

MEMO

TO: LRB

CC: IFLSC
STATE REPRESENTATIVE ELAINE NEKRITZ
ADAM MARGOLIN
ELANA T. VINER

FROM: P. ANDRÉ KATZ

DATE: MARCH 14, 2011

RE: SECTION 500

PART V

PROPERTY, SUPPORT AND ATTORNEY FEES

Section 501 [750 ILCS 5/501] Temporary Relief:

1. Section 501(a) – as parties appear to file “petitions” or “motions” for temporary relief. We propose to add in the words “petition for” before the word “move.”
2. We propose clarifying Section 501(a)(1) to state that it should be a financial affidavit setting forth the basis of any support related motion for temporary relief. The financial affidavit may be each county’s form financial affidavit, and a factual affidavit for other applicable relief sought under § 501. We propose one form financial affidavit to be used across the state. Further, the financial affidavit should be supported by documentary evidence including (e.g., income tax returns). There should also be a space on the financial affidavit for parties to declare whether they are receiving any federal and/or state financial subsidies, as any such subsidies should be included in that party’s income. Finally, in light of the fact that the court will be relying on these affidavits, there will have to be severe sanctions imposed on a party if it is determined that he or she intentionally and/or recklessly included false or misleading information in his or her financial affidavit. Upon motion of a party, a court may hold a hearing to determine whether and why there is a disparity between a party’s sworn affidavit and the supporting documentation.

3. We propose that Section 501 relief be available under §513(b) under all circumstances and that it be available in §513(a) proceedings after the court makes a *prima facie* finding that based on the affidavits before it, it appears that there would be a likelihood of success on the merits. This should be done on an expedited basis. We also believe that the parties seeking such relief should be encouraged not to create a self-imposed emergency. The relief sought under Section 513 should not include temporary maintenance or injunctive relief as to assets.

4. We propose that under the appropriate circumstances, a more comprehensive injunction/TRO order should be entered that doesn't have the loophole for expenditures made "in the usual course of business or for the necessities of life," provided the court enters appropriate orders that enable the parties to pay their necessary personal and business expenses (e.g. prejudgment distribution of assets, support, receiver).

5. We believe that "other temporary relief" as set forth in 503 (a)(3) should include the discretion of the court to order purchase or sale of assets and the requirement that a party or parties borrow funds in the appropriate circumstances.

6. **TEMPORARY MAINTENANCE & CHILD SUPPORT.** In light of the court's limited resources and time to deal with temporary issues, we propose that this issue be dealt with on a summary basis based on affidavits, tax returns and other relevant documentation. The recipient will be required to account for the use of his/her funds in the same manner the payee has to justify his/her use of marital funds. In essence it's a predistribution of marital assets.

7. **ATTORNEYS FEES.** We recommend adoption of the fee statute proposed by the ISBA and adopted by the legislature subject to the following:

- a. We recommend that all interim fee orders be "form" in nature for two reasons:
 - (i) It will assist the trial court in being able to easily ascertain what it ordered when making its final fee allocation
 - (ii) The form should include a warning to both parties that this is a pre-Judgment distribution subject to reallocation at the end of the case.
- b. We are recommending that the court shall rule on final fee petitions during the course of the case as opposed to the end.
- c. We are recommending that either party or his/her attorney may seek interim fees from the estate.

- d. We propose that “incurred but not paid” be a factor for interim fee awards.

8. We recommend that Section 701 be moved here and be modified as follows:

- (i) Remove injunctive requirements.
- (ii) Easier standard to keep somebody out of the residence verses ordering a person out.
- (iii) An objective standard should be employed.
- (iv) This Section should be titled “allocation of use of marital residence” so that in addition to exclusive possessions, the court could order “nesting” or other appropriate relief.
- (v) We recommend including a “balancing of hardship” test.

9. The 501.1 stay should be modified as follows:

- (a) It shouldn’t apply to “agents and employees.”
- (b) 501.1 (a)(1) is removed per *Messenger v. Edgar*.
- (c) 501.1(a)(2) no recommended changes.
- (d) 501.1(c)(3) this provision will be removed and we are including a 14 day limitation will be incorporated into revised 609(b).

The entire paragraph at the end of the provision starting with the words “A restraint” should be removed as that section related solely to Section 501.1 (a)(1).

Section 501.1(b) – This section will be removed in its entirety as it will be moot.

Section 501.1(c) -- This section will be removed in its entirety as it will be moot.

Section 501.1(d) -- This section will be removed in its entirety as it will be moot.

Section 501.1(e) – If we keep the stay as modified, no recommended changes.

Section 502 [750 ILCS 5/502] Agreement:

1. We recommend including post-emancipation support that is provided for in Section 513. Also, any Section 513 award shall be only retroactive to the date of filing.

2. The terms of the agreement incorporated into the Judgment are binding if there is a conflict between any prove-up testimony and the terms of the agreement itself. The standard of review for the trial court is "unconsonability" and this would preclude unscrupulous lawyers from attempting to use discrepancies between the prove-up transcript and agreement to serve as a basis for post-judgment relief.

3. The agreement shall be in writing.

4. Section 502(f): This provision should state that child support, post-emancipation support (Section 513), custody, and/or visitation is always modifiable upon a substantial change of circumstances. As it relates to limiting modification of the maintenance terms, this provision should specify that the parties may limit modification of maintenance in amount and/or duration and that the agreement should specify exactly what is non-modifiable. Finally, we should emphasize that the property provisions are never modifiable.

Section 503 [750 ILCS 5/503] Disposition of Property: Attached to this memo is a memo prepared by Steven Peskind, the leader of the property Pod, setting forth the proposed changes to that section. The IFLSC supports the recommendations set forth in the attached memo and recommends the proposed changes.

1. We recommend that non-marital property include all property acquired by the sole use of non-marital property as collateral for a loan that then is used to acquire property during the marriage, provided the party can prove by clear and convincing evidence that only non-marital funds were used to pay back the loan.

2. This provision should clearly specify that "valid agreement" includes premarital agreements and postnuptial agreements.

3. As it relates to Section 503(a)(5), we think we need to make sure that no inequities occur. Obviously, if one party sues another party for tort, such as battery, and receives damages, then those funds should not be considered marital property. However, if one spouse is required to sue another spouse in order to obtain insurance coverage, then we need to be clear that if the Judgment results in obtaining money from a third party payor such as an insurance company for reimbursable funds expenses, to the extent such funds are directly related to amounts advanced by the marital estate such funds should be considered marital property. (There may be other circumstances where one party may need to sue a parent or even a child in order to obtain insurance coverage but the family stays together).

4. The court shall be required to make specific factual findings for its property award beyond "considering all the relevant factors..."

5. We recommend eliminating the "in contemplation of marriage" exception created by the appellate courts.

6. We propose that after considering the evidence and making specific factual findings, the court may order appropriate payment "terms" if a party is required under the facts of the case to "buy-out" or "pay-off" the other spouse for her/his share of the estate. The terms should include, but not necessarily limited to, the timing and amount of the periodic

payments, an appropriate interest rate, if any, consideration of the nature, value and allocation of the marital and non-marital assets of the party doing the buy-out... In other words, the trial court will consider all the relevant factors in the case at hand as opposed to simply applying statutory interest.

7. Paragraph (1) of Steve Peskind's attached memo should be a separate provision akin to 604(b).

Section 504 [750 ILCS 5/504] Maintenance: Attached to this memo is the maintenance proposal submitted by Pod 4. I believe that we discussed and/or came to a consensus that the following changes be accepted subject to:

1. The court will have the authority to enter a time-fixed maintenance award that may not be extended. Obviously, the court should have the authority to modify maintenance during the term it orders in the event there is a substantial change in circumstances. However, we propose that in addition to permanent maintenance, reviewable maintenance, maintenance in gross, that the court will have the authority to set fix term of maintenance in that it will not be subject to extension, or modification.

2. The IFLSC agreed to provide for reviewable maintenance but that any Judgment of Dissolution of Marriage or marital settlement agreement incorporated into a Judgment must set forth the expectations to be placed on the recipient spouse during the period of time that he or she receives maintenance in order to qualify for additional maintenance. As opposed to addressing each factor, the court should have to make specific findings in support of its maintenance decision and specific findings as to why it chose the form of the maintenance.

3. The IFLSC recommends the following with respect to the "burdens of proof" as it relates to maintenance:

A. Pre-Decree - The burden of proof is on the party seeking maintenance to prove the need and type of maintenance being sought.

B. Post-Decree - The burdens of proof are as follows:

i. Permanent Maintenance: This, as all types of maintenance (other than maintenance-in-gross) terminate pursuant to the factors set forth in § 510. If a party wants to modify the support, the burden is on the petitioning party.

ii. Maintenance-in-Gross: Non-modifiable.

iii. Reviewable Maintenance: The Judgment whether decided after trial or whether it incorporates a Marital Settlement Agreement, must spell out the burden of proof and other parameters of reviewable maintenance.

iv. Fixed-Period Maintenance: The burden is on the party seeking the modification of amount based on a substantial change in circumstances.

4. We recommend that a party receiving maintenance must advise the payor of his or her intention to marry at least 30 days before the remarriage, unless the decision is made within said time period. In that event, he or she must notify the other party within 72 hours of getting married.

5. The IFLSC's consensus was against giving the trial court the discretion to allow the maintenance recipient to obtain life insurance on the payor's life to secure his/her maintenance obligation. After extensive discussions with the ISBA, we propose the following:

(a) Life insurance can only be awarded at the time of the initial judgment.

(b) The obligee will have the sole obligation to pay the premiums.

(c) All applications should be done at the time of the initial judgment and the court will be limited to an in camera review of the application in determining whether the application was made in good faith as to avoid discovery abuse.

(d) The court must consider the ability of the insured spouse to obtain additional insurance.

6. We recommend that the trial court **not** have the authority to order unallocated maintenance and child support due to all of the tax-related concerns.

7. We recommend the inclusion of these additional factors in Section 504.

a. Contributions made to the marriage including without limitations domestic duties [*see 504(a)(4) where this term is used*], homemaker contributions, and other financial and non-financial contribution to the marriage.

b. Factor (1) should include all financial obligations imposed on the parties as a result of the dissolution of marriage.

c. If we keep 504(a)(4), then we should include a provision requiring the court to consider any impairment on the present or future earning capacity of the party against whom maintenance is sought as a result of the marriage and the ultimate provisions of the judgment.

d. The words "realistic" needs to be inserted before 504(d)(3).

e. We believe that the custodial arrangements should be a factor.

f. We propose that Section 504(a)(8) should be replaced with the same provisions of 503(d)(8).

g. We propose that adding an additional factor: when maintenance is in lieu of and in addition to the "property allocation" (*see 503(d)(10)*) .

h. We need to include "any other factor that the court finds to be just and equitable" (*see 504(a)(11)*).

Section 505: The IFLSC supports the adoption of an income share model. The Illinois Department of Healthcare and Family Services ("HFS") is working on this proposal, and at this time are deferring to the work product of HFS as it relates to which exact type of model that should be adopted.

Section 505.1: With the exception of adding in a provision that allows the court to construe the overall facts and circumstances of the case at hand, we have no recommended changes.

Section 505.2: No recommended changes.

Section 505.3: No recommended changes.

Section 506: No recommended changes beyond the recent changes adapted by the Illinois Legislature.

Section 507: No recommended changes.

Section 507.1: No recommended changes.

Section 508: We recommend that the court be asked to rule on final fee petitions during the course of the case.

Additionally, we recommend:

(a) Fees incurred with respect to § 2-1401 motions may only be granted if the underlying motion is granted.

(b) Further, per Judge Lopez's suggestion and the Committee's approval, we propose that petitions for temporary fees in post-decree cases be heard on a non-evidentiary, summary basis (despite the fact that there is no marital estate at the time and that the final allocation and contribution issues should be decided at the end of the case). The Committee notes will reflect this is necessary, as the post-decree judges are inundated with evidentiary hearings. The same sanctions/penalties for providing inaccurate affidavits under Section 501 should apply.

(c) 508(a)(b) should include Hague proceedings (State or Federal).

Section 509: No recommended changes.

Section 510: No recommended changes specifically to this provision. However, a good portion of this Section will need to be revised to incorporate and implement other recommend changes such as:

(a) Specific findings as to the nature of maintenance (permanent, reviewable, in-gross or fixed term).

- (b) As entry into a civil union is now akin to remarriage, "entry into a civil union" should be added to the list of life events that automatically terminate an award of maintenance.

Section 511: No recommended changes. We agree that the comments should indicate the preference for motions to compel.

Section 512: We recommend the elimination to include venue where a party is actually employed (512(c)); otherwise, no recommended change.

Section 513: As an initial matter, all Section 513 relief be retroactive only to date of filing. With regards to the specific provisions of 513, the Committee recommends as follows:

(a)(1) We recommend that "disability" be defined. As recommended by Jill Egizi, the Committee proposes adopting the below definition for disability set forth in the Americans with Disabilities Act ("ADA"):

"The term 'disability' means, with respect to an individual –

(a) a physical or mental impairment that substantially limits one or more of the major life activities of such an individual;

(b) a record of such impairment; or

(c) being regarded as having such an impairment).

Also, in order to qualify for relief under 513(a)(1), the "disability" must arise before the duty to support is concluded. In other words, if college is not an issue, then before the child emancipates. If a college contributions is ordered, then for the duration of such award.

(a)(2): This relief must be sought prior to the emancipation of the child and it may only be retroactive to date of filing.

(b)(2): This provision should be refined to address the nature of the family their perspective on these issues, i.e. the court should be able to consider factors beyond the pure financial circumstances of the parties..

Section 514: This provision should be deleted.

Section 515: . This provision should be deleted.

Section 516: This provision should be deleted.

Section 517: This provision should be deleted.

(750 ILCS 5/504) (from Ch. 40, par. 504)

Sec. 504. Maintenance.

(a) In a proceeding for dissolution of marriage or legal separation or declaration of invalidity of marriage, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant ~~a temporary or permanent~~ maintenance award for either spouse in amounts and for periods of time as the court deems just, without regard to marital misconduct., ~~in gross or for fixed or indefinite periods of time~~, and the maintenance may be paid from the income or property of the other spouse after consideration of all relevant factors, including:

(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 forgone 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.

(b) The Court may order that maintenance be paid in the following manner:

(1) Temporary maintenance per 750 ILCS 5/501;

(2) Rehabilitative maintenance for a period of time, subject to a review;

(3) Finite non-modifiable maintenance for a determined period;

(4) Permanent maintenance for an indefinite period.

(b-5) Any maintenance obligation including any unallocated maintenance

and child support obligation, or any portion of any support obligation, that becomes due and remains unpaid shall accrue simple interest as set forth in Section 505 of this Act.

(b-6) The trial court may secure any maintenance award with an order requiring the spouse paying maintenance to provide an appropriate amount of life insurance, naming the recipient spouse as the beneficiary.

(b-7) Any new or existing maintenance order including any unallocated maintenance and child support order entered by the court under this Section shall be deemed to be a series of judgments against the person obligated to pay support thereunder. Each such judgment to be in the amount of each payment or installment of support and each such judgment to be deemed entered as of the date the corresponding payment or installment becomes due under the terms of the support order, except no judgment shall arise as to any installment coming due after the termination of maintenance as provided by Section 510 of the Illinois Marriage and Dissolution of Marriage Act or the provisions of any order for maintenance. Each such judgment shall have the full force, effect and attributes of any other judgment of this State, including the ability to be enforced. A lien arises by operation of law against the real and personal property of the obligor for each installment of overdue support owed by the obligor.

(c) The court may grant and enforce the payment of maintenance during the pendency of an appeal as the court shall deem reasonable and proper.

(d) No maintenance shall accrue during the period in which a party is imprisoned for failure to comply with the court's order for the payment of such maintenance.

(e) When maintenance is to be paid through the clerk of the court in a county of 1,000,000 inhabitants or less, the order shall direct the obligor to pay to the clerk, in addition to the maintenance payments, all fees imposed by the county board under paragraph (3) of subsection (u) of Section 27.1 of the Clerks of Courts Act. Unless paid in cash or pursuant to an order for withholding, the payment of the fee shall be by a separate instrument from the support payment and shall be made to the order of the Clerk.

(Source: P.A. 94-89, eff. 1-1-06.)

(a) In a proceeding for dissolution of marriage, a legal separation proceeding, a proceeding for declaration of invalidity of marriage, or in a post-judgment of dissolution proceeding by a court which lacked personal jurisdiction over one of the parties, the court may order the payment of one or more of the following types of maintenance from one spouse to the other:

1. Transitional maintenance, which is designed to assist a spouse maintain the approximate marital standard of living while they reintegrate back into a career, disrupted as a result of marital circumstances. The court may order the payments to be intermittent and/or modifiable subject to review, or non-modifiable payments for a finite period. In determining the award, the court shall consider how long the spouse has been away from their former career, and whether the spouse can resume employment at an income level that approximates their income at the time they last worked;

2. Improvement maintenance, which is designed to assist a spouse maintain the approximate marital standard of living while they attempt to develop financial independence, either by starting a new career or by obtaining appropriate training or education. The court may order the payments as either intermittent modifiable payments subject to review, or non-modifiable payments for a finite period;

3. Reimbursement maintenance, which is designed to reimburse a spouse for the following:

(a) their contributions and services to the education, training, career, career potential, license, or advanced degree to the other spouse

(b) the impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage.

The reimbursement maintenance payments may be ordered either as a non-modifiable lump sum, either from the property or income of the paying party, or as a series of intermittent payments, either modifiable or non-modifiable, for a fixed or indefinite term;

4. Long-term maintenance, which is designed to allow a spouse in a long-term marriage, to approximate the marital standard of living for an indefinite or definite period. It shall be presumed that in marriages lasting 20 years or longer, that neither party shall have a significantly greater standard of living than the other.

5. Maintenance in gross, which is a non-modifiable lump sum maintenance payment. The court may order the in gross payment either from the property or income of the paying party. The court may order maintenance in gross payment as an equitable remedy where appropriate.

(b) In determining any maintenance payment, the court shall consider all equitable factors including:

- (1) the income and property of each party, including marital property apportioned and non-marital property or either party;
- (2) any valid agreement of the parties;
- (3) the tax consequences of any maintenance or property award

(c) In ordering any maintenance award, the trial court shall make specific findings designating the type of maintenance awarded and the basis for the court's award. With regard to any awards that are to be later reviewed, the court shall make specific findings concerning the basis and reasons for the review and the expectations of both parties

(d) In determining maintenance, the court may not consider marital misconduct in marriages of ten years or longer.

(e) Where appropriate the court may order unallocated family support, subject to appropriate federal and state tax law, in lieu of specific maintenance or child support.

(f) Any maintenance obligation including any unallocated maintenance and child support obligation, or any portion of any support obligation, which becomes due and remains unpaid shall accrue simple interest as set forth in Section 505 of this Act.

(g) Any new or existing maintenance order, including any unallocated maintenance and child support order entered by the court under this Section, shall be deemed to be a series of judgments against the person obligated to pay support. Each judgment shall be in the amount of each payment or installment of support, and each such judgment is deemed entered as of the date the corresponding payment or installment becomes due under the terms of the support order. No judgment shall arise as to any installment coming due after the termination of maintenance as provided by Section 510 of the Illinois Marriage and Dissolution of Marriage Act or the provisions of any order for maintenance. Each such judgment shall have the full force, effect and attributes of any other judgment of this State, including the ability to be enforced. A lien arises by operation of law against the real and personal property of the obligor for each installment of overdue support owed by the obligor.

(h) The court may grant and enforce the payment of maintenance during the pendency of an appeal as the court shall deem reasonable and proper.

(i) No maintenance shall accrue during the period in which a party is imprisoned for failure to comply with the court's order for the payment of such maintenance.

(j) When maintenance is to be paid through the clerk of the court in a county of 1,000,000 inhabitants or less, the order shall direct the obligor to pay to the clerk, in addition to the maintenance payments, all fees imposed by the county board under paragraph (3) of subsection (u) of Section 27.1 of the Clerks of Courts Act. Unless paid in cash or pursuant to an order for withholding, the payment of the fee shall be by a separate instrument from the support payment and shall be made to the order of the Clerk.

Author comments:

Comments about Section a.

In this draft I have attempted to redefine with some specificity the “types” of maintenance payments that a court can award. I provided that a court may award various types; for example the court could award. For example both transitional and reimbursement maintenance may be appropriate.

The principle of reimbursement maintenance is derived from the American Law Institute model and incorporates principles already found in our existing maintenance statute. Standard of living is irrelevant in the context of reimbursement maintenance. In my opinion, reimbursement maintenance should survive a remarriage or cohabitation because it for reimbursement rather than prospective support. 750 ILCS 5/510 should be amended to reflect that fact.

Under this model, I have renamed rehabilitative maintenance as “improvement” maintenance and “transitional” maintenance. I think the word rehabilitate connotes some current inadequacy and is not very descriptive. Transitional maintenance is basically defined as a short term award to get an independent spouse back up and running. Improvement awards would likely be a longer term award.

Long term maintenance is what we currently call “permanent” maintenance. Again the word “permanent” is not particularly descriptive or appropriate. Note the presumption I have added that would statutorily proved for approximate income equalization in a 20 year marriage. This principle incorporates the Kane/DuPage model.

I have kept maintenance in gross as a “catch all.” I like giving the court as many equitable remedies as it needs.

Comments about Section b.

This section discusses universal factors for the court to consider in all cases. There are no real radical departures from existing law here. But see section c below.

Comments about Section c.

This section requires a trial court to outline with some specificity, the basis for the maintenance award. The court's expectations concerning the review is designed to clarify the problem outlined in In re Marriage of Golden

Comments about Section d.

In probably the most controversial rewrite, I have included, for the first time since 1977, a fault provision. While considerations of fault are barred in longer marriages, it may be appropriate to consider it in short-term marriages. Should a serial philanderer get maintenance? This issue obviously needs to be discussed more.

Comments about Section e.

This section specifically authorizes the trial court's use of unallocated family support. Under our current statutory scheme, the court is not specifically authorized to use this tax vehicle as an option.

(750 ILCS 5/503) (from Ch. 40, par. 503)

Sec. 503. Disposition of property.

(a) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":

- (1) property acquired by gift, legacy or descent or property acquired in exchange for same;
- (2) property acquired in exchange for property acquired before the marriage;
- (3) property acquired by a spouse after a judgment of legal separation;
- (4) property excluded by valid agreement of the parties;
- (5) any judgment or property obtained by judgment awarded to a spouse from the other spouse;
- (6) property acquired, in whole or in part, before the marriage. The equitable portion acquired prior to the marriage shall be considered non-marital;
- (7) the increase in value of non-marital property, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, income or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and
- (8) income from property acquired by a method listed in paragraph (1) through (7) of this subsection if the income is not attributed to the personal effort of a spouse.

(b) (1) For purposes of distribution of property, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, is presumed marital-property. This presumption includes non-marital property transferred into some form of co-ownership between the spouses, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. A spouse can overcome the presumption of marital property by showing through clear and convincing evidence that the property was acquired by a method listed in subsection (a) of this Section.

(2) For the purposes of distribution of property pursuant to this Section, all pension benefits (including pension benefits under the Illinois Pension Code, defined benefit plans, defined contribution plans/accounts, individual retirement accounts, and non-qualified plans) acquired by or participated in by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of the marriage are presumed to be marital property. A spouse can overcome the presumption that these pension benefits are marital property by showing through clear and convincing evidence that he pension benefits were acquired by a method listed in subsection (a) of this Section. The right to a division of pension benefits in just proportions under this Section is enforceable under Section 1-119 of the Illinois Pension Code.

The value of pension benefits in a retirement system subject to the Illinois Pension Code shall be determined in accordance with the valuation procedures established by the retirement system.

The recognition of pension benefits as marital property and the division of those benefits pursuant to a Qualified Illinois Domestic Relations Order shall not be deemed to be a diminishment, alienation, or impairment of those benefits. The division of pension benefits is an allocation or property in which each spouse has a species of common ownership.

(3) For purposes of distribution of property under this Section, all stock options and restricted stock granted to either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, vested or non-vested, or whether their value is ascertainable, are presumed to be marital property. This presumption of marital property is overcome by a showing that the stock options were acquired by a method listed in subsection (a) of this Section. The court shall allocate stock option between the parties at the time of the judgment of dissolution of marriage or declaration of invalidity of marriage recognizing that the value of the stock options may not be then determinable and that the actual division of the options may not occur until a future date. In making the allocation between the parties, the court shall consider, in addition to the factors set forth in subsection (d) of this Section, the following:

- (i) All circumstances underlying the grant of the stock option including but not limited to the vesting schedule, whether the grant was for past, present or future efforts, whether the grant is designed to promote future performance, or any combination thereof.
- (ii) The length of time from the grant of the option to the time the option is exercisable.

(c) Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:

1. A. If marital and non-marital property are commingled by one estate being contributed into the other the following shall apply:

- (i) If the contributed property loses its identity, the contributed property transmutes to the estate receiving the property (subject to paragraph 2 of this section);
- (ii) If the contributed property retains its identity it does not transmute and remains property of the contributing estate.

B. If marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection.

2. A. When one estate of property makes a contribution to another estate of property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation. No such reimbursement shall be made with respect to a

contribution, which is not retractable by clear and convincing evidence, or was a gift. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution.

B. When a spouse contributes personal effort to non-marital property, it shall be deemed a contribution by the marital estate, which shall receive a reimbursement for said efforts if the efforts are significant and result in substantial appreciation to the non-marital property. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution.

(d) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital to that spouse. It also shall divide the marital property and debts without regard to marital misconduct in just proportions considering all relevant factors, including:

- (1) Each parties contribution to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including:
 - (i) any decrease attributable to an advance from the parties' martial estate under subsection (c-1)(2) of Section 501;
 - (ii) the contribution of a spouse as a homemaker or to the family unit; and,
 - (iii) whether the contribution is after the commencement of a dissolution of marriage or declaration of invalidity proceeding
- (2) The dissipation by each party of the martial or non-marital property. Dissipation shall be defined as either parties use of assets or income for a purpose unrelated to the marriage, during a period that the marriage is undergoing an irretrievable breakdown, not to exceed three years prior to the date of the commencement of a dissolution of marriage proceeding or declaration of invalidity of marriage proceeding;
- (3) the value of the property assigned to each spouse;
- (4) the duration of the marriage;
- (5) the relevant economic circumstances of each spouse when the division or property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having the primary residence of the children;
- (6) any obligations and rights arising from a prior marriage of either party;
- (7) any pre or post nuptial agreements of the parties;
- (8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;
- (9) the custodial provisions for any children;
- (10) whether the apportionment is in lieu of or in addition to maintenance;

- (11) the reasonable opportunity of each spouse for future acquisition of capital assets and income;
 - (12) the tax consequences of the property division upon the respective economic circumstances of the parties; and,
 - (13) when the court does not divided the property on a 50% basis, the court shall make specific findings of fact as to the basis of deviating therefrom.
- (e) Each spouse has a species of common ownership in the marital property which vests at the time dissolution proceedings are commenced and continues only during the pendency of the action. Any such interest in marital property shall not encumber that property so as to restrict its transfer, assignment or conveyance by the title holder unless such title holder is specifically enjoined from making such transfer, assignment or conveyance.
- (f) In a proceeding for dissolution of marriage or declaration of invalidity of marriage or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, in determining the value of the marital and non-marital property for the purposes of dividing the property, shall value of the property as of the date of trial or some other date as close to the date of trial as is practicable.
- (g) The court if necessary to protect and promote the best interests of the children may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, physical and mental health, and general welfare of any minor, dependent, or incompetent child of the parties. In making a determination under this subsection, the court may consider, among other things, the conviction of a party of any of the offenses set forth in Section 12-3.3, 12-4, 12-4.1, 12-4.2, 12-4.3, 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961 if victim is a child of one of both of the parties, and there is a need for, and cost of, care, healing and counseling for the child who is the victim of the crime.
- (h) Unless specifically directed by a reviewing court, or upon good cause shown, the court shall not on remand consider any increase or decrease in the value of any "marital" or "non-marital" property occurring since the assessment of such property at the original trial or hearing, but shall use only that assessment made at the original trial or hearing.
- (i) The court may make such judgments affecting the marital property as may be just and may enforce such judgments by ordering a sale of marital property, with proceeds therefrom to be applied as determined by the court.
- (j) After proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be heard and decided, in accordance with the following provisions:

- (1) A petition for contribution, if not filed before the final hearing on other issues between the parties, shall be filed no later than 30 days after the closing of proofs in the final hearing or within such other period as the court orders.
 - (2) Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504.
 - (3) The filing of a petition for contribution shall not be deemed to constitute a waiver of the attorney-client privilege between the petitioning party and current or former counsel; and such a waiver shall not constitute a prerequisite to a hearing for contribution. If either party's presentation or contribution, however, includes evidence within the scope of the attorney-client privilege, the disclosure or disclosures shall be narrowly construed and shall not be deemed by the court to constitute a general waiver of the privilege as to matters beyond the scope of the presentation.
 - (4) No finding on which a contribution award is based or denied shall be asserted against counsel or former counsel for purposes of any hearing under subsection (c) or (e) of Section 508.
 - (5) A contribution award (payable to either the petitioning party or the party's counsel, or jointly, as the court determines) may be in the form of either a set dollar amount or a percentage of fees and costs (or a portion of fees and costs) to be subsequently agreed upon by the petitioning party and counsel or, alternatively, thereafter determined in a hearing pursuant to subsection (c) of Section 508 or previously or thereafter determined in an independent proceeding under subsection (e) of Section 508.
 - (6) The changes to this Section 503 made by this amendatory Act of 1996 apply to cases pending on or after June 1, 1997, except as otherwise provided in Section 508.
- (k) In determining the value of assets or property under this section, the court shall employ a fair market value standard. The date of the valuation for the purposes of division of assets shall be the date or such other date as agreed by the parties or ordered by the court, within its discretion.
- (l) The court may seek the advice of financial experts or other professionals, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine as a witness any professional consulted by the court, designated as the court's witness. Costs of said professional shall be allocated by the court between the parties.

(Source: P.A. 95-374, eff. 1-1-08; 96-583, eff. 1-1-10.)

Comments:

The rewrites to Section 503 are not dramatic departures from the existing statute. The rewrite is designed to clarify some of the more confusing sections and the changes do not substantially deviate from the former provisions.

There are a few substantive changes to note:

- Section (a)(6) has been amended to provide that an asset may have been partially acquired prior to the marriage. For example, the purchase of real estate on an installment contract. I have attempted to distinguish between an acquisition pre and post marriage. This may end up being more confusing but I thought it should be addressed.
- I added the word 'income' in section (a)(7) to clarify the obvious, that income earned during the marriage may be contributed to non-marital property.
- I specify that the standard overcomes the presumptions of marital property would be clear and convincing evidence. This basically incorporates the case law standards.
- Section (b)(2) was expanded to specifically include other types of retirement and employment plans. The existing statute just referred to pensions and for the sake of clarity, I felt it appropriate to add these various other categories of retirement plans.
- In paragraph (b)(3), I also provided for the distribution of restricted stock grants. These types of plans which are also known as "golden handcuff" plans are not specifically provided for in the existing statute.
- I also added in section (b)(3)(i) that the court could consider the vesting schedule and whether the grant is designed to promote future performance. This was an attempt to clarify those situation where someone might receive a restricted grant payable over a five-year period and the divorce occurs after year one. I considered a statutory application of the *Hunt* formula but felt it appropriate to leave it to the court's discretion.
- I completely rewrote section (c)1 and 2 simply to make them more readable. There were no substantive changes that were made.
- I added the word 'debts' in paragraph (d). In my review of the statute, I was surprised that that was not provided for anywhere.
- (d)(1)(iii) was added to allow the court to consider contributions of the parties respectively after the commencement of the proceedings.

- (d)(2) is an attempt to refine dissipation. I provided a definition for dissipation. Many people, including judges, want more specificity with regard to the dissipation statute. Others have argued persuasively that the discovery rules, when employed properly and enforced by the court, provide remedies to abuse concerning claims of dissipation. I have attempted to take a middle ground approach on this and simply define what dissipation was and limit any claims to an arbitrary three-year period.
- I added the word 'primary residence' to attempt to be consistent with the rewrites of the custody statute with the likely revisions of the custody statute.
- (d)(7) incorporates post-nuptial agreements.
- (d)(13), while not going as far as creating a presumption in favor of a 50/50 split, requires trial courts to make specific factual findings concerning the basis for deviating.
- Paragraphs k & l are brand new. Paragraph k employs statutorily a fair market value standard as the appropriate standard. Date of valuation remains the date of the trial but allows the court latitude to determine an appropriate date. It also allows the parties to agree to a date other than the trial date for the purposes of valuation. Paragraph l more or less mirrors 604B to allow the court to rely on independent financial experts where necessary.

(750 ILCS 5/503) (from Ch. 40, par. 503)

Sec. 503. Disposition of property.

(a) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":

(1) property acquired by gift, legacy or descent or property acquired in exchange for same;

(2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy or descent;

(3) property acquired by a spouse after a judgment of legal separation;

(4) property excluded by valid agreement of the parties;

(5) any judgment or property obtained by judgment awarded to a spouse from the other spouse;

(6) property acquired, in whole or in part, before the marriage. The equitable portion acquired prior to the marriage shall be considered non-marital;

(7) the increase in value of non-marital property acquired by a method listed in paragraphs (1) through (6) of this subsection, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, income or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and

(8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

(b)(1) For purposes of distribution of property pursuant to this Section, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, is presumed marital property. This presumption includes including non-marital property transferred into some form of co-ownership between the spouses, is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. A spouse can overcome the presumption of marital property is overcome by a showing through clear and convincing evidence that the property was acquired by a method listed in subsection (a) of this Section.

(2) For purposes of distribution of property pursuant to this Section, all pension benefits (including pension benefits under the Illinois Pension Code, defined benefit plans, defined contribution plans/accounts, individual retirement accounts, and non-qualified plans) acquired by or participated in by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of the marriage are presumed to be marital property, regardless of which spouse participates in the pension plan. A spouse can

overcome The presumption that these pension benefits are marital property is overcome by a showing through clear and convincing evidence that the pension benefits were acquired by a method listed in subsection (a) of this Section. The right to a division of pension benefits in just proportions under this Section is enforceable under Section 1-119 of the Illinois Pension Code.

The value of pension benefits in a retirement system subject to the Illinois Pension Code shall be determined in accordance with the valuation procedures established by the retirement system.

The recognition of pension benefits as marital property and the division of those benefits pursuant to a Qualified Illinois Domestic Relations Order shall not be deemed to be a diminishment, alienation, or impairment of those benefits. The division of pension benefits is an allocation of property in which each spouse has a species of common ownership.

(3) For purposes of distribution of property under this Section, all stock options and restricted stock granted to either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, whether vested or non-vested, or whether their value is ascertainable, are presumed to be marital property. This presumption of marital property is overcome by a showing that the stock options were acquired by a method listed in subsection (a) of this Section. The court shall allocate stock options between the parties at the time of the judgment of dissolution of marriage or declaration of invalidity of marriage recognizing that the value of the stock options may not be then determinable and that the actual division of the options may not occur until a future date. In making the allocation between the parties, the court shall consider, in addition to the factors set forth in subsection (d) of this Section, the following:

(i) All circumstances underlying the grant of the stock option including but not limited to the vesting schedule, whether the grant was for past, present, or future efforts, whether the grant is designed to promote future performance, or any combination thereof.

(ii) The length of time from the grant of the option to the time the option is exercisable.

(c) Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:

~~(1) When marital and non-marital property are commingled by contributing one estate of property into another resulting in a loss of identity of the contributed property, the classification of the contributed property is transmuted to the estate receiving the contribution, subject to the provisions of paragraph (2) of this subsection; provided that if marital and non-marital property are commingled into newly-acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection.~~

(1) A. If marital and non-marital property are commingled by one estate

being contributed into the other the following shall apply:

i. If the contributed property loses its identity, the contributed property transmutes to the estate receiving the property (subject to paragraph 2 of this section);

ii. If the contributed property retains its identity it does not transmute and remains property of the contributing estate.

B. If marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection

~~— (2) When one estate of property makes a contribution to another estate of property, or when a spouse contributes personal effort to non-marital property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation; provided, that no such reimbursement shall be made with respect to a contribution which is not retraceable by clear and convincing evidence, or was a gift, or, in the case of a contribution of personal effort of a spouse to non-marital property, unless the effort is significant and results in substantial appreciation of the non-marital property. Personal effort of a spouse shall be deemed a contribution by the marital estate. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution.~~

~~— (2) (A) When one estate of property makes a contribution to another estate of property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation. No such reimbursement shall be made with respect to a contribution, which is not retraceable by clear and convincing evidence, or was a gift. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution.~~

(B) When a spouse contributes personal effort to non-marital property, it shall be deemed a contribution by the marital estate, which shall receive a reimbursements for said efforts if the efforts are significant and result in substantial appreciation to the non-marital property. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution

(d) In a proceeding for dissolution of marriage or declaration of invalidity of

marriage, or in a proceeding for disposition of property following dissolution of marriage by a court which that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property and debts without regard to marital misconduct in just proportions considering all relevant factors, including:

(1) ~~each parties the contribution of each party to the~~ acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including

(i) ~~any such decrease attributable to a payment deemed to have been an~~ advance from the parties' marital estate under subsection (c-1)(2) of Section 501 and

(ii) the contribution of a spouse as a homemaker or to the family unit;

(iii) ~~whether the contribution is after the commencement of a~~ dissolution of marriage or declaration of invalidity proceeding

(2) the dissipation by each party of the marital or non-marital property. Dissipation shall be defined as either parties use of assets or income for a purpose unrelated to the marriage, during a period that the marriage is undergoing an irretrievable breakdown, not to exceed three years prior to the date of the commencement of a dissolution proceeding or declaration of invalidity.

(3) the value of the property assigned to each spouse;

(4) the duration of the marriage;

(5) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having the primary residence of the children;

(6) any obligations and rights arising from a prior marriage of either party;

(7) any ~~antenuptial~~ pre or post nuptial agreements of the parties;

(8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(9) the custodial provisions for any children;

(10) whether the apportionment is in lieu of or in addition to maintenance;

(11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and

(12) the tax consequences of the property division upon the respective economic circumstances of the parties.

(13) ~~When the court does not divide the property on a 50% basis, the court~~

shall make specific findings of fact as to the basis of deviating therefrom.

(e) Each spouse has a species of common ownership in the marital property which vests at the time dissolution proceedings are commenced and continues only during the pendency of the action. Any such interest in marital property shall not encumber that property so as to restrict its transfer, assignment or conveyance by the title holder unless such title holder is specifically enjoined from making such transfer, assignment or conveyance.

(f) In a proceeding for dissolution of marriage or declaration of invalidity of marriage or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, in determining the value of the marital and non-marital property for purposes of dividing the property, shall value the property as of the date of trial or some other date as close to the date of trial as is practicable.

(g) The court if necessary to protect and promote the best interests of the children may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, physical and mental health, and general welfare of any minor, dependent, or incompetent child of the parties. In making a determination under this subsection, the court may consider, among other things, the conviction of a party of any of the offenses set forth in Section 12-3.3, 12-4, 12-4.1, 12-4.2, 12-4.3, 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961 if the victim is a child of one or both of the parties, and there is a need for, and cost of, care, healing and counseling for the child who is the victim of the crime.

(h) Unless specifically directed by a reviewing court, or upon good cause shown, the court shall not on remand consider any increase or decrease in the value of any "marital" or "non-marital" property occurring since the assessment of such property at the original trial or hearing, but shall use only that assessment made at the original trial or hearing.

(i) The court may make such judgments affecting the marital property as may be just and may enforce such judgments by ordering a sale of marital property, with proceeds therefrom to be applied as determined by the court.

(j) After proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be heard and decided, in accordance with the following provisions:

(1) A petition for contribution, if not filed before the final hearing on other issues between the parties, shall be filed no later than 30 days after the closing of proofs in the final hearing or within such other period as the court orders.

(2) Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504.

(3) The filing of a petition for contribution shall not be deemed to constitute a waiver of the attorney-client privilege between the petitioning party and current or former counsel; and such a waiver shall not constitute a prerequisite to a hearing for contribution. If either party's presentation on contribution, however, includes evidence within the scope of the attorney-client privilege, the disclosure or disclosures shall be narrowly construed and shall not be deemed by the court to constitute a general waiver of the privilege as to matters beyond the scope of the presentation.

(4) No finding on which a contribution award is based or denied shall be asserted against counsel or former counsel for purposes of any hearing under subsection (c) or (e) of Section 508.

(5) A contribution award (payable to either the petitioning party or the party's counsel, or jointly, as the court determines) may be in the form of either a set dollar amount or a percentage of fees and costs (or a portion of fees and costs) to be subsequently agreed upon by the petitioning party and counsel or, alternatively, thereafter determined in a hearing pursuant to subsection (c) of Section 508 or previously or thereafter determined in an independent proceeding under subsection (e) of Section 508.

(6) The changes to this Section 503 made by this amendatory Act of 1996 apply to cases pending on or after June 1, 1997, except as otherwise provided in Section 508.

(k.) In determining the value of assets or property under this section, the court shall employ a fair market value standard. The date of valuation for the purposes of division of assets shall be the date of trial or such other date as agreed by the parties or ordered by the court, within its discretion.

(l) The court may seek the advice of financial experts or other professionals, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine as a witness any professional consulted by the court, designated as the court's witness. Costs of said professional shall be allocated by the court between the parties.

(Source: P.A. 95-374, eff. 1-1-08; 96-583, eff. 1-1-10.)