ILLINOIS STATE BAR ASSOCIATION

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Family Law

The newsletter of the Illinois State Bar Association's Section on Family Law

Chair's Column

BY MICHAEL STRAUSS

One of the tasks of the Family Law Section Council is to write and revise statutes. We are not all-knowing and cannot possibly see problems with each and every statute that we come across. This is where the family law attorneys in Illinois come into play. The Department of Homeland Security coined a phrase: "If you see something, say something." This applies to all of us. When and if you come across a problematic statute, please let us know. If you have a suggestion on how to correct the statute or have proposal for a new law, please inform us. I cannot guarantee that we will agree or that we will be able to correct every issue, but I can promise all of you that we will address any

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Fairness and Child Support in Illinois: Incompatible Goals or Unreasonable Expectations?

BY NANCY CHAUSOW SHAFER

In July 2017, Illinois became the 40th state to implement the income shares method of computing child support guidelines. As the name would suggest, this method shares the cost of child rearing between parents in relation to their respective income. Since its implementation, many practitioners, judges, and litigants have decried the changes, often citing "fairness" as an element missing from the new calculations. While most agree and understand the concept in principle, based on communications across the state, it seems unresolved concerns revolve around two main issues: (1) the Schedule of Basic Child Support Obligation (BCSO) is too low; and (2) the shared physical care formula too significantly reduces the already low child support obligation. Let's look at each point to explore the fairness and possible remedies in future statutory changes.

The BCSO schedule was created by economists retained by the Department of Healthcare and Family Services (HFS) who used data from federal government surveys in an attempt to quantify the cost of raising a child in an intact family. The BCSO is a fixed amount is based on two variables: (1) the combined net income of the parents and (2) the number of children to be supported. The first issue in determining the "fairness" of Illinois

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issue that is brought to our attention.

I wanted to highlight what occurred at our December meeting as I believe it truly exemplifies what I am trying to say in this article. One major issue that we have been discussing for some time now is 750 ILCS 5/607.6. Below is the entire statute.

(750 ILCS 5/607.6)

Sec. 607.6. Counseling.

(a) The court may order individual counseling for the child, family counseling for one or more of the parties and the child, or parental education for one or more of the parties, if it finds one or more of the following:

(1) both parents or all parties agree to the order;

(2) the child's physical health is endangered or that the child's emotional development is impaired;

(3) abuse of allocated parenting time under Section 607.5 has occurred; or

(4) one or both of the parties have violated the allocation judgment with regard to conduct affecting or in the presence of the child.

(b) The court may apportion the costs of counseling between the parties as appropriate.

(c) The remedies provided in this Section are in addition to, and do not diminish or abridge in any way, the court's power to exercise its authority through contempt or other proceedings.

(d) All counseling sessions shall be confidential. The communications in counseling shall not be used in any manner in litigation nor relied upon by any expert appointed by the court or retained by any party.

The problem with the statute is really subparagraph d. This subparagraph is blocking court appointed experts from getting and using ANY information from court ordered counseling. This poses many serious problems and has resulted in GAL's and other experts being discharged from cases based on their conversations with court ordered therapists. There was a recent Rule 23 case in the second district where this happened and the GAL was disqualified. This left the judge to have a trial on relocation with no GAL to opine on the issues at hand. Even more recently, there was a case in Cook County, where Dr. Amabile was removed from a case for speaking with court ordered therapists. Under this stringent standard, the judge cannot get ANY information about the therapy, even if the parties sign waivers.

As a section council, we debated this issue for nearly the entire meeting. There were many proposals to resolve this and to accommodate the courts' needs along with the needs of the parties and the rights to privacy. In the end, we voted to modify the law two ways. First, we are proposing changing the title to "Court Order Counseling." We are then proposing to delete entirely subparagraph d. Thus, HIPPA still applies and the parties can sign waivers, which would allow the communications to occur. Thus, the judge gets the very necessary information.

It is my understanding that a House Representative has already agreed to sponsor this and to get it done quickly to resolve this problem from the lawyers and judges alike.

We addressed one more law change at the meeting. Stuart Reid, an attorney primarily out of Lake County, Illinois, brought to our attention several problems with the Illinois Firearms Restraining Order Act, located at 430 ILCS 67 *et. seq.* He pointed out various issues with the law. While we realized that this law isn't truly just a family law issue, it needed correction. After a brief discussion, we approved Stuart's proposal.

I know that when many people think of working on law changes, they think of lobbyists and your own local House representatives and Senators. However, in my time on this section council, I have

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seen how quickly and efficiently we move in getting changes done. I am not writing this to pat us all on the backs. That said, many of the members of the section council definitely deserve our thanks for the time spent in effecting change for the better in our field of law. I am writing this to tell you all that you all have a voice. I am sure most of you know a member of our section council. Do not hesitate to let any of us know any ideas or issues that you are seeing that we could address. In fact, my email is straussfamilylaw@gmail.com. Feel free to reach out to me anytime with your thoughts or issues on any Illinois laws that needs addressing. ■

Fairness and Child Support in Illinois: Incompatible Goals or Unreasonable Expectations?

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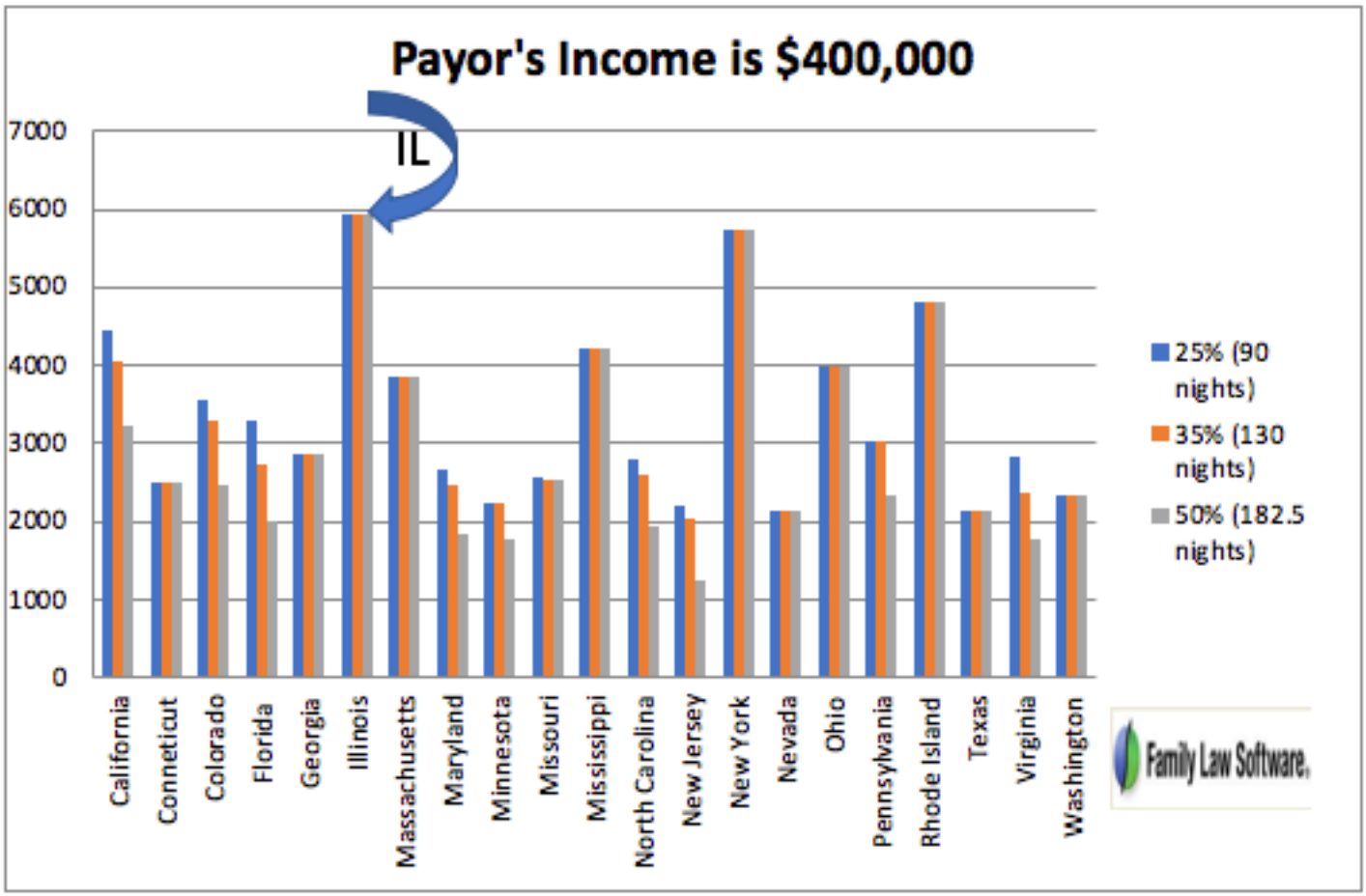
guidelines is whether the fixed BCSO schedule meets the goal of establishing the actual cost of raising a child.

The BCSO Schedule looks at specific federal government statistics related to income levels and regional geography and determines the average cost of raising a child in Illinois. Many practitioners, judges, and litigants in Illinois have been shocked at how low these averages are compared to the former Percentage of Payor Income Method especially for higher income parents. However, it is important to note Illinois' historically higher than average child support guideline amounts. Specifically, in an examination of the 23 states covered by Family Law Software, when all financial information remains the same, Illinois had the highest support under the old guidelines.



Once support is determined, based on this schedule, it is important to look at how it is then divided among two parents. Where there is not shared physical care, the entire BCSO is placed with the majority time parent. Where there is shared physical care (each parent maintains 40 percent or more of the average overnights per year) and dual households, the situation is not comparable to an intact household and the BCSO is only the starting point. Illinois statute has attempted to account for duplicated expenses as a result of dual households by increasing the BCSO, specifically multiplying it by 1.5; this is known as the Shared Physical Care Support Obligation (SPCSO). The procedure for dividing the SPCSO is what significantly reduces the overall child support guideline amounts.

First, the SPCSO is split between the parents proportionate to their share of their total income. Second, the allocated SPCSO for each parent is multiplied by the percentage of parenting overnights of the other parent. This cross multiplication is an attempt to equalize expenses incurred (effectively a parent's share of the SPCSO) as a result of a greater number of overnights as well as recognize the reduction in real costs to the majority time parent as a result of this allocation of overnights. Finally, the two subtotals are netted out with one parent paying the other the difference between their SPCSO allocations. This calculation yields the drastically reduced child support guideline amounts which concern so many litigants, attorneys and Judges.

While the former Percentage of Payor Income Method led to support orders higher than other states, many believe current calculation method results in support orders much too low. The real issue is twofold: are the current support guidelines objectively too low to the point of being unfair; and secondly, is there a better method to calculate support?

The Child Support Committee of the ISBA Family Law Section Council has looked into these questions; specifically, it has reviewed support formulas of other states to ascertain whether there may be a different formula that would yield results which satisfy more thoroughly the many interests looking for fairness in child support guideline results. Additionally, it has also looked into amending the current formula to address two main areas of concern: allocation of parenting time (and specifically overnights) driven by financial concerns and not the best interests of the child(ren); and the significantly lower support as a result of shared parenting time.

Another issue present in this discussion is whether the BCSO accurately reflects and accounts for the cost of raising a child in Illinois. Child support formulas in other states are often quite different than that in Illinois. While many utilize income shares, some start with gross income rather than net and build in taxes and deductions. There are certain states that use more than Illinois' two variables (combined net income and number of children) to arrive at the base guideline amount; for example, Massachusetts adjusts based on the age of the child.

Other states start the parenting time adjustment at one overnight per year and have a graduated scale from there. Minnesota has adopted a fractional formula that uses a ratio of total overnights cubed as the denominator and the number of overnights to each parent cubed as the numerator. As a final example of the drastic difference in calculation methods, Michigan recently moved away from the cubing calculation and changed it to a multiplier of 2.5 rather than cubed. Try doing that without a calculator or computer! Oregon uses a rather complicated formula which uses even more higher math than ours or any other. The end results in these states is a child support amount lower than ours. All of this is to say, it does not appear that any one state has the "best" or "most fair" formula. And, moreover, Illinois is not outside the nationwide norm in its support calculation method. Again, using Family Law Software and comparing results in the 22 other states computed in Family Law Software, based on the same fact pattern, we calculated the child support amount in each state and compared them to Illinois. The results now have Illinois in the middle of the pack, not the highest or the lowest by far.

While objectively speaking Illinois is in line with most of the rest of the country in its support calculation methodology, there are changes that could improve the perception of fairness in the community. First, the "cliff" of a shift from BCSO to SPCSO based on an arbitrary 146 overnights per year (40 percent) increases the likelihood of attempts to obtain, or defend, that magic number of overnights. Some states such as Minnesota and Michigan (cubing and the 2.5 multiplier, respectively) have created a smooth curve rather than a cliff. Others have moved to a lower number of overnights to start the parenting time adjustment and lessen the impact of each additional overnight (theoretically eliminating the impetus to fight for one more overnight). In examining other states, some have gone as low as starting the adjustment with even one overnight per year with many somewhere between 90 and 125 annual overnights. Smoothing out the "cliff" would benefit the public perception of Illinois support guidelines.

To avoid dramatic reduction in support for families now in the range of 0 to 145 nights, any smoothing of the cliff should be accompanied by another change that is firmly supported by a careful analysis of the economic elements of the SPCSO formula. When applying the SPCSO formula, the statute directs us to multiply the BCSO by 1.5; that exact multiplier is used in almost every other state that uses this method. However, upon further examination, this number is fairly random and without factual or scientific support from any source. If, in fact, the multiplier is intended to correct for the duplicated expenses of the two parents, the 1.5 multiplier is far less than needed to ameliorate that impact. Referencing the data included in the Technical Documentation Report issued concurrent with the Schedule of BCSO by HFS to account for the expenses that are actually duplicated, a more realistic multiplier would be closer to 1.7. While not all expenses are duplicated, so many are that it would make economic sense to err on the side of a higher multiplier for the SPCSO.

The Family Law Section Council CS committee hopes to make a recommendation to the Council and HFS in early 2020. Look for some changes to be proposed in an upcoming legislative session.■

Do I Really Have to Pay for That?: *Yakich v. Aulds* and the Constitutionality of Section 513 of the Illinois Marriage and Dissolution of Marriage Act

BY MAX BUNGERT

Introduction

For married parents with teenage children, the college selection process is an important milestone for helping their offspring reach self-sufficiency. Recognizing the uniquely personal nature of this decision, Illinois courts have largely stayed away from creating an obligation for married parents to help their college-aged children with paying for school.

This hands-off approach does not, however, apply to the college expenses incurred by the children of divorced or never married parents. Specifically, section 513 of the Illinois Marriage and Dissolution of Marriage Act allows courts to award money or property from one or both parties for the educational expenses of any non-minor children of the parties. The rationale for this section was first articulated in *Kujawinski v. Kujawinski*, in which the Illinois Supreme Court reasoned that divorced parents are less likely to pay for the educational expenses of their non-minor children for reasons that include a lack of proximity to the child, expenses incurred during the initial divorce, and a desire to spite a former spouse.

The underlying issue in *Kujawinski* was whether section 513 violates the Equal Protection Clause of the United States Constitution by requiring divorced or never married parents to pay for the educational expenses of their non-minor children when no such obligation exists for parents who are still together. In October of 2019 the issue was raised again in the case of *Yakich v. Aulds* which asked: In a society where divorce is prevalent and a college education is increasingly necessary, does it violate the Constitution's Equal Protection Clause to compel divorced and never married parents to contribute to the educational expenses of their non-minor children without having the same requirement for parents who are still together?

Yakich v. Aulds

In *Yakich v. Aulds* the trial court in DuPage County agreed with the and held that section 513 violated his right to equal protection and was therefore unconstitutional as applied in this in this circumstance. In reaching this decision, the court argued that the rationale in *Kujawinski*, that the children of unmarried parents are at a significant disadvantage in paying for college as compared with their counterparts whose parents are still together, was no longer applicable in an age of shifting family dynamics. It should be noted that the father's ability to pay was not an issue in the case.

The Illinois Supreme Court's Opinion

In a relatively short opinion, the Illinois Supreme Court expressed its disagreement with the trial court's approach to this case, calling their failure to apply the decision in *Kujawinski* a "serious error." Where the trial court pointed to changing family dynamics and increases in single-parent homes as reasons to overturn section 513, the supreme court emphasized the need to rely on precedent in coming to a decision in this, or any, case. The court recognized that trial courts are free to question the rationale behind decisions of higher courts but must nevertheless continue to apply those decisions until they are officially overturned. Ultimately, the trial court's ruling was vacated and the cause was remanded to the circuit court for further proceedings, with a recommendation that the standard from *Kujawinksi* be applied with respect to the constitutionality of Section 513.

Analysis

The decision in this case turns in large part on the relationship between the Constitution and large-scale social changes that threaten its principles. Understanding the complicated nature of this relationship, in 2015 the Illinois General Assembly created the Illinois Family Law Study Committee (IFLCS), which subsequently rewrote large segments of the Illinois Marriage and Dissolution of Marriage Act.[1] The primary motivation for this rewrite was the dramatic changes in familial societal norms in the years since the Act last experienced significant changes in 1979.[2] One such change is an understanding in many modern families that both parents will work outside of the home, and that they will both share the financial and emotional responsibilities of parenting.[3] Furthermore, the rewrite reflected an understanding that a growing number of children are raised by divorced or never-married parents, and the provisions of the Act needed to extend to a larger percentage of them.

So does *Yakich* have a point? In a modern society where both parents, regardless of marriage status, are expected to make contributions to their children's educational expenses, are the equal protection rights of divorced parents violated by the explicit requirement that they pay their kid's college costs? Looking to the goal of the Equal Protection Clause may begin to provide some answers. Generally, the Equal Protection Clauses of the United States and

Illinois Constitutions forbid government action that arbitrarily discriminates against some and favors others in like circumstances.[4]

The real question, then, is whether divorced and never-married parents are in a similar position as married parents with respect to paying for their non-minor children's education expenses. The court in *Kujawinski* seemed to think that they are not, and a modern plaintiff would have to make a showing that the factors cited by that court in favor of the requirement to pay are no longer applicable in our modern society. Some of those factors, for reference, are significant expenses incurred during the course of the divorce, lack of proximity to the child, and a desire to spite a former spouse.[5]

Before analyzing these factors in light of changes to the modern family dynamic, it is important to emphasize the distinction between divorced and never-married parents. The *Kujawinski* court seemed to have the former in mind when listing the factors in favor of a requirement to pay, and this bodes well for a plaintiff like Yakich, who was never married to the mother of his child. For him, and other similarly situated plaintiffs, a claim on equal protection grounds seems to have more merit than it might for a divorced parent based on the standard used in *Kujawinski*. For one thing, never-married parents do not have to deal with the emotional and financial hardships of a divorce. With the average cost of divorce of Illinois hovering around $14,000 per party (plus an extra $6,000 if it involves a child custody dispute), this financial aspect is a significant thing to consider when making an ultimate payment determination. [6] Similarly, the desire to spite a former spouse is less likely to be present in instances where parents were never married. This works in favor of Yakich and other never-married parents, as two of the primary factors given by the *Kujawinski* court are not relevant to their situations. The only other significant hurdle that they have to overcome is showing that they are just as close in proximity to the child as they would be in a married relationship. This might present a problem for fathers like Yakich, as there is evidence to suggest that declining marriage rates and increasing births out-of-wedlock is creating a trend of fathers living farther apart from their children.[7] However, the fact that non-minor children often attend colleges that are far from where either parent lives makes this factor less important as well. Yakich's daughter, for example, attended school in Florida, while both of her parents maintained residences in the Chicago area. Overall, never-married parents seem to have a relatively strong argument that section 513 violates their equal protection rights based on the standards in *Kujawinski*.

The same cannot be said, however, for the parents of non-minor children who *have* gone through a divorce. Where many of the factors cited by the court in *Kujawinski* don't apply to never-married parents of non-minor children, they certainly still apply to those who have divorced. In fact, with an ever-increasing number of marriages ending in divorce, the factors might be more relevant now than they were in 1978. This is especially true when it comes to the effects of divorce on the financial situations of the respective parties. While an increased emphasis on mediation or other forms of alternative dispute resolution might keep costs down somewhat, the *Kujawinski* court's assertion that the high cost of divorce might affect either parent's desire to pay for their non-minor child's education still seems to hold some merit in modern society. The same can be said for the desire to spite a former spouse, as a drawn-out divorce process is likely to lessen a parent's desire to pay for collection costs, especially if they have not been awarded primary custody. The only change that might weight in favor of treating divorced parents the same as still-married parents for the purposes of mandatory college payment is the shifting outlook on parental responsibilities. The *Kujawinski* court referenced this concept of parental responsibility, stating that the "moral obligation" to care for a child financially is less present for divorced parents, and especially divorced fathers.[8] In modern society, however, women are more likely to have full time jobs, and men more likely to help with traditional child rearing activities.[9] This one factor is probably still not enough to overcome the lack of changes in the other two, however, and divorced parents will therefore have trouble making the same equal protection claims as parents who were never married.

With the above framework in mind, it will be interesting to see how the Illinois Supreme Court chooses to rule when the issue of section 513's constitutionality inevitably comes before it again. While it is certainly the case that the payment of college expenses for non-minor children is an issue affected by the changes in societal norms referenced by the IFLCS, that organization's decision to leave section 513's general principles in during the rewrite of the Illinois Marriage and Dissolution of Marriage Act may suggest that the legislature still has the goal of creating obligations with respect to the payment of college expenses for divorced or never married parents. Assessing the constitutionality of section 513 might be most easily done by creating different standards for divorced and never-married parents rather than treating them as one group with common characteristics.

Conclusion

While the Illinois Supreme Court chose to remand the case and leave the issue of section 513's constitutionality for the trial court to decide, it is likely that the problem will come up again. The trial court was persuaded by the argument that changing family landscape necessitate a new outlook on old laws, and it is possible that this view will make its way to the supreme court relatively soon. In the meantime, divorced and never-married parents can expect to foot at least part of the bill when those children get into their dream schools. ■

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1. P. André Katz & Erin B. Bodendorfer, *The New and Improved Illinois Marriage and Dissolution of Marriage Act*, 103 Ill. B.J. 30 (2015).
2. *Id*.
3. *Id*.
4. Elizabeth M. Bosek, *et al.*, Nature and Scope of Prohibition. 11A Ill. Law and Prac. Constitutional Law § 272 (October 2019).
5. *Kujawinski*, 71 Ill.2d 563, 579 (1978).
6. Berry Tucker, *How Much Does a Divorce Cost in Illinois*, Berry K. Tucker & Associates, LTD, https://bk-tuckerlaw.com/how-much-does-a-divorce-cost-in-illinois/ (last visited Dec. 8, 2019).
7. Gretchen Livingston & Kim Parker, *A Table of Two Fathers: More Are Active, but More Are Absent*, Pew Research Social & Demographic Trends (June 15, 2011) http://www.pewsocialtrends.org/2011/06/15/a-tale-of-two-fathers/.
8. *Kujawinski*, 71 Ill.2d 563, 580 (1978).
9. Livingston, *supra* note 7.