2009 SUMMARY OF SIGNIFICANT ILLINOIS DIVORCE AND FAMILY LAW CASES / 2009 LEGISLATION

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Property Cases Law:

Retirement Benefits Case:

QILDROs:

***Winter* - Imposition of Constructive Trust for Pension Distributions Where Party Refuses to Sign Consent for Issuance of QILDRO**
IRMO Winter, 387 Ill. App. 3d 21 (1st Dist., 2008)
The 2008 case law summary addresses *Winter* more fully. I review *Winter* briefly here because it is excellent reading in comparison to the *Plunkett* decision. Recall that this case addressed the Second District's opinion in *IRMO Menken*, 334 Ill. App. 3d 531 (2d Dist. 2002), holding that the trial court lacked authority to order a state governmental plan participant to execute a consent for issuance of a QILDRO but had authority to enter a "triangular" type order, that is, one in which the participant is ordered to pay over the appropriate portion of his or her pension funds if and when received. In *Winter*, the triangular order and reliance upon the contempt power of the court was not workable because the participant lived outside of the United States. Therefore, the case the appellate court affirmed the trial court's imposition of a constructive trust. The most interesting language of the decision was the comment, "(We note, Ms. Winter did not challenge *Menken's* holding that a court may not compel consent under the QILDRO statute.)" The comment by the court seemed to reflect a frustration with not being able to review the issue presented by the Second District's *Menken* decision.

***Plunkett* - QILDROs / MSA as Effectively Constituting Consent for Issuance of QILDRO Even Where it Refers to a QDRO**
IRMO Rafferty Plunkett v,. Plunkett, 392 Ill. App. 3d 100 (Third Dist., 2009)
The *Plunkett* decision states:

> As part of the settlement agreement incorporated into the dissolution judgment, Marie was awarded 50% of Patrick's pension plan benefits acquired during the marriage. The judgment provided, in part:
>
> "As the Defendant is currently receiving his pension, it is the agreement of the parties that the Defendant shall pay Plaintiff one-half (½) of said pension amounts directly to Plaintiff commencing October 1, 1998[,] and continuing thereafter until such time as a Qualified Domestic Relations Order1 becomes effective for the benefit of Plaintiff."

It then explains in a footnote:

> The dissolution order incorrectly called for a qualified domestic relations order (QDRO). A QDRO is a creature of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C.A § 1001 et seq. (2006)), and although it is also a method

> for dividing pension benefits between the employee spouse and the nonemployee spouse pursuant to a dissolution of marriage, ERISA does not apply to an employee benefit plan if it is a government plan. *In re Marriage of Carlson*, 269 Ill. App. 3d 464, 466–67, 646 N.E.2d 321, 323 (1995). Prior to July 1, 1999, there was no statutory basis following the dissolution of a marriage for the apportionment of a government pension plan, a void addressed by the QILDRO legislation. C. Fain, Qualified Illinois Domestic Relations Orders: A Retirement System View, 88 Ill. B.J. 533 (2000).

The key quotation stated:

> The judgment for dissolution order contained nearly all the provisions required by the Pension Code and as such, meets the requirement of the written consent called for in the Pension Code. Patrick's consent should be considered binding, as would any other provision of the contracted settlement agreement. Patrick's consent, through the agreed settlement, can be read together with the QILDRO forms provided by SURS to give effect to the intention of the parties in reaching the settlement and to fulfill the substantial compliance directive of section 1-119(m)(1) of the QILDRO legislation. In the instant case, the trial court retained the authority to enforce the settlement agreement, just as it could have directed SURS at the time of the dissolution order to direct pension payments to Marie.

Comment: The original *Menken* decision is the first post-QILDRO decision holding that because you cannot order a participant (provided benefits began accruing post 1999) to sign a consent and therefore the proper approach is the so called triangular approach. Read *Menken* together with *IRMO Winter*, (1st Dist., 2008), *IRMO Culp* (4th Dist. 2010) and *IRMO Plunkett*, (Third Dist., 2009).

Winter held that the court could impose a constructive trust on pension distributions where a triangular order cannot work due to the participant being outside of the jurisdiction of the court, I have noted that the most interesting language of *Winter* was the comment, "(We note, Ms. Winter did not challenge Menken's holding that a court may not compel consent under the QILDRO statute.)" This comment by the later *Winter* decision seemed to reflect a frustration with not being able to review the issue presented by the Second District's *Menken* decision.

Culp, in turn, addresses a different nuance, i.e., what occurs where the settlement agreement provides for an equal division of benefits under the Illinois Pension Code [there SERS benefits] per a QILDRO but where the participant then refuses to sign the consent to issue a QILDRO. So in *Culp* the question whether the MSA provision was tantamount to a consent such that the a QILDRO could be entered by ordering the husband to sign the consent. Remember that in *Culp* the trial court ordered the ex-husband to sign the consent for issuance of a QILDRO. As a matter of guidance the husband did not appeal from the issue of the order of the trial court to sign the consent based on the MSA language. My speculation is that the participant abandoned this approach based upon the Plunkett decision.

Instead, the case which effectively addressed this issue was the *IRMO Plunkett* decision. *Plunkett*

involved the issue of whether the MSA could constitute a consent for the issuance of a QILDRO where the MSA mistakenly referred to the a Qualified Domestic Relations Order rather than a QILDRO. *Plunkett* had then held:

> The judgment for dissolution order contained nearly all the provisions required by the Pension Code and as such, meets the requirement of the written consent called for in the Pension Code. Patrick's consent should be considered binding, as would any other provision of the contracted settlement agreement. Patrick's consent, through the agreed settlement, can be read together with the QILDRO forms provided by SURS to give effect to the intention of the parties in reaching the settlement and to fulfill the substantial compliance directive of section 1-119(m)(1) of the QILDRO legislation. In the instant case, the trial court retained the authority to enforce the settlement agreement, just as it could have directed SURS at the time of the dissolution order to direct pension payments to Marie.

So we have a growing body of exception to the hardship imposed by the requirement based upon the language in the Illinois Pension Code that a participant who accrued benefits prior to the effective date of the original QILDRO legislation needed to sign a consent for issuance of a QILDRO. The reason for this language had been the belief that if it was not included in the statute there may be an unconstitutional wrongful taking. While this belief was surely misguided we are left with cases trying to carve out exceptions to the problems imposed by the limitations of the original QIDRO legislation.

***Kennedy* - Property / Retirement Benefits / ERISA: Plan Administrator Must Follow the Plan in Spite of Ex-Spouse's Waiver of Benefits**

Kennedy v. Plan Administrator for DuPont Savings & Investment Plan, 172 L.Ed.2d 662, 129 S.Ct. 865 (2009)

In January 2009, the U.S. Supreme Court held that a waiver of plan benefits in a divorce decree that did not amount to a QDRO was not effective when that waiver was inconsistent with the plan documents. Accordingly, the a plan administrator should follow the plan documents in distributing benefits. In this case, the husband's former wife waived any benefit from his employer's savings and investment plan (SIP). But he never changed her as beneficiary on his plan. The Supreme Court held that the plan administrator properly followed the plan documents – giving the death benefit to the former wife, in spite of her waiver, because the administrator's duty is to follow the plan. Since the ex-wife was still the named beneficiary, she was entitled to the benefits.

Practice Tip: This case is one more warning of the importance to remind clients at the conclusion of the case to change their beneficiary designations of their retirement plans.

Classification of Property:

Retained Earnings – Income from Non-Marital Corporation and Marital Energies Issue / Reimbursement

***Lundahl* - Retained Earnings Constituted Marital Property from Non-Marital Corporation but Amount was in Error**

IRMO Lundahl, 919 N.E.2d 480 (Second Dist. 2009)

Based on the facts of this case, the retained earnings of a non-marital corporation were determined to be marital property. The appellate court based its reasoning in part on the language of §503(a)(8) that provides that income from property acquired prior to marriage is nonmarital property if it is not attributable to the personal effort of a spouse. The appellate court concluded stated:

> Lundahl was the sole owner and shareholder of AIS, and thus the income of AIS during the marriage was attributable to Lundahl, making such income marital property. Accordingly, pursuant to both *Joynt* and the statute, the retained earnings of AIS were properly classified as marital property by the trial court.

Key language regarding *Lundahl* reasoning states:

> [O]ther states have generally held that retained earnings are nonmarital by evaluating two primary factors: "(1) the nature and extent of the stock holdings, i.e., is a majority of the stock held by a single shareholder spouse with the power to distribute the retained earnings; and (2) to what extent are retained earnings considered in the value of the corporation." *Joynt*, 375 Ill. App. 3d at 819. Contrary to the parties' interpretation of the case, **we do not believe that the *Joynt* court has set forth a "two-part" test**. Rather, the Third District acknowledged that these *were two primary factors that other jurisdictions relied upon.* Some jurisdictions, as Lundahl noted, relied on *only* one of those two factors. Nonetheless, we will evaluate both factors in light of the facts of the case at bar. (Emphasis added.)

The appellate court noted:

> Lundahl wholly owned AIS, was the sole shareholder of AIS, and could have unilaterally declared or withheld dividends. In fact, Lundahl unilaterally took disbursements from AIS's retained earnings in the amount of $147,000 in 2004, $218,000 in 2005, and $411,500 in 2006 without requiring approval from anyone else.
>
> [T]he retained earnings of AIS were not held by the corporation to pay expenses. They were not used to pay dividends, nor were they used in connection with the corporation. Additionally, they were taxed to Lundahl who paid the income tax on the earnings. Accordingly, we find that the retained earnings constituted Lundahl's income, rather than an asset of AIS.

Comment by GJG: Curiously, the *Lundahl* case fails to cite *Schmitt*, also a Second District case. Query: Why?

Schmidt

IRMO Schmitt, 391 Ill.App.3d 1010 (2nd Dist., 2009)

At the time of the divorce, the husband was the sole owner of a closely held corporation, Bricks, that was the successor corporation to a number of business ventures in which the husband had been involved since before the marriage. The husband took the position that all of his business entities since 1970 came from an entity known as Colonial. The acquisitions included significant real estate holdings of substantial worth.

Regarding the original premarital corporation, Colonial, the husband was given distributions to make the down payments and mortgage payments for certain real estate. The payments for the real estate were paid via what was reflected as end of the year distributions. The trial court had found that the husband's non-marital estate had a value of $6 million and the marital estate had a value of $350,000. The trial court awarded the wife what it found to the be the marital estate and required the husband to pay $1M in gross maintenance and arrearage. The appellate court reversed.

The appellate court stated:

> Thus, the distributions were income to Kim. Kim also testified that he purchased the Kedzie properties as an individual. We find nothing in the record sufficient to rebut the presumption that the distributions were attributable to Kim's personal efforts. Therefore, the trial court's finding that the Kedzie properties were purchased with nonmarital funds, and were thus nonmarital, is against the manifest weight of the evidence.

Regarding other real properties and businesses acquired during the marriage, funds from Colonial were used to purchase them. In this regard, the appellate court stated:

> Accordingly, Kim failed to establish by clear and convincing evidence that the funds used to purchase these assets were not distributions ("dividends," see *Joynt*, 375 Ill. App. 3d at 821) and, thus, income attributable to his personal efforts. Therefore, the trial court's finding that they were purchased with nonmarital funds is against the manifest weight of the evidence.

It is noteworthy there was testimony that the funds used to purchase these assets came from the operating account. The appellate court stated:

> However, this does not negate the fact that Kim could not recall whether these withdrawals were later charged against Kim's retained earnings account, thus constituting a distribution to Kim.

In an interesting quote, the appellate court stated:

> Further, although retained earnings in subchapter S corporations are generally considered nonmarital, they are considered marital if the spouse has control over the decision to disburse the retained earnings. See *Joynt*, 375 Ill. App. 3d at 819.

Regarding the purchase of another corporation during the marriage, Bricks, the appellate court stated:

> Kim testified that he did not know whether the money from Bricks was credited to his retained earnings account. Kim, as sole shareholder of Bricks, had complete control of and access to the retained earnings. Thus, the inference to be drawn from the evidence is that the funds were attributed to his personal efforts. Accordingly, the retained earnings of Bricks, and all assets Kim purchased with them, are presumed to be marital, and the record does not show that Kim rebutted with sufficient evidence either the inference or the presumption. Thus, the trial court's finding that Bricks and the assets purchased by Bricks were nonmarital is against the manifest weight of the evidence.

The next issue regarding the reimbursement issue was perhaps one of the most compelling. Recall that a party is not entitled to reimbursement due to marital energies if the marital estate has already been compensated due to salary or income from the non-marital efforts. The trial court found that the yearly salary of $20,000 from 2000 to 2006 as well as expenses paid for the wife and the children was sufficient to adequately compensate the marital estate. The appellate court noted that:

> Kim did not present evidence of his contributions for expenses for Sandra and the children for 1974 through 1999, which constituted most of the parties' marriage. The trial court's finding that $895,000 was sufficient to reimburse the marital estate, from Bricks' gross value along with its purchases of approximately $10,761,000 in real estate, is against the manifest weight of the evidence.

Read the line of cases discussed and distinguished in this case. Regarding the *Joynt* case, review my 2007 case law review. For a good discussion regarding this case and Illinois case law regarding retained earnings, see: "Retained earnings of a family business: Income, asset, or both?" Rory T. Weiler, ISBA FLS Newsletter, July 2009. Regarding lessons to be learned, Rory states:

> First of all, it seems clear that in order to establish retained earnings as a distinctly non-marital asset, several things must be present. A minority interest which is not controlling and cannot declare distributions is likely the best and easiest way to put these retained earnings into the non-marital category. There must also exist well-kept books, and clear distinctions between salary/compensation and distribution/dividends must be drawn and maintained. Distributions or "draws" that cannot be specifically tied to dividends distributed from retained earnings will not likely pass muster as anything other than compensation for personal efforts, and therefore potentially be subject to classification as marital property. This means that the niceties of good bookkeeping and accounting need to be instituted and maintained.
>
> Equally clear is the idea that for sole shareholders who completely control access to and distributions from retained earnings, establishing the non-marital character of retained earnings will be an uphill battle. Both *Joynt* and *Schmitt* seem unequivocal in their statements that retained earnings will be considered marital if the spouse has control over the decision to disburse the retained earnings. But all is not lost. The

> Second District seemed to leave the door open a little to the sole shareholder to rebut "the inference" that retained earnings controlled by a sole shareholder are marital.
>
> How might that be done? Perhaps, as is often common, a financing and security arrangement with the business' lender precludes, or severely restricts, the shareholders ability to draw distributions from the corporation. Perhaps the sole shareholder has yet to pay for the business purchase, and the seller, perhaps Dad or the Family Trust has rights under the contract to limit distributions to the shareholder. In the very common family business situation, where the spouse inherits the controlling interest from a parent or parents, the payment of estate taxes could be another reason why distributions are limited to the sole shareholder. None of these arguments have been tested, but anything that would impede the shareholder's access or control over retained earnings would appear to be worthy of arguing, given the *Schmitt* court's commentary. ISBA FLS Newsletter, July 2009, Vol. 53, No. 1, p. 4.

Comment: The Defendant filed a petition for leave to appeal. I was somewhat surprised that it was denied.

***Sanfratello* - Pizza Restaurants were Marital and Where Party Makes Business Valuation Process Nearly Impossible He Cannot Complain about Trial Court's Discretion in Valuing Businesses / Marital Home Acquired in Anticipation of Marriage Despite Being Gift from Parents**

IRMO Sanfratello, 393 Ill. App. 3d 641 (1st Dist., 2009)

Character of Businesses Gifted to Husband During Marriage: The principal holding of this case involved the husband's "unexplained cash" when the husband had an ownership interest in three pizza restaurants in determining his net income. But the husband also had various claims regarding the property division. Among the husband's claims were that the two pizza restaurants that he received during the marriage were non-marital in character. He argued that they were non-marital because they were gifts from his parents. The appellate court stated:

> We are unpersuaded that the gift presumption should trump the presumption of marital property in Michael's case. The interests in Pizza Factory and Pizza Cart that Michael acquired during the course of the marriage provided Michael with a means of supporting his family. We see no reason to find that the very means of support for Michael's family during the marriage should now be considered outside of the marital estate, a portion of which Elena is entitled to receive to give her any hope of approaching a standard of living she had during the marriage. Nor do we take Judge Brewer's discussion of sham transactions and fraudulent attempts to hide marital assets as driving her decision to classify the interests, gifted to Michael, as marital property. Judge Brewer's comments were certainly relevant to her assessments of the credibility of the witnesses.

Marital Home as Property Acquired in Anticipation of Marriage: This case did not fall within the

normal property acquired in anticipation of marriage line of cases. This line of cases that usually applies to a house purchased shortly before a marriage where the house is titled in the name of one spouse. But in this case, the house was gifted from his parents to him shortly before the marriage:

Michael contends, as he emphasized at oral argument, that marital property may only be found based on a gift in contemplation of marriage when such a gift is made by one would-be spouse to the other. See *In re Marriage of Philips*, 200 Ill. App. 3d at 400-01. Michael argues that because the home was purchased and gifted by his parents, the home retains its nonmarital character. While we question whether the rule Michael advocates has such clear application in this case because Joseph and Sharon were free to gift the home, built as the home for the newlyweds, to both Michael and Elena, a claim testified to by Elena, we need not resolve whether the gift from Michael's parents was meant for Michael only or meant for both Michael and Elena. See *In re Marriage of Malters*, 133 Ill. App. 3d 168, 478 N.E.2d 1068 (1985) (home found to be marital even though it was funded in part by monies provided by the wife's father). But the appellate court found that alternatively there was transmutation regarding this residence. Because the alternative finding is somewhat weak, I will quote from the language:

> Judge Brewer's finding of transmutation is amply supported by the record evidence that Michael and Elena, initially alone, and then with their children, shared the home as a family until the marriage deteriorated, that marital funds paid for the upkeep of the home, and that loans on the equity in the home were taken out jointly by Michael and Elena. In light of the deference we must give, under an abuse of discretion standard, to Judge Brewer's considered finding that the home was marital property, we find no basis to overturn that finding.

Of these findings, the only decent argument for transmutation was that loans were taken out against the home were joint.

Value of Business Interests: The husband also claimed that the trial court erred in valuing these restaurants. Curiously, the trial court because of what was a lack of appropriate proofs could only find that the business interests were “quite valuable.” The appellate court stated:

> Once again Michael seeks to use the gap in the evidence to his benefit. He contends Judge Brewer's "quite valuable" conclusion is unsupported by any "specific determination of value." The gap, which Michael could very well have filled at trial, cannot now be used as a sword to cut down Judge Brewer's finding. *** Where a party, his witnesses, and, as Judge Brewer found, the party's own attorney refuse to cooperate in the valuation process, the process approaches the impossible. We will not hear Michael complain of circumstances he created. Judge Brewer acted within her discretion in assessing the value of the businesses.

Third Party Defendants Versus Respondent in Discovery: In this case that party was Michael's father, Joseph. The husband's parents had been added as a respondent in discovery per Section 2-402 of the code. Proper procedures were not followed in converting his parents to third party defendants. The Code provisions regarding Respondents in Discovery state provide for the conversion into third

party defendants, “if the evidence discloses the existence of probable cause for such action.” But generally stated the plaintiff has six months to make such a request. Case law has held:

> "The plain meaning of section 2-402 and its interpretation in the case law establish a simple regime for converting a respondent in discovery into a defendant ***. First, to be timely and have proper form, *Clark[v. Brokaw Hospital*, 126 Ill. App. 3d 779 (1984)] teaches that a plaintiff's motion to amend a complaint to convert respondents in discovery into defendants must be filed within six months after naming a respondent in discovery, and the motion must indicate this purpose on its face or by the attachment of the amended complaint when the motion is filed or presented to the court. Next, as *Browning[v. Jackson Park Hospital*, 163 Ill. App. 3d 543 (1987),] holds, section 2-402 motions cannot properly be filed as routine motions, so a plaintiff must request a probable cause hearing because, *** only a court may decide this evidentiary question." *Froehlich v. Sheehan*, 240 Ill. App. 3d 93, 103(1992).

The defects were that there was motion to add the father as a third party defendant, but not his wife. The motion did not cite section 2-402 of the code but improperly cited sections 2-405, 2-406, and 2-407 of the Code, which address joining additional parties. And the court's order provided, “additional [third-] party respondents for purposes of obtaining information relative to business interests/concerns.” Thus, the appellate court concluded in this regard, “We take this order to mean that Joseph and Sharon were added as third-party respondents in discovery only. No mention of an evidentiary finding of "probable cause," pursuant to a hearing, was made in the order to support adding Joseph and Sharon as substantive third-party respondents.”

Attorney's Fees and Right to Separate Contribution Hearing: The former husband did not file a response to the contribution petition and in the absence of his clear post-decree request to hold a separate hearing, the appellate court found that the trial court properly granted all attorney's fees of the former wife.

***Abrell* - Illinois Supreme Court Affirms Appellate Court Re Whether Accrued Sick and Vacation Days are Marital Property**
IRMO Abrell, 386 Ill.App.3d 718 (Fourth Dist., 2008); Illinois Supreme Court (February 4, 2010).

I had included the 2008 *Abrell* decision because of the Illinois Supreme Court's review of this decision. The trial court determined the net value of certain of the vacation and sick days (through a state employer) in the property division. The appellate court stated:

> The categorization of John's accumulated sick and vacation days appears to be one of first impression in Illinois. No statute or previously reported decision in Illinois appears to have addressed the issue.... We have carefully considered the cases cited by appellant and appellee and conclude accumulated sick-leave and vacation days are not marital property. They are not property--they are a substitute for wages when, and if, the employee is unable to perform his duties.

This case also has a good discussion regarding motions for reconsideration.

The Supreme Court stated, “The issue of whether accumulated vacation and sick days are marital or nonmarital property is an issue of first impression in this court.”

> As the appellate court noted, other jurisdictions are split on the issue of whether vacation and sick days are marital property. Those courts have held that: (1) accrued vacation and sick days are marital property subject to division at the time of dissolution; (2) accrued vacation and sick days are marital property but are subject to distribution when received, not at the time of dissolution; and (3) accrued vacation and sick days are not marital property.

The Supreme Court addressed out of state case law at great length and then quoted with approval the appellate court's reasoning. The Supreme Court concluded:

> Although the trial court was able to put a value on those days in its judgment for dissolution, we find that the value assigned to those days was speculative at best. We also find that the reserved jurisdiction approach used by the Grund court could be unnecessarily complicated and difficult to administer, particularly if the parties are many years from retirement. Applying the facts to the holding the High Court stated:
>
> As the appellate court noted, John had no present right to be paid for his sick and vacation days absent retirement or termination of his employment. Further, while John had accrued 115 sick days and 42 vacation days at the time of trial, those days may or may not remain at the time John retires or terminates his employment. If John uses any of the sick or vacation days awarded to him prior to retirement or termination of his employment, John will never collect payment for those days. In that case, the award of the value of those days to John in the property distribution would be illusory. As John has argued, if this court reinstates the trial court’s finding that the accumulated vacation and sick days are marital property, John’s share of the marital estate will be diminished every time he uses a sick day or vacation day before his retirement or termination, while Jacquie’s cash payout will remain the same. Consequently, we find that although John accumulated his vacation and sick days during his marriage to Jacquie, the accumulation of those days had only a future value that was indeterminate and speculative. For that reason, we find that the accrued vacation and sick days differ from pension plans, stock options and deferred compensation.

<u>Dissipation</u>:

***Sanfratello* - Dissipation Cannot Include Monies that May Have Been Used to Pay Child Support / Party Cannot Claim of Error Re Dissipation Probably UTMA Account Where Testimony Not Clear as to Nature of Children's Accounts**

IRMO Sanfratello, 393 Ill. App. 3d 641 (1st Dist., 2009)
Dissipation Finding Cannot include Monies from Which Child Support was Paid: Also put this case in your summary of case law regarding cases in which dissipation was upheld. The only unique portion in this regard states:

> However, there is clear and convincing evidence that Michael paid child support during the dissolution proceedings, which must be excluded from a dissipation award. In re Marriage of Hagshenas, 234 Ill. App. 3d at 197 ("the expenditure of marital funds by one spouse for necessary, appropriate and legitimate expenses at a time when the marriage is undergoing an irreconcilable breakdown will not be considered to be dissipation"). It is unclear whether these support payments were excluded from the amount Judge Brewer found to be dissipation. Michael argues he paid $500 weekly to Elena and the children, fora total of $87,500. Elena does not dispute that Michael paid support in this amount, although, at times, the support he eventually provided was prompted by the filing of a rule to show cause. Based on the record before us, we remand to clarify whether the $87,500 paid in child support was wrongly included in the dissipation amount.

Dissipation of Children's Accounts: The final argument was that the husband could not have dissipated the children's bank accounts because they were not marital in character:

> It is true that an account created pursuant to the Illinois Uniform Transfers to Minors Act (Transfers to Minors Act) (760 ILCS 20/1 et seq. (West 2006)) becomes "custodial property [that] is indefeasibly vested" in the minor beneficiary (760 ILCS 20/12(b) (West 2006); *Pope v. First of America, N.A.*, 298 Ill. App. 3d 565, 567 (1998)), and is not considered part of the marital estate (*In re Marriage of Agostinelli*, 250 Ill. App. 3d 492 (1993)). It was Michael's burden to establish that the accounts fell under the Transfers to Minors Act. Because we find insufficient evidence that the accounts were not part of the marital estate, we reject his contention. The footnote to the decision mentioned that "UGMA accounts." It is likely that these were in fact UTMA accounts. But there was a failure of proof.

This is the only appellate court decision where the trial court actually had the a "party" removed from the courtroom during the trial. "After Michael gave inherently contradictory testimony, Judge Brewer had Joseph removed from the courtroom because, in the court's words, Joseph was "shaking his head" and "making noises" in response to Michael's testimony in an attempt to influence it."

***Awan and Parveen* - Dissipation via Failure to Explain Use of Marital Funds Including Income Tax Refunds**

IRMO Awan, 388 Ill.App.3d 204 (3d Dist. 2009)
Awan involved a dissipation finding of $76,000. The court stressed that Mr. Awan had admitted to several amounts of dissipation and failed to prove how he spent the remaining funds Ms Parveen had

claimed were dissipated funds. The appellate court stated, “Awan has not pointed this court to any evidence in the record of how he spent those funds or that he made those expenditures for a purpose related to the marriage,” and therefore affirmed the finding of dissipation. Regarding the items of dissipation the appellate court commented:

> The trial court made specific findings of fact. The court found that Parveen presented evidence that Awan "charged approximately $20,000 on his *** credit card, purchased a car for his girlfriend for about $16,000, and wrote checks for approximately $18,000. Many checks were written payable to cash." The court further found that Awan kept the parties’ tax refunds for tax years 2001 through 2003, totaling $22,028, for himself.

The appellate court next appropriately commented that once the wife presented her evidence that the burden shifted to her husband to show how he used the funds via clear and specific evidence of how the funds were used. Recall that dissipation claims are viewed on appeal via a manifest weight standard. Thus, this is one of a line of cases where the most significant issue of the failure to explain the use of marital funds including $22,000 in income tax refunds.

***Oden* - Division of Personal Injury Settlement**

IRMO Oden, 917 N.E.2d 13, 334 Ill.Dec. 416 (4th Dist., 9/21/09) [GDR 9-86]

The parties were married for nearly 30 years at the time of the filing of the divorce proceedings. The husband suffered an injury in 1988 resulting in a personal injury settlement. The appellate court commented that the settlement was paid jointly to the parties 15 years before the divorce proceedings. The *Oden* court commented:

> During the years following the accident, Loretta and Edward worked side by side, chose a frugal lifestyle, and enhanced and preserved their marital estate, including the injury settlement. The trial court had no evidence of Edward's future medical needs or the likely cost thereof. Thus, we find no abuse in the court's award of the additional $50,000 to Edward from the Salin account.

Accordingly, the appellate court affirmed the trial court's award of 54% of the account that had contained the proceeds from the personal injury settlement.

Cases involving the allocation of personal injury and worker's compensation benefits break down as:

Case Name	**Percentage Award to Injured Party**
IRMO DeBow	75%: Division to Occur after cash reserve of $500,000 and support of $1,500 per mo.
IRMO Murphy	83%
IRMO Adan	93%: 75/25 agreed upon div. of worker's compensation claim resulting in overall 88/12 allocation.

IRMO Hall	50%: Non-disabling injury (burn) and wife in fair health with only limited employability.
IRMO Pace	75%
IRMO DeRossett	75%
IRMO Zweig:	75% of overall marital assets affirmed.
Wolfe	Accident 1 year before divorce. $375,337.33 Structural Work Act settlement: 80% of which represented future wage loss. Of this 80%, wife awarded 10% as marital property / 20% awarded for child support trust. Husband appealed. Affirmed. GDR 98-109.

***Awan and Parveen* - Valuation Date of Assets in a Bifurcated Proceeding, Proof of Loans from Family Members**

IRMO Awan, 902 N.E.2d 777 (3rd Dist., 2009)

Valuation Date of Assets – The court addressed Ms Parveen's argument that the valuation of assets should have occurred at the time of the 2006 order addressing property distribution, which she alleged was the final judgment – and not at the time of the order dissolving the parties' marriage. The appellate court found that "property should be valued on the date the marriage is dissolved," which was in 2004. The court noted Section 401(b) of the IMDMA explicitly authorizes the court to enter a judgment dissolving the marriage and to reserve other issues upon the agreement of the parties. The court noted that Ms Parveen agreed to the bifurcated proceedings and order dissolving the marriage in 2004. The court stated:

> Section 401(b) places no restrictions on the scope or effect of a dissolution judgment that reserves issues. The entry of a valid dissolution judgment reserving other issues permits the parties to avoid complications that may otherwise arise, including 'the supervening rights of third parties, including subsequent spouses' (*Bogan*, 116 Ill. 2d at 80, 506 N.E.2d at 1246, quoting *Cohn*, 93Ill. 2d at 199, 443 N.E.2d at 545), or, as in this case, questions concerning the 'treatment [of] property accumulated [after the parties separate but before] the final disposition of property rights.'

The lesson here is that parties contemplating a bifurcated proceeding should balance the potential benefits of a bifurcated proceeding with the impact of the time between the valuation date and the final order on the remaining issues.

Proof of Family Loans – The court next addressed Ms Parveen's claim of loans to her brothers and Mr. Awan's objection to the order that he repay these loans. Mr. Awan claimed the loans were not sufficiently proven at trial. The appellate court noted that loans from parents to children are suspicious due to the potential advantage to the spouse whose parents made the transfer and the likely reduction of the other spouse's award of marital assets:

> When a court reviews the parties' marital assets and liabilities, transfers of money during the marriage from *the parents* of one of the parties are viewed with great skepticism because of the incentive for the parents and that spouse to conform their testimony at the dissolution proceeding so as to disadvantage the other spouse." *In re Marriage of Blazis*, 261 Ill. App. 3d 855, 868, 634 N.E.2d 1295, 1304 (1994).

The court stated that a similar approach should be taken with alleged loans from other family members to a spouse – because the same incentive applied. But the court then stated, "[a] court of review should not second-guess the trial court's factual findings on the validity of a debt when that finding is based upon the trial court's assessment of the credibility of witnesses and the weight it gives to their testimony *** unless the trial court's findings are against the manifest weight of the evidence." The appellate court noted that Ms Parveen presented evidence of the loans in terms of checks, deposits into her bank account, and testimony. Of greater interest, the appellate court also noted with approval that the trial court considered the husband's failure to comply with a court order to pay maintenance and to make certain mortgage payments while Ms Parveen still managed to keep the mortgage, etc. current with no income.

Replevin

***Carroll v. Curry* - Replevin: Return of Engagement Ring is Not Based on Fault**

Caroll v. Curry, (2nd Dist., 2009)

Following the break-up of their romantic relationship, James Caroll brought a two count replevin action against Allison Curry. Count I sought the return of an engagement ring. The trial court granted summary judgment in favor of plaintiff and against defendant as to count I, ruling that plaintiff was entitled to possession of the ring and ordering defendant relinquish it to plaintiff. The Defendant (Allison) appealed and the appellate court affirmed.

The appellate court noted that, "Replevin is a strict statutory proceeding, and the statute must be followed precisely." Section 19--101 of the Code of Civil Procedure (the Code) provides that, "[w]henever any goods or chattels have been wrongfully distrained, or otherwise wrongfully taken or are wrongfully detained, an action for replevin may be brought for the recovery of such goods or chattels, by the owner or person entitled to their possession."

The appellate court described how replevin actions operate:

> A plaintiff commences an action in replevin by filing a verified complaint "which describes the property to be replevied and states that the plaintiff in such action is the owner of the property so described, or that he or she is then lawfully entitled to its possession thereof, and that property is wrongfully detained by the defendant." 735 ILCS 5/19--104. The trial court then conducts a hearing to review the basis for the plaintiff's alleged claim to possession. 735 ILCS 5/19--107 (West 2006). Following the hearing, an order of replevin shall issue "[i]f the Plaintiff establishes a prima facie case to a superior right of possession of the disputed property, and if the plaintiff also demonstrates to the court the probability that the plaintiff will ultimately prevail on the underlying claim to possession." 735 ILCS 5/19--107. Thus, in a replevin action,

> the plaintiff bears the burden to "allege and prove that he [or she] is lawfully entitled to possession of the property, that the defendant wrongfully detains the property and refuses to deliver the possession of the property to the plaintiff."

The appellate court stated:

> [T]he pleadings, depositions, and affidavits establish that plaintiff is entitled to possess the ring as a matter of law. There is no dispute between the parties that plaintiff alone purchased the ring or that he gave the ring to defendant for the explicit purpose of proposing marriage. Thus, it is undisputed that the ring was a gift in contemplation of marriage. Gifts given in contemplation of marriage are deemed conditional on the subsequent marriage of the parties, and "the party who fails to perform on the condition of the gift has no right to property acquired under such pretenses." Given that the parties in this case did not marry and that defendant intended to terminate the engagement when she ordered plaintiff to leave her home, clearly the condition attached to the gift of the engagement ring was not fulfilled. The record reflects that plaintiff established his right of possession.

The next issue was wrongful retention. The appellate court first noted case law that holds that a demand is not necessary when the circumstances indicate that it would future effort.

The appellate court stated:

> Additionally, even though the term "wrongful" is not defined in the replevin statute the term is used in its legal, rather than equitable, sense and simply means that the party seeking replevin of the object has a greater possessory right to it. (Citation omitted).

Regarding the issue of fault, the appellate court stated, “Had the legislature intended for fault to be a consideration in replevin proceedings, it would have so provided in the language of the statute.”

So, according to the Second District, even where a party is at fault, if the engagement ring was given in anticipation of the marriage, that party is entitled to the return of the engagement ring.

Child Support

Initial and Post-Divorce: Establishing Amount of Child Support

***Sanfratello* - Unexplained Cash and Determining Net Income**

IRMO Sanfratello, 393 Ill. App. 3d 641 (1st Dist., 2009)

Regarding support the key portion of the decision after discussing the large unexplained cash available to the husband (likely from his pizza businesses) stated:

> In the absence of credible evidence from Michael regarding his net income, Judge Brewer imputed a $130,000 annual net income to Michael, based on the uncontested evidence that Michael had a steady flow of cash available to him. Michael now contends the support award is not reasonable under the circumstances because the $130,000 figure was "random, or a mystery." We disagree with Michael's characterization of Judge Brewer's calculations.

***Gosney* - Support and Circumstance in Which Court Should Not Impute Income**
IRMO Gosney, 394 Ill. App. 3d 1073 (3d Dist., 2009)
This is one of the relatively rare reversals of a trial court's decision to impute $350,000 in income to the ex-husband. The appellate decision will be quoted at length regarding the three reasons that it reversed the trial court:

> First, this is not a case in which the noncustodial parent was voluntarily unemployed. In Adams, the payor father quit his job and moved to Germany to live with his girlfriend without first obtaining employment. The court imputed income based on findings that the father was voluntarily unemployed and his prior income reflected his earning potential. *Adams*, 348 Ill. App. 3d at 344.
>
> Here, the trial court found that Gregory was involuntarily unemployed, and the evidence supports that conclusion. Gregory testified that he was forced out of the company by Dearborn's unfair and oppressive negotiation tactics and was asked to leave the firm when he failed to agree to the terms. Gregory was terminated and, within months, found another position in the financial management industry. He did not willingly decide to leave his job and then remain unemployed.
>
> Second, **nothing in the record suggests an attempt to evade a support obligation**. In Sweet, the court imputed income to the noncustodial parent, noting that the payor's self-employment produced little income, and he either misrepresented his income or willfully refused to support his children. The reviewing court concluded that without a good-faith effort to satisfy his support obligation, additional income was properly imputed based on the payor's earning potential. *Sweet*, 316 Ill. App. 3d at 107-08. In this case, immediately after Gregory lost his job, he began searching for new employment. Once those efforts proved fruitless, he started his own investment company in an attempt to quickly generate income. When self-employment was unsuccessful, he joined his wife's financial firm and utilized his training and expertise to earn a living. Gregory never neglected to pay child support under the 2004 order. He faithfully honored his obligation to support his children, **even increasing his payments on his own accord in 2006 when his income substantially increased**. He was not attempting to evade his support obligation.
>
> Third, **there is no evidence of an unreasonable failure to take advantage of an employment opportunity**. In *Hubbs*, the appellate court upheld an imputed income

> of $115,000 because the noncustodial parent's income for the previous three years was $133,000, $114,000, and $169,319 and he recently rejected a job that would have paid him $120,000 per year. *Hubbs*, 363 Ill. App. 3d at 706-07.

Support Enforcement

***Reimer* - Support Enforcement and Attorney's Fees / The Term "Abate" and Failure To Use Plain English**

IRMO Reimer, 387 Ill. App. 3d 1066 (Third Dist., 2009)

Tens of thousands of dollars in *Reimer* hinged on the difference between the words "suspend" and "abate." A 1994 order had provided, "All support due and owing by [petitioner] is hereby abated *nunc pro tunc* to March 2, 1994, the date of the filing of her petition to abate." The trial court focused on Supreme Court Rule 296(f)'s use of the term abate to mean that support continues to accrue but is simply not immediately payable. But this Supreme Court Rule calls for experimental programs and Will County never adopted this program. Only two Fourth District appellate cases address this Supreme Court Rule and the Third District first noted that it was not bound to follow the other districts' opinions. The *Reimer* court, contrary to the other districts' opinions, found that the language of Supreme Court Rule 296(f) regarding abate did not apply since Will County had not adopted the experimental program.

The appellate court noted that the Supreme Court had not revised the Supreme Court Rule in 19 years. In a well placed comment the Third District court stated to its higher court, "With that in mind, we respectfully suggest that the time has come for our supreme court to examine the overall applicability of Rule 296."

I had commented in 2009:

> I agree. We now have a split of districts on a word usage issue that can make a huge difference in child support obligors' lives in cases where their lawyers aren't aware of the critical importance of word choice. The appellate court therefore concluded that the trial court erred in its finding of an arrearage of $59,300. The appellate court remanded the matter to determine what effect the abatement order of 1994 had on the 1992 support order.

Effective January 1, 2011, Supreme Court Rule 296 was finally repealed.

The appellate court determined that the trial court abused its discretion in its fee award. It stated that the ex-husband was required to prove his inability to pay and his ex-wife's ability to pay the fees. He did not do so.

I then looked up the word "abate" in the Oxford English Dictionary. I could find no definitions consistent with the language [then] in SCR 296. The problem in this case was the haphazard use of the word "abate" in the 1994 order – without defining that word. In the experimental Supreme Court Rule the term had meant one thing and in the dictionary means another.

***Mannie* - Challenging Parentage and Child Support Arrearage**
People v. Mannie, 913 N.E.2d 1174, 332 Ill.Dec. 884 (1st Dist. 2009).
A man who voluntarily acknowledges he is the father of a child cannot contest the conclusive presumption of his paternity by presenting contrary evidence 30 years later. He can contest only the voluntariness of his acknowledgment of paternity if he can show fraud, duress, or material mistake of fact. Moreover, even if the man turns out not to be the father of a child (30 years later), his child support arrearage cannot be vacated because it is a vested right that already vested in the obligee.

***Gulla* - Enforcement / $100 per Day Penalties / Failure to Withhold Child Support -- Knowing Failure**
IRMO Gulla, 382 Ill. App. 3d 498, (2nd Dist., 2008) overruled, in part, 2009 by Illinois Supreme Court, See Illinois Supreme Court decision.

In this post-divorce case in which the employer was joined as a party Defendant, the employer appealed the trial court's judgment requiring it to pay $369,000 to the ex-wife as a penalty for knowingly failing to pay, within seven business days, child support from the wages of its employee, the ex-husband. The appellate court affirmed the trial court's judgment and the Illinois Supreme Court affirmed in part and reversed in part. The case provides excellent reading in adding to the general case regarding failure to withhold because the Supreme Court's reversal was only as to the issue of which law applied as to the penalty – and the law of Mississippi applied.

Comment: I first stated:

> It did not appear at the appellate court level that the issue of choice of law was addressed. The choice of law should have been the law of the state of Mississippi. This is because orders or notice of withholding are subject to withholding in each of the 50 states. However, the penalties of the state of the employer should have applied.

The trial and appellate court's applied Illinois law in Section 35(a) of the IWSA. The Illinois Supreme Court overruled the decision and determined that the penalty for failure to comply with the withholding order had to be based upon Mississippi law. The *Gulla* court stated:

> In the present case, Suzanne calculated 3,690 alleged penalties, reflected in the circuit court's March 26, 2007, order, resulting in a judgment of $369,000. In contrast, the Mississippi income withholding statute provides that where a payor willfully fails to withhold and remit income pursuant to a valid income withholding order, the payor shall be liable for a civil penalty of not more than $500, or $1,000 where the failure to comply is the result of collusion between the employer and employee.

The Supreme Court noted that the issue is controlled by the UIFSA.

> Specifically, section 502 of Model UIFSA provides: "The employer shall treat an income withholding order issued in another State which appears regular on its face as

> if it had been issued by a tribunal of this State." Further: "An employer who willfully fails to comply with an income-withholding order issued by another State and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an order issued by a tribunal of this State.

Support Enforcement

***Davenport* - Support Enforcement / Collection of Child Support for 44 Year Old "Child."**

IRMO Davenport, 388 Ill.App.3d 988 (2d Dist. 2009).

Davenport involves a child support arrears stemming from a 1972 divorce. The "child" at the of the ex-wife's petition was 44 years old. The trial court found a support arrearage including interest of $26,000. The father had only been required to pay $13 weekly. In March of 1981 the father overpaid by more than $1,000. The appellate court examined the statute of limitation that would apply to the case, because until July 1, 1997, the enforcement action had to be brought within 20 years of the support judgment. Relying on the 1997 amendment, the trial court concluded that the statute of limitations did not bar the mother's claim. The appellate court noted that as a general rule statutory amendments modifying procedural laws are applied retroactively while those modifying substantive are only prospective in nature. But even procedural amendments cannot be applied retroactively when doing so would impair a right that is sufficiently well established to be protected under the due process clause of the constitution. The 20 year statute of limitations had began to run in 1981 and therefore the statute had not run by the time it was extended by the 1997 amendment. The appellate court accordingly reasoned that the trial court correctly applied the amended statute of limitations, i.e., the elimination of any statute of limitations.

Next, the father urged that the trial court erred in refusing to apply the doctrine of laches to the case. The party asserting laches as a defense to a claim must prove two elements: (1) lack of diligence by the party asserting the claim; and (2) injury or prejudice as a result of the delay to the party asserting laches. The appellate court reasoned:

> Even assuming that the 26-year gap between the date respondent began to fall behind on his child support payments and the date petitioner brought suit evinces a lack of diligence on petitioner's part, we see no prejudice to respondent as a result of the delay. Respondent argues that he was prejudiced by the passage of time because it caused him to be unable to recall the amounts and dates of cash payments he made to respondent after March 1981. However, as petitioner notes, this is the precise argument this court rejected in *Smith*. See *IRMO Smith*, 347 Ill. App. 3d 395 (2004).

The key portion of the decision states:

> The real crux of respondent's laches argument is that he sees infirmity in petitioner's declining to pursue support from him during a period in which they both seem to agree he was without means to provide it, before changing course and deciding to pursue support upon learning that respondent was expecting a windfall from a property sale. Petitioner appears to us to have chosen a prudent course: she forwent pursuing support during respondent's period of unemployment, when doing so would have been expensive and futile, but, once she learned that respondent might be able

> to meet his obligation, she pursued the support that even respondent does not contest she was rightfully owed. This is not the type of inequitable result the doctrine of laches is designed to prevent.

The final issue was the imposition of interest since statutory interest on missed support payments was not required until January 1, 2000. The appellate court rejected the father's final argument and ruled that, while not mandatory, before the enactment of the 2000 amendment, allowance of statutory interest was within the court's discretion.

Comment:

- See the ISBA FLS Newsletter Practice Note: "Defenses to claims for unpaid child support," Joan Scott.

- Consider the impact of two amendments and the case law.

First Amendment: July 1997. The legislature removes the 20 year statute of limitations.

Second Amendment: January 1, 2000. The legislature imposes mandatory statutory interest.

So for any support order entered after 1977, there is effectively no statute of limitations. And commencing May 1, 1987 statutory interest has been mandatory -- consistent with the 2011 *Wiszowaty* Supreme Court decision (below). The case law when coupled with these amendments demonstrates how difficult it is to succeed on the defense of laches – the inability to prove support payments with the passage of time generally will not be a successful defense.

***Wiszowaty* Appellate Decision - Statutory Interest Before January 1, 2000 Mandatory or Discretionary**

Illinois Department of Healthcare & Family Services ex rel Wiszowaty v. Wiszowaty, 394 Ill.App.3d 49 (1st Dist., 2009).

The appellate court had ruled that until January 1, 2000, awarding interest on past-due child support was discretionary – not mandatory. The Supreme Court then reviewed this issue in its January 2011 decision where the Supreme Court reversed this appellate decision. The Illinois Supreme Court in January 2011 decided:

> 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.

***Black v. Bartholomew* - Workers' Compensation Award and Withholding of Income for Support**

IDHFS Ex rel. Black v. Bartholomew, 397 Ill. App. 3d 363 (4th Dist., 2009)

The court may order a child support arrearage to be paid out of a workers' compensation award

despite language in 820 ILCS 305/21 that exempts such payments or awards from judgments. The *Black* court held that §15(d) of the Income Withholding for Support Act, 750 ILCS 28/15(d), controls where as it provides an exception to 820 ILCS 305/21. It defines "income" as any form of periodic payment, including workers' compensation. It further states that any other law that limits the exempt income that can be **withheld shall not apply to support judgments**.

***Determan* - Non-Support Punishment Act and Necessity of Filing Verified Complaint**
People v. Determan, 397 Ill. App. 3d 929 (5th Dist., 2009)
A prosecution under the Non-Support Punishment Act for willful failure to provide support is commenced by the support recipient filing a verified complaint with the circuit court and not by the State's Attorney filing the of the information of indictment. The issue was whether the filing of a verified complaint with the State's Attorney rather than with the court was sufficient for the case to proceed. The State's attorney did not attach the complaint with the documents that if filed. The question was the interplay between Section 5 and 10 of the Act.

Section 5 of the Act provides: "A proceeding for enforcement of this Act may be instituted and prosecuted by the several State's Attorneys only upon the filing of a verified complaint by the person or persons receiving child or spousal support." 750 ILCS 16/5. But Section 10 of the Act provides, "Proceedings under this Act may be by indictment or information." 750 ILCS 16/10.

The ex-husband in *Determan* brought a motion to dismiss and the appellate court pointed out:

> A "Withdrawal of Complaint" executed by Krista Mason was attached to the motion to dismiss. It appears from the record that the defendant and Krista Mason had reached an out-of-court settlement of the dispute and that the defendant was going to pay some of the past-due support owed and remain current on his obligation.

The appellate court summarized their ruling:

> We conclude that, regardless of the legal sufficiency of the information filed by the State's Attorney, pursuant to section 5 of the Act, the State's Attorney had no authority to file that information until the person entitled to receive support had filed a verified complaint with the circuit court. This interpretation of section 5 is not inconsistent with section 10 of the Act, which provides that proceedings under the Act may be by indictment or information. While the verified complaint may not be sufficient under the Act to institute or commence the proceeding, it is a necessary prerequisite to the filing by the State's Attorney of the charging instrument, which does institute or commence the proceeding. While the verified complaint is not a necessary part of the charging instrument, it is a necessary prerequisite to the filing by the State's Attorney of the charging instrument.

Section 513 College Educational Expenses:

***Baumgartner* - Post-High School Educational Expenses / Emancipation Events / Child Being**

Jailed Not a Defense
IRMO Baumgartner, 393 Ill.App. 3d 297, 517 (First Dist., 2009)
The parties were divorced in 1998 and had one child, who was 10 years old at the time of the divorce. The relevant portion of the parties' judgment stated the parties were responsible for post high school expenses for the son, but the obligation was conditioned on the child having a desire and ability to further his education. In 2008, the ex-husband filed a petition to modify the terms of the judgment by way of terminating his obligation to contribute to the child's college expenses. The child was 20 years old at the time. The ex-husband alleged the child had attended two semesters at a community college, but then was incarcerated in the Illinois Department of Corrections for conviction on a sex offense. The child had a release date of April 9, 2009 and a release from parole date of April 9, 2010. Once paroled, the son would be required to register as a sex offender, and would be prohibited from being in the vicinity of any public or private school. The ex-husband further alleged that the son graduated at the bottom of his high school class and received failing or poor marks while enrolled at the community college. The trial court found the son's incarceration emancipated the son and therefore abated the ex-husband's obligation to provide Section 513 support. The trial court did not base its decision on any other fact or factor.

The appellate court reversed the trial court. The appellate court noted that no case in Illinois provides a child's incarceration has the effect of self-emancipation for a child. The appellate court also noted that, in general, the courts have declined to find incarceration as an emancipating event and one case in particular, *IRMO Van Winkle*, 107 Ill.App.3d 73, indicated that incarceration was not an emancipating event. The appellate court therefore reversed the trial court's termination of ex-husband's Section 513 obligation based solely on the son's incarceration.

One judge dissented. Judge Wolfson focused on the facts that the son was not a minor nor a delinquent. The judge noted the son was 22 years old at the time of the appeal, had been incarcerated at age 20 for a felony, and the ex-wife had not provided any evidence of the son's desire and ability to further his education. Judge Wolfson believed there was evidence the son had "abandoned any pursuit of a higher education when he plead guilty to two felonies involving the sexual abuse of a child." The judge noted that a child's abandonment of education can be an emancipating event, and believed the trial court decision should have been affirmed based on this reason.

***Portman* - Child Care Assistance Benefits from IDHS**
Portman v. Department of Human Services, No. 2-08-0406, (2d Dist., 2009).
Only primary residential custodians or primary residential parents may receive child care assistance from the Illinois Department of Human Services. This benefit does not extend to divorced parents who share joint legal custody but who have not been designated as the primary custodian.

Paternity

***Rolseth* - Paternity / Petition to Declare Non-Existence of Parent Child Relationship Based upon allegation of Fraud**
IRMO Rolseth (2nd Dist., 2009)

The trial court granted the petition to declare the non-existence of a parent child relationship brought by the putative father for two of the four children covered under a 1999 divorce judgment. It was not until July 2008, that the putative father brought his petition to declare the non-existence of two of the children.

The petition alleged intentional and fraudulent misrepresentation by his ex-wife. Paternity testing was completed in 2008 concluding that the two children were not the ex-husband's biological children. Thereafter, there was an "Agreed Order" signed by the parties that provided:

> "By admission of the parties in open court, and after reviewing all evidence including parentage test results, The Court finds that [petitioner] is not the father of [the two children mentioned in his petition]. To the extent that this Order conflicts with the Judgment of Dissolution of Marriage or any other prior order of Court, such prior orders are hereby vacated only to the extent that they evidence a finding of paternity, or obligation of support related to [the two children]."

Within 30 days, the mother filed a motion to vacate the agreed order alleging that the ex-wife was not represented by counsel and that the order was not "preceded by summons." The trial court denied respondent's motion with a written order, which noted that, during the July 28 hearing, "the court asked [respondent] if she wished to hire counsel and if she [was] asking for time to respond" but that respondent "replied in the negative."

This case contains an excellent discussion of vacature of agreed orders and the standards to do so. The most pithy quote contains dangerous language that are a danger sign when entering agreed orders modifying what would appear to be non-modifiable terms. It states:

> To the extent those cases remove the test for upsetting agreed orders from the standards of equity embodied in section 2--1401, we depart from them. Instead, we follow the rule that agreed orders may be modified or vacated only upon a showing that meets the standard applied to section 2--1401 petitions, a standard that may or may not, depending on the circumstances, be met by a showing of one or several of the types of challenges enumerated in our case law.

First the appellate court held that the lack of time between the summons and the agreed order did not invalidate it because the same agreed order could have been filed even if petitioner had not filed his petition. But the appellate court appeared not to rely upon this but to concentrate on the offer by the judge for additional time. Finally, the appellate court addressed the contention that the order was, in essence, void because the ex-husband's petition was not within the two year period under Section 2-1401 of the Code. The appellate court noted, however, that the petition was brought under Section 7 of the ILP of 1984 which provides for two year statute of limitations from the time the petitioner "obtains knowledge of relevant facts." The appellate court stated that in light of the agreed order, the ex-wife was essentially admitting the allegations regarding the ex-husband only recently having gained knowledge of facts indicating he was not the child' father. Accordingly, the appellate court affirmed the trial court's decision.

Maintenance Cases:

Initial Divorce:

***O'Brien* – Three Years with Review OK Where Wife had BA in business administration in 14 Year Marriage**

IRMO O'Brien, (2nd Dist., 2009)

Maintenance award for three years with review was not abuse of discretion for woman with a BA in business administration, where the parties were married in 1992 (14 year marriage until date of divorce), their two children were born in 1992 and 1999 and where the wife as the primary caretaker of the children. It was 11 years until the date of the filing of the petition for dissolution of marriage.

***Awan and Parveen* - Reviewable Maintenance Proper Despite 20+ Year Marriage Where No Children of Marriage**

IRMO Awan, 902 N.E.2d 777 (3rd Dist., 2009)

Mr. Awan and Ms Parveen were married in 1977 in Pakistan. They later immigrated to the United States, and Mr. Awan obtained degrees in veterinary medicine. The couple did not have children and moved several times during the marriage. Ms Parveen had earned a degree in Pakistan before moving to the United States, but did not obtain any additional education and did not work during the marriage. She claimed that this was at the insistence of Mr. Awan.

The parties began divorce proceedings in 2001. The court entered an order dissolving the marriage in 2004 but did not enter an order addressing the remaining issues of maintenance or other issues until 2006. So categorize the length of the marriage as 24 years until the date of filing of the divorce.

Both parties appealed the court's 2006 order. Ms Parveen appealed from the of reviewable maintenance award while Mr. Awan cross-appealed, objecting to any award of maintenance. The ex-husband argued any award of maintenance would not give his ex-wife the incentive to become self sufficient, which was his theme throughout the litigation (in that she chose not to work).

The appellate court commented:

> With regard to Parveen's contention that maintenance should have been permanent, the trial court's order awarding Parveen temporary maintenance was appropriate. "Rehabilitative maintenance may be granted if the receiving spouse has the present or future ability to become self sufficient or the ability to acquire skills that would allow employability at an appropriate income level, but to do so would require some time." In re Marriage of Brackett, 309 Ill. App. 3d 329, 340, 722 N.E.2d 287, 296 (1999). Parveen has a university degree from Pakistan and also has the opportunity to obtain an advanced degree in her field in this country. She does not suffer from a medical condition that prevents her from working. Accordingly, we find that the trial court did not abuse its discretion in making its maintenance award subject to periodic review to ascertain what efforts Parveen has made to become self-sufficient.

The appellate court noted that the reviewable maintenance award provides Ms Parveen the incentive to become self-sufficient. If she did not make a reasonable effort to do so, the court could terminate maintenance. On the other hand, if Ms Parveen made reasonable efforts to obtain employment and become self sufficient but was still unable to do so, the court could extend the reviewable maintenance or even make maintenance permanent.

Post-Decree Maintenance:

***Blum* Supreme Court - Trial Court Cannot Make Maintenance Award Non-Reviewable and Non-Modifiable**

IRMO Blum v. Koster, 235 Ill. 2d 21 (Ill. 2009)

The two issues relating to maintenance were: whether the trial court erred in modifying Judy Koster's periodic maintenance and whether the trial court erred in providing that its maintenance award was nonmodifiable and nonreviewable.

The original divorce involved a poorly worded provision for unallocated maintenance. In reducing maintenance, the trial court's post-decree order further provided:

> "This is in full and complete satisfaction of STEVEN BLUM's obligation to pay maintenance to JUDY KOSTER and other than the aforesaid payments, she shall be forever barred from seeking maintenance from the Petitioner. This Order is nonmodifiable as to duration and amount and can not be changed if there is a change in circumstances nor is it subject to any review by this Court."

The appellate court found the trial court's reduction of the ex-wife's maintenance was not supported by the evidence. It also determined that the trial court exceeded its statutory authority in making its award of maintenance nonmodifiable. I liked the language of the Supreme Court where it states:

> As the appellate court in this case noted, the parties' marital settlement agreement is "not a model of unambiguous drafting." Nor does the agreement state whether one party bears the burden of showing whether maintenance and support should continue, be modified, or be terminated after the initial 61-month period.

The Supreme Court then stated:

> The parties' marital settlement agreement here specifically provides for maintenance "reviewable" after the 61-month period. In viewing the agreement as a whole, we find that the parties agreed to a general review of maintenance. Thus, Steven did not have the burden of proving a substantial change in circumstances. Rather, the trial court was required to consider the factors in sections 504(a) and 510(a–5) (750 ILCS 5/504(a), 510(a–5) (West 2004)) in determining whether to modify or terminate Judy's maintenance. Accordingly, the trial court had discretion to continue maintenance without modification, to modify or terminate maintenance, or to change the maintenance payment terms. See *In re Marriage of Golden*, 358 Ill. App. 3d 464,

> 471 (2005). [Addressed at some length in one of our previous seminars by Jim Feldman.]
>
> It is clear from the marital settlement agreement that maintenance was intended to be temporary and rehabilitative. [Case cited and summary of case omitted]. Further, the initial award was for both maintenance and support, although it did not allocate specific amounts for each.

In a decision that is excellent reading, the Supreme Court reserved the appellate court decision and upheld the trial court's decision where the trial court reduced the maintenance obligation of the ex-husband.

The next issue was whether the trial court could make the post-decree remaining maintenance obligation non-reviewable and non-modifiable. The Supreme Court concluded:

> From a practical view, the obvious need for modifiability is summed up in a phrase: "life changes." The only certainty in life is the probability of life's ever-changing nature in the lives of divorced spouses. To conclude otherwise simply defies common sense and life experiences. For the preceding reasons, we affirm the appellate court's holding that the trial court erred in ordering Judy's maintenance award nonmodifiable and nonreviewable, absent express agreement by the parties.

Custody:

In Re A.S **- Jurisdiction in Child Custody Cases and Best Interest Factors**
In Re A.S. (*Sobieralski v. Aldworth*), (5th Dist., 2009).
Venue in Clinton County was proper because the non-marital child was residing with the father in Clinton County at the time the father filed his petition for determination of a father/child relationship. §601(b)(1) of the IMDMA states in pertinent part:

> (b) A child custody proceeding is commenced in the court:
> (1) by a parent, by filing a petition: ***
> (ii) for custody of the child, in the county in which he is permanently resident or found.

The Fifth District Appellate Court first ruled that Clinton County was a proper venue of the custody proceedings because Section 601(b)(1)(ii) allows a custody action to be filed in either the county in which the child is a permanent resident or the county in which the child is found at the time of the filing. The child, at the time the petition was filed, was residing with the father in Clinton County, and thus, Clinton County was a proper venue.

Regarding the custody judgment, the appellate court ruled the trial court's award of custody to the father was against the manifest weight of the evidence. The appellate court stated that although the

father was the child's primary caretaking parent for the year before the father's petition was filed, it was temporary so the mother could finish her college education. The *A.S.* court also reasoned the guardian ad litem's comment that the father had negative impressions of the mother allowed the conclusion that both parents could remain involved in the child's life if the mother was the custodial parent.

The key language from the trial court decision had stated:

> This Court finds that since [A.S.] has primarily resided with his father since June of 2006, and that he is only four years of age, it's clear that his father's home has been his primary physical residence and that [A.S.] is very comfortable in that situation. Under these circumstances, this Court is naming [petitioner] as the primary physical custodian.

The appellate court stated:

> However, as previously pointed out, petitioner was the primary physical custodian because of an agreement he made with respondent to take A.S. to Albers for a year in order for respondent to be able to finish her undergraduate degree. The agreement was based upon what respondent believed to be in her son's best interests at the time. Respondent wanted to be able to provide a better life for A.S. Petitioner was able to finish his degree in Carbondale, while respondent moved back with her parents and took care of the parties' son. We agree with respondent that if we were to uphold the circuit court's order, we would discourage any mother from allowing her child to reside with the father for any period of time, even if it was in the child's best interest. While it appears that petitioner is a good father and we applaud his efforts to establish a relationship with his son, we cannot condone his actions in this case. The agreement that petitioner have primary physical custody was to be temporary. Petitioner initially denied that the agreement was temporary and misled the circuit court at the hearing on respondent's motion to transfer venue. A manifest injustice has occurred in this case, and we refuse to reward petitioner for his deceit not only toward respondent but also toward the circuit court.

This case represents a stunning reversal based in significant part of the statutory factor of the §602(a)(8) factor, "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child."

Removal: Parentage / Divorce:

Removal:

***Meeta* - First District Takes Pro Removal Stance Where Based Significantly on General Quality of Life Factor Where Pilot Had Free Travel Available**
IRMO Meeta Bhati and Singh, 397 Ill.App. 3d 53 (1st Dist., 2nd Div. 2009)
The mother appeared from the order denying her petition for leave to remove the child to North

Carolina. The parties, who were both of Indian descent, were married in 1995 in India. The father, Ajay was, living in the Chicago area at the time of the marriage and the mother, Meeta, moved from India to Chicago after the wedding. They purchased a two bedroom townhome in Schaumburg, in which they resided, and Sonia was born in October 2001. At the time of the trial on the removal issue the father was an executive with United Airlines earnings approximately $400,000 annually." The appellate court commented, "As a benefit of his employment, he and his family members, including Sonia, travel free on United Airlines. He noted that although he does not pay for the tickets, there are tax implications."

The divorce judgment was entered in 2005. The ex-wife was worked for RSM McGladrey and earned a yearly salary of approximately $60,000. She had primary residential custody. The Father's parenting time was alternating weekends from Thursday to Monday and one night overnight each week. The father had three weeks parenting time during the summer. The daughter had just completed first grade.

Regarding other pertinent facts, the appellate court noted:

> Meeta testified that since her divorce, she has felt like a "pariah" or social outcast in the community. She noted that a single mother in Indian culture is ostracized and not given much respect. As a single mother, Meeta receives few social invitations and primarily socializes with other single mothers. Meeta is currently engaged to Dr. Viren Desai, who is also of Indian descent. They met through an Indian social networking website that brings people of Indian descent together for the purpose of marriage. She and Dr. Desai first began communicating with one another in April 2006 and met in person in May and became engaged that October. Dr. Desai is a physician who resides in Fayetteville, North Carolina. He is also divorced and shares custody of his two children who live nearby.
>
> Meeta stated that if the court granted her petition for removal, she would not work and would be a stay-at-home mother to Sonia. Meeta and Sonia travel about once a month to visit Dr. Desai in North Carolina and Sonia has become very close to his daughter, Bianca, who is about two years older than her. Dr. Desai travels to Schaumburg to visit Meeta and Sonia about once a month as well. The plane ride from Chicago to Raleigh-Durham, North Carolina, is about 1 hour and 45 minutes long, and then the drive to Fayetteville is about 1 hour long. Meeta described Dr. Desai's home as a large, four bedroom, four bathroom home with a big backyard, swimming pool ... located in a gated community of single family homes. Sonia would attend Fayetteville Academy, a private school close to Dr. Desai's home, and where his two children also attend. The school includes grades from kindergarten to twelfth grade and offers many after school programs and sporting activities. Dr. Desai's office is also located close to his home. He is a member of the country club in Fayetteville, which has a golf course, tennis courts, swimming pool and dining facility. Dr. Desai has a large family, which gets together frequently to celebrate various holidays and birthdays. Meeta and Sonia have been welcomed into his family. Dr. Desai is also a member of various Indian organizations in Fayetteville and

> Raleigh-Durham that often host social gatherings.
>
> Meeta testified that if she and Sonia were permitted to move to North Carolina, they would be able to spend more time together because Sonia would not need to be in daycare and Sonia would have more time for extracurricular activities and more of an opportunity to play with children from her school and the neighborhood. Meeta also stated that Sonia will be able to observe Meeta in her new role as a married woman, which Meeta thinks is important for Sonia. Meeta stated that Sonia and Bianca already consider each other stepsisters and love one another.
>
> Meeta further stated that to minimize the disruption of moving, she would ensure that Sonia was available to visit with Ajay either in Chicago or in North Carolina as much as possible. Meeta has a cellular telephone and a web camera that Ajay and Sonia can use to communicate. Meeta stated that she would keep Ajay informed about Sonia's school and her extracurricular activities. She also proposed that Sonia could visit Ajay during her spring break, half her summer vacation and they could alternate holidays as they currently do. Meeta denied threatening Ajay in any way if he did not agree to the move to North Carolina.

There was, however, negative evidence about the ex-wife. This included the following recap by the appellate court:

> He stated that around September 2006, Sonia told him about moving to North Carolina, which "completely shocked" him because Meeta had never said anything to him about it. As a result, he and Meeta agreed to meet at Starbuck's to discuss the situation. Ajay claimed that Meeta gave him 24 hours to decide if he would agree to removal and that if he did not agree, she would file a petition in court. Ajay further claimed that Meeta told him that she and Dr. Desai would make his life a "living hell" in that they would file lawsuits against him, they would send letters to his boss, and would make his life a difficult financial hardship if he did not agree. Ajay stated that anonymous letters were written to the CEO and CFO of United Airlines as well as the head of human resources concerning him and accusing him of things he never did.

The entire case should be reviewed in detail because removal cases are inevitably fact sensitive. A 604(b) was appointed to provide input regarding the impact of the proposed removal on the emotional, psychological and physical health of the daughter as well as the impact of the removal on the father daughter relationship. Regarding the 604(b) report, the appellate court noted:

> [T]he report discussed the concept of "protective factors," which were described as "the residential parent's sincere commitment to the involvement of the other parent, evident in frequent sharing of information, business-like and effective communication about the child, flexibility about time and working with the other parents whenever appropriate." Dr. Star concluded that in this case, protective measures "do not seem evident." Specifically, her report stated "[w]hile [Meeta] has

> allowed [Ajay] his parenting time without difficulty, she does not inspire confidence due to her apparent attempts to coach the child, her quasi-negative remarks about [Ajay] to Sonia, her exclusionary policy regarding decisions about Sonia's school, activities and medical matters and her willingness to manipulate situations to her advantage in an attempt to make [Ajay] look bad." The report concluded that "[t]he overall effects point to a potentially negative outcome to Sonia's adjustment and development immediately and in the future and a high risk for damage to her relationship with [Ajay]."

In analyzing the removal factors the appellate court first noted that the general quality of life for the custodial parent and child factor favored removal. Regarding the motives of the mother in seeking removal, the appellate court stated first stated that her motives were genuine and sincere regarding economic improvements but also noted that, “Meeta's motives insincere in that she had "failed to embrace the spirit" of the joint parenting agreement and left the court with the impression that she would be pleased if she did not have to interact with Ajay as frequently as she was obligated to do. The court further found that in this respect, Meeta's motives were intended to frustrate Ajay's visitation.” There were no issues regarding the father's motives in resisting the removal in the eyes of the trial and appellate courts. The fourth factor is the effect on the non-custodial parent's visitation if removal were granted. Regarding this factor the appellate court simply noted the finding by the trial court that the father had been “diligent in exercising all the parenting time afforded him in the parties' joint parenting agreement and routinely seeks additional time with Sonia.” So the focus was on the fifth factor – whether a realistic and reasonable visitation schedule could be reached if removal is allowed. The appellate court stated that financially this was quite possible because travel would be at essentially no cost. The appellate court, however, stated that this factor, “became irrelevant when the court considered the lack of "protective factors" as described by Dr. Star.

The trial court had noted that the move would substantially impair the father's regular and ongoing parenting time and that the emotional toll on the daughter would be, “too high a price to allow removal.” The appellate court also noted that the quality of time allowed would be substantially than the quality under the current visitation schedule.

Somewhat surprisingly, the appellate court commented favorably on the trial court's findings except as to the fourth factor:

> We note that the court found that any proposed schedule would substantially impair Ajay's parenting time with Sonia; however, the consideration is whether a realistic and reasonable schedule can be reached. This factor weighs in favor of removal.

In an extremely generous pro removal stance the appellate court concluded:

> Here, we are presented with a situation in which some of the *Eckert* factors weigh in favor of as well as against removal. As stated above, no one factor is controlling and a determination of the best interests of the child must be made on a case by case basis. In this case, we find three of the factors in Meeta's favor, namely, that removal would enhance the quality of life for both Meeta and Sonia, Meeta's motives in

> seeking removal are genuine and a reasonable visitation schedule could be established. The remaining two factors in Ajay's favor, that his motives for resisting removal are genuine and that his visitation with Sonia would be diminished, do not outweigh the other factors. This determination should not be interpreted to mean that removal is in Sonia's best interests because there were three factors in Meeta's favor and only two factors in Ajay's favor. Rather, it is the nature of those factors in Meeta's favor that lead to the determination that removal is in Sonia's best interests. The fact that the move will enhance the quality of life for Meeta and Sonia, that Meeta is seeking to move to marry Dr. Desai and that a reasonable visitation schedule could be established, weigh heavily in our determination that in this case, removal would be in Sonia's best interests. We find the court's determination that removal was not in Sonia's best interests to be against the manifest weight of the evidence. A review of the record leads to the conclusion that in this case, the opposite conclusion is clearly evident.
>
> We note that a child is neither a chattel that can be split between two owners nor an object in which any one person can hold a possessory interest. When drafting the removal statute the legislature provided that the best interests of the child were paramount. If removal results in an enhanced quality of life for Meeta and Sonia, then the fact that Ajay's visitation with Sonia would be diminished, should not overcome the other benefits to Sonia, which the court noted were numerous. We conclude that removal to North Carolina is in Sonia's best interests and the court's findings denying removal are against the manifest weight of the evidence. Meeta has met her burden of establishing that the petition for removal should be granted.

Justice Hoffman's dissent is better reasoned than the majority opinion in light of the deference that is supposed to be given to the trial court's decision. Justice Hoffman correctly urges:

> The majority has correctly set forth the standard of review in this case; namely, the manifest weight of the evidence. However, instead of according the trial court's decision the deference it is due (In re Marriage of Collingbourne, 204 Ill. 2d 498, 522 (2003)), the majority appears to have usurped the fact finding function of the trial court and decided this case de novo. As I believe that the trial court's well-reasoned order is not against the manifest weight of the evidence and should be affirmed, I dissent.

The dissent pointed out the trial court's finding that only one *Eckert* factor favored the removal, i.e., the indirect benefit – general quality of life factor.

***R.P.P.* – Parentage Removal / IMDMA §609 Only Applies to Where Never Married Custodial Parent Seeks Removal After Custody Order of Parentage Action Had Been Filed**

IRPO R.P.P., (3rd Dist., 2009)

The appellate court first quoted extensively from the *Fisher* decision:

> "[The mother] contends that section 13.5 is the operative section, and contends that unless a noncustodial parent files for an injunction pursuant to section 13.5, the Parentage Act does not restrict a custodial parent's ability to remove a child from the state. We disagree. Sections 14 and 16 of the Parentage Act clearly refer to removal as an issue to be addressed in the initial judgment and in judgment modifications. Moreover, both sections specify that the court's determination on removal is to be made in accordance with section 609 of the Marriage Act. Section 609 specifies that the court 'may grant leave' to a custodial parent to remove a child from Illinois-thus the parent must first request leave-and the burden is on the custodial parent to prove that removal would be in the child's best interests.
>
> The language of section 13.5 does not support [the mother's] position. Section 13.5 permits the court to enjoin the custodial parent 'from temporarily or permanently removing the child from Illinois *pending the adjudication of the issues of custody and visitation*.' (Emphasis added.) It is clear that the injunctions permitted by section 13.5 are intended to be temporary in nature, keeping the child in Illinois only until the court can conduct a hearing on the merits of a removal petition. * * *
>
> [W]hen a custodial parent intends to remove a child from Illinois he or she must request leave of court, and the burden is on the custodial parent to show that removal would be in the child's best interests. It is not incumbent on a noncustodial parent to request an injunction pursuant to section 13.5 in order to force the custodial parent to request leave of court before removing children from the state regardless of whether an injunction has been sought, and a custodial parent who removes children from the state without having first at least requested leave could potentially be subjected to contempt proceedings. If the noncustodial parent does seek an injunction, the burden is on the noncustodial parent to establish that he has no adequate remedy at law and will suffer irreparable harm without injunctive relief paying specific but not exclusive attention to the factors listed in section 13.5 of the Parentage Act."

But after quoting so extensively from the *Fisher* Supreme Court decision, the Third District *RPP* appellate court stated:

> We conclude that the holding in *Fisher* was only meant to apply to situations in which a custody order, **or pending parentage/custody action, already existed prior to the unmarried custodial parent removing the minor from the state**. A careful analysis of *Fisher* and the statutory scheme put in place by our legislature reveals that section 13.5 of the Parentage Act, as Traci argues, is the only mechanism available to the court to order the return of a minor child in situations such as this where the parents were never married and no proceedings whatsoever existed prior to the custodial parent leaving the state with the child.
>
> In *Fisher*, unlike the case at hand, the parties had been quarreling over custody and visitation for more than two years when the custodial parent requested permission to leave the state of Illinois.... It is our supreme court's reference to that legislative

> history that signifies to us that it intended its holding in *Fisher* to only apply to cases in which the never married custodial parent sought removal from the state after a custody order existed or a parentage action had been filed.

Thus, the appellate court found that the trial court erred in applying section 609 of the Marriage Act and remanded the matter for the court to apply section 13.5 of the Parentage Act.

Comment: The appellate court decision focuses upon whether there is an "action" or whether there are "proceedings in place." In this case, the child was 21 months old when the action to declare the parent child relationship was brought. The more common situation is where a VAP (voluntary acknowledgment of parentage) has been signed. Keep in mind the Parentage Act provides that after a VAP is in properly in place, "A judicial or administrative proceeding to ratify paternity ... is neither required nor permitted."

***IRMO Guthrie* - Impact of Short Duration of Marriage / Move Back to Original State**

IRMO Guthrie, 392 Ill.App.3d 169 (5th Dist., 2009)

In *Guthrie* the 5th District appellate court affirmed the trial court's granting of the mother's petition for removal of the children to Arizona. The *Guthrie* court commented that the trial court could consider evidence such as the "dismal employment record" of the father. The appellate court stated, "This case involved a marriage of short duration where the parties met and initially lived in Arizona. In light of this context, these findings support the conclusion that the child would be provided with a more secure and stable environment if the removal is allowed." Factors relevant to the trial court's decision including the fact that the mother's family resided in Arizona and that the father's family, who lived in Illinois, were not on speaking terms of the mother and had not offered to watch the parties daughter when the mother was working.

Regarding motives the court stated:

> The petitioner argues that the respondent's motives in resisting the move are questionable, as the respondent engaged in dishonorable behavior by luring the petitioner back to Illinois on the pretense of working out their marital problems. Notwithstanding the fact that the respondent admitted to this dishonest behavior on crossexamination, the petitioner was under no obligation to remain in Illinois and file for a dissolution of the marriage in this state. Accordingly, even though the respondent's behavior has been questionable in the past, there is insufficient evidence to support a finding that his motives in resisting the removal are improper. The evidence also shows that the petitioner's motives in seeking the removal are proper. As the circuit court stated in the judgment for the dissolution of the marriage, the motives of both parents in this cause are not an issue.

Other Cases Involving Custody or Visitation:

***IRMO Chehaiber* – Visitation: Difference btw. Restrictions Versus Modification of Visitation - Purpose is Addressing Perceived Parenting Skills Deficit**
IRMO Chehaiber, (2nd Dist., 2009)
§607(c) regarding restrictions on visitation provides:

> "The court may **modify** an order granting or denying visitation rights of a parent whenever modification would serve the best interest of the child; but the court shall **not restrict** a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health."

The issue in this case was what constitutes a restriction because in modification proceedings afforded the father significant less visitation including significantly less overnight visitation. The appellate court stated:

> Most of the Illinois cases that have considered the distinction between an order to "modify" visitation and an order to "restrict" visitation have cited a litany of examples of restrictions and modifications but stopped short of offering an explanation for why the examples fit one description but not the other. A typical case, *In re Marriage of Lee*, 246 Ill. App. 3d 628 (1993), explains the distinction as follows:
>
> > "A restriction of visitation is an action which limits, restrains, or confines visitation within bounds. A termination of visitation is a restriction, as is a prohibition on overnight visitation. Likewise, a requirement that visitation be supervised, occur in the home of the custodial parent, or outside the home of the noncustodial parent is a restriction. However, eliminating one day from a weekend visitation or shortening a summer visitation due to the activities of the child is not a restriction."

After discussing §607(c) with §607(a), the appellate court stated:

> Indeed, although we find no Illinois cases directly explaining the distinction between the terms "modify" and "restrict" as they are used in section 607(c), many opinions imply that the "restrict" portion of section 607(c) is a specific application of the general rule stated in section 607(a), that the noncustodial parent should be given reasonable visitation unless doing so would endanger the child. By placing section 607(c) in the context of the statute as a whole, we can divine that the legislature intended a "restriction" of visitation to denote a decision to limit a noncustodial parent's visitation to something less than the reasonable visitation to which he or she would otherwise be entitled. However, that insight leaves us short of a fully cohesive explanation.
>
> However, more importantly for our purposes, the comment also clarifies the distinction between modified and restricted visitation by elucidating the reasons underlying the distinction. As the comment explains, the more stringent

> endangerment standard was created to place a greater burden on a party seeking a reduction in a parent's visitation time where the reduction is based on reasons pertaining to perceived deficiencies of the parent, as opposed to reasons pertaining directly to the child's best interests.
>
> [S]ection 607 sets out a very cohesive scheme for setting (section 607(a)) and changing (section 607(c)) visitation. Pursuant to section 607(a), the noncustodial parent is entitled to reasonable visitation, which a court sets based on the child's best interests. The extent that the child's best interests allow the same level of visitation may change, and thus the amount of reasonable visitation to which the noncustodial parent is entitled may change, as circumstances progress; section 607(c) accounts for this by allowing modification of visitation in accord with the child's best interests.
>
> However, this reasonable visitation comes with the limitation (sometimes made explicit by a court order or a parenting agreement, but otherwise stated in section 607(a)) that the child not be exposed to morally or psychologically inappropriate settings or to physical danger. Thus, a party may also seek to reduce a noncustodial parent's visitation, either from the outset, under section 607(a), or after visitation has been set, under 607(c), because the party believes the noncustodial parent to be unsuited for full visitation. In that case, the reduction in visitation will be a restriction, and the party must show endangerment under section 607(a) or 607(c).
>
> Put as clearly as we can, then, the difference between a modification and a restriction in section 607(c) is that a modification looks at the child's best interests directly, while a restriction looks at the suitability of the parent whose visitation would be curtailed. The above-cited Illinois cases can be somewhat misleading when they list an array of examples of types of changes that have been deemed "restrictions" or "modifications," because it is not the result--the actual change in visitation--that distinguishes a restriction from a modification; it is the purpose for the change.

Accordingly, because the trial court's order did not address a defect in perceived parenting skills when it limited visitation, the appellate court ruled that the visitation modification was not a restriction. Finally, the appellate court disagreed with the reasoning of the *Gibson* decision where it had that it "[could not] escape the conclusion that some difference in the scope of" section 607(a) and the "restrict" portion of section 607(c) "was intended by the legislature."

Attorney's Fees:

***Blum* - Timeliness of Petitions for Contribution in Post-Decree Cases**
IRMO Blum v. Koster, 235 Ill. 2d 21 (Ill. 2009)
The issue was whether the trial court erred in dismissing the ex-wife's petition for contribution of attorney fees as untimely. The Supreme Court stated:

> We agree with the analysis of the court in *Macaluso* and the appellate court in this case. Section 508 governs attorney fees generally, including petitions for contribution of attorney fees and costs incurred in postdecree proceedings and initial dissolution proceedings. We also agree with *Macaluso's* conclusion that section 503(j) governs the procedural requirements applicable to petitions for contribution of attorney fees and costs incurred prior to the entry of final orders for dissolution of marriage. The phrase "all other issues," in section 503(j) refers to bifurcated contested trials, when the grounds are tried first and "other remaining issues" are either settled or tried separately. See 750 ILCS 5/403(e) (providing for bifurcated contested trials on issues of grounds and "other remaining issues"). Further, in the section 503 context, attorney fees are awarded in view of the total disposition of property and assets, thus justifying the 30-day requirement for filing a petition for contribution of attorney fees. Practically, a judge rarely decides "other remaining issues" immediately after a contested trial on the remaining issues. The petition for fees must, however, be presented to the judge after close of the evidence, and then attorney fees are decided as part of the overall property and asset distribution.

Thus, the Supreme Court held that the trial court erroneously dismissed the ex-wife's petition for contribution of attorney fees as untimely. So the Supreme Court affirmed the appellate court's decision holding that held that the timing requirements of Section 503(j)(1) of the IMDMA apply only to pre-decree, not post-decree, petitions. *Blum* presents a well reasoned analysis of the 1997 amendments to the attorney fees statute and timing requirements of the contribution statute.

Comment: Will there be the same result given the recent Leveling the Playing Field Amendments distinguishing in several instances between initial and post-divorce proceedings?

***Haken* - Allegation re Needlessly Increasing Cost of Litigation / Ability-Inability is Not the Standard**

IRMO Haken, 394 Ill. App. 3d 155, 162 (Fourth Dist., 2009)

This case revolved around the language of Section 508(b) that reads:

> If at any time a court finds that a hearing under this [s]ection was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly.

The issue was the "under this section" limitation in Section 508(b). The appellate court stated:

> Rudolf argues this subsection does not apply to this case because (1) this was not an action to enforce an order or judgment, and (2) no hearing was conducted under this section that was precipitated by some improper purpose. Rudolf claims the plain language of the above-quoted section requires, at least, one of these two occurrences. We conclude Rudolf's interpretation of the circumstances of when this section applies may be too limited. However, we need not determine whether section 508(b) is

> applicable because Leila argued for and the trial court awarded fees under section 508(a).

However, there is other useful language regarding unnecessarily increasing the cost of litigation in this decision:

> We believe the language in section 503 allows a court to consider an "unnecessary increase in the cost of litigation" when determining a fee award under section 508(a). Section 503(d) provides "[the court] also shall divide the marital property *** in just proportions *considering all relevant factors*." (Emphasis added.) 750 ILCS 5/503(d) (West 2008). Unnecessarily increasing the cost of litigation is a relevant factor in the division of property as well as in allocating attorney fees.

The case also contains a succinct discussion of the historical ability/inability standards:

> Rudolf argues the award of fees under section 508(a) was improper because the petitioning party must prove an inability to pay fees and the ability of the other party to pay. Here, the court found each party had the ability to pay his or her own fees. Rudolf contends "inability to pay" is a prerequisite to a fee award under section 508(a). Such a reading of this section eviscerates the statutory directive in section 503(j)(2) to consider the criteria for the division of marital property under section 503(d) in making contribution awards. Under Rudolf's reading of section 508(a), once a court finds a party has the ability to pay his or her own fees, further inquiry ends and the court need not look at any other factor to determine whether contribution should be made. Rudolf is wrong. ***
>
> The statute directs the court to consider many factors when deciding the amount of contribution a party may be ordered to make. The requirement that a person seeking contribution show an *inability* to pay appears nowhere in the statute. The relative financial standing of the parties should be considered, and that is what the section 503(d) factors are all about.

Finally, this is a good precursor to understanding the importance of the amendments to the Leveling the Playing Field statute under PA 96-583.

***Harrison* - Custody Modification Not Vexatious Despite Proof of Alienation**
IRMO Harrison, 388 Ill. App. 3d 115 (First, Dist., 2009)
Rarely has an Illinois case addressed the language of Section 508(b) of the IMDMA providing:

> "If at any time a court finds that a hearing under this Section was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly. Improper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation."

The Illinois appellate courts have also given little attention to the language in Section 610(c) regarding vexatious custody litigation (fee awards where a custody modification proceeding is vexatious and constitutes harassment). While the trial court found a pattern of alienating behavior, the appellate court found that there was no reversible error where the father had been successful in two previous modification of custody proceedings to obtain custody of the two other children. Additionally, the court appointed expert had recommended in favor of the ex-husband.

***Best II* - Premarital Agreements and Fee Waiver Clauses Related to Custody or Child Support Litigation - Party Able to Seek Fee Award for Support or Custody Portion of Case Based on Ability / Inability Standard**

IRMO Best (Best II), 387 Ill.App.3d 948 (2d Dist. 2009).

The *Best* case dealing with premarital agreements has taken an interesting path through the Illinois court system. H. Joseph Gitlin's revised *Best I* **Gitlin on Divorce Reports,** No. 08-60, quoted at length from Joe DuCanto's commentary on the decision. Joe DuCanto points out that the Supreme Court in *Best* got it right when it reversed the appellate court and determined that a declaratory judgment was a proper vehicle to address the validity, scope and application of a premarital agreement. DuCanto's concluding sentence reads, "Law often has been often referred to as the 'science of inefficiency.' Attorneys and litigants alike should welcome the high court's decision as a means to save time and money."

While *Best I* benefits divorce lawyers, imagine the course of this case now including the *Best II* decision. The same appellate court that was reversed in *Best I*, stated that the, "The supreme court then reversed our holding that declaratory judgment was improper and remanded the matter to this court to decide on the merits whether the trial court correctly interpreted the attorney fees clause of the premarital agreement." The Second District court concluded, "hold that the agreement was intended to encompass fees incurred in litigation of custody and other child-related issues, but we deem the agreement to be against public policy (and therefore unenforceable) as applied to the child-related issues." The appellate court then addressed whether the prohibition in the premarital agreement of awards of attorney's fees addressed issues of child support. The *Best II* court remarkably stated:

> [E]ven though we determine that the agreement's ban on fee-shifting was intended to include litigation of child support issues, the question remains whether such an agreement is enforceable as to those issues. As explained below, we hold that the fee-shifting ban in the agreement is not enforceable as to child-related issues, because it violates public policy by discouraging both parents from pursuing litigation in their child's best interests.

After noting that premarital agreements cannot dictate awards of child support or child custody, the appellate court then addressed whether the fee shifting bar governing child related issues violated public policy. The appellate court reviewed Illinois case law and found nothing on point that was persuasive and therefore examined case law from other states. One approach is to find that a fee-shifting bar is unenforceable only where the spouse "prosecuting the child's interests" demonstrates an inability to pay. Alternatively, the court could adopt an approach declaring a

fee-shifting bar unenforceable per se, without reference to the prosecuting spouse's ability to pay. The appellate court then in an overly broad statement suggested that there is little difference between these two results because, "in Illinois, the party seeking an award of attorney fees must establish his or her inability to pay and the other spouse's ability to do so." While there is case law that gives lip service to the traditional standards, the provisions for contribution do not adopt the ability/inability to pay as the benchmark but rather adopt the standards for property awards if no maintenance is award – or for maintenance awards if there is an award of spousal support. The Second District concluded, "So long as respondent is able to demonstrate an inability to pay attorney fees (and petitioner's ability to pay them), the agreement will not prevent her from recovering them."

Best II adopts an overly restrictive reasoning regarding limitations on fee awards in premarital agreements. Case law in Illinois before the Leveling the Playing Field amendments had not focused on inability / ability to pay as much as on the relative abilities to pay. The *McGuire* case, 305 Ill.App.3d 474 (5th Dist. 1999), comes closest to stating that the Leveling amendments were procedural and not substantive. *McGuire* then has a good summary of case law when it states, "Courts have considered the allocation of assets and liabilities, the award of maintenance, and the relative earning abilities of the parties when determining whether one party should contribute toward the payment of the other party's attorney fees."

Evidence Cases:

Mental Health Confidentiality

***Slomka* - Waiver of Mental Health Confidentiality / Injunctions against Therapy - Not Granted**
IRMO Slomka, 397 Ill. App. 3d 137 (1st Dist., 2009)
The issue was a December 2008 order denying the father's motion for preliminary injunction, in which the trial court specifically found that he had waived the right to assert his privilege under the Mental Health Confidentiality Act by failing to assert it. The first issue was whether under Section 5 of the Act, there must be a written waiver -- "a party may not waive confidentiality by failing to object on the grounds of privilege." But the appellate court noted:

> Section 10(a) of the Confidentiality Act, which governs disclosure in legal proceedings, states: “Except as provided herein, in any civil, criminal, administrative, or legislative proceeding, or in any proceeding preliminary thereto, a recipient, and a therapist on behalf and in the interest of a recipient, has the *privilege to refuse to disclose* and to *prevent the disclosure* of the recipient’s record or communications.” (Emphasis added.) 740 ILCS 110/10(a).

Section 10(A)(1) also provides, "Section 10(a)(1) provides in pertinent part: “Records and communications may be disclosed in a civil, criminal or administrative proceeding in which the recipient introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense.”

The appellate court found that the father was a recipient of mental health services under the Act.

Instructively, the opinion states:

> The meetings between Christopher, Mary, and Jean Gray were ostensibly to discuss how to address the divorce with their minor children. Parents have an independent right to maintain the confidentiality of conversations they may have had with mental health professionals with regard to their minor children. See *In re Marriage of Semmler*, 90 Ill. App. 3d 649, 654 (1980) (mother was a "recipient" within the meaning of the Confidentiality Act when she consulted with her minor child's therapist for parenting advice). As a "recipient" under the Confidentiality Act, Christopher was entitled to invoke the patient-therapist privilege. 740 ILCS 110/10(a) (West 2006).

But the appellate court rules that the privilege was waived by failing to object, "as this court has previously held, the patient-therapist privilege must be asserted by either the patient or the therapist or it is considered waived." Accordingly, the appellate court ruled:

> Despite being entitled to invoke the patient-therapist privilege to maintain the confidentiality of his communications with Jean Gray, Christopher failed to assert the privilege. At no time prior to or during Jean Gray's testimony did Christopher assert his privilege of therapist-patient confidentiality. The only objection to the testimony that Christopher raised was on the basis of relevance. That objection was insufficient to invoke the privilege

The opinion also contains a good discussion about the standards for injunctive relief and why they were not met in this case. Regarding the father's argument that the children should not be in counseling and that an injunction should have been entered by the trial court, the opinion stated:

> We find no support in *Wickham* for the argument that one custodial parent's choice of medical provider for their child should prevail over the other custodial parent's choice of medical provider, particularly where the fitness of neither custodial parent has even been questioned.

An interesting quote stated:

> The minor children in this case have been in therapy with Jean Gray with Christopher's knowledge since February and May 2008, respectively. Preliminary injunctions are improper where they tend to change the status quo of the parties rather than preserve it. *Schwartz*, 131 Ill. App. 3d at 354.

***Kim* - Disclosure of Medical Records in Divorce May Violate Mental Health Confidentiality**
Kim v. St. Elizabeth's Hospital, 395 Ill. App. 3d 1086 (5th Dist., 2009)
A woman whose mental health records may have been improperly disclosed in discovery during her divorce case may pursue claims against the hospital and health system that produced them. The trial court erred in dismissed the woman's claims because of questions remaining at the time of the

dismissal regarding whether the law firm had improperly subpoened the records without submitting a court order, and whether the hospital had acted improperly by providing them. Attorneys represented the then husband sought certain medical records. The hospital supplied the records, although there the deposition notice was not accompanied by a court order.

But first, the wife's counsel issued a subpoena requested the presence of a nurse at the time of a rehearing on the husband's motion to reopen and rehear an emergency order of protection. The hospital and nurse's motion to quash the subpoena was brought pursuant to the Mental Health and Developmental Disabilities Confidentiality Act (Mental Health Confidentiality Act) (740 ILCS 110/1 et seq. and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (45 C.F.R. §164.512 et seq.). The trial court granted the motion to quash the subpoena. But later the husband's counsel served a records only subpoena on the hospital seeking, ""[a] complete copy of any and all records regarding the care and treatment of " Kim, from her admission on December 29, 2004." The hospital forwarded the medical health information, including her mental health records, to husband's counsel. The trial court first entered an order prohibiting disclosure of the mental health care records beyond counsel. The wife then brought a motion to quash the subpoena and she sought suppression and destruction of the records. She alleged a violation of §10(d) of the Mental Health Confidentiality Act because an order was not first obtained. She argued that she had been damaged and sought monetary penalties as a sanction for the violation of the Confidentiality Act.

Section 10(d) provides as follows, in pertinent part:

> "No party to any proceeding described under paragraph[] (1) *** of subsection (a) of this Section, nor his or her attorney, shall serve a subpoena seeking to obtain access to records or communications under this Act unless the subpoena is accompanied by a written order issued by a judge, authorizing the disclosure of the records or the issuance of the subpoena. No person shall comply with a subpoena for records or communications under this Act[] unless the subpoena is accompanied by a written order authorizing the issuance of the subpoena or the disclosure of the records." 740 ILCS 110/10(d)

Section 15 of the Mental Health Confidentiality Act provides as follows: "Any person 9 aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief. Reasonable attorney's fees and costs may be awarded to the successful plaintiff in any action under this Act." 740 ILCS 110/15

Regarding the collateral estoppel argument the appellate court noted that the question of admissibility of the mental health records (which the trial court had reviewed) was separate from whether the records were obtained by an improper procedure. Regarding the argument by the husband's lawyers that it did not intend to request mental health care records the appellate court stated:

Because the subpoena requested "[a] complete copy of any and all records regarding the care and treatment of" the plaintiff, from her admission on December 29, 2004 (the date of her admission as a

result of an alleged suicide attempt), and her mental health records were forwarded, this argument is not persuasive.

Johnston v. Weil* - Mental Health Confidentiality and 604(b) Reports
We now have the Illinois Supreme Court's decision in this case.
The issue in *Johnston v. Weil* was whether defendants1violated 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 pursuant to section 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 section 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 decision 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).

***Quigg* – Mental Health Confidentiality Act Not Violated for Disclosing Wife's Prescription Profile to Husband**

Quigg v. Walgreen Co., 905 N.E.2d 293, 388 Ill. App.3d 696 (2d Dist. 2009).

In *Quigg*, the Second District court rejected a wife's argument that Walgreen's violated the Mental Health and Developmental Disabilities Confidentiality Act by disclosing her prescription profile to her husband in the course of dissolution proceedings. The appellate court reasoned that Walgreen's was neither a therapist nor an agency as defined under the Act and was not engaged in a therapeutic relationship with the wife to give rise to confidentiality or liability under the Act.

***Samuel* - Contempt / Civil Versus Criminal**

IRMO Samuel, (4th Dist., 2009)

This case discusses a point that will occasionally occur in family law proceedings. The case states:

> A party who argues that the trial court erred by acceding to the party's own suggestion cannot be heard to complain of the invited error. See *Stephens v. Taylor*, 207 Ill. 2d 216, 222, (2003); *Lapp v. Village of Winnetka*, 359 Ill. App. 3d 152, 163, (2005); *People v. Vaden*, 336 Ill. App. 3d 893, 896-97, (2003); *In re E.S.*, 324 Ill. App. 3d 661, 670, (2001).

Regarding civil versus criminal contempt, this decision contains some instructive language:

> The law of contempt is extraordinarily nuanced and arises in its application in circumstances of high emotion, such as here. Both the court and counsel must tread carefully to place the complained-of conduct in the correct denomination of contempt, because each type of contempt carries with it specific rules of procedure to avoid error. Principles of Contempt, written by the Honorable John P. Shonkwiler, is available to every judge in the State of Illinois and should be used to guide a trial judge in analyzing which category of contempt applies and what procedural rules obtain for that category.

See, IICLE's Chancery & Special Remedies, 2009 Edition, Chapter 2. An older version is available at: http://ija.org/bb/contempt.htm

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Jurisdiction:

***Heard* - Personal Jurisdiction and Minimum Contacts for Registration of Foreign Support Order**

DHFS ex. Re. Heard v. Heard,, 916 N.E.2d 61 (3d Dist. 2009)

Recall from law school the series of minimum contact cases for a state court to have jurisdiction over child support issues. The issue in this case was whether there were minimum contacts to register a Germany child support order. The *Heard* court summarized the facts:

> Here, Kevin's contacts with Germany do not indicate that he purposely availed himself of the benefits and protections of German law. Kevin's contacts with Germany as presented by the record are as follows: Kevin was stationed in Germany

> while in the United States Army and met a German citizen whom he married in Denmark in August 1997. Approximately nine months after their marriage, they moved to the United States in May 1998. In November 2001, Kevin and his German wife had a baby, Nicholas. In September 2003, Sandra and Nicholas traveled to Germany to visit her mother with Kevin's knowledge. After Sandra indicated that she and Nicholas would not be returning to the United States, it appears from the nature of the action before us that Kevin failed to support Nicholas while Nicholas was living in Germany. As in Kulko and Boyer, Kevin remained in Illinois where the family had lived for approximately two years, while Sandra left the marital home for Germany. In addition, the acts of marrying a German citizen and living briefly in Germany as a married couple are not, by themselves, acts by which Kevin purposely availed himself of the benefits of German law.

Accordingly, the appellate court ruled that trial court did not have sufficient minimum contacts to register the German child support order and, accordingly, reversed the trial court's decision.

O'Brien* – Petitions for Change of Judge: Motions under Code vs Motions under §63(c-1) of Judicial Code and Impact of *Caperton

IRMO O'Brien, (2nd Dist., 2009)

Perhaps most interesting aspect of the *O'Brien* case involves petitions for change of judge based an allegation of actual prejudice where the issue is whether the standard is the appearance of impropriety in light of the Supreme Court's *Caperton* decision.

The Certificate of Importance was granted in August 2009. As family lawyers we are often faced with petitions for change of judge – some brought by pro se litigants. To understand the issue, I will quote at length from the well-stated specially concurring opinion by Justice O'Malley:

> Petitioner asks us to clarify the standards governing removal of judges in light of the apparently conflicting treatment the issue has received in Illinois case law. Petitioner notes in his brief that, according to *Hoellen*, a party seeking substitution for cause must demonstrate the judge's subjective bias as well as "evidence of prejudicial trial conduct" (*Hoellen*, 367 Ill. App. 3d at 248), and he questions how *Hoellen* can be reconciled with *Wheatley*, a decision in which, without reference to any prejudicial conduct of the original trial judge and without a showing of any subjective bias, the Fifth District reversed and remanded the cause for a hearing before a new trial judge because there had been an objective appearance of the original trial judge's

impropriety under the Judicial Code (*Wheatley*, 297 Ill. App. 3d at 858-59). The majority responds by citing case law that the majority says "inescapably" (slip op. at 13) supports the proposition that the appearance of impropriety under the Judicial Code alone can stand as a basis for a motion to remove a judge, then by saying that that case law did not "state[] an intent to depart from *** authority that actual prejudice is generally required" (slip op. at 17), and then by saying that the case law "creat[es] only an exception to the actual prejudice requirement" (slip op. at 18). Thus the majority uses several pages to discuss what it terms a "tension" in the law before attempting an unworkable reconciliation6 and then offering an internally contradictory resolution.

> According to the majority, there are three bases on which a party may file a motion to

> have a judge removed from a case: a motion for substitution as of right under the Code, a motion for substitution for cause under the Code, and a motion based on the Judicial Code. The majority thus identifies Rule 63(C)(1) of the Judicial Code as a basis for a motion to remove a judge (and a basis for vacating a judgment by a judge who should have been removed) separate from a motion for substitution under the Code. Rule 63(C)(1) states that a judge "shall disqualify himself or herself" if the judge's "impartiality might reasonably be questioned." 210 Ill. 2d R. 63(C)(1).7 This rule sets out an objective test for requiring recusal: according to the rule as applied by *Wheatley* and repeated by the majority, a judgment may be vacated for the trial judge's failure to recuse himself or herself where his or her impartiality might reasonably be questioned, even if the judge was not actually biased. However, as the majority notes, a judgment may be vacated for the improper denial of a motion to substitute the trial judge for cause only if the appellant can demonstrate the trial judge's "personal bias" as well as "prejudicial trial conduct." This subjective standard, and this requirement of prejudicial trial conduct, cannot be reconciled with the objective standard described in Rule 63(C)(1) and *Wheatley*. The standard for vacating a judgment for improper denial of a motion to substitute for cause is far more rigorous than is the standard for vacating a judgment for improper failure to recuse, even though both seek the same remedy.

The language of the August 21, 2009 Certificate reads:

> In light of the United State Supreme Court decision in *Caperton v. A.T. Massey Coal Company, Inc.*, 77 U.S.L.W. 4456, 4460 (June 9, 2009) (No 08--22)) petitioner's request, **and our opinion's acknowledgment of the confused law regarding the standard for obtaining a substitution of judge**, we grant this certificate of importance pursuant to Supreme Court Rule 316.

2009 Legislation: Once again, 2009 (like 2010) was not an active session involving family law legislation – due to the continuing work of the Family Law Study Committee. The most significant legislation were the amendments to the Leveling the Playing Field Amendments and the Civil No Contact Order Act.

PA 96-583: Comprehensive Amendments to Leveling the Playing Field Amendments:
Status: 8/18/2009 Public Act . . . . . 96 -0583

Interim Fee Amendments: The 2009 amendments provide at §501(c-1):

> (1) Except for good cause shown, a proceeding for (or relating to) interim attorney's fees and costs in a pre-judgment dissolution proceeding shall be nonevidentiary, and summary in nature~~, and expeditious~~. All hearings for or relating to interim attorney's fees and costs under this subsection shall be scheduled expeditiously by the court.

The next change is more minor and merely provides that the factors for the court to consider are those "that appear reasonable and necessary, including to the extent applicable:..."

This was done because in post-divorce proceedings factors such as the marital estate are not applicable. It also provides a better argument that the interim fee provisions apply in parentage cases.

Contribution Amendments: The next change is to §503(d)(1):

> (1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including (I) any such decrease attributable to a payment deemed to have been an advance from the parties' marital estate under subsection (c-1)(2) of Section 501 and (ii) the contribution of a spouse as a homemaker or to the family unit;

Section 508 Amendments: The third change is to Section 508.

> **508 Generally**: The relevant portions or 508(a) now provide:
>
> **Preamble**: Interim attorney's fees and costs may be awarded from the opposing party, in a pre-judgment dissolution proceeding in accordance with subsection (c-1) of Section 501 and in any other proceeding under this subsection. At the conclusion of any pre-judgment dissolution proceeding under this subsection ~~the case~~, contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503 and in any other proceeding under this subsection. Fees and costs may be awarded in any proceeding to counsel from a former client in accordance with subsection (c) of this Section.
>
> **Affidavit in Support of Interim Fee Petition**: Next, there is an entirely new paragraph in §508(a):
>
> All petitions for or relating to **interim fees and costs** under this subsection shall be accompanied by an affidavit as to the factual basis for the relief requested and all hearings relative to any such petition shall be scheduled expeditiously by the court. All provisions for contribution under this subsection shall also be subject to paragraphs (3), (4), and (5) of subsection (j) of Section 503.

Enforcement and Improper Purpose – §508(b) – Improper Purpose Expanded to "Act": Perhaps the largest change to the Leveling the Playing Field statute changes only one word in Section 508(b):

> If at any time a court finds that a hearing under this Act ~~Section~~ was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly. Improper purposes **include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation**.

Fee Petitions Against Former Client - §508(c) – Tolling of Time Frames to File Petition re Motions to Reconsider, etc., and During Appellate Proceedings: Section 508(c) provides for attorney's fees against a lawyer's own client (former client). Subsection (5) sets forth the time-

frames for the filing of a petition. There is new language that now states:

> Each of the foregoing deadlines for the filing of a praecipe or a petition shall be: (A) tolled if a motion is filed under Section 2-1203 of the Code of Civil Procedure, in which instance a petition (or a praecipe) shall be filed no later than 30 days following disposition of all Section 2-1203 motions; or (B) tolled if a notice of appeal is filed, in which instance a petition (or praecipe) shall be filed no later than 30 days following the date jurisdiction on the issue appealed is returned to the trial court. If a praecipe has been timely filed, then by timely filed written stipulation between counsel and client (or former client), the deadline for the filing of a petition may be extended for a period of up to one year.

Consent Judgments for Fees - §508(d) – No Need to File Itemized Billing Statements: The final change involved petitions for a consent fee judgment under §508(d):

> A consent judgment between client and counsel, however, is permissible if it is entered pursuant to a verified petition for entry of consent judgment, supported by an affidavit of the counsel of record that includes the counsel's representation that the client has been provided ~~incorporates~~ an itemization of the billing or billings to the client, detailing hourly costs, time spent, and tasks performed, and by an affidavit of the client acknowledging receipt of that documentation, awareness of the right to a hearing.

PA 96-53: Income Withholding Amendments - Certified Mail OR Private Process Server
SB 100 Status: 7/23/2009 Public Act 96-53
This amendment adds only ten words to the Income Withholding for Support Act but it can have a very significant impact on actions seeking $100 per day penalties due to the failure to withhold. Until now the finding of the payor's non-performance within the time frame required had to shown by certified mail. The amendment adds the logical provision that it may also be proved by a sheriff's or private process server's proof of service – showing the date the income withholding notice was served on the payor.

PA 96-676: Custody and Military
HB 2283 Status: 8/25/2009 Public Act 96-676
We now have a new sub-section 10 in the factors the court considers in awarding custody under Section 602(a) of the IMDMA:

> (10) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed.

The other change is to custody modification – Section 610. It adds section (e):

> (e) A party's absence, relocation, or failure to comply with the court's orders on custody, visitation, or parenting time may not, by itself, be sufficient to justify a modification of a prior order if the reason for the absence, relocation, or failure to

comply is the party's deployment as a member of the United States Armed Forces.

PA 96-246: Stalking No Contact Order Act
HB 693: 8/11/2009 Public Act 96-246
The Stalking No Contact Order Act: The key is you don't need to have a dating relationship. Stalking is defined broadly:

> "**Stalking**" means engaging in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to fear for his or her safety or the safety of a third person or suffer **emotional distress**."
>
> "**Course of conduct**" means **2** or more **acts**, including but not limited to acts in which a respondent directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, **or communicates to or about, a person**, engages in other contact, or interferes with or damages a person's property or pet.

So we have the same standard, essentially, as for domestic violence. But you don't need to have a dating relationship. And it does not have to be what most people think of as stalking. While this law is in the Criminal Code, it provides for a civil order (although it can be filed in connection with a criminal proceeding.) The scheme is similar to Illinois domestic violence law – but, it defines stalking broader than the definition of "harassment" under the IDVA:

> "**Harassment**" means knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a **reasonable person emotional distress**; and does cause emotional distress to the petitioner.

PA 96-675: Unlawful Visitation Interference is Now Unlawful Visitation or Parenting Time Interference
HB2266 Status: 8/25/2009 House Public Act 96-0675
Section 10-5.5 of the Criminal Code was formerly titled "Unlawful Visitation Interference." The amendments now title this Unlawful visitation or parenting time interference. The terminology throughout this section was changed to include interference with parenting time as well as visitation.

Comment: Curiously, it took 13 years for the legislature to address the problems due to *People v. Warren*, 219 533 (1996).

PA 96-331: Electronic Communication (Virtual Visitation) Facilitated But It is Not Visitation:
Status: SB 1590 8/11/2009 Senate Public Act 96-0331
IMDMA §607(a) now includes two subsections:

> (1) "**Visitation**" means in-person time spent between a child and the child's parent. In appropriate circumstances, it may include electronic communication under

conditions and at times determined by the court.

(2) "**Electronic communication**" means time that a parent spends with his or her child during which the child is not in the parent's actual physical custody, but which is facilitated by the use of communication tools such as the telephone, electronic mail, instant messaging, video conferencing or other wired or wireless technologies via the Internet, or another medium of communication.

The removal section – §609 – now contains subsection (c) that provides simply:

(c) The court may not use the availability of electronic communication as a factor in support of a removal of a child by the custodial parent from Illinois.

Comment: Passage of this statute had been over-due.

PA 96-688: Amendments to Cindy Bischof's Law
Status: 8/25/2009 Public Act 96-688
PA 96-688 amends the law known as Cindy Bischof Law. This is the law that permits a judge to order a person charged with violating a protective order to wear a satellite tracking device—as a condition of parole, mandatory supervised release, early release, probation, or conditional discharge—that alerts police and the victim when the offender breaches a court-imposed boundary. The legislation provides that when a person is charged with a violation of an order of protection, the court may, in its discretion (rather than shall), order the respondent to undergo a risk assessment evaluation if certain conditions are present.

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