2000 to 2003 SUMMARY OF ILLINOIS DIVORCE AND FAMILY LAW CASES

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Property Cases Law:

Retirement Benefit Cases

Property Versus Cash Flow

***Bielawski* – Maintenance in Lieu of D.B. Plan Distribution**
IRMO Bielawski and Rycroft, 328 Ill.App.3d 243 (1st Dist. 2002)
Where a party enters into a MSA which treats an interest in a defined benefit plan as an income stream for the purpose of unallocated maintenance rather than dividing this asset pursuant to a QDRO, the trial court properly refused to grant the ex-wife's 2-1401 motion. The appellate court distinguished *Brackett*, 309 Ill.App. 3d 329 (2nd Dist. 1999) because *Brackett* involved a contested divorce rather than a MSA and because there were present value determinations as to the plan interest.

***Schacht* – Court May Consider Worker's Compensation Benefits Both as Property for Settlement Purposes and as an Income Stream but May Not Consider Entire Award as Both**

IRMO Schacht, 343 Ill.App. 3d 348 (2d Dist. 2003)

The trial court originally calculated respondent's child support obligation on the assumption that he was receiving approximately $1,490 per month in TTD. Later, there was a lump-sum payment intended to replace that income. However, the support obligor received only half of the lump-sum award because the trial court awarded petitioner 30% of the sum as marital property and set aside another 20% to create trusts for the children's educations. The support amount remained unchanged. The case states:

> In other words, respondent received only half of the worker's compensation settlement, but continued to pay child support as if he had received the entire amount. As a result, the settlement proceeds were nearly exhausted by the time respondent filed his motion to reduce support. While Dodds holds that a worker's compensation award may be considered income to the receiving spouse, it presupposes that he receives the entire award. Where, as here, a settlement is apportioned as marital property under *DeRossett*, "it follows that a child support award based on that settlement must be reduced proportionately.

Therefore, "Under the circumstances of this case, the court committed an impermissible 'double counting' of the settlement proceeds. See *IRMO Talty*, 166 Ill. 2d 232, 236 (1995). Furthermore, if the court imputed income to the Defendant, the court must make express findings." Therefore, the appellate court vacated the judgment and remanded the matter.

QDROs and QILDROs

***Menken* – No Authority of Trial Court to Order Signature of QILDRO for Pre-QILDRO Legislation Participant**

IRMO Menken, 334 Ill.App. 3d 531 (2d Dist. 2002)

The trial court [supposedly per this decision] lacks the authority to order a state governmental plan participant to execute a consent for issuance of a QILDRO but the trial court has authority to enter a "triangular" type order, that is, one in which the participant is ordered to pay over the appropriate portion of his or her pension funds if and when received. Keep in mind that *Menken* is the decision that led to many later decisions attempting to craft exceptions to the rule. These exceptions include the ability of a properly drafted MSA to constitute a consent – even in the absence of a QILDRO (*IRMO Hall*, 343 Ill.Dec. 514 (2nd Dist., 2010).– as well as the availability of the constructive trust doctrine to apply in appropriate cases (*IRMO Winter*, 387 Ill. App. 3d 21 (1st Dist., 2008)). See my separate outline addressing this topic.

***Peters* – Stock Bonuses are Marital Property (similar to stock options)**

IRMO Peters, 326 Ill.App.3d 364 (2d Dist. 2001), GDR 02-09

Contingent stock bonuses, like contingent and nonvested pension plans, are marital property to the extent they were earned during the marriage. The court should make distribution of the employee's interest in the plan on a reserved jurisdiction basis. (The agreement with company that if he was with the company for 10 years and if he met certain goals, an increasing percentage of stock would be transferred to him from 10% to 49%. The parties divorced after five years of husband's employment.) The opinion refers to the current law regarding stock options. The court notes two reserved jurisdiction type approaches (award percentage now with mechanism to enforce or wait to apportion until asset is in pay status.) The court cited *Wisniewski II* (pension case). It emphasized that apportionment at time of divorce is preferred. Otherwise, the decree is

non-final for years.

***Hulstrom* – Parties' MSA and Divorce Judgment Which Pooled Social Security Earnings Following 46 Year Marriage was Void**

IRMO Hulstrom, 342 Ill.App.3d 262 (2d Dist. 2003)

This was Illinois' first case in which the appellate court ruled that the state court lacked jurisdiction to divide social security benefits (by pooling the benefits and providing for an equal division) due to the anti-alienation provisions of the Social Security Act. Keep in mind that the seminal case is the later Illinois Supreme Court *Crook* decision, 211 Ill.2d 437, 286 Ill.Dec. 141 (2004). Consistent with the later *Crook* decision, the trial court improperly treated the benefits as marital property and the court's judgment in this regard was void. The matter was remanded to the trial court to divide marital property eight years after the end of the 46-year-marriage.

Keep in mind the nature the limited nature of the opinion, i.e., addressing social security pooling only. The appellate court stated:

> The issue of whether a state trial court lacks jurisdiction to enforce the provision of a marital settlement agreement dividing social security benefits is a question of first impression in Illinois. However, two other jurisdictions have ruled that a settlement agreement dividing such benefits as marital property is void for violating the anti-alienation provision of the Social Security Act (42 U.S.C. §407(a) (2000)). Gentry v. Gentry, 327 Ark. 266, 938 S.W.2d 231 (1997); *Boulter v. Boulter*, 113 Nev. 74, 930 P.2d 112 (1997). We find these cases to be persuasive and directly on point.

The entire decree is not normally void – just the enforcement of the clause regarding the social security. A question for the court was whether the clause, etc., was void or voidable.

The potential for post-remand litigation could have presented a quagmire as contemplated by the court:

> Finally, the parties' use and consumption of the marital property during the past eight years would make a redistribution of the entire marital estate nearly unworkable. To avoid this dilemma, the parties may decide to renegotiate the division of prospective social security benefits by characterizing them as maintenance (see Gentry, 327 Ark. at 270, 938 S.W.2d at 233) and leaving the remainder of the judgment undisturbed. However, the parties have remarried, and section 510(c) of the Marriage Act provides that the obligation to pay maintenance ordinarily terminates upon the remarriage of the party receiving maintenance. See 750 ILCS 5/510(c) (West 2000). Therefore, the parties would be required to draft "a written agreement set forth in the judgment or otherwise approved by the court" if they wish to devise a prospective maintenance schedule regarding the benefits. See 750 ILCS 5/510(c) (West 2000). Such an agreement should also consider the tax implications raised by an award of maintenance. See 750 ILCS 5/504(a)(9) (West 2000).
>
> We further note that, if the parties cannot reach agreement on remand, the trial court may consider the parties' accrued but unpaid social security benefits when redistributing all of the marital assets equitably. See generally *In re Marriage of Crook*, 334 Ill. App. 3d 377, 384-85 (2002), citing *In re Marriage of Boyer*, 538 N.W.2d 293, 296 (Iowa 1995).

Consider this case in connection with the later *IRMO Rogers*, 352 Ill. App. 3d 896 (4th Dist. 2004) holding that *receipt* of current social security benefits may be considered in awarding maintenance.

***Gaumer* – 84/16 Property Division Approved for 40+ Year Marriage with No Maintenance Due to QJSA Waiver**

IRMO Gaumer, 336 Ill.App.3d 1012 (5th Dist. 2003), GDR 03-22.

In a marriage of more than 40 years, with a 66-year-old wife and a 69-year-old husband, both of whom were unemployed, the trial court did not abuse its discretion in awarding 84% of the property to the wife with no maintenance, where the wife would likely outlive the husband. The critical fact in this case was that the court awarded the husband his entire pension which was approximately 70% marital and yielded $18,745 yearly. This was a somewhat unique case in which the wife waived survivorship benefits before the husband's plan went into pay status. For this reason, the court commented that, upon the husband's death, the wife would receive nothing via the pension. The decision stated, "an equal division of the pension is not truly equal because it remains dependent on [the ex-husband's] life. In the event he would pass, it would result in a sudden decline in Mrs. Gamer's financial status without any doing on her part."

***Cutler* – Business Valuation -- Improper Use of Income Approach Because of Covenant Not to Compete**

IRMO Cutler, 334 Ill.App. 3d 731 (5th Dist. 2002)

When the husband had a Geico insurance agency under a contract with a one-year non-competition clause, and the husband would have no renewals if the contract was terminated, the trial court erred by valuing the business without considering these factors that would significantly affect the sale. And, the trial court cannot simply select a value between the values opined by the two experts when one of the appraisals is not based upon proper evidence.

Dissipation:

***Carter* – Marriage's Breakdown May Have Occurred on First Separation in 1992 Instead of on 2nd Separation in 1998**

IRMO Carter, 317 Ill.App.3d 546 (4th Dist. 2000), GDR 01-6

The evidence showed that the wife filed a divorce petition in 1992 which was later dismissed on purported condition that the husband not incur more debts and where parties for the most part thereafter lived separate lives but lived in same household. So the trial court erred in finding breakdown of marriage after second separation in 1999. The court *did* have authority to order wife to obtain loan secured by marital residence to address debt situation but the court should use this power very sparingly. (Loss of bargaining power relative to creditors and rights in bankruptcy proceedings may be implicated).

Comment: *Carter* and *Cerven* may reflect a trend following the *O'Neill* decision to allow dissipation claims where the facts are "close." Keep in mind that the later case law emphasizes the phrase "began undergoing an irretrievable breakdown regarding the *O'Neill* standard. But the 2012 amendments now provide a 5 or 3 year limitation: "(iv) no dissipation shall be deemed to have occurred prior to 5 years before the filing of the petition for dissolution of marriage, or 3 years after the party claiming dissipation knew or should have known of the dissipation."

***Cerven* – No Personal Benefit from Gifts or Contributions**
IRMO Cerven, 317 Ill.App. 3d 895 (2nd Dist. 2000), GDR 01-33
Contributions made to the Mormon church by wife after the breakdown of the marriage constituted dissipation where wife could not establish the contributions were made for a family purpose, despite the fact that wife derived no personal benefit from the contributions.

Comment: The marital estate was reimbursed 45% of the $16,000 contributions despite testimony by wife that husband never objected to attendance by wife and children at church. Case placed burden on wife to show husband consented to contributions.

***Carrier* – Statutory Interest on Order Requiring Payment Rather Than a Money Judgment**
IRMO Carrier, 332 Ill.App. 3d 654 (2d Dist. 2002)
Mandatory statutory interest on judgments, per Section 2-1303 of the Code of Civil Procedure, does not apply to awards in divorce proceedings. The fact that the award was pursuant to a marital settlement agreement incorporated in the judgment does not alter this rule. In divorce proceedings interest is discretionary.

The wife, by the divorce judgment (MSA) was awarded an interest in her husband's IRA. After the judgment the wife initially undertook the transfer of the sum awarded to her, but thereafter it became the husband's responsibility. It was not an abuse of discretion not to award wife statutory interest for the time she undertook responsibility for the transfer.

Statutory interest is addressed in two sections of *Gitlin on Divorce*: Section 8-19 and Section 16-6. A breakdown of the post-*Finley* case law as to whether statutory interest is mandatory follows:

Interest on Property Settlements:
IRMO Tutor, 2011 IL App (2d) 100187 (August 26, 2011): Imposition of statutory interest was not a violation of an agreed bankruptcy order providing for terms of payment of lump-sum property settlement agreement.

Carrier: Second District, 2002: Statutory interest is not mandatory citing with approval the *Kaufman* decision.

Ahlness, 229 Ill.App.3d 761, 171 Ill.Dec. 244 (4th Dist. 1992). GDR 92-78. (Not cited in *Gitlin on Divorce: A Guide to Illinois Matrimonial Law*.) Ordering interest on an award of money, as part of the property distribution in a divorce, lies within the sound discretion of the trial judge. The statutory interest on judgments provided by the Code of Civil Procedure, is not controlling. GDR 92-78.

Scafuri: 2nd Dist. 1990: Interest at 1% over prime where wife to receive $375,000 in installments over a ten-year period, as part of property distribution, reversed. The appellate court held this was a judgment and therefore only the statutory interest rate of 9% could accrue. GDR 91-13.

Interest on Child Support:
Steinberg: 1st District, 1998: *Steinberg* had held that statutory interest for child support was *permissive* – before the date of the amendments requiring mandatory statutory interest on missed support payments (and

the later amendments regarding missed maintenance payments). This case had relied upon *Kaufman* which in turn relied upon *Finley*. GDR 99-99. But it was overturned by the 2011 *IDHFS v. Wiszowaty* decision:

> The General Assembly changed the law in 1987 by providing that each unpaid child support installment is an actual "judgment" that arises by operation of law, and that each such judgment "shall bear interest." Under the plain language of these statutory amendments, interest payments on child support payments became mandatory effective May, 1 1987. This court's decision in Finley does not compel a different result.

IRMO Rice, 2011 IL App (1st) 103753 (Modified on Denial of Rehearing: January 20, 2012): Statutory interest on support once again is retroactive -- in that case to April 1991.

Sloan: Second District, 1993. *Sloan* gave a narrow application to *Finley* and ruled that statutory interest was mandatory.

Maintenance Interest Cases:
Morris: 1st District, 1989: Under order requiring husband to pay wife a lump sum of maintenance and a lump sum of money in installments on account of property settlement, the ordering of statutory interest was mandatory. GDR 89-86.

Kaufman: 1st District, 1998: Maintenance arrearage was *not* subject to mandatory interest. GDR 93-108. While the later statutory amendments at §504(b)(5) and (b)(7) of the IMDMA provided in essence that the same rules regarding mandatory child support interest to missed support payments apply to non-paid maintenance, the language of this decision is instructive. This case provides a good summary of the earlier case law. Its broader holding was, "Based upon the broad language of *Finley*, *Bremer*, and *Bowman*, we conclude that the clear weight of authority favors a finding that allowance of interest on all dissolution judgments is within the discretion of the trial court."

IRMO Kolessar and Signore, 2012 IL App (1st) 102448 (January 17, 2012): In agreed orders involving a unilateral reduction in unallocated maintenance statutory interest is mandatory unless clearly waived.

***Gattone – Guerra* Analysis Favored Determination of Gift to Marriage**
In Re Gattone, 317 Ill.App.3d 346 (2d Dist. 2000), GDR 01-11
The property and maintenance angles of this case are addressed below involving a generous maintenance/property award. Regarding property characterization, the appellate court held that in in light of the four *Guerra* factors, the trial court did not err in finding that the husband did not overcome the presumption of gift to the marriage when title to real estate placed in joint tenancy. In reviewing size factor (size of gift relative to the entire estate), the issue is size at the time of the divorce but not the date of marriage. (The *Guerra* size was 44%.) Other factors are: 2) whether purchase price, improvements, and taxes paid on the property were paid from non-marital funds and who exercised control and management over property; 3) when asset was purchased; and 4) how the parties handled prior financial dealings with each other.

Think of these factors as:
Size. Larger size ➜ Non-marital

When Asset Acquired/ Later date ➜ Non-marital
Earlier Financial Dealings. If part of pattern ➜ Non-marital.
Control: More control ➜ Non-marital

Child Support

Initial and Post-Divorce: Establishing Amount of Child Support

Deviations from the Support Guidelines in High Income Cases

***In Re C.* – Deviation Case Involving NBA Player**
In Re C., 344 Ill.App. 3d 1137, 279 Ill. Dec. 674 (4th Dist. 2003).
It was not error to set child support at $8,000 monthly which was an amount significantly below the guidelines but far in excess of the shown needs when in 2001 the father earned $1.4 million, in 2002 his increased 10% to 20% and beginning November of 2003 he would begin earnings $4.5 million annually. The parties had calculated the father's net income in 2001 and the mother urged that guideline support at the time would have been $13,946 monthly while the father urged that his guideline support would have been $12,905 monthly. The appellate court also affirmed the result despite the argument that it may result in a windfall to the child by another relationship living with the mother. Additionally, the appellate court approved the requirement of the father to pay 100% of non-covered medical expenses despite the significant support award as well as 100% of the mother's attorney's fees.

***Garrett* – Income Averaging Approved and No Deviation Where Gross Average Income $214,000**
IRMO Garrett, 336 Ill.App.3d 1018 (5th Dist. 2003), GDR 03-35.
(1) Income averaging for three years approved despite having no broad fluctuation in annual incomes. (The appellate court found the husband's 1998 net income of $240,034, 1999 income of $237,897 and 2000 income of $164,836 "varied significantly from year to year.") (2) Child support set in accordance with statutory guidelines may exceed obligee's monthly household expenses because child's entitlement to child support is not limited to child's needs.

***Ackerley* – A Primer on Support Modification and Proper Determination of Net Income in Cases where Issue is Bonus, How to Handle FICA, etc.**
IRMO Ackerley, 333 Ill.App.3d 382 (2d Dist. 2002)
Ackerley reads as a primer on the law as to calculation of support in complex cases. It holds: 1) Monies received in excess of base pay but not explicitly characterized as bonus funds was in actuality a bonus. 2) Once high income child support obligor has reached his maximum FICA obligation, he cannot continue deducting the percentage amount applicable for FICA. 3) Even if the amount of child support ordered to be paid is 90% of the mother's total budget, (with one child and live-in boyfriend contributing $530 per month) a child support increase to $3,000 per month was affirmed on the basis of the standard of living the child would have if the parents had remained married.

***Schmid v. Williams* – Determine Post-Decree Support Based upon Exemptions Actually Used**
IDPA Ex Rel. Schmid v. Williams, 336 Ill.App.3d 553 (4th Dist. 2003), GDR 03-23.
When calculating net income, the court should examine the obligor's exemption withholding status at the time modification is sought, rather than at the time of the original judgment. Note, however, that this case

should be considered in conjunction with case law requiring consideration of the tax impact of a potential new spouse – which may be quite difficult to determine. Remember, new spouse's additional income will increase overall tax burden.

***Worrall* – Per Diem Expenses May be Deducted in Determining Support if Payor Maintains Burden of Proof that Reimbursements Not for Economic Gain**

IRMO Worrall, 334 Ill.App. 3d 550 (2d Dist. 2002)

In determining that the father's net income per Section 505 did not include certain *per diem* expenses the trial court erred. The father was a truck driver whose compensation consisted of his base pay plus an amount designated as *per diem*, which was designed to cover expenses for meals and lodging while on the road. *Worrall* stated, "It is important to recognize that *Crossland* did not definitively reach the question of whether amounts designated as "per diem" should be included in income for purposes of calculating child support. It was unnecessary to do so because no part of the child support obligor's pay was designated as per diem." Viewing *Crossland* as a whole, the limited holding of the case is that a parent owing support may not reduce his or her net income by an amount representing per diem if his or her employer does not designate any portion of his pay as "per diem." The appellate court concluded, "We therefore conclude that per diem allowances for travel expenses *generally constitute income* for the purpose of calculating child support. This income, however, is subject to reduction *to the extent that the child support payer can prove that the per diem was used for actual travel expenses* and not for his or her economic gain."

***Sweet* – Imputing Income in Modification Proceedings Where Payor Starts His Own Business**

IRMO Sweet, 316 Ill.App.3d 101 (2d Dist. 2000), GDR 00-88

Where ex-husband in bad faith voluntarily left employment with an exterminating firm and became self-employed by starting his own business, trial court could properly impute income to him commensurate with his ability to earn and increase child support based upon the needs of the children.

Support Modification or Enforcement

***Waller* – Post-18 Support Until Graduation from High School Requires Compliance with §513 and 510(a) of the IMDMA**

IRMO Waller, 339 Ill.App.3d 743 (4th Dist. 2003), GDR 03-74.

Where the underlying support order only provided for support while the child was a minor (i.e., through the date of the child's 18th birthday), a post-judgment extension of child support to provide for support for an 18-year old until the child graduates from high school is a modification of support and requires compliance with IMDMA §510(a) (modification requiring a showing of a substantial change of circumstances) and §513(a)(2) (support for non-minor children and educational expenses). Language to note from the decision states, "In short, if the child has attained majority, the trial court must turn to §513 when deciding whether to award support for that 'nonminor child'."'

***Letsinger* – Payor's Discharge of Debt in Bankruptcy Proceedings Warranted Increase in Support**

IRMO Letsinger, 321 Ill.App.3d 961 (2nd Dist.2001), GDR 01-37

Child support payor's discharge in bankruptcy, which caused debt burden to shift to child support recipient,

was a substantial change in circumstances warranting an increase in child support.

***Seitzinger* – Error to Order Custodial Parent to Maintain Health Insurance Without Contribution by Father**

IRMO Seitzinger, 333 Ill.App. 3d 103 (4th Dist., 2002)

The appellate court found that the trial court erred when it ordered *the custodial parent* to provide insurance. The appellate court commented that under Section 505.2 of the IMDMA, the noncustodial parent is required to provide a contribution to the cost and that therefore the trial court should have ordered the father to contribute half the cost of health insurance of the child.

***Osborne* – Provision for Life Insurance Did Not Terminate on the Emancipation of the Children**

IRMO Osborne, 327 Ill.App.3d 249 (3rd Dist. 2002), GDR 02-13

Osborne presents a learning opportunity regarding sloppy MSA language. *Osborne* ruled that the MSA must specifically refer to life insurance policies as being tied to child support obligation to terminate obligor's payment of premiums upon emancipation of the children. In this case the marital settlement agreement merely provided that the husband was to pay the premiums on six life insurance policies that named the his wife as the irrevocable beneficiary. The court denied the former husband's post-emancipation petition to terminate his obligation to provide life insurance.

Comment: This case involved a poorly drafted MSA that did not reflect the intent of the parties. §510(d) provides that child support does not terminate on the death of the parent providing support, "unless otherwise agreed in writing or expressly provided in a judgment." If the life insurance is provided in a MSA to secure payment of child support, the MSA should also provide that should there be compliance with the obligation to maintain life insurance, support terminates on death of the payor. Case law authorizes a party to provide life insurance to secure payment of support: *In re Janssen*, 292 Ill.App.3d 219 (4th Dist. 1997). But keep in mind that current case law is mixed on the issue of life insurance to secure maintenance.

Enforcement of Support:

***Grams* – Failure to Pay Amounts Withheld — $100 per day Penalty Based on Each Missed Payment**

Grams v. Autozone, Inc., 319 Ill.App. 3d 567 (3d Dist. 2001), GDR 01-27

Employer is subject to penalty of $100 per day for each day each child support payment is mailed late to payee. (The first six checks were mailed late to Mary as follows: first check, 69 days late, second check, 55 days late, third check 41 days late, fourth check, 27 days late, fifth check, 13 days late, sixth check, 2 days late. Thus the sum total of all days late for all pay periods was 207 days. Pursuant to 750 ILCS 28/35 which penalizes the employer $100 per day for late payments, the trial court fined Autozone $20,700 and the appellate court affirmed.) Keep in mind the importance of serving the withholding notice properly if one is to seek penalties of $100 per day.

***Murphy* – Arrearages Enforcement Via Attachment of Military Retirement Pay**

Murphy v. Wronke, 338 Ill.App.3d 1095 (4th Dist. 2003), GDR 03-65.

Public policy in Illinois ensures that child support judgments are enforced by all available means; thus, military retirement benefits may be turned over to satisfy an arrearage in child support. The issue was

whether 735 ILCS 5/12-1006, which exempts retirement plans from judgment enforcement, should prevail over the IMDMA §505 provision making retirement income a child support source. The *Murphy* court cited *In re Support of Matt*, 105 Ill.2d 330 (1985), which allowed income from a testamentary trust to be reached for child support.

***Thomas* – Second District Misguidedly Rules that Support Arrearage QDROs Are Limited to Amount of Benefits in Existence at Time of Original Judgment**

IRMO Thomas, 339 Ill.App.3d 214 (2d Dist. 2003), GDR 03-48.

This case went to hearing in 2002 and the support payor's 1984 income was pertinent to establishing an arrearage in child support ($650 per month or 35% of payor's net income – whichever was greater), and the 1984 income tax returns were not available, the trial court abused its discretion in refusing to consider the figures for the obligor's 1984 income based upon the Social Security Administration records. Child support arrearages may be enforced through the entry of a Qualified Domestic Relations Order (QDRO). However, the appellate court incorrectly held that the funds per the child support QDRO limited the amount of benefits in existence at the time of the original judgment. The appellate court did this based upon its mistaken reading of *Smithberg v. Illinois Municipal Retirement Fund*, 192 Ill. 2d 291, 303 (2000), when it commented that, "However, the value of the assignment should not exceed the value of the retirement accounts at the time of the marriage dissolution because only that 'beneficial interest was acquired during the marriage.'" *Smithberg* was a case in which the Supreme Court commented that based upon numerous cases, etc., there is no question that pension benefits (even those acquired under the Illinois Pension Code) are marital property to the extent that the "beneficial interest" was acquired during the marriage. It was a case which applied equitable principles so as to allow the first ex-wife to receive the death benefits she was ordered to have received under the terms of the divorce judgment.

Maintenance Cases

Initial Awards

***Reynard* – Maintenance Award of 20% of Net for 10 Years Which Did Not Equalize Incomes Affirmed Despite 33 Year Marriage**

IRMO Reynard, 344 Ill.App. 3d 785 (4th Dist. 2003), GDR 04-25.

The appellate court affirmed a maintenance award to wife of $1,600 monthly for ten years in a case involving a 33 year marriage. The wife's request for $3,750 monthly maintenance, purportedly to equalize parties' incomes, would adversely affect husband's ability to meet his own needs. The wife received 52% of the marital assets valued at $346,495. The husband's monthly net income from all sources, including interest and dividend payments per his affidavit was $7,973.

The language of the majority that could easily be taken out of context of a decision simply affirming the award as not being an abuse of discretion states:

> Mary Anne argues she is entitled to a maintenance award that equalizes the parties' net disposable incomes. Neither the Dissolution Act nor Illinois case law *requires* the equalization of incomes. 750 ILCS 5/504 (West 2000); *In re Marriage of Claydon*, 306 Ill.

> App. 3d 895, 902 (1999). "While the touchstone of proper apportionment is whether the division is *equitable* in nature, a just division does not require mathematical equality, given the range of factors to be considered by the trial court." *Koberlein*, 281 Ill. App. 3d at 887 ***
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> Equalization of the parties' incomes may be appropriate in some cases. Marriage is a moral and financial partnership of coequals. *In re Marriage of Hart*, 194 Ill. App. 3d 839, 853, 551 N.E.2d 737, 745 (1990) (Steigmann, J., specially concurring). It is inequitable upon dissolution to saddle a party with the burden of her reduced earning potential and to allow the other party to continue in the advantageous position he reached through their joint efforts. *Hart*, 194 Ill. App. 3d at 853 (Steigmann, J., specially concurring).
>
> Despite Mary Anne's significant sacrifices and contributions, we cannot say the trial court abused its discretion by awarding Mary Anne maintenance in the amount of $1,600 per month. The facts of this case do not rise to the level necessary to equalize the parties' net disposable incomes.

But note the dissent and the specially concurring opinion. The question the appellate court faced was whether the case presented an abuse of discretion. So, the majority was that this case did not present an abuse of discretion. But the dissent point out:

> I would reverse the trial court's award of maintenance as an abuse of discretion. Mary Anne was clearly entitled to additional maintenance. She contributed and sacrificed 33 years of her life as wife, mother, and campaign worker. She now has a much lower present and future earning capacity, unmet needs, greater age, lesser physical and emotional capabilities, and lowered standard of living. Moreover, she has clearly made a good-faith effort to support herself. ***
>
> Although Illinois law does not require an equalization of net disposable income in large-income cases (*Claydon*, 306 Ill. App. 3d at 902), the needs of the parties must still be met where possible. While this couple did not live an extravagant lifestyle so they could afford to send their children to college, they enjoyed substantial income, which should not be retained in large part by Charles, especially where, here, it was because of Mary Anne's sacrifices and significant contributions to the family during the parties' long marriage that Charles is able to have a greater earning capacity than does Mary Anne. As the majority points out "[i]t is inequitable upon dissolution to saddle a party with the burden of her reduced earning potential and to allow the other party to continue in the advantageous position he reached through their joint efforts" (slip op. at 11), and that is what the trial court did in this case.

<u>Permanent Maintenance with Factors Favoring Award</u>:

Long Term Marriages Cases:

***Keip* – Permanent Maintenance Award Should Have Been Ordered in 22 Year Marriage Case with Significant Income Disparity and Other Factors Favoring Long Term Award**
IRMO Keip, 332 Ill.App. 3d 876 (5th Dist. 2002)
In 22 year marriage case in which there were four children (two minor children) with the husband earning a gross income of $98,000 and the wife earning a net income of $14,568, it was error to award maintenance for one year with no review. The appellate court required maintenance to be in the amount of 10% of the husband's net income (doubling the amount) and requiring the maintenance award to be permanent. The marital estate had a negative net worth.

***Drury* – Maintenance - Permanent Maintenance where 29 year Marriage with Four Children**
IRMO Drury, 317 Ill.App.3d 201 (4th Dist. 2000) GDR 01-1
Where wife was earning $30,000 and husband was earning $77,000, trial court erred in awarding maintenance for three years. Appellate court opined that case law favored an award of permanent maintenance after reviewing the significant factors: 1) the significant disparity in the present and future earning capacities of the parties; 2) Lawrence had the opportunity to continue and advance his career during the marriage because of Phyllis' contributions to the family; (3) Phyllis will not be able to enjoy a standard of living similar to the one she enjoyed during the marriage; 4) she will be forced to sell her limited assets to meet her needs; 5) Lawrence is able to contribute to Phyllis' needs while still meeting his own; and 6) the 29-year marriage was of significant duration.

Shorter Term Marriages:

***Mayhall* – Despite 14 Year Long Marriage, No Error in Awarding Permanent Maintenance**
IRMO Mayhall, 311 Ill.App.3d 765 (4th Dist., 2000), GDR 00-18
The case stated, "In the present case, we cannot say it was improper to place the burden of proof on Edward to show that a substantial change of circumstances has occurred in order to terminate or reduce maintenance. Tammy has incentive to improve her economic situation even without a limited period of maintenance." Quoted with approval in *Drury*.

***Gattone* – Six Years Maintenance Despite Four Year Marriage and Significantly Disproportionate Property Distribution**
In Re Gattone, 317 Ill.App.3d 346 (2d Dist. 2000), GDR 01-11
Despite a four year marriage, the trial court did not abuse its discretion by ordering maintenance for six years at $1,000 per year and distributing estate 74%/26% favoring wife, where wife gave up her job in Wisconsin at beginning of the marriage and husband had non-marital estate of $800,000.

Finally, per Section 508(b), fees must be reasonable and there must be a finding that non-compliance was without compelling cause or justification.

Modification and Enforcement

Modification

***Turrell* – Petitioning Party Has Burden of Proof: Maintenance Not Reduced**

IRMO Turrell, 335 Ill.App. 3d 297 (2d Dist. 2002)

The party petitioning for modification of maintenance has the burden of proof. The trial court abused its discretion on the obligor's petition to reduce maintenance in allowing a reduction based upon its finding that the mother failed to offer evidence to support her claim that her Lyme's disease prohibited her from being employed. The appellate court held that the obligor alone bore the burden of showing that a substantial change in circumstances justified reducing maintenance. The recipient did not have the burden to prove she was entitled to continued maintenance.

The evidence in this regard focused on the former wife's health:

> The marital settlement agreement incorporated into the dissolution judgment acknowledged that she is afflicted with Lyme disease and was receiving Social Security disability payments. The agreement provided that the issue of maintenance was reviewable after five years and that "[t]he payment of additional maintenance *** shall be dependent upon the Wife's employability, health, and needs at that time." At the hearing, Virginia testified that she continues to receive disability and is unable to work as a nurse because she experiences short-term memory loss and fatigue. Dr. Jones also testified that Virginia is unable to work because of her symptoms. Dr. Jones acknowledged, however, that he is not Virginia's treating physician. Virginia further testified that she home-schools Sam due to his cognitive deficits and other symptoms caused by the Lyme disease.
>
> After hearing the evidence, the trial court found there was no medical evidence to support Virginia's claim that she is unable to work. In so doing, the court improperly placed the burden of proof on Virginia and erred as a matter of law. Graham petitioned the court to terminate his maintenance obligation. As the party seeking the modification, he had the burden of demonstrating a substantial change in circumstances. In re Marriage of Neuman, 295 Ill. App. 3d 212, 214 (1998). Thus, he was required to show a substantial change in circumstances that would justify reducing his maintenance obligation. Contrary to the trial court's ruling, Virginia did not have the burden of proving that she remained physically unable to work.
>
> Based on our review of the record, Graham did not meet his burden. He did not establish a substantial change in Virginia's health that would enable her to return to work, nor did he establish a substantial change in his own financial circumstances that would support reducing his maintenance obligation. We hold, therefore, that the reduction in maintenance was an abuse of discretion. Likewise, the two-year limit on Graham's maintenance obligation cannot stand. There is no guarantee that Virginia's condition will have improved by end of the two-year period. Certainly a review of the maintenance issue would be appropriate. Upon remand the court may in its discretion determine if and when such a review should take place.

The case also has very interesting language regarding the construction of contracts regarding medical expenses:

> In our view, the plain and unambiguous meaning of the term "medical expense" as used in the

parties' agreement encompasses only those expenses that are reasonable and necessary. Perhaps there might be a situation in which a party to a dissolution would agree to pay for treatment that is not considered reasonable or necessary by the medical community. Such a situation would be the exception, however, rather than the rule and should be specified in the settlement agreement. In the case before us, the language of the agreement does not indicate that the parties agreed that Graham would pay for such treatment.

Our research has not revealed any Illinois authority that squarely addresses this issue. Our holding finds support, though, in Goldberg v. Goldberg, 30 Ill. App. 3d 769 (1975). In that case, the court considered whether the husband was responsible for the payment of certain medical bills incurred by the wife. The parties' dissolution decree stated in relevant part that the husband agreed to pay the wife's extraordinary medical expenses exceeding $50, except for psychiatric or psychologic expenses. The court held that the husband was obligated to pay the expenses at issue because "[a]ll of the bills received into evidence were for amounts above $50 and there is no indication in the record that such expenses were unreasonable or unnecessary." (Emphasis added.) *Goldberg*, 30 Ill. App. 3d at 773. Virginia cites the same sentence from Goldberg and argues that it supports her position because all of Sam's expenses were reasonable and necessary. Apparently, Virginia believes that requiring her to show that Sam's expenses were "for a method of treatment which is recognized by the medical community for a recognized medical need" is different from requiring her to show that the expenses were reasonable and necessary. We disagree.

The court's requirement, while more specific than the term "reasonable and necessary," does not insert a new condition into the agreement. The question of whether an expense was for treatment recognized by the medical community goes to the reasonableness of the expense. Similarly, requiring Virginia to show that the expense was for a "recognized medical need" is simply another way of saying that she must show that the expense was necessary. Consequently, we hold that the trial court did not err in requiring Virginia to demonstrate that the expenses she incurred for Sam's treatment were "for a method of treatment which is recognized by the medical community for a recognized medical need."

***Culp* – Trial Court Properly Modified Rehabilitative Maintenance Award to Provide for Permanent Maintenance 14x Amount of Original Award**

IRMO Culp, 341 Ill.App. 3d 390 (4th Dist. 2003), GDR 03-76.

The trial court was affirmed when post-judgment maintenance review in which *$100 per week rehabilitative maintenance resulted in $1,400 per month permanent maintenance* because wife could not support herself commensurate with the standard of living established during the marriage despite having two jobs. §510(a-5) sets forth standards to use in reviewing or modifying maintenance. The discussion of the case law as to the ability of the trial court to change the character of the award is significant.

The husband relied upon *IRMO Cantrell*, 314 Ill.App. 3d 623 (2nd Dist. 2000) – a relief beyond the pleadings type case. In *Cantrell*, the wife was awarded rehabilitative maintenance to be reviewed after four years. At the scheduled maintenance review, the trial court extended maintenance for two years, subject to review at the end of that time. At the second review hearing (after two years had elapsed), the trial court awarded the recipient permanent maintenance despite the fact that she had merely requested a continuation of

rehabilitative maintenance. The Second District *Cantrell* court had vacated the permanent maintenance award, holding (along with other reasons) the trial court erred in exceeding the relief requested in the former wife's pleadings. *Culp* instructs:

> When trial courts set 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. For example, if time-limited maintenance--whether temporary or rehabilitative--will continue only if the recipient shows good faith in seeking education or employment or proves the need for continued maintenance, then the parties should be so advised. Neither party should be required to guess what the court will consider at the review hearing. If pleadings are required, that should be noted as well. In this case, the parties agreed no further pleadings would be necessary.

Note the later *IRMO Culp*, 399 Ill. App. 3d 542 (4th Dist., 2010) decision involved the issue of whether the QILDRO conformed to the MSA language.

Termination:

***Snow* – Retroactivity of Maintenance Termination due to Non-Marital Cohabitation and the *Snow* Factors**
IRMO Snow, 322 Ill.App. 3d 953 (3d Dist.2001), GDR 01-47
Maintenance termination on account of recipient's cohabitation should be retroactive to the time the conjugal cohabitation began and not when the petition to terminate maintenance is filed.

Comment: This case allows self-help where maintenance is not being withheld; that is, terminating maintenance if there is a strong belief as to cohabitation, but such self-help may be dangerous.

Custody

Initial or Post-Decree Alienation Type Cases

***Spent* – Alienation a Factor in Custody Modification Award to Father and What Constitutes Custody Judgment Per §610(a)**
IRMO Spent, 342 Ill.App. 3d 643 (4th Dist. 2003), GDR 03-105.
An award of a petition to terminate joint custody, or a motion to modify custody, which is later denied by the court, is not a custody judgment triggering the two-year non-modification provision in §610(a) of the Illinois Marriage and Dissolution of Marriage Act. In this case the mother's denial of father's visitation, denial of telephone contact, and making disparaging remarks about the father in child's presence were bases to transfer custody to father. This case conflicts with *Ehr v. Ehr*, 77 Ill.App.3d 540 (2d Dist. 1979): "It has been generally held that the custody of the child should not be awarded because of one parent's conduct in regard to the court orders or visitation rights." But other cases contrary to this general rule include:

IRMO Ricketts, (2nd Dist. 2002) GDR 02-47: A child custody transfer was warranted where evidence established that the mother failed to foster a close and continuing relationship between the child and the father by repeatedly interfering with the father's visitation schedule, and the mother did not facilitate a calm and positive environment for the child during visitation exchanges, and the mother's making derogatory remarks concerning the father and his family in the child's presence.

IRMO Divelbiss: 308 Ill.App.3d 198 (2d Dist. 1999) GDR 99-100: The custodial mother's failure to facilitate and encourage the relationship between father and child, denying visitations to father, filing of unsubstantiated reports of abuse to DCFS with the assistance of her current husband, and involvement of the child in "staging" volatile visitation exchanges warranted a transfer of custody under §610(b) of the IMDMA.

IRMO Kramer: 211 Ill.2d 401 (1st Dist., 4th Div. 1991) GDR 91-40: Child custody may be transferred when the custodial parent's conduct may be viewed as a comprehensive scheme to deny the non-custodial parent any type of relationship with the child and the transfer of custody is in the best interest of the child.

IRMO Smith: 170 Ill.App.3d 681 (5th Dist. 1988) GDR 88-49: Custody of the child was transferred from mother to father when mother did not allow visitation.

***Ricketts* – Interference with Visitation — Alienated Child Results in Custody Transfer**:
IRMO Ricketts, 329 Ill.App.3d 173(2d Dist. 2002), GDR 02-47
In this case, discussed below regarding the cross-petitions to modify, a child custody transfer was warranted where evidence established the mother failed to foster a close and continuing relationship between the child and the mother repeatedly interfering with the father's visitation schedule. The mother did not facilitate a calm and positive environment for the child at the point of transfer for visitation; and the mother made derogatory remarks concerning the father and his family in the child's presence.

Comment: Dr. Richard Gardner had advanced the theory that often high conflict custody disputes where a child wants to have little or nothing to do with the other parent – or cases of sexual abuse allegations brought during divorce proceedings – are the result of what he coiled "parental alienation syndrome." One of Gardner's conclusions was that the child is generally better off with the non-alienating parent, even where the other parent has been the primary caretaker of the child. More recently, mental health professionals focus is on the child and not only on the actions of the other parent. Thus, in such cases, mental health professionals will use the term "the alienated child" but avoid any reference to "syndrome."

***Seitzinger* – Joint Custody Award (Decision Making) Affirmed on Appeal Despite Mother's Contention that Parties Could not Cooperate / Conditioning Custody on Residence in *Two Counties* Improper**
IRMO Seitzinger, 333 Ill.App. 3d 103 (4th Dist., 2002)
Seitzinger is an important case addressing sole versus joint custody. It has been added to my spreadsheet reviewing the issue of joint versus sole custody awards and one of the few cases where joint custody was the result of appeal, i.e., an affirmation of the trial court's award in this case.

Also, the appellate court ruled that the trial court improperly conditioned award of primary physical custody on mother's remaining in two specified counties. In addressing the restriction on the custodial parent's ability to move with the children, the appellate court stated, "A trial court has broad powers in custody matters, including conditioning custody upon a custodian living within a reasonable distance from the noncustodial parent so visitation may be facilitated." [Citing *Manuele* — the other case which upheld a joint custody award. In *Manuele* the appellate court found that the limitation to one county was unreasonably restrictive.] *Seitzinger* stated:, *"Here, the restriction ... is arbitrary if the purpose of the restriction is ease of visitation. Geographical location is not, per se, determinative of ease of visitation. Ease of transportation may be just as important*. Other counties located near Roger's home in Ashland might prove just as easy to get to as would a location in the farthest corner of Sangamon or Cass County. More important, however, the trial court erroneously conditioned not only Kimberly's primary physical custody of Sabrina on her remaining in Sangamon or Cass County *but also the continuation of joint custody*. ... The custody status of a minor child should not change automatically with the removal of a parent from his or her present location. Instead, the best interest of the child should be considered when a child of custody is anticipated." Accordingly, the appellate court reversed the trial court's order automatically changing the primary physical custody as well as terminating joint custody since neither provision allowed the trial court to consider the child's best interest.

***Deem* – Trial Court Should Not Sole Provide for Custody to One Parent During School Year and to Other During Summer Where Children are Young**

IRMO Deem, 328 Ill.App.3d 453 (4th Dist. 2002)

Trial court improperly awarded the wife sole custody during the school year and the husband custody during the summer. Trial court therefore also erred in award of child support to the husband during his summer parenting time.

Contrast, *IRMO Dullard*, 176 Ill.App.3d 817, (1988) where the court upheld such an arrangement. The case states, "alternating custodial arrangements have been looked upon with disfavor unless the child is mature enough to cope with the custodial arrangement and visitation is difficult to organize because of the child's activities." Case cited cases such as *Oros* and *Swanson* disapproving of shifting custody between parents. Concurring opinion pointed out that language was misguided but the time allocation was not.

***Sopher* – Mental and Physical Health of Parties to Custody Proceedings — Low IQ of One Parent vs. Emotional Maturity of Other Parent**

IRMO Stopher, 328 Ill.App.3d 1037 (4th Dist. 2002)

Award of custody to a mother who had an IQ of 67 (a reading level of second grande, etc.) was affirmed when evidence showed that she could care for the child but the father was compulsive and impatient. Trial court properly awarded custody to mother despite the recommendation of the custody evaluator that custody should be awarded to the father due to his opinion that because of the mother's cognitive limitations, she would be unable to meet the child's developmental needs as the son grew older.

Modification of Custody Including Non-Alienation Cases

***Ricketts* – Joint Custody Modification When Cross-Petitions for Sole Custody**

IRMO Ricketts, 329 Ill.App.3d 173 (2d Dist. 2002), GDR 02-47
When each party to a joint parenting agreement files a modification petition seeking sole custody, the parties, in effect, agree to a termination of the joint custody and per section 610 of the IMDMA. So the court may make the custody modification on the basis of the best interest rather than a proof of changed circumstances by clear and convincing evidence.

> ***Comment***: A good bookend decision to *Ricketts* is 2011 *IRMO Smithson* where the Fourth District appellate court held that the admission in testimony that the JPA was not working was not a stipulation such that the court could bypass the language of section 610(b), i.e., substantial change in circumstances to be found by clear and convincing evidence and necessity of changing custody per best interest.

***Davis* – Dismissing Petition to Modify Custody was Error When "Change of Circumstances" May Include Situation Which Creates Instability for the Child if Original Parenting Plan Followed**
IRMO Davis, 341 Ill.App.3d 356 (3d Dist. 2003), GDR 03-78.
The JPA was entered when the child was three years old. It provided each parent equal parenting time, was modifiable based on a change in circumstances when the parties could not agree on which school the child would attend when she entered kindergarten. Regarding the relatively vague assertion that there was a substantial change of circumstances, the appellate court stated, "In other cases, *the inherent instability of the custody agreement creates a situation where modification is in the child's best interests, even if it is difficult to find a precise change in circumstances*." So, this is a case where there really wasn't a change in circumstances even though this should have been necessary for a custody modification. *Davis* speaks to the importance of good drafting of the original JPA in cases of joint physical custody involving young children.

What is Custody Judgment Per Section 610(a):

***Marsh* – Timing for Custody Modification Re Permanent Custody Order versus Final and Appealable Judgment**
IRMO Marsh, 343 Ill.App. 3d 1235 (4th Dist. 2003)
§610's two year requirement on petitions to modify custody absent affidavits showing serious endangerment starts to run when the trial court enters a permanent custody order, regardless of whether the order is entered at the same time as the final judgment or earlier in the divorce proceedings. Dictum: "We strongly urge trial courts to notify the parties on the record when a child custody determination is intended to be a permanent custody decision."

***Spent* – Denial of Petition to Modify Not a Custody Judgment Per §610(a)**
IRMO Spent, 342 Ill.App. 3d 643 (4th Dist. 2003), GDR 03-105.
An award of a petition to terminate joint custody, or a motion to modify custody, which is later denied by the court, is not a custody judgment triggering the two-year non-modification provision in §610(a) of the Illinois Marriage and Dissolution of Marriage Act.

Visitation:

***Minix* – Religious Education -- Party has Right to Take Children to Church of Choice Absent Showing of Harm**

IRMO Minix, 344 Ill.App. 3d 801 (4th Dist. 2003)

A court will not prohibit a non-custodial parent from taking a child to church, or teaching the child religious practices, when neither evidence of religious doctrinal differences nor harm to the child is presented. The case states, "Consistent with our decision in *Tisckos/Stewart* and other relevant authority, we hold that section 608 of the Dissolution Act permits the custodial parent to control the child's religious upbringing absent proof that involvement in any other religion is not harmful to the child. Trial courts have the authority to set forth accommodations during lawful visitation periods with a showing that such accommodations are necessary to eliminate or prevent any harm to the child and are in the child's best interest. Absent proof of harm or that attendance at religious services with the noncustodial parent somehow interferes with the custodial parent's selection of the child's religion, the noncustodial parent is entitled to his or her visitation period without interference from the custodial parent despite the authority granted to the custodian in section 608 of the Dissolution Act."

***Mitchell* – Ordering Non-Custodial Parent to Exercise Visitation**

IRMO Mitchell, 319 Ill.App. 3d 17 (2d Dist. 2001), GDR 01-30

Non-custodial parent cannot be ordered to exercise visitation.

Visitation by Non-Parents Including Grandparent and Step-Parent Visitation:

***Booth* – Step-Parent Visitation Limited to Circumstances in §607(b)(1.5)**

IRMO Booth, 325 Ill.App.3d 92 (3rd Dist. 2001), GDR 01-34

Grant of visitation with child to stepparent may be vacated when the facts of the case do not meet the conditions for visitation prescribed by the stepparent visitation statute, §607(b)(1.5) of the IMDMA. Conjunctive: 12 years old; 5 yrs. residence; parent deceased or disabled; child's wishes; providing care, etc., prior to petition.

***Sullivan* – Test for Determining Whether Father May Petition for Grandparent Visitation During Military Tour of Duty is Special Circumstance Test**

IRMO Sullivan, 342 Ill.App. 3d 560 (2d Dist. 2003). No GDR.

Where parent who is in the military petitions to permit his family to have continued visitation with his son during his tour of duty, the trial court should not have had his petition dismissed under 2-619(a)(1) of the Code (subject matter jurisdiction). Because the provisions §607(b)(1) and (b)(3) of the IMDMA were determined unconstitutional (grandparent visitation provisions) in *Wickham v. Byrne*, the law returns to how it was before the enactment of the statute. Illinois law before the enactment of the grandparent visitation provisions would have allowed the father to receive the relief that he was seeking, see *Solomon v. Solomon*, 319 Ill.App. 618, 621 (a case involving grandparent visitation under special circumstances in World War II, consistent with the goals of the Soldier's and Sailors' Civil Relief Act of 1940). The court distinguished *Wickham* because it involved the grandparents seeking grandparent visitation within their own capacity. Thus, the court stated, “As such, unlike *Wickham*, this case does not involve a judge deciding what is in the best interest of a child between a fit parent and a non-parent. Instead, this case involves the trial court's weighing the wishes of two fit parents to determine what is in the child's best interest.”

*** However, note that the Illinois Supreme Court has implicitly reversed this case in *M.M.D.*
Are There Any Common Law Rights to Grandparent Visitation?

***Wickham* – Previous Grandparent Visitation Statute Was Determined to be Unconstitutional**
Wickham v. Byrne, 199 Ill.2d 309 (2002), GDR 02-45
Previous IMDMA Sections 607(b)(1) and 607(b)(3) regarding "grandparent visitation" were facially unconstitutional because they unreasonably interfered with parents' fundamental liberty interests to raise the children.

UCCJEA:

***Kneitz* – Compliance with Void Out of State Order No Excuse for Failure to Follow Order of Illinois Court where Illinois was Court with CEJ under UCCJA**
IRMO Kneitz, 341 Ill.App. 3d 299 (2d Dist. 2003) (Trial Judge, Judge Condon), GDR 03-83.
Party was appropriately held in contempt for complying with an out of state order which was void because it did not adhere to the terms of the UCCJA, where Illinois had continuing exclusive jurisdiction because one of the parties continued to reside in Illinois. The court's purge of allowing visitation (despite the same being contrary to the terms of the void our of state order) was proper. An interesting quote stated, "What she may not do is unilaterally select another forum where she deems she will have a better chance of success."

Removal:

***Melton II* – Removal and Contempt**
IRPO Melton (Melton II), 321 Ill.App.3d 823(1st Dist., 2001), GDR 01-57
Recall that *Melton I* was a case that now has been superceded by the Illinois Supreme Court's 2013 case. *Melton I* is *In re Parentage of Melton*, 314 Ill. App. 3d 476, 480 (1st Dist. 2000) that had ruled that "the factors for determining visitation privileges in section 607(a) *** guide visitation determinations under the Parentage Act.") The appellate court commented in Melton II that in the original Melton appellate court decision:

> We held that the court lacked authority to enjoin Lynn from removing Bremen from the state. Before the mandate returned all jurisdiction to the trial court, Brace petitioned for a rule to show cause and for termination of daycare payments. Brace alleged that Lynn and Bremen moved out of state and Lynn had not returned Bremen for scheduled visitation. He also alleged that since she moved she provided no proof of daycare expenses.

Melton II then held that the mother's move out of state permitted by prior court ruling did not also grant her the right to violate father's visitation schedule.

Appellate Court Parentage/Removal Case Suggests the Difficult Issues Which Will Likely be Addressed in Future Case Law

Melton III (Harbour v. Melton), 333 Ill.App. 3d 124 (4th Dist. 2002)
This parentage removal case contains a good review of case law including *S.L.*, *Adams*, *Melton*, *R.M.F*, *M.M.W*. One argument made by the non-custodial parent was the argument that it would be improper for her to have to meet the statutory burden set forth in Section 610(a) to modify custody within two years. The appellate court commented, "Section 16 of the Illinois Parentage Act states that modification of custody or visitation 'shall be in accordance with the relevant factors specified' in the Marriage Act. Applying the narrow statutory construction analysis previously utilized in these types of cases, the "factors" are set out in Section 610(b) of the Marriage Act. We do not decide that question." The appellate court commented that there was no issue as to several items including whether the removal endangered the child's mental or emotional health or whether Section 610(a) was incorporated within the Parentage Act. The non-custodial mother raised the issue of discrimination toward illegitimate children. However, she failed to serve notice on the Attorney General of her intent to raise an issue of the constitutionality of a statute as required by SCR 19. It appears that if the court were to rule that Section 610(a) to custody modification proceedings occasioned by the removal would be applicable, that the prior case law as to constitutionality may be in error. *RMF* had suggested that illegitimate children are afforded the same procedural rights as legitimate children even though there was a different route traveled to access those rights. I had previously commented that this is not the case if Section 610(a) would apply to custody modification proceedings brought within two years.

Intrastate Removal

***McGillicuddy* – Joint Parenting Agreement May Provide Differing Standards from §610 if Residential Parent Moves from Area**
IRMO McGillicuddy, 315 Ill.App.3d 939 (3d Dist. 2000), GDR 00-91
Where the joint parenting agreement provided for reconsideration of the residential parent if he or she moved out of county with the children, the mother waived the presumption in favor of her that would otherwise have been implied under IMDMA 610 after she made such a move.

Comment: Case was based upon 610(b) (modification two years after custody judgment) and it addressed the burden of proof — clear and convincing evidence standard. Note this portion of the statute also uses the word "necessary" to serve the best interest of the children.

***Means* – Intrastate Removal of the Children Not Affected by JPA**
IRMO Means, 329 Ill.App.3d 392 (4th Dist. 2002) GDR 02-48
A joint parenting agreement which requires the parties to jointly decide what major issues concerning the children's "education, religious training and extraordinary healthcare" does not prohibit the custodian from removing the child intrastate.

COMMENT. *IRMO Findlay*, 296 Ill.App.3d 656 (2d Dist. 1998), GDR 98-65: The JPA stated that the parties "will jointly decide matters of substance regarding the children, including, without limitation intended, important questions of education, religion and elective medical care." The appellate court in *Findlay* ruled that the language of the JPA was ambiguous as to whether a proposed move with the children would be construed as a "matter of substance regarding the children." There was, however, no such broad language in *Means*.

IRMO Wycoff, 266 Ill.App.3d 408 (4th Dist. 1994), GDR 94-10: This was relied on by the mother in *Means*. It ruled: "It is not necessary for a custodial parent, or a parent with the primary physical custody of a child, to obtain permission from a court before moving to another location in Illinois."

IRMO Yndestad, 232 Ill.App.3d 1 (2d Dist. 1992), GDR 92-94: The JPA stated that the mother, the primary custodian, would continue to reside within a fifty mile radius from her present residence. Following the mother's petition to remove the child from Illinois, the appellate court concluded that "petitions to remove a child from Illinois are governed by section 609 * * * despite any provisions in a joint parenting agreement purporting to limit the right of removal."

IRMO Manuele, 107 Ill.App.3d 1090 (4th Dist. 1982): *Means* cited this case for the proposition that JPAs may impose reasonable limitations upon the custodian's choice of residences. In *Manuele* the trial court, in order to assure the father's visitation, required the mother to continue to reside in Sangamon County. The *Maneule* opinion ruled that protection of the father's rights of visitation would justify a reasonable residential restriction as a condition of the mother receiving custody of the children. However, Manuele also ruled that the limitations of the residence to Sangamon County was unreasonably restrictive and instructed the trial court, on remand, to reconsider this matter.

Paternity

***Dawson v. Smith* – DNA Test Proving Non-paternity Can Overcome Conclusiveness of a Voluntary Acknowledgment of Paternity**

People ex. Rel Dawson v. Smith, 343 Ill.App. 3d 208 (2d Dist. 2003). GDR 03-115.

A presumed father who signed voluntary acknowledgment of paternity may challenge the voluntary acknowledgment under §7(b)(5) of the Illinois Parentage Act of 1984 if subsequent DNA results establish non-parentage. In this case, Smith signed the voluntary acknowledgment two days after the child's birth. 4.5 years later, he requested DNA testing on himself and the child since he had doubts about the child's paternity because the child did not share his physical characteristics. The testing showed a 0% probability of Smith being the child's biological father. Later, Smith filed a verified amended complaint to establish non-paternity pursuant to §7(b-5) of the Act. The trial court dismissed the complaint finding that §5(b) of the Act renders a voluntary acknowledgment of paternity conclusive unless the acknowledgment is rescinded within 60 days under the process provided in §2 of the Vital Records Act (410 ILCS 535/12). Smith appealed and the Second District appellate court reversed and remanded.

*** Note: § 7(b-5) does not authorize an action to be brought absent DNA testing, nor does it provide for a mechanism compelling the mother and child to undergo DNA testing. Therefore, a presumed father who has proven his non-paternity through DNA testing may challenge the voluntary acknowledgment he had previously signed under §7(b-5) of the Act.

***JSA* – Married Party's Right to Parentage Testing**

J.S.A. v. M.H., 343 Ill.App. 3d 217 (3d Dist. 2003) GDR 03-120.

A party who is married has an absolute right to parentage testing pursuant to §7(b-5) the Illinois Parentage Act of 1984.

***Lipscome* – Tolling the Statute of Limitations in Parentage Cases**

Lipscome v. Wells, 326 Ill.App. 3d 760 (1st Dist. 2001)

It is a fraudulent act for a mother to falsely state in her complaint for paternity that the defendant is the father. This fraud will toll the application of the two year limitation of of the Code of Civil Procedure. §7(b-5) of the Illinois Parentage Act of 1984 allows for an action to declare the nonexistence of paternity after an adjudication of paternity if as a result of a DNA test the man is not the father of the child. But there must be DNA testing before such petition may be filed. The statute does not force the mother to have a DNA test.

***Kates* – Non-Existence of Paternity Proceedings Following Adjudication Requires Prior DNA Test Results**

IRMO Kates, 198 Ill.2d 156 (2001) GDR 02-11. (Illinois Supreme Court)

Before trial court can consider petition brought under Section 7(b-5) of the Illinois Parentage Act of 1984 (to declare the nonexistence of paternity after an adjudication and judgment of paternity), DNA test results disproving paternity must be obtained.

Comment: *Kates* shows the danger of acquiescing to parentage "adjudication" if there is any doubt. Keep in mind that an adjudication = voluntary acknowledgment of parentage.

§7(a)(4) vs. §8(a)(5): The statute of limitations period is set forth in §8(a)(4) which provides for the bringing of such a petition not more than six months after August 6, 1998 or more than two years after obtaining "actual knowledge of relevant facts." The statute states, "The 2-year period shall not apply to periods of time when the natural mother or the child refuses to submit to DNA tests." Key: Obtain test results disproving parentage either on consent or just with father and child.

***Wenzelman* – Visitation for Non-Marital Child Born During Marriage: Ruling that IMDMA §607(a) Applies Now Overruled by 2003 *IRPO J.W.* Supreme Court Decision**

Wenzelman v. Bennett, 322 Ill.App.3d 262 (3d Dist. 2001), GDR 01-42

IMDMA Section 607(a) which addresses visitation for a marital child, is also applicable to a nonmarital child and the father of a nonmarital child is entitled to a presumption of entitlement to reasonable visitation and thus the father does not have the burden of proving that visitation is in the child's best interest.

Comment: I had commented that:

> This case is contrary to strict construction type cases such as *RMF* and *Tysl* ruling that removal does not apply to parentage cases. Strict construction argument: Section 14 of the Parentage Act, states that the judgment "shall contain" or reserve a provision for child support. As to visitation, it states that the judgment "may contain provisions concerning the custody * * * and visitation privileges with the child."
>
> On the other hand, §607(a) of the IMDMA states that a parent not granted custody is entitled to "reasonable visitation rights." Case is contrary to *Gagnon* (228 Ill.App.3d 424 (4th Dist., 1997)) holding that in parentage proceedings visitation is a privilege and that therefore it is not necessary to prove serious endangerment to restrict visitation where no contact with the father for 8 years.

A good quote from the recent Illinois Supreme Court case on this point states:

> Initially, we observe that our appellate court has previously ruled inconsistently on this issue. Some cases have applied the best interests provisions set forth in section 602 of the Marriage Act, which lists several nonexclusive factors the court is to consider and weigh in making any custody determination. 750 ILCS 5/602(a) (West 2010). Other cases have applied the visitation provisions of section 607(a), which presumes visitation is in the best interests of the child absent evidence of serious endangerment. Compare:
>
> > *Wittendorf v. Worthington*, 2012 IL App (4th) 120525; *Department of Public Aid ex rel. Gagnon-Dix v. Gagnon*, 288 Ill. App. 3d 424, 428 (4th Dist. 1997) (finding that the reference in section 14(a)(1) of the Parentage Act to the Marriage Act was a reference to section 602 and did not incorporate section 607(a)), with
> >
> > *Jines v.* 335 Ill. App. 3d 1156, 1162 (5th Dist. 2002) (the plain language of the Parentage Act requires courts to use the standards for visitation outlined in section 607(a) of the Marriage Act); *In re Parentage of Melton*, 314 Ill. App. 3d 476, 480 (1st Dist. 2000) ("the factors for determining visitation privileges in section 607(a) *** guide visitation determinations under the Parentage Act"); *Wenzelman v. Bennett*, 322 Ill. App. 3d 262, 265 (2001) (where a prior parent-child relationship existed, a presumption existed in favor of the biological parent for visitation and parent was not required to prove visitation was in the child's best interests).

The Supreme Court then concluded, "To the extent that *Wenzelman*, *Jines* and *In re Parentage of Melton* contradict our conclusion, they are expressly overruled."

Domestic Violence

***Allison C.* – Definition of Dating Relationship under IDVA Not Including Single Date**
Allison C. v. David Westcott, 343 Ill.App. 3d 648, 278 Ill. Dec. 429 (2d Dist. 2003) (Trial judge was Judge Zopp)
A single date does not constitute a "dating relationship" because a dating relationship under the IDVA is an "intimate" relationship or a "serious courtship." This construction was based in part upon the fact that the IDVA serves a penal construction and, as such, it should be strictly construed in favor of the accused. The appellate court commented in reversing the trial court, "the relationship was brief and not exclusive."

***Creaser* – Emergency Order of Protection Should Not Have Granted Exclusive Possession of Marital Residence Based upon Conclusory Allegations**
Creaser v. Creaser, 342 Ill.App. 3d 215 (2d Dist. 2003). No GDR
The trial court should not have entered emergency order of protection including an award of exclusive possession of the marital residence because the IDVA requires consideration of:

> [T]he immediate danger of further abuse of petitioner by respondent, if petitioner chooses or had chosen to remain in the residence or household while respondent was given any prior notice or greater notice than was actually given of petitioner's efforts to obtain judicial relief, outweighs the hardships to respondent of an emergency order granting petitioner exclusive possession of the residence. 750 ILCS 60/217(a)(1)(ii)

The case stated:

> Thus, the court must consider both the hardship to the respondent and the danger of further abuse. This is not to say that a petitioner must meet some specific burden of showing that further abuse is likely. For instance, it would not necessarily be error for a court to issue an emergency order for exclusive possession of the residence solely on the basis of the petitioner's subjective impression that the respondent's state of mind made further abuse likely. The court is merely required to consider both the factors to be balanced, and therefore must have information relevant to both factors before it. In this case, the court made some inquiry into the potential hardship to respondent, but elicited no information relevant to the likelihood of further abuse. The petition itself was likewise devoid of such information except for the conclusory statement: 'Both parties have the right to occupancy; and, considering the risk of further abuse by Respondent interfering with the Petitioner's safe and peaceful occupancy, the balance of the hardships favors the Petitioner because of the following relevant factors: Availability, accessibility, cost, safety, adequacy, location and other characteristics of alternative housing for each party and any minors or other dependents'. This is a conclusion for the court, not petitioner.

An emergency sufficient to evict a person from a residence does not exist simply because there has been physical abuse in the past. It is noteworthy that, while the case was deemed moot, the appellate court published the decision under the public interest exception.

***Peck* – Outer Edges of What May Constitute Abuse (the Pool Stick Case)**
Peck v. Otten: 329 Ill.App. 3d 266 (3d Dist. 2002)
Breaking son's pool stick because son did not complete his homework and housework and where father had acted similarly on prior occasions when he came home late after drinking, constituted harassment and abuse under the IDVA.

The trial court erred in prohibiting the father from having contact with his son as a remedy. The trial court also erred in failing to provide for a termination date with respect to the OP. Note: Dissent.

***Flannery* – Standards Applying to Hearsay Allegations of Abuse in Proceedings under IDVA in Which Possession of Child is Sought / Corroboration of Abuse — Verbal Acts Accompanying Statements**
IRMO Flannery, 328 Ill.App.3d 602 (2d Dist. 2002)
(1) Section 8-2601 of the Code applies and Section 606(e) of the IMDMA does not apply to admissibility of hearsay statements of abuse in domestic violence proceedings where the relief sought is possession/visitation rather than legal custody. Thus, the trial court should have conducted a prior hearing to determine the reliability of the child's statements. (2) Verbal acts (child's physical conduct) cannot corroborate hearsay

statements of abuse, i.e., hearsay cannot corroborate hearsay under either the IDVA or Section 606(e) of the IMDMA.

IMDMA §606(e) provides that prior statements of abuse "shall be admissible in evidence in a hearing concerning custody or visitation with the child. No such statement, however, if uncorroborated and not subject to cross-examination shall be sufficient in itself to support a finding of abuse or neglect." Section 8-2601 of the Code addresses hearsay statements of sexual abuse for children under age 13.

Thus, note that the Code provisions address sexual abuse while the IMDMA provides address any sort of abuse "within the meaning of the Abused and Neglected Child Reporting Act" or within the meaning of the Juvenile Court Act."

***Scroggins* – Party Entitled to SOJ as of Right after Issuance of Emergency Orders in DV Proceedings**
IRMO Scroggins, 327 Ill.App.3d 333 (4th Dist. 2002), GDR 02-24
The trial court erred by not granting motion for substitution of judge as of right, even when filed the day before scheduled hearing on plenary order of protection, because motion was timely filed and made before hearing and before judge had ruled on any substantial issue in the case (court on its own motion had extended EOP after the filing of an appearance by husband's attorney).

Premarital Agreements:

***Barnes* – Enforceability of Premarital Agreement Where Each Party Represented by Attorney**
IRMO Barnes, 324 Ill.App.3d 514 (4th Dist., 2001), GDR 01-79
Trial court properly entered summary judgment because there was no genuine issue of material fact where claim coercion was limited to threat that there would be no wedding unless the premarital agreement was signed. In marriage of about nine years, adjusting from a marital lifestyle of luxury to one limited by wife's $24,000 per year salary is not an "undue hardship" that would allow the court, under the UPAA to award maintenance in contravention to the agreement.

Comment: The provision in the UPAA states that the undue hardship must be one which is not reasonably foreseeable at the time of the execution of the agreement. However, if there is such a hardship, the court may only require the party to pay maintenance to avoid such hardship.

***Drag* – Pre-UPAA Premarital Agreements and Unconscionability Standard**
IRMO Drag, 326 Ill.App.3d 1051 (3d Dist. 2002), GDR 02-46
Conflict of Interest: When wife-to-be accepted from her fiancee names of three lawyers and chose one, who disclosed that he had previously represented the husband in his divorce, the wife-to-be's oral waiver of attorney-client privilege did not invalidate the premarital agreement because of conflict of interest.

Unconscionable Agreement: An unconscionable agreement is one which no reasonable person would make and no honest person would accept. When husband made full disclosure of assets, including his worth of $6 million, and wife received in the divorce an award of $1,400 per month for six years, plus $150,000 in lump

sum an account of property and $51,000 as half of the tax return, the agreement was no unconscionable.

Disproportionality Test: Parties engaged to be married, before signing a premarital agreement, are in a confidential relationship. Where provisions for maintenance are disproportionate to the value of the other spouse's assets, there rises a presumption of concealment, overcome by a showing of total disclosure.

Attorney's Fees

***Schneider* – No Fee Award Where Parties Each Litigious**
IRMO Schneider, 343 Ill.App. 3d 628 (2d Dist. 2003)
The trial court did not err in refusing to award contribution toward attorney's fees where the parties "were equally unreasonable, litigious, and quarrelsome throughout the divorce proceedings, resulting in an unnecessarily expensive divorce." The appellate court also stated, "Furthermore, although Jodi's earning potential pales in comparison to Earl's, she has failed to show an inability to pay her own attorney fees". See *McCoy*, 272 Ill.App. 3d at 132 (ability to pay does not mean ability to pay without pain or sacrifice). Moreover, the appellate court commented that the wife was awarded a disproportionate and substantial share of the marital estate (worth approximately $326,000).

***Stella I* – Interim Fee Statute Re Disgorgement Does Not Apply to Parentage Proceedings**
Stella v. Garcia, 339 Ill.App.3d 610 (1st Dist., 3d Div. 2003), GDR 03-71.
The disgorgement provisions of the interim attorney fee statute, do not apply to parentage proceedings:

> "(n)owhere in section 17 of the Parentage Act did the legislature refer to disgorgement of fees. Nor does it cross-reference subsection 501(c-1) of the Marriage Act. The only cross-reference to the Marriage Act in section 17 of the Parentage Act is to section 508."

I refer to this case as *Stella I* since there was a later *Stella* case that often is confused with this case.

***Devick* – Lawyer Not Entitled to Recover Sanctions Award Made Against Lawyer by Another Party Urging that Client Sought Defense**
IRMO Devick (Devick II), 335 Ill.App.3d 734 (2d Dist. 2002), GDR 03-06.
A lawyer, in a fee petition against the client, is not entitled to recover sanctions award made against the lawyer by another party to the suit, and the lawyer may not charge the client for defending against the Rule 137 sanctions petition.

***Macaluso* – Timing Re Contribution Hearing in Post-Judgment Cases**
Macaluso v. Macaluso, 334 Ill.App. 3d 1043 (3rd Dist. 2002), GDR 02-55
Petition for contribution fees in post-judgment proceedings need not be filed before final judgment is entered, and such a petition may be filed at any time before the trial court loses jurisdiction.

Comment: The Second District *Konchar* opinion held that in post-divorce judgment proceedings a petition for contribution fees must be filed before the entry of the final judgment. Case is contrary to *Konchar* and reasons that the timing requirements of the contribution statute do not apply to post-divorce matters because

Section 503(j)'s references to "the final hearing on all other issues between the parties," is specific to the bifurcated hearing required in pre-decree proceedings.

***Hasabnis* – Disclosure of Billing Records in Contribution Hearing Not Mandatory; Reasonableness a Permissive Factor**
IRMO Hasabnis, 322 Ill.App.3d 582 (1st Dist, 3d Div. 2001), GDR 01-95
No abuse of discretion to strike husband's production request for wife's attorney's billing records; trial court does not need to determine necessity of fees, and production or examination of attorney's billing records is not required.

Comment: This decision contrary to *DeLarco*, 313 Ill.App.3d 107(2d Dist. 2000), holding that the reasonableness elements of section 508 applies to contribution hearings (amendments substantive rather than procedural — *McGuire*). Per *Hasabnis*, reasonableness is a permissive factor for the court to consider — not a mandatory factor while *DeLarco* stated that "the trial court must also consider whether the attorney fees charged by the petitioning party's attorney are reasonable."

***Lindsey-Robinson:* Waiver of Right to Object to Timing Re Contribution Action**
IRMO Lindsey-Robinson, 331 Ill.App.3d 261 (1st Dist., 1st Div. 2002), GDR 02-54
§503(j) of the IMDMA requires petitions for contribution by the other side to be filed and heard after proofs have closed and before judgment is entered. The statutory timing requirement, however, may be waived by lack of objection and, at the hearing, by arguing to the merits of the fee petition.

***Wildman, Harold v. Gaylord* – Attorney's Fees — Fees Sought Against Lawyer's Own Client — A Primer Re Breach of Contract Actions**
Wildman, Harrold, Allen and Dixon v. Gaylord, 317 Ill.App.3d 590 (1st Dist., 1st Div. 2000), GDR 01-19
In proceedings in which a lawyer seeks to recover fees from his own client pursuant to a breach of contract action, the lawyer is not required to present detailed contemporaneous records in order to sustain his burden of establishing that the attorney's fees sought are reasonable. The standard of review in such cases is the manifest weight. And unlike fee petitions and claims for quantum meruit fees (in which the trial court makes an independent valuation of reasonable attorney fees), where an express contract governs the compensation due an attorney, the hourly rate agreed to by the parties is the starting point of the court's analysis.

Comment: This is a well reasoned case. §508(c) provisions contain similar language the *Gaylord*. Under 508(c) court considers engagement agreement if drawn correctly and enforces its terms. The issue is "performance under the contract." The total amount must be "fair compensation" under the contract that were "reasonable and necessary."

Appeals:

Finality of Orders

***Alyassir* – Post-Decree Final and Appealable Orders – Child Support and Contempt Are One Proceeding**
IRMO Alyassir, 335 Ill.App. 3d 998 (2d Dist. 2003), GDR 03-12.

A trial court post-judgment ruling increasing child support is not appealable, even with a Rule 304(a) finding, when the issue of contempt for failure to pay medical bills remains pending. This Second District holding disagrees with the First District's 2001 ruling in Carr, 323 Ill.App.3d 481 (2001).

Finality Where Pending Fee Petitions

***King* – Fee Award Against Own Client During Case Not Final Until after Divorce**
IRMO King, 208 Ill. 2d 332 (2003), GDR 04-15.
The Illinois Supreme Court ruled in *King* that an order entered for attorney fees before the divorce judgment is entered is not final. So the trial court could modify the terms for payment of the fee award. A creditor could not initiate sheriff's sale of husband's home under pre-judgment order he recorded that limited collection to husband's bank accounts. Accordingly, the fee award could not be enforced during pendency of case.

***Devick* – Pending Fee Petition Against Lawyer's Client Did Not Affect Finality**
IRMO Devick (Devick II), 335 Ill.App.3d 734 (2d Dist. 2002), GDR 03-06.
Under §508(c)(2) of the IMDMA, a pending hearing on a fee petition brought by an attorney against the client does not affect the finality of the divorce judgment.

***Carr* – Non-Final Where Pending Contribution Petition in Post-Decree Support Modification Proceeding**
IRMO Carr, 323 Ill.App.3d 481 (1st Dist., 3d Div. 2001), GDR 01-51
Court order modifying child support is a final order. Notice of appeal must be filed within 30 days, notwithstanding pendency of a petition for attorney's fees.

Comment: This case is contrary to two cases involving initial dissolution of marriage proceeding: *IRMO Tomei*, 253 Ill.App.3d 663 (2d Dist. 1993), GDR 94-6, and *IRMO Tyler*, 230 Ill.App.3d 1009, 172 Ill.Dec. 840 (1st Dist. 1992). The *Carr* opinion states that the father relied on *IRMO Konchar*, 312 Ill.App.3d 441 (2d Dist. 2000), GDR 00-31, to argue that the appellate court lacked jurisdiction. *Konchar* held that the petition for contribution must be timely filed (before final hearings on other issues between the parties or no later than 30 days after the closing of proofs.)

***Murphy* – Appellate Fees: Substantially Prevailing on the Merits per 508(a)(3.1) Determined on Claim by Claim Basis**
IRMO Murphy, 203 Ill.2d 212 (2003), GDR 03-16.
To recover fees under IMDMA §508(a)(3.1), which allows fees for claims on which appellant substantially prevailed, appellant need not obtain at least half of the relief sought in the entire appeal.

Interspousal Tort Actions:

***Feltmeier* – Continuing Pattern of Physical and Verbal Abuse During Marriage Established Cause of**

Action for IIED as a Continuing Tort – S/L Running from Date Tortious Acts Cease
Feltmeier v. Feltmeier, 207 Ill. 2d 263, 278 (2003), GDR 03-116.
Illinois Supreme Court finds allegations of continuing and repeated physical and verbal abuse during the marriage stated a cause of action for intentional infliction of emotional distress (IIED). The cause of action for IIED is a continuing tort. The limitation period does not begin to run until the last injury or the date the tortious acts cease.

Estate Rights:

***Melton* – Estate Rights and ERISA's Preemption of Divorce Law**
Melton v. Melton, 324 F.2d 941 (7th Cir. 2003), GDR 03-58.
(1) ERISA preempts Illinois divorce law, so the second former wife named as life insurance beneficiary received death benefits even though the divorce judgment ending the first marriage required husband/father to name child from the first marriage as beneficiary. (2) General language in divorce agreement waiving interest in financial and property rights arising from marriage was not specific enough to be deemed waiver of second wife's beneficiary interest in ERISA-regulated group term life insurance given to husband as employee benefit. The ex-wife and the participant in their divorce had agreed to a "blanket revocation of their interests in all financial and property rights" arising out of their marital relationship and any asset assigned by the agreement including annuities, life insurance policies, and other financial instruments. However, the blanket revocation did not expressly name the participant's employer-provided life insurance. The trial court held that the former wife was entitled to the insurance proceeds and the daughter appealed to the Seventh Circuit. The Seventh Circuit affirmed citing the Supreme Court's *Egelhoff* decision regarding preemption. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

The decision stated that because the plan "determines beneficiary status according to the person(s) named in the plan documents," the former wife was the proper beneficiary. Turning to the waiver argument, the court reiterated its holding in an earlier case that "ERISA does not preempt an explicit waiver of interest by a nonparticipant beneficiary of [an ERISA-regulated] plan." But, the former wife's waiver, because it did not expressly refer to the participant's employer-provided life insurance or mention employment-related benefits at all, was not "sufficiently explicit" to be a waiver of her interest in the proceeds at issue in the case.

Evidence Cases and Expert Testimony

***Webb* – Voluntary Dismissals and Discovery Misconduct**
IRMO Webb, 333 Ill.App. 3d 1104 (2nd Dist. 2002)
The trial court must determine if petitioner engaged in discovery misconduct before assessing expenses under Rule 219(e) against petitioner who moved to voluntarily dismiss divorce.

***Roney* – Turning Over Evidence of Eavesdropping**
IRMO Roney, 332 Ill.App. 3d 824 (4th Dist. 2002)
The act of turning over tape recorded telephone conversations obtained by eavesdropping in violation of

criminal law constitutes a incriminating testimonial communication protected by the fifth amendment privilege.

Expert Testimony:

***Donaldson* – Illinois Supreme Court Rejects *Frye* Plus Standard: General Acceptance Test Remains**
Donaldson v. Central Illinois Public Service Company, 199 Ill. 2d 63 (2002) Illinois Supreme Court, (2002). The holding of the *Donaldson* case was that under the circumstances of the case it was harmless error not to hold a separate *Frye* hearing as to the testimony of the Plaintiff's experts. The case stated:

> Illinois law is unequivocal: the exclusive test for the admission of expert testimony is governed by the standard first expressed in *Frye*. (Citations omitted.) The *Frye* standard, commonly called the "general acceptance" test, dictates that scientific evidence is only admissible at trial if the methodology or scientific principle upon which the opinion is based is "sufficiently established to have gained general acceptance in the particular field to which it belongs." *Frye*, 293 F. At 1014.

Focus on Methodology — Not Conclusions: *Donaldson* stated that with "general acceptance" the focus is on the underlying methodology used to generate the conclusion, "If the underlying method used to generate an expert's opinion are reasonably relied upon by the experts in the field, the fact finder may consider the opinion — despite the novelty of the conclusion rendered by the expert." (Citations omitted).

General Acceptance Does not Mean Accepted by Majority of the Experts: "Simply stated, general acceptance does not require that the methodology be accepted by unanimity, consensus or even a majority of experts. A technique, however, is not "generally accepted" if it is experimental or of dubious validity. Thus, the *Frye* rule is meant to exclude methods new to science that undeservedly create a perception of certainty when the basis for the evidence or opinion is actually invalid." The *Frye* test therefore applies only where the scientific principle, technique or test offered to support the conclusion is "new" or "novel." The case then states, "Generally, however, a scientific technique is 'new' or 'novel' it is 'original or striking' or does not resemble something formerly known or used." (Citing *Webster's Third New International Dictionary*.)

***Jawad v. Whalen* – *Frye* Hearing Required as to Proffered Expert Testimony**
IRMO Jawad v. Whalen, 326 Ill.App.3d 141 (2nd Dist. 2001), GDR 02-08
Testimony of "expert" on abduction of children, when expert had no formal training in the field and relied on her experience, reading and research of literature in the area, should have been put to the test of *Frye v. United States* to determine if her testimony would constitute scientific evidence.

Keep in mind that this case was decided before the Illinois Supreme Court *Donaldson* case. *Jawad* also refers to the United States Supreme Court case regarding expert testimony, *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579, 113 S Court 2786, 125 L Ed 2d 469 (1993). Factors of *Daubert* include whether theory tested, peer review and publication. The decision states:

> To qualify as "scientific knowledge," an inference or assertion must be derived by the

> scientific method. Daubert (citation omitted). In short, a "scientific expert" is an expert who relies on the application of scientific principles, rather than on skill or experience-based observations, for the basis of his opinion.

***Troy S.* – Confidentiality of Mental Health Records Re Child Under Age 12: Non-Custodial Parent Only can Consent**

IRMO Troy S. and Rachel S., 319 Ill.App. 3d 61 (3d Dist. 2001), GDR 01-32

Written consent of only one parent is necessary for disclosure in a child custody proceeding of confidential records and communications under the Mental Health Act (IMHDDCA) For a child under twelve, one parent may waive the child's confidentiality and have the child's therapist testify.

Comment: Case consistent with previous cases such as *IRMO Kerman*, 253 Ill.App.3d 492 (2d Dist. 1993). Language of IMHDDCA uses word "parent" — not custodial parent. It even defines parent. Query: The statute uses the words "parent or guardian." Since the Confidentiality statute is disjunctive, what is the impact?

***Partipilo* – Substitution of Judge — Ruling on Substantial Issue: Motion to Stay Divorce Proceedings**

Partipilo v. Partipilo, 331 Ill.App. 3d 394 (1st Dist., 6th Div. 2002), GDR 02-56

A judge's ruling denying a party's motion to stay the divorce proceedings until collateral actions between the husband and wife are resolved is a substantial ruling and it was not error for the judge to deny motion for substitution of judge as a matter of right, after the judge ruled on a motion to stay the divorce proceedings.

Other Cases:

Malpractice Actions:

***O'Brien* – Malpractice Action In Case Where QDRO Not Entered Barred by Statute of Repose**

O'Brien v. Scovil, 332 Ill.App. 3d 1088 (3rd Dist. 2002)

Malpractice action against a lawyer is barred by statute of repose, despite situation where there likely would have been malpractice due to lawyer's failure to have QDRO entered given the death of the participant. The issue was the application of the statute of repose as the date of the termination of the lawyer's employment.

Compare this case to the 2010 *Snyder* decision. That decision stated in part:

> The animating principle of the quoted passage from *Wackrow* is that, as long as the client who had intended to convey an interest to the plaintiff was still alive, the attorney's error could be remedied at any time, by the drafting of a deed or other conveyance that effectuated his intent. The problem with the defective amendment was simply that it failed to do something that the client had intended, and that failure could have been remedied by having the client "do something," which was possible at any time before he died. The same principle

> applies here. *** See *Fitch v. McDermott, Will & Emery*, LLP, No. 2--09--0029, slip op. at 12-13 (April 28, 2010), pet. for leave to appeal pending, No. 110496 (no injury occurred until the death of the testator, because the testator could have revoked or amended the will prior to his death, leaving the farm to the plaintiff).

***Sanjuan-Moeller*– Petitions for Name Change of Minor: Actual Notice Required**
In re Petition of Gladys Sanjuan-Moeller, 343 Ill.App. 3d 202 (2d Dist. 2003)

This case was a case of first impression addressing the fact that the Illinois statutory provisions for name change do not require actual service of notice upon the non-custodial parent. The case stated:

> [W]e hold that a non-custodial parent is entitled to actual notice of proceedings to change his or her child's name. Additionally, we agree with *Tubbs* [620 P.2d 384, 386 (Okla. 1980] that a non-custodial parent is entitled to that notice as a matter of due process, especially when that parent's whereabouts are known or readily ascertainable and the parent is exercising visitation rights and paying child support. Furthermore, we hold that §21--103(b) of the Code is unconstitutional to the extent that it allows a custodial parent to change the name of his or her child without actual notice to the non-custodial parent.

2-1401 Petitions

***Johnson* – MSA Unconscionable Where Husband Pays Future Stream of $340k Over 14 years to Ostensibly Offset Marital Residence Equity of $85,000**
IRMO Johnson, 339 Ill. App. 3d 237
The parties were divorced in March 2000 and the former husband filed his petition under Section 2-1401 of the Code almost 20 months later. The trial court granted the 2-1401 petition, the former wife appealed and the appellate court affirmed.

The husband had appeared pro se in the original divorce case. At the prove-up the court also asked the husband - Gordon, "You understand that we're gonna do things here this morning that affect your legal rights on a permanent irrevocable basis?" Gordon replied affirmatively.

The MSA had provided that he would pay his former wife $450 weekly for 176 months (a period of nearly 15 years with a future total stream of payments of $340,000). The husband's testimony was that in 1999, after Christmas, the parties discussed ending their marriage. Sheila gave Gordon a handwritten proposal for a property settlement. Sheila proposed that Gordon pay her $450 per week. Sheila would receive the parties' home, and after repaying the home equity loan, she would release any claim to Gordon's pension. (The monthly payment on the home equity loan was $457.) Gordon agreed to the terms and the parties jointly visited Shiela's attorney. The appellate court stated:

> Gordon testified that he was unsure why the agreement provided that his weekly payments to Sheila would continue for 176 months. He stated that he thought this might correspond to the period for repaying the home equity loan. Gordon testified that he thought 176 months was an

> outer limit; that the weekly payments would end when the loan was paid off; and that Sheila had told him she would repay the loan as soon as possible. However, Gordon equivocated on this point, later testifying that he never really thought that the duration of his weekly payments to Sheila was related to the home equity loan.

The trial court concluded that the MSA was unconscionable. The court noted that the weekly payments had not been brought to the court's attention when it approved the agreement. The appellate court stated:

> Here, Gordon's section 2--1401 petition sought to bring the separation agreement's weekly payment provision to the trial court's attention. Of course this provision was a matter of record when judgment was entered, even though it is clear that the trial court was unaware of it. On the other hand, there was no evidence of the actuarial value of Gordon's pension in the initial dissolution proceedings. Leaving aside, for the moment, the question of Gordon's diligence, the question is whether that information, had it been known to the trial court, would have prevented rendition of the judgment incorporating the separation agreement. More specifically, section 2--1401 relief depends on whether the trial court would have found the agreement unconscionable. See 750 ILCS 5/502(b) (West 2000) ("The terms of the agreement *** are binding upon the court unless it finds *** that the agreement is unconscionable").
>
> A marital settlement agreement may be found unconscionable "when it is improvident, totally one-sided or oppressive." *In re Marriage of Carlson*, 101 Ill. App. 3d 924, 930 (1981). While Carlson indicates that " 'unconscionability' includes 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party' " (emphasis added) (*Carlson*, 101 Ill. App. 3d at 930), *** we do not view this as meaning that the absence of a meaningful choice is the only basis for finding unconscionability. Accord *In re Marriage of Gibson-Terry*, 325 Ill. App. 3d 317, 326 (2001) (distinguishing "procedural" unconscionability from "substantive" unconscionability). Here, the agreement was so one-sided and oppressive that it was unconscionable regardless of whether Gordon had a meaningful choice.
>
> The principal assets in the parties' marital estate were their $85,000 equity interest in the marital residence and Gordon's pension, which had a present value of about $100,000. Gordon was permitted to keep his pension, but was saddled with weekly payments totaling about $340,000 over 14 years. There is no evidence of the present value of these payments. However, it seems almost certain that, by any reasonable calculation, the present value of the weekly payments would exceed the present value of the pension. If so, it is possible Sheila would effectively receive money and other property worth *more than* the value of the marital estate. (emphasis supplied).

Regarding the fact that the payments were relatively small and the wife was not awarded maintenance within the MSA, the appellate court noted that, “This result cannot be justified on the theory that Sheila is not receiving maintenance. The $450 weekly payments were not designated maintenance, but compensation to Sheila for paying the $45,000 home equity loan and releasing any claim to Gordon's pension. Moreover, the separation agreement specifically recites that the parties were equally capable of supporting and maintaining

themselves. Sheila reaffirmed this during her prove-up testimony, and, in our view, she should not be permitted to recharacterize the weekly payments."

Injunctions

IRMO Schmitt, 321 Ill. App. 3rd 360 (2nd Dist. 2001)
A significant quote from Schmitt regarding injunctive relief in divorce cases states:

> we point out that, where the motion for preliminary injunction requests an order preserving the status quo between the parties and protecting property that would be lost or dissipated, injunctive relief may be granted even if the movant's ultimate success on the merits is in serious doubt. *Grauer*, 133 Ill. App. 3d at 1025, citing *Hoffman v. Wilkins*, 132 Ill. App. 2d 810, 818 (1971). Implicit in petitioner's motion is a request to preserve the status quo. Accordingly, this prong is satisfied.

After quoting from the language of Section 501(a)(2)(i) the appellate court stated:

> the trial court's order followed the language of the statute by prohibiting the alienation of "any of the assets of the parties except in the usual and ordinary course of business after seventy-two (72) hour written notice to the Petitioner and her attorney." Accordingly, we conclude that the trial court did not commit a manifest abuse of discretion in granting petitioner's motion for preliminary injunction.

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