2014 ILLINOIS
DIVORCE & FAMILY LAW CASES - FINANCIAL ISSUES

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Property Cases Law:

Stock Options, RSUs and RSAs:

***Micheli* – Stock Options and RSUs: Court Should Have Granted Equal Apportionment of Unvested Options RSUs**
IRMO Micheli, 2014 IL App (2d) 121245 (July 31, 2014) ✔

Unvested Options and RSUs: While I am critical of the maintenance portion of the appellate court decision, the portion involving unvested options and RSUs was well reasoned. There have been many cases involving options but few involving unvested RSUs and RSAs. In the original judgment for dissolution the court divided assets equally including vested options. The appellate court commented:

> Despite the ambiguous language, the parties agree that the court apparently intended to modify the judgment by awarding John all of the unvested stock options and RSUs. Ellen argues that the court made no findings to explain why the unvested stock options and RSUs were treated differently than their vested counterparts.

The court then stated:

> At dissolution, a court must allocate options between the parties, even though the options' values might be unascertainable and the actual property division might occur at a later date. 750 ILCS 5/503(b)(3).

The court explained:

> Section 503(b)(3) does not mention RSUs, but the trial court initially determined that John's RSUs were marital property subject to distribution. Like stock options, RSUs are a form of deferred compensation. Upon the expiration of the restriction, an owner automatically receives the RSUs, which become fully tradable common stock. Before they vest, the owner of the RSUs receives taxable quarterly dividends generated by the company.

The decision then held:

> We agree with Ellen that the court abused its discretion in awarding John all of the unvested stock options and RSUs, because this award is unrelated to its distribution of the defined contribution retirement plans and potentially gives John a windfall.

Other Property Cases

***Schlichting* – Trial Court Abused its Discretion When it Ordered Wife to Violate LLC Operating Agreement and Transfer Her LLC Membership to Nonmember Husband When Other Viable Options Were Available**
IRMO Schlichting, 2014 IL App (2d) 140158 (September 29, 2014)
This is a lengthy opinion with a simple holding: The court's order to violate a reasonable operating agreement was an untenable resolution, particularly where other options were available. The appellate court found that this violation (as well as the trial court's misinterpretation of the buyout provisions of

an operating agreement, coupled with the court's failure to resolve the dispute so as to avoid further litigation) constituted an abuse of discretion.

The wife was a member of an LLC with four of husband's family members. Husband was not a member of the LLC, most likely for his past history of suing and countersuing his family members. Regardless, the LLC contained provisions for valuing the LLC in the event of a divorce, as well as a buyout provision. The buyout provision required the other members of the LLC to unanimously approve the buyout of a member's interest.

As part of the divorce, the trial court ultimately ordered the husband to buyout the wife's interest at the value she believed it to be worth. The appellate court reversed:

> [We] determine that the trial court clearly ordered Larisa to violate the terms of the LLC's operating agreement. Again, the operating agreement prohibited the sale of any portion of a membership interest without the unanimous written consent of the other members (section 16.1). Contrary to this provision, the court ordered Larisa to sell her membership interest to Bruce without the unanimous consent of the other members. The operating agreement also required that the LLC buy out a divorcing member's interest (sections 16.6 and 16.4). Contrary to these terms, the court did not allow the *LLC* to buy out Larisa's interest; rather, it allowed *Bruce*, a nonmember, to buy out Larisa's interest.
>
> While no Illinois case *requires* a court to distribute marital property in accordance with an operating agreement binding one or both of the parties in their business activities, existing case law, both within and outside Illinois, comes together to establish that the failure to do so, *where compliance is easily possible*, constitutes an abuse of discretion. See, *e.g*., *Shrock v. Meier*, 2012 IL App (1st) 111408-U, ¶ 23. (Emphasis added).

There was also much dispute over the value of the business. The wife contended that no valuation was needed because the buyout provisions set forth how to value the business, as well as how to address a court-resolved dispute over value if the other party to the divorce sought a higher value. The appellate court simplified the overly-complex trial court resolution.

> The court apparently entertained Bruce's view that, if the court entered a greater valuation, the LLC would, subsequent to the divorce proceedings and outside the court's oversight, require Bruce and Larisa to pay back the difference in valuation. Contrary to the parties' interpretation, the court did not need to award Bruce a membership interest in order to provide Bruce with a means by which to pursue a greater valuation.
>
> When interpreting the agreement, we must give its clear and unambiguous terms their ordinary and natural meaning.
>
> Therefore, if the court set a higher valuation, the LLC would be required to buy out Larisa at that valuation, and only Larisa would be required to pay back the LLC the difference in valuation. In other words, a divorcing member is bound by the LLC's accountant's valuation, but the divorcing nonmember gets to walk away with his or her share of the higher, court-ordered valuation.

In reversing the trial court, the court did not remand. The court simply reversed that portion and ordered the wife to pay 35% of her share of the LLC to the husband, per the valuation that he provided. The court also reversed the trial court's decision to allow the husband to retain post-decree profits on the wife's share of the business. The court reasoned that if the wife had to pay the capital difference on any buyout post-decree, then the husband should not reap the benefit of post-divorce profits.

Classification of Property, Transmutation and Reimbursement

IRMO Dhillon, 2014 IL App (3d) 130653 (November 7, 2014)
The key issues in this case were the trial court's classification of a certain account called by the appellate decision the 4863 account as non-marital property. The appellate court first provided the black-letter law which I will recite:

> Before property can be assigned or divided in a dissolution of marriage proceeding, it must first be classified by the trial court as either marital or nonmarital. *Gattone*, 317 Ill. App. 13 3d at 351; *IRMO Cecil*, 202 Ill. App. 3d 783, 787 (1990). As noted above, a presumption of marital property applies to all property acquired during the marriage, which may be rebutted by clear and convincing evidence to the contrary. See 750 ILCS 5/503(a), (b)(1) (West 2012); *Gattone*, 317 Ill. App. 3d at 351-52. Any doubts as to the classification of property will be resolved in favor of finding that the property is marital property. *Gattone*, 317 Ill. App. 3d at 352. One of the listed categories of exceptions is property acquired by gift, legacy or descent. 750 ILCS 5/503(a)(1) (West 2012). Thus, property acquired during the marriage by one of the spouses *by gift* is generally the nonmarital property of the spouse that received the gift.

The appellate court then stated:

> In the present case, although husband occasionally referred to the large deposits that were initially made into account 4863 as a gift from his father, it is clear from the record and from husband's arguments before the trial court and this court that husband is not contending that the funds were a gift. Rather, husband is contending that the funds always belonged to his father and were only placed in account 4863 as a matter of convenience so that husband could transfer money on his father's behalf and so that husband's father would have money available to him when he was living or staying in the United States. Thus, we do not believe that the gift presumption would apply in this case and that the only presumption that is applicable here is the marital presumption. See *IRMO Hagshenas*, 234 Ill. App. 3d 178, 186-87 (1992) (noting that in a situation where both the gift presumption and the marital presumption apply to the property to be classified, the two presumptions cancel each other out, and a simple manifest weight of the evidence standard applies). Husband seems to recognize as much as husband acknowledges in his appellate brief that it was his burden to show by clear and convincing evidence that the funds in question were directly traceable to his father's money.

The appellate court then ruled that the trial court's conclusion that the funds in the 4863 account were non-marital was against the manifest weight. This was because the trial court incorrectly placed the burden on the wife to establish the funds were marital property, despite the fact that the account was opened during the marriage.

Next, the court reviewed and applied the evidence:

> The main evidence that husband presented to establish that the funds belonged to his father and were placed in the account as a matter of convenience for his father was husband's own testimony, which the trial court found to be completely lacking in credibility. Husband's testimony, therefore, could not have served as the basis for the finding that the funds in account 4863 were nonmarital property. In addition, as noted previously, the documentary evidence presented by husband in support of his claim of nonmarital property was completely insufficient to establish that contention. The bank statements that husband provided showed only that the funds in question made a brief stop in the joint account of husband and his father (or husband and his sister) before being transferred shortly thereafter to account 4863. Husband provided no further documentation to support his claim, nor is there any dispute in this case that the lack of financial records was solely attributable to husband. Furthermore, the fact that husband tendered to wife in discovery a tax return that failed to show over $10,000 that husband had received in interest income from the account serves to bolster the trial court's conclusion that husband had no credibility. A copy of the actual tax return received by wife from the IRS listed the $10,000 as interest income. The actual return provides some indication that the funds belonged to husband and not to husband's father, as husband was the person who had apparently received the interest and was claiming the interest for tax purposes. *** It follows, then, that the remaining funds that were added to the account over time during the marriage and which primarily consisted of husband's paycheck and work bonuses remained marital property when they were added to the account. The trial court erred in concluding to the contrary.

So, the appellate court reversed the finding by the trial court that the $301,607 in the account was marital property since "the presumption" was not rebutted by clear and convincing evidence.

This opinion also addresses dissipation. But the most important portion of the decision involved the classification issue.

Non-Marital Assets deposited into a Checking Account and Transferred to Stock Trading Account in Husband's Sole Name Were Not Transmuted into Marital Assets Since Traced by Clear and Convincing Evidence

***Foster* – Non-Marital Assets deposited into a Checking Account and Transferred to Stock Trading Account in Husband's Sole Name Were Not Transmuted into Marital Assets Since Traced by Clear and Convincing Evidence ✔**

IRMO Foster, 2014 IL App (1st) 123078 (August 22, 2014)

During the 1990's, the husband received an inheritance from the death of a cousin that provided substantial income to him, including funds from oil well leases and natural gas pipelines. The husband had a checking account in his sole name but the account contained marital funds and was used to pay marital expenses. The Court did find that account to be a marital account, and the husband did not contest this on appeal. The husband began receiving large payments from the oil well leases that he inherited, which he deposited into this checking account. Days later, he would transfer these sums to a stock trading account in his sole name.

The wife contended that once the inheritance funds were deposited into the checking account, they became marital funds. The trial court agreed. The appellate court reversed. The appellate court noted that the wife did not argue transmutation or reimbursement on appeal. She relied entirely on *Wojcik* in asserting that because his non-marital inheritance was placed into the same account as marital income, all later assets acquired from the same account must be marital.

The appellate court pointed out that this argument ignored the fact that there is no presumption that commingled property is always transmuted into marital property. In any event, the appellate court's consideration was limited to whether there was transmutation of the husband's non-marital inheritance because that case involved an analysis similar to one involving alleged transmutation (commingling plus loss of identity of contributed funds). The appellate court stated: "James contends his nonmarital income was not transmuted into marital property as his inheritance income did not lose its identity as his nonmarital property. We agree."

The appellate court then stated:

> The fact James was the sole signatory of the Chase checking account and Scottrade account further evidences his articulated intent to keep his nonmarital assets separate from Yvonne. Cf. *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, 43 (no evidence the husband intended to keep his nonmarital assets separate as the wife's name was on most, if not all, of the personal and business checking accounts). In addition, the fact the Chase checking account and Scottrade account were held in James's name alone, along with James's testimony that he never intended Yvonne to receive his nonmarital inheritance income, demonstrates James's intent to use the Chase checking account as a conduit for his nonmarital inheritance income. See *Steel*, 2011 IL App (2d) 080974, 76; *Heroy*, 385 Ill. App. 3d at 673. As such, James's nonmarital income never lost its identity and, therefore, was never transmuted into marital income. 750 ILCS 5/503(c)(1) (West 2012).

The appellate court noted that the transfers out of the account were less than the deposits into the account. But this not change the traceability of the assets. It remains clear, according to the appellate court, that the husband's intent was to use some of the inheritance on marital lifestyle, while ensuring that he maintained a non-marital portion of his inheritance separate from the marital estate.

The appellate court reiterated the burden of proof on traceability as the "clear and convincing" evidence standard. The wife argued that by placing the non-marital funds into an account with marital funds and then by creating a stock trading account with those combined funds, there was transmutation. The appellate court rejected the argument outright:

> On one hand, James did not transfer his nonmarital inheritance income one day after receiving it like the wife in ***Wojcik*** [2nd Dist., 2005]. On the other hand, unlike the husband in *Wojcik*, James was able to trace his nonmarital inheritance income from the Chase checking account to the Scottrade account by clear and convincing evidence, as James produced documentary evidence of the transfer of the funds from one account to the other. In addition, James did not move funds between other accounts (besides the ultimate transfer to the Scottrade account) or purchase certificates of deposit with the funds contained in the Chase checking account. What this case and the other transmutation cases illustrate is that whether the funds are traceable is a fact specific inquiry. Based on the evidence presented at trial, in conjunction with the trial court's

> factual findings, James established by clear and convincing evidence that the Scottrade account was his nonmarital property.

Because the trial court made awards of martial estate allocation and contribution to attorneys' fees based upon its determination that the stock trading account was marital (even though the trial court had a vastly lower amount in the stock trading account), the appellate court reversed and remanded for further consideration by the trial court on the issues of allocation of the marital estate, maintenance award, and contribution to attorneys' fees.

Further, the trial court did not find dissipation by the husband. The appellate court affirmed based in large part on the finding that the stock trading account was nonmarital. However, the court did advise that, on remand, the trial court may consider whether the husband dissipated his own nonmarital assets when making a determination of the allocation of the marital estate.

Comment: Recall that *Wojcik* involved the trial court's classification of a Harley Davidson as marital property:

> At the time he initially received the inheritance, there is no question that the property was nonmarital. 750 ILCS 5/503(a)(1) (West 2004). However, after receiving this money, Paul deposited it into a bank account jointly held by the parties. Apparently, the funds were then transferred between various accounts and certificates of deposit. Paul testified that he was not sure whether the original account that he deposited the money into was still open at the time of trial. Paul testified that, several months after receiving the inheritance, he purchased the motorcycle. Although Paul testified that he believed that he had used the inheritance money to purchase the motorcycle, Paul introduced no documentary evidence to show that the specific funds inherited were segregated and ultimately used for the purchase. As Paul had the burden to prove that the motorcycle was nonmarital, it was incumbent upon him to establish that he did not intend to make a gift to the marital estate at the time he deposited the inheritance into the parties' joint checking account. See *Hegge*, 285 Ill. App. 3d at 141.

***Akbani* - Normal Stresses of Divorce Do Not Rise to the Level of Duress in Determining the Validity of a Settlement Agreement. / Later Agreement Resolving Remaining Issues is Not Binding on the Parties Given Attorney Review Provision**

IRMO Akbani, 2014 IL App (5th) 130266 (August 26, 2014):

The parties sought to dissolve a ten-year marriage. They had no children, but they did have two successful classic car businesses. Anxiety, business choices, and an affair all boiled over into a divorce situation. The husband, who claims to have been so upset over the failing marriage, wanted to give the wife anything in the hopes of saving the marriage. The wife claims that the husband told her that if she wasn't happy with the marriage, she could leave. She chose to leave and the husband prepared a settlement agreement to dispose of their homes and car businesses.

In January of 2009, the trial court, after a hearing, found the parties were intelligent and financially-aware enough to enter into a binding agreement. However, the husband had second thoughts:

> Petitioner's second thoughts about the 2008 agreement he wrote and signed are not enough to set it aside. It is well established that the law favors peaceful settlement of marital dissolution disputes. *Guyton v. Guyton*, 17 Ill. 2d 439, 444, 161 N.E.2d 832, 835 (1959). Accordingly, we find the trial court did not err in finding the 2008 agreement enforceable.

The husband, who was the petitioner, argued that he was under duress when the agreement was entered into, that the parties were under a mutual mistake of fact, and that the agreement was unconscionable:

> Duress has been defined as including the imposition, oppression, undue influence or the taking of undue advantage of the stress of another whereby one is deprived of the exercise of his free will." *** It is generally accepted that "stress is common in dissolution proceedings." *** Stress alone does not prove duress. *** Even the stress of possibly losing custody of a child does not demonstrate that one lacked the ability to make a voluntary decision. *** The person asserting duress has the burden of proving by clear and convincing evidence that he was bereft of the quality of mind essential in making the contract. [citations omitted.]

The husband simply could not show duress. He was able to draft an agreement that cogently set out the financial rights and responsibilities of the parties – and even granted himself the more successful of the two classic car businesses. This also was why the Court felt that the agreement was not unconscionable.

> Petitioner submitted a spreadsheet in which he claims the actual division of property per the 2008 agreement left him only 17.35% of the marital assets, while respondent garnered 82.65% of the assets; however, petitioner's exhibit 37, submitted during the first hearing, shows he received 40.17% of the parties' assets, while respondent received 59.83% of the assets. Our own review of the record shows that the division of assets is not so "totally one-sided" as to rise to the level of unconscionability necessary to overturn the trial court's ruling. See *In re Marriage of Foster*, 115 Ill. App. 3d 969, 973 (1983).

Finally, there simply cannot be a mutual mistake of fact because the husband's post-agreement actions indicate that he knew exactly what the agreement entailed:

> Here, the record shows that petitioner took no action to contest the terms of the 2008 agreement until a week before the January 15, 2009, hearing. Between April 2008, when the parties signed the agreement, and January 2009, both parties proceeded as if the agreement was in effect. Respondent moved out of the marital home in O'Fallon, took up residence at the less expensive condo in Charlotte, and took control of the Charlotte business, while petitioner continued to own and operate the more profitable St. Louis business and live in the more expensive O'Fallon residence. Pursuant to the agreement, petitioner filed for divorce in July 2008, alleging irreconcilable differences. Petitioner continued to pay the mortgage on the O'Fallon residence until October 2008, thereby contradicting his own argument that he thought he only had to pay the mortgage until May 2008.

Mediated Agreement and Attorney Review Clause: In May of 2009, the husband filed an amended petition for dissolution of marriage, seeking further allocation of debts and his request for maintenance. The wife countered with a petition for rule to show cause, alleging the husband's non-compliance with the 2008 agreement. The parties went through voluntary mediation with a retired judge and reached an

agreement in mediation on all pending matters. The mediated agreement included a clause that subjected the agreement to review and consultation with their attorneys. The agreement was then reduced to formal writing, and one side rejected the agreement after consulting with her attorney.

In finding that the 2010 agreement was not binding on the parties, the appellate court commented:

> In the instant case, the attorney review provision is plain and unambiguous in that, as a term of the contract, each party is allowed the opportunity to review and consult with his or her respective attorney. Parties may specifically provide that negotiations are not binding until a formal agreement is executed. . . . The purpose of giving such broad latitude to an attorney is to give the parties who may not be sophisticated in such matters a chance to have their attorneys scrutinize the offer prior to final acceptance. *Olympic Restaurant Corp. v. Bank of Wheaton*, 251 Ill. App. 3d 594, 601 (1993).

In short, the best practice to be consistent and clear with clients heading to mediation:

> Represented parties cannot agree to proceed pro se and then include an attorney review clause in their mediation agreement. If the mediation session is truly meant to result in a binding marital settlement agreement, the parties should specifically state they are agreeing to proceed pro se, and an attorney review clause should not be included in the agreement, or counsel should be present, participate, and sign the resulting memorandum.

Premarital Agreements

***Henrich*: Premarital Agreement's Fee Shifting Ban as to Child Related Issues Violates Public Policy and Unenforceable as to Those Issues, But... ✔**
IRMO Heinrich, 2014 IL App (2d) 121333 (March 19, 2014)
The parties' premarital agreement's attorney-fee-shifting ban as to child-related issues violated Illinois' public policy and was unenforceable as to those issues. But the remainder of the agreement, pursuant to its severability clause, remained enforceable.

Child Support

Initial and Post-Divorce: Establishing Amount of Child Support

What Constitutes Income and So Called Double Dipping?

***Pratt* – Restricted Stock and Stock Options Constitute Income for Support Purposes Despite Being Allocated in Divorce as Property and in Spite of Clause in MSA ✔**
IRMO Pratt, 2014 IL App (1st) 130465 (August 12, 2014 - Corrected opinion posted August 29, 2014)
This part of this decision is an example of bad facts making "bad law" – at least in the First District.

The appellate court stated in somewhat shocking breadth:

> Murray's claim that the MSA contains a provision that "[a]ll restricted stock and stock options awarded to Murray or Sharon as an award of his/her share of the marital estate

> *** shall not be deemed income for child support purposes" is true. This provision precluding certain sources of income from consideration for child support purposes is against Illinois public policy and is thus void. We shall not enforce it.

I disagree. In any event, keep in mind that the decision is a limited one, merely affirming the ability of the trial court to modify the decision given the circumstances – "The trial court here acted within its authority when it modified that provision and included earnings from Murray's sale of restricted stock options as income for child support purposes."

The crux of the decision regarding the so called double dipping argument will be quoted at some length:

> Murray contends, however, that it is fundamentally unfair to include this income because he was awarded the restricted stock options as marital property in the dissolution judgment and, by receiving a portion of the income from the sale, Sharon is "double dipping." He argues that Sharon received her portion of the stocks as marital property and now she is receiving as child support a portion of Murray's income from his share. This is not "double dipping." The trial court can consider marital property as income for child support purposes, even if the income comes from vested stock options awarded as marital property to one of the parties. *In re Marriage of Colangelo*, 355 Ill. App. 3d 383, 390 (2005); see also *In re Marriage of Klomps*, 286 Ill. App. 3d 710, 714-15 (1997).
>
> Murray disagrees that *Colangelo* applies, arguing that unlike the stock options at issue here, the deferred compensation in *Colangelo* was "not valued, not listed in the agreement, not separately split between the parties, nor separately saleable." We note that Murray does not support this argument with any citations to authority. Nonetheless, the court in *Colangelo* did not base its determination on the type of deferred compensation at issue before it, but on the fact that deferred compensation and retirement benefits are income and they are not listed in the Act as an applicable deduction from income. *Colangelo*, 355 Ill. App. 3d at 392. The trial court acted correctly and did not abuse its discretion in finding that Murray's earnings from restricted stock option sales in 2011 constituted income for child support purposes.

Shared Parenting Time or Reverse Child Support

***Turk* – 2014: Illinois Supreme Court: Once Again the Custodial Parent Can be Ordered to Pay Support to Non-Custodial Parent ✔**
IRMO Turk, 2014 IL 116730 (June 19, 2014)
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). This case cited the first case but not the later. But it also pointed out one case that was not in my brief bank – a 1968 decision.

> That custodial parents may be required to pay child support to noncustodial parents where circumstances warrant it has long been recognized by the courts. *Elble v. Elble*, 100 Ill. App. 2d 221 (1968), decided over 40 years ago, is a case in point. There, the father had custody of the child, but the child preferred to live with the mother and did. On a petition for modification, the circuit court refused to change custody to the mother, but ordered the father, who was the custodial parent, to pay $100 per month in child support for the duration of the child's minority. The appellate court affirmed, holding that the

> language of the version of the statute then in effect was broad enough to authorize the trial judge's order. Id. at 226.
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> ¶ 27 To the same effect is *In re Marriage of Cesaretti*, 203 Ill. App. 3d 347 (1990). Applying the current version of the statute, the appellate court in that case rejected the father's contention that once legal and physical custody is placed in one parent, that custodial parent has no obligation to pay child support to the noncustodial parent. Id. at 356. Taking into account the parents' relative financial circumstances and the amount of time the child would be spending with each parent, the appellate court upheld the circuit court's order requiring the father to pay $75 per week in child support notwithstanding the fact that temporary custody of the child had been awarded to him..

The Court reasoned properly:

> Sometimes, as under the agreed custody judgment entered in this case, a parent who is technically noncustodial may have visitation rights which place the child in that parent's care for periods that rival those of the custodial parent and at commensurate cost. If Steven were correct and status as the custodial parent automatically precluded one from having to make any child support payments to the other parent, the noncustodial parent could end up having to pay a significant portion of the costs of raising the child without any regard to that parent's financial resources and needs or how they compared to the financial resources and needs of the custodial parent. That may not be problematic where the noncustodial parent happens to be the wealthier of the two, but where, as here, the noncustodial parent appears to have significantly fewer resources to meet the substantial support costs which are sure to arise from the extensive visitation schedule, disqualifying the poorer parent from obtaining any financial assistance for child care from the wealthier parent based solely on the poorer parent's classification as noncustodial would not only place an unfair burden on the poorer parent, it could also leave that parent with insufficient resources to care for the child in a manner even minimally comparable to that of the wealthier parent.
>
> Section 505(a) was intended to protect the rights of children to be supported by their parents in an amount commensurate with the parents' income. *In re Paternity of Perry*, 260 Ill. App. 3d 374, 382 (1994). Under Steven's approach, a child could well end up living commensurate with the parents' income only half the time, when he or she was staying with the wealthier parent. If custodial parents were categorically exempt from child support obligations, the wealthier parent's resources would be beyond the court's consideration and reach even though the visitation schedule resulted in the child actually residing with the poorer parent for a substantial period each week. This could be detrimental to the child psychologically as well as economically, for the instability resulting from having to "live a dual life in order to conform to the differing socio-economic classes of his or her parents" may cause the child to experience distress or other damaging emotional responses.

The Supreme Court cited case law from other jurisdictions regarding the ability of the court to require the custodial parent to pay child support. So, the critical portion of the reasoning of our Supreme Court's decision stated:

> The concern has been expressed that if we sanction awards of child support to noncustodial parents, we open the door to abuse by spouses who will use requests for modification of child support as a subterfuge for obtaining additional maintenance. We note, however, that the criteria for awarding and modifying child support are clearly set out in the statute. See 750 ILCS 5/505, 510 (West 2012). If those criteria are applied properly by the lower courts, and we must assume they will be, any abuse should be preventable. Moreover, and in any case, speculation of this kind cannot justify failing to follow the statute as written. *By its terms, section 505(a) does not restrict child support obligations to noncustodial parents*. It is axiomatic that we may not depart from a statute's plain language by reading into the law exceptions, limitations, or conditions that the legislature did not express (citations omitted), nor may we rewrite the law to make it consistent with our own idea of orderliness and public policy.

The Supreme Court opinion had two special concurrence. Ultimately the Supreme court affirmed reversed the trial court's judgment and remanded with directions. The conclusion by the Illinois Supreme Court was:

> [W]e affirm that portion of the appellate court's judgment which upheld the authority of the circuit court to order Steven to pay child support and remanded to the circuit court for an evidentiary hearing regarding the amount of child support Steven should be required to pay. We reverse that portion of the appellate court's judgment which upheld the circuit court's modification of the support order requiring Steven to pay the full amount of any of the children's medical and dental expenses not covered by insurance. On remand, the circuit court is directed to revisit that question when it reconsiders Steven's child support obligations.

Note that the appellate court reversed the portion of the circuit court's judgment which ordered the former husband to pay her child support and remanded the cause to the circuit court for an evidentiary hearing, with directions for the court to "clearly explain the basis for any support awarded." *** The Supreme Court commented that, "Having prevailed on this point in the appellate court, there is no need (or legal basis) for Steven to pursue it again in our court. We cannot do more for him than the appellate court has already done."

Comment by GJG: The Family Law Study Committee package – at least in its current guise – would essentially codify the *Turk* decision.

Smith **– Trial Court Abused Discretion in Awarding Guideline Support Where Parties Shared Custody**

IRMO Smith, 2012 IL App (2d) 110522 (December 18, 2012)

This is one of those rare decisions where the appellate court reversed the trial court when it awarded guideline support. But in this case custody was shared under the JPA – neither party was named a residential parent and each received "visitation." The mother had been ordered to pay child support to the father per the guidelines. The appellate court commented:

> Second, the rule of law "announced" in *Reppen-Sonneson* makes it clear that the trial court can use its discretion in choosing how to determine child support when custody of the child(ren) is shared. See *Reppen-Sonneson*, 299 Ill. App 3d at 695 ("When custody is shared, the court may apportion the percentage between the parents *(In re Marriage of*

Duerr, 250 Ill. App. 3d [232,] 238 [(1993)]), or may disregard the statutory guidelines in the Act and instead consider the factors listed in section 505(a)(2) (*In re Marriage of Steadman*, 283 Ill. App. 3d 703, 708-09 (1996)).").

The appellate court concluded that because the trial court essentially blindly applied the guidelines, there was an abuse of discretion.

Steadman and *Duerr* involved split custody situations. *Reppen-Sonneson* involved joint legal and physical custody. And recall that the bookend to this case is *IRMO DeMattia*, 302 Ill. App.3d 390, (4th Dist. 1999) holding that close to equal parenting time where one parent is named the primary residential parent does necessarily equate to a deviation case.

Support Modification or Enforcement

Support Enforcement Generally

***Collins v. DHFS ex rel Paczek* – Illinois Can Enforce, But Not Modify, a Support Order When the Obligor, Obligee, and Minor Children No Longer Reside in Illinois**
Collins v. Department of Health & Family Services ex rel. Paczek, 2014 IL App (2d) 130536 (June 26, 2014)

Illinois entered an original child support order as well a later order providing that a mother would contribute certain percentages to her child's health insurance, uninsured medical expenses, and travel expenses for the child to see the father during visitation. The mother and the child moved to Tennessee, and the father later relocated to Ohio. After the father moved, he filed in Illinois a motion to reduce support due to loss of employment and a petition for a rule to show cause against the mother for her failure to contribute to the medical and travel expenses. The trial court *sua sponte* dismissed the pleadings after learning that no party remained in Illinois and ruled that the proceedings should proceed in Tennessee. The appellate court *reversed* the order dismissing the *petition for a rule to show cause* because, under the Uniform Interstate Family Support Act (UIFSA), 750 ILCS 22/101, et seq., Illinois maintains continuing exclusive jurisdiction to enforce its own orders. But , Illinois did not have jurisdiction to *modify* a support order when neither the parties nor the child remain in the state.

Support Enforcement and $100 Per Day Penalty

***Murray* – Governmental Entities Exempt from $100 Per Day Penalties under Tort Immunity Act**
IRMO Murray, 2014 IL App (2d) 121253 (June 11, 2014) Not yet.
This local case involved $100 per day penalties involving McHenry County Conservation District. The Conservation District moved for dismissal, arguing that the statutory penalty was tantamount to a punitive award, which is barred by section 2-102 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-102)). The trial court capped the award at $50,000 based on the recent amendment to the Section 35 of the Income Withholding Act – where the limits were $10,000 per violation. The conversation District argued that the penalty was punitive and that it had immunity under Tort Immunity Act.

The appellate court ultimately ruled that Section 2-102 of the Tort Immunity Act conferred immunity from the $100-per day penalty because the penalty is "punitive" and reversed the trial court's decision.

The appellate court's conclusion was:

> Common-law punitive damages are uncertain while the penalty prescribed by section 35 is definite, but contrary to Jessica's assertion, their relative predictability does not render the former punitive and the latter compensatory for purposes of section 2-102 of the Tort Immunity Act. The overall character of both is punitive. *Chen* does not compel this court to deviate from the rationale of *Paulson*.

Comment: I disagree. Reading *Chen* does lead to a different conclusion.

Support Modification

***Pratt* – Variety of Support Issues Addressing Including Arguments for One Time Income, Extracurricular Activities:** 10-14.1
IRMO Pratt, 2014 IL App (1st) 130465 (August 12, 2014)
Pratt is discussed above regarding what constitutes income and the so called double dipping argument.

The former husband appealed the trial court's order modifying his child support payments to $4,697 per month and awarding the former wife $25,000 in attorney fees. On appeal, the father argued that the trial court erred in modifying his child support payments because it made errors in calculating his income for support purposes; and it failed to consider his former wife's obligation to support the children as well as the financial impact of her new husband living in her household. The appellate court affirmed.

The parties had entered into a 2007 judgment for dissolution of marriage incorporating their settlement agreement. The settlement agreement provided for payment of unallocated support the amount of $4400 per month for 48 months at which time the right to unallocated support would terminate. Additionally, the father would pay 50% of the gross of any bonus he received minus withholding for Medicare. The MSA further provided that "[a]ll unallocated maintenance and family support payments shall terminate earlier and immediately in the event of SHARON's death, remarriage, or co-habitation on a continuing resident conjugal basis and upon MURRAY's death."

The parties agreed that one of their sons, who has special needs, would live with father and the other three children would live primarily with mother and stay with father one-third of the time. The MSA set forth the amount of support which was based, in part, on the father's anticipated gross income from his employment at Kraft Foods (Kraft) of $172,500 (which includes base pay plus bonus), and the mother's earned income from self-employment in 2006 of $23,600.

In May 2010 mother filed a motion modify and sought guideline child support, that the father be required to pay all uninsured health care expenses, that he be required to pay various extracurricular expenses, etc. Hearing was held in November 2001 and the parties filed cross-motions to reconsider. The trial court granted the motions to reconsider and the hearing focused then on the father's income in 2011. In the amended order of July 2012, the trial court noted language of the marital settlement agreement that, "obviates any need to show a substantial change of circumstances before the child support aspects of the Judgment may be modified." The MSA provided that upon termination of maintenance "Murray shall pay to Sharon child support pursuant to the guidelines set forth in" the Act."

The appellate court then noted the following decision from the trial court:

> At the hearing, the trial court found that Murray's base salary for 2011 was $153,735 and he received bonus income of $20,887. It also found that Murray received dividends from his non-retirement Vanguard holdings and unvested restricted stock from Kraft in the amount of $918 for the first quarter of 2011. The trial court then multiplied the amount by four to estimate the total for the year ($3,672). It further found that Murray took a one-time IRA distribution of $5,000 in the first quarter of 2011 and "contributed heavily to his retirement accounts since the divorce." The trial court noted that as of July 1, 2010, his financial disclosure statement showed more than $1 million on deposit in retirement funds. Murray also "converted a substantial portion of a traditional IRA into a Roth IRA in 2010, even though doing so increased his income taxes by more than $70,000." Finally, the trial court found that certain restricted stock vested in 2011 and Murray exercised five sets of stock options that were awarded in prior years, all of which resulted in income to him.

The trial court determined that the father's total gross income for 2011 was $254,267 and after running a FinPlan analysis, it found that his net income for child support purposes was $176,146. Using the 32% guidelines for three children, the trial court ordered support for the three minor children of $4,647 per month. After the son's graduation, the amount reduces to $4,110 per month and after the daughter's emancipation, it further reduced support to $2,936 per month until the youngest daughter's emancipation.

Regarding payment for the children's activities, the trial court required:

> "b. Murray shall pay $2500 by May 1st each year to Sharon as his share of the cost of their daughters' summer activities (this amount includes any camp costs). Sharon will pay any additional summer activity costs. After Melissa emancipates, Murray's contribution will be reduced to $1250 for Heather's summer activities.
>
> c. Murray shall additionally pay Sharon the flat sum of $200/month year-round toward the costs of their minor daughters' school-year activities (other than those covered by subparagraphs d, e, or f). Sharon will pay any additional costs. When Melissa emancipates, Murray's monthly payment will be reduced to $100/month. Murray's last monthly payment will be due the month Heather emancipates."

The trial court further ordered that the parties split 50/50 the costs of required school fees, books, supplies, uniforms or equipment, and the costs of graduation, senior prom and other school-related celebrations. It also ordered Murray to contribute 80 percent of the orthodontia expenses unreimbursed by insurance "in recognition of his larger income."

Finally, the trial court ordered that pursuant to the MSA Murray's obligation to pay unallocated support and maintenance terminated on March 1, 2010, due to Sharon's cohabitation. It ordered Sharon to reimburse Murray $22,500 within one year for the gross bonus payment made to her in 2010. The trial court also found that "[e]ffective May 19, 2010, Murray shall owe Sharon the difference between the $4400 in child support he already has paid monthly and any additional amounts due under this order. The $22,500 amount Sharon owes Murray shall be reduced by any additional amounts owing under this paragraph for child support."

10-14.1: The court addressed extra-curricular activities and the like:

> In determining support payments, the trial court may consider the children's standard of living had the marriage not been dissolved even though this level of support may extend beyond base financial need. *In re Marriage of Bussey*, 108 Ill. 2d 286, 297 (1985). Participation in these activities would have been the norm for Murray's children had he and Sharon not divorced. Murray protests that the amount he must pay is more than what was actually expended in a given year; however, in the future the expenditures may amount to more than his required payments. As to its determination that he pay 80 percent of the orthodontia expenses unreimbursed by insurance "in recognition of his larger income," the trial court did not err. Although child support is the obligation of both parents, if one parent earns a disproportionately greater income than the other he or she should bear a larger share of the support.

Post-High School Educational Expenses

Aptitude

***Baumgartner* – 2014: Petition to Enforce Obligation to Pay for College Properly Denied when Aptitude Not Shown ✔**
IRMO Baumgartner, (*Baumgartner III*), 2014 IL App (1st) 120552 (March 31, 2014)
Recall the 2010 *Baumgartner* Illinois Supreme Court ruling that a child being jailed was not a defense to a 513 petition. And recall the original 2008 case addressing what constitutes income, among other things.

In this later *Baumgartner* case the appellate court affirmed the trial court's denial of the petition seeking enforcement of the provision for payment of their son's college expenses as well as affirmed the trial court's termination of that obligation. The appellate court ruled that the trial court correctly determined the son was emancipated and lacked the desire and ability to pursue a college education. Further, her request for an adjudication of indirect criminal contempt against respondent was properly dismissed in view of petitioner's failure to establish any court order that respondent violated.

Regarding case law involving criminal contempt:

> To be found in indirect criminal contempt requires "(1) the existence of a clear court order, and (2) the willful violation of that order." *People ex rel. City of Chicago v. Le Mirage, Inc.*, 2013 IL App (1st) 093547-B, ¶ 53. To satisfy the first element, the would-be contemnor must have received fair and precise notice of what the order prohibited. *Le Mirage, Inc.*, 2013 IL App (1st) 093547-B, ¶ 53.

Modification

***Saracco* – Modification of Post-High School Educational Expenses / Aptitude Shown Despite Poor Grades – But See Rewrite Provisions of §513 Law ✔**
IRMO Saracco, 2014 IL App (3d) 130741

One issue in this case is something that SB 57 had clarified in terms of restating what was essentially existing law: More specifically PA 99-90, effective January 1, 2016, provides at Section (f):

> Child support of children as provided in Section 513 after the children attain majority, *** may be modified upon a showing of a substantial change in circumstances.

Whether the Was a Substantial Change in Circumstances: The divorce judgment reserved the issue of college contribution. A post-decree order regarding one of the parties' children provided that mother would be responsible for 60% of his college expenses and father would be responsible for 40% of college expenses. The father was disabled (with his income consisting of disability income totaling $35,000) and the mother was employed earning a gross income after paying child support of $68,960.

The appellate court first noted:

> We have held that the pertinent question in determining whether to grant a petition for modification of a provision for payment of college expenses is whether the moving party has shown a substantial change in circumstances since entry of the original provision. *In re Marriage of Loffredi*, 232 Ill. App. 3d 709, 714 (1992).

The former husband argued that there was *not* a showing of an existence of a substantial change. The appellate court agreed. The appellate court ruled that the trial court erred in terminating mother's required contribution toward son's college expenses where the trial court did not specifically find a substantial change in circumstances, and the evidence did not support a substantial change. The son was an average student who accepted all available types of financial assistance. Neither his strained relationship with his mother, nor his decision not to work during college (consistent throughout college career) alone supported the finding of a substantial change in circumstances. The appellate court rejected the argument that the disparity between the parties' incomes had substantially narrowed:

> "[E]ven assuming that petitioner only recently started receiving the additional $11,000, the disparity between the parties' income is still significant. Thus, we do not believe a increase in petitioner's income from $24,000 to $35,000 purportedly since the original contribution order constitutes a "substantial change in circumstances" in light of the fact that respondent's income is still almost double that of petitioner."

Grades / Aptitude: Regarding the issue of the son's grades, the appellate court commented:

> Again, we hold the manifest weight of the evidence establishes that Dino's grades were "average." Moreover, we do not believe a cumulative GPA in the lower 2.0 range constitutes a "substantial change" for purposes of modification. Dino explained his grades are Bs and Cs. There is no evidence that Dino was an A student and suddenly changed to a C student. We also find it significant that according to respondent, Dino's grades have "come up a little bit."

And there was one other snippet of interest especially in light of the PA 99-90 amendments.

> Specifically, Dino's cumulative GPA hovered around the lower 2.0 region. *During the first hearing, the trial court noted that "there are plenty of students out there who do not have 4.0 averages that do very well in life." We agree*. While we acknowledge Dino was asked to leave St. John's for a semester, we call attention to the fact that he enrolled in

> three classes at a community college where he received the grade of A in all three classes. We also note that respondent acknowledges that Dino's grades have gotten better; however, they are not at the level she believes appropriate and thus believes Dino should attend a different school. The question of what school Dino should be attending is moot. The trial court correctly pointed out that Dino has been attending St. John's for over three years.

But, PA 99-90 (effective 1/1/16) provides:

> (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.

So, this will change things. Will this trump our provisions already in settlement agreements that may have provided a lower flood for grades? Anticipate that the "fails to maintain a cumulative "C" average except for good cause shown will turn to the standard. One wonders what the impact would be on this case.

Maintenance Cases

Initial Divorce

Indefinite Maintenance

***Foster* - Trial Court Did Not Err in Considering Payor's Non-Marital Income in Its Determination of Maintenance**
IRMO Foster, 2014 IL App (1st) 123078 (August 22, 2014)

The wife was a substitute teacher in the early days of the marriage, but later did not work and stayed at home. The husband owned a business, but then went into teaching. During the 1990's, the husband received an inheritance from the death of a cousin that provided substantial income to him, which the couple then used to support their higher than average lifestyle. The trial court awarded maintenance to the wife in the amount of 30% of the husband's gross income – whether marital or non-marital income.

In upholding the trial court, the appellate court reasoned:

> In determining the amount of maintenance, a trial court should consider the parties' income at the time of dissolution as well as their potential incomes. *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 161 (1993). Accordingly, a spouse is entitled to maintenance in an amount sufficient to maintain the standard of living the parties enjoyed during the course of the marriage if the providing spouse has the means to provide for the other spouse without compromising his own needs. *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 774 (1998).

The appellate court clearly noted that Section 504 of the IMDMA does not, in any way, define income, or otherwise exclude non-marital income or assets from the determination of maintenance awards:

> The statute itself does not state the maintenance must be paid only from marital income. In fact, section 504(a) does not differentiate between marital and nonmarital income, it merely states "maintenance may be paid from the income or property of the other spouse." Id. In addition, the statute requires the trial court to consider as one of the relevant factors "the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance." 750 ILCS 5/504(a)(1) (West 2012).

Note that the appellate court also upheld the percentage award of 30%, specifically commenting, "The trial court's order indicates that James's failure to file income tax returns since 2007 prevented it from calculating his net income with more attuned accuracy."

Comment: Consider a quote in this case:

> In determining the amount of maintenance, a trial court should consider the parties' income at the time of dissolution as well as their potential incomes. *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 161 (1993).

Then compare it to the following quote from the next case discussed:

> Ellen cites no authority for the proposition that maintenance should be an equitable distribution of the supporting spouse's income after the marriage dissolution.

***Micheli* – Trial Court Should Have Considered Cap on Bonuses in Awarding Maintenance ✔;**
IRMO Micheli, 2014 IL App (2d) 121245 (July 31, 2014)
Maintenance Amount: *Micheli* involved a 24 year marriage and the trial court awarded maintenance of $3,700 per month plus 20% of future bonuses. The appellate court ultimately ruled that the percentage should be capped. This was somewhat similar to what I have referred to as a "terraced" approach to setting maintenance per the previous *Dowd* decision. But recall that *Dowd* was a case that was generous to the wife in terms of the maintenance on base while it provided the percentage of bonuses as being significantly less than generous.

Key language had stated:

> We agree with John that the maintenance award is an abuse of discretion to the extent that it includes an uncapped amount based on a percentage of his future bonuses. Ordering John to pay 20% of his bonuses as uncapped maintenance sets up a potential windfall for Ellen and has no evidentiary relation to her present needs or the parties' standard of living during the marriage. On remand, the trial court should recalculate the monthly maintenance amount or at least cap the amount from John's future bonuses. If the trial court determines that $3,700 per month is inadequate to meet Ellen's needs and maintain her standard of living during the marriage, it may add a capped portion of John's future bonuses.

So, the appellate court stated:

> Though disadvantageous to Ellen, this is the predictable result of properly setting maintenance according to the standard of living enjoyed during the marriage. Ellen cites

> no authority for the proposition that maintenance should be an equitable distribution of the supporting spouse's income after the marriage dissolution. A trial court may, under the right circumstances, base maintenance on a percentage of the supporting spouse's income; but in this case, awarding Ellen an uncapped amount as a percentage of John's bonuses is an abuse of discretion because it has no evidentiary relation to her present needs or the parties' standard of living during the marriage.

I disagree with the analysis by the appellate court. Since the maintenance guidelines have now become law, there is a counter-argument against this position related to the definition of income. But it is suggested that the definition of income does not address the different public policy of maintenance and child support and whether it is appropriate at some point to cap maintenance if the amounts are beyond the historical lifestyle.

Length of Maintenance: Also of note, this case also had only provided a "opportunity to review" the seven-year maintenance award. The decision regarding there not being an award of indefinite maintenance should have been reversed by the appellate court.

The appellate court reasoned:

> Furthermore, the court's decision to forgo permanent maintenance likewise was not an abuse of discretion. Ellen is a college graduate who previously worked in the insurance industry. At the time of the dissolution, she was healthy, 48 years old, and employed full-time. Moreover, she was awarded a substantial portion of the marital estate, which is a statutory factor tending to mitigate her need for maintenance. By denying permanent maintenance, the trial court implicitly determined that Ellen had not shown that, after seven years, she would be employable only at an income substantially lower than the previous standard of living. Based on the evidence presented at trial, the court's decision to deny permanent maintenance was not inequitable such *that no reasonable person would take the view adopted by the court*. *Smith*, 2012 IL App (2d) 110522.

Keep in mind that the appellate court merely affirmed the trial court. Perhaps a reasonable person could take the view adopted by the trial court. But this reasonable person would not.

***Iqbal* – 2014: Where Husband Underemployed Trial Court Properly Awarded Maintenance Despite Similar Current Earnings of Parties ⊠**

IRMO Iqbal, 2014 IL App (2d) 131306 (Opinion filed May 6, 2014, Corrected posting date: 06/27/14) Many issues were addressed but I will address the maintenance issue only because it addresses a fairly common under-employment issue. The appellate court stated:

> Mohammad argues that the trial court should not have found that Uzma was entitled to maintenance because none of the enumerated factors favors a grant of maintenance. However, applying the factors to the evidence reveals that this argument clearly lacks merit. Uzma is in her forties, was married for over 10 years, and forwent employment during the marriage to stay home and care for the parties' children. The parties enjoyed a high standard of living while in Saudi Arabia, and they also appear to have been relatively comfortable when living in Illinois, albeit at a more middle-class standard of living. Due to her lack of credentials in this country and the need for additional education and certification, however, Uzma is not currently employable at a salary that would

> permit her to support the children and enjoy the same standard of living as during the marriage. Moreover, the slightly higher proportion of marital assets awarded to her will not cure the shortfall between her earning capacity and her household expenses.

Addressing the under-employment issue the court commented:

> Mohammad insists that the parties essentially have the same low earning capacity because, like Uzma, he cannot find work in Illinois that would permit him to maintain the parties' former standard of living. He also asserts that his needs are equal to Uzma's. However, the trial court found that Mohammad is currently underemployed and that he voluntarily left his most recent position, at which he was earning a high salary. The trial court also stated that, given his experience, skill level, and wage history, it expected that Mohammad would soon be able to find employment at a higher salary. His situation thus differs from Uzma's, as she requires additional training before she will become employable in her field. Moreover, Uzma's needs are greater, as she is the custodial parent, with the responsibility for meeting the children's daily needs. Although Mohammad introduced evidence that he had recently signed a lease to rent a house at $2,200 per month (so that he could care for the children if he were granted custody), at the time of trial he was living rent-free in his brother's home and was being supported by his brother, and thus he had minimal living expenses.

The ISBA Family Law Section Newsletter for December has an article by a lawyer for one of the parties addressing the premarital agreement. In that case the custody clauses which were determined to be against public policy were so intertwined with the financial aspects that the entire post-nuptial agreement was declared unenforceable.

Post-Divorce

Maintenance Reviews

***Heasley* – Trial Court Erred in Limiting Maintenance Following Second Review in Case Involving Excellent Discussion of Case Law**
IRMO Heasley, 2014 IL App (2d) 130937 (December 2, 2014)
The former wife appealed the trial court's order terminating her former husband's obligation to pay maintenance following the second review of maintenance following the divorce decree. The appellate court agreed with the former wife that the trial court failed to recognize the limited scope intended for the second review. Accordingly, the appellate court vacated and remanded.

Following a 23 year marriage, the parties were divorced in 2007. The divorce involved an evidentiary hearing on contested issues. At the time of the divorce the parties were ages 45 and 44. There was an obligation to pay child support for the minor child. The provisions of the judgment regarding maintenance provided:

> "7. *** [Respondent] is fully employed, earning $91,208 per year and [petitioner] is employed part time earning approximately $12,000 per year. Due to the length of the marriage and other appropriate [s]tatutory factors, the Court finds that maintenance should be awarded from [respondent] to [petitioner] in the amount of $1,050 per month, and the Court further finds that there may be a review of said maintenance after 24

> months upon petition by either party. The Court expects [petitioner] to either seek full time employment, or seeking [sic] additional schooling. ***
> 8. ***
>
> > B. *** The maintenance shall terminate upon the death of [petitioner], her remarriage, or other appropriate statutory factors. Maintenance is reviewable upon petition by either party on or after 24 months of maintenance payments from [respondent] to [petitioner], and the Court may, upon appropriate proofs, review maintenance after appropriate hearing.

In December 2009, the former husband sought his first review where filed a motion to modify maintenance asking that maintenance be terminated or reduced because his former wife had a sufficient time to become financially independent. The evidence indicated that the former wife was a graduate from Penn state in 1982 with an associates degree in architectural engineering. Before the birth of their daughter the wife worked full time with a civil engineering firm where she did drafting. After her daughter's birth, she worked part time and then briefly full time. Her full time salary had been $38,000. She quit working outside the home three years after her daughter's birth.

Note that in June 2005 while the divorce case was pending, the trial court directed the wife to find employment in her field of training. She received a job working part time earning $12,000 at the time of the divorce. The appellate court noted, "There is no dispute in this appeal that advances in the architectural industry have rendered petitioner's 1982 associate's degree obsolete."

There was testimony at the time of the original divorce about the her financial condition and inability to fund her education. She had been awarded the house. Her equity at the time of the first review was $100,000. In the divorce, she received a $125,000 IRA. Between withdrawals and market decreases the value of the IRA was $72,000 at the time of the first review. She had not used any money from the IRA to fund further education. She claimed that her debts had been "mounting" since the dissolution and that she depended on loans from family members.

During that first review hearing the former wife testified to her employment as bank teller. She testified regarding her attempts to advance herself at the bank where she worked. The former husband's current salary was $96,000 at the time of the initial review.

> After petitioner finished her testimony, the court engaged the parties in a lengthy dialogue as to the proper course regarding maintenance. Counsel for respondent remarked that he wished to call respondent to testify. The court indicated that respondent's testimony likely would make no difference, given the court's present inclination on the issue. Elaborating, the court expressed its belief that petitioner had made a good-faith effort to become financially independent and that respondent's maintenance obligation should not terminate until his retirement, barring a substantial change in circumstances ***

Part of that discussion stated:

> I think maintenance in the amount that's currently set, it's an appropriate amount. Her income has gone up a little bit, but so has yours. But I'm not going to make it permanent any more. *** I don't think there's any sense coming back in a couple of years, because I don't know what more I can do now than tell you get a job, work 40 hours a week, at the highest level you can. As best I can tell, you're there now. I don't think you're going to

> be satisfied being there. Even if your maintenance is terminated, it's not high enough for you just to sit back and rest on the [$]18,000 a year. It's always going to be in your best interest to try and make as much money as you can for yourself, even if it may result in your maintenance being terminated[,] because it's not enough for you to live on. And if you have the ability to make more money and be self-sufficient, I would think that you would do that, because the maintenance isn't enough to live on Easy Street. So I don't know that there's anything to come back for me to review in the case. I would say, I guess, that you're both eligible for retirement at age 65. ***
>
> I would think maintenance should terminate, in this case, at the age of 65, period. And I would think that it should be subject to modification under the terms of Section 510 [of the Illinois Marriage and Dissolution of Marriage Act. *** Retirement seems a logical cutoff date of 62, and I would hope that it would end before then."

Based on the court's remarks the former husband asked for a continuance to decide whether to present evidence. The court continued the matter and in November 2010 there was an order denying the petition to modify and providing, "The Court directs [petitioner] to remain fully employed and to seek out promotions and better job opportunities so as to increase her income." The court continued the matter to June 2012 for review of maintenance, at which time the court would "increase, decrease or leave the same amount."

The matter was later transferred to a different judge and in May 2012 the former husband filed a new motion to modify maintenance. The former wife filed a motion to increase maintenance. In September 2012, the court entered an order terminating child support. The stipulated facts were:

> Petitioner's current salary was $21,000 and respondent's was $120,000—both having increased since the June 2010 review. Petitioner was still employed as a bank teller at FNB, and her salary in that position would "top[] out somewhere" around $22,000 to $23,000. Since the June 2010 review, petitioner had taken no classes outside FNB. She had, however, continued to take in-house classes at FNB, including all the "word processing, all the accounting classes." Petitioner was also participating in a three-year "training program" with the goal of becoming "more of a bank administrator," such as a personal banker or branch manager. Petitioner was being "as active and as involved as [she] possibly [could] for any promotion that [would come] [her] way."

In December 2012, the trial court issued a written order providing that maintenance would terminate in 18 months. The appellate court first recognized that, in a maintenance review proceeding, "there is no threshold requirement of *** a substantial change in circumstances." See *In re Marriage of Golden*, 358 Ill. App. 3d 464, 471-72 (2005) (in a maintenance review, there is no requirement of a change in circumstances).

The trial court made many finding of facts against the former wife such as, "Petitioner has financial business ability and had an opportunity to re-enroll in college and chose not to."

Regarding case law involving rehabilitative maintenance the appellate court recited case law as:

> "Rehabilitative maintenance is appropriate if evidence shows a potential for future employability at an income that allows approximately the same standard of living established during the marriage." *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 340

> (1999). "Inherent in the concept of rehabilitative maintenance is the optimal goal that after a period of renewing or developing skills, or reentering the job market, the dependent former spouse will be able to become self-sufficient through his or her own income." *In re Marriage of Lenkner*, 241 Ill. App. 3d 15, 20 (1993).

The appellate court then quoted from the law regarding maintenance reviews at Section 510(a-5). The court distinguished between modification and review proceedings. Because of how well drafted this summary is, it will be quoted from at length:

> Courts have construed section 510(a-5) as distinguishing between review proceedings and modification proceedings. See *Blum v. Koster*, 235 Ill. 2d 21, 35-36 (2009); *Golden*, 358 Ill. App. 3d at 469 ("[R]eview proceedings and modification proceedings are separate and distinct mechanisms by which reconsideration of maintenance can occur."). A review proceeding occurs as a result of a prior court order for reconsideration of maintenance: "The power of the court *** includes the authority to award time-limited maintenance with a provision for review. [Citation.] The purpose of a time limit on the award is generally intended to motivate the recipient spouse to take the steps necessary to attain self-sufficiency. [Citation.] At the end of the specified time period, the court determines whether the maintenance award should be extended. [Citation.]" *In re Marriage of Rodriguez*, 359 Ill. App. 3d 307, 312 (2005).
>
> Where there is no such provision for review, a motion to reconsider maintenance initiates a modification proceeding rather than a review proceeding. See *Golden*, 358 Ill. App. 3d at 469 ("Review proceedings *** are held pursuant to prior court orders while modification proceedings can be initiated by the parties without prior order of the court."). As section 510(a-5) provides, maintenance will not be altered in a modification proceeding absent proof by the movant of a substantial change in circumstances. This threshold of proof is not required, however, in review proceedings. *Blum*, 235 Ill. 2d at 35-36; *Golden*, 358 Ill. App. 3d at 471-72

Review proceedings can be *general or limited*. See *Blum*, 235 Ill. 2d at 32; *Golden*, 358 Ill. App. 3d at 470 ("Review proceedings regarding maintenance can encompass various issues."). A general review of maintenance will involve consideration of all factors in section 510(a-5). See *Blum*, 235 Ill. 2d at 31-32. Limited review involving fewer statutory factors is possible. See id. at 32 ("The factors set forth in section 510(a-5) are inapplicable when the parties have otherwise agreed on the terms of modification and termination of maintenance in a written marital settlement agreement approved by the court, pursuant to section 502 [of the Act (750 ILCS 5/502 (West 2012))]); *Golden*, 358 Ill. App. 3d at 470 ("[T]he trial court can define the scope of the review, including limiting the review to certain issues."). A trial court that orders a review proceeding is encouraged to notify the parties of any limitations the court intends to set on that review:

> "When trial courts set review hearings, it would be preferable for the court to advise the parties who has the burden of going forward, who has the burden of proof, and what issues will be addressed. For example, if time-limited maintenance—whether temporary or rehabilitative—will continue only if the recipient shows good faith in seeking education or employment or proves the need for continued maintenance, then the parties should be so advised. Neither party should be required to guess what the court will consider at the review hearing." (Emphasis omitted.) *In re Marriage of Culp*, 341 Ill. App. 3d 390, 396-97 (2003).

The appellate court then determined that the reconsideration of maintenance was a review proceeding because it was done pursuant to the direction of the November 2010 order following the first review of maintenance. Then the appellate court considered, "how, if at all, the court intended to limit the scope of the second review. "Generally, the intention of the court is determined by the language in the order entered, but where the language of the order is ambiguous, it is subject to construction." Twardowski v. Holiday Hospitality Franchising, Inc., 321 Ill. App. 3d 509, 512 (2001). An ambiguous order "should be interpreted in the context of the record and the situation that existed at the time of [its] rendition." Id. The relevant sources include "pleadings, motions and issues before the court; the transcript of proceedings before the court; and arguments of counsel." *In re Marriage of Lehr*, 317 Ill. App. 3d 853, 858 (2000).

The appellate court next stated:

> The trial court's November 18, 2010, order provided for review of maintenance in 18 months. The court gave only the following guidance as to what would be its concern at the next review: "The Court directs [petitioner] to remain fully employed and to seek out promotions and better job opportunities so as to increase her income." Petitioner could reasonably interpret this as the sole criterion by which the trial court, at the next review, would judge her efforts toward self-sufficiency.

The court then reasoned:

> At the September 2012 review, the trial court specifically faulted petitioner for failing to pursue educational opportunities "from 2005 to 2012[, i.e., to the date of the second review]." Construing the November 18 order, we see no requirement that petitioner seek further education.

The court concluded, "Here, the court failed to recognize the limited scope of review authorized in the November 18, 2010, order." Accordingly, the appellate court vacated the trial court's judgment and remanded for a review consistent with the terms of the November 18, 2010 order.

***Virdi* – 2014 Trial Court Properly Did Not Consider Former Husband's Income Withdrawals from his Retirement Account as Income Given Facts of the Case**

IRMO Virdi, 2014 IL App (3d) 130561 (June 24, 2014) **@@@**

The parties were married in 1970 and petitioned for dissolution of marriage in 1993. A judgment of dissolution was entered in 1998, which included an award of maintenance to the wife. In August 2011, the trial court granted the former husband's petition to modify maintenance from $10,000 a month to $1,500 a month. The appellate court upheld that decision on unpublished decision. *IRMO Virdi*, 2013 IL App (3d) 120546-U. While that appeal was pending, the former wife filed a petition to modify the $1,500-a-month maintenance award, arguing that a substantial change in circumstances had occurred since that award was imposed. The trial court denied her petition to modify. The former wife appealed raising two issues: (1) that the trial court abused its discretion in denying her petition to modify maintenance; and (2) the court should award her attorney fees incurred for the present appeal. The appellate court affirmed.

The key issue was a substantial change in circumstances. The appellate court reviewed the facts claimed:

> Narveen claims that a substantial change in circumstances has occurred because she made withdrawals from her retirement account from $219,000 down to $2,500. In addition, Prem continues to withdraw from his retirement account in the amount of $10,000 a month. However, those changes do not constitute a change in circumstances sufficient to result in a modification of maintenance. Narveen's decision to withdraw from her retirement account was a result of her own lack of financial planning. As the court noted in its initial dissolution judgment, maintenance was initially ordered in anticipation of Prem's retirement. "[W]e are reluctant to find a 'substantial change in circumstances' where the trial court contemplated and expected the financial change at issue." Reynard, 378 Ill. App. 3d at 1005. From 2000 to at least September 2009, Narveen was receiving $10,000 a month in maintenance, some of which could have been used to plan for the inevitable reduction in maintenance that would accompany Prem's retirement.

The appellate court also commented:

> In addition, Narveen has not pursued avenues to become self-sufficient. Instead, she has continued to operate the Club and the Institute at a consistent loss, and drained her retirement account to pay the property taxes. Although a party should not have to liquidate assets in order to survive (In re Marriage of Keip, 332 Ill. App. 3d 876, 882 (2002)), the assets in question here operate at a loss and Narveen can no longer afford them. When determining maintenance payments, a court should consider whether a party's situation is necessary or incurred by choice. See *Reynard*, 378 Ill. App. 3d at 1007. Narveen's commitment to community service is laudable, but the Act does not countenance that Prem should subsidize her community service 15 years after the dissolution of their marriage. By analogy, a court would not find a change in circumstances to necessitate an increase in maintenance if a petitioner were to give all his or her assets to charity.

In a key passage the appellate court stated:

> Narveen also points to the distributions Prem has begun taking from his IRA as proof of a change in circumstances. However, Prem's distributions do not qualify as income for the purpose of calculating maintenance. The initial distribution of property took into account the parties' existing retirement accounts. In the years following, Prem chose to supplement his saving by investing his income, while Narveen used her savings to support a business that has not made any profit in over 20 years.

And the appellate court addressed the nest-egg in terms of the property award that the former wife had received:

> The purpose of the Act is to make the division of property the primary means of providing for the future needs of both parties. *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 338 (1999). In the present case, the initial dissolution order provided Narveen with $1.7 million in property. That property has dwindled as a result of Narveen's choice to continue operating the Club at a loss rather than pursuing activities that would provide her an income. Narveen also failed to keep up with the property taxes on her various properties. In addition, for nearly 10 years, Narveen was receiving annual maintenance payments in six figures, which could have been used to prepare for her retirement. That

> is, Narveen's current situation is the product of her own financial mismanagement and choice. At dissolution, the court awarded her $1.7 million in assets. Additionally, since then Prem has paid her well over $1 million in maintenance. This amounts to a very comfortable "life jacket." She elected to throw off her life jacket and ride a sinking ship into the deepest abyss in the sea. Prem used the assets awarded him in the dissolution wisely; Narveen did not. Prem cannot be held to account for Narveen's business failures 20 years after the divorce.

Attorney's Fees

Fee Contribution Actions

***Micheli* – 2014: Fee Award of Only $5,000 Affirmed**
IRMO Micheli, 2014 IL App (2d) 121245 (July 31, 2014)
The award of attorney's fees was surprising given the circumstances. The wife had an unpaid balance of $74,000 and was only awarded $10,000 despite the husband's greater ability to pay.

Ellen's attorneys billed a total of $182,000, with an unpaid balance of about $74,000. John's attorneys billed a total of $95,000, with an unpaid balance of about $36,000. The appellate court stated:

> After considering the entire judgment, the court found it fair and equitable to order John to contribute $10,000 toward Ellen's fees, and that finding is not an abuse of discretion. The award is not arbitrary, without conscientious judgment, or exceeding the bounds of reason. See *Marriage of Sobieski*, 2013 IL App (2d) 111146, ¶ 37.
>
> > [Sobieski involves an affirmation of the trial court's determination of husband's net income. Husband urged that his net income was set at too high of an amount at $12,000 per month. In that case the trial court had acknowledged the difficult in determining the husband's net income due to his lack of credibility. The appellate court had stated, "Of particular note, Jon admitted that he handles significant amounts of cash for Spirit of America, Inc., and, when asked how much, answered "it varies." Jon is the sole secretary for Spirit of America, Inc., in which he has a 25% ownership interest. He counts the cash, and he admitted to receiving "gifts" from his mother of $50,000 per year for the five years before trial. Such "gifts" included paying for his health insurance. Furthermore, the court found Jon's federal tax returns to be inconsistent, both internally and with each other."

And note that the actual award was one of only a $5,000 award – after receiving a credit for the husband's credit back because his greater payment of the costs for child representative.

This case treated the obligation to pay the child rep one to be paid from marital assets:

> It appears that the order to pay Poell, a marital obligation, required $5,000 to be paid from a marital asset, the Fidelity investment account. Because John had already paid $5,826.25 and Ellen had paid $3,356.25, the order granting John a $5,000 credit for the

payment from a marital account deviates from the trial court's stated intent to divide Poell's fees equally between the parties. The record lacks a transcript of the November 16, 2012, hearing, but if the trial court did not intend to treat the $5,000 payment to Poell as a credit to John's contribution to Ellen's attorney fees, the court may correct the accounting error on remand.

***DiGiovanni* – 2014: Trial Court Had Jurisdiction to Consider Fee Award and Parties Cannot by Their Agreement Forego a Lawyer's Right to Pursue Contribution Action Via Their Settlement Agreement ⊠**

IRMO DiGiovanni, 2014 IL App (1st) 130109 (June 27, 2014)
Divorce proceedings were brought in 2007 and in July 2009, the husband counsel withdrew from his representation. Several months later he filed a petition for attorney's fees against his former client. A mediation hearing on the petition was scheduled in January 2010. Then, however, the husband filed a Chapter 7 petition for bankruptcy listing the husband's counsel as one of his creditors. Accordingly, there was an order entered staying prosecution of former husband's petition and continued the matter for status on the bankruptcy. The husband's former counsel then filed a contribution petition against the wife in January of 2010. The former counsel claimed that the wife had a demonstrated ability to pay her husband's attorney fees and costs because his former client had told him that his wife had purchased a winning lottery ticket worth in excess of $2 million. The wife moved to dismiss claiming that the lawyer could only file a final fee petition during the pendency of dissolution proceeding against his own client – not against the opposing party. The trial court in February of 2010 granted the wife's motion finding that "former counsel may only obtain fees pursuant to [section] 508(c) which is limited to seeking fees against his client." It "denied as a matter of law" the petition for fees against the wife and required that notice to given to the former counsel of future proceedings including prove-up or entry of judgment. Thereafter, in March 2010, the court granted the wife leave to file a legal separation proceeding rather than divorce action. Thereafter, it entered a judgment for legal separation incorporating the MSA and an addendum to the MSA. In the addendum the parties agreed that given the lawyer's filing of his petition against the wife and his stated intent to appeal the court's denial of the petition, the following provision was incorporated into the separation agreement:

> "Respondent [Cosimo] shall be responsible for and pay his own attorney fees incurred in this cause. Respondent waives whether by statute or otherwise any right to contribution for attorney fees from Petitioner [Sandra]. Petitioner shall be responsible for and pay her own attorney fees incurred in this cause. But her right to contribution for attorney fees from Respondent or her right to seek a contribution from any attorney fees she is ordered to pay Michael Canulli pursuant to *Canulli's Petition* or any similar petition filed by him is reserved. Petitioner may only file a Petition for Contribution for attorney fees against Respondent if the trial court's order of February 19, 2010 is reversed or overturned in whole or in part by either the trial court or the appellate court or it is remanded by the appellate court to the trial court for further proceedings." (Emphasis in original.)

In any event, In April 2010, the bankruptcy court granted the husband's petition for a chapter 7 discharge. The husband's former attorney then filed a motion to vacate the February 2010 order granting the motion to dismiss. The trial court vacated its February 2010 order granting the wife's motion to dismiss the fee petition and required a response to the underlying petition. The appellate court recited the facts as:

> Sandra filed her answer and two affirmative defenses in August 2010. She argued Canulli's action for contribution was barred because (1) any debt owed to Canulli for attorney fees had been discharged by Cosimo's bankruptcy and there was, therefore, no longer any debt owed to Canulli to which Sandra could be required to contribute and (2), pursuant to section 508 of the Act, a former counsel may petition for fees only against the attorney's own client. Sandra filed a petition for contribution against Cosimo pursuant to the addendum to the parties' marital separation agreement. She also filed a petition for interim attorney fees against Canulli, asserting that she would be unable to properly defend against his petition for contribution without an award of interim fees.

The husband, in turn, filed an affirmative defense to his wife's petition for contribution. He argued that because Canulli's attorney fees had been discharged in the chapter 7 bankruptcy, Cosimo had no legal obligation or duty to pay Canulli's fees and Sandra was prohibited from seeking contribution from Cosimo for those fees as the fees had been properly discharged.

The convoluted nature of the proceedings were apparent by this rift by the appellate court:

> The case continued through assorted answers, responses and motions, including Canulli's motion to add Sandra's daughter Catherine as a necessary party. Canulli asserted that Sandra had given the proceeds of the $2 million lottery ticket to Catherine prior to the parties' legal separation in order to keep the winnings out of the marital estate and he sought an opportunity to demonstrate such. He stated Sandra's ownership interest in the lottery winnings was relevant to his petition for contribution given that her financial circumstances and ability to pay were in issue.

In March 2012, the wife filed a motion for summary judgment arguing that under Section 503(j) that the trial court did not have subject matter jurisdiction because 503(j) requires the petition for fees to be heard and decided before entry of judgment. The former counsel responded that where a timely fee petition is filed the trial court retains jurisdiction after the divorce or legal separation. The appellate court reversed finding that the court did have jurisdiction to consider the fee petition. The appellate court rejected the lawyer's request that the matter be assigned to a different judge.

The appellate court quoted from Section 508(a):

> *At the conclusion of any pre-judgment dissolution proceeding under this subsection, contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503 and in any other proceeding under this subsection.* ***
>
> *The court may order that the award of attorney's fees and costs (including an interim or contribution award) shall be paid directly to the attorney, who may enforce the order in his or her name,* or that it shall be paid to the appropriate party. Judgment may be entered and enforcement had accordingly." (Emphases added.) 750 ILCS 5/508(a) (West 2010).

The appellate court then cited a line of cases providing that, as a party in interest, the attorney has standing in such cases to pursue an action for fees himself. There was an excellent footnote that bears repeating:

> We cite herein to *Lee v. Lee*, 302 Ill. App. 3d 607 (1998), *In re Marriage of Baltzer*, 150 Ill. App. 3d 890 (1986), and *Heiden v. Ottinger*, 245 Ill. App. 3d 612 (1993), for the proposition that, under the Act, as a party in interest, the attorney has standing in contribution cases to pursue an action for attorney fees himself. All three cases considered attorney fees under section 508 of the Act as it existed prior to amendments to the Act in 1997. However, although section 508 has been twice amended since 1997, the cases remain good law. *In re Parentage of Rocca*, 408 Ill. App. 3d 956, 964 (2011). The 1997 amendments did not alter the statute such that an attorney's ability to pursue contribution is now restricted in a manner that did not exist when the statute was considered in *Lee*, *Baltzer* and *Heiden*. *Rocca*, 408 Ill. App. 3d at 964. Instead, "by including, for example, specific provisions permitting interim fees and contribution, the effect of the amendments was to *expand* the avenues for attorneys to obtain fees and to encourage attorneys to represent even those clients who are financially disadvantaged." (Emphasis in original.) *Rocca*, 408 Ill. App. 3d at 968.

The appellate court then stated that:

> nothing in the clear and unambiguous language of the Act, and specifically that in sections 503(j) and 508(a), provides that, once a judgment is entered in a dissolution or legal separation action, the court loses jurisdiction to consider a pending contribution petition.

The appellate court then noted that the timing provisions are not jurisdictional prerequisites:

> Since the timing requirements in section 503(j) are not jurisdictional, the court did not lose subject matter jurisdiction when it did not meet the requirement that, "before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be heard and decided." Although this is a directive to the court, the court does not lose jurisdiction to consider the petition if it fails to abide by the directive. The court, therefore, should have held a hearing on Canulli's petition.

Instructively, the appellate court then stated:

> Further, we note that, upon remand, the issue of the parties' agreement in the addendum to the agreement for legal separation will arise. The parties' agreement regarding who will pay attorney fees and costs is not binding on Canulli. *Rocca*, 408 Ill. App. 3d at 968 (citing *Lee*, 302 Ill. App. 3d 607, and *Heiden v. Ottinger*, 245 Ill. App. 3d 612 (1993)). The parties provided in the addendum to their legal separation agreement that each party would pay their own attorney fees and costs. However, as stated previously, the right to attorney fees and costs belongs to the attorney, not to either of the parties. [citations omitted.] Therefore, a marital settlement agreement (or, as in this case, an agreement of legal separation) purporting to allocate attorney fees will generally not extinguish a spouse's former attorney's right to pursue an award of fees from the other spouse. *Lee*, 302 Ill. App. 3d at 612-13. The parties are free to settle the division and allocation of their property, assets and liability but their agreement is not binding on third party creditors such as prior counsel. *Lee*, 302 Ill. App. 3d at 614. They "cannot waive something that belongs to someone else." *Rocca*, 408 Ill. App. 3d at 969. Accordingly, neither party can waive by their agreement Canulli's statutory right to pursue or request a hearing on a claim for attorney fees and costs against Sandra. [citations omitted.]

The appellate court provided the concluding commented:

> It would be precipitous of us to vacate the judgment of legal separation at this time. We leave it to the circuit court to determine, pending the outcome of the hearing on the petition for contribution, whether the parties' agreement for legal separation must be modified. We also leave to the trial court the interesting question, which has not been briefed before us, as to what effect the bankruptcy discharge has on Canulli's petition against Sandra.

Other Cases Involving Financial Issues:

***Abu-Hashim* – Trial Court's Discretion on Variety of Financial Issues Including: Allocating to Him All of Home Equity Line of Credit; Failing to Account for Prejudgment Distribution to Wife from his 401(k) Account to Pay for Interim Fees**
IRMO Abu-Hashim, 2014 IL App (1st) 122997 (June 25, 2014)
The appellate court reviewed the issues presented by the former husband on appeal as:

> Rajaie asserts that the trial court abused its discretion by: (1) allocating to him 100% of the $299,724.56 owed on a home equity line of credit on the parties' marital home; (2) failing to account for a prejudgment distribution to Kimberly of $50,000 from Rajaie's 401(k) account in equitably allocating the marital property; (3) valuing the parties' daycare business at $235,000, in the absence of evidence to support that valuation; and (4) failing to deviate from the statutory child support guidelines, ordering him to pay retroactive child support, and ordering him to pay child support on income from a profitable commercial rental property without offsetting the losses on other rental properties.

The appellate court commented at the beginning of its decision:

> Appellate courts typically give great deference on the factual issues to the trial court hearing the dissolution of marriage proceeding. One reason is the trial court's familiarity with the dueling spouses, and if represented, their counsel, and its exposure to and grasp of the evidence in the context of the entire proceeding. Rajaie Abu-Hashim, who appeals certain provisions in a judgment for dissolution of his marriage from petitioner, Kimberly Abu-Hashim, raises issues that all relate to factual disputes resolved by the trial court. Rajaie has not carried his burden of showing an abuse of discretion, and, accordingly, we affirm the trial court's decisions.

Regarding the interim fee award, the appellate court noted that:

> Rajaie has a vested interest in a 401(k) plan through his employer. During the litigation, both parties were each permitted to take $50,000 from the account to pay for their respective attorney fees. In its supplemental judgment, the court ordered that the remaining balance of the 401(k) account be divided equally between them.

Regarding the business valuation, the husband agreed that neither party presented evidence regarding value. The husband contended that the stipulations showing deposits of certain amounts showed that the business was worth more than $235,000. The appellate court commented that, "Because neither party

presented meaningful evidence of the business's value, we cannot say that the trial court's method of valuation was an abuse of its discretion. The appellate court did note cite case law regarding their being a potential failure of proofs on this issue.

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