SUMMARY OF 2013 ILLINOIS DIVORCE & FAMILY LAW CASES REGARDING CUSTODY, AND ISSUES OTHER THAN FINANCIAL DISPUTES

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Custody and "Visitation"

Initial Custody / Restrictions on Visitation

***Lonvick* – Custody Decision Against Mother Upheld and Trial Court Properly Allowed §604(b) Report Despite Alleged Hearsay in Report**

IRMO Lonvick, 2013 IL App (2d) 120865 (August 28, 2013)

There were many issues presented in this appeal and most of them involved the issue of custody. The trial court fairly readily rejected the mother's manifest weight argument regarding custody – even though she had been the primary caretaker of the children. This case contains some language that might be considered dangerous when it cites from another case smewhat out of context:

> Linda correctly points out that stability and continuity are in the best interest of a child [comment by GJG – this is a given] and that there is a presumption in favor of the present custodial parent [comment by GJG: not exactly]. See *Ricketts*, 329 Ill. App. 3d at 180. This does not mean, however, that the presumption controls every situation.

The crux of the mother's argument appeared to be that the trial court erred in admitting Dr. Blechman's 604(b) report because it contained "impermissible hearsay." The appellate court stated:

> Linda's argument fails because it is illogical. The Act allows a trial court to seek advice and guidance and to order an investigation and report in making a custody determination. Denying the court the ability to consider the advice contained in an appointed evaluator's written report would make no sense. The statute is clear, and case law supports the trial court's decision.
>
> We note that the trial court specifically explained the basis for its finding and that its remarks when denying Linda's motion for reconsideration are especially clear. The trial court reiterated its position that, even without the written evaluation, Dr. Blechman's testimony was credible and corroborated by other witnesses.

Custody - Joint Custody

***Debra N.* – Custody Modification: Trial Court Properly Modified Custody from Joint with Mother as Primary to Sole with Father as Custodian Despite 604(b) Evaluation Report Not Recommending Sole**.
IRMO Debra N., 2013 IL App (1st) 122145 (January 31, 2013)
Trial court properly modified joint custody award to mother and father to sole custody to father given the circumstances of the case. The former wife argued on appeal that the court's decision was contrary to the 604(b) recommendation:

> In her challenge to the trial court's custody order, Debra relies heavily on the fact that the court did not follow the recommendation of Doctor Rappaport, whom the court appointed as its expert pursuant to section 604(b) of the Act. 750 ILCS 5/604(b) (West 2008). She argues that the court ignored Doctor Rappaport's "credible [and] uncontroverted" testimony when it awarded sole custody of Aubrey to Michael, rendering its decision against the manifest weight of the evidence. We disagree.
>
> Section 604(b) of the Act "provides a mechanism for court appointment of an independent evaluator on custody and visitation issues. The purpose of the statute is to make the information available to assist the circuit court, and the expert witness is appointed to protect the interests of minor children regarding issues of custody and visitation." *Johnston v. Weil*, 396 Ill. App. 3d 781, 786 (2009). [Note by GJG: Recall the later Illinois Supreme Court's *Johnston v. Weil* decision regarding confidentiality issues].
>
> Although it is within the court's discretion to seek independent expert advice, it is well settled that a court is not bound to abide by the opinions or implement the recommendations of its court appointed expert. See *IRMO Saheb*, 377 Ill. App. 3d 615, 628 (2007) ("Nothing in Section 604 requires the trial court to follow the advice of the 604(b) evaluator. Advice is simply that–advice. The trial court is the ultimate fact finder in a child custody case, not the expert witness."); *IRMO Bailey*, 130 Ill. App. 3d 158, 160-61 (1985) ("Although the testimony of psychologists and social workers are relevant to the determination of custody, their opinions are not binding on the court.").

Restrictions on Visitation

Sexual Abuse Allegations

***IRMO Agers* — Uncorroborated Hearsay Statements of Child Insufficient to Find Abuse, and In Camera Interview Not Required**.
IRMO Agers, 2013 IL App (5th) 120375 (July 8, 2013).
This post-decree case involves allegations by Mother that Father had sexually abused their 5-year old child. The original divorce granted Mother custody and Father visitation every other weekend, holidays, and one week each summer. Mother lived in Pulaski County in the far southern part of Illinois, and Father lived in Tennessee. About 16 months after the divorce, Mother completely withheld visitation without explanation. Father filed a petition for rule to show cause and motion to modify visitation. Mother, in turn, filed a petition to terminate visitation alleging that Father sexually molested the child, which she had reported to DCFS but was being investigated by authorities in Tennessee. Mother claimed the child was fearful of Father, that the child was in therapy, and that the chid had made "great progress" since visitation was discontinued. Mother also filed a motion requesting an *in camera* interview of the child. The trial court denied the request for an in camera interview of the child, but ordered temporary, supervised visitation pending a hearing.

At hearing, both parents testified, as well as other family members and the child's therapist. Mother and her witnesses (i.e., grandmother, stepfather, and therapist) testified of hearsay statements of the child alleging sexual abuse committed by Father during visitations in Tennessee. The child did not testify. Mother also testified that she had observed redness in the child's vaginal area, but no medical evidence was offered. Mother claimed that the child's art and play therapy, and the alleged turnaround in the child's behavior once visitation was terminated, corroborated the child's statements of abuse. Father testified that he too had observed redness in the child's vaginal area but thought it could have been caused by bubble baths. Father offered into evidence a video recording of two of his supervised visits with the child at the courthouse, which purported to show that child was not afraid of Father. Father also testified that he had made a DCFS hotline call to report of suspected abuse just one month prior to Mother's DCFS hotline call. There were no criminal or abuse/neglect charges filed against either party.

After hearing, the trial court denied Mother's petition to terminate visitation and found that, while the child's hearsay statements of abuse are admissible under Section 606(e) of the Act, they were uncorroborated and insufficient by themselves to support a finding of abuse. The court then held Mother in contempt of court for denying visitation and ordered her to pay $1,500 toward Father's attorney's fees, and increased Father's visitation during the summer and allowed telephone and electronic visitation. Mother appealed. The Fifth District affirmed.

Section 606(e) of the IMDMA provides as follows:

> "Previous statements made by the child relating to any allegations that the child is an abused or neglected child *** shall be admissible in evidence in a hearing concerning custody of or visitation with the child. No such statement, however, if uncorroborated and not subject to cross-examination, shall be sufficient in itself to support a finding of abuse or neglect." 750 ILCS 5/606(e) (West 2008).

[***Side-Note: Different standard to admit child's hearsay in OP's than under IMDMA*** --- In the 2nd Judicial District, it has been held that Section 205(a) of IDVA mandates the application of Section 8-2601 of the Code of Civil Procedure (as opposed to Section 606(e) of the IMDMA) in assessing the admissibility of a minor's out-of-court statements in cases brought under the Domestic Violence Act. See, *Marriage of Flannery*, 328 Ill. App.3d 602 (2nd Dist., 2002).]

The Court cited the 1997 Illinois Supreme Court of *In re A.P.* for what is meant by sufficient corroboration:

> Sufficient corroboration of the alleged abuse or neglect requires more than just witnesses testifying that a minor related claims of abuse or neglect to them. *In re A.P.*, 179 Ill.2d, 184, 198 (1997). Corroboration of abuse or neglect requires "independent evidence which would support a logical and reasonable inference that the act of abuse or neglect described in the hearsay statement occurred." *In re A.P.*, 179 Ill.2d. at 199. Corroborating evidence makes it more probable that a minor was abused or neglected. *In re A.P.*, 179 Ill.2d at 199.

The Court held that such corroborating evidence absent in this case. There was no medical evidence presented, and conflicting lay testimony about the possible causation of the redness of the child's vaginal area, e.g., bubble baths. The Court also stated that the therapist's methods, i.e., art and play therapy, were questionable and her testimony was not unbiased as she was hired by Mother. There were also conflicting allegations of abuse made by each parent against the other. And, there was testimony that the child's behavior was age-appropriate. Mother failed to present any other evidence to show visitation would seriously endanger the child. The Court upheld the trial court's findings that, although the child's hearsay statements are admissible, the uncorroborated statements cannot be used to support a finding of abuse.

In Camera Interview: The Court also upheld the trial court's refusal to conduct an in camera interview. Section 604(a) provides that "a court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation." There is no absolute right to present a child's testimony during a custody proceeding, and, when it that testimony is presented, it is left to the trial court's discretion whether to receive it from the witness stand or *in camera*. Courts in Illinois have repeatedly held that whether a child should be interviewed *in camera* lies within the considerable discretion given to the trial courts in such matter. In this case, the child was only 5 years old, and the main purpose of the proffered by Mother for the interview was to have the child tell the judge what happened to her, which is not the same as ascertaining the child's preferences with respect to custody and visitation. Both parents alleged inappropriate conduct to the child. Mother could have presented the child's testimony during the hearing but chose not to do so. The Court found no abuse of discretion in denying the motion for an *in camera* interview.

Executive Summary re Recent In Camera Cases:
Agers - Proper not to grant request where child 5 year old child and reason was to support mother's contention that child was abused.
Grunstad v Cooper, 2012 IL App (3d) 120524: Trial court properly chose not to conduct camera interview with oldest child as there was ample evidence presented by other witnesses to know the oldest child's custodial preference.

Hague Convention

***Redmond* – Majority of 7th Circuit Court of Appeals Decides (Over a Blistering Dubitante Opinion) that Habitual Residence was in Illinois Despite Parties Agreement that Mother Return Child to Ireland in Irish Custody Order**

Derek Redmond v. Mary Redmond, 2013 WL 3821595 at 4. (7th Cir. July 25, 2013).
This was an appeal from the District Court for the Northern District of Illinois, Eastern Division regarding the Hague Convention. The case was argued October 2012 and decided July 25, 2013. Usually in cases of this sort the focus in determining the state of habitual residence is on the last shared intention of the parties. But this case does not follow focusing on this but instead on what it considered to be a fact sensitive review balancing the last shared intention with what it considered was other evidencing going to habitual residence.

The facts are generally accurate as stated in the Chicago Tribune article dated December 9, 2013 – on the front page. As introduced in the decision the facts are:

> Mary Redmond left her home in Illinois at age 19 to attend college in Ireland. There she met Derek Redmond, and the two began a romantic relationship. For most of the next 11 years, the couple lived together in Ireland, though they never married; their common last name is a coincidence. In 2006 Mary became pregnant. She and Derek agreed that the baby would be born in America but raised in Ireland. On March 28, 2007, their son, "JMR," was born in Illinois. They returned to Ireland with the baby 11 days later, but their relationship soon deteriorated. On November 10, 2007, Mary moved back to Illinois with JMR against Derek's wishes. The child was not quite eight months old.

The opinion next points out that ordinarily there would be no issue regarding application of the Hague Convention:

> Ordinarily a parent in Derek's position might have recourse to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, which requires signatories to promptly return children to the country of their habitual residence when they are "wrongfully removed to or retained in" another country in breach of the custody rights of the left-behind parent. Hague Convention art. 3, supra, T.I.A.S. No. 11670.

In any event, the father sought paternity and custody rights in Ireland and following a three year court battle in Ireland:

> On February 10, 2011, an Irish court granted Derek's request for guardianship and joint custody of JMR, and also ordered that the child live in or near Ballymurphy, Ireland. Mary participated in these proceedings and was in Ireland with JMR for the final hearing. The court allowed her to take JMR back to Illinois to make preparations for their move to Ireland, but only on condition that she promise under oath to return with the child by March 30, 2011.

The court of appeals continued:

> Mary made the promise but did not intend to keep it; she returned to Illinois with JMR and remained with him there. Eight months later Derek filed a Hague Convention petition in federal court in Illinois claiming that Mary wrongfully "retained" JMR in the United States in breach of his newly recognized custody rights in Ireland. The district court held that as of March 30, 2011, when Mary disobeyed the Irish court's order and the alleged wrongful "retention" occurred, JMR's habitual residence was Ireland.

The District court had focused on the fact that the mother's move to the States was unilateral and that the child's residence in the States was temporary and contingent on the results of the Irish guardianship proceeding. The District court ordered the return of the child under the Hague Convention. The mother appealed and the 7th Circuit Court of appeals reversed over a blistering quasi-dissent by the chief judge. According to the 7th Circuit Court of appeals, the District court focused on the "parents' initial agreement to raise their son in Ireland—their last shared intent about where he would live—and gave this evidence *decisive* effect." (Emphasis added).

The Court of Appeals majority opinion concluded:

> We reverse. The district court treated the parents' last shared intent as a kind of fixed doctrinal test for determining a child's habitual residence. It is not. The determination of habitual residence under the Hague Convention is a practical, flexible, factual inquiry that accounts for all available relevant evidence and considers the individual circumstances of each case. Here, the parents' shared intent when JMR was born sheds little light on the question of his habitual residence in 2011. When Mary moved with the baby to Illinois in November 2007, she had the exclusive right to decide where he would live; because she was JMR's sole legal custodian, his removal from Ireland was not wrongful under the Convention. By March 2011, the time of the alleged wrongful "retention," JMR's life was too firmly rooted in Illinois to consider Ireland his home. Because JMR was habitually resident in the United States, the district court was wrong to order him "returned" to Ireland.

The District Court of appeals noted that after making her promises to the Ireland court, the mother returned to Illinois in February 2011 and in March 2013 (when she was supposed to return the child), she petitioned for sole custody in Cook County. She also moved for an emergency protective order alleging a history of abuse and alcohol related misconduct. In May 2011, the Irish court issued a further order compelling Mary to bring JMR to Ireland on or before June 30. This order stated that retaining the child in the United States violated the Hague Convention. Again Mary did not comply.

In the Cook County District court the father moved to dismiss based on the lack of jurisdiction under the UCCJEA urging a lack of jurisdiction because a valid custody order a foreign court already governed the issue of custody. The Illinois and Irish courts conferred per § 36/110 of the UCCJEA. The state court judge concluded as follows:

> (1) Derek had timely invoked the jurisdiction of the Irish court; (2) the Irish guardianship and custody decree was issued in substantial conformity with the requirements of the Act; and (3) the decree did not violate fundamental

principles of human rights.

Accordingly, in July 2011, the Illinois court deferred to the earlier claim of jurisdiction by the Irish court, under Sections 36/105, 36/206 of the UCCJEA and declined to exercise jurisdiction over Mary's petition.

The 7th Circuit opinion then states:

> At this point Derek might have sought registration and enforcement of the Irish decree in Cook County Circuit Court, along with an order granting him immediate physical custody of JMR, as provided under the Uniform Act. See id. §§ 36/303-306, 36/310, 36/313. Instead, on December 1, 2011—five months after the state judge dismissed Mary's sole-custody petition—Derek filed a Hague Convention petition in the United States District Court for the Northern District of Illinois seeking an order that JMR be returned to Ireland.

Thereafter, as stated above, the District court granted the father's Hague petition. The District Court judge concluded that as of March 30, 2011, when Mary defied the Irish court's order and the alleged wrongful retention occurred, JMR's habitual residence was Ireland, not the United States. Per the terms of the Hague the court ordered the return of the child.

Regarding the mootness issue the Federal appellate court suggested in what may turn out to be a game of ping pong involving the child:

> The question of JMR's habitual residence is contested, and the correct answer determines the propriety of the district court's return order. Reversal may precipitate new legal and practical challenges surrounding JMR's re-return, *and if the child is returned to Illinois, he may not stay for long. His status will depend on the outcome of the presently pending litigation—and possible future litigation—in the Illinois state courts*. But Mary unquestionably has an interest in the return of her son, and "however small that concrete interest may be due to potential difficulties in enforcement, it is not simply a matter of academic debate, and is enough to save this case from mootness." (Emphasis added).

Regarding the wrongful removal issue and the issues under the Hague Convention the appellate court stated:

> Accordingly, a Hague Convention case asks the following questions in this order:
> (1) When did the removal or retention of the child occur?
> (2) In what State was the child habitually resident immediately prior to the removal or retention?
> (3) Was the removal or retention in breach of the custody rights of the petitioning parent under the law of the State of the child's habitual residence? and
> (4) Was the petitioning parent exercising those rights at the time of the unlawful removal or retention?

The opinion states the first two inquiries are factual ones centering on the child's habitual residence. The second two involved questions of both law and facts, "regarding the left-behind

parent's custody rights under the law of the State of the child's habitual residence and whether the parent was actually exercising those rights at the time of the removal or retention."

The overall point was that in 2007 when the mother moved to Illinois the removal was not in violation of the Hague. It was only potentially after the father was awarded rights of custody in Ireland on March 30, 2011 that the mother's removal may have been wrongful.

The majority opinion then suggests:

> Here, Derek seems to be using the Hague Convention as a substitute for an action in Illinois state court under the Uniform Act to enforce his newly recognized custody rights pursuant to the Irish court's order. Perhaps this invocation of the Convention's remedy is permissible under an expansive understanding of the term "retention," but we have our doubts.

The opinion then focused on the following question:

> Is a change in one parent's custody rights enough to make the other's parent's continued physical custody of the child a putative wrongful "retention" under the Convention? Stated differently, does the parent with physical custody of a child commit a wrongful retention—colloquially, an "abduction"—by reneging on a promise, made under oath, to obey a newly entered custody order in favor of the other parent?

The opinion then states:

> We asked for supplemental briefing on this question as well, but the parties seem to have missed our point. As far as we can tell, this is a question of first impression in this circuit and in most other circuits as well.

The decision then addresses case law under the Hague and states in an overly simplistic fashion:

> The Hague Convention targets international *child abduction*; it is not a jurisdiction-allocation or full-faith-and credit treaty. It does not provide a remedy for the recognition and enforcement of foreign custody orders or procedures for vindicating a wronged parent's custody rights more generally. Those rules are provided in the Uniform Child-Custody Jurisdiction and Enforcement Act.

It is suggested that the Hague Convention is actually somewhat misnamed. It is actually a treaty seeking to protect children both wrongfully removed *and wrongfully retained*. The title should not control over the substance of this international treaty. Next, the court focused on the issue of habitual residence in determining wrongful retention.

The opinion next properly states:

> If a child has not been moved from its habitual residence, there is no "left-behind" parent with grounds to complain about the move, and it makes no sense to speak in terms of ordering the child's "return." In that situation, relief under the Hague

> Convention must be denied without further inquiry into whether the petitioning parent's custody rights have been breached or whether the petitioning parent was actually exercising those rights at the relevant time.

The opinion next urges that this decision "requires an assessment of the observable facts on the ground, not an inquiry into the child's or parent's legal status in a particular place." The majority then focused on what it called its "this commonsense and fact-based approach." Next, the court stated:

> we think it clear that as of March 30, 2011, when the alleged wrongful retention occurred, JMR habitually resided in Illinois and had for some time. He was born in Illinois, and except for seven and a half months of his infancy, he lived continuously in Illinois with only periodic, brief visits to Ireland. By March 30, 2011, he had spent more than three of his four years in Illinois— approximately 80% of his young life.

The Court then looked to other facts that it believed gave rise to a habitual residence in the States such as frequent contact while in the states with relatives here, etc.

But the key question is whether the agreed order under which Mary was to return the child, etc., reflected an intention for habitual residence in Ireland. The majority stated, "The district court's reliance on the parents' last shared intent was misplaced, though perhaps understandable. The key quotation from the majority stated:

> Many Hague Convention cases emphasize the last shared intent of the parents as an important factor in the analysis of a child's habitual residence. But the habitual residence inquiry remains a flexible one, sensitive to the unique circumstances of the case and informed by common sense. The parents' last shared intent is one fact among others, and indeed may be a very important fact in some cases. But it is not a uniformly applicable "test" for determining habitual residence, as the district court seemed to think.

Cases go both ways regarding the issue of habitual intent and whether the focus is on the parent's intent or focuses on viewing things "from the child's perspective." The court then recognizes that there is a split among the Federal circuits on this point:

> Conventional wisdom thus recognizes a split between the circuits that follow *Mozes* and those that use a more child-centric approach, but we think the differences are not as great as they might seem. Although the Third, Sixth, and Eighth Circuits focus on the child's perspective, they consider parental intent, too.

In trying to reconcile the split the decision states:

> In substance, all circuits—ours included—consider both parental intent and the child's acclimatization, differing only in their emphasis. The crux of disagreement is how much weight to give one or the other, especially where the evidence conflicts.

The opinion then focuses on one decision making a distinction between cases of shared parental intent when the parents "are estranged essentially from the outset."

> The opinion then concludes its discussion of law by stating, "In short, the concept of "last shared parental intent" is not a fixed doctrinal requirement, and we think it unwise to set in stone the relative weights of parental intent and the child's acclimatization. The habitual-residence inquiry remains essentially fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions.

Then the decision looked how to weigh parental intent versus viewing things from the child's perspective.

> On this issue the district court erred by heavily weighting the parents' last shared intent. That might make sense when both parents have the right to fix the child's place of residence, but shared intent has less salience when only one parent has the legal right to do so. Most often two parents exercise that authority jointly, but not always. Here, Mary had sole custody under Irish law from the time of JMR's birth until March 2011; as such, she had the exclusive right to fix the place of JMR's residence.

Thus, the majority held that the child's habitual residence was in the States. Then the court stated:

> Mary and Derek are obviously locked in an international struggle over JMR's custody, and the potential for a jurisdictional conflict remains. But the Hague Convention does not provide a procedure for resolving the disputed jurisdictional and merits claims in this child-custody battle.

The 7th Circuit Court of appeals then made a gratuitous comment in a telling footnote that is somewhat the opposite of judicial restraint:

> Although the Supreme Court did not decide the matter in *Chafin*, *and the parties have not briefed the question here*, we think it clear that the court has the equitable authority to issue an order requiring JMR's return to the United States. That's the position of the U.S. Department of State, the designated Central Authority for assisting the implementation of the Hague Convention in the United States. On its behalf the United States filed an amicus curiae brief in Chafin explaining its position that because the court has the inherent equitable power to order the child's re-return, an appeal of a return order under the Hague Convention does not become moot by the return of the child. (Emphasis added.)

Note that this position is not from any appellate court decision or Supreme Court decision. Instead, it was merely a quote from an amicus brief. It is suggested that this dictum, buried within a footnote, had no place within the decision.

Comment: I liked the language of the "dubitante." I had to look up this word. It is from the Latin doubting and this is exactly my view on this decision. This sort of a writing might be considered to be closer to a dissent than a concurring opinion – especially when one reads the

contents of the chief judge's several page opinion.[1]

I liked the first comment, "Still, I find it hard to understand why this litigation continues or how any good can come of it." Yes.

The *dubitante* next states:

> The courts of Ireland have reached a final decision and awarded custody to Derek Redmond. The courts of Illinois also have reached a final decision and concluded that they have no warrant to disagree with the Irish decision.

Chief Justice Easterbrook, continues:

> Mary Redmond not only is bound by the Irish judgment awarding custody to Derek but also promised to obey that judgment. Her promise was essential to obtaining permission to travel with JMR to Illinois, purportedly to tidy up a few personal matters in preparation for a long-term stay in Ireland. Mary broke her promise and defied the Irish judgment. Ireland considers her a fugitive from justice (her contempt of court is obvious), which also makes it impossible to see how she can realistically hope to obtain lawful custody of JMR in Illinois. It is not simply that she violated both a valid judicial order and her own undertaking; it is that she has revealed that she will violate any order in Derek's favor. No legal system can accept that "heads I win, tails you lose" approach... *Mary has disqualified herself as a candidate for favorable treatment by the judiciary of any state or nation*.

The opinion next points to the loose and expansive language of the opinion I noted above:

> The parties' indifference to principles of preclusion is why my colleagues proceed to render a second decision under the Hague Convention—one at odds with Ireland's. This is within the judicial power, given *Chafin*, but teeters on the brink of being an advisory opinion.

The dubitante then pointed out that from the perspective of the law in Ireland the father did not establish rights of custody until February 2011. But then the opinion states that while this is correct when viewing things from the perspective of Irish law, it was questionable whether this

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[1]An article addressing this sort of decision by law professor Jason J. Czarnezki, states, "In the United States," as of June 30, 2005, says Czarneki, "the term has been used in only 626 written opinions. Clearly, concurrences, not dubitante opinions, are the norm when expressing reservations, but deciding to vote with the court's majority. However, the term is most frequently used to *express doubt in general*, not to define a judge's disposition in a given case. See, Czarnezki, "The Dubitante Opinion," Akron Law Review, Vol. 39, 2006, Marquette Law School Legal Studies Paper No. 06-15. See: papers.ssrn.com/sol3/papers.cfm?abstract_id=889449 And these opinions have been limited to four Justices including this Justice: i.e., Frank M. Coffin (First Circuit); Henry J. Friendly (Second Circuit); Frank H. Easterbrook (Seventh Circuit); and James C. Hill (Eleventh Circuit).

was correct from the perspective of Illinois, "What happens to the "habitual residence" issue when the jurisdiction in which the child is physically present does not view a change of residence as valid?" This was where the Illinois decision had deferred to the Irish decision under the terms of the UCCJEA. The decision then seems to provide its own suggestion as to what the Illinois courts might do – but clearly in reaction to the overstatements by the majority opinion:

> I do not want to resolve any issue of Illinois law (my colleagues correctly state that rights under the Hague Convention are a matter of federal law), but Illinois could well deem Mary's action in 2007 to have been a violation of Derek's rights—as Illinois understands those rights, though not as Ireland understands them. And if Illinois would deem JMR's presence in Illinois to be unlawful, how can the time he spent in Illinois count toward acquiring "habitual residence" in Illinois?

An interesting point. In an exceedingly well stated point, the chief Justice points to its own order issued after oral opinion for further arguments on this point.

> My colleagues recognize that time in Illinois would not count toward habitual residence if Mary's unilateral removal of JMR from Derek's custody had violated Irish law. Slip op. 30–31, citing *Kijowska v. Haines*, 463 F.3d 583, 587 (7th Cir. 2006). So why would time in Illinois count toward habitual residence if Mary's unilateral removal of JMR from Derek's custody violated Illinois law? My colleagues do not address that question—nor did the parties, though we issued an order after oral argument directing them to do so. Perhaps they misunderstood the question. But the result is an opinion that discusses a subject that may matter to other cases (though likely not to this one) without considering a potentially vital issue.

And the concluding words by the justice doubting the majority opinion state:

> I am not sure how this issue should be resolved, and I am content to let it pass because nothing we say here is likely to affect JMR's ultimate placement. The courts of Ireland and Illinois have made their decisions in adversarial litigation. It is time for this federal overlay to end and the subject be returned to the domestic relations apparatus of Illinois and Ireland, where it should have been all along.

Guardianship

A.W. – Guardianship Petition Should Not have been Dismissed and Evidentiary Hearing Required Regarding Whether Petitioner Could Rebut Presumption that Applies to Natural Parent

In re. A.W., 2013 IL App (5th) 130104 (August 30, 2013)

The child was born in 2010. In 2008, the natural father petitioned for custody, and in 2010 he was granted custody. He died in October 2012. At that time he last lived with a woman, Kristen. In the father's will he designating Kristen as guardian of the person and estate of A.W. Kristen filed her petition for guardianship:

> In her petition, she alleged that Emily was unable to make or carry out day-today decisions concerning A.W. Kristen asserted that Emily's history demonstrated that she was wholly unfit to care for A.W. and that she had relinquished that responsibility first to her parents, who were awarded guardianship, and then to James, who was awarded custody and with whom A.W. and Kristen lived before he died.

The trial court had dismissed the petition and the appellate court reversed. Regarding the natural parent presumption the appellate court stated:

> Whether the presumption is rebutted necessarily requires an evidentiary hearing, unless the allegations contained in the petition would not, if true, rebut such a presumption. *** Because Kristen's petition was sufficient, the circuit court should have heard evidence to determine whether Kristen could establish standing, i.e., whether she could rebut, by a preponderance of the evidence, the presumption that Emily is able to make and carry out day-to-day child-care decisions regarding A.W. If Kristen fails to rebut the presumption by a preponderance of the evidence, she lacks standing, and the circuit court then lacks jurisdiction to proceed on the petition.

Grandparent Visitation

***Dumiak* – Grandparents' Petition for Custody, Originally Reversed and Remanded for Lack of Standing, Later Properly Denied Following Evidentiary Hearing on Standing**
Dumiak v. Kinzer-Somerville, 2013 IL App (2d) 130336 (September 12, 2013)
This is a case of winning a battle yet losing the war – since lawyers often tend to use 'war analogies' in custody litigation. The original unpublished decision was 2012 IL App (2d) 120570-U, ¶ 37. There the appellate court held that the trial court had erred in not hearing evidence on the issue of grandparents' standing, because the fact that the child was living with the mother on the date that grandparents filed their custody petition was, alone, insufficient to defeat grandparents' standing. The appellate court instructed the trial court to determine whether the child was "not in the physical custody" of the her mother within the meaning of section 601(b)(2). More specifically, the appellate court instructed that the grandparents had to show that they had physical custody of the child because the mother voluntarily and indefinitely relinquished custody.

***Pruitt* – Appellate Court Affirmed Parents Motion to Strike and Dismiss Grandparent's Visitation Petition per 2-619(a)(9) of the Code**
Pruitt v. Pruitt, 2013 IL App (1st) 130032 (August 2, 2013)
The appellate court affirmed parents' motion to strike and dismiss grandparent's visitation petition per 2-619(a)(9) of the Code. The petitioner was the maternal grandfather of a child born October 2010. In September 2012, the grandfather filed his petition for grandparent visitation per section 607(a-3) of the IMDMA (the so called grandparent visitation statute). The petition's allegations, as recited by the appellate court opinion were:

> Russell's petition alleged, inter alia, that from August 2010 until July 2012,

> Stephanie and B.B., upon B.B's birth, resided in Russell's household with him, his wife and his minor children. During this time, Russell and his family provided supervision and care as well as food, clothing and other support for B.B. and Stephanie. The petition further alleged that no order of parentage, support or visitation had been entered. The remainder of the petition, in essence, alleged that, despite Russell's attempts, he had been unable to negotiate a reasonable visitation schedule with respondents, to the detriment of B.B.'s mental, physical and emotional health.

The gist of the motion to dismiss was that the grandfather did not satisfy failed to satisfy any of the conditions precedent for allowing him to file a petition for visitation as set forth in section 607(a-5)(1) of the IMDMA. The grandfather claimed that the trial court erred in failing to conduct an evidentiary hearing on his petition. The statute provides:

> any grandparent, great-grandparent, or sibling may file a petition for visitation rights to a minor child if there is an unreasonable denial of visitation by a parent and at least one of the following conditions exists:
> * * *
>
> > (D) the child is born out of wedlock, the parents are not living together, and the petitioner is a maternal grandparent, greatgrandparent, or sibling of the child born out of wedlock[.]"
> > 750 ILCS 5/607(a-5)(1)(D).

Remember, that this is a motion to dismiss per 2–619(a)(9) of the Code. The Defendant bears the initial burden to prove the affirmative matter defeating the plaintiff's claim. The 'affirmative matter' must be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. Once the Defendant meets this burden of going forward, then (according to case law) the burden shifts to Plaintiff who must establish that the affirmative defense asserted either is 'unfounded or requires the resolution of an essential element of material fact before it is proven.

The appellate court stated that the sworn affidavits by the child's parents (the Defendants) asserting that they lived together provided the necessary affirmative matter that could defeat the maternal grandfather's claim.

This case is necessary reading both for any case with similar facts and in addressing motions to dismiss.

Enforcement of Visitation

***McCormick* – Contempt to Enforce Visitation: Second Appeal is Not the Charm**
IRMO McCormick: 2013 IL App (2d) 120100 (August 26, 2013)
It is rare that a "second" bite at the apple seemingly provides more *gravitas* to a Rule 23 decision. But that is the case with *McCormick*. In the first unpublished case the appellate court reversed the trial court's failure to hold the mother in contempt of court where she had a variety of reasons or excuses for visitation not being afforded on quite a number of occasions.

Regarding the first appeal, the appellate court note in this published case noted:

> ... [T]his court held that the trial court erred in its August 11, 2011, finding that Amy was not in contempt and we remanded for a determination on sanctions. McCormick, 2013 IL App (2d) 110894-U, ¶¶ 31, 35. We reasoned that Amy had admitted she violated the visitation order and that her rationale, primarily that the children had other commitments, established that the violations were willful. Id. ¶ 31. Moreover, we stated that the trial court "misled Amy by suggesting that she could legitimately second-guess the visitation schedule." Id.

Regarding the facts of the second appeal, the appellate court commented:

> After the trial court issued its first finding of no contempt, and while the first appeal was pending, the parties continued under a slightly modified visitation schedule. However, on three separate weekends, Amy "allowed" at least one boy to miss a visit.

In curious reasoning the appellate court stated:

> Here, again, the contempt period at issue followed an initial finding of no contempt for prior violations of the visitation order. Amy continued to violate the visitation order during this period. However, we think it fair to say that there was no increase in the frequency or severity of the violations and that, if anything, Amy demonstrated greater compliance than she had in the past. Following the close of evidence and the trial court's ruling on the violations during the period at issue, this court reversed the trial court's finding of no contempt as to the previous period. Thus, the question for this court becomes whether to: (1) review the violations in light of only the visitation order and, in keeping with our previous appellate ruling, consider reversing; or (2) review the violations in light of the trial court's initial ruling of no contempt, even though that ruling was later determined to be erroneous. We favor the latter approach.

The appellate court concluded:

> Particularly where, in its initial finding of no contempt, the trial court "misled Amy by suggesting that *she could legitimately second-guess the visitation schedule*," we cannot find that Amy willfully disrespected an order of the court between August 11, 2011, and October 26, 2011. (Emphasis added by this appellate court decision). *McCormick*, 2013 IL App (2d) 110894-U, ¶ 31. Going forward and based on our reversal of the initial finding in *McCormick*, 2013 IL App (2d) 110894-U, however, we expect that Amy is now aware that any new violations may be considered contumacious behavior.

Removal

Removal Granted

***Banister* – Once Leave Is Granted to One State, There *Is* Jurisdiction to Grant or Deny a Removal Proceeding to Another More Far Away State / Removal Granted to One State a Factor in Allowing Removal to Another State**

Banister v. Partridge, 2013 IL App (4th) 120916 (February 26, 2013)

The mother filed a petition to remove her nine year old child from Illinois to Kentucky, two years after she married a senior enlisted Army soldier who lived in Kentucky. The trial court granted her petition, but then denied mother's later petition to remove child to Maine, after her husband had received orders to serve as instructor in Maine. The appellate reversed and reasoned that the greater geographic distance between Illinois and Maine, as opposed to distance between Illinois and Kentucky, did not warrant denial of mother's removal petition. Important factors included the mother's testimony about her options and about impact on child's quality of life if her petition were denied.

One issue was whether the court had jurisdiction to deny the mother's petition for removal to the more distant state, i.e., to Maine, since the court had already ruled (although not fully implemented its decision) regarding allowing removal to Kentucky. This is an important issue and one that I have repeatedly focused upon in terms of the lack of clarity of the case law regarding the issue of whether once a removal has been granted the trial court retains authority to deny another removal. I have pointed to the dual decisions on this issue – neither of which is from my Second District:

> In *In re Marriage of Lange*, 307 Ill. App. 3d 303, 309 (4th Dist., 1999), this court rejected the argument that Illinois trial courts did not have the authority to consider a subsequent petition for leave to remove a child from a state other than Illinois. We explained that decision, as follows:
>
> > "In the case at bar, to determine that the trial court did not have the authority to rule upon the request to move the children from Indiana to Texas would deprive the trial court of the authority to enforce the visitation provisions of the judgment of dissolution in spite of the clear legislative intention to the contrary expressed in the Illinois Act and the Marriage Act. Here, the circuit court in Illinois entered the judgment of dissolution and retained jurisdiction to enforce that judgment. It has the authority, incident to its power to enforce and modify the custody and visitation provisions of the judgment of dissolution, to grant or deny a motion by a custodial parent residing with the children outside of Illinois to remove the children from the current custodial residence to a more remote residence in some third state." *Lange*, 307 Ill. App. 3d at 311.
>
> Leah acknowledges our decision in *Lange* but relies on the Fifth District's decision in *In re Parentage of Tavares*, 363 Ill. App. 3d 964, 969 (5th Dist., 2006), for the proposition that once leave is given to a parent to move a child from Illinois, neither the Marriage Act nor Parentage Act requires a parent to seek further leave of court to move a child to another state.
>
> In *Tavares*, 363 Ill. App. 3d at 965-66, the respondent, an airman in the United

> States Air Force stationed in Illinois, had joint custody of her son with the petitioner, also an airman stationed in Illinois who enjoyed liberal visitation. Later, when the respondent received military orders transferring her to Alaska, the parties mutually agreed to modify the visitation schedule of their joint parenting agreement, which the trial court later approved. *Tavares*, 363 Ill. App. 3d at 966. Approximately 16 months after the respondent moved to Alaska, the petitioner filed a petition to modify custody. The respondent cross-appealed, filing a motion to modify visitation. *Tavares*, 363 Ill. App. 3d at 966-67.
>
> At a later hearing on the parties' respective filings, the petitioner testified that he believed the respondent was planning on leaving the military and moving to Texas. *Tavares*, 363 Ill. App. 3d at 967. Upon hearing this testimony, the trial court directed the respondent to file a petition to remove, which the court later denied. *Tavares*, 363 Ill. App. 3d at 967-68. On appeal, *the Fifth District concluded that the trial court erred because it was not authorized to direct the respondent to file a petition for leave to remove and to subsequently consider and deny that removal petition*. *Tavares*, 363 Ill. App. 3d at 969. In so concluding, the Fifth District stated that "[n]othing in the Parentage Act or the custody provisions of the *** Marriage Act *** requires a parent who has previously removed a child from the State of Illinois, with the permission of the court, to seek leave to that child to another state." *Tavares*, 363 Ill. App. 3d at 969.

More specifically, the concluding language of *Tavares* states:

> This brings us to the remaining issues before this court, which include *** the circuit court's denial of Shane's petition to modify custody, the circuit court's denial of Veronica's petition to modify visitation, and the court's modification of the visitation schedule. Because it is clear to this court that the circuit court's denial of Shane's petition to modify custody, the circuit court's denial of Veronica's petition to modify visitation, and the circuit court's decision to modify the visitation schedule, including its order that Andrew be enrolled in school at the Washington School in Belleville, *were based on its belief that it had the authority to deny Veronica's petition for leave to remove Andrew from the State of Illinois and essentially compel Veronica to remain in Illinois, these decisions are reversed, and this cause is remanded for reconsideration.*

The mother, Leah, contended that the 5th District's *Tavares* opinion, decided 6 years after *Lange*, creates a conflict between the districts regarding the issue of "subsequent removals." The appellate court stated:

> Thus, Leah implicitly urges this court to reassess our position in *Lange* in light of *Tavares*. We decline to do so. *** Here, despite Leah's urging, we adhere to our conclusion in *Lange* and reaffirm our stance that a trial court's authority to address a subsequent petition for leave to remove a minor is an inherent part of the court's authority to enforce the custody and visitation provisions of the judgment of dissolution.

The Fourth District's opinion in this *Banister* case clearly looks to its own previously decided

case and does not fully acknowledge the conflict between it and the later *Tavares* 5th District decision. We have a conflict among the districts. Also, keep in mind that the original 4th District *Lange* decision was not a strong decision. For example, it stated, "Finally, if all else fails, the parties have revested the trial court with jurisdiction." She did that in that case by filing her petition for removal. Contrast this with *Tavares* where the mother only filed her petition for removal because she was directed by the trial court to file this petition.

Normally one would hope that this would be appealed to the Illinois Supreme Court. But, the appellate court reduced the chances of this case going to the Supreme Court by affirming its previous decision but allowing the removal to the more distant state.

This case also addresses the best interest hearing required for contempt petitions of this sort, e.g., a contempt petition brought against the mother for moving the child contrary to a court order.

Executive Summary re Removal and Leave Effect of Leave to Remove to One State:
Banister v. Partridge, 2013 IL App (4th) 120916:

> Leave to remove to one state has effect on petition to remove to another state, but court still has jurisdiction to deny.

In re Parentage of Tavares, 363 Ill. App. 3d 964, 969 (5th Dist., 2006):

> Once leave is given to a parent to move a child from Illinois, neither the Marriage Act nor Parentage Act requires a parent to seek further leave of court to move a child to another state. So, the trial court erred because it was not authorized to direct the respondent to file a petition for leave to remove and to later consider and deny that removal petition.

IRMO Lange, 307 Ill. App. 3d 303, 309 (4th Dist., 1999):

> Court has authority to deny request for removal to a more far away state (Indiana and then to Texas) but note dissent.

***Smith* – Denial of Request for Removal Reversed Where Court Fashioned Alternate Custody Orders – One Where Mother was Allowed to Keep Custody if She Stayed in Illinois and a Second Granting Father Custody if She Still Insisted on Moving**
IRMO Smith, 2013 IL App (5th) 130349 (December 2, 2013)
The appellate court reversed the trial court's alternative orders – one where the mother could retain primary residential custody if she continued to live in Illinois and a second where the father would be awarded custody if the mother did not return to Illinois in 30 days. The appellate court stated:

> Such an alternative order implies that the minor child's best interest will literally change overnight, depending on whether Mother opts to relocate to Illinois within 30 days or stay in Ohio. Such an immediate and radical shift in the determination of what constitutes the "best interests" of the child in a custody proceeding is not contemplated by the kind of alternative order entered by the trial court. It certainly is not contemplated by section 602 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602 (West 2010)), which requires a detailed analysis of those factors to be considered when entering a custody award.

> Here, the court ignored the statutory mandate and placed Mother in an impossible situation by creating an "either or" decree that had very little to do with the "best interests" of the child. We also do not understand why, given some of the reasons upon which the court based its decision to require Mother to return to Illinois immediately, the court would allow Mother to retain primary physical custody at all, particularly in light of the fact that the court also gave Father sole decision-making authority over their son. Moreover, for Mother to comply with the court's order to return to Illinois in order to retain primary custody, she will compromise both the financial stability and security of herself and her son. If she returns to Illinois, the present custody and visitation schedule will remain essentially unchanged, but the child will be uprooted from the home and daycare he has now known for over two years. Additionally, as maintenance was denied, Mother will have no income with which to provide for the child, other than child support.
>
> Forcing Mother to choose between being gainfully employed or being unemployed in order to have primary custody of her son cannot be in the best interest of the child. *We further have trouble with the court's decision to allow Father to have the sole decision-making power for the child, whether or not Mother returns to Illinois*. We fail to see how this is in the child's best interest, especially when such a decision undoubtedly will result in additional changes given that Father has exhibited ambivalence toward a number of decisions regarding his son's well-being.
>
> Clearly Mother and Father have different personalities and styles of living. Father is more laid back and relaxed in his approach. Mother, who admittedly has a more rigid personality, is dedicated to the child's best interest, from his nutrition and healthcare to his daycare, schooling, and personal safety. This is not unnatural in light of the fact that she is a first-time mother and has primary physical custody of the child. Under the circumstances presented, we conclude that the court's ruling was arbitrary and against the manifest weight of the evidence.

The appellate court concluded:

> While we reverse the court's decision denying Mother's request for permanent removal of the minor child to Ohio, we regretfully are forced to remand this cause for additional proceedings. We, however, are remanding this cause on the sole issue of visitation. We are not in a position to set up a workable visitation schedule given that the child, now older, will be entering school in the near future.
>
> In summary, we are reversing the court's alternative custody orders and are allowing Mother to remain in Ohio and retain primary physical custody of the parties' minor child while granting joint custody to Mother and Father.

The decision also touched in the connection between the maintenance decision and removal.

> We also find fault with the court's denial of temporary maintenance if we were to

> uphold the court's decision. Given that Mother was ordered to return to Illinois within 30 days in order to retain primary physical custody, an award of, at a minimum, temporary maintenance would have been in order. If Mother agreed to return, she would have been faced not only with relocation expenses but also with the loss of her full-time income. While the parties' marriage was not long in duration, and Mother is more than capable of supporting herself, she would not have been able to do so immediately once she was forced to give up another lucrative career position. Clearly the court's order was unjustified if Mother were forced to return to Illinois. Given that we are reversing the denial of Mother's request for permanent removal of the child to Ohio, and, as a result thereof, Mother will not need maintenance, we need not address the issue any further.

Paternity

Statute of Limitations to Seek Paternity Determination

***Ralda-Sanden* – Statute of Limitations Equitably Tolled in Allowing Child to File Parentage Claim Beyond §8(a)(1) period.**
Ralda-Sanden v. Sanden, 2013 IL App (1st) 121117 (April 30, 2013)
The daughter filed a complaint to establish paternity against the putative father. The daughter was then 22 and three months after first learning of her father's identity. The daughter and her mother filed uncontroverted affidavits that mother, who had been a live-in nanny for Defendant, was raped by him, that her mother never told daughter of his identity, and that her mother told her he died in car accident. The appellate court held that the court may apply equitable tolling the statute of limitations period to allow a child to file a parentage claim past the Section 8(a)(1) limitations period of the Illinois Parentage Act.

Visitation Under the Parentage Act

***J.W.* – To Determine Visitation Privileges under §14(a) of the Parentage Act, the Initial Burden Is on the Noncustodial Parent to Show That Visitation Will Be in the Best Interests of the Child Pursuant to §602 of the IMDMA.**
IRPO J.W., 2013 IL 114817, Illinois Supreme Court, May 23, 2013.
Regarding the issue the Supreme Court stated:

> The question presented by this appeal is a narrow one: What is the proper standard to be applied when a biological father seeks visitation privileges after a determination of parentage under section 14(a)(1) Parentage Act (750 ILCS 45/14(a)(1) (West 2010)).

The real question was whether the IPA of 1984 incorporates the visitation provisions of Section 607(a) providing a presumption in favor of the biological parent for visitation and not requiring that parent to demonstrate that visitation was in the child's best interests.

The father urged that the appellate court correctly ruled that §14(a)(1) of the Parentage Act

incorporates the visitation provisions of section 607(a) of the IMDMA and thus there was a rebuttable presumption entitling the non-residential parent to reasonable visitation – unless the serious endangerment standard were proven by the custodial parent.

Section 607(a) of Marriage Act provides:

> [a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral or emotional health." 750 ILCS 5/607(a) (West 2008).

In contrast Section 14(a)(1) of the Parentage Act provides that the judgment "*may* contain provisions concerning *** visitation privileges with the child." (Emphasis suppled by appellate court.).

In its discussion the Supreme Court stated:

> As a result, the presumptive right to visitation in section 607(a) of the Marriage Act, drafted over 30 years ago, is in keeping with the traditional model of a family paradigm, where each parent has presumably exercised custody over the child and one parent will now be granted custody and the other reasonable visitation. Such a presumption reflects a legislative recognition of the need to protect the preexisting parent-child bond that presumably developed prior to the divorce or separation of two parents. Thus, to overcome the presumption that visitation is in the best interests of the child in custody proceedings filed by a parent under the Marriage Act, the General Assembly sought a higher, more stringent burden on the custodial parent than merely the traditional best-interests factors.
>
> In contrast, in actions under the Parentage Act, paternity is at issue and must first be proved. At the time visitation is sought, a relationship with the child may not have ever been forged, especially where paternity is established long after birth. See 750 ILCS 45/8(a)(1) (West 2010) (recognizing that the statute of limitations for raising paternity is two years after the minor reaches the age of majority). Additionally, the paradigm of preserving or continuing the parent-child relationship of a traditional intact family unit does not accurately reflect many family situations. *** Thus, in parentage actions, issues of visitation may arise under situations where the court may be asked to balance several competing interests related to the child.
>
> Given the myriad relationships that may evolve outside the parameters of a dissolution proceeding, the General Assembly could not have predetermined with such broad strokes that the presumptive entitlement to reasonable visitation absent "serious endangerment" is in a child's best interests in every parentage action, without giving the court the flexibility to consider the facts and circumstances of each case. Rather, the plain language of section 14(a)(1), giving the court discretion in awarding visitation and requiring "a finding in the best interests of the child," contemplates a hearing where the court has the flexibility to consider whether, and to what extent, the biological father may now exercise visitation

> rights with respect to the child. (Emphasis added.) 750 ILCS 45/14(a)(1) (West 2010); J.S.A., 224 Ill. 2d at 212. Accordingly, the "serious endangerment" standard under section 607(a) would undercut the court's statutory authority under section 14(a)(1) of the Parentage Act to deliberate and weigh factors relevant to making a "finding in the best interests of the child."
>
> The provisions of section 602 of the Marriage Act are broader and allow the court to take into account the facts and circumstances of each case. Section 602(a) sets forth a nonexclusive list of best-interests factors that the trial court shall consider in making determinations related to custody. These factors best promote the legislative intent under the Parentage Act given the nature of the proceedings.

Comment: The Supreme Court has spoken – at least pending an amendment to the current statutory scheme.

Promissory Estoppel Type Claims for Parenting Rights

Adoption

Mancini II – 2014 IL App (1st) 111138-B ***
Please see my original report of *Mancini* for the 2014 reconsideration in light of the Illinois Supreme Court's *DeHart's* decision.

Recall that in these divorce proceedings the petitioner had adopted a child as a single parent prior to the marriage and respondent never sought to adopt that child after the marriage but did seek custody after the marriage was dissolved. The appellate court had affirmed the trial court's dismissal of his attempt to obtain custody on the ground that he lacked standing. But the Supreme Court directed the appellate court to vacate its decision and reconsider the matter in light of the supreme court's decision in *DeHart* recognizing equitable adoption in a probate proceeding. In revisiting the issue, the appellate court stood by its original decision after concluding that although equitable adoption is applicable in probate cases, it should not apply in adoption, divorce, or parentage actions, especially when the statutes governing those proceedings clearly establish parental rights, who is a parent and how parentage is established through adoption; furthermore, equitable adoption is not recognized in Illinois in custody proceedings. The appellate court reasoned that in the absence of a contract in in the instant case, there was no basis for the "contract to adopt theory."

Adoptive Couple v. Baby Girl, ICWA **– 2013 Supreme Court Rules in June on Native American Adoption Case**
The United States Supreme Court ruled that a child of Native American ancestry could legally reside with her non-Native American adoptive parents over the objections of her biological father. The Court decided that the child's biological father, Dusten Brown, had relinquished his custodial rights at the time of her birth and that as a result, the 1978 Indian Child Welfare Act did not apply in this case. This decision overturned an earlier ruling from the South Carolina Supreme Court. In this case the father was approximately 1% Cherokee. ("It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to

her adoption under South Carolina law.")

Writing for the 5-4 majority, Justice Samuel Alito argued that an overbroad reading of the notion of custody would place Native American children at a "unique disadvantage in finding a permanent and loving family home."

> A biological Indian father ... could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA.

The ruling was based on finding by the majority that, "Under our reading of § 1912(f), Biological Father should not have been able to invoke § 1912(f) in this case, because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings." The key language in the ICWA provides:

> Section 1912(d) provides that "[a]ny party" seeking to terminate parental rights to an Indian child under state law "shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to *prevent the breakup of the Indian family* and that these efforts have proved unsuccessful." (Emphasis supplied.) ... Consistent with the statutory text, we hold that § 1912(d) applies only in cases where an Indian family's "breakup" would be precipitated by the termination of the parent's rights... But when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no "relationship" that would be "discontinu[ed]" — and no "effective entity" that would be "end[ed]" — by the termination of the Indian parent's rights. In such a situation, the "breakup of the Indian family" has long since occurred, and § 1912(d) is inapplicable.

Domestic Violence Type Issues

***Aaliyhah L.H.*, Trial Court Has Ability to Require Guns to be Outside of Parent's Access While Children were of Age of Minority**
In re Aaliyah L.H., 2013 IL App (2d) 120414 (November 25, 2013), Decision Judge Davenport.

This is an interesting case in which gun ownership rights type issues and the ability of the divorce court to place limitations on guns without a domestic violence order. The appellate court stated:

> Similarly, in this case, Shangwé is entitled to deduct the health insurance premiums he pays even though there is no additional cost for adding Aaliyah to his plan, which covers himself and his dependents. Accordingly, the trial court erred by failing to deduct Shangwé's $485 monthly health insurance premiums to determine his monthly net income. Thus, the trial court's finding that Shangwé's monthly net income was $3,695 was erroneous.

The mother cited section 505(a)(4) of the IMDMA:

> In cases where the court order provides for health/hospitalization insurance coverage pursuant to Section 505.2 of this Act, the premiums for that insurance, or that portion of the premiums for which the supporting party is responsible in the case of insurance provided through an employer's health insurance plan where the employer pays a portion of the premiums, shall be subtracted from net income in determining the minimum amount of support to be ordered."

The appellate court held that, "Nothing in this section limits the deduction that section 505(a)(3)(f) allows for health insurance premiums for all dependents" in rejecting the mother's position.

Gun Ownership and Second Amendment Rights in Context of Divorce Proceedings: Note that somewhat of a side issue to this case (but what would be the critical issue to some gun owners was the discussion regarding guns. The appellate court provided the background:

> In resolving this matter, the circuit court ordered that all of Timothy's firearms be placed in the custody of the sheriff of St. Clair County and that all current firearm owner identification cards belonging to Timothy be held by an attorney until further order of court. Christine's attorney further requested that these firearms be shipped to Pennsylvania, Timothy's home state, and that Timothy not possess a firearm in Illinois until the fall of 2013 when their youngest child commences college.

The appellate court then stated:

> Timothy argues that the circuit court's order as to firearms resulted in a deprivation of his liberty without due process of law, relying upon *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Court. 3020 (2010). Christine, in response, argues that pursuant to section 602 of the Act (750 ILCS 5/602 (West 2010)), the circuit court has a duty to consider the best interests of the children in this type of litigation and that this public policy is further expressed in the Illinois Domestic Violence Act of 1986 (750 ILCS 60/101 to 401.)

District of Columbia v. Heller, 554 U.S. 570 (2008), was a landmark case in which the U.S. Supreme Court held in a 5-4 decision that the Second Amendment applies to federal enclaves and protects an individual's right to possess a firearm for traditionally lawful purposes, such as self-defense within the home. The decision did not address the question of whether the Second Amendment extends beyond federal enclaves to the states, which was addressed later by *McDonald v. Chicago* (2010).

The appellate court then stated:

> We note in consideration that *Heller* indicates the existence of an area of reasonable regulation of firearms. We consider that the Illinois Domestic Violence Act of 1986 and the Illinois Marriage and Dissolution of Marriage Act

constitute a legitimate regulation of Timothy's second amendment rights.

Civil Proceedings

***Stapp v. Jansen* – Order of Protection Extended Due to Father's Alleged Contacts through Social Media, Despite Expert Testimony on Father's Behalf**
Stapp v. Jansen, 2013 IL App (4th) 120513 (4th Dist. filed April 25, 2013)
The mother's testimony and presentation regarding attempts by the father to contact her through social media web sites was sufficient evidence to support the extension of an order of protection, even where contravened by testimony of an expert and the defendant.

***Young* – A Parent's Viewing Pornography on I-Pad Does Not Constitute Harassment under the IDVA**
IRMO Young, 2013 IL App (2d) 121196 (May 7, 2013)
The trial court's finding the husband was accessing numerous child pornography sites on an iPad while inside the family residence was not "harassment" under the Domestic Violence Act. So, a plenary order of protection based on that conduct was improper. The appellate court stated:

> The undisputed evidence shows that Christine never used the iPad at issue before using it to find the network password. Moreover, Christine admitted that she never witnessed Douglas viewing pornography on the iPad. The evidence shows that Douglas's conduct in viewing pornography on the iPad was not directed toward Christine. Perhaps one reasonably could infer harassment if Douglas had reason to believe that Christine would activate the iPad, search the browser history, and click links to pornography in that history. However, those are not the facts. Douglas did not view the pornography in Christine's presence or leave the sites open and visible; the only visible trace of his conduct was the browser history of sites, which required multiple steps to access.

Accordingly, the appellate court reversed the trial court and ruled that the Petitioner did not prove, by a preponderance of the evidence, that husband acted "knowingly" by being consciously aware that his viewing of pornography on the I-Pad was "practically certain to cause emotional distress." While that is not the standard for determining harassment, the above quoted language makes it clear that the appellate court understood the nature of the trumped up claim regarding domestic violence given the facts. Before that the appellate court had quoted from the statute regarding the standard:

> "'Harassment' means *knowing* conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner." (Emphasis supplied.) 750 ILCS 60/103(7) (West 2010). "A person knows, or acts knowingly or with knowledge of *** [t]he result of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b)

Note that this last sentence comes from the Criminal Code:

(720 ILCS 5/4-5)

Sec. 4-5. *Knowledge*. A person knows, or acts *knowingly* or with knowledge of:

(a) The nature or attendant circumstances of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that his or her conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists.

(b) *The result of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his conduct*.

Conduct performed knowingly or with knowledge is performed wilfully, within the meaning of a statute using the term "willfully", unless the statute clearly requires another meaning.

When the law provides that acting knowingly suffices to establish an element of an offense, that element also is established if a person acts intentionally. [Emphasis supplied.]

Whether this definition of "knowing" is debatable. But, again, the quoted language regarding the steps that the wife had to take regarding the I-Pad clearly indicate the lack of knowing behavior in the sense of harassment whatever the definition.

Stalking No Contact Order Act

***Nicholson v. Wilson* -- Plenary Civil No Contact Order Affirmed Despite Variety of Attacks**

Nicholson v. Wilson, 2013 IL App (3d) 110517

This matter involved a no stalking order involving two police officers. The petition included allegations that the respondent, an officer in the same department, had engaged in inappropriate conduct toward her over the course of several years. The trial court rendered its ruling based upon two specific instances: (1) The male officer covertly videotaping the female officer during the fall of 2010; and (2) his use of a GPS tracking device which he placed on the female officer's car and used to monitor her movements. There were a variety of defenses including that the statute was unconstitutionally vague, that the Act violated the Equal Protection clause, and that the Act violated his 1st Amendment rights. The appellate court rejected this and quoted from the statute:

> The language of the Act clearly defines "stalking" as "2 or more acts" in which the respondent "directly" or "indirectly" used a "method" or "device" to "follow[], monitor[],observe[], surveil[]," "a specific person" in a manner that "would cause a reasonable person to fear for his or her safety" or "suffer emotional distress." 740 ILCS 21/10

Injunctions, Frozen - Pre-Embryos, Bifurcation, Vacatur of MSAs, Appeals, Dismissal (and Costs). and Other

Injunctions

Father Properly Permanently Enjoined from Requesting Adjustment re Child Support Arrearages

IRMO Sheaffer, 2013 IL App (2d) 121049 (July 23, 2013)
The father appealed from an order permanently enjoining him from requesting any adjustment from the Department of Healthcare and Family Services (HFS) to his child-support arrearage as determined by an order entered by the trial court November 2010. The appellate court affirmed. Regarding success on the merits the appellate court commented, "and respondent made clear in his own pleadings and evidence that he was attempting to usurp that power by challenging the amount that the administrative agency could collect."

The discussion regarding the so called "bond requirement" is noteworthy:

> Here, although respondent asked for a bond in his answer, he did not present any evidence at the hearing that one was necessary. See id. He further provides no reason for the need for a bond in his brief. Accordingly, he has not provided any basis to find that the trial court abused its discretion in denying the request for a bond.

Dismissal / Costs:

Competing Jurisdictions

***Marugesh* – While Divorce Proceeding in India Filed Before the Illinois Proceeding, the Illinois Court Properly Denied the Husband's Motion to Dismiss Where Nearly All Evidence in States and Parties Were Residents of the States**
IRMO Murugesh, 2013 IL App (3d) 110228 (August 8, 2013)
The parties, Murugesh and Deepa are citizens of India. In 1997, Murugesh came to the States and started a company in Illinois. The parties were married in India in January 1999, under the Hindu Marriage Act No. 25 of 1955. The marriage was solemnized in India in August 1999. In September 1999, Deepa moved to Illinois with Murugesh. A year later, Murugesh and Deepa had a child. The child was born in Illinois and has resided here since her birth.

In 2008 and 2009, Deepa spent extended periods in India. According to Murugesh, during these periods, Deepa was living with another man and holding herself out as his wife. Deepa returned to Illinois in March 2009. Shortly after, Murugesh filed a petition for dissolution in India under the Hindu Marriage Act, seeking a divorce. The India petition alleged that Deepa committed adultery and mental cruelty. Two days later, Deepa filed a petition for dissolution of marriage in Will County, alleging irreconcilable differences and mental cruelty. In April 2009, Murugesh filed a motion to dismiss the Illinois divorce proceeding, pursuant to section 2-619(a)(3) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(3)) arguing that a divorce action was already pending in India.

Since Murugesh filed his divorce action, neither he nor Deepa has been back to India. Murugesh's parents instituted two criminal actions against Deepa for adultery and filed a charge of attempted assault against Deepa and her parents. If Deepa were to return to India and be convicted of adultery, she could face up to two years in prison.

In the divorce proceedings in India the husband never personally appeared because of his commitments in the States. Instead, his father appeared "by proxy" on his behalf. Deepa's father

participated in the Indian divorce action on her behalf. Murugesh's father lives in the city where Murugesh filed his divorce action, while Deepa's father lives nearly 200 miles away. It takes him five to seven hours to travel that distance by car or train.

In any event, the trial court denied the husband's motion to dismiss. The trial court ruled essentially that nearly all of the evidence would have been in the States, that the only evidence not available in the States was that of adultery and that such evidences was not an issue in the United States.

The certified question for appeal was:

> "Where citizens and domiciliaries of India were married in India under the Hindu Marriage Act of 1955 but are currently living in Illinois; where grounds for divorce and/or dissolution are alleged to have arisen in both the State of Illinois and the Country of India, and that proof of those grounds would be located in each jurisdiction, and the husband filed his divorce action in India before the wife filed a Petition for Dissolution of Marriage in Illinois; where both courts have personal and subject matter jurisdiction over the respective proceedings; and where the India court, according to the Hindu Marriage Act of 1955, asserts exclusive jurisdiction to divorce parties married according to Hindu law such that India would not recognize an Illinois judgment of dissolution in a contested case, should the Illinois action be dismissed pursuant to 735 ILCS 5/2-619(a)(3) and/or the doctrine of forum non conveniens, principles of comity and the Illinois court's exclusive opportunity to avoid duplicative litigation?"

The appellate court answered the certified question in the negative. The appellate court considered the husband's argument that under the Uniform Foreign Money-Judgments Recognition Act (Recognition Act) (735 ILCS 5/12-618 et seq.), a "foreign judgment" is enforceable "in the same manner as the judgment of a sister state which is entitled to full faith and credit." But the Illinois appellate court noted that the Recognition Act does not apply to a divorce judgment entered by a foreign court.

Voluntary Dismissal:

***Szafranski V. Dunston*, Disposition of Cryopreserved Pre-embryos Created with One Party's Sperm and Another Party's Ova**
Szafranski V. Dunston, 2013 IL App (1st) 122975 (June 18, 2013)
This is an Illinois case of first impression. The appellate court commented:

> Being a case of first impression, the circuit court did an admirable job of considering the alternative approaches taken by other states' courts in addressing the issue of how to determine the disposition of cryopreserved pre-embryos created with one party's sperm and another party's ova. Obviously, the parties did not know which approach the circuit court would adopt prior to the circuit court applying the balancing approach and entering summary judgment in favor of the appellee. As we have explained, the proper test to apply is the contractual approach. Consequently, we vacate the entry of summary judgment in favor of the

appellee.

September 18, 2013: See: Chicago Tribune article.

Bifurcation

***Tomlins* – Bifurcation: Effect of Protracted Divorce Litigation on Children Where Grounds of No Fault Proven**
IRMO Tomlins, 2013 IL App (3d) 120099
www.state.il.us/court/Opinions/AppellateCourt/2013/3rdDistrict/3120099.pdf
Bifurcated judgment for dissolution of marriage properly entered where the court found that the effect of protracted and contentious litigation was having on the children where grounds of irreconcilable differences were found. I liked the discussion regarding the standing that applies to bifurcation proceedings:

> "Appropriate circumstances" is a nebulous concept. *Copeland*, 327 Ill. App. 3d at 865. Our supreme court has stated that reasons for bifurcation can exist if they are of a caliber similar to a lack of jurisdiction over the respondent, lack of an ability to pay support, or concerns for children. See *Bogan*, 116 Ill. 2d at 80. In *Wade*, the First District determined that one such reason was when the bifurcation was "necessary to protect and promote the emotional and mental well-being of the parties' children." *Wade*, 408 Ill. App. 3d at 780. While our supreme court has emphasized that the interests of finality and avoiding piecemeal litigation will often weigh against entering a judgment of dissolution prior to the resolution of all ancillary issues to a divorce proceeding, it has also recognized that "there are certainly cases where the personal circumstances of the parties necessitate bifurcated proceedings." *IRMO Mathis*, 2012 IL 113496, ¶ 31.

***Schnepf* — Substitution of Judge as of Right under §5/2-1001(a)(2); "Test the Waters" Approach Rejected**

Schnepf vs. Schnepf, 2013 IL App (4th) 121142 (September 11, 2013).
This litigation is a real estate partition case spanning many years between four children and their mother over their family farm in Pike County. In fact, the case outlived their late mother who passed away during the litigation. The case was filed in 2007 and, later that year, a hearing began on the defendant's motions to dismiss. During the 2007 hearing, the trial judge became aware of another pending case involving the same parties over the farm lease. Because the mother's competence was at issue in both cases, the trial judge adjourned the hearing, without making any ruling, until the lease litigation was resolved. Later, in 2008, one of the plaintiffs filed a motion for substitution of judge as a matter of right under Section 2-1001(a)(2) of the Code of Civil Procedure. The trial judge denied the motion on the basis that the plaintiff had the opportunity to "test the waters" because the judge had previously indicated its position to the merits of the complaint, even though the judge had not yet made any substantive ruling in the case. In 2009, the case proceeded to a trial whereby the trial judge determined each party's ownership interest in the farm. In 2012, the trial judge entered a final order finding that the real estate could not be equitably divided between the parties and ordered it to be sold. The

Appellate Court reversed the trial court's denial of the motion for substitution of judge as of right and, consequently, held all of its subsequent orders were void. The judgment was vacated and the case was remanded with instructions to grant the motion for substitution of judge as of right.

The Court's decision provides an excellent analysis of Section 5/2-1001 of the Code of Civil Procedure, most notably including the conflicting case law since the adoption of the code amendments in 1993. For example, despite the amended language for a motion for a substitution of judge without cause under Section 5/2-1001(a)(2), some cases were still being decided under the old version of the statute, i.e., the "test the waters" doctrine. The Court emphasized that the "test the waters" doctrine was rendered obsolete 20 years ago by the introduction of the right to a substitution of judge without cause under the newer version of Section 2-1001(a)(2). Now, when the statutory conditions are met and there is no showing that substitution is sought to delay or avoid a trial, trial judges have no authority to inquire into the movant's reason for seeking substitution. Any concerns over "judge shopping" are addressed by the requirement that the motion be presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case. Section 5/2-1001(a)(2) is a bright line test. For example, while a judge rolling his eyes might be thought to reveal his opinion about a case, it does not foreclose a motion for substitution as of right if the statutory conditions are met.

Evidence

Smith v. Murphy --- Expert Witness Barred After Untimely Disclosure

Smith v. Murphy, 2013 IL App (1st) 121839 (July 16, 2013)

This is a good case to read for the standards of compliance with Supreme Court Rule 213(f). In this medical malpractice case, plaintiff originally disclosed her expert-doctor, but, at his deposition, the plaintiff's expert withdrew all his previously-rendered adverse opinions against the defendants and changed his opinion to "no opinion." The plaintiff did not disclose any other experts during discovery, even after the botched deposition of her own expert. After the discovery deadline closed, the defendants sought summary judgment. In response to the motion for summary judgment, plaintiff submitted an unsigned affidavit of another retained expert and supplemental answers to Rule 213(f) interrogatories, but without leave of court and well after the discovery cutoff date. The trial court barred the plaintiff's new expert and, consequently, granted summary judgment in favor of defendants. The First District affirmed.

The decision recites the mandatory duty to properly answer witness interrogatories in strict adherence with Rule 213(f) and the duty to seasonally supplement prior answers under Rule 213(d). The plaintiff's disclosure was made almost a year after her first expert exonerated the defendants and almost five months after discovery closed, and only a few days before the case had been set for a trial. The plaintiff never sought leave of court to extend time for witness disclosure. The decision then recites the factors for the court to consider in determining appropriate sanctions under Rule 219. Here, the defendants were surprised and prejudiced by the late disclosure and made a timely objection, whereas the Plaintiff never offered a reason why an extension of time wasn't requested earlier. The Court affirmed the barring of the expert witness was a proper sanction. Similarly, the plaintiff's affidavit in opposition to summary judgment was also barred.

***Callahan* – Vacatur of MSA: Misrepresentations Made at Prove-up Consistently Favoring One Party**

IRMO Callahan, 2013 IL App (1st) 113751 (March 13, 2013)

Where misrepresentations made during a prove-up consistently favored Petitioner and the MSA unconscionably favored that party, the MSA incorporated into the JDOM was properly vacated. The husband was the petitioner in the divorce and the wife had filed a pro se appearance. The first time the matter came to the court for a "prove-up" the wife was not present but the written MSA was presented. Among other terms, there was a waiver of maintenance and the wife was not entitled to any interest in the husband's pension with the Chicago Fire Department. The court, in August 2008, found the agreement unconscionable and the colloquy at the time of the first attempted prove-up had stated:

> "THE COURT: I have a real problem with case, okay? His pension–if there was a present cash value–I'm not trying to play lawyer or actuary. But he's got three, four hundred thousand in his pension benefits, two hundred thousand in the house.
> MR. GRANT [Petitioner's Attorney]:I think his pension might be about–well, I think his deferred comp might be like a hundred thousand.
> THE COURT: How long have you worked for the fire department?
> THE WITNESS [Petitioner]: Twenty-nine years.
> THE COURT: And you're telling me he's got [sic] a pension of a hundred thousand? I did these things. I know what they are worth.
>
> * * *
>
> THE COURT: We an [sic] go on and on about this. I find that this agreement is unconscionable, okay? I am not going to enter it. *** You've got a woman who doesn't have a lawyer, with all due respect. *** The woman comes in and she's saying okay. Fine. But you tell me how she is going to live. If your client says that it was his intent to support her, put it in the agreement. Give her some maintenance. It's a–1979. It's almost a thirty-year marriage. And I am not going to enter this."

The wife who was 55 at the time of the hearing, had not worked outside the home since 1985. A second prove-up took place in September 2008 before a different judge. In the new MSA the maintenance was to be paid of $2,500 per month until August 2022 at which time the respondent could file a petition for "renewal" of maintenance but maintenance could not exceed $2,500 per month. The wife waived any interest in the husband's pension. The court expressed its concern over the waiver of retirement benefits. The representation by petitioner's counsel in response to that was, "My client is assuming 100,000 of family debts. The wife is being held harmless from that. His retirement account might be worth approximately the same as the debts. Therefore, there is no marital estate to divide. There is nothing." Ultimately, the court approved the MSA finding it to be conscionable. Two years later, the former wife brought a two-count petition to vacate portions of the MSA. Count 2 alleged that petitioner's counsel made misrepresentations of fact and law during the prove-up hearing. To support her claim of unconscionability, respondent averred that the net equity in the Nottingham residence, which was in fact marital

property, was $175,000. She further averred that the projected value of petitioner's pension plan was $1,500,000. The figures were based on appraisals, mortgage documents, and statutory and actuarial calculations. The appellate court affirmed the trial court's granting of summary judgment in respondent's favor based on Count 2 of her petition. The opinion also bears reading regarding the affirmation of the trial court's denial of a motion to allow a discovery deposition of the former wife in opposition to the motion for summary judgment.

Appeals:

***Price II* – Trial Court Retains Jurisdiction over Modification of Terms of Supplemental Order Requiring Interest to be Paid due to Failure to Pay Equalization Payment within 90 Days Despite Appeal**

IRMO Price, 2013 IL App (4th) 120422 (April 10, 2013)

In initial divorce proceedings the husband failed to make the "equalization payment" within 90 days as required by the divorce judgment. The trial court's assessment of interest on that judgment was upheld. The husband had claimed that because the later interest order interfered with the appellate court's consideration of whether the trial court erred in ordering that the payment be made within 90 days of the judgment.

The appellate court reasoned that although the husband had filed a notice of appeal, the trial court retained jurisdiction to determine matters arising independent of and collateral to its judgment. The trial court's assessment of interest was imposed as a penalty for husband's failure to pay the judgment within 90 days as originally ordered by the court. This was independent of and collateral to the issues raised in direct appeal: whether court erred in ordering him to pay the equalization payment within 90 days of judgment.

***Merriless* – Former Wife Failed to State Cause of Action for Variety of Claims Including RICO Claims**

Merriless v. Merriless, 2013 IL App (1st) 121897 (September 2013)

This was a sad but somewhat fascinating case involving what was essentially a conspiracy theory. The Plaintiff, former wife, sued a variety of individuals including her former lawyers, her former husband, her ex-husband's attorneys and her former fiancé for alleged damages after she settled her divorce case. The trial court gave her five difference chances to state a cause of action and then dismissed with prejudice her fourth amended complaint. The appellate court affirmed. The former wife attempted to state causes of action based on civil violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1962 (2006)), fraud, civil conspiracy, and legal malpractice against the defendants.

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