2005 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

Material Changes in Circumstances for Modification of Child Support

*IRMO Teri Eileen **Breitenfeldt***, 362 Ill. App. 3d 668 (Fourth Dist., 2005)

In *Breitenfeldt*, the marital settlement agreement provided for automatic disclosure of the husband's W-2 forms and then provided that if an increase in child support is "authorized," child support would

increase retroactively to January 1st of the year. The former husband's child support was increased in 2002 and two years later the ex-wife brought a petition to again increase child support. In cases of this sort there is often the issue of whether the dual prongs (needs versus ability to pay) are proven – since the issue of increased needs on behalf of the children is presumed if a number of years have passed since the entry of the last support order.

The appellate court reversed the finding of the trial court that the ex-wife had not shown a material change in circumstances. **Needs**: First, in reviewing whether there was shown a change in the children's needs, the *Breitenfeldt* court indicated that the former wife's circumstances had changed as a result of her recent divorce. The appellate court stated that the ex-wife now had only one income to support the family as well as additional child care expenses. **Ability to Pay**: The appellate court also determined that the trial court incorrectly determined payor's net income. The case involved complicated and detailed testimony regarding draw, commissions and an undefined term referred to as a SPIFF. The payor argued essentially that his tax returns and other pay document did not accurately reflect his income because they included as income funds which were repayment of draw from commission proceeds. The appellate court stated, "It defies logic that University Auto Park, on its W-2, and respondent, on his tax return, would list as income money respondent never received or from which he never derived any benefit. If respondent never actually received a benefit, it is not income. (citing from *Rogers*). Neither does the record reflect any amended income-tax returns correcting this alleged overpayment."

The appellate court then found that there had been a substantial increase in the payor's income. A significant quote states:

> Additionally, as petitioner points out, in 2003, respondent overwithheld federal and state taxes, resulting in a refund of $3,545 from federal taxes and $312 from state taxes, and this amount is added back into respondent's net income. *IRMO Pylawka*, 277 Ill. App. 3d 728, 733 (1996) (if the noncustodial parent overwithholds on his W-2, the amount should be added back to his net income when determining his child support under section 505(a) of the Act).

IRA Distribution as Income for Support Purposes:

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

Distributions from obligor's IRA are includable in net income and were properly considered by trial court when the trial court increased the obligor's child support obligation. The decision states:

> Consistent with the above understanding, Illinois courts have concluded that, for purposes of calculating child support, net income includes such items as a lump-sum worker's compensation award (*IRMO Dodds*, 222 Ill. App. 3d 99 (1991)), a military allowance (*IRMO McGowan*, 265 Ill. App. 3d 976 (1994)), an employee's deferred compensation (*Posey v. Tate*, 275 Ill. App. 3d 822 (1995)), and even the proceeds from a firefighter's pension (*People ex rel. Myers v. Kidd*, 308 Ill. App. 3d 593 (1999)).
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> We see no reason to distinguish IRA disbursements from these items. Like all of these items, IRA disbursements are a gain that may be measured in monetary form. *Rogers*, slip op. at 5. Moreover, IRA disbursements are monies received from an investment, that is, an investment in an IRA. See *Black's Law Dictionary* 789 (8th ed. 2004); see also http://www.investorwords.com/2641/IRA.html (last visited December 22, 2004) (defining an "IRA" as "[a] tax-deferred retirement account for an individual *** with

earnings tax-deferred until withdrawals begin"). Thus, given its plain and ordinary meaning, "income" includes IRA disbursements.

Comment: Try to reconcile *Lindman* and the later *IRMO O'Daniel*, 382 Ill. App. 3d 845 (4th Dist., 2008) decision.

***Colangelo* -- Distribution of Stock Options as Income, Effect of Tax Law Changes on Modification of Support:**

IRMO ***Colangelo***, 355 Ill. App. 3d 383 (2d Dist. 2005).

- **Appeals**: Because there were still pending post dissolution petitions when the court entered an order dismissing former wife's petition for rule to show cause, a notice of appeal that was filed more than 30 days after the dismissal order, but within 30 days of disposition of remaining pending petitions, is timely.

- **Child Support and Consideration of Distributions of Stock Options**: Regarding the facts the appellate court recited:

> The trial court divided the marital property with the intent to award 48% to Julius and 52% to Vicki. As pertinent here, Julius received 50% of the net value of vested stock options in NCI "if & when *** exercised" and 100% of unvested stock options in NCI. Because the vested and unvested stock options had yet to be exercised, the judgment listed their value as "unknown." In all, Julius's share of the marital property was valued at $152,777 plus his 50% share of the vested stock options and his 100% share of the unvested stock options. Vicki's share of the marital property was valued at $164,264 plus her 50% share of the vested stock options... Julius was ordered to pay monthly child support [in an amount certain]. Also, the court ordered Julius to pay, as child support, "20% of net of any bonus/commission/overtime received."

The issue was whether for contempt purposes after the divorce whether the father's exercise of stock options (which had been unvested) represented income:

> we note that the trial court allocated the unvested stock options to Julius. These stock options subsequently became vested and were distributed, and it is this distribution that is at issue. Because the unvested stock options transformed into a realized distribution, it would seem that the distribution is not marital property being counted as income, but instead the fruits of the marital property. However, even if the stock distribution is marital property as Julius claims, the pertinent case law persuades us that marital property can also be income for child support purposes. In *In re Marriage of Klomps*, 286 Ill. App. 3d 710 (1997), the court ruled that the petitioner's retirement benefits constituted income for child support purposes even though the same retirement benefits had been divided as marital property. *Klomps*, 286 Ill. App. 3d at 713-17. The court found that section 505(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/505(a) (West 2002)) compelled such a result. *Klomps*, 286 Ill. App. 3d at 713-17.

The trial court had addressed the double dipping type argument and stated, "And the basis is that the

Court has defined this as property. And to me it would be the same as if you received a piece of real estate, and then after the judgment, sold the real estate and got capital gains on it. And now this is considered to be income, and that is income, but it's not income for purposes of child support, because it's property that was divided in a judgment for dissolution."

The holding of *Colangelo* was:

> Julius's contention is that once the stock options were allocated as marital property, they could not later be classified as income for child support purposes. Julius does not dispute that if the stock options had not been awarded as marital property, they would meet the definition of "income" once distributed. Further, the trial court's child support order listed bonuses as one source of income, and there is no deduction listed in section 505(a)(3) for a stock bonus. Therefore, under *Klomps*, we find that, *even though the unrealized stock options were allocated to the parties as marital property, the realized stock distribution met the definition of "income" for purposes of determining child support*, and the trial court *erred* in finding that the stock distribution was not income. Thus, we reverse the trial court's denial of Vicki's petition for a rule to show cause and remand for further proceedings. (Emphasis added).

- **Effect of Changes in Tax Law on Support Modification**: Trial court erred when it granted ex-husband's motion for summary judgment dismissing ex-wife's petition to modify child support because: a) although base salary had stayed the same, wife alleged that his net income had increased because of changes in tax laws and that her expenses have increased, and b) husband's printout from software program without any supporting affidavit was not properly considered by court.

***Einstein* -- Extraordinary Medical Expenses for Later-born Child, Ongoing Medical Expenses, and Car Allowance**:

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

- **No Downward Deviation from Guidelines Despite Extraordinary Needs of Child by Later Relationship**: The trial court did not abuse its discretion when it refused to deviate downward from child support guidelines because of extraordinary medical needs of child born to respondent, father, after subject child was born.

- **Ongoing Medical Expenses Not Allowed as 505(a)(3)(h) Deduction if Not Repayment of Debt**: The provisions of Section 505(a)(3)(h) allow for a deduction for payments for debt incurred for medical expenses and do not provide for ongoing medical expenses. The appellate court acknowledged that the legislation is subject to differing interpretations and then stated:

  > Construing section 505(a)(3)(h) of the Dissolution Act as a whole and in light of the legislative debates and the supplement to the historical and practice notes, we interpret the first sentence to read as follows: "Expenditures for repayment of debts that represent [either (1)] reasonable and necessary expenses for the production of income, [(2)] medical expenditures necessary to preserve life or health, or [(3)] reasonable expenditures for the benefit of the child and the other parent, exclusive of gifts." Accordingly, we hold that only necessary medical expenses that constitute "repayment of debt" may be deducted from net income under section 505(a)(3)(h) of the Dissolution

Act (750 ILCS 5/505(a)(3)(h) (West 2000)). Because Jason argues only that the trial court improperly computed his net income by failing to deduct Jennah's **ongoing** medical expenses, we affirm the court's refusal to deduct such expenses.

- **Car Allowance**: In addition, the trial court properly included annual bonus and monthly automobile allowance in respondent's income for purposes of child support calculation. Regarding the car allowance, and consistent with Rogers, the case stated that the fact that the car allowance was not subject to taxation was irrelevant to the determination of whether it should be included in his net income. The decision stated that the father received his allowance and could choose to apply it to either automobile or other expenses.

- **Temporary Order Not Dividing Day Care Expenses No Impediment to Trial Court's Authority to Award Retroactive Award**: A different judge from the trial judge denied a motion by the mother to require the father to pay 50% of day care expenses. The decision notes that the successor judge was not bound by the findings of the first judge and that the trial court could properly order payment of a retroactive day care award -- despite the adverse temporary order.

- **Cook Dissent**: Judge Cook's dissent is well written in that he criticizes the failure to find that the medical expenses was not a reason to deviate from the support guidelines. The dissent is good reading any time there is an analogous case addressing what is perceived as the first family first rule. It stated:

  > The trial court's refusal to consider Jennah's needs is wrong as a matter of law. The argument that the first child is entitled to the full guidelines amount of 20% before the needs of the second child may be considered is wrong in policy and in law and may violate equal protection. See *Greiman v. Friedman*, 90 Ill. App. 3d 941, 948-49 (1980) (abuse of discretion to refuse to consider testimony concerning financial obligations to second family). Whatever the trial court's view of Jason, Jordan and Jennah stand on an equal footing. See *Rawles v. Hartman*, 172 Ill. App. 3d 931, 934 (1988) (support obligations extend equally to every child). The trial court was not allowed to ignore Jennah in setting child support for Jordan. Nor was the trial court allowed to punish Jason for his remarriage.

***Hightower* -- Reservation of Child Support Reversed**:

*IRMO **Hightower***, 358 Ill.App.3d 165 (2d Dist. 2005).

This Lake County case was decided by Judge Neddenriep and involved a divorce case filed in 2001 in which the parties reached a settlement in 2003 which was reduced to writing, signed by both parties and filed in the court file. The agreement was titled, "Memorandum of Settlement." Regarding support, the agreement provided (but in ALL CAPs):

> Child support is reserved, by reason of [respondent's] waiver of maintenance, which otherwise would have been approximately $1150 per month. In the event that [respondent's] net income substantially exceeds $2,000 per month, child support may be reviewed on petition."

The case was then continued to a date certain for a prove-up which never took place. There were then issues as to grounds and the case involved a discussion of the case law regarding condonation. The

court finally entered a judgment consistent with the previous agreement in which child support was reserved. The appellate court reversed this decision finding that there were no express reasons set forth in the judgment finding reason to deviate from the support guidelines.

MAINTENANCE

Thornley **-- Authority and Propriety to Award Maintenance in Gross in Short Term Marriage Case Where No Maintenance Requested**:

IRMO ***Thornley***, 361 Ill. App. 3d 1067 (4th Dist. 2005)
The trial court did not abuse its discretion when it made an uneven distribution of the marital assets and debts in favor of wife, who during short marriage assisted husband in obtaining chiropractic degree. Further, although there was no specific request for maintenance by wife in petition, she did not explicitly waive it and an award of $18,000 maintenance in gross was not in error.

Elenewski **-- Conjugal Cohabitation -- Date of Termination of Maintenance is Not Retroactive**:

IRMO ***Elenewski***, 357 Ill.App.3d 504 (4th Dist. 2005).
After the trial court concluded that the former wife no longer qualified for maintenance based on her conjugal cohabitation, it properly refused to retroactively reduce unallocated child support and maintenance award retroactive to date of commencement of cohabitation. However, it correctly concluded that the reduction to child support alone could be retroactive only to date of filing of motion to modify.

Golden **-- Maintenance Payor Did Not Have to Show Change in Circumstances Where Maintenance Review Sought Even Where Potential Relief Included Termination of Payments**:

IRMO ***Golden***, 358 Ill.App.3d 464 (2d Dist. 2005).
Golden addresses the issue of whether maintenance was a review or a modification in a case where the language in the marital settlement agreement was ambiguous as to the nature of the maintenance payments in terms of burden of proof, etc. The MSA stated that "[m]aintenance shall be non-modifiable for three years and may only be reviewed no sooner than thirty-six (36) months after the first payment." Approximately three years later, respondent petitioned to review or terminate maintenance. After hearing the trial court found that the ex-husband did not have to prove a substantial change in circumstances. Based upon its reading of the provisions of Section 510(a-5), the Second District appellate court affirmed (with a dissent).

The appellate court noted that, " Effective January 2004, our legislature amended section 510(a) of the Act, deleting the phrase 'and, with respect to maintenance, only upon a showing of a substantial change in circumstances.' See 750 ILCS 5/510(a)." The language of Section 510(a-5) then provides that, "An order for maintenance may be modified **or terminated** only upon a showing of a substantial change in circumstances. In all such proceedings, as well as in proceedings in which maintenance is being reviewed, the court shall consider the applicable factors set forth in subsection (a) of Section 504 and the following factors..." (Emphasis added.) The case stated:

> Turning to whether the agreement in this case contemplated a review of maintenance, we note that the agreement mentions both modification and review. The agreement further proscribes that neither modification nor review can occur before three years.

> However, with respect to the potential for a review hearing, the agreement states that review shall occur "no sooner than" 36 months after the first payment. We believe that the use of the phrase, "no sooner than," indicates that the parties contemplated that a review would in fact occur at some time after the 36 months passed. Therefore, we find that the agreement authorized respondent to bring a petition for review after the 36 months had passed.
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> We find it important to point out that the characterization of the hearing that is the subject of this case was made more difficult by the inartful drafting of the agreement.

The court also cited Illinois case law which emphasized that when the court sets a review, good drafting will advise the parties who has the burden of going forward, who has the burden of proof, and what issues will be addressed. The case states that if rehabilitate maintenance is ordered, an appropriate agreement or judgment would provide that maintenance would continue only if the recipient has shown "good faith in seeking education or employment or proves the need for continued maintenance." If pleadings are required, this should be stated. The majority then stated, " In this case, the parties' agreement, which was incorporated into the judgment, did not attempt to limit the scope of the review proceedings. Thus, we find that the parties' intent, and the intent of the court, was that a general review of maintenance could occur after the 36-month time period had passed."

***Rodriguez* -- Maintenance Which is Reviewable Within Four Years Does Not Terminate at End of Period**:

IRMO ***Rodriguez***, 359 Ill. App. 3d 307 (3rd Dist. 2005)
In this 1999 judgment, maintenance was "reviewable within four years." Slightly more than four years after the divorce decree, the ex-husband moved to terminate the withholding order claiming he had satisfied his maintenance obligation. The trial court concluded that it lacked jurisdiction to review maintenance, ordered termination of withholding order for maintenance and ordered wife to reimburse the ex-husband for the overpayment. The appellate court reversed the trial court's orders and found that the provision for review of maintenance made it rehabilitative maintenance, which was reviewable at any time until court has conducted a hearing. Once again the appellate court stated, "We agree with the court in *IRMO Culp*, when it stated that in setting review hearings it would be preferable for the court to advise the parties who has the burden of going forward, who has the burden of proof, and what issues will be addressed. *IRMO Culp*, 341 Ill. App. 3d 390, 396-97 (2003). Nevertheless, it is our view that anytime the court provides for maintenance reviewable after a time specified, the court retains jurisdiction to review the maintenance until one or both of the parties petitions for review. Upon review the trial court can consider whether maintenance should continue and if so, whether the amount should be increased or decreased. Until a party petitions for review, the maintenance award shall continue as ordered."

***Schiltz* – Initial Permanent Maintenance Award Reversed in 24 Year Marriage Case with Disparity in Incomes**:

IRMO ***Schiltz***, 358 Ill. App. 3d 1079 (3rd Dist. 2005).
The trial court abused its discretion when it awarded permanent maintenance of $800 per month to wife who had worked throughout the 24 yr. marriage and was capable of earning income consistent with the standard of living achieved during the marriage. The trial court had emphasized that the permanent award was subject to modification. The appellate court concentrated on one of the factors which I have stressed in my writings, i.e., the opportunity cost of missed job or career opportunities due to the

marriage -- often due to raising children. The appellate court stated that absent any evidence that wife sacrificed her earning capacity or career in order to support the husband's career or needs of the family, there should not have been an award of permanent maintenance despite the two to one income differential. The husband worked loading trucks earning $49,000 per year and wife worked as clerk at an insurance company earning $24,000 per year. A key quotation stated, " In this case, the trial court's award of permanent maintenance provided Pamela with little incentive to procure training or skills to attain self-sufficiency. However, rehabilitative maintenance would provide Pamela with such an incentive. See *Selinger*, 351 Ill. App. 3d 611."

***Michaelson* -- Maintenance in Gross -- Total Payments Over Time and No Other Termination Language:**

IRMO ***Michaelson***, 359 Ill. App. 3d 706 (1st Dist. 2005)
The trial court properly treated a provision in the MSA as maintenance in gross, dismissed the former husband's petition to modify and awarded the wife attorney's fees pursuant to Section 508(b) of IMDMA for defense of ex-husband's petition as well as prosecution of petition for rule to show cause because the ex-husband had no justifiable reason to refuse to make the maintenance payments. Despite wife's alleged remarriage or cohabitation, the provision in the MSA requiring husband to stop paying maintenance only upon full payment of total sum to wife took the obligation outside potential §510(c) termination. Because I am critical of the trial and appellate court decisions, I quote from the language of the MSA. The termination language of the MSA had provided:

> Husband shall be obligated to pay to Wife, as and for spousal support, the sum of $45,000 per year, beginning at such time that Husband becomes an attending physician, post residency, for a period of eight (8) years, for a total of Three Hundred Sixty Thousand ($360,000) Dollars. Said spousal support shall be paid to Wife in ninety six (96) equal monthly installments of Three Thousand Seven Hundred Fifty ($3,750.00) Dollars.
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> The maintenance payment(s)/obligation provided for by this agreement shall terminate completely, only after the payment of all monies due to Wife are paid in full, regardless of any other changed circumstances of the parties.

The agreement also provided, "Modification. The provisions of this agreement may be modified or rescinded by the written consent of both parties; however, the parties agree that they will not petition the court for a modification unless there is a substantial change in circumstances of the parties."

The appellate court stressed the fact that the agreement totals the maintenance to be paid over time. It also stressed the fact that by the terms of the MSA, the maintenance was to terminate completely only after payment of all monies due. Perhaps this was an award for maintenance in gross. At minimum, however, there should have been no finding of 508(b) attorney's fees, contempt, etc. The ex-husband's argument was, in part, that the agreement was ambiguous and that there was no way he would have agreed to a provision for maintenance in gross which would not terminate on his ex-wife's remarriage, where the parties had lived together for only six years following their marriage. Regarding the fee issue, the ex-husband contented that the fee award was improper because only $2,000 of the $9,640 in fees were related to enforcement. In affirming the fee award, the trial court used language akin to a sanctions ruling which stated, "He had no reasonable basis for his petition to terminate or modify maintenance."

FEDERAL PREEMPTION -- VA BENEFITS

***Wojcik** v. Wojcik*, 362 Ill. App. 3d 144 (2nd Dist. 2005)

- **Federal Preemption and VA Benefits**: The question presented was whether federal law preempts a trial court from considering a spouse's VA disability benefits in resolving the property issues in a divorce proceeding. The Wojcik court first noted that in light of *Hisquierdo* (U.S. Supreme Court) and *Crook* (Illinois Supreme Court), the trial court could not divide present or future VA disability benefits or use those benefits as an offset in the division of the marital estate. In this case, the trial court characterized as the husband's non-marital property the $28,000 in VA benefits he had already been paid following the commencement of the divorce proceedings. The husband objected to the portion of the trial court's memo of decision stating that it "was the Court's intent to as closely as possible arrive at a 50/50 distribution of the entire marital estate with any discrepancies in that accounted for by the larger non-marital estate awarded to [Paul]." Since the entirety of his nonmarital assets consisted of VA disability benefits that he had received, the husband urged that the trial court effectively awarded his wife a larger share of the marital estate as an offset for his disability benefits. The trial court rejected this argument noting that the trial court specifically stated its express intent was to award each party approximately 50% of the marital estate but that given the difficulties of making a precise distribution in this regard, to the extent that the estate was unequal it would favor the wife because of the husband's greater share of non-marital property. The appellate court stated, "Paul's accumulation of disability benefits, as nonmarital property set aside to him, was a proper factor for the trial court to consider in the division of the marital property." The trial court reasoned that the prohibition per *Hisquierdo* is to the present or anticipated disability benefit payments. (Note that the actual division of the marital estate was a 55/45 division favoring the wife.)

- **Consideration of VA Benefits as to Maintenance Issue**: The case then addresses the entire issue of maintenance in light of the case law. The trial court stated that, while "the *Crook* case may under certain circumstances result in inequities, as commented on by the Illinois Supreme Court, there is no reason for this Court to seek inequities by ignoring the reality of the benefits received by [Paul] on the issue of his right to receive maintenance from [Karen]." The ex-husband argued that the trial court's consideration of his receipt of disability benefits in ruling upon his petition for maintenance violated federal preemption principles. The appellate court then commented that, "the reviewing courts of numerous other states have held that a trial court may properly treat a veteran's present and future disability benefits as income in determining the veteran's obligation to pay alimony or maintenance." "These courts have held that the anti-attachment provisions of section 5301(a)(1) do not shield a veteran's benefits from being considered in an alimony or maintenance proceeding because a spouse seeking maintenance is not a "creditor" under the statute but is instead seeking family support. The appellate court as to the maintenance issue concluded, "In our view, these authorities provide a compelling basis for concluding that a trial court may consider a former spouse's present and anticipated disability benefits in determining the issue of maintenance.

- **General Reservation of Maintenance and Judicial Notice**: Another issue in the case was the court's general reservation of the entire maintenance awards -- until the statutory termination events (remarriage, conjugal cohabitation). This case was based upon a physician's testimony that the husband's disability may subside sufficiently to allow him to return to employment. The appellate court then somewhat gratuitously stated, "in light of our discussion above, the trial court properly could have considered Paul's disability income in determining his present

ability to pay maintenance. However, Karen has not filed a cross-appeal, and thus we will not disturb the trial court's finding that, as of the date of trial, Paul was unable to pay maintenance. Nonetheless, given Karen's need, we hold that it was appropriate for the trial court to reserve the issue of maintenance." The appellate court, however, did reserve the general reservation of maintenance and ruled that it should have set a review, etc., at a time certain. The appellate court noted that the trial court erred in denying his request to take judicial notice of the VA decision -- which included a written determination that he was permanently disabled." The appellate court then determined that this error was harmless. The appellate court stated that the "adjudication was a final and conclusive determination of Paul's right to receive VA disability benefits." The appellate court stated, "While the trial court certainly should have considered the materials contained in Paul's VA file, including the VA's written adjudication, the trial court was not bound to accept the VA's findings as its own."

MARITAL PROPERTY

***Schneider* -- The Second District Reversed re Personal Goodwill-- *Talty* Remains Illinois Law**:

IRMO ***Schneider***, 214 Ill.2d 152 (Ill. 2005).
Illinois Supreme Court, reversed Second District case
As I predicted, the Illinois Supreme Court found that the Second District Appellate Court erred when it ruled that the trial court should have added personal goodwill to the valuation of the husband's professional practice. Even though the wife waived maintenance and child support was not at issue, the present and future earning capacity of the husband is already a factor to be considered by the court when dividing marital property thereby making personal goodwill duplicative when included in value of the practice. The decision also stated that, "upon remand, the circuit court first must determine the proper value of the accounts receivable, then it must include the accounts receivable, cash on hand, cash surrender value of life insurance and the loans due from officers in the distribution of marital assets."

***Mouschovias* – Trial Court Correctly Used Reserved Jurisdiction Approach Regarding SURS Pension Despite Both Parties Requesting Immediate Offset**:

IRMO ***Mouschovias***, 359 Ill. App. 3d 348 (4th Dist. 2005).
In this case both parties asked for an immediate offset of the husband's State University Retirement System (SURS) pension plan. The trial court rejected this approach and divided it on a reserved jurisdiction basis. The appellate court found that the trial court properly divided marital assets and awarded wife a portion of husband's SURS pension in this way because
a) accounts which husband owned at time of marriage but into which he deposited marital funds lost its character as non marital by commingling; and

b) there was widely disparate evidence of the value of husband's pension and the fund will be increased after marriage by virtue of contributions made to the pension with marital funds,

Reimbursement Required from Non-Marital IRA: The appellate court next held that reimbursement to marital estate from husband's nonmarital IRA was proper because only source of contributions to IRA during marriage was husband's earnings as professor.

***Dundas* -- Characterization of Provisions in MSA as Property Versus Maintenance**:

IRMO ***Dundas***, 355 Ill.App.3d 423 (2d Dist 2005).

The trial court properly refused to terminate former husband's obligation to pay $200 per month to former wife until car loan was paid in full based on his assertion that wife was living with her boyfriend on a continuing conjugal basis, because former husband's obligation was not maintenance but was part of property division. What was noteworthy was the fact that the parties' marital settlement agreement labeled the payments as maintenance. The appellate court stated:

> When we examine the substance of the agreement, we cannot conclude that the agreement's terms unambiguously provided that the monthly payments were maintenance because the terms in the agreement are susceptible to two different, yet equally plausible, interpretations. ***
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> Here, as in *Rowden*, other than the car payments, both parties waived any claim to maintenance. Further, the payments went to pay off the car that petitioner was awarded, and the evidence revealed that there was a large outstanding balance on that loan. Thus, the agreement, which the trial court accepted, gave petitioner the car without burdening her with paying a disproportionate share of the total cost of the car. Moreover, the agreement to make monthly payments was specifically linked to the amount of the car loan and its duration, and respondent was required to make payments directly to the holder of the loan. Even though respondent was not obligated to pay the entire amount of each installment, he was responsible for a specific portion of it, and his obligation terminated when the loan was paid in full.

Because there was no petition in bankruptcy involved, precedent from Bankruptcy Court was considered inapposite.

Comment: The entire issue could have been avoided had the parties simply stated in their marital settlement agreement that the payments would not terminate due to the statutory termination events. However, the drafting was probably designed anticipating the possibility that the husband would attempt to discharge the obligation in bankruptcy.

PREMARITAL AGREEMENTS

Berger **-- Failure to Protect Separate Property Despite Premarital Agreement:**

IRMO ***Berger***, 357 Ill.App.3d 651 (2d Dist. 2005).

Although the trial court correctly found a maintenance waiver in the premarital agreement is valid and enforceable, it erred when it found husband overcame the presumption that funds that he placed in joint tenancy account with wife were intended as gift to the marriage. Husband knew well how to protect his separate property from claim of wife and chose not to do so. Further, the trial court correctly found that wife's vague explanation of how she spent funds withdrawn from joint account was inadequate to avoid finding of dissipation. Finally, the trial court's refusal to award fees was not abuse of discretion, because the wife failed to prove that she was unable to pay it.

UNIQUE CUSTODY ISSUES IN DIVORCE AND PATERNITY CASES

Simmons **-- Marriage Void Ab Initio and Consequent Lack of Standing Due to Gender Issues**:

IRMO ***Simmons***, 355 Ill.App.3d 942 (3rd Dist. 2005).
The trial court correctly held that the plaintiff (biologically a woman) lacked standing to seek custody of minor child born by artificial insemination to the respondent. Because the plaintiff had not undergone all of the surgeries necessary to reassign his/her gender to male, plaintiff was still female, despite certification of physician to Vital Records and issuance of new birth certificate identifying plaintiff as "male." Therefore, the marriage between the parties (a woman and a woman) was void ab initio, and consent signed by plaintiff at time of artificial insemination was not effective. Further, the plaintiff had no common law parental rights by virtue of his the long-standing relationship with child as her "father."

Purcell **-- Consent Decree Re Parenting Rights for Non-Biological Father**:

IRMO ***Purcell***, 355 Ill.App.3d 851 (4th Dist. 2005)
The trial court erred when it denied that portion of a declaratory judgment petition seeking a declaration that former husband of minor child's mother (who formerly paid support and enjoyed joint custody pursuant to judgment of dissolution, but who was determined not to be the biological father of the child) was entitled to visitation with the child. The parties had previously entered agreed order that child would be raised with plaintiff as his father. The significant portion of the decision states:

> We agree with Timothy the principles enunciated in *M.M.D.* should be applied here. Because Michelle agreed to visitation and this agreement was memorialized in the joint-parenting agreement and its later voluntary modification on August 6, 1999, it should be enforced as a contract unless Michelle can show a **contractual reason** for voiding or rescinding it. She has not done so. The record indicates both Michelle and Timothy may have had questions about his paternity in regard to Cody when they entered into the joint-parenting agreement in 1996, but Michelle still voluntarily entered into the agreement. Nothing was done to determine Cody's actual paternity until 2001 when Michelle wanted to gain more "child support" for Cody.

Connor v. Velinda C. **-- Custody Awarded to One of Two Women Who Adopted Child Based upon Custody Standards under the IMDMA**:

Barbara Connor v. Velinda C., 356 Ill.App.3d 315 (5th Dist. 2005).
This case is another fascinating case in 2005 addressing a somewhat unique standing issue. In *Connor*, there was a termination of the parenting times of the biological parents and an adoption decree declared the child to be Velinda and Barbara's child. Each adoptive parent sought custody of their daughter. Velinda (the Defendant) was the child's maternal grandmother (as well as her adopted mother). Velinda appealed the granting of custody to the Plaintiff (Barbara.) What she urged in essence was that the custody provisions of the IMDMA should not apply.

Connor ruled that the trial court properly applied provisions of IMDMA to determine custody of child, who was the adopted child of two women, one of whom being the child's natural grandmother, and the other not being biologically related. In so ruling it stated:

> The standing requirement for a nonparent, however, is inapposite here. In the present case, Barbara and Velinda consented together to become Jasmine's adoptive parents, and the parental rights of Jasmine's biological parents were terminated. See *In re M.M.*, 156 Ill. 2d 53, 62 (1993) (adoption constitutes a complete and permanent severance of legal and natural rights between biological parents and children, including the right to visitation and

> custody). As Jasmine's adoptive parents, both Velinda and Barbara had standing under the Dissolution Act to seek the custody of Jasmine. See 750 ILCS 5/601(b)(1)(ii) (West 2002) (a child-custody proceeding is commenced in court by a parent filing a petition for the custody of the child). Velinda's argument that Barbara did not have standing to pursue the custody of Jasmine is without merit.

The court then stated:

> Further, the statutory factors listed in section 602(a) of the Dissolution Act were relevant in determining Jasmine's custody, despite the fact that Velinda and Barbara were prohibited from marrying under Illinois law. See *Hall v. Hall*, 226 Ill. App. 3d 686, 689 (1991) (regardless of whether parents have ever been married, the statutory factors in the Dissolution Act are relevant to determine a child's custody).

***Huseman* -- Effect of Guardianship of Non-Minor Child with Downs Syndrome and Whether Jurisdiction to Award Joint Custody Within Guardianship Case**
In Re Guardianship of Huseman, 358 Ill.App.3d 299 (5th Dist. 2005).

IRGO Huseman involved an alleged disabled adult who had Downs Syndrome and the father commenced guardianship proceedings. The parties initially agreed that a guardian of the person and the estate was necessary and the mother was appointed as the guardian. The trial court ordered the Father to pay the social benefits to the mother for the care of the child. This case presented three issues: "(1) whether the trial court erred in ordering attorney fees to be paid from Tekoa's social security disability benefits, (2) whether the orders complied with the provisions of the Illinois Probate Act of 1975 (Act) (755 ILCS 5/1-1 et seq. (West 2000)), and (3) whether the trial court had jurisdiction to enter the order mandating joint custody."

Regarding the issue of whether the social security benefits were exempt, this case is not particularly on point because there was an voluntary agreement in this regard that the trial court merely had approved. The critical issue was whether the trial court erred in awarding what amounted to a joint custody order. The mother contended that the parties could not stipulate to the child Tekoa being a disabled adult nor stipulate to the court's jurisdiction to award visitation but instead had to follow the applicable statutes, including the requirement for a report that makes specific findings (755 ILCS 5/11a-9(a) (West 2000)) or an order for appropriate evaluations to be performed by qualified individuals (755 ILCS 5/11a-9(b)). The appellate court stated:

> While respondent has some arguable points, the basic problem with her position is that the orders from which she appeals were all agreed orders. Respondent does not argue that the orders were the result of fraud or coercion, and the record shows no indication of that. Tekoa was represented by her own court-appointed attorney and a guardian ad litem throughout the proceedings. Respondent, petitioner, Tekoa's attorney, and her guardian ad litem all agreed to the orders in question. Thus, we are dealing with a consent decree. See In re M.M.D., 213 Ill. 2d 105, 820 N.E.2d 392 (2004).

The *Huseman* court then stated:

> While we agree that this case is not subject to an award of visitation pursuant to the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/101 et seq. (West 2000)) because Tekoa is not a minor (1) , the instant case presents a unique situation due to Tekoa's Down's syndrome. Guardianships are utilized to promote the well-being of the disabled person, to protect him or her from neglect, exploitation, or abuse, and to encourage the development of the disabled person's maximum self-reliance and independence. 755 ILCS 5/11a-3(b)

(West 2002). The agreements reached by the parties, including visitation, appear to protect Tekoa and encourage her maximum self-reliance. Visitation will allow each parent to play an active role in Tekoa's life. Given respondent's penchant for changing attorneys, failure to comply with the visitation schedule established by the trial court, and failure to abide by her stipulations, dual custody and visitation are appropriate.

Comment by Gunnar J. Gitlin: We know that in the absence of guardianship proceedings it would have been improper to award visitation. For instance, there is potential relief under IMDMA Section 513(a)(1) ["When the child is mentally or physically disabled and not otherwise emancipated, an application for support may be made before or after the child has attained majority." But the IMDMA does not allow visitation. A query is the impact of the appointment of a GAL during the guardianship proceedings and whether that would have affected the agreed order regarding visitation and what was the equivalent to joint custody. Another query is whether the court in guardianship proceedings may enter orders for "visitation" -- reading parenting time allocation -- similar to those under the IMDMA.

A later case involving a child with Downs Syndrome is *IRMO Dobbs*, also decided by the 5th District shortly after *Huseman* -- but in this case where the visitation was part of an agreed order within the divorce proceedings:

> Here, the circuit court acted pursuant to the Marriage Act in ordering visitation as agreed to by the parties. Jodi was 24 years old when the divorce decree, which incorporated the marital settlement agreement's provisions regarding visitation, was entered. Jodi has never been declared a disabled adult under the Probate Act, and a guardian has not been appointed. The circuit court was without subject matter jurisdiction to order visitation. The intended relief of granting visitation would, however, be available to the parties pursuant to the Probate Act. See *In re Guardianship of Huseman*, (June 7, 2005). As previously discussed, the standards of the Marriage Act and the Probate Act are significantly different. See *Casarotto*, 316 Ill. App. 3d at 572-73. Jodi's rights were not protected, and the fact that the circuit court could have granted visitation pursuant to the Probate Act does not overcome the jurisdictional defect in this case. While the results of this case may seem unduly harsh and technical, the jurisdictional defect cannot be overcome on the basis that the parties agreed to the arrangement for several years. A void order may be attacked at any time. *In re Estate of Steinfeld*, 158 Ill. 2d at 12.

CHILD CUSTODY-- UCCJEA and CHILD REPRESENTATIVES

***D.S.* -- UCCJEA -- Home State**:

In re ***D.S.***, No. 99991, (December 1, 2005) **Illinois Supreme Court decision**.
This case addressed the issue of a child's home state when the child is less than six months old. In this regard, the UCCJEA defines the home state as, "the state in which the child lived from birth with [a parent or a person acting as a parent]." 750 ILCS 36/102(7). The argument against jurisdiction in Illinois in this case was that the child was born in Indiana and lived in Indiana for the child's entire life before being brought to Illinois by the DCFS. The State countered by arguing that there was essentially no home state for the child and that therefore Illinois had jurisdiction under the provisions of Section 201(a)(2) and (4) which provide:

> (2) a court of another state does not have jurisdiction under paragraph (1) *** and:

> (A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> (B) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships; ***
>
> (4) no court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3)." 750 ILCS 36/201(a)."

The Illinois Supreme Court then looked to the decisions of other states on the point of addressing the home state or lack thereof for a child under the age of six months under the UCCJEA in this case of first impression (in Illinois.) The Court cited with approval the following cases: *In re R.P.*, 966 S.W.2d 292 (Mo. App. 1998); *Adoption House, Inc. v. A.R.*, 820 A.2d 402 (Del. Fam. Ct. 2003) and *Joselit v. Joselit* , 375 Pa. Super. 203, 544 A.2d 59 (1988). The Court then stated, "We find these cases entirely persuasive. By itself, a temporary hospital stay incident to delivery is simply insufficient to confer "home state" jurisdiction under the UCCJEA."

D.S. then reasoned that, "allowing a temporary hospital stay to confer "home state" jurisdiction would undermine the public policy goals of the UCCJEA, which include ensuring that "a custody decree is rendered in that State **which can best decide the case** in the interest of the child." (Emphasis added.) 9 U.L.A. §101, Comment, at 657 (1999) The court explained:

> Consider, again, a Galena mother who chooses to deliver her baby in a Dubuque hospital. In addition to living in Illinois, this mother may work in Illinois, have a husband and other children in Illinois, pay taxes in Illinois, attend church in Illinois, and send her children to Illinois schools. Clearly, if the occasion arose, Illinois would be the state "which can best decide" a case involving the interest of this mother's children. Yet, if respondent is correct, and a mere hospital stay is sufficient to confer home state jurisdiction under the UCCJEA, Iowa would possess exclusive jurisdiction over this newborn, based solely on the location of the obstetrician's practice. Such formalism turns the UCCJEA on its head, conferring jurisdiction on a state with a *de minimis* interest in the child, to the exclusion of the only state that could conceivably be called the child's "home." We refuse to endorse this interpretation."

The struggle for the High court was avoiding the strict language of the UCCJEA which provides that the home state for a child under age 6 months is the state where the child has lived from birth. In this case the mother had no intention of returning to Indiana following the child's birth.

***Kostusik* -- Child's Representative - Authority to File Temporary Motions Regarding Custody:**

*IRMO **Kostusik***, 361 Ill. App. 3d 103 (1st Dist. 2005)

- **Interlocutory Appeals**: Although deficient, a notice of appeal pursuant to SCR 306 and 306A filed in the circuit court within 5 days of the entry of an interlocutory order modifying temporary custody filed by pro se petitioner, rather than petition for leave to appeal in the appellate court pursuant to SCR 306 within 5 business days and a notice of filing interlocutory appeal in the circuit court within 30 days of entry of order as now required by rules, is sufficient to confer jurisdiction on the appellate court, especially since other parties were not prejudiced thereby.

♦ **Role of Child Representative and Authority to File Temporary Motions**: There was no reversible error associated with trial court allowing the child representative to file an emergency petition to modify temporary custody, or with trial court deciding the petition based solely on affidavits, since petitioner failed to demand evidentiary hearing. The case states:

> The child's representative is a hybrid of an attorney and a guardian ad litem. Gilmore, Understanding the Illinois Child's Representative Statute, 89 Ill. B.J. 458, 460 (2001). The statute specifically details this dual role of the child's representative, explaining that "[t]he child's representative shall have the same power and authority to take part in the conduct of the litigation as does an attorney for a party and shall possess all the powers of investigation and recommendation as does a guardian ad litem." 750 ILCS 5/506(a)(3) (West 2004).
>
> The question here is whether the "power and authority" of the child's representative to "take part in the conduct of the litigation as does an attorney for a party" includes the ability to file motions for changes in temporary custody. Interpreting section 506(a)(3) in accordance with its plain meaning (see *Doe v. Chicago Board of Education*, 213 Ill. 2d 19, 24 (2004)), the child's representative, pursuant to his powers as an attorney, must be "able and obligated to conduct necessary discovery, file appropriate pleadings, depose and present witnesses, and review experts' reports." See Davis & Yazici, 12 Illinois Practice of Family Law, 750 5/506 (2005-06 ed.) (discussing the role of an attorney for the child in dissolution of marriage proceedings). Further, section 603(a) of the Act provides that "[a] party to a custody proceeding * * * may move for a temporary custody order." 750 ILCS 5/603(a) (West 2004). Because the child's representative is to have the same power and authority to take part in the litigation as an attorney for the parties, and an attorney for the parties may move for a temporary custody order, we find that section 506(a)(3) does endow the child's representative with the authority to file motions for changes in temporary custody. If we were to hold otherwise, the child's representative would be unable to advocate for the best interest of the child during the dissolution of marriage proceedings. See 750 ILCS 5/506(a)(3) (West 2004).

CASES REGARDING JURISDICTION TO ENTER ORDER IN ABSENCE OF PETITION

***Fiallo* -- Jurisdiction to Enter Order in Absence of a Petition**:

Fiallo v. Lee, 356 Ill.App.3d 649 (1st Dist. 2005).
The trial court erred when it found that an order entered several years earlier was *void ab initio* because of a violation of procedural due process. Because the obligor was present at the hearing on child support and testified regarding her income, the court had both personal and subject matter jurisdiction. Therefore, despite her claim that she did not receive copy of petition to set support, there was no due process violation.

REMOVAL (RELOCATION OF THE CHILDREN FROM ILLINOIS)

***Main* -- Move to Florida Allowed Despite Mother's Losing First Removal Petition**:

IRMO ***Main***, 361 Ill. App. 3d 983 (2nd Dist. 2005)
The most recent decision from the Second District was the *Main* decision in which the Second District appellate court followed *Collingbourne* and allowed a removal to Florida. What was remarkable about *Main*

is that the removal was affirmed on appeal despite the fact that the petition was filed only two years after the court had awarded custody to mother the on the condition that she relocate children back to Illinois from same location in Florida to which she proposed to move. One of the key aspects of this case was that when the mother moved back to Illinois, she moved to Marshall, a city which is in downstate Illinois -- and only several miles from the Illinois / Indiana border. For further information, see Gunnar J. Gitlin's updated article regarding removal (relocation) in Illinois.

DISQUALIFICATION OF ATTORNEY

***Hines* -- No Disqualification Absent Evidence Attorney Had Any Contact with Client Information despite Client Contact with Former Firm:**

*IRMO **Hines***, 356 Ill.App.3d 197 (2d Dist. 2005).
The trial court erred in disqualifying Attorney Gunnar Gitlin from representing his client, Byron Hines, in proceedings in which the ex-wife sought post-high school educational expenses pursuant to Section 513 of the IMDMA. The ex-wife had consulted with Attorney H. Joseph Gitlin at the law firm of Gitlin & Gitlin several years before the instant proceedings. Joseph Gitlin had prepared a detailed memo of his initial consultation with Mary Lou Hines. However, there was no evidence that Attorney Gunnar Gitlin ever read the memo. The appellate court agreed with Attorney Gitlin that the trial court did not properly consider the factors enunciated in *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 179 (1997), to determine whether an attorney should be disqualified under Rule 1.9 of the Illinois Rules of Professional Conduct.

The appellate court summarized the applicable law and stated:

> Attorney disqualification is a drastic measure because it destroys the attorney-client relationship by prohibiting a party from representation by counsel of his or her choosing." *Schwartz*, 177 Ill. 2d at 178. Therefore, a party seeking disqualification of counsel based on Rule 1.9 bears the burden of proving the prior attorney-client relationship and "establishing that the present and former representations are substantially related." *Schwartz*, 177 Ill. 2d at 174, 178. In determining whether the two representations are substantially related, the court must consider the following: (1) the scope of the former representation; (2) whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters; and (3) whether the information is relevant to the issues raised in the litigation pending against the former client. See *Schwartz*, 177 Ill. 2d at 178. The determination whether to disqualify an attorney rests within the sound discretion of a trial court, and a reviewing court will not disturb that determination absent an abuse of discretion. *Schwartz*, 177 Ill. 2d at 176. A trial court abuses its discretion when no reasonable person would have agreed with the position adopted by the trial court. *Schwartz*, 177 Ill. 2d at 176.

The appellate court concluded:

> Although Gunnar was a partner at Gitlin & Gitlin at the time of Mary Lou's consultation with Joseph, Gunnar left Gitlin & Gitlin in 2002 and there is no evidence that Gunnar read the memo, had any knowledge of the issues discussed during the consultation, or was privy to any confidential information. Therefore, the application of the first two prongs of the *Schwartz* test to the facts at bar do not support Mary Lou's position.
>
> Regarding the third prong, the current litigation involves only the issue of the allocation of college expenses for the parties' oldest child. Mary Lou has failed to present evidence

that the information she provided Joseph in 1994 is relevant to the current issue. Although Mary Lou discussed her assets with Joseph, the parties' assets were distributed more than 10 years ago in accordance with the settlement agreement. Nothing in the record indicates that the information given to Joseph over 10 years ago is relevant to the issue involved in the current litigation. For these reasons, we conclude that Mary Lou failed to meet her burden of showing a substantial relationship between the matters involved in the two representations for purposes of Rule 1.9. See *Schwartz*, 177 Ill. 2d at 183. Accordingly, the trial court abused its discretion by granting Mary Lou's motion to disqualify Gunnar as Byron's counsel.

INJUNCTIONS

***Hartney* -- Impact of Potential Dissipation Claim on Entry of Injunction in Divorce Cases**:
IRMO ***Hartney***, 355 Ill.App.3d 1088 (2d Dist. 2005).

The trial court erred when it dismissed the wife's petition for preliminary injunction without an evidentiary hearing. The wife's petition for preliminary injunction sought to prevent her husband from transferring marital assets based on allegation that he had transferred $165,000 of bonds (marital funds) into an account in his own name for his personal use and threatened to transfer more. The appellate court ruled in terms of the sufficiency of the pleadings that the potential remedy of damages is insufficient to warrant dismissal of injunction petition. The significant quote from the case is that, "Allowing Jeff to sell marital assets and remove them from marital accounts, thus requiring Karen to seek money damages after the marital estate's value plummets, is not the most practical and efficient remedy here. Karen has sufficiently pleaded that there is no adequate remedy at law, and the alleged potential loss of value in the marital estate makes injunctive relief proper." What should be kept in mind, however, is that this case merely required an evidentiary hearing as to whether an injunction should enter.

APPEALS ON ILLINOIS CUSTODY CASES AND EVIDENCE

***Sproat* -- Limits of Expedited Appeal Provisions of SCR 306(a) as to "Final Custody Orders":**

IRMO ***Sproat***, 357 Ill.App.3d 880 (2d Dist. 2005).
Because a custody order, and denial of a motion for reconsideration thereafter, reserved issues of property division, maintenance and child support, it is not final order for purposes of appeal. Further, SCR 306A providing expedited appeals of custody orders does not confer jurisdiction on appellate court for a custody order when other issues in the dissolution remain undecided. SCR 306A provides in relevant part: ""(a) The expedited procedures in this rule shall apply in the following child custody cases: (1) initial **final** child custody orders, (2) orders modifying child custody where a change of custody has been granted, (3) final orders of adoption and (4) final orders terminating parental rights." Official Reports Advance Sheet No. 8 (April 14, 2004), R. 306A, eff. July 1, 2004. The question was whether the use of the phrase “final custody orders” in SCR 306(a) was intended to essentially overrule the seminal Supreme Court's *Leopando* decision. The case ruled for a variety of reasons that it did not.

***Miller* -- Offers of Proof When Trial Court Limited Parties to Two Non-party Witnesses**:
IRMO ***Miller***, 359 Ill. App. 3d 659 (4th Dist. 2005)

Because Defendant, mother, failed to make a proper offer of proof, or even informal offer sufficient to place in the record information for the court to ascertain whether testimony of proposed witnesses would have been admissible or would have mattered to the outcome of child custody litigation, she cannot establish that the trial court abused its discretion when it limited the parties to two non party witnesses. This case is good reading in terms of summarizing case law regarding offers of proof. However, on December 1, 2005, the Supreme Court issued a supervisory order on this case. "The appellate court is directed to vacate the judgment of the Circuit Court of Adams County granting custody of the parties' minor children to Dustin Miller, and to remand to the circuit court, directing the circuit court to hold a new custody hearing with a prior opportunity for the parties to request leave to present more than two witnesses and to make an offer of proof in support of said request(s). See Gunnar J. Gitlin's Illinois Evidence Guide in Family Law Cases with Objections.

Standards of Review on Appeal in Family Law Cases:

♦ ***Breitenfeldt* -- Manifest Weight Standard in Modification of Child Support Cases**:

IRMO Teri Eileen ***Breitenfeldt***, No. 4-04-0987, (Fourth Dist., November 30, 2005)
The standard of review in this modification of support case was manifest weight, citing *IRMO Armstrong*, 346 Ill. App. 3d 818, 821 (2004).

♦ ***Vancura* -- Manifest Weight in Dissipation, Factual Findings for Factors of Property Distribution – Abuse of Discretion Re Final Property Distribution and How Court Considers Factors**:

IRMO ***Vancura***, 356 Ill.App.3d 200 (2d Dist. 2005).

It is noteworthy that this is one of the few appellate court decisions which discusses at length the standard of review in cases in which dissipation is at issue. "While a majority of appellate court cases apply an abuse of discretion standard of review to a trial court's determination as to whether dissipation occurred in a given case (citations omitted), many cases apply a manifest weight of the evidence standard (citations omitted) and still others inexplicably apply both standards (citations omitted.) Abuse of discretion is the most deferential standard of review--next to no review at all--and is therefore traditionally reserved for decisions made by a trial judge in overseeing his or her courtroom or in maintaining the progress of a trial. (Citation omitted). Manifest weight review, on the other hand, is generally reserved for factual or evidentiary determinations." The case then appears to put this issue to rest by stating, "However, because the determination of whether dissipation occurred in a given case is a factual one (e.g., *Petrovich*, 154 Ill. App. 3d at 886), appellate courts must review it using the manifest weight of the evidence standard of review."

The opinion then mentions numerous cases which incorrectly state the standard for review in divorce cases addressing property distributions and states instructively, "For clarity, we correct the error here. A reviewing court applies the **manifest weight** of the evidence standard to the **factual findings** for each factor on which a trial court may base its property disposition, but it applies the **abuse of discretion** standard in reviewing the trial court's **final property disposition** (and how the trial court considers those factors)." (Emphasis added.) Accordingly, the appellate court applied the manifest weight standard of review.

♦ ***Best* -- Manifest Weight Standard in Finding of Domestic Violence**:

Best *v. Best*, 358 Ill. App. 3d 1046(2nd Dist. 2005).
Lake County. (Hutchinson) Affirmed.* See Illinois Supreme Court decision.

- 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."

- Because the trial court could believe only those parts of plaintiff's testimony that were corroborated or uncontradicted, its finding is 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."

* See the Illinois Supreme Court *Best* case.

SANCTIONS, DISSIPATION AND ATTORNEY'S FEES

*IRMO **Vancura***, 356 Ill.App.3d 200 (2d Dist. 2005).

- **Sanctions for Failure to Comply with Discovery -- Barring Party from Presenting Any Evidence**: The trial court did not abuse its discretion when it barred husband from presenting any evidence at trial as sanction for failure to comply with discovery, especially since husband failed to include transcript of hearing at which sanctions were imposed in record.

- **Dissipation of $16,000 Check Without Accounting of Same**: The trial court's finding that husband had committed dissipation when he used proceeds of $16,000 check without an accounting to wife was not against the manifest weight of the evidence standard of review.

- **Attorney's Fees and Division of Marital Assets**: In addition, an award of marital assets and attorney's fees, based on testimony of wife, was not an abuse of discretion, the court having considered proper factors. The appellate court stated, "The party seeking an award of attorney fees must establish her inability to pay and the other spouse's ability to do so. *IRMO Puls*, 268 Ill. App. 3d 882, 889 (1994). Financial inability exists where requiring payment of fees would strip that party of her means of support or undermine her financial stability."

*IRMO **Mouschovias***, 359 Ill. App. 3d 348 (4th Dist. 2005).

Attorney's Fees Due to Unnecessarily Prolonging Litigation: Additionally, the trial court **properly** apportioned $40,000 of wife's attorney's fees to husband because of his unnecessary prolonging of custody litigation.

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