

**2015 ILLINOIS**  
**DIVORCE & FAMILY LAW CASES - FINANCIAL ISSUES**

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**Executive Summary:**

The family law rewrites regarding financial matters (everything other than ~~custody~~ allocation of parental responsibilities and parenting time) was more incremental and tends toward fleshing out existing case law – some key exceptions. The trend in 2015 was that we considered a number of cases involving Federal preemption and retirement benefit issues.

**Property Cases Law:**

**Retirement Benefit Cases**

**Division of State / Railroad Retirement Benefits, Federal Preemption and Social Security Benefit Equivalent**

***Frank* – Stop, Look and Listen: Division of Tier 2 Railroad Retirement Benefits in Divorce**  
[IRMO Frank](#), 2015 IL App (3d) 140292 (July 2015)

The parties were married for 20 years and the husband worked for the railroad for 18 of those years. The parties’ 1998 marital settlement agreement had provided:

“BRUCE shall have the sole right, title and interest in his pension and individual retirement plans, including but not limited to past, present and future contributions, interest and principal, whether contributed by BRUCE or his employer or both and whether unvested, partially vested, or fully vested, free and clear of any and all claims of SHIRLEY. A Qualified Domestic Relations Order will be entered which will provide SHIRLEY with \$621.00 per month upon BRUCE’s retirement.”

In the 1998 divorce proceedings, the wife was not represented and the husband had filed his petition for dissolution the day before the divorce judgment was entered – incorporating the MSA. But usually, a divorce judgment will simply incorporate the MSA entirely. This is not what occurred. The judgment had provided:

“Article VIII of the parties’ Separation Agreement is incorporated to the extent that it provides that BRUCE is awarded all rights in and to his pension provided by the United States Railroad Retirement Board and to the extent that SHIRLEY will receive a separate payment of \$621.00 per month, however, upon clarification by the plan administrator of the provisions of the pension, it appears that SHIRLEY’s benefits will commence not upon BRUCE’s retirement but upon her reaching the eligibility age for retirement, upon

which date she will receive her spousal pension benefits in the amount of \$621.00 per month without the necessity for any qualified domestic relations order.”

The former husband later retired from the Union Pacific in 2011. The former wife did not begin receiving pension payments and filed a petition for enforcement of the judgment in 2013. At the hearing there was evidence regarding railroad pension and the various tiers of benefits: Tiers 1 and 2 and the spousal annuity benefit. Ultimately, the trial court found an ambiguity in the MSA and allowed parol evidence offered by the former husband and found the former husband’s evidence regarding intent more credible. The trial court denied the former wife’s petition for enforcement. The former wife appealed and the appellate court affirmed. The appellate court first found that where the former wife did not show up for the prove-up, that the trial court should have required her to approve changes to the agreement before incorporating them into the Judgment. And the trial court should not have allowed parol evidence because the agreement was not ambiguous.

But the appellate court ultimately found in favor of the former husband for other reasons. The appellate court stated in broad language that is accurate regarding the division of social security benefits but not accurate regarding Tier 2 benefits:

Federal benefits, including railroad pensions and Social Security payments, may not be divided directly or used as an offset in a marital property distribution. *In re Marriage of Crook*, 211 Ill. 2d 437, 449-50 (2004); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 582 (1979). \*\*\* *The trial court was without authority to divide Bruce’s federal pension.*

[note by GJG: This is an over-statement and is not right. It is correct regarding Tier 1 benefits.]

Accordingly, the trial court was compelled to align the parties’ marital settlement agreement with the federal requirements, including that benefits under the Railroad Retirement Act cannot be divided or used as an offset in a marital property distribution. The judgment of dissolution, while a unilateral modification of the parties’ marital settlement agreement, was consistent with the requirements of the railroad pension. The specific changes the trial court made in modifying the parties’ agreement were that Shirley would not be eligible for the divorced spouse annuity until she reached full retirement age of 66 and that she must be unmarried to remain eligible. Pursuant to the Railroad Retirement Act, these requirements must be met before Shirley can receive the divorced spouse annuity provided for in the parties’ marital dissolution proceedings. The other portions of Bruce’s railroad pension, Tiers I and II, cannot be divided or used to offset the marital property distribution.

This language is deceptive at best. There is such a thing as a divorced spouse benefit. That is similar to [social security rights for the divorced spouse](#) and is quite limited in scope. One is not entitled to this based upon the provisions of divorce court order but by operation of law – at least 10 years of benefits, both at least 62 and the divorced spouse is unmarried.

To better understand railroad retirement in divorce, see, e.g., <http://www.rrb.gov/pdf/partition.pdf> It is a guide titled, “Attorneys Guide to the Partition of Railroad Retirement Annuities.”

Tier 1 is a component that cannot be divided. It is essentially a social security equivalent. The Tier 2 component is based only on the rail industry service and earnings. It is divisible. They are divided based on a “partition order.” So, Federal law prohibits the division of the social security equivalent but not the

other portion.

There are also problems historically regarding division of even Tier 2 benefits when the Participant dies. To address this situation, the Pension Protection Act of 2006 provided that, once in pay status since (a date certain in 2007), a benefit payable under a court order will remain payable for the lifetime of the non-participant ex-spouse, even if the participant dies. Thus the division should include the phrase that it is "payable even upon death." Since the benefit does not consider the lifetime of the non-participant, it effectively provides a free survivor benefit in the same amount as the partitioned award.

***Mueller – Property: Social Security Component of Retirement of Public Sector Employees and Federal Preemption: Majority Holds Improper to Back out Social Security Equivalent***

[\*IRMO Mueller\*](#), 2015 IL 117876 (June 2015) Illinois Supreme Court

*Mueller* involves a patently unfair issue but where the Illinois Supreme Court followed a strict construction of Federal law. For certain public sector employees, their social security equivalent is part of their retirement benefits. So, the question is whether this social security equivalent can effectively be backed out of a valuation. In this case the wife worked in private sector and had Social Security withheld from her pay; while the husband was an officer with city police department and contributed to the police pension fund and did not have Social Security tax withheld from his pay. The Husband could retire at age 50 with full pension benefits while the wife would expect full Social Security benefits at age 67.

The Illinois Supreme Court ruled that it was improper for a circuit court to consider Social Security benefits in equalizing a property distribution upon dissolution. Social Security benefits may not be divided directly or used as a basis for offset during dissolution proceedings. To consider the inequity of the situation, consider how the dissent discussed the case:

Christopher asks that the trial court be permitted to divide his pension in a way that would place him in the same financial position as Shelley. Specifically, Christopher proposes that a portion of his pension be retained for his benefit alone, with the remainder then apportioned between the parties. To establish how much of his pension he should retain, Christopher suggests that the trial court use the amount of Social Security benefits for which he would be eligible, if he had participated in that program. Stated otherwise, Christopher's request is simply that he be treated similarly to Shelley—no better and no worse—during the dissolution proceeding.

The dissent concluded:

The majority holds that, in dissolution proceedings such as this, Illinois trial courts are precluded from dividing pensions in a way that would clearly achieve "a more equitable result." 2014 IL App (4th) 130918-U, ¶ 24. There is no basis in law or policy for this holding. I must, therefore, respectfully dissent.

The dissent is excellent reading.

***Roberts – Decision Regarding Property Award and Inability to Divide Social Security Benefits / Impact of Mueller Supreme Court Decision***

[\*IRMO Roberts\*](#), 2015 IL App (3d) 140263 (May 2015)

*Roberts* was decided three weeks before the *Mueller* decision. It involved essentially the same issue but this case involved a teacher. Basically, the *Roberts* case urged the position taken by the dissent in *Muller*. Unfortunately, *Roberts* is no longer “good law.”

## Qualified Domestic Relations Orders and QILDROs

### ***Benson – Property: Retirement Benefits: Post-Judgement Order Requiring Payment of Portion of Disability Payments as Being in Nature of Disability Pension***

[IRMO Benson](#), 2015 IL App (4<sup>th</sup>) 140682 (May 2015)

In 1999, the trial court entered a judgment for dissolution. The primary marital asset was the husband (David’s) pension. The divorce decree judgment entered as a result of a trial provided, in pertinent part:

“[Nancy] is granted a one-half interest in [David’s] retirement plan through the Decatur Fire Department and his ICMA retirement account. Transfer of said funds shall be accomplished through qualified [Illinois] domestic relations orders.”

David continued to work as a firefighter until 2008 when he was injured on a call. In 2008, he began receiving disability payments. At the time, David was 59 years old, had approximately 35 years of service, and was eligible to retire and draw a retirement pension. He continued to own and operate Benson Disposal, a family-owned garbage service he acquired from his father, until July 2012, when he sold it. In 2013, the former wife filed what was titled, “Petition to Divide Pension Benefits.” In her petition, she alleged that she believed David was receiving retirement benefits but he refused to confirm that. Nancy stated she had attempted to file a QILDRO but had been unable to do so. Nancy requested an order directing David to pay her the appropriate share of his retirement benefits pursuant to the 1999 dissolution judgment as of the date he began receiving them. David argued Nancy’s petition should be dismissed because the pension benefits had already been divided in the 1999 order and he was “not receiving retirement benefits but [was] receiving disability benefits.” In 2013, the former wife filed a petition to enforce the terms of the divorce judgment. She alleged that the former husband refused to sign a consent for the entry of a QILDRO, and that by electing to receive a disability pension instead of a retirement pension, David had “refused, permanently, any share of his pension to [Nancy].”

During the April 15, 2014, hearing on Nancy’s petitions, David was the only witness called to testify. David testified there was never any agreement regarding retirement benefits (because the case was contested) and the trial court’s ruling pertained only to his retirement pension and did not mention disability benefits. At the time of the hearing, David’s monthly benefits were \$4,569.27. David testified he received his disability benefits tax-free. He admitted if he elected to take his retirement pension he would have to pay taxes on it. The disability benefits also included free health insurance for David and his current spouse. David testified he intended to continue to draw disability benefits as long as he was allowed. David argued the dissolution judgment did not mention disability benefits and there was no assignment of disability benefits. In arguing against a retroactive award, David argued Nancy should have come to court and asked for an award earlier.

The appellate court noted:

Nancy introduced plaintiff’s exhibit No. 4, a letter from Cary J. Collins, the attorney for the Decatur Firefighters Pension Board, into evidence without objection. That letter referred to David’s disability benefits as a “pension benefit.” The letter also stated David was not required to convert his disability pension to “a regular retirement pension.”



Instead, converting to a regular retirement pension “is only an option which a firefighter may exercise.” Nancy also introduced plaintiff’s exhibit No. 5, a copy of a document entitled “Firefighter’s Pension Plan Description,” into evidence without objection. This document shows benefits through the pension plan include disability benefits. Nancy also introduced plaintiff’s exhibit No. 9 into evidence as a demonstrative exhibit. It contained figures showing Nancy’s share of David’s pension would be 37.6% based on the number of years he worked and the time they were married. David did not object to the 37.6% figure. Nancy also requested an award of past-due disability payments dating to February 2008, i.e., when David began receiving those payments. Nancy acknowledged her petition was filed six years after he started to draw disability, but she argued she “never had the ability to take [David] to court to get her share of this pension.”

The trial court found David’s disability benefits were in the nature of a disability pension and, as a result, Nancy was entitled to a fractional interest in those benefits. The court awarded Nancy 37.6% of David’s disability benefits dating back to 2008, when David first began receiving them, as well as 37.6% of David’s monthly disability benefits going forward. The court found, although Nancy failed to seek enforcement of the 1999 judgment until 2013, she was still entitled to the benefits because David’s obligation to make those payments was already in existence as a result of the 1999 judgment and it had just gone unenforced. The court deferred entering specific dollar amounts to a later date. A later order determined the past-due amount that the former wife was to receive was \$116,345. Nancy was awarded on a going forward basis \$1,718 (as adjusted for increases).

The appellate court stated, “Under the circumstances presented in this case, the trial court did not err in finding Nancy was entitled to a share of David’s disability benefits where the dissolution judgment awarded Nancy a portion of David’s “retirement plan” and those benefits can reasonably be considered part of that plan.”

Next, David argued that disability benefits are not subject to division based on a QILDRO. See 40 ILCS 5/1-119(b)(4) (“A QILDRO shall not apply to or affect the payment of any survivor’s benefit, disability benefit, life insurance benefit, or health insurance benefit.”). David then appears to argue his disability benefits are therefore not subject to division. The appellate court disagreed. The appellate court noted that in essence the order was a triangular order under which the Plan would pay disability benefits to the former husband and then he would pay them over to his former wife:

Nothing in section 1-119 prohibited the court from doing so. See *In re Marriage of Menken*, 334 Ill. App. 3d 531, 534, (2002) (citing *In re Marriage of Roehn*, 216 Ill. App. 3d 891, 895, (1991) (in situations where a spouse is awarded a portion of the other spouse’s benefits and a QILDRO cannot be entered, payments may be made “triangularly” from the retirement fund to the retiree and then from the retiree to the spouse)).

The holding regarding past-due benefits is even important to this decision. The appellate court stated, “David mischaracterizes the trial court’s \$116,345.19 award to Nancy for past-due benefits as retroactive.” It then stated succinctly:

In this case, the trial court did not modify the original 1999 dissolution judgment. Instead, it construed it to have always included disability benefits as part of David’s retirement plan. In other words, the court was not creating a new property right in its

2014 order but rather enforcing a preexisting right under the 1999 judgment. The trial court did not err in awarding Nancy a portion of David's disability benefits dating to February 2008, when he first began receiving them.

**Comment:** This is an important case building on the prior case law. Note that the husband was likely actually penalized by being litigious if the amount he was to pay was based upon his gross rather than net. If he had received a normal retirement pension he would have had to pay taxes on it. But his disability benefits were tax free.

SB 57 / PA 99-90 provides at Section (f): "Property provisions of an agreement are never modifiable." This is dangerous language. Case law had held that property settlements are in a sense modifiable in any number of situations. In a sense, the trial court has the authority to reform a marital settlement agreement where it calls only for a division of retirement benefits but instead there are disability benefits. The case law focuses on the ability to reform the marital settlement agreement in appropriate cases. Other cases have focused on the reversion doctrine. Sample quotes from another case state (the 2006 Miller case):

Other Illinois courts have applied the reversion doctrine in similar situations. In *Adamson*, the Second District relied upon the doctrine to affirm the trial court's judgment, which modified the original final judgment of dissolution entered four years earlier when the parties had agreed to the modification. *Adamson*, 308 Ill.App.3d at 767-68. The court found that the agreement reversioned the trial court with jurisdiction despite the passage of more than two years. *Adamson*, 308 Ill.App.3d at 767.

Likewise, the Third District affirmed the trial court's denial of the wife's petition to vacate a stipulated judgment, which modified the original judgment of dissolution. *Elmore*, 219 Ill.App.3d at 65. The wife filed her petition to vacate four years after the modified judgment was entered. Citing section 510(b) of the Act, the wife claimed the modified judgment was void for lack of subject-matter jurisdiction because there were no allegations that the original judgment was procured by fraud or coercion or that any facts existed to entitle them to postjudgment relief under section 2-1401 of the Code. *Elmore*, 219 Ill.App.3d at 64. The trial court ruled that jurisdiction had reversioned by agreement of both parties. The reviewing court agreed, holding that the judgment of modification was binding.

## Other Property Cases

### Disproportionate Property Awards / Civil Unions:

#### ***Civil Union of Hamlin / Vasconcellos – Significantly Disproportionate Division (73/27) of Civil Union Property Was In Error – in Case Involving Business Valuation***

*In re Civil Union of Hamlin and Vasconcellos*, 2015 IL App (2d) 140231 (July 2015)

Following a contested hearing before the circuit court of Du Page County, respondent, Victoria Vasconcellos, and petitioner, Debra Hamlin, received a judgment dissolving their civil union. Pursuant to the judgment of dissolution, the trial court classified certain of the parties' assets as part of the civil-union estate and distributed those assets, allocating \$1,259,283 (73%) to respondent and \$462,459 (27%) to petitioner. Respondent appealed the judgment, arguing that the trial court erred in classifying certain assets as civil-union property. She contends that, because Illinois first recognized civil unions on June 1, 2011, the effective date of the Illinois Religious Freedom Protection and Civil Union Act (Act)



(750 ILCS 75/1 et seq. (West 2010) and because the Act should be given only prospective effect, any previously acquired assets must be classified as non-civil-union property.

Petitioner cross-appealed arguing that the trial court's asset distribution was an abuse of discretion because the main asset of the civil union, Cignot, an electronic cigarette (e-cigarette) vending company founded and run by respondent, was awarded wholly to respondent. Petitioner also argues that the trial court's determination that respondent contributed significantly more to the acquisition of civil-union property, as well as its valuation of Cignot, were against the manifest weight of the evidence. The appellate court affirmed in part, reversed in part, and remand the case.

This is an important case and bears reading. But because the law in all states in the union now provides for same sex marriage, the portion of the case involving civil unions is more of interest for cases "in the pipeline now" and therefore will not be reviewed at length. Nevertheless, note that the parties' civil union commenced on the date it was entered into and not on the effective date of the Act. Then the appellate court turned to the petitioner's cross-appeal arguing that the trial court's division of the civil-union estate, awarding 73% to respondent and 27% to petitioner, constituted an abuse of discretion. In this regard, I liked the appellate court's comment:

Thus, the fact that petitioner was not meaningfully involved in Cignot's operations does not mean that petitioner was not meaningfully involved in the acquisition of civil-union property. Respondent's contention is essentially a straw man and is wide of the mark.

A critical portion of the decision read, "We observe that, while petitioner's contribution is nonzero, it might also be less than respondent's contribution, so a disproportionate distribution of the asset might be warranted. However, we believe that the court abused its discretion by assigning no value to petitioner's contribution to Cignot and in awarding the entire asset to respondent."

The next issue was whether the trial court improperly valued the company based on perception of risk of future viability. The appellate court affirmed the trial court's valuation.

***Troske – Award Significantly Favoring Wife Affirmed Even Though Basis of Award Seemed to Stem from What Might be Dissipation Claims Despite No Specific Finding for Date of Irretrievable Breakdown***

[\*IRMO Troske\*](#), 2015 IL App (5th) 120448 (February 2015)

This was an appeal from a supplemental "dissolution order." The husband raised several issues on appeal and his primary contentions as summarized by the appellate court were that:

- (1) the trial court abused its discretion by awarding the wife, Karen M. Troske, essentially all of the couple's net wealth taking into account both the property distribution and assignment of debts;
- (2) the court abused its discretion by accepting the parties' stipulation that issues of maintenance and child support would be determined using income figures for 2009 where the hearings on ancillary issues took place early in 2011 and the court's order was entered in September 2012; and
- (3) the court abused its discretion by entering its order 18 months after the hearings. In addition, Robert argues that the court abused its discretion in ordering him to pay a portion of Karen's attorney fees. The appellate court affirmed the trial court on all matters.

My summary will focus on the disproportionate property division. The appellate court stated:

Robert first argues that the court abused its discretion in distributing the parties' property and assigning their debts. He contends that the court's distribution resulted in an award of 104% of the couple's wealth to Karen and negative 4% to Robert. This assertion overstates the extent to which the court's distribution favored Karen. Moreover, we find that under the facts presented, the unequal distribution actually ordered by the court was equitable.

The court then stated:

Taking all of these factors into account, the division of property still favors Karen. As both parties note, however, property distribution need not be mathematically equal; rather, it must be in proportions that are just and equitable. In re Marriage of Zweig, 343 Ill. App. 3d 590, 599 (2003) (citing 750 ILCS 5/503(d))

Read the decision for the husband's contention that the trial court essentially found that he dissipated marital property without finding when the marriage began undergoing an irretrievable breakdown. The appellate court stated:

Robert is correct in noting that the court never explicitly determined a point in time when the marriage had broken down. He is also correct in asserting that some of the funds were depleted before the parties were separated. As Robert points out, the parties received \$505,077 from the Ridgeview property early in 2005, which was two years before they began filing separate income tax returns and over three years before Robert filed a petition for dissolution. However, the mine subsidence settlement check was received in 2008, after the parties began filing separate tax returns and only four months before Robert filed for dissolution. In addition, much of the depletion of the accounts funded with proceeds from both of these sources as well as the depletion of Robert's individual retirement account took place after 2007. Indeed, as previously discussed, much of it occurred while these proceedings were pending before the trial court and in violation of court orders. We find ample support in the record for the court's conclusion that Robert still had either the unaccounted-for funds or the benefit of those funds. We further find that the court properly took this into account in distributing the property and assigning the debts.

**Comment Re Family Law Rewrite Impact:** The 2016 rewrites clarify the provision for when one can claim dissipation. (2)(4) provides, "(iv) no dissipation shall be deemed to have occurred prior to 3 years after the party claiming dissipation knew or should have known of the dissipation, but in no event prior to 5 years before the filing of the petition for dissolution of marriage."

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## **Child Support**

### **Initial and Post-Divorce: Establishing Amount of Child Support**

### **Social Security Retirement Benefits**

### ***Mitter* – Social Security Retirement Dependent Benefits Should be Credited Toward Support**

## **Obligation**

[IRMO Mitter](#), 2015 IL App (1st) 142695 (August 2015)

This case has an interesting procedural history regarding the issue of a credit for social security dependent benefits. At the prove-up hearing the parties came to all the terms of settlement with one notable exception. The father's counsel stipulated that "the amount paid for support was in fact, a properly-calculated 32 percent figure of his net income from all sources currently. What was disputed was whether the Social Security benefit of \$1,083 should be deducted from his support obligation because that amount was "earned by him." The trial court reasoned that Social Security benefit was a gratuity for the children, but noted "the Court may be wrong."

The issue in this case was whether the trial court erred in denying the father a credit for social security dependent benefits. The appellate court found the decision in *In re Marriage of Henry* to be persuasive. 156 Ill. 2d 541 (1993). In [IRMO Henry](#), the Illinois Supreme Court addressed whether the payment of a Social Security *disability* dependent benefit on behalf of the obligated parent satisfied the parent's child support obligation. But in this case, a case of first impression in Illinois, the issue was social security "retirement" benefits – not disability benefits.

In analyzing this issue, the court considered the nature and purpose of the dependent benefit and determined:

Initially, we note that when payments are made voluntarily and are not made for the benefit of the noncustodial parent, such payments are merely gratuitous. [citation.] In contrast, however, the right to social security benefits is earned. [citation.] A worker is legally compelled to set aside a portion of his wages in order to earn benefits used to support his dependent children in the event he becomes unable to do so himself. [citation.] Eligibility for social security benefits and the amount of such benefits depends on the earnings record of the primary beneficiary. [citation.] Thus, social security dependent disability benefits are not gratuitous [citation.], but are generated by the noncustodial parent through his labor and earnings.

The appellate court noted that other jurisdictions have determined that Social Security benefits paid to a dependent child are part of that parent's gross income based on the premise that these benefits represent substituted income that is otherwise due to that parent. The appellate court reasoned "Here, we believe respondent's retirement dependent benefits serve the same purpose as the disability benefits at issue in *Henry*."

Remarkably, the appellate court also found the settlement agreement to be unconscionable! So this is an excellent case to have in your brief bank. It is consistent with the recent *Turk* decision because it represents a trend to not somewhat blindly follow the child support guidelines – except in very high income.

Both parties are employed and each earns an upward of \$100,000 per year. The settlement agreement requires respondent to pay \$1,083, above the statutorily required amount when we factor in the children's Social Security dependent benefits. He did not voluntarily intend to bestow a gratuity on his children in the form of their dependent allotment of his Social Security benefits.

## **What Constitutes Income – Sub S Corporations and Retained Earnings**

**Moorthy – Trial Court Did Not Abuse Discretion in Excluding Retained Earnings of SubS Corporation as Income for Child Support**

[IRMO Moorthy](#), 2015 IL App (1st) 132077 (March 2015)

The players in this case are:

Mother: Moorthy

Father: Arjuna

Corporation: Mahantech.

A key factor was that the mother had the burden of proof due to the fact that she brought the modification of support proceedings. The key quotations in the case stated:

We note that there is no prior history of the subchapter S corporation's retained earnings because Arjuna did not acquire Mahantech until after the divorce was finalized. While we recognize that heightened scrutiny may be warranted where an individual has the ability to control distributions (*In re Marriage of Brand*, 44 P.3d at 330), there was no evidence presented that Arjuna was actually manipulating his income or refusing to declare distributions of Mahantech's income in order to avoid an increase in his child support obligation. Rather, the evidence indicated that Arjuna obtained majority ownership of the corporation at a time when it was not financially successful and he was able to make it more profitable over the years. He testified that the retained earnings must be reinvested in the company to ensure its continued growth and to cover overhead expenses in the event of a business downturn. \*\*\* In addition, Arjuna testified that although he was the majority shareholder, he owed a duty to the minority shareholder and could not declare a distribution without considering the other shareholder

Significantly, Moorthy failed to offer any evidence or testimony to rebut Arjuna's evidence that the retained earnings were necessary and appropriate business actions and were not excessive. Notably, Moorthy did not present the testimony of an accountant or other expert regarding whether the level of retained earnings was in line with the corporation's needs. As noted in *Taylor*, 158 S.W.3d at 358, expert testimony may be helpful and relevant in establishing "the level of retained earnings that are appropriate for the corporation to carry on its intended purpose, and the court should consider post-divorce corporation activities, particularly any unexplained increases or reductions of capitalization or retained earnings." See, e.g., *In re Marriage of Joynt*, 375 Ill. App. 3d at 818 (accountant testified about the retained earnings and other financial information concerning the obligor's closely held subchapter S corporation). Moorthy did not call an expert witness to present any evidence that Arjuna was manipulating his income or that the retained earnings were excessive, and she did not otherwise provide evidence through the examination of Arjuna or any other witness to rebut his testimony regarding Mahantech's financial situation. Despite Moorthy's argument to the contrary, our case law dictates that "[t]he party seeking relief has the burden of showing a change in circumstances substantial enough to warrant a change in support." *In re Marriage of Eberhardt*, 387 Ill. App. 3d at 231.

Although Arjuna's individual tax returns showed that he paid taxes on the portion of Mahantech's earnings that were attributable to him through the schedule K-1, his testimony indicated that the money to pay these taxes came from Mahantech's account, it was sent directly to the taxing agency, and the amount was not distributed to Arjuna first. An equivalent situation occurred in *In re Marriage of Brand*, 44 P.3d at 328, where the

father received a distribution from the corporation only for purposes of paying his share of the corporation's taxes, and the court held that this amount was not available to pay child support. We similarly conclude that the amounts used to pay Arjuna's proportionate share of the taxes on Mahantech's earnings did not constitute disbursements to him that should have been included in the child support calculation.

## “Reverse” Child Support

### ***Turk* – 2014: Illinois Supreme Court: Custodial Parent Can be Ordered to Pay Support to Non-Custodial Parent - Does *Turk* apply to Parentage Cases?**

[\*IRMO Turk\*](#), 2014 IL 116730 (June 19, 2014)

I include *Turk* because in 2016, Illinois statutory law conforms to this decision. I have been pointing out for years that Illinois case law provides authority for the custodial parent to provide support to the non-custodial parent. See: *IRMO Cesaretti*, 203 Ill. App.3d 347 (2d Dist. 1990) and *IRMO Pitts*, 169 Ill. App.3d 200 (5th Dist. 1988). PA 99-90 provides at §505(a) a new sentence defining in a circular manner the “supporting parent” simply as the parent who has to pay support: For purposes of this Section, the term "supporting parent" means the parent obligated to pay support to the other parent. This de-links support awards with awards of what we have considered to be “primary residential custody.”

There is an excellent article on *Turk* that came out in [September in the Family Law Section newsletter](#). The question posed was whether *Turk* applied to parentage cases. There he write:

Statutorily, the parent and child relationship, including support obligations, extends equally to every child and to every parent, regardless of the marital status of the parents. 750 ILCS 45/3 (West 2015). At first glance, it seems logical that *Turk* should apply to children in parentage cases. However, the Illinois Parentage Act of 1984 specifically considered and expressly states that child support is paid by the non-custodial parent. See 750 ILCS 45/14.

Unfortunately, the article was dated by the time it was published due to the Illinois Parentage Act of 2015, effective January 1, 2016. Wes Cowell in his comment he aptly quoted from the new Parentage Act. As he quoted:

The old law (750 ILCS 45/14) said:

"The court shall, in any event and regardless of the amount of the non-custodial parent's net income, in its judgment order the non-custodial parent to pay child support to the custodial parent in a minimum amount of not less than \$10 per month . . . ." 750 ILCS 45/14

So far so good.

The IPA 2016 provides in part:

[Temporary Relief Provision]:

In determining the amount of a temporary child support award, the court shall use the guidelines and standards set forth in Sections 505 and 505.2 of the Illinois Marriage and Dissolution of Marriage Act.

## Section 801. Child support orders Provision

(a) Notwithstanding any other law to the contrary, pending the outcome of a judicial determination of parentage, the court shall issue an order for child support upon motion by a party and a showing of clear and convincing evidence of parentage. In determining the amount of the child support award, the court shall use the guidelines and standards set forth in Sections 505 and 505.2 of the Illinois Marriage and Dissolution of Marriage Act.

## Section 802. Judgment Provision:

The judgment shall contain or explicitly reserve provisions concerning any duty and amount of child support and may contain provisions concerning the custody and guardianship of the child, **parenting time privileges with the child**, and the furnishing of bond or other security for the payment of the judgment, which the court shall determine in accordance with the relevant factors set forth in the Illinois Marriage and Dissolution of Marriage Act and any other applicable law of this State ...

## Support Enforcement

### Child Support Trust

#### ***Pasquesi – Child Support Trust and Replenishment of Same***

[\*IRMO Pasquesi\*](#), 2015 IL App (1st) 133926 (June 2015)

The MSA required the husband to deposit \$90,000 in a trust from which Roberta, as trustee, was to withdraw John's monthly child support obligation and his 50% share of child-related expenses. The MSA established the trust for 24 months and allowed for review for replenishment on or after the 24 months. Shortly after the 24 months expired, Roberta filed a petition to replenish the trust through June 2013 and to establish John's current child support obligation. John also filed a petition to set child support. After several days of testimony, the trial court ordered John to replenish the trust at a rate of \$12,000 per year, determined John's current and retroactive child support obligation, as well as his past-due child related expenses obligation. On appeal John asserted that the trial court abused its discretion in: (i) ordering him to replenish the trust, because Roberta, was interested party, as she was the trustee and there was no evidence to support replenishment. The appellate court affirmed:

The circuit court acted within its discretion in ordering John to replenish the trust because the parties' MSA named Roberta as trustee and John willfully refused to pay nonmedical expenses that were not in dispute..

Regarding exemptions, the trial also maintained the status quo under the MSA, by permitting the former wife to keep all four dependency tax exemptions. Paragraph 32 of the decision addressed the dependency exemptions. The appellate court reasoned:

“Much of the custodial parent's contribution to the care of the child is not conveniently reducible to financial figures relating only to the child.” *Id.* at 901-02 (listing other contributions, such as purchasing food for the family, laundering family clothing, and expending time and energy in the care of the child). Simply paying the statutory child support amount does not automatically entitle the noncustodial parent to the income tax exemption for the child. *Id.* at 902.

503(g) has not changed. But there is a change to the provisions regarding educational expenses of a



Non-minor Child.

The court if necessary to protect and promote the best interests of the children may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, physical and mental health, and general welfare of any minor, dependent, or incompetent child of the parties.

### **Child Enforcement Generally**

#### **Hill – Dismissal of Appellate Court Case Because of Father’s Defying Attempts to Enforcement Order for Support Enforcement**

[IRMO Hill](#), 2015 IL App (2d) 140345 (February 2015)

The crux of the case is clear from the following quote:

Jennifer argued that Ronald was not complying with the trial court’s orders as he had paid neither child support nor her attorney fees. Although the trial court had issued several rules to show cause, they were not served on Ronald, because his whereabouts were unknown. Relying on *Garrett v. Garrett*, 341 Ill. 232, 234 (1930), Jennifer argued that, where a party seeks review of a judicial order while at the same time defying the trial court’s attempts to enforce that order, the appeal should be dismissed.

Since the 1930 *Garrett* Illinois Supreme Court decision is an old case that I was not familiar with, I quote from the appellate court’s summary of *Garrett*:

Having now considered Ronald’s report, we determine that his appeal should be dismissed for the reasons set forth in *Garrett*. In that case, the husband was ordered to pay alimony, attorney fees, and court costs. He appealed from that order. While his appeal was pending, the husband refused to comply with the trial court’s order and therefore was found in contempt. The trial court was not able to enforce its contempt order, however, because the husband was concealing himself outside Illinois. The supreme court found that the husband’s absence hindered and embarrassed the due course of procedure by preventing the court from enforcing its decree. *Id.* at 234. The supreme court therefore concluded that “no reason is here disclosed why we should give consideration to one showing his contempt for our courts at the same time that he asks their affirmative assistance.” *Id.*

**Comment:** *Hill* and *Garrett* are necessary cases to have in your brief bank when dealing with a litigious individual who fails to comply with court orders.

### **Child Enforcement Against Estate**

#### **Ross – Case of First Impression: Support Enforcement Against Estate Untimely Under §18-12(b) of Probate Act 2 Years after Death**

[IRMO James Ross \(Deceased\) and Anita Ross Pruitt](#), 2015 IL App (2d) 130961 (Modified on Denial of Rehearing: April 2015)

Holly Ross was the executor of the estate of James S. Ross. She appealed from the trial court’s judgment in favor of Anita Ross Pruitt (Anita) on Anita’s petition for child support that James was ordered to pay

Anita in the 1983 decree dissolving their marriage. The appellate court ruled:

We agree with the Estate that Anita's petition to collect the child support arrearage was untimely under section 18-12(b) of the Probate Act of 1975 (755 ILCS 5/18-12(b) (West 2012)). Therefore, we reverse the trial court's judgment.

The parties were married in 1968 and were divorced in 1983. Anita was awarded custody of the children and the father was ordered to pay \$300 support per month. The father died in 2008 after suffering a workplace accident. In April 2012, Anita filed a "petition for confirmation of lien, sale of real estate, and entry of a QDRO." She alleged child support arrearages of \$7,770 and \$14,687.34, respectively, in two cases. Adding statutory interest, Anita alleged a total arrearage of \$65,976.46. Anita claimed that there was an existing lien in that amount against the assets of the estate by operation of section 505(d) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/505(d)).

The Estate responded by filing a nine-count motion to strike and dismiss Anita's petition. Count II of the motion asserted that Anita's petition was in the "wrong venue." Specifically, the Estate claimed that, because James was deceased and his and Anita's youngest child was long since emancipated, Anita should have brought her action in probate court rather than domestic relations court. Ultimately, the trial court disagreed finding that she was "entitled to attempt enforcement of any child support arrearage against the [E]state in this court." Then the estate in filed an a response and several affirmance defenses including laches as well as asserting that the petition was barred under Section 510(e) of the IMDMA and Section 18-12 of the Probate Act. The trial court struck all affirmance defenses raised by the estate except for laches. The case then proceeded to a bench trial where the trial court found in Anita's favor and against the estate for \$68,562.70, **consisting of \$22,457.34 plus \$46,105.36 in statutory interest.** The court also entered a QDRO against James' pension. The estate appealed and the appellate court reversed.

The key issue on appeal was whether §510(e) of the IMDMA, which incorporates the two year time limits of section 18-12(b) of the Probate Act, barred Anita's claim against the Estate for overdue child support. They appellate court concluded, "We agree with the Estate that Anita's claim was indeed time-barred under section 510(e) and section 18-12(b)."

Key provisions were subsections (d) and (e) of §510 of the IMDMA:

"(d) Unless otherwise provided in this Act, or as agreed in writing or expressly provided in the judgment, provisions for the support of a child are terminated by emancipation of the child, or if the child has attained the age of 18 and is still attending high school, provisions for the support of the child are terminated upon the date that the child graduates from high school or the date the child attains the age of 19, whichever is earlier, but not by the death of a parent obligated to support or educate the child. An existing obligation to pay for support or educational expenses, or both, is not terminated by the death of a parent. When a parent obligated to pay support or educational expenses, or both, dies, the amount of support or educational expenses, or both, may be enforced, *modified, revoked or commuted to a lump sum payment, as equity may require*, and that determination may be provided for at the time of the dissolution of the marriage or thereafter.

(e) The right to petition for support or educational expenses, or both, under Sections 505 [(750 ILCS 5/505 (West 2012))] and 513 [(750 ILCS 5/513 (West 2012))] is not extinguished by the death of a parent. Upon a petition filed before or after a parent's

death, the court may award sums of money out of the decedent's estate for the child's support or educational expenses, or both, as equity may require. The time within which a claim may be filed against the estate of a decedent under Sections 505 and 513 *and subsection (d) and this subsection* shall be governed by the provisions of the Probate Act of 1975 [(755 ILCS 5/1-1 et seq. (West 2012))], as a barrable, noncontingent claim." (Emphasis supplied.) 750 ILCS 5/510(d), (e) (West 2012).

Note that none of this language under (d) or (e) changes under the 2016 re-writes.

The appellate court then stated:

In the italicized language in the last sentence of subsection (e), the legislature mentions claims under subsection (d) separately from claims under subsection (e). We presume that the legislature thereby contemplated a substantive distinction between two types of claims for support against a deceased parent's estate. Evidently, the distinction is that subsection (d), in its final two sentences, concerns a claim against an estate based on a support obligation existing at the parent's death, while the first two sentences of subsection (e) concern a claim against the estate for an initial or "new" award of support. The comprehensive conjunctive in the final sentence of subsection (e) subjects to the Probate Act all claims for support against an estate, whether the claims are based on support obligations existing at the parent's death or are "new" claims for support. Moreover, with respect to the class of claims based on existing support obligations, there is no language in subsection (e) excepting claims for support arrearages from the governance of the Probate Act. *Therefore, Anita's claim for an arrearage is governed by the Probate Act.*

So, next we go to §18-12 of the Probate Act and its limitations periods:

"(a) Every claim against the estate of a decedent, except expenses of administration and surviving spouse's or child's award, is barred as to all of the decedent's estate if:

- (1) Notice is given to the claimant as provided in Section 18-3 and the claimant does not file a claim with the representative or the court on or before the date stated in the notice; or
- (2) Notice of disallowance is given to the claimant as provided in Section 18-11 and the claimant does not file a claim with the court on or before the date stated in the notice; or
- (3) The claimant or the claimant's address is not known to or reasonably ascertainable by the representative and the claimant does not file a claim with the representative or the court on or before the date stated in the published notice as provided in Section 18-3.

(b) *Unless sooner barred under subsection (a) of this Section, all claims which could have been barred under this Section are, in any event, barred 2 years after decedent's death, whether or not letters of office are issued upon the estate of the decedent.*" (Emphasis added.) 755 ILCS 5/18-12 (West 2012)

The appellate court then stated that Anita's claim was brought more than two years after the father's death. Thus, it was barred.

The court then suggested:

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Our reading of section 510(e) finds support in *In re Marriage of Epstein*, 339 Ill. App. 3d 586, 597 (2003), where the First District rejected the suggestion that section 510(e) subjects to the Probate Act only “new claim[s] for support,” not claims for “enforcement [or] modification [of] an existing court order.”

Anita’s claims as to why Section 510 should not apply to claims for support arrearages contained several excellent arguments. These bear reading because it is quite possible that the matter could be appealed to the Illinois Supreme Court. For example, she quoted from Section 510(d): “Notwithstanding any other State or local law to the contrary, a lien arises by operation of law against the real and personal property of the noncustodial parent for each installment of overdue support owed by the noncustodial parent.”

But the appellate court reasoned that, “the existence of a lien does not obviate the need to file a claim under the Probate Act against the payor’s estate.”

Next, Anita relied on Section 2-1602 of the Code re revivals of judgments:

“(a) A judgment may be revived by filing a petition to revive the judgment in the seventh year after its entry, or in the seventh year after its last revival, or in the twentieth year after its entry, or at any other time within 20 years after its entry if the judgment becomes dormant. The provisions of this amendatory Act of the 96th General Assembly are declarative of existing law.

\* \* \*

(g) *This Section does not apply to a child support judgment or to a judgment recovered in an action for damages for an injury described in Section 13-214.1 [(735 ILCS 5/13-214.1 (West 2012))], which need not be revived as provided in this Section and which may be enforced at any time as provided in Section 12-108 [(735 ILCS 5/12-108 (West 2012))].*” (Emphasis supplied.)

Then she quoted from Section 12-108: “Child support judgments, including those arising by operation of law, may be enforced at any time.”

This is a case of first impression: “We have found nothing in the Code, the Marriage Act, or the Probate Act to explain the interplay of these statutes as to the question at hand. It also appears that no published Illinois decision has addressed the issue.”

According to the appellate court, Section 510(e) governs because it has greater particularity. The appellate court summarized:

In conclusion, we hold that section 510(e) of the Marriage Act applies to Anita’s claim against the Estate for overdue child support. Under section 18-12(b) of the Probate Act, which section 510(e) incorporates, Anita’s claim is untimely and, consequently, barred. Therefore, the trial court erred in granting Anita’s motion to reconsider its dismissal of her petition.

Ultimately, there was a dismissal with prejudice. So the lesson to be learned was that for want of filing the matter in what in hindsight was the wrong court, the mother lost out on \$68,562.70.

### **Support Enforcement and UIFSA: Claims for Post-High School Educational Expenses**

***Edelman – 2015: Under the UIFSA and Full Faith and Credit for Child Support Orders Act Petition for Post-High School Educational Expenses Could not be Brought in Illinois but Only Based on Law in Original Forum State***

[\*IRMO Edelman and Preston\*](#), 2015 IL App (2d) 140847, (May 2015, Modified upon denial of rehearing August 2015)

The substance of this opinion once it gets past out of state law is at paragraph 28, titled, “Interaction Between Family Support Act and Full Faith and Credit Act.”

The appellate court points out that:

Subsection (h) of the Full Faith and Credit Act provides:

“Choice of law.— (1) In general.—In a proceeding to establish, modify, or enforce a child support order, the forum State’s law shall apply except as provided in paragraphs (2) and (3).

(2) Law of state of issuance of order.—In interpreting a child support order including the duration of current payments and other obligations of support, a court shall apply the law of the State of the court that issued the order.

(3) Period of limitation.—In an action to enforce arrears under a child support order, a court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation.” 28 U.S.C. § 1738B(h) (2006).

The appellate court stated:

the more applicable of the two subsections here, where the proper construction of the Connecticut judgment is not at issue. Thus, Illinois law must be applied. However, Melissa overlooks the fact that the Family Support Act, including section 611(c), is part of the law of Illinois. Accordingly, Illinois law in fact requires us to apply the law of the issuing state in determining whether an Illinois court presiding over a child support modification proceeding may grant the relief requested by the petitioner. See 750 ILCS 22/611(c) (West 2012). Thus, even if we follow subsection (h)(1)’s instructions to apply the law of the forum state, i.e., Illinois, that law still leads us back to Connecticut law.

Because of this, the choice-of-law provisions of the Full Faith and Credit Act do not yield a different result than the relevant state law, the Family Support Act. Accordingly, on this point at least,<sup>1</sup> there is no conflict between the two statutes, and thus no cause to look to the federal law.

The most critical portion of the decision is at paragraph 35. It distinguishes a “petition to increase child support and to set adult child support” from a petition for contribution to college expenses. The appellate court stated, “The trial court clearly erred in dismissing the portion of Melissa’s petition that sought to increase the amount of child support based upon additional income received by John.”

The appellate court then stated:

As for the portion of Melissa’s petition that sought to establish adult child support for the parties’ older child on the basis of disability, that is another matter. It appears that Connecticut law makes some provision for the establishment of child support for a disabled adult child (see Conn. Gen. Stat. § 46b-84(c) (2012)), although the availability

of such support is not clear under the circumstances present here.”

## **Post-High School Educational Expenses**

### **Establishment**

#### ***In Re M.M. – Parentage Case and Imputing Income to New Spouse***

*In Re M.M.*, 2015 IL App (2d) 140772 (March 2015)

This is a parentage case involving the allocation of expenses for college. After hearing on the mother's petition for allocation of her daughter's expenses for college, the trial court apportioned costs of attending Augustana College 33% to mother, 45% to father, and 22% to daughter. The appellate court held that the trial court improperly considered income of the mother's new husband in allocation of her expenses. The mother, who had not been employed outside the home, relied on her husband for nearly all her financial support. The appellate court ruled that the trial court improperly used the husband's income as baseline to determine the mother's contribution toward college expenses. The appellate court reasoned that the trial court could only impute income to mother in an amount commensurate with her own skills and experience – and it incorrectly imputed her husband's income to her, based upon the facts of the case.

The appellate court reasoned:

The present matter is distinguishable from the above cases, because Jennifer is a stay-at-home mother who relies on her new husband for just about all of her financial support. Furthermore, unlike the mothers in *Drysch* and *Street*, Jennifer testified that she did not have access to Tim's accounts and that she and Tim did not have any joint accounts.

This case did not directly address the issue of whether Illinois law regarding post-high school educational expenses applied in parentage cases. That was likely because the underlying order had provided that “[t]he issue of the responsibility for the child’s college and/or trade school expenses shall be determined by the financial conditions of the parties at the time said expenses are incurred.”

SB 57 / PA 99-90 provides at Section (f):

Child support of children as provided in Section 513 after the children attain majority, and parental responsibility allocation of children may be modified upon a showing of a substantial change in circumstances. The parties may provide that maintenance is non-modifiable in amount, duration, or both. If the parties do not provide that maintenance is non-modifiable in amount, duration, or both, then those terms are modifiable upon a substantial change of circumstances. Property provisions of an agreement are never modifiable.

**Comment re Family Law Rewrite:** The law regarding post-high school educational expenses has been entirely re-written.

(a)... Unless otherwise agreed to by the parties, all educational expenses which are the subject of a petition brought pursuant to this Section shall be incurred no later than the student's 23rd birthday, except for good cause shown, but in no event later than the



child's 25th birthday.

(b) Regardless of whether an award has been made under subsection (a), the court may require both parties and the child to complete the Free Application for Federal Student Aid (FAFSA) and other financial aid forms and to submit any form of that type prior to the designated submission deadline for the form. The court may require either or both parties to provide funds for the child so as to pay for the cost of up to 5 college applications, the cost of 2 standardized college entrance examinations, and the cost of one standardized college entrance examination preparatory course.

(c) The authority under this Section to make provision for educational expenses extends not only to periods of college education or vocational or professional or other training after graduation from high school, but also to any period during which the child of the parties is still attending high school, even though he or she attained the age of 19.

(d) Educational expenses may include, but shall not be limited to, the following:

- (1) except for good cause shown, the actual cost of the child's post-secondary expenses, including tuition and fees, provided that the cost for tuition and fees does not exceed the amount of tuition and fees paid by a student at the University of Illinois at Urbana-Champaign for the same academic year;
- (2) except for good cause shown, the actual costs of the child's housing expenses, whether on-campus or off-campus, provided that the housing expenses do not exceed the cost for the same academic year of a double-occupancy student room, with a standard meal plan, in a residence hall operated by the University of Illinois at Urbana-Champaign;
- (3) the actual costs of the child's medical expenses, including medical insurance, and dental expenses;
- (4) the reasonable living expenses of the child during the academic year and periods of recess:
  - (A) if the child is a resident student attending a post-secondary educational program; or
  - (B) if the child is living with one party at that party's home and attending a post-secondary educational program as a non-resident student, in which case the living expenses include an amount that pays for the reasonable cost of the child's food, utilities, and transportation; and

(5) the cost of books and other supplies necessary to attend college.

(e) Sums may be ordered payable to the child, to either party, or to the educational institution, directly or through a special account or trust created for that purpose, as the court sees fit.

(f) If educational expenses are ordered payable, each party and the child shall sign any consent necessary for the educational institution to provide a supporting party with access to the child's academic transcripts, records, and grade reports. The consent shall not apply to any non-academic records. Failure to execute the required consent may be a basis for a modification or termination of any order entered under this Section. Unless the court specifically finds that the child's safety would be jeopardized, each party is entitled to know the name of the educational institution the child attends.

(g) The authority under this Section to make provision for educational expenses

terminates when the child either: fails to maintain a cumulative "C" grade point average, except in the event of illness or other good cause shown; attains the age of 23; receives a baccalaureate degree; or marries. A child's enlisting in the armed forces, being incarcerated, or becoming pregnant does not terminate the court's authority to make provisions for the educational expenses for the child under this Section.

(h) An account established prior to the dissolution that is to be used for the child's post-secondary education, that is an account in a state tuition program under Section 529 of the Internal Revenue Code, or that is some other college savings plan, is to be considered by the court to be a resource of the child, provided that any post-judgment contribution made by a party to such an account is to be considered a contribution from that party.

(i) The child is not a third party beneficiary to the settlement agreement or judgment between the parties after trial and is not entitled to file a petition for contribution. If the parties' settlement agreement describes the manner in which a child's educational expenses will be paid, or if the court makes an award pursuant to this Section, then the parties are responsible pursuant to that agreement or award for the child's educational expenses, but in no event shall the court consider the child a third party beneficiary of that provision. In the event of the death or legal disability of a party who would have the right to file a petition for contribution, the child of the party may file a petition for contribution.

Relevant factors are now in (j) and includes the first factor:

(1) The present and future financial resources of both parties to meet their needs, including, but not limited to, savings for retirement. The deleted phrase is, "The financial resources of both parents."

## **Enforcement**

### **Retroactivity of Obligation in Light of *Petersen***

First note that [SB 57/PA 99-90](#) has a new provision consistent with *Petersen*:

(k) The establishment of an obligation to pay under this Section is retroactive only to the date of filing a petition. The right to enforce a prior obligation to pay may be enforced either before or after the obligation is incurred.

### ***Donnelly* – Post-High School Educational Expenses: Limits of *Petersen* Decision.**

[IRMO Donnelly](#), 2015 IL App (1st) 142619 (June 2015)

The Illinois appellate court has recently issued an important decision clarifying *Petersen*. In *Donnelly*, the appellate court held that *Petersen*'s limiting rule applies only in instances which are factually analogous, i.e., where there is only a reference to the reservation of the issue of payment of college expenses in the dissolution decree, and the parties have not included terms regarding payment of college

expenses in a MSA incorporated into the judgment.

In *Petersen*, the parties' 1999 dissolution judgment included the not-uncommon provision that "the court expressly reserves the issue of each party's obligation to contribute to the college or other education expenses of the parties' children pursuant to §513 of the Illinois Marriage and Dissolution of Marriage Act [IMDMA.]" 2011 IL 110984, ¶ 4. The former wife waited, however, until 2007 to file a petition for contribution against her ex-husband to recover the expenses she had incurred since 2002, when the first of the parties' three children entered college.

In *Donnelly*, the appellate court was presented with the following question, which was certified from the circuit court:

Does the holding in *Petersen*, 2011 IL 110984, preclude the court from ordering a parent to reimburse the other parent for college expenses allegedly paid prior to the date the petition is filed, whenever the parties' Judgment for Dissolution does not order a specific dollar amount or percentage to be paid, but leaves the amount to be determined at a later date?

The *Donnelly* court answered that it does not.

In *Donnelly*, the parties executed a MSA which contained a specific agreement that they would pay for their children's secondary education, although no specific dollar amounts were stated. Instead, they agreed that "[t]he extent of the parties' obligation hereunder shall be based upon their then respective financial conditions." *Id.* at ¶ 4. The MSA was thereafter incorporated into the dissolution judgment. *Id.*

The parties' agreement to pay for these expenses as set forth in their MSA was the focus in the appellate court's analysis. The court held that this language "not only expressly imposed the obligation to pay on both parties, *but also provided that any disagreement over the respective shares to be paid would be submitted to a court of competent jurisdiction upon proper notice and petition.*" Because the MSA established an express obligation by the parties that they would pay these educational expenses, the Court found this language distinguishable from the express judicial reservation of the issue of the parties' obligation in *Petersen*.

Therefore, unlike the mother in *Petersen* who was attempting to modify the parties' obligations, the Court held that when the mother in *Donnelly* petitioned for contribution, she was simply attempting to enforce the prior settlement agreement. As a result, the appellate court concluded that the rule established in *Petersen* did not preclude the trial court from ordering the father to reimburse the mother for college expenses she had already paid prior to the date that the petition was filed, even where the judgment did not order a specific dollar amount to be paid – instead leaving it open for a ruling at a later date.

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## **Maintenance Cases**

### **Initial Divorce**

### **Indefinite Maintenance**

***Shen – Time Limited Maintenance Award Reversed and Indefinite Maintenance Award Affirmed***  
[\*IRMO Shen\*](#), 2015 IL App (1st) 130733 (June 30, 2015), Paragraph 79-86.

In initial divorce proceedings the trial court abused its discretion in ordering that wife's maintenance would terminate on her 66th birthday. The evidence showed that the wife would not be able to support herself and would require permanent maintenance. Interestingly, the appellate court's decision included a provision for review if the wife's income attained at least \$45,000 and the appellate court affirmed this portion of the decision.

There was an excellent discussion regarding maintenance at paragraph 84.

The four common types of maintenance included in a final judgment are: (i) permanent maintenance (indefinite in duration); (ii) rehabilitative maintenance for a fixed term (terminates on the term's end or the occurrence of some event); (iii) rehabilitative maintenance (subject to a set review date); and (iv) maintenance in gross (specific, nonmodifiable sum, usually in lieu of property). "Permanent" does not mean everlasting; a better description would be "indefinite." An award of permanent maintenance may be modified or terminated either by agreement or as provided in section 510(c) of the Act. See *In re Marriage of Culp*, 341 Ill. App. 3d 390, 397 (2003) (burden of proving change in circumstances to justify termination or modification on paying party); *In re Marriage of Dunseth*, 260 Ill. App. 3d 816, 833 (1994) (permanent maintenance appropriate "where it is evident the recipient spouse is either unemployable or employable only at an income considerably lower than the standard of living established during the marriage").

The judgment specifically states that Janet is to receive "permanent maintenance," but the trial court included a termination event—her sixty-sixth birthday when "she is eligible for full social security benefits"—in addition to the statutory events. See 750 ILCS 5/510(c).

The parties agree that the maintenance arrangement ordered by the trial court, as a matter of law, does not constitute maintenance in gross. See *In re Marriage of Freeman*, 106 Ill. 2d 290, 298 (1985). We agree. What distinguishes maintenance in gross is its definite sum and vesting date. See *In re Marriage of D'Attomo*, 2012 IL App (1st) 111670, ¶ 24. Instead the parties, again in agreement, assert that the trial court ordered permanent maintenance, but erroneously deviated from the statutory termination events by providing that Janet's maintenance end on her becoming fully entitled to social security benefits. We agree.

The appellate court then referenced the *Walker* case holding that permanent maintenance may be reduced when the wife was nearly eligible for retirement benefits as teacher where total amount of her cash flow from remained substantially unchanged. But the appellate court stated:

Here, however, the trial court terminates maintenance without knowing anything about Janet's or Feng's financial circumstances at the time Janet reaches age 66, many years in the future. Terminating in this manner violates section 510(c), as a matter of law. Whether permanent maintenance is still required when Janet becomes social security eligible should be a matter to be decided at that time and not now. Trial judges cannot gaze into a crystal ball and foresee what the future holds for the parties. This explains why permanent maintenance is always modifiable or terminable should there occur a substantial change in circumstances.

Regarding maintenance in gross, note that PA 99-90:

the court may grant a maintenance award for either spouse in amounts and for periods of time as the court deems just, without regard to marital misconduct, ~~in gross or for fixed or indefinite periods of time~~ \*\*\*

And 510(a-6) provides:

(a-6) In a review under subsection (b-4.5) of Section 504 of this Act, the court may enter a fixed-term maintenance award that bars future maintenance only if, at the time of the entry of the award, the marriage had lasted 10 years or less at the time the original action was commenced.

## **Post-Divorce**

### **Conjugal Cohabitation**

#### **Provisions of Family Law Rewrite:**

[SB 57 / PA 99-90](#) provides in part at Section 510(c):

A payor's obligation to pay maintenance or unallocated maintenance terminates by operation of law on the date the recipient remarries or the date the court finds cohabitation began. The payor is entitled to reimbursement for all maintenance paid from that date forward.

It then provides:

A party receiving maintenance must advise the payor of his or her intention to marry at least 30 days before the remarriage, unless the decision is made within this time period. In that event, he or she must notify the other party within 72 hours of getting married.

***Miller – Cohabitation Not Shown Where Separate Residences, Separate Finances, etc.***  
[IRMO Miller](#), 2015 IL App (2d) 140530 (May 28, 2015)

The former husband petitioned the trial court pursuant to section 510(c) of the IMDMA for the termination of maintenance payments to petitioner, Lorena K. Miller. In reaching its determination, the trial court considered Facebook pictures and posts written by the two of them but it did not consider posts written by third parties. The court stated that the posts were relevant to its consideration of how the former wife and her significant other presented their relationship to others. The court also allowed the former husband to submit several financial documents over Lorena's hearsay objection. The appellate court affirmed finding that it was not improper for the court to consider the Facebook posts. Likewise, her argument concerning the financial documents failed.

The critical portion of the appellate court's decision, however, stated:

However, the trial court's overall finding that Lorena cohabited with Michael so as to have a de facto marriage, as opposed to an intimate dating relationship, was against the

manifest weight of the evidence. The six-factor analysis that the trial court applied is insufficient to distinguish an intimate dating relationship from a de facto marriage if unaccompanied by an understanding that the facts falling into each category must achieve a gravitas akin to marital behavior. The common-law standard of a de facto marriage is codified more precisely as cohabitation (with its three elements being resident, continuing, and conjugal). Therefore, while mindful that each case will present unique circumstances, we note that here the absence of certain traditional components of a marital relationship, such as intended permanence and mutual commitment (speaking to the continuing and conjugal elements), a shared day-to-day existence (speaking to the conjugal and residential elements), and the shared use and maintenance of material resources (speaking to the residential element), created a significant hurdle for Jeffrey. The trial court did not adequately consider the gravity (or lack thereof) of facts that fell into each of the six categories, nor did it adequately consider the absence of certain traditional components of a marital relationship. Though we defer to the trial court's assessment of the underlying facts, those facts do not establish a de facto marriage as required to permanently terminate maintenance. We thus reverse and remand.

The appellate court in this case departed from the critical *Susan* analysis:

We agree with the main holding in *Susan*, i.e., that a court should not consider the receiving spouse's financial need in determining whether she has entered into a de facto marriage, but, with regret, we must depart from *Susan*'s subtler points. That is, we must distance ourselves from *Susan* to the extent that it embraces the six-factor analysis as the preeminent test to determine a de facto marriage. As we have discussed (supra ¶¶ 45-47), the six-factor analysis is but a helpful tool, and a look at its history shows that its originators never intended for it to be the test for a *de facto* marriage. The six-factor analysis is insufficient to distinguish an intimate dating relationship from a *de facto* marriage if left unaccompanied by an understanding that the facts falling into each category must achieve a gravitas akin to marital behavior.

Applying the facts, the appellate court stated:

Returning to the instant case, the evidence clearly shows companionship and exclusive intimacy. However, a deeper level of commitment, permanence, and financial or material partnership are absent from Lorena and Michael's relationship such that it cannot reasonably be elevated beyond an intimate dating relationship. It is not a de facto marriage. As to commitment and permanence, Lorena and Michael discussed marriage early in the relationship, and Lorena told Michael that it was not the sort of relationship that she was looking for. Granted, Lorena and Michael enjoyed a lengthy dating relationship (though still shorter than the 15-year friendship in *Bates*), but there is no evidence supporting a conclusion that there was ever an intention to make the arrangement permanent. Unlike in *Susan*, the parties did not spend nearly every night together or have virtually free access to one another's homes. Lorena and Michael posted publicly on Facebook that they were "in a relationship," they represented themselves as a couple to their friends, they hosted at least one Thanksgiving holiday, and they willingly shared a golf club membership rate under the club-imposed label "significant others." It would be unreasonable to rely upon the golf club label of "significant others" to establish a marriage-like relationship, because "significant others" was the only label under which they could receive the financially advantageous joint rate that they sought. In any case, these signs of commitment are of a level shared by couples in intimate dating



relationships. While such signs of commitment are not inconsistent with a marriage-like relationship, they are insufficient, without more, to establish one.

As to partnership, Lorena and Michael never commingled any significant finances or resources. Each paid for his or her own expenses when traveling or dining out. No evidence supported the idea that, should one party fall upon hard financial times, the other would step in to keep their respective lifestyles relatively even.

The appellate court then stated, “We acknowledge that a couple can cohabit even where each member of the couple maintains a separate household.” But this was a critical part of the rationale for the appellate court:

However, where the cohabitation must be “resident,” these cases are the exception, and, in general, the absence of a shared residence and of shared housing resources, or, at least, of a shared day-to-day existence, is a significant hurdle for a petitioner to overcome. In *Susan* and *Herrin*, despite separate residences, the new couple spent nearly every day together, not, as here, just three days per week 70% of the time (for a yearly average of two out of seven days). *Susan*, 367 Ill. App. 3d at 930 (the couple spent nearly every night together despite maintaining separate residences); *Herrin*, 262 Ill. App. 3d at 577-78 (the new partner stayed at the former wife’s residence until bedtime, when he returned to his own residence).

An interesting aspect of the decision stated: “It is not surprising that two divorcees who were represented by counsel would be aware of a relatively common principle in divorce law. It would be more surprising if they were not.”

The appellate court concluded:

While a consideration of the nonexhaustive list of six common-law factors is helpful to any termination analysis, courts should not take a checklist approach wherein they merely note the presence of certain facts that fit into each category. Courts should be aware that many of the six factors can be present in an intimate dating relationship as well as a de facto marriage. As such, courts should consider the totality of the circumstances and look for a deeper level of commitment, intended permanence, and, unless otherwise explained, financial or material partnership in order to determine that the former spouse and her new partner are involved in a de facto marriage.

Again, applying the facts to the law, the appellate court wrapped up:

Here, Lorena and Michael’s lives were so neatly separate that, should either wish to end the relationship, all they would need to do is cancel the golf club membership and walk away. Lorena and Michael were not living as a husband and wife would live. They were not residing with one another, they maintained separate households, neither had keys to the other’s house or car, neither kept goods at the other’s home or did household chores (beyond occasional doggy duty), each paid for his or her own travel and entertainment, they kept separate finances, neither named the other as a beneficiary on any financial document or insurance policy, there is no evidence to suggest that they looked to one another for financial support, and there is no evidence to suggest that they intended to live life as partners.

## Maintenance Reviews

***Kuyk* – Marital Settlement Agreement Providing for Maintenance to be Paid for a Period of 60 Months at Which Time it Shall be Reviewable upon Filing of a Petition to Review Prior to Termination of Maintenance. Maintenance was reviewable even though petition for review filed after termination period. Case explains law regarding subject matter jurisdiction and reservation of jurisdiction.**

[\*IRMO Kuyk\*](#), 2015 IL App (2d) 140733 (September 30, 2015) (Kane County – Kevin Busch trial judge, Justice Hutchinson writing the appeal).

Throw out what you thought you know about petitions to review maintenance and their timeliness and about subject matter jurisdiction.

This was the second time that the matter came before the appellate court. In this appeal the question was whether the parties' divorce decree that incorporated the MSA prevented the former wife from filing a petition for review of maintenance. The trial court determined that under the terms of the MSA, maintenance had terminated before the former wife filed her review petition and therefore the petition was barred. The appellate court reversed and remanded. The MSA provided:

“Charles shall pay Kimberly maintenance in the sum of \$6,200.00 per month **for a period of 60 months at which time the maintenance shall be reviewable upon the filing of a petition prior to the termination of the maintenance.** In addition, Charles shall pay Kimberly 25% of his annual balance of profits received from Crowe Horwath [(an accounting firm, where Charles was a partner)] as and for additional maintenance. These amounts, coupled with the income[-]producing assets/pension described [elsewhere], will provide income to Kimberly in the approximate amount of \$152,700 per year.” (Emphasis added).

One key thing to know at the outset is that the case was based upon the marital settlement being ambiguous and construing the MSA against the former husband as a drafter.

In the first appeal the appellate court in an unpublished decision construed the MSA against the former husband as drafter held that the trial court correctly interpreted this article as stating that Charles would pay to Kimberly approximately \$152,700 per year in maintenance, or approximately \$12,725 per month.

The former husband made his 60<sup>th</sup> payment in April 2014 and then stopped paying maintenance. In June 2014 the former wife filed a petition to review maintenance asserting that the maintenance obligation remained extant and had not terminated. In response the former husband asserted that his maintenance obligation automatically terminated at the end of the 60 month period. He argued that the petition was barred because not filed prior to the expiration of the period of review and because she had not alleged a substantial change in circumstances, a necessary condition to “modify” or restart maintenance under §510(a-5). Further, he urged that per *Rice v. Rice*, 173 Ill. App. 3d 1098 (1988), the trial court lacked “jurisdiction” to entertain Kimberly’s review petition. The appellate court stated, “Although the parties were not specific in their pleadings (or their appellate briefs), the parties invoke the concept of subject matter jurisdiction, which is the circuit court’s inherent power to hear and decide a given case.”

I will quote from the appellate court’s summary of *Rice*:

In *Rice*, as part of the parties’ dissolution decree, the trial court ordered the petitioner

(former husband) to pay \$1,000 monthly maintenance to the respondent (former wife) for a period of 42 months. Twenty-four days after the final maintenance payment, the respondent filed a petition to modify the maintenance award. The trial court denied the petition and the appellate court affirmed, stating, “The respondent’s petition to modify the maintenance award \*\*\* was untimely, was filed after payment in full of the maintenance award and after the trial court’s *jurisdiction* to modify the maintenance award had terminated.” (Emphasis supplied.) Id. at 1103. The *Rice* court noted that the trial court in the dissolution judgment “did not *reserve jurisdiction* to review the award of rehabilitative maintenance at the end of the 42 months.” (Emphasis supplied.) Id. at 1099.

The appellate court held that the former husband’s reliance on *Rice* was “misplaced.” I liked this language from Justice Susan Hutchinson:

Jurisdiction is a loaded word and, in *Rice*, it was incorrectly used to suggest that Illinois circuit courts derive their subject matter jurisdiction from statutes, such as the Marriage Act. Under that view, if a party failed to comply with a statutory prerequisite—say, a pleading requirement—that failure seemingly divested the court of jurisdiction to hear and decide the case altogether. *Rice* was by no means alone in making this mistake (see, e.g., \*\*\*), but it is a mistake nonetheless.

The appellate court then cited to several cases including the recent [\*McCormick v. Robertson\*](#), 2015 IL 118230 case (child custody) – see the UCCJEA section of my separate outline for the Illinois Supreme Court case expanding on this. In important language the appellate court next explained:

The only prerequisite to the circuit court’s subject matter jurisdiction “is whether the asserted claim, legally sufficient or not, was filed in the proper tribunal” \*\*\* that is, whether it belongs to the class of cases generally heard in the circuit court \*\*\* Here, undoubtedly, issues related to the parties’ dissolution and post-decree maintenance were ordinary, justiciable matters for a circuit court to consider. Once Kimberly filed her petition, the trial court’s subject matter jurisdiction was triggered and it possessed the authority to adjudicate her claims. Put differently, parties may, by agreement, *revest* the court with jurisdiction but they may not *divest* the court of jurisdiction. Thus, even if maintenance had terminated (as in *Rice*), or Kimberly’s petition was barred by the MSA or insufficient under the Marriage Act, the court’s subject matter jurisdiction—the power to hear the petition and render a decision on its merits— was not affected. [Citations omitted.]

The appellate court then expounded on the proper view of what happens regarding what it means to “reserving jurisdiction” actually being an improper and misleading term:

To the extent that *Rice* and similar cases discuss maintenance petitions in jurisdictional terms, and speak of the need to “reserve” jurisdiction over post-decree matters (see *IRMO Heller*, 153 Ill. App. 3d 224 (1987); \*\*\* those cases are vestiges of an outmoded view of jurisdiction and we decline to follow them. As discussed in those cases, the concept of reserving “jurisdiction” is best understood as the court placing the parties on notice that it intends to revisit certain post-decree issues down the line (like maintenance, child support, income calculations, asset valuations, etc). We emphasize, however, that the form of that notice—whether the trial court says “jurisdiction” when it really means “issue”—or a lack of notice altogether is in no way jurisdictional. [citations omitted.]

Because of the sea change in how we need to think of this concept, Justice Hutchinson explained:

The through line is that the circuit court will always have subject matter jurisdiction to address a party's post-decree petition, regardless of what the parties agreed to in their MSA, because the circuit court is where post-dissolution matters are heard. That does not mean that a post-decree petition necessarily has merit and will succeed. The petition might fail for any number of procedural or substantive reasons (e.g., it could be barred by the MSA). Or, the court might make any number of errors when it considers the petition and reaches its decision. But those missteps would in no way divest the court of subject matter jurisdiction. \*\*\* Here, since the trial court had subject matter jurisdiction to adjudicate Kimberly's petition, the court erred to the extent that it denied the petition on jurisdictional grounds. [Citation omitted.]

Next, the appellate court stated that the trial court was not prevented from considering the petition under the terms of the MSA. "See *Blum v. Koster*, 235 Ill. 2d 21, 35 (2009) (where MSA provides for general review of maintenance, it is unnecessary to show a substantial change in circumstances)."

Getting to the specific language in this case which again provides that the maintenance would be paid, "for a period of 60 months at which time the maintenance shall be *reviewable* upon the filing of a petition prior to the termination of the maintenance." The appellate court next was able to dig into the problems with the language used that created the ambiguity:

Given the inherent tension between the phrases "at which time," "reviewable upon," and "prior to," we find article 2.2 to be ambiguous because it is susceptible to more than one reasonable interpretation. The agreement is ambiguous as to whether, at the 60-month mark, maintenance became reviewable (as Kimberly argues) or terminated (as Charles argues). Because of the ambiguity, we must construe the MSA against Charles, since he was the party who drafted it. \*\*\* Accordingly, we determine that, under the terms of the MSA, maintenance became reviewable after 60 months and did not terminate. Therefore, Kimberly's review petition was not time-barred; indeed, without a petition for review, Charles's maintenance obligation could not have terminated. See, e.g., *In re Marriage of Rodriguez*, 359 Ill. App. 3d 307, 313 (2005) (stating that when a court orders reviewable maintenance, "[u]ntil a party petitions for review, the maintenance award shall continue as ordered").

The former husband tried to rely on parol evidence but in the end he was left with the ambiguous language in the settlement agreement.

To the language in this decision [but not the MSA], I say – brava!

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## Attorney's Fees

### Fee Contribution Actions

#### ***Shen* – Appellate Court Case Focuses on Ability / Inability Language**

[\*IRMO Shen\*](#), 2015 IL App (1st) 130733 (June 2015)

The trial court erred in ordering the husband's 401(k) retirement account liquidated to, in part, satisfy interim attorney fees. The appellate court reasoned that:

The circuit court erred when it entered an order on October 12, 2011 that ordered the husband's 401(k) retirement account liquidated to, in part, satisfy interim attorney fees in contravention of *In re Marriage of Radzik*, 2011 IL App (2d) 100374, where the court held that retirement accounts are exempt under section 12-1006 of the Code of Civil Procedure (735 ILCS 5/12-1006 (West 2010)). We therefore must reverse this order, entered on October 12, 2011. As the wife sought reversal of this order but did not indicate what relief she sought concerning the use of the retirement funds to pay the attorneys, we remand for further proceedings and relief on remand.

Regarding the standard to be used in contribution petitions, the appellate court stated:

the court did not use the wrong legal standard in deciding to deny the wife's request for contribution to attorneys fees, as the Illinois Supreme Court continues to espouse the rule from *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005), that the spouse petitioning for contribution to attorney fees must show an inability to pay and the ability of the other spouse to pay, and this was the standard followed by the court. The evidence supported the husband also did not have the ability to pay fees and so the court's denial of the wife's request for contribution was not an abuse of discretion. We affirm the portion of the dissolution judgment denying the wife contribution to her attorney fees.

Note that there is a significant body of case law critical of the so called inability / ability standard.

Next the appellate court affirmed the trial court's order that the Florida time share would be sold and that there would be a priority of payment of the proceeds to the child representative first. The appellate court reasoned that Section 506(b) of the IMDMA, as to child representative's fees, allows payment from any source, including from marital estate, such that the order regarding the time share was appropriate.

Finally, the appellate court affirmed the trial court's denial of the husband's motion to modify maintenance based on his alleged change in employment status, as there was no objective evidence of his claimed back condition other than husband's self-reporting of symptoms, and court considered husband's pattern of not paying support in its finding of bad faith.

## Collection

### ***Branit* – Collection against Inherited IRA – Inherited IRA Not Exempt / Contribution Award** ***IRMO Branit***, 2015 IL App (1st) 141297 (September 2015)

This case has been highly litigated. As part of the former wife's post-decree collection efforts, she directed three citations to discover assets to the custodian and trustee of a beneficiary IRA that the former husband inherited from his deceased mother, the former owner of the account. The former husband moved to discharge the citations alleging that the funds in his beneficiary IRA were exempt from collection under Section 12-1006 of the Code of Civil Procedure. The trial court agreed but the appellate court disagreed and reversed.

The former wife claimed that the IRA did not meet the definition of a retirement plan under the Code. It provides:

"A debtor's interest in or right, whether vested or not, to the assets held in or to receive pensions, annuities, benefits, distributions, refunds of contributions, or other payments under a retirement plan is exempt from judgment, attachment, execution, distress for rent,

and seizure for the satisfaction of debts if the plan (i) is *intended in good faith to qualify as a retirement plan* under applicable provisions of the Internal Revenue Code of 1986, as now or hereafter amended, or (ii) is a public employee pension plan created under the Illinois Pension Code, as now or hereafter amended." 735 ILCS 5/12-1006(a).

First, the appellate court found an ambiguity in the statute so that it required proper construction. Note that the Supreme Court recently held that money in an inherited IRA does not qualify as "retirement funds" for purposes of the federal bankruptcy exemption. *Clark v. Rameker*, 573 U.S. \_\_\_, 134 S. Court. 2242 (2014). Prior to *Clark* there had been a split among the Federal bankruptcy courts in this regard.

Ultimately, the appellate court stated, "We agree that *Clark* is controlling." The court explained that, "The fact that the Illinois legislature intended section 12-1006 to be used in bankruptcy cases indicates that it was meant to be the Illinois equivalent of section 522 of the Bankruptcy Code." Note that Illinois has chosen to opt out of the Federal exemption scheme and that the exemptions are per Illinois law. The appellate court then stated, "We find no indication that the legislature, in exempting retirement plans, intended to exempt a non-spouse's interest in an inherited IRA account, which objectively serves no retirement purpose." The court also found that the inherited IRA was not intended in good faith to qualify as a retirement plan under the applicable provisions of the Internal Revenue Code. The court stated that the federal statute expressly distinguishes an "individual retirement account" from an "[i]nherited individual retirement account."

Most surprisingly, the appellate court also considered the former wife's last contention – that is that even if respondent's IRA account is exempt under section 12-1006 of the Code, she could still seek to enforce the contribution award against the account under section 15(d) of the Act. She thus maintained that section 15(d) of the Act operates as an exception to section 12-1006 of the Code, and that she made no effort to enforce the contribution award under the Act. The appellate court addressed this issue although it may not have been strictly necessary to do so stating, "given the continuous nature of the postdecree proceedings between petitioner and respondent, the parties are likely to raise this issue again if we do not address it now." The gist of the opinion was then that the IRA might be subject to income withholding notice if properly done.

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