Till Death Do Us Part or Otherwise Approved by the Court - Interpreting the Language of Sec. 510(C) of the IMDMA regarding Post-Death Maintenance Obligations and Life Insurance

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TILL DEATH DO US PART OR OTHERWISE APPROVED BY THE COURT? INTERPRETING THE LANGUAGE OF § 510(C) OF THE IMDMA REGARDING POST-DEATH MAINTENANCE OBLIGATIONS AND LIFE INSURANCE

“I Bride, take you Groom, to be my husband, to have and to hold from this day forward, for better or for worse, for richer or for poorer . . . until death* do us part.”

* In case of divorce, financial obligations may extend beyond death as otherwise approved by the court. For further explanation see IMDMA § 510(c).
—Legally Correct Wedding Vows

INTRODUCTION

As suggested above, the promises made at a traditional nuptial ceremony have fine print. To put it bluntly, based on the language of the traditional vows, it would seem that the love and financial support promised to a spouse during marriage terminates when death does the bride and groom part; however, if that marriage ends in divorce, this is not necessarily true. In Illinois, termination provisions for spousal support following divorce are governed by § 510(c) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA).1 Like the traditional wedding vows, this statute specifically lists death as an event that terminates all future maintenance2 obligations; however, the statute goes on to say “[u]nless otherwise . . . approved by the court.”3 It is currently unsettled among the Illinois appellate districts whether this language authorizes trial courts to order post-death maintenance payments, namely by means of requiring one party to

1. 750 ILL. COMP. STAT. 5/510(c) (2008).
   Unless otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court, the obligation to pay future maintenance is terminated upon the death of either party, or the remarriage of the party receiving maintenance, or if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis.

2. “Under the former Illinois Divorce Act, an award of spousal support, as distinguished from child support, was known as alimony. Under the [IMDMA] it is known as maintenance.” 2 H. JOSEPH GITLIN, GITLIN ON DIVORCE: A GUIDE TO ILLINOIS MATRIMONIAL LAW § 15-2 (3d ed. 2010) (emphasis omitted) (footnote omitted).

3. 750 ILL. COMP. STAT. 5/510(c).
maintain a life insurance policy listing the other as the sole beneficiary. Conflicting interpretations of the language of § 510(c) raise several important questions. First, what methods should Illinois courts employ to most effectively interpret the language of the IMDMA when determining whether the legislature authorized trial courts to issue judgments contrary to statutory provisions? Second, under the Act, is life insurance an allowable means of post-death maintenance?

Unless "agreed by the parties in a written separation agreement set forth in the judgment or otherwise approved by the court," § 510(c) terminates future maintenance obligations upon the death of either party or the remarriage or cohabitation of the payee. Illinois courts have generally considered a court order requiring a husband or wife to continue to pay premiums on a policy for the benefit of their dependent ex-spouse equal to a post-death maintenance obligation because death triggers the benefits of a life insurance policy. Applying a number of disjointed and conflicting methods of statutory interpretation, the Third and Fourth District Illinois Appellate Courts have come to different conclusions about whether the language of § 510(c) authorizes a court to order post-death maintenance in the form of life insurance.

In a 2008 case, the third district held that a trial court erred as a matter of law by requiring a payor to maintain an already existing life insurance policy for the benefit of his ex-wife "so long as [he] was statutorily obligated to pay maintenance." In In re Marriage of Ellinger, the court found that pursuant to § 510(c), a trial judge lacks the discretion to order an ex-spouse to maintain a life insurance policy for the benefit of his ex-wife absent a separate written agreement between the parties since § 510(c) explicitly terminated the obligation to pay future maintenance on the death of either party. However, several months later in In re Marriage of Walker, the fourth district accused the third district of applying a "faulty rationale," erroneously relying on presumptive case law, and erring in its interpretation of § 510(c). In Walker, the court found that the language of § 510(c)

4. Id.
5. Id.
6. Id.
7. In re Marriage of Ellinger, 882 N.E.2d 692, 694 (Ill. App. Ct. 2008). The court remanded the case because depriving the ex-wife of this life insurance policy "may have disturbed the trial court's original equitable calculation." Id. The court noted that on remand the lower court should "reconsider the distribution of those factors that may affect the financial future of the parties." Id. at 696.
8. Id. at 695.
was sufficiently broad to authorize a trial court to order the upkeep of a life insurance policy as security for a maintenance obligation. The fourth district concluded that, under the language of the section, a trial court has the discretion to order various forms of security for maintenance obligations that extend beyond death, including life insurance.

The third and fourth district split necessitates taking a closer look at the actual language of § 510(c). Consider the following hypothetical: After thirty years of marriage, Jack and Jill file for divorce due to “irreconcilable differences” over who spilled the pail more often. Jack and Jill are both fifty-five. Jack makes $300,000 a year as an engineer. Jill makes $30,000 as a teacher. After three days of trial, the court orders Jack to pay $3,000 per month to Jill as a permanent maintenance award in addition to a fifty-fifty property division. Jack and Jill have no existing life insurance policies. Two days after their divorce is finalized, Jack gets hit by a bus and dies. Assuming that Jack and Jill did not execute any sort of separate written agreement requiring Jack’s estate to continue making $3,000 monthly maintenance payments to Jill after his death, in any district in Illinois, Jill is no longer entitled to monthly maintenance once Jack dies. Knowing this, could the hypothetical court have ordered Jack to take out a life insurance policy naming Jill as the sole beneficiary? Put more broadly, under § 510(c), does a court have the authority to extend Jack’s financial obligations to Jill beyond his death to protect Jill’s financial future?

10. See id.
11. See id. Although the court did not give specific examples of other forms of maintenance security beyond life insurance, it is common for maintenance payments to be secured during the payor’s life by the use of collateral trust, and after the payor’s death, by the payor’s estate. See Muller Davis & Jody Meyer Yazici, Illinois Practice Series: Illinois Practice of Family Law 323 (10th ed. 2009). Further, under the old Divorce Act, § 21 spoke specifically of the use of property liens to “secure the payment of any money to become due by installments.” Ill. Rev. Stat. ch. 40, para. 21 (1975).

12. Unfortunately, it is impossible for this Comment to discuss hypothetical situations for Jack and Jack or Jill and Jill. Unlike the ambiguity over life insurance security, the IMDMA is very clear in its exclusion of persons from the institution of marriage based on sexual orientation. The Act states that “[a] marriage between 2 individuals of the same sex” is prohibited and is “contrary to the public policy of this State.” 750 ILL. COMP. STAT. 5/212(a)(5), 5/213.1 (2008). Hopefully, some day soon, Jack and Jack will be given their fair and equal opportunity to fight over life insurance awards in their Illinois divorce decree.

13. 750 ILL. COMP. STAT. 5/401(a)(2). The IMDMA retains traditional fault grounds, but adopts no-fault grounds as well, which require a showing that “irreconcilable differences have caused the irretrievable breakdown of the marriage.” Id.

14. See 750 ILL. COMP. STAT. 5/510(c). “Unless otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court, the obligation to pay future maintenance is terminated upon the death of either party . . . .” Id.
An interpretation of the plain meaning of the language of § 510(c) reveals that the legislature intended to authorize trial courts to extend maintenance obligations beyond death, remarriage, and cohabitation. In addition, a more historical interpretation of the language reveals that the IMDMA was adopted with an eye toward the Uniform Marriage and Divorce Act,¹⁵ which specifically authorizes courts to order post-death maintenance obligations.¹⁶

This Comment argues that based on a plain-meaning interpretation of the language of § 510(c) and a whole-statute analysis, the Illinois legislature intended to authorize trial courts to order a variety of post-death maintenance provisions. Consequently, a trial court may protect the future financial needs of a dependent spouse through the use of court-ordered life insurance.

In support of this thesis, Part II provides an overview of the goals of spousal support under the IMDMA and the basic rationale behind awards of life insurance security. It goes on to summarize the various third and fourth district decisions addressing post-death maintenance that led to the current split among the appellate districts.¹⁷ Part III analyzes the language of § 510(c) using plain-meaning interpretation and whole-statute analysis.¹⁸ Part IV considers the potential impact of post-death awards on individual parties and provides several examples of the various tax consequences of court-ordered post-death maintenance.¹⁹

II. BACKGROUND

Before interpreting the language of § 510(c) using plain-meaning and whole-statute analysis, it is necessary to understand the importance of spousal support orders and review the court opinions that created the current split in the districts. This Part first gives an overview of why maintenance awards may be necessary and why they are often secured with life insurance. It concludes by discussing the conflicting interpretations of § 510(c) leading to the current split. In addition, this Part lays out the basic principles of statutory construction applied in Part III to analyze the language of § 510(c).

¹⁵. See Gitlin, supra note 2, § 1-1.
¹⁷. See infra notes 20–130 and accompanying text.
¹⁸. See infra notes 131–220 and accompanying text.
¹⁹. See infra notes 221–28 and accompanying text.
A. Statutory History of § 510(c)

On October 1, 1977, the current Illinois Marriage and Dissolution of Marriage Act (IMMDA) became law, completely replacing the old Divorce Act and broadly changing the practice of family law in Illinois.20 The passage of the IMDMA also marked Illinois's adoption of a modified version of the Uniform Marriage and Divorce Act (UMDA) promulgated in 1970 and amended in 1971 and 1973.21 Currently, eight states, including Illinois, have fully adopted the UMDA.22

"Drafting of the [UMDA] by the National Conference of Commissioners on Uniform State Laws" (NCCUSL) began in 1967.23 A liaison with the American Bar Association (ABA) Section of Family Law was established and all drafting sessions of the Act were conducted jointly.24 However, the Act was not approved by the ABA house of delegates until 1974.25 Controversy within the ABA over the UMDA centered around the Act's recommendation for no-fault divorce.26


22. Mark R. Brown, Note, Whose Life (Insurance) Is It Anyway? Life Insurance and Divorce in America, 22 J. Fam. L. 95, 126 n.203 (1983). Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington have adopted the UMDA. Id. Colorado has recognized through judicial decision that § 316(b) of the Act changes the general rule that the obligation to pay alimony ceases upon death. Id.; see also In re Marriage of Koktavy, 612 P.2d 1161, 1162 (Colo. App. 1980).


26. See 750 Ill. Comp. Stat. 5/401(a)(2) (2008). In Illinois, traditional fault grounds for dissolution include impotency, the spouse had a living wife or husband at the time of the marriage, adultery subsequent to marriage, willful desertion for one year or more, habitual drunkenness, drug addiction, extreme physical or mental cruelty, felony conviction, or sexually transmitted disease. 750 Ill. Comp. Stat. 5/401(a)(1). The no-fault grounds adopted under the Uniform Act require a finding that the spouses have lived separate and apart for a continuous period in excess of 2 years and irreconcilable differences have caused the irretrievable breakdown of the marriage and the court determines that efforts at reconciliation have failed or that future attempts at reconciliation would be impracticable and not in the best interests of the family.

750 Ill. Comp. Stat. 5/401(a)(2). See also Davis & Yazici, supra note 11, at 34. "The addition of no-fault dissolution reflects the theory that the State's interest in preserving a marriage is no
Since the ABA approved the 1974 version of the UMDA, all states, including Illinois, have adopted some form of no-fault divorce.\textsuperscript{27}

The UMDA has had a profound impact on the development of divorce law in the United States. First and foremost, the UMDA played an integral role in abrogating fault-based divorce in the United States. Furthermore, today, the commission's reports and comments to the UMDA are an invaluable tool for interpreting state statutes derived from the uniform model. For instance, § 510(c) of the Illinois Act was derived from § 316(b) of the UMDA, which reads, "Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party . . . ."\textsuperscript{28} According to the official comments, this subsection of the Uniform Act "authorizes the parties to agree in writing or the court to provide in the decree that maintenance will continue beyond the death of the obligor"; however, in the absence of such a provision, "this section sets the termination date for the obligation to pay future maintenance."\textsuperscript{29}

Today, conflicting interpretations among the Illinois appellate districts over the language of § 510(c) center around the phrase "Unless otherwise agreed by the parties in a written separation agreement set forth in the judgment or otherwise approved by the court." However, as officially enacted on October 1, 1977, § 510(c) did not contain this phrase.\textsuperscript{30} It was not until May 1981, when the Illinois Senate passed Senate Bill 267 effectively amending then § 510(b), now § 510(c), that parties were permitted to extend the obligation to pay future maintenance beyond the death of either party or the remarriage or cohabitation of the payee.\textsuperscript{31} The legislative amendment to the Act was a direct response to the opinion of the First District Illinois Appellate Court in \textit{In re Marriage of Bramson}.\textsuperscript{32} Notwithstanding the clear intention of the parties to the contrary, the court in \textit{Bramson} interpreted the termination events enumerated in § 510(b) as mandatory events that

\textsuperscript{27}. Marriage as Contract, supra note 23, at 2089.

\textsuperscript{28}. Unif. Marriage & Divorce Act § 316(b), 9A U.L.A. 102 (1998). An additional ground for termination is "the remarriage of the party receiving maintenance." Id.

\textsuperscript{29}. Id. § 316(b) cmt.

\textsuperscript{30}. See Illinois Marriage and Dissolution of Marriage Act, Pub. Act No. 82-194, § 510(b), 1981 Ill. Laws 1130 (inserting "Unless otherwise agreed by the parties in a written separation agreement set forth in the judgment or otherwise approved by the court . . . .").

could not be avoided.33 Upon the passing of Illinois Senate Bill 267, Bramson was effectively overruled in this respect, essentially eliminating any dispute as to whether the language of the Act authorized parties to extend future maintenance obligations beyond statutory termination events.34 What remains unclear today is whether in addition to the parties, the amended language permits a court to extend the obligation to pay maintenance beyond the payor’s death.

In contrast to § 510(c) of the IMDMA and § 316(b) of the UMDA, § 510(d) concerning the termination of child support explicitly excludes death as a default statutory termination event: “Unless otherwise provided in this Act, or as agreed in writing or expressly provided in the judgment, provisions for the support of a child are terminated by emancipation . . . but not by the death of a parent obligated to support or educate the child.”35 Unlike § 510(c), the statutory termination and non-termination provisions for child support that exist today were also present at its enactment.36 However, the section was substantially rewritten in 2003 to clarify emancipation termination.37

33. See Bramson, 404 N.E.2d at 471. The court in Bramson interpreted § 510(b) as follows:
   The omission from the Illinois Act of the preamble clause contained in the Uniform
   Act indicates that the terminating events contained in section 510(b) are mandatory.
   Neither the parties pursuant to agreement nor the courts can avoid the statute’s
   directive.
   Accordingly, the provision of the new Marriage Act applies regardless of the settle-
   ment agreement.
   Id. (citations omitted).
34. See 82nd Ill. Gen. Assem., Transcript of Senate Proceedings, May 19, 1981, at 278 (state-
   ment of Sen. Marovitz).
   This bill allows parties by, written agreement, to extend the obligation to pay future
   maintenance beyond the death, remarriage, or conjugal cohabitation of one of the
   parties. It is a product of the Chicago Bar Association and the Illinois State Bar Asso-
   ciation. The IRS looks to State laws as to . . . whether or not there’s a taxable transfer.
   And this would indicate that rather than have separate contracts, which is presently the
   case, . . . the agreements could be put within a divorce decree and be enforceable.
   Id.
35. 750 ILL. COMP. STAT. 5/510(d) (2008). The Act further provides that in the event of an
   obligor’s death, the amount of expenses and/or support may be “enforced, modified, revoked or
   commuted to a lump sum payment, as equity may require, and that determination may be pro-
   vided for at the time of the dissolution of the marriage or thereafter.” Id.
   Laws 2675.
   3348-49 (amending subsection (d)):
   (d) Unless otherwise provided in this Act, or as agreed in writing or expressly provided in
   the judgment, provisions for the support of a child are terminated by emancipation of the
   child, or if the child has attained the age of 18 and is still attending high school, provi-
   sions for the support of the child are terminated upon the date that the child graduates
   from high school or the date the child attains the age of 19, whichever is earlier, but not
   by the death of a parent obligated to support or educate the child. Unless otherwise
Like § 510(c), § 510(d) regarding child support corresponds to a UMDA provision. The corresponding UMDA provision, § 316(c), provides that "provisions for the support of a child are terminated by emancipation of the child but not by the death of a parent obligated to support the child." In addition to § 316(c), all other payment securities mentioned in the IMDMA and the UMDA reference only child support. For example, § 503(g) of the IMDMA states, "The court if necessary to protect and promote the best interests of the children may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust . . . ." This language corresponds to § 307(b) of the UMDA. The official commentary to § 307(b) of the UMDA notes that the subsection "affords a way to safeguard the interests of the children against the possibility of the waste or dissipation of the assets allotted to a particular parent in consideration of being awarded custody or support of a child or children."

B. General Principles of IMDMA Maintenance Awards

Analyzing § 510(c) statutory termination events for maintenance payments only makes sense in light of the rationale for ordering maintenance in the first place. Maintenance awards under the Act are controlled by § 504(a)–(e). In contrast, property awards are controlled by § 503(a)–(j). In many marriages, providing for a fully dependent spouse by a division of property pursuant to § 503 will not provide sufficient financial security. Thus, the current version of § 504 au-

agreed in writing or expressly provided in a judgment, provisions for the support of a child are terminated by emancipation of the child, except as otherwise provided herein, but not by the death of a parent obligated to support or educate the child. An existing obligation to pay for support or educational expenses, or both, is not terminated by the death of a parent. When a parent obligated to pay support or educational expenses, or both, dies, the amount of support or educational expenses, or both, may be enforced, modified, revoked or commuted to a lump sum payment, as equity may require, and that determination may be provided for at the time of the dissolution of the marriage or thereafter.

Id. (alteration in original).

38. Unif. Marriage & Divorce Act § 316(c), 9A U.L.A. 102 (1998). This section contains similar information concerning the "just and appropriate" payment of post-death child support. Id.

39. 750 I.L. Comp. Stat. 5/503(g).


42. 750 I.L. Comp. Stat. 5/504(a)–(e).

43. 750 I.L. Comp. Stat. 5/503(a)–(j).

44. See Gitlin, supra note 2, § 15-1. "The curse of the poor is that they must pay in installments." Id.
The 1993 amendments to the IMDMA substantially rewrote § 504, omitting the provision that a court may grant maintenance only if it finds that the spouse seeking maintenance "lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs." Before the 1993 amendments, property awards were the primary way of providing for a dependent party in divorce; however, as amended, § 504 of the IMDMA outlines twelve factors that a court must consider when determining the amount and duration of a maintenance award. The twelfth factor allows courts to con-

45. See DAVIS & YAZICI, supra note 11, at 187. "The three most common forms of maintenance awarded by Illinois courts pursuant to § 504 are permanent maintenance, rehabilitative maintenance, and reviewable maintenance." Id.

46. Illinois Marriage and Dissolution of Marriage Act, Pub. Act No. 87-881, § 504(a)(1), 1992 Ill. Laws 1023. See also DAVIS & YAZICI, supra note 11, at 189 (discussing change in legislative and judicial attitudes toward maintenance with case citations). See generally Drefchinski, supra note 21, at 581 for a more extensive analysis of the pros and cons of maintenance in Illinois and a discussion of whether maintenance should simply be abolished rather than reformed.

47. 750 ILL. COMP. STAT. 5/504(a)(1)-(12). "[A]s the court deems just," and "without regard to marital misconduct," the court may award maintenance, paid from the income or property of the other spouse after the 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;

(2) the needs of each party;

(3) the 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) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, employment, and whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment;

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

(7) the duration of the marriage;

(8) the age and the physical and emotional condition of both parties;

(9) the tax consequences of the property division upon the respective economic circumstances of the parties;

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

(11) any valid agreement of the parties; and

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

Id.
sider any other factors that are "just and equitable,"48 which provides
the court with great latitude to consider the needs of the parties.49

Issues of maintenance security and other post-death protections be-
come particularly relevant in permanent maintenance situations. Illi-
nois courts have recognized a trend of awarding permanent
maintenance in the following situations: (1) when one spouse has
raised children and supported the family for a significant period of
time; (2) when full-time domestic duties have substantially impaired
skills for continued employment; (3) when one spouse has assumed
full responsibility for the family while the other spouse was obtaining
an education and becoming established in a profession; and (4) when
a spouse is not employable or is employable only at a low income
compared to his or her previous standard of living.50

In situations where something less than permanent maintenance is
just and equitable, the IMDMA also refers to "earning capacity"51
and limitations to attaining employment52 as opening the door for re-
habilitative maintenance.53 The goal of rehabilitative maintenance in
Illinois

is not limited to restoring a former spouse to his or her pre-marital
economic status or to the status he or she could have achieved but

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48. 750 ILL. COMP. STAT. 5/504(a)(12).
49. See In re Marriage of Mohr, 631 N.E.2d 785, 790 (Ill. App. Ct. 1994) (allowing courts to
consider the amount of a permanent maintenance award from a subsequent marriage as a factor
in considering the amount and duration of the current award); see also In re Marriage of Gat-
tone, 739 N.E.2d 998, 1005–07 (Ill. App. Ct. 2000) (concluding that the wife's relocation to Illi-
nois, absence from the job market, health problems, and age were all legitimate factors for a
court to consider when determining whether an award for rehabilitative maintenance was proper
and whether the court may order a spouse to pay for health insurance).
was originally noted in In re Marriage of Rubinstein, 495 N.E.2d 659, 665 (Ill. App. Ct. 1986). In
Rubinstein, the court reversed and remanded a case involving a husband and wife who were
married after college. Id. at 660. The wife agreed to be the sole source of support for the family
while the husband completed medical school and residency requirements. Id. She supported the
family for nine years. Id. After the husband entered practice, the wife completed her degree.
Id. In a frustrated opinion, the court remanded the case stressing that
Illinois courts give consideration to a more permanent award of maintenance to wives
who have undertaken to have children, raise and support the family, and who have lost
or been substantially impaired in maintaining their skills for continued employment
during the years when the husband was getting his education and becoming established.
Id. at 665.
51. 750 ILL. COMP. STAT. 5/504(a)(3).
52. 750 ILL. COMP. STAT. 5/504(a)(5).
53. Miles N. Beermann & Howard A. London, Rehabilitative Maintenance in Illinois, 75 ILL.
B.J. 658, 661 (1987). "The policy underlying rehabilitative maintenance is to sever the financial
ties between a former married couple in an expeditious, but just, manner and make each spouse
independent of the other as soon as practicable." In re Marriage of Cantrell, 732 N.E.2d 797, 801
for the marriage. . . [T]he full purpose of maintenance is to help encourage a spouse to regain dormant employment skills or develop new ones and, in proper circumstances, to provide supplementary income where the spouse cannot support herself in her pre-dissolution lifestyle.54

In cases where rehabilitative maintenance is appropriate, post-death protection—such as life insurance—becomes important only for the period of time during which the spouse is required to provide maintenance for the purpose of cushioning the dependant spouse until self-sufficiency is possible.55

In many cases, an award of rehabilitative maintenance occurs when a party is employed but not earning enough to cover monthly expenses.56 Unless the evidence clearly shows exactly when a dependent spouse will be able to support him or herself, the court may not speculate about a definite end period but must designate the award as reviewable.57 Again, the twelve factors enumerated in the IMDMA provide the court with broad discretion when determining the appropriate duration of a maintenance award and whether or not an award is reviewable.

C. Life Insurance as Security for Maintenance Awards

Consumers buy life insurance to protect their dependents against financial hardship if they should unexpectedly die.58 Statistics compiled by the American Council of Life Insurers show that most Ameri-


The IMDMA authorizes rehabilitative, or time limited, maintenance so that the spouse receiving the support has the incentive to use diligence in getting the training or skills necessary to attain self-sufficiency. This goal must be balanced against a realistic appraisal of the likelihood that the spouse receiving support will be able to support herself in some reasonable approximation of the standard of living established during the marriage, especially where the marriage was of a long duration and the spouse has had a long absence from the labor market.

Id. (citations omitted).
56. See Beermann & London, supra note 53, at 662.
57. Id. at 663.
58. AMERICAN COUNCIL OF LIFE INSURERS, LIFE INSURANCE FACT BOOK 63 (2010). There are two types of life insurance: (1) coverage for a specified “term,” and (2) permanent coverage for one’s “whole life.” Id. Term insurance provides coverage for a specified period of time. Id. at 64. Commonly there is a fixed premium, and so long as the premium is paid, payment is made to the named beneficiary in the event of the insured’s death. Id. When the term insurance expires—because the premium is not paid or the policy is purposely not renewed—no build up of cash value occurs. Id. In contrast, whole life insurance provides protection for as long as the insured remains living. Id. Unlike term insurance, whole life coverage builds a cash value over time, which the insured can borrow against in the event of a family financial emergency, retirement, or on any other need basis. If the insured decides to terminate the policy for any reason,
cans depend on some form of life insurance to provide economic security to their loved ones.\textsuperscript{59} When the insured person—the policyholder and often the family breadwinner—dies, the insurance company must pay the proceeds of the policy directly to the named beneficiary.\textsuperscript{60} In this way, life insurance proceeds provide a guaranteed replacement for lost income upon the death of a family wage earner, indemnity against outstanding family debts or medical debt accrued as a result of the insured's death, and general assurance that the surviving family can live "financially independently and in their accustomed style."\textsuperscript{61} Because of the various securities life insurance provides, the decision to obtain life insurance commonly follows the decision to marry or have children; therefore, it is not surprising that life insurance is an issue in divorce because "[j]ust as life insurance can indemnify against the loss of a spouse or parent during marriage, so too can it indemnify against the loss of a former spouse or parent afterward."\textsuperscript{62}

Today, agreements to maintain existing life insurance policies or take out new policies to secure maintenance obligations are often a part of marital settlement agreements because family law practitioners do not want their clients to end up in a precarious financial situation if their ex-spouses should unexpectedly die. Courts tend to have the same concern\textsuperscript{63} and typically have found that maintenance awards secured by life insurance obligations are an appropriate way of insuring against future financial difficulty for a dependent spouse. For example, returning to the previous hypothetical,\textsuperscript{64} as part of a property settlement, the court may require Jack to assign ownership of an existing policy to Jill but continue to pay the premiums. However, because the fiscal benefits of life insurance policies are generally triggered by the

According to the American Council of Life Insurers, due to the creation of whole life policies with investment and borrowing options, insurance does more than provide financial security for families in the case of death. It has become a major family asset, an emergency savings system, and an important estate-planning device. \textit{Id.} at 63.

\textsuperscript{59} See \textit{id.} In 2004, a reported 78\% of American families owned some type of life insurance policy. \textit{id.}


\textsuperscript{61} \textit{id.} at 534.

\textsuperscript{62} \textit{id.} at 538.

\textsuperscript{63} See, e.g., \textit{In re Marriage of Walker}, 899 N.E.2d 1097, 1111 (Ill. App. Ct. 2008). "My biggest concern about maintenance is, ma'am, if I were to award you the maintenance and he would, unfortunately, walk out here and get hit by a car, the maintenance is gone because it ends upon his death." \textit{id.} (quoting trial court).

\textsuperscript{64} See supra text accompanying note 13.
death of the policyholder, some Illinois courts have viewed the maintenance of life insurance premiums as a post-death maintenance award or a post-death security;\(^{65}\) other courts question whether the maintenance of a life insurance policy equates to post-death payment because "[a]n insured makes no payments on a life-insurance policy after his death."\(^{66}\) Although the Third and Fourth District Illinois Appellate Courts would agree that a separate written agreement executed by Jack and Jill requiring Jack to maintain Jill as the beneficiary on his policy is enforceable regardless of whether life insurance is considered post-death maintenance, "whether the court has the power to order the husband to maintain his life insurance policy for the benefit of the former wife as a means of alimony"\(^{67}\) is a matter of disagreement.

D. Conflicting Interpretations of § 510(c)

1. Illinois Appellate Court, Fourth District

In 1993, before the recent cases of Ellinger and Walker, the fourth district struggled with the issue of life insurance security as post-death maintenance. In the case of In re Marriage of Vernon, the fourth district affirmed the trial court’s judgment for the dissolution of a thirty-year marriage,\(^{68}\) requiring the husband to maintain his former wife as the beneficiary of his already existing life insurance policy until further order of the court.\(^{69}\) The Vernon court interpreted § 510(c) as

\(^{65}\) See, e.g., In re Marriage of Clarke, 465 N.E.2d 975, 977 (Ill. App. Ct. 1984) (holding that a court has no authority to require security for the payment of maintenance after the death of the obligor and that insurance on the life of the obligor would amount to such security).

\(^{66}\) Walker, 899 N.E.2d at 1110; In re Marriage of Vernon, 625 N.E.2d 823, 827 (Ill. App. Ct. 1993) ("Section 510[(c)] prohibits maintenance payments after an obligor's death, not payments during an obligor's life which have some effect after his death.").

\(^{67}\) Walker, 899 N.E.2d at 1111.

\(^{68}\) Vernon, 625 N.E.2d at 825. Carl and Ruth Vernon were married in August 1962 and had two children—both of whom were emancipated at the time of the dissolution proceedings—and filed for divorce in October 1990. Id. At the time of their divorce, Ruth was fifty years old and had physical limitations, high blood pressure, high cholesterol, chest pains, and wore an orthopedic shoe because of foot surgery for neuroma. Id. at 826. It was undisputed that during the thirty-year marriage, Ruth was a homemaker who raised the two children, did the laundry, cooked meals, cleaned the house, and never had a full time job. Id. She never made more than $2,500 in any year of the marriage and she finished only the eighth grade. Id. Carl was fifty-five years old at the time of the hearing, had worked as a store manager for twenty-three years, held the elected office of township supervisor, and his total gross income in 1991 was $37,000. Id.

\(^{69}\) Id. at 825. In 1992 the court entered an order addressing property distribution, giving Ruth the marital residence, the bulk of the tangible property, the Buick, all assets in her name, one-half of Carl's pension, the freezer, and the lawn mower. Id. She was ordered to continue paying the balance of the mortgage, while all other outstanding marital debts were assigned to Carl. Id. Several months later, the judgment of dissolution ordered Carl Vernon to (1) pay temporary maintenance of $950 per month for three years, (2) pay Ruth's health insurance for
“prohibit[ing] maintenance payments after an obligor’s death, not payments during an obligor’s life which have some effect after his death.” The court reasoned that § 102 of the IMDMA requires § 510(c) to be “liberally construed to make reasonable provisions for spouses and minor children,” including provisions for post-death protection.

According to the court in Vernon, the fact that the IMDMA does not contain a specific provision authorizing the court to provide maintenance security actually broadens the court’s power to authorize post-death security. The court pointed out that, because the IMDMA was “not simply a revision of Illinois law” but a “uniform act” completely replacing the old Divorce Act, it may be “inappropriate to give much weight to the fact that the uniform act does not contain specific provisions found in earlier Illinois statutes.”

By holding that a court may require a maintenance obligor to maintain insurance to protect against the “premature termination of maintenance” without running afoul of § 510(c), the Vernon court suggested that the fourth district’s previous opinion in In re Marriage of Clarke was wrongly decided to the extent that it relied on an erroneous interpretation of § 510(c). In Clarke, the court held that under § 510(c) a court does not have the authority to order a spouse or the estate of that spouse to make payments beyond death or to require a spouse to secure maintenance to the other spouse post-death by making the other spouse a beneficiary of a life insurance policy or any other contract payable at the death of the payor spouse. The appellate court affirmed the decision of the trial court, denying the wife any life insurance security for her $3,500 per month unallocated maintenance award. In interpreting the language of § 510(c), the court concluded that the word “approve” indicates that “there must

70. Id. at 828. For example, “[i]f a court awards a large amount of property instead of maintenance . . . that property will be available to the obligee after the obligor’s death.”

71. Id.

72. Id.; see also Steven R. Lake, Life Insurance Issues in Divorce Proceedings Demand Legislation, CHI. DAILY L. BULL., Sept. 1, 1994, at 5.

73. Lake, supra note 72, at 5.

74. Id.

75. Vernon, 625 N.E.2d at 827. Because the petitioner did not raise it in his brief, the court declined to address the application and reversal of Clarke. But the court’s opinion contains a lengthy discussion of the holding in Clarke. Id. at 827–28.


77. Id. The appellate decision contains hardly any recitation of the specifics of the property settlement, the length of the marriage, or the physical condition/financial situation of the parties. See generally id. In comparison to the three pages of facts included in the appellate court’s decision in Vernon, the Clarke decision is slim on facts, to say the least.
be a pre-existing ‘act’ or ‘thing’ for the court to approve.” According to the court, in the context of § 510(c) that “act” or “thing” is the written or oral agreement of the parties. If an agreement between the parties does not exist, then the court has no authority under § 510(c) to order maintenance beyond death, including any type of post-death security such as life insurance. Moreover, the court found that a failure of the legislature to include the security provision of the former Divorce Act in the IMDMA “evinces an intent to withdraw the authority from the court to require such security.”

2. Current District Split: The Third and Fourth District Illinois Appellate Courts

In early 2008, in Ellinger, the Illinois Appellate Court for the Third District held that a court may not impose a duty to maintain life insurance as security for maintenance on an ex-spouse without violating § 510(c). In order to ascertain the meaning of the language used by the legislature, the court contrasted the language of § 510(c) prohibiting post-death maintenance with the language of § 503(g) authorizing post-death protection for child support recipients. The court reasoned that because § 503(g) specifically grants courts the discretion to designate assets as security for child support in a § 503(g) trust, the omission of similar language for the security of spousal support presumes “that the legislature intended different results by the different language.” Because the applicability of the fourth district’s opinion in Clarke was raised, the court recognized Clarke as good law and defended the opinion by stating that the Vernon court’s rejection of Clarke was “obiter dicta.”

Several months later, in Walker, the fourth district fired back at the third district’s opinion in Ellinger disagreeing with its interpretation of

78. Id. at 977.
79. Id.
80. Id.
81. Id. at 978 (citing Goedde v. Cmty. Unit Sch. Dist. No. 7, 157 N.E.2d 266 (1959)).
82. In re Marriage of Ellinger, 882 N.E.2d 692, 695 (Ill. App. Ct. 2008). Again, in denying protection for a spousal support obligation, the court in Ellinger, like the court in Clarke, gives a sparse recitation of the facts. Here, the appellate court’s opinion merely states that the husband had purchased his existing life insurance policy in 1962, the couple was married in 1985, and filed for divorce in 2006. Id. at 693. The trial court’s final judgment required husband Gary Ellinger to pay his wife monthly maintenance until the first occurring “statutory termination event” and to maintain her as the sole beneficiary on his life insurance policy, “so long as he shall have an obligation to pay maintenance to [her].” Id.
83. Id. at 695.
84. Id.
85. Id.
§ 510(c). The fourth district held that the liberal construction of § 510 and § 504 authorizes a trial court “to award a form of security for a maintenance obligation, not necessarily limited to life insurance.”\footnote{86} In so holding, the court affirmed the trial court's permanent maintenance award to the ex-wife of $3,000 a month through May 2014 and $1,640 thereafter, which was secured by a court order requiring the husband to maintain a life insurance policy for the sole benefit of his wife.\footnote{87} The court reasoned that the language “or otherwise approved by the court” found in § 510(c) referred to the previous language mentioning a separate agreement between the parties. The court determined an order requiring life insurance in this case and in the previous decision in \textit{Clarke} did not violate § 510(c) because in both the facts of \textit{Clarke} and the facts at hand, the court had before it a detailed property settlement and an agreement to submit matters to the court for determination which the court may “otherwise approve.”\footnote{88} The court reasoned that these agreements satisfied the § 510(c) requirements.\footnote{89} In addition, the court noted that court-mandated life insurance does not necessarily violate § 510(c)'s post-death prohibition because “[a]n insured makes no payments on a life insurance policy after his death . . . [and] the insurance company, not the insured's estate, pays the proceeds to the ex-wife upon the insured's death”; therefore, life insurance is not necessarily a form of “postmortem alimony.”\footnote{90}

The court in \textit{Walker} also analyzed the language of § 503 and § 510 concerning child support, pointing out that the IMDMA does not specifically authorize that child support may be secured by life insurance. Instead, the authorization is broad and allows for “setting aside a portion of an estate to pay that child support,” allowing the court to broadly interpret the Act and do justice by the parties.\footnote{91} The court highlighted the ideas of justice and equity several times in the opinion, noting that if the court is not given broad discretion post-death, then a judge trying to make a fair property division “cannot give much weight to the fact that the ex-spouse is ordered to pay maintenance.”\footnote{92}

\footnote{86. \textit{In re Marriage of Walker}, 899 N.E.2d 1097, 1108 (Ill. App. Ct. 2008).}
\footnote{87. \textit{Id}.}
\footnote{88. \textit{Id}. at 1109.}
\footnote{89. \textit{Id}. at 1109–10.}
\footnote{90. \textit{Id}. at 1110.}
\footnote{91. \textit{Id}.}
\footnote{92. \textit{Id}. If a judge cannot protect his evaluation of the parties' situations and resulting maintenance award, then “[t]hat order may result in the ex-spouse paying hundreds of thousands of dollars or it may result in him paying almost nothing if he died quickly.” \textit{Id}.}
According to the court in Walker, "[t]he legislature does not require such uncertainty."93

F. General Rules of Statutory Interpretation in Illinois

In Illinois, statutes dealing with and providing for the dissolution of marriage have been strictly construed using plain-meaning interpretation.94 The primary rule of strict statutory interpretation is to ascertain the intent of the legislature.95 The best evidence of legislative intent is the plain meaning of the terms of the statute.96 Under Illinois Supreme Court precedent, "clear and unambiguous support statutes are not considered subject to other modes of interpretation or modification."97 Therefore, "[w]hen the language of the statute is unambiguous, the court may not depart from the language and read into the statute exceptions, limitations, or conditions."98

Plain-meaning interpretation involves a strict conjunctive and disjunctive reading of statutory phrases. Phrases separated by the word "and" are interpreted in the conjunctive.99 In contrast, "or" is used in a statute to signify the disjunctive.100 Statutory phrases separated by...
the use of a disjunctive "or" require the listed alternatives to be treated separately.\textsuperscript{101}

However, it is a generally accepted principle of statutory construction that subsections of an Act are not written in a vacuum.\textsuperscript{102} Therefore, subsections must be considered in reference to other subsections dealing with the same or substantially similar subject matter.\textsuperscript{103} Two provisions containing similar or identical language must be interpreted in harmony, and when the legislature uses certain language in one part of the Act and different language in the other, it can be assumed that different results were intended.\textsuperscript{104} In Illinois, when the language of a subsection is determined to be ambiguous, the court must then look to the statute as a whole to ascertain the intent of the legislature.\textsuperscript{105} However, great care is required in whole-statute interpretation. The fact that two statutory provisions contain similar or even identical language does not mean that they are necessarily subject to the exact same interpretation. The similarity of statutory subsections is informed by the purpose and context of the sections.\textsuperscript{106}

If after plain-meaning interpretation and whole-statute analysis are exhausted a court determines that statutory language is still ambiguous—in other words susceptible to two interpretations—then and only then does "it become[ ] proper to examine sources other than its language for evidence of legislative intent."\textsuperscript{107} In Illinois, the first extrinsic source for interpretation is the old law or the Uniform Law from which the new law is derived.\textsuperscript{108}

\textit{G. The Illinois Supreme Court's Interpretation of § 510(c)}

Although it is inexplicably not cited by any of the appellate court decisions dealing with post-death maintenance issues, the Illinois Supreme Court interpreted the language of § 510(c) in 1985. In \textit{Freeman},\textsuperscript{109} the Illinois Supreme Court stated that the trial judge

\begin{footnotes}
\footnotetext{101}{See 1A Singer & Singer, supra note 97, at 189–90.}
\footnotetext{102}{2A Singer & Singer, supra note 97, at 206.}
\footnotetext{103}{See id. at 206–08.}
\footnotetext{104}{See id. at 224–27.}
\footnotetext{105}{Id. at 212.}
\footnotetext{106}{Id. at 224.}
\footnotetext{107}{In re Marriage of Logston, 469 N.E.2d 167, 172 (Ill. 1984).}
\footnotetext{108}{See, e.g., id.}
\footnotetext{109}{In re Marriage of Freeman, 478 N.E.2d 326, 326 (Ill. 1985). The Illinois Supreme Court decided \textit{Freeman} after the fourth district appellate court's decision in \textit{Clarke}; however, because the issue in \textit{Freeman} concerned gross maintenance and the remarriage termination event, \textit{Clarke} is not cited. Neither \textit{Ellinger}, \textit{Walker}, nor \textit{Vernon}, which were decided post-\textit{Freeman}, cite the \textit{Freeman} decisions. Clearly, the supreme court's interpretation of the language of § 510(c) is binding on the district and appellate courts. There is no explanation for why it is uncited by any

“misconstrued the phrase ‘otherwise approved by the court’ when he read it to modify the word ‘agreement.’” According to the supreme court, a reading that requires a court to approve a written agreement of the parties “violates the basic canon of statutory construction that, ordinarily, relative or qualifying words or clauses modify words or phrases which are immediately preceding and do not modify those which are more remote.”

In Freeman, the trial judge ordered maintenance with the condition that the payments terminated upon the death of either party but not on the remarriage of the ex-wife, the maintenance recipient. The likelihood of the ex-wife’s remarriage was discussed in front of the judge and he specifically decided that the payments should extend beyond her inevitable remarriage. The husband argued that regardless of the judge’s good intentions or the inevitability of his ex-wife’s remarriage, ordering maintenance beyond remarriage violated § 510(c). The husband argued that the language of § 510(c), read in conjunction with § 504(b), expressly provides that maintenance awards terminate upon the remarriage of the receiving party unless there is an agreement by the parties embodied in the separation agreement and thereafter approved by the court. On the day the order was entered, there was a substituted judge. He ruled that § 510(c) required, as a matter of law, that maintenance payments terminate on remarriage if the parties had not agreed otherwise.

The Illinois Supreme Court disagreed with the husband’s argument and the substituted judge’s reasoning. The court held that “the legislature intended to allow future maintenance to survive the remarriage of the receiving party if the judge approves.” Applying a strict plain-meaning interpretation to the language of § 510(c), the supreme court affirmed the original order of the trial judge, noting that although the order may not have been perfectly clear, the original trial judge’s intentions were “a good example of the individual fashioning court addressing the issue of a trial court’s authority to order post-death maintenance pursuant to § 510(c).

10. Id. at 330.
11. Id. (citing Illinois v. Thomas, 256 N.E.2d 794 (Ill. 1970)).
12. Id. at 329.
13. Id.
14. Id. At the time, the statute was numbered § 510(b). Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
of remedy which is now possible under the language of the Act.”¹²⁰ Here, the judge’s order expressly indicated that maintenance payments would terminate upon death but would not terminate upon remarriage. The court held that the plain language of § 510(c) clearly authorized the judge to make such an order, so long as it was consistent with a just and equitable distribution of the marital property.¹²¹

H. Death and Taxes

As many family practitioners well know, divorce and tax law are intimately related because payments made and property transferred between a husband and wife in connection with divorce will affect taxable income and allow certain deductions to be taken by the parties. Almost all tax issues arising from divorce are controlled by §§ 71 and 215 of the Internal Revenue Code.¹²² Pursuant to the general rule, § 71 includes amounts received as maintenance in the payee’s gross income,¹²³ while § 215 deducts an equal amount from taxable income of the payor. However, the following contingencies laid out in § 71 must be satisfied in order for maintenance to be taxable to the payee and deductible by the payor pursuant to either section:

A. The payments must be in cash.
B. The payment must be made pursuant to a divorce or separation instrument . . . .
C. The spouses must be living in separate households . . . .
D. The payments must terminate at payee’s death . . . .
E. The payments cannot be fixed for children’s support.
F. The parties must not have opted out of deductible/taxable alimony . . . .¹²⁴

Thus, in connection with the Internal Revenue Code §§ 71 and 215, the purpose of a statutory termination event terminating maintenance at the death of either party pursuant to § 510(c) is to automatically satisfy the requirements for deductible/taxable payments. In fact, when the § 510(c) amendments were enacted in 1981, adding the language “unless otherwise agreed by the parties in a written separation agreement set forth in the judgment or otherwise approved by the court” ensured that maintenance awards made either by agreement of the parties or court order—which were subsequently incorporated in the judgment—retained legal significance, thereby allowing the payor a tax deduction equal to alimony payments made within the taxable

¹²⁰ Id.
¹²¹ Id.
¹²³ § 71.
¹²⁴ DAVIS & YAZICI, supra note 11, at 1325.
The amendment’s purpose was recognized in the case of *In re Marriage of Mass*, in which the court stated that one of the primary reasons for clarifying the language was to allow for a husband to get a federal tax deduction for maintenance payments made beyond an ex-wife’s remarriage when maintenance payments were required by the judgment. Therefore, unless agreed to by the parties or ordered by the court, § 510(c) ensures that payments made pursuant to the section automatically qualify for deductible/taxable IRS treatment if they satisfy the additional requirements. The Tax Reform Act of 1986 made state statutory termination events regarding the death of the payee more significant because absent an agreement of the parties or an order of the court, state law could control the deductibility of the payments. IRS Notice 87–9 explains,

Under pre-Tax Reform Act law, payments could qualify as alimony or separate maintenance payments only if the payor spouse’s liability to continue to make such payments terminated upon the death of the payee spouse. Moreover, it was required that the divorce or separate maintenance instrument expressly state that the liability to make payments would so terminate, even if, independent of the terms of the agreement, the liability to continue to make the payments would terminate upon the death of the payee spouse as a result of State law.

... Under the Tax Reform Act, as under pre-Tax Reform Act law, payments may qualify as alimony or separate maintenance payments only if the payor spouse’s liability terminates upon the death of the payee spouse. The termination of liability need not, however,

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Hence, one of the primary reasons for abolishing merger was to allow for a husband to get a federal tax deduction for maintenance payments made beyond a wife’s remarriage. Since the legislature abolished merger to allow such a result, then obviously the legislature intended for parties to be able to enter into written separation agreements under section 502 of the IMDMA which called for maintenance payments to be paid beyond the receiving spouse’s remarriage. Therefore, it becomes clear that the amendment to section 510(b) which goes into effect on January 1, 1982, is merely a clarification of what the legislature originally intended when it enacted the IMDMA. Thus, as of the effective date of the IMDMA, October 1, 1977, we hold that parties have been able to enter into written separation agreements in accordance with section 502 of the IMDMA which provides for enforceable maintenance terms that extend beyond the terminating events of section 510(b).

127. Tax Reform Act of 1986, Pub. L. No. 99-514, Sec. 1843(b). “Subparagraph (D) of section 71(b)(1) (defining alimony or separate maintenance payments) is amended by striking out ‘and the divorce or separation instrument states that there is no such liability.’” *Id.*
be expressly stated in the instrument if, for example, the termina-
tion would occur by operation of State law.\textsuperscript{128}

By designating maintenance payments as terminating at the death of
either party, § 510(c) of the IMDMA ensures that maintenance
awarded pursuant to the statute qualifies for deductible/taxable treat-
ment under I.R.C. § 71, unless otherwise agreed by the parties or the
court.

Unlike maintenance, child support is neither deductible to the
payor nor taxable to the payee pursuant to § 71(c).\textsuperscript{129} Although there
are some ways in which unallocated maintenance may be made to in-
clude child support and maintain a deductible/taxable status, if the
support terminates at a time related to the child—for example, a child
contingency—such support is not deductible.\textsuperscript{130} Thus, any court-ord-
dered extension of child support beyond the provided statutory termi-
nation events listed in § 510(d) has no effect on the taxable or
deductible nature of the support.

III. Analysis

Applying both a strict plain-meaning interpretation of the language
of § 510(c) and a whole-statute analysis, it is clear that the Illinois leg-
islature intended to authorize trial courts to order and approve a vari-
ety of post-death maintenance provisions. Consequently, a trial court
may protect the future financial needs of a dependent spouse through
the use of court-ordered life insurance or various other forms of post-
death support. It is inappropriate to move beyond the language of the
IMDMA to interpret the language of § 510(c) because the intent of
the legislature can be ascertained from its plain meaning. Interpreta-
tions of § 510(c) that do not strictly interpret its language violate fun-
damental canons and do not ascertain the true intent of the
legislature. If ambiguity is assumed, applying a whole-statute inter-
pretation of § 510(c) is proper. However, whole-statute analysis only
justifies comparing § 510(c) with subsections of the Act that have sim-
ilar purposes. The exceptions to termination events listed in § 510(c)
have a distinguishable function and purpose from the use of child sup-
port trusts authorized by § 503(g) and the termination events listed in
§ 510(d). Simply put, the purpose of terminating child support is dis-

\textsuperscript{128} I.R.S. Notice 87-9, 1987-1 C.B. 421.
\textsuperscript{129} I.R.C. § 71(c)(1) (2006). "Subsection (a) shall not apply to that part of any payment
which in terms of the divorce or separation instrument fix (in terms of an amount of money or a
part of the payment) as a sum which is payable for the support of children of the payor spouse."
\textit{Id.}
\textsuperscript{130} See \textsc{Davis} & \textsc{Yazici}, supra note 11, at 1327.
tistinguishable from the purpose of terminating spousal support. Therefore, it is an improper application of whole-statute analysis to compare the judicial discretion authorized in these sections to that authorized by the language of § 510(c). So long as the court order is just and equitable, the language of § 510(c) as interpreted by plain-meaning and whole-statute analysis authorizes a court to provide post-death maintenance. Limiting this authority is both contrary to the true intent of the Illinois legislature and inappropriate in the area of marital dissolution where the court's authority to order maintenance has a significant impact on the future financial security of the parties.

A. Plain-Meaning Interpretation

Interpreting § 510(c) requires first looking at the language of the section and giving that language its plain and ordinary meaning. As noted earlier, this involves a strict interpretation of all disjunctive and conjunctive phrases in the statute. A strict reading of § 510(c) reveals that the Illinois legislature intended to authorize courts to provide post-death maintenance if the case requires.

Guided by the conjunctive/disjunctive statutory canon, the Illinois Supreme Court has concluded that in enacting § 510(c), "the legislature intended to allow future maintenance to survive the remarriage of the receiving party if the judge approves." The court stated that under § 510(c), the phrase "otherwise approved by the court" does not modify the word "agreement." Consequently, the phrase "otherwise approved by the court" is remote from the phrase "agreement by the parties" because it is separated by a disjunctive "or." According to the supreme court, a reading that requires the court to approve a written agreement of the parties "violates the basic canon of statutory construction that, ordinarily, relative or qualifying words or clauses modify words or phrases which are immediately preceding and do not modify those which are more remote."
The holding of the Illinois Supreme Court in *Freeman* requires that the phrases in § 510(c) be read disjunctively. Therefore, if the provisions of a maintenance award are silent on the issue of termination, § 510(c) sets termination at either the (1) death of either party, (2) the remarriage of the party receiving maintenance, or (3) the cohabitation of the party receiving maintenance. However, the parties can agree in writing to different termination events or the judge can choose to “write out” certain statutory termination events altogether by expressly providing in his order that maintenance does not terminate upon death, remarriage, or cohabitation.136 A disjunctive reading of the phrase is dispositive of the argument that parties must first reach agreement before a judge can approve post-death maintenance.137 Under a disjunctive reading, a court’s approval of post-death maintenance is not triggered by a written agreement of the parties; rather, it stands alone.138 This disjunctive reading of § 510(c) is consistent with both the generally accepted principles of statutory construction and the supreme court’s interpretation of the plain meaning of the language of § 510(c) in *Freeman*.

Although the court in *Ellinger* stated that the case hinged on “the statutory construction of provisions in the Illinois Marriage and Dissolution of Marriage Act” and that the “best evidence of the legislature’s intent is the statutory language itself,” the court failed in its application of the articulated rule.139 The court simply skipped the primary analysis of the plain language of § 510(c) required by both the supreme court and the rules of statutory construction, choosing instead to analyze § 510(c) in relation to § 510(d).140 It is well established that when the legislature uses different language in similar provisions in the same act, it intended different results.141 This type of subsection comparison is a form of whole-statute analysis. However, whole-statute analysis is secondary to a determination of ambiguity

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136. *Id.* The legislature intended to allow future maintenance to survive the remarriage of the receiving party, the cohabitation of the parties, or the death of the parties if the judge approves. See *id.* at 328, 330.

137. This reading is dispositive of the argument in *Clarke* that if an agreement between the parties does not exist, then the court has no authority under § 510(c) to order maintenance beyond death, remarriage, or cohabitation. 465 N.E.2d 975, 977 (Ill. App. Ct. 1984). A disjunctive reading also cures the need of the court in *Walker* to justify the trial court’s authorization of post-death maintenance by pointing to the “detailed property settlement agreement” before the court, as a basis for triggering judicial discretion to make post-death orders. 899 N.E.2d 1097, 1109 (Ill. App. Ct. 2008).

138. See *Freeman*, 478 N.E.2d at 330 (allowing maintenance to survive statutory termination events if the judge sees fit).


140. *Id.*

141. See 1A SINGER & SINGER, supra note 97, at 224.
and the analysis of the plain meaning of that language. While Ellinger failed to address the plain meaning of § 510(c), the courts in Clarke and Walker did, but they interpreted it incorrectly.

In Clarke, the court argued that the language “otherwise approved by the court” meant that the court’s authority in this case is not inherent because “[w]ithin the context of section 510(c) there must be a pre-existing ‘act’ or ‘thing’ for the court to approve.”

Turning to Black’s Law Dictionary for a definition, the court noted that the word “approve” means to “be satisfied with; to confirm, ratify, sanction, or consent to some act or thing done by another.” According to the court, “approve” is distinguishable from “authorize” because “approve” is dependent on some act or thing done by another. Therefore, the court concluded that the court’s authority to order post-death maintenance arises only when there is a written agreement of the parties that (1) has been incorporated in the judgment and approved in that manner or (2) is “otherwise approved by the court.” Applying this analysis to the facts, the court held that because there was no agreement by the parties as to post-death security for the payment of unallocated maintenance, the trial court had no authority to order security that extended beyond Mr. Clarke’s death.

In Walker, the court expressly disagreed with the holding in Clarke, but not based on the court’s interpretation of the plain meaning of the language of § 510(c). Instead, the court disagreed with the conclusion in Clarke that there was no agreement. In Walker, the court stated that “[t]here was an agreement: a detailed property settlement agreement and an agreement to submit matters to the court for determination including inter alia security for unallocated maintenance and who should pay the premiums.” According to the court, the presence of a written agreement to provide $100,000 in insurance for the child’s college expenses was sufficient to satisfy the statutory requirement that a written agreement be submitted to the court for approval.

142. See Kraft, Inc. v. Edgar, 561 N.E.2d 656, 661 (Ill. 1990) (“In interpreting a statute, the primary rule, to which all other rules are subordinate, is to ascertain and give effect to the language used by the legislature.”); see also Collins v. Bd. of Trs. of Firemen’s Annuity & Benefit Fund, 610 N.E.2d 1250, 1255 (Ill. 1993) (“[W]e begin with the language of the statute.”).
144. Id. (emphasis added) (quoting Black’s Law Dictionary 94 (5th ed. 1979)).
145. Id.
146. Id. (quoting 750 Ill. Comp. Stat. 5/510(b) (2008)).
147. Id. at 979.
149. Id.
in order to trigger the court’s authority to order life insurance security for maintenance.\textsuperscript{150}

The Illinois Supreme Court and generally accepted methods of statutory construction require a strict interpretation of the plain meaning of § 510(c). By interpreting the phrase “in a written agreement set forth in the judgment or otherwise approved by the court”\textsuperscript{151} in the conjunctive, the courts in \textit{Walker} and \textit{Clarke} violated a basic cannon of statutory construction and disregarded the Illinois Supreme Court’s interpretation of the phrases in \textit{Freeman}. By neglecting to apply plain-meaning interpretation before applying a whole-statute analysis, the court in \textit{Ellinger} failed to ascertain the true intent of the Illinois legislature. As stated above, a disjunctive reading of the section is dispositive of the argument that parties must first reach agreement before a judge can approve post-death maintenance.\textsuperscript{152} Under a disjunctive reading, a court’s approval of post-death maintenance is not triggered by a written agreement of the parties; rather, it is triggered by the discretion of the judge. Only an interpretation of the plain meaning of § 510(c) that follows these maxims is in line with both the supreme court’s decision in \textit{Freeman} and basic canons of statutory construction. This type of interpretation reveals that (1) parties can agree in writing to different termination events or (2) the judge can expressly exclude the application of certain statutory termination events altogether. Therefore, if a judge finds that a post-death maintenance award such as life insurance is just and equitable, he may extend maintenance beyond the death of the payor without violating § 510(c).

\textbf{B. Whole-Statute Interpretation}

In contrast to plain-meaning, whole-statute interpretation may be applied to the language of § 510(c) if the language of the section is ambiguous.\textsuperscript{153} However, as stated earlier, great care is required in whole-statute interpretation. The fact that two statutory provisions contain similar or even identical language does not mean that they are necessarily subject to the exact same interpretation. The similarity of statutory subsections is informed by the purpose and function of the

\begin{itemize}
  \item \textsuperscript{150} \textit{Id.} at 1110.
  \item \textsuperscript{151} 750 ILL. COMP. STAT. 5/510(c).
  \item \textsuperscript{152} See \textit{supra} text accompanying note 137.
  \item \textsuperscript{153} See 2A \textsc{Singer} & \textsc{Singer}, \textit{supra} note 97, at 189–90. If the section is ambiguous, then two provisions containing similar or identical language must be interpreted in harmony and when the legislature uses certain language in one part of the act and different language in the other, it can be assumed that different results were intended. \textit{Id.}
\end{itemize}
Comparing the language of two functionally distinguishable subsections of an Act will not effectively ascertain the true intent of the legislature. When applied correctly, a whole-statute analysis also shows that the legislature intended to authorize trial courts to provide post-death maintenance if justice and equity require.

In determining whether the legislature intended § 510(c) to provide a trial court with the authority to order post-death maintenance such as life insurance the court in Ellinger and Walker applied whole-statute interpretation by comparing § 510(c) with several other provisions in the Act relating to statutory termination events and support security. To justify moving away from the plain language of § 510(c), the court in Walker stated that "there is no doubt" that the language in § 510(c) is unclear and ambiguous and therefore subject to other forms of statutory interpretation. However, in the Ellinger, Vernon, and Clarke opinions, ambiguity was simply not discussed. Regardless, the fact that § 510(c) has been interpreted differently by different courts can be evidence that the language of the statute may in fact be ambiguous.

In addition, the analysis of § 510(c) in Ellinger is, in effect, solely an application of whole-statute interpretation that compares the language of maintenance provisions and the language of child support provisions. However, just because the language used to describe maintenance termination events in § 510(c) is similar to the language used to describe termination events for child support, that does not necessarily mean the court is bound by the interpretations of child support subsections because the purpose of the termination events are distinct and separate. For instance, as discussed earlier, § 71 of the Internal Revenue Code requires maintenance payments to terminate at the death of the payee in order to qualify for deductible/taxable

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154. Id.
155. Walker, 899 N.E.2d at 1109.
156. See 2A SINGER & SINGER, supra note 97, at 189.
158. In re Marriage of Dulyn, 411 N.E.2d 988, 994 (Ill. App. Ct. 1980). The legislature enacted § 510(d) to guarantee support of a dependent child, even upon the death of the child support payor. Id.

[T]his section guarantees the dependent minor child of divorced parents from loss of support through disinheritance. While the court acknowledged that a divorced parent is free to disinherit a child of his divorced marriage, it concluded that under this section, he may do so only subject to the limited obligation of support.

Id.; see also In re Marriage of Schneider, 798 N.E.2d 1242, 1247 (Ill. App. Ct. 2003). Just as child support is always modifiable in order to protect the best interest of the child, child support does not terminate at death, notwithstanding a separate agreement of the parties. Id.
treatment. Thus, one of the purposes of including death as a statutory termination event for maintenance is to ensure that, unless otherwise agreed by the parties or ordered by the court, maintenance awards under § 510(c) automatically qualify for § 71 taxable/deductible treatment. In contrast to maintenance, pursuant to § 71(c), child support payments are neither deductible to the payor nor taxable to the payee regardless of the termination provisions. Therefore, while termination provisions for maintenance can have significant federal tax consequences, termination provisions for child support have no such effect.

In addition, the mere presence of § 503(g), which grants trial courts discretion to set aside a portion of the assets for the benefit of the children, does not show that the legislature intended to tie the hands of a trial court with regards to all forms of security for maintenance obligations, because § 503(g) is distinguishable from § 510(c). Section 503(g) authorizes courts to establish trusts that are designed to protect children, who are not parties to the negotiations that take place during the dissolution process, when special circumstances show that children may be in danger of financial insecurity. In short, § 503(g) authorizes a court to protect dependent children from financial insecurity based on a finding of special circumstances and is distinguishable from the purpose and function of § 510(c). In contrast to § 503(g), § 510(c) authorizes a court to protect a dependent spouse only in the case of death. Unlike children who will benefit from the funds in a § 503(g) trust if special circumstance other than the payor's death arise, a dependent spouse will not be able to collect post-death maintenance—such as life insurance—merely because the payor is incarcerated, suffering financial loss, or shows a pattern or unwillingness to pay support. This makes these sections distinguishable. Therefore,

160. Subsection 503(g) provides for the creation of a support trust for children only when it is necessary to “protect . . . the best interests of the children.” 750 ILL. COMP. STAT. 5/503(g) (2008).
161. See Davis & Yazici, supra note 11, at 182 (citing In re Marriage of Vucic, 576 N.E.2d 406 (Ill. App. Ct. 1991)). Evidence of a father's repetitive incarceration for theft supports a finding for the establishment of a § 503(g) trust because of the father's current and reasonable expected future inability to pay child support. Id.
162. Id. at 183 (citing In re Marriage of Hobson, 581 N.E.2d 388 (Ill. App. Ct. 1991), which found that the creation of a child support fund from the net proceeds of the sale of the marital residence was the only reasonably certain source of child support).
163. Id. (citing In re Marriage of Petersen, 744 N.E.2d 877 (Ill. App. Ct. 2001), which upheld the creation of a § 503(g) trust due to the fact that the father had been held in contempt of court twice for his failure to pay and his arrearages were in excess of $50,000).
comparing the language of the sections is an inappropriate and improper application of whole-statute analysis.

In analyzing the language of § 510(c) in relation to § 510(d) (regarding child support termination) and § 503(g) (regarding child support security), the Ellinger court erred in two ways. First, the court failed to recognize the distinct purposes of child support termination events and spousal support termination events and thus incorrectly concluded that the difference in the events with regards to the payor’s death implied that a trial court lacked authority to order post-death maintenance. The court’s comparison of the listed termination events is therefore erroneous. Second, the court was wrong to presume that the legislature intended to limit the court’s authority to order security for a maintenance obligation by providing a subsection that addressed judicial discretion to designate assets as security for child support. Particular provisions aimed at the protection of children who are not parties of the divorce proceedings does not show by the omission of similar provisions relating to maintenance that the legislature intended to limit the trial court’s authority to order post-death maintenance because the purposes of the sections are distinct. In short, the financial protection of dependent ex-spouses in case of death calls for different safeguards than the financial protection of dependent children in case of disinheritance.

1. Comparing Exceptions to Statutory Termination Events

In order to effectively apply whole-statute interpretation, it is important to accurately identify what language is being interpreted. The court in Ellinger was wrong to compare the statutory termination events for child support with the statutory termination events for maintenance to interpret the language “otherwise approved by the court.” The issue in Ellinger, Walker, Clarke, and Vernon is the language in § 510(c) dealing with the exceptions to the listed termination events—namely, whether a court is authorized to disregard the listed termination events—not what the listed termination events are. Although the listed events are distinguishable from the listed events.

164. See discussion infra notes 167–98 and accompanying text.
165. See discussion infra notes 199–220 and accompanying text.
168. In re Marriage of Ellinger, 882 N.E.2d 692, 695 (Ill. App. Ct. 2008). “[T]he language in the Act concerning a spouse’s obligation to pay maintenance after the obligor’s death is different from the language in the Act concerning a parent’s obligation to pay child support after the obligor’s death.” Id.
events for child support termination, the exceptions to the termination events provided in the IMDMA for both child support and maintenance provide a way for the court and the parties to contract around the default termination provisions listed therein.169 Section 510(c) states that the statutory termination events for maintenance apply unless “otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court.”170 Section 510(d) states that the statutory termination events for child support apply unless “otherwise provided in this Act, or as agreed in writing or expressly provided in the judgment.”171 In sum, the exceptions are analogous and properly comparable, but the termination events themselves are not.

Although the exact wording of these two phrases is not the same, the Illinois Supreme Court has found that the functions of the phrases are the same, having interpreted the language of both sections as authorizing a court to order support beyond the listed statutory termination events.172 In Finley v. Finley, the Illinois Supreme Court interpreted the language “expressly provided in the judgment” as authorizing a trial court to order child support to extend beyond emancipation.173 In Freeman, the Illinois Supreme Court interpreted the language “otherwise approved by the court” as authorizing trial courts to extend maintenance beyond the termination events listed in


The general rule is that the obligation of a parent to support a child terminates when the child reaches majority. In re Marriage of Holderrieth, 536 N.E.2d 946, 951 (Ill. 1989). However, § 510(d) . . . specifically provides that “unless otherwise agreed in writing or expressly provided in a judgment, provisions for the support of a child are terminated by emancipation of the child, except as otherwise provided herein.” The legislative purpose behind the adoption of § 510(d) is to allow the parties to a dissolution proceeding to remain liable for the support of children beyond emancipation. Finley v. Finley, 410 N.E.2d 12, 16 (Ill. 1980) (discussing then § 510(c), which was later redesignated section 510(d)).

Id. (second alteration in original). See also In re Marriage of Arvin, 540 N.E.2d 919, 923 (Ill. App. Ct. 1989). Parties may intend “their agreement concerning termination of maintenance to supersede section 510(b) of the Act and the grounds for termination set forth therein.” Id. 170. 750 Ill. Comp. Stat. 5/510(c).

171. 750 Ill. Comp. Stat. 5/510(d).

172. See Finley v. Finley, 410 N.E.2d 12, 16 (Ill. 1980).

We agree with the appellate court opinion of In re Marriage of Raski, wherein the court found that the provisions of the new act do not extend the parental obligation for support beyond minority except in limited statutory situation. . . . [W]e find that the legislative purpose behind section 510[c] is to permit the parties to agree to remain liable for the support of the child beyond emancipation. The plain language of section 510[c] states that provisions for child support are terminated by the child's emancipation, unless otherwise agreed in writing or by court order.

Id. (citation omitted).

173. Id.
§ 510(c), namely remarriage. According to the corresponding decisions of the court, both subsections authorize a trial court to order alternative termination events or dates beyond the termination events enumerated in the IMDMA.

The court in Ellinger went wrong by comparing the listed termination events for child support with the listed termination events for maintenance. Again, the exceptions are analogous and properly comparable, but the events themselves are not. Unlike the exceptions to the termination events listed in § 510(c) and § 510(d), which both authorize a court to extend support beyond the listed termination events, the actual statutory termination events for child support and maintenance are very different. This led the court in Ellinger to conclude that the legislature did not intend for courts to order post-death maintenance because they were expressly authorized to order post-death child support.

The language in the IMDMA concerning a spouse's obligation to pay maintenance after the obligor's death is different from the language concerning a parent's obligation to pay child support after the obligor's death. Section 510(c) states that with certain exceptions "the obligation to pay future maintenance is terminated upon the death of either party." However, § 510(d) says that with certain exceptions, provisions for the support of a child are not terminated "by the death of a parent obligated to support or educate the child." Since child support and maintenance are two separate and distinct subjects of marital dissolution, it would be odd if the legislature did not have different termination events for these methods of support. Under the IMDMA, the statutory-termination events for child support are (1) emancipation or (2) reaching age 18 or graduating from high school (whichever happens first). As discussed earlier, the statutory-termination events for spousal support are (1) the death of the payor, (2) the remarriage of the payee, or (3) the cohabitation of the payee. Not only are the statutory-termination

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175. In re Marriage of Ellinger, 882 N.E.2d 692, 695 (Ill. App. Ct. 2008). The Ellinger court seemed to be applying some form of inclusio unius est exclusio alterius (the inclusion of one is the exclusion of another) to the listed termination events. See id. at 694. “It is well established that when the legislature used certain language in one part of an act, and different language in another portion of the act, the legislature intended different results.” Id. Again, although their application of this maxim is correct, applying it to the listed termination events does not address the issue of whether or not a court order is an exception to those listed termination events.
176. 750 ILL. COMP. STAT. 5/510(c).
177. 750 ILL. COMP. STAT. 5/510(d); see also Ellinger, 882 N.E.2d at 695.
178. 750 ILL. COMP. STAT. 5/510(c).
179. 750 ILL. COMP. STAT. 5/510(d).
180. See supra notes 132–42 and accompanying text.
events different, but § 510(d) specifically states that the death of the payor is not a statutory-termination event for child support. The legislature made it clear that it never intended death to be a termination event for child support, even by court order, whereas for maintenance death is explicitly listed as such in order to reap the tax benefits of § 71 of the Internal Revenue Code.

In *Ellinger*, the court concluded that, based on this difference in the termination events, courts have discretion to order post-death child support but not post-death maintenance. But the issue in *Ellinger* and *Walker* was whether under § 510(c) a court was authorized to order post-death maintenance—namely life insurance security—in the face of death as a listed termination event. The issue was not whether death was a listed statutory termination event for maintenance. If the latter question was the issue, it would have been unnecessary for the court to look at § 510(d). The real issue is the court's authority to disregard the statutory termination events and fashion an alternative plan. The *Ellinger* court should have compared the language of the exceptions, not the statutory termination events themselves, to answer this question.

Why did the legislature use the language "otherwise approved by the court" to designate judicial discretion in one section and "expressly provided in the judgment" in another? Simply put, although both phrases authorize the court to make awards beyond the statutory termination periods, the court's authority to order post-death maintenance serves a different purpose than the court's authority to provide for post-majority child support in a judgment. In fact, the court's authority to set post-majority child support termination dates is explicitly addressed in §§ 505(a), 505(g), 513(a)(1), and 513(a)(2). The purpose of authorizing a trial court to approve post-majority child support is to promote the best interest of the child. Section 505(g) states, without exception, that termination of child support "shall be no earlier than the date on which the child covered by the

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181. 750 ILL. COMP. STAT. 5/510(d).
182. *See supra* notes 122–26 and accompanying text.
184. *Id.* at 694.
185. 750 ILL. COMP. STAT. 5/505(g) (setting out the minimum termination dates for child support).
186. 750 ILL. COMP. STAT. 5/513(g)(1) (allowing a court to order extended support for mentally or physically disabled children).
187. 750 ILL. COMP. STAT. 5/513(a)(2) (extending child support beyond emancipation when the trial court order makes a provision for the contribution of secondary education expenses). Under this subsection, the authority of the court to make provisions for educational expenses terminates when the child receives a baccalaureate degree. *Id.*
order will attain the age of 18" or "if the child will not graduate from high school until after attaining the age of 18, then the termination date shall be no earlier than . . . the child's high school graduation . . . or the date on which the child will attain the age of 19." Although this section prohibits authorizing child support that terminates before maturity, nothing in § 505(g) prevents the court from extending support beyond maturity if it is in the best interest of the child. For example, although parents are not usually held responsible for college expenses, pursuant to § 513(a)(2) and according to the Illinois Supreme Court, the trial court, in its discretion, may require a divorced parent to provide college expenses. The statute explicitly authorizes a trial court to create an obligation to pay educational expenses post-majority to provide for the "best interest of the child." In fact, the allowance of post-majority support is one of the few luxuries children of divorced parents may enjoy as opposed to children of still-married parents.

In contrast to the purpose behind authorizing post-majority child support, the purpose of authorizing a trial court to order post-death maintenance is to ensure the just and equitable division of marital property. The court's discretion to approve post-death maintenance obligations arises from the court's responsibility to ensure a just division of marital property based on the twelve factors enumerated in the IMDMA and any other factors the court finds "just and equitable." In addition, the court's discretion to approve and incorporate agreements and orders regarding maintenance awards arises from a need to ensure that agreements between parties concerning maintenance or orders by the court "could be put within a divorce decree and be enforceable." As referenced earlier, in 1981, the Illinois Senate passed bill 267 adding the following language: "[U]nless otherwise agreed by the parties in a written separation agreement set forth in the judgment or otherwise approved by the court . . . ." The Chicago Bar Association and the Illinois State Bar Association lobbied for the passage of this amendment because the language ensured that mainte-

188. 750 ILL. COMP. STAT. 5/505(g).
190. 750 ILL. COMP. STAT. 5/505(a)(2).
191. 750 ILL. COMP. STAT. 5/504(a)(1)-(12).
192. 750 ILL. COMP. STAT. 5/504(a)(12).
194. See Illinois Marriage and Dissolution of Marriage Act, Pub. Act No. 82-194, § 510(b), 1981 Ill. Laws 1130 (inserting "Unless otherwise agreed by the parties in a written separation agreement set forth in the judgment or otherwise approved by the court . . . .").
nance awards made either by agreement of the parties or by court order—which were subsequently incorporated in the judgment—retained legal significance, allowing the payor a tax deduction equal to alimony payments made within the taxable year. The legislature intended to make it clear that under § 510(c) a payor was meant to retain tax deductions for maintenance obligations, including those made after statutory termination events arising out of an agreement of the parties or a court order. In Mass, the court stated that one of the primary reasons for clarifying the language was to allow for a husband to get a federal tax deduction for maintenance payments made beyond an ex-wife’s remarriage when the continuation of maintenance payments was required by the judgment.

Looking at the language of the exceptions rather than the language of the termination events themselves, it is clear that the legislature intended trial courts to maintain the authority to tailor both spousal support and child support to the needs of the parties, by extending support beyond the termination events provided in the IMDMA. For children, the court’s discretion to extend support post-majority may ensure the best educational interest of the child. For a dependent ex-spouse, extending maintenance post-death may involve using life insurance or a life insurance trust to ensure a maintenance award is “just and equitable” and that parties to the agreement are able to receive the necessary tax benefits.

2. Comparing § 503(g) Child Support Trusts

The legislature did not intend to limit the court’s authority to authorize post-death maintenance protection by including language allowing courts to set aside marital assets for the benefit of dependent children in special circumstances. Support trusts created by the court for the benefit of dependent children are highly distinguishable from post-death maintenance awards, such as life insurance, because § 503(g) trusts protect against default under special circumstances, whereas post-death awards protect only against non-payment due to death. Despite this fact, the court in Ellinger reasoned that the legislature did not intend to authorize trial courts to award post-death maintenance because the IMDMA contains specific language authorizing a court to set aside marital or non-marital property in a “trust for the support, maintenance, education, physical and mental health, and

general welfare of any minor, dependent, or incompetent child of the parties.”199 and does not contain a corresponding provision for maintenance obligations.200 However, it would have been repetitive for the legislature to create a provision in the IMDMA allowing a court to set aside marital or non-marital property in a trust for the benefit of a party receiving maintenance, because the purpose of § 503 is to divide the marital property in just proportions considering all relevant factors, including the relative economic circumstances of the parties,201 whether the apportionment is in lieu of or in addition to maintenance,202 and the education, age, health, and general needs of both parties to the dissolution.203 For example, taking these factors into account, “an aged unemployed spouse in ill health might receive a greater percentage of the marital property than would a younger employable spouse.”204

Pursuant to § 503(d)(1)–(12), when determining property settlements, a court must consider all relevant factors to allocate the marital property in “just proportions.”205 If these factors lead the court to determine that a party should receive a greater portion of the jointly held assets, then the court will award a greater percentage to the deserving party.206 Consequently, the level of discretion authorized by the “just portions” language of § 503(d) concerning property distribution already accounts for “the support, maintenance, education, physical and mental health, and general welfare” of a dependent spouse.207 For example, the court is required to take into consideration “the relevant economic circumstances of each spouse when the division of property is to become effective,” including situations such as unemployment, retirement, and the opportunity for future income.208 Given various facts, a court may determine that periodic maintenance

199. 750 Ill. Comp. Stat. 5/503(g).
201. 750 Ill. Comp. Stat. 5/503(d)(5).
203. 750 Ill. Comp. Stat. 5/503(d)(8). Under an analysis of the individual facts of a case, the percentage allocation of marital property can range from 0% to 100%. See Davis & Yazici, supra note 11, at 130 (citing Stallings v. Stallings, 393 N.E.2d 1065 (Ill. App. Ct. 1979)). The division must be equitable, but not necessarily equal. Id. (citing In re Marriage of Orlando, 577 N.E.2d 1334, 1340 (Ill. App. Ct. 1991), which awarded two thirds of the marital property to the wife when the husband had a higher education and better income potential).
204. See Davis & Yazici, supra note 11, at 138 (citing In re Marriage of Swigers, 531 N.E.2d 858 (Ill. App. Ct. 1988); In re Marriage of Bonneau, 691 N.E.2d 123 (Ill. App. Ct. 1998)).
205. 750 Ill. Comp. Stat. 5/503(d).
206. See Stallings, 393 N.E.2d at 1066–67 (upholding an award of 100% of the marital assets to the wife).
207. 750 Ill. Comp. Stat. 5/503(g).
208. 750 Ill. Comp. Stat. 5/503(d).
payments are unworkable or unnecessary. Accordingly, in lieu of maintenance, the court may award a greater percentage of the marital property to the dependent spouse.\textsuperscript{209}

In contrast to dependent spouses, children lack standing to negotiate for a portion of the marital property to ensure their future financial security.\textsuperscript{210} However, § 503(g) provides for the creation of a support trust for children by specifically authorizing courts to allocate marital or non-marital property to the children if it is in their best interest and the court finds that special circumstances require it.\textsuperscript{211} For example, a trust may be established if there is evidence showing that a parent is unwilling or unable to make direct payments of support.\textsuperscript{212} In addition, where vast fluctuations in income have occurred or are likely due to special circumstances, § 503(g) authorizes a trial court to further the best interests of the children by protecting child support payments with the use of a § 503(g) trust, thereby including the children's interest in the property division.\textsuperscript{213} Therefore, pursuant to § 503 in the case of both a dependent spouse and a dependent child, Illinois courts have the discretion to use property to ensure just and equitable financial support.

The first factor a court must consider in determining whether a maintenance award is just, equitable, and workable is the property distribution.\textsuperscript{214} If the property award is sufficient to provide for a dependent spouse or a maintenance award seems unworkable, a court will increase the property apportionment to reflect this determina-

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\item Beermann & London, supra note 53, at 659.
\item 750 ILL. COMP. STAT. 5/503(g); see also In re Marriage of Andrew, 628 N.E.2d 221 (Ill. App. Ct. 1993). The creation of § 503(g) trusts out of the net proceeds of the sale of the marital home is proper to promote the best interests of the child under special circumstances or when both parties agree. Andrew, 628 N.E.2d at 224.
\item Judith G. McMullen, Prodding the Payor and Policing the Payee: Using Child Support Trusts to Create an Incentive for Prompt Payment of Support Obligations, 32 NEW ENG. L. REV. 439, 459 (1998); see also Andrew, 628 N.E.2d at 225.
\item 750 ILL. COMP. STAT. 5/504(a)(1).}
Before the adoption of § 503(g), the court did not have discretion to set aside marital property for dependent children. Child support was the only financial benefit a court could award children of divorce. If support went unpaid, children had no property to fall back on. However, § 503(g) allows courts to include children in the division of property by creating trusts which can be borrowed against if child support is not forthcoming or for certain educational expenses. This type of default security is distinguishable from any form of post-death maintenance award—such as a life insurance policy—because a dependent spouse cannot invoke post-death payment upon default. Consequently, post-death maintenance awards are highly distinguishable from the security provided by § 503(g) trusts. In other words, a court may order the creation of a § 503(g) trust based on evidence that child support may go unpaid; however, a court will not order a party to maintain a life insurance policy to ensure that maintenance payments are made in a timely manner because life insurance in no way secures periodic payments during the life of the payor. The purpose of ordering post-death maintenance is to ensure that if the payor dies while it was still his duty to pay support, his ex-spouse could avail herself of the proceeds of a life insurance policy or continuing support payments. In contrast to § 503(g) trusts, post-death protection for a maintenance obligation does not involve existing assets and it may not be borrowed against in case of default or inability to pay under special circumstances. Post-death maintenance protections such as life insurance protect against the premature death of the payor spouse, not the default. As the court in Walker noted, the legislature did not intend to limit the court's authority regarding post-death maintenance protection by including language allowing courts to set aside marital assets for the benefit of dependent children in special circumstances.

215. Beermann & London, supra note 53, at 659. “It would make no sense to award a spouse sufficient property to provide for her reasonable needs and then not require her to use the property for its intended purpose.” Id.
216. McMullen, supra note 213, at 454.
217. Andrew, 628 N.E.2d at 221.
219. Id.
220. See In re Marriage of Petersen, 744 N.E.2d 877, 891 (Ill. App. Ct. 2001) (upholding the imposition of a § 503(g) trust due to the father's demonstrated unwillingness to remain current on his child support obligation).
IV. IMPACT

A. Future Financial Security for Dependant Parties

It helps to return to the hypothetical separation of Jack and Jill to fully understand the impact that authorizing courts to order post-death maintenance has on the individual parties to a divorce. If Jack and Jill do not execute a complete marital settlement agreement, they will go to trial. Hypothetically speaking, based on concerns about Jack’s health or on his recent interest in cliff diving, a judge may find it necessary to provide Jill with financial security beyond Jack’s death, namely in the form of a life insurance policy. Prohibiting a court from ordering post-death maintenance, particularly in the form of life insurance, creates a gaping hole in the extensive maintenance provisions of the IMDMA and undermines the Act’s stated purpose of “mitigate[ing] the potential harm to the spouses and their children caused by the process of legal dissolution of marriage”221 because moments after Jill is awarded a substantial and permanent maintenance award meant to provide for her for the rest of her life, Jack could get hit by a bus and Jill would get nothing. In such a case,222 a failure to provide post-death protection would result in a future for Jill that is riddled with financial insecurity as a result of her divorce because the court previously determined that she made substantially less then Jack, she was in charge of the domestic chores for thirty years, and she needed monthly maintenance to survive. The language of § 510(c) authorizes courts to provide post-death maintenance if justice and equity require because the concepts of safeguarding families, mitigating harm, promoting equity, and eliminating misconduct223 are core purposes of the IMDMA. The language of § 510(c) should not be construed in a way that eliminates the court’s ability to construct safeguards in divorce judgments to promote these goals. Rather, a strict interpretation of the plain meaning of § 510(c) and a whole-statute analysis show that the Illinois legislature intended to authorize courts to provide post-death maintenance if the specific facts so require.

B. Tax Consequences

Given the authority to extend the obligation to pay maintenance beyond the death of the payor, however, courts must keep in mind the intimate connection that maintenance has to taxable income. If a judge chooses to extend the obligation to pay maintenance beyond the

222. See supra note 13 and accompanying text.
223. 750 ILL. COMP. STAT. 5/102(1)–(8).
death of the payor, this action would constitute a valid "drafting out" of the plain language of the Act providing that maintenance terminates at the "death of either party" and ensuring federal tax deductions. If it is the intention of the parties or the judge for maintenance payments to be taxable to the payee and deductible by the payor, notwithstanding the extension of the payor's obligation post-death, maintenance must still be tied to the death of the payee pursuant to I.R.C. § 71(d).

Subsection (D), the only part of the § 71 definition at issue with post-death maintenance, requires that for payments to be deemed maintenance, there must be no liability to continue payments after the death of the payee spouse. Otherwise, the payments are neither taxable to the payee nor deductible by the payor. While under the Tax Reform Act, a support agreement that does not explicitly provide that payments terminate upon the death of the payee spouse can nevertheless satisfy § 71(b)(1)(D) if the payments terminate in the event of the payee spouse’s death by operation of state law, under a provision that explicitly nullifies the operation of state law, no such presumption can apply and the taxable/deductible requirements are not met. The following examples are illustrative.

Example 1: Jack is ordered by the court pursuant to the couple’s decree of divorce to pay Jill $2,000 each month, commencing on January 1, 2011, and payable for month to month thereafter, so long as Jill lives. No event other than the death of Jill terminates the maintenance payments. Tax Consequences: Assuming these payments conform to the additional requirements of § 71, Jack’s payments are deductible from his gross income and taxable to Jill. This is an example of the authority that a court possesses under § 510(c) to extend the obligation to pay maintenance beyond death of the payor while maintaining a deductible/taxable status under I.R.C. § 71.

Example 2: Jack is ordered by the court pursuant to the couple’s decree of divorce to pay Jill $2,000 each month, commencing on January 1, 2011, and payable for month to month thereafter, for 15 years. Maintenance payments are set to terminate upon Jill’s remarriage or conjugal cohabitation but not upon the death of Jack. Tax Consequences: Again, this is an example of effective extension of a mainte-
nance obligation post-death; however, Jack’s payments would not be deductible from his gross income and taxable to Jill because the payments are not tied to Jill’s death as required by § 71. Further, the payments cannot terminate upon her death under § 510(c) because the court explicitly drafted out of the § 510(c) “death of either party” provision. Thus, by the express intention of the divorce decree, these maintenance payments have been made nondeductible. While the nondeductibility of the maintenance payments may be purposeful, parties and courts must be aware of the specific tax consequences in order to properly take them into account when evaluating the equity of the overall property settlement and the dollar amount of the monthly maintenance award.

A full discussion of the tax ramifications and complexities associated with the maintenance of court-ordered life insurance is beyond the scope of this Comment. However, the deductible/taxable nature of the insurance premiums typically turns on ownership of the policy.226 Generally, where the payor owns the policy and pays the premiums, the premiums are not deductible to him. In contrast, when the payee spouse owns the policy but the payor pays the premiums for her benefit, the payments may be deductible.227 Temporary regulation 1.71-1T, A-6 expressly provides that “premiums paid by the payor spouse for term or whole life insurance on the payor’s life made under the terms of the divorce or separation instrument will qualify as payments on behalf of the payee spouse to the extent that the payee spouse is the owner of the policy.”228

V. Conclusion

The current split in the Illinois appellate courts is a result of a combination of confusing statutory interpretations and conflicting social policies.229 However, interpreting statutes based on the social policy of various districts or the reasoning of various judges is inconsistent with the uniformity imagined by the Illinois legislature in enacting the IMDMA. In interpreting the language of the IMDMA, a court must look to the plain meaning of the language and then to the whole stat-

226. See Davis & Yazici, supra note 11, at 1332.
227. Id.
229. In Walker, the court applied liberal construction and a need for broad discretionary powers in family court to justify authorization of court-ordered post-death maintenance. 899 N.E.2d 1097 (Ill. App. Ct. 2008). This contrasted with Ellinger, which denied approval of post-death maintenance because the language of § 510(c) is different from the language regarding child support and the court found a need for strict statutory limits on judicial discretion in family court. 882 N.E.2d 692, 695 (Ill. App. Ct. 2008).
Applying the basic principles of plain-meaning and whole-statute analysis to the language of § 510(c) proves to be the most consistent and logically sound way to ascertain the true intent of the Illinois legislature because it is consistent with the Illinois Supreme Court’s holding in Freeman and it comports with the generally accepted principles of statutory construction used to interpret other Illinois support statutes.

By applying both plain-meaning interpretation and whole-statute analysis to the language of § 510(c) as required by the Illinois Supreme Court, it is clear that the legislature intended to authorize trial courts to award various forms of post-death maintenance. Consequently, a trial court may protect the future financial needs of a dependent spouse through the use of court-ordered life insurance or various other forms of post-death support.

As long as the court order is just and equitable, the language of § 510(c) as interpreted by plain-meaning and whole-statute analysis authorizes a court to provide post-death maintenance. Therefore, if a court should have any worry that Jack may soon be hit by a bus, entering an order obligating Jack to maintain a life insurance policy for the sole benefit of Jill does not violate § 510(c) because the legislature intended a court to maintain this authority.

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