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Exploring Upward Deviation in Child Support: The Road Rarely Taken

BY KATHY E. BOJCZUK

In Illinois, as in many other states, child support guidelines serve as a foundation for determining the financial responsibilities of divorcing parents towards their children. However, there are instances where these guidelines may not fully address the unique needs of the children or the financial capabilities of the parents. This is where the concept of deviating upwards in child support comes into play, offering a pathway that should be more actively utilized for the benefit of children and families across the state.

Understanding Upward Deviation in Illinois

Under Illinois law, child support calculations are statutory, and the

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'Living in Sin' Is About to Get a Lot Riskier

BY MEIGHAN A. HARMON

"Why buy the cow when you can get the milk for free?" This trite (and undoubtedly misogynistic) trope nonetheless has a very clear meaning. Why would someone marry when they can get all (or at least many) of the benefits of a partner without the financial commitment or sacrifice that comes with marriage? Illinois, like many other states, does not recognized common law marriage (which confers rights to property and/or support to unmarried cohabitants under certain circumstances) and there are no rights to palimony (spousal like support for unmarried people) in Illinois even following a long-term relationship. (Back in 1979, the Illinois Supreme Court shut down a request from an unmarried woman for equitable property and support rights from her partner (and father of her children) of 15 years. This approach was upheld more recently in *Blumenthal v. Brewer*—a 2016 case that denied similar equitable

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calculations follow the "Income Shares" model. Generally, the amount of child support is determined by a standardized income table as well as the number of children born to the parties, the incomes of both parents, and the allocation of parenting time. While these guidelines provide a structured approach to child support determination, they may not always capture the full extent of a child's needs or the financial capacity of the parents.

Pursuant to 750 ILCS 5/505(a)(3.4), there are statutory factors in deciding whether or not a court should deviate, which include:

(3.4) Deviation factors. In any action to establish or modify child support, whether pursuant to a temporary or final administrative or court order, the child support guidelines shall be used as a rebuttable presumption for the establishment or modification of the amount of child support. The court may deviate from the child support guidelines if the application would be inequitable, unjust, or inappropriate. Any deviation from the guidelines shall be accompanied by written findings by the court specifying the reasons for the deviation and the presumed amount under the child support guidelines without a deviation. These reasons may include:

A. extraordinary medical expenditures necessary to preserve the life or health of a party or a child of either or both of the parties;

B. additional expenses incurred for a child subject to the child support order who has special medical, physical, or developmental needs; and

C. any other factor the court determines should be applied upon a finding that the application of the child support guidelines would be inappropriate, after considering the best interest of the child.

Paragraph (C) provides the court with wide discretion on whether or not to decide on a deviation. To determine the best interest of the child, the court looks to the following factors, per 750 ILCS 5/505(a)(2):

> *(2) Duty of support. The court shall determine child*
>
> > *support in each case by applying the child support guidelines unless the court makes a finding that application of the guidelines would be inappropriate, after considering the* ***best interests of the child*** *and evidence which shows relevant factors including, but not limited to, one or more of the following:*
>
> *(A) the financial resources and needs of the child;*
>
> *(B) the financial resources and needs of the parents;*
>
> *(C) the standard of living the child would have enjoyed had the marriage or civil union not been dissolved; and*
>
> *(D) the physical and emotional condition of the*

In practice, though, family law practitioners rarely take this upward deviation which allows the court to adjust child support payments beyond the guideline amounts. The circumstances which justify this deviation may include the child's special needs, the parents' higher income levels, or extraordinary expenses not adequately covered by the standard guidelines.

Reasons to Embrace Upward Deviation

1. **Ensuring Adequate Support for Children's Needs**: Every child's needs are unique, and some may require additional financial support beyond what the standard guidelines provide. Upward deviation allows courts to consider these individual needs and ensure that children

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receive the support necessary for their well-being and development. If a child has special needs or requires one parent to stay home and take care of the child on an almost full-time basis, then that parent's ability to work full-time or at all becomes a huge factor. In this situation, it would be appropriate to request an upward deviation since the parent is acting as the child's caretaker is more involved than during normal conditions. If the parties are married, spousal support or maintenance should also be considered to provide the caring parent with more resources for themselves and the child. However, in situations where the parties are not married to each other, an upward child support deviation would be a reasonable option.

2. **Addressing Income Disparities Between Parents**: In cases where one parent significantly out-earns the other, the standard child support guidelines may not adequately reflect the child's financial requirements or the higher earning capacity of the paying parent. Upward deviation helps bridge this gap by adjusting support payments to align with the paying parent's income level, thereby ensuring a fair distribution of financial responsibility.
3. **Addressing Underreported Income of a Parent:** Often a payor might be self-employed and underreporting their income. In these situations, it's important to review their financial affidavits and financial statements to see how much their actual expenses amount to each month and what actual deposits flow into their bank accounts. It would also be important to review their business expenses, which might not be appropriate business expenses which are allowable under IMDMA. If their expenses are extraordinary while their income is low, that is a huge red flag. For example, if the payor claims they only make $20,000 per year, but they have two cars and one car is a luxurious sports vehicle with a car payment of $900 per month, that is a huge red flag. These kinds of expenses should be brought to the court's attention.
4. **Covering Extraordinary Expenses**: Illinois courts may deviate upwards in child support cases to address extraordinary expenses such as medical bills, educational costs, or childcare expenses that exceed the standard guidelines. By accommodating these additional financial burdens, upward deviation ensures that children have access to essential resources and opportunities.
5. **Maintaining Stability and Standard of Living**: Divorce can disrupt a child's sense of stability and security, particularly if it results in a significant change in their standard of living. Upward deviation allows courts to preserve the child's accustomed standard of living by ensuring that they continue to have access to the same level of financial support post-divorce.

The Importance of Utilizing Upward Deviation

While the option for upward deviation exists in Illinois law, it is often underutilized in child support cases. This may be due to a lack of awareness among parents and legal professionals about its availability or a reluctance to deviate from the standard guidelines.

However, by embracing upward deviation more proactively, Illinois courts can better address the diverse needs of children and families navigating the complexities of divorce. Increased utilization of upward deviation can lead to more equitable outcomes, ensuring that children receive the support they need to thrive, regardless of their parents' financial circumstances.

Conclusion

Upward deviation in child support cases in Illinois offers a valuable mechanism for tailoring support payments to the specific needs of children and families. By deviating upwards when justified by the circumstances, courts can ensure that children receive adequate financial support, maintain their standard of living, and access essential resources for their well-being. Embracing upward deviation as a viable option in child support proceedings can lead to fairer and more equitable outcomes for children across the state. ■

'Living in Sin' Is About to Get a Lot Riskier

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claims to a long-term same-sex partner who had no ability to marry during much of the relationship.) However, the idea that marriage is required to confer equitable property rights to long term unmarried partners may about to change.

House Bill 4404 (introduced in January 2024 by State Representative Daniel Didech) creates the Uniform Cohabitants' Economic Remedies Act. Pursuant to the proposed legislation, unmarried cohabitants (unmarried "couples" who live together) that make agreements regarding entitlement to property (presumably jointly occupied or maintained, but not jointly owned assets) will now have a "contractual or equitable" claim for breach of their "cohabitants' agreement." This agreement may be "oral, in a record, express or implied in fact." A "cohabitant's agreement" means an agreement between two people who become, are, or were cohabitants. The agreements give rise to claims to all sorts of assets (any "real, personal, tangible or intangible property or legal or equitable interest therein"—such as real estate, a business, a bank or investment account, etc.). For a more detailed

examination of the underlying philosophy behind this legislation and the trend in other states, see "Cohabitation in Illinois: The Need for Legislative Intervention", Stefani L. Ferrari, Chicago-Kent Law Review 93 Chi. Kent L. Rev. 561 (2018).

The bill as originally proposed included retroactive application and if enacted in the original form would have immediately confirmed retroactive claims under the law to anyone presently living (or who formerly lived) as unmarried cohabitants within a five-year statute of limitations after breach of the agreement occurred. However, the proposed bill in its current form applies to a cohabitants' agreement made on or after the effective date of the Act and to an equitable claim under the Act that accrues on or after the effective date of the Act. A second amendment to the pending bill further clarified that any claim brought under the Act would be subject to affirmative defenses, such as the statute of frauds (which requires that certain contracts must be in writing in order to be enforced) and that such a claim accrues upon the termination of the cohabitation, subject to a five-year general statute of limitations. The second amendment goes on to further clarify that a claim under the act may not impair the right or interest of a cohabitant's spouse or surviving spouse to the cohabitant's property and is subordinate to any domestic support obligation arising from a marriage of a cohabitant to another person.

Under the Act, the nature of the "cohabitant's agreement" could be as simple as a parties' belief, based upon an implied agreement, that because they cleaned and cared for a home owned by their cohabiting partner—they were entitled to a claim to the equity in that home that accrued during the relationship. The proposed law specifically provides "contributions to the relationship are sufficient consideration for the cohabitant's agreement." Furthermore, the later marriage of the cohabitants does not extinguish the right of a cohabitant to bring the action (which seems contrary to recent changes in the Illinois Marriage and Dissolution of Marriage Act, which disposed of the concept of a marital property right inuring to homes purchased in contemplation of marriage), although the marriage would terminate the period of cohabitation. The statute gives little guidance with regard to how to value the cohabitant's economic claim (or handle to handle a situation where the equity in the relevant property may have been otherwise utilized or spent—essentially giving rise to an "unsecured claim").

Practitioners in the family law bar need to be prepared for a potential insurgence of claims pursuant to this new legislation if it passes. A new wave of "cohabitation" or really "anti-cohabitation" agreements may ensue as the public becomes aware of the ramifications of cohabitating even while remaining unmarried. As marriage rates continue to fall and more and more couples chose to live together without being married—the pool of people impacted by this legislation is significant. ■

Illinois Child Support Services Family Resource Transformation

BY IRENE CURRAN

In 1974, Congress amended the Social Security Act[1] to add Title IV-D, which created the Child Support Enforcement Program.[2] The intent of Title IV-D was and is to enforce support obligations owed by noncustodial parents, locate noncustodial parents, establish paternity, and obtain child support.[3] Congress contemporaneously amended Title IV-A of the Social Security Act[4] to require all states participating in the federal AFDC (Aid to Families with Dependent Children) program, now known as TANF (Temporary Assistance for Needy Families), to operate a child support program in conformity with Title IV-D.[5] A State's participation in the TANF program is voluntary, but if a state chooses to participate, its plan must comply with the requirements of the Social Security Act and the regulations promulgated thereunder.[6] In Illinois, the Department of Healthcare and Family Services (HFS) is the designated IV-D agency, and the IV-D program is administered specifically by HFS's Division of Child Support Services (DCSS).[7]

The Illinois IV-D program has adhered to the original and continuing intent of Title IV-D by providing services including: (1) parent location; (2) paternity establishment; (3) support order establishment; (4) review and modification of child support orders; (5) collection and distribution of child support payments; and (7) establishment and enforcement of medical support.

Historically, HFS has focused largely on establishment and enforcement of support obligations. The program has many enforcement tools available for collecting child support. Most child support is collected through income withholding. Other tools include intercepting federal and state income tax refunds; withholding from unemployment compensation; perfecting liens on real and personal property, including judgments, inheritances, bank accounts, and retirement funds; intercepting lottery/gaming winnings; suspending or restricting state-issued licenses, including drivers, professional/occupational, and recreational/sporting; and reporting delinquent payors to the U.S. State Department for passport denial.

While establishment and enforcement certainly are the primary components of an effective child support program, the Illinois IV-D program also has evolved and expanded to provide services intended to help the entire family, including parents who pay support. The federal Office of Child Support Services, a division of the United States Department of Health and Human Services, which provides oversight to state IV-D programs, recognized long ago the importance of non-custodial parents' access to and engagement with their children. In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).[8] PRWORA further amended Title IV-D of the Social Security Act by authorizing mandatory grant funding to states to establish and administer programs to facilitate non-custodial parents' access to and visitation with their children. Grants may be used for mediation, counseling, parent education, development of parenting plans, visitation enforcement, and development of guidelines for visitation and alternative custody arrangements.[9]

Illinois has been a recipient of grant funding since the inception of the program. HFS currently has intergovernmental agreements for access and visitation programs with Cook, DuPage, Lake, Peoria, and St. Clair Counties, with the judiciary in each county administering the grants. Each county has focused its access and visitation program on different areas to assist marginalized families. In Cook County, the grant is used in domestic violence court. In Lake County, the court utilizes mediation services in the self-represented litigants court room. DuPage County uses the funds for family court and their visitation center, while Peoria and St. Clair Counties use the funds for mediation in their family division.

Another way in which HFS has shifted from a punitive to collaborative approach concerns the civil contempt process. This change arose after the United States Supreme Court's 2011 decision in *Turner v. Rogers*.[10] The issue in *Turner* was whether a state is required to provide legal counsel to an indigent person facing incarceration in a child support civil contempt proceeding. The majority found the Due Process Clause of the 14th Amendment did not automatically require appointment of counsel in such cases so long as the opposing party also is unrepresented and the state provides the following alternative procedural safeguards:

- Notice to the noncustodial parent that the ability to pay is a critical issue in the contempt proceedings;
- Use of a form that can be used to elicit relevant financial information;
- An opportunity at the contempt hearing for the noncustodial parent to respond to statements and questions about his/her financial status;
- An express finding by the court that the noncustodial parent has the ability to pay.[11]

As a result of the *Turner* decision, DCSS modified its internal process for referring contempt actions to its legal representatives. No longer are cases referred for contempt simply because support payments are not being made. Rather, DCSS caseworkers conduct a deeper preliminary dive into a child support payor's individual circumstances, including collecting information about the payor from both the receiving parent and various government databases accessible by DCSS. If a true

inability to pay is discovered, no contempt referral is made. Additionally, the case can be submitted for a modification of the support order if appropriate. This procedural change has resulted in fewer contempt referrals and an increase in right-sized orders based on a child support payor's actual income.

Another major change to the IV-D program occurred in 2021 regarding the manner in which HFS assesses and collects statutory interest on unpaid child support. As a general rule, statutory 9% interest accrues on all unpaid child support.[12] For many years, HFS automatically assessed interest in all IV-D cases with past due balances. In fact, Illinois was one of only 15 states that automatically assessed interest on unpaid child support. This changed with the 2019 passage of P.A. 101-0336,[13] which granted HFS the authority to provide by rule if or how it would enforce interest in IV-D cases.[14]

Prior to the passage of P.A. 101-0336, HFS, as part of its commitment to racial and economic equity, conducted research on the effect of its automatic assessment of interest in all IV-D cases. Data revealed HFS was assessing interest on cases where parties were unable to meet even their minimum child support obligations, let alone the interest that accrued on the past due balances. Further, the research exposed the fact that the automatic assessment of interest disproportionately impacted low-income families and families of color, which was leading to insurmountable debt HFS likely would never collect.[15] HFS's interest policy was a departure from what was occurring in non-IV-D cases, which is that interest on past due child support was assessed only when a court specifically ordered it at the request of a party.

Following the passage of P.A. 101-0336, HFS amended its administrative rule on interest to detail the criteria that must be met before HFS will establish interest on unpaid child support.[16] Under the amended rule, as of January 1, 2021, HFS offers IV-D customers the opportunity to establish interest when (1) the youngest child on the case has emancipated; (2) the principal balance on the case is zero; and (3) the minimum amount of interest owed on the case is $500. After the first two criteria are met, a letter notifying the IV-D customer of their right to request interest is auto-generated and mailed to the customer, at which point the customer has one year to make a written request for interest. HFS will review the case to determine the amount of interest owed, and if the third criterion is met, a legal referral is made for an adjudication of interest. This change in HFS's interest policy remedies the racial and economic inequities experienced by a large percentage of IV-D payors whose past due balances were artificially inflated by interest. Additionally, whereas HFS previously decided that interest should be assessed on all unpaid child support, the receiving parent now can determine whether interest establishment ultimately is in their family's best interest. This mirrors the options afforded to non-IV-D families, while maintaining HFS's assistance with the calculation of interest due and owing and the judicial process for its establishment. Further, since interest on child support is not paid until all principal is paid in full, in accordance with rules for the distribution of support, it aligned the process with the reality that interest will not be paid until such time as the principal balance has been satisfied. Following this policy change, HFS has seen a noticeable decrease in IV-D customers asking for interest establishment.

In early 2023, the Illinois General Assembly enacted legislation that will change the way child support payments are passed through to TANF recipients. Public Act 102-1115[17] amends Section 4-1.6 of the Illinois Public Aid Code by requiring that all child support, including current and past due, collected on behalf of a family applying for or receiving TANF will be disregarded as income when determining the level of TANF benefits.[18] In other words, child support no longer will be budgeted when determining a TANF household's level of benefits but will be passed through in full to the family. This significant change, which goes into effect July 1, 2024, is a departure from the current system that permits HFS to retain, as TANF reimbursement, a portion of monthly child support paid to families receiving TANF. Although HFS no longer will retain child support payments for TANF reimbursement, TANF cases will remain mandatory IV-D cases after July 1, 2024, because TANF cases remain mandatory IV-D cases under federal regulations. The only change is in the extent to which HFS chooses to retain any monies. The goal of this legislation is to put more money in the households of families who need it the most, thereby increasing the likelihood a family may be lifted out of poverty. The legislation also is consistent with one of the purposes of the child support guidelines, which is to ensure children receive the same financial support they would otherwise receive if the family was living in an intact household.[19]

2023 also saw the passage of two pieces of legislation designed to reach child support payors who may not be meeting their support obligations. P.A. 103-0343, which went into effect January 1, 2024, amends the Unemployment Insurance Act provision concerning the Directory of New Hires.[20] The Directory of New Hires provision requires Illinois employers to report to the Illinois Department of Employment Security (IDES) certain identifying information about newly hired employees, including, among other things, names, addresses, Social Security numbers, and dates of hire. HFS receives data from the Directory of New Hires, which then permits HFS to serve income withholding orders on the employers who report those new hires. The amendment in P.A. 103-0343 expands the definition of "newly hired employee" to include "an individual under an independent contractor arrangement."[21] This means HFS will now be able to collect child support through income withholding from child support payors working in the "gig economy." Employers such as Uber and Lyft no longer may refuse to honor an income withholding order because someone is an independent contractor and not an employee. HFS anticipates this important change will significantly increase child support collections for families.

The second piece of legislation directed at assisting child support payors is P.A. 103-0356.[22] This legislation, which went into effect January 1, 2024, provides that IDES, in collaboration with HFS and

the Department of Central Management Services, shall implement a pilot program that seeks to connect parents owing past due child support with work opportunities. It further specifies that the work opportunities provided to program participants shall include opportunities offered by employers located in the State of Illinois including, but not limited to, State employment. At present, Champaign, Kane, and Peoria counties are part of the pilot program, which is part of HFS's new initiative called Family Resource Connections.[23] Due to the relative newness of this implementation, no data is yet available on how many program participants have obtained employment. Nevertheless, as with the Directory of New Hires amendment, HFS anticipates this program will result in an increase in child support being collected for the families of Illinois as participants gain employment.

In addition to supporting the aforementioned legislative initiatives, HFS also is developing an increasing presence in the community by cultivating relationships with both the judiciary and community organizations that aid families in crisis. For example, DCSS has entered a partnership with the family court in Will County that gives DCSS caseworkers entrée into the courtroom. This arrangement gives families direct contact with DCSS and the opportunity to sign up for IV-D services or have questions and concerns addressed immediately. DCSS also hopes to expand its reach into mental health, veterans, and drug courts. Many participants in these courtrooms also have child support issues that need to be addressed, yet they are not being connected with IV-D services. DCSS hopes to reach these individuals as part of its mission to offer more holistic services to Illinois families.

Additionally, DCSS's outreach unit has been reenergized and has participated in several resource fairs as well as partnered with organizations such as the Exoneration Project and the Salvation Army. Other examples of collaborative initiatives include an intergovernmental agreement, covering the entire State of Illinois, with the United States Department of Veterans Affairs, Veterans Rehabilitative Services, to assist veterans with child support issues. On the domestic violence front, HFS recognizes the need of domestic violence survivors to secure financial security. To this end, DCSS currently has an agreement with a domestic violence shelter in Cook County whereby DCSS offers child support trainings and meetings with survivors at the shelter. Staff assist survivors in submitting applications for services as well as answer questions and provide other necessary services.

The foregoing examples are just the beginning of HFS's transformation of the IV-D program from one purely focused on establishment and enforcement to a more holistic, family-centered program that focuses on the needs of the entire family. Parenthood comes with its own challenges, and HFS recognizes each family's journey is unique. HFS continues to reimagine the IV-D program by developing innovative approaches, personalized solutions, and a commitment to improved outcomes for the families of Illinois.■

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1. 42 U.S.C. § 301 *et seq.*
2. 93 P.L. 647.
3. 42 U.S.C. § 651.
4. 42 U.S.C. § 601 *et seq.*
5. 93 P.L. 647.
6. *In re Marriage of Lappe*, 176 Ill. 2d 414 (1997).
7. Prior to 2010, DCSS was known as the Division of Child Support Enforcement.
8. 110 Stat. 2105.
9. 42 U.S.C. § 669b.
10. 131 S. Ct. 2507 (2011).
11. *Turner*, 131 S. Ct. at 2520.
12. 735 ILCS 5/2-1303 and 735 ILCS 5/12-109.
13. https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=101-0336&GA=101.
14. 305 ILCS 5/10-16.5.
15. https://www.illinois.gov/news/press-release.22863.html.
16. 89 Ill. Adm. Code 160.89.
17. https://www.ilga.gov/legislation/publicacts/102/102-1115.htm.
18. 305 ILCS 5/4-1.6.
19. 750 ILCS 5/505(a)(1)(D).
20.https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=103-0343&GA=103.
21. 820 ILCS 405/1801.1(D).
21. https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=103-0356&GA=103; 20 ILCS 1005/1005-130
22. https://hfs.illinois.gov/childsupport/parents/family-resource-connections.html .

Marital Property in Illinois Public Pension Plans (PART II): Actuarial Valuation, QILDROs and the QILDRO Discount

Part II of my article discusses the difference in the actuarial valuation of the marital estate if "horse-trading" marital assets versus the actuarial value of the marital estate if divided by Qualified Illinois Domestic Relations Order ("QILDRO").

Actuarial Valuation: In Part I of this article published last month, our fact pattern assumed a member's Teachers Retirement System "TRS" single life annuity of $2,000/mo is worth $486,000 in today's dollars. If the court awards a former spouse 40% of the total pension, the former spouse's share would be worth $486,000 x 40% = $194,400 assuming the member lives to the actuarial projected life expectancy -as there are no joint and survivor benefits for former spouses under the Illinois Pension Code.

However, consider ILCS 5/1-119(g)(1) which adds another layer of how you might want to value Illinois pension plans; because while a former spouse is not entitled to any survivor benefits if the member dies first, a former spouse is also not permitted to name a beneficiary to continue receiving their marital property interest should the former spouse predecease the member. That is, a former spouse is only permitted to collect their QILDRO interest while both the member and former spouse are jointly alive. This is what I commonly refer to as the "QILDRO Discount".

Example if divided by QILDRO: Assume a former spouse is awarded 40% of the total pension (see above), the actuarial present value to former spouse should be $194,000. If divided by QILDRO, former spouse's 40% share applies ONLY to the benefit while both member and former spouse are jointly alive (the QILDRO discount). The value of the QILDRO benefit and QILDRO discount are as follows:

Value while both parties are alive:	$420,000	(subject to QILDRO)
Value while member is alive only:	$66,000	(off limits to QILDRO)
Value while former spouse is alive only:	$0	(survivor benefit off limits)
Total Value of all payments:	$486,000	
Less value while member alive only:	($66,000)	(off limits to former spouse)
Benefit subject to QILDRO division:	$420,000	
QILDRO award to former spouse:	40.00%	
QILDRO value to former spouse:	$168,000	($420,000 x 40%)

Loss of value to former spouse if QILDRO is implemented instead of valuation:

Intended award:	$194,000
QILDRO award:	($168,000)
Loss in value to former spouse:	$26,000 (the QILDRO Discount)

Ultimately, when dissolving a marriage that involves a QILDRO it is crucial as my colleague Anne Prenner Schmidt notes "to look holistically at the assignment of the pension and other property and income of the parties to fully understand the limitations in of the former spouse's share." Having a valuation done can help the parties fully understand what the dissolution proceedings are leaving on the table or assigning away and make sure the parties are making decisions that will have long lasting success, thereby, preventing post decree actions and confusion.

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