2013 ILLINOIS
DIVORCE & FAMILY LAW CASES - FINANCIAL ISSUES

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Property Cases Law:

Retirement Benefit Cases

QDROs and QILDROs

***Winter II* – For Pension Benefits Covered under the Illinois Pension Code (QILDROs), Surviving Spouse Benefit Was Not Marital Property Subject to Distribution**
IRMO Winter, (*Winter II*), 2013 IL App (1st) 112836 (July 12, 2013)
Unfortunately, the decision in *Winter II* was to be expected. Recall that *Winter I* was the 2008 decision, 387 Ill. App. 3d 21, 23-24 (2008). That was the case that had held that where a party refuses to sign a consent for issuance of a QILDRO, the imposition of a constructive trust regarding benefits held under the Illinois Pension Code was proper. This was an excellent case law decision developing the law regarding what can occur in the absence of a consent. Unfortunately, the ultimate holding is that based on the language of the statute (the Illinois Pension Code) surviving spouse benefits are not subject to distribution. I liked the arguments posed by the former wife. Unfortunately, Illinois' statutory scheme prevailed. One may recall that Illinois divorce lawyers were told at the time of the compromise in which QILDRO

legislation was passed that very soon amendments would provide for surviving spouse provisions – similar to what is provided via ERISA covered plans. Despite the pension reform, it is hard to imagine that the needed statutory amendments will occur any time soon.

Dissipation

McBride – Trial Court Affirmed in Finding No Dissipation

IRMO McBride, 2013 IL App (1st) 112255 (May 14, 2013)
Regarding dissipation, the appellate court affirmed the trial court's rejection of a finding of dissipation. The appellate court reviewed the factual background regarding dissipation as:

> It detailed each party's machinations during 2008-11 in preparation for dissolution. The court concluded that each party had paid roughly equal amounts on attorney fees out of marital funds during this time and petitioner's use of marital funds to pay real estate taxes was cured by the court's order for reimbursement of taxes paid. The court found petitioner's testimony that her brothers had repaid the loans she made in 2006 credible and rejected respondent's claim of dissipation. The court also rejected petitioner's dissipation claim against respondent regarding his expense account and per diem payments from his employer.

In his appeal the husband argued that the trial court erred in determining that his wife's loans to family members were not dissipation of marital property. I liked the discussion of the findings necessary for dissipation:

> Accordingly, for dissipation, a court must find "(1) the property at issue was marital property; (2) the spouse accused of dissipation used the property for his or her sole benefit for a purpose unrelated to the marriage; and (3) the spouse did so while the marriage was undergoing an irreconcilable breakdown." *In re Marriage of Daebel*, 404 Ill. App. 3d 473, 490 (2010).

The first prong is obvious – because dissipation must be of marital property but occasionally this prong can be overlooked. Regarding the loans, the appellate court stated, "There is only testimony that the loans were made and that they were repaid, the court found that testimony credible and the funds were not dissipated. The court observed petitioner's testimony and reviewed the record and found the evidence clear that there was no dissipation."

Sunil Patel - Dissipation Affirmed Due to Cost of Visitation Supervisor in False Claim of Abuse Against Father

IRMO Sunil Patel and Amy Patel, 2013 IL App (1st) 112571 (June 28, 2013) - (Corrected).
First, note the two cases in 2013 – the Sunil Patel case and the Sonal Patel case – both involving property. This is the Sunil Patel case.

The wife appealed this case on a number of issues including the finding that she dissipated marital property. The background regarding dissipation was recited as:

> Between November 8, 2008, and February 3, 2009, Sunil's visitation with the children was supervised. The supervision was necessitated by Amy's false claims of abuse against Sunil and her coaching of the children to make false statements against Sunil. The trial court concluded that Amy had dissipated marital assets in the amount $6,923.75, the cost of the supervised visitation.

So, this is a case of first impression – dissipation claimed due to the consequences of a false allegation of abuse. The wife argued that the funds expended for his supervised visitation cannot constitute dissipation because the fees were not incurred by her for her sole benefit and because they were incurred as the result of a court order. But the appellate court held that case law "does not permit a party to avoid a finding of dissipation simply because the funds which were expended were necessitated by a court order." The appellate court affirmed the trial court's finding of dissipation.

Classification of Property

***McBride* – Although Wife Signed Title to Non-Marital Property into Joint Title, Trial Court Properly Found Presumption of Gift to the Marriage was Rebutted But Husband's Non-Marital Estate Entitled to Reimbursement**

IRMO McBride, 2013 IL App (1st) 112255 (May 14, 2013)

Classification - Wife Rebutted Presumption: Regarding property classification, the appellate court rejected the husband's argument and stated:

> Respondent argues that it is basic contract law that a signed legal document by a competent party, absent fraud or undue influence, speaks for itself. This citation to bedrock contract law principles ignores the effect of the Act and the specific provision providing for the rebuttable presumption in this case. While there is a signed quitclaim deed transferring title into joint tenancy, the evidence of record supports the trial court's finding that petitioner rebutted the presumption of marital property and its decision that 3312 North Seeley was nonmarital property is not against the manifest weight of the evidence. *** Furthermore, respondent's argument seeks a finding that nonmarital property was transmuted to marital property by the signing of the quitclaim deed. Respondent contends that the trial court understated the importance of the presumption of gift because "[e]ven though property might be considered nonmarital under section 503(a) (750 ILCS 5/503(a) (West 2002)), courts will presume a spouse who placed non-marital property in joint tenancy with the other spouse intended to make a gift to the marital estate." *In re Marriage of Berger*, 357 Ill. App. 3d 651, 660 (2005).

The appellate court then commented regarding the transfer of what had been the wife's premarital property to joint ownership shortly before the divorce case commenced:

> The parties separated in March 2008. In October and November 2008 the parties surreptitiously moved savings and earnings into separate individual accounts. Until November 28, 2008, when the parties executed several documents to reduce

> property tax burdens, title remained in petitioner's name alone. Respondent prepared the necessary documents including the quitclaim deed changing the ownership to joint ownership. Petitioner testified that she signed the quitclaim deed as part of the various documents but was not informed and did not understand that it altered the title to her property. No agreement, oral or otherwise, was adduced at trial indicating that petitioner intended to gift the property at any time.
>
> While petitioner is not blind, the policy underlying the Act exceptions to the presumption of gift are clearly supported here as in *Rink*. Furthermore, unlike in *Berger*, petitioner did not act on her own in signing the documents with an understanding of any agreement. In this case, respondent's actions must also be considered, in the context of the timeline of the parties' relationship, as he prepared the documents for petitioner to sign and did not explain the documents. Petitioner certainly should have carefully considered what she was signing, but the manifest weight of the evidence indicates that she had no intent to gift 3312 North Seeley.

Reimbursement: Nevertheless, the finding that the husband intended to make a gift when he paid off his wife’s mortgage (approximately $43,000) on that residence from his non-marital funds. The appellate court stated:

> Because the parties paid for real estate taxes for 3312 North Seeley from their joint account, the trial court ordered petitioner to reimburse the marital estate $75,000 for real estate taxes paid for 3312 North Seeley from marital funds. It follows that respondent should be reimbursed for his contribution to that property as well.
>
> Respondent argues that the trial court improperly allowed petitioner to testify to the May 11, 2010, letter from the parties concerning the closing and disbursement of the Signator One account. Respondent argues that the language of the letter is clear and unambiguous and not open to interpretation. Citing general tenets of contract law, respondent contends that the letter agreement must speak for itself and extrinsic evidence may not be considered in interpreting the meaning of the agreement.

The appellate court affirmed the finding that the agreement was ambiguous regarding whether the parties intended to remove the property from the “marital property calculus” and accordingly that the trial court properly allowed extrinsic evidence. The appellate court commented:

> Indeed, the letter simply contains a request from the parties for the closure of their joint account and an equal distribution of the funds into their two separate accounts. The letter does not speak to the dissolution proceedings or speak clearly and conclusively to any intent to affect those proceedings.

Other Property Cases

Bifurcation

- *Mathis* – IL Supreme Court: Date for Valuation in Bifurcated Case Where Grounds Judgment Entered

IRMO Mathis, 2012 IL 113496 (December 28, 2012). Illinois Supreme Court for the first time addressed the date for valuation in bifurcated divorce proceedings. The Supreme Court Rule 308 certified question on appeal was:

> "In a bifurcated dissolution proceeding, when a grounds judgment has been entered, and when there is a lengthy delay between the date of the entry of the grounds judgment and the hearing on ancillary issues, is the appropriate date for valuation of marital property the date of dissolution or a date as close as practicable to the date of trial of the ancillary issues?"

The appellate court granted the interlocutory appeal as a matter of first impression. The Illinois Supreme Court in December 2012 reversed the appellate court's decision and remanded the case. The Court reviewed case law and noted that it was near unanimous. Next, it noted the number of times the statute -- §503 -- was amended without amending the specific language. The Court then stated, "The rationale of *Rossi* and its progeny is that once the parties are divorced, the property they acquire is no longer marital property." The Supreme Court concluded:

> *Schinelli* is not contrary to the rule that the valuation date should be the date of dissolution. While the appellate court's decision in *Schinelli* did not preserve the amounts of the 401(k) account awarded in the initial order, it preserved the percentages awarded, and adhered to the intent of that order by dividing that account equally. Indeed, as the appellate court correctly understood there and here, there are ways to allocate and adjust for postdissolution increases and decreases in the value of marital property to attain a just distribution. See, e.g., 750 ILCS 5/503(c), (d)(1) (West 2010). Rather than adjust later, it is better to divide sooner, based on the value of the property on the date of dissolution. This rule encourages the parties to stop litigating, so they can receive and manage their proportion of the marital property, and discourages gamesmanship because the parties would be on notice that dilatory tactics would not aid either side. **Accordingly, we hold that, in a bifurcated dissolution proceeding, the date of valuation for marital property is the date the court enters judgment for dissolution following a trial on grounds for dissolution** (see 750 ILCS 5/401(b) (West 2010)) **or another date near it.** We believe this rule best serves the purpose of and the policy behind the Act, and accordingly the legislature's intent.

Accordingly, the Court held that the valuation date was August 2004, i.e., the date of the judgment for dissolution of marriage on grounds.

Consider also the following language within the IMDMA:

> (h) Unless specifically directed by a reviewing court, or upon good cause shown, the court shall not on remand consider any increase or decrease in the value of any "marital" or "non-marital" property occurring since the assessment of such property at the original trial or hearing, but shall use only that assessment made at the original trial or hearing.

I liked the optimistic conclusion, "On remand, we expect the parties to find common ground quickly, and new and healthier concerns outside the court system and the disputes that have plagued them for 12 years." Before stating this, the court stated, "There is simply no discernable reason why this case

should still be pending on any issues, now 12 years after the petition for dissolution was filed. The parties, their attorneys, and the trial court all share the blame."

Premarital Agreement

Chez – Joint Property Provisions of Premarital Agreement Properly Determined to be Clear and Unambiguous / Where Wife Allowed to Conditionally Testify Regarding Certain Property Despite Judicial Admissions Husband did Not Perfect Issue on Appeal By Failing to Submit Motion to Strike Testimony

IRMO Chez, 2013 IL App (1st) 120550 (November 26, 2013)
The dispute in this case was how two parcels of real estate was to be divided. The parties' Premarital Agreement (PMA) stated in pertinent part, "In the event of a dissolution of the parties' marriage, *all Joint Property shall be divided equally* between the parties." It also contained clauses that said it was the full agreement of the parties and was in lieu of the application of any marital property laws. Husband's arguments focused on whether the PMA was ambiguous.

Husband's first argument was that the properties should be deemed joint ventures rather than jointly held marital property. The court found the terms of the PMA were plain and unambiguous: any joint property "shall be divided equally between the parties." Because the real estate properties were jointly titled, the court found the real estate was to be equally divided, and distributed the properties equally between the parties.

Husband tried two other arguments to obtain a different result. He argued that he should be reimbursed for the costs he paid into the joint properties (because the PMA was silent on this topic), and that the common law theory of contribution required that he be reimbursed. The court noted a provision of general contract law in Illinois: if a contract purports on its face to be the parties' complete agreement, courts should not add terms about which the agreement is silent.
The PMA said it was the entire understanding and agreement and that joint property would simply be equally divided. So the court held it would not add reimbursement terms to the contract. On the argument of common law contribution, the court noted that spouses may opt out of the operation of marital property laws. And the parties explicitly did so in their premarital agreement.

Price – Property and Property Equalization Award Involving a Business Buy-Out Affirmed

IRMO Price (*Price I*), 2013 IL App (4th) 120155 (March 22, 2013)
The husband was required to make a so called property "equalization payment" of $330,000 within 90 days. He contended that this would require him to sell assets, etc. The appellate court affirmed the trial court's decision in a case that may be inaptly cited in future cases involving a business buy-out:

> While installment payments may be appropriate in some cases, *Leon* does not *require* a trial court order equalization payments be made in installments. In *Leon*, the Second District Appellate Court opined the trial court could, in its discretion, allow the ex-husband to compensate the ex-wife in installment payments. *Leon*, 80 Ill. App. 3d at 387, see also *Rosen*, 126 Ill. App. 3d at 778 (noting "where it

> has been necessary to award large assets to one spouse, the trial court is in a position to fashion offsetting payments flexibly"). In this case, after considering the total assets, liabilities, dissipation payments, and awards of nonmarital property, the trial court order Melvin to pay Jill $330,275.10 within 90 days. The trial court was in the best position to determine Melvin's ability to make this lump-sum payment and we find no abuse of discretion.

I disagree that this was the apt decision. But perhaps the appellate court was correct that this decision may not have been an abuse of discretion.

Note that 2013 brings *Price I* and *Price II*. This is the *Price I* decision.

The holding in *Price II* was that the trial court had jurisdiction to order the husband to pay interest on a money judgment even though the husband filed an appeal challenging the money judgment because the assessment of interest was collateral to the substantive issue raised in the husband's first appeal.

The decisions are:

Price I - This decision (March 22, 2013)
Price II – 2013 IL App (4th) 120422 (April 10, 2013) – The decision involving timeliness of an issue for appeal.

***IRMO Bradley* – Consideration of Tax Consequences of Retirement Accounts Not in Error**
In re Marriage of Bradley, 2013 IL App (5th) 100217(July 18, 2013 with posting date of September 2013)
Scant treatment was given to the issue of the apparent consideration of the tax consequences associated with (pre-tax) retirement account allocation other than to distinguish the case from *IRMO Alexander*, 368 Ill. App. 3d 192, 857 N.E.2d 766 (2006). That case had done a good job addressing speculative tax consequences. The case law discussion from the *Alexander* case was:

> However, in *In re Marriage of Emken*, 86 Ill. 2d 164, 167 (1981), the supreme court found that a circuit court erred when it reduced the value of certificates of deposit in the respondent's possession by the amounts that he would be required to pay in taxes and penalties if he were to surrender the assets. The supreme court held that there was no evidence in the record that the respondent would surrender the assets and that therefore it was improper to reduce the value of the assets in anticipation of losses which might arise as a result of the respondent's voluntary action. *In re Marriage of Emken*, 86 Ill. 2d at 167.
>
> James also cites *In re Marriage of Hawkins*, 160 Ill. App. 3d 71 (1987), and *In re Marriage of Perino*, 224 Ill. App. 3d 605 (1992), to further support his position. In *In re Marriage of Hawkins*, this court held that the circuit court did not err in failing to consider, in its valuation of certain property, the tax implications resulting from a subsequent sale of that property. We noted that the circuit court should not speculate about the existence and amount of future tax implications when no such sale is contemplated by the parties or required by the court's division of property. *In re Marriage of Hawkins*, 160 Ill. App. 3d at 79. In *In re*

> *Marriage of Perino*, the appellant argued that the trial court erred in failing to consider the tax consequences of a sale of a business. The appellate court found that the tax consequences were not a proper factor for consideration where the party did not have to sell any assets in order to meet the court's order, because the suggested consequences were purely hypothetical. *In re Marriage of Perino*, 224 Ill. App. 3d at 609.

Child Support

Initial and Post-Divorce: Establishing Amount of Child Support

Health Insurance Deduction in Determining Support

Aaliyhah L.H., Trial Court's Order Failing to Deduct Half of Health Insurance Premiums Reversed Even Though Expenses Not Required for Parties' Child / Payment of Half of Day Care Expenses Affirmed

In re Aaliyah L.H., 2013 IL App (2d) 120414 (November 25, 2013), Decision Judge Davenport.

This is a very interesting case regarding health care expenses as a deduction. The appellate court stated:

> 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."

The appellate court 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.

Gun Ownership and Second Amendment Rights in Context of Divorce Proceedings: Note that somewhat of a side issue to this case (but what would be the critical issue to some gun owners was the discussion regarding guns. The appellate court provided the background:

> In resolving this matter, the circuit court ordered that all of Timothy's firearms be

> placed in the custody of the sheriff of St. Clair County and that all current firearm owner identification cards belonging to Timothy be held by an attorney until further order of court. Christine's attorney further requested that these firearms be shipped to Pennsylvania, Timothy's home state, and that Timothy not possess a firearm in Illinois until the fall of 2013 when their youngest child commences college.

The appellate court then stated:

> Timothy argues that the circuit court's order as to firearms resulted in a deprivation of his liberty without due process of law, relying upon *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Court. 3020 (2010). Christine, in response, argues that pursuant to section 602 of the Act (750 ILCS 5/602 (West 2010)), the circuit court has a duty to consider the best interests of the children in this type of litigation and that this public policy is further expressed in the Illinois Domestic Violence Act of 1986 (750 ILCS 60/101 to 401.)

District of Columbia v. Heller, 554 U.S. 570 (2008), was a landmark case in which the U.S. Supreme Court held in a 5-4 decision that the Second Amendment applies to federal enclaves and protects an individual's right to possess a firearm for traditionally lawful purposes, such as self-defense within the home. The decision did not address the question of whether the Second Amendment extends beyond federal enclaves to the states, which was addressed later by *McDonald v. Chicago* (2010).

The appellate court then stated:

> We note in consideration that *Heller* indicates the existence of an area of reasonable regulation of firearms. We consider that the Illinois Domestic Violence Act of 1986 and the Illinois Marriage and Dissolution of Marriage Act constitute a legitimate regulation of Timothy's second amendment rights.

IRMO Bradley **– Support and Determination of Net Income / Court Must Provide Deductions for Health Insurance Premiums**

In re Marriage of Bradley, 2013 IL App (5th) 100217 (July 18, 2013 with posting date of September 2013 following denial of rehearing and a motion to publish what had been a Rule 23 decision.) The property portion of this decision is addressed above. The health insurance portion of the decision starts at paragraph 31.

This divorce case involved a nurse and a plastic surgeon. Regarding child support, the father had been ordered to reimburse his wife for the cost of health insurance for the two minor daughters – $521 per month. He argued that the trial court erred in not subtracting from its finding of net income for purposes of determining support his obligation, ordered by the trial court, to pay health insurance payments for the children of the parties. The appellate court stated, "Based upon the mandate of the statute, we determine that the circuit court was required to subtract the above-stated insurance obligation and modify the award of child support accordingly."

What Constitutes Income?

***Marsh* – Money Received from Post-Divorce Sale of Shares of Stock Owned Before Divorce Not Income for Purposes of Support**

[IRMO Marsh](), 2013, IL App (2d) 130423 (December 26, 2013)

The marital settlement agreement 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 appellate court in *Marsh* stated that *Colangelo* simply was 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."

[*Mayfield*]() – Illinois Supreme Court Rules Lump-Sum Worker's Compensation Was Income Given Facts of the Case

[*IRMO Mayfield*](), 2013 IL 114655 (May 23, 2013)

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*.

On an 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 presented, 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.

Wendt – Case of First Impression: Is Portion of Bonus that Accrued During the Last Year of the Marriage Marital Property or an Expectancy?

IRMO Wendt, 2013 IL App (1st) 123261 (August 16, 2013)

The only issue was whether the husband's 2012 bonus (to be issued in February 2013) was marital property based on what would be a fractional approach, i.e., with the parties being married for 9/12ths of the year and the issue of any possible allocation of this bonus being reserved. The trial court found the bonus to be more of an expectancy and not a contractually enforceable marital property right. The appellate court affirmed based on the facts.

This is an issue of first impression in Illinois, the appellate court noting: "The classification of a nonvested, discretionary bonus issued after the entry of a judgment for dissolution is an issue that has not yet been considered in Illinois." The points made by the appellate court in rejecting the wife's contention were that:

☞ *Employment at Will*: Employment of the husband was at will, the appellate court stating that, "Thus, he does not have a contractual right to receive a bonus by virtue of having signed an employment agreement providing for one."

☞ *Discretionary*: Next, the eligibility was based on "based on [his] individual performance, [his] demonstration of the characteristics described in the Citadel Leadership Model, and the Company's overall performance during 2012." [...a decision which depends in part on factors unrelated to Scott's work; Scott is not automatically entitled to receive a bonus. Indeed, Scott did not receive a bonus for the 2009 calendar year despite having earned bonuses for 2008 and 2010.]

☞ *Bonus Based on Incentive Program in Effect Year Following Divorce*. The company could change its policy for awarding bonuses, as is contemplated by its disclaimer that "2012 Participation Points will be governed by the relevant employee incentive program in effect when 2012 Participation Points are awarded."

The appellate court concluded:

> In sum, Scott does not have a contractual right to a bonus from his employer, but Citadel may choose to award a bonus in its discretion, a decision which is based on several factors and which would be governed by the employee incentive program in effect in early 2013, approximately five months after the dissolution

> of the parties' marriage. The right to the bonus is not automatic, and there has been at least one year in which Scott was not issued a bonus. Based on these facts, we cannot find that the bonus, if issued at all, constitutes marital property.

It is noteworthy that the wife cited a number of cases from other jurisdictions, but the appellate court stated that they were factually not on point: "In most of Alison's cited cases, either the employee spouse had an employment agreement or the payment that was considered by the court was received prior to the entry of the judgment for dissolution of marriage."

Note that the wife tried to urge that the Illinois case, *Peters*, regarding non-vested but otherwise non-contingent stock bonuses was controlling. 326 Ill. App. 3d at 369 (2001). The appellate court rejected this argument, stating that there was no employment agreement in the case analogous to that in *Peters* and that the husband was not contractually entitled to the bonus.

Turk – 2014 Illinois Supreme Court: Once Again the Custodial Parent Can be Ordered to Pay Support to Non-Custodial Parent

IRMO Turk, 2013 IL App (1st) 122486 (September 6, 2013) / 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. See: *IRMO Cesaretti*, 203 Ill. App.3d 347 (2d Dist. 1990) and *IRMO Pitts*, 169 Ill. App.3d 200 (5th Dist. 1988). This case cited the first case but not the later:

> Steven points out that Iris spends little time with the older child. However, Steven does not address the significant amount of time that Iris spends with the younger child or the fact that the trial court noted the alienation of the older child both during the hearing and in its written order... Finally, the best interest of the child is paramount in child support cases, and the trial court explicitly found that the ordering Steven to pay child support to Iris was in the best interest of the younger child.
>
> In the case at bar, we cannot say that the trial court abused its discretion in ordering. Steven to pay Iris child support. However, we must nevertheless reverse the trial court's decision and remand the case to the trial court because the amount of child support awarded to Iris is not supported by the record on appeal.

The appellate court mentioned that essentially the decision regarding child support was made based upon the financial disclosure statements. But the mother's financial disclosure statement (the mother had been the custodial parent but custody was transferred to the father) had been on the basis of her being the custodial parent. The appellate court then stated:

> There is nothing in the record itemizing Iris' parenting expenses after custody was shifted to Steven, and reliance on an earlier disclosure statement would not account for expenses that Steven, as the custodial parent, now pays instead of Iris. As a result, we are remanding this case back to the trial court to conduct an evidentiary hearing to determine what monies Iris pays when she has visitation with the children. That figure is the amount that the trial court should consider in determining child support. The trial court should also take the opportunity to

> clearly explain the basis for any support awarded, as required by section 505 of the Act.

This was because the trial court never determined the amount of support that the mother would have paid were the guidelines followed – only the amount the father would have paid. So, the point of the appellate court was that the court could require the father (custodial parent) to pay child support but the support per the guidelines for the mother should have been found and then there should have been a deviation, i.e., where the father would pay support to the mother.

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.

The Supreme Court cited case law from other jurisdictions regarding the ability of the court to require the custodial parent to pay child support. In one of those cases cited the Supreme Court cited with approval the language that "while a downward adjustment in lifestyle is a frequent consequence to divorce that affects both parents" the Pennsylvania Supreme Court had stated:

> "we would be remiss in failing to ignore the reality of what happens when children are required to live vastly different lives depending upon which parent has custody on any given day. To expect that quality of the contact between the non-custodial parent and the children will not be negatively impacted by that parent's comparative penury vis-à-vis the custodial parent is not realistic. Issuing a support order that allows such a situation to exist clearly is not in the best interests of the children. Therefore, where the incomes of the parents differ significantly, we believe that it is an abuse of discretion for the trial court to fail to consider whether deviating from the support guidelines is appropriate, even in cases where the result would be to order child support for a parent who is not the primary custodial parent." Id. at 651-52.

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.

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."

Smith – Trial Court Abused Discretion in Awarding Guideline Support Where Parties Shared Custody

IRMO Smith, 2012 IL App (2d) 110522 (December 18, 2012)
This is one of those rare decisions where the appellate court reversed the trial court when it awarded guideline support. But in this case custody was shared under the JPA – neither party was named a residential parent and each received "visitation." The mother had been ordered to pay child support to the father per the guidelines. 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.

Steadman and *Duerr* involved split custody situations. *Reppen-Sonneson* involved joint legal and physical custody. And recall that the bookend to this case is *IRMO DeMattia*, 302 Ill. App.3d 390, (4th Dist. 1999) holding that close to equal parenting time where one parent is named the primary residential parent does necessarily equate to a deviation case.

Day Care and Extracurricular Expenses:

Order Requiring Father to Pay only 20% of Day Care Expenses Affirmed

IRMO Carlson-Urbanczyk v. Urbanczyk, 2013 IL App (3d) 120731 (June 26, 2013)
Urbanczyk is a case that is curious in light of its timing. It affirmed an order requiring the father

to only pay 20% of day care and extracurricular expenses. The holding was that to vary from the "minimum support guidelines" by adding on these expenses, the court needed to find reasons to deviate from the guidelines.

But the statute was amended on *August 10, 2012* by Public Act 97-0941, to provide a new §2.5 to Section 505 of the IMDMA 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.

So, the standard under the amendment to the statute provides a standard of reasonableness. The divorce judgment in the underlying case was entered November 2011. The parties in that judgment had reserved the issues regarding day care / extracurricular expenses.

The decision explained, "At the time of the judgment of dissolution, the parties agreed the court should reserve ruling on whether father should also make contributions toward the payment of daycare and extracurricular expenses for the children until sometime after April 1, 2012, to allow father some time to improve his financial situation." The hearing was held in May 23, 2012. The case did not even acknowledge the new law being enacted in August. It is noteworthy that the legislation had passed both houses on May 16th. So, this case likely represents an instance of the mother's counsel not following pending family law legislation.

***Sobieski* – Child Support Deviations Where Substantial Parenting Time to Non-Residential Parent**

IRMO Sobieski, 2013 IL App (2d) 111146 (January 29, 2013)
www.state.il.us/court/Opinions/AppellateCourt/2013/2ndDistrict/2111146.pdf
The husband argued for a deviation from the support guidelines where he was required to pay $4,800 based on the guidelines (and he urged that the determination of net was incorrect – as discussed above). The crux of the father's argument was that a deviation should have been awarded because he spent a significant amount of time with the children per the JPA least portions of 216 days in a given year. Accordingly, he would be spending a significant amount of money to support the children beyond his child support payments, whereas his wife would be spending less money. Unfortunately, the appellate looked to *IRMO Demattia*, 302 Ill. App. 3d 390 (1999) and affirmed the decision.

In what might be considered "bad language" that leads parties to fight for either 50/50 custody rather than agreeing to a primary residential parent, the appellate court stated:

> Like the court in *Demattia*, we are unpersuaded that extended time spent with one's children requires a deviation from the statutory guidelines for child support. It is unclear how extended time spent with one's children affects the financial

> resources and needs of the children, or the financial resources and needs of the noncustodial parent, in a way that warrants deviation from the child support guidelines. Therese is the physical custodian of all four children; the needs of the children remain the same; and, per *Demattia*, spending time with one's children is not a chore that requires compensation but rather it is just that: spending time with one's children. Furthermore, the section 505(a)(2) factors are to be considered in light of the best interests of the children. Jon presented no evidence as to how a deviation downward from the guideline amount of child support would comport with the best interests of the children

Support Modification or Enforcement

Support Enforcement

***Popa* – Support Trust under §503(g) May be Established Over Objection of Custodial Parent Where that Parent Moves out of Jurisdiction Contrary to Court Orders**
IRMO Popa, 2013 IL App (1st) 130818 (August 23, 2013)

This is the first case in Illinois to address the interplay between §503(g) and §509. Illinois divorce lawyers inevitably overlook §509. It provides:

> Independence of provisions of judgment or temporary order. If a party fails to comply with a provision of a judgment, order or injunction, the obligation of the other party to make payments for support or maintenance or to permit visitation is not suspended; but he may move the court to grant an appropriate order. 750 ILCS 5/509 (West 2012).

Section 503(g) provides:

> The court if necessary to protect and promote the best interests of the children may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, physical and mental health, and general welfare of any minor, dependent, or incompetent child of the parties.

Legislatively, it would make sense that these trusts would not only relate to child support but maintenance. But that is not the point of this decision. The point of the decision is whether a child support trust can be established against the wishes of the custodial parent when that parent moves out of the jurisdiction so that there are separate enforcement issues regarding visitation. The mother tried to point the court's imposition of a 503(g) trust as a suspension of the obligation to pay support. But the court denied the father's motion to abate support so long as the mother remained outside of the court's jurisdiction. The appellate court stated:

> Instead, the court required Popa to establish a trust fund for the benefit of his children, with himself as trustee, and make all his support payments into the trust. Furthermore, the court ordered that neither Popa nor Garcia could make any withdrawals from the trust without court authorization. We conclude that the trial

> court neither relieved Popa of his obligation to pay child support nor impermissibly linked his obligation to pay child support to Garcia's suspension of Popa's visitation rights.

Of course, the appellate court agreed with the mother that the children could not be deprived of support due to misconduct – such as violation of the visitation terms of the decree – on behalf of the custodial parent. The father's argument was that the mother was using her support money to stay in Uruguay contrary to court orders.

The appellate court concluded:

> The parties' daughter has a condition that requires treatment by a physician, the court has a duty to act in the children's best interest, and Garcia has not provided the court with any evidence or information concerning the daughter's current condition and treatment.
>
> ¶ 27 Under these egregious circumstances, the court concluded that the establishment of the trust provided Popa with appropriate relief under section 509 of the Act. Specifically, the court stated that it was in the children's best interests to be returned to Illinois and Popa would incur considerable expense in attempting to retrieve his children.

Schultz v. Performance Lighting* – Withholding of Support and Penalties of $100 per Day for Failure to Withhold - *Supreme Court Decision

Schultz v. Performance Lighting, 2013 IL 115738 (November 2013)

I had been critical of the appellate case. But now the Supreme Court has spoken. The Supreme Court ruled that trial court properly dismissed the complaint to recover child support that should have been withheld from the paychecks of plaintiff's former husband. The Supreme 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 key portion of the Illinois Supreme Court decision summarizing the state of the current law provides:

> We conclude that irrespective of the parties' failure to communicate, the statute is unambiguous in providing that the lack of the obligee's social security number rendered the notice invalid and that the employer, at the time of the relevant events in this case, was not burdened with any statutory duty to contact the obligee of the notice's invalidity. We note that recent amendments to the statute seem to address the problem at issue here. We further note, however, that it is well settled that an amendment of an unambiguous statute creates a presumption that the amendment has worked a change in the law, while the amendment of an ambiguous statute creates no such presumption and might instead indicate that the legislature intended a clarification of the law....

> The recent amendments to the Act, effective August 17, 2012, now place the duty on the recipient of support to timely contact the employer for an explanation as to why support is not being withheld. 750 ILCS 28/45(j) (West 2012). Specifically, a recipient of support must notify the employer in writing if a support payment is not received. 750 ILCS 28/45(j) (West 2012). Then, within 14 days of receiving this written notice of nonreceipt of payment, the payor must either notify the obligee of the reason for the nonreceipt of payment, or make the payment with 9% interest. A payor who fails to comply with this provision is subject to the $100 per day penalty in section 35 of the Act. 750 ILCS 28/45(j) (West 2012)

See my commentary to the 2014 decision in the 2014 case law review.

Support Modification

***Putzler* – Child Support Modification and Showing of Increased Needs / Perqs**
IRMO Pultzler, 2013 IL App (2d) 120551 (February 2013)
www.state.il.us/court/Opinions/AppellateCourt/2013/2ndDistrict/2120551.pdf
The former husband appealed from two court orders: (1) a December 2011, order increasing his monthly child support obligation from $2,500 to $3,703; and (2) an April 2012, order awarding his former wife $3,125 in attorney fees in connection with her successful pursuit of two contempt petitions against him. The former husband appealed and the appellate court affirmed. This is one of the few recent decisions involving the standard applicable and detailed evidence regarding increased needs of the children – in a case where the custodial parent's income had increased, arguably offsetting those needs. This case is also significant regarding the CPA's testimony regarding perqs and adding those back into the non-custodial parent's income. Regarding perqs the decision stated:

> Coffey examined the corporation's tax returns and identified certain amounts that should not have been deducted from respondent's "income" for child support purposes. For example, Coffey added back into respondent's income the deductions taken for "perks," or expenses paid by the business that should actually be attributed to respondent, such as auto expenses, telephone expenses, and rent for the storage unit. Coffey explained that, with respect to the Ram truck, as there is only one location for respondent's business and commuting is not a business deduction, there is no business purpose for those vehicle expenses. Similarly, the telephone bills reflected that personal telephone expenses were being paid by the business and that personal assets were stored in the storage unit but the rent was being paid by the business.

Post-High School Educational Expenses

Standing to Pursue Claim Brought by Child

***Vondra* – No Right or Ability to Intervene in Parent's Divorce Case for Children to Pursue Claim for Post-High School Educational Expenses against Parents**
IRMO Vondra, 2013 IL App (1st) 123025 (June 2013)

Instead, a child's right to enforce the educational expenses provision of the Act stems from his position as a third-party beneficiary to his parents' settlement agreement contract. *Miller v. Miller*, 163 Ill. App. 3d 602, 612 (1987). "[A] third party who is the direct beneficiary of a contract has standing to enforce the obligations for his benefit incurred under that contract." Id. Such an action is by nature a breach of contract action. *Spircoff*, 2011 IL App (1st) 103189, ¶ 21. Therefore, where the settlement agreement clearly provides for educational expenses, the child as third-party beneficiary to the agreement has standing to bring a claim to enforce his rights under the contract. Id. at ¶ 22. It follows that in order for a child to enforce such rights as a third-party beneficiary, his parents must have first executed a settlement agreement providing for educational expenses. Here, the Vondra's divorce is pending and the parties have yet to execute a settlement agreement. Mika has filed a petition for the children's college expenses but the trial court has not ruled on the petition. The trial court did not err in finding that Nicholas and Michael lacked standing to bring their claim and denying their request to join in their parents' dissolution proceedings.

Executive Summary re Third Party Beneficiary Cases:

Standing Found:

☞ *IRMO Spircoff*, 2011 IL App (1st) 103189 (October 2011): Child had standing to enforce terms even where specific percentage allocation not stated in MSA.

☞ *Orr v. Orr*, 228 Ill.App.3d 234 (1st Dist. 1992): The child had standing where MSA provided that father desires that the child "attend a college or professional school and he agrees to participate in the financial responsibility for said education" where the agreement defines the terms but does not state the specific amount of his responsibility

☞ *Miller v. Miller*, 163 Ill.App.3d 602 (1st Dist., 1987): Child had standing to enforce MSA provision regarding college despite later exculpatory agreement between parents absolving father of the obligation.

Standing Not Found:

☞ *IRMO Goldstein*, 229 Ill.App.3d 399 (2d Dist. 1992): A child does not have standing to apply for modification of parental college education obligation.

Gitlin on Divorce has noted that the second and third appellate districts had not allowed a child to attempt to enforce while the first district has allowed such third party beneficiary actions.

Maintenance Cases

Initial Divorce

***Dea* – Maintenance Award Reversed Because of Failure to Consider Recipient's Social Security Disability Payments and Payor's Ability to Meet Her Own Living Expenses**

IRMO Dea,, 2013 IL App (1st) 122213 (November 12, 2013).
In this 22-year marriage, Husband is disabled and Wife works full-time. The parties separated three years before Wife filed for divorce. They have two, emancipated children. Wife is 58 years old. Although she worked as waitress while caring for the children during the marriage, she since became employed full time in the IT department of a law firm where she earning an annual gross salary of $78,000 plus overtime.

Husband is 59 years old, and he worked as a truck driver for BP Amoco during the marriage. Husband suffers from multiple sclerosis and depression, and he stopped working the same year the parties separated. Husband receives social security disability benefits, and also draws upon his retirement plans. Husband lives in the marital residence with no mortgage. Wife lives in a condominium she purchased after the parties separated. Husband has approximately $385,000 in retirement plans (consisting of a defined benefit, cash balance retirement plan and a defined contribution savings plan), about half of which is his non-marital property. Wife has approximately $30,000 in a 401(k) plan.

The parties each filed a Cook County Financial Disclosure Statement. I have rounded their reported figures. Husband listed his net monthly income as $3,400, consisting of $1,500 from disability payments and $1,900 from pension and retirement plans. However, the disability income is not included on his tax return because it is nontaxable. Husband's monthly living expenses were $3,800. Wife listed her net monthly income as $4,700, consisting of wages and overtime. Wife's monthly living expenses were $4,800.

The trial court found that Wife's financial status had improved through her efforts of self-sufficiency, whereas Husband's financial status declined due to his disability. The trial court held that, without maintenance, Husband would be unable to meet his needs considering the standard of living during the marriage. The trial court awarded Husband indefinite maintenance from Wife in the amount of $1,600 per month. Wife appealed.

The First District reversed and remanded the case for a new trial. The issues were (1) whether the trial court abused its discretion because it failed to consider Husband's nontaxable social security disability payments for purposes of meeting his living expenses and establishing the maintenance award, and (2) whether the trial court's maintenance award was an abuse of discretion because it causes Wife's monthly expenses to significantly exceed her net monthly income.

First, as to whether disability benefits should be considered for purposes of maintenance, the Court stated:

> It is well established in Illinois that social security benefits cannot be divided directly or used as an offset during state dissolution proceedings. *In re Marriage of Rogers*, 352 Ill. App. 3d 896,898 (2004). However, this court has held that such a restriction does not apply to *maintenance* awards, and social security benefits may be considered in determining maintenance awards. *Id.* at 899; see *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 164-65 (2005).

Here, the record was clear that the trial court failed to consider the social security disability payments received by Husband as a source of money available to him to meet his living

expenses. Instead, the trial court only relied on Husband's adjusted gross income from his tax return, which doesn't include the nontaxable social security disability benefits.

The omission was significant — Husband's adjusted gross income on his tax return was $20,600, when in fact his total income from all sources was actually $42,500. The key question for the appellate court was whether the disability income is available to Husband for his living expenses, regardless of whether it is taxable. Since the trial court failed to consider the disability payments, its maintenance award was reversed. The Court held that the trial court abused its discretion in excluding Husband's nontaxable social security disability payments from consideration in determining the amount of money available to him to meet his needs and in determining a maintenance award.

Regarding the second issue, Wife argued that the trial court abused its discretion because the maintenance award causes her monthly expenses to significantly exceed her net monthly income and Husband does not need the award to meet his monthly expenses. According to his disclosure statement, Husband only required an additional amount of $395 per month to meet his monthly expenses. Yet, the maintenance award of $1,600 per month apparently gave Husband a $1,200 monthly surplus, whereas it caused a $1,300 monthly deficit to Wife. The Court stated:

> While section 504(a) of the Act sets out certain factors as a guide for determining appropriate maintenance, the court must also be guided by reason and reality. It is sometimes not possible for each of the parties, individually, to maintain exactly the standard of living which they enjoyed collectively during the marriage. The amount of income which each party has to meet his basic living expenses is an important factor for the court to consider. *Marriage of Dea*, 2013 IL App (1st) 122213, ¶27.
>
> Here, the record did not support, nor did the trial court explain, awarding Husband maintenance significantly in excess of his stated monthly expenses, especially since the maintenance pushes Wife's obligation beyond her monthly income. Wife is expected to spend $1,300 more than she takes in each month to comply with the court's maintenance award. Under these circumstances, Wife's ability to pay maintenance is a significant factor that must be considered. The Court held that the trial court abused its discretion in awarding Husband permanent maintenance of $1,600 per month.

The Appellate Court reversed and remanded with instructions to specifically consider all of Husband's social security disability payments and the money available to Husband when compared to his expenses, and Wife's income when compared to her expenses, in determining an appropriate maintenance award.

Dowd **– Graduated Maintenance Payments with Cap on Bonuses for Payment of Maintenance Acceptable**

[*IRMO Dowd*](), 2013 IL App (3d) 120140 (June 20, 2013)
This case did not address the issue of whether maintenance should have been indefinite or subject to review but only the amount of maintenance on bonuses. The husband had been employed as director of operations for City Beverage Illinois and had been employed by City Beverage, since 1984. His base salary from 2006 through 2010 had been $150,000, but in April

2011, it increased to $165,000. According to the husband's testimony, he earned $290,000 in total gross income for 2010, including $145,000 in gross bonuses. He testified that he had been eligible to receive a bonus of up to $100,000 each year.

The trial court provided that the husband would pay $6,100 per month as maintenance for the next five years and reviewable thereafter. In addition, the court decided that Sharon should receive 50% of Michael's annual bonuses up to $50,000, 20% of his annual bonuses between $50,001 and $100,000, and no portion of his annual bonuses above $100,000.

The former wife appealed urging that the trial court abused its discretion by awarding her only 20% of Michael's bonuses between $50,001 and $100,000 per year, and failing to award her any share of Michael's bonuses exceeding $100,000. She also argued the trial court erred by denying her petition for contribution to attorney fees. The appellate court affirmed. The fixed monthly amount of maintenance was $6,100 and neither party appealed that portion of the judgment. The appellate court commented:

> With regard to Michael's annual bonuses, the trial court noted it had reviewed this case 'very seriously' and developed a graduated approach to Michael's bonuses as an incentive to encourage Michael to maintain his productivity because he would enjoy a larger share of his bonuses.

The Third District appellate concluded that the trial court did not "abuse its discretion." When I first reviewed the *Dowd* decision, what I had missed were several aspects of the case that resulted in the low percentage of bonuses not being an abuse of discretion. These factors were: the 20 year marriage, the fact that the wife received greater than 50% of the net marital estate (54 percent), her non-marital property of more than $134,000 and the fact hat there were no children born to the marriage.

***Price* – Initial Divorce - Permanent Maintenance Award Affirmed**
[*IRMO Price*](), 2013 IL App (4th) 120155 (March 22, 2013)
Regarding the permanent maintenance award, the first ruling was that the trial court's determination of the husband's net income was not against the manifest weight of the evidence. The husband had argued that the court should have applied income averaging rather than including as his income for maintenance purposes business income, which was variable and relatively recent. A good quote from the decision had stated:

> As this court has recently stated, " '[i]ncome' for tax purposes is not synonymous with 'income' for determining *** support." *In re Marriage of Bradley*, 2011 IL App (4th) 110392, ¶ 44. "The purpose of the two calculations are different. While the Internal Revenue Code is concerned with reaching an amount of taxable income, the support provisions in the Dissolution Act are concerned with reaching the amount of *** income" for determining support.

Regarding business income, the trial court had the court acknowledged (1) the husband's testimony he does not actually receive the rental money from the business – Sand Valley Sand and Gravel – and (2) the income tax returns were not representative of exactly what transpired within the parties' businesses because both parties testified the businesses paid various personal

expenses for the parties and the parties loaned money to the various businesses. The finding regarding the husband's net income was that it was a net of $300,000 per year. The appellate court approved the language from the trial court's decision, "In addition, the court noted even if it were to set aside the evidence and accepted Melvin was spending $10,871 per month in expenses and debt retirement as documented in his amended financial affidavit, he still had an income in excess of $25,000 per month with which to meet his expenses."

Next, the appellate court approved of the amount of maintenance award of $7,500 per month. The appellate court stated:

> At the time of the proceedings, Jill was 61 years of age and had a high school education. Following high school graduation, she worked for some time as a cashier at Zayres department store and later as an officer manager. Shortly before giving birth to their first daughter, Jill terminated her employment with Zayres. She then began working part-time for the parties' business that eventually became known as Mel Price Company, Inc. After the birth of their second daughter, Jill began working full-time for the parties' businesses, in addition to taking care of the home, the parties' biological daughters, and Melvin's daughter from a prior marriage. Jill continued working for the parties' businesses until 2007, at which time she was receiving an annual salary of $62,000 and benefits, including health insurance, a company car with some gas furnished, a company phone, and an employee pension plan. At the time of the hearing, Jill was unemployed and had not attempted to seek employment elsewhere. ¶ 32 The parties were married for 34 years. During the lengthy marriage, the parties enjoyed a high standard of living. They spent over $1 million on toys, collectibles, dolls, and other items without debt. They owned condominiums in Florida and took several vacations every year paid for from the businesses' funds.

Husband's argued that the rationale of *IRMO Bratcher* should have applied. The appellate court stated:

> This case is distinguishable from *Bratcher*. In *Bratcher*, this court—in a divided decision—reversed an ex-wife's award of maintenance where she had not only been awarded $1,634,719 in marital assets, but she was also receiving $8,193 per month in proved rental income and nearly $5,845 in interest income derived from a $876,759 lump-sum payment and had potential for making additional income as a realtor. Id. at 389. This court noted the ex-wife's income combined with the maintenance awarded would have resulted in the ex-wife receiving $12,000 more per month than the ex-husband. Id. at 388. Here, the only income-producing property awarded to Jill was the Voorhees Street property, which had a limited-term lease generating $550 in monthly rent or $6,600 per year, whereas Melvin was awarded all of the parties' businesses and all the assets of those businesses, which, according to the most recent year for which tax returns were available, grossed over $1.7 million.

The appellate court also looked to approval at the *IRMO Nord* decision:

> In *Nord*, this court upheld the ex-wife's permanent maintenance award of $17,000

> per month based on a number of factors also present in the instant case, including the long duration of the parties' marriage, the parties' lifestyle during the marriage, and the fact the ex-wife was only employable at a minimum-wage job and the ex-husband had greater present and future potential to earn income and acquire assets. *Nord*, 402 Ill. App. 3d at 303-04.

Jensen **– Appeals and Maintenance Reservations: Appellate Court Lacked Jurisdiction and Appeal was Premature Given Reservation of Ability to Award Maintenance**
IRMO Jensen, 2013 IL App (4th) 120355 (May 6, 2013)
The trial court's order finding that the wife was entitled to maintenance, but reserving the issue of maintenance for future determination and not setting an amount of maintenance to be paid, is not a final order for purposes of appeal. The trial court reserved maintenance to be review in six months, along with status of husband's employment and financial circumstances. Thus, appellate court lacks jurisdiction to consider an appeal of the underlying divorce.

Sunil Patel **- Maintenance in Gross Award Affirmed**
IRMO Sunil Patel and Amy Patel, 2013 IL App (1st) 112571 (June 28, 2013)
The wife appealed this case on a number of issues including the award of maintenance in gross. The parties had been married since November 2000. The husband was 42 years old and a physician, earning approximately $475,000 per year. The wife was 35 years old and had both undergraduate and graduate degrees but, until the parties' separation, she did not work outside of the home. At the time of the hearing, she earned approximately $14,500 per year, doing office work for a doctor and working at her church. The parties had two children: born in 2002 and 2003.

The trial court ordered the husband to pay to $210,000 over a period of 30 months as maintenance in gross. The trial court acknowledged that the wife had no experience in using her degrees and had no real job experience. The wife's educational background was that she received her law degree from DePaul University in 2002 but did not take the bar examination. At the time of trial she was in good health and 35 years old. The wife testified that she wanted to take the bar examination and estimated the cost of a review class and taking of the exam to be $5,000. However, she had not yet signed up for the exam. Instead, the wife was attending seminary school part-time to obtain a Master's degree in Theology. She took one class per semester at a cost of $1,320 per class. She had completed 4 out of the 15 classes necessary for her degree. Her goal was to work at the Lawndale Christian Center, which provides medical and legal services to the poor. She acknowledged that a master's degree was not required to work at the Center.

The appellate court commented:

> However, following the transfer of custody of the children to Sunil in June 2009, she had not taken any steps to become self-supporting. Instead, she chose to pursue another advanced degree which was not required for the work she planned to do in the future, while working at low-paying jobs that did not utilize the degrees she already had.

The appellate court reasoned simply:

> In rejecting Amy's request for an award of reviewable periodic maintenance, the trial court stated that it had considered the factors set forth in section 504(a) of the Act (750 ILCS 5/504(a) (West 2008)), in particular, the short term of the marriage, the length of the parties' separation, the property division, the fact that since January 2009, Sunil had been paying Amy $6,000 per month in support and continued to do so even after the children no longer resided with Amy, and Amy's failure to seek out appropriate employment in order to become self-supporting. The court determined that the maintenance in gross was appropriate since it would provide Amy with an additional period of support "while she develops and implements a realistic plan for employment and self-sufficiency."

Attorney's Fees:

Interim Fees

***Earlywine* - (Illinois Supreme Court) Interim Attorneys Fees and Disgorgement: Advance Payment Retainer No Bar to Disgorgement in Initial Divorce Case**

IRMO Earlywine, 2013 IL 114779 (October 3, 2013)

There are not many disgorgement cases. The issues addressed by the Illinois Supreme Court involved Separation of Powers, the Supreme Court Rules and the *Dowling* case. The question was essentially whether the Supreme Court Rules and *Dowling* trumped the disgorgement provisions when there is an "advance payment" retainer. The point is that with an advance payment fees earned are not "available funds" under the statute. The Supreme Court somewhat sidestepped this point. Also, construing the statute to make earned fees available for disgorgement, will discourage attorneys from getting involved in low-income, low-asset cases.

The Supreme Court held:

> It is clear from the attorney-client agreement that the advance payment retainer in this case was set up specifically to circumvent the "leveling of the playing field" rules set forth in the Act. To allow attorney fees to be shielded in this manner would directly undermine the policies set forth above and would strip the statute of its power. If we were to accept James' argument, an economically advantaged spouse could obtain an unfair advantage in any dissolution case simply by stockpiling funds in an advance payment retainer held by his or her attorney.

The court also stated:

> To the extent that James argues that the funds in his advance payment retainer were obtained from John's parents and are not marital property, we note that the statute does not distinguish between marital property and nonmarital property for the purpose of disgorgement of attorney fees. The statute contemplates that retainers paid "on behalf of" a spouse may be disgorged.

A more critical distinction, which still has not been clearly decided, is whether fees already earned, not still in unearned (or *Dowling*) retainers, would be subject to disgorgement. Under the current statute,

that distinction is not evident, and could be read to include fees paid and earned in the playing field leveling and disgorgement.

***Sonal and Vipul Patel* – Interim Fee Award of More than Amount Prayed for Affirmed on Appeal / "Friendly Contempt" re Interim Fees Not Overturned on Appeal**

IRMO Sonal Patel and Vipul Patel, 2013 IL App (1st) 122882 (October 11, 2013)
So, this is the other 2013 Patel case and while this one also involves attorney's fees, in this case the fee issue was the only one.

Interim Fee Award Beyond Ad Damnum Clause: An order requiring respondent to pay interim attorney fees of $69,000 to petitioner's attorney was upheld. The husband argued on appeal that the petitioner had only requested $51,040 and she failed to show she was unable to pay the fees and that respondent could pay. But the appellate court ruled that the record on appeal was insufficient to allow consideration of these objections.

This is one of the few cases that turns on the normal clause used as a "throw-away" in the prayer for relief in petitions – "such other relief as is appropriate" or some such language:

> Granted, in the ad damnum clause in petitioner's petition, she requested interim attorney fees and costs "in the total amount of for [sic] past due fees of $21,040 as of February 29, 2012[,] plus $30,000 for prospective fees." However, in her ad damnum clause, she also requested "such other relief as the court deemed equitable and just."

Friendly Contempt Order Not Reversed: Regarding the issue of a "friendly contempt" finding and an appeal, the appellate court stated:

> The Act does not allow for parties to generally test the validity of interim fee awards under the guise of a 'friendly contempt' merely because the party does not agree with the award." *In re Marriage of Levinson*, 2013 IL App (1st) 121696.
>
> Nothing in the record shows that respondent had a more compelling justification for not paying the award beyond his disinclination to pay it. Accordingly, we affirm the circuit court's orders holding respondent in contempt of court and imposing sanctions for his failure to purge the contempt. The purpose of imposing an indirect contempt order and its sanctions is to coerce compliance. *Levinson*, 2013 IL App (1st) 121696. As we affirm the fee award in question and the award has yet to be paid, we leave it to the trial court to determine whether it is appropriate to vacate the contempt order in the event its order is ultimately followed.

***Levinson* - Interim Fees Affirmed Despite the Fact that the Party Receiving Substantial Fee Award Had Already Been Paid More than Other Party**

IRMO Levinson, 2013 IL App (1st) 121696 (May 2, 2013)
The husband appealed the interim fee award of $78,500 and the contempt sanction for failing to pay the interim fee award. The appellate court affirmed.

The appellate court commented:

> On appeal, Robert briefly argues that an evidentiary hearing should have been conducted on Robin's interim fee petition. In the "issue presented on appeal" section of his brief, Robert lists as his first issue: "Whether it was an abuse of the trial court's discretion to award Robin's counsel $78,500 in interim attorney's fees where there existed no source of founds from which the fee award could be paid and the trial court denied Robert's requests for an evidentiary hearing." In the body of his brief, however, Robert fails to fully develop this argument..."

The appellate court then stated:

> Although Robert argues that "good cause" was shown to hold an evidentiary hearing in this matter, he fails to articulate to what good cause he refers. Conducting an evidentiary hearing on an interim fee petition in a predecree dissolution of marriage case is the exception not the rule; the statute clearly provides that "except for good cause shown, a proceeding for (or relating to) interim attorney's fees and costs in a pre-judgment dissolution proceeding shall be nonevidentiary and summary in nature." 750 ILCS 5/501(c-1)(1) (West 2010). Here, the court found no good cause to conduct an evidentiary hearing.

The trial court also found that the complicated financial issues required the use of experts for the interim fee issue. That finding was not appealed.

A curious aspect of the case is that the appellate court affirmed the amount of the award despite the fact that the wife's counsel had been paid more by way of fees than the husband's counsel. The appellate court, as did the trial court, relied upon the "catch-all" phrase within the interim fee factors and stated:

> Subsection H, which represents but one factor the court reviewed of many, provides for the analysis of payments made and expected to be made. The circuit court clearly addressed this issue in the order, and considered not only the payments that had already been made, but the source of those payments, as well. Allowing a party to not pay reasonable interim attorney fees in a situation such as that found in the case at bar solely because the other party previously paid more to her attorneys, without further analysis, would be unjust and would contravene the purpose of the interim fees statute.

***Price* – Contribution Action Denied Where Substantial Parity after Payment of Maintenance**

IRMO Price, 2013 IL App (4th) 120155 (March 22, 2013)
The key to the case regarding attorney's fees was whether the financial position of the parties was substantially similar following the maintenance award and property so that an award of fees was not warranted. The appellate court stated:

> Melvin asserts the court erred in ordering him to pay a portion of Jill's attorney fees because the financial circumstances of the parties is substantially similar due

> to the court's division of marital assets, liabilities, and Jill's maintenance award, and because Jill failed to show an inability to pay her own attorney fees. Jill argues the postdissolution financial circumstances of the parties are not substantially similar because Melvin was awarded all of the parties' businesses, which produced gross annual incomes in excess of $1.7 million. We agree with Jill.

The appellate court rejected the assumption that fees under the current statute are based on the historical ability/inability standard. The appellate court rejected this and stated that the standards in this case were "criteria for division of marital property under this §503 and, if maintenance has been awarded, on the criteria for an award of maintenance under §504." 750 ILCS 5/503(j)(2)." I had assumed that this meant that if maintenance was awarded the fees were based on the standards of §504 (without assuming that in cases with maintenance awards fees were based on the standards of both Sections 503 and 504. One recent case suggests the factors should include both of those, i.e., This case does not clarify this potential distinction, but *Sobieski*, discussed below does address this.

Sobieski – Contribution Petition in Initial Divorce and Relative Financial Circumstances In Considering Support

IRMO Sobieski, 2013 IL App (2d) 111146 (January 29, 2013)
Regarding the wife's petition for contribution toward attorney's fees, the appellate court stated that both the factors in §503 and 504 (property and maintenance factors) applied since the wife was awarded maintenance.

One issue in this case was the issue of the husband's cash allegedly received from his business. The appellate court stated:

> The thrust of Jon's argument is that the trial court lacked solid evidence that his gross monthly income was over $13,500, while other evidence supported less than $13,500. The "other evidence" was Jon's testimony that he made $10,000 per month in gross. On the other hand, there was testimony from Therese that Jon brought home $3,500 to $4,000 a week in cash. Given that the rest of the record does not make Jon's net income any more clear or precise, we agree that the trial court did the best it could in determining Jon's net income. There is at least as much evidence to support $12,000 net income as $10,000 gross. There is also ample evidence to doubt the credibility of Jon's testimony, including his position with Spirit of America, Inc., as the handler of all its cash, his ease of access to its funds, his equivocation as to the business's earnings, and his own financial applications that contradict his testimony as to his income. Furthermore, the trial court's determination of net income here was used for purposes of determining child support, and " '[i]ncome' for tax purposes is not synonymous with 'income' for determining child support." *IRMO Bradley*, 2011 IL App (4th) 110392.

The appellate court then stated:

> Thus, any "gifts" that Jon received, even if they were not reportable taxable income, would be income he could use to help support the children—one of the

> reasons why child support net income differs from taxable income. See id. For all these reasons, the trial court did not abuse its discretion in setting Jon's net income at $12,000 per month. Cf. *IRMO Miller*, 231 Ill. App. 3d 480, 483 (1992) (finding no abuse of discretion in failing to consider unreported cash income in determining net income when there was conflicting testimony as to whether it was ever received). We note, however, that under the statutory guidelines Jon's income is only one factor to consider in whether to order contribution to attorney fees. See 750 ILCS 5/503(d), 504(a).

The husband's next argument was that their financial situation, after payment of support, etc., was substantially similar and accordingly the fee order was in error. The husband relied on *IRMO Schinelli*, 406 Ill. App. 3d 991 (2011), to establish that his and his wife's respective financial situations demonstrated that the trial court erred. *Schinelli* involved an appeal of a $15,000 award for contribution to attorney fees. The *Schinelli* court noted that the respondent made approximately $200,000 per year, whereas the petitioner made approximately $30,000. The trial court attempted to rectify this difference by awarding the petitioner maintenance of approximately $80,000 per year ($6,692 to be paid monthly). The *Schinelli* court reasoned that when maintenance was factored in—by subtracting $80,000 from the respondent's yearly income and adding $80,000 to the petitioner's yearly income—the parties stood in substantially similar financial situations, i.e., $120,000 per year compared to $110,000 per year. Furthermore, the *Schinelli* court found that the petitioner had not provided evidence of her inability to pay attorney fees. For these reasons, the *Schinelli* court found that the trial court abused its discretion in awarding the petitioner a contribution to attorney fees.

In an important passage, the appellate court stated:

> Jon urges this court not only to adopt the *Schinelli* formulaic comparison of the parties' financial situations but to expand it by including child support in our calculation. We have doubts as to whether including child support in the *Schinelli* calculus would be proper even if we were to find the Schinelli analysis applicable here.

The appellate court then stated:

> In *Schinelli*, the salient criteria for the analysis were the net incomes adjusted by the maintenance award. But see *IRMO Minear*, 181 Ill. 2d 552, 563 (1998) (affirming trial court's award of attorney fees that was proportional to income before accounting for maintenance payments). Those were the only material facts the *Schinelli* court worked with to find that the trial court abused its discretion. In this case, the trial court considered additional factors. In making its initial determination of maintenance, the trial court considered "all criteria set forth in Section 504"—factors also to be considered for an award of attorney fees—and was persuaded by "the disparity in income between the parties, both currently and potentially; the length of the [m]arriage; and [Therese's] health." A critical factor for the trial court was Therese's health, which is a listed factor for attorney fees under Section 503(d)(8)—the very same section that lists "amount and sources of income" as a factor. 750 ILCS 5/503(d)(8) (West 2010). The trial court found that Therese is bipolar, suffers from depression, and is in remission from cancer. She

also had surgery for a secondary cancer shortly before trial, and she testified that her health insurance cost nearly $685 per month. The trial court found that Therese worked 20 to 25 hours a week at $10 per hour, was not self-supporting, had sufficiently searched for full-time employment, and had less promising financial prospects than Jon. Additionally, the trial court could have considered that Therese gave up full-time employment years ago to care for the children, a factor to consider under section 504(a)(1).

The appellate court then noted case law addressing the financial ability and inability standards regarding fee petitions against the opposing party.

> The *Schinelli* court cited general guiding principles: "[t]he propriety of an award of attorney fees is dependent upon a showing by the party seeking them of an inability to pay and the ability of the other spouse to do so," and an award of attorney fees will be reversed "when the financial circumstances of both parties are substantially similar and the party seeking fees has not shown an inability to pay." *Schinelli*, 406 Ill. App. 3d at 995. *These rules are not incorrect; they are, however, incomplete when applied to the facts of this case*. The language cited in the analysis of the contribution award in *Schinelli*, as well as other recent marriage dissolution cases, *was repeated from cases that predate the current, amended version* of Section 508(a). See *IRMO Haken*, 394 Ill. App. 3d 155, 162 (2009) (providing examples from the First, Second, Fourth, and Fifth Districts of our Appellate Court); see also *IRMO Roth*, 99 Ill. App. 3d 679, 686 (1981) (preamendment case cited by *Schinelli* for rule that court abuses its discretion in awarding attorney fees when parties are in substantially similar financial situations). Although neither the phrase "inability to pay" nor a specific test for substantially similar financial situations appears in the statute, the factors under Sections 503(d) and 504(a) are there to compare the *relative financial standings of the parties*. *Haken*, 394 Ill. App. 3d at 162. The statutory factors are the means by which a trial court can determine whether a spouse has an inability to pay or whether the parties' financial situations are so similar that a contribution to attorney fees would be improper. Furthermore, the conclusory phrase "inability to pay" was not meant to be interpreted definitively, whereas the plain language of the statutory factors provides a framework within which to compare the relative means of parties to pay their attorney fees. See *IRMO Schneider*, 214 Ill. 2d 152, 174 (2005) ("Financial inability exists where requiring payment of fees would strip that party of her means of support or undermine financial stability."); *IRMO Pond*, 379 Ill. App. 3d 982, 987 (2008) ("Inability to pay does not require a showing of destitution ***. *** [T]he court should consider the allocation of assets and liabilities, maintenance, and the relative earning abilities of the parties."); *IRMO Carr*, 221 Ill. App. 3d 609, 612 (1991) (" '[I]nability to pay' must be determined relative to the party's standard of living, employment abilities, allocated capital assets, existing indebtedness, and income available from investments and maintenance.").

Accordingly, the appellate court rejected the husband's argument that it should apply a comparison of their net incomes in a simple formulaic method in determining whether to award attorney's fees.

***Sunil Patel* - Attorney Awards and Allocation of Supervised Visitation Cost Only to Mother with Lesser Ability to Pay**

IRMO Sunil Patel and Amy Sines-Patel, 2013 IL App (1st) 112571 (June 28, 2013)
The wife appealed this case on a number of issues including the award of attorney's fees to her lawyers, the denial of her request for contribution, the requirement that she contribute to her husband's attorney's fees as well as her being required to pay the cost of the visitation supervisor.

Above we discussed the dissipation finding that was affirmed due to the requirement to pay the costs for the visitation supervisor. The wife also appealed the trial court's order granting her no attorney's fees on her petition for contribution. The wife lost on all issues on appeal including this one.

Regarding the supervised visitation fees for Amy to exercise her visitation, she maintained that the expense is part of the child support obligations under section 505 Act and must be allocated based on the best interest of the child and the relative abilities of the parents to pay. The father urged that the supervised visitation was necessitated by the mother's mental disorder. He maintained that he should not have to pay the cost for the supervised visitation in light of her continued denial that she suffers from any mental illness and her refusal to seek treatment. In addition, he pointed out that he was responsible for virtually all of the children's expenses.

This is one of the few cases that relied upon a 1997 case – *Hock v. Hock*, 50 Ill. App. 3d 583, 584 involving an interesting fact pattern. In that case the mother and child moved to Missouri and the father was allowed visitation in Illinois or Missouri. But the father later lost his eyesight and was unable to drive or work. He had requested that the child be sent to him for visitation two weeks in the summer and the trial court denied this request but the appellate court reversed. The court
found that the trial court's recommendation that the father visit the child in Missouri to show he was sincere in establishing a relationship was improper because it indicated that the court was punishing the father for his past inattentiveness to the child. The court also found that it was improper to put the burden of paying for visitation on the father and determined that the child must come to visit the father in Illinois.

In the instant case the mother's main argument was that she could not afford the expenses of $2,100 per month for the visitation supervisor. The court noted that she was awarded $7,000 per month for 30 months. The appellate court also noted that:

> the trial court did not order a specific amount to be paid for the supervised visitation; the only requirement was that it be a professional visitation supervisor. This allows Amy the opportunity to seek out a professional visitation supervisor she could better afford. Unlike the court in Hock, we cannot conclude that Amy is unable financially to pay the cost of supervised visitation.
>
> Moreover, unlike the father in Hock, Amy controls the duration and thus the cost of the supervised visitation.

The appellate court then quoted from the provisions in the judgment for her to seek unsupervised visitation, i.e.:

> I. Amy must be in regular treatment with a board certified psychiatrist who has expertise in the area of delusional disorders and who has access to Dr. Amabile's and Dr. Dinwiddie's reports; and
> ii. Amy must be evaluated by a board certified psychiatrist selected by the Court at her sole cost. The evaluator shall be asked to determine whether there is a continued risk of harm to the children should Amy have unsupervised visitation. If the parties are not in agreement with the recommendations of the evaluator, a hearing must be held before any change to the current visitation order shall be made."

The appellate court continued:

> Certainly it is in the best interest of the children to have a warm and close relationship with both Amy and Sunil. By recognizing and obtaining the necessary treatment, not only will Amy no longer be obligated for the cost of supervised visitation, she will be acting in the best interest of her children.

Comment: This case presents somewhat of a model as to how to address supervised visitation necessitated by mental illness and the refusal to seek treatment, as well as the costs associated with this.

The mother's resources would have been spent in better avenues than pursuing her fruitless appeal.

Other 2013 Cases Involving Financial Issues:

Are 604(b) Costs Payable to Voluntarily Dismiss?

***IRMO Tiballi* – §604(b) fees were Taxable as Costs Payable upon Voluntary Dismissal of Divorce Proceedings – Illinois Supreme Court accepts cert.**
IRMO Tiballi, 2013 IL App (2d) 120523
In this *groundbreaking* case – of first impression in Illinois – the trial court ordered the former husband (in post-divorce modification of custody proceedings) to pay the fees of the §604(b) expert in order to be entitled to voluntarily dismiss his petition. §2-1009(a) of the Illinois Code of Civil Procedure provides:

> The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and *upon payment of* costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause." (Emphasis supplied.) 735 ILCS 5/2-1009(a).

The appellate court stated that the case turned on the issue of whether 604(b) fees are court costs

o0r litigation expenses:

> By extension of the reasoning set forth in *Vicencio*, we read the word "costs," as used in section 2-1009(a), to mean "court costs"—a term used in contradistinction to "litigation expenses." The resolution of this appeal depends on which category includes the fees of a professional appointed by the trial court pursuant to section 604(b).

The court then reasoned:

> The services of section 604(b) professionals are a judicial resource, not a private litigation resource. We see no reason to treat the costs of such services differently from the costs of other judicial resources (both physical and human) that are defrayed by the collection of various fees and that are taxable under sections 5-108 and 2-1009(a) of the Code and similar provisions.

Comment: The dissent may be better reasoned. The dissent points out that the case was less one for voluntary dismissal but more one for dismissal for want of prosecution. The dissent pointed out that nowhere did the term "voluntary dismissal" occur in the record. The dissent further argued that fees for a 604(b) expert are non-recoverable.

So, the key questions in a voluntary dismissal and costs are whether 604(b) fees are costs and whether the fees for a GAL, AFC or CR are costs. The dissent urges that costs are more like filing fees, courthouse fees, reporter fees, subpoena witness fees, etc. The current version of §604(b) provides:

> (b) The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine, as a witness, any professional personnel consulted by the court, designated as a court's witness. <u>Professional personnel consulted by the court are subject to subpoena for the purposes of discovery, trial, or both. The court shall allocate the costs and fees of those professional personnel between the parties based upon the financial ability of each party and any other criteria the court considers appropriate. Upon the request of any party or upon the court's own motion, the court may conduct a hearing as to the reasonableness of those fees and costs</u>. (Source: P.A. 97-47, eff. 1-1-12.)

Recoverable Court Costs: Filing fees, jury fees, subpoena fees, statutory witness fees, deposition expenses necessarily used at trial.

Litigation Expenses: Most discovery deposition expenses (incurred primarily for counsel's convenience.)

***Arjmand* – 2-1401 Petitions: Once Agreement Determined Unconscionable Property Classifications in the Agreement Were Not Binding**
IRMO Arjmand, 2013 IL App (2d) 120639 (Filed: October 28, 2013, Rehearing Denied: December 9, 2013)

After considering wife's petition under section 2-1401 of the Code of Civil Procedure seeking to vacate the judgment dissolving her marriage, the trial court upheld the judgment but vacated the marital settlement agreement. On appeal, the trial court's order of vacatur was upheld, since:

* the agreement was unconscionable,

* petitioner failed to account for his wages and investments,

* the evidence indicated that petitioner's annual net income was over $650,000 but his testimony indicated an annual net income of $100,000, and

* several assets were not even mentioned in the settlement agreement,

Further, based on the finding that the agreement was unconscionable, the property classifications set forth by the parties in the agreement were not binding on the court.

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Note:
First Impression Cases:
Wendt: Bonus: Income or Asset?
Tiballi: 604(b) fees: Are they costs?

Supreme Court Decisions on Financial Issues:
Mathis: Bifurcation: B(1) or Remaining Issues;
Mayfield: Lump-sum Worker's Comp: Income?
Earlywine: Fees and Disgorgement.
Schultz: $100 day penalties and strict construction: Yes We Do Strictly Construe

Case to be Decided by the Illinois Supreme Court:
Tiballi: Illinois court accepts cert. See:
http://www.jdsupra.com/legalnews/hillinois-supreme-court-to-decide-whether-68467/
See: http://www.state.il.us/court/SupremeCourt/Antic_Ops/default.asp
[Anticipated decisions pdfs published generally at least once per month]

See also: 116254 *Jeffrey B. Blackburn, petitioner, v. Stephanie J. Blackburn, respondent* (2013 IL App (2d) 110719-U). Leave to appeal, Appellate Court, Second District. Petition for Leave Sought. September docket.
http://www.state.il.us/court/r23_orders/appellatecourt/2013/2nddistrict/2110719_r23.pdf

Order filed May 21, 2013
This appellate case is an example of using the "old" standards of ability / inability regarding attorney's fees in contribution awards despite this is the incorrect standard.

Note our two separate *Patel* cases. The later is *Sonal Patel and Vipul Patel* – the interim fee case. The earlier is *Sunil Patel and Amy Sines-Patel*. This is unusual – to say the least.

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