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# JUDICIAL DISCRETION V. PREDICTABLE OUTCOMES: A REVIEW OF THE 2016 AMENDMENTS TO THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT

DAVID E. BRADEN\*

## INTRODUCTION

Determining what is in a child's best interests is a regular function of family law courts.<sup>1</sup> Yet determining what is in a child's best interests is not a purely objective exercise.<sup>2</sup> Absent clear rules, decision-makers—such as judges—often retain significant discretion to decide important issues.<sup>3</sup> The challenge, in general, with broad judicial discretion is that it often produces unpredictable outcomes.<sup>4</sup> Consider the following cases.

In *In re Marriage of Johnson*, the employers of Joan Johnson's husband informed him that they would terminate him unless he accepted a transfer to Arizona.<sup>5</sup> Consequently, Joan petitioned the court to remove her children from a previous marriage from Illinois to Arizona to live with her new husband.<sup>6</sup> Joan's ex-husband, Joseph Pisowicz, argued against removal of the parties' children to Arizona, in part, because removal would substantially decrease his parenting time with the children.<sup>7</sup> At the time of their divorce, Joseph had been awarded

\* J.D., May 2017, Chicago-Kent College of Law, Illinois Institute of Technology. The author would like to thank Professor Katharine K. Baker for her invaluable insights and suggestions on this comment, Beth Fox for her editorial assistance, and Chicago-Kent Research Librarian Scott Vanderlin for his help in navigating legislative history. This paper refers to the amendments to the Illinois Marriage and Dissolution of Marriage Act (IMDMA) as the "2016 Amendments" due to their January 1, 2016 effective date.

1. See generally Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2230 (1991).

2. "[This] standard tells courts to do what is best for a child, as if what is best could be determined and was within their power to achieve. In fact, what is best for children depends upon values and norms upon which reasonable people differ." PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 2 (AM. LAW INST., Tentative Draft No. 3, 1998).

3. *Id.*

4. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 1, topic 1, Current Legal Context (AM. LAW INST. 2002) [hereinafter ALI PRINCIPLES].

5. *In re Marriage of Johnson*, 815 N.E.2d 1283, 1284 (Ill. App. Ct. 2004).

6. *Id.*

7. *Id.* at 1286.

parenting time with the children “every Wednesday and alternate Tuesdays, weekends, and holidays.”<sup>8</sup>

The *Johnson* trial court denied Joan’s petition for removal.<sup>9</sup> The trial court found, in part, that Joseph was a very involved parent and noted a “strong bond” between him and his children.<sup>10</sup> Joseph substantially exercised all of his visitation rights, attended the children’s sporting events, recitals, and parent-teacher conferences.<sup>11</sup> The Illinois Appellate Court, Second District affirmed the trial court, reasoning, in part, that “[Joseph] is a parent who possesses a unique and strong bond with his children; a bond that, if broken, could be detrimental to the children.”<sup>12</sup>

In contrast, in *In re Marriage of Bhati & Singh*, the Illinois Appellate Court, First District reversed the trial court’s denial of a mother’s petition to remove her daughter from Illinois.<sup>13</sup> In *Bhati*, Meeta Bhati petitioned the court to remove her daughter from a previous marriage from Illinois to North Carolina in order to live with her fiancé.<sup>14</sup> Meeta’s ex-husband, Ajay Singh, was originally awarded parenting time “every other weekend from Thursday night to Monday morning and every other Wednesday night to Thursday morning.”<sup>15</sup>

The First District noted that while the trial court found Ajay’s parenting time would be “substantially impair[ed]” by removal, the parents could still establish a “realistic and reasonable” parenting schedule.<sup>16</sup> The First District reasoned, “[i]f removal results in an enhanced quality of life for Meeta and [the child], then the fact that Ajay’s visitation with [the child] would be diminished, should not overcome the other benefits to [the child].”<sup>17</sup>

Despite the factual similarities between the *Johnson* and *Bhati & Singh* cases, the courts arrived at different conclusions as to what the outcome should be for the children’s best interests. Such differences in outcomes make litigation difficult to predict.

8. *Id.* at 1284.

9. *Id.* at 1288.

10. *Id.* at 1289.

11. *Id.*

12. *Id.* at 1292.

13. *In re Marriage of Bhati & Singh*, 920 N.E.2d 1147, 1156 (Ill. App. Ct. 2009).

14. *Id.* at 1150.

15. *Id.* at 1149.

16. *Id.* at 1156.

17. *Id.*

Predictable outcomes, particularly in the family law context, provide several benefits. First, predictable outcomes reduce litigation by enabling parties to predetermine their legal obligations<sup>18</sup> as well as to negotiate and plan for the future based on common expectations of court outcomes.<sup>19</sup> Second, predictable outcomes reduce “strategic and manipulative behavior by parents” because they know in advance how a court will rule.<sup>20</sup> Third, predictable outcomes instill in the parties a sentiment that the court’s ruling was just because cases with similar fact patterns would yield consistent results.<sup>21</sup>

In 2015, the Illinois General Assembly substantially amended the Illinois Marriage and Dissolution of Marriage Act (IMDMA).<sup>22</sup> The primary reasons expressed for amending the IMDMA were to reduce litigation and adversarial proceedings.<sup>23</sup>

This Comment evaluates how the 2016 amendments advance the stated legislative goals of increasing predictable outcomes and minimizing litigation while maintaining flexibility for fact-specific decision-making through judicial discretion. The Comment proceeds as follows. Part I recounts the history of marriage and divorce law in Illinois, particularly the 2016 amendments to the IMDMA. Part II describes the 2016 amendments in the traditional categories of family law: 1) maintenance (formerly known as alimony), 2) property division, 3) child support, and 4) allocation of parental responsibilities (formerly known as child custody). Lastly, Part III analyzes the impact of the IMDMA amendments.

## I. A CHANGING SOCIETY AND PUBLIC ACT 99-90 LEGISLATIVE HISTORY

In the past forty years, the Illinois legislature has comprehensively amended its marriage and divorce laws twice: first in 1977 when it adopted the Illinois Marriage and Dissolution of Marriage Act (IMDMA),<sup>24</sup> and more recently in 2015 when it passed the most recent comprehensive amendments.<sup>25</sup>

18. ALI PRINCIPLES, *supra* note 4, § 4.02.

19. Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1556 (1984).

20. ALI PRINCIPLES, *supra* note 4, ch. 1, topic 1, Current Legal Context.

21. Glendon, *supra* note 19, at 1556.

22. Act of July 21, 2015, 2015 Ill. Laws Pub. Act 99-90 (codified as 750 ILL. COMP. STAT. ANN. 5/101–802, eff. Jan. 1, 2016).

23. 99th Gen. Assembly, House Transcription Debate 27 (May 20, 2015, Ill.) (statement of Rep. Burke on S.B. 57).

24. Act of Sept. 22, 1977, 1977 Ill. Laws 2675. See Marshall J. Auerbach, *An Introduction to the New Illinois Marriage and Dissolution of Marriage Act*, 66 ILL. B.J. 132, 132 (1977) (finding the

From 1977 to 2015, the IMDMA had undergone only piecemeal amendments. However, since 1977, family dynamics, composition, and roles have continued to change significantly.<sup>26</sup> It is beyond the scope of this Comment to analyze all of these changes, but this Comment will describe some non-exhaustive examples of such changes below.<sup>27</sup>

*Fewer people are getting married.* In 1970, 66.8% of men aged fifteen years or older and 61.9% of women the same age were married.<sup>28</sup> In contrast, in 2016, 53.4% of men aged fifteen years or older and 50.8% of women the same age were married.<sup>29</sup> Moreover, in 1977, over 64% of all adults over seventeen years old lived with a spouse.<sup>30</sup> In 2016, nearly half of all adults over seventeen years old did *not* live with a spouse.<sup>31</sup>

*People are delaying marriage.* The median age at first marriage in 1977 was 24.0 years old for men and 21.6 years for women.<sup>32</sup> The me-

IMDMA “represents the first major revision of this kind [to Illinois marriage and divorce laws] since 1874”).

25. Act of July 21, 2015, 2015 Ill. Laws Pub. Act 99-90 (S.B. 57).

26. For example, in November 2013, Illinois passed the Religious Freedom and Marriage Fairness Act (RFMFA), which provided same-sex marriage for gay and lesbian couples. 2013 Ill. Laws 7141, 7141-146 (S.B. 10, enacted as Pub. Act 98-597). In June 2015 the Supreme Court of the United States recognized that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015). While RFMFA and the Supreme Court’s *Obergefell* ruling are outside the scope of this paper, the author notes that the legal institution of civil marriage has expanded to include both same- and opposite-sex couples. Due to the historical nature of this paper, however, the author generally utilizes heteronormative terms pertaining to husbands and wives when discussing historical family law concepts since same-sex marriage did not legally exist until very recently. For a fuller discussion of the path to marriage equality, see generally, MARC SOLOMON, *WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON* (2014); MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW* 94-166 (2010).

27. See generally Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 322-26 (2012).

28. U.S. Census Bureau, *Table MS-1. Marital Status of the Population 15 Years Old and Over by Sex, Race and Hispanic Origin: 1950 to Present*, U.S. DEP’T OF COMMERCE, <https://www.census.gov/hhes/families/data/marital.html> (released Nov. 2016).

29. *Id.*

30. U.S. Census Bureau, *Table AD-3. Living Arrangements of Adults 18 and Over, 1967 to Present*, U.S. DEP’T OF COMMERCE, <https://www.census.gov/hhes/families/data/adults.html> (released Nov. 2016).

31. *Id.*

32. U.S. Census Bureau, *Table MS-2. Estimated Median Age at First Marriage, by Sex: 1890 to Present*, U.S. DEP’T OF COMMERCE, <https://www.census.gov/hhes/families/data/marital.html> (released Nov. 2016).

dian age at first marriage in 2016 was 29.5 years old for men and 27.4 years for women.<sup>33</sup>

*More women are working at least part-time outside of the home.* The percentage of women in the labor force grew from 48.4% in 1977 to 57.0% in 2014.<sup>34</sup> Moreover, the percentage of women with children under eighteen years old who participated in the labor force grew from 50.8% in 1977 to 70.8% in 2014.<sup>35</sup>

*Women's financial earnings contribute more significantly to household income.* The percentage of married couples where the husband was the only wage-earner decreased from 27.3% in 1977 to 19.0% in 2013.<sup>36</sup> Wives' earnings as a percentage of family income increased from 26.1% in 1977 to 37.3% in 2013.<sup>37</sup> The female-to-male earnings ratio has increased from 0.589 in 1977 to 0.796 in 2015.<sup>38</sup>

In 2008, the Illinois House of Representatives passed a resolution to create a bipartisan Illinois Family Law Study Committee (IFLSC) to engage family law practitioners, agencies, and experts in "a thorough and comprehensive review of the Act to improve and update it in the context of these changes in the last thirty years."<sup>39</sup> After several years of hearings and debate, the IFLSC recommended legislation to the Governor and Illinois General Assembly.<sup>40</sup> On July 21, 2015, Governor Bruce Rauner signed Illinois Senate Bill 57 into law as Public Act 99-90, effective January 1, 2016.<sup>41</sup> This Comment will discuss the IFLSC's specific recommendations in Parts II and III as applicable.<sup>42</sup>

33. *Id.*

34. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BLS REPORTS: WOMEN IN THE LABOR FORCE: A DATABOOK 1, 13-14 (2015).

35. *Id.* at 25.

36. *Id.* at 84-85. The percentage of married couples where both husband and wife were wage earners in 1977 was 48.8% and 53.0% in 2013. *Id.*

37. *Id.* at 86.

38. BERNADETTE D. PROCTOR ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REP.: INCOME AND POVERTY IN THE UNITED STATES: 2015 1, 41 (Sept. 2016).

39. H.R. 1101, 95th Gen. Assemb., Reg. Sess. (Ill. 2008), <http://www.ilga.gov/legislation/95/HR/PDF/09500HR1101lv.pdf>.

40. The IFLSC's recommendations resulted in three state bills: House Bill 6192 (H.B. 6192, 97th Gen. Assemb., Reg. Sess. (Ill. 2012)), House Bill 1452 (H.B. 1452, 98th Gen. Assemb., Reg. Sess. (Ill. 2013)), and Senate Bill 57 (S.B. 57, 99th Gen. Assemb., Reg. Sess. (Ill. 2015)). In general, the IFLSC did not publish committee reports or meeting minutes. Instead, there are several memos from IFLSC chair André Katz that have been published on Mr. Katz's law firm website. *See* P. André Katz, *Illinois Family Law Study Committee Memoranda*, KATZ & STEFANI (Apr. 13, 2013), <http://katzstefani.com/news/illinois-family-law-study-committee-memoranda>.

41. Act of July 21, 2015, 2015 Ill. Laws Pub. Act 99-90 (S.B. 57); 5 ILL. COMP. STAT. ANN. 75/1 (West 2016).

42. There is very little actual legislative history for Public Act 99-90 or its predecessor bills. This paper cites Illinois General Assembly transcripts and journals available at the time of writing.

Public Act 99-90 amends, repeals, and replaces substantial portions of the IMDMA.<sup>43</sup> The amended act retains its title, IMDMA.<sup>44</sup> Some of the most significant changes include: 1) eliminating every ground for divorce except for irreconcilable differences;<sup>45</sup> 2) requiring courts to enter judgments no later than sixty days after the close of proofs;<sup>46</sup> 3) requiring courts to provide written rationales for maintenance awards and property divisions;<sup>47</sup> 4) repealing the custody provisions in favor of a new concept legislatively termed, “allocation of parental responsibilities;”<sup>48</sup> 5) replacing removal provisions with “relocation” criteria;<sup>49</sup> and 6) abolishing heartbalm statutes.<sup>50</sup> Underscoring these changes was a commitment to predictable outcomes and a more efficient divorce process—both of which are reflected in the legislative history of House Bill 1452, Senate Bill 57, and the text of the new statute itself as described below.<sup>51</sup>

During floor debate of House Bill 1452, bill sponsor Representative Kelly Burke stated that the bill provided “a comprehensive ap-

Since enacting Public Act 99-90, the Illinois legislature has passed several additional bills amending the IMDMA, including House Bill 3898 and House Bill 3982. *See* Act of Aug. 12, 2016, 2016 Ill. Laws Pub. Act 99-763 (eff. Jan. 1, 2017); Act of August 12, 2016, 2016 Ill. Laws Pub. Act 99-764 (eff. July 1, 2017). This paper does not examine the impact of the changes of these bills on the IMDMA except as otherwise specified.

43. *E.g.*, Matthew Hector, *Family Law Rewrite Goes to the Governor*, 103 ILL. B.J., July 2015, at 12.

44. Public Act 99-90 does not amend section 101 of the IMDMA, which provides the title of the Act.

45. § 401(a), 2015 Ill. Laws Pub. Act 99-90.

46. *Id.* § 413(a).

47. *Id.* §§ 503(a), 510(c-5).

48. *Id.* § 600. The new section 600 of the IMDMA provides, in part:

(d) “Parental responsibilities” means both parenting time and significant decision-making responsibilities with respect to a child.

(e) “Parenting time” means the time during which a parent is responsible for exercising caretaking functions and non-significant decision-making responsibilities with respect to the child.

(k) “Significant decision-making” means deciding issues of long-term importance in the life of a child. *Id.*

49. *Id.* §§ 600(g), 609.2.

50. Heartbalm statutes were acts that restricted a party’s ability to recover “monetary damages as solace for the emotional trauma occasioned by a loss of love and relationship.” *Heartbalm Statute*, BLACK’S LAW DICTIONARY (10th ed. 2014); Act of July 21, 2015, secs. 1-10, 1-15, 1-20, 1-25, 1-30, 1-35, §§ 5/7.1, 15/10.1, 50/7.1, 2015 Ill. Laws Pub. Act 99-90 (abolishing alienation of affections, breach of promise, and criminal conversation acts).

51. In January 2013, the IFLSC submitted revised recommendations based on the debate of House Bill 6192. These recommendations lead to House Bill 1452. *See* Memorandum from P. André Katz, Chairman, Ill. Family Law Study Comm. to Justin Cox, Asst. Counsel, Office of the Ill. Speaker of the House (Jan. 29, 2013) [hereinafter IFLSC Jan. 2013 Memo], <http://www.katzstefani.com/sites/katzstefani.com/files/iflsc-memo-012913.pdf>. Although House Bill 1452 did not become law, its provisions were substantially included in Senate Bill 57. As such, House Bill 1452 legislative history is relevant to Senate Bill 57’s enactment.

proach to improve the legal process of divorce and provide more efficient, fair divorces while better protecting our children.”<sup>52</sup> Summarizing the primary ways in which House Bill 1452 improves the IMDMA, Representative Burke remarked that the bill “focuses on reducing litigation by removing grounds for divorce,” “helps litigation [because] it provides [that] judges must issue decision [*sic*] within 60 days of closing of proofs of the case,” and “it sets a framework for a more interactive role with parents in determining a parenting plan for their children during their divorce.”<sup>53</sup> During final debate of Senate Bill 57 in the House, Representative Burke reiterated, “[T]he changes [to the IMDMA] are intended, in the vast majority of cases, to reduce conflict and reduce litigation and make the process less adversarial, especially where the custody and visitation and parenting time of children is involved.”<sup>54</sup>

The amended purposes of the IMDMA now explicitly identify predictable outcomes as a goal of the statute. Section 102 of the IMDMA now provides, in pertinent part, to “ensure predictable decision-making for the care of children and for the allocation of parenting time and other parental responsibilities, and avoid prolonged uncertainty by expeditiously resolving issues involving children.”<sup>55</sup>

## II. SELECTED AMENDED PROVISIONS OF THE IMDMA

Public Act 99-90 reaches nearly every provision of the IMDMA.<sup>56</sup> It is outside the scope of this Comment to identify and analyze every amendment to the IMDMA. However, the sections below on maintenance, property division, child support, and allocation of parental responsibilities identify substantial changes to the IMDMA.<sup>57</sup>

### *A. Maintenance*

The majority of jurisdictions have adopted spousal support statutes that enumerate numerous factors a judge should consider in determining whether to award maintenance, formerly known in Illinois

52. 98th Gen. Assembly, House Transcription Debate 8 (Apr. 10, 2014, Ill.) (statement of Rep. Burke).

53. *Id.* at 9.

54. 99th Gen. Assembly, House Transcription Debate 27 (May 20, 2015, Ill.) (statement of Rep. Burke on S.B. 57).

55. 2015 Ill. Laws Pub. Act 99-90 § 102 (emphasis added).

56. 2015 Ill. Laws Pub. Act 99-90.

57. See *supra* note 42.



as alimony.<sup>58</sup> Many statutes, however, do not dictate what the amount or the duration of a maintenance award should be.<sup>59</sup> These long statutory factor lists, coupled with the absence of guidance regarding the amount or duration of maintenance awards, often yield inconsistent and, therefore, unpredictable outcomes.<sup>60</sup> In other words, parties with similar factual circumstances could experience widely varying outcomes due to different judges' discretion and value judgments.

For example, in *In re Marriage of McNeeley*, the parties were married for thirty-two years.<sup>61</sup> Before the marriage, Doris McNeeley was employed for about two years as a radio station traffic manager, but she did not work throughout the thirty-two year marriage and now suffered from arthritis.<sup>62</sup> The trial court awarded Doris permanent maintenance, in part, because she had "no opportunity for employment . . . in the foreseeable future" since she had not worked in over thirty years.<sup>63</sup> However, the Illinois Appellate Court, First District reversed, in part, because Doris was "only 53 years old" and that her limited employment background did not prevent her from finding a job.<sup>64</sup>

In contrast, the Illinois Appellate Court, Fourth District found that the wife in *In re Marriage of Kerber* should receive permanent maintenance under similar circumstances as the McNeeleys.<sup>65</sup> The Kerbers were married for nearly thirty years.<sup>66</sup> During the marriage, Voncella Kerber quit her job as a dental assistant to raise the parties' children and did not work again until the parties separated.<sup>67</sup> The trial court, in part, awarded Voncella rehabilitative maintenance for one year.<sup>68</sup> The Fourth District modified the trial court's award from rehabilitative to

58. *E.g.*, FLA. STAT. ANN. § 61.08(2) (West, Westlaw through 2015 First Reg. Sess.); N.J. STAT. ANN. § 2A:34-23 (West, Westlaw through L.2015, c. 158 and J.R. No. 8).

59. *E.g.*, MINN. STAT. ANN. § 518.552 (West, Westlaw through 2015 First. Spec. Sess.); WASH. REV. CODE ANN. § 26.09.090 (West, Westlaw through 2105 Reg. and Spec. Sess.).

60. Act Concerning Guidelines for the Determination of Spousal Maintenance, sec. 1, § 14-10-114, 2013 Colo. Sess. Laws 639 (finding that "[b]ecause the statutes provide little guidance to the court concerning maintenance awards, there has been inconsistency in the amount and term of maintenance awarded in different judicial districts across the state in cases that involve similar factual circumstances.") (codified as amended at COLO. REV. STAT. ANN. § 14-10-114 (2014)); ALI PRINCIPLES, *supra* note 4, § 5.02 cmt. d.

61. *In re Marriage of McNeeley*, 453 N.E.2d 748, 750 (Ill. App. Ct. 1983).

62. *Id.* at 751.

63. *Id.* at 754.

64. *Id.*

65. *In re Marriage of Kerber*, 574 N.E.2d 830, 833 (Ill. App. Ct. 1991).

66. *Id.* at 831.

67. *Id.*

68. *Id.* at 832.

permanent maintenance.<sup>69</sup> The Fourth District reasoned that Voncella should have permanent maintenance, in part, because she stayed home to raise the parties' children during the marriage and would be entering the work force "relatively late in life."<sup>70</sup>

Approximately one year before the Illinois General Assembly passed Public Act 99-90 to comprehensively amend the IMDMA, the General Assembly adopted Public Act 98-961, which substantially amended the maintenance provision within the IMDMA.<sup>71</sup> As will be discussed below in this Section, Public Act 99-90 did not substantially change the provisions found in Public Act 98-961.

Before Public Act 98-961, Illinois's maintenance provision was entirely discretionary and based on numerous factors.<sup>72</sup> Judges, lawyers, and practitioners criticized the law for producing inconsistent outcomes and increasing litigation.<sup>73</sup> The Illinois State Bar Association (ISBA) Family Law Section Council found that "[t]he unintended 'problem' stems from the fact that each and every well intentioned domestic relations judge in each and every case has been forced to independently interpret and give weight to all the listed statutory factors in section 504—with each case starting from scratch!"<sup>74</sup>

In an effort to address these criticisms, the ISBA Family Law Section Council labored for more than three years to craft a solution.<sup>75</sup> The

69. *Id.* at 833.

70. *Id.*

71. Act of Aug. 15, 2014, sec. 5, § 504, 2014 Ill. Laws 4513, 4513–15 (S.B. 3231 enacted as Pub. Act 98-961) (codified as amended at 750 ILL. COMP. STAT. ANN. 5/504, effective Jan. 1, 2015). See author's note on S.B. 3231 in 12 MULLER DAVIS, ET AL., ILL. PRAC., FAM. L. ch. 750 § 5/504, Westlaw (database updated Oct. 2014).

72. Act of Aug. 26, 2011, sec. 5, § 504, 2011 Ill. Laws 11,463, 11,468–69 (S.B. 1824, enacted as Pub. Act 97-608) (codified as amended at 750 ILL. COMP. STAT. ANN. 5/504(a)(1)–(12) (West 2016)). Some of the factors include: the parties' income and property, the parties' present and future earning capacity, the standard of living during the marriage, the length of the marriage, and the parties' ages, physical, and emotional conditions. *Id.*

73. FAMILY LAW SECTION COUNCIL, ILL. STATE BAR ASS'N, ISBA RECOMMENDATIONS FOR AMENDMENTS TO THE MAINTENANCE PROVISIONS OF THE IMDMA 5 (2012) [hereinafter ISBA RECOMMENDATIONS] ("In Illinois, awards of maintenance have become increasingly and disturbingly inconsistent. Even when facts and circumstances are remarkably similar, maintenance awards vary widely and unpredictably—from case to case, courtroom to courtroom, county to county, region to region."); David H. Hopkins, *New Spousal Support Guidelines for Divorcing Couples in Illinois*, 58 FAM. L. (ILL. ST. B. ASS'N), Oct. 2014, at 5 ("Judicial inconsistency and unpredictability . . . make it difficult for attorneys to offer and accept settlement proposals on maintenance issues. The inevitable result has been excessive litigation, escalating legal fees, crowded court dockets, frustrated attorneys, and upset clients.")

74. ISBA RECOMMENDATIONS, *supra* note 73, at 5.

75. 98th Gen. Assembly, House Transcription Debate (May 20, 2014, Ill.) (statement of Rep. Sandack); Mark S. Mathewson, *Spousal Maintenance Guidelines Become Law in Illinois*, 102 ILL. B.J.

ISBA borrowed significantly from the recommendations of the American Academy of Matrimonial Lawyers' maintenance guidelines.<sup>76</sup> The ISBA's recommendations to adopt maintenance guidelines resulted in Illinois Senate Bill 3231,<sup>77</sup> which was adopted as Public Act 98-961.<sup>78</sup>

The ISBA Family Law Section Council's labor on the maintenance provision coincided with the IFLSC's efforts to amend comprehensively the IMDMA.<sup>79</sup> Although the IFLSC and ISBA approached maintenance reform differently,<sup>80</sup> the ISBA's efforts on the maintenance provision should be viewed as part of the same legislative efforts to increase predictable outcomes and reduce litigation.

Public Act 98-961 substantially amends the IMDMA maintenance provision by adopting maintenance guidelines for parties with combined gross incomes of less than \$250,000.<sup>81</sup> For parties with a com-

418 (2014). For a more thorough background on the ISBA Family Law Section Council's legislative drafting process, see Hopkins, *supra* note 73, at 5.

76. ISBA RECOMMENDATIONS, *supra* note 73, at 5. See AM. ACAD. OF MATRIMONIAL LAWYERS, REPORT OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS ON CONSIDERATIONS WHEN DETERMINING ALIMONY, SPOUSAL SUPPORT OR MAINTENANCE 4 (2007); Hopkins, *supra* note 73, at 5.

77. S.B. 3231, 98th Gen. Assemb., Reg. Sess., (Ill. 2014) (codified as amended at 750 ILL. COMP. STAT. ANN. 5/504, effective Jan. 1, 2015). See 98th Gen. Assembly, House Transcription Debate 100-01 (Ill. May 20, 2014, Ill.) (statement of Rep. Sandack) ("The current state of the law has 12 factors under 504 [of] the Act. This law, however, has become unmanageable. Judges have told us it's led to inconsistent awards.").

78. § 504, 2014 Ill. Laws 4513, 4513.

79. See Richard W. Zuckerman, *Maintenance Guidelines: The Why, The How, The Future*, at 2-3 (Nov. 7, 2014),

[https://peoriabar.org/sites/default/files/PART%20I\\_The%20Why,%20the%20How,%20the%20Future%20by%20RWZ.pdf](https://peoriabar.org/sites/default/files/PART%20I_The%20Why,%20the%20How,%20the%20Future%20by%20RWZ.pdf). Note: Mr. Zuckerman was a member of the IFLSC. See Janan Hanna, *Family Law Rewrite Still Brewing in the General Assembly*, 102 ILL. B.J. 153, 165 (2015).

80. The IFLSC pursued modest changes to the maintenance provision by amending the discretionary factors and codifying rehabilitative and permanent maintenance. Memorandum from P. André Katz, Chairman, Ill. Family Law Study Comm., on Recommendations for Section 500 to the Legislative Reference Bureau 10 (Mar. 14, 2011) [hereinafter IFLSC Sec. 500 Memo], <http://www.katzstefani.com/sites/katzstefani.com/files/memo500.pdf>. The ISBA pursued more substantial changes by adopting maintenance guidelines. See Hopkins, *supra* note 73, at 5; Zuckerman, *supra* note 79, at 2-3.

81. § 504(b-1), 2014 Ill. Laws at 4514. The new Section 504(b-1) of the IMDMA provides: (b-1) Amount and duration of maintenance. If the court determines that a maintenance award is appropriate, the court shall order maintenance in accordance with either paragraph (1) or (2) of this subsection (b-1):

(1) Maintenance award in accordance with guidelines. In situations when the combined gross income of the parties is less than \$250,000 and no multiple family situation exists, maintenance payable after the date the parties' marriage is dissolved shall be in accordance with subparagraphs (A) and (B) of this paragraph (1), unless the court makes a finding that the application of the guidelines would be inappropriate.

(A) The amount of maintenance under this paragraph (1) shall be calculated by taking 30% of the payor's gross income minus 20% of the payee's gross income. The amount calculated as maintenance, however, when added to the gross income of the payee, may not result in the payee receiving an amount that is in excess of 40% of the combined gross income of the parties.

bined gross income of less than \$250,000 and no other family support obligations, the guideline maintenance amount is 30% of the payor's gross income less 20% of the payee's gross income.<sup>82</sup> The statute caps this guideline amount at 40% of the parties' combined gross income.<sup>83</sup> The statute then provides for the duration of the maintenance award by multiplying the length of the marriage in years by a prescribed factor.<sup>84</sup> For any maintenance awards that fall outside of the maintenance guidelines, the court retains discretion to award maintenance based on the factors delineated in Section 504(a).<sup>85</sup>

Public Act 98-961 reflects an approach to maintenance that retains judicial discretion while incorporating guidelines that prescribe predictable outcomes. Section 504(a) of the IMDMA provides that a judge must still make an initial determination regarding whether maintenance is even appropriate.<sup>86</sup> Judges still consider myriad factors in making such determinations.<sup>87</sup> Once a judge determines that maintenance is appropriate, the statutory guidelines only apply to parties whose combined gross income does not exceed \$250,000 and who do not have prior child or spousal support obligations.<sup>88</sup> The rest is meant to be simple math: first, subtract a percentage of the payee's gross income from the payor's gross income to determine the award

(B) The duration of an award under this paragraph (1) shall be calculated by multiplying the length of the marriage by whichever of the following factors applies: 0-5 years (.20); 5-10 years (.40); 10-15 years (.60); or 15-20 years (.80). For a marriage of 20 or more years, the court, in its discretion, shall order either permanent maintenance or maintenance for a period equal to the length of the marriage.

(2) Maintenance award not in accordance with guidelines. Any non-guidelines award of maintenance shall be made after the court's consideration of all relevant factors set forth in subsection (a) of this Section.

82. *Id.* § 504(b-1)(1)(A).

83. *Id.* Suppose the payor's annual gross income is \$100,000 and the payee's annual gross income is \$50,000 for a combined gross income of \$150,000. The \$150,000 combined gross income falls within the scope of the maintenance guidelines. The initial annual maintenance amount before applying the cap would be \$20,000 ( $\$100,000 \times 0.3 = \$30,000$ ;  $\$50,000 \times 0.2 = \$10,000$ ;  $\$30,000 - \$10,000 = \$20,000$ ). However, \$20,000, when added to the payee's gross income, would equal \$70,000, which is greater than the 40% cap on combined gross income ( $\$150,000 \times 0.4 = \$60,000$ ) by \$10,000. So, the payee would only be entitled to \$10,000 annual maintenance under the guidelines.

84. *Id.* § 504(b-1)(1)(B). For example, the duration of a maintenance award for a fourteen-year marriage would last 8.4 years ( $14 \text{ years} \times 0.6$ ).

85. § 504(b-1)(2), 2014 Ill. Laws at 4514.

86. § 504(a), 2014 Ill. Laws at 4513.

87. *Id.* at 4513-14.

88. § 504(b-1)(1), 2014 Ill. Laws at 4514.

amount; second, multiply the length of the marriage in years by a statutorily prescribed factor to determine the duration of maintenance.<sup>89</sup>

At the time of this writing, Colorado,<sup>90</sup> Illinois,<sup>91</sup> Massachusetts,<sup>92</sup> New York,<sup>93</sup> and Pennsylvania<sup>94</sup> are the only states to have statutorily adopted maintenance guidelines that utilize *formulas* to determine the amount *and* duration of a maintenance award. Multiple other sub-state jurisdictions also have adopted maintenance guidelines that employ formulas.<sup>95</sup>

While not adopting maintenance guidelines with elaborate formula tables like Colorado<sup>96</sup> or Pennsylvania,<sup>97</sup> Texas also has adopted maintenance guidelines. The Texas guidelines restrict who qualifies for maintenance,<sup>98</sup> limit the duration of maintenance based on length of marriage,<sup>99</sup> and cap maintenance award amounts at the lesser of \$5,000 or 20% of the contributing spouse's gross monthly income.<sup>100</sup>

Similarly, many states also have enacted maintenance provisions intended to reduce litigation by restricting *who* qualifies for maintenance. Thirteen states (over 25%) restrict spouses statutorily from receiving maintenance at all unless they can demonstrate that they are unable to be self-supporting or lack sufficient property to provide for

89. § 504(b-1)(1)(A)-(B), 2014 Ill. Laws at 4514. This is of course an oversimplification of the calculation, but it serves for purposes of illustration.

90. Act Concerning Guidelines for the Determination of Spousal Maintenance, sec. 1, § 14-10-114(3)(b), 2013 Colo. Sess. Laws 639 (codified as amended at COLO. REV. STAT. ANN. § 14-10-114(3)(b), eff. Jan. 1, 2014).

91. § 504, 2014 Ill. Laws at 4513-14; see author's note on S.B. 3231 in DAVIS, ET AL., *supra* note 71, ch. 750 § 5/504.

92. MASS. GEN. LAWS ANN. Ch. 208, §§ 48, 49, 53 (West 2014).

93. Act of Sept. 25, 2015, sec. 4, § 236, pt. B(6), 2015 N.Y. Sess. Laws (A.B. 7645) (McKinney) (codified at N.Y. DOM. REL. LAW § 236 pt. B, eff. Jan. 23, 2016).

94. Act of Oct. 30, 1985, sec. 1, § 4322, 1985 Pa. Laws 264 (H.B. 98) (codified as amended at 23 PA. STAT. AND CONS. STAT. ANN. § 4322 (West 2014)). See also PA. R. CIV. P. 1910.16-4, Part IV (West 2014).

95. Multiple county courts provide for spousal support formulas within their jurisdictions' local rules. *E.g.*, Santa Clara Cty., Cal. Super. Ct. Fam. R. 3(C) & Fam. App. (West 2014); Cullum v. Cullum, 160 P.3d 231, 234-35 (Ariz. Ct. App. 2007) (describing the Maricopa County Superior Court spousal maintenance guidelines). See Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIMONIAL LAW. 61, 73-77 (2008) (reviewing multiple local jurisdictions that have experimented with, adopted, and/or proposed use of maintenance guidelines).

96. Act Concerning Guidelines for the Determination of Spousal Maintenance, sec. 1, § 14-10-114(3)(b), 2013 Colo. Sess. Laws 639 (codified as amended at COLO. REV. STAT. ANN. § 14-10-114(3)(b), eff. Jan. 1, 2014).

97. PA. R. CIV. P. 1910.16-4, Part IV (West, Westlaw through Oct. 15, 2015).

98. TEX. FAM. CODE ANN. § 8.051 (West, Westlaw through 2015 Reg. Sess.).

99. *Id.* § 8.054.

100. *Id.* § 8.055.

their reasonable needs—even after distributions from the court in dissolution of marriage proceedings.<sup>101</sup> Other states have elected to reduce litigation by prohibiting or limiting the award of maintenance to spouses of short-duration marriages.<sup>102</sup> Furthermore, some states have restricted the amount and duration of maintenance awards by providing numerous categories of alimony or maintenance that serve different purposes, many of which dictate short-term support.<sup>103</sup> In this manner, many states have acted to reduce maintenance-based litigation—with a large number of states opting to prevent parties from being eligible to receive maintenance rather than prescribing amounts and durations for awards. Like the other states' reform efforts, the Illinois statute should reduce litigation. The 2016 amendments clarify the ambiguities found in Public Act 98-961 by replacing overlapping brackets of time with specific periods as well as establishing that maintenance is calculated based on the length of the marriage “at the time the action was commenced.”<sup>104</sup> Most couples should easily be able to ascertain their combined gross income, calculate the amount of the award, and calculate the duration without using significant resources or expending time in court. While the amendments of Public Acts 98-961 and 99-90 did not necessarily improve the predictability

101. *E.g.*, ALA. CODE § 30-2-51(a) (West, Westlaw through Act 2015-559); ARIZ. REV. STAT. ANN. § 25-319(A) (Westlaw through 2015 First Legis. Sess.); COLO. REV. STAT. ANN. § 14-10-114(3)(d) (Westlaw 2015 First Reg. Sess.); DEL. CODE ANN. tit. 13, § 1512(b) (Westlaw through 80 Laws 2015, ch. 194); IDAHO CODE ANN. § 32-705(1) (Westlaw through 2015 First Legis. Sess.); IND. CODE ANN. § 31-15-7-2(2) (West, Westlaw through 2015 First Reg. Sess.); KY. REV. STAT. ANN. § 403.200(1) (West, Westlaw through 2015 Reg. Sess.); MINN. STAT. ANN. § 518.552(1) (West, Westlaw through 2015 First Spec. Sess.); MO. ANN. STAT. § 452.335(1) (West, Westlaw through 2015 Veto Sess.); MONT. CODE ANN. § 40-4-203(1) (West, Westlaw through 2015 Sess.); N.H. REV. STAT. ANN. § 458:19(I) (West, Westlaw through 2015 Reg. Sess.); TEX. FAM. CODE ANN. § 8.051 (West, Westlaw through 2015 Reg. Sess.); VT. STAT. ANN. tit. 15, § 752(a) (West, Westlaw through 2015 First Sess.).

102. *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 951-A (West, Westlaw through 2015 First Reg. Sess.) (presuming general support is unavailable to spouses who were married for less than 10 years); N.J. STAT. ANN. § 2A:34–23(c) (West, Westlaw through L.2015, c. 158 and J.R. No. 8) (limiting the duration of maintenance for marriages of less than 20 years not to exceed the length of the marriage).

103. *See, e.g.*, FLA. STAT. ANN. § 61.08 (West, Westlaw through 2015 First Reg. Sess.); S.C. CODE ANN. § 20-3-130 (West, Westlaw through 2015 Reg. Sess.).

104. Act of July 21, 2015, sec. 5-15, § 504(b-1)(1)(B), 2015 Ill. Laws Pub. Act 99-90 (codified at 750 ILL. COMP. STAT. ANN. 5/504(b-1)(1)(B), eff. Jan. 1, 2016). The amended Section 504(b-1)(1)(B) provides in pertinent part:

The duration of an award under this paragraph (1) shall be calculated by multiplying the length of the marriage at the time the action was commenced by whichever of the following factors applies: 5 years or less (.20); more than 5 years but less than 10 years (.40); 10 years or more but less than 15 years (.60); or 15 years or more but less than 20 years (.80). For a marriage of 20 or more years, the court, in its discretion, shall order either permanent maintenance or maintenance for a period equal to the length of the marriage. *Id.*

of whether a judge will determine that maintenance is appropriate in the first place, the guidelines will likely lead to more predictable amounts and duration of maintenance awards. For a discussion of how the maintenance guidelines also may produce more litigation, see *infra* section III.A.

### B. Property Division

In amending section 503 of the IMDMA, the legislature did not depart dramatically from the existing statute.<sup>105</sup> The legislature retained and amended the discretionary factors for allocating and dividing property.<sup>106</sup> It also retained the presumption that property acquired after marriage is marital property and codified the judicially adopted clear and convincing standard for overcoming this marital property presumption.<sup>107</sup> Additionally, the legislature adopted the fair market value standard for valuing assets, which will primarily affect litigation involving valuation of businesses.<sup>108</sup>

The sections below will describe two significant changes to section 503. First, the legislature added a provision to require courts to identify specific factual findings to justify their property classifications and allocations.<sup>109</sup> Second, the legislature empowered judges with the discretion to use financial experts.<sup>110</sup>

#### 1. Specific Factual Findings Required

Contrary to the recommendations of the American Law Institute's ("ALI") *Principles of the Law of Family Dissolution: Analysis and Recom-*

105. IFLSC Sec. 500 Memo, *supra* note 80, at comments to Section 503, p. 6.

106. § 503(a), (d), 2015 Ill. Laws Pub. Act 99-90.

107. *Id.* § 503(b)(1); see IFLSC Sec. 500 Memo, *supra* note 80, at comments to Section 503, p. 7. Public Act 99-763 clarifies some of the statutory language pertaining to the marital property presumption by stating, "The presumption of marital property is overcome . . ." rather than "A spouse may overcome the presumption. . ." Act of Aug. 12, 2016, Sec. 5, § 503(b)(1), 2016 Ill. Laws Pub. Act 99-763 (to be codified at 750 ILCS 5/503(b)(1), eff. Jan. 1, 2017). Just for clarity, the clear and convincing standard only applies to overcoming the presumption that property acquired after the date of marriage is marital. The judicial standard of review for judges' classification and distribution of property was *not* amended by statute and remains an "abuse of discretion" standard pursuant to Illinois case law.

108. § 503(k), 2015 Ill. Laws Pub. Act 99-90. Some courts have permitted asset-based approaches to business valuation. See, e.g., *In re Marriage of Cutler*, 778 N.E.2d 762, 767-68 (Ill. App. Ct. 2002) (finding the husband's asset-based valuation was supported by the evidence whereas the wife's fair market valuation lacked foundation and the trial court's capitalized returns method valuation was improper).

109. § 503(a), 2015 Ill. Laws Pub. Act 99-90.

110. *Id.* § 503(l).

*mendations* (ALI Principles), the Illinois legislature did not adopt an express rebuttable presumption of equal property division.<sup>111</sup> Instead, Public Act 99-90 amended but substantially retained the discretionary factors courts consider when classifying marital and non-marital property.<sup>112</sup>

The relevant text in section 503(d) of the IMDMA, which did not change in the amended IMDMA, states in part, “[The court] shall divide the marital property without regard to marital misconduct in *just proportions* considering all relevant factors.”<sup>113</sup>

Moreover, Public Act 99-90 added a new provision:

The court shall make specific factual findings as to its classification of assets as marital or non-marital property, values, and other factual findings supporting its property award.<sup>114</sup>

The IFLSC recommended this provision to prevent courts from issuing property rulings based on general findings.<sup>115</sup> The IFLSC chairman noted that practitioners and clients found decisions that merely stated general findings—such as using the phrase, “after considering all the facts and circumstances” without identifying specific facts that the court found to be conclusive—were unfair and difficult for appellate courts to review or for litigants to predict outcomes.<sup>116</sup> The IFLSC chairman also asserted that requiring the court to specify factual findings undergirding the court’s property classification and award would likely lead more parties “to comply with a court’s order when they understand why the allocations were made,” as well as improve appellate courts’ abilities to review cases on appeal.<sup>117</sup> For a discussion of how specific factual findings may or may not result in more litigation, see *infra* section III.B.

111. The ALI recommends that states adopt a rebuttable presumption of equal property division in order to generate more predictable outcomes than the current equitable division system does. ALI PRINCIPLES, *supra* note 4, § 4.09 & cmt. a. See also Baker, *supra* note 27, at 334-35.

112. § 503(a)(1)-(8), 2015 Ill. Laws Pub. Act 99-90.

113. *Id.* § 503(d) (emphasis added).

114. *Id.* § 503(a).

115. IFLSC Jan. 2013 Memo, *supra* note 51, at 3.

116. *Id.*; see Hector, *supra* note 43, at 13.

117. Hector, *supra* note 43, at 13.



## 2. May Seek Advice of Financial Experts

Public Act 99-90 created a new provision to enable courts to seek advice from financial experts. The new section 503(*I*) of the IMDMA provides in relevant part:

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.<sup>118</sup>

Paragraph (*I*), which "allow[s] the court to [rely] on independent financial experts where necessary," resembles the provision in section 604(b) of the IMDMA.<sup>119</sup> At the time of writing, there appears to be little other legislative history pertaining to the addition of this section. Since the IFLSC referred to section 604(b) of the IMDMA as the inspiration for the new section 503(*I*), a closer look at section 604(b) is warranted.

Section 604 of the IMDMA provided, in part, that trial courts may "seek the advice of professional personnel . . . on a regular basis."<sup>120</sup> In interpreting section 604 of the IMDMA, courts have found that "[t]he purpose of [section 604] is to make [ ] information available to assist the circuit court, and the expert witness is appointed to protect the interests of minor children regarding issues of custody and visitation."<sup>121</sup>

Following this logic, paragraph (*I*) of section 503 would appear to assist the court in understanding the financial nuances and impact of property division awards on the parties. However, while the 604 custody expert protects the interests of minor children who cannot advocate for themselves in divorce proceedings, it is unlikely courts would impute a similar protective purpose to 503 financial experts. More likely, the provision enables the court to identify a financial expert unaffiliated with either party who would provide independent, unbiased opinions. Such expert advice becomes necessary because so much

118. § 503(*I*), 2015 Ill. Laws Pub. Act 99-90.

119. IFLSC Sec. 500 Memo, *supra* note 80, at comments to Section 503, p. 7.

120. 750 ILL. COMP. STAT. ANN. 5/604(b) (repealed 2015).

121. *In re Marriage of Debra N. and Michael S.*, 2013 IL App (1st) 122145, ¶ 51, 4 N.E.3d 78, 90 (quoting *Johnston v. Weil*, 920 N.E.2d 494, 499 (Ill. App. Ct. 2009)).

of modern divorce litigation centers on valuing and distributing assets and debts.<sup>122</sup>

Unlike some other provisions in the amended IMDMA, the new section 503(l) does not limit judicial discretion but expands it. In situations where there is a battle of the experts or where one party has substantially more resources to litigate and hire experts, the discretionary power of the court to consult an independent financial expert could enable a more equitable result by providing the court with disinterested, unbiased advice. This may not lead to less litigation if one or both of the parties disagree with the court's expert; however, the written advice could provide evidence the court could reference in its newly required specific factual findings. Such expert-based, specific factual findings likely would be difficult to reverse on appeal due to the deferential abuse of discretion standard of review for property awards.<sup>123</sup>

### C. Child Support

The Illinois legislature largely kept section 505 of the IMDMA on child support untouched. While the IFLSC supported Illinois adopting an Income Shares model of child support,<sup>124</sup> the legislature retained Illinois's Percentage of Income model in the 2016 amendments and delayed consideration of a bill adopting an Income Shares model to a future date.<sup>125</sup> The majority of amendments to section 505 substitute the terms "supporting parent" for "non-custodial parent" in order to align section 505 terms with the overhaul of section VI of the IMDMA.<sup>126</sup> The more substantial changes to Illinois's child support provisions transpired in section 513 of the IMDMA. The legislature also

122. See Baker, *supra* note 27, at 347.

123. E.g., *In re Marriage of Polsky*, 899 N.E.2d 454, 462 (Ill. App. Ct. 2008).

124. IFLSC Sec. 500 Memo, *supra* note 80, at 7. States like Illinois that follow the Percentage of Income model for child support calculate the amount of support by using "a simple percentage of the noncustodial parent's income to calculate support orders," often accounting for the number of children to receive support. Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L.Q. 325, 329 (1991). In contrast, states that follow the Income Shares model of child support calculate the amount of support by using "the combined adjusted gross of both parents with deductions for prior support orders, child care, and health insurance costs." *Id.* at 328.

125. Act of July 21, 2015, sec. 5-15, § 505(a), 2015 Ill. Laws Pub. Act 99-90 (codified at 750 ILL. COMP. STAT. ANN. 5/505(a), eff. Jan. 1, 2016). At the time of writing, the Illinois General Assembly passed House Bill 3982, which converts Illinois to an Income Shares model state. Illinois Governor Bruce Rauner signed the bill on August 12, 2016 and the law will become effective on July 1, 2017. See Act of August 12, 2016, sec. 5, § 505(a), 2016 Ill. Laws Pub. Act 99-764 (to be codified at 750 ILL. COMP. STAT. ANN. 5/505(a), eff. July 1, 2017).

126. § 505, 2015 Ill. Laws Pub. Act 99-90; see discussion *infra* section II.D.

added a new section 513.5 to provide for “support for a non-minor child with a disability.”<sup>127</sup>

In part, the amended section 513 of the IMDMA provides the court with authority to require the parties and the child to file Free Application for Federal Student Aid (FAFSA) applications. It also authorizes the court to order the parties “to provide funds for the child [to] pay for up to [five] college applications, the cost of [two] standardized college entrance exams, and” one exam preparatory course.<sup>128</sup> Although seemingly arbitrary and overly involved in minutiae, the increased specificity of these provisions will likely lead to less litigation as parties can increasingly predict and expect which educational expenses the court will order.

Additionally, the new section 513(d) replaces the generic definition of educational expenses found in the former section 513(a)(2) with five enumerated expenses. In general, the new section 513(d) provides for the “actual cost” of post-secondary expenses, housing expenses, medical expenses, and the cost of books.<sup>129</sup> The new section also provides for the student’s reasonable living expenses.<sup>130</sup>

In contrast to the former law, the amended section 513(d) provides that, except for good cause shown, the student’s tuition, fees, and housing expenses cannot exceed that which a student enrolled at the University of Illinois at Urbana-Champaign (U. of I.) would pay.<sup>131</sup> While parties can always agree to pay above the statutory limits, the new price ceilings indexed to expenses at U. of I. limit *the court’s* ability to award full support to non-minor children who would prefer to attend a higher-priced public or private institution, such as the University of Michigan or DePaul University.<sup>132</sup> Such price ceilings have a

127. *Id.* § 513.5.

128. *Id.* § 513(b).

129. *Id.* § 513(d).

130. *Id.*

131. *Id.* Public Act 99-763 clarifies that the law is indexed to “in-state” tuition at U. of I. Act of Aug. 12, 2016, sec. 5, § 513(d)(1), 2016 Ill. Laws Pub. Act 99-763 (to be codified at 750 ILCS 5/503(d)(1), eff. Jan. 1, 2017).

132. The estimated tuition and fees for resident, first-year undergraduate students who entered the University of Illinois at Urbana-Champaign in 2016 is between \$15,698 and \$20,702. Office of Admissions, *Tuition*, U. ILL. (last visited Nov. 17, 2016), <http://admissions.illinois.edu/Invest/tuition>. In contrast, the estimated tuition and fees for non-resident, first-year undergraduate students who entered the College of Literature, Science, and Arts at University of Michigan, a public institution, in 2016 is \$45,410. Office of Undergraduate Admissions, *Costs*, U. MICH. (last visited Nov. 17, 2016), <http://admissions.umich.edu/costs-aid/costs>. Likewise, the estimated tuition and fees for first-year undergraduate students who entered the College of Liberal Arts and Sciences at DePaul University, a private institution in Illinois, in 2016 is \$37,020. Student Financial Accounts, *Tuition Rates 2016-2017*, DEPAUL U. (last

similar effect as maintenance guidelines—the court retains discretion to award educational expenses, but caps the award that the court may order. The specificity of this provision will likely lead to less litigation because parties will be better able to predict how the court will rule since the legislature has identified clear limits. For additional discussion of the effects of the specificity of the amended provisions in section 513, e.g., requiring parents to pay for up to five college applications, see *infra* section 0.0.

Lastly, the new section 513(i) provides that children are not third party beneficiaries to the parties' settlement agreement or judgment of dissolution of marriage and do not have standing to seek contribution to education expenses.<sup>133</sup> This amendment resolves a split of authority between the Illinois district courts.<sup>134</sup> Less litigation should result from this amendment because the legislature limited who has standing to bring an action for educational expenses of a non-minor child.

#### *D. Allocation of Parental Responsibilities, Formerly Known as Custody*

Arguably, the most significant change to the IMDMA involves the overhaul of section VI, formerly known as the custody provision. Under the amended IMDMA, custody terminology is replaced with "Allocation of Parental Responsibilities." A newly created section 600 of the IMDMA defines key terms within the new section VI.<sup>135</sup>

Family law practitioners frequently have cited "custody" and "visitation" terminology as a source of controversy between the divorcing

visited Nov. 17, 2016), <http://offices.depaul.edu/student-financial-accounts/cost-of-attendance/tuition/Pages/2016-2017.aspx>.

133. § 513(i), 2015 Ill. Laws Pub. Act 99-90.

134. Compare *Miller v. Miller*, 513 N.E.2d 605, 607 (Ill. App. Ct. 1987) (holding that a child did not have standing to bring an action to seek contribution to educational expenses from his parents), and *Garrison v. Garrison*, 425 N.E.2d 518, 521 (Ill. App. Ct. 1981) (concluding that a child did not have standing to enjoin his mother to create a trust for the benefit of his educational expenses as was required in his parents' divorce decree because the child was not a party to his parents' divorce), with *In re Marriage of Spircoff*, 2011 IL App (1st) 103189, ¶ 22–23, 959 N.E.2d 1224, 1230 (finding that adult children have standing as third party beneficiaries to enforce an education provision in divorce decrees), and *Miller v. Miller*, 516 N.E.3d 837, 847 (Ill. App. Ct. 1987) (holding a child did have standing as a direct third party beneficiary to bring an action to force his father to comply with an agreement to pay the child's college expenses).

135. In general, the new provisions of the IMDMA replace the term "custody" with "parental responsibilities" or "allocation of parental responsibilities." The provisions also replace the term parental "visitation" with the term "parenting time." The term "visitation" remains in the amended IMDMA regarding time between a child and non-parents. §§ 600–610.5, 2015 Ill. Laws Pub. Act 99-90.

parties.<sup>136</sup> Practitioners have said that parents recoil from the idea of having “visitation time” with their own children.<sup>137</sup> They also state that the term “custody” has been a term over which parents bitterly fought, aiming to acquire the “sole custody” or “residential custody” designations.<sup>138</sup>

By eliminating the terms “custody” and “visitation” and replacing them with “allocation of parental responsibilities” and “parenting time,” the legislature hoped to remove some of the animus from divorce proceedings.<sup>139</sup> The legislature hoped that refocusing the conversation from “who gets custody” to 1) who is responsible for significant “parental decisions” and 2) how much “parenting time” each parent receives would decrease animosity.<sup>140</sup> While this may seem only to be a semantic change, many family law practitioners insist it is also substantive. The sections below will describe two significant changes to section VI. First, the legislature added a provision requiring parents to draft parenting plans.<sup>141</sup> Second, the legislature changed the burden of proof to modify an order of allocation of parental responsibilities.<sup>142</sup>

## 1. Parenting Plans

The new section 602.10 of the IMDMA<sup>143</sup> replaces the provisions in the repealed section 602.1(b) regarding Joint Parenting Agreements.<sup>144</sup> The amended IMDMA eliminates the categories of “sole” or

136. See, e.g., Karen Covy, *What Do You Do When Custody is Gone: The New Illinois Divorce Law*, OURFAMILYWIZARD.COM (Mar. 22, 2016),

<https://www.ourfamilywizard.com/resources/IL/illinois-child-custody-laws; New Illinois Child Custody Law in 2016: No More “Custody” or “Visitation,”> BUGARSKY & NAVARRO, LLC (Nov. 11, 2015) [hereinafter Bugarsky & Navarro], [http://www.familylegalrights.com/divorce-and-custody-law/new-illinois-child-custody-law-in-2016; Carolyn D. Jansons, Changes to Parenting in Divorce, DRENDEL & JANSONS LAW GROUP \(Nov. 6, 2015\), http://ilfamilylaw.com/changes-to-parenting-in-divorce.](http://www.familylegalrights.com/divorce-and-custody-law/new-illinois-child-custody-law-in-2016; Carolyn D. Jansons, Changes to Parenting in Divorce, DRENDEL & JANSONS LAW GROUP (Nov. 6, 2015), http://ilfamilylaw.com/changes-to-parenting-in-divorce.)

137. See, e.g., Bugarsky & Navvaro, *supra* note 136; Jansons, *supra* note 136.

138. See, e.g., Covy, *supra* note 136; Bugarsky & Navvaro, *supra* note 136; Jansons, *supra* note 136.

139. See, e.g., Covy, *supra* note 136; Bugarsky & Navvaro, *supra* note 136; Jansons, *supra* note 136.

140. See, e.g., Covy, *supra* note 136; Bugarsky & Navvaro, *supra* note 136; Jansons, *supra* note 136.

141. § 602.10(a), 2015 Ill. Laws Pub. Act 99-90.

142. § 610.5(c), 2015 Ill. Laws Pub. Act 99-90.

143. § 602.10, 2015 Ill. Laws Pub. Act 99-90.

144. 750 ILL. COMP. STAT. ANN. 5/602.1(b) (repealed 2015). The repealed Section 602.1(b) of the IMDMA provided in pertinent part:

Upon the application of either or both parents, or upon its own motion, the court shall consider an award of joint custody. Joint custody means custody determined pursuant to a Joint Parenting

“joint” custody. Instead, parents are allocated parenting responsibilities and parenting time.<sup>145</sup> These semantic changes are intended to reduce animosity between the parties by preventing battles over which party “wins” the designation of “sole custody” or “residential parent.”<sup>146</sup> Pursuant to the amended IMDMA, all parents in divorce litigation must now submit—jointly or individually—parenting plans to the court.<sup>147</sup> Previously, only parents pursuing joint custody were required to submit a joint parenting agreement.<sup>148</sup> Public Act 99-763, passed one year after Public Act 99-90, clarifies that a parenting plan is not required, unless ordered by the court, where the respondent has not filed an appearance.<sup>149</sup>

The IFLSC recommended that the statute set standards for the contents of parenting plans and time limits for filing such plans so that litigation would proceed without delay.<sup>150</sup> Illinois’s parenting plan

Agreement or a Joint Parenting Order. In such cases, the court shall initially request the parents to produce a Joint Parenting Agreement. Such Agreement shall specify each parent’s powers, rights and responsibilities for the personal care of the child and for major decisions such as education, health care, and religious training. The Agreement shall further specify a procedure by which proposed changes, disputes and alleged breaches may be mediated or otherwise resolved and shall provide for a periodic review of its terms by the parents. . . . In the event the parents fail to produce a Joint Parenting Agreement, the court may enter an appropriate Joint Parenting Order under the standards of Section 602 which shall specify and contain the same elements as a Joint Parenting Agreement, or it may award sole custody under the standards of Sections 602, 607, and 608. *Id.*

145. §§ 600–610.5, 2015 Ill. Laws Pub. Act 99-90.

146. Jacalyn Birnbaum, Panel Presentation on Parenting Responsibility and Custody Provision Changes at the Chicago Bar Association Domestic Relations Committee Seminar: The New IMDMA: An Overview of the New Laws Affecting Illinois Families (Nov. 5, 2015).

147. § 602.10(a), 2015 Ill. Laws Pub. Act 99-90 (emphasis added).

148. 750 ILL. COMP. STAT. ANN. 5/602.1(b) (repealed 2015).

149. Act of Aug. 12, 2016, sec. 5, § 602.10(a), 2016 Ill. Laws Pub. Act 99-763 (to be codified at 750 ILCS 5/602.10(a), eff. Jan. 1, 2017).

150. Memorandum from P. André Katz, Chairman, Ill. Family Law Study Comm., on Recommendations for Section 600 to the Legislative Reference Bureau 4 (Mar. 14, 2011) [hereinafter IFLSC Sec. 600 Memo], <http://www.katzstefani.com/sites/katzstefani.com/files/memo600.pdf>. The new Section 602.10 of the IMDMA provides in pertinent part:

(f) Parenting plan contents. *At a minimum, a parenting plan must set forth the following:*

- (1) an allocation of significant decision-making responsibilities;
- (2) provisions for the child’s living arrangements and for each parent’s parenting time . . . ;
- (3) a mediation provision addressing any proposed reallocation of parenting time . . . ;
- (4) each parent’s right of access to medical, dental, and psychological records . . . , child care records, and school and extracurricular records, reports, and schedules . . . ;
- (5) a designation of the parent who will be denominated as the parent with the majority of parenting time for purposes of Section 606.10;
- (6) the child’s residential address for school enrollment purposes only;
- (7) each parent’s residence address and phone number, and each parent’s place of employment and employment address and phone number;

provisions largely reflect the recommendations from the ALI Principles.<sup>151</sup> First, the ALI found that prolonged divorce proceedings only exacerbate parties' feelings of anxiety due to uncertainty regarding the eventual outcome of the proceedings.<sup>152</sup> Requiring parents to file a parenting plan within 120 days of filing their initial petition for allocation of parental responsibilities should reduce the length of litigation and uncertainty regarding parenting decisions. Only time will tell if 120 days is enough time for parties to draft agreed-upon parenting plans, or merely an overly ambitious timetable.

Pursuant to Section 603.5 of the IMDMA, family law practitioners may want to consider entering *temporary* parenting plans rather than a permanent plan within the first 120 days.<sup>153</sup> Then the parties can later "amend or modify [the parenting plan] based on experience before entering it as a final allocation judgment at the conclusion of the case."<sup>154</sup> This may help neutralize tensions at the beginning of the case by assuring the parties that the temporary parenting plan is not permanent.<sup>155</sup>

Second, in recommending that jurisdictions adopt the parenting-plan model, the ALI contended that such plans shift the responsibility of determining the children's best interests, at least in the first instance, from the court to the parents.<sup>156</sup> In other words, parenting

(8) a requirement that a parent changing his or her residence provide at least 60 days prior written notice of the change to any other parent under the parenting plan or allocation judgment . . . ;

(9) provisions requiring each parent to notify the other of emergencies, health care, travel plans, or other significant child-related issues;

(10) transportation arrangements between the parents;

(11) provisions for communications, including electronic communications, with the child during the other parent's parenting time;

(12) provisions for resolving issues arising from a parent's future relocation, if applicable;

(13) provisions for future modifications of the parenting plan, if specified events occur;

(14) provisions for the exercise of the right of first refusal, if so desired . . . ; and

(15) any other provision that addresses the child's best interests or that will otherwise facilitate cooperation between the parents. . . .

(g) The court *shall conduct a trial or hearing* to determine a plan which maximizes the child's relationship and access to both parents and shall ensure that the access and the overall plan are in the best interests of the child. The court shall take the parenting plans into consideration when determining parenting time and responsibilities at trial or hearing. § 602.10, 2015 Ill. Laws Pub. Act 99-90 (emphasis added).

151. See ALI PRINCIPLES, *supra* note 4, § 2.05.

152. ALI PRINCIPLES, *supra* note 4, § 2.05 cmt. i.

153. Birnbaum, *supra* note 146, at \*CBA6.

154. *Id.*

155. *Id.*

156. ALI PRINCIPLES, *supra* note 4, § 2.05 cmt. a.

plans require parents to make a good faith effort to agree on how they will parent their children before the court intervenes.<sup>157</sup> In theory, such increased parental involvement in the development of parenting plans should reduce litigation because the parents will be more invested in upholding a document they have created together rather than one imposed by the courts. The legislative history confirms that the General Assembly intended parents to be more involved in the allocation of parental responsibilities.<sup>158</sup>

Section 602.10(f) of the amended IMDMA identifies fifteen categories of information that all parenting plans—whether agreed to by the parties or ordered by the court—must contain.<sup>159</sup> In general, the repealed joint custody provision prescribes in less detail what is required of the parties. Both the repealed joint custody provision and the amended IMDMA’s parenting plans require the parties or the court to determine who has responsibility for major life decisions, e.g., education, healthcare, and religious upbringing, as well as processes for modifying the agreement or resolving disputes.<sup>160</sup>

In contrast, some of the required categories in the new parenting plan provision are exactly prescriptive—provide the parent’s residence address and “each parent’s right of access to medical, dental, and psychological records.”<sup>161</sup> Other categories are more open-ended, leaving flexibility to flesh out the details—provide how the parties will deal with one parent moving to another state.<sup>162</sup>

In this sense, the parenting plan’s required contents serve as guidelines that contour the court’s discretion by legislatively advising what all parenting plans, at a minimum, must contain. Although the amended IMDMA retains numerous discretionary factors regarding the child’s best interests in allocating parental responsibilities,<sup>163</sup> the parenting plan approach directs the court—with limited exceptions—to accept the parents’ agreed-upon parenting plan.<sup>164</sup> In the event the

157. *Id.*

158. 98th Gen. Assembly, House Transcription Debate 9 (Apr. 10, 2014, Ill.) (statement of Rep. Burke).

159. Act of July 21, 2015, sec. 5-15, § 602.10(f), 2015 Ill. Laws Pub. Act 99-90 (codified at 750 ILL. COMP. STAT. ANN. 5/602.10(f), effective Jan. 1, 2016).

160. *Id.* §§ 602.5, 602.10; Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. ANN. 5/602.1(b) (repealed 2015).

161. *E.g.*, § 602.10(f)(4), (7), 2015 Ill. Laws Pub. Act 99-90.

162. *E.g.*, § 602.10(f)(12), 2015 Ill. Laws Pub. Act 99-90.

163. §§ 602.5(c), 602.7(b), 2015 Ill. Laws Pub. Act 99-90.

164. § 602.10(d), 2015 Ill. Laws Pub. Act 99-90. *See* ALI PRINCIPLES, *supra* note 4, § 2.06 & cmt. a.



parents cannot agree, the Court must consider each parent's separate parenting plan before it makes its own determination about what is in the children's best interests.<sup>165</sup> "Even when the parents cannot agree, the requirement that courts consider each of their proposed plans gives each of the parents an incentive to produce a thoughtful and rational plan."<sup>166</sup> The parenting plan requirements should produce outcomes that are more consistent because the legislature has thoroughly identified specific decisions and life scenarios that all parents must contemplate, decide, and articulate within a parenting plan. For additional discussion on the effects of the specificity of the parenting plan requirements, see *infra* section III.D.

Parenting plans may or may not reduce litigation. Although the change in terminology from "custody" and "visitation" to "allocation of parental responsibilities" and "parenting time" is meant to reduce fighting between the parties over who wins the "sole custody" designation, the battle over legal designations may simply shift to who is allocated the majority share of parenting responsibilities or parenting time. A number of jurisdictions have already adopted the "allocation of parental responsibilities" and "parenting time" lexicon, including Colorado,<sup>167</sup> Minnesota,<sup>168</sup> and Ohio,<sup>169</sup> which at the very least illustrates some legislatures' confidence in the terminology's ability to reduce the temperature between high-conflict parties.<sup>170</sup>

## 2. Modification of Allocation of Parental Responsibilities

The new section 610.5 of the IMDMA substantially amends the repealed section 610.<sup>171</sup> The repealed section 610 of the IMDMA provided in pertinent part:

165. § 602.10(e), (g), 2015 Ill. Laws Pub. Act 99-90.

166. ALI PRINCIPLES, *supra* note 4, § 2.05 cmt. a.

167. COLO. REV. STAT. ANN. § 14-10-123 (West, Westlaw through 2015 First Reg. Sess.) (providing proceedings "concerning the allocation of parental responsibilities").

168. MINN. STAT. ANN. § 518.175 (West, Westlaw through 2015 First Spec. Sess.) ("[T]he court shall . . . grant such parenting time on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child.").

169. OHIO REV. CODE ANN. § 3109.04(a) (West, Westlaw through 2015-2016 Legis. Sess.) ("[T]he court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage.").

170. *E.g.*, J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 225 (2014) ("More than the lexicon is at stake. The aim is forthrightly a culture change . . . to shift postseparation parenting from adversarial to collaborative.").

171. Public Act 99-763 further amends section 610.5 to permit modifications to parenting time at any time "upon a showing of changed circumstances that necessitates modification to

(b) The court *shall not modify* a prior custody judgment unless it finds by *clear and convincing evidence*, upon the basis of facts that have arisen since the prior judgment . . . that a change has occurred in the circumstances of the child or his custodian, . . . and that the modification is necessary to serve the best interest of the child.<sup>172</sup>

In contrast, the new section 610.5 of the IMDMA provides in pertinent part:

(c) [T]he court *shall modify* a parenting plan or allocation judgment when necessary to *serve the child's best interests* if the court finds, by a *preponderance of the evidence*, that on the basis of facts that have arisen since the entry of the existing parenting plan . . . , a substantial change has occurred in the circumstances of the child or of either parent and that a modification is necessary to serve the child's best interests.<sup>173</sup>

At the time of this writing, the legislative history for this new section was unavailable. The IFLSC simply noted in one of its memos, "750 ILCS 5/610 Modification—Replaced with 610.5."<sup>174</sup>

The new section 610.5(c) of the IMDMA substantially changes the repealed section 610(b) in the following ways. First, the provision now provides that the court *shall* modify a parenting plan or allocation judgment when 1) a substantial change has occurred in the circumstances of the child or of either parent and 2) a modification is necessary to serve the child's best interests—rather than proceeding from the presumption that the court will *not* modify a prior custody judgment. Second, the provision changes the burden of proof from requiring clear and convincing evidence that a change has occurred to requiring a showing, by a *preponderance of the evidence*, that a *substantial* change has occurred. For a discussion of how these changes to the

serve the best interests of the child." Act of Aug. 12, 2016, sec. 5, § 610.5(a), 2016 Ill. Laws Pub. Act 99-763 (to be codified at 750 ILCS 5/610.5(a), eff. Jan. 1, 2017). Parties are still prohibited from modifying orders allocating decision-making responsibilities before two years have elapsed from the order's entry unless a party can show serious endangerment to the child. *Id.*

172. 750 ILL. COMP. STAT. ANN. 5/610 (emphasis added), *repealed by* Act of July 21, 2015, sec. 5-20, 2015 Ill. Laws Pub. Act 99-90 (eff. Jan. 1, 2016).

173. § 610.5, 2015 Ill. Laws Pub. Act 99-90 (emphasis added). Section 610.5(f) also added the following provision: "If the court finds that a parent has repeatedly filed frivolous motions for modification, the court may bar the parent from filing a motion for modification for a period of time." *Id.*

174. IFLSC Sec. 600 Memo, *supra* note 150, at 6.

modification provision will lead to increased litigation, see *infra* section III.C.

### III. ANALYSIS

By comprehensively amending the IMDMA, the Illinois legislature sought to increase predictable outcomes and reduce litigation in divorce proceedings.<sup>175</sup> In some areas, the legislature likely will be successful. For instance, indexing college-related expenses to the cost of attendance at the University of Illinois at Urbana-Champaign preserves judicial discretion to award non-minor child education expenses but caps the level of the award.<sup>176</sup> Likewise, the maintenance guidelines preserve judicial discretion in determining whether a maintenance award is appropriate while increasing consistency by adding calculations to determine predictable award amounts and award durations based on gross income and the duration of the marriage.<sup>177</sup>

Moreover, requiring all parents to draft parenting plans should produce outcomes that are more consistent, not only because the statute specifies fifteen categories of information and decisions that all parents must contemplate in furtherance of their children's best interests, but also because the court is required to accept agreed parenting plans (in most circumstances) and consider the parenting plans of parents who cannot agree on a common plan.<sup>178</sup> These provisions should provide judges with a better starting place to craft allocation judgments, as the judge would know what each parent would prefer and would not have to start from scratch with a best interests determination.

In contrast, other portions of the amended IMDMA likely will not lead to outcomes that are more predictable. The following sections will describe how the IMDMA amendments may increase litigation, decrease predictable outcomes, and describe areas where the amendments pose additional challenges that may require future statutory resolution.

175. § 102, 2015 Ill. Laws Pub. Act 99-90; 99th Gen. Assembly, House Transcription Debate 27 (May 20, 2015, Ill.) (statement of Rep. Burke on S.B. 57).

176. § 513(d), 2015 Ill. Laws Pub. Act 99-90.

177. *Id.* § 504.

178. § 602.10, 2015 Ill. Laws Pub. Act 99-90 (emphasis added).

### A. Maintenance

While maintenance guidelines may lead to more predictable award amounts and duration of maintenance awards for most couples, the guidelines may also produce more litigation for other couples. Since the amount of maintenance is dependent upon the parties' combined gross incomes, there could be increased litigation regarding what should be included in gross income.<sup>179</sup> Section 504 of the IMDMA ties the definition of "gross income" to that which is "within the scope of that phrase in section 505 of this Act."<sup>180</sup> Although section 505 of the IMDMA is inclusive with its definition of income, creative lawyers may argue around this provision, which would increase litigation.<sup>181</sup>

Moreover, the maintenance guidelines produce a multiplier effect related to the length of the marriage that could result in undesirable outcomes.<sup>182</sup> For instance, presume a couple was married for nine years. Under the guidelines, a spouse of nine years entitled to maintenance would receive maintenance for 3.6 years (nine years multiplied by 0.4).<sup>183</sup> In contrast, if that same spouse waited until the couple had been married for ten years to file a petition for dissolution of marriage, then that spouse would be entitled to receive maintenance for six years (ten years multiplied by 0.6).<sup>184</sup> In this manner, the multiplier effect of the length of marriage could produce incentives for couples to delay filing for divorce.

In discerning whether to file for divorce, many parents consider whether to remain married for the sake of their children. The multiplier effect could encourage a parent to stay in a marriage longer to benefit from the multiplier effect, while also providing the children with two married parents. Such choices are difficult, but some research indicates that children with high-conflict parents may not be better off with their parents together.<sup>185</sup> The State should be concerned about

179. See Gemma B. Allen, *Navigating the New: Addressing the Most Comprehensive Changes in Illinois Family Law in Almost Forty Years*, in STRATEGIES FOR FAMILY LAW IN ILLINOIS, 2015-2016 EDITION: LEADING LAWYERS ON LEVERAGING ALTERNATIVE DISPUTE RESOLUTION, NEGOTIATING ALIMONY AND CHILD SUPPORT, AND MANAGING CLIENT EXPECTATIONS, at \*5-6 (Thomson Reuters / Aspatore 2015), 2015 WL 6157374; Jeffrey L. Hirsch, *Solving for X & Y: The Illinois Spousal Maintenance Guidelines*, 103 ILL. B.J., Sept. 2015, at 32, 47.

180. § 504(b-3), 2015 Ill. Laws Pub. Act 99-90.

181. Allen, *supra* note 179, at \*5-6; Hirsch, *supra* note 179, at 47.

182. Hirsch, *supra* note 179, at 47.

183. § 504(b-1)(1)(B), 2015 Ill. Laws Pub. Act 99-90.

184. *Id.*

185. *E.g.*, Kelly Musick & Ann Meier, *Are Both Parents Always Better Than One? Parental Conflict and Adult Well-Being*, 39 Soc. Sci. Res. 814, 826 (2010).

such double-edged guidelines that would incentivize high-conflict parents staying together to reap a longer maintenance payout to the detriment of their children.

Likewise, there could be increased litigation regarding the duration of maintenance due to the multiplier effect of the length of the marriage.<sup>186</sup> For instance, consider a married couple where both spouses are well-educated professionals—a doctor and a lawyer. They were married for ten years and, for the first five years, both spouses earned professional wages and contributed financially to the marital estate. Then for the last five years of the marriage, one spouse forwent his salary to be a stay-at-home dad. Presuming the court finds the stay-at-home dad should receive maintenance, should the court award maintenance based on the ten-year duration of the marriage, or the five-year period where the father did not earn a wage?

A related challenge involves the increase in cohabitation before marriage and its possible effect on maintenance awards. A majority of men and women in the United States cohabit with their first spouse before their first marriage.<sup>187</sup> While many couples delay marriage, they are not abandoning the institution.<sup>188</sup> Consequently, it is possible that domestic relations courts in the near future—if not already—will face couples who cohabit for a number of years before marriage.<sup>189</sup>

Imagine a dating couple that does not want to marry immediately and instead chooses to cohabit together. Suppose this couple also fits the fact pattern where, from the time the couple began cohabiting, one partner was the primary wage earner while the other partner forwent professional opportunities in order to concentrate on nonwage-earning activities, such as childrearing. Now suppose the couple cohabited for six years and then were married for ten years before filing for divorce. In this situation, the nonwage-earning spouse might want to argue that the court should award maintenance not based on the ten-year duration of the marriage, but rather from the moment the couple

186. Hirsch, *supra* note 179, at 47.

187. Casey E. Copen et. al. *First Marriages in the United States: Data from the 2006-2010 National Survey of Family Growth*, NAT'L HEALTH STAT. REP., no. 49, Mar. 22, 2012, at 8.

188. *Id.* at 6.

189. In 1979, the Illinois Supreme Court held in *Hewitt v. Hewitt* that it is against Illinois public policy to enforce mutual property rights between unmarried cohabitants. 394 N.E.2d 1204, 1211 (Ill. 1979). In August 2016, the Illinois Supreme Court affirmed its thirty-seven-year-old holding in *Hewitt*. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 81. Consequently, Illinois courts likely will not be sympathetic to arguments seeking to claw back into the parties' cohabitation history. The author provides the examples below for more sympathetic jurisdictions or a time in the future if Illinois were to recognize cohabitant rights.

began cohabiting sixteen years ago since that is the actual period when the nonwage-earning spouse's reliance on the wage-earning spouse began.

In the scenarios above, the guidelines increase litigation regarding the dividing lines they have imposed on the length of the marriage. The larger multiplier for longer duration marriages likely reflects the policy preference to protect, in particular, nonwage-earning spouses who may have less of an ability to (re)enter the workforce or acquire property after longer-term marriages.<sup>190</sup> If we as a society favor this policy preference—protecting nonwage-earning spouses exiting longer-term marriages—then we have to consider whether we will tolerate—in order to gain a clearer cut rule—the occasional party who delays dissolution proceedings to take advantage of the multiplier effect. We also have to contemplate the justice of a spouse of a fourteen-year and 364-day marriage receiving maintenance for 8.4 years while a spouse of a fifteen-year marriage receives maintenance for twelve years. For judicial economy and clear expectations for parties who look to the law to predict what their outcome will be, these probably are prices we are willing to pay.

In practice, family law attorneys should take careful notice of their client's date of marriage and intended filing dates. Attorneys should advise their clients of the multiplier effects related to the duration of maintenance awards. If the client would receive maintenance from a former spouse, the attorney should consider whether it is advisable to delay filing a petition for dissolution of marriage if there would be substantial gains in the duration of the maintenance award. If a client would have to pay maintenance to a former spouse, then the attorney should consider whether the client's upcoming anniversary would require filing a petition of dissolution of marriage more promptly in order to avoid having a longer term obligation to pay maintenance.

### *B. Property Division*

Although the legislature intended to reduce litigation and increase predictable outcomes by requiring courts to state specific factual findings related to property division decisions, such factual findings alone may not have that effect. First, the legislature retained discretionary factors without adding any presumptive guidance as to how courts should allocate property. Second, Illinois appellate courts are unlikely

190. See *infra* Section III.B.1. Case Law & Equitable Distribution.

to disturb a trial court's discretion due to the highly deferential abuse of discretion standard of review for property decisions.

### 1. Case Law & Equitable Distribution

In contrast to Illinois, some states have adopted statutes that expressly provide a rebuttable presumption of equal division of marital property.<sup>191</sup> Other states statutorily provide that the property shall be divided equally between the parties unless an equal division would be unjust.<sup>192</sup> Without an express statutory provision, Illinois courts must rely on judicially created case law to determine what "just proportions" in property division are. This is not an ideal situation because it does not provide the parties with clear expectations or predictable outcomes.

Well-established Illinois case law indicates that "property distribution need not be mathematically equal; rather, it must be in proportions that are just and equitable."<sup>193</sup> Language that property division "need not be mathematically equal" facially seems weaker than a presumption of equal property division, and thus appears less effective in reducing litigation or producing predictable outcomes.

Illinois case law further specifies that determining what is "just and equitable" is a fact-specific inquiry left within the court's discretion and consideration of the enumerated statutory factors.<sup>194</sup> Some of these factors include whether either party dissipated assets,<sup>195</sup> the length of the marriage,<sup>196</sup> the employability of each spouse,<sup>197</sup> whether property is awarded "in lieu of or in addition to maintenance,"<sup>198</sup> and each spouse's reasonable opportunity to acquire assets in the future.<sup>199</sup>

191. *E.g.*, FLA. STAT. ANN. § 61.075(1) (West, Westlaw through 2015 First Reg. Sess.); IND. CODE § 31-15-7-5, Sec. 5 (West, Westlaw through 2015 First Reg. Sess.).

192. *E.g.*, OHIO REV. CODE ANN. § 3105.171(C)(1) (West, Westlaw through 2015-2016 Legis. Sess.) ("Except as provided in this division or division (E) of this section, the division of marital property shall be equal. If an equal division of marital property would be inequitable, the court shall not divide the marital property equally but instead shall divide it between the spouses in the manner the court determines equitable.").

193. *In re Marriage of Troske*, 2015 IL App (5th) 120448, ¶ 26, 27 N.E.3d 86, 94. *E.g.*, *In re Marriage of Aschwanden*, 411 N.E.2d 238, 241 (Ill. 1980); *In re Marriage of Callahan*, 2013 IL App (1st) 113751, ¶ 21, 984 N.E.2d 531, 537; *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 121, 968 N.E.2d 115, 150-51; *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 32, 966 N.E.2d 1024, 1031; *In re Marriage of Thornley*, 838 N.E.2d 981, 985 (Ill. App. Ct. 2005).

194. *E.g.*, *Troske*, 2015 IL App (5th) 120448, ¶ 26, 27 N.E.3d at 94.

195. 750 ILL. COMP. STAT. ANN. 5/503(d)(2) (amended 2015).

196. *Id.* 503(d)(4) (amended 2015).

197. *Id.* 503(d)(8) (amended 2015).

198. *Id.* 503(d)(10) (amended 2015).

199. *Id.* 503(d)(11) (amended 2015).

Such factors alone leave judges with virtually unfettered discretion.<sup>200</sup> As such, “if there are no set rules, it is difficult to see what value specific findings might have.”<sup>201</sup> In other words, the overall status quo has not changed—except now judges must elucidate the facts supporting their discretion.

A review of Illinois case law reveals that one fact pattern in particular frequently deviates from the equal property division standard: the homemaker spouse.<sup>202</sup> For example, in *In re Marriage of Henke*, the Illinois Appellate Court, Second District held, in part, that the trial court did not abuse its discretion when it awarded the wife sixty-seven percent of the net marital estate and the husband thirty-three percent.<sup>203</sup> The parties were married for sixteen years.<sup>204</sup> The husband was a self-employed farmer.<sup>205</sup> Throughout the marriage, the wife was a full-time homemaker.<sup>206</sup>

The *Henke* trial court awarded the wife \$522,267 in net marital assets and the husband \$255,377 in net marital assets.<sup>207</sup> The Second District reasoned that a disproportionate property division was not an abuse of discretion because the wife was less able to acquire property in the future than her husband.<sup>208</sup> The court found that the husband had significant non-marital assets at his disposal, including his family’s farm.<sup>209</sup> In contrast, the court noted that the wife did not work outside the home for nearly fifteen years and would not receive maintenance.<sup>210</sup>

In many of the cases like *Henke* where the court found an unequal property distribution would be just, the couple had been married for over twelve years, one spouse engaged in nonwage-earning activity, e.g., homemaking, for the duration of the marriage with little to no employment experience outside the marital home, and the higher-earning spouse receiving a smaller share of marital property also had substan-

200. Ira Mark Ellman, *Inventing Family Law: Brigitte M. Bodenheimer Memorial Lecture on the Family*, 32 U.C. DAVIS L. REV. 855, 868–69 (1999).

201. *Id.* at 869.

202. *E.g.*, *In re Marriage of Aschwanden*, 411 N.E.2d 238, 239–40 (Ill. 1980); *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 124, 968 N.E.2d 115, 152.

203. *In re Marriage of Henke*, 728 N.E.2d 1137, 1150 (Ill. App. Ct. 2000).

204. *Id.* at 1139.

205. *Id.*

206. *Id.*

207. *Id.* at 1149–50.

208. *Id.* at 1150.

209. *Id.*

210. *Id.*



tial non-marital assets on which to rely.<sup>211</sup> In cases of particularly long marriages, courts have awarded both maintenance and disproportionate shares of the marital estate.<sup>212</sup> The dearth of cases concerning property division for couples with shorter marriages or more equal economic standing, i.e., both spouses were employed outside the home and contributed financially to the marital estate, suggests that these cases do not get litigated and perhaps more closely follow an equal property division notwithstanding the absence of an express statutory presumption of equal property division.

As the Superior Court of Pennsylvania noted, “[E]quitable distribution does not presume an equal division of marital property and the goal of economic justice will often dictate otherwise.”<sup>213</sup> For nonwage-earning spouses of long marriages, an equal property division may not be just or equitable because they have sacrificed earning potential and personal property accumulation during the marriage in favor of other family obligations, frequently childrearing.<sup>214</sup> In Illinois, case law supports nonwage-earning spouses of long marriages acquiring a disproportionate property distribution.<sup>215</sup> And for nonwage-earning spouses of particularly long marriages, the court may award both a disproportionate share of property and maintenance.<sup>216</sup>

Ultimately, Illinois would be better served by a statutory presumption of equal property distribution. Requiring courts to issue specific findings of fact regarding property distribution orders does very

211. *In re Marriage of Aschwanden*, 411 N.E.2d 238, 239–40 (Ill. 1980) (holding the trial court abused its discretion when it awarded the husband 78% of the marital estate for his economic contributions to the marriage while not adequately considering the homemaker spouse’s contributions to the marriage); *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 124, 968 N.E.2d 115, 152 (holding the trial court did not abuse its discretion when awarding the wife 77% of the marital estate when the parties had been married for twenty-two years, the husband had substantial non-marital assets, the wife was a homemaker without recent employment experience, and the wife did receive a maintenance award); *In re Marriage of Heroy*, 895 N.E.2d 1025, 1046 (Ill. App. Ct. 2008) (holding the trial court did not abuse its discretion when awarding the wife 55% of the marital estate when the couple was married for twenty-six years, the wife was a homemaker for the duration of the marriage, and the husband had substantial non-marital assets). *But see In re Marriage of Thornley*, 838 N.E.2d 981, 985–86 (Ill. App. Ct. 2005) (holding the trial court did not abuse its discretion when awarding the wife a disproportionate share of the marital estate when the couple had been married for less than five years, and her husband had relied on her support through chiropractor school and was expected to now have substantial earning capacity).

212. *See, e.g., Heroy*, 895 N.E.2d at 1043, 1046.

213. *Mercatell v. Mercatell*, 2004 PA Super 271, ¶ 13, 854 A.2d 609, 612.

214. ALI PRINCIPLES, *supra* note 4, § 4.09 cmts. b–c; Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801, 802 (1999).

215. *E.g., Aschwanden*, 411 N.E.2d at 239–40; *Romano*, 2012 IL App (2d) 091339, ¶ 124, 968 N.E.2d at 152.

216. *See, e.g., Heroy*, 895 N.E.2d at 1043.

little to assist judges in determining how to more uniformly approach discretionary factors of property distribution. Although the “just proportions” jurisprudence often means “equal,” equal division of property is only an implicit outcome of this judicial discretion-based rule. An explicit presumption of equal property division would provide more predictable outcomes.

With an equal property distribution presumption, judges would have a definitive starting place from which to adjudicate property division issues rather than having to decide on a case-by-case basis from scratch what the percentage property distribution should be. This refocuses the judge’s discretion from what the allocation should be to whether the court should deviate from a fifty-fifty property division. The exceptions to such a presumption should be rare and statutorily defined so that parties can have clear expectations about the litigation. The nonwage-earning spouse exception found in Illinois’s “just proportions” jurisprudence could be included within the list of clearly identified factors rebutting the presumption of equal property division.<sup>217</sup> In this manner, adopting a presumption of equal property division should reduce litigation and increase predictable outcomes by narrowing the scope of judicial discretion.

In practice, family law attorneys should take note that “equitable division” more often than not means equal division in Illinois. Where both parties were wage-earners and contributed financially and intangibly to the marriage, attorneys should advise their clients that they are unlikely to receive a disproportionate share of marital property. However, if clients were married to their spouses for over ten years and were non-wage earners or contributed substantially less financially to the marriage than their spouses, such clients are more likely than other parties to receive both maintenance and a disproportionate share of property.

## 2. Abuse of Discretion Standard

Illinois appellate courts are unlikely to disturb a trial court’s discretion regarding property division.<sup>218</sup> While requiring specific factual

217. *E.g.*, IND. CODE § 31-15-7-5, Sec. 5 (West, Westlaw through 2015 First Reg. Sess.).

218. *E.g.*, *In re Marriage of Polsky*, 899 N.E.2d 454, 462 (Ill. App. Ct. 2008) (“[I]t is well established that decisions concerning the distribution of marital property lie within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. . . . An abuse of discretion is found only when no reasonable person would take the view adopted by the trial court.”) (citations omitted).

findings provides more material in the record from which an appellate court can review a trial court's decision, Illinois's abuse of discretion standard, which predates Public Act 99-90, will uphold most trial court decisions. Such a deferential standard of review should deter parties from litigating at the appellate level and thus reduce litigation.

However, despite the difficulty of meeting the abuse of discretion standard, parties have continued to litigate property division decisions.<sup>219</sup> So while it appears unlikely—at least in the short-run—that the presence of specific factual findings will deter parties from litigating, it is possible that clearer case law will emerge from appellate courts since they now arguably will articulate clearer law in response to more specific fact patterns.

In other words, it is possible that trial courts already decide cases correctly and consistently; however, due to their general factual findings, their decisions have been opaque, and appellate courts have had few facts and reasoning to review. It is also possible that specific factual findings will encourage better decision-making because judges will be required to justify their decisions and reasoning in writing. In the end, this could reduce appellate litigation if it appears appellate courts are unwilling to disturb trial courts' *fact-based* decisions.

In summary, Illinois's "just proportions" jurisprudence may or may not result in more litigation for couples with a nonwage-earning spouse. Case law favoring nonwage-earning spouses may entice higher earning spouses to settle more quickly for an equal property division rather than risk losing property to nonwage-earning spouses in contested cases. Moreover, nonwage-earning spouses would have to calculate whether litigating for more than a fifty percent share of the marital estate is worth the cost of litigation.

In practice, family law attorneys should use the trial court's specific findings to advise their clients. Although the standard of review has not changed, in some cases, the specific findings will help lawyers persuade their clients to save resources and not appeal because the appellate court is unlikely to overrule the trial court's factual findings. Likewise, the specific findings may also assist lawyers to better discern which trial court decisions to appeal since the specific findings may make it clearer how a trial court erred in its reasoning and conclusions drawn from the stated facts.

219. *E.g.*, *Aschwanden*, 411 N.E.2d at 239-40; *Romano*, 2012 IL App (2d) 091339, ¶ 124, 968 N.E.2d at 152.

### C. Allocation of Parental Responsibilities

Changing the standard of proof for modification of parenting plans or allocation judgments from requiring clear and convincing evidence to merely requiring a preponderance of the evidence will increase litigation and decrease predictable outcomes. The preponderance of the evidence standard is a significantly easier burden to meet than the abolished clear and convincing standard. Under the clear and convincing standard, parties could better predict results because only in limited cases will a party meet that standard. In contrast, under a preponderance of the evidence standard, it is much less predictable whether a party can convince a court that change is appropriate. Fewer bars to entry will likely lead to more litigation.

For example, in *In re Marriage of Diddens*, the Illinois Appellate Court, Third District affirmed the trial court's decision not to modify a child custody judgment.<sup>220</sup> In *Diddens*, the mother and the parties' children moved in with the mother's parents.<sup>221</sup> The mother and her parents smoked in the home despite the children's pre-existing asthma and respiratory ailments.<sup>222</sup> During the custody proceeding, two clinical psychologists, including the court's expert, recommended that "it was in the children's best interests that [the father] have physical custody of [the children]."<sup>223</sup> Under this evidence, the Third District found that the father had *not* established by clear and convincing evidence that a change had occurred in the children's lives requiring modification of the custody judgment to serve their best interests.<sup>224</sup>

Under the new preponderance of the evidence standard, legal practitioners would have greater difficulty predicting the outcome in cases like *Diddens* because the "best interests of the child" standard is subjective.<sup>225</sup> Therefore, another judge might find that the children's best interests would more likely than not be served by changing custody to the father. While this might be a desirable outcome in this particular case if one cares about second-hand smoke, the preponderance of the evidence standard makes custody proceedings less predictable

220. *In re Marriage of Diddens*, 625 N.E.2d 1033, 1037 (Ill. App. Ct. 1993).

221. *Id.* at 1034.

222. *Id.* at 1034-35.

223. *Id.* at 1035.

224. *Id.* at 1037.

225. See Ellman, *supra* note 200, at 864.

because it erodes the well-established public policy of stability in custody decisions.<sup>226</sup>

Likewise, changing the posture of the court from it shall *not* modify to the court *shall* modify parenting plans, will increase litigation and decrease predictable outcomes. The change from “shall not modify” to “shall modify” not only reverses the court’s posture of presumptively not modifying a custody judgment, but also changes the court’s likelihood of being overturned. Under the amended IMDMA, courts now must modify a parenting plan or allocation judgment if it is in the child’s best interests or risk opening their decisions to appellate review. In this manner, parents could return to the court every two years seeking a modification in the parenting plan.

Under the preponderance of the evidence standard, domestic relations courts would be faced with the choice of a) granting the motion where it is more likely than not in the child’s best interests to modify the plan, b) deny the motion where it is not more likely in the child’s best interests, c) deny the motion by finding that the modification action is “vexatious or constitutes harassment,” and/or d) deny the motion and bar the parent from filing another modification action due to repeated frivolous motions for modification. Options *b*, *c*, and *d* will likely invite appellate review because the options conflict with the statute’s “shall modify” imperative.

Moreover, this amendment will likely frustrate the best interests of children. The amended section 102 of the IMDMA underscores that one of the purposes of the IMDMA is to “ensure predictable decision-making for the care of children”<sup>227</sup> To that end, Illinois case law has long held that “there exists a strong presumption in favor of maintaining the *status quo* in custody arrangements. [. . .] The rationale behind this presumption is that stability is important in the lives of children.”<sup>228</sup> By adopting the more easily met preponderance of the evidence standard, the Illinois legislature may have statutorily superseded these well-established common law presumptions to the detriment of children.

226. *E.g.*, *In re Marriage of Davis*, 792 N.E.2d 391, 394 (Ill. App. Ct. 2003) (citing *In re Marriage of Nolte*, 609 N.E.2d 381, 385 (Ill. App. Ct. 1993)).

227. Act of July 21, 2015, sec. 5-15, § 102(5), 2015 Ill. Laws Pub. Act 99-90 (codified at 750 ILL. COMP. STAT. ANN. 5/102(5), effective Jan. 1, 2016).

228. *E.g.*, *In re Marriage of Davis*, 792 N.E.2d 391, 394 (Ill. App. Ct. 2003) (citing *In re Marriage of Nolte*, 609 N.E.2d 381, 385 (Ill. App. Ct. 1993)).

Likewise, easily modified allocation judgments also disrupt the stability and certainty of outcome for the parents, who might feel compelled to bargain money for parenting time.<sup>229</sup> “Uncertainty of outcome is very destructive of the position of the primary caretaker parent because he or she will be willing to sacrifice everything else in order to avoid the terrible prospect of losing the child in the unpredictable process of litigation.”<sup>230</sup> This may translate into such a parent being willing to bargain to keep the current custody arrangement in exchange for receiving less financial support from the non-custodial parent.<sup>231</sup> Such an outcome is not desirable because children’s best interests are not advanced when financial support is sacrificed to maintain a status quo custody award.<sup>232</sup>

In short, these amendments lower the threshold for modification, making it easier to win modification actions. Easier modification neither promotes stability in the children’s lives nor enables the parties to feel confident that their legal woes in separation will be over with the entry of a judgment of dissolution of marriage. If the legislature did anything wrong in amending the IMDMA, it is this.

#### *D. Privileging Uniformity Over Burdens on the Parties*

Many of the IMDMA amendments regulate minute details of divorced parties’ lives. For instance, the amended IMDMA now provides that the court may order a parent to pay for up to five college applications.<sup>233</sup> Furthermore, in drafting their parenting plans, parents must address fifteen categories of information and decisions, including “a requirement that a parent changing his or her residence provide at least 60 days prior written notice of the change to any other parent under the parenting plan”<sup>234</sup> and “provisions for communications, including electronic communications, with the child during the other

229. *Garska v. McCoy*, 278 S.E.2d 357, 360 (W. Va. 1981) (“Our experience instructs us that uncertainty about the outcome of custody disputes leads to the irresistible temptation to trade the custody of the child in return for lower alimony and child support payments.”).

230. *Id.* at 362.

231. *Id.*

232. *Id.* at 361 (“[W]e are concerned to prevent the issue of custody from being used in an abusive way as a coercive weapon to affect the level of support payments and the outcome of other issues in the underlying divorce proceeding. Where a custody fight emanates from this reprehensible motive the children inevitably become pawns to be sacrificed in what ultimately becomes a very cynical game.”).

233. Act of July 21, 2015, sec. 5-15, § 513(b), 2015 Ill. Laws Pub. Act 99-90 (codified at 750 ILL. COMP. STAT. ANN. 5/513(b), effective Jan. 1, 2016).

234. § 602.10(f)(8), 2015 Ill. Laws Pub. Act 99-90 (emphasis added).

parent's parenting time."<sup>235</sup> Facially, these provisions do not seem like rocket science and most people would likely agree that parents should pay for their children's college applications and be able to communicate with their children during the other parent's time.

Have divorce proceedings become so acrimonious that the legislature felt the need to empower the courts to point to a statute to tell a parent, "Yes, you have to pay your child's college application fees"? Or was there such inconsistency across the courts of Illinois that the legislature desired greater uniformity? Regardless of the answers to these questions, one policy question remains: do the benefits of uniformity, more predictable outcomes, and conserving judicial economy outweigh the burdens imposed on divorced parties? Since these amendments seem to advance the children's best interests by identifying in detail what parents are required to do, this should reduce litigation over trivial matters and conceivably force parents to focus less on litigation and more on parenting.

In practice, family law attorneys should advise their clients of what the law provides, e.g., payment for up to five college applications, so that clients have clear expectations and do not litigate trivial matters. Law firms should create standard parenting plan forms that contemplate all section 602.10 factors. Overall, lawyers should advise their clients that the spirit of these IMDMA provisions is to guarantee that the parties consider their children's best interests and avoid drawn out litigation that could be harmful to the children.

## CONCLUSION

This Comment's analysis demonstrates that several of the significant amendments to the IMDMA will likely achieve the stated goals of increasing predictable outcomes and reducing litigation by refining the scope of judicial discretion. Such amendments include indexing college-related expenses, applying maintenance guidelines, and implementing parenting plans.

However, other amendments likely will not achieve this goal. One such amendment includes requiring courts to issue specific factual findings for property division orders when the standard of appellate review remains an abuse of discretion and judges do not have statutory presumptions from which to guide their analyses.

235. § 602.10(f)(11), 2015 Ill. Laws Pub. Act 99-90 (emphasis added).

More troublesome, though, is the legislature's move to change the standard of proof for modification proceedings to requiring a showing of a substantial change in circumstances by a *preponderance of the evidence* and providing that the court *shall* modify parenting plans in such a situation. These changes will not only increase litigation by lowering the threshold for winning a modification claim but also harm the best interests of children who will be subject to less stability in their home environments. To promote stability, encourage closure in divorce proceedings, and further the best interests of children, the Illinois legislature should readopt its original modification rule *not to modify* a prior allocation of parental responsibilities without clear and convincing evidence of a change in circumstances.