2011 SUMMARY OF ILLINOIS DIVORCE AND FAMILY LAW CASES -

EXCLUDING ATTORNEY'S FEES, CONFLICTS OF INTERESTS AND BANKRUPTCY CASES

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2011 has been one of the most important years regarding case law developments that I can recall. I have a theory regarding the reason. But that theory I will address later. Because of the plethora of important cases I have broken them down into two categories. This is the larger outline of 2011 case law.

Property Cases Law:

Retirement Benefit Cases

Defined Contribution Plans

***Schinelli* – Defined Contribution Plan and Change in Value of Plan from Date of Divorce Trial to Date of Distribution**

IRMO Schinelli, 406 Ill. App. 3d 991 (2nd Dist., 2011).

This was the second appeal. In the first appeal the court had, among other things, changed the cap regarding the percentage order regarding maintenance downward from $650,000 so that the former wife was sharing in the her former husband's income regarding supplemental maintenance only for income between $200,000 to $250,000 – rather than $200,000 to $650,000. *Schinilli I*, was unpublished.

This case is important because in a number of divorce cases the court enters its judgment dividing assets based upon evidence at the time of trial. But by the time the court decides the case after taking the case under advisement, etc., and the assets are divided, the assets awarded to one party may be of significantly less (or different) value than per the previous evidence. This might be remedied by a stipulation regarding changes in value. But of course, after the close of proofs it may be difficult or impossible to present this evidence. In any event, the changes in value in this case were even more profound because the delay was attributable to the appeals.

In this case, the former husband pointed out that the value of his 401(k) plan on remand had dropped drastically due to market conditions – with the evidence at the time of the trial -- in March 2007 -- indicating the value had been $309,423. The trial court stated:

> The evidence established that as of March 31, 2009, the Wachovia 401(k) account had a value of $179,830. In response to comments by the parties as to its intent in dividing the retirement accounts, the trial court explained: "I added them all up, divided them by two. She kept hers, he kept his; except for the 401K for him, he would have to roll over money into her. So that, when they all ended up at the bottom, they had the same amount. The Wachovia 401K was the vehicle designated

> to be the one that money would come out of his so that, when it went into hers, they would each have the same total for all of their accounts.

The former wife's attorney had argued that the divorce judgment provided that she was to receive $152,522 from the Wachovia 401(k). So that is the amount she should receive. At the close of the hearing on remand, the trial court awarded the wife $152,522 (84.8%) of the Wachovia 401(k) account's value. The former husband contended that the trial court's dissolution order intended that the parties' retirement assets be divided equally between them. But the effect of the QDRO was to award his former wife an additional $125,000.

In an interesting wrinkle the appellate court stated:

> Here, the problem with the dissolution order is not that it is ambiguous; the problem is that it is unenforceable. The dissolution order unambiguously provided that Bruce was to receive $156,901 from the Wachovia 401(k) account and that Cecily was to receive $152,522 from the Wachovia 401(k) account. When the trial court entered the QDRO on April 27, 2009, the dissolution order was impossible to comply with because the Wachovia 401(k) account was worth only $179,830. We therefore believe that the trial court's resolution of this issue—to have Bruce bear all the loss that the Wachovia 401(k) account incurred—is both unfair and contrary to the judgment of dissolution. Accordingly, the trial court's decision must be reversed.

So, in one more case, the appellate court has made what could be construed as an "equitable" resolution rather than a strict construction of the exact language of the order when it comes to dividing retirement benefits. The appellate court stated:

> Here, unlike in *Carrier*, [332 Ill. App. 3d 654 (2002)] the parties did not have a marital settlement agreement that divided their marital assets. As such, unlike the husband in *Carrier*, Bruce never *agreed* that Cecily would receive a fixed amount from the retirement account at issue. Rather, the parties' retirement assets were divided by the trial court. In the absence of any marital settlement agreement providing that Cecily would receive a set amount, we believe that it would be patently unfair to saddle one of the parties with all of the losses incurred in the Wachovia 401(k) account. Accordingly, as stated above, we believe that the trial court erred in allocating all of that loss to Bruce. (emphasis added.)

QDROs and QILDROs

***Hendry* -- Omission of Deferred Compensation Plan by Name in MSA did not Preclude its Division**

IRMO Hendry, 409 Ill. App. 3d 1012 (May 12, 2011)

The appellate court reversed the trial court that excluded the division of former husband's deferred compensation plan because the MSA did not include that plan with a specific list of plans referred to in the Agreement. But the MSA had another subparagraph that provided for the general division of tax deferred assets providing in part, "The parties shall value the tax deferred assets and pensions with the exception of the Pacific Life SERP, and divide the accounts equally." The issue on appeal

was the true intent of the parties. The Appellate Court relied on the recent case of *IRMO Hall*, 404 Ill.App.3d 160 (2nd Dist., 2010), and held that the intent showed by the words in the MSA included all tax deferred plans:

> We are further guided by the "well-known maxim of construction, *inclusio unius est exclusio alterius*, or the inclusion of one is the exclusion of the other."

Using what was essentially a double negative the appellate court stated, "By failing to name the Pacific Life deferred compensation plan with the SERP Plan, it is clear that the parties did not intend to exclude the former from being divided equally between the parties." Thus, the former wife was entitled to 50% of the balance of each of former husband's tax deferred assets with the exception of the SERP Plan which was specifically excluded.

***Reda v. Estate of Reda* – Court Properly Imposed Constructive Trust on Estate Where No QILDRO Entered / Amount Not Half of Contributions Plus Interest**

Reda v. Reda, 408 Ill. App. 3d 379 (1st Dist., February 15, 2011)

The wife was properly awarded a half interest in her husband's pension which remained in the pension plan until his death, nine years after the divorce. This had included the interest that had accrued in the pension plan on her half up to the time of his death. The intent at the time of the divorce was to award wife the accrued value of half the benefits when it was time for benefits to be distributed. Otherwise, the husband's estate would be unjustly enriched by husband's breach of the MSA in failing to obtain a life insurance policy or annuity as the MSA required.

The MSA had provided:

> "P. Mario currently has an interest in the State University Retirement System Pension of Illinois, hereinafter designated 'the pension plan' ***. 1. Current Contribution. Mario's total cash contributions to the pension plan, plus interest thereon, *was currently valued at $64,920 as of January 1, 1988.*
> 2. Termination of Employment. In the event Mario shall, for any reason whatsoever, regardless of cause, prior to retirement, cease to be an 'employee,' *** or commences a leave of absence or leaves of absence having a total or combined duration of in excess of 2 calender years, *** he shall apply for a refund of his contributions plus interest thereon and pay to Janis within fifteen (15) days from the date of receipt by him of said lump sum pension payment, the sum of $32,460 plus the proportion of the interest earned after December 21, 1987 attributable to the sum of $32,460.
> 3. Death of Mario Prior or Janis Prior to Retirement. Mario shall obtain within thirty (30) days from the date of entry of the Judgment for Dissolution of Marriage a life insurance policy on his life or an annuity in the face amount of $32,460.00 payable to Janis as irrevocable beneficiary. *** Mario shall provide Janis with proof of purchase, the original life insurance policy or annuity contract and proof of premium payment on an annual basis ***.

The appellate court commented that:

> Paragraph (P)(4) of the agreement provided Janis with an interest, upon Mario's retirement, of her half of the pension benefits. Paragraph (P)(4) accounted for the

> accrued value of Janis's half of the monthly annuity payments Mario would have received during retirement.

Testimony at the prove-up stated:

> Specifically, Janis testified: " MS. VEON [Attorney for Janis]: In addition to that, Mr. Reda has agreed to *obtain an insurance policy or an annuity which will pay you your portion of the death benefit based on what Mr. Reda currently has accrued in the pension*, if in fact he should remarry and then die prior to you receiving your portion of the death benefit in that plan?
>
> JANIS: That's correct." (Emphasis supplied.)

The former husband died in 2007. The estate filed a motion to reconsider when the former wife received the contribution amount. The trial court ultimately entered a judgment against the Estate in the amount of $160,121. The amount of $160,121, included the former wife's share of the pension at the time of the divorce judgment and the interest that accrued until Mario's death. The trial court reasoned that "[w]hen I read the judgment language and what was at issue here, without any question Jani[s] was awarded a portion of his pension benefits, that being a marital asset."

The appellate court stated:

> In this case, the language of the judgment of dissolution of marriage and the oral marital settlement agreement, as testified to by both Janis and Mario, show their intent for Janis to have one-half of Mario's pension based on the amount accumulated at the time of their divorce. *Blum*, 235 Ill. 2d at 33 ("the court must ascertain the parties' intent from the language of the agreement"). Paragraph (P) of the judgment of dissolution of marriage outlines the parties' rights and obligations as to Mario's pension. Paragraph (P)(3) specifically states what should happen should Mario die before retirement, and, thus, is the controlling provision here.
>
> By the terms of the agreement, Mario was required to buy a life insurance policy or an annuity in the amount of $32,460 to protect Janis's interest. The Estate argues that Janis should receive *only $32,460 based on the requirement to buy life insurance or an annuity in that amount*. However, Mario never bought a life insurance policy or annuity as required under the agreement. Mario's breach in failing to buy such a policy or annuity renders it impossible to ascertain what the parties intended, or at a minimum what Mario intended, to be the exact amount Janis would receive upon his death. We note the judgment of dissolution of marriage does not state what type of life insurance or annuity Mario was required to buy. If he had bought a term policy, then no interest would accrue. Had he purchased whole life or an annuity, then interest would have accrued on Janis's $32,460. We cannot speculate what amount Janis would have received at Mario's death had Mario fulfilled his obligation under the agreement and purchased insurance or an annuity. It is a nonevent, which due to Mario's breach in failing to perform becomes immaterial to our analysis. Most importantly, Janis agreed in response to the question during her testimony that Mario was "to obtain an insurance policy or annuity which will pay you your portion of the

> death benefit based on what [Mario] currently has accrued in his pension, if in fact he should remarry and then die prior to you receiving your portion of the death benefit plan." The question and her response supports a conclusion that the purpose of paragraph (P)(3) of the judgment was to insure Janis received her share of the death benefits, which included her designated one-half of the pension and the interest that accrues on her one-half up to the time of Mario's death.

Because of the importance of the case, it will be quoted at length:

> In determining the parties' intent, we must consider the whole judgment of dissolution of marriage. *Karafotas*, 402 Ill. App. 3d at 571. Awarding Janis $161,121, the value of her half of the pension at the time of Mario's death, is an outcome consistent with paragraphs (P)(2) and (4) of the judgment of dissolution of marriage, should those provisions have applied. Paragraph (P)(2) makes clear that if Mario had ceased to be an employee, Janis would have received $32,460, plus interest in the form of a lump-sum pension payment. Paragraph (P)(4) would have awarded Janis the accrued value of $32,460 upon Mario's retirement in the form of an annuity. Considering the whole agreement, we find that it was the intent of the parties at the time of the dissolution of marriage to award Janis the accrued value of her half of the pension benefits when the time came for those pension benefits to be distributed. Awarding Janis only $32,460, as opposed to the accrued value of $161,121, would be inequitable as it would go against the intent of the parties at the time of the agreement. Furthermore, doing so would allow the Estate, through Mario's breach of the marital settlement agreement, to be unjustly enriched. See *Smithberg v. Illinois Municipal Retirement Fund*, 192 Ill. 2d 291, 299 (2000) [addressing the ability to impose a constructive trust to avoid unjust enrichment.] By failing to obtain either the life insurance policy or the annuity as required by the agreement, Mario avoided having to pay any premium on those policies or to pay a lump sum on an annuity from the time of the judgment of dissolution of marriage in 1988 until his death in 2007. The money that Mario, and by extension the property that became his estate upon his death, should have paid on the life insurance or annuity policy unjustly enriched Mario at the expense of Janis.
>
> Finally, to award Janis $161,121, comports with the notions of equity and fairness and the ability for the circuit court to enforce its judgment of dissolution of marriage. Our supreme court, in discussing the equitable apportionment of pension benefits in a divorce proceeding, stated: "[I]n many cases pension benefits may constitute one of the most important items of property acquired in a marriage of long duration; in some perhaps, it may be the only asset of any significant value. To deprive a domestic relations court of the power to apportion the value of such a significant marital asset, and enforce the apportionment, would, in many cases, deprive the court of the ability to do justice between the parties. A court's authority to enforce its judgment, equitably apportioning marital assets, surely cannot be subordinate to the whims of one of the parties in the divorce proceeding or defeated by his or her blatant violation of the parties' agreement as incorporated in a judgment of dissolution. As we have demonstrated, courts are not powerless to enforce their judgments." Id. at 304. This statement of our supreme court is particularly relevant in the instant case. Mario did

> not comport with the judgment of dissolution of marriage by purchasing life insurance or an annuity. Pension benefits are a marital asset that is subject to division. *IRMO Abma*, 308 Ill. App. 3d at 615. To enforce its judgment, the circuit court properly awarded Janis the value accrued for her half of the pension benefits. The award of $161,121 comports with notions of justice and fairness and is the most equitable result based on the judgment of dissolution of marriage and Mario's actions in failing to protect Janis's interest in her half of the pension.

Property Classification

***Hluska* -- Classifying Ownership of Corporate Interest as Marital Property Not Reversible Error**

IRMO Hluska, 2011 IL App (1st) 092636

The appellate court decision stated:

> Last, Mike claims that the trial court erred in classifying his ownership interest in Hluska and Good Times as marital property. Specifically, Mike argues that his ownership interests in the two corporations should not be considered marital property because he received his ownership interests as a gift from his brother, John, and later from his mother, Katheryn, and did not provide any monetary consideration for his interests.

The appellate court first reviewed the difference between gifts and emphasized the without consideration requirement and then broke out is discussion in sections separately addressing "John's Gift" and "Kathryn's Gift." Regarding "John's Gift" the appellate court stated:

> In considering this evidence it would appear that Mike received a percentage of ownership in both companies for his work and Rebecca's work in helping the companies grow during their marriage. As a result, we cannot find that Mike proved by clear and convincing evidence that he acquired his ownership interests as gifts because he was unable to overcome the presumption that his interests were marital property.

Regarding "Kathryn's Gift" the appellate court stated:

> Even if we did find Mike established the element of donative intent, we again would have the issue of whether the corporations's tax returns reporting the percentage of stock allocated to Mike is sufficient evidence to satisfy the element of actual delivery. As previously stated, the evidence in this case showed that no stock certificates were ever issued; therefore, there is no evidence to show that shares of stock were transferred from Katheryn to Mike without consideration. John testified that no transfer or assignment of stock was ever performed. The only evidence of delivery, if any, is the conclusion on the corporate tax returns showing Mike's percentage of interest, which we concluded was insufficient. In sum, we cannot say that the trial court's classification was against the manifest weight of the evidence.

***Weisman* - Property Acquired in Anticipation of Marriage: Characterization of Property as Non-Marital Overturned**

IRMO Weisman, 2011 IL App (1st) 101856 (September 28, 2011)

There has not been a reported "property acquired in anticipation of marriage" for years. But we now have one. The case overturned the trial court and stated:

> For the reasons that follow, we conclude that the circuit court's finding that the Cleveland house was not purchased in contemplation of marriage is against the manifest weight of the evidence. Both parties testified that the Cleveland house was purchased with the idea that it would be a marital residence where they each testified that they had intended to purchase a house in Chicago in which they could live with their children and petitioner testified that although he had planned to move to Chicago once his responsibilities to his children had been satisfied, his engagement to petitioner accelerated that move. *In re Marriage of Ohrt*, 154 Ill. App. 3d 738, 742 (1987). Prior to purchasing the house, both petitioner and respondent had been looking for houses and had gone to see the Cleveland house. *Olbrecht*, 232 Ill. App. 3d at 364; *Jacks*, 200 Ill. App. 3d at 118; *In re Marriage of Malters*, 133 Ill. App. 3d 168, 177 (1985). Respondent made changes to the design of the house to accommodate the parties' four children. *Olbrecht*, 232 Ill. App. 3d at 364; Jacks, 200 Ill. App. 3d at 118. In addition, the parties were already engaged when they began looking for a house, the house was purchased only three months prior to their marriage, petitioner was paying respondent's rent at the time of the purchase, and respondent moved in with petitioner in his Highland Park house upon the expiration of her lease while the Cleveland house was being constructed. *Cf. In re Marriage of Leisner*, 219 Ill. App. 3d 752, 762-63 (1991) (residence was not marital property where it was purchased more than 15 months prior to the parties' engagement and there was no evidence that the respondent planned to marry the petitioner at the time of purchase); *In re Marriage of Reeser*, 97 Ill. App. 3d 838, 840 (1981) (house was not marital property where there was no evidence as to when the parties became engaged or where the petitioner lived prior to purchasing the house).

The appellate court concluded:

> To the extent petitioner's contribution to the acquisition of the house may have been disproportionate to that made by respondent, that is a factor the circuit court may consider in dividing the marital property (750 ILCS 5/503(d)(1) (West 2006)) or determining whether petitioner may be entitled to reimbursement (750 ILCS 5/503(c)(2).

Comment: See ***Gitlin on Divorce*** - Section 8-3. There in the 1992 *Olbrecht* ***Gitlin on Divorce Report***, we commented:

> The rules suggested by the case law regarding property purchased in contemplation of the marriage are:
>
> 1. The courts are reluctant to apply the "purchased in contemplation" rule to anything but a marital residence. See *IRMO Tatham*, 173 Ill.App.3d 1072, (5th Dist. 1988)

GDR 88-79; and IRMO Click, 169 Ill.App.3d 48, (2nd Dist. 1988) (payment of $10,000 in legal fees determined not to be for the acquisition of property and therefore was not a contribution to the marital estate. The funds were not traceable from any property from which they could be repaid.)

2. In the case of the residence there must be evidence that the parties intended to use the residence as a marital residence. See *IRMO Ohrt*, GDR, No. 87-18.

3. The property must be purchased a short time before the marriage. If the time period is over one year, it is much less likely that a residence will be considered to be purchased in contemplation of the marriage, even if the parties to intend to use the residence as a marital residence. See *IRMO Leisner*, 219 Ill.App.3d 752 (1st Dist., 1991), GDR No. 91-124.

4. Title is not dispositive [*Jacks*, GDR, No. 97-40] and might be of no consequence [Ohrt, 87-18] in a given case.

5. Often a critical factor is whether the property the equity in the residence was purchased with marital funds or entirely with premarital or non-marital funds. Leisner, GDR, No. 91-124, *Philips*, GDR, No. 90-60.

6. In cases where there could be reimbursement between estates under section 503(c) of the IMDMA, the courts are reluctant to apply that statute and order reimbursement. Instead, the court will find that the property was purchased in contemplation of the marriage and therefore marital property thus giving the court greater latitude in distributing the marital property between the parties.

The other newer case is *IRMO Sanfratello*, that held that despite title to the marital residence being only in the father's name, the appellate court ruled that the father's parents, when they made the downpayment on the home, made a "gift in contemplation of marriage" and this, plus marital funds being used for the mortgage, made the property marital. I liked the concurrence. Justice Appelton pointed out:

While I concur with the reasoning and result expressed by the majority, I write separately to highlight some concerns with the possible effect of the answer we announce today to the certified question. Where, as apparently in this case, the parties have substantial assets and business interests, the answer to the certified question may serve to create a new level of gamesmanship in the resolution of a divorce proceeding. Given that the proper evaluation of diverse business assets is a very time-consuming process and the discovery needed to test those valuations consumes even more time, the value of the marital estate can, and likely will, change (sometimes dramatically) while this process plays out. Of course, that will require a whole new round of valuations.

Many judges will refuse to enter a "grounds only" judgment of dissolution for this reason. However, there are some cases where the entry of a "grounds only" judgment is necessary due to the personal circumstances of the parties. Even in a case without

> such special circumstances, the trial court must have the ability to determine a final valuation date to force resolution of the proceedings, as we have held here, recognizing "as close to the trial date as practicable" is a flexible concept the trial court can use as the specifics of the case before it requires.

Well stated.

***Bradley* – Trial Court Properly Barred Party, as Discovery Sanctions, from Asserting Claim that Property was Non-Marital Gift**
IRMO Bradley, 2011 IL App (4th) 110392 (Filed 12/6/11)
The appellate court stated:

> The factors used to determine if a trial court abused its discretion in determining the appropriate sanction include the following: (1) the surprise to the adverse party, (2) the prejudicial effect of the proffered evidence or testimony, (3) the nature of the evidence or testimony, (4) the diligence of the adverse party in seeking discovery, (5) the timeliness of the adverse party's objection to the evidence or testimony, and (6) the good faith of the party offering the evidence or testimony. No single factor is determinative. *Shimanovsky*, *181* Ill. 2d at 124.

The court then stated:

> Vicki had no idea that Bobby was deeded the Missouri farm until approximately two weeks before trial. The fact that she was told Bobby owned the Missouri farm approximately two weeks before trial does not obliterate the surprise factor. Vicki did not have an adequate opportunity to investigate the circumstances by which the property was deeded to Bobby and to secure an appraisal. An enormous potential for prejudice lies if financial information is missing due to a party's failure to comply with discovery. See *In re Marriage of Barnett*, 344 Ill. App. 3d 1150, 1153 (2003). The Missouri farm was the most significant asset before the court, valued at $227,000. Bobby initially refused to identify in his answer to interrogatories and pretrial affidavit the substantial acreage he owned in Missouri and then repeatedly lied to the court concerning his acquisition of the property.
>
> Vicki filed and sent interrogatories and a request for production on approximately May 1, 2009, and filed a motion to compel answers to the interrogatories on August 5, 2009. She secured a court order demanding compliance with her discovery, but at the hearing on November 20, 2009, Vicki advised the trial court that Bobby failed to identify in his answer to interrogatories and pretrial affidavit the substantial acreage he owned in Missouri. A review of the record reveals Vicki timely objected to Bobby's failure to comply with discovery rules and court orders.
>
> The trial court sanctioned a flagrant violation of the court's discovery rules and orders. Vicki faced the potential of being blindsided by undisclosed evidence. The

> less drastic alternative sanction suggested by Bobby, awarding Vicki reasonable attorney fees, does not cure the problems of an unbalanced consideration of the issues and an unfair exercise in brinkmanship. It is reasonable to characterize this as "a deliberate and contumacious disregard for the court's authority." *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 68 (1995). The court acted within its discretion in barring Bobby's claim that the Missouri farm was nonmarital property.

***Steel* – Property Classification and Reimbursement of the Marital Estate – the limits of the *Lundahl* Decision / Commingling Not Established Where Evidence Reflects Use of Marital Account(s) as Conduit**

IRMO Steel, 2011 IL App (2d) 080974 (November 21, 2011, December 30, 2011 - published in 2012)

The appellate court broke down its discussion of Property Classification and Reimbursement of the Marital Estate into chunks: (1) Procedural History (¶6); (2) Respondent's Use of the "Due from Officers" Account at KASC (¶12); (3) Respondent's Acquisition of Shares in KASC (¶27); (4) Respondent's Acquisition of Interests in SFF Inc. and SFF LLC (¶33); (5) Respondent's Acquisition of Interests in MM Products and MM Properties (¶44); (6) Respondent's Acquisition of Interests in Private Placements (¶48). The analysis of the first issue begins in earnest at paragraph 58 where it states:

> Petitioner's arguments begin, naturally, with KASC because its funds were in large part the source for respondent's acquisition of the other corporate interests. Petitioner's argument as to KASC is two-fold. First, she argues that respondent's share of the retained earnings of KASC is marital because the earnings were essentially income. Second, she argues that respondent's KASC stock is marital because it was purchased with funds that became marital through commingling.
>
> On the first argument, petitioner cites case law addressing how to classify a spouse's share of the retained earnings of a closely held corporation. See *In re Marriage of Lundahl*, 396 Ill. App. 3d 495 (2009); *In re Marriage of Joynt*, 375 Ill. App. 3d 817 (2007). ***

Then the case addressed the merits of the petitioner's claims. The decision recaps petitioner's argument:

> Turning, then, to address petitioner's argument that respondent's share of the retained earnings of KASC is marital property, we contrast her argument with a position she could have, but has not, taken, i.e., that the marital estate is entitled to reimbursement for respondent's efforts at KASC. See 750 ILCS 5/503(c)(2) (West 2010) ("When one estate of property makes a contribution to another estate of property, or when a spouse contributes personal effort to non-marital property, the contributing estate shall be reimbursed from the estate receiving the contribution ***."). This argument would have assumed that respondent's interest in KASC is nonmarital and that respondent's nonmarital estate must compensate the marital estate. Though some of

> petitioner's language rings of a reimbursement claim—such as her statement that respondent's "efforts during the marriage unquestionably and substantially increased [KASC's] earnings as a subchapter S corporation, and its net worth"—her ultimate conclusion is that respondent's interest in KASC is marital.

Interestingly, this is the same point made in my outline originally prepared for the Martin Luther King Day 2010 seminar. The appellate court discussed the bookend cases – *Joynt* and *Lundahl:*

> On the retained earnings issue, the overarching principle, as noted in *Joynt*, is that the retained earnings and profits of a subchapter S corporation in which the spouse has an ownership interest remain the corporation's property, and are not considered income to a spouse, until severed from the other corporate assets and distributed as dividends. *Joynt*, 375 Ill. App. 3d at 821. Under certain circumstances, however, retained earnings may be considered marital property. Id. at 819. There are two primary factors. The first is the extent of the spouse's ability to distribute the retained earnings to himself. *Joynt*, 375 Ill. App. 3d at 819; *Lundahl*, 396 Ill. App. 3d at 503-04. *** The second is the extent to which retained earnings are considered in the value of the corporation and utilized to fund the corporation's business. *Joynt*, 375 Ill. App. 3d at 819-21; *Lundahl*, 396 Ill. App. 3d at 503-04. *Joynt* and *Lundahl* portray contrasting pictures of a corporation's treatment of its retained earnings.

The appellate court then discussed *Joynt* and *Lundahl* at length and

> [DFO Distributions] Petitioner claims that respondent's liberal use of the DFO shows a manner of control more similar to *Lundahl* than to *Joynt*. In truth, **the DFO advances** do not implicate the concerns of *Lundahl* and *Joynt* at all. The issue in those cases was the spouse's ability to actually receive the retained earnings of the S corporation. While KASC's shareholder distributions, like those in *Lundahl* and Joynt, are an actual disbursement of retained earnings, DFO advances are not. Rather, they are secured by the retained earnings. As we understand the process, KASC's lender records the DFO advances as shareholder distributions in order to determine the level of security for the advances, but the advances are not a true disbursement of retained earnings. There was no question at trial that DFO advances are loans,3 and petitioner does not dispute that characterization. (Though there was no definite repayment term for any of the DFO advances, pressure to repay flowed naturally from the accrual of interest and the enforcement of the net-worth cap.)
>
> [KASC Distributions]¶ 68 Petitioner does also cite respondent's taking of "distributions" of the retained earnings, which she claims were "at [respondent's] sole discretion." The evidence is unclear as to KASC's policy on distributions, though Ludwig testified that distributions must be disbursed equally among shareholders. **External restrictions on distributions, however, existed in the form of the bank covenants, which required KASC to maintain a certain level of tangible net worth—retained earnings being one component of net worth**. See *INOVA Diagnostics, Inc. v. Strayhorn*, 166 S.W.3d 394, 400 (Tex. Ct. App. 2005) ("One

component of net worth or stockholder's book equity value is a corporation's retained earnings."). The bank covenants are evidence that KASC, like the corporation in *Joynt* and unlike the corporation in *Lundahl*, relied on its retained earnings for its business operations and hence for its survival. In 2000, the bank required KASC to issue distributions to pay down the DFO balance. Thus, even if the DFO advances were akin to shareholder distributions that actually disbursed the retained earnings, we would not conclude that respondent had unrestricted access to funds from KASC. In any event, the level of shareholder discretion is just one factor in determining whether retained earnings are income to the spouse. The remaining factors favor respondent.

> First, as in *Joynt*, KASC reimbursed respondent for the taxes he paid on its retained earnings.
>
> Second, as petitioner does not dispute, the salary that respondent received from KASC, which ranged in the last several years from $400,000 to $600,000 yearly, was adequate compensation for his work at KASC. See *Joynt*, 375 Ill. App. 3d at 821.

¶ 69 Thus, the relevant factors set forth in *Joynt* and *Lundahl* weigh in favor of holding that KASC's retained earnings are not income to respondent. There are restrictions on respondent's ability to disburse the retained earnings, KASC relies on the retained earnings to operate its business, KASC reimburses respondent for his tax payments on his share of the retained earnings, and respondent is adequately compensated at KASC through salary.

Commingling Argument in Light of Conduit Case Law: Next the appellate court broke down the commingling question as, "The question, rather, is whether certain nonmarital funds from KASC became marital when they were wired or deposited. The appellate court then addressed the commingling argument in light of the conduit case law:

> That nonmarital funds were deposited into a marital account does not establish beyond question that the funds were transmuted into marital property. Rather, the following principles govern: "Although the placement of nonmarital funds into a joint checking account [4] may transmute the nonmarital funds into marital property [citations], nonmarital funds that are placed into a joint account merely as a conduit to transfer money will not be deemed to be transmuted into marital property. [citations]." *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 673 (2008). "The failure to properly segregate nonmarital property, by commingling it with marital property, evinces an intent to treat the former as part of the marital estate." *Wojcik*, 362 Ill. App. 3d at 154.

The appellate court then stated:

> Obviously, of those enumerated here, the only disbursements that had the potential

> for commingling with marital funds were the three wires of $26,833.34 and the one wire of $2.6 million. **We hold that these funds did not lose their identity through commingling**.
>
> Representative of the "conduit" rule to which *Heroy* alludes is this district's decision in *Wojcik*, which contains two contrasting factual scenarios that help illustrate the rule. The respondent in *Wojcik* claimed a motorcycle as his nonmarital property, and the petitioner claimed an automobile as her nonmarital property. Each party claimed that the item was nonmarital because it was purchased with nonmarital funds. Because in each instance the funds had first been placed in the parties' joint checking account, the presumption arose that the funds were a gift to the marital estate. *Wojick*, 362 Ill. App. 3d at 155; see also *In re Marriage of Berger*, 357 Ill. App. 3d 651, 660 (2005) ("courts will presume a spouse who placed nonmarital property in joint tenancy with the other spouse intended to make a gift to the marital estate"). In analyzing the gift issue, however, we found it relevant whether the party was able to trace the proceeds, and in this way the gift issue overlapped with the issue of whether the nonmarital funds lost their identity through commingling with marital property. See *Wojcik*, 362 Ill. App. 3d at 154 ("The failure to properly segregate nonmarital property, by commingling it with marital property, evinces an intent to treat the former as part of the marital estate."). We held that the petitioner rebutted the gift presumption but that the respondent did not. Id. at 154-55.

I have referred to these factors as the *Guerra* factors – with *IRMO Guerra* being a case originally handled by Gitlin & Burns (the year before I started at the firm) 153 Ill.App.3d 550, (1987).

Because of the importance of this case, the remainder of the discussion will be treated separately in my comprehensive outline regarding *Joynt*, *Lundahl*, etc. (See Gitlin on Divorce Report 87-06).

The appellate court then noted that this analysis requires attention to the specific history of those funds. But the Petitioner resorted "exclusively to evidence of how respondent generally used his NT account." The appellate court determined that the overall intent appeared to be to use certain marital accounts only as conduits for non-marital property.

Curiously, there was no claim for reimbursement, "We note that petitioner makes reference to respondent's periodic use of proceeds from the NT account to pay down the DFO balance. Petitioner does not, we stress, raise in this appeal a claim for reimbursement to the marital estate for the funds that respondent used to pay down the DFO debt."

The third issue on appeal was the respondent's income for the purpose of paying support and maintenance (§88):

> The trial court, though acknowledging that respondent's annual income "far exceeded" $1 million for some years, decided that it was "reasonable and fair" to take respondent's income as being $1 million yearly. The court did not indicate how it arrived at this figure. The court alluded to a "concession" by respondent, but at most

> the concession was to "net cash income" of between $500,000 and $800,000 a year from 2001 though 2006—not to $1 million in income per year. Of course, the trial court had the duty to ascertain whether respondent's concession was self-serving and to make its own calculation of respondent's income. Unfortunately, though we are called upon to review the $1 million figure, we have no actual calculation to critique. It is not our province, as a court of review, to determine such a fact-intensive issue in the first instance. We do note that even a cursory review of the record shows the $1 million figure to be exceedingly low even as an average. The yearly inflows ranged from $1.6 to $4.2 million. Newman did not distinguish among the sources for the inflows, which evidently included DFO advances. As noted above in Part I(A)(1), respondent's DFO advances amounted to hundreds of thousands of dollars a year. Whether these advances constituted "income" to respondent under section 505(a)(3) of the Act (750 ILCS 5/505(a)(3) (West 2010)) is an issue the trial court should consider on remand. See In re Marriage of Rogers, 345 Ill. App. 3d 77, 80 (2003) (holding that proceeds of loan from spouse's parents were "income" to the spouse under section 505 of the Act), aff'd on other grounds, 213 Ill. 2d 129, 139 (2004).
>
> There is no corresponding provision authorizing the exclusion of loan proceeds"); see also In re Marriage of Tegeler, 365 Ill. App. 3d 448, 457-58 (2006) (holding that spouse's line of credit was not "income" under section 505 of the Act and noting that, though loan proceeds generally should not be considered "income," there might be cases in which it is appropriate to treat them as such).
>
> ¶ 92 Accordingly, we remand for the trial court to make the initial calculation of respondent's income. Section 505(a)(3) of the Act defines "net income" broadly as "the total of all income from all sources," minus certain deductions (750 ILCS 5/505(a)(3) (West 2010)). Though this definition is given expressly for determining child support obligations, it applies as well to maintenance determinations. See In re Marriage of Sharp, 369 Ill. App. 3d 271, 280 (2006). The Act does not define "income," but cases have defined it as "something that comes in as an increment or addition, a gain or profit that is usually measured in money, and increases the recipient's wealth." Id. Income includes "any form of payment to an individual, regardless of its source, and regardless of whether it is nonrecurring." Id.

The last issue was the value of Michigan home. There was no valuation of the home presented by the wife who received the home. The trial court valued the Michigan home at $5.5 million. The sole evidence consisted of the price for the lot, the cost of constructing the house, and the listing range of $5.9 to $6.1 million proposed by the realtor. The appellate court stated, "We refuse to entertain petitioner's complaint about the quality of the evidence on valuation where she herself did not attempt to introduce any better evidence." The appellate court stated, "Where the parties have not presented more probative evidence on valuation, the trial court may rely on the for which the parties purchased the property, even if the sale was several years before trial. *In re Marriage of Landwehr*, 225 Ill. App. 3d 149, 153 (1992)." The appellate court stated:

> Petitioner asks that, in reviewing the trial court's valuation, we take "notice" of two

> "truisms," namely that: (1) homes rarely sell for their initial listing price; and (2) the housing market has continued a substantial downturn, including up to the time of judgment, with property values correspondingly suffering. Petitioner cites no authority by which we may take account of these supposed truths about the real estate market, and we decline to do so. She also asks that we consider that the Michigan home "sits unsold during the current market, a 'white elephant' out of proportion with the value of surrounding properties." Petitioner does not cite to the record for this proposition. (From the record, it appears that the Michigan home had not been listed as of the time of trial.)

Perhaps the best approach for the wife would have been to have the house listed for sale – in order help demonstrate the value in this real estate market.

Other Property Cases:

***Mathis* – Date for Valuation in Bifurcated Case Where Grounds Judgment Entered**
IRMO Mathis, 2011 IL App (4th) 110301, (November 9, 2011); 2012 IL 113496 (December 28, 2012). Illinois Supreme Court recently ruled on this decision. The Supreme Court Rule 308 certified question on appeal was:

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

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

> *Schinelli* is not contrary to the rule that the valuation date should be the date of dissolution. While the appellate court's decision in *Schinelli* did not preserve the amounts of the 401(k) account awarded in the initial order, it preserved the percentages awarded, and adhered to the intent of that order by dividing that account equally. Indeed, as the appellate court correctly understood there and here, there are ways to allocate and adjust for postdissolution increases and decreases in the value of marital property to attain a just distribution. See, e.g., 750 ILCS 5/503(c), (d)(1) (West 2010). Rather than adjust later, it is better to divide sooner, based on the value of the property on the date of dissolution. This rule encourages the parties to stop litigating, so they can receive and manage their proportion of the marital property, and discourages gamesmanship because the parties would be on notice that dilatory

> tactics would not aid either side. **Accordingly, we hold that, in a bifurcated dissolution proceeding, the date of valuation for marital property is the date the court enters judgment for dissolution following a trial on grounds for dissolution** (see 750 ILCS 5/401(b) (West 2010)) **or another date near it.** We believe this rule best serves the purpose of and the policy behind the Act, and accordingly the legislature's intent.

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

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

***Hluska* -- Failure to Value Certain Properties Does Not Result in Reversible Error**

IRMO Hluska, 2011 IL App (1st) 092636 (December 9, 2011)

The husband argued that the failure of the court to value certain properties resulted in reversible error. The appellate court disagreed:

> We do not find Mike's argument persuasive that the trial court's failure to specifically value his ownership interests was an abuse of discretion and warrants reversal and a rehearing. Neither party provided the trial court with any evidence concerning the value of either asset. Our review of the record shows that Mike had sufficient opportunity during pretrial discovery and during trial to present evidence on the value of these two assets. Discovery was open for more than two years and there is no indication in the record that Mike sought an appraisal of the Lorenz property or employed an expert to determine the value of his ownership interests in the two corporations. At trial, Mike had an additional opportunity to present evidence of the value of these assets, but he failed to do so.
>
> Concerning Mike's ownership interests, the record shows that Rebecca filed two motions to compel discovery against Mike, each of which requested an estimate value of his ownership interests, which he failed to provide. In addition, Hluska sought to prevent Rebecca from obtaining information as to the value of Mike's ownership interest and initiated a motion to quash Rebecca's subpoenas to obtain the information.
>
> ¶ 64 Mike cannot fail to disclose information on value of the assets at issue and then complain that the trial court erred in not placing a specific value on them.

Normally, I do not like string cites. But the summary within this string site is excellent so it will be quoted:

> *In re Marriage of Sanfratello*, 393 Ill. App. 3d at 650-51 (trial court's failure to provide a " 'specific determination of value' " was not an abuse of discretion when husband did not disclose to certified public accountant and trial court "necessary financial documents" needed to evaluate the worth of his three businesses);
>
> *In re Marriage of Tyrrell*, 132 Ill. App. 3d 348 (1985) (trial court's refusal to assign a value to stock was not an abuse of discretion because the husband failed to provide sufficient evidence of the value of the corporation);
>
> *In re Marriage of Bauer*, 138 Ill. App. 3d 379 (1985) (wife's failure to present any evidence as to value of her corporation did not mandate reversal and remand for new hearing to determine its value);
>
> *In re Marriage of Smith*, 114 Ill. App. 3d 47 (1983) (trial court did not err in refusing to reopen case for admission of evidence of value of marital property when neither party provided evidence of the property's value at trial);
>
> *In re Marriage of Thornton*, 89 Ill. App. 3d 1078 (1980) (trial court refusal to value property not abuse of discretion when parties failed to comply with court's order to have the property appraised.

The appellate court concluded this discussion by quoting from *In re Marriage of Smith* at length:

> "[I]t is the parties' obligation to present the court with sufficient evidence of the value of the property. Reviewing courts cannot continue to reverse and remand dissolution cases where the parties have had an adequate opportunity to introduce evidence but have failed to do so. Parties should not be allowed to benefit on review from their failure to introduce evidence at trial. [Citations.] Remanding cases such as the one before us would only protract the litigation and clog the trial courts with issues which should have been disposed of at the initial hearing. As the trial court here said after numerous hearings in this case, at some point we must 'ring the curtain down.' " *In re Marriage of Smith*, 114 Ill. App. 3d at 54-55.

***Schinelli* – Dissipation and Meeting Burden of Showing Clear and Convincing Evidence**
IRMO Schinelli, 406 Ill. App. 3d 991 (2nd Dist., January 12, 2011).
Items Not Dissipation Where Budget Shows Deficit after Payment of Court Imposed Expenses: The appellate court ruled that the trial court erred (on remand) in finding that the husband had dissipated assets from the joint checking account. In the first appeal, the appellate court remanded the matter for a new evidentiary hearing on the issue of alleged dissipation of $17,919. Following the hearing on remand, the appellate court stated:

> Although the trial court conducted a hearing and allowed Bruce to present evidence of how funds in the joint checking account had been spent, the trial court's ruling was unrelated to the evidence presented. Instead, the trial court essentially found that

> Bruce should have been paying the family's bills with one of his individual accounts rather than the joint account. That was improper. See *IRMO Davis*, 215 Ill. App. 3d 763, 778 (1991) (although husband had other funds available to him, he was not required to use those funds, before using marital funds, for family purposes.

The appellate court then noted the husband's deficit after paying a variety of court ordered expenses such as all the household expenses for the marital residence, his own household expenses, and all of his son's personal and education-related expenses. The appellate court stated, "Based on the evidence adduced at the original trial in conjunction with the evidence presented at the hearing on remand, the record shows that Bruce established by *clear and convincing evidence* that he did not dissipate marital assets."

Child Support

Initial and Post-Divorce: Establishing Amount of Child Support

***Steel* – Record Should Provide Sufficient Determination regarding Net Income / Determining of Net for Maintenance Purposes is Same as for Support Purposes**

IRMO Steel, 2011 IL App (2d) 080974 (November 21, 2011)

The third issue in this 50 page appeal was the respondent's income for the purpose of paying support and maintenance (§88):

> The trial court, though acknowledging that respondent's annual income "far exceeded" $1 million for some years, decided that it was "reasonable and fair" to take respondent's income as being $1 million yearly. The court did not indicate how it arrived at this figure. The court alluded to a "concession" by respondent, but at most the concession was to "net cash income" of between $500,000 and $800,000 a year from 2001 though 2006—not to $1 million in income per year. Of course, the trial court had the duty to ascertain whether respondent's concession was self-serving and to make its own calculation of respondent's income. Unfortunately, though we are called upon to review the $1 million figure, we have no actual calculation to critique. It is not our province, as a court of review, to determine such a fact-intensive issue in the first instance. We do note that even a cursory review of the record shows the $1 million figure to be exceedingly low even as an average. The yearly inflows ranged from $1.6 to $4.2 million. Newman did not distinguish among the sources for the inflows, which evidently included DFO advances. As noted above in Part I(A)(1), respondent's DFO advances amounted to hundreds of thousands of dollars a year. Whether these advances constituted "income" to respondent under section 505(a)(3) of the Act (750 ILCS 5/505(a)(3) (West 2010)) is an issue the trial court should consider on remand. See In re Marriage of Rogers, 345 Ill. App. 3d 77, 80 (2003) (holding that proceeds of loan from spouse's parents were "income" to the spouse under section 505 of the Act), aff'd on other grounds, 213 Ill. 2d 129, 139 (2004).

> There is no corresponding provision authorizing the exclusion of loan proceeds"); see also In re Marriage of Tegeler, 365 Ill. App. 3d 448, 457-58 (2006) (holding that spouse's line of credit was not "income" under section 505 of the Act and noting that, though loan proceeds generally should not be considered "income," there might be cases in which it is appropriate to treat them as such).
>
> ¶ 92 Accordingly, we remand for the trial court to make the initial calculation of respondent's income. Section 505(a)(3) of the Act defines "net income" broadly as "the total of all income from all sources," minus certain deductions (750 ILCS 5/505(a)(3) (West 2010)). Though this definition is given expressly for determining child support obligations, it applies as well to maintenance determinations. See In re Marriage of Sharp, 369 Ill. App. 3d 271, 280 (2006). The Act does not define "income," but cases have defined it as "something that comes in as an increment or addition, a gain or profit that is usually measured in money, and increases the recipient's wealth." Id. Income includes "any form of payment to an individual, regardless of its source, and regardless of whether it is nonrecurring." Id.

***McGrath* - Trial Court Can Base Support on Non-Custodial Parent's Regular Withdrawals Where Payor Unemployed for Extended Time Period**

IRMO McGrath, 2011 IL App (1st) 102119 (Filing 6/30/11; Corrected 8/10/11). Case Overturned by Illinois Supreme Court

The father was unemployed at the time of the divorce in September 2007 and support was reserved. Nearly a year later, the mother petitioned to set child support, seeking that support be determined based upon his regular withdrawals each month of $8,500 from his savings account to meet expenses. The trial court deviated downward from the child support guidelines due to the facts of the case. But the court considered the $8,500 monthly as income to the unemployed father.

The father relied on *IRMO O'Daniel*, 382 Ill. App. 3d 845 (2008), urging that funds withdrawn from an IRA account did not constitute income under the IMDMA because the money in the account was self-funded and was basically no different than a savings account.

Consider the Second District's 2005 *IRMO Lindman* decision, 356 Ill. App.3d 462 (2d Dist. 2005). *Lindman* held that the trial court properly refused to grant the father's petition to reduce child support when he lost his job and was receiving distributions of IRA awarded him in the divorce case, because the distributions from his IRA were properly considered §505 "income". *Lindman* contains several quotes establishing the comprehensive sweep of what constitutes income for support purposes:

> Illinois courts have concluded that, for purposes of calculating child support, net income includes such items as a lump-sum worker's compensation award (*In re Marriage of Dodds*, 222 Ill. App. 3d 99 (1991)), a military allowance (*In re Marriage of McGowan*, 265 Ill. App. 3d 976 (1994)), an employee's deferred compensation (*Posey v. Tate*, 275 Ill. App. 3d 822 (1995)), and even the proceeds from a firefighter's pension (*People ex rel. Myers v. Kidd*, 308 Ill. App. 3d 593 (1999)). We see no reason to distinguish IRA disbursements from these items. Like all of these

> items, IRA disbursements are a gain that may be measured in monetary form. *Rogers*, slip op. at 5. Moreover, IRA disbursements are monies received from an investment, that is, an investment in an IRA. See *Black's Law Dictionary* 789 (8th ed. 2004); see also www.investorwords.com/2641/IRA.html (last visited December 22, 2004) (defining an "IRA" as "[a] tax-deferred retirement account for an individual *** with earnings tax-deferred until withdrawals begin"). Thus, given its plain and ordinary meaning, "income" includes IRA disbursements.

Instructively, *Lindman* addressed "'double counting'" and cited *IRMO Zells*, 572 N.E.2d 944 (1991). *Lindman* had stated:

> It may be argued that the court is double counting this money, that is, it is counting the money on its way into and its way out of the IRA. In other words, the money placed into the IRA from year one to year five is being counted twice. To avoid double counting in this situation, the court may have to determine what percentage of the IRA money was considered in the year one net income calculation and discount the year five net income calculation accordingly.

IRMO Eberhardt, 387 Ill. App. 3d 226 (First Dist., 2008), involved an improper double counting in a case involving IRA liquidations. The IRAs were awarded in a property settlement were later liquidated and viewed as income. The appellate court cited *IRMO Klomps* for the following:

> "If we were to allow retirement income to be excluded from net income when setting child support merely because those benefits, prior to their receipt, were used to determine an equitable distribution of the parties' marital property, we would be adding provisions to the Act that do not exist. We will not twist the clear meaning of the Act to invent an otherwise nonexistent rule that would be contrary to the purpose of making 'reasonable provision for spouses and minor children during and after litigation.' [Citation.]" *In re Marriage of Klomps*, 286 Ill. App. 3d at 716-17.

The *Eberhardt* court had stated:

> Martin argues we should follow the holding in *O'Daniel* rather than *Lindman* and *Eberhardt*, despite *Eberhardt* being decided by the first district of this court. We understand Martin's comparison between his savings accounts and an IRA and his reliance on *O'Daniel*. However, the issue presented in this case does not require us to follow or deviate from the holdings in *O'Daniel* or *Lindman* and *Eberhardt*. Here, we need only determine whether the money Martin withdraws from his savings accounts constitutes "net income" under the Act. We answer this question by looking at the Act. ***

The focus on this *McGrath* decision was that it involved an unemployed father:

> An unemployed parent who lives off regularly liquidated assets is not absolved of his child support obligation. The legislature has adopted an expansive definition of what

> constitutes "net income." There are no provisions in the Act excluding Martin's monthly withdrawals from the definition of "net income." The circuit court *has discretion in the appropriate case* to order child support based on regularly liquidated assets used to fund expenses. Absent an abuse of discretion, we will not disturb the circuit court's finding that money from such assets constitutes income for child support orders. *We conclude that the circuit court was correct to include as part of Martin's income the money he withdraws from his savings accounts*. (emphasis added).

It is the last comment that likely will result in the reversal by the Illinois Supreme Court. Had the appellate court left its decision with the first highlighted comment regarding the trial court's discretion, the Illinois Supreme Court would not have likely accepted the appeal.

***Comment**: To see the Illinois Supreme Court oral arguments regarding *McGrath*, click here.

Support or Maintenance Modification / Enforcement - Statutory Interest
***Wiszowaty* – Illinois Supreme Court rules that Statutory Interest on Missed Child Support Payments Mandatory Following 1987**
IDHFS ex rel. Wiszowaty v. Wiszowaty, 239 Ill. 2d 483, Illinois Supreme Court (January 21, 2011).
The issue was whether delinquent child support payments in Illinois began to bear mandatory interest in 1987 with the passage of Public Act 85–2 (eff. May 1, 1987). The appellate court had concluded that they did not. 394 Ill.App.3d 49. The Illinois Supreme Court reversed the judgment of the appellate court. It stated:

> The General Assembly changed the law in 1987 by providing that each unpaid child support installment is an actual "judgment" that arises by operation of law, and that each such judgment "shall bear interest." Under the plain language of these statutory amendments, interest payments on child support payments became mandatory effective May 1, 1987. This court's decision in *Finley* does not compel a different result.

As a result of the Illinois Supreme Court we can expect that more cases will emphasize promissory estoppel or laches type defenses to support enforcement – where there is a good faith argument in this regard.

***Rice* – Statutory Interest on Support Once Again is Retroactive to April 1991**
IRMO Rice, 2011 IL App (1st) 103753 (December 9, 2011, Modified on Denial of Rehearing: January 20, 2012)
The first issue on appeal was the validity of the reduction provisions in child support (see pager 11). The appellate court stated:

> In the agreement, as noted, there was an allocation of the support obligation per child, with each child being allocated an equal share of the obligation, which corresponded to the 25% reduction as each child reached the age of majority. However, after the

> modifications of the support obligation, there was no longer an allocation of support but solely a lump-sum support obligation. It does not follow that the same pro rata reduction was agreed to by the parties in the absence of an allocation of the support obligation. If Daniel wished to reduce his child support obligation, whether by 25% or by any other amount, he was required to petition the court, at which point the trial court would determine whether Daniel was entitled to a reduction in his support obligation. Since he did not do so, the October 23, 1990, order remained in effect.
>
> Accordingly, we affirm the trial court's finding that the reduction provision did not apply and that Daniel's support obligation was based on a payment of $700 per month until his youngest child was emancipated.

The next issue was the interest calculation and the father argued that the IDHFS improperly assessed interest beginning on April 23, 1991, and argues that interest on any arrearage should have been imposed beginning on January 1, 2000. His argument solely focused on the time between April 23, 1991, and January 1, 2000. Once again this case focused on the 2011 *Wiszowaty* Supreme Court decision. The appellate court concluded, "Following the Illinois Supreme Court's decision in *Wiszowaty*, we agree with the circuit court and find that mandatory interest accrued on Daniel's delinquent child support beginning on April 23, 1991, the most recent date in which arrearage was calculated by the court." So, 2011 brought us one Supreme Court cases and two appellate court cases indicating that interest on unpaid support is mandatory to April 1991.

Post-High School Educational Expenses

Spircoff* - Third Party Beneficiary Action to Retroactively Enforce Explicit Provision of MSA Not Barred by *Petersen

Spircoff - 2011 IL App (1st) 103189 (October 19, 2011)

IRMO Petersen, 2011 IL 110984, does not bar action by a third-party beneficiary to retroactively enforce a provision of his or her parents' MSA as to payment of educational expenses where payment was not expressly reserved for future consideration by trial court in initial proceedings. The certified question for appeal was instructive and therefore will be quoted:

> If the ruling in *Petersen* bars a party from contribution from a former spouse from contribution for college expenses incurred prior to the date of filing of a petition brought pursuant to 750 ILCS 5/513, does the same bar to retroactive relief for college expenses incurred prior to the filing date apply to a petition brought by a third[-]party beneficiary to enforce a provision of his parents['] marital settlement agreement to contribute to his college education[?]

The appellate court provided a resounding no as an answer. The appellate court distinguished Petersen and reasoned:

> First, we note that unlike the situation presented in *Petersen*, here the obligation of the parties for educational expenses was clearly and affirmatively stated and was not

> expressly reserved. We reach this conclusion even though the actual allocation of those expenses was not made at the time the judgment of dissolution was entered.

In reaching their decision the appellate court approved the language of *Orr v. Orr*, 228 Ill. App. 3d 234, 238 (1992) not being a general reservation clause:

> In *Orr*, the court found that the father's obligation for educational expenses was affirmatively stated in the marital settlement agreement as follows: "Husband desires that the minor children shall attend a college or professional school and he agrees to participate in the financial responsibility for said education." (Internal quotation marks omitted.) *Orr*, 228 Ill. App. 3d at 239. Where such obligation to provide for a child's college expenses is included in a property settlement agreement that is later incorporated in a divorce decree, that obligation is even more definite and obligatory. *Orr*, 228 Ill. App. 3d at 239 (citing *Larsen v. Larsen*, 126 Ill. App. 3d 1072 (1984)).

The appellate court also pointed to the language of *In re Marriage of Albiani*, 159 Ill. App. 3d 519 (1987):

> "That the parties shall pay and be equally responsible for the tuition, room, and board and reasonable transportation expenses in connection with MARK ALBIANI's pharmacy school expenses." (Internal quotation marks omitted.) *Albiani*, 159 Ill. App. 3d at 522. On appeal, the appellant argued that the trial court had erred in its judgment of dissolution by failing to adjudicate the ultimate responsibility for payment of the future academic costs of the parties' minor child. *Albiani*, 159 Ill. App. 3d at 525. The court affirmed, noting that should the parties in the future disagree as to how to divide the child's academic costs, the circuit court retained jurisdiction to settle the dispute. Albiani, 159 Ill. App. 3d at 526-27

But in *Albiani* the percentage was stated. In any event, we now have *IRMO Koenig*, 2012 IL App (2d) 110503 joining *Spircoff* for a line of cases allowing retroactivity where the percentage allocation was not stated.

Executive Summary re Third Party Beneficiary Cases:

Standing Found:

- ☞ *IRMO Spircoff*, 2011 IL App (1st) 103189 (October 2011): Child had standing to enforce terms even where specific percentage allocation not stated in MSA.

- ☞ *Orr v. Orr*, 228 Ill.App.3d 234 (1st Dist. 1992): Child had standing where MSA provided that father desires that the child "attend a college or professional school and he agrees to participate in the financial responsibility for said education" where the agreement defines the terms but does not state the specific amount of his responsibility.

- ☞ *Martha Martha v. Glenn Miller*, 163 Ill.App.3d 602 (1st Dist., 1987): Child had standing to enforce MSA provision regarding college despite later exculpatory agreement between

parents absolving father of the obligation.

Standing Not Found:

☞ *IRMO Goldstein*, 229 Ill.App.3d 399 (2d Dist. 1992): A child does not have standing to apply for modification of parental college education obligation.

Gitlin on Divorce has noted that the second and third appellate districts had not allowed a child to attempt to enforce while the first district has allowed such third party beneficiary actions.

***Chee* – Petition Not Time Barred Even Though Children Had Received Undergraduate Degrees Before Bringing the Petition Where Party Under Notice that Expenses Would be Sought**

IRMO Chee, 2011 IL App (1st) 102797 (July 22, 2011)

Chee involved a complex case procedurally in which the wife first brought a motion for summary judgment on the issue of whether the marriage should be dissolved or declared void. In her motion for summary judgment she repeatedly asked the court to "hold respondent responsible for one third of all past, current, and future educational expenses of the children" under Section 513(a)(2). The former husband reasoned that his wife's petition should be time barred because the children had received their BA degrees before the divorce was actually filed. The appellate court reasoned:

> Moreover, Samuel's proposed construction would impose a deadline for not only filing but adjudicating a child's last educational expense petition, which is problematic. ... It cannot be seriously contended that the legislature intended for the language at issue to indiscriminately inconvenience parents of divorced children, to disadvantage other litigants, and to interfere with a court's efficient administration of its docket.

The appellate court then stated:

> ¶ 16 We do not share Samuel's concern that a parent will wait 50 years to request reimbursement for educational expenses. We consider Nelia typical of most litigants in the domestic relations division of the circuit court, in that she contemplated these expenses when she contemplated ending her marriage to Samuel. When she motioned for summary judgment as to whether the marriage should be dissolved or declared void, she repeatedly asked the court to "hold respondent responsible for one third of all past, current, and future educational expenses of the children under 750 ILCS 5/513 (a)(2)," and within a few weeks of the hearing date, she followed up with her "Petition for Section 513 College Support."

The next question was the impact of the *Petersen* appellate court decision. This will be quoted at length because of alternative nature of the reasoning considering the potential impact of the Illinois Supreme Court *Petersen* decision when announced.

> If *Petersen* were controlling here, Samuel would not be legally liable for his children's college expenses because Nelia's petition was filed after a final judgment. In our opinion, however, the May order regarding Nelia's motion for summary judgment was not a final order because it did not resolve all the issues between the parties. *** Nelia sought summary judgment only as to whether the marriage should be dissolved or declared void, she expressly requested adjudication of Samuel's liability for the children's education expenses, the court's order included citation to section 513, and during additional proceedings on August 5, 2010, and August 23, 2010, the parties and the court indicated the educational expenses were still outstanding and subject to the court's adjudication. The circumstances were similar to those in *In re Marriage of Bennett*, 306 Ill. App. 3d 246 (1999), in that most of the children's educational expenses slightly predated the petition for dissolution and could have been properly considered during the pendancy of the suit contemporaneously with other ancillary issues such as the division of marital property. Alternatively, in the event we have misconstrued the record on appeal and the summary judgment order was actually intended to be a final, appealable order which concluded the entire case, then Nelia's section 513 petition would be a timely motion to reconsider the ruling. Nelia filed the section 513 petition on June 1, 2010, before the May 5, 2010 order became final with the passage of 30 days and was properly considered while the court still had jurisdiction to consider any of its terms, including the division of assets, debts, and liability for educating the two children. Thus, under either scenario, the court could properly consider Nelia's petition for both children's educational expenses, and *Petersen* is not controlling.

***Petersen* -- Illinois Supreme Court Rules that Reservation Clause for Post-high School Educational Expenses Does Not Allow Obligation under Section 513 to Predate Filing of Petition**

IRMO Petersen, 2011 IL 110984 (Sept. 22, 2011)

In *Petersen*, the 1999 divorce judgment provided a standard reservation of jurisdiction clause regarding post-high school educational expenses per §513 of the IMDMA.

> The Court expressly reserves the issue of each party's obligation to contribute to the college or other education expenses of the parties' children pursuant to Section 513 of the [Illinois Marriage and Dissolution of Marriage Act].

In May 2007, the ex-wife filed her petition requesting an allocation of college expenses for the children. The oldest child was a graduate of Cornell University in 2006 – attending school there from 2002. The middle child was 21 years old at the time of the hearing and had attended Wake Forest University for his first year of college (2004-05) and then transferred to the University of Texas. The youngest child was 18 years old and was in his first year of college at California Polytechnic State University. The ex-wife had not spoken to the ex-husband since 2002. The ex-wife testified that she sent her ex-husband a letter in 2002 listing the expenses that the oldest son would incur at Cornell but never received a response. The ex-husband testified that he never received this letter. The ex-wife financed the children's college educations via loans, etc. The oldest

son had already received his B.A by the time the ex-wife's petition was filed.

The parties' incomes were:

	Husband	Wife
2002	$94,000	
2003	$180,687	$30,170
2004	$181,939	$34,955
2005	$220,314	$35,160
2006	$294,563	$40,268

The trial court ordered the ex-husband to pay 75% of the total college expenses for all three children – **past**, present and future. Ultimately, the trial court determined the amount due from the ex-husband for past expenses was $**227,260.** The trial court also ordered the ex-husband to pay $46,291 for the younger children's 2008-09 college expenses. The ex-husband appealed urging either that the trial court did not have jurisdiction to require him to pay college expenses prior to the filing of the ex-wife's petition.

The appellate court noted that §510(a) of the IMDMA provides in part, "...[T]he provisions of any judgment respecting maintenance or *support* may be modified only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification."

The first point of the Supreme Court's opinion was that "there was no merit to [the former wife's] argument that college expenses do not constitute 'child support' and that, as a consequence, section 510 is inapplicable." The Supreme Court then examined whether the former wife was seeking to modify the original divorce decree. The court looked to the definition of "modify" and ruled that the former wife *was* seeking to modify the decree – impose an obligation where no specific obligation existed before. The Court then reviewed case law and stated:

> These cases establish that Illinois decisional law has since 1986 consistently regarded the actions pursuant to reservation clauses to be modifications under Section 510 subject to the prohibition of retroactive support.

The Supreme court noted that on remand the degree to which the former wife had depleted her financial resources to pay for college could be a consideration in apportioning expenses from the date she filed her petition forward.

Comment: Again, the key language was the nature of the reservation clause in the case. It had said:

> The Court expressly reserves the issue of each party's obligation to contribute to the college or other education expenses of the parties' children pursuant to Section 513 of the [Illinois Marriage and Dissolution of Marriage Act].

So, the practice tip now is address the parameters within the MSA or to warn the client following the end of the case of the need to file a petition in time any time the issue is reserved.

Maintenance Cases

Initial Divorce

***Lichtenauer* – Imputing Income: Placing Live-in Girlfriend on Payroll Earning $120k per Year Factor Considered Contrived Arrangement and Factor in Determining Permanent Maintenance Award**

IRMO Lichtenauer, 408 Ill. App. 3d 1075 (3rd Dist, March 9, 2011)

The parties were married 1976 (a marriage of more than 33 years) and the divorce petition was filed in 2005 (which was dismissed but immediately refiled in 2007). The husband appealed the permanent maintenance award of $1,850 per month. The evidence at trial showed that the husband sold his interest in his business during the course of the divorce proceedings. Just before dissolving the business the husband started a new business called Correct Electric. After selling the business he became an employee of the new business. His live-in girlfriend became the president of the new business, Correct Electric and she earned a salary of $120,000 a year, "in spite of having no previous corporate executive experience or qualifications for this position." The husband was also the major shareholder, and the shareholder's agreement allowed his female companion to transfer her shares in the company to Earl at any time without the other shareholders' approval. The husband claimed no financial interest in Correct Electric beyond the approximate $70,000 annual salary he received as an employee. The trial court found this to be a contrived arrangement and the appellate court affirmed.

The wife had been working full time earning $15.70 per hour as an office coordinator. She earned an annual salary of $31,000. Regarding the wife's health the appellate court noted that she had been:

> diagnosed with Crohn's disease and spasmodic dysphonia, which is a neurological disorder that affects her vocal chords and intermittently interferes with her speaking ability. Joanne said she receives Botox treatments on her vocal chords for that condition. She stated that Crohn's disease is an autoimmune disease that affects her intestines, for which she has received intravenous treatments at the hospital every eight weeks for the last year and a half. Joanne testified to prescription medications that she also takes regularly.

Regarding the husband's income situations the trial court found:

> In the instant case, the court found that, factoring in Earl's ability to earn income and the opportunity he passed up, specifically his girlfriend's position with the company earning over $120,000 per year, the court could award maintenance to Joanne imputing $120,000 per year as Earl's ability to produce income.

The appellate court stated:

> Having determined the trial court correctly decided permanent maintenance was appropriate, we turn to Earl's contention that he did not have the ability to pay maintenance in the amount ordered by the court in this case. The case law provides

that the ability of the maintenance-paying spouse to contribute to the other's support can be properly determined by considering both current and future ability to pay ongoing maintenance. In *Smith*, a case which is factually similar to the case at bar, the parties were married for 34 years and the 52-year-old wife had little prospect of earning an adequate salary to meet her needs. In that case, the husband voluntarily reduced his income by retiring during the pending divorce proceedings in an attempt to avoid paying maintenance. *Smith*, 77 Ill. App. 3d at 862.

In that case, the court held:

> "In our view, the word 'ability' indicates that we should consider the level at which the maintenance-paying spouse is able to contribute, not merely the level at which he is willing to work. Thus, we hold that it was appropriate for the trial court to look at the husband's prospective income, as well as his current actual income, in setting the level of maintenance, particularly where the difference between actual and potential income is a result of totally voluntary retirement." *Smith*, 77 Ill. App. 3d at 862.

In *Smith*, the court considered the circumstances surrounding the husband's retirement as it related to the divorce proceedings and found that his motives for retirement were called into question. *Smith*, 77 Ill. App. 3d at 862-63. In that case, the trial court determined that the husband chose to resign his position as president of a company during the pendency of a dissolution of marriage proceeding to become a consultant which reduced his income by 50%. *Smith*, 77 Ill. App. 3d at 862-63. On appeal, the court upheld the trial court's determination that the husband had the ability to pay more maintenance than his current retirement income would seem to allow based on his position at his previous employment. *Smith*, 77 Ill. App. 3d at 863. Regarding Earl's current and prospective ability to pay maintenance, the record reveals that Earl was healthy at the time of the divorce. He voluntarily opted to sell his share of the Cipher and Baum Signs businesses during the pendency of the divorce. First, the trial judge noted that Earl was not under any requirement to buy into the new business, Correct Electric, after selling his ownership interest in Cipher and Baum Signs. Next, the court observed that, while Earl voluntarily chose not to buy shares in the new corporation himself, Earl voluntarily brought his girlfriend, Mauk, into the new business by loaning her money to become the majority shareholder in the new corporation that would ultimately compensate Earl as an hourly employee. The court found that Mauk's "ascension in the presidency of this company or the person who was running this company was somewhat contrived."

The appellate court then stated:

> It is well established in Illinois, "[i]n order to impute income, a court must find that one of the following factors applies: (1) the payor is voluntarily unemployed ***; (2) the payor is attempting to evade a support obligation ***; or (3) the payor has

unreasonably failed to take advantage of an employment opportunity." *IRMO Gosney*, 394 Ill. App. 3d 1073, 1077 (2009); *IRMO Rogers*, 213 Ill. 2d 129 (2004).

The court found the second factor to be present, specifically that Earl was attempting to evade a support obligation based on the "contrived" structure of the Correct Electric corporation and the salary paid to Earl's girlfriend, the named president of Correct Electric. As to the third factor, the court found that Earl passed up the opportunity to have held his girlfriend's position as president of the company, earning over $120,000 per year. Consequently, the court awarded maintenance after imputing $120,000 of his girlfriend's annual salary to Earl when considering Earl's present and potential ability to produce income.

Post-Decree Maintenance:

Unallocated Maintenance:

***Doermer* – Unallocated Maintenance is Non-Modifiable When there is only a Maintenance Component -- After the Child Reaches the Age of Majority**

IRMO Doermer, 2011 IL App (1st) 101567, (August 16, 2011, Corrected September 6, 2011)

The trial court did not err in ultimately granting the former-husband's 2-619.1 motion to dismiss his former wife's "petition for extension of maintenance." Under the marital settlement agreement the father paid unallocated support of $5,785 per month. The 1999 MSA had the following non-modifiability clause:

> "RICHARD's obligation to pay and KATHLEEN's right to receive maintenance shall terminate upon the first to occur of the following events: a) payment of unallocated maintenance and child support for eighty-four (84) consecutive months (seven consecutive years) following entry of a Judgment for Dissolution of Marriage; b) the death of KATHLEEN; c) the remarriage of KATHLEEN; or d) [t]he cohabitation of KATHLEEN with another adult person on a residential conjugal basis. Thereafter, KATHLEEN shall be forever barred from receiving maintenance and thereafter KATHLEEN shall have the right to receive child support only until such time as CAITLIN attains an 'emancipation event' as hereinafter stated."

The 2005 modifications to the MSA terms provided:

> A. [Richard] shall continue to pay unallocated maintenance and child support to [Kathleen] until January 31, 2006 in the sum of $5860.00 per month; and
> B. Thereafter, commencing February 1, 2006 and through July 16, 2009, the sum of $5000.00 per month payable in two equal installments on the 1st and 15th of each month as unallocated maintenance and support.
> 2. Article III, paragraph 2 shall remain in force and effect except the provision for the amount and length of payment amended as provided in paragraphs A and B above.
> 3. The parties acknowledge the fact that the minor child of the parties, to wit, Caitlin

> Doermer, will be attending a private facility, known as Culver Academy, and as such, will not be spending all of her time in the residence of [Kathleen]. [Kathleen] shall have no obligation to pay any costs associated with Culver Academy.
> 4. This Order is entered predicated upon that information.
> 5. All other provisions of the [m]arital [s]ettlement [a]greement shall remain in full force and effect."

In June 2009, the former wife filed a petition for extension of maintenance -- requesting that the duration of her support award be extended because an alleged substantial change in her circumstances affected her "ability to support herself and the daughter's minority status." The daughter had become the age of majority and emancipated in July 2009.

The former husband argued that the parties' MSA deprived the circuit court of the authority to grant an extension of maintenance after Caitlin's emancipation. He cited an October 2009 Illinois Supreme Court decision (*Blum v. Koster*, 235 Ill. 2d 21 (2009)), for support. The appellate court found that because maintenance only was being sought beyond July 2009, that there was essentially no child support component and therefore the *Blum* decision controlled.

The appellate court stated:

> Based on the plain language of the marital settlement agreement, we find that it was the parties' intent for Richard to make unallocated maintenance and child support payments to Kathleen until July 16, 2009, when Caitlin turned 18 years old and became emancipated.

Comment: There is a problem with this case. When you have an unallocated maintenance case you need to make absolutely certain to ensure that the payor can deduct the payments, that it terminated either six months before or after the child turns age 18.

Tax law provides that a payment will be treated as specifically designated as child support to the extent that the payment is reduced either:

> On the happening of a contingency relating to a child, or
> At a time that can be clearly associated with the contingency.

There is a presumption that the payment terminates due to a contingency related to a child if the payments are reduced 6 months before or after the date the child will reach 18, 21, or local age of majority -- in Illinois age 18.

But there is only a three year window to amend tax returns. So this is a case of poor drafting of the MSA.

***Streur* -- Retroactive Support Should be Given to Date of Termination of Unallocated Support**
IRMO Streur, 2011 IL App (1st) 082326 Filed May 11, 2011; Rehearing Denied June 10, 2011; Modified, June 15, 2011. *Streur* held that when unallocated maintenance terminated the former husband had notice consistent with the provisions of §510(a) of the IMDMA (based on case law) that

his child support obligation would commence. Accordingly, child support should have been retroactive to the date that his unallocated support had terminated rather than on the date the former wife had specifically moved to set child support. This case is good reading for exceptions to the requirement for filing a petition for modification of support. This includes case law involving petitioning for custody without mentioning child support and other somewhat unusual fact patterns.
.

***Nilles* – Permanent Non-Modifiable Maintenance Cannot be Modified if the Agreement is Deemed Unconscionable Based on the Circumstances 10 Years After the MSA**
IRMO Nilles, 2011 IL App (2d) 100528 (August 9, 2011)
A finding of unconscionability of the underlying MSA must be based on the parties' economic situation at the immediately following making of the agreement. Accordingly, the trial court's modification of the ostensibly non-modifiable 502(f) maintenance obligation, based upon the unconscionability ten years later, was improper.

***Anderson* – While Substantial Change in Circumstances Shown, Trial Court Improperly Considered Maintenance Recipient's Potential Eligibility for Public Assistance**
IRMO Anderson, 409 Ill. App. 3d 191 (1st Dist., March 31, 2011)
This case involved a 37 year marriage and a Husband who was 80 years old and unable to work due to health issues. The former husband had been unemployed at the time of the 1999 divorce and the evidence showed that his asset based was substantially reduced from the time of the divorce. The appellate court noted that, "In *Connors*, 303 Ill.App. 3d at 226, the court found that in a modification proceeding, parties are allowed to present only evidence which goes back to the latest petition for modification to avoid relitigating matters already settled." Regarding the issue of living on assets and an increase in reported gross income due to retirement account withdrawals, the appellate court stated:

> "While his social security benefits have increased by $400 a month since 1999, the rest of his income consists mostly of withdrawals from his retirement funds, which are being depleted as he makes those withdrawals and according to petitioner, will last only for two years from the time of the hearing... Furthermore, while it appears that petitioner is still withdrawing the same amount from his Morgan Stanley account for himself as he did in 1999, he testified that because of the losses that he suffered during the market decline, his funds would last only two years after the date of the hearing. *** In contrast, petitioner in this case showed that over the course of 10 years, the value of his retirement account, which is one of his main sources of income, decreased from over $200,000 in 1999 to $63,000 in 2009. Unlike the facts in *Dunseth*, the record here does not indicate that petitioner's source of income merely "dipped" or decreased temporarily due to the payment of special costs or temporary circumstances. Moreover, petitioner testified that he has removed his money from the market and invested it in cash and government securities, and is therefore unlikely to benefit from a potential market recovery, even if and when such a recovery may come about.

The appellate court then summarized:

> In this case, respondent has not shown why a distinction should be made between a substantial change in income and a similar change in the value of an account from which income is derived. In this case, the record indicates that petitioner's Morgan Stanley account was worth at least $200,000 at the entry of the last order, and that its value decreased to $63,000 at the time of the hearing on his motion to terminate maintenance. [P]etitioner relies on that account to make his maintenance payments and for his own support. Thus, even if the value of petitioner's Morgan Stanley account may have been uncertain and subject to fluctuation, that did not preclude petitioner from seeking termination of his maintenance obligation if he could no longer rely on that account as a source of income to make those payments. Additionally, respondent's assertion that petitioner's income has increased since 1999 is misleading because, as noted above, his income consists largely of withdrawals from his retirement account.

Note the discussion of the *IRMO Waller* decision regarding the retirement of the former husband at age 63 and the fact that the former husband there was not successful in trying to terminate maintenance – in part since there were "bad facts."

> Respondent's reliance on *IRMO Waller*, 253 Ill. App. 3d 360, 362, (1993), is misplaced. In *Waller*, the court found that the maintenance payor's retirement at age 63 was not a substantial change in circumstances that would justify termination of maintenance where he had refused employment, albeit at a lower rate of pay, and was in good health. In denying his motion to terminate maintenance, the trial court noted that while it was contemplated at the time of the judgment of dissolution that the former husband would retire, it had no provisions for reduction or termination of maintenance. It also noted that former husband lived in a house owned by his current wife and owned another house with no mortgage while the former wife had a mortgage on her condominium. In affirming the trial court's denial, the reviewing court found that the former husband
>
> > Had not reached the customary retirement age,
> > He was in good health, and
> > His resignation was under his control. (citations omitted).

But the trial court erred in this case in in terminating maintenance in assuming that the former wife would potentially be eligible to receive public welfare assistance so as to enable her to live in an assisted living facility. The appellate court stated:

> Neither of the parties nor the court has introduced any authority to permit a court to rely upon the receipt of public welfare benefits as a substitute for spousal maintenance. In perspective, such reliance would allow a spouse to use public welfare as a substitute or supplement to his own spousal obligation and to the recipient's spousal entitlement. While we have found a dearth of authority on this subject in Illinois, other jurisdictions have addressed this question as to and disallow the use of public welfare entitlements as a substitute for a spouse's maintenance obligations. See *Remick v. Remick*, 456 A.2d 163, 167-68, 310 Pa. Super. 23, 32- 33

(1983); *Safford v. Safford*, 391 N.W.2d 548, 550 (Minn. Ct. App. 1986); 27B C.J.S. Divorce §612 (2005).

Regarding the issue of potential public welfare benefits the appellate court concluded:

> Thus, the trial court abused its discretion in taking into account that respondent may be eligible for public assistance, even though it acknowledged that her eligibility was uncertain. More significantly, the trial court abused its discretion in assuming that public assistance can be a substitute for a spousal obligation.

Comment: There are cases also involving second jobs and termination of maintenance which is also a mainstream issue: 17 ALR 5th, 143.

Custody and "Visitation"

Initial Custody / Supervised Visitation

***IRMO DTW* – Sole Custody Award to Professional Basketball Player Father Where Significant Evidence of Alienation**
IRMO D.T.W and S.L.W., 2011 IL App (1st) 111225 (December 30, 2011)
This case involves a professional basketball player awarded custody and granted leave to remove the child to Florida. For professional basketball fans, we all know who this case involved: a native son who chose not to sign with the Chicago Bulls.

Custody and Alienation: This case involves an award of custody against what was the primary caretaker of the children. The first issue was one seeking to reverse the sole custody decision based upon the manifest weight standard. There was evidence of "alienation" in this case that the mother argued favored an award of custody to her. The appellate court found essentially that the trial court properly considered the evidence that the majority of alienating behaviors were on behalf of the mother in its award of custody. The case stated:

> We are unpersuaded by respondent's argument that before awarding sole custody to D.T., the court should have provided her with an opportunity to avail herself of professional help to change her alienating behavior as recommended by Doctor Amabile. In support of this argument respondent relies on *In re Marriage of Bates*, 212 Ill. 2d 489 (2004), and *In re Marriage of Divelbiss*, 308 Ill. App. 3d 198 (1999). Respondent points out that in the May 6, 2010, report, Amabile recommended joint custody with respondent as the primary residential parent and advised respondent to seek counseling with the goal of helping her learn to support the children's relationship with D.T. In her July 26, 2010, report, Amabile concluded that sole custody should be awarded to respondent and recommended: respondent seek counseling with a professional who is familiar with the process of alienation; the court appoint a parenting coordinator to help the parties start communicating with each other and someone to monitor the family to ensure that the process of alienation

> is diminishing; and specific court orders that address visitation times and phone contact.

The discussion regarding the nature of custody evaluations is significant:

> We note that Doctor Amabile's recommendations are not controlling. Prince, 261 Ill. App. 3d at 615. A recommendation concerning the custody of a child is just that, a recommendation. Prince, 261 Ill. App. 3d at 615-16 (citing *In re Marriage of Felson*, 171 Ill. App. 3d 923 (1988)). A trial court is free to evaluate the evidence presented and accept or reject the recommendation in whole or in part. *Prince*, 261 Ill. App. 3d at 616. Just because a trial court followed an expert's recommendations in *Bates* and *Divelbiss* does not mean the same result should necessarily follow in this case. This is especially so where, as here, Amabile: was not aware of certain instances of alienation on respondent's part at the time she filed her reports and recommendations; noted that sole custody with respondent was a less desirable arrangement than joint custody because of the risk that respondent would abuse her authority and continue to alienate the children from D.T.; expressed concerns as to whether respondent would follow court directives; acknowledged that respondent tried to manipulate the court system; and testified at the custody trial that respondent's alienating behavior had progressed beyond the moderate range and was entering the severe range.

Regarding the actual evidence of alienation during the case, the appellate court state:

> Contrary to respondent's argument, the record shows that her alienating behavior worsened during the two-year course of the custody proceeding. The record also shows that respondent had ample opportunity to comply with Doctor Amabile's recommendations to seek counseling but failed to do so.

Allowance of Petition for Removal After Party Rested His Case: Perhaps the most remarkable portion of the decision addressed the trial court's granting leave to remove from Illinois to Florida:

> Respondent claims the court erred in prompting and allowing D.T. to a file a petition for removal after he had rested his case. In the alternative, respondent maintains the court erred in granting D.T.'s petition.

Regarding amendments to the pleadings, the appellate court considered 735 ILCS 5/2-616(a) and (c). The factors the court considers include:

> (1) whether the proposed amendment would cure the defective pleading; (2) whether the other party would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether the moving party had previous opportunities to amend the pleading.

The appellate court rejected the prejudice argument. The appellate court stated:

> Here, we cannot say that respondent was prejudiced or surprised by the amendment. D.T. testified from the beginning of the custody trial that he was seeking sole custody of the children in Florida. He testified about the efforts he made to research schools in the Miami area and the support system he would have in Miami. Respondent was well aware that D.T. worked and lived in Miami. She extensively cross-examined D.T. about his July 2010 signing of a new contract with the Miami Heat, his schedule as a professional basketball player and the amount of time he would be able to spend in Miami with the children if he were awarded sole custody.

Remarkably, the appellate court stated:

> Although we agree with respondent that D.T. had earlier opportunities to amend and seek removal, we find no error with the court's decision allowing him to file the amendment at the end of his case. The record shows that the family had dual residences in both Illinois and Florida and that the children spent time in both states. ***

***Kic* - Nesting Arrangement Not An Abuse of Discretion in a Case Involving Two Pro Se Individuals Where It Appeared to be Working**

Kic v. Bianucci, 2011 IL App (1st) 100622 (December 13, 2011)

The mother in this case appealed nine separate issues. This will focus on the joint custody issue as it is unusual. The trial court had ordered that each parent would share residential responsibilities in caring for their child at marital residence, after in-depth analysis of relevant factors, which was the system already established by parties in mediation, noting that both parties had adjusted their lifestyles and work schedules for best interests of the child.

Recalling that both parties were pro se, the key discussion states:

> Teresa also claims that the trial court erred by entering an order that was silent on the issues of designating a residential parent and contributions to educational expenses and extracurricular activities for Robert. A close examination of the trial court's order does not support Teresa's contentions. On the issue of designating a residential parent, the trial court recognized that the parties had agreed to and implemented a stable system where Robert lives in the Shaker Ct. home full time (the home in which he has lived since birth). William lives in the Shaker Ct. home with Robert from Thursday night through Sunday of each week, and Teresa lives with Robert in the same home from Sunday through Thursday afternoon of each week. The system was established by a mediation agreement between the parties dated January 10, 2008.

I disagree. While the trial court found that the arrangement was apparently working, there was no back-up plan if it did not continue to work. The result of this case is essentially an invitation to further litigation. Part of the problem is that the appellate court noted that

Pretrial Conference and Motion for SOJ: Other issues of note in this decision included the

discussion regarding whether a pretrial conference actually occurred since it would amount to a substantive ruling precluding the wife from being able to change judges as of right.

Request to Admit: Perhaps a more interesting discussion involved the question of allowing the former husband more than 28 days to respond to the request to admit facts.

***In Re B.B.* - Presumption in Section 14(a)(2) of the IPA Does Not Constitute a Custody Judgment**

In re: B.B. and K.B., Minors, 2011 IL App (4th) 110521 (October 28, 2011)

The father had filed paternity action, and eight years later filed for custody of the two minor children. The appellate court ruled that the trial court properly considered the IMDMA Section 602(a) and other relevant factors in awarding custody of two children to father. Both children stated in interviews with court they wanted to reside with father, the GAL recommended father have custody, and court considered mother's lack of supervision of minors. Presumption in Section 14(a)(2) of Parentage Act (where judgment of parentage contains no explicit award of custody) does not constitute a custody judgment. As custody judgment did not exist when father sought custody, his petition was for an initial custody judgment rather than for modification.

> The first sentence of section 14(a)(2) expressly states visitation rights or a support obligation in one parent contained in a parentage judgment must be treated as a custody judgment in favor of the other parent. See 750 ILCS 45/14(a)(2) (West Supp. 2003). However, the second sentence does not use the phrase "shall be considered a judgment granting custody." See 750 ILCS 45/14(a)(2) (West Supp. 2003). It merely provides a *presumption* the mother has custody of the children and even specifies a circumstance under which the presumption would not apply. See 750 ILCS 45/14(a)(2). *** On the other hand, a "judgment" is "a court's official decision with respect to the rights and obligations of parties to a lawsuit." *** With section 14(a)(2), the statutory presumption exists because no action by a court existed to show a determination of the parties' custodial rights. Accordingly, we find the presumption contained in section 14(a)(2) of the Parentage Act does not constitute a custody judgment.

***Voris* – Supervised Visitation: Illinois Does Not Require Showing of Detailed Harm for Supervised Visitation but Standard Would Have Been Met if This Were the Standard**

Voris v. Voris, 2011 IL App (1st) 103814, (1st Dist., November 22, 2011)

Illinois remains rather regressive regarding the statutory terms for parenting time for the non-residential parent – pending the potential adoption of the Family Law Study Committee's recommendations regarding statutory amendments to custody. In any event, perhaps the term visitation is best applied when parenting time is restricted as it was in *Voris*. In this case the father claimed that the order providing for supervised visitation was incorrect because of the lack of proof of harm. He cited decisions from Arkansas, Idaho, Missouri, Nebraska, Washington and New Jersey that he represented as standing for the proposition that harm must be proven in detail. The appellate

court noted the non-binding nature of these out of state decisions. A potential focus was on whether the court improperly relied on the father's religion as a Jehovah's Witness in its decision for supervised visitation. But the decision stated:

> In any event, it appears petitioner met the standard by showing detailed harm to the three children in numerous ways. Appellant's argument is devoid of any citation to any evidence that would lead this court to believe that the circuit court was biased or incorrect when it ruled that all future visitation be supervised. The record is replete with evidence that Mark was using his religious faith as a tool to alienate the three children from their mother, Orla, his ex-wife. The record is also filled with evidence demonstrating that Mark's actions were having severe negative effects on the three children and endangering their emotional and mental well-being. One psychologist's expert report was submitted by the petitioner at trial on this issue. Mark did not rebut this psychologist's report with any expert report of his own that supported any contrary view regarding the deleterious effects his many actions had on the children. Mark also did not rebut the expert's conclusions that Mark suffered from mania, grandiose aspirations and lack of impulse control and substance abuse and that he scored within the dysfunctional range on the psychological testing, although he was given opportunity to present his side, including any contrary expert's analysis of his psychological state of mind. To the extent that Mark submitted his testimony and argument as an attempt to rebut the expert's report, such attempt failed as the court found Mark's testimony entirely incredible.

***A-Hearn* – Discovery Sanctions: Discovery Sanctions Involving Barring All Witnesses in a Custody Case Stand on a Different Footing as Compared to Other Issues**

IRMO A'Hearn, 408 Ill. App. 3d 1091 (3rd Dist., March 21, 2011, Corrected Opinion April 22, 2011)

Trial court abused its discretion in barring husband from presenting all witnesses on the issue of custody as a discovery sanction per SCR 219(c). The appellate court stated:

> In this case, barring all of Michael's witnesses and then dismissing his petition was too harsh of a sanction. As Michael concedes, the trial court's dissatisfaction was justified. Despite the fact that Michael was given several more months to complete discovery, he waited until a couple of days before trial to disclose his witnesses. However, dismissal in this case was an abuse of discretion because the trial court imposed the harshest sanction available after insufficient enforcement efforts.
>
> Our review of the record establishes that the only effort the trial court undertook to compel Michael into complying with discovery was to continue the trial and issue a new due date. Then, when Michael failed to comply, the court barred his witnesses despite the fact that other sanctions existed, such as holding Michael's attorney in contempt or awarding Rose reasonable attorney fees. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). Even acknowledging the wide discretion given to trial courts to impose sanctions, we believe it was an abuse of discretion to bar all of Michael's witnesses after postponing the discovery due date one time. *** In the instant case, while the

> trial court certainly had an interest in seeking compliance with its discovery order, our supreme court has stated that child custody proceedings should focus on the best interest of the child. Ill. S. Ct. R. 900(a). We do not find that it is in the best interest of the child to have a custody petition denied pursuant to a discovery sanction instead of hearing the petition on the merits. Therefore, we hold that the trial court abused its discretion in imposing a sanction that had the effect of dismissing Michael's petition.

The well-reasoned concurrence stated:

> With respect to the question of the discovery sanction, I do not find an abuse of discretion and therefore dissent from the contrary finding of the majority. The trial court sanctioned a fairly flagrant violation of the rules of discovery. The fact that one party (Rose) faces the potential of being blind-sided by undisclosed evidence or witnesses seems to me to be no less detrimental to a reasoned determination of the ultimate best interest of the child than the exclusion of evidence tendered by a party who has willfully violated the fair play that is inherent in both the discovery rules themselves and the effectiveness of our adversarial system.

***Johnston v. Weil* – IL Supreme Court: §604(b) Reports Not Confidential Under Mental Health Confidentiality Act**

Johnston v. Weil, 241 Ill. 2d 169, Illinois Supreme Court (February 25, 2011)

The issue in *Johnston v. Weil* was whether defendants violated the Mental Health and Developmental Disabilities Confidentiality Act (Confidentiality Act) (740 ILCS 110/1 et seq.) by disseminating, or causing to be disseminated, information obtained by a professional witness who was appointed by the circuit court under §604(b) of the IMDMA. The appellate court concluded, "we find that plaintiffs may *not* invoke the protections of the Confidentiality Act with respect to communications made by plaintiffs to the §604(b) court appointed psychiatrist in the course of the custody and visitation evaluation. Accordingly, we answer the certified question in the negative."

The specific certified question for the Illinois Supreme Court was:

> Whether evaluations, communications, reports and information obtained pursuant to section 750 ILCS 5/604(b) of the Illinois Marriage and Dissolution of Marriage [Act] are confidential under the Mental Health and Developmental Disabilities Confidentiality Act 740 ILCS 110/1 et seq. where the 604(b) professional personnel [sic] to advise the court is a psychiatrist or other mental health professional.

The Supreme Court's decision first addressed the IMDMA language itself:

> We agree with plaintiffs that section 604(b) of the Marriage Act, considered alone, requires disclosure of the 604(b) report only in the particular proceeding in which the advice is sought. Initially, the plain language of the statute refers only to counsel in that proceeding. 750 ILCS 5/604(b). ***

> Nonetheless, disclosure of the section 604(b) report is clearly intended to be limited to the parties in the particular proceeding. We conclude that section 604(b) of the Marriage Act confines Dr. Amabile's 604(b) report to the McCann postdissolution proceeding.

The Supreme Court then addressed the language of §605 at length and then commented:

> The legislature intended that courts and counsel consider sections 604, 605, and 606 (hearings) together in child custody proceedings. As the comment to section 404 of the Uniform Marriage Act, from which section 604 of the Marriage Act derives, explains: "This section, and the two which follow, are designed to permit the court to make custodial and visitation decisions as informally and noncontentiously as possible, based on as much relevant information as can be secured, while preserving a fair hearing for all interested parties." Unif. Marriage and Divorce Act §404, 9A U.L.A. 381, Comment (1998).
>
> Child custody proceedings epitomize the need for maximum disclosure of information in the goal of reaching justice. *** Section 604(b) "allows the court to seek the advice of professional personnel in order to supplement the evidence provided by the parties." Ill. Ann. Stat., ch. 40, par. 604, Historical and Practice Notes, at 57 (Smith-Hurd 1980). As defendants' supporting amicus observes, courts consider section 604(b) reports to be evidence of record, and consider such reports prepared by mental health professionals as prepared by any other professional personnel. See, e.g., *IRMO Bhati*, 397 Ill. App. 3d 53, 67-68 (2009); Auer, 86 Ill. App. 3d at 87-88.

Regarding the language of the IMDMA, the Supreme Court stated:

> We agree with the appellate court that section 604(b) of the Marriage Act provides no limitations or exceptions when the section 604(b) professional is a mental health professional. 396 Ill. App. 3d at 785-86. Although section 605 of the Marriage Act provides defendants with a remedy, **we conclude that section 604(b) confines disclosure of Dr. Amabile's report to the court, counsel, and the parties in the McCann postdissolution proceeding**.

The Supreme Court decision next addressed the Confidentiality Act in Section B and stated:

> This court has repeatedly recognized that the Confidentiality Act constitutes "a strong statement" by the legislature about the importance of keeping mental health records confidential. *Reda*, 199 Ill. 2d at 60; *Norskog*, 197 Ill. 2d at 71-72. We expressly reaffirm this unmistakable legislative intent. However, the Confidentiality Act simply does not apply in the present case because Dr. Amabile and plaintiffs were not engaged in a therapeutic relationship.
>
> [W]e conclude that section 604(b) of the Marriage Act does not distinguish mental health personnel from other 604(b) professional personnel. Further, although section

> 605 provides defendants with a remedy, **section 604(b) confines Dr. Amabile's report to the McCann postdissolution proceeding. Additionally, the Confidentiality Act does not apply in this case.**
>
> We observe that, in dicta, the appellate court discussed possible remedies that plaintiffs could pursue as an alternative to a Confidentiality Act claim. 396 Ill. App. 3d at 791. While we have reviewed the record in the interests of judicial economy and the need to reach an equitable result (*Bright*, 166 Ill. 2d at 208), we find that the appellate court's suggested remedies fall outside the proper scope of our review of the certified question. See *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 358 (2007).

While a close call, I agree Justice Kilbride's dissent. He urges:

> The plain language of the Confidentiality Act shows that the certified question should be answered affirmatively. Specifically, section 10 of the Confidentiality Act, entitled "Disclosure in civil, criminal, and other proceedings," identifies several exceptions to the Confidentiality Act's blanket prohibition on the disclosure of mental health information. Critically, section 10(a)(4) addresses the precise issue presented in the certified question, the disclosure of mental health *information in a court-ordered examination*, providing that: "Records and communications made to or by a therapist in the course of examination ordered by a court for good cause shown may, if otherwise relevant and admissible, be disclosed in a civil, criminal, or administrative proceeding in which the recipient is a party or in appropriate pretrial proceedings, provided such court has found that the recipient has been as adequately and as effectively as possible informed before submitting to such examination that such records and communications would not be considered confidential or privileged. Such records and communications shall be admissible only as to issues involving the recipient's physical or mental condition and only to the extent that these are germane to such proceedings." (Emphasis added.) 740 ILCS 110/10(a)(4).
>
> Thus, the plain language of section 10(a)(4) allows for disclosure of mental health information obtained in a court-ordered examination only if two important conditions are met: (1) the information must be relevant, germane, and admissible in the proceeding at issue and (2) the recipient must be adequately and effectively informed that any record or communication is not confidential before submitting to the court-ordered examination.
>
> Rather than acknowledging the legislative intent underlying section 10(a)(4), the majority attempts to distinguish the provision by noting that disclosure of mental health information is discretionary under section 10(a)(4) but disclosure of a report under section 604(b) is mandatory. Slip op. at 13-14. That distinction, however, is of little, if any, consequence, and should certainly not be considered dispositive after a careful comparison between section 10(a)(4) of the Confidentiality Act and section 604(b) of the Marriage Act

Because we are left with this Supreme Court decision, the answer should be prompt legislation or

rules addressing the potential void left by this decision. The Supreme Court comments several times that a §604(b) report is apparently confined to the case – what was stated as the court, counsel and the parties. But the case really does not address the key issue, i.e., the potential for redisclosure in other proceedings, etc., of mental health communications. It simply states that §604(b) allows a limited disclosure and that the Confidentiality Act does not apply.

Keep in mind the deliberate language of the Supreme Court where they were not commenting upon the alternative remedies suggested by the appellate court's decision. Therefore, the language of the appellate court decision should be kept in mind:

> Further, we note that section 13.4(a)(i)(h) of the Rules of the Circuit Court of Cook County, which was recently amended, provides that the circuit court "may" issue a protective order with respect to a section 604(b) expert's report. Section 13.4(a)(i)(h) provides: "At the time of the appointment of an evaluation pursuant to 750 ILCS 5/604, the court may issue a protective order prohibiting the parties or their attorneys from disseminating the contents of said report for purposes other than the litigation or to the minor children or to anyone who is not a party to the litigation." Cook Co. Cir. Ct. R.13.4(a)(i)(h) (eff. April 1, 2009). While this provision was recently enacted, the circuit court's rule addresses plaintiffs' public policy concern that if the Confidentiality Act does not apply, the reports from a section 604(b) expert would routinely be disseminated to the public.

But keep in mind that this is a Cook County rule only.

Both orders appointing a 604(b) evaluation as well as local rules as enacted in the state should address the importance of keeping these reports as confidential as is possible in wake of our Supreme Court's decision in this case. While the case stated that, "section 604(b) confines disclosure of Dr. Amabile's report to the court, counsel, and the parties in the McCann postdissolution proceeding" the IMDMA provides no remedy for redisclosure, etc., while there are specific remedies within the Confidentiality Act. But the Confidentiality Act remedies do not apply. So the real issue is that of a remedy for non-compliance.

The Supreme Court stated it was not commenting upon potential other remedies:

> [W]e note that other causes of action may be available to preserve the privacy and confidentiality of the communications at issue particularly when a protective order is involved. See, e.g., *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154 (2007) (patient filed a complaint against hospital and its employee, who revealed patient's pregnancy results to patient's sister at a public tavern, alleging, inter alia, invasion of privacy and negligent infliction of emotional distress); *Cordts v. Chicago Tribune Co.*, 369 Ill. App. 3d 601 (2006) (employee brought invasion of privacy and defamation claims against his employer and a company hired by the employer to evaluate his disability claim, alleging that the company wrongfully disclosed to plaintiff's ex-wife that he was receiving treatment for depression after learning of the fact while evaluating his disability claim). However, we have no cause to consider whether alternative remedies may be available to plaintiffs under the narrow question presented in this

case pursuant to Supreme Court Rule 308. See *Brookbank v. Olson*, 389 Ill. App. 3d 683, 685 (2009) (this court's review is generally limited to the question certified by the trial court).

Custody Modification

***Smithson* – Burden of Proof Regarding Custody Modification: Admission that JPA was Not Working Did not Amount to Stipulation to Terminate Joint Custody**
IRMO Smithson, 407 Ill. App. 3d 597 (4th Dist., January 31, 2011)
Recall that Illinois case law holds that when there are dueling petitions to modify joint custody, the trial court proceeds to a best interest determination rather than address whether there has been a substantial change of circumstances, etc. [*IRMO Lasky*, 176 Ill. 2d 75, 81 (1997)]. Following *Lasky*, this court found in *IRMO Ricketts*, 329 Ill. App. 3d 173 (2002), where both parents file petitions to modify a joint-custody agreement, each seeking sole custody, both parents are, in essence, agreeing joint custody should be terminated and there was no need to show serious endangerment to the child's physical, mental, moral, or emotional health in order to modify the custody agreement. *Ricketts*, 329 Ill. App. 3d at 178.] The former husband contended that, while his former wife had not filed a petition to modify joint custody, her testimony that joint custody was not working constituted a stipulation that she no longer desired to have joint custody and urged that the trial court should have gone straight to a best interest determination. The appellate court correctly noted that the circumstances of this case were different from those found in *Lasky* and *Ricketts*. The appellate court stated:

> Although Christina did testify as an adverse witness she found joint parenting not working, during her attorney's opportunity to elicit testimony to clarify her testimony, Christina testified the reason she did not believe joint custody was working was she believed she was parenting with Julia, James' new wife, and not James. She based her belief on the fact the communication between the two families was conducted mostly by e-mail and James was at work when most of the e-mail exchanges were made. Julia operated an in-home day-care facility and was home during the day. Christina further stated she could continue to joint parent with James and this was in the best interests of the children. ... Both parties did not file petitions to modify custody nor was there a stipulation to that effect. Christina's testimony, equivocal at best, was not an agreement to terminate joint custody. We will not extend the reasoning of either *Lasky* or *Ricketts* to include the facts of this case.

This case also instructively addresses indirectly how not to win a father's custody case. It states, "Both parties presented evidence of the other's flaws...." This case should be required reading and has many interesting quotes such as:

> Although "train wreck" may describe Christina's past life in relation to the men in her life, the evidence indicated she has been a good mother to Jacob and Ryan overall and they were currently thriving in her care. No evidence showed she was currently in any relationship, let alone an abusive one. If James' interest in the boys' well-being remains at its current level, he will keep Christina focused should she be tempted to

falter in her care of the boys.

Many overlook the "necessity" language of the statute but this trial court did not:

> The trial court concluded James did not prove it was *necessary* to change physical custody from Christina to him. The court also concluded the joint-custody arrangement should be terminated, and it was in Jacob and Ryan's best interests to be in Christina's custody. These conclusions and ensuing orders by the court are not against the manifest weight of the evidence or an abuse of discretion.

So the former husband lost his battle for custody but also lost what had been the award of joint custody such that it was modified to an award of sole custody.

Removal

Removal Granted

***Dorfman* – Court Affirms Mother's Removal of Children from Illinois to Georgia over GAL's Objection**

IRMO Dorfman, 2011 IL App (3d) 110099 (August 24, 2011)

The parties were divorced and mother was awarded sole custody in May, 2009. The father's parenting time was reserved in the divorce judgment and following its entry, the father was awarded supervised visitation. The father had a history of severe mental health issues, substance abuse and institutionalization and three emergency order of protection were entered against the Father in favor of the Mother based upon various and numerous allegations of harassment, intimidation and threats. Father was imprisoned from December 2009 to June 2010 for violating the Order of Protection. When not imprisoned father had been generally unemployed and had not paid support. Mother moved with the children to Georgia to live with her father and her step-mother in June, 2010 (the day before her former husband's release from prison). Then she filed a removal petition in August 2010. The mother claimed she did not know she needed permission before removing the children from Illinois. She testified she had better employment opportunities in Georgia and had the support of her father. The mother agreed that the father could have supervised visits (supervised by father's family members) with the children over school breaks.

The GAL made a report to the Court expressing concern that the mother had taken the children and uprooted the children without permission based upon her need to feel "safer." The GAL indicated the Father had never been "physically abusive" to the mother and her fear did not seem reasonable. The GAL also did not believe a reasonable parenting schedule could be reached despite the Father having seen the children once in the last fourteen months. The GAL admitted she did not review father's medical records and did not know of his substance abuse problems. The trial court granted the removal and the appellate court affirmed.

The appellate court, after examining the *Eckert* factors, ruled that while the Mother's motivation for moving was to get distance from the Father, her desire to move was without "fault"on her part, was reasonable under the circumstances, and was not in bad faith. The Court determined that a reasonable visitation schedule, for supervised visits, could be reached, particularly given the mother's

willingness to facilitate the visits and her close relationship with the father's family and the availability of “virtual” visitation. But keep in mind the language of the so called “virtual visitation” amendments that provide that it could not substitute for actual visitation.

The appellate court went on to opine that the trial Court did not use the availability of electronic communication as a factor in support of removal in violation of section 609(a), but rather referred to the availability of electronic communication in passing when discussing Barry's visitation potential: "Specifically , the court noted that Barry was restrained by his ankle monitoring device and an order of protection, that Beth would cooperate with visitation from Georgia due to her close relationship with Barbara and Judy [Barry's family members] that visitation could occur during the week-long breaks from school and over the summer and that "[p]hone and Skype communication would be available."

Also, the *Dorfman* court disagreed with the father's claim the he has been denied any visitation based on the court's ruling. Instead, the appellate court found that the trial judge had essentially reserved the issue to determine if and agreed visitation schedule could be reached and would set the issue of visitation for hearing if an agreement was not reached. By responding "sure" when the trial court proposed this approach, husband consented to what he was now alleged was an error by the court. Finding that the husband had not properly preserved the issue and had not cited any authority for the proposition that the trial court must provide a visitation schedule by the same time if enters Judgment on a petition for removal, the appellate court affirmed the trial court's decision.

***IRMO DTW* – Removal to Professional Basketball Player Father Where Significant Evidence of Alienation – Even Where Removal Petition Filed Late**

IRMO D.T.W and S.L.W., 2011 IL App (1st) 111225 (December 30, 2011)

DTW involves a professional basketball player awarded custody and granted leave to remove the child to Florida. For professional basketball fans, we all know who this case involved: a native son who chose not to sign with the Chicago Bulls.

Alienation: This case involves an award of custody against what was the primary caretaker of the children. The discussion regarding alienation is significant because it affected the removal decision:

> Contrary to respondent's argument, the record shows that her alienating behavior worsened during the two-year course of the custody proceeding. The record also shows that respondent had ample opportunity to comply with Doctor Amabile's recommendations to seek counseling but failed to do so.

Perhaps the most remarkable portion of the decision addressed the trial court's granting leave to remove from Illinois to Florida:

> Respondent claims the court erred in prompting and allowing D.T. to a file a petition for removal after he had rested his case. In the alternative, respondent maintains the court erred in granting D.T.'s petition.

Paternity

***IRPO Unknown Minor* - Putative Father Has Ability to Bring Paternity Proceedings and Obtain Paternity Testing Despite Voluntary Acknowledgment of Paternity**
In Re Paternity of an Unknown Minor, 2011 IL App (1st) 102445 (June 30, 2011)
Respondent was properly found in contempt for refusing to comply with an order to submit herself and her child to DNA testing in petitioner's action alleging that he was the father of respondent's child, even though third-party respondent signed an acknowledgment of paternity when the child was born, since the acknowledgment did not deprive the trial court of authority to determine paternity of the child by establishing a father-child relationship pursuant to section 5 of the Illinois Parentage Act. Rather, the language of section 7(a) of the Act permits a man alleging that he is the father of a child to bring an action to determine paternity, regardless of any presumption of paternity by another man. Accordingly, the petitioner had standing to pursue his claim, and the trial court had authority under section 7(a) to order respondent to submit herself and the child to DNA testing.

Contempt

***Smithson* – Not Indirect Civil Contempt Despite Language in MSA re Required Payment**:
IRMO Smithson, (4th Dist., January 31, 2010)
The contempt issue was the former husband's failure to pay his share of health-care expenses for the children not covered by insurance. The MSA had stated:

> 5. Each of the parties shall maintain medical insurance available to them through their employment for the benefit of the minor children of the parties, and each of the parties shall pay one-half of any medical, dental, optical, orthodontal or other health care related expense for the children not covered by any insurance."

The appellate court stated:

> James admits this agreement exists but contends the parties later agreed Christina would pay all uncovered medical expenses for Jacob and Ryan in exchange for not being obligated to provide medical insurance for them; while James would continue to provide primary medical-insurance coverage for the boys. Christina emphatically denied there was any such agreement. James admits there was no written agreement between the parties modifying the court order. *** He had notice Christina was seeking payment for these expenses at least since she filed the petition for adjudication of indirect civil contempt on September 11, 2009. James did not pay any of those expenses and he had the ability to do so.

I thought, that the court in making the above notations was likely to affirm the contempt issue. Instead, it stated – using a long first sentence.

> James has an arguable point, but we find because he did nothing to reduce the alleged modified agreement to writing or bring it before the court despite the equivocal "agreement" he received from Christina, it was unreasonable for him to rely on the alleged modifications and not pay his share of uncovered medical expenses prior to Christina filing a petition for an adjudication of indirect civil contempt. He was fully aware of the existence of the original agreement as to uncovered medical

> expenses. We do not believe his conduct supports a finding of civil contempt. Instead, we conclude his conduct was *not* justified and he remains responsible for his share of uncovered medical expenses and the attorney Christina incurred seeking to enforce the original agreement.

Comment: The better issue would have been fees under §508(b), i.e., whether he could maintain his burden of demonstrating compelling cause or justification for non-compliance. Strategically, this should have been the former wife's focus rather than the contempt issue.

Guardianship

Guardianship of Children:
***TPS* - Co-guardian of Children Who Was Not Biologically Related Has Standing to Oppose Petition to Terminate Guardianship Brought by Her Long Term Same Sex Partner**
In Re T.P.S. 2011 IL App (5th) 100617 (June 20, 2011)
The parties were involved in a long term same-sex relationship, during which the Petitioner (Dee) gave birth to two children. The respondent, Cathy, became co-guardian of each child pursuant to a guardianship set up for each child shortly after the birth of each. The petition filed after the birth of the first child alleged, among other things, that the two women already shared in T.P.S.'s daily care and that they both provided for his financial needs. A court-appointed guardian ad litem recommended that the court grant the petition. After the birth of the second child, a similar procedure was filed. After the parties ended their relationship, Dee sought to terminate the guardianships. Cathy argued that she had standing and that while the superior-rights doctrine is a presumption it is not absolute. She noted that once a guardianship has been established, a biological parent seeking to terminate the guardianship must show that a substantial change in circumstances has occurred and the court must consider whether terminating the guardianship is in the children's best interests. The trial court found that Cathy lacked standing to oppose Dee's petitions because she was not the children's biological or adoptive parent based on the superior rights doctrine. The appellate court noted the following colloquy between Cathy's lawyer and the judge:

> "COURT: Where is the standing for a determination such as this?
> MS. SCHAFER: The determination to be made?
> COURT: Yeah. Michelle, I understand what's going on here. These two have split up.
> MS. SCHAFER: Correct.
> COURT: You're wanting to proceed such as in a divorce. I understand that. It's my understanding–and correct me if I'm wrong–that Illinois doesn't recognize this type of
> a union."

The court then asked, "Where's the standing for a non-parent to raise custodial rights in a circumstance *such as this*?" (Emphasis supplied by appellate decision) Counsel replied that Cathy had standing because she was appointed as a co-guardian. The court asked Cathy's attorney to point to a case that decided the issue of a nonparent's standing in the specific context of a same-sex couple. Counsel acknowledged that there were no such cases. The court inquired: "Let me ask you this. How

do we get it to the appellate court to get it decided?" Counsel argued that cases dealing with the standing of other nonparent guardians in other contexts supported her position that Cathy's status as a co-guardian gave her standing. The trial court granted the petitions to terminate stating:

> "I think she ought to have the right to come here, and I think she ought to have the right to present evidence, and she ought to have the right to attempt to have custody of these two children. I don't think the law in the state of Illinois gives her that opportunity since she is not related to these children and did not adopt these children. I believe that there is no standing by [Cathy] as the law in Illinois now stands. I don't think I can state it any clearer that I disagree with the law, but I think I am bound to follow that law."

Cathy appealed and the appellate court reversed. The appellate court noted that on January 1, 2011, the Probate Act was amended to codify and expand on the applicable rules. Section 11–14.1 now provides that if a parent files a petition to terminate the guardianship, the court "shall *** terminate the guardianship if the parent establishes, by a preponderance of the evidence, that a material change in the circumstances of the minor or the parent has occurred ***; unless the guardian establishes, by clear and convincing evidence, that termination of the guardianship would not be in the best interests of the minor." Pub. Act 96–1338 (eff. Jan. 1, 2011) (adding 755 ILCS 5/11–14.1(b)). The statute goes on to mandate that courts consider "all relevant factors" in making the best-interests determination and lists several of those factors. Pub. Act 96–1338 (eff. Jan. 1, 2011) (adding 755 ILCS 5/11–14.1(b)).

The appellate court stated:

> It is clear, then, that both the courts of this state and its legislature contemplate a role for an appointed guardian in proceedings to terminate a guardianship. There are good reasons for this. Once a guardianship has been established, the court has already found either that the parent consented to the guardianship or that the parent was unable or unwilling to meet the child's daily needs. Either of these conditions is sufficient to rebut the presumption that the parent's rights to the care and custody of the child preclude the guardian from having any say in proceedings to terminate the guardianship. The circumstances surrounding a petition to terminate a guardianship are inherently different from those surrounding a petition to establish a guardianship. Here, a court has already found that it was appropriate to grant Cathy the authority to act as the children's guardian. This gives her a cognizable interest in their welfare. Moreover, obviously, the court could not appoint Cathy as a guardian in the first place unless it found that the presumption of the superior-rights doctrine was overcome.

The appellate court closed by noting, "In addition, although a guardian has standing to oppose the termination of a guardianship, she must still prove by clear and convincing evidence that a continuation of the guardianship is in the children's best interests."

Guardianship of Disabled Adult

***Karbin* – Appellate Court's 2011 Decision Reversed in 2012 by Illinois Supreme Court Re Authority of Plenary Guardian to Continue Divorce Proceedings on Behalf of Ward Where Spouse Initiated Divorce and Guardian Filed Counter-Petition on Behalf of Disabled Person - Case Reversed by Illinois Supreme Court.**

Karbin v. Karbin, 2011 IL App (1st) 101545 (06/30/11) and 2012 IL 112815 (October 4, 2012) Where a husband filed a petition for the dissolution of his marriage to a disabled person and the disabled person's plenary guardian filed a counterpetition for dissolution, the trial court properly dismissed the guardian's petition after the husband voluntarily dismissed his petition and left the guardian's petition as the only pending dissolution petition. I will focus on the portions of the Illinois Appellate case that is relates to the ultimate decision by the Illinois Supreme Court in October 2012.

The appellate court had reasoned that the Illinois Supreme Court's rulings in *IRMO Drews* (115 Ill. 2d 201, 203-04 (1986), and *IRMO Burgess* (189 Ill. 2d 270 (2000)), that a plenary guardian does not have authority to seek a dissolution of marriage on behalf of award applied. The issue was whether the language of section 11a–17 of the Probate Act authorizing a guardian to "maintain" a dissolution action if the ward filed a petition for dissolution before being adjudicated a disabled person could be construed as giving the guardian authority to proceed with seeking a divorce. Recall that *Drew* had held that the plenary guardian does not have standing to maintain a divorce action on behalf of the ward. But *Burgess* had ruled that the bar in *Drews* did not apply to a divorce petition filed before the guardian was appointed for the petitioning spouse.

Comment: I had regarding the appellate court opinion:

> I agree with Justice Cahill's dissent. "... I believe *Drews* can be limited to cases initiated by the guardian of the disabled spouse. I would remand this case with directions to the trial court to decide whether the counterpetition filed by the guardian is in the best interest of the ward."

The Illinois Supreme Court did just this, "For the foregoing reasons, we reverse the judgments of the appellate and circuit courts. This cause is remanded to the circuit court for further proceedings consistent with this opinion."

The Illinois Supreme Court concluded:

> In our view, the circuit court's assessment of the petition for dissolution filed by a guardian on behalf of a ward pursuant to the standards set forth in section 11a-17(e) provides the needed procedural and substantive safeguards to ensure that the best interests of the ward are achieved while preventing a guardian from pursuing a dissolution of marriage for his or her own financial benefit, or because of the guardian's personal antipathy toward the ward's spouse. *To further safeguard the interests of all parties involved, we agree with Marcia that the guardian must satisfy a clear and convincing burden of proof that the dissolution is in the ward's best interests*. We believe a heightened burden is appropriate because "[c]ases involving the dissolution of an incompetent spouse's marriage *** present issues involving personal interests more complex and important than those typically presented in a civil lawsuit." *Ruvalcaba*, 850 P.2d at 683; cf. *In re Longeway*, 133 Ill. 2d at 51. (Emphasis added.)

Evidence, Discovery Cases and Other

***Hall-Walker* -- Oral Settlement Agreement Upheld**
In re Nancy Hall-Walker, Debtor, 2011 WL 652461.
The Bankruptcy Court upheld the trial court's ruling that oral settlement agreement was reached between the former wife and Respondent concerning her claim for damages against Respondent for violation of the automatic bankruptcy stay. The testimony showed that counsel had offered $5,000 to settle the claim, that a copy of a proposed written settlement agreement was tendered, as well as a check in the amount of $5,000. The former wife had accepted the offer through counsel and only after she thought about her decision overnight did she recant the acceptance. The evidence showed there was a valid offer, acceptance, and meeting of the minds as to the material terms of the settlement agreement, which bound the parties to its terms.

***Duncan v. Peterson* – False Light Invasion of Privacy Claim Affirmed**
Duncan v. Brevin Peterson and the Moody Church, 408 Ill. App. 3d 911 (Second Dist., December 30, 2010)
I review this case because occasionally in divorce proceedings one may threaten or publish material to the public that is false and may damage an individual. A cause of action exists: "False Light Invasion of Privacy."

The question was whether the dissemination of the letters to individual members of a church constituted false light invasion of privacy. It was ruled that the general subject matter of the dispute did not involve internal church matters and accordingly the ecclesiastical abstention doctrine did not apply. A contention was that because the contents of the letter to the church members contained religious opinions and could not be proved false, no false-light-invasion-of-privacy claim can be sustained, no matter how derogatory the contents of the letters might be. The appellate court commented that the enclosure to the letter:

> stated all accusations contained within it as fact, not as opinion. The letter stated, "You have had an improper relationship with a divorced single woman," "Your decision to file a divorce petition against your wife," "Your misuse of alcohol," and "Your misuse of personal funds ." Moreover, some of these factual allegations were falsehoods, such as that plaintiff filed a divorce petition against his wife, and the other allegations were stated without any investigation, such as that plaintiff misused alcohol and personal funds. As the April 23, 2000, letter was enclosed with the May 9, 2000, letter, it was part of the publication serving as the basis for the false-light-invasion-of-privacy claim. Because the April 23, 2000, enclosure contained false of fact, this argument fails. See *Duncan*, 359 Ill. App. 3d. at 1037-38 (May 9, 2000, letter included April 23, 2000, letter and May 5, 2000, letter as enclosures).

The next issue was conditional privilege. The fair report privilege provides that the:

> "'publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public

> concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.' " *Solaia Technology*, 221 Ill. 2d at 585, quoting Restatement (Second) of Torts §611 (1977). There are two requirements to establish the privilege: (1) the report must be of an official proceeding; and (2) the report must be complete and accurate or a fair abridgement of the official proceeding.

The case fairly rejected the contention that this privilege may apply because it not "a report or summary of an official proceeding but "was instead a series of accusations and requests by leaders of a church." Moreover, even this privilege is only conditional and it can be overcome at trial if one provides that one either intentionally published the material while knowing the matter was false or displayed a reckless disregard as to the matter's falseness. Elements of this cause of action include (1) falsity of the statement; (2) evidence of actual malice; and (3) whether one was placed in the false light "before the public."

***Wade* – Bifurcation: Trial Court Properly Bifurcated Case Where Showing of Appropriate Circumstances Due to Impact of Protracted Litigation on Children**

D.T.W., 2011 IL App (1st) 111225 (1st Dist., March 31, 2011)
www.state.il.us/court/Opinions/AppellateCourt/2012/.../1111203.pdf
The appellate court first recited the black-letter law re bifurcation:

> However, a court may only enter a judgment of dissolution while reserving resolution of the issues of child custody, child support, or maintenance upon agreement of the parties or a motion by either party and a finding that appropriate circumstances exist. 750 ILCS 5/401(b)

The trial court had first mentioned that the list provided in the seminal *Cohen* decision was non-exhaustive list. The trial court then stated that it felt the extended and protracted litigation was a problem and that it believed the highly contentious nature of the case was having a serious and detrimental impact on the mental health of the parties' children. The court further stated that respondent had caused multiple delays by continually replacing her attorneys, reiterated that it was "very troubled and concerned about the impact that all of this has had upon the children," and found that appropriate circumstances existed to grant petitioner's motion to bifurcate. The court then explained that it did not think bifurcation would have a detrimental impact on the case because a custody trial had been scheduled and the financial issues were not going to be resolved anytime soon, due in part to the size of the marital estate. The appellate court stated:

> Although the parties discuss numerous bases that the circuit court allegedly relied upon, or could have relied upon, to justify bifurcation in their briefs, it is clear from the court's comments that it granted bifurcation because it was in the best interests of the parties' children, and not because it wanted to punish respondent for repeatedly changing counsel or delaying the proceedings.

The appellate court next stated:

> Having determined that bifurcation may be justified where necessary to alleviate the detrimental impact of the dissolution proceedings on the parties' children, we now

must decide whether the circuit court abused its discretion by finding that appropriate circumstances existed to justify bifurcation on that basis in this case.

The court then concluded:

> The court was confronted with an unusually protracted and contentious litigation in this case, which it reasonably believed was having a detrimental impact on the mental and emotional health of the parties' children. By granting a bifurcated judgment of dissolution, the court at least resolved one issue present in the proceedings and provided the parties and their children with certainty and finality regarding the parties' marital status. Unlike in *Cohn*, 93 Ill. 2d at 200, where the circuit court did not give any consideration to the question of whether bifurcation was necessary, here the court acknowledged the general presumption against bifurcation and considered the relevant case law and the unique circumstances present in this case before concluding that bifurcation was justified.

***Mather* – Forum Non-Convenience: Trial Court Properly Transferred Case from Cook County to DuPage County**

IRMO Mather, 408 Ill. App. 3d 853 (1st Dist., March 31, 2011)

The "public interest factors in a forum non-convenience motion include:

> (1) the interest in deciding controversies locally;
> (2) the unfairness of imposing trial expense and the burden of jury duty on residents of a forum that has little connection to the litigation; and
> (3) the administrative difficulties presented by adding litigation to already congested court dockets." (Citations omitted).

Because there was no evidence that one court or the other was more congested the key factors were the first two:

> First, the public interest factor of deciding locally marital controversies favors transfer. In domestic relations cases where the marriage occurred in the same county that the marital home was located and the children resided, there is a strong tie to that county. Here, the parties were married in Du Page County, they both lived in Du Page County until 19 days before Tim filed for dissolution, when he rented a second apartment in Cook County. The children live in Du Page County, they go to school in Du Page County, and their mother works and lives in Du Page County. Those factors provide strong ties to that county.

Regarding the second factor the appellate court stated:

> Second, the unfairness of imposing trial expenses and the burden of jury duty on residents of a forum that has little connection to the litigation favors transfer. Although this is not a jury matter, Cook County has such a minimal tie to this case that it could be considered unfair to impose the expense of a trial on its citizens only because Tim leased a Chicago apartment 19 days before he filed his action for dissolution. However, ordinarily "the unfairness of imposing trial expense is really

not a consideration when the two county court locations are only 32 miles apart." *Shirley v. Kumar*, 404 Ill. App. 3d 106, 112 (2010). Until 19 days before the filing of the action, Tim did not reside in Cook County. However, he did work here and therefore had some ties to Cook County.]

***Schneider* -- Supreme Court Rule 137 Sanctions / Specific Performance Re a Get**

Schneider v. Schneider, 408 Ill. App. 3d 192 (1st Dist. 2nd Div., filed March 15, 2011)

This is one of a number of cases throughout the nation addressing a refusal by one to give a get (a divorce under Jewish law.) A footnote explained:

> A get is a divorce document, which according to Jewish Law, must be presented by a husband to his wife to effect their divorce. The essential text of the get is quite short: "You are hereby permitted to all men," i.e., the wife is no longer a married woman, and the laws of adultery no longer apply. The get also returns to the wife the legal rights which a husband holds in regard to his wife in a Jewish marriage.

The parties had been married under a Jewish ceremony which, among other things, required them to enter into a ketubah (a pre-marital contract under Jewish law). The parties did enter into that contract. After the parties were divorced (the civil divorce), the former wife sought her former husband's cooperation in obtaining this get. After she was unsuccessful, she filed a chancery action seeking specific performance of the ketubah -- the premarital agreement. She did this because under orthodox Jewish law she remained married until she obtained a get. The decision explains:

> If a husband refuses to give his wife a get, the wife becomes known as "agunah," or "chained." If an agunah were to marry again, this second marriage would not be recognized under Jewish law and tradition and the wife would be seen as adulterous. Any children of the second marriage would be considered "mamzerim," or illegitimate.

The former wife contended that the based on *In re Marriage of Goldman*, 196 Ill. App. 3d 785 (1990), the ketubah that she and her former husband had signed during their marriage ceremony formed a binding contract that required Earl to give her a get in the event that their civil marriage was dissolved. In six different pleadings the former husband raised essentially the same argument, i.e., that *IRMO Goldman* did not apply. An interesting quote that could be taken out of context stated:

> Rule 137 is not a means by which the trial court should punish litigants whose arguments do not succeed; instead it is a tool which they can employ to prevent future abuse of the judicial process or discipline in the case of past abuses.

Supreme Court Rule 137 states:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ***

The appellate court then stated:

> In the instant case, Earl repeatedly argued that this court's decision in *IRMO Goldman*, 196 Ill. App. 3d 785 (1990), upon which Jodi relied, was inapplicable and distinguishable on its facts. By our count, Earl raised this same argument in six different pleadings beginning with his initial motion to dismiss Jodi's complaint and ending with his reply to Jodi's answer to his motion to reconsider and vacate the order of June 3, 2009. In each of these pleadings, Earl used similar language and argument with minimal if any citation to case law. And each time, Jodi filed the appropriate responsive pleadings. Even though the trial court denied Earl's motion to dismiss based upon his reading of *Goldman*, Earl continued to raise this argument as a defense to each and every action that Jodi and the trial court took in an attempt to bring the case at bar to resolution. Although not relevant to the issue of Rule 137 sanctions, which deal only with pleadings, motions, and other papers filed with the trial court, Earl's counsel repeatedly raised the same *Goldman* arguments at oral argument before the trial court.

The appellate court then looked to the whether *Goldman* applied in determining whether sanctions should have been brought. The appellate court rejected the former husband's arguments that *Goldman* was applicable. It commented:

> Earl's arguments that *Goldman* is distinguishable on its facts are without merit. Earl highlighted the following factual differences in his pleadings: (1) the wife in *Goldman* had included a count for specific performance in her divorce petition; (2) in *Goldman*, the ketubah issue arose prior to the entry of a judgment of dissolution of divorce; and (3) an evidentiary hearing was held in *Goldman*, in which rabbis testified that because the husband was using his refusal to give a get as a means of extorting concessions from his wife and because the husband had abandoned his wife, the get did not need to be voluntarily given. The first two differences are *de minimis*. In the instant case, Earl filed the petition for divorce, and thus we cannot expect Jodi to have sought specific performance in that proceeding. Indeed, because it was Earl who filed the petition, it would have been reasonable for Jodi to assume that Earl would seek to dissolve the marriage under both Illinois civil law and Orthodox Jewish law.

The lack of an evidentiary hearing under different circumstances might provide a basis for distinguishing this court's decision from *Goldman*. However, the facts in this case make that argument unpersuasive here. The blame for lack of an evidentiary hearing can be placed solely upon Earl's failure to respond and act in accordance with court rule.

Comment: I liked the discussion of the circular nature that litigation can often involve:

> Even after the trial court issued its September 19, 2008, order directing Earl to sign a form allowing Jodi to pursue a get, Earl continued to press his arguments that *Goldman* did not apply. Once the trial court had determined the issue of specific performance, Earl employed his *Goldman* argument as a defense to the trial court's order granting Jodi attorney fees. Everytime Jodi presented the court with a petition for fees, Earl would file a responsive pleading raising the same *Goldman* argument. Jodi would then respond and file a supplemental petition updating her request for fees to include attorney fees and costs incurred in responding to Earl's latest pleading, and

> Earl would file another response raising the same *Goldman* argument. This cycle continued for several months until the trial court finally denied Earl's motion to reconsider on July 13, 2009.

The appellate court concluded:

> Because Earl raised the same baseless argument repeatedly in response to Jodi's every filing, even after the trial court's judgment on the merits, we can see no reason for these pleadings except "to harass or to cause unnecessary delay or needless increase in the cost of litigation."

The appellate court affirmed sanctions of $54,516.22 pursuant to Supreme Court Rule 137.

Appeals

***Molloy* – Whether Order Amounts to Injunction – Ministerial Order Under §604.5 Prohibiting Attorneys from Accompanying Party to Custody Evaluator Interview**
IRMO Molloy, 407 Ill. App. 3d 987 (1st Dist., February 10, 2011)

The critical distinction in determining whether an order is an injunction and immediately appealable is whether the order is simply ministerial:

> However, as our supreme court made clear, the language of an order does not determine whether it may be appealed. *In re A Minor*, 127 Ill. 2d at 260. "Not every nonfinal order of a court is appealable, even if it compels a party to do or not do a particular thing." *In re A Minor*, 127 Ill. 2d 247, 261-62, (1989). Court orders that are ministerial or administrative cannot be the subject of an interlocutory appeal. *In re A Minor*, 127 Ill. 2d at 262. An order is deemed ministerial or administrative if it regulates only procedural details of the litigation before the court.

The appellate court concluded:

> No injunctive relief under Supreme Court Rule 307(a)(1) was granted by the circuit court's order barring the petitioner's attorneys from accompanying the petitioner to his interview with the evaluator under section 604.5 of the Illinois Marriage and Dissolution Act. The order was ministerial, setting a condition on a custody evaluation as section 604.5(b) expressly provides. We have no jurisdiction to address this interlocutory appeal.

Note that no reply brief was filed.

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Last Updated on: May 26, 2016