The Modification of Judgments for Dissolution of Marriage

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INTRODUCTION

A significant number of cases a Family Law Practitioner participates in involve post-decree matters and the possible modification of Judgments. In some instances the request is an attempt to cure issues which were not properly addressed in the underlying Judgment. This may involve issues of interpretation, meaning and/or issues which, particularly with children, were not contemplated or addressed. However, the most frequent scenarios are, as a result of the passage of time, changes in circumstances of the parties requiring the Court to revisit certain issues. A modification proceeding involves altering and/or adding additional terms to a Judgment.

One of the underlying principals of the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") is to promote the amicable settlement of disputes [1] as well as to mitigate harm to the parties and their children caused by the dissolution process.[2] As a result, any dissolution of marriage involves three (3) essential participants: each of the parties advancing their respective positions; and the Court making decisions on contested issues or approving of any agreement reached by the parties.

In order to protect settlements or Judgments and to protect the parties and their children, the IMDMA imposes certain threshold requirements and burdens of proof on a party seeking to undue that which has been done. A primary issue is the protection and promotion of the validity of Judgments,[3] creating stability while having the ability to

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[1] 750 ILCS 5/102(3).
[2] 750 ILCS 5/102(4).
[3] *In Re The Marriage of Himmel*, 285 Ill.App.3d 145, 149, 220 Ill.Dec. 719, 723, 673, N.E.2d 1140, 1144 (2nd Dist. 1996); *King v. King*, 130 Ill.App.3d 642, 654, 85 Ill.Dec. 874, 881, 474 N.E.2d 834, 841 (5th Dist. 1985).

adjust obligations in light of changing circumstances,[4] resolving issues under circumstances which should have been known or disclosed,[5] or revisiting problems created by improperly entered judgments which are void as against public policy or existing law. As a practical matter, this last category occurs when parties and/or their attorneys create provisions which are the equivalent of "Band-Aids" on issues in order to achieve settlement while everyone involved should have known the resolution would be problematic in the future or unenforceable.

The form of this presentation will be to highlight to the Family Law Practitioner on the procedures and laws of modification. This presentation will be divided into the four (4) areas of modification requests:

A. Child Support or Unallocated Support;

B. Maintenance;

C. Property Distribution; and

D. Custody/Visitation.

Each of these general issues imposes separate burdens and obligations which the Family Law Practitioner needs to be familiar with.

A. THE MODIFICATION OF CHILD SUPPORT

The starting place for any Family Law Practitioner faced with a possible child support modification proceeding is the various statutes for modification[6]. This involves the statute authorizing modification[7] and the statute authorizing an award of child

[4] 750 ILCS 5/510 & 610.
[5] 735 ILCS 5/2-1401.
[6] 750 ILCS 5/505 and 510.
[7] 750 ILCS 5/510.

support.[8] Both statutes come into play because such a proceeding is a two (2) stage process: (1) do the facts warrant modification; and, if so, (2) what should the modification be (what should be the level of child support).

Whether modification should be allowed is governed by section 510 of the IMDMA.[9] Specifically section 510(a) of the IMDMA governs the first stage in the process. The burden of proof required depends upon whether the person receiving support is receiving services from the Illinois Department of Public Aid under Article X of the Illinois Public Aid Code. In such an instance, provided that 36 months has passed since the entry of the last child support order or the modification of same, modification is automatic if there is an inconsistency of at least 20% but no less than $10 per month between the amount of the existing order and what child support would otherwise be pursuant to section 505 of the IMDMA.[10] If the original order, however, created a deviation from guidelines and there has not been a change in circumstances that warranted the original deviation, then modification is not appropriate.

In cases not involving the Illinois Department of Public Aid, the person seeking the modification has the burden of proving that there has been a substantial change in circumstances.[11] If a substantial change in circumstances is proven, the Courts are then directed to set child support in accordance with section 505 of the IMDMA.[12] In other words, if a litigant can get through stage I successfully, the Court is to set child support in stage II *de novo*.[13]

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[8] 750 ILCS 5/505.
[9] 750 ILCS 5/510.
[10] 750 ILCS 5/510(a)(2)(A)).
[11] 750 ILCS 5/510(a)(1).
[12] 750 ILCS 5/510(a)(1).
[13] *In Re Marriage of Davis*, 287, Ill.App.3d 888, 890, 174 Ill.Dec.622, 624, 599 N.E.2d 168, 170 (5th Dist. 1992).

Illinois is a fact pleading state. Merely pleading that a substantial change has occurred without any specific factual allegations is insufficient to withstand a motion to strike.[14] In Illinois, however, litigants are not required to plead evidence.[15] Some facts must be alleged concerning the threshold question of change in circumstances for the pleading to be properly before the Court but not all of the evidence which will be presented needs to be alleged.

In order to determine whether the threshold finding of a change in circumstances can be met, the Family Law Practitioner must focus on the facts and circumstances surrounding the imposition of the initial obligation in order to prosecute or defend against such a request. Some Appellate decisions have focused on the relevant facts as being similar to if not identical to the factors the Court may consider pursuant to section 505 of the IMDMA including whether to deviate from guidelines.[16] However the practitioner needs to be reminded that section 505 of the IMDMA sets forth various factors but does not limit the Court's inquiry into only these factors; rather, the prefaced language this section of the statute is "...after considering the best interests of the child in light of evidence **including but not limited to** one or more of the following factors...". In other words, the statute and the cases interpreting the statute give the Court substantial discretion as to what may be deemed relevant for its consideration.

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[14] *Vernon v. Schuster*, 179 Ill.2d 338, 394, 228 Ill.Dec. 195, 198, 688 N.E.2d 1172, 1175 (1997); *Anderson v. Vanden Dorpel*, 172 Ill.2d 399, 408, 217 Ill.Dec. 720, 724, 667 N.E. 2d 1296, 1300 (1996).

[15] *Zeitz v. Village of Glenview*, 227 Ill.App.3d 891, 894, 169 Ill.Dec. 897, 900, 592 N.E.2d 384, 397, (1st Dist. 1992); S*ee also: Lloyd v. County of DuPage,* 303 Ill.App.3d 544, 554, 236 Ill.Dec. 602, 689, 707 N.E.2d 1252, 1259 (2nd Dist. 1999) (Rule 23).

[16] 750 ILCS 5/505(a)(2); *In Re The Marriage of Pytawka*, 277 Ill.App.3d 728, 731-32, 214 Ill.Dec. 651, 654, 661 N.E.2d 505, 508 (2nd Dist. 1996); *In Re The Marriage of Lambdin*, 245 Ill.App.3d 797, 806, 184 Ill.Dec. 789, 797, 613 N.E.2d 1381, 1389 (4th Dist. 1993); *In ReThe Marriage of Heil* at 890, 174 Ill.Dec. at 624, 599 N.E. at 170).

A substantial number of cases have, at first blush, limited the Court's ability to modify child support only in circumstances where the evidence shows **both** an increased ability to pay as well as increased needs of the children.[17] While Courts have emphasized the necessity of a finding of increased ability to pay, the requirement of increased needs has been diluted by many decisions allowing the Courts to presume as children get older and costs of living increase (cost of living rarely decreases) and, therefore, the needs of the children increase.[18] Court's have also held that an increase in the payor's net income in and of itself is enough to warrant a finding of change of circumstances.[19] Other Courts have held the increase in the payor's income is but one factor.[20] In this vein, child support may be increased irrespective of any increased needs of the children.[21] The more balanced view is that an increase in income is but one factor to consider.[22]

The Family Law Practitioner may encounter Judgments with provisions for maintenance of the former spouse as well as a separate award of child support. Upon the termination of maintenance, it is not uncommon for the former maintenance recipient to seek an increase in child support – a direct or indirect link to the termination of

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[17] *In Re The Marriage of Sweet*, 316 Ill.App.3d 101,105, 249 Ill.Dec. 212, 216, 735 N.E.2d 1037, 1041 (2nd Dist. 2000); *In Re The Marriage of Davis*, 287 Ill.App.3d 846, 851, 223 Ill.Dec. 166, 170, 679 N.E.2d 110, 114 (5th Dist. 1997); *In Re The Marriage of Pylawka* at 731, 214 Ill.Dec. at 654, 661 N.E.2d at 508; *In Re The Marriage of Schmuold*, 88 Ill.App.3d 348, 350, 43 Ill.Dec. 629, 631, 410 N.E.2d 629, 631 (2nd Dist. 1980); *In Re The Marriage of Scott*, 72 Ill.App.3d 117, 124, 27 Ill.Dec. 863, 868, 389 N.E.2d 1271, 1276 (1st Dist. 1979).

[18] *In Re The Marriage of Davis* at 851, 223 Ill.Dec. at 170, 679 N.E.2d at 114; *In Re The Marriage of Pylawka* at 731, 214 Ill.Dec. at 654, 661 N.E.2d at 508; *In Re The Marriage of Reegel* at 499, 183 Ill.Dec. at 170, 611 N.E.2d at 23; *In Re The Marriage of Heil* at 894, 174 Ill.Dec. at 627, 599 N.E. 2d at 173; *In Re The Marriage of Helfrich*, 101 Ill.App.3d 1070, 1073, 57 Ill.Dec. 469, 471, 428 N.E. 2d 1149, 1151 (1st Dist. 1981); *In Re The Marriage of Roth* at 682, 55 Ill.Dec. at 274, 426 N.E.2d at 249; *In Re The Marriage of Schmerold* at 351, 43 Ill.Dec. at 631, 410 N.E.2d at 631; *In Re The Marriage of Scott* at 124, 27 Ill.Dec. at 868, 389 N.E.2d at 1276).

[19] *In Re The Marriage of Lambolin* at 806, 184 Ill.Dec. at 797 613 N.E.2d at 1389; *In Re The Marriage of Heil* at 891, 174 Ill.Dec. at 624, 599 N.E.2d at 171).

[20] *In Re The Marriage of Villanueva* at 149, 218 Ill.Dec. at 108, 668 N.E.2d at 591).

[21] *In Re The Marriage of Freesen* at 105, 211 Ill.Dec. at 767, 655 N.E.2d at 1150).

[22] *In Re The Marriage of Villanueva* at 149, 218 Ill.Dec. at 108, 668 N.E.2d at 591).

maintenance provisions of the Judgment. Since the terms of the Judgment were known, foreseeable changes are insufficient in and of themselves to create a change in circumstances.[23] In addition, the change must occur since the entry of Judgment (or last order modifying support).[24]

If a litigant proves his or her case in stage I, the threshold determination of substantial change in circumstances having been met, the Court is then charged with making a *de novo* determination of support. The Family Law Practitioner needs to assess what does this result in. Since the setting of child support is primarily income driven, absent a significant increase in income, significant judicial and financial resources can be wasted winning the battle and loosing the war. Is the increase income significant enough to make a difference?

Controversy exists as to how the remarriage of a spouse impacts potentially his or her ability to pay or entitlement to receive support and whether remarriages can constitute itself a change in circumstances in light of the new spouses' financial resources.[25] Prior to the recent cases of *In Re The Marriage of Street* and *In Re The Marriage of Drysch* (both of these cases involved college expense allocation), under equitable theories there was an ability for the Court's to consider the financial resources of the payor of child support and the effect of his or her remarriage. In the case of *In Re The Marriage of McBride*[26], the First District of the Illinois Appellate Court addressed the relevancy of the payor's new spouse's finances relative to child support. The payor filed a petition to

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[23] *In Re The Marriage of Hughes*, 322 Ill.App.3d 815, 818-819, 255 Ill.Dec. 929, 931-32, 751 N.E.2d 23, 25-26 (2nd Dist. 2001).
[24] Id.
[25] *In Re The Marriage of Street*, 325 Ill.App. 3d 108, 114-15, 258 Ill.Dec. 613, 618-19, 756 N.E. 2d 887, 892-93 (3rd Dist. 2001); *In Re The Marriage of Drysch*, 314 Ill.App.3d 640, 646, 247 Ill.Dec. 409, 414, 732 N.E. 2d 125, 130 (2nd Dist. 2000).
[26] 166 Ill.App.3d 504, 116 Ill.Dec. 880, 519 N.E.2d 1095 (1st Dist. 1988).

modify his child support obligation after the payee filed a petition for rule to show cause because of the payor's failure to pay child support. The payor had remarried and his current spouse was earning an income. Citing the *Robin*[27] case as precedence, the Appellate Court affirmed the proposition that that financial status of the new spouse should not be considered in determining whether the payor has the ability to fulfill his child support obligation.[28] However, the Appellate Court went on to note, under an equitable theory, that the trial court could consider the payor's new spouse's income in order to determine whether the imposition of the modified child support obligation would endanger the payor's or his current spouse's financial circumstances.[29] In justifying a seeming departure from the *Robin*[30]decision, the Appellate Court held that the trial court "reached an equitable conclusion" and there was no indication that the trial court had based the child support award " . . . solely on the combined salaries of (the payor) and his present wife."[31]

The Fourth District of the Illinois Appellate Court thereafter considered the question as to the relevancy of the payor's new spouse's finances on at least three (3) occasions. In the case of *In Re The Marriage of Keown*[32], the payor filed a petition to reduce child support. The payor contested the ability of the trial court to consider her current spouse's income in determining the child support. The Appellate Court affirmed that the new spouse's financial status may not be considered to ascertain the payor's ability to fulfill a child support obligation.[33] However, recognizing the logic of the

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[27] 45 Ill.App.3d 365, 3 Ill.Dec. 950, 359 N.E.2d 809 (1st Dist. 1977).
[28] 166 Ill.App.3d 504, 511, 116 Ill.Dec. 880, 885, 519 N.E.2d 1095, 1100 (1st Dist. 1988).
[29] *Id.*
[30] 45 Ill.App.3d 365, 3 Ill.Dec. 950, 359 N.E.2d 809 (1st Dist. 1977).
[31] 166 Ill.App.3d 504, 512, 116 Ill.Dec. 880, 885, 519 N.E.2d 1095, 1100 (1st Dist. 1988).
[32] 225 Ill.App.3d 808, 167 Ill.Dec. 375, 587 N.E.2d 644 (4th Dist. 1992).
[33] *Id.* at 813, 167 Ill.Dec. at 378, 587 N.E.2d at 647.

McBride[34] decision, the Appellate Court also held that the trial court may consider the new spouse's financial status "...to determine whether the payment of child support would endanger the ability of the support-paying party and that party's current spouse to meet their needs."[35]

If under our statute children have a right to live the lifestyle that they would have enjoyed had the marriage not been dissolved,[36] is there an ability to increase their lifestyle because of remarriage? The Court is without jurisdiction to impose an obligation on the new spouse. However if a change in circumstances exists, in setting support, how the payor is living is a relevant consideration.

With respect to unallocated family support, by definition, this is a blending of child support and maintenance for tax deductibility purposes. While child support is never nonmodifiable, maintenance can be.[37] Unfortunately, some agreements provides that this blended form of support is nonmodifiable. These provisions are against public policy and are invalid because an unspecified portion of the payment is child support and therefore modifiable.[38] However, an open issue exists as to whether, in an unallocated family support situation, a provisions can be enforceable which terminates a parties' right to maintenance on a date certain without specifying what portion of the payment is maintenance. In other words, theoretically, the right to receive maintenance can be made nonmodifiable in duration but because it is blended with child support it cannot be

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[34] 166 Ill.App.3d 504, 511, 116 Ill.Dec. 880, 885, 519 N.E.2d 1095, 1100 (1st Dist. 1988)
[35] *Id. See also: In Re The Marriage of Baptist*, 232 Ill.App.3d 906, 174 Ill.Dec. 81, 598 N.E.2d 278 (4th Dist. 1992) and *In Re The Marriage of Boland*, 308 Ill.App.3d 1063, 242 Ill.Dec. 536, 721 N.E.2d 815 (4th Dist. 1999).
[36] 750 ILCS 505 (a) (2) (c).
[37] 750 ILCS 5/504/502(f).
[38] *In Re The Marriage of Sassano*, 337 Ill.App.3d 186, 193, 271 Ill.Dec. 864, 869-70, 785 N.E.2d 1058, 1063-64 (2nd Dist. 2003). *In Re The Marriage of Semonick*, 315 Ill.App.3d 395, 403, 248 Ill.Dec. 136, 142, 733 N.E.2d 811, 817 (1st Dist. 2000).

nonmodifiable in amount during the duration of the obligation. Consider the following clause:

> The Respondent shall pay to the Petitioner the sum of $1,000 per month in unallocated family support as and for the children and the maintenance of the Petitioner for a period of 48 months. At the expiration of this period, a Court of competent jurisdiction upon proper petition and notice shall set the Respondent's child support obligation. In no event will the Petitioner be entitled to receive maintenance for herself beyond the 48 month period and expressly waives the right to receive and the Respondent's obligation to pay such maintenance.

Such a provision may create a limited right to receive maintenance over a specified period of time. However, at any time during this period of unallocated family support, the recipient could request modification as to amount. A question exists as to whether the recipient could seek modification in the duration of the maintenance obligation during the term. In other words, the day before the expiration of the unallocated family support a petition is filed alleging a change of circumstances requesting an extension of the duration. Because a "change in circumstances" is the threshold questions, and because the termination of the right is foreseeable because of the terms of the agreement, logic dictates the request should fail.[39] However, this remains an issue open to interpretation.

In *Boyer v. Rudkan*[40] a litigant sued his attorney for malpractice for including a provision in his settlement agreement providing for unallocated maintenance and child support which were designated nonmodifiable. The former wife subsequently remarried. The former husband sought the termination of the maintenance rights under the unallocated award despite the nonmodifiable provisions. The former husband did not succeed so, naturally, he sued his attorney. In affirming the trial court decision that the maintenance provisions were nonmodifiable, the Appellate Court held as follows:

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[39] *In Re The Marriage of Hughes* at 818-819, 255 Ill.Dec. at 931-32; 751 N.E.2d at 25-26).
[40] 161 Ill.App.3d 237, 112 Ill.Dec. 734, 519 N.E.2d 200 (3rd Dist. 1987).

> "Consequently, pursuant to *Kozloff*, even before 1982 section 510(b) permitted parties to agree to maintenance that would be payable following the remarriage of the recipient. As this instant settlement agreement included such a provision, we find that the maintenance payments were not modifiable."[41]

In the case of *In Re The Marriage of Mateja*[42] an agreement was entered into for the "...support of maintenance of either (wife) or the minor child." The former husband later sought the termination of maintenance. The trial court denied the requested modification. The Appellate Court affirmed based on the clear and unambiguous language of the agreement. The Appellate Court specifically rejected the reasoning of the case of *In Re The Marriage of Sutton*.[43] Unfortunately, confusing this issue, the Illinois Supreme Court later took an appeal of the *Sutton* case. In *Sutton* the trial court granted a legal separation of the parties which included the incorporation of an agreement that restricted the modification of maintenance (not unallocated family support). The Supreme Court construed the wording of 750 ILCS 5/502(f) as being limited to dissolution of marriage actions and since the case involved legal separation, no such restriction was enforceable.[44] This case, however, had not involved a child support component.

In the case of *In Re The Marriage of Lehr*[45] an award of unallocated alimony and child support was entered. The award precluded modification of his amount in the event the wife derived income from employment.[46] The former husband later filed a Petition to Modify asserting, as one of his basis for modification, that his former spouse was

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[41] *Id* at 240, 112 Ill.Dec. at 736, 514 N.E.2d at 202.
[42] 183 Ill.App.3d 759, 132 Ill.Dec. 666, 540 N.E.2d 406 (1st Dist. 1989).
[43] 178 Ill.App.3d 928, 128 Ill.Dec. 37, 533 N.E.2d 1125 (3rd Dist. 1989).
[44] *In Re The Marriage of Sutton*, 136 Ill.2d 441, 447-49, 145 Ill.Dec. 890, 893-94, 557 N.E.2d 869, 872-73 (1990).
[45] 217 Ill.App.3d 929, 160 Ill.Dec. 840, 578 N.E.2d 19 (1st Dist. 1991).
[46] *Id.* at 932, 160 Ill.Dec. at 842, 578 N.E.2d at 21.

employed. The trial court reduced the unallocated family support. The Appellate Court reversed based on the unambiguous terms of the agreement precluding modification of the maintenance component based upon the former wife earning an income.[47]

Yet the case of *In Re The Marriage of Semonchik*[48] provides greater confusion and controversy. In *Semonchik* an award of unallocated child support and maintenance was made pursuant to the parties' agreement. The agreement precluded modification of the support and provided maintenance would terminate on a date certain. The payor filed a motion to reduce the obligation to pay the support based upon the fact that the maintenance was limited in duration and his employment terminated. The Appellate Court held that because the maintenance was combined with child support, despite the terms of the agreement, the maintenance was modifiable.[49]

Finally, *In Re The Marriage of Sassano,*[50] an unallocated child support and maintenance amount was agreed to and approved by this Court. The agreement reflected that the support was nonmodifiable. Prior to the termination of the support, the payor sought to modify his obligation. While the trial court determined that the obligation should not be modified, the Appellate Court determined that the support, because it was a blend of maintenance and child support, was modifiable despite the terms of the agreement.

A reasonable and consistent interpretation of these decisions to make them consistent is during the term of unallocated family support, irrespective of provisions regarding non-modifiability, the obligations and rights are modifiable. However, the

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[47] *Id.* at 936, 160 Ill.Dec. at 844, 578 N.E.2d at 24.
[48] 315 Ill.App.3d 395, 248 Ill.Dec. 136, 733 N.E.2d 811 (1st Dist. 2000)
[49] *Id.* at 403, 248, Ill.Dec. at 142, 733 N.E.2d at 817).
[50] 337 Ill.App.3d 186, 271 Ill.Dec.864, 785 N.E.2d 1058 (2nd Dist. 2003)

undetermined question is if the terms require the waiver of such an obligation after a specified term to pay maintenance and the term expires, is there a right to modify that portion of the payment that relates to maintenance? There is no definitive decision; yet, there is nothing to loose by attempting to limit the duration of such an obligation or right.

B. MODIFICATION OF MAINTENANCE

When dealing with issues regarding the possible modifiability of maintenance, like child support, the starting place of the Family Law Practitioner is the statute.[51] Pursuant to statute, maintenance may only be modified "...upon a showing of a substantial change in circumstances."[52] Again this process is in two (2) stages. If a substantial change has occurred, in modifying maintenance, the factors to be considered are the same as in an initial award of maintenance.[53] The trial court must balance the ability of the potential recipient to support himself or herself in some approximation of the standard of living enjoyed during the marriage.[54]

Unlike child support, with respect to maintenance, there is no formula or calculation that can be used by the court to determine the correct amount by statute. Rather, the factors are nebulous at best so that the court has great discretion in the determination whether there should be a modification and, if there is a change, the

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[51] 750 ILCS 5/510(a).
[52] 750 ILCS 5/510(a); *In Re The Marriage of Dunseth*, 260 Ill.App.3d 816, 827, 198 Ill.Dec.620, 629, 633 N.E.2d 82, 91 (4th Dist. 1994).
[53] *Koenigsknecht* at 478, 236 Ill.Dec. at 270, 707 N.E.2d at 115 (1st Dist. 1998); *See also In Re Marriage of Krupp*, 207 Ill.App.3d 779, 792, 152 Ill.Dec. 742, 750, 566 N.E.2d 429, 437 (1st Dist. 1990). 750 ILCS 5/504.
[54] *In Re The Marriage of Sann*, 313 Ill.App.3d 317, 322, 246 Ill.Dec. 173, 177, 729 N.E.2d 546, 550 (4th Dist. 2000)

subsequent setting of maintenance.[55] The burden of proof is upon the litigant seeking modification.[56]

The mechanics of such a proceeding is identical to child support, the two (2) stages. What is different is the nebulous nature of the considerations the court has in setting the modified support amount if there is a change in circumstances. Pursuant to Illinois law, a consideration of the court is the standard of living enjoyed during the course of the marriage.[57] An argument therefore exists that any increase in the payor's lifestyle is not relevant. However, "lifestyle" is but one factor. If there is a substantial change in circumstances, the court is permitted to "...consider all relevant factors, including...".[58] As a result, while a litigant should not benefit from an increased lifestyle of the payor, and may not be able to increase his or her lifestyle to justify modification, the discretion afforded to the Court can be result oriented. In other words, the judiciary can decide where it wants to get to and then it is free to get to that result because of the discretion the Court has. The Family Law Practitioner needs to be mindful of these dynamics.

A trend in the law previously existed disfavoring maintenance so that, if a property division could result in a party being able to support himself or herself, maintenance was not to be awarded.[59] Yet, the trend in the law seems to recognize that

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[55] *In Re The Marriage of Connors*, 303 Ill.App.3d 219, 224, 236 Ill.Dec. 430, 435, 707 N.E.2d 275, 280 (2nd Dist. 1999); *In Re The Marriage of Izzo*, 264 Ill.App.3d 790, 791, 202 Ill.Dec. 188, 185-86, 637 N.E.2d 723, 724-25 (1st Dist. 1994).

[56] *In Re The Marriage of Connors* at 224, 236 Ill.Dec. 435, 707 N.E.2d at 280; *In Re The Marriage of Izzo* at 791, 202 Ill.Dec. at 185, 637 N.E.2d at 724; *In Re The Marriage of Krupp* at 791, 152 Ill.Dec. 742, 749, 566 N.E.2d at 436.

[57] 750 ILCS 5/504(a)(6).

[58] 750 ILCS 504(a).

[59] *In Re The Marriage of Durante*, 201 Ill.App.3d 376, 385, 147 Ill.Dec. 56, 63, 559 N.E.2d 56, 63 (1st Dist. 1990).

the reality of traditional families requires a permanent award[60] in cases of long term marriage. This shift to permanent maintenance in the appropriate case creates the greater possibility for modification proceedings.

When the payor of maintenance seeks modification because of a change in income, an inquiry is necessary as to why the reduction in income, if it has occurred, occurred. If the reduction in income resulted from a voluntary act on the part of the payor (i.e. quitting his or her job), the necessary focus is whether the voluntary action was made in good faith.[61] Because the burden of proof is upon the litigant advocating modification, it is his or her burden to prove his or her good faith.[62] The concern is obviously the potential for a litigant to seek to evade his or her support responsibility by manipulating his or her employment or income earning ability.

Modification may also involve an issue as to the recipient's actions. There is no requirement that the payor's circumstances is the sole focus. A common form of maintenance in Illinois is rehabilitative: how much does the recipient need over what period of time in order to facilitate he or she to become self supporting.[63] At the end of the term the Court typically reviews the obligation of support, reviews whether the

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[60] *See: In Re The Marriage of Reynard*, 344 Ill.App.3d 785, 279 Ill.Dec. 917, 801 N.E.2d 591 (4th Dist. 2003); *In Re The Marriage of Culp*, 341 Ill.App.3d, 275 Ill.Dec. 221, 792 N.E.2d 452 (4th Dist. 2003); *In Re The Marriage of Keip*, 332 Ill.App.3d 876, 266 Ill.Dec. 157, 773 N.E.2d 1227 (5th Dist. 2002); *In Re The Marriage of Drury*, 317 Ill.App.3d 201, 251 Ill.Dec. 284, 740 N.E.2d 365 (4th Dist. 2000); *In Re The Marriage of Brackett*, 309 Ill.App.3d 329, 242 Ill.Dec. 798, 722 N.E.2d 287 (2nd Dist. 1999); *In Re The Marriage of Severino*, 298 Ill.App.3d 224, 232 Ill.Dec. 355, 698 N.E.2d 193 (2nd Dist. 1998); *In Re The Marriage of Durante*, 201 Ill.App.3d 376, 147 Ill.Dec. 56, 559 N.E.2d 56 (1st Dist. 1990).

[61] *In Re The Marriage of Brent*, 263 Ill.App.3d 916, 922, 200 Ill.Dec.799, 803, 635 N.E.2d 1382, 1386 (4th Dist. 1998); *In Re The Marriage of Lyons*, 155 Ill.App.3d 300, 305, 108 Ill.Dec. 297, 301, 508 N.E.2d 458, 462 (2nd Dist. 1987); *In Re The Marriage of Cons*, 150 Ill.App.3d 812, 814, 104 Ill.Dec. 259, 261, 502 N.E.2d 756, 758 (3rd Dist. 1986); *In Re The Marriage of Kowski*, 123 Ill.App.3d 811, 814, 79 Ill.Dec. 286, 289, 463 N.E.2d 840, 843 (1st Dist. 1984); *In Re The Marriage of Stephenson*, 121 Ill.App.3d 698, 700-01, 77 Ill.Dec. 142, 144, 460 N.E.2d 1, 3 (5th Dist. 1984).

[62] *In Re The Marriage of Lyons* at 305, 108 Ill.Dec. at 301, 508 N.E.2d at 462.

[63] *In Re The Marriage of Centrell*, 314 Ill.App.3d 623, 629, 247 Ill.Dec.742, 747, 732 N.E.2d 797, 802 (2nd Dist. 2000); *In Re The Marriage of Ward*, 267 Ill.App.3d 35, 42, 204 Ill.Dec. 449, 454, 641 N.E.2d 879, 884 (2nd Dist. 1994).

recipient has made an effort to become self-supporting, and does the payor have the ability to pay. A litigant may not "self imposed poverty" as a means to obtain maintenance.[64] The failure of the recipient of maintenance to make a good faith effort to achieve financial independence can, it and of itself, be a basis for modification of maintenance.[65]

Modification includes termination. By law, unless otherwise specified in the Judgment, the obligation to pay and right to receive maintenance terminates upon the recipient's death, remarriage or cohabitation on a continuing conjugal basis.[66] It is not difficult to prove death or remarriage, cohabitation is another issue. Cohabitation is an issue of fact depending upon the presence or absence of factors which the Court has discretion in finding.

Under Illinois law, if the Court finds that a person is engaged in a relationship which constitutes "cohabitation on a resident, continuing and conjugal basis", rights to maintenance are forever terminated. The test is not whether they are necessarily engaged in a sexual relationship (although this is a common factor in most of the cases) the test is whether a *de facto* husband and wife type of relationship exists.[67] As noted in *Frasco*, "...proof of sexual conduct between cohabitants s unnecessary to establish cohabitation on a conjugal basis". So what does "conjugal" mean in this context?

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[64] *In Re The Marriage of Schuster*, 224 Ill.App.3d 958, 970, 167 Ill.Dec. 73, 82, 586 N.E.2d 1345, 1354 (2nd Dist. 1992).
[65] *In Re The Marriage of Cantrell* at 629, 247 Ill.Dec. at 747, 732 N.E.2d at 802; *In Re The Marriage of Mayhall*, 311 Ill.App.3d 765, 770, 244 Ill.Dec. 227, 231, 725 N.E.2d 22, 26 (4th Dist. 2000); *In Re The Marriage of Koenighkneght* at 479, 236 Ill.Dec. at 270, 707 N.E.2d 115; *In Re The Marriage of Ward*, 267 Ill.App.3d at 42, 204 Ill.Dec. at 455, 641 N.E.2d at 885.
[66] 750 ILCS 5/510(c); *In Re The Marriage of Brent* at 921-22, 200 Ill.Dec. at 803, 635 N.E. 2d at 1386.
[67] *In Re the Marriage of Frasco*, 265 Ill.App.3d 202 Ill.Dec. 787, 638 N.E.2d 655 (4th Dist. 1994).

Our Supreme Court reviewed this issue in the case of *In Re The Marriage of Sappington.*[68] In this case a man and woman lived together. When the woman's former husband attempted to terminate her support asserting she was involved in cohabitation on a resident, continuing and conjugal basis, the woman asserted that the man with whom she was living was just a friend and that because he was impotent, they had no sexual relationship so that no "conjugal" relationship existed. while the Supreme Court in ***Sappington*** acknowledged that the existence of a sexual relationship was a factor, the absence of such a sexual relationship did not mean necessarily that the relationship was not "conjugal". The simple test developed is that if a Court looking at the totality of the facts, would conclude that a relationship is "husband-and-wife-like", a "conjugal" relationship will be found to exist. Besides the presence or absence of a sexual relationship, factors, as in ***Sappington***, can include, but are limited to, the following:

1) The alleged couple do many things together as if one was a husband and the other was a wife (the amount of time they spend together and the nature of the activities);[69]

2) The alleged couple live in the same home together;

3) The alleged couple have gone out together exclusively;

4) The alleged couple have taken vacations together sharing expenses;

5) The alleged couple frequently, if not exclusively, have their meals with each other;

6) The alleged couple share finances, have joint accounts and/or commingled their funds;[70]

7) The alleged couple exchange gifts and share holidays together; and

8) The alleged couple share household chores.

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[68] 106 Ill.2d 456, 88 Ill.Dec. 61, 478 N.E.2d 376 (1985).
[69] *In Re The Marriage of Herrin*, 262 Ill.App.3d 573, 199 Ill.Dec. 814, 634 N.E.2d 1168 (4th Dist. 1994).
[70] *In Re The Marriage of Toole*, 273 Ill.App.3d 607, 210 Ill.Dec. 551, 652 N.E.2d 456 (2nd Dist. 1995).

With respect to child support, all installments are deemed vested and therefore non-modifiable prior to the filing of any proceeding for modification This is not the same when dealing with maintenance. The commencement of "cohabitation" results in the termination.[71] What is of some interest is a phrase in the case of *In Re The Marriage of Toole*:[72]

> "Thus, because (the wife) cohabitated on a resident, continuing conjugal basis with (her boyfriend), and (the wife) and (the husband) *did not subsequently reconcile*, (the husband's obligation to pay all forms of maintenance...has been terminated". (*Emphasis Added*).[73]

As most people know, there is currently controversy as to same-sex marriages. There is no dispute that Illinois is a conservative state on these issues. While these unions are not yet recognized, such relationships without the benefit of legal sanction have been deemed sufficient for the termination of maintenance.[74]

There appears to be, because of the lack of any specific guidelines, a greater potential to modify maintenance awards given the fact that the "circumstances" for comparative purposes are more nebulous. The Family Law Practitioner needs to be cognizant of the standards and stages: Stage I: is there a substantial change based upon the facts; and if there is a change, what could be the ultimate effect. While our statutes permit, as a consideration for the court, the court to consider the "...standard of living

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[71] *In Re The Marriage of Snow*, 322 Ill.App.3d 953, 957, 255 Ill.Dec. 883, 886, 750 N.E.2d 1268, 1271 (3rd Dist. 2001); *In Re The Marriage of Gray*, 314 Ill.App.3d 249, 252, 247 Ill.Dec. 169, 172, 731 N.E.2d 942, 945 (2nd Dist. 2000); *In Re The Marriage of Toole*, 273 Ill.App.3d 607, 612-13, 210 Ill.Dec.551, 555-56, 653 N.E.2d 456, 460-61 (2nd Dist. 1995).

[72] *Id.*

[73] *Id.*

[74] *In Re The Marriage of Weisbrach*, 304 Ill.App.3d 99, 105-07, 237 Ill.Dec. 809, 813-815, 710 N.E.2d 439, 443-45 (2nd Dist. 1999). One of the authors finds a huge inconsistency with the Court being able to find a "defacto" husband and wife relationships between same sex couples as the basis to terminate support while, at the same time, being prohibited from recognizing legally such relationships. Without getting into the fray of this issue, there needs to be a consistent position.

established during the marriage...", the statutes do not allow for an increase or appreciation in this standard.[75]

C. MODIFICATION OF PROPERTY SETTLEMENTS

One of the keys is when do you file such an action. The starting place is, again, the statute. Section 510(b) states as follows:

> "The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment *under the laws of this State*. (Emphasis added).

There are two avenues of approach to vacate or modify a property settlement "*under the laws of this State*". The first is pursuant to 735 ILCS 5/2-1203. This Motion must be filed within 30 days of the Judgment.[76] The standard employed is discretionary.[77] The purpose of this motion is to alert the Court of possible errors and afford the court the opportunity to correct the errors.[78] In deciding this issue the Court is required to consider the litigant's right to fundamental or substantial justice. Under the above standards, while the Court is very reluctant to ever alter a previously made decision, the filing of such a Motion within 30 days of the Judgment relaxes the standards.

After 30 days from the entry of Judgment, the proceeding "...under the laws of this State..." are pursuant to 735 ILCS 5/2-1401. This statute requires a pleading to be filed with an appropriate affidavit or "other showing" as to the facts not known to the Court in support of the relief requested.[79] If the facts had been known to the Court at the

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[75] 750 ILCS 5/504(a)(6)
[76] 785 ILCS 5/2-1203.
[77] *Mryszuk v. Hayes*, 228 Ill.App.3d 860, 863, 171 Ill.Dec. 80, 82, 593 N.E.2d 900, 902 (1st Dist. 1992).
[78] *Id.; Loyola Academy v. S.S. Roof Maintenance,* 198 Ill.App.3d 799, 802, 144 Ill.Dec. 908, 410-11, 556 N.E.2d 586, 589-90 (1st Dist. 1990); *Sikowsyi,* 127 Ill.App.3d 614, 617, 83 Ill.Dec. 118, 120, 469 N.E.2d 725, 727 (1st Dist. 1984.
[79] 735 ILCS 5/2-1801(b).

time of the Judgment would have prevented the entry of Judgment, relief is available.[80] While the Court possesses powers of "as justice and fairness require",[81] the Court is without jurisdiction to make equitable modifications of judgments after 30 days.[82]

In order to proceed under 735 ILCS 5/2-1401, it is required that the party seeking relief prove the following:

(1) The existence of a meritorious defense or claim in the original action;

(2) due diligence in presenting the underlying claim; and

(3) due diligence in filing the underlying petition.[83]

By statue such an action is required to be filed within two (2) years of the entry of judgment unless legal disability, duress or no knowledge of fraud is an issue an then the two (2) year period starts when such conditions terminate or knowledge is acquired.[84]

Some Judgments contain provisions which are void as against public policy. The proper procedure for attacking these judgments is a 735 ILCS 5/2-1401 motion. A void judgment is subject to collateral attack.[85] There is no requirement of the showing of due diligence or a meritorious defense.[86]

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[80] *In Re The Marriage of Himmel*, 285 Ill.App.3d 145, 148, 220, Ill.Dec. 719, 722, 673 N.E.2d 1140, 1143 (2nd Dist. 1996); *In Re The Marriage of Johnston*, 237 Ill.App.3d 381, 390, 178 Ill.Dec. 122, 129, 604 N.E.2d 378, 385 (4th Dist. 1992).

[81] *Id.*

[82] *In Re The Marriage of Allen*, 308 Ill.App.3d 759, 764, 242 Ill.Dec. 198, 204, 721 N.E.2d 166, 172 (2nd Dist. 1999); *In Re The Marriage of* Hubbard, 215 Ill.App.3d 113, 117, 158 Ill.Dec. 747750, 574 N.E.2d 860, 863 (2nd Dist. 1991); *In Re The Marriage of Allen*, 343 Ill.App.3d 410, 412-13, 278 Ill.Dec. 288, 290-91, 798 N.E.2d 135, 137-38 (3rd Dist. 2003).

[83] *In Re The Marriage of Shaner*, 252 Ill.App.3d 146, 163, 191 Ill.Dec. 839, 851, 624 N.E.2d 1217, 1229 (1st Dist. 1993); *In Re The Marriage of Johnson* at 394, 178 Ill.Dec. at 131, 608 N.E.2d at 387.

[84] *People v. Made*; 193 Ill.2d 395, 250 Ill.Dec. 345, 400, 250 Ill.Dec. 660, 663, 739 N.E.2d 423, 426 (2000).

[85] *In Re The Marriage of Halstrom*, 342 Ill.App.3d 262, 276 Ill.Dec. 730, 737, 794 N.E.2d 980, 987 (2nd Dist. 2003).

[86] *In Re The Marriage of Adamson*, 308 Ill.App.3d 759, 763, 242 Ill.Dec. 198, 204, 721 N.E. 166, 172 (2nd Dist. 1999).

D. CHILD CUSTODY/VISITATION

In situations where a request to modify a prior child custody decision is made, two (2) questions must be initially addressed: (1) when is the request being made; and (2) what are the reasons for the request. The modification of child custody decisions is governed by 750 ILCS 5/610 of the IMDMA.[87] As to the "when" question, it is the policy of the State of Illinois to favor the finality of child custody judgments to promote stability for children.[88] In furtherance of this policy section 610(a) of the IMDMA[89] provides as follows:

> "Unless by stipulation of the parties, no motion to modify custody judgment may be made earlier than two years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health."

Based on this section, within the two years, modification can only be considered if a pleading is filed supported by affidavits supporting "a reason to believe" serious endangerment is occurring. Failure to comply with prerequisites will make the pleading defective and subject to attack.

Still focusing on "when", section 610(a) limits modification within the two year time frame from the date of the custody judgment.[90] It is not an uncommon practice in some cases for the parties to first resolve custody issues, enter an order and later resolve often financial issues. An issue arises when the two (2) years starts to run. The answer to this inquiry may depend on the manner in which the order of custody and Judgment is

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[87] 750 ILCS 5/610.
[88] *In Re The Marriage of Marsh*, 343 Ill.App.3d 1235, ___, 279 Ill.Dec. 234, 240-41, 799 N.E.2d 1037, 1043-44 (4th Dist. 2003), *In Re The Marriage of Gustafson*, 247 Ill.App.3d 797, 801, 187 Ill.Dec. 592, 595, 617 N.E.2d 1313, 1316 (4th Dist. 1993); *In Re The Marriage of Padiak*, 101 Ill.App.3d 306, 311-12, 56 Ill.Dec. 826, 830, 427 N.E.2d 1372, 1376 (2nd Dist. 1981).
[89] 750 ILCS 5/610(a)
[90] 750 ILCS 5/610(a)

drafted. In the recent case of *In Re The Marriage of Marsh*[91], the Court terminated joint custody and reserved the resolution of the remaining issues of child support, visitation and attorneys' fees.[92] The remaining issues were resolved approximately one year later with the entry of a final and appealable order.[93] One of the litigants filed a motion to reconsider raising issues as to the custody order. The issue became whether section 610 of the IMDMA allowed for these issues to be revisited since the final and appealable order was entered subsequent to an earlier custody determination that, up until the final order, was not appealable. Section 610(a) does not require the entry of a final and appealable Judgment or Order. This section provides for the two (2) year limitation from the date of the custody order. With this rational, in *Marsh*, the two year limitation period was deemed to commence on the date of the order as opposed to the date of the final and appealable judgment.[94]

While the facts of the *Marsh* case are not extremely clear, the Family Law Practitioner needs to be aware of the possible practice implications. If the client has primary custody and the goal is to protect that custody determination, in a circumstance where there is a prior custody order before a final Judgment, in the final judgment the Family Law Practitioner is well advised to incorporate and restate the provisions of the earlier order in hopes of extending it two (2) years from the final judgment as opposed to the earlier custody order. If it is in the client's interests to shorten this period, the Family Law Practitioner should be careful when the Judgment (the final and appealable order) is entered to not allow the entry of such an order which could be construed as extending the

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[91] ____Ill.App.3d ___, 279 Ill.Dec. 234, 799 N.E.2d 1037 (4th Dist. 2003)
[92] *Id* at ___, 279 Ill.Dec. at 238, 799 N.E.2d at 1041
[93] *Id.*
[94] *Id.* at ___, 279 Ill.Dec. at 241, 799 N.E.2d at 1044.

two year probation period. An example of a clause which might accomplish the extension, please consider the following:

> "The parties are awarded joint legal custody of their children with the children to primarily reside with the Petitioner. The provisions of the order establishing the arrangement entered on January 31, 2003 is attached and *incorporated* herein and shall be enforceable as an order to this Court."

An example of a clause which may not extend the two (2) year prohibition could be the following:

> "The parties were previously awarded joint legal custody of their children with the children to primarily reside with the Petitioner. By operation of this final Judgment, nothing contained herein shall be construed as altering or modifying the prior order of joint custody which otherwise shall remain enforceable and legally in effect."

As it relates to the issue of "when" within two years, the absolute requirements of section 610(a) of the IMDMA[95] requires affidavits to be filed within the two year period. This is mandatory.[96] While mandatory, the failure to object to the failure to comply with this requirement waives the issue.[97] The absence of affidavits is not jurisdictional.[98] The focus of the affidavits is the litigants' request for modification in terms of his or her "reason to believe" that there is endangerment thereby allowing the Court to consider the request.[99] If the Court determines the affidavits are sufficient, the case then proceeds, irrespective of whether the case if filed within two years or not, with an evidentiary

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[95] 750 ILCS 5/610(a).

[96] *In Re The Marriage of Sexton*, 84 Ill.2d 312, 319, 49 Ill.Dec. 709, 712, 418 N.E.2d 729, 732 (1981); *In Re The Marriage of Noble*, 192 Ill.App.3d 501, 506, 139 Ill.Dec. 133, 136, 548 N.E.2d 518, 521 (2nd Dist. 1990).

[97] *In Re The Marriage of Sexton* at 322, 49 Ill.Dec. at 714, 418 N.E.2d at 734; *In Re The Marriage of Noble* at 507-08, 139 Ill.Dec. at 136-37; 548 N.E.2d at 521-22; *In Re The Marriage of Hading*, 150 Ill.App.3d 623, 627, 103 Ill.Dec. 654, 658, 501 N.E.2d 971, 975 (2nd Dist. 1986).

[98] *In Re The Marriage of Sexton* at 322, 49 Ill.Dec. at 714, 418 N.E.2d at 734; *In Re The Marriage of Noble* at 507-08, 139 Ill.Dec. at 136-37; 548 N.E.2d at 521-22; *In Re The Marriage of Hading*, 150 Ill.App.3d 623, 627, 103 Ill.Dec. 654, 658, 501 N.E.2d 971, 975 (2nd Dist. 1986).

[99] *Department of Public Aid ex. rel. Davis v. Brewer*, 183 Ill.2d 540, 554-55, 234 Ill.Dec. 223, 229, 702 N.E.2d 563, 569 (1998).

determination as to whether modification, if at all may be warranted.[100] All section 610(a) of the IMDMA requires is within the two (2) years that the court decide, based on affidavits, whether there is "reason to believe" endangerment may be occurring. If the Court considers that the pleading is sufficient, the inquiry shifts to the reason or basis of the request which is contained in section 610(b) of the IMDMA.[101]

Regardless of when a request for modification is sought, in order for the court to modify custody, a determination must be made as to whether the facts show by clear and convincing evidence since the entry of the prior judgment that the best interests of the children dictate this modification.[102] This is no longer an issue of serious endangerment. Section 610(b) of the IMDMA[103] requires an initial analysis as to the form of custody to evaluate whether the reasons for the request are sufficient. Pursuant to this section, when dealing with joint custody the change in circumstances relevant to the inquiry relates to "...the child or either or both parties...". When dealing with sole custody, the inquiry is limited to a change in circumstances in "...the child or his custodian..."; in this circumstance, any change in the circumstances of the non-custodial are irrelevant by statute.[104] Changes in the circumstances of the non-custodial parent is not alone

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[100] *Department of Public Aid ex. rel Davis* at 555-56, 234 Ill.Dec. at 229-30, 702 N.E.2d at 569-70).
[101] 750 ILCS 5/610(a) and (b).
[102] 750 ILCS 5/610(b).
[103] 750 ILCS 5/610(b).
[104] *In Re The Marriage of Andersen,* 236 Ill.App.3d 679, 682, 177 Ill.Dec. 289, 291, 603 N.E.2d 70, 72 (2nd Dist. 1992); *In Re The Marriage of Gibbons*, 158 Ill.App.3d 998, 1004, 111 Ill.Dec. 148, 152, 512 N.E.2d 52, 56 (4th Dist. 1987).

sufficient for a change of custody.[105] There is a presumption under the law favoring the current custodial pursuant to the last judgment or order.[106]

In the event a Court elects to entertain a modification proceeding and finds that by clear and convincing evidence that modification is in the best interests of the children, because of issues of stability there are limits upon what the court can do. For example, assume the mother has been physically injured and is hospitalized, if the father seeks custody the court must either grant or deny the request. The granting of the request triggers the two year prohibition imposed in section 610(a) for subsequent modification. In post decree proceedings, the court is without authority to enter temporary orders changing custody.[107]

Visitation, on the other hand, does not have the same level of prohibitions concerning modification. The modification of visitation is authorized pursuant to section 607(c) of the IMDMA[108] Whether to modify visitation is determined by the best interests of the child.[109] There is no need, with respect to a request for modification, to show a material change in circumstances.[110] The burden of proof for modification as to what is in the children's best interests is by the preponderance of the evidence.[111] Even in

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[105] *In Re The Marriage of Rathburn,* 48 Ill.App.3d 328, 335, 6 Ill.Dec. 314, 319, 362 N.E.2d 1136, 1141 (4th Dist. 1977); *In Re The Marriage of Rayburn,* 45 Ill.App.3d 712, 713-14, 4 Ill.Dec. 395, 397, 360 N.E.2d 142, 144 (4th Dist. 1977).

[106] *In Re The Marriage of Means,* 329 Ill.App.3d 392, 396-97, 264 Ill.Dec. 797, 800-801, 771 N.E.2d 501, 504-05 (4th Dist. 2002); *In RE The Marriage of Childers,* 305 Ill.App.3d, 70, 74, 238 Ill.Dec. 353, 356, Ill.NE.2d 456, 459 (2nd Dist. 1999);l *In Re The Marriage of Melton,* 288 Ill.App.3d 1084, 1088, 224 Ill.Dec. 425, 427, 681 N.E.2d 1046, 1048 (5th Dist. 1997); *In Re The Marriage of Riess,* 260 Ill.App.3d 210, 217, 198 Ill.Dec. 305, 310, 632 N.E.2d 635, 640 (2nd Dist. 1994).

[107] *In Re The Marriage of Valliere*, 275 Ill.App.3d 1095, 100-04, 212 Ill.Dec. 696, 699-702, 657 N.E.2d 1041, 1044-47 (1st Dist. 1995); *In Re The Marriage of Cesaretti*, 203 Ill.App. 347, 353, 149 Ill.Dec. 28, 31-32, 561 N.E.2d 306, 309-310 (2nd Dist. 1990).

[108] 750 ILCS 5/607(c).

[109] 750 ILCS 5/607 and 602.

[110] *Sarchet v. Ziegler*, 278 Ill.App.3d 460, 463 215 Ill.Dec. 275, 277, 663 N.E.2d 25, 27 (3rd Dist. 1996).

[111] *Lyons v. Lyons*, 228 Ill.App. 3d 407, 410, 169 Ill.Dec. 502, 503-04, 591 N.E.2d 1006, 1007-08 (5th Dist. 1992).

situations of alleged endangerment, such endangerment need only be proved by a preponderance of the evidence.[112]

[112] *In Re The Marriage of Slayton*, 292 Ill.App.3d 379, 386-87, 226 Ill.Dec. 583, 588, 685 N.E.2d 1038, 1043 (4th Dist. 1997); *In Re The Marriage of Fields*, 283 Ill.App.3d 894, 905, 219 Ill.Dec. 420, 427, 671 N.E.2d 85, 92 (4th 1996).