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“But I told her to get a job...” Maintenance Statutory Factors in determining whether maintenance should be ordered.

I wish I had a dollar for every time in my 30-year career I heard “but I told her to get a job.” My answer to this often is “well she didn’t get a job.”

The statutory factors set forth in 750 ILCS 5/504 instruct the court in making a determination of whether to award maintenance.

(a) Entitlement to maintenance. In a proceeding for dissolution of marriage, legal separation, declaration of invalidity of marriage, or dissolution of a civil union, a proceeding for maintenance following a legal separation or dissolution of the marriage or civil union by a court which lacked personal jurisdiction over the absent spouse, a proceeding for modification of a previous order for maintenance under Section 510 of this Act, or any proceeding authorized under Section 501 of this Act, the court may grant a maintenance award for either spouse in amounts and for periods of time as the court deems just, without regard to marital misconduct, and the maintenance may be paid from the income or property of the other spouse. The court shall first make a finding as to whether a maintenance award is appropriate, after consideration of all relevant factors, including:

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

(2) the needs of each party;

(3) the realistic present and future earning capacity of each party;

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

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

(6) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment;

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

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

(8) the duration of the marriage;

(9) the age, health, station, occupation, amount and

sources of income, vocational skills, employability, estate, liabilities, and the needs of each of the parties;

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

(11) the tax consequences to each party;

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

(13) any valid agreement of the parties; and

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

None of the factors have to do with what “should have been” or what “could have been.” All of the factors have to do with “what is.” What are the facts on the ground at the time of the dissolution? This is what is considered by the court in determining whether maintenance should be allowed.

All of the factors are important, but key factors include age of the parties, length of the marriage, current incomes and current income potential. The court focuses on these facts in determining maintenance. Often the husband might tell me, she has teaching degree! Then I find out the teaching degree was from a small college in Alaska in 1989 and the wife has been home with couple’s five children, one of who is special needs, for the last 20 years. Meanwhile the husband has made a fantastic living as a financial advisor. Applied to the factors, this is a maintenance case.

On the other hand, if the wife is purposely unemployed or underemployed, the facts on the ground might point in the direction away from maintenance. Let’s take our same husband in the example above with his successful career as a financial advisor and this time the wife is an out of work surgeon. After let’s say a 10-year marriage, wife took a sabbatical from her practice as an Orthopedic surgeon after the birth of the couple’s first child. Both sets of grandparents live nearby and are more than willing and able to babysit and they do babysit quite often so wife can go to her daily Yoga class, her Spinning Class three days per week, soup kitchen volunteering three nights per week, and just for good measure, wife puts in about 3-4 hours per day training for her next triathlon.

On those facts, husband needs to fight maintenance. Wife can work and should get back to work. On the other hand, if husband waits 20 years to file for divorce and all this time wife has this

lifestyle stated above, she cannot realistically just jump back into the operating room and start operating. Thus at that time, the facts on the ground applied to the statutory factors would point to maintenance.

The facts of the case, with perhaps some creativity in organization and argument by the attorneys, impacts the court's decision on whether maintenance should be awarded or now. Next month we will look at if maintenance is allowed, then how much and for how long. Stay tuned.

- Thomas J. Kasper