

**FROM RICHES TO RAGS AS THE PENDULUM SWINGS BACK
ON REHABILITATIVE MAINTENANCE**

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The family law courts are in the business of dealing with the unpleasant realities that result from plans gone awry; a marriage, planned to last a lifetime, doesn't and everything contingent upon its doing so must be reconceptualized. For example, families, especially those that include children, are often headed by two adults who plan to inhabit distinct roles during their marriage: the breadwinner and the homemaker. To execute this plan, one spouse concentrates energy on advancing professionally so as to provide for the family's financial needs and the other is responsible to maintain the family emotionally, through nurturing and management of the household. Each partner's ability to perform his or her selected role is dependent upon the successful performance of the other.

This interdependence, which some would say is the sine qua non of a well-functioning family, can become an albatross around each of the parties' necks once their marriage is over. The spouse accustomed to performing the breadwinner function who is suddenly forced to maintain a household alone and provide for the emotional needs of children, may fare quite poorly. Indeed, the breadwinner may never be able to approximate the level of competence at these tasks that was achieved by the homemaker spouse over a long period of time and during critical points in the lives of the parties' children. Likewise, the homemaker spouse, who prioritized home and children, often at the expense of career and during crucial career-building periods, will likely be unable to generate income akin to that earned by the breadwinner spouse.

In fact, in cases of a long term marriage, homemaker spouses are often incapable of generating income that can meet even their minimum basic requirements, let alone allow the homemaker to continue at the standard of living the parties established during the marriage.

As yet, the law has not attempted to redress the lopsided competencies of a breadwinner spouse post-divorce, but the plight of the homemaker spouse who is not self-supporting and is unlikely to become so has received quite a bit of attention, often in the form of what is known as “rehabilitative maintenance.” This article will conduct a case study of the development of the doctrine of rehabilitative maintenance by examining the law in the state of Illinois on that topic, up to and including a recent amendment to the Illinois Marriage and Dissolution of Marriage Act (the “IMDMA”) that went into effect on January 1, 2004.

The case study will reveal that the law of rehabilitative maintenance, which initially required the homemaker spouse to seek employment and attain financial self-sufficiency post-divorce, has trended toward awards of permanent maintenance in the courts and the legislature over the past twenty years. It would appear however, that there is an effort afoot to swing the pendulum back again with the enactment of the 2004 amendment to the IMDMA.

Development of the Doctrine of Rehabilitative Maintenance pre-1993

Prior to 1993, when the Illinois legislature first amended the IMDMA section dealing with maintenance, courts could only award maintenance if it found the recipient spouse

- (1) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs, and
- (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home, or
- (3) is otherwise without sufficient income.

The statute then provided that the court award maintenance after considering seven factors, among which were the following: “the financial resources of the party seeking maintenance,

including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian” and “the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment.”¹

Although the phrase “rehabilitative maintenance” was not used anywhere in the statute, the courts interpreted the statute before 1993 to impose an affirmative duty upon the homemaker spouse to look for work and, if necessary, to retrain so as to become economically independent of the breadwinner post-divorce. Conspicuously absent from the statute was any mention of permanent maintenance. The theory behind this statutory and common law approach, which itself was a departure from an earlier era in which long-term or permanent maintenance was almost always awarded, was that property awards to the homemaker upon divorce would generate enough income so as to make extended maintenance awards unnecessary, if, in addition, the homemaker could generate some earned income independently. Unfortunately, theory did not march with economic reality: a homemaker’s portion of most marital estates, once divided, rarely produces enough income to enable a non-working spouse to become self-supporting. Yet, this approach to cases, especially those involving lengthy marriages, was ubiquitous and led to some fairly harsh results.

¹ 750 ILCS 5/504(b)(2) which no longer appears in the IMDMA, read: “The maintenance order shall be in such amounts and for such periods of time as the court deems just, made without regard to marital misconduct and may be in gross or for fixed or indefinite periods of time and the maintenance may be made from the income or property of the other spouse after consideration of all relevant factors, including: (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian; (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the age and physical and emotional condition of both parties; (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and (7) the tax consequences of the property division upon the respective circumstances of the parties.”

For example, in In re the Marriage of Henzler, 134 Ill.App.3d 318, 480 N.E.2d 147 (4th Dist. 1985) the appellate court overturned the trial court's continuation of rehabilitative maintenance, albeit at a reduced level, and terminated maintenance entirely. The parties in Henzler had been married for twenty one years at the time of their divorce. The trial court awarded maintenance "to permit petitioner to acquire marketable job skills and become self-supporting." The trial court also observed, however, that "the marital property [was] insufficient to provide for petitioner in her period of economic rehabilitation and the future [was] too uncertain to justify establishing a finite period for maintenance." Id., at 321.

Once the wife completed her college degree, but was not yet employed, the husband petitioned to modify the maintenance, but he was denied. He then renewed his petition for modification when the wife got a job and the trial court granted him a reduction of maintenance from \$1,000 a month to \$750 a month, but the appellate court didn't think the trial court had gone far enough. Finding that "the ex-spouse awarded maintenance is under an affirmative obligation to seek appropriate training and skills to become financially independent in the future" they reversed the trial court and terminated maintenance altogether because "[they] conclude[d] that the statutory goal of rehabilitative maintenance ha[d] been achieved." Id., at 322, 323. At the time of the appeals court ruling, the wife was earning approximately \$20,000 a year and the husband was earning twice that amount.

Five years later, the appellate court was still holding firm in the view it articulated in Henzler. In In re Marriage of Frus, 202 Ill.App.3d 844, 560 N.E.2d 638 (3rd Dist. 1990), the court once again reversed a lower court opinion denying the husband's petition to terminate rehabilitative maintenance on the grounds that the wife had been rehabilitated. At the time of the parties' divorce the wife was unemployed but she was earning \$29,214 at the time the petition to

modify was filed. The husband, however, had seen a rise in annual income from \$50,000 at the time of divorce to \$342,000 at the time he filed his petition to terminate maintenance. Nevertheless, the court found the wife “earned a master’s degree in clinical psychology and became employed full time, earning nearly \$30,000 per year. Regardless of the parties’ relative incomes, we find the statutory goal of rehabilitative maintenance has been achieved.” Id., at 846.

On the eve of the rehabilitative maintenance statutory amendment of 1993, the appellate court issued two rulings, six months apart, in which their attitude toward continuation of rehabilitative maintenance seemed to soften considerably. The first case, In re Marriage of Carpel, 232 Ill.App.3d 806, 597 N.E.2d 847 (4th Dist. 1992), involved the dissolution of a seventeen-year marriage in which the wife received an award of four year reviewable maintenance. One year after the divorce, the wife petitioned to both increase and extend maintenance on the ground that the husband had misrepresented his income to the court at the time of the award as \$50,000, when in actuality it was \$200,000. The trial court denied the wife’s petition for modification of the rehabilitative maintenance award because it found the wife had “sufficient means, opportunity, ability and a reasonable time to obtain gainful employment, training and financial independence during the rehabilitative period of 48 months.” Id., at 863.

The appellate court reversed and remanded, specifically because the trial court “incorrectly viewed the policies underlying maintenance awards” “as if [the wife] bore an obligation to find a full-time job to support herself (which at best would provided her with but a fraction of Ronald’s income or the income they enjoyed while married), and her failure to do so precluded her from receiving any extension or increase in her maintenance.” Id., at 864. Instead, the appeals court suggested “the court can offset any potential salary [the wife] could

have earned from its maintenance award. However, to completely deny her any extended or increased maintenance ... constitutes an abuse of discretion.” Id.

The second case, In re Marriage of Lenkner, 241 Ill.App.3d 15, 608 N.E.2d 897 (4th Dist. 1993), found the appellate court affirming a trial court’s denial of husband’s petition to terminate maintenance after the dissolution of an eighteen-year marriage. The husband made no attempt to show that there had been a “substantial change in circumstances,” as required by the IMDMA before modifying or terminating an existing maintenance award. Rather, the husband alleged that the wife ought to have been rehabilitated over the six years that had passed since the divorce. At the time of his petition to modify maintenance, the husband was earning \$55,000 to \$60,000 per year and the wife was earning a net income of \$8400 a year. The appellate court stated unequivocally that “while the goal of financial independence remains, financial independence is to be measured in terms of the standard of living established during the marriage... Where there is a disparity in the earning powers of the former spouses, and the dependent former spouse cannot earn an income sufficient to become financially independent at the standard of living established during the marriage, the dependent former spouse may be entitled to continue to receive maintenance, ..., even though this does not accomplish the goal of severing the economic ties of the former spouse.” Id., at 27.

Finally, in a case that straddled the periods before and after the statute was amended – the amendment was enacted between the time of the trial court’s ruling and the appellate court’s rendering its opinion – the court in In re Marriage of Harlow, 251 Ill.App.3d 152, 621 N.E.2d 929 (4th Dist. 1993) confronted the issue of continuing rehabilitative maintenance awarded after the dissolution of a thirty-two year marriage. The review period on the trial court’s initial rehabilitative maintenance award was only one year. After two hearings at the husband’s

instigation on the first and second anniversaries of the award, the court reduced the payments on the ground advanced by the husband that the wife had completed her associate degree, and decided the award would terminate after one more year. The wife appealed and argued she should either be awarded permanent maintenance or continued rehabilitative maintenance reviewable after five years. At the time of her appeal, the wife was earning \$12,000 a year and the husband was earning \$43,000.

The trial court held that although the wife had worked outside the home during the marriage, her work “did not provide her the means to obtain employment after dissolution of the marriage at a salary level that would allow her to meet her reasonable needs or to maintain the standard of living she enjoyed during the marriage.” Further, the court found comfort for its holding in the new revisions to the statute, to be discussed shortly, that removed the affirmative obligation to seek employment from the spouse receiving maintenance. The court stated, “We do not view [the revision] as changing preexisting law in this regard, but instead as ratifying the interpretation of that law as stated in the specially concurring opinion in Hart.” Id., at 937.

The Hart case, decided in 1990, contains one of the most often cited passages in domestic relations law, and it can readily be identified as a milestone in the evolution of the doctrine of maintenance:

“Marriage is a partnership, not only morally, but financially. Spouses are coequals, and homemaker services must be recognized as significant when the economic incidents of divorce are determined. Petitioner should not be penalized for having performed her assignment under the agreed-upon division of labor within the family. It is inequitable upon distribution to saddle petitioner with the burden of her reduced earning potential and to allow respondent to continue in the advantageous position he reached through their joint efforts.”

In Re Marriage of Hart, 194 Ill.App.3d 839, 551 N.E.2d 737, 745 (1990).

Modest 1993 Statutory Revision Turns the Tide to Permanent Maintenance

On January 1, 1993, §504 of the Illinois Marriage and Dissolution of Marriage Act was amended to provide:

§504 The court may grant a temporary or permanent maintenance award for either spouse in amounts and for such periods as the court deems just...after consideration of all relevant factors.

This new language, although only slightly different from the prior version of the statute, granted courts express authority to award permanent maintenance, thereby tacitly acknowledging the value of homemaker contributions. Now courts were freed of the obligation to find that the spouse seeking maintenance “lacks sufficient property...to provide for his/her reasonable needs” or “is unable to support him/herself through appropriate employment” as was the case prior to 1993. In making “just” awards under the new law, the courts were required only to consider all of the following factors:

- (1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance;
- (2) the needs of each party;
- (3) the present and future earning capacity of each party;
- (4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having foregone or delayed education, training, employment or career opportunities due to the marriage;
- (5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training and employment, and whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment;
- (6) the standard of living established during the marriage;
- (7) the duration of the marriage;
- (8) the age and the physical and emotional condition of both parties;
- (9) the tax consequences of the property division upon the respective economic circumstances of the parties;
- (10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;
- (11) any valid agreement of the parties; and
- (12) any other factor that the court expressly finds to be just and equitable.

In 2002, the Illinois Appellate Court in the case of In Re Marriage of Keip, 332 Ill.App. 876, 773 N.E.2d 1227 (2002), reversed a trial court award of \$400 per month for one year to \$800 per month in permanent maintenance. In Keip, after a twenty-two year marriage the wife's income was \$85,000 less than the husband's income and the wife was the primary custodian of the parties' four children.

The Appellate Court analyzed the parties' needs and determined that the reasonable needs of the party seeking maintenance are to be measured by the standard of living the parties enjoyed during the marriage. The court then went on to comment that "because two households are more costly to maintain than one, most parties are not able to afford the same standard of living they enjoyed during the marriage after they are divorced." *Id.* At 883. If such is the case, the court must apportion the deficit between the parties and balance their competing claims to the available income. In Re Marriage of Simmons, 87 Ill.App.3d at 661, 409 N.E.2d at 328.

The Keip court went on to find that the wife's present earning capacity had been impaired due to her domestic duties and the husband had marketable skills while the wife did not. The court gave the wife financial consideration for both the disparity in the incomes and earning potentials of the spouses, as well as for the wife's valuable homemaker contributions. Not surprisingly, the court cited to the famous passage from the special concurring opinion in Hart, *supra* at 7.

Finally, the Keip court opined:

The spouse need not be reduced to poverty before maintenance is appropriate. In Re Marriage of Martin, 223 Ill.App.3d 855, 860, 166 Ill.Dec. 136, 585 N.E.2d 1158, 1162 (1992). A balance must be achieved between providing maintenance as an incentive to wife to attempt to achieve self-sufficiency and a "realistic appraisal" of whether such self-sufficiency is even possible under these circumstances....It is unlikely that even with additional training, at this stage in her life, wife will ever earn a salary that will meet her needs commensurate with

the standard of living she had while married to husband. “[W]hen the facts make it clear that one spouse is unable to support herself in the manner in which [the parties] lived during the marriage, then it is an abuse of discretion to award only rehabilitative maintenance.

In a case decided in June 2003, the Illinois Appellate Court in In re Marriage of Culp, 341 Ill.App.3d 390, 792 N.E.2d 452, affirmed a trial court’s award of permanent maintenance. The parties had a twenty-four year marriage and two children. Although the trial court initially awarded rehabilitative maintenance for one year, when it reviewed its award on the anniversary date, the wife received permanent maintenance.

These two cases are emblematic of a general trend in Illinois toward more initial awards of permanent maintenance as well as a rise in the award of permanent maintenance once the review period for rehabilitative maintenance ends. Although some practitioners may believe the trend is moving away from awarding permanent maintenance, there is ample evidence that this is not true. Permanent maintenance has been affirmed in a number of jurisdictions throughout the United States in cases involving long-term marriages where one spouse was the breadwinner and the other a homemaker.

In re Marriage of Minnear,² a five hundred dollar per month permanent maintenance award was affirmed for a 19 year marriage where there were two children from the marriage, the wife was 40 years old, the husband was 41 years old, and the wife’s net income was \$1,086 per month compared to the husband’s \$1,920 net income per month.

In Sullivan v. Sullivan,³ a Tennessee case decided in September 2002, the appellate court affirmed the trial court award of alimony in futuro (permanent maintenance) of \$3,500 to the wife until death, remarriage or age 65. The court noted that “[i]n light of the length of this

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

³ 2002 WL 2023125 (Tenn.Ct.App.) (Sept. 5, 2002).

marriage, the work histories of the parties, their educational backgrounds, age and health status, we believe the award of alimony in futuro is appropriate.”⁴

In a recent Minnesota case, Paehlke v. Paehlke⁵ the court awarded the wife permanent maintenance after a nineteen year marriage with no children. The court found that appellant historically earned three or four times more than respondent and that respondent was unlikely to find a higher-paying job due to her age (50), lack of meaningful post-high-school education, and frequent job changes. The court further found that respondent lacked liquid assets to provide for her reasonable needs because the property she received through the parties' stipulation either could not be used without tax consequences and penalties or was already earmarked to pay her attorney fees and pay off her credit cards. As a result, the court held:

In view of the limited career options available to [respondent], the disparate earnings of the parties, the length of the parties' marriage, the middle class standard of living established during the marriage, this court's determination that [appellant] has the ability to meet his own needs while contributing to the support of [respondent], and having carefully considered the parties' health and all of the other factors enumerated at Minn.Stat. § 518.552, the Court finds that [respondent] is entitled to an award of [permanent] spousal maintenance.⁶

A spouse seeking permanent maintenance has the burden of proving the necessity for it.⁷ While permanent poor health of the proposed recipient spouse may be a basis for permanent maintenance, it was error for the trial court to make the award permanent when the wife did not present medical or lay testimony to prove that the medical condition she complained about was permanent.⁸

⁴ *Id.*

⁵ 2002 WL 1968730 (Minn.App.) (Aug. 27, 2002).

⁶ *Id.* (The trial court also awarded that the wife's maintenance extend beyond the husband's death. The appellate court reversed that portion of the decision.)

⁷ In re Marriage of Gunn, 233 Ill.App.3d 165, 598 N.E.2d 1013, 174 Ill.Dec. 381 (5th Dist. 1992).

⁸ In re Marriage of Gurrula, 219 Ill.App.3d 164, 578 N.E.2d 1380, 161 Ill.Dec. 734 (5th Dist. 1991).

January 1, 2004 Statutory Revision: Prognosis for the Future

On July 24, 2003, the Governor of Illinois signed Public Act 93-353, which amended section 510 of the IMDMA that deals with modification of child support and maintenance. The new amendment specifies the factors courts are to consider in post-judgment proceedings to review, modify or terminate maintenance, clearly implicating rehabilitative maintenance awards. The new section, 510(a-5) provides:

An order for maintenance may be modified or terminated only upon a showing of a substantial change in circumstances. In all such proceedings, as well as in proceedings in which maintenance is being reviewed, the court shall consider the applicable factors set forth in subsection (a) of Section 504 and the following factors:

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

There has yet to be any case law interpreting this new section of the IMDMA, but the intent of the legislature in drafting this amendment can readily be gleaned from the face of the revision itself. In particular, two parts of this new statutory text stand out: first, the courts are mandated to consider efforts made by the spouse receiving maintenance to be self-supporting

and to decide if they were “reasonable;” second, the courts are being asked to consider the ratio between the length of the marriage and the amount of maintenance already received at the time the petition to modify or terminate is brought.

The new “reasonableness” standard the amendment seems to impose brings us back to an era when spousal efforts to become self sufficient lay at the heart of decisions to continue or terminate maintenance. It is fair to say that this harkening back to the early stages in the evolution of the concept of rehabilitative maintenance cannot bode well for homemaker spouses. Likewise, considering the duration of maintenance previously paid and remaining to be paid relative to the duration of the marriage without supplying any standard ratio that is deemed acceptable, could provide the basis for draconian holdings like those discussed earlier in this article, where spouses who, in the opinion of the court, ought to have been rehabilitated within a certain period, were denied continued maintenance regardless of their actual needs or circumstances.

It remains to be seen, however, whether this amendment will succeed in altering the attitude the courts have taken toward maintenance awards; recall that the courts led the charge in changing the duration and amount of maintenance awards, a trend which this latest amendment seems designed to reverse. Although the will of the legislature at this time seems clear, the efforts of that body to effect change in the way cases are decided may run counter to the influences that drove the trend toward longer maintenance awards up to this point, such as the changing composition of the domestic relations judiciary from largely male to an almost equal, if not greater majority of female jurists, as well as the rising number of homemakers, who despite impressive credentials and lucrative employment opportunities, have elected the role of homemaker by choice.