

**2012 REVIEW OF ILLINOIS DIVORCE AND FAMILY LAW CASES**  
**INVOLVING FINANCIAL ISSUES**

By: Gunnar J. Gitlin  
The Gitlin Law Firm, P.C., Woodstock, Illinois  
© 2016 - May 12, 2016

---

<b>Property Cases Law</b> .....	<a href="#">Page 3 of 48</a>
<b>Retirement Benefit Cases</b> .....	<a href="#">Page 3 of 48</a>
<b>QDROs and QILDROs</b> .....	<a href="#">Page 4 of 48</a>
<i>Kehoe</i> – Standard Coverture Fraction Type QILDRO Not Required Years Later Despite <i>Richardson</i> and <i>Culp</i> Given Savings Clause in Non-Effective QDRO .....	<a href="#">Page 4 of 48</a>
<b>Other Property Cases</b> .....	<a href="#">Page 7 of 48</a>
<i>MLK - Mathis</i> – IL Supreme Court: Date for Valuation in Bifurcated Case Where Grounds Judgment Entered .....	<a href="#">Page 7 of 48</a>
<i>Berberet</i> – Potential Personal Injury Claim: Appellate Court Approved Trial Court's Not Reserving Jurisdiction Regarding Potential Personal Injury Cause of Action where No Claim Filed as of Date of Divorce -with a Caveat .....	<a href="#">Page 9 of 48</a>
<i>Romano</i> – “Fraud on Marital Rights” Claim Rejected, Disproportionate Property Award Affirmed .....	<a href="#">Page 9 of 48</a>
<i>Washkowiak</i> - Worker's Compensation Awards and Medical Set Aside Accounts in Cases Involving Medicare .....	<a href="#">Page 11 of 48</a>
<i>Estate of Doman v Doman</i> - Death of spouse after a bifurcated divorce judgment on grounds was entered, but before any other issue was resolved ..	<a href="#">Page 14 of 48</a>
.....	<a href="#">Page 15 of 48</a>
<b>Dissipation</b> .....	<a href="#">Page 15 of 48</a>
<i>Berberet</i> – Appellate Court Approved No Finding of Dissipation / Tax Consequences: Addressing Overall Allocation More Equally in Terms of Assets Subject to Later Tax Was Proper .....	<a href="#">Page 15 of 48</a>
<i>Romano</i> – Timing Issue Re When Marriage Began Undergoing Irretrievable Breakdown and Even Though Marriage May have Been Troubled Does Not Necessarily Prove Marriage Began Undergoing Irretrievable Breakdown .....	<a href="#">Page 16 of 48</a>
<b>Classification of Property</b> .....	<a href="#">Page 18 of 48</a>
<i>Romano</i> – Classification of Property: Various Assets Properly Held to be Non-Marital Property of Husband .....	<a href="#">Page 18 of 48</a>
<i>Dann</i> -- Characterization of Assets Acquired via Distributions of Premarital Business Involved Genuine Issue of Material Fact and Summary Judgment Finding That Asset Acquired Was Non-Marital Reversed Where, Despite Minority Status, If Party Had Substantial Influence over Decision to Retain Net Earnings or Disburse Them .....	<a href="#">Page 22 of 48</a>
<i>Mathis</i> – Date for Valuation in Bifurcated Case Where Grounds Judgment Entered .....	<a href="#">Page 24 of 48</a>
<b>Child Support</b> .....	<a href="#">Page 25 of 48</a>

<b>Initial and Post-Divorce: Establishing Amount of Child Support</b> . . . . .	<a href="#">Page 25 of 48</a>
<i>McGrath</i> : Illinois Supreme Court – Funds an Unemployed Parent Regularly Withdraws from Savings Account Should Not Be Included in Calculating Net Income under §505(a)(2) of the IMDMA . . . . .	<a href="#">Page 25 of 48</a>
<i>Smith</i> – Trial Court Abused Discretion in Awarding Guideline Support Where Parties Shared Custody . . . . .	<a href="#">Page 26 of 48</a>
<i>Berberet</i> – Deviation from Support Guidelines Affirmed Where Support Payor's Income Less than Custodian's and Where Non-Residential Parent Would Experience Financial Constraint Where Guidelines Followed . . . . .	<a href="#">Page 26 of 48</a>
<i>Berberet</i> – Dependency Exemption Allocation: Equal Allocation Proper Where Mother Had Higher Income and Father / Non-Residential Parent Paid Less than Guideline Support . . . . .	<a href="#">Page 27 of 48</a>
<b>Support or Maintenance Modification / Enforcement</b> . . . . .	<a href="#">Page 27 of 48</a>
<i>IDHFS v. Beamon</i> – Where Current Support Amount Far Less than Guidelines, a Substantial Change in Circumstances Must be Alleged to Modify Support . . . . .	<a href="#">Page 27 of 48</a>
<b>Post-High School Educational Expenses</b> . . . . .	<a href="#">Page 28 of 48</a>
<i>Razzano</i> – Where MSA provided that Support Terminated at Age 22 So Long as Child Attending College and Parties Agreed that Support Provision was in Lieu of Obligation Under Section 513, Modification Proceeding Determined under Section 505 and Not 513 . . . . .	<a href="#">Page 28 of 48</a>
<i>Koenig</i> – Where MSA Recites Responsibility to Contribute to College and Graduate School, Party Entitled to Retroactive Award Despite Argument that <i>Petersen</i> Controlled . . . . .	<a href="#">Page 29 of 48</a>
<b>Maintenance Cases</b> . . . . .	<a href="#">Page 29 of 48</a>
<b>Initial Divorce</b> . . . . .	<a href="#">Page 29 of 48</a>
<i>D'Attomo</i> – Trial Court Could Provide for Maintenance in Gross Rather than Rehabilitative Maintenance . . . . .	<a href="#">Page 29 of 48</a>
<i>Branklin</i> – Permanent Maintenance of \$3,000 Per Month Affirmed Where Husband Earned Gross of \$400,000 and Wife \$75,000 But Statute re Life Insurance to Secure Maintenance Must be Followed . . . . .	<a href="#">Page 30 of 48</a>
<i>Romano</i> – “Maintenance as Substitute for Child Support” -- Trial Court Cannot Award “Unallocated Maintenance” that Would Not Normally be Modifiable When Child Emancipates . . . . .	<a href="#">Page 33 of 48</a>
<b>Post-Decree Maintenance</b> . . . . .	<a href="#">Page 34 of 48</a>
<i>Bolte</i> – Maintenance Modification: Trial Court Improperly Terminated Award of What Had Been Called Rehabilitative Maintenance . . . . .	<a href="#">Page 34 of 48</a>
<i>Bohnsack</i> – Language of MSA Provided for Modifiable Maintenance Despite Annual Payments of \$10k for Six Year Term . . . . .	<a href="#">Page 37 of 48</a>
Unallocated Maintenance Cases - Review or Modification . . . . .	<a href="#">Page 38 of 48</a>
<i>DiGiovanni</i> - Unallocated Maintenance Award Properly Reduced on Emancipation Imputing Income to the Former Wife and Focusing on Evidence from Date of Earlier Modification Order Forward . . . . .	<a href="#">Page 38 of 48</a>
<i>Kincaid</i> - Unallocated Maintenance: When Modifying Unallocated Maintenance During its Term a Determination of Net Income is Required Because of the Support Component . . . . .	<a href="#">Page 41 of 48</a>
<i>Kolessar</i> – In Agreed Orders Involving A Unilateral Reduction in Unallocated	

Maintenance Statutory Interest is Mandatory Unless Clearly Waived	<a href="#">Page 42 of 48</a>
<i>McLauchlan</i> - Trial Court Properly Did Not Terminate Maintenance Award Where Former Husband Did Not Modify His Standard of Living / But Trial Court Improperly Considered Withdrawals from Retirement Accounts in Calculating Maintenance When Wife Waived Any Interest in Original Divorce	<a href="#">Page 43 of 48</a>
<b>Attorney's Fees</b>	<a href="#">Page 44 of 48</a>
<b>Disgorgement</b>	<a href="#">Page 44 of 48</a>
<i>Nash</i> – Interim Fees and Disgorgement: Disgorgement Improper Unless Unambiguous Finding that Both Parties Lacked Ability to Pay Interim Attorney's Fees	<a href="#">Page 44 of 48</a>
~ <i>Earlywine</i> - (Cert granted to IL Supreme Court) Interim Attorneys Fees and Disgorgement: Advance Payment Retainer No Bar to Disgorgement in Appropriate Initial Divorce Case Where Not Plead as a Defense	<a href="#">Page 45 of 48</a>
<i>Nye</i> – Fees and Civil Procedure - No Right to Refile Voluntarily Dismissed Case Unless Specifically Reserved	<a href="#">Page 45 of 48</a>
<b>Contribution Petitions</b>	<a href="#">Page 46 of 48</a>
~ <i>DiGiovanni</i> - Contribution Petitions: Fee Shifting Provision Upheld Where Former Wife's Petition Viewed as Petition to Modify Rather than Simply Review	<a href="#">Page 46 of 48</a>
<i>Bolte</i> – Post-Decree Attorney's Fees on Maintenance Review Improperly Denied	<a href="#">Page 47 of 48</a>

**Property Cases Law:**

**Retirement Benefit Cases**

***Smith* – Trial Court Abused Discretion in Equally Dividing 401(k) Without Appearing to Consider Statutory Factors**

[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 divided selected marital property equally. The appellate court stated:

With regard to the specific division of Sharyl’s 401(k), our review of the record indicates that the trial court abused its discretion. The record reflects that when ruling on the division of the 401(k) the trial court made the following comment:

“But nevertheless, with regard to any and all pensions, or of the like, a portion earned during the marriage should be divided half to each side, and I don’t see a reason to deviate with the other findings of the court \*\*\*.”

These comments indicate to us that the trial court did not review the relevant factors under section 503(d) of the Act to divide the 401(k) in just proportions as required under the Act. 750 ILCS 5/503(d) (West 2010). Instead, the trial court found that any income in the 401(k) earned during the marriage should be divided half to each side as

a matter of course.

## QDROs and QILDROs

### ***Kehoe – Standard Coverture Fraction Type QILDRO Not Required Years Later Despite Richardson and Culp Given Savings Clause in Non-Effective QDRO***

*IRMO Kehoe*, 2012 IL App (1st) 110644 (March 16, 2012)

After a six year marriage, the parties were divorced in 1988. They had separated in August 1985. The Judgment for Dissolution of Marriage incorporated a MSA which provided that the wife was entitled to one-half of the value of her husband's pension from the date of his employment with the Village of Schiller Park as a police officer to the date of the separation of the parties. After the former husband's retirement, the former wife filed a motion for entry of a QILDRO along with a proposed consent for issuance. The motion and proposed QILDRO set forth a method of calculation for determining the value of the marital portion of Frank's pension. After a hearing in June 2010, where the former husband objected to the former wife's proposed calculation of pension benefits, the trial court entered a written order denying the former wife's motion for entry of a QILDRO. The trial court also denied her motion for reconsideration. The former wife appealed and the appellate court affirmed.

The MSA provided:

"The parties agree that LAURETTA shall be entitled to receive one half of the value of the pension from the date of FRANK's employment with the Village of Schiller Park to the date of the separation of the parties, which is August 31, 1985 (hereinafter referred to as 'one-half'). \*\*\* FRANK further understands that a Qualified Domestic Relations Order reflecting the above shall be lodged with the Schiller Park Police Pension Fund directing them and ordering them to pay one-half (½) of FRANK'S pension to LAURETTA commencing at the time of FRANK'S retirement or termination of employment from the Village of Schiller Park. The right of LAURETTA to receive FRANK'S one-half (½) pension shall not survive after LAURETTA'S death."

A QDRO was also incorporated in the divorce judgment. The QDRO will be quoted from at length because of the importance of the language:

"The interest in the Husband's name in the SCHILLER PARK POLICE PENSION FUND (hereinafter referred to as 'PLAN') or successor, shall be divided between the parties as follows:

\* \* \*

(v.) Marital Portion: An amount equal to the balance in the Husband's account (in the case of a defined contribution plan) and/or *the amount accumulated by the Husband under the terms of the plan* (in the case of a defined benefit plan) *for each Plan multiplied by a fraction, the numerator of which is the number of years (months) of marriage during which benefits were accumulated prior to the 'Marital Retirement Date', aforesaid, and the denominator of which is the total number of years (months) during which benefits were accumulated prior to the marital retirement date.*

(Emphasis added.) \* \* \*

5. Increased Benefits: Any increases in the Husband's accrued benefits in either Plan caused by contributions occurring subsequent to the marital retirement date are not to

be construed as part of the marital portion. Accordingly such increases shall be disbursed to and enjoyed solely by the Husband and the Wife shall not be entitled to share in any such increases.

\* \* \*

13. Savings Clause: It is the intention of the Wife and Husband that the foregoing provisions shall qualify as a Qualified Domestic Relations Order and whenever the provisions hereunder are inconsistent with the definition of a Qualified Domestic Relations Order as may be contained, from time to time, in the Internal Revenue Code of 1954, as amended, and/or the Employee Retirement Security Act of 1974, as may or may not be amended, this Agreement shall be amended from time to time as may be necessary to comply with the requirements for a Qualified Domestic Relations Order. Both parties shall enter into an agreed order of court as may be reasonably required to amend this Article and/or the Judgment for Dissolution of Marriage to so comply.”

The former husband retired November 2009. The Schiller Park Police Pension informed the former wife that they could not honor the QDRO. In January 2010, the former wife then forwarded a consent to issue a QILDRO which the former husband refused to sign.

The proposed QILDRO followed the following formula to calculate the marital portion:

The amount of the alternate payee’s benefit shall be the result of  $(A/B) \times C \times D$  where:  
“A’ equals the number of months of regular plus permissive service that the member accumulated in the Retirement System from the date of marriage (04-28-1979) to the date of the divorce (12-23-1988). \*\*\*

‘B’ equals the number of months of regular plus permissive service that the member accumulated in the Retirement System from the time of initial membership in the Retirement System through the member’s effective date of retirement. \*\*\*

.; ‘C’ equals the gross amount of \*\*\* the member’s monthly retirement benefits \*\*\* calculated as of the member’s effective date of retirement including permissive service, upgrades purchased, and other benefit formula enhancements; \*\*\*

‘D’ equals the percentage noted in Section III(A)(2) [50% per month of the marital portion of the pension].”

The former husband, Frank, objected to the method of proposed apportionment since he claimed that the benefits should not be calculated as of when benefits went into pay status and then applying a formula. But the formula he proposed would provide only one half of the value of the pension as of the date of the divorce. The trial court entered a written order denying the ex-wife’s motion for entry of a QILDRO and ordered Frank to pay Lauretta 50% of his pension as of the date of separation, stating:

“Respondent pursuant to the order and judgment for dissolution of marriage shall pay to Petitioner 50% the pension as of the date of separation which is 8/31/85. Said calculation is Petitioner’s marital portion.”

The former wife appealed and the appellate court affirmed the trial court's award generally but remanded with instructions. The appellate court first quoted from a portion of MSA:

“The parties agree that LAURETTA shall be entitled to receive one half of the value of the pension from the date of FRANK’S employment with the Village of Schiller Park to the date of the separation of the parties, which is August 31, 1985 (hereinafter referred

to as ‘one-half’).” If the parties’ judgment included only this provision and no other language or additional documents such as a QDRO, the judgment may have been viewed as “silent as to what portion of the pension benefit is marital” and the trial court would then have the discretion to decide how to allocate the pension benefits. However, the marital settlement agreement and QDRO in the case at bar already set out the method of calculation and pension apportionment. The parties’ QDRO explains that Frank’s pension plan should be “multiplied by a fraction, the numerator of which is the number of years (months) of marriage during which benefits were accumulated prior to the ‘Marital Retirement Date’, aforesaid, and the denominator of which is the total number of years (months) during which benefits were accumulated prior to the marital retirement date.” The term “Marital Retirement Date” referred to the date when the final judgment of dissolution was entered and its definition was used “for the sole purpose of computing the marital purpose” of Frank’s pension plan.

The detail of the QDRO’s language regarding the calculation of Frank’s pension and, even more notably, *the very act of incorporating a completed QDRO into the dissolution judgment* show that the judgment is not “silent” as to how the pension should be divided and what portion of the pension benefit is marital. [Richardson](#), 381 Ill. App. 3d at 53. The parties clearly agreed upon a formula for calculating the pension apportionment during the time of dissolution. By incorporating a QDRO within the judgment, the trial court had already directed and ordered the Schiller Park Police Pension Fund to pay to Laretta her share of the pension benefits upon Frank’s retirement. Entering a QDRO at the time of dissolution would be meaningless if the trial court actually intended for the marital portion of Frank’s pension to be determined at a later time. (Emphasis added).

Part of the reason for rejecting the former approach was the clause regarding increased benefits providing that providing that any increased in the husband’s accrued benefits caused by contributions occurring subsequent to the marital retirement date are not to be construed as part of the marital portion.” But keep in mind that the reasons for increases are not merely the later contributions since the benefits are based upon the salary at the time of retirement.

In any event, the appellate court commented, “It is difficult to adopt Laretta’s proposed method of calculating her share of the pension benefits without directly violating the terms of this provision.” The *Kehoe* trial court did so regardless of the former wife’s argument that the *Hunt* formula was preferred.

The appellate court distinguished the [IRMO Richardson](#) decision:

First, *Richardson* is only relevant in cases where the judgment of dissolution is “silent” on how the marital portion of the pension benefits is to be calculated. *Richardson*, 381 Ill. App. 3d at 53. In *Richardson*, the judgment stated nothing more than that the former wife was awarded one-half of the marital portion of the pension and did not state how the marital portion would be calculated. *Richardson*, 381 Ill. App. 3d at 53. [IRfMO Culp](#), another case Laretta relies on, also involved a settlement agreement which “contain[ed] no explicit language directing the trial court how to divide the marital portion of the pension other than to do so ‘equally.’” *IRMO Culp*, 399 Ill. App. 3d 542, 552 (2010).

In contrast to [Richardson](#) and [Culp](#), the judgment in the case at bar incorporated a

QDRO that includes specific language detailing the marital retirement date and a formula for calculating the marital portion of pension benefits. The parties' QDRO also explicitly prohibits Lauretta from sharing in any increases in Frank's accrued benefits caused by contributions made after the date of dissolution. The judgment in *Richardson* and settlement agreement in *Culp* did not include a similar provision or such restrictive language as the QDRO did here. These differences clearly demonstrate that the judgment in the case at bar was not "silent" in regards to the method of pension apportionment. As a result, *Richardson* does not control here because the trial court did not have the "discretion" to decide how to calculate the pension benefits and was precluded from using the reserved jurisdiction approach. *Richardson*, 381 Ill. App. 3d at 53.

Second, the trial court in *Richardson* was able to choose the reserved jurisdiction approach because the judgment expressly indicated that the court shall retain jurisdiction for the purpose of later entering a QDRO. *Richardson*, 381 Ill. App. 3d at 52. The court interpreted the judgment to mean "by reserving jurisdiction to enter an allocation order, the court also reserved jurisdiction to determine the calculation of that allocation." *Richardson*, 381 Ill. App. 3d at 53. The case at bar differs from *Richardson* in that a QDRO was incorporated into the judgment at the time of the dissolution. The trial court did not retain jurisdiction to allocate the pension benefits because a QDRO had already set forth the calculation of the marital portion of the pension when judgment was entered. Again, *Richardson* does not apply because the trial court does not have the discretion to decide on a method of pension apportionment when the judgment has already done so through the parties' QDRO.

Finally, the former wife argued that the standard coverture fraction approach should be followed due to the change in the QILDRO statute with the amendments. She urged that these changes rendered the QDRO void and thus triggering the "savings clause" within that QDRO. The appellate court stated:

The savings clause does not afford Lauretta another opportunity to formulate a method of apportionment which will entitle her to a greater share of the pension benefits than what was originally agreed to in the parties' marital settlement agreement and QDRO. However, an appropriate qualified Illinois domestic relations order is required to direct the pension fund to pay Lauretta her share of the benefits.

The case was only remanded for the entry of a QDRO following the former husband's language providing for the limited benefits that he argued for.

**Comment by Gunnar J. Gitlin:** *Kehoe* fleshes out the significant body of case law that has developed when addressing pension benefits under the Illinois Pension Code, in cases where the judgment was entered before the two sets of changes to the Illinois Pension Code with the later having been made in 2006.

---

## Other Property Cases

### ***MLK - Mathis* – IL Supreme Court: Date for Valuation in Bifurcated Case Where Grounds Judgment Entered**

[\*IRMO Mathis\*](#), 2012 IL 113496 (December 28, 2012). Illinois Supreme Court recently ruled on this decision. The Supreme Court Rule 308 certified question on appeal was:

"In a bifurcated dissolution proceeding, when a grounds judgment has been entered, and when there is a lengthy delay between the date of the entry of the grounds judgment and the hearing on ancillary issues, is the appropriate date for valuation of marital property the date of dissolution or a date as close as practicable to the date of trial of the ancillary issues?"

The appellate court granted the interlocutory appeal as a matter of first impression. The Illinois Supreme Court in December 2012 reversed the appellate court's decision and remanded the case. The Court reviewed case law and noted that it was near unanimous. Next, it noted the number of times the statute -- Section 503 -- was amended without amending the specific language. The Court then stated, "The rationale of *Rossi* and its progeny is that once the parties are divorced, the property they acquire is no longer marital property." The Supreme Court concluded:

*Schinelli* is not contrary to the rule that the valuation date should be the date of dissolution. While the appellate court's decision in *Schinelli* did not preserve the amounts of the 401(k) account awarded in the initial order, it preserved the percentages awarded, and adhered to the intent of that order by dividing that account equally. Indeed, as the appellate court correctly understood there and here, there are ways to allocate and adjust for postdissolution increases and decreases in the value of marital property to attain a just distribution. See, e.g., 750 ILCS 5/503(c), (d)(1) (West 2010). Rather than adjust later, it is better to divide sooner, based on the value of the property on the date of dissolution. This rule encourages the parties to stop litigating, so they can receive and manage their proportion of the marital property, and discourages gamesmanship because the parties would be on notice that dilatory tactics would not aid either side. **Accordingly, we hold that, in a bifurcated dissolution proceeding, the date of valuation for marital property is the date the court enters judgment for dissolution following a trial on grounds for dissolution (see 750 ILCS 5/401(b) (West 2010)) or another date near it.** We believe this rule best serves the purpose of and the policy behind the Act, and accordingly the legislature's intent.

Accordingly, the Court held that the valuation date was August 2004, i.e., the date of the judgment for dissolution of marriage on grounds.

I liked the optimistic conclusion, "On remand, we expect the parties to find common ground quickly, and new and healthier concerns outside the court system and the disputes that have plagued them for 12 years." Before stating this, the court stated, "There is simply no discernable reason why this case should still be pending on any issues, now 12 years after the petition for dissolution was filed. The parties, their attorneys, and the trial court all share the blame."

### ***D'Attomo* – Classification - Whether Home Equity Loan Invested in Business Was Loan to Business or Investment into the Business**

[\*In re Marriage of D'Attomo\*](#), 2012 Ill. App. (1<sup>st</sup>) 111670 (September 26, 2012, rehearing denied October 29, 2012)

Respondent, John J. D'Attomo, appealed from the judgment of the circuit court of Cook County dissolving his marriage to petitioner, Betsy J. D'Attomo. The first issue on appeal was his contention



that the home equity loans totaling \$201,500 received in 2007 were a loan to the business. The business valuator had testified on the wife's behalf that he valued the business at \$69,000 and did not consider the home equity loan as a debt to the business. He explained that he believed a regular debt would be evidenced by a note between the business and the lender. The husband urged that it was a business loan, in part, because the bakery's tax returns, financial statements and "year one pro forma" sheet characterized the funds as a loan. The trial court found the bakery to be worth \$69,000 treating the funds from the home equity loan as an investment into the business rather than a loan to it.

The accountant involved in creating these documents testified that the characterization was done for tax purposes and he made no assessment as to whether there were, in fact, a loan or equity. While John testified to the intent to a loan to the business (that it was to be repaid when their eldest child would graduate from college), Betsy testified that they were intended as an investment. The trial court found that the wife's testimony was credible while the husband's was "consistently skewed toward demeaning and provoking Betsy." Based upon the record, the appellate court affirmed the finding that the home equity loan was not a loan to the business.

***Berberet* – Potential Personal Injury Claim: Appellate Court Approved Trial Court's Not Reserving Jurisdiction Regarding Potential Personal Injury Cause of Action where No Claim Filed as of Date of Divorce -with a Caveat**

[\*IRMO Berberet\*](#), 2012 IL App (4th) 110749 (08/29/12)

This case provides a new wrinkle regarding a potential personal injury cause of action that a party might bring post decree. The decision stated:

In summer 2010, David was involved in a motor vehicle accident. As a result of the accident, he totaled his truck. Insurance covered the damage to his vehicle. At the time of the dissolution hearing, David had not filed a personal injury claim; however, he did not rule out the possibility, testifying that "it depended" whether he would pursue a demand against the insurance company. He also testified that he called an attorney concerning the injuries he received from the accident. According to David, as of the dissolution hearing, his attorney had not taken any action on his behalf.

Rebecca argues that the trial court abused its discretion in failing to consider David's potential personal injury claim as an asset of the marriage, because personal injury awards accruing during a marriage are marital assets subject to division. In support of her argument, Rebecca relies on the following three cases: *In re Marriage of Toth*, 224 Ill. App. 3d 43 (1991); *In re Marriage of Pace*, 278 Ill. App. 3d 932 (1996); and *In re Marriage of DeBow*, 236 Ill. App. 3d 1038 (1992). However, those cases involve personal injury claims filed before or during the pendency of the dissolution proceeding. As of the dissolution hearing, David had not filed a personal injury claim. Based on the record provided, it is too speculative as to whether David will file a personal injury claim within the statute of limitations. While we do not want to encourage parties to delay the filing of a personal injury claim until after their dissolution proceeding is concluded, we cannot say that in this case the trial court abused its discretion by not considering David's potential personal injury claim.

***Romano* – "Fraud on Marital Rights" Claim Rejected, Disproportionate Property Award Affirmed**

[IRMO Romano](#), 2012 IL App (2d) 091339 (March 21, 2012)

See also holdings re Classification, Dissipation and Maintenance, below. This appellate court decision is 63 pages long.

**“Fraud on Marital Rights:”** The wife's final claim was that the husband's transfers of various assets into the DMR trusts and later out of the trusts to his siblings constituted a fraud on her marital rights. At the close of evidence the husband brought an oral motion for a directed finding on this claim. The court sustained the request for directed finding. This case should be looked to regarding the law regarding directed findings. The appellate court stated:

As such, a transfer is not vulnerable to attack by a spouse unless the transaction “is a sham and is ‘colorable’ or ‘illusory’ and is tantamount to a fraud.” *Johnson*, 73 Ill. 2d at 358 (quoting *Holmes v. Mims*, 1 Ill. 2d 274, 275 (1953)).<sup>6</sup> An “illusory” transfer is one “which takes back all that it gives.” *Johnson*, 73 Ill. 2d at 359. A “colorable” transfer is one “which appears absolute on its face but due to some secret or tacit understanding between the transferor and the transferee the transfer is, in fact, not a transfer because the parties intended that ownership be retained by the transferor.” *Johnson*, 73 Ill. 2d at 359. In other words, although a spouse’s marital rights can be defeated by an actual transfer, a purported transfer whereby the owner does not intend to convey a present interest, but intends to retain ownership, is evidence of an intent to defraud. *Johnson*, 73 Ill. 2d at 359-60; see also *Demos v. Demos*, 8 Ill. App. 3d 906, 908 (1972).

Regarding the trusts the appellate court stated:

In her case in chief, Cynthia presented the testimony of Tarshis in support of her claim of fraud on her marital rights. Tarshis testified that he is an attorney who specializes in trusts and estates and creditor protection. On direct examination, Tarshis explained that trusts can be established with “ties” that permit the settlor of the trust to maintain some control over the assets transferred therein. Tarshis testified that, if the settlor has too many “ties” to the trust, there is a risk that the transfer will not “hold up” and would be classified as “elusory [sic].” After reviewing various documents, including the DMR trusts, trusts established by other members of the Romano family, and transactions between the DMR trusts and members of the Romano family, Tarshis testified that he found six “ties” between Daniel and the DMR trusts.

In any event, the appellate court stated:

The present case is factually distinguishable from *Frederick*. [218 Ill. App. 3d 533, 537-539 (1991)]. The DMR trusts were not created proximate to Daniel’s contemplating a divorce. Indeed, the creation of the estate plan predated the divorce filing by five years, and there is no indication that, when Daniel discussed the estate plan with his attorney, he inquired regarding the ramifications of a divorce on the estate plan. Further, in contrast to the husband in *Frederick*, there is no evidence that Daniel made any misrepresentations to Cynthia about his family’s estate plan or that he forced her to enter into any type of agreement regarding the allocation of the parties’ assets upon divorce.

**72/23% Disproportionate Property Division:** The husband claimed that the 77/23% marital property

division was in error. The appellate court stated:

In its October 12, 2009, letter opinion, the trial court acknowledged that the division of property was “grossly disparate.” Regarding Daniel’s first point, however, the trial court found that Daniel was “to a great extent” responsible for creating the parties’ lavish lifestyle. The court noted that, while the lifestyle cannot continue, Cynthia and Alexander should not experience a “drastic and immediate change” while Daniel, albeit through the largesse of his family, lives with little apparent diminution of lifestyle. The appellate court affirmed the disproportionate property division.

### ***Washkowiak - Worker's Compensation Awards and Medical Set Aside Accounts in Cases Involving Medicare***

*IRMO Washkowiak*, 2012 IL App (3d) 110174 (March 7, 2012)

The husband, Christopher Washkowiak, appealed from the trial court’s order awarding his wife \$12,250, a figure representing 17.5% of the portion of his workers’ compensation settlement including the portion placed in a Medicare set-aside account. During the marriage the husband had suffered a work related accident and filed a worker's compensation claim. The 2010 divorce judgment incorporated the MSA. It provided:

The Respondent is awarded 17.5% of the net proceeds from the Petitioner’s workers’ compensation settlement as and for her interest in the same. Net proceeds are defined as the agreed award amount less workers’ compensation attorneys’ fees and usual and customary litigation fees and expenses. The Petitioner is ordered not to receive any funds from his settlement without first directing his attorney to provide a draft check to the Respondent for her portion herein. Net shall include any reimbursement for unemployment which he actually pays and *medical payments* he actually pays.” (Emphasis supplied by majority opinion.)

Three months after the divorce, the worker's compensation case was settled. The agreement included a “Workers’ Compensation Medicare Set-aside Arrangement.” The agreement defined the medical set aside as “an interest bearing bank account funded solely by the Medicare Allocation and used solely to pay for future Medicare-covered medical and/or prescription drug expenses.” The monetary terms of the set aside were:

#### “THE ATTACHED TERMS OF THE SETTLEMENT

Total amount of settlement     \$365,000 (does not include \$70,000 [Set Aside])  
Deduction: Attorney’s fees       \$67,903.35  
Deduction: Medical reports, X-rays \$766.60  
Amount employee will receive \$296,330 \*\*\*

- “4. The parties agree that \*\*\* Centers for Medicare Services approval of the [Set Aside] is not required under CMS policy.  
5. The parties agree that of the total settlement amount of \$435,000, the amount that is allocated to the [Set Aside] is \$70,000. \* \* \*  
14. In entering into this \*\*\* Agreement, it is not the intentions of the parties to shift responsibility of the Claimant’s future medical treatment and/or prescription drug treatment to the Federal government. The allocation of \$70,000 is intended directly for payment of Claimant’s future treatment related to the work injury that would normally

be covered by Medicare so that the parties are in compliance with the Medicare Secondary Payer Act (42 U.S.C. § 1395(b)) and applicable Medicare rules and regulations.”

The parties agreed that the former wife was entitled to 17.5% of the \$296,330 received under the settlement agreement. But post-divorce they disputed whether the former wife was entitled to 17.5% of the \$70,000 representing the medical set aside. The former husband urged that the medical set aside funds were not part of the "net proceeds" of the settlement. Instead, he argued that the funds were set aside solely to satisfy Medicare's interests. The former wife argued that she was entitled to her share of the set aside funds as the \$70,000 did not fall under the excluded category of "attorneys' fees and usual and customary litigation fees and expenses," as provided in paragraph 10 of the judgment of dissolution. The trial court held that the \$70,000 set aside was to be *included* in the net proceeds for purposes of calculating respondent's 17.5% share. Since the undisputed amounts had already been paid, the trial court ordered the former husband to pay his former wife \$12,250.

The appellate court then stated:

According to the dissolution decree, "net proceeds" include reimbursement for medical payments actually paid by petitioner. The funds in the MSA are part of the settlement with petitioner and are to be used for petitioner's medical payments. Unless there is something about an MSA that removes the medical set aside funds from the definition of "net proceeds," the funds fall squarely within the dissolution decree's definition of "net proceeds."

The appellate court then provided an excellent review for any family lawyer of the Medicare program as it relates to Medicare set asides. The opinion uses the acronym MSA. But because I use the term MSA to refer to a marital settlement agreement, I have not used the trial and appellate court's chosen acronym. Historically, Medicare would pay for medical services whether or not the recipient was covered by another plan. But, beginning in 1980 there were a series of amendments designed to address increasing Medicare costs. Those amendments are known as the "Medicare as Secondary Payer." They use one the acronym -- MSP. So we now have the term MSP statute (or provisions). See, 42 U.S.C. § 1395y. The MSP statute precludes Medicare from providing payment for services to the extent that the payment in question has been made or can reasonably be expected to be made promptly under the applicable workers' compensation act. This exclusion is also embodied in the Code of Federal Regulations -- which expressly embraces workers' compensation as payment subject to reimbursement to Medicare.

Next, I quote at length from the 42 C.F.R. § 411.46 (2012):

“(a) **Lump-sum commutation of future benefits.** If a lump-sum compensation award stipulates that the amount paid is intended to compensate the individual for all future medical expenses required because of the work-related injury or disease, Medicare payments for such services are excluded until medical expenses related to the injury or disease equal the amount of the lump-sum payment.

(b) Lump-sum compromise settlement.

(1) A lump-sum compromise settlement is deemed to be a workers'

compensation payment for Medicare purposes, even if the settlement agreement stipulates that there is no liability under the workers' compensation law or plan.

(2) If a settlement appears to represent an attempt to shift to Medicare the responsibility for payment of medical expenses for the treatment of a work-related condition, the settlement will not be recognized. For example, if the parties to a settlement attempt to maximize the amount of disability benefits paid under workers' compensation by releasing the workers' compensation carrier from liability for medical expenses for a particular condition even though the facts show that the condition is work-related, Medicare will not pay for treatment of that condition. \*\*\*

(d) Lump-sum compromise settlement: Effect on payment for services furnished after the date of settlement--

(1) Basic rule. Except as specified in paragraph (d)(2) of this section, if a lump-sum compromise settlement forecloses the possibility of future payment of workers' compensation benefits, medical expenses incurred after the date of the settlement are payable under Medicare.

(2) Exception. If the settlement agreement allocates certain amounts for specific future medical services, Medicare does not pay for those services until medical expenses related to the injury or disease equal the amount of the lump-sum settlement allocated to future medical expenses."

The appellate court next explained that the worker's compensation settlement in this case included a medical set aside allotting \$70,000 of the settlement for future medical expenses. So, Medicare would pay for medical expenses only after the medical set aside would be exhausted. The appellate court then stated:

Therefore, the \$70,000 placed into the MSA is for the sole purpose of paying petitioner's medical bills; the settlement is reimbursing him for his future medical costs. Accordingly, the funds in the MSA fall squarely under the definition of "net proceeds" contained in the dissolution agreement.

According to the appellate court the former husband did not present evidence that the funds in the medical set aside were not "net proceeds" as defined within the marital settlement agreement, "There is no question the money is his." The appellate court then stated:

The MSA clarifies how much of the settlement is intended to pay for future medical costs associated with the injury and places that amount in a separate account so that it can be shown that those funds were used to pay petitioner's medical costs caused by the injury. Since the dissolution decree defines "net proceeds" to include payment for future medical costs, the funds in the MSA are net proceeds. The trial court correctly determined that respondent is entitled to 17.5% of the entire settlement.

The majority opinion tries to address the dissent: "The dissent's statement that "Medicare is the sole beneficiary of any and all medical set asides, as these accounts are created solely to protect Medicare's

interests," is incorrect." The majority points out that if theoretically there are no medical costs, the funds are returned to the injured individual.

The majority opinion urges:

In essence, in settling his workers' compensation claim, petitioner agreed to earmark \$70,000 for his future medical bills. In settling the property claims in his marital dissolution, petitioner agreed that monies identified for "medical payments" would be part of the "net proceeds." The \$70,000 that petitioner chose to place in the MSA falls squarely within the petitioner's own definition of "net proceeds." *The dissent picks one sentence out of paragraph 10 of the agreed dissolution order and ignores another sentence that states, "Net shall include any reimbursement for unemployment which he actually pays and medical payments he actually pays."* The dissent manufactures an ambiguity by ignoring part of the paragraph. There is no ambiguity. (Emphasis added.)

I disagree. The dissent was better reasoned. But, the entire point goes to the importance of drafting the original marital settlement agreement in cases involving worker's compensation and Medicare, etc., to specifically anticipate the medicare set aside account. Unfortunately, this was not done.

**Comment by Gunnar J. Gitlin:** After reading the opinion and not noting the district, I speculated that the case would have originated from the Third Judicial District. The majority opinion results in a situation that lawyers call "bad facts making bad law." I believe that the original settlement agreement indeed was ambiguous.

The real question is what was meant by the phrase "medical payments he actually pays." I agree with the dissent where it points out:

The majority's citation to this sentence alone establishes an internal conflict within the judgment rendering it ambiguous. Again, the clear intent of petitioner and respondent was to ensure respondent received 17.5% of the net proceeds of petitioner's workers' compensation settlement. The workers' compensation settlement agreement, however, expressly provides that the medical set aside funds are not included in the total amount of the settlement. The judgment of dissolution is devoid of any reference to medical set aside funds. Moreover, the set aside funds do not constitute a "reimbursement for \*\*\* medical payments." Instead, the medical set aside funds are funds set aside to protect Medicare's interests in case petitioner is required to seek medical treatment or care in the future. Thus, the majority's reliance upon the above sentence has no bearing or relevance on the precise issue before us.

Yes! But once again, this case goes to the importance of anticipatory drafting done in a sophisticated manner.

***Estate of Doman v Doman - Death of spouse after a bifurcated divorce judgment on grounds was entered, but before any other issue was resolved.***

[Estate of Doman v Doman](#) 2012 IL App (4<sup>th</sup>) 120123 (Oct. 11, 2012)

The husband and wife were married in 1994. In 2011 the wife filed a divorce petition. On June 10,

2011, the trial court entered a written divorce judgment on grounds, reserving all other issues. The husband died on July 4, 2011. On July 5, 2011, the trial court made a docket entry noting the husband's death and dismissing the divorce case.

In September 2011 the wife filed a petition in the probate division as the surviving spouse. The husband's children responded by arguing the June 2011 judgment was a final judgment dissolving the wife's marriage to the husband. Following hearing, the probate court determined the divorce was final and the wife was not an heir of the husband. The probate court appointed the husband's children as coadministrators of the estate. The wife appealed. The appellate court reversed the probate court's determination.

The appellate court noted that no party contested or appealed the trial court's order dismissing the divorce petition. Further, the substantive issues in the divorce case, other than grounds, were not heard and no judgment was entered regarding support or property division issues. To affirm the probate court's determination would result in preventing the wife from making any claim to marital property through divorce or probate. Under the circumstances, the appellate court concluded the trial court intended to dismiss the entirety of the divorce proceeding, not just claims regarding property and support.

The appellate court noted the bifurcation of the judgment pursuant to Section 401 of the IMDMA was permissible and that, usually, "the death of a party subsequent to entry of a judgment for dissolution but before judgment on reserved issues shall not abate the proceedings," the trial court did have authority to set aside any judgment within 30 days of that judgment. The order dismissing the divorce petition was made within 30 days of the judgment and, therefore, would be proper under Section 1301(e) of the Code of Civil Procedure. The appellate court reversed the trial court's order holding the wife was restored to the same position as if she had never filed a divorce petition. However, as the wife did not appeal the order appointing the children as coadministrators, the appellate court did not address the later order.

---

## **Dissipation**

First, keep in mind the changes to the statute commencing January 1, 2013 regarding dissipation.

### ***Berberet* – Appellate Court Approved No Finding of Dissipation / Tax Consequences: Addressing Overall Allocation More Equally in Terms of Assets Subject to Later Tax Was Proper**

[\*IRMO Berberet\*](#), 2012 IL App (4th) 110749 (08/29/12)

**Dissipation:** Regarding dissipation the appellate court stated:

In February 2010, David received a workers' compensation settlement of \$46,786.81 for an injury he suffered in 2006. That same month, he deposited \$36,401.05, the workers' compensation award minus attorney fees, into a Credit Union savings account. From that account, David made numerous withdrawals. From February 2010 to October 2010, David made cash withdrawals totaling \$4,200. David claims that he used the settlement money to pay rent, attorney fees, credit card debt, and normal expenses. He also claims that he used the money to pay for three vacations, including a family vacation in Minnesota, a hunting trip in Arkansas, and a trip to Las Vegas. As of the end of 2010, \$14,675.88 was in the account. ¶ 54 The trial court found that David

adequately explained the use of money from his workers' compensation settlement and the money was used for a legitimate marital purpose. In making its determination, the court emphasized that recreation and vacations consistent with the lifestyle established during the parties' marriage constitute a legitimate marital purpose. Last, the court considered that "David's use of cash and Rebecca's accumulation of credit card debt was a comparable and balancing use of marital assets, with each party reducing the size of the marital estate in their own separate way for similar marital purposes."

Review this decision regarding:

- \* Cash withdrawals consistent with the previous routine;
- \* Vacations that were not extravagant;
- \* Attorney's fees payments;
- \* Purchasing a new vehicle was not dissipation resulting from depreciation.

**Tax Consequences - Consideration of Tax Implications of Retirement Account Division as Part of Overall Estate:** Regarding retirement accounts, the decision addresses cases where the apportionment overall is weighted such that one party has greater assets subject to tax consequences, i.e., retirement assets. The decision states:

Last, Rebecca argues that the trial court erred in granting David's motion to reconsider the source of his equalization payment. On April 5, 2011, the court ordered David to pay Rebecca an equalization payment of \$52,397. However, because the court planned on awarding the SOGA profit-sharing account to Rebecca, the equalization payment was to be reduced by one-half the value of Rebecca's SOGA profit-sharing account as of December 31, 2010. After the close of evidence, the parties reached a stipulation as to the value of the SOGA profit-sharing account and the court reduced David's equalization payment to \$28,163. On June 22, 2010, David filed a motion to reconsider, urging the court to allow him to make his equalization payment by a transfer of funds from a qualified retirement account. One month later, the court granted David's motion.

We find that the trial court did not err in granting David's motion to reconsider. Section 503(d)(12) of the Act provides for consideration of "the tax consequences of the property division upon the respective economic circumstances of the parties." The majority of David's awarded assets were retirement funds, constituting pretax assets. David had \$337,809 in pretax assets, while Rebecca had less than half that amount, \$151,925. The court's decision on reconsideration addresses the disproportionate tax consequences of the property division upon David by taking into account that some tax will be due when the parties withdraw money from one of their retirement accounts. In accounting for the tax consequences, the court also made a point of not speculating as to the future tax rate.

***Romano – Timing Issue Re When Marriage Began Undergoing Irretrievable Breakdown and Even Though Marriage May have Been Troubled Does Not Necessarily Prove Marriage Began Undergoing Irretrievable Breakdown***

[\*IRMO Romano\*](#), 2012 IL App (2d) 091339 (March 21, 2012)

See also holding re Maintenance, below. This appellate court decision is 63 pages long.

**Timing Re Dissipation:** This case also involves one more regarding the timing of alleged dissipation –



that is, when the marriage began undergoing an irretrievable breakdown. The wife tried to bump back that date to 2000 or 2003 and the trial court rejected this. The trial court's discussion was quoted from at length:

“The notion that any dispute during the course of a marriage that ultimately ends in divorce is enough to find that the marriage is ‘undergoing an irretrievable breakdown’ ignores human nature and the realities of life. Dissipation has become the ‘silver bullet’ of divorce litigation, and virtually every case now contains allegations that the marriage was undergoing an irretrievable breakdown, and an accounting of expenditures must be made in the face of an allegation of dissipation. Candidly, absent some fairy-tale marriage where no dispute of any consequence arises, and then the parties suddenly divorce, the holding of *Hazel* is the appropriate law to be applied in the face of the ever-present allegations of dissipation.

An irretrievable breakdown is not a ‘prolonged gradual process extending from the initial signs of trouble in a marriage until the actual breakdown itself.’ *In re Marriage of Hazel*, 219 Ill. App. 3d 920, 921 \*\*\* (5th Dist. 1991). Rather, the date of irretrievable breakdown is the date by which it is apparent that a breakdown is inevitable. *Id.* at 922. Courts define the date of irretrievable breakdown in this way in order to avoid the overly burdensome task of ‘examin[ing] every argument or conflict in the marriage from the moment the vows are exchanged to the date of dissolution.’ *Id.* at 921-22. cf. [In re Marriage of Holthaus](#), 387 Ill. App. 3d 367 \*\*\* (2nd Dist. 2008).

Using the standards set forth above, the Romano marriage was not ‘undergoing an irretrievable breakdown’ in either 2000 or 2003. In further support of this conclusion, the court finds Cynthia’s testimony in this regard less credible than *[sic]* [Daniel’s]. The ‘dissipation’ aspect of this case arose well into the litigation, when Cynthia apparently realized that these ‘transfers’, even if of marital property, could not form the basis of a claim unless they could be characterized as dissipation. Her testimony as to the alleged ‘evolution’ of the irretrievable breakdown was not persuasive, and the trial court is in the best position to evaluate the credibility of the witnesses.”

The wife argued that the trial court applied the wrong legal standard because it should have focused on when the parties’ marriage *began* undergoing an irreconcilable breakdown—the standard set forth in *Holthaus*. She argued that the trial court improperly looked to the precise date on which the breakdown of the parties’ marriage was inevitable. She asserts that the trial court’s citation to *Hazel* demonstrated that the court utilized this improper standard. The appellate court stated: “To place Cynthia’s arguments in context, we examine *Holthaus* and *Hazel*.” In an excellent discussion of the case law, the appellate court stated:

However, Cynthia misconstrues *Hazel*. In *Holthaus*, we did not overrule *Hazel* either expressly or tacitly. The point the *Hazel* court was trying to make is that not every incident or conflict that occurs during a marriage signals that the marriage has begun to undergo an irreconcilable breakdown. See [In re Marriage of Zweig](#), 343 Ill. App. 3d 590, 598-99 (2003) (discussing *Hazel*). The *Hazel* court noted that many couples experience problems during marriage. *Hazel*, 219 Ill. App. 3d at 921. However, to establish dissipation, the marriage has to be “undergoing *irreconcilable breakdown*.” (Emphasis in original.) *Hazel*, 219 Ill. App. 3d at 921 (citing *O’Neill*, 138 Ill. 2d at

497). The term “irreconcilable” is defined as “impossible to bring into friendly accord or understanding: hostile beyond the possibility of reconciliation.” *Webster’s Third New International Dictionary* 1195 (2002). Thus, for instance, in *Hazel*, the court acknowledged the wife’s allegations of gambling, drinking, loafing, and wasting of marital assets on the part of her spouse as early as 1980, but it found these allegations insufficient to signal that the marriage had begun to undergo an irreconcilable breakdown at that time. *Hazel*, 219 Ill. App. 3d at 921-23. The court pointed out that, prior to 1988, the wife had not filed for dissolution and the parties had never physically separated. *Hazel*, 219 Ill. App. 3d at 922. Moreover, the wife testified that despite some marital discord the couple would always reach a point when things would go back the way they had been prior to any altercation and that they continued to engage in sexual relations until the filing of the petition for dissolution in June 1988. *Hazel*, 219 Ill. App. 3d at 922. In short, the *Hazel* court concluded that, while the marriage might not have been a happy one, the trial court’s finding that the marriage was not undergoing an irreconcilable breakdown prior to 1988 was not improper. *Hazel*, 219 Ill. App. 3d at 922-23.

In reaching its conclusion regarding these two cases as applied, the appellate court stated:

The trial court cited to *Hazel* to stress that while the Romanos, like most married couples, might have had disputes during the course of their marriage, not every conflict signals that a marriage has begun to undergo an irreconcilable breakdown. While the language the trial court used to explain its decision might not have been set forth with complete clarity, we do not interpret its decision to be in conflict with our holding in *Holthaus*. In fact, the trial court expressly acknowledged the *Holthaus* decision by citing to it using the signal “cf.” See *The Bluebook: A Uniform System of Citation* R. 1.2(a), at 55 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010) (noting that the signal “cf.” designates that the “[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support”).

Well stated!

Next the wife argued that the term “irretrievable” rather than “irreconcilable” was significant. But the appellate court reject this as a “distinction without a difference.” After looking to the similar dictionary definitions, the appellate court stated, “Second, courts have used the two terms interchangeably in discussing dissipation.”

## **Classification of Property**

### ***Romano* – Classification of Property: Various Assets Properly Held to be Non-Marital Property of Husband**

[\*IRMO Romano\*](#), 2012 IL App (2d) 091339 (March 21, 2012)

See also holdings re Dissipation and Maintenance, etc., elsewhere. This appellate court decision is 63 pages long.

The former wife appealed the trial court's classification of several assets urging that they were marital property. The companies whose characterization was contested were: (1) Romano Brothers Beverage Company (RBBC); (2) Paramount Distributing Company (Paramount); (3) Central Wholesale

Company (Central); (4) Mueller Distributing Company (Mueller); (5) M&D Investments, LLC (M&D); and (6) Power Distributing LLC (Power). As if one were reading *War and Peace*, a list of the players is helpful:

The husband / “Daniel.”,  
The husband's father: “Buddy,”  
Daniel's uncle (Michael II);  
Michael II's Eldest son: Michael III.

The appellate court explained:

Complicating the ownership structure of the companies was the fact that, beginning in 2001, the Romano family began to implement an estate plan that ultimately involved transferring the family's interests in these entities into and out of various trusts. To this end, Daniel established three irrevocable grantor trusts on October 29, 2001. Daniel's trusts were denominated as follows: (1) the Daniel M. Romano Gift Trust (DMR Gift Trust); (2) the Daniel M. Romano MP Annuity Trust (MP Trust); and (3) the Daniel M. Romano SP Annuity Trust (SP Trust) (collectively, the DMR trusts). Buddy was the trustee of all three DMR trusts.

During most of the marriage, the husband worked for RBBC, a family owned liquor distributing company. Paramount, Central and Mueller were the so called affiliates.

First the appellate court addressed the case law regarding dualing presumptions where a gift from a parent to child is receiving during the marriage. The appellate court first noted that the dual presumptions conflict each other out (the presumption of gift from parent to child being non-marital and the presumption that all funds received during the marriage are marital). So the trial court was left to determine the character based upon the totality of the evidence without applying a presumption. In these cases the manifest weight standard applies. The trial court ruled that the Romano companies including RBBC and the affiliates were non-marital...:

and that the transfers of the proceeds from the sale of the companies were accomplished “pursuant to a plan for the distribution of wealth generated by the sale of the Romano companies.” Further, in its judgment of dissolution entered November 17, 2009, the trial court found that the assets of the DMR Gift Trust and the MP Trust were “neither part of the marital estate nor Daniel's nonmarital property.” The court did find, however, that the assets of the SP Trust constituted marital property. While the rationale for the trial court's findings that RBBC and the Affiliates were Daniel's nonmarital property is not entirely clear from the record, we note that we review the correctness of the trial court's result rather than the correctness of its reasoning. [\*In re Marriage of Ackerley\*](#), 333 Ill. App. 3d 382, 392 (2002).

The appellate court noted the case law that transfers between siblings are curiously not presumed to be gifts. See [\*IRMO Awan\*](#), 388 Ill. App. 3d 204, 213 (2009). So, regarding the portion that was received from siblings, rather than the portion received from his parents, there was a rebuttable presumption that these shares were marital. But in this case the trial court found that the husband overcame this presumption by clear and convincing evidence. This case notes the definition of gift as, “a voluntary gratuitous transfer of property from donor to donee where the donor manifests an intent to make such a gift and absolutely and irrevocably delivers the property to the donee.” The appellate court noted that

there was a “gratuitous, voluntary transfer of property.” The husband testified that he did not compensate his siblings for the 12 shares of stock and that neither he nor any third party was obligated to repay his siblings for these shares. The wife did not present evidence to the contrary. Next, the appellate court noted the, “evidence that Daniel’s siblings intended to make a gift and that there was an absolute and irrevocable delivery of property.” Regarding RBBC, the company where the husband had worked, there was no evidence that the husband compensated his father. Stronger evidence than in the usual case existed: the father was able to testify regarding his intent and the father had submitted gift tax returns.

The wife relied on the [Sanfratello](#) decision, 393 Ill. App. 3d 641 (1st Dist., 2009), but the appellate court rejected this case as being on point:

In *Sanfratello*, one of the principle (*sic*) areas of contention involved the husband’s employment with, and ownership interests in, three pizza restaurants, two of which were opened during the parties’ marriage. At trial, the husband claimed that he had no ownership interests in the businesses and was a mere employee. He also asserted that his only income was derived from his employment at the restaurants, which totaled about \$2,200 every two weeks. Although his tax returns supported the claim that this had been his salary for the past 20 years, he admitted to making large cash deposits of additional money into his personal bank account. Further, the wife had testified that many of the family’s expenses during the marriage, including “expensive dinners, designer clothing, and groceries,” had been paid in cash. Given these facts, the trial court imputed to the husband an annual income of \$130,000, based on the uncontested evidence that he had a steady flow of cash available to him. In addition, the court classified as marital property the husband’s interests in the two restaurants that were opened during the marriage.

In that case the husband had argued that the trial court erred in classifying as marital his interests in two restaurants opened during the marriage. The appellate court's discussion rejecting the application of this case will be quoted at length because of its significance:

According to Cynthia, like the husband in *Sanfratello*, the parties’ lavish lifestyle was financed by Daniel’s involvement in RBBC, and, like in *Sanfratello*, his interest in RBBC should therefore be considered marital property. We find that the facts of *Sanfratello* are dissimilar to the facts of the case at bar and, therefore, Cynthia’s reliance on that case is misplaced. In *Sanfratello*, two of the restaurants were founded during the marriage, but, at trial, the husband initially denied that he had any ownership interests in the restaurants and then later claimed that the interests he had were given to him by his parents. Here, unlike in *Sanfratello*, Daniel did not found RBBC during the marriage. Instead, Daniel’s grandfather founded the company long before Daniel was even born. Daniel’s father and uncle later fully acquired the business. Further, the evidence at trial, including testimony, gift tax returns, and stock certificates, demonstrated that Daniel had been gifted all of his interest in RBBC. No evidence of a gift was presented at all in *Sanfratello* because at trial the husband initially denied possessing interests in the restaurants.

Moreover, the husband in *Sanfratello* received a low salary from his employment at the restaurants, and he admitted to taking cash from them for his personal use. Considering his regular use of cash from the restaurants, the court imputed to him an annual income

of \$130,000. In the present case, there was evidence that Daniel, prior to the sale of his RBBC stock, received a substantial salary (\$350,000) for his employment with RBBC, as compensation for his personal efforts. Further, there was no evidence that Daniel was a majority shareholder of RBBC or that he had any control over or access to RBBC's retained earnings. As such, throughout the parties' marriage, the parties' lifestyle was based on Daniel's income from employment. It was not until the sale of his ownership interests in RBBC to the DMR trusts and the ultimate sale of RBBC's assets to SWSI that Daniel received any considerable income due to his interests in RBBC. Because the only similarity between the instant case and *Sanfratello* is that Daniel worked at one time for a family business, we reject Cynthia's reliance on that case for her claim that RBBC is marital property.

Regarding the affiliates, they were acquired during the marriage so they were presumptively marital. So, the question was whether the husband overcame the presumption by clear and convincing evidence. There was a stock purchase agreement in which RBBC agreed to purchase Paramount's stock. But the testimony of the former CFO and treasurer was that RBBC had determined that it would lose its status as an S Corp if it had owned 80% or more of another corporation's stock. So, RBBC could not directly own Paramount. Although the former CLF / treasurer had testified to it being a "kind of a gratuitous transfer to their sons" he explained that "RBBC gave the sons the funds to purchase Paramount. Further the neither the husband nor his brother expended any personal efforts to obtain that money. There were similar arrangements regarding the two other affiliates. Thus, the husband's testimony was that:

RBBC would write a check for his share of the purchase price. Daniel would deposit these funds into his personal account and then write a check for the same amount of money to make the acquisition. Daniel testified that he did not render any personal services in exchange for these funds and that he never reimbursed RBBC for the funds the company provided. For his part, Buddy [the father] testified that Daniel and Michael III each owned a 50% share in each of the three Affiliates. Although Buddy stated that he gave Daniel the interests in the Affiliates, he also indicated, consistent with the testimony of [the former CFO] and Daniel, that the funds used to purchase the Affiliates came from RBBC. Buddy also testified that Daniel did not have to pay any money to acquire his interests in the Affiliates and that RBBC guaranteed notes for the Affiliates.

The former wife had various arguments regarding these transactions. The most interesting was her argument that "the funds supplied by RBBC to Daniel were treated as salary, bonus, or some other form of income to [Daniel] for his employment at RBBC." The appellate court rejected this and stated:

However, the trial evidence established that Daniel expended no personal efforts in order to receive the funds. Moreover, the evidence indicated that Daniel was adequately compensated for his work at RBBC. In this regard, Daniel testified that his salary at RBBC in the mid-to-late nineties was approximately \$250,000 per year. Daniel further testified that by 2002 his salary from RBBC had increased to \$350,000 per year. For these reasons, we find that the trial court's classification of the Affiliates as Daniel's nonmarital property is not against the manifest weight of the evidence.

The appellate court addressed the next classification issue on appeal at page 28, paragraph 70 regarding M&D and Power. Again, the conflicting presumptions cancelled each other out (because these were

acquired from a gift from his father). The appellate court stated, “The trial court found that Daniel’s interests in M&D and Power were Daniel’s nonmarital property. Although the trial court did not explain its reasoning in depth, we reiterate that we review the result reached by the trial court, not its reasoning.” Again, we have Federal gift tax returns prepared by the father and testimony by the father regarding his intent.

***Dann -- Characterization of Assets Acquired via Distributions of Premarital Business Involved Genuine Issue of Material Fact and Summary Judgment Finding That Asset Acquired Was Non-Marital Reversed Where, Despite Minority Status, If Party Had Substantial Influence over Decision to Retain Net Earnings or Disburse Them***

*IRMO Dann*, 2012 IL App (2d) 100343 (July 20, 2012)

Respondent, Lori Dann, appealed from the order of the circuit court dissolving her marriage to petitioner, Russell Dann. First, she challenged the trial court’s summary judgment ruling that certain assets were part of Russell’s nonmarital estate. Regarding the background, the appellate court stated:

On February 28, 2008, Russell filed a motion for summary judgment, triggering a flood of filings that did not subside until March 23, 2009, when Lori moved for reconsideration of the trial court’s March 13, 2009, summary judgment ruling. Russell amended the motion on June 23, 2008, and again on August 13, 2008. In a somewhat unusual procedure, the trial court commenced trial on July 10, 2008, while Russell’s summary judgment motions were still pending. Three witnesses had testified before the trial court entered summary judgment on March 13, 2009. Moreover, the trial concluded before the trial court denied, on May 5, 2009, Lori’s motion to reconsider.

Regarding the specific issues in the husband’s summary judgment motion, the appellate court stated:

Russell, it seems, argued that, of the 2,050 shares of DBI owned by his trust, 1,500 were acquired before the parties’ marriage and 550 were acquired during the marriage but with the use of nonmarital funds, namely, distributions from DBI and a \$300,000 gift from Armand to Russell. Russell also appeared to argue that his interest in DRIP was nonmarital because it, too, was purchased with distributions from DBI. Finally, Russell argued that, though BPA LLC was formed during the marriage, his interest in the firm was nonmarital because the firm was the successor in interest to a company in which Russell had acquired an interest before the parties’ marriage.

Lori argued that there were genuine issues of material fact whether Russell’s trust’s interests in DBI and DRIP, and his individual interest in BPA LLC, were entirely nonmarital.

Ultimately, the appellate court reviewed the recent decisions in *Schmitt, Lundahl*, etc.

Russell extracts from the discussion in *Booth* the principle that “income from \*\*\* nonmarital property remain[s] non-marital unless shown that it was for personal efforts,” which, Russell claims, “implicitly plac[es] the burden of making that showing upon the non-owning spouse.” Russell is mistaken. First, the principle he claims to derive from *Booth* is not consistent with the statutory scheme. While it is true that not all proceeds from a nonmarital business are necessarily “income” under section 503(a)(8), such proceeds are, when received during the marriage, presumptively marital property, and if the owning spouse would find haven in section 503(a)(8), he must

prove both that the proceeds are “income” and that they are “not attributable to [his] personal effort” (750 ILCS 5/503(a)(8) (West 2010)). Second, we do not read *Booth* as holding otherwise. Even if we did, we would decline to follow *Booth*, out of fidelity, firstly, to the clear language and structure of section 503(a) and, secondly, to this district’s decision in *Schmitt*, which faithfully applies section 503(a). \*\*\*

*Schmitt* correctly applied section 503(a)(8) by requiring Kim to prove not only that the funds disbursed to him during the marriage and used by him to acquire the Kedzie and suburban properties were “income,” but also that they were “not attributable to [his] personal effort.” In the case of the suburban properties, we relied on evidence of personal effort, i.e., that Kim was the sole owner of Bricks. In the case of the Kedzie properties, however, we relied on the presumption alone and found nothing in the record to rebut it. Russell comments: “Because the husband in *Schmitt* was a sole proprietor, the *Schmitt* court did not have the chance to distinguish between earned marital income and non-marital ownership distributions. Because the husband was the sole owner, the *Schmitt* court generally referred to all income from his business as marital.” Russell ignores the reality that different facts underlay the analyses of the properties purchased by Colonial and those purchased by Bricks. Kim was the sole proprietor of Bricks but not the sole proprietor of Colonial. We made no presumption based on Kim’s degree of ownership in either company, but recognized only the presumption that all property acquired by either spouse during the marriage was marital. We simply held Kim to his burden under section 503(a)(8).

In insisting that the presumption of personal effort arises, if at all, only in the case of a sole proprietorship, Russell distorts section 503(a). If, whether in all cases or just in the case of a sole proprietorship, the spouse claiming the property as nonmarital need prove only that the property is “income” under section 503(a)(8), then the presumption under section 503(a) is only a half presumption.

Applying the foregoing principles, we hold that the record before the trial court when it entered summary judgment contained no evidence to rebut the presumption that the payments from DBI for the purchase of the 550 shares were attributable to Russell’s personal effort. Essentially, the only evidence before the trial court was Russell’s and Barsella’s averments that DBI made payments so that the trust could purchase 550 additional shares of DBI, and Russell’s deposition testimony that the payments were “distributions” from DBI. Citing *Joynt*, *Schmitt*, and *Lundahl*, Russell notes that he did not have a controlling interest in DBI. This fact alone did not overcome the presumption. The thrust of the analyses in *Joynt* and *Lundahl* is that “distributions” or “dividends” disbursed during the marriage may be considered nonmarital property if proven not to be compensation to the spouse, that is, if proven not to be due to “the personal effort of a spouse.” Here, the record at the summary judgment stage was silent on whether DBI even deemed the transfers to be distributions or dividends rather than salary, which is typically compensation for personal effort. See *In re Marriage of Phillips*, 229 Ill. App. 3d 809, 818 (1992) (“remuneration to a spouse, in whatever form, during the marriage is considered marital property”). Moreover, Russell’s deposition testimony that the transfers were “distributions” is not determinative, for he did not indicate what he meant by the term, nor does the context reveal it. As material fact questions remained, summary judgment for Russell was improper

Regarding the husband's focus on his non-controlling interest in the stock the appellate court stated:

Russell's status as a minority shareholder of DBI also is not determinative. Russell would have us conclude from this fact alone that he lacked influence over the disbursement of funds from DBI, but we decline the invitation. "[W]hen a shareholder spouse has a majority of stock *or* otherwise has substantial influence over the decision to retain the net earnings or to disburse them in the form of cash dividends, courts have held that retained earnings are marital property." (Emphasis in original.) *Id.* at 820. Russell adduced no evidence of DBI's policies on distributions and so did not foreclose the possibility that, despite his minority interest, he had substantial influence over the decision to retain or disburse earnings.

***Mathis* – Date for Valuation in Bifurcated Case Where Grounds Judgment Entered**

[\*IRMO Mathis\*](#), 2011 IL App (4th) 110301, (November 9, 2011); 2012 IL 113496 (December 28, 2012). Illinois Supreme Court recently ruled on this decision. The Supreme Court Rule 308 certified question on appeal was:

"In a bifurcated dissolution proceeding, when a grounds judgment has been entered, and when there is a lengthy delay between the date of the entry of the grounds judgment and the hearing on ancillary issues, is the appropriate date for valuation of marital property the date of dissolution or a date as close as practicable to the date of trial of the ancillary issues?"

The appellate court granted the interlocutory appeal as a matter of first impression. The Illinois Supreme Court in December 2012 reversed the appellate court's decision and remanded the case. The Court reviewed case law and noted that it was near unanimous. Next, it noted the number of times the statute -- Section 503 -- was amended without amending the specific language. The Court then stated, "The rationale of *Rossi* and its progeny is that once the parties are divorced, the property they acquire is no longer marital property." The Supreme Court concluded:

*Schinelli* is not contrary to the rule that the valuation date should be the date of dissolution. While the appellate court's decision in *Schinelli* did not preserve the amounts of the 401(k) account awarded in the initial order, it preserved the percentages awarded, and adhered to the intent of that order by dividing that account equally. Indeed, as the appellate court correctly understood there and here, there are ways to allocate and adjust for postdissolution increases and decreases in the value of marital property to attain a just distribution. See, e.g., 750 ILCS 5/503(c), (d)(1) (West 2010). Rather than adjust later, it is better to divide sooner, based on the value of the property on the date of dissolution. This rule encourages the parties to stop litigating, so they can receive and manage their proportion of the marital property, and discourages gamesmanship because the parties would be on notice that dilatory tactics would not aid either side. **Accordingly, we hold that, in a bifurcated dissolution proceeding, the date of valuation for marital property is the date the court enters judgment for dissolution following a trial on grounds for dissolution (see 750 ILCS 5/401(b) (West 2010)) or another date near it.** We believe this rule best serves the purpose of and the policy behind the Act, and accordingly the legislature's intent.



Accordingly, the Court held that the valuation date was August 2004, i.e., the date of the judgment for dissolution of marriage on grounds.

I liked the optimistic conclusion, “On remand, we expect the parties to find common ground quickly, and new and healthier concerns outside the court system and the disputes that have plagued them for 12 years.” Before stating this, the court stated, “There is simply no discernable reason why this case should still be pending on any issues, now 12 years after the petition for dissolution was filed. The parties, their attorneys, and the trial court all share the blame.”

---

## **Child Support**

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

#### ***McGrath*: Illinois Supreme Court – Funds an Unemployed Parent Regularly Withdraws from Savings Account Should Not Be Included in Calculating Net Income under §505(a)(2) of the IMDMA**

[\*IRMO McGrath\*](#), 2012 IL 112792 (May 24, 2012).

The Illinois Supreme Court concluded, as I predicted:

Because the trial court improperly included money that respondent withdraws from his savings account in its calculation of net income for child support purposes, we reverse its judgment and remand the cause for a new calculation of respondent’s child support obligation. The trial court should calculate respondent’s net income without regard to amounts that he regularly withdraws from his savings account. The court may then consider whether 28% of this amount is inappropriate based on, inter alia, respondent’s assets. If the court determines that the amount is inappropriate, it should make the specific finding required by section 505(a)(2) and adjust the award accordingly.

Because of the importance of the decision, I quote from the key discussion points:

Money that a person withdraws from a savings account simply does not fit into any of these definitions. The money in the account already belongs to the account’s owner, and simply withdrawing it does not represent a gain or benefit to the owner. The money is not coming in as an increment or addition, and the account owner is not “receiving” the money because it already belongs to him.

The appellate court’s analysis went off track when it stated that “[t]here are no provisions in the Act excluding Martin’s monthly withdrawals from the definition of ‘net income’ ” (2011 IL App (1st) 102119, ¶ 11), for it is the term “income” itself that excludes respondent’s savings account withdrawals. The appellate court should not have been looking for savings account withdrawals in the statutory deductions from income, because those withdrawals were not income in the first place. We note that, although petitioner’s attorney believed that the ultimate amount of child support arrived at by the trial court was appropriate, he conceded at oral argument that the appellate court’s analysis was problematic and, when pressed, agreed that he was not going to the mat in defense of that analysis.

The trial and appellate courts were rightly concerned that the amount generated by respondent's actual net income was inadequate, particularly when the evidence showed that respondent had considerable assets and was withdrawing over \$8,000 from his savings account every month. *The Act, however, specifically provides for what to do in such a situation. If application of the guidelines generates an amount that the court considers inappropriate, then the court should make a specific finding to that effect and adjust the amount accordingly.* One factor that the court can consider in determining that the amount is inappropriate is "the financial resources and needs of the non-custodial parent." 750 ILCS 5/505(a)(2)(e) (West 2010). Thus, calculating respondent's net income correctly does not have to mean that respondent is "absolved of his child support obligation" (2011 IL App (1st) 102119, ¶ 11), as the appellate court feared.

Essentially, the point of *Rogers* and now *McGrath* is that the trial court should deviate from the support guidelines more often to properly consider situations such as this.

### ***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. In this case custody was shared under the JPA. 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.

### ***Berberet* – Deviation from Support Guidelines Affirmed Where Support Payor's Income Less than Custodian's and Where Non-Residential Parent Would Experience Financial Constraint Where Guidelines Followed**

[\*IRMO Berberet\*](#), 2012 IL App (4th) 110749 (08/29/12)

The most recent deviation case is [\*IRMO Berberet\*](#), 2012 IL App (4th) 110749 which contains a good review of the case law. It does not involve a case involving high income of the support payor, but instead, represents a case where the payor's income was less than the payee's income. The appellate court stated:

The court found that if the guideline amount was awarded, Rebecca's net monthly income would exceed David's by nearly \$4,000, the difference between \$7,035 per month and \$3,046. As a result, the court determined that David would experience financial constraint if he was required to pay the guideline amount of support. Last, the court determined that if the support guidelines were imposed David's involvement with the children would be adversely affected: "David would be substantially unable to

participate in the children's school, athletic and social activities or to enjoy any recreational activities with the children. Such a result is not in the children's best interests." The court did not abuse its discretion in awarding the downward deviation in support.

***Berberet – Dependency Exemption Allocation: Equal Allocation Proper Where Mother Had Higher Income and Father / Non-Residential Parent Paid Less than Guideline Support***

*IRMO Berberet*, 2012 IL App (4th) 110749 (08/29/12)

The decision stated:

The trial court awarded the parties each one child for tax dependency and exemption purposes and ordered the third child alternated from year to year. The parties share joint custody of the children. Rebecca is the primary custodial parent, while David is scheduled to have the children at least once a week during the school year and on his days off during the summer. In its memorandum of opinion, the court acknowledged Rebecca's greater contribution to the care of the children, but still found that the tax exemptions should be alternated between the parties.

In this case, both parties contribute to the costs associated with raising their children. David provides financial support to the children in the form of monthly child support payments, \$1,000, and health-care payments, \$219.98. He is also responsible for the costs associated with caring for the children while they are staying at his home. However, as the primary custodial parent, Rebecca is responsible for more of the costs associated with "maintaining a home, purchasing food for the family, laundering the family's clothing, and maintaining the family mode of transportation." *Stockton v. Oldenburg*, 305 Ill. App. 3d 897, 901-02 (1999). We find that David's contribution to the costs associated with raising the children is not so disparate from Rebecca's that no reasonable person would agree with the court's allocation of the tax exemptions for the parties' children.

**Support or Maintenance Modification / Enforcement**

***IDHFS v. Beamon – Where Current Support Amount Far Less than Guidelines, a Substantial Change in Circumstances Must be Alleged to Modify Support***

*The Department of Healthcare and Family Services v. Beamon*, 2012 IL App (1st) 110541 (March 30, 2012).

On July 9, 2010 an agreed order was entered setting support bimonthly to \$375 with the court noting at the time that the father's income was "undetermined." A month and a half later, on August 31, 2010, petitioner filed a petition seeking an increase in support alleging simply that the father was earning \$72,000 a year and seeking an award of 20% of his net income. The father filed a motion to strike under 2-615 of the Code because there was no allegation of substantial change in circumstances per 750 ILCS 5/510(a)(1) and that modification was not permissible under section 510(a)(2)(A) of the Marriage Act because 36 months had not elapsed since the last order.

The Petitioner first contended that the permanent child support order entered by the court in July 9, 2010, was erroneous because the court failed to adhere to the guidelines set forth in section 505 of the IMDMA and failed to explain why the court deviated from the guideline amount. But the appellate court stated that it did not have jurisdiction to address this issue more than 30 days after the entry of the final July 2010 order.

The appellate court ruled that a petition for modification of child support relying on guidelines alone cannot be brought within thirty six months of date of support order:

¶ 14... Petitioner ignores the fact that a petition for modification under section 510(a)(2)(A) relying on the guidelines alone cannot be brought within 36 months of the date of the support order. At the same time, simply claiming a deviation from the guidelines alone is not sufficient to allege a substantial change in circumstances under section 510(a)(1), as to so hold would essentially vitiate the section 510(a)(2)(A) 36-month time limitation. As a result, the court did not err in granting respondent's motion to strike where the petition was clearly insufficient to state a cause of action under either section.

But ultimately, the appellate court ruled that the petitioner should be allowed to amend her petition within a reasonable time rather than dismiss the motion with prejudice. The appellate court stated:

¶ 18... We observe that although the trial court's order does not specifically state it was entered with prejudice, it notes that "the previous permanent, by agreement child support order entered on July 9, 2010 shall stand." We follow the rule that an initial pleading should not be dismissed with prejudice unless it is clearly apparent that no set of facts can be proven that will entitle the petitioner to recover. (citations omitted).

---

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

#### ***Razzano* – Where MSA provided that Support Terminated at Age 22 So Long as Child Attending College and Parties Agreed that Support Provision was in Lieu of Obligation Under Section 513, Modification Proceeding Determined under Section 505 and Not 513**

[\*IRMO Razzano\*](#), 2012 IL App (3d) 110608 (November 14, 2012)

So, where to place this case – as a child support modification or a post-high school educational expense case? *IRMO Razzano* involves another case in which the parties agreed to something that is quite unusual. Recent cases that similarly have enforced unusual arrangements, including the case requiring arbitration over certain limited parenting disputes *In re Marriage of Coulter* Illinois Supreme Court Decision where the court approved of the parties essentially pre-agreeing to removal.

In *Razzano*, the parties agreed that the father would pay child support until emancipation as defined in the agreement. In relevant part the emancipation provision included, “the child’s reaching age twenty-two (22), so long as the child is attending college full-time, or completing college, or terminating full-time attendance at college, whichever shall first occur.” The parties initially included a statement within their agreement that “the parties have made no agreement regarding the expenses of education beyond primary education.” However, they crossed that provision out and replaced it with the handwritten provision: “the parties have agreed that the support provision below is in lieu of any other obligation by [the father] for education support.”

The appellate court stated that the handwritten provision reflected the intent to satisfy post-high school education support in the context of child support payments thereby excluding Section 513 from consideration. The appellate court then cited *Gitlin on Divorce* and a variety of cases holding that parties can “contract out” of an obligation under Section 513. The court commented that even though Brenda’s attorney at the modification hearing stated that to the best of his memory he believed the agreement had nothing to do with post-high school educational expenses, that belief did not change the

impact of what the majority considered to be the unambiguous statement in the MSA itself. Accordingly, the appellate court held that the trial court did not err when it used the guidelines under Section 505 to modify the father's child support obligation rather than apply Section 513(a)(2) regarding post-high school educational expenses.

The partially dissenting opinion urged that the underlying marital settlement agreement was not clear. It urged that the cases cited by the majority were distinguishable because in each the father had previously agreed to pay educational expenses. The dissent then urged that the case is more analogous to the *In re Marriage of Petersen* decision. It urged that educational expenses are a form of support unless the trial court may also modify an award of educational expenses. It then urged that modification needed to be made under Section 513 and not Section 505. So the dissent urged that where a party seeks to impose new obligations, Section 505 is superseded by Section 513. Accordingly, the dissent urged that since the child had attained the age of majority, child support needed to turn to Section 513 to decide whether to award support to the non-minor child. It urged that Section 505 applied only to children under the age of 18 or under the age of 19 while still in high school. In summary, the dissent agreed with the majority that the trial court had the authority to modify the existing child support ordered to cover the mother's increased medical expenses because the parties defined the emancipation event in their separation agreement beyond the time the children reached their majority. However, it urged that the trial court abused its discretion in not calculating the obligation under Section 513 of the Act.

***Koenig* – Where MSA Recites Responsibility to Contribute to College and Graduate School, Party Entitled to Retroactive Award Despite Argument that *Petersen* Controlled**

[\*IRMO Koenig\*](#), 2012 IL App (2d) 110503

In *IRMO Koenig*, the appellate court chose to follow limited application of the seminal *Petersen* decision, following the reasoning of the [\*Spircoff\*](#) third party beneficiary decision. In *Koenig* the MSA had provided that the parties would be responsible for college, and in fact, for graduate school. The MSA set forth the length of the potential obligation for both college and graduate school. But it did not set forth the percentage regarding each parent's responsibilities to pay for post-high school educational expenses. On this basis, the trial court found that *Petersen* controlled and denied any retroactive application. The appellate court reversed the trial court agreeing that the case was analogous to the [\*Spircoff\*](#) decision. Curiously, the appellate court noted that there was no reservation under Section 513. But it does not seem that this should control because clearly the percentage allocation was, in fact, reserved. The point was that the case did not involve a general reservation as in *Petersen*.

---

**Maintenance Cases**

**Initial Divorce**

***D'Attomo* – Trial Court Could Provide for Maintenance in Gross Rather than Rehabilitative Maintenance**

[\*In re Marriage of D'Attomo\*](#), 2012 Ill. App. (1<sup>st</sup>) 111670 (September 26, 2012)

The wife in this case was awarded a 60/40 property distribution. In addition, the court awarded her a lump-sum maintenance award of \$36,000 payable at \$1,000 monthly for 36 months. The parties had been married since 1996 and both were practicing lawyers before the marriage. Betsy earned her B.A.,

in business administration in 1990 and her J.D., in 1993. The appellate court noted that the marriage was 11 years long until the date of filing. While the appellate court cited case law holding that periodic maintenance is the preferred form and an award of maintenance in gross is appropriate only in exceptional circumstances, the based upon *Marriage of Freeman*, 106 Ill. 2d 290 at 296 (1985), the trial court is authorized to award maintenance in gross if found to be appropriate and just in an appropriate case. In this case involving the wife, a lawyer, who was planning to start a new career owning a bakery, the appellate court affirmed the maintenance in gross award.

***Branklin* – Permanent Maintenance of \$3,000 Per Month Affirmed Where Husband Earned Gross of \$400,000 and Wife \$75,000 But Statute re Life Insurance to Secure Maintenance Must be Followed**

*IRMO Branklin*, 2012 IL App (2d) 110203 (March 12, 2012)

The trial court awarded the wife \$3,000 per month permanent (read indefinite) maintenance. The former husband appealed arguing his former wife should not have been awarded any maintenance while she contended in her cross-appeal that the amount was not enough and she should have been awarded \$7,000 monthly. I keep statistics on divorce cases involving maintenance awards with the spreadsheets broken down based on the length of the marriage. The relevant statistics in this case are:

**Years of Marriage Until Filing Divorce Petition:** 26

**Years of Marriage Until Divorce:** 29

**Range of Net Estate Awarded Wife:** \$605,340 and \$800,100 (with the range due to competing valuations of the present value of the wife's TRS benefits).

**Range of Assets Awarded Husband:** \$574,000 to \$1.8 M (with the range due to competing valuations of husband's medical practice - with husband urging a value of only \$57,000 for his practice while the wife's expert valued the practice at \$960,000). But the husband also received the marital residence with a net negative equity between \$234,000 and \$334,000.

**Husband's Gross Earnings 2010:** \$400,000 (orthodontist). Specifically, salary as found by appellate court of \$364,000, rental income of \$30,000 and certain other perqs.

**Wife's Gross Earnings 2010:** \$75,000 (tenured teacher)

**Age of Husband:** 58 years old.

**Age of Wife:** 55 years old.

**Health of Parties:** Husband had recent heart attack.

Regarding the issue of life insurance, the trial court had explained that, based on this court's decision in *IRMO Feldman*, 199 Ill. App. 3d 1002 (1990), it believed it could not order the husband to purchase such life insurance to secure life insurance.

Because this is a published opinion helping develop the law on an important subject, I will quote from the maintenance discussion at length:

During the last years of the marriage, the parties had a combined annual income of approximately \$500,000 and they had assets that, based on some valuations, were worth more than \$2.5 million. This enabled the parties to enjoy a high standard of living. They lived in a home that originally cost \$1.3 million. Both parties were able to enjoy traveling on Gary's airplane.

The record is clear that Karen would not be able to maintain the standard of living she was accustomed to without some assistance from Gary. Expenses for Karen's reasonable monthly needs as found by the trial court, were between \$6,608 and

\$7,108, which exceeded her monthly income of \$6,333. Further, as Gary's monthly income, based on his salary alone, was \$30,667, he was able to pay maintenance without greatly affecting his own standard of living. Gary argues that the parties' standard of living during the marriage should be given minimal weight because the parties were living beyond their means during the marriage. The primary example Gary cites is the \$1.3 million home that the parties bought and for which he is still personally obligated to pay over \$800,000. Gary's argument is unpersuasive. Although the parties might have been living beyond their means during the marriage, we believe it would be inequitable to saddle Karen alone with a reduced standard of living, especially since Gary earns over \$30,000 a month and continues to live in the expensive home that, he now complains, the parties should never have purchased.

We also reject Gary's argument that Karen should not have been awarded maintenance because she has a job that pays a good salary of \$75,000 and had already been awarded marital assets that were worth over \$600,000. Gary contends that maintenance should be awarded only if the dependent spouse needs assistance to become financially independent. See *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 652 (2008). Based on Karen's income and assets, Gary argues that maintenance was inappropriate because she was already financially independent.

We do not disagree with the principle that Gary cites from *Heroy*. However, whether one is able to meet her reasonable needs and become financially independent is still set in the context of what the standard of living was during the marriage. See *In re Marriage of Culp*, 341 Ill. App. 3d 390, 398 (2003) (reasonable needs must be viewed in light of the standard of living established during the marriage); *In re Marriage of Tietz*, 238 Ill. App. 3d 965, 972 (1992) ("[t]he benchmark for determination of maintenance is the reasonable needs of the spouse seeking maintenance in view of the standard of living established during the marriage"). Here, the assets that Karen received in the MSA were generally not income-producing. Other than the \$55,000 in cash, which could produce some interest income, the assets she was awarded could not help her offset the expenses for her monthly needs. Cf. *In re Marriage of Bratcher*, 383 Ill. App. 3d 388 (2008) (trial court's decision to award maintenance to wife was improper in light of \$1.6 million in assets that were awarded to wife, many of which were income-producing). Further, Karen's salary, although significant at \$75,000, was not high enough by itself to allow her to maintain the same standard of living she enjoyed during the marriage as part of a household that had a \$500,000 annual income. Thus, we agree with the trial court that Karen could not meet her reasonable needs, in view of the standard of living established during the marriage, without some assistance from Gary.

After discussing the financial affidavit of the wife, her needs, etc., the appellate court stated:

Based on the trial court's comments, it is apparent that it agreed with Gary's assertion that many of the expenses that Karen listed in her financial affidavit were inflated. The trial court took that into consideration when it lowered Karen's monthly expenses to what it believed they really were. Nonetheless, it is also apparent that the trial court found that Karen's standard of living would be reduced in comparison to what it was during the marriage if it set maintenance only at a level that met her current needs. As set forth above, it was appropriate for the trial court to consider not only Karen's

current needs but also how much maintenance was necessary to allow her to enjoy a standard of living comparable to that she enjoyed during the marriage. *Culp*, 341 Ill. App. 3d at 398.

Next the appellate court rejected the argument that maintenance should not be permanent, in part, based upon the husband's health. The appellate court stated:

In so ruling, we find Gary's reliance on *Bratcher*, *Murphy*, and *In re Marriage of Haas*, 215 Ill. App. 3d 959 (1991), to be misplaced. In *Bratcher*, the reviewing court found that monthly maintenance of \$12,500 for 111 months was inappropriate because the wife had been awarded substantial assets (\$1.6 million, the same as her husband). *Bratcher*, 383 Ill. App. 3d at 388. These assets provided her a monthly income of approximately \$14,000. Further, the monthly maintenance award was improper because it made the wife's monthly income (\$26,500) substantially higher than the husband's (\$14,500). *Id.* at 389. Here, the assets that Karen was awarded were generally not income-producing. Also, the maintenance award did not create a situation where her monthly income was higher than Gary's.

In *Murphy*, following a 10-year-marriage, the wife was awarded \$826,000 in marital and nonmarital assets, some of which were income-producing. She was also awarded \$15,000 a month in maintenance for four years. On appeal, the wife argued that she should have received monthly maintenance of \$46,000 and for a longer period of time in order to maintain the standard of living that she enjoyed during the marriage. The reviewing court rejected her argument, finding that her expenses were inflated because she sought to enjoy the same perks (flying on jets, traveling on yachts) that she did when she was traveling with her husband on business. *Murphy*, 359 Ill. App. 3d at 304. The reviewing court explained that there was no requirement that the parties are to permanently maintain the same standard of living. *Id.* at 306. Here, Karen and Gary were married substantially longer than the parties in *Murphy*, and, compared to the wife in *Murphy*, Karen was awarded relatively few income-producing assets and was awarded maintenance at a substantially lower rate, although for a longer period of time. Moreover, despite Gary's insistence to the contrary, based upon his ability to pay, the trial court did not abuse its discretion in ordering that he pay maintenance in order to help Karen approximate the standard of living that she enjoyed during the marriage. *Culp*, 341 Ill. App. 3d at 398.

In *Haas*, the wife received \$80,468 in marital assets and the husband received \$72,964 in marital assets. The wife's annual gross income was approximately \$14,524 while the husband's was \$49,000. The trial court awarded the wife maintenance of \$600 per month, to be reviewed in 18 months. On appeal, the wife argued that her maintenance award should have been higher and for a longer duration. The reviewing court found that permanent maintenance was not justified, because the wife had been employed throughout the marriage and seemingly had the potential to become self sufficient. *Haas*, 215 Ill. App. 3d at 964. Further, the reviewing court found that \$600 a month in maintenance was sufficient to allow the wife to maintain her standard of living. *Id.* at 964-65. Here, in contrast, as set forth above, Karen did not have the ability to meet her reasonable needs, based on the standard of living established during the marriage, without some assistance from Gary.



Regarding the wife's claim that the amount of maintenance was insufficient, the appellate court stated:

There is no requirement under either the Dissolution Act or Illinois case law that requires the equalization of incomes. *In re Marriage of Reynard*, 344 Ill. App. 3d 785, 791 (2003). There is also no such prohibition. *Id.* Thus, whether a trial court should equalize the parties' incomes (or more equally apportion them, as Karen argues in this case) is a matter for the trial court's discretion. For the reasons set forth above, we do not believe that the trial court abused its discretion in setting the maintenance award at \$3,000. In arguing that their incomes should have been more equally apportioned, Karen minimizes Gary's health concerns as well as the likelihood that his employment income would be dropping due to his age. Thus, although Gary's current income indicated that he could pay Karen more in maintenance, there was not the same certainty with regard to Gary's future income. As we believe that the trial court properly considered Gary's current income, Karen's needs, and the impact of Gary's impending reduced employment income, we do not believe that the trial court abused its discretion in not setting the maintenance award at a higher level.

**Life Insurance to Secure Maintenance:** Regarding the life insurance issue, the appellate court based its decision on the case law before the January 1, 2012 amendments but then commented:

We also note that, effective January 1, 2012, the Illinois General Assembly modified the Dissolution Act to specifically allow the trial court discretion in ordering a maintenance award to be secured by life insurance. Section 504(b-7)(f) of the Dissolution Act now provides: "An award ordered by a court upon entry of a dissolution judgment or upon entry of an award of maintenance following a reservation of maintenance in a dissolution judgment may be reasonably secured, in whole or in part, by life insurance on the payor's life on terms as to which the parties agree, or if they do not agree, on such terms determined by the court \*\*\*." Pub. Act 97-608, § 5 (eff. Jan. 1, 2012).

Regarding following the earlier Second District opinion, the Second District appellate court stated, "Although the trial court was bound to follow this court's decision in *Feldman*, we are not." It followed the reasoning in *IRMO Walker*, 386 Ill. App. 3d 1034, 1049 (2008). But clearly the decision was influenced by the change in the statutory law when it stated:

Further, we believe that the General Assembly's recent amendment to the Dissolution Act does not change a court's ability to order that a maintenance award be secured by a life insurance policy; rather, the General Assembly's amendment clarifies that the court does have that power. We therefore depart from this court's decision in *Feldman*. Accordingly, since the trial court did not consider the merits of Karen's argument that her maintenance award be secured by a life insurance policy, we vacate that part of the trial court's decision and remand with directions that it exercise its discretion in determining whether Gary should purchase life insurance to secure his maintenance obligations to Karen and, if so, in what amount and under what terms it should be ordered. See Pub. Act 97-608, §5 (eff. Jan. 1, 2012).

**Romano – "Maintenance as Substitute for Child Support" -- Trial Court Cannot Award "Unallocated Maintenance" that Would Not Normally be Modifiable When Child Emancipates**

[IRMO Romano](#), 2012 IL App (2d) 091339 (March 21, 2012)

**Maintenance as Substitute for Child Support:** At the time of the entry of the Judgment, there was only one minor child subject to child support. The trial court first granted \$6,000 per month maintenance and \$6,000 monthly child support. There were also percentage portions if the husband's gross income were over \$550,000 per year. The trial court reconsidered this overall scheme and stated, "The unintended consequence of the award is to suggest that at Alexander's emancipation only the maintenance should continue. Based upon the length of the marriage and the earning capacity of each party, the court will award Cynthia with periodic maintenance of \$15,000 per month and sets [sic] child support at zero. [Daniel] will pay additional maintenance in the amount of 40% of any income over \$550,000 per year. The downward deviation on child support is approved based upon the amount of maintenance Cynthia will receive and the assets set aside for her. Should the maintenance terminate while Alexander remains unemancipated then child support will be set at the then-existing guidelines or any deviation a court deems appropriate." §126.

The husband argued that while the award was modifiable, he would be required to show a substantial change in circumstances and that the child's emancipation would be an already anticipated event. The ex-wife argued that the entire award was tax deductible to him (unallocated) and was proper. The appellate court agreed with the husband. The appellate court stated, "Although an award of unallocated maintenance and child support, attendant with any federal income tax benefits, may be made under the Act (see *Belluomini*, 104 Ill. App. 3d at 307-08), we conclude that the trial court's maintenance order in this case did not constitute an unallocated award." The appellate court explained that if the award were truly an unallocated maintenance award, the husband would be able to seek a modification of on the child's emancipation:

Here, the trial court stated in its December 12, 2009, letter opinion that it was reconsidering the awards of maintenance and child support because "[t]he unintended consequence of the award is to suggest that at Alexander's emancipation only the maintenance award should continue." *In other words, the trial court did not intend Alexander's emancipation to have any effect on Cynthia's maintenance award, and any attempt by Daniel to seek modification upon Alexander's emancipation would be futile.* Since the award crafted by the trial court contravenes the statutory right to modify child support (see *Gleason*, 266 Ill. App. 3d at 468), it cannot be considered unallocated support. As such, we vacate the award and remand the matter to the trial court for a determination of the proper amounts of maintenance and child support. (emphasis added).

## **Post-Decree Maintenance**

### ***Bolte* – Maintenance Modification: Trial Court Improperly Terminated Award of What Had Been Called Rehabilitative Maintenance**

[IRMO Bolte](#), 2012 IL App (3d) 110791 (September 12, 2012)

Seven years before the divorce, the parties learned that the wife, Sue, suffered from myasthenia gravis, a progressive, disabling disease that causes respiratory, circulatory and motor skill problems. Following 27 years of marriage, the court entered the divorce judgment in April 1998 incorporating the parties' MSA. The agreement provides, in relevant part:

"The Petitioner shall pay the sum of \$2,000.00 per month to the Respondent as for

*rehabilitative* maintenance, deductible as maintenance payment to the Petitioner and as income to the Respondent, as and for *rehabilitative* maintenance. Said sum shall begin on the 1st day of May, 1998 and shall continue bi-weekly thereafter each month following the entry of the judgment of Dissolution of Marriage, with said notice to the Petitioner's employer.

All maintenance shall be terminated upon the death of either party, or the Respondent's remarriage and/or cohabitation with a person of the opposite sex on a continuing conjugal basis and *may be reviewable upon the Petitioner's retirement.*" (Emphases supplied.)

The agreement also includes a waiver, which states: "Except as otherwise specifically provided herein \*\*\* the parties are forever barred from asserting any claims against one another \*\*\* whether by way of maintenance." (Emphasis in appellate court decision).

The former husband retired at age 59 in June 2010. He testified that he took the early retirement to secure more favorable postretirement healthcare benefits. Later, he petitioned the court to terminate or reduce his maintenance payments to Sue. The former wife countered with a petition seeking permanent maintenance and the ex-husband brought a motion to strike that pleading urging that it was barred due to the waiver language quoted above. On July 28, 2011, the trial court found that Sue was barred from seeking permanent maintenance, but it granting her 10 days' leave to amend her pleadings to state a cause upon which proper relief could be granted and preserving the previously scheduled evidentiary review hearing on September 2, 2011. The appellate then states:

At the evidentiary hearing, Sue's treating physician of 10 years, Dr. Charles Bruyntjens, testified to Sue's condition over vigorous objection from Terry's counsel. Bruyntjens explained that myasthenia gravis is a disease where Sue's neuromuscular system does not connect, resulting in a decreased or total inability to swallow or eat, and a lack of functioning of the facial and voluntary muscles, including respiratory muscles. A decreased functioning in the respiratory muscles sometimes requires Sue to be hospitalized and placed on life support. Bruyntjens further testified that any strenuous activity, stress and infections can cause her muscles to work harder, and then give out entirely. This included any repetitive movement, including that of the type required at a doctor's office. In his medical opinion, Dr. Bruyntjens stated that Sue was unable to maintain any kind of gainful employment at the time, and her condition and symptoms would be ongoing for the rest of her life. Following the doctor's testimony, evidence was elicited from both Sue and Terry as to their respective incomes, assets and debts. The trial court terminated Terry's maintenance obligation in its October 12, 2011, order.

The trial court reasoned that the diagnosis and prognosis were known nearly seven years before the time the parties entered into their marital settlement agreement. The court found that rehabilitative maintenance was necessarily temporary in nature, placing the burden on Sue, as payee, to "seek appropriate employment and the capability to perform employment." The court referenced Sue's testimony, indicating her only efforts to become self sufficient were in seeking employment within her previous profession as a nurse, ignoring the possibility of finding work she was capable of performing in some other position.

Regarding the decision reached by trial court the appellate court stated:

The court interpreted Sue's pleadings as a request to reform the contract and change the agreed upon rehabilitative maintenance to permanent maintenance nearly 13 years after the fact. The court declined such reformation, noting that in reaching an agreement specifically for rehabilitative maintenance, the parties ostensibly believed that Sue had a realistic likelihood of being able to work and improve her earning capacity before Terry retired. Moreover, the court would not allow reformation where the valid and enforceable marital settlement agreement contained a waiver provision prohibiting both parties from asserting additional claims for maintenance or property. It concluded that on the day the parties entered into the agreement, Sue made a knowing and voluntary relinquishment of all remaining rights against Terry for permanent maintenance or property.

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

Here, the trial court's recitation of the definition of "rehabilitative" is unpersuasive. We are of the view that if it walks like a duck and talks like a duck, it is a duck, notwithstanding the fact that it is wearing a cap and sunglasses. In honing in on the word "rehabilitative," the trial court locked in on the cap and sunglasses while refusing to look and see what was wearing them. Certainly, neither the parties nor the court could have reasonably believed that it would take Sue nearly 20 years to rehabilitate. At the time the judgment of dissolution was entered, Terry was 45 years old and the maintenance award was reviewable upon his retirement. If Terry had retired at 65, that would be 20 years of "rehabilitative" maintenance. Even in taking an early retirement at 59, Terry continued to pay Sue to "rehabilitate" for 14 years. If actions speak louder than words, then Terry's continued payment until his retirement screams that he did not view this as rehabilitative maintenance. The trial court's construction of this maintenance agreement flies in the face of the traditional understanding of rehabilitative maintenance, where the underlying policy is "to sever all financial ties between the former couple in an expeditious, but just, manner and make each spouse independent of the other as soon as practicable." *In re Marriage of Carpenter*, 286 Ill. App. 3d 969, 973 (1997) (citing *In re Marriage of Ward*, 267 Ill. App. 3d 35, 42 (1994)).

After reviewing certain case law the appellate court stated:

The holding in *Blum* supports the proposition that the label attached to a maintenance award has to be viewed contemporaneously with all other provisions of the marital settlement agreement to determine the parties' intent. Terry and Sue essentially described and agreed to a permanent maintenance award labeled as rehabilitative maintenance. Placing the adjective "rehabilitative" in front of the term "maintenance" does not necessarily render it rehabilitative. This is especially true when it was to continue without limitation for a contemplated period of 20 years, at which point it could be reviewed to determine if an increase, reduction, or complete termination was warranted. The parties knew that Sue's condition would deteriorate and that her likelihood of returning to the workforce in any meaningful capacity was slim. Indeed, Sue was already receiving social security disability benefits at the time of dissolution. In agreeing to such an award, it is clear the parties realized Sue would never be able to support herself or maintain the standard of living to which she had become accustomed during the marriage.

Perhaps even more telling is the fact that Terry and Sue did not agree on a fixed period when the award would terminate or become reviewable. Rehabilitative maintenance is generally paid for a fixed period after which it terminates, thereby presumably allowing the recipient to become "rehabilitated" and able to support herself. This agreement contained no such provision. It did not state that after a certain amount had time lapsed, the parties would come back to court to determine if Sue had been diligently seeking appropriate employment in an effort to become self-sufficient. It did not state that Sue's maintenance award would automatically terminate after a definite number of years. Instead, the parties agreed that upon Terry's retirement (anticipated at the time to be nearly two decades later), they could petition the court to review the award and presumably make a determination about the parties' relative financial needs. Common sense dictates that an award of maintenance that would terminate only upon death, remarriage, or cohabitation and first reviewable on a date anticipated to be 20 years down the road is not, and was not, rehabilitative maintenance. This is especially true when the parties to the agreement knew that the recipient of the award has an incurable, progressively debilitating disease.

While the trial court based its decision on certain waiver language, the appellate court stated that:

We find the trial court's characterization of the waiver provision erroneous based on the preceding analysis of the maintenance award and the terms of the agreement itself. The parties agreed to permanent maintenance, and such awards can be reviewed, modified and terminated. See *In re Marriage of Selinger*, 351 Ill. App. 3d 611, 617 (2004). The waiver provision provides, "[e]xcept as otherwise provided herein \*\*\* the parties are forever barred from asserting any claims against one another \*\*\* whether by way of maintenance." (Emphasis added.) The parties did, in fact, "otherwise provide" for maintenance within the marital settlement agreement. The waiver provision is inapplicable.

***Bohnsack* – Language of MSA Provided for Modifiable Maintenance Despite Annual Payments of \$10k for Six Year Term**

[\*IRMO Bohnsack\*](#), 2012 IL App (2d) 110250 (March 29, 2012)

The MSA had provided:

Mark shall pay to Deb \$10,000 in maintenance for 6 years, beginning on January 1, 2006[,] and the last payment ending on January 1, 2011. Mark shall pay this money to Deb twice a year, with a payment of \$5[,]000 on January 1 and a payment of \$5[,]000.00 on June 1st of every year, with the last year being 2011.

Four years later, the former wife filed a petition to modify her maintenance award, seeking an increase due to a substantial change in circumstances. The trial court granted the petition to increase and awarded \$3,000 monthly. In a post-trial motion and on appeal the former husband argued that the maintenance was maintenance in gross so it was non-modifiable. The trial court disagreed and the appellate court affirmed the ruling of the trial court.

The appellate court found that the language of the MSA was "ambiguous at best." While the ex-husband argued that maintenance was maintenance in gross because of definitive amount and set vesting dates. The appellate court disagreed that the cases the former husband cited were on point

because each case provided a specific total sum to be paid to the recipient. The string cite from the appellate court's decision as paraphrased states:

*IRMO Freeman*, 106 Ill. 2d at 294 (1985) (the modified judgment specifically labeled the \$27,000 the husband was to pay to the wife as maintenance in gross);

*IRMO Michaelson*, 359 Ill. App. 3d at 708 (2005) (settlement agreement provided that the husband was to pay the wife “ ‘a total of Three Hundred Sixty Thousand (\$360,000) Dollars’ ” and that the maintenance provisions were to terminate “ ‘only after the payment of all monies due to Wife are paid in full’ ”);

*IRMO Hildebrand*, 166 Ill. App. 3d at 797 (1988) (settlement agreement awarded the wife the specific sum of \$12,000 in maintenance);

*IRMO Burgstrom*, 135 Ill. App. 3d 854, 857 (1985) (order provided a specific sum that the husband was to pay to the wife).

The appellate court then reasoned:

Although petitioner contends that the total sum is easily calculable, the lack of a specifically stated total sum differentiates the present case from those found to involve maintenance in gross and lends credence to the position that the maintenance award was for periodic maintenance over a fixed period. See *IRMO Harris*, 284 Ill. App. 3d 389, 390, 392 (1996) (holding that a settlement agreement that provided that the husband was to pay the wife \$606 per month for 10 years but did not provide for a specific total sum was for periodic maintenance for a fixed period rather than maintenance in gross).

**Comment:** Had the parties intended non-modifiable maintenance, what could have occurred in this case would be for the former husband to bring a motion for declaratory judgment seeking a finding that the MSA provisions were ambiguous. The proper ruling would have been that the terms were maintenance. Then the former husband could have focused on any evidence beyond the four corners of the MSA indicating the agreement for maintenance in a fixed amount. It seems that the former husband only argued the language of the MSA without offering such extrinsic evidence.

## **Unallocated Maintenance Cases - Review or Modification**

### ***DiGiovanni* - Unallocated Maintenance Award Properly Reduced on Emancipation Imputing Income to the Former Wife and Focusing on Evidence from Date of Earlier Modification Order Forward**

*IRMO S.D. and N.D.*, 2012 IL App (1st) 101876 (November 13, 2012)

The parties had been married for 25 years and were divorced in January 2005. The case had an original filing date of November 13, 2012 and then a posting date of the “corrected” opinion on December 5th. The parties in the originally posted decision were listed as [S.D.] and Nick decision were DiGiovanni. The names were redacted in the corrected decisions.

The marital settlement agreement had provided for unallocated child support and maintenance to be

paid for five years (when it would be reviewable) in the amount of \$20,000 per month. The MSA recited that the amount was based on his average gross income for the years 2001 through 2003 of \$974,000. In 2007 the former husband filed a petition to modify and following a hearing and finding of a substantial change in circumstances, the unallocated maintenance was reduced in July of 2007 to \$14,500 monthly. The judgment further provided that the unallocated payments "shall be reviewable provided [S.D.] files a Petition within 30 days of the minor child's (Sam's) graduation from high school. Failure of [S.D.] to file such a petition timely, shall terminate any further maintenance obligations of [N.D.] to [S.D.]" The order further modified terms so that [N.D.] was responsible for 100% of Sam's boarding school expenses.

In June of 2008, the former wife filed a "Petition to Extend Maintenance." Her petition alleged that her son had voluntarily withdrawn from high school in order to avoid being expelled because of misconduct. Her petition alleged that he was eligible to take the GED and could potentially earn his GED within 30 days of the filing of the petition. The petition sought an extension of maintenance "both temporarily and permanently." The petition also sought a modification of maintenance payments "so that [S.D.]'s after tax cash monthly flow is at least \$35,000."

In August 2008, the former husband filed his own petition to modify support based on a substantial change in circumstances, including Sam's emancipation, a substantial reduction in [N.D.]'s income, and [S.D.]'s rehabilitation and ability to obtain gainful employment. Although the trial court initially determined that it would only allow evidence gathered from the July 2007 order to the present to show a substantial change in circumstances, it allowed [S.D.] to offer testimony and evidence relating to the standard of living she and [N.D.] enjoyed during their marriage. At a hearing in February 2009, [N.D.]'s counsel made a request for a temporary reduction in support due to Sam's emancipation. The trial court reduced the monthly support payment from \$14,500 to \$12,000 per month, subject to reconsideration at the close of proofs.

There was a hearing over 8 days conducted between February 2009 to August of that year. [S.D.] presented vocational expert Deborah Gordon, who testified that the average income for all social workers in the area was \$37,500 per year. She concluded, based on her research and the fact petitioner had a degree in social work from the University of Chicago, that [S.D.] potentially could earn between \$18,000 and \$44,000 per year.

[S.D.] also presented Cathy Belamonte Newman as a lifestyle expert. The decision stated:

Belamonte testified that she gathered information and prepared a report showing "a numerical picture of \*\*\* what [S.D.]'s lifestyle would be like today had it remained the same as what she enjoyed during the marriage." She stated that she sought documentation from the current time period as well as from the period just preceding the divorce. Belamonte acknowledged that "the documentation that I was seeking to do that assignment the way that I would typically do it was not available. The records had been destroyed and \*\*\* I was not able to obtain them from [the attorneys'] office or from [S.D.]." Instead, Belamonte interviewed petitioner and petitioner provided "a large amount of anecdotal information" including pictures from trips, travel documents, and invitations to social events.

The evidence was that the former husband was a partner at Lock Lord Bissell & Liddell, LLP. He stated that his average income for 2006, 2007, and 2008 was \$685,700, a 29.59% decrease from the income used to calculate support in the MSA. He also testified that his income for 2009 from January 1 through

June 15 was \$158,172 and he expected his total income for 2009 would further decrease.

The evidence was that the former wife received a masters degree in social work from the University of Chicago. She is not currently working because to practice independently she needs to pass the licensed clinical social worker (LCSW) examination. She testified that she is eligible to take the examination. She acknowledged that the a penalty clause of the MSA was negotiated by the parties to reduce the chance of future litigation. The court also found that [S.D.] had assets worth in excess of \$1 million, including the marital home.

The former husband also hired a vocational expert. His expert testified that current licensed clinical social work jobs in Illinois ranged from \$38,000 to \$81,000 and [S.D.] was qualified for these positions. She concluded that [S.D.] could earn a mid-\$50,000-per-year salary.

In June 2010, the trial court issued an order granting [N.D.]'s petition and denying [S.D.]'s petition. It also found reasonable the inference that "the parties considered all the relevant statutory factors in determining the appropriate unallocated maintenance obligation agreed to between the parties." The trial court then stated: "[a] review of the record shows that not only is [she] seeking an extension of the current \$14,500 per month unallocated support obligation, but [she] is requesting that [N.D.]'s obligation be increased by 175% of the \$20,000" agreed to in the MSA and four times the \$12,605 [S.D.] claimed she needed to support her lifestyle in 2004 according to her affidavit dated August 5, 2004. It found that her request for this sum to support her alone "ignores the fact that the Court found \$14,500 monthly unallocated maintenance \*\*\* was sufficient to meet the reasonable financial needs of both" [S.D.] and her minor child. It noted that neither party appealed the prior order and further found that "there is no credible evidence contained in the record of this cause which would justify anything remotely near what [S.D.] has requested." The court acknowledged that the July 19, 2007 order required petitioner to file a petition to review support upon Sam's graduation from high school, but the order did not condone a request to increase support "without having a factual basis for such a request."

The trial court concluded that [S.D.]'s "testimony of her purported pre-decree lifestyle [was] not credible as it [was] based on incomplete, inaccurate and unreliable information. Additionally, her testimony is impeached by her representations predecree of her financial needs." The court also gave little weight to Belamonte's testimony since it was based on the same incomplete and unreliable information.

The trial court imputed \$37,500 of income to the former wife finding that she did not make a good faith effort to obtain her license (LCSW). Regarding changed circumstances, the trial court found both that the son had been emancipated but that the former husband's income decreased 24% since the unallocated support award. The court found an award of permanent maintenance was appropriate. It further found that \$10,000 per month would meet [S.D.]'s reasonable monthly needs and also imputed the annual sum of \$37,500 (or \$3,125 per month) as "a reasonable sum [petitioner] could generate being employed as a LCSW." Therefore, [N.D.]'s permanent monthly maintenance obligation to [S.D.] would be \$6,875 per month. The court applied the award retroactive to February 9, 2009.

The former wife appealed and the appellate court affirmed. The former wife first contended her petition was a petition for review and not one for modification. Accordingly, she urged that she did not need to show a substantial change in circumstances. The appellate court agreed that she was not required to show a substantial change because the hearing was actually a review hearing. The appellate court found that the trial court's error was harmless where it addressed changes in circumstances because it used the same analytical process that courts use in reviewing maintenance generally under



the standards of Sections 504(a) and 510(a-5).

The appellate court noted that the former husband (by agreement) was responsible for 100% of the son's college expenses. The appellate court then stated:

In light of the fact that \$14,500 per month was found to meet [S.D.]'s needs before Sam's emancipation, the trial court determined that \$10,000 per month was a reasonable sum to meet [S.D.]'s present needs. It also reduced the amount by \$3,125 per month to reflect the income imputed to her. Therefore, [N.D.]'s monthly obligation to [S.D.] would be \$6,875. Although the court found that [S.D.] was rehabilitated, it acknowledged that [N.D.] "will always have a greater earning ability than" petitioner. Considering the statutory factors, the trial court determined "that an award [of] permanent maintenance is appropriate." The trial court did not abuse its discretion in awarding [S.D.] \$6,875-per-month permanent maintenance.

The appellate court then stated, "Although the agreement did not refer to [S.D.]'s maintenance as rehabilitative, the provisions of the agreement when viewed together suggest such an intent by the parties. See *Blum*, 235 Ill. 2d at 35.

A fascinating aspect of the case involves the issue of the res judicata potential affect of the order modifying downward the maintenance obligation and whether the former wife could go back to the divorce in establishing lifestyle, etc. The appellate decision stated in a carefully worded and limited decision:

The trial court took judicial notice of the parties' MSA and the July 2007 order, and the fact that both necessarily took into account the parties' standard of living during the marriage. The trial court did not err in stating that evidence of the parties' lifestyle during the marriage was res judicata. Notwithstanding, upon [S.D.]'s attorney's insistence, the trial court did allow [S.D.] to testify as to the standard of living she enjoyed during the marriage and to present the testimony of Belamonte, although it concluded that it did not find her testimony credible. We find no error here.

The appellate court then contains an excellent discussion regarding income averaging discussing the *Schroeder*, 215 Ill. App. 3d 156 (1991) which held that the income data did not show a "definitive pattern of economic reversal" justifying the use of income averaging (there six years was used and the appellate court found the income history to be too old to be reliable). In contrast, *IRMO Elies*, 248 Ill. App. 3d 1052, 1060-61 (1993), the first district appellate court found that using the income average from the past three years was an appropriate method for determining available income for maintenance and support given the facts of the case. The appellate court stated, "We choose to follow *Elies* and find that the trial court did not err in utilizing income averaging to determine [N.D.]'s available income for maintenance."

***Kincaid* - Unallocated Maintenance: When Modifying Unallocated Maintenance During its Term a Determination of Net Income is Required Because of the Support Component**  
[\*IRMO Kincaid\*](#), 2012 IL App (3d) 110511 (July 3, 2012)

The former husband argued that the trial court erred in increasing his unallocated support payments based on his gross income. He contended that the trial court was required to determine his net

income before increasing his support payments, which consisted of both child support and maintenance. The appellate court ruled:

We need not decide whether a trial court must consider a payor's gross income or net income when awarding maintenance because Brian was ordered to pay unallocated support, which is both child support and maintenance. See *Gleason*, 266 Ill. App. 3d at 468. While a court is not explicitly required to consider a payor's net income when making a maintenance award, a court is required to do so when making an award of child support. Compare 750 ILCS 5/504(a) (West 2010) ("income"), with 750 ILCS 5/505(a)(1) (West 2008) ("net income"). Since unallocated support is always comprised of some child support, we believe that a trial court must always determine the payor's net income, as that term is defined in section 505(a)(3) of the Act, before awarding unallocated support.

Here, the trial court increased Brian's unallocated support obligation based on his gross income. Since the trial court failed to consider Brian's net income, we reverse the court's order increasing Brian's unallocated support obligation and remand for the trial court to determine Brian's net income. The court may then order Brian to pay an unallocated support award based on that amount.

***Kolessar – In Agreed Orders Involving A Unilateral Reduction in Unallocated Maintenance Statutory Interest is Mandatory Unless Clearly Waived***

[\*IRMO Kolessar and Signore\*](#), 2012 IL App (1st) 102448 (January 17, 2012)

The key issue in this case involved statutory interest once the former husband unilaterally reductions of his unallocated maintenance obligation. The former wife urged on appeal that the trial court erred in finding that the imposition of statutory interest on the arrearages was discretionary, relying on *Finley v. Finley*, 81 Ill. 2d 317 (1980). The appellate court first commented:

In *Illinois Department of Healthcare & Family Services ex rel. Wiszowaty v. Wiszowaty*, 239 Ill. 2d 483 (2011), the supreme court clarified its ruling in *Finley*, finding that it "stands for the proposition that, where *there are no controlling statutes* defining unpaid support payments as judgments or providing for interest, interest may be awarded \*\*\* as a discretionary matter." (Emphasis in original.) *Wiszowaty*, 239 Ill. 2d at 489.

To try to distinguish *Wiszowaty* the former husband pointed out that at issue in this case were agreed orders:

Such an order represents "a recitation of an agreement between the parties and is subject to the rules of contract interpretation." *In re Marriage of Tutor*, 2011 IL App (2d) 100187, ¶ 13. They are not "judicial determination[s] of the parties' rights." *In re Haber*, 99 Ill. App. 3d 306, 309 (1981). Furthermore, agreed orders are "conclusive on the parties and can be amended or set aside \*\*\* only upon a showing that the order resulted from fraudulent misrepresentation, coercion, incompetence of one of the parties, gross disparity in the position or capacity of the parties, or newly discovered evidence." *Haber*, 99 Ill. App. 3d at 309. Signore argues that the orders intended to "address and finalize" all issues pertaining to his petitions for modification and the fact that they were silent on the issue of interest evidenced the parties' intent to preclude an

interest award.

The appellate court rejected this argument and stated that the “agreed order, however, must reflect an 'intentional relinquishment' of that right” and that “mere silence is not enough.” The appellate court concluded as to the interest issue:

Here, the agreed orders were silent on the issue of statutory interest pertaining to the arrearages. Since the Marriage Act requires that interest be paid on orders for child support, and the agreed orders at issue did not contain an explicit waiver by Kolessar of her right to the statutory interest, the trial court erred in failing to award interest on the arrearages.

***McLauchlan - Trial Court Properly Did Not Terminate Maintenance Award Where Former Husband Did Not Modify His Standard of Living / But Trial Court Improperly Considered Withdrawals from Retirement Accounts in Calculating Maintenance When Wife Waived Any Interest in Original Divorce***

[\*IRMO McLauchlan\*](#), 2012 IL App (1st) 102114 (March 13, 2012)

The issues on appeal were whether the trial court abused its discretion in failing to terminate the maintenance award and whether the trial court erred when it included withdrawals from the former husband's retirement accounts as income in calculating maintenance and his arrearage. The appellate court affirmed in part and reversed and remanded in part.

Regarding the issue of terminate of maintenance, the appellate court stated:

David argues that maintenance payments to Patricia should be terminated due to the change in his employment status and his dwindling retirement accounts. Furthermore, Patricia has the home in Florida, as well as \$600,000 in investments and \$100,000 in savings from which to draw income. The trial court took these factors into account, as well as the factors listed in sections 504(a) and 510(a-5). It acknowledged David's change in employment status, and found credible Mr. DiGiovanni's testimony that David did not voluntarily quit his job at Locke, Lord, Bissell & Liddell. It also found a substantial decrease in David's earnings. *However, the trial court noted that "[r]espondent has not modified his standard of living to accommodate his change in job status" and "has no impairment in his present or future earning capacity and he has the ability to earn significantly greater future income than respondent."* Patricia on the other hand, due to the length of the marriage, lacked the education and job experience to earn substantial income. Therefore, the court did not terminate maintenance but instead modified it downward to 20% of David's gross income from all sources. The sources include, but are not limited to, David's interest in his father's revocable trust, retirement accounts, and the McLauchlan Law Group LLC, from January 1, 2009, to date. The trial court considered the relevant factors and the record supports its decision to modify, rather than terminate, maintenance. (emphasis added.)

An aside is that this appears to be the same lawyer who had his own November 2002 published decision (at first published with names and then with the names in a corrected decision removed) – a decision in which he was generally successful regarding a maintenance review battle (even though he was required to pay indefinite maintenance).

The key next issue was how to determine his “gross income” referred to in the MSA and whether the

trial court was correct that it included his IRA withdrawals. Instructively, the appellate court stated:

This court's precedents set out in *In re Marriage of Munford*, 173 Ill. App. 3d 576 (1988), are instructive here. The parties in *Munford* executed a property settlement agreement, which was incorporated into the dissolution of marriage judgment. Solomon Munford was ordered to pay his ex-wife, Jessye, \$300 per month as maintenance. As part of the property settlement, Jessye was awarded financial assets worth \$29,500, as well as a " 'Vacation Key Plan' " in Lake Geneva, Wisconsin, and all the furnishings and fixtures contained in the marital home. In turn, Jessye agreed to pay Solomon \$3,500 for his interest in their joint property and she "waived 'any and all claims that she may have in and to Solomon's pension and/or profit sharing plans.' " (Emphasis in original.) *Munford*, 173 Ill. App. 3d at 577.

The ultimate decision was that:

Therefore, we hold the record supports the trial court's determination to modify David's maintenance obligation. However, the trial court's finding that "gross income" includes monies drawn from David's retirement benefits when modifying maintenance was improper. We hold that absent fraud, coercion or misrepresentation, where the parties have entered into a property settlement agreement wherein each has waived any and all interests in and to the retirement plan(s) of the other party, the parties are bound to the terms of their agreement. Under such circumstances neither Illinois case law nor section 504(a) permits the trial court to consider withdrawals from retirement accounts when deciding whether to modify maintenance and in setting the amount of a new maintenance award. Allowing the trial court to do so violates the parties' original intent when contracting and represents a modification of the parties' property settlement agreement rather than a modification of maintenance provisions of the dissolution judgment based on a substantial change in circumstances.

---

### **Attorney's Fees:**

#### **Disgorgement**

#### ***Nash – Interim Fees and Disgorgement: Disgorgement Improper Unless Unambiguous Finding that Both Parties Lacked Ability to Pay Interim Attorney's Fees***

[\*IRMO Nash\*](#), 2012 IL App (1st) 113724-B (October 1, 2012)

Where the order was ambiguous as to the inability of both parties to pay interim attorney's fees as required under section 501(c-1)(3) of the IMDMA, the trial court lacked authority to require disgorgement. Accordingly, the disgorgement order was void and must be vacated.

**Note:** I like the comment by my father in his Gitlin on Divorce Report:

The disgorgement part of the leveling part of the interim fees statute seemed like a free lunch to temporary fee applicants, but Nash said "Whoa! Let's look at the statute."

The bar and bench owe a debt of gratitude to Attorney Enrico Mirabelli of Chicago for prosecuting this appeal.

**~Earlywine - (Cert granted to IL Supreme Court) Interim Attorneys Fees and Disgorgement: Advance Payment Retainer No Bar to Disgorgement in Appropriate Initial Divorce Case Where Not Plead as a Defense**

[IRMO Earlywine](#), 2012 IL App (2d) 110730 (July 13, 2012)

There are not many disgorgement cases. And because the Illinois Supreme Court has granted cert and allowed the submission of an amicus, this case should be viewed by all Illinois family lawyers. Note that in January 15, 2013, the Illinois Supreme Court allowed a motion on by attorneys Paul L. Feinstein and Michael G. DiDomenico for leave to file a brief as amicus curiae in support of appellant.

The real issues that were not addressed at the appellate court level involve Separation of Powers, the Supreme Court Rules and the *Dowling* case. The question is whether the Supreme Court Rules and Dowling trump the disgorgement provisions when there is an “advance payment” retainer. The point is that with an advance payment fees earned are not “available funds” under the statute. The Appellate Court never got this point. Also, construing the statute to make earned fees available for disgorgement, will discourage attorneys from getting involved in low-income, low-asset cases.

For a discussion, see ISBA’s newsletter: ISBA’s Family Law Newsletter, Heather M. Hurst, April 2013, vol. 56, no. 9. Earlywine was argued immediately after the *Mayfield* decision. See:

[http://www.state.il.us/court/media/on\\_demand.asp](http://www.state.il.us/court/media/on_demand.asp)

The case was argued on May 19<sup>th</sup>. But a key distinction not made in the oral arguments addressed the distinction between fees as earned or unearned.

Factually, this case involved payment by a relative of fees and an advance payment retainer, when there was not sufficient funds in the marital estate otherwise to pay fees.

**Nye – Fees and Civil Procedure - No Right to Refile Voluntarily Dismissed Case Unless Specifically Reserved**

[Nye and Associates v. Boado](#), 2012 IL App (2d) 110804, May 31, 2012

I almost missed this *res judicata* case that would be normally filed under motions to dismiss per section 2-619(a)(4) of the Code of Civil Procedure (Code). But this case should warn family lawyers of the perils of business. The background is that Attorney Jonathan Nye filed an independent action for fees against his former client. Jonathan later filed a motion to voluntarily dismiss the independent action asking leave to refile. But an order was entered simply providing that the matter was “voluntarily non-suited.” The court order did not indicate whether it was dismissed with or without prejudice nor did it mention the ability to refile. Nye then sought fees within the family law case itself but it was determined by the trial court that the action was not timely brought and Nye choose not to appeal that finding, Then Nye brought a new independent complaint alleging that the earlier action had been voluntarily dismissed. The former client, Boado, moved to dismiss per 2-619(a)(4) of the Code urging grounds of *res judicata*.

While there was little double that Nye had indeed voluntarily dismissed his earlier independent action (or at least that this was the intent), In any event, there was testimony by both lawyers that the intent was to voluntarily dismiss but the former client’s attorney disagreed that there was an agreement to be able to refile. The trial judge dismissed the new fee complaint on grounds of *res judicata* and Nye appealed. The appellate court first found:

Here, it is clear that basic principles of *res judicata* apply. There was a final judgment on the merits in Nye I, the issues that were raised in Nye II could have been adjudicated

in Nye I, and the parties were identical.

But Nye argued that an exception applied due to the nature of the dismissal - a voluntarily dismissal where the intent was for him to be able to refile. The appellate court then noted that Illinois has adopted claims splitting as addressed in Section 26(1) of the Restatement (Second) of Judgments (1982). Under the first two exceptions of this section, res judicata principles do not bar a second action if:

“(1) the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein; (2) the court in the first action expressly reserved the plaintiff’s right to maintain the second action....” *Hudson*, 228 Ill. 2d at 472-73.

The appellate court first found that there was no agreement for leave to refile. Regarding the second exception, Nye urged that because he had requested leave to refile, and the counts in Nye I were dismissed without prejudice, the record shows that the court intended that he have leave to refile.

The heart of the appellate court opinion stated:

Nye’s argument that the record as a whole shows that the court intended to allow it to refile also fails. Nye argues that the combination of its motion to voluntarily dismiss, which asked for leave to refile, with Boado’s failure to object, and the court’s grant of the motion, is sufficient to show that it had leave to refile the claims in a new lawsuit. But, under the exception at issue, the court must expressly state the right to refile. *Matejczyk*, 397 Ill. App. 3d at 10-11. An express reservation requires that the intent be clearly and unmistakably communicated or directly stated. See *Quintas v. Asset Management Group, Inc.*, 395 Ill. App. 3d 324, 333 (2009). Here, nothing was expressly stated by the court in regard to the ability to refile.

Finally, the appellate court discussed Nye’s assertion that the use of the antiquated language of “non-suit” somehow rendered the order voluntarily dismissing as void. This argument was fairly summarily rejected.

See:

<http://www.isba.org/sites/default/files/sections/familylaw/newsletter/Family%20Law%20July%202012.pdf> See also: “*Hudson*: New Limits on the Plaintiff’s Right to Refile a Voluntarily Dismissed Case” in the June 2008 IBJ and “Voluntary Dismissal: The Hudson Doctrine Four Years Later” in the June 2012 IBJ.

## **Contribution Petitions**

### **~DiGiovanni - Contribution Petitions: Fee Shifting Provision Upheld Where Former Wife's Petition Viewed as Petition to Modify Rather than Simply Review**

*IRMO S.D. and N.D.*, 2012 IL App (1st) 101876 (November 13, 2012)

See the discussion above regarding maintenance that discussed the facts of this case. Regarding the fee issue, the appellate decision stated:

The parties also petitioned for attorney fees. The court found that [N.D.] was successful in his petition to decrease maintenance and [S.D.] was not successful in seeking an increase in maintenance. The parties agreed in paragraph 3.7 of their MSA that if [S.D.] sought an increase in support but was unsuccessful, she would be responsible for 100%

of [N.D.]'s reasonable attorney fees and costs. The court determined that the provision should be enforced. Alternatively, the court found that [N.D.] is entitled to fees and costs pursuant to section 508(b) of the Act for having to defend [S.D.]'s petition to extend maintenance. It determined that [S.D.]'s request of a "400% increase in [N.D.]'s support obligation for [S.D.] alone" was based on "unreasonable and unconscionable" arguments, and her presentation of "testimony on a lifestyle during the marriage" which was not properly before the court was unnecessary and not credible. It found that the hearing on [S.D.]'s petition "was precipitated and conducted for an improper purpose \*\*\* [and] needlessly increase[d] the cost of litigation to both parties." The trial court ordered [S.D.] and her attorneys "to contribute equally all reasonable attorney fees and costs incurred by [N.D.] as a result of him having to defend against [S.D.]'s Petition to Extend Maintenance."

The ex-husband's amended fee petition requested \$118,120 in fees and the trial court granted his amended petition but reduced the award to \$78,500. The former wife appealed and the appellate court affirmed.

The fee decision is ground-breaking. [S.D.] contended that the trial court also erred in applying section 3.7 of the MSA because the clause is against public policy. She claimed that the clause improperly orders the unsuccessful party to pay the fees of the successful party without regard to the parties' ability to pay. The appellate court stated, "There is nothing inherently unconscionable about a provision in a contract awarding attorney fees to the prevailing party."

The appellate court next stated:

[S.D.] also argues that the clause is unconscionable because it penalizes her for seeking review of her maintenance when she is under court order to seek such review. However, as discussed above [S.D.] did not merely seek to extend her existing maintenance and support but sought an increase in the amount of support. If she had petitioned for an extension of payments, without seeking an increase in the amount of support, she would not have triggered section 3.7. Section 3.7 comes into play only when "[S.D.] seeks an increase in the support amount paid by [N.D.] to [S.D.]." We are not persuaded by her contentions and find section 3.7 of the MSA valid and enforceable.

Next, the former wife urged that she was actually successful because she obtained permanent maintenance. But the appellate court stated that Section 3.7 of the MSA had stated that if [S.D.] was unsuccessful in seeking "*an increase in the support amount paid by [N.D.]*" she would be responsible for 100% of his reasonable attorney fees and costs. The former wife claimed that due to the nature of unallocated support, when the court set maintenance alone, it could well have represented an increase. The appellate court disagreed and noted that she sought \$35,000 per month maintenance which must represent an increase. The appellate court noted the trial court's finding that [S.D.]'s request for an increase in monthly support to \$35,000 "in post tax dollars virtually eliminated any possibility of negotiation between the parties to resolve this matter in a reasonable fashion and only assured that the matter would be tried in a full evidentiary hearing." The appellate court affirmed the fee award.

### ***Bolte* – Post-Decree Attorney's Fees on Maintenance Review Improperly Denied**

*IRMO Bolte*, 2012 IL App (3d) 110791 (September 12, 2012)

The appellate court reversed the trial court's decision regarding attorney's fees based upon the trial court's flawed analysis of work that was reasonable and necessary. The trial court based its fee

decision, in part, on its determination that the wife was barred from seeking permanent maintenance because of the title placed on maintenance as being “rehabilitative.”

The appellate court stated:

Furthermore, the research and discovery conducted by counsel in regard to Terry's financial status at the time of the September 1 hearing was relevant to a meaningful review of both the maintenance and attorney fees issues. To find otherwise disregards the statutory directives of both sections 510(a-5) and 504(a). \*\*\* Section 503(j)(2) provides that any award of contribution for fees and costs to one party from the other party shall be based on the criteria for division of marital property under this section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under section 504 (750 ILCS 5/503(j)(2) (West 2010)).

The appellate court then reviewed the parties' very different financial circumstances including the former husband's pensions and pension payments, his current wife's income from employment and the limited cash flow of the former wife. The appellate court then concluded:

The trial court acknowledged the obvious great disparity between Sue's and Terry's actual earnings and their earning capacities. Sue depends solely on social security disability benefits and maintenance payments, and her earning capacity is virtually eliminated due to her disability. A thorough review of the record makes clear that Sue has proven she lacks the ability to pay, and conversely, Terry is more than able. Sue is not required to show destitution in order for the trial court to award her attorney fees. See Gable, 205 Ill. App. 3d at 700. The trial court, nonetheless, ordered Terry to pay only half of Sue's fees, predominately on the basis that her claim for increased maintenance was "nonmeritorious." To the contrary, it was imperative for Sue's counsel to pursue information regarding Terry's finances in order to have both a meaningful review of the maintenance award and the petition for attorney fees. The trial court abused its discretion in ruling on Sue's request for attorney fees.

---

*The Gitlin Law Firm, P.C., provides the above information as a service to other lawyers to assist with continuing legal education. A person's accessing the information contained in this web site is not considered as retaining The Gitlin Law Firm for any case nor is it considered as providing legal advice. The Gitlin Law Firm cannot guarantee the outcome of any case.*

The Gitlin Law Firm  
Practice Limited to Family Law  
663 East Calhoun Street  
Woodstock, IL 60098  
815/338-9401

[www.gitlinlawfirm.com](http://www.gitlinlawfirm.com)

Last Updated: May 12, 2016

G:\Docs\Writings\CL\2012 Case Law Update Financial IssuesA1.wpd

© 2016, The Gitlin Law Firm, P.C.