

# **SUMMARY OF SIGNIFICANT ILLINOIS DIVORCE AND FAMILY LAW CASES / 2008 LEGISLATION**

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**Property Cases Law:**

**Retirement Benefits Cases:**

***Richardson* - Defined Benefit Plan (Police Pension Fund) / Coverture Fraction Approach**  
[IRMO Richardson](#), 381 Ill.App.3d 47 (1<sup>st</sup> Dist, 2008), [GDR 08-31](#).

In this case, the parties' marital settlement agreement somewhat addressed the husband's interest

in a [defined benefit plan](#): Village of Hoffman Estates Police Pension Fund. The MARITAL SETTLEMENT AGREEMENT simply awarded the ex-wife one-half of her ex-husband's pension "as it has accrued" from the date of the marriage to the date of the dissolution judgement. The significant dates were:

Date of benefit accrual:	October 12, 1973
Date of Marriage:	June 14, 1984
Date of Divorce:	March 27, 1995
Date Benefits in Pay Status:	December 2002 (total years 29 years).
Date of Allocation Order:	March 2007

Significant amounts as explained below were:

Fractional Approach:	\$1,112.62
Frozen Interest Approach:	\$624
Husband's Gross Benefits:	\$6,012.83

Under the Illinois Pension Code, 40 ILCS 5/3-111, for service in excess of 20 years, the pension benefit is 50% of final salary plus 2.5% of salary for each year up to 30 years. Thus, the cap is 75% of final pay. Because the husband had 29 years of service, his yearly benefit was calculated at 72.5% of his final salary, for a monthly benefit of \$6,012.83 gross. In September 2003, the ex-husband started paying his ex-wife an amount toward her share of the benefits admittedly guessing at the amount. His testimony was that he contacted the fund and they told him to pay \$624 per month which he began paying in December 2003 plus additional sums to cover the year of missed payments. The ex-wife's petition seeking the entry of a [QDRO](#)<sup>1</sup> was dismissed and then she brought a motion requesting a judgment for the correct monthly amount and payment of an arrearage. The ex-wife urged that she should receive either \$1,118.44 or \$1,112.67 per month, depending on which of the two allocation formulas suggested by her expert applied, plus her share of the 3% cost of living increases petitioner would receive annually starting in January 2005. The ex-husband urged her share should be \$625.40 per month since the ex-wife should not receive the benefit of the years he worked before and after the divorce.

The ex-wife's expert used two approaches with the second approach being the traditional fractional approach and the first approach being what he termed a "subtraction approach." The ex-husband's expert was an actuary for the Village of Hoffman Estates. He urged the \$625 figure based upon the fact that a police officer with more than 10 years of service as of the date of the divorce would have received 2.5% of salary for each year of service. He calculated the marital portion at 25% of the salary the ex-husband was receiving at the time of the divorce decree in 1995 (the then salary of \$60,037). Both experts agreed that the annual 3% cost of living increases petitioner would receive starting in January 2005 were not earned benefits resulting from petitioner's service as a police officer and he would get them annually no matter how many years he participated in the pension plan.

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<sup>1</sup>The decision does not comment about the fact that a QILDRO would have been the proper vehicle or the change in the QILDRO law made after the husband went into pay status but before the decision was ultimately entered nor does it comment upon whether there was any impact due to the *Menken* decision.

The appellate court approved of the use of the fractional approach (sometimes called coverture fraction or timeline approach and by the ex-wife's expert called the "reserved jurisdiction" approach). It also required the ex-husband to "pass along the 3% cost of living increases whenever he receives them" and to pay the arrearage based upon the proper calculations. The case has an excellent discussion of case law. The appellate court also affirmed the trial court's award to the ex-wife of the proportionate share of the cost of living increases.

**Comment:** At the time of the entry of the divorce decree, the first version of the QILDRO law has not yet been passed. Accordingly, the decree anticipated what was essentially a "triangular order", i.e., one in which the plan paid funds to the ex-husband who in turn paid them over to the ex-wife.

### **Winter - QILDROs / Imposition of Constructive Trust for Pension Distributions Where Party Refuses to Sign Consent for Issuance of QILDRO**

[IRMO Winter](#), (*Winter I*) 387 Ill. App. 3d 21 (1<sup>st</sup> Dist., 2008)

*Winter* is an interesting case in which the First District appellate court faced the issue of a refusal to sign a consent for issuance of a QILDRO in light of the Second District's [IRMO Menken](#), 334 Ill. App. 3d 531 (2d Dist. 2002) which had held that the trial court lacks the authority to order a state governmental plan participant to execute a consent for issuance of a QILDRO but the trial court has 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 this case, the appellate court faced the situation where the triangular order and reliance upon the contempt power of the court was not workable because the participant lived outside of the United States. Based upon the facts of the case the appellate court affirmed the trial court's imposition of a constructive trust. Perhaps 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.

### **Schurtz - QILDROs / Defined Benefit Plan (Firefighters Pension Fund) - Are Disability Benefits Pension Benefits?**

[IRMO Schurtz](#), 382 Ill.App.3d 1123, 1125 (3<sup>rd</sup> Dist., 2008)

This case was another case involving retirement benefits covered under the Illinois Pension Code stemming from the time when QILDROs were not allowed. The 1993 settlement agreement stated in part:

As a part of the distribution of marital property, the parties will divide evenly JOHN B. SCHURTZ' accrued retirement pension benefits as of September 16, 1993, if, as, and when received by him. \* \* \* In the event a Qualified Domestic Relations Order is lawfully able to be entered in the future with regard to said pension, each party will cooperate to the entry thereof."

In late 2004, when the ex-husband was 62 years old, he became unable to work as a firefighter and applied for disability benefits. The City of Peoria Fireman's Pension Board approved his

application and he began receiving \$4,374.00 per month in disability payments. In February 2005, the ex-wife's lawyer sent the ex-husband a letter requesting consent to issue what should have been called a QILDRO (the decision indicates the lawyer requested to issue a QDRO). When the ex-husband refused, the ex-wife filed a petition for rule in which she sought to enforce the judgment. The decision discusses the ex-husband's testimony that he did not necessarily intend to retire although it was possible he could stay on disability as long as he lived therefore bypassing retirement benefits. The trial court granted the ex-wife's petition for rule holding the disability pension to be a retirement pension consistent with the MSA. The ex-wife then filed a petition for fees per § 508(b) claiming that his failure to sign the consent for issuance of a "QDRO" was "without cause or justification."<sup>2</sup> The court required the ex-husband to reimburse his ex-wife for payments he should have made but did not require pre-judgment statutory interest. The court denied the ex-wife's request for attorney's fees finding he had a good faith justification for his conduct.

*Schurtz* has a good discussion regarding disability and retirement benefits. It states:

When a pension plan provides disability benefits as well as retirement benefits and the marital settlement agreement refers only to "retirement" benefits and is silent as to disability payments, a court may reasonably interpret the agreement in one of two ways: (1) as a grant to the ex-spouse of a portion of any benefits received under the pension plan, or (2) as limiting the ex-spouse's interest in the pension plan to normal, age-related retirement benefits. \*\*\* When a pension plan provides disability benefits as well as retirement benefits and the marital settlement agreement refers only to "retirement" benefits and is silent as to disability payments, a court may reasonably interpret the agreement in one of two ways: (1) as a grant to the ex-spouse of a portion of any benefits received under the pension plan, or (2) as limiting the ex-spouse's interest in the pension plan to normal, age-related retirement benefits. This interpretation is reasonable because the disability pay is meant to replace the disabled ex-husband's income, not act as retirement pay. However, when an ex-husband is entitled to receive retirement pay and is receiving disability income instead, a settlement agreement providing the ex-wife a portion of retirement benefits "can be reasonably interpreted in only one way -- the petitioner [should] be paid the percentage of what would be the normal retirement benefits, whether respondent [is] paid normal retirement benefits or disability retirement benefits." It is not the label of the payments (i.e., disability or retirement) that controls.

In this case the appellate court found the ex-husband was eligible for retirement pay when he began receiving disability benefits instead of retirement benefits. See 40 ILCS 5/4-109(a). Moreover, the amount was exactly the same as he would have received had he received retirement benefits. The appellate court concluded in this regard:

His disability benefits do not serve as income replacement, but as a replacement

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<sup>2</sup>The mis-quote from the statute is noteworthy since §508(b) has used the phrase without "compelling" cause or justification since 1997 (at the time of the "Leveling" amendments.)



for his retirement pension. Thus, the trial court properly found that Lynette was entitled to share in the payments.

Of note is the position taken by the dissent pointing out that there were two amicus briefs filed by various firefighter groups urging that the Illinois Pension Code exempts disability benefits where the Pension Code states, ““a QILDRO shall not apply to or affect the payment of any ... disability benefit...” The dissent urged that a matter of statutory construction should be considered as a matter *de novo* and states:

While there are no cases adopting the position articulated by the *amici*, I am convinced that the legislative intent is nonetheless clear. Based upon the statutory analysis proffered by the amici, I would find that the trial court erred as a matter of law in subjecting John’s disability benefit to division.

### ***Jamieson - QDROs / Defined Contribution Plan (Profit Sharing Plan) / Enhanced Benefits***

*IRMO Jamieson*, 379 Ill. App. 3d 100 (1<sup>st</sup> Dist, 2008)

This is another case in which the ex-husband claimed the divorce decree provided the ex-wife with increased benefits. However, this case did not involve a significant time lapse such as in *Richardson* and it involved a defined contribution plan. I have urged that best practices are to enter the QDRO at the time of the divorce decree in order to try to ensure avoiding the cost of post-decree litigation. Some lawyers try to address this by indicating in the divorce decree the provisions the QDRO is to contain. This case is an example of the fact that when such provisions are not comprehensive they provide a dis-service to clients because they do not ensure that post-decree litigation will be kept to a minimum.

The June 30, 2006, Marital Settlement Agreement contained the following language:

a. Name of Plan. It is intended that the Wife shall receive an interest in the Husband’s benefits in the Jamieson and Associates Money Purchase Pension Trust, and the Husband shall cooperate in entering a Qualified Domestic Relations Order (QDRO) to effectuate this intent. Said [QDRO] shall include the following information and provisions:

iii. Description of Benefit to be Transferred to Alternate Payee. 55% of the marital portion of the total benefits accrued by the Participant under the Plan, as of the date of entry of Judgment of Dissolution of Marriage, shall be segregated into a separate account established in the Alternate Payee’s name and invested in accordance with the Plan provisions.”

After the divorce, the parties submitted dueling QDROs. Husband’s QDRO provided:

Amount of Assignment: This Order assigns to Alternate Payee \* \* \* 55% of the money purchase account of the Participant’s Total Account Balances, of said above accounts as determined by the Plan **on or before June 30, 2006**.

Post-Divorce Contributions Attributable to Periods Before Divorce: In the event

that the Plan made any contributions to the Participant's account(s) after June 30, 2006, but that are attributable to periods before this date, then such Total Account Balance shall further include such contributed amounts."

Wife's QDRO provided:

Amount of assignment: This Order assigns to Alternate Payee \* \* \* 55% of the money purchase account of the Participant's Total Account Balances, of said above accounts as determined by the plan **for Plan Year ending September 30, 2005.**

Post-Divorce Contributions Attributable to Periods Before Divorce: In the event that the Plan made any contributions to the Participant's account(s) **for Plan Year ending September 30, 2006**, then the Alternate Payee **shall receive 41.25% (which is 55% of 75% of the Plan Year) of such contributions as of September 30, 2006.**"

To understand the reason for the dueling provisions, consider how the profit sharing plan was funded. The plan is made up of a pooled set of assets in a trust for the benefit of all plan participants. The assets are valued annually on September 30<sup>th</sup>. At that time, the earnings that have accrued in the plan since the prior September, along with any discretionary contributions made by the employer, are allocated among the participants to their individual accounts. The decision explains:

The earnings are allocated based on a participant's individual account balance for the prior year. For example, if a participant's balance represented 25% of the total assets in the trust, he would be entitled to 25% of the earnings that have accrued throughout the year on September 30. The contributions are generally allocated based on a participant's salary. The earnings and contributions are only allocated to participants employed on September 30 and are credited to participants' individual accounts as of September 30 for that fiscal year. If a participant is terminated or withdraws from employment prior to September 30, he would only be entitled to the balance in his account as of the previous year end. He would not be entitled to earnings or contributions for that fiscal year. Those benefits would then be allocated among the remaining participants. Thus, any growth in the profit-sharing plan enures to the benefit of those who are employed at the end of the fiscal year.

The trial court ruled as follows:

The QDRO proposed by Kathleen Jamieson takes into account what occurred between the last valuation date and the dissolution judgment date and provides for a calculable distribution that is consistent with the parties' agreement and the judgment incorporating their agreement. Edward Jamieson presented insufficient evidence of an impact on other Plan participants to support a conclusion that entry of the QDRO proposed by Kathleen Jamieson is impermissible.



The ex-husband contended that this provided his ex-wife with an increased benefit. The appellate court held that the QDRO entered by trial court did not violate either the terms of the MARITAL SETTLEMENT AGREEMENT or ERISA by providing that wife would be entitled to receive a percentage of increase in plan between the last plan valuation date and the end of the new valuation year. Even though the QDRO awarded the wife benefits that were contingent on husband's continuous employment as of date of entry of settlement agreement, it was no longer contingent at time of entry of QDRO.

**Comment:** This is a case where theoretically there would be favorable treatment to the wife for the delay in entering the QDRO. The query remains whether the cost of trial and appellate resulted in a net positive financial impact to the ex-wife. The reserved jurisdiction approach, i.e., waiting for some time to determine if retroactive contributions are made depends upon the knowledge of how the plan operates. Any time there is a profit sharing plan, you should be aware of the nature of the plan and the fact that there may be what are essentially discretionary contributions. Shulman in his book QDRO Handbook, §13.02(e) at p 13-10, recommends the following language be included in QDROs to clarify the intent: "Further, such Account Balance shall include all amounts (including plan forfeitures, if applicable, contributed to the Plan on behalf of the Participant after the date of the entry of the judgment for dissolution of marriage that are attributable to periods before such date." However, if there is to be an immediate roll-over and the QDRO is submitted immediately providing for a immediate rollover this would present a problem in terms of qualification of the DRO (domestic relations order). I agree with Shulman's further statement, "From an equitable standpoint, the alternate payee should be entitled to a pro rata share of the contributions made [following the divorce, but attributable to periods before the divorce.] See, p. 16-29. For profit sharing plans, remember that the cap is 25% of earned income which is up to a maximum of \$46,000 (as of 2008 with COLAs following this year.) For further information regarding profit sharing plans see:

[www.irs.gov/retirement/article/0,,id=108948,00.html](http://www.irs.gov/retirement/article/0,,id=108948,00.html)

Additionally, a good basic summary regarding the types of retirement plans is also at the IRS site: [www.irs.gov/retirement/sponsor/article/0,,id=155347,00.html](http://www.irs.gov/retirement/sponsor/article/0,,id=155347,00.html)

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## **Division of Marital Estate and Consideration of One Spouse's Greater Contribution**

### ***Polsky - Property Division / Award of \$183M to Wife Affirmed Where Award Represented 50% of Net Marital Estate***

[\*IRMO Polsky\*](#), (1<sup>st</sup> District, 2008)

The ex-husband argued on appeal that the trial court erred by awarding his wife \$183 million, which represented an equal share of the marital estate, following the parties' 30-year marriage. As is the theme in the other 2008 cases discussed below, he urged that the trial court's award ignored the "overwhelmingly disproportionate" contribution he made to the value of the estate. The husband contended that the massive marital estate exists solely because of his efforts in acquiring three companies. The appellate court rejected the husband's arguments which were in essence that his wife would receive a windfall and that the trial court should have emphasized the contribution factor. The appellate court stated:

Thus, under section 503(d), a spouse's financial contribution to the acquisition of

marital property is only one of several factors the trial court considers when fashioning an equitable distribution of marital assets. *In re Marriage of Johns*, 311 Ill. App. 3d 699, 704 (2000). *In re Marriage of Heroy*, No. 1-07-0308, slip op. at 32 (September 17, 2008), this court recently has held that "[a]lthough a party's greater financial contribution may support a disproportionate property award in favor of the contributing spouse (see, e.g., *In re Marriage of Jones*, 187 Ill. App. 3d 206 (1989); *In re Marriage of Guntren*, 141 Ill. App. 3d 1 (1986)), 'a spouse's greater financial contributions do not necessarily entitle him or her to a greater share of the marital assets' (*In re Marriage of Scoville*, 233 Ill. App. 3d 746, 758 (1992)). Indeed, '[i]n a long-term marriage, the source of the assets in acquiring marital property becomes less of a factor, and a spouse's role as homemaker becomes greater.' *Scoville*, 233 Ill. App. 3d at 758." Each case rests on its own facts. *In re Marriage of Cecil*, 202 Ill. App. 3d 783, 790 (1990).

The appellate court noted the similarity of the case with *Heroy*. The court then commented that the appellate court's review of a trial court's decision such as this is "extremely deferential."

***Heroy* - 55% plus Substantial Maintenance Award Permissible When Significant Non-Marital Estate and Long-Term Marriage / Effect of Substantial Nonmarital Property Even Where Permanent Maintenance Award**

[IRMO Heroy](#), 385 Ill.App.3d at 652 (1<sup>st</sup> Dist., 2008)

Where the wife's non-marital estate was valued at \$154,000 while the husband's non-marital estate was valued at \$4,041,000, it was permissible to award the wife 55% of the \$8.7 million marital estate in addition to a generous maintenance award. The appellate court stated in pertinent part:

Although a party's greater financial contribution may support a disproportionate property award in favor of the contributing spouse (see, e.g., *In re Marriage of Jones*, 187 Ill. App. 3d 206 (1989); *IRMO Guntren*, 141 Ill. App. 3d 1 (1986)), "a spouse's greater financial contributions do not necessarily entitle him or her to a greater share of the marital assets" (*IRMO Scoville*, 233 Ill. App. 3d 746, 758 (1992)). Indeed, "[i]n a long-term marriage, the source of the assets in acquiring marital property becomes less of a factor, and a spouse's role as homemaker becomes greater." *Scoville*, 233 Ill. App. 3d at 758.

In affirming the disproportionate property division, the appellate court focused on factors including the opportunity cost to the wife in primarily raising the children and forgoing her career. Regarding the contention that the trial court should not have divided the marital estate in the wife's favor when she also received permanent maintenance, the appellate court stated, "the Act in no way precludes a trial court from awarding a spouse both maintenance and marital property; rather, it merely requires the court to consider maintenance when equitably distributing marital property.

***Demar* - Impact of Party's Contribution of Non-Marital Property to Marital Estate**

[IRMO Demar](#), 385 Ill.App.3d 837 (1st Dist., 2008)

This is another “high end” divorce case. It is also another case in which one of the significant arguments on appeal was that the trial court’s division failed to take into account the husband’s greater financial contribution to the marital estate. The appellate court stated:

A review of the trial court’s finding regarding transmutation of the parties’ nonmarital assets gained by the creation and sale of ProNurse is necessary for an understanding of the trial court’s division of the marital estate in the case at bar.

A unique angle in the case is that before the marriage each party had acquired shares in a company called ProNurse in an 80/20 ratio with the husband having 80% of the stock. However, each party’s premarital ProNurse stock was sold during the marriage in the undivided amount of \$4.5 M and deposited into the parties’ jointly held account. The parties also received two promissory notes for a total of \$1 million, one for \$200,000 payable to Karen and another for \$800,000 payable to Hale. The promissory notes were paid within a year. The appellate court explained that there was then considerable commingling so that the original premarital funds lost their identity. The appellate court ruled:

Although a large portion of the funds in the Smith Barney account at the time of dissolution of marriage was contributed by Hale’s deposit of his nonmarital assets gained by the sale of his shares in ProNurse, it is impossible to ascertain the source of funds with which specific bonds were purchased in the Smith Barney account. Hale therefore failed to produce clear and convincing evidence that would trace the individual bonds purchased by nonmarital funds.

The husband argued against the 60/40 (in his favor) division of the Smith Barney Account but in affirming the appellate court noted that the “marriage was of long duration; [and] Karen made substantial contributions as a homemaker, especially in acting as the primary caretaker for the two children born to this marriage...”

**Comment:** Read *Heroy* and *Demar* in tandem for the proposition that the longer the marriage in a case with significant opportunity cost the lesser the contribution factor.<sup>3</sup> The inverse is also true, i.e., in a short term marriage with little opportunity cost for the spouse with the lesser contribution, the greater the court should focus on the contribution of one spouse toward the acquisition of marital property.

### **Dissipation Cases:**

#### ***Holthaus - Dissipation / Standard re Timing is When the Marriage Was Undergoing an Irretrievable Breakdown***

[\*IRMO Holthaus\*](#), 387 Ill. App. 3d 367 (Second Dist., 2008)

The wife argued on appeal that the trial court erroneously included as dissipation \$86,000 that she withdrew before February 2005, which the trial court determined was the date of the

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<sup>3</sup>§503(d)(1): “...contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property...”

irretrievable breakdown of the parties' marriage. The husband, on the other hand, contended that the trial court erred in calculating the dissipation only as of February 2005. The appellate court agreed with the husband. The appellate court first noted that the issue of whether dissipation has occurred as a question of fact and accordingly the manifest weight standard apply on review. Besides the seminal Supreme Court *O'Neill*, decision, the wife cited *DeLarco* and *Toole* in support of the timing issue. This is one of the few cases to comment on a point the Gitlin Law Firm has previously made – *O'Neill's* emphasis on the term “is undergoing” when referring to the timing of the marital breakdown. The appellate court stated, “Accordingly, we disagree with Angeline's contention that dissipation occurs only after an irreconcilable breakdown has occurred, and we turn now to the trial court's specific finding.” The key quote of the appellate court stated:

It appears that the trial court calculated dissipation, not from when the parties' marriage began undergoing an irreconcilable breakdown, but rather from when the parties' marriage had completed the process of breaking down. This is apparent from the trial court's language in its letter order: “[T]he court fixes the date of irretrievable breakdown as February[] 2005, the date of physical separation.” “So when was the breakdown?” “Under the circumstances February 2005 is the date that the marriage was irretrievably broken.” This language demonstrates that the trial court was attempting to pinpoint the date on which the parties' marriage “was irretrievably broken” rather than attempting to determine when the marriage began to irreconcilably break down. As previously discussed, dissipation is to be calculated from the time the parties' marriage begins to undergo an irreconcilable breakdown, not from a date after which it is irreconcilably broken. *In re Marriage of Olson*, 223 Ill. App. 3d 636, 647 (1992).

Because dissipation cases are fact sensitive and are often cited, the facts mentioned by the appellate court other than the February 2005 argument are significant:

Although the February 2005 argument between the parties does appear to have been the final straw in the process of the irreconcilable breakdown of the parties' marriage, the evidence presented at trial by both Angeline and Nicholas strongly indicates that the parties' marriage **was undergoing** an irreconcilable breakdown long before then. Between 1997 and 2001, the parties stopped having marital relations, sleeping in the same bedroom, living in the same part of the house, sharing meals, and communicating. They were living in an environment that Nicholas testified, and Angeline did not contest, was hostile. In October 2001, following a confrontation between the parties regarding \$6,000 Angeline had withdrawn at a casino, Angeline told Nicholas she wanted a divorce. The following month, she went so far as to write him a letter detailing her “plan” for the future, which included a suggested division of responsibility between the parties for their financial obligations and which indicated that Angeline wanted to keep the marital home. In November 2004, Nicholas began to move personal belongings out of the marital home, and he finally moved out permanently in February 2005.

Thus, the appellate court stated:

From this evidence, we conclude that the parties' marriage was undergoing an irreconcilable breakdown long before February 2005. See *In re Marriage of Carter*, 317 Ill. App. 3d 546, 552 (2000) (holding that the trial court's determination of when the parties' marriage was undergoing an irreconcilable breakdown was against the manifest weight of the evidence where, prior to the date determined by the trial court, the parties only occasionally slept together, mostly lived separate lives, kept finances at arm's length, and did not share meals or child-rearing responsibilities).

The appellate court did not fix an exact date for when the marriage was undergoing an irretrievable breakdown but remanded the case to the trial court to make this determination.

### ***Goettler - Dissipation / Types of Dissipation***

[\*IRMO Goettler\*](#), 378 Ill.App.3d 1023 (4<sup>th</sup> Dist., 2008)

The trial court erred when it found that both parties dissipated assets without stating any basis for its finding regarding the wife, and when it failed to consider husband's dissipation of specific assets in its division of property. Regarding dissipation the appellate court reasoned that the following items were dissipation: church contributions of \$7,700, cashing in \$26,000 in a German life-insurance policy after the separation to pay a "loan" from a "colleague", the amount of \$6,000 which was not accounted for from a 2002 tax refund, and the reduction in the Husband's 401(k) from \$82,938.46 to \$52,695.53 due to various loans. Regarding these issues, the appellate court ruled that the husband did not maintain his burden of showing "clear and specific" evidence that the funds from were used for legitimate family expenses. Therefore, the trial court's failure to specifically find dissipation regarding these assets was against the manifest weight of the evidence. Additionally, the appellate court found that the \$7,700 church contribution was correctly ruled to be dissipation. The appellate court held that the vague finding by the trial court that both parties dissipated assets was insufficient. Further, the *Goettler* court held that the trial court improperly based its calculation of the equity in the marital home on the mortgage balance at the time of the parties' separation rather than the time of hearing since the standard per §503(f) is that the court, "'shall value the property as of the **date of trial or some other date as close to the date of trial** as is practicable."

### ***Trevino - Marital Settlement Agreements / Life Insurance / Constructive Trusts***

[\*In re Estate of Trevino\*](#), 381 Ill.App.3d 553 (2<sup>nd</sup> Dist., 2008)

The ex-wife's life insurance policy, which was a benefit of her employment, was governed by provision in the marital settlement agreement which required both parties to "maintain the children of the parties as the beneficiaries of any and all retirement plan[s], pension plans, and death benefits." Therefore, after her death, the probate court correctly interpreted the marital settlement agreement when it imposed a constructive trust on proceeds of policy in favor of the guardian of parties' children, even though former husband remained listed as the beneficiary.

### ***Carroll v. Curry - Replevin: Engagement Ring***

[\*Carroll v. Curry\*](#), (2<sup>nd</sup> Dist., 2009)

Following the break-up of their romantic relationship, James Carroll 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.

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### **Premarital Agreements:**

#### ***Best - Premarital Agreements / Declaratory Judgments and the Termination of Controversy Requirement***



[IRMO Best](#) 228 Ill. 2d 107 (March 2008) Illinois Supreme Court.

The issue for the Illinois Supreme Court in *Best* was whether the appellate court erred by *sua sponte* reversing the trial court's declaratory judgment order addressing the validity and effect of a premarital agreement because the second prong of the declaratory judgment statute (735 ILCS 5/2-701(a), requiring the termination of **some part** [emphasis supplied by Supreme Court] of the parties' controversy, was not met. The appellate court held that the that the second prong of the statute was met even though a final divorce judgment had not been entered and, therefore, reversed in part the appellate court judgment. The Supreme Court stated:

Construing the agreement will indeed terminate a significant part of the parties' controversy. No question of whether the agreement's provisions provide the controlling authority over the parties' dissolution rights will remain... Allowing the declaratory judgment before the final dissolution order undoubtedly upheld the parties' rights under the Act to enter into a binding contract before marriage to control the outcome of many issues that could arise during their dissolution.

However, the appellate court correctly concluded that provision in the premarital agreement prohibiting spousal support award when parties have 'separated' was ambiguous; and, construed it to bar spousal award only upon entry of a legal separation. The appellate court reasoned, "Thus, the court primarily relied on the rule of construction that a premarital agreement should not be read to eliminate marital rights unless that intention is "clearly apparent." The appellate court also stated that the same result would apply under the rule of *contra proferentem*, which provides that the drafter of the agreement bears the risk of any ambiguity. Therefore, the appellate court properly refused to vacate temporary order requiring the husband to reinstate his wife on his medical insurance policy.

**Comment:** The *Best* decision was correct in emphasizing that declaratory judgments apply to divorce cases and may be granted where there is an actual controversy and it would terminate "some part" of that controversy.

### ***Rosenbaum - Premarital Agreements / Interim Attorney's Fees***

[IRMO Rosenbaum-Golden](#), 381 Ill.App.3d 65 (1st Dist., 2008). This case involved interim fee awards totaling \$ \$250,000 and a premarital agreement which had attempted to limit fee awards. The premarital agreement provided:

Bruce and Jody both **release and waive any and all right to counsel fees, accounting fees** or other expenses relating to the separation of the parties or termination of their marriage, except that (I) Bruce agreed that he shall bear 50% of the cost of accounting fees or other expenses incurred by Jody, subject to a maximum of \$15,000, and (ii) either party shall be responsible for any such fees or expenses of the other party created by dilatory or evasive action as determined by a court of competent jurisdiction."

The trial court found that the husband had been making "selective disclosures" regarding his income and awarded and had a serious "credibility issue." The trial court's first interim fee award was \$150,000. For instance, the husband failed in his responsive pleadings to inform the

court of all payments he had made to counsel as required by the interim fee statute. The appellate court stated:

We agree with petitioner that when the trial court ordered respondent to pay interim attorney fees, it simply ordered him to pay her “a portion of the funds to which she is already entitled under the Premarital Agreement’s requirement that the parties divide marital property equally, in the form of a payment to her attorneys rather than to her directly.”

The appellate court held that because an interim fee award is an advance on the wife's share of the marital estate, it does not violate provision in a premarital agreement restricting claims for fees. However, this statement is not necessarily correct because of the provision that not only all interim fee awards but also, “the aggregate of all other payments by each party to counsel and related payments to third parties” are deemed advances against the marital estate. There is further the provision in the interim fee statute referring to “unless otherwise ordered.” Assume that the husband paid his fees through non-marital sources. The nuance is that the trial court would need to then “otherwise order” in not deeming the husband’s payments to be an advance against his share of the estate while ruling that the wife’s payments were an advance against her share. Given the loose language in the interim fee statute as to when the court should “otherwise order” the broad language of the trial court is not necessary correct.

However, I agree with the *Rosenbaum* decision when it ruled that a provision in a premarital agreement would need to clearly waive interim attorney’s fees given the unique nature of the interim fee statute. In fact, I pointed this out in the fall 2007 IICLE seminar regarding premarital agreements shortly before this decision.

### ***Braunling* - Reformation of Premarital Agreement / 10 Year Statute of Limitations Tolloed During Marriage**

[\*IRMO Braunling\*](#), 381 Ill. App. 3d 1097 (2<sup>nd</sup> Dist., 2008)

This case involves two certified questions regarding the parties’ premarital agreement. The significant question was:

Does the 10-year statute of limitations for contract actions, found in §13–206 of the Code, bar an action for reformation of a premarital agreement brought more than 10 years after the agreement's execution?

Regarding the first question the wife relief on §13--206 of the Code, which provides, in part:

"Except as provided in Section 2--725 of the 'Uniform Commercial Code', actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within 10 years next after the cause of action accrued[.]" 735 ILCS 5/13--206

The appellate court reviewed Section 9 of the IUPA which provides that:

Any statute of limitations applicable to an action asserting a claim for relief **under a premarital agreement** is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party." (Emphasis added.)

The appellate court determined that the statute of limitations was tolled per Section 9 during the parties' marriage. The appellate court stated:

The basis for a reformation action is that the parties agreed to reduce to writing a mutual understanding but, in doing so, through either mutual mistake or mistake on one side coupled with fraud on the other, they omitted some material provision. *Briarcliffe Lakeside Townhouse Owners Ass'n v. City of Wheaton*, 170 Ill. App. 3d 244, 251 (1988). A reformation action is brought to change the **written instrument** by inserting the omitted provision so that the instrument conforms to the parties' **original agreement**. *Briarcliffe*, 170 Ill. App. 3d at 251. "Thus, what is sought to be reformed is not the understanding between the parties, but rather the written instrument which inaccurately reflects it." (Emphasis omitted.) *Briarcliffe*, 170 Ill. App. 3d at 251.

The appellate court concluded regarding the first question:

Having determined that section 9 of the Act tolls any statute of limitations during the parties' marriage, we answer the first certified question in the negative. The 10-year limitations period in section 13--206 of the Code was tolled during the marriage, and Scot's reformation action, which was brought more than 10 years after the premarital agreement's execution, but only one year after the dissolution proceedings commenced, is not barred by the 10-year limitations period.

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## **Child Support**

### **What Constitutes Income for Support Purposes**

#### ***Eberhardt - Child Support / Claimed Double Counting of Withdrawals from IRA Account***

*IRMO Eberhardt*, 387 Ill. App. 3d 226, 232 (First Dist., 2008)

*Eberhardt* addresses the claim that there is an improper double counting when improper double counting occurs when IRAs that are awarded in a property settlement are liquidated and viewed as income. The appellate court commented that the cases that they cited all turned on their facts including *IRMO Lindman* and *IRMO Klomps*. The appellate court cited *Klomps* for the following discussion:

"If we were to allow retirement income to be excluded from net income when setting child support merely because those benefits, prior to their receipt, were used to determine an equitable distribution of the parties' marital property, we would be adding provisions to the Act that do not exist. We will not twist the clear meaning of the Act to invent an otherwise nonexistent rule that would be contrary to the

purpose of making 'reasonable provision for spouses and minor children during and after litigation.' [Citation.]" *In re Marriage of Klomps*, 286 Ill. App. 3d at 716-17.

Clearly, the facts were controlling in this case. Perhaps it is a matter of bad facts making somewhat bad law. In applying the facts and not finding an abuse of the trial court's discretion the appellate court stated:

Here, as in *Croak*, the court found Stephen to be evasive and less than straightforward about his finances. It found a pattern of nondisclosure. The court did not believe Stephen's story of a sudden downturn in business. The court addressed the double counting issue, calling it a misguided argument on Stephen's part because the IRA income was less of an influence on the court's decision than the perception that Stephen's testimony was not credible. The court also noted that Stephen apparently spent money for his own benefit rather than meeting his court ordered support obligations to his children.

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**Comment:** Because of the importance of this issue, awareness of the case law cited is critical. The Gitlin on Divorce comment to the 1997 *Klomps* decision stated:

The father in *Klomps*, the appellant, relied heavily on *Harmon*. The father's brief stated that *Harmon* "is authority that an item may be a marital asset or income, but not both." *Harmon* said nothing of the sort. The Second District in *Harmon* passed on whether various types of income of the child support obligors would be included in calculating net income. The *Harmon* court considered passive income the mother received from bonds or securities -- passive income which was reported on her tax return but not actually received, gift income, and also interest income. The interest income was being paid to her by the child support recipient, the father who was paying the mother \$750 per month interest on account of a property settlement balance due to her of \$90,000. The appellate court did not discuss rationale for excluding interest. It merely stated:

The possibility of future financial resources also should not be considered when setting an award of child support. (*Ivanyi*, 171 Ill.App.3d at 422, GDR 91-10.) For this reason, we agree with respondent that money she received as a gift cannot be considered income. *Finally, we also agree with respondent that the monthly interest payments which comprise her share of the marital assets should not be used to calculate her net income.* (See *In re Marriage of Hart* (1990), 194 Ill.App.3d 839, 850). We therefore conclude that the trial court did not abuse its discretion in determining respondent's net income. [Emphasis added.]

We stated, "It would appear the review court affirming the trial court on the issue of the interest income was an ad hoc decision because the appellate court, like the trial court, was sympathetic to the plight of the recovering alcoholic, unemployed mother."

Keep in mind that instructively, the *Lindman* decision addressed "'double counting'" and cited the *IRMO Zells*, 143 Ill. 2d 251 (1991). *Lindman* stated:

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

### **Further Case Law Review Re Types of Income Which Might be Considered for Support**

#### **Purposes:**

*Einstein v. Nijim*, 358 Ill.App.3d 263 (4th Dist. 2005)

Father's **annual bonus** and **monthly automobile allowance** were properly included in his income for purposes of calculating child support.

*IRMO Lindman*, 356 Ill.App.3d 462 (2d Dist. 2005)

**Disbursements from father's IRA**, though non-recurring, were income for purposes of calculating his child support.

*IRMO Rogers*, 213 Ill.2d 129 (2004)

Money received as repayment of a **loan** and money received as a **gift** can be considered in computing net income for child support purposes when the benefits enhance the obligor's wealth, which facilitates the obligor's ability to support the obligor's child.

[\*Illinois Dep't of Public Aid ex rel. Jennings v. White\*](#), 286 Ill.App.3d 213 (3d Dist. 1997)

Trial court's finding that **payments from a Federal Employers Liability Act** were "income" for child support calculation purposes was supported by the broad interpretation of "income" found in IMDMA §505.

*Villanueva v. O'Gara*, 383 Ill.App.3d 147 (2d Dist. 1996)

That part of a **personal injury settlement which represented reimbursement for lost earnings** is income for the purpose of setting the amount of child support where the mother/custodian sought a lump sum increase in child support in post-judgment proceedings. Those parts of the settlement which represented the disability and disfigurement and pain and suffering to be experienced in the future and reimbursement for medical care, however, would not be "net income" for child support purposes.

*McGowan v. McLaughlin*, 265 Ill.App.3d 905 (1st Dist., 1994)

**Military benefits and allowances** are considered income in the calculation and determination of child support obligations.

*IRMO Benkendorf*, 252 Ill.App.3d 429 (1st Dist., 1993)

It is not an abuse of discretion to consider **severance pay** as earnings in calculating the obligation for child support.

*IRMO Rogliano*, 198 Ill.App.3d 404 (5th Dist. 1990)

Trial court did not abuse discretion in basing temporary child support upon income received by party through **liquidating non-marital assets while party was unemployed**.

*McGrath*, 2011 IL App (1st) 102119

Under unique circumstances of this case **regular money withdrawn from savings account** can be income. Contrast this with the next case discussed - *O'Daniel*. The dangerous quote from that later case is simply, "The circuit court has discretion in the appropriate case to order child support based on regularly liquidated assets used to fund expenses."

***O'Daniel - Child Support: IRA Withdrawals Not Income Per Rogers / Lindman.***

[IRMO \*O'Daniel\*](#), 382 Ill. App. 3d 845 (4<sup>th</sup> Dist., 2008)

One of the issues in this case was whether distributions from an IRA were to be considered income consistent with the *Rogers* decision and the Second District *Lindman* (356 Ill. App. 3d 462 (2005)) decision. The *O'Daniel* appellate court stated:

It would appear from the above quote ("Thus, given its plain and ordinary meaning, 'income' includes IRA disbursements") that the Second District would find that any IRA disbursement would constitute income. We disagree and do not find *Rogers* supports this proposition. The Second District's decision does not adequately take into account that IRAs are ordinarily self-funded by the individual possessing the retirement account. Except for the tax benefits a person gets from an IRA and the penalties he or she will incur if he or she withdraws the money early, an IRA basically is no different than a savings account, although the risks may differ... The only portion of the IRA that would constitute a gain for the individual would be the interest and/or appreciation earnings from the IRA.

The appellate court then ruled that because the ex-wife did not state in her brief what portion of the IRA consisted of contributions, the appellate court could not determine any portion that may constitute income for child support purposes.

***Baumgartner - Percentage Order of Support / Defining Net Per Rogers: Proceeds of House Sale and Loan Receipts / Non-Reimbursed Business Expenses Allowed***

[IRMO \*Baumgartner\*](#), 384 Ill. App.3d 39 (2008). (1<sup>st</sup> Dist., 2008)

This case involved a 53 page decision involving a 2001 agreed order that was entered before the amendments to the §505 of the IMDMA allowing for percentage orders of child support. The agreed order stated that "Craig's net monthly income \*\*\* will be approximately \$3,809." The order provided further:

Effective January 1, 2001, Craig shall pay \$762 per month to Susan as child support which is 20% of his estimated net income. At this time it is not known whether Craig's monthly net income will exceed \$3,809 due to overtime, bonuses, or raises.

The language of the agreement then contained complex provisions for adjustments which read as



follows:

Accordingly, on an annual basis, within 30 days after Craig receives his W-2 statement from his employer at year end, he will: (I) provide a copy of his W-2 to Susan along with a copy of his Year-end pay stub, and (ii) recompute his net income in light of any additional income and/or deductions in excess of the amount upon which this order is based; and (iii) if the amount of child support paid during the prior year was less than 20% of Craig's actual net income from, he will pay Susan the difference between the amount paid and the recomputed 20% figure so that the total amount will equal 20% of Craig's net income, as defined by 750 ILCS 5/505. In addition, Craig will provide Susan with copies of his income tax returns on an annual basis within 14 days after filing the returns."

The appellate court stated that because of the uncertainty expressed in the agreed order, it met the standards of §505 as to the entry of a percentage order in addition to the base.

The next issue was ex-wife's contention that the mortgage loan the husband took out to purchase his residence should have been included in determining his net income per *Rogers*. The appellate court first noted that in *IRMO Tegeler*, 365 Ill. App. 3d, 448 (2006), the Second District disagreed with the determination in *Rogers I* that loan proceeds were to be considered income under §505(a)(3). The appellate court then noted the absence of Illinois case law regarding mortgage loans and reviewed out of court case law regarding student loans and stated that "the analysis in *IRMO Rocha*, 68 Cal. App. 4th 514, 80 Cal. Rptr. 2d 376 (1998), is somewhat helpful." The California statute listed types of income to be considered but did not list loans. The appellate court stated:

[A] determining factor in many of the above cases is whether repayment of the money received was required. Where repayment was required, the loan was not considered income. While in *Rogers* the supreme court upheld the appellate court's determination that the "loans" in that case were income, it did so on the basis that loans were "loans in name only." In other words, no repayment was required or even intended when those loans were made.

The court then concluded, "We do not hold that loan proceeds may never constitute income. However, a residential mortgage loan, made by a bona fide lender, does not constitute income."

The next question was whether proceeds from the sale of residential property that are used to purchase a new residence are income for child support purposes. The appellate court stated that since the IMDMA does not define "income" it was proper to review the definition of income per *Rogers* as a gain or recurrent benefit, measured in money and as money from employment, business, investments, royalties, gifts and the like. Surprisingly, the appellate court then stated:

Under §505(a)(3) and the definition of income cited in *Rogers II*, we are constrained to agree with Susan that the proceeds from the sale of property such as a residence would qualify as income.

It is suggested, however, that holding is a mis-reading of *Rogers* and not consistent with *McGrath*. The appellate court immediately qualified this statement:

Nonetheless, we do not agree that the circuit court erred in refusing to include the proceeds in its determination of net income. As a practical matter, it stands to reason that to a certain extent the sale proceeds represent a return on payments made by Craig out of income already accounted for in the determination of his child support obligation.

The appellate court then stated:

A similar situation [passive income not actually received] occurs where a parent sells his or her residence and uses the proceeds to purchase a new residence. The sale proceeds are not actually available to the parent to spend as income... We cannot say that the proceeds from the sale of residential property can never be considered income for child support purposes. Here, however, the sale of Craig's California residence was necessitated by his employment situation, and the proceeds were utilized to purchase his residence in Illinois where he had obtained employment. Under these circumstances, the circuit court did not err in excluding the proceeds from the sale of Craig's California from his income for child support purposes.

The next issue was the deductibility of non-reimbursed business expenses under §505(a)(3)(h). The ex-wife urged that the expenses were not reasonable and necessary in part due to the fact that the expenses exceeded his income for the period and the appellate court stated:

in the present case, Craig's nonreimbursed business expenses, as stipulated to by Susan, constituted a *prima facie* showing that the expenses were legitimate. While Susan did not stipulate to their reasonableness, her argument, based solely on the lack of profit, does not rebut the reasonableness of the expenses.

The next issue in the deduction of the business expenses is the repayment of debt issue:

We disagree with Susan and the court in *Gay* that *Rinkus* was wrongly decided. Subsection (a)(3)(h) does not limit "debt" to a one-time-only business expense. "Debt" is defined as "[l]iability on a claim; a specific sum of money due by agreement or otherwise." *Black's Law Dictionary*, 410 (7th ed. 1999). *Gay* does not explain why repaying debts incurred for day-to-day business expenses is any different from paying a one-time business expense, except that such an interpretation conflicts with the requirement of a repayment plan. *Gay*, 279 Ill. App. 3d at 147.

The appellate court then determining the business expenses were deductible and stated:

the agreed order complies with subsection (a)(3)(h) in that Craig's nonreimbursed business expenses will be deductible only in the year he repays them and is self-executing.

**Takata - Enforcement / Enforcement of Child Support against an IRA in Name of New Spouse**

[IRMO Takata and Hafley \(Takata II\)](#), 383 Ill.App.3d 782 (3<sup>rd</sup> Dist., 2008)

In *Takata* the former wife (who I believe is a lawyer representing herself) sought to collect a \$31,068 claimed support arrearage from an individual retirement account (IRA) under the third-party defendant's name (the ex-husband's new wife's name). The trial court denied the motion, the ex-wife appealed and the appellate court reversed and remanded. At the time of the filing, the arrearage amount was \$25,453.48. It appears that the funds may have been rolled over from the name of the ex-husband to his new wife. The proceeding was brought under §2--1402(c)(3) of the Code. The trial court ruled:

The interest Plaintiff seeks to recover is a 401(k) retirement account held in the name of Third Party Defendant. Plaintiff claims Defendant has an interest in that account by reason of his general disclosure in an interrogatory and by reason of his alleged potential marital interest in the assets in the purely speculative event of a divorce between Defendant and Third Party Defendant. Because there would theoretically be an ability on the part of Defendant to claim an interest to some degree in said 401(k) account, Plaintiff argues that she should be entitled to reach that interest at this time pursuant to 735 ILCS 5/2-1402. The evidence submitted did not establish the extent of the interest of Defendant, if any, such that the Court could award Plaintiff a specific amount... More significantly, the interest of Defendant, if any, in and to Third Party Defendant's 401(k) account is an inchoate interest at best that is dependent on a variety of hypothetical and speculative factors (including the occurrence of a divorce and the weighing and balancing of numerous factors set forth in Section 503 of the Illinois Marriage and Dissolution of Marriage Act, along with other assets and liabilities).

No briefs were filed but the appellate court ruled, "We reverse the trial court's judgment because the petitioner has made a *prima facie* case of reversible error." The appellate court determined that the IRA account was not exempt from application to the judgment for two reasons.

First, the respondent and third-party defendant did not seek an exemption hearing as provided under section 2--1402(l) of the Code. A judgment creditor does not have the burden of showing that an exemption is inapplicable. Therefore, the respondent and third-party defendant cannot claim that the IRA is exempt from judgment. Second, even if the respondent and third-party defendant could assert an exemption, such an exemption would be overcome by a statutory exception to income exemptions for the collection of child support. Under section 12--1006 of the Code, a debtor's interest in or right to the assets in a retirement plan, such as an IRA, is exempt from judgment. 735 ILCS 5/12--1006(a), (b)(3). However, section 15(d) of the Income Withholding for Support Act provides an exception to this income exemption from judgment for the collection of child support... income includes any payment from annuity, pension, and retirement benefits and that "[a]ny other State or local laws which limit or exempt income or the amount or percentage of income that can be withheld shall not apply."

The next issue was whether the trial court erred when it denied the petitioner's motion for turnover of the IRA under §2--1402(c)(3) of the Code. The appellate court ruled:

The petitioner argues that *Gonzalez* does not apply to this case and that the IRA is the respondent and third-party defendant's marital property, subject to turnover to the extent of the respondent's interest. We agree... The respondent has an actual interest in the IRA in the third-party defendant's name as it is the respondent and third-party defendant's marital property. In this case, the evidence shows that the IRA was held in the name of the third-party defendant. The third-party defendant did not present evidence or argue that the IRA was nonmarital property because it was acquired before her marriage to the respondent or for any other reason. In fact, the third-party defendant did not appear to have much knowledge about this IRA account. Accordingly, we find that the IRA is marital property of the respondent and third-party defendant. Moreover, because the IRA is marital property and the respondent has a legal interest in it, we find that the IRA is subject to turnover to the extent of the respondent's interest.

See: [Is There Marital Property Before Divorce: So Sayeth Takata](#)

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**Comment by GJG:** See also: [ISBA article regarding this article](#).

Further comment on this case, had been at the litigant / lawyer / former wife's website:

<http://www.catlaw.net>

She wrote: "*Takata v Hafley* is a landmark case because pursuant to *Takata v Hafley* deadbeats in Illinois can no longer hide their income or assets in a new spouse's name and thereby evade child support enforcement."

The ex-wife's version of facts from her web-site had stated:

- "1) Ex husband (FH) has worked for unreported income as a carpenter for most of his adult life.
- (2) Since his re-marriage FH has repeatedly concealed his income and assets in his new spouse's name (LH) to evade child support enforcement, and his testimony has repeatedly been found to be not credible.
- (3) October 2003: ex Wife (CAT) enrolls child support case in Peoria County, Illinois.
- (4) December 22, 2005: By and through his attorney, FH produces the H's joint 2002 Federal Income tax return which shows two retirement account disbursements totaling \$80,128, in which FH asserts a \$31,000 ownership interest;
  - (a) The H's joint income tax returns for 2002 show that \$15,854 is disbursed from a 401k to the H's (FH and LH, jointly); and
  - (b) another \$64,274 is disbursed to the H's (FH and LH, jointly) from a "pension or annuity"; and

- (c) In his December 22, 2005 sworn interrogatory responses FH asserts a \$31,000 ownership interest in an IRA now held in the name of LH.

(5) FH owes CAT over \$25,000 in past due support.”

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***Gulla - Enforcement / \$100 per Day Penalties / Failure to Withhold Child Support -- Knowing Failure***

[\*IRMO Gulla\*](#), 382 Ill. App. 3d 498, (2<sup>nd</sup> Dist., 2008) overruled, in part, June 4, 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.

In this case subsequent to the children being emancipated there was a substantial support arrearage. On March 20, 2006, after the ex-husband was employed with Knobias in Mississippi, the trial court entered an order requiring the ex-husband to pay \$3,000 per month towards the arrearage. That same day, the trial court issued a notice to Knobias to withhold income for support. The employer was served with the notice on March 28, 2006, by certified mail, return receipt requested. The notice included the following provisions:

Under Illinois law, you must begin withholding no later than the next payment of income to the employee/obligor that occurs 14 business days after the date of this Notice. You must send the amount withheld to the payee within 7 business days of the pay date. You are entitled to deduct a fee for your actual cost not to exceed \$5.00 monthly to defray the cost of withholding. The total withheld amount, including your fee, cannot exceed the amount permitted under the Federal Consumer Credit Act. (emphasis in original.)

In December 2006, the employer filed a limited response to the petition for a rule to show cause per §2-301 of the Code asserting that there was no jurisdiction over the employer. Then, on January 3, 2007, Knobias filed a second response to the petition for a rule to show cause, asking that the trial court find that it had acted in good faith to comply with the notice to withhold income. It indicated that the husband’s counsel had informed the employer that they would file a motion to vacate the trial court’s March 20, 2006 order and that the ex-wife’s lawyer indicated that he did not intend to contest the motion to vacate. It then contended that on April 5, 2006, the ex-husband’s Illinois lawyer notified Knobias that the parties had settled the issue and that Stephen would make payments through ExpertPay. Knobias attached the affidavit of its in house counsel.

The appellate court summarized the arguments made by Knobias as:

Knobias raises numerous contentions on appeal. Knobias's primary argument seems to be that, based on the circumstances, it was inequitable to find that Knobias knowingly failed to withhold the amount designated in the income-withholding

notice. Knobias emphasizes that the notice ordered more money to be withheld from Stephen's pay than he was making on a monthly basis. Knobias therefore argues that it was impossible to comply with the trial court's order. Upon receiving the notice, Knobias maintains, it reasonably relied on Stephen's attorney's representation that the dispute between Suzanne and Stephen had been resolved. Knobias asserts that, immediately upon notification that the matter had not been resolved, income was withheld.

The appellate court in rejecting Knobias' arguments stated:

The notice explained that, if the amount to be withheld exceeded the amount allowed by the law of its state, Knobias should withhold only the amount allowed by its state... Despite this sufficient notice, Knobias failed to withhold any of Stephen's income. Although the record reveals that Knobias realized that the maximum amount that it could withhold was 50% of Stephen's net income, it did not withhold that amount until it received notice of Suzanne's petition for a rule to show cause. Furthermore, although the notice directed Knobias to contact Suzanne's attorney if it had any questions regarding the notice, it did not. Based on the clarity of the notice and Knobias's failure to adhere to its terms, Knobias cannot rebut the presumption in the Withholding Act that it knowingly failed to pay over the amounts that it was obligated to.

**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. A PLA on this case has been accepted on 9/24/08 (No. 106612).

The update to this is that the Illinois Supreme Court indeed reversed the decision as to the penalty. The trial and appellate court's applied Illinois law in Section 35(a) of the IWSA. The Illinois Supreme Court overruled the decision 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.

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### ***Hudson - Child Support Claim Against Decedent Estate: No Conflict with Probate Act Child's Award***

*In re Estate of Joseph D. Hudson*, (5<sup>th</sup> Dist., 2008)

This case involved claims for "child's awards" under the Probate Act of 1975 (Probate Act) (755 ILCS 5/15-2(b) and for child support under §510(d) of the IMDMA in probate proceedings. The trial court granted child's awards pursuant to the Probate Act, but it denied a claim for future child support under the IMDMA. On appeal the petitioner urged that the trial court erred by finding that the provisions for a child's award under the Probate Act and for child support under the Marriage Act are duplicative and mandate an offset. The appellate court reversed and remanded. Two children were born of the marriage and the decedent died in 2004.

The Probate Act provides:

(b) If a deceased resident of this State leaves no surviving spouse, there shall be allowed to all children of the decedent who were minors at the date of death and all adult dependent children, exempt from the enforcement of a judgment, garnishment[,] or attachment in the possession of the representative, a sum of money that the court deems reasonable for the proper support of those children for the period of 9 months after the death of the decedent in a manner suited to the condition in life of those children and to the condition of the estate. The award may in no case be less than \$5,000 for each of those children, together with an additional sum not less than \$10,000 that shall be divided equally among those children or apportioned as the court directs and that shall be paid for the benefit of any of those children to any person that the court directs." 755 ILCS 5/15-2(b) (West 2006).

The IMDMA provides:

"(d) ... [P]rovisions for the support of a child are terminated by emancipation of the child, or if the child has attained the age of 18 and is still attending high school, provisions for the support of the child are terminated upon the date that the child graduates from high school or the date the child attains the age of 19, whichever is earlier, but not by the death of a parent obligated to support or educate the child. An existing obligation to pay for support or educational expenses, or both, is not terminated by the death of a parent. When a parent obligated to pay support or educational expenses, or both, dies, the amount of support or educational expenses, or both, may be enforced, modified, revoked[,] or commuted to a lump sum payment, as equity may require, and that determination may be provided for at the time of the dissolution of the marriage or thereafter." 750 ILCS 5/510(d) (West 2006).

The appellate court ruled that the trial court erred in finding these two provisions to be duplicative

and stated that they do not conflict. The appellate court concluded:

Thus, the Marriage Act does not require an offset for the child's awards made pursuant to the Probate Act. Any modification of child support is discretionary. The trial court erred by ruling that the offset was mandated by duplication in the statutes.

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## **Maintenance Cases:**

### **Initial Divorce:**

#### ***Walker - Permanent Maintenance Award Affirmed***

[IRMO Walker](#), 287 Ill.App.3d 634 (4<sup>th</sup> Dist., 2008)

*Walker* held that the trial court did not err in its award of permanent maintenance. The ex-husband first argued that the permanent maintenance award was against the manifest weight of the evidence because the award was based on an inflated figure for his net income. The husband's income was variable because of bonuses. At the hearing on the motion to reconsider, the trial court indicated it made its decision on maintenance based on David's income of \$204,000 versus Barbara's income of \$37,000. The appellate court stated, "While the trial court did not make an express finding as to David's credibility, the court clearly rejected David's testimony that the bonus was a one-time occurrence." The appellate court stated:

Permanent maintenance should be awarded where a spouse is not employable or is only employable at a lower income as compared to the spouse's previous standard of living. *In re Marriage of Schiltz*, 358 Ill. App. 3d 1079, 1084 (2005). A spouse should not be required to lower the standard of living established in the marriage as long as the payor spouse has sufficient assets to meet his needs and the needs of his former spouse. *In re Marriage of Drury*, 317 Ill. App. 3d 201, 207 (2000).

In this case the wife was a teacher and earned approximately \$2,500 monthly and she testified to monthly expenses of \$3,500. The trial court ordered the husband to pay \$2,000 per month in permanent maintenance for April and May 2007, then \$3,000 per month through May 2014. Beginning in May 2014, the ex-wife will receive between \$800 and \$1,300 from her Teacher's Retirement Fund. For this reason, the court reduced the ex-husband's maintenance obligation to only \$1,640 per month starting May 2014. The appellate court noted the 26 year marriage.

#### ***Heroy - Generous Permanent Maintenance Award Permissible Despite Wife's Educational Background / Trial Court Not Required to Make Specific Findings re Cash flow from Assets Awarded to Spouse***

[IRMO Heroy](#), 385 Ill. App. 3d 640 (1<sup>st</sup> Dist., 2008)

*Heroy* serves as a primer in reviewing the life regarding maintenance in long term marriage cases with a significant lifestyle [\$35,000 permanent maintenance award affirmed.] Of significance was the completing experts submitting reports and testifying as to lifestyle. The case overall is 53 pages in length with the discussion on maintenance in its various aspects summarizing the law.

***Bratcher - Maintenance: In Case Involving Long Term Marriage and Large Estate with Husband Receiving Business: Trial Court Improperly Attempted to Equalize Income***  
[IRMO Bratcher](#), 383 Ill. App. 3d 388 (4<sup>th</sup> Dist., 2008)

*Bratcher* involved a 34 year marriage in which each party received property valued at approximately \$1.6 million and the husband was ordered to pay maintenance of \$12,500 per month for a period of 111 months. The appellate court reversed and remanded. The husband was awarded his heating and air conditioning business valued at \$1.3 million. The husband was ordered to pay a structured property settlement of \$876,759.

The appellate court commented:

Under the trial court's order, Lela will receive monthly income of approximately \$14,000, consisting of \$8,193 rental income on the Fort Jesse Road property and \$5,845 interest at 8% on the lump-sum payment, plus perhaps some income from her anticipated work as a realtor... David will receive monthly income of approximately \$27,000, ... If maintenance is factored in, Lela will have monthly income of \$26,500 and David will have monthly income of \$14,500.

The appellate court compared the *Rubeinstein* decision and stated:

That is not true in the present case where the parties had acquired several millions of dollars in assets and Lela was awarded half of those assets. Lela was not "saddle[d] \*\*\* with the burden of her reduced earning potential" (*Hart*, 194 Ill. App. 3d at 853)--she was awarded assets totaling more than the value of the business. It is true that Lela will never generate the income that David does, but there is no need for Lela to work. In some cases, the family business may constitute almost all of the assets and it may be necessary to award that business to the operator of the business and compensate the other spouse through maintenance. That is not true in the present case where Lela was awarded substantial assets, including a \$876,759 lump-sum payment, similar to maintenance in gross. Lela made important contributions to the business in its early years, but she has been compensated for those contributions.

The appellate court then stated:

Lela's earning capacity would probably be greater if she had worked continuously outside the home after the parties' marriage, but it would never have approached David's. Lela was not "disadvantaged by the marriage in comparison to" David. Equalization of incomes might be appropriate even though neither spouse has been disadvantaged by the marriage, where the parties have been married for many years, they have few assets, and both have been employed with one spouse earning more than the other. Again, that is not the situation here. It is not necessary to equalize the income of these parties so that they may continue at the standard of living enjoyed during the marriage. This case involved sufficient assets to make a substantial award to Lela, and the lump-sum distribution eliminated any inequality between the parties.

The court then concluded:

The trial court abused its discretion in its award of maintenance. The trial court properly provided for Lela by its division of marital property. Where it is possible to do so, a division of property that adequately provides for the parties is preferable to an award of maintenance. Lela has the advantage of certainty with the lump-sum payment; it cannot be modified or terminated in the future. **The fact that David could afford to pay some maintenance is not a reason for ordering him to do so.**

*Comment:* *Heroy* and *Bratcher* provide an interesting point and counter-point in cases involving a long term marriage. There exists a fundamentally different judicial philosophy with the 1<sup>st</sup> District affirmance in *Heroy* compared to the reversal in the 4<sup>th</sup> District's *Bratcher* decision.

### **Post-Decree Maintenance:**

#### ***Barile* - Maintenance: Effect of Voidable Non-Modifiable Maintenance Obligation / Contempt for Non-Payment of Maintenance / Interest on Non-paid Maintenance**

[\*IRMO Barile\*](#), 385 Ill. App. 3d 752 (2<sup>nd</sup> Dist., 2008)

The ex-husband was required to pay \$5,318 per month which was termed “non-modifiable” during the term of its payments. The appellate court had an interesting discussion regarding this:

Specifically, the court seriously questioned whether Illinois law permitted a court to enter an order for maintenance that provided that the amount of maintenance was nonmodifiable. Because of this concern, the court asked the parties to present arguments on whether, because of the unauthorized order, the court had jurisdiction over the case. The court finally determined that the maintenance provision in the dissolution order was voidable, not void, and, thus, the court had jurisdiction over the case.

Because the trial court found that the order was voidable, the trial court dismissed the husband's petition to abate, terminate or modify maintenance. On appeal, however, the only issues were (1) the trial court erred when it refused to find the ex-husband in contempt; and (2) whether interest on the maintenance arrearage should run from September 2006, when petitioner stopped paying maintenance. The appellate court then stated:

Although it is true that the trial court should not have ordered that the amount of maintenance was nonmodifiable (750 ILCS 5/510 (West 2006)), such an order merely made that provision of the dissolution order voidable, not void (see *In re Marriage of David*, 367 Ill. App. 3d 908, 916-17 (2006)). That said, the issue then becomes whether petitioner can be held in contempt for violating a voidable order. As this presents a question of law, our review is *de novo*. *In re Marriage of Thompson*, 357 Ill. App. 3d 854, 857 (2005).

The appellate court first ruled that the former husband could be held in contempt for violating a voidable order. The appellate court somewhat surprisingly reversed the trial court and stated:

Here, regardless of whether the trial court abused its discretion, we determine that its finding that petitioner was not in contempt was against the manifest weight of the evidence.

The appellate court ruled that the ex-husband had not maintained his burden once non-payment of \$69,134 was proven. The appellate court stated:

[T]he defense of poverty and misfortune as a valid excuse for nonpayment has been found applicable only in the most extreme cases, notably where a [party who is ordered to pay support] had no money and no way of getting money to meet his support obligations." *In re Marriage of Dall*, 212 Ill. App. 3d 85, 97-98 (1991). Moreover, a party's "financial inability to comply with an order must be shown by definite and explicit evidence." *Dall*, 212 Ill. App. 3d at 98. Here, petitioner failed to meet that threshold. Petitioner's choice to cover his own expenses and many nonessential expenses that the parties' children incurred does not absolve him of his maintenance obligation.

Next the court addressed the interest issue. The appellate court noted the law at subsection (b--5):

"Any maintenance obligation including any unallocated maintenance and child support obligation, or any portion of any support obligation, that becomes due and remains unpaid shall accrue simple interest as set forth in Section 505 of this Act." 750 ILCS 5/504(b--5) (West 2006).

Section 505 then refers to §12--109 of the Code. This section provides that "Every judgment except those arising by operation of law from child support orders shall bear interest thereon as provided in §2--1303 of [the Code]." Section 2--1303 of the Code then refers to how to calculate interest, which was to be 9% interest from the date of the judgment. The appellate court reasoned:

Because section 12--109(b) dictates that interest on child support accrues if support is not paid at the end of the month when due, §504(b--5), by incorporating §12--109, dictates that interest on maintenance accrues the same way. See also D. Yavitz, *Interest on Past-Due Maintenance and Child Support: the New Calculus*, 94 Ill. B.J. 76, 93 (2006).

The appellate court then stated:

While section 505 of the Marriage Act directs us to section 12--109 of the Code without specifying subsection (a) or (b), it appears clear we are directed to subsection (b), because subsection (b) provides for the method of calculating interest on child support, hence on maintenance. However, to the extent the legislature may have left this ambiguous, we engage in the following analysis.

After an extended and interesting discussion the appellate court concluded:

Accordingly, we hold that interest on maintenance, like interest on child support, is calculated per section 12--109(b).

The court then remanded the case for the imposition of a contempt sanction and for the calculation of interest on the arrearage per §12--109(b) of the Code.

***Reynard - Petition to Increase Maintenance***

*IRMO Reynard*, 378 Ill.App.3d 997 (4<sup>th</sup> Dist., 2008)

The trial court did not abuse its discretion when it refused to increase former wife's maintenance payment after parties' youngest child graduated from college and former husband remarried. The trial court properly weighed evidence and concluded that there had been insufficient evidence of material change in parties' circumstances because husband incurred loans in order to pay for child's education, had substantial capital improvements expenses as result of deferring maintenance to home, and had spouse with her own set of expenses. In addition, although the wife lost her tenant, she increased her investment income.

***Abrell - Petition to Decrease Permanent Maintenance Award Based upon Wife's Job Shortly After Close of Proofs and Small Reduction Only***

*IRMO Abrell*, 386 Ill. App. 3d 718 (Fourth Dist., 2008)

The appellate court stated:

While the goal after dissolution is for a dependent spouse to become self-supporting, this "does not mean the ability to merely meet one's minimum requirements, but entails the ability to earn an income which will provide a standard of living similar to that enjoyed during the marriage."

The court noted that the marriage lasted more than 20 years and that there was no significant income producing property or non-marital holdings. The husband earned approximately \$72,000 per year while his ex-wife earned \$16,608 at her then-current job at SIU School of Medicine. The trial court in this case reduced maintenance from \$1,500 to \$1,250 monthly where wife obtained employment shortly after the close of proofs in the case. The appellate court stated:

With the award of maintenance of \$1,250 per month, Jacquie's gross income was \$31,608 per year while John's yearly gross income was \$57,000 after payment of maintenance. Although neither party was able to maintain the standard of living enjoyed during the marriage, John would be able to come closer than Jacquie. While both had health issues, John had a law degree and many years of work experience in the legal field. Jacquie had a high school education and had been out of the work force for approximately 17 years. Jacquie was 60 years old. Her prospects for increasing her standard of living through employment are not good.

The appellate court denied the husband's appeal and ruled:

The initial maintenance award to Jacquie covered her living expenses. The reduced award in addition to her salary does not provide her luxuries but will help get her closer to the standard of living she enjoyed during the marriage. Further, the



reduced award of maintenance still leaves John with enough income to meet his living expenses.

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**Post-High School Educational Expenses:**

*People ex rel Sussen v. Keller*, No. 4-07-0704 (4<sup>th</sup> Dist., 2008)

**Sussen - Choice of School and Ability to Pay Expenses:** The trial courts findings that the child's choice of out-of-state post-high school technical school for automobile repair was reasonable was against the manifest weight of the evidence. The respondent presented evidence that an adequate less expensive local school was available, and there was no evidence demonstrating that the child's choice was a superior program. However, the trial court's determination that the respondent, who earned \$22,000 per year, could afford to contribute one third of expenses for school, transportation and lodging was not against the manifest weight. On remand the court should order the respondent to pay one-third of costs of completing an associates program for a less expensive community college program.

*IRMO Deike*, 381 Ill. App. 3d 620, 632 (4<sup>th</sup> Dist., 2008)

**Deike - Overall Allocation of Expenses:** This is a good case to review as to the issues of post-high school educational expenses because it is fact sensitive. The parties had agreed that each would pay 50% of the college expenses and the ex-husband filed a petition to modify based upon a substantial change in circumstances. Issues included living expenses during the summer months and the ex-husband's loss of his previous job and the bar and grill he purchased operating at a loss. The appellate court stated:

As for the remaining college expenses, Robert is responsible for one-half as he agreed to be in the marital settlement agreement. He owns a cabin worth \$120,000 and he testified it had a \$23,000 mortgaging the cabin as collateral for his \$60,000 to \$80,000 "debt-consolidation" loan need not have been believed by the trial court. He was unable to remember the amount of the loan. Robert provided no paperwork regarding either the existence of the debt-consolidation-loan or any collateral for the loan.

Robert lost his job at Mitsubishi through no fault of his own, but he had substantial severance and unemployment benefits and was employable. When those ran out, he chose to invest in the bar and grill, thereby depleting any reserve he had and incurring more debt when he had college-expense obligations for Brennon and knew he would likely have those obligations for both daughters in the near future. He is capable of earning in excess of \$47,000 per year as shown by his net income in 2004 while he is actually in a job paying him \$27,000 in gross income.

Other findings of note stated:

The children's contributions to their college expenses are just that and Robert should not be expected to reimburse Marshella if she chooses to reimburse them for their contributions. Their financial resources are to be taken into account when

considering petitions to modify college education expenses.

In short, the appellate court affirmed the trial court's judgment.

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### **Custody and Jurisdiction:**

#### ***Suriano v. Lefeber - Sua Sponte Termination of Joint Custody***

[\*Suriano v. Lefeber\*](#), 386 Ill. App.3d 490 (1<sup>st</sup> Dist., 2008)

In these post-divorce proceedings several petitions for rule to show cause were filed alleging non-compliance with the terms of the joint parenting agreement by making unilateral decisions without consultation as to health care and other matters. The relief sought included amending the JPA to provide that petitioner cannot make any unilateral decisions regarding the children's care and activities and that respondent receive sufficient notice of any upcoming decisions regarding the children's care and activities. The trial did not make a finding of contempt. The trial court stated that it would not amend the joint parenting agreement because it was "going to terminate it sua sponte," and then it awarded custody of the children to petitioner. The court noted that the parties were unable to cooperate and that "there should never ever have been joint parenting." When counsel for respondent objected, the court explained: "I have the right to do it in the best interest of these children. In this entire hearing almost every word out of these people's mouths indicated that there should have never been joint parenting. And I have the right to do it in the best interest of the children." The court further stated that if respondent wanted to have a custody hearing, it would schedule a hearing for a future date. The father appealed urging that the trial court lacked jurisdiction to enter the order terminating the parties' joint parenting agreement and awarding custody of the children to petitioner. The appellate court reversed.

The appellate stated:

The court's authority to exercise its jurisdiction and resolve a justiciable question is invoked through the filing of a complaint or petition, pleadings that function to frame the issues for the trial court and circumscribe the relief the court is empowered to order. *Ligon*, 264 Ill. App. 3d at 707. A party cannot be granted relief in the absence of corresponding pleadings; if a justiciable issue is not presented to the court through proper pleadings, the court cannot sua sponte adjudicate an issue. Orders that are entered in the absence of a justiciable question properly presented to the court by the parties are void since they result from court action exceeding its jurisdiction. *Ligon*, 264 Ill. App. 3d at 707

The appellate court then ruled that the trial court's order was void and that the order violated the father's due process rights. The last request of the father was for a new judge. As to this issue, the appellate court denied the relief requested ruling that the allegations did not overcome the presumption of impartiality, "The judge's determination to terminate joint custody, albeit erroneous, did not evidence any bias toward respondent."

#### ***Sophia G.L., – IL Sup. Ct: UCCJEA / Registration of Temporary Custody Judgment and Notice Requirements of Act***

*In re Sophia G.L., a Minor*, No. 104603 (Illinois Supreme Court, May 22, 2008)

This case involved a custody dispute between parents and paternal grandfather and his wife (grandparents) in a jurisdictional dispute regarding registering an out of state (Indiana) child custody determination. The Indiana order awarded the grandparents temporary custody. The Illinois court refused to register the judgment and the appellate court reversed. In this case there was no legal determination of parentage as to the father and the mother. The mother, had lived with her father (the child's grandfather) and his wife since child's birth. The mother then moved to Illinois to live with child's father prior to the first temporary custody order. The legal issue was whether one of the exceptions to registration existed under §305(d) of the UCCJEA which provides:

“(d) A person seeking to contest the validity of a registered order must request a hearing within 20 days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

- (1) the issuing court did not have jurisdiction under Article 2; \*\*\*
- (3) the person contesting registration was entitled to notice, but notice was not given in accordance with the standards of §108 [750 ILCS 36/108], in the proceedings before the court that issued the order for which registration is sought.”

The arguments by the grandparents were that Indiana was the child's home state at the time of the Indiana temporary custody order and that there was no legal determination of parentage at the time of that order and accordingly the father was not entitled to notice. Regarding the first issue the grandparents urged that Indiana had jurisdiction because Indiana was the child's home state for six months immediately prior to the commencement of the proceeding and persons acting as Sophia's parents continued to live in that state. Accordingly, the question was whether the grandparents were “persons acting as parents” according to the UCCJEA. The Illinois Supreme Court noted the findings that the grandparents were *de facto* custodians. While this Indiana term (*de facto* custodians) differs from the persons acting as parents per the UCCJEA, the Supreme Court noted that the UCCJEA defines the term Person Acting as Parent as:

“a person, other than a parent, who: (A) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of the child custody proceeding; and (B) has been awarded legal custody by a court or claims a right to legal custody under the law of this State.” 750 ILCS 36/102(13)

Physical custody is in turn defined as “the physical care and supervision of a child.” The Court stated, “in determining whether Indiana had home state jurisdiction over this matter pursuant to §201 of the UCCJEA, we only consider whether Sophia resided in Indiana for six consecutive months prior to the commencement of the custody proceeding and whether a parent or person acting as a parent continued to reside in the state. The Illinois Court then deferred to the Indiana court's factual determinations on these issues.

The next question, however, was notice per §305(d)(3), i.e., that a person contesting registration was entitled to notice but given notice. The detailed notice provisions of the UCCJEA are at §205(a) which provide:

“Before a child-custody determination is made under this Act, notice and an opportunity to be heard \*\*\* must be given to all persons entitled to notice under the law of this State, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.” 750 ILCS 36/205(a)

The Supreme Court determined that although the father was not entitled to notice until he established parentage in Illinois, the initial order was an exercise of emergency jurisdiction only. By the time of hearing on temporary custody jurisdiction, the Indiana court was aware of Illinois parentage determination; and acted without giving father proper notice as required by UCCJEA.

A final note in this significant case was the refusal by the Indiana judge to communicate with the Illinois judge. The Supreme Court in significant dictum stated:

We take this opportunity, however, to emphasize the importance of the communication provisions of the UCCJEA. See *In re Joseph V.D.*, 373 Ill. App. 3d 559, 562 (2007) (where an Illinois child support order was vacated due to noncompliance with the UCCJEA communication provisions). The comments to the UCCJEA state: “[T]his Act should be interpreted according to its purposes which are to: \*\*\* (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child.” 9 U.L.A. §101, Comment, at 657 (1999); see also *In re D.S.*, 217 Ill. 2d 306, 317-18 (2005). To that end, the UCCJEA is replete with provisions which either encourage or require courts to communicate with each other. See 750 ILCS 36/110, 204, 206, 307 (West 2004); see also 750 ILCS 36/112 (West 2004) (setting forth provisions for “Cooperation Between Courts”).

The Supreme Court took the opportunity to then state:

Section 206(b) of the UCCJEA, entitled “Simultaneous Proceedings,” provides in relevant part:

“If the court determines that a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this Act, the court of this State shall stay its proceeding and communicate with the court of the other state.” 750 ILCS 36/206(b) (West 2004).

Judge Bell adhered to that statute when she called Judge Love eight times and wrote four letters. We acknowledge that Judge Love was not required to initiate communications with Judge Bell under the provisions of the UCCJEA that applied based on Indiana’s position as the court with initial custody jurisdiction in this case. See 750 ILCS 36/110 (stating that courts “may” communicate). However, we believe that she was required to participate when Judge Bell initiated communication pursuant to the UCCJEA’s mandate, and we are disturbed by her unwillingness to do so. See 750 ILCS 36/206(b) (mandating that the court “shall” communicate with the other court exercising simultaneous jurisdiction). The

Indiana court's order would have had Sophia taken from her mother and father and brought to Indiana by law enforcement personnel. A decision of such magnitude certainly warrants a telephone conversation between the courts involved in the matter.

***M.C.C. - Standing to Seek Custody: No Voluntary Relinquishment of Custody by Both Parents***

*In re Custody of M.C.C.*, No. 1-08-0203 (1<sup>st</sup> Dist., 2008)

The issue in this case was standing of the maternal grandparents to seek custody following the death of their daughter. The mother and father had executed a voluntary acknowledgment of paternity and several months later the mother died in a traffic accident. In the grandmother's DuPage County petition for adoption and custody, she alleged that the child had always lived with her and that the child's father was an unfit parent because he had not established a relationship with child and did not support him financially. The father filed a Cook County petition seeking sole custody alleging that he had a relationship with his son and that his son had lived with him and the mother from his birth until January of 2006. Though the petition admitted that the child then currently resided with the maternal grandmother, the father denied transferring physical custody of the child to his grandmother. The father filed a motion to dismiss urging that the grandmother did not have standing under § 601(b)(2) of the IMDMA because the grandmother could not show that the child was not in the continuous physical custody of one of his parents since birth. Regarding the evidence:

The court found that although Hameeda helped her daughter to care for M.C.C., Aisha had retained physical custody of M.C.C. until her death. The court further found Matthew had "attempted to see his child in spite of the strained relationship" with Aisha's family, had "spent some periods of time" with M.C.C., though the court believed the actual amount was neither as lengthy as Matthew claimed nor as brief as Hameeda alleged, and had asked for physical possession of M.C.C. in a timely manner after Aisha's death.

The trial court dismissed the grandmother's petition and the appellate court affirmed. In reviewing the case law and addressing the voluntary relinquishment standard the appellate court stated:

When determining whether a voluntary relinquishment of physical custody has taken place, the court considers who cared for the child before the custody petition was filed, how the nonparent gained physical possession, and the "nature and duration" of the possession.

The appellate court stated:

In order for Hameeda to establish standing to proceed with her petition for custody, she must not only show that Matthew, as M.C.C.'s remaining natural parent, voluntarily relinquished physical custody of M.C.C. but that Aisha did as well. (Citing the seminal Supreme Court *Peterson* case).

The appellate court agreed with the trial court that the child remained in the mother's physical

custody until her death after which the father requested custody in a timely manner.

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

#### ***Holthaus - Attorney's Fees / Fees as an Advance Against the Marital Estate and the Impact of the Unless Otherwise Ordered Language***

[\*IRMO Holthaus\*](#), 387 Ill.App.3d 367 (Second Dist., 2008)

The third of the significant *Holthaus* holdings addressed the trial court's purported failure to treat the parties' attorney fees as advances on their respective shares of the marital estate per Section 501(c-1)(2) of IMDMA. Despite the potential waiver issue in terms of the issue not being argued at the trial court level, the appellate court stated that, "We choose to address Angeline's contention because it is necessary to the development of a sound body of precedent concerning the application of section 501(c-1)(2) of the Act." This case addresses the same issue as one of the first cases that I had regarding the "unless otherwise ordered" provision of the interim fee statute. In my case, I urged that the trial court had the authority to not deem all fees paid as an advance against the estate, i.e., for good cause shown. The appellate court stated:

The plain language of section 501(c--1)(2) makes apparent that the trial court is required to treat the parties' attorney fees as advances, "[u]nless otherwise ordered." (Emphasis added.) 750 ILCS 5/501(c--1)(2) (West 2006); see also [\*In re Marriage of Beyer\*](#), 324 Ill. App. 3d 305, 314 (2001) (noting that section 501(c--1)(2) creates a presumption that attorney fees will be treated as advances, but that the presumption does not apply where the court orders otherwise).

Here, the trial court ordered otherwise when following trial it ordered that, subject to the division of the marital estate, which was skewed so as to compensate Nicholas for attorney fees incurred as a result of Angeline's behavior during the proceedings, the parties were to be responsible for their respective attorney fees. Accordingly, the trial court's decision falls squarely within the confines of the statute.

The appellate court then stated:

Thus, we cannot say that the trial court abused its discretion in requiring the parties to be responsible for their respective attorney fees. See *In re Marriage of Bussey*, 108 Ill. 2d 286, 299 (1985) ("The awarding of attorney fees and the proportion to be paid are within the sound discretion of the trial court and will not be disturbed on appeal, absent an abuse of discretion").

#### ***Eberhardt - Attorney's Fees / Right to a Hearing under Section 508(b)***

[\*IRMO Eberhardt\*](#), 387 Ill. App. 3d 226 (First Dist., 2008)

In this case the husband's counsel asked for a separate evidentiary hearing where the wife's lawyer would be required to testify about his fees and services. The trial court denied the request and ordered the husband to pay \$3,000 of the wife's attorney fees. The judge said he had considered the parties' arguments and the factors used by courts in assessing a petition for attorney fees. The



judge said he also had reviewed wife's lawyer's hourly billing sheets and costs. The appellate court stated:

It appears from the transcripts that the trial court regarded proceedings held on December 19, 2006, as a hearing on attorney fees. But because Stephen requested a separate hearing, he is entitled to receive one. We reverse the trial court's award of attorney fees and remand for a hearing on this issue.

***Thompson - Attorney's fees for GAL / Right to Evidentiary Hearing for Final Fee Hearing***  
*IRMO Thompson*, No. 1-06-0472 (1<sup>st</sup> Dist., 2008)

In this case, the Muller Firm Ltd. (the firm) was appointed by the trial court to represent the parties' children in the proceeding. At issue was whether the trial court erred in granting the firm's "fee petition for setting final fees and costs" without first holding an evidentiary hearing. The appellate court ruled that it did and reversed the trial court's decision. The appellate court distinguished interim and final fee awards and noted that in petitions for fees under §508 where a contested hearing is requested, the trial court must hold an evidentiary hearing on the petition. The dissent is good reading. It urged that an individual must make a showing entitling him to challenge the §506 fee petition at an evidentiary hearing, in this case, by establishing "good cause." The dissent stated, "Unlike *Kaufman* and *Jones*, this case does not involve a fee dispute under §508 between parties to a divorce, but a §506 petition by a child representative." The dissent also pointed out that if §508 applies, then it would fully apply to such things as the alternative dispute resolution mechanism, etc.

***Cooney - Child Representative Fees Following Discharge for Work Related to the Representation***

*Cooney v. Bischoff*, 386 Ill. App. 3d 348 (2<sup>nd</sup> Dist., 2008)

In *Cooney*, in chancery proceedings the mother filed a complaint for issuance of a mandatory injunction directed to child representative. The mother sought that the child representative appear in an administrative hearing relating to her custody of the children. At the time the mother filed her chancery pleadings the child representative filed her motion to withdraw. The child representative argued that the complaint for mandatory injunction was contrary to the terms of Section 506(a)(3) of the IMDMA, which provides that the child representative "shall not be called as a witness." The chancery court ordered to attend the administrative hearing and on the same date the trial court granted leave for the child representative to withdraw. Later, the child representative filed her petition for attorney's fees for services related to chancery proceedings. The appellate court in a two to one decision affirmed the trial court's award of fees. The majority opinion concluded:

[D]efendant is entitled to her full fees because the trial court implicitly found that the work postdating the discharge order came within the course of representation. We do not base our holding, as the dissent states, on the idea that "the trial court *could have* reappointed [defendant]" (slip op. at 7); we base our holding on the idea that the trial court had the authority to determine that the course of representation did not cease with the discharge order.

**Comment:** The dissent's argument is better reasoned because of the slippery slope of where the

decision could lead. The dissent cogently states:

The majority is concerned that denying the defendant her post-discharge fees could discourage attorneys from serving as child representatives. There is no reason, however, why a child representative cannot avoid all danger by simply waiting until all services have been rendered before seeking discharge. Other attorneys involved in dissolution proceedings face similar limitations on their ability to recover for their services. See, e.g., 750 ILCS 5/503(j)(1) (petitions for contribution to attorney fees must be filed within 30 days of the dissolution judgment). In addition, other types of witnesses responding to subpoenas face similar challenges in ensuring that they are adequately compensated for their time and expenses.

### ***Levin v. Greco - Child Representative Fees Discharged in Bankruptcy***

*Levin vs. Greco (In re Greco)*, Adversary No. 08-A-251 (Bankr. N.D. IL, November 20, 2008)

In an adversary proceeding, the Bankruptcy Court for the Northern District of Illinois held that a debt owed to a child representative in an Illinois divorce case was not a “domestic support obligation” that would have made the debt non-dischargeable under §523(a)(5) of the Code. In the underlying divorce case, Attorney Joel Levin had been appointed as child representative for Greco’s children. The parties settled the divorce and, as part of the settlement, Mr. Greco agreed to pay \$8,927 to Levin for child representative fees while Mrs. Greco agreed to pay a much lesser amount. The agreement was incorporated into an order entered by the divorce court. Note that the order did not impose an obligation upon either party to satisfy the other party’s payment obligation. Mr. Greco then filed a Chapter 7 bankruptcy. Attorney Levin filed an adversary complaint to determine the non-dischargeability of his debt under §523(a)(5) of the Code. The debtor did not appear or respond to the adversary complaint, and Levin moved for a default judgment. Levin argued that because his services to Greco’s children were in the nature of support, the debtor’s obligation to pay for those services must be nondischargeable. The Court, *sua sponte*, questioned whether Levin’s status as a child representative under Illinois law gave rise to a “domestic support obligation” as a matter of law.

Under §523(a)(5) of the Code, a debt for a domestic support obligation is excepted from discharge. “*Domestic support obligation*” is defined under §101(14A) of the Code, which has four elements:

- (1) the debt must be owed or recoverable by a person with a particular relationship to the debtor, i.e. spouse, former spouse, child or such child’s legal guardian, or a government unit;
- (2) the nature of the obligation must be for support or alimony;
- (3) the source of the debt must be a divorce agreement, decree or court order; and
- (4) the debt must not have been assigned to a nongovernmental entity, unless it is voluntarily assigned by the spouse, former spouse or child of the debtor for the purpose of collecting the debt.

The bankruptcy court found that Levin’s complaint satisfied all but the first element. Payment for the services that Levin provided to the children can be characterized as “support” for the children. Moreover, the obligation to Levin arose under a settlement agreement incorporated into a divorce decree, and it has not been assigned. But the court held that Levin, as a child representative, did

not satisfy the payee requirement of the definition.

The court distinguished case law which had held that an award of fees to a guardian ad litem appointed to represent the interests of the debtor's child in a custody dispute were nondischargeable under §523(a)(5) of the Code. The court believed the case law failed to give proper interpretation to the "payee" element of nondischargeability, distinct from the requirement that the obligation be in the nature of support. The child representative's right to payment from the debtor is not a domestic support obligation simply because it is a court-ordered payment in the nature of support. The critical reasoning to the decision was that Levin's claim as child representative was not owed or recoverable by the debtor's spouse. The Greco's divorce order provided for separate amounts to be paid to the child representative by each spouse, with no obligation on either party to satisfy the other party's payment. Therefore, Greco's obligation pay the child representative was neither indirectly "payable to" nor "recoverable by" Greco's former spouse.

The bankruptcy court rejected Levin's argument that the court should be guided by the provision under §506(b) of the IMDMA stating that "all fees and costs payable to an attorney, guardian ad litem, or child representative . . . are by implication deemed to be in the nature of support of the child and are within the exceptions to discharge in bankruptcy under 11 U.S.C.A. 523." The Supremacy Clause of the U.S. Constitution precludes any argument that state statutes can override acts of Congress, particularly in bankruptcy where Congress is given authority to enact uniform laws. Ultimately, the bankruptcy court denied the motion for default judgment, but still provided Attorney Levin with an opportunity to demonstrate that the complaint is viable. The final result is unknown, but the prospect for success seems bleak.

**\* Practice tip for Child Representatives & GAL's** — Regardless of the allocation for payment, fees should be reduced to judgment with joint and several liability of the parties with indemnification provision by each against the other. Arguably, in the case above, had the ex-spouse been liable under the divorce judgment to satisfy the debtor's portion of the child representative fees due to his failure to pay, the ex-spouse would likely have had a right to recover those fees from the debtor, thereby satisfying the "payee" requirement of the debt. Consequently, the debt owed to the child representative may have qualified as a non-dischargeable domestic support obligation.

### ***Pond - Attorney's Fees / Contribution Award***

[\*IRMO Pond\*](#), 379 Ill.App.3d 982 (2<sup>nd</sup> Dist., 2008)

On the same day that the parties signed the marital settlement agreement, the trial court entertained the parties' petitions for contribution to attorney fees. The trial court denied both petitions. The trial court stated:

"The issue of contribution is set forth in the attorney's petitions and essentially request the court to, after looking at the division of property and the relative financial circumstances of the property [sic] after the division of this property is made and any other factors, there being no maintenance, that would be the other major consideration, looking at their incomes and ability to pay, the Court is going to deny any relief by [petitioner] in this case. The Court finds that, as I say, at the

end of the day, the economic circumstances available to [respondent] would not, in this Court's judgment, constitute \*\*\* an equitable basis for him to make a contribution towards any attorney's fees that will be paid. So [petitioner's] request for contribution to attorney's fees is denied.

The appellate court cited *Miner* in support of the proposition that “Inability to pay does not require a showing of destitution, and the party seeking fees is not required to divest himself of capital assets before requesting fees. It stated, “Rather, a party is unable to pay her fees if the payment would strip her of her means of support or undermine her financial stability. *Schneider*, 214 Ill. 2d at 174. In determining whether and in what amount to award attorney fees, the court should consider the allocation of assets and liabilities, maintenance, and the relative earning abilities of the parties. *IRMO Suriano*, 324 Ill. App. 3d 839, 852 (2001). Regarding earnings, the court may consider both current and prospective income. *IRMO Selinger*, 351 Ill. App. 3d 611, 622 (2004).”

This case will be analyzed at length because there are very few cases which involve reversals of a failure to make a contribution award. In fact, the appellate court was able to cite only three previous appellate court cases, each prior to the “Leveling” amendments.

In this case the ex-husband had agreed in the Marital Settlement Agreement to pay \$5,000 toward attorney’s fees which was apparently due to violations as to discovery issues. The court then pointed out that the fee award was not one made per §508(b) but per §508(a) – incorporating the contribution provisions by reference. The ex-wife argued that the court could consider a party’s conduct as to the reason for the litigation, citing *IRMO Ziemer*, 189 Ill. App. 3d 966, 969 (1989). The ex-wife also argued that her ex-husband should be required to contribute toward the \$63,000 balance of fees owed because she had already borrowed \$28,000 to pay her attorney, because the house which was the majority of the estate awarded to her was illiquid and because her ex-husband could afford to pay via a contribution award payments over time. The ex-husband argued in part that he had over \$38,000 in credit card debt he was therefore left with no money after paying the credit card debt. The ex-husband thus argued that while his ex-wife had similar debt (excluding attorney fees), she also has the house. He also urged that the ex-wife had waived the argument that he could make installment payments, because she did not offer such a proposal in the trial court. The ex-husband’s further arguments were:

On the subject of income, respondent points out that petitioner was earning \$38,422 in 2005 when she quit her job, and he argues that the trial court was imputing an income to her of \$25,000 for college contribution purposes only. Respondent maintains that we should not ignore that petitioner quit her job in the middle of the proceedings and then asked for contribution based on a lower imputed income for college purposes. Respondent further argues that petitioner received 65% of the assets to balance his higher income. According to respondent, petitioner already benefitted from the differences in income but now seeks to double dip.

The appellate court determined that the ex-wife did not waive the issue of seeking payments over time by now raising it at the trial court level. Because the ex-wife quit her job earning \$38,000, the appellate court stated that it was reasonable to consider that her future income would likely rise. See *Selinger*, 351 Ill. App. 3d at 622 (court may consider both current and prospective

income). Regarding the ex-husband's income, the settlement agreement recited that he earned \$93,610 in 2005 and had a projected 2006 income of \$83,000 based upon his October year to date income. The appellate court focused its attention on the cases reversing the trial court's denial of attorney's fees: *IRMO Carpenter*, 286 Ill. App. 3d 969 (1997), *IRMO Haas*, 215 Ill. App. 3d 959 (1991), and *Sullivan v. Sullivan*, 68 Ill. App. 3d 242 (1979).

Those cases break down as follows as to the income comparison:

Case	Amt Sought	Wife	Note	Husband	Note
<i>Carpenter</i>	\$3,543	\$12,000		\$45,000	Estimated for H
<i>Hass</i>	\$5,647	\$15,000	Less Than	\$49,000	Excluding Bonus
<i>Sullivan</i>		\$4,176	W's Gross	\$14,676	Net figure for H

Applying the facts, the appellate court stated:

Petitioner clearly demonstrated that she is unable to pay her attorney fees without invading her capital assets or undermining her financial stability. Although petitioner received a greater portion of the marital assets, they consist largely of retirement accounts and illiquid assets such as the house. Petitioner also received around two-thirds of the liabilities, giving her over \$100,000 in debts. These debts are in addition to petitioner's attorney fee debts of over \$91,000 and the approximately \$52,000 debt she incurred to pay respondent his share of the home's equity. These circumstances, along with petitioner's limited income, show that petitioner is unable to pay her attorney fees.

We also conclude that petitioner showed that respondent is able to pay at least a portion of her attorney fees. While respondent may still have about \$20,000 in credit card debt if he applies his remaining equity from the house to the outstanding credit card balance, this is his only remaining debt, and he has no child support or maintenance obligations. Respondent's income of over \$83,000 is over three times petitioner's imputed income and more than twice her previous income at Dick Pond Shoes. The courts in *Carpenter*, *Haas*, and *Sullivan* all emphasized the differences in the parties' incomes in determining that the trial courts abused their discretion in refusing to order attorney fee contributions. Though respondent argues that petitioner has already benefitted from the differences in income by receiving 65% of the marital assets, as stated, in determining whether and in what amount to award attorney fees, the court should take into account the allocation of assets and liabilities, maintenance, and the parties' relative earning abilities. Thus in analyzing this issue, we are cognizant of petitioner's greater assets. But we also consider that this benefit was diluted by her waiver of maintenance and her assumption of a much greater share of the liabilities. We agree with respondent that he should not be responsible for the entire remaining balance of petitioner's attorney fees. At the same time, considering the nature of petitioner's assets, her vast debts, and the significant income disparities, we believe that the trial court abused its discretion by

not ordering respondent to contribute to petitioner's attorney fees in any amount beyond the \$5,000 he already paid.

Accordingly, the appellate court reversed and remanded the case to the trial court to determine the contribution award.

### **Contempt Cases:**

#### ***Hopwood - Post-Divorce / Contempt / Standing / Debt Paid by ex-Wife's Father: Doctrine of Subrogation***

[\*IRMO Hopwood\*](#), 378 Ill.App.3d 746 (5<sup>th</sup> Dist., 2008) This is a unique contempt case involving the doctrine of subrogation. In this case, the ex-husband was ordered to pay a debt to People's Bank (on which the ex-wife's father was also a guarantor). The appellate court stated:

It is clear that when [the ex-husband] paid the debt to Peoples Bank, he became subrogated to the rights of the bank against both [ex-wife's father] and [his-ex-wife.] "The doctrine of subrogation allows a person who, pursuant to a legal liability, is compelled to pay an obligation of another to obtain reimbursement from the party who is primarily liable."

The appellate court, however, noted that as of the time of the hearing the wife's father had not brought any subrogation claim. The appellate court noted:

We have found surprisingly little authority explaining the circumstances under which a party to a dissolution of marriage may enforce the obligation of the other party to pay a joint debt. Consequently, we will attempt to clearly set forth the nature of an order to indemnify a party from a debt.

The appellate court then ruled:

We construe the terms of the parties' marital settlement, as ordered by the court, to require Tim to indemnify Carol from both loss and liability. There is no dispute that Tim failed to pay the debt to Peoples Bank. Thus, if Carol had been required to pay any portion divorce case involving of that debt, a cause of action would have accrued to her pursuant to Tim's obligation to indemnify her against loss. Likewise, if liability for the debt became fixed against Carol, by judgment or settlement, a cause of action would have accrued to her pursuant to Tim's obligation to indemnify her against liability. At this point, however, Carol has sustained neither loss nor liability. As a result, no cause of action has accrued in her favor, and the trial court was correct in denying her claim.

#### ***Schwieger - Appeals/ Post-Divorce / Contempt***

[\*IRMO Schwieger\*](#), 379 Ill.App.3d 687 (2<sup>nd</sup> Dist., 2008) Appeal dismissed. The ex-husband's appeal from order finding that he failed to pay his former wife for her share of proceeds from sale of marital home must be dismissed because order on motion for indirect criminal contempt of court does not impose penalty and there remains a second motion to find husband in indirect criminal



contempt still pending.

### **Evidence Cases:**

#### ***Dominguez - Criminal / Domestic Battery/ Right Of Confrontation / Hearsay***

[People v. Dominguez](#), 382 Ill. App. 3d 757, 767-68 (2<sup>nd</sup> Dist., 2008)

At the defendant's trial for domestic battery, where the victim appeared and contradicted the version of events that she had given, she was not unavailable for purposes of defendant's right of confrontation. Further, the conversation with 911 operator was not testimonial in nature; because questions from the operator were directed to ascertaining whether immediate aid needed was to be sent. In addition, victim's handwritten statement to police officer was properly admitted pursuant to Section 115-10.1 of Code of Criminal Procedure.

See also, *People v. Chmurra*, 401 Ill. App. 3d 721, 723-26 (2010). Appellate court found that a domestic battery victim's statements to the 911 operator were not inadmissible under Crawford, even though they were made after she fled to a neighbor's house. The court found that those statements were nontestimonial because the operator's questions about the incident were made to determine whether medical attention was needed, whether her son was in danger and what behavior the police may expect when confronting her husband. *Chmurra*, 401 Ill. App. 3d 721, 723-26.

#### ***Robinson - Evidence / Hearsay: Excited Utterance Exception re Victim's Statements of Domestic Battery***

[People v. Robinson](#), 379 Ill.App.3d 679 (2<sup>nd</sup> Dist., Rehearing denied Feb. 13, 2008), [GDR 08-20](#).

The excited utterance hearsay exception permitted an officer to testify regarding the victim's statements of domestic battery. The appellate court reviewed the law we first learned in law school and states:

"Three factors have been deemed necessary to lay the foundation for the admission of a statement under the excited utterance exception to the hearsay rule. [Citation.] They are: (1) an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) an absence of time to fabricate; and (3) a relation of the statement to the circumstances of the occurrence. [Citation.] In determining whether a hearsay statement is admissible under this exception, courts use a totality of the circumstances analysis. [Citation.]

#### ***Holthaus - Evidence / Late Responses to Requests to Admit - Absence of Prejudice Not Sufficient***

[IRMO Holthaus](#), 387 Ill. App. 3d 367 (Second Dist., 2008)

The wife argued in this case that the trial court erred in refusing to allow her late response to her husband's request to admit, and thus in striking her response, because there was no demonstrable prejudice to the husband as a result of her late response. The appellate court stated:

Pursuant to Supreme Court Rule 183, a trial court is permitted to extend the time for responding to a request to admit, "for good cause shown." 134 Ill. 2d R. 183;

*Bright v. Dicke*, 166 Ill. 2d 204, 208 (1995). "Although Rule 183 does give judges discretion to allow responses [to requests to admit] to be served beyond the 28-day time limit, that discretion does not come into play under the rule unless the responding party can first show good cause for the extension." *Bright*, 166 Ill. 2d at 209. The absence of prejudice alone is insufficient to establish good cause under Rule 183. Whether good cause exists is fact-dependent and rests within the sound discretion of the trial court; thus, the trial court's determination will not be disturbed absent an abuse of discretion. *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 353-54 (2007).

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### **Other Case Law:**

#### ***Gary - Injunctions: Traditional Injunctive Criteria Not Applicable to Proceedings Seeking Injunctions against Party's from Proceeding with Related Actions in Other Courts***

[\*IRMO Gary\*](#), 384 Ill. App. 3d 979 (2<sup>nd</sup> Dist., 2008)

This case addresses an injunction restraining the parties before them from filing or proceeding with related actions in other courts – relief permissible in order to prevent the maintenance of vexatious and harassing litigation. The appellate court stated (with some citations omitted):

The prosecution of a later-filed suit also may be enjoined if it appears likely to cause undue interference with the progress of the original action. *IRMO Elliott*, 265 Ill. App. 3d 912, 914 (1994). What is less clear are the standards used to determine whether the entry of such an injunction is appropriate in a particular case. In general, courts have not required that parties seeking to enjoin later-filed actions demonstrate the existence of the elements typically needed for injunctive relief in other contexts... Instead, courts have enjoined parties from filing or proceeding with actions in other Illinois courts where (a) either the parties and the legal issues involved are the same or the issues involved in the later-filed action are of the type that can and should ordinarily be disposed of in the course of the original action; and (b) there does not appear to be any proper purpose for the maintenance of the later-filed action.

The appellate court then noted the general rule that “when two or more actions involving the same parties and the same issues are brought in different venues, ”the court first acquiring jurisdiction retains the jurisdiction and may dispose of the entire controversy, and no court of coordinate power is at liberty to interfere with the first court's jurisdiction.” The appellate court noted with the approval the decision in *IRMO Baltzer*, 150 Ill. App. 3d 890 (1986), where it affirmed the injunction against a later-filed action without requiring that the parties seeking the injunction show the traditional elements for an injunction. In that case, the trial court had entered an injunction requiring an attorney to file his attorney fee petition in DuPage County, the court in which the divorce was proceeding, and to dismiss his separate Cook County petition. The appellate court there that duplicative actions waste the resources of the courts and litigants.

The appellate court also cited *IRMO Schweih*s, 222 Ill. App. 3d 887 (1991), [GDR 92-18](#), where the court upheld the entry of an enjoining the mortgagee of the marital home as a third party in a

divorce case and enjoining the dissolution case, enjoining that mortgagee from filing any foreclosure action in a separate division of the same circuit court – thus requiring it to file the foreclosure in the dissolution action instead. Finally, however, the court noted but criticized the language from one case which had *IRMO Elliott*, 265 Ill. App. 3d at 914, that "[c]ourts use the same standards for preliminarily enjoining legal actions as for other preliminary injunctions." The appellate court stated:

Accordingly, .. We hold that a litigant seeking to enjoin later-filed actions in other Illinois courts need not demonstrate the existence of the factors for typical injunctions ... and may obtain an injunction where: (a) either the parties and the legal issues involved are the same or the issues involved in the later-filed action are of the type that can and ordinarily should be disposed of in the course of the original action; and (b) there does not appear to be any proper purpose for the maintenance of the later-filed action.

### ***Nessler - Divorce Judgments / Fraud***

[\*Nessler v. Nessler\*](#), No. 4-07-0220 (4<sup>th</sup> Dist., 2008)

Reversed and remanded. *Nessler* is an unusual and complex case involving, in part, an action for money damages caused by the ex-husband's alleged fraudulent inducement of her execution of the marital settlement agreement. In this case the parties were married, divorced, remarried and then the remarriage was declared invalid. The ex-husband moved to dismiss the complaint per Section 2-619 of the Code of Civil Procedure. The appellate court noted the allegation in the complaint that the husband, an attorney, induced her to enter into agreement by misrepresenting to her the parties' rights and intentions was sufficient to allege fraudulent concealment; and toll limitations period for both 2-1401 motion and for fraud. The appellate court noted:

Also, we are not convinced that the statute of limitations began to run in 1996 when the judgment of dissolution was entered because the couple remarried in 2000 and the second marriage was declared invalid in 2004 when the trusts, the subjects of the MARITAL SETTLEMENT AGREEMENT, were funded for the first time. This leaves open the question as to what effect the remarriage had on the unfunded MARITAL SETTLEMENT AGREEMENT and what effect the declaration of invalid marriage has on the then-funded MARITAL SETTLEMENT AGREEMENT.

Regarding the claim of fiduciary relationship between the husband (a lawyer) and his wife, the appellate court stated:

We note that we are not convinced that a fiduciary duty could not exist according to plaintiff's allegations. This is not a case of a divorcing husband and wife on level footing. In this case, defendant husband is an attorney and plaintiff wife is not. Plaintiff alleges defendant advised her regarding Illinois divorce laws. Defendant clearly knew his wife was not an attorney and might have known that she would trust his legal advice. While a marital relationship alone may not establish a fiduciary relationship, a fiduciary relationship may arise in a marital relationship as

the result of special circumstances of the couple's relationship, where one spouse places trust in the other so that the latter gains superiority and influence over the former.

### ***Pfalzgraf* - Grandparent Visitation**

*In re Grandparent Visitation of Pfalzgraf*, 378 Ill.App.3d 1107, 1108 (5<sup>th</sup> Dist., 2008)

In *Pfalzgraf*, the paternal grandparents filed a petition for grandparent visitation per §607 of the IMDMA alleging that their son did not object and seeking extensive visitation with their granddaughter. The trial court ruled that the grandparent visitation time must not diminish the parenting time of the mother, consistent with the language of §607(a-5)(1)(b) of the IMDMA providing that, "The visitation of the grandparent ... must not diminish the visitation of the parent who is not related to the grandparent ... seeking visitation." The appellate court noted:

The petitioners argue that the circuit court "improperly conflated the terms 'visitation' and 'custody' " when the court concluded that subsection (a-5)(1)(B)'s directive that "[t]he visitation of the grandparent \*\*\* must not diminish the visitation of the parent who is not related to the grandparent \*\*\* seeking visitation" precluded it from ordering that their requested visitation occur during the respondent's custody time. The petitioners maintain that the directive was enacted to "prevent a court from reducing the time that a noncustodial parent will have with his or her child" and should be interpreted accordingly

The appellate court reviewed the interpretation of statute *de novo* and stated:

Section 607 of the Act refers to both "custody" and "visitation," while subsection (a-5)(1)(B)'s directive that "[t]he visitation of the grandparent \*\*\* must not diminish the visitation of the parent who is not related to the grandparent \*\*\* seeking visitation" refers only to the latter. Thus, given its language's plain and ordinary meaning, the directive only precludes a court from granting grandparent visitation that diminishes the unrelated parent's *visitation* time.

Applying this principle, the appellate court found that the petition was brought by the grandparents who were related to the parent with visitation and the analysis under a-5(1)(b) regarding the impact on the unrelated person's visitation time was not applicable. The court then reviewed whether it could sustain the trial court's ruling on other grounds. In this case the custodial mother advised that she did not want the paternal grandparents time to diminish her custodial time. The appellate court then stated that it is presumed that this decision is not harmful to her daughter's health and therefore the burden was upon the paternal grandparents to prove that her decision is harmful to her daughter's mental, physical or emotional health. The appellate court stated:

By failing to rebut the presumption set forth in subsection (a-5)(3), the petitioners failed to provide the circuit court with a valid basis upon which to grant their request that the visitation occur during the respondent's custody time.

Ultimately, the decision by the trial court was accordingly affirmed but on other grounds.

## **G.E.M. - Paternity: Inability to Set Aside Voluntary Acknowledgment of Paternity**

*In Re Parentage of G.E.M.*, 382 Ill. App. 3d at 1118 (3<sup>rd</sup> Dist., 2008)

In 1995 the parties executed a voluntary acknowledgment of paternity and named the father on the birth certificate. Shortly after the child's birth, the mother then brought parentage action which determined support and visitation. In 2000, the mother requested that the paternity judgment be set aside. The trial court granted the mother's request and vacated "any judgments for child support" entered against the purported father. The court order added "all prior orders of parentage are hereby vacated, too." A year later, the mother brought a petition to declare the existence of a father-child relationship against another man. The second purported father brought a motion to dismiss per §2-619(a) of the Code in which he urged that since the mother and the voluntary father both signed an acknowledgment of paternity naming the voluntary father as G.E.M.'s father, that issue had already been resolved and was binding on those parties. Further, the second purported father urged that there was a judicial declaration of paternity via entry of the agreed orders for support, etc. He argued that the later order vacating the paternity judgment was void. The second purported father appealed and the appellate court reversed. This decision contains an excellent discussion as to how voluntary acknowledgments of paternity operate as judgments:

The Act allows that fatherhood is not always created by pure genetics. Consent is as legally binding on a parent as a DNA determination when that unconditional acceptance of the role of parent is voluntarily accepted for purposes of an adoption or a voluntary acceptance of paternity. Here, both mother and Richard agreed to name Richard as G.E.M.'s legal father at birth. Neither Richard nor mother timely rescinded that agreement or alleged that their respective acknowledgments of paternity were based on duress, fraud, or mistake of fact as required by statute. This acknowledgment creates a legal presumption which can not be easily cast aside when the responsibilities of parenting become difficult.

The appellate court pointed out that §45/5(b) of the Act states that a party may rescind his or her voluntary acknowledgment of parentage within 60 days of its signing. The appellate court then stated, "In *Smith*, our supreme court explained that the presumption from a voluntary acknowledgment of paternity under the statute is conclusive and "cannot be overcome by any additional evidence or argument." The appellate court then in far-reaching language stated:

In parentage cases, the trial court has no inherent powers to deviate from the statute. Parental rights can be surrendered by the parent in limited situations or terminated by the state under special circumstances. However, there is not any statutory authority for a court to vacate or simply set aside parental rights at the request of a parent. The trial court's authority is limited to the exercise of the powers conferred upon the court by the Act. No court can arbitrarily vacate a judgment of paternity, created by statute or judicial determination, and allow a parent to abandon the duties necessary for the well-being of their child, no matter how inconvenient those obligations may be for one or both parents.

**Comment:** This decision is an excellent primer on various other laws and should be read. Lawyers often overlook the portion of the IPA which states:

(b) Notwithstanding any other provisions of this Act, paternity established in

accordance with subsection (a) has the full force and effect of a judgment entered under this Act and serves as a basis for seeking a child support order without any further proceedings to establish paternity.

(c) A judicial or administrative proceeding to ratify paternity established in accordance with subsection (a) is neither required **nor permitted**.

***Benjamin - Domestic Violence / Individuals Defined by IDVA: Family or Household Member and Collateral Affinity***

*Benjamin v. McKinnon*, 379 Ill. App. 3d 1013 (4<sup>th</sup> Dist., 2008)

A woman was properly granted a plenary order of protection against the father and brother of her divorced son's ex-wife. The *Benjamin v. McKinnon* court cited the IDVA's inclusion of "persons related by...prior marriage" in the definition of "family or household member." The court also relied on its stated purpose of preventing escalating intra-family violence in finding the IDVA protection extended to siblings and parents of formerly married spouses. In this case, the argument was that these individuals were not "family or household members of the Plaintiff under the Act." The case used terms of art of direct affinity which is the relationship of one spouse to the other spouse's blood relatives and collateral affinity which is the relationship of a spouse's relatives to the other spouse's blood relatives such as a "wife's brother and her husband's sister." (citing *Black's Law Dictionary*.) The opinion found that the defendants were relatives by collateral affinity seeking support through and out-of-state case. The dissent urged that "there must be some parameters to determine when and if people are related by marriage" and urged that the statute does not use the term "relatives by collateral affinity."

***Gordon - Post-Decree / No Long Arm Jurisdiction re Personal Injury Infliction of Distress Claim***

*Gordon v. Gordon*, Ill. App.3d 732, (3<sup>rd</sup> Dist., 2008).

Affirmed. The trial court correctly concluded that it lacked personal jurisdiction over Florida defendant, plaintiff's former wife, and dismissed the plaintiff's complaint for intentional and negligent infliction of emotional distress. All of the alleged offensive acts related to defendant's behavior surrounding a Florida Marital Settlement Agreement incorporated in a Florida judgment were insufficient to require her to defend action in this State under due process. These acts consisted of only a call and an E-mail to Illinois. The issue was the catch-all provision in the long arm statute which provides, "that a trial court may exercise jurisdiction "on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." 735 ILCS 5/2--209(c)." In applying the "catch-all" the court focused on whether Federal and Illinois due process concerns were met and concluded that they were not. This case cites the minimum contacts test and *International Shoe* and its progeny.

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**Divorce Tax:**

***Perkins - Divorce Tax / Deductibility of Spousal Support: Termination on Death Requirement***

*Perkins v. Commissioner of Internal Revenue*, T.C. Memo. 2008-41 (Feb. 26, 2008)

While the agreement was silent as to whether payments from proceeds of disability insurance



would terminate on death, the tax court determined state law required such payments to terminate on the death of the payee. Therefore, the payments were alimony under the Internal Revenue Code.

**Dependency Exemption Revenue Ruling:** Effective since July 2, 2008, we now have the final amendments to Treas. Reg. 1.152-4 clarifying which parent is to receive the child or children as dependency exemptions. See: [Internal Revenue Bulletin: 2008-33](#)

The regulations first define terms. The custodial parent is the parent with whom the child resides for the greater number of nights during the calendar year. A child who is temporarily absent from a parent's home for a night would be treated as residing with the parent with whom the child would have resided for the night. However, if a child resides with neither parent for a night, for example, because another party is entitled to custody of the child for that night, the child would be treated as not residing with either parent for that night. Under the tie-breaking rule, if a child resides with each parent for an equal number of nights during the calendar year, the parent with the higher AGI for that year is treated as the custodial parent. A child resides with a parent for the night if the child sleeps at the residence of that parent (whether or not the parent is actually present) or in the company of the parent when the child does not sleep at a parent's residence (vacations, for example).

A child who does not reside with either parent for a night is treated as residing with the parent with whom the child would have resided for the night but for the absence. The regulations provide an exception for parents who work at night. If, due to a parent's nighttime work schedule, a child resides a greater number of days but not nights with the parent who works at night, that parent is treated as the custodial parent. On a school day, the child is treated as residing at the primary residence registered with the school. The regulations finally provide additional clarity for children who turn age 19. Neither parent has "custody" within the meaning of I.R.C. § 152(e)(1) for children who have attained the age of 19. For the child who has reached age 19, the dependency exemption may be taken by the parent who provides over half of that child's support if the child is a student not yet attaining the age of 24 at the close of the calendar year. Student is defined consistent with the Internal Revenue Code.

**Release of Dependency Exemptions:** The custodial parent is the parent who can take the dependency exemption (and child tax credit as well as other benefits). However, the custodial parent can release to the non-custodial parent the right to claim the tax benefits by signing a written declaration (consent) to that effect. Because most parents sign a release on a year by year basis, I do not address the regulations effecting the ability to revoke the release except for noting that it is effective in the following year.

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**Legislation:** This has not been an active session in terms of movement on significant family law legislation. The apparent reason for bills which stalled, etc., is HR1101 whose aim has been to comprehensively review the Illinois Marriage and Dissolution of Marriage Act.

**Domestic Violence Law - [95-773 \(Pdf\)](#)- Cindy Bischof Law: Allows Use of GPS Devices**

The new law (PA 95-773 / [SB 2719](#)) amends various law including the Criminal Code of 1961, the

Unified Code of Corrections, the Code of Criminal Procedure of 1963, and the Illinois Domestic Violence Act. It provides that the respondent shall undergo a risk assessment evaluation per protocols set by the Illinois Department of Human Services under such terms and conditions as the court may direct (rather than attend and complete partner abuse intervention programs). The Act creates the Domestic Violence Surveillance Fund in the State treasury. The offense of violation of an order of protection includes the respondent's failure to attend and complete partner abuse intervention programs. It provides that a person charged with a violation of an order of protection, as a condition of bail, may be ordered by the court to carry or wear a global positioning system device. A person convicted of violation of an order of protection, as a condition of parole, mandatory supervised release, or early release, shall be ordered to carry or wear a GPS device. A person sentenced to probation or conditional discharge for violation of an order of protection, as a condition of probation or conditional discharge, **may be** ordered to carry or wear a GPS device. In domestic violence cases, the court shall order the respondent to attend and complete partner abuse intervention programs. Finally, the law adds to every penalty imposed upon a plea of guilty or finding of guilty resulting in a judgment of conviction of a violation of an order of protection an additional fine in an amount not less than \$200 which shall be deposited into the Domestic Violence Surveillance Fund. The cornerstone of the new law provides:

(f) When a person is charged with a violation of an order of protection under Section 12-30 of the Criminal Code of 1961, the court shall order the respondent to undergo a risk assessment evaluation at an Illinois Department of Human Services protocol approved partner abuse intervention program. Based on the results of the risk assessment and the other circumstances of the violation, the court may order that the person, as a condition of bail, be placed under electronic surveillance as provided in Section 5-8A-7 of the Unified Code of Corrections.

**Status:** Effective January 1, 2009

**Educational Expenses: Right to Know Name of Educational Institution - [Senate Bill 2044](#)** (Dillard, R-Downers Grove) entitles each parent to know the name of the education institution that the child attends unless the court finds that the child's safety would be jeopardized. It had been surprising that this right was not considered to be implicit in the previous statutory scheme by one Illinois case. This law was to address fact.

<http://www.ilga.gov/legislation/95/SB/PDF/09500SB2044v.pdf>

**Status:** Public Act . . . . . 95-0954

**Health Care Coverage for Young Adults - [HB 5285](#)**

[Public Act 95-958](#): An act which effects negotiations in some family law cases is health care coverage for young adults. See:

[http://www.sj-r.com/time\\_out/x980819531/Senate-backs-health-insurance-expansion](http://www.sj-r.com/time_out/x980819531/Senate-backs-health-insurance-expansion)

[Governor's Press Release](#)

(note amendatory veto).

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