

Family Law

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

Chair's column: Amendment to Section 504 of the IMDMA

BY LANE HARVEY

I have had the opportunity to review the amendments drafted and proposed by our Maintenance and Child Support Committee under the chairmanship of Judges Dickler and Loza and Maggie Bennett. It was my honor to appear before the Senate Judiciary Committee as a witness regarding the bill and to have the opportunity to confer, individually, with

some of the members of the committee regarding the amended statute. I am happy to report that the committee unanimously approved the draft bill.

The purposed amendment, essentially, makes three changes in the Act which, taken together, will both clarify the current statute and allow it to work more closely

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Computation of basic child support obligation

BY MARGARET BENNETT

Editor's note: Illinois child support laws are about to undergo a major shift. Margaret Bennett has traveled across the state lecturing and informing family law practitioners how the new income shares legislation will impact child support calculations.

Section 1.5 of 750/ILCS 5/505 will state:

Calculate each parent's combined net monthly income.

Add the parents' monthly net income to determine the combined monthly net income of the parents. Select the appropriate amount from the Schedule of Basic Child Support Obligation based on the parties' combined monthly net income and number of children of the parties. Calculate each parent's percentage share of the

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Chair's column

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with the Income Shares Child Support statute which becomes effective July 1, 2017. We believe that the amendment will be an improvement and, hopefully, allow for the alleviation of some difficult results under the current version of the statutes.

The first significant change in the statute is to change the guideline amount limit from \$250,000 to \$500,000 in gross income. There are at least two reasons for doing this. First is that such an amount will parallel the amounts involved in the Income Shares Child Support statute. The ceiling set out in the Schedules of Basic Child Support Obligations is a combined net income of \$30,000 per month. While the maintenance obligation is measured in gross income, when a reasonable income tax liability is added back to the \$30,000 per month, the amounts are parallel. The second reason for raising that amount is that, anecdotally, it appears that courts are, with some increasing frequency, applying the guideline formula to incomes exceeding the \$250,000. By raising the amount to which the guidelines apply it will more closely parallel the Income Shares Child Support statute and acknowledge what courts are, in fact, doing.

The second significant change has to do with duration. The statute, as originally drafted, carried 20% "cliffs" for each five year increment in the duration of the marriage. That is, after five years of marriage, the duration for maintenance would be for 20% of the duration of the marriage. After the tenth year of marriage, that duration period was raised 40% and then raised 20% for each five year period up to twenty years. The inequity of such a system should be apparent. For example, a party married nine years, 364 days would, under the guidelines, be entitled to have 20% of the duration of the marriage as the duration of the maintenance. Yet, a party married ten years and one day, would be entitled to have maintenance for a period of 40% of the duration of the marriage. Such stark results are not only inequitable but provide a great incentive for game playing

regarding choosing a date of filing for the petition for dissolution. The *reductio ad absurdum* in the example above is that two additional years of maintenance would be due under the guidelines for two additional days of marriage. The new statute changes the incremental duration by adding a 4% increase to the duration for each additional year of marriage after the fifth year and up to the 20 years. In the example used above, the increase in the duration of maintenance for the two additional days would not be 20% but, rather, 4%. It is believed that such a system would be far more equitable and provide significantly less incentive for game playing.

The third significant change in the bill is the addition of a provision which specifically refers to the courts awarding temporary maintenance and provides that the award of temporary maintenance pursuant to the guidelines may be a corresponding credit to the duration of maintenance set forth as described above. The significance of that section is that, while Section 501(a) of the Act provided for temporary relief, including temporary maintenance, there was no specific provision in the statute which indicated any relationship between Sections 501 and 504. As would have been anticipated, it was fairly typically for courts to use the guidelines for purposes of setting temporary maintenance although nothing in either Sections 501 or 504 specifically set out any relationship between them. That such use of the guidelines could be reasonably anticipated was clear from the caselaw related to the use of child support guidelines for setting temporary support as adopted by caselaw. (See, *inter alia*, *In Re Marriage of Rogliano*, 198 Ill.App.3d 404 (5th Dist. 1990)). Under the amended statute, Section 504(b-1)(1.5) establishes the link and clarifies the impact of the award of temporary maintenance using the guidelines.

The bill in my view constitutes a substantial improvement to the current maintenance statute in that it clarifies certain points, allows for the maintenance

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statute to work more closely with the new child support statute and creates a more equitable duration calculation. The bill, as the Senate Committee agreed, is worthy of passage.

There is, however, one note of caution that practitioners and courts should always keep in mind. That point is the fundamental difference between maintenance and child support. Clearly, we all understand that there is a *presumption* that child support is due from the party who does not have the primary allocation of parenting time to the party who does. Both the current statute, the new statute and the caselaw makes that matter clear. However, there is *no presumption* that maintenance is

due. Indeed, the maintenance statute, as it current exists, makes very clear that there are preconditions which must be met before maintenance may be awarded. Unless such conditions are established as a prerequisite for getting to the guidelines, maintenance should *not* be awarded. It has been the policy announced both by the courts and by the legislature in the statute that maintenance is a matter of last resort, not first resort. Indeed, the factors involving the division of marital property, as more specifically set forth in Section 503(d), when read in conjunction with Section 504 make it clear that the first choice for satisfying the needs of the spouse is a division of property as opposed to maintenance. That such has

been the judicial policy of this state for many years as apparent from a review of the cases of *In Re Marriage of Hollensbe*, 165 Ill.App.3d 522 (5th Dist. 1988) and *In Re Marriage of Jarvis*, 245 Ill.app.3d 1007 (4th Dist. 1993). A review of the proposed amendment to the statute and a review of the maintenance guideline statute itself clearly indicates that nothing contained within it has changed the fundamental policy that maintenance is a matter of last resort, not first resort. Rather, what the statute does is to make the guidelines more equitable and to provide a basis for the guidelines to work better in conjunction with the new Income Shares Child Support statute. ■

Computation of basic child support obligation

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basic child support obligation. Although a monetary obligation is computed for each parent as child support, the receiving parent's share is not payable to the other parent and is presumed to be spent directly on the child.

1. Calculate Each Parent's Combined Net Monthly Income

Calculate each parent's income by including income from all sources and properly calculating federal, state, FICA or self-employment tax, and Medicare tax. Include in the recipient's gross income any maintenance payments received, and subtract from the gross income any maintenance payments paid pursuant to court order. Union dues, student loans, mandatory retirement contributions, the cost of family health insurance, and the cost of the obligor's life insurance are no longer relevant to the computation of net income. In the event a party pays into a parallel system in lieu of FICA as a mandatory condition of employment, i.e. the railroad retirement system, exclude the amount paid into the parallel system from gross income.

A. Two Formulas to Determine Net Income

The statute sets forth two formulas

to calculate net income. The statute provides that the parties can either use the "**standardized tax amount formula**" which is a simplified formula, or "**the individualized tax amount formula**." The standardized tax amount formula assumes that both parties are single and using the standard deduction with one dependency exemption. Dependency exemptions for the parties' children are allocated as the parents agree or as the court determines. The individualized tax amount formula takes into consideration the filing status of the parties, the allocation of dependency exemptions, itemized deductions, tax credits and other tax variables found on tax returns. The parties may agree to use another formula to determine net income provided the court finds the formula conscionable.

B. Multiple Family Adjustment

When computing net income, if a parent supports other children either pursuant to a court order or without a court order, the multiple family adjustment is applicable. In the event the parent pays support pursuant to a prior court order, subtract that amount from the net income of the payor parent. In the event a parent pays

support for a child without a court order, determine the multiple family adjustment by using the lesser of the actual amount being paid for support of the other child, or 75% of the amount of basic child support obligation (using that parent's income alone) whichever is less. However, the court has discretion to disregard the multiple family adjustment if the court finds that the amount would cause economic hardship to the child.

2. Add the Parents' Monthly Net Income

Add the monthly net income of both parents to arrive at the **total combined monthly net income of the parents**.

3. Select the Appropriate Amount from the Schedule of Basic Child Support Obligation

Based on the parents' total combined monthly net income and the number of minor children the parents have together, select the corresponding entry on the Schedule of Basic Child Support Obligation to determine the basic child support obligations of the parties.

4. Calculate Each Parent's Percentage Share of the Basic Child Support Obligation

Divide each parent's monthly net income by the total combined net income of the parents to determine:

- A. The percent of each parent's income to the total combined monthly net income; and
- B. What percent each parent is responsible to pay.

For example, if the mother's net income is \$2,500 per month, and the total

combined net income of the parents is \$10,000 per month, \$2,500 divided by \$10,000 is .25, which is 25%. Therefore the mother would be responsible for 25%, and the father 75% of the basic child support obligation.

5. Determine Each Parent's Share of the Basic Child Support Obligation

Determine each parent's share of the basic monthly child support obligation based upon their percentage share of the combined monthly net income. The statute

assumes that the parent with the majority of parenting time will use the amount of their basic child support obligation for the child. Unless the shared physical care formula applies, the parent who does not have the majority of parenting time will pay his or her share of support to the parent with the majority of parenting time. The shared physical care formula applies in cases where the parent who does not have the majority of parenting time has 146 parenting time overnights per year which represents 40% of nights in a calendar year. ■

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Friday, 06-09-17 – Chicago Regional Office—Estate Administrative Issues: Are You Prepared to Handle Some of the Difficult Issues Facing Your Client? Presented by Trust and Estates. 9:00 a.m. – 4:15 p.m.

Friday, 06-09-17 – LIVE Webcast— Estate Administrative Issues: Are You Prepared to Handle Some of the Difficult Issues Facing Your Client? Presented by Trust and Estates. 9:00 a.m. – 4:15 p.m.

Tuesday, 06-13-17- Webinar—Excel Power Hour. Practice Toolbox Series. 12:00 -1:00 p.m.

Wednesday, 06-14-17 – Live Webcast— Implicit Bias: How it Impacts the Legal Workplace and Courtroom Dynamics. Presented by the ISBA Committee on Racial and Ethnic Minorities and the Law. 12:00 -2:00 pm.

Friday, 06-16-17 – The Abbey Resort in Fontana, Wisconsin—Moneyball for Lawyers: Using Data to Build a Major-League Practice. Time TBD.

Friday, 06-16-17 – The Abbey Resort in Fontana, Wisconsin—Effectively and Ethically Handling Referrals for Personal Injury Clients. Presented by Law Office Management and Economics. Time TBD.

Friday, 06-16-17 – The Abbey Resort in Fontana, Wisconsin—E-Filing in Illinois. Presented by the ISBA Standing Committee on Legal Technology. 8:45 – 10:15 am.

Friday, 06-16-17 – The Abbey Resort in Fontana, Wisconsin—Boost Your Memory Power - Improve Your Practice. Master Series Presented by the Illinois State Bar Association.

Wednesday, 06-21-2017—Chicago, ISBA Regional Office—Gain the Edge! * Negotiation Strategies for Lawyers - Marty Latz Negotiations. Master Series Presented by the ISBA. 9:00 a.m. – 4:30 p.m.

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Tuesday, 06-27-17- Webinar—Google Apps Power Hour. Practice Toolbox Series. 12:00 -1:00 p.m. ■

What family law practitioners need to know about cyberstalking

BY MARIE SARANTAKIS

Technology has changed the divorce landscape. According to the American Association of Matrimonial Attorneys, 92% of the nation's top divorce attorneys surveyed reported experiencing an increased amount of evidence obtained from smartphones in divorce proceedings.¹ The growing use of technology results in a permanent trail of data. Because of the digital footprint left behind, the average person today can easily transform into the sophisticated espionage artist of a decade past.

Many dissolution actions are fraught with deceit, lies, and indiscretions; therefore it should be no surprise that untrusting partners who have been victim to these ills will find their own means of uncovering the truth. Emotions tend to run high in cases when someone is potentially losing their lover, children, and property.

It is common to blame the other spouse and there is a natural inclination to gain an upper hand. Clients often desire to expose just how bad their ex really is to the Court and to the world at large. Ironically, it's the client who wants to reveal their former flame's shortcomings, who can likely end up themselves reflecting poorly in the eyes of the Court by resorting to low-brow tactics, such as cyberstalking.

Courts tend to frown on information obtained through covert means. Once a case is filed and a Court has jurisdiction over a matter, the rules of civil procedure apply and thereby allow for ample methods of discovery. The practical risks of obtaining information through illicit means is that it can lead to a host of civil and criminal penalties. Moreover, the information obtained, even though perhaps derogatory to the other side, may not be relevant.

On January 1, 2016, the Illinois Marriage and Dissolution of Marriage

Act ("IMDMA") underwent a radical transformation.² One of the major changes to the law was that Illinois eliminated all fault grounds for dissolution of marriage actions.

Prior to that time, spouses could assert such things as adultery, impotency, and habitual drunkenness as the reason supporting their divorce. Today, all dissolution cases proceed as a no-fault cause of action under the umbrella of irreconcilable differences. The shift was an attempt to reduce the acrimony and public mudslinging underpinning many tumultuous relationships ensconced in the legal system.

In the modern era of no-fault divorce, spouses obtaining unflattering information about their soon-to-be-ex spouse will likely find such evidence to be irrelevant for legal purposes. For example, Illinois courts are not going to punish a cheating or blameworthy spouse. The Court will not alter the determination of parenting time, spousal support, or the allocation of property based on who is most culpable for causing the irretrievable breakdown of the marriage.

While fault is irrelevant, parties may nevertheless still be held accountable for their behavior. There are limited circumstances when evidence of bad acts are necessarily admissible. For example, if there is reason to believe a parent could pose an endangerment to a child, unsupervised parenting time can be affected.

Alternatively, successfully showing improper spending can be deemed as the dissipation of marital assets and alter an allocation of property distribution. Even though there are limited circumstances when bad character is material, clients should be made aware that cyberstalking is generally unlikely to yield any meaningful

reward and is riddled with risk.

If an attorney has reason to believe their client is tempted to resort to illicit means of obtaining information, they should advise their clients on the lawful methods of obtaining the same information through the discovery process. The average client going through a divorce is often unfamiliar with the resources available to them in order to obtain information during a legal proceeding. A careful litigator will take the time to explain what it means to issue a subpoena, propound interrogatories, request documents in a notice to produce, and conduct a deposition.

These tools comply with the Illinois Civil Code of Procedure, and will yield the same facts, but are obtained in a manner favorable to your client and admissible by the Courts.

Due to the low cost and relative ease of obtaining private information oneself, there is an inherent temptation for clients to circumvent lawful methods. In the past, sleuthing would require resources, effort, and some type of physical momentum. The person seeking information would have to follow their ex, log on to their computer, hire an investigator, or install cameras. Today, spying has become distant and simplified. Because it is increasingly simpler to send and receive data, it is intercepted more frequently.

One of the most common ways that spouses uncover the other's secrets is through spyware. Spyware is stealth software that is installed on a computer or smartphone with the purpose of monitoring the user's activity. Over time spyware developers have camouflaged their systems so that the presence of their programs have become increasingly insidious and difficult to uncover. A non-tech savvy consumer can easily take advantage of these programs; they are easy

to install and cost very little, often ranging between \$30 to \$100.

The installation of spyware takes place one of two ways. The most direct method is when the hacking party physically downloads a program onto the device itself. However, if the spying spouse does not have access to the device, there are other methods to download the spyware remotely. For example, the hacker can send an e-mail attachment that downloads spyware onto the other spouse's computer or smartphone. No matter how adversarial the split, few spouses would expect the other to be sending a virus. The most likely reaction when receiving an email attachment from a former partner, whether prompted by love, hate, or curiosity, is that the receiving party will open it. Irrespective of method, installing spyware is relatively easy for even a novice to accomplish.

Because it is so simple for a spouse to single-handedly engage in cyberstalking, such actions are usually impulsive and not well thought out, leaving the perpetrator vulnerable to civil and criminal liability. Spouses, despite their relationship to one another, are not exempt from federal or state wiretapping laws.

On a federal level, attorneys should have a rudimentary understanding of the following acts in order to protect their client's interests.

Federal Wiretap Act of 1968³

Under the Federal Wiretap Act, a spouse who intended to engage in the wire or oral interception of communications, can be ordered to cease their actions, incur fines, or even be imprisoned for up to five years.

Electronic Communications Privacy Act (ECPA)⁴

The ECPA updated the Federal Wiretap Law of 1968. It is intended to protect data transmitted via technological means, such as e-mails, thereby criminally codifying the interception and disclosure of electronic communications.

Federal Stored Communications Act⁵

This Act makes it illegal to hack electronic communications through intentional and unauthorized access. It bears heavy fines, both civilly and

criminally, along with substantial prison terms.

Federal Computer Fraud and Abuse Act⁶

The Federal Computer Fraud and Abuse Act was initially intended to protect government computers, however, it has since been expanded to include any computer that is used for interstate commerce, thereby including essentially every computer. This statute makes it a crime for an individual to go into another's computer and obtain governmental, financial, and/or other types of consumer related information.

In addition to federal acts, there are numerous state statutes that should be taken into consideration. For example, attorneys should have a working knowledge of the Illinois Eavesdropping Statute.⁷

This law has undergone some serious amendments in the past few years. Prior to 2014, the statute was extremely broad, and individuals could be found liable for committing even an inadvertent recording.

The Illinois Supreme Court found the statute to be unconstitutional in *People v. Melongo*⁸ and *People v. Clark*.⁹ As a result, in December of 2014, a revised law went into effect. This new statute makes eavesdropping illegal only if it occurs through surreptitious means. A violation could mean declaratory, injunctive, and even punitive damages as well as potential jail time.

In addition to eavesdropping, the Illinois Computer Crime Law¹⁰ makes the unauthorized use of another's computer or smartphone a criminal violation. There are a plethora of additional laws concerning fraud, harassment, stalking, voyeurism, wiretapping, privacy, and trespass which may be applicable.

For a mistrusting spouse in the midst of dissolution litigation, installing spyware has become quick, economical, and simple. Accordingly, addressing this matter with clients has become increasingly necessary. Today's family law attorney must have a cursory understanding of the legal framework concerning privacy issues in order to adequately instruct their clients about actions for which they may be found

civilly and/or criminally liable. ■

1. American Association of Matrimonial Attorneys, Survey of Nation's Top Divorce Attorneys Reveals Spike in Smartphone and Text Evidence During Divorces, February 8, 2012, available at <<http://www.aaml.org/about-the-academy/press/press-releases/divorce/lawyers-finding-divorceapp-smart-phones>>.

2. Marie Sarantakis, Ten Changes in Family Law that Practitioners Need to Know in 2016: A Brief Summary of Modifications to the IMDMA, Illinois State Bar Association Family Law Newsletter, Vol. 39, No. 6, December 31, 2016, available at <<https://www.isba.org/sections/familylaw/newsletter/2015/12/tenchangesfamilylawpractitionersnee>>.

3. 18 U.S.C. § 2510-22.

4. Id.

5. 18 U.S.C. § 2701.

6. 18 U.S.C. 1030.

7. 720 ILCS 5/14-2.

8. *People v. Melongo*, 2014 IL 114852.

9. *People v. Clark*, 2014 IL 115776.

10. 720 ILCS 5/17-51.

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