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## **DUPAGE COUNTY BAR ASSOCIATION**

### **MEGA MEETING**

**January 25, 2014**

### **FAMILY LAW CASE UPDATES**

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## **ADOPTION**

*In re Adoption of C.J.W.*, 2013 WL 937979, (Ill.App. 5 Dist.), March 8, 2013

The Petitioners appealed the circuit court's decision when the court granted the Mother's motion for directed verdict on allegations that she was an unfit parent. The appellate court affirmed the decision of the trial court. It is important to point out that at the start of the trial, the parties and the circuit court agreed that the court would only consider evidence of the Mother's conduct during the 12-month period preceding the filing of the petition.

The Petitioners, who are the aunt and uncle of the child, filed a Petition to Adopt the Minor Child. The Petitioners alleged that in 2008, the Petitioners and the grandfather to the child were granted temporary custody of the child. Approximately two years prior to the filing of the petition, the Mother moved in with the child's grandfather. In the 12 months preceding the filing, the appellate court found that there was not sufficient evidence that the Mother had intended to forego her parenting rights. The Mother was living with the child and the grandfather during this time period and had taken the child to the doctor with the grandfather present. The court also found that although the Mother was not solely financially responsible for the child, the grandfather was helping her, and State aid was available. Although there was evidence that there were a number of cats in the residence and that diapers were not disposed of properly, this did not support a finding that the Mother was unfit. The appellate court alludes to the fact that there may have been a different outcome had the parties not limited the evidence to the 12 months preceding the adoption petition.

## **ATTORNEY-CLIENT RELATIONSHIP**

*In re Marriage of Kurotsuchi*, 2013 WL 791237 (Ill.App. 1 Dist.), March 1, 2013

The Husband appealed various portions of his judgment for dissolution of marriage. The first issue concerned a summary judgment ruling regarding the Wife's non-marital property. The Husband is an attorney and the Wife claimed that an attorney-client relationship existed at the time she transferred her non-marital property to the parties jointly. She claimed the Husband failed to appropriately advise her of the ramifications of such a transfer (*i.e.*, marital property). The trial court granted the summary judgment motion and found that an attorney-client relationship existed. However, the appellate court reversed, stating that a genuine issue of material fact exists regarding the attorney-client relationship. The Husband represented the Wife in one real estate transaction, but that representation did not automatically carry to the second transaction.

The Husband also challenged the trial court's refusal to consider various emails between the Wife and her attorney. The appellate court affirmed and held that no such exception existed here and that attorney-client emails were privileged, despite the fact that the Husband found the emails.

The Husband also appealed the trial court's modification of temporary support, claiming that the Wife used "self help" to modify her support obligation. In upholding the trial court's ruling, the appellate court held that because the Husband never moved to enforce the temporary support order by filing a petition for rule to show cause or other, the court was not required to punish the Wife. The trial court's ruling was not an abuse of discretion.

*In re Marriage of Kuziel*, 2013 WL 1296235 (Ill.App. 1 Dist.), March 29, 2013

Attorney was engaged to the sister of the Wife in dissolution of marriage proceedings. The Wife asked Attorney to speak to the Husband on her behalf regarding settlement. The Husband was represented by counsel, which Attorney knew. Attorney and the Husband had a telephone conversation about the proceedings, outside the knowledge of the Husband's counsel. One week later, Attorney filed an appearance on behalf of the Wife. The Husband then filed a motion to disqualify Attorney based on Rules 1.10, 1.12 and 2.4 of the Illinois Rules of Professional Conduct of 2010. The trial court found that Attorney violated Rule 4.2, in that

Attorney represented the Wife in the divorce, and communicated with the Husband directly despite the fact that he knew the Husband was represented by counsel.

On appeal, the court first considered whether an attorney-client relationship existed between the Wife and Attorney before Attorney spoke to the Husband by phone about the divorce. The appellate court found that the attorney-client relationship existed at that time, even though no written or formal agreement had been entered into between Attorney and the Wife, as the attorney-client relationship hinges upon the prospective client's "manifested intention" to seek legal advice and the prospective client's reasonable belief that he is consulting a lawyer for that purpose. Therefore, the analysis is based upon the *client's* point of view, rather than that of the attorney. Because the Wife consulted with Attorney before he spoke to the Husband, the attorney-client relationship already existed. Therefore, Attorney did violate Rule 4.2.

#### **ATTORNEY FEES**

*Radzik v. Agrella*, 2013 WL 3969574 (Ill.App. 2 Dist.), July 30, 2013

A law firm that represented Wife in a dissolution proceeding brought a petition for attorney fees pursuant to section 503(j) of the IMDMA against the Wife's former Husband. The trial court entered an order requiring the former Husband to contribute \$10,000 to his Wife's remaining attorney fees, which order he subsequently appealed. On appeal, the former Husband challenged the validity of the law firm's underlying fee agreement. He argued that the agreement was void as against public policy because it contained a contingency fee not permitted in domestic relations matters. The appellate court acknowledged that the law firm's fee agreement did contain language that the results achieved on the client's behalf could be considered in determining the total fees owed. However, it ultimately found that a legal fee does not automatically become an illegal contingency fee if the results of the case is one factor considered in determining the reasonableness of the fees charged to the client. The appellate court further found that the fee agreement at issue could not be construed to establish that the law firm had arranged for an illegal contingency fee because the agreement as a whole was clear that the firm was only seeking fees pertaining to the hourly rate.

*In re Marriage of Cwik*, 2013 WL 4799368 (Ill.App. 1 Dist.), Sept 6, 2013 (see below)

*In re Marriage of Bradley*, 2013 WL 1919163 (Ill.App. 5 Dist.), May 7, 2013 (see below)

*In re Marriage of Campbell*, 2013 WL 2302099 (Ill.App. 4 Dist.), May 24, 2013 (see below)

*In re Marriage of Melcher*, 2013 WL 1799008 (Ill.App.3 Dist.), April 26, 2013 (see below)

*In re Marriage of Midlash*, 2013 WL 3377441 (Ill.App. 2 Dist.), June 28, 2013 (see below)

*In re Marriage of Powell*, 2013 WL 2299152 (Ill.App. 2 Dist.), May, 23 2013 (see below)

*In re Marriage of Saxer*, 2013 WL 3341002 (Ill.App. 4 Dist.), June 27, 2013 (see below)

*In re Marriage of Lonvick*, 2013 WL 4654504 (Ill.App. 2 Dist.), Aug. 28, 2013 (see below)

#### **ATTORNEY FEES**

*In re Marriage of Price*, 2013 WL 1188008 (Ill.App. 4 Dist.), March 22, 2013 (see below)

*In re Marriage of Levinson*, 2013 WL 1283817 (Ill.App. 1 Dist.), March 28, 2013

The Wife filed an interim fee petition pursuant to 750 ILCS 5/501(c-1), asking the court to award her \$125,000 in interim and prospective fees and costs. At the time the Wife filed her petition, she had paid her attorneys more than the Husband has paid in attorney's fees. As a result, the Husband asked the court to disgorge some of the fees the Wife had paid in favor of the Husband. The trial court awarded the Wife \$100,000 in interim and prospective fees. The Husband filed a motion to reconsider, arguing that the court erred in the award of fees and in awarding said fees without a full hearing to allow testimony of the parties or presentation of evidence. The trial court granted the motion to reconsider and awarded the Wife \$78,500 in

interim fees as an advance from the marital estate. In so doing, the court specifically addressed the factors set forth in 750 ILCS 5/501(c-1). The Husband did not pay the interim fee award, claiming he was unable to pay said amount. The Husband was held in indirect civil contempt for same, and eventually a body attachment was entered against the Husband.

The appellate court found there was no abuse of discretion in the trial court's interim award of \$78,500. The Wife was unable to pay her own fees, and the Husband solely controlled the marital assets. The trial court properly considered all of the 501(c-1) factors, was familiar with the case, and also reviewed numerous financial documents submitted by both parties prior to its ruling. Because the Husband had the better financial ability to pay the fees, it was not an abuse of discretion for the court to so order.

*In re Marriage of White*, 2013 WL 1287065 (Ill.App. 2 Dist.), March 28, 2013

This case was first appealed in 2011 and remanded to the trial court. The retrial took place in 2012. The Husband appealed from the trial court's decision on remand as to calculation of the Husband's net income, calculation of child support, maintenance, the division of property and the Husband's obligation to pay life insurance.

This second appeal focused on the issue of determining the Husband's net monthly income. On remand, the trial court found that his net income was much higher than at the original trial. The appellate court reasoned that because it did not direct the trial court on remand to accept the original figure as the Husband's net monthly income, and the original trial court order was entered in 2009, it was appropriate for the trial court to hear evidence regarding the Husband's current monthly income.

In determining the Husband's gross income, the appellate court did not abuse its discretion by averaging the Husband's income over a five-year period due to income fluctuations or by including actual cash distributions the Husband received from his company, given that the Husband's company purportedly paid distributions to cover taxes but the Husband over withheld money for taxes so that he would receive large tax refunds and use the money for personal expenses. Further, the company never required the Husband to repay the overage.

The appellate court also found no abuse of discretion in awarding the Wife permanent maintenance. The trial court went through a detailed analysis of the section 504(a) factors. 750 ILCS 5/504(a). Even though the Wife is currently employed on a part-time basis as a nurse, the trial court based its decision on the fact that the Wife is unable to support herself in the manner in which she lived during the marriage, her contributions to child-rearing and homemaking, the different earning capacities of the parties, the 20-year length of marriage, and the Wife's current child care responsibilities.

With regard to attorney fees, the Husband argued that the trial court's award of \$50,000 in attorney fees to the Wife was arbitrary. The appellate court disagreed, relying on section 508(b) of the Act which allows for an award of fees if a hearing is conducted for any improper purpose, including unnecessary delay. 750 ILCS 5/508(b).

#### **ATTORNEY FEES**

*In re Marriage of Putzler*, 2013 WL 493304 (Ill.App. 2 Dist.), Feb. 11, 2013 (see CHILD SUPPORT, below)

*In re Marriage of Chapa*, 2013 WL 592909 (Ill.App. 2 Dist.) Feb. 13, 2013

The Wife appealed the judgment in her divorce proceedings wherein she challenged nearly all aspects of the judgment including attorney fees, support and property settlement. The trial court did not specifically award child support. However, the appellate court held that the maintenance award was essentially unallocated support and was in fact support for the Wife and the minor child. The Wife appealed the trial court's decision to sell the marital residence. As matters of property distribution are reviewed according to the abuse-of-discretion standard, the trial court

was not improper by ordering the sale of the marital residence in order to alleviate a substantial marital debt.

The appellate court had similar reasoning with regard to the Wife's challenge of the overall property division. The Wife argued that she *only* received half of the marital estate, and cited case law wherein homemakers received a greater percentage of the marital estate. The Wife received half of the Husband's income in the form of maintenance and the appellate court reasoned because she was actually receiving a greater percentage of equity from the marital residence, the court found no abuse of discretion in the trial court's property apportionment. The Wife also received stock options and argues that the trial court erred in requiring her to exercise her options in order to realize her asset. The Wife proposed an alternate approach as a preferred method of distribution but did not cite any supporting case law. Therefore, the appellate court declined to entertain the argument.

The Wife appealed the trial court's findings regarding dissipation and attorney fees. Again, the appellate court affirmed the trial court, stating that the Wife presented no specific evidence to support the position that the trial court's ruling was against the manifest weight of the evidence. With regard to attorney fees, both parties incurred approximately the same amount in fees. Based on the division of the estate and the maintenance award to the Wife, the court found that both parties are in relatively equal positions to pay their respective fees.

#### **ATTORNEY FEES**

*In re Marriage of Earlywine*, 2013 WL 5488941 (Ill.), Oct. 3, 2013

In a dissolution proceeding, a Wife filed a petition for interim attorney fees pursuant to 750 ILCS 5/501(c-1), asking the court to order the Husband to pay her fees or to order the disgorgement of fees previously paid to the Husband's attorney. The Husband filed a response stating that he had been unemployed for some time, had no money to retain counsel and that his parents had paid his legal fees. The trial court found that neither the Husband nor the Wife had the financial ability to pay their respective attorney fees and costs. However, the Husband's attorney was ordered to disgorge to the Wife's attorney half of the advance payment retainer previously paid to him. The trial court held the Husband's attorney in friendly contempt so that he could appeal the disgorgement order. On appeal, the order of contempt against the Husband's attorney was vacated, but the disgorgement order was affirmed. The Husband's attorney was granted leave to appeal to the Illinois Supreme Court pursuant to Illinois Supreme Court Rule 315. He then argued that, because the advance payment retainer paid by the Husband's parents became the attorney's property immediately upon payment, it should not be subject to disgorgement. The Supreme Court disagreed, finding that a party to a dissolution proceeding should not be able to use an advance payment retainer as a means of circumventing the "leveling of the playing field" provisions of the Illinois Marriage and Dissolution of Marriage Act. Advance payment retainers were deemed not exempt from disgorgement and the judgment of the appellate court upholding the trial court's turnover order was affirmed.

*In re Marriage of Patel*, 2013 WL 5593312 (Ill.App. 1 Dist.), Oct. 11, 2013

A Husband appealed from the trial court's order requiring that he pay his Wife's interim attorney fees and from the court's subsequent order finding him in indirect civil contempt and imposing sanctions for his failure to comply with the order to pay attorney fees. He argued that the trial court abused its discretion in awarding attorney fees to the Wife because the record failed to demonstrate that he had the ability to pay her fees. He further argued that the trial court lacked jurisdiction to award the Wife \$69,000 in interim fees when her petition requested only \$51,040.

The trial court had largely based its decision to award interim attorney fees to the Wife on the financial disclosure statements filed by the parties in the dissolution proceeding, which statements were relied on extensively by the parties' respective counsels during the hearing. The only way the appellate court could have determined that the trial had abused its discretion would have been to review these financial disclosure statements. However, the parties'

disclosure statements were never admitted into evidence and were not made a part of the record on appeal. Because the burden to provide a sufficiently complete record of the trial proceedings is on the appellant, the appellate court had no option but to presume that the trial court's order had a sufficient basis.

With regard to the Husband's jurisdictional claim, the appellate court considered that the Wife had requested an interim award of "not less than" \$51,400, that her counsel had twice requested \$70,000 during the hearing without objection by the Husband's attorney, and that the Wife's attorneys had been paid \$69,000 less than the Husband's attorneys in coming to the conclusion that the trial court had jurisdiction under section 501(c-1) to award the Wife attorney fees in order to level the playing field between the parties. Accordingly, the trial court's orders, including the finding of contempt against the Husband, were affirmed.

*In re Marriage of Arjmand*, 2013 WL 5783387 (Ill.App. 2 Dist.), Oct. 28, 2013

A former Wife filed a petition to vacate a dissolution judgment. She had been unrepresented during the parties' divorce proceeding. She alleged that she had been coerced into entering into the parties' Marital Settlement Agreement ("MSA") and that the Husband had fraudulently concealed assets. The trial court vacated the MSA, finding it to be unconscionable. The Husband appealed, arguing that the trial court's finding that the MSA was unconscionable was against the manifest weight of the evidence. Based on the fact that the division of assets disproportionately favored the Husband, that Husband vastly understated his income and net worth to the trial court at the prove up, and that there were several known assets not listed in the MSA, the appellate court concluded that the trial court's finding of the MSA as unconscionable was not against the manifest weight of the evidence. The appellate court also found that because of the Husband's misleading testimony and his failure to disclose assets, it was not improper for the trial court to be flexible in considering the Wife's lack of due diligence prior to the entry of the dissolution judgment.

#### **APPEAL**

*In re Marriage of Beiriger*, 2013 WL 4737418 (Ill.App. 1 Dist.), Sept. 3, 2013

On appeal, the Wife contended that the trial court abused its discretion by improperly distributing marital assets. The decision of the trial court was affirmed because the Wife failed to provide this court with a report of the proceedings from the trial court as required by Supreme Court Rule 321. In the absence of a record, the appellate court must assume the trial court acted in conformity with the law and had a sufficient financial basis for its finding.

#### **APPEAL-INCOMPLETE RECORD ON REVIEW**

*In re Marriage of Guerrero*, 2013 WL 1092989 (Ill.App. 1 Dist.), March 15, 2013

The appellate court affirmed the trial court's order finding the Husband in contempt of court where the Husband failed to present a complete record of the trial court proceedings to enable the court to review his claims.

The trial court found the Husband in contempt of court for failure to pay off the balloon note and mortgage on a property that he owned in joint tenancy with his now ex-Wife (the Wife). The Husband argued that the trial court failed to make a finding of whether his conduct was willful and contumacious. He also alleged that the evidence at hearing established that his conduct was neither willful nor contumacious. The Husband filed with the appellate court a purported bystander's report. The report included summaries of his testimony and that of the Wife. However, there was no indication that he served the report on the Wife or that he submitted it to the trial court for approval and certification. The appellate court found that absent certification by the trial court, or a stipulation by all parties, no bystander's report may be filed. Therefore, the court must presume that the trial court acted in conformity with the law.

## **APPELLATE JURISDICTION**

*In re Marriage of Corwin*, 2013 WL 4716528 (Ill.App. 1 Dist.), Aug. 30, 2013

Ex-Husband sought to join the ex-Wife's new Husband as a third party in a post dissolution proceeding. The trial court entered an order granting such relief by adding the new husband as a third party to the action for discovery purposes. The new husband appealed, arguing that the trial court lacked subject matter jurisdiction, lacked personal jurisdiction over him and improperly joined him as a third party under section 2-405 of the Code of Civil Procedure. The appeal was ultimately dismissed for lack of jurisdiction because the order appealed from did not contain an express written finding that there is no just reason for delaying the appeal as required by Illinois Supreme Court Rule 304(a).

*In re Marriage of Chruscinski*, 2013 WL 2475048 (Ill.App. 1 Dist.), June 6, 2013

A *pro se* litigant appealed an order denying his petition to modify child support. The appellate court affirmed the trial court's order on a presumption of correctness because the *pro se* litigant failed to provide a sufficiently complete record to support his claim or to comply with Supreme Court 341 in presenting his argument.

*In re Marriage of Jenson*, 2013 WL 1870061 (Ill.App. 4 Dist.), May 6, 2013

Following a trial in a dissolution proceeding, the trial court entered an order resolving the issues related to property allocation between the parties, but expressly reserved the issue of maintenance to be revisited in six months, along with the status of the Husband's employment. The Husband appealed the trial court's property allocation order. However, the appeal was ultimately dismissed based on the trial court's reservation of maintenance. Because the issue of maintenance was integrally related to the trial court's allocation of the couple's property, the appellate court found that the trial court's order was not a final and appealable order. Thus, the appellate court lacked jurisdiction to consider the merits of the Husband's appeal.

*In re Marriage of Schlitching*, 2013 WL 3875053 (Ill.App. 2 Dist.), July 24, 2013

In a dissolution proceeding, the trial court determined that a Wife's membership interest in an LLC was marital property and awarded 65% of the potential cash distribution from her equity interest in the LLC to the Wife and 35% to the Husband. Post-decree litigation as to the value of the LLC, and as to the appropriate methodology to effectuate the cash distribution to the Husband ensued. The trial court eventually entered an order requiring the Wife to transfer her rights to the LLC to the Husband and the Husband to buy the Wife out of her interest at the Wife's proposed value of \$19,500.

The Wife appealed this order complaining that the trial court's order improperly forced her to violate a transfer restriction in the operating agreement of the LLC. However, at the time she filed this appeal, her motion requesting reimbursement from the Husband for capital contributions she had made to the LLC during the dissolution proceeding remained pending before the trial court. The appellate court held that it lacked jurisdiction over the Wife's appeal because the Wife's pending claim for reimbursement could change the scope of the appeal and therefore, affected the finality and appealability of the case.

## **APPEAL-PREMATURE**

*In re Marriage of Spiegler*, 2012 WL 811426 (Ill.App. 2 Dist.), March 4, 2013

An attorney appealed from a judgment dismissing her fee petition filed against both parties in a dissolution of marriage action. In response to the petition filed by the attorney, the Wife filed a counterclaim for a refund of her retainer. The attorney thereafter filed a "Motion to Close File Instantly," asserting that because nothing had occurred in the case since 2007, the case should be closed. The Wife responded, noting the pendency of her counterclaim and asserting that the attorney had filed a breach-of-contract action against the Wife in Cook County. That case was dismissed pursuant to section 2-619(a)(3) of the Code of Civil Procedure. 735 ILCS 5/2-

619(a)(3). Further, the Wife filed a motion to dismiss the fee petition under Illinois Supreme Court Rule 273, asserting that the Cook County dismissal order was an adjudication on the merits of the attorney's right to fees. The trial court granted the motion to dismiss, and the attorney's fee petition was dismissed with prejudice.

On appeal, the court found that a section 2-619(a)(3) dismissal is not a dismissal on the merits. Therefore, the appellate court found that because the case was not dismissed on the merits, the counterclaim filed by the Wife for a refund of her fees was still pending before the trial court. Because the attorney appealed while a counterclaim was still pending and without a Rule 304(a) finding, the appeal was premature and was dismissed.

## **BIFURCATION**

*In re Marriage of Skibinski*, 2013 WL 1187476 (Ill.App. 2 Dist.), March 20, 2013

After a number of continuances and hearings, the trial court entered a bifurcated judgment for dissolution of marriage on October 17, 2011, and the bench trial on the financial issues concluded on December 15, 2011. On appeal, the Wife contended that the trial court erred when it entered a bifurcated judgment for dissolution of marriage and when it distributed marital property, including the valuation of the estate and denying her claim of dissipation. Finally, she argued that the trial court erred in its finding regarding child support, maintenance, and attorney fees.

The appellate court found that the trial court did not err when it entered a bifurcated divorce. It was appropriate to bifurcate the divorce due to the protracted nature of the litigation of this case, which resulted from a number of continuances requested by the Wife. The appellate court found that the bifurcation was necessary to overcome delays and to foster progress of the case. Therefore, the court rejected the Wife's claim that the bifurcation was granted to punish her.

The Wife next argued that the court erred in its division of assets. The Wife argued that the trial court erred in awarding the Husband 904.371 ESOP shares that he acquired prior to the marriage because 60 percent of the shares had vested during the marriage. The appellate court found that the award was not improper, holding that an interest acquired prior to marriage constitutes non marital property regardless of when the interest became fully vested.

The Wife argued that the trial court improperly valued and awarded the SARS stock options that the Husband received in 2005, 2006, and 2007, which have not been exercised. The appellate court found that the trial court did not abuse its discretion in valuing the stocks where the parties had stipulated to evidence regarding the values of the stock options for 2006. Therefore, using the stipulated figure, the trial court subtracted the strike price from the share price and multiplied that value by the current exercisable shares.

The Wife also argued that the trial court abused its discretion by not finding that the Husband dissipated the marital estate when he used funds to purchase a new home. The court found that the record is clear that the money was properly used for marital expenses and that it was necessary for the Husband to purchase a home and to furnish the home. Further, the court found that both parties had withdrawn money from the marital estate but that they both used the money for marital expenses. Therefore, the court found that the Husband did not dissipate the marital estate.

The Wife next argued that the trial court abused its discretion when it applied a downward deviation from the guidelines for child support. Instead of ordering the Husband to pay 28 percent of his net monthly income for two children, or \$2,363 per month, the court ordered the Husband to pay \$1,700 per month. The court found the deviation to be warranted because of the amount of time that the children would spend with the Husband. Further, the court did order that the Husband was to pay 35 percent of all bonuses as additional support. In this case, the bonuses received were significant. Therefore, the court did not find an abuse of discretion.



Finally, the Wife argued that the court abused its discretion when the court did not award her maintenance or order the Husband to pay her attorney fees. The court found that the Wife inflated her financial disclosure statement and that she began to live a more lavish lifestyle once the divorce proceeding began. Further, the court found that both parties were able to be self-supporting and that they both excelled in their employment positions. Finally, the court found that the Wife was receiving 55 percent of the marital estate. Therefore, the court did not abuse its discretion when it did not award maintenance or attorney fees in favor of the Wife.

*In re Marriage of Mathis*, 2012 WL 6725818 (Ill.), Dec. 28, 2012

This case first appeared in the 2011 Case Updates, when 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?

On appeal, the Illinois Supreme Court reversed and remanded the appellate court's decision. 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 had 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 was the date of the trial on property distribution, not the date of dissolution.

After the decision of the appellate court, the Illinois Supreme Court allowed Husband's petition for leave to appeal. The court held that, in a bifurcated dissolution proceeding, the date of valuation for marital property is the date the court enters judgment for dissolution following a trial on grounds for dissolution. In reversing the appellate court's decision, the Illinois Supreme Court held that it is better to divide property sooner, based on the value of the property on the date of dissolution. This rule encourages the parties to stop litigating so that they can receive and manage their proportion of the marital property, and discourages gamesmanship because the parties would be on notice that dilatory tactics would not aid either side.

*In re Marriage of Tomlins*, 2012 WL 145507 (Ill.App. 3 Dist.), Jan. 14, 2013

Husband appealed from the trial court's decision to enter a bifurcated dissolution judgment. The appellate court affirmed.

On April 14, 2011, Wife was the sole witness at a hearing to determine whether grounds existed for irreconcilable differences. Wife testified that the parties had not had intercourse since October 2008 and had been sleeping in separate beds. She testified that the parties had an on-again, off-again relationship in which they would spend months separated during the course of their marriage. Husband left the house permanently on April 28, 2009. She also testified as to Husband's history of physically and mentally abusing her and the kids. The court found that at some point, the parties had attempted to reconcile and that it was clear to the court that the parties were unable to reconcile their marriage and that there were irreconcilable differences. Over Husband's objection, the court bifurcated the divorce, holding that there was no just reason for delay for either enforcement or appeal or both of the bifurcation.

On appeal, Husband argued that the trial court did not have jurisdiction to hear the appeal. The husband argued that the circuit court erred when it found pursuant to Illinois Supreme Court Rule 304(a) that there was no just reason to delay enforcement of, or appeal from, the circuit court's judgment. On appeal, the court found that the decision to enter a bifurcated judgment of dissolution constitutes a final and appealable judgment under Illinois Supreme Court Rule 301.



Husband next argued that the court erred when it found that grounds existed, as Husband believed Wife did not prove that the parties lived "separate and apart" as required by the IMDMA. In this case, Wife testified that her husband had moved from the marital residence in April of 2009 and that they had not had intercourse since October 2008. Under these circumstances, the court held that Wife did in fact prove that the parties had been living separate and apart as required by the Act.

Husband also argued that the circuit court erred when it bifurcated the proceedings because he believed that there were no appropriate grounds to do so. The appellate court found that while our supreme court has emphasized that the interest of finality and avoiding piecemeal litigation will often weigh against entering a judgment of dissolution prior to the resolution of all ancillary issues, it has also recognized that there are cases where the personal circumstances of the parties necessitate bifurcated proceedings. Under the circumstances of this case, the appellate court agreed with the circuit court that appropriate circumstances existed to bifurcate the proceedings.

### **CHILD SUPPORT**

*In re Marriage of Putzler*, 2013 WL 493304 (Ill.App. 2 Dist.), Feb. 11, 2013

The Ex-Wife petitioned for an increase in child support and moved for indirect civil contempt against the Ex-Husband. The trial court granted the increase in child support and awarded the Ex-Wife attorney fees as the prevailing party on the contempt motion. The Ex-Husband appealed.

The Ex-Husband argued that the Ex-Wife had failed to establish a substantial change in circumstances warranting a modification of child support because the Ex-Wife's expenses were lumped together such that there was no substantiation that the portion of the children's expenses had increased; her affidavit showed that her expenses had decreased; her income had increased; and the requirement that the Ex-Husband pay two-thirds of extracurricular and uncovered medical expenses essentially provides a mechanism for increasing child support. The appellate court rejected the Ex-Husband's arguments, not only because evidence was presented to the trial court of the increase in the children's needs, but also based on the fact that a substantial change in circumstances justifying a modification of child support may be based solely upon an increase in the supporting parent's ability to pay. The appellate court further found that the Ex-Wife was not required to list specific dollar amounts for each expense item and her testimony regarding the increase in the children's expenses was sufficient.

The Ex-Husband further argued that the trial court erred in awarding the Ex-Wife attorney fees related to the pursuit of her contempt petitions. Specifically, he argued the Ex-Wife should not have been awarded attorneys fees for the following reasons: (1) the trial court had declined to find him in contempt on one of the two contempt petitions; (2) the trial court did not find that his failure to comply with the court order was without compelling cause or justification as required by Section 508(b) of the Illinois Marriage and Dissolution of Marriage Act; and (3) the Ex-Wife did not have to pay her attorney by virtue of the fact that she worked at her attorney's law firm, the attorney should not recover any fees. 750 ILCS 5/508(b).

The appellate court rejected these arguments and affirmed the trial court's decision. Although the trial court had declined to find the Ex-Husband in *criminal* contempt, it did find him in indirect *civil* contempt on both of the contempt petitions filed by the Ex-Wife. Thus, the fee award was appropriate. Second, even though the trial court's written order did not specifically state that the Ex-Husband's failure to comply with the court order was "without compelling cause or justification," the court did find him in contempt of court. The appellate court held that the contempt finding implies the underlying finding that the Ex-Husband's actions were without compelling cause or justification. Further, the court's order *did* label the Ex-Husband's actions as "willful," which the appellate court deemed equivalent to a finding that noncompliance was without compelling cause or justification.

Finally, the appellate court rejected the Ex-Husband's argument that the Ex-Wife should not be able to recover 508(b) attorney fees due to the fact that the Ex-Wife did not have to pay her attorneys. The appellate court set forth the two purposes set forth by Section 508(b): to limit the financial burden assumed by the party who pursues an enforcement action and a means of sanctioning unjustified violations of court orders. That 508(b) fees may be imposed as merely a sanction is supported by the fact that a trial court must impose fees without consideration of either party's ability to pay and is only to consider the reasonableness of the fees award. Based on this reasoning, the appellate court held that, although the Ex-Wife was not personally burdened by the incursion of attorney fees, the fee award to her attorney was appropriate as both a sanction for the Ex-Husband's violation of the order and as compensation to counsel for the services expended on his client's behalf.

## **CHILD SUPPORT**

*Knauf v. Lobner*, 2013 WL 5234345 (Ill.App. 2 Dist.), Sept. 16, 2013

In a post-decree proceeding, ex-Wife filed a motion to modify her ex-Husband's child support obligation based on a purported increase in his net income. In her petition, she alleged that the ex-Husband's tax return showed that he had earned a gross income of \$41,000 from his employment and that he had withdrawn in excess of \$83,500 from his retirement accounts, from which no child support was paid. At the time of the entry of the prior child support order, the ex-Husband's tax return reflected a business income of only \$4,900 and IRA distributions of \$36,000, resulting in an adjusted gross income of \$37,381. The trial court ultimately determined that the ex-Husband was living a lifestyle that approximated a net income of \$50,000 and modified his child support obligation based on this new imputed income amount.

The ex-Husband appealed, arguing first that the trial court erred in increasing his child support obligation based on withdrawals from retirement accounts because the parties' marital settlement agreement specifically provided that such withdrawals were not to be used in the calculating his net income for child support purposes. The appellate disagreed with him, finding that the trial court had properly interpreted the parties' agreement. The agreement stated that the ex-Husband's child support was "initially" to be set based on 28% of his imputed gross annual income of \$35,000. The use of the word, "initially," was an acknowledgment that the amount could change in the future. As such, the appellate court affirmed the trial court's decision that the ex-Husband should be required to pay child support on his net income in accordance with statutory guidelines, which meant imputing additional income to him to account for the increased income he received from taking greater withdrawals from his retirement accounts than he was at the time of the prior order. The ex-Husband further argued that the petitioner had failed to establish a substantial change in circumstances and that there was no evidence in the record to support the trial court's finding that his lifestyle averaged an annual net income of \$50,000. However, because the ex-Husband's failure to offer any substantial argument that he had *not* enjoyed a substantial change in circumstances, the appellate court declined to find the trial court's decision to be an abuse of discretion.

*Campbell v. Walker*, 2013 WL 4010302 (Ill.App. 4 Dist.), Aug. 6, 2013

The Mother sought to increase the Father's child support arrearage payment. The appellate court affirmed the decision of the trial court, denying the increase of the monthly payment.

In this case, the parties were never married. In 1996, the court ordered the Father to add the child as a beneficiary of his monthly Social Security disability benefits. The Father began receiving \$679 per month for the benefit of the child, and he paid that sum to the Mother. In 1998, the court found that the Father owed \$54,240 in child support for the period of March 1984 through July 1996. The child turned 18 in March of 2002, and the Father stopped receiving Social Security disability dependency benefits for the child. In 2012, the Mother sought to have the trial court increase the Father's child support arrearage payment to \$679 per month as opposed to the \$200 per month he was currently ordered to pay pursuant to court order.

The trial court found that it did not have the authority to increase the payment to \$679 per month under section 14(i-5) of the Parentage Act. This portion of the Act conveys that if a child support arrearage exists and is equal to one month's support obligation, on the termination date of the trial court's child-support order, or if the court's order is silent as to a termination date, on the day the child attains the age of majority, then the child support payment obligation remains an enforceable payment to satisfy the arrearage balance. However, there is a presumption that a child support order has been entered. In this case, the parties conceded that no child support order was ever entered by the trial court. The acknowledgment of the trial court that there was a disability payment did not constitute a trial support order. Therefore, the appellate court affirmed the decision of the trial court.

*In re Marriage of Clark*, 2013 WL 4806458 (Ill.App. 3 Dist.), Sept. 9, 2013

After hearing, the trial court found that the Father had failed to establish a substantial change in circumstances and denied the Father's petition to establish child support. The appellate court affirmed the decision of the trial court.

In the parties' original judgment, the parents were awarded joint custody of the minor children with the Father being awarded physical custody subject to the Mother's two overnight parenting visits with the minor children. The judgment provided that no child support would be paid in light of the comparable incomes of the parties and the amount of time that the parents would have the children in their custody.

In his petition, the Father alleged that he made less money, that Mother made more money, and that she spent less time with the older child. The evidence presented at trial was that the Father made the same amount of money, the Mother made less, and that although she no longer had overnight parenting time with the oldest child, she did have dinners with him. The trial court found that this was not enough to warrant a change in circumstances as the Mother already had limited parenting time with the children as a tradeoff for no child support. On review, the appellate court found there was no abuse of discretion. The court further found that although the Mother no longer had overnights with the oldest child, she still had overnights with the youngest child and she had dinners with the oldest child.

*In re Marriage of Turk*, 2013 WL 4805674 (Ill.App. 1 Dist.), Sept. 6, 2013

After hearing, the trial court found that the Father earned \$150,000 per year and the Mother earned \$10,000 per year. Based on those findings, the trial court ordered the Father, who had sole custody of the minor children, to pay the Mother \$600 per month for child support and ordered that the Father be solely responsible for all of the children's uninsured medical expenses. The appellate court reversed the trial court's decision and remanded the case to the trial court.

On appeal the Father argued that the trial court did not have the authority under section 505 of the Act to order him, the custodial parent, to pay child support to the Mother, the noncustodial parent. Here, the appellate court found that the language of section 505 of the IMDMA, which states, "the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for his support," to be instructive. 750 ILCS 5/505(a). Further, at least one Illinois court interpreting the Act has held that a trial court may award child support to the noncustodial parent when both parents have significant parenting time, and there is a disparity of income between the two parents. *Cesaretti*, 203 Ill.App.3d at 356. In the current case, the parents had close to a 50/50 division of parenting time with the minor children. Therefore the appellate court found that the trial court had the authority to order the custodial parent to pay the non-custodial parent child support. However, this case was reversed and remanded because the amount of child support awarded to the Mother was not supported by the record. The case was remanded for the court to conduct an evidentiary hearing to determine what monies the Mother pays when she has parenting time with the children.

*In re Marriage of Popa*, 2013 WL 4516996 (Ill.App. 1 Dist.), Aug. 23, 2013

The appellate court held that the trial court did not abuse its discretion when it ordered the creation of a trust fund for the benefit of the minor children.

In this case, the Mother took the children to Uruguay and did not return with them (her improper removal of the children is being litigated). The Father filed a motion to abate child support, and the trial court denied the motion. However, the trial court ordered him to open a trust account for the benefit of the minor children, name himself as trustee, and pay his child support into the trust. The order also provided that neither the Mother nor the Father could make withdrawals from the trust without the court's authorization. The Mother, through her attorney, sought an interlocutory appeal asking the court to reverse the order of the trial court and order the Father to pay the child support directly to her.

The appellate court found that the trial court did not terminate or reduce the Father's support obligation based on the Mother's removal of the children. Instead, the court noted that her behavior was so egregious that appropriate relief was warranted under section 509 of the IMDMA. In making its decision, the court stated that it was in the children's best interest to be returned to Illinois and that the Father would incur considerable expense in attempting to retrieve the children. The establishment of the trust for the benefit of the children assured the Father that support payments would not be misused because neither he nor the Mother could withdraw from the trust without the court's permission. Therefore, the appellate court affirmed the decision of the trial court.

*In re Marriage of Carlson-Urbanczyk*, 2013 WL 3204746 (Ill.App.3 Dist.), June 26, 2013

The trial court ordered the Father to pay 40% of the extra-curricular activities and daycare expenses in addition to his child support obligation. After the Father filed a motion for rehearing, the trial court found that if the Father were to pay 40% of extracurricular activities and daycare expenses in addition to his child support obligation, the Father's net income would be \$1,983.00, while the Mother's net income would increase to \$8,660 after taking into account the child support she would receive and the money she would have available if the Father paid 40% of the expenses. Therefore, the trial court reduced the Father's additional payment of daycare and extracurricular expenses to 20%.

On appeal, the court found that any amount above the 32% of Father's net income represented an upward deviation from the statutory amount that must be supported by the record. The court found that if the Father were to pay an additional 40% to the expenses, he would be paying 50% of his net income to support the child. Therefore, the appellate court found that, based on the record, the Father did not have the ability to pay 40% of daycare and additional extracurricular expenses and affirmed the trial court's decision.

*In re Marriage of Clark*, 2013 WL 3324221 (Ill.App. 2 Dist.), June 27, 2013

The appellate court found that the trial court erred in denying Wife an award of interest on respondent's child support arrearage.

In 2009, both parties filed petitions for modification of child support. In March of 2012, the trial court provided a memorandum of decision and requested the parties to make retroactive arrearage calculations. The court then entered an order modifying support retroactively, and ordered that interest would not be applied to the retroactive arrearage.

The appellate court found that unpaid child support payment shall be deemed judgments and that the judgments shall bear interest at the same rate as all other judgments. The use of the word "shall" makes it mandatory. Therefore, the trial court erred when it did not award interest on the arrearage.

*In re Marriage of Mayfield*, 2013 WL 2253208 (Ill.), May 23, 2013

The Husband appealed the trial court's order awarding the Wife 20% of his lump-sum workers' compensation settlement as child support. After the appellate court affirmed the trial court's order, the Husband appealed to the Supreme Court. The decisions of the lower courts were affirmed.

On appeal, Husband argued that the court should not have awarded 20% of the entire workman's compensation benefit to the Wife as and for child support because that would constitute child support beyond the child's majority. The Husband argued that the amount should be prorated based on when the child was to emancipate.

Here, the court found that to set child support at 20% of the prorated monthly equivalent would be a departure from the guidelines, and the Husband presented no proof that child support should be deviated. Further, Husband never specifically asked the court to deviate from the guidelines. Therefore, the judgment was affirmed.

*In re Marriage of Midlash*, 2013 WL 3377441 (Ill.App. 2 Dist.), June 28, 2013

The Mother filed an appeal contending that the trial court abused its discretion when it allowed for a downward deviation in child support, awarded maintenance in gross, and ordered the parties to be responsible for their own attorney fees. The appellate court affirmed the decision of the trial court.

The Wife first contends that the trial court abused its discretion when it applied a downward deviation from child support guidelines. The trial court ordered the Husband to pay 23% of his net income for child support. In doing so, the trial court found that the deviation was warranted because of the substantial amount of parenting time had by the Husband. Further, the trial court acknowledged that because the Husband's parenting time took place after school, it likely defrayed costs for daycare that would have been incurred by both parents. Therefore, the appellate court found that there was no abuse of discretion by the trial court.

The Wife contended that the trial court abused its discretion in awarding maintenance in gross. Specifically, she argued that the court ignored the standards set forth in Section 504 of the IMDMA. The appellate court found that there was no abuse of discretion because it was clear from the record that the court did look to the factors in Section 504, including the fact that the Husband was currently unemployed, but had some assets. Further, the appellate court found that the overriding intent in awarding maintenance in gross is to ensure the receiving spouse's financial security by minimizing the risks inherent in a periodic maintenance review.

Finally, the Wife contended that the trial court erred when it ordered both parties to be responsible for paying their own attorney fees. Specifically, the Wife argued that the Husband's actions increased her attorney fees and diminished the estate of the parties. However, the appellate found no indication of this in record and affirmed the judgment of the lower court.

*In re Marriage of Powell*, 2013 WL 2299152 (Ill.App. 2 Dist.), May, 23 2013

In a post-decree proceeding, an ex-Husband was found in indirect civil contempt of court for failing to pay child support on a \$1.8 million buy-out he received for his membership interest in his former company, for failing to pay child support on the \$384,786 he received from the payment of his capital account, and for his failure to disclose information regarding this additional income to the ex-Wife in accordance with the parties' dissolution judgment. The trial court also awarded attorney fees to the ex-Wife pursuant to Section 508(b) of the Illinois Marriage and Dissolution of Marriage Act in connection with the contempt proceedings.

The ex-Husband appealed, arguing that his interest in his former company was something he already owned. Thus, the redemption of such interest was not "income" pursuant to Section 505(a)(3) of the Illinois Marriage and Dissolution of Marriage Act. The appellate court agreed that the redemption of the principal amount of his interest could not be defined as income

because it had been awarded to the ex-Husband in the parties' settlement agreement and because there had been a decrease in value of his interest since the divorce as a result of his premature involuntarily termination from the company. As such, the appellate court found that he did not receive "income" when the company paid out the ex-Husband's reduced interest and reversed the trial court's finding of contempt on this issue. However, with respect to the funds received by the ex-Husband from his capital account, the appellate court found that this did constitute income on which he was required to pay child support and affirmed the trial court's contempt finding on this issue. Accordingly, the award of attorney's fees to the ex-Wife was vacated and remanded for recalculation.

*In re Marriage of Redman and Greiff*, 2013 WL 2457281 (Ill.App. 1 Dist.), June 4, 2013

An ex-Husband brought a petition to reduce his child support obligation on the basis that he was unemployed and unable to pay child support in accordance with the parties' dissolution judgment. After a hearing on the merits, the trial court found the ex-Husband's testimony about his efforts to find employment and his supporting documentation to be incredible. The trial court also found that the ex-Husband's testimony regarding his alleged financial status was contrived in order to minimize his child support obligations. However, the trial court ultimately did reduce the ex-Husband's monthly child support obligation from \$1,706 per month to \$700 per month. It further ordered him to pay 20% of his net severance package and of his net unemployment benefits as child support.

The ex-Husband appealed, claiming that the trial court had improperly imputed income to him in setting his child support obligation. The appellate court upheld the trial court's order, finding that there was no abuse of discretion because the trial court had properly referenced child support guidelines, had analyzed the amount and duration of the ex-Husband's unemployment benefits, and had assessed his credibility as a witness. It further found that the trial court's order was justified because trial courts have the authority to order parties to pay child support at a level commensurate with earning potential, as well as to impute income to parties who are voluntarily under-employed.

*In re matter of Timmons and Weaver*, 2013 WL 2486948 (Ill.App. 5 Dist.), June 6, 2013

On March 3, 2004, an order was entered in a post-decree action requiring Father to pay 32% of his net income based on his income during the years 2003 through 2004. The order did not include the specific dollar amount that the Father was required to pay. When the Mother later brought a petition to establish a child support arrearage based on the March 3, 2004 order, the trial court denied her request and found that the Father owed no arrearage.

On appeal of the trial court's order, the appellate court agreed with the trial court's finding that the Mother was equitably estopped from claiming an arrearage because she had accepted the amount of child support the Father had paid pursuant to a withholding order for over six years without challenging it, and because she had successfully modified child support in 2009 without claiming an arrearage was owed at that time. As such, the appellate court found that the Mother's conduct induced the Father to detrimentally rely on the assumption that he was satisfying his child support obligation and that such reliance was reasonable.

*In re Marriage of Weber*, 2013 WL 3357822 (Ill.App. 4 Dist.), June 28, 2013

The appellate court found that the trial court's factual findings did not support its modification of the Father's child support obligation.

The parties had joint physical and legal custody of the minor children. At the time of the entry of the Judgment, the parties were earning the same amount of money. The Mother agreed to provide health insurance for the children and to be solely responsible for the payment. The parties agreed that the Father's parents would provide daycare services free of charge. During the trial, the Mother asserted that there was a substantial change in circumstance based on the fact that she earned less money than at the time of judgment and that the Father was now

earning more money. The appellate court found that nothing in the record supported Mother's claim that she now made less income than the Father. Further, in its written order, the trial court made no finding of a substantial change in circumstances. The appellate court also found that no evidence was presented at the modification hearing regarding the needs of the minor children or changes to those needs following the original judgment. The fact that the Mother was insuring the minor children was not a substantial change in circumstances because she had been insuring the children at the time of the Judgment. Therefore, this case was remanded so that the trial court may make specific findings regarding whether a substantial change in circumstances occurred.

#### **CHILD SUPPORT**

*Logan v. Lewis*, 2013 WL 1279426 (Ill.App. 4 Dist.), March 27, 2013

The Mother and the Father entered into a written agreement whereby the Father would pay \$30,000 in child support arrearages, subject to the court's approval. One month later, the Father filed the agreement with the court. That same month, the Mother filed a motion for immediate payment of all of the child support arrearages, not the \$30,000 negotiated settlement amount. The trial court found that the agreement reflecting a \$30,000 negotiated settlement was fair and enforceable. The Mother appealed.

On appeal, the court determined that the parties' agreement was a private, contractual agreement to modify the child support arrearage and was enforceable when both parties agreed and the court approved it. Because it was entered by the court, it was properly before the court. Further, the Mother's conduct during the negotiation of the agreement evidenced her intent to exchange her right to receive periodic payments of the full arrearage amount for an immediate payment of a lesser amount. Therefore, the trial court did not abuse its discretion by enforcing the terms of that agreement.

#### **CHILD SUPPORT**

*In re Marriage of Bleier and Echt*, 2013 WL 12228573 (Ill.App.2 Dist.), March 26, 2013

A dissolution judgment provided that the Husband was to pay to the Wife child support in the amount \$9,000 per month. Thereafter, the Husband filed a motion to modify child support alleging a substantial decline in his income and unilaterally reduced his monthly support payments to \$3,875. The Wife filed a petition for adjudication of indirect civil contempt and the trial court entered a rule to show cause against the Husband. The Wife then filed a third-party citation notice and citation to discover assets against JP Morgan Chase asserting that judgments had been entered against the Husband for the months he had failed to pay child support in full. The trial court granted the Husband's motion to quash and dismiss the citation finding that there was no final judgment with respect to child support for the months following the filing of the Husband's motion to modify child support because the child support for those months may be changed. The order granting the Husband's motion to quash was the subject of the Wife's appeal.

First, the appellate court rejected the Husband's claim that the appellate court lacked jurisdiction to address the appeal. The appellate court disagreed with the trial court that there was no final judgment with respect to child support. Instead, the appellate court reasoned that the child support order in the parties' dissolution judgment constituted a series of enforceable judgments with each such judgment being entered as of the date the corresponding child support payment became due. Therefore, for each month that the Husband underpaid child support, there was a judgment entered against him that the Wife was entitled to enforce. When the trial court dismissed the Wife's citation, it foreclosed her from collecting the unsatisfied amount, making the order final and appealable and, thus, subject to the appellate court's jurisdiction. The appellate court also ultimately reversed the trial court's order on the merits also due to the existence of this series of enforceable judgments against the Husband. For this reason and because the Husband's motion to modify support did not stay the enforcement of those



judgments, the appellate court held that the Wife was entitled, as a "judgment creditor" under 735 ILCS 2-1402, to prosecute supplementary proceedings to examine the Husband or a third party to discover the Husband's assets and to compel application of his assets to satisfy the judgments against him.

**CHILD SUPPORT (See also CUSTODY, DIVISION OF ASSETS)**

*In re Marriage of Mayes*, 2013 WL 992636 (Ill.App. 4 Dist.), March 13, 2013

The appellate court upheld the trial court's decision to deny the Husband's motion to vacate the temporary child support order setting his child support obligation at \$965 per month because the Husband was represented by counsel at the time child support was set "by agreement of the parties" at \$965 per month. Furthermore, the Husband had ratified the order by signing a temporary agreed order incorporating the original temporary support order two days later. The appellate court further upheld the trial court's setting of child support at \$965 per month in the final dissolution judgment. Though the Husband had testified that he was earning a lower income while on medical leave from the State, he had not produced evidence of this reduction in his income.

Even though the trial court did not specifically find serious endangerment pursuant to section 607 of the Illinois Marriage and Dissolution of Marriage Act, the appellate court also affirmed the trial court's ruling that the Husband's visitation was to be supervised. Its reasoning was that visitation rights can be restricted with the mere finding that a danger is posed to the children, which finding was made by the trial court. Further, appellate court held that it lacked jurisdiction to review the Husband's appeal of a plenary order of protection against the Husband because he filed the appeal more than 30 days after its entry.

The Husband further argued that the trial court had erred in dividing the marital estate, specifically contesting the trial court's valuation of his SERS pension, the award of the marital residence to the Wife, and the order that the Husband was to pay past due mortgage payments in the amount of \$14,248.44. He also challenged the trial court's finding of dissipation. As to the SERS pension, the appellate court held that it was appropriate for the trial court to adopt the Wife's valuation because her valuation properly included both the Husband's contributions and the State's contributions; whereas, the Husband's valuation only included his contributions. The appellate court further held that it was not an abuse of discretion for the trial court to award the Wife the marital residence to preserve continuity for the children and to equitably distribute the estate. The appellate court found the award of \$14,248.44 to the Wife for past due mortgage payments to be reasonable because the Husband had disregarded the court's previous order that he pay the mortgage payments on an interim basis during the pendency of the divorce litigation and the award was compensation for the past due arrearage. Finally, the appellate court concluded that the trial court's finding of dissipation was not against the manifest weight of the evidence because the Husband was unable to meet his burden of proving that he has used the parties' tax refund for purposes other than for his own sole benefit.

*In re Marriage of Skibinski*, 2013 WL 1187476 (Ill.App. 2 Dist.), March 20, 2013 (see above)

*In re Marriage of White*, 2013 WL 1287065 (Ill.App. 2 Dist.), March 28, 2013 (see above)

*In re Marriage of Bottom*, 2013 WL 1701810 (Ill.App. 5 Dist.), April 18, 2013 (see below)

*In re Marriage of Cummings*, 2013 WL 3881036 (Ill.App. 3 Dist.), July 25, 2013 (see below)

*In re Marriage of Bradley*, 2013 WL 1919163 (Ill.App. 5 Dist.), May 7, 2013 (see below)



## **CIVIL SUITS FOR NON-ECONOMIC DAMAGES**

*Murphy v. Colson*, 2013 WL 5761064 (Ill.App. 2 Dist.), Oct. 24, 2013

A former Husband filed a three-count civil complaint against his former Wife's alleged paramour for: (1) alienation of affection; (2) criminal conversation; and (3) intentional infliction of emotional distress. In addition, he sought specific damages to recoup many of the expenses he incurred as a result of the divorce (*i.e.*, loss of the value of his dental practice, maintenance payments to former Wife, *et. al.*), as well as for certain non-economic damages, including mental anguish, injured feelings, and the like. He then filed a motion for partial summary judgment, seeking a declaration that the statutory exclusion of certain non-economic, compensatory damages under the Alienation of Affections Act and the Criminal Conversation Act is unconstitutional. The trial court denied his motion. The alleged paramour then filed his own motion for partial summary judgment, seeking a declaration that the statutory exclusions are constitutional. The trial court granted the alleged paramour's motion and entered a Rule 304(a) finding, allowing the former Husband to immediately appeal.

On appeal, the former Husband first challenged the constitutionality of the statutory exclusion on the grounds that it was a violation of the separation of powers clause. He relied on cases in which the court found caps on non-economic damages in medical malpractice actions to be unconstitutional. The appellate court rejected the former Husband's argument, finding that these medical malpractice actions were inapplicable because they dealt not with statutory exclusions, but with judiciary authority to cap jury awards. The appellate court also referred to applicable case law which states that the legislature has authority to deny certain types of damages, as long as the cause of action itself is not wholly prohibited.

The former Husband further claimed that the restriction on his ability to recover non-economic damages constituted discrimination because he is being treated differently than other similarly situated torts plaintiffs who *do* have the ability recover non-economic, compensatory damages. The appellate court disagreed because former Husband had failed to establish that he actually was similarly situated to these other types of torts plaintiffs. Accordingly, the trial court's grant of partial summary judgment in favor of the alleged paramour was affirmed.

## **COLLEGE EXPENSES**

*In re Parentage of Thompson*, 2013 WL 2488057 (Ill.App. 3 Dist.), June 6, 2013

Both parties filed petitions for contribution to college expenses. After hearing, the trial court ordered each parent to pay \$9,000 per year towards college expenses. The appellate court affirmed the judgment.

On appeal, the Mother argued that the court's apportionment of college expenses was an abuse of discretion because the court failed to properly evaluate the financial resources of both parents. The Mother argued that the court should have focused on her income and not the income of her current spouse. It is clear in the record that although the Mother was physically able to work, her current marriage allowed her to enjoy a comfortable lifestyle without seeking employment. The appellate court found that there was no abuse of discretion because the lawmakers employed the term "resources" when identifying the proper measure of each parent's ability to pay. Had the legislature intended only for employed parents to contribute to college expenses, a more narrow term such as net income, wage, or salary would have been incorporated into the statute. The court considered the fact that the Mother was able to meet her personal monthly expenses of \$8,452.00 by way of receiving support and/or "gifts" in this amount from her current Husband. Her monthly expenses included \$625 per month for vacations which alone would fund a 50% contribution of the college expenses. Therefore, it was proper for the court to consider all resources available to the Mother, including the income of her current spouse.

*In re Marriage of Vondra*, 2013 WL 3270577 (Ill.App. 1 Dist.), June 28, 2013

A Mother filed a petition for dissolution of marriage in which she requested that the Father contribute toward the college expenses of the parties' two adult sons. The two adult sons then filed a motion seeking intervenor status to assert a claim for contribution to their college expenses. The trial court denied the sons' request, holding that they lacked standing to intervene in their parent's dissolution proceedings. They then filed a motion to reconsider the trial court's order, which was denied.

On appeal, the sons first contend that joinder is mandatory under Section 2-406 of the Illinois Code of Civil Procedure because they have an interest that the dissolution judgment may adversely affect them. Joinder as parties to the dissolution action would allow them to protect their interests under Section 513 of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), which allows the trial court to make provision for the educational expenses of the children of parties to a divorce. The appellate court rejected this claim, finding that the Act itself creates no right in a child to directly petition the court for the benefits potentially available under Section 513. As such, the sons lacked standing to intervene to enforce such a claim. Instead, a son's right to enforce the provisions of Section 513 would arise if they became third-party beneficiaries to their parents' settlement agreement contract. In other words, if the parties' final settlement included a provision for the sons' educational expenses, they would then have standing to bring a claim to enforce their rights under their parent's contract.

Further, the sons claimed that the trial court should have allowed them to intervene as a matter of right pursuant to Section 2-408 of the Illinois Code of Civil Procedure because of the concern that their parents may not adequately represent their interests. However, the appellate court points to the fact that the sons' Mother had filed a petition seeking contribution to their educational expenses wherein she alleged that their Father had the financial resources to pay all of their educational expenses. This demonstrated her intent to adequately represent the sons' interests on this issue. Based on this, the appellate court affirmed the trial court's denial of the young men's motion to intervene in their parents' dissolution proceedings.

## **CONTEMPT**

*In re Marriage of Popovich*, 2013 WL 1092113 (Ill.App. 2 Dist.), March 14, 2013

During the pendency of the divorce action, the Wife petitioned the court for interim attorney fees. The court ordered the Husband to pay the Wife's attorney \$60,000 in interim attorney fees. The Husband failed to make the payment and a contempt petition was filed by the Wife. The court found the Husband in contempt and sentenced him to jail until he paid the interim fees. The court denied the Husband's petition to stay his jail sentence. Thereafter, the Husband appealed pursuant to Supreme Court Rule 304(b)(5), and the court stayed the Husband's sentence after he posted a \$7,000 bond. On appeal, the appellate court examined whether the Husband should have been held in contempt of court for failing to pay the interim fees.

The appellate court noted that a valid excuse for failing to make court-ordered payments is very limited. In this case, the burden is on the Husband to show that he neither has money now with which to pay, nor has he wrongfully disposed of money or assets with which he might have paid. The Husband argued that the trial court improperly considered that he could liquidate his IRA to pay the fees. The appellate court found that the trial court never required the Husband to liquidate his IRA. Instead, the trial court specifically stated that it did consider the fact that the Husband had withdrawn fees from an IRA to finance his law firm because that showed that the Husband had the ability to pay the interim fees, but instead paid for things that he felt were more important. Further, the appellate court found that in considering a party's ability to pay interim attorney fees, a court may consider the amount of money that a party took out of an IRA. The Husband argued that there was uncontested evidence that his law firm was in debt. The appellate court found that the record did not indicate that the law firm was in debt, but rather found that the law firm was a substantial asset. The Husband also argued that his income was

only \$10,000 per month. It is clear from the record that the Husband was not forthcoming with regards to his income and could in fact be making more money. The appellate court affirmed the decision of the trial court and found that the evidence supported the fact that the Husband was financially able to comply with the order for interim fees.

*In re Marriage of Smith*, 2012 WL 6587768 (Ill.App. 2 Dist.), Dec. 18, 2012

Wife petitioned for dissolution of marriage. The circuit court dissolved the marriage, divided property, and determined child custody. Husband appealed, and the appellate court affirmed in part, reversed in part, and remanded.

On appeal, Husband contended that the trial court erred in granting him maintenance in the amount of \$200 per month for only 2 years. On cross-appeal, Wife argued that the trial court erred in: (1) granting Husband child support equal to 20% of her net income, when the parties share custody of the minor child; and (2) distributing her 401(K) equally between the parties. During the trial, Wife testified that she suffered from several diseases, that she had been the primary wage earner in the family, that her hours at work had been cut from 80 hours every two weeks to 72 hours every two weeks, and that Husband was currently disabled but not permanently disabled and that he could have a desk job. She also testified that Husband had a gambling problem and spent time at the horse races. Husband testified that he was permanently disabled, that he received \$1,471.35 net every month from Social Security, and that \$600 of that was allotted for his daughter. He also testified that he had received a worker's compensation settlement in the amount of \$114,000.00, and that \$94,397.51 remained of the settlement. He testified that he did go to the dog track and that he usually broke even. He did not go into great detail about his disability. At the close of trial, the trial court ordered that Wife should pay \$805 per month for child support. This was above 20% of her net income and did not take into account the fact that the parties were awarded joint physical custody of the child. The Husband filed a petition to reconsider as the court had failed to distribute the Wife's 401(k) and asked that the court reconsider the maintenance award in light of his disability. Wife also filed a motion to reconsider with regard to the child support figure. Thereafter, the court modified its judgment *nunc pro tunc*. The court modified child support to \$711.20, which was 20% of Wife's net income. The court also ordered that the retirement account be divided equally.

On appeal, the court held that the court awarded the proper amount of maintenance to Husband. The court held that Husband was physically capable of being employed in some capacity. By his own testimony, he left the home a few days a week to go to the racetrack. Therefore, the appellate court found that the trial court was correct in finding that Husband was not permanently disabled. Further, the amount was proper in light of the fact that Wife would be receiving more debt, which included a first and second mortgage on the marital residence, and that Husband was awarded \$80,000 of the remaining workman's compensation settlement.

The appellate court found that the trial court abused its discretion in awarding Husband child support equal to 20% of Wife's net income. The appellate court found that because the parties were to share custody of the child, the trial court had two options: (1) apportion the percentage between the parties; or (2) consider the factors in section 505(a)(2) of the Act and award an alternative figure. Because this is a split custody case, the court is not required to state its reasons for the deviation under section 505. However, the appellate court found that the trial court did not review the factors of section 505(a)(2). Therefore, this issue was reversed and remanded.

Finally, the appellate court found that the trial court did not review the relevant factors under section 503(d) of the Act to divide the 401(k) in just proportions, as required by the Act. Instead, the trial court found that any income in the 401(k) earned during the marriage should be divided equally as a matter of course. In failing to exercise its discretion when dividing the 401(k), the appellate court found that the trial court abused its discretion. This issue was remanded for a proper division of the assets pursuant to section 503(d) of the Act.

*In re Marriage of Chapa*, 2013 WL 4477830 (Ill.App. 2 Dist.), Aug. 19, 2013

The trial court entered a dissolution judgment requiring that the parties' marital residence be immediately placed on the market for sale. The Wife appealed, arguing that the sale of the home should be postponed until the parties' youngest child was set to graduate high school. Thereafter, the Husband initiated a contempt proceeding when the Wife continued to refuse to cooperate in listing the home for sale. While the appeal remained pending, the trial court entered a post-decree enforcement order requiring the parties to sign a court-approved listing agreement for the marital residence. The Wife was unrepresented at the time because her prior counsel had withdrawn. She then sought to vacate the enforcement order through new counsel, claiming that the order was entered in violation of Illinois Supreme Court Rule 13 because she had not been granted 21 days to obtain new counsel and was unrepresented at the time of the order's entry. She further argued that if the home were to sell before her appeal was resolved, the fruits of a successful appeal would be lost. The trial court denied the Wife's motion to vacate and subsequently found her to be in indirect civil contempt of court for refusing to sign the listing agreement, which order she appealed. The appellate court ultimately upheld the trial court's order denying the motion to vacate and upheld the trial court's finding of indirect contempt. It disregarded the Wife's argument that the order was invalid based on her not being granted 21 days to find new counsel, as the contempt proceeding had actually taken place 22 days after her prior counsel was granted leave to withdraw. The appellate court did, however, find that the finding of contempt against the Wife was a "very close call," because her legitimate appeal was pending at the time. As such, the appellate court modified the purge order by directing the trial court to give the parties one opportunity to present evidence of the current value of the home and, if appropriate, to amend the listing agreement. It also omitted the portion of the purge order requiring the Wife to sign a quit-claim deed to transfer her interest in the property to the Husband.

*In re Marriage of McCormick*, 2013 WL 4517005 (Ill.App. 2 Dist.), Aug. 26, 2013

This is a second post-decree contempt proceeding brought by the Husband against his former Wife. After the trial court issued its first finding of no contempt, and while the first appeal was pending, the parties continued to operate on a slightly modified parenting schedule. However, on three separate occasions, the Wife had allowed at least one of minor children to miss a visit with their Father. The trial court entered a finding of no contempt.

On appeal, the appellate court held that in determining whether a party's violation of a court order constituted contempt, the trial court may consider the procedural posture of the case as a context for a party's actions. In other words, it is important to consider the party's frame of reference and feedback from the court at the time he or she committed the alleged violation. Here, the Wife was informed that her previous actions, including allowing the boys to miss more than 43 visits, was not contemptuous. Therefore, until the appellate court reversed the decision of the trial court in April 2013, she continued to believe that allowing the children to attend their activities instead of visit with their Father was not contemptuous. Therefore, the court should not have found that the Wife willfully disrespected an order of the court between August 11, 2011 and October 2011 because the court led her to believe that she could legitimately second-guess the visitation schedule.

*In re Marriage of Beevers*, 2013 WL 3872784 (Ill.App. 2 Dist.), July 23, 2013

The Husband appeals from the trial court's order finding him in contempt for failing to pay current and past-due support for the period of June 10, 2009 to August 7, 2012. The appellate court affirmed the decision of the trial court.

The Husband argued that the court's finding that he was in contempt was against the manifest weight of the evidence. Husband was receiving payments for his living expenses from a trust. Husband argued that he was unable to direct the trust to pay his maintenance and child support arrearages. The Husband argued that the trust could only be used for his support, care, and

maintenance. However, the Husband testified that the Trust paid thousands of dollars to his girlfriend to reimburse her for living expenses for both the Husband and his son. In addition, the court found that once the beneficiary receives trust income, the income is no longer subject to the spendthrift provision's protections and can be used for any purpose, including the payment of child support and maintenance. Although the trust was not giving the Husband money for his living expenses, the trust did purchase a car which the Husband could have liquidated to pay child support and his arrearage.

The Husband further argued that the contempt order must be reversed because there was no evidence that he could pay the purge amount. The court found that keeping the Husband out of jail would have fallen within the provisions of the trust to provide for the proper support, care, and maintenance of the Husband. Therefore, it would be within the trustees' discretion to pay the purge amount. The court found that "a respondent is considered to be able to pay a purge amount if it is within the trustees' discretion to pay."

*In re Marriage of Campbell*, 2013 WL 2302099 (Ill.App. 4 Dist.), May 24, 2013

The Husband appealed the trial court's finding of indirect civil contempt and appeals from an order directing him to pay his Wife's attorney fees.

The Husband also argued that the trial court erred in finding him in contempt of court for failing to reimburse his Wife for the purchase price of an engagement ring. The Husband argued that the Wife was to present him with documentation showing how much he owed. The court found that her submissions were sufficient to apprise the Husband of what was owed and that the Husband did not submit evidence that he had paid for the ring. Therefore, there was no abuse of discretion.

The Husband next argued that the trial court erred in contempt proceedings in finding that he owed \$333.19 for the minor child's uninsured medical expenses. The appellate court did find that the Husband met his burden when he was able to produce receipts showing that he did in fact pay all of the medical expenses but for \$9.89. The appellate court found that he did owe the money, but that his actions were not willful and contumacious.

Finally on appeal, the Husband argued that the court erred in ordering him to pay \$3,000 of his Wife's attorney fees. This issue was remanded for the court to make specific findings to support its award of attorney fees relating to the contempt finding, and to make findings as to Husband's improper filing of a Motion to Modify and the court's imposition of sanctions under Rule 137.

*In re Marriage of McCormick*, 2013 WL 1798686 (Ill.App. 2 Dist.), April 25, 2013

The Father appeals from an order that denied his petition for rule to show cause against the Mother.

On appeal, the Father argued that the Mother admitted that she did not comply with the visitation order and that her explanations show that the violations were willful. During the proceedings, it is clear that the Mother conceded she was placing her judgment of the best interest of the children above the visitation order. She never contested the fact that the order had been violated. Her own descriptions of her motivations established that her violations were willful. For example, she allowed the children to attend sleepovers with friends instead of having them available for the Father's parenting time, and she would deny the Father's parenting time because the children had practice and games. Therefore, the case was reversed and remanded. The appellate court also stated that the lower court should award attorney fees because her failure to comply was without compelling cause or justification.

*Scanlon v. Kenshol*, 2013 WL 1955689 (Ill.App. 4 Dist.), May 10, 2013

The Father appealed from the trial court's order finding him in contempt and ordering him to serve 30 weekends in jail subject to his payment of \$30,000 in child support arrearages.

On appeal, the Father argued that the trial court erred when it required him to pay \$30,000 to purge his contempt. In January 2003, the Father was ordered to pay child support in the amount of \$87.60 per week. In May 2004, the Father filed a motion to abate child support because he was in jail. He served 180 days in jail. The motion was granted. In January 2012, the court entered an order finding the Father owed an arrearage of \$53,225.39. The court ordered him to pay \$60 per week in support and \$25 per week towards the arrearage. The Father filed a motion to modify support alleging that he was no longer working. Thereafter the State filed a petition for adjudication of indirect civil contempt. The court denied the Father's motion to modify, and found him in contempt of court for failing to pay child support. The court found that the Father's inability to pay resulted from a reduction in income that was not in good faith, and that he had not paid support commensurate with his ability to pay. Further, he owned a home that, if sold, may provide him with the ability to pay the arrearage. The court sentenced him to the aforementioned jail time.

The appellate court affirmed the trial court's decision holding that there was no evidence that the Father was incapable of employment. His statement that he was "minimally employable" concedes that he was employable. Further, he offered no evidence that his inability to pay was not in good faith, that his reduction in income was not in good faith, and that he had paid support commensurate with his ability to pay. Further, the Father could sell his house and purge himself, but he chose not to do so.

*Banister v. Partridge*, 2013 WL 683190 (Ill.App. 4 Dist.), Feb. 26, 2013 (see REMOVAL, below)

*In re Marriage of Putzler*, 2013 WL 493304 (Ill.App. 2 Dist.), Feb. 11, 2013 (see CHILD SUPPORT, above)

## **CUSTODY**

*In re Marriage of Lonvick*, 2013 WL 4654504 (Ill.App. 2 Dist.), Aug. 28, 2013

After a contested custody battle, Father was awarded sole custody of the parties' minor child, and the Mother was ordered to pay child support to the Father. In addition, the Father was ordered to pay maintenance to the Mother in the amount of \$3,000 per month and to pay \$120,000 in attorney fees directly to the Mother's attorneys. Both parties appealed, with the Father cross-appealing the portion of the judgment pertaining to attorney fees. Regarding the award of sole custody to the Father, the appellate court deferred to the trial court, as there had been ample testimony regarding the Mother's mental issues, her irrational, over-protective behavior and her efforts to marginalize the Father, such as secretly registering the child in new school district, withdrawing the child from various activities without consulting the Father and interfering with the Father's visitation. The appellate court also dispelled the Mother's argument that the section 604(b) custody evaluation report was inadmissible hearsay evidence and should not have been admitted into evidence by the trial court. Because section 605(c) of the Act provides that the trial court "may examine and consider the investigator's report in determining custody," an exception to the hearsay rule exists which allowed for the admission of the 604(b) report. The appellate court also rejected the Mother's argument that the trial court had erred in denying her motion for substitution of judge for cause. The appellate court agreed with the trial court that simply allowing the Father to enroll the child in the school district in which the child had always resided did not indicate a prejudice by the trial court against the Mother. Finally, the appellate court upheld the trial court's award of attorney fees to the Mother's attorneys, finding that it was not an abuse of discretion because the Mother lacked the ability to pay her own attorney fees and the Father had the ability to contribute as ordered.

## CUSTODY

*Arko v. Ford*, 2013 WL 3976802, (Ill.App. 2 Dist.), Aug. 2, 2013

Father filed a petition to modify custody and to grant sole custody to him. The trial court's decision to grant his petition and award sole custody to the Father was not against the manifest weight of the evidence. Therefore, the appellate court affirmed the decision of the trial court.

This case has a sad set of facts which involve allegations of sexual abuse against the Father (all deemed unfounded), a child who acted out sexually, and at one point, was hospitalized for the "tantrums" that she threw. Mother argued that the child's behavior had greatly improved over the last six months. However, the relevant time period for assessing a change of circumstances stems from the date of the previous judgment. Therefore, in this case, the relevant time period was from 2007 until the trial in January 2013. The court found that the Mother's relationships were a change in circumstances. In this case, Mother was engaged to a man named Eric in 2007. She married him in 2009. She left Eric in 2011 and dated two men whom the child had met and formed attachments. The Mother then rekindled her relationship with Eric and in November 2012 the court vacated their divorce. In that time period, the child attended 4 different schools. Although it is true that changed conditions alone do not warrant a modification in custody, changed conditions with a finding that such changes affect the welfare of the child, do warrant a change in modification. In this case, Dr. Shapiro testified that the child formed attachments to people, and when those attachments were threatened, it created anxiety in her. The record reflects that the Mother exposed the child to a number of romantic relationships and attachments while the Father did not. The court found that exposing the child to different relationships, schools, and residences; blocking the Father's parenting time on baseless allegations of sexual abuse; and withholding important information regarding the child's behavior and treatment, specifically, the Mother not telling the Father that the child had acted out sexually or that she was hospitalized; all constituted a change in circumstances that affected the child's well-being.

Based on the record, it is clear that the court correctly analyzed whether a change in circumstance had occurred and whether a modification of custody was in the child's best interest under section 610(b). The appellate court found that four of the factors were relevant, and that this was enough to support the trial court's decision to modify custody. The child's interaction with her parents, siblings, and any other person who may significantly affect her best interest; the child's adjustment to home, school, and community; the mental and physical health of the individuals involved; and the willingness of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; all weighed in favor of the Father.

*In re Marriage of Beatti*, 2013 WL 5235061 (Ill.App. 5 Dist.), Sept. 16, 2013

The appellate court found that the trial court erred when it entered a temporary order granting a change of custody under section 601(b) of the IMDMA. On December 17, 2012, the trial court entered an order that temporarily modified custody. The order modified custody from the Mother to the Father. The case was set to be reviewed on March 19, 2013, and on that date, the trial court entered an order which adopted the December 2012 order.

On appeal, the court found that by entering the December 2012 temporary order, the court circumvented the legislative presumption and policy of section 610(b) of the IMDMA. Basically, the trial court entered a temporary order that set up an unauthorized hearing for further review, thereby shifting the burden of proof to the Mother who had custody in the original order. The temporary order allowed the parties to seek a further modification of custody within 90 days, contrary to the two year prohibition of section 610(a) of the IMDMA. Further, the court failed to make a finding that the Father had met his burden by clear and convincing evidence, thus warranting a permanent change in custody. Therefore, the appellate court vacated the



December 2012 and March 2013 orders, and the case was remanded to the circuit court to enter a revised order based upon the evidence heard in December 2012.

*In re Richter v. Zak*, 2013 WL 5027549 (Ill.App. 3 Dist.), Sept. 11, 2013

The parents entered into an agreed order granting the Mother sole custody of the children and awarding the Father supervised visits. The issue as to supervised visits was to be revisited in four months, or after the conclusion of the Father's criminal matter. On May 1, 2012, the Father filed an emergency petition to modify/review visitation, alleging that his criminal case had concluded. At the conclusion of the hearing for modification, the trial court granted the Father's petition, holding that the Mother did not meet the burden of showing substantial endangerment.

On appeal, the court found that the trial court erred in its decision. The appellate court stated that the party seeking the modification has the burden of showing that a modified visitation is in the best interest of the children, and that by contrast, the endangerment standard was created to place the burden on the party seeking a reduction in a parent's visitation time to demonstrate the noncustodial parent's deficiencies. In this case, the Mother did not file a petition to restrict the Father's visitation. Instead, the Father filed a Petition to Modify Visitation. Therefore, the trial court erred by placing on Mother the burden of proving that unsupervised visitation would seriously endanger the child. Therefore, the case was reversed and remanded to the lower court.

*In re Marriage of Soucie*, 2013 WL 5302499 (Ill.App. 3 Dist.), Sept. 17, 2013

After a trial, the court awarded sole custody of the minor child to the Father. The appellate court affirmed the decision of the trial court.

The issue on appeal was whether the trial court's grant of sole custody to the Father was in the child's best interest. Based on the review of the record, the trial court found that two of the best interest factors weighed in favor of the Father, and the other factors did not weigh in either parent's favor. Specifically, the court found that the interaction and relationships of the child with his parents and other significant persons favored the Father. The evidence presented demonstrated that the child had a consistent and positive relationship with the paternal grandmother and aunt and with the Father's child from another marriage. The Mother presented no evidence of significant relationships on her side of the family. The court also found that the willingness and ability of each parent to foster a relationship with the other parent also favored the Father. The Mother had lied about her use of baby-sitters and found that the Mother had extreme animosity towards the Father, which sometimes led to her limiting the Father's parenting time. Also, the court looked to both parents' work schedules and found that the nature of the Mother's work required her to work long days, late nights, and weekends. Also, she did not have a set schedule for her job, whereas the Father had a set schedule.

The court further found that the parties were unable to joint parent the child based on their inability to cooperate and make basic joint decisions regarding the child. For example, the parties failed to reach an agreement on transporting the child and failed to agree on potty training the child. Therefore, the decision of the trial court was affirmed.

## **CUSTODY**

*In re Anya J.K., a Minor*, 2013 WL 1932716 (Ill.App. 2 Dist.), May 8, 2013

The Mother appeals from an order of the trial court granting the petition filed by the Father to modify custody of the parties' daughter and denying the Mother's petition to modify custody. The trial court's order was affirmed.

In 2008, the court awarded joint custody to the parents. Prior to the Father filing his petition to modify custody, there were a number of modifications made to the parenting time of the Father because the Mother had move three hours away. Further, the Mother had sought two emergency orders of protection against the Father around the time of his summer vacation time



with the minor child. Both orders of protection were vacated and the Father was granted makeup parenting time. During the trial, the court barred 10 of the Mother's exhibits, finding they were either too remote in time or not relevant.

The trial court heard testimony from the Father that the child did not want to hug and kiss him at pick up and drop offs because she was worried about her Mother's and Grandmother's reactions. Therefore, the Father and daughter would say their "good-byes" a few blocks away from the drop off point. The GAL further testified that the Mother openly spoke negatively about the Father in front of the child, and when she did so, the child first hid under a chair and then under a table in the GAL's office. The GAL also testified that the child had hidden a picture she drew for her Father from her Mother. The Mother testified that she did not sugar-coat anything for the daughter and that she did talk badly about the Father. The Mother's witnesses all testified that the child had complained of abuse from her Father, but the GAL testified that the child did not complain of abuse to her, and that a GAL appointed in one of the order of protection cases found that the child had been previously coached by her Mother to say that her Father abused her.

After the trial court awarded the Father sole custody, the Mother appealed. The Mother argued that the court abused its discretion when it barred a number of her exhibits which would have shown a pattern of abuse on the Father's part. The court withheld the trial court's decision finding that the instances of abuse happened several years ago, with no instances of violence on the Father's part within the last seven years. Therefore, the instances were too remote in time and not relevant. Further, none of the allegations of abuse occurred after the entry of the judgment for joint custody in 2008.

The Mother next argued that the court's order granting the Father sole custody was against the manifest weight of the evidence. Mother argued that the trial court erred when it found that the child was suffering emotionally while in the Mother's care. The appellate court found that there was a plethora of evidence in the record to support the finding that the child was suffering emotionally while in the Mother's care. Some of the evidence included the child hiding under a chair in the GAL's office when the Mother spoke negatively about her Father, and the fact that both the Mother and Grandmother testified that when they questioned the child about her time with her Father, she would hide under the table.

The Mother then argued that it was not in the child's best interest for the court to modify custody. The Mother argued that the child was well-adjusted and was above average in intelligence. The court found that although it was true that the child was well-adjusted and above average in intelligence, there was overwhelming evidence that the Mother's conduct caused the child emotional turmoil.

*In re Marriage of Bingham*, 2013 WL 2641562 (Ill.App. 2 Dist.), June 7, 2013

After trial, the court awarded sole custody of the minor child to the Father. On appeal, the Mother argued that the trial court erred in awarding the Father sole custody.

On appeal, the Mother argued that it was not in the best interest of the child to live with the Father. The Mother argued that she had extensive parenting experience, the Father admitted to abusing alcohol in the past, that she had overcome her misuse of pain medication, and that there was no evidence that her minimal use of marijuana and cocaine interfered with her relationship with the child. The appellate court found that the trial court did not abuse its discretion when awarding the Father sole custody of the child. Based on the record, the trial court found the Mother's testimony regarding her drug use to be inconsistent. Also, the trial court adopted the guardian *ad litem's* finding that the Father was more likely to facilitate a relationship with the Mother. It is clear that the trial court considered all of the factors of 750 ILCS 5/602. Therefore, the decision of the trial court was affirmed.

*Lipe v. Lash*, 2013 WL 3777092 (Ill.App. 5 Dist.), July 15, 2013

After a hearing, the trial court denied the Father's petition to modify custody. On appeal, the court found that this was against the manifest weight of evidence and reversed the decision of the trial court.

In 2002, an agreed order was entered granting the Mother sole custody of the minor child. In 2010, the Mother remarried. A few months after the marriage, the Father filed an emergency order of protection against the new Husband, which was granted. The order forbade the new Husband from coming near the child. A subsequent order was entered against the Mother forbidding her to allow the child near her Husband. The orders were eventually modified so that the new Husband could have interaction with the child from 8 a.m. to 8 p.m. The record reflected that Mother was unable to keep a steady job and that until meeting her Husband, she had a number of boyfriends whom she brought around the child. Further, she had recently stopped contact with her immediate family. Her immediate family had provided care for the minor child and financial support to the Mother and child. The record also reflected that there were no further incidents of abuse between Mother and her Husband (the last incident occurring in 2010). The evidence reflected that the Father had a Wife and child and a stable career.

The appellate court found that there were changes in circumstances since the original order was entered. These changes included the Mother's marriage and issues of alcohol, domestic violence and instability. The court next did an analysis of the best interest factors. The court found that all of the abuse allegations were too remote in time. The court also found that the child was well-adjusted and wanted to live with his Mother. The court looked at additional factors, including the mental stability of the parties and the willingness of each party to facilitate and encourage a close and continuing relationship between the other parent and the child. After doing the analysis, more of the factors were in the Father's favor. Therefore, the case was reversed and remanded for a finding that the Father's petition to modify should be granted.

*In re Matter of Mark R. and Daiva S.*, 2013 WL 3379264 (Ill.App. 1 Dist.), June 28, 2013

After a three-day bench trial, Father was awarded sole custody of the minor child. The Mother appealed arguing, first, that she was entitled to a jury trial under the Illinois and United State Constitutions, and second, that the trial court's award of sole custody to the Father was based on factors outside the scope of Section 602 of the Illinois Marriage and Dissolution of Marriage Act (IMDMA).

As to the Mother's claim that she was denied her constitutional right to a jury trial, the appellate court found that because the IMDMA expressly precludes a jury trial on all cases arising under the statute, the Mother had no basis for an appeal on those grounds.

The Mother also argued that the trial court improperly considered factors that fell outside the scope of the factors of Section 602 of the IMDMA, and had improperly considered evidence that she was mentally unstable, despite the results of a psychiatric evaluation showing she does not demonstrate signs of mental illness. The appellate court disagreed, finding that there was sufficient evidence in the record to support the trial court's finding that it was in the best interests of the parties' minor child that the Father be awarded sole custody. The trial court had heard testimony from both parties, from the Husband's supervisor, from one of the Mother's visitation monitors, and from friends and acquaintances of both parties. The trial court was able to assess these witnesses firsthand. The trial court acknowledged having heard testimony regarding several incidents in which the Mother had failed to abide by visitation orders by taking the child for several days and failing to return her to the Father. It also heard evidence that the Mother had been driving without a license, insurance, or a car seat, and that she had been rude and abusive toward the court-appointed visitation supervisors in front of the child. The trial court further noted that the Mother had made contradictory and untrue statements about her living situation, claimed to know famous people, and had behaved erratically in court. All of these

factors considered by the trial court were both proper considerations in making a custody determination and supported the custody determination that was reached by the trial court.

*In re Marriage of Melcher*, 2013 WL 1799008 (Ill.App.3 Dist.), April 26, 2013

The parties were married for ten years, and during their divorce proceedings, the Mother was awarded residential custody of the minor children. Seven years later, the Father filed a petition to modify custody. The trial court denied the petition and ordered the Father to pay the Guardian *ad litem's* fees. The Father appealed.

The record reflects that both children wanted to live with their Father and that their relationship with their Mother and her live-in boyfriend was strained. One child was on a downhill slide at school and the Guardian *ad litem* attributed this to the poor relationship he had with the Mother's boyfriend. The other child was doing fine in school. Based on the record, the Father had minimal visitation with the children and no overnight visits with them for six years. Based on these facts, the court affirmed the decision of the trial court. The court found that a child's preference is not sufficient to modify or change custody. Further, it was clear that the Mother was working to improve the issues with the children, and there was no evidence that the child who was on a downward slope would improve if he lived with the Father.

With regards to the Guardian *ad litem's* fees, the appellate court found that it was an abuse of discretion to order the Father to pay all of the fees. It is clear that the court considered which party necessitated the GAL's appointment and assessed all the fees to the Father. The court found that when determining the proper allocation of a Guardian *ad litem's* fees, the court should consider the total circumstances of the parties, including their financial resources to pay. Nothing in the record shows that the trial court considered the parties' resources or their respective abilities to pay. Therefore, this issue was reversed and remanded.

*Robinson v. Henderson*, 2013 WL 2423992 (Ill.App.3 Dist.), May 31, 2013

After trial, the court entered an order granting residential custody of the minor child to the Father. The Mother appealed from the order and argued that the trial court misinterpreted the evidence and did not give proper weight or consideration to the evidence in her favor.

In this case, the court noted that most of the statutory factors had no relevance or were balanced in favor of neither party. The two factors that the court relied on were (1) the physical and mental health of all the parties, including the physical and mental well-being of the child; and (2) the interaction and interrelationships of the child with her parents, siblings, and any other persons who might significantly impact her best interest.

The trial court expressed concerns over the Mother's mental stability and possible alcohol abuse. The court also observed that the Mother's living arrangements and family interactions were less stable than those of the Father's. Based on the record, the appellate court found that there was no abuse of discretion and affirmed the decision of the lower court.

## **CUSTODY**

*In re Marriage of Cserep*, 2013 WL 1737871 (Ill.App. 2 Dist.), April 22, 2013

A Husband's petition seeking to modify custody of a minor child was granted and the Wife appealed. The Husband alleged that the Wife had seriously endangered the child by ignoring the recommendation of the child's pediatric allergist that her pets be removed from the home due to the seriousness of the child's asthma and allergies and because the child had excessive absences from school. The Husband's allegations were supported by the child's guardian *ad litem*, who testified that the child's allergy and respiratory problems were a part of the reason the child missed so much school prior to the pets being removed from the home. He also observed that it had taken the Wife six months to remove the pets from the home after she had learned that they were the cause of the child's health problems and testified that the Wife's behavior indicated a "real problem in decision on behalf of the parent with regard to the child."

The Wife argued that the trial court's decision was in error because the trial court failed to make specific findings of fact as to a change in circumstances as required by 750 ILCS 5/610(b). She also argued that the Husband had failed to prove by clear and convincing evidence that a change in circumstances had occurred because the circumstances alleged by the Husband had existed at the time the dissolution judgment was entered, namely, the daughter had already been diagnosed with allergies and was living with pets at the time of the divorce. However, the appellate court rejected the Wife's arguments, finding that the change of custody was warranted based on the evidence in the record surrounding the increased severity of the child's medical condition since the divorce and the school absences which also occurred following the parties' divorce. Further, the appellate court found that, when taken together, the remarks made by the trial court met the factual findings requirement of section 610(b).

*In re Marriage of Bottom*, 2013 WL 1701810 (Ill.App. 5 Dist.), April 18, 2013

The Husband argued on appeal that the court erred in not awarding the parties joint custody of the children. The appellate court found that the record supported the trial court's decision and upheld the award of sole custody of the Wife. The appellate court's decision was based on the fact that the Wife had been the primary caretaker of the children, the Husband had limited involvement in decisions pertaining to the children's education, health and welfare, and the communication between the parties was poor due to the Husband's frequent failure to return or answer the Wife's calls or texts.

The Husband additionally disputed the trial court's decision to set a child support amount based upon the Husband's ability to earn a gross yearly income of \$39,000. He argued that the imputation was incorrect because he was self-employed and his business was consistently operating at a net loss. However, the appellate court reasoned that because the Husband had been earning approximately \$50,000 per year prior to starting his own business, his financial statement showed a yearly income of \$33,000, and his business tax returns showed deductions for expenses that were clearly personal in nature, it was proper for the trial court to impute an income of \$39,000 per year to him when calculating child support.

Finally, the Husband contested the trial court's finding that the farmland gifted to both parties during the marriage was the Wife's non-marital property. Because the farm had been in the Wife's family for several generations, and the Wife had been responsible for paying all bills and for making all decisions related to the farm, the appellate court upheld the trial court's ruling. The appellate court further acknowledged that even if the trial court's classification of the property as non-marital was erroneous, the trial court's overall distribution of the property and debts did not constitute an abuse of discretion, because the Wife was required to take on all outstanding indebtedness associated with the farmland, including marital debts which were taken against the farmland by the parties during the marriage.

## **CUSTODY**

*In re Marriage of Archer*, 2013 WL 1195617 (Ill.App. 2 Dist.), March 22, 2013

The Ex-Husband appealed the trial court's order granting custody of the minor child to the Ex-Wife. The appellate court affirmed the decision of the trial court.

The parties separated in May of 2010, and the Husband helped the Wife move into a new apartment with the minor child. Fifteen months later, the Husband petitioned for a dissolution of marriage and sought sole custody of the minor child. The Wife filed a response alleging that the Husband was not the biological father of the child. After various motions, the parties entered into an agreed order in February 2012 stating that the Husband was the presumed natural father. A guardian *ad litem* was appointed in this case, and the case proceeded to trial. The trial court awarded sole custody to the Wife with visitation to the Father. The court found it noteworthy that during the initial separation and prior to the institution of divorce proceedings, the parties themselves chose the Mother as the primary custodian. The trial court discounted accusations of the Wife's drinking problem, having noted that she appeared *pro se* and that

there were no physical or mental conditions that would adversely impact her ability to parent. Further, the court acknowledged that the Wife had instituted an action to declare the non-existence of paternity. However, once the parties entered into and agreed order for custody, the Wife abided by the terms of the order. Finally, even though the court found it troubling that the Wife had denied receiving support from the Husband, and the Husband proved that he provided support, the trial court still awarded custody to the Wife.

The Husband appealed, arguing that because the Wife's testimony was not credible, she should not have been awarded custody. The appellate court found that the trial court did consider the issue as to the Wife's denial of receiving support in its decision. Because the trial court is in the best position to determine a person's overall credibility, the appellate court found that the trial court's credibility determination should stand.

The Husband next argued that he is able to provide the child with a more appropriate living situation. Particularly, he argued that he could provide a home in a family neighborhood and that the Wife had a drinking problem. He further alleged that because the court did not know enough about the mother's boyfriend who would be living with the child, she should not be awarded custody. The appellate court found that the trial court properly considered a fair amount of evidence concerning the child's life with his mother. The court found that the child was familiar and comfortable with his living situation. The court discounted accusations that the Wife had a drinking problem by finding the Husband's witnesses to her drinking not credible. Further, there was no evidence to suggest that the boyfriend was a poor influence on the child, and the boyfriend's testimony was not required in this case. Finally, the appellate court found that the Wife was able to facilitate a relationship between the Father and the child and had been doing so since the entry of the agreed order.

*In re Matter of Haslett and Matthews*, 2013 WL 1279673 (Ill.App. 5 Dist.), March 27, 2013

The Father filed a petition to determine the existence of a father-child relationship and an emergency petition for temporary relief seeking custody of the child in Fayette County. The Mother filed an answer, a counter-petition for temporary custody and a motion to transfer venue to Williamson County. There was no clear record to indicate whether the Mother's motion to transfer venue was ever heard or ruled upon. However, a hearing did take place on the parties' cross petitions for custody of the minor child. As a result, the parties were awarded joint custody of the child, with the Father being designated the primary residential parent, and the parenting time was split with the Father having 60 percent and the Mother having 40 percent of the time with the child. The Mother then filed an appeal, arguing that the trial court had erred in denying her motion to transfer venue and in ordering that the child's primary residence be with the Father. Notably, the Mother did not contest the trial court's joint custody decision.

Because the Mother's attorney did not take reasonably diligent steps to obtain and submit a record of the trial court's ruling on the Mother's motion to transfer venue for the appellate court's review, the appellate court upheld the trial court's order regarding this issue. Further, the appellate court found that the trial court's designation of the Father as the primary residential custodian was not against the manifest weight of the evidence, particularly in the light of the fact that the parties were to have joint custody with a 60/40 split of parenting time. The appellate court also highlighted the factors that supported the trial court's decision, including the close bond between the Father and the child, the Father's attention to the child's medical needs and the Father's superior support system for the child's care. The only factor that the Mother cited in support of her argument was that the trial court made a specific finding that the Mother's ability to facilitate a parent-child relationship was superior to that of the Father. According to the appellate court, this solitary finding among the many factors considered was not sufficient to disturb the trial court's order.

*In re Marriage of Maier*, 2013 WL 1287361 (Ill.App. 3 Dist.), March 29, 2013

In divorce proceedings, each parent sought sole custody of the two minor children. The trial court granted sole custody to the Father. In so finding, the trial court determined that three statutory factors under 750 ILCS 5/602 were not present and that the factors concerning the wishes of the parties, the wishes of the children, the children's adjustment to home, school and community and the interactions of the children with parents, siblings and others were equal. Therefore, the trial court's decision was based upon the factor concerning the parents' willingness and ability to facilitate and encourage a close and continuing relationship between the other parent and the children. In this regard, the trial court was concerned that the Mother threatened to withhold visitation if the Father did not pay support (though she never actually followed through with the threat). The court also placed importance on one of the children's teacher's testimony that that child, who was autistic and had cognitive delay, thrived more with the Father. The appellate court affirmed, in that the trial court did not abuse its discretion nor did it make factual determinations contrary to the manifest weight of the evidence.

*In re Marriage of Ohms*, 2013 WL 870221 (Ill.App. 5 Dist.), March 7, 2013

The Husband appealed the court's decision denying his Petition to Modify Custody. On appeal, the Husband first argued that the trial court erred when it concluded that he did not satisfy the prerequisites to establish endangerment of the child. The court noted that the Illinois Supreme Court has held that section 610 of the Illinois Marriage and Dissolution of Marriage Act established two prerequisites that must be met where a modification of custody is sought within two years of the entry of a custody order. First, the moving party must establish a reason to believe that the minor child's present environment may endanger seriously his physical, mental, moral, or emotional health. The second prerequisite is that the moving party must prove by clear and convincing evidence that the modification of custody is necessary to serve the best interest of the child. See *Department of Public Aid ex rel. Davis v. Brewer*, 183 Ill.2d 540 (1998).

In this case, the court found that the Husband had alleged a significant change of circumstances and sufficient factual allegations to constitute an endangerment to the physical, mental and emotional health of the minor child. It was clear from the record that the Wife had moved a number of times with the child, that she did not have a license and there was conflicting testimony over whether the Mother voluntarily relinquished custody of the child for a few weeks or whether the Father simply asked for additional time with the child. Therefore, the appellate court focused on whether a significant change in circumstance had occurred to warrant a change of custody for the best interest of the child. The court found that despite the facts that the Wife had changed residences a number of times and that the school district for the child had changed multiple times, the minor child was well-adjusted, respectful, and well-behaved. The evidence presented showed that the child was a good student despite the school changes, and the Mother testified that she would take the necessary steps to get her driver's license. Further, the evidence showed that the child had a number of friends and that he liked living with his Mother. Therefore, the appellate court found that the trial court did not abuse its discretion when it denied the Husband's petition.

## **CUSTODY**

*In re Marriage of Lee*, 2013 WL 511419 (Ill.App. 3 Dist.), Feb. 11, 2013

The trial court's order granting sole custody of the two minor children to their father in a dissolution of marriage proceeding was upheld on appeal.

The appellate court found that the trial court did not abuse its discretion in awarding the father sole custody of the minor children because it was clear from the record that the trial court weighed the statutory factors and determined that the best interests of the children was a close call. The trial court determined that the mother could provide a home where each of the children would have their own rooms and where the children would receive the daily support of their maternal grandparents, along with an extensive extended family. Further, after an *in*

*camera* interview with the parties' 12-year old, the court took notice that the child wanted to live with his mother. The court also determined that the father had a full-time caregiver (his girlfriend) for the children and a stable family environment. However, the home was a three-bedroom home which he shared with his girlfriend and her three children. The court found that the parties, including the father's girlfriend, showed a lack of maturity in their use of disparaging remarks through social networking. The court clearly considered the mother's criminal history, her alcohol and drug abuse issues, her recent involvement in the drug culture and her pending incarceration. Therefore, after weighing all of the factors, the court properly determined that the father should be awarded sole custody of the children.

*In re Marriage of Glab*, 2013 WL 453974 (Ill.App. 2 Dist.), Feb. 4, 2013

The sole issue on appeal is whether the trial court's award of custody of the children to the father should be reversed. The Mother argued that the finding was against the manifest weight of the evidence. On review, the appellate court affirmed the trial court's decision.

On review, the court found that the trial court thoroughly reviewed the factors set forth in 602(a) of the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/602(a). The court heard testimony that the Mother was living in a three-bedroom apartment in Lakemoor and that she intended to move for the second time in two years, to Crystal Lake. On the other hand, the Father was awarded the parties' marital residence where the children had lived for the past five years. The home was close to the maternal grandparents, the children would be attending the same schools, and would be involved in the same extra-curricular activities as they had during the marriage. The trial court was aware that the Father had financial problems and may not have been able to keep the home, but the court still found that he could provide a more stable environment. The appellate court found that although the Mother had been the primary caretaker of the children during the marriage, there is no presumption in favor of the existing custodian when making an initial custody determination, as there is in modification of custody cases. Therefore, the appellate court affirmed the holding of the trial court.

*In re M.E.D.*, 2013 WL 749709 (Ill.App. 3 Dist.), Feb. 26, 2013

The trial court entered a joint parenting agreement that provided for a change in residential custody when the child entered first grade. The child was to reside primarily with the Father until entering first grade, at which point the Mother would then become the residential parent. Four months before the child was to begin first grade, the Father filed a petition to modify custody, seeking permanent residential custody of the child.

In August of 2012, the trial court entered a 16-page order and judgment, finding that there had been a substantial change in circumstances because the mother had switched from part to full-time employment, the parents' ability to communicate had deteriorated, the mother had remarried and moved to a new city and the Father believed the Mother's parenting skills had changed. In its order, the trial court also analyzed the best interest factors, finding that the two factors that weighed in favor of the mother were that the child would benefit from living with her half-sister, who was already residing with the Mother, and that the Mother would be more likely to foster a positive relationship between the child and the Father. The trial court determined that the one factor that weighed slightly in favor of the Father was that the child was well adjusted to her home, school, and community and that the Father was more involved with the child's school and extracurricular activities. The court further found that the Mother was more credible than the Father. The trial court ultimately denied the Father's petition, and the Father appealed.

The appellate court reasoned that joint parenting agreement should not be invalidated on public policy grounds, in that section 502 of the Illinois Marriage and Dissolution of Marriage Act allows parents to enter into written or oral agreements regarding custody and visitation because it supports the right of fit parents to decide what is in their child's best interests. 750 ILCS 5/502. Section 610 of the Act provides that a change in custody should be granted only when the nonresidential parent establishes by clear and convincing evidence both that a change in



circumstances has occurred and that a modification of custody is necessary to serve the child's best interests. The Father waived the presumption in favor of the physical custodian implied within Section 610 of the Act by entering into an agreement that provided for an automatic change in custody. Further, the appellate court found that the trial court was not bound by the *Guardian ad litem's* recommendations, as the trial court itself is the ultimate fact finder in a child custody case. The fact that a 16-page order specifically detailing the trial court's analysis of the best interest factors of Section 602 was entered demonstrates that the trial court gave appropriate consideration to those factors. The appellate court also gave great deference to the trial court's decision because the trial court is in the best position to assess the evidence, including the credibility of the parties. Thus, the appellate court found that trial court's ruling was not against the manifest weight of the evidence and the trial court's denial of the Father's petition to modify custody should be affirmed.

## **CUSTODY**

*In re the Parentage of K.E.B.*, 2013 WL 5234414 (Ill.App. 2 Dist.), Sept. 16, 2013

A father filed a petition to establish parentage, custody and child support seeking sole legal custody of his minor child. He alleged that the mother's ability to parent was severely compromised by her chronic alcoholism and erratic behavior. After a lengthy custody trial, the trial court awarded the parties joint custody with residential custody being awarded to the father. A judgment order was entered setting forth the mother's visitation schedule. In it, the mother was not awarded any overnight visitation with the child except for three grandparent-supervised visits per year. She was further directed to secure an alcohol evaluation report from an approved agency, at her own expense, and to enroll in a recommended alcohol treatment program. The mother appealed, challenging certain points in the court's factual findings, the residential custody award, and the restrictive aspects of the visitation order.

The appellate court upheld all of the factual findings of the trial court that were challenged by the mother. With regard to her argument that the award of residential custody to the father was against the manifest weight of the evidence, the appellate court deferred to the trial court's conclusions as it was in the best position to assess the credibility of the witnesses. However, because the trial court failed to make the requisite finding that the mother's unrestricted visitation would seriously endanger the child's physical, mental, moral or emotional health, the appellate court reversed and remanded for the trial court to apply the proper standard in determining the mother's visitation rights.

## **CUSTODY – MODIFICATION**

*In re Marriage of Debra N. and Michael S.*, 2013 WL 394874 (Ill.App. 1 Dist.), Jan. 31, 2013

Mother appeals an order of the circuit court modifying the joint custody agreement that had been previously reached by the parties and awarding sole custody to Father. The court affirmed the judgment of the circuit court.

The court appointed both a child representative and a 604(b) evaluator. The 604(b) evaluator opined that Mother should be awarded sole custody, but that Father should have increased parenting time as he had a lot to offer to the child. The child's representative argued that the court should keep the status quo. The circuit court find that Mother interfered with Father's parenting time and that she engaged in a pattern of interference and manipulation of the child's school activities, Father's parenting schedule and vacation and holiday parenting time.

On appeal, Mother argued that it was improper for the court to not follow the recommendation of the 604(b) evaluator. The appellate court held that although it is within the court's discretion to seek independent expert advice, it is well settled that a court is not bound to abide by the opinions or implement the recommendations of its court appointed expert. The mere fact that the trial court's custody determination did not correspond to the recommendation of the 604(b) evaluator does not render its decision against the manifest weight of the evidence.



Mother also argued that the court's finding was against the manifest weight of the evidence because it conflicted with the recommendation of the child representative. The court found this argument to be disingenuous given that Mother was the party who initially sought modification of the JPA and testified at length about the difficulties that have arisen between the parents. Moreover, pursuant to 506(a)(3) of the Act, the court is not required to implement the personal opinion of the child representative as the statute makes clear that the role of the child representative is to provide the court with evidence-based arguments and not personal opinions. For these reasons, the decision of the trial court was affirmed.

*In re Marriage of Roland*, 2013 WL 268180 (Ill.App. 2 Dist.), Jan. 23, 2013

Mother appealed the trial court's order denying her request to appear at a custody hearing via telephone, and thereafter, awarded Father sole custody of the parties' minor child. The appellate court affirmed the decision of the trial court.

Mother argued that the court violated her due process rights by denying her a hearing by phone. Due process requires notice and an opportunity to be heard. Here, Mother had both. At an earlier hearing date, the court granted her continuance. The court notified Mother as to when the custody hearing would take place. The court informed her that she could either personally appear or have counsel appear on her behalf. Mother did not appear in person nor did she hire counsel. Although she did not avail herself of the opportunity to be heard, her due process rights were not violated.

Mother also argued that her medical condition made it impossible for her to travel; therefore, the court should have allowed her to appear by phone. The court held that the decision to permit hearings by telephone is governed by local court rules. Here, the local court rules provided that routine matters may, at the court's discretion, be heard by telephone, but that unless all parties and the judge agree, contested matters will not be permitted via telephone. This court did try to accommodate Mother's situation by continuing the custody hearing, thus giving her time to hire an attorney. The appellate court found that the trial court did not abuse its discretion. The court also pointed out that the respondent chose to move out of state during a custody proceeding and that if she did not move, the risk of travel would not have been an issue.

*In re Marriage of Mayes*, 2013 WL 992636 (Ill. App. 4 Dist.), March 13, 2013 (see above)

### **CUSTODY-TEMPORARY**

*In re Marriage of Appel*, 2013 WL 2146224 (Ill.App. 2 Dist.), May 14, 2013

After hearing, the trial court granted temporary custody of the minor child to the Mother. The Father appealed the decision of the trial court, and the appellate court affirmed the decision of the trial court.

Pursuant to the judgment for dissolution of marriage, the Father was granted sole custody of the minor child. The Mother filed a petition for temporary custody alleging that the Father was sentenced to jail for a period of no less than 90 days. The Father testified that he was sentenced to the work release program and would be released from 6 am-7 pm every day. Therefore, he could be with the child in the morning and after she returned from school. Further, she would be in the care of her step-mother or grandparents at night. The evidence reflected that the Mother did not live in the same school district. After hearing, the Mother was granted residential placement of the child until further order of the court. The appellate court found that there is a presumption in the law that a natural parent has superior rights to a child. Further, the court found that while the Father is on work release, he would be unavailable for his daughter during non-working hours. Therefore, in light of the presumption in favor of the natural parent, there was no error made by the trial court.

## **DIRECTED VERDICT**

*In re Adoption of C.J.W.*, 2013 WL 937979, (Ill.App. 5 Dist.), March 8, 2013 (see above)

## **DISSIPATION**

*In re Marriage of Stephens and Coolidge*, 2013 WL 1200249 (Ill.App. 1 Dist.), March 25, 2013

A Wife appealed the trial court's judgment, arguing that the court erred in: (1) finding that she dissipated marital assets on horse-related expenditures in the amount of \$656,000; (2) failing to award her maintenance; (3) valuing certain accounts of the parties; and (4) requiring her to sell the marital residence or refinance its mortgage so that the Husband would no longer appear on the mortgage.

Prior to the Wife being terminated from her employment in May of 2009, both parties had been highly compensated partners at KPMG, at one time earning a combined gross yearly income totaling approximately \$1,700,000. The parties had also acquired several million dollars in assets during the marriage, which included horses that were purchased during the marriage but used by the Wife and maintained for approximately \$22,500 per month. The trial court found that the Wife's horse-related expenditures of almost \$656,000 between May of 2009 and the date of the trial constituted dissipation because the horses were not related to the marriage, the Husband had taken no part in enjoying the horses and the Husband had only acquiesced to the Wife's ownership of the horses because the Wife's income had justified the expense. Despite the Wife's arguments that her horse-related expenses remained consistent before and after the breakdown the parties' marriage and that the trial court's dissipation finding was inappropriately linked to the date of her loss of employment, the appellate court found the trial court's ruling was not against the manifest weight of the evidence. The appellate court also upheld the trial court's finding that the Wife was not entitled to maintenance because she is capable of supporting herself but had failed to make adequate efforts to do so after her termination from KPMG. The appellate court reasoned that extensive evidence supported the trial court's decision, including that the Wife had held a high-paying job at KPMG, that she was qualified for other similar positions, and that she spent the time since losing her job serving on various boards, traveling for vacations, and running for public office rather searching for appropriate employment.

The Wife also challenged the trial court's valuation of two of the parties' pension accounts, arguing that the court should have increased the values of those accounts to reflect interest. The appellate court did not disrupt the trial court's reliance on a valuation method that did not incorporate interest. However, because the trial court had incorrectly included interest in the value of one of the Wife's pension accounts, the valuation portion of the trial court's decision was reversed and remanded to revalue the Wife's pension account.

Finally, the Husband had filed a motion seeking to modify the judgment to require the Wife to either sell the parties' homes, which she had been awarded, or to refinance the mortgages on the homes so that he was no longer obligated under them. The trial court made this modification, and the appellate court deferred to the discretion of the trial court and upheld its ruling.

## **DIVISION OF ASSETS**

*In re Marriage of Mokeyeva v. Gumenyuk*, 2-13 WL 1296088 (Ill.App. 1 Dist.), March 29, 2013

A Wife appealed the trial court's dissolution judgment, as well as the trial court's denial of her motion to reconsider such judgment, on the basis that the judgment was silent on a number of issues, despite the introduction of evidence as to those issues at the trial. Wife argued that the trial court erred: in failing to accurately determining the parties' assets and dividing them accordingly; in denying her request for a reservation of maintenance for 3 years; in allowing unrestricted overnight visitation for the Husband; in failing to order the Husband to maintain a life insurance policy for the benefit of the minor children; in failing to order the Husband's medical insurance carrier to treat her as a policy holder for the purposes of reimbursement and

communication regarding the children's benefits; and in failing to order the preservation of the existent college fund. The appellate court ultimately reversed the dissolution judgment of the trial court, and remanded the matter for further proceedings because the trial court had abused its discretion in a number of ways. Specifically, the judgment failed to address the division of all of the parties' assets, including the Husband's car and the parties' pension funds. It also failed to address the parties' life insurance benefits, medical insurance for the minor children and the payment of a number of the child-related and college expenses. The appellate court also noted that the judgment contained a number of internal inconsistencies and factual assertions that were wholly unsupported by the record.

#### **DIVISION OF PROPERTY**

*In re Marriage of Bottom*, 2013 WL 1701810 (Ill.App. 5 Dist.), April 18, 2013 (see above)

#### **DIVISION OF ASSETS**

*In re Marriage of Bell*, 2013 WL 4033912 (Ill.App. 3 Dist.), Aug. 7, 2013

After a trial, the Husband appealed from the judgment of the trial court awarding his Wife a disproportionate share of the marital assets. The appellate court affirmed in part and reversed in part and remanded to the lower court.

After trial, the Wife was awarded 58% of the net marital assets. The Husband argued that the court must find "extraordinary circumstances" to uphold the trial court's distribution of assets. The appellate court found that the trial court is not required to make an equal division and that "extraordinary circumstances" do not need to exist. The award was not unreasonable because the Husband had a far greater ability to earn a substantial income. Further, the court factored in that the Husband dissipated over \$49,000 in marital assets. The court also factored in the custodial provisions of the Wife having custody of the children and the fact that she would reside with the children in the marital residence.

The Husband next argued that the trial court erred by including the parties' attorney fees as marital debt when it divided the assets and debts. The appellate court found that the trial court did abuse its discretion by treating attorney fees incurred in a dissolution of marriage action as marital debt, because the Act contains specific provisions for assigning and dividing attorney fees. Because of the specific provisions included in section 508 of the act, including a party establishing an inability to pay and the other spouse's ability to pay when determining contribution, the division of attorney fees should be dealt with under this provision and it is not within the trial court's power to divide the marital assets and debts under section 503(d). If the court were allowed to do this, the court could assign debt associated with a party's attorney fees to the other party without showing that the spouse incurring the fees could not pay them. Therefore, this issue was remanded so that the court could divide the net marital assets without including attorney fees incurred by the parties as marital debt.

*In re Marriage of Burrell*, 2013 WL 4033827 (Ill.App. 3 Dist.), Aug. 8, 2013 (see below)

*In re Marriage of Howell*, 2013 WL 4204193 (Ill.App. 5 Dist.), Aug. 14, 2013 (see below)

*In re Marriage of Radakovic*, 2013 WL 4614490 (Ill.App. 1 Dist.), Aug. 26, 2013 (see below)

#### **DOMESTIC VIOLENCE ACT**

*Gregory v. Allen*, 2013 WL 594306 (Ill.App. 3 Dist.) Feb. 15, 2013

The Ex-Husband appealed from the trial court's order granting a plenary order of protection in favor of his Ex-Wife and the parties' two sons, arguing that the court's finding of harassment was against the manifest weight of the evidence and the court failed to comply with the statutory requirement that it make specific findings.

The appellate court found that the trial court's determination that the Ex-Husband's conduct constituted harassment was not against the manifest weight of the evidence. The Ex-Husband

had pounded on the Ex-Wife's door, peered into her window, yelled at the children, and recorded the events with a video camera, and the Petitioner and the parties' child felt threatened and scared. The appellate court further found that because the plenary order of protection specifically stated and listed the statutory factors that had been considered by the trial court, as well as contained information as to the nature of the abuse and the intended remedies, the trial court's findings in support of the plenary order of protection were adequate and any omissions were harmless error. Specifically, the failure to include the court's oral pronouncement that the plenary order of protection was conditioned on the Ex-Husband's ability to care for or support his children does not render the order of protection unenforceable because the trial court lacked the authority to make a plenary order of protection conditional in that way. Thus, the appellate court held that the plenary order of protection adequately conformed to the trial court's ruling and affirmed the judgment of the trial court.

## **EMBRYOS**

*Szafanski v. Dunston*, 2013 WL 3048631 (Ill.App. 1 Dist.), June 18, 2013

This was a matter of first impression for the appellate court level. The trial court awarded pre-embryos to the Mother after the couple broke up. The appellate court found that the approach for resolving the dispute over the disposition of pre-embryos is to honor the parties' own mutually expressed intent as set forth in prior agreements. Therefore, this case was remanded for proper review under the contract approach.

In this case, the couple was dating. The Mother was diagnosed with non-Hodgkin's lymphoma, and was informed that her treatments would cause her to lose her fertility. The Father agreed to donate his sperm for the purpose of creating pre-embryos with the Mother's eggs. The parties signed a document entitled "Informed Consent for Assisted Reproduction." The form stated that neither party could use the embryos without the consent of the other party (if applicable), and that in the case of a separation, the facility would abide by the terms of the court decree or settlement agreement. The parties met with an attorney, and reviewed a co-parenting agreement stating that the Father would agree to take on all legal, custodial, and other obligations to the child regardless of any change of circumstance between the parties. The agreement further stated that if the parents separated, the Mother would control the disposition of the pre-embryos. The agreement was not signed. Nevertheless, the parties went through the process of creating the pre-embryos and the next day the Mother began her treatment. A few weeks later, the Father broke up with the Mother via text message and filed a petition to permanently enjoin the Mother from using the pre-embryos.

The question on appeal was "who controls the disposition of cryopreserved pre-embryos created with one party's sperm and another party's ova." The court performs a very thorough discussion of two different approaches: the contractual approach and the balancing approach. The court found that the contractual approach was the proper approach. The court found that honoring the parents' agreements properly allows them, rather than the courts, to make their own reproductive choices while providing a measure of certainty necessary for proper family planning. Further, by honoring the agreements, the court found that this would promote serious discussions between the parties prior to participating in *in vitro* fertilization. The court further found that where there is no agreement regarding the disposition of pre-embryos, then the relative interests of the parties in using or not using the pre-embryos must be weighed.

## **GRANDPARENTS' STANDING**

*Dumiak v. Kinzer-Summerville*, 2013 WL 5004696 (Ill.App. 2 Dist.), Sept. 12, 2013

The Grandparents appealed from the trial court's denial of their custody petition following an evidentiary hearing on the issue of standing. The appellate court affirmed the decision of the trial court.

From August 2008 to October 2010, the child lived with his Grandparents. The Mother visited with the child and had occasional overnights with the child, but she always returned him to the Grandparents. During this time period, the Grandparents made all of the decisions for the child without the input of the Mother. On October 31, 2010, the Mother picked up the child and did not return the child to the Grandparents. The Grandparents did not file a petition for custody until February 4, 2011. After the Grandparents case-in-chief, the Mother moved for a directed finding. The court granted the motion, finding that the Grandparents were not in possession of the child after October 31, 2010.

The appellate court found that the Grandparents did not meet their burden of showing that the child was not in the Mother's physical custody at the time they filed their petition. It is undisputed that the child lived with the Grandparents from August 2008-October 2010. The court specifically stated that because the child was not in the Mother's physical custody during that time, had the Grandparents filed a custody petition then, they would have enjoyed the status of standing under section 601(b)(2) of the IMDMA. However, the court had to decide whether the Mother was reinvested with physical custody on the date of filing. In this case, she was reinvested with physical custody. The evidence established that the Mother had physical custody of the child for over three months before a petition was filed. During this time period, the Mother made all of the decisions for the child including when the child could see the Grandparents. Therefore, based on these set of facts, the Grandparents failed to demonstrate that the Mother did not have physical custody of the child at the time they filed their custody petition.

#### **GRANDPARENT VISITATION**

*In re Marriage of Carlyon v. Baarson*, 2013 WL 4774457 (Ill.App. 5 Dist.), Sept. 4, 2013

After the death of her daughter, maternal Grandmother filed a petition for guardianship of the child of her deceased daughter and her deceased daughter's husband ("Father"). She alleged that Father had forcibly removed the child from her daughter's physical custody to the State of Maryland prior to her daughter's death. She also filed a petition for custody of the child and for grandparent visitation under the IMDMA. The guardianship case was eventually consolidated with the pending custody case and later dismissed with prejudice. The petition for custody and petition for grandparent visitation were later also dismissed, and Grandmother appealed the dismissal of her petition for grandparent visitation. Though the child had not resided in State of Illinois for six consecutive months prior to the filing of the petition for grandparent visitation, Grandmother argued that she met the definition of a person acting as a parent of the child for the purposes of ascertaining the home state of the child because of her past caretaking of the child in the State of Illinois. The trial court disagreed, finding that because Grandmother's petition for custody had already been dismissed, she did not have a right to legal custody in order to fulfill the status of a person acting as a parent. For this reason, the appellate court ultimately upheld the trial court's finding that that Illinois was not the home state of the child and that Illinois lacked subject matter jurisdiction over the petition for grandparent visitation.

#### **GRANDPARENT VISITATION**

*In re Matter of Grandparent Visitation*, 2013 WL 1296380 (Ill.App. 1 Dist.), March 29, 2013

The maternal Grandparents filed a petition seeking visitation with their grandchildren pursuant to 750 ILCS 5/607(a-5). The children's mother died of natural causes. The Grandparents alleged that they had a strong and positive bond with the grandchildren but that they had been denied visitation with the grandchildren. The Grandparents further alleged that the children's emotional health would be affected by the denial of visitation time. The Father filed a combined motion to dismiss the petition pursuant 735 ILCS 5/2-619.1. The Father argued that the Grandparents failed to plead that this decision was harmful to the children's emotional health. The circuit court entered an order granting the motion to dismiss but granted the Grandparents leave to replead. The Grandparents filed an amended petition, and the Father filed another combined motion to

dismiss pursuant to 735 ILCS 5/2-619.1. The Grandparents sought leave to file a second amended pleading, and the court again granted leave to do so. The Father again filed a combined motion to dismiss pursuant to 735 ILCS 5/2-619.1, raising arguments substantially similar to those in the first and second motion to dismiss. The circuit court entered an order granting the Father's motion to dismiss the second amended petition with prejudice.

In this case, the Grandparents had standing to file a petition based on the fact that the children's mother was deceased. In determining whether to grant such a petition, the statute provides "a rebuttable presumption that a fit parent's actions and decisions regarding grandparent, great-grandparent, or sibling visitation are not harmful to the child's mental, physical, or emotional health. The burden is on the party filing a petition under this Section to prove that the parent's actions and decisions regarding visitation times are harmful to the child's mental, physical, or emotional health." 750 ILCS 5/607 (a-5)(3). In this case, the second amended petition alleges that the Father is an unfit parent. However, the only basis stated for this allegation is that the Father's denial of visitation to the Grandparents is harmful to the children. Further, the second amended petition alleges that denying the Grandparents visitation will deprive the children of a family identity, sense of belonging and affirmation. The court has previously held that allegations of this nature are not a type of "harm" sufficient to rebut the statutory presumption in favor of a fit parent's decisions regarding grandparent visitation. Therefore, the trial court did not err when it dismissed the second amended petition. Further, the Grandparents had several prior opportunities to amend the petition, and the petitions filed did not substantially differ from one another. Therefore, the trial court did not err when it denied the petition with prejudice.

## **GUARDIANSHIP**

*In re T.P.S.*, 2013 WL 827539 (Ill.App. 5 Dist.), March 4, 2013

Birth Mother and her Partner were in a same-sex relationship and were granted co-guardianship over two children who were conceived via artificial insemination. After the parties' relationship ended, Birth Mother filed petitions to terminate the guardianships. The trial court granted the petitions based on the finding that the Partner lacked standing to oppose. The appellate court then reversed this decision and on remand, the trial court found that continuing guardianships was not in the children's best interests. The Partner again appealed that ruling and the appellate court again reversed.

The Partner had been the primary caregiver of the minor children since their birth and the parties' relationship was strained prior to the birth of the second child. At the time the parties entered into co-guardianship of the second child, the Birth Mother had told the Partner she no longer wanted to be a couple. The Birth Mother then moved out of the parties' residence for nearly a year during the end of their relationship but the Partner continued to care for the children primarily during the day.

Approximately one year after the Birth Mother and the Partner ended their relationship, the Birth Mother filed the petitions to terminate guardianships. In reversing the trial court's finding that the Partner lacked standing to oppose these petitions, the appellate court stated that the Birth Mother must demonstrate a material change in circumstances, by a preponderance of the evidence. The Partner then must demonstrate by clear and convincing evidence that terminations would not be in the best interests of the children.

During the continued litigation, the parties stipulated that the Birth Mother considered herself a part of the Partner's family, that the Partner attended the Birth Mother's doctor's visits during the conception of the children, that the children called the Partner, "Mom" and that the children were close to the Partner's extended family. The parties introduced testimonies of a guardian *ad litem* and a clinical psychologist. Ultimately, the trial court found that a material change occurred when the parties' relationship ended and that the court did not have the power to award visitation to the Partner.

On appeal, the court ruled the Birth Mother had not met her burden of proving a "material"

change occurred, as there were no changes that directly related to the best interests of the children. The trial court also incorrectly assessed the best interests of the children. The children were close with both parties, both parties were able to provide stable homes and both parties would be able to work together to make decisions for the children. The appellate court held that the trial court must consider these relevant factors in evaluating the termination of the guardianships.

### **HAGUE CONVENTION**

*In re matter of Mary Redmond and Derek Redmond*, 2013 WL 3821595 (C.A.7 (Ill.)), July 25, 2013

A Mother left her home in Illinois to attend college in Ireland. There, she met the Father and the two began an eleven-year long romantic relationship. During that time, the Mother became pregnant. The couple agreed that the baby would be born in America, but would be raised in Ireland. Eleven days after the birth of the child, the parties returned to Ireland, but their relationship soon deteriorated. The Mother moved back to Illinois against the Father's wishes when the child was eight months old. Because under Irish law, unmarried Fathers are not legally recognized as parents the Father did not initially have recourse under the Hague Convention. However, the Father filed an action in Ireland to establish his rights, and after a lengthy court battle, was eventually granted guardianship and joint custody of the child. The Irish court also ordered that the child was to live in or near Ballymurphy, Ireland. The Mother participated in these proceedings in Ireland, after which she was granted permission to take the child back to Illinois to prepare for their move to Ireland on the condition that she swear under oath to return to Ireland by a date certain. Instead, the Mother returned to Illinois where she remained with the child. Thereafter, the Father filed a Hague Convention petition in federal court, claiming that the Mother had wrongfully retained the parties' child in the United States in breach of his newly recognized custody rights in Ireland. The United States District Court for the Northern District of Illinois ordered the child to be returned to Ireland and the Mother appealed.

The appellate court found that the Mother had not wrongfully removed the child from Ireland because, under Irish law, the Father had no custody rights to assert at the time that the Mother removed the child from Ireland. Because the Mother had *de facto* sole custody of the child, she had the exclusive right to fix his residence. After living in Illinois for 80% of his life and engaging in his everyday life activities there, the child's residence in Illinois was not "temporary," but had become his habitual residence. Therefore, the Mother's return to Illinois after the entry of the order establishing the Father's custodial rights did not constitute wrongful retention of the child.

The appellate court ultimately reversed the district court's decision due to its improper interpretation of the meaning of the term "habitual residence" within the meaning of the Hague Convention. The determination of a child's habitual residence is supposed to consider all available, relevant evidence and the individual circumstances of each case, and not be determined solely by the parent's last shared intent. Furthermore, the appellate court reasoned that the Hague Convention is intended as a means of preventing international child abduction and is not meant to provide a mechanism for the recognition or enforcement of foreign custody orders. This function is served by the Uniform Child Custody Jurisdiction and Enforcement Act and would have been the more appropriate means for the Father in this case to enforce his newly declared custody rights.

### **INJUNCTIVE RELIEF**

*In re Marriage of Sheaffer*, 2013 WL 3808798 (Ill.App. 2 Dist.), July 23, 2013

The trial court entered an order setting forth a child support arrearage owed by an ex-Husband. Thereafter, the Department of Healthcare and Family Services (HFS) notified the ex-Husband of its intent to collect the past-due child support amount that was set forth in the trial court's order. Through HFS, the ex-Husband contested the calculation of the amount past due, claiming that



he had made direct payments to the ex-Wife for which he should receive credit. HFS notified the ex-Wife of the Husband's attempt to modify the trial court's child support calculation. She then brought a post-decree action seeking injunctive relief against the ex-Husband, alleging the trial court had exclusive jurisdiction over the issue. As a result, the trial court enjoined the ex-Husband from seeking to modify its order before any administrative agency and from seeking a redetermination of his arrearage. The ex-Husband appealed.

The appellate court ultimately held that the ex-Wife had established her entitlement to the injunction because she had stated a clearly ascertainable right to protect the finality of the trial court's decision and the injunction was the only remedy that would ensure that HFS would not usurp the trial court's arrearage calculation.

*In re Marriage of Brass*, 2013 WL 1790992 (Ill.App. 1 Dist.), April 25, 2013

In a dissolution proceeding, the Wife appealed the trial court's order denying her motion to vacate two orders entered by the trial court. The orders that were subject to her challenge provided for a partial lift of a previously entered preliminary injunction that had prohibited the parties from removing funds from their various accounts, and prevented the Husband from purchasing or renting real estate. Instead, the trial court allowed for the liquidation of certain accounts to pay certain expenses of the parties, including their attorney fees. It also extended a modified preliminary injunction limiting the parties' use of their marital accounts to the scope of the order, and extended the prohibition on the Husband's use of marital funds for making real estate purchases. The Wife argued that the modification to the preliminary injunction invited misconduct on the part of the Husband because it allowed him to use non-marital funds to make real estate purchases. She further challenged the orders on the grounds that they improperly ordered the parties to use retirement funds, which are exempt from creditors under Section 12-1006 of the Illinois Code of Civil Procedure.

As to the threshold challenge raised by the Husband that the appellate court lacked jurisdiction, the appellate court determined that the orders in question were for injunctive relief and not temporary orders and, therefore, immediately appealable pursuant to Illinois Supreme Court Rule 307(a)(1).

On the merits of the Wife's appeal, the appellate court ultimately concluded that the Wife failed to establish that she would suffer irreparable injury or that she lacked an adequate remedy at law due to the trial court's refusal to reinstate the original preliminary injunction. The Wife had petitioned the trial court for support and alleged that marital bills were unpaid. The purpose of the modification of the preliminary injunction was to enable the payment of these bills. Had the previous preliminary injunction regarding the parties' account been reinstated, the parties would not have been able to pay their expenses, thereby causing more injury. Additionally, if the Husband failed to adhere to the order, the Wife had the available remedy of filing a petition for rule to show cause against him. Therefore, the preliminary injunction that remained in place was sufficient to protect the Wife's claim to the marital estate.

The appellate court also rejected the Wife's contention that the trial court had wrongfully ordered the parties to use retirement funds, as in the case of *In re Marriage of Radzik*, 353 Ill.Dec. 124, 143 (2011). Unlike in *Radzik*, there was no contempt order against the Wife to form the basis for her appeal. Also, the trial court's order did not, in fact, order the liquidation of retirement accounts to pay interim attorney fee. Attorney fees were to be paid from various liquid accounts, the Husband's salary, and income tax refunds. The parties were to use retirement funds only in the event they were not approved for a pending mortgage application, at which time the funds would be liquidated and paid to the parties' accountant and toward their real estate tax bill. As such, the appellate court found that the Wife had failed to show any grounds for the review of the trial court's interim review award and this portion of her appeal was dismissed.

## JUDGMENT FOR DISSOLUTION OF MARRIAGE

*In re Marriage of Baecker*, 2012 WL 6743536 (Ill.App. 3 Dist.), Dec. 31, 2012

Husband filed a petition for dissolution of marriage in February 2010. In June 2010, Husband was convicted and sentenced to prison for attempting to kill Wife. In March of 2011, the parties indicated that they had reached an agreement. At all relevant times, Husband was represented by an attorney and was not present in court. Further, the trial court specifically asked the attorney if he had the authority to enter the settlement and whether he had explained the settlement to his client. The attorney said that he had explained everything to his client and that he had the authority to enter into the agreement. The trial court read the terms of the oral agreement into the record and instructed counsel to prepare the final judgment. Husband refused to sign the judgment. Wife filed a motion to enforce the judgment and Husband filed a motion to vacate the oral settlement. The trial court heard the arguments of both parties and entered a final judgment, which incorporated the oral settlement agreement. On appeal, Husband argued that the court erred in denying his motion to vacate, that the oral settlement agreement was not an enforceable contract for which there was a requisite "meeting of the minds" and that he was under duress and the victim of coercion at the time the settlement was reached. The appellate court affirmed the trial court's decision.

On appeal, the court found that the record contained many statements by Husband's attorney that demonstrated that the agreement was acceptable to Husband, that Husband wished to proceed, and that he knew he had the right to a trial. Moreover, Husband did not provide the court with any affidavit or evidence to refute the apparent authority that his attorney had to settle on his behalf.

Husband next argued that there was no meeting of the minds as to the payment of his attorney fees. The court found that, at all times, the parties had clearly agreed that Husband's attorney would receive \$25,000 from the net proceeds of the sale of his vehicle and any remaining funds would go to Wife. The appellate court found that the record was clear of these intentions.

Finally, Husband argued that he was under duress when he agreed to the terms of the divorce as he only had 20 minutes to talk to his attorney, and that the agreement was unconscionable. The record clearly stated that his attorney believed that his client would receive 48% of the estate and that his client agreed to the terms of the settlement. The court found that nothing in the record indicates that Husband was coerced or under duress at the time the agreement was entered. Husband did not point to a single instance of wrongdoing by Wife or her attorney that would rise to the level of coercion or duress.

*In re Marriage of Ansborg*, 2013 WL 164015 (Ill.App. 3 Dist.), Jan. 10, 2013

After trial, a judgment for dissolution of marriage was entered. Husband appeals from that judgment, arguing that the trial court erred in: (1) awarding sole custody of the parties' five minor children to his wife; (2) reserving the issue of husband's visitation with the children; (3) awarding Wife a larger share of the marital estate; (4) allocating a smaller portion of the total debt to Wife; and (5) ordering Husband to contribute to Wife's attorney fees. The appellate court affirmed the trial court's judgment.

As his first point of contention on appeal, Husband argued that the trial court erred in awarding sole custody of the children to Wife. However, Husband had previously agreed that joint custody was no longer feasible, did not seek sole custody of the children and did not object at trial to either the termination of joint custody or to an award of sole custody to Wife. Therefore, Husband cannot complain on appeal that the trial court's order of sole custody was improper. Husband next argued that the trial court erred in reserving the issue of visitation. Wife asserted, among other things, that this issue was moot because visitation was later set by the trial court in response to her husband's post-judgment motion. The court agreed with Wife's assertions.

As his third and fourth points of contention on appeal, Husband argues that the trial court erred in its distribution of the marital assets and total debt between the parties. The trial court went through all of the parties' assets and debts and tried to distribute them in a fair and reasonable manner, which for the most part, was relatively equal. The real property was apportioned in that Wife was awarded the marital home and the equity in the home, which was not enough to reimburse her for the amount of nonmarital funds she had contributed; and Husband was awarded the time share in Mexico. As for the retirement accounts and pension, the marital portions of those accounts were split between the parties and the non-marital portions (or accounts) were awarded to each party individually. The insurance policies were also awarded to each party individually. In a similar manner, the trial court divided the total debts between the parties and made each party responsible for a portion of the marital debt and for all of his or her own individual debt. The appellate court found that the trial court was very thorough in making its decision and that the division of equity was equitable.

Finally, Husband argued that the court improperly ordered him to contribute to his wife's attorney fees. In so doing, the trial court had before it evidence as to the respective financial condition of the parties and was aware that Wife had paid \$250 in attorney fees and had an outstanding balance of about \$17,000 and that husband had paid about \$27,000 in attorney fees to his various attorneys. Therefore, the appellate court found that the trial court's order was proper.

*In re Marriage of Tuttle*, 2013 WL 164035 (Ill.App. 5 Dist.), Jan. 11, 2013

Before the marriage, the parties allegedly entered into a prenuptial agreement, but at the time of divorce, a copy of the agreement could not be found. At trial, Wife testified that Husband came into the marriage owning farmland and that she owned no real estate. They both testified that from the time of the marriage until 2003, the parties acquired 10 different parcels of real estate. While still married, Husband created a revocable trust into which he deeded real estate he owned before the marriage, as well as real estate acquired during the marriage. Husband named himself as the sole beneficiary, as well as the trustee and settlor of the state. The trust was structured to be converted upon Husband's death to a trust he set up with eight beneficiaries. His wife was not named a beneficiary.

The first issue on appeal was whether a written prenuptial agreement was necessary in light of both parties' acknowledgement that there was an agreement and both parties' general agreement as to its terms. The appellate court found that in order to accurately follow the terms of a prenuptial agreement, it must be in writing. The parties in this case testified generally about the terms, but without the written document there was no way to confirm their statements. Furthermore, agreements relative to marriage of the type claimed in this case have always been governed by the statute of frauds, which mandates that in order "to charge any person upon any agreement made upon consideration of marriage \* \* \* [the agreement] shall be in writing, and signed by the party to be charged therewith." 740 ILCS 80/1 (West 2010).

The next issue on appeal related to a piece of property Husband received from his first marriage. The trial court acknowledged that the property was nonmarital and that despite the fact that the mortgage payments were presumably made with marital assets, the property did not lose its nonmarital character and was not transmuted into marital property. However, because marital assets were used to pay the mortgage, the court determined that Wife was entitled to one-half of the payments made on this mortgage from the date of their 1981 marriage until the mortgage was released in late 1989. The appellate court found that the income Husband earned during the marriage came from the operation of Tuttle Farms from Tuttle Grain. While the Tuttle Farms and Tuttle Grain farmland and equipment may or may not have been nonmarital in nature, income derived from these assets, regardless of classification, is construed as marital income. Consequently, Wife was properly entitled to one-half of the total amount of mortgage payments made during the marriage.

The next issue on appeal was whether the trial court erred in not giving Husband a 50% credit

for a house awarded to his wife and the trial court's valuation of five properties. On appeal, the court found that based on its review of the record the trial court did not err in awarding 100% of the house to Wife. The court found that just proportions do not require an equal split of all of the assets. In light of the nonmarital property awarded to Husband, the award was proper as to Wife. With regard to the other five properties, Wife had appraisals performed on all of the properties. Husband had only one property appraised. Husband argued that the court should have assigned values to the property as of the date of dissolution, not as of the date they were appraised. However, Husband provided no evidence that the appraisal values obtained by Wife were not as of the date of dissolution. Therefore, the trial court was correct in using Wife's appraisals. However, the trial court was not correct when it averaged the appraisals done by Husband and Wife. The trial court must have an evidentiary basis for establishing a property value. Because the trial court did not accept either appraisal, but rather averaged the appraisals, the appellate court found that there was no evidentiary foundation for the value reached by the trial court. Therefore, this issue was reversed and remanded.

Husband also argued that the court should not have awarded Wife any amount of money for properties that were held in his trust. However, it is clear that many of those properties were marital and that the trust was created during the marriage. Therefore, it was proper for the court to award Wife a portion of the marital property held in the trust.

Next, the trial court found that Husband had dissipated marital assets in the sum of \$100,000 in order to purchase a house in Yuma, Arizona for his ex-wife. Husband argued that he loaned the money to his ex-wife. Since the "loan" had been made, no amount of money had been paid by the ex-wife to reimburse Husband. Therefore, the trial court was correct in finding that Husband dissipated \$100,000.

At trial, Wife had an expert testify that Tuttle Farms, a separate legal entity, did not own the land it farmed but rather the land was owned by the parties. The accountant testified that Tuttle Farm farmed but never paid rent for the land it farmed. The court found that Wife was entitled to 50% of the unpaid rent. Husband argued that the land was nonmarital property and thus income derived from that land would also be nonmarital. He also argued that because his wife did not have much farm-related knowledge and did no more than run farm-related errands, she was not entitled to any income. Based upon the timeline of events in this case, along with the fact that Wife was, at times, legally obligated for debt on the farmland at issue, the court affirmed that Wife was entitled to one-half of the unpaid rent on the acreage farmed by Tuttle Farms. Regardless of whether the real estate was construed as a nonmarital asset, the income was marital. Therefore, the trial court did not abuse its discretion.

Finally, the court found that in light of the fact that Husband was awarded the income-producing assets of the marriage, the trial court did not abuse its discretion when it awarded maintenance to Wife.

*In re Marriage of Sobieski*, 2013 WL 326365 (Ill.App. 2 Dist.), Jan. 29, 2013

Husband contended that the trial court erred in ordering him to pay \$43,180.50 of his wife's attorney fees and in setting his monthly child support obligation at \$4,800. The appellate court affirmed the decision of the trial court.

On appeal, Husband argued that the determination of his net income was too high, and that even assuming that his income was properly determined, Wife was in a substantially similar financial situation. The trial court had difficulty determining Husband's net income because his testimony lacked credibility. Husband listed his monthly income at \$13,500 on finance applications but testified that he did not make more than \$10,000 per month. He further admitted that he handled significant amounts of cash for the business owned by his family (he had a 25% ownership interest) and that his mother had given him \$50,000 in cash each year as a gift for the past five years. Wife testified that he brought home \$3,500 to \$4,000 per week in cash. The appellate court found that the trial court did its best to determine Husband's net

income. Therefore, \$12,000 was a proper number to use for net income.

Next, Husband argued that he should not have to pay his wife's attorney fees because once the court takes into account child support and maintenance, the two are in a similar financial situation. Husband relied on *In re marriage of Schinelli*, 406 Ill.App.3d 991 (2011). In that case, the court reasoned that when maintenance was factored in the parties stood in a similar financial position. In the instant case, the court stated, "We have serious doubts as to whether including child support in the *Schinelli* calculus would be proper even if we were to find the *Schinelli* analysis applicable here." Under section 508(a) of the IMDMA, the court is to consider the financial resources of the parties, and such consideration is to be done in accordance with section 503(j) of the Act. Section 503(j) requires consideration of the 503(d) factors, and if maintenance is awarded, the 504(a) factors as well. Based on the factors, the court found that the trial court properly considered said factors in awarding attorney fees to Wife.

Finally, Husband argued that the court should have deviated from the statutory guidelines for child support because the children spent a significant time with him. The court rejected the argument that extended time spent with one's children requires a deviation from child support guidelines. Husband presented no evidence that his extended time with the children would affect the financial resources and needs of the children, or the financial resources and needs of the noncustodial parent, in a way that warranted a deviation.

## **JURISDICTION**

*In re Marriage of Matwichuk*, 2013 WL 1296072 (Ill.App. 1 Dist.), March 29, 2013

An ex-Wife filed a petition to modify and extend rehabilitative maintenance. The ex-Husband filed a petition to terminate the ex-Wife's rehabilitative maintenance and then filed a motion for summary judgment. The trial court entered an order denying the ex-Husband's motion for summary judgment and thereafter found, pursuant to Illinois Supreme Court Rule 304(a), that there was no reason to delay ex-Husband's appeal of the order denying the motion for summary judgment. The ex-Husband then filed the appeal. However, the appellate court ultimately declined to address the merits because it lacked appellate jurisdiction. The appellate court's decision was based on the fact that an order denying a motion for summary judgment is not a final order, but rather interlocutory in nature and not appealable.

## **JURISDICTION**

*Boucher v. Rose*, 2013 WL 4716031 (Ill.App. 5 Dist.), Aug. 29, 2013

The Mother appealed from an order of the circuit court of Jackson County, Illinois, dismissing her petition for child support and visitation. The court dismissed the petition after conferring with the trial judge of the Henderson circuit court in Kentucky and receiving an order from the Kentucky court in which the Kentucky court chose to retain jurisdiction in a similarly styled case filed by the Father. The appellate court affirmed the decision of the trial court.

In this case, the Father filed his petition in the Kentucky court before the Mother filed her petition in Illinois. Further, both parties appeared before the Kentucky court. The Mother did not present her evidence regarding residence and jurisdiction at that time.

The record reflects that there was proper communication between the Illinois and Kentucky courts and that there was a finding by the Kentucky court that the child had not resided in Illinois for six months prior to the time the Kentucky action was filed. Therefore, it was not up to Illinois to re-litigate the issue.

*In re Marriage of Cwik*, 2013 WL 4799368 (Ill.App. 1 Dist.), Sept 6, 2013

The court dismissed the Husband's petition to enroll a foreign judgment for dissolution of marriage and to modify the parenting schedule. The court also granted the Wife's petition for attorney fees. The appellate court affirmed the decision of the trial court.

The parties were divorced in Ohio. A month after being divorced, the Wife filed a petition to relocate to Chicago in the Ohio court. Her petition was granted and the parenting schedule was modified. Thereafter, litigation continued in the Ohio court with regards to an order of protection and a petition to modify parenting time filed by the Wife. After she filed the petition to modify parenting time, the Husband filed a petition to enroll a foreign judgment and petition to modify parenting time in Cook County. Thereafter, the Ohio court granted the Wife's petition to modify parenting time and the Wife filed a motion to dismiss the Husband's petitions. The Cook County court granted the Wife's motion and denied the Husband's petitions. Further, the court found that the Husband's petitions were not filed in good faith and awarded the Wife attorney fees and costs.

In this case, the appellate court affirmed the decision of the trial court holding that a court order in Ohio specifically stated that the Ohio court would retain exclusive continuing jurisdiction over the issue of reallocation of parental rights and responsibilities of the minor children pursuant to the relevant Ohio statute. Ohio was able to maintain jurisdiction of this case because at no time did the Husband file an affidavit to relocate with the Ohio Court. Therefore, it was proper for the Ohio Court to determine that the Husband still lived in Ohio, and therefore, Ohio could retain jurisdiction. Because the court properly determined that the court lacked jurisdiction, the court awarded attorney fees against the Husband for improperly bringing the action, not as a sanction for violating a decree over which the court had no jurisdiction.

*In re Marriage of Murugesh*, 2013 WL 4027182 (Ill.App. 3 Dist.), Aug. 8, 2013

After the Husband filed a petition for dissolution of marriage in India, the Wife filed her petition for dissolution of marriage in this state. The trial court denied the Husband's motion to dismiss the Wife's petition and certified a question for appeal.

In this case, the certified question asked the court to determine whether, based on the facts of this case, the Illinois action should be dismissed pursuant to (1) section 2-619(a)(3) of the Code (735 ILCS section 2-619(a)(3)), (2) the doctrine of *forum non conveniens*, (3) principles of comity (4) "The Illinois court's exclusivity opportunity to avoid duplicative litigation."

With regard to the first issue, the court found that the Illinois courts are not required to recognize or enforce divorce judgments from foreign countries. Because of this, the purpose of section 2-619(a)(3) of the Code to "avoid duplicative litigation" is not achieved by dismissing an Illinois action in favor of a foreign dissolution action. Therefore, section 2-619(a)(3) of the Code should not be used to dismiss the Illinois dissolution action in favor of the Indian action.

With regard to the second issue, all the relevant factors weigh against dismissal of the Illinois divorce proceeding. Both parties reside in the State of Illinois, and neither one of them have personally appeared in court in India (they both had family members appear on their behalf). Further, most of the relevant proofs are located in Illinois, including their assets and any issues related to the minor child. Although the Husband claimed that there were witnesses in India, those witnesses were only relevant to the Wife's alleged infidelity. Therefore, based on the relevant factors, dismissing the Illinois case pursuant to the doctrine of *forum non conveniens* would not be appropriate.

With regard to the third and fourth issues, because Indian courts will not recognize the Illinois divorce decree, it would be inappropriate for an Illinois court to recognize the Indian divorce decree under principles of comity. Further, Illinois has a significant and substantial interest in the parties and the dissolution of their marriage since they both live in Illinois. It is clear that the Husband only filed in India as a means to take advantage of foreign law. Therefore, Illinois should not grant comity to the Indian court's judgment. Further, the child has lived in Illinois her entire life, and only an Illinois court can make an initial child custody determination. Therefore, the certified question of the trial court was answered.

## MAINTENANCE

*In re Marriage of Courson*, 2013 WL 485273 (Ill.App. 5 Dist.), Feb. 6, 2013

The Ex-Husband appealed from the circuit court's judgment in which he was ordered to pay the Ex-Wife \$1,600 per month in permanent maintenance, to be reviewed in five years. The appellate court affirmed the decision of the circuit court.

The appellate court found that several factors supported the award of maintenance. The parties were married for nearly 25 years. On the date of the hearing, the Ex-Husband was 48 years old and presented no evidence of any physical or emotional limitations. The Ex-Wife testified that she was 57 years old and declared disabled by the Social Security Administration due to a back injury, heart problems, diabetes, and "nerves." In looking at the standard of living established during the marriage, the Ex-Husband had no problem maintaining and even surpassing his previous standard of living, as he was currently living in a home valued at \$184,400, while the marital residence was valued at \$93,000. In contrast, the Ex-Wife no longer enjoyed the standard of living she had during the marriage, as she was residing with her son and was seeking a place to live with monthly rent not to exceed \$400. Further, the court found that the Ex-Wife was unemployable due to her disabilities and had no way of earning an income. In comparison, the Ex-Husband earned a gross monthly income of \$6,325. Therefore, the trial court's decision was affirmed.

*In re Marriage of Gadson*, 2013 WL 708044 (Ill.App. 4 Dist.), Feb. 25, 2013

In post-decree litigation beginning in April of 2009, the Ex-Husband filed his first in a series of pleadings to reduce his maintenance obligation on the basis that he was unemployed and receiving disability. In August of 2009, the trial court denied that motion. In January 2010, the Ex-Husband again filed a petition to terminate maintenance, once again claiming that he was injured in the course of his employment and could no longer work. Following an April 2010 hearing, the court denied the Ex-Husband's petition based on the fact the Social Security Administration had denied his disability claim and because the court was not convinced, based on the Ex-Husband's conduct, that he was truly unable to work. The Ex-Husband appealed this decision, and the appellate court affirmed.

In April of 2011, the Ex-Husband again filed a petition to terminate maintenance, claiming again that mental instability prevented him from working. In December of 2011, the Social Security Administration entered an adjudication in his favor. Despite this and despite the testimony of Ex-Husband's expert psychiatrist that he was unable to work, the trial court again denied his request to terminate maintenance in January of 2012. The Ex-Husband then filed a motion to reconsider the trial court's order, which the court denied. The trial court found that it was not bound by the Social Security Administration's findings when the court had previously made a determination that the Ex-Husband's claims regarding his alleged inability to work were not credible.

The Petitioner appealed the trial court's decision, and again, the appellate court affirmed. The appellate court found that it was within the trial court's discretion to deny the Ex-Husband's motion to modify because the January 5, 2012 order demonstrated that the trial court had given legitimate consideration to the evidence presented by the Ex-Husband yet found that this evidence did not outweigh the court's belief that the Ex-Husband was able to work.

*In re Marriage of Perlman*, 2013 WL 434047 (Ill.App. 2 Dist.), Feb. 4, 2013

The Ex-Husband petitioned the court for a modification of his maintenance obligation based on the fact that his income had decreased from a \$356,134 gross annual income to a \$318,086 gross annual income. He noted that he was paying \$75,000 per year in gross income to the Ex-Wife, which equaled 21% of his annual gross income. He requested that the court use his new income in determining 21% of his gross income for maintenance. The Ex-Husband pointed out that although he was to pay \$75,000 per year in maintenance, the payments were not in equal



installments, but rather they varied pursuant to a payment schedule as set forth in the judgment. After the hearing, the court modified the maintenance award so that the Ex-Husband would be paying \$60,000 per year for maintenance payable in equal installments. The court further found that the Ex-Husband overpaid maintenance in the amount of \$3,440 for 2011 (the court made the award retroactive to the date of filing in October 2011.)

On appeal, the Ex-Wife argued that the Ex-Husband was only entitled to a modification of payments going forward from October 12, 2011 (the date of filing); by reducing the total maintenance due and owing for the first 9 ½ months of 2011, the trial court effectively allowed a reduction in maintenance prior to the filing of the petition.

The appellate court found that the Ex-Husband paid, pursuant to the schedule set forth in the judgment, all installments due through the date of the filing of his petition. Therefore, the appellate court declined to hold that the court modified payments for the period prior to the date petitioner filed his petition. However, the trial court abused its discretion when it based the balance of his 2011 maintenance on income only from October 12 through December 31, 2011. The appellate court found that the trial court should have based the reduction in maintenance on the Ex-Husband's entire 2011 income. Thus, the court should have determined that the Ex-Husband owed \$12,500 for the 2011 year-end period, and, given that he had already paid \$11,000 in maintenance for that period, he still owed \$1,500. Therefore, instead of finding an overpayment, the trial court should have found an underpayment of maintenance. Therefore, this issue was remanded.

*In re Marriage of Poppenhagen*, 2013 WL 451536 (Ill.App. 2 Dist.), Feb. 5, 2013

The appellate court found that the trial court did not abuse its discretion in: (1) denying the Ex-Husband's petition to terminate or abate maintenance, where the court found his testimony incredible; and (2) limiting the relief to that specified in Ex-Husband's prayer for relief, in that he never requested a modification of maintenance.

The Ex-Husband petitioned the court to terminate maintenance or, in the alternative, to abate maintenance, alleging that a substantial change in circumstances had occurred since the entry of the judgment in that he was re-diagnosed with prostate cancer. In his prayer for relief, the Ex-Husband asked that the court terminate or abate maintenance until his medical condition was fully known and for such other and further relief as may be appropriate under the circumstances.

The Ex-Husband testified that he had been earning \$33,000 per year from Home Depot working 40 hours per week, and he received some pension benefits. After he was re-diagnosed with prostate cancer, he retired. His gross income consisted of Social Security (\$2,375 gross per month) income and his pension of \$895 per month. The Ex-Wife testified that she received \$938 per month from Respondent's pension and \$764 in monthly Social Security benefits. After the hearing, the trial court found that although the Ex-Husband's health may have worsened, only his testimony was presented to support his contention and his medical condition was not fully known to the court. Further, the court found that the Ex-Husband did not request a modification but only requested a termination or abatement of support. Therefore, the court found that his retirement and subsequent claim of unemployment did not constitute a substantial change in circumstances.

The appellate court found that the trial court did not abuse its discretion in finding that there was no substantial change in circumstances. It is clear from the record that the court determined, after hearing the Ex-Husband's testimony and in the absence of any evidence substantiating it, the Ex-Husband voluntarily left his employment, failed to establish that he was unable to work and failed to establish the status of his medical condition. Further, although the trial court may be empowered to enter a modification order, it was not obligated to do so. The appellate court also found that the Ex-Husband did not raise the modification option at the hearing on his petition. Therefore, the judgment of the trial court was affirmed.

## MAINTENANCE

*In re Marriage of Howell*, 2013 WL 4204193 (Ill.App. 5 Dist.), Aug. 14, 2013

Husband appealed a dissolution judgment on the issues of maintenance, marital residence valuation, dissipation of marital property and valuation of the marital portion of his pension. The trial court had determined that maintenance to the Wife was appropriate in this case but also recognized that the Husband had a significant child support arrearage and owed additional money to the Wife due to his dissipation of marital assets, payment of which would leave him with insufficient assets from which he would be able to pay maintenance. Therefore, the Wife was awarded an additional 10% of the Husband's pension, or 60% of his pension. The appellate court vacated and remanded this portion trial court's judgment, finding that it was vague and in need of clarification because the trial court had never explicitly divided the marital portion of the pension elsewhere in the judgment as part of the property division. Furthermore, the appellate court also questioned whether future pension benefits, not set to begin for many years, could serve the purpose of maintenance. The appellate court upheld the remainder of the trial court's order pertaining to the valuation of the marital residence and the Husband's dissipation of marital property.

*In re Marriage of Akers*, 2013 WL 3488269 (Ill.App. 2 Dist.), July 10, 2013

The trial court entered an order barring the Husband from receiving maintenance and imputing an income to the Husband for child support purposes. On appeal, the court found that the trial court abused its discretion by not awarding the Husband temporary maintenance.

During the marriage, the Husband was employed as a professor at various colleges. The most he made was approximately \$50,000 per year. He had worked part-time, and at times not worked at all in order to stay home with the children while the Wife advanced her career. At the time of trial, the Wife was making over \$290,000 per year and the Husband had been unemployed for approximately two years.

The appellate court found that the trial court improperly penalized the Husband for decisions that were made by, and beneficial to, the family. The court found that for maintenance purposes, it is relevant that, for the vast majority of the marriage, the Husband was employed. The Husband's employment was well-suited for the family. The appellate court found that the trial court should not have put so much emphasis on the fact that the Husband was underemployed or happy to stay at home and to turn down employment opportunities during the marriage, but instead should have focused on the decision of the family for him to stay home, and should have looked at his employment history during the entire marriage. Further, the decision for him not to be employed took place prior to the dissolution proceedings. The court found that given the Husband's unemployment status at the time of dissolution, a rehabilitative maintenance award was proper.

The Wife next argues that the trial court erred when it reserved child support for a period of six months. Thereafter, if employed, he would pay child support based on section 505(a) of the IMDMA, and if he was not employed, he would pay child support based on an imputed income of \$40,000.00. The appellate court found that the trial court did not err in imputing an income to the Husband after the expiration of a six month period. The court found that there existed evidence that the Husband rejected employment opportunities and that he was in fact voluntarily unemployed and that based on his earning history, he could make \$40,000.00 per year.

*In re Marriage of Boma*, 2013 WL 2153952 (Ill.App. 3 Dist.), May 20, 2013

An ex-Husband filed a petition to modify support alleging a substantial change in his financial circumstances due to the loss of his job and health benefits. The trial court agreed that the ex-Husband's financial circumstances had changed and reduced his required weekly payments from \$500 per week to \$250 per week. However, it ultimately upheld his obligation to pay a total of \$78,000 in unallocated support to the ex-Wife as set forth in the dissolution order. The ex-

Husband appealed arguing that the original judgment amount of \$78,000, and not just the weekly payment amount, was subject to modification based upon a showing of a substantial change in circumstances. The appellate court ultimately reversed and remanded the trial court's decision on the basis that because unallocated maintenance includes child support, it is always subject to a statutory right of modification.

*In re Marriage of Dowd*, 2013 WL 3088824 (Ill. App. 3 Dist.), June 20, 2013

On appeal, the Wife argued that the trial court abused its discretion by awarding her only 20% of her husband's bonuses of between \$50,001 and \$100,000 per year and failing to award her any of his bonus exceeding \$100,000. Further, she argued that the trial court erred by not awarding her attorney fees. The appellate court affirmed the decision of the trial court.

The court found that the Wife's reasonable needs would be met with her monthly maintenance award of \$6,400 and her monthly income. Further, the court awarded her 50% of Husband's net annual bonus up to \$50,000. The appellate court commended the trial court's reasoning that the Husband needed an incentive to continue working at his current rate and that incentive would be to maintain a larger portion of his bonus over \$50,001. The court found that due to the flexibility designed into the court's order, the Wife was eligible to receive up to \$35,000 per year in additional maintenance. With regard to the attorney fees, the court found that the Wife received property and accounts valued in excess of \$200,000, excluding the value of the marital home awarded to her and her maintenance award. Therefore, she had sufficient assets to pay her attorney fees.

*In re Marriage of Dubravec*, 2013 WL 2389889 (Ill.App.3 Dist.), May 29, 2013

The Husband appealed a dissolution order distributing the debts of the parties and awarding the Wife maintenance and child support.

The Husband first argued that the trial court abused its discretion by dividing the marital assets in a 60/40 split in favor of the Wife. The Wife stopped working in 1995. The Husband owned a periodontal practice and the court determined that the Husband's net income for purposes of child support was \$12,758.00 per month. The court affirmed the division of assets based on the fact that the Husband had more potential to increase his income by retaining the business.

The Husband next argued that the trial court abused its discretion by assigning him the entirety of the debt associated with the practice. The court affirmed the trial court's holding that where one party is substantially responsible for the creation of the debt and has a substantially greater capacity to earn money, it is not an abuse of discretion for that party to be assigned the debt. Further, the Husband incurred this debt in acquiring new office space, and the debt was considered when calculating the value of his practice. It would be unfair to saddle the Wife with the debt as the Husband had asked to be awarded the practice and he had a greater capacity to pay off the debt.

The Husband next argued that the trial court improperly over-estimated his monthly income. However, the court relied on the testimony of the Husband's accountant when determining his net income. Therefore, there was no abuse of discretion.

*In re Marriage of Turngren*, 2013 WL 3376957 (Ill.App. 4 Dist.), July 3, 2013

The Husband filed a petition to terminate his maintenance obligation to his former Wife. The trial court found that the Husband did not prove a substantial change in circumstances justifying a downward modification of his maintenance obligation. The appellate court affirmed.

The Husband argued that the trial court erred in finding no change of circumstances existed to support a downward modification of maintenance. The Husband argued that the Wife's income had increased and that her expenses had decreased since the time of the divorce. He further argued that her income and expense affidavit showed that she was supporting their adult children. The court found that the Wife's financial situation had improved, but only minimally.

She had the same job and her income increased from \$25,453 in 2004 to \$32,877 at the time of the divorce, while the Husband's income increased from \$275,000 in 2004 to \$570,000. The court noted that it was important to weigh the parties' relative financial situations against their 26-year marriage. At the time of Judgment, the Wife was awarded permanent maintenance. Although, she had an affirmative obligation to seek appropriate training, it is only one factor to be considered. The Wife maintained employment commensurate with her skills, and she maintained that employment while many of her co-workers were no longer employed because of the economy. Further, the Husband had agreed to the maintenance amount in 2004, and the court found it puzzling how he could argue for a modification when his income had in fact doubled. Because of the length of the marriage, the court found that the Wife was entitled to live a comfortable lifestyle just as she did during the marriage, and the fact that she spent money on adult children had no bearing on her maintenance award.

*In re Marriage of Bradley*, 2013 WL 1919163 (Ill.App. 5 Dist.), May 7, 2013 (see below)

*In re Marriage of Jacobson*, 2013 WL 1932713 (Ill.App. 2 Dist.), May 8, 2013 (see below)

*In re Marriage of Midlash*, 2013 WL 3377441 (Ill.App. 2 Dist.), June 28, 2013 (see above)

## **MAINTENANCE**

*In re Marriage of Braun and Bartolini*, 2013 WL 1228572 (Ill.App. 1 Dist.), March 26, 2013

The Husband appealed the trial court's denial of his motion to reconsider the court's ruling awarding the Wife maintenance in gross in the amount of \$4,000 per month for 120 months, which totaled \$480,000 maintenance in gross and resulted in a 54/46 split of the marital estate in the Wife's favor. The parties were both licensed dentists and owned a dental practice. However, the Husband had worked as a dentist full-time earning a gross income of \$185,269 while the Wife worked as a teacher in a dental program earning a gross income of only \$45,074. The Wife had chosen to work as an instructor because it allowed her to devote time to the parties' children, particularly the parties' epileptic child. The Husband argued that the trial court's award to the Wife was inappropriate because it did not take into account that the Wife chose to remain underemployed during the marriage and that it provided no incentive for the Wife to seek employment commensurate with her education and training. The appellate court noted that the record on appeal did not include a transcript of the trial court proceedings and, thus, there is a presumption that the trial court's decision was in conformity with the law and had a sufficient factual basis. Despite this, the appellate court also upheld the trial court's maintenance award to the Wife on the merits because the parties had been married 26 years, the parties' successful dental business had been awarded to the Husband, and the Wife had chosen a less lucrative career path in order to take care of the parties' children.

*In re Marriage of Hosack*, 2013 WL 811437 (Ill.App. 3 Dist.), March 4, 2013

No abuse of discretion when the court denied the Husband's request to modify or terminate his maintenance obligation after he voluntarily retired. The court also did not err when it found the Husband had violated the Marital Settlement Agreement when he failed to increase his maintenance payments as per the terms of the Agreement and the court ordered Husband to pay Wife's attorney fees.

The parties were married for 35 years and divorced in January 2009. The Husband was ordered to pay maintenance of \$1,200 every other week until the parties' cottage was sold, and then the maintenance payment was to be increased to \$1,400 every two weeks. The Husband was to pay all expenses of the cottage until it was sold. The Husband earned approximately \$150,000 annually. The Wife earned approximately \$32,000 annually. The parties were 64 and 63 years old, respectively. Prior to selling the cottage, the Husband made certain repairs to the cottage and he claims the Wife agreed to pay for one-half of those expenses, or \$3,000. After the cottage sold and the Wife did not pay the \$3,000 to him from her share of the proceeds, the Husband did not increase the maintenance check to \$1,400, but unilaterally began withholding

an extra \$200 per maintenance check so he could recoup the \$3,000. In November 2011, the Husband filed a petition to terminate maintenance based on his anticipated early retirement in January 2012, and in January 2012, he stopped paying maintenance. The basis for his early retirement was that he had physical difficulties (knee problems) that inhibited his ability to do his job as a project manager overseeing operations in multiple field facilities, which included physical work such as climbing ladders. Also, his company had wanted to reassign him to a new job location that would have required him to live away from his home (and new wife) from Monday through Thursday or Friday of each week. No medical evidence was presented as to his physical difficulties. At the hearing, evidence was presented showing that the Husband had participated in a skating marathon during the same time that he claimed his knee problems prevented him from working.

Whether a spouse may rely on retirement as a change in circumstances to justify modification of maintenance depends on the circumstances of each individual case. *In re Marriage of Walker*, 253 Ill. App.3d 360, 362 (1993). A voluntary early retirement resulting in reduced income is not automatically a substantial change in circumstances. Here, the Husband failed to establish a change of circumstances sufficient to warrant a modification. Although his knees gave him some discomfort, he enjoyed physically demanding recreation; therefore, the knees did not force his retirement. As to the maintenance, the Husband unilaterally stopped paying, and he failed to show good cause as to why he failed to abide by the court's order. The trial court decision was affirmed.

*In re Marriage of Price*, 2013 WL 1188008 (Ill.App. 4 Dist.), March 22, 2013

The Husband appealed a dissolution judgment, arguing that the trial court erred in: (1) awarding the Wife \$7,500 per month in permanent maintenance; (2) ordering him to pay \$15,000 of the Wife's attorney fees; and (3) ordering a \$330,275 equalization payment to be made within 90 days of the court's judgment.

The appellate court found that there was ample evidence in the record to substantiate the trial court's finding of the Husband's annual income to be in excess of \$300,000. It also found that the award of permanent maintenance in the amount of \$7,500 was not an abuse of discretion because the section 504(a) statutory maintenance factors weighed in the Wife's favor. 750 ILCS 5/504(a). Specifically, the parties had been married for 34 years, they had enjoyed a high standard of living during the marriage without incurring debt, the Wife had no reasonable prospects of employment, and the maintenance award was necessary to meet the Wife's monthly living expenses. Relying on *In re Marriage of Thornton*, 89 Ill.App.3d 1078, 1088 (1980), the appellate court echoed the trial court's contention that the Wife should not be required to spend the assets awarded to her in the divorce, however significant, if the Husband is able pay maintenance to cover her reasonable expenses.

The Husband claimed that the trial court's award of \$15,000 towards the Wife's attorney fees was an abuse of discretion because the financial circumstances of the parties were substantially similar after the court's division of marital assets, liabilities and the Wife's maintenance award. The appellate court found that requiring the Husband to pay \$15,000 of the Wife's \$78,837 in outstanding attorney fees was not an abuse of discretion, especially in the light of the fact that the Husband had been awarded the parties' businesses, which had grossed over \$1.7 million during the tax year prior to the divorce. The appellate court also rejected the Husband's argument that the \$330,275 equalization payment to the Wife was improper because it requires him to sell or impair assets.

*In re Marriage of Stephens and Coolidge*, 2013 WL 1200249 (Ill. App. 1 Dist.), March 25, 2013 (see above)

*In re Marriage of White*, 2013 WL 1287065 (Ill. App. 2 Dist.), March 28, 2013 (see above)

*In re Marriage of Kurotsuchi*, 2013 WL 791237 (Ill.App. 1 Dist.), March 1, 2013 (see above)

## **MAINTENANCE IN GROSS,**

*In re Marriage of Radakovic*, 2013 WL 4614490 (Ill.App. 1 Dist.), Aug. 26, 2013

Husband and Wife were the joint owners of a property located in South Elgin that was owned by a marital business called Sigma Investments, LLC (Sigma). Prior to the parties' marriage, the Husband had started a machinery repair business called Field Systems Machinery (FSM), of which he was the sole owner. He later started Sigma during the marriage with the intent to purchase the South Elgin property in its name to house FSM's operations. The Husband had a 99% interest in Sigma, while the Wife had a 1% interest. Upon the commencement of the dissolution proceeding, the Wife brought a petition to enjoin the Husband from selling, transferring or otherwise encumbering the South Elgin property when she learned that he had plans to close the business and then sell the property. In spite of a subsequent agreed order prohibiting him from doing so, the Husband consolidated the loan against FSM with the mortgage on the South Elgin property in order to finance a construction project for Sigma in the midst of the divorce proceeding. The trial court found that the Husband's actions reduced the net equity of Sigma, which constituted dissipation of a marital asset. A judgment was entered against the Husband in the amount of \$275,712.50. The court further awarded the Wife 60% and the Husband 40% of the marital assets, awarded the Husband 100% of the value of FSM and awarded the Wife \$100,000 maintenance in gross. The Husband appealed the trial court's order denying his motion for reconsideration of the dissolution judgment.

The appellate court affirmed the trial court's decision regarding the Wife's entitlement to maintenance, including the form in which such maintenance was to be paid. Despite the Husband's challenge to the characterization of the maintenance in gross, the appellate court found that appropriate circumstances existed in this case; specifically, the fact that the Husband was past typical retirement age, making it necessary for the trial court to ensure that the Wife received a specific sum. The appellate court also affirmed the trial court's award of 60% of the marital estate to the Wife.

However, the appellate court did vacate the judgment of \$257,712.50 against the Husband for his alleged dissipation. The facts presented to the trial court established that Sigma had borrowed \$350,000 and FSM had borrowed \$550,000. FSM paid down approximately \$125,000 of Sigma's \$350,000 loan, and the respondent consolidated the remaining \$225,000 of Sigma's loan with FSM's outstanding \$550,000 loan under Sigma's name. While the Husband's actions appear to have lowered Sigma's value by having it assume FSM's debt, both parties' experts agreed that the construction expenses for which the loan was used actually belonged to Sigma and should have been recorded on Sigma's books. Had they been properly recorded, Sigma's value would not have been changed because the property's value was always subject to the loans used to finance the construction. As such, the appellate court determined that the trial court's finding regarding the Husband's dissipation was against the manifest weight of the evidence.

## **MARITAL PORTION OF DEFERRED COMPENSATION PLAN**

*In re Marriage of Baker*, 2013 WL 1385001 (Ill.App. 3 Dist.), April 3, 2013

The court found that the trial court did not err in applying the *Hunt* formula when determining the Wife's share of the Husband's non-qualified deferred compensation plan. Further, the trial court did not err in awarding the Wife 10.5% of the deferred compensation.

The parties resolved all issues of the case except for the determination of the Wife's interest in the deferred compensation plan. The Husband received a letter from human resources on December 17, 2010, indicating that he had been designated as a participant in the deferred compensation plan retroactive to September 30, 2010. The Husband began working for the company in July of 1981. During the trial, the Wife argued that the marital portion of the deferred compensation plan was 86%, and she should be awarded 43% under the terms of the settlement agreement. Her calculation was based on the Husband's length of participation in the

plan during the marriage of 367 months (July 1981 through September 2017) and assumed the Husband would retire at full service in September of 2017, a total of 420 months in the plan. The Husband argued that the marital duration of accumulated benefits was from September 2010 to February 2012, or 17 months, and a total length of participation in the plan of 84 months (September 2010 to September 2017.) Thus, the marital interest in the pension was 21%, resulting in 10.5% being awarded to the Wife.

In its analysis, the court noted that although the Husband began his employment in July of 1981, he did not begin participating in the deferred compensation plan until he was notified by human resources. Therefore, he did not begin accumulating benefits under the plan until September 2010. Further, nothing in the plan indicated that the accumulation of benefits was based on the length of the Husband's service. Instead, the plan indicated that it is designed to supplement the higher income employees and that eligibility is based on the committee's discretion. Thus, according to the property division agreed to by the parties, the Wife is entitled to receive 10.5% of the Husband's nonqualified deferred compensation plan.

### **MOTION TO DISMISS**

*Carlyle v. O'Brien*, 2013 WL 4773051 (Ill.App. 2 Dist.), Sept. 5, 2013

The trial court denied the Father's section 2-1401 petition. The decision was affirmed by the trial court.

On April 7, 2010, the court entered a final order with regard to custody and child support. On May 5, 2010, the Mother petitioned for a contribution to her attorney fees. The trial court ordered the Father to contribute to the attorney fees of the Mother. The Father filed a motion to reconsider, asserting that the petition was untimely and contended that the court's factual findings were against the manifest weight of the evidence. The motion to reconsider was denied and the Defendant filed his Section 2-1401 petition, asserting once again that plaintiff's petition was untimely filed and that the evidence did not support the court's factual finding. The trial court denied the 2-1401 petition.

The appellate court found that the Father's section 2-1401 petition presents the appearance of a second, untimely motion to reconsider. The arguments were taken virtually verbatim from his motion to reconsider. The purpose of a section 2-1401 petition is to bring to the court's attention facts not known to it when it rendered its judgment. The Father's petition contains no facts that were not already of record when the trial court entered the order granting the Mother's fees. If the Father believed that the denial of his motion to reconsider was erroneous, he should have appealed the denial, rather than filing what was essentially a second motion to reconsider.

### **ORDERS OF PROTECTION**

*In re Marriage of Young*, 2013 WL 1296424 (Ill.App. 2 Dist.), March 29, 2013

The Wife filed a petition for a plenary order of protection against the Husband, claiming the Husband "harassed" the Wife. The alleged harassment involved an incident where the Wife's iPad could not connect to the internet at the marital residence, so the Wife accessed another iPad in the home. When the Wife viewed that iPad's browser history, she observed a long list of sites that appeared to be pornographic, including child pornography. The trial court granted the plenary order of protection based on the fact that the sites appeared to be child pornography and that the Wife was harassed by viewing the list of sites.

The Husband appealed the entry of the plenary order of protection. The appellate court reversed, in that the evidence presented at trial did not support a finding of "harassment" under the Illinois Domestic Violence Act. To support a finding of harassment, the Wife needed to have proven that the Husband acted "knowingly," i.e., that he was consciously aware that his viewing of pornography on the iPad was practically certain to cause the Wife emotional distress. The evidence did not support such a finding.



## **PARENTAGE**

*R.M. v. D.Z.*, 2013 WL 811439 (Ill.App. 3 Dist.), March 4, 2013

The trial court did not abuse its discretion when it declined to conduct a second *in camera* interview with 11-year old twin children. A directed finding for the Mother was not against the manifest weight of the evidence, and the court did not abuse its discretion in striking the Father's second motion to reopen proofs.

In March 2005, the Mother brought a petition for child support. The parties entered into a Joint Parenting Agreement in February 2006 providing that Father would have substantial time with the children. His child support obligation was less than 28 percent in recognition of the Joint Parenting Agreement and time spent by each parent with the children. In August 2009, the Mother moved into the Father's home with the children because she had no home of her own. In 2010, after the Mother expressed her intent to move out with the children and into her own place, the Father filed a petition seeking a change in residential custody. The Father made numerous allegations of the Mother's inability to provide a safe and stable environment for the children. He also relied on Twitter postings made by the Mother's 17-year old daughter in which the daughter, K.M., allegedly made statements threatening to harm the twins and also made reference to drinking and taking drugs, allegedly with the Mother's knowledge.

The court conducted *in camera* interviews of the children, and after a hearing, found that the Father failed to establish a substantial change in circumstances. The court also referenced the Twitter postings as "alarming" but stated they were not actually evidence of "something actually occurring"— especially given the way young people use Twitter. There was no evidence that the Mother was aware of or condoned K.M.'s drug or alcohol use. The court granted directed finding. The Father filed a motion to re-open the proofs, which was granted. After a hearing, a second directed finding was entered when the court again found no change of circumstances warranting a modification. When the Father filed a second motion to open the proofs, the motion was stricken, as the Father's motion contained basically the same arguments and proofs previously presented and already considered by the court: "Every case must have an endpoint."

## **PARENTING TIME**

*In re Marriage of Agers*, 2013 WL 2404022 (Ill.App. 5 Dist.), May 30, 2013

In a post-decree action, a Father brought a petition for rule to show cause and a motion for modification of visitation after the child's Mother had unilaterally terminated his visitation with the parties' minor child. Thereafter, the Mother filed a response to the Father's motion for modification of visitation, a motion for an *in camera* interview of the minor child and petition for termination of visitation in which she alleged that the minor child had identified the Father as the perpetrator of sexual abuse both to the Department of Children and Family Services (DCFS) and to the child's therapist. After a hearing on the parties' various pleadings, an order was entered denying the Mother's petition for termination of visitation and granting the Father's motion for visitation. With respect to the Father's petition for rule to show cause, the Mother's denial of the Father's visitation in violation of the dissolution judgment was found to be willful and she was held in contempt of court. The Mother then appealed, arguing that the trial court had abused its discretion by disregarding out-of-court statements made by the child regarding the alleged sexual abuse, by admitting a videotape of the Father and the child during a supervised visit at the courthouse into evidence and by denying her request for an *in camera* interview with the child.

The appellate court denied the Mother's appeal, finding that the trial court did not disregard the child's out-of-court statements, but rather considered them and found them to be uncorroborated. Hearsay statements made by an allegedly abused child alone, without corroboration, are insufficient to support a finding of abuse. As to the admissibility of the videotape, the appellate court found that the trial court had correctly found that nothing said on the tape could be used as proof of any matter asserted, but that it could be used to show that

the child did not fear the Father. The appellate court also found that, because the trial court was in a better position to determine whether an *in camera* interview was appropriate based on the facts and circumstances of the case, the denial of the Mother's request for the *in camera* interview was not an abuse of discretion.

*In re Parentage of J.W.*, 2013 WL 2253211 (Ill.), May 23, 2013

The biological Father ("Father") sought visitation privileges with child following a determination of parentage. The trial court denied visitation. The appellate court reversed and remanded and the Supreme Court affirmed the decision of the trial court.

The Mother began an intimate relationship with a man by the name of Jason. During that same time, she had a one-time sexual encounter with the Father. The Mother became pregnant and assumed the child was Jason's. She became married to Jason and then the couple divorced in 2006 and Jason was awarded parenting time with the child. A few years later, the Mother married a man by the name of Joe. Around the same time, the Father saw a picture of the child and contacted the Mother. The Mother, child, and the Father submitted to DNA testing, and the DNA testing gave a positive result for the Father. After receiving the results, the Mother temporarily separated from Joe and moved to where the Father was residing and placed the child in school there. She also informed Jason that he was not the Father. The Mother originally introduced the child to the Father as a friend, but later told her it was her "real dad." Meanwhile Jason and the Mother agreed to modify the judgment. Under the modified order, the Mother was prohibited from residing with the Father, prohibited from allowing the child to have any contact with the Father, and prohibited from promoting the existence of a parent-child relationship. The Father filed a petition to determine the existence of a parent child relationship, and he was later declared the biological Father. However, the court found that the minor child did not have an understanding of the situation and therefore found that it was not in the best interest of the child to be reintroduced to her the Father at this time. The court did order that the child be evaluated annually to determine her understanding of the identification of her Father.

The question presented on appeal was: What is the proper standard to be applied when a biological Father seeks visitation privileges after a determination of parentage under 14(a)(1) of the Parentage Act. The Supreme Court found that in a proceeding to determine visitation privileges under section 14(a)(1) of the Parentage Act, the initial burden is on the petitioner to show that visitation will be in the best interests of the child pursuant to the provisions set forth in section 602 of the Marriage Act. Because the child was too young to understand the circumstances, it was not in the best interest of the child to establish visitation.

#### **PETITION TO VACATE**

*In re Marriage of Perl*, 2013 WL 3811218 (Ill.App. 2 Dist.), July 17, 2013

After entering an agreed order with regard to child support, the Wife filed a section 2-1401 petition to vacate an agreed order. The trial court denied the petition, and the appellate court affirmed the decision.

The parties entered an agreed order modifying child support and custody of the minor child. After the order was entered, the Mother filed her petition to vacate stating that the order was void because the court lacked subject matter jurisdiction because no party filed a petition seeking modification of child support or custody. The trial court denied her petition. The appellate court found that the trial court did have subject matter jurisdiction because an agreed order concerning support or custody will generally be effective as an initial pleading. Essentially, the content of the order informs the parties as to what is at stake.

*In re Marriage of Raine*, 2013 WL 2257840 (Ill. App. 2 Dist.), May 31, 2013

The trial court denied the Husband's section 2-1401 petition to vacate the marital settlement agreement ("MSA"). The appellate court found that the MSA was not unconscionable or

procured through fraud and, therefore, the trial court properly denied the Husband's motion to vacate the MSA under section 2-1401.

On appeal, the Husband argued that he had a meritorious defense because the agreement was unconscionable and procured by fraud. The Husband argued that he was undergoing counseling for severe depression at the time he signed the MSA. However, the Husband forfeited this argument when he abandoned this argument in front of the trial court.

The Husband next argued that the agreement left him in a dire financial situation. The court found that there is no dispute that very shortly after the entry of the agreement, the Husband was in a dire financial situation. However, the court found that the Husband was a seasoned entrepreneur, and he made a calculated risk to receive his business entities in the final agreement in exchange for giving the Wife other property. The court found that he was an educated man who elected to represent himself. Further, it is clear that the Husband signed each page of the MSA and was well aware of the property he was being awarded, and he made the intentional decision to keep his business entities with the assumption that the businesses would turn around and make a profit in the future.

#### **PROPERTY- CHARACTERIZATION OF**

*In re Marriage of Daneman*, 2013 WL 5234414 (Ill.App. 2 Dist.), Sept. 16, 2013

A Husband appealed the property disposition in a dissolution judgment. He first challenged the classification of the Wife's pre-marital home as her non-marital property, also claiming that the trial court had abused its discretion in reimbursing the Wife for the \$86,061 contribution she made to the purchase of the parties' marital home using funds from her pre-marital home. The appellate court found that the Wife had met her burden of proving her pre-marital home to be non-marital property by presenting undisputed evidence that it was acquired prior to the marriage. The Husband failed to establish that it had been transferred into some form of co-ownership. Accordingly, the trial court's classification of the Wife's pre-marital home as non-marital was not against the manifest weight of the evidence and her non-marital estate was rightfully reimbursed for her contribution of \$86,061 contribution toward the purchase of the parties' marital home.

The Husband further challenged the division of the Wife's 401(k) plan, arguing that the trial court should have reimbursed the parties' marital estate for all of the 401(k)' growth that occurred during the marriage regardless of whether the growth was attributable to the non-marital or marital contributions. Illinois law is clear that a marital estate is not entitled to reimbursement for increases in the value of a non-marital asset, unless the increase in value is attributable to marital contributions or to the significant personal efforts of a spouse. The Husband presented no evidence to that effect and, therefore, the appellate court agreed with the trial court's decision to reimburse the marital estate for only the increase in value that was attributable to marital contributions.

The appellate court did find that the trial court's classification of a vintage Coke machine as marital property was against the manifest weight of the evidence because the Wife had never challenged the Husband's testimony that he had paid for and brought the vintage Coke Machine into the marriage. As such, the judgment of the trial court was affirmed, except as to the award of the vintage Coke machine to the Wife, which was reversed.

#### **PROPERTY- CHARACTERIZATION OF**

*In re Marriage of Burrell*, 2013 WL 4033827 (Ill.App. 3 Dist.), Aug. 8, 2013

In a dissolution proceeding, the characterization of several rental properties that had been owned and operated as a part of a real estate business by the Husband prior to the parties' marriage were in dispute. Also at issue was the Husband's misuse of marital funds for gambling and to pay the mortgage on his girlfriend's home. Following trial, the trial court found that the four rental properties owned by the Husband prior to the marriage were transmuted into marital

property by the comingling of income from the properties with the parties' other rental properties. Furthermore, the trial court found that the Husband had dissipated the marital estate in the amount of \$256,547. The Wife was awarded one-half of the Husband's pension, the marital residence and its furnishings, several investment properties and a HUD contract for an apartment complex owned by the parties. The Husband was awarded the other half of his pension, several investment properties and his personal property, including bank accounts and vehicles. In total, the Wife received \$666,408 in marital assets and the Husband received \$632,329, less the \$259,547 he dissipated. The Husband appealed the trial court's order, arguing that the trial court had erred in finding that his non-marital properties were transmuted into marital property. He further claimed that the Wife's marital misconduct should serve to lessen the contribution, if any, she had made to the marital estate. The appellate court rejected both arguments and upheld the trial court's ruling, finding that the classification and allocation of property set forth in the dissolution judgment resulted in an equitable distribution and did not constitute an abuse of discretion.

### **PROPERTY DISTRIBUTION**

*In re Marriage of Cummings*, 2013 WL 3881036 (Ill.App. 3 Dist.), July 25, 2013

The Husband appeals from an order of the trial court in which marital assets were distributed and the court imputed income to him for the sake of determining child support. The appellate court affirmed the decision of the trial court.

The record reflects that the Wife had not been employed outside the home since 1996, and that she stayed at home with the parties' children. Further, the Husband was employed as an ER physician until he resigned in August of 2011. At that time, he was on track to make over \$385,000 for the year. After leaving his job, his income was \$10,000 per month from his disability insurance. The record also reflected that the Husband did not comply with a number of temporary support orders.

The Husband first argues that the trial court abused its discretion when it awarded a disproportionate share of assets to the Wife. The court found that the trial court did not err when it awarded the Wife 54% of the total assets. This was based on the considerable marital debt and the Husband's history of noncompliance with previous court ordered financial obligations during the prolonged dissolution proceedings.

The Husband next argued that the trial court erred when it imputed income to him which was commensurate with his earning potential and prior employment income. The Husband argued that his monthly disability income of \$10,000 should have dictated the amount of statutory child support and his ability to pay other court ordered maintenance. The court found that the Husband was not terminated from his previous employment by the employer, but voluntarily resigned as a result of his own conduct. Further, the court found that the Husband had a history of non-compliance with court ordered support obligations, and that he had received job offers, but either turned down those offers or the offers were withdrawn because he told the person offering him the job that he suffered from serious mental health infirmities. (The court did not find that the Husband had serious mental health issues). The court therefore found that the Husband voluntarily reduced his pay, and therefore, it was proper to impute an income to him commensurate with his prior employment and commensurate with his experience.

*In re Marriage of Domas*, 2013 WL 3874074 (Ill.App. 2 Dist.), July, 23, 2013

A Husband and a Wife filed cross appeals from a dissolution judgment raising an assortment of issues, all of which the appellate court deemed to be within the discretion of the trial court or to concern matters of fact. The appellate court gave deference to the trial court on all issues and upheld the trial court's rulings.

The Husband raised two issues on appeal. First, he claimed that the trial court had abused its discretion by failing to consider a \$150,000 distribution that had been awarded to the Wife

during the pendency of the divorce proceedings in its final distribution of the marital property. The appellate court found that, because he had failed to offer an explanation or to cite to any case law to support his claims, the Husband failed to meet his burden of establishing that the trial court had erred on that issue. The Husband also challenged the trial court's \$19,000 judgment against him for a support arrearage that was entered 30 days after the dissolution judgment was entered, claiming that the trial court's actions were barred by *res judicata*. The trial court generally has the authority to modify its own judgments within 30 days. As such, the appellate court upheld the trial court's entry of the \$19,000 judgment because it had fallen within the prescribed time frame.

The Wife raised seven issues on appeal. First, she argued that, as a result of the Husband's pervasive discovery violations throughout the dissolution proceedings, it was an abuse of discretion for the trial court to allow the Husband or his agents to testify at trial. The appellate court found that because the Wife was unable to satisfy the necessary burden of showing that no reasonable person could conclude that the Husband should not have been allowed to offer testimony at trial, it was not an abuse of discretion on the part of the trial court to deny the Wife's request for such an extreme discovery sanction. The Wife also challenged several other components of the trial court's ruling, including the denial of her claims of dissipation against the Husband, the trial court's award of \$5,000 per month for her maintenance, the classification of certain assets as the Husband's non-marital property, the overall division of marital property, and the court's ruling regarding attorney's fees. On each issue, the appellate court upheld the trial court's rulings.

*In re Marriage of Jacobson*, 2013 WL 1932713 (Ill.App. 2 Dist.), May 8, 2013

A Wife appealed a dissolution judgment, raising five issues on appeal. First, the appellate court summarily rejected with the Wife's various challenges to the trial court's factual determinations regarding the characterizations of certain items of property as marital because she cited to no legal authority in support of her arguments.

As to the Wife's claim that the trial court erred in refusing to grant her attorney's motion to withdraw, the appellate found that there was no abuse of discretion because the Wife had strenuously objected when her attorney sought to withdraw, and had, thus, invited any error that may have occurred.

The appellate court also affirmed the trial court's ruling that the Wife had gifted a parcel of land in Downers Grove to the parties' marital estate because she had failed to rebut the presumption that the transfer of property was a gift to the marital estate. Though all property acquired before a marriage is generally considered non-marital property, where the contribution from spouse's non-marital estate to the marital estate is intended to be a gift, it becomes part of the marital estate.

The Wife further argued that the trial court had erred in denying her maintenance, in part because of the Husband's \$1.5 million non-marital estate. The appellate court found that, while the Husband's substantial non-marital estate may be relevant in determining his ability to pay maintenance, it was irrelevant to the question of whether the Wife was in need of maintenance. Because the Wife was awarded \$936,000 in marital property in the divorce, and the other factors set forth in Section 504 of the Illinois Marriage and Dissolution of Marriage Act were properly considered, the appellate court found there was no abuse of discretion in denying the Wife maintenance.

The appellate court also upheld the trial court's ruling regarding the Wife's dissipation of \$22,000 in marital assets derived from the sale of a parcel of real property in Texas. Though the Wife testified that she deposited the funds into a joint bank account, there was sufficient evidence in the record for the trial court to doubt the credibility of the Wife's testimony. Accordingly, the appellate court found that the trial court's ruling not against the manifest weight of the evidence.

*In re Marriage of Saxer*, 2013 WL 3341002 (Ill.App. 4 Dist.), June 27, 2013

A Husband appealed a trial court's order classifying as marital property a one-half interest in 115 acres of property that the Husband had purchased from his brother. He argued that the evidence offered at trial had established that he had purchased his brother's one-half interest in the land using a loan he obtained through Farm Credit Services, which he later paid with proceeds from his Father's life estate. However, because the trial court had found that the Husband had failed to offer bank statements, checks, deposit or withdrawal slips to confirm this testimony, the appellate court found that the trial court's decision was not contrary to the manifest weight of the evidence.

The Husband also appealed the trial court's order with respect to the distribution of attorney fees. Originally, the trial court had ordered the total of attorney fees expended to be deducted from the marital estate prior to each party receiving his or her equal distribution. On the Wife's motion to reconsider, the attorney's fees were redistributed so that each party was to be responsible for their respective portion of the attorney's fees, which disadvantaged the Husband because he had expended more in attorney fees. He appealed, claiming that he should have been entitled to a hearing pursuant to 750 ILCS 5/501(c-1) before the trial court could redistribute the fees. The appellate court ultimately upheld the trial court's decision because the record did not indicate that the Husband had made a claim for contribution to his attorney fees or sought such a hearing during the divorce proceedings.

The appellate court did agree with the Husband's contention that the trial court had abused its discretion by failing to allocate the non-marital portion of his pension to him and remanded the order awarding the Wife 50% of his pension. The trial court could either conduct further proceedings to determine the marital portion of the Husband's pension or enter a modified judgment order awarding 50% of only the marital portion of the Husband's pension to the Wife.

*In re Marriage of Urban and Howell*, 2013 WL 2420491 (Ill.App.2 Dist.), May 31, 2013

The Husband was a radiologist and the Wife was an ophthalmologist. Both parties were the sole shareholders of their respective medical practices. The Wife appealed from the dissolution judgment, arguing that the trial court had erred in qualifying the Husband's witness as an expert in business valuation, in valuing the Husband's radiology practice at \$0 and in failing to include as marital liabilities both a shareholder loan she had taken against her medical practice to pay for the parties' vacation home, as well as an embezzlement loan she had incurred due to misconduct by her former partner.

The appellate court first rejected the Wife's argument that trial court had erred in qualifying the Husband's witness as an expert witness due to his lack of educational credentials and experience in valuing radiology practices. Because an expert need only have knowledge and experience beyond that of an average citizen, the Husband's expert, who had a financial degree and 20 to 25 years of experience valuing businesses in the medical field, had the background necessary to be qualified as an expert.

The appellate court also rejected the Wife's claim that the Husband's witness had not used generally accepted principles of business valuation in reaching his opinion. His conclusions were not inconsistent with the standards applied by the Wife's own expert witnesses. Also, the central distinction between the Husband's and the Wife's expert's calculations was the difference in compensation ascribed to the Husband and to the other physician employed by his practice, with the Wife's expert claiming that the physicians were overcompensated. Because the trial court's findings regarding the reasonableness of the Husband's income were supported by the evidence in the record, the appellate court held that the trial court's finding that the radiology practice was valueless under the income valuation approach, was not against the manifest weight of the evidence. The appellate court did hold, however, that it was against the manifest weight of the evidence for the trial court to not then account for the minimum value of the practice arrived at under the cost approach. Accordingly, the appellate court modified the



trial court's ruling to exclude the 10-days of liquidation expenses that the Husband's expert witness had improperly included in his valuation.

Lastly, the appellate court concluded that, although the shareholder loan taken by the Wife for the purchase of the parties' vacation home should have been considered a marital debt, the Wife's failure to raise this issue during the trial and prior to filing her motion to reconsider constituted a waiver of this claim. Furthermore, the appellate court upheld the trial court's ruling that the embezzlement loan was not considered a marital debt because this debt was included in the valuation of the Wife's medical practice. Thus, it was a liability of the business, not of the Wife.

## **PROPERTY – DIVISION, IDENTIFICATION and VALUATION**

### **Classification as Marital or Non-marital**

*In re Marriage of McBride*, 2013 WL 1289150 (Ill.App. 1 Dist.), March 29, 2013

The Husband first challenged the trial court's classification of a home as non-marital property. The Wife purchased a residence in Chicago 5 years prior to her marriage to the Husband. During the parties' marriage, the Husband used his non-marital funds to pay off the mortgage on the Wife's property. In 2008, the parties discussed lowering the property taxes to the non-marital property and the marital residence. The Husband prepared the paperwork and the Wife signed the documents presented to her. One of the documents was a quitclaim deed for joint tenancy of the non-marital property. The Wife did not know the repercussions of signing the document until she went to list the residence a year later. In the judgment, the trial court found that the Wife did not have donative intent when signing the quitclaim deed. Further, the court found that the \$40,000 of the Husband's non-marital money used to pay off the mortgage was a gift, and therefore, he was not entitled to reimbursement. However, the marital estate was entitled to a \$75,000 reimbursement, which represented the real estate taxes paid on the non-marital property from the marital bank account.

On appeal, the court found that the evidence in the record supported the trial court's finding that the Wife rebutted the presumption of marital property and that the property was in fact the Wife's non-marital property. The Court further found that the trial court's finding that the \$40,000 from the Husband to pay off the mortgage was not a gift, and these funds should be reimbursed from the Wife's non-marital estate. The court found that the Husband was entitled to reimbursement because the contribution enhanced the value of the home. Therefore, this issue was reversed by the appellate court.

The Husband next argued that the Wife dissipated marital funds by making loans to family members and failing to prove that the loans were repaid. The court found that the loans the Wife made to her family were made around the same time the parties mutually agreed to advance a loan to an acquaintance. Further, the Wife made the loans in 2006, prior to the breakdown of the parties' marriage. Therefore, the decision was affirmed.

### **Classification as Marital or Non-marital, Division, Valuation**

*In re Marriage of Janssen*, 2013 WL 1681259 (Ill.App. 4 Dist.), April 17, 2013

First, the Husband disputed the trial court's classification of one of the parties' farm properties as marital property. He claimed that because he had purchased the farm, in part, by a like-kind exchange for another farm property that was his non-marital property, the farm itself was his non-marital property and the marital estate should only be reimbursed for its contributions. However, the trial court found that because the marital estate had contributed more than half of the purchase price and that the Husband had done nothing to distinguish the marital and non-marital contributions, transmutation had occurred and the Husband had failed to overcome the presumption that the farm was marital. Agreeing with the trial court's findings, the appellate court affirmed the trial court's classification of the farm as marital property.



The Wife challenged the trial court's valuation of the parties' farm assets, which were assigned to the Husband. She argued that the trial court had failed to value the assets on the date of dissolution because it considered debt incurred after the dissolution date, which was prepayment for items for the 2011 crop. She also argued that the trial court should have used the reserved-jurisdiction approach for the dividing the 2012 crop. The appellate court recognized that the trial court had not calculated the value of the farm exactly and had merely provided an estimate due to the difficulty in determining the value of farm assets on a particular date and time. As such, there was no indication that a date other than the date of dissolution was used in the valuation. The appellate court found the estimate to be appropriate and within the trial court's discretion. Further, the appellate court rejected the Wife's argument that the reserved jurisdiction approach should have been used because it would have failed to consider that the Wife already received a portion of the 2011 crop profits by her receipt of temporary child support and maintenance.

The Husband also argued that the trial court had erred in failing to attribute the value of the Wife's non-marital interest in her family's trust to the Wife. The appellate court affirmed the trial court's decision based on the fact that the Wife's ownership interest was a contingent future interest, rather than a present asset with value that could have been considered in examining the Wife's overall financial resources. The Husband additionally argued that the trial court had erred in valuing the parties' gold and silver because the market value of gold and silver had increased since the appraisal. Again, the appellate court affirmed the trial court's valuation, finding that any error that may have occurred as a result of the appraisal being out of date was *de minimis* because the trial court divided the gold and silver equally between the parties. Further, neither party had presented any evidence about the appreciation of the gold and silver between the appraisal and the date of dissolution and; thus, the trial court properly relied on same.

The Husband was awarded a second farm as his non-marital property subject to certain reimbursements to the marital estate. However, the Wife contested the trial court's valuation of the marital contribution to the second farm, arguing that the marital estate had contributed 44.67% of the equity in the farm and thus is entitled to reimbursement of 44.67% of the farm's current valuation. She also argued the marital estate should have been reimbursed for improvements made to the second farm. The appellate court upheld the trial court's decision, as the trial court had found that Wife did not put forth sufficient evidence of improvements made to the farm by the marital estate so the appellate court found that the trial court's denial of reimbursement was not against the manifest weight of the evidence.

Each party additionally argued that they each should have been entitled to more than half of the marital estate. The Wife argued she should have received a greater share because of the size of the Husband's non-marital estate and the Husband argued his share should have been greater because was the person primarily responsible for the working the farms. The appellate court rejected both parties' arguments and affirmed the trial court's decision, finding that the trial court's memorandum of opinion demonstrated that it had thoroughly considered the parties' circumstances as they related to the relevant statutory factors. However, because the Husband had actually testified about the \$10,000 cash that was removed from the safe, the appellate court remanded the issue and directed the trial court make a credibility determination as to the Husband's testimony regarding that solitary issue.

The Wife also argued that the trial court erred by providing that her award of maintenance could be modified in light of the property distribution. The trial court had recognized that because the income generated from the farm property awarded to the Husband was difficult to calculate, a substantial change in circumstances could occur as a result of the dissolution judgment. The appellate court acknowledged that, in most circumstances, the Wife's assertion would have been correct because all of the relevant circumstances can usually be considered when making support awards at the time of dissolution. However, it ultimately affirmed the trial court's

decision because the difficulty in calculating the Husband's farm income made this case an exception.

Finally, the parties both challenged certain aspects of the trial court's child support order. The appellate court summarily rejected the Husband's arguments because his challenges were only as to the Wife's calculations and not as to the trial court's findings. The Wife additionally argued that the trial court had erred by assigning all of the dependency exemptions to the Husband, citing to other cases in which courts had divided the dependency exemptions equally between the parties. However, the appellate court found that this case was distinguishable from the case the Wife cites to in that the Wife did not point to any evidence in the record that her financial contributions to the children's support are equivalent to the Husband's contributions. Accordingly, the appellate court found that the trial court's award of all exemptions to the Husband was not against the manifest weight of the evidence.

### **PROPERTY AWARD AND DISSIPATION**

*In re Marriage of Claps*, 2013 WL 1701840 (Ill.App. 2 Dist.), April 18, 2013

The Husband first argued that the trial court erred in finding that he dissipated \$400,982 in marital assets. The Husband argued that he refuted this claim by clear and convincing evidence when he offered extensive testimony at trial to explain the expenses he incurred during the time his marriage to the Wife was undergoing an irretrievable breakdown. The court noted that pursuant to Supreme Court Rule 341(h)(7), an appellant's brief must contain argument "which shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on." Illinois Supreme Court Rule 341(h)(7). The court found that instead of supplying the reasons for his contentions as required by Rule 341, the Husband instead simply referred this court to almost 1,000 pages of the record to make his point. The Husband chose to dump the burden of his argument upon the court. Therefore, the court found that because he did not summarize his testimony and did not explain how his expenditures related to the 13 distinct findings of dissipation listed in the trial court's order, the Husband forfeited his claim that the expenditures did not constitute dissipation.

The Husband did specifically reference two findings of dissipation and offered reasons why those findings were in error. Specifically, he argued that the trial court erred in finding that he dissipated \$12,122 in charge card interest and \$17,600 in private loans to his girlfriend, parents, and sister. It is clear from the record that the Husband consistently made the minimum payments on credit cards and that he made many late payments. Given these facts, it was not unreasonable for the court to find that the Husband's consistent failure to pay the charge cards on their due date, coupled with his decision to make minimum payments, constituted dissipation. With regards to the private loans, neither the Husband nor his sister knew the exact amount that she borrowed nor did they know how much she repaid to him. Further, the court did not find the Husband to be credible with regard to the repayment of the loans from his parents and his girlfriend. Therefore, it was not error to find that the Husband dissipated \$17,600 in private loans.

Next, the Husband argued that the trial court's classification of certain marital assets as dissipation were against the manifest weight of the evidence. Specifically, he claimed that the transfer of one marital asset to another asset cannot constitute dissipation and therefore, awarding him the property and finding that he dissipated the marital estate was in error. The court found that the trial court did not err in classifying certain marital assets as dissipation. The court found that the Husband purchased these items for his sole use and enjoyment during the breakdown of the marriage. Although he earned a high income, there was no equity left in the marital estate because of the Husband's spending. The court stated "[F]or us to hold that a transfer of one marital asset to another marital asset can never constitute dissipation would prevent the trial court from equitably distributing the marital estate and allow spouses to do exactly what the Husband has done here - use up all the marital estate by purchasing material

items that only he would enjoy, then forcing the other spouse to either take half of them or nothing at all.”

The Husband next argued that the method of accounting used by the trial court was erroneous and, therefore, the amount of dissipation set by the trial court should be reversed. The court found that like the first subpart of his dissipation argument, the Husband has forfeited his claim. The Husband cited to 116 pages of the record, without summarizing any testimony regarding why such deductions were valid. He did not provide the court with specific arguments and the reasons therefore to support the issue of improper calculation.

The Husband argued that the trial court erred in not considering the economic conditions upon the marital estate. The court was not persuaded by this argument and found that even if the market had been more stable and the parties’ property had increased values, the court was not convinced that the Husband would not have borrowed to the fullest extent of whatever capacity the property would further support.

The Husband argued that the trial court abused its discretion in awarding the Wife statutory child support for the minor child. Specifically, he argued that it was error for the trial court to deny his request for a downward deviation from the statutory child support guidelines and require him to pay \$1,775.15 per week for child support. The court found that there was extensive testimony regarding to the mental health issues and special needs of the child. The court stated that just because the Husband is a high wage earner does not mean the Husband is automatically awarded a downward deviation of child support. In this case, based on the needs of the child, the child support amount seems less likely to be a “windfall.” Instead, the amount awarded conforms to the guideline child support and the amount will help ensure the proper care for the child.

The Husband then argued that the trial court erred in denying his motion to terminate maintenance. Specifically, he argued that the trial court’s order stating that the Wife was not cohabitating with her boyfriend on a resident, continuing, conjugal basis was against the manifest weight of the evidence. The court found that it was clear that the Wife was not living with her boyfriend. In 18 months, the Wife and her boyfriend had gone on one vacation together and spent one holiday together. Further, they only spent between 10 to 13 nights together. Further, the court was not persuaded by the fact that the Wife invoked her Fifth Amendment right against self-incrimination when asked whether she was engaged in a sexual relationship with her boyfriend. Adultery is still a crime in the State of Illinois and answering in the affirmative would constitute an admission.

On her cross appeal, the Wife argued that the trial court erred in finding that the Husband only dissipated \$400,982. She argued that the Husband dissipated \$607,238 in marital assets. Like the Husband, the Wife did not address the issues with specificity and she forfeited her claim for the full \$607,238. However, the Wife did specifically allege that her Husband dissipated \$61,000 from an IRA. The court found that the Husband’s testimony that he used the funds from the parties’ IRA to pay bills was insufficient to meet the burden of showing by clear and convincing evidence how those funds were spent. Again, the Husband referred generally to his testimony, and he did not address the argument with any specificity.

### **PROPERTY-NON-MARITAL**

*In re Marriage of Wendt*, 2013 WL 4428901 (Ill.App. 1 Dist.), Aug. 16, 2013

The appellate court held that in a matter of first impression, a non-vested discretionary bonus to be issued to the Husband after the entry of a judgment for dissolution did not constitute marital property.

The sole issue on review concerned the Husband’s 2012 bonus from his employer, which, if issued at all, would be issued in February 2013. The Wife claimed that nine-twelfths of the bonus is marital property because it accrued during the marriage. The Husband claimed that the bonus

was non-marital property because it was speculative and discretionary. The record reflects that the Husband was eligible to receive a bonus for the year 2012 from his employer “based on his individual performance, his demonstration of the characteristics described in the Citadel Leadership Model, and the Company’s overall performance during 2012.” Further, the company specifically provided, “All bonuses and awards are discretionary. Your entitlement to any bonus or award shall be determined and awarded, if at all, at the discretion of the Company.” It was also clear that the decision of whether the Husband would be awarded a bonus for the 2012 calendar year would be governed by the employee incentive program in effect in early 2013

The court found that the Husband did not have a contractual right to a bonus from his employer, but Citadel may choose to award a bonus at its discretion, a decision which is based on several factors and which would be governed by the employee incentive program in effect in early 2013, approximately five months after the dissolution of the parties’ marriage. The rights to the bonus are not automatic and, therefore, the court could not find that the bonus, if issued, would constitute marital property.

### **PROPERTY DIVISION**

*In re Marriage of Bradley*, 2013 WL 1919163 (Ill.App. 5 Dist.), May 7, 2013 (see below)

*In re Marriage of Dubravec*, 2013 WL 2389889 (Ill.App.3 Dist.), May 29, 2013 (see above)

*In re Marriage of Mayes*, 2013 WL 992636 (Ill.App. 4 Dist.), March 13, 2013 (see above)

*In re Marriage of Price*, 2013 WL 1188008 (Ill.App. 4 Dist.), March 22, 2013 (see above)

*In re Marriage of Skibinski*, 2013 WL 1187476 (Ill.App. 2 Dist.), March 20, 2013 (see above)

*In re Marriage of Stephens and Coolidge*, 2013 WL 1200249 (Ill.App. 1 Dist.), March 25, 2013 (see above)

### **PROBATE ISSUES**

*In re Marriage of Doman*, 2013 WL 4781708 (Ill.App. 4 Dist.), Sept. 5, 2013

The trial court entered a judgment for dissolution of marriage on grounds only and reserved ruling on ancillary issues. However, after the dissolution judgment was entered but before the trial court could rule on any ancillary issues, the Husband died intestate. After the Husband’s death, the trial court entered a docket entry stating, “cause is dismissed.” The Wife then filed a petition for probate and appointment of administrator of the Husband’s estate. Thereafter, the Husband’s adopted daughter filed a counter-petition, arguing that the Wife was no longer an heir to the Husband’s estate because the marriage had been dissolved. The probate court agreed with the adopted daughter that the Wife was no longer an heir to the Husband’s estate because the docket entry did not affect the grounds-only dissolution judgment. The Wife appealed and the appellate court reversed the probate court’s judgment, concluding that docket entry constituted a dismissal of the divorce proceeding in its entirety. The Wife was, thus, considered the Husband’s surviving spouse under the Probate Act of 1975. After the appellate court’s decision, the adopted daughter filed a petition for clarification of the judgment and/or relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure in the domestic relations case. The Wife then filed a section 2-619 motion to dismiss the adopted daughter’s petition. The trial court granted the Wife’s motion to dismiss on the basis that the adopted daughter’s petition was barred by collateral estoppel due to the appellate court’s prior decision that the Wife was the Husband’s heir under the Probate Act. The adopted daughter then appealed, arguing that the trial court erred in granting the Wife’s motion to dismiss. The appellate court ultimately affirmed the trial court’s dismissal of the adopted daughter’s 2-1401 petition, finding that the petition was barred by collateral estoppel. It also found that the adopted daughter was not diligent in bringing her claim regarding the propriety of the docket-entry as dismissing the divorce action.

## **PROCEDURE: NOTICE**

*Shaffner v. Shaffner*, 2013 WL 4860087 (Ill.App. 5 Dist.), Sept. 11, 2013

The Father filed a petition for modification of child custody. The Mother received a copy of the petition by certified mail. She did not receive a summons or a notice of hearing. She failed to respond and failed to present herself at the hearing. The trial court entered a default judgment in favor of the Father. The Mother later filed a petition to vacate the default judgment. The trial court entered an order granting her petition. The Father appealed.

On appeal, the court found that the trial court did not have personal jurisdiction of the Mother when it modified child custody. The Father did not comply with the statutory notice requirement in that he did not serve written notice upon the Mother at least 30 days prior to the hearing on the petition to modify. The lack of notice to the Mother deprived the court of jurisdiction to modify custody; therefore, the judgment was void. Further, the Mother was deprived of her due process right to be heard on the issue. The decision of the trial court to vacate the default judgment was affirmed.

## **QILDRO**

*In re Marriage of Fitzgerald*, 2013 WL 167454 (Ill.App. 4 Dist.), Jan. 9, 2013

In post-decree litigation, Husband filed a petition to terminate an agreed QILDRO, which stated how a portion of his pension was to be distributed to his wife. After filing the petition, Husband sent a request to admit to his wife, to which he claimed she did not file a timely reply. Husband filed a motion for summary judgment based on what he deemed to be admissions by his wife for failing to reply in a timely matter. The motion was denied. The court denied his petition to terminate the QILDRO, as husband had agreed to the language of the QILDRO and had previously agreed to the amount of his pension given to his wife and it was not limited by the present value of the amount at the date of the dissolution of marriage. The court found that the husband's request to admit was mailed to the wife on November 22, 2010. Pursuant to Illinois Supreme Court Rule 12, date of service is deemed to be November 26, 2010, four days after mailing. The wife filed her response on December 20, 2010 and mailed it to husband the same day. This the date of service on the husband is deemed to be December 24, 2010. December 24, 2010 is 28 days after November 26, 2010. Therefore, she did file a timely response.

Husband then argued that his wife was receiving more money as a result of the QILDRO than was intended in the MSA. The MSA stated that the amount awarded to Wife was \$16,337.28. The appellate court found that the language of the marital settlement agreement did not limit Wife to this amount. Further, the 2009 QILDRO did not modify the terms of the settlement agreement. Further, the MSA provided that Wife would receive \$16,337.28 as part of her share of the retirement, equal to 19% of the retirement account. The QILDRO amount also equaled 19% of the retirement account. Further, the parties agreed to the settlement terms of the MSA and QILDRO, and the court did not find that the QILDRO was a modification of the MSA. The court held that the actual benefit at the time of the retirement, not the estimated benefit at the time of the parties' dissolution, should be used when calculating the former spouse's benefit amount.

In denying Wife's petition for contribution to attorney fees, the court properly considered the parties' relevant economic circumstances. Although Husband had more income, neither party was in a position to pay substantial attorney fees. The trial court found that the litigation stemmed from inartfully drafted documents. The appellate court affirmed the decision of the trial court for the same reasons.

## REMOVAL

*In re Marriage of Campbell*, 2013 WL 4477831 (Ill.App. 2 Dist.), Aug. 19, 2013

After a trial in a dissolution proceeding, the trial court awarded custody of two minor children to the Mother and allowed her to remove the children to the State of Utah. The Father appealed the decision allowing removal, arguing that the trial court's finding was against the manifest weight of the evidence. At the commencement of the dissolution proceedings, the Mother fled the State of Illinois with the parties' two minor children to the State of Utah where her extended family resided. The Mother claimed to have left Illinois because she had been abused by the children's Father and feared for her life. Several months prior to her leaving, the Father had signed a document agreeing that the Mother could move to Utah with the children. He later claimed he did not agree to the move and had agreed to sign the document believing it would have no legal weight. After the Mother's initial removal of the children from Illinois, an order was entered granting the Father eight weeks of visitation in the State of Illinois and requiring the Mother to submit to a mental health evaluation. At the time of the trial, the Father had physical custody of the parties' two children. The appellate court ultimately affirmed the trial court's order, finding that the trial court's decision allowing the Mother to remove the children to the State of Utah was not against the manifest weight of the evidence. The trial court had heard ample evidence regarding the domestic violence perpetrated by the Father and found the Mother's testimony regarding his abuse to be credible. As such, her removal of the children from Illinois was legitimate and not motivated by a desire to frustrate the Father's access to the children. The trial court had also heard testimony suggesting that the Mother would be more apt to facilitate ongoing visitation with the Father, that she had a family support network in Utah, that she had good options for housing and a career in Utah and that it would serve the children's best interests to reside with their half-siblings, all of whom would also be living with the Mother in Utah.

*Cole v. Johnson*, 2013 WL 37402 (Ill.App. 4 Dist.), July 23, 2013

After trial, the trial court denied the Mother's petition to remove the child from Illinois to Texas. The Mother appealed and the appellate court found that the trial court's decision was against the manifest weight of the evidence.

The evidence reflected that both parties lived in Illinois along with their families and that the Mother had no relatives in Texas. The Father also had reasonable parenting time with the minor child. The Father lived at home with his parents and made approximately \$20,000 per year. The Mother wanted to move to Texas because her fiancé was employed doing wire line work on the oil fields in Texas. He made approximately \$130,000 per year. He could not find similar work in Illinois. The Mother made approximately \$7,000 per year in Texas. She was accepted into a nursing program in Texas with a scholarship and would be able to be a stay at home mom if she moved to Texas.

Based on the facts of this case, the appellate court found that the Mother met her burden to remove the minor child to Texas. Her fiancé could help both her and the child financially. Further, the Mother would be able to stay home with the child since she did not have to work. And because she did not have to work, she could also fly back to Illinois with the child so that the Father could have parenting time, and his parenting time would be for extended periods of time. The court found that the proposed removal offered such huge benefits to the child that it would be unreasonable to decline him the chance to raise his quality of life because his Father's parenting time would be decreased.

*In re Marriage of Notter*, 2013 WL 1896771 (Ill.App. 4 Dist.), May 3, 2013

A post-decree removal proceeding was initiated by the Mother of a five year old boy. The Mother sought to remove the child to Texas because she had been unable to find a job in Illinois and she wanted to live with her Mother in Texas, which would enable her to attend a training program to become an ultrasound technician. Her Mother would pay for all of her and the



child's living expenses, financial aid would cover her educational costs and she had been accepted to two different schools in Texas. The Father contested the removal, challenging the Mother's her motivations in requesting the removal and efforts to find employment in Illinois. He argued that he had religiously exercised his visitations rights, which would be impeded if the Mother were permitted to remove the child to Texas. However, there was a court order in place requiring the Father to have supervised visitation with the child due to his having suffered from psychosis that he had not made substantial effort to have lifted. He had not been to his psychiatrist in over two years, despite having insurance that paid for the visits.

The trial court entered a written order granting the Mother's motion to remove the child to Texas. It also ordered her to post a \$100,000 surety that required her to follow the terms of the removal order, which included filing written proof of her enrollment in one of the Texas ultra-sound technician programs and to continue to file written proof every 60 days. The Father appealed. Because the appellate court deemed it the trial court's role to assess the Mother's sincerity in seeking the removal and to determine whether the removal was in the child's best interests, the appellate court found that the grant of the Mother's petition to remove the parties' minor child was not against the manifest weight of the evidence.

## **REMOVAL**

*Banister v. Partridge*, 2013 WL 683190 (Ill.App. 4 Dist.), Feb. 26, 2013

The circuit court granted The Mother's petition for removal, dismissed the Father's contempt complaint, and subsequently denied the Mother's second removal petition involving removing the child to another state. The Mother appealed and the Father cross-appealed. The appellate court affirmed in part and reversed in part.

On appeal, the Mother argued that the trial court lacked the statutory authority to consider her petition to remove the minor child to Maine and that the court's denial of her removal petition was against the manifest weight of the evidence. In this case, the trial court had earlier granted the Mother's petition to remove the child to Kentucky. Once in Kentucky, and after some time, the Mother's husband was transferred to Maine, and the Mother subsequently filed the instant removal petition. The appellate court found that the trial court's authority to address a subsequent petition for leave to remove a minor is an inherent part of the court's authority to enforce the custody and visitation provisions of the judgment. Therefore, the court rejected the Mother's statutory challenge.

With regard to the Mother's second issue on appeal, the appellate court found that the trial court's denial of her second removal petition was against the manifest weight of evidence. The trial court correctly identified that many of the facts and considerations identified in the court's earlier order for removal remained unchanged. The only difference, and the difference that the court hung its hat on, was the fact that the distance from Maine to Illinois was farther than Kentucky to Illinois and that the Father would have less parenting time. However, it was clear that the Mother was not making this move to frustrate the Father's parenting time but rather to better the quality of her and the minor's life by moving to Maine with the family unit. The appellate court held that although a denial of the Mother's petition would undoubtedly permit the Father more time with the child, it would also come at the expense of the quality life of the child. Therefore, the appellate court reversed the decision of the trial court.

On cross appeal, the Father argued that the court erred in dismissing his petition for rule to show cause as to why the Mother should not be held in contempt for moving the child to Kentucky in violation of the court's oral admonishment. During the proceedings involving the first petition for removal to Kentucky, the Mother moved the child to Kentucky before the conclusion of the proceedings and after the court gave an oral admonishment to her not to permanently remove the child from Illinois until the conclusion of the proceedings. The appellate court found that it was clear that the evidence showed that the Mother realized that the court could deny her petition for removal and therefore she made arrangements with the



Illinois school district to permit the child to return to the Illinois school if the court so decided. As a result, the appellate court found the Mother's behavior was not contemptuous.

## **SANCTIONS**

*In re Marriage of Yates*, 2013 WL 81366 (Ill.App. 1 Dist.), March 4, 2013

This case has a ten-year history of litigation, which includes three appeals. The bulk of this decision is devoted to the court's analysis of many different petitions filed by each party dealing with child support payments, offsets to child support payments, retroactive child support, abating child support awards, voiding child support awards and awarding child support. The focus has more to do with procedure and the difficulties presented with many different petitions pending and unresolved over time. The court also repeatedly chastised the Wife for failing to provide the appellate court with a proper record on appeal. The trial court's decision regarding child support was affirmed.

Sanctions. However, the appellate court did find that the trial court erred in imposing sanctions on the Wife personally, instead of on the Wife's attorney. The trial court imposed sanctions because the Wife's attorney issued a subpoena to the Husband's current wife's employer in violation of a court order barring any further subpoenas being issued without court approval and because the attorney attempted to depose the current wife without seeking prior court order for the issuance of the subpoena, not once, but three times. The subpoenas were signed by the Wife's attorney, not the Wife, so sanctions were appropriate against him, not the client. The appellate court modified the trial court's order and imposed sanctions against the Wife's attorney and in favor of the Husband.

Attorney fees. Finally, the Wife claimed that the court abused its discretion in denying her petition for contribution to her attorney fees. She claimed that the court's denial of her request was based on a "mythical imputed income." The bottom line is, although the Wife claimed she had minimal income and her monthly expenses exceeded her income by \$4,022 each month, and she had no debt other than a student loan and her attorney fees. The evidence showed that the Wife's father gave her money to pay her living expenses and apparently some of her attorney fees. The appellate court found that the money her father gave her for living expenses was not "mythical" but real income that the trial court properly imputed to the Wife. There was no evidence that the Wife was unable to pay her bills—just that her father had been paying her bills. Therefore, the Wife was able to pay her attorney fees, either through her father's direct payments to her attorney or through the monthly cash gifts that the Wife receives from her father.

*Zippershtein v. Zippershtein*, 2013 WL 1189479 (Ill.App. 1 Dist.), March 22, 2013

The ex-Husband's estate appealed an order denying his motion for sanctions pursuant to Illinois Supreme Court Rule 137 against his ex-Wife. The appellate court affirmed.

The ex-Wife filed a verified petition to vacate the parties' judgment for dissolution of marriage pursuant to section 2-1401 of the Code of Civil Procedure, claiming that the ex-Husband had failed to disclose various parcels of commercial real estate that he had purchased after the parties had obtained a "get" (a Jewish divorce) but before the parties were legally divorced. 735 ILCS 5/2-1401. Specifically, she came to learn that the ex-Husband had owned \$12 million worth of additional properties, which were not included in the parties' Marital Settlement Agreement. However, during the ex-Wife's deposition, she admitted that she was knowledgeable of her ex-Husband's involvement in real estate transactions during the period in question. After this revelation, the ex-Wife filed a motion for leave to file an amended section 2-1401 petition to vacate the dissolution judgment. Thereafter, the ex-Husband's estate filed a motion for summary judgment of the original section 2-1401 petition and a motion for sanctions pursuant to Illinois Supreme Court Rule 137. The motion for summary judgment was granted. The motion requesting sanctions against the ex-Wife was denied.

The appellate court upheld the trial court's denial of the motion for sanctions against the ex-Wife because even though she had some knowledge that the ex-Husband had participated in real estate transactions prior to the divorce, the record was clear that she was unaware of the extent of his interest in the various commercial properties in question. Even though the ex-Wife was unable to establish the fraudulent intent of the ex-Husband so as to excuse her lack of due diligence in timely filing her 2-1401 petition, she did present circumstantial evidence that the ex-Husband had taken affirmative measures to prevent her from learning of his investments. Based on this, the ex-Wife's claim had been meritorious and an award of sanctions to the ex-Husband's estate would have been inappropriate.

### **SERIOUS ENDANGERMENT**

*In re Custody of T.R.M.* (2013 WL 2154160 (Ill.App. 4 Dist.), May 17, 2013)

After trial, the court found that further visitation with the child and his Father would seriously endanger the child. The court ordered that there be no visitation or contact between the Father and child for one year, and the case was set for status a year out. The appellate court affirmed the decision of the trial court.

On appeal, Father first argued that the Mother failed to meet her burden that visitation with the child would seriously endanger the child. The record is clear that the experts in this case all opined that the child's fragile mental condition would be seriously endangered by further contact with the Father. Much of the Father's conduct during his parenting time with the child was undisputed such as the Father pulling out a chair so that the supervisor would fall over it, the Father screaming at the supervisor in front of the child, the Father calling the child a "dumb ass," and the child asking his Father if he remembered "when you touch my you-know," and the Father telling the child not to say that. Further, the supervisor and expert both opined that the Father had sexually abused the child as illustrated by the child not wanting to get out of the car for visits, and the fact that the child told multiple people that he had been abused. Therefore, the evidence in this case overwhelmingly supported the trial court's decision to suspend contact between the Father and the son. Further, prior to ordering the suspension of contact, the court had ordered supervised contact. The court found that if the Father acted in a disturbing manner during the supervised visits, he would act in the same way, or worse, during unsupervised visits.

### **SUPREME COURT RULE 308**

*In re Marriage of Shelton*, 2013 WL 1737213 (Ill.App. 5 Dist.), April 22, 2013

A Husband and Wife were co-founders of a Christian broadcasting network and the Husband was an extremely well known Seventh Day Adventist televangelist. A dissolution of marriage proceeding was eventually initiated. However, prior to the filing, and in late 2003, the Husband produced two versions of a draft manuscript that he intended to have published. After his version of the manuscript was written, the Husband consulted with an author who had done prior work for the broadcasting network, to review his manuscripts and provide feedback. This consultation occurred on May 24, 2004. Thereafter, the author rewrote of the first chapter of the manuscript and presented it to the Husband on May 26, 2004. Based on how pleased he was with the author's rewrite of the first chapter, on May 30, 2004, the Husband asked the author to rewrite the entire book.

On June 14, 2004, the Husband and Wife filed divorce papers in Guam and then on June 25, 2004, the Superior Court of Guam entered an order dissolving their marriage but reserving the issues of the division of property. The issue of property division later came before the circuit court of Franklin County, Illinois.

As of June 26, 2004, the author had completed chapters 1-4 of her first draft of the rewrite of the Husband's manuscript. Then, in August of 2004, the Husband first approached the president of the publishing company that would later publish the finalized version of the book. By December of 2004, the book was completed and printed, but there was no written agreement between the

Husband and the publisher in place. After turning the writing process over to the author on May 30, 2004, the Husband made no further contributions to the writing of the book. Furthermore, the published version of the book did not at all resemble his initial manuscript. On May 23, 2005, the Husband and the publishing company entered into written agreement, which provided for royalties to be paid to the Husband. Then, in late 2005, at the request of the publisher, the author condensed the book into a shorter version for distribution in major retail outlets. The Husband took no part in the condensation process. By 2007, over 5 million copies of the condensed version of the book were in print.

The issue before the trial court was whether any royalties received by the Husband for the sale of the book were divisible as marital property. The parties filed cross motions for summary determination of major issues, as a result of which the trial court entered an order that the manuscript and the royalties from the sale of books were all marital property. The Husband filed a motion to reconsider and asked to the court to certify the following question pursuant to Illinois Supreme Court 308:

In an Illinois dissolution of marriage proceeding, can a court divide as marital property the royalties received after the date of dissolution by an author-spouse pursuant to a publication contract executed after the date of dissolution and where the underlying literary work was not in final form and had not been published as of the date of dissolution?

On appeal, the Wife argued that the books, as well as the royalties stemming therefrom, were marital property because every bit of skill, effort and energy that the Husband put into the book occurred during the marriage. The Husband claimed that under federal copyright law, his manuscript and the books drafted by the author were separate and distinct copyrighted literary works and because the books themselves did not come into existence until after the dissolution of marriage, the royalties of the books are not marital property. Ultimately, the appellate court declined to answer the question certified by the trial court and the appeal was dismissed. The appellate court found the question was too broad and would have led to a hypothetical answer with no practical effect. However, it did provide guidance to the trial court that was in line with the Husband's analysis of federal copyright law. It further indicated that the appropriate question before the court regarded the legal relationship between the author's books and the Husband's original manuscript. The trial court needs to determine whether the author's books were "derivative works" of the Husband's manuscript, as ultimately the Wife's economic interest was limited to only that which is attached to the Husband's manuscript itself.

## **SURVIVING SPOUSE**

*In re Marriage of Winter*, 2013 WL 3516322 (Ill.App. 1 Dist.), July 12, 2013

The Wife appealed the trial court's order finding that the surviving spouse benefit was not marital property subject to distribution. The appellate court affirmed the decision of the trial court.

The Husband had a pension through TRS. The pension had a provision stating "a surviving spouse of a teacher shall be entitled to a survivor's pension only if the surviving spouse was married to the teacher for at least one year immediately prior to the teacher's death." The court found that the pension code clearly excluded the Wife as a surviving spouse. The benefit did not belong to the Husband or the Wife, but to a hypothetical and undetermined "surviving spouse" defined by the pension code. Therefore, the benefits could not be considered marital property.

## **UCCJEA**

*Meier v. Ball*, 2013 WL 3148935 (Ill.App. 4 Dist.), June 18, 2013

The appellate court affirmed the trial court's vacatur of its earlier decision to register a foreign judgment.

The original custody judgment was entered in California. Per the judgment, the Mother was granted leave to remove the child to Ohio. However, the Judgment also stated that Illinois would have jurisdiction of this case because the Father was moving to Illinois. After the judgment was entered, the Father filed in the court of common pleas, juvenile division in Ohio. While litigation was pending, the Father filed a *pro se* petition to register a foreign judgment in Illinois. In support of his petition, he alleged that he had custody of the child and that the Mother would not return the child to him. The court entered an order registering the judgment and directing the Mother to return the child to the Father. The next day, the Father took the child from school without informing the Mother. The Mother filed a motion for emergency relief and, at hearing, the trial court vacated its earlier decision stating that the court lacked jurisdiction under section 201 of the UCCJEA. The appellate court affirmed the trial court's decision finding that the child had never lived in Illinois, and when the Father filed his petition in Illinois, he did so with knowledge that the court of appeals of Ohio had modified the parties' original agreement by affirming that Ohio had jurisdiction of this case.

## **VACATING THE JUDGMENT**

*In re Marriage of Callahan*, 2013 WL 266042 (Ill.App. 1 Dist.), Jan. 23, 2013

The parties entered into a legal separation agreement in 2007. In August of 2008, Husband filed his motion for judgment of dissolution of marriage. Wife did not attend the initial prove-up hearing. The court found that the first agreement was unconscionable. Husband had testified that both parties were waiving maintenance and that he would pay his wife's health insurance for 4 years. Husband testified that he would be awarded the marital residence, be responsible for \$100,000 of debt and be awarded his pension. The court did not grant the dissolution as the court did not believe that Husband's pension was only \$100,000 even though he worked for the fire department for 29 years. Further, the court found the agreement was unconscionable since Wife was 51 years old at the time of the hearing and had not had a job since 1985, and she was receiving no assets. A second prove-up hearing was held in September of 2008. The MSA was entered, although the court stated that the division of assets was troubling. Per the MSA, Wife was to receive \$2,500 in maintenance per month until April 12, 2012. Husband was awarded the marital residence and his pension. During prove up, Husband's attorney stated that his client was assuming \$100,000 of marital debt and that his retirement account was worth the same amount as the debt. He also had his client testify that the house was awarded to him as part of the legal separation, and as such, the party was his non-marital property.

Two years later, Wife moved to vacate portions of the judgment. She testified that her husband fraudulently induced her to sign the MSA. She testified that she was unable to read the MSA herself because the medication she was on severely impacted her cognitive functioning. She stated that her husband assured her she would be awarded half of the marital residence and that he would pay for her health insurance and would give 50% of his pension to her. She stated that she did not read the document, nor was she provided with a copy. It was not until her medications were reduced in April 2010 that she consulted with an attorney and learned the terms of the agreement. She further stated that her husband's attorney misrepresented that the marital residence was her husband's non-marital property and that because Husband's pension was only worth \$100,000, the same amount as the parties' debts, there was no marital estate to divide. Wife testified that the projected value of the pension was \$1,500,000.00. Wife moved for summary judgment on Count II of her motion. Husband sought leave to take her deposition. Wife moved to quash the taking of the deposition. The motion to quash was granted as well as Wife's motion for summary judgment relative to count II of the motion to vacate.

Husband argued that the court erred in granting the summary judgment because his wife did not satisfy the requirement of due diligence. On appeal, the court found, that generally there should be a finding of due diligence before a decision on a section 2-1401 petition is rendered. However, because the court concluded that there was evidence of unconscionability and fraud in the instant case that would require vacating the judgment of dissolution regardless of whether Wife acted diligently, the court need not remand for an inquiry into Wife's diligence.

The court found that the agreement was unconscionable as Wife was a homemaker who was left with nonmodifiable maintenance while Husband retained the marital estate. Although he was awarded the debt, this did not come close to offsetting the value of the assets received in the MSA. In addition, Wife presented undisputed evidence that the agreement was procured by fraud. Here, Husband and his attorney made numerous misrepresentations of material fact at the prove-up hearing. Further Husband sought to take Wife's deposition in order to test the veracity of her claims of legal incompetency. However, although Wife's motion to vacate contained allegations of her incompetency, this was not the basis on which she moved for summary judgment. Her motion for summary judgment was premised on count II of her motion to vacate, which alleged fraudulent acts by Husband's attorney and the unconscionability of the MSA. Therefore, the appellate court affirmed.

## **VALUATION**

*In re Marriage of Bradley*, 2013 WL 1919163 (Ill.App. 5 Dist.), May 7, 2013

This case involves cross appeals by a Husband and a Wife of a dissolution judgment on numerous issues.

First, the Husband challenged the valuation of his medical practice which he argued resulted in a \$40,000 mathematical error in the property distribution. The appellate court upheld the trial court's findings as to the valuation, noting that the Husband had presented little in the way of valuation evidence. It further found that, even if such evidence existed, the alleged \$40,000 discrepancy was an error of no practical effect or prejudice to the trial court's ultimate property distribution. The Husband further claimed that the trial court had erred in not subtracting the amount he was required to pay in health insurance for the parties' children when calculating his net income for the purposes of determining his child support obligation. The appellate court agreed with the Husband and reduced his child support obligation pursuant to statute. Despite having failed to object to this disposition at trial, the Husband also challenged the trial court's order that all of his firearms be placed in the custody of the Sheriff and that his firearm owner identification cards be held by an attorney until further order of court. He claimed that such an order resulted in a deprivation of his liberty without due process of law. However, the trial court had heard evidence at trial that the Husband had threatened to discharge his firearms in front of the parties' children. As the trial court has a duty to protect the best interests of children, the appellate court found that the removal of the Husband's firearms constituted a reasonable regulation of his second amendment rights. Finally, in spite of various challenges raised by the Husband as to these issues, the appellate court also upheld the trial court's order with respect to the consideration of taxes in distributing the parties' retirement accounts, the Wife's award of maintenance, the Husband's obligation to contribute to the Wife's attorney fees, the Husband's continuing duty to provide the Wife with his and his corporation's tax returns, the designation of the Wife as the trustee of the minor children's interest in the Husband's life insurance policy, and the requirement that the Husband pay the cost of the children's medical insurance.

The Wife claimed the trial court erred in failing to enter a judgment against the Husband's medical corporation pursuant to Section 35 of the Income Withholding for Support Act. Upon the corporation's failure to withhold support pursuant to the Act, the Wife filed an enforcement petition joining the corporation as third party. She notes that the record indicates the trial court's acknowledgement of the corporation's failure to withhold the Husband's income by requiring him to pay the unpaid support. Because the Income Withholding Statute makes a judgment mandatory when the payor has failed to withhold, the appellate court vacated this portion of the

trial court's order and remanded the matter for further proceedings consistent with the statute. The Wife further challenged the trial court's failure to make child support and maintenance retroactive to the date of the first order for temporary relief, the failure to hold the Husband in contempt for noncompliance, and the failure to assess attorney's fees to the Husband related to this issue as an abuse of discretion. The appellate disagreed with the Wife and deferred to the trial court's ruling.

*In re Marriage of Urban and Howell*, 2013 WL 2420491 (Il.App. 2 Dist.), May, 31, 2013