2014 DIVORCE & FAMILY LAW CASES REGARDING CUSTODY, AND ISSUES *OTHER THAN* FINANCIAL DISPUTES

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Custody and "Visitation"

Initial Custody / Restrictions on Visitation

***Eckersall*: Was Order Regulating Many Aspects of Parent's Lives an Injunction Subject to Interlocutory Appeal?**
IRMO Eckersall, 2014 IL App (1st) 132223 (May 28, 2014)

Eckersall has an extraordinarily well written lead-off paragraph:

> All too frequently children become casualties, caught in the crossfire of their parents' hostilities. Alert judges and lawyers aware of the signs of potential trouble, as a matter of course, will enter an order placing restrictions on the parents when their children are in their custody. Restrictions, for purposes of illustration, may preclude the parents from engaging in electronic surveillance, using alcohol and drugs, discussing the divorce, administering corporal punishment, and criticizing, demeaning, or disparaging the other parent. At issue is this type of order, which in this case was characterized as an "injunction."

The decision then explained that the wife filed what she contended as an interlocutory appeal under SCR 307(a)(1) urging that the order entered against her and her husband was an injunction. The order directed the divorcing couple from participating in certain behaviors when their three children were in their custody. There were 14 different elements of the trial court's order relative to behavior directed toward the children. The wife argued that:

> (i) the trial court lacked jurisdiction to enter the order in the absence of either party filing a motion;
> (ii) the order violated her right to due process because it was entered without an evidentiary hearing;
> (ii) the trial court failed to make findings of fact as required by section 11-101 of the Illinois Code of Civil Procedure (735 ILCS 5/11-101);
> (iv) the order infringed on her rights to parent her children in violation of the fourteenth amendment of the U.S. Constitution and section 2, article I, of the Illinois Constitution; and
> (v) the order violated her freedom of speech under the United States and Illinois constitutions.

The appellate court ultimately dismissed her appeal ruling that the trial court did not enter an injunction order subject to a SCR 307 interlocutory appeal.

But note the dissenting opinion. This case is fascinating reading. The dissent urged:

> To determine whether an order is injunctive in nature, a court must look beyond form and address the substance of the order. *In re a Minor*, 127 Ill. 2d 247, 260 (1989) (construing an order prohibiting publication of a minor's name as an injunction even though not labeled as such). The majority concedes this, but concludes we lack jurisdiction under Supreme Court Rule 307(a)(1) (Ill. S. Court. R. 307(a)(1) (eff. Feb 26, 2010)), reasoning that because there is no evidence that the order was intended to grant injunctive relief, we should presume the order is not an injunction.
>
> This reasoning turns the logic of *In re a Minor* on its head. The order is labeled an "injunction"; it "restrains" and "enjoins" the parties, "until further order," from 11 categories of conduct and speech, which are

> "prohibited." It is only by ignoring the plain language of the order that the majority is able to characterize it as something other than what it says it is.

Then the dissent urged:

> Instead, rather than address the substance of the order and the manner of its entry, the majority concludes the order must not be an injunction because customary procedures were not followed and that the order is in the nature of "temporary relief" authorized under section 501 of the Act. 750 ILCS 5/501 (West 2012). By so recasting the nature of the order, the majority concludes that although it does restrain Catherine's and Raymond's speech and conduct, it is nevertheless "administrative" or "ministerial" in nature. Such administrative and ministerial orders are not appealable because they operate solely to regulate the procedural details of litigation and are distinguishable from traditional forms of injunctive relief because they do not affect the relations of the parties in their daily activities outside the litigation. *In re a Minor*, 127 Ill. 2d at 262.

The dissent's language was equally well written:

> The majority's reasoning underscores why the order is exactly what it purports to be: an effort to bring the authority of the court to bear on a parent's decision to speak to or behave toward their children in a particular way. The majority notes that parents embroiled in dissolution proceedings often behave in ways that negatively affect their children. The precise purpose of the order, therefore, is to "restrain" and "enjoin" Catherine or Raymond from engaging in such harmful speech and behavior before it ever happens. I do not know what label to place on such an order other than an injunction. And I am unaware of any authority for entering an injunction whose purpose is purely prophylactic. See *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry. Co.*, 195 Ill. 2d 356, 371 (2001) (right to injunctive relief "rests on actual or presently threatened interference with another's rights"' damage must be "likely and not merely possible").

I had previously written: "Read the decision: Who was correct? The majority of the dissent?" 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 Supreme court concluded by wiping out any precedential effect of the Illinois appellate court's 2014 opinion.

***K.E.B.* – Supervised Visitation Requiring Parties to Agree on Time and Place Effectively Gave Control to Custodian/ Father Was Improper**

In re Parentage of K.E.B., 2014 IL App (2d) 131332 (July 24, 2014) Pursuant to section 607(c) of the IMDMA, visitation rights may be modified whenever the best interests of the child would be served. But visitation rights may not be restricted unless the court finds that the visitation would seriously endanger the child's physical, mental, moral, or emotional health. This case involved a visitation dispute between parents with a "tumultuous history" and where the mother had a history of alcohol abuse. The trial court's order granting supervised visitation, but requiring the parties to agree to the time and place, effectively gave the petitioning father control of respondent's right to visit with her child by not ensuring that respondent would have visitation when the parties did not agree on a time and place. Accordingly, that portion of the order was reversed and the cause was remanded for the setting of a specific schedule, unless the parties agreed otherwise.

Custody Jurisdiction and Hague

Hague Convention

***Lozano v. Alvarez*, 2014 U.S. Supreme Court – Under Hague Convention There Exists No Right to a Defense of Equitable Estoppel if One Does Not Bring Petition Within One Year**

Lazono v. Montoya, United States Supreme Court (March 5, 2014)

The question in this case was the deadline within the Hague Convention for bringing a petition – with that period being a year. If the petition is timely filed, a court "shall order the return of the child forthwith." But when the petition is filed after the 1-year period expires, the court "shall . . . order the return of the child, unless it is demonstrated that the child is now settled in its new environment." The Supreme Court ruled that Section 12's 1 year language requirement is not subject to equitable tolling. Accordingly, the court ruled that without a presumption of equitable tolling in that case, the Convention did not support extending the one year period during concealment. Note that the abducting parent does not necessarily profit by running out the clock since both American courts and Convention signatories have considered concealment as a factor in determining whether a child is settled. So the court reasoned that equitable tolling was neither required nor the only available means to advance the directives of the Convention.

Grandparent Visitation:

***Robinson v. Reif* – Grandparent Visitation Petition Properly Granted in Case that Addresses**

Robinson v. Reif, 2014 IL App (4th) 140244 (November 24, 2014)

This 28 page decision is excellent reading regarding the current state of the law regarding grandparent visitation. The maternal grandparents filed petition for permanent and temporary grandparent visitation of their two minor grandchildren, whom they had taken care of in their home for 18 months after car accident in which children's mother was killed and their father was severely injured. The children were ages 3 and age 7 months at time of accident. The appellate court ruled that the trial court's judgment, granting the grandparent's petition and setting a visitation schedule, was not against manifest weight of the evidence. Plaintiffs presented expert testimony that young children develop attachments to primary caregivers. She opined that the children formed an attachment to Plaintiffs during this critical development stage and that the children would be damaged emotionally if deprived of all visitation with Plaintiffs. Regarding the nature of the expert testimony in this case the appellate court commented:

> Defendant argues that the trial court should have based its ruling on the testimony of his experts, who actually met the children. However, although plaintiff's expert, Osgood, may have been better informed if she had met the children, we believe (and the trial court could have concluded) that defendant's experts may have been better informed if they had met plaintiffs.

The appellate court contrasted the findings in *Flynn v. Henkel*, 369 Ill. App. 3d 328, 335 (2006), rev'd, 227 Ill. 2d 176 (2007):

> Rejecting this reasoning, the supreme court in *Flynn* noted that the grandmother "did not present any evidence to show that denial of visitation with her would result in harm to [the child's] mental, physical, or emotional health. The only evidence pertaining to harm [the child] would experience from the denial of visitation with his grandmother came from [the mother], who was asked, 'Do you believe it would be harmful for [the child] not to see [the grandmother] and visit with her?' and she answered, 'No.' " *Flynn*, 227 Ill. 2d at 184, 880 N.E.2d at 170.

Removal

Removal Granted

***Rogan M. – II*: Standard in Removal Cases Is Not the Custody Modification Standard of Clear and Convincing Evidence – Petitioner Bears Burden of Proof via Preponderance of the Evidence**

In Re Parentage of Rogan M., 2014 IL App (1st) 141214 (September 12, 2014)

Note the decision in *In re Parentage of Rogan M*, 2014 IL App (1st) 132765 (March 7, 2014)

The decision in that first case was to determine essentially that the appeal of the removal decision was premature since the record showed that after the removal petition was filed, the parties filed several other petitions, including attorney's fees and respondent's petitions for custody and a parenting schedule. Since those matters were pending when petitioner filed her notice of appeal, the denial of the removal petition was not a final judgment appealable as of right. Accordingly, the order was not a "custody judgment" or a "modification of custody" that could be immediately appealed under Supreme Court Rule 304(b)(6).

The mother in this second appeal argued that the trial court erroneously applied the "clear and convincing" standard to removal proceedings. The appellate court stated that while section 609 identifies with whom the burden of proof rests (the petitioner seeking removal), it does not set forth a quantum of proof for removal petitions. The court stated that because the statute is silent as to this information, "the preponderance of the evidence standard presumably would apply."

The father argued that Section 610(b) of the IMDMA applies in terms of its clear and convincing standard. The court commented that, "This court has stated on several occasions that a removal petition is not a petition to modify custody under section 610 of the Marriage Act. The appellate court cited the first *Rogan M.* decision ("This court has stated on several occasions that a removal petition is not a petition to modify custody under section 610 of the Marriage Act. *In re Parentage of Rogan M.*, 2014 IL App (1st) 132765, ¶ 23").

The appellate court concluded, "Accordingly, we find the trial court erred in applying the more stringent clear and convincing standard."

Parentage and Adoption

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., (*Scarlett Z.D. II*), 2014 IL App (2d) 120266-B (May 22, 2014) This case may seem 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 denied the petition for leave to appeal, it entered the following 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."

And ultimately this case went before the Illinois Supreme Court.

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**.

Ultimately, the 2014 appellate court in *Scarlett Z.D.* ruled:

> Regarding standing, as Jim concedes, he is not Scarlett's biological or legally adoptive parent, and Scarlett has always been in Maria's physical custody. Therefore, under the Dissolution Act and the Parentage Act of 1984, Jim had no standing to bring his claims for custody, visitation, and support. Furthermore, because Illinois does not recognize the equitable parent doctrine, Jim is precluded from asserting standing on that theory. **However, because the equitable adoption doctrine announced in *DeHart* might present a potentially viable theory upon which Jim could assert standing, we remand for further proceedings**. On remand, the trial court should make additional factual findings, pursuant to the equitable adoption doctrine, to determine whether there is a "need in justice for this extraordinary equitable intervention." (Internal quotation marks omitted.) Ford, 82 P.3d at 754-55. In its discretion, the court may, but need not, hear additional evidence or argument, or both, on the issue of equitable adoption. If the court finds that Jim does have standing under the equitable adoption theory, the court should proceed to consider Scarlett's best interests. If the court finds that Jim does not have standing, it should deny counts I and II again. (Emphasis added.)

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 initial research that ultimately resulted in an article by Paulette Gray regarding equitable relief in divorce case. That article came before this line of case law.

***Mancini* – Despite *DeHart* case Recognizing Equitable Adoption in Probate Proceedings No Right for Equitable Adoption in Cases Under IMDMA**
Mancini II – 2014 IL App (1st) 111138-B ***
Please see my original report of *Mancini* for the 2014 reconsideration in light of the Illinois Supreme Court's *DeHart's* decision.

Recall that in these divorce proceedings the petitioner had adopted a child as a single parent prior to the marriage and respondent never sought to adopt that child after the marriage but did seek custody after the marriage was dissolved. The appellate court had affirmed the trial court's dismissal of his attempt to obtain custody on the ground that he lacked standing. But the Supreme Court directed the appellate court to vacate its decision and reconsider the matter in light of the supreme court's decision in *DeHart* recognizing equitable adoption in a probate proceeding.

In revisiting the issue, the appellate court stood by its original decision after concluding that *although equitable adoption is applicable in probate cases, it should not apply in adoption, divorce, or parentage actions*, especially when the statutes governing those proceedings clearly establish parental rights, who is a parent and how parentage is established through adoption; furthermore, equitable adoption is not recognized in Illinois in custody proceedings. The appellate court reasoned that in the absence of a contract in in the instant case, there was no basis for invoking the "contract to adopt theory." But, as discussed, below, isn't this contrary to the Illinois Supreme Court's instructions re *Scarlett Z.D.* and that decision.

Comment by GJG: After writing the above, I found an apt summary of these two decisions in the ISBA Family Law Section's newsletter. See: http://www.davisfriedman.com/cm/pdfs/Illinois-State-Bar-Association-Family-Law-Newsletter-Hurst-Article-Marriage-Mancine-2014.pdf by Heather M. Hurst.

Heather writes:

> Depending on the result from the *Scarlett* trial court on remand, and the likely subsequent appeal if the original opinion is altered, it is possible there will be a conflict between the First and Second District Appellate

Courts which may ultimately be addressed by the Supreme Court.

Regardless of the result on remand in *Scarlett*, it is clear that if the situations raised in *Mancine* and *Scarlett* are going to be appropriately addressed, Illinois law needs to be changed. Certainly, there are situations in which it may be in the best interest of a child for a non-parent who has been a significant part of the child's life to be allowed parenting time, or even custody. Preventing a relationship between a non-parent who has lived with a child for a significant period of time and is regarded by the child as their parent, cannot be in the child's best interest. This is especially true considering the emergence of more non-traditional families.

On the flip side, in both *Mancine* and *Scarlett*, the non-parent "fathers" had the ability to formally adopt the children in question but failed to do so. Recognizing such individuals as equitable parents could reward their inaction and undermine the formal adoption process. Further, some fear that sanctioning equitable parenting would interfere with the long-standing constitutional recognition of a parent's fundamental liberty interest to decide the care, custody, and control of his or her own children by allowing a non-parent to impede upon those decisions.

The Supreme Court of Illinois will likely be required to resolve the conflict between the *Mancine* court and the *Scarlett* court, depending, of course, on the *Scarlett* court's decision on remand. Or the legislature may statutorily recognize equitable parents in the interim. One thing is clear: with the growth of non-traditional families on the rise, complex cases requiring a recognition of the realities of their relationships continue to increase in frequency, and the children at the root of the controversies will be the ones who suffer as years and years of their childhoods are spent litigating their custody.

The author noted in that article, "A previous version of HB1452, a proposed rewrite of the Illinois Marriage and Dissolution of Marriage Act (presently referred to Assignments in the Senate), included a revision to the current Act which would allow for an "equitable parent" to have standing to seek custody and parenting time with a minor child. However, due to considerable criticism of this portion of the rewrite, the section regarding "equitable parents" has been removed from the current version of the bill."

Domestic Violence / Exclusive Possession Issues

Domestic Violence Type Issues

***Kiferbaum* – Correlative Orders of Protection Allowed But Mutual Domestic Violence Orders are Not**

IRMO Kiferbaum, 2014 IL App (1st) 130736 (September 30, 2014)

Though the Appellate Court's opinion is difficult to discern at first because of style and

form issues, the issue boils down to this: Can both parties file separate petitions for an order of protection, following all statutory and procedural issues and providing all necessary proofs, which would result in two separate orders of protection being issued? In short, the Court found if these requirements are met, it is error to dismiss or deny a petition on the grounds that *mutual* orders of protection are prohibited.

The former-wife was involved with a contentious, harassing and intimidating pre-decree situation, where she obtained an order of protection. Though many of us hope that the parties settle down and reduce combat after the divorce is final, this case did not follow that pattern. Bad behaviors and harassment continued after the divorce. The former-wife sought an order of protection in 2012, but it was ultimately dismissed. The former husband then filed for an order of protection, alleging different facts and issues. The ex-wife filed an amended petition for order of protection and the battle was over the former husband's motion to dismiss. After many months, the petitions went to hearing. The Court granted the former husband's request for an order of protection and dismissed the ex-wife's petition. The trial court found that 750 ILCS 60/215 expressly prohibits mutual orders of protection.

In reversing the trial court, the appellate court reasoned:

> The plain language of section 215 indicates that correlative orders of protection, like that sought by Judith, may be issued and provides a clear roadmap for a party and the court to follow, namely that: "both parties have properly filed written pleadings, proved past abuse by the other party, given prior written notice to the other party unless excused under Section 217, satisfied all prerequisites for the type of order and each remedy granted, and otherwise complied with this Act." 750 ILCS 60/215. In this case, the record indicates that Judith filed a separate petition for protective order, commencing a separate action under section 202 of the Illinois Domestic Violence Act. 750 ILCS 60/202. In further compliance with the statute, and section 215 in particular, Judith filed a written petition, provided an affidavit in support of her allegations, provided notice to all parties, and was prepared to present separate proof in support of her petition. Accordingly, the trial court erred by dismissing her petition.

The important takeaway from this case is that we now have guidance on the difference between mutual and correlative orders of protection:

> Mutual orders of protection typically occur within the same document, arising from a singular pleading and proceedings, despite the fact that one party may not have even desired an order of protection" . . . Correlative orders involve "both parties have properly filed written pleadings, proved past abuse by the other party, given prior written notice to the other party unless excused under Section 217, satisfied all prerequisites for the type of order and each remedy granted, and otherwise complied with this Act.

The Court reasoned that to hold otherwise would allow the abuser to run to the courthouse to control the legal access to relief as well.

***Bradley* – Trial Court Has Ability to Require Guns to be Outside of Parent's Access While Children were of Age of Minority**

IRMO Bradley, 2013 IL App (5th) 100217 (Opinion filed July 18, 2013 after Motion to Publish granted).

This is an interesting case in which gun ownership rights type issues and the ability of the divorce court to place limitations on guns *without* a domestic violence order. Note that this is 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:

> The circuit court heard evidence concerning confrontations between Christine and Timothy, some in the presence of the parties' minor children and some involving the threat of the discharge of firearms by Timothy. 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.

In moving from the constitutional attacks to the other issues relating to the authority given to the former wife to assign the responsibility for carrying out the portion of the order related to the guns. The appellate court continued:

> We disagree that this order constitutes an abuse of discretion. We note that Christine is the custodial parent, that Timothy was the party taking actions with the firearms in this domestic dispute, that initially in front of the circuit court Timothy agreed to the disposition of the weapons, and that the judgment of the circuit court does not leave Christine without the financial capacity to pay for the shipping of the weapon to Timothy's parents in Pennsylvania. We also find, given the failure of Timothy to comply with various court-ordered obligations, that it was not an abuse of discretion for the circuit court to assign the actual execution of its order to Christine rather than Timothy, apparently reflecting the court's assessment that in this manner, the court's order would actually be carried out. As noted in Christine's argument, the paramount obligation of the circuit court is to consider and protect the best interests of the children (750 ILCS 5/602(a) (West 2010)), and we cannot say that the assignment of these duties and expenses to Christine in order to ensure protection of the minor children constitutes an abuse of discretion.

Exclusive Possession of Marital Residence

***Engst* - Exclusive Possession Properly Granted**
IRMO Engst, 2014 IL App (4th) 131078 (April 2014)
Where the evidence was sufficient to warrant a finding that the mental well-being of respondent or the parties' children was jeopardized by both parents' occupancy of the marital residence, the trial court's award of exclusive possession of the residence during the pendency of the marriage dissolution proceedings to respondent pursuant to section 701 of the IMDMA was not against the manifest weight of the evidence.

This is an excellent decision to keep in your "brief bank" because all too often lawyers believe that to obtain exclusive possession case law addressing the word jeopardy is harder to get than the $2000 double jeopardy. The case states:

> As stated, *Levinson* is factually distinguishable from the present case. Most obvious is that, unlike in *Levinson*, the parties in this case resided in the marital home together on a full-time basis. Next, in the case at bar, we find no indication from the record that the trial court applied an incorrect standard or an overly expansive definition of "jeopardize." Further, the evidence presented in this case involved more serious concerns than the "stress" alleged in *Levinson*. Here, Michelle testified that David was physically and verbally aggressive toward her, she felt intimidated and bullied by his behavior, and the children witnessed the parties' conflicts. Finally, in *Levinson*, the wife's testimony regarding the children's

well-being was contradicted by the testimony of a court-appointed evaluator. In this instance, Michelle's testimony was not similarly contradicted.

Attorney's Fees Other than Contribution Actions:

***Linta* – Prevailing Party Provisions Not Entitled to Enforcement in Issues Involving Children**

IRMO Linta, 2014 IL App (2d) 130862 (September 17, 2014)
The MSA in a Nevada divorce contained a "prevailing party" provision regarding post-decree attorney's fees. After the divorce, the parties and their minor children relocated to Illinois and the Nevada judgment was registered as an Illinois judgment. Following various petitions brought by both parties, the trial court denied petitioner's request for attorney fees based on the prevailing-party provision. The former wife appealed appeals, contending that the trial court erred in denying her request for fees. The appellate court affirmed.

The prevailing party provision stated simply, ""In any action arising hereunder, or any separate action pertaining to the validity of this Agreement, the prevailing party shall be awarded reasonable attorney fees and costs." The wife claimed that the prevailing – party provision was binding on the trial court.

The *Linta* appellate court stated:

> At the outset, we note that under Illinois law the prevailing-party provision is unenforceable as applied to issues related to the children. Petitioner is seeking to invoke the provision with respect to her petitions to modify child support and visitation. Section 502(b) expressly provides that marital settlement agreements are binding "except those providing for the support, custody and visitation" of children. 750 ILCS 5/502(b) (West 2010). Portions of a marital settlement agreement that relate to support, custody, and visitation of children are not binding on the trial court. *In re Marriage of Ingram*, 259 Ill. App. 3d 685, 689 (1994).

The appellate court the focused on the holding in *IRMO Best*, 387 Ill. App. 3d 948 (2009), instructive. [Keep in mind that this is the 2009 appellate court *Best* decision referenced. Compare this with the 2008 Illinois Supreme Court *Best* decision, 228 Ill. 2d 107, 113 (2008), holding that a declaratory judgment ruling entered during the course of dissolution proceedings was appealable under Rule 304(a).] In *Best*, the parties' premarital agreement provided that "'[t]he parties acknowledge, understand and agree that in the event of any court proceeding of and concerning their marital relationship or dissolution thereof, that [sic] each party shall pay and be responsible for payment of their own respective attorney fees and all ancillary costs incurred in connection with any such proceeding.' " The appellate court in *Best* found that the fee-shifting ban violated Illinois public policy requiring that a child's right to support may not be adversely affected by a premarital agreement:

> The court emphasized that the law severely limits on public-policy grounds the enforceability of contracts affecting the custody and support of children. Further, Illinois law per se rejects premarital agreements that impair child-support rights or specify custody.

The appellate court in *Linta* concluded:

> In sum, we find that petitioner is not entitled to attorney fees based on the prevailing party provision. The language of section 502(b) does not bind the trial court to the settlement agreement for issues involving the care and custody of minors.

Other Cases:

Motion to Set Aside Judgment between 30 Days and Two Years

***Little* – Meritorious Claim and Due Diligence Sufficiently Alleged as Against Corporate Entity Not Revealed via Discovery**
IRMO Little, 2014 IL App (2d) 140373 (December 22, 2014)
Little contains and excellent summary regarding relief under 2-1401 of the Code:

> [A] petitioner must affirmatively set forth specific factual allegations supporting: (1) the existence of a meritorious defense or claim against the judgment; (2) due diligence in presenting the defense or claim to the trial court in the original action; and (3) due diligence in filing the petition. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 30. The purpose of a section 2-1401 petition for relief from judgment is to raise facts that, if known at the time of judgment, would have prevented its entry. A section 2- 1401 petition is subject to a motion to dismiss where it either fails to state a cause of action or shows on its face that the petitioner is not entitled to relief. We review de novo the trial court's dismissal of a section 2-1401 petition. [non-family law citations omitted.]

The issue in this case was the requirement for the trial court to divide the marital estate in "just proportions" as to the husband's claims to the wife's interest in a business known as Hydro-Master Parts. The appellate court found that the husband's allegations sufficiently alleged a meritorious claim when he alleged that her 40% interest in this business was created during the marriage with her marital efforts. The case cites case law as to benefits earned during the marriage but received after the divorce were marital.

The next issue was whether the husband sufficiently alleged due diligence. The appellate court mentioned the following:

> In his petition, Donald listed the many steps that he took to determine whether Cheri had any interest in Hydro-Master Parts. He alleged that he settled the case because Cheri testified that she did not transfer any marital assets to Hydro- Master Parts and had no interest in the company. Cheri

> argues that Donald was not diligent, because he failed to depose Dieter and Schmidt and because he waived his right to a bench trial at which he could have confronted Cheri about her alleged ownership in Hydro-Master Parts.2

The appellate court reasoned:

> We find that Donald sufficiently alleged due diligence in presenting the claim to the trial court in the original action. In light of the many steps that Donald allegedly took to discover his claim, we cannot hold that his failure to take the additional steps that Cheri identifies defeats his claim of diligence as a matter of law. At most, Cheri's arguments raise questions of fact on the issue of Donald's diligence, which cannot be resolved on a section 2-615 motion to dismiss.

***Harnack* – Exception Circumstances Not Shown for Relaxing Requirement of Providing Due Diligence**

IRMO Harnack, 2014 IL App (1st) 121424 (November 21, 2014)

The trial court had entered a default judgment dissolving marriage and apportioning the parties' assets. The default judgment ruled that all shares of stock held by husband or his enterprises were marital property. It awarded the wife half of shares of stock as her marital portion. Eight months later, the husband moved to set aside judgment per Sections 2-1301(e) and 2-1401(a) of the Code of Civil Procedure. The appellate court ruled that exceptional circumstances were not shown to exist to warrant relaxing due diligence requirements of Section 2-1401. Accordingly, the appellate court ruled that the trial court properly denied the Section 2-1401 petition and Section 2-1301(e) motion to vacate judgment. The case was remanded to the trial court to amend judgment to clarify provisions for transfer of shares of stock to escrow.

Retroactivity of Legislation

***Hayashi v. IDFPR* - Illinois Supreme Court Addresses Issue of Retroactivity Having Implications on Maintenance Guidelines**

Hayashi v. IDFPR, (Illinois Department of Financial and Professional Regulation), 2014 IL 116023

The issue of retroactivity of legislation is now a compelling issue for Illinois lawyers in light of the maintenance guidelines and the absence of a statement of the effective date. The question is whether it applies to only cases filed after January 1, 2015 or to pending cases. This new case provides an excellent summary starting at paragraph 23:

> In determining whether a statute may be applied retroactively, as opposed to prospectively only, this court has adopted the approach set forth by the United States Supreme Court in Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994). Commonwealth Edison Co. v. Will County Collector, 196 Ill. 2d 27, 38 (2001). *** Where there is no express provision

> regarding the temporal reach, the court must determine whether applying the statute would have a "retroactive" or "retrospective" impact, that is, "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf, 511 U.S. at 280. Where there would be no retroactive impact, as defined in Landgraf, the court may apply the statute to the parties. Commonwealth Edison Co., 196 Ill. 2d at 38. However, if applying the statute *would have a retroactive impact*, then the court must presume that the legislature did not intend that it be so applied. Id. ***
>
> An amended statute which creates new requirements to be imposed in the present or future, and not in the past, does not have a retroactive impact on the parties.

So, what is a retroactive impact? To answer that question we go to the previous cases.

Eavesdropping

Illinois Supremes Rule Illinois' Eavesdropping Statute as Unconstitutional – Next Comes the Maintenance Guidelines
People v. Melongo, Illinois Supreme Court, 2014 IL 114852
In 2014 the Illinois Supreme Court ruled the Illinois eavesdropping law unconstitutional. This case made the national spotlight including the Huffington Post, the Chicago Tribune and others including our Illinois Bar Journal. So, until recently there had been no prohibition on eavesdropping in Illinois except as limited by federal law. Click here for the 2015 law / PA 98-1142. It redefines a private conversation.

> For the purposes of this Article, "private ~~the term~~ conversation" means any oral communication between 2 or more persons, whether in person or transmitted between the parties by wire or other means, when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation. A reasonable expectation shall include any expectation recognized by law, including, but not limited to, an expectation derived from a privilege, immunity, or right established by common law, Supreme Court rule, or the Illinois or United States Constitution.

Subsection (e) regarding electronic communications is amended to focus on "private" communications. It now provides:

> For purposes of this Article, "private electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or part by a wire, radio, pager, computer, electromagnetic, photo electronic or photo optical system, when the sending or ~~and~~ receiving party intends the electronic communication to be private under circumstances reasonably justifying that expectation. A

> reasonable expectation shall include any expectation recognized by law, including, but not limited to, an expectation derived from a privilege, immunity, or right established by common law, Supreme Court rule, or the Illinois or United States Constitution.

There is a new definition of surreptitious: "(g) Surreptitious. For purposes of this Article, "surreptitious" means obtained or made by stealth or deception, or executed through secrecy or concealment." Section 14-2 that addresses the elements adds a focus on the requirement that it be knowing and intentional. And one more new provision in those amendments states:

> (a-5) It does not constitute a violation of this Article to surreptitiously use an eavesdropping device to overhear, transmit, or record a private conversation, or to surreptitiously intercept, record, or transcribe a private electronic communication, if the overhearing, transmitting, recording, interception, or transcription is done in accordance with Article 108A or Article 108B of the Code of Criminal Procedure of 1963.

Federal law only requires one party to a recording to authorize it. See, 18 U.S. Code Chapter 119 – Wire and Electronic Communications Interception and Interception of Oral Communications. See also: AAML Journal article by Cary J. Mogerman and Stephanie L. Jones. Vol. 21, 2008. *Electronic Eavesdropping and Divorce: The New Era of Electronic Eavesdropping and Divorce: An Analysis of the Federal Law Relating to Eavesdropping and Privacy in the Internet Age*

Are 604(b) Costs Required to be Paid to Voluntarily Dismiss

***IRMO Tiballi* – Illinois Supreme Court Rules §604(b) fees Not Taxable as Costs Payable upon Voluntary Dismissal of Divorce Proceedings**

IRMO Tiballi, 2014 IL 116319 (March 20, 2014)

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 Supreme Court noted the three requirements for voluntary dismissal.

> (1) the plaintiff must file a motion for voluntary dismissal prior to the beginning of trial; (2) the plaintiff must give proper notice; and (3) the plaintiff must pay costs.

The Illinois Supreme Court then reviewed whether the order was a dismissal for want of prosecution or for voluntary dismissal without prejudice. I had noted that I had agreed with the appellate court's dissent and the Supreme Court agreed stating:

> Thus, we agree with the appellate court dissent that it is hard to characterize the trial court's dismissal order as being a voluntary dismissal under the circumstances presented by the record before us.

The Court then stated:

> We find, however, that it makes no practical difference here, as we still must reach the merits of the underlying "costs" issue regardless of whether the circuit court's order is characterized as a dismissal for want of prosecution rather than a "voluntary dismissal" under section 2-1009(a). This is because under either kind of dismissal, judgment must be awarded in favor of the defendant for his or her court "costs."

So, then the question was whether 604(b) Evaluator Fees are Costs. The Court reasoned properly:

> Applying *Vicencio's* narrow definition of "costs," we hold that the fees of Dr. Shapiro as a section 604(b) evaluator do not qualify as "court costs" under sections 2-1009 and 5-116 of the Code. The fees of a section 604(b) evaluator clearly do not fall under the definition of "costs" adopted by this court, which again was "charges or fees taxed by the court, such as filing fees, courthouse fees, and reporter fees," as well as subpoena fees and statutory witness fees. We agree with the appellate court dissent that there are too many differences between the examples of court costs identified by *Vicencio* and the section 604(b) evaluator fees at issue here to justify squeezing the evaluator fees within the term "costs." See 2013 IL App (2d) 120523, ¶ 29 (Zenoff, J., dissenting).
>
> For example, in contrast to court costs, which are generally paid directly to the clerk of the court, section 604(b) evaluator fees are paid directly to the evaluator, who sends out invoices for his professional services directly to the parties. Furthermore, unlike evaluator fees, statutory witness fees are set by statute at $20 per day and $0.20 per mile for travel (705 ILCS 35/4.3(a) (West 2012)), and the parties are not invoiced for any professional services (citation omitted.)

The Illinois Supreme Court then looked to the language of 604(b) that provides, "*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*."

The Court concluded:

> In sum, we find that requiring a party who has his custody petition

> dismissed without prejudice for non-abusive reasons to automatically bear the full cost of a section 604(b) evaluator is beyond the scope of what the legislature intended when it enacted the costs statutes of the Code and section 604(b) of the Marriage Act. We hold that section 604(b) is the specific statute that controls the matter before us and that evaluator fees are not "court costs" within the meaning of sections 2-1009 or 5-116 of the Code. The only appropriate statutory basis, then, for allocation (or reallocation) of section 604(b) fees is section 604(b) itself.

Jurisdiction:

***Lasota* – Polish Court Did Not Have Personal Jurisdiction Over the Wife. Accordingly, Illinois Court Properly Awarded Property, Maintenance and Payment of Attorney's Fees**
IRMO Lasota and Luterek, 2014 IL App (1st) 132009 (August 13, 2014)

I like the introduction given by the appellate court to the case:

> While Janusz Luterek ended his nine-year marriage to Elzbieta Lasota by obtaining a judgment in Poland where the couple married, that was far from the conclusion of their dissolution proceedings, which took place in Illinois, where they had resettled before their marriage broke down. After the Polish court judgment was registered in Cook County, Elzbieta sought her share of the martial property and an award of temporary maintenance and attorney fees, all issues unaddressed by the Polish court. Janusz argued, however, that the court in Poland and not the circuit court in Cook County had jurisdiction to deal with the marriage, and, in any event, res judicata barred Elzbieta's petition. The circuit court rejected Janusz's contentions and held that under the Illinois Marriage and Dissolution of Marriage Act (the Act) *** jurisdiction existed here because Janusz had not served Elzbieta with process and Elzbieta had not made a general appearance before the court in Poland. The circuit court then ordered Janusz to pay Elzbieta temporary maintenance and interim attorney fees and held him in civil contempt when he failed to comply.

The appellate court continued:

> Janusz seeks reversal of the order of civil contempt as void due to the circuit court's erroneous determination that Elzbieta had not appeared before the Polish court. The record, however, supports a finding that in addition to never having been served process, Elizbieta at no time submitted herself to the jurisdiction of the Polish court for purposes of the divorce. Therefore, we affirm.

***Marzouki* – Illinois Court Did Not Abuse Discretion in Denying Motion for Stay of Illinois Proceedings to Allow French Court Which Entered Divorce Judgment to**

Effectuate the Terms Given the Facts
Marzouki v. Najar-Marzouki, 2014 IL App (1st) 132841 (May 15, 2014)

The parties, Jamel and respondent, Olfa Najar-Marzouki (Olfa), are French citizens and were married in 1998. They moved to Illinois in 1999. They then bought a house in Evanston. They have two children, both born in Illinois. In July 2010, they moved with their children to France, where the husband worked remotely for his Illinois based employer. The wife worked in France. And while in France, they rented out their Evanston house. In January 2011, the husband filed for divorce and in December 2011, the couple and their children returned to the States. In November 20123, the French family law court entered a divorce judgment.

It provided, in part:, "In addition to pronouncing the divorce, the court ordered that "the parents shall exercise joint parental authority with the children's usual place of residence being with their father." It also further "order[ed] the liquidation and distribution out of the spouses' marital rights." The order also "[*i]nvites* the parties to settle this liquidation and distribution out of court with the assistance of a notary of their choice." (Emphasis in original.)

This Illinois action commenced February 2013 when the husband filed a petition in Cook County to enforce the foreign judgment. He also filed a "Petition to Establish Child Support." The wife in March 2013 filed, among other things, a "motion to allocate the marital estate." In response the husband filed a motion to dismiss the motion to allocate but the trial court denied the motion to denied. At some point the husband also filed a "Motion for Stay and to Enjoin Discovery and Trial on Respondent's Motion to Allocate Marital Assets." This had been brought under 2-619(a)(3) of the Code and 501 of the IMDMA (petition for preliminary injunction). After a hearing the trial court denied this motion. The husband filed a motion for interlocutory appeal in August 2013. The appellate court noted that it had appellate jurisdiction to review the interlocutory order of August 2013 denying his motion to stay since the issue in injunctive in relief and is therefore immediately appealable. ["[a]n appeal may be taken to the Appellate Court from an interlocutory order of court *** granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." Ill. S. Court. R. 307(a)(1)]

The trial court then reviews the issue of whether the stay was warranted under the abuse of discretion standard. Section 2-619(a)(3) of the Code allows for a stay or dismissal of a cause of action if "there is another action pending between the same parties for the same cause." *In re Marriage of Murugesh*, 2013 IL App (3d) 110228, ¶ 19. "The purpose of section 2-619(a)(3) is 'to avoid duplicative litigation.' Even when the "same cause" and "same parties" requirements are met, a circuit court is not automatically required to dismiss or stay a proceeding under section 2-619(a)(3). The party seeking the stay must justify it by clear and convincing circumstances outweighing its potential harm to the opposing party. To that end, he "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. [Citation.]"

The husband argued that the stay was appropriate to allow the French court to complete its proceedings. The appellate court then commented:

> We now conclude that the circuit court's ruling was legally correct based on the plain language of the judgment of dissolution entered by the French court, which the circuit court had considered three weeks earlier in ruling on Jamel's motion to dismiss. As the circuit court stated: "Based upon Jamel's request that the 11-26-12 French Judgment for Dissolution of Marriage be registered and enrolled in Cook County, Illinois, this Honorable Court has both subject matter and personal jurisdiction over this cause." The court concluded that "[b]ased upon Jamel's registration and enrollment of the French Judgment for Dissolution of Marriage in Cook County, Illinois, Jamel has waived his claim that the French courts have retained subject matter or personal jurisdiction." The circuit court further found that there were no pending proceedings in the French court. Also, as we have noted, the French court ordered the "liquidation and distribution out of the spouses' marital rights" and merely invited the parties "to settle this liquidation and distribution out of court with the assistance of a notary of their choice."

Accordingly, the Illinois court ruled that because the French court had already issued its judgment, the husband failed to show that there was anything pending *in the French court*. Therefore, he failed to meet his burden of showing that the trial court abused its discretion in denying his motion for stay of the wife's motion to allocate marital assets.

***Heindl* – Alleged Violation of SCR 213 Regarding Orders Entered After Withdrawal of Counsel and Denial of Petition by *Pro Se* Individual for Interim Fees to Hire Lawyer**

IRMO Heindl, 2014 IL App (2d) 130198 (May 28, 2014)

The former wife appealed arguing that her due process rights were violated where the court, after her counsel withdrew and in violation of Illinois Supreme Court Rule 13, entered a series of orders prejudicial to her. Further, she argued that the court erred where it denied her request for interim attorney fees so that she could hire counsel. Finally, she argued that the court abused its discretion where it denied her request to continue the trial on account of a recent surgery. The appellate court affirmed the trial court.

The appellate court reasoned that the orders entered within 21 days of the date her counsel was allowed to withdraw were not prejudicial to respondent, that her petition for interim attorney fees was not verified or supported by an affidavit or other nontestimonial matter. The appellate court noted that the wife did not submit any affidavits or medical evidence supporting her claim that she could not proceed with the trial, she admitted that she drove herself to court, and she was able to perform "admirably" in court.

The case confirmed what divorce lawyers well know – there is no right to counsel in a divorce case:

> There was no Rule 13 violation here. First, despite Victoria's reliance on *In re Marriage of Fahy*, 208 Ill. App. 3d 677, 688 (1991), we note that there is no constitutional "right to counsel" in a dissolution proceeding, so a Rule 13 violation cannot impinge on any such "right." (Citation

omitted.)

Next the appellate court commented:

> Second (and whether or not Victoria was present in court on September 12, 2012), there was nothing inherently prejudicial in the court's decision to allow Brunkalla to withdraw and to then schedule a firm and final trial date more than 90 days thereafter. Indeed, when the court allowed Brunkalla to withdraw, the trial was scheduled for October 2012. It was because of Brunkalla's withdrawal and in order to comply with Rule 13 and to accommodate Victoria that trial was rescheduled to December 2012. Similarly, there was nothing inherently prejudicial about the court's order noting that the remaining requests were "withdrawn." Those requests were not denied or dismissed with prejudice. Rather, that they were deemed withdrawn suggests that Victoria or any new counsel could, if appropriate, refile them.

In fact, this is exactly what usually happens upon the withdrawal of counsel.

Next, the former wife argued that the trial court order allowing the withdrawal of her counsel was in error. The appellate court instructively noted:

> First, she suggests that the order allowing the withdrawal was an abuse of discretion because withdrawal was allowed too close to the pending October trial dates. That issue, however, was immediately remedied by the court's order striking those trial dates and rescheduling trial more than 90 days later. Second, Victoria asserts that the court erred in permitting Brunkalla's withdrawal because it was "doubtful" that another attorney would assume representation when he or she became aware that Victoria had limited funds and a looming, firm and final trial date. This is pure speculation. Further, the November 26, 2012, order reflects that Victoria was informed that any counsel she found could come in on an emergency basis to seek fees for undertaking the representation. Victoria views that order dismissively, noting that any counsel's request for fees on an emergency basis could, theoretically, have been denied when presented. Of course, the request might also have been granted. In any event, Victoria's argument is again pure speculation and simply does not convince us that the court abused its discretion in allowing Brunkalla to withdraw. In sum, we reject Victoria's argument that there was a Rule 13 violation.

The appellate court also provides guidance on how to seek pro se an award of attorney's fees. The conundrum is how to seek an award of fees for counsel when one already is representing oneself pro se. The appellate decision mentions that but focuses on the critical facts:

> Nor did Victoria present an affidavit from an attorney reflecting that he or she would be willing to undertake representation upon receipt of a specified retainer. As such, the court did not have either a basis for

> assessing what amount to award or any manner for ensuring that an award would even go to an attorney, as opposed to being used by Victoria in any manner she saw fit.

Accordingly, the appellate court side-stepped the issue one would hope it would have addressed, "Ultimately, however, we need not decide here whether section 501(c-1) authorizes an interim fee award to allow a pro se litigant to retain counsel." Regarding the heart of the denial of her petition for interim fees, the appellate court commented:

> Here, Victoria's petition requested $25,000 to $30,000 in interim fees and alleged that she had no funds to hire an attorney; however, the petition provided no verification, affidavits, or any other nontestimonial support for her request. In contrast, Keith's response to the petition alleged that he had already paid Victoria $12,000 in interim fees, that he owed his own attorneys outstanding fees, and that he lacked sufficient funds to further contribute. Further, Keith's response contained affidavits and exhibits to support his claims. Victoria points out that Keith's verified response admitted that his 2011 gross earnings were $210,000 and that she was unemployed. This, however, is overly simplistic and paints an incomplete picture of both the parties' finances and Keith's response in its entirety, which also alleged that his 2011 net earnings were $110,000, that Victoria was voluntarily unemployed, and, further, that other expenses, such as maintenance and child support, left him without funds to pay his own attorneys.

***Sheth* – Request for Continuance Not Granted Despite Request for More Time in Quest for Lawyer Who Would Take Case**

IRMO Sheth, 2014 IL App (1st) 132611 (August 22, 2014)

I put this case under the non-financial cases because it is unique. There is not another Illinois case directly on point. Ultimately, the appellate court ruled it did not have jurisdiction. But the crux of the opinion addressed the argument that he should have been granted a continuance in light of his search for a lawyer:

> [E]ven if we had jurisdiction over his appeal, Sushil would not prevail, as we find his arguments meritless. Finally, while Sushil argues that he should have been granted continuances in light of his search for an attorney, a trial court's decision on a requested continuance is reviewed for an abuse of discretion (citation omitted), and the record does not contain anything to indicate that the trial court here abused its discretion in ruling on Anita's motion and Sushil's motion to reconsider on the scheduled hearing dates.

Protective Orders

***Daveisha C.* – Protective Orders Involving Sensitive Matters Involving Children: Implications Especially for GALs**

In re Daveisha C., 2014 IL App (1st) 133870 (August 27, 2014)

This is one of the first case to address the limits of *Sholnick*. In *Skolnick*, a protective

order covering information received during discovery prevented an attorney from fulfilling her duty to report attorney misconduct. The circuit court denied the attorney's request to modify the protective order so she could disclose the misconduct to the Attorney Registration and Disciplinary Commission. *Skolnick*, 191 Ill. 2d at 218-19, 224. The Illinois Supreme Court held the trial court abused its discretion, noting that "[i]n the absence of any stated justification for refusing to modify the protective order, the interests of justice weigh decidedly in favor of allowing [the attorney] to fulfill her ethical duty to disclose the alleged attorney misconduct." *Skolnick*, 191 Ill. 2d at 226. The appellate court distinguished the circumstances.

A quote applicable to family law cases in terms of the role of a GAL, etc. states:

> Further, the Public Guardian contends his status as the petitioner grants him the right to receive a copy of Daveisha's recorded VSI, which is undermined by the protective order's acknowledgment requirement and contrary to the discovery rules, relying on Illinois Supreme Court Rule 201(b)(1) (eff. Jan. 1, 2013) (provides for full disclosure of any relevant matter) together with Illinois Supreme Court Rule 907(b) (eff. July 1, 2006) (provides a child's attorney and guardian at litem shall have access to all relevant documents),

Because there were no Illinois cases directly on point and it refers to case law from other states addressing, for example, how to handle sensitive information involving a child:

> As *Scoles* suggests, the State urges us to hold that in a case where sensitive material is the subject of a discovery dispute, the court need not have evidence that an attorney intends to misuse the evidence in violation of ethical rules before it can properly enter a protective order.
>
> We agree. In doing so, we recognize that *Scoles* is not binding and is factually distinguishable as a criminal case, which addresses concerns not relevant to juvenile court proceedings in Illinois. Nevertheless, we find instructive for our purposes the court's discussion about "the general right to discovery as it intersects with the flexibility afforded to the trial court, on a showing of good cause, to guard against unnecessary harm brought about through a defendant's access to discovery." *Scoles*, 69 A. 3d at 571.

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