terminate maintenance based on a party cohabitating with a significant other on a continuing, conjugal basis.¹⁹⁵ The *Miller* Court strayed significantly from prior appellate court decisions when it reversed the trial court's decision to terminate maintenance based on a finding of cohabitation.¹⁹⁶ Prior to *Miller*, the definition of "cohabitation" as a finding for terminating maintenance had become broader and broader, culminating in the development of the six-factor test set forth in *In re Marriage of Herrin*.¹⁹⁷ Specifically, the court looked at: (1) the length of the relationship; (2) the amount of time spent together; (3) the nature of activities engaged in; (4) the interrelation of personal affairs (including finances); (5) whether they vacation together; and (6) whether they spend holidays together.¹⁹⁸ While the *Herrin* six-factor test provided some guidance to courts, it was widely criticized for creating a much broader evidentiary standard for terminating maintenance.¹⁹⁹ In practice, courts were left unsure of how much weight to give to each factor and instances of termination based on findings of cohabitation increased because typically at least one factor would apply to every dating relationship.²⁰⁰ The *Miller* decision served as a means to place the six-factor test back in the much narrower context of looking at whether the relationship arose to a level of a "*de facto* marriage" regardless of whether the six factors existed to some extent.

As part of the Judgment for Dissolution of Marriage in *Miller*, Wife was awarded permanent maintenance.²⁰¹ Following entry of the Judgment, Wife began dating her boyfriend, Michael, exclusively.²⁰² He would stay with her every weekend, from Thursday through Sunday, and they were members of the same golf course. The couple never commingled their finances and

¹⁹² *Id.*

¹⁹³ *In re Marriage of Walther*, 2018 IL App (3d) 170289.

¹⁹⁴ *In re Marriage of Miller*, 2015 IL App (2d) 140530.

¹⁹⁵ *Walther*, 2018 IL App (3d) 170289, ¶ 26.

¹⁹⁶ *Miller*, 2015 IL App (2d) 140530, ¶ 69.

¹⁹⁷ *In re Marriage of Herrin*, 262 Ill. App. 3d 573, 577, 634 N.E.2d 1168, 1171 (4th Dist. 1994).

¹⁹⁸ *Id.*

¹⁹⁹ Leon I. Finkel & Katelyn A. Blanchard, *Dating, Maintenance, and Miller*, 104 ILL. B.J. 34, 35-36 (2016).

²⁰⁰ *Id.* at 36.

²⁰¹ *Miller*, 2015 IL App (2d) 140530, ¶ 4.

²⁰² *Id.* ¶ 5.

always paid for expenses and meals separately, but they did vacation and spend holidays together.²⁰³ By the time Husband filed his Petition to Terminate Maintenance, however, the couple had stopped spending weekends together and Michael had terminated his golf course membership.²⁰⁴ In their analysis, the Second District Appellate Court found that though the couple had “intimately dated,” this did not rise to the level of a “*de facto* marriage” for purposes of finding cohabitation.²⁰⁵ The court explained that the six factors existing by themselves, did not automatically distinguish a relationship from being an “intimate dating relationship” or a “*de facto* marriage.”²⁰⁶ Instead, the *Miller* court advised that courts should instead be analyzing whether the facts in each category considered in the totality reached a level substantially similar to marital behavior.²⁰⁷ With this in mind, the court ultimately found Wife’s relationship with Michael did not rise to “cohabitation on a conjugal, continuing basis.”²⁰⁸ The *Miller* analysis led the way to further clarification in *Walther*.²⁰⁹

In *In re Marriage of Walther*,²¹⁰ the Third District Appellate Court considered whether the trial court’s termination of maintenance based on a finding that a recipient spouse was in a *de facto* husband and wife relationship was against the manifest weight of the evidence.²¹¹ The parties’ in *Walther* entered into a Marital Settlement Agreement which provided that Husband would pay maintenance to Wife, which would terminate if the Wife was living with a significant other on a resident, continuing conjugal basis.²¹² The *Walther* court followed the “totality of the circumstances” approach elaborated in *Miller*, but still considered the six *Herrin*²¹³ factors listed above.²¹⁴ In applying these factors, the court noted that Wife shared a bedroom with her boyfriend and regularly engaged in sex with him; Wife kept clothing at her boyfriend’s house and regularly bought him groceries and prepared meals for him and freely came and left from the house; Wife spent all major holidays with him; and Wife moved her daughter to her boyfriend’s house.²¹⁵ Based on these facts, the appellate court reversed the

²⁰³ *Id.* ¶¶ 9-13, 16.

²⁰⁴ *Id.* ¶¶ 15, 63.

²⁰⁵ *Id.* ¶ 62.

²⁰⁶ *Id.* ¶ 60.

²⁰⁷ *Id.*

²⁰⁸ *Id.* ¶ 62.

²⁰⁹ *In re Marriage of Walther*, 2018 IL App (3d) 170289, ¶ 26.

²¹⁰ *Id.*

²¹¹ *Id.* ¶ 26.

²¹² *Id.* ¶ 3.

²¹³ *In re Marriage of Herrin*, 262 Ill. App. 3d 573, 577, 634 N.E.2d 1168, 1171 (4th Dist. 1994).

²¹⁴ *Walther*, 2018 IL App (3d) 170289 at ¶ 26.

²¹⁵ *Id.* ¶ 26-33.

trial court's decisions and remanded with directions to determine a date upon which Husband's maintenance obligation terminated.²¹⁶

However, Justice Carter wrote a dissenting opinion that illustrates how fact-specific the cohabitation analysis is and expressed that the majority did not give enough deference to the trial court as to factual and credibility determinations in the case.²¹⁷ In his dissent, Justice Carter noted as follows: the couple's relationship was only eleven months long and Wife testified that she did intend for the relationship to be permanent; there was scant evidence presented on how long Wife spent with her boyfriend during their relationship and what daily activities they engaged in; and Wife and boyfriend did not share any financial accounts and got all statements for her accounts mailed to her own address.²¹⁸ Based on his own totality of the circumstances analysis, Justice Carter opined that he would affirm the trial court's ruling, holding its denial of Husband's Petition to Terminate Maintenance was not contrary to the manifest weight of the evidence.²¹⁹

6. *In re Marriage of Juiris*²²⁰

In *Juiris*, the First District Appellate Court considered cohabitation as a terminating factor for maintenance in the context of pre-Judgment proceedings.²²¹ During the pendency of proceedings, Husband filed a motion for temporary support seeking temporary maintenance.²²² The trial court entered and continued the motion for trial.²²³ At trial, the court ordered Wife to pay Husband maintenance, including an award of retroactive maintenance.²²⁴ On appeal, Wife argued that the trial court erred in awarding Husband temporary maintenance because the pair cohabited together for two of the three years of the divorce proceeding, so the trial court should not have awarded maintenance during these years.²²⁵ The First District rejected this argument, noting that a reading of the clear language of the relevant statute regarding termination²²⁶ only applies to awards of future maintenance, not temporary or past maintenance.²²⁷ The court noted moreover that Wife did not cite to anything in the record showing the parties were engaged in

²¹⁶ *Id.* ¶ 35.

²¹⁷ *Id.* ¶ 39 (Carter, J., dissenting).

²¹⁸ *Id.* ¶¶ 41-46.

²¹⁹ *Id.* ¶ 47.

²²⁰ *In re Marriage of Juiris*, 2018 IL App (1st) 170545.

²²¹ *Id.* ¶ 22.

²²² *Id.* ¶ 9.

²²³ *Id.*

²²⁴ *Id.* ¶ 22.

²²⁵ *Id.*

²²⁶ 750 ILL. COMP. STAT. 5/510(c) (2018).

²²⁷ *Juiris*, 2018 IL App (1st) 170545, ¶ 24.

conjugal activities during this time.²²⁸ Following this case, it is important for practitioners to advise their clients that even though they may still be residing in the same residence as their spouse during the pendency of the proceeding, they may still have exposure for payment of temporary maintenance.²²⁹

7. *In re Marriage of Wojcik*²³⁰

The First District Appellate Court case of *In re Marriage of Wojcik* addressed two important issues related to maintenance.²³¹ First, the time period during which a spouse can seek to review maintenance, and second, the appropriateness to extend maintenance.²³² In *Wojcik*, the parties' Judgment for Dissolution of Marriage provided that Husband was to pay Wife support for "60 months, reviewable."²³³ A few weeks after the sixty months had passed, Wife filed a Motion to Extend Maintenance.²³⁴ Husband filed a Motion to Dismiss Wife's Motion, arguing that Wife had to file her Motion within the sixty-month period.²³⁵ At trial, the trial court denied Husband's Motion to Dismiss, granted Wife's Petition to Extend Maintenance, and awarded Wife permanent maintenance retroactive to date of filing of Wife's Petition and pre-judgment interest on the retroactive maintenance.²³⁶

On appeal, the First District first addressed the trial court's denial of Husband's Motion to Dismiss.²³⁷ In affirming the trial court's decision, the First District relied heavily on parallel analysis conducted previously in *In re Marriage of Rodriguez*.²³⁸ In *Rodriguez*, the husband argued that because his former wife "did not petition for review of maintenance within the four-year period" set for maintenance in the order, the former wife "was forever barred from seeking an extension"²³⁹ The Third District rejected this argument, noting that in that case, the Judgment expressly provided for

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *In re Marriage of Wojcik*, 2018 IL App (1st) 170625.

²³¹ *Id.* ¶¶ 14-39.

²³² *Id.*

²³³ *Id.* ¶ 22.

²³⁴ *Id.* ¶ 1.

²³⁵ *Id.* ¶ 10.

²³⁶ *Id.* ¶¶ 10, 13.

²³⁷ *Id.* ¶ 16.

²³⁸ *Id.* ¶¶ 20-24; *see also In re Marriage of Rodriguez*, 359 Ill. App. 3d 307, 834 N.E.2d 71 (3d Dist. 2005).

²³⁹ *Wojcik*, 2018 IL App (1st) 170625, ¶ 21; *see also Rodriguez*, 359 Ill. App. 3d at 312, 834 N.E.2d at 75.

reviewability of maintenance after four years.²⁴⁰ Similarly, in *Wojcik*, the plain language of the parties' Marital Settlement Agreement specified that the support would be reviewable after sixty months.²⁴¹ The court further rejected Husband's reliance on *In re Marriage of Doermer*,²⁴² noting that unlike in *Doermer*, the Marital Settlement Agreement in *Wojcik* did not include also include a provision that provided for termination of maintenance after payment of support for sixty months.²⁴³ Accordingly, the First District found Wife was not time-barred from filing her Petition to Review and Extend Maintenance.²⁴⁴

In turning to the issue of extending Husband's maintenance obligation, the First District first noted the trial court's consideration of Wife's testimony that she had tried to seek gainful employment.²⁴⁵ The court found that although Wife was able to obtain employment since entry of the Judgment, it was insufficient to meet her monthly needs and standard of living as established during the parties' almost thirty-year marriage.²⁴⁶ The court noted further that during the parties' marriage, Wife stayed at home to perform domestic duties, in turn allowing Husband to work and thrive.²⁴⁷ In affirming the trial court's decision to award permanent maintenance to Wife, the First District found that the trial court had considered the foregoing factors and had already imputed full-time income to Wife commensurate to what it believed she could reasonably earn.²⁴⁸

Finally, the First District reversed the trial court's ruling as it related to pre-judgment interest on retroactive maintenance back to date of filing of Wife's Petition.²⁴⁹ The court noted that the retroactive maintenance did not become due and could not be considered unpaid until the point the trial court entered the Judgment modifying and extending Husband's support obligation.²⁵⁰ It followed that logic to opine further that Husband was not breaching a known, static obligation or unjustifiably withholding money.²⁵¹ Accordingly, it was in error for the trial court to accrue interest against him for retroactive maintenance.²⁵²

²⁴⁰ *Wojcik*, 2018 IL App (1st) 170625, ¶ 24; *see also Rodriguez*, 359 Ill. App. 3d at 312-13, 834 N.E.2d at 75-76.

²⁴¹ *Wojcik*, 2018 IL App (1st) 170625, ¶¶ 18-23.

²⁴² *In re Marriage of Doermer*, 2011 IL App (1st) 101567.

²⁴³ *Wojcik*, 2018 IL App (1st) 170625, ¶ 25; *see also Doermer*, 2011 IL App (1st) 101567, ¶ 4.

²⁴⁴ *Wojcik*, 2018 IL App (1st) 170625, ¶ 28.

²⁴⁵ *Id.* ¶¶ 32-39.

²⁴⁶ *Id.* ¶ 34.

²⁴⁷ *Id.* ¶ 33.

²⁴⁸ *Id.* ¶¶ 37-39.

²⁴⁹ *Id.* ¶ 45.

²⁵⁰ *Id.* ¶ 42.

²⁵¹ *Id.* ¶ 43.

²⁵² *Id.*

B. Child Support

The following selected child support opinions issued in 2017 and 2018 address the principles of equitable estoppel as applied to child support, and whether a court should find there has been a substantial change in circumstances where the financial position of a party has not changed or where the parties previously contemplated a cap for support.

1. *In re Marriage of Hodges*²⁵³

In *Hodges*, the Fifth District Appellate Court examined whether the principles of equitable estoppel could be applied as a basis for reducing a child support arrearage payable by Husband.²⁵⁴ A Judgment for Dissolution of Marriage was entered dissolving the parties' marriage in 2004 and setting a child support obligation for the Husband.²⁵⁵ In 2006, the Illinois Department of Healthcare and Family Services ("HFS") filed a Petition to Intervene, which was subsequently granted.²⁵⁶ HFS, through an assistant attorney general, filed a Petition for Adjudication of Indirect Civil Contempt against Ex-Husband, alleging he was in arrears for child support.²⁵⁷ As part of this proceeding, the assistant attorney general drafted a new Uniform Order of Support, filling out the child support payment line with \$330 to be paid every other week.²⁵⁸ However, this new Uniform Order of Support was never entered.²⁵⁹ The only Order that was entered was one that provided that on Wife's motion, the HFS proceeding was dismissed.²⁶⁰ Notwithstanding the fact that the Order was not entered, Husband started paying \$165/week as child support.²⁶¹ Further, in 2010, Wife handwrote a letter to Husband including spreadsheets showing Husband's child support payments of \$165/week and her acceptance of \$165/week for child support instead of the \$788/month originally ordered in the Judgment.²⁶² In 2014, Wife contacted HFS for help collecting child support against Husband.²⁶³ On appeal, the Fifth District affirmed the trial court's decision that Wife was equitably

²⁵³ *In re Marriage of Hodges*, 2018 IL App (5th) 170164.

²⁵⁴ *Id.*

²⁵⁵ *Id.* ¶ 4.

²⁵⁶ *Id.* ¶ 5.

²⁵⁷ *Id.*

²⁵⁸ *Id.* ¶ 6.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* ¶ 8.

²⁶² *Id.*

²⁶³ *Id.* ¶ 9.

estopped from collecting delinquent support payments from the date of her verbal agreement in 2006 until she initiated enforcement proceedings in 2014.²⁶⁴ Specifically, the drafted order and Wife’s subsequent letter induced Husband to detrimentally rely on the assumption he was satisfying his child support obligation during this time period.²⁶⁵

2. *In re Marriage of Verhines and Hickey*²⁶⁶

The *Verhines* court provided additional insight into whether a “substantial change in circumstances” has occurred when a party retires if his or her relative economic position remains substantially similar.²⁶⁷ In *Verhines*, the Husband filed a Motion to Modify Child Support following his retirement at age 64.²⁶⁸ His prior employment income was \$180,000.²⁶⁹ The trial court granted Husband’s Petition, finding there was a substantial change in circumstances, but deviated upward from guidelines, in contemplation of Husband’s substantial wealth.²⁷⁰ On appeal, Wife argued two main contested points: (1) there was no substantial change in circumstances, and (2) the Court failed to consider Husband’s \$400,000 withdrawal from his IRA that he used for payment of his living expenses.²⁷¹ The Second District Appellate Court reversed the trial court’s decision on both issues.²⁷²

When analyzing whether there was a substantial change in circumstances, the Second District first looked at how the change in Husband’s employment status affected his overall economic position.²⁷³ The court reiterated the Fourth District’s prior decision in *In re Marriage of Deike*,²⁷⁴ noting that a court must take a holistic view of an obligor parent’s financial position and consider all financial resources available.²⁷⁵ Specifically, the court noted that Husband had \$2.585 million in brokerage accounts, three homes, and a demonstrated travel budget of \$60,000/year.²⁷⁶ The court found “no reasonable person could have found that [Husband] met his burden” to show his change in employment status resulted in an economic

²⁶⁴ *Id.* ¶ 31.

²⁶⁵ *Id.*

²⁶⁶ *Verhines v. Hickey*, 2018 IL App (2d) 171034.

²⁶⁷ *Id.*

²⁶⁸ *Id.* ¶ 1.

²⁶⁹ *Id.*

²⁷⁰ *Id.* ¶¶ 37-42.

²⁷¹ *Id.* ¶ 50. On appeal, Wife also argued that the Court forgot to include \$83,000 in deferred compensation funds as income to Husband for child support, but Husband conceded this was in error and the issue was not discussed further within the opinion.

²⁷² *Id.* ¶ 118.

²⁷³ *Id.* ¶¶ 79-98.

²⁷⁴ *In re Marriage of Deike*, 381 Ill. App. 3d 620, 887 N.E.2d 628 (4th Dist. 2008).

²⁷⁵ *Id.* ¶ 86.

²⁷⁶ *Id.* ¶ 113.

reversal sufficient to constitute a substantial change in circumstances.²⁷⁷ Given these considerations, the court found Husband still had the means to meet his previous monthly support obligation and no substantial change in circumstances had occurred.²⁷⁸

Turning to the Husband's withdrawal from his IRA, on appeal, Wife argued that the Court improperly failed to consider this \$400,000 withdrawal that Husband used for living expenses in calculating his income.²⁷⁹ The court discussed the apparent circuit split as to whether IRA withdrawals should be considered "income" to the withdrawing party.²⁸⁰ First, in *In re Marriage of Lindman*,²⁸¹ the court found that \$80,000 in disbursements from Husband's IRA constituted income, even though it was not recurring.²⁸² In coming to this conclusion, the court noted that IRA disbursements were indistinguishable from other monies that have been long-held as income, including deferred compensation, military allowances, pensions, and work compensation awards.²⁸³ These disbursements are monies received from an investment that can be measured in monetary form.²⁸⁴ However, the *Lindman* court added a caveat to their analysis, stating that double counting would occur if earnings deposited into an IRA were counted as income both in the year they were deposited and the year they were withdrawn.²⁸⁵ In contrast, the Fourth District case of *In re Marriage of O'Daniel*²⁸⁶ found that IRA withdrawals were not income for purposes of calculating child support.²⁸⁷ Finding that an IRA is akin to a savings account, the *O'Daniel* court noted:

The money the individual places in an IRA already belongs to that individual. When an individual withdraws money he placed into an IRA, he does not gain anything as the money was already his. Therefore, it is not gain and not income. The only portion of the IRA that would constitute a

²⁷⁷ *Id.* ¶ 79.

²⁷⁸ *Id.*

²⁷⁹ *Id.* ¶ 50.

²⁸⁰ *Id.* ¶ 59.

²⁸¹ *In re Marriage of Lindman*, 356 Ill. App. 3d 462, 824 N.E.2d 1219 (2d Dist. 2005).

²⁸² *Verhines v. Hickey*, 2018 IL App (2d) 171034, ¶ 60; *see also Lindman*, 356 Ill. App. 3d at 463-64, 824 N.E.2d at 1220-21.

²⁸³ *Verhines*, 2018 IL App (2d) 171034, ¶ 61; *see also Lindman*, 356 Ill. App. 3d at 466, 824 N.E.2d at 1222-23.

²⁸⁴ *Verhines*, 2018 IL App (2d) 171034, ¶ 61; *see also Lindman*, 356 Ill. App. 3d at 466, 824 N.E.2d at 1222-23.

²⁸⁵ *Verhines*, 2018 IL App (2d) 171034, ¶ 62; *see also Lindman*, 356 Ill. App. 3d at 470, 824 N.E.2d at 1226.

²⁸⁶ *In re Marriage of O'Daniel*, 382 Ill. App. 3d 845, 889 N.E.2d 254 (4th Dist. 2008).

²⁸⁷ *Verhines*, 2018 IL App (2d) 171034, ¶ 64; *see also O'Daniel*, 382 Ill. App. 3d at 850, 889 N.E.2d at 258.

gain for the individual would be the interest and/or appreciation earnings from the IRA.²⁸⁸

In reviewing the *O'Daniel* decision, the *Verhines* court opined that like *Lindman*, the *O'Daniel* court still provided that a portion of the IRA withdrawal could be considered income to the withdrawing party.²⁸⁹ Ultimately, following the carveouts set forth in *Lindman* and *O'Daniel*, the court found the trial court erred in not considering the withdrawal at all and failing to consider that Husband used a substantial portion of the money withdrawn from his IRA for his living expenses.²⁹⁰ The court stressed Husband's continued lavish lifestyle, partially as a result of the withdrawal.²⁹¹

3. *In re Marriage of Fisher*²⁹²

The *Fisher* court examined the validity of a “cap” on child support as set forth in the parties' Marital Settlement Agreement.²⁹³ The parties in *Fisher* were divorced in April 2015, and entered a Marital Settlement Agreement, which provided, in pertinent part:

[Husband] shall pay guideline child support to [Wife] in the amount of 28% of his net income up to \$300,000 of Gross Annual Income. . . The parties acknowledge and agree that the cap on child support set forth in this Paragraph is appropriate given [Husband]'s income level, the allocation of the children's expenses as set forth in this agreement, the parties' current standard of living, and all other factors to be considered by the court in establishing a cap and deviating from the guideline support.²⁹⁴

In April 2016, Wife filed a petition to modify child support, which was resolved by agreed order without modifying child support directly.²⁹⁵ In January 2017, Wife filed a second motion to modify child support, alleging a substantial change in circumstances had occurred as Husband's income had gone up from \$300,000 to \$488,000.²⁹⁶ Wife further claimed the cap in the parties' Marital Settlement Agreement was contrary to public policy as it did not meet the requirements set forth in Section 505 of the Illinois Marriage

²⁸⁸ *Verhines*, 2018 IL App (2d) 171034, ¶ 64.

²⁸⁹ *Id.* ¶ 65.

²⁹⁰ *Id.* ¶ 76.

²⁹¹ *Id.*

²⁹² *In re Marriage of Fisher*, 2018 IL App (2d) 170384.

²⁹³ *Id.* ¶ 17.

²⁹⁴ *Id.* ¶ 3.

²⁹⁵ *Id.* ¶ 7.

²⁹⁶ *Id.* ¶ 8.

and Dissolution of Marriage Act.²⁹⁷ To analyze the cap, the court turned to the plain language of 750 ILCS 5/505, which specifically states that guidelines shall be applied “unless the court finds that a deviation from the guidelines is appropriate *after considering the best interests of the child.*”²⁹⁸ The court agreed with Wife’s argument, noting that the parties’ Judgment itself had no mention of child support and neither the Judgment or Marital Settlement Agreement explicitly took into consideration of best interests of the child as it related to the cap.²⁹⁹ Husband argued that because both parties agreed to include the cap, it was contemplated his income may exceed \$300,000 and therefore, no substantial change in circumstances occurred.³⁰⁰ However, the court noted, “it is well settled that it is the *court’s* responsibility, not the *parties’* responsibility, to determine the adequacy and amount of child support.”³⁰¹ The court further noted that “parties may not contract away their rights to petition to modify child support because the court is obligated to protect the best interests of the children involved.”³⁰² Accordingly, the fact that the parties agreed to a cap in their Marital Settlement Agreement was irrelevant.³⁰³ Because the parties’ Judgment did not comply with the requirements under 750 ILCS 5/505 to expressly find a cap was in the children’s best interests, the court held the cap provision was stricken.³⁰⁴

This case presents two important takeaways for practitioners who are negotiating “caps” on child support for their clients. First, they should always advise their clients that the other parent will always have the ability to petition the court to modify child support, including caps on income. Second, when drafting child support provisions in Marital Settlement Agreements, practitioners should be sure to include language regarding consideration of what is in the best interests of the children in the event of deviation to increase likelihood that this provision would not be similarly stricken.

²⁹⁷ *Id.* ¶ 9.

²⁹⁸ 750 ILL. COMP. STAT.5/505 (2018), *emphasis added*. It is important to note that while this cited language is taken from 750 ILL. COMP. STAT. 5/505, prior to the 2017 amendment, the amended iteration of the statute contains similar language: “unless a court makes a finding that application of the guidelines would be inappropriate, *after considering the best interests of the child.*”

²⁹⁹ *Fisher*, 2018 IL App (2d) 170384, ¶¶ 25-26.

³⁰⁰ *Id.* ¶ 9.

³⁰¹ *Id.* ¶ 25; *see also In re Paternity of Perry*, 260 Ill. App. 3d 374, 380, 632 N.E.2d 286, 291 (1st Dist. 1994), (citing *Blisset v. Blisset*, 144 Ill. App. 3d 1088, 1092, 495 N.E.2d 608, 611 (4th Dist.1986)).

³⁰² *Fisher*, 2018 IL App (2d) 170384, ¶ 26; (citing *Blisset v. Blisset*, 123 Ill. 2d 161, 167, 526 N.E.2d 125, 127-28 (1988)).

³⁰³ *Fisher*, 2018 IL App (2d) 170384, ¶ 25.

³⁰⁴ *Id.* ¶ 30.

4. *In re Marriage of Rushing*³⁰⁵

In *In re Marriage of Rushing*, the Fifth District Appellate Court explored whether the income of a party's new spouse should be considered in calculating the party's child support obligation.³⁰⁶ In *Rushing*, the parties were divorced in 2009 and Husband subsequently re-married his new wife, Jamie.³⁰⁷ In 2010, Husband started a new investigative business and his previous wife agreed to temporarily terminate his child support obligation while his business got off the ground.³⁰⁸ In 2015, previous wife filed a Petition to Modify Child Support to "reinstate" the husband's obligation.³⁰⁹ At the hearing, Husband was unclear about what financial resources were available to him, but testified that he did not have sufficient income to cover his monthly expenses without help from his new wife.³¹⁰ Citing *In re Marriage of Keown*,³¹¹ the court noted previous guidance that it may be appropriate to consider the financial status of a current spouse "to determine whether the payment of child support would endanger the ability of the support-paying party and that party's current spouse to meet their needs."³¹² The court noted that because of husband's new wife's income, he "was able to have a home and minimal household expenses and the benefits of a healthy income while he started a business, earned his own income, . . . and paid no child support since 2010 [by agreement of the parties while Husband built his business]."³¹³ Accordingly, he was able to enjoy a comfortable lifestyle that exceeded his stated resources and had income available to pay support to his previous wife.³¹⁴ Further, the court noted Husband was less than forthcoming about both his income and his wife's income, repeatedly refusing to tender copies of his tax return.³¹⁵ Based on the foregoing, the Fifth District affirmed the trial court's decision to calculate child support taking into consideration the new wife's income.³¹⁶

³⁰⁵ *In re Marriage of Rushing*, 2018 IL App (5th) 170146.

³⁰⁶ *Id.* ¶ 33.

³⁰⁷ *Id.* ¶ 3.

³⁰⁸ *Id.* ¶¶ 5, 39.

³⁰⁹ *Id.* ¶ 39.

³¹⁰ *Id.* ¶¶ 39-40.

³¹¹ *In re Marriage of Keown*, 225 Ill. App. 3d 808, 587 N.E.2d 644 (4th Dist. 1992).

³¹² *Rushing*, 2018 IL App (5th) 170146, ¶ 36; *see also Keown*, 225 Ill. App. 3d 808, 813, 587 N.E.2d 644, 647 (4th Dist. 1992).

³¹³ *Rushing*, 2018 IL App (5th) 170146, ¶ 43.

³¹⁴ *Id.* ¶ 47.

³¹⁵ *Id.*

³¹⁶ *Id.* ¶ 51.

C. Attorney's Fees

The following select case law relates to disgorgement of previously earned attorneys' fees and payment of attorneys' fees by a third party.

1. *In re Marriage of Goesel*³¹⁷

The *Goesel* case was the seminal case of 2018 regarding attorney's fees earned in Illinois family law cases. Specifically, in *Goesel*, the Illinois Supreme Court considered whether attorneys' fees, that were previously earned, could be subject to disgorgement as part of an interim fee award.³¹⁸ The relevant statute governing interim fees, 750 ILCS 5/501(c-1), is frequently referred to as the "leveling the playing field" statute.³¹⁹ The idea behind a request for interim fees is to "level the playing field" in terms of attorneys' fees such that one party cannot be put at a disadvantage simply because they have less access to income and resources for payment of attorney's fees.³²⁰ Effectively, requests for interim fees ask for the opposing party/the opposing party's attorney to release funds so both parties have equal access to funds for litigation.³²¹ Interim fee awards have been extensively litigated over the past ten years and their scope has narrowed significantly through authority issued on the subject.³²² A brief history of recent cases related to interim fee awards thus far may help in understanding the impact of *Goesel* on future cases.

The appellate courts first started dealing with the strategies attorneys employed to shield monies previously paid to the attorneys in *Dowling v. Chicago Options Associates Inc.*³²³ In *Dowling*, the Illinois Supreme Court drew a distinction between advance-payment retainers and security retainers.³²⁴ Whereas a security retainer remains the property of the client and is held in an attorney's client funds/trust account until earned, an advance-payment retainer is deposited directly into the attorney's operating

³¹⁷ *In re Marriage of Goesel*, 2017 IL 122046.

³¹⁸ *Id.* ¶ 1.

³¹⁹ *Id.* ¶¶ 23, 29.

³²⁰ Gunnar J. Gitlin, *Attorney's Fees and Illinois Divorce: Following the Tortuous Path: Leveling and Re-Leveling the Playing Field – 20 Years Later - Divorce and Post-Divorce Only*, GITLIN L. FIRM (2018), <http://gitlinlawfirm.com/wp-content/uploads/2016/07/Attorneys-Fees-in-Divorce-Cases-Illinois-No-Parentage.pdf>.

³²¹ *Id.*

³²² *Id.*

³²³ *Dowling v. Chicago Options Assoc. Inc.*, 226 Ill. 2d 277, 285-86, 875 N.E. 2d 1012, 1018 (2007).

³²⁴ *Id.*

account, which shields it from claims of a client's creditors.³²⁵ Accordingly, advance-payment retainers are considered the property of the attorney, subject to refund of unearned funds.³²⁶

Following the holding in *Dowling*, attorneys started using advance-payment retainers as ways to shield clients against payment of interim fee awards as well.³²⁷ The court in *In re Marriage of Earlywine* held this was not permissible.³²⁸ In *Earlywine*, after the trial court found that both parties lacked sufficient financial resources to fund the litigation, it ordered petitioner's attorney to disgorge (turn over) half of the funds previously paid to him as an advance-payment retainer to respondent's attorney.³²⁹ Petitioner's attorney had taken an advance-payment retainer to try to circumvent 750 ILCS 5/501(c-1).³³⁰ However, the Illinois Supreme Court found that if advance-payment retainers were an impenetrable shield to interim fee requests, it would directly undermine the intent of the statute and underlying policies.³³¹ In other words, an economically advantaged spouse could obtain an unfair financial advantage in a case simply by paying attorneys' fees as an advance-payment retainer.³³² Based on this reasoning, the Illinois Supreme Court affirmed the trial court's turnover order.³³³ The decision in *Earlywine* led to a drastic split between the appellate court circuits.³³⁴

First, in the 2015 case of *In re Marriage of Squire*, the Second District Appellate Court considered appropriateness to disgorge attorneys' fees borrowed by a wife from her parents, then paid to her attorneys.³³⁵ In *Squire*, the Wife borrowed \$130,000 from her parents to pay her attorneys to represent her.³³⁶ Her husband subsequently filed a Petition for Interim Attorneys' Fees.³³⁷ The trial court ordered the Wife's attorneys to disgorge \$60,000 (approximately one-half) of the \$130,000 the firm had already previously billed to the Wife.³³⁸ The *Squire* court noted that it did not matter

³²⁵ *Id.* at 290.

³²⁶ *Frequently Asked Questions for Retainers and Dowling*, ILL. ATT'Y REGISTRATION & DISCIPLINARY COMMISSION SUP. CT. ILL., <http://iadc.org/DowlingFAQs.html> (last visited Nov. 25, 2018).

³²⁷ *See, e.g., In re Marriage of Earlywine*, 2013 IL 114779, ¶ 6.

³²⁸ *In re Marriage of Earlywine*, 2013 IL 114779, ¶ 29, 36.

³²⁹ *Id.* ¶ 1.

³³⁰ *Id.* ¶ 27.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* ¶ 36.

³³⁴ *See, e.g., In re Marriage of Squire*, 2015 IL App (2d) 150274; *In re Marriage of Altman*, 2016 IL App (1st) 143076.

³³⁵ *In re Marriage of Squire*, 2015 IL App (2d) 150274.

³³⁶ *Id.* ¶ 4.

³³⁷ *Id.* ¶ 2.

³³⁸ *Id.* ¶ 6.

that the fees that were borrowed were from the Wife's family since they were paid as attorneys' fees.³³⁹ Further, the *Squire* court rejected the argument that the fees were already "earned" and thus no longer "available" to be paid for an interim fee award.³⁴⁰ Wife's attorney argued that unlike in *Earlywine*, he had not taken funds as an advance-payment retainer, but instead had actually earned the monies by already performing and billing for legal services during the course of his representation.³⁴¹ The *Squire* court rejected this distinction, holding that 750 ILCS 5/501(c-1) was also intended to protect against an economically advantaged spouse filing many pleadings and motions early in a case to "earn" fees, while leaving the other spouse to file responses without being able to obtain resources to do so.³⁴²

Conversely, the First District Appellate Court had a different interpretation, as held in *In re Marriage of Altman*.³⁴³ After finding that both parties lacked sufficient assets or income to pay reasonable attorneys' fees and costs, the trial court ordered that the Husband's attorney disgorge \$16,000 in attorneys' fees paid for services already performed.³⁴⁴ On appeal, the First District reversed the trial court's order as to previously earned fees.³⁴⁵ The court noted that it was not an appropriate reading of 750 ILCS 5/501(c-1) to say even though a law firm had earned fees, already paid itself and used that income to pay salaries, business overhead, and other litigation expenses and costs, it could be required to refund those fees to a third party.³⁴⁶ Based on this reading of the statute, the First District held that funds earned by and paid to a party's lawyer were not "available" under 750 ILCS 5/501(c-1).³⁴⁷

This circuit split came to a head in the Illinois Supreme Court decision of *In re Marriage of Goesel*.³⁴⁸ In *Goesel*, the Illinois Supreme Court specifically reversed the *Squire* decision and sided with the *Altman* court, holding that fees that have already been earned are not subject to disgorgement.³⁴⁹ In agreeing with the First District, the court reiterated that some lawyers (i.e. solo practitioners/small firms) would otherwise be unable to comply with orders to pay disgorged funds they earned over several

³³⁹ *Id.* ¶ 23.

³⁴⁰ *Id.* ¶¶ 19-22.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *In re Marriage of Altman*, 2016 IL App (1st) 143076.

³⁴⁴ *Id.* ¶ 10.

³⁴⁵ *Id.* ¶ 1.

³⁴⁶ *Id.* ¶ 33.

³⁴⁷ *Id.* ¶ 36.

³⁴⁸ *In re Marriage of Goesel*, 2017 IL 122046.

³⁴⁹ *Id.* ¶ 24.

months that they previously already transferred out of their operating accounts in order to continue day-to-day functions.³⁵⁰ It is important to note that despite its decision, the Illinois Supreme Court specifically provided that the precedent set forth *Earlywine* was still good law as it related to advance-payment retainers.³⁵¹ Following the *Goesel* decision, there is still an opening for potential litigation regarding disgorgement of fees. Specifically, in *Goesel*, the Illinois Supreme Court noted that both parties stipulated that the earned fees in question were all “reasonable and necessary” for the litigation.³⁵² However, the question remains open as to how a court would rule in a matter where it found the earned fees were not reasonable and necessary.

2. *Goldwater v. Greenberg*³⁵³

In *Goldwater v. Greenberg*, the First District Appellate Court considered a motion to dismiss brought by a party’s parents following a complaint filed against them for payment of fees for their son.³⁵⁴ In *Goldwater*, Plaintiff (an Illinois attorney) sued his former client’s parents for breach of contract to pay legal fees incurred on his client’s behalf.³⁵⁵ Plaintiff had entered into a retainer agreement with his client, at which time the client advised the Plaintiff to send all billing to his parents (the Defendants) and a note stating, “Please send all bills to George” (his father).³⁵⁶ Defendant made three separate payments on client’s behalf during the course of litigation.³⁵⁷ After completion of the attorney’s representation of client, the attorney sent a final bill to client’s parents, who refused to pay.³⁵⁸ In response to the attorney’s complaint, Defendant filed a Motion to Dismiss arguing in part that Defendant was not part of the retention agreement for his son’s divorce and his alleged promise to pay his son’s legal fees was unenforceable under the statute of frauds.³⁵⁹ In analyzing George’s statute of frauds defense, the First District found that because the attorney performed his duties under the signed contract, under the doctrine of complete performance, this precluded an assertion of a statute of frauds defense to enforcement.³⁶⁰ Accordingly,

³⁵⁰ *Id.* ¶ 29.

³⁵¹ *Id.* ¶ 18.

³⁵² *Id.* ¶ 5.

³⁵³ *Goldwater v. Greenberg*, 2017 IL App (1st) 163003.

³⁵⁴ *Id.* ¶ 1.

³⁵⁵ *Id.*

³⁵⁶ *Id.* ¶ 2.

³⁵⁷ *Id.* ¶ 3.

³⁵⁸ *Id.* ¶ 4.

³⁵⁹ *Id.* ¶ 5.

³⁶⁰ *Id.* ¶ 14 (citing *Greenberger, Krauss & Tenenbaum v. Catalfo*, 293 Ill. App. 3d 88, 96, 687 N.E.2d 153, 159 (1st Dist. 1997)).

the court reversed the trial court's dismissal of the lawyer's complaint against his client's father.³⁶¹ Following the *Goldwater* decision, family law attorneys should make sure to get a signed agreement, in writing, with any third party who agrees to pay attorneys' fees on behalf of a client.

D. Enforcement of Premarital Agreements

A recent study of four thousand recently married couples found that on average, people are getting married later in life than ever before.³⁶² As a result, couples are accumulating more assets prior to marriage that they wish to protect in the event of a divorce.³⁶³ In turn, there has been a noticeable spike in prenuptial agreements amongst couples, particularly millennials, as well.³⁶⁴ Prenuptial agreements can separate and shield a couple's assets from any potential litigation.³⁶⁵ However, with this rise also comes a common misconception that by signing an agreement, that agreement becomes automatically enforceable. In reality, if one spouse chooses to challenge the enforceability of said agreement, the couple may still need to litigate the enforceability of the agreement prior to entering a final divorce judgment.³⁶⁶ Two Illinois appellate cases issued in September of 2018 help explain the specific criteria a court will consider in the event enforceability is challenged.³⁶⁷

1. *In re Marriage of Woodrum*³⁶⁸

In *In re Marriage of Woodrum*, the Third District Appellate Court carefully went through the language of Section 10/7 of the Illinois Uniform Premarital Agreement Act³⁶⁹ to determine whether the agreement in question

³⁶¹ *Id.* ¶ 20.

³⁶² Kristin Salaky, *Couples Are Waiting Longer Than Ever to Get Married – Here's How Long They Spend Dating, Living Together, and Engaged*, BUS. INSIDER (July 20, 2017, 2:26 PM), <https://www.businessinsider.com/people-dating-longer-than-ever-before-getting-married-2017-7>.

³⁶³ Susan Shain, *The Rise of the Millennial Prenup*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/smarter-living/millennial-prenup-weddings-money.html>.

³⁶⁴ *Id.*

³⁶⁵ Thomas J. Handler, *A Stealthy Prenup Can Help Protect Assets*, N.Y. TIMES (Mar. 21, 2013), <https://www.nytimes.com/roomfordebate/2013/03/21/the-power-of-the-prenup/a-stealthy-prenup-can-help-protect-assets>.

³⁶⁶ Paul Sullivan, *Getting Married? Forget Sweet Nothings; Let's Talk About Money*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/your-money/prenuptial-agreements.html>.

³⁶⁷ See *In re Marriage of Woodrum*, 2018 IL App (3d) 170369; *In re Marriage of Kranzler*, 2018 IL App (1st) 171169.

³⁶⁸ *Woodrum*, 2018 IL App (3d) 170369.

³⁶⁹ 750 ILL. COMP. STAT. 10/7 (2018).

should be enforced.³⁷⁰ In *Woodrum*, the parties executed a premarital agreement on June 13, 2007, and were subsequently married on July 29, 2007.³⁷¹ Both parties were represented by counsel, but Wife testified she did not review the agreement alone or with her attorney prior to signing.³⁷² Both parties also completed a written asset disclosure, but Husband's disclosure did not list a value of a residence or his business interests in his family business.³⁷³ Finally, the court found Wife was intelligent and familiar with property division terms as she had previously been an insurance broker and had been divorced twice before, through which she entered two marital settlement agreements.³⁷⁴

The plain language of 750 ILCS 10/7 provides that for a court to find an agreement is unenforceable, the challenging party must either prove:

they did not execute the agreement voluntarily, or that the agreement was unconscionable when executed and before execution, that party 1) was not provided with a fair and reasonable disclosure of assets and financial obligations of the other party; 2) [did not execute a written waiver of the disclosure]; and 3) did not have and could not reasonably have had adequate knowledge of the property and financial obligations of the other party.³⁷⁵

The court stressed that a “fair and reasonable disclosure” is different than a “full and complete disclosure” of assets.³⁷⁶ Accordingly, even if a party does not disclose an asset or its value, that does not automatically make the agreement unenforceable.³⁷⁷ The court looked further at the fact that the Wife lived with her Husband for six years prior to their marriage and entering into the agreement and had enough familiarity with his assets and financial obligations.³⁷⁸ Finally, the court found the Wife had been represented by competent counsel when she entered the agreement and even if she had not read it at the time, had the opportunity to do so.³⁷⁹ For the foregoing reasons, the court ultimately determined the agreement was enforceable.³⁸⁰

After determining the agreement was enforceable, the appellate court also addressed whether the trial court erred in awarding Wife temporary maintenance when there was a waiver of maintenance by both parties

³⁷⁰ *Woodrum*, 2018 IL App (3d) 170369.

³⁷¹ *Id.* ¶ 3.

³⁷² *Id.* ¶ 25.

³⁷³ *Id.* ¶ 21.

³⁷⁴ *Id.* ¶¶ 26-27.

³⁷⁵ *Id.* ¶ 56 (alteration in original).

³⁷⁶ *Id.* ¶ 66.

³⁷⁷ *Id.* ¶ 82.

³⁷⁸ *Id.* ¶ 80.

³⁷⁹ *Id.* ¶ 92.

³⁸⁰ *Id.* ¶ 98.

contained in the agreement.³⁸¹ The court ultimately found that the maintenance waiver provision in the agreement only precluded maintenance “upon divorce or dissolution of marriage,” not prior to that.³⁸² Consequently, the court affirmed the trial court’s decision and found that based on the plain language of the agreement, the maintenance waiver did not preclude awards of temporary maintenance.³⁸³ Based on this analysis, if a client intends to preclude any type of maintenance award under their agreement, their attorney should ensure it is clear that all awards of maintenance, temporary, rehabilitative, or otherwise, are all precluded, not just maintenance upon entry of a final Judgment.

2. *In re Marriage of Kranzler*³⁸⁴

In *In re Marriage of Kranzler*, the court considered both whether an agreement was unconscionable and signed under duress, as well as whether a court still retained subject matter jurisdiction to issue a declaratory judgment where Wife filed a Motion for Voluntary Dismissal of the dissolution of marriage proceedings.³⁸⁵ In *Kranzler*, even though the agreement was circulated several weeks before the parties were married, the parties did not execute the final agreement until moments before their wedding and Wife was already pregnant at the time.³⁸⁶ Both parties were represented by counsel during the negotiations.³⁸⁷ The agreement outlined that the Husband would leave his Wife a percentage of his net estate and pay her an amount per month, increasing with the length of marriage.³⁸⁸ After Wife filed for divorce, Husband filed a Motion for Declaratory Judgment, asking the court to find the agreement was valid and enforceable.³⁸⁹ Wife subsequently filed a Motion for Voluntary Dismissal to dismiss the dissolution of marriage proceedings.³⁹⁰

In analyzing whether the trial court had subject matter jurisdiction over Husband’s motion for declaratory relief, the First District Appellate Court focused on the plain language of 735 ILCS 5/2-701.³⁹¹ Specifically, the court

³⁸¹ *Id.* ¶ 108.

³⁸² *Id.* ¶¶ 110-111.

³⁸³ *Id.*

³⁸⁴ *In re Marriage of Kranzler*, 2018 IL App (1st) 171169.

³⁸⁵ *Id.* ¶ 38.

³⁸⁶ *Id.* ¶ 3.

³⁸⁷ *Id.* ¶ 16.

³⁸⁸ *Id.* ¶ 4.

³⁸⁹ *Id.* ¶¶ 5-6.

³⁹⁰ *Id.* ¶ 8.

³⁹¹ *Id.* ¶ 49 (citing 735 ILL. COMP. STAT. 5/2-701 (2018)).

considered whether there was an “actual controversy” and whether entry of a declaratory judgment would terminate “some part of that controversy.”³⁹² The Illinois Supreme Court previously established that if a Motion for Declaratory Judgment met the statutory requirements, it could survive as an independent action even if the dissolution petition was not granted.³⁹³ Here, the court found that enforceability of the agreement was in fact an “actual controversy” and issuing a ruling would help resolve that controversy.³⁹⁴ Further, the appellate court noted that even though husband’s Motion for Declaratory Judgment was not titled “counterclaim,” that did not deprive the circuit court of subject matter jurisdiction given the contents of his Motion.³⁹⁵

Turning to the Wife’s argument that she was under duress when she signed the agreement, the court noted that the Wife relied heavily on the fact that she faced pressure from her father and fiancé’s father to enter the agreement before they were married.³⁹⁶ However, the Wife failed to make any allegations that she felt any pressure from her fiancé himself.³⁹⁷ The court relied on prior case law to find that even if it did consider threats from the fathers, “threats cannot constitute duress unless they are legally or morally wrong.”³⁹⁸ The court found that the alleged threats did not meet this threshold.³⁹⁹

3. *Tips for Practitioners Following Woodrum and Kranzler*

The *Woodrum* and *Kranzler* cases allow Illinois family law practitioners to guide clients through criteria a court may consider when determining validity and enforcement of a prenuptial or postnuptial agreement.⁴⁰⁰ First, although the Illinois Uniform Premarital Agreement Act does not require a written disclosure of income, assets, and liabilities, practitioners should advise their clients to complete one.⁴⁰¹ This disclosure can be used by courts to determine if a party made a “fair and reasonable

³⁹² *Id.* ¶ 52.

³⁹³ *Id.* ¶¶ 48, 50 (citing *In re Marriage of Best*, 228 Ill. 2d 107, 886 N.E.2d 939 (2008); *In re Marriage of Krol*, 2015 IL App (1st) 140976).

³⁹⁴ *Kranzler*, 2018 IL App (1st) 171169, ¶¶ 54-55.

³⁹⁵ *Id.* ¶ 56 (citing *Sarkissian v. Chicago Bd. of Educ.*, 201 Ill. 2d 95, 102, 776 N.E.2d 195, 200-01 (2002) (“The caption of a motion is not controlling; the character of the pleading is determined from its content, not its label.”)).

³⁹⁶ *Id.* ¶ 81.

³⁹⁷ *Id.*

³⁹⁸ *Id.* quoting *In re Marriage of Barnes*, 324 Ill. App. 3d 514, 519, 755 N.E.2d 522, 527 (2001).

³⁹⁹ *Id.*

⁴⁰⁰ See *In re Marriage of Woodrum*, 2018 IL App (3d) 170369; *Kranzler v. Kranzler*, 2018 IL App (1st), 171169.

⁴⁰¹ H.B. 470, 89th Gen. Assemb., Reg. Sess. (Ill. 1989).

disclosure” of their assets and liabilities. Similarly, practitioners should be sure to ask pointed questions to understand the length and nature of their client’s relationship with their fiancé prior to entering into the agreement. In *Woodrum*, even though the Husband did not disclose the value of the marital residence when the parties signed their prenuptial agreement, the court found that the Wife had ample ability to understand the value given that she lived in the residence with the Husband for six years prior to entering into the agreement and was familiar with the surrounding area and comparable sales.⁴⁰² If a client does insist that they want to waive a written disclosure, practitioners should insist they sign a written waiver of disclosure to memorialize their intent at the time of execution.

Next, attorneys should as a matter of practice, always be sure to maintain both an original, executed copy of the prenuptial agreement, as well as all notes and fee records related to discussion and negotiation of the agreement. In *Woodrum*, one of the Wife’s arguments against enforcement of the agreement was that she claimed her attorney had not reviewed the agreement or gone over the provisions of the agreement with her.⁴⁰³ However, the Wife’s attorney was able to produce his detailed billing records and describe his ordinary practice with regards to reviewing prenuptial agreements.⁴⁰⁴ It is also a good idea to consider “proving up” the agreement with a formal court reporter so you have a transcript for future reference and have a meeting of the minds as to terms of the agreement.

Finally, *Woodrum* and *Kranzler* are both illustrative of important evidence to introduce when arguing whether an agreement should be enforceable. First, attorneys should consider each party’s educational and work background and any other prior knowledge he or she may have relevant to understanding terms of the agreement. For example, in *Woodrum*, the court noted that the Wife was familiar with similar legal terms as she had been divorced twice before and previously negotiated two marital settlement agreements.⁴⁰⁵ The *Woodrum* court also considered that the Wife previously brokered complex insurance policies, so she was familiar with reading fine print.⁴⁰⁶ Similarly, in *Kranzler*, the court considered that the Wife, through her attorney, had proposed various revisions to the agreement prior to its execution, seeming to point to her familiarity with the terms.⁴⁰⁷ Second, attorneys who are claiming an agreement is unfair due to a failure to disclose

⁴⁰² *Woodrum*, 2018 IL App (3d) 170369, ¶ 72.

⁴⁰³ *Id.* ¶¶ 29-30.

⁴⁰⁴ *Id.* ¶ 39.

⁴⁰⁵ *Id.* ¶ 90.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Kranzler v. Kranzler*, 2018 IL App (1st) 171169, ¶ 80.

certain assets should introduce evidence of the value of those assets as of the current date. The *Woodrum* court found the Wife did not meet her burden to prove her Husband's disclosure was not fair or reasonable in part because she did not introduce any evidence that the assets in question had any present value or any ascertainable future value.⁴⁰⁸

IV. CONCLUSION

The field of family law continues to experience significant changes in the years following the overhaul to the Illinois Marriage and Dissolution of Marriage Act in 2016, most notably to the calculation of child support and maintenance. It is increasingly important for family law practitioners to keep abreast of these changes to the law, as well as new guidance offered by the Supreme Court of Illinois and Illinois Appellate Courts.

⁴⁰⁸ *Woodrum*, 2018 IL App (3d) 170369, ¶ 77.