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FAMILY LAW CASE UPDATE

FAMILY LAW COMMITTEE

MEGA MEETING

January 26, 2013

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FAMILY LAW COMMITTEE MEGA MEETING
2012 CASE UPDATES REVIEW

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ABUSED AND NEGLECTED CHILD REPORTING ACT

Julie Q. v. Dept. of Children & Family Services, 2011 Ill.App. (2nd) 100643, 963 N.E.2d 401

Father reported Mother to DCFS after child told him Mother, who was a recovering alcoholic, locked child in her bedroom and that Mother had been drinking. DCFS ultimately indicated Mother based upon allegation No. 10/60, "the total circumstances lead a reasonable person to believe that the child is in substantial risk. This allegation of harm also includes placing a child in an environment that is injurious to the child's welfare." 89 Ill. Adm. Code 300, app. B, No. 10/60 (2011). Mother appealed finding of neglect to an Administrative Law Judge, then to trial court, then to appellate court.

Mother's primary allegation on appeal was that the indicated finding was improper in that the DCFS rule 10/60 upon which the finding was based exceeds the authority granted to DCFS by its enabling statute. The appellate court agreed. In so doing, the court considered the Abused and Neglected Child Reporting Act ("Act"), and in particular, Section 3, which defines a "neglected child" pursuant to four circumstances. 325 ILCS 5/3 (West 2008). DCFS allegations 10/60 impermissibly expands upon Section 3 of the Act, in that it expands the legislature's definition of a neglected child beyond the four circumstances set forth in Section 3 of the Act. As a result, "environment injurious" should not serve as a basis for a neglect finding.

Further, the indicated finding was against the manifest weight of the evidence. The evidence regarding the events that formed the basis of the allegations was inadmissible. The appellate court determined that some of the evidence was hearsay not otherwise admissible and that other evidence was improper collateral impeachment. The only direct evidence concerning the specific date in question came from Mother herself. Finally, the remaining evidence revolved around other alleged incidents occurring outside of the date in question, and even then, the other alleged incidents had been deemed "unfounded" by DCFS.

ADOPTION

In re Adoption of H.B., 2012 Ill.App. (4th) 120459, 976 N.E.2d 1193

On July 19, 2011, the Petitioner, the child's Aunt, filed a petition for adoption of H.B., alleging, in part, that the biological Mother was unfit. In October 2011, the trial court terminated the parental rights of the biological Father. The Mother contested the adoption. In February 2012, the trial court conducted the fitness hearing. In April 2003, the Father was granted custody of the child, but the child resided with the Mother from June 2003 until May 2004. In August of 2004, the paternal Grandmother was granted temporary emergency custody of the child following the arrest of the Father and Mother for felony drug charges. In June of 2005, the Aunt was appointed temporary joint custodian of the child. The Mother was released after 8 months but then resided in a drug rehabilitation center through June of 2005. While at the rehabilitation center, the child visited with her Mother 3 times in the center and 3 times at the maternal Grandmother's home when the Mother had a weekend pass. After her release, the Mother visited the child one to two times per month at the maternal Grandmother's house and talked with the child three times per month. This schedule continued until 2007 when the Aunt told the Mother she could only see the child at the Aunt's house. Because the Aunt lived far from the Mother, the visits dwindled, with the Mother visiting the child 3-5 times during 2008 and 2009. The Mother testified that many of her calls would go unreturned and that the Aunt moved with the child. The Mother also testified that the Aunt hung up on her on a number of occasions and that on September 23, 2009, told her she could not see her daughter for her birthday, told her she could never see the child again, and that the child did not want to see her. The Aunt testified that she did not tell the Mother she could not see the child but that the she did tell the Mother that she could not see the child on the child's birthday. She testified that once the child

turned 8 years old, she let the child decide whether or not she wanted to talk to her Mother and that she did not encourage the child to call her *Mom*. After the September 23, 2009 phone call in which the Aunt told the Mother that she could not see her daughter for her birthday, the Mother did not have contact with the child. After the hearing, the trial court dismissed the petition for adoption, and the Aunt appealed.

The appellate court found that in order to rebut a finding of unfitness and an intention to forego one's own parental rights in an adoption proceeding, any evidence submitted explaining why the parent has had no contact with the child must have occurred within the 12 months following the parent's last contact with the child; this 12-month line of demarcation begins with the parent's last contact or communication with the child because any impediments preventing future contact must have necessarily occurred during or after the last contact or communication with the child. The court found that during the September 23, 2009 phone call, the Mother was told not to call anymore and that her daughter did not want to see her and that the Aunt left the decision of whether to have contact with the Mother up to a child. The court found that these two impediments occurred within the appropriate 12-month period. Therefore, the Mother did not forego her parental rights.

Further, the court held that the Mother did not desert her daughter. Although she did not proactively attempt to regain custody, this was not proof by clear and convincing evidence that she intended to permanently relinquish custody. Further, she voluntarily gave temporary custody to the Grandmother because she was incarcerated, and she had in fact visited the child until she was told she could no longer see the child.

The Court found that the Aunt did everything she could to discourage the parent-child relationship, including allowing the child to decide whether or not she wanted to talk to her Mother, hanging up on the Mother, not including the Mother in holiday plans, etc. The matter was affirmed and remanded for the trial court to fashion an order establishing permanency for the custodial arrangement which has been enjoyed by the child, and setting forth the rights and responsibilities of all parties.

In re Marriage of Mancine, 2012 Ill.App. (1st) 111138, 965 N.E.2d 592

On appeal, the court affirmed the lower court's dismissal due to the ex-husband's lack of standing.

Prior to the parties beginning a relationship, the wife had begun the process of adopting a child. Because she had already started the process of adopting a child as a single parent, upon meeting the husband, the parties were advised by the adoption agent to finish the process as a single adoption, but to then have the husband adopt the child as a stepparent after the parties' marriage. The parties had begun the stepparent screening for the adoption process, but a petition for adoption was never filed.

The issue on appeal was whether a non-biological step-father has standing to seek custody of a child he intended to adopt but never formally adopted. The court held that Illinois has not adopted the "equitable parent" doctrine and that the step-father had no standing as a parent to seek custody under the IMDMA, the Illinois Parentage Act or the Illinois Parentage Act of 1984, especially since the child was in the custody of the mother, the only legal parent of the child. The court denied the step-father's arguments of equitable estoppel and equitable adoption because the step-father was aware at all times that he was not the biological father of the child and that formal adoption was necessary, and because Illinois does not recognize equitable adoption.

In re Parentage of J.W., 2012 Ill.App. (4th) 120212, 972 N.E.2d 826

Foreign Adoption

After a parentage action and dissolution action were consolidated, the trial court entered an order of parentage, denied biological Father visitation and entered an order as to child support. The biological Father appealed, and the appellate court reversed and remanded.

The minor child, J.W., was born in April 2002. Jason Willis was listed as the father on the birth certificate. J.W.'s, Mother, Amy, married Jason Wills in March 2003, believing him to be the father of J.W. The couple divorced in January 2006, and Amy was awarded custody. In 2008, the Petitioner, Steve Taylor, contacted Amy after seeing a photograph of J.W. Amy confirmed that he could be the father, and after DNA testing confirmed that Steve Taylor was the Father, he filed a parentage action in February 2009.

In the dissolution action between Jason Willis and Amy, the court entered an order at Jason Willis's request ordering Amy to not reside with Steve Taylor or permit him to have contact with J.W. The two cases were consolidated in April 2009, and in September 2009, an order of parentage was entered as to Steven. After hearing from the GAL and a clinical psychologist, the trial court denied Steve Taylor's request for visitation and reserved the issue of child support. In January 2012, the parties entered an Agreed Order as to child support, and in February 2012, Steve Taylor filed his notice of appeal claiming the court erred in requiring him to have the burden of proving visitation was in J.W.'s best interest and the court erred in not granting him visitation.

The first issue on appeal was whether Jason Willis does not have standing in the matter. The court found that Steve Taylor's arguments concerning Jason Willis's lack of standing are disingenuous as Steve Taylor invited participation by Jason by asking that the cases be consolidated.

Steve Taylor next argued that the trial court applied the wrong burden of proof when it held the burden of proof is on the noncustodial parent seeking visitation under the Parentage Act to establish visitation is in the best interest of the minor child. Because Steve Taylor is the biological Father, the presumption is that he is entitled to reasonable visitation rights unless visitation would seriously endanger J.W.'s physical, mental, moral and emotional health. The trial court erred when it placed the evidentiary burden on Steve Taylor to show that visitation was not in the best interest of the child. Therefore, this matter was reversed and remanded to allow for visitation.

ARBITRATION

In re Marriage of Golden, 2012 Ill.App. (2nd) 120513, 974 N.E.2d 927

The ex-Husband moved to compel arbitration pursuant to the arbitration clause of the parenting agreement. The trial court denied the motion. On appeal, the appellate court reversed and remanded.

The ex-Wife was awarded custody of the minor children. The arbitration clause of the parenting agreement stated: "*The matters of camp, medical decisions, and the regular parenting time schedule are the only matters which shall be arbitrated.*" Prior to filing the motion, the ex-Husband had requested through the arbitrator and parenting coordinator that the parties meet to discuss his concerns about the current parenting schedule. The ex-Wife argued that the arbitration was inappropriate because the ex-Husband's motion stated that he wished to "discuss" the regular parenting schedule and that he gave no additional detail regarding what issues existed to be arbitrated.

On appeal the court held that the existence of a dispute or controversy was a prerequisite to arbitration. Contrary to the ex-Wife's position, the dispute or controversy need not take the form of a disagreement over how specifically to alter the regular parenting time. In this case, there was a dispute or controversy existing over the ex-Wife's allegedly excessive and disruptive forfeiture of regular parenting time under the parenting time schedule. Therefore, the appellate court reversed the trial court's holding.

ARTIFICIAL INSEMINATION

In re T.P.S. and K.M.S., 2012 Ill.App. (5th) 120176, 978 N.E.2d 1070

Former same-sex partner petitioned to establish parentage, custody, visitation, and child support with respect to children conceived through artificial insemination and borne by the other partner during the relationship. The circuit court entered a judgment dismissing the petition and the former partner appealed.

The Petitioner and Respondent were involved in a long-term relationship. During the relationship, the parties agreed that the Respondent would conceive two children by artificial insemination. The parties agreed the Respondent would give birth because she was younger and because she had health insurance. The parties agreed the Petitioner would be a full and equal co-parent and that she would be the primary caregiver. The Petitioner was involved in the entire process of the artificial insemination. After the birth of the first child, the parties consulted with an attorney to discuss pursuing a second-parent adoption for the Petitioner. Their attorney advised them that the circuit court in Williamson County would not grant a second-parent adoption to a same-sex, non-biological parent. Instead, their attorney recommended the creation of a co-guardianship as the quickest and surest means of securing the Petitioner's legal rights that were as close as possible to parental rights. Therefore, after the birth of each child, the parties jointly petitioned the circuit court to make them equal co-guardians.

The relationship ended in 2009. The Petitioner continued to see the children on a daily basis until October 2010, when the Respondent petitioned the court to dismiss the co-guardianship. (See *In re T.P.S.,* 2011 IL App (5th) 100617, ¶ 19, 352 Ill.Dec. 590, 954 N.E.2d 673.) In this case, the Petitioner filed a petition to establish parentage, custody, visitation, and child support with respect to the children. The Respondent moved to dismiss the petition, arguing that the Petitioner lacked standing to seek custody or visitation with the minor children because she was not a biological or adoptive parent. The trial court granted the Respondent's motion and entered a judgment dismissing Petitioner's petition with prejudice. The Petitioner appealed.

The central issue on appeal is whether Illinois recognizes a common law action for child custody and visitation where an unmarried couple agrees to conceive a child by artificial insemination, and the couple subsequently begins raising the child as coequal parents. The court found that with respect to children born of artificial insemination, under the facts of this case, the Illinois legislature has not barred a common law contract and promissory estoppel causes of action for custody and visitation brought by the non-biological parent.

This court found that the Supreme Court's decision in *In re Parentage of M.J.,* 203 Ill.2d 526, 272 Ill.Dec. 329, 787 N.E.2d 144 (2003), sets forth the proper framework to analyze a case of this nature. In the case at hand, the court looked to the public policy of Illinois. The court found that the children were entitled to the physical, mental, emotional, and monetary support of both of their "parents," and this right to support was not limited to just monetary support, but also includes physical, mental, and emotional support. Because the Petitioner participated in the decision and process of bringing the children into this world through artificial insemination, *M.J.* established the Petitioner's common law obligation to financially support the children.

The court next looked to the three sections of the Illinois Parentage Act to determine whether

the Illinois Parentage Act precluded the Petitioner's common law claims. The court turned to the language of the Illinois Parentage Act to determine the legislature's intent with respect to the right of children conceived by artificial insemination to the physical, mental, and emotional support from the non-biological person who participated in the decision and process of bringing them into this world. The Court found that there is nothing in the Illinois Parentage Act that expressly prohibits common law actions, not only to establish the non-biological parent's parental responsibility but also to establish the non-biological parent's parental rights with respect to children born by artificial insemination. Like the Supreme Court concluded in M.J., this court believes that had the legislature intended for children to be denied their non-biological parent's physical, mental, and emotional support, it would have done so expressly.

CHILD SUPPORT

In re Marriage of Razzano, 2012 Ill.App. (3rd) 110608, 2012 WL 5936770

Modification

Ex-Wife moved to modify child support. The circuit court granted the motion, and ex-Husband appealed. The appellate court affirmed the lower court's decision.

The parties had two children and were divorced in 1992. The ex-Wife was granted custody of the minor children, and the parties agreed that the ex-Husband would pay child support in the amount of $600 per month. The parties' agreement further stated that ex-Husband's "obligation for the support and maintenance of each child shall continue until the child attains full emancipation as defined in this Agreement." The Agreement defined emancipation as including "the child's reaching age twenty-two, so long as the child is attending college full-time, or completing college, or terminating full-time attendance at college, whichever shall first occur." With regard to education expenses, the Agreement stated that the ex-Wife "shall assume responsibility for the expenses of education of the minor children including day care and private school expenses." The Agreement went on to state that the parties agreed that "the support provisions below is in lieu of any other obligation by [ex-Husband] for educational support."

In September 2005, the ex-Wife filed a motion to modify child support. In the alternative, she also filed a petition for educational support, in which she requested that the ex-Husband contribute to the children's post-secondary education expenses. After years of delay, the trial court entered judgment in favor of the ex-Wife and ordered the ex-Husband to pay a modified amount of child support pursuant to section 505, rather than section 513.

On appeal, the ex-Husband argued that the circuit court erred when it modified support pursuant to section 505(a) of the Act. Specifically, he argued that because section 505(a)'s guidelines apply to child support obligations only when the children are under the age of 18 or under the age of 19 if they are still in high school (750 ILCS 5/505(a)), the court should have used section 513 when it modified child support obligations, as section 513 specifically applies to education expenses accruing after a child reaches the age of majority. (750 ILCS 5/513).

The appellate court found that in this Agreement, the parties agreed that the ex-Husband would pay child support until the children were emancipated, and this agreement defined emancipation differently than the Act. The court further stated that parties are free to negotiate this definition of emancipation. Further, the parties agreed that the support provisions were in lieu of the ex-Husband's educational support. In so doing, the parties evinced the intent to satisfy all education expenses obligations and considerations in the context of the ex-Husband's child support payment, thereby excluding section 513 from consideration. The court found that rather than reserve the issue for future determination, the parties agreed to redefine "child support" to include post secondary education expenses. Therefore, based solely on the terms of this agreement, the circuit court did not err when it used the guidelines in section 505(a) to modify

the ex-Husband's child support obligation rather than consider modification pursuant to section 513(a)(2).

In re Marriage of Romano, 2012 Ill.App. (2nd) 091339, 968 N.E.2d 115

Child Support, Classification of Property: Marital v Non Marital and Gifts, Dissipation

This case truly points out the need for and benefit of careful tracing and consistent testimony to determine the proper classification of assets. Where Husband successfully established that his interests in various businesses and the source of funds that went into and out of various trusts were pre-marital, gifts or the result of his Father's estate planning, those assets were properly classified as non-marital. Also, where court awarded only maintenance and not child support, and the language did not specify that the monthly payment was for unallocated family support, issue was remanded for a determination of a maintenance and child support award.

The parties were married in 1987. Husband filed a petition for dissolution of marriage in June 2006, and Wife filed a counter-petition in December 2007. The trial commenced in 2008. One of the principal areas of contention in the case involved Husband's interest in six family-owned companies in which Husband's parents and siblings also held interests, and the classification of those interests as marital or non-marital. Further complicating the facts, the Romano family (Husband's father and siblings) began implementing an estate plan that ultimately involved transferring the family's interests in these companies into and out of various trusts.

A substantial portion of the trial court and the appellate court's decision involves the detailed and complicated tracing of the companies, the assets, ownership, funding, sources of funding, and movement of assets into and out of various trusts associated with the estate planning activities commenced by Husband's father.

The parties also owned various other assets, including several residences. Husband claimed that the marital estate was worth $1.37 million and Wife claimed it was worth $45 million.

Husband's interest in various family owned companies. The appellate court addressed Husband's interest in shares of RBBC stock that he received from his father and siblings. The court found that as to the shares received from his father, there was a presumption that those shares were a gift because he received them from his father. There was also a presumption that the shares were marital property, because the shares were acquired during the marriage. When an asset is subject to conflicting presumptions, the presumptions are cancelled out and the trial court is free to determine whether the asset is marital or non-marital, without relying on either presumption. *In re Marriage of Hagshenas*, 234 Ill. App.3d 178 (1992). As to the shares received from siblings, although there is no presumption of a gift from siblings, the evidence supported that those shares met the requirements of a gift to Husband and therefore were classified as non- marital property.

The appellate court rejected Wife's argument that the facts in this case were analogous to *In re Marriage of Sanfrontello,* 393 Ill.App.3d 641 (2009). Wife argued that Husband's interest in the RBBC stock is marital because Husband's employment at that company was used to support the family. The court found that Husband was receiving substantial compensation from the company for his employment ($350,000). There was no evidence he was a major shareholder or had any control over or access to the company's retained earnings. Husband's interest was non-marital.

As to Husband's interests in various other affiliated companies, although there was a presumption that those interests were marital because they were acquired during the marriage, Husband overcame the presumption by clear and convincing evidence that the property was acquired by one of the methods set forth in §5/503(a) of the Act and therefore was non marital.

Missing Funds. The appellate court rejected Wife's contention that the trial court's judgment failed to account for more than $6 million of "missing funds". The record supported Husband's explanation of how those funds were used.

Dissipation. The appellate court found that the trial court did not use an improper standard in assessing when the irreconcilable breakdown of the marriage occurred. Moreover, the evidence at trial showed that the marriage actually stayed together for many years after the Wife's alleged dates for the irretrievable breakdown.

Fraud on Wife's Marital Rights. Wife claimed at trial that Husband's transfer of assets into and out of trusts constituted a fraud on her marital rights. At the close of Wife's case, Husband made a motion for directed finding on this claim, which was granted. Wife appeals that decision.

The appellate court discusses the two-step analysis for directed verdict: 1) the court must determine as a matter of law whether the plaintiff has presented a *prima facie* case, i.e., whether the plaintiff has presented some evidence essential to each element of the cause of action; and 2) if the plaintiff has presented evidence on each element, the court must then weigh the totality of the evidence presented, including evidence favorable to the defendant. If the trial court finds that plaintiff has failed to establish a *prima facie* case, then the appellate standard of review is *de novo.* However, if the trial court moves to the second step and considers the weight and quality of the evidence and finds no *prima facie* case, then the appellate standard of review is manifest weight of the evidence.

The appellate court rejected Wife's claim that the trial court erroneously granted Husband's request for directed verdict. The trusts that were created during the marriage were not created around the time of the divorce and there was no evidence presented to support Wife's claim that Husband made any misrepresentations to her about his family's estate plan or that he forced any type of an agreement upon Wife as to the allocation of marital assets.

Distribution of marital assets. The trial court did not abuse its discretion in awarding Wife 77% of the marital assets and 23% to Husband. Husband contributed substantially to the lavish lifestyle of the family and Wife's lifestyle should not be abruptly changed. Court also considered Wife's role as a homemaker, Husband's superior earning ability, greater opportunity for future acquisition of assets, more sources of current and future income, his substantial non-marital assets and the fact that some of those could be valuable in the future, as well as his age, health and current income.

Maintenance as Substitution for Child Support. In an original letter of opinion, the trial court fixed child support and maintenance at specific amounts. Subsequently, the court modified that decision *sua sponte* and awarded Wife maintenance and set child support at zero. The language of the decision did not reference the payment as unallocated family support, only as maintenance. The modified decision also explained that the court was making the modification because it wanted Wife to have that level of income and that it should not be reduced upon the youngest child's emancipation. The appellate court found that the award as crafted by the trial court contravened the statutory right to child support. The award was vacated and that issue remanded to establish maintenance and child support.

In re Marriage of Kolessar, 2012 Ill.App. (1st) 102448, 964 N.E.2d 1166

The ex-wife appealed the circuit court's decision that she was not entitled to interest on child support arrearages and that the ex-husband's actions were not willful. The appellate court held that the ex-wife was entitled to interest on the ex-husband's child support arrearages, and the ex-husband's unilateral reduction of his child support obligation was not willful.

Upon entry of the divorce judgment, the ex-husband was ordered to pay the ex-wife $2,000 in child support each month. The ex-husband filed a petition to modify his child support obligation and, while the petition was pending, the ex-husband unilaterally modified his support payment. The parties entered an agreed order with regard to the first petition to modify, but the order was silent as to arrearages and interest to be paid on the arrearage. The ex-husband later filed a second petition to modify support, and while the petition was pending, he again unilaterally modified the amount of his support payment. The ex-wife filed a petition for rule to show cause and, after hearing, the ex-wife contended: (1) the trial court erred in denying her request for statutory interest on past-due court-ordered support due by the ex-husband; (2) the trial court erred in finding that the ex-husband's first unilateral modification of his support obligation was not willful or contumacious; and (3) the trial court erred in failing to find that the ex-husband's second unilateral modification of support was without cause or justification. The appellate court reversed the court's determination as to statutory interest but affirmed the court's findings regarding the ex-husband's unilateral modifications.

The appellate court held that even though the ex-wife entered an agreed order that was silent as to child support arrearages and interest on the arrearages, she did not explicitly waive her right under the IMDMA to interest on the amount of the ex-husband's child support arrearages, and thus she was entitled to interest on the arrearage. With regard to the unilateral modification of child support, the court held that a mere absence of compliance with child support obligations is not sufficient to find the violating party in contempt, unless the evidence shows the failure to comply was willful and contumacious. The court found that the ex-husband's unilateral reduction was not willful because at the time of modification, one of the two children had reached the age of majority, the ex-wife had remarried, and the ex-husband began working at a new job with a reduced salary.

DCFS, ex rel. Daniels, v. Beamon, 2012 Ill.App. (1st) 110541, 971 N.E.2d 542

Following entry of a permanent award of child support in paternity proceedings, Mother filed a verified petition for modification of child support, contending that the award improperly deviated from the guidelines. Father filed a 735 ILCS 5/2-615 motion to strike which was granted, and Mother appealed. The court affirmed and remanded with directions.

On July 9, 2010, the court held that it was without jurisdiction to review the trial court's permanent award of child support on Mother's appeal from trial court striking her petition because the child support order was final for purposes of appeal and Mother did not file a timely notice of appeal from the order. Further, in her petition, Mother did not claim a substantial change of circumstances as a basis for the modification. Therefore, a petition for child support modification relying on the guidelines alone cannot be brought within 36 months of the date of the support order. However, this court did hold that before granting Father's motion to strike Mother's petition, the trial support was to give Mother the opportunity to correct the deficiency in her pleading. Therefore, although this court affirmed the trial court's order granting the 2-615 motion to strike, this matter was remanded with directions that the trial court afford Mother the opportunity to amend her petition.

In re Marriage of Berberet, 2012 Ill.App. (4th) 110749, 974 N.E.2d 417

Child Support, Dissipation and Property

The Wife appealed from the trial court's decision providing for a downward deviation from the child support guidelines, its determination that Husband did not dissipate his workers' compensation, its determination that the Husband's certificates of deposit were not marital property, and the trial court's decision not to assign dissipation to the Husband. The appellate court affirmed the trial court's decision.

Deviation from Guideline Support

The first issue on appeal was whether it was an abuse of discretion to deviate downward from child support guidelines. The court held that the trial court did not abuse its discretion in so doing. The court found that if the guideline amount was awarded, the Wife's net monthly income would exceed the Husband's income by approximately $4,000.00, and if the guidelines were imposed, the Husband's involvement with the children would be adversely affected. Further, the court divided the tax dependency exemptions. The court found that the Husband contributed to the cost associated with raising the children and that his contribution is not so disparate from the Wife's contribution that no reasonable person would agree with the court's allocation of the tax exemptions for the parties' children.

Dissipation

The Wife next argues that the Husband dissipated his workers' compensation settlement. The court found that the Husband received over $46,000.00 for an injury suffered during the marriage. The Wife argued that he dissipated over $21,000.00. The Husband testified that he took 3 vacations and made a number of cash withdrawals with which he paid his attorney fees, rent, groceries and credit cards bills. The court pointed out that the use of marital assets to pay fees to one's attorney for the costs of the divorce constitutes a dissipation of marital assets. The court found that the Wife also used marital funds for her attorney fees and vacations, and the Wife used approximately the same amount of money.

Property

The court found that a series of CDs opened by the Husband were non-marital property. Although the Husband placed an inheritance in the marital account, he merely used the marital account as a conduit until he transferred the money to the CDs.

Finally, the court found that the trial court did not err in valuing the Husband's vehicle at $33,875.00, despite the fact that he had purchased the vehicle a year before the divorce for $43,855.00. The court found that property should be valued as of the date of trial or as close to the trial date as practicable. Further, the Wife failed to present sufficient evidence that the Husband paid an excessive amount for the vehicle or that he took actions to cause the depreciation of the vehicle.

In re Marriage of McGrath, 2012 IL 112792, 970 N.E.2d 12

Following the entry of the judgment for dissolution of marriage, the Wife petitioned the court to establish the Husband's child support obligation. The court ordered the unemployed Husband to pay $2,000.00 per month. The appellate court affirmed the judgment, the Husband appealed, and the Supreme Court reversed and held that the funds the Husband regularly withdrew from his savings account in order to support himself while unemployed was not "net income" for purposes of calculating child support.

During the course of the post-decree proceedings, the trial court found that the Husband withdrew $8,500.00 from a savings account to meet his monthly expenses. The court explained that it was not imputing income to the Husband, but was basing the amount of child support on the Husband's living expenses and the assets which are available to him to meet his living expenses. An order of withholding was entered in the amount of $2,000.00 per month. The appellate court affirmed.

On appeal, the Supreme Court found that the trial court erred in its initial calculation of the Husband's net income because it included amounts that the Husband regularly withdrew from his savings accounts. The Court found that the money in the account already belonged to the Husband and that simply withdrawing it does not represent a gain or a benefit to the owner.

The money was not coming in as an addition. In its decision, the Supreme Court stated that the courts were rightly concerned that the amount generated by the Husband's actual net income was inadequate, particularly when the evidence showed that the Husband had considerable assets and was withdrawing over $8,000.00 from a savings every month. The court held that if application of the guidelines generates an amount that the court considers inappropriate, the court should make a specific finding to that effect and adjust the amount accordingly. One factor that the court can consider in determining that that amount is inappropriate is "the financial resources and needs of the non-custodial parent." The Court held that the trial court should calculate the Husband's net income without regard to the amount that he withdraws from the savings accounts. After doing so, the court may consider whether 28% of this amount is inappropriate based on the Husband's assets. If the court determines that the amount is inappropriate, it should make a specific finding required by 505(a)(2) and adjust the award accordingly.

COMPUTER CRIME

People v. Janisch, 2012 Ill.App. (5th) 100150, 966 N.E.2d 1034

The defendant appeals her conviction of computer tampering under the Computer Crime Prevention Law (720 ILCS 5/16D-3(a)(2)(West 2006)). The defendant ex-wife and ex-husband were in the midst of an ongoing dispute over child support. They had been divorced for over a decade. Ex-husband began receiving emails from a "Misty Reynolds" suggesting a romantic relationship. The emails from "Misty" referred to information ex-husband had put in other emails sent from his account, including his salary and his attendance at a recent company dinner. At around the same time, someone had accessed ex-husband's email account and sent a personal email between him and his current wife to everyone on his contact list. Ex-husband's IP logs and subscriber information were subpoenaed. The IP address was registered with the defendant's mother, who testified that the defendant was living with her at the time the emails were sent and that she had access to the Internet.

The appellate court held that the defendant's conduct in accessing ex-husband's email account without his authorization clearly fell under the plain meaning of the statute. This case is important to note for family law practitioners in order that they can caution clients that criminal action could be taken against them if they sign into their spouse's email and use the information they find without the permission of their spouse.

CONFLICT OF INTEREST

In re W.R., 2012 Ill.App. (3rd) 110179, 966 N.E.2d 1139

The appellate court affirmed the trial court's decision granting a new trial, finding that attorney's representation of father of one of the children constituted a *per se* conflict of interest.

The state filed a petition against Mother, alleging that the children were neglected. Attorney Drell was appointed to represent W.R., Sr. (Father) in the juvenile proceeding. During the closing arguments, the GAL referred to a prior family court case. The judge asked the attorneys about the family law court case, and it was discovered that Drell was the mediator in that case involving Mother and Father. Mother filed a motion for a new trial based on a violation of Rule 1.2 of the Rules of Professional Conduct. The trial court held that there was a *per se* conflict of interest and the State appealed.

The appellate court held that although Drell never represented Mother, she was once in a position to access information about her, and possibly form an opinion as to which parent should have custody of W.R. The court found that it did not serve the interests of future mediations for clients to know that information disclosed during the process could later be used

against them. The court also held that this was a violation of Rule 1.2 because the record revealed that the issues of custody and visitation were present throughout the juvenile court proceedings and the parties in the two cases were the same. Also, only three years had elapsed between the family court case and juvenile case. Therefore, any information that Drell had learned as the mediator, could still be relevant to the juvenile case.

CONTRACT INTERPRETATION: Custody

HFS v. Cortez, 2012 Ill.App. (2nd) 120502, 2012 WL 6087180

Father appeals from the trial court's order dismissing his petition for custody of the minor child and for an order to return the child to Illinois. The appellate court dismissed in part and affirmed in part.

The minor child was born in September 2000. In February 2011, the Mother of the child, who was living in California with the child, filed a uniform support petition in Kane County. The petition sought to establish paternity and to obtain a support order. The Father filed a petition for DNA testing. The testing resulted in a 99.99% probability of parentage. The state's attorney sought a hearing on the Mother's petition, and the Father filed a three-count petition seeking an order to return the child to Illinois, custody and the abatement of child support during the pendency of the proceedings. The Department of Health and Family Services (HFS) was granted leave to file a response to the Father's petition and filed a motion to strike the petition. The Mother entered a "special" appearance for the purpose of determining jurisdiction and requested the court to deny or strike the Father's petition. The trial court denied the Father's claim for the child's immediate return and denied his claim for custody finding that the court did not have custody over the Mother for determination of custody. The trial court entered a temporary support order and in the same order stated, "provisions of this order regarding custody is (*sic)* hereby appealable."

The appellate court found that they had a duty to consider the jurisdiction issue *sua sponte,* as the trial court merely stated that the "provisions of this order regarding custody is (*sic)* hereby appealable." No reference to Rule 304(a) was made in the trial court order. Rule 304(a) requires an "express written finding" that there is no reason for delaying appeal. The appellate court found that there was no express finding pursuant to Rule 304(a), but the order specifically referred only to the appealability of the custody provisions and not to the appealability of the claim for the immediate return of the child. Further, while the trial court's order stated that it "denied" the claim of custody, such a characterization of the disposition is incorrect. As the trial court found that it did not have jurisdiction, the trial court could not deny the claim; it could only dismiss for lack of jurisdiction. Therefore, this was not a final order and was not appealable.

However, the appellate court found that the Father's request of requiring the petitioner to return the minor child to Illinois was in fact a claim for injunctive relief. The appellate court found that by denying the claim, the trial court refused to grant the requested injunctive relief. The appellate court lacked a record to determine whether or not the Father had sufficient evidence to be granted the injunctive relief, leaving no basis to reverse the trial court. Therefore, the appeal was dismissed as to all issues other than the trial court's denial of the claim seeking an immediate return of the minor child to Illinois, which was affirmed.

CONTRIBUTION TO COLLEGE

In re Marriage of Koenig, 2012 Ill.App. (2nd) 110503, 969 N.E.2d 462

Former Wife filed a post-decree petition for retroactive contribution for college and law school expenses. Former Husband filed a motion for summary judgment, and the court granted former Husband's motion. Former Wife appealed. On appeal, the court reversed and remanded.

The appellate court performed a thorough review of *Petersen v. Petersen*, 403 Ill.App. 3d 839 (Wife was not entitled to retroactive college expenses where the allocation of college expenses was reserved in the Judgment; therefore, the allocation would be in the nature of a modification of child support) and *In re Marriage of Spircoff,* 959 N.E. 2d 1224 (judgment specifically stated the obligation for college expenses was not expressly reserved as in *Petersen).*

The court held that this case was more in line with *Spircoff* than with *Petersen.* The parties' settlement agreement, incorporated into the judgment for dissolution of marriage, contained neither a reservation clause on the issue of college and postgraduate expenses nor any reference to section 513. Rather, it affirmatively assigned responsibility to both parties for the college and post-college expenses of the parties' daughter. Therefore, the cause was remanded for hearing on contribution to the expenses.

CUSTODY

In re Marriage of Perry, 2012 Ill.App. (1st) 113054, 2012 WL 1622619

The appellate court affirmed the order of the circuit court granting temporary custody of the children and temporary possession of the home to Husband.

Throughout the marriage, Wife had been a stay-at-home mom. Wife filed for divorce on March 15, 2011, and in her petition for dissolution of marriage, she asked for temporary custody of the children, child support and exclusive possession of the nonmarital home (purchased by Husband prior to the marriage). After hearing and closing arguments on the issue, the court granted temporary custody of the children and temporary possession of the home to Husband.

On appeal, Wife first argued that the circuit court exceeded its authority when it granted Husband temporary custody of the children and exclusive possession of the residence and lacked authority to do so because Husband did not have a pleading on file requesting such relief. The court held that Wife's pleading placed the custody of the children and possession of the house in issue, thereby making these issues justiciable to allow their determination by the court. Further, when Husband testified that he wanted custody of the children, Wife did not raise any objections.

Wife next argued that the court should not have considered her work as an escort in awarding temporary custody to Husband, because it has no bearing on her parenting. The court found that it was not Wife's work as an escort that was at issue, but its impact of her line of work on the children. Evidence was presented that Wife was neglecting her children because of her escort business, and as a result, their school work and the children's relationship with their mother were deteriorating. Further, evidence was presented that Wife was exposing the children to an individual who may have been a client. There was no evidence in the record that the court was prejudiced by the fact that Wife was an escort.

Next, Wife argues that the court erred in admitting a flash drive containing photographs into evidence because Husband did not sufficiently authenticate and establish a foundation for the photographs and because the photographs were not produced pursuant to Supreme Court Rule 214 (Ill. S. Ct. R. 214 (eff. Jan. 1, 1996)). After objections were made as to relevance, foundation and nondisclosure in response to Supreme Court Rule 214, the court ruled that the photographs were relevant. Wife never obtained a ruling from the court on her objections based on foundation and Supreme Court Rule 214, nor did she move to strike the evidence. Therefore, she waived her objection. The court did find that there was insufficient foundation that the pictures came from a certain escort website. However, the error was harmless as the court had other information that Wife was working as an escort. Finally the court did not abuse its discretion in denying Wife's motion to reopen the proofs to admit Husband's phone into evidence to show that the pictures had come from the phone and not the website. Because

Wife already testified that the pictures came from Husband's phone, the pictures were not the determining factor in her case, and there was a chain of evidence issue with regards to the phone.

DIRECTED VERDICTS

Grunstad v. Cooper, 2012 Ill.App. (3rd) 120,524, 978 N.E.2d 727

After hearing on the Father's motion to modify custody, the court granted the Mother's motion for directed verdict. The Father appealed, and the Appellate Court affirmed the trial court's ruling.

Pursuant to a 2003 Court Order, the parents were granted joint custody of the minor children, and the Mother was named the residential parent. In 2010, the Father filed a petition to modify custody in which he sought to have primary residential custody of the children. At the close of the Father's case, the Mother made a motion for directed verdict. The court found that the changes in circumstances did not adversely affect the welfare of the children, and granted the Mother's motion.

On appeal, the Father argued that the court erred when it denied his motion to conduct an *in camera* interview of one of the children. The court held that the trial court's denial of the Father's motion to conduct an *in camera* interview of his minor daughter with regard to with which parent she wanted to live did not constitute an abuse of discretion. The appellate court found that during the trial court proceeding, the court decided to delay ruling on Father's motion until after the evidence was presented. The daughter was ten years old at the time of the trial and the court was aware of the daughter's preference to live with her Father, but was reluctant to conduct an interview because the child's preference was only one factor to consider in reaching a custody decision, and the court was concerned about the emotional impact the interview would have on the child. Further, the court does not need to interview a child in a custody dispute in order to consider and weigh what it considers to be the wishes of the child.

The Father's second argument on appeal was that the court erred when it granted the Mother's motion for a directed verdict. Specifically, Father argues that he presented a *prima facie* case sufficient to defeat the motion for directed finding. When ruling on a motion for a directed verdict, the court must first determine, as a matter of law, whether the plaintiff has presented a *prima facie* case. A plaintiff establishes a *prima facie* case by proffering at least some evidence on every element essential to the plaintiff's underlying cause of action. If the circuit court determines that the plaintiff has presented a *prima facie* case, the court then moves to the second prong of the inquiry, and must consider the totality of the evidence presented, including any evidence which is favorable to the defendant, by weighing all the evidence, determining the credibility of the witnesses, and drawing reasonable inferences therefrom. In this case, the court found that there was a substantial change of circumstances. However, the court found that the trial court did a thorough job reviewing all of the evidence, including the child's preference to live with her Father, the discrepancies between the teacher's testimony at trial in which she stated that the child did not have a good year and was not working at her potential, the child's report card in which the teacher wrote all positive comments, and the fact that the child had missed school because she had lice. After reviewing the evidence, the court did not think that the trial court abused its discretion by granting the Mother's motion for directed verdict.

DISGORGEMENT

In re Marriage of Nash, 2012 Ill.App. (1st) 113724-B, 2012 WL 4497728

During the course of the proceedings, the Husband was ordered to pay $5,000 to his Wife's attorney and $5,000 to the child representative. The same order stated that if he did not pay the money in 14 days, his attorney would have to pay the money out of the $15,000 retainer he had received. The Husband did not pay, and his attorney withdrew as counsel and asked to intervene in the case. The attorney refused to turn over the money and was held in "friendly contempt." On appeal, the court vacated the order requiring the attorney to disgorge the $15,000 and finding of contempt and remanded.

The appellate court held that prior to entering an order requiring an attorney to disgorge funds from his retainer for the payment of interim attorney fees and costs to both parties' counsel, the trial court must first find that both parties lack financial ability or access to assets or income for reasonable attorney fees and costs. Here the court made a finding that the Wife lacked the financial ability, but the court never made that same finding with regard to the Husband.

DISSIPATION

See *In re Marriage of Romano,* 2012 Ill.App. (2nd) 091339, 968 N.E.2d 115 (above)

DISSOLUTION OF MARRIAGE

In re Marriage of D'Attomo, 2012 Ill.App. (1st) 111670, 978 N.E.2d 277

The parties were married for 11 years. Both parties were attorneys. However, after the first child was born, the parties agreed that the Wife would stay at home. During this time, the parties opened a bakery and advanced over $200,000 to the bakery by taking a home equity loan. Further, the Wife obtained a $30,000 loan for the bakery by signing a promissory note. She did not sign in the capacity of the business. During trial, the Wife's business appraiser valued the business at $69,000. The appraiser did not consider the home equity loan as a debt to the bakery. Further, the valuation assumed that the $30,000 loan was a liability to the business. The judge awarded the business to the Wife, found that the value of the business was $69,000, and treated the funds from the home equity loan as an investment into the business rather than a loan to the business. He ordered that the Husband pay lump-sum maintenance of $36,000 payable at the rate of $1,000 per month for 36 months. The court reasoned that Wife could pursue the bakery business and either prosper or realize that she needed to pursue a new line of work.

The Husband first appealed to the classification of the home equity loan. The Husband argued that the loan was an implied in-fact contract, not an investment. The appellate court found that the trial court was in a better position to weigh the testimony, and that the trial court had found the Wife was the more credible witness. Further, the appellate court found that the trial court's ruling was not against the manifest weight of evidence because the trial court took into account that the debt was not evidenced by a note between the business and the lender.

Next, the Husband argued that the court erred in awarding the Wife rehabilitative maintenance without requiring her to seek gainful employment. The appellate court held that it is clear that the court awarded maintenance in gross and did not need to state the aforementioned. Here, the order provides a definite, non-modifiable total sum in installments over a definite period of time.

The Husband also argued that the valuation of the business was incorrect because the $30,000 loan should be classified as a personal debt to the Wife, not a marital debt. The appellate court found that the loan was ostensibly obtained to benefit a marital asset even though the Wife signed for it herself and not as the president.

EXCLUSIVE POSSESSION

In re Marriage of Levinson, 2012 Ill.App. (1st) 112567, 975 N.E.2d 270

Wife filed a petition for exclusive possession of the marital residence for the duration of the dissolution of marriage proceedings. The circuit court granted the petition, and the Husband filed an interlocutory appeal. The appellate court reversed the circuit court's decision.

During the proceedings, the parties were following a schedule in which the children remained living in the residence and the parents rotated in and out of the house on a weekly basis. The Wife alleged that this "changing of the guard" was confusing to the children, both of which have special needs, and that there was no stability in the children's lives. She further alleged that the Husband left the home in total disarray. The court appointed an evaluator who testified that although this situation caused stress to the children and although the children had a closer relationship with their mother, the children were not being seriously endangered by the current situation. After hearing on the matter, the trial court found that the children's well-being was jeopardized by the current situation.

On appeal, the court held that section 701 of the Illinois Marriage and Dissolution of Marriage Act imposes a high bar for exclusive possession. The court found that the combination of factors in this case did not give rise to constitute physical or mental jeopardy.

FEES - ADVANCED PAYMENT RETAINER

In re Marriage of Earlywine, 2012 Ill.App. (2nd) 110730, 972 N.E.2d 1248

During the course of dissolution proceedings, the Wife's attorney petitioned for interim attorney fees. The trial court granted the petition and ordered the Husband's attorney to turn over $4,000.00 held in an advanced payment retainer. When the Husband's attorney's motion for reconsideration was denied, Husband's attorney refused to turn over the funds and asked to be held in friendly contempt. The appellate court held that the Marriage Act provision for interim attorney fees did not exempt "advance payment retainers."

An advanced payment retainer is a retainer that is paid to an attorney for his commitment to provide legal services in the future. Money paid in an advanced payment retainer becomes the property of the attorney immediately upon payment and are deposited in the attorney's general account. The court held that advance payment retainers should be used sparingly and only to accomplish some specific purpose for a client that other forms of retainers would greatly frustrate (such as when a client wishes to hire counsel to represent him or her against judgment creditors.) The court held that permitting the use of an advanced payment retainer in this case would serve the purpose of doing away with leveling the playing field between the parties. Further, the court held that advanced payment retainers are subject to turnover in a dissolution case because the court may order the funds held by one party's attorney in a "retainer" to be turned over to opposing counsel as interim attorney fees. The statutory language does not limit the type of "retainer" that is subject to disgorgement. Therefore, the Husband's attorney was ordered to turn over funds to the Wife's attorney.

The appellate court vacated the contempt order, as the Husband's attorney acted solely to respectfully test the propriety of the turnover order.

FORUM NON CONVENIENS.

In re Marriage of Ricard, 2012 Ill.App. (1st) 111757, 975 N.E.2d 1220

The Husband filed a petition for dissolution of marriage in Cook County, Illinois. The circuit court granted the Wife's motion to dismiss the petition on the grounds of *forum non conveniens.* On Appeal, the court affirmed the trial court's decision.

The Husband is a French citizen who owns property in Glencoe and Winnetka, Illinois and multiple properties in France. At the time of the divorce, he was living at the Winnetka house. The Wife is a French citizen who resides in France. The parties were married in France. In 2009, the Husband filed for divorce in France. In a separate action, the Wife filed for spousal support in France. She was awarded $5,000.00 a month in spousal support. Husband voluntarily dismissed the divorce action in France and refilled in Illinois.

Generally, a plaintiff's choice of forum will prevail if the venue is proper and the inconvenient factors chosen to the forum do not greatly outweigh the plaintiff's substantial right to try the case in the chosen forum. A trial court is to determine both the private and public interest factors in deciding *forum non conveniens.* The private interest factors include: (1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary and real evidence; and (3) all other practical problems that make trial of a case easy, expeditious and inexpensive. The public interest factors include: (1) the interest in deciding controversies locally; (2) the unfairness of imposing trial expense and the burden of jury duty on residents of a forum that has little connection to the litigation; and (3) the administrative difficulties presented by additional litigation.

In this case, the court found that the trial court did not abuse its discretion in dismissing the Husband's petition because both parties were French citizens, the Wife resided in France for her entire life, Wife only had a French passport, she was not fluent in English and required an interpreter, Husband was a retired millionaire and owned multiple properties in France, and the parties were married in France.

GRANDPARENT VISITATION

In re Anaya R., 2012 Ill.App. (1st) 121101, 977 N.E.2d 836

The paternal Grandmother of a child born out of wedlock petitioned, under the grandparent visitation statute, for guardianship of the child after the child's Father was deported. After the petition was denied, she filed a petition for visitation. The trial court denied the petition and the Grandmother appealed. The appellate court affirmed.

On appeal, the Grandmother claimed that the trial court erred in denying her petition for visitation because she sufficiently demonstrated that a denial of visitation would harm the child. Under the grandparent visitation statute, a grandparent is permitted to file a petition for visitation "if there is an unreasonable denial of visitation by a parent" and at least one of a number of conditions exists. 750 ILCS 5/607(a-5)(1). On appeal, the trial court found that the Grandmother presented no evidence that the child would be harmed without a grant of visitation; the Grandmother made misrepresentations to the judge in her initial petition for temporary guardianship (she alleged she was the primary caretaker and that the Mother was unwilling to care for the child), which proved to be untrue; the Grandmother told the child things that were untrue or confusing; Grandmother attempted to interfere with the Mother's relationship with the child; and the trial court observed that the Grandmother was "domineering and overbearing." Therefore, the appellate court affirmed the trial court's decision.

GUARDIAN AD LITEM – CONFLICT OF INTEREST

In re Marriage of Petrik, 2012 Ill.App. (2nd) 110495, 973 N.E.2d 474

Pro se Husband appealed from orders reappointing Attorney O'Connell as the Guardian *ad litem*, denying the Husband's motion to discharge the GAL and to strike the GAL report, granting the GAL's petition for fees, and denying the Husband's motion for sanctions against the GAL. The appellate court affirmed in part, reversed in part and remanded.

Shortly after the court entered a marital settlement agreement and joint parenting agreement, the parties filed dueling petitions for rules to show cause. The Husband filed a petition to modify visitation and to appoint a GAL. The court appointed O'Connell as GAL. On June 11, 2008, the court entered an order resolving the issues. The order further stated that the parties would use O'Connell as an ongoing mediator in the case. There were no pending petitions when, on March 17, 2009, O'Connell filed a motion to compel the parties' cooperation with the GAL. On March 27, 2009, the GAL's motion was granted and an order was entered stating that "*O'Connell shall continue to serve as GAL.*" On September 15, 2009, O'Connell filed a GAL report. On November 23, 2009, after the GAL report was filed, the Wife filed a petition to modify visitation. The Husband filed a motion to discharge O'Connell and to strike the GAL report. At a hearing in February of 2010, the court found that the June 11, 2008 order discharged O'Connell and that the March 27, 2009 order reappointed O'Connell as the GAL. The court denied the Husband's motion and entered an order reappointing the GAL, stating, "*the appointment is continuous with his appointment on 3/27/09. Between 6/11/08 and 3/26/09, O'Connell was acting as a mediator. O'Connell will no longer act as a mediator in this case.*" O'Connell filed a second GAL report on June 2, 2010. On November 8, 2010 the court entered a modified joint parenting agreement. O'Connell filed a petition for his fees for his work performed after March 27, 2009. The Husband argued that O'Connell was not entitled to fees after June 11, 2008 and filed a petition for Rule 137 sanctions alleging that in O'Connell's motion to compel the parties' cooperation, O'Connell misrepresented that he was acting as the GAL at that time. The court denied the Husband's motion and granted O'Connell's fee petition.

On appeal, the court found that the trial court abused its discretion in reappointing O'Connell as the GAL when no post-dissolution proceedings were pending. A GAL is only to be appointed to assist the court in resolving pending proceedings. When O'Connell was reappointed on March 27, 2009, there were no pending proceedings between the parties. Therefore, there was no justification for reappointing O'Connell on March 27, 2009. Further, the court did not enter an order setting forth the tasks of O'Connell. Therefore, in the absence of pending post-dissolution proceedings, and in the absence of an order specifying the tasks O'Connell was to complete, none of the fees for work O'Connell performed between March 27, 2009 and February 24, 2010 were reasonable or necessary. Any work that O'Connell performed during that time was at his own peril.

The appellate court found that the denial of the Husband's petition for Rule 137 sanctions was proper. The court found that because O'Connell was not a party or an attorney for the parties, but rather a mediator at the time of his filing of the petition to compel the parties to cooperate with the GAL, Rule 137 was not a proper remedy for his conduct. The proper remedy for O'Connell's purported misrepresentation would have been a petition for adjudication of criminal contempt.

Finally, the court gave a warning to the attorneys. The court stated, "*We note that an attorney in O'Connell's position would be wise to be cognizant of conflicts of interest arising out of the appointment as mediator and GAL in the same matter. Given a mediator's obligation to keep mediation communication confidential, contrasted with a GAL's duties to testify or submit a written report to the court, an attorney's exposure to confidential information as mediator would undermine his ability to subsequently fulfill his role as GAL.* "

GUARDIANSHIP

Karbin v. Karbin, 2012 IL 112815, 977 N.E.2d 154

The Husband filed for a dissolution of marriage from his disabled Wife. Wife's daughter, Wife's plenary guardian, filed a counter petition for dissolution. The Husband dismissed his petition and moved to dismiss the Wife's counter petition. The circuit court dismissed Wife's counter petition

and the appellate court affirmed the trial court. Leave to appeal was granted, and the Illinois Supreme Court reversed and remanded.

The Illinois Supreme Court first looked to *In re Marriage of Drews,* 115 Ill.2d 201 (1986). In this case, the court held that a plenary guardian of a disable adult does not have standing to initiate an action for the dissolution of a ward's marriage. In so ruling, the court noted that a strong "majority rule" existed, which held that "absent statutory authorization, a guardian cannot institute an action on behalf of a ward for the dissolution of the ward's marriage." The court held that sections 11a-17 and 11a-18 of the Probate Act grants only limited standing related solely to matters directly bearing on the management of the ward's estate.

The Illinois Supreme Court next considered *In re Marriage of Burgess,* 189 Ill.2d 270 (2000). In that case, rather than accepting *Drews'* interpretation of the powers conferred to guardians under the Probate Act as being exclusive or limiting, the court interpreted those powers broadly, concluding that, although not specifically stated in the statute, a guardian's authority to maintain a dissolution action on behalf of a ward "may be implied" from these provisions, and that Section 11a-17(a) provided a broad description of a guardian's powers.

The Illinois Supreme Court ultimately found that courts have moved away from requiring explicit grants of statutory authority in order for a guardian to act, instead allowing "implied authority" to suffice.

Further, the Illinois Supreme Court held that with the concept of "injury" removed from divorce in Illinois, it is difficult for the court to accept the view that the decision to divorce is qualitatively different from any other deeply personal decision. If the disabled adult regains competency and disagrees with the guardian's decision, remarriage to the former spouse may be possible. Thus, there is no reason why the guardian should not be allowed to use the substituted-judgment provisions found in section 11a-17(e) of the Probate Act to make all the types of uniquely personal decisions that are in the ward's best interest, including the decision to seek a dissolution of marriage. The Illinois Supreme Court also held that given the purpose of the Probate Act to protect the ward, it would contravene that purpose if it were to prohibit the exercise of the guardian's power in the best interest of the ward while endorsing a power imbalance against the incompetent spouse, which would result in physical or emotional abuse, financial exploitation or neglect of the incompetent spouse by the "competent" partner.

As a result, the Supreme Court overruled *Drews,* and reversed the judgments of both the circuit and appellate courts.

Estate of H.B., 2012 Ill.App. (3rd) 120475, 2012 WL 6042532

Guardianship and the Probate Act

This is an appeal by biological Mother from a 2010 trial court order granting the maternal Grandmother "temporary" guardianship of minor child H.B. over Mother's objection and a 2012 order granting the maternal Grandparents joint guardianship over H.B., also over Mother's objection. The 2010 order was reversed and the 2012 order was vacated and remanded.

2010 Order. Grandmother filed an "Emergency Petition for the Appointment of a Temporary Guardian ", which was granted by the trial court. Grandmother brought the emergency petition under the Probate Act. The appellate court reversed, stating that tor the Probate Act does not contain any provisions allowing for an "emergency" or for "temporary custody" over the objection of the biological parent. An emergency request to remove a child from the care of the biological parent should have been addressed under the Juvenile Court Act of 1987. 705 ILCS 405/1-1 *et.seq.* By proceeding under the Probate Act and not under the Juvenile Act, Mother was

prevented from having court appointed counsel and also from having the court require Mother to complete court ordered programs to improve her parenting skills.

Under the Probate Act there are two limited situations under which a non-parent can be named as a guardian: (1) a parent can designate a guardian, in a writing witnessed by two credible witnesses over the age of 18 which must also be approved by the other non-petitioning parent, if also willing and able to make day to day decisions regarding the child 755 ILCS 5/11-5(a-1), 11-5.3, 11-5.4 (West 2010); and (2) only after the court finds the biological parents are not willing or able to make and carry out the day to day decisions for their child *and* that guardianship is in the child's best interest. 755 ILCS 5/11-5(b). Here there was no evidence offered to rebut the presumption that Mother was willing and able - and there were no findings regarding the biological Father's willingness and ability to care for the child and no evidence regarding the child's best interest.

2012 Order. This Order was vacated and remanded. In determining guardianship, the trial court must first consider standing to bring the petition and then rebut the presumption that a parent is willing and able. In this case, the trial court considered and made a decision that Mother was willing but unable to make day to day decisions regarding the child. However, the court did not make any factual determination as to whether biological Father was willing and able to make day to day decisions. Nor did the court consider or make any findings as to what was in the child's best interest. The findings of "best interest" (Section 11-5 of the Probate Act) and whether a parent is "able and willing" (Paragraph b) are separate questions of fact. The trial court did not conduct the examination of these two separate factual issues before granting the guardianship. The order was vacated and remanded.

INTERNATIONAL CHILD ABDUCTION REMEDIES ACT

Khan v. Fatima, 680 F 3rd 781, C.A. 7 (IL)

Father, a Canadian resident, brought action against Mother, a United States citizen who had taken the parties' child to live with her in the U.S., seeking return of the child under the International Child Abduction Remedies Act. The United States District Court for the Northern District of Illinois ordered the child returned to Father. Mother appealed. The Court of Appeals held that the evidentiary hearing was inadequate, and the court's error in failing to make findings of fact and to allow psychological evidence was not error. Therefore, the case was vacated and remanded, with directions.

The parties flew to India for vacation with their child. While in India, Mother had Father arrested for abuse. Mother, who was pregnant, flew to the United States with the child. The second child was born in the United States, and this matter only concerns the first child. After one day of hearing, the trial court issued a final order of return and also ordered that Mother was to give the child's passport to Father. Mother appealed. On Mother's motion, the appellate court stayed both the order of return and the order that Mother turn over the passport, pending the decision in Mother's appeal. On May 1, 2012, the court ordered the child returned to her Mother pending the court's final decision, but that Mother and child's passports were to be held by the U.S. Marshall Service.

Article 13(b) of the Hague Convention provides a defense to the return of an abducted child if there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. This must be proved by clear and convincing evidence (42 U.S.C. Section 11603(e)(2)(A)). Rule 52(a)(1) of the civil rules required the judge to "find the facts specifically and states [his] conclusions of law separately" when he is the trier of fact. The court's final order contained no findings of fact relating to the Article 13(b) defense. In the order, the judge simply made a conclusion of law. The judge

ignored the potential risk in Father's behavior towards Mother in the child's presence even though evidence was presented regarding same. The judge also refused the request that the child be seen by a psychologist for an evaluation. The reviewing court held that the evidentiary hearing was inadequate and that Rule 52(a) was violated, as there were no findings of key issues.

Walker v. Walker, 2012 WL 5668330, C.A.7 (IL)

Husband, a citizen of Australia, filed suit under the International Child Abduction Remedies Act (ICARA), seeking to compel Wife, a citizen of the United States, to return the couple's three children to Australia. The United States District Court for the Northern District of Illinois denied the petition. Husband appealed, and the United States Court of Appeals reversed and remanded.

The parties were married in Chicago in 1993. The family lived in Seattle until 1998, when they moved to Australia. The eldest child was born in the United States but only lived here for one year before the parties' move. The two younger children were born in Australia. In June 2010, the family traveled to the United States. Both parties expected Wife and children to remain in the United States for 6 months. According to Husband, the children and Wife were to live with his Wife's parents while the family home in Australia was being remodeled. According to Wife, the trip was intended as an extended prelude to a permanent move to the United States. Husband returned to Australia in late July 2010. In November 2010, Wife filed for divorce in Cook County. Upon receiving notice, Husband's attorney in Australia sent a letter, dated January 21, 2011, Wife's divorce attorney offering to settle the divorce out of court. In the letter he made, "on a without prejudice basis," certain proposals that were expressly conditioned on Wife's acceptance of the offer. For example, in exchange for granting Wife primary custody and allowing the children to remain in the United States, Husband asked for the full nine weeks of the children's summer break and two weeks over winter break. He further requested that he be allowed to visit with the children in the United States at least twice per year. The letter also referred to the Hague Convention and noted that the parties' habitual residence was Australia. After several exchanges, it was clear that the parties would not reach an agreement. Husband then filed a request for the return of the children with the Australian Central Authority in mid-February 2011. In May of 2011, he filed a petition for return in the Northern District of Illinois. Following a two-day evidentiary hearing, the district court denied the petition.

Wife first argued that the case was moot in light of an Illinois state court judgment awarding her sole custody of the children. The appellate court held that the case was not moot. Article 17 of the Hague Convention expressly states, "The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention." The entire purpose of the convention is to deter parents from absconding with their children and crossing international borders in the hopes of obtaining a favorable custody determination in a favorable jurisdiction.

The next issue on appeal is the court's decision to admit the January 21 letter written by the Australian attorney. The appellate court found that the letter was an offer of settlement and should have been inadmissible. However, the letter provides no basis for denying the petition for return.

Husband further challenged the district court's findings that he (1) failed to establish that the children were habitually resident in Australia; (2) failed to establish that he was exercising his custody rights; and (3) consented to the children remaining permanently in the United States. The district court identified May 4, 2011, the day the Husband filed his petition for return, as the date that the retention began. The court stated that this was the first time Husband unequivocally signaled his opposition to the children's presence in the United States. The

appellate court found that the district court was apparently under the impression that Husband did nothing during the five months between the exchange of letters with Wife and the filing for the petition for return. The petition reveals that in mid-February, Husband filed a request for return with the Central Authority in Australia. The appellate court found that for the district court to conclude that Husband's opposition was not apparent until May 4, 2011 was clear error. Accordingly, for the purpose of the analysis, the appellate court used a retention date of January 21, 2011, or at the latest, a few weeks thereafter.

To prevail on his petition, Husband was required to show that Australia was the children's habitual residence at the time of their retention in the United States. In a case alleging wrongful retention, the court must determine a child's habitual residence by asking "whether a prior place of residence was effectively abandoned and a new residence established by the shared actions and intent of the parents coupled with the passage of time." The court could not find enough in the record to support the conclusion that the parents arrived in the United States with the shared intention of abandoning Australia and establishing a new habitual residence in the United States.

The district court found that Husband abandoned the children. In support of this conclusion, the court noted that he did not return to the United States after he left in July of 2010, that he ceased supporting the family after the January 2011 letter, and that the January letter was mainly concerned with the negotiation of support payments and it gave consent for the children to stay in the United States. The appellate court found that this did not add up to unequivocal abandonment. Both parties testified that they always intended for Husband to return to Australia for work and to oversee the construction on the house. Further, Husband had plans to spend Christmas in the United States, but because of the divorce proceedings he cancelled his plans. Further, the January 21 letter does not give consent for the children to stay in the United States, as it was for settlement purposes and it was rejected. Further, a letter which asks for 9 weeks of parenting time in the summer, 2 weeks over Christmas break, and multiple visits during the year, can hardly be characterized as indifferent to custody issues. Further, his lack of financial support is irrelevant to whether he was exercising his custody rights.

Finally, on appeal, Husband argued that the district court improperly held that his January 2011 letter was consent for the children to remain in the United States. The appellate court agreed with the Husband, finding that the letter was an opening offer. It conceded nothing, and in any event, was rendered null by the parties' failure to come to an agreement. Therefore, this case was reversed and remanded for the determination of which court system should resolve the underlying issue of child custody.

JUDGMENT

In re Marriage of Susman, 2012 Ill.App. (1st) 112068, 2012 WL 1969293

Following the judgment for dissolution of marriage, the Husband filed a post-judgment motion to modify. The circuit court denied his motion on the grounds that the judgment was not final. The appellate court dismissed the appeal.

The marital settlement agreement allocated the marital estate, but reserved two issues for further consideration. First, the parties reserved the issue of responsibility relating to all joint taxes and federal income tax returns filed before 2008. Second, the parties reserved the allocation of personal property. After the judgment was entered, the Husband filed a petition to modify. The Husband alleged that a mistake in fact existed with respect to the parties' 2009 tax liability and that the marital settlement agreement did not apportion this liability.

The motion was denied and the appellate court dismissed the appeal, stating the court was unable to reach the merits of the Husband's claims because the reservation of issues denied

the appellate court jurisdiction. A judgment is not final unless it determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment.

JUDGMENT FOR DISSOLUTION OF MARRIAGE

In re Marriage of Bianucci, 2012 Ill. App. (1st) 100622, 962 N.E.2d 1071.

On February 9, 2010, the circuit court of Cook County denied the Petitioner-appellant's motion to reconsider the judgment for dissolution of marriage. The first issue on appeal was whether the trial court erred in denying the appellant's motion for substitution of Judge. The appellate court confirmed the trial court's ruling by stating that the appellant was able to test the waters in an open court pretrial while both parties were acting as *pro se* litigants.

The next issue on appeal was whether the trial court committed reversible error when the trial court allowed the appellee to reopen discovery and amend his pleadings after the trial began. The appellant specifically alleged that the appellee did not put her on notice of a dissipation claim and that the court committed reversible error by allowing the appellee more than 28 days to respond to a request to admit facts. The court said that because the trial court is afforded broad discretion in overseeing discovery matters, absent a showing of an abuse of discretion, the reviewing court would not overturn the trial court's ruling. The court also stated that dissipation may be considered by the trial court *sua sponte* regardless of the pleadings of either party. Further, the appellant was not prejudiced when the court ruled on the issue of dissipation because the dissipation issue was not ruled on until the court entered the dissolution order. The court also stated that the decision whether to allow an Extension for a discovery matter is discretionary, and that there was no evidence of abuse of discretion by the trial court.

The court also addressed the issue as to whether the trial court committed reversible error when it failed to name a residential parent and failed to enter an order on child support, educational Expenses and costs for Extracurricular activities of the minor child. The appellate court stated that the courts have jurisdiction to enter a judgment for dissolution of marriage, even if it has reserved the issues of child support, custody, maintenance or distribution of property. The statute does provide that when appropriate circumstances are present the court has discretion to reserve the issues of child custody, support, maintenance or distribution of property and to determine those issues subsequent to the dissolution of marriage. Specifically, the court held that in this case there was considerable evidence in the record to support the ruling of the trial court. The trial court considered a number of factors, including the financial resources of the child, the split custody system established through mediation, and the fact that both parents earned a considerable income. Therefore, the application of a child support order against either party was not warranted.

In re Marriage of Hluska, 2011 Ill.App. (1st) 092636, 961 N.E.2d 1247

The Husband appeals certain provisions in a judgment for dissolution of marriage. The first issue on appeal is whether the trial court erred in apportioning marital assets, awarding maintenance, and awarding attorney fees to the Wife without first valuing certain marital and non-marital assets. Under the IMDMA, a court must classify the property as either marital or non-marital before it may dispose of property upon a dissolution of marriage. In order to divide the marital property in just proportions, the trial court first must establish the value of the parties' marital and non marital assets. However, the Act does not require the court to place a specific value on each item of property. In this case, neither party presented evidence concerning the value of certain assets including a non-marital residence and the value of a marital business. The court held that the Husband cannot fail to disclose information on the value of the assets and then complain that the trial court erred in not placing a specific value on them.

The Husband's second issue on appeal was whether the trial court erred in reserving allocation of the Wife's credit card obligations for determination at a later date. Specifically, the Husband contends that the trial court bifurcated the dissolution judgment and reserved its determination of the credit card debt obligations without finding that appropriate circumstances Existed to warrant a bifurcation. The court held that the trial court did not bifurcate the judgment because the trial court made it clear that the Wife was responsible for paying her credit cards and that the payment of the credit cards would only be considered upon a review or petition to modify with all other factors including maintenance. The court also stated that the IMDMA authorizes a court to enter a dissolution judgment reserving issues upon the agreement of the parties, or a motion of either party and a finding by the court.

The final issue on appeal is whether the trial court erred in classifying the Husband's business ownership interests as marital property. Specifically, the Husband argued that his ownership interests in two corporations should not be considered marital property because he received his ownership interests as gifts from his brother and his mother. It is the burden of the party claiming that the property acquired during the marriage is non-marital to prove by clear and convincing evidence that the property falls within an enumerated section of the IMDMA. In this case, the ownership interests were acquired during the marriage. In this case, no stock certificates were ever issued. However the corporation's tax returns reported the percentage of stock allocated to the Husband. The court held that the corporation's tax returns reporting the percentage of stock transferred to the Husband were not sufficient evidence to satisfy the actual delivery. The evidence in this case showed that no stock certificates were ever issued. Therefore, there was no evidence to show that the shares of stock were transferred. Therefore, the Husband failed to provide proof on donative intent and delivery.

In re Marriage of Bradley, 2011 Ill.App. (4th) 110392, 961 N.E.2d 980

On April 12, 2011, the trial court entered a judgment dissolving the marriage, addressing issues of property distribution and maintenance. The Husband appealed. The first issue on appeal was whether the trial court erred in barring the claim that a farm was non-marital property and that barring the claim was too harsh of a discovery sanction. The appellate court held that the trial court acted within its discretion by barring Husband from claiming a farm was non-marital property as a discovery sanction. In this case, the Wife did not know that the Husband owned a farm until two weeks before trial, the Husband lied to the court concerning the property, and the farm was the most substantial asset before the court.

The second issue on appeal is whether the trial court erred in the amount it awarded the Wife for her attorney fees. The Appellate court held that the trial court did not abuse its discretion because a trial court may award attorney fees as sanctions when a party's misconduct has caused another party to incur fees. Further, the trial court considered section 508(a) of the dissolution act which allows a court to consider any other factor that the court Expressly finds to be just and equitable when determining a fee award under 508(a). Unnecessarily increasing the cost of litigation is a factor the court may consider in allocating attorney fees.

The final issue on appeal was whether the court abused its discretion when determining the amount of money that the Husband was to pay for child support and maintenance. The court affirmed the trial court's decision to award the Wife maintenance and further stated that the Husband had the greater present and future potential to earn income and acquire assets. As for child support, the court stated that the Dissolution Act requires the trial court to consider all income from all sources in the computation of child support. "Income" for tax purposes is not synonymous with "income" for determining child support. The Internal Revenue Code is concerned with reaching an amount of taxable income while the support provisions in the Dissolution Act are concerned with reaching the amount of parental income in order to

determine the sum each parent can pay for the support of their child. Here, the court used the father's overtime wages in the determination of net income. Because child support is modifiable, if those wages are no longer available, the court stated that the father could petition the court.

In re Marriage of Steel, 2011 Ill.App. (2nd) 080974, 977 N.E.2d 761

After the entry of judgment for divorce, the wife appealed and the husband cross appealed. The first issue on appeal is whether the retained earnings of the husband's corporation were non-marital. With the exception of approximately 6% of the husband's interest in the corporation, the husband acquired all corporate assets in question during the marriage. Property acquired during a marriage is presumptively marital, and the presumption can be overcome only by clear and convincing evidence. In this case, the appellate court affirmed the trial court in its holding that the retained earnings were the husband's non-marital property. The retained earnings could not be claimed as income by the husband since there were restrictions on the husband's ability to disburse them, the corporation relied on the retained earnings to operate its business, husband was adequately compensated by the corporation through his salary, and any additional funds that he acquired for personal use were the equivalent of loans that had to be repaid to the corporation.

The next issue on appeal was whether the husband's stock in one of his companies was partly acquired with funds that became marital through commingling. The appellate court affirmed the trial court and held that although non-marital funds were placed into a joint checking account, the funds are not commingled when the joint account is merely used for a conduit to transfer money. The specific funds in question never lost their identity and, therefore, they were not commingled with marital money.

The third issue on appeal was whether the trial court erred in holding that the marital estate is entitled to reimbursement for the payments that the husband made to his brother as part of his purchase of his brother's shares in the Subchapter S Corporation. The appellate court held that the trial court erred in its ruling and, although the source of the payments was an account into which marital funds had been deposited, the proceeds from the husband's non-marital share of the corporation had been deposited into the account, and the account from which payments were made was not a joint marital account but was rather part of a revocable trust of which the husband was the trustee and the wife was a beneficiary.

The fourth issue on appeal was whether the trial court overvalued the Michigan residence. The wife argued that the court lacked competent evidence to assign a value to the residence because the court did not have any expert valuation testimony. The appellate court held that where the parties have not presented more probative evidence on the valuation of marital property, the trial court may rely on the price for which the parties purchased the property, even if the sale was several years before trial.

This matter was remanded to the trial court for the determination of respondent's income for determining child support and maintenance.

MAINTENANCE

In re Marriage of Bolte, 2012 Ill.App. (3rd) 110791, 975 N.E.2d 1257

In April of 1998, the circuit court entered a judgment for dissolution of marriage. The Marital Settlement Agreement stated in relevant part: "The Petitioner shall pay the sum of $2,000.00 per month to the Respondent as for rehabilitative maintenance, deductible as maintenance payment to the Petitioner and as income to the Respondent, as and for rehabilitative maintenance. Said sum shall begin on the 1st day of May, 1998 and shall continue bi-weekly thereafter each month following the entry of the judgment of dissolution of marriage, with said

notice to the Petitioner's employer. All maintenance shall be terminated upon the death of either party, or the Respondent's remarriage and/or cohabitation with a person of the opposite sex on a continual conjugal basis and may be reviewable upon the Petitioner's retirement."

In June of 2010, the ex-Husband retired at the age of 59 and petitioned the court to terminate or reduce his maintenance payments. At the evidentiary hearing, the ex-Wife's doctor testified that due to Wife's medical condition of myasthenia gravis, she was unable to be employed. The trial court terminated the maintenance, stating that she had not searched for appropriate employment considering her medical condition, and that because the parties had agreed to rehabilitative maintenance and waived any claims to permanent maintenance in the Marital Settlement Agreement, the parties believed that the ex-Wife would improve and would become employed. Further, the circuit court ordered the ex-Husband to contribute to the ex-Wife's attorney fees, but held that nearly half of the work for which the ex-Wife sought fees was unreasonable.

On appeal, the court held that the trial court's reliance on the term "rehabilitative maintenance" was misguided. Specifically, the appellate court stated, "We are of the view that if it walks like a duck and talks like a duck, it is a duck, notwithstanding the fact that it is wearing a cap and sunglasses. In honing in on the word rehabilitative, the trial court locked in on the cap and sunglasses while refusing to look and see what was wearing them." The trial court further stated that the parties had agreed that the ex-Husband would pay "rehabilitative" maintenance until the ex-Husband retired. If he would have waited until 65, that would be 20 years of "rehabilitative" maintenance. Instead he retired at age 59 and continued to pay his ex-Wife to "rehabilitate" for 14 years. The court found that although the maintenance was labeled as "rehabilitative," it was in fact permanent maintenance as it could only terminate upon her death, remarriage or cohabitation and first reviewable on a date anticipated to be 20 years down the road. Further, the trial court abused its discretion in ruling on the ex-Wife's request for attorney fees. The work done by her attorneys was necessary to prove that she was entitled to maintenance.

In re Marriage of Bohnsack, 2012 Ill.App. (2nd) 110250, 968 N.E.2d 692

The appellate court affirmed the decision of the trial court that the marital settlement agreement provided an award of reviewable maintenance and was therefore modifiable.

Four years after the entry of a judgment for dissolution of marriage, which incorporated the parties' MSA, Wife filed a petition to modify the maintenance award, seeking an increase. The original language of the MSA stated, "Mark shall pay to Deb $10,000 in maintenance for 6 years, beginning on January 1, 2006, and the last payment ending on January 1, 2011. Mark shall pay the money to Deb twice a year, with a payment of $5,000 on January 1 and a payment of $5,000 on June 1st of every year, with the last year being 2011." Following a hearing, the trial court granted the petition and ordered Husband to pay maintenance in the amount of $3,000 per month.

On appeal, Husband argued that because the maintenance award in the settlement agreement was maintenance in gross, which is nonmodifiable, it is in the nature of a property settlement and cannot be raised more than 30 days after entry of judgment. The appellate court found that this maintenance was periodic maintenance and held that the settlement agreement does not label the maintenance "in gross," nor does it provide a specific total sum that Husband was to pay to Wife. Although Husband contends that the sum is easily calculable, the lack of a specifically stated total sum distinguishes this case from those found to involve maintenance in gross and lends credence to the position that the maintenance award was for periodic maintenance over a fixed period. Nothing in the language of the settlement agreement indicated that January 1, 2006 was intended as a vesting date for maintenance in gross rather than merely a start date for periodic maintenance.

In re Marriage of McLauchlan, 2012 Ill.App. (1st) 102114, 966 N.E.2d 1151

When determining maintenance, withdrawals from a liquidated asset in which the other party waived his or her interest does not constitute income. To consider the liquidation of the retirement account as income represents a modification of the parties' MSA, which is not allowable, except for fraud, coercion or misrepresentation. There is a distinction between including retirement withdrawals for purposes of calculating child support versus maintenance.

Parties were married for 30 years. Judgment for dissolution of marriage was entered in 2001. At the time of the divorce, the parties had 3 adult children. Wife had not worked during the marriage and was initially awarded $14,000 per month in maintenance to be reviewed after 6 years. She also received the parties' home in Florida and a portion of the equity in the marital home. The parties waived "any and all interests or partial interests in and to the retirement plan(s) the other party is receiving pursuant to the terms of the Agreement." Five years prior to the divorce, Husband's income as an attorney had averaged approximately $540,000 per year, before reductions for retirement accounts, pensions, etc. He paid maintenance of $14,000 per month through 2007; in 2008, he paid only $31,500.

Husband's law firm had merged with another firm in Texas and his income was reduced to $250,000. In 2008, Husband was terminated from the firm, although one of the partners of the firm testified that the firm allowed him to "voluntarily" resign. In 2007, Husband's gross income was $361,226, of which $129,000 consisted of retirement withdrawals. His 2008 return showed gross income of $284,848, which included withdrawals of $116,477. He started his own firm and lost $162,000 doing so.

The evidence was clear that Husband was withdrawing substantial sums of money from his retirement accounts and using it to live on because he had insufficient income to pay his own bills or to pay maintenance.

Trial court modified maintenance to 20% of his gross and included the retirement withdrawals in calculating the income available to pay maintenance. The court also stated that it was not terminating maintenance because Husband had the ability to earn significantly more than Wife and he had not modified his standard of living to accommodate the change in his job status.

Wife relied on a string of cases in which withdrawals of retirement money were included in income calculations.

The appellate court affirmed in part, reversed in part and remanded. The appellate court considered the §5/504(a) factors establishing maintenance and §5/510 for modifying maintenance. However, the court distinguished between the use of retirement withdrawals for calculating income for child support versus maintenance. Child support is based on all income from all sources, as the court is obligated to protect the children's best interest and public policy dictates that parents are to support their children. Those interests are not applicable in determining a modification of maintenance.

Moreover, in this particular case, the court found that the clear and unambiguous terms of the MSA provide that each party had waived any and all interest in the retirement assets allocated to the other party. To now include Husband's withdrawals from retirement accounts as income for maintenance purposes is an improper modification of the property settlement agreement. *In re Marriage of Munford*, 173 Ill.App.3d 576 (1988). Absent fraud, coercion or misrepresentation, when the parties have entered into a property settlement agreement wherein each party has waived their rights to the interests in the retirement plan allocated to the other, the parties are bound to that agreement.

MAINTENANCE AND LIFE INSURANCE

In re Marriage of Brankin, 2012 Ill.App. (2nd) 110203, 967 N.E.2d 358

The husband appeals from the order of the circuit court awarding the wife $3,000 per month in permanent maintenance. The wife filed a cross-appeal arguing that the trial court's award of maintenance was insufficient. She also argued that the trial court erred in denying her request to secure the maintenance award with a life insurance policy. The appellate court affirmed the award of maintenance to the wife and remanded the issue of life insurance back to the lower court.

With regard to the cross-appeals concerning maintenance, the evidence presented at trial indicated that the wife produced income of $6,333 per month and the husband earned more than $30,000 per month. However, upon consideration of the standard of living of the parties, the court determined that although the wife generated an income of approximately $6,000 per month, this was not enough to maintain the standard of living to which she was accustomed. The wife was not employable at an income that would enable her to maintain her previous standard of living.

In determining the amount of maintenance, the court properly looked to the husband's health and how much longer he was going to work. The court found that although the husband was not in great health and would be retiring soon, an award of permanent maintenance was proper as the husband had substantial assets, many of which were income-producing. Based on the evidence, the husband would be able to pay maintenance after retirement without significantly affecting his own standard of living. Nevertheless, the appellate court also held that although there was a disparity in the incomes, the maintenance amount was proper and should not be higher. There is no requirement in case law or in the statute that requires the equalization of income. The court properly determined the wife's monthly living expenses in conjunction with her earnings in awarding the maintenance amount.

Also on appeal was the wife's contention that the trial court erred in denying her request that maintenance be secured by a life insurance policy. When denying the award of life insurance to secure the maintenance provisions, the lower court did not consider the merits of the wife's argument that her maintenance award be secured by a life insurance policy. The appellate court held that the trial court has the discretion to award a form of security, such as life insurance, for a maintenance obligation consistent with the purposes of the Illinois Marriage and Dissolution of Marriage Act. The appellate court stated that the General Assembly's recent amendment to the Illinois Marriage and Dissolution of Marriage Act does not change a court's ability to order that a maintenance award be secured by a life insurance policy; rather, the General Assembly amendment clarifies that the court does have the power to do so.

MAINTENANCE – NON-MARITAL ESTATE

In re Marriage of Sturm, 2012 Ill.App. (4th) 110559, 970 N.E.2d 117

The Court entered a judgment for dissolution of marriage in which it divided the parties' assets and the Wife was denied maintenance. The Wife filed a notice of appeal, and the court entered an order reversing the trial court's judgment that the life insurance proceeds that the Wife received were marital property and remanded to the trial court. The trial court again denied the Wife maintenance. The appellate court affirmed the trial court's decision.

During the marriage, the Husband and Wife were both employed and earning approximately $100,000.00. Toward the end of the marriage, the parties' son passed away. The Wife was unable to continue to work after her son's death and significantly cut back on her work hours.

The Wife was also the beneficiary of the son's life insurance policy. Prior to the divorce, the Husband was fired from his job. He took a job making less than $30,000.00 a year.

After the appellate court found that the life insurance proceeds were non-marital and reversed the trial court's order that the life insurance policy was awarded to the Wife *in lieu* of maintenance, this matter was remanded to the trial court for determination of maintenance for the Wife. Maintenance was again denied. On review, the appellate court held that the significance of a determination that that property is marital or non-marital is that marital property may be divided, but non marital property must be assigned to the owner. The court held that maintenance was unnecessary because of the Wife's non marital assets, a factor that the court is entitled to consider under 504(a)(1). The court held that it is important to look at the overall total assets held by the parties, not the label placed on those assets.

MAINTENANCE, MODIFICATION OF

In re Marriage of DiGiovanni, 2012 Ill.App. (1st) 101876, 2012 WL 5910373

On June 17, 2008, ex-Wife filed "Petition to Extend Maintenance" within time frame provided by last modification of maintenance award in 2007. On August 29, 2008, ex-Husband filed petition to modify support based upon a substantial change in circumstances, including minor child's emancipation, reduction in his income and ex-Wife's rehabilitation and ability to obtain gainful employment. Trial court reduced monthly support in 2009 after eight days of hearing. In 2010, trial court granted ex-Husband's petition and denied ex-Wife's petition. Trial court imputed $37,500 in annual income to ex-Wife in its calculation of maintenance but also found that an award of permanent maintenance would be appropriate. Ex-Wife was also required to pay ex-Husband's attorney fees.

On appeal, the court found that ex-Wife's petition to extend maintenance sought a general review of maintenance, and therefore she was not required to prove a substantial change in circumstances. Ultimately, the appellate court affirmed the trial court, as the trial court properly considered the factors set forth in sections 504(a) and 510(a-5) of the Marriage Act. 750 ILCS 5/504(a), 510(a-5). Further, it was not an abuse of discretion to impute $37,500 in income to ex-Wife, as there was credible vocational expert testimony that ex-Wife should be able to immediately obtain employment with such income but chose not to. The trial court found this failure to be in bad faith. Similarly, the trial court did not err in utilizing income averaging to determine ex-Husband's available income for maintenance.

Finally, the appellate court affirmed ex-Wife's obligation to pay toward ex-Husband's attorney's fees, in that the parties' expressly agreed in their Marital Settlement Agreement that whichever party sought modification of maintenance and lost would be 100 percent responsible for the other party's attorney fees. The appellate court found nothing "inherently unconscionable" about awarding attorney's fees to the prevailing party in a Marital Settlement Agreement.

ORAL MARITAL SETTLEMENT AGREEMENT

In re Marriage of Epting, 2012 Ill.App. (1st)11372, 2012 WL 6099531

On July 13, 2011, the parties entered into an oral marital settlement agreement, which was included in the prove-up for the dissolution. That same day, the parties reduced the oral marital settlement agreement to writing and signed it. The written settlement agreement provided that the Respondent would pay the Mother the sum of $3,967 per month for maintenance payments. On August 11, 2011, the Respondent filed a motion to vacate the prove up. This motion was denied. On October 11, 2011, the trial court entered a judgment dissolving the parties' marriage and incorporated the written marital settlement agreement. The Respondent's attorney withdrew, and on October 27, 2011, the Respondent filed a pro se motion to reconsider the

denial of the previous motion to vacate. The trial court denied the motion to reconsider on November 17, 2011. The Respondent appealed, claiming that the court lacked subject matter jurisdiction and that if the court did not lack subject matter jurisdiction, it erred in denying his motion to reconsider. The appellate court affirmed the trial court's decision.

The appellate court found that although at no point during the dissolution proceeding did the Respondent argue that the trial court lacked subject matter jurisdiction, a subject matter jurisdiction challenge can be attacked at any time. However, the Respondent did not file an answer to the petition, nor did he testify at the prove up hearing that the court lacked subject matter jurisdiction. Thus, the trial court had subject matter jurisdiction over this case, and the appellate court had subject matter jurisdiction to hear the appeal.

The Respondent also argued that the trial court improperly denied his pro se motion to reconsider, arguing that the agreement was unconscionable and that he was coerced into signing it. The Respondent did not provide a complete record of the trial court proceedings. Therefore, the appellate court resolved any doubts arising from an incomplete record against the Respondent because, absent record evidence to the contrary, the appellate court must assume that the trial court acted in conformity with the law and had before it the necessary facts to support its decisions. The appellate court found that the trial court was within its discretion to deny the pro se motion to reconsider. Although the Respondent argued that the Marital Settlement Agreement was hastily contrived, that he did not understand its terms, and that his attorney told him that he had no choice but to sign the agreement, the Respondent presented no evidence to support this claim and the record does not disclose evidence of coercion or unconscionability. Therefore, the decision of the trial court was affirmed.

In re Marriage of Haller, 2012 Ill.App. (5th) 110478, 2012 WL 5941989

The issue in this case was whether, under the circumstances, the oral marital settlement agreement read into the record was valid and binding, even when Husband filed a motion to set it aside prior to the entry of a Judgment for Dissolution.

Parties appeared for trial, reached a settlement that morning and placed the oral agreement on the record in court. Both parties testified that they wanted the court to approve the agreement and that they each understood it was binding. The trial court judge took time to explain the consequences of the oral agreement. The hearing was interrupted by attorneys working together to clarify language of the agreement as needed and to make sure the parties understood the terms being agreed upon. After the hearing but before entry of the final written judgment, Husband filed a motion to set aside the settlement agreement because he learned from his employer (a company in which he also had an ownership interest) that he was going to receive $300,000 less in bonus money than what he understood when he entered into the oral agreement. Wife filed a motion for entry of the written settlement and Judgment. The trial court conducted a hearing on the issue, took testimony in court, and after considering all the relevant evidence, found that the oral agreement was binding. Appellate court affirmed.

Appellate court distinguished between this case and others in which oral agreements were set aside. In this case, the petition had been filed 3 ½ years before the oral agreement was placed on the record, there was extensive negotiation between parties with the aid of counsel. At the time of trial the parties elected not to proceed with a contested hearing, but stipulated that they had resolved all of the issues. Both testified to their understanding and that they wanted the court to approve the agreement. Neither of the parties expressed *any* objection or lack of understanding of the terms reached or that those terms represented their final agreement. As to Husband's "mistake" as to the amount of the bonus he anticipated receiving, the court found that based on the evidence presented, the Husband had already received, in previous years, the bonus monies that he alleged were the basis of the "mistake". Thus, there was no mistake.

PARENTAGE

In re Parentage of H.L.B., 2012 Ill.App. (4th) 120437, 976 N.E.2d 1186

On September 15, 1999, Mother gave birth to H.L.B. On March 17, 2001, The Department of Health and Family Services (HFS) served the Boyfriend with notice of alleged paternity. A default order was entered on April 18, 2001 adjudicating the Boyfriend as the father of the child. On May 30, 2001, the Boyfriend sent a letter to HFS appealing the decision. HFS offered the Boyfriend genetic testing. On June 12, 2001, the Boyfriend signed an agreement to be bound by the results of the DNA testing, and that if he failed to appear, he would be adjudicated the father. The Boyfriend failed to appear for the testing, and the April 18, 2001 order remained in effect. On November 17, 2004, the Boyfriend filed a petition to determine parentage. The petition was dismissed on the basis of *res judicata*. In the summer of 2011, the Boyfriend met the child for the first time. The Boyfriend asked the Mother for DNA testing. After DNA testing, the results indicated that the Boyfriend was not the father. On January 18, 2012, the Boyfriend filed a petition to establish the nonexistence of a parent-child relationship under 7(b-5) of the Parentage Act. The Mother filed a motion for involuntary dismissal, and the matter was dismissed after hearing. However, the issue of the Mother's attorney fees was still pending.

On appeal, the court found that it had jurisdiction. The court held that the issue of attorney fees is incidental to the ultimate rights adjudicated in a paternity action. A determination of attorney fees is not directly tied to a finding of paternity.

Further, the court found that section 7(b-5) of the Parentage Age, which permits a non-paternity action to be brought by a man adjudicated to be a child's father if later discovered not to be the father as a result of DNA testing, only applies to adjudications pursuant to marital presumptions rather than presumptions arising out of voluntary acknowledgements. The Boyfriend signed an agreed order to be bound by the results of the genetic testing. The same order stated that if he did not show up for the testing, a default order would be entered. Therefore, his acknowledgment was voluntary. Even if section 7(b-5) applied to him, his non-paternity claim is outside the statute of limitations. Section 8(a)(4) of the Parentage Act provides that actions to declare the nonexistence of paternity shall be barred if brought more than 2 years after the petitioner obtains actual knowledge of relevant facts. The Boyfriend had actual knowledge of the relevant facts before the DNA test was performed in 2011. His 2004 petition demonstrates that he had serious doubts that he was the father of this child. Further, he failed to show for genetic testing in 2001.

PARENTAGE ACT

Wittendorf v. Worthington, 2012 Ill.App. (4th) 120, 2012 WL 6055783

Mother was in abusive relationship with Father for several years before child was born. Parties lived together for child's first few months in Georgia, and then Mother returned with child to Illinois. Mother obtained a plenary order of protection against Father while she also pursued parentage action against Father in Illinois. Mother sought supervised visitation between child (who was 16 months old at the time of trial).

Trial court awarded Mother residential custody of child but did not require supervised visitation between child and Father. Further, the court's order did not even require visitation to take place in Illinois. Trial court also modified terms of plenary order of protection to allow contact with child and personal contact between Father and Mother concerning child.

The appellate court reversed and remanded as to visitation but affirmed the modification of the order of protection. With regard to visitation, the court first found that the trial court improperly applied section 607(a) of the Marriage Act to this paternity case. Rather, the Parentage Act

incorporates section 602 of the Marriage Act, not section 607. 750 ILCS 45/14(a)(1), 750 ILCS 5/602, 607. Not every rule that would apply to a parent in a dissolution of marriage proceeding would apply to a parent in a parentage case. In this matter, the trial court abused its discretion in setting the visitation schedule because it failed to account for the child's tender age and lack of familiarity with Father (child had not seen Father for one year of his 16-month life). The court provided that on remand, the visitation schedule should be limited to supervised visitation to take place in the child's home town in Illinois, with no overnight visits.

With regard to modification of the plenary order of protection, the court found that the modification allowing for personal contact between Mother and Father was an abuse of discretion.

PATERNITY

In re G.M., 2012 Ill.App. (2nd) 110370, 977 N.E.2d 791

Mother, A.M., appeals the dismissal of her petition to establish the paternity of her son, G.M. She contends that the trial court erred in concluding that the petition was barred by a two-year statute of limitations. The appellate court reversed and remanded.

Mother, A.M. was married to husband, F.J.M. The marriage was an "open" marriage in which they engaged in sex with other couples. In November 2006, mother engaged in sexual intercourse with F.J.M and shortly thereafter engaged in sexual intercourse with E.M.B. In January 2007, mother discovered she was pregnant, and in February 2007, she advised friends that she was 11 weeks pregnant. The child was born on July 31, 2007. At first the child resembled her husband but, as he grew older, he began to resemble E.M.B. On May 19, 2009, mother filed a petition to determine a parent and child relationship between G.M. and E.M.B. The petition named F.J.M. as a respondent because he is G.M.'s putative father by virtue of the marriage.

The trial court found that mother first had to establish that her husband was not in fact the father. Thus, the trial court held that the two-year statute of limitations governing actions to establish the nonexistence of a parent-child relationship applied.

The appellate court reversed this decision, stating that Section 8 of the Paternity Act provides that an action to declare the existence of a father and child relationship shall be barred if brought later than 2 years after the child reaches the age of majority (750 ILCS 45/8(a)(1)). However, an action to declare the nonexistence of a parent and child relationship shall be barred if brought later than 2 years after the mother obtains knowledge of the relevant facts (750 ILCS 45/8(a)(3)). Because the petition was one to establish a father and child relationship, the petition was subject to Section 8(a)(1). It is clear that the petition sought to have E.M.B. declared the father of G.M.

In re Parentage of Scarlett Z.-D., 2012 Ill.App. (2nd) 120266, 975 N.E.2d 755

Former Boyfriend filed an action to establish parentage of a child who had been adopted by former Girlfriend during the parties' romantic relationship. The trial court dismissed the former Boyfriend's contract claim, and following a trial, entered judgment in favor of the Girlfriend on claims of custody, visitation and child support. The appellate court affirmed the trial court's decision.

Boyfriend and Girlfriend began dating in 1999. They became engaged in either 2000 or 2001. The Girlfriend went to Slovakia to visit family in early 2003. While there, she met a three-and-one-half year old orphan girl. Girlfriend commenced an adoption process under Slovakian law. Under the Slovakian law, the Boyfriend was not allowed to join in the adoption process, but he was involved in the process and travelled to Slovakia five times during the year-long process. In

2004, the Girlfriend returned to Illinois with the child and the parties lived as a family. The parties never married and neither took steps to obtain recognition of the adoption in Illinois. The parties separated in August of 2008, and the Boyfriend filed a petition for declaration of parental rights, which was stricken by the trial court. In May of 2009, the Boyfriend filed an action to establish his parentage. Counts III through VI were entitled "breach of oral agreement," "promissory estoppel," and "breach of an implied contract in law," and each count prayed for relief in the form of custody, visitation and child support determinations. The Girlfriend filed a section 2-615 motion to dismiss, alleging that the Boyfriend did not have standing. The Boyfriend's response alleged that the Girlfriend's motion was not the proper vehicle to raise standing, and therefore raised the standing argument. Without leave of court, the Girlfriend filed a 2-619 motion to dismiss asserting lack of standing. The Boyfriend moved to strike the 2-619 motion because it was untimely. The court denied the Girlfriend's 2-619 motion. With respect to her section 2-615 motion, the court granted the motion to dismiss as to counts III through VI, concluding that there was no common-law cause of action for paternity, and that the claims did not meet the elements of contract law. The trial court conducted a hearing on Counts I and II. After hearing, the court found that although there was no question as to the Boyfriend's role in the child's life, the court could not address the issue of the best interest of the child without first addressing the standing issue. The court held that the Boyfriend has no statutory legal standing and that the Mother was the sole parent.

The first issue that the Boyfriend argued on appeal was whether Girlfriend waived the issue of standing by failing to file a timely section 2-619 motion. The court found that the Girlfriend did not waive the issue of standing even if Girlfriend's motion to dismiss for lack of standing was untimely and filed without leave, because she had raised the issue of standing in a prior motion to dismiss.

The Boyfriend next raised an equitable estoppel argument. The court found that the Girlfriend was not equitably estopped from challenging the Boyfriend's standing. The court found that at all times, the Boyfriend knew he was not the biological father of the child and he never adopted the child. The court further found that the Boyfriend lacked standing under the doctrine of *parens patriae* as there were no allegations made as to the unfitness of the Girlfriend. Therefore, the appellate court affirmed the trial court's decision.

PROPERTY - DATE OF VALUATION

In re Marriage of Mathis, 2011 Ill.App. (4th) 110301, 960 N.E.2d 1201

Note: This decision was overruled by the Supreme Court on December 28, 2012 and appeared in the case updates covered at the January 15, 2013 Family Law Committee Meeting.)

The Champaign County circuit court certified the following question for interlocutory review pursuant to Illinois Supreme Court Rule 308:

> "In a bifurcated dissolution proceeding, when a grounds judgment has been entered, and when there is a lengthy delay between the date of the entry of the grounds judgment and the hearing on the ancillary issues, is the appropriate date for valuation of marital property the date of dissolution or a date as close as practicable to the date of trial of the ancillary issues?"

The question certified for review required the appellate court to interpret the applicability of section 503(f) to bifurcated dissolution proceedings where the grounds judgment had been entered before a hearing on the ancillary issues. Until this case, no reviewing court has specifically addressed section 503(f)'s application to such proceedings. The appellate court found that the valuation date for the property in the bifurcated dissolution proceeding in which a judgment on the grounds had been entered several years prior to hearing on the ancillary

issues, was the date of the trial on the property distribution matter and not the date of dissolution. Section 503(f)'s use of the phrase "date of trial" did not give rise to a patent ambiguity since it addressed only disposition of property and had nothing to do with the grounds for dissolution. Section 503(f) does not give rise to a latent ambiguity, or unintended consequences, since the use of any other date not connected to the trial on the issue of the property distribution was more likely to produce an anomalous result.

QDRO

In re Marriage of Kehoe, 2012 Ill.App. (1st) 110644, 966 N.E.2d 1165

The appellate court affirmed trial court's holding that Wife was not entitled to more benefits than she agreed to in the original settlement offer but remanded for the entry of an appropriate Qualified Illinois Domestic Relations Order spelling out the terms of the original settlement agreement and initial QDRO.

The parties were divorced on August 31, 1985. Pursuant to the marital settlement agreement, the parties agreed that the Wife would be entitled to receive half of the value of Husband's pension with the Village of Schiller Park to the date of the parties' divorce. A QDRO was made a part of the judgment, and the Schiller Park Police Pension Fund was ordered to pay Wife her half at the time of the Husband's retirement. The judgment also stated that Wife would be entitled to 50% of the value of the pension at the time of the divorce. Husband retired in 2009 and, because of a change in the Illinois pension law, Wife was advised that the police pension funds only pay pension benefits based on a court-ordered QILDRO and that the QDRO would not be recognized. At a post-judgment hearing, Wife's proposed QILDRO set forth a formula which calculated Wife's pension benefits by dividing Husband's pension as of the date the pension went into pay status as opposed to the date set forth in the judgment and original QDRO. Wife's motion for entry of QILDRO and motion to reconsider were both denied.

The appellate court held that if the trial court adopted Wife's method, or the *Hunt* method, this method of calculation would violate the direct terms of the QDRO which specifically prohibited the Wife from being entitled to any increases in the Husband's accrued benefits in the pension plan caused by contributions occurring subsequent to the date of divorce. The appellate court found that the judgment incorporated a QDRO that includes specific language detailing the retirement date and a formula for calculating the marital portion of the pension benefits.

REMOVAL

In re Marriage of Coulter, 2012 Ill.App. (3d) 100973, 964 N.E. 2d 1159

On appeal, the court affirmed the lower court's decision granting the ex-wife's petition for removal of the minor child.

The parties divorced in 2005, and the mother was given sole custody of the minor child subject to the father's visitation rights of two nights per week, every other weekend and alternating holidays. In 2010, the mother filed a petition for removal citing that she had obtained employment as a Foreign Service officer for the State Department and that her post would consist of time in Washington, D.C. and time overseas. The petition contained a proposed parenting schedule and information with regard to different schools.

When deciding a removal case, the Illinois Supreme Court in *IRMO Eckert,* 119 Ill.2d 316, 518 N.E.2d 1041 (1988), has identified several factors that the circuit court should consider in assessing the child's best interest: (1) whether the move will enhance the quality of life for the custodial parent and for the child; (2) whether the custodial parent is motivated by a desire to hinder or defeat the noncustodial parent's visitation rights; (3) the noncustodial parent's motives for challenging removal; (4) the effect the move would have on the noncustodial parent's

visitation rights; and (5) whether the move would still allow for a reasonable and realistic visitation schedule for the noncustodial parents. The court found that removal was in the best interest of the child because the evidence presented demonstrated that the quality of life for the custodial parent and the child would be greatly enhanced. The mother's salary was nearly doubled, the health insurance was more comprehensive, the residence was an upgrade and the schools were better or comparable to the child's current school. With regard to the remaining factors, the court held that a reasonable visitation schedule could be achieved and that although the father would have less parenting time with the child, he would have ten uninterrupted weeks in the summer with the child. Also, the family would receive financial assistance from the State Department for traveling expenses. Therefore, visits would be affordable.

Shinall v. Carter, 2012 Ill.App. (3rd) 110302, 964 N.E.2d 110302

Mother filed a petition for paternity and for leave to remove the child from Illinois to Colorado. The trial court awarded sole custody to the mother and granted leave for removal. On appeal, the court held that there was evidence to award sole custody to the mother, but there was no evidence to support the trial court's finding that removal was proper.

The parties lived together but never married. While living together, the parties had a child together. The mother also had a child from another marriage. Within ten months of the relationship ending, the mother married a man in the Air Force who was stationed in Colorado. While the petition for removal was pending, the mother remained in Illinois, and her husband went to Colorado. As part of her petition for removal, the mother alleged that the child's quality of life would increase because the mother would become a stay-at-home mother in Colorado.

The court held that it was proper to award the mother sole custody because the mother was the primary caretaker. The record indicated that the parties did not have the necessary level of respect for each other to cooperate in co-parenting, as the parties made disparaging remarks against each other in front of the child, and at one point, there was an order of protection against the father.

Upon consideration of the *Eckert* factors, the court held that evidence did not support removal because there was no evidence presented that having a stay-at-home mother was an improvement over the child's current situation of being able to see both parents on a regular basis and being in daycare with her paternal grandparents twice per week. Evidence that the mother wanted to live with her new husband did not support a finding that the removal was proper because there was evidence that the child was strongly bonded with her father and his family, that the father exercised his visitation with the child, and that the mother and her husband never lived together as husband and wife. Additionally, because of the father's income, he could not reasonably travel to and from Colorado to visit with the child, and a reasonable visitation schedule could not be maintained.

In re Marriage of D.T.W. and S.L.W., 2011 Ill.App. (1st) 111225, 964 N.E.2d 573

The mother appealed from the order of the circuit court granting father sole custody of the children and allowing for removal. The appellate court affirmed the trial court's decision.

During the divorce proceedings, both parties filed a petition for sole custody of the minor children. The divorce petition was filed in Illinois. Throughout the divorce proceeding, the father lived in Florida because he was a member of the Miami Heat Basketball Team. The mother moved the children from Florida to Illinois during the divorce proceeding. On appeal, the mother argued that Illinois should not have had jurisdiction of this matter. However, the parties adjudicated their rights before the Illinois court to a final judgment without objection to the court's right to hear the cause.

The court found that both parties had strong and loving relationships with the children. However, the court held that awarding the father sole custody was proper because the father was willing to encourage a close and continuing relationship between the children and their mother and the mother was not willing to encourage a relationship between the father and children. For example, during the pendency of the case, the mother tried to alienate the children from their father by stating that the children were sick at father's scheduled parenting time, and on certain occasions, she refused to make the children available to their father.

In this case, the court found that the initial disruption caused by the move from Illinois would be outweighed by the long-term benefits of the children moving to Florida. The children would now be with their father and extended family without the stress they had experienced while traveling to be with their father. Also, while the children lived in Illinois, they had almost no contact with their father. When the children were in Miami, the father demonstrated that he was able to spend more time with the children. Evidence was presented that father's motive to move the children was well intentioned and that mother's attempts to alienate the children from their father would be thwarted by the removal. Evidence was presented that a reasonable visitation schedule could be maintained with the mother traveling to Florida, and that the mother's visitation would not be thwarted by the father. Therefore, the court found that removal was in the best interest of the minor children.

In re Marriage of DeMaret, 2012 WL 335866 (Ill.App. 1st Dist.)

Mother filed a petition to remove the minor child to New Jersey. The trial court denied her petition, and the appellate court affirmed the decision.

During the course of the marriage, the parties had four children. The parties were divorced in September 2006. The mother was awarded sole custody subject to the father's parenting time of every other weekend and one night per week. In 2010, the mother filed a petition for removal. The mother testified that at her former job, she made approximately $263,000 and at her new job, she would make a minimum of $475,000. In addition to earning more, she would be required to travel less, but her new job would require her to travel out of the country for extended periods of time. The mother also testified that she had extended family on the East Coast.

The court looked at the factors established in *Eckert.* The court held that the *Eckert* factor regarding an improvement in the quality of life for the children and custodial parent in this case did not support granting removal. Although the mother would make more money and the children would be closer to their maternal grandparents, the evidence indicated that the academic life for the children would not improve in New Jersey. The maternal grandparents had traveled to Illinois to stay with the children during the mother's extended trips, and the mother's commute to her new job was only ten minutes shorter than her current commute. The court also found that the ex-wife's reason for moving was so she could make decisions for the children with little input from their father. Granting the removal would increase the mother's control over the children and marginalize the relationship between father and children. The court found that the father's parenting time would have been frustrated by the move. Although the mother offered him longer periods of time with the children, the schedule was not possible with his work schedule and the children's school schedule. In this case, there was not enough evidence to support that removal was in the best interest of the children.

In re Marriage of Coulter, 2012 IL 113474, 976 N.E.2d 337

Ex-Husband sought a preliminary injunction to bar the ex-Wife from removing the children from Illinois. The ex-Wife petitioned for temporary removal. The circuit court denied the injunction. The appellate court reversed and remanded. On remand, the circuit court ordered the ex-Wife to

return the children to Illinois pursuant to the mandate of the appellate court. The ex-Wife's petition for leave to appeal was granted and the Supreme Court held that the ex-Wife was free to remove the children from Illinois under the terms of the parties' Joint Parenting Agreement.

The parties were divorced on May 8, 2008. The parties entered into a Joint Parenting Agreement which expressly contemplated that the Wife would move the children to California. The Husband agreed to the removal, providing certain conditions were met. These conditions were that the Wife would not move from Illinois to Southern California for 24 months subsequent the entry of the Judgment. Further, the parties agreed that after the 24-month period, the parties would have 12 months to mediate the issue of removal. If the parties did not reach an agreement between months 24 and 36, the Wife was free to remove the children, and the Husband could petition the court to determine his parenting time.

Five days before the 24-month period, the ex-Wife's attorney gave the ex-Husband's attorney written notice of her intent to relocate to California. The ex-Husband did not respond to the letter. Two months before the expiration of the 12-month period for discussion, the ex-Husband filed an emergency petition seeking to enjoin the ex-Wife from moving the children. The injunction was denied and the ex-Wife filed a petition for permanent removal. The ex-Husband filed an interlocutory appeal, and the appellate court reversed the dismissal of the interlocutory appeal. The circuit court ordered the ex-Wife to return to Illinois with the minor children.

The Supreme Court found that the ex-Wife complied with the notice requirement and did not refuse to participate in mediation. Therefore, she was free to remove the children to California. The Joint Parenting Agreement granted her leave to remove the children. Therefore, she did not have to file a petition allowing her to do so. The Joint Parenting Agreement that the parties presented to the court evidences their agreement that removal would be in the best interest of the children, so long as they remain in Illinois for two years following their parents' divorce. The question of best interest was resolved by the parties, and their resolution was given proper deference by the court.

REMOVAL and SUPPORT

In re Marriage of Kincaid, 2012 Ill.App. (3rd) 110511, 972 N.E.2d 1218

The Wife petitioned to remove the children to Texas and for modification of support. The circuit court granted the Wife's petition for removal, ordered Husband to pay counseling expenses for the children, and increased the Husband's unallocated family support. The appellate court found: (1) the circuit court was required to consider Husband's net income before increasing his unallocated support obligation; (2) the Husband was required to pay half of the children's counseling fees; and (3) the circuit court's order granting removal of the parties' children to Texas was not against the manifest weight of evidence.

Removal

Wife testified that she was offered a position in Texas which would allow her to make approximately $6,000.00 per month. She testified that in Illinois she was currently making $2,700.00 per month and that she could not find a comparable position in Illinois. Wife further testified that her extended family lived in Texas and she offered a reasonable visitation schedule for Husband. In finding that the removal would be in the best interest of the children, the court reviewed the *Eckert* factors, 518 N.E.2d 1041 (1988). The court found that the move to Texas would improve the quality of life for the children and Wife by increasing the Wife's salary and by allowing the children to have more contact with their extended family. Further the visitation schedule suggested by the Wife allowed for Husband's monthly visitation with the children and increases the number of days the Husband will spend with the children. Furthermore, the children could Skype with their father on a daily basis.

Support

The appellate court found that the circuit court erred in increasing the Husband's unallocated support obligation without first determining the Husband's net income. In this case, the trial court increased the Husband's unallocated support obligation based on his gross income. Because unallocated support is comprised of child support, the court must determine a party's net income before modifying unallocated support (750 ILCS 5/505(a)(1)). Therefore, the issue as to the amount of Husband's unallocated support obligation was remanded.

Finally, the Husband argued that the trial court erred in requiring him to pay half of the children's counseling bills pursuant to the marital settlement agreement and joint parenting agreement. The Husband argued that the parents have joint decision-making authority over healthcare for the children and that he was never consulted concerning the children attending counseling. The court found that it was undisputed that the children were attending counseling before the dissolution of marriage and that the children's continued participation in counseling was not a major decision that the parties had to discuss and agree on. Therefore, the Court held that the Husband was required to reimburse the Wife for the counseling appointments.

SANCTIONS – SUPREME COURT RULE 137

In re Marriage of Johnson, 2011 Ill.App. (1st) 102826, 963 N.E.2d 1045

In this case, the Ex-Wife filed a petition seeking relief from a final judgment in the divorce proceeding. The Ex-Husband filed a motion for summary judgment and a motion for sanctions against the Ex-Wife. The Circuit Court of Cook County granted the motions and *sua sponte* sanctioned the Ex-Wife's attorneys for filing the petition for relief from judgment.

Since Rule 137 is punitive in nature, the rule is to be strictly construed. The court has stated that a trial court's decision on sanctions must clearly set forth the factual basis for the result reached in order to be afforded deferential treatment. Here, the trial court *sua sponte* imposed sanctions against the attorneys. However, the trial court never informed the attorneys that it considered their actions in the filing of the section 2-1401 petition to be sanctionable and the attorneys represented the Petitioner at the hearing and presented arguments on behalf of their client. Rule 137 does allow the trial court to impose sanctions upon its own initiative. However this court stated that the opportunity for a person subject to sanctions to be heard is a different matter. In this case, the attorneys did not have the opportunity to defend their actions separate from the actions of their client. The Petitioner was given the opportunity to be represented by counsel and to defend against the Respondent's claim for sanctions, but the attorneys were not.

SUMMARY JUDGMENT

In re Marriage of Maurice B.H., 2012 WL 4712024 (Ill.App. 1st Dist.)

The parties were divorced in March of 2006 in Champaign County. On May 29, 2009, the Husband filed petitions to enroll a foreign judgment, modify custody and for specific visitation in Cook County. On September 24, 2009, the Husband served the Wife with custody interrogatories and notice to produce documents. On December 14, 2009, the Wife filed a motion for protective order, supervised discovery and interim attorney fees. On December 15, 2009, the court entered an order staying discovery. On July 23, 2010, the parties entered into an agreed order lifting the stay and granting 28 days to respond to discovery. On May 24, 2010, a child representative was appointed. On November 2, 2010, Husband filed a motion to deem his request to admit facts admitted. On December 12, 2010 the court granted the motion and all 350 items were deemed admitted. On March 11, 2011, the ex-Husband filed his motion for summary judgment relying on the facts deemed admitted. The child representative filed a motion seeking an extension of time to respond to the summary judgment motion. At the

conclusion of the hearing a year later, the trial court stated that the ex-Husband had showed a substantial change of circumstances as of November 25, 2009, based on the admitted facts. However the court stated that the request to admit only provided information through November 2009. The trial judge entered an order granting partial summary judgment based on the admitted facts. The order directs that although the Husband was retroactively granted custody as of November 2009, the Wife would retain possession of the child until the trial. During the trial, the statutory burden of proof would switch to the Wife to prove the best interest of the child. The Wife appealed.

The appellate court held that the transcript of proceedings for the hearing on the motion clearly showed that the trial judge did not consider the totality of the circumstances. The record shows that the trial judge not only believed triable issues of fact existed, but she ordered a trial to determine whether physical custody of the child should be transferred to the Husband. Summary judgment should only be awarded when the moving party's right to judgment is "clear and free from doubt." The appellate court held that the trial court erred in entering a retroactive partial summary judgment on the custody of the child and shifting the burden to the Wife to regain custody.

TERMINATION OF PARENTAL RIGHTS

R.S. v. A.S., 2012 Ill.App. (5th) 110321, 968 N.E.2d 201

Father filed an application for leave to appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010) in connection with the adoption proceedings initiated by Mother attempting to terminate his parental rights to the parties' minor child. The circuit court granted the application and certified the parties' question without objection. The appellate court affirmed.

In the petition for adoption, Mother alleged that Father had not had contact with the minor child since December 15, 2005, and pursuant to section 1 (D)(n) of the Adoption Act (750 ILCS 50/1(D)(n) (West 2004)), had evidenced his intent to forego his parenting rights. Father filed affirmative defenses raising several matters relating to conduct and incidents that Father claimed explained his lack of communication with the minor child. All of the alleged incidents occurred before December 15, 2005.

The question certified before the court is: "In relation to determining parental unfitness pursuant to 750 ILCS 50/1(D)(n) must any act which Father claims to have deprived him of the ability to visit or communicate arise after the twelve month is alleged to have begun?" The trial court answered this question in the affirmative and the appellate court concluded that the trial court was correct.

The appellate court held that the 12-month line of demarcation begins with the date of the last visit or communication between the parent and child. The court further stated that acts which may constitute a defense for the fitness portion of the hearing must have taken place during the 12-month period in which no communication took place, commencing with the last date of communication.

In re Julian K., 2012 Ill.App.(1st) 112841, 966 N.E.2d 1107

In re Shauntae P., 2012 Ill.App. (1st) 112280, 967 N.E.2d 968

In re Tamera A., 2012 WL 111131 (Ill.App. 2 Dist.) March 29, 2012

TRUSTS

See *In re Marriage of Romano,* 2012 Ill.App. (2nd) 091339, 968 N.E.2d 115 (above)

VACATING THE MARITAL SETTLEMENT AGREEMENT

In re Marriage of Roepenack, 2012 Ill.App. (3rd) 110198, 966 N.E.2d 1024

The husband appeals from the trial court's order granting the wife's petition for relief from the judgment, arguing that the trial court erred in: (1) finding that the Marital Settlement Agreement was unconscionable; and (2) admitting a business appraisal into evidence. The appellate court affirmed the trial court's decision.

During the divorce, the wife acted *pro se* and the husband was represented by counsel. The husband advised the wife that his income was $100,000. He testified to same at the prove up hearing. Pursuant to the entry of the marital settlement agreement on June 16, 2009, the husband was awarded two businesses, and the wife was awarded the marital home. On May 12, 2010, pursuant to section 2-1401 of the Illinois Code of Civil Procedure, the wife filed a petition to reopen or vacate the Marital Settlement agreement alleging fraudulent concealment and misrepresentation on the husband's part.

The wife testified that the husband filed the 2008 taxes after the divorce was entered, and that upon signing the taxes, she learned that husband's income was $211,000. At that time, she also learned that the businesses were worth in excess of $1.3 million as opposed to only owing debt on same, as the husband had advised her. The wife sought to admit a business appraisal. The court admitted the appraisal with limitations. The trial court indicated that the appraisal would be admitted for "the secondary tertiary reasons dealing with state of mind and the overall ultimate issue of whether or not fraud or deception was involved."

In order to receive relief under section 2-1401, a party must affirmatively allege that there was (1) the existence of a meritorious defense or claim; (2) due diligence presenting the defense or claim; and (3) due diligence in filing the petition. In order to sustain a claim that an agreement is unconscionable, the wife must prove that the settlement was improvident, totally one-sided or oppressive. To sustain a claim of fraud, one must prove that: (1) false statements of material fact known or believed to be false by the party making it; (2) intent to induce another party to act; (3) action by the other party in reliance on the truth of the statement; and (4) damage to the other party relying on such statement.

The evidence in this case proved that the husband's inaccuracy in disclosing his income had a direct effect on how the wife viewed the value of the businesses. The husband failed to disclose the existence of the appraised value of the businesses and led the wife to believe that the businesses were worth little to nothing. The trial court's finding that the Marital Settlement Agreement was unconscionable and procured by fraud was supported by the fact that the husband received the majority of the assets, submitted an unauthorized deviation of child support to both the wife and the court, and failed to disclose marital and personal assets.

The husband also argued that the trial court admitted error when it admitted the business evaluation. The appellate court held that it was not error as the evaluation was admitted into evidence for the limited purpose of determining whether fraud or deception was involved in this case; the appraisal was not admitted to prove the value of the businesses.

Wade v. Wade, 2012 Ill.App. (1st) 111203, 966 N.E.2d 1093

The wife appeals from the trial court's retroactive vacation of an agreed preliminary injunction order (API) entered between the parties. The appellate court reversed and remanded.

The parties entered into an agreed preliminary injunction order. The husband filed a motion to vacate, or in the alternative, to modify. The court denied count I of the petition, which asked the court to vacate the API. The court began a hearing on count II of the petition, which asked for the relief of modifying the API. After the husband presented his evidence, the court entered an order vacating the API as to February 26, 2010, the date the court denied count I of the petition. When the court entered the order, the wife had not presented all of her evidence.

The appellate court found that the trial court appeared to rely on an understanding that both parties agreed that the API was no longer viable. However, based on the record, the wife never agreed to vacate the order and strongly objected to a dissolution of the API. Therefore, the injunctive aspect of the order could not have been vacated without an appropriate basis. The trial court made no findings on the record as to why the order should be vacated. The court merely stated that the API was not working for either party. Also, in dissolving the injunction, the court made no provisions for the disposition of the escrowed accounts. Finally, by retroactively vacating the API in the middle of an evidentiary hearing, the court denied the wife the opportunity to present evidence to show why the protection offered by the API should not be dissolved.

VISITATION-SUPERVISED

In re Marriage of Voris, 2012 Ill.App. (1st) 103814, 961 N.E.2d 475

In this custody action, the *pro se* appellant appeals from an order of the circuit court that amended the original agreed parenting order regarding custody and visitation with the three minor children and determined that the father was only allowed supervised visitation with his minor children. The Court held that there was evidence in the supporting the trial court's order determining that the father only be allowed supervised visitation with his children. Specifically, the father was using his religious faith as a tool to alienate the children from their mother, the father's actions had severe negative effects on the children and endangered their emotional and mental well-being, and the father did not rebut the expert's conclusions that the father suffered from mania, grandiose aspirations and lack of impulse control and substance abuse and that he scored within the dysfunctional range on the psychological testing.

VOLUNTARY DISMISSAL WITHOUT PREJUDICE

The Law Offices of Nye and Associates v. Boado, 2012 Ill.App. 110804, 970 N.E.2d 1213

Nye appeals from the trial court's order dismissing its complaint against Eduardo Boado, under section 2-619(a)(4). The appellate court affirmed based on the principles of *res judicata.*

Nye filed a complaint against Boado seeking attorney fees and costs in connection with Nye's representation of Boado in a marital dissolution action. Nye moved to voluntarily dismiss his petition without prejudice. The trial court granted the motion with a written order drafted by Boado, stating that the counts were "voluntarily non-suited." There was no mention of prejudice or leave to refile. Nye filed a new complaint with the same two counts that were voluntarily dismissed. The trial court found that *res judicata* applied and the case was dismissed.

The appellate court affirmed the decision, finding that there was a final judgment on the merits in Nye I, the issues that were raised in Nye II could have been adjudicated in Nye I and the parties were identical. A plaintiff cannot file a complaint with multiple counts, take a voluntary dismissal without prejudice of some of the counts, pursue the undismissed counts to final

judgment, and then harass the defendant with successive suits simply because the dismissals of those counts were entered without prejudice.

WORKER'S COMPENSATION AND THE MARRIAGE SETTLEMENT AGREEMENT LANGUAGE

In re Marriage of Washowiak, 2012 Ill.App. (3rd) 110174, 966 N.E.2d 1060

The husband appeals from the trial court's order awarding the wife 17.5% of the portion of his workers' compensation settlement that was placed in a Medicare set-aside account. The appellate court affirmed the trial court's decision.

The parties were divorced in August of 2010. During the parties' marriage, the husband suffered a work-related injury. The husband subsequently filed a claim for workers' compensation. The parties contemplated his award in the Marital Settlement Agreement. Specifically, the agreement stated, "The Respondent is awarded 17.5% of the net proceeds from the Petitioner's workers' compensation settlement as and for her interest in the same. Net proceeds are defined as the agreed award amount less workers' compensation attorneys' fees and usual and customary litigation fees and expenses.... Net shall include any reimbursement for unemployment which he actually pays and medical payments he actually pays."

In December of 2010, the husband accepted a settlement award on the worker's compensation claim. The award included $70,000 that was placed in a Medicare Set-aside arrangement. The settlement agreement defined the set-aside arrangement as "an interest bearing bank account funded solely by the Medicare Allocation and used solely to pay for future Medicare-covered medical and/or prescription drug expenses."

A dispute arose between the parties as to whether wife was entitled to 17.5% of the money in the set-aside account. The court looked to the language of the Marital Settlement Agreement for the definition of net proceeds. Because the dissolution decree defines "net proceeds" to include payment for future medical costs, the funds in the set-aside account are net proceeds. No evidence was presented by the husband to prove that the funds in the set-aside account were not "net proceeds."