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DuPage County Bar Association

FAMILY LAW COMMITTEE

MEGA MEETING

January 28, 2012

Case Updates from 2011

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January 28, 2012

MEGA MEETING

JANUARY 28, 2012

Page

MEGA MEETING

JANUARY 28, 2012

ATTORNEY FEES

1. *Bruzas v. Richardson*, 408 Ill.App.3d 98, 945 N.E.2d 1208 (1st Dist. 2011).

Law firm (Petitioners) were retained to file an appeal. Client was unable to pay fees at that time, so she proposed paying the firm 9% interest on the attorney fees. The agreement was never reduced to writing. Appeal was conducted and appellate court reversed trial court's judgment. Retrial resulted in a mistrial, and thereafter client's attorneys requested her Ex-Husband contribute to her attorney fees. Trial court granted the petition and ordered Ex-Husband to pay Petitioners the attorney fees owed by client. Eventually the parties entered a settlement agreement that required each party to pay his/her own attorney fees. Client paid Petitioners the balance of their fees but refused to pay any interest that Petitioners had charged. A jury found in favor of the Petitioners as to the interest owed by client.

Client argued on appeal that the oral agreement to pay interest should have been void *ab initio* as against public policy because the agreement to pay interest was not in writing. She relied upon two advisory opinions from the ISBA and section 508(c)(2) of the Illinois Marriage and Dissolution of Marriage Act in support of her argument. As to the former, the appellate court noted that ISBA opinions are not binding precedent, and even still, failing to reduce the interest fee agreement to writing was not so egregious as to violate public policy. Client knew that the Petitioners were charging interest on their fees, and Petitioners' claim was reasonable in that they agreed to represent client on appeal even though she was unable to pay them at that time. As to the latter, section 508(c)(2) applies to cases pending on or after June 1, 1997, and client's case was filed before 1997. The appellate court also rejected client's claims of undue influence, fiduciary duty and compromised verdict.

2. *In re Marriage of Radzik and Agrella*, 955 N.E.2d 591 (2nd Dist. 2011).

Wife's attorneys filed an interim fee petition against Husband. Court ordered Husband to pay interim fees. Wife's attorneys later filed second interim fee petition. No financial affidavit was attached to the second petition and Wife did not sign or verify the petition. Husband argued he could not pay Wife's fees, as he had no additional funds. Husband asked for an evidentiary hearing on the second fee petition. Court determined an evidentiary hearing was unnecessary and awarded additional interim fees based on the court's recollection that Husband mentioned having a retirement account he might be able to liquidate. Husband filed a motion to reconsider, arguing that Wife failed to establish either her current financial status or Husband's ability to pay her fees. The court denied the motion to reconsider. Wife filed a petition for rule to show cause and court ordered Husband to cash out his IRA to pay attorney fees and fees for the Child Representative. Court later found Husband to be in contempt for failing to pay said fees.

The appellate court first addressed Wife's failure to provide her financial affidavit with her second interim fee petition or to attach any other financial documents, as she had the burden to prove she was entitled to the requested relief (*and* that Husband had ability to pay). Therefore, the court should have conducted an evidentiary hearing, including as to the nature or extent of the marital estate or available assets—court's assumptions as to Husband's access to funds was an abuse of discretion.

Next, the appellate court considered whether the trial court could order Husband's IRA liquidated to pay an interim fee award. As to this issue, the appellate court concluded that IRAs are exempt from judgment for interim attorney fees (though they can be

ordered liquidated to enforce support judgments). In so ruling, the appellate court relied on section 12-1006 of the Code of Civil Procedure (735 ILCS 5/12-1006 (West 2008)), which provides that retirement plans are exempt from judgment, attachment, execution and seizure for the satisfaction of debts. The court noted that despite the fact that cases interpreting the section 12-1006 exemption to exclude support arrearages were decided before the 1997 "leveling the playing field" amendments to the IMDMA, the amendments did not fundamentally alter section 12-1006 of the Code. Therefore, there is no authority for a trial court to order a retirement account liquidated to satisfy an attorney fee award.

The contempt order was vacated because Husband's refusal to liquidate the IRA "stemmed from a good-faith effort to secure interpretation of" his obligation to pay attorney fees from that IRA.

ATTORNEY FEES - CONTRIBUTION TO

A client may settle his or her claims, but a party cannot waive an attorney's right to seek contribution toward attorney fees from the opposing party.

3. *In re Parentage of Rocca,* 408 Ill.App.3d 956, 946 N.E.2d 1003 (2nd Dist. 2011).

In 2008, Mother filed a parentage action to establish parentage of her two children. Mother's attorney file a petition for interim attorney fees asserting that Mother is unemployed after being disabled and Father earns in excess of $150,000 from his ownership of a jewelry store. Father responded that he earned approximately $125,000 per year. The parties' attorneys exchanged correspondence regarding Father contributing toward Mother's fees. Hearing on the fee petition was continued several times. Ultimately, Mother's attorney moved to withdraw as counsel before hearing was held. Mother's attorney requested a hearing to determine final attorney fees and to assess Father's contribution thereto. The court granted the motion to withdraw and granted leave to file a petition for final fees and contribution within 30 days. Mother retained replacement counsel. Less than three months later, the court entered a settlement agreement executed by the parties and without the knowledge Mother's former attorney ("Former Attorney.") The settlement included the following language:

> "Attorney fees: Each party shall be solely and exclusively responsible for payment of any and all attorney fees that have been, or will be, incurred by that party. Each party waives any right to a hearing on contribution to fees that he or she may possess against the other."

One month after the settlement agreement was entered Former Attorney petitioned for final attorney fees and contribution from Father. The court allowed the final fees petition despite its being filed more than thirty days following the prior order granting him leave to file a petition for setting of final fees. However, the court then found that the Former Attorney's fee petition was a petition for contribution against Father and that was waived by both Mother and Father as part of their settlement agreement. Therefore, the trial court found the agreement of the parties barred any fee petition for contribution against Father. Instead, the trial court ordered a judgment be entered against Mother for Former Attorney's fees.

Former Attorney filed this appeal. The only issue on appeal is whether the trial court properly concluded that the parties' settlement agreement in which they waived claims for contribution against one another could preclude Former Attorney from seeking contribution against Father for Mother's attorney fees. The appellate court reviewed case law presented by Father. One such case pointed out that section 508 of the Illinois Marriage and Dissolution of Marriage act allows the award of fees directly to the attorney, who may enforce the order and judgment in his or her own name; and, despite fees generally being awarded to the client, they belong to the attorney who has standing to pursue an action for fees as the party in interest, with or without participation by client.

The appellate court reversed and remanded finding that a party may settle his or her claims, but a party cannot waive something that belongs to someone else. The appellate court remanded the cause for the trial court to consider Former Attorney's petition for contribution against Father.

BANKRUPTCY

4. *Berge v. Mader,* 957 N.E.2d 968 (1st Dist. 2011).

Plaintiff commenced bankruptcy proceedings. The following month she was involved in a car accident that resulted in her filing a negligence complaint. Plaintiff received a "no assets" discharge of her debts in bankruptcy, but she had never disclosed her negligence suit to the bankruptcy court. The appellate court held that a judicial estoppel precluded Plaintiff's personal injury action that was not disclosed in bankruptcy proceeding.

This case potentially holds weight for family law cases in which bankruptcy proceedings were commenced or concluded prior to the divorce in terms of the precedential effect bankruptcy disclosures can have on discovery and valuations of estates in divorce proceedings.

5. *In re Anderson, --- B.R. ----,* 2011 WL 4987017 (Bkrtcy.N.D.Ill. 2011).

The Child Representative was appointed to represent the children of the marriage prior to the Father filing bankruptcy proceedings. After the automatic stay was entered in Father's bankruptcy case, the Child Representative, who was owed fees, moved to modify or annul the automatic stay to ensure she could collect her fees from Father, despite his having filed a bankruptcy proceeding.

The appellate court held that the debt owed to the Child Representative constituted a domestic support obligation exempt from discharge under 11 U.S.C. § 523(a)(5). Matters regarding child custody and support are family law matters generally within the jurisdiction of state courts. Bankruptcy judges generally defer to state court judges on such matters and will permit the automatic stay to be lifted or modified to collect support obligations unless the debt is to be paid through a plan approved by the bankruptcy court.

BIFURCATION

6. ***In re Marriage of Wade,*** 408 Ill.App.3d 775, 946 N.E.2d 485 (1st Dist. 2011).

It is reasonable to bifurcate a dissolution to protect and promote the emotional and mental well-being of the parties' children.

In 2007, Husband filed a *praecipe* for summons in a suit for dissolution of marriage. In 2008, Husband filed a petition for dissolution of marriage. Husband alleged grounds of irreconcilable differences and sought dissolution, property distribution and joint custody. Wife filed a response to Husband's petition and a counter-petition alleging desertion, mental cruelty and adultery. Wife sought dissolution, support and sole custody. In 2010 Husband filed a motion to bifurcate the judgment for dissolution of marriage. Husband asserted that the parties had satisfied the grounds of irreconcilable differences and appropriate circumstance existed to bifurcate the proceeding due to Wife's delaying the litigation by repeatedly changing counsel and interfering with Husband's parenting time. The Child Representative supported the bifurcation. Wife filed a response, opposed bifurcation and denied Husband's allegations. The court granted Husband's motion to bifurcate and recognized that bifurcation is generally disfavored. The court found the circumstances were appropriate and three days later held a hearing and entered Judgment for Dissolution based upon the grounds of irreconcilable differences. Wife filed this appeal.

The appellate court looked to prior case law, specifically *IRMO Cohn,* 93 Ill.2d 190 (1982) where the Illinois Supreme Court held that the court does not have unfettered discretion to bifurcate. However, bifurcation is justified in certain circumstances. The following, non-exhaustive list, are such justified certain circumstances: where the court does not have *in personam* jurisdiction over the respondent; where a party is unable to pay child support or maintenance if so ordered; where the court has set aside an adequate fund for child support...; or where the parties' child or children do not reside with either parent. Further, bifurcation is justified where the circumstances listed in *Cohn* are present or where the circumstances are of the same caliber. The record showed that the trial court gave substantial consideration to the question of whether appropriate circumstances existed to bifurcate and determined that such circumstances did exist in this case because the length and contentiousness of the proceedings were having a detrimental impact on the mental health of the parties' children. In other words, bifurcation was in the best interests of the children. The appellate court confirmed that the legislature intended for the court to take the best interests and well-being of the parties' children into account while conducting proceedings in a dissolution of marriage and therefore affirmed the ruling of the trial court. Reasonable circumstances may exist to justify bifurcation where the court concludes that bifurcation is necessary to protect and promote the emotional and mental well-being of the parties' children.

CHILD REPRESENTATIVE - IMMUNITY FOR

7. *Vlastelica v. Brend,* 954 N.E.2d 874 (1st Dist. 2011).

Mother, individually and as next friend for child, filed a legal malpractice complaint against attorney, who had been appointed as the Child Representative in her divorce case. Mother alleged that the Child Representative had committed legal malpractice, intentional breach of fiduciary duty and intentional interference with her custody rights. The majority of the accusations alleged that Child Representative was biased towards Husband, that he had threatened Mother, that he had entangled her in "stressful and unnecessary litigation for an additional five years," and that he had falsely represented facts to the court. She pleaded that the Child Representative's law firm was also liable for legal malpractice, intentional breach of fiduciary duty and intentional interference with her custody rights because other attorneys in the firm had performed "25%" of the legal work for the minor child.

The Child Representative filed and was granted, a motion to dismiss Mother's suit. She appealed.

The appellate court held that common law grants Child Representatives absolute immunity from liability because they are the "arms of the court." The court stressed the need for this immunity, as it is "imperative to allow the representative to fulfill his obligations for the court without worry of harassment and intimidations from dissatisfied parents." All of the alleged misfeasance and malfeasance committed by the Child Representative occurred within the course of his court-appointed duties and are subject to absolute immunity.

The court further noted that if the Child Representative had in fact violated his role, Mother's remedy is to seek discharge of the representative and appealing the denial of that motion.

CHILD SUPPORT

8. *In re Marriage of McGrath,* 954 N.E.2d 842 (1st Dist. 2011).

On September 14, 2007, the court entered the judgment for dissolution of marriage incorporating the parties' marital settlement agreement and joint parenting agreements. The agreement provided that the minor children would reside with the Wife and the

parties would contribute to the children's various expenses. At the time of the judgment, Husband was unemployed so the issue of child support was reserved. On July 9, 2008, the Wife petitioned the court to determine child support. The Husband testified that he was unemployed and lived off the assets that were awarded to him as part of the MSA. He testified that each month he withdrew $8,500 from a savings account to meet his expenses. The trial court ordered the Husband to pay $2,000 per month as and for child support.

The issue on appeal is whether the money that the Husband withdrew from his savings accounts constituted "net income" under 750 ILCS 5/505. "Net income" is defined as "the total of all income from all sources." The courts have asserted that an unemployed parent who lives off regularly liquidated assets is not absolved of his child support obligations. The appellate court held that the circuit court was correct to include as part of Husband's income the money he withdrew from his savings accounts.

The Husband also argued that his only income is the interest that he received from his savings accounts, which amounted to $171.69 a month. He argued that he should only pay 28% of this amount, or $48.07. However, the appellate court determined that the Husband's withdrawals from his savings accounts constituted income. Since the Husband testified that he withdrew $8,500 per month, the trial court found that the circuit court determined that the statutory guideline of 28% amounts to $2,380 a month. The court deviated downward ordering the Husband to pay $2,000 per month. The appellate court found no error.

9. *In Re the Marriage of Rice,* --- N.E.----, 2011 WL 6245354 (1st Dist. 2011).

The parties divorced in 1982 and entered into a marital settlement agreement concerning the amount of child support that the husband was to pay. The agreement included a provision that as each of the couple's four minor children emancipated, the support obligation would decrease by "one quarter" (the reduction provision). In 1990, the post-judgment court entered an order modifying the amount of child support that the father was to pay, and the order did not mention the reduction provision. In 2009, all four children were emancipated and the court found that the father owed approximately $80,000 in arrearages (This number reflected interest accrued beginning in 1991.)

The first issue on appeal is whether the 1990 court order modifying the husband's support obligation had an effect on the reduction provision. The Appellate Court affirmed the trial court's decision that the 1990 support order modified the support provisions in the marital settlement agreement. The 1990 order made no mention of allocating the support amount per child and stated that it was pursuant to the guidelines. The 1990 order did not refer to the parties' MSA. Therefore, the modification changed the character of the obligations from payments that were allocated to each child to an unallocated lump-sum support obligation. The court held that in cases of unallocated lump-sum support obligations, a party may not unilaterally reduce the amount of support paid and must petition the court for any modifications.

Father also argued that the interest on the child support prior to January 1, 2000 was discretionary and that, based on equitable principles, interest should only accrue in this case beginning on January 1, 2000. The appellate court held that this issue was resolved by the Illinois Supreme Court, which held that interest on delinquent child support payments became mandatory in 1987. Therefore, it was appropriate for the trial court to order that the interest for the delinquent child support began accruing in 1991, the most recent date in which the arrearage was calculated by the court.

COLLEGE EXPENSES

10. *In re Marriage of Spircoff,* ---N.E.2d ----, 2011 WL 5064246 (1st Dist. 2011).

The trial court certified the following question for review:

> "If the ruling in Petersen v. Petersen, 403 Ill.App.3d 839 (2010) bars a party from contribution from a former spouse for college expenses incurred prior to the date of filing of a petition brought pursuant to 750 ILCS 5/513, does the same bar to retroactive relief for college expenses incurred prior to the filing date apply to a petition brought by a third party beneficiary to enforce a provision of his parents' marital settlement agreement to contribute to his college education?"

The third party beneficiary commenced this breach of contract action to enforce a provision of his parents' marital settlement agreement that was incorporated into the parties' dissolution of marriage judgment and concerned the payment of his college expenses.

The court found this case to be distinguishable from *Petersen* because here the obligation of the parties for educational expenses was clearly and affirmatively stated and was not expressly reserved. The court reached this conclusion even though the actual allocation of those expenses was not made at the time the judgment of dissolution was entered (specifically, the judgment referred to 513 for allocation of the college expenses.) The court held that the holding in *Petersen* did not bar an action by a third-party beneficiary to retroactively enforce a provision of his or her parents' marital settlement agreement related to payment of educational expenses where such payment of such expenses was not expressly reserved for future consideration by the trial court in the initial proceedings.

The court also found that *Petersen* was inapplicable to this case because it involves an action by a third-party beneficiary seeking enforcement of the provisions of a marital settlement agreement which is by nature, a breach of contract action, and not an action to modify a section 513 order.

11. *In re Marriage of Petersen,* 955 N.E.2d 1131 (1st Dist. 2011).

On May 17, 2007, former Wife filed a post-decree petition to allocate college expenses for three children. The oldest child began college in 2002 and graduated in 2006. The middle child began college in 2004 and was still in college at the time the petition was filed. The youngest child was to begin college in the fall of 2007. At the time of the parties' divorce in 1999, an marital settlement agreement was entered by the court. The following language was included,

> "...The Court expressly reserves the issue of each party's obligation to contribute to the college or other education expenses of the parties' children pursuant to Section 513 of the Illinois Marriage and Marriage Dissolution Act..."

The circuit court ordered the former Husband to pay 75% of all past, present, and future college expenses of the children. The appellate court affirmed in part. Former Husband's request for leave to appeal was granted.

The Supreme Court examined section 513 of the IMDMA and determined that non-minor children's post-secondary expenses were a form of "child support." Therefore, the action brought by the former Wife brought her within the purview of section 510. The Act provides that provisions of any judgment respecting maintenance or support may be modified "only as to installments accruing subsequent to due notice" by the party seeking the change. Under the plain language of the statute, a retroactive modification is

limited to only those installments that date back to the filing date of the petition for modification. The Supreme Court held that given the construction of 510, it is reasonable to believe that parties to divorce actions presume that issues that are reserved in the original dissolution decree will be adjudicated in the manner set forth in section 510.

COLLEGE EXPENSES - CONTRIBUTION TO

12. *In re Marriage of Chee*, 952 N.E.2d 1252 (1st Dist. 2011).

At issue was a petition filed by Mother during dissolution of marriage/invalidity of marriage proceedings for contribution to children's college expenses, even though the subject children had already graduated from college. Father had never contributed to the children's college expenses. Father filed a motion to dismiss Mother's petition, claiming the court lost authority to adjudicate educational expenses upon each child's graduation. The trial court granted the motion to dismiss.

The appellate court considered the plain language of section 513 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/513 (West 2008)) and determined that the statute addresses the subject matter of educational expenses petitions rather than the timing of adjudication. In other words, section 513 covers the "what" of an expense petition rather than the "when." The court then distinguished its ruling from the *Petersen* decision (*Petersen v. Petersen*, 403 Ill.App.3d 839 (2010)). In the *Petersen* case, the parents' divorce judgment reserved the issue of contribution to college expenses of the children pursuant to section 513 of the IMDMA. Mother filed a petition eight years after the judgment was entered, seeking contribution to college expenses, some of which had been incurred prior to Mother's filing. Father was not liable for any of first child's college expenses and only a portion of younger children's expenses. The *Petersen* case involved a petition filed after a final judgment. In the instant matter, there had not been a final order entered. Therefore, *Petersen* was not controlling.

CONFLICT OF INTEREST

13. *In re Marriage of Newton*, 955 N.E.2d 572 (1st Dist. 2011).

Husband had an initial consultation with appellants, Grund & Leavitt, P.C. Subsequent to the initial consultation, Grund then met with Wife. Wife then retained Grund and Grund represented her in a divorce proceeding. In March 2007, Husband's attorney filed an emergency motion to disqualify Wife's attorneys due to Grund's former representation of Husband in the same proceeding. In August 2009, the circuit court entered a preliminary injunction order prohibiting Grund & Leavitt from representing Wife. After hearing in September 2007, and subsequent appeals and rehearings, it was ordered that Berman, an attorney who had joined Grund & Leavitt, was allowed to represent Wife while the disqualification motion was pending.

In January 2009, Grund & Leavitt filed a petition for attorney fees on behalf of Wife seeking prospective and interim fees and costs from Husband of $250,000. The court conducted a hearing (as directed by a prior order from the appellate court) and allowed Grund to testify. On March 3, 2009, the circuit court entered its memorandum of opinion and order finding that there was an attorney-client relationship between Grund and Husband and disqualifying Grund & Leavitt from representing Wife.

On March 10, 2009, the matter was before the court on Grund & Leavitt's fee petition. The court concluded it could not award attorney fees because of counsel's disqualification. Counsel would not step away from the bench, and the court found him in contempt.

Grund then appealed the contempt filing and the underlying denial of their petition for fees.

The appellate court found that Grund had standing to appeal, despite the fact that the divorce case had concluded, because the petition for fees was filed under section 750 ILCS 5/508 and was filed during the pendency of the dissolution proceedings. They also had standing because they appealed a contempt finding.

The appellate court affirmed the trial court's disqualification of Grund under Rule 1.9 of the Illinois Rules or Professional Conduct. Because Grund had formerly represented Husband (by virtue of his initial consultation with Husband), there was a conflict of interest.

Further, the appellate court affirmed the trial court's denial of fees. Grund & Leavitt's disqualification barred them from recovering attorney fees. Grund's contract with Wife was void *ab initio* because it violated Rule 1.9. The court held that public policy and precedent holds that if there is no contract between the attorneys and the client, there is no basis upon which to award fees. The firm is not entitled to any attorney fees before the court entered the disqualification order because the retainer agreement was void *ab initio*, as Grund & Leavitt knew they had met with Husband and had violated public policy and Rule 1.9 by entering into a retainer agreement with Wife.

The appellate court also affirmed the finding of contempt. The court noted that the purging provision of the order was well within the court's discretion. Grund & Leavitt had no good-faith basis to draw a contempt judgment to test the validity of the court's order denying their attorney fees due to the established conflict of interest.

CUSTODY MODIFICATION

14. *In re B.B. and K.B.,* --- N.E.2d ---- 2011 WL 5127775 (4th Dist. 2011)

In December 2002, the Mother filed a petition to establish a father-child relationship and a petition for custody against Father. On March 25, 2003, prior to paternity testing, the court entered a temporary child support order. On June 24, 2004, the parties announced they were back together. The court vacated the temporary child support order and granted the petition to establish a father-child relationship. The court also found the custody petition to be moot. In May 2010, after IDHFS filed a petition to intervene and a petition to modify custody, the court ordered the Father to pay permanent support. On June 1, 2010, the Father filed a petition for temporary and permanent custody of the minor children. The Mother filed a motion to dismiss asserting the April 2010 child-support order granted her custody of the minor children under section 14(a)(2) of the Illinois Parentage Act of 1984 and, thus, Father's modification petition was within two years. After a hearing, the court found that the June 2004 order was a custody order and granted Father leave to file a petition for modification of custody. The Father did so and after a hearing, was awarded custody of the two children.

On appeal, the Mother asserted that the trial court's May 2010 permanent child support order was a judgment awarding her custody of the children under 750 ILCS 45/14(a)(2). The Father asserted that the June 2004 paternity order was a judgment awarding the Mother custody and therefore, could be modified. Section 14(a)(2) of the Parentage Act expressly applies to parentage judgments and does not address temporary child-support orders entered before the parentage judgment or support orders after a final parentage judgment. Because parentage was determined in June 2004, the May 2010 order was not a part of the parentage judgment. Because the March 2003 temporary support order was entered prior to determining parentage, the March 2003 order did not constitute a custody judgment. The appellate court also held that because the June 2004 parentage judgment did not address support or visitation, it did not constitute a custody judgment. Therefore, since a custody judgment did not exist when the Father sought custody of the minor children, the Father's petition was for an initial custody judgment and not a modification.

DISSIPATION AND ATTORNEY FEES

15. *In re Marriage of Schinelli,* 406 Ill.App.3d 991, 942 N.E.2d 682 (2nd Dist. 2011).

The circuit court entered maintenance and property division orders. Husband appealed and the appellate court affirmed in part and reversed in part and remanded. On remand, the circuit court entered additional orders, and Husband appealed.

On appeal, Husband argues that (1) the award of attorney fees to Wife was improper, that (2) he did not dissipate assets from the joint checking account; and Wife argues that (3) the court should have reevaluated retirement account when considering a motion for a qualified domestic relations order.

With regard to the attorney fees, the court first held that Husband's filing of his appeal was untimely as it was more than 30 days past when the court ruled on the issue. However, the appellate court held that because not all the issues in the case were resolved on the same date, Husband's appeal was timely as it was within the 30 day period of the "termination of litigation between the parties." Next, the appellate court held that Wife's award of attorney fees was improper because the parties were in substantially similar financial circumstances and Wife had not demonstrated an inability to pay her fees. The fact that Wife had primarily prevailed on the appeal was not relevant to the award of attorney fees.

With regard to dissipation, the appellate court disagreed with the lower court and found that where Husband could show various deposits into a joint account, and where Husband testified that he incurred a monthly deficit for marital expenses and that he deposited over $6,000 from one of his individual accounts to the joint account to pay bills, Husband had established by clear and convincing evidence that he did not dissipate marital assets. The trial court's finding to the contrary was therefore against the manifest weight of the evidence.

The retirement assets in this case were to be divided equally between the parties. However, at the time the QDRO was entered, the Husband's 401(k) no longer had the total amount listed in the Judgment for Dissolution. Wife still sought the dollar figure stated in the Judgment, which comprised nearly the total amount left in the 401(k), and asked that Husband bear the loss that the 401(k) account incurred. The trial court sided with Wife on this issue. On appeal the appellate court held that when the trial court entered the Judgment, the ultimate intent was for an essentially equal division of retirement assets. Because of the decline in the market, when the QDRO was entered with the court, the Judgment was impossible to comply with because the 401(k) was worth so much less. Accordingly, both parties were to bear the loss of the account and the account was to be split in proportion to the manner it was originally divided.

DISTRIBUTION OF RETIREMENT ACCOUNT

16. *Reda v. Estate of Reda,* 408 Ill.App.3d 379, 944 N.E.2d 378 (1st Dist. 2011).

Petitioner, Wife and Respondent, Husband were divorced in 1988. Wife was awarded a one-half interest in Husband's SURS pension which remained in the pension until Husband's death in 2007. Husband's total cash contributions to the SURS, plus interest thereon, were valued at $64,920 as of January 1, 1988.

The parties' marital settlement agreement provided for several different scenarios by which Wife was to receive her one-half share of the SURS. In the event of Husband's termination of employment prior to retirement, Husband was to apply for a refund of his contributions plus interest thereon and to pay Wife within fifteen days, the sum of $32,460 plus the proportion of the interest earned after December 21, 1987 attributable to the sum of $32,460. Additionally, Husband was to obtain a life insurance policy on his own life or an annuity with the face value of $32,460.00 payable to Wife as an

irrevocable beneficiary within thirty days of the entry of the Judgment for dissolution of marriage. Upon Husband's retirement, Wife was to receive her interest in Husband's pension. Further, language in the marital settlement agreement accounted for the accrued value of Wife's half of the monthly annuity payments Husband would have received during retirement.

Husband failed to obtain the life insurance or annuity. In December of 1988, Husband designated his three children as primary beneficiaries of his SURS Pension. In 2002, Husband designated his New Wife as primary beneficiary. Wife is not mentioned in any of the designation forms.

Husband died in 2007 and was still an employee under the plan at the time of his death. Husband's SURS account, including contributions and interests that had grown to over $730,000.00 by the time of Husband's death. At the time of Husband's death, SURS began distributing the death and survivor benefits of the pension to New Wife and Husband's two children from his marriage to New Wife.

Wife filed an amended motion for entry of judgment, requesting judgment be entered in her favor in the amount of $191,581 plus attorney fees. Further, Wife requested that a constructive trust be imposed on Husband's Estate ("the Estate"). The circuit court ordered a constructive trust on the estate, ordered statutory interest be paid on the judgment of $32,460 from the date of the judgment for dissolution of marriage until the Estate fully paid the obligation. The Estate filed a motion to reconsider and the circuit court vacated its prior order and entered judgment against the Estate in the amount of $160,121. The sum included Wife's share of the pension at the time of divorce and the interest that had accrued on Wife's share until Husband's death. Statutory interest was not included in the new order.

The Estate appealed. The Estate argued Wife is only entitled to $32,400 based on her right to half of Husband's pension at the time of their divorce and no interest of accrual value. Wife argues that the Judgment for Dissolution awards her one-half of the then-accrued pension, plus any later accrual value to her initial share of the account of pension investments. The appellate court looked to the terms of the marital settlement agreement and the testimony of the parties at the time of the entry of the judgment. The appellate court found that both parties showed their intent for Wife to receive one-half of Husband's pension based upon testimony given during the prove up of the Marital Settlement agreement and based upon on the amount accumulated in the SURS pension at the time of their divorce. Husband's breach of the agreement to obtain a life insurance policy or annuity renders it impossible to determine the parties' intent as to that paragraph and therefore it was not considered. With regard to the remaining paragraphs of the Marital Settlement Agreement, awarding Wife $160,121 is most consistent with the parties' intent, and comports with the notions of equity and fairness and the ability for the circuit court to enforce its judgment of dissolution of marriage.

DIVISION OF PROPERTY/ MARITAL PROPERTY

17. In re Marriage of Jones, --- N.E.2d ----, 2011 WL 1334848 (5th Dist. 2011).

Petitioner, Husband, appeals the trial court's final ruling on the division of property pursuant to the parties' dissolution of marriage. Specifically, Husband raised the following three issues: 1) whether the determination that all of his IRA account was marital property was proper, 2) whether the determination that all of his investment accounts were marital property was proper, and 3) whether the trial court erred in excluding the second mortgage on the house in determining the equity therein. The Respondent, Wife, also filed a cross-appeal and argued the trial court erred in its subsequent determination that Husband should be reimbursed $60,000 from his IRA. The appellate court affirmed as follows:

The IRA was all marital property. In the trial Husband presented evidence that he had initially funded his IRA with premarital assets. He argued that his IRA was always non-marital property, even if the marital property increased its value. His expert testified that he attempted to determine the marital portion based on a ratio of what was in the account at the time of the marriage, as opposed to what stocks were owned or purchased with the initial funds. As such the court held that the premarital and marital funds were commingled and lost their identity. Thus the IRA is marital.

Similarly, the investment account is also marital property. Despite the fact that Husband initially funded the investment account with $60,000 of non-marital funds, throughout the years the account and funds were commingled and lost their identity as either non-marital or marital. The appellate court affirmed the trial court's decision to reimburse Husband $60,000 from the investment account as his non-marital property.

With regard to the exclusion of the second mortgage on the marital home, the trial court found that this mortgage, held by Husband's relatives, could be forgiven which would result in Husband receiving a greater share of the marital estate. Husband's relatives loaned him money to purchase an airplane but neither they nor Husband ever recorded their interest. Further, the loan was taken out without Wife's consent. Husband expressed a desire throughout the litigation to keep the marital home and its debts. Additionally, Husband had not made any payments towards the principal of the loan from his relatives. Given the circumstances in total, the appellate court found that the trial court did not err by excluding the second mortgage as a marital debt.

EVALUATIONS - 604(b)

18. *Johnston v. Weil,* --- N.E.2d ----, 2011 WL 681684 (Ill. 2011).

Mother had one child with First Father and divorced. Then Wife had another child with Second Father and divorced. First Father filed a motion to modify the joint parenting agreement. A 604(b) evaluator was appointed to assist the court in determining the custody of the first child. Second Father then filed a motion seeking temporary custody of second child and sought leave to subpoena the 604(b) evaluator that was appointed in First Father case. Mother asserted that the report of the 604(b) evaluator was privileged under the Confidentiality Act 740 ILCS 110/1. The circuit court found that the report of the 604(b) evaluator in First Father case was privileged under the Confidentiality Act and not discoverable in the Second Father's case.

Mother and her parents filed the instant complaint which named as defendants, First Father and his attorney's, the Child Representative in First Father's case, Second Father, Second Father's attorney and the Child Representative in Second Father's case. The complaint alleged that the 604(b) evaluator was a therapist within the meaning of the Confidentiality Act; that the 604(b) evaluator engaged in confidential communications with Mother and her parents and that the information the 604(b) evaluator obtained in her report in the First Father's case was privileged under the Confidentiality Act. Further, Mother alleged that the First Father defendants, individually and/or jointly, disclosed the confidential information to the Second Father defendants. The complaint sought $200,000 in damages.

The Child Representative in Second Father's case filed a section 2-619(a)(9) motion to dismiss and attached an affidavit. The affidavit stated that the Second Father's Child Representative called the First Father's 604(b) evaluator to determine whether her 604(b) report had any relevance to the Second Child. The 604(b) evaluator stated that the areas evaluated were related to ongoing substance abuse, ongoing violence and the ongoing impact of poor impulse control. Said issues would be relevant to the parenting of any child. The circuit court denied the motion to dismiss the complaint. The Respondents filed a motion to reconsider and to certify the below question, which the

court did certify. The Cook County circuit court certified the following question for interlocutory appeal:

> "Whether evaluations, communications, reports and information obtained pursuant to section 604(b) of the Illinois Marriage and Dissolution of Marriage [Act] are confidential under the Mental Health and Developmental Disabilities Confidentiality [Act] where the 604(b) professional personnel to advise the court is a psychiatrist or other mental health professional."

The appellate court found, and the Supreme Court confirmed the answer is "*no*." The Supreme Court held that section 604(b) on its face requires disclosure of the 604(b) report only in the particular proceeding in which the advice is sought. The Respondents also ignored section 605 which provides the remedy intended by the legislature in cases where a party in a post dissolution proceeding seeks relevant evidence obtained in another post dissolution proceeding. Section 605 provides "*that a parent or custodian may request the circuit court, or in a contested custody proceeding, on the court's own motion, to order 'an investigation and report concerning custodial arrangements.'*" Further *"the investigator may consult with and obtain information from medical, psychiatric or other expert persons who have served the child in the past, without obtaining the consent of the parent or the child's custodian.*" 750 ILCS 5/605(b). The Supreme Court found that the plane language of section 605 allows for disclosure in precisely the situation presented in this case.

Section 604(b) does not provide for any exceptions when the 604(b) professional is a mental health professional. Therefore, the report of the professional is limited to the court, counsel and the parties in that particular proceeding. The Supreme Court rejects the argument that the professional is a therapist who provided the parties with services and therefore the report is privileged under the Confidentiality Act. The Supreme Court held that a custody evaluation pursuant to section 604(b) does not constitute psychiatric services received for a mental condition. Therefore, section 10(a) of the Confidentiality Act does not apply to the information obtained by and the report of a section 604(b) professional.

19. *In re Marriage of Molloy*, 407 Ill.App.3d 987, 943 N.E.2d 298 (1st Dist. 2011).

Pro se Wife requested a 604.5 evaluation be conducted in a dissolution of marriage proceeding. Wife motioned to request that Husband's attorney be barred from attending the evaluation to prevent an unbalanced report since Wife did not have an attorney. After opportunity to present law and conduct a hearing, the court granted Wife's motion. Husband argued that the Wife's motion was an attempt to prevent him from exercising his statutory right pursuant to section 2-1003(d) of the Illinois Code of Civil Procedure. The purpose of the 604.5 evaluation is to determine the best interests of the children. The purpose of a 2-1003(d) evaluation is to determine the extent of a party's injuries or the capacity of a party to exercise his or her rights. The circuit court held that a party does not have a right to have an attorney present at a child custody evaluation as one does during a discovery evaluation.

Husband's request for Rule 304(a) language to allow for an immediate appeal was denied by the court. Husband's attorney then drafted an order asserting that the "injunctive relief" requested by Wife was granted. Husband filed an interlocutory appeal citing Illinois Supreme Court Rule 307(a)(1) as the basis for appellate jurisdiction. The Public Guardian filed a motion to dismiss for lack of Jurisdiction under Rule 361.

The appellate court addressed the following issue: does the Husband's claim that his statutory right under section 2-1003(d) of the Code extend to an evaluation under section 604.5 of the Act such that barring the presence of Husband's counsel qualifies as an injunction? The Public Guardian alleged that the order did not qualify as one

granting an injunction on under Rule 307(a)(1) as it merely sets conditions for the Husband's 604.5 evaluation, despite the fact that the language of the order characterizes the relief as injunctive. Further, 604.5 expressly provides that the "conditions" of the evaluation are to be determined by the circuit court.

The appellate court found the aim of the circuit court's order to be ministerial, an order that places a "condition" on the custody evaluation. Therefore, the order is not the equivalent of a preliminary injunction whose function is to "preserve the *status quo* pending resolution of the merits of the case." The appellate court found that since no injunctive relief was granted, there was no jurisdiction to address the interlocutory appeal.

GUARDIANSHIP

20. *Karbin v. Karbin*, 954 N.E.2d 854 (1st Dist. 2011).

Husband filed his petition for dissolution of marriage against Wife, who was disabled and had a guardian. Guardian counter-petitioned on behalf of Wife. Husband then dismissed his petition and filed a motion to dismiss disabled Wife's counter-petition. Court granted motion for dismissal, as the court found Guardian had no authority under the Probate Act to prosecute a petition for dissolution of marriage.

The appellate court affirmed, reasoning that the Probate Act authorizes a guardian only to "maintain" a dissolution action; it does not give the guardian authority to continue a counter-petition if the initial petition has been dismissed. 755 ILCS 5/11a-17(a-5) (West 2008).

21. *In re T.P.S.*, 954 N.E.2d 673 (5th Dist. 2011).

Biological Mother and her same-sex partner entered into co-guardianships for children born to biological Mother during relationship. After the relationship ended, biological Mother filed petitions to terminate guardianships. Trial court granted petitions based on lack of jurisdiction over child custody proceeding involving a same-sex couple where non-biological partner did not legally adopt the children.

On appeal, the court looked to the plain language of the Probate Act to determine whether former partner has standing to oppose biological Mother's petitions to terminate the guardianships, as her standing is governed solely by the Probate Act. On January 1, 2011, the Probate Act Section 11-14.1 was amended to provide express provisions relating to standing in a petition to terminate a guardianship. 755 ILCS 5/11-14.1(b). Pursuant to this section, former partner has standing to oppose the termination of her guardianship because the trial court had previously found it was appropriate to grant the guardianship in the first instance. However, former partner must still prove by clear and convincing evidence that continuation of the guardianship is in the children's best interests.

HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

22. *In re Marriage of Habrzyk*, 759 F.Supp.2d 1014 (N.D. Ill. 2011).

Father filed an action against Mother for return of his daughter to Poland alleging Mother violated the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention") and International Child Abduction Remedies Act (ICARA) when she removed the daughter from Poland to Canada and subsequently to Chicago. Father filed a motion for summary judgment which is the subject of this opinion.

In 2006, the parties married in Poland and one child resulted from their marriage. The parties continued to be married but ceased living together consistently. The child moved with Mother and the Father visited and lived with Mother and the child off and on for the

three years following the child's birth. Mother alleged that the Father physically and emotionally abused her and the child. On April 3, 2009, Mother left with the child on a flight to Toronto, without notifying or obtaining an agreement from Father. Mother resided in Canada for several weeks before boarding a small passenger boat with the child and coming to the United States – avoiding customs.

When Father was unable to locate Mother, he contacted the Polish police and reported both missing. Father was informed by the Polish Border Service that Mother and child had left on a flight to Canada. Father then reported to the Polish police that Mother had abducted the child. On April 8, Father initiated judicial proceedings in Poland to establish the whereabouts of the child and for access to the child. In May and June 2009, Father contacted the Polish Consulate in Chicago and the United States Consulate in Poland seeking assistance in locating the child.

On January 4, 2010, Father filed his Hague application with the Polish Central Authority. On April 14, 2010 the location of the child and Mother were determined by the Office of Children's Issues of the U.S. Department of State. Father filed his Petition for Return of Child Under the Hague Convention and ICARA on September 14, 2010. On December 17, 2010 Father moved for summary judgment.

The Convention requires that the determination of whether the child's removal was wrongful must be made under the laws of the country in which the child has his or her habitual residence. To prevail in his action, Father must establish by preponderance of the evidence that the child has been wrongfully removed within the meaning of the convention. If Father meets this burden, the child must be returned unless Mother can establish one of the four defenses provided for in the Convention.

The first question is whether the Father can establish a case of wrongful removal by Mother. There are three elements. First, for the Convention to apply the child must have been a "habitual resident" in the country from which she was removed immediately before any breach of custody or access of rights. Second, the removal must have been in breach of rights of custody attributed to a person under the laws of the State from which the child was removed. Finally, at the time of the removal, those rights were actually exercised or would have been exercised. Father alleges he has established a *prima facie* case because (1) there is no dispute that Poland was the place of the Child's habitual residence, (2) Father has custody rights over the Child under Polish law and removal from Poland was in violation of those rights and (3) it is undisputed that Father was exercising his rights prior to the Child's removal. Father was granted summary judgment on each of these three issues.

Under the Convention the court must return the child unless the respondent can prove one of four defenses. The four defenses are: "Consent or Acquiescence", "Grave Risk," "Public Policy," and "Settled in New Surroundings."

Consent. Discussion of a hypothetical to Chicago to see Mother's family is not sufficient to establish consent. Father is entitled to summary Judgment on this issue.

Acquiescence. Mother claims Father's attempts to contact the child since she was removed constitutes acquiescence. The inquiry turns on the subjective intent of the parent who is claimed to have acquiesced. Given the gaps in which Father took no action there is a tryable issue as to whether Father acquiesced to the child remaining in the United States.

Grave Risk. There is grave risk to the child if the petitioning parent may, with some non-negligible probability, injure the child. Mother alleged Father tried to run the child over with his car, threatened to kill Mother if she reported it, and that Father abused drugs and alcohol in front of the child. The court denied summary judgment on this issue.

Public Policy Defense. The return of the child may be refused if it would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms. This defense is meant to only be used on the rare occasion where the conscience of the court would be shocked. The court granted summary judgment for Father regarding this defense.

Settled in New Surroundings Defense. The Convention provides that a child wrongfully removed must be returned if less than one year has elapsed between the date of the commencement of the judicial proceeding and the wrongful removal. If the period is longer than a year the court need not order the child's return if it is demonstrated that the child is now settled. Father alleges that the court should toll the Convention's filing period because respondent concealed the location of the child. The Ninth and Eleventh Circuits have held that equitable tolling can apply where one parent concealed the child. Two conditions must be met: first that the abducting parent concealed the child and second, that concealment caused the petitioning parent's delay. The Seventh Circuit has not addressed the issue. However, the court finds the reasoning of the Ninth and Eleventh Circuits compelling. There are material facts in dispute. Therefore, summary judgment is denied regarding this defense.

Settled in New Environment. The factors the courts consider include: (1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular school activities, and (6) the respondent's employment and financial stability. This is a very fact dependent issue and therefore summary judgment is denied.

INTEREST ON CHILD SUPPORT ARREARAGES

23. *Illinois Department of Healthcare and Family Services ex rel, M. Wiszowaty v. M. Wiszowaty, 239* Ill.2d 483, 942 N.E.2d 125 (Ill. 2011).

Department of Healthcare and Family Services (DHFS) intervened in child support proceeding and petitioned for rule to show cause as to why Father should not be held in contempt of court for failure to pay child support from 1992 to 2005.

An agreed order was entered as to the amount of the arrearage but the parties contested whether interest was due on the entire amount. Father conceded to payment of interest on the unpaid support payments after 2000 (when certain amendments were made to the Illinois Marriage and Dissolution of Marriage Act). However, he argued that prior to that date, the imposition of interest was left to the discretion of the circuit court and that the circumstances of his case did not warrant imposing interest.

The appellate court reversed the lower court and found that the General Assembly changed the law in 1987 by providing that each unpaid child support installment is an actual "judgment" that arises by operation of law, and that each such judgment "shall bear interest." As such, the entire arrearage (from 1992 to 2005) was subject to interest.

JOINT CUSTODY - TERMINATION OF & CONTEMPT FINDING FOR LACK OF PAYMENT OF MEDICAL EXPENSES

24. *In re Marriage of Smithson,* 407 Ill.App.3d 597, 943 N.E.2d 1169 (4th Dist. 2011).

Father filed a motion to modify custody requesting the joint parenting agreement entered four years prior awarding Mother primary physical custody be terminated and that he be awarded sole custody of the parties' two minor sons. Mother filed a petition for adjudication of civil contempt, alleging Father failed to pay one-half of the children's uncovered medical related expenses as required by the judgment for dissolution.

Following trial, the court determined joint custody was not working for the parents. Further, the court found that Father had not proved by clear and convincing evidence a change in physical custody from Mother to him was necessary for the well-being of the children. The court also found that Father failed to prove an agreement existed by which Mother would pay all uncovered medical expenses (contrary to the language of the judgment for dissolution.) Therefore, the court denied the motion to modify custody, terminated the joint parenting agreement, awarded sole custody of the minor children to Mother and found Father in contempt for failing to pay his share of the children's uncovered medical expenses.

Father appealed alleging that the trial court applied the wrong burden of proof in denying his motion to modify custody. Father contends he need not prove a change of circumstance occurred and that the court need only determine what custody arrangement was in the best interest of the children. To modify a custody order, a petitioner must demonstrate by clear and convincing evidence (1) a change in circumstances of the children or his custodian has occurred and (2) a modification is necessary to serve the best interest of the child. However, in the case of a joint parenting agreement, where both parties agree to a termination of the agreement, the court may proceed directly to a determination of the child's best interests. In this case the trial court did not find that Mother agreed to terminate the joint parenting agreement. The appellate court then went through the testimony received at trial, including the recommendations of a Guardian *ad litem* and a custody evaluator, which were in conflict with each other and determined that the trial court did not abuse its discretion in holding that it was not in the best interests of the children to remove them from the only home they had ever known to go live with their Father who had only recently become active in their lives.

The appellate court reversed the trial court's contempt finding for Father's failure to pay uncovered medical expenses. Trial court found that the Father did not prove an agreement to modify the original order as to payment of uncovered medical expenses. The Trial court further found that despite Mother not sending the documents, nor demanding payment from Father, Father received the explanation of benefits and was aware of the expenses. The appellate court reversed the trial court and found that despite Father being aware of the expenses, his conduct did not support a contempt finding. However, he does remain responsible for payment of his one-half share of the children's expenses.

JUDGMENTS

25. *In re Marriage of Goldsmith*, --- N.E.2d ----, 2011 WL 3848839 (1st Dist. 2011)/

Wife and Husband entered into a marital settlement agreement in which they expressly acknowledged they had engaged in limited discovery. One year after judgment was entered, Ex-Wife filed a petition alleging Ex-Husband failed to disclose certain assets, triggering a provision in their settlement agreement that would make those assets subject to division; or, in the alternative, asking that the judgment be vacated pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). Trial court found that Ex-Wife knew of or could have discovered the "newly discovered assets" and that Ex-Wife did not present any credible evidence that Ex-Husband fraudulently concealed the assets.

The appellate court affirmed. There were three assets which Ex-Wife claimed Ex-Husband failed to disclose, namely: proceeds from a lawsuit; stock; and tax refunds from amended joint tax returns. As to the first asset, the lawsuit proceeds stemmed from an asset Ex-Wife had agreed was Ex-Husband's non-marital asset. Therefore, the settlement was likewise non-marital. With regard to the bank stock, the Ex-Wife admitted that the asset was previously disclosed, but she alleged that the nature of the

asset (*i.e.*, that it was stock) was not. The appellate court determined that the nondisclosure of the nature of the asset made no difference. Finally, the court looked to the language of the parties' marital settlement agreement to address the amended tax return filed after judgment was entered. The court found that because the MSA did not contain language granting the Ex-Wife the right to share in said refunds, the court declined to add a benefit to the Ex-Wife in the MSA that she did not negotiate with the Ex-Husband.

The court also addressed Ex-Wife's claim that she acted with legal due diligence by relying on the representation and warranty in the MSA. The court found that Ex-Wife's position is unsupported by Illinois law: *"When a divorce party elects to forego formal discovery in favor of accepting a representation and warranty of full and complete disclosure, the party does so at his or her own peril."* Therefore, Ex-Wife did not act with due diligence and therefore failed to establish a necessary element to reopen judgment. The court emphasized, however, that the instant case did not present a question of fraudulent concealment of assets.

26. *In re Marriage of Streur,* 955 N.E.2d 497(1st Dist. 2011).

A judgment for dissolution of marriage was entered on April 18, 2000. the judgment incorporated the marital settlement agreement and joint parenting agreement, which awarded the parties joint custody of the minor children and named the Wife as the residential parent. On June 2, 2004, the Wife filed a petition to modify and increase unallocated support and a petition for rule to show cause based on the Husband's failure to disclose his paystubs, W-2 statements, and K-1s on a quarterly basis pursuant to the parties' agreement. The petition for rule was later withdrawn. On April 1, 2005, while the petition to modify was still pending, the Husband filed a petition to set child support since his obligation to pay unallocated maintenance terminated on March 1, 2005. On June 14, 2006, the Wife filed a motion for voluntary dismissal. On July 11, 2006, the court entered an agreed order dismissing the case.

On November 9, 2006, the Wife filed a petition to vacate the judgment under section 2-1401 (735 ILCS 5/2-1401). The Wife claimed that the Husband made false statements of material fact regarding his income and assets upon which she relied and that he failed to turn over his paystubs, W-2 statements and K-1s as required by the marital settlement agreement. The Husband filed a motion to dismiss based on the statute of limitations. In the meantime, the Wife also filed a petition to set child support on May 18, 2007. On April 14, 2008, the trial court set child support at $17,000 per month and determined child support was retroactive to May 1, 2007. The court dismissed the petition to vacate the judgment based on statute of limitation grounds, and the court awarded the Wife attorney fees in the amount of $127,000. Both the Wife and Husband appealed.

On appeal, the Wife argued that the trial court erred in failing to make the award retroactive to June 2, 2004 (the date Wife initially filed her petition to modify) because the Husband received notice that she was requesting a modification. The Husband argued that the court cannot go back to June 2, 2004 because the case was dismissed and that the retroactive date should be May 18, 2007, the date he received notice that the Wife filed a petition to set child support. The reviewing court held that the appropriate date for ordering a retroactive child support obligation to begin was not the date that the Wife filed her initial petition to modify support, but rather, it was the date that the Husband's unallocated support per the marital settlement agreement ended. The court held that because the Husband knew that his support obligation would be modified after March 1, 2005, either by agreement or by court order, the Husband had proper notice that his support would be modified. Therefore, child support was retroactive to March 1, 2005.

Also on appeal, the Wife argued that her motion to vacate was not time barred and should not have been dismissed. The appellate court affirmed the trial court's finding that the Wife's motion was time barred. The court held that to be entitled to relief under section 2-1401, the petitioner must affirmatively set forth specific allegations supporting each of the elements: 1) the existence of a meritorious claim or defense; 2) due diligence in presenting that claim or defense in the original action; and 3) due diligence in presenting the section 2-1401 petition. A section 2-1401 petition must be filed within 2 years of entry of the relevant final judgment, but time during which the grounds for relief is fraudulently concealed is excluded from the two-year period. The court held that the statute of limitations on the Wife's petition to vacate the marital settlement agreement provisions in the judgment for dissolution of marriage was not tolled by the Husband's alleged concealment of assets. In making this finding, the court stated that the Wife's previous petition for rule to show cause alleged substantially the same concealment as her motion to vacate and, thus, she had knowledge of a possible claim, but waited until after the limitations period to file her motion to vacate.

Finally, the Husband argued the trial court's award of attorney fees to the Wife in the amount of $127,000. The appellate court found that the trial court did not abuse its discretion in awarding attorney fees to Wife in the post-decree matter. In affirming the decision, the trial court held that although the Wife did not succeed on one petition, there was no evidence that she acted in bad faith, and the Wife did not work while the Husband had a substantial income.

27. *In re Marriage of Hendry,* 949 N.E.2d 716, 409 Ill.App.3d 1012 (2nd Dist. 2011).

On October 27, 2008, the trial court entered a judgment of dissolution of marriage. The judgment incorporated the parties' MSA, which addressed the distribution of the parties' retirement accounts. In section 9.6 of the MSA, the parties agreed that the Husband's Pacific Life SERP account was a non-vested account and the Wife waived all right to the account. Section 9.7 of the same agreement stated the following:

> "Retirement Accounts: MICHAEL currently has the following retirement accounts in place, exclusive of the Pacific Life SERP which was discussed in paragraph 9.6: A Pacific Life RISP in the amount of $341,760.00; a Pacific Life Employee Retirement Plan in the amount of $70,189.00; an E-Trade IRA in the amount of approximately $25,000.00...
>
> A. The parties shall value the tax-deferred assets and pensions with the exception of the Pacific Life SERP, and divide the accounts equally. The date of valuation will be September 30, 2008..."

In making this agreement, the parties did not mention the Husband's Pacific Life Deferred Compensation Plan. The Wife filed a petition to enforce the judgment, alleging that the parties' intent was to equally split all marital assets, including "non-qualified or retirement plans." The Wife also filed a petition to modify and/or vacate the judgment of dissolution of marriage alleging that the Husband concealed the fact that he was vested in the excluded plan. The trial court denied the Wife's petitions to enforce and to modify and/or vacate.

On appeal the Wife argued that the trial court erred by interpreting the parties' MSA as denying her a share of Husband's Pacific Life deferred compensation plan. The appellate court reversed the trial court. In doing so, the court held that the court's primary objective is to give effect to the intent of the parties, and the intent of the parties must be determined only by the language of the agreement, absent any ambiguity. Court held that by failing to name the Pacific Life Deferred Compensation Plan with the SERP, it is clear that the parties did not intend to exclude the former from being divided equally between the parties. The court ruled that the parties intended for the Wife to receive

50% of the account balance of each of the Husband's tax-deferred assets and pensions, including the Pacific Life Deferred Compensation Plan, with the exception of the SERP Plan. Therefore, the appellate court held that the Wife's petition to enforce should not have been denied.

The Wife also appealed the trial court's denial of her petition to modify and/or vacate. The appellate court held that the Wife failed to cite any relevant authority to support her contention that the Husband concealed that the plan was vested. The court stated that the Wife failed to support her contention with argument beyond her bald assertion. Therefore, the Wife forfeited this issue on appeal.

JUDGMENT FOR DISSOLUTION OF MARRIAGE

28. *In re Marriage of Bianucci*, --- N.E.2d ----, 2011 WL 6344768 (1st Dist. 2011).

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

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

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

29. *In re Marriage of Hluska*, --- N.E.2d ----. 2011 WL 6244808 (1st Dist. 2011).

The Husband appeals certain provisions in a judgment for dissolution of marriage. The first issue on appeal is whether the trial court erred in apportioning marital assets, awarding maintenance, and awarding attorney fees to the Wife without first valuing certain marital and non-marital assets. Under the IMDMA, a court must classify the property as either marital or non-marital before it may dispose of property upon a

dissolution of marriage. In order to divide the marital property in just proportions, the trial court first must establish the value of the parties' marital and non marital assets. However, the Act does not require the court to place a specific value on each item of property. In this case, neither party presented evidence concerning the value of certain assets including a non-marital residence and the value of a marital business. The court held that the Husband cannot fail to disclose information on the value of the assets and then complain that the trial court erred in not placing a specific value on them.

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

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

30. *In re Marriage of Bradley,* 2011 WL 6098782 (4th Dist. 2011).

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

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

The final issue on appeal was whether the court abused its discretion when determining the amount of money that the Husband was to pay for child support and maintenance. The court affirmed the trial court's decision to award the Wife maintenance and further stated that the Husband had the greater present and future potential to earn income and acquire assets. As for child support, the court stated that the Dissolution Act requires the trial court to consider all income from all sources in the computation of child support. "Income" for tax purposes is not synonymous with "income" for determining child support. The Internal Revenue Code is concerned with reaching an amount of taxable income while the support provisions in the Dissolution Act are concerned with reaching the amount of parental income in order to determine the sum each parent can pay for the support of their child. Here, the court used the father's overtime wages in the determination of net income. Because child support is modifiable, if those wages are no longer available, the court stated that the father could petition the court.

31. *In Re the Marriage of Steel,* --- N.E.----, 2011 WL 5869518 (2nd Dist. 2011).

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

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

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

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

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

MAINTENANCE

32. *In re Marriage of Anderson,* 409 Ill.App.3d 191, 951 N.E.2d 524 (1st Dist. 2011).

Respondent appealed an order terminating her maintenance and denying her petition for rule to show cause. She contended that the trial court erred in terminating her maintenance because Petitioner failed to establish the existence of a substantial change and that, in any event, Petitioner had sufficient income and assets to continue to pay maintenance to Respondent, while Respondent is financially dependent. Respondent also argued that the court erred in not finding Petitioner in contempt for his noncompliance with the court's previous order denying Petitioner's motion to modify maintenance.

The appellate court affirmed the trial court's decision that Petitioner showed a substantial change in circumstances. However, the trial court abused its discretion in taking into account that Respondent *may* be eligible for public assistance and by in essence assuming that public assistance can be a substitute for a spousal obligation.

The appellate court also found that the trial court erred as the statutory provision of maintenance explicitly mandates that the value of spouses' property holdings must be considered in determining the appropriateness of maintenance and is applicable both ways in that the court may take such property values into consideration in determining a spouse's obligation to pay maintenance and a spouse's right to receive maintenance. Here, Husband had substantially more assets than Wife, which the court did not consider.

With regard to the trial court's decision not to find Petitioner in contempt, the appellate court held that in light of its decision to remand the matter for reexamination of the maintenance award, it also remanded the matter for a reexamination as to whether Petitioner's unilateral direction to his stock broker to terminate the maintenance payment warrants a finding of contempt.

MAINTENANCE - MODIFICATION OF

33. *In re Marriage of Nilles,* 955 N.E.2d 611 (2nd Dist. 2011).

Husband and Wife entered into a Marital Settlement Agreement providing for maintenance to Wife, which was "not subject to modification for any reason whatsoever." Despite that clause, ten years later Husband filed a two-count petition to modify or vacate the judgment with regard to his maintenance and other support provisions, based on his substantial change in financial circumstances.

The trial court reduced Husband's maintenance obligation from $8,000 to $3,000 per month but ordered the remaining $5,000 per month to accrue as a claim against Husband's estate. The court also terminated various other support-related obligations.

The appellate court reversed. Husband had complained of his current economic conditions, not the conditions under which the agreement was made. The trial court cannot find an agreement unconscionable ten years after it was entered, based on Husband's current financial conditions. A finding of unconscionability must be based upon the parties' economic positions immediately following the making of an agreement. The appellate court stressed the need for security for parties to contracts, even when faced with a change in circumstances.

MAINTENANCE - EXTENSION OF

34. *In re Marriage of Doermer,* 955 N.E.2d 1225 (1st Dist. 2011).

On January 22, 1999, the court entered a judgment for dissolution of marriage, which incorporated the parties' marital settlement agreement. The Wife was awarded

residential custody of the minor child with the Husband having liberal visitation with the child. The Husband was ordered to pay unallocated maintenance in the amount of $5,785 per month. The agreement specifically stated,

> "RICHARD'S obligation to pay and KATHLEEN'S right to receive maintenance shall terminate on the first to occur of the following events: a)payment of unallocated maintenance and child support for eighty-four (84) consecutive month (seven consecutive years) following entry of the Judgment for Dissolution of Marriage; b) the death of KATHLEEN; c) The remarriage of KATHLEEN; or d) the cohabitation of KATHLEEN with another adult person on a regular conjugal basis. Thereafter, KATHLEEN shall be forever barred from receiving the maintenance and thereafter KATHLEEN shall have the right to receive child support only until such time as CAITLYN attains an "emancipation event" as hereinafter stated.

In April 2005, the parties agreed to modify portions of the MSA, which extended the length of the unallocated maintenance. All other terms of the MSA were to remain in full force and effect. In June of 2009, the Wife filed a petition for an extension of maintenance pursuant to section 510 of the IMDMA requesting that the duration of her support award be extended. On July 16, 2009, the minor child reached the age of majority and on July 23, 2009, the Husband filed a motion to dismiss the Wife's petition. The court denied the Husband's motion to dismiss and Husband filed a motion to reconsider. The court, relying on *Blum v. Koster,* 235 Ill.2d 21, 919 N.E.2d 333 (2009), entered an order granting Husband's motion to reconsider and granting the motion to dismiss the Wife's petition to modify.

The issue on appeal is whether the circuit court erred in granting the Husband's motion to dismiss. On appeal, the Wife argued that unallocated maintenance and child support are always modifiable, regardless of whether a non-modification exists in the marital settlement agreement. In making this argument, the Wife relied on the *Semonchik* case. *IRMO Semonchik,* 315 Ill.App.3d 396, 733 N.E.2d 811 (2000). In the *Semonchik* case, the court held that despite the fact that the parties stipulated to an end date in the marital settlement agreement for the termination of unallocated support and maintenance, that payment was subject to the statutory right of modification contained in the IMDMA because the children were not emancipated and child support was still at issue.

The Husband countered that the circuit court properly found that the non-modification clause in the parties' marital settlement agreement was enforceable. The Husband and the trial court relied on the decision made in *Blum v. Koster,* 235 Ill.2d 21, 919 N.E.2d 333 (2009). In *Blum,* the parties agreed that maintenance would terminate after 61 months. At the end of the 61 months, the Husband filed a petition to terminate maintenance. The *Blum* court held that because maintenance was at issue at the end of the 61-month period, the terms of the marital settlement agreement were binding on the parties and the court, and the marital settlement agreement deprived the court of the authority to grant an extension of maintenance upon the emancipation of the children.

In the present case, the reviewing court found that the facts were more like *Blum* than *Semonchik,* and the Wife's petition to modify was essentially a request to extend maintenance because child support was no longer an issue due to the emancipation of the child. Therefore, the Wife was not entitled to an automatic statutory right to modify the support award, and the marital settlement agreement was nonmodifiable.

PATERNITY ACTION AFTER SIGNED VOLUNTARY ACKNOWLEDGMENT OF PATERNITY

35. *Sandoval v. Botello*, 951 N.E.2d 1220 (1st Dist. 2011).

Alleged biological Father brought a paternity action, alleging that he was Father of child and that Mother had admitted to a past sexual relationship with him, and requesting DNA testing of Mother and child. Mother refused to submit to testing, alleging that Presumptive Father had already signed a Voluntary Acknowledgment of Paternity when child was born. Thus, she argued that the acknowledgment of paternity conclusively established a father-child relationship between the child and Presumptive Father.

The trial court ordered Mother to submit to DNA testing. She refused, was held in contempt and appealed.

The appellate court held that Mother was obligated to submit to DNA testing. Even though a legal presumption arose by virtue of the signed acknowledgment of paternity, that presumption may be rebutted. 750 ILCS 45/7(a) specifically allows "*an action to determine the existence of the Father and child relationship, whether or not such a relationship is already presumed under Section 5 of this act, may be brought by...a man presumed or alleging himself to be the Father of the child or expected child.*"

PATERNITY/ESTATE

36. *In re Guardianship of A.G.G.*, 406 Ill.App.3d 389, 948 N.E.2d 81 (5th Dist. 2011).

In this case an unrelated male sought guardianship of the minor, A.G.G. The court, in conducting a guardianship hearing, mistakenly confused the two standards for guardianship. First, upon the filing of a petition the court may appoint a guardian as "the court finds to be in the best interest of the minor." The court must first determine whether the appointment of a guardian is in the best interests of the minor.

The court must next determine whether the minor has a parent "*whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor.*" For this determination, there is a presumption that the parents are willing and able but that may be rebutted by a *preponderance of the evidence.*

The court confused the two standards and essentially, the issue of standing was never tried. As such, the case was reversed and remanded with directions to conduct an evidentiary hearing on standing.

PROPERTY - DATE OF VALUATION

37. *In re Marriage of Mathis,* 2011 WL 5438977 (4th Dist. 2011).

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

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

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

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

REMOVAL

38. *In re Marriage of Dorfman*, 956 N.E.2d 1040 (3rd Dist. 2011).

The court entered a judgment for dissolution of marriage on May 20, 2009. Pursuant to the terms of the judgment, the court awarded the Wife sole custody of the minor children. The court reserved the matter of the Husband's visitation and noted that he had yet to complete a parenting class. After the divorce, the court granted Husband varying terms of supervised visitation. In June 2010, the Wife moved with the minors to Georgia, and she filed her petition for removal in August 2010. Husband filed a motion asking the court to order the Wife and the children to move back to Illinois. At hearing, the parties testified as to the Husband's mental health history, the orders of protection against Husband on behalf of the Wife, the Husband's violation of the orders of protection, the Husband's jail time for violation of the orders of protection, the Husband's supervised visitation with the children, the Husband's alcohol consumption, and the Wife's fear of the Husband. The Guardian *ad litem* appointed to this case opined that the Husband's visitation with the minor children should be supervised. Basing its findings on the *Eckert* factors(*IRMO Eckert,* 119 Ill.2d 316 (1988)), the trial court held that its finding that Wife wanted to move to Georgia because of her fear of the Husband was well founded in fact. The Husband objected to the move to preserve his relationship with the minors and, thus, both motives were without fault. The court further found that the Wife's quality of life was enhanced in Georgia because she lived without fear of Husband, and that the Wife's and children's needs were met in Georgia. The court further found that visitation between the Husband and the minor children was limited, whether the minors lived in Illinois or Georgia, due to an ankle monitoring device that the Husband was required to wear, and the current order of protection against Husband, and the need for the visitation to be supervised. The court believed that a reasonable and realistic visitation schedule could be reached due to the minors' liberal school break schedule.

On appeal, the Husband argued that the court erred in granting the Wife's petition for removal. Like the trial court, the appellate court looked to the factors in *Eckert.* The five factors that the court must consider when granting a removal are as follows: 1) the proposed move in terms of likelihood for enhancing the general quality of life for both the custodial parent and the children; 2) the motives of the custodial parent in seeking the move to determine whether the removal is merely a ruse intended to defeat or frustrate visitation; 3) the motives of the noncustodial parent in resisting the removal; 4) the visitation rights of the noncustodial parent; and 5) whether a realistic and reasonable visitation schedule can be reached if the move is allowed. The *Eckert* factors are not exclusive, and the trial court should consider any and all relevant evidence in arriving at its decision. The appellate court held that the trial court heard extensive testimony and properly considered the evidence in light of *Eckert* and affirmed the judgment of the trial court.

SANCTIONS - DISCOVERY

39. *In re Marriage of A'Hearn*, 408 Ill.App.3d 1091, 947 N.E.2d 333 (3rd Dist. 2011).

Ex-Husband initiated modification of custody proceedings. He failed to answer Ex-Wife's Illinois Supreme Court Rule 213(f) witness disclosures and answered outstanding

discovery requests five days before trial. Ex-Wife moved to bar Ex-Husband from calling witnesses. The trial court sanctioned Ex-Husband by barring his witnesses. As a result, Ex-Husband's petition for custody was dismissed with prejudice, as Ex-Husband could not prevail on his petition without witness testimony.

On appeal, the court agreed with Ex-Husband that the trial court abused its discretion by barring his witnesses as a discovery sanction. Such an extreme sanction was too harsh, upon consideration of the Illinois Supreme Court Rule 900(a), which requires courts to focus on the best interest of the child in child custody proceedings.

SANCTIONS – SUPREME COURT RULE 137

40. *Schneider v. Schneider*, 408 Ill.App.3d 192, 945 N.E.2d 650 (1st Dist. 2011).

Orthodox Jewish couple divorced in 2002. Ex-Husband refused to give Ex-Wife a "*get,*" or a religious divorce, in contravention of their religious marriage contract, or "*ketubah.*"

Ex-Wife sued Ex-Husband for specific performance, asking the court to order Ex-Husband to give her a *get* and pay her attorney fees and costs. Ex-Wife relied upon *IRMO Goldman*, 196 Ill.App.3d 75 (1990) in support of her motion for specific performance. Trial court ordered Ex-Husband to give Ex-Wife a *get*, and Ex-Wife pursued attorney fees from Ex-Husband. Trial court sanctioned Ex-Husband pursuant to Illinois Supreme Court Rule 137 and entered judgment against Ex-Husband.

The sole issue on appeal was the trial court's assessment of sanctions pursuant to Rule 137. Ex-Husband argued that the trial court sanctioned him as a result of his conduct in the litigation. The appellate court agreed that it would have been inappropriate for the trial court to sanction under Rule 137 based upon a party's conduct before the court. However, the appellate court further determined that the sanctions were not based upon same. Rather, Ex-Husband raised the same baseless argument in response to every pleading filed by Ex-Wife, even after the trial court ruled on the merits of those arguments. Ex-Husband should have appealed the trial judge's decision rejecting his arguments but did not. Therefore, the Ex-Husband's persistence in raising the same arguments was only "to harass or cause unnecessary delay or needless increase in the cost of litigation." Rule 137.

41. *In re Marriage of Johnson*, --- N.E.2d ----. 2011 WL 6823915 (1st Dist. 2011).

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

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

SERVICE BY PUBLICATION

42. *In re Dar. C. and Das. C.*, 957 N.E.2d 898 (Ill. 2011).

The issue on appeal is whether the State performed a "diligent" inquiry" to ascertain respondent's current and last known address, as required for service by publication under section 2-16(2) of the Juvenile Court Act of 1987, and necessary for the trial court to obtain personal jurisdiction.

In this case, the record demonstrated that the respondent suffered from mental illness and moved between his Illinois residence, his relatives' respective homes, and a treatment facility in Illinois. Throughout the proceeding to terminate the respondent's parental rights, the Department of Children and Family Services ("DCFS") and the State consistently maintained that respondent could not be located in Illinois. However, in a separate child support matter, the State had successfully located the Respondent. The search for the Father primarily involved entering the Father's name into various databases and then mailing letters to potential addresses, including his sister's and parent's addresses. During the initial search in the databases, the Father's name was misspelled. DCFS did not send anyone to those addresses even after the sister had expressed a desire to have a relationship with the children. Therefore, the court held that the State and DCFS had failed to perform the necessary diligent inquiry under section 2-16(2), the statute authoring service by publication in this case. Because of this, the State's service by publication was defective and did not confer personal jurisdiction to the trial court, rendering the judgment to terminate parental rights void.

SUBSTITUTION OF JUDGE

43. *In re Marriage of O'Brien*, --- N.E.2d ----, 2011 WL 3359713 (Ill. 2011).

Husband filed motion for substitution of judge for cause pursuant to section 2-1001(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-1001(a)(3) (West 2006)). Husband claimed judge was prejudiced and biased against him because judge exchanged greetings with Wife at the health club where Wife worked and because Husband observed Wife waving to judge in court in an inappropriate manner. Husband did not file his motion until more than a year after the conversations between the judge and Wife allegedly occurred. Judge had also made numerous rulings in Husband's favor. Motion for substitution of judge for cause was denied.

Husband appealed. Though Husband conceded he could not establish actual prejudice, he argued that the standard of review by the reviewing judge should not be "actual prejudice" but rather the "appearance of impropriety." Husband relied primarily on the Supreme Court case of *Caperton v. A.T. Massey Coal Co.*, 556 U.S. ____, 129 S. Ct. 2252 (2009), which held that when a party contends that the failure of a judge to recuse violates due process, an objective inquiry must be made as to whether an "average judge" in his position is likely to be neutral or whether there is an unconstitutional potential for bias.

The Illinois Supreme Court rejected Husband's arguments, as the *"appearance of impropriety"* criteria is set forth in the canons of the Judicial Code, not in the section of the Code of Civil Procedure dealing with substitution of judges for cause. (Ill. S. Ct. R. 63(C)(1); 735 ILCS 5/2-1001(a)(3) (West 2006)). Recusal relates to the canons of judicial ethics found in the Judicial Code, whereas substitution of judge petitions are brought under the Code of Civil Procedure and decided by another judge. This "neutral assessment" of claims against the challenged judge therefore comports with due process concerns. To agree with Husband's position would necessarily require that the mere appearance of impropriety would be enough to force a judge's removal from a case. The Code of Civil Procedure is not so broad.

SUPPORT - IMPUTED INCOME

44. *In re Marriage* of *Lichtenauer,* 408 Ill.App.3d 1075, 945 N.E.2d 119 (3rd Dist. 2011).

It is proper to impute a live-in girlfriend's income to Husband in order to determine income for support purposes in certain circumstances?

Petitioner, Wife and Respondent, Husband were married in 1976. In 2005, Wife filed a dissolution action in Will County, which she dismissed in 2007. Immediately thereafter, Husband filed the dissolution action in La Salle County which gives rise to this appeal.

During the course of the dissolution proceedings Husband sold his interest in two businesses. Prior to dissolving one of the businesses in 2006, the business's corporate attorney formed a new corporation (hereinafter "New Corporation"). After selling the first two businesses, Husband became an employee of the New Corporation.

During the contested hearing, evidence was presented to show that Husband's live-in Girlfriend ("Girlfriend") became president of New Corporation. Further, that Girlfriend had no prior experience running a business of any kind and she was paid a salary of $120,000. Husband's salary working for New Corporation was only $70,000. New Corporation had sales revenue of $4.14 million in 2007. All of New Corporation's shareholders, except Girlfriend, were excluded from transferring shares of the business without the consent of the majority of the shareholders. Girlfriend, however, was expressly given permission to transfer shares to Husband only, without offering them to the corporation or other shareholders first. It was also shown that Husband loaned money to Girlfriend in the same sum she used to invest into the company – but Husband denied he provided these sums specifically for her investment and also denied that is where her investment funds came from. When asked why Husband did not invest on his own, he said his attorney told him not to. The court found the circumstances by which Girlfriend became president of New Corporation to be a contrived arrangement. Further, the court found that Husband placed Girlfriend in the position in the New Corporation to avoid bringing those assets or opportunities into the dissolution proceeding. The court referred to *IRMO Smith,* 77 Ill.App.3d 858, (1979) and held that the *Smith* case distinguished the current level of income from the ability to earn income. Here the court found Husband's ability to earn income and the opportunity he passed up, specifically his Girlfriend's position in the New Corporation, would have had him earning $120,000. Therefore, the court imputed $120,000 as income to Husband and ordered Husband to pay Wife permanent maintenance in the sum of $1,850 per month.

Husband appealed. Husband alleged two issues: first that the court erred in awarding Wife an "excessive" amount of permanent maintenance after imputing Girlfriend's income to Husband and, second, that the court did not consider the unequal property distribution in making the maintenance allocation.

The appellate court upheld the trial judge's award of maintenance based upon the detailed ruling of the trial judge. In order to impute income the court must find that one of the following factors applies: 1) payor is voluntarily unemployed; 2) payor is attempting to evade a support obligation; or 3) payor has unreasonably failed to take advantage of an employment opportunity. In this case the court found the second and third factors to apply. The appellate court affirmed the ruling of the trial court.

VENUE - TRANSFER OF

45. *In re Marriage of Mather,* 408 Ill.App.3d 853, 946 N.E.2d 529 (1st Dist. 2011).

Petitioner filed his petition for dissolution of marriage in Cook County. At the time of his filing, although Petitioner maintained a residence and worked in Cook County, Respondent and the minor children lived in Du Page County. Further, Petitioner also maintained a residence in Lisle, Du Page County, for visitation with his minor children and had leased his Chicago residence only 19 days before filing his petition for dissolution. The Respondent and children's connections were in Du Page County only. Respondent filed a motion to dismiss the petition pursuant to the doctrine of *forum non conveniens.* After hearing on the motion, the trial court granted Respondent's request and denied Petitioner's motion to reconsider. The appeal followed.

The appellate court found that the trial court did not abuse its discretion by granting Respondent's motion to dismiss. The appellate court evaluated all relevant factors including: 1) petitioner's choice of forum; 2) private interest factors: (a) the convenience of the parties, (b) the relative ease of access to sources of testimonial, documentary, and real evidence, and (c) all other practical problems that make trial of a case easy, expeditious, and inexpensive; and 3) public interest factors: (a) the interest in deciding controversies locally, (b) the unfairness of imposing trial expense and the burden of jury duty on a resident of a forum that has little connection to the litigation, and (c) the administrative difficulties presented by adding litigation to already congested court dockets.

The trial court evaluated these factors and specifically stated it did not consider the location or rates of the parties' respective attorneys. In balancing the various factors, the appellate court found that the trial court did not abuse its discretion in finding that DuPage was the more convenient forum.

VISITATION - SUPERVISED

46. *In re Marriage of Voris,* --- N.E.2d ----, 2011 WL 5903444 (1st Dist. 2011).

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