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FAMILY LAW COMMITTEE

Family Law Case Updates

February 18, 2014

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ATTORNEY FEES

Mirabella, Kincaid, Frederick & Mirabella, L.L.C. v. Diotallevi, 2013 WL 6869965 (Ill.App. 2 Dist.), Dec. 30, 2013

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

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

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

In re Parentage of Rocca, 2013 WL 6493566 (Ill.App. 2 Dist.), Dec. 11, 2013

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

The first appeal in this case was filed by the attorney after the trial court denied the attorney's petition for contribution to attorney fees from the former client's Husband on the basis that the attorney withdrew and the parties subsequently entered into a settlement agreement that stated

the parties were solely responsible for their own attorney fees with a waiver of any right to a hearing on contribution to attorney fees. The appellate court originally reversed the trial court on the basis that the settlement agreement was entered by the parties without the attorney's knowledge or consent after the attorney had withdraw from the case. Further, the case was remanded based upon the following findings of the appellate court: Section 503(j) of the Illinois Marriage and Dissolution of Marriage Act, if applicable to parentage cases, did not preclude the contribution petition; each of the parties could not waive a right belonging to an attorney; and waiving a contribution hearing does not equate to waiving contribution altogether.

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

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

former client's economic circumstances, inability or ability to pay, or any payments the former client made to date toward the outstanding fee judgment, it was appropriate to deny the attorney's contribution petition.

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

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

See also *In re Marriage of Hanusin*, 2013 WL 6157178 (Ill.App. 2 Dist.), Nov. 20, 2013, below.

CHILD SUPPORT (See also CONTEMPT)

In re Custody of J.M.B. and D.E.B., 2013 WL 6823107 (Ill.App. 1 Dist.), Dec. 19, 2013

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

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

In re Marriage of Marsh, 2013 WL 6835294 (Ill.App. 2 Dist.), Dec. 26, 2013

A former Wife brought a petition for rule to show cause against her former Husband, claiming that the former Husband had failed to comply with his child support obligations. The trial court denied the former Wife's petition and the Wife appealed. The issue on appeal was whether the money received by the former Husband from the post-dissolution sale of certain shares of stock he owned prior to the dissolution constituted income for child support purposes pursuant to Section 505(a)(3) of the Illinois Marriage and Dissolution of Marriage Act. The Husband argued that because he had actually sold the stock at a loss due to the decline in the value of the stock

since the dissolution of the parties' marriage, he did not receive any income that would be subject to child support. The appellate court agreed with the Husband, finding that, because the Husband had simply converted the previously existing asset into cash, the trial court was correct to deny the former Wife's petition for rule to show cause and in determining the former Husband's sale of stock did not constitute income for child support purposes.

In re Marriage of Rangel and Cisneros, 2013 WL 6221358 (Ill.App. 1 Dist.), Nov. 27, 2013

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

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

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

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

maintenance) and that the Husband could not conduct proper discovery to show a defense of cohabitation or self-sufficiency to the Wife's maintenance claims because of the lapse of time.

See also *In re Marriage of Hanusin*, 2013 WL 6157178 (Ill.App. 2 Dist.), Nov. 20, 2013, below.

See also *In re Marriage of Peppler*, 2013 WL 6670764 (Ill.App. 2 Dist.), Dec. 16, 2013, below.

CLASSIFICATION OF PROPERTY

In re Marriage of Sottile, 2013 WL 6869987 (Ill.App. 2 Dist.), Dec. 30, 2013

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

CONTEMPT (See also CHILD SUPPORT, VISITATION)

In re Marriage of Culp, 2013 WL 6537195 (Ill.App. 4 Dist.), Dec. 10, 2013

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

In re Marriage of Howell, 2013 WL 6813913 (Ill.App. 1 Dist.), Dec. 19, 2013

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

The appellate court found that the trial court did not abuse its discretion in holding the former Husband in contempt of court and issuing a body attachment order when he failed to pay the \$8,100 purge amount, nor were the trial court's findings against the manifest weight of the evidence. The trial court had heard certain testimony that refuted the Husband's claimed

inability to make the payments, including testimony that the former Husband owned a home in Evanston, Illinois with an appraised value of approximately \$410,000 on which he had recently received \$67,000 in net loan proceeds from a mortgage he had taken on the property. In addition, he owned a farmhouse and 13 acres in Wisconsin, which he claimed not to be marketable, but then also submitted a Comparative Market Analysis to the trial court valuing the property at \$43,700. The appellate court also found that, based on the evidence heard by the trial court, any inability on the part of the former Husband to pay the fee was a result of his choice to make payments as he wished rather than payments that had been mandated by court order.

In re Marriage of Peppler, 2013 WL 6670764 (Ill.App. 2 Dist.), Dec. 16, 2013

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

The trial court also decided to grant the former Husband's request to modify his child support obligation, providing that he was to pay 28% of all net money received from all sources to the former Wife, but no dollar amount was set. The former Wife argued on appeal that the trial court's decision was in error because the former Husband had failed to prove there was a substantial change in circumstances as his testimony was the only evidence of his reduced income, the trial court improperly refused to consider his use of retirement funds as income, and the court order failed to state a specific dollar amount of support. The appellate court found insufficient evidence in the record to support a finding of a substantial change in circumstances, and the trial court's order was reversed. The appellate court also noted that, even if the order had not been reserved, it would have been remanded because the trial court erred as a matter of law in failing to set an actual dollar amount of support.

See also *In re Marriage of Marsh*, 2013 WL 6835294 (Ill.App. 2 Dist.), Dec. 26, 2013, above.

CUSTODY

In re Marriage of Agee, 2013 WL 6211988 (Ill.App. 5 Dist.), Nov. 26, 2013

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

After reviewing the record, the appellate court found that the trial court's custody determination was not against the manifest weight of the evidence and that the trial court accurately examined and analyzed the factors of 602(a) of the Illinois Marriage and Dissolution of Marriage Act based upon the facts and circumstances of the case. Specifically, the appellate court found that the relationship between the child and her parents, siblings and others favored the Wife because the child was close to the Wife's in-state family and the Wife could more easily establish a relationship between the child and the Father's daughters, who were born through two prior

relationships. Further, sole custody favored the Wife because the child was well adjusted to her home, school and community, while the Husband attempted to remove the child to Missouri where he believed he could more easily obtain employment. Another reason the appellate court favored sole custody to the Wife was that the mental and physical health of all individuals slightly favored her over the Husband. Specifically, the appellate court found that the Husband suffered from frequent heart episodes which required him to lie down for significant periods of time. Further, during the marriage he claimed he needed to de-stress after work by watching television or playing video games in order to prevent said heart episodes, and others testified to anxiety stress attacks and time off of work due to stress and anxiety throughout the case. In addition, the appellate court determined that the Husband had significant issues with his knee which prevented him from interacting fully with the child, and that he failed to follow a court order which required the parties to attend counseling or the Guardian *ad litem's* recommendations to attend counseling to become educated on the impact alienation has on a child. The appellate court also found that the threat of physical violence by the child's potential custodian directed against another person and the occurrence of repeated abuse directed against another person favored the Wife due to the Husband's abusive conduct and anger issues raised in testimony from numerous past significant others and the Wife herself. The appellate court also found that the willingness and ability of the Wife to facilitate a close and continuing relationship between the child and the Husband favored an award of sole custody to her, while the Husband actively alienated the child from the Wife. Ultimately, the appellate court found that an award of sole custody to the Wife was in the child's best interests based upon the factors enumerated in 602(a) and was supported by the Guardian *ad litem's* report.

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

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

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

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

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

Cascio v. Pace, 2014 WL 197724 (N.D.Ill.), Jan. 16, 2014

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

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

However, the district court held that the Wife asserted exceptions to the return of the children. Specifically, the Wife argued the "settled" exception and the "consent or acquiescence" exception, and she proved that these exceptions overcame the wrongful removal or retention by a preponderance of the evidence. The district court found that the Husband expressly consented to the retention of the children in Illinois and rejected the Husband's arguments that he did so under duress. The district court found the Husband's testimony that he was pressured to allow the children to remain in Illinois by one of the Wife's family members lacked credibility, and his justification to support his claim that he only agreed to the retention under duress because he was afraid of causing an argument and needed to catch a ride to the airport

unpersuasive. Further, the Husband's inaccuracy set forth in his verified and sworn petition in regards to a statement the Wife made to him relating to the duress claim contributed to the district court's ruling and the finding of a lack of credibility. The court determined that the Husband expressly consented to the retention, but that ASP did not.

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

In re Custody of C.C., 2013 WL 6407684 (Ill.App. 3 Dist.), Dec. 9, 2013

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

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

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

Next, the appellate court held that it lacked jurisdiction to address any other issues raised by the second alleged Father because of his untimely appeal. The second alleged Father failed to file his notice of appeal of the order denying his motion to vacate within 30 days. Specifically, the appellate court rejected the second alleged Father's argument that he could not appeal the court's ruling until after the trial court resolved the Wife's pending petition for attorney fees and found that his appeal was not timely. Further, the appellate court found it lacked jurisdiction to address the second alleged Father's request to modify child support due to his failure to timely appeal the court's rejection of his request for a downward deviation in child support after entry of

a final agreed order resolving all pending issues related to visitation. The appellate court rejected the second alleged Father's argument that he could not appeal the court's ruling until after the trial court resolved the Wife's pending petition for attorney fees. Specifically, the appellate court held that the Mother's request for attorney fees had nothing to do with the merits of the second alleged Father's petition to intervene involving child support and visitation and was instead motivated and related to the second alleged Father's desire to have the trial court recognize the first Father's ability and obligation to contribute to the child's support.

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

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

In re Marriage of Lanham v. Howard, 2014 WL 61347 (Ill.App. 4 Dist.), Jan. 7, 2014

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

In re Marriage of Saul, 2014 WL 201716 (Ill.App. 3 Dist.), Jan. 17, 2014

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

The Wife argues that the circuit court erred in awarding the Husband custody of the children when the record was clear that the Husband started confrontations with the Wife in public and in front of the children. The court ultimately found that the Husband's living situation would provide more stability for the children as he had a definite place to live. The Wife had allowed the marital

residence to go into foreclosure and it was uncertain what her living situation would be. Further, she provided no testimony as to where she would live and what school the children would attend if she lost the marital residence. There was also testimony that the Wife interfered with the children's relationship with their father. Although the court did not specifically state the factors for allowing the removal, it is clear that the court found the Husband's living situation to be more stable. Further, the visitation exchanges were already taking place between Davenport, Iowa and Moline, Illinois, so there was not a significant change in that aspect. The children would have to switch schools, but they would have to do that if they remained in the Wife's care anyway.

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

See also *Dawn W. v. Michael W.*, 2013 IL App (5th) 130430-U, 2014 WL 251985 (Ill.App. 5 Dist.), Jan. 22, 2014, below.

DISSIPATION

In re Marriage of Sather, 2013 WL 6670299 (Ill.App. 2 Dist.), Dec. 16, 2013

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

MAINTENANCE (See also CONTEMPT, ATTORNEY'S FEES)

In re Marriage of Hardy, 2013 WL 6199968 (Ill.App. 4 Dist.), Nov. 25, 2013

A Wife appealed the trial court's award of 24 months of rehabilitative maintenance where the record revealed that she was 47 years old, had only a GED, and was a recovering substance abuser with a litany of medical problems who had recently started a business cleaning houses earning approximately \$11,000 per year. Conversely, the Husband had a bachelor's degree in engineering and was working in the aviation and aircraft industry, earning approximately \$125,000 per year. Based on these facts, the appellate court determined that the record lacked any evidence to support the notion that the Wife would be able to support her reasonable needs, or have achieved a livelihood commensurate with the standard of living enjoyed during the parties' 23-year marriage at the conclusion of a 24-month rehabilitative maintenance period. The appellate court held that the rehabilitative maintenance award to the Wife was an abuse of discretion and that the Wife should be awarded permanent maintenance.

The appellate court also held that because the record clearly demonstrated that the Wife had been borrowing money from friends to get by, and the Husband had incurred a significantly greater amount in attorney's fees, and because the sole asset awarded to the Wife was a \$16,800 401(k) on which she would have to pay a tax penalty in order to liquidate it to pay attorney's, it was also an abuse of discretion for the trial court to deny the Wife's request for attorney's fees. Rather than remanding the matter for further hearing, the appellate court reversed the trial court's decision and directed the Husband to be responsible for \$3,150 of the Wife's attorney fees, plus the costs of the appeal.

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

In re Marriage of Kawiecki, 2013 WL 6835244 (Ill.App. 1 Dist.), Dec. 23, 2013

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

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

MARITAL SETTLEMENT AGREEMENTS

In re Marriage of Mitchell, 2013 WL 6157174 (Ill.App. 2 Dist.), Nov. 20, 2013

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

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

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

MOOTNESS (See also MAINTENANCE)

In re Marriage of Tahseen, 2013 WL 6843593 (Ill.App. 2 Dist.), Dec. 23, 2013

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

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

See also *In re Marriage of Hanusin*, 2013 WL 6157178 (Ill.App. 2 Dist.), Nov. 20, 2013, below.

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

Dawn W. v. Michael W., 2013 IL App (5th) 130430-U, 2014 WL 251985 (Ill.App. 5 Dist.), Jan. 22, 2014

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

PENSION BENEFITS

In re Marriage of Carter, 2014 WL 202589 (Ill.App. 4 Dist.), Jan. 17, 2014

A former Husband and former Wife requested the trial court to interpret an "Order Regarding Pension Benefits" that had been issued in the proceeding for the dissolution of their marriage. The former Wife argued that the order required the former Husband to pay her a portion of the disability benefits he was receiving from the pension fund, while the order seemed to only apply to his retirement benefits, and not his disability benefits. The former Husband maintained that the requirement that he pay his former Wife a portion of his disability benefits would be in violation of 1-119 of the Illinois Pension Code and the pension protection clause of the Illinois Constitution of 1970. The appellate court held because the order stated that the former Wife was entitled to, "any pension benefit actually received by the [former Husband] upon retirement or under the terms and conditions of the plan," and because the disability benefits were a pension benefit afforded the former Husband under the terms and conditions plan, the trial court correctly interpreted its prior order as requiring the former Husband to pay the former Wife a portion of his disability benefits.

PREMARITAL AGREEMENTS

In re Marriage of Baruffi, 2013 WL 6221386 (Ill.App. 2 Dist.), Nov. 27, 2013

A Husband filed an appellant's brief that contained an incomplete statement of facts in violation of Rule 341(h)(6) and an incomplete appendix in violation of Rule 342(a). The appellate court subsequently issued a minute order *sua sponte* directing the Husband's counsel to file an

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

In re Marriage of Chez, 2013 WL 6173808 (Ill.App. 1 Dist.), Nov. 26, 2013

A Husband and Wife entered into a premarital agreement ("PMA") prior to their marriage. During their dissolution proceedings, the parties agreed that the PMA reflected their intent to opt out of the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") and waive their marital rights against the property of the other spouse. However, the treatment of two categories of real estate acquisitions that the parties had engaged in during the marriage became the subject of dispute, with the Husband seeking to characterize the parties' Chicago and California residences as "joint ventures," meaning they were his sole property, and the Wife seeking to declare them as "joint properties," meaning they were to be divided equally. The trial court eventually determined that the Chicago and California residences were "joint properties" within the meaning of the PMA because they were held in joint tenancy. This caused the Husband to file a claim for contribution seeking reimbursement for costs he had paid from his separate properties toward the joint properties. The trial court ultimately denied the Husband's request for contribution, finding that the parties' PMA was unambiguous in requiring the equal distribution of proceeds from the sale of all joint property, and that neither party was to receive reimbursement. The Husband unsuccessfully appealed the trial court's decision with the appellate court finding there no error.

PROPERTY SETTLEMENT

In re Marriage of Fraser, 2013 WL 6271924, (Ill.App. 2 Dist.), Dec. 3, 2013

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

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

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

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

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

The appellate court reversed the trial court's ruling on the personal property allocation on the basis that the trial court failed to properly characterize the personal property as either marital or non-marital, and failed to acquire and consider enough evidence pursuant to Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act to make an equitable finding as to the distribution of personal property. The appellate court found that the trial court made no findings to support an equitable distribution of the property because the trial court simply adopted the

Husband's property list without consideration or findings as to the nature of the property. The appellate court rejected the Husband's argument that the Wife forfeited her opportunity for a hearing on the adjudication of the personal property, because the Wife did in fact request the court to consider her claims to the personal property. However, the trial court failed to consider the Wife's position regarding personal property on the basis that the Wife's request was improper and untimely as she failed to create and circulate a list of the personal property she desired pursuant to the trial court's order. The appellate court also held that the trial court was not permitted to consider the Wife's misconduct when distributing property. As a result, the appellate court affirmed the trial court's rulings denying the Wife's motion to vacate the settlement agreement and awarding attorney fees to the Husband, but vacated the trial court's ruling on the personal property distribution and remanded the case.

REMOVAL

In re Marriage of Meyers, 2013 WL 199212 (Ill.App. 3 Dist.), Nov. 22, 2013

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

In re Marriage of Smith, 2013 WL 6237443 (Ill.App. 5 Dist.), Dec. 2, 2013

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

See also *In re Marriage of Saul*, 2014 WL 201716 (Ill.App. 3 Dist.), Jan. 17, 2014, above.

REQUESTS TO RE-OPEN PROOFS

In re Marriage of Pavsek, 2013 WL 6040380 (Ill.App. 3 Dist.), Nov. 12, 2013

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

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

SAME-SEX MARRIAGE

Gray and Ewert v. People of the State of Illinois and Cook County Clerk, 2013 WL 6355918 (N.D.Ill.), Dec. 5, 2013

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

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

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

Moreover, the district court found that the same-sex partners met the legal burden required to grant a preliminary injunction. Specifically, the district court found that the same-sex couple would suffer irreparable harm for which there would be no adequate remedy at law, because denying the same-sex couple the opportunity to marry before a terminally ill partner passed away would prevent both parties from realizing important federal rights and benefits triggered by

marriage. In addition, the district court recognized that without temporary relief, the same-sex couple would also be deprived of the emotional and personal benefits that accompany marriage. The district court found that the same-sex couple demonstrated some likelihood of success regarding the equal protection claim as applied, due to the Illinois General Assembly's recognition of marriage as a fundamental right to which same-sex couples are entitled. In addition, the district court found further support in the passage of Senate Bill 10, which protects same-sex couples by officially recognizing the value of all the benefits that an official marriage status entails and that same-sex couples are entitled to enjoy those benefits. Last, the district court held that the balance of harms and the public interest as determined by the people of the State weighed heavily in the favor of the same-sex couple, because any harm resulting to the Clerk or the people of the State is minor in comparison to the same-sex couple being unable to marry prior to June 1, 2014 in light of the partner's terminal illness. Ultimately, given the fact that the balancing of harms so strongly favored the same-sex couple, the district court found that a lesser showing of likelihood of success on the merits was required in the case and the same-sex couple did demonstrate that a challenge to the constitutionality of the current Illinois law prohibiting same-sex marriage was at least plausible. The district court granted the same-sex couple's request for temporary injunctive relief in order to get married prior to the effective date of the newly enacted law allowing same-sex marriage in Illinois.

VALUATION

In re Marriage of Hanusin, 2013 WL 6157178 (Ill.App. 2 Dist.), Nov. 20, 2013

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

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

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

VISITATION

In re Marriage of Igel, 2013 WL 6672449 (Ill.App. 3 Dist.), Dec. 16, 2013

The Husband appealed from the trial court's decision restricting his parenting time with the minor children. The Husband argued that the trial court did not find that reasonable visitation would result in serious endangerment, as required by the statute. The record clearly reflects that the court was concerned that the Husband's behavior could pose a danger to the children if it was not supervised. In this case, Husband was often intoxicated, displayed erratic mood swings

and told the GAL that he had power in Washington and that people bowed down to him. Because the court's reasons for ordering supervised visitation could be discerned from the record, the trial court's order restricting Husband's visitation was affirmed.

See also *In re Marriage of Culp*, 2013 WL 6537195 (Ill.App. 4 Dist.), Dec. 10, 2013, above.

See *Dawn W. v. Michael W.*, 2013 IL App (5th) 130430-U, 2014 WL 251985 (Ill.App. 5 Dist.), Jan. 22, 2014, above.