Stepping In(come):
Evaluating the Inherent Inconsistency of Illinois’s Trend Toward Consideration of New Spouse Income in Child Support Modification

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I. INTRODUCTION

Beatrix and Bill Kiddo were once a happily married couple with a charming life together in suburban Chicago.¹ Unfortunately, things

¹ The example that follows is purely hypothetical and meant to illustrate the main issues that arise in a child support modification proceeding where one or both parties have remarried.
changed. Bill lost his job as an investment banker in early 2001 when the economy turned sour, and the couple’s blissful marriage fell apart shortly thereafter. A messy divorce followed, and sole custody of the couple’s only child, B.B., then four-years-old, went to Beatrix. Bill was ordered to pay child support in 2002 and has always followed through on his obligation.

Since then, Beatrix and Bill have both remarried. Bill’s new wife, Elle, is a high-powered corporate attorney in downtown Chicago, pulling in a salary of over six figures annually. Bill found employment too, but his current salary is much less than what he made in 2002. Bill and Elle have no children together, but Elle’s thirteen-year-old daughter from a previous marriage lives with the new couple. Beatrix, on the other hand, remarried Earl McGraw and moved away from the city with B.B. Beatrix’s new husband is a man of modest means, and the new family lives a less-than-comfortable lower-middle-class life. Despite their limited financial means, Beatrix and Earl try to give B.B. all that she desires. B.B.’s needs have increased with her age; she’s involved in YMCA soccer, takes viola lessons three times per week, participates in Girl Scouts, and attends many costly summer camps.

Beatrix feels that Bill is not pulling his weight in supporting B.B. She filed a petition for modification of their child support judgment, citing B.B.’s increased needs and Bill’s increased ability to pay (due to his new wife’s large salary). Bill is upset by this and feels that Elle’s income cannot be considered because she should not be responsible for B.B.’s support. Under Illinois law, what happens? Will the modifying court consider Elle’s income in determining Bill’s new child support obligation? If so, should Illinois courts consider this information?

Illinois family law concerning this issue is currently in a state of flux. **2** Traditionally, Illinois courts rejected consideration of new spouse income in child support modification proceedings because a new spouse has no obligation to support a stepchild. **3** Recently, however, the tide has turned. Some Illinois appellate courts have found consideration of this information to be warranted in certain circumstances. **4** The efficacy and logic of these holdings beckons assessment.

This comment will provide an in-depth discussion of the Illinois case law that developed the current rule in favor of considering new spouse income in child support modification. Part II will explore the traditional rule against consideration of such income. Part III will provide a primer on

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**2.** 2 H. JOSEPH GITLIN, GITLIN ON DIVORCE: A GUIDE TO ILLINOIS MATRIMONIAL LAW § 17-1(l), at 17-52.1 (3d ed. 2006).


the basics of the Illinois Marriage and Dissolution of Marriage Act as it relates to child support modification. Part IV will cover the cases that broke from the traditional rule and resulted in the more pragmatic (but unnecessarily muddled) approach applied by Illinois courts today. Along the way, shortcomings and confusion created by these holdings will be explored. Coverage of other jurisdictions’ treatment of the issue will follow in Part V, focusing on those jurisdictions that provide a clear and explicit rule that respects the principle of the traditional rule while providing for a realistic approach in particular circumstances. Finally, Part VI argues that a system that disregards new spouse income should be created by the Illinois state legislature.

II. ILLINOIS CASES EXEMPLIFYING THE TRADITIONAL RULE

Precedent for the traditional rule against considering a new spouse’s income in modifying child support can be traced to a number of cases in the 1970s. However, to put the traditional rule into perspective, it will be helpful to briefly examine the treatment of divorce, remarriage, and support before the courts began to articulate an official stance or oft-cited directive.

The 1966 Third District case Kelleher v. Kelleher gives some insight into why the traditional rule evolved as it did—quite slowly. The court in Kelleher reviewed the divorce judgment of Mary and Charles Kelleher, parents of three minor children, who divorced in 1959. The divorce decree provided that Mary was granted custody of all three children, and Charles was ordered to pay $220 per month for support and alimony. Mary was compelled to go to work to support her and the children and, despite this, still faced a shortfall in meeting monthly expenses. To remedy this shortage, Mary sought a modification of child support and alimony. The trial court, in weighing the financial needs of Mary and the children, referenced the fact that an increase in child support hinge’s upon two factors: 1) the increased needs of the children, and 2) the increased ability of the father to pay. These factors stemmed from analysis under then-existing Paragraph 19 of the Divorce Act, which provided for modification
of support judgments when the circumstances made it "appear reasonable
and proper." In the Kellehers' case, subsequent to their original divorce
decree, it was discovered that one of the children was mentally disabled and
required costly special needs care. Additionally, Charles had remarried,
his second wife bringing two children of her own to the new family, and his
yearly salary nearly doubled from that at the time of the divorce. Not
surprisingly, given the increased needs of the child and Charles's increased
ability to pay, the Third District reversed and remanded the trial court's
decision to maintain child support at the 1959 level.

Taking a step back from the Kelleher decision, it is important to point
out a few details that the reviewing court glazed over that are frequently
given at least passing consideration in modern trial court support modifica-
tion proceedings and subsequent appellate review. First, the Kelleher court,
in assessing Charles's financial means, made no mention of whether
Charles's new wife contributed anything, by way of employment income or
income-producing assets, to the new family unit's financial resources or
ability to meet expenses. Second, the notion that Charles's second
family's needs should be considered at all in the modification calculus is
conspicuously absent. It is essential to keep both of these considerations
in mind as discussion of the evolution of the Illinois rule proceeds. Illinois
courts today generally weigh the needs of first and second families
equally.

14. Id. at 140-41.
15. Id. at 142.
16. See id. at 140-41 (listing income and expenses of Charles and that he has
remarried, but neglecting to mention any other household income).
17. Illinois courts have traditionally favored the needs of a "first family." See, e.g.,
Roqueplot v. Roqueplot, 410 N.E.2d 441, 445 (Ill. App. Ct. 1980) ("Although we recognize
the additional responsibilities imposed by a subsequent remarriage, we adhere to the view
the defendant's first obligations must be met before the second obligations can or will be
considered."). See also Gregory v. Gregory, 202 N.E.2d 139, 143 (Ill. App. Ct. 1964)
(noting in dicta that "the first come first and the second come second. In other words, the
first obligations must be met before the second obligations can or will be considered.").
18. The principle in place in Kelleher, sometimes referred to as "first family first,”
has been eroded somewhat by the requirement (under the Illinois Marriage and Dissolution
of Marriage Act § 505(a)) that consideration be given to the financial resources and needs of
the obligor parent in the determination of the income available to meet the needs of the
children to be supported. Gemma B. Allen, Child Support, in 3 Illinois Family Law § 4-1,
at 4.74 (Ill. Inst. for Cont. Leg. Ed. ed., 2003). For more discussion of this trend, please see
James H. Feldman, Modification and Termination of Maintenance and Child Support, in 2
1985) (commenting on "society's increased acceptance of the principle of equality of
treatment of all children, including those from earlier or later unions"). See also Marvin M.
Moore, The Significance of a Divorced Father's Remarriage in Adjudicating a Motion to
A. **EDWARDS AND ROBIN**

The analytical foundation of the traditional rule against considering a new spouse’s income in child support modification proceedings is often cited to two cases: *Edwards v. Edwards*\(^1\) and *Robin v. Robin*.\(^2\) The facts of both require scrutiny, as the two cases approached the issue of new spouse income from opposite perspectives; *Robin* involved the support obligee’s remarriage,\(^21\) while *Edwards* concerned the obligor’s remarriage.\(^22\)

In *Edwards*, the Fourth District reviewed an obligor’s challenge to a lower court’s modification of his support judgment after he had been released from the military, subsequently remarried, and found private employment.\(^23\) The trial court, in modifying support, considered evidence that the obligor’s new spouse earned $217 per month.\(^24\) Articulating what appears to be a “common sense” conclusion, the appellate court stated that the “financial status of [obligor’s] present wife has no bearing upon the obligation of [the obligor] to support his minor child.”\(^25\) Despite this fact, the reviewing court determined that the trial court’s use of this evidence in its decision to modify was not an abuse of discretion but rather an “assessment of those matters which demonstrate clearly the effort to reach an equitable conclusion.”\(^26\)

In essence, the *Edwards* Court appeared to speak out of both sides of its mouth. At once it denounced inclusion of the evidence at trial, yet still held that equity required its consideration. Although complicating application of the “no bearing” principle, the court made it clear that “all of the facts surrounding both households” were to be considered in modification.\(^27\) It is logical that having more income available because of a new spouse clearly affects the obligor’s ability to pay support, since a new spouse may pay other expenses the obligor would normally be fully responsible for. However, we must keep in mind that the support obliga-

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20. *Id. at 811.
21. *Id. at 823.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
tion, and the ability to pay, is the court’s focus, not the expenses deferred by the new spouse’s income.

The other side of the remarriage coin is when the obligee remarries, changing his or her available means and ability to support a child or children. Robin v. Robin, the most-cited case in support of the traditional rule, involved an obligor father’s appeal of a modification judgment that resulted in his payments being increased by 500%. The dramatic nature of the increase leads to a gut reaction of injustice, and the court’s holding inferred as much. Phyllis Robin, the support obligee, remarried a wealthy man and was not employed during her new marriage. Evidence presented at trial showed that Phyllis’s new husband, although retired, received $1,500 per month from his former business. However, Phyllis’s new husband only funded a small checking and savings account for her; she had no other source of income, few assets, and relied on him for support.

The court, adhering to Edwards’s dicta, held that the new spouse’s income could not be considered in determining Phyllis’s ability to fulfill her duty to support the child. Although Phyllis and her daughter Bonnie evidently enjoyed a comfortable lifestyle because of her new spouse’s wealth, the court refused to weigh this evidence at all. Phyllis clearly had an equal duty to support Bonnie, but her new husband had no such duty under Illinois law. The obligor spouse failed to show that Phyllis “possessed the ability to fulfill that duty.” This case, clearly an extreme example of a court’s refusal to consider a new spouse’s income, income which can be a significant contribution to the new household’s finances, looks like a bit of a relic when compared to the weight Illinois courts place on such evidence today.

29. Id. at 814 (noting that the manifest weight of the evidence did not support the increase, reversing the judgment of the trial court, and remanding the cause for a new determination of the proper amount of increase based on the child’s needs and obligor’s ability to pay).
30. Id. at 811.
31. Id.
32. Id. at 811, 814.
33. Id. at 814.
34. The couple resided in a condominium on Lake Shore Drive in Chicago, worth $90,000 to $95,000, and also purchased a home in Northbrook for $101,000. Evidence presented at the modification hearing included calculations of Bonnie’s monthly expenses for clothes, vacations, and food which were $100, $125 and $125, respectively. Robin, 359 N.E.2d at 811.
35. Id. at 814.
36. See, e.g., In re Marriage of Cianchetti, 815 N.E.2d 17, 19-20 (Ill. App. Ct. 2004). The Cianchetti Court found the fact that, although the obligee wife’s new husband “is not obligated to pay for [obligee’s] children’s tuition,” his income could be “used to examine
B. POST ROBIN AND THE “AVAILABLE MEANS” THEORY OF SWANSON

Once the rule in Robin was established, Illinois courts’ reliance upon its central premise of focusing on the parties’ ability to meet child support obligations, and not the positive or negative financial effects a new spouse may bring, was short-lived. Although lip service was often paid to the logic of the rule, few courts followed the rule’s specific directive of not considering a new spouse’s income at all. Two decisions, In re Support of Sharp38 and In re Marriage of Kessler,39 both held that a new spouse’s income, although potentially a substantial factor, should nevertheless not be considered.

In Kessler, the court upheld an increase in support payments, despite the fact that the obligee had remarried a physician whose practice was burgeoning.40 The court “duly noted” the “increase in the [obligee’s] second husband’s income from his medical practice” but did not “consider this to be a persuasive or controlling factor” in upholding the support modification.41 The justification given for this holding was, of course, the “should not be considered” language of Robin.42 Similarly, in Sharp, the Third District held that the trial court did not err in failing to consider the income of the appellee-petitioner’s second husband, again relying on Robin.43

Despite the strong, prohibitory language of Robin, a competing line of cases began to emerge which would ultimately result in a nearly opposite rule. It was as if the principle in place (stepparents having no obligation to pay for stepchildren) became expendable. Almost concurrently with the First District’s decision in Robin, the Third District decided the case of Swanson v. Swanson.44 Swanson turned out to be a significant precedent in terms of laying the groundwork for appellate courts to later discard or

the extent to which [obligee’s] income could be freed through reliance on her husband for support.” Id.

37. See, e.g., In re Support of Whitney, 413 N.E.2d 872, 874-75 (Ill. App. Ct. 1980) (quoting, verbatim, the language of Robin and holding, in contravention to Robin, that consideration of new spouse’s income was relevant); In re Marriage of McBride, 519 N.E.2d 1095, 1100 (Ill. App. Ct. 1988) (same).
40. Kessler, 441 N.E.2d at 1229.
41. Id.
42. Id. (quoting Robin v. Robin, 359 N.E.2d 809, 814 (Ill. App. Ct. 1977)).
43. Sharp, 382 N.E.2d at 1283 (quoting Robin, 359 N.E.2d at 814).
pervert the basic premise of Robin.\textsuperscript{45} A principle emerged from Swanson that was carried forward and subsequently quoted regularly: "the amount of child support is to be determined 'by accommodating the needs of the children with the available means of the parties.'"\textsuperscript{46}

At first blush, this principle seems quite logical, pragmatic, and equitable. Of course, in practice, the "available means" language could be extended to include inquiry into all the "means" (read "financial resources")\textsuperscript{47} to which a former spouse may have access as a result of his or her remarriage.\textsuperscript{48} The Whitney case took that idea and ran with it, opening the floodgates for the current trend towards considering the income of a new spouse in child support modification in Illinois.\textsuperscript{49} However, before discussing Whitney and its implications with regard to the current trend, it is important to make a detour to explore the contours of the Illinois Marriage and Dissolution of Marriage Act,\textsuperscript{50} which was enacted in 1977, shortly before the common law began to trend towards considering new spouse income in child support modification.

III. IMDMA BASICS AND CHILD SUPPORT MODIFICATION STATUTES

The Illinois Marriage and Dissolution of Marriage Act ("IMDMA") was enacted in 1977\textsuperscript{51} and incorporates parts III and IV of the Uniform Marriage and Divorce Act.\textsuperscript{52} Eight other states have followed suit and, in most cases, have adopted the UMDA in its entirety, resulting in similar policies regarding child support across many jurisdictions.\textsuperscript{53} Prior to the...
enactment of IMDMA, Illinois courts interpreted the language of the Illinois Divorce Act\textsuperscript{54} in modifying alimony and child support judgments.\textsuperscript{55}

The IMDMA contains a number of sections that deal with child support and modification of child support judgments. For the purposes of discussion here, the most relevant are sections 5/505,\textsuperscript{56} 5/510,\textsuperscript{57} and 5/513.\textsuperscript{58} A brief discussion of each is warranted to serve as a reference point in examining the current trend in support modification jurisprudence.

A. SECTION 5/505 – CHILD SUPPORT GUIDELINES

IMDMA section 5/505 outlines the methodology Illinois trial courts must apply when child support is deemed necessary.\textsuperscript{59} The court may order “either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for his support.”\textsuperscript{60} This duty “includes the obligation to provide for the reasonable and necessary physical, mental and emotional health needs of the child.”\textsuperscript{61} A “child”
includes “any child under age eighteen and any child under age nineteen who is still attending high school.”

The statute outlines a minimum child support amount based on the number of children receiving support and a corresponding percentage of the obligor’s net income. “Net income” is defined as “the total of all income from all sources,” minus a number of deductions. Notably, this section neither precludes nor prescribes that “all sources” might include the income of a new spouse. Additionally, section 5/505.2 establishes that courts must, upon request of the support obligee or Public Office, order an obligor with a health insurance plan provided by an employer, labor union, or trade union to name the child granted support as a beneficiary under that plan.

A court may depart from the minimum guidelines only if it makes a finding that application of the guidelines would be inappropriate based on a number of relevant factors and taking into consideration the “best interests of the child.” In terms of considering the income of a new spouse when deciding to depart from the minimum guideline, the language of two factors rises to the forefront as potentially relevant: “(b) the financial resources and needs of the custodial parent” and “(e) the financial resources and needs of the non-custodial parent.” Exactly what “financial resources” means is a key point of contention and shall be discussed infra.

62. Id.
63. (1) The Court shall determine the minimum amount of support by using the following guidelines:

<table>
<thead>
<tr>
<th>Number of Children</th>
<th>Percent of Supporting Party's Net Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>20%</td>
</tr>
<tr>
<td>2</td>
<td>28%</td>
</tr>
<tr>
<td>3</td>
<td>32%</td>
</tr>
<tr>
<td>4</td>
<td>40%</td>
</tr>
<tr>
<td>5</td>
<td>45%</td>
</tr>
<tr>
<td>6 or more</td>
<td>50%</td>
</tr>
</tbody>
</table>

68. 750 ILL. COMP. STAT. 5/505(a)(2)(e) (2004) (emphasis added). As an aside, this code section raises consideration not only of the obligor’s new spouse’s income but also the obligor’s income from employment or lack thereof. What if the obligor becomes voluntarily unemployed because of his or her improved financial status due to remarriage? IMDMA Section 505.1 was added in 1989 to deal with this problem. In pertinent part, it reads:

Whenever it is determined in a proceeding to establish or enforce a child support or maintenance obligation that the person owing a duty of support is unemployed, the court may order the person to seek employment and report periodically to the court with a diary, listing or other memorandum of his or her efforts in accordance with such order . . .

B. SECTION 5/510 – MODIFICATION OF JUDGMENTS

IMDMA section 5/510 concerns modification and termination of provisions for maintenance, support, educational expenses, and property dispositions.69 A judgment regarding maintenance or support may only be modified upon a showing of a “substantial change in circumstances,”70 an inconsistency between the trial court’s order and the guidelines in section 5/505,71 or a showing of existing health care needs of the child or children receiving support.72 Traditionally, analysis for determining whether a “substantial change in circumstances” has occurred to warrant an increase in child support or maintenance hinges upon the existence of two factors: 1) the needs of the child or children have increased, and 2) the obligor’s ability to pay support has increased.73 The burden of clearly proving the existence of these two factors is on the party petitioning for increased support.74 A trial court’s order modifying child support will not be overturned upon review in the absence of an abuse of discretion.75

C. SECTION 5/513—SUPPORT FOR NON-MINOR CHILDREN AND EDUCATION

IMDMA section 5/513 was created to furnish a means to provide for the education of children of divorced parents.76 In pertinent part, it provides that a trial court may award sums of money out of the property and income of either or both parties or the estate of a deceased parent, as equity may require, for the support of the child or children of the parties who have attained majority in two instances.77 These two circumstances are: 1) when the child is mentally or physically disabled and not otherwise emancipated,78 or 2) when the child has educational expenses.79 Orders

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73. In re Marriage of Scott, 389 N.E.2d 1271, 1276 (Ill. App. Ct. 1979). Practical considerations like inflation and the fact that as children age their needs become more costly are also given weight. See, e.g., Addington v. Addington, 363 N.E.2d 151, 154 (Ill. App. Ct. 1977) (“[W]here [the obligor’s] increased ability to pay is demonstrated, a proper basis for establishing increased need is that since the entry of the original support provision, the children have grown older and the cost of living has risen.”).
74. Addington, 363 N.E.2d at 154.
75. In re Marriage of Bussey, 483 N.E.2d 1229, 1233 (Ill. 1985).
79. 750 ILL. COMP. STAT. 5/513(a)(2) (2004). In pertinent part, this statute reads:
entered pursuant to this section are always modifiable as circumstances warrant. 80

Section 5/513 has become a very important conduit for Illinois courts in terms of opening the door to a more expansive view of what constitutes "financial resources" under the IMDMA. 81

IV. THE CURRENT ILLINOIS TREND TOWARD CONSIDERING NEW SPOUSE INCOME

A. CASES THAT ESTABLISHED THE CURRENT ILLINOIS TREND

The first decision in Illinois in which an appellate court held that it was not error to consider an obligor’s spouse’s income in support modification proceedings was In re Support of Whitney. 82 In Whitney, the Third District examined a case where both the obligor and obligee remarried, and evidence of the financial effects of both new spouses was presented at trial. 83 Marcia Hofstetter, the support obligee, objected at trial to her new husband’s cross-examination testimony regarding his gross income and contributions to the new couple’s mortgage on the home previously owned by Mr. Hofstetter and transferred to joint tenancy when Marcia and Mr. Hofstetter married. 84 The trial court considered this evidence relevant because it clarified the extent to which the children’s expenses, computed by dividing the total family expenses among the four members of the new household, were being paid by Marcia’s new husband. 85 There was no indication in the record that Marcia’s new husband’s income was considered in determining the ability of Marcia to fulfill her duty of support, despite the fact that these expenses were shared and thus freed some of Marcia’s financial resources. 86

The educational expenses may include, but shall not be limited to, room, board, dues, tuition, transportation, books, fees, registration and application costs, medical expenses including medical insurance, dental expenses, and living expenses during the school year and periods of recess, which sums may be ordered payable to the child, to either parent, or to the educational institution, directly or through a special account or trust created for that purpose, as the court sees fit. 87

Id. This authority of the trial court, in the case of a child not mentally or physically disabled and otherwise emancipated, does not attach once the child has received a baccalaureate degree. Id.

83. Id. at 874.
84. Id. at 874.
85. Id.
86. Id.
A stickier issue for the reviewing court was the income of Larry Whitney’s (the obligor) new wife. Linda Whitney was unemployed at the time of trial because of a strike. Although the court made it clear that Marcia’s new husband had no duty to support Larry and Marcia’s children, it was equally clear that Linda’s income had some consequential effect on Larry’s ability to meet his child support obligations. Stating that Robin was “inapposite” on the issue, the court hung its hat on the fact that Larry had an obligation of support to his new spouse, arguably one taking precedence over that owed to the children from his first marriage. Instead, it relied on the “available means” language of Swanson to determine that weighing the decrease in Linda’s income due to strike was a proper consideration for the court.

**i) First District**

*Greiman v. Friedman* is also an important precedent that strengthened the case for considering the income of a new spouse in modification. Although the pertinent issue on review was not consideration of a new spouse’s income *per se*, the appellate court reviewed a husband’s claim that the trial court abused its discretion when it failed to consider the financial obligations of his second family. This somewhat tangential issue, however, provided a significant foray into weighing “first” and “second” family needs in an effort to reach a “more principled” and “more equitable” determination of the shares of support contributions.

The ex-husband in *Greiman*, Edward Friedman, appealed from an order granting his ex-wife’s post-decree motion to require his continued payment of college expenses for their three adult daughters pursuant to IMDMA section 5/513. One of the main issues raised by Friedman was that the trial court failed to satisfy paragraph 513(a) of that section, which provides that the trial court shall consider as relevant “[t]he financial resources of both parents,” in determining whether to award post-majority educational support. Friedman successfully argued that both his second family and college-aged children placed demands upon his financial resources and neither should have been given outright favorable treatment.

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87. *Id.* at 874-75.
88. *Whitney*, 413 N.E.2d at 874-75.
89. *Id.* at 875 (maintaining that “Linda Whitney’s employment status is certainly relevant to the issue of her husband Larry’s ‘available means’.”)
91. *Id.* at 79.
92. *Id.* at 83-84.
93. *Id.* at 79-81.
94. *Id.* at 83.
The reviewing court noted that Friedman probably pooled his resources with that of his second spouse, resulting in assets and liabilities that were substantially intertwined. Analysis of Friedman’s available “financial resources” to contribute to his daughters’ college expenses would, therefore, be “more equitably” completed if each party were allowed to submit “detailed information of their finances.”

Following this logic, it is obvious that filing a joint tax return can potentially create a difficult situation for a trial court attempting to determine the income available for an obligor to pay child support. This was an important concern in In re Marriage of McBride. In that case, the First District reviewed an order modifying Matthew McBride’s child support obligation and awarding a support arrearage to petitioner Madeline McBride. Upon dissolution of their marriage, Matthew and Madeline’s judgment of dissolution included agreed provisions for child support, a common stipulation. The agreement called for Matthew to pay forty percent of his net income, which was defined in the document, for the support of the parties’ three children. This stipulated percentage was later challenged and modified (to $500/month in support) after Matthew was found to be in arrears on his payments.

The modifying court made use of Matthew and his new wife Anne’s joint income tax return to determine the amount of income available to meet Matthew’s support obligations. In fact, the court made an express assertion that it was taking “into account Anne McBride’s income, to determine what money is available to Matthew McBride for payment of child support.” The First District acquiesced to this evidence with little resistance, despite the fact that it referenced the holding in . Skirting the issue, the appellate court recognized that the trial court was really protecting the needs of the second family. Instead of treating this as a consideration of “the financial status of a current spouse,” which would be impermissible, the reviewing court instead viewed the modifying court’s

95. Id. at 84.
96. Greiman, 414 N.E.2d at 84.
98. Id. at 1097.
99. “NET INCOME DEFINED: . . . ‘Net income’ is defined as the Husband’s total annual earnings and income in each calendar year from all sources . . . .” Id. at 1097.
100. Id. at 1097.
101. Id.
102. Id. at 1100.
103. McBride, 519 N.E.2d at 1100.
104. Id.
105. Id. (stating that the trial court was “merely recognizing that the amount of child support payable by Matthew from his earnings would not endanger his and his wife’s needs.”).
use of the joint return merely as “an assessment of the financial circumstances and needs of” the new family “as well as the minor children.”

In an effort to “reach an equitable conclusion in exercising its discretion in determining the amount of child support,” the First District held that the modifying court’s use of the joint tax return income amount was permissible. This result is particularly problematic, considering that the financial status of a current spouse should, in the court’s own words, “not be considered.” This decision, like others that followed, provided scant certainty in fleshing out a clear-cut rule for practitioners.

ii) Fourth District

The Fourth District weighed in on the issue shortly thereafter, citing McBride as persuasive precedent. In In re Marriage of Keown, the court reviewed the modification of a child support order in which Cynthia Wright, the support obligee, and Brian Keown, the support obligor, shared joint custody of three minor children. Petitioner Keown was ordered to serve as the residential custodial parent of Brian Jr. and Sara, and respondent Wright was ordered to serve as the residential custodial parent of Brandon. Each party was ordered to bear the support of the children residing with that party, and the trial court was petitioned to deviate from the IMDMA guidelines.

106. Id.
107. Id.
108. Id.
109. Shortly after McBride, the First District held that it was not an abuse of discretion to consider that an obligor’s spouse’s return to work “may free up more money” for the support of his children and ex-wife. In re Marriage of Garelick, 522 N.E.2d 738, 743 (Ill. App. Ct. 1988).
110. Furthermore, the First District’s comment that use of the joint return provided “no indication that the court was actually basing its award solely on the combined salaries of Matthew and his present wife” only added to the confusion. McBride, 519 N.E.2d at 1100. The modifying court certainly considered other evidence in modification, but holding that use of a joint return does not take into account the “financial status” of a new spouse is unquestionably paradoxical.
112. Id. at 645-46.
113. Id. at 646.
114. Id. Due to this split-custody setup, the reviewing court felt it was appropriate for the trial court to deviate from the IMDMA Section 505 guidelines in determining child support:

The guidelines ‘shall be applied in each case, unless the court . . . finds a reason for deviating from the guidelines’. . . The failure to strictly comply with the guidelines is appropriate in split custody cases . . . A strict mathematical application of the guidelines where there is split custody of the children is not contemplated by the statute.
Wright had re-married, moved with her new husband to Arizona, given up her career as a dental hygienist, and became a full-time homemaker. She attempted to represent that she was unemployed and without current income, but the trial court found that she was "self-employed" and had an income "not subject to accurate ascertainment." This "income" came from rental property jointly owned by her new husband, which generated rents of $83,394 and net income of $15,388, as demonstrated on a 1989 tax return.

Citing McBride for the premise that this income was factored in equitably to determine whether the payment of child support would "endanger the ability of the support-paying party and that party's current spouse to meet their needs," the Fourth District did not construe the trial court's order as "placing an obligation on [respondent's new spouse] to support respondent's children." This result is problematic in two respects. First, the $83,394 of rental income plainly should not have been solely attributed to Cynthia Wright since the asset was jointly owned. Second, the court left open the question of what the proper method of dividing income-generating interest in this asset should have been. Should it have been "equitably" apportioned? Fifty-fifty? With regard to the latter issue, this circumstance is often contentious, and therefore not easily resolved because marital assets that generate income are typically not neatly divisible. The apportionment of rental income, however, could have been equitably divided between Cynthia and her new spouse, presumably with little difficulty.

The Fourth District extended the holding of Keown later in 1992 when it upheld consideration of new spouse income in In re Marriage of Baptist. Baptist was a unique case because it appeared that the obligor father, Martin, tried to transfer partnership interests to his new wife, Linzy, to assure that the income generated would not be attributable to him. To legitimize this subterfuge, the obligor argued that the transfer was really an exchange for a one-half interest in his new spouse's home, "in which she

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Id. 115.  
116. Keown, 587 N.E.2d at 646.  
117. Id. at 647. Although the court never specifies, it is likely that this return was filed jointly.  
118. Id.  
119. Id.  
120. See, e.g., In re Marriage of Baptist, 598 N.E.2d 278 (Ill. App. Ct. 1992) (discussing a fact situation in which an obligor father transferred part of his various business partnership interests to his new spouse, thus creating confusion in calculating the obligor's net income).  
121. Id. at 287.  
122. Id. at 286.
had over $100,000 in equity." At trial, counsel for the obligor father partially opened the door to admitting evidence of his new spouse’s net worth and earnings during direct examination. This line of inquiry persisted during cross-examination and faced no objection from the obligor’s counsel. Upon review, the Fourth District considered the issue of new spousal income waived because of a failure to raise an objection at trial. However, the court commented in dicta that testimony regarding Linzy’s income and net worth was proper because it served to protect her interests and separate the assets of both parties. Additionally, Keown was referenced for the proposition that a current spouse’s income should be equitably considered to ensure that the new couple’s “ability to meet their needs” is not “imperil[ed].”

The Fourth District revisited the spousal income issue and steadfastly held to its earlier precedents of Keown and Baptist in In re Marriage of Mitteer. Mitteer involved the child support modification of an obligor ex-husband who intended to return to school to pursue a bachelor’s degree in business, which resulted in his new wife supporting him during his education. Obligor Martin Mitteer faced an increase in child support payments to his first wife and an order to pay partial orthodontic expenses for the couple’s child, Nicole. In an interesting twist, the court’s focus was not on imputing Martin’s new spouse’s income to him but instead on consideration of the combined income of his obligee ex-wife Sharon and her new spouse. The Fourth District reviewed evidence that showed a combined income of $40,000 per year for Sharon and her new husband when both were working (her new husband was laid off at the time of trial). Upon review, the court maintained that it was proper to consider the income of both parties together to assess the resources and needs of

123. Id. at 287.
124. Id. Arguably, as the appellate court noted, Linzy’s testimony was indispensable to establish what her financial interests were in the partnership. See id. at 286-87. Courts walk a fine line between 1) allowing proper definition and quantification of the interests of both the support obligor and his or her new spouse, and 2) eliciting facts pertaining to new spousal income which could confuse, complicate, or otherwise impermissibly cause consideration of the new spouse’s financial status in a child support modification proceeding.
125. Baptist, 598 N.E.2d at 287.
126. Id.
127. Id. It was also necessary to elicit such testimony to assure that Martin’s transfers were proper. Id.
128. Id.
130. Id. at 610.
131. Id. at 609.
132. Id. at 614.
133. Id.
Sharon and her new family. The Mitteer court determined that a party’s ability to support a child “cannot be made in a vacuum,” even if it means imputing the income of a party not directly obligated to pay for support (Sharon’s new husband) to a support obligee.

iii) Third District

The Third District decision In re Marriage of Riegel, the court’s first case since Whitney to approach this issue directly, held in favor of considering new spousal income with no citation to any authority whatsoever. In short, the facts of the case involved the failed attempt of a child support obligee to increase support payments for her two children. A change of circumstances, in this case the presumption that the cost of raising children increases as children grow older, was found by the trial court to be lacking. The trial court looked to the fact that obligee Robin Riegel had a wealthy boyfriend that bought many expensive items for the children, resulting in increased expectations but not increased needs. Obligor Jeffrey Riegel’s income had also decreased since the original support decree while Robin’s increased.

Upon review, the Third District reversed the cause and remanded for a hearing regarding whether a change in circumstances had occurred and whether the support should be increased. Pointing to Jeffrey’s remarriage to “a woman who earns $34,000 a year” and the fact that “he may now have more income at his disposal than he did [at the time of the original decree],” the appellate court found error with the lower court’s “failure to determine or consider Jeffrey’s total income.” The logic of this decision is arguably sound, but, given the hesitation most courts display in considering new spousal income in modification, the lack of cited authority in Riegel is puzzling.

Although not a case involving child support, Thurston v. Thurston was a Third District spousal maintenance modification case that included an

134. Id.
137. Id. at 23-24.
138. Id. at 23.
139. Id. at 22-23.
140. Id.
141. Id. at 22.
142. Riegel, 611 N.E.2d at 24.
143. Id. at 23-24. The court also noted that Jeffrey’s support payments amounted to only 13% of his salary, which was “substantially less than the 25% figure suggested in the [child support] statute.” Id. at 24.
interesting dissent suggesting an essential limitation on expansion of the rule in favor of considering new spousal income in child support modification. First, citing the familiar credo that “the financial status of a divorced party’s spouse has no bearing in a proceeding for modification of . . . child support,” the dissenting judge argued for emphasis to be placed on an actual showing that the new spouse contributes to the expenses of the second family when arguing for consideration of new spouse resources. Put plainly, “it is improper for a court to assume that a party’s new spouse contributes to such expenses based only on the fact that the two are married.” Without an unambiguous evidentiary showing of direct contribution, it is clear that a trial court could blatantly exaggerate the financial benefits or detriments of a new spouse entering the picture.

B. RECENT CASES THAT EXPANDED THE RULE IN FAVOR OF CONSIDERING NEW SPOUSE INCOME

The Illinois rule against considering new spousal income in child support modification has clearly been eroded by a number of appellate decisions in the 1980s and 1990s. However, no single decision has had as profound a polarizing effect on distancing Illinois jurisprudence from its traditional stance than the 2000 Second District decision In re Marriage of Drysch. Drysch is a key precedent because of the expansive, and arguably manifestly pragmatic, approach it took in accounting for a party’s financial resources in child support modification cases. Importantly, the Drysch court failed to limit its holding to cases falling under IMDMA section 5/513 (dealing with post high school educational expenses), opening

145. Id. at 122 (Barry, J., dissenting) (quoting In re Marriage of Garelick, 522 N.E.2d 738, 743 (Ill. App. Ct. 1988)).
146. Id. at 122 (Barry, J., dissenting). Justice Barry stated:
I believe the rule might be better stated as follows: A trial court may look at the financial status of a party’s new spouse only to the extent that the new spouse actually contributes to the expenses claimed by the party in the [modification] proceeding to determine a party’s ability to pay [support].
Id. (emphasis added).
147. Id. at 122.
148. Similarly, the Fourth District has also shown a preference for an explicit and convincing evidentiary showing of the division of finances between spouses. See, e.g., In re Marriage of Boland, 721 N.E.2d 815, 818 (Ill. App. Ct. 1999) (stating that the “respondent failed to produce sufficient evidence to support the contention his current spouse retained a 35% ownership interest in the farming operation.”).
the door to consider a new spouse’s income when calculating basic child support obligations under IMDMA section 5/505.150

Petitioner Vicky Drysch appealed a Kane County Circuit Court order “requiring the respondent, Mark Drysch, to pay 10% of the educational expenses of the parties’ son, Adam.”151 On appeal, Vicky’s first argument was that “the trial court erred in considering her new husband’s income in determining the amount Mark should pay towards Adam’s college expenses.”152 The parties’ original marital settlement agreement included a provision for the payment of future educational expenses of minor children.153 The provision first implied a contribution agreement based on the parties’ “financial abilities,” and, in absence of a mutually satisfactory agreement, a court was to fashion a contribution schedule “taking into consideration Section 513” of the IMDMA.154

Unsurprisingly, section 5/513 came into play because of Vicky’s dissatisfaction with Mark’s contributions to Adam’s $20,000 per year educational expenditures to attend Purdue University.155 Section 5/513, in pertinent part, exhorted a court to consider “all relevant factors” in making an award of educational expenses for a child, including “[t]he financial resources of both parents.”156 The ambiguity of the phrase “financial resources” was a focal point for the Drysch Court, and solidifying a workable definition was necessary to resolve the instant dispute between Vicky and Mark and, more importantly, many similarly-situated divorcees to follow. Vicky’s remarriage resulted in a veritable pecuniary windfall for her,157 and the court’s statutory interpretation of the term “financial resources” determined the legal treatment of her new husband’s finances.

Vicky and her new husband Alex were both realtors working for the lucrative “Rullo Team” in Geneva.158 At trial, Vicky testified that she and Alex pooled their money for meeting household expenses.159 Vicky received a $50,000 per year salary, but a joint tax return for Vicky and Alex

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151. Drysch, 732 N.E.2d at 126.
152. Id. at 128.
153. Id. at 127.
154. Id.
155. Id.
157. In entering its order, the trial court noted: “Vicky enjoyed a higher standard of living than when she was married to Mark.” Drysch, 732 N.E.2d at 128.
158. Id. at 127.
159. Id. at 129-30.
reported a gross income of $621,000 in 1998. Mark sought to admit this return into evidence over Vicky’s objection, and the trial court overruled the objection because of Vicky’s testimony regarding her commingling of finances with Alex. Based upon Vicky and Alex’s rather large combined income, in comparison to Mark’s gross salary of $70,000 per year, the trial court ordered Mark, as obligor, to be responsible for only 10% of Adam’s college expenses.

Upon reviewing Vicky’s challenge to this order, the Second District was called to interpret the meaning of IMDMA section 5/513’s “financial resources of both parents” factor. The court turned to principles of statutory interpretation to ascertain the legislature’s intent, principally that “intent is best discerned from the words of the statute itself.” Clear and unambiguous language presses a court “to construe the statute as enacted without adding exceptions, conditions, or limitations to the legislature’s clearly expressed intent.” In the case of “the financial resources of both parents,” the appellate court in Drysch looked to a law dictionary definition of “resources.”

The court used the Black’s Law Dictionary definition of “resources,” meaning: “money or any property that can be converted to meet needs” as well as “available means or capability of any kind.” The fact that the statute did not use a more narrow term like “income” or “salary” reflected the legislature’s intent that trial courts “consider all the money or property to which a parent has access.” This definition includes the parent’s “income,” “property and investment holdings,” and “money or property that could be available to [him or her] through [his or her] new spouse.” The

160. Id. at 127.
161. Id. at 127.
162. Id. at 128. Mark also remarried, and his joint tax return with his then-current wife reported a gross income of $85,269.49. Drysch, 732 N.E.2d at 127.
163. Id.
164. “The primary question before us is whether Vicky’s current husband’s income constitutes part of her ‘financial resources’ so as to be considered by the trial court pursuant to section 513.” Id. at 128.
165. Id. at 129.
166. Id. at 129 (citing Bethania Ass’n v. Jackson, 635 N.E.2d 671 (Ill. App. Ct. 1994)).
167. Id. at 129.
168. Drysch, 732 N.E.2d at 129 (quoting BLACK’S LAW DICTIONARY 1179 (5th ed. 1979)). The “available means” nomenclature also came into play in the Third District’s Swanson decision, which formed some of the foundation of the current rule in favor of considering new spouse income. Swanson v. Swanson, 367 N.E.2d 512, 513 (Ill. App. Ct. 1977). One can view this as a disappointing irony or a logical “full-circle” result, depending on perception.
169. Drysch, 732 N.E.2d at 129.
170. Id.
court went on to cite a number of precedents, already discussed infra, to bolster its statutory interpretation.

The Drysch Court cited Greiman v. Friedman for the proposition that it is important for the trial court to hear further evidence on the parties’ complete financial circumstances when a husband and wife pool financial resources.\(^\text{171}\) Under the Second District’s characterization of “financial resources,” it is necessary for a trial court to consider a current spouse’s income to get a “complete grasp of [their] financial resources.”\(^\text{172}\) This method is “more equitable,” results in a “fairer and more just determination” of the financial resources available for supporting a child, and prevents the party from “shield[ing] some of her financial resources from the trial court’s consideration.”\(^\text{173}\) The Second District also cited Baptist and Keown to similar effect, noting a definite trend in the law, while brushing aside the practical effect of Robin’s traditional prohibitory language.\(^\text{174}\)

In summary, the Second District held that “a trial court may equitably consider the income of a parent’s current spouse in determining an appropriate award of child support” and that consideration of Alex’s income was not error.\(^\text{175}\) The Drysch case is troubling and again leaves the fundamental question unanswered: whether the financial status of a new spouse should be considered in child support modification. Even the Second District did not explicitly hold that Robin’s prohibition against considering the financial status of a new spouse is incorrect, outdated, unjust, or even contrary to current Illinois law.\(^\text{176}\)

The court’s analysis of the language employed by IMDMA section 5/513 is also arguably incorrect, even by a plain meaning standard. The statute can more properly be read to place emphasis on “of both parents,” an interpretation that properly restricts consideration to only those resources actually made, produced, earned, or attributable directly to the parents of the child receiving support.\(^\text{177}\) A non-parent’s (stepparent’s) resources would not be subject to consideration by the court under this interpretation.\(^\text{178}\) The court’s focus on “resources” as including monies not actually

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\(^\text{171}\). Id. at 129-30 (citing Greiman v. Friedman, 414 N.E.2d 77 (Ill. App. Ct. 1980)).

\(^\text{172}\). Id.

\(^\text{173}\). Id. at 130.

\(^\text{174}\). Id.

\(^\text{175}\). Drysch, 732 N.E.2d at 130.

\(^\text{176}\). See id.


\(^\text{178}\). Certainly, the concept of “marital property” may create a roadblock to this interpretation. All property acquired “by either spouse subsequent to the marriage” is that of both parties for purposes of equitable disposition upon divorce. 750 ILL. COMP. STAT. 5/503(a) (2004). However, marital property is not designated as such until dissolution of marriage occurs. Partipilo v. Partipilo, 770 N.E.2d 1136, 1141 (Ill. App. Ct. 2002).
earned by the parent responsible for support payments only entangles a third party, the stepparent, into a constructive obligation for the support of his or her stepchildren. Under Illinois law, a new spouse has no legal obligation of support for his or her stepchildren, and the Drysch Court took notice of this fact. Considering these "resources" may be appropriate, but only for the very limited purpose of assuring that they are not factored into calculations to determine a biological obligor parent's ability to support his or her children. To do otherwise would imply an unjustified obligation of support on the stepparent.

The Third District in Street v. Street followed Drysch, but the circumstances involved the consideration of the income of a support payee's spouse and the trial court's refusal to admit evidence regarding this income. The payee whose spouse's income came into question challenged the assertion that the trial court abused its discretion when it made the decision to exclude this evidence. Pointing to the fact that Drysch did not order an absolute "mandate" that courts consider such information, the payee argued that a trial court might properly exclude it as irrelevant.

The Third District took notice of the traditional rule, which held this type of information irrelevant in determining either parent's ability to meet his or her obligations, but then recognized a "current trend" towards an opposite rule. Much like Drysch, the reviewing court in Street did not explicitly discredit the logic of the precedents against considering new spousal income but instead chose to extend the existing progressive precedents. After Street, the distinction between using new spousal income to 1) "determine [the obligor's] ability to pay" (impermissible), and 2) "examine the extent to which [obligor's] income can be freed through reliance on [his or her spouse]" (permissible), remains undeniably mystifying under current Illinois law.

IMDMA section 5/505(a) provides that only parties "owing a duty of support," i.e., the biological parents of the child, may be ordered to pay

Arguably, the property is still suitably divisible for child support purposes when the parties are currently married.

180. Drysch, 732 N.E.2d at 130.
182. Id. at 892.
183. Id. at 891.
184. Id. at 891-92.
185. Id. at 892.
186. See id. at 891-93.
such support.\textsuperscript{188} Phrased another way, the overriding principle in place is that a non-parent owes no duty of child support.\textsuperscript{189} Illinois courts have tried to skirt this principle with pragmatic logic\textsuperscript{190} that focuses on the “available means”\textsuperscript{191} of a parent or interprets “financial resources”\textsuperscript{192} to include the resources of a non-parent, effectively allowing a new spouse’s income to be used to compute support. The motivation for this pragmatic approach is not entirely invidious; clearly, courts are seeking to provide the most equitable and fair outcome that meets the needs of the child or children. However, where principle and pragmatism collide there is sure to be confusion. Illinois law regarding this issue is in need of reform.

V. TREATMENT OF NEW SPOUSE INCOME IN OTHER JURISDICTIONS

The competing interests of principle and pragmatism need not create muddled jurisprudence. This part of the comment focuses on the application of other jurisdictions’ rules with regard to new spouse or cohabitant income in an effort to demonstrate that Illinois courts (presumably with some legislative intervention) can clarify existing law while still respecting the competing interests implicated by rules of both traditional and more recent vintage.\textsuperscript{193} Coverage of every state’s rules with regard to this issue is unnecessary to point out that more coherent alternatives to Illinois’s system exist, so the focus here is on a few schemes that approach the issue with varied, but successful, methodology.

A. CALIFORNIA

California’s treatment of new spouse income in child support modification is given unambiguous direction in California’s Family Code.

\textsuperscript{188} 750 ILL. COMP. STAT. 5/505(a) (2004).
\textsuperscript{190} For a fascinating discussion of pragmatism and its relation to the judge’s role, please see generally Richard A. Posner, Pragmatic Adjudication, 18 CARDOZO L. REV. 1 (1996). Judge Posner makes an argument in favor of “start[ing] with and giv[ing] more weight to the facts” of a case and turning to authority secondarily. Id. at 8. This “gut-reaction” methodology seems to be in play in many of the Illinois decisions regarding the consideration of new spouse income in child support modification. Id. at 9.
\textsuperscript{192} In re Marriage of Drysch, 732 N.E.2d 125, 130 (Ill. App. Ct. 2000).
\textsuperscript{193} For a broad overview of the five main types of child support guideline formulas applied nationally, please see generally Susan A. Roehrich, Making Ends Meet: Toward Fair Calculation of Child Support When Obligors Must Support Both Prior and Subsequent Children, 20 WM. MITCHELL L. REV. 967 (1994).
Section 4057.5, entitled "Income of Obligor Parent's Subsequent Spouse or Nonmarital Partner; Consideration," explicitly governs how new spouse income is to be treated. Generally, such income "shall not be considered when determining or modifying child support." However, in an "extraordinary case where excluding that income would lead to extreme and severe hardship to any child subject to the child support award," the court shall also consider new spousal income in determining or modifying support. Additionally, California courts are urged to consider whether using new spousal income would lead to "extreme and severe hardship" to any other children supported by the obligor or new spouse. Income of an obligee's subsequent spouse or nonmarital partner is given identical treatment.

On first blush, the California statute seems to be much more limiting than the rule employed by Illinois courts. Consequently, the principle that a subsequent spouse has no obligation of support to an obligor or obligee's child is firmly in place in California. The most obvious signpost of this is that California has a statute that outlines the issue explicitly. (Arguably, a first step towards clarifying Illinois law in this area would be some type of statutory treatment of new spousal income.) However, even the California statute is not free from criticism, as two primary circumstances indicate: 1) What constitutes an "extraordinary case" leading to "extreme hardship" to a child?, and 2) How have California courts reconciled application of section 4057.5 with other "competing" sections of the California Family Code?

The 1995 case In re Marriage of Wood is the seminal decision interpreting section 4057.5. The Wood Court held that, in light of section 4057.5's "direct statutory prohibition," it was an abuse of discretion for a trial court to consider a support obligee's new spouse's income in modifying a child support judgment. The court noted that section 4057.5(2)(b) provides that, based on a parent's conduct in chosen unemployment or underemployment, a court may look to new mate income. However, the focus should remain on the child, and "[o]nly if a child would suffer may..."
the trial court look to new mate income."\textsuperscript{202} In essence, the court held that "extreme hardship" does not result, thereby allowing consideration of new spousal income in modification, when the lifestyle (presumably one of comfort) of the child's new family is really at issue.\textsuperscript{203} Such was the case in \textit{Wood}, as the obligee's new husband provided a comfortable lifestyle for the obligee's child, incensing the obligor whose income had also increased since the original judgment (thereby justifying increased support).\textsuperscript{204}

\textit{Wood} also approached the problem of correlating section 4057.5 with other sections of the Family Code. Section 4057 specified that application of the basic child support guidelines may "be unjust or inappropriate due to special circumstances."\textsuperscript{205} The statute provides a nonexhaustive list of the special circumstances, which may justify deviation from the guidelines, and it was arguable that new spousal income could potentially qualify under the "special circumstances" exception.\textsuperscript{206} Indeed, this argument was supported by the fact that the predecessor to section 4057 included new mate income as a factor to consider.\textsuperscript{207} The \textit{Wood} court rejected this construction outright, however, given the more specific prohibition outlined in section 4057.5.\textsuperscript{208}

A more troubling statutory problem, which parallels Illinois courts' use of jointly filed tax returns to determine income available, was discussed in \textit{In re Marriage of Carlsen}.\textsuperscript{209} To determine net disposable income for child support purposes, California trial courts are directed to deduct from annual gross income "the actual amounts attributable to the following items . . . (a) The state and federal income tax liability resulting from the parties' taxable income . . . . State and federal income taxes shall be those actually payable . . . after considering appropriate filing status . . . ."\textsuperscript{210} For a couple filing jointly, it would then require consideration of new spouse income to reach this deduction amount. Unfortunately, section 4057.5 states that "[t]he income of the obligee parent's subsequent spouse . . . shall not be considered when determining or modifying child support . . . ."\textsuperscript{211} The California appellate court seemed to find no problem with this discrepancy,

\begin{itemize}
  \item \textsuperscript{202} \textit{Id.} at 243. What constitutes "extreme hardship" is still a subjective standard. Arguably, to clear this hurdle a party urging a court to recognize such a standard would have to provide a strong evidentiary showing of increased or unusual need for the child that could only be met by considering new spousal income.
  \item \textsuperscript{203} \textit{Id.} at 241, 243.
  \item \textsuperscript{204} \textit{Id.} at 237.
  \item \textsuperscript{205} \textsc{Cal. Fam. Code} \S\ 4057(b)(5) (2004); \textit{Wood}, 44 Cal. Rptr. 2d at 238.
  \item \textsuperscript{206} \textit{Wood}, 44 Cal. Rptr. 2d at 238.
  \item \textit{Id.}
  \item \textsuperscript{208} \textit{Id.} at 243.
  \item \textsuperscript{209} \textit{In re} Marriage of Carlsen, 57 Cal. Rptr. 2d 630 (Cal. Ct. App. 1996).
  \item \textsuperscript{210} \textit{Id.} at 634 (quoting \textsc{Cal. Fam. Code} \S\ 4059).
  \item \textsuperscript{211} \textit{Id.} at 633 (quoting \textsc{Cal. Fam. Code} \S\ 4057.5).
\end{itemize}
stating that "the subsequent spouse's income is not being used to subsidize
the parent's expenses in any way."\textsuperscript{212} This interpretation is questionable; it
appears that the new spouse is sharing or subsidizing the obligee spouse's
income tax burden in a joint-filing situation.

Despite these shortcomings, the California statute seems to present an
alternative which allows for a principled stance on the obligations of a
stepparent while still allowing for flexibility in unusual circumstances
which would result in injustice to the child.

B. TEXAS

Texas has a statutory scheme similar to California; however, the ex-
ceptions provided by the California rule are not laid forth in the same
manner.\textsuperscript{213} Section 156.404(a) of the Texas Family Code states: "The court
may not add any portion of the net resources of a new spouse to the net
resources of an obligor or obligee in order to calculate the amount of child
support to be ordered in a suit for modification."\textsuperscript{214} Similarly, subsection
(b) states that "[t]he court may not subtract the needs of a new spouse, or of
a dependent of a new spouse, from the net resources of the obligor or
obligee in a suit for modification."\textsuperscript{215} A logical feature of the Texas Family
Code, which is lacking in the Illinois child support scheme, is an explicit
definition of "resources" and consistent use of the term throughout the
statutes.\textsuperscript{216} The IMDMA looks to the "net income" of the supporting party,
deefined in the statute,\textsuperscript{217} in determining child support obligations, but the
code subsequently uses a different term for modifications ("financial
resources").\textsuperscript{218} The statute fails to define this alternative term as used to

\textsuperscript{212} Id. at 634.
\textsuperscript{213} The exception for an unemployed or underemployed spouse set forth in section
4057.5 of the California statute is not treated as an "extraordinary case" by the Texas statute.
Texas Family Code Section 154.066 sets forth that "[i]f the actual income of the obligor is
significantly less than what the obligor could earn because of intentional unemployment or
underemployment, the court may apply the support guidelines to the earning potential of the
\textsuperscript{214} TEX. FAM. CODE ANN. § 156.404(a) (Vernon 2004).
\textsuperscript{215} TEX. FAM. CODE ANN. § 156.404(b) (Vernon 2004).
\textsuperscript{216} Section 154.062 of the Texas Family Code states that "resources" for
calculating child support purposes includes: all wage and salary income; interest, dividends
and royalty income; self-employment income; net rental income; and all other income
actually received (including severance pay, retirement benefits, pensions, trust income,
annuities, capital gains, social security benefits, unemployment benefits, disability and
workers' compensation benefits, and interest income from notes). TEX. FAM. CODE ANN. §
156.062. (Vernon 2004).
\textsuperscript{218} 750 ILL. COMP. STAT. 5/505(a)(2) (2004).
deviate from the guidelines and upon modification.\textsuperscript{219} The Texas statute is quite comprehensive in this respect because of its internal consistency in terminology coupled with its explicit rule regarding new spousal resources.

Application of the Texas statute has appeared to be relatively seamless. Two cases, \textit{In re Knott}\textsuperscript{220} and \textit{Starck v. Nelson},\textsuperscript{221} harmonized the existing statutory structure to determine that, even in light of a new spouse’s contributions to jointly shared living expenses, the new spouse’s resources should not be considered.

In \textit{Starck}, the appellate court commented that the legislature intended to design a “neutral scheme that would be unaffected by the remarriage of a child support obligor, either for the purpose of increasing or decreasing child support.”\textsuperscript{222} The statutes provide that a trial court \textit{must} consider the definition of “resources” in place, \textit{may} consider a list of evidentiary factors that allow for deviation from the basic child support guidelines, and \textit{may not} consider the new spouse’s contribution.\textsuperscript{223} Allowing a trial court to deviate from the child support guidelines because a new spouse contributes to joint living expenses “allows the court to do indirectly what the statute directly prohibits.”\textsuperscript{224} The \textit{Starck} Court held that the trial court’s decision to allow a deviation from the guidelines, in light of the statutory prohibition, was error.\textsuperscript{225}

Similarly, the reviewing court in \textit{Knott} held that “the statutory method for calculating child support was not designed to impose a duty on an obligor’s spouse to support the obligor’s children using the income of the obligor’s spouse.”\textsuperscript{226} (Illinois’s principle is similar, notwithstanding it being \textit{implied} from statutory and case law instead of having explicit statutory support). The consistency of Texas jurisprudence in this area of the law is an encouraging sign.

The Texas statutory scheme provides a logical and intrinsically workable solution to the problem of new spousal income in child support modification. The clarity and clear policy decisions of the legislature are characterized by the ease with which Texas courts have applied the prohibition on considering new spousal resources in child support modification.\textsuperscript{227}

\begin{itemize}
  \item \textsuperscript{219} 750 ILL. COMP. STAT. 5/510 (2004).
  \item \textsuperscript{220} \textit{In re Knott}, 118 S.W.3d 899 (Tex. App. 2003).
  \item \textsuperscript{221} \textit{Starck v. Nelson}, 878 S.W.2d 302 (Tex. App. 1994).
  \item \textsuperscript{222} \textit{Id.} at 306.
  \item \textsuperscript{223} \textit{Id.}
  \item \textsuperscript{224} \textit{Id.}
  \item \textsuperscript{225} \textit{Id.}
  \item \textsuperscript{226} \textit{In re Knott}, 118 S.W.3d 899, 905 (Tex. App. 2003).
  \item \textsuperscript{227} Minnesota’s rule is similar to Texas’s: No Minnesota case law or statute imposes a legal duty upon a new spouse to provide support for his or her stepchildren. \textit{Creighton v. Creighton}, 670 N.W.2d 621, 628 (Minn. Ct. App. 2003). In addition, section
C. ARIZONA

Arizona’s law with regard to considering new spousal income in child support modification takes a unique approach. Although the Arizona Child Support Guidelines seem to explicitly hold that “income of a parent’s new spouse is not treated as income of that parent,” these guidelines are not a “source of law” but a “source of guidance to the trial courts in the application of the law embodied in the statutes and recorded cases.”" In that light, the appellate court in In re Marriage of Pacific was forced to evaluate whether automatic treatment of one-half of an obligor’s new spouse’s income as that of the obligor was appropriate.230

The appellate court first looked at the existing doctrine in place regarding treatment of child support judgments in light of remarriage, particularly Hines v. Hines, a decision involving assignment of child support to a new spouse.231 Child support is treated as a “premarital separate debt” under Arizona law.232 Under Arizona Revised Statutes section 25-215(B), the “community property” of the married couple, including the income of a new spouse, “is liable for the premarital separate debts or other liabilities of a spouse . . . only to the extent of the value of that spouse’s contribution to the community property which would have been such spouse’s separate property if single.”233 In other words, the income of a new spouse may not be reached to satisfy a premarital separate debt.234

Given this fact, the Pacific Court rejected the obligee’s argument in favor of implicating one-half of the obligor’s wife’s income to the obligor in modifying his child support obligation.235 The court commented that it

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518.551(5)(b)(1) of the Minnesota statute explicitly excludes from the definition of net income “the income of the obligor’s spouse” (used to calculate the obligor’s amount owed). MINN. STAT. § 518.551(Subd. 5)(b)(1) (2004).


229. In re Marriage of Pacific, 815 P.2d 7, 10 (Ariz. Ct. App. 1991). It should be noted that this decision still reflects the current state of Arizona law, despite the fact that it was decided over a decade ago.

230. Id.


232. Id. at 971.

233. Community property is defined in Arizona Revised Statutes section 25-211 and includes “[a]ll property acquired by either husband or wife during the marriage.” ARIZ. REV. STAT. ANN. § 25-211 (2004).


235. See, e.g., Hines, 707 P.2d at 971 (“[obligor’s wife’s] wages may not be reached to satisfy [obligor’s] child support obligation. Child support is a premarital liability of [obligor]. A.R.S. § 25-215(B) permits it to be paid out of the new community’s property only to the extent of [obligor’s] contribution that would have been his separate property if he were single. [Obligor’s wife’s] wages do not satisfy this test.”).

might consider this income as a benefit that a parent derives from remarriage or expense sharing but that this approach required some type of fact-finding and not automatic “arithmetic income-splitting.” More importantly, the appellate court recognized that the explicit language of the Child Support Guidelines stated that the income of a new spouse is not to be considered income of an obligor parent.

The Arizona approach offers a unique solution involving the application of a property right limitation that views the child support obligation as a separate, distinct, and genuinely precedent responsibility of the obligated parent. Adjusting Illinois law to mirror the Arizona rule would require an overhaul of existing statutory provisions or a greatly modified reading of current precedents, so this solution may not be feasible.

D. MISSOURI

The scheme in place in Missouri begins to stray from the certainty desired of a rule treating new spousal income in child support modification, but it is still worthy of analysis. Section 453.400 of the Missouri code concerns both a stepparent’s limited duty to support his or her stepchild and treatment of new spousal income. The statute provides that a stepparent “shall support his or her stepchild to the same extent that a natural or adoptive parent is required to support his or her child so long as the stepchild is living in the same home as the stepparent.” However, the code is careful to note that the section shall not be “construed as abrogating or in any way diminishing the duty a parent otherwise would have to provide child support.” In addition, an explicit clause prescribes that “no court shall consider the income of a stepparent, or the amount actually provided for a stepchild by a stepparent, in determining the amount of child support paid” by an obligor.

237. Id. at 8.
239. The Illinois Rights of Married Persons Act provides that “[n]either husband or wife shall be liable for the debts or liabilities of the other incurred before marriage, and (except as herein otherwise provided) they shall not be liable for the separate debts of each other.” 750 ILL. COMP. STAT. 65/5 (2004). This appears to speak in the same voice as the Arizona statute, but the fact that no other limiting provisions exist in the Illinois code to treat child support, as a “premarital separate debt” does not put Illinois law on par with Arizona.
241. Id.
242. Id.
243. Id. However, a comment to Missouri Supreme Court Civil Procedure Form 14, used to calculate the presumed child support amount, reveals ambiguity in application. “‘Income’ for purposes of computing the presumed child support amount consists of a financial benefit or money received by a parent that could have a positive impact on the parent’s ability to support the parent’s children.” Presumed Child Support Amount
Application of the Missouri statutes has been somewhat similar to Illinois courts' travails, but with a wrinkle that has made the results slightly more predictable. In applying the statutory scheme, the appellate court in *Searcy v. Searcy* concluded without hesitation that a "trial court may not consider the income of [obligor's] new wife or the reduced expenses resulting from [obligor's] new wife's contributions to their household." That said, the trial court may consider the new wife's contributions to household expenses, "in connection with its consideration of the parents' financial resources and needs," when rebutting the amount determined by the guidelines. The court went on to determine that the "financial resources and needs of the parents," a factor to consider under the Missouri Guidelines, "[w]hen given its plain and ordinary interpretation," would include contributions of the new spouse because the needs of the new family are "interdependent." The court argued that this position was consistent with section 452.340.8, which stated "that the presumed correct child support amount may be 'rebutted' upon a finding that the amount is unjust or inappropriate after consideration of all relevant factors."

The Missouri scheme is similar to Illinois's in its interpretation of the "financial resources" concept. However, the fact that Missouri does not allow for consideration of new spousal income in the initial determination of the presumed correct child support amount in its Child Support Guidelines allows for more certainty in assuring that the financial status of the new spouse is not taken into account at trial. In other words, Missouri's rule presumes that new spousal income is irrelevant to an obligor's ability to pay support in most cases, but there may be particular cases where a re-evaluation of the financial situation of the new family is necessary in light of the new spouse's contributions.

VI. THE FUTURE OF THE CURRENT ILLINOIS TREND

From the preceding brief overview of a few states' treatment of new spouse income in child support modification, it is plain that Illinois's rule...
could be modified to improve clarity, reflect overriding principle, and still provide a just manner of adjudicating these claims in light of the practical financial implications of remarriage. This change would almost certainly require modification of, or addition to, the IMDMA. Such a decision must be made legislatively and will require the weighing of existing principle (a stepparent owes no duty of support to a stepchild) against the pragmatic treatment of new spouse income, expense sharing, and resource pooling. These are policy concerns and should be evaluated and weighed appropriately, but the focus must remain on clarity, consistency, and precise application in Illinois domestic courts.

The current Illinois trend appears to be facially logical, at least on an abstract level, yet has a general disregard for existing principle. It is easy to demonstrate that a party’s available funds are increased and individual expenses decreased when more dollars are added to his or her “financial resources” by way of the new couple’s collective share. Moreover, a new spouse knows what they are “getting into” upon marriage. It is obvious that extra economic responsibilities may attach when inimically entangling the fiscal resources of two parties. This entanglement is certainly by choice, and the convenience and economy that commingling income and expenses provides is only one of a myriad of reasons couples choose to marry. However, should the responsibilities created by this bond include effectively paying child support for a child not one’s own? Without hesitation, the answer in Illinois is still “no.” Is this what happens when new spousal income is considered in child support modification? Arguably, yes.

The rule as it stands today is inconsistent with the basic tenets of IMDMA section 5/505(a). A stepparent has no obligation of support toward his or her stepchild, yet his or her income may be used to determine what a support obligor owes to a support obligee. In effect, the stepparent is pouring money into a collective pot in which the support obligee has a court-mandated right to dip. Ironically, this stance contravenes the equal-handed treatment now espoused by some courts and commentators with regard to “first” and “second” families. In Illinois, part of a “second” family’s available resources are now free for dispersion directly to a “first” family support obligee.

The Illinois rule that the financial status of a new spouse should not be considered in child support modification has never been explicitly

251. See, e.g., 750 ILL. COMP. STAT. 5/505(a) (2004).
252. See, e.g., Drysch, 732 N.E.2d at 130.
254. See generally Moore, supra note 18, at 483, 496-97.
overruled.\textsuperscript{256} It has been perverted, but the principle in place is rock-solid and rational: parties have no responsibility or obligation to pay for the needs of children that are not their own. The focus of a trial court modifying support must remain on two items: 1) the increasing needs of the child, and 2) the obligor’s potentially increased ability to pay.\textsuperscript{257} Does remarriage sometimes increase this ability to pay? Certainly. However, when that increased ability to pay arises solely because a non-obligated party’s income is entangled, inconsistency and injustice result. Reform is needed in this area of the law.

Although an appellate challenge has not yet been raised which pits the “financial resources” language of IMDMA section 5/505(2)(b) against the “no obligation of stepparents” principle of section 5/505(a), one can only loom on the horizon.\textsuperscript{258} Amending section 5/505(2)(b) to in some way disallow a modifying court’s consideration of new spousal income is a practical way to rectify this inherent inconsistency. The California and Texas models seem to be the most simple and workable formulations because of their clear and explicit language, consistent reflection of policy directives, and foresight with regard to extenuating circumstances that might justify departure from general principles.\textsuperscript{259} The Illinois General Assembly would be prudent to follow these states’ leads.

VII. CONCLUSION

Providing for the well being of children should be the foremost concern in child support modification cases. That being said, these cases inevitably embroil the financial circumstances of parties unrelated to those children when a support obligor or obligee remarries. Given that a stepparent in Illinois has no legal duty of support to a stepchild,\textsuperscript{260} it can only follow that consideration of that party’s income in modifying a child support judgment is inappropriate. The purpose of this comment is to acknowledge the need for reform of Illinois law to eliminate stepparent income from the child support modification calculus.

After a brief introductory hypothetical in Part I, Part II of this comment explored the history of the traditional Illinois common law rule

\textsuperscript{256} See, e.g., Drysch, 732 N.E.2d at 130; Street v. Street, 756 N.E.2d 887, 891-93 (Ill. App. Ct. 2001).
\textsuperscript{257} See, e.g., Scott, 389 N.E.2d at 1276.
\textsuperscript{258} Recall that the Drysch case concerned application of the “financial resources” language in construing IMDMA Section 5/513. Drysch, 732 N.E.2d at 130. This holding has not yet extended outside of the educational expense support context.
\textsuperscript{259} CAL. FAM. CODE. § 4057.5 (West 2004); TEX. FAM. CODE ANN. § 156.404 (Vernon 2004).
\textsuperscript{260} See generally Drysch, 732 N.E.2d at 130.
outlawing consideration of new spouse income in child support modification. Part III provided a brief review of important Illinois statutory provisions governing the judicial grant and modification of child support. After this review, Part IV discussed those cases that broke from the traditional rule in favor of an approach that considers a stepparent's income as part of a support obligor's "financial resources." The focus of Part V of this comment was on those states that explicitly outlaw consideration of new spouse income in child support modification, with an eye toward the reform of Illinois law. Finally, Part VI summarized the central thesis of this comment: that consideration of new spouse income in child support modification is unfair and should be legislatively proscribed.

Current Illinois jurisprudence regarding the issue of new spouse income in child support modification seems to embrace the more pragmatic concerns of entangled remarriage finance while muddling the existing principles of state statutes. The Illinois General Assembly, following the lead of other jurisdictions, should take steps to clarify current law with regard to this issue while respecting the underlying principles of the IMDMA. Specific and explicit guidelines eliminating consideration of new spouse income in child support modification would return certainty to Illinois family law practitioners.

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