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**DuPage County Bar Association**  
**MEGA MEETING**  
**Family Law Case Updates**  
**January 24, 2015**

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# MEGA MEETING 2015

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## ADOPTION

*Elston v. Oglesby IV*, 2014 WL 5474694 (Ill.App. 4 Dist.), Dec. 16, 2014\*\*

A Daughter filed a motion to reopen an adoption in which she was the adoptee alleging that the trial court lacked personal jurisdiction over the biological Father because of a fraud perpetrated on the court by biological Mother. The Daughter's paternal half-Brother filed a motion to dismiss the Daughter's adoption challenge. The trial court granted the half-Brother's motion to dismiss and the Daughter appealed.

The Daughter argues that the trial court erred in barring her adoption challenge due to a one-year statute of limitations. The Daughter's adoption challenge alleged that her biological Mother filed a false affidavit regarding knowledge as to the biological Father's whereabouts and that the Mother either knew or had the ability to determine the Father's location. The appellate court determined that the Daughter's allegations amounted to extrinsic fraud, which only gave the trial court who approved the adoption "colorable jurisdiction," and that the adoption judgment could be rendered void if proven. However, the appellate court ultimately denied the Daughter's appeal and adoption challenge as she lacked standing because no other party can complain that the rights of a party were violated other than the biological Mother or biological Father involved. While the Daughter was a party to the underlying adoption, she could not challenge the adoption by arguing a lack of personal jurisdiction over the biological Father as she lacked standing to do so. The appellate court affirmed the trial court's ruling.

*In re Adoption of L.S.*, 2014 IL App (4<sup>th</sup>) 140276-U, Aug. 27, 2014

The Shearers appealed the decision of the trial court denying their petition to adopt the minor child and granting the Davidsons' petition for adoption. The Davidsons and the Shearers had competing petitions to adopt an eight-year-old child after the minor child's mother had passed away. In 2007, the child was placed in foster care with the Davidson family. She was returned to her mother's care in 2009 but had regular contact with the Davidson family. In 2013, after the child's mother passed away, the child's grandparents and aunt agreed that the child should live with the Davidsons. The Shearers were related to the child's mother as the child's mother was a cousin to John Shearer. The Shearers had never met the minor child.

At the trial, the Shearers experts (who happened to be John Shearer's father and John Shearer's wife) testified that, based on the minor child's mother's lifestyle, the minor child may have been exposed to drugs and HIV and could have mental, social and neurocognitive problems. The Shearers argued that because of the child's background, and because she was biracial, she should be placed with Shearer family. The Shearers lived in California and testified that they lived in an integrated community. The appellate court found that the trial court gave the proper weight to the experts. The court found that these experts never met the child or reviewed her medical, school and other records. The court further held that there was no error in granting the Davidsons custody petition as the child had known the Davidsons since she was 2 ½ years old, the Davidsons treated her as their own child, the Davidsons had other children who treated the child like their sibling, the child still kept in touch with her other relatives, and the child was involved in her school and community and was thriving.

*In re Marriage of Mancine and Gansner*, 2014 IL App (1st) 111138-B, March 31, 2014

Husband sought custody of a minor child that was not the biological child of either the Husband or the Wife and had been adopted by only the Wife. The trial court granted the Wife's section 2-619 motion to dismiss the Husband's request for custody based on his lack of standing due to the fact that he never became a parent because he never adopted the child. On appeal, the Husband argued that the trial court was in error and should have applied the "equitable adoption" doctrine as applied in the Illinois Supreme Court case of *DeHart v. DeHart*, 2013 IL 114137. However, the appellate court found *DeHart* to be legally inapplicable because it was a common-law will contest proceeding in which the concept of equitable adoption could be applied; the instant proceedings are both statutory, not equitable, proceedings. As such, the trial court's decision granting the Wife's 2-619 motion was upheld.

## **ADOPTION - TERMINATION OF PARENTAL RIGHTS**

*In re Adoption of J.K.*, 2014 IL App (4th) 131058-U, March 17, 2014

A minor child's biological Father and his wife filed a petition for adoption of a minor child, requesting that the trial court terminate the parental rights of the child's biological Mother. The Father had previously been awarded custody of the child, subject to Mother's visitation rights. The trial court heard testimony from the Father's expert physician that Mother had taken the child to the hospital with clavicle and rib fractures so severe that one of the child's lungs had collapsed. The child had also sustained fractures to both shinbones, to her skull and to the center and each side of her jaw. The physician stated that the injuries could not have been caused by accidental means, were inflicted either constantly or intermittently, were in some instances life-threatening, were interfering with her normal growth and development and were affecting her ability to consume life-sustaining nutrition. In addition, the child's counselor also testified that he had diagnosed the child with Post Traumatic Stress Disorder because the child was having angry outbursts, nightmares and was soiling her bed. During the hearing, Mother admitted that she had previously pled guilty to two counts of "battery resulting in serious bodily injury to a person less than 14 years of age" in an Indiana criminal case. Mother was first found to be unfit. Then, after a best-interest hearing, her parental rights were terminated. The appellate court ultimately upheld the trial court's decision finding that the termination of the Mother's parental rights was not against the manifest of the evidence.

## **ALLOCATION OF PROPERTY (See also VALUATION, CHILD SUPPORT)**

*In re Marriage of Abu-Hashim*, 2014 IL App (1st) 122997, June 25, 2014

A former Husband appealed from several provisions in a dissolution judgment, including the trial court's allocation of the parties' home equity line of credit to him, the failure to account for a \$50,000 distribution from his 401(k) to the Wife in equitably allocating marital property, in valuing the parties' daycare business, in failing to deviate from statutory child support guidelines by ordering him to pay retroactive child support and in ordering him to pay child support on income from a profitable commercial rental property without offsetting the losses on other rental properties. The appellate court found the trial court did not abuse its discretion as to any of the issues appealed by the Husband, all of which stem from factual disputes that the trial court is in the best position to assess and decide. Accordingly, the trial court's decision was affirmed.

*In re Marriage of Ziegler*, 2014 IL App (1<sup>st</sup>) 123353-U, July 7, 2014

A Husband appealed the trial court's ruling to divide marital property with a valuation date as of the date of entry of the judgment for dissolution of marriage instead of the separation date, an error related to the value of a joint savings account and the trial court's denial of his motion to vacate. The appellate court affirmed the trial court's rulings.

The appellate court held that the ruling in *Mathis (Marriage of Mathis, 2012 IL 113496)* was limited to bifurcated proceedings only and did not apply where there was no delay between entry of the judgment of dissolution of marriage and the division of marital property. The Husband next argued that the trial court erred by not considering a division of cash from the account in 2009, when the Wife and Husband separated, in determining the equal split of marital property. The appellate court could not properly consider the Husband's argument due to his failure to provide a sufficient record for the court to review. As such, the appellate court presumed the trial court conformed to the law and had a sufficient factual basis for its reasoning. While the appellate court reasoned that any split of cash prior to the entry of the judgment should not be included in the assets from which the trial court made the allocation, nothing in the record provided a basis for the appellate court to vacate the trial court's judgment, which was due to the Husband's failure to provide an adequate record.

Overall, the appellate court affirmed the trial court's ruling which valued the property as of the date of entry of the judgment and not the separation date.

## **AMBIGUITIES IN TRIAL RECORD**

*In re Marriage of Ghatan*, 2014 IL App (5<sup>th</sup>) 130117-U, May 15, 2014

Subsequent to the entry of a judgment for dissolution of marriage, both parties brought motions to reopen proofs to introduce additional evidence regarding the valuation and the characterization of property in the judgment. After the proceedings took place on both parties' motions, the Husband appealed from the judgment, arguing that the trial court had erred in failing to reopen proofs. Upon the appellate court's review of the record, it was unclear how the trial court had actually ruled on the parties' motion to reopen proofs. The record seemed to indicate that the trial court had treated the hearing as a mere summation of evidence previously admitted at trial. However, the trial court relied on some of the parties' new exhibits in the judgment, suggesting that the motions had been granted. Due to this ambiguity, the appellate court vacated the trial court's supplemental judgment of dissolution of marriage and remanded the matter to the trial court to clarify its ruling on the parties' motions to reopen proofs, to clarify what exhibits, if any, were admitted into evidence, and to conduct such other further proceedings as may be necessary.

## **AMENDMENTS TO COUNTERCLAIMS AND SUMMARY JUDGMENT**

*Kuhn, Mitchell, Moss, Mork, Kocsis & Lechnowitz, LLC v. Ripani*, 2014 IL App (2d) 130589-U, Feb. 20, 2014

Former client appealed the trial court's order denying his request to amend his counter-complaint for malpractice against his former attorney and granting the former attorney's motion for summary judgment, which was affirmed by the appellate court.

On appeal, the appellate court found that requests to amend are not absolute and are discretionary. The former client specifically requested to amend his counter-complaint to add a claim for negligent infliction of emotional distress, which the appellate court found raised an entirely new claim and theory of recovery. The appellate court agreed with the former attorney's arguments that such a claim for relief would have required additional discovery and possibly postponed the trial date in this cause, and that the former client had three years to previously amend his petition and include such a claim but failed to do so earlier.

The former client only argued error as to his obligation to pay child support on imputed income when he was unemployed at the time of entry of the judgment. The appellate court highlighted the undisputed facts that (1) the former client fully understood the terms of the settlement agreement when he agreed to set child support on an imputed income of \$120,000.00; (2) he knew that the imputed income was far in excess of his actual income at the time of entry of the judgment (received only unemployment benefits); (3) no coercion or duress existed; (4) e-mails between the former client and former attorney demonstrated that the client repeatedly read and considered the terms of settlement; and (5) he was informed that he would have to prove a substantial change in circumstances to modify child support. The appellate court held that the provisions of the settlement agreement in no way impaired or prevented him from bringing a successful motion to modify the child support, did not state that the child support was non-modifiable, and the former client failed to set forth any evidence demonstrating a genuine issue of material fact. In sum, the appellate court affirmed the trial court's judgment as it related to denying the former client's request to amend his counter-complaint for malpractice and granting the former attorney's motion for summary judgment.

## **APPELLATE JURISDICTION**

*In re Marriage of Igel*, 2014 IL App (3d) 130961-U, May 7, 2014

The trial court entered an order finding that a Father had satisfied the requisite conditions established by a prior court order entitling him to begin having unsupervised visitation with his minor sons. The Mother filed a motion to reconsider the court's ruling. The court denied the Mother's motion and included Illinois Supreme Court Rule 304(a) language in the order, pursuant to which the Mother appealed. The appellate court ultimately denied the Mother's appeal for lack of jurisdiction due to the fact that the trial court had retained jurisdiction to conduct a 45-day review of the unsupervised visitation and to consider the Father's request for an expansion of visitation. As such, despite the inclusion of 304(a) language, the trial court's order denying the Mother's motion to reconsider was not a final and appealable order.

*Marzouki v. Marzouki*, 2014 IL App (1st) 132841-U, March 31, 2014

The Husband filed an interlocutory appeal pursuant to Supreme Court Rule 307(a)(1) from an August 14, 2013 order denying his motion for a stay and to enjoin discovery and trial. He further appealed all underlying orders, including a July 22, 2013 court order denying his motion to dismiss the Wife's motion to allocate the marital estate.

The court found that while it did have jurisdiction of the motion for stay because a stay order is immediately appealable under Rule 307(a)(1), the motion to dismiss is not appealable. An appeal under Rule 307 does not open the door to a general review of all orders entered by the trial court up to the date of the order that is appealed. A trial court's denial of a motion to dismiss is an interlocutory order, but it is not one that is final and appealable.

The Husband argued that the stay was necessary because there was a case pending in France, where the parties were divorced. The court found that the Husband failed to show that there was another action pending in France. The Husband failed to meet his burden on appeal of showing that the circuit court abused its discretion in denying his motion for a stay of the Wife's motion to allocate the marital estate.

*In re Marriage of Withrow*, 2014 IL App (1st) 130433-U, April 22, 2014

The appellate court denied an appeal after determining that it did not have jurisdiction due to an untimely filed notice of appeal and that the order appealed from was not an appealable order.

A *pro se* Husband appealed from an order entered by the trial court denying his motion for substitution of judge and his motion for interlocutory appeal, arguing that his due process rights were violated and that the judge was biased. The appellate court found that the appeal was untimely because the *pro se* Husband had filed his notice of appeal in December, before the appellate court orally denied all of the Husband's motions and before the order denying all motions was entered in January. Further, the appellate court held that the denial of the Husband's motion for interlocutory appeal was not a final and appealable order because the Husband sought appeal only on the trial court's denial of his motion for substitution of judge and did not seek any injunctive relief.

**APPELLATE JURISDICTION (See also PAYMENT OF CHILD'S FUNERAL EXPENSES)**

*In re Marriage of Gardner*, 2014 IL App (1st) 130430-U, Feb. 28, 2014

**ATTORNEY FEES (See also MAINTENANCE, CHARACTERIZATION OF PROPERTY)**

*In re Marriage of Bernat*, 2014 IL App (2d) 121212-U, Feb. 26, 2014

Husband and Wife each filed appeals challenging several aspects of the trial court's dissolution judgment, including the trial court's decisions as to attorney fees, maintenance and the characterization of certain property. In particular, Husband argued that the trial court erred in not reimbursing his non-marital estate for attorney fees he had paid on Wife's behalf during the proceedings, claiming that an earlier interim fee order provided that those fees would be reimbursed. The Husband also argued that the trial court erred in treating monies used to pay his attorney fees as an advance against his share of the marital estate, but did not do the same for the Wife. However, the trial court had specified that further liquidation of marital assets to reimburse the Husband from the marital estate would have resulted in a re-examination of the Wife's need for maintenance. Therefore, the appellate court upheld the trial court's decision not only because the Husband had misinterpreted the interim fee order, which had been entered without prejudice to further allocation at trial, but also because the trial court had provided a valid reason for not reimbursing the Husband. The Husband also challenged the trial court's award of Section 508(b) fees to the Wife for contempt petitions she brought during the pendency of the case. Although he had been found in contempt of court on each occasion, he claimed he should not be liable for 508(b) fees because the trial court made no specific finding that his actions were "without compelling cause or justification." The appellate court disagreed, finding that the contempt finding alone was sufficient for the Husband to be charged with the 508(b) fees. All other aspects of the trial court's decision appealed by the parties were also affirmed.

*In re Marriage of Cozzi-Digiovanni and Digiovanni*, 2014 IL App (1<sup>st</sup>) 130109, June 27, 2014

The former attorney of Husband filed an appeal from the trial court's ruling granting the Wife summary judgment against Husband's former attorney's petition for contribution to attorney fees. The appellate court reversed and remanded the trial court's order because the trial court retained subject matter jurisdiction to rule on the petition for contribution, even after entry of a legal separation agreement, and the agreement which stated that Husband and Wife would each be responsible for their own attorney fees was not binding on the Husband's former attorney.

Husband's former attorney filed a petition for contribution against the Wife after the Husband filed for bankruptcy during a pending divorce case and the attorney withdrew from representing Husband. The trial court granted the Wife's motion for summary judgment against the Husband's former attorney's petition for contribution to attorney fees on the basis that the petition was not decided prior to the entry of a judgment for legal separation. The appellate court held that the trial court should have scheduled and had a hearing on the Husband's former attorney's petition for contribution, after the attorney filed a timely motion to reconsider, prior to entry of a final judgment or legal separation agreement. However, the court's failure to meet this statutory requirement did not deprive the court of having subject matter jurisdiction. Further, the appellate court held that any agreement between the Husband and Wife as to who will pay attorney fees and costs is not binding on the former Husband's attorney, as the right to payment for attorney fees and costs belonged to the attorney.

As such, the appellate court reversed and remanded the case, finding that the trial court erred in granting the Wife's motion for summary judgment against the Husband's former attorney's petition for contribution to attorney fees and ruling that the trial court should conduct a hearing on said petition.

*In re Marriage of Greisman*, 2014 WL 5803137 (Ill.App. 2 Dist.), Nov. 7, 2014 \*

Wife appealed the trial court's decision denying her petition for attorney fees. The parties' marital settlement agreement provided for an award of attorney fees to the prevailing party in any post dissolution litigation. In this case, Husband brought a petition to reduce maintenance. Although there was no hearing on the petition, the Husband voluntarily dismissed his petition after the Court suggested that his petition would not be successful. The appellate court found that under the terms of the unambiguous marital settlement agreement, the Husband commenced an unsuccessful post decree matter, and the Wife was the prevailing party.

*Gross v. Ward*, 2014 IL App (1st) 121573-U, March 21, 2014

Man appealed the trial court's order awarding attorney fees to a woman in an order of protection proceeding, after his new attorney appeared before the court for hearing but was unprepared to proceed contrary to the man's earlier representation to the court.

The appellate court found that the man failed to provide a complete record on appeal in that he did not include copies of the transcript or bystander's report from the hearing in which attorney fees were awarded, any of the written motions for fees or the man's response. As a result of the incomplete record, the appellate court held that they must presume that the relevant trial court's order awarding attorney fees to the woman was in conformity with relevant law and there was a sufficient factual basis to enter such an order.

*In re Marriage of Lengerich*, 2014 IL App (1st) 123754-U, Oct. 14, 2014

Husband's motion to modify his child support obligation was granted based on his claim that he had suffered a reduction in his income. However, three years later, Wife discovered that he had concealed information regarding his income and financial interests, and she sought to vacate the order reducing Husband's child support obligation. Her motion was granted, and the trial court made findings that Husband had committed a fraud on the court, found him in direct civil contempt, and remanded him to the Cook County jail for five nights. Wife was granted leave to file a petition pursuant to Section 508(b) of the IMDMA and was eventually awarded \$42,000 in fees. Husband appealed, arguing that the trial court failed to make sufficient factual findings to substantiate the award of fees. The appellate court disagreed and ultimately upheld the trial court's decision because the record clearly showed that Husband's fraudulent concealment of information regarding his income and assets resulted in more than eight years of litigation as the court attempted to properly determine his support obligation.

*In re Marriage of Linta*, 2014 IL App (2d) 130862, Sep. 17, 2014

A Nevada court entered a dissolution judgment incorporating a marital settlement agreement, which contained a prevailing party provision with respect to attorney fees. Thereafter, the parties and their minor children relocated to Illinois, and the Nevada judgment was registered as an Illinois judgment. Following various petitions filed by both parties, the trial court denied the Wife's request for attorney's fees pursuant to the prevailing party provision. The Wife appealed. She argued that the prevailing party provision of the marital settlement agreement was binding on the trial court and that the trial abused its discretion in denying her petition for fees. However, the appellate court determined that, pursuant to Section 502(b) of the IMDMA, the prevailing party provision was unenforceable when applied to issues relating to the children and affirmed the decision of the trial court.

*In re Marriage of Madan v. Das*, 2014 IL App (1<sup>st</sup>) 130248, May 9, 2014

A former Husband and Wife had been engaged in continuous post-decree litigation since the entry of their divorce judgment. During the litigation, the former Wife filed a petition for attorney fees, alleging that she had incurred \$21,412.50 in post-judgment fees and costs and requested that the former Husband be ordered to pay them in their entirety. The trial court denied the former Wife's petition finding that the former Wife had failed to show an inability to pay her own fees. On the appeal, the appellate court relied on the Supreme Court case of *In re Marriage of Schneider*, 214 Ill.2d 152, 174 (2005) and affirmed the trial court's decision because Wife had indeed failed to show an inability to pay as required by Section 508(a). Moreover, due to the former Wife's failure to supply the full record of the trial court proceedings, the appellate court was left with no choice but to presume that the gaps in the record supported the trial court's ruling and resolved any doubts against the former Wife.

*Mirabella, Kincaid, Frederick & Mirabella, LLC v. Diotallevi*, 2013 IL App (2d) 120152-U, Dec. 30, 2013

The law firm filed a small claims action against a former client for attorney fees incurred in the former client's divorce case. The client appealed the trial court's judgment against him and an order which barred him from arguing malpractice as a defense to said judgment. The trial court found that the former client and law firm voluntarily entered into the fee agreement, that the former client never disputed the hourly rates charged by the law firm, that said rates were customary to what other attorneys in the community charge for similar representation, that the work described in the law firm's billing statements was completed, and that another attorney at the law firm who took over the case shortly before trial had no impact on the representation rendered to the former client. The trial court determined that the former client's argument that the law firm's charges were excessive was based on his opinion that the law firm did not obtain a favorable result for him in the divorce proceeding, and a disagreement both had over strategic decisions made at trial.

On appeal, the former client argued that the judgment for attorney fees must be reversed due to the fact that the law firm's fees were excessive and unreasonable and the trial court refused to allow the former client to assert a defense of malpractice. The law firm responded by arguing that the former client's appeal must be dismissed for failure to adhere to Supreme Court Rules 341 and 342(a), that the fee award was not against the manifest weight of the evidence, and that the trial court should reject the former client's assertion that he was denied the right to raise attorney malpractice as a defense.

The appellate court held that, despite the former client's failure to comply with Supreme Court Rules 341 and 342(a) where his appellate brief should have been stricken and dismissed based upon the violations of said rules, the trial court's findings related to the judgment for attorney fees was not unreasonable, arbitrary or not based upon the evidence. Further, the appellate court held that an increase in rates during a case is not a basis for reversing the judgment for attorney fees where the former client did not allege that he failed to receive monthly billing statements or that he objected to any specific charges until the law firm attempted to collect on the unpaid balance months after the divorce proceeding concluded. As for the former client's malpractice claim, the appellate court held that the former client did not waive his claim to malpractice by not filing a counterclaim or an affirmative defense before the small claims court, as small claims cases are less formal than other proceedings and counterclaims and affirmative defenses need not be specifically pled in written pleadings. However, the appellate court held that the former client's separate action for legal malpractice did in fact prevent him from raising a malpractice claim at the same time as the attorney fee claim in small claims court. In sum, the appellate court affirmed the trial



court's judgment for legal services against the former client, finding the judgment was not against the manifest weight of the evidence and that the trial court did not abuse discretion when it barred the former client from asserting a malpractice defense when a separate action for malpractice was concurrently pending.

*Monticello v. Monticello*, 2014 IL App (1st) 123671-U, Jan. 28, 2014

A Wife appealed the trial court's ruling denying her petitions for contribution to attorney fees, based upon the trial court's finding that the Wife had the ability to pay and should be responsible for her own fees because a substantial amount of the fees were incurred when she was represented by her new Husband.

The Wife argued that she was unable to pay the fees due because she makes only \$25,000.00, while her ex-Husband makes a base salary of \$245,000.00. She has significant credit card debt, and would have to liquidate an asset to pay the fees owed. The appellate court held that simply because there is a significant disparity in incomes does not mean that a party is unable to pay their own attorney fees. While a significant disparity in incomes is a significant factor for a court to consider in awarding a contribution, the appellate court has ruled that a party does not establish an inability to pay where there is a regular income or assets available from which to make payments toward attorney fees. Here, the Wife testified that she had bank accounts of approximately \$20,000.00 and available credit lines exceeding \$65,000.00, her new Husband pays her household living expenses and her car payment, and some of her listed monthly expenses no longer applied.

Next, the appellate court rejected the Wife's argument that the ex-Husband should be responsible for her fees because the trial court ordered him to pay all of the outstanding child representative's fees. The appellate court found that it could not determine from the record the reasoning for ordering the Husband to pay the outstanding child representative's fees and that the trial court did not err in its decision to deny an award of attorney fees. Further, the appellate court rejected the Wife's argument that the trial court denied a contribution to attorney fees simply because she was represented by her new Husband. After reviewing the record, the appellate court found that the trial court did not imply that the new Husband should work for free, but that the new Husband should be paid entirely by the Wife due to her failure to prove an inability to pay. As a result, the appellate court affirmed the trial court's denial of her petitions for contribution to attorney fees.

*In re Parentage of Price v. Dunn*, 2014 IL App (1<sup>st</sup>) 131347-U, April 24, 2014

A parentage action was voluntarily dismissed on the joint request of the parties. Following the dismissal, the attorney who had represented the Mother in the action filed a petition for final attorney fees against her former client, and for contribution from the Father based on an interim order entered against the Father prior to the dismissal of the case. Both the Mother and Father filed Section 2-219 motions to dismiss the attorney's petition. The Mother argued that the court lacked subject matter jurisdiction to hear the fee petition because it was untimely filed outside of the statutorily mandated 30 days post-final judgment period. The Mother's motion to dismiss was granted due to lack of subject matter jurisdiction and the attorney appealed. Relying on the case of *In re Marriage of Baniak*, 2011 IL App (1<sup>st</sup>) 092017, the appellate court determined that the trial court did, in fact, have jurisdiction to entertain the attorney's petition, even outside of the 30-day post-judgment period because the filing of a petition for final fees is a procedural, rather than jurisdictional requirement. Furthermore, the trial court had granted the attorney leave to file the fee petition in 60, rather than 30 days. As such, the appellate court reversed the trial court's decision and remanded the matter for further proceedings.

*Lamar v. Rocca (In re Rocca)*, 2013 IL App (2d) 121147, Dec. 11, 2013

An attorney appealed the trial court's ruling denying the attorney's claim for contribution from former client's Husband, the attorney's petitions for supplemental and appellate attorney fees, and the attorney's motion for sanctions.

The first appeal in this case was filed by the attorney after the trial court denied the attorney's petition for contribution to attorney fees from the former client's Husband on the basis that the attorney withdrew and the parties subsequently entered into a settlement agreement that stated the parties were solely responsible for their own attorney fees with a waiver of any right to a hearing on contribution to attorney fees. The appellate court originally reversed the trial court on the basis that the settlement agreement

was entered by the parties without the attorney's knowledge or consent after the attorney had withdraw from the case. Further, the case was remanded based upon the following findings of the appellate court: Section 503(j) of the Illinois Marriage and Dissolution of Marriage Act, if applicable to parentage cases, did not preclude the contribution petition; each of the parties could not waive a right belonging to an attorney; and waiving a contribution hearing does not equate to waiving contribution altogether.

During the second appeal in this case, the attorney argued that the appellate court determined that the sum of attorney fees was reasonable and that the former client's Husband should be ordered to contribute to the entire fee judgment. In contrast, the former client's Husband argued that the trial court was only required to consider contribution and that he was entitled to argue against the reasonableness of the fees to which he may be ordered to contribute. At the trial court's 503(j) final contribution hearing, the former client's Husband moved for a directed finding after the attorney testified to the reasonableness of the fees but failed to establish the former client's inability to pay. The trial court granted the former client's Husband's motion and denied the petition for contribution to attorney fees on the basis that the court could not rely on the former client's financial status from two years ago and that there was no evidence as to the former client's current economic status, what the former client had paid if anything toward the fee judgment, or the former client's current inability to pay the fee judgment. Further, the trial court denied two new fee petitions filed by the attorney. The first fee petition was for supplemental fees for the time of the attorney's withdrawal as counsel through the court's dismissal of the contribution petition; and the second was for appeal costs, both including requests for contribution from the former client's Husband. The trial court denied both petitions for fees on the basis that the attorney withdrew as counsel for the former client and was pursuing attorney fees against the former client and the former client's Husband on his own behalf, not for the former client. As such, the trial court reasoned that the attorney pursued the first appeal on his own accord and not that of his former client and that the Illinois Marriage and Dissolution of Marriage Act does not provide a former attorney a cause of action or right to sue former clients for costs associated with appeals that are prosecuted on the attorney's behalf. In addition, the trial court denied the attorney's motion for sanctions as the trial court did not find the former client's Husband's arguments frivolous or presented for the purpose of harassing the attorney.

On appeal, the appellate court clarified its prior findings and stated that it did not address whether the fee award was reasonable or that the former client's Husband should be ordered to contribute to the fee judgment in part or in whole. Instead, the appellate court reiterated that the attorney's contribution petition was improperly dismissed and a contribution to the previously awarded fees should be considered at hearing. Next, the appellate court rejected the attorney's argument that a contribution hearing is waived on the basis that the former client and the former client's Husband waived the right to a contribution hearing in the settlement agreement previously entered. The appellate court held that the waiver of the right to a contribution hearing in the settlement agreement was between the former client and the former client's Husband, and did not include the attorney as a party, and should not serve as a waiver of a contribution hearing after a contribution claim is filed by an attorney. The appellate court further found that it did not previously find that Section 503(j) did not apply to parentage actions or that the trial court could not rely on 503(j) when denying the contribution petition. Last, the appellate court found that if 503(j) is applicable to parentage cases, it requires an assessment of the present economic circumstances of both parties and that even if 503(j) is not applicable, a court must examine evidence that a party who incurred attorney fees is unable to pay before ordering another party to pay said fees. The appellate court held that absent information regarding the former client's economic circumstances, inability or ability to pay, or any payments the former client made to date toward the outstanding fee judgment, it was appropriate to deny the attorney's contribution petition.

As for the supplemental fee petitions filed by the attorney, the appellate court held that the trial court properly denied the petitions because the attorney was not entitled to or had a statutory right to collect additional fees or the costs for an appeal taken against a former client after the attorney withdrew and the attorney's initial petition for final fees and costs had already been determined. The appellate court found that once the attorney withdrew, the parties settled the underlying parentage action, and the former client obtained new counsel, the attorney could not argue that the pursuit of additional fees and appeal costs and a contribution to said costs after the attorney-client relationship ended was on the former client's behalf. The appellate court confirmed that the attorney could not obtain fees from a former client or argue

contribution from a former client's spouse where he was appealing in his own interest for additional attorney fees owed after he withdrew and during appeal.

The appellate court affirmed the dismissal of the attorney's motion for sanctions based upon the fact that a losing argument is not always a frivolous or sanctionable one and that the trial court is in the best position to determine whether actions or arguments of a party are sanctionable. In summary, the trial court's denial of the attorney's contribution petition, petitions for supplemental attorney fees and appeal costs, and motion for sanctions was affirmed by the appellate court.

See also *In re Marriage of Hanusin*, 2013 IL App (2d) 130339-U, Nov. 20, 2013

*In re Marriage of Sangerman*, 2014 IL App (4<sup>th</sup>) 130626-U, April 1, 2014

The appellate court affirmed the trial court's order awarding the ex-Husband child support and attorney fees because the record provided by the ex-Wife on appeal was inadequate.

Upon review of the record, the appellate court determined that the trial court denied the ex-Wife's motion to modify a custody order previously entered, awarding the ex-Husband sole custody of the parties' two children. The trial court found that no allegations set forth in the ex-Wife's motion would rise to the level of serious endangerment warranting a modification and that the facts alleged did not rise to the level of clear and convincing evidence of fraud, coercion, or duress sufficient to set aside the custody order. Subsequent to the denial of the motion to modify the custody order, the ex-Husband sought child support and an award of attorney fees in connection with the ex-Wife's motion to modify. The appellate court found that in order to support a claim of error, the ex-Wife had the burden to provide a complete record for review. Here, the appellate court found that no transcript from the hearing related to the child support or attorney fee award existed and that the ex-Wife failed to file a bystander's report or agreed statement of facts in connection with the proceeding. As such, the appellate court failed to address the ex-Wife's claims of error related to the award of child support and attorney fees because the record provided was insufficient and the appellate court was left to merely speculate as to the content of the ex-Wife and ex-Husband's arguments at hearing.

*Schneider v. Schneider*, 2014 IL App (1st) 122973-U, April 15, 2014

Ex-Wife appealed the trial court's order granting the ex-Husband's motion to strike the ex-Wife's amended fee petition. The petition for attorney fees was related to the ex-Wife's underlying petition for specific performance to enforce her ex-Husband's contractual obligation to give her a "get" under Orthodox Jewish law. The trial court awarded fees to the ex-Wife and directed her to prepare a petition for fees in connection with the ex-Husband's failure to give her the "get." However, the trial court granted the ex-Husband's motion to strike because the ex-Wife brought her petition for fees pursuant to 508(a) of the Illinois Marriage and Dissolution of Marriage Act.

The appellate court held that the original claim filed by the ex-Wife was for specific performance pursuant to contract law. The ex-Wife's petition did not refer to any provision of the Illinois Marriage and Dissolution of Marriage Act. The appellate court found that the Act only allows awards of attorney fees and costs in connection with the maintenance or defense of a proceeding under the Act. While the appellate court found that 508(a)(6) may have provided a means for the ex-Wife to recover attorney fees under the Act, the ex-Wife failed to file her petition pursuant to that subsection of 508(a). As such, the appellate court held that the underlying petition filed by the ex-Wife did not involve a proceeding or judgment under the Act and the ex-Wife was not entitled to fees pursuant to 508(a) of the Act. The appellate court further rejected the ex-Wife's argument that prior court rulings have already determined that her amended fee petition falls under 508(a) of the Act, because the ex-Wife failed to provide any authority to support the position that a prior award for interim fees under 501(c)(1) automatically allows her to recover fees under 508(a)(1) or 508(a)(3) of the Act. In sum, the appellate court affirmed the trial court's order granting the ex-Husband's motion to strike and dismiss the ex-Wife's amended fee petition.

*Toth v. Howrey*, 2014 IL App (4th) 140462-U, Oct. 23, 2014

Father filed a parentage action to establish a father and child relationship and to set visitation. At a contested hearing on Father's petition to set visitation, Father and the court's appointed clinical psychologist testified that frequent visits between the Father and child were in the child's best interests. The trial court entered an order for Father to have visitation on alternating weekends, beginning at 10:00

a.m. on Fridays, and every Wednesday beginning at 10:00 a.m. Mother appealed, arguing that the trial court had improperly shifted the burden of proof to her by erroneously presuming that additional visitation would be beneficial to the child. The appellate court found that while Mother was correct that the Father had the initial burden of proof, the trial court heard testimony from the Father and from the clinical psychologist about the minor child's positive interactions with his Father, which was enough to meet this burden. Based upon same, it was not in error for the court to presume additional visitation time would be beneficial as the court starts with the presumption that maximum parental involvement is in the best interest of the child. Mother had the opportunity to present evidence that the visitation was not in the child's best interest but did not do so. Thus, the appellate court determined that the trial court's visitation order was not against the manifest weight of the evidence.

**ATTORNEY FEES (See also CHILD SUPPORT)**

*In re C.M.K., a Minor, Thomas v. Kinsella*, 2014 IL App (4<sup>th</sup>) 130699-U, May 28, 2014

**ATTORNEY FEES (See also MAINTENANCE, DISSIPATION)**

*In re Marriage Berg*, 2014 IL App (3d) 130688-U, Aug. 13, 2014

**ATTORNEY'S FEES (See also MAINTENANCE, NON-MARITAL INCOME)**

*In re Marriage of Foster*, 2014 IL App (1st) 123078, Aug. 22, 2014

**CHARACTERIZATION OF LAWSUIT SETTLEMENT PROCEEDS**

*In re Marriage of Nesbitt*, 2014 IL App (1st) 131825-U, Sep. 4, 2014

Former Wife filed a petition for rule to show cause against former Husband for his alleged failure to distribute her marital share of a settlement he had received in a lawsuit for legal malpractice against his former dissolution attorneys. She claimed that the malpractice claim was an asset in existence when the court entered the final dissolution judgment, which meant that she was entitled to a portion of the settlement monies. The former Husband moved to dismiss the former Wife's petition, and his motion was granted. The trial court reasoned that even if the former Husband had realized at some point during the divorce proceeding that his attorneys were mishandling his case, he would still only be able to speculate as to the damages before the entry of judgment. Therefore, the former Husband's malpractice claim did not accrue until after the entry of judgment. The former Wife appealed the trial court's dismissal of her petition, but the appellate court ultimately agreed with the trial court. The former Husband had not satisfied all of the necessary elements to sustain a claim of legal malpractice against his attorneys until he suffered actual damages, which was upon the entry of the final divorce judgment. Therefore, the decision of the trial court was affirmed.

**CHARACTERIZATION OF PROPERTY**

*In re Marriage of Dhillon*, 2014 WL 5794551 (Ill.App. 3 Dist.), Dec. 12, 2014\*\*

The Wife appealed from the trial court's order classifying a savings account as Husband's non-marital property. Wife further argued that she should be entitled to the savings account and that the Husband dissipated the account in question. Husband appealed from the trial court's decision finding that the husband's entire retirement account was marital.

The appellate court reversed and remanded the trial court's decision that the savings account was his non-marital account. In reversing the decision, the appellate court found that because the account in question was opened during the marriage, the marital presumption clearly applied to the account. However, the trial court actually placed the burden on the Wife to prove that the account was marital, instead of placing the burden on Husband to prove that the account was his non-marital property. Because Husband's only evidence as to the source of the funds was his testimony, and the trial court found him to be lacking credibility, the appellate court reversed the decision. The trial court should have found that Husband did not meet his burden of proving the source of the funds. Therefore, the funds in the savings account should have been deemed marital property. Because the funds were marital property, the appellate court found that Wife should be awarded 50% of the account. The court found that the account held in excess of \$300,000 prior to the husband's dissipation of the funds. Because the funds

were marital, the appellate court also found that the Husband dissipated the account while the marriage was undergoing an irreparable breakdown.

The last issue on appeal was whether the trial court erred when it determined that all of the Husband's retirement account was marital property. The appellate court found that the evidence clearly reflected the Husband's position that he rolled non marital retirement monies into a marital account, and that a portion of the account remained non marital. Therefore, the case was remanded to determine which portion of the account was Husband's non marital retirement.

*In re Marriage of Sottile*, 2013 IL App (2d) 130242-U, Dec. 30, 2013

The Wife appeals from the order of the circuit court's classification of the marital residence as marital property. The parties purchased a home in 1999. The property was jointly titled. In 2004, the Husband executed a quit claim deed to the Wife because he was expecting a substantial sum of money from litigation. He executed the deed to shield the residence from his creditors. The appellate court found that the Wife failed to establish by clear and convincing evidence that the Husband intended to pass title and relinquish all present and future dominion over the residence. This is based on the fact that the fact that the Husband lived in the residence until 2010 and continued to contribute to the household expenses even after he moved out.

See also *In re Marriage of Bernat*, 2014 IL App (2d) 121212-U, Feb. 26, 2014.

### **CHILD SUPPORT**

*In re Aniya*, 2014 WL 6908269 (Ill.App. 1 Dist.), Dec. 5, 2014 \*

The appellate court reversed and remanded the trial court's award of child support which was a downward deviation from the guideline of 11% of the Father's income, because the trial court failed to consider the substantial difference between the Mother and Father's incomes.

In this case, Father was ordered to pay 11% of his monthly income. The Father earned approximately \$90,000 in 2010, and \$150,000 in 2011, and through December 13, 2013 he earned \$159,725.80, while the Mother worked at CTA and earned approximately \$27,000 in 2012. The trial court found that guideline support would have been \$2,006 per month and that a downward deviation of support was warranted because that support amount would be excessive based upon the expenses set forth on the Mother's financial statement which included expenses for herself, her current husband, the minor child and two other children from a different relationship. Here, the trial court calculated the child's monthly expenses at \$2,235 and pro-rated the child's share of the expenses listed on the Mother's financial statement and divided it equally between the Mother and Father to calculate the Father's support obligation at \$1,117.00 per month.

The appellate court held that the trial court abused its discretion in failing to consider the substantial difference in the Mother and Father's incomes and stated that the trial court is not limited to a child's base financial needs when determining support. Instead, the trial court should consider the child's standard of living had the Mother and Father remained together. The appellate court determined that while both parents are obligated to financially support a child, the Father's income was five times larger than the Mother's and the child was entitled to the financial benefit of the Father's larger income. In sum, the appellate court reversed the trial court's order and remanded with directions for the trial court to enter a child support order for \$2,006 per month, which was 20% of the Father's income per the statutory guidelines.

*In re Marriage of Berwanger*, 2014 WL 6882306 (Ill.App. 2 Dist.), Dec. 5, 2014\*

The Husband appealed the trial court's order modifying his child support obligation by requiring him to pay full statutory support despite a shared custody arrangement between Husband and Wife. The appellate court affirmed the trial court's ruling and found it could not address whether the trial court abused its discretion in denying a petition for attorney's fees where an official record of the relevant hearing was not included in the record on appeal.

At the time of divorce, both parties were unemployed and had two children and the Husband was to pay \$1,100 per month in child support while unemployed. The Marital Settlement Agreement specifically stated that when the parties found jobs, either party could petition to modify support and that the Husband

would be paying 28% of the net of his current income at that time. The Husband and Wife both subsequently found employment with a gross salary of \$5,000 per month and Husband filed a petition to modify child support.

The appellate court held that the trial court followed the parties' Marital Settlement Agreement and applied statutory guidelines per the language in the agreement. Here, the trial court did not abuse its discretion as the agreement specifically stated that upon attaining employment, the Husband would pay the Wife 28% of his net income. The trial court calculated support based upon this agreement and did not find that a deviation was warranted based upon shared custody. In sum, the appellate court affirmed the trial court's award of statutory child support, and determined they could not address an appeal related to a denial of Husband's request for attorney's fees as he failed to provide a transcript or certified bystander's report of the proceedings.

*In re Marriage of Brady*, 2014 IL App (2d) 131150-U, June 23, 2014

The appellate court found that the trial court erred in modifying and terminating child support *sua sponte*.

In this case, Husband had sole custody of the minor children, subject to the Wife's parenting time. However, Wife did not see the children. After hearing on Wife's visitation petition, the court found that it was because of the Husband that the children had no relationship with their mother. For this reason, the court *sua sponte* terminated child support. On appeal, the Court found that neither party had requested any modification of child support due to the Husband's purported visitation interference. Further, the Husband had not received any notice that child support may be modified or terminated. Therefore, the case was reversed and remanded to the lower court.

*In re Marriage of Brinkley*, 2014 IL App (1st) 131397-U, March 19, 2014

Ex-Wife appealed the trial court's order granting the ex-Husband's motion to dismiss her petition for turnover of funds to collect child support on the basis of judicial estoppel, where the ex-Wife failed to disclose the previously entered judgment for child support in her bankruptcy proceeding.

The appellate court rejected the ex-Wife's argument that she inadvertently failed to disclose the child support judgment against her ex-Husband because she was clearly aware that the judgment existed at the time she filed for bankruptcy. Further, the appellate court cited to the ex-Wife's original defense to the motion to dismiss in which she argued that she deliberately failed to disclose the information because she felt she would never collect on the judgment and it was not an asset to disclose. The appellate court found that the ex-Wife could not originally make claims that she was aware of the judgment and made a conscious decision not to disclose it in the bankruptcy proceeding, and subsequently argue that she inadvertently failed to disclose the judgment or abandoned efforts to pursue collection. In addition, the ex-Wife commenced collections on the judgment shortly after her four year bankruptcy case came to a conclusion, which further discredited her argument that she abandoned any hope of receiving funds to satisfy the judgment. The appellate court further addressed the ex-Wife's failure to cite to any relevant and controlling legal authority, other than federal case law, in her brief, which ultimately warranted sanctions pursuant to Illinois Supreme Court Rule 375(b). As such, the appellate court affirmed the trial court's order granting the motion to dismiss the ex-Wife's claim to collect on a child support judgment on the basis of judicial estoppel.

*In re Marriage of Burstein*, 2014 IL App (2d) 120098-U, Feb. 13, 2014 (See below)

*In re C.M.K., a Minor, Thomas v. Kinsella*, 2014 IL App (4<sup>th</sup>) 130699-U, May 28, 2014

The Father appealed the court's decision ordering him to pay attorney fees. The appellate court found that the Parentage Act authorizes the trial court to order a party to pay some or all of the other party's reasonable attorney fees in accordance with the relevant factors set forth in the IMDMA. Here, the court found that the Father made twice the amount that the Mother earned. Given the disparity in the incomes, the appellate court affirmed the order requiring the Father to pay a portion of the Mother's attorney fees.

The Father next argued that the court erred in ordering him to pay 20% of all bonuses for child support. Again, the appellate court found that the Parentage Act specified that the trial court shall determine child support in accordance with the IMDMA. The Court found that net income, for purposes of additional child support, could include bonuses and commissions.

*In re Marriage of Goldin*, 2014 IL App (1st) 131674-U, Jan. 22, 2014

The trial court awarded sole custody of the minor child to the Wife. The Husband filed his timely appeal, arguing that the court erred in admitting the report of Dr. Kerry Smith, who was designated by the Wife to perform a custody evaluation, and that the court erred in awarding the Wife sole custody of the minor child. The Husband argued that he did not receive the last page of Dr. Smith's report, and therefore, he did not receive her report within 21 days of the completing of her investigation. On review, the court found that the statute contemplates that the trial court, in its discretion, may extend or modify the 21-day time period. However, the Husband did have the full report an entire year before trial. Therefore, he was not prejudiced. The Husband further asserted that the court erred when it admitted the report of Dr. Amabile, the court's expert pursuant to 604(b). The Husband argued that a court order was entered providing that Dr. Amabile was not to see Dr. Smith's report. The reviewing court found that although the Wife's attorney gave Dr. Amabile the report, it was not willful and the Husband chose not to depose Dr. Amabile. Therefore, the court did not err in admitting the report.

The Husband finally argued that the court erred when it awarded sole custody to the Wife. The appellate court found that the evidence overwhelmingly supports the trial court's decision to award sole custody to the Wife. Both experts and the child representative opined that the Wife should be awarded sole custody.

*In re Marriage of Grove*, 2014 IL App (4th) 130733-U, Jan. 21, 2014

Husband appealed from the trial court's order terminating joint custody and awarding sole custody of the minor children to the Wife. Prior to the termination of joint custody, the parents had 50/50 parenting time with the children. The parents lived approximately 15 miles from each other. During the trial, both parents testified that they did not communicate well with each other, and their only forms of communication were text and email. Further, both children testified that they wanted to live with their mother because there was a routine and their friends and family lived close by.

On review, the court found that in the age of Facebook, Twitter, and cell phone texting, there is nothing wrong with communicating digitally. However, it was necessary for the court to understand why these parents only communicated digitally, and it was clear that they could not communicate any other way because the Wife perceived the Husband as verbally confrontational, and both parties testified that they could not get along. When doing its analysis, the appellate court found that the trial court properly weighed all factors of section 602(a), and in the end, it was not an abuse of discretion to award the Wife sole custody. The court did take into account the wants of the children and the court found that the children were better adjusted to the Wife's residence.

#### **CHILD SUPPORT (See also CUSTODY)**

*Haley v. Edwards*, 2014 IL App (4th) 140400-U, Oct. 8, 2014

Mother appealed the trial court's order modifying custody of the children from her to Father. The appellate court reversed the trial court's ruling.

On appeal, Mother argued that the trial court lacked jurisdiction to modify custody *sua sponte*, as Father's pleading failed to request such relief; that the court erred when it ordered her to pay child support of \$100 per month to Father; that her procedural due process rights were violated because Father's pleading did not put her on notice that child custody may be modified and she never received notice of the hearing; and that the court erred in granting custody of the children to Father.

The appellate court held that the trial court lacked subject matter jurisdiction to modify child custody and child support and therefore did not address whether the custody award was against the manifest weight of the evidence. The appellate court found that the only pleading Father had filed at the time custody was modified was a petition for visitation, which requested only visitation time with the child and not a modification of child custody or a request for child support. Further, the appellate court found that Mother's due process rights were violated as the record did not reflect that the Mother was given notice that the hearing on Father's petition for visitation would involve custody or support issues. Therefore, the appellate court held that the trial court's order modifying custody and awarding child support was void as the trial court had no jurisdiction to *sua sponte* modify custody or award child support where no petition requesting such relief was on file.

The appellate court also rejected Father's argument that the petition for visitation was titled a "petition to establish custody and visitation" and therefore gave notice to Wife that custody issues would be determined at the scheduled hearing, as the petition's substance did not request custody of the child or allege a substantial change in circumstances which would warrant a modification of custody. The court also rejected Father's argument that his prayer for relief generally requesting "such other and further relief as the Honorable Court deems equitable and just" allowed the court to modify custody or award support. The appellate court held that orders entered in the absence of a justiciable question are void and the issue of custody and child support must be presented to the court in a petition in order for it to be decided.

See also *In re Marriage of Hanusin*, 2013 IL App (2d) 130339-U, Nov. 20, 2013

*In re Marriage of Illum*, 2014 IL App (3d) 120069-U, March 24, 2014

After a trial in a dissolution proceeding, Husband was ordered to pay child support in amount of \$50 per week for the one child of the parties' marriage, which represented a deviation downward from statutory guidelines. The deviation was based on Husband's obligation to his two children from a prior marriage and the fact that each party had custody of at least one child, even though the Husband's children were not of the parties' marriage. The trial court also initially stated that it could not make a finding as to the Husband's net income from his lawn care business. The Wife filed a motion to reconsider the child support award, which resulted in the trial court making a finding that the Husband's net income was \$2,633 per month, an amount much lower than that of the prior year because of a recent decline in his business. However, the weekly child support amount was affirmed. On appeal by the Wife, the appellate court found the trial court's findings as to the Husband's net income and the child support amount were an abuse of discretion. Because the Husband's income from his lawn care business had been higher in previous years, the trial court should have averaged his income for the three years prior to the date of trial. The trial court had also improperly considered the Husband's obligation to support his two children from another marriage, because those children were in his custody and he was receiving child support from his former Wife. The matter was remanded as to both issues.

*John v. Shana*, 2014 WL 7177503 (Ill.App. 1 Dist.), Dec. 16, 2014\*

The appellate court reversed the trial court's ruling awarding retroactive child support to the Father of the children after Mother appealed. The trial court ordered Mother to pay Father \$308 each month in support, the parties to equally split the Guardian ad litem's (GAL) fees, and retroactive child support in the sum of \$10,164 plus interest. The appellate court found that the Mother had significantly less income than the Father, where Mother earned \$1,100 per month in public assistance and unemployment and the Father earned \$50,000 annually. The appellate court reversed the trial court's award for retroactive support and remanded for the trial court to recalculate support. The appellate court also reversed the trial court's order equally apportioning the GAL's fees, because of the substantial difference in incomes and each party's respective ability to pay the fees. The appellate court ruled that the trial court abused its discretion in setting retroactive child support and half of the GAL's fees, and remanded the case for further proceedings.

*In re Marriage of Scheeler*, 2014 WL 5511391 (Ill.App. 2 Dist.), Oct. 31, 2014\* (See also Custody)

The Husband appealed the trial court's judgment awarding Wife sole custody of the children, imputing income to him and ordering him to pay \$1,400 per month in child support; an order directing the Husband not to sleep with the children in the same bed during visitation, the valuation and division of property, and award of attorney's fees to the Wife of \$15,000.

The appellate court rejected the Husband's arguments that the trial court failed to consider each of the party's physical and mental health conditions, wrongly determined that he was unable and unwilling to facilitate a close and continuing relationship between the children and the Wife, and failed to consider that the Husband acted consistently in the children's best interests. The appellate court cited to the facts that the Wife was more involved in parenting than the Husband and that the 604(b) evaluator recommended sole custody to the Wife, despite any mental health issues. Further, the appellate court rejected the Husband's argument that he would be willing to facilitate a close relationship between the children and the Wife based upon his behavior at trial wherein he attempted to paint the Wife as a depressed and anxious person with serious mental disorders.



The appellate court further rejected the Husband's argument against imputing income, as the trial court found that the Husband was voluntarily underemployed due to his testimony that he had not sent his resume to any employers and that the imputed income of \$25,000 was minimal based upon the Husband's master's degree in theology and prior work history as a director of religious education at a parish for 10 years. Further, the appellate court held that the Husband asserted in his brief that he was now earning \$22,500 per year and that the imputed income was reasonable.

The appellate court affirmed the trial court's award of \$15,000 in attorney's fees given the Husband's lack of debt, substantial support received from his Mother by living with her rent-free and his use of a vehicle she purchased for him during the divorce proceedings, Husband's low living expenses and his greater earning capacity. In sum, the appellate court affirmed the trial court's ruling.

### **CHILD SUPPORT (See also CONTEMPT)**

*In re Custody of J.M.B.*, 2013 IL App (1st) 122142-U, Dec. 19, 2013

By the end of the trial, the children were emancipated. For the sole purpose of determining the financial support of the children, the court found that the parties exercised relatively equal parenting time with the children. With regards to support, the court found that the application of Section 505 of the Illinois Marriage and Dissolution of Marriage Act would be inappropriate in this case based on the equal parenting time and the parties' high incomes. Therefore, the court found that neither party owed child support for the time period of April 1, 2009 through July 1, 2011.

The Petitioner appealed the decision of the court, first arguing that the court failed to count substantial gifts and loans in name only as part of the Respondent's income. The appellate court found that it was proper for the trial court to find that the money from the Respondent's Husband to the Respondent was a loan that needed to be repaid and thus it should not be used in calculating income. However, the substantial gift that the Respondent received should have been included in the Respondent's income as it was a valuable benefit to the Respondent. However, this was a harmless error as it was proper for the trial court to not apply the standards of Section 505 in determining child support. It was proper to find that the children's lifestyles did not suffer because of the parties' separation because of the high incomes of the parties.

*In re Marriage of Jones*, 2014 IL App (5th) 130264-U, March 21, 2014

Husband appealed a judgment for dissolution of marriage that awarded child support and maintenance, disproportionately divided the assets of the Husband and Wife and contained a finding that the Husband dissipated assets. The appellate court affirmed the trial court's ruling.

The Husband argued that the trial court erred in awarding the Wife half of the gross amount withdrawn from an insurance fund without taking tax penalties into account and that said funds were not dissipated because they were used to pay marital expenses and student loans incurred during the marriage. The appellate court found that the Husband purchased a new vehicle with the proceeds from the insurance policy and that the Husband prepaid student loans in association with a master's degree that was never completed. As such, the appellate court found that neither benefited the Wife or the children, the Husband reduced available marital funds, and the gross amount of insurance proceeds was removed from the marital estate to benefit the Husband. Therefore, the trial court was not required to account for the tax effect on the funds.

Next, the appellate court rejected the Husband's argument that the trial court erred in not valuing the law firm and awarding the Wife a \$45,000 lump sum payment for the Husband's business interests in addition to awarding her a disproportionate share of the estate and maintenance. The appellate court held that the court was not required to assign a specific value to the Husband's law firm in determining how property was to be distributed and that the trial court considered the totality of the Husband and Wife's financial circumstances. Further, the appellate court found that no evidence existed that the trial court "double dipped" by awarding the Wife a lump sum payment for the Husband's business interests as well as a disproportionate share of the assets and maintenance.

Last, the appellate court rejected the Husband's argument that his income was inflated due to receipt of fees from a single case and that his student loan payments should have been deducted in calculating child support. The appellate court held that it was reasonable for the trial court to assume that the large

reported startup costs associated with the Husband's law firm were unlikely to reoccur and some of the substantial expenses such as baseball season tickets, a new vehicle, and over \$100,000 in advertising costs could have been postponed. In sum, the appellate court found that the award in child support was not onerous given the gross receipts of the Husband's law firm and that the Husband demonstrated a series of voluntary choices that effectively reduced his current income. Overall, the appellate court affirmed the trial court's ruling.

*In re Marriage of Jones and Courter*, 2014 IL App (3d) 120897-U, April 25, 2014

The appellate court affirmed the court's ruling that pursuant to the terms of the Marital Settlement Agreement (MSA), the Husband owed the Wife back child support and college expenses. The parties' marital settlement agreement stated "during the full time the child is in actual residence at school and the Husband is paying board and lodging for her, child support payments for such child shall be abated to 50% of the amount herein provided." A few years after the entry of the marital settlement agreement a Uniform Support Order was entered by the court modifying the Husband's child support figure and setting forth a termination date for child support. Based on this order, the Husband ceased child support on the date the child turned 18. The Mother filed a petition for child support, alleging that Husband failed to pay the reduced child support amount mandated in the MSA. The trial court ordered the Husband to pay \$12,379.86 for the child support arrearage.

Husband appealed, arguing that the support order modified the MSA and set an absolute termination date. The appellate court found that when the trial court modified the amount of child support the Husband was to pay, the parties did not revisit the issue of financial support for the child while she was in college. Further, the Court found that there was no legal precedent for this court to construe the Uniform Order for Support in a manner that would defeat the parties' agreement in the MSA.

*In re Marriage of Kaczor v. Kaczor*, 2014 IL App (3d) 130531-U, May 9, 2014

The Husband appealed the child support award where the court included his employer-based contributions to his profit sharing plan as part of his net income for child support purposes. The appellate court affirmed the order of the trial court finding that the Husband's argument that the contributions were mandatory was disingenuous, as he provided no authority stating that the contributions were mandatory. Further, the court found that the Husband owned 25% of the business, and the contributions as determined by the Husband and the other three co-owners, represented a gain or a benefit that the Husband received through his self-employment. Therefore, the court found that the contributions were income for purposes of determining child support.

*In re Marriage of Leonard*, 2014 IL App (1st) 132848-U, Sep. 15, 2014

Husband appealed the trial court's order denying his motion to invalidate a number of orders entered by the trial court relating to his child support obligation. The appellate court affirmed the trial court's ruling.

The appellate court held that a parent cannot invalidate a child support obligation by filing a rescission of marriage affidavit with the state of Illinois. After Husband was found to be \$55,000 in arrears for delinquent child support, he filed a number of motions attempting to invalidate his marriage, claiming he did not know at the time when he was married that he was involving the State of Illinois as a third party to the marriage, and he filed a "certified promissory note" with the Illinois Child Support Disbursement Unit which he argued was sufficient to pay the arrearage. The appellate court rejected the Husband's arguments that the trial court lacked jurisdiction over him, as the appellate court pointed to the fact that the Husband actually initiated the original divorce proceedings in 1996, thereby subjecting himself to the jurisdiction of the court, and a settlement agreement was entered into in 1997 that specifically provided he pay child support to the Wife. The appellate court further rejected the Husband's rescission affidavit of the marriage and referenced his promissory note as "funny money," further evidencing the Husband's *modus operandi* to avoid paying his child support obligation. The appellate court stated that the Husband's actions in attempting to invalidate his marriage and avoid his child support obligation were based on "imaginary non-existent law."

*In re Marriage of MacNeil*, 2014 IL App (2d) 130117-U, May 29, 2014

The Wife and Husband filed cross-appeals of the trial court's decision to grant Wife's petition to modify child support and the trial court's calculation of statutory child support, which was applied retroactively. The appellate court affirmed the trial court's rulings.

The Husband was paying the Wife \$25,000.00 per month in maintenance, which factored in the Wife's payment of child support to the Husband of \$3,000.00 per month. The Husband argued that the Wife's obligation to pay child support to him should not have been modified because a portion of the maintenance payment was earmarked as a return payment for child support from the Wife to the Husband. However, the appellate court found that the agreement was ambiguous and there was no clear expression of the intent of the parties as to what would occur if a child were to emancipate or the termination of the child support payments. The appellate court held that the trial court did not err in finding that no emancipation provision was included in the agreement and that emancipation terminated the Wife's child support payments to the Husband.

The Wife argued that the trial court erred in ordering her to pay a higher amount in child support because neither party requested an increase in support, and that the trial court should not have made the award retroactive to the date Wife filed her petition to modify support. The appellate court held that the trial court did not err in applying the statutory guidelines for child support to the Wife's income and adjusting the child support upward. The appellate court rejected the Wife's argument that child support should have been reduced on a *pro rata* basis by \$1,000.00 per child. The appellate court stated that no *pro rata* reduction was contained in the agreement, unallocated child support is not necessarily reduced on a *pro rata* basis when a child becomes emancipated, and there is a rebuttable presumption that a specified percentage of a noncustodial parent's income is appropriate in awarding child support. Further, the trial court specifically stated on the record that there was no information provided that would allow him to deviate from the statutory guidelines.

Finally, the appellate court held that the Wife was on notice that a change could be made to the original child support obligation and could not now claim unfairness or a lack of notice that the child support would increase retroactively to the date of filing of her petition to modify support. As such, the appellate court affirmed the trial court's rulings granting Wife's petition to modify child support and the trial court's increase in child support which was applied retroactively.

*In re Marriage of Marsh*, 2013 IL App (2d) 130423, Dec. 26, 2013

A former Wife brought a petition for rule to show cause against her former Husband, claiming that the former Husband had failed to comply with his child support obligations. The trial court denied the former Wife's petition and the Wife appealed. The issue on appeal was whether the money received by the former Husband from the post-dissolution sale of certain shares of stock he owned prior to the dissolution constituted income for child support purposes pursuant to Section 505(a)(3) of the Illinois Marriage and Dissolution of Marriage Act. The Husband argued that because he had actually sold the stock at a loss due to the decline in the value of the stock since the dissolution of the parties' marriage, he did not receive any income that would be subject to child support. The appellate court agreed with the Husband, finding that, because the Husband had simply converted the previously existing asset into cash, the trial court was correct to deny the former Wife's petition for rule to show cause and in determining the former Husband's sale of stock did not constitute income for child support purposes.

*In re Marriage of McGinnis*, 2014 IL App (4th) 130980-U, Aug. 25, 2014

A dissolution judgment was entered pursuant to which a Husband was ordered to pay child support in the amount of \$375 per week. Thereafter, the Husband filed a petition to modify his child support obligation, alleging that he had suffered a downturn in income as an over-the-road truck driver. The Wife also filed a post-decree petition seeking contribution from the Husband for their children's extracurricular expenses. The trial court granted both parties' petitions, reducing the Husband's child support obligation to \$273.69 per week but requiring the Husband to pay 50% of the children's extracurricular expenses. The Wife appealed, arguing that the Husband had failed to establish a change in circumstances or that his reduction in income was not a result of his own deliberate efforts. However, the appellate court found that the record supported the trial court's finding that the Husband's decline in income was not an anomaly because his income had been consistently declining for several years. The record was also devoid of any

indication, other than the Wife's suggestion, that the Husband's decline in income was voluntary. Rather, the Husband had provided a reasonable explanation for the reduction in his income.

*In re Marriage of Medley*, 2014 IL App (3d) 130532, Aug. 13, 2014

Both the Wife and Husband appealed the trial court's order awarding child support to the Wife for two children with special needs. The appellate court reversed and remanded the case for further proceedings related to the applicable statute.

The Wife filed a petition to increase support pursuant to section 505 while the children were still in high school and under the age of 19. The Husband subsequently argued that the applicable statute for determining an increase in support was section 513, because the children were disabled and over the age of 18. The parties entered into a settlement agreement for child support in 1999, which was prior to the 2003 amendment to section 505. Here, the appellate court held that amended section 505 included children under age 19 who are still attending high school. As such, the appellate court held that the applicable statute to apply to the request to increase child support when the children were 18 and still in high school was section 505.

Next, the appellate court rejected Husband's argument that the trial court lacked authority to award child support, transportation and education expenses pursuant to 513 after the children graduated high school because Wife never filed a proper 513 petition. The appellate court found there was no error in the court proceeding under 513 because the Husband specifically requested that the trial court proceed under 513 and the rule of invited error prevents a party from requesting to proceed in one manner at the trial court level and then contend on appeal that the requested action was in error. In addition, the appellate court rejected the Husband's argument that the retroactive support should have been retroactive to June 3, 2010, when both parties agreed to proceed under 513 instead of 505. The appellate court held that the Husband was on notice that the support payments could be modified as of the date of filing of the Wife's original petition on December 11, 2008. Further, the appellate court found that if Husband's argument for retroactivity was accepted, the children would have been without support since September 29, 2009 due to his medical leave from employment at the time and that the trial court protected the best interests of the children when awarding retroactive support. The appellate court also reversed the trial court's ruling that the child support award be offset by the SSI income the children received, because while SSI is a factor to be considered in calculating support, the ultimate purpose of SSI income is to supplement income (including child support) and not substitute for it, unlike SSD benefits.

The appellate court further remanded the case for a hearing on the transportation and educational expenses, with specific instruction for the trial court to make a finding of a substantial change in circumstances and consider reviewing any changed circumstances, including any changes in incomes and a worker's compensation settlement subsequently received by the Husband.

*Mongue v. Couri*, 2014 IL App (3d) 130666-U, Feb. 7, 2014

The Father appealed from the trial court's order awarding the Mother residential custody of the child and reducing Father's parenting time to every other weekend. The trial court concluded that the Mother exhibited a more cooperative behavior that favored awarding her physical custody of the child.

The Father argued that the court erred in finding that he was unable to facilitate and encourage a close and continuing relationship between the Mother and child. The appellate court found that the court properly considered all of the custody factors and found that most of the factors did not favor either parent. The factor upon which the court relied was the willingness of each parent to facilitate a relationship between the child and the other parent. The court found that the Father was insecure about the child's relationship with her step-Father. Further, the Father placed the child in an unacceptable position by recording her comments and attempting to use the child's comments against the Mother. Because this was a "close call," the court relied on this factor to make its custody decision.

See also *In re Marriage of Pepler*, 2013 IL App (2d) 120313-U, Dec. 16, 2013

*In re Marriage of Pratt*, 2014 IL App (1st) 130465, Aug. 12, 2014

Husband appealed the trial court's order increasing child support and awarding the Wife \$25,000 in attorney's fees. The Husband had previously been paying the Wife unallocated family support. Wife filed

a motion to modify the Husband's support payments due to the fact that the maintenance portion of the unallocated support terminated, as she was cohabitating with her new Husband, and she requested that the trial court set statutory child support. The appellate court affirmed the trial court's ruling.

The appellate court rejected the Husband's argument that the trial court failed to consider the Wife's new husband's income in determining child support because the issue was raised for the first time on appeal, so said argument was waived. Further, the appellate court determined that the Wife testified that although the new husband lived with her and the children, he paid for all of his own expenses and there was no evidence that the new husband and Wife commingled income or assets. The appellate court also found that the trial court adequately reviewed the Husband's income at the time the hearing occurred and properly included \$5,000 as income for a converted traditional IRA to a Roth IRA. The appellate court determined that such a conversion was a taxable event indicating some type of benefit or income to the Husband and, according to section 505(a)(3), was includable as income for the purpose of calculating child support.

Next, the appellate court rejected the Husband's argument that dividend income was not recurring income and should not have been included as income for purposes of calculating support, and that he received fewer dividends than what was estimated by the trial court (after the trial court took Husband's first-quarter dividend earnings and multiplied that amount by four). The appellate court held that the trial court had the authority to estimate a party's income for child support purposes, had the authority to compel a party to pay at a level commensurate with his earning potential even where the exact amount of future dividend income was subject to change and uncertain, and that the Husband failed to request any deviation from guideline support based upon the non-recurring dividend income.

Last, the appellate court rejected the Husband's claim that the trial court erred by requiring him pay more in extracurricular and activities expenses than what the Wife currently spends and by ordering him to pay for 80% of orthodontia expenses. The appellate court held that the trial court considered the children's standard of living, that participation in the activities would have been the norm, and that the expenditures may amount to more in the future than the Husband's required payments, and that, given the contentious relationship between the Wife and Husband, that adjudication of this issue was in the best interests of the children. Further, the appellate court stated that if one parent earns disproportionately more than the other, the trial court could order that one party bear a larger share of the support. Here, the appellate court found that the Wife earned \$55,000 and Husband earned \$254,267 in gross income and that the trial court's order was warranted.

The appellate court also determined that a provision contained in the marital settlement agreement precluding income received from restricted stock and stock options from being included in calculating income for support purposes was void, against Illinois public policy, and therefore unenforceable. While the parties may agree to the terms relating to the children's support, they may not prevent the trial court from determining in the future what is in the best interests of the children when calculating child support during a modification proceeding. The appellate court further rejected the Husband's argument that the Wife was double-dipping into his assets and income because the restricted stock was awarded to him as a property settlement per the judgment, and now he was being required to pay support on the portion of income received from the sale of said stock. The appellate court held that the trial court may consider marital property as income for child support purposes even if said income comes from vested stock options.

*In re Prince M.*, 2014 IL App (1st) 132086-U, Sep. 30, 2014

Mother's motion for custody of the child was granted. Father appealed and the appellate court affirmed. The appellate court found that the trial court properly examined and applied the factors in Section 602 of the Illinois Marriage and Dissolution of Marriage Act in examining the best interest and welfare of the child and awarding custody to the Mother. The court rejected Father's argument that the factors in Section 610 should have been examined because Section 610 only applies after a prior custody judgment has been entered, *i.e.*, a final custody order rather than a temporary custody order. Therefore, while a temporary order for custody had been previously entered in the case in 2011, granting temporary custody of the child to Father, that order was only temporary as set forth in the specific language of the order and did not trigger an application of the factors set forth in Section 610.

*In re Marriage of Rangel v. Cisneros*, 2013 IL App (1st) 130616-U, Nov. 27, 2013

The Wife filed a petition for indirect civil contempt for the Father's failure to pay child support and maintenance since 1970. The trial court entered an order barring the Wife from claiming unpaid child support and maintenance payments based upon the statute of limitations and the doctrine of *laches*.

The appellate court held that the statute of limitations applies to money obligations which are payable in installments, and that a separate cause of action arises out of each unpaid installment whereby the statute of limitations begins to run on each installment when it becomes due. On appeal, the Wife argued that the statute of limitations tolled when the Husband left Illinois to move to Texas in 1989. However, the appellate court held that the Husband was not considered out of state for purposes of tolling the statute of limitations because he was still subject to and submitted to Illinois jurisdiction by obtaining a divorce in the state and failing to pay support. The appellate court acknowledged that the Wife never attempted service or sought assistance to locate the Husband to serve him. Also, the appellate court distinguished that the Wife was attempting to revive and enforce an Illinois judgment against the Husband, and was not enrolling a foreign judgment for the first time.

Next, the appellate court held that Section 13-218 of the Code of Civil Procedure sets forth a general limit of 20 years for revival of judgments. However, that statute was amended in 1997 by Section 12-108(a), which excluded child support judgments from the 20-year requirement for revival. As such, the appellate court found that actual enforcement of child support judgments may occur at any time and there is no need for revival of those judgments based upon the amendment that became effective on July 1, 1997. Based upon this finding, the appellate court held that any unpaid child support prior to the effective date of the amendment was a money judgment subject to the 20-year statute of limitations. In sum, the appellate court concluded that the trial court erred in entirely barring the Wife's claim for unpaid child support after the effective date of the 1997 amendment to Section 13-218, and that time-barred claims for child support could not be revived by retroactively applying the amendment. Therefore, the appellate court found that child support payments were barred from the date of entry of the judgment, January 27, 1970, through July 1, 1977, due to the original 20 year statute of limitations on money judgments, and any child support payments owed between July 1, 1977 through August 13, 1984, when the child emancipated, were not barred by the statute of limitations.

The appellate court subsequently found that the 1997 amendment to Section 12-108(a) did not alter the 20 year statute of limitations for revival of maintenance judgments set forth by Section 13-218 and instead applied a seven-year expiration for the enforcement of judgments, so long as the judgment had been revived. Here, the appellate court found that the Wife may enforce any maintenance judgments within seven years of her petition to enforce said unpaid maintenance, and she may seek to revive any maintenance judgments within 20 years of her petition for unpaid maintenance. While the appellate court held that the Wife may be entitled to revive and enforce some of the unpaid maintenance, the appellate court affirmed the trial court's application of the doctrine of *laches*. The appellate court reviewed the trial court's record and affirmed the application of *laches* due to the fact that the Wife was dishonest about a temporary child support order entered prior to the judgment that reserved the issue of alimony (or maintenance) and that the Husband could not conduct proper discovery to show a defense of cohabitation or self-sufficiency to the Wife's maintenance claims because of the lapse of time.

*In re Marriage of Shores*, 2014 IL App (2d) 130151, May 16, 2014

A Husband appealed the trial court's order increasing child support. The appellate court affirmed in part, reversed in part, and remanded the case back to the trial court.

The Husband argued that the trial court erred in calculating his income by including a *pro rata* share of his bonus for work he performed in 2010 but received in 2011, after the child's emancipation, and two relocation reimbursements from his employer as income under Section 505(a)(3) of the Illinois Marriage and Dissolution of Marriage Act. The appellate court held that the date upon which the benefit was earned is irrelevant, and that payment of the bonus was entirely at the discretion of his employer, the bonus was speculative, the income from the bonus was not actually received until after the child's emancipation in 2010, and that it should not have been included as income for child support purposes. The appellate court further held that the relocation reimbursements received were income for purposes of calculating income for child support purposes absent repayment, despite being repaid by the Husband

after he later voluntarily left his employer, because he failed to raise this argument on appeal. The appellate court reasoned that the reimbursements were income that accrued prior to emancipation, even though one reimbursement was received after the child's emancipation, and was not speculative like the bonus.

In sum, the appellate court found that speculative income, which is paid at the discretion of the employer, is income for purposes of child support when and if it is received, instead of when it is earned. Therefore, the appellate court reversed the trial court's ruling that included the Husband's speculative bonus as income for child support purposes, and affirmed the trial court's ruling that included the Husband's relocation reimbursements as income for child support purposes.

*In re Parentage of Smith v. Dinwiddie*, 2014 IL App (1st) 120997-U, Feb. 3, 2014

A Father brought a petition to modify the terms of a child support order which required him to pay 20% of any net bonus or commission he received. He anticipated that he was to receive gross bonus income of as much as \$400,000 and claimed that the Mother would receive a windfall if he were required to pay her 20% of these funds. The trial court granted the Father's petition to modify and excluded 20% of his yearly bonus from his income for child support purposes because the child support he was paying on his base income exceeded the child-related expenses. The Mother subsequently filed a motion to reconsider, which was granted in part in that the Father was required to pay 20% of his net bonus, capped at \$50,000. The Father appealed. The appellate court ultimately found that the trial court had not abused its discretion in requiring the Father to pay child support on his bonuses because the statutory considerations were properly addressed and because the trial court had capped the bonus percentage to prevent a windfall to the Mother. The appellate court further upheld the trial court's contempt finding for the Father's failure to pay child support on his \$400,000 bonus because he had clearly failed to file the petition to modify child support until after he received the bonus.

*In re Marriage of Thompson*, 2014 IL App (1st) 130658-U, March 13, 2014

Husband appealed from the trial court's decision to hold him in contempt of court for failing to pay child support and maintenance. Further, the Husband appealed the trial court's decision denying his motion to modify child support and maintenance.

During trial, the Husband testified that in 2012, he earned \$196,000 in gross wages. Thereafter, he voluntarily left his job to open his own business because he thought he would eventually make more money. In fact, he was operating at a loss and ceased to make his child support and maintenance payments. The trial court found that the Husband failed to ensure he had adequate funds set aside so he could comply with the dissolution judgment before launching his own business. Further, the court found that the Husband failed to present a credible motive for terminating his employment shortly after agreeing through the Marital Settlement Agreement to provide maintenance to his Wife for two years and child support payment based on his sizeable income. The appellate court affirmed the trial court's holding.

*In re Marriage of Turk*, 2014 IL 116730, June 19, 2014

A Husband appealed the trial court's order which awarded him sole custody of the children by agreement, ordered him (custodial parent) to pay child support to the Wife (noncustodial parent), and increased his contribution to the children's medical and dental expenses. The appellate court reversed and remanded the trial court's ruling and the Husband appealed to the Illinois Supreme Court.

The Supreme Court held that the trial court may order a custodial parent to pay the noncustodial parent child support if the facts and circumstances support such an award and it is in the children's best interests. Here, the Husband earned approximately \$150,000.00 per year while the Wife earned less than \$10,000.00 per year, and the trial court ordered Husband to pay to Wife the sum of \$600.00 per month in child support and solely pay all uncovered medical expenses for the children. The appellate court found that the trial court did not abuse its discretion in awarding support from a custodial parent to a noncustodial parent. Also, the appellate court did not find that the trial court did not have the authority to order such an award. However, the appellate court found that the amount in support that was ordered was not supported by the record and remanded the case for a hearing on the money the Wife paid on behalf of the children during her parenting time with the children and directed the trial court to fully explain the basis for any support award.

The Supreme Court found that the language found within Section 505 of the Illinois Marriage and Dissolution of Marriage Act does not support the position that trial courts may only impose a child support obligation on noncustodial parents, and that the statutory language provides that either or both parents owing a duty of support to a child may be ordered to pay an amount reasonable and necessary to support the child. The Supreme Court further held that nothing in the statutory language or construction of Section 505 makes custody necessary or dispositive for an award of child support or exempts custodial parents from an obligation to pay child support. The Supreme Court determined that where a noncustodial parent appears to have less financial resources than a custodial parent, a trial court should not disqualify the noncustodial parent from obtaining financial assistance for a child's welfare simply because they are the noncustodial parent, as this would create an unfair burden on the lesser advantaged parent and may leave one parent with insufficient financial resources to properly care for the child in a comparable way to the parent who has more financial resources.

The Supreme Court cited to cases where a custodial parent has been ordered to pay a noncustodial parent support, including *Elble v. Elble*, 100 IL App2d 221 (1968) and *In re Marriage of Cesaretti*, 203 IL App3d 347 (1990). The Supreme Court held that the case of *Shoff v. Shoff*, 179 IL App3d 178 (1989) was of no assistance to the Husband because the Fifth District Appellate Court upheld a trial court's ruling that a custodial parent was no longer required to pay child support to the noncustodial parent due to the fact that the custodial parent was providing for all of the child's financial needs. The Supreme Court found that this ruling was based upon equity instead of the language set forth in Section 505. The Supreme Court further cited to other jurisdictions which have recognized circumstances which would require a custodial parent to pay child support to a noncustodial parent.

The Supreme Court held that the appellate court's reversal and remand of the Husband's support obligation warranted reversal and remand of the Husband's obligation to pay for the child's uncovered medical and dental expenses. The Supreme Court reasoned that the payment of child support from one parent to another is also directly linked to a determination of each parent's contribution to the children's ancillary expenses connected to the children's care.

Overall, the Supreme Court affirmed the appellate court's judgment that a court does have the authority to order a custodial parent to pay child support to a noncustodial parent but the proper amount of the Husband's support obligation should be remanded to the trial court for a full hearing of the financial circumstances of both parties. In addition, the Supreme Court reversed the appellate court's judgment upholding the trial court's order requiring the Husband to solely pay the children's medical and dental expenses and remanded this issue to the trial court to determine along with the amount the Husband should pay to the Wife for child support.

*In re Marriage of Vogt and Dossett*, 2014 IL App (5<sup>th</sup>) 130298-U, June 26, 2014

The Husband appealed the trial court's ruling denying his petition to modify his child support obligation and granting the Wife's petition for contribution to college expenses. The appellate court affirmed the trial court's ruling.

The appellate court held that the Husband failed to provide a complete record to the appellate court on review. Specifically, the Husband failed to include a bound and certified transcript of the proceedings, any documentary exhibits offered or filed by either party, a bystander's report or an agreed statement of facts. As such, the appellate court presumed that the trial court had a sufficient factual basis and that the court conformed with the law, and affirmed the trial court's ruling.

*Westra v. Westra*, 2014 IL App (5<sup>th</sup>) 130101-U, March 20, 2014

Ex-Wife appealed the trial court's order denying her motion to increase child support and her petition for indirect civil contempt for her ex-Husband's failure to provide an accounting of gross income received from his rental property or to pay support from his rental income.

The appellate court held that the trial court erred in denying the petition for indirect civil contempt because the language of the agreement unequivocally required the ex-Husband to provide more documentation than just income tax returns. The appellate court found that the ex-Husband was an experienced attorney who handled divorce cases and drafted the agreement. Based upon these facts, the appellate court found that the ex-Husband could have clarified the agreement to require him to tender tax returns



only but failed to do so. In addition, the language of the agreement specified that the ex-Husband was to pay child support from any rental property owned and provide an accounting relating to such income. The appellate court held that the ex-Husband was required to pay child support from all sources of income, including investment and rental income, and that the record did not contain express findings justifying a downward deviation in child support. As such, the appellate court found that the ex-Husband did violate the order by failing to provide an annual accounting for all rental income and remanded the case for further determination.

Next, the appellate court addressed the ex-Wife's arguments that the ex-Husband paid less than 20% of his net income for child support, warranting a modification of child support. Upon review, the appellate court found that the calculations provided by the ex-Wife accurately reflected that the ex-Husband paid less than 20% of his net income. However, she failed to deduct health insurance premiums and only alleged a substantial change in circumstances in her motion to increase child support. In addition, the appellate court found merit in the ex-Wife's argument that the ex-Husband claimed deductions for questionable expenses to lower his net rental income. Specifically, the appellate court questioned a management fee paid to the ex-Husband, despite him not managing either rental property owned, and expenses for keeping a boat at the rental property for personal use only. As such, the appellate court remanded the case to the trial court to determine the ex-Husband's true net income from the rental properties, consider whether imputed rental income is warranted, and whether the ex-Husband violated the court order by not paying child support from the rental income.

*In re Marriage of Zeiger*, 2014 IL App (5th) 140104-U, Oct. 7, 2014

Wife appealed the trial court's order granting Husband primary physical custody of the minor children and denying her request for retroactive child support. She also argued that Husband was awarded excessive visitation. The appellate court affirmed the trial court's ruling.

Wife unilaterally moved with the children to a residence approximately 20 minutes away from the marital residence in which Husband resided. Wife also unilaterally enrolled the children in public school without consulting with Husband. The trial court found that Wife was a registered nurse who worked an extended schedule, and the parties spent almost equal amounts of time with the children. The appellate court reviewed the record and determined that the trial court's award of custody and visitation was not against the manifest weight of the evidence presented where the children were younger and could not express their opinions as to custody. There was no evidence of violence or abuse, both parents had good relationships with the children, and Husband was the more flexible parent given the current parenting schedule and would facilitate a relationship between Wife and children. The appellate court specifically determined that the children spent almost equal amounts of time with both parents and that the parenting schedule crafted by the trial court still allowed the children to spend time with their step-sister, Wife's daughter from a previous relationship.

Next, the appellate court affirmed the trial court's denial of Wife's request for retroactive support from the date of filing of her petition for dissolution of marriage after finding that Husband and Wife equally divided the children's costs during separation, Husband had expended additional cash funds to support the children, the parties had almost equal time with the children and Husband and Wife earned similar incomes.

#### **CHILD SUPPORT (See also ALLOCATION OF PROPERTY, VALUATION)**

*In re Marriage of Abu-Hashim*, 2014 IL App (1st) 122997, June 25, 2014

#### **COLLEGE CONTRIBUTION**

*In re Marriage of Baumgartner*, 2014, IL App (1<sup>st</sup>) 120552, March 31, 2014

Wife appealed the trial court's ruling denying her amended petition to enforce the post-high school education provisions of the judgment, reinstating and granting the Husband's cross-petition to terminate the obligation to provide for education expenses and the striking of Wife's petition for indirect criminal contempt against the Husband for liquidating the child's college savings plan. The Husband's request for termination of the obligation to provide for college expenses was based on the child's failure to exhibit any desire or ability to attend college and the child's failure to communicate his plans for post-high school education following the child's incarceration.

While the appellate court specifically found that incarceration of a child should not automatically terminate the obligation to provide for education expenses, the appellate court found that the child lived with the Wife, was employed earning \$15 per hour, was engaged and had fathered a child of his own; and this evidence established that the child was not dependent upon the Wife for his support. Further, the appellate court found that no evidence was presented by the Wife that the child was supported financially by her and that he was employed and actually providing support to a child of his own at the time of the hearing. Further, the appellate court agreed with the trial court that the child lacked the desire and ability to further his education. The child failed to indicate that he would be accepted to a four-year college or university, did not establish that he had the ability to be accepted since he had not applied, was aware he needed to repeat standardized testing but failed to do so, was aware of a college savings plan held by the Husband but failed to contact the Husband to find out how to use the savings plan and failed to respond to the Husband when he attempted to contact him and the Wife regarding the college savings plan.

Next, the appellate court briefly addressed the Wife's contempt petition against the Husband. The appellate court found that the Wife failed to demonstrate that any existing court orders required the Husband to inform the college savings plan of where the child was residing or to provide the plan with the child's contact information. In addition, the appellate court found that the Wife failed to allege any facts to support her claim that the transfer of the college savings plan to the Husband's new wife violated the requirement that the Husband maintain the account for the child. The appellate court found that even if the Husband violated the stay order and liquidated the college savings plan, that he did not do so willfully because he sought the advice of his attorney prior to terminating the savings plan and was advised to do so. Accordingly, the appellate court affirmed the trial court's order terminating the Husband and Wife's obligations to pay for the child's college expenses and striking the Wife's petition for indirect criminal contempt.

*In re Marriage of Saracco*, 2014 WL 6657629 (Ill.App. 3 Dist.), Nov. 25, 2014\*\*

The Husband appealed the trial court's decision terminating the Wife's obligation to contribute to the son's college expenses. The appellate court found that the Wife, in bringing her petition to terminate/modify, failed to allege a substantial change in circumstance which would warrant a modification or termination of her contribution. Specifically, the court found that Wife's argument that the son was receiving poor grades and was not contributing to his college expenses was not compelling. The court found that son had always been a C student and that son had applied for all grants, scholarships and financial aid.

## **CONTEMPT**

*In re Marriage of Cowen*, 2014 WL 4656868 (IL App 2 Dist.), Sept. 17, 2014 (only Westlaw cite available)

Pursuant to the judgment for dissolution of marriage, Husband was to refinance two properties in order to remove Wife's name from the mortgages. Husband failed to do so, and Wife filed a petition for rule to show cause. The court did not find Husband in contempt of court and gave him a time certain to refinance. If he was unable to refinance, he was to sell the properties. On appeal, the court found that the trial court lacked jurisdiction to modify the agreement by requiring Husband to sell the properties if he could not refinance. The appellate court found that the court does not have jurisdiction to engraft new obligations onto a dissolution judgment or otherwise equitably modify it.

## **CONTEMPT (See also CHILD SUPPORT, VISITATION)**

*In re Marriage of Culp*, 2013 IL App (4th) 130037-U, Dec. 10, 2013

A former Husband initiated a post-decree contempt proceeding against his former Wife for alleged violations of a visitation order. The Wife had been granted out-of-state removal of the minor children from Illinois to Tennessee, and according to the former Wife's testimony during the hearing, even though she attempted to cooperate with the visitation order and to ensure the Husband had visitation with the children, both parties had struggled to adhere to the visitation schedule because neither had sufficient financial resources to facilitate the interstate visits. In turn, the trial court entered a finding of no contempt and modified the visitation schedule, finding that the modification was in the best interests of the children. On appeal, the appellate court disagreed with the former Husband's argument that the trial court erred in failing to find the former Wife in contempt because there was sufficient evidence in the record to support the trial court's determination that the former Wife's failure to comply with the visitation order was not

willful or contumacious. However, the appellate court agreed with the former Husband that the trial court had erred in modifying the visitation schedule *sua sponte* when no pleading was before the court requesting such relief, and vacated that portion of the trial court's order.

*Howell v. Howell*, 2013 IL App (1st) 120821-U, Dec. 19, 2013

A former Wife brought several petitions for rule to show cause, alleging the former Husband had failed to pay college expenses for the parties' children as required by the parties' dissolution judgment. The former Husband was found in contempt for his failure to pay such college expenses and was subsequently ordered to pay \$8,100 in fees to the former Wife's attorney pursuant to Section 508(b) of the Illinois Marriage and Dissolution of Marriage Act. When he failed to pay the attorney's fees, he was again held in contempt, with \$8,100 in unpaid attorney's fees being set as the purge amount. Thereafter, a body attachment was issued against the former Husband when he failed to satisfy the purge. The former Husband appealed the body attachment order and the underlying contempt order related to his failure to pay the attorney's fees.

The appellate court found that the trial court did not abuse its discretion in holding the former Husband in contempt of court and issuing a body attachment order when he failed to pay the \$8,100 purge amount, nor were the trial court's findings against the manifest weight of the evidence. The trial court had heard certain testimony that refuted the Husband's claimed inability to make the payments, including testimony that the former Husband owned a home in Evanston, Illinois with an appraised value of approximately \$410,000 on which he had recently received \$67,000 in net loan proceeds from a mortgage he had taken on the property. In addition, he owned a farmhouse and 13 acres in Wisconsin, which he claimed not to be marketable, but then also submitted a Comparative Market Analysis to the trial court valuing the property at \$43,700. The appellate court also found that, based on the evidence heard by the trial court, any inability on the part of the former Husband to pay the fee was a result of his choice to make payments as he wished rather than payments that had been mandated by court order.

See also *In re Marriage of Marsh*, 2013 IL App (2d) 130423, Dec. 26, 2013

*Michel v. Michel*, 2014 IL App (5th) 130439-U, March 17, 2014

Husband appealed from the trial court's order finding him in contempt of court for his failure to pay child support. Husband testified that he was unable to continue working in the roofing and concrete industry due to work injuries. During trial, however, the Husband testified that he mowed lawn to pay his rent, he carried a 55 pound child through Meramec Caverns for 45 minutes, and he applied for only four jobs in seven months. The court found that this was not a reasonable effort to obtain employment, and no evidence was presented to show that the Husband could not mow more lawns to pay child support. The appellate court found that the trial court's finding that the Husband's failure to pay was willful was not against the manifest weight of the evidence.

*In re Marriage of Peppler*, 2013 IL App (2d) 120313-U, Dec. 16, 2013

A former Wife filed a petition for rule to show cause alleging that the former Husband had failed abide by a provision of the parties' judgment requiring him to pay certain expenses toward the former marital residence. The former Husband filed a petition to modify child support, among other requests. Relative to the contempt petition, the trial court found that the former Wife had acted in bad faith in failing to list the marital residence for sale, only recently listing it by owner at a price in excess of the fair market value in attempt to continue to not sell the home. Because the listing of the marital residence was a condition precedent to the former Husband's obligation to pay the expenses associated with the residence, and the Wife did not comply with the judgment in this regard, the trial court concluded that the former Husband did not owe the former Wife the payments associated with the residence. Based on the trial court's conclusion that the former Husband was not responsible for the expenses as a matter of law, the appellate affirmed the trial court's refusal to hold the former Husband in contempt.

The trial court also decided to grant the former Husband's request to modify his child support obligation, providing that he was to pay 28% of all net money received from all sources to the former Wife, but no dollar amount was set. The former Wife argued on appeal that the trial court's decision was in error because the former Husband had failed to prove there was a substantial change in circumstances as his testimony was the only evidence of his reduced income, the trial court improperly refused to consider his

use of retirement funds as income, and the court order failed to state a specific dollar amount of support. The appellate court found insufficient evidence in the record to support a finding of a substantial change in circumstances, and the trial court's order was reversed. The appellate court also noted that, even if the order had not been reserved, it would have been remanded because the trial court erred as a matter of law in failing to set an actual dollar amount of support.

*In re Marriage of Ray*, 2014 IL App (4th) 130326, March 3, 2014

Wife brought a petition for rule to show cause for a Husband's failure to pay support in accordance with a temporary support order. A rule was entered against the Husband and the petition was scheduled for hearing for the Husband to show cause as to his non-compliance with the order. At the hearing, the Husband orally moved to stay the proceedings due to an ongoing federal criminal investigation regarding his nonpayment of taxes. He claimed that he would be unable to defend himself or testify regarding his inability to pay in response to any question that might incriminate him in the criminal investigation. The trial court denied the Husband's motion to stay and during the hearing, the Husband invoked his Fifth Amendment privilege. In spite of this, the Husband was found in indirect civil contempt of court and ordered him to pay a purge of \$1,000. On appeal by the Husband, the appellate court affirmed the trial court's decision. The finding of contempt was not a result of the Husband asserting his Fifth Amendment privilege, but because he had failed to meet his burden of showing why he should not be held in contempt for failing to comply with the court order. The Husband's assertion of his Fifth Amendment privilege was not a substitute for evidence, nor did it shift the burden back to the Wife.

See also *In re Parentage of Smith v. Dinwiddie*, 2014 IL App (1st) 120997-U, Feb. 3, 2014

## **CUSTODY**

*In re Marriage of Agee*, 2013 IL App (5th) 130320-U, Nov. 26, 2013

The Husband and Wife cross-appealed the trial court's decision to award sole custody of the child to the Wife, impute income to the Husband to set child support at \$500.00 per month, distribute property and debt between the Husband and Wife, and order the Husband to contribute \$1,250.00 to the Wife's attorney fees.

After reviewing the record, the appellate court found that the trial court's custody determination was not against the manifest weight of the evidence and that the trial court accurately examined and analyzed the factors of 602(a) of the Illinois Marriage and Dissolution of Marriage Act based upon the facts and circumstances of the case. Specifically, the appellate court found that the relationship between the child and her parents, siblings and others favored the Wife because the child was close to the Wife's in-state family and the Wife could more easily establish a relationship between the child and the Father's daughters, who were born through two prior relationships. Further, sole custody favored the Wife because the child was well adjusted to her home, school and community, while the Husband attempted to remove the child to Missouri where he believed he could more easily obtain employment. Another reason the appellate court favored sole custody to the Wife was that the mental and physical health of all individuals slightly favored her over the Husband. Specifically, the appellate court found that the Husband suffered from frequent heart episodes which required him to lie down for significant periods of time. Further, during the marriage he claimed he needed to de-stress after work by watching television or playing video games in order to prevent said heart episodes, and others testified to anxiety stress attacks and time off of work due to stress and anxiety throughout the case. In addition, the appellate court determined that the Husband had significant issues with his knee which prevented him from interacting fully with the child, and that he failed to follow a court order which required the parties to attend counseling or the Guardian *ad litem's* recommendations to attend counseling to become educated on the impact alienation has on a child. The appellate court also found that the threat of physical violence by the child's potential custodian directed against another person and the occurrence of repeated abuse directed against another person favored the Wife due to the Husband's abusive conduct and anger issues raised in testimony from numerous past significant others and the Wife herself. The appellate court also found that the willingness and ability of the Wife to facilitate a close and continuing relationship between the child and the Husband favored an award of sole custody to her, while the Husband actively alienated the child from the Wife. Ultimately, the appellate court found that an award of sole custody to the Wife was in

the child's best interests based upon the factors enumerated in 602(a) and was supported by the Guardian *ad litem's* report.

The appellate court next examined the trial court's ruling on the property and debt of the parties as it related to an insurance settlement the Husband received from an incident involving the Husband and Wife, where the Wife allegedly backed a car into the Husband and injured his knee during an exchange of the child. After review of the record, the appellate court found that the trial court did abuse its discretion in failing to classify the insurance settlement as marital or non-marital property and failing to re-open proofs to determine the amount the Husband actually received from the settlement. To clarify, the appellate court was unsure as to whether the Husband received the entire \$62,500.00 of the settlement or if a portion was used to pay medical bills and attorney fees. Furthermore, the appellate court reversed the trial court's ruling that the Husband should pay 20% of the net proceeds from the settlement to the Wife for child support purposes. The appellate court found that the settlement proceeds should not have constituted income for child support purposes until the court determined whether any portion of the settlement was for lost income and how much money the Husband actually received.

The appellate court rejected the Husband's argument that the trial court erred in imputing income and awarding monthly child support to the Wife when he was unemployed and had no income. The appellate court found that the Husband was voluntarily unemployed because he had been offered employment through the insurance industry, but failed to accept the job because he was afraid his Wife would get one-half of his earnings if he was still married. As such, the appellate court found the trial court did not abuse its discretion in imputing income based upon the Husband's annual income from a prior job.

Further, the appellate court rejected the Wife's argument that gifts of money from the Husband's family should have been included in the Husband's net income for child support purposes. The appellate court found that the family members testified that the payments were loans to pay attorney fees and that any gifts given, if said sums were classified as gifts and not loans, were not recurring and therefore properly excluded from the Husband's income for purposes of calculating child support.

The appellate court also examined the trial court's failure to hear the Wife's petition for interim attorney fees on the basis that the Husband paid a larger sum in attorney fees than the Wife, and both parties borrowed significant amounts of money from family members to pay attorney fees. The appellate court held that the trial court erred in failing to hear the Wife's petition for interim attorney fees and that the failure could have prejudiced the Wife and the outcome of the case as it related to equalizing the Wife's and Husband's litigation resources. In addition, the appellate court found that the trial court failed to re-open the proofs to determine the details of the settlement the Husband received and how that could have possibly affected the award for attorney fees. The appellate court found that the Wife's attorney fees were larger than her annual salary and she indeed demonstrated an inability to pay. However, the trial court failed to address the Wife's arguments that the Husband unnecessarily increased the cost of litigation through his uncooperative and combative behavior, the property allocation favored the Husband and that there is a disparity in income and expenses due to his receipt of monetary gifts from his family.

Overall, the appellate court affirmed the trial court's award of sole custody to the Wife and the setting of child support, yet reversed and remanded the trial court's property distribution, attorney fee award and the award of child support from the net proceeds of the settlement.

*In re Marriage of Ali-Khan and Sheikh*, 2014 IL App (2d) 130619-U, June 16, 2014

A Husband appealed from the trial court's judgment granting the Wife sole custody of the parties' children. The appellate court found that the trial court gave sufficient consideration to the statutory custody factors and that the evidence supported the trial court's determination that the parties high level of distrust and hostility made them unable to achieve the level of cooperation necessary for joint parenting. For example, the parties were unable to agree on the children's extracurricular activities, religious training, religious dietary restrictions, bedtime, medical care, discipline – specifically on the use of corporal punishment – or on issues surrounding daycare costs. As such, the trial court's award of sole custody to the Wife was affirmed.

*In re Marriage of Anderson*, 2014 IL App (4th) 140221-U, Aug. 7, 2014

Husband appealed from a custody judgment awarding custody of the parties' child to the Wife. He argued that the trial court did not give sufficient weight to the Wife's use of marijuana, her compulsiveness as demonstrated by the fact that she got a tattoo and purchased a new car when she allegedly could not afford to do so, and the fact that he had been the child's primary caretaker. However, the trial court had also heard evidence regarding the Husband's domestic abuse of the Wife and determined that the Wife was more likely than the Husband to facilitate the relationship between the Father and the parties' child. Therefore, the appellate court found that the factual findings underlying the award of custody to the Wife are not against the manifest weight of the evidence, nor was there an abuse of discretion. The trial court's custody judgment was affirmed.

*Campbell v. Campbell*, 2014 IL App (5<sup>th</sup>) 120442-U, Feb. 3, 2014

An ex-Husband appealed the trial court's ruling granting the ex-Wife's emergency petition for temporary custody and petition for modification of custody, and modifying tax exemptions to allow each party to claim a child, when the parties shared joint custody of the children and ex-Husband had been designated the primary residential parent.

First, the appellate court declined to address the merits of the ex-Husband's arguments as they related to temporary custody because the issue was moot. The appellate court found that the trial court granted the ex-Wife's petition to modify custody permanently, which superseded the order granting temporary custody, and that the ex-Husband later agreed that the ex-Wife should have temporary custody of the children in an agreed order entered approximately eight months later.

Next, the appellate court affirmed the trial court's finding of a substantial change in circumstances for the following reasons: the parties now lived in the same school district; the ex-Wife was not going to be deployed and had plans to end her employment with the Air Force, while the ex-Husband intended to remain on active duty; the ex-Wife's active involvement with the children's education and individual educational plans (IEPs); the enrollment of the children in counseling; the stable home environment the ex-Wife's remarriage provided; and the ex-Husband's actions in resisting communicating with the ex-Wife regarding the children, his unilateral decision making despite having joint custody of the children, and his hindrance of the ex-Wife's contact and parenting time with the children.

In addition, the appellate court found that the modification of custody was in the best interests of the children. Specifically, the ex-Wife and her current husband provide a stable and loving family environment, the children became enrolled in extracurricular activities which the ex-Husband had not done in the past, and one of the child's emotional disabilities had improved while in the ex-Wife's temporary physical care. The ex-Husband failed to communicate with the ex-Wife regarding the children and failed to facilitate a relationship between the ex-Wife and the children, while the ex-Wife allowed regular communication between the ex-Husband and the children, attempted to communicate with the ex-Husband regarding the children and even allowed extra parenting time between the ex-Husband and children while the litigation was pending. Further, the modification of custody was supported by the GAL's report.

Finally, the appellate court found no need to address the ex-Husband's arguments as to the modification of the tax exemptions, as he waived the issue by failing to object to the ex-Wife's request to claim one of the children as a tax exemption at trial, in his motion to reconsider, or during hearing on his motion to reconsider. Accordingly, the trial court's order was affirmed by the appellate court.

*Cascio v. Pace*, 992 F. Supp. 2d 856, Jan. 16, 2014

The Husband of two children, along with the Italian welfare agency, *Azienda Servizi Alla Persona Ambito 9* (ASP), filed a petition pursuant to the Hague Convention for the immediate return of the children to Italy after the Wife and mother of the children remained in Illinois after a summer vacation and refused to return the children.

The district court found that the Husband presented a *prima facie* case that the removal or retention of the children was wrongful according to the requirements as set forth under the Hague Convention. The parties agreed that the children's place of habitual residence was Italy immediately prior to the children remaining in Illinois. The district court found that the Husband and ASP had rights of custody to the

children as defined under the Hague Convention. The appellate court found that ASP had custody rights to the children because the entity monitored the children's welfare in Italy after a domestic dispute and the parents were required to contact ASP prior to removing the children from the country. The district court further found that the Husband was exercising his custody rights even though he allegedly agreed for the entire family to relocate to the United States but later changed his mind and requested the entire family to return to Italy. The district court held that the Husband never gave any indication he was abandoning his parental rights or left the decision as to the children's residence solely up to the Wife. Further, ASP was found to have been exercising parental rights and not abandoning those rights as it was still engaged in active and ongoing monitoring prior to the children's vacation to Illinois, scheduled a counseling session for the children upon their expected return from vacation, and no court had discharged the ASP of its duties to monitor and supervise the family.

However, the district court held that the Wife asserted exceptions to the return of the children. Specifically, the Wife argued the "settled" exception and the "consent or acquiescence" exception, and she proved that these exceptions overcame the wrongful removal or retention by a preponderance of the evidence. The district court found that the Husband expressly consented to the retention of the children in Illinois and rejected the Husband's arguments that he did so under duress. The district court found the Husband's testimony that he was pressured to allow the children to remain in Illinois by one of the Wife's family members lacked credibility, and his justification to support his claim that he only agreed to the retention under duress because he was afraid of causing an argument and needed to catch a ride to the airport unpersuasive. Further, the Husband's inaccuracy set forth in his verified and sworn petition in regards to a statement the Wife made to him relating to the duress claim contributed to the district court's ruling and the finding of a lack of credibility. The court determined that the Husband expressly consented to the retention, but that ASP did not.

For the settled exception to apply, the Wife needed to prove that the petition for return was filed more than one year after retention and that the children were settled in their new environment. The district court examined arguments from both the Husband and ASP of an equitable tolling period, since the petition for return was filed more than a year after the retention of the child in Illinois. The district court rejected an equitable tolling argument because there was no evidence of fraudulent concealment of the children and the Wife took no affirmative steps to conceal the children's location from either the Husband or ASP. In fact, the district court determined that the delay in filing by the Husband and ASP was due to procedural problems arising in Italy with the filing of the petition for return. As for whether the children were settled into their new environment, the district court found compelling proof that the children had in fact settled because of the children's ongoing enrollment and success in school, active involvement in activities and social gatherings, strong relationships with family and friends in the area, and the younger child's conversion to speaking almost exclusively in English despite efforts by both the Wife and older child for the child to be bi-lingual. As a result, the district court applied the settled exception to both the Husband and ASP and denied the petition for return.

*In re Custody of C.C.*, 2013 IL App (3d) 120342, Dec. 9, 2013

The appellate court reversed the court's award of attorney fees but declined to address the second alleged Father's motion to vacate the order establishing the first Father as the child's legal Father through an executed voluntary acknowledgment of paternity (VAP) from the day after the child's birth, and the appropriate percentage the second alleged Father should pay for child support due to a lack of jurisdiction.

Originally, the trial court denied the second alleged Father's motion to vacate the order establishing parentage between the Mother and the first Father because the trial court held that it did not have authority to grant a third party's motion to vacate a parent-child relationship established by a VAP. However, the second alleged Father was proven to be the biological Father of the child through DNA testing and the trial court entered an order finding the second alleged Father to be the biological Father of the child, ordered statutory child support to be paid and established temporary visitation between the child and second alleged Father. After the court's denial of the motion to vacate, the Mother filed the petition for contribution to her attorney fees and the second alleged Father filed a petition requesting a downward deviation in child support based upon the fact that the child had three legally established parents. The

trial court granted the Mother's petition for contribution to her fees, denied the second alleged Father's request for a downward deviation of child support and entered an agreed visitation order.

First, the appellate court found that the trial court abused its discretion in ordering the second alleged Father to contribute to one-third of the Mother's attorney fees because the record did not suggest that the second alleged Father had the ability to pay the attorney fees.

Next, the appellate court held that it lacked jurisdiction to address any other issues raised by the second alleged Father because of his untimely appeal. The second alleged Father failed to file his notice of appeal of the order denying his motion to vacate within 30 days. Specifically, the appellate court rejected the second alleged Father's argument that he could not appeal the court's ruling until after the trial court resolved the Wife's pending petition for attorney fees and found that his appeal was not timely. Further, the appellate court found it lacked jurisdiction to address the second alleged Father's request to modify child support due to his failure to timely appeal the court's rejection of his request for a downward deviation in child support after entry of a final agreed order resolving all pending issues related to visitation. The appellate court rejected the second alleged Father's argument that he could not appeal the court's ruling until after the trial court resolved the Wife's pending petition for attorney fees. Specifically, the appellate court held that the Mother's request for attorney fees had nothing to do with the merits of the second alleged Father's petition to intervene involving child support and visitation and was instead motivated and related to the second alleged Father's desire to have the trial court recognize the first Father's ability and obligation to contribute to the child's support.

The appellate court disagreed with the dissent's decision to offer an advisory opinion regarding the diminished status of the first Father's parental rights of the child because the second alleged Father did not argue that the trial court's inconsistent rulings operated to extinguish the first Father's parental rights to the child. The appellate court held that parental rights established by a VAP do not become void simply because a child is genetically linked to another Father and the only person who has a statutory right to file a petition to determine the nonexistence of a parent-child relationship is the individual who initially signed the VAP. Further, the appellate court recognized that an individual who is the legal custodian of a child has a fundamental liberty interest in maintaining such a right and the trial court made no finding of fraud when it entered the original paternity order. However, the appellate court did raise concerns regarding the trial court's recognition of two different individuals as the child's Father and was unsure if two individuals could share equal parental rights and obligations as the child's Father. In addition, the appellate court was unsure whether there was statutory authority to order the second alleged Father, who was in fact the child's biological Father, to pay any amount in child support when the child had a different legally recognized VAP Father, or whether the second alleged Father had standing to intervene in the paternity action filed by the Mother and first Father who signed the VAP.

In sum, the appellate court reversed the judgment for attorney fees against the second alleged Father and refused to review the merits of the second alleged Father's motion to vacate or deviate downward from statutory child support due to a lack of jurisdiction.

*In re Marriage of Davidson*, 2014 IL App (2d) 130684-U, Sep. 17, 2014

The Husband appealed the trial court's order granting Wife permanent maintenance of \$14,167 per month and child support of \$5,000 per month and ordering that all outstanding attorney's fees be paid from the marital estate prior to division between the Husband and Wife. The appellate court affirmed the trial court's ruling for maintenance and attorney's fees but reversed the trial court's ruling regarding child support and remanded the case for further proceedings.

The appellate court affirmed the trial court's ruling as to the maintenance amount after considering the Wife's lack of work history and age and the difference in earning capacities, as Husband was a corporate executive while Wife had been out of the workforce caring for the children for over 20 years. The appellate court rejected Husband's argument that income should be imputed to the Wife because she could reinvest awarded property to make money.

The appellate court also affirmed the trial court's decision to impute income to Husband of \$544,000 after he voluntarily retired from his employer, because the appellate court found he had not actually "retired" and the Wife testified that, while she knew the Husband was going to leave his current employer, she still believed he would continue working. The appellate court further found that the Husband continued to



seek employment by continuing to apply for corporate positions after being “retired,” continued to spend lavishly by purchasing a \$1.28 million dollar home, and becoming engaged to a woman who was not employed and had no plans of securing employment, and that Husband continued to maintain his standard of living. In addition, the appellate court held that the imputed income was not unreasonable based upon the Husband’s historically earned income from 2005 through 2008, when he voluntarily left his employer, and Husband failed to present any evidence of a reduced earning capacity. Finally, the appellate court affirmed the trial court’s decision to award permanent maintenance with no review provision as there was no evidence Wife would ever become employed at a salary that would enable her to support herself at the standard of living established during the marriage, which began in 1987.

The appellate court next reversed the trial court’s decision to award \$5,000 per month in child support, finding that the awarded amount of child support was excessive as it far exceeded the child-related expenses set forth in Wife’s financial affidavit of \$922 per month, the parties equally shared time with the children, and because Husband was solely responsible for medical and dental insurance for the children. The appellate court rejected the Wife’s argument that the \$922 did not include other children’s expenses, given the fact that the maintenance award of \$14,167 per month exceeded all of the listed expenses on her financial affidavit. The appellate court also rejected the Wife’s argument that the child support should remain at \$5,000 based upon the standard of living established during the marriage because no evidence was presented to establish that a child support award of \$5,000 was necessary to maintain the child’s standard of living while the child was in Wife’s possession for half of the time. However, the appellate court did not find the trial court abused its discretion in imputing income to Husband or the trial court’s calculation of net income. The appellate court ultimately remanded the case for further rulings and clarification on the child support calculation and the dependency exemption for the child.

See also *Dawn W. v. Michael W.*, 2014 IL App (5th) 130430-U, Jan. 22, 2014

*In re G.A.K., a Minor Child*, 2014 WL 5770357 (Ill.App. 1 Dist.). Nov. 4, 2014\*

The trial court awarded Mother sole custody of the minor child. Further, the Mother was allowed to remove the child to Canada. The Father appealed the trial court’s decision arguing that it was against the manifest weight of the evidence. Unfortunately, the Father failed to provide a record of the trial. Based upon the appellate court’s review of the 21-page trial order granting Mother sole custody and the right of removal, the appellate court did not find any error by the trial court. The trial court addressed all of the custody and removal factors in its court order.

*In re Marriage of Flynn*, 2014 WL 6609176 (Ill.App. 2 Dist.), Nov. 20, 2014\*

Father appealed from the trial court’s judgment denying as untimely his petition to contest paternity and his petition filed pursuant to Section 2-1401 of the Code of Civil Procedure. Evidence was presented at trial that the Father knew in 2003 that the minor child in question may not be his child. Evidence was presented that he told third parties that the child was not his child because he did not have intercourse with his wife at the time the child was conceived. Evidence was also presented that he married the Mother when she was pregnant with the child. The appellate court found that the evidence clearly support the trial court’s finding that the Father, more than 2 years before he filed his petition to contest paternity, knew that he might not be the child’s father. Therefore, the 2 year statute of limitations period to contest paternity had already expired by the time he brought this petition. The Father also argued that the trial court erred when it denied his 2-1401(c) petition. The appellate court found that there was no evidence to show that the Father was actually deceived by the purported fraud (the Mother telling him that the child was his). Because the Father failed to demonstrate fraudulent concealment, the decision of the lower court was affirmed.

*In re Marriage of Groshans*, 2014 IL App (5th) 140109-U, Aug. 11, 2014

Wife appealed from the trial court’s ruling awarding Husband sole legal custody of the parties’ minor child. The appellate court affirmed the trial court’s ruling.

The appellate court cited to the background of the case, specifically that Wife filed a number of petitions for orders of protection against the Husband alleging sexual abuse. However, all requests were ultimately dismissed for insufficient evidence and charges for false reporting were considered against the Wife. The 604(b) evaluator and the guardian *ad litem* originally recommended sole custody to Wife, but

Husband subsequently obtained an order of protection for himself and the child and was granted temporary custody of the minor child after Wife forcibly entered the Husband's home and removed the child to her vehicle. This occurred prior to the court making a final ruling on the two-day custody hearing after the court took the matter under advisement. As such, the Husband filed a motion to reopen evidence, which was granted by the trial court and affirmed by the appellate court, due to the fact that the Wife failed to object to the reopening of evidence at trial and both Wife and Husband presented additional information to the trial court. The experts subsequently changed their recommendation to sole custody to Husband after the additional evidence pertaining to the Husband's order of protection against the Wife was presented to the trial court.

The appellate court affirmed the trial court's ruling citing to the facts that because Husband was employed and his parents were available to care for the child, Husband could provide a more stable living environment, Husband could better foster a relationship between the Wife and child, and Wife lived with a boyfriend who smoked and had pets despite the child's perceived medical issues.

*In re Marriage of Gwaltney*, 2014 IL App (5th) 140178-U, Sep. 10, 2014

The appellate court upheld the decision of the trial court in which the trial court awarded the Wife sole custody of the minor child.

Husband appealed the decision of the trial court, arguing that he would provide a more stable environment for the minor child. He argued that he had temporary custody of the minor child for the past two years and the child was well adjusted to her home and school. The appellate court found that a court may consider the length of time a child has spent with a parent by virtue of a temporary custody order, but there is no presumption in favor of the existing custodian under section 602 of the Act. Further, it was clear from the record that during the two-year time period when the Husband had temporary custody, he did not advise the Wife of the child's activities or grades and denied a number of requests that the Wife made to take care of the child while the Husband was working and the child was in daycare.

*Horton v. Jones*, 2014 IL App (3d) 140446-U, Oct. 29, 2014

After a trial, the court modified a custody arrangement from joint custody with Mother as the residential parent to sole custody to Father. In this case, the court found that the Mother's fundamental lack of honesty was the crux of the court's finding. The court found that the foundation of a joint parenting agreement would be honest dealings between the parties. The Mother had shown an inability to do so, and to continue with joint parenting would be detrimental to the minor child.

*Lanham v. Howard*, 2014 IL App (4<sup>th</sup>) 130754-U, Jan. 7, 2014

A *pro se* Husband filed a motion to modify custody less than two years after a custody judgment had been entered awarding custody to the Wife. Thereafter, the trial court entered a written order which indicated that both parties had appeared *pro se* at the hearing on the Husband's motion, witnesses were sworn and evidence heard regarding the unsafe living conditions in the Wife's home. The Husband was then awarded custody of the parties' two minor children subject to reasonable visitation by the Wife. The Wife appealed the trial court's order. The appellate court found that because the Wife's brief was inadequate and she failed to present a sufficiently complete record of the proceeding, it would be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis.

*Lee v. Fosdick*, 2014 IL App (4th) 130939, March 20, 2014

Grandmother appealed the trial court's order granting the Father's motion to dismiss her amended motion for modification of custody on the basis that the Grandmother lacked standing. The trial court certified the issue for appeal to determine whether the Grandmother would be required to reestablish standing in order to modify a custody order, where the trial court originally found she had standing, ordered temporary custody to her and granted substantial parenting time to her after awarding permanent custody to the child's Father.

The appellate court held that standing is determined at the beginning of a lawsuit, and the Grandmother began her action for custody of the minor child after her own daughter died. Further, the appellate court found that the modification of a custody order is a continuation of the original lawsuit filed and does not

initiate a new lawsuit where standing would need to be reestablished. The trial court originally found that the Grandmother had standing after the Grandmother filed for custody following the child's mother's death, where the Father was uninvolved in the child's life and had no known contact with the child previously. The appellate court addressed the Father's potential arguments that he began showing interest in the child after the mother's death, later won permanent custody of the child and resumed having physical custody of the child after being released on probation from criminal charges. However, the appellate court rejected these arguments, finding that the Father's later conduct had no bearing on the issue of the Grandmother's standing at the time she initiated the original action for custody and was irrelevant.

*In re Marriage of Murphy*, 2014 WL 1887604 (IL App 3 Dist.), May 8, 2014

The appellate court found that the trial court's award of residential custody to the Husband was supported by the record. On appeal, the Wife argued that the trial court erred in admitting evidence and in considering a report prepared pursuant to Section 604(b) of the IMDMA by Dr. Robert Shapiro.

The court appointed Dr. Shapiro pursuant to 604(b). Following the issuance of Dr. Shapiro's 20-page report, the Wife voluntarily dismissed her petition for dissolution. Thereafter, the Husband filed a petition for dissolution of marriage. Eight months after the filing, Dr. Shapiro was again appointed pursuant to 604(b). Dr. Shapiro issued a 3-page report in which he referenced the previous report. The appellate court found that pursuant to Section 605 of the Marriage Act, Dr. Shapiro was entitled to utilize all the information he gathered from all sources (including himself) when he prepared his report and recommendation in the second proceeding.

*In re S.A.D., a Minor Child*, 2014 WL 6654253 (Ill.App. 5 Dist.), Nov. 24, 2014\*

The Father appealed the decision of the trial court to award Mother residential custody and appealed the court's decision to grant him less parenting time once the child was of school age. On appeal, the court found no error in awarding Mother residential custody. Although there was conflicting evidence as to the Mother's fitness to maintain primary residential custody, the evidence did reveal that the Mother had always been the primary custodian, the child, who was age 4 at the time of the trial, was happy and doing well, and the Father, although very involved with the child, had never paid Mother child support. Further, the Mother had a new job which provided flexibility to be available for any necessity that may arise with the child. The appellate court did find that the court erred when it determined that the Father should have less parenting time once the daughter started school. On appeal, the court found that there is no evidence in the record supporting this modification, especially when the parties do not know what school the child would be attending.

### **CUSTODY (See also SUBSTITUTION OF JUDGE FOR CAUSE)**

*In re Marriage of Roy*, 2014 (5<sup>th</sup>) 130260-U, July 11, 2014

### **CUSTODY**

*Saul v. Saul*, 2014 IL App (3d) 130499-U, Jan. 17, 2014

The circuit court divided the parties' assets and awarded primary residential custody of the parties' children to the Husband, thus allowing him to remove the children to Iowa. The Wife appealed. The appellate court affirmed the custody decision but remanded the case on the issues of division of asset and liabilities, child support, maintenance and contribution to attorney fees.

The Wife argues that the circuit court erred in awarding the Husband custody of the children when the record was clear that the Husband started confrontations with the Wife in public and in front of the children. The court ultimately found that the Husband's living situation would provide more stability for the children as he had a definite place to live. The Wife had allowed the marital residence to go into foreclosure and it was uncertain what her living situation would be. Further, she provided no testimony as to where she would live and what school the children would attend if she lost the marital residence. There was also testimony that the Wife interfered with the children's relationship with their father. Although the court did not specifically state the factors for allowing the removal, it is clear that the court found the Husband's living situation to be more stable. Further, the visitation exchanges were already taking place between Davenport, Iowa and Moline, Illinois, so there was not a significant change in that aspect. The

children would have to switch schools, but they would have to do that if they remained in the Wife's care anyway.

With regard to the division of assets, the Wife argued that the court assigned most of the credit card debt to her, ordered her to pay the full mortgage and ruled that she had to pay her own attorney fees. The court found that this was an abuse of discretion. Further, the circuit court ordering the Wife to pay child support and denying her maintenance was also an abuse of discretion as the Wife earned approximately \$17,000 and the Husband earned approximately \$60,000 per year. The trial court's order left the Wife in an unstable financial position. Further, the reviewing court found that it was an abuse of discretion for the Wife to be ordered to pay her own attorney fees when the parties each had \$40,000 in attorney fees and the Husband was able to pay most of his fees while the Wife still owed \$20,000.

*In re Marriage of Scheeler*, 2014 WL 5511391 (Ill.App. 2 Dist.), Oct. 31, 2014\* (See also Child Support)

The Husband appealed the trial court's judgment awarding Wife sole custody of the children, imputing income to him and ordering him to pay \$1,400 per month in child support; an order directing the Husband not to sleep with the children in the same bed during visitation, the valuation and division of property, and award of attorney's fees to the Wife of \$15,000.

The appellate court rejected the Husband's arguments that the trial court failed to consider each of the party's physical and mental health conditions, wrongly determined that he was unable and unwilling to facilitate a close and continuing relationship between the children and the Wife, and failed to consider that the Husband acted consistently in the children's best interests. The appellate court cited to the facts that the Wife was more involved in parenting than the Husband and that the 604(b) evaluator recommended sole custody to the Wife, despite any mental health issues. Further, the appellate court rejected the Husband's argument that he would be willing to facilitate a close relationship between the children and the Wife based upon his behavior at trial wherein he attempted to paint the Wife as a depressed and anxious person with serious mental disorders.

The appellate court further rejected the Husband's argument against imputing income, as the trial court found that the Husband was voluntarily underemployed due to his testimony that he had not sent his resume to any employers and that the imputed income of \$25,000 was minimal based upon the Husband's master's degree in theology and prior work history as a director of religious education at a parish for 10 years. Further, the appellate court held that the Husband asserted in his brief that he was now earning \$22,500 per year and that the imputed income was reasonable.

The appellate court affirmed the trial court's award of \$15,000 in attorney's fees given the Husband's lack of debt, substantial support received from his Mother by living with her rent-free and his use of a vehicle she purchased for him during the divorce proceedings, Husband's low living expenses and his greater earning capacity. In sum, the appellate court affirmed the trial court's ruling.

*In re Marriage of Schroedl v. Schroedl*, 2014 IL App (2d). 140291-U, July 29, 2014

The Wife appealed the trial court's ruling which granted the Husband's petition to modify custody after the Wife relocated with the children one hour from the Husband's residence. The appellate court found that the trial court did not abuse its discretion in granting the Husband's motion to modify custody, finding there was a substantial change in circumstances and that a modification was necessary to serve the best interests of the children.

The appellate court stated that the trial court found that a majority of the factors set forth in Section 602(a) of the Illinois Marriage and Dissolution of Marriage Act did not apply or did not favor either party, but that the factor related to a parent's willingness and ability to foster a close relationship with the other parent weighed heavily in the Husband's favor. The appellate court held that the trial court's finding that the Wife's practice of allowing the child's alienation from the Husband was not against the manifest weight of the evidence. This was based upon the facts that the Husband was the primary daytime caregiver of one of the children while the Wife worked, that he enjoyed a close relationship with the children, that the Wife was inappropriately alienating the older child as the Wife and the older child used similar language to describe their respective relationships with the Husband, and that the guardian *ad litem* testified that the same alienation the Wife allowed with the older child was being exhibited in the younger children as well. The appellate court relied on the trial court's finding that the Wife was unwilling to foster a relationship

between the Husband and the children, as the Wife moved the children without informing the Husband, enrolled the children in new schools without his input, and did not make the children available for phone visits with the Husband. Further, the appellate court relied upon the trial court's finding that the Husband actually did facilitate a relationship between the Wife and the children, which occurred during a period of time where the Husband had custody under a default judgment and encouraged visitation and phone contact between the Wife and the children when he had no obligation to do so.

The appellate court affirmed the trial court's ruling granting the Husband's petition to modify custody and awarding the Husband sole custody of the minor children.

*In re Marriage of Stone*, 2014 IL App (3d) 130977-U, May 9, 2014

After trial, the court granted sole custody of the minor children to the Husband and ordered Wife's visitation to be supervised. The appellate court upheld the order of the lower court.

At the start of this case, Husband was awarded temporary custody of the four minor children with supervised visitation for the Wife and children. During the pendency of the case, the Wife was awarded temporary custody of two of the four children. Once Wife was awarded temporary custody of the two older children and unsupervised visitation with the minor children, allegations began that the Husband was physically and sexually abusing the kids. Over six allegations of physical and sexual abuse were made to the police and DCFS. Each time, the allegations were unfounded by DCFS. At the trial, the court found that the Wife was unable to facilitate a relationship with the minor children and the court awarded Husband sole custody of the minor children. The Court further found that the Wife's "*manipulative, conniving, divisive behavior, seriously endangers all four children's mental, moral and emotional health.*" On review, the appellate court found that this conclusion was supported by the testimony of the Husband and the guardian *ad litem*, who both stated that the Husband's relationship with the children deteriorated as soon as the Wife was granted unsupervised visitation.

In addition to the issue of custody, on appeal, Wife argued that her rights were violated because the guardian *ad litem* exceeded his authority by including hearsay statements in his reports and by investigating allegations of abuse. The court found that a guardian *ad litem* is not prohibited from considering inadmissible evidence, such as hearsay, and including it in a report. Further, the Wife was given the opportunity to cross-examine the guardian *ad litem* regarding his reports and recommendations. The Court found that a guardian *ad litem* is not precluded from investigating allegations of abuse.

*In re Marriage of Wallace*, 2014 IL App (2d) 140233-U, June 25, 2014

Upon dissolution of their marriage, a Husband and Wife were awarded joint legal custody of their two minor children, with the Wife being designated the children's primary residential parent. Thereafter, the Wife relocated 1½ hours away from the Husband's residence, which caused the Husband to file a petition to modify custody of the children. He cited the Wife's move and the ensuing conflicts of the parties as a substantial change in circumstances. At the trial, the 604(b) custody evaluator testified that she believed it was in the children's best interests to award sole custody to the Husband, placing the blame for the parties' conflicts on the Wife and her move. Likewise, the guardian *ad litem* for the children also testified that the Joint Parenting Agreement should be terminated and that sole custody should be awarded to the Husband. Despite such testimony, the trial court denied the Husband's petition for modification of custody. It found that the Husband had failed to present sufficient evidence that the children's situation would be better if custody were placed with him, and that the 604(b) evaluator and guardian *ad litem* had improperly ignored the policy favoring the present custodian, which intended to promote stability for children. The trial court also found that the Husband's testimony was less believable and less persuasive than the Wife's testimony. Because the trial court is in the best position to judge the credibility of the witnesses and assess the best interests of the child, the appellate court found that the trial court's denial of the Husband's petition was not against the manifest weight of the evidence and its decision was affirmed.

#### **CUSTODY (See also CHILD SUPPORT)**

*In re Marriage of Zeiger*, 2014 IL App (5th) 140104-U, Oct. 7, 2014

## **DECLARATORY JUDGMENT**

*In re Marriage of Akbani*, 2014 IL App (5th) 130266, Aug. 26, 2014

Husband appealed the trial court's order denying a declaratory judgment on a marital settlement agreement reached in mediation in 2010 and upheld the first marital settlement agreement entered into in 2008 as valid, binding, and enforceable. The appellate court affirmed the trial court's ruling.

The appellate court rejected Husband's argument that the 2008 agreement was unenforceable because he wrote the 2008 agreement and was a competent businessman, had personal knowledge of the assets the Husband and Wife had amassed, and signed the agreement before the Wife did, who made no substantial changes to the document before signing. The appellate court further held that duress did not apply in this case because the stress Husband was under was in no way greater than the stress any party goes through when involved in a divorce proceeding or when faced with the possibility of losing custody of a child, and that said agreement was not unconscionable, as he was awarded one business which he admitted was making more than was the second business awarded to the Wife. The appellate court also rejected the Husband's argument of mutual mistake of fact as to the understanding of the terms of the agreement because he took no action to contest the terms of the 2008 agreement and both parties proceeded after the agreement was signed as if it was in full effect.

Next, the appellate court affirmed the trial court's ruling that the 2010 agreement reached after mediation was not enforceable because there was an attorney review provision in the agreement, which the trial court found was a condition precedent to the formation of a binding agreement between the Husband and Wife. The appellate court found that the attorney review provision was plain and unambiguous and allowed for the opportunity for both Husband and Wife to review the agreement with an attorney. The appellate court stated that if it accepted Husband's argument, doing so would render the attorney review clause within the 2010 agreement meaningless. Further, both parties were represented by attorneys who did not specialize in family law, and should have had the opportunity to consult with both of their retained attorneys prior to entering into a binding agreement per the plain language of the agreement.

## **DISSIPATION (See also MAINTENANCE, ATTORNEY FEES)**

*In re Marriage Berg*, 2014 IL App (3d) 130688-U, Aug. 13, 2014

Husband filed a petition for dissolution of marriage on September 8, 2008. Wife initially appeared in the case, but in March of 2009, her attorney was granted leave to withdraw, and the Wife failed to appear thereafter. A dissolution judgment was entered on the previously scheduled trial date in her absence. Nearly 16 months after its entry, the Wife filed a motion to vacate the dissolution judgment. Her motion was eventually granted, and a trial was had on the merits of the Husband's original petition. During the trial, the Wife claimed that the Husband had dissipated the sum of \$179,330.87 since the parties' separation. However, the trial court denied this claim, finding that the Husband had established that the monies were used in part to pay down the marital home mortgage arrearage that the Wife had failed to pay when she moved out, and for other expenditures that were consistent with the parties' spending habits during the marriage. Any lack of financial record-keeping on his part could be attributed to his reasonable belief that he did not need to track his spending after the parties' marriage was originally dissolved in May of 2009. The appellate court upheld the trial court's denial of the Wife's claim of dissipation against the Husband. All other aspects of the dissolution judgment appealed by both parties regarding maintenance and attorney's fees were also upheld by the appellate court.

*In re Marriage of Sather*, 2013 IL App (2d) 121420-U, Dec. 16, 2013

After trial, the court found that the clearest delineation of when the parties' marriage had irretrievably broken down was on April 18, 2007, when the Husband left the marital residence and did not return. The court found that the total amount of dissipation was \$107,766.43 and awarded half of the amount to the Wife. Further, the Wife received more assets than the Husband. On appeal, the Wife argued that the date of separation was in May of 2004 when Husband's affair with another woman was "in full bloom." The appellate court found that the trial court effectively found that there was a possibility of reconciliation until the Husband officially moved out of the marital residence in 2007. Therefore, the court found that the marriage was not clearly undergoing an irretrievable breakdown until the Husband left the residence and did not return. The Wife also argued that the Husband dissipated more assets than the \$107,766.43.

However, the appellate court found that the court did not abuse its discretion in the manner that it accounted for the additional dissipation through its property distribution.

#### **DIVISION OF PROPERTY (See also MAINTENANCE)**

*In re Marriage of Donze*, 2014 IL App (4th) 130677-U, April 11, 2014

In a dissolution proceeding, there was a dispute between Husband and Wife as to the allocation of two tracts of marital farmland property and as to the Wife's entitlement to maintenance. The Wife proposed that the tracts of land be divided between the parties with her receiving the tract on which the marital residence was located. She testified that she was emotionally attached to the property. She also proposed that she receive \$2,500 per month in maintenance. The Husband proposed that he be permitted to purchase both properties using other retirement assets, which he believed would eliminate potentially acrimonious future dealings with one another and would result in the Wife receiving a large cash settlement, thereby eliminating her need for maintenance. The Wife was not employed outside of the home but was actively engaged in farming. The Husband was employed outside of the home earning a gross annual income of \$73,000. The trial court chose to adopt the Wife's proposal regarding the division of the farmland property and she was awarded permanent maintenance in the amount of \$2,000 per month. The Husband appealed both issues. The appellate court ultimately upheld the trial court's decision, finding there to be no abuse of discretion in the property and maintenance awards.

#### **DIVISION OF PROPERTY**

*In re Marriage of Schlichting*, 2014 IL App (2d) 140158, Sep. 29, 2014

The trial court deemed Wife's membership in an LLC to be marital, awarded Husband, a non member, Wife's membership interest, and ordered Husband to pay Wife \$19,500 for her interest. The appellate court reversed and remanded the decision of the trial court, finding that by awarding Husband Wife's membership, the order violated the LLC's operating agreement. Therefore, the court abused its discretion in ordering Wife to convey her share of the LLC to Husband. Specifically, the LLC's operating agreement contained a transfer restriction that prohibited any member from selling to a non-member absent the unanimous written consent of the other members. Further, the LLC agreement required that the LLC buy out a divorcing member's interest. In its order, the trial court did not allow the LLC to buy out Wife's interest. Instead, it ordered Husband, a non member, to buy out her interest.

#### **DIVISION OF PROPERTY**

*In re Marriage of Thoele v. Lopez*, 2014 IL App (1st) 131460-U, Jan. 27, 2014 (See below)

#### **ESTABLISHMENT OF SECTION 503(g) TRUST (See also DIVISION OF PROPERTY, MAINTENANCE)**

*In re Marriage of Thoele v. Lopez*, 2014 IL App (1st) 131460-U, Jan. 27, 2014

A Husband appealed various aspects of a dissolution judgment including: the division of marital property, the award to Wife of both children's dependency exemptions, the award of maintenance to the Wife in the form of health insurance coverage for 5 years, and the requirement that Husband place his retirement account in a Section 503(g) trust for the benefit of the children. Regarding the court's requirement that the Husband establish a 503(g) trust for the benefit of the children using his retirement funds, the appellate court found that the imposition of such a trust was warranted because the evidence established that the Husband did not have a life insurance policy, that he was uninsurable due to health conditions and that he had recently liquidated other retirement accounts to pay attorney fees and personal expenses, which suggested that he might further liquidate his retirement assets. He was also unable to articulate a plan as to how he would support the children if he died or otherwise became unable to work. The appellate court further affirmed the trial court's decision regarding all other matters.

#### **EXCLUSIVE POSSESSION**

*In re Marriage of Engst*, 2014 App (4<sup>th</sup>) 131078, April 3, 2014

The Husband appealed the trial court's order denying his motion to strike and dismiss the Wife's petition for temporary exclusive possession of the marital residence and granting said petition. The appellate court affirmed the trial court's ruling.

First, the appellate court rejected the Husband's arguments that his motion to strike and dismiss the Wife's petition for exclusive possession should have been granted because the Wife's petition contained only vague and conclusory allegations and did not put him on notice of the specific claims she was to present in favor of exclusive possession. The appellate court held that the trial court did not err in denying the Husband's motion to strike and dismiss the Wife's petition because a 2-615 motion only addresses defects in pleadings. Here, the appellate court found that the Wife's petition for exclusive possession sought temporary relief. The appellate court distinguished between pleadings, which consist of a party's formal allegations of claims or defenses, and motions, which apply to the court for a ruling or order in a pending case. Here, the appellate court found that the ex-Wife's petition for exclusive possession should have been designated as a motion instead of a pleading and was not subject to dismissal pursuant to 2-615.

Next, the appellate court rejected the Husband's arguments that there was insufficient evidence to award exclusive possession because neither the Wife nor Husband sought an order of protection and there was no history of physical abuse. After reviewing the record, the appellate court determined that the trial court found the Wife's testimony credible and the children were being exposed to a negative situation that warranted exclusive possession, as the Wife and children were jeopardized by both spouses occupying the same residence. The appellate court found that the Husband was verbally and physically aggressive toward the Wife, some of the conflicts occurred in front of the children, and the Husband denied any negative impact on the children, who would cry and who had expressed that they did not like it when their parents argued. The appellate court held that physical violence need not be present to warrant relief and that the trial court had the authority to grant exclusive possession upon a showing that either the physical or mental well of the Wife or children was jeopardized. Overall, the appellate court affirmed the trial court's order granting the Wife's petition for temporary exclusive possession of the marital residence.

#### **FINAL AND APPEALABLE ORDERS**

*In re Marriage of Cooling*, 2014 IL App (2d) 130838-U, May 5, 2014

An agreed order was entered in a dissolution proceeding that addressed the Wife's waiver of maintenance and the division of property. It also stated that it was a final order and a "complete adjustment of the parties' property rights," and was to be incorporated by reference into any subsequent judgment for dissolution of marriage. Four years later, the Wife filed a notice setting the case for entry of a judgment for dissolution of marriage. The Husband responded by filing a petition seeking to revoke and/or modify the agreed order. The trial court denied the Husband's petition and entered a judgment for dissolution of marriage incorporating the agreed order into the judgment. On appeal, the Husband argued that the trial court's decision was in error because the agreed order was a temporary order and not a final and appealable order. He also argued that the trial court erred in valuing the marital property as of the date of the temporary order, rather than the date of entry of judgment. The appellate court disagreed, finding that, under the contract law, the Husband was bound by the agreed order even though it was not a final appealable order.

#### **FOREIGN JUDGMENTS**

*Marzouki v. Najar-Marzouki*, 2014 IL App (1st) 132841, May 15, 2014

A former Husband filed a petition to enforce the parties' French judgment for dissolution of marriage and a petition to establish child support in the State of Illinois. Thereafter, the former Wife filed a motion to allocate the parties' marital estate pursuant to the French judgment. The former Husband responded by filing a motion to dismiss, and at some later point, a motion for a stay and to enjoin discovery and trial on the former Wife's motion. He claimed that the French court had retained subject matter jurisdiction over the division of the parties' estate. The trial court denied both of the former Husband's motions, to which he responded by filing an interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(1). Because former Husband had been the party to initiate the action to enroll the French judgment in Illinois and because there were no pending proceedings before the French court, the appellate court affirmed the trial court's order denying the Husband's motions.



## **FORUM NON CONVENIENS**

*In re Marriage Beckman*, 2014 IL App (4th) 130446-U, Feb. 21, 2014

Wife appealed from the trial court's order denying her motion to dismiss the Husband's petition to modify custody of their daughter. The Wife argued that the case should have been transferred to Florida based on *forum non conveniens*. In the initial custody proceeding, Wife was awarded sole custody of the minor child. The Wife and the child lived in Florida. In December 2012, the Wife was arrested for cruelty toward a child and aggravated abuse in Seminole County. The child was placed in a foster home until she was released to the Husband, a resident of Illinois, in January 2013. The Husband filed an emergency order of protection and a petition to modify custody in Illinois. The Wife filed a motion to dismiss the motion to modify custody, arguing that the case should be heard in Florida. In coming to its decision, the trial court reviewed the factors of 750 ILCS 36/207. The court relied most heavily on factor one, which states, "whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child." The trial court found that Illinois was the best state to retain jurisdiction because Illinois was in the better position to protect the child from domestic violence. The appellate court upheld the decision of the trial court, finding that although the child resided primarily in Florida for eight years, the trial court found protecting the child from potential harm strongly favored Illinois retaining jurisdiction.

## **GRANDPARENT VISITATION**

*In re Isabella and Bethany*, 2014 IL App (2d) 140249-U, Sep. 9, 2014

Grandparents appealed the trial court's ruling modifying the visitation schedule by suspending grandparent visitation for 18 months and ordering that any visitation during that time period be in the best interests of the minors as determined by the children's Father. The appellate court affirmed the trial court's ruling.

The minor children had previously lived with their maternal Grandparents while Father was undergoing rehabilitation after a car accident, which ultimately killed the children's Mother. Subsequently, the trial court entered a number of orders adjudicating sole custody to the Father, setting forth a specific parenting schedule for the Grandparents' visitation, and later denying the Grandparents' visitation for 18 months after the trial court found the Grandparents interfered with the decisions of the remarried Father and his new wife as parents. The Grandparents argued on appeal that the trial court abused its discretion in denying visitation and their motion for reconsideration. The appellate court stated that the Grandparents entered into an agreed order granting sole custody to the Father and setting forth grandparent visitation that was to be set and/or modified pursuant to the best interests of the children.

Further, the appellate court held that the trial court appropriately determined what visitation schedule would be in the best interests of the children and weighed all of the factors set forth in section 602. Specifically, the appellate court found that it was not improper for the Father to limit visitation in the children's best interests due to the Grandparents' continued interference with the parent's decision making, unilateral choice of taking the children to the hospital because of concerns related to malnourishment, repeated attempts to involve DCFS, and a perceived ultimate desire to have guardianship or custody of the children. Moreover, the appellate court found that Skype visits with the Grandparents often agitated the children and interfered with their extracurricular and social schedules, the Grandparents' actions caused both financial and emotional distress to the family, and no evidence in the record supported the Grandparents' concern that the children were malnourished.

*Robinson v. Reif*, 2014 WL 6612596 (Ill.App. 4 Dist.), Nov. 24, 2014\*\*

Father appealed the trial court's decision granting visitation to the maternal grandparents. Following the death of the children's mother in a car accident, in which the Father was injured, the maternal grandparents had custody of the two minor children for 18 months. Upon Father's remarriage, he successfully regained custody of the children and moved out of state. In doing so, he cut off all contact with the maternal grandparents. On appeal, the Father argued that the maternal grandparents lacked standing under section 607(a-5)(1) of the Act. The appellate court found that the Father forfeited his standing argument by failing to raise it in a timely manner in the trial court. The court noted that even if the Father had preserved his objection under section 607(a-5)(1) of the Act, the record contained sufficient

evidence to support a finding that the Father unreasonably withheld visitation. Considering the fact that the maternal grandparents obtained custody of the children for 18 months after the death of the children's mother, and the intimate relationship they established with the children, it was unreasonable for the Father to completely cut ties with the maternal grandparents.

Father next argued that the maternal grandparents failed to rebut the statutory presumption that his actions and decisions regarding the grandparent's visitation were not harmful to the children's mental, physical, or emotional health. The Court found that the grandparents met their burden of demonstrating that Father's actions and decisions regarding visitation with the minor children were harmful to the children's mental, physical and emotional health.

## **HAGUE CONVENTION**

*Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, March 5, 2014

The parties resided in London from the birth of their child until the Mother left with the child for a women's shelter. Nine months later, the Mother left the United Kingdom and went to live with her sister in New York. The Father was unable to locate the child for 16 months following the removal. When he did discover the child's whereabouts, he filed a petition for the return of the child pursuant to the Hague Convention. Article 12 of the Hague Convention provides that if a parent files a petition within one year of the child's removal, the court is required to order the return of the child no matter what. After the one-year period expires, the child is still to be returned, unless the child has become settled in his or her new environment. Despite the Father's argument that the one-year period should be equitably tolled during the period the Mother concealed the child, the New York District Court denied the Father's petition on the basis that the child had become settled in New York. The Supreme Court granted certiorari to decide whether the Hague Convention's one-year period was subject to equitable tolling. According to the Supreme Court, unlike a statute of limitations that would prohibit the filing of a return petition after one year, the one-year period in Article 12 merely permits courts to give consideration to another factor – the child's interest in settlement - after that period has run. Therefore, equitable tolling was inapplicable and the District Court's decision was affirmed.

## **JURISDICTION, PERSONAL**

*In re Marriage of Lasota and Luterek*, 2014 IL App (1<sup>st</sup>) 132009, Aug. 13, 2014

Husband obtained a judgment for dissolution of marriage against his Wife in Poland where the parties had married, though they had later moved to Illinois. After the Polish judgment was registered in Cook County, the Wife filed a petition seeking her share of the marital property and an award of temporary maintenance and attorney's fees from the Husband. The Husband argued, however, that the Polish court and not the circuit court of Cook County had jurisdiction over their marriage and that *res judicata* barred the Wife's petition. The circuit court rejected the Husband's arguments, finding that because the Wife had not been served with process or appeared in the Polish case, jurisdiction existed in Cook County. The circuit court further ordered the Husband to pay temporary maintenance and interim attorney's fees and held the Husband in civil contempt when he failed to do so. Husband appealed from the contempt finding, alleging that it was void due to the circuit court's erroneous determination that the Wife had not appeared before the Polish court. He cited to examples in the Polish proceeding which he claimed to demonstrate that Wife had submitted herself to the Polish court's jurisdiction. Ultimately, the appellate court agreed with the circuit court that the evidence proffered by the Husband when properly translated, actually demonstrated that the Wife had objected to the Polish court's jurisdiction and at no time submitted herself to the Polish court for the purposes of the divorce.

## **JURISDICTION, SUBJECT MATTER**

*In re Marriage of Fabian and Blount*, 2014 IL App (2d) 140062-U, May 7 2014

A Husband appealed the trial court's order denying his motion to change venue and granting the Wife's petition for modification of custody, which alleged the child was physically and emotionally abused by the Husband. The appellate court affirmed the trial court's order because there was no report of the proceedings on the hearing for modification of child custody or bystander's report.

The Husband argued that he was no longer residing in Illinois and that Illinois was no longer the home state of the child, as he was granted custody in the initial judgment for dissolution of marriage and resided with the child in Virginia, and that evidence pertaining to the petition for modification of custody, including teachers, neighbors and friends who observed the Husband and the child would be in Virginia. The appellate court held that Illinois had exclusive and continuing jurisdiction under the UCCJEA because Illinois was where the initial custody determination was made and the Wife still resided in the state of Illinois.

Next, the appellate court affirmed the trial court's ruling as it related to the Wife's petition for modification of custody since the appellate court presumed the trial court conformed to the law and had a sufficient factual basis for denial of his motion to change venue absent a record or bystander's report, which were not provided by the Husband. Overall, the appellate court affirmed the trial court's ruling denying his motion to change venue and granting the Wife's petition for modification of custody.

*Marzouki v. Marzouki*, 2014 IL App (1st) 132841-U, March 31, 2014

The Husband filed an interlocutory appeal pursuant to Supreme Court Rule 307(a)(1) from an August 14, 2013 order denying his motion for a stay and to enjoin discovery and trial. He further appealed all underlying orders including a July 22, 2013 court order denying his motion to dismiss the Wife's motion to allocate the marital estate.

The court found that while it did have jurisdiction of the motion for stay because a stay order is immediately appealable under Rule 307(a)(1), the motion to dismiss is not appealable. An appeal under Rule 307 does not open the door to a general review of all orders entered by the trial court up to the date of the order that is appealed. A trial court's denial of a motion to dismiss is an interlocutory order, but it is not one that is final and appealable.

The Husband argued that the stay was necessary because there was a case pending in France, where the parties were divorced. The court found that the Husband failed to show that there was another action pending in France. The Husband failed to meet his burden on appeal of showing that the circuit court abused its discretion in denying his motion for a stay of the Wife's motion to allocate the marital estate.

*In re Marriage of Sheth*, 2014 IL App (1st) 132611, Aug. 22, 2014

Husband appealed the trial court's order allowing the Wife to change the custodian on four bank accounts in the children's names. The appellate court held that they lacked jurisdiction to hear the appeal because of the Husband's late filing of the notice of appeal.

Here, the trial court granted the Wife's motion to change the custodian on four bank accounts, and the Husband filed a motion to reconsider. The trial court ultimately denied the Husband's motion to reconsider on June 28, 2013. The notice of appeal had to be filed within 30 days after entry of the order disposing of the last pending post-judgment motion, and if the 30th day falls on a Saturday or Sunday, neither day is included in the 30-day deadline for filing. The appellate court held that the notice of appeal was due on July 29, 2013 and that the file-stamped notice of appeal was dated August 13, 2013, which is more than 30 days after the denial of the motion to reconsider. However, the Husband argued that the certificate of service stated that the notice of appeal was placed in the mail on July 22, 2013, within the 30-day time period, and should be considered filed within the applicable time period under Supreme Court Rule 373. While the Husband presented a certificate of service, the appellate court held that it was not notarized and did not meet the proof-of-mailing requirements set forth in rule 12(b)(3). Therefore, the appellate court was deprived of jurisdiction over the matter and dismissed the appeal.

*In re Marriage of Webb*, 2014 IL App (2d) 140688-U, Sep. 24, 2014

Husband appealed the trial court's order denying his motion to dismiss Wife's petition for dissolution of marriage based on *res judicata*. Previously, a trial court in another county had denied Wife's petition for dissolution of marriage due to her failure to produce sufficient evidence of mental cruelty. After the trial court denied Husband's motion to dismiss, he filed a second motion to dismiss the case under the doctrine of *forum non conveniens*. The appellate court held that it lacked jurisdiction to hear the appeal because Husband brought a petition for interlocutory appeal pursuant to Illinois Supreme Court Rule 306(a)(2) to seek review of the order denying his motion to dismiss under the doctrine of *forum non*

*conveniens*; however, the substance of his request on appeal addressed the denial of his motion to dismiss pursuant to the doctrine of *res judicata*.

Here, the appellate court found that the substance of the appeal was what controlled and not the caption of the appeal. Therefore, the appellate court had no authority to review an order denying the motion to dismiss pursuant to the doctrine of *res judicata* because Rule 306(a)(2) does not provide for appeal from such orders. As such, the appellate court was without authority to grant leave to appeal from the trial court's non-final order and dismissed the appeal.

## **MAINTENANCE**

*In re Marriage of Barker*, 2014 IL App (5th) 120511-U, June 19, 2014

The appellate court reversed the decision of the trial court to impute an artificially exaggerated level of yearly income to the Wife when determining her maintenance award. The Wife had left her job in New Jersey to marry the Husband. Husband was awarded custody of his three minor children from his previous marriage, and Wife became a stay-at-home mother to care for the Husband's three children and the child of this marriage. At the time of the dissolution, the Wife was 60 years old. The Wife had gone back to work in 2008 but was only earning \$18,385 per year. The court imputed an annual income to the Wife of \$50,000 and awarded her \$1,500 in monthly maintenance for 24 months.

On review, the appellate court found that the parties were married for 21 years and that the Wife left her job in another state to raise the Husband's three children from another marriage. When she did return to work, she found a job at the children's school and was able to maintain the same hours as the children. The appellate court found that without any reasonable explanation, the court erred when it imputed an income of \$50,000 to the Wife and did not make the award of maintenance permanent.

*In re Marriage of Heasley*, 2014 WL 6766653 (Ill.App. 2 Dist.), Dec. 2, 2014\*\*

Ex-Wife appealed the trial court's order terminating ex-Husband's maintenance obligation after a second review of maintenance following entry of the Judgment for Dissolution of Marriage. The appellate court vacated the trial court's order terminating maintenance and remanded the case for further proceedings.

Here, the ex-Wife was awarded rehabilitative maintenance in 2007 and a reconsideration of maintenance whereby the trial court reviewed the maintenance awarded on September 17, 2012. The appellate court held that the review that occurred on September 17, 2012 was a review proceeding and not a modification proceeding (which would have required a substantial change in circumstances). The appellate court referenced the trial court's order entered on November 18, 2010, which provided for a review of maintenance in 18 months, and specifically directed the ex-Wife to remain fully employed and seek promotions and better job opportunities to increase her income. The appellate court found that this language could be reasonably interpreted by the ex-Wife to mean that the review of maintenance was a limited review of only the ex-Wife's ability to remain employed and seek better job opportunities to increase her income, and not to seek further education. The appellate court held that the trial court ruled that the ex-Wife had remained fully employed without going back to school, had sought promotions by applying to a managerial position within the bank where she now worked and that she had made good faith effort to continue full-time employment at the bank. As such, the appellate court vacated the trial court's order terminating ex-Husband's obligation to pay maintenance because the trial court abused its discretion by failing to recognize the limited scope of review per the court order entered November 18, 2010, which set forth the terms of the review of maintenance.

## **MAINTENANCE (See also DISSIPATION, ATTORNEY FEES)**

*In re Marriage Berg*, 2014 IL App (3d) 130688-U, Aug. 13, 2014

## **MAINTENANCE**

*In re Marriage of Bernat*, 2014 IL App (2d) 121212-U, Feb. 26, 2014

**MAINTENANCE (See also PROPERTY AWARD, below)**

*In re Marriage of Brockus*, 2014 IL App (5th) 130540-U, Oct. 22, 2014

Husband appealed a judgment for dissolution of marriage, arguing that the trial court violated local rules by issuing the judgment more than 11 months after trial and that the court abused its discretion in dividing the property, designating certain stock as marital, awarding retroactive temporary maintenance to Wife when Husband was unemployed, awarding non-modifiable maintenance to Wife, and holding that such payments were non-taxable to Wife and non-deductible by Husband. The appellate court determined that no local rules were violated by the issuance of the judgment, the court did abuse discretion in designating the stocks as marital, and modified the judgment to this effect and affirmed the modified judgment.

The appellate court rejected Husband's argument that the judgment should be reversed on appeal due to a violation of a local court rule that states no judge shall keep a matter under advisement for a period of time greater than 90 days because he cited to no authority that entitled him to such relief. Next, the appellate court affirmed the trial court's division of property and the disproportionate award in assets because funds inherited by Husband were deposited into a joint account and were used to purchase the marital residence held in joint tenancy and because Husband failed to present any evidence to rebut the presumption that he gifted the inherited monies for the purchase of the marital residence. Further, the appellate court found the division of property was appropriate given the 38-year duration of the marriage, Wife's contribution to the marriage as a homemaker and caretaker of three children, the difference between Wife's part-time income of \$36,000 and Husband's full-time income in excess of \$100,000, and the lack of non-marital assets held by Wife versus Husband's non-marital assets valued at \$135,000. The appellate court also rejected Husband's arguments related to his payment of maintenance and found that the trial court's ruling was not against the manifest weight of the evidence. The appellate court found that the trial court did not intend the \$54,000 maintenance payment to be deductible by Husband and includible to Wife for income tax purposes and the appellate court found that the trial court did not abuse its discretion in making this decision based upon the language in section 71(b) and 215 of the US Code and that the definition of alimony or maintenance *does not* include all payments designated in a judgment.

The appellate court further reversed the trial court's ruling as to 326 shares of stock, which the trial court found were inherited by the husband and presumed to be marital property, due to his failure to present clear and convincing evidence otherwise. Here, the appellate court modified the trial court's ruling and designated the stock as non-marital. The appellate court held that the husband testified that the stocks were acquired through an inheritance, the husband did not contribute to the stock during the marriage other than by reinvesting dividends that would have been received, and he did not purchase any new stock during the marriage. As such, the appellate court modified the trial court's judgment regarding the stock and awarded the stock to the husband as his non-marital property. The appellate court affirmed the trial court's ruling after this modification to the judgment.

**MAINTENANCE**

*In re Marriage of Ciszewski*, 2014 IL App (1<sup>st</sup>) 130004-U, Jan. 23, 2014

The former Husband appeals from the trial court's order granting the former Wife's motion to extend maintenance for two years and holding that the maintenance would be reviewable after two years.

The appellate court found that the continuation of maintenance was proper in this case, as this was a 17-year marriage, the Wife stayed home during the marriage to raise the children and she was unable to further her career. After the divorce, the Wife attempted to secure employment by applying to five jobs per week. Further, she was attempting to improve her skills by attending school to obtain her associate's degree in accounting. Therefore, she was taking steps toward financial independence.

*In re Marriage of Cook*, 2014 IL App (2d) 130796-U, March 13, 2014

The trial court denied a former Husband's petition seeking to terminate maintenance payments to his former Wife, finding that the former Wife was not cohabitating with another on a residential, continuing and conjugal basis as alleged. The trial court heard evidence that the former Wife had been exclusively dating her boyfriend for a number of years. However, the boyfriend lived out of state and he and the

former Wife only saw each other on alternating weekends and for a few weeks during the year. The former Wife also testified regarding trips to visit the boyfriend, including purchases she made for him while visiting him. Specifically, the former Wife purchased her own car and a set of golf clubs to keep at the boyfriend's house, and paid for several shared expenses during trips with the boyfriend, including hotel rooms, meals, entertainment costs and the like. There was no evidence that the former Wife and the boyfriend had intermingled their financial affairs. The appellate court ultimately affirmed the trial court's decision, finding the trial court did not abuse its discretion in deciding that the former Husband failed to meet his burden of establishing that the former Wife had established a *de facto* marriage pursuant to the applicable statutory factors.

**MAINTENANCE (See also DIVISION OF PROPERTY)**

*In re Marriage of Donze*, 2014 IL App (4th) 130677-U, April 11, 2014

**MAINTENANCE (See also NON-MARITAL INCOME, ATTORNEY FEES)**

*In re Marriage of Foster*, 2014 IL App (1st) 123078, Aug. 22, 2014

**MAINTENANCE**

*In re Marriage of Gunn*, 2014 IL App (3d) 130068-U, Feb. 7, 2014

The Husband appealed the trial court's order awarding permanent maintenance to Wife, claiming that the award was excessive and should have been temporary instead of permanent. On cross appeal, the Wife argued that the trial court erred in reducing a permanent maintenance award from \$600.00 per month to \$500.00 per month after the Husband filed a motion to reconsider.

After a 25-year marriage where the Wife earned a net income of \$42,000.00 as a licensed clinical counselor at a church and the Husband earned a net income of \$57,750.00 as a self-employed salon owner and hairdresser, the trial court awarded the Wife child support, divided the marital property giving the Wife an advantage of approximately \$26,000.00 as an award of maintenance in gross, and awarded the Wife permanent maintenance of \$600.00 per month to equalize the parties' incomes. The appellate court found that the trial court did not abuse its discretion in the award of permanent maintenance due to the trial court's findings after review of the factors in section 504 of the Illinois Marriage and Dissolution of Marriage Act. Specifically, the appellate court referenced the fact that the Husband regularly overspent his income, which failed to support his claim that he could not meet monthly expenses; the trial court allocated property to the Husband which would eliminate some of his debts thereby reducing his monthly expenses; Husband's future earning potential was significantly greater than the Wife's; and Wife could not maintain the standard of living established during the marriage without a permanent maintenance award. The appellate court affirmed the trial court's award of permanent maintenance in the sum of \$500.00 per month.

**MAINTENANCE (See also CONTEMPT, ATTORNEY FEES)**

*In re Marriage of Hardy*, 2013 IL App (4th) 130027-U, Nov. 25, 2013

A Wife appealed the trial court's award of 24 months of rehabilitative maintenance where the record revealed that she was 47 years old, had only a GED, and was a recovering substance abuser with a litany of medical problems who had recently started a business cleaning houses earning approximately \$11,000 per year. Conversely, the Husband had a bachelor's degree in engineering and was working in the aviation and aircraft industry, earning approximately \$125,000 per year. Based on these facts, the appellate court determined that the record lacked any evidence to support the notion that the Wife would be able to support her reasonable needs, or have achieved a livelihood commensurate with the standard of living enjoyed during the parties' 23-year marriage at the conclusion of a 24-month rehabilitative maintenance period. The appellate court held that the rehabilitative maintenance award to the Wife was an abuse of discretion and that the Wife should be awarded permanent maintenance. The appellate court also held that because the record clearly demonstrated that the Wife had been borrowing money from friends to get by, and the Husband had incurred a significantly greater amount in attorney's fees, and because the sole asset awarded to the Wife was a \$16,800 401(k) on which she would have to pay a tax penalty in order to liquidate it to pay attorney's, it was also an abuse of discretion for the trial court to deny the Wife's request for attorney's fees. Rather than remanding the matter for further hearing, the

appellate court reversed the trial court's decision and directed the Husband to be responsible for \$3,150 of the Wife's attorney fees, plus the costs of the appeal.

As to the Husband's cross-appeal, the appellate court found that because of the conflicting evidence offered regarding the Wife's living arrangements and the relationship with her boyfriend, it was reasonable for the trial court to find that he had failed to meet his burden of demonstrating that the Wife was cohabitating on a residential, continuing conjugal basis. This portion of the trial court's judgment was affirmed.

*Kawiecki v. Kawiecki*, 2013 IL App (1st) 121250-U, Dec. 23, 2013

In an appeal from a judgment for dissolution of marriage, a Husband argued that the trial court erred in awarding maintenance in the amount of \$800 per month to the Wife because the maintenance award, in combination with his payment of child support, resulted in the Wife receiving 63.5% of the total income earned by the parties, despite the fact that the Husband shares equal parenting time and was required to contribute to half of the children's expenses. The appellate court found that, even if it was true that the Wife was receiving a greater share of the available income of the parties, the Husband was unable to establish that the trial court abused its discretion in awarding the Wife maintenance. The appellate court acknowledged that this was a 17-year marriage, the Wife had acted as homemaker and stay-at-home mom while the Husband was the primary breadwinner, and the parties had substantially disparate incomes. Thus, the trial court was correct in finding that the statutory factors of Section 504 of the Illinois Marriage and Dissolution of Marriage Act weighed in the Wife's favor with regard to award of maintenance.

The Husband also challenged certain other aspects of the dissolution judgment, including the allocation of attorney fees, money advances made to the Wife, credit card payments made by the Husband, the requirement that Husband is to refinance the marital home, and in later entering a finding of contempt against him for his failure to pay the Wife 55% of her share of the marital residence. The appellate court ultimately determined that the trial court did not abuse its discretion in any regard, affirming all aspects of the judgment and subsequent contempt order.

*In re Marriage of Micheli*, 2014 App (2d) 121245, July 31, 2014

A Husband and Wife filed cross appeals from a dissolution judgment as to the issues of the award of maintenance to the Wife, the award of all of the Husband's unvested stock options and restricted stock units to the Husband, the award of a \$10,000 contribution from the Husband toward the Wife's attorney fees and subsequent credit to the Husband for the payment of \$5,000 toward the child representative's fees, and the finding that the diamond from the Wife's engagement ring was the Husband's non-marital property. Regarding the issue of maintenance, the Husband was ordered to pay reviewable maintenance for a period of 7 years to the Wife in the amount \$3,700 per month, plus 20% of all future bonuses. On appeal, the Husband argued that the uncapped maintenance amount based on a percentage of future bonuses was an abuse of discretion because it had no relation to the Wife's standard of living during the marriage. The appellate court agreed that requiring the Husband to pay 20% of his bonuses as uncapped maintenance would result in a potential windfall to the Wife that has no evidentiary relation to her present needs or to the parties' standard of living during the marriage. Accordingly, the trial court's bonus percentage order was reversed and remanded with an instruction for the trial court to either recalculate the monthly maintenance amount, or to cap the maintenance amount from the Husband's future bonuses. As to the remaining issues, the appellate court reversed the trial court's award of 100% of the unvested stock options and restricted stock units to the Husband, reversed the trial court's order giving a \$5,000 credit to the Husband towards his obligation to contribute to the Wife's attorney fees, and affirmed the trial court's award of the diamond from the Wife's engagement ring to the Husband because the appellate court lacked jurisdiction to address the issue as a result of the Wife's failure to raise it in her notice of cross-appeal.

*In re Marriage of Mirea and Nicolae*, 2014 IL App (2d) 130323-U, Jan. 24, 2014

The Husband appealed from the trial court's order barring both parties from receiving maintenance, and he appealed from a post dissolution order awarding attorney fees to his former attorneys.

In this case, the premarital agreement, although awkwardly phrased, unambiguously reflected intent of the parties to waive maintenance. The Husband argued that the Wife waived the paragraph of the premarital agreement in which they were barred from maintenance when an Agreed Court order was entered providing she was temporarily responsible for the payment of the mortgage. The court properly found that this was a temporary order and did not constitute the payment of maintenance.

The appellate court also found that the award of attorney fees was correct as the attorney testified as to her work on the case, level of expertise, fee agreement, and billing records. The Husband only testified as to a few matters concerning which he had disagreed with his attorney. Therefore, the trial court did not abuse its discretion.

*See also In re Marriage of Thoele v. Lopez*, 2014 IL App (1st) 131460-U, Jan. 27, 2014

*In re Marriage of Viridi*, 2014 IL (3d) 130561, June 24, 2014

The appellate court held that the former Wife's change in circumstances was not sufficient to justify a modification of maintenance. At the time of the divorce, Wife was awarded \$1.7 million in assets and maintenance in the amount of \$10,000 per month for 10 years. Her maintenance was later modified to \$1,500 per month, as Husband had retired. The Court found that although her retirement accounts had significantly decreased, this did not result in a substantial change in circumstances. The court found that it was the Wife's lack of financial planning that caused her to draw down her retirement accounts. Further, the court found that the Wife did nothing to become self-sufficient. Instead, she continued to operate a business at a loss. The appellate court specifically stated, "*she elected to throw off her life jacket and ride a sinking ship into the deepest abyss of the sea.*"

#### **MARITAL SETTLEMENT AGREEMENTS**

*In re Marriage of Mitchell*, 2013 IL App (2d) 130303-U, Nov. 20, 2013

A Husband appealed from the trial court's determination that a marital settlement agreement (MSA) was valid and enforceable. After several months of negotiation regarding the MSA, the Wife's attorney emailed an MSA that had been signed by the Wife to the Husband's attorney. Later that day, the Husband met with his attorney, made three handwritten changes, initialed them and signed this revised version of the MSA. His attorney then emailed the revised MSA to the Wife's attorney. Upon receipt, the Wife's attorney sent the revised MSA to the Wife and then left the office for the weekend. Her office received the MSA signed and initialed by the Wife later that evening. The Wife's attorney claimed that she communicated the Wife's acceptance of the revised version of the MSA to the Husband's attorney over that weekend. Conversely, the husband's attorney claimed that the parties and attorneys had further discussions regarding additional changes to the MSA and it was never the parties' intention that the revised, signed version of the MSA was the final version.

On appeal, the Husband first argued that there had been no acceptance of what he dubbed his "counter offer" (i.e. the revised MSA) because of these continued communications. Because neither party knew at the time the MSA was executed that changes in the Husband's compensation structure would result in him being obligated to pay the 2011 taxes earlier than anticipated and the parties had continued to communicate over the weekend about necessary changes to the MSA regarding this issue, he also claimed a material mistake of fact warranted his rescission of the MSA. He also contended that the revised MSA lacked adequate consideration, that its terms were unconscionable, and that he was under duress when he signed it because the Wife had been threatening to sue him and expose him as a poor investor.

The appellate court disagreed with the Husband, ultimately affirming the trial court's decision that the signed, revised MSA was valid and enforceable. The Wife's signature constituted valid acceptance, despite any subsequent communications regarding the Husband's advanced payment of 2011 tax liability because the MSA provided that the Husband would pay the taxes regardless of when they came due. Also, the Wife's waiver of her right to sue the Husband for his investment losses of the family's funds was of sufficient value to constitute adequate consideration. Finally, the appellate court also recognized that the MSA had been negotiated for several months between represented parties, and so the mere fact that the marital estate was divided 80%/20% in the Wife's favor, did not make the agreement unconscionable.



## **MODIFICATION OF CUSTODY**

*Haake v. Wehking*, 2014 IL App (5th) 130545-U, April 4, 2014

Ex-Wife appealed the decision of the circuit court awarding primary physical custody of the minor child to the ex-Husband. The parties had 50/50 joint custody of the minor child. The ex-Wife filed a petition for modification seeking sole custody. She alleged that she was moving two hours away from the parties' marital home and that she wished to enroll the child in kindergarten at a local school near her new residence. Wife had also remarried and alleged that she and her new Husband would be able to leave their jobs at a moment's notice if the child needed to be picked up from school. She described the home and the school the child would be attending. The ex-Husband filed a motion for sole custody and alleged that the child had more stability in his home as this is where the child grew up. At the hearing, he testified that he recently broke up with his girlfriend of two years, that he was looking for a new job, and that he was considering jobs out of state. He also testified that he had punched a hole in the wall and that he was arrested for DUI. The trial court found that the parents should have joint custody of the child, with ex-Husband having primary residential custody subject to the ex-Wife's weekend parenting time.

On appeal, the court found that the ex-Husband's home did not provide more stability. In light of the fact that he was considering a move and that he had broken up with his girlfriend, it was clear that this was an abuse of discretion. Further, the child had become acclimated to the ex-Wife's residence as she had now been living there for six months and the child was attending preschool where the ex-Wife lived. Further, the appellate court found that it was an abuse of discretion to not weigh the fact that the ex-Husband had punched a hole in the wall during an argument while the child was present and had been found guilty of DUI. While the court did state that people make mistakes, the court went on to say that these things matter when custody can be awarded to either party. Therefore, the appellate court reversed the decision of the lower court.

## **MODIFICATION OF SUPPORT AND RULE TO SHOW CAUSE**

*In re Marriage of Tabaczyk*, 2013 IL App (2d) 130051-U, Jan. 27, 2014

A Husband appealed the trial court's order granting the Wife's petition for rule to show cause, amended petition for rule to show cause, and mittimus for contempt for his failure to pay child support and maintenance and other miscellaneous children's expenses, denying his petition to modify the judgment to reduce his child support and maintenance obligations, denying his petition to terminate maintenance, and denying his motion to reconsider his petition to modify child support and maintenance. The appellate court affirmed the trial court's rulings.

On appeal, the appellate court held that the Husband did not meet his burden of proof in establishing a substantial change in circumstances because he failed to produce evidence to substantiate his claim that his income had been reduced. While the Husband did establish that he lost his job through no fault of his own, the appellate court held that a change in circumstances, such as the involuntary loss of a job, does not necessarily affect a person's ability to meet a support obligation, especially where a person continues to have the financial ability to make considerable purchases. Here, in spite of having a child support obligation, the Husband purchased a condominium, a 50% interest in a 7-Eleven franchise (and expressed a desire to obtain more stores), and a new car and continued to travel. In addition, the appellate court found that the Husband's purported efforts to obtain employment were not convincing as he only applied to federal government jobs and did not apply for any positions in the private sector, despite having experience in banking and finance law. Further, the Husband argued that the trial court erred in failing to hear evidence on the Wife's employment status and health as it relates to the modification of maintenance. However, the appellate court determined that the trial court properly denied testimony from the Wife regarding these issues because the motion to modify dealt only with the Husband's change in circumstances and not the Wife's.

The appellate court also rejected the Husband's argument that the trial court should have terminated maintenance. The appellate court found that while the trial court warned the Wife that her lack of effort to seek employment would work against her when the maintenance award was reviewed, employment or lack thereof of a spouse is only one factor to consider in determining whether to modify maintenance. Here, the trial court properly found that the maintenance should continue and be reviewed instead of

terminated based upon the long-term duration of the marriage, the Wife's role as a stay-at-home parent and the Husband's failure to comply with the maintenance obligation.

**MOOTNESS (See also MAINTENANCE)**

*In re Tahseen*, 2013 IL App (2d) 130738-U, Dec. 23, 2013

A Husband raised two issues in an appeal from a judgment for dissolution of marriage. The first was the trial court's suspension of his visitation with his minor daughter, which he claimed was an abuse of discretion due to the trial court's failure to make a finding of substantial endangerment. Thereafter, both parties filed motions to supplement the record on appeal with an order entered by the trial court granting the father with unsupervised visitation with the child two days per week. The Wife contended that the visitation portion of the appeal had become moot as a result of the temporary visitation order. Over the father's objection, the appellate court agreed with the mother and deemed this portion of the father's appeal moot because there was no longer an "actual controversy" regarding the father's suspension of visitation in need of resolution by the appellate court.

The Husband also challenged the trial court's award of maintenance to the Wife in the amount of \$1,000 per month for 2 years. He argued that because the Wife was a physician who had earned approximately \$200,000 per year during the 5 years she previously worked for a medical group, and that her income from her own medical practice was increasing until she filed for divorce, that the trial court abused its discretion in awarding her maintenance. Taking into consideration that the trial court found evidence of the Wife's worsening medical condition to be a justifiable cause for her recent decline in income, the appellate ultimately affirmed the trial court's award of maintenance.

See also **MAINTENANCE** *In re Marriage of Hanusin*, 2013 IL App (2d) 130339-U, Nov. 20, 2013

**MOTION TO VACATE**

*In re Marriage of Harnack and Fanady*, 2014 WL 6612882 (Ill.App. 1 Dist.), Nov. 21, 2014\*\*

A Husband appealed the trial court's entry of a default judgment for dissolution of marriage eight months after entry. After the Wife filed a petition for dissolution of marriage, the Husband stopped participating in the proceedings when his counsel was granted leave to withdrawal and he was ordered to file an appearance on his own behalf. However, Husband failed to do so and a default judgment was entered allocating the parties' property and awarding support to the Wife. While the divorce case was pending, the Husband's company was involved in litigation against Jerome Israelov in chancery court regarding the purchase of a membership seat on the Chicago Board of Options Exchange (CBOE). The trial court consolidated the pending chancery proceedings with the divorce case.

The trial court entered a default judgment and escrowed 40,000 shares of stock pending the outcome of the chancery proceedings, and awarded the Wife specific shares of stock as her marital portion of said shares. The trial court found that the Husband, while choosing not to participate in the divorce proceedings, had obtained a religious divorce in the Greek Orthodox Church and an ex parte judgment in Florida. Further, after entry of the default judgment, the Husband directly violated the terms of the judgment by transferring title of the marital residence from his business trust to a separate trust, naming his father and friend as beneficial trustees, instead of transferring title to his Wife. The Husband also attempted to file numerous actions against the Wife, her attorney, and the Cook County judge who entered the default judgment in both federal court and chancery court, but the complaints were ultimately dismissed.

On appeal, the Husband argued that the trial court erred in denying his section 2-1301(e) motion to vacate because of the Husband's failure to file an appeal within 30 days of entry of the default judgment, and denying his section 2-1401(a) petition to vacate because of the Husband's lack of diligence. The appellate court affirmed the trial court's ruling and interpretation of section 2-1301(e), stating that this statute did not apply to the situation because the default judgment was a final order that fully allocated the parties' estate and the Husband failed to file an appeal of the final order within 30 days. The appellate court rejected the Husband's argument that the default judgment was not a final order because it reserved Israelov's claim to 40,000 shares of stock pending the outcome of the chancery proceedings. The appellate court held that the court did not reserve determining the allocation of the shares and the fact that Israelov's claim remained unresolved had no impact on the finality of the default judgment

entered. While the divorce petition and the chancery proceedings involving Israelov dealt with the shares of stock after purchase of a CBOE seat, the appellate court found that the consolidation was simply for convenience and Israelov did not become a party to the pending divorce. Further, the appellate court found that it would not be reasonable for the trial court to vacate the default judgment because of the Husband's failure to participate in the proceedings for 15 months, requiring the entry of injunctive orders to stop disposing of marital property and his egregious, contemptuous behavior throughout the case in failing to abide by court orders.

Next, the appellate court rejected the Husband's arguments that the default judgment should be overturned pursuant to section 2-1401 because he had no standing to argue that the judgment negatively impacted his business partners, failed to provide an adequate affidavit supporting matters not of record, and failed to show by a preponderance of the evidence that he exercised due diligence. In addition, the appellate court found that the Husband's assertion that the judgment was uneven and unfair regarding the amount of CBOE stock he owned was not a valid basis to vacate the default judgment.

In sum, the appellate court affirmed the trial court's denial of the Husband's motion to vacate the default judgment pursuant to section 2-1301(e) and 2-1401, but remanded the case for further direction regarding the source of the 40,000 shares of CBOE stock and stock award.

*In re Marriage of Little*, 2014 WL 7243190 (Ill.App. 2 Dist.), Dec. 22, 2014\*\*

Husband appealed the trial court's dismissal of his petition under 2-1401 of the Code of Civil Procedure in which he sought to vacate his Marital Settlement Agreement. In his Section 2-1401 petition, Husband alleged that while the dissolution proceedings were pending, the Wife transferred assets belonging to the marital business to her brother and his business. Husband alleged that the Wife testified to the contrary during the dissolution proceedings in 2012. The Husband alleged that he learned of the transfer when his ex-Wife filed a two-count complaint, alleging a breach of contract against her brother's business. In her petition, she alleged that she helped form her brother's business in 2011 and that she was to become a 40% owner after her divorce. The Wife moved to dismiss the Husband's petition under Section 2-615 of the Code. The trial court granted the motion to dismiss, with prejudice.

On appeal, the appellate court found that the Husband sufficiently alleged a meritorious claim. The court further held that the Husband sufficiently alleged due diligence in presenting and filing the claim. The appellate court held that the Husband's petition was sufficient to survive a motion to dismiss under Section 2-615 and the case was remanded for further proceedings.

*In re Marriage of Lyman*, 2014 WL 6756013 (Ill.App. 1 Dist.), Dec. 1, 2014\*

The Wife and Husband cross-appealed the trial court's order dismissing the Wife's petition to vacate a marital settlement agreement and allowing the Wife leave to amend her section 2-1401 petition. The appellate court affirmed the trial court's denial of the Wife's petitions to overturn and vacate the agreement, vacated the trial court's order as it related to an award of Supreme Court Rule 137 sanctions to the Husband, and found that the trial court abused its discretion by allowing the Wife leave to amend her petition to vacate under section 2-616(a) of the Illinois Code of Civil Procedure.

Here, the Wife argued fraud and breach of the marital settlement agreement. Specifically, the Wife argued that fraud was perpetrated on her because the Husband informed her that his businesses were ceasing to operate and would lose value, yet after entry of the judgment for dissolution of marriage, Wife discovered the following: (1) Husband received a \$1.7 million distribution on September 30, 2009 from his business; (2) Husband failed to disclose bank accounts held by the company, including \$4 million in one account; and (3) the 2009 general ledger of the company revealed \$9 million in cash. The Wife argued that the trial court erred when it found as a matter of law that the September 30, 2009 distribution was a business asset instead of the Husband's income and failed to vacate the judgment. The appellate court rejected the Wife's argument because the settlement agreement specifically stated that the Husband need not disclose the value of his interest in the company as the parties bargained for a payment of \$475,000 to Wife for the anticipated final distribution from the Husband's company. The appellate court also affirmed the trial court's application of res judicata as the trial court entered a final judgment and settlement agreement and the Wife could not re-try the same issues as they could have been addressed at the time of entry of the agreement. The appellate court also rejected the Wife's assertion of fraud because the Wife could have discovered information about the Husband's misrepresentation of his assets

through discovery (she was represented by counsel and hired an expert to value the business) prior to accepting the Husband's representation of financial disclosure and entering into a settlement agreement.

The appellate court found that the trial court abused its discretion by allowing the Wife to amend her petition to vacate, as she failed to meet the legal requirements set forth in Section 2-616(a) and had not demonstrated that the proposed amendment would cure a defect in her pleading. The appellate court found that the Wife's proposed amendment simply reasserted her breach of the marital settlement agreement claim by pasting the same language she had previously included in a prior petition, which had already been dismissed by the trial court for failure to state a cause of action. As a result, the appellate court ruled that the trial court abused its discretion by allowing the Wife leave to amend her second amended 2-1401 petition to vacate the settlement agreement.

The appellate court also remanded the case for further proceedings on an award of Supreme Court Rule 137 sanctions, as more information was needed regarding the reason Wife's counsel redacted letters for the trial court's consideration and an evidentiary hearing had to take place. Ultimately, the appellate court affirmed the trial court's decision to dismiss the Wife's amended and second amended 2-1401 petitions, reversed the trial court's decision to allow the Wife leave to file a second amended 2-1401 petition, and vacated the trial court's award for sanctions and remanded that matter for further proceedings.

*Zurita v. Zurita-Spiller*, 2014 WL 6908289 (Ill.App. 1 Dist.), Dec. 5, 2014\*

The appellate court vacated the trial court's order finding the Husband in civil contempt for failure to pay child support and comply with discovery. The appellate court vacated the trial court's ruling because the Husband was entitled to have his health insurance premiums deducted from his net income when child support was calculated and these premiums were never deducted by the trial court. In addition, the appellate court supported the trial court's order to the Husband to comply with the Wife's discovery requests found no abuse of discretion where the trial court ordered the Husband to comply with said discovery requests.

The appellate court reversed the trial court's finding of civil contempt because the petition for rule to show cause filed by Wife failed to seek a contempt finding for non-payment of extracurricular activities, miscellaneous school expenses and uncovered medical expenses. The appellate court held that the trial court's order related to the Husband's payment of insurance and medical expenses was ambiguous, as it did not set forth the specific amounts that Husband was to pay or the date by which he was required to make such payments. The appellate court also accepted the Husband's argument that any overpayments made to the Wife should be credited against any child support arrearage and that the trial court must determine what overpayments occurred, if any.

Ultimately, the appellate court found that the trial court's contempt order was void with regard to the discovery violation and also void as to the child support because the order failed to contain any sanction or penalty designed to compel future compliance with the order and contained no instruction as to how he may purge himself of the contempt causing the sanctions to be lifted. In sum, the appellate court vacated the finding of contempt and found that the arrearage for child support was improperly calculated and remanded the case for further proceedings to calculate the appropriate temporary support amount and the arrearage, if any.

*O'Relly v. Stern*, 2014 IL App (1st) 130434-U, April 10, 32014

Wife appealed the trial court's order denying her petition to vacate the final judgment for dissolution of marriage. During the course of the proceedings, both parties were represented by counsel. The Wife was awarded sole custody of the minor child and the parties' property was divided. After entry of the final Judgment, the Wife filed her section 2-1401 petition alleging there was fraudulent concealment during the proceedings and a number of other issues. The court denied the petition and issued a 26-page written order after a hearing on the petition.

On review, the appellate court held that the Wife failed to supply an adequate record in that it contained no transcript of the evidentiary hearing on her petition. The appellate court therefore relied on the thorough 26-page report of the trial court. The trial court specifically found that during the hearing on the petition to dismiss, the Wife blamed herself and her attorneys for failing to discover facts that she

admitted were easily discoverable. The appellate court found that section 2-1401 does not afford a litigant remedy whereby he may be relieved of the consequences of his own mistake or negligence.

*In re Marriage of Vargo*, 2014 IL App (5<sup>th</sup>) 140012-U, June 13, 2014

The appellate court held that the trial court properly granted the Husband's Section 2-1401 petition to vacate the marital settlement agreement and joint parenting agreement on the basis of fraudulent inducement.

In this case, the Wife indicated to the guardian *ad litem* and the Husband, and her counsel sent a letter stating, that she had no plans of moving with the minor child. Five months after entry of the judgment for dissolution of marriage, the Wife filed a petition for modification indicating that she accepted employment in Chicago (about 5 hours away from her current location). Husband then filed his motion under Section 2-1401. The Husband testified that he relied on the Wife's statements that she would not move when he entered into a parenting agreement with her. He testified that he would not have entered into the parenting agreement with the Wife had he known that she had plans to move. During the hearing, it became clear that Wife had intentions to move while she was making the statements that she was not going to move. Therefore, the appellate court found that the Husband reliance on Wife's statements was reasonable and that he suffered damages as a result.

*In re Parentage of Greyson*, 2014 IL App (2d) 140380-U, Sep. 15, 2014

Three days prior to the date a custody trial was set to commence, a *pro se* Mother filed a motion to continue the trial, alleging that she had been in an inpatient rehabilitation program and that a continuance was necessary for her to adequately prepare for trial. The trial court denied the Mother's motion for the continuance, finding that she had failed to exercise due diligence in filing her motion because the trial had been set prior to the Mother voluntarily entering the inpatient program. On the date of the trial, the Mother failed to appear, but her friend appeared and reported to the court that the Mother was in the hospital due to a panic attack. The trial proceeded in her absence and a judgment was entered awarding sole custody to the Father. Thereafter, the Mother retained counsel and filed a motion to vacate the custody judgment pursuant to Section 2-1301(e) of the Code of Civil Procedure, which was denied by the trial court. The Mother then appealed. She argued that the trial court applied the wrong legal standard of proof in denying her motion to vacate because it improperly held her to the standard of proof set forth in Section 2-1401. However, the appellate court found that the trial court had properly treated the motion under the correct standard of proof and, thus, did not abuse its discretion in denying the Mother's motion to vacate.

## **NAME CHANGE**

*McManemy v. Weber*, 2014 IL App (5<sup>th</sup>) 130519-U, July 22, 2014

The Father appealed from a circuit court order denying his petition for change of name of his minor son. The appellate court found that the lower court applied the incorrect statute and burden of proof. Under Illinois law, a party can seek a name change pursuant to both the Code of Civil Procedure and the Illinois Marriage and Dissolution of Marriage Act. The Father brought his Petition under the Code of Civil Procedure. The standard to change a name under the Code of Civil Procedure is clear and convincing evidence. Therefore, the trial court found that the Father did not meet the standard and denied his petition. The appellate court found that the standard of review under the IMDMA is the best interest of the child. The appellate court found that a noncustodial parent is not authorized to bring a petition to change their child's name under the Code of Civil Procedure. On the other hand, a name change may be sought through the court with jurisdiction over custodial matters because "changing a child's name is a matter incident to the custody of a child." The decision of the lower court was reversed and remanded to the trial court with directions that the name change be determined pursuant to the proper standard.

## **NON-MARITAL INCOME (See also MAINTENANCE, ATTORNEY FEES)**

*In re Marriage of Foster*, 2014 IL App (1st) 123078, Aug. 22, 2014

Husband and Wife filed cross-appeals claiming a number of errors by the trial court including the classification of the Husband's non-marital property, the award of maintenance to the Wife and the contribution to attorney fees by Husband to Wife.

During the trial, the court classified a Scottrade account and awarded the value to the Husband. The court valued the account at \$448. The Wife argued that the account should have been valued at \$178,993, and had the account been properly valued, she would have received a greater share of the marital estate. The Husband argued that the Scottrade account was actually his non-marital account and that the trial court improperly classified the account as marital. On appeal, the court found that the account was in fact the Husband's non-marital account. The evidence at trial showed the Husband used a marital account as a conduit to transfer payment from a non-marital asset into the Scottrade account. The Scottrade account was opened after the breakdown of the marriage, and the Wife's name was not on the account. The appellate court found the non-marital income was easily identifiable, and the Husband's marital income was completely exhausted after paying for marital expenses. Therefore, the appellate court found that the non-marital inheritance was not transmuted in marital property when it was deposited into a marital account. Based on this error, the case was remanded to the trial court to determine the division of assets, and the award of maintenance and attorney fees.

The appellate court also ordered the case to be remanded for the trial court to consider the issue of the Husband's dissipation of his non-marital estate. The court found that section 503(d)(2) allows the trial court to consider the dissipation of non-marital assets when allocating the marital assets.

With regard to maintenance, the appellate court held that a spouse is entitled to maintenance in an amount sufficient to maintain the standard of living the parties enjoyed during the marriage, if the providing spouse has the means to provide for the other spouse without compromising his own needs. The appellate court also found that section 504(a) does not differentiate between marital and non-marital income. It merely states, "Maintenance may be paid from the income or property of the other spouse."

#### **ORDERS OF PROTECTION (See also MODIFICATIONS OF CUSTODY, VISITATION)**

*Dawn W. v. Michael W.*, 2014 IL App (5th) 130430-U, Jan. 22, 2014

The trial court issued a plenary order of protection against a Father, and awarded the Mother the physical care and possession of the parties' minor children, with the Father having supervised visitation. The Father appealed, alleging that the trial court's order was against the manifest weight of the evidence because its findings did not comply with Section 214(c)(3) of the Illinois Domestic Violence Act of 1986, because the Mother had been improperly permitted to use the order of protection to modify custody without meeting the standards set forth in Section 610(b) of the Illinois Marriage and Dissolution of Marriage Act (The Act) and because there was an insufficient finding of fact to support supervised visitation. However, during the hearing on the plenary order of protection, the Mother testified that when she was picking the children up from the Father's house for her visitation the children told her that they had found the Father passed out drunk the night before and had gone home with one of the Father's neighbors when they were unable to wake him up. She also testified that one of the children told her that the Father had "stepped on her" when she asked him for a fudgsicle and told the child that, "she couldn't have one until her Mother paid him the money she owed him." The Father also told the child that her Mother was a "fucking bitch" and "wasn't her real mom." The Mother found bruises on the child's body that were consistent with her story. The Father testified similarly to the central elements of the Mother's testimony, and the child's corroborating testimony was presented by stipulation. Accordingly, the appellate court found that there was sufficient evidence in the record to establish that the Father had committed abuse and that the statutory factors had been met in issuing the plenary order of protection. Furthermore, once the trial court found that the Father had committed abuse against the child, it was within the court's purview to modify custody and to limit the Father's visitation because of the rebuttable presumption set forth in Section 214(b)(5) of the Act providing that an award of the physical care of a child to that child's abuser is not in the child's best interests.

#### **PARENTING TIME**

*In re Marriage of Eckersall*, 2014 IL App (1st) 132223, May 28, 2014

The Wife appealed the trial court's order prohibiting her from partaking in certain behaviors during her parenting time that the trial court found could be detrimental to the welfare of the children while in her custody. The appellate court dismissed the appeal after holding the trial court did not violate the Wife's due process rights and the order was not an injunction that would allow an interlocutory appeal.

The Wife argues that the trial court violated her due process rights on the basis that the trial court entered a temporary parenting schedule set forth by the children's representative, which was entered in the absence of a motion by either party, and restricted her right to free speech. The appellate court found the Wife's arguments were without merit because the trial court warned that if the Wife and Husband could not reach an agreed-upon parenting order that the trial court would set the terms of the parenting schedule and had a clause that allowed either Wife or Husband to request a hearing as to any or all of the prohibitions set forth in the parenting order.

The appellate court also rejected the Wife's argument that the entry of the trial court's order prohibiting certain conduct was an injunctive order. The appellate court reasoned that the child representative did not file a petition or affidavit in support of injunctive relief, the trial court presumably viewed the order as something other than an injunctive order, the order did not preserve any status quo (which is the function of a preliminary injunction), and the order more closely related to temporary relief. The appellate court further stated that the trial court has broad discretion in determining visitation rights and restrictions after examining what is in a child's best interests and that the order entered addressed issues that often arise during contentious divorce cases and courts should err on the side of caution rather than risk.

Overall, the appellate court dismissed the appeal after finding that no injunctive relief was granted by the trial court and that the appellate court lacked jurisdiction to hear the appeal.

### **PAROL EVIDENCE**

*In re Marriage of Steverson*, 2014 IL App (2d) 140089-U, Oct. 16, 2014

As contemplated by the parties' marital settlement agreement, a former Wife filed a petition to set child support in accordance with Section 505 of the IMDMA and to set maintenance at 19% of the former Husband's gross income and bonuses. She claimed that the term "bonuses" as used in the marital settlement agreement was unambiguous, and intended to include any compensation the former Husband received in addition to base salary. Therefore, for the purposes of calculating maintenance, "bonuses" was to include awards of stock options and RSUs granted to the former Husband following the entry of the judgment. Conversely, the Husband argued that the term "bonuses" in the settlement agreement was ambiguous and that parol evidence demonstrated that the parties intended to exclude stock options and RSUs from the calculation of maintenance. The appellate court determined, as the trial court had, that the use of the term "bonuses" in the settlement agreement is ambiguous because the settlement agreement was silent as to the meaning of the term bonuses. Further, the trial court's finding based on parol evidence that the parties intended the term to mean annual cash bonuses was not against the manifest weight of the evidence. As such, the trial court's decision to exclude the Husband's stock options and RSUs from the maintenance calculation was affirmed.

### **PAYMENT OF CHILD'S FUNERAL EXPENSES (See also APPELLATE JURISDICTION)**

*In re Marriage of Gardner*, 2014 IL App (1st) 130430-U, Feb. 28, 2014

In a paternity action, the trial court granted a Mother's petition requesting that the Father pay one-half of the funeral expenses for their deceased 26-year old son. The Father had been under an obligation to pay support for the parties' son past the age of minority because the son was disabled. The Father appealed, arguing that the trial court should have stricken the petition for failure to specify the statute relied upon for the relief sought because there was no legal basis for the trial court's order and because the order was entered without proper notice and testimony. The appellate court dismissed the Father's appeal for lack of jurisdiction because the order appealed from did not dispose of all of the parties' pending claims, as there were still child support issues pending, and because the order lacked Illinois Supreme Court Rule 304(a) language.

### **PENSION BENEFITS**

*In re Marriage of Carter*, 2014 IL App (4th) 130475-U, Jan. 17, 2014

A former Husband and former Wife requested the trial court to interpret an "Order Regarding Pension Benefits" that had been issued in the proceeding for the dissolution of their marriage. The former Wife argued that the order required the former Husband to pay her a portion of the disability benefits he was receiving from the pension fund, while the order seemed to only apply to his retirement benefits, and not

his disability benefits. The former Husband maintained that the requirement that he pay his former Wife a portion of his disability benefits would be in violation of 1-119 of the Illinois Pension Code and the pension protection clause of the Illinois Constitution of 1970. The appellate court held because the order stated that the former Wife was entitled to, “any pension benefit actually received by the [former Husband] upon retirement or under the terms and conditions of the plan,” and because the disability benefits were a pension benefit afforded the former Husband under the terms and conditions plan, the trial court correctly interpreted its prior order as requiring the former Husband to pay the former Wife a portion of his disability benefits.

#### **PETITION FOR RULE TO SHOW CAUSE**

*In re Marriage of Bloom*, 2014 IL App (2d) 130163-U, March 31, 2014

The appellate court found that the trial court did not abuse its discretion in denying the Wife’s various requests for rules to show cause.

Wife argues that the Husband violated the judgment when he removed her from a credit card that he was supposed to provide for tennis expenses for the minor children. However, the court found that it was proper to remove the Wife as an authorized user as she was classifying “tennis expenses” as her hotel room and dinner (by herself) for her children’s tennis tournaments. The Wife next argued that the court erred when it did not find the Husband in contempt for failing to give her medical insurance cards for the minor children. The appellate court found that the Wife did not meet her burden as the judgment had a self-executing provision if the Wife was not given the insurance cards. Further, the trial court found that the obligation to give the Wife the insurance cards terminated because the children emancipated, and the Wife did not explain why Husband had a continuing duty to provide her with insurance cards. This was the court’s same rationale in ruling that the Husband did not violate the judgment when he did not provide proof of life insurance for the Wife. In light of the fact that the Wife did not meet her burden, the ruling of the lower court was affirmed.

#### **POSTNUPTIAL AGREEMENTS**

*In re Marriage of Auriemma*, 2014 IL App (2d) 130643-U, March 12, 2014

Husband appealed the trial court’s order granting the Wife’s motion for declaratory judgment invalidating a postnuptial agreement entered into by the parties on the basis that the postnuptial agreement was unenforceable because it lacked consideration and was unconscionable.

First, the appellate court rejected the Wife’s arguments that the agreement should be set aside because the Wife was under duress and did not receive full disclosure of her Husband’s assets. The appellate court held that the Wife was represented by an attorney who advised her not to sign the agreement, but she did so anyway. Further, although the agreement did not include a detailed list of the Husband’s disclosed assets, the appellate court found, after examining allegations in the Wife’s petition for dissolution which was filed in a divorce proceeding later voluntarily dismissed by the Wife, that the Wife did know that the Husband had substantial assets.

However, the appellate court found that the agreement was substantively unconscionable on the basis that the agreement awarded the Wife no maintenance after a 16-year marriage, only 5% of the retirement assets, 13.7% of the appreciation equity of the marital residence, and the Husband received all of his substantial ownership interests in various businesses. The appellate court further rejected the Husband’s argument that the maintenance and property awards were not unconscionable because he was paying for a majority of the marital expenses. The appellate court found that all of the obligations the Husband was required to pay pursuant to the agreement were expenses he would already be paying given the fact that he earned a substantial income and the Wife did not. Further, the expenses were all obligations the Husband would most likely be obligated to pay if he were to file for divorce even without the existing agreement. Overall, the appellate court affirmed the trial court’s order invalidating the postnuptial agreement on the basis that the terms of the agreement were unconscionable.



*In re Marriage of Iqbal and Khan*, 2014 IL App (2d) 131306, May 6, 2014

The Husband appealed from the trial court's ruling that found the postnuptial agreement unenforceable, granted sole custody of the children to the Wife, and awarded the Wife maintenance. The appellate court affirmed the trial court's entry of the judgment.

The appellate court rejected the Wife's argument that the appellate court lacked jurisdiction because the trial court reserved the amount of maintenance she was to receive. The appellate court held that it did in fact have jurisdiction to hear the appeal because the judgment was a final and appealable order, including the declaratory judgment ruling. The Husband argued that the postnuptial agreement was valid and enforceable. However, the appellate court found the agreement to be against public policy, as custody of the children was to be determined solely by a third party after examining whether Wife or Husband reasonably or unreasonably sought a divorce. Next, the appellate court rejected the Husband's argument that any unenforceable provisions related to custody of the children were severable from the remainder of the agreement. The appellate court held that the provisions related to custody were intertwined with the financial provisions of the agreement and could not be severed. Further, the appellate court held that regardless of whether the provisions were severable, the agreement was still invalid and unenforceable as the term "unreasonable divorce" was vague, ambiguous and uncertain and not curable by any parol evidence.

The appellate court held that the agreement was substantively unconscionable because the terms of the agreement were completely one-sided and oppressive to the Wife, as she was to forfeit all rights to the largest marital asset, the residence, if she "unreasonably" filed for divorce, and no similar penalty existed for the Husband. The appellate court also affirmed the trial court's ruling granting sole custody to the Wife on the basis that the Husband failed to rebut the guardian *ad litem*'s and 604(b) evaluator's opinions that the parties' level of conflict was too high to consider joint custody and that the Wife did not interfere with visitation, and found instead that she made a good faith effort to provide the Husband with visitation. The appellate court also found that the Wife was entitled to maintenance given her age, the long-term length of a ten-year marriage, the fact that the Wife did not pursue employment in order to stay at home with the children, the Wife's need for additional education, her lack of credentials to obtain employment in the United States, the difference in the parties' earning capacity and the household expenses.

Overall, the appellate court affirmed the trial court's ruling that the postnuptial agreement entered was unenforceable and the entry of a judgment for dissolution of marriage awarding the Wife sole custody of the children and maintenance.

## **PRENUPTIAL AGREEMENTS**

*In re Marriage of Baruffi*, 2013 IL App (2d) 120519-U, Nov. 27, 2013

A Husband filed an appellant's brief that contained an incomplete statement of facts in violation of Rule 341(h)(6) and an incomplete appendix in violation of Rule 342(a). The appellate court subsequently issued a minute order *sua sponte* directing the Husband's counsel to file an amended statement of facts and appendix on or before a date certain. The Husband's counsel filed a motion seeking an extension of time to file the amended appellant's brief, which the appellate court denied, as it too was not in compliance with applicable rules. He did not file another motion seeking an extension of time but did file an amended appellant's brief, which he had not been granted leave to file. The rule violations originally identified by the appellate court had not been adequately remedied in the amended brief. Nevertheless, the appellate court addressed the issues raised by the Husband on appeal, though ultimately affirmed the decision of the trial court. The Husband's first argument was that the written judgment conflicted with the court's oral ruling. The appellate court summarily dismissed this argument as being borderline frivolous and of no practical effect. The appellate court further concluded that Husband forfeited his second argument contesting the trial court's award of maintenance to the Wife because he failed to adequately state his contentions or to cite to any authority in support of those contentions.

*In re Marriage of Chez*, 2013 IL App (1st) 120550, Nov. 26, 2013

A Husband and Wife entered into a premarital agreement (PMA) prior to their marriage. During their dissolution proceedings, the parties agreed that the PMA reflected their intent to opt out of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) and waive their marital rights against the property of

the other spouse. However, the treatment of two categories of real estate acquisitions that the parties had engaged in during the marriage became the subject of dispute, with the Husband seeking to characterize the parties' Chicago and California residences as "joint ventures," meaning they were his sole property, and the Wife seeking to declare them as "joint properties," meaning they were to be divided equally. The trial court eventually determined that the Chicago and California residences were "joint properties" within the meaning of the PMA because they were held in joint tenancy. This caused the Husband to file a claim for contribution seeking reimbursement for costs he had paid from his separate properties toward the joint properties. The trial court ultimately denied the Husband's request for contribution, finding that the parties' PMA was unambiguous in requiring the equal distribution of proceeds from the sale of all joint property, and that neither party was to receive reimbursement. The Husband unsuccessfully appealed the trial court's decision with the appellate court finding there no error.

*In re Marriage of Heinrich*, 2014 IL App (2d) 121333, March 19, 2014

After the Wife filed a motion seeking a general determination of the parties' rights under their premarital agreement, the court declared the premarital agreement valid. Further, the court held that the premarital agreement's attorney-fee-shifting ban was valid as to child-related issues.

On appeal, the Husband argued that the court erred in declaring valid the premarital agreement's fee-shifting ban as to child related issues. The appellate court held that the agreement's attorney-fee-shifting ban as to child-related issues violated Illinois public policy and is unenforceable as to those issues. Therefore, the appellate court reversed on this issue. However, the appellate court upheld the decision of the trial court in which the court denied the Husband's motion to reconsider the court's finding that the premarital agreement was valid. The court found that except for the aforementioned issue, the pre-marital agreement was valid.

#### **PROPERTY AWARD (See also MAINTENANCE)**

*In re Marriage of Brockus*, 2014 IL App (5th) 130540-U, Oct. 22, 2014

#### **PROPERTY SETTLEMENT**

*In re Marriage of Fraser*, 2013 IL App (2d) 130152-U, Dec. 3, 2013

On appeal, the Wife argued that the trial court erred in denying her motion to vacate the marital settlement agreement (MSA) for being unconscionable, awarding the Father attorney fees, and failing to make an evidence-based decision when allocating the personal property of the parties. After review of the record, the appellate court affirmed the trial court's ruling on the motion to vacate and award of attorney fees and reversed and remanded the trial court's decision regarding the allocation of personal property.

Initially, the Husband argued that the appellate court lacked jurisdiction on the basis that the MSA was not a final order because the allocation of personal property was reserved at the time of entry of the judgment. In the original agreement, both parties had 30 days to come to an agreement as to the allocation of personal property and if they failed to do so a party could petition the court for adjudication of said property. The appellate court found that the settlement agreement had the potential to be a final and appealable order after 30 days and that, at a minimum, the settlement agreement, after personal property had not been settled, was an interlocutory order. Therefore, the appellate court found that the trial court had authority to consider the merits of the Wife's motion to vacate, and due to the fact that all pending matters had been resolved, the appellate court had authority to review the trial court's ruling.

The appellate court rejected the Wife's argument that the agreement was substantively unconscionable because the agreement was not one-sided or oppressive to the Wife, despite her lack of satisfaction with the provisions addressing the refinance and mortgage associated with the marital residence, the maintenance provision as it failed to include the Husband's non-marital oil royalties, and the children's college expenses. The appellate court found that the agreement did account for the mortgage debt and did not undermine the 52/48 split of the marital estate. Next, the appellate court found that the Wife failed to prove that the exclusion of the Husband's oil royalties resulted in a significant disparity in each party's respective lifestyle after the divorce, as the Wife's hired expert determined that the value of said royalties was relatively minimal. Further, the appellate court determined that any disadvantage the Wife incurred as a result of not including the royalties was counterbalanced in her disproportionate share of the property

distribution. Last, the appellate court rejected the Wife's argument that she had fewer resources to pay for the children's college expenses because she was burdened with the mortgage on the marital residence and was excluded from the Husband's oil royalties because the court reasoned that the Wife's first two arguments failed and she did not have fewer resources than the Husband.

The appellate court also rejected the Wife's argument that the agreement was procedurally unconscionable because she was under duress and being forced into signing the agreement by her own attorney, she did not understand the terms of the agreement which were hastily presented to her, and she was under a great deal of personal stress. Specifically, the appellate court cited to the trial court's care in quoting the Wife's testimony from the prove up as it provided context that she was not entering into the agreement against her will. Further, the appellate court found that the trial court had explained that the agreement was substantially similar to the numerous pre-trial recommendations of the court, and that while the Wife was under stress it was not enough to render her unable to voluntarily enter into the agreement. Further, the appellate court rejected the Wife's argument that the attorney pressured her or was motivated to finalize the case to secure his fees because the Wife was aware of the terms of the agreement and did understand them. The appellate court found that the Wife communicated with her attorney via e-mail and negotiated the terms of the agreement to her attorney. Moreover, the attorney represented that the Wife actually suggested the refinancing terms of the agreement with which she later was dissatisfied. Therefore, the appellate court rejected the Wife's argument that she was rushed into an agreement she did not fully comprehend simply because she would have difficulty refinancing the mortgage. Specifically, the appellate court pointed to the Wife's failure to offer proof that she would be unable to refinance the \$1 million mortgage when she had a net worth of over \$3 million but no employment income, and found that the record did not indicate what the Wife's foundation was for statements relating to her belief of her inability to refinance.

Next, the appellate court addressed the award of attorney fees related to an incident where the Wife failed to provide the Husband access to a safe within the marital residence because the safe was allegedly out of batteries. The appellate court affirmed the trial court's ruling on the fees due to the fact that the Wife failed to testify at the fee hearing regarding her failure to open the safe. Further, the appellate court found that the bystander's report provided no further basis to reverse the trial court's award of fees.

The appellate court reversed the trial court's ruling on the personal property allocation on the basis that the trial court failed to properly characterize the personal property as either marital or non-marital, and failed to acquire and consider enough evidence pursuant to Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act to make an equitable finding as to the distribution of personal property. The appellate court found that the trial court made no findings to support an equitable distribution of the property because the trial court simply adopted the Husband's property list without consideration or findings as to the nature of the property. The appellate court rejected the Husband's argument that the Wife forfeited her opportunity for a hearing on the adjudication of the personal property, because the Wife did in fact request the court to consider her claims to the personal property. However, the trial court failed to consider the Wife's position regarding personal property on the basis that the Wife's request was improper and untimely as she failed to create and circulate a list of the personal property she desired pursuant to the trial court's order. The appellate court also held that the trial court was not permitted to consider the Wife's misconduct when distributing property. As a result, the appellate court affirmed the trial court's rulings denying the Wife's motion to vacate the settlement agreement and awarding attorney fees to the Husband, but vacated the trial court's ruling on the personal property distribution and remanded the case.

*In re Marriage of Harkey*, 2014 IL App (3d) 130211-U, Feb. 10, 2014

A Husband appealed the trial court's ruling awarding each party their individual retirement accounts, arguing that the trial court erred in valuing the Wife's teacher's pension, which led to an inequitable distribution of marital assets.

The appellate court rejected the Husband's argument that the trial court erroneously relied on an inaccurate value for the Wife's pension, because the Wife and Husband stipulated to the value of the pension in a submitted pretrial memorandum. The Husband acknowledged that he made an error in including the wrong value of the Wife's pension in a motion, but that the trial court used the correct value

of the Wife's pension in rendering final judgment. Further, the appellate court rejected the Husband's argument that the trial court did not have the value of his federal pension and could not properly divide the retirement accounts or assets according to the total-offset approach. Here, the appellate court found that neither party presented expert testimony as to the value of the pension, the Husband did not object to the value of the Wife's pension or provide any information as to his own federal pension, and both the Husband and Wife actually stipulated to the present value of the Wife's member contributions and a benefit report.

In addition, the appellate court also pointed out additional factors that the trial court considered, which supported its allocation of marital assets. Specifically, the appellate court referenced the Wife's testimony that she was not planning on drawing from the pension because it would preclude her from future employment as a teacher, the Husband's testimony that he did not plan on retiring even though he was closer to retirement age than the Wife, and the trial court's decision to deny the Wife's request for maintenance and contribution to health insurance in lieu of awarding her the entirety of her pension. In sum, the appellate court affirmed the trial court's ruling after determining that the trial court did not err in valuing the Wife's pension or in allocating the marital property.

### **RECUSAL OF JUDGE**

*Brzowski v. Brzowski*, 2014 IL App (3d) 130404, March 14, 2014

Ex-Husband appealed the trial court's ruling extending an order of protection originally entered in 2007 in favor of his ex-Wife by a judge who had previously recused herself from the case. The appellate court affirmed the trial court's ruling denying the ex-Husband's arguments as they related to the validity of the underlying order of protection and divorce proceedings, vacated the trial court's order extending the order of protection and remanded the case for further proceedings.

The appellate court rejected the ex-Husband's arguments relating to the validity of the order of protection entered in 2007 and subsequent extensions in 2009 and 2011 and the ex-Husband's claims that the underlying dissolution of marriage proceedings were invalid and he was, therefore, still married to the ex-Wife. The appellate court cited to the doctrine of law-of-the-case and *res judicata* finding that the ex-Husband was barred from presenting these arguments as they had previously been decided and affirmed.

Next, the appellate court held that when a judge has been disqualified through recusal or through a petition for substitution, a judge should have no further involvement in the case and cannot enter any further orders in the matter. Further, the appellate court found that if any substantive orders are entered after recusal or substitution, those orders must be vacated. Accordingly, the appellate court vacated the trial court's order extending the order of protection entered after the judge had recused herself from the case, ordered the order of protection to remain in effect on a temporary basis and remanded the case to be re-heard on the ex-Wife's emergency motion to extend the order of protection.

### **REMOVAL**

*In re Marriage of Broquard*, 2014 WL 7277827 (Ill.App. 4 Dist.), Dec. 22, 2014\*

The Husband appealed a trial court's ruling which granted the Wife's petition to remove the parties' children to Washington, D.C. The appellate court affirmed the trial court's ruling.

The Wife filed a petition for removal after receiving a job offer to serve as principal in a Washington, D.C. public school. The record reflected that the Wife took the children on numerous occasions to visit the school and surrounding area to determine whether the move was in the children's best interests and that the children had established a level of support and familiarity with Washington, D.C. The Wife would receive an annual salary of \$103,000 and a \$5,000 salary increase every year and would be eligible for a \$25,000 annual bonus, in contrast to her current income, which was \$5,833 gross per month with a possible \$1,500 annual bonus. The trial court determined after examining the Eckert factors that the removal would be in the best interests of the children as the move would provide financial, cultural and education benefits to the children, and that the Wife had been pursuing this career goal since early in the parties' marriage. This supported the Wife's claim that the removal was not merely an attempt to interfere with the Husband's visitation with the children.

The Husband argued that the trial court erred by finding that the removal would improve the Wife and the children's quality of life, failed to consider the potential harm to the children which could result from the removal, and finding that a realistic and reasonable visitation schedule could be determined. The appellate court found that the Wife's salary would provide her with disposable income, due to the potential range of rental fees she could receive in renting out her current home in Bloomington-Normal. The appellate court also found her job security would be higher in D.C, with more professional support, and that the position as principal was a prestigious position. Further, the appellate court found that the children would benefit financially and emotionally by having their mother being the principal of the school they would be attending, and culturally through the available museums and other historical landmarks available within the area. The appellate court rejected the Husband's argument that the trial court erred by failing to consider the potential harm to the children. The appellate court found that even though the court may not have explicitly outlined the potential harm to the children's and Husband's relationship as a result of the removal, the appellate court determined that the court did consider this factor and properly weighed potential harm to the relationship. The appellate court found that a realistic and reasonable visitation schedule could be achieved given the Husband's employment position (he worked from home which provides him with a great amount of flexibility with the visitation schedule). Overall, the appellate court found that the trial court did not abuse its discretion by granting the removal.

*Christensen-Williams v. Rakes*, 2014 IL App (3d) 130580-U, June 11, 2014

The Mother appealed from the trial court's denial of her petition for leave to remove the minor child to Oklahoma. Specifically, the Mother argued that the trial court erred in failing to consider evidence of her new husband's employment in Oklahoma following the filing of her petition. The appellate court affirmed the decision of the lower court, finding that the record shows that the trial court properly considered events following the filing of the petition for removal. The appellate court found that although the trial gave little weight to the fact that the new Husband found a job in Oklahoma, the trial court did consider the job in balancing the *Eckert* factors. The appellate court specifically found that there was insufficient evidence to prove that a move to Oklahoma was in the best interest of the minor child, especially in light of the drastic adverse effect the removal would have on the Father's visitation. There was also no indication of whether the schools in Oklahoma were better or similar to the schools in Illinois.

*In re Marriage of Jackson*, 2014 IL App (4th) 140389-U, Sep. 29, 2014

Wife filed a petition to remove the minor children from the state of Illinois to Pennsylvania, which the trial court denied. Wife testified that her new Husband would be earning more money. However, she did not provide any evidence as to the cost of living in Illinois versus Pennsylvania. Further, Husband had parenting time every other weekend beginning Friday and ending Tuesday morning. If the Wife should move, Husband's relationship with the children would be harmed. Further, as neither parent had assets or significant earnings, it would be impossible for the parties or the children to travel back and forth for visitation. While the Wife's family live in Pennsylvania and the children would have a close relationship with them, their relationship with Husband's family, who live in Illinois, would suffer. Therefore, the appellate court affirmed the decision of the trial court.

*In re Marriage of Meyers*, 2013 IL App (3d) 120485-U, Nov. 22, 2013

The Wife appealed from the trial court's denial of her request to remove the children to Wyoming. The court was not convinced that the quality of life would be better for the children, nor was the court convinced that her prospects of employment were more than speculative. The court further noted that the Husband did his best to exercise his visitation, and that the Wife had not always been cooperative (she had been held in contempt of court for interfering with the Husband's visitation rights). On appeal, the court affirmed the trial court's order finding that the Wife's testimony was vague and self serving, and she did not establish a significant improvement in quality of life. Further, because she had not cooperated with the Husband's parenting time while in Illinois, the court found that it was unlikely that she would cooperate with his parenting time while living in another state.

*Palumbo v. Ruff*, 2014 IL App (2d) 140069-U, June 12, 2014

A Mother sought to permanently remove a minor child from Illinois to New Hampshire over the objection of the Father. The central basis for her request was that her husband, the minor child's step-father, had been relocated to New Hampshire for his employment. The trial record revealed that the Mother had

been the child's primary caretaker since his birth and was more closely bonded to the child than the Father was. The child had resided with his Mother and step-father for over half of his life, and was closely bonded to his step-father and his half brother. The Father's parents (*i.e.*, the child's paternal grandparents), rather than the Father himself, had been a constant presence in the child's life. However, there had been an amiable relationship between the Mother and Father such that the Mother was likely to continue to facilitate the Father's visitation with the child if the removal was granted. Accordingly, the trial court determined that it was in the minor child's best interests to permit the removal and the appellate court affirmed.

*Keisha M v. John M (In re Parentage of Rogan M)*, 2014 IL App (1 st) 132765, March 7, 2014

Mother appealed from a judgment of the trial court denying her petition to remove her minor child from Illinois to California. She argued that the trial court improperly applied a clear and convincing evidentiary standard when it should have applied a preponderance of the evidence standard in determining whether the removal was in the best interests of the minor child. Because Section 609 of the IMDMA is silent as to the appropriate evidentiary standard to apply, the appellate court concluded that the preponderance of the evidence standard should have been applied. The trial court's decision was reversed and remanded for further proceedings so that the matter could be decided pursuant to the proper evidentiary standard.

See also *Saul v. Saul*, 2014 IL App (3d) 130499-U, Jan. 17, 2014

*In re Marriage of Smith*, 2013, IL App (5th) 130349, Dec. 2, 2013

The Wife appealed from the trial court's denial of her request to remove the minor child permanently to Ohio. During the marriage, the Wife left her marketing job in Chicago and the parties moved in with her parents in Maryville, Illinois. Husband found a job in St. Louis. The parties separated shortly after the move, and the Wife began looking for jobs in marketing. The only job she found was in Ohio. The circuit court granted her petition for temporary removal. After the trial, the court gave the Wife two options for custody. The first option was that she had 30 days to return to Illinois. If she returned, the parties would have joint custody. She would be the residential parent, but the Husband would have final decision making authority. The second option was that if she chose to remain in Ohio, Husband would have sole custody of the minor child. On appeal, the court reversed the trial court's decision finding that that a custodial parent is not required to exhaust all employment opportunities in Illinois before seeking employment out of state. Further, the Wife's motives for seeking removal to Ohio were rooted in her desire to obtain gainful employment, not to keep the minor child from his Husband. The court also found that the trial court's alternative order implies that the minor child's best interest would literally change overnight, depending on whether Wife moved back to Illinois. The trial court ignored the statutory mandate and placed the Wife in an impossible situation by creating an "either or" decree that had very little to do with the "best interest" of the child.

## **REQUESTS FOR MENTAL HEALTH EXAMINATIONS**

*In re Marriage of Newberry*, 2014 IL App (3d) 140171, July 28, 2014

In a dissolution proceeding where custody was disputed, a Husband brought a motion for a mental health examination of the Wife. His central allegations were that the Wife had told him that she was depressed and suffered from insomnia, that she had taken prescription medication for pre-menstrual issues at one time, and that she had claimed to have seen a ghost in the marital residence. The trial court denied the motion, finding there to be no factual support for the Husband's allegation that the Wife's mental health negatively impacted her ability to parent the parties' children, or affected her relationship with the children. Ultimately, the trial court awarded sole custody of the minor children to the Wife and ordered the Husband to pay \$2,000 in attorney fees to the Wife's counsel as a result of his undue litigiousness. The trial court's decision was affirmed on appeal brought by the Husband, as the appellate court found there to be no abuse of discretion on the part of the trial court.

## **REQUESTS TO RE-OPEN PROOFS**

*In re Pavek*, 2013 IL App (3d) 120047-U, Nov. 12, 2013

A Husband failed to appear for the remainder of trial proceedings after providing 2 days of his own testimony and did not reappear until the Wife rested her case after 3 additional days of testimony. The

trial court denied the Husband's counsel's oral motion for a continuance so that the Husband could testify as a rebuttal witness, due to the fact that the Husband's repeated failure to appear during the trial had prevented the Wife's counsel from having the opportunity to cross-examine him and because there were no assurances that the Husband would be present to testify even if the court granted the continuance. The court also found that the Husband was attempting to manipulate the situation by not appearing. Prior to closing arguments, the Husband filed a written motion to reopen his case-in-chief and to continue for rebuttal testimony, which the trial court likewise denied. After the trial court entered a written judgment for dissolution of marriage, the Husband filed a motion to reconsider the denial of his motion to reopen his case-in-chief and a notice of appeal. On appeal, the appellate court concluded that the trial court's denial of the Husband's request to reopen his case-in-chief and to continue the matter for rebuttal testimony was neither arbitrary nor unreasonable based on the sequence of events that occurred in the case.

## **SAME-SEX MARRIAGE**

*Gray v. Orr*, 4 F. Supp. 3d 984, Dec. 5, 2013

Same-sex partners filed to challenge the constitutionality of Illinois law prohibiting same-sex marriage on the basis of a violation of the equal protection clause of the Fourteenth Amendment and a motion for temporary restraining order prohibiting the county clerk from enforcing the ban on same-sex marriage and allow the couple to marry in Illinois prior to the effective date of the newly enacted law allowing same-sex marriage in Illinois. The district court granted the same-sex partners' motion for temporary restraining order as it related solely to the same-sex couple, because the potential harm in denying injunctive relief would be irreparably great, due to the fact that one of the partners was terminally ill and possibly approaching death prior to obtaining the marriage.

The district court noted that the governor of Illinois signed an amendment to the Illinois Marriage and Dissolution of Marriage Act which permits same-sex couples to legally marry in Illinois on November 20, 2013. However, said amendment does not become effective until June 1, 2014. The district court found that there was strong evidence that the terminally ill same-sex partner would not live through the effective date of the new law allowing same-sex marriage. At the initial hearing on the same-sex partners' motions, the Illinois Attorney General represented that the State did not object to the injunctive relief the same-sex partners sought and that issuing a marriage license to the couple prior to the effective date of the amendment allowing such marriages would not disserve the public interest. In addition, counsel for the Cook County Clerk indicated a desire to issue the marriage license but was unwilling to do so absent a court order.

The district court determined that the same-sex couple did have Article III standing because the couple suffered a concrete redressable injury as the clerk refused to issue the couple a marriage license absent a court order. Further, the district court found that a justiciable controversy existed, even though the Attorney General and Clerk's office agree with the same-sex couple's as-applied equal protection challenge to the current Illinois law prohibiting same-sex marriages. The district court held that despite the Attorney General and Clerk's positions which agreed with the same-sex couple's legal claims, the entities still refused to give the same-sex couple's claims legal effect and issue the marriage license.

Moreover, the district court found that the same-sex partners met the legal burden required to grant a preliminary injunction. Specifically, the district court found that the same-sex couple would suffer irreparable harm for which there would be no adequate remedy at law, because denying the same-sex couple the opportunity to marry before a terminally ill partner passed away would prevent both parties from realizing important federal rights and benefits triggered by marriage. In addition, the district court recognized that without temporary relief, the same-sex couple would also be deprived of the emotional and personal benefits that accompany marriage. The district court found that the same-sex couple demonstrated some likelihood of success regarding the equal protection claim as applied, due to the Illinois General Assembly's recognition of marriage as a fundamental right to which same-sex couples are entitled. In addition, the district court found further support in the passage of Senate Bill 10, which protects same-sex couples by officially recognizing the value of all the benefits that an official marriage status entails and that same-sex couples are entitled to enjoy those benefits. Last, the district court held that the balance of harms and the public interest as determined by the people of the State weighed heavily in the favor of the same-sex couple, because any harm resulting to the Clerk or the people of the State is minor in comparison to the same-sex couple being unable to marry prior to June 1, 2014 in light

of the partner's terminal illness. Ultimately, given the fact that the balancing of harms so strongly favored the same-sex couple, the district court found that a lesser showing of likelihood of success on the merits was required in the case and the same-sex couple did demonstrate that a challenge to the constitutionality of the current Illinois law prohibiting same-sex marriage was at least plausible. The district court granted the same-sex couple's request for temporary injunctive relief in order to get married prior to the effective date of the newly enacted law allowing same-sex marriage in Illinois.

## **SANCTIONS**

*In re Marriage of Bloom*, 2014 IL App (2d) 130642, April 25, 2014

The Wife appealed the trial court's award of sanctions to the Husband due to the filing of several petitions seeking to enforce the marital settlement agreement and seeking to hold the Husband in contempt of court. The appellate court affirmed the trial court's award of sanctions on the basis that the Wife filed a number of frivolous pleadings that were for an improper purpose, specifically, to harass the Husband.

The appellate court found that the Husband had good cause to remove her from a credit card that was set up to pay for the children's tennis expenses after the Wife used the credit card to fly to Arizona to attend the child's tennis tournament. Further, the appellate court found that the Husband did in fact provide insurance for the children and gave the children medical insurance cards directly and that any alleged violation of not providing the Wife with the medical insurance cards was *de minimus* in nature. Last, the appellate court found that the Wife's action of filing a petition related to the Husband providing her tax information was already litigated by the trial court.

Next, the Wife argued a number of arguments related to the attorney fees she was ordered to pay, including research fees that she alleged were not appropriate, the calculation of hours and the hourly rate, the commingling of multiple tasks inappropriately combined, improper overhead costs such as messenger services, duplicative fees for the same services, rounding time for work completed to the nearest quarter hour, and travel costs. The appellate court rejected all of the aforementioned arguments and affirmed the trial court's award of sanctions against the Wife in favor of the Husband.

## **SECTION 604(b) FEES**

*In re Marriage of Tiballi*, 2014 IL App (2d) 116319, March 20, 2014

In a post-dissolution custody proceeding, the trial court ordered the Husband to pay the fees of the court-appointed custody evaluator. The appellate court affirmed the decision of the trial court, and the Supreme Court reversed and remanded for allocation of the evaluator's fees between the parties.

The court appointed Dr. Robert Shapiro to act as evaluator in the case and report his findings and recommendations to the court pursuant to 604(b) of the Illinois Marriage and Dissolution of Marriage Act. After Dr. Shapiro filed his report, the Wife filed a motion to dismiss Husband's Petition to Modify Custody. In her motion, Wife alleged that after the report was filed, the Husband advised, through counsel, that he was not going to proceed with his Petition to Modify Custody. The trial court entered an order granting Wife's Motion to Dismiss. The Wife also filed a motion for costs and the trial court granted her motion upon determination that the section 604(b) fees billed by Dr. Shapiro was a "court cost" under section 1-009(a) of the Code.

On appeal, the Supreme Court found the Husband did not file a motion to have his case voluntarily dismissed. Instead, the Husband's petition was dismissed on the Wife's motion, which should have been considered a motion for dismissal based on want of prosecution. However, the Supreme Court found that this designation did not matter because 735 ILCS 5/5-116 states that "in all cases, where any action is voluntarily dismissed by the plaintiff or is dismissed for want of prosecution by reason that the plaintiff neglects to prosecute same, the defendant shall recover judgment for his or her costs." The Court held that "court costs" has historically been defined as filing fees, subpoena fees, courthouse fees, reporter fees and statutory witness fees. Therefore, the Court found that Dr. Shapiro's fees as the 604(b) evaluator did not qualify as "court costs." Further, the Court found that it was the intent of the legislature to allocate the fees of the 604(b) evaluator between the parties based on their respective abilities to pay and on any other criteria the court considers appropriate. By contrast, court costs are not subject to allocation among the parties based on their ability to pay.



## **SERIOUS ENDANGERMENT**

*In re Parentage of R.M.M.*, 2014 IL App (1st) 132246-U, June 3, 2014

The trial court denied Father's petition for the temporary suspension of Mother's parenting time with the parties' twelve-year old child, finding that the Father had failed to satisfy his burden of proving that visitation with the Mother would seriously endanger the physical, mental, moral or emotional health of the child. The Father appealed, claiming that the trial court had failed to give sufficient weight to the conclusions of his expert witnesses. Specifically, two expert witnesses testified on the Father's behalf during the hearing: a therapist who had been treating the minor child for several years, and a doctor who had been appointed during the proceeding to conduct a mental examination of the Mother. Both witnesses testified that the Mother was not appropriately responding to the child's emotions, that her "mental condition" seriously endangered the child, and that her contact with the child should be suspended through his first year of high school. However, during the Mother's testimony, she rebutted a number of the doctor's conclusions. The appellate court ultimately affirmed the trial court's decision, finding that the alleged conduct of the Mother came nowhere near establishing a serious danger to the child.

## **SUBSTITUTION OF JUDGE FOR CAUSE (See also CUSTODY)**

*In re Marriage of Goldin and Morganstein*, 2014 IL App (1st) 131674-U, March 26, 2014

Husband appealed the trial court's order denying his petition for substitution of judge for cause. The appellate court affirmed the trial court's order, finding that the petition was untimely and unfounded and found that the trial court did not abuse its discretion with respect to child support, visitation, maintenance and attorney fees.

On appeal, the appellate court found that the petition for substitution of judge for cause was not timely as it was filed one week prior to trial. In addition, the appellate court found that the petition did not provide opposing counsel with proper notice because the petition was presented for hearing less than 24 hours after notice was given to the Wife's attorney and was not presented at the earliest practicable moment as required by case law where no excuse for the delay was provided. Further, the appellate court found that the petition was unfounded because the alleged grounds for cause related to earlier rulings made by the trial court four months earlier and approximately one year prior to the filing of the instant dissolution proceeding. Specifically, Husband's allegations related to the Wife's appearance before the judge in a prior divorce proceeding and the appellate court found no bias where the judge ruled against the Wife in the prior proceeding. Upon review of the record, the appellate court found no evidence in the record of any bias or favoritism toward either party. Moreover, the appellate court determined that the Husband never questioned the judge's ability to render decisions in the case or accused the judge of bias at any time prior to filing his petition for substitution one week before trial.

Next, the appellate court affirmed the trial court's rulings on visitation, child support, maintenance and attorney fees finding that all rulings were consistent with applicable law and no error existed. Overall, the appellate court affirmed the trial court's denial of a petition for substitution of judge for cause and rulings on all other issues involved in the case.

## **SUBSTITUTION OF JUDGE FOR CAUSE**

*In re Marriage of Roy*, 2014 (5<sup>th</sup>) 130260-U, July 11, 2014

Wife appealed from a supplemental judgment for dissolution of marriage that awarded the parties joint custody and made dispositions of marital property and debts. She also appealed from the trial court's denial of her request for a substitution of judge for cause. The appellate court determined that it lacked jurisdiction because the judgment was not final and appealable, except for the issues of custody and the denial of the Wife's request for substitution of judge. The Wife's motion for substitution of judge was brought based the trial judge's alleged accusation of bigotry on the part of the Wife's attorney. After a hearing on the motion wherein the transcript of the interaction between the judge and attorney was reviewed, the trial court found there to be insufficient evidence to call into question the judge's impartiality and the Wife's motion was denied. This decision was affirmed by the appellate court. Conversely, the appellate court found that the trial court's award of joint custody was against the manifest weight of the evidence because it completely contradicted the dissolution record, which included 21 temporary orders,

20 contempt petitions, 5 petitions for injunctive relief, numerous motions for sanctions and other discovery-related motions, and was replete with examples of the parties' inability to cooperate. Court orders had been entered forbidding the parties from communicating with one another except in cases of emergency, micro-managing the items that needed to be packed for the children's visits with both parents, and appointing a best-interest evaluator. Accordingly, the trial court's award of joint custody was reversed and the matter was remanded for further proceedings to make a sole custody determination.

### **TERMINATION OF PARENTAL RIGHTS**

*In re Adoption of J.K.*, 2014 IL App (4th) 131058-U, March 17, 2014

A minor child's biological Father and his wife filed a petition for adoption of a minor child requesting that the trial court terminate the parental rights of the child's biological Mother. The Father had previously been awarded custody of the child, subject to Mother's visitation rights. The trial court heard testimony from the Father's expert physician that Mother had taken the child to the hospital with clavicle and rib fractures so severe that one of the child's lungs had collapsed. The child had also sustained fractures to both shinbones, to her skull and to the center and each side of her jaw. The physician stated that the injuries could not have been caused by accidental means, were inflicted either constantly or intermittently, were in some instances life-threatening, were interfering with her normal growth and development and were affecting her ability to consume life-sustaining nutrition. In addition, the child's counselor also testified that he had diagnosed the child with Post Traumatic Stress Disorder because the child was having angry outbursts, nightmares and was soiling her bed. During the hearing, Mother admitted that she had previously pled guilty to two counts of "battery resulting in serious bodily injury to a person less than 14 years of age" in an Indiana criminal case. Mother was first found to be unfit. Then, after a best-interest hearing, her parental rights were terminated. The appellate court ultimately upheld the trial court's decision finding that the termination of the Mother's parental rights was not against the manifest of the evidence.

### **UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA)**

*Bennett v. Gordon*, 2014 IL App (1st) 113139-U, Feb. 5, 2014

A Husband filed a petition for dissolution of marriage in Cook County, Illinois and had the Wife served in Florida, which was where the Wife and the child had been living for the 3 prior years. Though Florida was the home state of the child at the time the divorce action was initiated, Illinois had jurisdiction to make an initial custody determination pursuant the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) because Florida had declined to exercise jurisdiction at that time. A default dissolution judgment was entered in Cook County because Wife had never appeared in court. The default judgment awarded the parties joint custody of the child, with Wife as the "primary residential party." The default judgment made no mention of the fact that the Wife and minor child resided in Florida.

Over a year later, the Husband filed a motion for modification of custody in Cook County, Illinois alleging that he and the Wife had agreed to him receiving residential custody of the child. The matter then came before the court when an unfamiliar judge was sitting in the usual judge's stead. As a result, an "agreed" order modifying residential custody of the child and terminating child support was entered. Shortly thereafter, the Wife filed an emergency motion to vacate the supposed "agreed" order, which the trial court granted finding that the order had been fraudulently obtained. The trial court also prohibited the Husband from having any further contact with the Wife or with the minor child.

The Husband subsequently filed a motion to reinstate the order awarding him residential custody and seeking to vacate the order denying him access to the child. The trial court entered an order denying the Husband's motion with prejudice and prohibiting him from filing any further pleadings in Cook County, Illinois because the court lacked jurisdiction. The Husband appealed. However, the appellate court ultimately upheld the trial court's order because, under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), Florida had jurisdiction of custody matters regarding the minor child because Florida was the child's home state.

*McCormick v. Robertson*, 2014 IL App (4<sup>th</sup>) 140208, Aug. 8, 2014

Father, who was a resident of the State of Illinois, engaged in a sexual relationship with Mother, who was a resident of the State of Missouri. Their relationship resulted in the conception and birth of a child in the

State of Missouri. Shortly thereafter, the Father filed a petition to establish parentage and for custody in the State of Illinois. The Mother entered an appearance in the State of Illinois and eventually the parties agreed to the entry of a judgment of parentage and joint parenting agreement.

Two years later, the Mother and the parties' child moved to the State of Nevada, which resulted in the Father filing a petition to terminate the joint parenting agreement and for sole custody. The Mother responded by filing a petition to establish UCCJEA jurisdiction, custody and child support in the State of Nevada. She also filed a motion to vacate the original parentage and joint custody judgment, alleging that the order was void because the circuit court lacked subject matter jurisdiction under the UCCJEA. A UCCJEA conference was conducted between the States of Illinois and Nevada, after which the Illinois circuit court declared the original parentage and custody judgment void. The Father appealed, arguing that the child custody proceeding was a justiciable matter within the general jurisdiction of the circuit court conferred by the Illinois Constitution. The appellate court ultimately agreed with the Father. The Illinois circuit courts derive their jurisdiction to hear child custody matters from the state's constitution, as opposed to the UCCJEA. Therefore, the circuit court did possess the subject-matter jurisdiction to hear the Father's original petition and to enter the custody judgment, and the judgment was not void for lack of subject matter jurisdiction.

## **VALUATION**

*In re Marriage of Hanusin*, 2013 IL App (2d) 130339-U, Nov. 20, 2013

A Husband appealed the trial court's decision on five issues: (1) the valuation of his interest in his company, (2) the requirement that he reimburse the marital estate for the increase in value of his non-marital vehicle, (3) the calculation of his income for child support purposes, (4) the amount of maintenance he was ordered to pay the Wife, and (5) the requirement that he be required to contribute to the Wife's attorney fees.

With respect to the valuation of the Husband's interest in his company, the Husband argued that the trial court improperly relied on the Wife's expert's application of the income and market approaches in determining the closely held corporation's stock price. He argued that the trial court should have, instead, calculated the value of the corporation based on its book value and goodwill. He contended that the court's inappropriate consideration of a previous arms-length sale of stock that had taken place 4 years prior was as a result of the trial court's use of the improper valuation approaches. The appellate court disagreed, finding that both methods applied by the trial court were permissible methods of valuation. It also found that the 4-year old stock purchase was relevant evidence because it was the most recent purchase of the corporation's stock involving a willing seller and a willing buyer. Accordingly, the appellate court concluded that the trial court's determination of the Husband's value in his company was not against the manifest weight of the evidence and upheld the trial court's valuation of the Husband's stock as it impacted the parties' distributions from the marital estate.

The appellate court further found there to be no abuse of discretion on the part of the trial court relative to all other issues challenged by the Husband on appeal.

## **VALUATION (See also CHILD SUPPORT)**

*In re Marriage of Burstein*, 2014 IL App (2d) 120098-U, Feb. 13, 2014

A Wife challenged the trial court's valuation of her urologist Husband's membership interests in three medical clinics, its classification of a portion of one of the clinics as third-party property, its method of allocating the marital portion of the membership interest of one of the clinics, and its denial of her request to reopen proofs. She further argued that the trial court abused its discretion in setting child support below the statutory guidelines at less than 10% of the Husband's net income and in denying her petition for contribution to attorney fees without a hearing.

The Wife argued that the trial court abused its discretion in classifying a portion of one of the Husband's clinics as the third-party property of his brother and parents. Because the membership agreement provided that only a licensed urologist could have a membership interest in the clinic, the appellate court agreed with the Wife that the Husband was the sole owner of the membership interests in the clinic. The Husband was merely distributing income to his brother and parents because he was prohibited from transferring ownership to them. The appellate court found that the trial court should have classified all of

the membership interests in the medical clinic as marital property and remanded the issue so that all marital membership interests could be equitably distributed between the parties.

The appellate court otherwise upheld the trial court's valuation of the Husband's membership interests in the three medical clinics, the trial court's method of allocating the portion the Husband's membership interests that had already been deemed marital and its denial of the Wife's request to reopen proofs. The appellate court also found that the Wife had the ability to support the child and to pay her own attorney fees because she received \$12,500 per month in permanent maintenance, \$2,500 per month in child support, over \$700,000 in marital assets, and 25% of distributions from the medical clinics which typically exceeded \$100,000 per year.

#### **VALUATION (See also ALLOCATION OF PROPERTY, CHILD SUPPORT)**

*In re Marriage of Abu-Hashim*, 2014 IL App (1st) 122997, June 25, 2014

#### **VALUATION OF CROP PROCEEDS**

*In re Marriage of Buckman*, 2014 IL App (3d) 120303-U, April 9, 2014

In a dissolution judgment, a Wife was awarded 55% of the Husband's 2010 crop proceeds from his farming operation. A subsequent court order was eventually issued in which the 2010 crop proceeds were calculated and payment schedule was put in place. The Husband appealed as to the valuation and payment schedule. He argued that the trial court mistakenly included a \$5,645 government subsidy in the total gross income for grain sales to be divided because it was not actually income from the sale of the grain itself. He also argued that the court was mistaken in denying him a credit of \$55,689.29 for debts incurred for various expenses, including the purchase of seed, fertilizer, chemicals and repairs to equipment. The appellate court found there to be no abuse of the discretion in the trial court's valuation of the crop proceeds because the government subsidy was paid to the Husband for growing certain crops and was variable based on grain prices. Furthermore, the trial court had already considered the Husband's debt in arriving at the dissolution decision. As a result, the trial court's decision as to both the valuation of the gross crop proceeds and the payment schedule were upheld.

#### **VIOLATIONS OF THE INCOME WITHHOLDING FOR SUPPORT ACT**

*In re Marriage of Murray*, 2014 IL App (2d) 121253, June 11, 2014

A former Wife filed a complaint against former Husband's employer, the McHenry County Conservation District, after the Conservation District's payroll agent failed to process five child support payments due to the former Wife. She sought a \$1,086.90 child support arrearage as well as a statutory penalty that ultimately grew to \$407,700. The Conservation District paid the arrearage to stop the accrual of the statutory penalty. Following a bench trial, the trial court entered a judgment in favor of the former Wife on the statutory penalty claim, but capped the award at \$50,000, based on a recent amendment to Section 35 of the Withholding Act that limits such penalties to \$10,000 per violation. The Conservation District appealed, arguing that, as a government entity, it was immune from the \$100 per day penalty pursuant to Section 2-102 of the Tort Immunity Act because the penalty was punitive. The appellate court agreed, finding that the denial of the Conservation District's immunity was in error because it contravened the well-established policy of the Tort Immunity Act by holding taxpayers responsible for the agency's violation of the law. As such, the trial court's judgment in favor of the former Wife was reversed.

#### **VISITATION**

*In re Marriage of Igel*, 2013 IL App (3d) 130175-U, Dec. 16, 2013

The Husband appealed from the trial court's decision restricting his parenting time with the minor children. The Husband argued that the trial court did not find that reasonable visitation would result in serious endangerment, as required by the statute. The record clearly reflects that the court was concerned that the Husband's behavior could pose a danger to the children if it was not supervised. In this case, Husband was often intoxicated, displayed erratic mood swings and told the GAL that he had power in Washington and that people bowed down to him. Because the court's reasons for ordering supervised visitation could be discerned from the record, the trial court's order restricting Husband's visitation was affirmed.

See also *In re Marriage of Culp*, 2013 IL App (4th) 130037-U, Dec. 10, 2013

See also *Dawn W. v. Michael W.*, 2014 IL App (5th) 130430-U, Jan. 22, 2014

#### **VISITATION**

*In re Parentage of K.E.B.*, 2014 IL App (2d) 131332, July 24, 2014

The trial court entered an order providing for supervised visitation between the Mother and the child on the condition that the Mother and the Father agreed on a time and place for the visitation. The appellate court found that the trial court abused its discretion in requiring the parties to agree to a time and place for the visitation. The Court found that requiring the parties to agree to a time and place effectively gave the Father total control of when and if the parenting time would take place. The record reflects that the parties have a tumultuous history and it seemed unlikely that the parents would agree to parenting time. Therefore, the case was remanded for the setting of a specific visitation schedule.

\* Denotes Rule 23(e) Order; updated citation not available.

\*\*Denotes new case; updated citation not available.