SUMMARY OF 2012 ILLINOIS DIVORCE & FAMILY LAW CASES
CUSTODY, REMOVAL AND NON-FINANCIAL CASES

For GAL Seminar
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Custody and "Visitation"

Initial Custody / Supervised Visitation

Domestic Violence and Supervised Visitation

***Wittendorf* - Where Plenary OP in Existence Visitation Should Have Been Gradually Reintroduced, Visitation Should have Initially been Supervised and OP Should Not Have Been Modified to Allow Direct Contact**
Wittendorf v. Worthington, 2012 IL App (4th) 120525 (Rule 23 Order Withdrawn - November 30, 2012, original opinion filed - November 6, 2012)
This case involved a child born to unmarried parents during their abusive relationship. The appellate court determined that the trial court erred in creating a visitation schedule that failed to provide for a gradual reintroduction of the defendant to his son and by modifying the plaintiff's order of protection to allow for personal contact with defendant.

Regarding the father's visitation, the decision concluded:

> In determining visitation, the trial court should have applied the best interests standard set forth in section 602. However, we find that under the best interests standard or "endanger seriously" standard, the court abused its discretion in setting a visitation schedule that does not provide for a gradual reintroduction of the father and child and fails to account for L.W.'s tender age and lack of familiarity with Kenneth. On remand, the court shall create a new visitation schedule that is limited to supervised visitation in Springfield, Illinois. Under the new schedule, no overnight visitation shall be authorized.

The second point of the decision was whether the plenary OP was modified properly to provide for unsupervised visitation. The court modified the plenary order to allow for personal, mail, and telephonic contact "to the extent that such is strictly necessary to effectuate the terms" of the order. In critical language for future cases, the appellate court stated:

> Based on the evidence, the trial court abused its discretion in modifying Geannette's plenary order of protection to allow for personal contact. The restriction imposed by the court on the amount of personal contact between the parties fails to adequately account for the tumultuous nature of the parties' relationship. In this case, even minimal personal contact between the parties opens the door for harassment and abuse.

There is no doubt this decision was properly published.

***Brock* - Trial Court Finds Section 607(e)'s Over-breadth Renders it Unconstitutional**
Brock v. Brock, 02 D 12849 (Circuit Court of Cook County) December 21, 2012.
Rarely are trial court family law decisions widely publicized. But when the trial court finds a provision of our family law unconstitutional, we can anticipate that the ultimate result will be a published decision. In *Brock* the Cook County trial court found that §607(e) was so overly broad that it interfered with the fundamental right of a parent even when a compelling state interest may not be furthered by interference. I report on the decision because if its excellent synopsis of case law. The trial court compared the due process concerns involving a parent who has murdered the other parent ("the parent, grandparent, great-grandparent, or sibling of the child who is the subject of the order") *viz* visitation, there were not similar protections in in Section 607(e):

> (e) No parent, not granted custody of the child, or grandparent, or great-grandparent, or stepparent, or sibling of any minor child, convicted of any offense involving an illegal sex act perpetrated upon a victim less than 18 years of age including but not limited to offenses for violations of Article 12 of the Criminal Code of 1961, is entitled to visitation rights while incarcerated or while on parole, probation, conditional discharge, periodic imprisonment, or mandatory supervised release for that offense, and upon discharge from incarceration for a misdemeanor offense or upon discharge from parole, probation, conditional discharge, periodic imprisonment, or mandatory supervised release for a felony offense, visitation shall be denied until the person successfully completes a treatment program approved by the court.

***Perry* -- Temporary Custody Award Could Consider Wife's Work as Escort Where Wife Brought an Individual Who May Have Been One of Her Clients to Meet Children and Work Otherwise Kept Her Away from Home for Significant Periods**:
IRMO Perry, 2012 IL App (1st) 113054.
This is a case of what might be considered "bad facts" making bad law. Illinois divorce lawyers know that regarding custody under §602(b), "The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child." This case is an example of a situation where a parent seeks to "backdoor" negative evidence about his or her spouse under the guise of the evidence having an impact on the children.

The appellate court stated:

> Frank's argument for seeking temporary custody was that Lori's work as an escort was negatively affecting the children and was not in their best interest. Evidence was adduced at the hearing that Lori was bringing an individual, Thomas Jun, around the children, and that this individual may be one of her clients in her escort business. One of the specific factors to consider under section 602 is "the interaction and interrelationship of the child with his parent or parents, his siblings *and any other person who may significantly affect the child's best interest*." (Emphasis in original).
>
> Further evidence was provided by Frank's testimony that Lori was neglecting the children because of her escort business and as a result their schoolwork was

> deteriorating and her relationship with the children was deteriorating. Thus, Lori's work as an escort was indeed relevant in determining custody.
>
> The circuit court found that her work as an escort negatively impacted her care of the children, and there was evidence in the record to support the court's determination. The court noted Lori's insufficient explanation of her numerous out-of-town trips and influx of income in 2010. There was also evidence that Thomas Jun, who may have been one of Lori's escort service clients, was paying Lori $5,000 a month and was present with Lori on a continual basis around the children. Frank testified that when Lori began working as an escort again she began ignoring the children and had a difficult time managing the three boys. Both Frank and the guardian ad litem, Gloria Block, noted their significant concerns about the fact that the parties' eldest child, Frank, was throwing his homework in the garbage.

Even the appellate court, though, considered the record inappropriately once the “bell” was rung regarding the wife's escort service work. For example, the wife's cash flow from her any alleged escort service work really should have had no bearing on the issue of temporary custody. Nor should the trial court have allowed the pictures of the wife, which were purportedly from an escort service website, into evidence. While the appellate court suggests that allowing into evidence the pictures as apparently stemming from a certain escort service website constituted “harmless error”, I suggest that this negative evidence may have anything but harmless. Unfortunately, for the wife, though there was other evidence that the trial court could hang its hat in affirming the decision of the trial court.

The husband's arguments on appeal for the reasons that the trial court did properly “backdoor” this negative evidence are classic:

> As Frank rather cogently argues, "The fact that Lori works as an escort is not the issue. It is how her work impacts the children that is material." We also note Frank's very candid, fair, and unbiased treatment of the issue when he argues that "[a]ny prejudice from the use of the word 'escort' and the connotation of that term has no place in this case." It is clear that Frank's argument is firmly grounded on the best interest of the children.

To this I say - really? If the point were the best interest of the children solely, one would think that the husband would have refrained from seeking to have the court view the pictures apparently from an escort service website without taking the simple step of printing out the pages from the internet.

***Mancine* – Appellate Court Rejects Equitable Parent Claim Where Adoption Intended But Had Not Yet Occurred During Marriage**

IRMO Mancine, 2012 IL App (1st) 111138 (February 2, 2012)

The background of the case is unusual. I will quote from the introduction of the case:

> Miki and Nicholas began dating in the spring of 2008. At that time, Miki was

separated from her then-husband, John Mancine. Miki had a one-year-old adopted daughter named Elizabeth and had begun the process of adopting a second child, William, and was matched with a birth mother. Miki and Nicholas decided they would marry in approximately June or July of 2008. Because Miki had already started the adoption process of William as a single parent before she met Nicholas, Miki and Nicholas were advised by the adoption agent to finish the process of Miki's adoption of William, and then for Nicholas to adopt William as a stepparent after the parties' marriage. At the time, Miki and Nicholas resided in Wisconsin, where unmarried couples cannot simultaneously adopt a child. See Wis. Stat. Ann. § 48.82 (West 2008).

¶4 William was born on August 5, 2008, and his birth certificate reflected the name "William Michael Gansner." In early September 2008, the adoption agent visited Miki and Nicholas to update the home study completed in January 2008 because Nicholas had moved in with Miki and was co-parenting William. Miki's adoption of William was not yet finalized due to the six-month statutory waiting period. In the adoption agent's report of February 27, 2009, the agent noted that Miki named Nicholas as the sole guardian of William and any future child she has, and named her parents as alternate guardians. Nicholas took care of William, including diaper changes and feedings. On November 2, 2008, William was baptized. The church record for the baptism listed William's "parents" as Nicholas and Miki. Nicholas and Miki became formally engaged in December 2008.

¶5 William's adoption by Miki as a single adult was finalized in Wisconsin on March 4, 2009. The adoption papers identified William as "William Michael Gansner." Nicholas and Miki got married in May 2009. It was both Nicholas' and Miki's intent that Nicholas formally adopt William as a stepparent after their wedding. Miki had contacted William's adoption agent before their wedding and arranged for her to visit them immediately following the wedding to perform a screening for Nicholas' adoption of William. In June 2009 the adoption agent performed the stepparent adoption screening of Nicholas. The agent's report of June 9, 2009, reflected that the adoption agency intended to support the granting of Nicholas' stepparent adoption petition. In Nicholas' affidavit in support of his pleadings, he attached an e-mail from the adoption agent to Nicholas dated August 6, 2010, informing Nicholas that he was free to file his stepparent adoption petition, and he averred that this is a true and correct copy of the e-mail.

¶6 At that time, Nicholas and Miki had already started the process of adopting yet another child, Henry, and were in the process of moving from Wisconsin to Chicago, Illinois, to be closer to Miki's parents. Nicholas alleges that he was under the impression that he and Miki had to assemble a number of documents to accompany his adoption petition. Later, he learned that he simply had to provide a form petition and include a copy of the order of Miki's adoption of William. Nicholas alleges in his brief that "[a]s a result of all of these factors, the ministerial act of filing the stepparent adoption papers just never happened." It is undisputed that respondent never filed a petition to adopt William.

> ¶7 Nicholas and Miki moved to Chicago with Elizabeth and William. Henry was born on September 16, 2009. Nicholas alleges that since he was out of work and Miki was traveling for her job, he was the primary caretaker of the three children. Nicholas avers in his affidavit that on August 6, 2009, Miki e-mailed him asking, "Have you made any progress toward adopting William???? I would like you to take care of that ASAP," and telling Nicholas to "call Carol Gapen from law center for children and families."
>
> ¶8 Nicholas eventually became employed in a full-time position as an assistant Attorney General for the State of Illinois. Nicholas maintains he continued to act as the three children's primary caretaker and took Elizabeth and William to day care and Henry to Miki's parents' house every morning. In the evenings, Miki's mother and a nanny would pick up the children from day care and bring them home to be with Nicholas. Nicholas was listed as the children's parent at their day care facility. According to Nicholas, Miki always held out William as Nicholas' child and held out herself, Nicholas, Elizabeth, William and Henry as "the Gansner family."

In any event, the wife filed for divorce in Cook County in 2010. She alleged only one child -- Henry. The husband filed a response and counter-petition seeking sole custody of both children. The wife countered with a motion to dismiss the claim for custody regarding William based on his lack of standing. The trial court granted the wife's §2-619(a)(9) motion to dismiss and the appellate court affirmed. The issue on appeal was whether a non-biological father has standing to seek custody of a child he intended to adopt but never formally adopted. The Illinois court eventually rejected any “equitable parent” or similar claim of the husband to assert standing.

The appellate court noted that Illinois law:

> provides that a custody proceeding may be commenced by a nonparent " 'by filing a petition for custody of the child in the county in which he is permanently resident or found, *but only if he is not in the physical custody of one of his parents*.' " (Emphasis in original.) *In re R.L.S.*, 218 Ill. 2d 428, 434 (2006) (quoting 750 ILCS 5/601(b)(2) (West 2004)). Our supreme court has interpreted this section as a standing requirement for nonparents. *In re R.L.S.*, 218 Ill. 2d at 434-35 (citing *In re Custody of Peterson*, 112 Ill. 2d 48, 52 (1986)). " 'Standing' in this context refers to a statutory requirement the nonparent must meet before the trial court proceeds to the merits of the petition for custody." *In re Custody of M.C.C.*, 383 Ill. App. 3d 913, 917 (2008) (citing *In re R.L.S.*, 218 Ill. 2d at 436).

***Shinall* – Appellate Court Grants Sole Custody to Mother Where Evidence Indicates She Was More Likely to Foster Relationship of Child with Father**

Shinall v. Carter, 2012 IL App (3d) 110302 (January 5, 201).

The trial awarded mother sole custody of three-year-old girl. The appellate court ruled that the trial court did not err in awarding the mother sole custody and finding that parents did not have necessary level of respect for each other to cooperate in child rearing. In this case, the appellate court ruled that the mother was (awarded sole custody) was more likely to encourage father's

relationship with child than vice versa.

Regarding joint custody the appellate court stated:

> In this case, the record shows that Jeremy cooperated with Jessica on major parenting issues that directly affected Ava, such as support, visitation, and where Ava would reside during the pendency of this case. The majority of Jessica and Jeremy's disagreements consisted of petty bickering that was not much different than any other parenting couple, whether married or unmarried. On this record, it could be said that the parents have demonstrated their ability to follow their own oral agreement such that they similarly would have the "capacity to substantially comply with a Joint Parenting Order" as required under the language of the joint parenting statute. See 750 ILCS 5/602.1(c)(1)
>
> Nonetheless, the trial court did not abuse its discretion in denying joint custody. Here, the trial court found that awarding joint custody would not be in Ava's best interest because the parties did not have the necessary level of respect for each other to cooperate in Ava's child rearing, as indicated by their friction and need for third-party witnesses at their exchanges. Although Jeremy testified the parties were able to cooperate, Jessica contradicted Jeremy's testimony with evidence of animosity that had manifested into disparaging comments being said in front of Ava and Ava's day-care provider quitting to avoid being caught in the middle of the parties' conflict. We defer to the trial court's findings and, as such, cannot say that the trial court's denial of awarding joint custody was against the manifest weight of the evidence.

Regarding sole custody the appellate court case focused on the cooperation factor since other aspects were quite close:

> The court considered the evidence in its proper context and determined that most factors either favored neither party or were not applicable. The trial court properly focused on the factor of the willingness of each parent to facilitate a relationship between the minor and the other parent. The trial court found that Jessica would be more likely to encourage a close relationship between Ava and Jeremy in light of Jeremy's animosity toward Jessica and the disparaging comments he made about Jessica in front of Ava. The trial court additionally noted that Jessica had been Ava's primary caregiver since the parties' separation. *IRMO Hefer*, 282 Ill. App. 3d 73 (1996) (although there is not a presumption in favor of the existing custodian when making an 14initial custody determination as there is in modification of custody cases, a court may consider the period of time a child has spent with a parent under a temporary custody order).
>
> Essentially, the case was close, as indicated by the trial court, and the evidence did not strongly favor either party. Although the record could support a finding that Jeremy was more likely to encourage Jessica's relationship with Ava in light of his testimony stressing the importance of Ava's relationships with himself and Jessica as her parents and in light of Jessica's instructing Ava to call Nate "daddy," we

must defer to the trial court's findings. As such, we affirm the trial court's decision to award Jessica sole custody.

***Petrick* – Guardian ad Litem's Role: Once Post-Decree Proceedings Concluded GAL's Role is Concluded and Reappointment of former GAL on his own Motion was in Error**
IRMO Petrick, 2012 IL App (2d) 110495, July 19, 2012
Petrick is a groundbreaking case in Illinois that should be required reading for all GAL's and aspiring GALs. Because of the importance of this decision significant parts will be quoted from at some length.

The parties were divorced in April 2007 and the divorce judgment incorporated the MSA and the JPA. Curiously, the wife within the JPA was awarded sole custody. Shortly after the divorce judgment was entered the parties filed various petitions against each other for alleged violations of the MSA and JPA. The father, Edward, petition to modify visitation and to appoint a GAL On June 11, 2008, the court entered an agreed order modifying the visitation terms of the MSA and JPA based in part on the father's work schedule requiring a "process of corresponding back and forth each month to set the following month's visitation schedule." The order also stated that the parties "agree and have stated to the G.A.L. that there are no pending issues that have not been addressed with the G.A.L., and both parties agree to withdraw their pending petitions." The order further provided that the parties "agree that they will not file additional petitions relating to the children without first going to mediation" and that they "agree to use Dan O'Connell as an ongoing mediator in this case."

While it should have been readily apparent to a judge later handling the case, the former GAL and later mediator should never have been "reappointed" as a GAL. And he certainly should not have been reappointed as a GAL without anything pending. In fact, the former GAL's former role in the case commenced with his filing of a motion entitled, "Motion to Compel Parents' Cooperation with GAL."

Ultimately, the pro se father, Edward Petrik, appealed from orders (1) reappointing attorney Daniel F. O'Connell as the guardian ad litem (GAL) in Lynne and Edward Petrik's dissolution-of-marriage proceeding; (2) denying Edward's motion to discharge O'Connell as GAL and to strike his GAL report; (3) granting O'Connell's petitions for GAL fees; and (4) denying Edward's petition for sanctions against O'Connell pursuant to Illinois Supreme Court Rule 137. The appellate court ruled in favor on the father's requests with the exception of his petition for sanctions.

The appellate court found that the trial court abused its discretion by reappointing O'Connell as GAL since nothing was pending at the time. The appellate court reviewed case law and statutory law that had a bearing on the issue of the appointment of a GAL while nothing was pending:

> The Act does not permit a trial court to modify a judgment of dissolution sua sponte when no postdissolution petitions have been filed. See *In re Custody of Ayala*, 344 Ill. App. 3d 574, 584-85 (2003) (holding that the trial court exceeded its authority when it awarded custody of a child to the child's stepmother and grandparents where no pleading requested that relief); *In re Marriage of Fox*, 191

> Ill. App. 3d 514, 520-22 (1989) (holding that the trial court exceeded its authority when it modified custody when no petition to modify custody was pending); see also *Ligon v. Williams*, 264 Ill. App. 3d 701, 708-09 (1994) (holding that the trial court exceeded its authority when it awarded custody of a child to the father, when mother's petition brought under the Illinois Parentage Act of 1984 (750 ILCS 45/1 et seq.) did not seek a ruling on custody). Rather, section 511 of the Act provides that a judgment of dissolution "may be enforced or modified by order of court *pursuant to petition*." (Emphasis in original). 750 ILCS 5/511. Regarding modification of a child custody order in particular, section 601(d) of the Act dictates that "[p]roceedings for modification of a previous custody order *** must be initiated by serving a written notice and a copy of the petition for modification upon the child's parent, guardian and custodian at least 30 days prior to hearing on the petition." 750 ILCS 5/601(d).

Then the appellate court stated:

> The requirement of a pending proceeding, initiated by the filing of a petition, is significant, because the Act contemplates appointment of a GAL only to assist the court in resolving pending proceedings. Section 506(a)(2) of the Act authorizes a court to appoint an attorney to serve as a GAL "[i]n any *proceedings* involving the support, custody, visitation, education, parentage, property interest, or general welfare of a minor or dependent child." (Emphasis in original) 750 ILCS 5/506(a)(2). Regarding appointment of a GAL in a child custody proceeding specifically, section 601(f) of the Act provides that "[t]he court shall, at the court's discretion or upon the request of any party entitled to petition for custody of the child, appoint a guardian ad litem to represent the best interest of the child for the duration of the custody *proceeding* or for any modifications of any custody orders entered." (Emphasis in original.) 750 ILCS 5/601(f). Nowhere does the Act provide for appointment of a GAL to investigate out-of-court disputes that are not the subject of pending proceedings.

The appellate court also rejected O'Connell's argument that he was never discharged as a GAL. The appellate court stated:

> Whether the June 11, 2008, order served to discharge O'Connell as GAL is not at issue on appeal. At the February 24, 2010, hearing on Edward's motion to discharge O'Connell, the trial court found that the June 11, 2008, order discharged O'Connell pursuant to local rule 15.20(l), and no one appealed that finding. The trial court went on to find that O'Connell "was acting as a mediator" between June 11, 2008, and March 26, 2009, and, again, no one appealed that finding.

This case warns of the dangers inherent in a professional maintaining dual roles - as mediator and possible GAL:

> O'Connell testified at his deposition that he believed that his continued involvement in the case after June 11, 2008, consisted of "activities more in keeping with a guardian ad litem's role." However, O'Connell's perception of his

> role does not override the objective and undisputed considerations that, after June 11, 2008, he was acting under a court order designating him as an "ongoing mediator," and, in its February 24, 2010, order, the trial court found that he was acting as a mediator, not as GAL, from June 11, 2008, to March 26, 2009.

The appellate court stated:

> Based on the foregoing, we conclude that the trial court abused its discretion in reappointing O'Connell as GAL on March 27, 2009. With no postdissolution proceedings pending, there was no apparent justification for the trial court's reappointment of O'Connell as GAL.
>
> We also agree with Edward that the trial court's "blank check" reappointment order, which did not specify the tasks expected of O'Connell as GAL, exacerbated the problem of reappointing O'Connell as GAL when no postdissolution proceedings were pending. Section 506(a)(2) of the Act authorizes a trial court to appoint a GAL "to address the issues the court delineates." 750 ILCS 5/506(a)(2) (West 2008). The GAL is then obligated to "investigate the facts of the case" and "interview the child and the parties" before either testifying or submitting a written report regarding the GAL's recommendations. 750 ILCS 5/506(a)(2) (West 2008). In the absence of pending proceedings, appointing a GAL to investigate facts, conduct interviews, and give a recommendation raises the question, "To what end?" Furthermore, circuit court rule 15.20(g) required the trial court in this case to specify in the reappointment order "the tasks expected of" O'Connell as GAL (16th Judicial Cir. Ct. R. 15.20(g) (Apr. 12, 2007)), which it did not do. Given the absence of pending proceedings and the reappointment order's silence with respect to what tasks were expected of O'Connell, it undoubtedly came as a surprise to Edward when O'Connell filed his GAL report on September 15, 2009, recommending a change in visitation.

Finally, the appellate court reversed the award of fees to O'Connell consistent with its decision, stating:

> A court may award only GAL fees that are "reasonable and necessary." 750 ILCS 5/506(b) (West 2008). In the absence of pending postdissolution proceedings, and in the absence of an order specifying the tasks O'Connell was to complete, none of the fees for work O'Connell performed between March 27, 2009, and February 24, 2010, were either reasonable or necessary. Any work O'Connell performed during that time was at his own peril.

In further taking O'Connell to task the appellate court referenced the Supreme Court 900 series rules regarding mediation:

> To effectuate this purpose, Rule 907(e) provides that a GAL "shall determine whether a settlement of the custody dispute can be achieved by agreement, and, to the extent feasible, shall attempt to resolve such disputes by an agreement that serves the best interest of the child." Ill. S. Ct. R. 907(e) (eff. July 1, 2006). Here,

> rather than work to resolve a pending custody dispute, O'Connell filed his motion to compel the parents' cooperation despite the absence of pending postdissolution proceedings. He later filed a report recommending that visitation be modified, when no petition to modify visitation was pending. Without necessarily attributing negative motivations to his actions, it nevertheless would be inconsistent with the public policy encouraging settlement to award fees to O'Connell for his work that encouraged postdissolution litigation between the parties.

The SCR 137 discussion did not break new ground. But there was an interesting discussion of petitions for adjudication in indirect criminal contempt which, "covers the entire gamut of disrespectful, disruptive, deceitful, and disobedient acts (or failures to act) which affect judicial proceedings."

Custody - Joint Custody

***Kincaid* - Where Counseling Started Before the Divorce, Continuation of Counseling is Not a Joint Major Decision**
IRMO Kincaid, 2012 IL App (3d) 110511 (July 3, 2012)
The opinion stated:

> Because counseling was ongoing when the joint parenting agreement was signed, the children's continued participation in counseling was not "a major decision" that the parties had to discuss and agree on.

Also, if the father objected to the counseling post-divorce, he had to initiate mediation. Since he did not do so, the court affirmed the trial court's ruling that he had to pay half of the children's counseling bills.

Custody - Custody Modification

***Grunstad v Cooper* - Directed Verdict Upheld in Custody Modification Case as Well as denial of Request for In Camera Interview**
Grunstad v Cooper , 2012 IL App (3d) 120524 (October 17, 2012)

Directed Verdict Upheld: Regarding the modification of custody, the opinion stated:

> In assessing the evidence the trial court emphasized that the law favored the finality of custody decisions and created a presumption in favor of the child's current custodian.

The appellate court concluded the father failed to present clear and convincing evidence to establish his *prima facie* case. The case has a good discussion regarding directed verdicts and the standards that apply, i.e., the two prong test with the first being establishing a prima facia case

with at least some evidence on every essential element. The appellate court stated that "In its role as the finder of fact, the court must consider the totality of the evidence presented, including any evidence which is favorable to the defendant." But the standard is not to consider the evidence as in cases with jury trials in the light of evidence most favorable to the Plaintiff. "Rather, the circuit court must weigh all the evidence, determine the credibility of the witnesses, and draw reasonable inferences therefrom."

Denial of In Camera Interview: Regarding the denial of an in-camera interview with a 13 year old child, the opinion stated:

> the trial court did not abuse its discretion in not conducting the *in camera* interview with the oldest child as there was ample evidence presented by other witnesses to know the oldest child's custodial preference.

Grandparent Visitation

***Anaya R.* -- Grandmother Failed to Rebut Presumption That Mother's Denial of Visitation Was Not Harmful to the Child**:
In re Anaya R., a Minor, 2012 IL App (1st) 121101 (August 31, 2012)
This case resulted from petitioner Mildred M.'s appeal of the trial court's order denying her petition for visitation with her five-year-old granddaughter, Anaya R. (the child). Mildred is the paternal grandmother of the child, and Vanessa M. R. is the child's mother. The child's father Mauricio, Mildred's son, was deported to Ecuador in 2008. On appeal, Mildred claimed that the trial court failed to properly consider the factors listed in §607(a-5) of the IMDMA, commonly referred to as the grandparent visitation statute, and that she presented sufficient evidence to demonstrate that a denial of visitation would harm the child. The appellate court ultimately affirmed.

The appellate court first cited *Flynn v. Henkel*, 227 Ill. 2d 176, 181 (2007) for the presumption "is the embodiment of the fundamental right of parents to make decisions concerning the care, custody, and control of their children which is protected by the fourteenth amendment." In that case, the Illinois Supreme Court case concluded:

> Neither denial of an opportunity for grandparent visitation, as the trial court found, nor a child "never knowing a grandparent who loved him and who did not undermine the child's relationship with his mother," as the appellate court held, is "harm" that will rebut the presumption stated in section 607(a–5)(3) that a fit parent's denial of a grandparent's visitation is not harmful to the child's mental, physical, or emotional health. Cf. *Lulay v. Lulay*, 293 Ill. 2d at 476-78.

The appellate court in this case concluded, "While Mildred presented evidence that she was heavily involved in the child's life, she did not present evidence that the effect of denying visitation would be any different than the type of "harm" rejected in *Flynn.* Then, after noting

the contentious relationship between the paternal grandmother and the mother, the appellate court stated, "Thus, even if here, Mildred is more involved than the grandmother in *Flynn*, the negative aspects of the relationship are also greater, and we cannot find that Mildred's involvement in the child's life alone is sufficient to demonstrate that the trial court's decision was against the manifest weight of the evidence." Accordingly, the appellate court affirmed the trial court's determination that the mother did not rebut the presumption that the mother's denial of visitation was not harmful to the child.

Guardianship

***Karbin* – Appellate Court's Decision Reversed in 2012 by Illinois Supreme Court Re Authority of Plenary Guardian to Continue Divorce Proceedings on Behalf of Ward Where Spouse Initiated Divorce and Guardian Filed Counter-Petition on Behalf of Disabled Person**

Karbin v. Karbin, 2011 IL App (1st) 101545 (06/30/11) and 2012 IL 112815 (October 4, 2012)
Where a husband filed a petition for the dissolution of his marriage to a disabled person and the disabled person's plenary guardian filed a counterpetition for dissolution, the trial court should not have dismissed the guardian's petition after the husband voluntarily dismissed his petition and left the guardian's petition as the only pending dissolution petition.

The appellate court had reasoned that the Illinois Supreme Court's rulings in *IRMO Drews* (115 Ill. 2d 201, 203-04 (1986), and *IRMO Burgess* (189 Ill. 2d 270 (2000)), that a plenary guardian does not have authority to seek a dissolution of marriage on behalf of award applied. The issue was whether the language of section 11a–17 of the Probate Act authorizing a guardian to "maintain" a dissolution action if the ward filed a petition for dissolution before being adjudicated a disabled person could be construed as giving the guardian authority to proceed with seeking a divorce. Recall that *Drew* had held that the plenary guardian does not have standing to maintain a divorce action on behalf of the ward. But *Burgess* had ruled that the bar in *Drews* did not apply to a divorce petition filed before the guardian was appointed for the petitioning spouse.

The key language of the decision was:

> By overruling *Drews*, we align Illinois with those states which allow a guardian to seek court permission to bring a dissolution action on behalf of a ward where not expressly barred or allowed by statute. *** We therefore reverse the judgments of both the circuit and appellate courts and hold that Marcia's petition should be allowed to be filed. On remand, we direct the circuit court to hold a "best interests" hearing (see 755 ILCS 5/11a-17(e) (West 2008) (setting forth factors to be considered in determining the best interests of the ward)) in order to determine whether it is in Marcia's best interests to seek the dissolution of her marriage.

Comment: Regarding the appellate court opinion I had commented:

> I agree with Justice Cahill's dissent. "... I believe *Drews* can be limited to cases *initiated* by the guardian of the disabled spouse. I would remand this case with directions to the trial court to decide whether the counterpetition filed by the guardian is in the best interest of the ward."

The Illinois Supreme Court did just this, "For the foregoing reasons, we reverse the judgments of the appellate and circuit courts. This cause is remanded to the circuit court for further proceedings consistent with this opinion."

The Illinois Supreme Court concluded:

> In our view, the circuit court's assessment of the petition for dissolution filed by a guardian on behalf of a ward pursuant to the standards set forth in section 11a-17(e) provides the needed procedural and substantive safeguards to ensure that the best interests of the ward are achieved while preventing a guardian from pursuing a dissolution of marriage for his or her own financial benefit, or because of the guardian's personal antipathy toward the ward's spouse. *To further safeguard the interests of all parties involved, we agree with Marcia that the guardian must satisfy a clear and convincing burden of proof that the dissolution is in the ward's best interests*. We believe a heightened burden is appropriate because "[c]ases involving the dissolution of an incompetent spouse's marriage *** present issues involving personal interests more complex and important than those typically presented in a civil lawsuit." *Ruvalcaba*, 850 P.2d at 683; cf. *In re Longeway*, 133 Ill. 2d at 51. (Emphasis added.)

***Guardianship of Tatyanna* -- Voluntary Relinquishment Not Established Even if This Standard Applied to Pre-January 1, 2011 Case**

In re the Guardianship Estate of Tatyanna T., a Minor, 2012 IL App (1st) 112957 (August 10, 2012)

Pursuant to an oral agreement between the parties, petitioners Cary T. and her daughter, Frances T., cared for Tatyanna T., respondent's biological daughter, in their home from the time Tatyanna was born until she was seven years old, at which point she began living with respondent. Petitioners thereafter filed a petition for guardianship over Tatyanna, arguing that respondent had voluntarily relinquished custody of Tatyanna to them. Respondent filed a motion to dismiss that petition, which the trial court granted. Ultimately, the appellate court affirmed the trial court's decision.

On appeal, petitioners argue that because respondent conveyed what they called a "constructive guardianship" over Tatyanna to them, the trial court erred in dismissing their petition for lack of jurisdiction. The key question was the issue of voluntary relinquishment.

According to the Probate Act the court lacks jurisdiction to hear a petition for the appointment of a guardian of a minor when:

> "(i) the minor has a living parent *** whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor, unless: *(1) the parent or parents voluntarily relinquished physical custody of the minor; (2) after receiving notice of the hearing under Section 11-10.1, the parent or parents fail to object to the appointment at the hearing on the petition; or (3) the parent or parents consent to the appointment as evidenced by a written document that has been notarized and dated, or by a personal appearance and consent in open court; or (ii) there is a guardian for the minor appointed by a court of competent jurisdiction*. There shall be a rebuttable presumption that a parent of a minor is willing and able to make and carry out day-to-day child care decisions concerning the minor, but the presumption may be rebutted by a preponderance of the evidence." (Emphasis supplied). 755 ILCS 5/11-5(b).

Paragraph (b) was amended, effective January 1, 2011, to include language granting standing to petitioners when a parent who is otherwise alive and willing and able to care for the child has "voluntarily relinquished physical custody of the minor." 755 ILCS 5/11-5(b). But in this case, the arrangement of Tatyanna's care took place and was terminated before this amendment took effect.

In terms of being instructive for future cases, the decision states:

> It appears that in response to R.L.S., our legislature again amended paragraph (b) in 2011, codifying *Newsome's* and the Marriage Act's "physical custody"standard, thus allowing a nonparent petitioning for guardianship to have standing, even if the biological parent is otherwise able to care for the child, if the parent's custody has been voluntarily relinquished.

The appellate court stated that this recent amendment to paragraph (b) represents a substantive change in the law which cannot be applied retroactively to respondent. But the appellate court later stated that assuming for the sake of argument that the amendment were not substantive the decision would be the same because there was no voluntary relinquishment of custody established. The decision bears reading on its review of case law regarding the voluntary relinquishment - since the court in guardianship can look to voluntary relinquishment cases under the IMDMA (and vice versa).

H.B. **Probate Act does not Authorize Emergency Petitions and Required Best Interest Finding, Etc., Given Circumstances of Case**
In re Estate of H.B., 2012 IL App (3d) 120475 (November 28, 2012)
The players are:

Courtney B. is the mother of the minor H.B, who was born out of wedlock on April 25, 2005. Mitchell T. is the biological father of H.B., and, according to the record in this case, he exercised his right to visit H.B. every other weekend. Maria and Darrell are H.B.'s maternal

grandparents. The background as recited by the appellate court:

> The biological mother (Courtney), appealed the trial court's order of November 2010, awarding "temporary" guardianship of H.B. to Maria, without Courtney's consent, pursuant to the Probate Act of 1975. She also appealed from the order of March 2012, granting the maternal grandparents, Maria and Darrell B. (Darrell), joint guardianship of H.B. over Courtney's objection, also under the Probate Act. The appellate court reversed the 2010 order and vacated and remanded the 2012 order.

The appellate court instructively stated:

> However, after carefully reviewing the Probate Act, we are unable to find any provisions allowing a court to enter an order for "emergency" or "temporary" guardianship of a child pursuant to section 11-8 of the Probate Act, contrary to wishes of a biological parent. Instead, an emergency request to remove a child from the care of a biological parent, such as that presented by the first petition in this case, may be addressed using the Juvenile Court Act of 1987 (705 ILCS 405/1-1 et seq. (West 2010)) (Juvenile Court Act), which is specifically designed to address such urgent situations. However, after carefully reviewing the Probate Act, we are unable to find any provisions allowing a court to enter an order for "emergency" or "temporary" guardianship of a child pursuant to section 11-8 of the Probate Act, contrary to wishes of a biological parent.4 Instead, an emergency request to remove a child from the care of a biological parent, such as that presented by the first petition in this case, may be addressed using the Juvenile Court Act of 1987 (705 ILCS 405/1-1 et seq. (West 2010)) (Juvenile Court Act), which is specifically designed to address such urgent situations.

The appellate court then stated:

> In this case, Maria admitted that she attempted to "manipulate the situation" rather than risk that the court might allow DCFS to place H.B. with someone else. Maria's decision to avoid the Juvenile Court Act and to petition for guardianship under the Probate Act, without a biological parent's consent, is problematic to us because this approach did not allow Courtney to request the trial court to provide her with a court-appointed attorney pursuant to the Juvenile Court Act. 705 ILCS 405/1-5(1). In addition, as carefully noted by the trial court, this approach also prevented the court from requiring Courtney to complete court-ordered programs designed to improve her parenting skills under the authority of the Juvenile Court Act. Finally, the second order of guardianship removed H.B. from Courtney's care until H.B. reached the age of 18, which deprived Courtney of her right, as a biological parent, to make and carry out the day-to-day child care decisions concerning her daughter.

There are two limited situations under the Probate Act of seeking to accomplish something

similar to what was sought. First, the court could appoint a non-parent as guardian based on the biological parent's written designation. And this is subject to several stringent requirements such as being approved by the non-appointing parent if wiling and able to make the day-to-day decisions regarding child care. Second, whether there is not a written designation that complies with the Probate Act requirements, The Probate Act allows the court to appoint a nonparent as a guardian of a minor only *after* the court finds the biological parent or parents are not willing or able to make and carry out the day-to-day child care decisions for their child. 755 ILCS 5/11-5(b). The Act provides, "There shall be a rebuttable presumption that a parent of a minor is willing and able to make and carry out day-to-day child care decisions concerning the minor, but the presumption may be rebutted by a preponderance of the evidence."

The appellate court commented that:

> Maria's attorney did not offer any evidence concerning H.B.'s best interest, nor did counsel attempt to rebut the statutory presumption under section 11-5(b) that Courtney was both willing and able to carry out day-to-day child care decisions concerning H.B. Further, the trial court did not make any finding regarding H.B.'s father's willingness or ability to make the day-to-day child care decisions concerning H.B. as required by section 11-5(b) of the Probate Act before entering the first order of guardianship. 755 ILCS 5/11-5(b).

So the appellate court concluded that the trial court erred in granting the emergency petition both because there was no authority for an emergency petition under the Probate Act and because there was a required initial determination that needed to be made, i.e., that guardianship was in H.B.'s best interest and that Maria had rebutted the presumption that Courtney was willing and able to make the day-to-day care decisions for her daughter.

This case also bears interesting reading as to the second petition under the Probate Act. Ultimately, given the unique circumstances, the appellate court remanded for a new hearing rather than outright reversing with the potential opportunity to follow the standards of the Probate Act in terms of standing: "In spite of good intentions, the trial court did not conduct the necessary bifurcated examination of these two separate factual issues before granting the second petition for guardianship in favor of the maternal grandparents on March 2, 2012."

Removal

Removal Granted

***IRMO DTW* – Removal to Professional Basketball Player Father Where Significant Evidence of Alienation – Even Where Removal Petition Filed Late**

IRMO D.T.W and S.L.W., 2011 IL App (1st) 111225 (December 30, 2011)

DTW involves a professional basketball player awarded custody and granted leave to remove the child to Florida. For professional basketball fans, we all know who this case involved: a native

son who chose not to sign with the Chicago Bulls.

Alienation: This case involves an award of custody against what was the primary caretaker of the children. The discussion regarding alienation is significant because it affected the removal decision:

> Contrary to respondent's argument, the record shows that her alienating behavior worsened during the two-year course of the custody proceeding. The record also shows that respondent had ample opportunity to comply with Doctor Amabile's recommendations to seek counseling but failed to do so.

Perhaps the most remarkable portion of the decision addressed the trial court's granting leave to remove from Illinois to Florida:

> Respondent claims the court erred in prompting and allowing D.T. to a file a petition for removal after he had rested his case. In the alternative, respondent maintains the court erred in granting D.T.'s petition.

***Kincaid* - Removal Properly Granted to Texas Where Support Network of Extended Family, Career Advancement and Other Factors Supported Removal**

IRMO Kincaid, 2012 IL App (3d) 110511 (July 3, 2012)

Regarding the first removal factor, the enhancement of the general quality of life, the decision stated:

> the court found that the move would likely enhance the general quality of life for both Lynne and the children. The court noted that the move would increase Lynne's income and provide her with greater opportunities to advance her career. The move would also provide both Lynne and the children a support network of extended family, which Lynne does not have in Illinois. The court noted that both children are enthusiastic about attending school in Austin, where the educational opportunities are at least equal to the schools in Frankfort.

Regarding the second factor, motives of the one seeking removal, the court found “not a scintilla of evidence to suggest that interfering with the relationship between Dr. Kincaid and the children [is] a factor."

Regarding the third factor, the motives of the parent opposing removal, the trial court had found:

> Brian's motives for opposing the move "are deeply steeped in obtaining a favorable financial settlement, rather than his professed statement th[at] 'it will interfere with his relationship with his children.' " The court believed that Brian's primary focus was his career, not his children, as evidenced by his failure to take advantage of his mid-week and summer visitation with the children.

This is in keeping with my earlier writings that analogized this to the parable of the talents and the importance for the non-custodial parent of actually taking advantage of the parenting time awarded if there is ultimately a removal battle.

Regarding the factors (four and five) involving the impact on the non-residential parent's parenting time, the court stated:

> the court stated that it had "every reason to believe that the proposed visitation schedule will allow Dr. Kincaid to maintain his relationship with his children, and if he takes advantage of all of it, enhance it."

The court ultimately found that the trial courts findings were not against the manifest weight of the evidence. I note that the discussion stated:

> It allows for monthly visitation and actually increases the number of days the children will spend with Br

(affirming removal where visitation would be somewhat increased).

When giving advice to individuals seeking removal, this is consistent with what my advice usually is, i.e., in terms of "day counting" except in unusual circumstances to be proposing at least the same and more likely more time than before the removal.

In its conclusion regarding the better employment factor (which goes to the trickle down theory, i.e., general improvement in the quality of life), the appellate court stated:

> First, Lynne testified that she searched for jobs in Illinois but was unable to find any that are comparable to the jobs she has been offered in Austin. She explained that the jobs she has been offered in Austin provide her with much greater opportunities for advancement than any job in Illinois. Better employment is a reasonable justification for removal. See *In re Marriage of Parr*, 345 Ill. App. 3d 371, 379 (2003).

Coulter and Trinidad **-- Illinois Supreme Court - Parties by JPA May Pre-Agree to Removal**
IRMO Robert Lee Coulter and Eleanor Trinidad, 2012 IL 113474 (September 20, 2012)
The parties were divorce in May 2008 and the mother received primary custody fo the three minor children based on the Joint Parenting Agreement. After the mother, Amy Trinidad, informed the father, Robert Lee Coulter (Lee), of her intention to move to California with the children as permitted by their joint parenting agreement, he sought a preliminary injunction barring her from removing the children from Illinois. Amy thereafter filed a petition for temporary removal. After a hearing, the circuit court of Will County denied the injunction. The appellate court reversed and remanded in an unpublished decision. 2011 IL App (3d) 110424-U. The Illinois Supreme Court allowed Amy's petition for leave to appeal pursuant to Supreme Court Rule 315 (Ill. S. Ct. R. 315 (eff. Feb. 26, 2010)). The Illinois Supreme Court reversed the appellate court's judgment.

The JPA addressed potential removal:

> Each party agrees that so long as Lee is a resident of Illinois the children shall not be removed from the State of Illinois for a period of twenty-four (24) months subsequent to the entry of a Judgement herein. The parties further agree that in the event the Mother wishes to remove the children to the State of California, more particularly, Southern California or Orange County, she shall provide the Father with her notice of intent to do so. As stated hereinabove, no removal shall take place in the first twenty-four (24) months[;] however, during the next twelve (12) months, the parties agree to mediate and/or discuss a removal to Southern California and if the parties reach an agreement then the removal shall be allowed.
>
> If the parties do not reach an agreement between the twenty-fourth and thirty-sixth month after the entry of a Judgement herein then the Mother will be free to remove the children and herself to Southern California without any contest from the Father as to a removal. In the event the parties do not work out an agreement between the twenty-fourth and thirty-sixth month the mother is then allowed to remove the children, the Father shall still have the right to have the Court determine the parenting schedule even though he has no further right to contest the issue of removal.
>
> The provisions with respect to removal set forth hereinabove pertain only to the Mother's desire and/or intent to remove the children to Southern California. [If] [t]he Mother desires to remove the children to an out of state location other than Southern California then these provisions shall not apply and the Mother shall be subject to the statutory provisions of Section 609 of the [Illinois Marriage and Dissolution of Marriage Act]."

On May 3, 2010, five days short of the second anniversary of the entry of the judgment of dissolution, Amy's attorney gave Lee's attorney written notice of her intent per the terms of the JPA to relocate to California. The letter specifically requested that Lee's attorney respond to the notice. Lee neither responded, either directly or through his attorney, nor initiated mediation or discussion with Amy regarding the planned removal. Then in March 2011, two months before the expiration of the 12-month period for discussion or mediation, Lee filed an emergency petition seeking to enjoin Amy from removing the children to California. He alleged that Amy had not requested mediation. He also alleged that the removal provision in the JPA contained "insufficient evidence to support a finding that removal is in the children's best interest." He alleged that a substantial change in circumstances had occurred such that he should be given sole custody of the children.

Amy responded by filing her petition for temporary removal in May 2011, nothing that removal was specifically allowed by the terms of the MSA. In June 2011, the trial court denied Lee's petition for injunction. Although the court did not specifically state that it was allowing Amy's petition for temporary removal, it did state that it would be necessary to modify the visitation schedule because the children would be moving to California. She filed her petition for

permanent removal in July 2011. Lee took an interlocutory appeal. The appellate court found that the trial court had abused its discretion in denying the request for injunction . The appellate court the appellate court stated that granting a preliminary injunction would "preserve the status quo" and would "do no more than prohibit respondent from an act which she is already lawfully prevented from doing." On remand, the appellate court required the mother to return the children to Illinois. The Supreme Court entered a stay of that order in allowing the petition for leave to appeal.

The sole issue on appeal was whether in light of the provisions of Section 609(a) the trial court abused its discretion when it denied Lee's request for a preliminary injunction to bar Amy from removing their children from Illinois. And the first query for the supreme court was whether the judgment which incorporated the JPA contained removal provisions constitute that constituted the leave of court to remove pursuant to Section 609 ("The court may grant leave, before or after judgment, to any party having custody of any minor child or children to remove such child or children from Illinois***)

The crux of the decision states:

> Lee argues that despite the JPA, which expressly contemplates removal, no court has yet made a determination as to whether removal would be in the best interests of the children. He asserts that this question must be resolved by the court before Amy can be allowed to take the children to California.
>
> We disagree. *** At the very least, the JPA evinces Lee's agreement that the planned move would not be against their best interests.

The Court concluded:

> In sum, the parties' JPA was incorporated into the judgment of dissolution and was thereafter enforceable as an order of the court. The agreement expressly granted Amy leave to remove the children provided that she complied with certain requirements. She fully complied. Lee's express waiver of any objection to removal should have been enforced by the circuit court and, thus, the court properly denied his petition for a temporary restraining order.

The court finally stated that the father was not "entirely without recourse" and commented that his petition to change custody remained pending and that the father would "have the opportunity to meet his burden."

***Coulter* -- Trial Court's Grant of Removal Affirmed Where Mother Received Job as Foreign Service Officer with State Department**

IRMO Melissa and Donald Coulter, 2012 IL App (3d) 100973, (January 13, 2012)

2012 brings with us two *Coulter* cases - *Coulter v. Trinidad* by the Illinois Supreme Court and this earlier *Coulter* case from the Third District. In this *Coulter* decision, the trial court's granted

the mother's petition for removal of her nine-year-old daughter, after the mother obtained employment as a foreign service officer for State Department. The appellate court somewhat surprisingly affirmed the decision as not against the manifest weight of the evidence. The mother would have two-thirds overseas posts and one-third posts in Washington, D.C. The posts would last for two to three years, with transitions typically occurring in summers. The appellate court noted the trial court's findings that the move of mother would greatly enhance quality of life for mother and child. The trial court's decision stated, "The economic, social, educational and cultural opportunities afforded by [Melissa's] achievement of obtaining a position with the United States State Department as a Foreign Service Officer cannot be understated."

The mother attached to the petition data sheets reported that the schools in Virginia or with American students in overseas schools had better SAT schools than the national average. More importantly, she attached a proposed parenting agreement to her petition. It proposed 10 weeks visitation to the father during the summer (basically the entire summer except two weeks). Transportation costs would be covered by the State Department. The mother proposed that she would assume responsibility to ensure that the children were chaperoned during travel from [her] residence to [Donald's] residence. There was also a proposal regarding extended spring break and Christmas break. The proposed agreement provided that the mother would provide the daughter with a computer and Internet access so Donald could communicate with her via webcam and e-mail. The agreement provided that the mother would pay the cost for school (actually the portion not covered by the State Department).

Curiously, at the time of the removal hearing the mother had been working in Washington D.C. and had been living in Virginia. In any event, best viewed this case can be viewed as one where the appellate court simply affirmed the rulings of the trial court. Recall that the standard is manifest weight. To reverse the appellate court needed to find that the trial court's findings were against the manifest weight of the evidence. Thus, the appellate court concluded:

> This is undoubtedly a difficult case, as the removal significantly decreases Donald's visitation time. Nevertheless, under the circumstances of this particular case, we cannot say that the circuit court's findings on the relevant factors were against the manifest weight of the evidence. See, e.g., *R.M.F.*, 275 Ill. App. 3d at 48 ("[t]he presumption in favor of the trial court's decision is compelling in such cases and should not be disturbed merely because we might arrive at a different

Removal Denied

***Demaret* – Trial Court's Decision Denying Removal Not Against Manifest Weight Where Trial Court Properly Addressed Each Factor Finding None Supported Move and Even Where Move is for Significantly Higher Income for Financially Successful Mother**
IRMO Demaret, 2012 IL App (1st) 111916 (January 27, 2012)
In this case the 2006 divorce judgment incorporating the parenting agreement awarded the wife sole custody of the parties' four children. The father received parenting time alternate weekends and one evening per week. He also had a right of first refusal when the mother was out of town

for work. At the time of the divorce the mother expressed concerns regarding the father's alcohol consumption. The parenting agreement contained provisions regarding the father's alcohol use during his parenting time. In July 2010 the mother filed a petition for removal seeking to move the children to New Jersey.

From 2001 until July 2010, the former wife (Elizabeth) worked for Arthur J. Gallagher (Gallagher), servicing clients in their international operations. In 2007, her gross income was $266,933; in 2008, she earned $293,176; and in 2009, she earned $263,263. Her job required her to travel periodically, both within the country and internationally.

The appellate court then summarized the Elizabeth's next choices:

> In December 2009, Elizabeth began exploring an employment lead with Marsh, a company located in New York. Elizabeth knew that accepting a job with Marsh would require that she relocate to the New York area. In June 2010, Elizabeth executed an employment contract with Marsh. She would begin with a gross salary base of $245,000, which would increase to $275,000 upon relocating to the New York area. She would also receive a minimum of $125,000 in a guaranteed bonus and $75,000 in stock options. According to Elizabeth's testimony, her annual salary would be a minimum of $475,000, with the possibility of additional bonuses. After signing the contract with Marsh, Elizabeth informed James of her new employment and her intent to move to New Jersey with the children. She resigned from her job at Gallagher.

In addition to earning more money at Marsh, Elizabeth would be required to travel less than when she worked at Gallagher. Work-related travel would be on a "need driven" basis. While at Gallagher, Elizabeth traveled 30 to 35 times per year. At Marsh, she would travel less often, but her travel would more frequently take her out of the country. Marsh also provided better medical benefits with lower out-of-pocket expenses. Her commute from her anticipated home in Middleton to New York City would be shorter than her Chicago-area commute to Gallagher by approximately 10 minutes. According to Elizabeth, the shorter commute time and reduced travel would give her more time at home with the children.

Other factors of interest were the fact that Elizabeth had extended family on the east coast since her parents lived five miles from Middleton, and her sister lived in D.C. The appellate court stated:

> In New Jersey, the children would have a nanny or Elizabeth's mother would take care of them when Elizabeth could not be home. In Illinois, the children have a nanny and at times Elizabeth's mother flies in to stay with the children when Elizabeth travels. James also cares for the children in accordance with his right of first refusal.

The former wife pointed out that flights to Newark leave essentially ever hour and are quite

affordable – about $225 for a round trip ticket at the time of trial on removal. She offered to pay her former husband $5,000 annually for travel expenses. She envisioned a schedule for parenting time similar to the current schedule but granting the father longer blocks of time. She envisioned her former husband flying to New Jersey on various alternating weekends and staying with Elizabeth's parent's home – who had a separate apartment contained within the building structure of their house. There were many other significant facts in this decision.

I liked the appellate court's quote from *Collingbourne* summarizing the balancing of the *Eckert* factors:

> In assessing best interests, the circuit court should keep in mind two salient considerations. First, "a child has an important interest in 'maintaining significant contact with both parents following the divorce.' " Id. at 522 (quoting *Eckert*, 119 Ill. 2d at 325). Second, the quality of a child's life may be enhanced from the child's experience "stemming from the [custodial] parent's life enhancement."

Regarding the manifest weight standard the decision stated:

> A circuit court's decision on removal is entitled to substantial deference because the judge, as trier of fact, directly observes the parties from which he or she can " 'evaluate their temperaments, personalities, and capabilities.' " *Eckert*, 119 Ill. 2d at 330 (quoting *Gallagher v. Gallagher*, 60 Ill. App. 3d 26, 31-32 (1978)). A court of review will reverse only if the appealing party can demonstrate that the decision is against the *manifest weight* of the evidence such that the ruling constitutes a *manifest injustice*. *Eckert*, 119 Ill. 2d at 328. "A decision is against the manifest weight of the evidence where the *opposite conclusion is clearly evident or where the court's findings are unreasonable, arbitrary, and not based on any of the evidence." In re Marriage of Matchen*, 372 Ill. App. 3d 937, 946 (2007) (citing *In re Marriage of Main*, 361 Ill. App. 3d 983, 989 (2005)). (Emphasis in original.)

The appellate court then reviewed each *Eckert* factor and ultimately ruled that the decision was not against the manifest weight of the evidence.

Recall what I have referred to as my “economic necessity” article regarding removal and the general quality of life factor. The appellate court stated:

> The trial judge characterized Elizabeth's claim of additional savings for college expenses based on her increased salary as "self-serving" given that Elizabeth earned a substantial salary while at Gallagher. Elizabeth argues that she is the sole source of financial support for the children as James makes only small contributions; even if this is true, she has not shown that she was unable to support her children during her employment at *Gallagher*. *In other words, leaving her job in pursuit of more money for the children was not a necessity.* Although the trial judge's statement that Elizabeth's most recent gross income at

> Gallagher of $263,000 is "substantially similar" to her base earnings of $475,000 at Marsh is questionable, *the trial judge reasonably concluded that a higher salary alone is not enough to favor removal on the first factor.*

***Shinall* – Appellate Court Reverses Removal Award Despite Trial Court's Finding of Improvement of General Quality of Life with Removal**

Shinall v. Carter, 2012 IL App (3d) 110302 (January 5, 2012).

The trial awarded mother sole custody of three-year-old girl, and granted the mother's petition for removal of child from Illinois to Colorado, where her new husband lived. The appellate court ruled that the trial court erred in allowing removal determining that the trial court's finding that child's quality of life would improve by having a stay-at-home mother was not supported by the evidence. The Third District appellate court held that the removal would have drastic adverse effect on father's visitation, would substantially alter father-child bond, and would deprive child of stable home environment. *Shinall* noted that the *Eckert* factors are not exclusive and other factors to consider were that the mother's history of relationships indicated a tendency toward impulsivity. And the mother and her husband had not yet established a marital home together. On the other hand, the appellate court ruled that the trial court did not err in awarding the mother sole custody and finding that parents did not have necessary level of respect for each other to cooperate in child rearing. In this case, the appellate court ruled that the mother was (awarded sole custody) was more likely to encourage father's relationship with child than vice versa.

Paternity

***H.L.B.* – Even though Man Obtained DNA Testing Providing He was Not the Father Where Administrative Order Found him to be Father, Based upon Facts of Case his Action to Declare Non-Paternity Was Barred**

In re Parentage of H.L.B . 2012 IL App (4th) 120437 (9/27/12)

In September 1999 Heather gave birth to H.L.B. Before the child's birth, Heather and Bradley were involved in a sexual relationship. They were not married. Then, in March 2001, The Department of Healthcare and Family Services filed a notice of alleged paternity and support obligation. The notice stated that he had been identified as the father and stated that Bradley must attend an interview and a date and time certain. The notice indicated that if he failed to attend he may be "legally declared to be the father of the child named in this notice and ordered to pay support for the child from birth until the child is at least 18 years old." Bradley did not appear for this interview and as a result the Department entered an administrative paternity order finding him in default and adjudicating him to be the legal father. Bradley send a letter to the Department appealing the default order and requesting paternity testing. The Department offered testing and Bradley withdrew his appeal on May 30, 2001. And in June of 2001 he signed an agreement to be bound by the results of genetic testing. The agreement provided that if the results were greater than 500/1, the department would enter an administrative paternity order finding him to be the father. However, if he failed to appear as scheduled, then the Department would enter an order finding him to be the father by default. The Department mailed the administrative order for genetic testing to him providing the date, time and place. But Bradley

failed to appear as scheduled. As a result the administrative paternity order naming him as father remained in effect and he began paying support.

In November 2004, Bradley fled a petition to determine parentage and the Department filed a motion for involuntary dismissal. The trial court dismissed Bradley's petition on the basis of *res judicata*.

Then, in the summer of 2011 Bradley met the child for the first time. After the meeting he requested that Heather present the child for DNA testing and in August 2011, heather voluntarily presented the child for the DNA test. The results indicated that Bradley was not the father because the probability of paternity was zero. In January 2012, Bradley filed a petition to determine the non-existence of parentage under Section 7(b-5) of the Parentage Act. He also sought vacature of any court orders regarding future support payments. In response, the Department filed a motion for dismissal under Section 2-619(a)(4) of the Code alleging his petition was barred due to the *res judicata* effect of both the 2001 administrative order and the later 2005 order as well as the running of the statute of limitations. It alleged he lacked standing under Section 7(b-5) because he was not married to heather nor did he sign a VAP. Heather joined the Department in its motion and sought fees under Section 17 of the Parentage Act. And she sought sanctions under SCR 137. The trial court ruled against the Bradley and the appellate court affirmed.

Recall that Section 7(b-5) of the Parentage Act provides that an action to declare non-existence may be brought after an adjudication of paternity in any judgment *by a man adjudicated to be the father pursuant to the presumption in Section 5 of the Act, if as a result of DNA tests, it is discovered that the man adjudicated to be the father is not the natural father of the child.* *** Because 7(b-5) references the presumptions in Section 5, we look to those provisions – it contains four types of presumptions: two arising from marriage and two out ov voluntary acknowledgments of paternity. In his brief Bradley admitted that th presumptions did not apply and acknowledged that he did not sign a VAP. He argued that "he should be considered to have signed an acknowledgment of parentage pursuant to §5(a)(4) in that he signed an Agreed Order to be Bound by the Results of Genetic Testing and then failed to appear for testing with the knowledge that his failure to appear would result in a default Administrative Paternity Order being entered." He argued that *Jackson v. Newsome*, 325 Ill.App. 3d 372 (2001) had language that stated that the presumptions in Section 5 were "not meant to incorporate the minute and ministerial technical requirements of Section 12 of the Records Act..." But the appellate court rejected this argument stated that the Illinois Supreme Court in *Smith*, 212 Ill. 2d at 406-07 held that §7(b-5) presumptions should be *narrowly* read. The appellate court noted that where the presumption of paternity arises out of a voluntary acknowledgment, §7(b-5) does not apply and that a VAP could only be set aside on the basis of fraud, duress or material mistake of fact (See Section 6(d)).

Next, the appellate court determined that even if this Section applied, his non-paternity claimed violated the applicable statute of limitations in Section 8(a)(4) of the Parentage Act. It refers to Section 7(b-5) and provides that actions to declare non-existence "shall be barred if brought *** more than 2 years after the petitioner obtains knowledge of *relevant* facts." The appellate court

stated, "Bradley is essentially saying that his 2004 action was frivolous and his 2001 failure to appear for genetic testing, knowing that an administrative order would e entered, is irrelevant.

And finally, the appellate court ruled that the doctrine of *res judicata*, applied. So, once again the moral of our story is that a man, even though his is not the biological father, who sits on his rights to paternity testing is – a father.

Standing to Adopt

***K.B.D.* – Standing to Adopt Existed for Related Adoption Where Petitioners Not Married**

In Re Adoption of K.B.D., 2012 IL App (1st) 121558 (December 14, 2012)

The critical question was the standing to adopt since the parents seeking adoption were not married. So, the case was reviewed on this issue as a matter of construction of the statute, de novo.

The adoption act provides regarding who may adopt:

> "A reputable person of legal age and of either sex, provided that if such person is married and has not been living separate and apart from his or her spouse for 12 months or longer, his or her spouse shall be a party to the adoption proceeding, including a husband or wife desiring to adopt a child of the other spouse, in all of which cases the adoption shall be by both spouses jointly[.]" 750 ILCS 50/2(A)(a)

The Act additionally defines a "related child" as "a child subject to adoption where either or both of the adopting parents stands in any of the following relationships to the child by blood or marriage: parent, grand-parent, brother, sister, step-parent, step-grandparent, step-brother, stepsister, uncle, aunt, great-uncle, great-aunt, or cousin of first degree." 750 ILCS 50/1(b). The case then reasoned

> In the case at bar, we agree with Aaron and Jennifer that *K.M.* clearly supports their ability to jointly petition to adopt the child. There is no question that Aaron is related to the child by blood, so the situation here is essentially identical to that presented in *K.M.*: one petitioner is the child's natural parent and the other is not, but the two seek to jointly adopt the child. We are not persuaded by Vicki's distinction that in *K.M.*, 'the petitioners presumably lived together and maintained an intimate relationship supportive of the best interests of the minor child.'

The court then found that there was standing to adopt.

Equitable Estoppel Type Claims for Parenting Rights

***Scarlett Z-D* -- Equitable Parent and Estoppel Claim Rejected Where Claimed Equitable Parent Knew of Fact he Was Not Legally the Father**:

In re Parentage of Scarlett Z.-D., a Minor, 2012 IL App (2d) 120266 (August 30, 2012)

Consider the interesting background of this 30 page case. The parties with the short form names of Jim and Maria within the opinion began living together in 1999 and they later became engaged. In early 2003, Maria went to Slovakia to visit family. While there, she met Scarlett, a 3½-year-old orphan girl. Maria commenced the process of adopting Scarlett under Slovakian law. During the year-long adoption process, Maria lived in Slovakia. Under Slovakian law, Jim was not permitted to adopt Scarlett because he was neither a Slovakian national nor married to Maria, 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 adopt Scarlett. With that background one can then understand why the appellate court affirmed the trial court's dismissal under section 2-615 of the Code of Civil Procedure of Jim's contract claims and from the court's denial, following trial, of his claims for custody, visitation, and child support.

The issue in Maria's motion to dismiss was standing under Section 601 of the IMDMA. The appellate court stated it was acceptable to raise the standing issue via a Section 2-615 motion under the Code because "because the issue was raised as a factual insufficiency on the face of the petition, namely, that Jim failed to allege any facts that would have brought him within the purview of either the Dissolution Act or the Parentage Act of 1984." The appellate court next capsulized Jim's argument as:

> Jim contends that he has common-law standing based on his parent-child relationship with Scarlett, whether he is characterized as an equitable parent, a de facto parent, or a psychological parent, or under the doctrine of in loco parentis. He urges us to decline to follow the First District "trilogy" of *In re Visitation with C.B.L.*, 309 Ill. App. 3d 888 (1999), *In re Marriage of Simmons*, 355 Ill. App. 3d 942 (2005), and *Mancine*, 2012 IL App (1st) 111138, because the cases were wrongly decided and conflict with our supreme court's precedent as well as "the vast majority of precedent" from our appellate court.

This case was clearly well-briefed and argued as reflected by the fact that the Illinois ACLU submitted an amicus brief in support of Jim's appeal. (And the Family Institute at Northwestern University submitted a brief -- but in support of Maria's position on appeal).

Recall that *C.B.L.* involved a lesbian relationship during which one partner bore a child as a result of artificial insemination. The nonparent was involved in the child's birth and in caring for the child for 1½ years, until the parties separated. The nonparent filed suit, seeking visitation and claiming standing as a de facto parent or under the doctrine of in loco parentis. The trial court dismissed the suit for lack of standing, and the appellate court affirmed. The appellate court held that standing to seek visitation is found only in the Dissolution Act and that the nonparent's claims of common-law standing were therefore without merit.

In review the second of the trio of First District cases, the appellate court stated:

> Several years later, in *Simmons*, the First District extended its holding in *C.B.L.* to

> apply to standing to seek custody. In Simmons, the parties "participated in a wedding ceremony," and the wife gave birth following artificial insemination. The husband, however, was a transsexual male who had been born a female. The husband filed for dissolution of marriage and sought custody of the child. The wife argued that the husband lacked standing because the same-sex marriage was invalid under Illinois law and he was not the biological or adoptive father. The trial court declared the marriage void ab initio, denied the dissolution petition, and granted sole custody to the wife. On appeal, the husband argued, inter alia, that he had standing as an equitable or de facto parent. The court relied on *C.B.L.* to hold that standing to seek custody is found only in the Dissolution Act, the Parentage Act of 1984, or the Illinois Parentage Act.

Regarding the most recent of this trio of First District decisions, the appellate court stated:

> Relying on *Simmons*, this year, the First District, in *Mancine*, affirmed the trial court's dismissal under section 2-619 of a husband's petition for custody for lack of standing. In *Mancine*, the adoptive mother of a child, W., became engaged to a man while she was in the process of adopting as a single parent. The parties intended that the husband would adopt W. as a stepparent. The parties married two months after the wife's adoption was completed, and the husband began, but never completed, the process of adopting W. The parties subsequently adopted a child, H., together. About 16 months into the marriage, the wife filed a petition for dissolution, in which she alleged that the parties had only one child, H. The husband filed a counterpetition seeking custody of W. The wife filed a motion to dismiss, challenging the husband's standing, which the trial court granted.
>
> On appeal, the husband contended, inter alia, that he had standing as W.'s equitable parent since he had been the child's primary caretaker. The court noted that Illinois has not recognized the equitable parent doctrine.... Citing *Simmons*, the court stated that "standing to seek full care and custody of a minor child is found solely within" the Dissolution Act, the Parentage Act of 1984, or the Illinois Parentage Act. The court stated that the husband did not qualify as a parent under section 2 of the Parentage Act of 1984 because he was neither the biological nor the adoptive parent. The court further concluded that the husband lacked statutory standing as a nonparent under section 601(b)(2) of the Dissolution Act because the child was in the physical custody of his only legal parent—the wife.

The appellate court in the instant case agreed with the reasoning and holding of *Mancini*. But note that the *Mancine* case also involved a second opinion – 2014 IL App (1st) 111138-B. That later *Mancine* case had stated:

> After our opinion, the Illinois Supreme Court rendered a decision in *DeHart v. DeHart*, 2013 IL 114137, recognizing equitable adoption in the context of an adult seeking inheritance in a probate proceeding. After the decision in DeHart, we received a supervisory order from the Illinois Supreme Court directing us to

> vacate our prior opinion and instructing us to reconsider our decision in light of *DeHart* to determine if a different result was warranted. In re Marriage of *Mancine*, No. 113978 (Ill. May 29, 2013) (supervisory order). We hereby vacate our prior opinion and substitute this opinion, determining that DeHart does not warrant a different result from our prior decision, because equitable adoption is a concept in probate to determine inheritance and should have no application in the context of statutory proceedings of adoption, divorce proceedings, or parentage, and also because the facts of this case are vastly different from *DeHart* and do not meet the adopted standards in *DeHart* to establish an equitable adoption.

In any event, the appellate court in the instant case stated:

> Under *Mancine*, Jim lacks both statutory standing on the facts and common-law standing because the equitable parent doctrine is not recognized in Illinois. Jim acknowledges his lack of standing under *Mancine*, but he urges that *Mancine* was wrongly decided because the Dissolution Act and the Parentage Act of 1984 did not supplant the common law and standing is not found solely in the statutes. Therefore, according to Jim, he has common-law standing to seek custody.

The appellate court distinguished *In re Parentage of M.J.*, 203 Ill. 2d 526 (2003) that Jim relied upon. In M.J., the trial court dismissed a biological mother's complaint seeking child support from the man who was her former paramour. The mother alleged that he had orally consented to her being artificially inseminated and had agreed to support the twins born as a result. Upon discovering that the man was married, the mother filed suit to establish paternity and to impose a support obligation, seeking relief under both the common law and under the Illinois Parentage Act. The appellate court affirmed, but the supreme court reversed as to the common-law claims. The supreme court first noted Illinois's strong public policy "recognizing the right of every child to the physical, mental, emotional, and monetary support of his or her parents." The court observed that the Illinois Parentage Act, pertaining solely to children born as a result of artificial insemination, contained only three sections and included no language indicating an intent to prohibit common-law actions for child support. The court also noted that "statutes and case law do not equivocate in imposing child support obligations for other children born out of wedlock." Accordingly, the supreme court held that the Illinois Parentage Act did not preclude the mother's common-law claims for child support. But the court concluded, "Our holding is limited to the unique circumstances of this case." Those unusual facts included including the purported father's financial support of twins born to his paramour as a result of artificial insemination to which he allegedly consented. The appellate court noted that the court in *M.J.* addressed common-law claims only for child support, not a common-law claim for custody.

The other cases cited by Jim in this case bear reading because the appellate court decision does an excellent job reviewing case law involving non-traditional family questions involving standing.

Finally, the appellate court rejected the equitable estoppel argument relying in significant part on the similar *Mancini* case. The equitable estoppel factors bear repeating:

> '(1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other person intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof.'

The most significant factor in this case was that Jim knew that he was not the biological father, that the Slovakian adoption did not pertain to him, and that formal adoption in Illinois would be necessary.

The appellate court concluded:

> While we are not unsympathetic to Jim's position, or indeed, to Scarlett's situation (especially having read the amicus brief submitted by the Family Institute at Northwestern University, et al.), not only would it be inappropriate for us to ignore existing Illinois law, but our doing so would likely be fraught with unintended consequences. Legal change in this complex area of social significance must be the product of careful, extensive policy debate, sensitive not only to the evolving realities of nontraditional families and the needs of the persons within those families, not the least of whom are the children, but also to parents' fundamental liberty interest embodied in the superior rights doctrine and its restriction of the ability of the state to interfere in family matters. In short, the comprehensive legislative solution demanded here must be provided by our General Assembly.

***TPS* – Action Seeking Custody and Parental Rights Regarding Children Born by Former Partner's Artificial Insemination Improperly Dismissed**
In re T.P.S., 2012 IL App (5th) 120176 (October 9, 2012)
The holding from the opinion syllabus was:

> Petitioner's action seeking custody and other parental rights with respect to the children born to her former partner by artificial insemination based on contract, promissory estoppel and implied contract was *improperly* dismissed, since the best interests of children and society are served by recognizing that parental rights may be asserted based on conduct evincing actual consent to artificial insemination by an unmarried couple along with active participation by a nonbiological partner as a coparent.

The opinion stated in part:

> We offer no opinion on whether *Scarlett Z.-D.* was correctly decided with respect to a common law action for custody or visitation of adopted children. The facts of the present case do not involve adopted children similar to *Scarlett Z.-D.* Accordingly, with respect to standing to bring a common law action concerning children conceived by artificial insemination, we believe our analysis should follow the framework established by the supreme court in M.J., not by the appellate court in *Scarlett Z.-D.* The *Scarlett Z.-D.* court further held that, even if the legislature did not intend to supplant the common law, there are no Illinois cases that would give the former boyfriend common law standing to pursue his claim for custody of the adopted child. In the present case, we believe that Cathy has alleged sufficient facts to seek custody and visitation under common law contract and promissory estoppel theories.

The appellate court then referenced the decisions in *In re M.M.D.*, 213 Ill. 2d 105 (2004) and *In re Marriage of Purcell*, 355 Ill. App. 3d 851 (2005). Recall that *MMD* the court held that although the constitution prohibits the state from forcing fit parents to yield visitation rights to a child's grandparents when the parents do not wish to do so, "[t]here is no corresponding constitutional prohibition against a fit parent's decision to *voluntarily* bestow visitation privileges on his child's grandparents." And in *Purcell* the husband was granted visitation privileges in a JPA but the husband was later determined not to be the father of the children. The court, nonetheless, held that the visitation agreement provided in the consent decree "should be enforced as a contract unless [the mother] can show a *contractual* reason for voiding or rescinding it.

The appellate court pointed out:

> In the present case, Cathy has pleaded facts sufficient to allege an agreement between her and Dee to conceive two children by artificial insemination and to raise the children with Cathy and Dee having coequal rights as parents. The lives of these children are derived directly from the express agreement between Cathy and Dee, as a couple, to expand their family by having children together through artificial insemination.

The appellate concluded:

> In *M.J.*, the court stated that if an unmarried person "who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law." *M.J.*, 203 Ill. 2d at 541, 787 N.E.2d at 152. The same is true with respect to parental rights. If an unmarried person causes the birth of a child by the deliberate, premeditated conduct of artificial insemination under the express agreement with the mother to serve as a coequal parent, that person should receive the same treatment in the eyes of the law as a person who biologically causes conception.

> Enforcing this agreement between the parties under common law contract or promissory estoppel theories does not offend Illinois's public policy. There is nothing in the record to suggest that Cathy's physical, mental, and emotional support for the children would be anything but beneficial for the children. In addition, we do not believe that Cathy and Dee's agreement with respect to the birth, care, and parental rights of these children is contrary to any Illinois public policy as provided in the constitution, statutes, or decisions of Illinois courts. Although Dee is the only biological parent, there is no constitutional provision that prohibited Dee from voluntarily entering into a coparenting agreement with her partner for the specific purpose of creating a family through assisted reproduction technology and agreeing to coparent any children produced as a result of the agreement. Dee's voluntary agreement with Cathy concerning Cathy's rights as a coparent does not offend any constitutional provision. *In re M.M.D.*, 213 Ill. 2d at 114, 820 N.E.2d at 399.

Visitation Privileges Versus Rights

***Wittendorf* - Visitation Privileges Standard Applies in Paternity Cases**
Wittendorf v. Worthington, 2012 IL App (4th) 120525 (November 2012)
This case involved a child born to unmarried parents during their abusive relationship. On appeal the mother argued that the trial court erred in granting the father unsupervised visitation, because the court applied the "endanger seriously" standard set forth in section 607(a) of the IMDMA rather than the "best interests" standard provided in section 602:

> We disagree and find that section 14(a)(1) of the Parentage Act incorporates section 602 of the Marriage Act and not section 607 of the Marriage Act. Department of Public Aid ex rel. Gagnon-Dix v. Gagnon, 288 Ill. App. 3d 424, 428, 680 N.E.2d 509, 512 (1997). Section 602 lists relevant factors to consider in determining the best interests of a child.

The decision concluded: "In determining visitation, the trial court should have applied the best interests standard set forth in section 602." So, this case is now consistent with the 2013 *J.W.* Supreme Court decision which came down on the side of this case.

***IRPO J.W.* -- Visitation Rights vs Privileges in Paternity Cases: Fourth District Reverses Field from its *Gagnon* Decision – But Overruled by Illinois Supreme Court**
Parentage of J.W., 2012 IL App (4th) 120212 (July 23, 2012)
Because this case is no longer good law in light of the Supreme Court decision, I will have pared down the original discussion. The case law discussion from this case remains of interest because it has a good discussion of the incorporation by reference issue that can come up in other contexts, especially regarding the integration of the so called "Parentage" Act and the IMDMA such as issues such as fees, etc.

The Illinois Supreme Court in 2013 reversed the appellate court's decision and adopted the

approach taken by the trial court in this case, i.e., the approach that there are visitation privileges in paternity cases and according the burden was on the father to show best interests.

Regarding visitation involving the "my two dads" issue, the appellate court stated:

> J.W. is fortunate to have both a legal, or presumed, father and a biological father who want involvement in her life. Both Steve and Jason are to be complimented for their care and interest in J.W. Both of them have the opportunity to create an ongoing relationship with J.W. and to do so without impinging on the visitation time Jason now enjoys.

~*G.M.* -- Where the Wife Gives Birth to a Child of Another Man During a Marriage, the Effective Statute of Limitations Applying to the Wife for Bringing Paternity Case Is until Age 20 of the Child

In re G.M., 2012 IL App (2d) 110370 (March 12, 2012, Modified on denial of rehearing September 25, 2012)

This See "Leave to Appeal Docket - September Term 2013: 115165 In re G.M., a Minor (A.M., respondent, v. E.M.B. et al.) F.J.M., petitioner. Leave to appeal, Appellate Court, Second District, p. 17.

With the Illinois appellate and supreme court style guidelines the writing of many Illinois cases has improved. Read this opinion, both for the writing and the reasoning. The first three paragraphs introduce the case:

> Petitioner, A.M., appeals the dismissal of her petition to establish the paternity of her son, G.M. She contends that the trial court erred in concluding that the petition was barred by a two-year statute of limitations. We reverse and remand.
>
> We briefly summarize the facts as alleged in the petition. Petitioner was married to respondent F.J.M., but theirs was an "open" marriage in which they engaged in sex with other couples. During November 2006, petitioner engaged in sex with her husband. Also around that time, petitioner and her husband met respondent E.M.B. and his wife, S.B. The couples met at E.M.B.'s home around Thanksgiving 2006. On that occasion, petitioner had sex with E.M.B., although she did not think that he ejaculated inside her.
>
> In January 2007, petitioner discovered that she was pregnant. At a Super Bowl party in February 2007, petitioner announced that she was 11 weeks pregnant. Petitioner gave birth to G.M. on July 31, 2007. At first the child resembled F.J.M., but, as he grew older, he began to resemble E.M.B.

The mother/petitioner then brought a petition to establish a parent child relationship against EMB. It named her husband as a respondent only because he was the putative father by virtue of their marriage.

I liked the way the appellate court framed the legal issues:

> To explain our conclusion, we first briefly summarize the Act's relevant provisions. Section 7 of the Act essentially creates two distinct causes of action. It provides for an "action to determine the existence of [a] father and child relationship" (750 ILCS 45/7(a) (West 2008)) as well as an "action to declare the non-existence of [a] parent and child relationship" (750 ILCS 45/7(b) (West 2008)). Section 8 of the Act provides radically different limitations periods for the two types of actions. An action to declare the existence of a father and child relationship, with exceptions not relevant here, "shall be barred if brought later than 2 years after the child reaches the age of majority." 750 ILCS 45/8(a)(1) (West 2008). However, an action to declare the nonexistence of a parent and child relationship "shall be barred if brought later than 2 years after the petitioner obtains knowledge of relevant facts." 750 ILCS 45/8(a)(3) (West 2008). Thus, a paternity action under section 7(a) effectively has a 20-year limitations period: a party can bring an action any time up to 2 years after the minor reaches the age of majority. However, a "nonpaternity" action under section 7(b) must be brought within two years after the petitioner learns the "relevant facts."

The parties tried the case and even presented their arguments to the appellate court as if the only argument were when there was knowledge of relevant facts – assuming the two year statute of limitations applied – rather than considering whether the proper statute of limitations was the two years after majority. The short summary of the appellate court regarding its review of the statutory and case law stated, "The trial court in this case apparently believed that, where there is a putative father, it is first necessary to disestablish his parentage before pursuing a parentage action against the true biological father. However, nothing in either the plain language of the statute or the case law supports this."

The public policy discussion was also well done:

> Given the Act's purposes to avoid discrimination against illegitimate children and expand the opportunities of children to seek support from their parents, we cannot agree that the two-year limitations period applies here. We note that a contrary holding would mean that the actions of adults could cut off a child's right to establish a relationship with his or her biological father while the child is still an infant. This is not what the legislature intended.
>
> We recognize that our reading of the statute might create a somewhat anomalous situation where a petitioner can pursue a paternity action against the biological father while the statute of limitations has expired on a putative father's right to file a nonpaternity action. The apparent policy reason for this dichotomy is to protect the minor's interests. It gives the minor (or a representative) two years after the minor attains majority to pursue a paternity action against his or her father while not allowing the minor to be "abandoned" by a putative father filing a nonpaternity action midway through the child's minority.

> This safe-sided approach is particularly appropriate given the realities of modern society. It is not unusual for a child to have a paternal relationship with a biological father and one or more stepparents. Thus, that our reading of the statute could result in a minor having a parental relationship with more than one father should not be a bar to the result in this case. Ultimately, of course, issues such as support and visitation will have to be determined according to a child's best interests.

Comment re Legal Writing: I have been using in my writing the Style Manual for the Supreme and Appellate Courts of Illinois - 4th Edition. See: www.state.il.us/court/StyleManual/SupCrt_StyleManual.pdf. It states:

> Do not replace an official title of a state act with an acronym. Illinois Marriage and Dissolution of Marriage Act (the Act). Not: Illinois Marriage and Dissolution of Marriage Act (the IMDMA)

This is one of the few guidelines I do not follow. But this is because of the focused audience that reads my writings as opposed to those who read appellate court decisions generally.

Evidence:

***Perry* -- Images Downloaded to Flash Drive and Authentication of Website Pages**:
IRMO Perry, 2012 IL App (1st) 113054.
A key part of the *Perry* decision was when it addressed an issue of first impression in Illinois - authentication of web-site pages, photos, etc. It cited with approval out of state cases ruling that a print-out can be properly authenticated where the printout contained the Internet domain address and the date it was printed and the court accessed the website and verified the Web page. Regarding the husband's downloading photographs of the web which were purportedly from an escort service's website, the appellate court stated:

> None of the photos were screenshots of the Web site, nor did they include the Internet address on the photos. Given the ability to manipulate such digital images, and given [the] concerns regarding the ability of others to post pictures online, we cannot conclude that there was a sufficient foundation that the photographs ... were specifically from the *** Web site, and we cannot conclude that the admission of the photographs to prove that Lori was specifically part of the online "Chix Escorts" service was not an abuse of discretion.

Comment: For a further discussion, see my updated article regarding Objections and Evidence in Illinois divorce cases. The updated article incorporates this and the other evidence points from *Perry*.

The practice tip is that to properly authenticate web pages, one could:
☞ Print the web page;

- ☞ Copy the webpage to a print-screen that would have the website address. But this would not necessarily have the date it was printed.
- ☞ "Print" to a pdf and save the copy for potential printing at a later time. This will have both the website address and the date.

The key, though, is to make certain when you anticipate a webpage to change to print the results periodically.

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