2006 SUMMARY OF SIGNIFICANT ILLINOIS DIVORCE AND FAMILY LAW CASES

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Note the references to GDRs are to the Gitlin on Divorce Reports.

CHILD SUPPORT

Hubbs - Income Averaging, Imputing Income and Downward Deviations:

*IRMO **Hubbs***, 363 Ill. App. 3d 696 (Fifth Dist., 2006)

♦ **Imputing Income and Income Averaging Based upon Historical Earnings from Past Job When Income from New Employment Uncertain**: The appellate court held that the trial court did not err in imputing to the husband a base gross income of $115,000 (based upon an average of the past three years of his previous employment.) In addition, the husband was required to pay 13% of the gross income above this amount. The husband urged that the trial court erred in imputing income to him based upon his previous employment. On the income averaging issue the appellate court stated:

> Where it is difficult to ascertain the net income of a noncustodial spouse, the circuit court may consider past earnings in determining the noncustodial spouse's net income for purposes of making a child support award. *IRMO Karonis*, 296 Ill.App. 3d 86, 92 (1998). Using an average income for the previous three years of employment is a reasonable method for determining net income where income has fluctuated widely from year to year. *IRMO Nelson*, 297 Ill.App. 3d 651, 655 (1998).

What is interesting is that this case presents a new wrinkle, i.e., income averaging based upon a past job in light of the uncertain nature of the income from the current job. In the husband's current job, his ultimate income would be based upon commissions. He received an advance of $7,500 monthly and these advances were loans which would then have to be repaid from commissions. The husband was responsible for all expenses related to the production of his income. The husband urged that the trial court should have determined his net income to be $2,367 per month. The appellate court applied the facts of the case to its decision as follows:

> Mark's income for the previous three years was $133,000, $114,009, and $169,319, respectively. Mark also testified that he had recently rejected a job offer that would have paid him a salary of $120,000 a year. We believe that based on the evidence in this case, the circuit court acted properly in imputing Mark's gross income at $115,000. This figure is slightly below his average income for the previous three years and slightly below a salary that he could have earned had he accepted another position. Although the circuit court could have required Mark to pay a percentage of his net income to Peggy, we believe that it acted properly in determining gross income to be $115,000.

See: **www.gitlinlawfirm.com/writings/support2.htm#TOC2_17** for discussion of income averaging case law.

- **Failure to Deviate Downward from the Guidelines**: The last issue was whether the trial court should have deviated from the support guidelines in view of the relatively high income of the husband. The award of child support was based on slightly more than the average of income for past three years plus a percentage of the husband's gross income over that amount. The court found this award was not in error – because the court is not required to deviate downward from guidelines. The appellate court stated in this regard, "In fact, as Mark contends, his income will not be as high as it was the previous year, because he took a lower-paying position with a greater future earning potential. If that greater earning potential comes to fruition and it appears that the child support award has resulted in a windfall, then he is certainly entitled to file a petition for a modification. However, based on the circumstances presently before the court, we find no abuse of discretion."

Tegeler – Day to Day Business Expenses and Proof of Income via Expenditures:

IRMO Tegeler, 365 Ill.App. 3d 448 (Second Dist., 2006)

***Gay* Distinguished (Day to Day Business Expenses) in the Second District**: In *Tegeler* one of the issues was the income of the ex-husband as a farmer and whether the trial court properly calculated the ex-husband's net income consistent with the provisions of Section 505(a)(3)(h) of the IMDMA – reasonable and necessary business expenses which are for the repayment of debt. The former wife argued that the trial court should not have subtracted the ex-husband's day-to-day operating expenses when determining his net income on an income averaging basis was less than $20,000 annually. The ex-wife claimed that the father presented no evidence that such expenses went toward the repayment of debts or that they represented reasonable and necessary expenses for his income production. Interestingly, the majority sided with the Cook dissent (and partial concurrence) in *Gay v. Dunlop*, 279 Ill.App. 3d 140 (1996). In *Gay v. Dunlop*, the appellate court held that money spent on gas, auto repairs, and insurance premiums, and certain other expenses, should not have been subtracted, because they were not expenses for the repayment of debts. In shades of *Rimkus* the appellate court stated, "We believe that *Gay* is distinguishable from the instant case." The appellate court then quoted from the Cook dissent where he noted that Section 505(a)(3) could be "troublesome" for more traditionally self-employed people:

> "It seems clear there are obvious deductions which are not listed. For example, how is net income calculated for a merchant engaged in the sale of goods? Under section 505(a)(3) the court must begin with the total of the merchant's receipts from sales. Can there be a deduction for cost of goods sold? The only listed deduction which might apply is section 505(a)(3)(h), but that seems overly restrictive. There should be a deduction for cost of goods sold even if the merchant pays cash for them, even if there is no 'repayment of debts,' and even if the expense is a continuing one. I conclude the legislature intended to allow such obvious deductions even without specific language in section 505(a)(3). In the present case, for example, [the father] was not required to include the total commissions he earned and was entitled to a credit for the share taken by

> Coldwell Banker, including amounts it paid for his office expenses." *Gay*, 279 Ill.App. 3d at 151 (Cook, J., concurring in part and dissenting in part).

The appellate court justified its decision based upon the definition of income per *Rogers II*, defining income as "something that comes in as an increment or addition" as well as other similar definitions. The appellate court then stated, "As respondent's wealth is increased only by his gross farm revenues minus his day-to-day operating expenses, we conclude that the trial court properly adopted respondent's use of this figure as his "income" before subtracting the deductions specifically listed in section 505(a)(3)." The appellate court further justified is decision per the *Worrall* decision also addressing the issue of the definition of income (in the context of the per diem expenses paid to a truck driver.) Finally, the appellate court noted the limits of the *Rogers* decision as to loans and stated, "We believe that, in general, loans should not be considered income... A contrary interpretation that includes loans as income would often create unjust or absurd results...."

Proof of Income through Unaccounted for Expenditures: Finally, the ex-wife argued that bank records showed that respondent spent an average of $72,000 per year from 2002 through 2004 on personal items, ski trips, restaurants, and cash withdrawals and that he never explained how his checking account was funded. The appellate court stated:

> respondent partially explained the source of funding for his checking account. However, to the extent that respondent's personal spending exceeded his "net income" of $50,000 to $70,000 per year, we agree that the source of such money is unexplained and should be considered as an additional resource for child support. In arriving at our conclusion, we emphasize that respondent testified that his checking account was funded solely from farming proceeds and not, for example, from loans. We also note that the unexplained funds do not appear to have been carried over from prior years' savings; according to bank statements in the record, respondent's checking account had a balance of $844.25 on January 15, 2002. Of course, any checks that correspond to the deductions allowed in section 505(a)(3) or to documented expenditures for the farm should not be included as unexplained resources, because they have already been taken into account in calculating respondent's net income.

No Statutory Interest on Retroactive Support: The last issue was statutory interest on what was essentially retroactive child support. The appellate court held that retroactive child support (in this case total of $11,200 in child support payable in monthly payments of $300) does not represent any overdue amounts, so we agree with the trial court that it should not accumulate interest.

Practice Tip: *Tegeler* is a significant case to have in your arsenal – but one to try to avoid. While this case is good law in the Second District it is very difficult to reconcile this case with *Gay*. It tries to point out to Justice Cook's partial dissent in *Gay* in which he points out that while the father was self-employed, his relationship to Coldwell Banker was "similar to an employee." Assume that we are reviewing Schedule C of a personal tax return, i.e., Profit or Loss from Business. My approach has been that based upon *Gay*, the cost of good sold is clearly

an allowable deduction. Therefore, *Gay* clearly does not hold that we use the gross receipts figure but instead the starting point may be through taking the "gross income" figure – which is then offset for the expenses. When dealing with a self-employed individual, my other approach has been to disallow any depreciation deduction on line 13 of the tax returns as well as certain other deductions which fall into the realm of the case law such as the expenses for business use of an individuals home, the meals and entertainment expense, etc.

The other advice is to inform the party who has a "sole proprietorship is simply to incorporate (create an S Corp., LLC., etc.) because case law does not seem to apply the same standard when there is a separate entity. The next piece of advice to give such an individual is to ensure that he or she does not "live outside of the business" but is placed on an actual salary from the business – salary where personal items are paid for through the salary and where only business expenses are paid for directly through the business. In this way we avoid the entire issue presented by the questions that this line of cases presents.

Greene v. Young **– Retroactivity of Child Support Even Following Emancipation of Child**:

People ex rel Greene v. Young, 367 Ill. App. 3d 211 (Fourth Dist., 2006)

A 1998 preprinted order had provided, ""Respondent shall pay $ 'Abated' per for child support." The word "abated" was handwritten on a blank line. The order did not indicate payments were to accrue during the abatement. The order also stated Robert "shall give written notice to the [IDPA] immediately upon obtaining or changing employment." The cause was continued for approximately three months when defendant would be required "to present proof of applications for employment." After several court appearances in 1989 the matter was placed on the "inactive docket" and there were no pleadings filed until 2005 when the mother filed a petition to modify child support – retroactive to the 1988 order.

The appellate court ruled that the trial court erred when it dismissed mother's petition to retroactively modify child support and to collect arrearages filed several years after child was emancipated. Although order abating child support was entered before passage of SCR Rule 296(f), once the Rule became effective, abatement could extend for only six months, and child support obligation should have continued to accrue. The critical portion of the decision was the holding that since the father failed to notify court when he obtained employment, as he was ordered, and he did not appear in court when ordered, the court could retroactively set child support based on his earning record after 1988 order entered. This decision should be noted to be fact-specific. It states:

> We find it important that it was not Candice's responsibility to continuously bring Robert into court to check on his employment status. To require her to do so would have been inconvenient, expensive, and waste of judicial resources. *People ex rel. Williams v. Williams*, 191 Ill.App. 3d 311, 317-18 (1989). Moreover, it would have been unreasonable, especially considering approximately 20 hearings to review Robert's employment status had already been held, with none of the hearings resulting in Robert being ordered to pay adequate support as he was

> constantly either unemployed or underemployed. Both Illinois' public policy and the May 1988 order put the onus on Robert to report a change in his employment status so that he would be required to support his child. Candice alleged Robert failed to report the change in his employment status upon gaining employment. If true, Robert directly disregarded the court's May 1988 order and violated the public policy of this state. We conclude that under these circumstances, a "circuit court is not statutorily barred from imposing a retroactive child[-] support obligation upon a respondent in an ongoing child[-]support proceeding who, contrary to the court's directive, has failed to inform the court of his having resumed employment." *Williams*, 191 Ill.App. 3d at 317 ***
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> While *Williams* involved a petition to modify that was filed before the child reached majority, we see no reason why the Williams rationale should not apply to the unique facts in this case, especially in light of Robert's willful defiance of the May 1988 order requiring him to report a change in his income, his failure to appear in court when required by the May 1988 order, and the fact that his failure to report new employment is criminal under section 20(f) of the Non-Support Punishment Act (750 ILCS 16/20(f) (West 2004)).

It is not surprising that there was a partial dissent in this case – by Justice Turner. The dissent is better reasoned – especially as applied to a child who is emancipated. The dissent stated:

> However, Candice's inaction, along with the IDPA, the State's Attorney, and/or the AG, dictates a result denying the requested relief. Moreover, the General Assembly, not the courts, provides the framework for the implementation, enforcement, and achievement of this state's public policy. Here, the majority's holding finds no support in the law, and in my view, citing public-policy considerations as a rationale for disregarding settled law does not justify the majority's action to reach a preferred result, however desirable.

ENFORCEMENT OF SUPPORT AND VISITATION

***Miller* – $100 per Day Penalty for Failure to Withhold Unconstitutional as Applied**:

IRMO Miller, First Dist, December 12, 2006 (See further:
http://www.gitlinlawfirm.com/writings/hb100.htm)
Also, see the Illinois Supreme Court's Miller decision.

The Defendant, H.E. Miller, Sr., appealed from the trial court's judgment ordering him to pay a $1,172,100 penalty to the plaintiff, Lenora Miller, for knowingly failing to timely remit child support payments withheld from his employee's wages. The appellate court reversed and remanded the matter. Ultimately the Illinois Supreme Court reversed this appellate decision, reaffirming the decision of the trial court. 227 Ill. 2d 185, 194. (2007).

The potential liability stemmed from a May 2001 divorce judgment requiring the ex-husband to pay $82 weekly in child support. Shortly, thereafter, an order for withholding was served on the

Defendant. The issue was the $100 per day penalty of 750 ILCS 28/35(a). In a stipulation as to the facts, the parties agreed that between April 15, 2002, and October 4, 2004, the defendant withheld 128 child support payments from the husband's wages, but failed to timely remit the payments to the State Disbursement Unit. The parties also agreed that the penalties for the defendant's delay equaled $1,172,100. The circuit court entered a judgment against the defendant for $1,172,100 in statutory penalties pursuant to section 35 of the Act. Please see the discussion of the Illinois Supreme Court's reversal of the appellate court decision for further discussion.

Sharp **- Support Enforcement – Civil and Criminal Contempt Distinguished / Spendthrift Trust Provisions No Shield to Contempt Finding as Funds Constitute Income per Sec. 505**:

IRMO Sharp, 369 Ill. App. 3d 271 (2nd Dist., 2006)

The husband failed to prove on appeal that $5,000 per month award of temporary child support and maintenance was against the manifest weight of the evidence because he failed to include transcript of the hearing in the record on appeal. Further, trial court's order sentencing him to jail for willful failure to pay support, with provision that he could purge himself of contempt by paying arrearage, is civil indirect contempt order. In addition, because husband received sufficient distributions from spendthrift trust to pay arrearage, as well as funds borrowed from others, he failed to overcome presumption that failure to pay was willful.

A significant portion of *Sharpe* often overlooked has been quoted by later decisions such as Section 505(a)(3) of the Act defines "net income" broadly as "the total of all income from all sources," minus certain deductions (750 ILCS 5/505(a)(3)). Though this definition is given expressly for determining child support obligations, it applies as well to maintenance determinations. See *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 280 (2006). See, *IRMO Steel*, 2011 IL App (2d) 080974 (November 2011).

Jungkans: **Support Enforcement – Equitable Estoppel and the Limits of *Blisset***

IRMO Jungkans, 364 Ill.App. 3d 582 (Second Dist., 2006)

Equitable Estoppel Shown When Partial Payments and Transfer of Custody of One Child Even Where Other Children Remain: The trial court erred when it held that it lacked authority to consider former husband's defense of equitable estoppel to child support collection proceeding which asserted that former wife was equitably estopped from collecting child support that accrued, over nine years, after one of two children of the parties went to live with former husband and he, with agreement of former wife, reduced child support he was paying in half. In so ruling, the appellate court expanded upon the decisions in *Duerr*, 250 Ill.App. 3d 232(First Dist., 1993) and *Johnston*, 196 Ill.App. 3d 101 (Fourth Dist., 1990). *Blisset* is the key Illinois Supreme Court case ruling that verbal agreements to modify child support and not enforceable. *Duerr* is the appellate court case where the court determined that equitable estoppel applied when the Father was given custody of both children but there was no court order modifying

custody or child support. In this case, the court cited several cases and had stated, ""Illinois courts have tended to find that an informal change in custody preceding a cessation of child support payments lends credibility to" an assertion of equitable estoppel." The court ruled that the *Jungkans* case was most similar to *Johnston* because in both *Jungkans* and *Johnston* custody of not all of the children was informally transferred. However, *Johnson* involved the situation where only one of five children was transferred to the father and the only issue was the failure to provide support for that child. In this case custody of one of the parties' children went to live with the father, the obligor spouse. The father then reduced his child-support payments in half, and mother accepted these payments for approximately nine years.

***Saputo*: Support Enforcement – 20 Year Statute of Limitations No Longer Applies in All Cases — With Open Issue as to Effect on Child Support Judgments Time Barred as of July 1, 1997**:

*IRMO **Saputo***, 363 Ill.App. 3d 1011 (First Dist., 2006)

Saputo involved a 1966 divorce decree in which it was alleged that the former husband failed to make any child support payments of $30 weekly. The ex-wife filed a "petition for revival of judgments" alleging that her ex-husband owed her $375,529.71 (including statutory interest). Because the 1997 amendment to Section 12-108(a), providing that child support judgments may be enforced at any time, applies to all child support obligations, and not just public aid cases, the trial court erred when it dismissed a petition to revive a judgment for child support arrearage that accrued more than twenty years earlier. Child support judgments need not be revived, being specifically exempted from the provisions of Section 13-218 of Code of Civil Procedure. The court stated, " In reaching this conclusion, we recognize that past Illinois case law has applied the 20-year statute of limitations contained in section 13-218 to child support judgments. See, e.g., *IRMO Kramer*, 253 Ill.App. 3d 923, 927 (1993); *People ex rel. Wray v. Brassard*, 226 Ill.App. 3d 1007, 1013-14 (1992); *IRMO Yakubec*, 154 Ill.App. 3d 540, 544 (1987)..." The appellate court also stated, "For this reason, we also reject the circuit court's and defendant's reliance on *IRMO Smith*, 347 Ill.App. 3d 395." The critical aspect of the opinion, however, addressed the retroactivity of the 1997 amendments as to enforcement of those support judgments that had then become time barred (as of the date of the July 1, 1997 amendments). The appellate court parenthetically cited *Kramer* (above) mentioning the holding, "("Subsequent legislation extending the statute of limitations cannot be applied retroactively to revive a time-barred cause of action unless the legislature indicates otherwise ***")." The appellate court stated that it did not reach this issue because it was clear that part of the support judgments due under the 1996 divorce decree were not time barred by the 20 year statute of limitation that had been in effect until 1997. Therefore, on remand, the trial court must consider whether the amendment applies retroactively.

***Charous*: Visitation Enforcement Where Children Do Not Want to Visit – A Classic Case**

IRMO Charous, 368 Ill. App. 3d 99 (2nd Dist., 2006)

Charous is a classic visitation case involving a parenting agreement and a mother who used the children's desire not to visit as an excuse not to send them. The mother also loaded the children up on extracurricular activities and told them that they could not do things because their father would not pay for them. The appellate court reversed the trial court's refusal to hold the mother in contempt or to award attorney's fees. A good quote states:

> Illinois courts have held that a custodial parent may not disregard the visitation requirements of a dissolution judgment merely because his or her children do not desire to visit the noncustodial parent. Where a dissolution judgment places the ultimate responsibility for compliance with the visitation provisions upon the custodial parent, the custodial parent cannot escape his or her duty to comply with the visitation provisions by 'attempting to shift this burden to the discretion of [his or] her children'. A parent must comply with court-ordered visitation even where the child has expressed hostility toward the other parent." (Citations omitted).

This is a case to keep on hand for every client who believes that she (or he) does not need to send the children if they do not want to visit.

MAINTENANCE AND CONJUGAL COHABITATION

Thornton – Economic Impact Even Where No Economic Benefit / Termination of Maintenance before Filing of Petition

IRMO Thornton, 373 Ill. App. 3d 200 (Third Dist., 2007).

In the original opinion issued in this appeal, the appellate court affirmed the trial court on all three issues. In April 2007, the appellate court vacated that opinion and suggested that it "affirmed" the *IRMO Snow* decision, reversed the trial court's order finding the obligation to pay maintenance had abated, and remanded the matter for consideration of respondent's requests for extended, increased and permanent maintenance. The ex-wife in *Thornton* allowed her former husband's brother to move in with her "out of the goodness of her heart" because he "did not have a place to stay [and] was in essence, homeless." I had been critical of this decision in my original review, especially as we compare the original *Thornton* decision with *Susan*. One of the significant quotes from the decision stated:

> The instant case does, however, directly raise the issue of whether a spouse who has been ordered by the court to pay maintenance can cease such payments unilaterally without benefit of a petition and a determination that there had, in fact, been "conjugal cohabitation." We believe, contrary to the decision in Gray, that such unilateral action is contrary to the Illinois Marriage and Dissolution of Marriage Act and flies in the face of extensive and long-standing family case law. *** We, therefore, find the Act requires that a petition must be filed and the requisite findings concerning conjugal cohabitation must be made before a

court-imposed obligation to pay maintenance as ordered can be terminated

This 2007 decision also continues the line of cases such as the *Rodriguez* case setting a dangerous precedent because it allowed an application for permanent maintenance after the expiration of the original time period for maintenance. The underlying divorce judgment had incorporated A MSA that required the ex-husband to pay commencing March 2001 in the amount of $275 per month for 30 months (through to September 2003). In 2004, the ex-wife filed a petition alleging a complete failure to pay any of the maintenance payments and seeking payment of the previously required past maintenance and extended, increased and permanent maintenance. At hearing, the court found the arrearage and the ex-husband apparently made an oral motion to find that maintenance terminated by operation of law due to a conjugal relationship. The appellate court noted that therefore there was no petition to invoke the court's power to consider termination of maintenance on the basis of conjugal cohabitation.

The appellate court in this case noted the six factors as recited in the *Susan* case. It noted that there was no evidence as to any of these factors and consequently, no evidence that there ever was a de facto husband and wife relationship. The appellate court found no evidence of a resident, continuing conjugal relationship.

The next question was the timeliness of the ex-wife's petition -- filed after the expiration of the 30 month period. The critical language of the underlying MSA had stated, "The maintenance shall be reviewed at the end of this period, to determine whether it should continue and, if so, to what extent." Because of this language, the appellate court found that the trial court had jurisdiction to consider the ex-wife's petition for permanent maintenance.

***Susan*: *De Facto* Married Relationship Found Despite Separate Finances and Property**

IRMO Susan, 367 Ill. App. 3d 926 (2nd Dist., 2006).
In 2000 dissolution of marriage proceedings the husband was required to pay monthly maintenance to his wife. The ex-husband petitioned to terminate maintenance in April 2005, alleging that his former wife was residing on a continuing conjugal basis with her boyfriend. The appellate court noted that there are six factors the court may consider when determining if a relationship is a de factor marriage: courts look to the totality of the circumstances and consider the following factors: "(1) the length of the relationship; (2) the amount of time the couple spends together; (3) the nature of activities engaged in; (4) the interrelation of their personal affairs; (5) whether they vacation together; and (6) whether they spend holidays together." *In re Marriage of Sunday*, 354 Ill.App. 3d 184, 189 (2004).

The testimony and evidence at trial showed that ex-wife and her boyfriend had been together for over three years at the time of the hearing, and the evidence demonstrated that they spent nearly every night together during their relationship. The evidence also showed that the two took many trips together and spent virtually all holidays together. However, the evidence indicated that ex-wife and her boyfriend did not commingle funds or provide each other with monetary support. They also completely maintained separate residences, bank accounts, and expenses.

What is surprising about this case is the complete lack of financial support by the boyfriend as

well as maintaining two separate residences. The ex-wife maintained that "[m]aintenance is predicated upon a need for support by the spouse who is to receive maintenance" and, thus, "the most important question that arises in all termination of maintenance cases" is "whether the relationship has materially affected the recipient spouse's need for support." However, the appellate court rejected this argument and noted that, "The import of the fourth factor [the interrelation of their personal affairs] is not whether the new *de facto* spouse financially supports the recipient, but rather whether their personal affairs, including financial matters, are commingled as those of a married couple would typically be." The court in *Susan* states that commingling of funds is merely an indicator of a married relationship.

The court also notes a distinction between a proceeding under Section 510(a) and Section 501(c). A proceeding under (a) allows for modification *or* termination, while a proceeding under (c) only allows modification. Thus, need is a consideration under subpart (a) but not subpart (c):

Further, though it is true that "[m]aintenance is predicated upon a need for support by the spouse who is to receive maintenance" (*Sappington*, 106 Ill. 2d at 467), section 510(c) makes no reference to any of the factors underlying an award of maintenance. Section 510(a), on the other hand, explicitly incorporates the factors to be considered in awarding maintenance. 750 ILCS 5/510(a--5) (West 2004) ("the court shall consider the applicable factors set forth in [section 504(a)]" of the Act, which lays out the factors to be considered in awarding maintenance). Thus, the rationale underlying an award of maintenance, including the recipient spouse's need for support, is expressly made relevant in a proceeding under section 510(a), but not in one under section 510(c).

Comment: *Thornton* and *Susan* are difficult to reconcile with one another. Thornton focuses upon the financial aspect of the relationship with the case stating, "we also place great significance in this type of financial interrelation." Susan de-emphasized the financial relationship. While it states that the fourth factor does not focus simply on financial matters but on "whether their personal affairs, including financial matters, are commingled." As a practical matter, it is very difficult to give advice to an individual who is paying maintenance and it is believed that the former spouse is engaging in a resident, continuing, conjugal relationship. Keep in mind that this is one of the few areas where the case law supports what might be considered as "self-help", i.e., stopping making payments toward maintenance if it is believed that this will not suggest to maintenance receiving spouse that a petition to find that maintenance should have terminated. One issue in these self-help cases is proving when the relationship stopped. One piece of advice is to have the client in situations such as this create a separate account with the funds for maintenance in it so that if the court finds that there is no conjugal cohabitation, that the maintenance paying spouse is in a position to comply with the order. Keep in mind also that if the maintenance paying spouse loses, then each missed payment is a judgment and entitled to 9% interest.

MARITAL PROPERTY

***Frye* Standard Not Applicable To Theory Applied to Differentiate Enterprise / Personal Goodwill and Consideration of Speculative Tax Consequences**:

IRMO Alexander, 368 Ill. App. 3d 192 (Fifth Dist., 2006)

- **Multiattribute Utility Theory in Differentiating Personal/ Enterprise Goodwill Was Not Scientific Evidence and Thus Did Not Need to Meet *Frye* Standard**: The trial court valued James's medical practice at $379,473, of which $160,000 consisted of enterprise goodwill. In this case, the husband's expert valued his medical practice at $20,000 and the wife's expert valued the practice at $581,000. The wife's expert, Wood, testified that, in his opinion, the husband's practice had a total goodwill value of $350,000, of which $245,000 consisted of enterprise goodwill and $105,000 consisted of personal goodwill. In reaching his conclusion, Wood testified that he utilized an approach called the multiattribute utility theory. At the trial court level and on appeal the husband argued, that Wood's testimony pertaining to the value of enterprise and personal goodwill should not have been admitted because the multiattribute utility theory used by Wood to form his opinion is a novel scientific methodology that is not generally accepted in the relevant scientific community. Accordingly, husband argued that Wood's opinion on the amount of the total goodwill that constituted enterprise goodwill was inadmissible under *Frye*.

The trial court specifically found, "Mr. Wood's approach, though not scientific, was thoughtful and persuasive." Although the trial court admitted Wood's testimony, it rejected Wood's proposed total goodwill figure of $350,000 and found that James's medical practice had a total goodwill value of $240,000. The trial court then used Wood's approach to the extent that he suggested that approximately two-thirds of the total goodwill in the practice consisted of enterprise goodwill. The trial court then found that $160,000 of the total value of goodwill in the husband's medical practice constituted enterprise goodwill.

The appellate court stated that, "it is important to remember that the *Frye* test only applies to evidence that is both novel and scientific. If an expert's opinion is not novel or scientific, it is not subject to the *Frye* test but still remains subject to the general admissibility test applied to all expert testimony." The appellate court then stated: "If an expert's opinion is derived solely from his or her observations and experiences, the opinion is generally not considered scientific evidence. On the other hand, if the expert's opinion is derived from a particular scientific methodology, such as the application of scientific principles or the use of other literature or studies, then the opinion is generally considered scientific. Again, the line that separates scientific evidence from nonscientific evidence is not always clear."

The appellate court then stated, "After conducting a thorough examination of Wood's multiattribute utility theory, we are convinced that this method does not constitute scientific evidence subject to a *Frye* hearing." The appellate court stated:

> The methodology employed by Wood does not rely on the application of scientific principles but incorporates basic math with the observations and experience of the valuators. As Wood points out, the creation of the alternatives, the creation of the ranges, the creation of the attributes, and the values assigned to the attributes are all derived from the subjective determinations of the valuator. Wood never contends that there are universal alternatives, attributes, utility values, or ranges that must be applied in each and every situation. Furthermore, he does not allege that there are constant or universal values that must be

assigned. Wood leaves just about everything to the sole discretion of the valuator.

Further, the appellate court rejected the husband's argument that the trial court did not take into account the covenant not to compete.

♦ **Consideration of Speculative Tax Consequences**: The final issue was whether the trial court erred when it discounted value of Vanguard account because of tax consequences. The reduction due to potential tax consequences was from $13,792 to $10,804. The appellate case has a good summary of case law regarding consideration of speculative tax consequences:

> James also cites *In re Marriage of Hawkins*, 160 Ill.App. 3d 71 (1987), and *In re Marriage of Perino*, 224 Ill.App. 3d 605 (1992), to further support his position. In *In re Marriage of Hawkins*, this court held that the circuit court did not err in failing to consider, in its valuation of certain property, the tax implications resulting from a subsequent sale of that property. We noted that the circuit court should not speculate about the existence and amount of future tax implications when no such sale is contemplated by the parties or required by the court's division of property. *In re Marriage of Hawkins*, 160 Ill.App. 3d at 79. In *In re Marriage of Perino*, the appellant argued that the trial court erred in failing to consider the tax consequences of a sale of a business. The appellate court found that the tax consequences were not a proper factor for consideration where the party did not have to sell any assets in order to meet the court's order, because the suggested consequences were purely hypothetical. In re Marriage of Perino, 224 Ill.App. 3d at 609.

The appellate court stated that the reduction in value was in error but that this valuation only marginally impacted the entire valuation and distribution of marital property and that any error was *de minimus* and a reversal was not necessary.

Wanstreet: **Property: Conflicting Presumptions in Case Involving Question of Whether Assignment of Property in Trust for Child Was Non-Marital Property**:

IRMO ***Wanstreet***, 364 Ill. App. 3d 729 (Fifth Dist., 2006)

This decision is also discussed below regarding custody issues. The property issue was the characterization of the interest of the farm trust property. The appellate court noted that, "Under the assignment, respondent's mother purported to "sell, assign, transfer[,] and set over" her interest" and stated. "the trial court could have concluded that the plain language of the documents clearly established an assignment for consideration." The case discusses the "conflicting presumptions" case law regarding gifts from parents to a child during the course of the marriage (the two presumptions – property received during a marriage versus gift to a marriage – essentially cancel each other out). Interestingly, the question was whether to follow the approach of the Second District case *Blunda* (1998) or the First District's *Didier* (2000) case. *Blunda* has emphasized that the presumption of non-marital character "it is the burden of the party challenging the gift to present evidence that the parent making the transfer lacked donative intent."

The appellate court stated in summary, "In re Marriage of *Didier* stands for the proposition that neither party in a dissolution of marriage case must present clear and convincing evidence to overcome a presumption. We agree with *In re Marriage of Didier* that these presumptions cancel each other out and that neither party should have to prove his or her case by clear and convincing evidence." The appellate court then affirmed the trial court's decision holding the property to be marital noting that there was no strong evidence of gift to the child and the interest had suggested an assignment for value.

Samardzija **– Presumption that Property Acquired During Marriage is Marital / Loans Due from Non-Marital Business**:

IRMO ***Samardzija***, 365 Ill.App. 3d 702 (Third Dist., 2006)

House Constructed During the Marriage and Titled in One Party's Name: This case addressed the issue of a house that was build by the parties during the marriage and was placed in the husband's name alone. The husband contributed non-marital funds to purchase the lot and applied significant funds toward the construction. However, the husband also incurred a loan which were paid in part through his marital funds – the husband's paychecks. The appellate court reversed the trial court's finding that the house was non-marital property. The appellate court stated, "we remand for recalculation of the home's value and for determination by the court regarding any credit due for the contribution of non-marital funds."

Loans Back to Shareholders from Non-Marital Corporation: The second issue in this case was the contention that profit bonuses – which the husband loaned back to a corporation which was non-marital in character (a gift to the husband during the marriage from the husband's parents) – were marital property. The appellate court stated that the income from this non-marital asset was non-marital. (The case does not quote from case law on this point but quotes only from Section 503(a)(1)(8). The appellate court noted the testimony that the husband had never put any money into the corporation – other than loaning back the profit bonuses and dividends. The Third District court stated that the wife's reliance upon *Schneider* was misguided. *Schneider* does hold that accounts receivable should be considered in determining the value of a dental practice (without addressing the propriety of discounting of such receivables for collectability). The appellate court held that *Schneider* is limited to the issue of the property valuation of a marital asset.

David**: Defined Benefit QDRO Drafting Issues Re Whether Reference to Amount Certain in Memo of Decision Was Designed to Eliminate COLAs Supplemental Benefits and Early Retirement Benefits**:

IRMO David, 367 Ill. App. 3d 908 (Second Dist. 2006)

The appellate court ruled that the QDRO which was entered by trial court was consistent with divorce judgment in which trial court awarded 60% of husband's pension to wife. Despite the fact that the divorce used a dollar certain amount in rendering its memo of decision (stating that the wife's share of the pensions would amount to $17,816 annually) the appellate court stated that the trial court properly interpreted "pension" to include all employment benefits paid on a monthly basis, including cost of living adjustments, supplemental benefits and early retirement benefits.

Hubbs: **Dissipation of Marital Assets Based upon Difference Between Income and Expenses Paid**

*IRMO **Hubbs***, 363 Ill.App. 3d 696 (Fifth Dist., 2006)

After addressing the fact that the standard of review in this dissipation case was manifest weight, the appellate court then affirmed the trial court's decision on these issues. The *Hubbs* court determined that the trial court could charge husband with dissipation consisting of the difference between his disposable income from the date of the breakdown of the marriage until the hearing, and his reported expenditures. One item of dissipation affirmed was a loan which was repaid to the husband's father with somewhat dubious proof as to how legitimate the loan was.

Alexander **– Retirement Account Value Should Not Have Been Reduced due to Speculative Tax Consequences**

IRMO Alexander, 368 Ill. App. 3d 192 (Fifth Dist., 2006)

After citing the property section that allows the court to consider tax consequences in the allocation of property, the court stated:

> However, in *In re Marriage of Emken*, 86 Ill. 2d 164, 167 (1981), the supreme court found that a circuit court erred when it reduced the value of certificates of deposit in the respondent's possession by the amounts that he would be required to pay in taxes and penalties if he were to surrender the assets. The supreme court held that there was no evidence in the record that the respondent would surrender the assets and that therefore it was improper to reduce the value of the assets in anticipation of losses which might arise as a result of the respondent's voluntary action. *In re Marriage of Emken*, 86 Ill. 2d at 167.
>
> James also cites *In re Marriage of Hawkins*, 160 Ill. App. 3d 71 (1987), and *In re Marriage of Perino*, 224 Ill. App. 3d 605 (1992), to further support his position. In In re Marriage of Hawkins, this court held that the circuit court did not err in failing to consider, in its valuation of certain property, the tax implications resulting from a subsequent sale of that property. We noted that the circuit court should not speculate about the existence and amount of future tax implications when no such sale is contemplated by the parties or required by the court's

> division of property. *In re Marriage of Hawkins*, 160 Ill. App. 3d at 79. *In In re Marriage of Perino*, the appellant argued that the trial court erred in failing to consider the tax consequences of a sale of a business. The appellate court found that the tax consequences were not a proper factor for consideration where the party did not have to sell any assets in order to meet the court's order, because the suggested consequences were purely hypothetical. *In re Marriage of Perino*, 224 Ill. App. 3d at 609.

While the consideration of tax consequences for these brokerage accounts was error, the appellate court stated that it was de minimum error:

> In light of the precedent set forth above, we believe that the circuit court abused its discretion in The circuit court should not have reduced the value of the funds by 21%. However, because an appropriate valuation only marginally impacts the entire valuation and subsequent distribution of marital property, we find that any error is de minimis and that a reversal is not required. The circuit court valued all the marital property at approximately $1 million. A proper valuation of the Vanguard accounts would merely increase the total value of the parties' marital property by less than one half of one percent of its current figure.

UNIQUE CUSTODY ISSUES IN DIVORCE AND PATERNITY CASES

JURISDICTIONAL ISSUES

Sutherlin – Ability to Address Custody in Proceedings under the IDVA (Illinois Domestic Violence Act):

Sutherlin v. ***Sutherlin,*** 363 Ill.App. 3d 691 (Fifth Dist., 2006)

The trial court erred when it refused to consider the issue of temporary custody of the parties' child while granting a plenary order of protection. The petition was not a covert attempt to interfere with custody or visitation; and the IDVA contains a specific provision allowing the petitioner to request custody as one of its remedies in order that the petitioner not be trapped in an abusive situation out of fear of retaliation. The issue in this case was whether the impact of the *Radke* appellate court decision (349 Ill.App. 3d 264, 265 (2004)) where the court stated: "Obtaining an order of protection is not the proper procedure for resolving child custody or visitation issues. Those issues should be resolved under the Illinois Marriage and Dissolution of Marriage Act [citation]." However, the *Sutherlin* court pointed out that the petitioner in *Radke* admitted that the reason she had obtained the order of protection was to temporarily suspend visitation and that the parties' daughter had sought the order so that she could see the respondent only when she wanted to see him. The appellate court stated:

> *Radke* and the cases cited by *Radke* stand for the principle that visitation or custody issues should not be addressed at an order-of-protection hearing where the primary

objective of the party seeking an order of protection is really to interfere with or change a child custody or visitation order. *Radke v. Radke*, 349 Ill.App. 3d 264, 269 (2004); see also *Wilson v. Jackson*, 312 Ill.App. 3d 1156, 1164 (2000) (cited in *Radke*); *IRMO Gordon*, 233 Ill.App. 3d 617, 626 (1992) (cited in *Radke*). Because there is no evidence that Amanda had any motive other than trying to protect herself from an abusive husband, there is no evidence of any ulterior motive.

International Child Abduction Remedies Act (ICARA):

Kijowska v. Haines, No. 06-2424 (September 8, 2006). Appeal, N.D. Ill., E. Div.

In action under International Child Abduction Remedies Act, the District Court did not err in ordering the return of child to Poland after finding, among other things, that Poland was child's "habitual residence." The record showed that a U.S.-born father had previously disavowed seeking custody of infant while the infant was originally in U.S., and that Poland was child's "habitual residence" where: (1) mother was citizen of Poland; and (2) mother took child, who was also citizen of Poland, to Poland when child was only two months old. The court ruled that the mother's temporary return to Illinois six months after move to Poland did not make Illinois the child's habitual residence even though the father had previously obtained *ex parte* custody order.

Miller – Revestment of Jurisdiction:

IRMO Miller, 363 Ill.App. 3d 906 (Fourth Dist., 2006)

The revestment doctrine gave the trial court jurisdiction, pursuant to the provisions of Section 510 of the IMDMA, to vacate Judgment for Dissolution of Marriage entered 6 years earlier, because both parties testified that they did not realize that order had been entered until several years later and continued to live together as husband and wife for several years. Further, the trial court found that original order was entered based on an agreement of the parties, which in fact, did not exist.

McNeil – Unconscionability of Settlement Agreements:

IRMO McNeil, Nos. 2--05--0098 & 2--05--0405 cons. (2nd Dist. October 3, 2006)

The trial court denied its discretion in denying the motion alleging unconscionability of the oral settlement agreement and that it was not in the children's best interests where trial court's sole stated reason for denying the motion to reject the order was that the respondent had agreed to the terms at the oral prove up. The inquiry into unconscionability requires a two-prong analysis, and the trial court must consider: (1) the conditions under which the agreement was made; and (2) the parties' economic circumstances resulting from the agreement. In this case even if the trial court arguably addressed the circumstances under which respondent made the agreement, it did not address the parties' economic circumstances resulting from the agreement.

Wright **– Name Change in Independent Proceedings**:

In Re Wright, 363 Ill.App. 3d 894 (Fourth Dist., 2006)

The trial court erred when it allowed the father of child to change his daughter's surname by means of independent name change petition over the objection of the child's mother. Because the family court had already determined matters of custody, by entering agreed joint custody order (with mother having primary physical custody and reserving jurisdiction in parentage action), the name change should be decided by that court as an incident of custody.

STANDING

Reyes **– Effect of Failure to Register for the Putative Father Registry Versus Execution of Voluntary Acknowledgment of Paternity Form upon Adoption Proceedings**:

In re Petition of Reyes, No. 1-06-1534 (1st Dist., 2006)

The trial court erred when it entered an order terminating parental rights of the defendant, father, based on his failure to register with Putative Father Registry within 30 days of birth of child. The appellate court held that the production of the birth certificate with the defendant's name as father of child is evidence that defendant signed the voluntary acknowledgment of paternity. Under those circumstances, his consent to adoption is required absent a finding of unfitness.

Archibald **– Effect of Temporary Custody Order on Voluntary Relinquishment Standard**:

IRMO ***Archibald***, 363 Ill.App. 3d 725 (Fifth Dist., 2006)

The step-father had standing under Section 601(b)(2) of the IMDMA to seek custody of his step-son who resided with him because mother agreed to a temporary order and the child was living with neither parent at time he sought custody. Further, the trial court did not abuse its discretion when it awarded father custody of both children born of the marriage and his step son. One of the key issues in this type of standing case is the requirement of the nonparent to show that the natural parent relinquished the legal custody of the child, rather than just physical possession. This requirement places the burden upon the nonparent to show that the parent somehow voluntarily and indefinitely relinquished the custody of the child.

***RLS* – Illinois Supreme Court Addresses Standing under Probate Act**:

In re **R.L.S.**, 218 Ill. 2d 428 (Ill. 2006)

In this case the significant question was whether §601(b)(2) of the IMDMA should be read into the Probate Act. The appellate court had held that the sole standing requirement for guardianship petitioners is stated in section 11-5(b) of the Probate Act and rejected the line of cases based upon *In re Person & Estate of Newsome*, 173 Ill.App. 3d 376 (1988) and its progeny. The question in the case was whether the voluntary and indefinite relinquishment standard – discussed in many Illinois cases including most recently in *Archibald* applied. The threshold issue is how the Probate Act and the IMDMA apply the superior rights doctrine recognized in the Probate Act at 755 ILCS 5/11-7 and in the IMDMA at Section 601(b)(2). The language of the Probate Act provides in part, "If both parents of a minor are living and are competent to transact their own business and are fit persons, they are entitled to the custody of the person of the minor and the direction of his education. If one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is similarly entitled. The parents have equal powers, rights and duties concerning the minor. If the parents live apart, the court for good reason may award the custody and education of the minor to either parent or to some other person."

The standing provision of the Probate Act provides, "The court lacks jurisdiction to proceed on a petition for the appointment of a guardian of a minor if (i) the minor has a living parent, adoptive parent or adjudicated parent, whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor, unless the parent or parents consent to the appointment or, after receiving notice of the hearing under Section 11-10.1, fails to object to the appointment at the hearing on the petition or (ii) there is a guardian for the minor appointed by a court of competent jurisdiction. There shall be a rebuttable presumption that a parent of a minor is willing and able to make and carry out day-to-day child care decisions concerning the minor, but the presumption may be rebutted by a preponderance of the evidence." 755 ILCS 5/11-5(b)

The Supreme Court stated:

> By allowing a guardianship petition to proceed to a hearing on the merits over the wishes of a parent only when the parent has been established to be unwilling or unable to carry out day-to-day childcare decisions, the Probate Act respects the superior rights of parents while also insuring to protect the health, safety, and welfare of children. We fail to see how the Probate Act suffers the same infirmity as the statute at issue in *Troxel*."

The court then gutted numerous previous appellate court decisions in stating:

> This court's cases refusing to apply section 11-7 as written are wrong and should no longer be followed. Section 11-7 means what it says: fit parents are entitled to custody. The Probate Act, as properly construed, protects the due process rights of fit parents and does not suffer from the same constitutional infirmities as the Washington statute considered in *Troxel*.

Custody of TW **– Third Party Standing under the IMDMA in Light of *R.L.S.***:

In re Custody of T.W., 365 Ill.App. 3d 1075 (Fifth Dist., 2006)

The appellate court affirmed the trial court's determination in this case that the Plaintiff showed good cause to overcome the presumption that custody for the father would be in the child's best interest and that the best interests of the child would be served by awarding custody to the petitioners. The basis of this decision with the *R.L.S.* decision and it is the first reported case following *R.L.S.* The appellate introduced its decision by stating that, "A review of *In re R.L.S.* reveals that the supreme court was addressing the safeguards provided in the Probate Act and not setting a benchmark for standards under the Marriage Act." The appellate court later summarized its commentary by stating, "*In re R.L.S.* found that the Probate Act, sans incorporation, passed constitutional muster. *In re R.L.S.* did not announce a new benchmark for protecting parents' rights."

CHILD CUSTODY AND NON-BIOLOGICAL PARENTS

Felzak **– Grandparent Visitation**:

***Felzak** v .Hruby*, No. 2-05-0848 (Second Dist., September 6, 2006) ((McLAREN, partial dissent, special concurrence) Affirmed in part, vacated in part (modification)

Because the trial court had subject matter jurisdiction under common law to consider grandparent visitation petition at the time that parties entered an agreed order (although the petition alleged statutory provision (607(b) of IMDMA) which has since been declared unconstitutional on its face), the trial court did not err when it held the father and the adoptive mother in contempt of court for refusing to abide by an order allowing visitation between children and mother of deceased natural mother. However, the order prohibiting the parents from speaking to their daughter about the litigation improperly infringes on parents' fourteenth amendment rights and must be vacated.

UCCJEA and Child Representatives

Horgan v. Romans **– UCCJEA – Forum Selection Clause**:

IRMO Horgan v. Romans, 366 Ill. App. 3d 180 (First Dist., 2006)

The issue in this case was a motion under Section 207 of the UCCJEA seeking the Illinois court to find that it was an inconvenient forum – in a case where there was a forum selection clause as part of an agreement for removal. There are eight factors in Section 207 of the UCCJEA including factor five, "any agreement of the parties as to which state should assume jurisdiction." The *Horgan* court stated, "The fifth factor in section 207 specifically allows the circuit court to consider **"any agreement** of the parties as to which state should assume jurisdiction" alongside and with equal importance as the other seven factors. (Emphasis supplied.) 750 ILCS 36/207(b)(5)."

Comment: I disagree with this decision because it treats the agreement as just one factor among others. If there is an agreement, it should be given a higher priority than the other factors under the UCCJEA. Also note that this case merely involved the situation where the appellate court affirmed the decision of the trial court. It is unfortunate that the appellate court did not cite case law from other jurisdictions addressing this issue.

Diaz: **UCCJEA - Significant Contacts:**

IRMO Diaz, 363 Ill.App. 3d 1091 (Second Dist., 2006)

The trial court erred when it dismissed the custody portion of the petition for dissolution of marriage pursuant to 2-619 of the Code (based on lack of subject matter jurisdiction). Neither Michigan, where father resides, nor Illinois, where mother resides, qualified as home state of the child. Additionally, Illinois was determined to have significant connections to the child, being the place where the mother now resides, the child was born, and where mother returned each time she separated from father. Accordingly, Section 201(a)(2) of UCCJEA gave Illinois subject matter jurisdiction over infant's custody.

Wanstreet: **Custody: In Camera Interview Not a Right / Sole vs. Custody**

IRMO ***Wanstreet***, 364 Ill. App. 3d 729 (Fifth Dist., 2006)

Denial of Request for In Camera Interview: The trial court did not commit reversible error in denying the motion for in camera interview of the minor children. Curiously, the court calls the father's contention that the children would have testified in a given manner as speculative. However, given the fact that it is probably impossible to do a proper offer of proof in this regard, the statement that what the children would testify to is speculative involves circular reasoning (it is speculative because the trial court denied the motion). The appellate court then stated, "A court does not need to interview a child in order to consider and weigh what it considers to be the wishes of the child. 750 ILCS 5/602(a)(2) (West 2004); *In re Marriage of Hefer*, 282 Ill.App. 3d 73, 76 (1996); *In re Marriage of Johnson*, 245 Ill.App. 3d at 555; *In re Marriage of Stuckert*, 138 Ill.App. 3d 788, 790 (1985)."

Curiously, the appellate court mis-cited *Hefer*. I had *Hefer* (GDR 96-47) as standing for the proposition that, "A child's wishes should not be determinative in a custody decision, for children may lack the maturity to make important decisions and may be subject to influence by their parents." However, in *Hefer* the motion for in camera had been allowed and it had been the contention that one party had influenced the children leading to the in camera interview. *Hefer* does, however, make a similar statement when it mentions, "A better way than an in camera hearing to get the child's preferences before the court may be through admission of the child's hearsay statements, through the testimony of a guardian ad litem, or through professional personnel. *In re Marriage of Wycoff*, 266 Ill.App.3d 408, 415-16 (1994)." *Johnson*, however, was the more proper cite. *Johnson*

held that the determination of whether to grant a motion for in camera interview is discretionary. The dissent in *Johnson* points out the mandatory nature of considering the children's wishes.

Good language in the *Wanstreet* decision states, "In this case, the court waited to rule on the motion for an in camera interview until after the parties had presented evidence. That patience underscores the sound discretion exercised by the court in the case at hand." This, indeed, has been the practice of every judge in front of whom I have recently tried cases.

Sole Custody Award Despite Some Indication Parties Can Cooperate: A second holding of *Wanstreet* is that the trial court did not err in awarding sole custody, despite "some indication that the parties can cooperate." However, again, using somewhat circular reasoning the appellate court decision states, "the lack of a proposed joint-parenting agreement and the matters contested in litigation indicate that the parties lack the high level of cooperation necessary for successful joint custody." While this may be true is is true of virtually all cases in which there is an issue as to joint or sole custody. The appellate court stated, "Furthermore, the residential circumstances of the parties weigh against joint custody."

The third issue was the characterization of the interest of the farm trust property. The appellate court noted that, "Under the assignment, respondent's mother purported to "sell, assign, transfer[,] and set over" her interest" and stated. "the trial court could have concluded that the plain language of the documents clearly established an assignment for consideration." The case discusses the "conflicting presumptions" case law regarding gifts from parents to a child during the course of the marriage (the two presumptions – property received during a marriage versus gift to a marriage – essentially cancel each other out). Interestingly, the question was whether to follow the approach of the Second District case *Blunda* (1998) or the First District's *Didier* (2000) case. *Blunda* has emphasized that the presumption of non-marital character "it is the burden of the party challenging the gift to present evidence that the parent making the transfer lacked donative intent." The appellate court stated in summary, "In re Marriage of *Didier* stands for the proposition that neither party in a dissolution of marriage case must present clear and convincing evidence to overcome a presumption. We agree with *In re Marriage of Didier* that these presumptions cancel each other out and that neither party should have to prove his or her case by clear and convincing evidence." The appellate court then affirmed the trial court's decision holding the property to be marital noting that there was no strong evidence of gift to the child and the interest had suggested an assignment for value.

Gambla: **Custody - Law Re Expert Witnesses**

IRMO Gambla and Woodson**,** 367 Ill. App.3d 441 (Second Dist., 2006)

This case is of note because of the discussion regarding expert witnesses in custody cases. The appellate court had a good discussion of the applicable case law and stated:

> Christopher argues that Dr. Thomas was unqualified and that her opinions were not based on theories generally accepted by the relevant scientific community. The test for competency of an expert is whether the witness exhibits sufficient knowledge of the subject matter. *In re Custody of Baty*, 83 Ill.App. 3d 113, 115 (1980). For a witness to testify as an expert concerning an opinion, it must be demonstrated that the witness possesses special skills or knowledge beyond that of the average

> layperson. *People v. Hernandez*, 313 Ill.App. 3d 780, 784 (2000). The opinion testimony of an expert is admissible if the expert is qualified by knowledge, skill, experience, training, or education in a field that has at least a modicum of reliability, and if the testimony would aid the trier of fact in understanding the evidence. *Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2003); *In re Marriage of Jawad*, 326 Ill.App. 3d 141, 152 (2001). The determination of a witness's qualifications rests within the sound discretion of the trial judge and will not be reversed absent an abuse of that discretion. *Snelson*, 204 Ill. 2d at 24; *In re K.T.*, 361 Ill.App. 3d 187, 202 (2005).
>
> That said, an expert witness's opinion cannot be based upon mere conjecture and guess. *Jawad*, 326 Ill.App. 3d at 152. An expert's opinion is only as valid as the reasons for the opinion, and the trial court is not required to blindly accept the expert's assertion that his testimony has an adequate foundation. *Turner v. Williams*, 326 Ill.App. 3d 541, 552-53 (2001). Rather, the trial court must look behind the expert's conclusion and analyze the adequacy of the foundation. *Soto v. Gaytan*, 313 Ill.App. 3d 137, 146 (2000). Indeed, the trial court plays a critical role in excluding testimony that does not bear an adequate foundation of reliability. *Soto*, 313 Ill.App. 3d at 146.
>
> Under the standard articulated in *Frye*, the proponent of expert testimony predicated upon a scientific theory must establish that the theory has gained general acceptance in the expert's scientific field. *Turner*, 326 Ill.App. 3d at 554. In this context, "general acceptance" does not mean universal acceptance, and it does not require that the methodology in question be accepted by unanimity, consensus, or even a majority of experts. *In re Commitment of Simons*, 213 Ill. 2d 523, 530 (2004). Instead, it is sufficient that the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field. Significantly, the *Frye* test applies only to "new" or "novel" scientific methodologies. *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 78-79 (2002). Generally speaking, a scientific methodology is considered "new" or "novel" if it is " 'original or striking' " or "does 'not resembl[e] something formerly known or used.' " *Donaldson*, 199 Ill. 2d at 79, quoting *Webster's Third New International Dictionary* 1546 (1993).

What was interesting is that the psychologist whose testimony was at issue was determined to be an expert to render opinions only on the methodologies used by the custody evaluators in the case. However, while this was the ostensible purpose for which the expert testified, he also testified that African Americans will tend to have higher scores on the MMPI-2, etc. The husband's contention was that the scope of the testimony exceeded the bounds for which it had been admitted and that therefore the failure to request a *Frye* hearing should not have been deemed a waiver of this issue. A curious aspect of the case is that the issue of race did play a factor in the decision – although the majority found that it was not the sole factor. Essentially the dissent argued that the trial court improperly considered the race card when the dissent suggested that it was clear from the trial court's opinion that the trial court believed that a black woman could better raise a "multi-cultural" child. Part of the challenge to the expert's testimony was on this aspect of the case.

For an excellent article regarding expert witnesses, see: "The Expert Witness
By: Justice Robert E. Gordon," March 9, 2011,
http://decaloguesociety.org/Documents/20110309%20Expert%20Witnesses%20CLE.pdf

REMOVAL

Removal Issues in Cases Other than Standard Removal Case Law:

Samardzija – Intrastate Removal

IRMO **Samardzija**, 365 Ill.App. 3d 702 (Third Dist., 2006)

25 Mile Intrastate Removal Provision Reversed: Of the many issues in this opinion two resulted in reversals of the trial court's award. Perhaps the most significant issue that was reversed was the trial court's requirement that the mother not move the children's residence more than 25 miles without the father's consent or court order. The appellate court summarized Illinois case law which will not be specifically cited here but holds that the parent granted primary physical custody need not obtain judicial approval to move to another location in Illinois although the parties can impose geographic limitations by agreement. Additionally, "consistent with the trial court's broad powers in custody matters, it may condition custody upon living within a reasonable distance from the non-custodial parent to facilitate visitation." The appellate court noted that the primary justification in support of the 25 mile restriction was the two hour right of first refusal provision in the joint parenting agreement and the argument that a move outside of this area would render this provision meaningless. The appellate court stated: "The case law suggests a presumption in favor of allowing freedom of movement within the state, and overcoming that presumption requires a more compelling reason than simply avoiding inconvenience to the non-custodial parent."

Aside: True Notre Dame fans can not only pronounce Samardzija, they can spell it - - - without looking. He is talented in both baseball and footfall and signed by the Cubs this June. It's suh-MARR-zhuh. He caught 15 touchdown passes last year for the Irish.

Fisher v. Waldrop – Paternity Removal and Injunctions in Paternity Cases Pending Hearing on Removal Petition

Fisher v. Waldrop, 221 Ill. 2d 102 (Ill. 2006)

The *Fisher* IL Supreme Court correctly ruled that §609 of IMDMA applies to custodians of children under the Parentage Act and requires that they petition for, and prove that, removal of child from Illinois is in the child's best interests. A significant quote from the *Fisher* decision states, "The

legislative history indicates that the legislature's intent was to grant a parent in a Parentage Act action rights similar, if not identical, to those of a parent in a Marriage Act action." The problem with this reading, however, is the injunctive language of Section 13.5 of the Illinois Parentage Act of 1984. The Supreme Court stated, "Section 13.5 permits the court to enjoin the custodial parent "from temporarily or permanently removing the child from Illinois **pending the adjudication of the issues of custody and visitation**." (Emphasis added.) 750 ILCS 45/13.5(a) (West 2004). It is clear that the injunctions permitted by section 13.5 are intended to be temporary in nature, keeping the child in Illinois only until the court can conduct a hearing on the merits of a removal petition.

In instructive language the Supreme Court states:

> It is clear that at the hearing on the removal the sole issue is the best interests of the child. See 750 ILCS 5/609(a). However, at the hearing on the injunction, the focus is more on the parents' interests. Although other factors may be considered, the three factors which section 13.5 specifically requires the circuit court to take into account all involve the parents: the extent to which the party opposing removal has previously been involved with the child; the likelihood that parentage will be established; and the impact that an injunction would have on the custodial parent. his makes sense, because at the injunction stage the noncustodial parent is not seeking to permanently prevent removal. Rather, the noncustodial parent is asserting that his or her interest in and relationship with the child outweighs any burden that an injunction may impose on the custodial parent and, consequently, the status quo should be maintained until the custodial parent shows that the move is truly in the child's best interests."

Then Supreme Court then stated that the injunction hearing: "places the focus on whether the noncustodial parent has an interest of sufficient magnitude to warrant delaying removal until the custodial parent can prove that removal is in the child's best interests.... This is important to clarify: the injunction hearing is not the equivalent of the best-interests hearing, and a circuit court's order denying an injunction is not tantamount to an order granting leave to remove." In a curious double negative, the Court stated, "It is not impossible that a circuit court could conclude that a noncustodial parent was not entitled to an injunction but also ultimately determine that the custodial parent's proposed removal of the child would not be in the child's best interests."

The Supreme Court determined that the trial court improperly conflated question of removal with petition of non-custodian, father for injunction. The Supreme Court remanded the matter for hearing on the injunctive petition and stated that should the mother file a petition for removal, the trial court could then rule on such petition. Thus, under the Supreme Court's reasoning all injunctions are temporary in nature – and valid only until a hearing on the petition for removal.

Mainstream Removal Issues

***Hansel* – Move to North Carolina Not Allowed Where §604.5 Expert Testified against the Removal and Extended Family in Illinois**:

IRMO Hansel, 366 Ill. App. 3d 752 (Third Dist., 2006)

In *IRMO Hansel*, the Third District appellate court affirmed the denial of a petition for leave to remove a child from Illinois to North Carolina. The mother sought removal to accommodate mother's pending marriage to self employed fiancé whose income was sufficient to enable mother to stop working outside of the home. The appellate court stated that the ruling was not against the manifest weight of the evidence in light of the eight year old child's close relationship with her father, and extended family, and testimony of a psychologist (a §604.5 expert) that removal would actually harm child. The §604.5 expert (Dr. Roger Hatcher) pointed out that research showed to his satisfaction that adolescent girls whose fathers are relatively absent from their lives have greater social problems than girls with fathers active in their lives. The §604.5 testimony was not refuted by other expert testimony. Gunnar J. Gitlin's updated article regarding removal (relocation) in Illinois.

***Tavares* – Effect of One Removal Order upon Ability to Relocate to Another State**:

IRPO Tavares, 363 Ill.App. 3d 964 (Fifth Dist., 2006)

The mother was granted leave to move the child to Alaska – consistent with the terms of a joint parenting agreement. The appellate court found that the mother was not thereafter required to seek permission of parentage court in order to move from Alaska to Texas. Accordingly, the trial court erred when it directed the mother to file a petition to remove the child and when it based its ruling on both father's and mother's petitions to modify joint custody order on assumption that it could require the mother to remain in Illinois with the child. In determining that the trial court erred in requiring the mother to file a petition to remove (and considering this petition) the appellate court stated:

> **Nothing in the Parentage Act or the custody provisions of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/601 et seq. (West 2004)) requires a parent who has previously removed a child from the State of Illinois, with the permission of the court, to seek leave to move that child to another state**. Furthermore, nothing in the Parentage Act or the Marriage Act gives the court the authority to grant or deny leave to a parent who has already removed a child from the State of Illinois to move that child to another state. The Marriage Act, and now the Parentage Act through a 2003 amendment, only provides the court with the authority to grant or deny leave to remove a child "from Illinois." 750 ILCS 45/16 (West 2004); 750 ILCS 5/609 (West 2004).

The appellate court correctly noted that its decision was consistent with the *IRMO Lange* decision. *Lange* involved a post-decree divorce case in which the mother had been granted leave to remove the child to Terra Haute, Indiana (less than an hour's drive from the non-custodial parent's residence.) The mother later filed a petition to remove the children to Texas – although the motion did not state that it was brought pursuant to Section 609 of the IMDMA. The *Lange* majority opinion stated that it addressed the jurisdictional argument merely because the dissent addressed this issue. *Lange* then noted that the parties never questioned the jurisdictional issue (and it was not even presented as an argument on appeal). The strained nature of that opinion was evidence because the appellate court in *Lange* stated "if all else fails" the parties had revested the court with jurisdiction

– through the mother's filing a petition for removal. *Lange* stated:

> In this case, the child was already permitted to be removed from Illinois, and the trial court's approval was implicit in the original decision of dissolution. In this case, Susanna's motion purported to be a petition for removal, but it was also in the nature of a petition to modify visitation to facilitate Susanna's move to Texas with the children. The trial court had jurisdiction to consider the removal and visitation issues. The order denying Susanna's request to move the children from Indiana to Texas was within the authority of the trial court to enforce the custody and visitation provisions of the judgment of dissolution.

The language of *Lange* contrasts with that of *Tavares*.

Practice Tip: Assume leave is granted by permission to remove a child from Illinois to Wisconsin. The contrast between *Lange* and *Tavares* is noteworthy. In divorce cases and in paternity cases there is a strong argument that once removal is granted, no further authority of the court is necessary in order for there to be a second move – to a more distant state. The first practice tip is that if you are seeking to move the child to a new state – after having been granted leave to remove – to not file a petition for removal. Instead file a petition to modify visitation – but only if this is necessary. Under the UCCJEA, Illinois has continuing exclusive jurisdiction as to custody – so long as one parent remains in Illinois – despite grant of removal. The second tip is that if you are granting leave by permission to move to a state such as Wisconsin, provide in the order the Illinois court expressly reserves jurisdiction to consider and determine the issue of removal if the custodial parent seeks to move from Wisconsin to another state.

ETHICS / MALPRACTICE

***Peters* – Censure Due to Indirectly Communicating with Person Represented by Counsel by Obtaining Signature on Settlement Agreement**:

Angela E. Peters, No. 04 CH 127, September 22, 2006: Finding of misconduct by indirectly communicating with person represented by counsel affirmed, but finding of direct contact reversed. Recommended sanction modified from censure to reprimand)

After a conference outside the courtroom (in McHenry County), it became apparent that written marital settlement agreement prepared by the wife's counsel was not acceptable to her client. The husband's counsel asked and was refused permission by husband's counsel to talk to her client. The respondent committed misconduct when she wrote in changes to the MSA, and showed her client where to initial changes knowing that her client intended to obtain his wife's initialed approval of changes in opposition to the advise of her attorneys. The husband's attorney then presented the agreement to the court. However, the evidence does did not support a finding that attorney communicated directly with opposing wife after her attorney left location of meeting. Although misconduct did not involve dishonesty, it prejudiced the administration of justice. The recommended sanction for an attorney with no disciplinary record, with good reputation, and who has served her community and profession, should be reduced to a reprimand.

***Weisman v. SDF* – Legal Malpractice Verdict Not Against Manifest Weight**:
Weisman v. Schiller, Ducanto and Fleck, LTD., No. 1-04-2950 (September 20, 2006).

This is the second published Illinois case addressing this cause of action. In the first *Weisman* appeal the appellate court reversed the trial court's decision that the claim was barred by the doctrine of *res judicata*. The appellate court in that case determined that the §508 proceeding for attorney's fees did not provide an adequate forum to litigate plaintiff's legal malpractice claim. It stated that the counter-claim could not be presented in reaction to a petition for attorney's fees brought under § 508 of the IMDMA. *Weisman II* ruled that in the subsequent legal malpractice trial, the verdict in favor of the Schiller firm was not against manifest weight of the evidence. The Plaintiff, who fired Schiller shortly before entering into marital settlement agreement, failed to definitively prove that defendant's breach of standard of care was the proximate cause of her failure to obtain settlement with her lawyer/husband (personal injury firm) for the full share of marital estate to which she was entitled.

Further, the trial court properly limited expert's testimony regarding the value of the husband's law firm because his analyses considered enterprise goodwill as a component of the value, which was not, at time of representation, available. In addition, there was no discovery violation associated with testimony of the lawyer/husband because he was properly disclosed as occurrence witness. In addition, trial court correctly gave long firm sole proximate cause instruction and refused non pattern instruction with regards to viability of cause of action before settlement.

OTHER ISSUES

***Seffren* – Injunctions Against Third Parties in Divorce Cases**:

*IRMO **Seffren***, 366 Ill. App. 3d 628 (First Dist., 2006).

The trial court had both personal and subject matter jurisdiction over third party in post-dissolution proceeding filed by father to enjoin third party from being in presence of children of marriage, pursuant to provisions of IMDMA and Code of Civil Procedure – despite the fact that the third party was resident of different county. However, the trial court erred when it entered a permanent injunction barring the third party from being in presence of children without first conducting an evidentiary hearing.

***Wisniewski v. Kownacki* -- Illinois Supreme Court Finds Confidentiality Statutes re Mental Health Records Drug Abuse and Dependency Act Do Not Apply to Treatment Before Enactment of Statutes**
Wisniewski v.. Kownacki, 221 Ill.2d 453 (2006)
This case presented the question as to whether, in a case alleging that defendant sexually abused plaintiff, the trial court properly found that privileges from disclosure arising out of Mental Health and Developmental Disabilities Confidentiality Act and out of Alcoholism and Other Drug Abuse and Dependency Act did not apply to documents related to defendant's treatment generated prior to

enactment of said statutes. The Appellate Court, in finding that said documents must be produced, found that said statutes could not be applied retroactively. The conclusion by the Illinois Supreme court was that:

> For the reasons stated, we conclude that the nondisclosure rights created by the Confidentiality Act and the Dependency Act apply to records covered by those Acts, regardless of when the records were created. We reverse those portions of the appellate court's and the circuit court's judgments holding otherwise.

McNeil – Unconscionability of Settlement Agreement

IRMO McNeil, 367 Ill.App.3d 676 (2nd Dist., 2006)

The trial court denied its discretion in denying the motion alleging unconscionability of the oral settlement agreement and that it was not in the children's best interests where trial court's sole stated reason for denying the motion to reject the order was that the respondent had agreed to the terms at the oral prove up. The inquiry into unconscionability requires a two-prong analysis, and the trial court must consider: (1) the conditions under which the agreement was made; and (2) the parties' economic circumstances resulting from the agreement. In this case even if the trial court arguably addressed the circumstances under which respondent made the agreement, it did not address the parties' economic circumstances resulting from the agreement.

APPEALS

Final and Appealable Orders:

Capitani – Final and Appealable Orders Where Parent Named as Primary Residential Parent Subject to "Usual Visitation" But JPO Reserved:

IRMO Capitani, 368 Ill.App.3d 486 (2nd Dist., 2006)

This case addressed the issue of final and appealable orders in divorce cases. More specifically, in the case the judgment for dissolution of marriage awarded joint custody and named the respondent as the primary and residential parent but awarded the petitioner the "usual and customary visitation." However, the trial court also stated that the court "reserves jurisdiction over this cause for the purposes of entering a joint parenting order incorporating a joint parenting agreement to be prepared and submitted to this court by the parties." The appellate court noted that this clearly showed that not all of the issues in dispute were fully addressed and settled by the March 22, 2005 judgment for dissolution of marriage. The joint parenting order was not entered until July 2005. The appellate court stated that the entry of the JPO clearly was not "incidental." The problems in identifying final and appealable orders is illustrated by the cogency of the dissenting opinion.

***Mardjetko* - Divorce Judgment Not Final Despite Bifurcation**
IRMO Mardjetko, 369 Ill. App. 3d 934 (2nd Dist., 2007)

Where the court bifurcates the judgment, there is no jurisdiction to consider an appeal. Note, however, that this appeal would not be good law if the court bifurcated the issue of custody rather than the other issues in the case in light of the later amendments to the Supreme Court Rules. This case holds that based upon a reading of *Leopando* and *Bogan* that the propriety of a bifurcation is the only issue reviewable before the trial court decides all issues.

***Hubbs* – Final Orders / Standard of Review**
*IRMO **Hubbs***, 363 Ill.App. 3d 696 (Fifth Dist., 2006)

The appellate court applied the proper standard of review based upon the decisions in *Vancura*, 356 Ill.App. 3d 200 (2005) – that dissipation is based upon a manifest weight standard and the division of property on an abuse of discretion standard. (The other significant standard of review decision is *Best*, 358 Ill.App. 3d 1046 (2nd Dist., 2005) – a Second District Justice Hutchinson decision – where the Illinois Supreme Court agreed with the appellate court's analysis.

- **Illinois Supreme Court – Manifest Weight Standard in Finding of Domestic Violence**:

  ***Best** v. Best*, 358 Ill.App. 3d 1046 (Second Dist., 2005) Lake County. (Hutchinson). *Best v. Best*, 223 Ill 2d at 342 (2006). Decided by Illinois Supreme Court as to the Manifest Weight Standard.

- **Manifest Weight Standard**: The trial court's finding that the defendant abused plaintiff, his wife, when it entered an order of protection, is reviewed on the manifest weight of evidence standard as opposed to the more deferential abuse of discretion standard. In her decision, Justice Hutchinson disagreed with the line of cases *IRMO Blitstein*, 212 Ill.App. 3d 124, 131 (1991); *IRMO Lichtenstein*, 263 Ill.App. 3d 266, 269 (1994); and *Wilson*, 312 Ill.App. 3d at 1165. Justice Hutchinson writes, "Although long, this line of precedent is unconvincing." The court then stated, "Applying a manifest-weight-of-the-evidence standard, we will reverse the trial court's decision only if the opposite conclusion is clearly evident or the determination is unreasonable, arbitrary, or without basis in the evidence presented." The Illinois Supreme Court agreed with Justice Hutchinson's analysis.

- **Application of Principle *Falsus in Uno, Falsus in Omnibus***: Because the trial court could believe only those parts of plaintiff's testimony that were corroborated or uncontradicted, its finding was not against manifest weight of the evidence despite its expressed doubts about her credibility. The decision has a good discussion as to the Latin maxim: "*falsus in uno, falsus in omnibus*" (false in one thing, false in all things.). The decision states, "the principle for which "*falsus in uno, falsus in omnibus*" stands is that, when a witness testifies falsely as to one material point, the trier of the fact **may** disregard the **uncorroborated** testimony of that witness regarding other points."

ATTORNEY'S FEES

Alexander – Interim Expert's Fees / Contribution Award in Case of Non-Disclosure Without Prior Filing of Contribution Petition:

IRMO Alexander, 368 Ill. App. 3d 192 (Fifth Dist., 2006)

- **Interim Expert's Fees**: The third issue in this case was the award of interim attorney's and expert's fees. The appellate court stated that using a liberal reading of the statute, an interim fee award may include an interim award of expert's fees.

- **Contingent Fee Award – Prior to Filing of Fee Petition**: The fourth issue was issue of contribution. The trial court entered an a judgment providing that the husband had "done nothing to facilitate an efficient resolution of this case," that he had "engaged in a series of deceptions about, and nondisclosure of, assets," and that he had "caused the unnecessary expenditure of attorney fees." The circuit court then awarded the wife $25,000 in attorney fees. The trial court's order stated that the amount "will be awarded in the event that a petition [seeking attorney fees] is filed within 30 days." The ex-wife then file her petition within such 30 days and the ex-husband filed a response. He did not file a post-trial motion. The appellate court affirmed and denied the husband's claim that he was denied due process.

2006 LEGISLATION

Grandparents' Visitation:

Status: House Bill 4357 rewrote the visitation statute for grandparents and siblings. It has had an effective date of 1, 2007 as Public Act 94-1026.

Overview: PA 94-1026 changed the standing for visitation for grandparents, great-grandparents, and siblings. It provides that there is an unreasonable denial of visitation by a parent and one of the following occurs:

> (1) The child's other parent is deceased or has been missing for at least three months. A parent is considering "missing" if parent has been reported as missing to a law enforcement agency, and the parent's location has not been determined. (This missing-parent ground for standing is an expansion from current law.)
>
> (2) A parent of the child is incompetent as a matter of law. (Same as current law.)
>
> (3) A parent has been incarcerated in jail or prison during the three-month period preceding the filing of the petition. (Current law requires that one parent be sentenced to a period of imprisonment for more than one year without any limitation on when the sentence is served.)
>
> (4) At least one parent does not object to the visitation by a nonparent and there is a pending dissolution proceeding of a parent; a pending custody or visitation proceeding involving the child; or the child's mother and father are divorced or have been legally separated from each other. (Current law is limited to the situation in which the child's mother and father are divorced or have been legally separated from each other during the three-month period before the filing of the petition for visitation, and at least one parent does not object to the visitation by the nonparent.)
>
> (5) The child was born out of wedlock, the parents are not living together, and the petitioner is a maternal grandparent, great-grandparent, or sibling of the child.
>
> (6) The child is born out of wedlock, the parents are not living together, the petitioner is a paternal grandparent, great-grandparent, or sibling, and paternity has been established by court of competent jurisdiction.
>
> An adoption case order terminating parental rights to or for the adoption of a child automatically terminates any visitation rights previously granted under §607. However, if the adoptive parent or parents are related to the child, any person who was related to the child before the adoption as grandparent, great-grandparent, or sibling has standing for visitation.

Three things to keep in mind while reading this Section.

(1) "Sibling" is defined as a brother, sister, stepbrother, or stepsister of the minor child.

(2) If there is no pending litigation, a petition for visitation filed by a nonparent must be filed in the county in which the child resides.

(3) Nothing in §607 applies to a child subject to a pending petition under the Juvenile Court Act or a pending petition to adopt an unrelated child.

These 2006 amendments did three other things.

> (1) In the list of criteria on whether a court should grant a nonparent visitation, it adds a new criterion for the court to consider. This criterion is whether the nonparent was a full-time caretaker of the child for a period of not less than six consecutive months. But House Bill 4357 does not change the current rebuttable presumption that a fit parent's actions and decisions regarding nonparent visitation are not harmful to the child. The burden of proof is still on the nonparent seeking visitation to prove that those actions and decisions are harmful to the child's mental, physical, or emotional health.
>
> (2) In the modification of a visitation order, it clarifies that a child's parent may always petition to modify visitation upon changed circumstances when necessary to promote the child's best interest.
>
> (3) Section 607 has three different provisions affecting the right of a nonparent to modify a visitation order. House Bill 4357 repeals two of the three provisions to clarify that a court may not modify an existing visitation order to nonparent unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior visitation order or that were unknown to the court at the time of the entry of the order, that a change has occurred in the circumstances of the child or the child's custodian and that modification is necessary to protect the mental, physical, or emotional health of the child.

A question clearly remains whether this relatively liberal statute will meet the standards of *Troxel* and its progeny. Three state Supreme Court cases in other states to address this issue including: *Hiller v. Fausey*, 904 A.2d 875 (2006), 127 S.Ct. 1876 (2007) (petition for writ denied.) See, e.g., Families: Rights, Law and Stability by Kathleen Killigan (2008).

In the Pennsylvania case, that state's Supreme Court ruled that the state law that authorized a court to award "partial custody" or visitation to a child's grandparent who is the grandparent or parent of the child's deceased parent was constitutional.

A second 2006 case also survived a challenge but this time in Utah. *In re Estate of Thurgood*, Utah, No. 20040796 (8/25/06), it was held that the Utah grandparent visitation statute was facially valid and constitutionally applied in a case in which the grandparents were awarded visitation over the father's objection following her divorced mother's death.

In the 2006 Colorado case the Colorado Supreme Court ruled that a boy's paternal grandparents can keep visiting him, even though his grandparents could not prove that denying visitation would harm him.

See a good overview of grandparent visitation case law in 2009 which downloads a Word document.

Health Insurance Amendments to Section 505.2 of the IMDMA:

Status: HB 4383 is now Public Act 94-923. It has been effective since January 1, 2007.

Overview: 750 ILCS 5/505.2 now has Section 2.5 that reads:

> 2.5. The court shall order the obligor to reimburse the obligee for 50% of the premium for placing the child on his or her health insurance policy if:
>
> > (i) a health insurance plan is not available to the obligor through an employer or labor union or trade union and the court does not order the obligor to cover the child as a beneficiary of any health insurance plan that is available to the obligor on a group basis or as a beneficiary of an independent health insurance plan to be obtained by the obligor; or
> > (ii) the obligor does not obtain medical insurance for the child within 90 days of the date of the court order requiring the obligor to obtain insurance for the child.
>
> The provisions of subparagraph (i) of paragraph 2.5 of subsection (c) shall be applied, unless the court makes a finding that to apply those provisions would be inappropriate after considering all of the factors listed in paragraph 2 of subsection (a) of Section 505
>
> The court may order the obligor to reimburse the oligee for 100% of the premium for placing the child on his or her health insurance policy.

Also, Section 14 of the Illinois Parentage Act of 1984 will be amended (the Judgment provisions) to read as follows:

> Specifically, in determining the amount of any child support award or child health insurance coverage, the court shall use the guidelines and standards set forth in subsection (a) of Section 505 and in Section 505.2 of the Illinois Marriage and Dissolution of Marriage Act.

Attorney Fee Amendments re Fee Petitions in Independent Actions:

Status: SB 2475 is now law – PA 94-1016. It amends the provisions of 750 ILCS 5/508(e) to allow a longer statute of limitations for the filing of fees against a former client. It has been effective as of July 7, 2006.

Overview: The new attorney fee legislation addresses the "one year statute of limitations" in seeking fees against your own client when brining an independent action in family law cases. Section 508(e) now provides:

> (1) While a case under this Act is still pending ~~pends~~, a former counsel may pursue such an award and judgment at any time subsequent to 90 days after the entry of an order granting counsel leave to withdraw; and

(2) After the close of the period during which a petition (or praecipe) may be filed under subdivision (c)(5), if no such petition (or praecipe) for the counsel remains pending, any counsel or former counsel may pursue such an award and judgment in an independent proceeding~~,provided the complaint in the independent proceeding is filed within one year after the close of the foregoing period~~.

In an independent proceeding, the prior applicability of this Section shall in no way be deemed to have diminished any other right of any counsel (or former counsel) to pursue an award and judgment for legal fees and costs on the basis of remedies that may otherwise exist under applicable law; and the limitations period for breach of contract shall apply. In an independent proceeding under subdivision (e)(1) in which the former counsel had represented a former client in a dissolution case that is still pending ~~pends~~, the former client may bring in his or her spouse as a third-party defendant, provided on or before the final date for filing a petition (or praecipe) under subsection (c), the party files an appropriate third-party complaint under Section 2-406 of the Code of Civil Procedure.

The changes made by this amendatory Act of the 94th General Assembly are declarative of existing law.

As a reminder, the statute of limitations for a contract action is 10 years, pursuant to 735 ILCS 5/13-206:

Sec. 13-206. **Ten year limitation**. Except as provided in Section 2-725 of the "Uniform Commercial Code", actions on ... **written contracts**, or other evidences of indebtedness in writing, shall be commenced within 10 years next after the cause of action accrued; but if any payment or new promise to pay has been made, in writing, on any ... contract, or other written evidence of indebtedness, within or after the period of 10 years, then an action may be commenced thereon at any time within 10 years after the time of such payment or promise to pay.

QILDRO Legislation -- PA-94-657: These critical amendments have been effective since July 1, 2006. Besides adding terms such as “permissive service” and “regular service” the key change allows for orders not in a dollar certain but following a percentage approach.

Overview: QILDROs are now for support rather as well as property distribution. Another provision allows a distribution of the death benefit or the portion of the death benefit otherwise payable to the death benefit beneficiary or estate to be paid to the payee. The critical portion of the statute which I had favored for years now provides for percentage orders for QILDROS similar to those allowed in QDROs. The amendments provide that "in the case of a periodic benefit, this amount must be specified as a dollar amount per month or per month as specified in subsection (n)." It thus wipes up the dollar certain requirement that was a bane to Illinois family lawyers try to provide for an equitable distribution of state retirement benefits. This subsection then provides a new form for distribution in section (–5). The Act places the responsibility for providing accurate calculations on the lawyers. The current terminology percentage QILDROS is a "QILDRO Calculation Court Order." What will now occurs is that within 45 days after the system receives a QILDRO, then the

retirement system provides a great deal of specified information regarding the benefits. Other critical provisions allow the payee to share in possible annual post-retirement increases in benefits.

If a percentage order is followed under what might be called a "traditional coverture fraction" there is express language. This is called a "Marital Portion Benefit Calculation Formula." A supplemental order is then entered providing for the use of this formula.

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