

New Illinois Law Falls Short in Addressing the Elimination of Alimony Federal Tax Deduction

One of the biggest changes of the Tax Cuts and Jobs Act of 2017 (TCJA) is the elimination of the "alimony deduction," which went into effect January 1, 2019. With the alimony deduction no longer available to maintenance obligors for all new cases filed after December 31, 2018, as well as all pending cases that were not concluded by December 31, 2018, the Illinois General Assembly revised their maintenance/alimony statutes. Accordingly, Illinois Public Act 100-0923, effective as of January 1, 2019, attempts to substantially align and reconcile its guideline maintenance formula with the new non-deductible federal tax regime. In its effort to achieve equilibrium, however, the revised statute may do more harm than good.

The new guideline formula substitutes net income for gross income and increases the percentages involved. Previously, maintenance was calculated as 30% of the obligor's gross income less 20% of the recipient's gross income. Now, guideline maintenance is defined as 33.33% (or 1/3) of the obligor's net income less 25% (or 1/4) of the recipient's net income. The effect of these changes is to considerably reduce the payor spouse's statutory maintenance obligation. For example, using the current tax brackets, the annual support obligation of a payor spouse with annual gross income of \$100,000 to a payee spouse with no independent income was \$30,000 under the old guidelines and is

approximately \$24,000 under the new guidelines. However, after satisfying both their tax liability and maintenance obligation, the payor spouse will generally experience a decrease in annual take home pay. Using the same example, under the new formula, the payor spouse would be left with a little less than \$50,000 in take home pay, down from roughly \$52,500 prior to the law's enactment.

Of course, as either spouse's income increases, the percentage of the payor's income staked out for maintenance will decrease proportionally.

The practical effect of the new law is that an obligor will have a higher tax liability and lower support obligation, a recipient will have no tax liability (at least with respect to maintenance), and both spouses will have less disposable net income actually available to them. In this new paradigm, neither party has much to cheer about but the obligor may have a little more to lament.

That is not to say the new law cannot be navigated. Maintenance is one of many moving parts in a modern divorce. An award of maintenance may affect the child support which may affect the property division. Altering one component impacts the entire system. In this way, the new formula highlights the need for thoughtful negotiation and vigorous advocacy.



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By Claire R. McKenzie

It is also important to consider the new formula in the context of other changes to and existing provisions in the Illinois law. In its previous revisions, the state legislature added language emphasizing that a court must first make a finding that maintenance is appropriate. If the court does not make such a finding, both parties are barred from receiving maintenance. In order to make this threshold decision, a court must consider many factors. The legislature specifically broadened these factors to include more generally the tax consequences to each party, which appears to be a nod to the TCAJA's treatment of support obligations. Adverse tax consequences, combined with other relevant statutory factors, may lead a court to determine either that maintenance is not appropriate, or that non-guideline maintenance is more appropriate. In the event that a judge awards non-guideline maintenance, she will look to the same statutory factors mentioned above to determine the amount and duration of the award. Currently, since there are no appellate decisions regarding the new formula, it is difficult to say how or whether non-guideline

maintenance would be determined based on burdensome tax consequences. In the meantime, it is prudent to anticipate that a court will apply the guideline formula.

In addition to case by case escape hatches, there are certain concrete limitations on awards of maintenance. First, a payee spouse may not receive a maintenance award that, when added to his or her net income, results in that spouse receiving an amount greater than 40% of the parties' combined net income. This rule works primarily to preclude guideline maintenance awards between spouses with comparable levels of income. Second, in a case where an award would result in a combined maintenance and child support obligation greater than 50% of the payor's net income, the court may determine and award non-guideline maintenance and/or non-guideline child support. This issue will most likely apply when the parties have disparate incomes and multiple minor children. Importantly, these scenarios are the exceptions, and divorcing couples will have to grapple with the recently implemented formula.

The important takeaways from the new law are the following:

- Obligors will have lower maintenance obligations but will experience a related decrease in take home pay; and
- Recipient spouses will receive less in maintenance but will have no tax liability in connection with that income.

Whether and how courts might award non-guideline maintenance because of harsh tax burdens remains to be seen. Therefore, it is best to assume that the guideline formula will apply. While the effect of the revised statute is unfavorable at first blush, both obligors and recipients of maintenance can still achieve positive outcomes through careful planning and attentive representation.

New 2019 Illinois Divorce Laws: More Than Just the End of Deductible Maintenance

The year 2019 brought one of the most substantial changes to the treatment of maintenance (alimony) for tax purposes: federal law was modified to disallow its tax deductibility. Along with this change to the Internal Revenue Code, the Illinois General Assembly enacted additional changes, with some in response to the elimination of deductibility, while others addressed related issues.

Highlights of some of the significant changes are as follows:

- For those couples with combined gross annual income less than \$500,000, maintenance, if ordered, is generally calculated by taking 33 1/3% of the payor's net annual income minus 25% of the payee's net annual income. Maintenance when added to the net income of the payee is not to be an amount in excess of 40% of the combined net income of the parties.

- Modification of earlier maintenance orders entered before January 1, 2019 that are and continue to be eligible for inclusion in the gross income of the payee for federal income tax purposes and deductible by the payor are calculated using the prior law, taking 30% of the payor's gross annual income minus 20% of the payee's gross annual income. This is unless both parties agree that the payments under the modified order are not tax deductible; in such case the current law prevails. The amount calculated for the modified maintenance, however, when added to the gross income of the payee, is not to exceed 40% of the combined gross income of the parties.

- Before a judge starts calculating the maintenance amount, the law now requires the court to make an initial determination of whether maintenance is really needed by the recipient, i.e., whether it is "appropriate" under the facts of the case. Specific findings of fact must be made by the court as to its reasoning for awarding or barring maintenance, and the court shall include references to each relevant factor as provided for in the statute. A list of those factors appears at the end of this article.

- If the maintenance payor's total maintenance and child support obligation under statutory requirements ends up exceeding 50% of the payor's net income, the judge can then deviate from the statutory calculations for maintenance or child support or both.

- Because maintenance is now based on the concept of "net income" rather than gross income, the law now similarly defines net income for maintenance as it does for child support; namely, income from all sources less taxes.

- The General Assembly also codified three distinct categories of maintenance that had previously been described only by the courts in case law:

- (1) Fixed-term maintenance: The court designates the termination of the period during which this maintenance is to be paid, and any further maintenance is barred once that period expires.

- (2) Indefinite maintenance: The court does not designate a termination date, and the payments continue until modified or terminated pursuant to statute.

- (3) Reviewable maintenance: If the court grants maintenance for a specific term with a review, the court designates the period of the specific term and states that the maintenance is reviewable.

- As to temporary maintenance (maintenance awarded during the pendency of a case and prior to the final orders) the same factors a court considers for awarding maintenance at the conclusion of the case are to also be used when the court sets temporary maintenance. These are:

- (1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance as well as all financial obligations imposed on the parties as a result of the dissolution of marriage;

- (2) the needs of each party;

- (3) the realistic 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) any impairment of the realistic present or future earning capacity of the party against whom maintenance is sought;



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- (6) 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;

- (6.1) the effect of any parental responsibility arrangements and its effect on a party's ability to seek or maintain employment;

- (7) the standard of living established during the marriage;

- (8) the duration of the marriage;

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

- (10) all sources of public and private income including, without limitation, disability and retirement income;

- (11) the tax consequences to each party;

- (12) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;

- (13) any valid agreement of the parties; and

- (14) any other factor that the court expressly finds to be just and equitable.

IN THE NEWS

Amy N. Schiller's article "Nevada gets tough even by UFC standards" was published in the Chicago Daily Law Bulletin. Her article "Despite new state law, child support can remain tricky for pro athlete" was also published in the Chicago Daily Law Bulletin.

Evan D. Whitfield was profiled in the Chicago Daily Law Bulletin for the section "Generation Esq."

Michele M. Jochner presented "Key Considerations for Appealing Interlocutory Orders" at the Second Biennial Illinois Appellate Practice Seminar hosted by The Illinois State Bar Association on October 18, 2018.

Schiller DuCanto & Fleck hosted the DePaul Latino Law Student Association Alumni event on November 1st, 2018.

Jennifer L. Dillon was recognized in the Irish Legal 100.

Brett M. Buckley's article "Stock market's wild ride can make divorce allocations a bit tricky" was published in the Chicago Daily Law Bulletin.

Kimberly A. Cook was named one of Chicago's 2018 Notable Minority Lawyers by Crain's Chicago. Kim was interviewed for the article "New year, stale marriage? Divorce Day brings surge in filings" published in the Chicago Tribune. She was also interviewed for the article "Kimberly Cook on family law, oversharing and all things Beyoncé" that was published in Super Lawyers Magazine.

Claire R. McKenzie was interviewed for the article "Get divorced before the new year or lose alimony tax deduction for as long as you both shall live" published in the Chicago Tribune. She was also profiled in Leading Lawyers Magazine for the article "Reaching the Family Law Field by Bucking Conventional Wisdom."

Donald C. Schiller's article "Are changes to state's pre-marital agreement law in the wind?" was published in the Chicago Daily Law Bulletin. His article "When CEOs Divorce" was also published on the Schiller DuCanto & Fleck blog.

Gregory C. Maksimuk was voted onto the Board of Directors for CASA of DuPage County in 2019.

Schiller DuCanto & Fleck had 37 lawyers selected as Super Lawyers and Rising Stars by Super Lawyers Magazine 2019. Meighan Harmon and Anita Ventrelli were selected to the Top 50 Women Lawyers in Illinois across all areas of law and Jason Sposeep was selected to the Top 100 Lawyers in Illinois across all areas of law.

Adam M. Zebelian was interviewed for the Chicago Daily Law Bulletin's article "Busy Lawyer Finds Time for Others." In addition, Adam was installed as the Secretary of the Lesbian and Gay Bar Association's Board.

Brittany Heitz Goodlett was promoted to Partner.

Jason N. Sposeep was promoted to Senior Partner. Jason was also interviewed for the podcast "The Collaborative Process - When it Just Works!" for the Collaborative Resolution Project.

Michelle Lawless' article "Five Ways to Build Strong Client Relationships from Day One" was published on Attorney At Work.

Meighan Harmon was profiled for the article "Harmon named Schiller DuCanto & Fleck's new Managing Partner" published in the Chicago Daily Law Bulletin.

Kara Francis-Berry presented "The 2019 Changes to the Maintenance Statute" to The Chicago Bar Association YLS Family Law Committee on March 6, 2019.

Anita Ventrelli was a panelist for the presentation "The Pathway to Partnership" hosted by The Hispanic Lawyers Association of Illinois' Latina Lawyer's Commission (LLC) together with the Hispanic National Bar Association.

The materials contained in this Newsletter are intended for general informational purposes only and not to be construed as legal advice or opinion.

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