Appeals in Illinois' Divorce and Paternity Cases: The Elusive Final and Appealable Order in Light of the 2008 *Gutman* Decision, our Supreme Court Amendments involving Parental Allocation Cases, and the 2021 *Crecos III* decision

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Executive Summary:
This article examines the cases behind what I had referred to as "Illinois appellate courts' ever-shrinking ability to review divorce and paternity cases when issues remain pending with the trial court.' In light of the 2010 amendments and our Supreme Court's *Crecos III* decision, that statement remains true with the major exception involving parental allocation judgments in initial divorce and parentage cases–where other issues haven't been resolved.

I. Introduction

When an Illinois divorce or paternity lawyer considers an appeal of a trial court's judgment, the most difficult issue is determining when a court order is final and thus appealable. While Supreme Court Rule 304(a) requires that the underlying judgment resolve all claims to constitute a final order, Illinois caselaw has not held this to be a bright-line rule.

Once in each of the past four decades, the Illinois Supreme Court has decided a significant case addressing final and appealable orders relating to family law cases. In the 1970s, the Illinois Supreme Court ruled in *Deckard v Joiner*[1] that *incidental* claims to the ultimate rights to be determined do not render an order nonfinal.

In the 1980s, the Illinois Supreme Court ruled in *Marriage of Leopando*[2] that even if the trial court's custody order contains a special finding per Supreme Court Rule 304(a) – that there is no just reason to delay enforcement or appeal of the custody portion of a divorce judgment – the judgment for dissolution of marriage is still not final when the financial issues have not been addressed.

In the 1990s, the Illinois Supreme Court, in *Franson v Micelli*,[3] addressed what types of claims might be considered incidental to the ultimate rights sought to be determined, so a parentage case may be considered final and appealable.

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[1] 44 Ill 2d 412 (1970).
[2] 96 Ill 2d 114 (1983).
[3] 172 Ill 2d 352 (1996).

In the 2000s (in 2008), the Illinois Supreme Court in *IRMO Gutman* again took a strict construction of Supreme Court Rule 304(a) as it applied to contempt petitions and other post-decree matters.

And in 2021, the Illinois Supreme Court addressed the then split among our district courts and held that post-judgment parental allocation proceedings are not appealable absent a Rule 304(a) finding.

As a result of the amendments to the Supreme Court Rules providing for expedited resolution of custody / parental allocation cases at the trial court level, for the first time a comprehensive series of amendments substantially limited the impact of the original *Leopando* decision. Thus, in 2010 the Illinois Supreme Court specifically allow for "piecemeal" litigation of what's now parental allocation cases by separating out this issue [at least in pre-decree cases] and allowing for immediate appeal. This is exactly as I had anticipated following the so-called requirements that parental allocation cases in initial would be resolved within 18 months.

As the following review of the cases shows, it appears that if the trial court reserves virtually any significant issue that should have been ruled upon when the divorce or parentage judgment was entered and that issue has not been finalized, the judgment will not be final and appealable.

II. Leading Illinois Supreme Court Cases

Five Illinois Supreme Court family-law cases have addressed appeals under Rule 304(a) and restricted the circumstances under which a case might be considered final despite reservation of any underlying issues. Until *Franson v Micelli*, the leading case on appealable orders in parentage proceedings was *Deckard v Joiner.*

A. ***Deckard v Joiner (1970)***

In *Deckard v Joiner*, brought under an earlier version of the Illinois Paternity Act,[4] the mother sought child support and payment of her expenses directly resulting from her pregnancy. An acknowledgment of paternity signed by the defendant was on file. An order entered in 1962 found the defendant was the child's father and found him liable for support and birth expenses but reserved determination of the precise amount of support and birth expenses. An order entered in 1963 directed the defendant to pay doctor and hospital bills, plus support of $15 per week.

In 1967, the defendant filed a motion to vacate the 1962 paternity order and the 1963 support order and sought other relief. The trial court denied the defendant's 1967 motion. After numerous other motions by the defendant were denied in 1968, he filed a notice of appeal under which he planned to appeal every order entered from 1962 through 1968. The *Deckard* court ruled that the March 1962 paternity order was not final and appealable because it reserved ruling on the substantial issue of the amount of support and expenses for which the defendant was liable. However, the 1963 order resolved those issues and constituted a final determination of the

[4] Ill Rev Stat 1961, ch 106 3/4.

parties' ultimate rights. Therefore, the 1968 appeal was untimely.

B. Marriage of Leopando (1983)

The Supreme Court addressed the applicability of Supreme Court Rule 304(a) to divorce proceedings in the 1983 case of *Marriage of Leopando*.[5] *Leopando* held that the "issues raised in a dissolution-of-marriage case are not separate claims and therefore not appealable under Rule 304(a)."

In *Leopando*, the trial court dissolved the marriage in December 1981 and six days later awarded the husband permanent custody of the parties' minor child. The custody order recited "that there is no just reason to delay enforcement or appeal of this Order." It reserved for future consideration the issues of maintenance, property division, and attorney fees. The mother appealed from the custody award. Before the Illinois Supreme Court, the father questioned the appealability of the custody order under Rule 304(a). The high court agreed with the father, finding no final and appealable order because the custody issue was not a separate, appealable claim from the issues upon which the trial court reserved ruling.

The *Leopando* court stated the reason it allowed leave to appeal: “It seems clear that the law at the time of the instant appeal implied that custody orders, containing the requisite Rule 304(a) language by the trial court, were immediately appealable.” *Leopando* held a custody order was not appealable, even if the “magic language” of Rule 304(a) were present, because a custody order did not constitute a separate claim in a divorce proceeding.

Leopando is often cited as authority, and has often been the springboard, for other cases dealing with a divorce judgment's finality when not all of the issues have been resolved. This is probably because of the broad language used in the *Leopando* opinion:

> A petition for dissolution advances a single claim; that is, a request for an order dissolving the parties' marriage. The numerous other issues involved, such as custody, property distribution, and support are merely questions which are ancillary to the cause of action. They do not represent separate, unrelated claims; rather, they are separate issues relating to the same claim. In fact, it is difficult to conceive of a situation in which the issues are more interrelated than those involved in a dissolution proceeding. Should the trial court decline to grant the petition for dissolution, no final relief may be obtained relevant to the other issues involved. On the other hand, where a dissolution of marriage is granted, a determination as to which party receives custody will necessarily affect how much, if any, support and maintenance are paid. Practically speaking, then, until all of the ancillary issues are resolved, the petition for dissolution is not fully adjudicated. [Citation omitted.]

C. Franson v Micelli (1996)

Until 2008, the last significant Illinois Supreme Court case dealing with final and

[5] 449 NE2d at 140.

appealable orders in a domestic relations setting was *Franson v Micelli*,[6] a parentage case. The putative father in *Franson* appealed a judgment entered upon a jury verdict finding him to be the father of the plaintiff's child. The appellate court opinion did not address whether the trial court's judgment was final and appealable.[7]

The Illinois Supreme Court in *Franson* found that while the trial court ruled on prospective child support, the record did not indicate if the trial court ruled on the mother's request for retroactive child support and health insurance for the child. The Illinois Supreme Court in *Franson* determined that the trial court's failure to rule upon retroactive child support and the putative father's health insurance obligation rendered the trial court's decision unappealable because it was not a final order.

The *Franson* court tried to, but could not, find a way to support the appellate court judgment, which was faulty because the trial court's judgment was not final. The *Franson* court noted the duty to provide health insurance is an "integral part" of a parent's current and future support obligations. Under Illinois law, the matters are intertwined.[8] The court in *Franson* found that even when the trial court enters a support order in a parentage action, the case is not final and appealable if the trial court reserved retroactive child support or reimbursement to the mother for pregnancy and delivery expenses.

D. *IRMO Gutman* (2008)

In re Marriage of Gutman,[9] is the more recent Illinois Supreme Court case addressing the timing of appeals in family law cases. This case involved a denial of a motion to vacate an order granting the former husband's petition to terminate maintenance. Twenty-nine days later the mother moved to vacate that judgment and after the court denied the mother's motion, 35 days later she filed a motion to reconsider. Despite the fact that the ex-wife's petition for civil contempt had been still pending, the appellate court ruled that the trial court's judgment granting the petition to terminate the maintenance was the final judgment as to all "claims for relief" in the divorce action. Accordingly, the appellate court held that the ex-wife's appeal was not timely.

The Supreme Court stated:

> The appellate court below held that a contempt petition, although a "part" of the underlying action, does not raise a "claim for relief" in that action within the meaning of Rule 304(a). 376 Ill. App. 3d at 763. Therefore, according to the court, the order terminating maintenance was a final order as to all "claims" in the dissolution action and required no Rule 304(a) finding to be final and appealable. We disagree.

The Supreme Court explained:

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[6] 666 NE2d 1188.

[7] *Franson v Micelli*, 269 Ill App 3d 20 (1st D 1994).

[8] See 750 ILCS 5/505.2.

[9] *In re Gutman*, 232 Ill. 2d 145 (2008).

> The appellate court held that the pending contempt petition in this case is entirely separate from the dissolution proceeding. In so doing, the court departed from two previous decisions in which the opposite conclusion was reached. See *In re Marriage of Colangelo*, 355 Ill. App. 3d 383, 388-89 (2005) (absent a Rule 304(a) finding, a party could not appeal the denial of a civil contempt petition while a postdissolution petition to increase child support was pending); *In re Marriage of Alyassir*, 335 Ill. App. 3d 998 (2003) (absent a Rule 304(a) finding, a party could not appeal a judgment on a postdissolution petition to increase child support while a civil contempt petition was pending).
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> The appellate court held that "[a]lthough a civil contempt petition is a part of the underlying action, it is nevertheless 'an original special proceeding, collateral to, and independent of, the case in which the contempt arises.' " 376 Ill. App. 3d at 762, quoting *Kazubowski v. Kazubowski*, 45 Ill. 2d 405, 415 (1970). In relying on the *Kazubowski* decision, however, the appellate court ignored language immediately preceding and following the quoted statement. What we actually held in Kazubowski was: "ordinarily an adjudication in a contempt proceeding is final and appealable because it is an original special proceeding, collateral to, and independent of, the case in which the contempt arises **where the imposition of the sanction does not directly affect the outcome of the principal action**." (Emphases added.) *Kazubowski*, 45 Ill. 2d at 414-15.

The Supreme Court then stated:

> The appellate court disregarded the language limiting the original and special status to an adjudication of contempt. The court unjustifiably expanded the language in Kazubowski to apply to the pending contempt petition in the case at bar. No other court has held a pending contempt petition to be an independent action separate from the underlying case. Rather, the rule, which this court has consistently held, is that only a contempt **judgment that imposes a sanction** is a final, appealable order.

Finally, the Supreme Court pointed out that until the entry of a contempt order imposing a sanction, a contempt petition provides no basis for obtaining immediate appellate jurisdiction over any part of the case under Rule 304(b)(5). The Supreme Court concluded that the trial court's order disposing of the maintenance petitions was not a final and appealable order.

In 2010, we had a critical exception to the previous rules against what could be referred to as piecemeal litigation at the appellate court level in cases where the custody [read: parental allocation] judgment is entered prior to the remainder of the issues in the case. On February 26, 2010, the Supreme Court amended its rules addressing "Appeals from Judgments that Do Not Dispose of the Entire Proceeding,", i.e., S.Ct. Rule 304.

> A subsection to S.Ct. Rule 304(b) – subsection 6 [amended in 2016] provides:
> (6) A custody or allocation of parental responsibilities judgment or modification

of such judgment entered pursuant to the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/101 et seq.) ["IMDMA"] or *Illinois Parentage Act of 2015 (750 ILCS 46/101 et seq.).*

Also note that this ties in with SCR 306(a)(5) addresses interlocutory appeals by permission and upon leave of court to the appellate court and provides that one may seek leave to appeal from:

"5) from interlocutory orders affecting the care and custody of or the allocation of parental responsibilities for unemancipated minors or the relocation (formerly known as removal) of unemancipated minors, if the appeal of such orders is not otherwise specifically provided for elsewhere in these rules;

*** If the petition for leave to appeal an order granting a new trial is granted, all rulings of the trial court on the post-trial motions are before the reviewing court without the necessity of a cross-petition.

I will quote from the 2010 committee comments to SCR 304 because they contain an excellent explanation, even though the term "custody" does not appear in the current version of the IMDMA:

The term "custody judgment" comes from section 610 of the [IMDMA] (750 ILCS 5/610), where it is **used to** refer to the trial court's permanent determination of custody entered incident to the dissolution of marriage, as distinguished from any temporary or interim orders of custody entered pursuant to section 603 of the Act (750 ILCS 5/603) and any orders modifying child custody subsequent to the dissolution of a marriage pursuant to section 610 of the Act (750 ILCS 5/610). The Illinois Parentage Act of 1984 also uses the term "judgment" to refer to the order which resolves custody of the subject child. See 750 ILCS 45/14. Subparagraph (b)(6) is adopted pursuant to the authority given to the Illinois Supreme Court by article VI, sections 6 and 16, of the Illinois Constitution of 1970. The intent behind the addition of subparagraph (b)(6) was to supercede the supreme court's decision in *IRMO Leopando*, 96 Ill. 2d 114, 119 (1983). In *Leopando*, the court held that the dissolution of marriage comprises a single, indivisible claim and that, therefore, a child custody determination cannot be severed from the rest of the dissolution of the marriage and appealed on its own under Rule 304(a). **Now, a child custody judgment, even when it is entered prior to the resolution of other matters involved in the dissolution proceeding such as property distribution and support, shall be treated as a distinct claim and shall be appealable without a special finding**. A custody judgment entered pursuant to section 14 of the Illinois Parentage Act of 1984 shall also be appealable without a special finding. The goal of this amendment is to promote stability for affected families by providing a means to obtain swifter resolution of child custody matters.

This subparagraph to S. Ct. Rule 304 has had perhaps the most significant impact in the past 30 years on appeals in litigation of issues involving allocation of parenting time. It could be argued that the result has been exactly what the Supreme Court and the 2016 IMDMA Rewrite had envisioned, by essentially allowing for what is essentially a bifurcation of the case for the purpose of appeal as to the parental allocation issue and the remaining issues.

Marriage of Teymour[10] decision was relied upon by our Illinois Supreme Court in *Crecos III*, which is discussed below. *Teymour* involved a 2017 First District decision in which the former husband appealed from certain orders entered in post-judgment proceedings, while other claims remained pending. The trial court did not make a finding pursuant to Supreme Court Rule 304(a) as to the orders appealed and ultimately the appellate court dismissed the case for lack of jurisdiction to appeal.

At the outset, the First District recognized that appellate caselaw had been divided regarding whether jurisdiction over the type of appeal at issue is governed by Illinois Supreme Court Rule 301 or Rule 304(a). The appellate court reviewed the history of the caselaw involved in post-decree piecemeal appeals, including the Court's 2008 *In re Marriage of Gutman* decision. The First District court commented that, "*Gutman* only added fuel to the jurisdictional fire." *Teymour* then stated, "*Gutman* implicitly holds that unrelated post-dissolution matters constitute separate claims subject to Rule 304(a). On the other hand, it also noted that the Third District's *In re Marriage of A'Hearn*,[11] found that *Gutman* did not overrule *Carr*.

Then, in parting with its own caselaw, the First District joined the Second and Fourth Districts and adhered to Rule 304(a)'s mandate that a final order disposing of one of several claims may not be appealed without an express finding that there's no just cause for delay. The appellate court criticized its own decision in *Carr* stating that that decision did not acknowledge the Illinois Supreme Court's *In re Custody of Purdy* decision or Rule 304(a):

> *Carr* cited no legal authority in support of its finding that an order disposing of one of several pending postdissolution claims may be appealed by virtue of the claims being "separate and unrelated." Yet, subsequent decisions have found Carr implicitly found that these separate claims were separate postdissolution actions, which, as stated, would negate the necessity of a Rule 304(a) finding. [Citation.] In addition, the First District has repeatedly relied on this so-called jurisdictional rule to find no Rule 304(a) finding is required to appeal, so long as the matter pending in the trial court is unrelated to the matter on appeal. See *In re Marriage of Knoll*, 2016 IL App (1st) 152494, 46; *In re Marriage of Baumgartner*, 2014 IL App (1st) 120552, 34-36; *Demaret*, 2012 IL App (1st) 111916, 35; but see *In re Marriage of Dianovsky*, 2013 IL App (1st) 121223, 40 (indicating some doubt regarding this position). Furthermore, the Third District joined the First District and reasoned that *Purdy* supported their collective position.[12]

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[10] In re Marriage of Teymour (Teymour v. Mostafa), 2017 IL App (1st) 161091.

[11] In re Marriage of A'Hearn, 408 Ill. App. 3d 1091, 1093-94 (3d Dist. 2011).

[12] Teymour v. Mostafa, 2017 IL App (1st) 161091, 26.

In reviewing recent Supreme Court and appellate caselaw the appellate court stated that they establish the following:

> (1) *pre-dissolution issues* are generally related and part of a single claim, requiring the entire matter to be resolved in order for the appellate court to be vested with jurisdiction;
> (2) simultaneously pending post-dissolution matters *may be unrelated* and, therefore, constitute separate claims; and
> (3) an order disposing of only one such claim is not subject to appeal absent a Rule 304(a) finding.

When considering the facts of the instant case, the appellate court concluded that the trial court's orders appealed from did not dispose of every claim. The former husband filed a notice of appeal from orders finding him to be in indirect civil contempt and granting former his former wife's motion for sanctions. Even assuming that his request for child support was no longer pending when he filed his notice of appeal, petitions for attorney fees under section 508(a), section 508(b), and Supreme Court Rule 219 were still pending. Thus, the appellate court did not have jurisdiction under Rule 301. Further, because the trial court did not make a finding under Rule 304(a), the orders were also not appealable under that rule.

E. *IRMO Crecos III* (2021)

2021 brought needed clarity to Illinois appellate law regarding finality of orders in post-decree proceedings. Our Supreme Court, in *Crecos (III)*, sided with the Second and Fourth District opinions discussed below. It quoted from and approved language within *Teymour*:

> Where a party files one postdissolution petition, several more are likely to follow. Allowing or requiring parties to appeal after each postdissolution claim is resolved would put great strain on the appellate court's docket and impose an unnecessary burden on those who would prefer not to appeal until the trial court resolves all pending claims. To be sure, justice may on occasion require that a final order disposing of a claim be immediately appealed, rather than held at bay until another pending postdissolution claim is resolved. Yet, Rule 304(a) accommodates those circumstances: the trial court need only enter a Rule 304(a) finding." Id.

The decision further clarified that although our caselaw had used the terms "claims" and "actions" interchangeably, "unrelated postdissolution matters constitute separate claims, so that a final order disposing of one of several claims may not be appealed without a Rule 304(a) finding." Ultimately, however, the Court reversed the appellate court's ruling in what had been the published version of the decision. The Court ruled that the fee award entered in September 2018 was a final order on a postdissolution petition. The Court ruled that the appellate court erred in analyzing that order as a pre-dissolution interim-fee award.

III. Cases Applying *Deckard, Leopando*, and *Franson*

The progression of rulings in the Illinois Supreme Court cases previously discussed has greatly influenced other cases considering whether orders in domestic relations cases are final and appealable.

A. ***Several Matters Reserved***

Before *Franson*, whether an order that reserved ruling on several matters was characterized as "final and appealable" depended in part on whether it was a divorce or parentage case. Reserving several issues in a divorce case without resolving them will render any orders issued on those issues non-final and non-appealable.[13]

One proceeding demonstrating that pre-*Franson* parentage cases were treated differently from divorce cases was the 1983 first district case of *Watkins v Martin*.[14] *Watkins* held that the reservation of attorney fees and costs and retroactive support made the order final and appealable because those matters were merely incidental and did not affect the ultimate parental rights. Post-*Franson* parentage proceedings have not treated parentage cases differently from divorce cases.[15]

B. Monies Related to Children

1. **Mother's Pregnancy Expenses in Parentage Cases**

As noted above in *Watkins v Martin*,[16] the appellate court stated that the entry of a parentage order and a determination of support were the two basic orders actually required for "virtual completion" of a parentage case. Matters such as attorney fees and costs and pregnancy expenses, according to *Watkins*, could be determined later without interfering with the parties' basic rights.

The Illinois Supreme Court in *Franson* subsequently found the issue of retroactive child support to be a matter of substantial controversy. Opinions issued after *Watkins* held that the reservation of pregnancy and birth expenses meant orders in those parentage cases were not final

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[13] *Marriage of Mardjetko*, 308 Ill.Dec. 289 (2d D 2007) (reserved ruling on visitation, maintenance, and post-high school education expenses); *Marriage of Koch*, 119 Ill App 3d 388 (2d D 1983) (reserved ruling on maintenance, property, and attorney fees); *Marriage of Hirsch*, 135 Ill App 3d 945 (1st D 1985) (reserved ruling on wife's medical expenses and guardian ad litem fees); *Marriage of Merrick*, 183 Ill App 3d 843, 868 (2d D 1989) (reserved ruling on claim for interest on a bonus check that husband did not timely pay to wife, and also on wife's claim for attorney fees); *Marriage of O'Brien*, 243 Ill App 3d 386 (1st D 1993) (reserved ruling on maintenance and attorney fees; continued certain injunctions previously entered regarding transfer of marital property; husband and daughter ordered to provide accounting for certain receipts and expenditures).

[14] 115 Ill App 3d 417 (1st D 1983).

[15] *Baldassone v Gorzelanczyk*, 282 Ill App 3d 330 (1st Dist 1996) (order establishing parentage was not final and appealable because trial court did not rule on current or retroactive child support or health insurance); *IDPA ex rel K.W. v Lekberg*, 295 Ill App 3d 1067 (2d D 1998) (trial court did not address present child support, reimbursement for pregnancy or delivery costs, health insurance, or payment for blood tests).

[16] 450 NE2d at 868.

and appealable.[17] It is therefore certain that *Watkins* is no longer good law.

2. Child Support in Parentage Proceedings

Until *Franson* was issued, a trial court's reservation of child support in a parentage case may or may not have made the case final and appealable, depending on which appellate district view was followed. The third district ruled in 1994 in *People ex rel Block v Darm*[18] that an order determining the issues of parentage, current child support, and health insurance was final and appealable, even though the issue of retroactive child support was reserved, because the trial court's order contained Rule 304(a) language.

The *Block* appellate court concluded that because the trial court's order finally determined the issues of paternity, current child support, and health insurance, some definite and separate parts of the controversy between the parties were clearly disposed. Even though retroactive child support was reserved, the order was final and appealable. Besides its reliance on the order containing Rule 304(a) language, the *Block* appellate court distinguished *Leopando*, noting that *Leopando* involved divorce proceedings and that the Illinois Supreme Court had not yet similarly ruled in parentage cases. *Block* certainly does not survive *Franson v Micelli*.

In contrast to *Block*, in 1995 the fifth district in *Elkins v Huckelberry*[19] determined that a parentage judgment reserving child support but including Rule 304(a) language was not final and appealable. Citing *Deckard v Joiner* and disagreeing with *Block*, the *Elkins* court held that a parentage order is not final and appealable without ruling on the amount of current child support and expenses the father must pay.

Department of Public Aid ex rel. Chiapelli v. Viviano[20] was another paternity case where it was determined that a paternity case was not final where the dollar amount of retroactive child support was not determined. In *Chiapelli*, the court found that an order setting the father's retroactive child support obligation at 20% of his net income for the previous four years and ordering the father to produce evidence of his income within 14 days was not final and appealable. The *Chiapelli* trial court had set the father's retroactive child support obligation at 20% of his net income, but it did not determine the exact amount of payments. The appellate court stated, "This is not a mere ministerial act upon which a calculation can easily be measured, as there are potential disputes about the materials submitted, the inferences drawn from any material, and the amounts to properly be considered in arriving at a net upon which 20% can be assessed." See also: *Lekberg*, 295 Ill. App. 3d at 1069; *Baldassone v. Gorzelanczyk*, 282 Ill. App. 3d 330, 333 (1996) (holding that an order declaring parentage is not a final order if it does not at least rule on the amount of child support for which the defendant is liable).

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[17] *People ex rel Driver v Taylor*, 152 Ill App 3d 413, 504 NE2d 516 (4th D 1987); *Dept. of Public Aid ex rel Corrigan v Hawkins*, 187 Ill App 3d 139 (2d D 1989); *Gay v Dunlap*, 279 Ill App 3d 140 (4th D 1996).

[18] 267 Ill App 3d 354 (3d D 1994).

[19] 276 Ill App 3d 1073 (5th D 1995).

[20] 195 Ill. App. 3d 1033 (1990)

3. Child Support in Divorce and Post-Judgment Divorce Proceedings

The fourth district appellate court in *Marriage of Fink*[21] characterized a post-judgment order reducing child support, but subject to later repayment, as a final and appealable order. In *Fink* the father suffered reduced income during a work strike. The trial court reduced his child support temporarily and the balance of the child support was suspended, subject to accrual for later repayment.

The *Fink* appellate court held the trial court order fully and finally disposed of the father's request to reduce his child support obligation permanently, and the order's including a provision for review did not render it unappealable. One key to the *Fink* court finding the order final and appealable is that the *Fink* appeal involved post-judgment proceedings.

In *Shermach v. Brunory*[22], the appellate court found that it lacked jurisdiction where the order modifying custody did not adjudicate all of the claims raised by the petitioner. The petitioner asked the court to award temporary and permanent custody, order the respondent to pay child support, and set a visitation schedule. The order appealed resolved the issues of permanent custody and visitation but not child support. While the order set child support at 20% of the respondent's net income from all sources, it reserved the dollar amount for a future determination. The *Shermach* court dismissed the appeal and held that the determination of a noncustodial parent's support obligation is integrally related to the determination of custody. "We see no compelling reason for allowing piecemeal appeals when the matter of child support has only been partially determined by the trial court." The appellate court noted, " This case is similar to *Deckard v. Joiner*, 44 Ill. 2d 412, 255 (1970), a case upon which our supreme court recently relied in *Franson v. Micelli*, 172 Ill. 2d 352 (1996)." This case is no longer good law in light of the 2010 amendments to SCR 204.

Recently, *IRMO Mackin*, the appellate court found that it lacked jurisdiction where the divorce judgment reserved jurisdiction for 180 days to address child support – relying on the *Shermach* decision. More specifically, the judgment stated:

> The court further orders that there will be no further order of child support for 180 days from the date of this order[] and that this matter shall be set for review after the expiration of 180 days for examination of the financial circumstances of [mother] and a determination by the Court at that time as to an appropriate amount of child support to be paid from that date forward by [mother] to [father] for the support of the parties' two minor children."

The appellate court ruled:

> Here, the issue of child support has not been resolved. While the court did not impose any other child support obligation on mother, other than the trust, from the

[21] 275 Ill App 3d 960 (4th D 1995).

[22] 333 Ill. App. 3d 313 (1st Dist., 2002).

> date of the filing of the petition to the date of the order and 180 days past the date of the order, the court expressly reserved jurisdiction by stating that mother's future obligation for child support was to be determined at the expiration of those180 days. The issue of child support is a matter of substantial controversy and is not merely incidental. In fact, the determination of a noncustodial parent's support obligation is integrally related to the determination of custody. *Shermach v. Brunory.* Here, just as in *Shermach*, the matter of child support has only been partially determined by the trial court. The court decided to wait 180 days to examine the financial circumstances of mother, at which time the court would then make a determination on an appropriate amount of child support to be paid by mother from that date forward for the support of the parties' children. Clearly the court did not resolve the issue of child support and therefore did not resolve the entire dissolution claim.

4. **Health Insurance**

In *People ex rel Davis v Washington*,[23] the trial court's reserving ruling on health insurance required the dismissal of the appeal. The *Davis* court specifically pointed to the *Franson* court's statements that the issue of retroactive child support was a matter of substantial controversy between the parties, and that the support issues could not be fully resolved until the health insurance issues were resolved. Despite the fact that in *Davis* there was no retroactive child support issue (as in *Franson*), the Davis court held that Franson supported the view that a support order is not final until health insurance issues are resolved, and that a parentage judgment is not final until the support issues are fully resolved.

5. Post-High School Education Expenses

Marriage of Brenkacz[24] involved the former husband's post-divorce judgment petition to modify unallocated child support and the former wife's petition for contribution for their children's college expenses. The trial court in July 1988 terminated unallocated family support and entered a maintenance order. That order also ordered the father to pay two-thirds of the college expenses for their older son and reserved ruling on the payment of the younger son's college expenses, as he was not yet in college.

The *Brenkacz* appellate court cited a similar case, *Marriage of Stockton*,[25] in holding that maintenance and college expenses were interrelated, so the reservation of some college expense issues rendered the order not final and appealable. *Brenkacz* extends *Leopando*. Following *Brenkacz,* if the trial court reserves jurisdiction on payment of any of a child's educational expenses, absent a 304(a) finding, it wouldn't be possible to appeal an educational expense award as to other children, and perhaps not even be possible to appeal any other issues from the

[23] 283 Ill App 3d 437 (1st D 1996).
[24] 185 Ill App 3d 437 (1st D 1996).
[25] 169 Ill App 3d 318 (4th D 1988).

case, until all of the children have reached college age.

6. Reservation of Multiple Issues in Divorce Action

In the 2007 Second District case of *Marriage of Mardjetko,*[26] a default judgment granting wife a divorce, dividing property, barring the husband from maintenance, and deciding custody and child support, but reserving jurisdiction on the issues of visitation, the wife's maintenance, and post-high school education expenses was held not to constitute a final judgment. Because the judgment reserved fundamental issues and therefore did not resolve the entire dissolution claim, it was not a final judgment. Consequently, the appellate court held *sua sponte* that it lacked jurisdiction to consider the husband's appeal of the denial of his motion to vacate the judgment. What is important about this case was the fact that the appellate court had a great deal of instructive language addressing final and appealable orders. A good portion of the decision relates to the use of the word "reserved" because this distinction is critical. The decision states:

> However, we think further comment on issues being "reserved" may be useful, given problems that regularly arise with that term. "Illinois law encourages resolution of all issues ancillary to dissolution, as well as dissolution itself, in a single proceeding, for reasons of certainty, financial security [citations], and judicial economy." *Kenik*, 181 Ill. App. 3d at 275. A court may reserve issues for later resolution in limited circumstances only...
>
> We recognize that trial courts sometimes describe issues as being "reserved" when, in fact, the court has decided the issue (usually based on circumstances it expects to be temporary), but intends to revisit the issue soon. Such a use of the word "reserved" nearly guarantees confusion. The Act uses the word "reserves" specifically for instances where the court is bifurcating judgment. Where it is unmistakable that a trial court is using the word in a sense that does not defeat the finality of the judgment, we will not frustrate that intent by adhering to the meaning of "reserves" in the Act. Here, however, neither the order for dissolution nor the transcript of the prove-up hearing shows that the court had in fact made a decision about "reserved" issues. We therefore take the word to have the meaning given it by the Act.

7. Appellate Jurisdiction and Retroactivity of Supreme Court Amendments

In *Marriage of Duggan,*[27] the appellate court allowed the appeal of a postjudgment child support order without a Rule 304(a) finding, notwithstanding that a visitation petition remained pending. In postjudgment proceedings, the parties had initially agreed to modify child support with the entry of a percentage support order under which the respondent would pay "28% of net income every two weeks." The respondent then sought to vacate the percentage support order on the basis that support must be stated as a specific dollar figure instead of a percentage. At the

[26] 308 Ill.Dec 289 (2nd D 2007).

[27] 376 Ill.App.3d 725 (2d D 2007).

same time, he filed a petition to establish specific visitation. The trial court denied the respondent's motion to vacate the agreed order, and the respondent filed a notice of appeal. However, the respondent's visitation petition had not yet been decided. The appellate court viewed such postdissolution petitions as stating new claims within the same dissolution action, as opposed to each postdissolution petition being a new action. Under such view, there must be a Rule 304(a) finding in order to appeal a final order on one petition when another is still pending. While the appellate case was pending, however, the Illinois Supreme Court issued amendments to Rule 303(a), which governs the time for filing an appeal. The amended rule acts to save appeals which would otherwise be premature by providing that, when a timely postjudgment motion has been filed, a notice of appeal filed before "the final disposition of any separate claim" does not become effective until the order disposing of the separate claim is entered. Consequently, in order decide whether it had jurisdiction over the respondent's appeal, the *Duggan* Court was first required to determine whether the amendments to Rule 303(a) should apply to all cases pending before the appellate court on the effective date (retroactive application), or only to those appeals filed after the effective date (prospective application). The Court concluded that the amendments should be applied retroactively. Accordingly, under amended Rule 303(a) (saving premature appeals filed during the pendency of other claims), the respondent's notice of appeal was not effective until the trial court later resolved the pending visitation petition, which in turn constitutes a timely notice of appeal. *Duggan* contains a good discussion regarding the finality of orders and retroactivity of legislation that should be reviewed in appropriate cases.

C. Maintenance

In *Marriage of Lord*,[28] the divorce judgment was held to be final despite the trial court's reserving the question of maintenance for two years. The basis for finding the judgment final was an implicit finding that maintenance was not justified under the circumstances attendant at the time of the divorce. Thus, the trial court made a decision on the issue of maintenance. Two years later in *Marriage of Cannon*,[29] the Illinois Supreme Court also held a divorce judgment making maintenance reviewable in two years would not affect the appealability of the judgment.

What has come to be known as "rehabilitative maintenance" and is occasionally called "transitional maintenance"[30] is a maintenance award granted for a certain period. After that period, the court may decide to extend, terminate, or modify maintenance. Such reservation of jurisdiction was held in *Marriage of Lawrence*[31] not to affect the finality of the divorce judgment.

In *Lawrence* the divorce judgment awarded (curiously phrased) "temporary" maintenance to the wife for three years, to be reviewable thereafter. The *Lawrence* court, citing *Cannon*, held

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[28] 125 Ill App3d 1 (2d D 1984).

[29] 112 Ill 2d 552 (1986).

[30] Richard W. Zuckerman, Chairman's Column, Illinois State Bar Association Family Law Section Newsletter, Vol 42, No 3 (Feb 1999).

[31] 146 Ill App 3d 307 (3d D 1986).

the technicality of the trial court's characterizing the maintenance award as "temporary" did not affect the divorce judgment's finality. *In re Marriage of Bingham*[32] similarly held that a reservation of maintenance did not affect the appealability of a divorce judgment. The actual issue under *Bingham* was the ex-wife's entitlement to apply for benefits under her ex-husband's military pension plan, where the judgment, entered some years before, reserved jurisdiction on the issue of maintenance.

The 2013 *In re Marriage of Jensen*[33] case involved the reservation of the issue of maintenance for six months. The trial court issued its first memorandum of opinion on August 23, 2011. The opinion divided marital property but did not address the wife's allegations of dissipation. The order also reserved maintenance, but it did set child support. The trial court entered its order on the second bifurcated hearing that incorporated the August 23, 2011, rulings. The wife then filed a motion for reconsideration, arguing that no final order had been entered in the case. The issue on appeal was whether the divorce judgment was final with a reservation of the issue of maintenance for a period of six months. The appellate court held where "the trial court's order reserves the issue of maintenance for a future determination and does not set an amount of maintenance to be paid, the court's order is not final for purposes of appeal."

D. Property Rights

The difficult issue on final and appealable orders concerning property rights in divorce proceedings often involves pension benefits and personal injury actions.

1. **Pension Benefits**

Distribution of benefits under a pension plan is frequently accomplished through a "reserved jurisdiction" or "if and when" provision in the marital settlement agreement or divorce judgment. Under such a vehicle, each spouse takes an interest in the plan benefits if and when those benefits become payable. Such a "reservation of jurisdiction" should not affect a judgment's finality because there is a present adjudication of the parties' interest in the pension plan. Only the enjoyment of benefits is delayed.

On the other hand, in *Marriage of Rosenow*,[34] the trial court reserved jurisdiction to decide how the pension plan should be distributed between the parties "if, as, and when Respondent receives any benefits from the System." Citing *Leopando*, the *Rosenow* court held there was no final and appealable order because there was no present adjudication of the pension plan distribution.

A 1993 first district case, *Marriage of Petraitis*,[35] ruled that a divorce judgment that

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[32] 181 Ill App 3d 966 (2d D 1989).

[33] In re Marriage of Jensen, 2013 IL App (4th) 120355 (4th Dist. 2013).

[34] 123 Ill App 3d 546 (4th D 1984).

[35] 263 Ill App 3d 1022 (1st D 1993).

provided for the future preparation and submission of a Qualified Domestic Relations Order (QDRO) was not a final judgment, and the trial court retains jurisdiction until finally disposing of that issue. It should therefore follow that once the QDRO is entered, the divorce judgment may be final and appealable.

In *Marriage of Wisniewski (Wisniewski II)*,[36] the issue was whether there was a final order at the time of a 1983 divorce judgment (upon remand by the appellate court) or whether the final order was entered in 1996. The trial court, on remand in 1983,[37] did not specifically allocate the husband's retirement interest, instead providing that "[j]urisdiction is continued and retained to apportion between the parties according to marital share and supervise payments of the pension if, as, and when it becomes vested in and payable to [the husband]." The husband retired in 1994, and soon after the wife petitioned for allocation of his pension benefits. The husband appealed the trial court's 1996 distribution order, and the wife argued that his appeal was not timely based upon her view of the procedure used to apportion the pension in the 1983 order.

The *Wisniewski II* court held there were two variants of the reserved jurisdiction approach, and that under the second variant the trial court waits until benefits are to be paid before determining the marital interest, or the non-pensioner's share. The wife urged that the trial court followed the reserved jurisdictional approach in the 1983 order, so the husband needed to have appealed from that order in 1983. The wife argued the trial court's 1983 "if, as, and when" language implied the "proportionality rule" was to be used.

The appellate court disagreed, ruling the 1983 order did not determine the method of apportionment but only referred to its timing. The *Wisniewski II* appellate court held the apportionment was not completed until the 1996 order was entered, making that order final and appealable.

2. Personal Injury Action

The trial court's reservation of jurisdiction in *Marriage of Toth*[38] to dispose of a pending personal injury claim of a party did not affect the finality of the divorce judgment, and the divorce judgment was allowed to be appealed. The wife in *Toth* contend contended that the trial court's reservation of jurisdiction to divide any proceeds received on account of her pending personal injury action precluded an appeal of the divorce until the personal injury case concluded. The appellate court disagreed. Citing *Lord* with approval, the *Toth* review court found the trial court resolved all issues that could be decided at the time of judgment and reserved jurisdiction over only one issue that could not be resolved at that time.

E. Attorney Fees

[36] 286 Ill App 3d 236 (4th D 1997).

[37] *Marriage of Wisniewski (Wisniewski II)*, 107 Ill App 3d 711(4th D 1982).

[38] 224 Ill App 3d 43 (1st D 1991).

In *Marriage of Piccione*,[39] the appellate court found a post-judgment order in a divorce case was not final and appealable because it reserved the issue of attorney fees. The order also failed to include the language required by Rule 304(a). The second district in *Marriage of Tomei*[40] also concluded that a divorce judgment was not final and appealable when a petition for attorney fees between the parties was pending, and thus rendered a notice of appeal premature. Further, dismissal of the fee petition by an agreed order after the notice of appeal was filed did not cure the defect.[41] The *Tomei* court found attorney fees depend on and are integrally related to decisions regarding the parties' financial resources. A disposition of allocating fees should therefore be made before the appellate court can properly assess lower court rulings on maintenance, child support, or division of property. Similarly, in *In re Marriage of Derning*[42],, the appellate court held that the question of liability for attorney fees was integral to the judgment dissolving the parties' marriage and that the judgment was not final until that liability was finally determined.

A post-decree order modifying visitation that reserved the issue of attorney fees was ruled not to be final and appealable in *Marriage of Ruchala*.[43] The mother appealed the trial court's denial of her request to set a visitation schedule and the court's terminating her rights to visitation. In considering the wife's request, *Ruchala* noted the trial court reserved ruling on attorney fees.

A case which distinguished *Piccione* and came to the opposite result was *IRMO Sassano*.[44] In *Sassano* it was urged that the appeal was premature because a petition for attorney's fees was still pending at the time of the appeal. The *Sassano* court ruled, " The facts of this case and *Piccione* are very similar. However, this case is distinguishable because the trial court entered the express written finding as required by Rule 304(a) and respondent filed his notice of appeal within 30 days of the finding. Therefore, we conclude that we have jurisdiction to review the denial of respondent's motion to modify support, and we deny petitioner's motion to dismiss the appeal." Accordingly, *Sassano* is one of the few cases to turn on the issue of whether there was an express written finding per SCR 304(a).

In *Marriage of Kerman*,[45] however, the fee petition was the lawyer's own fee petition against his own client brought under a previous version of IMDMA section 508.40 The *Kerman* court held the lawyer's pending fee petition did not affect the divorce judgment's finality and appealability because determining the reasonableness of fees owed by a party to his former attorney "does not affect the previous apportionment of attorney fees between the parties."

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[39] 158 Ill App 3d 955 (2d D 1987).

[40] 253 Ill App 3d 663 (2d D 1993).

[41] See also *Marriage of Cierny*,187 Ill App 3d 334 (1st D 1989) (wife's pending petition for fees against husband rendered divorce judgment non-appealable).

[42] 117 Ill. App. 3d 620 (1983)

[43] 208 Ill App 3d 971(2d D 1991).

[44] 337 Ill. App. 3d 186 (2d D 2003).

[45] 253 Ill App 3d 492 (2d D 1993).

The 1997 amendments to the attorney fees provisions of the Illinois Marriage and Dissolution of Marriage Act better known as the "Leveling of the Playing Field Amendments," address the issue of finality of judgments in the context of a lawyer's fee petition against his or her own client. The amended IMDMA section 508(c)(2)[46] is consistent with the *Kerman* decision and provides in pertinent part:

> Irrespective of a Petition for Setting Final Fees and Costs being heard in conjunction with an original proceeding under this Act, the requested under a Petition for Setting Final Fees and Costs constitutes a distinct cause of action. A pending but undetermined Petition for Setting Final Fees and Costs shall not affect appealability of any judgment or other adjudication in the original proceeding.[47]

In the 2003 *IRMO King* decision, the Illinois Supreme Court affirmed the appellate court's decision and held that an order entered for attorney fees before the divorce judgment is entered is interlocutory and not final, so trial court can modify the terms for payment of the fee award. Furthermore, a creditor could not initiate sheriff's sale of husband's home under pre-judgment order he recorded that limited collection to husband's bank accounts.

The Muller Law Firm in King withdrew its representation of the husband in Cook County divorce proceedings. On January 5, 1999, the trial court entered a fee award in Muller's favor for $4,380, with the order stating, "Said sum shall be paid directly to the Muller Firm Ltd. from one of Mr. King's bank accounts currently restrained***." The January 5th order added that there was "no just cause existing to delay appeal or enforcement hereof." On February 5, 1999, a divorce judgment was entered. The judgment stated in pertinent part: "8.2 The Court entered Judgment against Samuel King and in favor of The Muller Firm on January 5, 1999, in the amount of $4,380.00. Said sum shall be paid ~~out of the accounts listed in Section 2.2(a)~~ out of, Samuel King's assets." (Strikeout in original.) The Muller Firm recorded the January 5, 1999, order to create a lien against the husband's home, then proceeded with collection efforts that included a sheriff's sale of the husband's home. At sale the bid of the appellants in this case, Kenneth Swiatek, et al., was accepted. The husband, who had been without legal representation after The Muller Firm withdrew, then hired an attorney who filed a petition to vacate the sheriff's sale, alleging several aspects of non-compliance with Article XII of the Illinois Code of Civil Procedure (judgments and enforcement).

The trial court ultimately granted the husband's motion to vacate the sheriff's sale and the appellate court affirmed the trial court's order vacating the sheriff's sale. The appellate court decision regarding the standard of review is instructive when it addresses ambiguous versus unambiguous language. The Supreme Court looked to the language in Section 508©)(2) which provides that the petition for attorney's fees against a lawyer's own client (technically called a "petition for setting final fees and costs") constitutes a "distinct cause of action."

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[46] 750 ILCS 5/508 (1993).

[47] 750 ILCS 5/508(c)(2) (1997).

The Supreme Court stated, “The cardinal rule of statutory construction is that the court must ascertain and give effect to the intent of the legislature. *Paris v. Feder*[48]. When construing a statute, the court should look first to the language of the statute, giving the terms their plain and ordinary meaning[49]. Where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction[50]. If the statutory language is ambiguous, however, we may look to other sources to ascertain the legislature's intent. *People v. Ross*[51],. The construction of a statute is a question of law that is reviewed *de novo*.

The Supreme Court addressed the argument that there was a final order when the fee issue against the lawyer’s own client was resolved due to the language in the statute which had provided that the fee claim was a “distinct cause of action.” The Supreme Court stated, “However, in ascertaining the meaning of a statute, a court should not read language in isolation, but must consider it in the context of the entire statute.” The Supreme Court stated, “Accordingly, the phrase "distinct cause of action" must be read together with the sentence immediately following, which states that a pending, but undetermined, petition for fees shall not affect the appealability of any judgment or other adjudication in the dissolution proceeding. By use of this language, section 508©) contemplates that a petition for setting final fees may still be pending at the time a final judgment of dissolution of marriage is entered....

The Supreme Court then reasoned:

> Accordingly, given the separation of final fee petitions from other issues in the dissolution proceeding under the new procedures, there is no reason to defer finality and appealability of dissolution judgments until fee petitions are resolved. In such cases, the concerns we expressed in *Leopando* about the appealability of orders on interrelated issues in a dissolution case do not apply. It is in this context that the phrase "distinct cause of action" in section 508(c)(2) must be understood. The use of that phrase is simply a recognition that the issue of fees owed by a client to his or her attorney is not interrelated with other issues, such as child support, property division, and maintenance. As such, once these other interrelated issues are finally determined, the judgment of dissolution is final and appealable, despite the continued pendency of the issue of attorney fees under section 508(c).

The Supreme Court specifically addressed the issue of the finality of attorney fee awards against a lawyer’s own client made prior to the entry of the judgment of dissolution of marriage, given the fact that the trial court made a Rule 304(a) finding that there was no just reason to delay enforcement or appeal of the underlying order. In a familiar refrain, the Court stated, “However, a prerequisite for such a finding is that the judgment must be a ‘final judgment[52].’

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[48] 179 Ill. 2d 173, 177 (1997).

[49] Paris, 179 Ill. 2d at 177.

[50] *Davis v. Toshiba Machine Co., America*, 186 Ill. 2d 181, 184-85 (1999).

[51] 168 Ill. 2d 347, 352 (1995)

[52] 155 Ill. 2d R. 304(a).

Inclusion of Rule 304(a) language does not convert a nonfinal order into a final order for purposes of enforcement or appeal. Citations omitted."

The Supreme Court also noted that a further reason that the January 5th order was not a final order related to the trial court's ability to reconsider the judgment of dissolution of marriage pursuant to §2-1203 of the Illinois Code of Civil Procedure. The Supreme Court pointed out a scenario that commonly occurs in divorce cases:

> Suppose, for example, that the trial court denies contribution on behalf of a client spouse in a contribution hearing. The client's previously withdrawn attorney then files a petition for final fees and obtains an award of fees under section 508(c). A judgment of dissolution is subsequently entered and the client's current attorney files a postjudgment motion and one of the issues is the court's denial of contribution. If the court reconsiders that denial and enters an order allowing some contribution to the client's attorney fees from the other spouse, the court must then modify the order awarding attorney fees to withdrawn counsel to reflect the contribution from the client's spouse to the client's attorney fees and the client's reduced liability for fees to the attorney. It is the order on reconsideration that then becomes the final and appealable order. 155 Ill. 2d R. 303(a)(1). Such a scenario illustrates the potential difficulties in viewing an attorney fee award entered pursuant to section 508(c) as a final, appealable, and enforceable order prior to entry of a final judgment of dissolution of marriage.

A final case which addressed the appealability of an interim order for attorney's fees held that temporary order which directed the husband's attorneys to disgorge a portion of the fees previously paid to them by husband is not subject to appeal either before or after final dissolution. See IRMO Johnson[53] and *Leving v. Weiman and Wessel*[54]. The question in whether the disgorgement order was a final order. The appellate court correctly noted that the order was not final until the conclusion of the divorce proceedings.

IRMO Olesky[55] also addressed an appeal of an interim order for attorney's fees finding the matter was not subject to appeal where it involved post-divorce proceedings. In *Olesky,* the respondent urged that this court lacked jurisdiction because the plain language of sections 501(c-1)(1) and (2) of the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") precluded appeals of interim orders under *In re Marriage of Tetzlaff*[56]. The petitioner's ex-husband argued that *Tetzlaff* did not apply because it involved interim attorney fees for predissolution proceedings, but that Olesky involved fees for postdissolution proceedings. The appellate court stated summarily, "This is incorrect. Section 501(c-1) applies to both predissolution and postdissolution decree proceedings. *In re Marriage of Beyer*[57]."

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[53] 351 Ill. App. 3d 88 (Ill. App. Ct. 2004)

[54] Id.

[55] 337 Ill.App.3d 946 (2nd Dist. 2003)

[56] 304 Ill. App. 3d 1030 (1999).

[57] 324 Ill. App. 3d 305, 314 (2001).

In *Olesky*, the court stated, “The trial court here found that Henryk “has the financial ability to pay reasonable amounts” to “enable [Margaret] to participate adequately in the litigation." Unlike *Lawrence*, this order was not set for future review by the trial court. Neither was the $4,000 designated as a one-time or final interim fee payment. These facts support the conclusion that the order was interlocutory and not subject to appeal. Petitioner's motion to dismiss for want of jurisdiction the portion of the appeal related to interim attorney fees is granted.”

G. Contempt

In 2004, the Third District appellate court in *Earles v. Earles*[58] addressed the issue of whether contempt proceedings were independent of the petition to increase child support. In this case, the appellate court affirmed the trial court’s ruling that it lacked jurisdiction to consider the motion to reconsider the order, which finally disposed of the cross-petitions to modify support, found the ex-husband in contempt and continued the matter for sentencing. The appellate court reasoned that because contempt is a collateral proceeding independent of other matters, the order was final and appealable regarding the cross-petitions to modify. Therefore, the court lacked jurisdiction to consider a post-trial motion challenging the holding on the petitions to modify filed more than 30 days after the order. *Earles* may not be good law in light of the 2008 *Gutman* decision.

H. Domestic Violence Proceedings

Generally, a plenary order of protection is immediately appealable – even whether there is an argument that the underlying case is still pending and that therefore appealing the order of protection amounts to piecemeal litigation. A 2004 case addressing this issue is *In re T.H. and K.M., Minors*[59], where the First District court addressed a previous case on this issue. There, the court first stated, “... this court has held that a protective order is a claim separate from and not ancillary to its related proceedings and may be appealed as a judgment in and of itself. See *In re Marriage of Blitstein*[60].

Next, the First District court noted that Supreme Court Rule 307(a)(1) allows appeals on an interlocutory basis of an order, “granting, modifying, refusing, dissolving, or refusing to dissolve an injunction.” The court then stated:

> The State relies on this court's decision in *In re Johnny S.*[61], in contending that the order of protection does not constitute an injunction and is therefore not appealable. In that case, three minors appealed from an order of the circuit court

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[58] 352 Ill. App. 3d 274 (2004).
[59] 354 Ill. App. 3d 301 (2004).
[60] 212 Ill. App. 3d 124, 129-30 (1991).
[61] 219 Ill. App. 3d 420 (1991).

> which allowed the children to remain with their father pending a final custody determination. The order was entered at a temporary custody hearing held pursuant to the Juvenile Court Act (705 ILCS 405/1-1 et seq. (West 2002)), and we concluded that it was an interim decision which left the parties' status intact and did not rise to the level of an injunctive order[62]. We find the proceedings and facts in this case distinguishable.
>
> In this case, the initial emergency order of protection and the ensuing plenary order were entered pursuant to section 202(a)(2)(ii) of the Illinois Domestic Violence Act of 1986, in conjunction with proceedings to terminate the respondent's parental rights and to appoint a guardian with the right to consent to adoption. 750 ILCS 60/102(4), 202(a)(2)(ii). The order compelled respondent to stay away from T.H. and to refrain from physically abusing and harassing her, from going to HELP's offices, and from contacting anyone at the transportation company for a definite duration of two years. By contrast, in *In re Johnny S.*, the respondent was not compelled to do anything and the order maintained the status quo pending the outcome of a temporary custody hearing. Accordingly, we conclude that the plenary order of protection is injunctive in substance rather than administrative and as such is an appealable final order. We therefore find that this court has jurisdiction to consider this appeal.

In *In re Marriage of Gordon*[63], the court determined that a petition for a protective order under the Domestic Violence Act filed in a divorce case is a separate claim and is not an ancillary part of the claim for dissolution.

H. Distinct Issues

There are issues other than domestic violence proceedings within divorce cases which are clearly distinct issues and therefore not an ancillary claim to the divorce proceedings.

In 2005, the IRMO Link[64] court addressed the issue of whether of whether the husband's third-party action against his former girlfriend (ostensibly former) is distinct from the issues between the parties in their divorce case. In that case, the husband deeded property which had been in his name alone and would have been marital property to his girlfriend's name. Thereafter, the girlfriend allegedly changed the locks to the house. Thereafter, the husband brought a third party complaint alleging that his former girlfriend held the property in a resulting trust for the benefit of the marital estate.

The issue on appeal was the timeliness of the proceedings because at the time the divorce case

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[62] Id at 422.

[63] 233 Ill. App. 3d 617 (1992).

[64] Nos. 2-05-0194 & 2-05-0209 cons. (2d Dist. November 2005)

was still pending. What was also noteworthy was that no party addressed the jurisdiction issue and the appellate court decided this issue sua sponte. The appellate court determined it had no jurisdiction but then noted that the appellants, "might rely upon Rule 304(a) and, after obtaining the necessary written finding from the trial court, return to this court." The court stated, " if resolution of David's third-party action against Cheri is distinct from the issues between Helen and David in the dissolution case, this case is appealable with a proper Rule 304(a) finding."

The appellate court then ruled, "Thus, although the third-party case touches upon one of the ancillary issues in this dissolution, in our judgment it is not intertwined with the dissolution case in the same way that the custody issue was intertwined with the dissolution claim in *Leopando*. [Note that this aspect of the case no longer applies in light of the 2010 amendments to the Supreme Court Rules.] Therefore, we hold that the judgment in favor of Cheri on the third-party complaint would have been immediately appealable if the appellants had obtained the necessary Rule 304(a) finding." Thus, *Link* is one of the few cases addressing the importance of the inclusion of SCR 304(a) language in divorce cases – when the issue is clearly a distinct one.

Instructively, the appellate court included a discussion of a somewhat similar appellate court case decided 25 years ago. The appellate court stated:

> *In re Marriage of Peshek*[65], lends support for our conclusion that the issue of whether David made a gift of the property is distinct from the dissolution issues. In that case, the petitioner and the respondent in the dissolution case deeded their marital home to the petitioner's parents, who put it into a land trust with a bank. The respondent sought leave to file a third-party complaint against the petitioner's parents and the bank in the dissolution case, which was denied. The respondent alleged that the beneficial interest in the marital home was the sole property of the marital estate. The appellate court held that the respondent should have been allowed to file the third-party complaint in the dissolution proceeding because under section 503 of the Act the court has to consider whether property is marital or nonmarital. The appellate court pointed out the speculative nature of the marital estate's interest in the property. "At best, the property can be considered a potential or alleged asset. It is possible that a hearing on this issue would result in a finding that the parties have no interest in the property because they deeded the house to [the petitioner's parents] as a gift ***." This language suggests that the issue of whether the parties made a gift is distinct from the dissolution issues and that a separate hearing on what interest the marital estate has is a threshold to considering whether the property is marital or nonmarital.

I. Relocation Cases.

In re Marriage of Fatkin, 2019 IL 123602 (2019).

An order allowing relocation is appealable under Supreme Court Rule 304(b)(6). After the father

[65] 89 Ill. App. 3d 959 (1980).

filed a notice of intent to relocate with the children to Virginia Beach, Virginia and the mother objected, the trial court held a trial and issued a lengthy decision to allow the relocation. The Mother appealed and the Appellate Court reversed. Mother had filed her notice of appeal pursuant to Rule 304(b)(6), which allows for the immediate appeal from any custody or allocation of parental responsibilities judgment or modification of such judgment entered pursuant to the IMDMA. The trial court's order made findings as to the children's best interest and included language that the parenting time would have to be modified as a result of its ruling and provided for a modified parenting schedule. Given the definition of what an "allocation of parenting responsibilities judgment" is under the IMDMA, there is no question that an order granting a relocation petition fell within the definition of an allocation of parental responsibilities for the purpose of Rule 304(b)(6) and was immediately appealable.

J. **Final and Appealable Orders**: **Motion for Substitution of Judge Ruling Not Appealable.**

In re Marriage of Morgan, 2019 IL App (3d) 180560.
The husband appealed the denial of a Motion for Substitution of Judge for cause. The exchange between the court and husband's counsel that was the basis for "cause" involved a statement by the court that he "tends" to keep mutually agreed upon allocation judgments in place if "it only inconveniences one party." The exchange took place after the court had ordered the parties to mediation on various post-decree parenting issues. The judge who heard the motion for substitution of judge for cause entered an order denying the motion but agreed to add the language: "[t]his ruling is appealable pursuant to Supreme Court Rule 304 and other applicable rules."

The appellate court observed that the court did not include the specific language of Rule 304(a) that provides that there is *no just reason for delaying enforcement or appeal or both*. The court noted that it was not clear from the record that the court intended to invoke Rule 304(a) because the court referenced a "Rule 308" in the transcript. The key holding was not a reference to the failure to invoke thaumaturgical language but that simply mentioning appealability while improperly referencing Rule 304 does not confer appellate jurisdiction. The precise language of the rule should be utilized in an order. Further, the denial of a motion for substitution of judge is interlocutory and would not have been a final, appealable order just because the proper 304(a) language was included.

IV. Effect of Premature or Untimely Motions to Reconsider

A. Premature Motion to Reconsider Does Not Extend Time to File Notice of Appeal.

In the 2007 case of *Marriage of Waddick*[66] the wife filed a motion to reconsider the trial court's written decision, but prior to entry of the actual judgment. She did not file another post-trial motion or notice of appeal within 30 days after entry of the judgment. Instead, she filed her

[66] 869 N.E.2d 1089 (2d D 2007).

notice of appeal within 30 days after the trial court denied her motion for reconsideration. However, since the wife's motion was filed prematurely before entry of the judgment (regardless of when the motion was heard), it did not qualify as a timely postjudgment motion. Accordingly, the motion could not extend the time for filing the notice of appeal. In order to qualify as a postjudgment motion for purposes of SCR 303(a), a motion must be directed against the judgment and the ex-wife's motion was directed against the trial court's written decision, not its judgment.

B. Improper Motion to Reconsider Results in Untimely Notice of Appeal.

In the case of *Marriage of Singel,*[67] on the thirtieth day after entry of judgment, the respondent filed a motion for an extension of time for filing a motion to reconsider. The respondent did not actually file a motion to reconsider the judgment, either within 30 days or at any time thereafter. After the trial court denied the respondent's motion for an extension of time, he then filed a notice of appeal. The appellate court dismissed the appeal as untimely since the notice of appeal was filed more than 30 days after entry of the dissolution judgment. The respondent's motion for an extension to time did not constitute a proper postjudgment motion under Section 2-1203 of the Code of Civil Procedure because it did not request any relief against the judgment. The decision states, "Contrary to what respondent contends, it does not matter that he filed his motion for an extension of time within 30 days after the entry of the judgment." Moreover, the respondent's reliance upon S.Ct.Rule 183 was misplaced since that rule applies only to the time limits for filing pleadings and to time limits that have been set by the supreme court rules. The trial court could not have used Rule 183 to grant respondent more time to file a postjudgment motion. Therefore, because the respondent did not file a proper postjudgment motion which would have extended the time in which to appeal, his notice of appeal was untimely.

V. Conclusion

Most of the cases cited in this article held that the appeals were premature. Most of the cases allowing an appeal were issued before the Illinois Supreme Court opinion in *Franson v Micelli*. Under the narrow construction allowed by *Franson*, many of the previous cases in which the appeal was allowed even though the trial court reserved jurisdiction on some issue must be questioned. However, a case should still be considered final and appealable if the trial court reserved only the abilities to enforce and modify its orders. This ruling, from *Deckard v Joiner*, is unchanged by *Franson*.

The standard in parentage cases appears to be that a trial court decision is not final and appealable unless the issues of parentage, pregnancy and birth expenses, visitation, support, and attorney fees have been resolved – with the 2010 exception that custody decisions are now appealable as a separate matter under SCR 304(b)(6). The standard in divorce proceedings is that a trial court decision is not final and appealable unless all issues that can be resolved at the time

[67] 868 N.E.2d 1079 (2d D 2007).

of judgment have been resolved, with the possible exception of maintenance in cases where no maintenance is being currently awarded but there is a reservation to award future maintenance and custody per the 2010 amendments to SCR 304(b).

It is unclear whether a trial court's reservation of whether to award maintenance will now be considered final and appealable in light of *Franson*. The appellate courts in *Lord and Cannon* considered the trial court's orders final and appealable, even though in both cases the trial courts reserved ruling on maintenance for two years. The assumption is that by finding that a spouse did not need maintenance at the time the order was entered, the trial court made a finding with regard to maintenance. The reservation of maintenance for two years, therefore, could be construed as the trial court's ability to modify its maintenance order.

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