2004 SUMMARY OF ILLINOIS DIVORCE AND FAMILY LAW CASES AND NEW SUPREME COURT RULES

By: Gunnar J. Gitlin
The Gitlin Law Firm, P.C., Woodstock, Illinois
© 2016 - May 6, 2016

www.gitlinlawfirm.com

Property . . . . Page 2 of 14
Sawicki – Private Disability Policy Marital Property But Coverture Fraction Approach Should Have Been Used . . . . Page 2 of 14

Child Support . . . . Page 2 of 14
Lindman – Consideration of IRA Distributions: Considered Income Based on Facts of Case . . . . Page 2 of 14
Armstrong – Child Support Modification – Benchmark Order to Determine Whether Substantial Change in Circumstances Has Occurred . . . . Page 4 of 14
Rogers – Illinois Supreme Court Decides Whether Based upon Facts of the Case Gifts and Loans May Constitute Income . . . . Page 4 of 14

Grandparent Visitation . . . . Page 5 of 14
M.M.D. - Illinois Supreme Court Rules that Contract Entered into Pre-*Wickham* for Grandparent Visitation is Not Void . . . . Page 5 of 14

Domestic Violence . . . . Page 6 of 14
Gilbert – Hearsay Evidence of Sexual Abuse under IMDMA §606(a) . . . . . Page 6 of 14
Steward -- Authority of Trial Court to Award Reimbursement of Fees for Appointed Domestic Violence Counsel . . . . Page 7 of 14

Custody . . . . Page 8 of 14
Bates – Previous Child's Representative Statute Unconstitutional and Legislation Amending Child Rep Statute Following Bates . . . . Page 8 of 14
Skelton – Custody Jurisdiction Only Addresses Born Children . . . . Page 10 of 14

Maintenance . . . . Page 10 of 14
Rogers – Current Social Security Benefits May be Considered in Awarding Maintenance <u>IRMO Rogers</u>, 352 Ill. App. 3d 896 (4th Dist. 2004). (This is not the Supreme Court *Rogers* child support decision). . . . . Page 10 of 14
Sunday – Termination of Maintenance Due to Cohabitation . . . . Page 11 of 14

Paternity Cases . . . . Page 11 of 14
Smith – Voluntary Acknowledgment of Paternity Cannot be Undone Via DNA Testing . . . . Page 12 of 14
IRPO John M. – Provisions of Parentage Act Not Shown to be Facially Unconstitutional . . . . Page 12 of 14

Removal . . . . Page 12 of 14
Johnson – Third 2004 Second District Removal Case -- Now Approving Language in *Stahl* . . . . Page 12 of 14
Repond – Second District Removal Case Critical of Same District's *Stahl* Decision and Court Allows Removal to Switzerland . . . . Page 13 of 14

Other Case Law . . . . Page 14 of 14

Property

Crook – Illinois Supreme Court rules that social security benefits cannot make an offsetting award of property due to the value of social security benefits that cannot be divided as part of the divorce under Federal law.

***Sawicki* – Private Disability Policy Marital Property But Coverture Fraction Approach Should Have Been Used**
IRMO Sawicki, 346 Ill. App. 3d 1107 (3d Dist 2004).
The husband's private disability annuity, which was benefit of employment that accrued both before and after marriage, was properly characterized as marital asset by trial court. But the trial court erred in its calculation of marital vs. non marital component of policy. It should have divided total number of years accrued, by number of years between marriage and disability to arrive at marital percentage. Further, it failed to consider fair market value of survivor's annuity when apportioning marital property. In addition, retroactive award of proceeds paid was not abuse of discretion, it being trial court's attempt to compensate wife for disparity between temporary child support award and her share of payments received by husband during pendency of action.

Child Support:

***Lindman* – Consideration of IRA Distributions: Considered Income Based on Facts of Case**
IRMO Lindman, 356 Ill.App.3d 462 (2d Dist. 2005).
The trial court did not err when it refused to grant petitioner’s petition to reduce child support because he lost his job and was receiving distributions of IRA awarded him in dissolution proceeding, because the distributions from his IRA were properly considered “income” within definition of Section 503of IMDMA, therefore making his net income greater than it was when

child support was set. Significant factors in the trial court's award were the fact that the ex-husband lost his job due to alcohol abuse and that at the time of the divorce, he earned approximately $80,000 annually while the two years immediately before filing his petition for modification (2000 and 2001), the ex-husband had a gross income of $160,000 and $100,000, respectively. Lindman contains several quotes establishing the comprehensive sweep of what constitutes income for support purposes:

> 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)).
>
> We see no reason to distinguish IRA disbursements from these items. Like all of these items, IRA disbursements are a gain that may be measured in monetary form. Rogers, slip op. at 5. Moreover, IRA disbursements are monies received from an investment, that is, an investment in an IRA. See *Black's Law Dictionary* 789 (8th ed. 2004); see also www.investorwords.com/2641/IRA.html (last visited December 22, 2004) (defining an "IRA" as "[a] tax-deferred retirement account for an individual *** with earnings tax-deferred until withdrawals begin"). Thus, given its plain and ordinary meaning, "income" includes IRA disbursements.

Next, the court addressed the ex-husband's other arguments including the argument that the IRA distributions were non-recurring, that IRA disbursements should not have been included because it was property awarded to him as part of the divorce settlement. The appellate court was very clear as to the limitations of the opinion in terms of applying an abuse of discretion standard:

> Thus, consideration of these arguments requires us to determine only whether the circuit court's net income calculations and its resulting refusal to modify petitioner's child support obligation amounted to an abuse of discretion. In re Marriage of Schacht, 343 Ill. App. 3d 348, 352 (2003). "A trial court abuses its discretion only when its ruling is ' " 'arbitrary, fanciful or unreasonable' " or " 'where no reasonable man would take the view adopted by the trial court.' " ' [Citations.]" With that in mind, we take petitioner's arguments in turn.

The court next stated:

> To begin with, "the Act does not provide for a deduction of nonrecurring income in calculating net income for purposes of child support." *IRMO Hart*, 194 Ill. App. 3d 839, 850 (1990). Thus, if we were to conclude that such income is, by virtue of its lack of regularity, excluded from the net income calculation, we would read into the plain language of the statute limitations and conditions not expressed by the legislature. And there is a further problem with petitioner's theory. It

> presumes that the net income inquiry is concerned with what a parent's income will be at some time after the child support determination is made. It is not. Rather, the net income inquiry focuses on a parent's income at the time the determination is made. Should that income later change, the Act allows a parent to petition for modification of the support order. 750 ILCS 5/510 (West 2002). Indeed, that is precisely what petitioner did here. But what the Act does not do is allow the possibility of more or less income in the future to determine whether the parent will pay more or less child support today.

On a more summary basis, the appellate court rejected the husband's other two arguments.

***Armstrong* – Child Support Modification – Benchmark Order to Determine Whether Substantial Change in Circumstances Has Occurred**:
IRMO Armstrong, 346 Ill. App. 3d 818 (4th Dist. 2004).
For purposes of modification of child support, the issue of whether a substantial change in circumstances does not run from the time the denial of the ex-husband's petition to reduce support when the denial was due to the bad faith reduction in income resulting in changes in jobs. Therefore, where the former husband obtained third position before filing his petition to reduce, which paid more than second job, but less than his employment at time of dissolution of marriage, he failed to demonstrate change sufficient to justify reduction.

***Rogers* – Illinois Supreme Court Decides Whether Based upon Facts of the Case Gifts and Loans May Constitute Income**:
IRMO Rogers, 213 Ill. 2d 129 (2004).
The Supreme Court in *Rogers* ruled that the trial and appellate courts properly included regularly recurring gifts and loans from obligor's family members as income for purposes of child support calculation pursuant to Section 505 of IMDMA. The evidence demonstrated that loans were debts in name only having no expectation of being repaid and income for purposes of child support is more expansive than that contained in tax laws. The Supreme Court stated:

> Based on the foregoing principles, we conclude, as the appellate court did, that the circuit court was correct to include as part of the father's "income" the annual gifts he received from his parents. That the gifts may not have been subject to taxation by the federal government is of no consequence. They represented a valuable benefit to the father that enhanced his wealth and facilitated his ability to support Dylan. They therefore qualify as "income" and were properly considered by the circuit court in computing the father's "net income" under section 505(a)(3) of the Act.

The Supreme Court rejected the rationale of the *IRMO Harman* decision (1991) when it stated:

> Later in its opinion, the court in In re Marriage of Harmon attempted to buttress its

> position using the theory that there was no guarantee that the respondent, who received $10,000 per year from her mother, would continue to receive such gifts in the future. Although it was possible that the payments would go on, the court reasoned that "[t]he possibility of future financial resources *** should not be considered when setting an award of child support."
>
> This rationale is also untenable. Few, if any, sources of income are certain to continue unchanged year in and year out. People can lose their jobs, interest rates can fall, business conditions can wipe out profits and dividends. Accordingly, the relevant focus under section 505 is the parent's economic situation at the time the child support calculations are made by the court. If a parent has received payments that would otherwise qualify as "income" under the statute, nothing in the law permits those payments to be excluded from consideration merely because like payments might not be forthcoming in the future. As our appellate court has held, "the Act does not provide for a deduction of nonrecurring income in calculating net income for purposes of child support." *In re Marriage of Hart*, 194 Ill. App. 3d 839, 850 (1990).
>
> Having said that, we hasten to add that the nonrecurring nature of an income stream is not irrelevant. Recurring or not, the income must be included by the circuit court in the first instance when it computes a parent's "net income" and applies the statutory guidelines for determining the minimum amount of support due under section 505(a)(1) of the Act. If, however, the evidence shows that a parent is unlikely to continue receiving certain payments in the future, the circuit court may consider that fact when determining, under section 505(a)(2) of the Act, whether, and to what extent, deviation from the statutory support guidelines is warranted. Moreover, if the payments should stop earlier than anticipated by the court, the parent obligated to provide support based on those payments may seek modification of the support order pursuant to section 510 of the Act.

I had anticipated a reversal by the Illinois Supreme Court as to the characterization of the loan issue but was curious that the Supreme Court accepted the case for cert., if it had intended to do so because there was no common law record. The Supreme Court side-stepped the entire issue when it stated, "Although the father challenges the appellate court's construction of the statute, we have no occasion in this case to address whether and under what circumstances loan proceeds are properly regarded as an element of income for child support purposes. The reason for that is that the sums at issue here are loans in name only." The question was whether the person had ever been required to repay any of the loans when there was testimony that the father had received the "loan" amounts for each year in his adult life.

Grandparent Visitation:

***M.M.D.* - Illinois Supreme Court Rules that Contract Entered into Pre-*Wickham* for**

Grandparent Visitation is Not Void.
In Re M.M.D., 213 Ill.2d 105 (2004)

While the Supreme Court ruled that a pre-*Wickham* contract was not void, the Supreme Court side-stepped the issue of whether there are common law rights to grand parent visitation. Recall that in *Wickham v. Byrne,* then Section 607(b) of IMDMA had been declared unconstitutional but in this case the issue was the contractual nature of a consent decree. The Illinois Supreme Court stated, "Declaring a contract void and unenforceable is a power the courts therefore exercise sparingly. An agreement will not be held void, as being contrary to public policy, unless it is clearly contrary to what the constitution, the statutes or the decisions of the courts have declared to be the public policy or unless [it is] manifestly injurious to the public welfare.'" However, visitation provisions are always subject to modification, and should the trial court decide that modification is necessary to serve the best interests of the child, it must adhere to *Wickham*. The Supreme Court then stated, " There is no corresponding constitutional prohibition against a fit parent's decision to voluntarily bestow visitation privileges on his child's grandparents. To the contrary, the very constitutional principles that required us to strike down the grandparent visitation statute in *Wickham* require that a parent's voluntary visitation decision be honored."

In a critical portion of the Supreme Court decision, the Supreme Court did not address the issue of whether there are no longer common law rights to grandparent visitation when it stated, "there is one aspect of the appellate court's disposition with which we do not agree. In reaching the result it did, the appellate court invoked common law principles governing a court's right to award grandparents visitation privileges beyond those granted by the child's parents. Those principles are inapplicable here. As we have pointed out at several points in this opinion, the case before us involves a consent decree. The Duncans' visitation rights under that decree were conferred voluntarily by Johnson. They were not imposed by the court and did not exceed the limits to which Johnson agreed. Accordingly, the common law authority of courts to award grandparent visitation beyond that allowed by the child's parents is of no relevance."

Domestic Violence:

***Gilbert* – Hearsay Evidence of Sexual Abuse under IMDMA §606(a)**
IRMO Gilbert, 355 Ill. App. 3d 104 (1st Dist., 4th Div. 2004)
Hearsay Evidence of Sexual Abuse: The trial court properly admitted out of court statements made by 4 year old child of sexual abuse by father to mother and investigators in hearing of order of protection petition brought within dissolution of marriage file because Section 606(a) applied to enable admission without a qualifying hearing and where there was sufficient corroboration within child's description of events. What was noteworthy was that this case was contrary to the principles in *Flannery* (a case in which Attorney Gunnar J. Gitlin was one of the trial lawyers). *Gilbert* stated:

> A recent case would suggest a different outcome. *In In re Marriage of Flannery*, 328 Ill. App. 3d 602 (2002), the court determined that merely observing the physical evidence of the child's hearsay statements of sexual abuse, such as using

> puppets or other "games," was insufficient to provide corroboration under any of the operative statutes. The statements relating to observation of the child were also hearsay.
>
> If the *Flannery* case is bedrock precedent, it would be almost impossible to obtain a finding of sexual abuse unless there was some physical evidence on the body of the child or unless the abuser had other witnesses to his abuse, a matter that is certainly unlikely.

But *Gilbert* can be distinguished from *Flannery*. In *Flannery* the child was not interviewed by a professional until approximately six months after the child first made allegedly hearsay statements (to her maternal grandmother). When there was finally an interview by a professional, it was by a mental health care worker without significant experience in this sort of case. The *Gilbert* court suggested, "The trial court had available the observation of Caryn Brauweiler, the assistant director of the Child Advocacy Center of Northwest Cook County, who has, as we have noted, conducted 1,000 interviews of allegedly abused children, 300 of which involved a child under the age of four." The evidence in *Gilbert* was also much more specific in terms of the allegations with the appellate court commenting, "The trial court also noted the improbability that B.G. would be aware of knowledge about a penile erection in that it would be "real little and then it would get real big" or that she had some knowledge of ejaculation as evidenced by her comment, 'Let's not talk about it. It's yucky.'"

But note the dissent. First, the dissent addressed whether the use of an order of protection to alter the child's visitation rights with regards to child was proper. The dissent urged, "Like the petitioners in *Radke* and *Wilson*, Lynette improperly sought an order of protection in order to suspend or alter Bradley's visitation rights with his daughter. As stated in both *Radke* and *Wilson*, the Domestic Violence Act is not the proper statute to use to alter a parent's visitation rights with their child. That is precisely what Lynette did. As such, the trial court's order of protection should be vacated."

The dissent also believed that the hearsay statements were not properly corroborated. The dissent is well written and persuasive.

Steward -- Authority of Trial Court to Award Reimbursement of Fees for Appointed Domestic Violence Counsel

Steward v. Schluter, 352 Ill. App. 3d 1196 (4th Dist. 2004)
1) The trial court did not abuse its discretion when it barred child's counselor from testifying at hearing resulting in issuance of plenary order of protection because, although stipulation between parties that counselor would not be called as a witness is not automatically enforceable, trial court based its ruling on best interests of child. 2) Trial court had authority to order respondent to reimburse county for a portion of fees of domestic violence attorney ordered to represent petitioner pursuant to county's administrative order because attorney's fees are authorized as "loss resulting from abuse" in Section 214 of Domestic Violence Act; and appointment of domestic violence attorney is legitimate exercise of court's authority to regulate the practice of law and

conduct the orderly administration of justice. Regarding the appointment of a domestic violence attorney and the possibility of a fee award in this regard, the appellate court stated:

> Respondent also contends that the trial court erred when it ordered him to reimburse Piatt County for fees paid to the domestic violence attorney. In Piatt County Administrative Order 97-1, the circuit court created the position of domestic violence attorney. The domestic violence attorney was created to represent pro se petitioners in domestic violence proceedings. The order provided that upon completion of the representation, the domestic violence attorney shall provide an itemization of fees with the court and shall be paid by the county. The order also provided:
>
>> "Upon the allowance of a petition for fees by the Domestic Violence Attorney, the court may order reimbursement by the parties to the County for the expense of the Domestic Violence Attorney. If the Domestic Violence Attorney represented the petitioner, and a plenary order of protection was entered during such representation, then the court, considering the financial resources of the parties, may order the respondent to reimburse the County for the expense of the Domestic Violence Attorney." Piatt County Adm. Order 97-1 (Eff. June 17, 2002).

In a striking comment the appellate court stated:

> This court upheld the trial court's authority to appoint an attorney to serve as a domestic violence attorney in *Scroggins v. Scroggins*, 327 Ill. App. 3d 333, 337 (2002). Respondent mistakenly asserts that the holding in Scroggins is based upon the Domestic Relations Legal Funding Act (Legal Funding Act) (705 ILCS 130/1 through 30 (West 2002)). Although we cited the Legal Funding Act in support of our finding, *Scroggins* did not rely upon it for the holding that courts have the authority to appoint counsel to represent an indigent person in domestic relations matters. *Scroggins*, 327 Ill. App. 3d at 337. Courts have the authority to appoint counsel pursuant to the inherent power of the judiciary to regulate the practice of law and to conduct the orderly administration of justice. *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 28 (1966).

The case also contained an apt quote from the concurrence regarding communications with a mental health care provider, "[A]nyone seeking the nonconsensual release of mental health information faces a formidable challenge ***." *Norskog v. Pfiel*, 197 Ill. 2d 60, 72 (2001)."

Custody

Bates **– Previous Child's Representative Statute Unconstitutional and Legislation Amending Child Rep Statute Following Bates**

IRMO Bates, (Illinois Supreme Court) 212 Ill. 2d 489 (2004).
Illinois Supreme Court Finds Child's Representative Statute Unconstitutional Section 506(a)(3) of IMDMA Unconstitutionally as Applied in the Case: The high court held that the statute interfered with mother's due process rights to the extent that it allowed child representative's report to be considered by court without the ability to cross examine child representative; the error was harmless in petition to modify custody because the evidence overwhelmingly established that the mother systematically interfered with father's relationship with child and court did not base its decision on representative's recommendation. The court stated:

> Section 506(a)(3) of the Act, as applied in this case, deprived Norma of procedural due process of law because her protected liberty interest in the care, custody, and control of her daughter was adversely affected by the statutory prohibition of calling the child's representative as a witness and cross-examining him. Nevertheless, in light of the overwhelming expert testimony supporting a modification of custody, and because the content of the representative's report was not inconsistent with the other evidence at trial, admission of the report was not prejudicial, and the error in failing to allow cross-examination was harmless.

Parental Alienation "Syndrome": The case is also significant in that addresses "parental alienation syndrome" in the context of a *Frye* hearing. It appears that the Supreme Court went out of its way not to try to lend credence to the theory as a syndrome, etc., when it stated:

> In view of the sparse record challenging the general acceptance of the PAS principle, allowing Dr. Gardner's parental alienation syndrome testimony was not an abuse of discretion. We note, however, that PAS is now the subject of legal and professional criticism, and our holding in this case does not foreclose further challenges to the validity or general acceptance of that concept in future cases.

Update by Gunnar J. Gitlin: The legislation regarding the role of the child representative now provides:

> The child representative shall advocate what the child representative finds to be in the best interests of the child after reviewing the facts and circumstances of the case. The child representative shall meet with the child and the parties, investigate the facts of the case, and encourage settlement and the use of alternative forms of dispute resolution. The child representative shall have the same authority and obligation to participate in the litigation as does an attorney for a party and shall possess all the powers of investigation as does a guardian ad litem. The child representative shall consider, but not be bound by, the expressed wishes of the child. A child representative shall have received training in child advocacy or shall possess such experience as determined to be equivalent to such training by the chief judge of the circuit where the child representative has been appointed. The child representative shall not disclose confidential communications made by the child, except as required by law or by the Rules of Professional Conduct. The child representative shall not render an opinion, recommendation, or report to the

> court and shall not be called as a witness, but shall offer evidence-based legal arguments. The child representative shall disclose the position as to what the child representative intends to advocate in a pre-trial memorandum that shall be served upon all counsel of record prior to the trial. The position disclosed in the pre-trial memorandum shall not be considered evidence. The court and the parties may consider the position of the child representative for purposes of a settlement conference.

***Skelton* – Custody Jurisdiction Only Addresses Born Children**
IRMO Skelton, 352 Ill. App. 3d 348 (5th Dist. 2004).
This case presents an interesting wrinkle on the issue of custody jurisdiction. In *Skelton* the appellate court held that because custody provisions of IMDMA do not apply to unborn children, and because dissolution is statutory remedy unknown to common law, the court properly dismissed the husband's complaint seeking to assume jurisdiction over custody of unborn child, and to require his pregnant wife to return to Illinois until the birth of child. The later birth of child in Texas established it as the home state of the child for purposes of custody determinations. The appellate court states:

> While we appreciate the concern that Jeffrey had relative to his unborn child, we must agree with the position taken by the trial court-Illinois courts simply lack jurisdiction in this type of situation over an unborn child. Virtually everything about a dissolution of a marriage is statutory, and a deviation from these statutory guidelines typically results in a ruling that the trial court's determination was erroneous. See, e.g., *In re Marriage of Waller*, 339 Ill. App. 3d 743 (2003). While our state recognizes an unborn child as a child for purposes of criminal prosecutions (see, e.g. , 720 ILCS 5/9-1.2 (West 2002)) and wrongful-death actions (740 ILCS 180/2.2 (West 2002)), those situations are statutory in nature.

Maintenance:

***Rogers* – Current Social Security Benefits May be Considered in Awarding Maintenance**
***IRMO Rogers*, 352 Ill. App. 3d 896 (4th Dist. 2004). (This is not the Supreme Court *Rogers* child support decision).**

Trial court may consider disparity in current social security benefit payments for the purpose of awarding maintenance. The trial court did not abuse its discretion when it considered total income of both disabled husband and disabled wife, after lengthy marriage, and ordered husband to pay one half of his pension and $900 per month in maintenance based, in part, on husband's greater social security income, because there is no prohibition against considering social security income when determining issue of maintenance. The husband cited the Supreme Court's 2004 *Crook* decision and the appellate court stated:

> The calculation of a maintenance award is another matter. None of the cases Jerry cites involve the award of maintenance, only the division of property. *Crook* commented on the fact that because Congress reserved the authority to amend or repeal provisions of the Social Security Act, the United States Supreme Court has held that social security beneficiaries have a "noncontractual interest" in social security benefits and that those benefits are not to be considered as an accrued property right. *Crook*, 211 Ill. 2d at 442. *** We see no reason for a court to ignore the circumstance that one party is currently receiving a social security benefit of $1,321 per month while the other is receiving $216 per month.

***Sunday* – Termination of Maintenance Due to Cohabitation**:
IRMO Sunday, 354 Ill. App. 3d 184 (2004).

The trial court's determination that former wife was subject to termination of maintenance because she was living with her boyfriend on a continuing, conjugal basis is against the manifest weight of the evidence. The appellate court stated that to provide the existence of a resident, continuing, conjugal relationship, a spouse must show that the other is involved in a de facto husband and wife relationship. It suggested that courts examine this by considering 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. *Snow*, 322 Ill. App. 3d at 956." The appellate court noted that the cohabitation was reflectively short -- four months. It referred to the following decisions *Snow* (1.5 years); *Toole* (four years); *Herrin*, 262 Ill. App. 3d 573, 574 (1994) (two years).

The case distinguished *Roofe*, 122 Ill. App. 3d 56 (1984), involving a nine month relationship and a cohabitation of only six weeks because in that case the paramour had abandoned his old residence because in that case the wife had moved furniture and personal possessions into the third party's house, discussed marriage with him, and planned to continue to reside in the new home indefinitely. In distinguishing Roofe the court stated that in Sunday there is no evidence that either the ex-wife or her boyfriend had abandoned his or her residence for that of the other. Likewise, there was no evidence that the boyfriend had transferred any furniture or possessions to the boyfriend's house. The evidence also showed only that the boyfriend was a frequently overnight guest staying the night at many of five nights per week. The testimony from the boyfriend and the ex-wife was that this was due to an alleged fear of the ex-husband because of his pattern of harassment. The appellate court stated, "As a result of effectively ignoring this important and uncontradicted evidence, the trial court miscalculated the weight to accord the amount-of-time factor. We hold that this factor should be accorded relatively little weight in determining the existence of a conjugal and cohabiting relationship in this case, because respondent's actions have caused this factor to appear artificially inflated." Furthermore, the ex-wife and her boyfriend did not regularly share household chores or expenses and they did not commingle funds.

Paternity Cases:

***Smith* – Voluntary Acknowledgment of Paternity Cannot be Undone Via DNA Testing**:
In *Smith*, the Illinois Supreme Court decided a critical case reversing the Second District's decision (343 Ill.App.3d 208) and deciding that a man cannot undo a voluntary acknowledgment of paternity by later proving that he is not the father via DNA tests. The case ruled that the father could not do so. This is consistent with my warnings in my paternity Q&A of the dangers of signing such a consent without sure knowledge of paternity.

***IRPO John M.* – Provisions of Parentage Act Not Shown to be Facially Unconstitutional**:
In re Parentage of John M., 212 Ill. 2d 253 (2d Dist. 2004). Reversed. Illinois Supreme Court.

The trial court erred when it held that provisions of Parentage Act allowing a person claiming to be the child's father to file petition to establish a parent and child relationship, as applied to presumed father, the husband of child's mother, and child, unconstitutionally violated due process and equal protection without conducting evidentiary hearing. Further, husband has failed to meet burden of establishing that the statute is facially unconstitutional. Specifically, the Supreme Court held, "In particular, Dennis has not shown why it would be unconstitutional to allow a paternity action to proceed without a best interest hearing in a situation where the biological father has been living with the child or where the marriage between the child's mother and the presumed father has already disintegrated so that there is no 'intact family.' Thus, Dennis' arguments do not support the circuit court's holding that the statute is facially invalid."

Removal

Johnson* – Third 2004 Second District Removal Case -- Now Approving Language in *Stahl
IRMO Johnson, 352 Ill. App. 3d 605 (2d Dist. 2004).

Johnson ruled that the trial court's decision to deny petition by mother, the physical custodian, to remove the minor children to Arizona was not against the manifest weight of the evidence in light of the trial court's conscientious application of *Collingbourne* and *Eckert*, the close and beneficial relationship between the children and their father which would be adversely affected by removal, and the children's desire not to be separated from their friends and family in Illinois. *Johnson* noted the apparent conflict with *Repond* when it stated:

> We are mindful that our decision may, at first glance, seem at odds with this court's recent decision in *In re Marriage of Repond*, 349 Ill. App. 3d 910 (2004). In Repond , this court applied the Eckert factors and reversed a trial court's ruling denying the custodial parent's petition to remove the children to Switzerland. *Repond*, 349 Ill. App. 3d at 917. The Repond court then went on to state its disagreement with another recent decision of this court in *In re Marriage of Stahl*,

> 348 Ill. App. 3d 602 (2004), which affirmed a trial court's denial of a custodial parent's petition for removal to Wisconsin. *Repond*, 349 Ill. App. 3d at 920-21.

The court strained to emphasize its agreement with the reasoning in the *Stahl* decision stating, "This court stands by the *Stahl* case as being sound in reason and consistent with our supreme court's pronouncements in *Eckert* and *Collingbourne*." The court concluded:

> There are several other important aspects to *Collingbourne* that must be emphasized, besides the nexus between the well-being of the custodial parent and the well-being of the child. *** A careful reading of both *Repond* and *Stahl* will reveal that the facts and circumstances surrounding Repond were vastly different from those surrounding *Stahl* . Indeed, rarely will the facts and circumstances in two separate removal cases be comparable. *** The case at hand is certainly distinguishable from Repond . In *Repond*, the non-custodial parent:
>
>> was not involved in his children's lives. *Repond*, 349 Ill. App. 3d at 919.
>>
>> [had] exercised only half of his allowed visitation with the children. *Repond*, 349 Ill. App. 3d at 919.
>>
>> ... did not attend the children's extracurricular activities. *Repond*, 349 Ill. App. 3d at 919.
>>
>> ... did not allow the children to bring friends over. *Repond*, 349 Ill. App. 3d at 919.
>>
>> ... even refused to allow one of the children to live with him. *Repond*, 349 Ill. App. 3d at 920.
>
> However, in the present case, Joseph is a loving, involved parent whose life revolves around his children. He is a parent who possesses a unique and strong bond with his children; a bond that, if broken, could be detrimental to the children.

***Repond* – Second District Removal Case Critical of Same District's *Stahl* Decision and Court Allows Removal to Switzerland**

IRMO Repond, 349 Ill. App. 3d 910 (2d Dist. 2004).

The trial court's decision to deny petition by mother to remove children to Switzerland, where she had employment offers that would enable her to pursue her career as physicist, after being unable to find suitable employment in Illinois, is against manifest weight of the evidence. Father exercised only half his allotted visitation, had family in Switzerland, could visit the children during several business trips he took each year to Europe, and would not allow children to live with him. Mother, on the other hand, could provide suitable housing with her new husband, livelihood, education, and extended family, if petition were allowed. The case is good reading in any removal case. In its summary Justice Hutchinson aptly states:

> The purpose of a published opinion is to develop and maintain a coherent body of law. *Siegel v. Levy Organization Development Co.*, 153 Ill. 2d 534, 544 (1992). To this end, it is imperative that a reviewing court set forth a rationale, discussing relevant case law pertaining to the issues. *Siegel*, 153 Ill. 2d at 544-45. Although we recognize that removal requests must be decided on a case-by-case basis (*Eckert*, 119 Ill. 2d at 326), we believe that our consideration here of the entire body of supreme court precedent pertaining to removal is more thorough than that presented in *Stahl*. We believe that this published opinion will provide future guidance to trial courts and parties in this sensitive area of removal.

See updated removal article.

Other Case Law:

IRMO Chrobak, 349 Ill. App. 3d 894 (2d Dist. 2004).
Although the husband obtained a dissolution of Illinois marriage in Canada without appearance by his then wife, the wife was properly estopped from using the Canadian decree to challenge subsequent legal separation decree entered by default in Illinois. The Second District appellate court reasoned that the wife signed written marital settlement agreement which formed basis for legal separation decree in Illinois, and accepted benefits of decree, to wit: periodic maintenance and a portion of respondent's pension.

The Gitlin Law Firm, P.C., provides the above information as a service to other lawyers to assist with continuing legal education. A person's accessing the information contained in this web site is not considered as retaining The Gitlin Law Firm for any case nor is it considered as providing legal advice. The Gitlin Law Firm cannot guarantee the outcome of any case.

The Gitlin Law Firm
Practice Limited to Family Law
663 East Calhoun Street
Woodstock, IL 60098
815/338-9401
www.gitlinlawfirm.com
Last Updated: May 6, 2016
G:\Docs\Writings\CL\Case Law Update 2004.wpd
© 2016, The Gitlin Law Firm, P.C.