2015 DIVORCE & FAMILY LAW CASES REGARDING CUSTODY, AND ISSUES *OTHER THAN* FINANCIAL DISPUTES

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Updated: Thursday, May 12, 2016

Executive Summary: In 2016, Illinois law regarding what had been called "custody" will result in a sea-change involving a complete re-thinking about what is involved in matters involving ~~custody and visitation~~ / parental rights and responsibilities and parenting time. This summary will focus case law and the implications that the 2016 rewrites will have on many of the cases involving non-financial issues. The most important case that will have an impact most analogous to *Brown v. Board of Education* is *Obergefell* (June 26, 2015). The result of cases such as *Obergefell* and *Szafranski* when coupled with the rewrites of Illinois parentage and law regarding divorce will result in changes as dramatic to Illinois family law as at any time in our history. We can see how dramatically the law continues to be in a state of flux with difficult facts essentially making bad law with our September 2015 *In re Visitation of J.T.H* case.

Custody and "Visitation"

Initial Custody Generally / Joint Versus Sole

Perez – Prescient Case – Award of Equal Parenting Time in Joint Parenting *Order* Affirmed on Appeal

IRMO Perez, 2015 IL App (3d) 140876 (April 3, 2015)

The appellate court affirmed the trial court's order of equal (50/50) shared physical custody schedule involving their child, then age 4, under a joint custody *order*. The appellate court commented in what will be antiquated language under the 2016 Rewrite that, "that the parties showed an extraordinary level of cooperation required for joint parenting arrangement" – and that both parents were heavily involved in child's life and both wished to maintain that level of involvement. The court found it was in child's best interest to fashion custody order to maximize involvement of both parties. The appellate court held that the trial court was within its discretion in deciding to forgo designating either parent as the "primary" residential custodian. In fact, this will be *de rigueur* under the 2016 Rewrite.

Custody Modification Standards

Rogers – For modification of custody the change in circumstances must be material to the child's welfare but shown effect on child not necessary

IRMO Rogers, 2015 IL App (4th) 140765 (January 2015)

This is a rare custody case where the trial court granted a motion for reconsideration. The case stated:

> In granting respondent's motion to reconsider, the court explained that it (1) "gave too much emphasis" to language from *Nolte* in its original order and (2) "placed an additional burden on [respondent] to show that the welfare of the child was adversely affected or harmed by the acts and conduct of [petitioner], rather than considering the factors for the best interest of the child for modification." After reviewing the evidence under the best-interest factors set forth in section 602(a) of the Act (750 ILCS 5/602(a) (West 2012)), the court stated, in pertinent part...:
>
> > "In my initial opinion letter, I found that there did not seem to be an effect on [B.R.] I believe that I overstated that, and there is evidence that [B.R.] has been adversely affected. That [sic] fact that there was not an accident when [petitioner] drove from Aurora to Kankakee with the invisible people is fortuitous. [B.R.] was left unattended in

> the automobile and entered the hospital emergency room in the early morning hours of March 21[, 2013]. The children in [petitioner's] care were being neglected when Scott Vernard found [petitioner] asleep on her couch on April 16[, 2013]. One of those children was [B.R.] *** I do not believe you have to wait until something actually happens to [B.R.] to modify custody."

> The trial court further explained that its previous finding—that petitioner had a credibility problem—was "an understatement." The court noted that petitioner lied to Shawn, respondent, and DCFS investigators, and that she must have lied during either her deposition or her trial testimony. The court also expressed "major concern" that petitioner never followed up with doctors after her repeated psychiatric hospitalizations. Based upon these and other factors, the court found that it was necessary to serve B.R.'s best interest that he be placed in respondent's custody.

The appellate decision then explained its reference to case law as:

> Under the plain language of this statute, the party seeking modification of custody must prove by clear and convincing evidence that (1) a change has occurred in the circumstances of the child or his custodian and (2) modification of custody is necessary to serve the best interest of the child. An important—and we think **obvious—caveat to this rule is that the change in circumstances must be material to the child's best interest**. In other words, **"[c]hanged conditions alone do not warrant modification in custody without a finding that such changes affect the welfare of the child**." *Nolte,* 241 Ill. App. 3d at 325-26. (Emphasis added).

The appellate court then stated:

> Petitioner construes the *Nolte* court's reference to "changes affect[ing] the welfare of the child" as allowing modification of custody only when changed circumstances *have already harmed or affected the welfare of the child*. In other words, petitioner contends that, regardless of the degree or nature of the change in circumstances, section 610(b) of the Act prohibits the trial court from modifying custody until those changes have resulted in actual harm to the child. This is an absurd interpretation of the statute.

Comment: Our modification statutes regarding "custody" have been at 610(a) and (b). Now, they will be at Section 610.5 which is new. Section 610.5(c) reads:

> Except in a case concerning the modification of any restriction of parental responsibilities under Section 603.10, the court shall modify a parenting plan or allocation judgment when necessary to serve the child's best interests if the court finds, by a *preponderance of the evidence*,

that on the basis of facts that have arisen since the entry of the existing parenting plan or allocation judgment or were not anticipated therein,

a substantial change has occurred in the circumstances of the child or of either parent and that a modification is necessary to serve the child's best interests.

This is very similar. Compare the previous language:

(b) *** unless it finds by *clear and convincing evidence*,

upon the basis of facts that have arisen since the prior judgment [same] or that were unknown to the court at the time of entry of the prior judgment [change in re-write to not anticipated therein],

that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, [changed in new statue simply to child or either parent]

and that the modification is necessary to serve the best interest of the child.

Entirely new is the following language:

(e) The court may modify a parenting plan or allocation judgment **without a showing of changed circumstances** if (i) the modification is in the child's *best interests*; and (ii) *any* of the following are proven as to the modification:

(1) [**6 Months Rule**] the modification reflects the actual arrangement under which the child has been receiving care, *without parental objection*, for the *6 months* preceding the filing of the petition for modification, provided that the arrangement is not the result of a parent's acquiescence resulting from circumstances that negated the parent's ability to give meaningful consent;
(2) [**Minor Modification**] the modification constitutes a *minor modification* in the parenting plan or allocation judgment;
(3) the modification is necessary to modify an agreed parenting plan or allocation judgment that the court would not have ordered or approved under Section 602.5 or 602.7 had the court been aware of the circumstances at the time of the order or approval [602.5 is the section titled “allocation of parental responsibilities” and 602.7 is “allocation of parenting time]; or
(4) [**Agreement**] the parties agree to the modification.

Custody Jurisdiction and Hague

Hague Convention

***Krol* – 2015: Father’s Petition under Hague Convention Independent from Divorce Filing and Survived Dismissal of Divorce**

IRMO Krol, 2015 IL App. (1st) 140976, March 2015
Three were three issues in this case involving issues under the Hague Convention.

The critical issue was whether the Hague Convention issue survived the dismissal of the divorce petition.

> We find that Josef's Hague petition should be treated as an independent action that survives the dismissal of the petition for dissolution of marriage just as an order of protection also survives the dismissal of a petition for dissolution of marriage. The Hague petition could have initiated a cause of action, just as an order of protection can initiate a cause of action. Compare 42 U.S.C. § 11603(b) (2006) with 750 ILCS 60/202(a)(1), (2), (3) (West 2008) (Actions for orders of protection are commenced: "(1) *Independently: By filing a petition for an order of protection in any civil court*, unless specific courts are designated by local rule or order. (2) In conjunction with another civil proceeding. (3) In conjunction with a delinquency petition or a criminal prosecution ***." (Emphasis added.)). The fact that Dorota filed her petition for dissolution of marriage in the circuit court of Cook County should not determine the fate of a Hague petition that could have stood as its own independent cause of action. It bears noting that the procedural steps of the Hague Convention take time (Convention, supra, ch. 3, arts. 8, 9, 10), and, as a result, a Hague petition may not be filed as expeditiously as another matter without similar procedural hurdles.

The appellate court explained:

> In addition to standing as an independent action, the ICARA clearly provides the jurisdictional grounds for a Hague petition independent of the jurisdictional grounds of the original complaint. 42 U.S.C. § 11603(a) (2006) ("The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention."). In *Crall-Shaffer v. Shaffer*, an appellate court in Ohio similarly found that a defendant-father's Hague petition could remain pending for independent adjudication following the plaintiff-wife's voluntary dismissal of her action for legal separation. *Crall-Shaffer*, 663 N.E.2d at 1348. The court stated "[W]e decline to construe the Hague petition as a counterclaim which could not remain pending for independent adjudication by the court." Id. The court then held that "the Hamilton County Court of Common Pleas, Domestic Relations Division, as a court of the state of Ohio, had original and concurrent jurisdiction over the Hague petition pursuant to Section 11603(a), Title 42, U.S. Code." Id.

Clearly, the facts were critical regarding the appellate court's belief that the mother was essentially trying to game the system by dismissing her divorce petition.

> In this case, given that Dorota has kept the child for three years after the trial court held that the habitual residence of the child was Poland, it seems reasonable for a court to conclude that she used the voluntary dismissal mechanism to "avoid a potential decision on the 'merits' or to avoid an adverse ruling as opposed to using it to correct a procedural or technical defect." (Internal quotation marks omitted.) *In re Marriage of Saleh*, 202 Ill. App. 3d 131, 135 (1990) *** We cannot allow the

> use of the voluntary dismissal mechanism to avoid an unfavorable determination on a child's habitual residence. Furthermore, allowing the Hague petition to stand alone further discourages "parents from crossing international borders in search of a more sympathetic forum" in which to litigate custody issues. *In re Lozano*, 809 F. Supp. 2d 197, 217 (S.D.N.Y. 2011).

The third issue was there had been a substantial change in circumstances for the minor child that the court failed to consider after the initial determination of habitual residence. The appellate court stated:

This argument fails because Dorota's noncompliance with court orders created the delay that brought about any "change in circumstances" that Dorota now hopes to use to her advantage. Any "change in circumstances" or "acclimatization" that the child experienced occurred during the period of time in which Dorota was not responsive to court orders mandating that the child be returned to Poland.

Factually, the court stated:

> Dorota initially failed to comply with the September 2, 2010 order when she did not return the child to Poland by October 2, 2010. She then failed to comply with the September 2, 2010 and December 17, 2010 orders when she did not return the child to Poland by January 16, 2011. Subsequently, Dorota was absent from court on at least three occasions. Dorota avoided court orders and two body attachments before she was found in contempt of court. During this period and until October 2013, Dorota remained with the child in the United States. In fact, the child was not returned to Poland until August 2014, almost four years after the initial determination of the child's habitual residence. She cannot now benefit from her defiance of court orders to prove the child's change in circumstances.

Applying this third factor the court stated:

> Moreover, nothing in the Convention or its implementing legislation allows for the defense of a "substantial change in circumstances." The only defenses are those elaborated in the Convention. Convention, supra, ch. 3, arts. 12, 13, 13(b), 20. We are not persuaded to undertake, as Dorota suggests, as a "matter of first impression" whether defenses outside the Convention are applicable. The Convention and the ICARA establish procedures for the prompt return of children wrongfully removed or retained and Dorota's conduct forestalled the smooth execution of those procedures.

***Ortiz* – Grave Risk of Harm Exception: Sexual Abuse**

Ortiz v. Martinez, June 2015

In *Ortiz*, the Seventh Circuit upheld the District Court's ruling that evidence of sexual abuse falls within the "grave risk" exception to the Hague's mandatory return rule. In this case the Defendant mother, was a Mexican-citizen who wrongfully removed two minor children from Mexico and Plaintiff father sought their return. The District Court, however, found that although the children were wrongfully removed, clear evidence of daughter's sexual abuse by the father fell under the 'grave risk' exception to the Hague Convention's mandatory rule which requires a child be

returned to his or her country of habitual residence. The 7th Circuit appellate court upheld the ruling noting that the mother, daughter, and court-appointed psychologist's testimony all supported a finding of sexual abuse and that the evidence of sexual abuse was substantial and sufficient to meet the clear and convincing standard. See:
http://www.internationalfamilylawfirm.com/2015/06/new-grave-risk-hague-abduction-case.html

UCCJEA

***Feckless v Diamond* – 2015 – Parentage Act versus UCCJEA: Parentage Act allows pre-birth filing but UCCJEA home state jurisdiction does not exist prior to child's birth**
Fleckles v. Diamond, 2015 IL App (2d) 141229 (June 2015)
This case involved a permissive interlocutory appeal. At a time when the child was not yet born, the Plaintiff filed a petition for parentage to establish paternity and obtain joint custody and visitation, as well as UCCJEA claims. The appellate court found that even if the petition defectively stated claims, the court had constitutionally derived subject matter jurisdiction over petition. The UCCJEA contains exclusive provisions as to custody determinations. Home-state determination must be deferred until the child's birth, and upon that birth, the birth state (in this case, Colorado) became the home state. UCCJEA "jurisdiction" did not exist prior to a child's birth. Accordingly, any portions of the case involving *custody* must be determined in Colorado.

The appellate court borrowed from what is suggested is bad language from the recent Supreme Court decision:

> Addressing section 201 of the UCCJEA, which speaks of jurisdiction, the supreme court explained that, as used therein, "jurisdiction" means "*a procedural limit on when the court may hear initial custody matters, not a precondition to the exercise of the court's inherent authority*. It could not be more, for as we have held, that authority emanates solely from article VI, section 9, of our constitution." (Emphasis added.) Id. ¶ 27. "*Once a court has subject matter jurisdiction over a matter*, its judgment will not be rendered void *nor will it lose jurisdiction merely because of an error or impropriety in its determination of the facts or the* application of the law." (Emphases added.) Id. ¶ 28.2

Regarding the home state issue the appellate court stated:

> When James filed his petition, the child was not yet born. His petition was brought pursuant to the Parentage Act, which, unlike the UCCJEA, contemplates unborn children and provides that, in such a case, the proceedings are stayed until after the child's birth, "except for service or process, the taking of depositions to perpetuate testimony, and the ordering of blood tests under appropriate circumstances." 750 ILCS 45/7(e)

The appellate court next stated:

> Here, James notes that the UCCJEA (in section 201, its jurisdictional provision) does not identify a paternity ruling as constituting an "initial child-custody determination" within its purview. It encompasses only: "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or

> visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual." 750 ILCS 36/102(3) (West 2014). However, James fails to note that the statute provides, with respect to custody determinations, that it contains the exclusive provisions to make such determinations.
>
> We find persuasive the foreign case law upon which Danielle relies, which supports her position that James's claims be bifurcated and the child-custody determination be made in Colorado because that is the child's home state due to his birth there. *** The foregoing cases are persuasive, and we agree with their reasoning that a home-state determination must be deferred until the child's birth and that, upon the child's birth, the birth state—here, Colorado—becomes the home state. The trial court erred in assessing the case under section 201(a)(2)'s significant-connection analysis and the factors thereunder, such as Danielle's residence and intent. As Danielle notes, foreign cases recognize that UCCJEA "jurisdiction" does not exist prior to a child's birth and conclude that the issues in cases such as this be bifurcated and decided by different states' courts.

***McCormick* – Poorly Reasoned Appellate Decision: Illinois Court's Lack of Proper Jurisdiction Under the UCCJEA Resulted in an Order Merely Voidable Rather than Void** Illinois Supreme Court decision, 2015 IL 118230 (March 2015).

In 2010 the father filed a petition to establish a father child relationship and a judgment a paternity was entered in Champaign County regarding the care of the parties child. In 2014 following a series of motions filed by the parties, the Champaign County trial court found that the 2010 order was void and it dismissed the father's initial 2010 petition with prejudice. The court determined that it did not have jurisdiction to enter the order under the UCCJEA. On Appeal the father appealed urging that the trial court did have subject matter jurisdiction and the appellate court agreed – vacating the trial court's March 2014 order.

The underlying 2010 order had found that there was jurisdiction over the parties and subject matter. The order was silent regarding the state of the child's residence. The order expressly confirmed and adopted the joint parenting agreement of the parties. The agreement contained a visitation schedule to be implemented upon the fathers return from active military service. In November 2012 the mother and the child moved to Las Vegas Nevada with the mother's parents. The parties disagree as to whether the father objected to the move.

In December 2013 the father filed a petition to terminate the JPA and seeking that he be awarded custody. The mother filed a petition to establish custody jurisdiction in Nevada alleging that the underlying February 2010 judgment was void. In February 2014 the Illinois and Nevada courts participated in a telephone conference in which the parties were present via counsel. The Illinois and Nevada courts determined that under the UCCJEA that Champaign County did not initially have subject matter jurisdiction and that the February 2010 order was void for lack of subject matter jurisdiction. It was further determined that further proceedings would be conducted in Nevada which was then the child's "home state" under the UCCJEA.

Also note that there are two custody jurisdictional laws that you should be aware of: the UCCJEA

and the PKPA. The PKPA is actually the law that addresses which judgments are to be entitled to full faith and credit. See: http://www.law.cornell.edu/uscode/text/28/1738A. See: PKPA, 28 U.S.C. § 1738A. It was disappointing that this was not even discussed.

An apt quote from the Illinois Supreme Court decision affirming the appellate court was that:

> Accordingly, *regardless of whether the circuit court should have proceeded to consider the custody issue on the merits in this case*, it had subject matter jurisdiction to entertain McCormick's complaint and to enter its February 8, 2010, "judgment of parentage, custody [and] related matters." The circuit court therefore erred in vacating that order as void for lack of subject matter jurisdiction four years later and retroactively dismissing McCormick's complaint with prejudice.

I disagree with the ultimate decision but the Illinois Supreme Court has spoken.

The Illinois Supreme first quoted from §201 of the UCCJEA and then stated, "As a preliminary matter, we note that this *statute*, by its terms, applies only to proceedings involving the initial determination of child custody."

This is not an accurate statement. The UCCJEA applies to more than just that. The definitions of the Act provide, " "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, **paternity**, termination of parental rights, and protection from domestic violence, **in which the issue may appear**. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Article 3."

The Supreme Court continued by stating:

> Although child custody was certainly an important component of the proceeding brought by McCormick in the circuit court of Champaign County, equally important was McCormick's desire to obtain legal confirmation that he was L.M.'s father pursuant to the Parentage Act. Champaign County was unquestionably an appropriate forum for that determination. No possible basis exists for challenging the authority of the circuit court of Champaign County to rule on that aspect of the case. To the extent that the court's subsequent order invalidated its initial *parentage* determination and dismissed McCormick's parentage claim, it was clearly erroneous, and the appellate court properly set it aside.

The Court then stated:

> The appellate court also acted properly when it set aside the circuit court's judgment invalidating, on voidness grounds, its prior ruling regarding child custody and incorporating the parties' joint parenting agreement. The circuit court's conclusion that the earlier order was void was based exclusively on its conclusion that McCormick's claim did not meet the requirements specified by section 201 of the UCCJEA (750 ILCS 36/20).

Next, the court used strained language when it acknowledged:

> To be sure, §201 does speaks in terms of "jurisdiction" when describing the conditions which must be met before an Illinois court will consider and decide the question of initial child custody. As used in the statute, however, "jurisdiction" must be understood as simply a procedural limit on when the court may hear initial custody matters, not a precondition to the exercise of the court's inherent authority. It could not be more, for as we have held, that authority emanates solely from article VI, section 9, of our constitution (Ill. Const. 1970, art. VI, § 9). See *In re Luis R.*, 239 Ill. 2d at 304; *Siegel v. Siegel*, 84 Ill. 2d 212, 221 (1981).

One wonders then what does the term jurisdiction mean if it does not mean just that.

The most daunting portion of the decision reads:

> The determination of who should have custody of L.M. clearly presented a justiciable matter. It therefore fell within the subject matter jurisdiction of the circuit court of Champaign County. Once a court has subject matter jurisdiction over a matter, its judgment will not be rendered void nor will it lose jurisdiction merely because of an error or impropriety in its determination of the facts or application of the law.

So, a justiciable matter trumps the UCCJEA?

Removal / Relocation

Removal Ultimately Granted

***Tedrick* – Removal granted to South Carolina where mother had new job that appeared to be more secure**
IRMO Tedrick, 2015 IL App (4th) 140773 (January 2015)
The parties were awarded joint custody with the mother named as the primary residential parent. The appellate court stated:

> In June 2014, petitioner filed a petition to remove A.T. permanently to South Carolina, where petitioner has a new job: a job that appears to be more secure and more desirable than the precarious and punishing job she had in Illinois. In August 2014, the trial court held an evidentiary hearing on the petition for removal, after which the court denied the petition, finding that the proposed removal would not be in A.T.'s best interest. Because that finding is against the manifest weight of the evidence, we reverse the trial court's judgment, and we remand this case with directions to make a new visitation schedule.

Comment: Under the new law removal is now called "relocation." This is in keeping with national trends.
SB 57 provides:

> (g) **"Relocation"** means:
> (1) [Collar countries provision] a change of residence from the child's current primary residence located in the county of Cook, DuPage, Kane, Lake, McHenry, or Will to a new residence within this State that is more than *25 miles* from the

child's current residence;
(2) [Non-Collar countries provision] a change of residence from the child's current primary residence located in a county not listed in paragraph (1) to a new residence within this State that is more than *50 miles* from the child's current primary residence; or
(3) [Outside Illinois] a change of residence from the child's current primary residence to a residence **outside the borders of this State** that is more than *25 miles from the current primary residence*.

The new law does not define what constitutes miles – as the crow flies, driving distance, etc.?

One critical change in the relocation statute as compared to existing case law is that a relocation constitutes a change in circumstances. "A parent's relocation constitutes a substantial change in circumstances for purposes of Section 610.5."

Standing, Parentage, Adoption and Frozen Embryos

***Szafranski v. Dunston* – Frozen Pre-Embryos: In Case of First Impression in Illinois, Appellate Court Sided on Behalf of Prospective Mother Where Oral Contract and Only Chance to Have Biological Child**
Szafranski v. Dunston, 2015 IL App (1st) 122975-B
In October 2015 the Illinois Supreme Court denied cert!

I reported on this case in 2013 and predicted that respondent, Karla Dunston, would prevail. This is, then the 2nd appellate court decision involving this case. Ultimately, the First District court held that the Petitioner, Jacob Szafranski, and the Respondent, Karla Dunston, entered into an oral contract where they agreed to create pre-embryos that Karla could use to have a biological child in the future. According to the appellate court the parties did not modify this contract when they executed the medical informed consent presented to them by the doctor performing the IVF procedure. The Court further held that Karla's interests in having the opportunity to have a biological child outweighed Jacob's interests because the pre-embryos were Karla's only chance to have a biological child due to her diagnosis with lymphoma.

The trial court had heard testimony from both of the parties, the physician, and an adoption and reproductive technology lawyer who had met with the parties prior to the procedure taking place. The evidence also included the details of the parties' communications leading up to the decision by Jacob to donate his sperm and the reasons Karla underwent the procedure, including the fact that she was told by her doctor that she would not be able to have a biological child after chemotherapy. The Appellate Court affirmed the trial court's decision that the parties intended to allow Karla to use the pre-embryos without limitation when they formed their oral contract and further held that the medical informed consent neither modified nor contradicted the parties' oral contract. Therefore, Karla was awarded custody of the pre-embryos.

See the excellent summary by Judge Celia Gamrath in the *Chicago Lawyer*.

Comment: Review your marital fact sheet (intake form) to make certain you ask if there is any frozen pre-embryos. Click here to review the Leave to Appeal Dispositions 2015.

Promissory Adoption / Estoppel Type Claims for Parenting Rights

***Scarlett Z.D. II* – In Light of Equitable Adoption Theory Per *DeHart*, Case Remanded for Petitioner to Determine Whether Need in Justice For Extraordinary Equitable Intervention and Then Consider Argument, Evidence or Both Regarding Equitable Adoption**
In re Parentage of Scarlett Z.-D., Illinois Supreme Court: 2015 IL 117904 (March 2015).

This case should be familiar. That is because in 2012 we had our first appellate decision in this matter. What I did not know until reading this case was that while the Illinois Supreme Court initially denied the petition for leave to appeal, it entered a supervisory order:

> In the exercise of this Court's supervisory authority, the Appellate Court, Second District, is directed to vacate its order in [*In re Parentage of Scarlett Z.-D.*, 2012 IL App (2d) 120266)]. The Appellate Court is instructed to reconsider its decision in light of this Court's opinion in *DeHart v. DeHart*, [2013 IL 114137], to determine if a different result is warranted."

Now for the factual background. This is well capsulized by the following two paragraphs of the second appellate decision slightly paraphrased to remove some non-essential dates:

> Jim and Maria began living together as a couple in 1999. They became engaged in 2000 or 2001. In early 2003, Maria went to Slovakia to visit family. While there, she met Scarlett, a 3 ½ -year-old orphan girl. Maria and Jim decided that Maria would adopt Scarlett, and Maria commenced the process. Under Slovakian law, Jim was not permitted to adopt Scarlett, because he was neither a Slovakian national nor married to Maria. During the year-long adoption process, Maria lived in Slovakia. Jim remained in the United States, but he was involved in the process and traveled to Slovakia approximately five times during that period. In 2004, Maria returned to the United States with Scarlett, and the parties lived together with Scarlett as a family. The parties never married, and neither took any steps to obtain recognition of the adoption in Illinois. Jim did not legally adopt Scarlett.
>
> By 2008, the parties' relationship had deteriorated, and Maria moved out with Scarlett. Jim then filed a petition for declaration of parental rights. In 2009, Jim filed his second amended petition, at issue here. In count I, Jim requested a declaration of parentage and an order granting the parties joint legal and physical custody or, alternatively, granting him primary custody with reasonable visitation for Maria. In count II, Jim sought an equitable division of child support between the parties. Counts III through VI, entitled breach of oral agreement, promissory estoppel, breach of implied contract in fact, and breach of implied contract in law, respectively, each prayed for relief in the form of custody, visitation, and child support determinations.

Recall the Illinois Supreme Court's *DeHart* decision announcing the equitable adoption doctrine starting at paragraph 50 of that decision. See my 2013 review of that decision. *DeHart's* discussion started off with the statement, "We note that the concept of 'equitable adoption' is somewhat murky because many states seem to equate the theory of equitable adoption with a contract-to-adopt theory." The Supreme Court in *DeHart* had reasoned:

> Although no Illinois court has expressly recognized the concept of equitable adoption as it is presented here, no Illinois court has expressly rejected it either. We do find, however, that the underpinnings to pave the way for its recognition can be found in this court's earlier decisions ...
>
> The question remaining is under what circumstances should an equitable adoption theory be recognized. We believe that the California Supreme Court struck the proper balance in *Ford*, and therefore adopt its holding here. We do not believe it sufficient merely to prove that a familial relationship existed between the decedent and the plaintiff. Nor do we deem it sufficient to show... that the plaintiff merely demonstrate that from an age of tender years, he held a position exactly equivalent to a statutorily adopted child. Rather, **we hold that a plaintiff bringing an equitable adoption claim must prove an intent to adopt along the lines described in *Ford*** and, additionally, **must show that the decedent acted consistently with that intent by forming with the plaintiff a close and enduring familial relationship**.

The Illinois Supreme Court ruled, "We agree with Maria that the doctrine of equitable adoption, as recognized in *DeHart*, is a probate concept to determine inheritance and does not apply to proceedings for parentage, custody, and visitation."

A conservative court concluded:

> We are not unsympathetic to the position of Jim, or even that of Scarlett. However, as Jim concedes, he lacks statutory standing to bring his claims for custody, visitation, and support. Legal change in this complex area must be the product of a policy debate that is sensitive not only to the evolving reality of "non-traditional" families and their needs, but also to parents' fundamental liberty interest embodied in the superior rights doctrine.

Dissent: Justice McLaren added an opinion specially concurring in part and dissenting in part. He stated, "I dissent from the limited scope of the proceedings that the majority orders on remand, as well as from the limitations that the majority imposes upon the trial court's ability to render findings of fact and conclusions of law based upon the opinion in *DeHart*."

The dissent continued:

> *DeHart* considered two aspects of adoption law. One aspect related to the contractual concept of contract to adopt; the other aspect was the equitable concept of equitable adoption. I do not believe that the pleadings in this case relate to a contract to adopt. On the other hand, I do believe that the equitable concept of equitable adoption has relevance to Jim's standing to seek the requested relief. The trial court should determine if Jim has standing as to any count under the equitable factors of estoppel underlying the concept of equitable adoption. If Jim is found to have standing, the trial court should determine whether the presentation of further evidence or argument is appropriate. Thereafter, it should rule on the merits of any count for which Jim has standing.

Comment: I agree with the dissent. But this is a close and difficult case. The entire case reminds me of an extended exchange that I had with the Hon. Edward R. Jordan regarding whether under Illinois law under the IMDMA and the IPA of 1984 the courts have equitable powers. Judge Jordan had an infectious sense of humor and a keen intellect. He moderated two of my IICLE full day seminars on child support and maintenance. His position on the equitable powers of the divorce court was that it was extraordinarily limited. I ended up drafted the research that resulted in an article by Paulette Gray regarding equitable relief in divorce case. That article came before this line of case law.

And now we have the March 2015 decision. The conclusion was, "the judgment of the appellate court is affirmed in part and reversed in part, and the judgment of the circuit court of Du Page County is affirmed."

***In re Visitation of J.T.H.* – Standing to Petition for Visitation: No Standing to Pursue Visitation Despite Verbal Agreement to Adopt**

In Re Visitation of J.T.H., 2015 IL App (1st) 142384 (September 2015)

The background of this case is recited as:

> From 2002 to 2006, and again from 2006 to 2009, Jenny and Julia were in a romantic relationship with each other. In 2006, the parties broke up for a period of approximately six months, during which Julia became pregnant with the minor child in the case at bar, J.T.H. The parties reconciled their relationship prior to J.T.H.'s birth in 2007. Julia is the biological mother of J.T.H. Jenny was present for J.T.H.'s birth and for surgery performed on him in 2007, helped select a name for the child, attended prenatal doctor visits with Julia, and resided with J.T.H. in the parties' shared home. According to Jenny's allegations in her complaint, Jenny paid for half of J.T.H.'s expenses, traveled with Julia and J.T.H., was present for many milestones, and the parties publicly held themselves out to be a family.
>
> ¶ 4 In 2009, the parties' romantic relationship dissolved and Jenny moved out of the shared home, while J.T.H. continued to reside in the home with Julia. Following the parties' break up in 2009, Jenny continued to visit with J.T.H., including picking him up from daycare and caring for him a few hours daily, spending every other weekend with him, and spending some holidays together. The parties also continued to participate in activities together, such as going to the beach and attending dinners and parties with family and friends.

While the parties discussed guardianship or adoption and agreed to adoption when they had secured sufficient funds to pay for the costs. But then on January 10, 2014, Julia informed Jenny that she no longer wanted Jenny to have contact with J.T.H. Jenny has not seen or spoken to J.T.H. since that date. Jenny filed a petition for visitation based on the intent to adopt, etc. This was denied at the trial court level.

On appeal in this case Jenny relied primarily on the 2nd District's May 2014 *IRPO Scarlett Z.D.*, case while she attempted to distinguish the 1st District's *IRMO Mancine* case. The appellate court stated:

> However, we note that, since the filing of Jenny's opening and reply briefs on appeal before us, our supreme court reversed the Second District's May 22, 2014 ruling in *In re Parentage of Scarlett Z.-D.*, and definitively held that the equitable adoption doctrine, as recognized in *DeHart*, is a probate concept to determine inheritance and does not apply to parentage, child custody, or visitation proceedings. *In re Parentage of Scarlett Z.-D.*, 2015 IL 117904, ¶¶ 2, 52. Therefore, pursuant to our supreme court's final holding in *In re Parentage of Scarlett Z.-D.*, we hold that Jenny lacks standing to petition for visitation of J.T.H.

Parentage

***Ostrander* – Divorce Case: Statute of Limitations to Declare Non-Parentage Begins When Father Obtains Knowledge He Was Not Biological Father – Not When Petition for Divorce and DNA Test Results Obtained**

IRMO Ostrander, 2015 IL App (3d) 130755 (February 2015)

Celia Gamrath had an excellent summary on one aspect of this case in the *Chicago Lawyer*.

The Appellate Court reversed the trial court's order finding that the presumption of paternity had been rebutted for a child born during the marriage when father presented DNA test results at a hearing during the pendency of the divorce case. The evidence showed that both husband and wife knew the child was not biologically father's when she was diagnosed with a particular genetic disease at birth. However, the parties agreed to stay together as a family and remained married for 8 more years. §8(a)(3) of the Parentage Act provides that an action to declare the non-existence of a parent-child relationship will be barred if brought later than 2 years after the petitioner *obtains knowledge of the relevant facts*. Further, when mother asserted that the statute of limitations had run of father's ability to file such a claim, the burden shifted to father to show that he had only obtained knowledge of the relevant facts within two years of bringing his petition. Because knowledge of relevant facts triggering the statute of limitations can be inferred where it has been demonstrated that a man has serious doubts as to whether he is the child's parent, and *because the genetic disease gave rise to those serious doubts*, father was now precluded from being able to ask the court to declare him to not be the father of the child. There is an excellent discussion in the appellate court regarding the statute of limitations:

> We feel compelled to point out that the statue of limitations of the Parentage Act is intended to control in situations precisely like the one before us. The Fourth District has explained the policy underlying the statute of limitations in the Parentage Act:
>
> > "To paraphrase Justice Holmes, a child, 'like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, cannot be displaced without cutting at his life.' (M. Lerner, *The Mind and Faith of Justice Holmes* 417 (1953); [citation)]. It is wrong to make a child a part of a family unit and pass over substantial concerns regarding the child's paternity only to raise them years later in an attempt to avoid child support." *In re Marriage of O'Brien*, 247 Ill. App. 3d 745, 750 (1993).

The statutory references in this appeal are as follows:

> Section 5 of the Parentage Act provides that "[a] man is presumed to be the natural father of a child if *** he and the child's natural mother are or have been married to each other *** and the child is born or conceived during such marriage." 750 ILCS 45/5(a)(1). The Parentage Act also provides that such a presumption under subsection (a)(1) may be rebutted by clear and convincing evidence. 750 ILCS 45/5(b).
>
> Section 7(b) provides that "[a]n action to declare the non-existence of the parent and child relationship may be brought by the child, the natural mother, or a man presumed to be the father under subdivision (a)(1) or (a)(2) of Section 5 of this Act." 750 ILCS 45/7(b) (West 2004). This cause of action, however, is limited by section 8 of the Parentage Act, entitled "Statute of limitations." 750 ILCS 45/8 (West 2004). Specifically, subsection (a)(3) provides: "An action to declare the non-existence of the parent and child relationship brought under subsection (b) of Section 7 of this Act shall be barred if brought later than 2 years after the petitioner obtains knowledge of relevant facts." 750 ILCS 45/8(a)(3)

The IPA of 2015 provides:

> (750 ILCS 46/608) Sec. 608. **Limitation; child having presumed parent**.
> (a) An *alleged father*, as that term is defined in Section 103 of this Act, must commence an action to *establish* a parent-child relationship for a child having a presumed parent not later than 2 years after the petitioner *knew or should have known* of the relevant facts. The time the petitioner is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.
> (b) A proceeding seeking to declare the *non-existence* of the parent-child relationship between a child and the child's *presumed father* may be maintained at any time by a person described in paragraphs (1) through (4) of subsection (a) of Section 204 of this Act if the court determines that the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception.
> (c) An adjudication under this Section shall serve as a rebuttal or confirmation of a presumed parent as defined in subsection (p) of Section 103.

Section 103 needs to be reviewed, in turn.

> (p) "Presumed parent" means an individual who, by operation of law under Section 204 of this Act, is recognized as the parent of a child until that status is rebutted or confirmed in a judicial or administrative proceeding.

Next, we look to Section 204:

> Sec. 204. Presumption of parentage.
> (a) A person is presumed to be the parent of a child if:
> (1) the person and the mother of the child have entered into a *marriage*, civil union, or substantially similar legal relationship, *and the child is born to the*

mother during the marriage, civil union, or substantially similar legal relationship, except as provided by a valid gestational surrogacy contract, or other law;

(2) the person and the mother of the child were in a marriage, civil union, or substantially similar legal relationship and the child is born to the mother *within 300 days after the marriage*, civil union, or substantially similar legal relationship is terminated by death, declaration of invalidity of marriage, judgment for dissolution of marriage, civil union, or substantially similar legal relationship, or after a judgment for legal separation, except as provided by a valid gestational surrogacy contract, or other law;

(3) before the birth of the child, the person and the mother of the child entered into a marriage, civil union, or substantially similar legal relationship in apparent compliance with law, even if the attempted marriage, civil union, or substantially similar legal relationship is or could be declared invalid, and the child is born during the invalid marriage, civil union, or substantially similar legal relationship or within 300 days after its termination by death, declaration of invalidity of marriage, judgment for dissolution of marriage, civil union, or substantially similar legal relationship, or after a judgment for legal separation, except as provided by a valid gestational surrogacy contract, or other law; or

(4) *after the child's birth*, the person and the child's mother have entered into a marriage, civil union, or substantially similar legal relationship, even if the marriage, civil union, or substantially similar legal relationship is or could be declared invalid, *and the person is named, with the person's written consent, as the child's parent on the child's birth certificate*.

(b) If 2 or more conflicting presumptions arise under this Section, the presumption which on the facts is founded on the weightier considerations of policy and logic, especially the policy of promoting the child's best interests, controls.

Then Section 205 addresses proceedings to declare the non-existence of a parent-child relationship. The time frame for bringing the action is two years:

(b) An action to declare the *non-existence of the parent-child relationship* brought under subsection (a) of this Section shall be barred if brought later than 2 years after the petitioner *knew or should have known of the relevant facts.* The 2-year period for bringing an action to declare the non-existence of the parent-child relationship shall not extend beyond the date on which the child reaches the age of 18 years. Failure to bring an action within 2 years shall not bar any party from asserting a defense in any action to declare the existence of the parent-child relationship.

Other Cases:

Appeals - Timeliness

Post-Decree

***Kuyk* – Each Separate Post-Decree Petition is Not Separate Based on Case Law in Second and Fourth Districts While First and Third Differ**

IRMO Kuyk, 2015 IL App (2d) 140733 (September 30, 2015)
Six days after the trial court entered its order denying the former wife's petition for maintenance review, the former husband filed a petition for rule to show cause concerning a separate matter – an unrelated tax liability. Although the former wife's appeal was initially timely as to the order denying her review petition, the new petition rendered that order no longer appealable according to the Second District court. The appellate court stated:

> We recognize that there is a split in authority over this issue. The First and Third Districts hold that each post-decree order is separately appealable (*IRMO Demaret*, 2012 IL App (1st) 111916, ¶ 35; *IRMO A'Hearn*, 408 Ill. App. 3d 1091, 1097-98 (2011)), while this district and the Fourth District maintain that a post-decree order is not appealable without a Rule 304(a) finding if another post-decree matter is pending (*IRMO Duggan*, 376 Ill. App. 3d 725, 744 (2007); *IRMO Gaudio*, 368 Ill. App. 3d 153, 157-58 (2006)). Until this split is resolved by our supreme court, we continue to adhere to our position as set forth in *Valkiunas*, *Knoerr*, and *Duggan*.

Injunctions and Mootness

***Eckersall* – Appeal was Moot Regarding Whether Interlocutory Order Prohibiting Various Conduct Constituted an Injunction – But Expect Further Litigation on this Issue in Light of the 2016 Amendments to IMDMA 600 Series**
IRMO Eckersall, 2015 IL 117922 (January 2015, Modified upon Denial of Rehearing March 23, 2015) **Illinois Supreme Court**
This appeal arises from an interlocutory order entered during a proceeding to dissolve the marriage of Raymond and Catherine Eckersall. That order restricted the parties' dealings and communication with their children during the dissolution of marriage proceeding. The appellate court dismissed the appeal for lack of jurisdiction, finding that the interim order was not an injunction and thus not appealable pursuant to Illinois Supreme Court Rule 307(a) (eff. Feb. 26, 2010). 2014 IL App (1st) 132223. This court allowed Catherine's petition for leave to appeal (Ill. S. Court. R. 315(a) (eff. July 1, 2013)). For the following reasons, we dismiss the appeal as moot.

Ultimately, the Illinois Supreme Court granted the former wife's petition for leave to appeal and allowed the Illinois Chapter of the AAML to file an amicus brief in support of Catherine. The Illinois Supreme Court first noted that the matter had been deemed moot but then addressed whether the public interest exception applied. The Illinois Chapter of the AAML had urged that the public interest exception did apply as to whether the July 2013 order constituted an appealable injunction. The case is excellent reading as to this law cited. I disagree with certain statements by the Supreme Court. The issue is likely to be faced in the future, especially with the 2016 amendments to Illinois law regarding custody and especially the broad language regarding "caretaking functions" under Section 600(c). I especially disagree with the following language from the Illinois Supreme Court:

> Here, in contrast to In re A Minor and In re R.V., the order entered in this case is not of public concern. Issues that arise in dissolution of marriage proceedings tend to be very fact specific and do not have broad-reaching implications beyond the particular dissolution of marriage proceedings. As stated above, this type of "form" order has a limited application and does not have a significant effect on the

public as a whole.

The conclusion of the Illinois Supreme Court was interesting:

> Having determined that the question presented on appeal is moot and there being no reason to apply the public interest exception, we conclude that the petition for leave to appeal was improvidently granted.

Again, I disagree. Consider the following language Section 600:

> "Caretaking functions" means tasks that involve interaction with a child or that direct, arrange, and supervise the interaction with and care of a child provided by others, or for obtaining the resources allowing for the provision of these functions. The term includes, but is not limited to, the following: [a broad job description / laundry list is then included with 8 parts.]

Next consider the definition of parenting time as including:

> "Parenting time" means the time during which a parent is responsible for **exercising caretaking functions** and non-significant decision-making responsibilities with respect to the child.

Then consider how a restriction on parenting time is defined:

> "Restriction of parenting time" means *any limitation or condition* placed on parenting time, including supervision.

Piecing these together we can see that the sorts of orders entered by the *Eckersall* court would no longer be allowed under the 2016 rewrite!

***Harris* – Timeliness of appeal: Order Entered During Pendency of Divorce was Final Determination of Custody and Accordingly Appeal was Timely Even Where Order was Titled as Temporary**

IRMO Harris, 2015 IL App (2d) 140616 (June 29, 2015)

The appellate court stated:

> The order of November 25 was a final custody order under Rule 304(b)(6). To be sure, the trial court referred to the November 25 order as "temporary." That characterization was, however, inaccurate as to the substance of the custody determination, and we deem the order final despite the court's characterization. See *In re Marriage of Lawrence*, 146 Ill. App. 3d 307, 309-10 (1986) (looking to the substance of a maintenance order, not to the trial court's characterization of it as "temporary," in determining the order's reviewability). In the November 25 order, the court specifically provided that the same custody determination was to appear in the dissolution judgment, so that the court intended that there be no difference in substance between the November 25 custody determination and that in the dissolution judgment. If anything in the November 25 order had a temporary aspect, it was in the provisions for the child's transition to living with Alan. The

existence of those provisions only emphasizes that the order contemplated an immediate change that the court did not contemplate reversing.

Annulment (Declaration of Invalidity)

***Igene* – Marriage Not Annulled Where Misrepresentations Did Not Go to Essentials of Marriage Contract, Despite Lies About Several Prior Marriages**

IRMO Igene, 2015 IL App (1st) 140344 (June 26, 2015)

Igene held that the court erred in annulling (declaring the marriage invalid) parties' marriage pursuant to §301(1) of the IMDMA on ground that at time of marriage, Respondent fraudulently concealed fact that he was previously married to three different women. Respondent's concealment of three previous marriages did not amount to fraud going to essentials of parties' marriage contract. Respondent made no representations as to the number of his previous marriages, and no representations made by him on which Petitioner could rely. The appellate court stated:

> Courts in most jurisdictions have determined that the concealment of a prior marriage which has been dissolved by the death of, or divorce from, a spouse does not amount to fraud going to the essentials of the marriage contract, even where there have been multiple divorces.

Motion to Set Aside Judgment After Two Years

***Rocha* – Conscious Act to Withhold Information Constituted a Fraud on the Court Sufficient to Grant 2-1401 Petition and in Allow Retroactive Support Prior to Date of Filing of Petition**

IRMO Rocha, 2015 IL App (3d) 140470

This case involved a 1998 divorce judgment where the father was required to pay $150 per week support. 15 years later, the trial court entered an order granting the former wife's petition under §2-1401 of the Code to vacate the earlier orders based on the father's fraudulent concealment of his income and employment from the court beginning in 2003. The father appealed from the finding of fraud. He also challenged the order requiring him to pay support before his former wife filed her 2010 petition to increase. The appellate court affirmed and remanded with directions.

The appellate court stated:

> In this case, during the hearing on the merits of Lori's second amended section 2-1401 petition, Stephen admitted he failed to disclose his employment at Porter Memorial Hospital when he appeared before the court on both May 29, and July 29, 2003. After admitting he did not give truthful information to the court, Stephen attempted to provide an explanation for his omission.

The appellate court then reasoned:

> First, Stephen explained he did not provide this information to the court because he was not directly asked about the status of his employment during either court proceeding. Further, Stephen stated he did not disclose his employment in 2003 because his employment was subject to a 90-day probationary period and he could have been terminated without cause. The court was not persuaded by Stephen's

> testimony regarding his justifications for remaining silent about his current employment from 2003 to 2011, the date of his deposition. Consequently, the trial court found Stephen's "conscious act" to withhold information from the court constituted a fraud upon the court.

The unique history of the case was summarized as:

> Due to Judge Baron's intensive oversight, Stephen paid approximately $8,000 in various lump-sum payments during the seven months between December 10, 2002, and the status hearing regarding Stephen's ability to purge the contempt on July 29, 2003. Nonetheless, after monitoring Stephen for seven months, Judge Baron abandoned his efforts to require Stephen's frequent appearance in court to update the court on his search for employment. Consequently, on July 29, 2003, Judge Baron adopted a different approach and ordered Stephen to make regular weekly payments in the amount of $100 toward the arrearage in lieu of continued frequent trips to the court to report on his job status. Unbeknownst to Judge Baron on July 29, 2003, Stephen had been steadily employed at Porter Memorial Hospital since May 12, 2003.

I especially liked the discussion that stated:

> Clearly, if Stephen had been forthright and advised the judge that he became gainfully employed on May 12, 2003, the court may have ordered Stephen to use some of his new income to pay down the remaining 2002 arrearage on a swifter timeline. Further, if Lori had known Stephen obtained steady employment in 2003, perhaps she would have requested an increase in child support long before 2010 or at least requested the court to order higher monthly payments on the arrearage.

***Cavitt* – 2-1401 Motion and 510(b) Fees: Fees Properly Granted under 508(b) Fees and No Evidentiary Hearing Required to Deny 2-1401 Petition Given Nature of Allegations**

Cavitt v. Repel, 2015 IL App (1st) 133382

This case involved never married parents with a biological son who was born in 1995. In 1997 there was a judgment for parentage that incorporated the parties "parental settlement agreement." The procedural history of the case is extensive. Basically, the mother was seeking to go back many years to seek retroactive support due to misrepresentations regarding the father's income. Questions under a 2-1401 petition included whether the mother had previously accused the father of fraud.

Ultimately, the trial court entered order granting the father's motion to dismiss something called a "petition to void" filed by Mary (the mother). She was seeking to vacate, per §2-1401, the 1997 judgment for child support. The appellate court ultimately ruled that the trial court was within its discretion in imposing $31,997 in attorney's fees and costs upon Plaintiff, per §508(b) of Marriage Act and Rule 219(b), for her refusal to answer or her changing her answers to Defendant's requests for admission.

The appellate court held that §508(b) does not require court to weigh parties' respective income and assets before imposing fees on non-compliant party. Additionally, the court was not required to conduct full evidentiary hearing before dismissing the §2-1401 petition to vacate. The trial

court properly dismissed petition as it alleged no specific facts of intentional misstatement or concealment but only conclusory statements.

Motions of Change of Judge

***Crecos* – Post Decree Orders Void due to Initial Error in Denying Motion for Substitution of Judge as of Right**

IRMO Crecos, 2015 IL App (2d) 132756 (July 28, 2015)

This case is an example of a "house of cards" due to the court's improper denial of a motion for change of judge as of right. When the court does so, in essence there is a "get out of jail free card" for the lawyer who brought the motion because all orders later entered are void. The central issue was whether a court's denial of wife's motion for substitution of judge was proper, and whether the orders entered after said denial were void. The parties were divorced in 2009. Thereafter, post decree petitions were filed and a new judge was assigned to the file. The former wife filed a motion for substitution of judge regarding the second judge assigned to the case.

Regarding a motion for substitution of judge as of right, the appellate court notes, "a motion is timely and shall be granted according to the statute, provided that the motion is presented before a hearing begins and provided that the Judge *to whom it is presented* has not made any substantial rulings. . . . A ruling is considered substantial when it relates directly to the merits of the case."

The former husband had filed an emergency motion regarding various parenting complaints against the ex-wife. The judge found the motion was not an emergency and set a briefing schedule. The former wife then filed her motion for substitution of judge. The judge denied the motion without explaining the reason for the denial.

The question was whether the trial court's finding that underlying motion was not an emergency was a ruling on the merits of the case. The appellate court noted the trial judge did not give his opinion on the merits of the husband's motion. The appellate court stated, "An order which sets a briefing schedule or a hearing date is not a substantive ruling because it is not directly related to the merits of the case." That is clear enough. The court then summarily stated that, because the order denying the substitution was in error, all later orders were void. Before the instant appellate decision, the former husband had been successful in obtaining orders for his ex-wife to turn over property or pay over $700,000 to the former husband – so all of his work and attorneys fee in obtaining that $700,000 order were for naught.

Jurisdiction:

FUSFSPA

***Robinson* – 2015: Applicability of Federal Uniformed Services Former Spouses's Protection Act and Jurisdiction**

IRMO Robinson, 2015 IL App (1st) 132345 (June 29, 2015)

is one of the few cases in Illinois involving the applicability of the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) (10 U.S.C. § 1408 (2006)). In this case the issue was modification of an out-of-state divorce judgment dividing a former military member's pension. The parties were divorced in Michigan in 2009. As part of the consent judgment entered by the Michigan court, the ex-wife received 25% of the former husband's military pension. She then moved to Illinois and sought to register the Michigan judgment in Cook County. After former

husband did not appear in Cook County, the trial court registered the Michigan order and entered an order dividing the military retirement pay. The former husband then filed a motion to vacate that order, alleging that the Illinois circuit court lacked personal jurisdiction over him. The trial court denied his denied the former husband's motion and entered another order dividing Former husband's pension.

Former husband appeals, asserting that the Illinois circuit court lacked personal jurisdiction to divide his pension under FUSFSPA, which empowers state courts to divide military retirement pay in divorce proceedings. The appellate court agreed that FUSFSPA applied to the circuit court's actions in this case and that the trial court erred in determining that he consented to personal jurisdiction. Accordingly, it vacated the trial court's order dividing the former husband's military pension and remanded for an evidentiary hearing to determine whether former husband was a resident or domiciliary of Illinois under FUSFSPA.

This was potentially a case of first impression:

> No Illinois court has interpreted the "consent" required by section 1408(c)(4)(C) of FUSFSPA. Most courts in other states have held that a party impliedly consents to jurisdiction under FUSFSPA where he or she waives a challenge to the court's personal jurisdiction under state law.

But the appellate court stated:

> We do not need to pick a side here, because under any view of DeAngelo's actions, he did not "consent" to jurisdiction. Under Illinois law, a party does not waive a challenge to a court's personal jurisdiction if the party challenges the court's jurisdiction before filing a motion or other responsive pleading.

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Last Updated: May 12, 2016
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