ATTORNEY'S FEES AND ILLINOIS DIVORCE: FOLLOWING THE TORTUOUS PATH:

LEVELING THE PLAYING FIELD 28 YEARS LATER – DIVORCE AND POST-DIVORCE ONLY

Gunnar J. Gitlin

Woodstock, Illinois
www.GitlinLawFirm.com

Executive Summary:

All Illinois divorce lawyers have heard of the so-called Leveling the Playing Field Act. Yet it's not an Act, but a haphazard series of amendments that have evolved over the past two-plus decades. The Illinois legislature adopted the original amendments on June 1, 1997, which govern attorneys' fees in divorce and family law cases (cases under the Illinois Marriage and Dissolution of Marriage Act—"IMDMA"). While those who promoted the original legislation promised to quickly address its faults, we only had limited sets of amendments in 2009 and 2016. The later amendments, as part of the 2016 Rewrite to Illinois family law, provided tweaks to the law regarding attorney's fees in divorce and parentage cases.

And since then, we've had three key Illinois Supreme Court cases:

- Crecos (III).
- *Heroy II;*
- *Goesel*

Crecos breaks new ground in addressing the changes to our statutory scheme in 2010. It holds that post-decree interim-fee petitions are on a different footing from pre-decree petitions. Post-decree interim-fee petitions are subject to interlocutory appeal—but only where the order includes SCR 304(a) language.

Heroy II attempted to balance the historical ability/inability to pay standard with the language of our statute, as applied to this post-divorce case.

Goesel held that *earned fees* weren't subject to disgorgement.

Note that the author provides a separate outline addressing issues specific to parentage in Illinois family law cases.

2016 through 2022 Statutory Changes.

2016 Changes Highlighted: This outline addresses the key areas of dispute regarding the legislation and discusses the caselaw addressing this legislation, the 2009 amendments, the 2016 amendments, and the recent Illinois Supreme Court cases on the subject of attorney fees. At the outset, I highlight the changes to the purposes of the IMDMA per the 2016 amendments that provide in part:

> (8) Make reasonable provision for support ~~spouses and minor children~~ during and after an underlying dissolution of marriage, legal separation, parentage, or parental responsibility allocation action ~~litigation~~ , including provision for timely advances ~~awards~~ of interim fees and costs to all attorneys, experts, and opinion witnesses including guardians ad litem and children's representatives, to achieve substantial parity in parties' access to funds for *pre-judgment* litigation costs *in an action for dissolution of marriage or legal separation*;

The other substantive changes to the attorney fees in the 2016 legislation include:

> SEC. 501(C-1)
> As used in this subsection (c-1), "interim attorney's fees and costs" ….
> (2) …. Any portion of any interim award constituting an overpayment shall be remitted back to the appropriate party or parties, or, alternatively, to successor counsel, as the court determines and directs, after notice in a form designated by the Supreme Court. An order for the award of interim attorney's fees shall be a standardized form order and labeled "Interim Fee Award Order".

Another key change—the legislation reduced the time for filing a contribution petition to 14 days after the close of proofs in a final hearing:

> SEC. 503. **DISPOSITION OF PROPERTY AND DEBTS.**
> (j) After proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be heard and decided, in accordance with the following provisions:
> (1) A petition for contribution, if not filed before the final hearing on other issues between the parties, shall be filed no later than 14 ~~30~~ days after the closing of proofs in the final hearing or within such other period as the court orders.

The amendments incorporated a new category of fees under Section 508(a) fees:

SEC. 508. **ATTORNEY'S FEES; CLIENT'S RIGHTS AND RESPONSIBILITIES RESPECTING FEES AND COSTS.**

(a) Awards may be made in connection with the following: ….

(4) The maintenance or defense of a petition brought under Section 2-1401 of the Code of Civil Procedure seeking relief from a final order or judgment under this Act. Fees incurred with respect to motions under Section 2-1401 of the Code of Civil Procedure may be granted only to the Party who substantially prevails.

(7) Costs and attorney's fees incurred in an action under the Hague Convention on the Civil Aspects of International Child Abduction.

And finally, 2016 brought a new provision to Section 508(a) specifically addressing interim attorney fees in post-decree proceedings and the nature of the fee hearing:

A petition for temporary attorney's fees in a post-judgment case *may* be heard on a non-evidentiary, summary basis.

Compare this to the language of Section 501(c-1) that pre-judgment interim-fee proceedings, except for "good cause shown… *shall* be nonevidentiary and summary in nature." All hearings for or relating to interim attorney's fees and costs under this subsection shall be scheduled expeditiously by the court." This language, however, should have matched with the "any other proceeding" [where allowed] phrasing within the 2010 amendments.

Fee Provisions in 2016 Relocation Statute:

The new provisions in the child relocation statute provide:

The court may consider a parent's failure to comply with the notice requirements of this Section without good cause;
(i) as a factor in determining whether the parent's relocation is in good faith; and
(ii) as a basis for awarding reasonable attorney's fees and costs resulting from the parent's failure to comply with these provisions.

Fee Provisions in Modification of Parenting Time / Parental Responsibility Amendments, Effective 2016: There are similar but somewhat different provisions to the fee provisions for vexatious "custody" modification litigation. See: 750 ILCS 5/610.5. Subsection (f) now provides:

Attorney's fees and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious or constitutes harassment. If the court

> finds that a parent has repeatedly filed frivolous motions for modification, the court may bar the parent from filing a motion for modification for a period of time.

The latter language is entirely new.

Abuse of Allocated Parenting Time and 750 ILCS 5/607.5 Effective 2016:

In 2016, there were new fee provisions within the abuse of parenting time provisions of Section 607.5:

> (d) In addition to any other order entered under subsection (c), except for good cause shown, the court shall order a parent who has failed to provide allocated parenting time or to exercise allocated parenting time to pay the aggrieved party his or her reasonable attorney's fees, court costs, and expenses associated with an action brought under this Section. If the court finds that the respondent in an action brought under this Section has not violated the allocated parenting time, the court may order the petitioner to pay the respondent's reasonable attorney's fees, court costs, and expenses incurred in the action.

2022 Amendment: Domestic-Abuse Focused 2022 Amendment: "Retainer Fee to Obtain an Attorney":

Public Act 102-480 provides for "an allowance from the other party for a retainer fee to obtain an attorney." It states:

> (1.5) A petition for interim fees that seeks an order for the payment of an initial retainer to retain an attorney shall have attached to it an affidavit from the attorney to be retained that the attorney has been contacted by the moving party and the attorney has agreed to enter an appearance if the court grants the relief requested, together with a certificate from the moving party that the interim fees granted will only be used by the moving party to retain an attorney. Any interim fees granted pursuant to this paragraph shall be paid directly to the identified attorney.

The original legislation was within the injunctive relief provisions of Section 501, while the legislation as enrolled was incorporated within the interim-fee provisions of Section 501(c-1). The amendment sought to avoid the factual pleading requirements involved with injunctive relief proceedings. This required a motion to concur involving a Second Senate Floor Amendment. https://legiscan.com/IL/drafts/HB3484/2021.

When commenting on this legislation, State Senator Rachelle Aud Crowe (D-Glen Carbon) stated:

> Divorces can cause emotional stress for all family members involved—and especially for a domestic violence survivor who depends financially on their abuser. This law empowers survivors to hire representation and get out of a dangerous relationship.

Interim Fees and Divorce Proceedings

Disgorgement Caselaw:

***Earlywine* - Interim Attorney's Fees and Disgorgement: Illinois Supreme Court Rules Advance-Payment Retainer Not Necessarily Bar to Disgorgement**.
IRMO Earlywine, 2013 IL 114779
The key disgorgement cases are this one and *Goesel*, which follows. The issues addressed by the Illinois Supreme Court in *Earlywine* involved separation of powers, the Supreme Court Rules, and *Dowling*. The case addressed whether an "advance payment" retainer *[*also referred to as *"special purpose retainer"* under Rules of Professional Conduct 1.05(d)*]* shielded fees from potential disgorgement. The Supreme Court sidestepped the issue and held:

> It is clear from the attorney-client agreement that the advance payment retainer in this case was set up specifically to circumvent the "leveling of the playing field" rules set forth in the Act. To allow attorney fees to be shielded in this manner would directly undermine the policies set forth above and would strip the statute of its power. If we were to accept James' argument, an economically advantaged spouse could obtain an unfair advantage in any dissolution case simply by stockpiling funds in an advance payment retainer held by his or her attorney.

The court also stated:

> To the extent that James argues that the funds in his advance payment retainer were obtained from John's parents and are not marital property, we note that the statute does not distinguish between marital property and nonmarital property for the purpose of disgorgement of attorney fees. The statute contemplates that retainers paid "on behalf of" a spouse may be disgorged.

Earlywine did not address the critical distinction: whether earned fees—whether the court could enter disgorgement of unearned (or *Dowling*) retainers. Under the current statute, it could be read to include fees paid and earned in the playing field-leveling and disgorgement.

Following *Earlywine*, our districts split regarding whether *earned* fees should be subject to disgorgement. In *In re Marriage of Squire*, 2015 IL App (2d) 150271, the Second District had held that retainers or interim payments could be disgorged whether or not the attorney had earned them. But the First District rejected this view in *In re Marriage of Altman*, 2016 IL App (1st) 143076. According to the First District [and ultimately our Supreme Court], "available" should be construed to mean those funds that have not yet been earned.

Goesel—Illinois Supreme Court Rules Only Unearned Fees Subject to Disgorgement:

In 2017, the Illinois Supreme Court addressed the split among the Districts in *In re Marriage of Goesel*. The wife in *Goesel* filed her interim-fee petition seeking disgorgement. The trial court found that neither party had the current ability to pay attorney fees and ordered the husband's attorney to disgorge $40,952 of attorney fees that the husband had paid to her. The lawyer did not pay the disgorgement amount and was held in contempt. The appellate court reversed in what had been the third appellate decision in three years to take up the issue of whether section 501(c-1)(3)—and its reference to "available funds"—permitted disgorgement of already-earned attorney fees in the name of "levelling the playing field."

The Illinois Supreme Court sided with the First District per *Altman*, ultimately holding that the court cannot require disgorgement of earned fees as a matter of law. The Court concluded:

> For all of the above reasons, we believe that Altman's interpretation is correct. "[F]unds earned by and paid to a party's lawyer in the normal course of representation for past services rendered are not 'available funds' within the meaning of section 501(c-1)(3)." Altman, 2016 IL App (1st) 143076, ¶ 36. This is a difficult question, and the policy concerns on both sides are substantial. It is not possible to construe the statute in such a way that will not lead to unfairness and inequitable results in some situations. We therefore proceed today with an abundance of caution. We believe that the legislature needs to take another look at section 501(c-1)(3) and make its intentions absolutely clear. Specifically, the legislature should define what it means by "available funds" and explain whether this includes fees that the attorney has already earned, whether attorneys who are no longer in the case may also be ordered to disgorge fees, and whether it is a defense to disgorgement that the attorney no longer has the money. Absent such an explanation from the legislature, we hold that fees that have been earned by an attorney are not subject to disgorgement. Here, there is no dispute that the amount that the trial court ordered disgorged from Holwell represented earned fees, and the parties stipulated that Holwell's fees were reasonable and necessary. Accordingly, we affirm the appellate court's judgment, which reversed both the disgorgement order and the finding of contempt. We likewise agree with the appellate court that there is not sufficient certainty and clarity in the record regarding the $13,000 in fees that had been paid to Boback but were being held by Holwell. (Goesel at para. 35).

Goesel correctly suggests that the legislature should amend the fee statute in light of its definition of "available funds." During the pendency of an interim-fee petition, it's clear that a lawyer should not be able to continue with the representation and then claim that fees received are earned fees and not subject to disgorgement. Yet such a result may be consistent with the strict language of the statute.

***Nash* -- Disgorgement of Interim Fees Requires Clear Finding of Inability on Behalf of Both Parties**.
IRMO Nash, 2012 IL App (1st) 113724
Nash ruled that where the order was ambiguous as to the inability of both parties to pay interim attorney's fees as required under section 501(c-1)(3) of the IMDMA, the trial court lacked authority to require disgorgement. Accordingly, the disgorgement order was void and must be vacated.

Other Interim Fee Cases:

Interim Fees and Post-Dissolution of Marriage Proceedings and First District's *Beyer* Opinion: An issue clarified by a First District appellate court decision is whether IMDMA § 501(c-1) and § 503(j) apply to post-dissolution of marriage proceedings. Trial courts had been divided on this issue. *IRMO Beyer*, 324 Ill.App.3d 305 (1st Dist. 2001), clarified this issue. But *Beyer* did not address whether a hearing in post-decree proceedings should be expedited. In my writings before the 2009 amendments, I had urged that there could not be a presumption of expedited hearings in paternity cases.

Thus, before the passage of the 2009 Amendments, while there was an argument that the interim fee statute should apply to post-decree proceedings, the better-reasoned approach was that the interim fee statute does not apply in post-dissolution of marriage proceedings. Nevertheless, we now have one appellate court decision, *IRMO Beyer*, which takes the opposite approach. Additionally, the language of the 2009 Amendments now makes it clear that the legislation applies to post-divorce proceedings.

As set forth below, we already have at least two divisions among the districts as to issues relating to the "Leveling" amendments: 1) whether, in contribution awards, reasonableness is a necessary element; and 2) whether, in post-judgment proceedings, the contribution petition must be heard before judgment is entered.

Interim Fees and Expert's Fees: *IRMO Alexander*, 368 Ill. App. 3d 192 (Fifth Dist. 2006), addressed whether expert fees are authorized under the interim fee legislation. The appellate court stated that, using a liberal reading of the statute, an interim fee award may include an interim award of expert fees.

Evidentiary Hearing Required in Pre-Decree Dissolution Case Where Significant Problems with Affidavit: *IRMO Radzik*, 2011 IL App (2d) 100374, involved financial affidavits that supported the fee petition that were either outdated or inaccurate. The case held that given the problems with the affidavit, good cause was shown for an evidentiary hearing. The appellate court found that the trial court abused its discretion in its interim-fee order requiring the liquidation of the husband's IRA. The appellate court pointed out that the second petition for interim fees contained no affidavit from the petitioner or her attorneys:

> In addition, the local rules required that the petition contain a current financial affidavit and that other updated financial documents be produced at the hearing. 19th Judicial Cir. Ct. R. 11.02. *** However, even if the court considered both petitions and their exhibits together, the evidence to support petitioner's inability to pay and respondent's ability to pay was lacking. The petition alleged only generally that petitioner could not pay and that respondent had a substantial income and was "well able" to pay. As to petitioner's inability to pay, the financial affidavit was clearly outdated and inaccurate. *** In addition, and unlike the respondent in *Rosenbaum-Golden*, respondent here provided not just allegations, but evidence, in the form of eBay printouts, reflecting that petitioner's financial affidavit was likely an inaccurate picture of her current financial status. *** **At a minimum, we think that good cause was shown to hold an evidentiary hearing**. However, the court abused its discretion in determining that petitioner established respondent's ability to pay, because it received virtually no evidence regarding respondent's present ability to pay the amount that the court awarded.

An excellent discussion from the appellate court stated:

> In sum, we conclude that a court's knowledge of the case can stretch only so far. The Act permits nonevidentiary, summary hearings on interim-fee petitions, but it does not obviate the need for proof. The Act requires the petitioning party, through the petition, affidavits, and any other relevant documents, to establish both his or her inability to pay and the responding party's ability to pay. While the court here might have been able to determine from its knowledge of the case that an interim fee award might be appropriate or that the fees that counsel charged (and, in turn, that petitioner requested) were theoretically reasonable, the record does not reflect that petitioner in any way established respondent's ability to pay the amount that the court, in fact, awarded. Thus, we reverse the November 6, 2009, interim fee award.

Substantial Interim Fee Affirmed Despite the Fact that the Party Receiving Fee Award Had Already Been Paid More than the Other Party / No Right to Pre-Decree Evidentiary Hearing: *IRMO Levinson*, 2013 IL App (1st) 121696, affirmed a substantial interim fee award. The syllabus of this case provided an accurate summary: "In an unusually litigious marriage dissolution action, the trial court did not abuse its discretion in ordering respondent to pay $78,500 in interim fees (including expert fees) for petitioner based on consideration of the statutory factors and the financial information indicating that respondent controlled the marital assets and had the means to pay the fees." One issue is whether there should have been an evidentiary hearing as in *Radzik*. The appellate court distinguished the case:

In the present case, the interim fees awarded were not ordered to be paid from a liquidated IRA or any other retirement account. In addition, the *Radzik* court's concern in reversing and ordering an evidentiary hearing was that the petitioner had not included supporting documentation that the respondent could pay the requested interim fee award, and the court had reason to believe the minimal documentation provided was "inaccurate." These concerns are not present in the case at bar. Rather, Robin supported her motion for interim fees with substantial documentation . Robert's reliance on *Radzik* is unpersuasive.

Interim Fee Award Cannot be in Favor of Lawyer's own Client.

The 2020 *In re Marriage of Paris* decision[1] addressed two issues of first impression in Illinois, the first one being whether an interim fee award can be made in favor of the non-petitioning party, in this case, the husband. The case ruled that it could not. In this initial divorce case, the trial court held the husband in indirect civil contempt for disobeying an interim-fee order and committed him to jail until he paid a $550,000 purge. The trial court had ordered the husband to pay the purge into a fund for the parties' lawyers and financial experts. The appellate court affirmed in part and reversed and remanded the case. The appellate court held that the trial court did not abuse its discretion in granting the interim award where there were complex issues and wife's expert showed evidence that husband's net worth exceeded $20 million.

Caselaw Re Contribution Petitions:

The common theme in caselaw addressing the Leveling Amendments is that the changes make it more difficult for lawyers and appellate courts to understand the statute's complexities. That remains with the 2016 amendments. Recent caselaw also points out the less-than-revolutionary aspects of the Leveling amendments, consistent with the 2017 *In re Marriage of Heroy II* decision. This issue is discussed in greater detail in § 19-4[m][5] "Relative Financial Ability to Pay Fees" of ***Gitlin on Divorce***.

Ability to Pay Caselaw involving Contribution Petitions

It is, however, suggested that one read *Heroy II* in tandem with the Supreme Court's more recent *IRMO Crecos* (III) decision and the even more recent Second District's *Chapa* decision. While *Crecos III* was a post-decree interim-fee case that made new law regarding the appealability of post-judgment unrelated claims [SCR 304(a) language is necessary], an overlooked portion of Crecos demonstrates that the Court considered the overall statutory scheme and the clear language of the statute when reviewing interim-fee and contribution petitions.

More specifically, *Crecos III* emphasized the three types of fee-shifting proceedings outside of contribution awards:

[1] In re Marriage of Paris, 2020 IL App (1st) 181116.

• Interim Fees:
    - ☞ Prejudgment Divorce interim-fee petitions;
    - ☞ Any other Interim-fee proceedings brought under 508(a);

Contribution awards break down as:
    - ☞ Prejudgment Divorce contribution petition;
    - ☞ Any other contribution proceedings brought under 508(a).

Because of *Crecos*' emphasis, we must pay attention to the language of Section 508(a) and the related provisions as they were tweaked within the 2010 and 2016 packages of amendments. Therefore, *Crecos* presages that *Heroy II* should be limited in its application by its facts. *Heroy II* involved a post-judgment proceeding, so the Court properly applied an inability-to-pay-plus standard. The standard in post-judgment proceedings is inability to pay, and the court must consider the parties' "financial resources" as directed by the language of Section 508(a). Using this standard, the court should enter a contribution award even when one has substantial assets if the failure to award fees in "any other proceedings" under Section 508(a) would undermine one's relative financial stability.

Reading *Heroy II* in connection with *Crecos* and the more recent *Chapa* case, we should recall that the plain language of Section 508(a) states, "All provisions for contribution under this subsection shall also be subject to paragraphs (3), (4), and (5) of subsection (j) of Section 503." Section 503(j)(2) is the property that, in turn, incorporates the standards for property and maintenance in Sections 503(d) and 504(a) of the IMDMA. Those are the standards, therefore, that apply to pre-judgment divorce proceedings. In any other fee-contribution proceedings brought under the IMDMA (IMDMA 508(a)(1) to (7), *Heroy II* controls.

***Chapa*—Trial court erred by failing to *consider* the statutory factors in Sections 503(d) and 504(a) in post-judgment proceedings**. The most recent case to weigh in on this issue is *IRMO Chapa*, 2022 IL App (2d) 210772. This case has a history of being heavily contested at the trial and the appellate court level, and the instant decisions involved a review of maintenance following the emancipation of the children in a case involving an unallocated family support award.

The trial court denied the former wife's contribution claim, and the appellate court reversed. The former wife argued that the trial court abused its discretion in denying her contribution petition, by failing to consider any of the required statutory considerations under Section 503(j)–and then by reference to the standards in Section 503(d) [the property standards] as well as Section 504(a) [since maintenance had been awarded]. Because the trial court failed to explain its basis for denying the fee award, the appellate court presumed that the trial court relied on the same reasoning that led it to deny the petition to extend maintenance. While those considerations might have been appropriate, the attorney fee provisions require the trial court to consider "all" the statutorily relevant factors.

***McGuire* — Changes Are Procedural and Not Substantive vs. *Haken* – Inability / Ability is Not the Standard:** Specifically, in *IRMO McGuire*, 305 Ill.App. 3d 474 (5th Dist. 1999), the appellate court held that the Leveling amendments make only procedural changes, while keeping intact the substantive criteria for awards. In light of the 2009 second set of amendments, however, and the more recent caselaw, this is oversimplified. The 2009 amendments provide for differing standards regarding pre- and post-judgment proceedings. *McGuire* held that a contribution award was not mandatory even though the party seeking the fee award received a disproportionate property division.

In contrast to *McGuire* stands *IRMO Haken*, 394 Ill. App. 3d 155 (Fourth Dist. 2009). *Haken* succinctly discusses the historical ability/inability standards–which are even more important to note in light of the 2009 amendments and because it was discussed at length in the 2017 Illinois Supreme Court *Heroy II* decision at ¶ 16 to 17. *Haken* addressed the standards that apply both before and after the 1997 and 2009 amendments, as applied to post-judgment proceedings. It stated:

> Rudolf argues the award of fees under section 508(a) was improper because the petitioning party must prove an inability to pay fees and the ability of the other party to pay. Here, the court found each party had the ability to pay his or her own fees. Rudolf contends "inability to pay" is a prerequisite to a fee award under section 508(a). **Such a reading of this section eviscerates the statutory directive in section 503(j)(2) to consider the criteria for the division of marital property under section 503(d) in making contribution awards**. Under Rudolf's reading of section 508(a), once a court finds a party has the ability to pay his or her own fees, further inquiry ends and the court need not look at any other factor to determine whether contribution should be made. Rudolf is wrong. ***
>
> The statute directs the court to consider many factors when deciding the amount of contribution a party may be ordered to make. **The requirement that a person seeking contribution show an *inability* to pay appears nowhere in the statute**. The relative financial standing of the parties should be considered, and that is what the section 503(d) factors are all about.

***Dowd*: Court Applies Ability and Inability Standard without Commenting on Statute and Other Caselaw**: In *IRMO Dowd*, 2013 IL App (3d) addressed the wife's petition for contribution. In a case not cited by *Heroy II*, the appellate court gave scant consideration to the caselaw and stated rather simply:

> Sharon also contends on appeal the trial court erred by denying her petition for contribution to attorney fees. *** *In re Marriage of Morse*, 240 Ill. App. 3d 296, 312 (1993). The propriety of an award of attorney fees is dependent upon a showing by the party seeking them of an inability to pay and a demonstration of the ability of the other spouse to do so. Id. In this case, the trial court found that "both parties have sufficient assets to pay their own attorney's fees." We agree. Sharon received property and accounts valued in excess of $200,000, excluding the value of the marital home and her maintenance award. Based on this record, we conclude Sharon had sufficient income and assets to pay her own attorney fees.

***Shen* – Appellate Court Case Focused on Ability / Inability Language**: In *IRMO Shen*, 2015 IL App (1st) 130733, was cited by *Heroy II* at some length. This initial divorce decision had emphasized the historical standards to be used in contribution petitions:

> The court did not use the wrong legal standard in deciding to deny the wife's request for contribution to attorneys fees, as the Illinois Supreme Court continues to espouse the rule from *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005) [actually this decision was prior to the 2010 amendments], that the spouse petitioning for contribution to attorney fees must show an inability to pay and the ability of the other spouse to pay, and this was the standard followed by the court. The evidence supported the husband also did not have the ability to pay fees and so the court's denial of the wife's request for contribution was not an abuse of discretion. We affirm the portion of the dissolution judgment denying the wife contribution to her attorney fees.

Yet *Schneider* was a 2005 initial divorce case decided five years before the legislature amended the applicable standards in contribution petitions that relate to initial divorce cases. Nevertheless, the language of *Schneider* was key as it remains applicable to all other proceedings. There the Court had emphasized, "Financial inability exists where requiring payment of fees would strip that party of her means of support or undermine her financial stability. *Puls*, 268 Ill. App. 3d at 889."

As stated above, there is a significant body of caselaw critical of the inability/ability standard. This author had urged that the June 2015 *Shen* was on the wrong side of the law, as illustrated by a quote from a case that had shortly followed it: *IRMO Hill*, 2015 IL App (2d) 140345 (September 28, 2015):

> Moreover, our court has recently noted that *Schinelli* relied on older caselaw in looking solely to the parties' incomes and assets in determining "inability to pay," while the current version of section 508(a) requires a court to consider all of the various statutory factors contained in sections 503(j) and 504 of the Dissolution Act (750 ILCS 5/503(j), 504 (West 2012)), relating to the distribution of marital property and the award of maintenance. See Sobieski, 2013 IL App (2d) 111146, ¶ 49 (noting this reliance on older caselaw and that the phrase "inability to pay" does not appear in the current version of section 508(a)). [as applicable to pre-decree divorce cases.]

***Anderson* – Ability / Inability Should Not be the Standard; Standard Should be Relative Abilities to Pay:** *IRMO Anderson*, 2015 Ill. App. 3rd.140257. The *Anderson* opinion, by Justice Mary K. O'Brien, citing an earlier version of this paper, stated:

> We find the analysis offered by *Haken* court persuasive and adopt its rationale. *Haken* incorporates the statutory amendments designed to "level the playing field" in dissolution proceedings. See Gunnar J. Gitlin, The Revolution That Wasn't: Leveling and Re-leveling the Playing Field-Twelve Years Later, Gitlin Law Firm (2009), available at …; Gunnar J. Gitlin, Following the Tortuous Path: Leveling and Re-Leveling the Playing Field-Seventeen Years Later, Gitlin Law Firm (2014), available at … Accordingly, we reject the necessity of proving a spouse's inability to pay as a prerequisite to a contribution award. In determining a fee petition, a trial court should consider the parties' relative financial circumstances as directed by the statutory factors in sections 503(d) and 504(a). We believe this approach is aligned with the statutory goals and better allows attorneys the opportunity to recoup at least a portion of their fees...

As we will see, *Anderson* was also cited twice in the *Heroy II* decision.

Cases Citing Traditional Ability / Inability – *Adams* and *Heroy*: A 2004 Illinois appellate court decision addressing the issue of a fee contribution hearing took the traditional view that fees should not be granted where one party has the ability to pay. In *Adams*, 348 Ill. App. 3d 340 (3rd Dist, 2004), the appellate court reversed a fee award despite affirming the trial court's increase in support. The appellate court stated:

> The primary obligation for payment of attorney fees rests upon the party for whom the services are rendered. In re *Marriage of Mantei*, 222 Ill. App. 3d 933 (1991). However, the court may order one spouse to pay some or all of the attorney fees incurred by the other. 750 ILCS 5/508 (West 2000). In order to justify an award of attorney fees, the party seeking the award must demonstrate both financial inability to pay the fees and the ability of the other spouse to do so. *In re Marriage of Cotton*, 103 Ill. 2d 346 (1984).
>
> In this case, Carol's financial disclosure statement indicates that she had a savings account with a balance of $74,000, as well as other financial assets. We conclude that the trial court erred in awarding Carol attorney fees because the record shows that she had the ability to pay her own attorney fees upon seeking the default judgment.

***Price* Rejecting Ability / Inability Standard for Contribution Awards**: *IRMO Price*, 2013 IL App (4th) 120155, was cited along with *Haken* and *Anderson* as rejecting the ability/inability approach. In *Price*, the Fourth District appellate court stated:

> Melvin asserts the court erred in ordering him to pay a portion of Jill's attorney fees because the financial circumstances of the parties is substantially similar due to the court's division of marital assets, liabilities, and Jill's maintenance award, and because Jill failed to show an inability to pay her own attorney fees. Jill

> argues the post-dissolution financial circumstances of the parties are not substantially similar because Melvin was awarded all of the parties' businesses, which produced gross annual incomes in excess of $1.7 million. We agree with Jill.

The appellate court *rejected* the assumption that fees under the current statute should be based on the historical ability/inability standard as applied to this pre-judgment divorce case. The appellate court stated that the standards in this case were "criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504." 750 ILCS 5/503(j)(2)." I assumed that this meant that if maintenance was awarded, the fees were based on the standards of Section 504 (without assuming that in cases with maintenance awards, fees were based on the standards of *both* Sections 503 and 504).

Sobieski.

A 2013 Second District pre-judgment divorce case was relied upon by the Illinois Supreme Court, which ruled that, in assessing ability/inability to pay, the court should consider the factors in 503 and 504 (as applicable). So, while *Price* did not clarify this potential distinction, *Sobieskidd* concluded that the 503 and 504 factors "are the means by which the trial court can determine whether a spouse has the ability to pay." *IRMO Sobieski*, 2013 IL App (2d) 111146.

> Because of its prominence in *Heroy II, Sobieski* will be quoted from at some length:
>
> The *Schinelli* court cited general guiding principles: "[t]he propriety of an award of attorney fees is dependent upon a showing by the party seeking them of an inability to pay and the ability of the other spouse to do so," and an award of attorney fees will be reversed "when the financial circumstances of both parties are substantially similar and the party seeking fees has not shown an inability to pay." *Schinelli*, 406 Ill. App. 3d at 995. These rules are not incorrect; they are, however, incomplete when applied to the facts of this case. **The language cited in the analysis of the contribution award in *Schinelli*, as well as other recent marriage dissolution cases, was repeated from cases that predate the current, amended version of Section 508(a).** See *IRMO Haken*, 394 Ill. App. 3d 155, 162 (2009) (providing examples from the First, Second, Fourth, and Fifth Districts of our Appellate Court); see also *IRMO Roth*, 99 Ill. App. 3d 679, 686 (1981) (preamendment case cited by *Schinelli* for rule that court abuses its discretion in awarding attorney fees when parties are in substantially similar financial situations). Although neither the phrase "inability to pay" nor a specific test for substantially similar financial situations appears in the statute, the factors under Sections 503(d) and 504(a) are there to compare *the relative financial standings of the parties*. *Haken*, 394 Ill. App. 3d at 162. The statutory factors are the means by which a trial court can determine whether a spouse has an inability to pay or whether the parties' financial situations are so similar that a contribution to

> attorney fees would be improper. Furthermore, the conclusory phrase "inability to pay" was not meant to be interpreted definitively, whereas the plain language of the statutory factors provides a framework within which to compare the relative means of parties to pay their attorney fees. See *IRMO Schneider*, 214 Ill. 2d 152, 174 (2005) ("Financial inability exists where requiring payment of fees would strip that party of her means of support or undermine financial stability."); *IRMO Pond*, 379 Ill. App. 3d 982, 987 (2008) ("Inability to pay does not require a showing of destitution ***. *** [T]he court should consider the allocation of assets and liabilities, maintenance, *and the relative earning abilities of the parties*."); *IRMO Carr*, 221 Ill. App. 3d 609, 612 (1991) (" '[I]nability to pay' must be determined relative to the *party's standard of living, employment abilities, allocated capital assets, existing indebtedness, and income available from investments and maintenance*."). [Emphasis added.]

Accordingly, the *Sobieski* appellate court rejected the husband's argument that it should apply a comparison of their net incomes in a simple formulaic method in determining whether to award attorney's fees.

The 2017 *In re Marriage of Heroy* [*Heroy II*][2] was argued by two large Chicago family law firms: the Schiller, DuCanto & Fleck firm for the appellant former wife and Berger and Schatz on behalf of the former husband. Yet the ex-husband's lawyers did not, in this case, point out the nuances of the statute regarding pre-decree cases and all other proceedings that became apparent to the court in *Crecos*.

The Illinois Supreme Court tried to split the difference between these two approaches while siding somewhat in favor or the cases focusing upon the statutory requirements (financial resources as mentioned in the opening of Section 508(a) as against a strict reading of the inability/ability "standard.") *Heroy* has been heavily litigated over the years. *Heroy I* is discussed in the maintenance chapter[3] of *Gitlin on Divorce*. The appellate court had affirmed an indefinite maintenance award of $35,000 per month where the wife had a law degree and an earning potential of more than $100,000 annually. Less than a year after the Illinois Supreme Court appellate court declined the former husband's petition for leave to appeal, Heroy filed his petition to terminate or modify the maintenance award. His former wife, Tuke, filed a petition for contribution to her attorney's fees. In 2012, the trial court issued its memorandum opinion and order concluding that Heroy had proved his income had decreased. Yet the trial court only decreased maintenance from $35,000 to $27,000 per month. The trial court also granted the contribution petition, awarding Tuke $125,000 of her $345,000 of fees—36% for those keeping statistics. Notably, to secure maintenance post-decree, the former wife paid $1.3 million in fees and another $700,000 in post-judgment litigation expenses. The fallback argument in this case, on behalf of the former wife, was indeed that requiring payment of all her fees would undermine her financial ability, although the primary focus was that the property and maintenance standards should apply.

During oral arguments, the trial court acknowledged a tension between the Court's statement in

[2] In re Marriage of Heroy, 2017 IL 120205.

[3] See Gitlin on Divorce: A Guide to Illinois Family Law: § 15-18[d][3] "Marriages of More than Twenty Years" and § 15-12[b] "Permanent [Indefinite] Maintenance Affirmed."

In re Marriage of Schneider[4] and the provisions of section 508 of the IMDMA regarding the standard for awarding attorney fees. The trial court acknowledged the statement in *Schneider*, where it ruled that an award of contribution is appropriate when the petitioning party is unable to pay his or her attorney fees and the other party has the ability to do so.[5] On the other hand, the trial court stated that that section 508 instructs the court to apply a list of factors to determine whether one party should be required to contribute to the attorney fees of the other, including the criteria used to divide marital property and award maintenance. The trial court noted that it would apply the standard in *Schneider* and concluded in its written opinion that Tuke had some ability to pay fees, but if she were required to pay all her fees, *her financial stability would be undermined*. The trial court found Heroy's ability to pay. Heroy appealed and Tuke filed a petition seeking $100,000 in prospective fees to defend the appeal—which the trial court granted while limiting the judgment to $35,000. Heroy again appealed, and the appellate court, in an unpublished decision, reversed the portion of the trial court's decision in which the court stated it intended to award 25% of the former husband's net cash flow, which was $25,745 per month. But this was a minor point overall. More critical to the Supreme Court's analysis was the fee issue. The appellate court had reversed the trial court's attorney-fee award, concluding that there was no evidence supporting Tuke's claim that she was unable to pay her attorney fees. The Court allowed Tuke's petition for leave to appeal and Heroy's request for cross-relief regarding maintenance modification. The Illinois Supreme Court overruled the appellate decision and found that the trial court properly found that, should the former wife have to pay all of her attorney fees, it would undermine her financial stability.

The Court reasoned [with this author's notes]:

> The language in section 508 is clear and unambiguous. The trial court must (1) "consider[ ] the financial resources of the parties" [author: yes] and (2) make its decision on a petition for contribution "in accordance with subsection (j) of Section 503 [author: no]."[6] To say that the court should not consider the statutory factors is clearly contrary to the plain language of the statute. [author: no as applied to post-divorce proceedings but yet as it would apply to the parties' financial resources.] Nor are we convinced, however, that *Schneider*, *Bussey*, and *Cotton* must be overturned. [Correct] In *Schneider*, the court stated that "[f]inancial inability exists where requiring payment of fees would strip that party of her means of support or undermine her financial stability."[7] [Agreed.] The court further noted that it considered the parties' *relative earning capacities*, the parties' shares of the marital assets, and the child support order before concluding that the circuit court had not erred when it ordered each party to pay their own fees. Id. at 174-75.[8] [Exactly the point!]

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[4] In re Marriage of Schneider, 214 Ill. 2d 152 (2005).

[5] In re Marriage of Schneider, 214 Ill. 2d 152, 174 (2005)

[6] Citing 750 ILCS 5/508(a) (West 2014).

[7] Citing: In re Marriage of Schneider, 214 Ill. 2d at 174, in turn, citing In re Marriage of Puls, 268 Ill. App. 3d 882, 889 (1994).

[8] In re Marriage of Heroy, 2017 IL 120205, ¶ 19.

The Court next incorrectly referenced the 1992 *Pagano* decision (*Pagano II*) [9] as being one where the Court had previously found that the petitioner's financial stability would have been undermined had she been required to pay her own attorney's fees. A reading of the Court's *Pagano II* decision indicates that it merely affirmed the trial court's decision on remand, but there was no mention of petitioner's financial welfare being undermined without a fee award within *Pagano II*.

The Court concluded:

> The Court held "it is clear that inability to pay standard was never intended to limit wards of attorney fees to those situation in which a party could show a $0 bank account." A "party is unable to pay if, after consideration of all of the relevant statutory factors, the court finds that requiring the party to pay the entirety of the fees would undermine his or her financial stability."

The Court reasoned that section 508(a) of the IMDMA instructs us to turn to Section 503(j) in contribution proceedings. This is correct—but only in part. The opinion took a potentially wrong turn [see Crecos III] where it stated that section 503(j) [as applied to post-divorce proceedings] instructs the court to look at subsection 503(d) (the criteria for dividing marital property). When the court awards maintenance, section 503(j) instructs the court to also consider the second criterion under 504(a) (for awarding maintenance). Those are indeed what the statute requires in pre-judgment divorce cases.

In applying sections 508 (as well as considering 503(j), 503(d), and 504(a)) of the IMDMA, the Court found the trial court did not abuse its discretion in awarding the former wife $160,000 in total attorney's fees. The trial court properly examined: the award of net marital assets of $4.148 million to Tuke in the divorce, the depletion of her assets due to payment of post-decree attorney fees,[10] her minimal prospects of substantially increasing her retirement account, and her minimal capacity for employment. The Court noted the trial court's finding that Tuke had enjoyed a lavish standard of living during the marriage and that she had foregone her career to raise the parties' children. The Court further noted that the former husband received net marital assets of $3.137 million at the time of the divorce. Yet at the trial on the petition to modify maintenance, the Heroy had $5 million in assets in addition to his non-marital interest in his family business, real estate held by his business, and his non-marital art collection. He also had an investment account valued at $933,000.

***Heroy's* Conclusion re Contribution Petitions**:

The Illinois Supreme Court ruled in essence that the trial court, rather than the appellate court, had struck the proper balance in applying the statutory factors, as well as what this author calls the *relative* ability-to-pay standard. In her initial petition to the Illinois Supreme Court, Tuke had asserted that her attorney fees at that point exceeded $1 million. In making its ruling, the Court reasoned that when the legislature adopted the Leveling amendment, it had intended to incorporate, in a sense, the inability/ability standard that had been part in parcel of Illinois law.[11] It is, however, suggested that this

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[9] In re Marriage of Pagano, 154 Ill. 2d 174, 191 (1992) (Pagano II).

[10] At the time of the trial on the petition to modify maintenance, the former wife had assets valued at $2.345 million and the Court noted that the depletion of her assets was largely because of her payment of attorney fees.

[11] In re Marriage of Heroy, 2017 IL 120205, ¶ 15. (Noting that the parties in Schneider did not dispute the standard to be applied and that the language in Section 508(a) referring to the court's considering "the financial sources of the

should have been limited to the initial divorce proceedings.

The intent of the Leveling amendments had been, in fact, to prevent a party from using his or her financial strength to win a war of attrition—even in post-decree litigation. This was recognized by the Court when it stated, "The legislative debates regarding the Leveling Amendments indicate that the drafters were concerned that one party could use his or her superior assets to force the other to settle or not contest various issues in dissolution proceedings."[12] The inability/ability standard is a relic of pre-Leveling caselaw as it would apply to initial divorce proceedings.

Heroy II approves of the language in the 1984 *Weinberg* case[13] stating, "[I]t is not necessary for the spouse seeking the fees to divest her capital assets [citation], deplete her means of support, or undermine her economic stability [citations] in order to pay [the attorney fees]." But by not relegating the inability-to-pay standard to the ash-heap of history, the Court allowed too much reliance on the previous case-law standard that continues to apply in post-divorce proceedings. Since the Court did not abandon entirely the inability to pay mantra, it would be best if the legislature would take up the challenge presented by the Court's opinion and provide that inability to pay one's attorney fees no longer is the standard. That could be done through adding language to the purposes section of the IMDMA at section 103, consistent with the original legislative debate when the Leveling amendments were passed.

***Brackett* — Trial Court Must Conduct Hearing on Previously Filed Contribution Petition**: Another significant case addressing the Leveling Amendments was the *Brackett* case, in which I was the appellate lawyer for Mrs. Brackett. *Brackett* held that, upon the filing of a petition for contribution of fees, the trial court must conduct a hearing on the petition. *IRMO Brackett*, 309 Ill.App.3d 329 (2d Dist. 1999). One question in *Brackett* was whether a separate hearing is necessary for a contribution petition. *Brackett* held:

> We, however, temper our agreement with *McGuire* by cautioning against too literal a reading of section 503(j). We do not read section 503(j) as requiring an additional hearing, which would further burden already overburdened trial courts, but, rather, as requiring a trial court to hear, through testimony or otherwise, additional proofs when a petition for contribution is filed in accordance with section 503(j) in the context of preexisting proceedings. If the trial court wishes to hold a separate and distinct hearing on the petition, it has the discretion to do so.

***Selinger* -- Appellate Court Affirmed Denial of Separate Fee Hearing Where Not Sought on Timely Basis**: A 2004 Fourth District opinion addresses whether a separate hearing is required on a contribution petition. In *IRMO Selinger*, 351 Ill. App. 3d at 622 (4th Dist. 2004), the appellate court affirmed the trial court's denial of any right to contribution. The wife in

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parties" had not been amended despite repeated references to inability-to-pay standard.

[12]In re Marriage of Heroy, 2017 IL 120205, ¶ 17. ("Haken court relied on these amendments as evidence that the legislature intended to do away with the inability to pay standard. 394 Ill. App. 3d at 162.")

[13] In re Marriage of Weinberg, 125 Ill. App. 3d 904, 919 (1984).

Selinger earned approximately $37,000 per year from her job as a registered nurse, while the husband earned more than $100,000 from his various jobs. Regarding the issue of whether a separate fee hearing must be conducted, the appellate court stated:

> The lack of a hearing here is not dispositive. The assets and liabilities of the two parties were already before the court, as was the amount of Pamela's attorney fees. We fail to see what other evidence had to be presented for the court to rule on Pamela's request. Further, we note Pamela waited to file her request for fees until several weeks after the close of proofs in this case, at a time when the parties were not in person before the court. It was then up to her to call it to the court's attention if she believed an additional hearing was necessary prior to issuance of the court's order. Failing that, it was then Pamela's responsibility to call to the court's attention its failure to hold a hearing within 30 days of the entry of the order and before this appeal was filed. The failure to hold a hearing would have been easily correctable in the trial court. Her failure to take these steps does not allow her to now challenge the trial court's alleged failure to hold a hearing on her motion for contribution to attorney fees. See *Minear*, 287 Ill. App. 3d at 1079-80.
>
> As to the court's finding no contribution to attorney fees was warranted, we find no abuse of discretion. In view of our decision to award permanent maintenance in a greater amount, disparity in income levels between the parties will not be large enough to require contribution to Pamela's attorney fees.

***DeLarco* — Four Significant Holdings**: *IRMO DeLarco*, 313 Ill.App.3d 107 (2nd Dist. 2000) was the next significant appellate court case involving the fee contribution statute. It had several significant rulings, mainly related to contribution petitions. The *DeLarco* court ruled:

1. **Contribution Awards Does not Equate to Fee Equalization:** The fee-equalizing portion of the statute, §501(c-1)(3) of the IMDMA applies only to temporary fee awards. Equalization does not apply at the contribution hearing. The holding in *DeLarco* regarding "fee equalization" not being a part of the contribution statute is significant in light of the potentially confusing language of the statute. The interim fee portion of the statute states that "*unless otherwise ordered*" all fees paid shall be deemed an advance against the marital estate. The query was what the phrase "unless otherwise ordered" refers to.

2. **Advance Against the Marital Estate — Court May Consider Relevant Economic Circumstances of Parties**: While attorney's fees paid by each party from marital assets may be deemed as an advance against the marital estate, the trial court may consider in a contribution hearing the relevant economic circumstances of each party in the apportionment of marital property. This is in line with both *DeLarco* and *Holthaus*.

3. **Reasonableness is a Mandatory Factor**: Although §503 does not mention reasonableness for contribution hearing, the reasonableness requirement of §508 also applies to contribution fees.

4. **Reasonableness Finding Re Other Party No Effect on 508(c) Petition**: Finding of reasonableness or unreasonableness in contribution hearing may not be asserted against the attorney in a hearing for attorney's fees against either a client or former client.

5. **Business Records — Actual Timeslips Must be Made Available to Other Party *if* These are Original Documents — An Incentive to Direct Input**: Assume the lawyer does not directly input timeslips into a time and billing program. For such records to be admitted under the business records exception of the hearsay rule, the original documents must be in court or made available to the opposing party. The party seeking admission of the summaries must also be able to provide the testimony of a competent witness or witnesses who has seen the original documents and can testify to the facts contained in the individual timeslips.

***Schneider* – No Contribution Award Where Parties Equally Unreasonably Litigious**: *IRMO Schneider*, 343 Ill. App. 3d 628, 1295 (2nd Dist. 2003) *(the same case as the Illinois Supreme Court case addressing personal goodwill)* ruled that the trial court did not err in refusing to award contribution toward attorney's fees where the parties "were equally unreasonable, litigious, and quarrelsome throughout the divorce proceedings, resulting in an unnecessarily expensive divorce." The appellate court also stated, "Furthermore, although Jodi's earning potential pales in comparison to Earl's, she has failed to show an inability to pay her own attorney fees. See *McCoy*, 272 Ill. App. 3d at 132 (ability to pay does not mean ability to pay without pain or sacrifice)." Moreover, the appellate court noted that the wife was awarded a disproportionate and substantial share of the marital estate (approximately $326,000). *Schneider* thus continued the line of caselaw where the courts denied a contribution petition in a case where both parties were to blame for an expensive and litigious divorce and where there is no showing of "inability to pay." See, e.g., *IRMO Aleshire*, 273 Ill.App.3d 81(3d Dist.1995) [In cross-petitions for enforcement, the court may apportion attorney's fees in a manner that reflects the parties' relative culpability.] *IRMO Mandei*, 222 Ill.App.3d 933 (4th Dist. 1991). Trial court did not abuse its discretion in ordering each party to pay own fees where the fees were generated largely from the result of the parties' unwillingness to compromise.

***Pond* – Second District Case Comprehensively Addressing Ability to Pay and Allocation Factors**: *IRMO Pond*, (2nd Dist. 2008) will be analyzed at length because few cases involve reversals of a failure to make a contribution award. In fact, the appellate court was able to cite only three previous appellate court cases, each prior to the "Leveling" amendments. On the same day the parties signed the marital settlement agreement, the trial court heard the parties' petitions for contribution toward attorney's fees. The trial court denied both petitions. The trial court stated:

> The issue of contribution is set forth in the attorney's petitions and essentially request the court to, after looking at the division of property and the relative financial circumstances of the property [sic] after the division of this property is made and any other factors, there being no maintenance, that would be the other major consideration, looking at their incomes and ability to pay, the Court is going to deny any relief by [petitioner] in this case. The Court finds that, as I say, at the end of the day, the economic circumstances available to [respondent] would not, in this Court's judgment, constitute *** an equitable basis for him to make a contribution towards any attorney's fees that will be paid. So [petitioner's] request for contribution to attorney's fees is denied.

The appellate court cited *Minear* in support of the proposition that "Inability to pay does not require a showing of destitution, and the party seeking fees is not required to divest himself of capital assets before requesting fees. It stated, "Rather, a party is unable to pay her fees if the payment would strip her of her means of support or undermine her financial stability. *Schneider*, 214 Ill. 2d at 174. In determining whether and in what amount to award attorney fees, the court should consider the allocation of assets and liabilities, maintenance, and the parties' relative earning abilities. *IRMO Suriano*, 324 Ill. App. 3d 839, 852 (2001). Regarding earnings, the court may consider both current and prospective income. *IRMO Selinger*, 351 Ill. App. 3d 611, 622 (2004)."

In *Pond*, the ex-husband agreed in the settlement agreement (MSA) to pay $5,000 toward attorney's fees, apparently due to discovery violations. The court then pointed out that the fee award was not made under §508(b) but under §508(a), which incorporated the contribution provisions by reference. The ex-wife argued that the court could consider a party's conduct as the reason for the litigation, citing *IRMO Ziemer*, 189 Ill. App. 3d 966, 969 (1989). The ex-wife also argued that her former husband should be required to contribute toward the $63,000 balance of fees owed because 1) she had already borrowed $28,000 to pay her attorney, 2) the house, which was the majority of the estate awarded to her, was illiquid and 3) her former husband could afford to pay via a contribution award and make payments over time. The ex-husband argued, in part, that he had over $38,000 in credit card debt and was left with no money after paying it. He thus argued that while he and his former wife had similar debts (excluding attorney fees), she also had the house. He also urged that the ex-wife had waived the argument that he could make installment payments, because she did not offer such a proposal in the trial court. The ex-husband's further arguments were:

> On the subject of income, respondent points out that petitioner was earning $38,422 in 2005 when she quit her job, and he argues that the trial court was imputing an income to her of $25,000 for college contribution purposes only. Respondent maintains that we should not ignore that petitioner quit her job in the middle of the proceedings and then asked for contribution based on a lower imputed income for college purposes. Respondent further argues that petitioner received 65% of the assets to balance his higher income. According to respondent,

> petitioner already benefited from the differences in income but now seeks to double dip.

The appellate court determined that the ex-wife did not waive the issue of seeking payments over time. Because the former wife quit her job earning $38,000, the appellate court found it reasonable to consider that her future income would likely rise. See *Selinger*, 351 Ill. App. 3d at 622 (court may consider both current and prospective income). Regarding the ex-husband's income, the settlement agreement recited that he earned $93,610 in 2005 and had a projected 2006 income of $83,000 based upon year-to-date income. The appellate court focused its attention on the cases reversing the trial court's denial of attorney's fees: *IRMO Carpenter*, 286 Ill. App. 3d 969 (1997), *IRMO Haas*, 215 Ill. App. 3d 959 (1991), and *Sullivan v. Sullivan*, 68 Ill. App. 3d 242 (1979).

Those cases break down as follows as to the income comparison:

Case	Amt Sought	Wife	Note	Husband	Note
Carpenter	$3,543	$12,000		$45,000	Estimated for H
Hass	$5,647	$15,000	Less Than	$49,000	Excluding Bonus
Sullivan		$4,176	W's Gross	$14,676	Net figure for H

Applying the facts, the appellate court stated:

> Petitioner clearly demonstrated that she is unable to pay her attorney fees without invading her capital assets or undermining her financial stability. Although petitioner received a greater portion of the marital assets, they consist largely of retirement accounts and illiquid assets such as the house. Petitioner also received around two-thirds of the liabilities, giving her over $100,000 in debts. These debts are in addition to petitioner's attorney fee debts of over $91,000 and the approximately $52,000 debt she incurred to pay respondent his share of the home's equity. These circumstances, along with petitioner's limited income, show that petitioner is unable to pay her attorney fees.
>
> We also conclude that petitioner showed that respondent is able to pay at least a portion of her attorney fees. While respondent may still have about $20,000 in credit card debt if he applies his remaining equity from the house to the outstanding credit card balance, this is his only remaining debt, and he has no child support or maintenance obligations. Respondent's income of over $83,000 is over three times petitioner's imputed income and more than twice her previous income at Dick Pond Shoes. The courts in *Carpenter*, *Haas*, and *Sullivan* all emphasized the differences in the parties' incomes in determining that the trial courts abused their discretion in refusing to order attorney fee contributions. Though respondent argues that petitioner has already benefitted from the differences in income by receiving 65% of the marital assets, as stated, in determining whether and in what amount to award attorney fees, the court should

> take into account the allocation of assets and liabilities, maintenance, and the parties' relative earning abilities. Thus in analyzing this issue, we are cognizant of petitioner's greater assets. But we also consider that this benefit was diluted by her waiver of maintenance and her assumption of a much greater share of the liabilities. We agree with respondent that he should not be responsible for the entire remaining balance of petitioner's attorney fees. At the same time, considering the nature of petitioner's assets, her vast debts, and the significant income disparities, we believe that the trial court abused its discretion by not ordering respondent to contribute to petitioner's attorney fees in any amount beyond the $5,000 he already paid.

Accordingly, the appellate court reversed and remanded the case to the trial court to determine the contribution award.

This case remains consistent with the Supreme Court's 2017 *Heroy* decision.

***Nesbitt* – Standards in Contribution Hearings and Bundled Billing Statements**: *IRMO Nesbitt*, (First Dist. 2007) involves Schiller, DuCanto and Fleck's (SDF) fee contribution petition seeking $1.109 million in fees ($227,000 being previously paid). After the initial filing, wife's counsel filed two supplemental fee petitions seeking for a four-month period of an additional $111,784 and for a three-month period of $228,779.

One of the factors in this case was that in the SDF billing statements there is a listing of tasks during a day and a listing of the total time per day but not a breakdown per task. The SDF policy is that the employee may aggregate the time for all of the work on a given day. It was noted that while some associates itemize their time that this is eliminated when billing records are sent to the client.

The appellate decision addressed the reasons for the very high attorney's fees. David Hopkins of SDF conceded that the charges for litigation were "overwhelmingly high when compared to [Lisa's] share of the marital estate" but explained the unique circumstances and complexities of the case. A lawyer for the first law firm representing the husband testified that the husband "was very angry at Lisa because he had been thrown out of his house." The husband terminated his relationship with his firm because they were "not aggressive enough in representing Mr. Nesbitt." That firm filed an action to recover their fees and the husband filed a lawsuit against the lawyer individually and against his firm. The ex-husband conceded that in a settlement proposal generated in 2001, he wrote, "If Lisa chooses not to come to a reasonable agreement as set forth below, we can simply go to court and have a full, blown out litigation slash war." In previous years the husband's gross income had been over $1M but in 2004 it was approximately $400,000. The husband had an interest in three businesses and received a yearly salary. The trial court ultimately "ordered Bruce to contribute $700,000 to Lisa's attorney fees because "Bruce holds a financial position far superior to [Lisa's] and is well able to help defray her fees, and because the Court believes that Bruce protracted the litigation out of sheer vindictiveness." There were appeals and cross-appeals and the appellate court generally affirmed the trial court's

decision.

The critical discussion on appeal addressed the bundled services of SDF and stated:

> Though not explicitly required by section 503(j), we have found that contribution awards under that section must be reasonable. *Hasabnis*, 322 Ill. App. 3d at 596 ("Section 503(j) does not expressly require the award of fees be reasonable, but since we cannot envision a grant of legislative authority that tells judges to be unreasonable, we read the statute as incorporating a reasonability requirement"). Bruce, relying primarily on our holding in *Hasabnis*, argues on appeal that "the trial court's finding–that it is impossible to tell with precision whether all the work performed was reasonable–should have resulted in a denial of all of the fees requested in [Lisa's] contribution petition," because such a finding is necessary to award contribution under section 503(j) of the Act. We disagree.

The appellate court stated that based upon *Hasabnis* did not require the necessity of fees but did require the fees to be reasonable. The court cited this case for the proposition that, "While a trial court may review the petitioning party's billing records**, it is not required to do so**." But the court recognized that *DeLarco*, 313 Ill. App. 3d 107 (2000), had held that the trial court " 'must,' in making an award of fees pursuant to a contribution petition, 'consider whether the attorney fees charged by the petitioning party's attorney are reasonable.'

Fee Equalization and "Unless Otherwise Ordered" of the Interim Fee Statute:
IRMO Holthaus has addressed most directly the "unless otherwise ordered" language of §501(c-1)(2) of IMDMA that is discussed above when addressing the *DeLarco* holdings. Despite the potential waiver issue not being argued at the trial court level, the *Holthaus* appellate court stated, "We choose to address Angeline's contention because it is necessary to the development of a sound body of precedent concerning the application of section 501(c-1)(2) of the Act." Thus, this case presents an instance of what might be called judicial activism. The appellate court in *Holthaus* stated:

> The plain language of section 501(c--1)(2) makes apparent that the trial court is required to treat the parties' attorney fees as advances, "**[***u]nless otherwise ordered*." (Emphasis added.) 750 ILCS 5/501(c--1)(2) (West 2006); see also *In re Marriage of Beyer*, 324 Ill. App. 3d 305, 314 (2001) (noting that section 501(c--1)(2) creates a presumption that attorney fees will be treated as advances, but that the presumption does not apply where the court orders otherwise).
>
> Here, the trial court ordered otherwise when following trial it ordered that, subject to the division of the marital estate, which was skewed so as to compensate Nicholas for attorney fees incurred as a result of Angeline's behavior during the proceedings, *the parties were to be responsible for their respective attorney fees. Accordingly, the trial court's decision falls squarely within the confines of the statute.*

The *Holthaus* court then stated:

> Thus, we cannot say that the trial court abused its discretion in requiring the parties to be responsible for their respective attorney fees. See *In re Marriage of Bussey*, 108 Ill. 2d 286, 299 (1985) ("The awarding of attorney fees and the proportion to be paid are within the sound discretion of the trial court and will not be disturbed on appeal, absent an abuse of discretion").

Is Reasonableness a Permissive or Mandatory Factor? Contrast *DeLarco* and *Hasabnis*: As discussed above, *DeLarco* ruled that in contribution petitions, fees must be shown to be reasonable. You might respond by believing that of course contribution awards should only be made is the fees were reasonable. The problem is that the specific contribution portion of the statute – §503(j) never mentions reasonableness. As applicable to pre-decree dissolution cases, it just states that the court shall make contribution awards based upon the maintenance factors if maintenance is awarded or otherwise based upon the property factors.

While the 2000 Second District *DeLarco* decision appeared to put an end to the query about whether fees in contribution petitions must be reasonable, the First District chose not to adopt the reasoning of *DeLarco* in *Hasabnis*, a case involving the Schiller, DuCanto & Fleck law firm. The legal issue in this case was whether a party who is seeking a contribution award should be required to disclose detailed billing records. The Schiller firm brought a motion to quash the discovery request in this regard and the trial court granted this motion. The appellate court affirmed holding that reasonableness of fees is a *permissive* factor in contribution proceedings rather than a mandatory factor. *IRMO Hasabnis*, 322 Ill.App.3d 582 (1st Dist, 2001). The language of *Hasabnis* was curious. It states:

> We realize one court has held that under section 508(a) the trial judge "must," in making an award of fees pursuant to a contribution petition, "consider whether the attorney fees charged by the petitioning party's attorney are reasonable." *In re Marriage of DeLarco*, ***. Although we do not see that requirement in any of the relevant statutes, we need not decide whether we will part company with *DeLarco* on this point. It is clear to us the trial court did examine the amount of fees [the wife] had paid and still owed her attorneys. The trial court was asked by [the wife] to award fees it found "equitable, just, and in accordance with the provisions of section 503(j) * * *." We believe the trial court did so.

The argument that reasonableness is a "permissive" factor is the argument set forth in David Hopkins' Illinois Bar Journal article, "'Leveling the Playing Field in Divorce: Questions and Answers about the New Law." 85 IBJ, 410 (Sept. 1997). Hopkins suggests, "If contribution awards were to be determined on the basis of traditional §508 criteria — i.e., reasonableness and necessity of fees — the conflict of interest problem posted by prior law would have persisted." Hopkins had urged that contribution awards should be determined "in a manner akin to other

types of debts in the divorcing couple's marital estate." I disagree in light of the language in Section 508 of the IMDMA. The first sentence of §508 states, "The court *** and after considering the financial resources of the parties, may order any party to pay a **reasonable** amount for his own or the other party's costs and attorney's fees."

In any event, while *Hasabnis* tried to make a distinction in stating that *necessity* is not an element of the contribution statute, fees still must be reasonable. The specific quote as to reasonableness states: "Section 503(j) does not expressly require the award of fees be reasonable, but since we cannot envision a grant of legislative authority that tells judges to be unreasonable, we read the statute as incorporating a reasonability requirement." While the appellate court gave lip service to reasonableness being a factor, it then went on to appear to reject this assumption. Picking up from the argument made in the Hopkins' Illinois Bar Journal article the court stated, "*A critical examination of the reasonableness of the petitioner's attorneys' fees would not be consistent with the obvious goals of section 503(j) -- to avoid conflicts of interest between petitioner and her attorney and to preserve the lawyer-client privilege.*" Again, I disagree. As pointed out in *DeLarco*, a finding of reasonableness or unreasonableness in a contribution hearing may not be asserted against the attorney in a hearing for attorney's fees against either a client or former client.

It is urged that the First District appellate court decision is poorly reasoned and the Second District's *DeLarco* decision was better reasoned. It does not make sense to exact the supposed conflict of interest between lawyer and his or her client when he is pursuing a fee contribution petition as against the depth of Illinois law which requires fees to be reasonable. It is urged that the court is not in a position to properly determine whether fees are reasonable unless detailed billing records are submitted.

***Gattone* — A Second 2nd District Case Holding Fees Must be Reasonable:** We have one more case which conflicts with the First District's approach in rejecting reasonableness as a mandatory consideration in contribution petitions: *IRMO Gattone*, 317 Ill.App.3d 346 (2d Dist. 2000). Consistent with *DeLarco*, the Second District *Gattone* court held that if the court makes a contribution award, it should make a determination that the fees requested are reasonable.

IRMO Bolte, 2012 IL App (3d) 110791, addressed another *post-decree* attorney's fee case where the appellate court reversed the trial court's award of only half of the ex-wife's fees.

The appellate court reversed the trial court's decision regarding attorney's fees based upon the trial court's flawed analysis of work that was reasonable and necessary. The trial court based its fee decision, in part, on its determination that the wife was barred from seeking permanent maintenance because of the title placed on maintenance as being "rehabilitative."

The appellate court stated:

> Furthermore, the research and discovery conducted by counsel in regard to Terry's financial status at the time of the September 1 hearing was relevant to a

> meaningful review of both the maintenance and attorney fees issues. To find otherwise disregards the statutory directives of both sections 510(a-5) and 504(a). *** Section 503(j)(2) provides that any award of contribution for fees and costs to one party from the other party shall be based on the criteria for division of marital property under this section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under section 504 (750 ILCS 5/503(j)(2) (West 2010)). [Author: Yes, but…]

The appellate court then reviewed the parties' very different financial circumstances including the former husband's pensions and pension payments, his current wife's income from employment and the limited cash flow of the former wife. The appellate court then stated:

> The trial court acknowledged the obvious great disparity between Sue's and Terry's actual earnings and their earning capacities. Sue depends solely on social security disability benefits and maintenance payments, and her earning capacity is virtually eliminated due to her disability. A thorough review of the record makes clear that Sue has proven she lacks the ability to pay, and conversely, Terry is more than able. Sue is not required to show destitution in order for the trial court to award her attorney fees. See *Gable*, 205 Ill. App. 3d at 700. The trial court, nonetheless, ordered Terry to pay only half of Sue's fees, predominately on the basis that her claim for increased maintenance was "nonmeritorious." To the contrary, it was imperative for Sue's counsel to pursue information regarding Terry's finances in order to have both a meaningful review of the maintenance award and the petition for attorney fees. The trial court abused its discretion in ruling on Sue's request for attorney fees.

Contribution Petitions and Timing.

Our caselaw has evolved regarding the timing element regarding when it is necessary to file a contribution petition. Note that in 2010 amendments to the Leveling Act began to flesh out differing standards that apply to pre-decree divorce cases and "any other" fee-shifting cases brought under IMDMA 508(a).

So, we have two sets of cases involving the timing elements: initial divorce cases with a shorter filing deadline (except if the court otherwise orders) and the deadline applicable to all other proceedings.

Timing for Filing "Contribution" Petition or Petition for Fees under §508(a): Caselaw conflicts regarding the timing issues for filing a contribution petition. Section 508(a) in pertinent

part *now* states (with the "redlining showing the 2010 amendments):

> The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party's costs and attorney's fees. [Interim fee provisions omitted breaking down these into pre-judgment proceedings under 501(c-1) and in all other proceedings under 508(a)] At the conclusion of <u>any prejudgment dissolution proceeding under this subsection</u>~~the case~~, contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503 <u>and in any other proceeding under this subsection</u>.

Thus, Section 503(j)(1) and (2) no longer applies (the timing and criteria elements) to any other proceeding under Section 508(a), which generally applies to post-divorce contribution petitions. It is only incorporated by reference when addressing pre-decree situations – with the specific reference being "prejudgment dissolution" proceedings. Consider this language with the following provisions of Section 508(a): "All provisions for contribution under this subsection shall also be subject to paragraphs (3), (4), and (5) of subsection (j) of Section 503." The pertinent parts of §503(j) of the IMDMA that apply to pre-judgment dissolution proceedings (and not to pre-judgment parenting cases under the maxim of construction that the inclusion of one means the exclusion of the other) are:

> **<u>Time for Hearing — After Close of Proofs and Before Judgment is Entered:</u>** **After proofs have closed** in the final hearing *on all other issues* between the parties *** and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be *heard and decided*, in accordance with the following provisions:
>
> > **<u>Not Later than 14 ~~30~~ Days After Close of Proofs / Such Other Period as Court Orders</u>**: (1) A petition for contribution, if *not filed before the final hearing on other issues between the parties, shall be filed no later than 14 ~~30~~ days after the closing of proofs in the final hearing or within such other period as the court orders.* [Note the change with the Family Law Study Committee 2016 Legislation from 30 to 14 days.]
> >
> > **<u>Criteria (Property or Maintenance Orders but See IL Supreme Court Case Referencing These Standards Plus Ability/Inability Standard)</u>**: (2) Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504.

***IRMO Konchar* — 2000 Case [Prior to 2009 Amendments] Had to be Heard and**

Decided before Entry of Final Judgment: An early [and now somewhat antiquated] case addressing the timing issue prior to more recent amendments to the statute is *IRMO Konchar*, 312 Ill.App.3d 441 (2d Dist. 2000). *Konchar* was a post-decree proceeding holding that a 503(j) contribution petition was to be heard and decided before a final judgment is entered. "When proofs are closed and a final order/judgment is entered on the same day, a petition filed thereafter is not timely filed and should be dismissed."

In *Konchar*, within 30 days of the close of proofs and entry of final judgment, the father filed a petition for fees, claiming that he could not pay his own fees because he was unemployed and disabled. The trial judge, Margaret Mullen, denied the petition for attorney's fees because the petition was not heard and decided before the date the final judgment/order was entered. The father appealed. The Second District appellate court affirmed the trial court. The appellate court concluded that reading §508(a) and 503(j) together, the conclusion is that a petition for contribution fees must be heard and decided before the final judgment is entered. The opinion stated:

> Here, section 508(a) of the Act provides that attorney fees may be awarded at the conclusion of a case. The fees may be awarded in accordance with section 503(j) of the Act. Section 503(j) of the Act provides that a petition for fees must be **heard and decided** after the close of proofs in the final hearing and **before judgment is entered**. However, that language is qualified by section 503(j)(1) of the Act, which provides that if a petition for fees is not filed before the final hearing, then the petition must be filed no later than 30 days after the closing of proofs in the final hearing.
>
> * * *
>
> We conclude that, under section 503(j) of the Act, a petition for attorney fees must be heard and decided **before the final judgment is entered**. We determine that the phrase "before judgment is entered" that is presented in section 503(j) **limits subsection (1) of section 503(j) of the Act so that the 30-day extension only applies to situations where a final judgment has not been entered**.

***Macaluso* — Case Contrary to *Konchar* Holding – In Post-Divorce Proceedings No Bar until 30 Days after Entry of Judgment**: For a while, the law seemed clear that a fee petition, even in post-judgment proceedings, must be filed before the final judgment is entered. However, the *Macaluso v. Macaluso*, 334 Ill.App.3d 1043 (3rd Dist. 2002), decision, disagreed with *Konchar* (as discussed above in the Illinois Supreme Court *Blum* decision) and held that a petition for contribution fees in post-judgment proceedings need not be filed before final judgment is entered, and the a petition may be filed at any time before the trial court loses jurisdiction. *Macaluso* reasoned that the timing requirements of the contribution statute do not apply to post-divorce matters because §503(j)'s references to "the final hearing **on all other issues** between the parties," is specific to the bifurcated hearing required in pre-decree

proceedings. *Macaluso* is the better-reasoned decision. The above caselaw reflected the conflict among the districts because the original leveling legislation had not been drafted with post-divorce proceedings in mind.

What does the phrase mean – so long as the trial court has jurisdiction over the case? This is an especially interesting question considering the recent decisions being critical of prior caselaw regarding how some appellate decisions had interpreted jurisdiction. See, for example, the Illinois Supreme Court's decision in *McCormick v. Robertson,* 2015 IL 118230.

***Blum* – Timing Requirements Apply to Pre-Decree Cases / Not Post-Decree Cases**: A 2009 Illinois Supreme Court case addresses the timing of a contribution petition in post-decree cases but unfortunately did not involve the 2010 amendments, *IRMO Blum*, 235 Ill. 2d 21 (Ill. 2009). In *Blum,* the trial court dismissed the ex-wife's contribution petition as untimely filed under the rule of *Konchar*. The issue was whether the trial court erred in dismissing the ex-wife's petition for contribution of attorney fees as untimely. The Court stated:

> We agree with the analysis of the court in *Macaluso* and the appellate court in this case. Section 508 governs attorney fees generally, including petitions for contribution of attorney fees and costs incurred in postdecree proceedings and initial dissolution proceedings. We also agree with *Macaluso's* conclusion that section 503(j) governs the procedural requirements applicable to petitions for contribution of attorney fees and costs incurred prior to the entry of final orders for dissolution of marriage. The phrase "all other issues," in section 503(j) refers to bifurcated contested trials, when the grounds are tried first and "other remaining issues" are either settled or tried separately. See 750 ILCS 5/403(e) (providing for bifurcated contested trials on issues of grounds and "other remaining issues"). Further, in the section 503 context, attorney fees are awarded in view of the total disposition of property and assets, thus justifying the 30-day requirement for filing a petition for contribution of attorney fees. Practically, a judge rarely decides "other remaining issues" immediately after a contested trial on the remaining issues. The petition for fees must, however, be presented to the judge after close of the evidence, and then attorney fees are decided as part of the overall property and asset distribution.

Thus, the Supreme Court held that the trial court erroneously dismissed the ex-wife's petition for contribution of attorney fees as untimely.

Caselaw Regarding Waiver of Right to Object to Timing re Contribution Petition or Fee Hearing against Client -- *Lindsey-Robinson* and *Baniak*:

Lindsey-Robinson – Participation in Contribution Hearing and No Objection: Muddying the waters even more as to the timing issue is the *IRMO Lindsey-Robinson*, 331 Ill.App.3d 261 (1st Dist. 2002) decision. This case stands for the proposition that there may be a

waiver of the right to object to the timing of the contribution action. In this case, the appellate court ruled that the timing requirement may be waived by lack of objection and, at the hearing, by arguing to the merits of the fee petition.

Baniak **-- Time Frame Requirements under the IMDMA are Not Necessary for Subject Matter Jurisdiction and Filing of Late Fee Petition Acceptable Where Waiver**: A more recent case with similarity to *Lindsey-Robinson* – except this time in the context of a petition for fees against a lawyer's own client – is the 2011 *IRMO Baniak* case, 2011 IL App (1st) 092017. The judgment for divorce, incorporating the MSA, was entered October 31, 2008. Attorney Dean Dussias filed his petition for setting final attorney fees on December 1, 2008, a period of 31 days after the trial court entered the divorce judgment. In December 2008, the trial court granted Dussias leave to withdraw as counsel for the former wife. On July 10, 2009, the trial court awarded $71,347 of attorney fees to Dussias. The former wife appealed and the appellate court affirmed.

Attorney Dussias former client claimed, among other things, that Dean's fee petition was not timely filed and that he did not first seek leave to withdraw as required by the statute.

The appellate court first quoted from Section 508(c)(5) of the IMDMA:

> A [fee] petition *** shall be filed no later than the end of the period in which it is permissible to file a motion pursuant to Section 2-1203 of the Code of Civil Procedure." And that Section of the Code of Civil Procedure provides, "In all cases tried without a jury, any party may, within 30 days after the entry of the judgment ***, file a motion *** for other relief." 735 ILCS 5/2-1203(a)."

The appellate court noted the above section of the Code of Civil Procedure. Then the appellate court stated:

> However, 1964 amendments to the judicial article of the 1870 constitution radically changed the legislature's role in determining the jurisdiction of the circuit court. Thus, the legislature's *power to define the circuit court's jurisdiction was expressly limited to the area of administrative review*. Id. The current constitution, adopted in 1970, retains this limitation.

But after discussing this, the appellate court stated:

> Furthermore, Kristina has waived the issue of the failure of Dussias to comply with the time restrictions imposed by the legislature in section 508 by failing to object to Dussias' fee petition and participating in court-ordered dispute mediation and a subsequent hearing on the petition without an objection. *In re Marriage of Lindsey-Robinson*, 331 Ill. App. 3d 261, 265 (2002).

The *Lindsey-Robinson* was a case handled successfully by the *Gitlin & Gitlin* firm (my former

firm where I was a partner with my father). Citing *Lindsey-Robinson*, the appellate court found there to be a waiver, "By proceeding without objection, the appellant waived any violation of the timing requirements of section 508(c) regarding the filing of the fee petition. *Lindsey-Robinson*, 331 Ill. App. 3d 261."

Fees for Prosecuting Appeals

Substantially Prevailed for Fees for Appeals — Obtaining 50% of Relief Sought — *Murphy*: When discussing the 2002 *Murphy* decision, I had stated:

> "Another example of the poorly thought out nature of some of the amendments was the amendment to Section 508(a)(3.1), which provides that a party may obtain attorney's fees for the prosecution of an appeal if that party has "substantially prevailed." *IRMO Murphy*, 327 Ill.App.3d 845 (4th Dist. 2002), addressed the issue of what was meant by the term "substantially." It ruled that for fees to be awarded under §508(a)(3.1), the party prosecuting appeal must obtain at least 50% of the relief sought.: The opinion states that to substantially prevail means to prevail "largely but not wholly," taken from one dictionary definition. The analysis in *Murphy* measures relief sought versus relief obtained. It states that determination was not based on the fact that appellant prevailed on only one of four contentions raised but next commented that substantially prevails "suggests" one must obtain at least 50% of relief sought. It relied on federal law regarding the term "prevailed" as to fee awards in which only a partial victory was required. *Murphy* states that the term "substantially" must have been intended to prevent the application of the lower threshold.
>
> Justice Cook dissented and properly suggested that the goal of Leveling Statute was to resolve conflict in caselaw as to whether fees could be awarded for successful appeal. Cook stated that it is not sufficient that a party prevails nominally or technically. There must be a victory in substance — a real victory. The dissent quotes the primary definition of "real" from *Websters* as "not imaginary or illusory, real, true," and stated that the requirement of an overwhelming victory runs counter to the 1997 amendments:
>
> > If a party has a legitimate basis for appeal we should not attempt to discourage that party from raising other issues as well, even though the party thereby risks obtaining less than 50% of the relief sought. The appellate court should attempt to provide guidance on troublesome issues, not penalize parties for raising issues other than sure winners.
>
> Note that the Illinois Supreme Court has accepted cert. I expect a reversal from the Illinois Supreme Court."

In fact, the Illinois Supreme Court did reverse the appellate court. In *IRMO Murphy*, (2003), the Court required fees to be awarded for appellate proceedings on a “claim-by-claim” basis, that is, if on an individual claim the petitioner substantially prevailed on the merits. The *Murphy* Supreme Court ruled, '" We believe that the appropriate reading of this section is that, in the context of a petition for fees for prosecution of an appeal, the circuit court may only award fees incurred for those individual claims on which the appellant can be said to have "substantially prevailed" on appeal." The *Murphy* Supreme Court stated:

> Our construction of the statute obviates this concern. An appellant may petition for fees incurred in the prosecution of any issue on which he substantially prevailed on a prior appeal, regardless of how many other issues may have been raised. However, awarding appellate fees on a claim-by-claim basis also removes any affirmative incentive for a party to add frivolous issues on appeal along with meritorious issues, in hopes of increasing the fees which his opponent may be required to pay. By our construction of the statute a party may raise any claims he desires on appeal. While the circuit court may award fees for issues deemed meritorious by the appellate court, no recompense will be had for preparation of claims on which the appellate court determined not to grant relief.

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§ 19-3[k] Services Not Directly Connected With Divorce

2022 brought us two Illinois appellate court decision developing the law involving obtaining fees from the opposing party in ancillary litigation, i.e., fees not directly connected with the divorce case.

IRMO Buonincontro, 2022 IL App (2d) 210380 (McHenry County)
The husband filed a fee contribution petition seeking an award of $194,000 against his wife, which the trial court denied. The appellate court affirmed. There were several noteworthy aspects of this decision, including a reaffirmation that one can obtain fees for paralegal services but only so long as they are reasonable.

The husband’s fee petition against his wife sought fees for a Florida proceeding that he contended “involved the parties and their children.” Thus, he argued that the trial court erred in not awarding fees under the ancillary litigation provisions of the IMDMA, per section 508(a)(6). Yet the former wife pointed out that the trial court merely found that Robert failed to prove the reasonableness of the fees incurred due to the Florida proceeding–not that it lacked authority to award fees for ancillary litigation. The appellate court agreed that the denial of these fees was not an abuse of discretion “as the record reflects that Robert failed to establish the reasonableness of the fees.” As the former wife argued, the appellate court found that the trial court properly disallowed fees that Robert incurred “by virtue of his own conduct in taking the children to Florida without her consent.” The appellate court also noted that the record established that the

wife obtained an order allowing her to pick up the children in Florida and return with them to Illinois.

Two weeks prior to this decision, we had a second decision from the Second District involving ancillary litigation.

IRMO Miklowicz, 2022 IL App (2d) 210713 (Aug. 4, 2022) (DuPage)

Respondent appealed from the dismissal of her petition for attorney fees under sections 508(a)(1) *["[t]he maintenance or defense of any proceeding under [the] Act"]* and (a)(6) *[[a]ncillary litigation incident to, or reasonably connected with, a proceeding under this Act"]* of the IMDMA. The Respondent had sought fees incurred in defense of a criminal prosecution based on her alleged violation of the visitation / parenting-time provisions of the divorce judgment. The appellate court affirmed, finding that section the IMDMA (a)(1) did not allow the court to require the petitioner to pay respondent's fees for defending a criminal prosecution. Further, the criminal proceeding was not "ancillary" to the proceedings as required for imposition of fees under section 508(a)(6). The Miklowicz court turned to the definition of the term "ancillary." It quoted Blacks Law Dictionary's meaning of, "[s]upplementary; subordinate." The Miklowicz court stated that while the criminal case relied on the divorce judgment that:

> "it is far from evident that the independent act of the sovereign in prosecuting the violation of a criminal statute is supplementary, much less subordinate, to a dissolution judgment that arose out of a private party's civil petition. Not only was the prosecution ultimately brought by a party with no involvement in the dissolution proceeding, but it was brought in a different court, heard by a different judge, and decided under a higher burden of proof.

The appellate court also culled the limited caselaw authority from other jurisdictions that militated against the respondent's expansive reading of the term "ancillary."

508(b) Failure to Comply Caselaw.

Failure to Comply with Court Orders — Compelling Cause or Justification Standard / Burden of Proof is on Non-Complying Party: 508(b) of the IMDMA states:

> In every proceeding for the enforcement of an order or judgment when the court finds that the *failure* to comply with the order or judgment was *without compelling* cause or justification, the court shall order the party against whom the proceeding is brought to pay the costs and reasonable attorney's fees of the prevailing party.

This was one more place in the statutory scheme that the 2016 amendments were well intentioned, but didn't lend enough clarity. The key legal issue in addressing fees per §508(b) is the burden of proof issue, i.e., is the burden of proof the same as in contempt proceedings. If the burden of proof is the same as in contempt proceedings, then once a party would show non-compliance then the burden would shift. The "Leveling" amendment added the word "compelling" to the cause or justification language of §508(b). However, the amendments did not eliminate the double negative contained in this section. The first negative is the failure to comply. The second negative is the "without compelling cause or justification" standard. The statute states that once the court makes a finding that there is no compelling cause or justification, then fees are mandatory. This begs the question, however. The potential legal issue is who has the burden of showing whether there is a cause or justification for non-compliance once non-compliance is demonstrated.

McGuire, 305 Ill.App.3d 474 (5th Dist. 1999) (discussed above), stated:

> Generally, courts have broad discretion in determining whether to grant attorney fees in dissolution proceedings. However, when a party's failure to comply with an order is without cause or justification, an award of reasonable attorney fees and costs is mandatory. See *In re Marriage of Baggett*, 281 Ill. App. 3d 34 (1996) [Discussed below]. It is within the court's discretion to decide whether the delinquent spouse's failure to pay maintenance was "without cause or justification". (Citations Omitted.)

The issue not clarified by the above is who has the burden of proof per §508(b) once a party is shown not to have complied with a court order. There are several cases all holding that the burden of proof is on the party who does not comply with a court order. *McGuire*, 305 Ill.App.3d 474 (5th Dist. 1999), was one of the few Illinois post-Leveling appellate court decision addressing this issue.

McGuire further stated:

> Under section 508(b), if a party to a dissolution does not fulfill a condition imposed upon him or her by an order, *the burden is on that party to produce evidence of cause or justification*. See *In re Marriage of Baggett*, 281 Ill. App. 3d 34 (1996); 750 ILCS 5/508(b) (West 1994). According to section 508(b), as amended, the noncompliant party is required to demonstrate compelling cause or justification. 750 ILCS 508(b) (West 1996).

The opinion noted that in that case the husband offered evidence as to his cause or justification for his non-compliance and did not reverse the trial court's discretion in ruling that the husband had met his burden of proof.

Similarly, *Baggett* (cited by *McGuire*) stated:

> When an order has not been complied with, the court need not find the respondent in contempt, but it should then determine whether any failure to pay was "without cause or justification" for purposes of mandatory attorney fees under section 508 of the Act. *In re Marriage of Roach*, 245 Ill.App.3d 742, 748 (1993).

Baggett pointed out that in contempt proceedings a *prima facia* case of contempt is established merely by establishing the non-compliance. The burden of establishing a defense of course shifts to the alleged contemnor. The *Baggett* court applies the same evidentiary rule to the "without cause or justification" issue in an application for attorney's fees for enforcement. *Baggett* stated:

> In this case, the record is devoid of any evidence of [the ex-husband's] cause or justification for not complying with the order. Therefore, we hold that the court erred in not granting Rebecca attorney fees, and we remand for the court to determine a fair and reasonable amount of attorney fees.

Another case consistent with *Baggett* and *Roach* is *IRMO Young*, 200 Ill.App.3d 226 (4th Dist. 1990). Based upon this line of cases, it appears clear that the word “compelling” was likely added to the statute to indicate that once non-compliance is shown, the burden of proof to avoid payment of attorney's fees is that the non-complying party must show his or her *compelling* cause or justification for non-compliance. At least in this regard the amendment to §508(b) did not have the opposite intended effect. It probably does lend some additional clarity to this aspect of the fee statute.

Improper Purpose Caselaw.

See: ***Gitlin on Divorce***: § 19-4[n] “Precipitating Circumstances.”

Attorney’s Fees and Reasonableness of Party / Court’s Consideration of Conduct that Needlessly Increases the Cost of the Litigation vs. Right to Present Good Faith Case: One of the relatively “early” post-“Leveling” cases that related to attorney's fees because of a party’s “unreasonable” conduct was *IRMO Menken*, 334 Ill.App.3d 531 (2nd Dist. 2002). The husband had refused to consent to the issuance of a QILDRO affecting his state retirement benefits (Rockford police benefits) while steadfastly battling things out in court. The trial court entered an order that the father would not be required to pay fees—unless he refused to consent to the issuance of a QILDRO. Later, when the husband in fact refused to consent, the trial court entered an order for fees. The appellate court gratuitously commented (because the father did not appeal the issue) that “we feel compelled to note that the trial court should not have conditioned the amount of attorney fees on whether respondent signed the consent form. The issues were unrelated...”

IRMO Haken (Fourth Dist. 2009), addressed the language of §508(b) that had then read:

> If at any time a court finds that a hearing under **this [s]ection** was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly.

The issue was the "under this section" limitation in §508(b). The appellate court stated:

> Rudolf argues this subsection does not apply to this case because (1) this was not an action to enforce an order or judgment, and (2) no hearing was conducted under this section that was precipitated by some improper purpose. Rudolf claims the plain language of the above-quoted section requires, at least, one of these two occurrences. We conclude Rudolf's interpretation of the circumstances of when this section applies may be too limited. However, we need not determine whether section 508(b) is applicable because Leila argued for and the trial court awarded fees under section 508(a).

However, there is other useful language regarding unnecessarily increasing the cost of litigation in this decision:

> We believe the language in section 503 allows a court to consider an "unnecessary increase in the cost of litigation" when determining a fee award under section 508(a). Section 503(d) provides "[the court] also shall divide the marital property *** in just proportions considering all relevant factors." (Emphasis added.) 750 ILCS 5/503(d) (West 2008). Unnecessarily increasing the cost of litigation is a relevant factor in the division of property as well as in allocating attorney fees.

Haken is a precursor to understanding the importance of the amendments to the Leveling the Playing Field statute under Pub. Act 96-583. The largest change to the Leveling the Playing Field statute in the 2009 amendments was the change to only one word in §508(b):

> If at any time a court finds that a hearing under this Act ~~Section~~ was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly. Improper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation.

Another case addressing the court's consideration of the conduct of a party in increasing the cost of litigation is *IRMO Harrison*, 388 Ill. App. 3d 115 (First, Dist. 2009). Rarely has an Illinois case addressed the language in [former] §610(c) regarding vexatious custody litigation (fee awards where a custody *modification* proceeding is vexatious and constitutes harassment). While the trial court found a pattern of alienating behavior, the appellate court found that there was no reversible error where the father had been successful in two previous modifications of custody proceedings to obtain custody of the two other children. Additionally, the court appointed expert had recommended in favor of the ex-husband.

Note that the current statutory language is in the modification of parental allocation section: 750 ILCS 5/610.5(f) that currently reads:

(f) **[Attorney's Fees in Modification Proceedings]** Attorney's fees and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious or constitutes harassment. If the court finds that a parent has repeatedly filed frivolous motions for modification, the court may bar the parent from filing a motion for modification for a period of time.

Compare the *Harrison* decision to a more recent case involving an unsuccessful petition regarding a maintenance review hearing. In *IRMO Bolte*, 2012 IL App (3d) 110791, the appellate court reversed the trial court's decision regarding attorney's fees based upon the trial court's flawed analysis of work that was reasonable and necessary. The trial court based its fee decision, in part, on its determination that the wife was barred from seeking permanent maintenance because of the title placed on maintenance as being "rehabilitative." The appellate court stated:

> Furthermore, the research and discovery conducted by counsel in regard to Terry's financial status at the time of the September 1 hearing was relevant to a meaningful review of both the maintenance and attorney fees issues. To find otherwise disregards the statutory directives of both sections 510(a-5) and 504(a). *** Section 503(j)(2) provides that any award of contribution for fees and costs to one party from the other party shall be based on the criteria for division of marital property under this section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under section 504 (750 ILCS 5/503(j)(2) (West 2010)).

The appellate court then reviewed the parties' very different financial circumstances including the former husband's pensions and pension payments, his current wife's income from employment and the limited cash flow of the former wife. The appellate court then concluded:

> The trial court acknowledged the obvious great disparity between Sue's and Terry's actual earnings and their earning capacities. Sue depends solely on social security disability benefits and maintenance payments, and her earning capacity is virtually eliminated due to her disability. A thorough review of the record makes clear that Sue has proven she lacks the ability to pay, and conversely, Terry is more than able. Sue is not required to show destitution in order for the trial court to award her attorney fees. *See Gable*, 205 Ill. App. 3d at 700. The trial court, nonetheless, ordered Terry to pay only half of Sue's fees, predominately on the basis that her claim for increased maintenance was "nonmeritorious." To the contrary, it was imperative for Sue's counsel to pursue information regarding Terry's finances in order to have both a meaningful review of the maintenance award and the petition for attorney fees. The trial court abused its discretion in ruling on Sue's request for attorney fees.

Attorney Fees \ "Any Improper Purpose" under Section 508(b)

IRMO Davis, 2019 IL App (3d) 170389

Attorney's fees under Section 508(b) were proper where the trial court found that the former husband had engaged in the type of improper purposes due to his litigation strategy, handling the case *pro se*. The former wife had filed a petition for contribution alleging that a significant portion of the attorney fees she incurred were due to her former husband's "litigious nature"

including his "habitual refusal to comply with discovery and the court's orders." The court found that "We spent so much time on this case arguing over stuff that didn't matter. * * * And, you know, I find that this thing was a simple case that could have been solved thousands of dollars ago."

Necessity of Filing under 508(b) Where Fees Requires Reversal of $50k Award.
Recently, the appellate court emphasized that the standards in Section 508(b) are not subsumed within the rubric of a general contribution petition. The trial court awarded the wife $50,000 as a contribution award due to the husband's aggressive tactics during litigation and not based upon her inability to pay. The appellate court in the November 2020 *IRMO Budorick* decision[14] stressed the limitations on the trial court's authority where the petition is not brought under 508(b):

> In sum, there are two bases on which to award attorney fees in dissolution proceedings: subsections 508(a) and 508(b) of the Act. Heather expressly denied bringing her fee petition under subsection 508(b) of the Act, and the court did not award fees under subsection 508(a) because it explicitly stated that the award was "not based on the ability of the parties to pay." Further, in its ruling, the court made it clear that the basis of its fee award was in response to Daniel's dilatory tactics in the dissolution proceedings and was not based on either subsection 508(a) or subsection 508(b) of the Act. Because the court's fee award was not based on any applicable section of the Act, we conclude that the court abused its discretion in ordering Daniel to contribute $50,000 to Heather's attorney fees.

2022 *Eisterhold* Decision Upholding Substantial 508(b) Improper Purpose Fees Despite Motion to Voluntarily Dismiss.

Eisterhold v. Gizewski[15] involved parentage proceedings in which the agreed allocation judgment required the father, James, to pay child support of $295 per month to Candice. It provided that, "All child support payments are to be made directly to Candice from James." Shortly thereafter, Candice filed a motion seeking to have James's monthly child support payments withheld from his paycheck. The motion asserted that a "Uniform Order for Support"—reflecting a provision for income withholding—was contemplated by the parties prior to the allocation judgment. In response, James asserted that there had been no delinquency in child support and that the parties had entered into a written agreement consistent with the IWSA that James would pay Candice directly. James asserted the statements made by Candice's counsel—that James had not paid child support—were false and an attempt to cure the deficiencies in her motion.

Candice, however, later moved to voluntarily dismiss her motion. The trial court continued her motion to voluntarily dismiss several times, and James filed a petition for Illinois Supreme Court Rule 137 sanctions and for attorney fees under section 508(b) of the IMDMA. After several continuances, the circuit court granted Caddice's motion to voluntarily dismiss and later sanctioned Candice and her

[14] In re Marriage of Budorick, 2020 IL App (1st) 190994, ¶ 69.
[15] Eisterhold v. Gizewski, 2022 IL App (1st) 210490.

attorneys at The Stogsdill Law Firm, P.C. (Stogsdill law firm) under Supreme Court Rule 137 and awarded James attorney fees under section 508(b). The father's law firm had petitioned for $23,593 in fees resulting from the motion. More specifically, the trial court ordered Rule 137 sanctions against Candice and the Stogsdill Law Firm of $2,500 each. The trial court also ordered Candice and the Stogsdill Law Firm to pay $9,296.80 each for reasonable attorney fees under the improper-purpose clause of section 508(b).

On appeal Candice argued that the allegations in her motion for withholding order were incorrect as a result of "bad communication" and that the trial court erred in granting SCR 137 sanctions. She also urged that fees, if any, should be limited to the period after she filed a motion to dismiss. Finally, she argued that the court lacked statutory authority to award 508(b) fees because the case was a parentage case.

A critical aspect of the case revolved around Candice's motion to voluntarily dismiss her motion—a motion to seeking a withholding order. She claimed that she had an unfettered right to dismiss this motion since it was served before any hearing or trial on her motion. Yet the appellate court affirmed and emphasized that the trial court did not deny her motion to voluntarily dismiss.

Sanctions Caselaw

Non-IMDMA 2019 Illinois Supreme Court Decision re SCR 137 Fees against for Lawyer Defending Himself from Frivolous Cause of Action
McCarthy v. Taylor, 2019 IL 123622 (Modified upon Denial of Opinion October 1, 2019)
At issue in this case of first impression was whether a court may impose sanctions in the form of attorney fees under SCR 137(a) to compensate an attorney defending himself against a frivolous cause of action. The circuit court found that Rule 137 sanctions were warranted and entered a fee award. The appellate court affirmed the circuit court's finding of violation but vacated the monetary award.

Applying rules of statutory construction, Justice Kilbride first examined the plain language of Rule 137 and concluded that there was nothing in Rule 137 precluding an award of fees in favor of a pro se attorney defending against a frivolous lawsuit. Next, the court distinguished two cases that denied fees available under fee-shifting statutes to attorneys who brought suit in their own names in order to deter abusive fee generation. The Court reasoned that, in contrast, Rule 137 sanctions were meant to deter frivolous or harassing litigation, a policy that would be defeated if attorney fees to pro se attorneys defending against meritless claims were denied. Thus, the majority affirmed the Rule 137 violation finding but reversed the appellate court's vacatur of the fee award with directions to reinstate it.

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The Gitlin Law Firm, P.C.
663 East Calhoun Street
Woodstock, IL 60098
815-338-9401
Last Updated: November 20, 2025
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