FOLLOWING THE TORTUOUS PATH:

LEVELING AND RE-LEVELING THE PLAYING FIELD -

28 YEARS AND ONE NEW ACT LATER –

ISSUES UNIQUE TO PARENTAGE CASES

Gunnar J. Gitlin

Woodstock, Illinois
www.GitlinLawFirm.com

Executive Summary: Involving Parentage Cases and Attorney's Fees:

Illinois enacted detailed legislation in 1997 controlling attorney's fees in divorce and matrimonial law matters (cases under the Illinois Marriage and Dissolution of Marriage Act (IMDMA). Although a promise was made to quickly amend this legislation to address concerns, no significant amendments were made until 2009. In 2016, we had a new set of amendments to the fee legislation. And the same date, the rewrite of Illinois law regarding paternity went into effect – the Illinois Parentage Act of 2015. This outline will address issues unique to parentage (paternity) cases, focusing on the interplay between the IMDMA and the Parentage Act of 2015.

Interim Fees and Parentage and Post-Divorce Applicability:

Additional complexity with the Leveling amendments is caused by the legislation not yet being further amended to specify whether the interim fee provisions applied to parentage proceedings. It had been an open question whether the interim fee statute applied to post-decree proceedings. These issues were clarified with the 2009 amendments. That language now states, "Interim attorney's fees and costs may be awarded from the opposing party, in a pre-judgment dissolution proceeding in accordance with subsection (c-1) of Section 501 and in any other proceeding under this subsection." So, then in non-divorce (read parentage cases) or post-decree divorce cases, we first look to the language of Section 508 which later states, simply: "All petitions for or relating to interim fees and costs under this subsection shall be accompanied by an affidavit as to the factual basis for the relief requested and all hearings relative to any such petition shall be scheduled expeditiously by the court."

The specific interim fee at Section 501(c-1), in turn, reads, in part:

> (1) Except for good cause shown, a proceeding for (or relating to) interim attorney's fees and costs in a pre-judgment dissolution proceeding shall be nonevidentiary, and summary in nature~~, and expeditious~~. All hearings for or relating to interim attorney's fees and costs under this subsection shall be scheduled expeditiously by the court.

The 2009 amendments make it clear that there is no presumption for a non-evidentiary and summary hearing in post-decree cases. This hearing only applies to pre-decree dissolution-type cases. But all interim fee awards – both pre-decree and post-decree are still supposed to be handled "expeditiously" – whatever import the court may provide to that word.

The 2009 Amendments also provide that the interim fee factors the court is to consider are those "that appear reasonable and necessary, including to the extent applicable:..."

And the 2016 Amendments add a new provision that was implied but not mandated, "A responsive pleading shall include costs incurred, and shall indicate whether the costs are paid or unpaid."

Interim Fees and Parentage Proceedings: Compare the Illinois Parentage Act of 1984 and of 2015.

The Illinois Parentage Act of 1984 states at §17:

> "[T]he court may order reasonable fees of counsel, experts and other costs of the action, pretrial proceedings, post-judgment proceedings to enforce or modify the judgment and the appeal or the defense of an appeal of the judgment to be paid by the parties in accordance with the relevant factors specified in §508 of the Illinois Marriage and Dissolution of Marriage Act."

The Illinois Parentage Act of 2015 states:

> The court may assess filing fees, reasonable attorney's fees, fees for genetic testing, other costs, necessary travel expenses, and other reasonable expenses incurred in a proceeding under this Act. The court may award attorney's fees, which may be paid directly to the attorney, who may enforce the order in the attorney's own name.

Later, it provides:

> Section 809. Right to counsel.
> (a) Any party may be represented by counsel at all proceedings under this Act. Except as otherwise provided in this Act, the court may order, *in accordance with the relevant factors specified in Section 508 of the Illinois Marriage and Dissolution of Marriage Act*, reasonable fees of counsel, experts, and other costs of the action, pre-trial proceedings, post-judgment proceedings to enforce or modify the judgment, and the appeal or the defense of an appeal of the judgment to be paid by the parties. ***

The amendments to §508 apply to parentage proceedings. So, the statement of the client's rights must be attached to the engagement agreement in parentage proceedings.

Parentage / Removal (Relocation) Case Law: Since §508 incorporates by reference §501(c-1) and §503(j), there has been the question of whether these sections would be incorporated by reference in parentage cases by the 1984 IPA §17. Based upon the line of parentage cases, such as the parentage removal case law [now relocation], I had urged that only the portion of the statute directly referred to would be incorporated by reference – that is, Section 508 and not the contribution statute and the interim fee statute. In fact, this was the reason the 2009 amendments now differentiate between "dissolution" cases – which are those cases explicitly brought under the Illinois Dissolution of Marriage Act rather than those non-"dissolution" type cases where Section 508 is incorporated by reference – that is, cases brought under the Illinois Parentage Act of 1984.

No Disgorgement in Parentage Cases per *Stella I*: In the original 2013 *Stella v. Garcia* opinion (*Stella I*), 339 Ill. App. 3d 610 (2003), the First District addressed the incorporation by reference issue and stated:

> We take *In re Parentage of Melton* and *In re Adams* to mean only those Marriage Act relevant factors and standards expressly embraced by the Parentage Act may be applied by trial judges in parentage cases. These would include a section 508 provision that permits awards of attorney's fees to be paid directly to attorneys, *Heiden v. Ottinger*, 245 Ill. App. 3d 612 (1993); and a section 508 provision that allows a trial court to award reasonable attorney's fees incurred by custodial parents during child support enforcement proceedings where the non-custodial parent's failure to pay is without cause or justification. *Davis v. Sprague*, 186 Ill. App. 3d 249 (1989). We find nothing in the pertinent statutes that expresses a legislative intent to grant trial judges the power to order disgorgement of interim fees in a Parentage Act proceeding.
>
> The statute at issue here is section 17 of the 1984 Parentage Act:
>
> > "Except as otherwise provided in this Act, the court may order reasonable fees of counsel, experts, and other costs of the action, pre-trial proceedings, post-judgment proceedings to enforce or modify the judgment, and the appeal or the defense of an appeal of the judgment, *to be paid by the parties in accordance with the relevant factors specified in Section 508 of the Illinois Marriage and Dissolution of Marriage Act, as amended*." (Emphasis added by appellate court.) 750 ILCS 45/17.

Ultimately, the *Stella I* appellate court held that §501(c-1) of the IMDMA regarding potential "disgorgement" of interim attorney fees did not apply to parentage proceedings. This rationale was in line with my original discussion. The quotation from the case was, "(n)owhere in section 17 of the Parentage Act did the legislature refer to disgorgement of fees. Nor does it cross-reference subsection 501(c-1) of the Marriage Act. The only cross-reference to the Marriage Act in section 17 of the Parentage Act is to section 508." This result was consistent with the 2009 amendments to the IMDMA.

***Stella II* – Other Portions of Interim Fee Statute Apply to Parentage Cases**: In *Stella II*, 353 Ill. App. 3d 415 (2004), the appellate court took the position that in parentage proceedings, the court can award interim attorney's fees under the provisions of §501(c-1) of the IMDMA, so long as it does not require disgorgement. This is in line with the *Rocca* decision, commenting with approval on *Stella II*. The *Stella II* appellate court stated at the beginning of its decision:

> The trial court in this case, relying entirely on *Stella I*, held the Parentage Act does not provide for interim attorney's fees. We intended no such result and today we clear the air by addressing two questions certified for interlocutory appeal pursuant to Illinois Supreme Court Rule 308(a):
>
> "Question 1: Can interim attorney's fees be awarded under section 17 of the [Parentage Act]?
>
> Question 2: If the answer to Question 1 is "Yes," can those interim attorney's fees be awarded using the methods, factors, and procedures, set forth in section 501(c-1)(1), (2), and (3) of the [Marriage Act] without considering disgorgement?"
>
> We answer the certified questions "yes" and "yes."

Stella II commented that, "Neither of the articles written by the bar association committees that promoted the 1997 amendments suggests that the level playing field provisions in subsection (c-1)(3) were intended to apply to parentage actions." *Stella II* then stated, "Our courts have held attorney's fees cannot be awarded in paternity actions without contractual or statutory authority. That flat statement does not resolve our inquiry, it begins it." The labored reasoning of the appellate court then suggests, "While section 17 makes no specific reference to interim fees, it requires entry into section 508, which does." In defense of its position the court opines, "We do not see that the lack of a marital estate as a source of fees has any particular bearing on our resolution of legislative intent."

I had disagreed *Stella II* – but my concerns were partly addressed by the 2009 amendments. The opinion had seemed persuasive until one recognizes a key difference between parentage cases and divorce cases: the lack of a marital estate in parentage cases. As I had pointed out, a key safety valve provision in divorce cases was that while the proceedings are summary in nature, any "overpayment" may be recovered at the conclusion of the case because all fees would be deemed an advance against the marital estate. By definition, there is no marital estate in parentage cases, so overlaying this statute makes little sense. It was for a similar reason that the 2009 amendments provided, in essence, that interim fees were to be awarded under the standards of Section 508 only when applied to non-divorce cases or cases that are post-decree.

There was an excellent discussion about how poorly drafted the overall the statutory scheme regarding attorney fees is when one considers the "multiple incorporation by reference" issue. And while the Illinois Parentage Act of 2015, as well as the 2016 amendments to the IMDMA, should have addressed these concerns, they did not.

IRPO Rocca I 408 Ill. App. 3d 956 (2nd Dist., 2011) addressed this issue tangentially. In addressing the incorporation by reference of the IPA of 1984 (§17 referring only to §508 and then the potential incorporation from §508 of the interim fee and contribution provisions), the appellate court made a point that I've repeatedly made:

> However, section 508 of the Marriage Act, which addresses "attorney's fees; client's rights and responsibilities respecting fees and costs," cross-references other sections of the Marriage Act and, accordingly, consideration of the "relevant" portions thereof as applied to the Parentage Act becomes more complicated. Indeed, one court has referred to the process of turning to the Marriage Act to assess attorney fees and costs under the Parentage Act as a "tortuous path." *In re the Minor Child Stella*, 353 Ill. App. 3d 415, 418 (2004). [Note: I refer to that case as *Stella v. Garcia* or *Stella II*]."

A 1995 ISBA's Family Law Newsletter addressed this issue, i.e., attorney fees in paternity cases. See April 2005, Vol. 48, No. 3. The authors there suggested that the *Stella II* language could be used to argue against a requirement of disgorgement by an attorney in divorce cases. The authors stated, "The authorizing paragraph of the Parentage Act is no more limiting: 'the court may order reasonable fees of counsel... to be paid by the parties...'" Therefore, while this court has clarified that interim awards are authorized and disgorgement orders are not, it may have opened the door to yet another unintended consequence."

Just as *Stella* spawned two appellate court decisions, so did *Rocca*. *In re Parentage of Rocca (Rocca II)*, 2013 IL App (2d) 121147, resulted from the remand of *Rocca I*. The appellate court in *Rocca II* clarified its decision in *Rocca I* and first stated:

> We did not purport to find that the fees awarded were reasonable or that Rocca should be ordered to contribute to them. We simply held that the court should "consider" the petition for contribution toward the fees previously awarded. Rocca, 408 Ill. App. 3d at 970… As such, our holding did not preclude the trial court from holding a hearing to consider whether contribution was appropriate.

The appellate court next addressed the waiver of the right to a contribution hearing within the parties' agreement did not necessarily mean that the now former lawyer, Landau, was barred from presenting his own petition for contribution stating:

> In our prior decision, we did not hold that Landau [the attorney] stood in Lamar's [the mother's] shoes, such that Rocca's waiver of a hearing applied to Landau's pursuit of contribution. To the contrary, by virtue of holding that Lamar could not waive something that belonged to Landau, we distinguished between Lamar and Landau. In other words, the very fact that Landau was not a party to the agreement was one of the bases for our decision that the trial court should not have dismissed his contribution petition. The trial court properly declined to flip that proposition on its head to find Rocca's waiver of a

> contribution hearing, entered into only with Lamar, nevertheless barred him from seeking a hearing upon remand.[1]

The appellate court continued to clarify its prior ruling and opened with a double negative:

> [W]e did not hold that section 503(j) does not apply to parentage actions. Rather, our prior decision noted that section 503(j)'s application to parentage actions is unclear, and we simply rejected Rocca's argument that, if it applied, section 503(j) precluded Landau's ability to petition for contribution. Id. at 965 n.3, 968. The distinction is that we did not hold that the trial court could not rely on section 503(j)'s factors to ultimately deny contribution.[2]

The limited nature of the court's ruling was clear when it stated: "Further, even if section 503(j) does not apply to a parentage action, it is well established that, before ordering one party to pay the other party's attorney fees, there must be evidence showing that the party who incurred fees is unable to pay. See Keip, 332 Ill. App. 3d at 884."

With those clarifications made, the appellate court ultimately held that the trial court, on remand, properly denied the attorney's contribution petition because he presented no evidence regarding the former client's current financial circumstances.[3] It also held that the trial court properly dismissed the attorney's supplemental and appellate fee petitions because he could not recover fees from the client and the opposing party in the parentage action for actions performed after his withdrawal as the client's counsel. The case stated that merely because the attorney's position may be aligned with the client's interests did not mean his position was taken on her behalf.

More recently, the appellate court in *In re Parentage of J.W.*, 2017 IL App (2d) 160554, addressed these issues from another vantage point, whether the lack of a written engagement agreement barred a lawyer from seeking a contribution award in a parentage proceedings. The appellate court commented in detail regarding the *Stella II* and *Rocca I* decisions:

> In Stella [II], the appellate court, addressing two certified questions, held that interim attorney fees can be awarded in a parentage proceeding under the costs provision of the Parentage Act of 1984 (750 ILCS 45/17 (West 2002)) and sections 501(c-1) and 508 of the Marriage Act (750 ILCS 5/501(c-1), 508 (West 2002)). Stella, 353 Ill. App. 3d at 420-21. The appellate court reasoned that a "fundamental reason" for the interim fee system in the Marriage Act was to "prevent a party from using his or her relative wealth as a litigation tool." (Internal quotation marks omitted.) Id. at 420. Further, the court

---

[1] Id at ¶ 15.

[2] Id at ¶ 16.

[3] "Further, even if section 503(j) does not apply to a parentage action, it is well established that, before ordering one party to pay the other party's attorney fees, there must be evidence showing that the party who incurred fees is unable to pay. See Keip, 332 Ill. App. 3d at 884."

explained:

> "Providing interim attorney fees in Parentage Act and Marriage Act cases well might produce similar public policy benefits that would not have escaped the legislature's attention: avoiding long delays, discouraging the use of superior assets as a litigation tool, encouraging attorneys to undertake parentage actions, and reducing the risk of simply outlasting the disadvantaged party." Id. at 420-21.

The appellate court then stated:

> Similarly, in *Rocca*, this court held that the mother's attorney had a right to seek contribution from the father for attorney fees under the Parentage Act of 1984. Our court stated:
>
> > " 'The fee-shifting provisions of section 508, coupled with the court's ability to award fees directly to the attorney, provide an incentive for attorneys who might otherwise decline to represent spouses with few financial resources of their own. Thus, the attorney's right to proceed against the other spouse for an award of fees is oftentimes essential to a spouse's ability to procure legal representation.' " *Rocca*, 408 Ill. App. 3d at 962 (quoting *Lee v. Lee*, 302 Ill. App. 3d 607, 612-13 (1998))

Note: This topic is discussed in further detail in *Gitlin on Divorce: A Guide to Illinois Family Law*.

The Gitlin Law Firm, P.C.
663 East Calhoun Street
Woodstock, IL 60098
815-338-9401
Last Updated: November 19, 2025
G:\Docs\Writings\Attorney Fees in Illinois Parentage Cases.doc\11/19/2025