

FOLLOWING THE TORTUOUS PATH:
LEVELING AND RE-LEVELING THE PLAYING FIELD -
19 YEARS LATER – ISSUES UNIQUE TO PARENTAGE CASES

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Executive Summary: Since June 1, 1997 detailed legislation has been in force controlling attorney's fees in divorce and matrimonial law matters (cases under the Illinois Marriage and Dissolution of Marriage Act - “IMDMA”). While there was the promise to quickly amend this legislation to address some of the significant concerns, until 2009 there were no significant amendments. Effective January 1, 2016 we have a new amendments to the fee legislation. And the same date, a rewrite of Illinois law regarding paternity went into effect – the Illinois Parentage Act of 2015. This outline will address issues unique to parentage (paternity) cases, focusing on the interplay between the IMDMA and the Parentage Act of 2015.

Interim Fees and Parentage and Post-Divorce Applicability: Additional complexity with the Leveling amendments is caused by the legislation not yet being further amended to specify whether the interim fee provisions applied to parentage proceedings. And it had been an open question about whether the interim fee statute applied to post-decree proceedings. These issues were generally clarified with the 2009 amendments. The language that was finally adopted to address these concerns now states, “Interim attorney's fees and costs may be awarded from the opposing party, in a pre-judgment dissolution proceeding in accordance with subsection (c-1) of Section 501 and in any other proceeding under this subsection.” So, then in non-divorce (read parentage cases) or post-decree divorce cases, we first look to the language of Section 508 which later states, simply: “All petitions for or relating to interim fees and costs under this subsection shall be accompanied by an affidavit as to the factual basis for the relief requested and all hearings relative to any such petition shall be scheduled expeditiously by the court.”

The specific interim fee at Section 501(c-1), in turn, reads, in part:

(1) Except for good cause shown, a proceeding for (or relating to) interim attorney's fees and costs in a pre-judgment dissolution proceeding shall be nonevidentiary, and summary in nature, and expeditious. All hearings for or relating to interim attorney's fees and costs under this subsection shall be scheduled expeditiously by the court.

The 2009 amendments make it clear that there is no presumption for a non-evidentiary and summary hearing in post-decree cases. This hearing only applies to pre-decree dissolution type cases. But all interim fee awards – both pre-decree and post-decree are still supposed to be handled “expeditiously” – whatever import the court may provide to that word.

The 2009 Amendments also provide that the interim fee factors the court is to consider are those “that appear reasonable and necessary, including to the extent applicable:...”

And the 2016 Amendments add a new provision that was implied but not mandated, “A responsive pleading shall include costs incurred, and shall indicate whether the costs are paid or unpaid.”

Interim Fees and Parentage Proceedings: Compare the Illinois Parentage Act of 1984 and of 2015.

The Illinois Parentage Act of 1984 states at §17 that,

“[T]he court may order reasonable fees of counsel, experts and other costs of the action, pretrial proceedings, post-judgment proceedings to enforce or modify the judgment and the appeal or the defense of an appeal of the judgment to be paid by the parties in accordance with the relevant factors specified in §508 of the Illinois Marriage and Dissolution of Marriage Act.”

The [Illinois Parentage Act of 2015](#) (effective January 1, 2016) states that:

The court may assess filing fees, reasonable attorney's fees, fees for genetic testing, other costs, necessary travel expenses, and other reasonable expenses incurred in a proceeding under this Act. The court may award attorney's fees, which may be paid directly to the attorney, who may enforce the order in the attorney's own name.

Later, it provides:

Section 809. Right to counsel.

(a) Any party may be represented by counsel at all proceedings under this Act. Except as otherwise provided in this Act, the court may order, *in accordance with the relevant factors specified in Section 508 of the Illinois Marriage and Dissolution of Marriage Act*, reasonable fees of counsel, experts, and other costs of the action, pre-trial proceedings, post-judgment proceedings to enforce or modify the judgment, and the appeal or the defense of an appeal of the judgment to be paid by the parties. ***

Therefore, the amendments to §508 apply to parentage proceedings. This means that the statement of client's rights must be attached to the engagement agreement in parentage proceedings.

Parentage / Removal Case Law: Since §508 incorporates by reference §501(c-1) and §503(j), there had been the question of whether these sections would be incorporated by reference in parentage cases by IPA §17. Based upon the line of parentage cases such as the parentage removal case law [now relocation], I had urged that only the portion of the statute directly referred to would be incorporated by reference – that is Section 508 and not the contribution statute and the interim fee statute. In fact, this was the reason the 2009 amendments now differentiate between “dissolution” cases – which are those cases brought specifically under the Illinois Dissolution of Marriage Act rather than those non-“dissolution” type cases where Section 508 is incorporated by reference – that is cases brought under the Illinois Parentage Act of 1984.

No Disgorgement in Parentage Cases per *Stella I*: In the original 2013 [*Stella v. Garcia*](#) opinion (*Stella I*), 339 Ill. App. 3d 610 (2003), the First District addressed this incorporation by reference issue and stated:

We take *In re Parentage of Melton* and *In re Adams* to mean only those Marriage Act relevant factors and standards expressly embraced by the Parentage Act may be applied by trial judges in parentage cases. These would include a section 508 provision that permits awards of attorney's fees to be paid directly to attorneys, *Heiden v. Ottinger*, 245 Ill. App. 3d 612 (1993); and a section 508 provision that allows a trial court to award reasonable attorney's fees incurred by custodial parents during child support enforcement proceedings where the non-custodial parent's failure to pay is without cause or justification. *Davis v. Sprague*, 186 Ill. App. 3d 249 (1989). We find nothing in the pertinent statutes that expresses a legislative intent to grant trial judges the power to order disgorgement of interim fees in a Parentage Act proceeding.

The statute at issue here is section 17 of the Parentage Act:

"Except as otherwise provided in this Act, the court may order reasonable fees of counsel, experts, and other costs of the action, pre-trial proceedings, post-judgment proceedings to enforce or modify the judgment, and the appeal or the defense of an appeal of the judgment, *to be paid by the parties in accordance with the relevant factors specified in Section 508 of the Illinois Marriage and Dissolution of Marriage Act, as amended.*" (Emphasis added by appellate court.) 750 ILCS 45/17 (West 2000).

Ultimately, the *Stella I* appellate court held that §501(c-1) of the IMDMA regarding potential “disgorgement” of interim attorney fees did not apply to parentage proceedings. This rationale was in line with my original discussion. The quotation from the case was, "(n)owhere in section 17 of the Parentage Act did the legislature refer to disgorgement of fees. Nor does it cross-reference subsection 501(c-1) of the Marriage Act. The only cross-reference to the Marriage Act in section 17 of the Parentage Act is to section 508." In fact, this result is consistent with the 2009 amendments.

Stella II – Other Portions of Interim Fee Statute Apply to Parentage Cases: In [*Stella II*](#) (2004), the appellate court took the position that in parentage proceedings the court can award interim attorney's fees under the provisions of §501(c-1) of the IMDMA, so long as it does not require disgorgement. This is consistent with what was ultimately codified into the statute in 2009. And it is consistent with the *Rocca* decision commenting with approval on *Stella II*.

The appellate court stated in the beginning of its decision:

The trial court in this case, relying entirely on *Stella I*, held the Parentage Act does not provide for interim attorney's fees. We intended no such result and today we clear the air by addressing two questions certified for interlocutory appeal pursuant to Illinois Supreme Court Rule 308(a):

"Question 1: Can interim attorney's fees be awarded under section 17 of the [Parentage Act]?"

Question 2: If the answer to Question 1 is "Yes," can those interim attorney's fees be awarded using the methods, factors, and procedures, set forth in section 501(c-1)(1), (2), and (3) of the [Marriage Act] without considering disgorgement?"

We answer the certified questions "yes" and "yes."

The *Stella II* court first commented that, "Neither of the articles written by the bar association committees that promoted the 1997 amendments suggests that the level playing field provisions in subsection (c-1)(3) were intended to apply to parentage actions." *Stella II* then stated, "Our courts have held attorney's fees cannot be awarded in paternity actions without contractual or statutory authority. That flat statement does not resolve our inquiry, it begins it." The labored reasoning of the appellate court then suggests, "While section 17 makes no specific reference to interim fees, it requires entry into section 508, which does." In defense of its position the court opines, "We do not see that the lack of a marital estate as a source of fees has any particular bearing on our resolution of legislative intent."

I had disagreed *Stella II* – but my concerns have partly been addressed by the 2009 amendments. The opinion had seemed persuasive until one recognizes a key difference between parentage cases and divorce cases, i.e., the lack of a marital estate in parentage cases. As I had pointed out, a key safety valve provision in divorce cases was that while the proceedings are summary in nature any "overpayment" may be recovered at the conclusion of the case because all fees would be deemed an advance against the marital estate. There simply is no marital estate in parentage cases so overlaying this statute makes little sense. It was for this reason that the 2009 amendments provided, in essence, that interim fees were to be awarded under the standards of Section 508 only when applied to non-divorce cases or cases that are post-decree.

There was an excellent discussion about how poorly drafted overall the statutory scheme is when one considers what I refer to as the "multiple incorporation by reference" issue. And while the Illinois

Parentage Act of 2015 as well as the 2016 amendments to the IMDMA should have addressed these concerns, they did not.

[*IRPO Rocca*](#), 408 Ill. App. 3d 956 (2nd Dist., 2011) addressed this issue somewhat tangentially. In dealing with the incorporation by reference of the IPA of 1984 (§17 referring only to §508 and then the incorporation from §508 the interim fee provisions and the contribution provisions, etc.) the appellate court made a point that I have repeatedly made:

However, section 508 of the Marriage Act, which addresses “attorney’s fees; client’s rights and responsibilities respecting fees and costs,” cross-references other sections of the Marriage Act and, accordingly, consideration of the “relevant” portions thereof as applied to the Parentage Act becomes more complicated. Indeed, one court has referred to the process of turning to the Marriage Act to assess attorney fees and costs under the Parentage Act as a “tortuous path.” *In re the Minor Child Stella*, 353 Ill. App. 3d 415, 418 (2004). [Note: I refer to that case as *Stella v. Garcia* or *Stella II*.”

Stella II had ruled that interim fees may be awarded in paternity actions using the same factors and procedures as in actions under the IMDMA. The first *Stella* case had ruled that there is no disgorgement in parentage cases (*Stella I*).

After drafting this article, an article was published in the ISBA’s Family Law Newsletter addressing the same issue, i.e., attorney’s fees in paternity cases. See April 2005, Vol. 48, No. 3. The authors of that article suggest that the language in *Stella II* might be used to argue against a requirement of disgorgement by an attorney in divorce cases. The authors stated, “The authorizing paragraph of the Parentage Act is no more limiting: “the court may order reasonable fees of counsel... to be paid by the parties...” Therefore, while this court has clarified that interim awards are authorized and disgorgement orders are not, it may have opened the door to yet another unintended consequence.”

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