2010 SUMMARY OF ILLINOIS DIVORCE AND FAMILY LAW CASES AND NEW SUPREME COURT RULES

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Property Cases Law:

Retirement Benefit Cases:

QILDROs:

***Culp* - Whether QILDRO Conformed to Settlement Agreement**
IRMO Culp, 399 Ill. App. 3d 542 (4th Dist., 2010)
As part of their settlement agreement, the parties agreed that the former husband's retirement benefits were to be "equally divided as of April 20, 1999, pursuant to a separate [Qualified Illinois Domestic Relations Order (QILDRO)]." Because the husband, Jerry, was not near retirement at the time of the dissolution, the trial court reserved jurisdiction for the entry of a QILDRO at a later date. In 2009, the former wife, Susan, filed a motion for entry of a QILDRO along with a proposed order directing Jerry to sign his consent to the QILDRO. The proposed QILDRO set forth a formula for determining the value of the marital portion of Jerry's pension and dividing it between the parties. The trial court ultimately entered an order directing the former husband to sign his consent. He appealed arguing that the trial court erred in finding Susan's proposed QILDRO conformed to the parties' settlement agreement. The appellate court disagreed with the ex-husband and affirmed the decision of the trial court.

The MSA had provided:

> "[Jerry] has certain retirement benefits through [SERS] which are valued at approximately $84,000 as of April 20, 1999, the date of entry of the [j]udgment of [d]issolution of [m]arriage on grounds. Said retirement benefits shall be equally divided as of April 20, 1999, pursuant to a separate QILDRO to be entered by

> agreement of the parties or by order of the court."

The appellate court noted that nearly two years then passed during which neither an agreement by the parties nor an order by the trial court divided the pension pursuant to a QILDRO. In June 2001, the court entered a written order stating:

> "[t]he entry of a *** []QILDRO[] is reserved. [Jerry] shall notify [Susan], in writing, 30 days prior to making any application for retirement or request for retirement benefits" to allow Susan time to file for entry of a QILDRO prior to the commencement of the pension's disbursement."

In the proposed QILDRO, Susan named herself as alternate payee and recipient of 50% of the marital portion of Jerry's monthly retirement benefit, any lump-sum payment upon termination of the benefit, any partial refund becoming payable to Jerry, and any benefits payable to Jerry's beneficiaries upon his death. The QILDRO set forth the following formula for calculating the marital portion of the pension consistent with what is Article 9 of the model QILDRO form, i.e., the model using what is in essence a coverture fraction type approach.

The QILDRO included regular plus permissive service. It included death benefit and it also included the COLA clause, i.e., the ex-wife to share in the post-retirement increases to the extent of her benefits otherwise provided in the QILDRO.

The former husband on appeal argued that the formula used in distributing his SERS pension deviated from the court's September 1999 supplemental order, which Jerry alleged awarded Susan $42,000--half of the pension's value when he filed his dissolution petition in April 1999.

The trial court's decision stated:

> The [o]rder does not specify that [Susan] is to receive $42,000[], and in the [c]ourt's opinion, if that were the intention of the parties, provision would have been made for the entry of judgment in that amount and a payment schedule. That was clearly not the intention of the parties. If [Susan's] portion were fixed at $42,000[], there would be no need for a QILDRO. A subsequent [o]rder on January 12, 2001[,] also reserved the entry of the QILDRO.
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> *** [T]he [SERS pension] was the major asset in the divorce proceeding, and [Jerry] was only 44 years old at the time [the court entered its order of dissolution]. Obviously, retirement was many years away. [Jerry] was to notify [Susan] in writing when he planned to retire so that the QILDRO could be entered.
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> It would be unconscionable to conclude now that the parties intended for [Susan] to wait untold years to receive her interest in the only major asset from the marriage, if her interest was fixed at $42,000[] and no more. Such an approach would deny her the benefit of interest on her asset or the benefit of any [cost-of-living adjustment] or other increases in the value of the asset. The parties clearly intended to have a QILDRO entered, with the benefits divided using the customary formulaic approach. This is not a case *** where the parties reached a clear and unambiguous agreement

> that [Susan] should receive $42,000[] at some time in the future, with no interest on her asset and no increase in value through the intervening years. There was no such 'bargain[,]' and [Susan] cannot be held to this strained interpretation of the [a]greed [s]upplemental [o]rder."

The court further found Susan's proposed QILDRO conformed to the parties' agreement and ordered Jerry to sign the QILDRO and submit it to the court for entry.

On appeal the ex-husband urged that the parties' agreement unambiguously valued the pension's marital portion at $84,000 and provided Susan would receive $42,000, exactly half without any interest or cost-of-living adjustments, and (2) no language in the agreement indicated the use of the formula set forth in Susan's proposed QILDRO to divide the pension.

The appellate court first reviewed the case law and then commented:

> In the case at bar, the trial court opted to reserve jurisdiction as to the division of Jerry's pension until closer to his retirement rather than awarding Susan a lump sum of the pension's value at the time of dissolution. Over 10 years later, the parties now disagree as to the value of Susan's "equal" share.

The appellate court decision will be quoted from at length because of the importance of it to similar cases:

> Because the agreement states "[s]aid retirement benefits shall be *equally divided* as of April 20, 1999 [(the dissolution date)]" (emphasis added), Jerry contends the parties intended Susan's share of the marital portion to be $42,000, exactly half of $84,000, the pension's value as of the dissolution date.
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> He further argues the agreement provided no express language permitting Susan interest or cost-of-living adjustments on her share of the pension. **However, limiting Susan's share to $42,000 would allow Jerry the marital portion's entire growth in value between the date of dissolution and the date of his retirement, thereby rendering the parties' shares of the marital portion unequal**. Accordingly, we find Jerry's interpretation of the agreement unreasonable because the agreement simply states an approximate value of the pension on the date of dissolution and provides Susan receive 50% of the retirement plan pursuant to a QILDRO filed in the future.
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> The settlement agreement never states Susan shall receive $42,000. Instead, the settlement agreement lists $84,000 as an approximate valuation of the pension's value on the dissolution date. The agreement further lists the dissolution date, April 20, 1999, for purposes of ascertaining the duration of the marriage. **Both the approximate value of the pension and the end date of the marriage are set forth to assist in the later assessment and division of the pension's marital portion**. The provision for entry of "a separate QILDRO" further evidences the parties' intent to ascertain the value of and equally divide the marital portion of the pension at a later date.

> Jerry's pension is a defined-benefit plan pension. Under a defined-benefit plan, the value of the pension's benefit is determined at retirement based on years of service and final - 13 - salary. See *Richardson*, 381 Ill. App. 3d at 54, 884 N.E.2d at 1253. Each year of service is valued cumulatively: the longer SERS members work, the higher the percentage of their final salary they will collect as their pension. See *Richardson*, 381 Ill. App. 3d at 54, 884 N.E.2d at 1253. Because each year of service contributes to the overall value of the pension, the marital portion of the pension increases in value the longer the pension holder works. Thus, its total value is unascertainable until the time of retirement, which is often years after the dissolution of marriage.
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> Essentially, Jerry argues the parties agreed to freeze Susan's share of the pension at the dissolution date. This interpretation of the settlement agreement's plain language fails to award Susan the benefits associated with deferring receipt of her share of the pension until Jerry retires. See *Ramsey*, 339 Ill. App. 3d at 759, 792 N.E.2d at 343-44. **Also, by postponing the division of the pension until it is received, both parties shared the risk Jerry would change jobs or die before retiring, which would reduce the pension substantially or forfeit its benefits completely**. See *Ramsey*, 339 Ill. App. 3d at 759, 792 N.E.2d at 343. **Because Susan and Jerry shared those risks when they agreed to postpone the division of the pension, equity requires they share in the benefits of unforseen increases in the value of the pension as well.** See *Ramsey*, 339 Ill. App. 3d at 759, 792 N.E.2d at 343.
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> Susan had no incentive to postpone receipt of a flat rate, lump-sum payment. The only reasonable interpretation of the parties' settlement agreement is the parties knew the marital portion would grow in value during the period between the dissolution of marriage and Jerry's retirement and thus opted to wait to equally divide the pension until its value fully matured and became ascertainable. **Because Jerry's proposed interpretation of the agreement leads to an unfair and unreasonable result, we cannot conclude the parties intended Susan receive half the value of the pension's marital portion at the time of the dissolution**.

The ex-husband argued that the court specifically erred in following the so called *Hunt* formula. The decision stated:

> Here, the trial court found the parties intended to divide the marital portion of the pension pursuant to the "customary formulaic approach," as used in Susan's proposed QILDRO. Jerry maintains the court erred in using the *Hunt* formula to determine the value of the marital portion of the pension because at the time of the court's agreed supplemental order in September 1999, QILDROs did not specify the *Hunt* formula for dividing the marital portion of pensions and therefore the parties could not have intended the formula's use.

The ex-husband argued that the trial court should have followed the *Wenc* decision and allowed extrinsic evidence as to the parties' intent because of the potentially ambiguous nature of the settlement agreement. The appellate court noted that:

> Unlike the parties' settlement agreement in *Wenc*, the parties' agreement in this case does not contain mysterious sums and a surplusage of ambiguous phrases. Rather, it contains no explicit language directing the trial court how to divide the marital portion of the pension other than to do so "equally." Therefore, this case is dissimilar to *Wenc* and more akin to *Richardson*.

The appellate court then decided:

> While the settlement agreement did not expressly enumerate the formula by which to equally divide the pension's marital portion, the parties' intent is evidenced by the fact the parties chose to use the reserved-jurisdiction approach and later entry of a QILDRO and did not use language contrary to the customary formulaic approach set forth in *Hunt*.

Regarding the fact that the *Hunt* formula has become the standard for dividing defined benefit plans using the reserved jurisdiction approach the court commented:

> The *Hunt* formula, stated in 1979, is a widely used method for dividing pensions' marital portions under the reserved-jurisdiction approach, especially where the approach applies to defined-benefit plan pensions. See *Richardson*, 381 Ill. App. 3d at 52, 884 N.E.2d at 1251; *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1115, 806 N.E.2d 701, 708 (2004). This was the case at the time of the trial court's supplemental order incorporating the parties' settlement agreement in 1999. The General Assembly's subsequent endorsement of the *Hunt* formula by amending section 1-119 of the Illinois Pension Code to include it within QILDROs addressing the division of governmental pensions' marital portions (see 40 ILCS 5/1-119(n) further indicates the formula's widespread acceptance.

***Hall* – Trial Court had Authority to Enforce Retirement Plan Division Although Plan in MSA Not Mentioned by Name**

IRMO Hall, 404 Ill.App.3d 160 (2nd Dist., 2010).

Hall involves one more case where the orders dividing the retirement benefits were not entered at the time of the divorce causing problems years later for the parties. The MSA in *Hall* had provided:

> 18.1 [Respondent] is a plan participant in the Anheuser-Busch Deferred Income Stock Purchase and Savings Plan, and is also a plan participant in a second retirement plan referred to as the Kraft Foods Thrift Plan. With respect to the Anheuser-Busch Deferred Income Stock Purchase and Savings Plan, the parties agree to enter into a Qualified Domestic Relations Order [(QDRO)] providing for the distribution of fifty percent (50%) of the account balance to [petitioner], as alternate payee, as of the date of entry of this [judgment of dissolution of marriage]. With respect to the Kraft Foods Thrift Plan, the parties agree to enter into a [QDRO] providing for the distribution of fifty percent (50%) of the account balance to [petitioner], as alternate payee, as of the date of entry of this [judgment of dissolution of marriage].
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> * * *

> 18.4 It is the intention of this [article] that [petitioner] is to receive fifty percent (50%) of the account balance of each of [respondent's] retirement plans valued as of the date of the entry of this [judgment of dissolution of marriage]."

It was later apparently learned by the ex-wife that the former husband had a defined benefit plan. The defined benefit plan is a traditional pension plan. To divide it you would not be dividing an account balance but dividing a future stream of payments. The ex-wife had petitioned the court to reform or modify the parties' MSA to ensure that she received 50 percent of all of husband's retirement interests, not just the two specifically enumerated in one section of the MSA.

Although she brought her petition pursuant to §§2-1401 and 13-206 of the Code of Civil Procedure, the appellate court ruled that the substance of the petition sought not to modify the judgment, but to enforce it. Therefore, the trial court had jurisdiction to enforce the terms of the MSA without having to establish a basis to vacate the judgment. The Second District appellate court also held that the language of the MSA was unambiguous because one section of the MSA clearly stated that the parties intended to split all of husband's retirement assets, not just the ones listed in a subsequent section of the MSA.

The concurring opinion was better reasoned. It stated, "I disagree with the majority that article 18.4 of the marital settlement agreement is unambiguous." Article 18.3 then states that respondent was responsible for preparing the QDRO for "each of these retirement plans." Article 18.4 then provides that it was the parties' intention to divide the "balance of each of [respondent's] retirement plans" equally." The concurring opinion then stated:

> Given the fact that the parties had testified that they intended to divide the marital property equally and that the pensions in question were marital property, I would predict that respondent would have a difficult time prevailing, but I do believe that the question is proper for the fact finder.

Comment: I agree. Consider Hall in conjunction with the 2011 *IRMO Hendry* case coming to a similar conclusion.

Short QILDRO Case Law Summary:

- ***Menken***: 334 Ill. App. 3d 531 (2d Dist. 2002). *Menken* is the first post-QILDRO legislation decision holding that because you cannot order a participant (provided benefits began accruing post 1999) to sign a consent, the proper approach is the so called triangular approach. Read *Menken* together with *IRMO Winter*, (1st Dist., 2008), *IRMO Culp*, (4th Dist., 2010) and *IRMO Plunkett*, (3rd Dist., 2009).

- ***Winter***: 899 N.E.2d 1080, 387 Ill. App. 3d 21 (1st Dist., 2008). *Winter* held that the court could impose a constructive trust on pension distributions where a triangular order cannot work due to the participant being outside of the jurisdiction of the court, I have noted that the most interesting language of *Winter* was the comment, "(We note, Ms. Winter did not challenge *Menken's* holding that a court may not compel consent under the QILDRO statute.)" This comment by the later *Winter* decision seemed to reflect a frustration with not being able to review the issue presented by the Second District's *Menken* decision.

But curiously, the *Winter* decision is not in accord with a recent ERISA decision, *Metropolitan Life Ins. Co. v. Cline*, No. 07-36031, ___ F.2d __ (9th Cir. filed Jul. 20, 2010). *Metropolitan Life* held that the imposition of a constructive trust on retirement plan proceeds paid to widow of decedent, and in favor of his second wife, was not permitted. It stated that such a constructive trust circumvented ERISA and, therefore, was preempted. That case has held, "The district court held ERISA did not preempt the creation of such a trust. The appellate court stated: "**While certain circumstances allow for the imposition of a constructive trust over the proceeds from a pension plan**, those circumstances are not present here. The imposition of a constructive trust simply cannot be used to circumvent ERISA preemption except in the limited circumstances where a valid QDRO exists."

- ***Culp***: *Culp*, 399 Ill. App. 3d 542 (4th Dist., 2010). *Culp*, in turn, addresses a different nuance, i.e., what occurs where the settlement agreement provides for an equal division of benefits under the Illinois Pension Code [there SERS benefits] per a QILDRO but where the participant then signs the consent to issue a QILDRO. So in *Culp* the question whether the MSA provision was tantamount to a consent such that the a QILDRO could be entered by ordering the husband to sign the consent was not reached. Remember that in *Culp* the trial court ordered the ex-husband to sign the consent for issuance of a QILDRO. But the husband did not appeal from the issue of the order of the trial court to sign the consent based on the MSA language. My speculation is that the participant abandoned this approach based upon the *Plunkett* decision.

- ***Plunkett***: 392 Ill. App. 3d 100 (3rd Dist., 2009). Instead, the case which effectively addressed this issue was the *IRMO Plunkett* decision. *Plunkett* involved the issue of whether the MSA could constitute a consent for the issuance of a QILDRO where the MSA mistakenly referred to a Qualified Domestic Relations Order rather than a QILDRO. The key holding of *Plunkett* was:

  > The judgment for dissolution order contained nearly all the provisions required by the Pension Code and as such, meets the requirement of the written consent called for in the Pension Code. Patrick's consent should be considered binding, as would any other provision of the contracted settlement agreement. Patrick's consent, through the agreed settlement, can be read together with the QILDRO forms provided by SURS to give effect to the intention of the parties in reaching the settlement and to fulfill the substantial compliance directive of §1-119(m)(1) of the QILDRO legislation. In the instant case, the trial court retained the authority to enforce the settlement agreement, just as it could have directed SURS at the time of the dissolution order to direct pension payments to Marie.

- **Short Conclusion**: So we have a growing body of exceptions to the hardship imposed by the requirement based upon the language in the Illinois Pension Code that a participant who accrued benefits before the effective date of the original QILDRO legislation needs to sign a consent for issuance of a QILDRO. The reason for this language had been the belief among some lobbying against the legislation that if it was not included in the statute there may be an unconstitutional wrongful taking of pension benefits. While this belief was misguided, we

are left with cases trying to carve out exceptions to the problems imposed by the limitations of the original QILDRO legislation.

***Karafotas* - Effect of MSA on Windfall Profits of Post-Divorce Sale of Seat on the Chicago Mercantile Exchange (CME)**

IRMO Karafotas, 402 Ill. App. 3d 566 (1st Dist., 2010)

The 2000 marital settlement agreement in the property portion had provided:

> "E) Phillips's [sic] Chicago Mercantile Seats: Except as set forth herein Phillip shall retain his two seats (CME and IMM) on the Chicago Mercantile Exchange as his sole property free and clear of any interest therein by Pamela. Phillip agree[s] that in the event he dies before Pamela then upon his death, the asset known as the IMM International Monetary Market Exchange Membership, division of the CME (hereafter referred to as the IMM membership[)], will be transferred to Pamela. *** In the event th[at] Pamela dies before Phillip, Pamela'[s] estate shall have no claim to the IMM membership and it shall remain the sole property of Phillip. If Phillip sells the IMM membership during his lifetime, Phillip agrees that he will transfer to Pamela one-half of the net sales proceeds of after taxes and customary sales expenses within thirty days of the receipt of the proceeds. ***
>
> Pamela and Phillip wish to treat the property transfers herein as an economic severance. Upon completion of the property transfers, or entry of a Judgment of Dissolution of Marriage, each parties' assets, income from the assets and income shall be treated as that person's separate non-marital property."

The Agreement concluded:

> "Mutual Waiver: Except as to the provisions contained in this Agreement, each of the parties does forever waive, release, relinquishes [sic] and quit claim to the other all rights of homestead, maintenance and other property rights and claims, including claims of tortious acts, which he or she now has or may hereafter have, *** in or to, or against the property of the other party, or his or her estate, whether now owned or hereafter acquired by such party."

After the divorce, a series of complex transactions resulted in the transformation of the CME from a privately held entity into a for-profit public holdings company.

In 2008 the ex-wife (Pamela) filed a motion for summary judgment in which she asserted that she was entitled to 50% of the net proceeds from the sale of stock which represented her ex-husband's IMM Membership in the old CME. On June 29, 2009, the trial court entered two orders denying Pamela's motion for summary judgment. The court found that there was no genuine issue of material fact and that Pamela was not entitled to judgment as a matter of law. The court ruled that no sale had occurred regarding the ex-husband's IMM Membership for purposes of the Agreement.

The ex-wife contended on appeal that her motion for summary judgment should have been granted because 40% of the Class A stock which her ex-husband (Phillip) had sold derived from the

exchange/conversion of his IMM Membership into stock in CME Holdings. While acknowledging that Phillip did not sell his entire IMM Membership and still retained trading rights under an IMM Membership with the same membership number (No. 602), Pamela argued that Phillip's original IMM Membership was exchanged for stock, and the Class A stock which Phillip sold represented a substantial portion of the original IMM Membership in question. Pamela sought summary judgment in the amount of$928,077.50.

The appellate court summarized:

> We conclude, that pursuant to the Agreement, Phillip is required to pay Pamela 50% of the net-after-tax proceeds he received from the sale of the Class A stock he acquired in exchange for his IMM Membership, amounting to $928,077.50. Because there are no genuine issues of material fact, Pamela is entitled to judgment in her favor as a matter of law.

Child Support

Initial and Post-Divorce: Establishing Amount of Child Support

***Anderson* – Consideration of Gifts for Support: Percentage Order; Stock Splits Not Income**
IRMO Anderson, 405 Ill. App. 3d 1129 (3rd Dist., 2010)

Consideration of Gifts from Parents Via Percentage Order: *Anderson* involved a history of gifts from the parents – although not in a predictable pattern. The appellate court reversed the trial court's failure to consider future gifts from the obligor's parents:

> In this case, Molly requested language in the court's order requiring Michael to include 28% of any gifts or loans he may receive from his parents in his child support payments in accordance with statutory guidelines. The evidence demonstrated that Michael received significant annual gifts from his parents, including substantial "loans" without repayment and a vehicle. These gifts appear to represent a continuing source of income that he has received over the course of his adult life. Moreover, they are a valuable benefit to Michael that facilitate his ability to support the girls. The trial court should not exclude such payments simply because similar payments may not occur in the future. See *Rogers*, 213 Ill. 2d at 138. **Accordingly, any substantial gifts from Michael's parents should have been included in his net income, and the trial court abused its discretion in failing to consider them for child support purposes**. We therefore remand the matter for the trial court to enter a modified child support order to include as income gifts Michael receives from his family.

The wrinkle that *Anderson* appears to present in this regard is treating gifts somewhat like bonuses that are not predictable in terms of amount or when they will be paid – although they are subject to payment of child support.

Whether Stock Split Constituted Income: Third, *Anderson* addressed what constitutes income – in this case whether a reverse stock split constituted income for the purpose of child support. First, the appellate court quoted from the definitions of income in *Rogers* and in *Worrall*. *Anderson* provided a good review of what constitutes income:

> Under these definitions, a variety of payments qualify as income under §505(a)(3). Courts have included:
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> - Individual retirement account (IRA) disbursements representing deferred employment earnings; See *IRMO Lindman*, 356 Ill. App.3d 462 (2005).
> - Receipt of company stock from employment stock options, *IRMO Colangelo*, 355 Ill. App.3d 383 (2nd Dist., 2005);
> - Worker's compensation awards. *Department of Public Aid ex rel. Jennings v. White*, 286 Ill. App.3d 213 (1997);
> - The proceeds from pensions as income under the Dissolution Act. *IRMO Klomps*, 286 Ill. App.3d 710 (1997).
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> However, using the same statutory definition, other courts have determined that:
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> - Withdrawals from self-funded IRAs See *IRMO O'Daniel*, 382 Ill. App. 3d 845 (4th Dist., 2008).
> ` - Proceeds from the sale of residential property. *IRMO Baumgartner*, 384 Ill. App.3d 39 (2008).
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> do not constitute income under §505(a)(3).;
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> In *O'Daniel*, the appellate court determined that the father's IRA disbursements did not constitute income because IRA accounts are ordinarily self-funded by the individual account holder. The court noted that "[w]hen an individual withdraws money he placed into an IRA, he does not gain anything as the money was already his. Therefore, it is not a gain and not income." *O'Daniel*, 382 Ill. App. 3d at 850. In reaching its conclusion, the court reasoned that the only portion of the IRA that would constitute a gain for the individual, and therefore income for purposes of child support, would be the interest or appreciation earnings from the IRA. *O'Daniel*, 382 Ill. App. 3d at 850; see also *Baumgartner*, 384 Ill. App. 3d at 57 (where parent sells home and uses proceeds to purchase new home, proceeds are not actually available as income).

The appellate court then stated:

> In this case, the proceeds from the reverse stock split of Michael's AEC shares did not involve a gain or recurring benefit or employment compensation... The cash proceeds took the place of the former shares of stock. Michael then used those proceeds to purchase gold coins. The asset already belonged to Michael, and the proceeds were used to purchase another investment asset. Accordingly, the proceeds do not qualify as income for child support purposes.

The appellate court then provided a caveat:

> In reaching our conclusion, we note that the distribution of stock may constitute income for child support purposes **if the stock is sold pursuant to an employment bonus-based option**. See *Colangelo*, 355 Ill. App. 3d 383. Here, however, the sale of Michael's stock was necessitated by the company's decision to implement a reverse stock split of minority shareholders, **a decision over which Michael had no control**. He then utilized the proceeds to purchase other investment assets. Under these circumstances, the proceeds do not qualify as "net income" under section 505(a)(3). (Emphasis added.)

Comment: A good survey of earlier cases by the *Lindman* decision discussed above stated:

> Consistent with the above understanding, Illinois courts have concluded that, for purposes of calculating child support, net income includes such items as:
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> - A lump-sum worker's compensation award (*IRMO Dodds*, 222 Ill. App. 3d 99 (1991)),
> - A military allowance (*IRMO McGowan*, 265 Ill. App. 3d 976 (1994)),
> - An employee's deferred compensation (*Posey v. Tate*, 275 Ill. App. 3d 822 (1995)), and even
> - The proceeds from a firefighter's pension (*People ex rel. Myers v. Kidd*, 308 Ill. App. 3d 593 (1999)).

***Gosney* - Support and Circumstance in Which Court Should Not Impute Income**
IRMO Gosney, 394 Ill. App. 3d 1073 (3d Dist., 2009)
This is one of the relatively rare reversals of a trial court's decision to impute $350,000 in income to the ex-husband. The appellate decision will be quoted at length regarding the three reasons that it reversed the trial court:

> First, this is not a case in which the noncustodial parent was voluntarily unemployed. In Adams, the payor father quit his job and moved to Germany to live with his girlfriend without first obtaining employment. The court imputed income based on findings that the father was voluntarily unemployed and his prior income reflected his earning potential. *Adams*, 348 Ill. App. 3d at 344.
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> Here, the trial court found that Gregory was involuntarily unemployed, and the evidence supports that conclusion. Gregory testified that he was forced out of the company by Dearborn's unfair and oppressive negotiation tactics and was asked to leave the firm when he failed to agree to the terms. Gregory was terminated and, within months, found another position in the financial management industry. He did not willingly decide to leave his job and then remain unemployed.
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> Second, **nothing in the record suggests an attempt to evade a support obligation**. In Sweet, the court imputed income to the noncustodial parent, noting that the payor's self-employment produced little income, and he either misrepresented his income or willfully refused to support his children. The reviewing court concluded that without

> a good-faith effort to satisfy his support obligation, additional income was properly imputed based on the payor's earning potential. *Sweet*, 316 Ill. App. 3d at 107-08. In this case, immediately after Gregory lost his job, he began searching for new employment. Once those efforts proved fruitless, he started his own investment company in an attempt to quickly generate income. When self-employment was unsuccessful, he joined his wife's financial firm and utilized his training and expertise to earn a living. Gregory never neglected to pay child support under the 2004 order. He faithfully honored his obligation to support his children, **even increasing his payments on his own accord in 2006 when his income substantially increased**. He was not attempting to evade his support obligation.
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> Third, **there is no evidence of an unreasonable failure to take advantage of an employment opportunity**. In *Hubbs*, the appellate court upheld an imputed income of $115,000 because the noncustodial parent's income for the previous three years was $133,000, $114,000, and $169,319 and he recently rejected a job that would have paid him $120,000 per year. *Hubbs*, 363 Ill. App. 3d at 706-07.

***Abrell* - Illinois Supreme Court Affirms Appellate Court Re Whether Accrued Sick and Vacation Days are Marital Property**
IRMO Abrell, 236 Ill. 2d 249 (Ill. 2010).

In *Abrell* the trial court determined the net value of certain of the vacation and sick days (through a state employer) in the property division. The appellate court stated:

> The categorization of John's accumulated sick and vacation days appears to be one of first impression in Illinois. No statute or previously reported decision in Illinois appears to have addressed the issue.... We have carefully considered the cases cited by appellant and appellee and conclude accumulated sick-leave and vacation days are not marital property. They are not property--they are a substitute for wages when, and if, the employee is unable to perform his duties.

This case also has a good discussion regarding motions for reconsideration.

The Illinois Supreme Court stated, "The issue of whether accumulated vacation and sick days are marital or nonmarital property is an issue of first impression in this court."

> As the appellate court noted, other jurisdictions are split on the issue of whether vacation and sick days are marital property. Those courts have held that: (1) accrued vacation and sick days are marital property subject to division at the time of dissolution; (2) accrued vacation and sick days are marital property but are subject to distribution when received, not at the time of dissolution; and (3) accrued vacation and sick days are not marital property.

The Supreme Court addressed out of state case law at great length and then quoted with approval the

appellate court's reasoning. The Supreme Court concluded:

> Although the trial court was able to put a value on those days in its judgment for dissolution, we find that the value assigned to those days was speculative at best. We also find that the reserved jurisdiction approach used by the Grund court could be unnecessarily complicated and difficult to administer, particularly if the parties are many years from retirement. Applying the facts to the holding the High Court stated:
>
> As the appellate court noted, John had no present right to be paid for his sick and vacation days absent retirement or termination of his employment. Further, while John had accrued 115 sick days and 42 vacation days at the time of trial, those days may or may not remain at the time John retires or terminates his employment. If John uses any of the sick or vacation days awarded to him prior to retirement or termination of his employment, John will never collect payment for those days. In that case, the award of the value of those days to John in the property distribution would be illusory. As John has argued, if this court reinstates the trial court's finding that the accumulated vacation and sick days are marital property, John's share of the marital estate will be diminished every time he uses a sick day or vacation day before his retirement or termination, while Jacquie's cash payout will remain the same. Consequently, we find that although John accumulated his vacation and sick days during his marriage to Jacquie, the accumulation of those days had only a future value that was indeterminate and speculative. For that reason, we find that the accrued vacation and sick days differ from pension plans, stock options and deferred compensation.

Note the limits of *Abrell*:

> We agree that when a party has actually received payment for vacation and/or sick days accrued during marriage prior to a judgment for dissolution, the payment for those days is marital property subject to distribution in the marital estate. Under that scenario, the vacation and/or sick days have been converted to cash, the value of which is definite and certain. In this case, however, the accrued days have not been converted to cash, and the value of those days remains uncertain.

Of course *Abrell* provides an incentive for a party not to convert accrued sick or vacation days to cash – if that party has the ability to defer such an election.

Support Modification or Enforcement

***Rash* – Argument for SSD Setoff to Non-Covered Medical Expenses: Reasoning of *Henry* Does Not Apply**

IRMO Rash, 406 Ill. App. 3d 381 (5th Dist., 2010)

While there was a substantial change in circumstances (where the father had become disabled and the

sole source of his income was his social security disability benefit), there was not a substantial change in circumstances sufficient to modify support.

The other issue in this case was whether the payment of the dependent benefit to the child on behalf of a support obligor satisfied his obligation to pay half of the uncovered or extraordinary medical expenses that had accrued since he had been declared disabled. The father (and intervenor – his father) argued that the nature and purpose of his medical support obligation and that of the dependent benefit are the same and that, in accordance with the Illinois Supreme Court's decision in *In re Marriage of Henry*, the dependent benefit should have offset respondent's obligation for his share of the accrued, uncovered medical expenses of his child. In reviewing *Henry* the appellate court stated:

> The court concluded that because the dependent benefit was earned by the noncustodial parent, was made on behalf of that parent, and was paid with contributions from that parent's earnings, the payment of the dependent benefit satisfied the noncustodial parent's child support obligation. In re Marriage of Henry, 156 Ill. 2d at 552, 622 N.E.2d at 809. The dependent's benefit satisfied only the amount of the child support arrearage that accrued during the period that the dependent's benefit was received. *In re Marriage of Henry*, 156 Ill. 2d at 549-50, 622 N.E.2d at 808; *Department of Public Aid ex rel. Pinkston v. Pinkston*, 325 Ill. App. 3d 212, 757 N.E.2d 977 (2001).

The appellate court ruled:

> The issue is this case is distinguishable from that decided in *Henry*. The question in this case is whether the payment of the dependent benefit on behalf of a disabled parent satisfies that parent's obligation to pay his share of the uncovered or extraordinary medical expenses that have accrued since he was declared disabled. Following the template of the supreme court's reasoning outlined in *Henry*, we have considered whether the medical support obligation and the social security dependent benefit serve similar purposes, and we have concluded that they do not.

The court reasoned:

> A fixed monthly child support payment and a monthly social security dependent's benefit serve substantially similar purposes. Henry, 156 Ill. 2d at 551, 622 N.E.2d at 809. Each is intended to provide for ordinary and customary items needed for the support and maintenance of a dependent child. See 750 ILCS 5/505(a)(1); 20 C.F.R. §404.366(a). Rent, utilities, and groceries are examples of fixed, relatively predictable, ordinary expenses that can be estimated and itemized in a family budget. In contrast, **uncovered and extraordinary medical expenses are, in general, not fixed, less certain, and unpredictable costs for which it is difficult to budget**. These expenses can be budget busters. In this case, the parties agreed to split the extraordinary medical expenses and included these expenses as a specific provision, separate from the child support provision, in their marital settlement agreement. After

> considering the nature and purpose of the social security dependent benefit and that of the medical support obligation, we cannot conclude that a dependent benefit is intended **to cover unpredictable, contingent costs such as uncovered health care expenses and extraordinary expenses**. Accordingly, the circuit court **did not err** in denying the motion to apply the dependent benefit to offset respondent's obligation to pay his share of the child's medical expenses that had accrued from December 2004 through December 2008.

***U.S. v. Bell* - Deadbeats Parents Punishment Act**

In terms of Federal child support enforcement, first we had the Child Support Recover Act (CSRA) in 1992. The CSRA aimed to deter nonpayment of state ordered support obligations through vigorous prosecution of egregious offenders. While federal prosecution efforts were successful under the CSRA, some law enforcement agencies found that the simple misdemeanor penalties provided for under the Act did not have the force to deter the most serious violators. The problem with enforcement under the CSRA was remedied in 1998 with the passage of the Deadbeat Parents Punishment Act (DPPA) which created two new categories of federal felonies for the most egregious child support violators.

Today, a child support violator can be prosecuted under Federal law if the following facts exists: 1) the violator willfully failed to pay a known child support obligation for a child in another state which has a) remained unpaid for longer than a year or is greater than $5,000 (misdemeanor), or has b) remained unpaid for longer than two years or is greater than $10,000 (felony). The alternative is where the violator traveled in interstate or foreign commerce with the intent to evade a support obligation; if such obligation has remained unpaid for a period of one year or longer-or is greater than $5,000 (felony). See 18 U.S.C. §228.

There is not a great deal of Federal law applying the DPPA. In *United States v. Bell*, 598 F.3d 366 (7th Cir. 2010), after a federal jury trial, defendant Maurice Bell was convicted of violating the Deadbeat Parents Punishment Act of 1988, 18 U.S.C. §228(a)(3), for failure to pay child support. He was sentenced to two years' imprisonment and ordered to pay restitution of nearly $84,000. On appeal, the defendant argued that the district court erred in denying his motion to dismiss the indictment on the grounds that it was barred by the five-year statute of limitations. The court of appeals rejected that claim, holding that the defendant's failure to pay child support was a continuing offense. Accordingly, the prosecution was timely. The court of appeals, however, remanded the case for a new sentence because the district court erred in applying the "enhancement for a violation of a court order," which amounted to impermissible double counting in sentencing. The decision noted the split among the Circuits with the Second Circuit defining double counting differently than the 7th Circuit regarding the issue of potential upward adjustments under the sentencing guidelines.

***Heady* - Enjoining Other Enforcement Activities Improper Unless Clear Waiver**

IRMO Heady, 398 Ill. App. 3d 582 (2d Dist., 2010)

The trial court should not have effectively estopped the Illinois Department of Healthcare and Family Services from enforcing a child support arrearage in a case where the trial court's order established a monthly payment on the support arrears. Accordingly, the IDHFS was free to pursue other

enforcement remedies – even if the obligor were current in his support payments on the arrearage. Such enforcement activities may include publishing the ex-husband's name on the "deadbeats most wanted" list, reporting the arrearage to a credit bureau, and referring the arrearage to a private agency or to the Illinois Department of Revenue.

$100 Day Penalty for Failure to Withhold Support

***Stockton* - Penalties for Failure to Withhold Support - Two Year Statute of Limitations**
IRMO Stockton, 401 Ill.App.3d 1064 (2d Dist. 2010)
This complex factual case (including problems with the State Disbursement Unit's manner of record keeping) regarding timing of payments is necessary reading for an in depth knowledge of how the provisions of the Income Withholding for Support Act (IWSA) operate.

The appellate court stated:

> The threshold question this case turns on is not whether the distribution in the problematic line should be credited to Rockwell, but whether the information contained in the problematic line indicates that an outstanding payment remains under the 1998 withholding order. It is the answer to this question that dictates the parameters of our statute-of-limitations analysis, and we conclude that no outstanding payment remains under the 1998 withholding order. The Withholding Act does not set forth a statute of limitations for an action to collect an arrearage amount or for an action to collect penalties.

The appellate court first ruled that 735 ILCS 5/12--108 does not apply to penalties under the IWSA – §12-108 providing that “"[c]hild support judgments, including those arising by operation of law, may be enforced at any time."

The appellate court ruled that a two year statute of limitations applied under §13-202 of the Code (735 ILCS 5/13--202) for statutory penalties. Accordingly, the ex-wife's action was time-barred.

***Vaughn* - Blue Cross May be Required to Withhold Child Support Regarding Payments to a Private Physician's Practice**
IRMO Vaughn, 403 Ill.App.3d 830 (1st Dist., 2010)
The issue in this case was whether Blue Cross payments to a sole proprietorship (in this case the ex-husband was a chiropractor) would fall within payments subject to withholding under the Income Withholding for Support Act (IWSA). On a weekly basis, Blue Cross had remitted payments for the services the ex-husband provides to its insureds via an electronic funds transfer account that was established several years earlier. The ex-wife served Blue Cross with a withholding notice. Blue Cross responded to the withholding notice by stating, in part: “Please be aware we do not become involved in personal cases and are not allowed to set up this type of convenience for the provider.” The ex-wife then sent Blue Cross another withholding notice, a copy of the order of support, and a copy of the relevant portion of the IWSA. She also informed Blue Cross that she would pursue statutory penalties under the IWSA if Blue Cross continued to disregard its duty to comply with the

withholding notice. Blue Cross again responded that it was “not allowed to set up this type of convenience for the provider.”

The ex-wife then brought a complaint seeking $100 per day penalties for failure to withhold. Blue Cross moved to dismiss the complaint because it alleged that it did not pay income to the ex-husband. Alternatively, Blue Cross moved to dismiss the ex-wife's complaint because it alleged that it did not knowingly violate the Withholding Act. Blue Cross further stated that it made payments to the "Vaughn Center" for the ex-husband's treatment of Blue Cross's insureds rather than directly to the ex-husband as an individual. The ex-wife presented an affidavit of the ex-husband which stated that the Vaughn Center was a pseudonym under which he did business. The ex-husband also stated in his affidavit that Blue Cross transmits the payments directed to the Vaughn Center into his personal checking account.

The trial court granted Blue Cross' motion to dismiss under §2-619 of the Code finding both that Blue Cross did not knowingly fail to comply with the IWSA and that the ex-wife did not present credible evidence that Blue Cross "had knowledge that the funds that they were transferring were going to an individual who was [a] child support obligor." The ex-wife appealed and the appellate court reversed and remanded.

The appellate court stated:

> [B]ecause a determination of whether the word “individual” in the Withholding Act includes a sole proprietorship is a question of law, our standard of review is de novo, and we do not give the trial court’s interpretation any deference.

The issue is whether Blue Cross was the ex-husband's payor. The IWSA defines a “payor” as “any payor of income to an obligor.” 750 ILCS 28/15(g):

> Thus, in order for Blue Cross to be a “payor,” it must pay Ronald income.” The Withholding Act defines “income,” in pertinent part, as “any form of periodic payment to an individual, regardless of source.” 750 ILCS 28/15(d).

The appellate court then reasoned:

> Blue Cross argues that it does not pay Ronald income because it pays Vaughn Center. Blue Cross further contends that Vaughn Center is not an “individual” under the Withholding Act’s definitions of “income” and “obligor.” However, the affidavit submitted by Ronald establishes that Ronald is a sole proprietor and Vaughn Center is a legal nonentity. “[A] sole proprietorship has no legal identity separate from that of the individual who owns it.” *Vernon v. Schuster*, 179 Ill. 2d 338, 347, 688 N.E.2d 1172, 1176-77 (1997). Moreover, even if a sole proprietor does business under a fictitious name, the sole proprietor has not created a separate legal entity. *Vernon*, 179 Ill. 2d at 347-48, 688 N.E.2d at 1176-77. Thus, the word “individual” in the Withholding Act’s definition of “income” includes a sole proprietorship. See *Shively*

> *v. Belleville Township High School District No. 201*, 329 Ill. App. 3d 1156, 1165-66, 769 N.E.2d 1062, 1070 (2002) (interpreting "individuals" in the School Code's professional services exemption (105 ILCS 5/10-20.21(a)(i) (West 2006)) to refer "to the ones performing the service, not the ones with whom the contract is made" because, if "individuals" referred to the latter, sole proprietorships, but not corporations, would fall under the exemption). *** Consequently, because Blue Cross pays Vaughn Center income, it was required to comply with the withholding notice that it received from Jill.

Regarding the §2-619 motion, the appellate court then addressed the trial court's ruling that Blue Cross did not knowingly violate the IWSA. The appellate court noted that a "§2-619 admits the legal sufficiency of the plaintiff's claim but asserts 'affirmative matter' outside of the pleading that defeats the claim." But the court then noted that "where the affirmative matter is merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint, §2-619(a)(9) should not be used." It stated that the trial court must resolve any factual disputes in a complaint that is brought against a payor under the Withholding Act and thus improperly granted Blue Cross' motion on the merits – based solely upon affidavits:

> However, in deciding the motion's merits, "a trial court cannot determine disputed factual issues solely upon affidavits and counteraffidavits. If the affidavits present disputed facts, the parties must be afforded the opportunity to have an evidentiary hearing." (citation omitted). Alternatively, the trial court "may deny the motion without prejudice to the right to raise the subject matter of the motion by answer."

The appellate court stated that:

> [I]f the trial court dismisses the cause of action on the pleadings and affidavits, as was the case here, our duty on appeal is to determine "whether there is a genuine issue of material fact and whether the defendant is entitled to judgment as a matter of law." ***
>
> Blue Cross submitted an affidavit stating that it made payments to Vaughn Center. Jill then submitted an affidavit from Ronald stating that the payments from Blue Cross were directly deposited into Ronald's personal checking account. We agree with Jill that if this dispute had been properly before it, and if this fact was material, the trial court should not have granted a §2-619 motion where the counteraffidavits raised a factual dispute and no evidentiary hearing was held to resolve the dispute.

The court then stated that the issue of a knowing violation of the IWSA could not be properly raised in a §2-619 motion for two reasons. First, it is not an affirmative matter but the negation of essential element of the ex-wife's case. Second, the appellate court stated:

> The Withholding Act imposes a penalty on a payor "[i]f the payor knowingly fails to withhold the amount designated in the income withholding notice or to pay any

> amount withheld to the State Disbursement Unit." 750 ILCS 28/35(a) (West 2006). However, "knowingly" refers to a payor's omissions that occur after the payor receives a withholding notice and presumably recognizes that it pays income to the individual. *** In other words, the Withholding Act's penalty provision assumes that a withholding notice is served on an actual payor and that the payor realizes that it pays income to the individual designated in the notice.

The appellate court concluded:

> Therefore, even if a payor does not realize that its payee is in fact the obligor named in the notice, that fact would not provide a valid defense that would exempt it from the Withholding Act's penalty provision. ***
>
> However, instead of complying with the notice or filing a declaratory judgment action to challenge its identification as a payor in the underlying case, Blue Cross sent a response to Jill in which it stated that it is "not allowed to set up this type of convenience for the provider." This is analogous to the employers in *Miller*, 227 Ill. 2d at 202, 879 N.E.2d at 302, and *Gulla*, 382 Ill. App. 3d at 503, 888 N.E.2d at 589, who disregarded the withholding notices they received. Blue Cross cannot avoid the Withholding Act by merely stating that it is not allowed to offer a "convenience" to a provider when it is required by statute to do so and has received proper notice. Thus, because whether Blue Cross knew it was paying the obligor is not a valid defense to this action, the trial court erroneously granted Blue Cross's motion to dismiss. Finally, we note that the statutory penalty for a knowing violation of the Withholding Act is mandatory, not discretionary.

Comment: This case goes exactly to a point that I have made over the years in various seminars. A sole proprietorship would be subject to withholding income if properly served. Only weeks before this decision was made I observed the trial court's finding that a sole proprietorship was not subject to $100 per day penalties as it may bankrupt him, i.e., it could simply not pay these penalties. This is not a defense to the statutory penalties.

Read the concurring opinion by Justice O'Brien. Note that a petition for leave to appeal has been submitted.

Uniform Interstate Family Support Act:

***Vailas* - UIFSA re Modification of Support Explained**:
IRMO Vailas, 406 Ill. App. 3d 32 (First Dist., 2010)
The *Vailas* case is excellent reading as providing a primer for simply reading and understanding the UIFSA. While one can register a judgment of another state, this does not matter for the purpose of modification jurisdiction. While the mother's current state may be Illinois (with the child) when a parent resides in the original forum state, that state has continuing exclusive jurisdiction. Personal service in Illinois is irrelevant.

***Galvez* – Paternity Proceedings and Date Order for Support Determined to be Final**
Galvez v. Rentas, 403 Ill. App. 3d 491, 498 (1st Dist., 2nd Div., 2010)
This case involved a paternity proceeding without a voluntary acknowledgment of paternity. The appellate court held that a September 2006 agreed order of paternity was final, even though it did not address child support. When Illinois Department of Healthcare and Family Services intervened in December 2008 to set child support, biological father was not entitled to further DNA testing. Appellate Court affirmed.

The key issue based upon the putative father's argument was that §11(a) of the IPA of 1984 provides for DNA testing prior to judgment in a paternity case. It provides that, "[a]s soon as practicable, the court *** may, and upon request of party shall, order or direct the mother, child and alleged father to submit to deoxyribonucleic acid (DNA) tests to determine inherited characteristics. If any party refuses to submit to the tests, the court **may resolve the question of paternity** against that party or enforce its order if the rights of others and the interests of justice so require." (Emphasis added.) 750 ILCS 45/11(a)"

The appellate court stated:

> From this language, it is clear that, where the matter of paternity is unresolved, the court must order a DNA test if one of the parties requests it. But Jose Jr.'s paternity was not unresolved. The court made a judicial determination resolving Jose Jr.'s paternity in 2006, when it entered its order declaring Rentas to be the father of the boy. Accordingly, since the matter of the boy's paternity was resolved, Rentas had no right to DNA testing under section 11.

So next, the issue was whether the agreed order establishing paternity was a final judgment under §14 of the IPA of 1984. The appellate court stated, "The court's 2006 order is a final judgment resolving Jose Jr.'s paternity." The father argued §14(a)(1) of the IPA of 1984 that provides:

> The judgment **shall** contain or explicitly reserve provisions concerning **any duty** and amount of child support and may contain provisions concerning the custody and guardianship of the child, [and] visitation privileges with the child *** ." (Emphasis added.) 750 ILCS 45/14(a)(1).

Because of the fact that there was joint legal custody, the appellate court ruled the father was not a non-custodial parent because of the provision for joint custody. The appellate court stated:

> It [the order establishing paternity, etc.] did not address child support because child support was not in dispute. Galvez did not ask for it and Rentas was not required to pay it because child support is only required from noncustodial parents. In 2006, Rentas was a custodial parent. He lived with Galvez and Jose Jr. and, with Galvez, jointly supported the boy. As a custodial parent, Rentas did not have "any duty" to pay child support. Because Rentas had no duty to pay child support, there was nothing for the court to address pursuant to section 14(a)(1). It was only when Rentas

> moved out of Galvez's home that child support and medical insurance became disputed issues pursuant to the Department's petition to modify child support.

Post-High School Educational Expenses:

***Truhlar* - Payment of Expenses for College from Normally Exempt Social Security Disability Benefits**
IRMO Truhlar, 404 Ill. App. 3d 176 (2nd Dist., 2010)
The parties' 1994 divorce judgment incorporated a MSA that provided in part:

> The Husband and Wife shall each contribute to the costs of higher education of the children. The amount that each of the parties shall pay may be agreed upon by the parties at the time each child is to enter a school of higher education; and in the event that the parties are unable to agree, the Court shall determine the amount that each party shall pay based upon each of the parties' ability to pay at that time and upon said child's desire and aptitude to enter a school of higher education. The Court shall also consider the amount that said child can contribute to the higher education in determining the contribution of each party.

When the daughter was age 17, the ex-wife filed a petition for contribution to college expenses under §513 of the IMDMA. The evidence at hearing showed that the former husband had remarried; his sole source of income was social security disability benefits of $1,825 per month; and his current wife's monthly earnings were approximately twice that amount. In 2008, the trial court ordered the ex-husband to contribute $361.25 per month toward his daughter's college education. The ex-husband moved to vacate the order arguing that under Federal law his social security disability benefits were beyond the reach of creditors, so there was no way to enforce the contribution obligation. The trial court agreed. Although the trial court noted authority that social security disability payments could be reached to satisfy a child support obligation, the trial court concluded that contribution to an emancipated child's college education was not child support. The ex-wife appealed and the appellate court reversed and stated:

> As noted, however, James successfully moved to vacate the order, persuading the trial court that his income, which consisted of social security disability benefits, was protected by section 407(a) of the Social Security Act (the Act), which prohibits the assignment or transfer of the future payment of benefits under subchapter II of the Act and exempts any benefits paid or payable under subchapter II from "execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. §407(a) (2006). The exemption covers social security disability payments. See *DeTienne v. DeTienne*, 815 F. Supp. 394, 396 (D. Kan. 1993). However, section 659(a) of the Act (42 U.S.C. §659(a) (2006)) carves out a limited exception to the exemption set forth in section 407(a), by waiving the United States's sovereign immunity with respect to certain proceedings to collect "child support or alimony." We note that, pursuant to section 407(b) of the Act, any

> statute creating an exception to the exemption must do so by express reference to section 407. 42 U.S.C. §407(b) (2006). James argues that section 659(a) does not satisfy this requirement. To the contrary, section 659(a) expressly states that the exception it creates applies "[n]otwithstanding any other provision of law (**including section 407 of [the Act**] ***)." (Emphasis added.) 42 U.S.C. §659(a) (2006).

The *Truhlar* court then stated:

> For purposes of section 659(a), "child support *** means amounts required to be paid under a judgment, decree, or order *** issued by a court or an administrative agency of competent jurisdiction, **for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing State**." (Emphasis added.) 42 U.S.C. §659(i)(2) (2006). In vacating the order that James contribute to Ashley's college education, the trial court reasoned that such contribution was not child support.

So the issue was whether the payment of all or part of the college education of a child who has reached the age of majority constitutes payment for "the support and maintenance of the child" within the meaning of §659(i)(2) and therefore constitutes child support. The appellate court then stated:

> Section 513(a) of the Marriage Act is consistent with this understanding. Specifically, pursuant to section 513(a), an order requiring one or both parents to contribute to a child's education is within the trial court's authority to "award sums of money *** **for the support of the child or children of the parties who have attained majority**." (Emphasis added.) 750 ILCS 5/513(a). Nonetheless, there appear to be no reported decisions considering whether the obligation to contribute to a child's college education is "support" within the meaning of section 659 of the Act. *** Although the question of whether an obligation constitutes "support" is ultimately one of federal law, because "there is no federal domestic relations law, the *** court must naturally consider state law in determining the appropriate federal standard."

The court reasoned:

> Generally speaking, courts have found agreements, judgments, and orders requiring one or both parents to contribute to a child's college education to qualify as "support," unless it appears that the true purpose of the agreement, judgment, or order was to offset a disparity in the division of marital property.

The court then noted that there was no evidence that the purpose of the agreement to contribute to college expenses in the MSA was to offset for a disparity in the distribution of property.

In language which could easily be misconstrued, the court then stated:

> As discussed above, Illinois and other jurisdictions have recognized that, in proper cases, a college education is necessary to prepare a child for adult life and can thus be

> grouped with the child's more basic needs, such as food, shelter, medical care, and parental supervision.

The court concluded:

> Consequently, contribution to Ashley's college education qualifies as "support," and section 659 of the Act authorizes proceedings against the federal government to collect James's social security disability benefits in satisfaction of that obligation.

***Petersen* - Retroactive Award Not Allowed Where Mere General Reservation Because §513 Relief is in the Nature of Child Support -- $227K Award of Pre-Petition Expenses Reversed - Supreme Court in Accord with Appellate Court's Decision**

Petersen v. Petersen, 403 Ill.App.3d 839 (1st Dist., 2010).

In *Petersen*, the 1999 divorce judgment provided a standard reservation of jurisdiction clause regarding post-high school educational expenses per §513 of the IMDMA.

> The Court expressly reserves the issue of each party's obligation to contribute to the college or other education expenses of the parties' children pursuant to Section 513 of the [Illinois Marriage and Dissolution of Marriage Act].

In May 2007, the ex-wife filed her petition requesting an allocation of college expenses for the children. The oldest child was a graduate of Cornell University in 2006 – attending school there from 2002. The middle child was 21 years old at the time of the hearing and had attended Wake Forest University for his first year of college (2004-05) and then transferred to the University of Texas. The youngest child was 18 years old and was in his first year of college at California Polytechnic State University. The ex-wife had not spoken to the ex-husband since 2002. The ex-wife testified that she sent her ex-husband a letter in 2002 listing the expenses that the oldest son would incur at Cornell but never received a response. The ex-husband testified that he never received this letter. The ex-wife financed the children's college educations via loans, etc. The oldest son had already received his B.A by the time the ex-wife's petition was filed.

The parties' incomes were:

	Husband	**Wife**
2002	$94,000	
2003	$180,687	$30,170
2004	$181,939	$34,955
2005	$220,314	$35,160
2006	$294,563	$40,268

The trial court ordered the ex-husband to pay 75% of the total college expenses for all three children – **past**, present and future. Ultimately, the trial court determined the amount due from the ex-husband for past expenses was $**227,260.** The trial court also ordered the ex-husband to pay $46,291 for the younger children's 2008-09 college expenses. The ex-husband appealed urging either that the

trial court did not have jurisdiction to require him to pay college expenses prior to the filing of the ex-wife's petition.

The appellate court noted that §510(a) of the IMDMA provides in part, "...[T]he provisions of any judgment respecting maintenance or *support* may be modified only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification."

The appellate court then stated:

> In general, courts have viewed §513 educational expenses as a type of child support:
>
> > " 'Support' is simply a general term that can include 'educational expenses' for a child who has turned 18 but is still in high school. 'Educational expenses' may include 'room' and 'board,' just as the more generic term, 'support,' may include shelter and food. A court can award 'support' to disabled unemancipated children, minor or nonminor (750 ILCS 5/513(a)(1)), and a particular kind of support, 'educational expenses,' to 'nonminor children' in school (750 ILCS 5/513(a)(2)).' " *In re Marriage of Waller*, 339 Ill. App. 3d 743, 748, 791 N.E.2d 674 (2003).

In doing so the appellate court emphasized the language of §513(a) *[the preamble section before (a) addressing disability and (b) addressing post-high school educational expenses]* which states:

> The court may award sums of money out of the property and income of either or both parties *** for the *support* of the child or children of the parties who have attained majority in the following instances *** (emphasis supplied in *Petersen* decision).

The court also looked to the case law which has held that §513 expenses are included under what in 1987 was §510(c) of the IMDMA -- now §510(e). §510(e) provides that support or educational support is not terminated on the death of a parent. *Petersen* cited *IRMO Champagne*, 153 Ill. App. 3d at 563-64 (2nd Dist., 1987), [GDR 87-13].

More importantly, the appellate court relied on *IRMO Loffredi*, 232 Ill. App. 3d 709 (1992) (GDR 92-101) which addressed whether the obligation to pay expenses under §513 was modifiable despite a §502(f) non-modifiability provision:

> The court looked to section 502(f), which deals with modification of settlement agreements, and found a provision for college expenses in a settlement agreement is in the nature of child support pursuant to section 502(f) and may be modified. *Loffredi*, 232 Ill. App. 3d at 711.

The appellate court ultimately held:

> Janet's petition for educational expenses is a modification of the **support** provisions

> of the judgment and section 510 requires Kevin's contribution to his children's educational expenses to begin on the notice date of Janet's petition.

The ex-wife argued that *IRMO Bennett*, 306 Ill. App. 3d 246 (1999), [GDR 99-74] illustrated a situation where the appellate court affirmed a trial court decision allowing retroactive educational expense payments. Our *Gitlin on Divorce* summary of that case stated, "In original proceedings the court may grant reimbursement for educational expenses husband paid before divorce petition was filed where wife cites no case law or statute prohibiting such reimbursement."

The appellate court in 1999 in *Bennett* had reasoned:

> We conclude that the court did not err in ordering Beatrice to reimburse Edgar for a portion of Karen's previous educational expenses. The awarding of educational expenses is within the sound discretion of the trial court. (citation omitted). Beatrice argues that the court has no authority to order her to reimburse Edgar for the payment of expenses that predate the filing of the petition for dissolution. Comparing an award of educational support to an award of child support (see *In re Marriage of Dieter*, 271 Ill. App. 3d 181, 190 (1995)), Beatrice argues that, since a trial court has no authority to retroactively modify a child support order (see *In re Marriage of Henry*, 156 Ill. 2d 541, 544 (1993)), there is no authority for a court to impose a support reimbursement order retroactively for funds expended before the case was filed. However, she cites no case law or statute prohibiting the court from ordering reimbursement for the educational expenses paid prior to the filing of a petition for dissolution. The appellate court has considered reimbursement for the educational costs expended after an order of dissolution, and the concept was not rejected. See Singer v. Singer, 70 Ill. App. 3d 472 (1979) (court declined to grant a request for reimbursement only because the petitioner did not demand a specific amount or present evidence as to actual payments made or her financial position).
>
> Furthermore, a child's educational expenses are chargeable to both parents under section 15(a)(1) of the Rights of Married Persons Act (the Expense Statute). See 750 ILCS 65/15(a)(1) (West 1996). Under the Expense Statute, creditors may sue parents jointly or separately for family and education expenses. 750 ILCS 65/15(a)(1) (West 1996). Thus, Beatrice could have been held liable for all or any portion of Karen's expenses before or after the petition for dissolution was filed. See *Proctor Hospital v. Taylor*, 279 Ill. App. 3d 624, 626-27 (1996). We decline to hold that a trial court abuses its discretion in granting reimbursement for the educational expenses paid before the filing of a petition for dissolution and find no error here.

In the instant case, the appellate court stated, however, that. "*Bennett* is distinguishable from the case at bar in that the educational expenses there occurred while the parties were still married."

Important limiting language of *Petersen* states:

> In this case, we note, the judgement of dissolution of marriage did not determine

> whether the parents were required to pay the college expenses of the children (a form of child support), but reserved the issue to be decided in the future.

Comment Following Petition for Leave to Appeal Granted: In November 2010, the petition for leave to appeal was granted on the *Petersen* case.

Again, the key language was the nature of the reservation clause in the case. It had said:

> The Court expressly reserves the issue of each party's obligation to contribute to the college or other education expenses of the parties' children pursuant to Section 513 of the [Illinois Marriage and Dissolution of Marriage Act].

This is little more than restating what the statute says. Keep in mind that Section 513(b) says:

> The court **may** also make provision for the educational expenses of the child or children of the parties, whether of minor or majority age, and an application for educational expenses may be made before or after the child has attained majority, or after the death of either parent."

Recall that Illinois did away with a statute of limitations dealing with child support in 1997. Since §513 support is in the nature of support, if a party could seek retroactive contribute toward §513 this obligation could can go back even beyond the grave. This could then be done via what I would refer to as a "barebones reservation clause" that did not even recognize each party's obligation to contribute toward §513 expenses.

So the key issue is whether maintenance reserved in a judgment can be set prior to a petition being filed? My answer: On this first look to: *People ex Rel. Greene v. Young*, 367 Ill.App.3d 211, 304 Ill.Dec. 958, 854 N.E.2d 300 (4th Dist. 2006). *Green* ruled that the mother should not be barred from seeking to enforce order for child support arrears, entered in October 1987, three years after child's emancipation and seeking back child support from May 1988 when father never informed mother of his employment status per May 1988 court order. That case held:

> We recognize that under normal circumstances "[s]upport may be modified only as to installments accruing after the nonmoving party has been notified that a motion to modify has been filed and only upon a showing of a substantial change in circumstances" (*In re Marriage of Zukausky*, 244 Ill. App. 3d 614, 618, 613 N.E.2d 394, 398 (1993), citing Ill. Rev. Stat. 1991, ch. 40, par. 510(a)). However, **the facts of this case are extraordinary**. As stated, a circuit court may impose a retroactive child support obligation upon a respondent in an ongoing child-support proceeding **when a respondent has failed to inform the court of his having resumed employment as required by court order**. *Williams*, 191 Ill. App. 3d at 317, 547 N.E.2d at 731.

That opinion concluded:

> Our research has led us to no cases with facts similar to those present here. However, we find support for our holding in the public policy of this state in regard to a parent's duty to support his children and the fact Robert directly disregarded a court order requiring him to report any change in his employment status.

Another case that could be looked to would be *IRMO Mathias*, 304 Ill.App.3d 326 (3d Dist. 1999). It ruled that when a 1982 divorce judgment entered child support of $40 per child for two children of the marriage, but awarded only $20 at **"temporary support" for third child**, whose paternity was in dispute in the child support modification proceedings filed in 1996, the mother was **not** entitled to modification of the temporary support back to 1982 since, per IMDMA § 510(a) modification of support can only be made retroactive to the time of filing of the petition for modification and notice. So this presents a good bookend to *Green*.

One more case that might be looked to might be *IRMO Campbell*, 252 Ill.App.3d 653 (1st Dist., 3d Div. 1993). In that case the MSA provided: 1) unallocated child support and maintenance will terminate at a certain time during the child's minority, 2) the parties will agree re future child support or the court shall set child support. The ruling: If the parties do not timely renegotiate, the child support award **may be retroactive** to the termination, not court filing date. The key difference is that the MSA had provided that the parties will agree regarding future child support." The MSA in *Petersen* had not specifically mandated an obligation for post-high school education.

I also found *Rimkus v. Rimkus*, 199 Ill.App.3d 903, 145 Ill.Dec. 868, 557 N.E.2d 638 (1st Dist. 1990). It ruled that when the MSA provides that when unemployed party realizes substantial income he **shall enter into discussions with his spouse and that if the parties are unable to agree the matter shall be presented to the court for its determination**. The wife was **not** entitled to child support retroactive to obtaining employment. This is another comparison case to *Williams*, above. I suggest the best choice is to handle this issue legislatively.

Maintenance Cases:

***Nord* - Permanent Maintenance: Award of Permanent Maintenance of $17,000 a Month Affirmed**

IRMO Nord, 402 Ill.App.3d 288 (4th Dist., 2010)

The parties were married in 1972 and accordingly this was a long term marriage case in which the children were adults at the time of trial, the husband was age 57 and the wife was age 58. The marriage was 36 years at the time of trial. The husband was a physician practicing in the field of obstetrics and gynecology. The wife (Kathleen) was a high school graduate and ceased working in 1980 to care for the parties' two children, so she had not worked outside the home for nearly 30 years.

The parties reserved the key issue which was that of maintenance. Regarding the $17,000 monthly permanent maintenance award, the husband contended that (1) his resources were insufficient to pay the maintenance award, (2) $17,000 per month was not necessary for Kathleen's reasonable expenses, (3) his actual expenses were not considered, (4) Kathleen received the bulk of the marital

assets, and (5) $5,000 per month for 60 months would adequately support Kathleen.

According to the parties' tax returns, the ex-husband's total gross income was $994,507 in 2002, $1,162,517 in 2003, $1,655,786 in 2004, $1,669,178 in 2005, $1,576,942 in 2006, and $898,827 in 2007. In addition, petitioner's exhibits show Daniel's total gross income for 2008 was $813,031. As a result, his average income for 2002 to 2008 was over $1 million. Regarding the husband's argument that the court should not have considered capital gains as income, the appellate court noted the trial court's findings that it had concluded that the last two years were the best representation of the husband's income and that it had given the husband the benefit of the doubt in this regard – because these years had no significant capital gains income.

There were also significant property disputes but I believe the key aspect to this decision involves what was essentially a generous maintenance award affirmed on appeal.

Custody

Jurisdiction / Hague

***Abbott* - *Ne Exeat* Provision Constitutes Rights of Custody under Article III of the Hague Convention**

Abbott v. Abbott, 560 U.S. ___, .130 S.Cr.1983, U.S. Supreme Court (May 17, 2010)

A key term in dealing with the Hague Convention on Civil Aspects of Child Convention (Hague Convention) is that the convention requires the return of children only if the person was **habitually a resident** of the country immediately before the action that results in the breach of rights of custody or rights (and likely rights of access.) The issue was whether a party has rights of custody under the Hague by virtue of a *ne exeat* clause (an order preventing exit with the children from the country). Abbott held that a parent has a right of custody under the Hague Convention by reason of that *parent's ne exeat* right. A key aspect of the case was not necessary the ne exeat order but the fact that under Chilean law provides that"[o]nce the court has decreed" that one of the parents has visitation rights, that parent's "authorization" generally "shall also be required"before the child may be taken out of the country.

See also: http://www.shulmanrogers.com/assets/attachments/WadingIntoDeepWater.pdf

***Akula* - No Exclusive, Continuing Jurisdiction under the UCCJEA in Illinois / Ruling by Indian Court Supposedly in Substantial Conformity with the UCCJEA**

IRMO Akula, 404 Ill. App. 3d 350, 361-62 (1st Dist., 2010)

This case demonstrates the dangers involved in countries where the Hague Convention does not apply. For a good article addressing some of the dangers involving India and the Hague, see: http://www.international-divorce.com/parental-child-abduction-india.htm

In this case, the mother was awarded custody of the parties' son. The former husband (Vikram) then moved to India. The former husband argued that his wife then moved to India. While the evidence was somewhat weak in this regard and while the Indian court refused to communicate with the

Illinois court (as would be its duty under the UCCJEA), the Indian court found that the parties were both residents of India. The ex-husband was able to obtain an ex-parte restraining order and various other very orders in the Indian family law court. The Illinois trial court ultimately ruled that (1) Illinois was the residence of the Mother (Malini); (2) Illinois had continuing, exclusive jurisdiction over the parties and subject matter under the UCCJEA; and (3) the Indian family court failed to find that mother and child no longer resided in Illinois. The Illinois trial court also ruled that the proceedings in the Indian family court were not being conducted in substantial conformity with the jurisdictional standards of the UCCJEA, rendering the Indian court's orders unrecognizable and unenforceable under §105 of the UCCJEA (750 ILCS 36/105).

The former husband appealed and the certified question was "Did the Circuit Court properly rule that Illinois has exclusive and continuing jurisdiction because the Indian family court did not make a judicial determination in substantial conformity with subsection 202(a)(2) of the UCCJEA?"

The Illinois court stated that the sole issue was the interpretation of UCCJEA §202(a)(2) UCCJEA, which provides:

> (a) Except as otherwise provided in Section 204, a court of this State which has made a child-custody determination consistent with Section 201 or 203 has exclusive, continuing jurisdiction over the determination until:
>
> ***
>
> (2) a court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State." 750 ILCS 36/202(a)(2).

The Indian family law court had ruled that the parties were "now ordinarily residing" in India. This case then addresses the definition of "residence" and "domicile." The appellate court's discussion is instructive for future cases and because many Illinois divorce lawyers are not fully aware of the contents of UCCJEA. So, I will quote from the decision at length:

> Given that the concept of residence does not have a fixed and constant meaning, the question is whether the circuit court correctly used a definition synonymous with "domicile" in the context of jurisdiction under the UCCJEA. The official comment to section 202 of the UCCJEA states in part:
>
> > "2. Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree State. The exact language of subparagraph (a)(2) was the subject of considerable debate. Ultimately the Conference settled on the phrase that 'a court of this State or a court of another State determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State' to determine when the exclusive, continuing jurisdiction of a State ended. The phrase is meant to be identical in meaning to the language of the PKPA [the federal Parental Kidnaping Prevention Act] which provides that full faith and credit is to be given to custody determinations made by a State in the exercise of its

> continuing jurisdiction when that 'State remains the residence of.... ' The phrase is also the equivalent of the language 'continues to reside' which occurs in UIFSA [Uniform Interstate Family Support Act] § 205(a)(1) to determine the exclusive, continuing jurisdiction of the State that made a support order. The phrase 'remains the residence of' in the PKPA has been the subject of conflicting case law. It is the intention of this Act that paragraph (a)(2) of this section means that the named persons no longer continue to actually live within the State. Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases.
>
> The phrase 'do not presently reside' is not used in the sense of a technical domicile. The fact that the original determination State still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the State.
>
> If the child, the parents, and all persons acting as parents have all left the State which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in State B, as well as a court in State A, can decide that State A has lost exclusive, continuing jurisdiction.
>
> The continuing jurisdiction provisions of this section are narrower than the comparable provisions of the PKPA. That statute authorizes continuing jurisdiction so long as any 'contestant' remains in the original decree State and that State continues to have jurisdiction under its own law. This Act eliminates the contestant classification." Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. §202, Comment, at 674-75 (1999). Thus, it is clear that the drafters of the UCCJEA did not intend that "residence" be equated with "domicile" in this context. See, e.g., In re Marriage of Nurie, 176 Cal. App. 4th 478, 500 n.23, 98 Cal. Rptr. 3d 200, 219 n.23 (2009).

Ultimately, the Illinois appellate court held:

> Based on the text of section 202(a) and the intent of its drafters, we conclude that the Indian family court's finding that the parties and child are "now ordinarily residing" in Hyderabad necessarily implied that they did not presently reside in Illinois. *** The Indian family court thus acted in substantial conformity with the jurisdictional requirements of the UCCJEA as enacted in Illinois.

For the appeal, Lake Toback represented the petitioner, appellant and Grund & Leavitt represented the appellee.

Comment: To see a good discussion of the case law on this, you may review a 2012 unpublished decision discussing this case.

***In Re G.P.* – Child Custody Proceedings Under SCR 903**

In Re G.P., 404 Ill.App.3d 272 (3rd District, 2010)

G.P. held that the trial court erred as a matter of law by denying the mother's motion for custody and granting the State's motion to terminate wardship in proceedings that violated Supreme Court Rule 903 because the child custody proceedings were not heard in front of the same judge.

The *Gitlin on Divorce Report* of this decision follows because it is well done:

G.P. is the minor child of nonmarital parents. In 2008, in juvenile court proceedings, the trial court adjudged G.P. to be neglected. At the dispositional hearing, the court made the child a ward of the found the mother to be unfit; and granted custody of the child to the father. Immediately after the dispositional hearing, the mother filed a motion to restore G.P. to her custody. In family court, the father filed a petition for custody of the child. In juvenile court, the father filed motions: (1) to consolidate the juvenile court and the family court custody matters, under Supreme Court Rule 903; and (2) to dismiss the mother's motion to restore custody. The juvenile court: (1) denied the father's motions; and (2) granted the mother's motion to restore custody to her, without previously having found her to be fit.

In the first appeal regarding this matter, *In Re G.P.*, 385 Ill.App. 3d 490, 324 Ill. Dec. 654, 896 N.E.2d 440 (3d Dist. 2008), the father appealed, arguing the juvenile court erred in its decisions regarding his motions. The appellate court reversed the trial court's order denying consolidation, vacated the order restoring the child's placement with the mother, and directed the trial court to grant the petition to consolidate both juvenile and family court proceedings before one judge pursuant to Supreme Court Rule 903.

On remand, the juvenile court granted the State's motion to terminate the child's wardship and the mother filed a motion to reconsider. The trial court then: (1) partially granted the mother's motion to reconsider by vacating its previous order terminating wardship; (2) denied the mother's motion to restore custody; (3) denied her motion to reconsider in all other respects; and (4) again granted the State's motion to terminate wardship. The juvenile court then transferred the matter to the family court for further proceedings before a different judge.

The mother appealed the juvenile court's order and argued the trial court failed to follow the appellate court's order **to hold a single consolidated custody hearing regarding both the juvenile court and the family court matter**. The Third District Appellate Court vacated the trial court's rulings from the first remand and remanded the cause a second time for proceedings that follow the requirements of Rule 903.

Illinois Supreme Court Rule 903 states:

> Whenever possible and appropriate, all child custody proceedings relating to an individual child shall be conducted by a single judge. Each judicial circuit shall adopt

> a rule or order providing for assignment and coordination of child custody proceedings. Assignments in child custody proceedings shall be in accordance with the circuit rule or order then in force.

The Third District Appellate Court first admonished Will County for not having adopted a local court rule, or order, to address the coordination of a child custody proceeding such as this one, since this case was last remanded in 2008. Next, the review court ruled Supreme Court Rule 903 requires consolidated child custody proceedings in a trial court before a single judge "whenever possible and appropriate," which in this case it found such proceedings were both possible and appropriate. The appellate court acknowledged that in its previous ruling, it stated the proceedings on remand were to be conducted in "the consolidated hearing of" the mother's custody motion filed in the juvenile court and the father's custody petition filed in the family court, but the Supreme Court Rule does not require a consolidated hearing, in the singular, to be held before a single judge, but rather, consolidated proceedings, in the plural, before a single judge. Because a juvenile court judge held the juvenile court proceedings, and then prepared to transfer the matter to the family court for proceedings before a different judge sitting in family court, the appellate court concluded the proceedings were in direct contravention of the appellate court's previous order and were in violation of the plain language of Rule 903.

***Macknin* – Motion to Disqualify Attorney Representing Child Witness**
Macknin v. Macknin, 404 Ill. App. 3d 520 (2nd Dist., 2010)
Macknin involved a motion seeking to disqualify an attorney representing a child witness. The motion to disqualify was granted and the appellate court reserved holding that §506 of the IMDMA does not require that the court select the attorney. The child may be represented by a lawyer hired by someone else. It held that no conflict of interest was shown to exist given the facts of the case. The issue in that case was whether the child's attorney was essentially hired by the mother – either directly or indirectly – thus creating the conflict of interests.

Paternity

***In Re M.M.* - Right of GAL to Challenge Paternity Despite Voluntary Acknowledgment of Paternity**
People v. Robert M. (In Re M.M., A Minor), 401 Ill.App.3d 416 (1st Dist., 1st Div. 2010)
In Re M.M. held that a child, by a guardian ad litem (GAL), may challenge establishment of paternity through a Voluntary Acknowledgment of Paternity (VAP) by the introduction of DNA evidence, despite the fact that the child did not challenging the VAP within the statutory limitation period. This is because the child was not in privity to the parents entering into the VAP.

The appellate court stated that the issue was a de novo review of statutory construction. The statute at issue provides:

> "An action to declare the non-existence of the parent and child relationship may be brought by the child, the natural mother, or a man presumed to be the father under

> subdivision (a)(1) or (a)(2) of Section 5 of this Act. Actions brought by the child, the natural mother or a presumed father shall be brought by verified complaint." 750 ILCS 45/7(b)

Robert contended that M.M. is estopped from bringing an action to declare the nonexistence of their relationship under §7(b). The critical discussion is quoted at length because of the importance of the knowledge of this line of case law:

> M.M.'s GAL, however, contends that, because M.M. was not a party or in privity with Robert M. or Shante M. in the "cause of action," she is not barred from challenging that judgment. We agree. There is no dispute that M.M. was not a party to the signing of the VAP. We also find M.M. was not in privity with Robert M. or Shante M. when they executed the document. A line of parentage cases hold that a minor is not in privity with his mother in a paternity action and therefore is not barred from bringing his own paternity action. See *Department of Public Aid ex rel. Stark v. Wheeler*, 248 Ill. App. 3d 749, 751, 618 N.E.2d 1311 (1993); *In re Parentage of Mayberry*, 222 Ill. App. 3d 1008, 1011, 584 N.E.2d 533 (1991); *Department of Public Aid ex rel. Skelton v. Liesman*, 218 Ill. App. 3d 437, 439-40, 578 N.E.2d 310 (1991); *Maller v. Cohen*, 176 Ill. App. 3d 987, 991, 531 N.E.2d 1029 (1988). Support for the holding is found in the differing interests of the minor and the mother, in addition to the differing statute of limitations for the minor and the mother to assert paternity actions. *Liesman*, 218 Ill. App. 3d at 441. Moreover, it has been noted in dissolution proceedings that a minor is not in privity with his mother when the minor's interests are not represented by a GAL. See *In re Parentage of Rodgers*, 279 Ill. App. 3d 648, 654, 665 N.E.2d 36 (1996); *In re Marriage of Klebs*, 196 Ill. App. 3d 472, 483, 554 N.E.2d 298 (1990); *Simcox*, 131 Ill. 2d at 499 (Ryan, J., specially concurring).

The appellate court concluded:

> The clear language of the statute demonstrates that M.M., by and through her GAL, had standing to bring the disputed action. Section 7(b) provides, in relevant part: "[a]n action to declare the non-existence of the parent and child relationship may be brought by the child, the natural mother, or a man presumed to be the father under subdivision (a)(1) or (a)(2) of Section 5 of this Act." 750 ILCS 45/7(b) (West 2008). The statute plainly says that a child may bring a petition to establish nonpaternity. The statute does not restrict the child's ability to do so.

Domestic Violence:

***Patton* - IDVA §226 and Alleged False Statements – Cornerstone of Litigation**

Patton v. Lee, 406 Ill.App.3d 195 (2nd Dist., 2010)

This case held that the alleged false statements about Lee contained were inconsequential to the issue of whether an order of protection should issue and therefore Lee was not entitled to either sanctions

under SCR 137 or per §226 of the IDVA. I will focus on §226 IDVA issue because it is the first appellate court case to address the application of this section at length. Recall that §226 of the IDVA provides:

> Untrue statements. Allegations and denials, made ***without reasonable cause and found to be untrue***, *shall* subject the party pleading them to the payment of reasonable expenses *actually incurred* by the other party *by reason of* the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal, as provided in Supreme Court Rule 137. The Court may direct that a copy of an order entered under this Section be provided to the State's Attorney so that he or she may determine whether to prosecute for perjury." 750 ILCS 60/226.

The appellate case notes accurately the death of case law interpreting §226:

> The parties do not point to any precedent concerning sanctions under section 226, and we have been unable to find any. However, section 226 is the same as one of the predecessor statutes to Rule 137. Accordingly, cases that interpreted that section provide guidance. Because former section 2--611 is penal, it is strictly construed. Thus, "the complaining party may seek only those costs and fees which have a *direct connection* to the sanctionable pleadings or statements." (citation omitted). A party seeking an award under section 2--611 has the burden of establishing that he or she actually incurred fees and expenses by reason of the untrue pleadings. *Beno v. McNew*, 186 Ill. App. 3d 359, 365 (1989). The petition for fees must specifically identify both the statements falsely made and the fees that resulted from those false statements. See *Berkin*, 191 Ill. App. 3d at 1063-64. These principles are consistent with the plain language of the statute, which allows recovery of fees actually incurred by the other party by reason of the untrue pleading. If untrue portions of the pleading would not actually affect the outcome of the case, recovery of fees unrelated to the specific untrue statements is not allowed. See, e.g., *Berkin*, 191 Ill. App. 3d at 1063; Mari, 179 Ill. App. 3d at 323-24.
>
> The general rule that the fees sought must be tied to specific untrue statements does not apply when those untrue statements are the §stone of an entire baseless lawsuit.

Applying these principles to the case, the appellate court stated:

> Here, the trial court reasonably found that the false statements Lee complained of were *inconsequential* to the overall determination of whether an order of protection should be issued. Had those items on the petition been correctly answered, the dispute would still have been present. Although Lee argues that, by answering the questions incorrectly, Patton increased his chances of success on the petition, that does not make those specific items the "*cornerstone of the litigation*."

Comment: *Patton v. Lee* reminds me of "Top Generals for 1000, Alex."

***Holtorf* – Neglect Does Not, in itself, Constitute Abuse under the IDVA**
IRMO Holtorf, 397 Ill. App. 3d 805 (2d Dist., 2010)
Holtorf addresses an issue which arguably also is a matter of first impression in Illinois – whether under the Domestic Violence Act (IDVA), neglect equals abuse. The appellate court ultimately ruled that neglect, itself, does not equal abuse. But the case points out the problems in not providing an adequate record of the proceedings, that is, the transcript of the proceedings. Holtorf involved a case where the mother repeatedly was arrested for shoplifting. She did so on several occasions when the children were left in the car. While the order itself appeared mostly premised on apparent findings of neglect, the appellate court ruled that, "These allegations, if proved, certainly rise to the level of physical abuse, defined in §103(14)(iii) of the Act as "knowing or reckless conduct which creates an immediate risk of physical harm." 750 ILCS 60/103(14)(iii)."

Criminal Proceedings / Violations of Orders of Protection

***People v. Hinton* – Requirement of Actual Notice**
People v. Hinton, 402 Ill.App.3d 181 (3d Dist. 2010)
To be guilty of the crime of violation of an order of protection [720 ILCS 5/12-30(a)(2)], the defendant must have actual notice of the contents of the order of protection.

An apt perspective by H. Joseph Gitlin in his GDR states:

> Illinois law generally does not require that someone have actual knowledge of the contents of an injunctive order to be subject to its terms. The notice received by the defendant in Hinton would be sufficient for a court to enter an enforceable order in most proceedings for an injunction. An order of protection is an injunctive order, but is subject to the notice requirements contained in the Illinois Domestic Violence Act (IDVA). The IDVA requires actual knowledge of the contents of an order of protection probably because Illinois law makes violation of such order a crime. The IDVA at 750 ILCS 60/223, requires a defendant or respondent have actual knowledge of the contents of the order before the court may enforce the order through its contempt powers as well. In requiring actual knowledge, the legislature may be recognizing the potential for abuse of orders of protection, or the reluctance of courts to deny petitions for orders of protection.

***People v. Sucic* – Three Year Conviction for Cyberstalking and Harassment via Electronic Communication**
People v. Sucic, 401 Ill.App.3d 492 (1st Dist., 3rd Div. 2010)
Defendant's convictions for cyberstalking and stalking and concurrent terms of three years in prison, affirmed. The crime of cyberstalking is at 720 ILCS 5/2-7.5(a)(1). And the crime of harassment through electronic communication is at 720 ILCS 135/1-2(a)(4).

The Third Division rejected the Defendant's (Sucic's) argument that the cyberstalking statute is unconstitutional as an overbroad criminalization of free speech. A cyberstalking conviction requires

knowing, unjustified, harassment by transmitting a threat of bodily harm. The statute was intended to punish only conduct performed without lawful authority. "Where speech is an integral part of unlawful conduct, it has no constitutional protection." *People v. Bailey*, 167 Ill.2d 210, 227 (1995)(addressing the stalking statute). "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protects individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" Citation omitted.

Finally, Sucic argued the evidence was insufficient to convict him of stalking because the evidence failed to establish that on two separate occasions he placed the victim "under surveillance." He argued he only went to Stern's residence, where he used to live, and there was no evidence she was inside on February 19, 2007. That argument was also rejected. There is no minimum amount of time a defendant is required to remain outside a victim's apartment, and the evidence showed "defendant's conduct was not the sort of innocent behavior of a mere visitor as he suggests." The appellate court ruled that the State did not have to prove Stern was inside her apartment on February 19, 2007. The words of the statute, "other place occupied by the person" do not apply to a victim's school, place of employment, vehicle or residence.

Attorney's Fees:

***Pal v. Gudgel*– Intervenor Cannot Seek Fees Under §508(a)**

IRMO Pal v. Gudgel, 397 Ill. App. 3d 903 (4th Dist., 2010)

The first issue was a case of first impression – whether an intervenor could seek attorney's fees under §508(a) of the IMDMA. For interesting reading, review the facts of the case involving Gudgel. But for the purpose of the this summary, I address the more significant legal issues. The appellate court stated:

> In addition to the stated purpose found in §102(5), the language of §508(a) is telling of the legislature's intent. While the General Assembly used the term "party" in §508(a), the section only refers to two parties. According to section 508(a):
>
> > "The court *** may order any party to pay a reasonable amount for his own or *the other party's* *** attorney's fees. Interim attorney's fees *** may be awarded from *the opposing party* ***. At the conclusion of the case, contribution to attorney's fees *** may be awarded from *the opposing party* in accordance with subsection (j) of [s]ection 503." (Emphases added.) 750 ILCS 5/508(a).

The appellate court then stated:

> An intervenor is not an "opposing" party in a dissolution action. The spouses are the "opposing" parties. An intervenor is someone who is merely allowed to join an action in order to assert or protect an interest that may be affected by a court's order.

The appellate court then looked to the language for contribution awards per §503(j)(2) and pointed out that it specifically referenced awards of contribution to one party from the other party. The appellate court ruled, "As a result, we find the trial court correctly concluded an intervenor is not eligible for attorney fees pursuant to §508(a) of the Dissolution Act (750 ILCS 5/508(a)).

Next, the appellate court stated, "We need not address whether the trial court erred in finding a court can award an intervenor attorney fees pursuant to §508(b) of the Dissolution Act (750 ILCS 5/508(b) to affirm the trial court."

Read the specifically concurring opinion. The concurring opinion agreed that an intervenor cannot obtain a fee award under §508(a). The concurring opinion disagreed that the majority opinion should have avoided a decision regarding whether under §508(b) an intervenor might collect attorney's fees:

> They may be, however, recoverable under section 508(b) of the Dissolution Act (750 ILCS 5/508(b) if they are incurred to defend a pleading filed for an improper purpose. See *In re Marriage of Pillot*, 145 Ill. App. 3d 293, 495 N.E.2d 1247 (1986). No such improper purpose was found here.

Evidence and Discovery Cases:

***Jorgenson – Abbreviated Hearing Involving* Significant Issue is Improper**

IDHFS ex rel. Jorgenson v. Jorgenson, 403 Ill.App.3d 1009 (3rd Dist., 2010)
A child support award to the mother was reversed when the proceedings were "very informal and improperly abbreviated" and where the father was not given an opportunity to testify regarding financial matters. The issue in this case was retroactive support – from the child's birth with the child being born in 1990 and the hearing being held in December 2008. Following a direct examination of the mother by counsel for the Department, the court asked the father if he wanted to ask the mother any questions. The father answered in the negative.

Immediately after the father declined the opportunity to cross-examine the mother, and when counsel for the Department requested the court order retroactive support back to the end of 1991, the father stated:

> I am contesting the retroactive support because from that date that you just mentioned until this date, I have contacted [petitioner] by phone and I was upset when we talked and she said that she felt it would be better for me not to contact my daughter at all to avoid confusion, so I agreed.

The trial court's written order fixed the total amount of retroactive child support owed by the father at $61,125, calculating the child support at $75 per week. The father appealed. The appellate court vacated the trial court's order and remanded.

The appellate court opinion stated:

> The proceeding in this case was very informal and improperly abbreviated. The court erroneously did not afford respondent an opportunity to present any evidence or his own sworn testimony regarding his past income, current income, and any prior contributions to the child's support. [Citation omitted.] *** This cursory proceeding was insufficient to protect [the father's] due process rights.

I liked my father's comment so much that I quote from it here at length.

Comment by H. Joseph Gitlin: The above opinion reminds me of a Cook County case in which I was involved, representing a mother who was held in contempt and I appealed. The appellate court opinion in *Eden v. Eden*, 34 Ill.App.3d 382, 340 N.E.2d 141 (1975), states: "The report of proceedings for that date reveals a colloquy between the court and the counsel for both parties in which the defendant's [husband's] attorney, after presenting a petition for rule to show cause, made representations to the court about the plaintiff's conduct pertaining to visitation of the parties' children. *** [T]he record shows that the court then invited both counsel into chambers." The appellate court concluded that the issue of contempt was heard by the court in chambers without the parties being sworn or an opportunity afforded both sides to present evidence or to cross-examine witnesses. The appellate court reversed.

Trial judges hearing matrimonial cases are given a great deal of discretion, which is as it should be. Divorce, historically, was an equitable remedy heard on the chancery side of the court. Chancellors deal with fairness, or equity, thus they must be given discretion. On appeal it takes a great deal to establish an abuse of discretion.

It is unfortunate, but true, that some divorce judges take advantage of the latitude they have and run their courtrooms as if they were a legal entity unto themselves, that is, that they make the rules. A divorce judge has a particular responsibility to play the game according to the rules and not to make up her or his own rules because the judge knows that a reversal is unlikely.

The Scriptures state, "For unto whomever much is given, of him shall much be required: and to whom men have committed much, of him they will ask more." Much is given in the way of discretion to divorce judges. Much, in the way of fairness, is required of these judges.

Montes v. Mai, 398 Ill. App. 3d 424 (1st Dist., 2010)
A chiropractor is a physician for the purpose of taking an evidence deposition.

***Daebel* - Discovery Sanctions Not Sufficient Where Party Refused to Sit for Deposition Yet Testified at Trial**
IRMO Daebel, 404 Ill. App. 3d 473 (2nd Dist., 2010)
Where a party refuses to sit for her deposition but later testifies at trial the sanctions for discovery non-compliance sanctions had to be more than merely a monetary sanction:

> The purpose of the discovery rules, and of Rule 219, is to ensure a fair trial; the trial court's approach validated petitioner's gamesmanship to respondent's extreme detriment. The only rational cure for petitioner's admitted misconduct was that which respondent requested: barring her testimony and barring her from presenting undisclosed defenses. Since the trial court did not pursue this course, and instead entered a fecklessly lenient sanction that left respondent unfairly prejudiced, we conclude that the trial court abused its discretion and thus that we must reverse its sanctions ruling.

***Daebel* - Impact of Request to Admit on Dissipation**

IRMO Daebel, 404 Ill. App. 3d 473 (2nd Dist., 2010)

Even if the term dissipation is considered a conclusion of law, the remaining admissions at issue in this case combined with the uncontested facts from the pleadings and testimony, established the elements of dissipation. The case cited from *PRS International*:

> The key question is whether a requested admission deals with a question of **fact**. Accordingly, requests for legal conclusions are improper; however, requests for admissions of factual questions which might give rise to legal conclusions are not improper. For example, a party's conduct pursuant to a contract, including what actions that party did or did not take, would be a factual question properly included in a request to admit. However, whether that conduct amounts to a material breach is a legal rather than a factual question, and thus is not appropriate for a request to admit. In subsequent filings, the other party may refer to that party's conduct under the contract and argue that it amounts to a breach, but the language of Rule 216 refers only to factual issues. Therefore, requests under Rule 216 must be limited to questions of fact." (Emphases in original.) *P.R.S. International*, 184 Ill. 2d at 236-37.

The case then quoted from *Hubeny v. Chairse*, 305 Ill. App. 3d 1038 (1999):

> "[A] request for admissions is proper if a finder of fact must take some analytical step, no matter how small, from the contents of the admissions to the final conclusion that the party seeks to establish. *** Even if the admission of that fact plainly requires the fact finder to conclude that a party breached a contract or was negligent as a matter of law, a request for that admission is proper and the failure to respond to it is binding." *Hubeny*, 305 Ill. App. 3d at 1043-44.

The case commented that the elements establishing dissipation, of course, are 1) use of marital property for one's benefit; 2) for a purpose unrelated to the marriage; and 3) when the marriage was undergoing an irretrievable breakdown. The interesting quote is that:

> On the second element, the admissions state that petitioner missed payments and "attempted to drive down the appraisal value of the home in order to lower the equity value of the home," a purpose decidedly unrelated to the marriage.

***Daebel* - Evidence Deposition of Physician Re Inability to Work**
IRMO Daebel, 404 Ill. App. 3d 473 (2nd Dist., 2010)
The trial court erred in not allowing the evidence deposition of a physician as "hearsay" due to the provisions of Supreme Court Rule 212(b).

To see Supreme Court Oral Arguments, Click here.

2010/2011 LEGISLATION AND RULES:

Legislative Changes:

Income Withholding Amendments

Service by Delivery to a Third-Party Commercial Carrier
Effective December 29, 2009, Supreme Court Rules 11, 12, 361, 367, 373, 381, and 383 were amended to expressly allow for service by delivery to a third-party commercial carrier such as UPS or Federal Express.

Service of Withholding Notices – Ordinary Mail, Certified Mail, Fax or as Allowed for Service of Summons
PA 096-0858 (Effective January 8, 2010)
§28/20(g) provides that a withholding notice be served upon the obligor by regular mail and upon the payor by ordinary mail, certified mail, facsimile transmission or as otherwise allowed for service of summons. PA 096-0858 revises the section so proofs of service of the payor and obligor no longer need be filed with the clerk of the court except when necessary in connection with actions to enforce, contest, modify, suspend, terminate, or correct the order. Although the Public Act states it is effective upon becoming law, the specific amendments to the statute apply to orders from September 1, 2009.

§28-21(g) of the IWSA now provides in part:

> A copy of an income withholding notice and proof of service shall be filed with the Clerk of the Circuit Court only when necessary in connection with a petition to contest, modify, suspend, terminate, or correct an income withholding notice, an action to enforce income withholding against a payor, or the resolution of other disputes involving an income withholding notice. The changes made to this subsection by this amendatory Act of the 96th General Assembly apply on and after September 1, 2009. ~~A copy of the income withholding notice together with proofs of service on the payor and the obligor shall be filed with the Clerk of the Circuit Court~~.

It also contains changes to the law regarding what occurs in IV-D cases regarding the National Medical Support Notice.

Confidentiality of Mental Health Records and Subpoenas
Public Act 096-1399
PA 96-1399 amended sections 4, 9.2, and 10 of the Illinois Mental Health and Developmental Disabilities Confidentiality Act (Mental Health Act). The key change for our purposes is the required notice to the client and the treatment provider to request the issuance of a subpoena. The modification also makes it a requirement for specific language to be included in the subpoena. Public Act 096-1399 makes changes to the Illinois Mental Health and Developmental Disabilities Act (Mental Health Act). The modifications focus on access to a client's mental health records.

To obtain a client's mental health records, the party seeking the disclosure must send notice to the client and the treatment provider. The client and the treatment provider must be given an opportunity to object to such disclosure pursuant to §110/10(b) of the Mental Health Act. A judge may not issue a written order authorizing the disclosure of mental health records or the issuance of a subpoena without compliance with the above two requirements.

In addition, every subpoena duces tecum issued by a court or administrative agency that is served on any person pursuant to §110/10 must contain the following language:

> No person shall comply with a subpoena for mental health records or communications pursuant to Section 10 of the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/10, unless the subpoena is accompanied by a written order that authorizes the issuance of the subpoena and the disclosure or records or communications.

Adoption: Consents and Surrenders
PA 096-1461 (effective January 1, 2011) (pdf)
A recent amendment to the Illinois Adoption Act makes four changes to the Act. (1) It creates a consent form for adoption to a specified person or persons in non-DCFS cases; (2) If an adoption to a specified person in a non-DCFS case does not occur, the birth parent is given notice of this within 10 business days. The birth parent has within 10 business days from the date that the written notice was sent to respond; (3) It requires consenting birth parents to read or have read to them a new statutory form entitled "Birth Parent Rights and Responsibilities-Private Form;" and (4) It creates a surrender form to an agency that involves a specified person who is to adopt the child.

Child Support or Maintenance Not Stayed Pending Post-Judgment Proceedings
PA 096-1072 (Effective January 1, 2011)
Public Act 096-1072 amends the Code and the IMDMA. It states that a monetary child support or maintenance order shall not be suspended or stayed pending post-judgment proceedings. See §2-1203(b) of the Code of Civil Procedure and §413(a) of the Illinois Marriage and Dissolution of Marriage Act.

So the current language of §413 reads in part:

> An order requiring maintenance ~~or directing payment of money for~~ support ~~or maintenance~~ of a ~~the~~ spouse or a ~~the~~ minor child or children entered under this Act or

any other law of this State shall not be suspended or the enforcement thereof stayed pending the filing and resolution of post-judgment motions or an appeal.

Domestic Violence / Orders of Protection: Entry of Order into LEADS
PA 096-1241, effective January 1, 2011, amends the Illinois Code of Criminal Procedure [112A-17(c)(2)] and the Illinois Domestic Violence Act – [§217(c)(2)]. It states a judge issuing an emergency order of protection shall promptly communicate the order to the sheriff to facilitate its entry into the Law Enforcement Agencies Data System (LEADS). The earlier law had provided that the clerk of the court was to file the order for service with the sheriff on the next court date following entry of the order.

Paternity – Tests to Determine Inherited Characteristics [GDR 10-55]
PA 096-1074. §11 of the Illinois Parentage Act of 1984 governs the manner, admissibility, and effect of genetic testing in parentage proceedings. Public Act 096- 1074 updates §11 to alter the manner in which genetic testing is conducted, to provide a challenge to the methods used, to reflect changes in the sensitivity of genetic testing, and to allow the court to allocate costs.

New or Amended Supreme Court Rules

Codification of Illinois Rules of Evidence
See: http://www.state.il.us/court/SupremeCourt/Evidence/Evidence.asp
Effective January 1, 2011, Illinois has codified its rules of evidence. The new rules contain 14 "modernizations which address "non-controversial developments in the law of evidence as reflected in the FRE. The Court reserved Rule 813(18) which as originally drafted would have created a hearsay exception for learned treatises. This exception is in the FRE but it was urged that it was contrary to Illinois law – although this may not be the case. The new rules contain changes in two areas. The first addresses opinion testimony which now is located in Rules 405 and 608, and the second deals with hearsay statements under 803(3).

Expansion of SCR 23 - Publication of Rule 23(b) Written Orders
Effective January 1, 2011, SCR 23 changes the types of cases
http://www.state.il.us/court/supremecourt/Rules/Amend/2010/091310.pdf

> (b) Written Order. Cases which do not qualify for disposition by opinion may be disposed of by a concise written order which shall succinctly state: (1) in a separate introductory paragraph, a concise syllabus of the court's holding(s) in the case ***
>
> (e)(1) An ~~unpublished~~ order entered under subpart (b) or (c) of this rule is not precedential and may not be cited by any party except to support contentions of double jeopardy, res judicata, collateral estoppel or law of the case. When cited for these purposes, a copy of the order shall be furnished to all other counsel and the court.

(2) An order entered under subpart (b) of this rule must contain on its first page a notice in substantially the following form:

> **NOTICE**: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1)

(g) Electronic Publication. In order to make available to the public all opinions and orders entered under subparts (a) and (b) of this rule, the clerks of the Appellate Court shall transmit an electronic copy of each opinion or order filed in his or her district to the webmaster of the Illinois Supreme and Appellate Courts' Web site on the day of filing. No opinion or order may be posted to the Web site that does not substantially comply with the Style Manual for the Supreme and Appellate Courts.

Recent SCR 23 Written Orders
Archives of SCR 23 Written Orders

Supreme Court Amends Rule 216 - Requests to Admit:
Effective January 1, 2011, we have new rules addressing requests to admit facts per SCR 216 by adding new paragraphs (f) and (g) that now read:

(f) Number of Requests. The maximum number of requests for admission a party may serve on another party is 30, unless a higher number is agreed to by the parties or ordered by the court for good cause shown. If a request has subparts, each subpart counts as a separate request.

(g) Special Requirements. A party must: (1) prepare a separate paper which contains only the requests and the documents required for genuine document requests; (2) serve this paper separate from other papers; and (3) put the following warning in a prominent place on the **first page** in **12-point** or larger boldface type: "**WARNING: If you fail to serve the response required by Rule 216 within 28 days after you are served with this paper, all the facts set forth in the requests will be deemed true and all the documents described in the requests will be deemed genuine**."

Supreme Court Rule 795 – Hours of Professionalism Credits Upped:
SCR 795(d) providing for the minimum professionalism CLE, has been amended to provide:

A minimum of four of the total hours required for ~~any two-year~~ the first two reporting periods must be in the area of professionalism, diversity issues, mental illness and addiction issues, civility, or legal ethics. Beginning with the reporting periods ending on June 30 of either 2012 or 2013, in which 30 hours of CLE are required, and for all subsequent reporting periods, a minimum of six of the total CLE hours required must be in such areas.

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