

IRMO SOLECKI

2020 IL App (2d) 190381

**Hard Lessons & Unexpected Consequences
From Well-intentioned, Poorly-drafted MSA's**



Mr. & Mrs. Solecki's MSA and Modification/Enforcement in the Trial Court

- 2015 divorce: Husband = chiropractor (\$240K). Wife = unemployed.
- Mediated agreement by a non-attorney mediator.
- Child Support based on 32% of net income of payor.
- Wife's attorney drafted the MSA. Husband represented himself.
- *Was there any legal scrutiny applied the mediated agreement?*
 - Cut-and-paste the mediated true-up. Intent to capture any additional support owed on Husband's S Corp business income.
 - Boilerplate severability clause in MSA.

Mr. & Mrs. Solecki's MSA and Modification/Enforcement in the Trial Court

Husband's 2017 motion to modify child support.

- **Count I** – Modify because Wife got a job/income increased and Husband's income decreased. (See, *IRMO Salvatore*)
- **Count II** – Modify true-up provision for 2018 and going forward based on new income-shares statute. (See, [*IRMO Salvatore*](#))
- **Count III** – Determine true-up owed per MSA for 2015-17 – disputed calculation.

In the Trial Court: Background

- Wife started new business/work as a massage therapist; modest \$\$\$. But, Wife living with her boyfriend at time of hearing.
- Husband's business income increased.
- Testimony of intent of mediated true-up agreement – what deductions should be taken against Husband's additional income. (parol evidence?)
- Wife's former divorce attorney testified.

Trial Court's Decision

Trial Judge:

- 2015-17 true-up taken after deductions on all income; Husband owes \$7,870 (not \$76k claimed)!
- “Substantial change in the financial position of the parties” --
- applied Income-Shares Guidelines, which lowered support obligation, but then deviated upward because true-up provision to be terminated (windfall) prospectively.
- **Strike** paragraphs 3.1 (32%), 3.2 (semi-monthly payments), 3.3 (annual disclosure), 3.4 (true-up), and 3.5 (defining net income) from the MSA.

Second District Appellate Court

- “Net income:”
 - Defined by parties, or
 - §505?
- Rules of Contract Interpretation apply to a MSA.
 - A contract should be construed consistent with public policy if its language reasonably permits.
 - Court cannot add language where the agreement is silent or where the added words would change the plain meaning as expressed by the parties’ agreement.
 - Cannot avoid conflict between MSA and Statutory definition of net income.

Second District Holdings

- Though a trial court can deviate from the amount of support that the guidelines generate based on a party's net income, court is not permitted to deviate *from the measure of net income to which the guidelines apply in the first instance. Solecki at ¶62.*
- Parties cannot by agreement legitimize a departure that the trial court has no power in its own right to grant. *Solecki at ¶63.*
- The 30% deduction agreed by the parties infringed section 505(a)(3)'s concept of "net income" because it was not keyed to actual business expenses. The flat 30% deduction implicates the children's best interests because it has the potential to suppress income that would otherwise be figured into child support. *Solecki at ¶66.*

Second District Appellate Court

- Courts not at liberty to depart from the definition of “net income” in section 505(a)(3), either by excluding what is properly “income” or by disallowing/limiting the enumerated deductions.
- This deviation is not permitted even if the parties consent to it in an MSA. *Solecki at ¶69.*
- Since the true-up provisions were irreconcilable with the Act, the trial court should have simply struck them without conducting the true-ups:
 - Good-bye \$7,870, Goodbye to \$76,000 claim, attorney fees to try post-decree case and to appeal the ruling!
 - Hello malpractice claim?

Second District re Substantial Change

Substantial change in circumstances? The change in the parties' financial positions overlooks the "elephant in the room."

- The loss of the true-up provision was significant to the MSA's child-support scheme; safeguard against shortfalls in support, but also a windfall because of the MSA's more inclusive concept of net income.
- This *itself* is a substantial change. *Solecki* at ¶74.
- No mention of whether Wife's new business income and/or live-in boyfriend should constitute a substantial change in circumstances? How to reconcile with *IRMO Salvatore*?

True-ups after *IRMO Solecki*

- Income-shares statute calculates a BCSO based on the parties' combined net incomes and then allocates that BCSO obligation between both parents.
- So, if one or both parent's income changes, the BCSO will change.
- This is completely different than the former payor-%-income statute.

True-ups after *IRMO Solecki*

- True-up percentage orders which are based solely on one parent's change in income are inconsistent with the income-shares statute because it will fail to account for the corresponding change to the BCSO --- possibly short-changing child support.
- *IRMO Solecki* = invalid and unenforceable, even if the parties agree.
- How can it be done?