CHILD SUPPORT 101/102 – STATUTORY AND CASE LAW

(See Separate Outline for Interest on Non-Paid Support and Maintenance)

The Gitlin Law Firm, P.C., Woodstock, Illinois

www.gitlinlawfirm.com

I. **Statutory Law Re Child Support**:

Note the Attached up to date Exhibit Re §505.

Perhaps the most dramatic change in child support will result from the changes to the law regarding ~~custody~~ - allocation of parental responsibilities effective January 1, 2016. The most dramatic changes will be the result of the fact that the 2016 rewrite seeks to eliminate to the extent possible battles over naming a primary residential parent. The heading to Section 606.10 is important and indicates"Designation of custodian for purposes of other statutes." It then emphasizes that, " solely for the purposes of all State and federal statutes that require a designation or determination of custody or a custodian, a parenting plan shall designate the parent who is allocated the majority of parenting time." It then emphasizes that, "this designation shall not affect parents' rights and responsibilities under the parenting plan." When we combine that with the 2014 Illinois Supreme Court *Turk* decision holding that the non-residential parent may be required to pay support to the custodial parent as well as the 2016 codification of that *Turk* decision we can see that the law regarding child support will change dramatically starting in 2016. No longer should the guidelines be as blindly followed with narrow exceptions. We can also anticipate that in the near future that Illinois will finally adopt income shares. This paper will first will highlight significant changes to §505 of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), and many of the statutory provisions regarding support that are often overlooked.

A. **IMDMA §505 - Child Support**:

1. **General Support Provisions:** Some of the significant portions of §505(a) will be quoted because an experienced family lawyer should read the exact language of the statute over and over again.

State of the Quadrennial Review: Anticipating Illinois Finally Adopting Income Shares Model:
Recall that by Federal mandate since 1989 each state was to review and amend its guidelines every four years. This is called a Quadrennial Review. I have pointed out that the Illinois child support guidelines remain far behind the times. I have urged that Illinois should adopt an Income Sharing Model. Thirty eight states have adopted the Income Shares Model. There are ten states following a model similar to Illinois – the percentage of the obligor's income
See: 660 *Family Law Quarterly, Volume 48, Number 4, Winter 2015*

See www.ncsl.org/issues-research/human-services/guideline-models-by-state.aspx

Regarding another state's work on updating their guidelines see:
www.pacourts.us/assets/uploads/Resources/Documents/Economists%20Report%20-%20000016.pdf

Regarding a draft white paper from the Illinois committee: See
www.childsupportillinois.com/assets/070912incomeshares.pdf

Until recently, few states had changed. But beginning in 2005, many states have adopted the income shares model. Tennessee, Georgia, and Minnesota moved from the percentage-of-obligor model to income shares guidelines. The District of Columbia and Massachusetts also recently switched to an

income shares approach: the District switched in 2007 and Massachusetts switched in 2009.

The percentage of income formula – especially the percentage of gross income formula – is the simplest and oldest of the support guideline models. The committee that will be responsible for finally pushing through income shares is the "Child Support Advisory Committee." The statute governing this committee provides:

> (305 ILCS 5/12-4.20c) Sec. 12-4.20c. Appointment of Child Support Advisory Committee. Appoint the Child Support Advisory Committee to be composed of members of the General Assembly, the judiciary, the private bar, and others with expertise specific to child support establishment and enforcement. Among the tasks of the Committee shall be the periodic review of the State's child support guidelines as required by the federal Family Support Act of 1988. Members shall be appointed for one year terms commencing on January 1 of each year. Each newly appointed Committee shall elect a chairperson from among its members. Members shall serve without compensation, but shall be reimbursed for expenses incurred in the performance of their duties. The Committee shall meet at least quarterly and at other times at the call of the chairperson or at the request of the Director. (Source: P.A. 86-1347; 86-1432.)

The website even contains an introduction regarding income shares. Their Q&As explain that there were supposed to be reviews of the guidelines every four years. The Q&As also state:

> Q: When was the most recent review and what was decided?
>
> A. The Child Support Advisory Committeeconducted the 2010 review in early December. The Committee recommended that Illinois replace the percentage of obligor income model with an income shares model.
>
> Q: What is the income shares model?
>
> A: The income shares model for determining child support is used in 38 states throughout the US, and is the most commonly used method today. The basis for income shares is a table that uses economic data to determine the amount that parents who reside together expend for the needs of their child or children, based on combined family income and the size of the family. The method then determines the pro-rated amount each parent should contribute to their child or children when the parents do not reside together.

For details regarding the committee, see the IDHFS site:
www2.illinois.gov/hfs/PublicInvolvement/BoardsandCommisions/Pages/cs.aspx
Under the What's Next bookmark, they state:

- The Child Support Advisory Committee is in the process of drafting a legislative proposal.

- The legislative proposal will include a suggested effective date. That date is likely to be some years in the future – perhaps as far out as 2014- to allow for the amount of time it will take to implement a new system and to provide the necessary education and training.

But obviously that time has come and gone.

The last known debates regarding the proposed guidelines was whether to adopt a net or gross income model. Because a net income model is more fair to more individuals, it is hoped that committee adopts a net income, income shares model.

For more information on the status of the four year review, see:
www.childsupportillinois.com/advisory/news.html (Meeting Notices).
www.childsupportillinois.com/advisory/schedule.html (Meeting Schedule)

For an excellent pdf of a PowerPoint presentation regarding the income shares model by Jane C. Venohr, Ph.D., Economist, Center for Policy Research, Denver, Colorado see
www.childsupportillinois.com/assets/120810_csadv_venohr.pdf
Please note that the links on page 13 of her outline are not current.

Why do we need to understand that within a year, Illinois will likely finally adopt an income shares model? It is critical to anticipate whether the guidelines change is a substantial change in circumstances in order to modify child support. In appropriate cases, consider adding language that would favor your client in this regard.

Anticipate that legislation should be submitted in 2016.

The Current Illinois Guidelines – From the Obligation of the "Custodial Parent" to "The Parent Obligated to Pay Support": The most important change is to the Illinois guidelines is the change effective January 1, 2016 providing for a circular definition. No longer must the non-custodial parent pay child support, as consistent with *Turk*. Instead, the law provides, "For purposes of this Section, the term "supporting parent" means the parent obligated to pay support to the other parent."

Regarding the nature of the guidelines and the deviation required if they are not followed, consider the impact of the 2012 amendments to §505(a)(2) based on PA 97-941/ SB 2569. It provides:

> (2) The above guidelines shall be applied in each case unless the court finds that a deviation from the guidelines is appropriate after considering the best interest of the child in light of the evidence, including, but not limited to, one or more of the following relevant factors:
> ***

But the question remains an open one with the 2016 amendments of whether the requirements for deviation are nearly as strong in parenting plans where it is more clear that parenting time is relatively equally divided.

The key language of our current Section 505 is the definition of net income. Case relies often upon a word or two in terms of the definitions for deductions from net or what constitutes income, etc.. So:

> "(3) "Net income" is defined as the total of all ***income*** from *all sources*, minus the following deductions:
> (a) Federal income tax (**properly calculated** withholding or estimated payments);
> (b) State income tax (**properly calculated** withholding or estimated payments);
> (c) Social Security (FICA payments);

(d) Mandatory retirement contributions required by law or as a condition of employment;
(e) Union dues;
(f) Dependent **and individual** health/hospitalization insurance premiums *and premiums for life insurance ordered by the court to reasonably secure payment of ordered child support;**
(g) Prior obligations of support or maintenance actually paid pursuant to a court order;
(g-5) Obligations pursuant to a court order for maintenance in the pending proceeding actually paid or payable under Section 504 **to the same party to whom child support is to be payable**;
(h) Expenditures **for repayment of debts** that represent reasonable and necessary expenses for the production of income, **including but not limited to student loans**, [SB 57 / PA 99-90 - 2016] medical expenditures necessary to preserve life or health, reasonable expenditures for the benefit of the child and the other parent, exclusive of gifts. The court shall reduce net income in determining the minimum amount of support to be ordered only for the period that such payments are due and shall enter an order containing provisions for its self-executing modification upon termination of such payment period."

Surprisingly, PA 99-90 did not allow a deduction for life insurance to secure maintenance.

Note that health insurance is deductible even if it is not a specific deduction on a party's pay-check stub and even if a non-custodial parent is reimbursing the custodial parent for child's portion of the premiums paid. This is because §505(a)(4) provides:

> In cases where the court order provides for health/hospitalization insurance coverage pursuant to Section 505.2 of this Act, the premiums for that insurance, or that portion of the premiums for which the supporting party is responsible in the case of insurance provided through an employer's health insurance plan where the employer pays a portion of the premiums, shall be subtracted from net income in determining the minimum amount of support to be ordered.

***Comment**: Significant case law addressing these deductions will be discussed below.*

a. **§505(a)(2.5) – Add-ons to Support Now Explicit**: There is a relatively new provision (2.5) that reads:

> (2.5) The court, in its discretion, in addition to setting child support pursuant to the guidelines and factors, **may order either or both parents owing a duty of support to a child of the marriage to contribute to the following expenses, if determined by the court to be reasonable**:
> (a) health needs not covered by insurance;
> (b) child care;
> (c) education; and
> (d) extracurricular activities.

b. **§505(a)(5) – Base Plus Percentage Orders and Findings Necessary**:
"The final order in all cases shall state the support level in dollar amounts. However, if the court **finds** that the child support amount cannot be expressed exclusively as a dollar amount because all or a portion of the payor's net income is uncertain as to source, time of payment, or amount, the court may order a percentage amount of support in addition to a specific dollar amount and enter such other orders as may be necessary to determine and enforce, on a timely basis, the applicable support ordered."

Comment: Keep in mind that the original Illinois law had provided simply that support had to be stated in dollar amounts. The remainder of the language was added because of the problems with this requirement. In practice lawyers and judges have tended to ignore the requirement of a finding that support cannot be stated only in a dollar amount in cases where there are bonuses, etc. This rendered as virtually irrelevant the Supreme Court's *IRMO Mitchell* decision which addressed void versus voidable percentage orders of support. There has been no case law addressing whether a percentage order without a finding per Section 505(a)(5) [stating that all or a portion of the net income is uncertain as to source, timing or amount] would render the order voidable. But the trial court should not enter a pure percentage order because doing this would be contrary to the statute.

c. ***Ackerley* and *Anderson* Decisions Re Additional "Bonus" Income**:

A 2002 Second District opinion addressed the issue of what constitutes additional income (bonuses) for the purpose of payment of support. *IRMO Ackerley*, 333 Ill. App.3d 382 (2d Dist. 2002), serves as a primer on support modification and proper determination of net income (including bonus income). *Ackerley* held that monies received in excess of base pay, but not explicitly characterized as bonus funds, were in actuality a bonus. Read this decision. It warns of the importance of the careful drafting in any case where there is a base plus a percentage order of support. Careful drafting will anticipate payment in a means other than a bonus or a commission. (But good drafting would not readily address the possibility of providing stock options in lieu of additional compensation.) The question in *Ackerley* was whether the additional income was a bonus as opposed to the former husband's contention that it was additional weekly income because he was working harder.

IRMO Anderson, 405 Ill. App. 3d 1129 (3rd Dist., 2010), reflected the trend toward including potential bonuses even if it is not necessarily clear that they will continue to be paid. The appellate court stated:

> Michael is entitled to one if he satisfies certain employee expectations, and any bonus or commission he earns is income for purposes of determining child support. Accordingly, the trial court erred in refusing to include his bonus in the child support award. On remand, the trial court should order Michael to pay 28% of any bonus or commission he earns from his employer as child support.

2. **§505(a-5) – Contempt Enforcement Proceedings and Notice to Payor**:

Section 505(a-5) reads:

> "In an action to enforce an order for support based on the respondent's failure to make support payments as required by the order, notice of proceedings to hold the respondent in contempt for that failure may be served on the respondent by personal service **or by regular mail addressed to the respondent's last known address**. The respondent's last known address **may be determined from records of the clerk of the court, from the Federal Case Registry of Child Support Orders, or by any other reasonable means**."

Section 505(b) provides in part:

> "In addition to the penalties or punishment that may be imposed under this Section, any person whose conduct constitutes a violation of Section 15 of the Non-Support Punishment Act may be prosecuted under that Act, and a person convicted under that Act may be sentenced in accordance with that Act. The sentence may include but need not be limited to a requirement that the person perform community service under Section 50 of that Act or participate in a work alternative program under Section 50 of that Act. A person may not be required to participate in a work alternative program under Section 50 of that Act if the person is currently participating in a work program pursuant to Section 505.1 of this Act."

3. 2012 Amendments to Section 505(b) Re Self-Employed or Individuals Owning Business Found in Contempt

www.ilga.gov/legislation/billstatus.asp?DocNum=3549&GAID=11&GA=97&DocTypeID=SB&LegID=65315&SessionID=84
This became law on August 2012 via Public Act 97-1029. The legislation adds new provisions to the lengthy (b) to Section 505:

> If a person who is found guilty of contempt for failure to comply with an order to pay support is a person who conducts a business or who is self-employed, the court in addition to other penalties provided by law *may* order that the person do one or more of the following: (I) provide to the court monthly financial statements showing income and expenses from the business or the self-employment; (ii) seek employment and report periodically to the court with a diary, listing, or other memorandum of his or her employment search efforts; or (iii) report to the Department of Employment Security for job search services to find employment that will be subject to withholding of child support.

It also amends Illinois law regarding paternity and the Non-Support and Punishment Act.

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4. "Discovering Hidden Assets" – Piercing the Ownership Veil in "Alter Ego" Type Cases

Section 505(b) of IMDMA [PA 90-476] (as amended by the 2016 Family Law Study Committee Amendments] provides:

> "If there is a unity of interest and ownership sufficient to render no financial separation between a supporting parent and another person or persons or business entity, the court may pierce the ownership veil of the person, persons, or business entity to discover assets of the

noncustodial parent held in the name of that person, those persons or that business entity. The following circumstances are sufficient to authorize a court to order discovery of the assets of a person, persons, or business entity and to compel the application of any discovered assets toward payment on the judgment for support:

(1) The supporting parent and the person or persons or business entity maintain records together.
(2) The supporting parent and the person, persons or business entity fails to maintain an arms length relationship between themselves with regard to any assets.
(3) The supporting parent transfers assets to the person, persons or business entity with the intent to perpetrate a fraud on the custodial parent.

With respect to assets which are real property, no order entered under this paragraph shall effect the rights of bona fide purchasers, mortgagees, judgment creditors, or other lien holders who acquire their interest in the property prior to the time a notice of lis pendens pursuant to the Code or Civil Procedure or a copy of the order is placed of record in the office of the recorder of deeds for the county in which the real property is located. 750 ILCS 505(b)."

Comment: Note that §12-112 of the Code was amended to effectuate the above provisions. The corresponding provisions of the Illinois Parentage Act of 1984 were also amended (§15(b)(2.5)). Unfortunately, there are not corresponding maintenance provisions.

5. **Three Different Notification Provisions**:

a. **Notification Provisions of 505(f) – First Notification Provision**

Section 505(f) of the IMDMA provides**:**

"(f) **All orders for support**, when entered or modified, shall include a provision requiring the supporting parent **to notify the court** [and, in cases where the party is receiving child and support services under Article X of the Illinois Public Aid Code, the Department of Healthcare and Family Services, within 7 days, (I) of the name and address of any new employer of the obligor, (ii) whether the obligor has access to health insurance coverage through the employer or other group coverage and, if so, the policy name and number and the names or persons covered under the policy, and (iii) of any new residential or mailing address or telephone number of the non-custodial parent. In any subsequent action to enforce a support order, upon a sufficient showing that a diligent effort has been made to ascertain the location of the non-custodial parent, service of process or provision of notice necessary in the case may be made at the last known address of the non-custodial parent in any manner expressly provided by the Code of Civil Procedure of this Act, which service shall be sufficient for purposes of due process."

Compare this section with the provisions of Section 505(h) of the IMDMA discussed below.

***Comment**:* These provisions basically require that all orders of support include provisions requiring the child support obligor to notify the court of information as to new employment, health insurance information, and any new residential or mailing address. These are in addition to the notification provisions of the Income Withholding for Support Act. In cases where payments are not made through the SDU, include language in a marital settlement agreement which is consistent with the above provisions.

b. **IMDMA Sec. 505(h) - Notification of Employment Termination – Second Notification Provision – Includes Recipient:**

Section 505(h) requires written notification as to new employment and termination of employment. The statute provides:

> "(h) An order entered under this Section shall include a provision requiring the obligor to report to the **obligee** and the clerk of the court within 10 days each time the obligor obtains new employment, and each time the obligor's employment is terminated for any reason. The report shall be in writing and shall, in the case of new employment, include the name and address of the new employer. **Failure to report new employment or the termination of current employment, if coupled with nonpayment of support for a period in excess of 60 days, is indirect criminal contempt**. For any obligor arrested for failure to report new employment bond shall be in the amount of the child support that should have been paid during the period of unreported employment. An order entered under this Section **shall** include a provision requiring the **obligor and obligee parents to advise each other of a change in residence within 5 days of the change** except when the court finds that the physical, mental or emotional health of a party or that of a minor child, or both, would be seriously endangered by disclosure of the party's address."

***Comment**:* My marital settlement agreement will contain the provisions set forth above as well as the provisions as to statutory interest. So, an additional provision of your MSA may read:

> Provisions of MSA Re Support Required: A support obligation required under the terms of the judgment for dissolution of marriage or any portion of a support obligation that becomes due and remains unpaid for 30 days or more shall accrue simple interest at the rate of 9% per annum. As required by Section 505(f) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), the Husband shall provide written notice to the Clerk of the Court, within 7 days of: (I) of the name and address of any new employer of the payor; (ii) whether the payor has access to health insurance coverage through the employer or other group coverage and, if so, the policy name and number and the names or persons covered under the policy, and (iii) of any new residential or mailing address or telephone number of the non-custodial parent.
>
> In addition, as required by Section 505(h) of the IMDMA, the Husband shall inform the Wife within 10 days each time he obtains new employment, and each time his employment is terminated for any reason. The report shall be in writing and shall, in the case of new employment, include the name and address of the

new employer. In addition, both the Husband and the Wife shall be required to inform each other of a change of residence within five days of the change.

c. IMDMA Sec. 505.3 - Third Notification Provision – Further Disclosures Required by Both Parents to Clerk of Court – (State Case Registry):

In 2001, [part of PA 91-21] a subsection was added to the child support provisions adding another series of notification provisions. Section 505.3, including the 2007 amendments in PA 95-331, provides:

> "Sec. 505.3. Information to State Case Registry.
> (a) In this Section: "Order for support", "obligor", "obligee", and "business day" are defined as set forth in the Income Withholding for Support Act. "State Case Registry" means the State Case Registry established under Section 10-27 of the Illinois Public Aid Code.
> (b) **Each** order for support **entered or modified** by the circuit court under this Act **shall** require that the obligor and obligee
>
> (I) file with the **clerk** of the circuit court the information required by this Section ... at the time of **entry or modification** of the order for support and
>
> (ii) file updated information with the clerk within 5 business days of any change.
>
> Failure of the obligor or obligee to file or update the required information shall be punishable as in cases of contempt. The failure shall not prevent the court from entering or modifying the order for support, however.
> (c) The **obligor** shall file the following information: the obligor's name, date of birth, social security number, and mailing address. If either the obligor or the obligee receives child support enforcement services from the Illinois Department of Public Aid under Article X of the Illinois Public Aid Code, the obligor shall also file the following information: the obligor's telephone number, driver's license number, and residential address (if different from the obligor's mailing address), and the name, address, and telephone number of the obligor's employer or employers.
> (d) The **obligee** shall file the following information: (1) The names of the obligee and the child or children covered by the order for support. (2) The dates of birth of the obligee and the child or children covered by the order for support. (3) The social security numbers of the obligee and the child or children covered by the order for support. (4) The obligee's mailing address. ***
> (h) Information filed by the obligor and obligee under this Section that is not specifically required to be included in the body of an order for support under other laws is not a public record and shall be treated as confidential and subject to disclosure only in accordance with the provisions of this Section, Section 10-27 of the Illinois Public Aid Code, and Title IV, Part D of the Social Security Act.

Comment: We now have three provisions for notification to the clerk – Section 505(f), (h) and 505.3. Unfortunately, the time frames for disclosure are inconsistent and range from five days to ten days. One would believe that the legislature would have opted for consistency to send a strong message to obligors so that they would have know exactly what was required. It is also curious that the legislature provided for contempt sanctions for failure of both parents to provide their this further information to the clerk.

d. **Summary re Notification Provisions**:

To summarize these confusing notification statutes:

505(f) requires **payor's** disclosure **to the clerk** within **7 days** of:
The name and address of new employer;
Whether payor has access to health insurance coverage through employment, etc.
Any new residential or mailing address or telephone number.

505(h) requires **payor's** disclosure to both **recipient and the clerk** in writing within **10 days** of:
Each time the payor receives a new job (including the name and address)
Each time the payor's job is terminated;
Failure to report if coupled with non-payment for more than 60 days = indirect **criminal** contempt.
505(h) also requires **both parents** to advise each other to a change in residence within **5 days** (with the domestic violence exceptions).

Section 505.3 requires disclosure of **both parents** to the clerk.
Payor must disclose: Name, date of birth, social security number and mailing address.
Recipient must disclose name, dates of birth and SSNs of the recipient and of the children. The recipient must also disclose her address.
Both are required to provide an update to the clerk within **5 days** of any new information.

6. **Termination of Support Dates Must be Stated and Support Continues to Age 19 if Child Still Attending High School**:

Section 505(g) provides:

> "An order for support shall include a date on which the current support obligation terminates. [See below for the elimination of the requirement that the withholding notice also provide a termination date.] The termination date shall be no earlier than the date on which the child covered by the order will attain the age of **18. However, if the child will not graduate from high school until after attaining the age of 18, then the termination date shall be no earlier than the earlier of the date on which the child's high school graduation will occur or the date on which the child will attain the age of 19.** The order for support shall state that the termination date does not apply to any arrearage that may remain unpaid on that date. Nothing in this subsection shall be construed to prevent the court from modifying the order or terminating the order in the event the child is otherwise emancipated."

Comments: These provisions dovetail with the changes made to Section 513 and impact the drafting of marital settlement agreements and orders for support. The provisions of Section 513 relating to post-high school educational expenses previously referred to age 18 as the age upon a party must petition for support under the guise of this section instead of under Section 505. The corresponding provisions of Section 513 state, "The authority under this Section to make provision for educational expenses extends not only to periods of college education or professional or other training after

graduation from high school, but also to any period during which the child of the parties is still attending high school, even though he or she attained the age of **19**."

This language refers to age 19 as to the presumptive early termination date if a student is still attending high school. Keep in mind, however, this legislation would only effect the termination dates on new orders following the date of this amendment and may not effect the provisions of previous orders providing different termination dates.

Many court orders ignore the requirement to include a specific date on which child support terminates. The child support order should not merely include language such as "child support terminates may be when the child turns age 18 or graduates from high school, whichever later occurs." The attached support order provides for a termination of child support on a date certain.

WARNING*:* *IRMO Mulry*, 314 Ill. App.3d 756 (4th Dist., 2000), held that a father was required to pay both child support and post-high school educational expenses when marital settlement agreement stated his obligation for child support would continue "if the child is attending post-secondary education the child's graduation from * * * college * * * or reaching age 23, whichever shall occur first." The opinion stated: "[A]lthough a provision in a dissolution judgment for the payment of a child's college expenses is a term in the nature of child support (citations omitted) it does not foreclose one's obligation to pay support or educational expenses, or both. The parties' separation agreement makes reference to [the ex-husband's] "obligations for support" and his "obligations for each child."

This statutory provision may undo some of the hardship represented by the *IRMO Waller*, decision, 339 Ill. App.3d 743 (4th Dist., 2003), GDR 03-74. *Waller* held that 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'."

B. **Amendments to §505.2 (Health Insurance) and *IRMO Takata (I)***:

Every support order must include a provision for health insurance coverage of a minor child. §505.2 states:

> (b) (1) Whenever the court establishes, modifies or enforces an order for child support..., the court shall include in the order a provision for health insurance care coverage of the child which shall, upon request of the obligee or Public Office, require that any child covered by the order be named as a beneficiary of any health insurance plan that is available to the obligor through an employer or labor union or trade union. ***
>
> (d) The dollar amount of the premiums for court-ordered health insurance *** *shall* be considered an additional child support obligation owed by the obligor. Whenever the obligor fails to provide or maintain health insurance pursuant to an order for support, the obligor *shall* be liable to the obligee **for the dollar amount of the premiums**

which were not paid and shall **also** be liable for **all medical expenses incurred by the minor child which would have been paid or reimbursed by the health insurance** which the obligor was ordered to provide or maintain. In addition, the obligee may petition the court to modify the order based solely on the obligor's failure to pay the premiums for court-ordered health insurance. ***. 750 ILCS 5/505.2(d) (emphasis added).

Comment: A 2002 case addressed the health insurance issue. *IRMO Seitzinger*, 333 Ill. App.3d 103, 107-08 (Fourth Dist., 2002). In *Seitzinger* the trial court entered an order requiring the custodial parent to maintain health insurance (presumably because she had the better insurance). The former wife appealed contending that her former husband should have been required to pay half the cost of the insurance premiums. *Seitzinger* stated, "the duty to provide health insurance is an integral part of a parent's present and future support obligations." The case held that when insurance is available through an employer under 505.2(b) providing health insurance is mandatory on request of the support recipient. Accordingly, the former husband was required to contribute half the cost of the health insurance premiums. A quote from the case is interesting. It states, "The joint custody he enjoys with Kimberly means he has joint obligations as well as joint benefits. He is just as responsible for day care and health insurance costs now as when the parties were married."

Note the use of the word "obligations." This terminology is important because a parent may be entitled to the dependency exemptions only if he is current in payment of child support or the agreement may refer to support obligations.

1. **Section 2.5 of §505.2**:

After the *Seitzinger* decision a new section was added to Section 505.2 -- §2.5. Many believe this imposes a requirement on the non-custodial parent to reimburse the custodial parent for 50% of the children's portion of the health insurance premiums. But this overlooks the last provision of the section that states, "The court may order the obligor to reimburse the obligee for 100% of the premium for placing the child on his or her health insurance policy." So 50% of the presumptive minimum amount. Sub-section 2.5 reads:

"(2.5) The court shall order the obligor to reimburse the obligee for 50% of the premium for placing the child on his or her health insurance policy if:

(I) a health insurance plan is not available to the obligor through an employer or labor union or trade union and the court does not order the obligor to cover the child as a beneficiary of any health insurance plan that is available to the obligor on a group basis or as a beneficiary of an independent health insurance plan to be obtained by the obligor; or

(ii) the obligor does not obtain medical insurance for the child within 90 days of the date of the court order requiring the obligor to obtain insurance for the child.

The provisions of subparagraph (I) of paragraph 2.5 of subsection (c) shall be applied, unless the court makes a finding that to apply those provisions would be inappropriate after considering all of the factors listed in paragraph 2 of subsection (a) of Section 505.

The court may order the obligor to reimburse the obligee for 100% of the premium for placing the child on his or her health insurance policy."

2. ***IRMO Takata (I)* - A Potential Windfall for Custodial Parent**:

IRMO Takata, 304 Ill. App.3d 85 (2d Dist. 1999), (*Takata I*) holds:

> Where a party fails to pay health insurance premiums as required by the underlying judgment, the obligor must pay the custodial parent for all of the cost of the health insurance premiums he failed to pay for the children per §505.2(d) of the IMDMA.

The former husband in *Takata* failed to pay the health insurance premiums as required by the original divorce judgment and post-judgment order. The former wife then insured the children through Medicaid. The Medicaid coverage was at no cost to the former wife.

The former wife petitioned for a rule to show cause, requesting, in part, an award of the dollar amount of the unpaid insurance premiums pursuant to IMDMA §505.2(d). The trial court found the former husband in contempt for failure to pay health insurance, but ordered him to pay only 25% of the unpaid health insurance premiums. The court reasoned this percentage represented the amount of additional child support she would have received had the premiums not been deducted from her former husband's income in determining his child support obligation. The trial court further reasoned that awarding the full amount of the premiums would result in a "windfall," because the former wife paid nothing to have the children covered by Medicaid.

The Second District court reversed the trial court's order that the ex-husband pay the ex-wife only 25% of the health insurance premiums he failed to pay for the children. The appellate court recited the child support statute which provides, "Whenever the obligor fails to provide or maintain health insurance pursuant to an order for support, the obligor *shall* be liable to the obligee for the dollar amount of the premiums which were not paid ***. 750 ILCS 5/505.2(d) (emphasis added)." *Takata* held the use of the word "shall" left the trial court without discretion to award an obligee less than the full dollar amount of the unpaid insurance premiums. It further stated the trial court's discounting of the ex-husband's liability "rewards the ex-husband for shirking his parental court-ordered duties."

Note: There is also a later case by the same name: *IRMO Takata and Hafley*, 383 Ill.App.3d 782 (3rd Dist., 2008) (*Takata II*). The case moved from the Second District to the Third District. The former wife is a lawyer who "made law" in two cases representing herself. The second case (the 2008 case) had held that an IRA in the name of the "new wife" was not exempt from collection proceedings.

3. **National Medical Support Notice**

Background: Most family law attorneys are aware that a Qualified Medical Child Support Order (QMCSO) can be used to secure health insurance coverage for children of divorcing parents. But such orders are seldom used. As cumbersome as QMSCOs were to implement, not to mention draft, Congress and the Department of Labor have streamlined the process by creating a two page form called the National Medical Support Notice (NMSN). So, I answer the questions:

"What" are National Child Support Notices or QMCSOs,
"Why" you would use a QMCSO,
"How" you would use a QMCSO, and
"When" you would use a QMCSO.

QMCSOs were modeled after Qualified Domestic Relations Orders (QDROs), in concept and format. But this is where the similarities end. QMCSO's go back to 1993 and as stated are rarely used by many lawyers.

To streamline the implementation of QMCSOs, the U.S. Department of Labor issued certain rules, effective in 2001, relating to the provisions of the Child Support Performance and Incentive Act (CSPIA) of 1998, which created the National Medical Support Notice. The QMCSO and National Medical Support Notice are actually one in the same, or a NMSN can be thought of as being a subset of QMCSOs.

The acronym you should know is NMSN. A good resource (as with QDROs) is the DOL website: www.dol.gov/ebsa/publications/qmcso.html

The national law:

> (a) Mandatory State laws. States must have laws, in accordance with section 466(a)(19) of the Act, requiring procedures specified under paragraph (c) of this section for the use, where appropriate, of the National Medical Support Notice (NMSN), to enforce the provision of health care coverage for children of noncustodial parents who are required to provide health care coverage through an employment-related group health plan pursuant to a child support order and for whom the employer is known to the State agency.
>
> (b) Exception. States are not required to use the NMSN in cases with court or administrative orders that stipulate alternative health care coverage to employer-based coverage.

(3) Employers must transfer the NMSN to the appropriate group health plan providing any such health care coverage for which the child(ren) is eligible (excluding the severable Notice to Withhold for Health Care Coverage directing the employer to withhold any mandatory employee contributions to the plan) within twenty business days after the date of the NMSN.

(4) Employers must withhold any obligation of the employee for employee contributions necessary for coverage of the child(ren) and send any amount withheld directly to the plan.

(5) Employees may contest the withholding based on a mistake of fact. If the employee contests such withholding, the employer must initiate withholding until such time as the employer receives notice that the contest is resolved.

(6) Employers must notify the State agency promptly whenever the noncustodial parent's employment is terminated in the same manner as required for income withholding cases in accordance with §303.100(e)(1)(x) of this part.

(7) The State agency must promptly notify the employer when there is no longer a current order for medical support in effect for which the IV-D agency is responsible.

(8) The State agency, in consultation with the custodial parent, must promptly select from available plan options when the plan administrator reports that there is more than one option available under the plan.

See: law.justia.com/cfr/title45/45-2.1.2.1.4.html#45:2.1.2.1.4.0.1.14

C. **Consumer Reporting and Publication of Deadbeat Parents**:

Illinois Public Aid Code (§10-16.4 (305 ILCS 5/10-16.4), the **Illinois Marriage and Dissolution of Marriage Act** (§706.3) and the **Illinois Parentage Act of 1984** (§20.5) all contain corresponding provisions. The Acts first define a "consumer reporting agency" according to §603(f) of the Fair Credit Reporting Act, 15 U.S.C. 1681a(f). Since January 1999 – with the minor change regarding the clerk's fee in 2005 (PA 93-836), §706.3 of the IMDMA and their counterparts have provided:

1. **Consumer Reporting Agency Provisions**:

Whenever a court of competent jurisdiction finds that an obligor either owes an arrearage of more than $10,000, **is delinquent in payment of an amount equal to 3 months' support** obligation pursuant to an order for support**, or fails to pay child support annual fee for a period of three years,** the court **shall** direct the clerk of the court to make information concerning the obligor available to consumer reporting agencies.

2. **"Deadbeat" Parent Publication**:

Whenever a court of competent jurisdiction finds that an obligor either owes an arrearage of more than $10,000 or is delinquent in payment of an amount equal to 3 months' support obligation pursuant to an order for support, the court shall direct the clerk of the court to cause the obligor's name and address to be published in a newspaper of general circulation in the area in which the obligor resides. The clerk shall cause the obligor's name and address to be published only after sending to the obligor at the obligor's last known address, by certified mail, return receipt requested, a notice of intent to publish the information. This subsection (c) applies only if the obligor resides in the county in which the clerk of the court holds office. **[PA 90-673].**

D. **Amended Legislation re Body Attachments - §505 and §713 of the IMDMA and 2013 Amendments to the Code of Civil Procedure:**

2001 legislation *[PA 91-113 – which also added §a-5 to §505 allowing for contempt proceedings re child support to be served via regular mail at the last known address]* amended 750 ILCS 5/713 and provides for service of a notice for body attachment to enforce a support order by regular mail instead of by certified mail with restricted delivery.

As stated above, §505(a-5) provides for notice for contempt in support enforcement cases to be mailed to the last known address. There were also amendments made to §713(a) regarding body attachment. It provides:

> Notices under this Section shall be served upon the Obligor by any means authorized under subsection (a-5) of Section 505 ~~either (1) by prepaid certified mail with delivery restricted to the Obligor, or (2) by personal service on the Obligor~~.

HB 2473: Body Attachment Amendments to the Code of Civil Procedure Excepting Support Enforcement from 2012 Limitations
http://www.ilga.gov/legislation/billstatus.asp?DocNum=2473&GAID=12&GA=98&DocTypeID=HB&LegID=74260&SessionID=85
This 2013 legislation adds several words to the 2012 legislation that had limited body attachments. Now, support enforcement is not subject to the limitations at 735 ILCS 5/12-107.5:

> (f) The requirements or limitations of this Section do not apply to the enforcement of any order or judgment for child support, any order or judgment resulting from an adjudication of a municipal ordinance violation that is subject to Supreme Court Rules 570 through 579, or from an administrative adjudication of such an ordinance violation. (Source: P.A. 97-848, eff. 7-25-12.)

E. **Enforcement of Support after Child's Emancipation**

> "The court does not lose the powers of contempt, driver's license suspension, or other child support enforcement mechanisms, including, but not limited to, criminal prosecution as set forth in this Act, upon the emancipation of the minor child or children."

This 2001 statutory provision [P.A. 92-203] wiped out the ruling of the appellate court in *Fritch v. Fritch*, 224 Ill. App.3d 29 (1st Dist., 1991). *Fritch* had held that the trial court erred by entering a contempt finding against father as a means to enforce payment of a child support arrearage where children had reached their majority.

G. **2015 Support Enforcement Case Law**:

***Hill* – Dismissal of Appellate Court Case Because of Father's Defying Attempts to Enforcement Order for Support Enforcement**
IRMO Hill, 2015 IL App (2d) 140345 (February 2015)
The crux of the case is clear from the following quote:

> Jennifer argued that Ronald was not complying with the trial court's orders as he had paid neither child support nor her attorney fees. Although the trial court had issued several rules to show cause, they were not served on Ronald, because his whereabouts were unknown. Relying on *Garrett v. Garrett*, 341 Ill. 232, 234 (1930), Jennifer argued that, where a party seeks review of a judicial order while at the same time defying the trial court's attempts to enforce that order, the appeal should be dismissed.

Since the 1930 *Garrett* Illinois Supreme Court decision, is an old case that many are familiar with, I will quote from the appellate court's summary of *Garrett* at some length:

> Having now considered Ronald's report, we determine that his appeal should be dismissed for the reasons set forth in Garrett. In that case, the husband was ordered to pay alimony, attorney fees, and court costs. He appealed from that order. While his appeal was pending, the husband refused to comply with the trial court's order and therefore was found in

contempt. The trial court was not able to enforce its contempt order, however, because the husband was concealing himself outside Illinois. The supreme court found that the husband's absence hindered and embarrassed the due course of procedure by preventing the court from enforcing its decree. Id. at 234. The supreme court therefore concluded that "no reason is here disclosed why we should give consideration to one showing his contempt for our courts at the same time that he asks their affirmative assistance." Id.

***Ross* – Support Enforcement Against Estate Untimely Under §18-12(b) of Probate Act**

IRMO James Ross (Deceased) and Anita Ross Pruitt, 2015 IL App (2d) 130961
Holly Ross, executor of the estate of James S. Ross, appealed from the trial court's judgment in favor of Anita Ross Pruitt (Anita) on Anita's petition for child support that James was ordered to pay Anita in the 1983 decree dissolving their marriage. The appellate court ruled:

> We agree with the Estate that Anita's petition to collect the child support arrearage was untimely under section 18-12(b) of the Probate Act of 1975 (755 ILCS 5/18-12(b) (West 2012)). Therefore, we reverse the trial court's judgment.

The parties were married in 1968 and were divorced in 1983. Anita was awarded custody of the children and the father was ordered to pay $300 support per month. The father died in 2008 after suffering a workplace accident. In April 2012, Anita filed a "petition for confirmation of lien, sale of real estate, and entry of a qualified domestic relations order." She alleged child support arrearages of $7,770 and $14,687.34, respectively, in two cases. Adding statutory interest, Anita alleged a total arrearage of $65,976.46. Anita claimed Anita claimed that there was an existing lien in that amount against the assets of the Estate by operation of section 505(d) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/505(d)).

The Estate responded by filing a nine-count motion to strike and dismiss Anita's petition. Count II of the motion asserted that Anita's petition was in the "wrong venue." Specifically, the Estate claimed that, because James was deceased and his and Anita's youngest child was long since emancipated, Anita should have brought her action in probate court rather than domestic relations court. Ultimately, the trial court granted Anita's motion to reconsider finding that she was "entitled to attempt enforcement of any child support arrearage against the [E]state in this court." Then the estate in filed an a response and several affirmance defenses including laches as well as asserting that the petition was barred under Section 510(e) of the IMDMA and Section 18-12 of the Probate Act. The trial court struck all affirmance defenses raised by the estate except for laches. The case proceeded to a bench trial where the trial court found in Anita's favor and against the estate for $68,562.70, consisting of $22,457.34 plus $46,105.36 in statutory interest. The court also entered a QDRO against James' pension. The estate appealed and the appellate court reversed.

The key issue on appeal was whether §510(e) of the IMDMA, which incorporates the time limits of section 18-12(b) of the Probate Act, barred Anita's claim against the Estate for overdue child support. They appellate court concluded, "We agree with the Estate that Anita's claim was indeed time-barred under section 510(e) and section 18-12(b)."

Key provisions were subsections (d) and (e) of §510 of the IMDMA:

"(d) Unless otherwise provided in this Act, or as agreed in writing or expressly provided in the judgment, provisions for the support of a child are terminated by emancipation of the child, or if the child has attained the age of 18 and is still attending high school, provisions for the support of the child are terminated upon the date that the child graduates from high school or the date the child attains the age of 19, whichever is earlier, but not by the death of a parent obligated to support or educate the child. An existing obligation to pay for support or educational expenses, or both, is not terminated by the death of a parent. When a parent obligated to pay support or educational expenses, or both, dies, the amount of support or educational expenses, or both, may be enforced, *modified, revoked or commuted to a lump sum payment, as equity may require*, and that determination may be provided for at the time of the dissolution of the marriage or thereafter.

(e) The right to petition for support or educational expenses, or both, under Sections 505 [(750 ILCS 5/505 (West 2012))] and 513 [(750 ILCS 5/513 (West 2012))] is not extinguished by the death of a parent. Upon a petition filed before or after a parent's death, the court may award sums of money out of the decedent's estate for the child's support or educational expenses, or both, as equity may require. The time within which a claim may be filed against the estate of a decedent under Sections 505 and 513 *and subsection (d) and this subsection* shall be governed by the provisions of the Probate Act of 1975 [(755 ILCS 5/1-1 et seq. (West 2012))], as a barrable, noncontingent claim." (Emphasis supplied.) 750 ILCS 5/510(d), (e) (West 2012).

The appellate court then stated:

In the italicized language in the last sentence of subsection (e), the legislature mentions claims under subsection (d) separately from claims under subsection (e). We presume that the legislature thereby contemplated a substantive distinction between two types of claims for support against a deceased parent's estate. Evidently, the distinction is that subsection (d), in its final two sentences, concerns a claim against an estate based on a support obligation existing at the parent's death, while the first two sentences of subsection (e) concern a claim against the estate for an initial or "new" award of support. The comprehensive conjunctive in the final sentence of subsection (e) subjects to the Probate Act all claims for support against an estate, whether the claims are based on support obligations existing at the parent's death or are "new" claims for support. Moreover, with respect to the class of claims based on existing support obligations, there is no language in subsection (e) excepting claims for support arrearages from the governance of the Probate Act. Therefore, Anita's claim for an arrearage is governed by the Probate Act.

So, next we go to §18-12 of the Probate Act and its limitations periods:

"(a) Every claim against the estate of a decedent, except expenses of administration and surviving spouse's or child's award, is barred as to all of the decedent's estate if:

(1) Notice is given to the claimant as provided in Section 18-3 and the claimant does not file a claim with the representative or the court on or before the date stated in the notice; or

(2) Notice of disallowance is given to the claimant as provided in Section 18-11 and the claimant does not file a claim with the court on or before the date stated in the notice; or

(3) The claimant or the claimant's address is not known to or reasonably ascertainable by the representative and the claimant does not file a claim with the representative or the court on or before the date stated in the published notice as provided in Section 18-3.

(b) *Unless sooner barred under subsection (a) of this Section, all claims which could have been barred under this Section are, in any event, barred 2 years after decedent's death, whether or not letters of office are issued upon the estate of the decedent*." (Emphasis added.) 755 ILCS 5/18-12 (West 2012)

The appellate court then stated that Anita's claim was brought more than two years after the father's death. Thus, it was barred.

The court then suggested:

> Our reading of section 510(e) finds support in *In re Marriage of Epsteen*, 339 Ill. App. 3d 586, 597 (2003), where the First District rejected the suggestion that section 510(e) subjects to the Probate Act only "new claim[s] for support," not claims for "enforcement [or] modification [of] an existing court order."

Anita's claims as to why Section 510 should not apply to claims for support arrearages contained several excellent arguments. These bear reading because it is quite possible that the matter could be appealed to the Illinois Supreme Court. For example, she quoted from Section 510(d): "Notwithstanding any other State or local law to the contrary, a lien arises by operation of law against the real and personal property of the noncustodial parent for each installment of overdue support owed by the noncustodial parent."

But the appellate court reasoned that, "the existence of a lien does not obviate the need to file a claim under the Probate Act against the payor's estate."

Next, Anita relied on Section 2-1602 of the Code re revivals of judgments:

> "(a) A judgment may be revived by filing a petition to revive the judgment in the seventh year after its entry, or in the seventh year after its last revival, or in the twentieth year after its entry, or at any other time within 20 years after its entry if the judgment becomes dormant. The provisions of this amendatory Act of the 96th General Assembly are declarative of existing law.
> * * *
> (g) *This Section does not apply to a child support judgment* or to a judgment recovered in an action for damages for an injury described in Section 13-214.1 [(735 ILCS 5/13-214.1 (West 2012))], which need not be revived as provided in this Section and which may be enforced at any time as provided in Section 12-108 [(735 ILCS 5/12-108 (West 2012))]." (Emphasis supplied.)

Then she quoted from Section 12-108: "Child support judgments, including those arising by operation of law, may be enforced at any time."

This is a case of first impression: "We have found nothing in the Code, the Marriage Act, or the Probate Act to explain the interplay of these statutes as to the question at hand. It also appears that no

published Illinois decision has addressed the issue."

According to the appellate court Section 510(e) governs because it has greater particularity. The appellate court summarized:

> In conclusion, we hold that section 510(e) of the Marriage Act applies to Anita's claim against the Estate for overdue child support. Under section 18-12(b) of the Probate Act, which section 510(e) incorporates, Anita's claim is untimely and, consequently, barred. Therefore, the trial court erred in granting Anita's motion to reconsider its dismissal of her petition.

Ultimately, there was a dismissal with prejudice. So the lesson to be learned was that for want of filing the matter in what in hindsight was the wrong court, the mother lost out on $68,562.70.

II. **Income Withholding for Support Act (IWSA)**:

A. **Background**:

The genesis for January 1, 1999 provisions for mandatory withholding of income for support was the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996. §314 of the Act required states to have statutorily prescribed procedures for mandatory income withholding for support payments subject to enforcement. The law also required each state to adopt the Uniform Interstate Support Act. Based upon this all states now have adopted some form of the UIFSA (see the Gitlin Law Firm's article regarding UIFSA) and all states provide for mandatory support withholding.

In 1999 the Illinois legislature consolidated the various withholding provisions into one act – the Income Withholding for Support Act.

Many requirements of the Income Withholding for Support Act can be determined by reviewing the applicable forms:

- Uniform Order for Support;
- Notice / Order to Withhold Income for Support (Income Withholding for Support Form);
- Proof of Service of Income Withholding Notice;

As also discussed below, the income withholding notice must be **"in the standard format prescribed by the federal Department of Health and Human Services**." [750 ILCS 28/20 (c)(1)]. So where can we find the standard format prescribed by the federal Department of Health and Human Services (DHHS). That "standard format" has gone through several changes in the last decade. See Form OMB-0970-0154 for "Sample Form," – Income Withholding for Support, created through the DHHS Office of Child Support Enforcement updated.

The current instructions form states:

> INCOME WITHHOLDING FOR SUPPORT (OMB 0970-0154 exp. 7/31/2017).

Ideally, state-wide or at least county by county our withholding forms would be comprehensively

updated to be consistent with the requirements of the statute.

Any form used in Illinois must comply with this form. A key point based on this form is the requirement that unless the notice is being sent by the state or a tribal child support enforcement agency one must send along with the notice a copy of the law that allows the obligee to send the notice (in Illinois, §20(g) of the IWSA). The DHHS form is subject to updates.

Unfortunately, the form Notice to Withhold Income for Support in use in most counties in Illinois does not incorporate the current Federal law as well as the updates to Illinois law including the 2010 amendments and the 2016 amendments. For this reason, I revised the form so it is as consistent with the Federal form and the requirements of Illinois law. See the attached fillable notice/order to withhold income for support.

Illinois law does not require the notice for income withholding to be approved by the judge or by the clerk of the court to make certain that it conforms to the underlying support order. The order/notice follows the federal form in that it provides for the court's "authorization." The court could approve the form notice, i.e, enter it as an order - thus verifying that it conforms to the support order. But remember: the court does not have to "enter" a withholding order. This has not been a requirement under Illinois law since 1997. Ever since that date, it has been possible to simply serve an income withholding "notice" on the employer. Also, keep in mind the requirements of UIFSA §502(b). This refers to an "order." But section 502(b) of the UIFSA provides, "The employer shall treat an income-withholding order issued in another state which appears regular on its face as if it had been issued by a tribunal of this State." For a good article that goes to many of the same points that I have made over the years regarding income withholding notices, see:
https://www.iicle.com/articles/article.aspx?id=44

B. **Legislation Addressing Withholding of Support**

2001 legislation [PA 91-212] incorporated the changes of PA 90-790, addressed below, into the Income Withholding for Support Act.

> "**State Disbursement Unit (SDU)**: Since 10/1/99 the SDU has been collecting and disbursing payments made under court order in **all** cases in which support is paid under the Income Withholding for Support Act."
>
> "**Information to State Registry**: Within 5 business days the clerk must provide the docket number of all orders setting or modifying support along with information which includes the driver's license for both parents. The parties must report any changes within 5 days and the clerks must report any changes they happen to find out about. (305 ILCS 5/10-10.5)."

C. **General Provisions of Income Withholding for Support**:

1. **Service of Notices**:

Service of Withholding Notices: As is stated below, the notices are to be served upon the employer, but do not have to be served by personal delivery or certified mail. Instead, they can be served by:

- Regular mail,
- Certified Mail, return receipt requested;
- Fax or "other electronic means;
- Personal delivery. (750 ILCS 28/24(g)).

At the time of the service upon the payor, the child support recipient (or the public office) shall serve a copy of a notice upon the obligor by ordinary mail addressed to his or her last known address. The child support recipient is then to file proofs of service upon the payor with the Clerk of the Court. (Sec. 24(g)).

Filing Notices and Proof of Service Only When Necessary: Remember, though the legislature amended the IWSA relatively recently to provide that the income withholding notice does not need to be filed (or the proof of service). Per 750 ILCS 28/20:

> A copy of an income withholding notice and proof of service shall be filed with the Clerk of the Circuit Court ***only when necessary*** in connection with a petition to contest, modify, suspend, terminate, or correct an income withholding notice, an action to enforce income withholding against a payor, or the resolution of other disputes involving an income withholding notice.

Service of Withholding Notice If $100 / Day Penalties May be Sought: Consider when penalties of $100 per day can be imposed for failure to withhold. See: www.gitlinlawfirm.com/writings/hb100.htm Under the Income Withholding for Support Act, to be able to impose $100 per day penalties:

> "A finding of a payor's nonperformance within the time required under this Act must be documented by:
> - a certified mail return receipt; or
> - a sheriff's **or private process server's** proof of service showing the date the income withholding notice was served on the payor."

So, while you can serve of income withholding notices via regular mail, fax, or other electronic means (usually E-mail); to impose $100 per day penalties service would need to be by certified mail or via personal delivery by a sheriff or private process server. See the updated Affidavit of Proof of Service of Withholding Notice.

a. **New / Additional Employer: Later Service of Same Notice**:

Any other employer may be served at a later time with the same income withholding notice without further notice. (IWSA 24(h)).

2. **Delinquencies Versus Arrearages in Support**:

The amendments do not require the court to determine past-due support before a child support **delinquency** can be withheld from an obligor's wages. Instead, the amendments merely require a notice of income withholding to be served upon the employer with a copy to the obligor. The notice

may include payments on any purported delinquency that are not to be less than 20% of the total of the current child support order plus the payments on any arrearage. The amendments require that every time there is a support obligation, an order for support must be entered. Among the requirements in the support orders is the requirement to state the amount the obligor must pay in the future on any delinquency that might accrue. The payor must immediately withhold (14 days after receipt of notice to withhold). The obligor must to object to any withholding within 20 days after service.

Note the difference between the terms "arrearage" and "delinquency." An arrearage is a child support arrearage as determined by the court and incorporated into a court order. A delinquency is not established by the court, but is simply a payment that remains unpaid after the entry of an order for support.

3. **Withholding Notices Standard Form Must Follow HHS Form**:

Illinois law mandates that every support order shall:

> "Require an income withholding notice to be prepared and served immediately upon any payor of the obligor by the obligee or public office, **unless a written agreement is reached between and signed by both parties providing for an alternative arrangement, approved and entered into the record by the court, which ensures payment of support**. In that case, the order for support shall provide that an income withholding notice is to be prepared and served only if the obligor becomes delinquent in payment the order for support; and
>
> Contain a dollar amount to be paid until payment in full of any delinquency that accrues after entry of the order for support. The amount for payment of delinquency shall not be less than 20% of the total of the current support amount and the amount to be paid periodically for payment of any arrearage stated in the order for support."

The income withholding notice is required to be in the *"standard format prescribed by the federal Department of Health and Human Services*." [750 ILCS 28/20 (c)(1)]. As stated in that website:

> All employers must honor an income withholding order/notice for child support from any state. Out-of-state income withholding orders/notices are valid throughout the country including U.S. territories. All states are required to use a standardized withholding form entitled Income Withholding for Support (OMB-0970-0154)

See: www.acf.hhs.gov/programs/cse/newhire/employer/private/income_withholding.htm

www.acf.hhs.gov/programs/cse/forms/ (This contains links to the various Federal child support related forms)

www.acf.hhs.gov/programs/cse/forms/OMB-0970-0154.pdf (This contains a link to the current Federal form).

Nevertheless, numerous requirements in the IWSA of what must be provided in notices for income withholding are not exactly in this standard format. Accordingly, the attached form has been revised to correspond as directly as possible to Illinois law. The IWSA requires the notice, among other

things, to:

> (1.1) state the date of entry of the order for support upon which the income withholding notice is based; and
>
> (4) Direct any payor or labor union or trade union to enroll each child as a beneficiary of a health insurance plan and withhold or cause to be withheld, if applicable any required premiums.

4. **Income Withholding after Accrual of Delinquency**:

Whenever an obligor accrues a delinquency in support, the obligee (or public office) may prepare and serve upon the payor an income withholding notice that "contains a computation of the period and total amount of the delinquency as of the date of the notice; and directs the payor to withhold the dollar amount required to be withheld under the order for support for payment of the delinquency." Once again, the obligor must object to the withholding notice within 20 days by filing a petition to contest withholding. The only grounds to contest withholding are a dispute concerning the existence or amount of the delinquency or the identity of the obligor. The clerk is then to notify both the obligor and the obligee of the time and place for the hearing on the petition to contest withholding.

5. **Initiating Withholding Where Court Has Not Required That Income Withholding Take Place Immediately**:

In cases where the court has not required income withholding take place immediately but there was an order for support providing for payments of a delinquency, the child support recipient can still serve a notice for income withholding. In such cases the recipient prepares and serves a notice that states that the parties' written agreement providing an alternative arrangement to immediate withholding no longer ensures payment of support. The notice must state the reason that the written agreement no longer assures such payment. The obligor may contest this withholding but the grounds are limited to whether the parties' written agreement providing an alternate arrangement to income withholding continues to ensure payment of support. It is not grounds to contest such withholding that the obligor has made all payments due by the date of the petition.

6. **Petitions to Correct Income Withholding Notices**:

One important provision of the legislation allows an obligor to petition the court at any time to correct a term contained in an income withholding notice to "conform to that stated in the underlying order for support for (a) the amount of current support; (b) the amount of the arrearage; (c) the periodic amount for payment of the arrearage; (d) the periodic amount for payment of the delinquency."

7. **Service of Income Withholding Notices if the Support Order Does Not Contain the Income Withholding Provisions as to Delinquencies, etc**:

A significant provision is the ability to serve an income withholding notice even in cases where there are existing orders for withholding or there is no order for withholding. The IWSA provides that an income withholding notice may be served on a payor even though the most recent order for support

does not contain an income withholding provision with respect to any delinquency and the obligor has accrued a delinquency after entry of the most recent order for support. In this event the obligee prepares and serves a standard income withholding except that the notice contains a periodic amount for the payment of the delinquency equal to 20% of the total of the current support and the amount to be paid periodically for payment of any arrearage stated in the most recent order for support. See: 750 ILCS 28/55.

8. **Additional Duties of Income Withholding for Support Act**:

While §505 requires the parties to provide certain information to the **court**, etc, there are additional notification provisions within the IWSA.

a. **Obligor's Information Duties**:

§45(a) of the Income Withholding for Support Act requires the obligor to provide the following information:

> "Each obligor **(whether or not** income is being withhold) must notify the **obligee**, **any public office** and the **clerk** of the court of any **change of address** within 7 days. (c).
>
> Each obligor **whose income is being withheld** shall notify the **obligee, the public office** and the **clerk** of the court of any **new payor**, within 7 days. (d)"

b. **Obligee's Information Requirements**:

The obligee is required to provide information as to the following:

> "An obligee who is receiving income withholding payments under this Act shall notify the payor, if the obligee receives the payments directly from the payor, or the public office or the Clerk of the Circuit Court, as appropriate, of any change of address within 7 days of such change. (a)
>
> An obligee who is a recipient of public aid shall send a copy of any income withholding notice served by the obligee to the Division of Child Support Enforcement of the Illinois Department of Public Aid. (b)"

D. **Amendments to Income Withholding Provisions**: Soon after Illinois required mandatory withholding of income for support, legislation clarified the procedures to be used under the IWSA. [PA 90-790].

"Defined "business day."

Required all income withholding **notices** to state the **date of entry of the order for support** and contain the **signature of the obligee**.

Where notice is issued after a delinquency, it eliminated the requirement to contain "**a computation of the period and the amount of the delinquency**." [See my form as

updated.]

***Black v. Bartholomew* - Workers' Compensation Award and Withholding of Income for Support**
IDHFS Ex rel. Black v. Bartholomew, 397 Ill. App. 3d 363 (4th Dist., 2009) ruled that the court may order a child support arrearage to be paid out of a workers' compensation award despite language in 820 ILCS 305/21 that exempts such payments or awards from judgments. The *Black* court held that §15(d) of the Income Withholding for Support Act, 750 ILCS 28/15(d), controls where as it provides an exception to 820 ILCS 305/21. It defines "income" as any form of periodic payment, including workers' compensation. It , and further states that any other law that limits the exempt income that can be **withheld shall not apply to support judgments**.

And it seems that in 2013, the IWSA will be amended to eliminate the requirement that income withholding notices contain a termination date for support since this legislation has passed both houses as of May 3, 2013. But keep in mind that the IMDMA still provides that, "(g) An order for support shall include a date on which the current support obligation terminates..." So, we still have termination dates that are required – they simply are not required to be stated within the income withholding "notice."

III. **Non-Support Punishment Act (NSPA)**:

While it is unethical to direct clients to threaten criminal prosecution for an advantage in civil proceedings, clients should be directed toward the provisions of the Non-Support Punishment Act (NSPA). These provisions that became effective in 1999 can be effective especially when there is an out of state obligor with a large child support arrearage. I review the criminal provisions because they can be used as an effective means of "self-help."

A. **Criminal Provisions of Non-Support Punishment Act**:

The NSPA generally permits State's Attorneys and Attorney Generals to prosecute for failure to support, except in default orders for support.

Failure to Support Definition: Failure to support is committed when:

1) "A person willfully and without lawful excuse fails to provide for support or maintenance of his spouse in need of support or likewise willfully deserts or refuses to provide for his minor children in need of support and the person has the ability to provide for such support; or *

2) A person willfully fails to pay a court or administrative support order for longer than six months or is more than $5,000 in arrears and the person has the ability to pay; or *

3) A person **leaves the state with the intent to evade** a court/administrative order which has been **unpaid** for **more than 6 months; or**

   has accumulated an **arrearage greater than $5,000**; **

4) A person willfully fails to pay a court or administrative support order for longer than a

year or
has accumulated an arrearage **greater than $20,000** and the person has the **ability to pay**. **"

Rebuttable Presumption: There is a rebuttable presumption that the existence of non-default support order provides the ability to pay.

* First time violation is Class A misdemeanor. 2nd violation is class 4 felony.
** **Class 4 felony**.

B. **Suspension of Driver's Privileges**: Suspension of driver's privileges is an underused vehicle to try to obtain compliance with an arrearage in support. It is addressed in a separate presentation.

C. **Federal Support Enforcement Law**: Besides state laws, Federal law exists to help address problems involving interstate child support cases.

In terms of Federal child support enforcement, first we had the Child Support Recover Act (CSRA) in 1992. The CSRA aimed to deter nonpayment of state ordered support obligations through vigorous prosecution of egregious offenders. While federal prosecution efforts were successful under the CSRA, some law enforcement agencies found that the simple misdemeanor penalties provided for under the Act did not have the force to deter the most serious violators. The problem with enforcement under the CSRA was remedied in 1998 with the passage of the Deadbeat Parents Punishment Act (DPPA) which created two new categories of federal felonies for the most egregious child support violators.

Today, a child support violator can be prosecuted under Federal law if the following facts exists: 1) the violator willfully failed to pay a known child support obligation for a child in another state which has a) remained unpaid for longer than a year or is greater than $5,000 (misdemeanor), or has b) remained unpaid for longer than two years or is greater than $10,000 (felony). The alternative is where the violator traveled in interstate or foreign commerce with the intent to evade a support obligation; if such obligation has remained unpaid for a period of one year or longer-or is greater than $5,000 (felony). See 18 U.S.C. §228.

Prosecutors do not indict all offenders, as with most other criminal cases. The DOJ states that prosecutors consider the following factors before deciding whether to move ahead:

The DOJ website states:

Even if the above facts are present in an individual case, a decision whether or not a federal prosecution will be pursued may also include the following considerations:
1) Whether state civil and criminal remedies reasonable available have first been pursued;
2) Whether the violator has exhibited a pattern of moving from state to state to avoid payment;
3) Whether the violator has actually attempted to conceal his whereabouts or identity including using an alias or false social security number; and
4) Whether the violator has failed to comply with a support order despite previous contempt

orders in state court.

IV. **Case Law Interpretations of IMDMA §505(a)(3)**:

A. **Requirement for Proper Net Income Calculations in Each Case**: Case law has held that it is improper for the court not to consider the effect of the parties' new filing status and the reallocation of the dependency exemptions. So your lawyer should present net income calculations in every case involving setting or modifying child support is at issue. And these should not be merely based upon the deductions on a pay-check stub. As discussed above, *IRMO Ackerley*, 333 Ill. App.3d 382 (2d Dist. 2002) addresses not only the bonus issue but also how to calculate child support properly.

In *Ackerley* the trial court ordered payment of a support arrearage of $90,975, set a support obligation of $3,000 per month. By the terms of the marital settlement agreement, the husband had been required to pay a base amount of support plus an amount equal to 25% of any "net bonus as defined by statute" received by him from his employer. The agreement provided, "For verification purposes, father shall provide mother with copies of his W-2 forms or other tax related statements indicating the bonus he has received on or before January 31st of each calendar year for the preceding calendar year." The ex-husband was current in his base support as well as the bonuses through January of 2000.

One issue was whether FICA payments should be deducted in determining the amount owed for the support arrearage. The discussion of this is interesting in part because the bonuses were received at the beginning of the year and there was withholding from the bonus checks due to the FICA contribution. The appellate court rejected this argument noting that the FICA contribution ceases after a certain income level. The case quoted from *IRMO Olson*, 223 Ill. App.3d 636 (1992), "Bimonthly payroll receipts for periods less than a year for a noncustodial parent with above-average income may not reflect true income because such partial records do not reflect increased income on reaching maximum FICA withholding." The appellate court stated:

> "The mere fortuity that respondent received his bonuses early in January, which often terminated his FICA obligation for the balance of the year and allowed him to collect his base salary free of this tax, should not work to disadvantage petitioner and the children.... In short, we find no error in attributing deductions for dependent health insurance and FICA taxes to respondent's base salary instead of to his bonuses."

Another issue was whether the trial court should have added back tax refunds into the ex-husband's bonuses. The appellate court noted it was able to use the actual amount of income the ex-husband received as well as the actual tax he paid as shown on his tax returns. *Ackerley* notes that §505(a)(3)(a) allows for a deduction of federal income tax as "properly calculated withholding or estimated payments." The appellate court stated:

> "Properly calculated withholding is, by definition, withholding that coincides with actual tax owed on one's gross income. Thus, in calculating respondent's net income, we deducted the actual federal income tax that he paid from the actual total income that he received. An alternate approach employed by some courts is to begin with net income and add back in any refunds, which represent overwithholding. See *In re Marriage of Pylawka*, 277 Ill. App. 3d 728, 733 (1996) ("Thus, if the noncustodial parent overwithholds on his W-2, thereby overpaying his Federal income tax, the amount should be added back to his net income for purposes of determining his support obligation under section 505(a) of the Act"). These approaches represent two sides of a single mathematical coin. Because we have the benefit of having respondent's tax returns for past years available, we have chosen to employ the former approach, as it simplifies the calculation. Further, we agree with respondent that the effect of respondent's wife's income on his tax refunds should have been ignored. We note, however, that respondent's wife's income was relatively trivial when compared with respondent's income. Thus, whether one accounts for her income makes little difference to the ultimate determination of the amount of the arrearage."

The *Ackerley* decision also addressed one method to determine the Federal tax attributable to the bonus. It stated:

> "We first determined the amount of federal income tax attributable to a bonus. To do so, we divided the bonus by the total income for the given year. This yielded a ratio of bonus to total income. We then multiplied the total federal income tax for the year by the ratio. This yielded a figure that represented a proportionate share of the tax attributable to the bonus. By attributing a proportionate share of the tax to the bonus, we eliminated the effect of tax bracketing used in the federal income tax system. We believe that eliminating this effect is equitable. Neither party should benefit or be prejudiced by the artifice of considering certain income as falling into a certain bracket. Moreover, in determining appropriate child support, we are not bound by the technicalities of federal income tax law. See *In re Marriage of McGowan*, 265 Ill. App. 3d 976, 979 (1994)."

This decision is well-reasoned. It points to the complex nature of proper support calculations. The appellate court did not base the taxes on the highest or lowest marginal tax bracket. Instead, it applied the overall effective tax bracket and determined taxes on this basis. For a further discussion of this topic, see the outlines regarding tax calculations in support cases.

***Steel* – Record Should Provide Sufficient Determination regarding Net Income / Determining of Net for Maintenance Purposes is Same as for Support Purposes**

IRMO Steel, 2011 IL App (2d) 080974

This lengthy appellate court case reads as a primer on several issues including the importance of the record establishing sufficient evidence of net income. And the case is one of the few which emphasizes that the trial court should determine net income for maintenance purposes the same way it calculates net income for support purposes. The appellate court stated in part at §88:

> The trial court, though acknowledging that respondent's annual income "far exceeded" $1 million for some years, decided that it was "reasonable and fair" to take respondent's income as being $1 million yearly. The court did not indicate how it arrived at this figure. The court alluded to a "concession" by respondent, but at most the concession was to "net

cash income" of between $500,000 and $800,000 a year from 2001 though 2006—not to $1 million in income per year. Of course, the trial court had the duty to ascertain whether respondent's concession was self-serving and to make its own calculation of respondent's income. Unfortunately, though we are called upon to review the $1 million figure, we have no actual calculation to critique. It is not our province, as a court of review, to determine such a fact-intensive issue in the first instance. We do note that even a cursory review of the record shows the $1 million figure to be exceedingly low even as an average. The yearly inflows ranged from $1.6 to $4.2 million. Newman did not distinguish among the sources for the inflows, which evidently included DFO advances. As noted above in Part I(A)(1), respondent's DFO advances amounted to hundreds of thousands of dollars a year. Whether these advances constituted "income" to respondent under section 505(a)(3) of the Act (750 ILCS 5/505(a)(3) (West 2010)) is an issue the trial court should consider on remand. See *In re Marriage of Rogers*, 345 Ill. App. 3d 77, 80 (2003) (holding that proceeds of loan from spouse's parents were "income" to the spouse under section 505 of the Act), aff'd on other grounds, 213 Ill. 2d 129, 139 (2004).

There is no corresponding provision authorizing the exclusion of loan proceeds"); see also *In re Marriage of Tegeler*, 365 Ill. App. 3d 448, 457-58 (2006) (holding that spouse's line of credit was not "income" under section 505 of the Act and noting that, though loan proceeds generally should not be considered "income," there might be cases in which it is appropriate to treat them as such).

Accordingly, we remand for the trial court to make the initial calculation of respondent's income. Section 505(a)(3) of the Act defines "net income" broadly as "the total of all income from all sources," minus certain deductions (750 ILCS 5/505(a)(3) (West 2010)). Though this definition is given expressly for determining child support obligations, it applies as well to maintenance determinations. See *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 280 (2006). The Act does not define "income," but cases have defined it as "something that comes in as an increment or addition, a gain or profit that is usually measured in money, and increases the recipient's wealth." Id. Income includes "any form of payment to an individual, regardless of its source, and regardless of whether it is nonrecurring." Id.

B. **Method of Calculating Net Income**: Attached is a worksheet for calculation of net income. This worksheet will let you know what to look for when you analyze net income calculations offered by either party. Some judges use a tax program in chambers to determine net income. Besides FinPlan an excellent program of this type is Family Law Software.

1. **Gross Income**: Determine the gross income.

2. **Adjusted Gross Income**: Determine the adjusted gross income by subtracting adjustments from the gross income. The common adjustments are maintenance payments and certain voluntarily retirement contributions. One key issue is whether you allow maintenance to be an "above the line" deduction (adjustment) in determining the adjusted gross income. Arguments can be made on either side of this issue.

3. **Itemized or Standard Deductions and Exemptions**: From the adjusted gross income, subtract the exemptions and the deductions. For final hearings, assume the tax status following the divorce. So, if the child support payor is awarded a residence and you know the amount of itemized deductions, use itemized deductions. If itemized deductions are not known, use the standard deduction. Use the total number of exemptions that the payor will be entitled to following the divorce. In post-decree proceedings use the actual number of exemptions claimed by the payor.

4. **Federal Tax Rate**: Apply the tax chart to determine the federal tax. See my attached annual Federal tax chart or determine this using a program such as FinPlan or Family Law Software.

5. **Social Security Tax**: Determine the social security tax. This is calculated based upon gross employment income with a cap for the FICA component. The health insurance (Medicare) portion does not have a cap. Calculation of net for self-employed individuals is more complicated. As stated, judges should require attorneys to submit net income calculations in each such case.

6. **State Tax**: Next, state tax is calculated upon gross income. $2,000 is the state deduction per exemption. Another reason to remember to include property taxes paid in FinPlan or Family Law Software is that Illinois tax law allows a credit on the property taxes paid for an person's principal residence. Are any children attending private grade school (kindergarten through high school)? If so, do not overlook the credit of up to $500 per family for educational expenses over $250.

7. **Net Income for Support**: Subtract federal, state and FICA tax from the gross income. Finally, subtract the deductions allowed per §505 as well as the total child care credit *(discussed below)*.

C. **Specific Deductions**:

1. **Health Care Premiums**:

IRMO Stone, 191 Ill. App.3d 172 (4th Dist. 1989), was the first case to hold that the deduction for health and hospitalization insurance premiums is **not** limited to children covered by the support order but includes all premium amounts paid. In *IRMO Davis*, 287 Ill. App.3d 846 (5th Dist. 1997), the appellate court held that the trial court erred in not allowing a father a deduction in determining child support for health insurance premiums he paid for himself.

§505(a)(4) of the IMDMA, however, provides:

> "In cases where the court order provides for health/hospitalization insurance coverage pursuant to Section 505.2 of this Act, the premiums for that insurance, or that portion of the premiums for which the supporting party is responsible in the case of insurance provided through an employer's health insurance plan where the employer pays a portion of the premiums, shall be subtracted from net income in determining the minimum amount of support to be ordered."

So, does this mean that when the non-custodial parent is required to reimburse the custodial parent for 50% or more of the custodial parent's portion of the health insurance premiums for the child that this amount is deductible? The law is not crystal clear on this point because §505.2(c)(2.5) was later added to §505.2.

The appellate court in *Davis* held that, "Nothing in this section limits the deduction that section 505(a)(3)(f) allows for health insurance premiums for all dependents" in rejecting the mother's position.

The appellate court addressed this issue in *In re Aaliyah L.H.*, 2013 IL App (2d) 120414. The appellate court reversed the trial court's order failing to deduct half of the health insurance premiums *even though the expenses were not required for the parties' child*. The appellate court stated:

> Section 505(a)(3)(f) is clear on its face. It allows for the deduction of health insurance premiums for dependents, without limitation. See *IRMO* Ill. App. 3d 172, 175 (1989). It does not indicate that the deduction can be taken only if the premium increases for adding the child at issue to the plan. ***
>
> Similarly, in this case, Shangwé is entitled to deduct the health insurance premiums he pays *even though there is no additional cost for adding Aaliyah to his plan*, which covers himself and his dependents. Accordingly, the trial court erred by failing to deduct Shangwé's $485 monthly health insurance premiums to determine his monthly net income. Thus, the trial court's finding that Shangwé's monthly net income was $3,695 was erroneous.

The mother cited section 505(a)(4) of the IMDMA:

> In cases where the court order provides for health/hospitalization insurance coverage pursuant to Section 505.2 of this Act, the premiums for that insurance, or that portion of the premiums for which the supporting party is responsible in the case of insurance provided through an employer's health insurance plan where the employer pays a portion of the premiums, shall be subtracted from net income in determining the minimum amount of support to be ordered."

But the appellate court stated, "Nothing in this section limits the deduction that section 505(a)(3)(f) allows for health insurance premiums for all dependents."

2. **Maintenance as a Deduction in Calculating Support – 505(a)(3)(g-5)**:

The maintenance guidelines provide for an additional and new deduction in determining child support:

> (g-5) Obligations pursuant to a court order for maintenance in the pending proceeding actually paid or payable under Section 504 to the same party to whom child support is to be payable.

The problem is that once we calculate maintenance based on gross, then there is a difference in the net income of the obligor because of the tax advantage to him (or her) of paying maintenance.

3. **Prior Obligations of Support**:

The issue here is whether prior obligations of support refers to prior families or prior support orders. A 1993 Second District case had held that this refers to a family that is first in time as compared to another family. *IRMO Zukausky*, 244 Ill. App.3d 614 (2d Dist. 1993). This was confirmed by a 1998 case – also from the Second District. *IRMO Potts*, 297 Ill. App.3d 148 (2d Dist. 1998), GDR 98-80. Keep in mind, though that the first Second District case – *Zukausky*, presented a unique fact pattern that the trial court had found suspicious – a divorce from the second wife being instituted shortly after the proceedings to increase support from the first wife with a very large agreed upon temporary alimony award to the second wife.

The second case, *IRMO Potts*, also involved an unusual fact pattern with the possibility of "game-playing" by the support obligor. The appellate court in *Potts* had stated:

> In the interest of justice, we are compelled to make a final note concerning this case. Based on the records before us, it appears that Jeffrey concealed his first child's existence and the pending award of her support from the Boone County court. It also appears that Jeffrey purposefully depleted the income available for his first child by agreeing to set child support and maintenance for his second family at more than 50% of his net income. A trial judge has a difficult task in setting fair and reasonable child support. A litigant who fails to fully inform the court that on the next day another court is going to set child support for his first family acts reprehensibly and should not benefit from such conduct.

So, this earlier case law is not as cut and dried as it appears as addressed by a dissent by Justice Cook in the 2005 *Einstein v. Nijim* decision. Here he attacked the reasoning of the *Potts* case. The Cook dissent stated:

> It has been suggested that the language of section 505(a)(3)(g) allowing the deduction of "[p]rior obligations of support or maintenance actually paid pursuant to a court order" (750 ILCS 5/505(a)(3)(g)) carries forward the rule that a divorced spouse's obligations to the first family must be met before the obligations to the second family can or will be considered. *Potts*, *** I would suggest that use of the term "prior obligations" simply expresses the desire that child support be calculated based on the current situation and not on consideration of future obligations or attempts to predict what may happen in the future.
>
> *Potts*'s statement of the "first family" rule is not supported by the cases it cites. *In re Marriage of Zukausky*, 244 Ill. App. 3d 614, 624 (1993), mentions the rule but goes on to say "[t]he court should not ignore the supporting parent's obligations to a second family and should consider that factor in deciding the appropriate modification award for the first family." *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 63 (1980), involved a petition to modify child support after the petitioner married a woman who had five children. Support of other children may be disregarded where there is no legal or moral obligation to provide it. *In re Marriage of Vucic*, 216 Ill. App. 3d 692, 704 (1991).

A significant case addressing children by a previously relationship is *Slagel v. Wessels*, 314 Ill. App.3d 330 (4th Dist. 2000). *Slagel* involved a fact pattern in which the mother's previous husband had died and as a result she had custody of three children by a previous marriage. While she had to support these three children, there was no court ordered obligation for support. The question in *Slagel*

was whether the court may deviate downward from the support guidelines in a case where there is a not a *per se* prior support obligation – but where the children, of course, need to be supported. In rejecting a rote application of the guidelines, the opinion stated:

> "The guidelines are a useful method of insuring that child support is set in an amount that is reasonable and necessary. Section 505, however, does not provide comprehensive rules for every conceivable situation. It is recognized that there are times when it will be improper for the trial court to apply the guidelines. For example, in "split custody" cases, where each parent is the custodian of at least one of the parties' children, section 505's guidelines are not necessarily applicable. *In re Marriage of Demattia*, 302 Ill. App.3d 390, 393 (1999). [GDR 99-22]."

The *Slagel* court met the argument that §505 addresses prior child support obligations. The opinion stated:

> "One could argue that the legislature dealt with this situation when it provided a deduction from "net income" for "[p]rior obligations of support or maintenance actually paid pursuant to a court order." 750 ILCS 5/505(a)(3)(g). We disagree. Wessels argues that there is no court order here. The "court order" requirement was designed to avoid the situation where the individual owing a duty of child support sought to avoid that obligation by asserting the payment of large amounts to a prior family that may not in fact have been made or that may have been made in excess of the needs of the prior family. There is no doubt that Slagel is the sole support for her three children, and she should be given some consideration for the payments that she is required to make on that account."

Slagel represents a case of first impression in Illinois.

4. **Depreciation and Business Expenses**:

Subsection 505(a)(5) defines net income as income from all sources minus certain deductions including:

> "(h) **Expenditures** for **repayment of debts** that represent **reasonable and necessary expenses for the production of income**... The court shall reduce net income in determining the minimum amount of support to be ordered only for the period that such payments are due and shall enter an order containing provisions for its self-executing modification upon termination of such payment period."

a. **Case Law Overview**:

Early case law regarding business expenses did not concentrate on the requirement of showing a debt repayment schedule. Cases shortly before the Supreme Court's *Minear* decision dealing with depreciation have emphasized this requirement: *IRMO Nelson*, 297 Ill. App.3d 651 (3d Dist. 1998), *IRMO Davis*, 287 Ill. App.3d 846 (5th Dist. 1997). But the Illinois Supreme Court's *IRMO Minear*, 181 Ill. 2d 552 (1998), case indicated that the law is less than clear on this subject. The *Minear* ruling was conservative because it did not go beyond the issues presented. The *Minear* court sidestepped substantive legal arguments, noting that the husband never explained the basis for the depreciation

expense in his financial statement. So the *Minear* Court ruled that the husband "failed to present evidence that would, under the rule he proposes, warrant exclusion of that expense." My comment to the *Gitlin on Divorce Report* of the Supreme Court's decision stated:

> "The Supreme Court could have easily decided to refuse to take cert on this case. They probably accepted cert knowing that there was a division among the districts and wanting to clear up the issue. Unfortunately, after accepting cert and reviewing the record, they learned that there was nothing to state the nature of the depreciation expense. Being a conservative judiciary, the court did the proper thing and refused to suggest by way of broad dictum that had the expense been justified as reasonable and necessary that the expense would have been allowed."

By way of example, *Nelson* held that the child support payor was not allowed to deduct farm equipment depreciation from his net income because he failed to show the expense was an "expenditure for the repayment of debt." It further held that the child support payor was not allowed to deduct payments toward farm operating loan principal from his net income because allowing the deduction would have permitted the payor use of the same deduction twice.

b. **Quantification – Spreadsheets**

I include two spreadsheets analyzing business expenses and depreciation as deductions in determining net income.

In the business expense spreadsheet, *Gay on Behalf of Gay v. Dunlap* is divided into two parts because the determination of one expense was remanded to the trial court. The remainder of the expenses were not allowed. Those expenses not allowed in this early case reviewing the deduction of business expenses were: meals, entertainment, car expenses (as opposed to the lease expense) , legal and professional services, and office expense supplies.

The column regarding "Expense Allowed" refers to those cases in which the expense was ultimately allowed as a deductible reasonable and necessary business expense as an end result. This includes cases where the expense was allowed at the trial court level and the result was affirmed, and cases where the trial court did not allow the expense but there was a reversal.

The taxpayer type is not always clear from the opinion. Where it appears, the taxpayer type is set forth. In most cases included in te spreadsheet, the taxpayer is a Schedule C taxpayer. In only one case was the business incorporated: *IRMO Heil*. It is probably not coincidental that this is one of the few cases where at least a portion of the expense was allowed as a reasonable and necessary business expense.

I review the business expenses cases from newest to oldest because of the change in the emphasis in case law from the concentration on the debt requirement to what constitutes income.

c. **Flowchart re Depreciation Cases**:

IRMO Davis presents what can be illustrated via a flow chart regarding depreciation cases. But note that especially in light of the Illinois Supreme Court's *Minear* case as well as the *Worrall* case, it appears that the law is not at all fixed regarding whether there is an emphasis on proof of a debt repayment schedule.

(1) **Debt Repayment Schedule**: First determine if there is a debt repayment schedule.
   (a) If no ➪ **Generally** non-deductible (but issue not definitely resolved per *Minear*/ *Worrall*).
   (b) If yes ➪ Go to step (2).

(2) **For Production of Income**: Determine whether the payor maintains his or her burden of proof of demonstrating expense was reasonable and necessary expense for production of income. (See *Minear*, *Worrall*, etc.)

   (a) **Increase in Income**: Did income increase as a result of the expense? If yes, go to step (3). If no, this still may be deductible if extenuating circumstances exist.

   (b) **Extenuating Circumstances**: If there are extenuating circumstances, even though income did not increase, did the payor have a good faith belief that his income would have increased as a result of the expense?

      i) If no, ⇨ Non-deductible.
      ii) If yes, ⇨ Go to step (2).

(3) **Reasonableness**: Did the support payor maintain his or her burden of proof of demonstrating the expenses are reasonable?

(4) **If Expense Depreciation**:
   (a) Straight-line = Reasonable according to *Davis*.
   (a) Non-straight line = Unreasonable: Convert to straight-line depreciation schedule.

The most difficult deduction for the court to handle is expenses for the repayment of debts that represent reasonable and necessary expenses for the production of income. Non-reimbursed business expenses may or may not be deductible, depending upon whether they are reasonable and necessary and whether there is a debt that is being repaid.

In *Gay on Behalf of Gay v. Dunlap*, 279 Ill. App.3d 140 (4th Dist. 1996), the appellate court applied a good faith test to business expenses, i.e., whether those expenses were outlaid by a parent with a good-faith belief his or her income would increase as a result, and which actually did act to increase income, or would have done so absent some extenuating circumstances.

There is another argument, however, that business debts should be "limited to extraordinary, large ticket, nonrecurring expenses," based on the language of section 505(a)(3)(h): "The court ... shall

enter an order containing provisions for its self-executing modification upon termination of such payment period," as urged by the dissent in *Gay*. The appellate court focused upon a specified repayment schedule in *Posey v. Tate*, 275 Ill. App.3d 822 (1st Dist., 6th Div. 1995). The *Posey* court held that the trial court did not abuse its discretion in allowing depreciation on rental properties to be deducted from income for purposes of setting child support, where the payor used a straight-line depreciation method and the expense could be presented in a specified repayment schedule. Contrast *Posey* to *IRMO Cornale*, 199 Ill. App.3d 134 (4th Dist. 1990), where the appellate court held that the trial court did not err in refusing to deduct from the support obligor's net income his expenses incurred for a rental property which, although an investment, produced no income.

d. **Student Loans May be Only Partially Deductible**:

Davis had ruled that student loans are deductible in determining net income. A 2004 case again addressed this issue in *Roper v. Johns*, 345 Ill. App.3d 1127 (Fifth Dist. 2004), GDR 04-37, in which the Fifth District appellate court found student loans (in this case for law school) may only be partially deductible based upon the rationale of *IRMO Heil*, 233 Ill. App. 3d 888, 892 (1992) (hunting lodge expenses only 50% deductible). *Roper* first commented:

> The only such deduction relevant here is the deduction for the repayment of loans for "reasonable and necessary expenses for the production of income." 750 ILCS 5/505(a)(3)(h). This court has recognized that student loans fall within this category. *IRMO Davis*, 287 Ill. App. 3d at 854. Although we held that the loans at issue in In re Marriage of *Davis* were deductible in their entirety (see *IRMO Davis*, 287 Ill. App.3d at 856), our opinion should not be read as holding that student loan payments will always be completely deductible. Like other debt payments deductible under this provision, student loans must be both reasonable and necessary for the production of income. See *IRMO Davis*, 287 Ill. App. 3d at 853 ("simply because an expense falls into the category of a debt repayment does not mean that it is necessarily deductible")."

Regarding whether a deduction is an all or nothing proposition, the *Roper* court stated: "Moreover, our examination of the purposes to be served by allowing the deduction in the context of student loan payments convinces us that trial courts must have the flexibility to find that a partial deduction is warranted."

After reviewing the law in other jurisdictions as to the issue, the appellate court stated:

> “With these principles in mind, we next consider whether – and to what extent – the debt Jeff incurred in pursuing his education was reasonable and necessary. Illinois courts have defined "necessary" expenses as " 'those expenses outlaid by a parent with a good-faith belief his or her income would increase as a result, and which actually did act to increase income[] or would have done so absent some extenuating circumstances.' " *IRMO Davis*, 287 Ill. App. 3d at 853 (quoting *Gay v. Dunlap*, 279 Ill. App. 3d 140, 149 (1996)). We have defined "reasonable" as not immoderate, extreme, or excessive considering the relationship between the amount of the expenditure and the amount by which the parent's income is expected to increase as a result. *IRMO Davis*, 287 Ill. App. 3d at 853 (citing *Gay*, 279 Ill. App. 3d at 149)."

As to the amount of the partial deduction the appellate court finally reasoned:

> "In the instant case, Jeff's combination of degrees enhanced his earning capacity and was, therefore, necessary for the production of income. However, we do not believe that the expenditure was reasonable-at least not in its entirety-for two reasons. First, it was entirely possible for Jeff to attain those degrees without incurring such an overwhelming level of debt. He could have found a job using the skills he had acquired with his undergraduate business degree and either attended law school part time while working full time or waited a few years between college and law school so he could pay down some of his undergraduate loans and save money towards his law school tuition and expenses. Further, he could have applied to law schools with lower tuition. Second, we agree with the trial court that the amount of debt incurred was excessive in relation to the extent to which Jeff's income was enhanced."

e. ***Per Diem* Deduction for Business Expenses**:

(1) ***Crossland* – Rejected Deduction of IRS *Per Diem* Allowance for Business Expenses**:

IRMO Crossland, 307 Ill. App.3d 292 (3d Dist. 1999), held the *per diem* expenses allowable federal income tax deduction for unreimbursed business expenses are not deductible in calculating net income for child support purposes. In *Crossland*, the former husband sought a deduction for his business expenses, based on the Internal Revenue Service's $36-per-day allowable income tax deduction for business expenses, rather than an actual expense allowance provided by his employer. The trial court denied the ex-husband's request and the Third District appellate court affirmed.

On appeal, the ex-husband did not argue that his expenses fell within any deduction listed in §505(a)(3)(h) of the Illinois Marriage and Dissolution of Marriage Act. Rather, the ex-husband argued the legislature never contemplated that a supporting parent would have to pay child support on gross receipts reduced only by those deductions listed in §505(a)(3), and he should be able to deduct ordinary and necessary expenses incurred in carrying on his trade. He further argued the IRS's *per diem* allowance was a reasonable estimation of his business expenses, so he should be able to deduct that allowance instead of the actual expenses incurred.

The appellate court did not directly address the ex-husband's argument that §505(a)(3) was not an exhaustive list of deductions for calculating net income for child support. Rather, it held the *per diem* allowance was an inappropriate deduction in calculating net income for child support because at least some portion of the allowance may represent income. It stated that to the extent the *per diem* allowance exceeds actual expenses, the *per diem* allowance is income rather than a reimbursement and is properly considered in calculating child support. The reviewing court further held the Internal Revenue Code's *per diem* allowance had no bearing on the issue of net income for child support. As an aside, the appellate court noted that since the allowance is available only as an itemized deduction, it does not reduce taxable income if the taxpayer does not have enough itemized deductions to surpass the standard deduction.

(2) ***Worrall* – Allowed Deduction of *Per Diem* Business Expenses if Actual**

Amounts Spent Proven:

A 2002 Illinois appellate court decision addressed the sort of *per diem* business expenses that can be deducted in determining child support – *IRMO Worrall*, 334 Ill. App.3d 550 (2nd Dist. 2002). The *Worrall* appellate court reviewed whether the trial court was correct in determining the father's net income per §505 did not include certain *per diem* expenses. The father was a truck driver whose compensation consisted of his base pay plus an amount designated as *per diem.* This per diem reimbursement was designed to cover expenses for meals and lodging while on the road.

A key ruling by the *Worrall* court stated:

> "The case law cited by the Department illustrates that the supporting parent bears the burden of establishing that a deduction applies, See e.g., *In re Marriage of Minear*, 181 Ill. 2d 552 (1998) (even assuming that depreciation of business assets could be deducted, supporting parent could not take the deduction because no evidence was offered to explain the claimed depreciation expense); *IRMO Nelson*, 297 Ill. App.3d 651 (1998), (party claiming a deduction for depreciation as a reasonable and necessary expense for the production of income was required to show that the expense was the repayment of a debt.)"

The appellate court commented that there is a distinction between income and a recoupment of capital. (Citing *Villanueva v. O'Gara*, 282 Ill. App.3d 147 (1996)). In that case the issue was what portion of the net proceeds from the settlement of a product liability lawsuit were "income" for the purpose of support modification. The holding in the case was that recoupment for disability, disfigurement, pain, suffering and reasonable past and future medical expenses do not equal income for the purpose of paying support.

Worrall explained that *Crossland* was a limited opinion:

> "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*."

In a decision which was surprisingly liberal (non-strict constructionist), the Second District *Worrall* went on to reject the reasoning of the *Crossland* decision. *Worrall* reasoned:

> "However, under the trial court's rationale, supporting parents earning the same total compensation and incurring the same expenses for meals and lodging might pay different amounts of child support depending on how much of the compensation, if any, is designated a per diem. An over-the-road truck driver who does not receive any compensation designated a per diem would apparently have to the show the applicability of a specific deduction under section 505(a)(3) of the Act (750 ILCS 5/505(a)(3)). This he or she might be unable to do because the only potentially applicable deduction is for "[e]xpenditures for repayment of debts that represent reasonable and necessary expenses for the production of income." (Emphasis added.) 750 ILCS 5/505(a)(3)(h) (West 2000). See *Crossland*, 307 Ill.

> App. 3d at 294 (over-the-road trucker "concede[d] that his business travel expenses do not fall within subsection 505(a)(3)(h) of the Act because they do not constitute repayment of debt"). We see no reason why the amount of support a parent pays should depend on notations on his pay stub that are simply designed to obtain advantageous tax treatment. **To permit such a result would exalt form over substance**. 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**. ***"

The decision thus held:

> "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."

The appellate court then remanded the matter for a new hearing directing the trial court to include in the father's income the entire amount of the *per diem* travel allowance received reduced by the amount actually used for travel expenses with the father having the burden of proving the travel expenses. As to the burden of proof, the appellate court commented that, "unless the supporting parent bears the burden of proof, he or she will have no incentive to keep records of expenses for meals and lodging; such records are not necessary for tax purposes but might be useful against the parent in a child support proceeding."

(3) ***Tegeler* – Liberal View of Debt Requirement Language When Defining Income for a Farmer re Operating Expenses**:

IRMO Tegeler, 365 Ill. App. 3d 448 (Second Dist., 2006), was the first Illinois appellate decision to take a liberal view regarding the "debt requirement" language. In *Tegeler* one of the issues was the income of the ex-husband as a farmer and whether the trial court properly calculated the ex-husband's net income consistent with the provisions of Section 505(a)(3)(h) of the IMDMA – reasonable and necessary business expenses which are for the repayment of debt. The former wife argued that the trial court should not have subtracted the ex-husband's day-to-day operating expenses when determining his net income on an income averaging basis was less than $20,000 annually. The ex-wife claimed that the father presented no evidence that such expenses went toward the repayment of debts or that they represented reasonable and necessary expenses for his income production. Interestingly, the majority sided with the Cook dissent (and partial concurrence) in *Gay v. Dunlop*, 279 Ill. App. 3d 140 (1996). In *Gay v. Dunlop*, the appellate court held that money spent on gas, auto repairs, and insurance premiums, and certain other expenses, should not have been subtracted, because they were not expenses for the repayment of debts. In shades of *Rimkus* the appellate court stated, "We believe that *Gay* is distinguishable from the instant case." The appellate court then quoted from the Cook dissent where he noted that Section 505(a)(3) could be "troublesome" for more traditionally self-employed people:

> "It seems clear there are obvious deductions which are not listed. For example, how is net income calculated for a merchant engaged in the sale of goods? Under section 505(a)(3) the

> court must begin with the total of the merchant's receipts from sales. Can there be a deduction for cost of goods sold? The only listed deduction which might apply is section 505(a)(3)(h), but that seems overly restrictive. There should be a deduction for cost of goods sold even if the merchant pays cash for them, even if there is no 'repayment of debts,' and even if the expense is a continuing one. I conclude the legislature intended to allow such obvious deductions even without specific language in section 505(a)(3). In the present case, for example, [the father] was not required to include the total commissions he earned and was entitled to a credit for the share taken by Coldwell Banker, including amounts it paid for his office expenses." *Gay*, 279 Ill. App. 3d at 151 (Cook, J., concurring in part and dissenting in part).

The appellate court justified its decision based upon the definition of income per *Rogers*, (213 Ill.2d 129 (2004)) defining income as "something that comes in as an increment or addition" as well as other similar definitions. The appellate court then stated, "As respondent's wealth is increased only by his gross farm revenues minus his day-to-day operating expenses, we conclude that the trial court properly adopted respondent's use of this figure as his "income" before subtracting the deductions specifically listed in section 505(a)(3)." The appellate court further justified is decision per the *Worrall* decision also addressing the issue of the definition of income (in the context of the per diem expenses paid to a truck driver.) Finally, the appellate court noted the limits of *Rogers* as to loans and stated, "We believe that, in general, loans should not be considered income... A contrary interpretation that includes loans as income would often create unjust or absurd results...."

Tegeler is a significant case to have in your arsenal – but one to try to avoid. While this case is good law in the Second District, it is difficult to reconcile it with *Gay*. *Tegeler* relies on Justice Cook's partial dissent in *Gay* in which he points out that while the father was self-employed, his relationship to Coldwell Banker was "similar to an employee." Assume that we are reviewing Schedule C of a personal tax return, i.e., Profit or Loss from Business. My approach has been that based upon *Gay*, the cost of good sold is clearly an allowable deduction. Therefore, *Gay* does not hold that we use the gross receipts figure but instead the starting point may be through taking the "gross income" figure – which is then offset for the expenses. When dealing with a self-employed individual, my other approach has been to presumptively disallow any depreciation deduction on line 13 of the tax returns. Then, focus on whether the depreciation is straight line of accelerated as well as the type of asset (e.g., with the focus on whether the asset the type that actually depreciates and needs to be replaced). Other approaches which might be presumptively disallowed are certain other deductions such as the expenses for business use of an individuals home, the meals and entertainment expense, etc.

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

5. **Reasonable Expenditures for the Benefit of the Child and the Other Parent**:

Common expenses of this type include child care expenses, premiums for life insurance and secondary

school tuition expenses.

6. **General Expenses for the Benefit of the Child, Exclusive of Gifts**:

According to 5th District 1997 case, the money a child support payor spends on a child (exclusive of gifts) should be deductible in determining his net income. *IRMO Davis*, 287 Ill. App.3d 846 (5th Dist. 1997). *Davis* states:

> Additionally, defendant's exhibit 8 shows that Duane spent over $1,200 on Danielle in 1994, exclusive of gifts. According to section 505(a)(3)(h), Duane is entitled to have his net income reduced for "reasonable expenditures for the benefit of the child and the other parent, exclusive of gifts." If Duane did, in fact, spend $1,200 on Danielle, exclusive of gifts, he is entitled to a deduction for that amount.

But the problem with applying this case is that it generally only works when retroactively applied because most expenses of this sort are not paid based upon a regular schedule which can be quantified (except in hindsight).

a. **2012 Legislation and Child Care Expenses / Parochial School, Extra-Curricular Expenses, etc.**:

With PA 97-941 / SB 2569 (the one also addressing the new law regarding dissipation) there is a new provision to 505(a)(2.5) that reads:

> (2.5) The court, in its discretion, in addition to setting child support pursuant to the guidelines and factors, may order either or both parents owing a duty of support to a child of the marriage to contribute to the following expenses, if determined by the court to be reasonable:
> (a) health needs not covered by insurance;
> **(b) child care;**
> (c) education; and
> (d) extracurricular activities.

Before this, orders providing for payment of child care were a creation of case law. In *IRMO Stanley*, 279 Ill. App.3d 1083 (4th Dist. 1996), one deduction from gross income was "day care contribution," per *IRMO Serna*, 172 Ill. App.3d 1051 (4th Dist. 1988). *Stanley* suggests in *dictum* that a justification for deducting the child care contribution is subparagraph (a)(3)(h) of §505, which authorizes a deduction for "reasonable expenditures for the benefit of the child and the other parent." Child care expenses are certainly reasonable expenses for the benefit of the child and the other parent. The problem is setting child support at a dollar certain while allowing a deduction for child care expenses in determining net.

In 2013, the Illinois appellate court case addressed day care expenses. *In re Aaliyah L.H.*, 2013 IL App (2d) 120414. That case affirmed the trial court's decision and addressed the *Serna* decision:

> Shangwé cites *Serna*, 172 Ill. App. 3d 1051, for the proposition that "the circuit court has discretion to require an obligor to make a contribution to daycare in addition to regular child support after considering all relevant factors [pursuant to section 505(a)(2)]." *** *Serna* does not stand for this proposition. In *Serna*, the supporting parent argued on appeal that "the day-care costs should be considered as part of the figure computed according to the guidelines." *** The nonsupporting parent argued that "the division of day-care expenses was a decision within the discretion of the trial court." Id. The appellate court held that the trial court did not abuse its discretion in dividing the daycare costs between the parties without applying the factors set forth in section 505(a)(2) to the facts of the case.

The appellate court in fact noted that "during the pendency of this case, the General Assembly enacted Public Act 97-941 (eff. Jan. 1, 2013) (adding 750 ILCS 5/505(a)(2.5)), which specifically addresses childcare in addition to other expenses the court may order a parent to contribute to."

The provision for payment of educational expenses had also been a creature of case law. For a discussion of this, see *Gitlin on Divorce*: Private Primary and Secondary Schools [20-15] including cases such as *IRMO Alexander*, 231 Ill.App.3d 95 (4th Dist. 1992) and *IRMO Benkendorf*, 252 Ill.App.3d 429 (1st Dist., 1993).

D. **Income Averaging Cases**:

1. **Introduction**:

Perhaps one of the most underused methods of determining income for the purpose of paying either child support or maintenance is an income averaging approach. While there is a significant body of Illinois case law which looks favorably upon averaging income in appropriate cases, many lawyers underuse this device to determine income in cases where the payor's income varies. Keep in mind that most of the income averaging cases were decided before the legislature changed the statute to allow a base plus a percentage. But many cases are not the types where a base plus a percentage readily applies. For example, assume an employee whose work is somewhat seasonal. Often the parties agree in these sort of cases to set support on an average year long income anticipating potential unemployment for a certain period many years.

2. **Review of Cases**:

Nelson: In *IRMO Nelson*, 297 Ill. App.3d 651 (3d Dist. 1998), the appellate court held that when child support obligor has fluctuating annual income, trial court properly determined child support by averaging obligor's net income over three consecutive years. The appellate court in *Nelson* commented favorably on the *IRMO Freesen* and *IRMO Elies* cases, discussed below. The *Nelson* three year figures were $43,000 in 1996, $74,000 in 1995 and $91,000 in 1994.

Freesen: A similar ruling was regarding income averaging was made in *Freesen*, 275 Ill. App.3d 97 (4th Dist. 1995). The *Freesen* court held that where there are income fluctuations, it is appropriate to consider prior years of income. *Freesen* stated:

> "Income need not fluctuate wildly before it is appropriate for the trial court to consider prior

> years of income in determining prospective income. We also note that there is no iron-clad rule requiring a trial court to consider only the last three years of income in arriving at net income for child support purposes. At least the three prior years should be used to obtain an accurate income picture. Beyond that, however, it must be left to the discretion of the trial court, as facts will vary in each case. While a court should not base net income findings upon the mere possibility of future financial resources, neither should it rely upon outdated information which no longer reflects prospective income."

At least three prior years of income should be used. It is suggested that *Freesen* represents a trend to consider an income averaging approach, whereas prior case law suggested the use of such an approach should be limited to very unusual circumstances.

Elies: In *Elies*, 248 Ill. App.3d 1052 (1st Dist., 6th Div. 1993), the appellate court affirmed an award of child support based upon 3 year averaging where the income fluctuated significantly and reliability was not disputed.

Schroeder: *IRMO Schroeder*, 215 Ill. App.3d 156 (4th Dist. 1991), held that deviations from current reliable current income data require a compelling showing of a definitive pattern of economic reversals. These cases break down as follows:

Carpel: The 1992 case of *In re Marriage of Carpel* also involved income averaging, but that case does not establish clear income averaging guidelines It appeared *Carpel* was a three year averaging award in a case involving a lawyer. *Carpel* stated:

> "In a case such as this, the trial court should consider the supporting parent's previous income when trying to determine his prospective income. However, a court should not base its net income finding on the mere possibility of future financial resources (*Harmon*, 210 Ill. App. 3d at 96) or on outdated data that no longer reflect prospective income. (*In re Marriage of Schroeder* (1991), 215 Ill. App. 3d 156, 161-62.)"

DiFatta: *IRMO DiFatta*, 306 Ill. App.3d 656 (2d Dist. 1999), presented a new wrinkle regarding the income averaging cases. *DiFatta* held that where child support obligor is paid by the hour and his average hours of employment fluctuate significantly from year to year, a court may average the number of hours worked for the past ten years in determining net income for child support purposes. The *DiFatta* court approved the trial court's income averaging for ten years. That is a long time and sets an Illinois court of review record for the number of years for which a court can income average.

Garrett: A 2003 income averaging case is *IRMO Garrett*. In *Garrett*, the husband was a self-employed physician who earned a net income in 1993 earned a net income of approximately $175,000. In 1999 the former wife filed a petition to increase child support. The trial court in the modification proceedings found that there had been a trend toward growth in the ex-husband's income from the time of the divorce. The ex-husband on appeal argued that the 2000 projected net income figure of $164,836 should have been used in applying the statutory guidelines. The appellate court after approving of the language in *Freesen* that income does not need to wildly fluctuate for the court to income average commented that, "We agree with the trial court's decision to average the net income of the previous three years because the income amounts varied significantly from year to year. Specifically, the court found [the ex-husband's] 1999 net income to be $240,034; his 1999 net income to be $237,897 and his 2000 net income to be $164,836. **Further, considering the fact that the**

court found the reduction in [the ex-husband's] gross income from 1999 to 2000 (the time this action was pending) atypical and unexplained by [the ex-husband's] testimony, the court would have been justified in excluding the 1999 to 2000 income altogether and substituting 1997's income of $197,497, thereby resulting in an even higher averaged income." The last sentence of the discussion was dictum but is interesting dictum considering the fact that this is the first Illinois case which addresses the possibility of ignoring the most recent annual income figure in an income averaging approach where it is thought that there may be a degree of income manipulation for the most recent year.

A 2006 income averaging case is *IRMO Hubbs*, 363 Ill. App. 3d 696 (Fifth Dist., 2006). *Hubbs* applies income averaging when income from new employment is uncertain and where a certain level of income is imputed based upon a decision to take a job with more speculation as to commissions versus a job with a certain income. The appellate court held that the trial court did not err in imputing to the husband a base gross income of $115,000 (based upon an average of the past three years of his previous employment.) In addition, the husband was required to pay 13% of the gross income above this amount. The husband urged that the trial court erred in imputing income to him based upon his previous employment. On the income averaging issue the appellate court stated:

> Where it is difficult to ascertain the net income of a noncustodial spouse, the circuit court may consider past earnings in determining the noncustodial spouse's net income for purposes of making a child support award. *IRMO Karonis,* 296 Ill. App. 3d 86, 92 (2nd Dist., 1998) [*Karonis* held that where it is difficult to ascertain exact amount of child support obligor's income and his credit application/financial statement stated an income of $110,000, whereas he testified to an income of only $13,000, the trial court's assessment that the obligor's net income was $40,000 per year was affirmed.] Using an average income for the previous three years of employment is a reasonable method for determining net income where income has fluctuated widely from year to year. *IRMO Nelson.*

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

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

IRMO S.D. and N.D., 2012 IL App (1st) 101876 (November 13, 2012), contains an excellent discussion regarding income averaging. The former wife urged that the trial court erred in using a three year averaging of income:

> Next S.D. contends that the trial court's averaging of N.D.'s income for the years 2006, 2007, and 2008 was error because although his income decreased from 2006 to 2007, it rose from 2006 to 2008. She argues that the income data did not show a "definitive pattern of economic reversal" justifying the use of income averaging. As support, she cites *In re Marriage of Schroeder*, 215 Ill. App. 3d 156 (1991). However, the trial court in that case averaged *six years* of income and the appellate court determined that some of the data was too old and unreliable. Id. at 161. It concluded that income averaging should only be used if a "definitive pattern of economic reversals" over several years is shown. Id. Also, the trial court here used data accepted by both parties for the *past three years only*. *In In re Marriage of Elies*, 248 Ill. App. 3d 1052, 1060-61 (1993), the First District Appellate Court found that using the income average from the past three years was an appropriate method for determining available income for maintenance and support. Furthermore, it disagreed with *Schroeder's* conclusion that income averaging should only be used if a definitive pattern of economic reversals over several years is shown. Id. We choose to follow *Elies* and find that the trial court did not err in utilizing income averaging to determine N.D.'s available income for maintenance.

The appellate court stated, "We choose to follow *Elies* and find that the trial court did not err in utilizing income averaging to determine [N.D.]'s available income for maintenance."

3. **Income Averaging Cases Summary**:

These cases break down as follows:

- ☞ Three year averaging OK even where income does not fluctuate wildly - *Freesen*
- ☞ Three year averaging OK where income fluctuates significantly - Elies, Nelson, *Garrett*, and *S.D. and N.D.*
- ☞ Six year weighted average improper. - *Schroeder*
- ☞ 10 years averaging **of hours** worked permissible when hours fluctuate significantly. *DiFatta*.
- ☞ Three year averaging does not necessarily have to be the last three years where there is evidence of what some lawyers call "sudden income deficiency syndrome." *Garrett*.

E. **One Time Income, Loans, Gifts or Regular Withdrawals: *IRMO Rogers*, *McGrath* and *Mayfield* – the New Trilogy**:

Overview: The bookend decisions are *Rogers* and *McGrath*, with *Rogers* being a very inclusive case as to what constitutes income and the *McGrath* appellate court decision (reversed by the Supreme Court) being portrayed as *McGrath* gone wild. It appears to have been an attempt to rein in some of the very inclusive language in *McGrath*.

When reading these decisions there are some common themes that one should look because it seems that case law is very fact specific – sometimes arguably placing form over substance. The questions to ask yourself include:

> What is double dipping in the context of income for support? This means is there an improper

double dipping if property is awarded as part of the divorce and later considered as income. Or is the double dipping only when the income is considered twice as income: once when the funds were received and then (deposited or invested) and a second time when liquidated? And if we use the later approach, is this an all or nothing approach or should there be an analysis as to what constituted what?

How is the claimed double dipping type argument similar or different to the double dipping argument regarding business valuation cases and personal and enterprise goodwill. Remember, there that the original contention was that the double dipping was consideration of the income of the business owning spouse twice: as a source of child support and maintenance. But later than issue morphed to focus not on the interplay between support /maintenance versus property but the property factors inherent to the property standards of the IMDMA themselves.

What are the areas where form may be seemed to be exalted over substance? And if we can identify those areas, how do we advice our clients so as to best try to avoid double counting and to try to avoid income recognition in a close case?

Rogers: With these questions, we can turn to *Rogers*. In 2004, I wrote: "Illinois family lawyers should keep a close watch on the Supreme Court's review of *IRMO Rogers*, 345 Ill. App.3d 77 (1st Dist., 2003) as to whether gifts and loans constitute income. *Rogers* (like *Collingbourne*) is one of the seminal Illinois family law decisions of the 2000's.

The divorced father in *Rogers* earned only $15,000 annually from his teaching position. [And the common theme in many court's applications of *Rogers* is where an individual's salary is not substantial and significantly below his regular cash flow from all sources.] The trial court set his support obligation at $250 monthly. The mother appealed and argued that the trial court should have determined that his income was substantially higher because the father had received $46,000 in gifts and loans every year of the father's adult life. Including those gifts and loans, the mother urged that the father's income was $61,000 not the $15,000 the father claimed. The ex-husband urged that consistent with *IRMO Harmon*, 210 Ill. App. 3d 92 (1991) an annual gift of $10,000 should not be considered where there is uncertainty the gift would be received in the future.

The *Rogers* Illinois Supreme Court decision, 213 Ill.2d 129 (2004), represented a water-shed for Illinois divorce lawyers. The Supreme Court noted that the first step in determining net income is to determine the "total of all income from all sources." The Supreme Court then stated:

> As the word itself suggests, "income" is simply "something that comes in as *an increment or addition ***: a gain or recurrent benefit* that is usually measured in money ***: the value of goods and services received by an individual in a given period of time." Webster's Third New International Dictionary 1143 (1986). It has likewise been defined as "[t]he money or other form of payment that one receives, usually periodically, from employment, business, investments, royalties, gifts and the like." *Black's Law Dictionary* 778 (8th ed. 2004).
>
> Under these definitions, a variety of payments will qualify as "income" for purposes of section 505(a)(3) of the Act that would not be taxable as income under the Internal Revenue Code... Based on the foregoing principles, we conclude, as the appellate court did, that the

> circuit court was correct to include as part of the father's "income" the annual gifts he received from his parents... They represented a valuable benefit to the father that enhanced his wealth and facilitated his ability to support Dylan.

***Rogers* and Loans and Gifts**: Regarding the argument that consideration of future receipts of gifts and loans constitutes speculation, the Supreme Court stated:

> Few, if any, sources of income are certain to continue unchanged year in and year out. People can lose their jobs, interest rates can fall, business conditions can wipe out profits and dividends. Accordingly, the relevant focus under section 505 is the parent's economic situation at the time the child support calculations are made by the court. If a parent has received payments that would otherwise qualify as "income" under the statute, nothing in the law permits those payments to be excluded from consideration merely because like payments might not be forthcoming in the future. As our appellate court has held, "the Act does not provide for a deduction of nonrecurring income in calculating net income for purposes of child support." *In re Marriage of Hart*, 194 Ill. App. 3d 839, 850 (1990).

The Illinois Supreme Court, however, allowed an out when it noted that, "the nonrecurring nature of an income stream is not irrelevant." It reasoned:

> Recurring or not, the income must be included by the circuit court in the first instance when it computes a parent's "net income" and applies the statutory guidelines for determining the minimum amount of support due under section 505(a)(1) of the Act. If, however, the evidence shows that a parent is unlikely to continue receiving certain payments in the future, the circuit court may consider that fact when determining, under section 505(a)(2) of the Act (750 ILCS 5/505(a)(2) (West 2002)), whether, and to what extent, deviation from the statutory support guidelines is warranted. Moreover, if the payments should stop earlier than anticipated by the court, the parent obligated to provide support based on those payments may seek modification of the support order pursuant to section 510 of the Act

Before *Rogers*, case law regarding non-recurring income had clearly held that the court has discretion whether to consider such income in determining child support. For example, in *IRMO Miller*, 231 Ill. App.3d 481 (3d Dist. 1992), the appellate court stated:

> While nonrecurring income may properly be included in calculating net income for purposes of child support (*IRMO Hart* (1990), 194 Ill. App.3d 839), this is not an inflexible rule, and the trial court has the discretion to exclude such income. To hold otherwise could lead to absurd results, as where a party's income is artificially inflated by a large capital gain on the sale of a residence. We believe that such determinations are best left to the sound discretion of the trial court.

Regarding the consideration of loans as income, the Supreme Court noted that the most credible testimony was that the father was never required to repay any of the loans given to him each year by his parents. The Court then stated, "That being so, the money the father received from his parents was no less 'income' than the gifts they gave him or the salary he received from his teaching job."

***Anderson* – Irregular History of Gifts**: *IRMO Anderson and Murphy*, 405 Ill. App. 3d 1129, 1134 (3rd Dist., 2010), addressed another case where there was a history of gifts from the parents – although

not in a predictable pattern. The appellate court reversed the trial court's failure to consider future gifts from the obligor's parents:

> In this case, Molly requested language in the court's order requiring Michael to include 28% of any gifts or loans he may receive from his parents in his child support payments in accordance with statutory guidelines. The evidence demonstrated that Michael received significant annual gifts from his parents, including substantial "loans" without repayment and a vehicle. These gifts appear to represent a continuing source of income that he has received over the course of his adult life. Moreover, they are a valuable benefit to Michael that facilitate his ability to support the girls. The trial court should not exclude such payments simply because similar payments may not occur in the future. See *Rogers*, 213 Ill. 2d at 138. **Accordingly, any substantial gifts from Michael's parents should have been included in his net income, and the trial court abused its discretion in failing to consider them for child support purposes**. We therefore remand the matter for the trial court to enter a modified child support order to include as income gifts Michael receives from his family.

The wrinkle *Anderson* presented was treating gifts somewhat like bonuses that are not predictable in terms of amount or when they will be paid – although they are subject to payment of child support.

Consideration of IRA and Other Distributions: The case law in following *Rogers*, has been less generous in terms of whether income might be considered as non-recurring.

IRA Distributions and Double Dipping Claims – Lindman and Eberhardt:

***Lindman* – IRA Distribution May Be Considered Net Income for Unemployed Father Given Facts of Case**: An example of a bad case making bad law is the Second District's 2005 *IRMO Lindman*, decision, 356 Ill. App.3d 462 (2d Dist. 2005). For a good discussion of IRA distributions of child support, review a 2012 Second District Rule 23 decision that provides a summary of the applicable case law - starting at paragraph 33, page 14 of the decision (see 2012 IL App (2d) 100681-U).

Lindman held that the trial court did not err when it refused to grant petitioner's petition to reduce child support because he lost his job and was receiving distributions of IRA awarded him in dissolution proceeding. According to *Lindman* the distributions from his IRA were properly considered §505 "income," therefore making his net income greater than when support was set. Significant factors in the trial court's award were the fact that the ex-husband lost his job due to alcohol abuse and that at the time of the divorce he earned approximately $80,000 annually. But two years before filing his petition for modification (2000 and 2001), the ex-husband had a gross income of $160,000 and $100,000, respectively. *Lindman* contains several quotes establishing the comprehensive sweep of what constitutes income for support purposes:

> Consistent with the above understanding, Illinois courts have concluded that, for purposes of calculating child support, net income includes such items as a **lump-sum worker's compensation award** (*In re Marriage of Dodds*, 222 Ill. App. 3d 99 (1991)), **a military allowance** (*In re Marriage of McGowan*, 265 Ill. App. 3d 976 (1994)), an **employee's deferred compensation** (*Posey v. Tate*, 275 Ill. App. 3d 822 (1995)), and even the

proceeds from a firefighter's pension (*People ex rel. Myers v. Kidd*, 308 Ill. App. 3d 593 (1999)).

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

Next, the court addressed the ex-husband's other points including the argument that the IRA distributions were non-recurring. The *Lindman* appellate court was clear as to the limitations of the opinion in terms of applying an abuse of discretion standard:

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

The *Lindman* court stated:

To begin with, "the Act does not provide for a deduction of nonrecurring income in calculating net income for purposes of child support." *In re Marriage of Hart*, 194 Ill. App. 3d 839, 850 (1990). Thus, if we were to conclude that such income is, by virtue of its lack of regularity, excluded from the net income calculation, we would read into the plain language of the statute limitations and conditions not expressed by the legislature. And there is a further problem with petitioner's theory. It presumes that the net income inquiry is concerned with what a parent's income will be at some time after the child support determination is made. It is not. Rather, the net income inquiry focuses on a parent's income at the time the determination is made. Should that income later change, the Act allows a parent to petition for modification of the support order. 750 ILCS 5/510.. Indeed, that is precisely what petitioner did here. But what the Act does not do is allow the possibility of more or less income in the future to determine whether the parent will pay more or less child support today.

Note the Rule 23 decision mentioned above tried to elucidate:

The trial court noted that the IRA was allocated to Thomas at the time of dissolution and that to include it as income would result in an impermissible double counting. Pursuant to *Lindman*, the “double counting” issues arises if Thomas contributed to the IRA after the dissolution and the contributions were considered as income in calculating the base amount of child support. See id. at 470 (double counting is when, relative to net income for child support purposes, the money is counted on its way into and its way out of the IRA). Double

> counting does not arise merely because the IRA was allocated as part of the dissolution judgment. Nonetheless...

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

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

Note the Rule 23 decision mentioned above tried to elucidate:

> The trial court noted that the IRA was allocated to Thomas at the time of dissolution and that to include it as income would result in an impermissible double counting. Pursuant to Lindman, the "double counting" issues arises if Thomas contributed to the IRA after the dissolution and the contributions were considered as income in calculating the base amount of child support. See id. at 470 (double counting is when, relative to net income for child support purposes, the money is counted on its way into and its way out of the IRA). Double counting does not arise merely because the IRA was allocated as part of the dissolution judgment. Nonetheless...

***Eberhardt* – IRA Distributions as Net Income**: *IRMO Eberhardt*, 387 Ill. App. 3d 226, 232 (First Dist., 2008), also addressed the claim that there is an improper double counting when improper double counting occurs when IRAs that are awarded in a property settlement are liquidated and viewed as income. The appellate court commented that the cases that they cited all turned on their facts including *IRMO Lindman* and *IRMO Klomps*. The appellate court cited *Klomps* for the following discussion:

> "If we were to allow retirement income to be excluded from net income when setting child support merely because those benefits, prior to their receipt, were used to determine an equitable distribution of the parties' marital property, we would be adding provisions to the Act that do not exist. We will not twist the clear meaning of the Act to invent an otherwise nonexistent rule that would be contrary to the purpose of making 'reasonable provision for spouses and minor children during and after litigation.' [Citation.]" *In re Marriage of Klomps*, 286 Ill. App. 3d at 716-17.

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

> Here, as in *Croak*, [an out of state case relied upon] the court found Stephen to be evasive and less than straightforward about his finances. It found a pattern of nondisclosure. The court did not believe Stephen's story of a sudden downturn in business. The court addressed the double counting issue, calling it a misguided argument on Stephen's part because the

> IRA income was less of an influence on the court's decision than the perception that Stephen's testimony was not credible. The court also noted that Stephen apparently spent money for his own benefit rather than meeting his court ordered support obligations to his children.

I have commented that because of the importance of this issue, awareness of the case law cited is critical - especially in light of the Supreme Court's in 2012 revisiting *Rogers* in another setting. The *Gitlin on Divorce* comment to the 1997 *Klomps* decision had stated:

> The father in *Klomps*, the appellant, relied heavily on *Harmon*. The father's brief stated that *Harmon* "is authority that an item may be a marital asset or income, but not both." *Harmon* said nothing of the sort. The Second District in *Harmon* passed on whether various types of income of the child support obligors would be included in calculating net income. The *Harmon* court considered passive income the mother received from bonds or securities -- passive income which was reported on her tax return but not actually received, gift income, and also interest income. The interest income was being paid to her by the child support recipient, the father who was paying the mother $750 per month interest on account of a property settlement balance due to her of $90,000. The appellate court did not discuss rationale for excluding interest. It merely stated:
>
> > *Finally, we also agree with respondent that the monthly interest payments which comprise her share of the marital assets should not be used to calculate her net income*. (See *In re Marriage of Hart* (1990), 194 Ill. App.3d 839, 850.) We therefore conclude that the trial court did not abuse its discretion in determining respondent's net income. [Emphasis added.]

But *Lindman* and *Eberhardt* might be revisited at some time in the future light of the Illinois Supreme Court's 2012 *McGrath* decision.

***McGrath* – Funds an Unemployed Parent Regularly Withdraws from Savings Account Should Not be included In Calculating Net Income Under §505(a)(2) of the IMDMA**

IRMO McGrath, 2012 IL 112792.

The Supreme Court concluded, as I predicted:

> Because the trial court improperly included money that respondent withdraws from his savings account in its calculation of net income for child support purposes, we reverse its judgment and remand the cause for a new calculation of respondent's child support obligation. The trial court should calculate respondent's net income without regard to amounts that he regularly withdraws from his savings account. The court may then consider whether 28% of this amount is inappropriate based on, inter alia, respondent's assets. If the court determines that the amount is inappropriate, it should make the specific finding required by section 505(a)(2) and adjust the award accordingly.

Because of the importance of the decision, I will quote from the key discussion points:

> Money that a person withdraws from a savings account simply does not fit into any of these definitions. The money in the account already belongs to the account's owner, and simply

> withdrawing it does not represent a gain or benefit to the owner. The money is not coming in as an increment or addition, and the account owner is not "receiving" the money because it already belongs to him. ¶ 15 The appellate court's analysis went off track when it stated that "[t]here are no provisions in the Act excluding Martin's monthly withdrawals from the definition of 'net income' " (2011 IL App (1st) 102119, ¶ 11), for it is the term "income" itself that excludes respondent's savings account withdrawals. The appellate court should not have been looking for savings account withdrawals in the statutory deductions from income, because those withdrawals were not income in the first place. We note that, although petitioner's attorney believed that the ultimate amount of child support arrived at by the trial court was appropriate, he conceded at oral argument that the appellate court's analysis was problematic and, when pressed, agreed that he was not going to the mat in defense of that analysis.
>
> The trial and appellate courts were rightly concerned that the amount generated by respondent's actual net income was inadequate, particularly when the evidence showed that respondent had considerable assets and was withdrawing over $8,000 from his savings account every month. *The Act, however, specifically provides for what to do in such a situation. If application of the guidelines generates an amount that the court considers inappropriate, then the court should make a specific finding to that effect and adjust the amount accordingly*. One factor that the court can consider in determining that the amount is inappropriate is "the financial resources and needs of the non-custodial parent." 750 ILCS 5/505(a)(2)(e) (West 2010). Thus, calculating respondent's net income correctly does not have to mean that respondent is "absolved of his child support obligation" (2011 IL App (1st) 102119, ¶ 11), as the appellate court feared.

Essentially, the point of *Rogers*, and now *McGrath*, is that the trial court should deviate from the support guidelines more often to properly consider situations such as this. I had written, "But expect that the Illinois Supreme Court will reverse the trial and appellate court in *McGrath* and remand the case with instructions."

***Baumgartner* -- Proceeds from Sale of Residential Property Were Not Income**: A case addressing non-recurring income in light of *Rogers* is *IRMO Baumgartner*, (1st Dist., 2008). An issue was whether proceeds from the sale of residential property that were used to purchase a new residence were income for child support purposes. The appellate court in *Baumgartner* stated that since the IMDMA does not define "income" it was proper to review the definition of income per *Rogers* as a gain or recurrent benefit, measured in money and as money from employment, business, investments, royalties, gifts and the like. Surprisingly, the appellate court then stated:

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

The *Baumgartner* appellate court immediately qualified this statement:

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

already accounted for in the determination of his child support obligation.

The appellate court then stated:

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

In fact, it was this decision that in 2012 was relied upon in an unpublished decision that did not consider IRA distributions as income for child support purposes, based on the facts of that case.

In oral arguments the first argument presented to Petitioner's counsel was that the trial court could have chosen to deviate from the guidelines after considering the regular withdrawals as income.

Colangelo **– Child Support and Consideration of Distributions of Stock Options**: *IRMO Colangelo*, 355 Ill. App. 3d 383 (2d Dist. 2005), is an important post-*Rogers* case that can be cited against the proposition for considering double dipping problems broadly (e.g., the external potential double dipping between property and child support rather than just double counting funds for support purposes).

But once more, this may be a case of bad facts leading to bad law. This is because the current usual scenario regarding stock options is that the unvested options are allocated via a triangular order to the non-optional holding spouse on a reserved jurisdiction basis. But this did not occur in *Colangelo* as the father received 100% of the unvested stock options as his part of the net marital estate. Now, perhaps he received an award of slightly less than half the other portions of the marital estate due to this. But it is impossible to quantify this.

In any event, the appellate court recited the facts as:

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

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

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

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

The holding of *Colangelo* was:

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

Compare the Next Two cases: *Marsh* and *Pratt*:

Marsh – Post-Divorce Sale of Stock Not Income When Paper Loss:
Marsh held that money received from post-divorce sale of shares of stock owned before divorce was not income for purposes of support.
IRMO Marsh, 2013, IL App (2d) 130423. The marital settlement agreement in *Marsh* had provided that the husband would retain ownership of "[h]is shares owned in Wisted's Supermarket." (There was an identical provision for petitioner to retain ownership of "[h]er shares owned in Wisted's Supermarket.") In addition, the MSA included the following provisions concerning child support:

> "A. [Respondent] shall pay to [petitioner], as and for the support of the minor child ***, the sum of $731 per month commencing April[] 2012. [Respondent's] child support payments will be offset against [petitioner's] maintenance payments ***. As a result of this offset, the amount to actually be withheld from [respondent's] paycheck shall be $231 per month.

> B. In addition to the specific dollar amount in paragraph one of this order, and also retroactive to include April of 2012, [respondent] shall pay 20% of all additional income, every three months, and shall provide [petitioner] income records sufficient to determine and enforce the percentage amount of such additional support."

In February 2013 the ex-wife filed a petition for rule and for attorney's fees. The former wife alleged that in December 2012, her former husband received $275,000 in income from the sale of his shares of Wisted's stock and failed to pay her 20% of that income as required. According to the ex-wife's affidavit she averred:

> "2. During the course of our marriage, my father gave [respondent] and me shares of stock in Wisted's Supermarket Inc. 2013 IL App (2d) 130423
>
> 3. The transfer of these shares to me and [respondent] was a gift and Wisted's Supermarkets, Inc. paid for all personal income tax obligations that [respondent] and I incurred as a result of our ownership of the stock. In addition, depending on the profitability of the company, [respondent] and I have received stock distributions in addition to the funds to cover taxes."

In the former husband's response he indicated that he sold the stock at a "loss" and accordingly did not receive any income subject to payment of support. He attached an affidavit from a CPA indicating that the cost basis of the stock was more than the amount sold. The cost basis was determined based on the value of the stock at the time it was gifted to the former husband and then adjusting the basis yearly by the amount of the net income or losses of Wisted's proportionate to the number of shares owned in relation to the total number outstanding from the date of the gift through year end 2011. The affidavit by the CPA indicated that there would be additional income for 2012 and that therefore the cost basis would actually increase somewhat. The affidavit further stated:

> 7. That the reason that the income/loss impacts the basis of the stock is that, the shareholders['] proportionate share of those earnings/losses [is] passed through to them by a K-1, as this [is] a sub-chapter S corporation. The shareholder than [sic] pays the income taxes on these earnings even though the earnings have not been distributed. The increasing of the basis of the stock is a proper accounting procedure to prevent double taxation of the same earnings.

At the hearing neither party presented evidence. The trial court found that there was no increase in the former husband's wealth and denied the former wife's petition. The appellate court affirmed. The appellate court reviewed the matter de novo as to what constituted income per case law including *Rogers* and *McGrath*.

The quotes from the appellate court decision are instructive:

> In *Rogers*, the supreme court discussed the plain and ordinary meaning of the term "income":
>
> > "As the word itself suggests, 'income' is simply 'something that comes in as an increment or addition ***: a gain or recurrent benefit that is usu[ually] [sic] measured in money ***: the value of goods and services received by an individual in a given

> period of time.' *Webster's Third New International Dictionary* 1143 (1986). It has likewise been defined as '[t]he money or other form of payment that one receives, usu[ually] [sic] periodically, from employment, business, investments, royalties, gifts and the like.' *Black's Law Dictionary* 778 (8th ed. 2004)." *Rogers*, 213 Ill. 2d at 136-37.

> Illinois courts have also defined "income" as " ' "a gain or profit" [citation] and is "ordinarily understood to be a return on the investment of labor or capital, thereby increasing the wealth of the recipient" [citations].' " *In re Marriage of Worrall*, 334 Ill. App. 3d 550, 553-54 (2002) (quoting *Villanueva v. O'Gara*, 282 Ill. App. 3d 147, 150 (1996)) .

The argument of the former wife was that when the stock was sold her ex-husband realized "new money" he did not have before and thus realized a gain. The former husband contended that he "simply converted" the stock he was awarded into cash and the cash was already income he owned."

The Second District appellate court stated:

> The question, here, is whether respondent's stock was analogous to the savings account in *McGrath*. Petitioner seeks to distinguish *McGrath* by arguing that, "[u]nlike in *McGrath*, where pre-existing funds were being withdrawn from a savings account, the [respondent] in this case *did* receive money that he did not previously have (or pay child support from), as a gain or increment in addition to funds he had before he sold his gifted shares of stock." (Emphasis in original.) However, the fact that, at the time of dissolution, the asset was in the form of stock rather than money is a distinction without a difference, because the stock was a liquid asset, readily converted into cash. Thus, the mere conversion of the stock to money did not result in a gain for respondent. The cash proceeds simply took the place of the shares of stock. See *In re Marriage of Anderson*, 405 Ill. App. 3d 1129, 1135 (2010) (proceeds from reverse stock split not income where the cash proceeds took the place of the former shares of stock). Further, the fact that respondent had been gifted the shares is of no consequence. Whether the shares were gifted or purchased, respondent received the shares prior to the dissolution and was the owner at the time of dissolution.

The former wife tried to rely on the 2005 *Colangelo* opinion holding that distributions from vested stock options are income in determining support. But the appellate court explained the background of the opinion as:

> There, at the time of dissolution, the trial court allocated unvested stock options to the father as marital property. Id. at 385. The stock options subsequently became vested and were distributed. Id. at 386.
>
> On appeal, the father maintained that to count the stock distributions as income would amount to double-counting the value of the asset, because the unvested stock options had previously been distributed to him as marital property. Id. at 389. We found that the trial court should have considered the father's stock distributions as income for child support purposes. Id. We stated: "Because the unvested stock options transformed into a realized distribution, it would seem that the distribution is not marital property being counted as income, but instead the fruits of the marital property." Id.

The *Marsh* appellate court tried to distinguish *Colangelo* as simply a different factual scenario and the holding did not apply: "Certainly, as this court noted, when the stock options vested and resulted in stock distributions, there was a gain. Id. at 392. Here, unlike in *Colangelo*, there was no gain. Indeed, the evidence established that respondent sold the shares at a loss."

***Pratt* – Restricted Stock and Stock Options Income Despite Terms of MSA**: But compare the more recent decision in *IRMO Pratt*, 2014 IL App (1st) 130465 (August 12, 2014) where the appellate court held that restricted stock and stock options constitute income for support purposes despite being allocated in divorce as property and in spite of clause in MSA. I have suggested that this part of this decision is an example of bad facts making "bad law" – at least in the First District.

The appellate court stated in somewhat shocking breadth:

> Murray's claim that the MSA contains a provision that "[a]ll restricted stock and stock options awarded to Murray or Sharon as an award of his/her share of the marital estate *** shall not be deemed income for child support purposes" is true. This provision precluding certain sources of income from consideration for child support purposes is against Illinois public policy and is thus void. We shall not enforce it.

I disagree. In any event, keep in mind that the decision is a limited one, merely affirming the ability of the trial court to modify the decision given the circumstances – "The trial court here acted within its authority when it modified that provision and included earnings from Murray's sale of restricted stock options as income for child support purposes."

The crux of the decision regarding the so called double dipping argument will be quoted at some length:

> Murray contends, however, that it is fundamentally unfair to include this income because he was awarded the restricted stock options as marital property in the dissolution judgment and, by receiving a portion of the income from the sale, Sharon is "double dipping." He argues that Sharon received her portion of the stocks as marital property and now she is receiving as child support a portion of Murray's income from his share. This is not "double dipping." The trial court can consider marital property as income for child support purposes, even if the income comes from vested stock options awarded as marital property to one of the parties. *In re Marriage of Colangelo*, 355 Ill. App. 3d 383, 390 (2005); see also *In re Marriage of Klomps*, 286 Ill. App. 3d 710, 714-15 (1997).
>
> Murray disagrees that *Colangelo* applies, arguing that unlike the stock options at issue here, the deferred compensation in Colangelo was "not valued, not listed in the agreement, not separately split between the parties, nor separately saleable." We note that Murray does not support this argument with any citations to authority. Nonetheless, the court in *Colangelo* did not base its determination on the type of deferred compensation at issue before it, but on the fact that deferred compensation and retirement benefits are income and they are not listed in the Act as an applicable deduction from income. *Colangelo*, 355 Ill. App. 3d at 392. The trial court acted correctly and did not abuse its discretion in finding that Murray's earnings from restricted stock option sales in 2011 constituted income for child support purposes.

***Anderson* -- Reverse Stock Split Did Not Constitute Income**: In 2010, *IRMO Anderson*, 405 Ill. App. 3d 1129 (3rd Dist., 2 010), addressed what constitutes income – in this case whether a reverse stock split constituted income for the purpose of child support. First, the appellate court quoted from the definitions of income in *Rogers* and in *Worrall*. The *Anderson* court first quoted from *Rogers* regarding a variety of payments constituting income under section 505(a)(3):

> Courts have included individual retirement account (IRA) disbursements representing deferred employment earnings, receipt of company stock from employment stock options, worker's compensation awards and the proceeds from pensions as income under the Dissolution Act. See *In re Marriage of Lindman*, 356 Ill. App. 3d 462 (2005); *In re Marriage of Colangelo*, 355 Ill. App. 3d 383 (2005); *Department of Public Aid ex rel. Jennings v. White*, 286 Ill. App. 3d 213 (1997); *In re Marriage of Klomps*, 286 Ill. App. 3d 710 (1997). However, using the same statutory definition, other courts have determined that withdrawals from self-funded IRAs and proceeds from the sale of residential property do not constitute income under section 505(a)(3). See *In re Marriage of O'Daniel*, 382 Ill. App. 3d 845 (2008); *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39 (2008).
>
> In *In O'Daniel*, the appellate court determined that the father's IRA disbursements did not constitute income because IRA accounts are ordinarily self-funded by the individual account holder. The court noted that "[w]hen an individual withdraws money he placed into an IRA, he does not gain anything as the money was already his. Therefore, it is not a gain and not income." *O'Daniel*, 382 Ill. App. 3d at 850. In reaching its conclusion, the court reasoned that the only portion of the IRA that would constitute a gain for the individual, and therefore income for purposes of child support, would be the interest or appreciation earnings from the IRA. *O'Daniel*, 382 Ill. App. 3d at 850; see also *Baumgartner*, 384 Ill. App. 3d at 57 (where parent sells home and uses proceeds to purchase new home, proceeds are not actually available as income).

The appellate court then stated:

> In this case, the proceeds from the reverse stock split of Michael's AEC shares did not involve a gain or recurring benefit or employment compensation. *** The cash proceeds took the place of the former shares of stock. Michael then used those proceeds to purchase gold coins. The asset already belonged to Michael, and the proceeds were used to purchase another investment asset. Accordingly, the proceeds do not qualify as income for child support purposes.

The appellate court then provided a caveat:

> In reaching our conclusion, we note that the distribution of stock may constitute income for child support purposes if the stock is sold pursuant to an employment bonus-based option. See *Colangelo*, 355 Ill. App. 3d 383. Here, however, the sale of Michael's stock was necessitated by the company's decision to implement a reverse stock split of minority shareholders, **a decision over which Michael had no control**. He then utilized the proceeds to purchase other investment assets. Under these circumstances, the proceeds do not qualify as "net income" under section 505(a)(3).

IRMO Mayfield – Illinois Supreme Court Rules Lump-Sum Worker's Compensation Was Income

Given Facts of the Case:

Within the last ten years, we have a trilogy of Illinois Supreme Court cases involving child support addressing the meaning of what income is: *Rogers*, *McGrath* and now *Mayfield*, 2013 IL 114655 (May 23, 2013). As discussed above, on oversimplified basis, recall that *Rogers* defined income as including gifts and loans. *McGrath* stated that withdrawals from savings are not income. And now *Mayfield* holds that given the facts of the case a lump-sum worker's compensation award was income. I predict that this case will be mis-cited for what it does not say. The case does not say that worker's compensation awards necessarily constitute income on which support should be based. Instead, the case went out its way to essentially urge that if the case had been properly tried, it may have been appropriate that there would be a deviation from the guidelines. The case concluded:

> More importantly, Mayfield presented insufficient evidence to warrant a deviation under section 505(a)(2). Apparently, Dykes testified that Jessica was "in need of current support," but Mayfield did not testify that Jessica's financial resources; her standard of living if the marriage had not been dissolved; her physical, mental, emotional, and educational needs; or even his own financial resources and needs were such that a downward deviation from the guidelines was appropriate. **He provided no details about his injury or his prognosis for future employment, other than the settlement agreement, which stated only that he is "seeking employment [within] his restriction," but provided telling details about how he spent the settlement**. Accordingly, the trial court was correct to set child support at 20% of the lump-sum settlement in the absence of any evidence to support a different amount.

Executive Summary re Consideration of Non-Traditional income Following *Rogers*:

Gifting or Loan Cases:

- ☞ *IRMO Anderson*, 405 Ill. App. 3d 1129, 1134 ((3rd Dist., 2010): Where there is a history of gifts from the parents , but not in a predictable pattern, the gifts should be considering in setting child support on a percentage as received basis.

IRA Distribution Cases:

- ☞ *IRMO Lindman*, decision, 356 Ill. App.3d 462 (2d Dist. 2005): In this fact specific case the trial court did not err when it refused to grant petitioner's petition to reduce child support. Father had lost his job and was receiving distributions of IRA awarded him in dissolution proceeding. The IRA distributions were properly considered §505 "income," therefore making his net income greater than when support was set.

- ☞ *IRMO Eberhardt*, 387 Ill. App. 3d 226 (First Dist., 2008): Issue: Whether there is an improper double counting when improper double counting occurs when IRAs that are awarded in a property settlement are liquidated and viewed as income. Comment: All similar cases turn on the facts. In this case given father's credibility gap, the appellate court affirmed the consideration of IRA distributions as income.

Regular Withdrawal Cases:

☞ *IRMO McGrath*, 2012 IL 112792 (May 24, 2012): Illinois Supreme Court: Funds an unemployed parent regularly withdraws from savings account should not be included in calculating net income under §505(a)(2).

Stocking up: Stock Splits, Restricted Stock, Stock Options or Sale of Stock:

☞ *IRMO Anderson*, 405 Ill. App. 3d 1129 (3rd Dist., 2010): Reverse stock split did not constitute income because there was no gain, employment compensation or recurring benefit. ["we note that the distribution of stock may constitute income for child support purposes if the stock is sold pursuant to an employment bonus-based option. See *Colangelo*, 355 Ill. App. 3d 383."]

☞ *IRMO Marsh*, 2013, IL App (2d) 130423 (December 2013): Money received from post-divorce sale of shares of stock owned before divorce was not income for purposes of support. Case distinguishes *Colangelo*.

☞ *IRMO Pratt*, 2014 IL App (1st) 130465 (August 12, 2014) Restricted stock and stock options were income despite the terms of the MSA.

☞ *IRMO Colangelo*, 355 Ill. App. 3d 383 (2d Dist. 2005): The father's exercise of stock options that had been unvested at the time of the divorce constituted income for support – even though the unrealized stock options were allocated to the parties as marital property (in this case allocated 100% to the father).

Worker's Compensation Income

☞ *IRMO Mayfield*, 2013 IL 114655 (Illinois Supreme Court): Worker's compensation award constitutes income for support purposes, but the court can choose to deviate from the guidelines if appropriate evidence is presented.

F. **Deviations from the Support Guidelines**:

Three lines of case law commonly involve deviations from the support guidelines: 1) cases where there is equal or nearly equal parenting time for each party; 2) cases where the payor is in the high income category; 3) cases whether custody of the children is split. The split custody cases is separately addressed -- in my outline regarding rules of thumb in divorce cases.

And a question may come into play as to whether the change in the statutory language makes it easier for the court to deviate from the child support guidelines based upon the prospective changes to Section 502(a)(2). The changes are more important and will read:

> (2) The above guidelines shall be applied in each case unless the court finds that a deviation from the guidelines is appropriate after considering the best interest of the child in light of the evidence, including, but not limited to, ~~makes a finding that application of the guidelines would be inappropriate, after considering the best interests of the child in light of evidence~~

~~including but not limited to~~ one or more of the following relevant factors: ***

(d) the physical, mental, and emotional needs ~~condition~~ of the child~~, and his educational needs;~~ and

(d-5) the educational needs of the child; and

So the key language is going from "makes a finding that application of the guidelines would be inappropriate" to "finds that a deviation from the guidelines is appropriate." This is a better standard because the current standard essentially uses a double negative. The double negative is that the court follows the guidelines *unless* there is a finding that application in *inappropriate*.

1. **Deviations In Cases with Extensive Parenting Time**:

Illinois is not in the mainstream regarding its treatment of cases with extensive parenting time (defined as being less than but close to 50% of the time). To put things in perspective, most states have a "shared parenting time offset" Thirty three states have such an offset as established either by case law generally by statutory law. My rule of thumb is that with a "basic" schedule a parent has perhaps 33% of the parenting time. So the question is what occurs when the parenting time for the non-residential parent is generous – perhaps between 40% to 45% of the time but not a true joint physical custody schedule. If the goal of the support guidelines were fairness, the support guidelines would be increased where the non-custodial parent has little contact with the children and would be reduced when parenting time is far beyond the so called "norm." But there is a conflict between fairness and ease of application. The Illinois child support guidelines err on the side of ease of application. But in doing so, they set up scenario where some parents steadfastly seek a "50/50" parenting time to reduce their child support obligation – even in cases where this not appropriate.

***DeMattia* -- No Deviation Despite Generous Parenting Time and Equal Incomes**: A case often cited in support of the proposition the trial court should not consider extensive parenting time to the non-residential parent as a possible deviation factor is *IRMO DeMattia*, 302 Ill. App.3d 390, (4th Dist. 1999), GDR 99-22. But the *DeMattia* court only affirmed the refusal of the trial court to deviate downward from minimum statutory child support guidelines even thought the father had extensive visitation. The Fourth District court held that the payor was not entitled to automatic child support reduction. The decision recited husband's parenting time:

> (1) Tuesday through Friday from 6 a.m. to 2 p.m., which accommodated Darlene's work schedule; (2) every other weekend from 10 a.m. on Saturday to 7 p.m. on Sunday; and (3) the Saturdays Darlene worked from 6 a.m. to 4 p.m. Holidays and birthdays were divided equally and each party received 30 days of vacation time throughout the year.

So, he argued he had parenting time for 10 of 14 days for at least 8 hours per day. The appellate court expressed that it was not making a broad-based rule about downward deviations from the minimum child support guidelines:

> We do not suggest a trial court could never deviate downward from the guidelines based on the noncustodial parent's extended provision of care for his or her children. We do not seek to discourage noncustodial parents from having substantial contact with their children. The benefit a noncustodial parent receives from having substantial involvement with his or her children cannot be measured by dollars. There should not be an automatic deduction in

> child support because a noncustodial parent has the opportunity to spend substantial time with the children and fulfill a parental responsibility. Caring for one's own children is not day care nor is it a chore for which to be compensated. Our decision is not a criticism of [the husband] for asking this interesting question, but we decline the invitation to add a new layer of complexity to custody and support decisions. Our decision is limited to the facts in this case. (Emphasis in original)

***Reppen-Sonneson* -- Guidelines Don't Apply to Joint Physical Custody**: A case somewhat contrary to *DeMattia* is *IRMO Reppen-Sonneson*, 299 Ill. App.3d 691 (2d Dist. 1998). It held that the trial court not obligated to rely on statutory guidelines where parents *equally* shared custody of children. Child support by husband to wife below statutory guidelines was affirmed. In *Reppen-Sonneson*, the husband was required to pay 15% of his net income for support of three children. The appellate court stated:

> The parties agreed to share in the legal and physical custody of their three children. Because both parents share the custody of the children, the trial court was not obligated to rely on the statutory guidelines. In this case, only [the father] was ordered to pay $75 per week in child support. In addition to providing the sole support, [the father] pays the children's health insurance and 75% of any extraordinary medical expenses such as orthodontia. [The father] has just as much responsibility in caring for the children as [the mother]. We do not find that the court abused its discretion.

***Smith* – Trial Court Abused Discretion in Awarding Guideline Support Where Parties Shared Custody:** *IRMO Smith*, 2012 IL App (2d) 110522 (December 2012). The parties in *Smith* had entered into a Joint Parenting Order which designated neither as primary and allowed each party visitation on alternating weekends and half the week days. The financial circumstances of the case were that:

> Their 2007 tax return indicated that Sharyl's gross income for that year was $72,465, and Lloyd received $13,196 from Social Security. In 2008, Sharyl's gross income was $76,030, and Lloyd received $13,817 from Social Security. In 2009, Sharyl's gross income was $74,928; Lloyd received $14,621 from Social Security. In addition, Lloyd receives a Social Security allotment for Alyssa because he is receiving Social Security disability.

Regarding support, the trial court stated:

> "Next, there is essentially an uncontroverted presentation on the net income for Sharyl Smith, that being the amount of $3,556. If so, it is true that 20 percent of that amount should drop that monthly child support payment from $805 to $711.20, effective as of the first point in time that the payment was made or would have been made payable. In other words, as of the date of judgment."

The 2012 *Smith* decision is one of those rare decisions where the appellate court reversed the trial court when it awarded guideline support. In this case custody was shared under the JPA. The appellate court commented:

> Second, the rule of law "announced" in Reppen-Sonneson makes it clear that the trial court can use its discretion in choosing how to determine child support when custody of the

child(ren) is shared. See *Reppen-Sonneson*, 299 Ill. App 3d at 695 ("When custody is shared, the court may apportion the percentage between the parents *(In re Marriage of Duerr*, 250 Ill. App. 3d [232,] 238 [(1993)]), or may disregard the statutory guidelines in the Act and instead consider the factors listed in section 505(a)(2) (*In re Marriage of Steadman*, 283 Ill. App. 3d 703, 708-09 (1996)).").

The appellate court concluded that because the trial court essentially blindly applied the guidelines, there was an abuse of discretion.

2. **Child Support to "Visiting" Parent**:

Illinois now has several "reverse" child support cases – cases where child support is paid to the non-residential parent. And the most recent on is where the Illinois Supreme Court has finally weighed in on the issue and determined that – yes – the court has the authority to require the custodial parent to pay support to the "visiting" parent.

***Cesaretti* – Where Parenting Time Relatively Equal Custodial Parent May be Required to Pay Support to Non-Custodial Parent**: In *IRMO Cesaretti*, 203 Ill. App.3d 347 (2d Dist. 1990), the court held that where parties share parenting time relatively equally, the trial court did not err in requiring custodial parent to pay child support to non-custodial parent in view of disparity in parties' incomes. In *Cesaretti* the husband urged that once legal and physical custody is placed in one parent, the custodial parent has no obligation to pay support to the non-custodial parent. The appellate court rejected the husband's argument, noting that while the trial court had awarded husband temporary custody, the child nevertheless was to spend approximately equal time with each parent. The appellate court held that given such a custody arrangement, the trial court did not err in ordering the custodial parent to pay child support to the non-custodial parent. The husband testified at trial that he had a yearly gross income of more than $20,000 and that his monthly expenses were approximately $1,000. The wife testified that she earned approximately $7,000 a year and her monthly expenses were more than $2,000. The appellate court noted it is equitable that the parent with the disproportionately greater income should bear the greater share of the costs for support. Thus, the appellate court held that the trial court's award of $75 per week to the non-custodial parent was not in error.

***Pitts* – Disabled Wife Entitled to Support During Summer Visitation:** Another "reverse" child support type case is *IRMO Pitts*, 169 Ill. App.3d 200 (5th Dist. 1988). *Pitts* ruled that the non-custodial parent, who has one month of visitation during summer, and who is in financial need, was entitled to child support during visitation. The evidence in *Pitts* showed that the wife was disabled and her only reliable source of income was $527 per month disability pay from the Illinois Teacher's Retirement System. Her parents also gave her $300 per month. The husband earned $2,000 per month from his law practice.

Note that these reverse child support cases are not consistent with the mis-reading discussed above of *IRMO Reppen-Sonneson*, 299 Ill. App.3d 691 (2d Dist. 1998), i.e., that even where parenting time is nearly equal there is not a justification for a deviation from the support guidelines.

***Turk* – Illinois Supreme Court: Custodial Parent Can be Ordered to Pay Support**: *IRMO Turk*, 2014 IL 116730 (June 19, 2014). I have been pointing out for years that Illinois case law provides authority for the custodial parent to provide support to the non-custodial parent. And 2014 brought us

a case that confirms this where the father was awarded custody in post-decree proceedings yet ordered to pay support.

The Court reasoned properly:

> Sometimes, as under the agreed custody judgment entered in this case, a parent who is technically noncustodial may have visitation rights which place the child in that parent's care for periods that rival those of the custodial parent and at commensurate cost. If Steven were correct and status as the custodial parent automatically precluded one from having to make any child support payments to the other parent, the noncustodial parent could end up having to pay a significant portion of the costs of raising the child without any regard to that parent's financial resources and needs or how they compared to the financial resources and needs of the custodial parent. That may not be problematic where the noncustodial parent happens to be the wealthier of the two, but where, as here, the noncustodial parent appears to have significantly fewer resources to meet the substantial support costs which are sure to arise from the extensive visitation schedule, disqualifying the poorer parent from obtaining any financial assistance for child care from the wealthier parent based solely on the poorer parent's classification as noncustodial would not only place an unfair burden on the poorer parent, it could also leave that parent with insufficient resources to care for the child in a manner even minimally comparable to that of the wealthier parent.
>
> Section 505(a) was intended to protect the rights of children to be supported by their parents in an amount commensurate with the parents' income. *In re Paternity of Perry*, 260 Ill. App. 3d 374, 382 (1994). Under Steven's approach, a child could well end up living commensurate with the parents' income only half the time, when he or she was staying with the wealthier parent. If custodial parents were categorically exempt from child support obligations, the wealthier parent's resources would be beyond the court's consideration and reach even though the visitation schedule resulted in the child actually residing with the poorer parent for a substantial period each week. This could be detrimental to the child psychologically as well as economically, for the instability resulting from having to "live a dual life in order to conform to the differing socio-economic classes of his or her parents" may cause the child to experience distress or other damaging emotional responses.

The Supreme Court cited case law from other jurisdictions regarding the ability of the court to require the custodial parent to pay child support. So, the critical portion of the reasoning of our Supreme Court's decision stated:

> The concern has been expressed that if we sanction awards of child support to noncustodial parents, we open the door to abuse by spouses who will use requests for modification of child support as a subterfuge for obtaining additional maintenance. We note, however, that the criteria for awarding and modifying child support are clearly set out in the statute. See 750 ILCS 5/505, 510 (West 2012). If those criteria are applied properly by the lower courts, and we must assume they will be, any abuse should be preventable. Moreover, and in any case, speculation of this kind cannot justify failing to follow the statute as written. *By its terms, section 505(a) does not restrict child support obligations to noncustodial parents*. It is axiomatic that we may not depart from a statute's plain language by reading into the law exceptions, limitations, or conditions that the legislature did not express (citations omitted), nor may we rewrite the law to make it consistent with our own idea of orderliness

and public policy.

The Supreme Court opinion had two special concurrence. Ultimately the Supreme court affirmed reversed the trial court's judgment and remanded with directions. The conclusion by the Illinois Supreme Court was:

> [W]e affirm that portion of the appellate court's judgment which upheld the authority of the circuit court to order Steven to pay child support and remanded to the circuit court for an evidentiary hearing regarding the amount of child support Steven should be required to pay. We reverse that portion of the appellate court's judgment which upheld the circuit court's modification of the support order requiring Steven to pay the full amount of any of the children's medical and dental expenses not covered by insurance. On remand, the circuit court is directed to revisit that question when it reconsiders Steven's child support obligations.

Note that the appellate court reversed the portion of the circuit court's judgment which ordered the former husband to pay her child support and remanded the cause to the circuit court for an evidentiary hearing, with directions for the court to "clearly explain the basis for any support awarded." 2013 IL App (1st) 122486, ¶ 48. The Supreme Court commented that, "Having prevailed on this point in the appellate court, there is no need (or legal basis) for Steven to pursue it again in our court. We cannot do more for him than the appellate court has already done."

3. **Deviations from the Guidelines in High Income Cases**:

a. **Introduction**:

I may receive more consultation on cases involving deviations from the support guidelines in high income cases than perhaps any other mainstream family law issue. I review these cases in chronological order. When looking at these cases, the range for deviating from the support guidelines was lower in earlier cases than in later cases. Also, note those cases involving paternity proceedings compared to divorce proceedings. Often trial courts seem to deviate to a greater degree in paternity cases – especially involving a short term relationship as compared to divorce cases. While neither trial courts nor appellate courts can differentiate between divorce and paternity proceedings in terms of a different treatment of child support, keep in mind that §505(a)(2)(c) reads: "the standard of living the child would have enjoyed had the marriage not been dissolved;." But take the case of an "outlier" – a short term relationship leading to the birth of a child. The IPA of 1984 (what might be referred to as the Paternity Act) incorporates by reference the standards of section 505 in determining child support. But much like the Paternity Act incorporating by reference the standards for attorney's fees – the standards for deviating from the support guidelines – just as to the standards for determining attorney's fees are specific to divorce cases. So, should we focus more on needs in paternity cases as opposed to divorce case? Perhaps we should when focusing on short term relationships. On the other hand, case law in light of *Stanley* and its progeny, cannot penalize a child due to the difference in status in divorce and paternity proceedings.

To see a good article discussing deviations from the child support guidelines, see: www.cklawreview.com/wp-content/uploads/vol86no1/Raatjes.pdf I liked her opening quote that read, ""[N]o child, no matter how wealthy the parents, needs to be provided more than three ponies." *In re*

Marriage of Patterson, 920 P.2d 450, 455 (Kan. Court. App. 1996). Chicago Kent Law Review, Vol 86:1. Also, see www.americanbar.org/content/dam/aba/publications/family_law_quarterly/vol45/2sum11_nelson.authcheckdam.pdf (a 2011 article that is national in scope). There the author writes, "However, resolving the question of the appropriate child support amount was not easily answered in the high-income cases. Nearly every state has a specific statute dealing with income over the guidelines, or high-income child support, attempting to eliminate the quandary regarding the appropriate level of child support for the high-income parent. A continuing difficulty exists, however, not just because the various states have created their own methods, but also the method within any particular state may not be set forth with sufficient clarity to provide consistent results." Contrary to Lori Nelson's assertion, the Illinois statutory guidelines at this time simply do not mention this all to frequent fact pattern. So, while she rights "nearly every statute has a specific statute dealing with income over the guidelines," understand that Illinois is the exception that creates that rule.

IRMO Berberet, 2012 IL App (4th) 110749, contains a good review of the case law. It does not involve a case involving high income of the support payor, but instead, represents a case where the payor's income was less than the payee's income. The appellate court stated:

> The court found that if the guideline amount was awarded, Rebecca's net monthly income would exceed David's by nearly $4,000, the difference between $7,035 per month and $3,046. As a result, the court determined that David would experience financial constraint if he was required to pay the guideline amount of support. Last, the court determined that if the support guidelines were imposed David's involvement with the children would be adversely affected: "David would be substantially unable to participate in the children's school, athletic and social activities or to enjoy any recreational activities with the children. Such a result is not in the children's best interests." The court did not abuse its discretion in awarding the downward deviation in support.

b. **Case Law Review**:

Bush: An early Illinois case that is in keeping with the current approach of Illinois cases – albeit deviating at a lower figure than some current cases – is *IRMO Bush v. Turner,* 191 Ill. App.3d 249 (4th Dist. 1989). Both parents were physicians. The custodial parent earned $7,200 per month. The Bush court ruled the trial court abused its discretion when it followed the guidelines and required the father to pay child support equal to 20% of the husband's net income **where his net annual income was $150,000 per year** ($12,500 per month). The trial court had ordered husband to pay $800 child support per month to wife but also ordered the husband to pay into a trust account for the child's benefit an amount equal to approximately 20% of his net income less the amount of the $800 per month cash payment to wife. In reversing the trial court's award, the *Bush* court calculated that husband would pay child support of approximately $30,000 per year. The court noted there was no evidence that the child's needs were not being met and that the record of typical expenditures for the child tended to support an award of child support close to $800 per month. Thus, the *Bush* court held that the trial court's overall award of 20% of the husband's net income was excessive and constituted an abuse of discretion. The appellate court instructed the trial court in setting an appropriate amount of child support to take into account the lifestyle the child would have enjoyed absent the dissolution, but cautioned the court against ordering too great an amount of support for this reason:

> "Despite the requirement that a court consider a child's station in life, the courts are not required to automatically open the door to a windfall for children where one or more parents have larger incomes. A larger income does not necessarily trigger an extravagant lifestyle or the accumulation of a trust fund. . .. We are not required to equate large incomes with lavish lifestyles."

A key factor appeared to be the significant income of the custodial parent.

Scafuri: In *Scafuri*, 203 Ill. App.3d 385 (2nd Dist., 1990), the trial court awarded child support award of $10,000 per month according to the statutory guidelines. The appellate court reversed and without remanding ordered child support of $6,000 per month -- 19% of the payor's net income (three were three minor children). The *Scafuri* court ruled: (1) The child support guidelines of Section 505 of the IMDMA: "shift the burden of presenting evidence to the parent who is asking the court to deviate from the guidelines in setting a child support award;" (2) "When dealing with above-average incomes, the specific facts of each case become more critical in determining whether the guidelines should be adhered to."

Osborn: *IRMO Osborn*, 206 Ill. App.3d 588, (5th Dist. 1990), GDR 97-7. A child support award below the statutory guidelines was proper given the child's needs and the standard of living the four children would have received had the parents not dissolved the marriage. The obligor's income was $9,793 per month. The trial court awarded child support in the amount of $3,300 per month, 34% of the obligor's net monthly income, which was below the 40% statutory minimum for four children. The court found that the award was appropriate given that the child support was properly reduced in consideration of the obligor's responsibility to pay, in addition to child support, costs associated with visitation where the obligor resided in Canada.

Decision Leading to Change in Law Allowing Consideration of Needs -- *Van Kampen*: One Illinois appellate court decision refused to deviate from the child support guidelines despite the high income of the support obligor. In *IDPA ex. Rel. Temple v. Van Kampen*, 243 Ill. App.3d 767 (3d Dist. 1993), the third appellate court district held that because the needs of the child were not a statutory consideration in Section 505 of the IMDMA, the trial court did not err in refusing to deviate from the guidelines. In reaction to the *Temple* case, in 1995 the Illinois legislation amended the IMDMA to provide that the needs of the children were a statutory consideration per Section 505(a)(2)(a). This section provides that in determining whether to deviate from the support guidelines the trial court must consider "the financial resources **and needs** of the child." Previously, the guidelines had merely provided that the court in deviation from the guidelines should consider only the financial **resources** of the child. (See *Gitlin on Divorce*: Section 10-3(I)(4) for a discussion of the legislative history behind this amendment.) Illinois case law addressing deviations from the support guidelines in high income cases will be briefly reviewed.

Graham v. Adams: The 1993 Fourth District case of *Graham v. Adams*, 239 Ill. App.3d 643 (4th Dist. 1993), involved a deviation from the support guidelines where the father had a net income in a range lower than the above cases -- $8,000 per month (approximately **$96,000 per year**). According to the statutory guidelines the required child support would be $1,600 per month for one chid. The trial court, however, set child support at $400 per month. The Illinois Department of Public Aid appealed and the appellate court affirmed the trial court. The appellate court stated:

> "As this court has recently noted, "the support schedules contained in the statute have less

> utility as the net income of the parties increases because the schedules are premised upon percentages related to average child-rearing expenses." [Citation omitted.] In cases such as the present, where the parties both have above-average incomes, the specific facts govern whether the court should adhere to the guidelines. [Citation omitted.] Child support is not intended to provide children with an extravagant lifestyle but is designed to insure adequate support payments for the upbringing of the children." [Citation omitted.]

Thus, *Graham* affirmed an award of child support which was 5% of the payor's net income rather than 20% of his net income.

Lee*:* The trial court in *Lee*, 246 Ill. App.3d 628 (4th Dist. 1993), deviated from the support guidelines and ordered payment of support at $3,000 monthly for one child, noting that the amount was "more than adequate" to support the child. The husband appealed urging that there should have been a greater deviation and the appellate court affirmed the trial court's award. In *Lee*, the husband's net income from 1988 through 1991 ranged from **$234,000** ($19,500 per month) **to $324,400** ($27,000 per month). These two sums, respectively, would have produced monthly child support of $3,900 and $5,400. The trial court awarded a child support figure "somewhat under the statutory guidelines". If we assume that the husband's net income was a midway point between these two figures ($280,000 per year or $23,000 monthly), then **the trial court's child support award that was affirmed was approximately 13% of the husband's net income**. The mother's income in *Lee* was less than $20,000 per year.

Perry: *In Re Perry*, 260 Ill. App.3d 374 (1st Dist. 1994), held that the trial court must consider the needs of the child in setting child support. The father in *Perry* urged that sufficient evidence was presented to the trial court for deviating from the support guidelines. The appellate court made no ruling on this contention since the case had to be remanded to the trial court to make express findings in support of the deviation. The appellate court noted that in remand the trial court should consider, among other things: 1) the fact that the mother sought 100% of the chid's expenses from the father; and 2) the argument that when the noncustodial parent's income is high, there is justification in deviating from guideline support. The *Perry* court cited *Marriage of Scafuri* (2nd Dist., 1990), and *Marriage of Lee* (4th Dist. 1993).

Singleteary: In *IRMO Singleteary*, 293 Ill. App.3d 25 (1st Dist., 1997), the father's income very substantially increased following the divorce: the father's **gross** income increased from $90,000 to **$300,000 per year**. The marital settlement agreement in *Singleteary* provided the father would pay $864 per month, or 20% of his net income (whichever was greater), for child support for one child. The *Singleteary* appellate court found that the trial court properly modified child support for one child from $864 per month to $2,000 per month, despite it being substantially below the child support guideline amount, because the appellate court held that $2,000 per month was adequate to maintain the child's lifestyle.

The facts of *Singleteary* were significant. In addition to child support the father paid the monthly mortgage on the condominium in which the parties resided during the marriage and in which the mother and child continued to reside. The father also paid for the child's camp, various lessons, club dues, educational bonds, etc. The mother, had a $75,500 per year salary and showed expenses for the child that were substantially less than $2,000. She testified that she believed she and the child needed a larger residence and that she would like the child to attend a private school. *Singleteary* stated:

> "Where the individual incomes of both parents are more than sufficient to provide for the reasonable needs of the parties' children, the court is justified in setting a figure below the guideline amount. In determining the child support obligation of a high-income parent, the court must balance competing concerns. On the one hand, child support awards are not intended to be windfalls. On the other hand, the court must consider the standard of living the children would have enjoyed absent parental separation and dissolution."

In affirming the trial court's award of $2,000 per month for child support the appellate court reasoned that this amounted to more than twice the amount of the original child support award. *Singleteary* also ruled that the child's "shown needs and lifestyle to which he is accustomed can be adequately maintained on a total award of $2,000 per month."

Ackerley: *IRMO Ackerley*, 333 Ill. App.3d 382 (2d Dist. 2002), involved a high income case with a duty to support one child. The appellate court noted the financial resources of the ex-husband were more than ample to meet his needs. It also noted it was "inferrable" that his son would have enjoyed a high standard of living had the marriage not dissolved. Finally, it noted the financial resources of the ex-wife were much smaller than that of her ex-husband. The decision rejected the husband's argument that his frugal lifestyle should be a reason for a greater deviation from the guidelines:

> Respondent complains that the amount of child support set by the trial court constitutes approximately 90% of petitioner's stated monthly expenses. We first note that, assuming respondent is correct, the needs of the petitioner and her son are but two factors a court is directed to consider as part of a multipart, totality-of-the-circumstances test. Other factors, as set forth in the preceding paragraph, militate for a significant award. See 750 ILCS 5/505(a)(2) (West 2000). Second, it is inferrable that, if the marriage had not dissolved, petitioner's son would have been enjoying a higher standard of living. Had he been enjoying the same standard of living while residing with petitioner, it is apparent that the family's monthly expenses would have been higher. A support award need not be limited to the shown needs of the child. *In re Marriage of Lee*, 246 Ill. App. 3d 628, 643 (1993).
>
> Respondent also poses the related question of "how many pagers, cell phones and cars does one child need?" We will not assume that petitioner will spend all of the child support money on luxuries or frivolities. In an incongruous fashion, respondent asks that we make this assumption about petitioner but complains bitterly because the trial court characterized his lifestyle as luxurious. *** Respondent relies on *In re Marriage of Bush*, 191 Ill. App. 3d 249, 261 (1989), for the proposition that courts are "not required to equate large incomes with lavish life-styles." We have no quarrel with this proposition. However, that a court is not required to draw such an inference says nothing regarding whether a court may do so. Moreover, whether respondent leads a frugal lifestyle is only pertinent to half the inquiry set forth in section 505(a)(2)(e), which focuses on both the needs and resources of the noncustodial parent. 750 ILCS 5/505(a)(2)(e). Even if respondent's needs are few, his resources are considerable. In sum, assuming a frugal lifestyle for respondent is not sufficient to tip the balance in respondent's favor such that the trial court abused its discretion in setting child support.

Note that the support award was $3,000 per month – which was based upon an income of $167,000 per year at the time of trial. The trial court set the support, however, at an amount certain and did not require payment of bonuses or other income for support.

Garrett: *IRMO Garrett*, 336 Ill. App.3d 1018 (5th Dist. 2003), followed the guidelines despite the fact the payor's income was substantial. A significant quote from *Garrett* stated:

> "Harry complains that the child support is a windfall to Elizabeth and that in its award the trial court should have considered the personal finances of Elizabeth. According to Harry, Elizabeth has elected to live so frugally that only a portion of the child support is actually spent. Harry believes that Elizabeth has effectively circumvented the intent of the child support order and basically converted these funds intended for the children into spousal maintenance. There is no evidence, however, in the record to support the proposition that Elizabeth has in any way misappropriated child support money for her own use. The court will not engage in gross speculation in that regard. The fact that Elizabeth has placed money in savings to provide for future uncertainties is commendable. Responsible adults do not spend every penny available to them. This court does not want to instruct that unless a custodial parent spends the allotted child support money within the month it is received, the court will deem the excess unnecessary."

The trial court set support at $3,507 monthly while the needs of the mother's household (with no financial contribution on her behalf) were $3,422. The appellate court then stated, "We are aware that the amount paid in child support currently exceeds the monthly expenses for the entire household, but a child's entitlement to a level of support is not limited to his or her 'shown needs'." Note that the mother's net annual income was $19,200 while the father's net annual income averaged $214,255. This case, though, points out when we examine the lifestyle – we look to the lifestyle of the child at the time of the divorce (before the dissolution.)

In Re Keon C.: The Fourth District appellate court (alternatively cited as *Hall v. Clark*), addressed a case involving a very high wage earner and a substantial deviation from the support guidelines involving a father who was a professional basketball player. *In Re Keon C.*, 344 Ill. App. 3d 1137 (4th Dist. 2003). *In Re Keon C.* held 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. The father urged his guideline support would have been $12,905 monthly. The appellate court also affirmed the result despite the argument 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.

Keon's discussion of the mother's other child (by a different relationship) bears noting. The father argued that this was a critical factor in the *Graham* case – discussed above. In trying to distinguish Graham the appellate court stated:

> *Graham* did not "stress" that the standard-of-living factor should receive less emphasis than other child-support factors in a case where the custodial parent has another child, as respondent contends. The court simply stated that the "balancing test requires consideration of all factors as set forth in section 505(a)(2) of the Marriage Act, with an **adjustment to and possibly less emphasis on** section 505(a)(2)(c) [(standard of living)] [citation]." (Emphasis added.) *Graham*, 239 Ill. App. 3d at 647. *Graham* simply recognizes that when the custodial parent has another child, a balancing test is necessary on a case-by-case basis,

some cases "possibly" requiring less emphasis on the standard of living.

c. **Executive Summary as to Deviation Cases**:

I liked the comment to a *Gitlin on Divorce Report* of a Rule 23, 2009 decision by Justice Cook (retired). He stated:

> There are problems if the words "standard of living the child would have enjoyed" are interpreted broadly. If the father is living in a 5-bedroom house should the child be allowed to live in a 5-bedroom house (along with his mother, her boyfriend, and children from another marriage)? Child support should not be a substitute for maintenance. Of course, it is virtually impossible to segregate many of the expenses of the child from the expenses of the custodian. If the custodian has children by another marriage, she is not required to prepare meals based on the amount of child support received for each child. ("You get a steak, you get a hot dog.") The best solution seems to be that stated in *Bush*: child support should be "adequate," not "extravagant."

☞ ***Scafuri:*** (2nd Dist., 1990):
- Three children.
- $10,000 monthly per guidelines was the result of trial court's decision
- $6,000 per appellate court = 19% of net income rather than 32%.

☞ ***Lee***: (4th Dist. 1993):
- Net income from 1988 through 1991 ranged from $234,000 ($19,500 per month) to $324,400 ($27,000 per month).
- Range of support per guidelines: $3,900 and $5,400
- Order $3,000 and husband appealed.
- Based upon an average of these two figures ($280,000 per year or $23,000 monthly), the trial award was 13% of the husband's net income rather than 25% of his net income.

☞ ***Graham:*** (4th Dist. 1993):
- Net Income $8,000 monthly.
- Guideline Support would have been $1,800.
- Trial court's award of $400 per month affirmed.

☞ ***Singleteary***: (1st Dist. 1997):
- The gross income of the husband $300,000.
- $15,322 per month net income.
- Guideline support would have been $3,066.40.
- $2,000 per month support was affirmed which was 13% of the husband's net income rather than 20%.

☞ ***Ackerley***: (2nd Dist. 2002):
- Base gross income was a $167,000 per year at time of trial.
- Child support award of $3,000 per month for one child.
- Guideline support would have been $5,510 per month but trial court found it would be a windfall.

- Court did not order payment of support on bonuses.

☞ *In Re Keon C.*, 344 Ill. App. 3d 1137 (4th Dist. 2003):
- Professional basketball player parentage case.
- Child support set at $8,000 monthly. The father earned 1.4 M but this would increase in 2003 to 4.5M. The Mother urged guideline support would be $13,946 monthly while father urged it would be $12,905 monthly – both based upon then current earnings.

The above cases indicate that where there is a high wage earner, there should be a deviation from the child support guidelines. Illinois law is essentially provides that the amount of support is a reasonable accommodation between two competing interests: the ability of the non-custodial parent to pay (if he has high wages) as against the needs of the non-custodial parent.

d. What if Custodial Parent's Income is Higher than Non-Custodial Parent's Income?

IRMO Berberet, 2012 IL App (4th) 110749, involves the type of cases that are occurring more and more frequently, i.e., the custodial parent has a greater income than the non-custodial parent. The mother appealed from the trial court's deviation and the appellate court stated:

> Rebecca argues that the trial court abused its discretion in deviating downward from the guideline amount of child support set forth under section 505(a) of the Act.
>
> Based on the record, we find that the trial court correctly followed the procedure set forth in section 505(a) of the Act for deviating from the support guidelines. The court calculated the amount of support required under the guidelines, $1,433 per month, and determined that the amount was not appropriate. In accordance with section 505(a) of the Act, the court also stated the reasons for its variance from the guidelines. As authorized under section 505(a)(2)(e) of the Act (750 ILCS 5/505(a)(2)(e) (West 2010)), the court considered the financial resources and needs of the noncustodial parent. *The court found that if the guideline amount was awarded, Rebecca' s net monthly income would exceed David's by nearly $4,000, the difference between $7,035 per month and $3,046.* As a result, the court determined that David would experience financial constraint if he was required to pay the guideline amount of support. Last the court determined that if the support guidelines were imposed David's involvement with the children would be adversely affected: "David would be substantially unable to participate in the children's school, athletic and social activities or to enjoy any recreational activities with the children. Such a result is not in the children's best interests." The court did not abuse its discretion in awarding the downward deviation in support.

V. **Social Security Benefits and Adoption Subsidies as a Credit Toward a Support Obligation**:

In 2004, the Illinois appellate court addressed an issue of first impression: whether the court should grant a credit for an adoption subsidy for three children (the parties had five minor children). See *IRMO Newberry*, 346 Ill. App.3d 526 (3d Dist. 2004). In that case the mother had received from the

state of Iowa a credit of approximately $1,450 per month for support of the three adopted children. The trial court had first noted the line of cases illustrated by *IRMO Henry*, 156 Ill.2d 541 (1993) held that social security benefits may satisfy the obligor's support obligation. The court noted the payment from Iowa was "somewhere between a gratuitous and an earned benefit," but that without question it was a benefit generated by the parties willingness to adopt the children and the purpose was to help support them. The appellate court ruled:

> "In our opinion, the circuit court's treatment of the Iowa adoption subsidies properly recognized them as resources of the children available for their support. *See Strandberg*, 664 N.W.2d 887. Considering that the amount of the parties' net income is approximately equal, and the amount of the subsidies paid for three of the children is proportionately greater than their share of an unallocated 45% of David's income, we cannot say that the court erred in granting credit against David's support obligation. The $804.40-per-month award determined by reducing the percentage of David's net income to be paid for child support appears to blend the children's needs with what is fair and what is workable. See *In re Marriage of Rogers*, 283 Ill. App. 3d 719 (1996) (citing *Lemon v. Kurtzman*, 411 U.S. 192, 36 L. Ed. 2d 151, 93 S. Court. 1463 (1973)). We conclude that the court did not err in its treatment of the adoption subsidies."

Regarding credits for social security benefits, the leading case cited above is the Illinois Supreme Court *IRMO Henry*, 156 Ill.2d 541 (1993) decision. There the Supreme Court held that during the period disability payments were made to the children, the father satisfied his child support obligation. An exception to this rule (other than the issue of maintenance arrearages per *IRMO Schrimpf*) is *IDPA ex rel. Pinkston v. Pinkston*, 325 Ill. App.3d 212 (2d Dist. 2001), which ruled that when a child receives Social Security benefits that exceed the father's child support obligation, the excess cannot be applied to a child support arrearage that accrued before the father's disability. For a more complete discussion of this topic, please see Section 10-3(s) and section 17-1(s)(1) of *Gitlin on Divorce: A Guide to Illinois Matrimonial Law*.

VI. **Consideration of Income Tax Refunds, Dependency Exemptions and the Child Care Credit**:

A. ***Pylawka* – Case Arguably Requiring Maintenance to be Considered as Adjustment in Determining Net Income**:

The law is clear that if an individual files his or her incomes tax returns so as to receive a refund (over-withholding), the income tax refunds should be considered as income and added back to the individual's net income. *IRMO Teri Eileen Breitenfeldt*, 362 Ill. App. 3d 668 (Fourth Dist. 2005) addressed this issue, cited *Pylawka* and stated: "as petitioner points out, in 2003, respondent overwithheld federal and state taxes, resulting in a refund of $3,545 from federal taxes and $312 from state taxes, and this amount is added back into respondent's net income."

In light of *IRMO Pylawka* (2d Dist. 1996), it may be urged that the fact that maintenance is a deduction to the maintenance payor should be considered in determining an appropriate amount of child support. *Pylawka* seems to hold that in proceedings to modify child support, tax refund attributable to maintenance payments made to former wife should be considered in determining a party's net income.

But the essence of *Pylawka* was that the trial court erred when it determined child support on the basis of income tax withholding. It did not necessarily require that maintenance be allowed as an "above the line" adjustment in determining net income. For the sake of simplicity, keep in mind that to the extent that maintenance is allowed as an adjustment in determining net income, this increases the net income.

What are the arguments in that child support should be determined after allowing a deduction for maintenance? The recipient could argue Illinois case law (*Pylawka, Ackerley*, *Breitenfeldt*) requires net income to be determined based upon the taxes that will actually be paid. Clearly, the payor will have a higher net income (considered alone) when the payor pays maintenance. Thus, in such cases it is more likely the payor will receive a substantial refund if the payor uses appropriate withholding. The arguments the payor would make, however, are that providing that maintenance is a deduction in determining the net income would result in a number of unsound complications in Illinois family law cases and, therefore, such a deduction should not be allowed. One example of such a deduction would be the fact that maintenance will often end within a relatively short period of time from the judgment. Thus, if maintenance were allowed as a deduction, the payor would want a provision in the settlement agreement which would provide that upon the termination of maintenance, child support would in fact decrease. But the recipient could argue the potential for an increase in income may offset the loss of the maintenance deduction. Even if the court reserves the ability to modify support downward based upon this potential change in circumstances (even as a matter de novo — without showing a substantial change in circumstances) there still is the issue of the cost-effectiveness of going to court to modify support in this instance.

Another public policy argument that the payor could make is that the maintenance rules of thumb, etc., must already consider the deductibility of maintenance and there may be a potential for a sort of double consideration of this deduction. The bottom-line is that Illinois family lawyers should be aware that in determining income for the purpose of support the maintenance deduction is a critical one to consider — especially in those cases with a substantial maintenance award.

B. **Dependency Exemptions**:

The general rule under the Internal Revenue Code is that the custodian of the children is entitled to take the children as dependent exemptions. But if the custodian agrees that the non-custodial parent may take the children as exemptions and agrees to sign Internal Revenue Service Form 8332 so stating, the non-custodial parent is entitled to claim the children.

There is no issue under Illinois law that the trial court has the power to order the custodial parent to sign a waiver that he or she will not claim the child as a dependency exemption. The trial court also has the power to allocate the dependency exemptions in post decree matters. See *IRMO Van Ooteghem*, 187 Ill. App.3d 696 (3d Dist. 1989). In *McCloud*, 197 Ill. App.3d 95 (3d Dist. 1989), the Third District held it was error to award the exemptions to the parent providing support absent circumstances warranting the transfer to him. The Fifth District in *IRMO Rogliano*, 198 Ill. App.3d 404 (5th Dist. 1990), held that the trial court should allocate the exemption based upon which parent will contribute the majority of the support for the child. See also *IRMO Clabault*, 249 Ill. App.3d 641 (2d Dist. 1993).

Case law has begun to fine tune this issue in cases where it is a close call as to which parent is

contributing the majority of the support for the children. *IRMO Moore*, 307 Ill. App.3d 1041 (5th Dist. 1999), involved post-divorce proceedings in which the ex-husband claimed the children's expenses were $1,520 per month and his child support amounted to 51.9% of those expenses. He argued the party paying the majority of the children's expenses is entitled to the dependency exemptions, citing three cases. *Claubult, Fowler* (197 Ill. App.3d 95 (3d Dist. 1990)) and *Rogliano*. The ex-wife agreed with the ex-husband's reading of the cases he cited, but argued that he did not provide a majority of the children's support because the children's expenses were more than $1,520 per month.

The *Moore* court held the allocation of dependency tax exemptions is an element of a support award. As such it is a topic over which a trial court has "considerable discretion." *Moore* commented that although *Rogliano* held that in allocating exemptions the court should consider which parent will provide the majority of the child's support, and although *Clabault* affirmed an award of all exemptions to the parent providing more than 51% of the children's support, these holdings did not require an award of all tax exemptions to the parent paying the majority of the children's support. The *Moore* court stated that because the children's expenses were found to be more than $5,120 per month, the ex-husband was not paying more than 51% of the children's support, rendering the *Rogliano* and *Clabault* holdings inapplicable. The appellate court found no abuse of discretion in dividing the tax exemptions between the two parents who each paid approximately half of the expenses for the children.

Any judgment of dissolution of marriage should specify that the parties shall execute such forms as are required to effect the allocation of the dependency exemptions. While Illinois case law seems to hold that the trial court should allocate the dependency exemption based upon which parent will contribute the **majority** of child support, this would make no sense in cases where the child support payor is in the highest income tax brackets because of the phase-out of the exemption at the high income end. The court should take a practical approach in these cases, allocating the exemptions to each party based upon who would take the greater economic benefit from them.

A case similar to the *Moore* holding is *Stockton v. Oldenburg*, 305 Ill. App.3d 897 (4th Dist. 1999). The trial court apparently found the parties equally contributed to the rearing of the child – and awarded each party the tax exemption in alternate years. The appellate court stated that this was neither an abuse of discretion nor against the manifest weight of the evidence.

IDPA Ex Rel. Schmid v. Williams, 36 Ill. App.3d 553 (4th Dist., 2003), GDR 03-23, addressed the issue of whether in a post-decree case the actual number of exemptions claimed must be used for child support purposes. This may be at issue because often the payor will have remarried and then have the benefit of being able to claim exemptions for children by the current marriage. The argument that the exemptions are awarded due to increased costs of raising the children has the ring of fairness to it.

Schmid v. Williams ruled that 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, 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. For example, potential new spouse's income will often place an individual in a higher tax bracket thus largely or entirely offsetting the impact of gaining additional dependency exemptions.

IRMO Berberet, 2012 IL App (4th) 110749 involved the allocation of the exemptions. The trial court

did what was fairly standard and allocated them equally. The mother had the higher income and the father was the non-residential parent who paid less than guideline support. The decision stated:

> The trial court awarded the parties each one child for tax dependency and exemption purposes and ordered the third child alternated from year to year. The parties share joint custody of the children. Rebecca is the primary custodial parent, while David is scheduled to have the children at least once a week during the school year and on his days off during the summer. In its memorandum of opinion, the court acknowledged Rebecca's greater contribution to the care of the children, but still found that the tax exemptions should be alternated between the parties.
>
> In this case, both parties contribute to the costs associated with raising their children. David provides financial support to the children in the form of monthly child support payments, $1,000, and health-care payments, $219.98. He is also responsible for the costs associated with caring for the children while they are staying at his home. However, as the primary custodial parent, Rebecca is responsible for more of the costs associated with "maintaining a home, purchasing food for the family, laundering the family's clothing, and maintaining the family mode of transportation." *Stockton v. Oldenburg*, 305 Ill. App. 3d 897, 901-02 (1999). We find that David's contribution to the costs associated with raising the children is not so disparate from Rebecca's that no reasonable person would agree with the court's allocation of the tax exemptions for the parties' children. @@@

C. **Child Care Credit**: See separate outline.

VII. Amendments Re $100 Per Day Penalties: Failure to Withhold / Pay Over Income for Support:

See separate detailed outline as well as the 2012 / 1013 Legislative and Supreme Court Rule Changes. There are several key changes including:

> The total penalty for a payor's failure, on one occasion, to withhold or pay to the State Disbursement Unit an amount designated in the income withholding notice may not exceed $10,000.
>
> An action to collect the penalty may not be brought more than one year after the date of the payor's alleged failure to withhold or pay income.

The new requirements add to what the withholding notice must state at Section 20(7) of the IWSA:

> (7) **in bold face type, the size of which equals the largest type on the notice**, state the duties of the payor and the fines and penalties for failure to withhold and pay over income and for discharging, disciplining, refusing to hire, or otherwise penalizing the obligor because of the duty to withhold and pay over income under this Section;

Finally, in 2012 there are new paragraph (j) to Section 45 regarding "Additional Duties."

(j) If an obligee who is receiving income withholding payments under this Act does not receive a payment required under the income withholding notice, he or she must give written notice of the non-receipt to the payor. The notice must include the date on which the obligee believes the payment was to have been made and the amount of the payment. The obligee must send the notice to the payor by certified mail, return receipt requested.

After receiving a written notice of non-receipt of payment under this subsection, a payor must, within 14 days thereafter, either (I) notify the obligee of the reason for the non-receipt of payment or (ii) make the required payment, together with interest at the rate of 9% calculated from the date on which the payment of income should have been made. A payor who fails to comply with this subsection is subject to the $100 per day penalty provided under subsection (a) of Section 35 of this Act.

What is the Effect of the 2013 *Schultz* Case on Withholding Notices?
Schultz v. Performance Lighting, 2013 IL App (2d) 120405 (February 5, 2013), is a poorly reasoned case ruled that a complaint to recover child support that should have been withheld from the paychecks of plaintiff's former husband was properly dismissed. The appellate court reasoned that Plaintiff failed to strictly comply with the requirement of §20(c) of the Income Withholding for Support Act that her former husband's *social security number* be included in the notice of withholding served on his employer and that, according to the court, this apparently rendered the notice invalid. The Second District overstated its distinction of the *IRMO Gulla*, Illinois Supreme Court decision, 382 Ill. App. 3d 498 (2007), aff'd, 234 Ill. 2d 414 (2009).

Consider, however, the fact that in Illinois there are also what are titled Uniform Orders for Support. There was no mention of a uniform order for support in this case and accordingly it is anticipated that the uniform order of support was not served on the employer as accompanying the notice for income withholding. The uniform order for support is in actuality supplemental to the notice/order to withhold income for support and provides a great deal of other identifying information. Also consider the fact that there are changes to the SCRs with an effective date bumped back repeatedly – including to January 1, 2015. ~~~

That is the Supreme Court Rule *which was to have been effective January 1st) provides that:

(a) In civil cases, personal identity information shall not be included in documents or exhibits filed with the court. ***
(b) Personal identity information, for purposes of this rule, is defined as follows:
(1) Social Security numbers ***
A court may order other types of information redacted or filed confidentially, consistent with the purpose and procedures of this rule.

But the withholding notice is not generally filed. It is merely served. So, it would seem the new SCR would not apply.

VIII. **Other Case Law Re Support Enforcement**:

A. **Burden of Proof Re Payments is on Payor after Court Takes Judicial Notice of Existence of Support Obligation**:

The Second District's *IRMO Smith* decision. 347 Ill. App.3d 395 (Second Dist., 2004) in addressing a petition for payment of past due child support stated:

> At the hearing on the petitions, Sharon testified that William owed $60,520 in overdue child support from the date of the dissolution to the date she filed her petition. Sharon relied on her "*best recollection*" to create a "*guesstimate*" of the arrearage **because she did not have records of all of the payments William made**. Sharon assisted her attorney in preparing a document summarizing William's payments, and she suspected that she actually overestimated the amount he paid. Sharon denied telling William that he was not required to pay support. Two of the couple's daughters lived with William for a few months after 1997.

What was interesting was the ex-wife's testimony was based upon "guesstimates" of the arrearage. The discussion regarding the burden of proof is significant in that it correctly places the burden on the payor when it states, "In this case, Sharon's reference to the dissolution judgment and child support orders established the existence of William's support obligation. William, then, bore the burden of proving that he paid the obligation. Admitting that neither party presented compelling evidence on the issue of payment, the court found that William failed to meet his burden of proof. We conclude that the court's finding is not against the manifest weight of the evidence." Also review this case regarding potential defenses of equitable estoppel as well as laches.

B. **Support Paid Directly Rather Than Through SDU – A Warning**:

IRMO Paredes, 371 Ill. App. 3d 647 (1st Dist., 2007) presents a warning to Illinois lawyers and to child support payors in any case where the mother may have been on public aid. The *Paredes* court ruled that the trial court erred when it gave the father, the obligor, credit for the support payments *paid to the mother*, rather than making payments through the Clerk for use of HFS (formerly IDPA). By receiving public assistance, the custodian assigned her child support obligation to the Department to the extent of assistance that she received. The appellate court noted that the support order specifically required that obligor make payments through the Clerk and that there was specific testimony at the prove-up as to payments through the clerk of the court and as to the knowledge of the then husband as to his wife's being on public aid: "So, any payments are going to be made through the clerk of the circuit court and end up going to public aid, you understand that..." However, of further note was the testimony that, "In response to a letter from HFS, he went to a child support office and showed "them" receipts indicating he had made payments directly to Maria. According to Jose, "they" looked at the receipts and told Jose things were fine. Jose left the meeting and continued to pay support directly to Maria.

The trial court in this matter found, "as a matter of law, that any payments made directly from Jose Paredes to Maria Paredes and never credited by [the Department] (as shown in the Certified Accounting) are child support payments within the meaning of the [Illinois Marriage and the Judgment for Dissolution of Marriage]."

In its analysis, the appellate court first reviewed the provisions of §10-1 of the Illinois Public Aid Code (305 ILCS 5/10-1) which provide that "by accepting financial aid" a spouse or a parent or other person having custody is deemed to have made an assignment to the Department of all rights to support up to the amount of the financial aid provided. The appellate court then stated that, "Under the plain language of Section 10-1, during that time, Maria automatically assigned to the Department her rights to receive child support payments to the extent she received public aid, **and Jose was obligated**

to make those child support payments to the Department. (Emphasis added)." The appellate court then ruled that, "Accordingly, we agree with the Department that Jose's payments to Maria cannot be counted against the debt he owes the Department and that the circuit court's determination to the contrary is in error." Second, the appellate court noted that modification of support is an exclusively judicial function, citing *Blisset* (the seminal 1998 Illinois Supreme Court decision) and *Jungkans*, 364 Ill. App. 3d 582 (Second Dist., 2006). Keep in mind, however, that *Jungkans* would appear to be a decision which would be cited as much in the father's favor than the mother. (This was the decision in which the Second District court held that the trial court erred when it held that it lacked authority to consider former husband's defense of equitable estoppel to child support collection proceeding which asserted that former wife was equitably estopped from collecting child support that accrued, over nine years, after one of two children of the parties went to live with former husband and he, with agreement of former wife, reduced child support he was paying in half.)

The appellate court next reasoned that the non-judicial agreement between the parties for direct payments is unenforceable and void, and therefore, the original arrangement in the judgment for divorce remained in effect. Unfortunately, while this reasoning simply does not make sense where actual payments are made for child support to the support recipient. The nature of the somewhat strained reasoning of the opinion of the inapt citations to *IRMO Dwan* (holding that the trial court properly refused to give father a credit toward child support arrearage for payments made to third parties and *IRMO Borland*, 88 Ill. App. 3d 576, 580 (1980) (holding that it was error for the trial court to allow a set-off against the arrearages for the amount paid directly by respondent paid directly to his adult children).

Next, the appellate court cited the Department's appellate arguments that the trial court's ruling was contrary to public policy because it would thwart the Department's ability to effectively collect support. It urged that the decision would creates an incentive for parties who owe the Department not to pay through the clerk's office. The Department argued that the trial court's decision frustrates the ability of the Department to effectively monitor the payment of support because tracing individual private payments is simply cost-prohibitive. The appellate court stated:

> The Department's arguments regarding public policy are well-taken. Viewed in conjunction with our determinations above, the public policy considerations presented by the Department support our decision to reverse the circuit court's judgment.

What is striking is the last portion of the decision which states:

> We are mindful of Jose's arguments that the true party in error in this case is Maria and that it would "violate fundamental principles of justice, equity and good conscience" to make him "pay money twice [while Maria is] able to keep $13,505 over what she was entitled to receive without any obligation of her making repayment to the State.

The appellate court remarkably suggests:

> Nevertheless, we emphasize that our decision in this appeal does not foreclose or limit Jose's ability to file a private action against Maria under a theory of, for example, contribution, indemnification, or unjust enrichment, to recover the $13,505 he paid directly to her and which she did not report to the Department.

To this the author suggested – good luck!

IX. **Imputing Income**:

A. **Introduction**:

Often, courts are faced with the issue of a child support payor who terminates his (or her) employment. Historically, case law in Illinois has stressed the issue of whether the termination of employment was made in bad faith, i.e., in an effort to avoid a child support obligation. But several cases have addressed the issue that more often occurs -- where an individual quits a job to take another job with potentially better long term prospects which at first pays substantially less than the previous job.

The significant Illinois decision regarding this issue is *IRMO Sweet*, 316 Ill. App.3d 101 (2nd Dist. 2000). *Sweet* imputed income in modification proceedings where a payor started his own business and voluntarily left his employment with an exterminating business. While this court commented that the termination was in bad faith, the focus on this case was on whether an individual could remain self-employed at a lower rate of income. One of the key factors is which party has the burden of proof. The *Sweet* decision commented upon this and stated:

> A party seeking to decrease his or her child support obligation based on a voluntary change in employment must demonstrate that the action was taken in good faith and not to evade financial responsibility to his or her children. *In re Marriage of Maczko*, 263 Ill. App. 3d 991, 994 (1992); *Mitteer*, 241 Ill. App. 3d at 227. Absent good faith, the voluntary termination of employment does not warrant an abatement of child support. *In re Marriage of Dall*, 212 Ill. App. 3d 85, 95-96 (1991).

Then the *Sweet* court made the comment, "Rather, if a court finds that a party is not making a good-faith effort to earn sufficient income, the court may set or continue that party's support obligation at a higher level appropriate to the party's skills and experience." In *Sweet* the husband earned a net income of $15,000 per year prior to his termination of employment and then earned less each year while self-employed. Therefore, the facts of *Sweet* should be kept in consideration in a case where it is urged that the court should impute income to a self-employed individual. The court then stated, "While a party's desire to remain self-employed is not insignificant, the above cases show that the interests of the other spouse and the children may sometimes take precedence."

IRMO Adams, 348 Ill. App.3d 340 (3d Dist. 2004) also addressed imputed income. The husband argued that the trial court erred in setting child support while he was unemployed because after he voluntarily quit his job he sought and obtained a higher paying job. The appellate court stated:

> It is well established that courts have the authority to compel parties to pay child support at a level commensurate with their earning potential. Sweet. A court may impute additional income to a noncustodial parent who is voluntarily underemployed. *Sweet*.
>
> In this case, Steven voluntarily terminated his employment in Washington D.C. because he had better career prospects in Germany. As shown by his testimony, Steven was confident that he would make more money in Germany. Therefore, it appears that he received a

> benefit from setting child support based on his prior income, which was lower than his expected future income. In any event, we find that the trial court did not exceed its authority in setting child support based on Steven's prior income because he was voluntarily unemployed and his prior income reflected his earning potential.

In *IRMO Hubbs*, 363 Ill. App. 3d 696 (Fifth Dist., 2006), as discussed above, the new development in Illinois case law imputes income based upon the previous job without stressing the bad faith termination of previous employment where the father rejected a job offer and had uncertain current income because his pay was based upon commissions. The *Hubbs* court held that the trial court did not err in imputing to the husband a base gross income of $115,000 (based upon an average of the past three years of his previous employment.) In addition, the husband was required to pay 13% of the gross income above this amount. The husband urged that the trial court erred in imputing income to him based upon his previous employment.

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

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

IRMO Tegeler, 365 Ill. App. 3d 448 (2nd Dist., 2006), the ex-wife argued that bank records showed that respondent spent an average of $72,000 per year from 2002 through 2004 on personal items, ski trips, restaurants, and cash withdrawals and that he never explained how his checking account was funded. The appellate court stated:

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

***Sanfratello* - Unexplained Cash and Determining Net Income:** A 2009 imputed income case, *IRMO Sanfratello*, (1st Dist., 2009), discussing the large unexplained cash available to the husband (likely from his pizza businesses):

> In the absence of credible evidence from Michael regarding his net income, Judge Brewer imputed a $130,000 annual net income to Michael, based on the uncontested evidence that Michael had a steady flow of cash available to him. Michael now contends the support award is not reasonable under the circumstances because the $130,000 figure was "random, or a mystery." We disagree with Michael's characterization of Judge Brewer's calculations.

***Gosney* - Support and Circumstance in Which Court Should Not Impute Income**: *Gosney* is the only reversal of an Illinois trial court's imputation of income within the past decade. *IRMO Gosney*, 394 Ill. App. 3d 1073 (3rd Dist., 2009). The appellate decision will be quoted at length regarding the reasons that it reversed the trial court:

> First, this is **not** a case in which the noncustodial parent was **voluntarily unemployed**. In *Adams*, the payor father quit his job and moved to Germany to live with his girlfriend without first obtaining employment. The court imputed income based on findings that the father was voluntarily unemployed and his prior income reflected his earning potential. *Adams*, 348 Ill. App. 3d at 344.
>
> Here, the trial court found that Gregory was involuntarily unemployed, and the evidence supports that conclusion. Gregory testified that he was forced out of the company by Dearborn's unfair and oppressive negotiation tactics and was asked to leave the firm when he failed to agree to the terms. Gregory was terminated and, within months, found another position in the financial management industry. He did not willingly decide to leave his job and then remain unemployed.
>
> Second, **nothing in the record suggests an attempt to evade a support obligation**. In Sweet, the court imputed income to the noncustodial parent, noting that the payor's self-employment produced little income, and he either misrepresented his income or willfully refused to support his children. The reviewing court concluded that without a good-faith effort to satisfy his support obligation, additional income was properly imputed based on the payor's earning potential. *Sweet*, 316 Ill. App. 3d at 107-08. In this case, immediately after Gregory lost his job, he began searching for new employment. Once those efforts proved fruitless, he started his own investment company in an attempt to quickly generate income. When self-employment was unsuccessful, he joined his wife's financial firm and utilized his training and expertise to earn a living. Gregory never neglected to pay child support under the 2004 order. He faithfully honored his obligation to support his children, **even increasing his payments on his own accord in 2006 when his income substantially increased**. He was not attempting to evade his support obligation.

Third, **there is no evidence of an unreasonable failure to take advantage of an employment opportunity**. In *Hubbs*, the appellate court upheld an imputed income of $115,000 because the noncustodial parent's income for the previous three years was $133,000, $114,000, and $169,319 and he recently rejected a job that would have paid him $120,000 per year. *Hubbs*, 363 Ill. App. 3d at 706-07.

So, *Gosney* points to what might be oversimplified to the necessity of showing one of three factors to impute income:
1) Voluntary unemployment (this is the classic situation);
2) Evidence of an attempt to avoid a support obligation;
3) Evidence of an unreasonable failure to take advantage of an employment opportunity.

Gunnar J. Gitlin
The Gitlin Law Firm, P.C.
663 East Calhoun Street
Woodstock, IL 60098
815-338-9401
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