

## Family Law and Practice Section MCLE Program Webinar March 19, 2024

**Welcome/Announcements and Introductions,**  
Jane Nagle, Family Law and Practice Section Chair

**12:00 PM – 1:00 PM**

**Program**  
**A Year In Review: 2023 Domestic Relations Cases**  
Vicki Kelly, *Sefton Kelly Family Law*

Join Vicki Kelly as she discusses the important 2023 case law affecting family law matters. Topics will include maintenance, child support, parenting time and other family law issues.

**Link to Evaluation**      The evaluation must be completed to receive CLE credit.  
<https://www.surveymonkey.com/r/FamilyLaw03192024>

**Next CLE Program:**      April 16<sup>th</sup> – Brett Williamson and Chris Zaruba, *The Stogsdill Law Firm, PC*

**DCBA Events:**      March 27<sup>th</sup> – [Lawyers Lending a Hand](#) – DuPage Convalescent Center, Wheaton

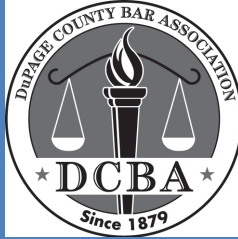
March 28<sup>th</sup> – [Unwind](#) – Weber Grill, Lombard

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**DUPAGE COUNTY BAR ASSOCIATION**

***Case Updates***

**March 19, 2024**

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## **ABSOLUTE LITIGATION PRIVILEGE**

*Goodman v. Goodman*, 2023 WL 3608963 (Ill. App. 2d Dist.), May 24, 2023

During the divorce proceedings, Wife discovered that Husband hired investigators to conduct surveillance of Wife for more than three years. During the pendency of the divorce, Wife obtained a two-year plenary order of protection against Husband where the trial court determined that the surveillance of Wife was obsessive and commenced initially to show that Wife was having an affair and was transformed into a means for determining whether Wife was cohabitating. The trial court further found that the investigation was not necessary to accomplish any purpose and was completely and utterly inappropriate, warranting a plenary order of protection. Following the finalization of the divorce, Wife filed a complaint against Husband, alleging, in part, a claim for intentional infliction of emotional distress pertaining to Husband's surveillance of her, and claims of negligent abuse, willful and wanton negligent abuse, and willful and wanton intentional abuse. The trial court dismissed the abuse claims finding that the Domestic Violence Act ("DVA") does not provide a private right of action and that the DVA provides appropriate remedies for violations of its provisions. The trial court also granted summary judgment in favor of Husband on Wife's claim for intentional infliction of emotional distress, holding that it was barred by the absolute litigation privilege. Wife appealed, arguing that the trial court erred in finding that the absolute litigation privilege barred her claim for intentional infliction of emotional distress. Alternatively, Wife argued that if the appellate court found that the privilege applied, then the trial court erred in finding no implied private right of action under the DVA and, in turn, dismissing the abuse complaints.

The appellate court affirmed. The appellate court emphasized that the absolute litigation privilege is an affirmative defense which immunizes certain statements and conduct by attorneys in their course of action. The purpose of the privilege is to allow attorneys the utmost freedom in their efforts to secure justice for their clients and is based on section 586 of the Restatement (Second) of Torts. Section 586 provides that an attorney is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel if it has some relation to the proceeding. A private party to the litigation enjoys the same privilege. For the litigation privilege to apply, the communication must pertain to proposed or pending litigation. The pertinency requirement can be applied to statements or actions related to the subject controversy and those not confined to specific issues related to the litigation. When the privilege applies, no liability will attach even at the expense of uncompensated harm to the plaintiff. The privilege applies to communications or actions made before, during, and after litigation, regardless of the defendant's motive or the unreasonableness of his conduct. Based upon the aforementioned principles, the appellate court found that the surveillance did bear some relation to the divorce proceedings, thus the trial court did not err in finding that Wife's intentional infliction of emotion distress claim was barred by the absolute litigation privilege. Pertaining to the implication of a private cause of action, the appellate court held that there is no implied private right of action where a statute is replete with sanctions and remedies for violations of its provisions. The appellate court found that the DVA's plain language did not intend to imply a private right of action, and the DVA and common law both provided several remedies for Wife.

## ADMISSION OF EVIDENCE

*In re Marriage of Turner*, 2023 WL 2344360 (Ill. App. 3rd Dist.), March 3, 2023\*

In February 2021, Husband filed a petition for dissolution of marriage and Wife filed a counter-petition for dissolution of marriage. Two children were born to the parties. The trial court entered a parenting allocation plan and order granting Wife primary decision-making authority over the children and majority parenting time during the school year. Husband appealed, arguing that the trial court denied his constitutional rights as well as Illinois law and rules when it denied him a hearing on his May 2021 petition for a temporary parenting schedule. Husband further argued that the trial court erred in allowing certain evidence and testimony to be admitted at trial. Lastly, Husband argued that the trial court erred in its allocation of decision-making and parenting time.

The appellate court affirmed. As to Husband's contention that his constitutional rights were denied, the appellate court found that in his notice of appeal Husband specified only the trial court's September 2022 parenting allocation plan and order as the order from which he was appealing. Husband made no mention of the trial court's order entered in July 2021, denying him a hearing on his petition for a temporary parenting schedule which he filed in May 2021. Moreover, the July 2021 order is not related to the trial court's September 2022 parenting allocation plan and order. The appellate court noted that a notice of appeal shall specify the judgment or part thereof or other orders appealed from, and the relief sought from the reviewing court. Accordingly, the appellate court held that it lacked jurisdiction to consider the propriety of that order and any alleged violations as a result of that order.

The appellate court next analyzed Husband's contention that the trial court erred in admitting Dr. Hatcher's report into evidence and allowing Dr. Shapiro to testify that Wife should have sole decision-making authority. The appellate court noted that the paramount consideration and guiding principle in determining child custody is the best interests of the child, considering all relevant factors, and the trial court exercising broad discretion in admitting relevant evidence that may assist the court in arriving at a custody determination. Section 604.10 of the Act authorizes a trial court to seek the advice of any professional, whether or not regularly employed by the court, to assist the court in determining the child's best interests. A court-appointed professional shall testify as the court's witness and be subject to cross examination. The professional's report must set forth specific information as set forth in section 604.10 of the Act. Husband contended that Dr. Hatcher's report was inadmissible because it contained an inappropriate medical diagnosis of him. The appellate court held that because the trial court specifically stated that it disregarded Dr. Hatcher's conclusion regarding Husband's medical diagnosis and the doctor's recommendation with regard to specific parenting time and decision-making, the appellate court need not consider the propriety of the court's admission of the doctor's report because there was no prejudice to Husband.

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Regarding Dr. Shapiro's testimony, the appellate court noted that pursuant to Illinois Supreme Court Rule 213(f), a party may identify a controlled expert witness who will give expert testimony at trial and the information disclosed by the expert limits the testimony that can be given by a witness on direct examination at trial. Without making disclosure under Illinois Supreme Court Rule 213, a cross-examining party can elicit information including opinions from the witness. Rule 213 does not restrict the opposing party from asking questions or eliciting opinions from a controlled expert. Husband disclosed Dr. Shapiro as his 213(f) witness, and then sought to limit Wife from seeking an opinion from Dr. Shapiro about whether it was in the children's best interests for her to have primary decision-making authority. The appellate court found that pursuant to rule 213(g), it was proper and appropriate for Wife to elicit said opinion.

The appellate court stated that a trial court shall allocate decision-making responsibilities according to the child's best interests after considering factors set forth in section 602.5 of the Act. The trial court discussed each and every factor related to the allocation of parental decision-making and explained its findings as to each factor, finding that no factors favored Husband. Moreover, the trial court's determination was supported by the opinion of the GAL and Dr. Shapiro. The appellate court further noted that a trial court shall allocate parenting time according to the child's best interests after considering factors set forth in section 602.7 of the Act. In its order, the trial court discussed each and every factor related to the allocation of parenting time, finding that no factors favored Husband. Lastly, the trial court's allocation of parenting time was almost exactly what the GAL recommended, ultimately awarding the parties equal parenting time during the summer and holidays while awarding Wife majority parenting time during the school year. Therefore, the trial court's judgment was affirmed in its entirety.

## **ADOPTION**

*In re Adoption of E.W.*, 2023 WL 5748551 (Ill. App. 1st Dist.), September 6, 2023\*

Mother and her fiancé sought to adopt Mother's son with biological Father. Father did not consent to the adoption. Mother sought a finding of unfitness against Father in an attempt for her fiancé to be able to adopt her son without Father's consent. Mother argued that Father offered to consent to the adoption if Mother paid him. Father testified that he continued to request that he be allowed to exercise parenting time and have phone calls with the child, to which Mother continuously denied despite Father's consistent efforts to see and talk to his son. The trial court found that Mother failed to establish unfitness by clear and convincing evidence and dismissed the petition for adoption. Mother appealed, arguing that the trial court erred in finding that she failed to establish Father's unfitness pursuant to the three sections of the Adoption Act.

The appellate court affirmed. The appellate court reviewed all three sections of the Adoption Act required to be considered when determining a parent's unfitness. The first ground is abandonment of the child and whether the parent intended to either abandon or desert the child. After review of the record, the appellate court found that the settlement

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proposals Father and/or his attorney made were not indicative of Father's intent to abandon or desert the child, and it was not synonymous to Father offering to sell the child to a stranger, and the adoption was going to be by Mother's fiancé whom the child and Father knew. The appellate court further emphasized that the court is not to consider the child's best interests when ruling on parental unfitness. The second ground is a failure to maintain a reasonable degree of interest, concern, or responsibility as to the child's welfare. The appellate court emphasized that when considering this ground, it is the parent's efforts to carry out parental responsibilities, rather than their success, that is to be considered, stating that the fact that a custodial parent denies or hinders the visitation rights of a noncustodial parent may be a significant element weighing against the clear and convincing determination of the noncustodial parent's indifference to the child. The appellate court found that Father consistently exercised his parenting time and requested daily phone calls with the child until Mother eventually began prohibiting it. Even thereafter, Father continued to request phone calls with the child. Therefore, the appellate court found that Father did not exhibit a failure to maintain a reasonable degree of interest, concern, or responsibility as to the child's welfare. The third and final ground is neglect of, or misconduct toward the child. The appellate court held that Mother did not allege that any of Father's conduct constitutes misconduct or neglect, and she did provide legal support for their argument. Therefore, that argument was waived. To be thorough, the appellate court considered the argument, taking into consideration the definition of neglect set forth in the Juvenile Court Act under 750 ILCS 50/2.1. The appellate court held that the facts presented to the court did not support any of the bases for a finding of neglect under the Juvenile Court Act, where the evidence did not suggest that Father thought he was putting his son in danger or harm's way or suggest any misconduct toward the child as set forth in the statute.

## **ALLOCATION OF CHILD-RELATED EXPENSES**

See also, ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME, *In re Marriage of Swafford*, 2023 WL 5530690 (Ill. App. 5th Dist.), August 28, 2023\*

## **ALLOCATION OF DEBT**

See also, ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME, *In re Marriage of Morgan L. and Gregory L.*, 2023 WL 6891576 (Ill. App. 5th Dist.), October 19, 2023\*

## **ALLOCATION OF MARITAL ASSETS**

*In re Marriage of Leitzen*, 2023 WL 3316884 (Ill. App. 4th Dist.), May 9, 2023\*

After a trial on Wife's petition for dissolution, the trial court awarded the parties their respective bank accounts; Wife was awarded her pension; Husband was awarded his retirement account; the proceeds from sale of the marital residence were divided equally; and Husband was awarded an equalization payment of \$51,000 from Wife's 401(k) via a QDRO. Further, after evaluating the

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statutory maintenance factors, the trial court denied Husband's request for maintenance, finding that Wife's decision to retire was reasonable and that Husband was completely employable and had no impairment in his earning capacity. Husband appealed, arguing that the trial court erred when it denied his request for maintenance, awarded Wife her entire pension, ordered the equalization payment to be paid from Wife's 401(k) via a QDRO rather than from cash proceeds from the sale of the marital residence, and admitted certain evidence at the final hearing pertaining to Wife's testimony that she had high blood pressure.

The appellate court affirmed. Pertaining to the denial of Husband's request for maintenance, the appellate court determined that Wife did not retire in bad faith justifying an imputation of income onto her, and that the trial court adequately considered all the factors in Section 504 of the IMDMA. The appellate court ruled that the record did not establish the opposite conclusion was apparent, thus the trial court's denial of Husband's request for maintenance was not unreasonable given its factual findings and was, therefore, not an abuse of discretion. As to the distribution of marital assets, the appellate court explained that a trial court is to divide marital property by considering the factors in section 503(b) of the IMDMA. The appellate court emphasized that a proper apportionment of marital property is to be equitable based on the specific facts, not necessarily an equal division. One spouse may be awarded a larger share of the assets if the relevant factors warrant such a result. The appellate court highlighted that the IMDMA seeks to cut off all entanglements between the parties when possible. Given the facts of this specific case and application of the factors set forth in section 503(b), the appellate court found that the trial court's division of marital assets was appropriate. The appellate court further held that the trial court's issuance of a QDRO was proper because it was used to equitably divide marital retirement assets. As for Wife's testimony regarding her high blood pressure, the appellate court held that Wife's statements were not being used to prove the truth of the matter asserted, nor was it offered as proof of an impairment to earning future income. Rather, the testimony was offered to show Wife's motivations for retiring, and therefore it was not considered hearsay. The appellate court held that even assuming the statements were hearsay, Wife's emotions and physical sensations were relevant to her decision to retire, and therefore admissible under the hearsay exceptions in Rule of Evidence 803(3). Further, her decision to retire factored into the trial court's determination of maintenance, whether income should be imputed to her, and the disposition of marital assets, thus her reason underlying that decision had a logical probative weight tending to prove or disprove facts material to the issues presented in the proceeding.

See also, **ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME**, *In re Marriage of Kopecky*, 2023 WL 3198817 (Ill. App. 4th Dist.), May 2, 2023\*

### **ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME**

*In re Marriage of Zagorski*, 2023 WL 2017411 (Ill. App. 2d Dist.), February 15, 2023\*

The parties were married in 2008 and had one child. In 2020, Husband petitioned for a dissolution of the marriage. At trial, Wife testified that she was the primary caretaker for the majority of the child's life, especially during the school year. For the past six months prior to trial, the parties had been following an "every other day" parenting schedule while they were still residing together.

The parties agreed that they were both capable and willing to cooperate and make decisions for the child together, and that both were good parents. Wife requested majority of parenting time,

\*Unpublished/Rule 23(e)(1) decision.

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and Husband requested 50/50 parenting time as they had been doing prior to trial. The trial court ultimately allocated the marital residence to Wife, and majority of parenting time to Wife during the child's school year, with 50/50 parenting time during school breaks. The trial court considered the relevant best interests of the child factors under 750 ILCS 5/602.7(b), and the trend in Illinois precedence cautioned to avoid 50/50 parenting time schedules.

The appellate court affirmed, holding that trial court did not abuse its discretion in allocating the majority of parenting time during the school year to Wife, nor was it against the manifest weight of the evidence. Courts shall allocate parenting time according to the child's best interests in accordance with the factors in 750 ILCS 5/602.7(b). Illinois courts have cautioned against 50/50 allocations of parenting time, partly deriving from the belief that frequently shifting children between houses is detrimental. Here the appellate court found that the trial court reviewed all of the section 602.7(b) factors in reaching its decision. Only factor 7 favored Husband, where Husband and child were healthy, and Wife suffered from lupus and epilepsy, but ultimately found that Wife was able to manage her health.

Additionally, the appellate court highlighted that the trial court was particularly concerned with providing stability during the school year, and its decision promoted stability by minimizing the disruption that frequent back and forth exchanges would have imposed on the child's school week. The trial court's allocation of parenting time when the child was not in school was appropriate. Lastly, the appellate court rejected Husband's argument that the trial court was speculative in that it assumed Wife would be able to remain in the marital residence and thus provide the child with greater stability, while refusing to assume that Husband would reside nearby in a safe environment. The appellate court stated that it was reasonable to let Wife remain in the marital residence, the record provided that Wife could afford to do so, it was undisputed that the trial court did not know where Husband would reside, and it was not an error to consider this unknown given that one of the best interest factors is the distance between the residences of the parents and the cost and difficulty of transporting the child. The appellate court found that the parties' 50/50 schedule they were following for six months prior to trial only worked because the parties were residing in the same residence.

*In re D.R.B.*, 2023 WL 2733475 (Ill. App. 1st Dist.), March 31, 2023\*

The trial court modified parenting time and ultimately granted Mother majority parenting time, required Father to attend counseling as a condition precedent to Father seeking to modify parenting time again, and awarded Mother retroactive child support. The trial court also awarded Mother 508(b) attorney's fees, finding that Father's filing of emergency motions was designed to harass Mother and was an attempt to intimidate Mother. Father appealed, alleging that: 1) the trial court erred in modifying his parenting time without considering and finding that a substantial change in circumstances had occurred and that modification was in the child's best interest; 2) the trial court erred in requiring petitioner to undergo counseling and restricting his parental responsibilities without any evidence of the child's serious endangerment; 3) the trial court abused its discretion in awarding one year's worth of retroactive child support given the circumstances of the case and the parties' long history of reserving support; and 4) the trial court abused its discretion in awarding 508(b) attorney's fees for additional filings not included in its ruling.

The appellate court affirmed. The appellate court found that there was a substantial change in circumstances since the entry of the parenting plan, as the prior 50/50 parenting schedule was not feasible anymore, due to the parties' inability to co-parent, the child's new school schedule,

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and police and DCFS involvement. The appellate court further held that the imposition of counseling was not a restriction on petitioner's decision-making or parental abilities that required a finding of serious endangerment, but rather it was a condition precedent to Father's seeking a modification of parenting time in the future. The appellate court also ruled that the trial court's award of retroactive child support and 508(b) attorney's fees was not an abuse of discretion. A trial court is authorized to order retroactive child support payments as early as the filing date of a motion to modify. Mother filed a motion to modify in January of 2019, and the trial court only awarded retroactive child support from January 2021 forward. Regarding the 508(b) attorney's fees, the trial court properly concluded that the bulk of Father's emergency pleadings were not emergencies, and its oral and written rulings were consistent.

*In re Marriage of Kopecky*, 2023 WL 3198817 (Ill. App. 4th Dist.), May 2, 2023\*

Husband appealed the trial court's judgment regarding the allocation of parental responsibilities, the division of marital assets, and the award of attorney's fees, and further argued that his due process rights were violated. The appellate court affirmed the trial court's judgment on all issues. Husband's brief did not dispute the evidence presented, but argued the trial court erred in the weight it gave the evidence.

The trial court's memorandum was a detailed, 34-page, single-spaced order that the appellate court referred to throughout its opinion to reject Husband's arguments.

Mother moved 1 ½ hours away when she left the marital residence with the parties' twins. Mother was awarded sole decision-making and majority of parenting time. The trial court reasoned that Mother had made good decisions for the children while the case was pending and showed an ability to facilitate father's relationship with the children. The 604.10(b) evaluator recommended Mother to have decision-making and the majority of parenting time because the children would benefit from the continuation of their home environment. The trial court gave thoughtful consideration to all of the 602.5 and 602.7 factors.

Husband argued the division of assets was not equitable because the court did not consider the overpayment of temporary maintenance. The appellate court affirmed the trial court's division of assets and noted that Husband did not point to any factual or legal errors by the trial court in his brief.

The appellate court also affirmed the trial court's award of attorney's fees to Wife finding no abuse of discretion. The appellate court noted that the trial court discussed in its written order the parties' finances and analyzed their finances under the standard set forth in Section 503 in determining that Husband should contribute to Wife's attorney's fees.

The appellate court found no violation of Husband's procedural due process rights as he received all notices and fully participated in the litigation process. All of Husband's arguments on appeal amounted to an attempt to have the appellate court reweigh the evidence and rule in his favor. The appellate court is not a court of "do-overs."

*Illinois Department of Healthcare and Family Services Ex Rel., Tasha P. and Nana W.*, 2023 WL 5103981 (Ill. App. 3rd Dist.), August 9, 2023\*

Father sought an allocation of parental responsibilities and parenting time for the parties' minor child. A GAL was appointed, and a temporary order was entered providing Father 35% of the parenting time. Despite Mother having been primary caregiver for the child's first year of life, the GAL testified at trial that it was in the child's best interest for the parties to share equal parenting time. She took into account that Mother resided in Darien and Father resided in Bolingbrook and the short distance could facilitate an equal schedule. The GAL also focused on the fact that Father would be better able and willing to facilitate the child's relationship with Mother (e.g., Mother sought baseless Order of Protection; Mother attempted to surveil Father, etc.), and thus recommended joint decision-making responsibilities. Father, who lived with his Wife and other child of similar age to the minor in question, had also begun taking steps to enroll the child in preschool in the program near his home, whereas Mother had provided little information as to the Head Start programs she testified to have been looking into. Mother also moved regularly, including unilaterally moving the child out of state for a period of time. The trial court awarded joint decision-making responsibilities and equal parenting time. The trial court also found that it would be beneficial for the child to attend the same school as his same-age sibling and held that the child would attend school in Father's district. Mother appealed, arguing that the trial court's decision was unreasonable because she was the child's primary caregiver and changing the allocation would require the child to adjust to a new schedule.

The appellate court affirmed, finding that Mother failed to dispute several of the trial court's findings that weighed against her, including her inability to properly co-parent with Father and her sporadic residency history. While the change in the child's schedule was a factor to be considered, that factor alone, especially given the minor change in the schedule, did not mean the trial court's decision was against the manifest weight of the evidence. The trial court properly relied on the GAL's recommendations and considered the statutory factors.

*In re Marriage of Knabb*, 2023 WL 4695937 (Ill. App. 1st Dist.), July 24, 2023\*

Wife appealed several orders that were entered in the divorce case during the two years it was litigated. The appellate court held that the orders entered prior to the parties' judgment were not final orders and were actually superseded by the judgment. Therefore, any orders entered prior to the judgment were considered moot.

Wife appealed the trial court's ruling awarding Husband sole decision making and majority of parenting time citing Guardian ad Litem bias, evidence of the parties' ability to co-parent, and her history of being the primary caretaker of the child. The appellate court affirmed, noting that the trial court has broad discretion in considering evidence and allocating parental responsibilities and parenting time. The appellate court also noted that Wife failed to present any evidence that the trial court's findings were against the manifest weight of the evidence.

Wife also appealed the trial court's imputation of income to her for purposes of calculating support. She argued no income should have been imputed based on her approval for

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social security disability benefits as a result of her post traumatic stress disorder. The trial court found that Wife failed to establish her disability at trial and that she was not credible. The appellate court found that given all the evidence, the trial court properly imputed income based on deposits into Wife's bank account that she did not report as income.

Wife further appealed the trial court's award of \$8,982 in fees to Husband based on her violation of two court orders. The appellate court affirmed the fee award and held a finding of contempt was not necessary for a 508(b) award, and Wife did not dispute that she had violated both orders. Wife also argued the amount was improper as Husband failed to establish the reasonableness of the fees incurred. However, Wife failed to provide a complete record of the evidence presented to the trial court as to the reasonableness of fees, and thus, the appellate court found it appropriate to defer to the trial court's discretion as the record reflected the trial court did receive and review some billing records. On appeal, any incompleteness of the record is to be resolved against the appellant. The trial court was familiar with the entirety of the divorce proceedings, including the work of Husband's counsel, and could infer reasonableness based on evidence of fees from a prior rule to show cause.

*In re Marriage of Swafford*, 2023 WL 5530690 (Ill. App. 5th Dist.), August 28, 2023\*

The parties were married in 2017, and they had two children. Wife filed a petition for dissolution of marriage in 2021. Wife was the primary caretaker of the children throughout the parties' marriage. In March 2023, the case concluded and Wife was awarded sole decision-making authority and majority parenting time subject to Husband's reasonable parenting time, and the parties were equally responsible for child-related expenses. In determining the allocation of parental responsibilities, the trial court addressed the applicable statutory factors. Husband appealed, arguing that the trial court erred in allocating Wife sole decision-making authority, majority parenting time, and ordering the parties to be equally responsible for child-related expenses.

The appellate court affirmed. The appellate court stated that Husband did not claim on appeal that the trial court failed to consider the statutory factors pertaining to decision-making authority or that the trial court's findings were not supported by the record, but rather claimed that the trial court ignored the testimony that Husband provided and the evidence he submitted as it related to the statutory factors. The appellate court emphasized that there is no requirement that a trial court must address every piece of evidence or all of the testimony provided during the hearing. The appellate court further explained that here, the trial court relied primarily on testimony and evidence provided by Wife because it found her testimony and evidence to be more credible or compelling than that provided by Husband, and an appellate court will not reweigh evidence or disturb the trial court's credibility determination. As such, the appellate court held that the trial court's allocation of decision-making was not against the manifest weight of the evidence.

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Pertaining to the allocation of parenting time, the appellate court stated that the evidence revealed that a shared parenting time schedule was disruptive, and that the parties disagreed on the major subjects regarding the children. The appellate court held that the trial court applied the statutory factors when making its decision on the allocation of parenting time, and such decision was not against the manifest weight of the evidence.

Lastly, pertaining to child-related expenses, the trial court held that no review of the matter was necessary, as it was barred by the invited-error doctrine. Specifically, the appellate court found that the record showed the parties agreed to equally split child-related expenses between agreed orders, stipulations, and position statements. As such, the appellate court affirmed the trial court's ruling.

*In re Marriage of Morgan L. and Gregory L.*, 2023 WL 6891576 (Ill. App. 5th Dist.), October 19, 2023\*

The parties were married in 2010, and two children were born as a result. In 2021, Wife filed her petition for dissolution of marriage. In 2023, Husband filed a notice of intent to claim nonmarital contribution to the marital estate. In 2011, the parties purchased acres of land, with the mortgage in both parties' names. Husband alleged that there was an oral agreement with his parents to purchase the property, and his parents would pay half of the earnest money, down payment, monthly mortgage payments, real estate taxes, and homeowner's insurance. Husband claimed that once the parties built a house on the property, they would transfer half of the acres to his parents such that the land would be separated into two tracts. In the following 10 years, Husband's parents contributed a significant amount of funds toward the property expenses. Wife stopped making payments toward the property in 2021 when the parties separated. Husband requested that the trial court award his parents a one-half interest in the value of the equity in the marital real estate. The trial court awarded the property to Husband, allocated the mortgage debt to Husband, and ordered Husband to pay half of the equity in the property to Wife. The trial court held that any contributions made by Husband's parents were gifts to the parties, and not an outstanding debt to be repaid, but if there was an outstanding debt owed to Husband's parents, Husband would be responsible for same. The trial court also indicated that the parties had not reached an agreement as to the valuation of vehicles, so the trial court averaged the values provided by the parties.

Regarding the allocation of parental responsibilities and parenting time, the trial court heard testimony from multiple witnesses pertaining to the children's current standing at their new school in Wife's district, interactions between the parties regarding their ability to coparent, and which party was the primary caretaker of the children. The trial court ultimately determined that the parties were not able to coparent, that the children were adjusted to their present environment with Wife, and that Wife was the primary caretaker. As such, the trial court allocated sole decision-making and majority parenting time to Wife in accordance with the statutory factors.

Husband appealed, arguing that the trial court's allocation of parenting time and parental responsibilities were against the manifest weight of the evidence, the trial court erred in the valuation of the marital property, and the court erred in its allocation of debt.

The appellate court affirmed. Pertaining to the allocation of parenting time and parental responsibilities, the appellate court reviewed the record and considered the factors set forth in

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sections 602.5 and 602.7. The appellate court emphasized that a trial court's best-interest determinations are entitled to great deference. As such, the appellate court found that, although the trial court acknowledged that Husband loved the children, the trial court's best-interest determinations were not against the manifest weight of the evidence which demonstrated that Wife had been the primary caretaker; the children were adjusted to their environment with Wife and their new school; there was a lack of willingness on Husband's part to facilitate and encourage a close and continuing relationship between the children and Wife; there was prior physical violence or threats of violence; and, the parties' were not able to properly coparent.

As for the valuation of marital property, the appellate court held that due to the lack of agreement by the parties regarding the value of the vehicles, the trial court's valuation of same by averaging the two presented values was not against the manifest weight of the evidence. Husband also argued that the money contributed by his parents was not a gift, but rather a debt that needed to be repaid. The appellate court reiterated that there was no written documentation to establish the money contributed by Husband's parents was a loan, there was no written agreement setting out the terms of the agreement or showing how the money must be repaid, and the parties had not made any payments to Husband's parents during the marriage, supporting that the funds were a gift, despite Husband's father's testimony that he expected to be reimbursed. The appellate court held that such findings were not against the manifest weight of the evidence.

*In re Marriage of Rabbat and Topalo*, 2023 WL 7161783 (Ill. App. 3rd Dist.), October 31, 2023\*

This was a highly contested case involving a Guardian ad Litem ("GAL"), a Rule 215 expert, a court appointed 604.10(b) expert, and Wife's 604.10(c) expert. After hearing testimony from all the experts, the parties, and other witnesses, the trial court awarded joint decision-making for education, medical, and extracurricular activities, and sole decision-making to Wife for religion. The trial court awarded Wife with majority of parenting time.

The appellate court found ample evidence to support the trial court's decision on religious decision-making and noted the parties had an implied agreement that Wife would take the lead with respect to religious matters both before and after the marriage. The court also looked to the past conduct of the parties and found their actions corroborated their agreement regarding religion. The appellate court noted that the trial court was not required to make specific findings to support its award of religious decision-making responsibilities to Wife and that section 602.5 did not require the court to state the reasons for its decision. Here the trial court had stated it considered all relevant statutory factors to determine the best interest of the child.

The appellate court found the trial court's decision on parenting time was not against the manifest weight of the evidence. Husband was granted only slightly less parenting time than Wife which was slightly less than what the GAL recommended, more than what the 604.10(b) expert recommended, and much more than what the 604.10(c) expert recommended. Notably, the appellate court affirmed the trial court's decision that Husband not have parenting time on Father's Day because it fell on a Sunday and Sundays were designated to Wife to ensure the small child was well rested for Sunday church.

*In re Marriage of Cholach*, 2023 WL 7923887 (Ill. App. 1st Dist.), November 16, 2023\*

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Upon the filing of the divorce, the parties initially agreed to a nesting schedule. However, Husband then failed to communicate with Wife regarding children-related issues and failed to provide notice of when he would be at the house or exercising his parenting time. Therefore, the Guardian ad Litem recommended, and the trial court ordered, that Wife be allocated sole decision-making authority and be granted sole possession of the marital residence. Husband appealed both the allocation of decision-making authority and the court's order regarding possession of the residence.

The appellate court dismissed the appeal regarding exclusive possession as it was not referenced in the final order that Husband sought to appeal. The order granting exclusive possession did not have Rule 304(a) language with the finding that "there is no just reason for delaying either enforcement or appeal or both." The appellate court affirmed the trial court's ruling on decision-making and rejected Husband's argument that the trial court only cited the factors for parenting time and did not properly consider the factors set forth in Section 602.5 of the Illinois Marriage and Dissolution of Marriage Act. The trial court stated in its ruling that the court reviewed all statutory factors with regards to the allocation of parenting decisions and parenting time. Furthermore, the evidence, including Husband's own admission, showed that Husband ignored and failed to respond to texts or emails from Wife and he failed to communicate with Wife on parenting issues.

*In re Marriage of Hussain and Ali*, 2023 WL 7319416 (Ill. App. 2d Dist.), November 7, 2023\*

The parties were married in 2004 and had two children. In July 2021, Husband filed for divorce. The trial court granted Wife temporary exclusive possession of the marital residence, appointed a Guardian ad Litem (GAL), entered a temporary support order requiring Husband to pay Wife \$750 per month, and ordered Husband to temporarily contribute to the marital residence expenses. In February 2022, the trial court entered an order allowing Husband to access and use marital funds held in his IRA for purposes of paying marital expenses but reserved the issue of allocation of any such withdrawals. The GAL provided her initial report, which recommended joint decision-making and reasonable and liberal parenting time. In June 2022, the trial court granted Wife permission to access and use marital funds in her IRA for purposes of paying her attorney's fees, GAL fees, business valuation, and real estate appraisals. The trial court reserved the issue of allocation of such withdrawals. The GAL conducted additional interviews and expressed that she now recommended that Wife be allocated sole decision-making authority and majority parenting time during the school year. The GAL opined that the parties were not able to co-parent. The case proceeded to trial.

The trial court found that Wife and the GAL were both credible, and Husband was not. While finding that both parents had, at times, acted contrary to the children's best interests, after consideration of the statutory factors set forth in Sections 602.5 and 602.7, the trial court determined that it was in the children's best interests for Wife to have sole decision-making authority and majority parenting time after considering Husband's abuse, the Our Family Wizard messages, the parties' lack of ability to co-parent, and the

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children's mental health. The trial court acknowledged that the children expressed a preference to spend more time with Husband, but ultimately found that the children's preferences did not outweigh its other concerns. As for assets, the trial court awarded Wife the marital residence and ordered a second property to be sold and the proceeds to be split equally. The trial court characterized all retirement and investment accounts as marital, finding that Husband did not meet his burden of proving otherwise. The trial court then allocated the parties' retirement and investment accounts amongst the parties, with Wife receiving approximately \$30,000 more in total. The trial court also characterized Husband's company as marital and determined its value by taking the value of the company's bank accounts and subtracting its credit card debt. The trial court then awarded the company to Husband. The trial court found that the evidence Husband presented regarding an alleged promissory note between the business and an investor and an SBA loan was not sufficient for the court to reduce the value of the company. When calculating Husband's income, the trial court used Husband's gross monthly wages, his average monthly non-employee compensation, and personal expenses paid for by the company that qualified as gross income pursuant to section 505(a)(3.1)(B) of the Illinois Marriage and Dissolution of Marriage Act. The trial court calculated and ordered statutory maintenance and child support accordingly. Husband filed a motion to reconsider which was denied. Husband appealed, arguing that the trial court improperly valued his company, erred in determining his income, improperly divided the parties' retirement accounts, and improperly erred in its allocation of parental responsibilities.

The appellate court affirmed. First, the appellate court noted that, since the Husband produced an insufficient record on appeal, any insufficiencies in the record would be held against Husband. The appellate court held that the trial court properly valued Husband's company considering that there was a lack of expert testimony and sufficient evidence pertaining to the value of the company, and case law supported the method of valuation the trial court conducted. The appellate court held that the trial court was not required to accept Husband's testimony pertaining to loans against the company where there was insufficient evidence of same, even if Husband's testimony regarding same was un rebutted.

Second, the appellate court held that Husband forfeited his argument regarding the court's determination of his income, but nonetheless explained that the trial court acted appropriately by treating Husband's regular salary differently than his non-employee compensation. The appellate court found that the trial court had to take an average of the non-employee compensation where same fluctuated each year, while the regular salary did not.

Third, Husband claimed that the trial's court's division of assets unfairly favored Wife and failed to account for the withdrawals each party made from their retirement accounts during the pendency of the dissolution. While the trial court did not expressly address the allocation of said withdrawals, it did state that the division was in consideration of the parties' incomes, economic circumstances, Husband's higher earnings, each parties' future earning capacity and the ability to continue to save for retirement, and the division

of other assets and debt. Husband originally contended this matter in his motion to reconsider which was denied for “the reasons stated in the record”. However, as Husband failed to provide a sufficient record, the appellate court had no other choice but to affirm the trial court’s decision.

Lastly, the appellate court held that the trial court thoroughly addressed each of the statutory factors related to the allocation of parental responsibilities and found that it was in the best interests of the children for Wife to make the decisions and be allocated a majority of the parenting time. Husband argued that the trial court did not adequately consider the wishes of the children. The appellate court held that a mature child’s preference about which parent they want to live with should be given considerable weight when it is based on sound reasoning; however, their preference is not controlling or binding if the court determines that the child’s preference is not in their best interest. The appellate court found that there were several concerns about the Husband that outweighed the children’s preferences, such as his abuse, the child’s suicidal ideations, and Husband’s lack of ability to coparent.

See also MAINTENANCE, *In re Marriage of Sessions*, 2023 WL 1860964 (Ill. App. 5th Dist.), February 9, 2023\*

See also, ADMISSION OF EVIDENCE, *In re Marriage of Turner*, 2023 WL 2344360 (Ill. App. 3rd Dist.), March 3, 2023\*

See also RELOCATION, *IN re Marriage of Mardi*, 2023 WL 2386506 (Ill. App. 4th Dist.) March 7, 2023\*

See also, ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME, *In re Marriage of Knabb*, 2023 WL 4695937 (Ill. App. 1st Dist.), July 24, 2023\*

See also, ALLOCATION OF PARENTAL RESPONSIBILITIES, *In re Marriage of Swafford*, 2023 WL 5530690 (Ill. App. 5th Dist.), August 28, 2023\*

## **ALLOCATION OF PROPERTY**

*In re Marriage of Almodovar*, 2023 WL 7489949 (Ill. App. 2d Dist.), November 13, 2023\*

During the marriage, the parties owned and operated a business. During the pendency of the dissolution matter, an order was entered providing that Wife would run the business and that Husband’s access to the building would be restricted and he would not be employed by the business. Wife filed a petition seeking contribution to her attorneys’ fees on the basis that Husband’s numerous detrimental actions and efforts to sabotage the business unnecessarily protracted and increased the cost of litigation.

The trial court equally divided the parties' assets and reserved maintenance until the parties decided if one would buy the other out of the business. The trial court erroneously stated that Wife had not filed a petition for contribution to fees and found both parties needlessly increased the cost of litigation and that both parties had an ability to pay fees. Ultimately, neither party bought the business, but their son did, paying Husband cash for his interest and Wife accepted a promissory note for her interest. Wife appealed and argued the trial court should have awarded her 65% of the marital estate, failed to award her indefinite maintenance, and failed to grant her petition for contribution to attorney fees. Husband argued Wife "invited error" in accepting a promissory note and thus her appeal should be estopped; the appellate court rejected this argument.

The appellate court affirmed the equal division of assets and the reservation of maintenance. The appellate court found that the trial court did err with respect to Wife's petition for contribution to attorneys' fees and remanded the matter for that issue to be addressed by the trial court.

*In re Marriage of Grant*, 2023 WL 7295195 (Ill. App. 5th Dist.), November 3, 2023\*

The parties were married in 1994. Wife filed a petition for dissolution of marriage in 2019. Wife appealed the trial court's maintenance award and property award. The appellate court held that the trial court's maintenance and property distribution was an abuse of discretion where the trial court did not consider all statutory factors and failed to award an equitable distribution of the marital estate.

The trial court set Husband's monthly income without any explanation and failed to consider Wife's limited earning potential due to her lack of work experience. The trial court also failed to consider the value of marital property, specifically the amount in each party's respective bank accounts, which resulted in Wife receiving less than 50% of the marital assets because the court awarded each party their own accounts without evidence of the balances. The trial court further failed to consider the value of Husband's non-marital interest in an LLC, for which evidence had been presented and which further resulted in an inequitable distribution of the estate. The trial court improperly allowed Husband to terminate his life insurance obligation to secure maintenance without any explanation. The case was remanded, and the trial court was required to consider Section 503 factors (1)-(12).

*In re Marriage of Reed*, 2023 WL 8869453 (Ill.App 1 Dist.), December 22, 2023\*

The parties were married in 2011. Wife filed for divorce in 2020 and sought temporary maintenance. In lieu of maintenance, the trial court awarded Wife exclusive possession of the marital residence until February 2021, where Wife was responsible for paying for the maintenance, utilities, and upkeep, and Husband was responsible for paying the mortgage and insurance. Wife also filed a notice of intent to claim dissipation. In said

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notice, she claimed the breakdown of the marriage was October 2013, and claimed that Husband dissipated assets by making payments from his checking account between 2015 and 2020, where she did not learn of said transactions until she received discovery. The trial court denied Wife's dissipation claim, finding that the parties functioned as a married couple until the time of separation and that Wife knew about Husband's spending. Husband claimed that the marital residence was nonmarital, as the source of the downpayment for same was from his nonmarital assets, and there was a homestead waiver. However, the trial court rejected said claim, as the residence was purchased during the marriage and marital funds were used to pay the expenses associated with the parties' ownership of the residence. The trial court did award the marital residence and 100% of the equity in same to Husband. The trial court also stated that it considered such an award of the residence in its award of \$10,000 for Wife's attorney's fees. The trial court further explained the award for attorney's fees was due to the fact that Husband was the higher income earner for a period of time. The trial court further awarded a Chicago Heights property to Husband as his nonmarital property, finding that it was inherited by Husband from his father. The trial court further awarded the parties their own bank accounts, finding that the parties had been separated for two years and had not commingled finances since then. Pertaining to maintenance, the trial court found that guideline maintenance would be \$0 based on Wife's current income and found that each party was able to provide for their own support. Wife filed a petition to vacate, modify, or reconsider, arguing that the trial court awarded Husband a disproportionate share of the marital estate and that it erred in its finding on the Chicago Heights property, dissipation, and the marital asset distribution generally. The trial court denied her motion, and the appeal followed.

The appellate court affirmed in part and reversed and remanded in two narrow respects. First, as to the Chicago Heights property, the appellate court held that the trial court's decision that it was a nonmarital gift to Husband was not against the manifest weight of the evidence. The appellate court stated that the evidence Husband offered, alongside the lack of evidence from Wife otherwise, sufficed for Husband to meet his burden after the competing presumptions cancelled each other out. As to dissipation, the appellate court agreed with the trial court that Wife failed to prove that the marriage began to break down before the parties' separation date. However, the appellate court disagreed that no dissipation occurred thereafter, holding that Husband had the burden to demonstrate specific evidence as to how the funds at issue were spent, but he failed to do so. Thus, the appellate court remanded the trial court to add the dissipated funds from the parties' separation date forward, back to the marital estate to be distributed on remand. As to the distribution of the parties' bank accounts, the appellate court found that the trial court abused its discretion by awarding each party their own accounts. The appellate court held that the law is clear that, regardless of the parties' date of separation, the funds in the account are marital property until the time of dissolution. The appellate court remanded the case so that the funds held in the parties' bank accounts could be distributed. The appellate court affirmed the distribution of all other property.

See also, CHILD SUPPORT, *In re Marriage of Garnhart*, 2023 WL 9017833 (Ill.App. 4 Dist.), December 28, 2023\*

See also, ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME, *In re Marriage of Hussain and Ali*, 2023 WL 7319416 (Ill. App. 2d Dist.), November 7, 2023\*

## **APPELLATE JURISDICTION**

*In re N.N.*, 2023 WL 2564594 (Ill. App. 1st Dist.), March 17, 2023\*

The trial court granted Mother a plenary order of protection against Father in September 2022, and found Father in indirect contempt of court for failing to pay Mother's attorney's fees and child support, and to undergo a psychological evaluation. Father appealed 15 separate matters. Father alleged that the judge terminated all of his rights for a second time, and the order of protection was entered in default as he was not present for the proceeding and was never served with an emergency order of protection. Father also argued that the trial court decided, without corroborating evidence or without serving him, to enter a plenary restraining order. Father also appealed numerous court orders via a motion to reinstate.

The appellate court affirmed the entry of the order of protection, and dismissed the appeal on all other matters for lack of jurisdiction because the orders challenged were not final orders. The appellate court explained that an emergency order of protection under the IDVA shall be issued if a petition satisfies certain requirements, regarding prior service of process or of notice upon respondent. Father failed to provide a sufficiently complete record, thus the appellate court held that it is presumed the trial court's order was in conformity with the law and had a sufficient factual basis. Pertaining to the second appeal on the motion to reinstate, the appellate court stated that Father failed to comply with the law by failing to make any allegations in his Motion or to include any supporting arguments. The appellate court explained that a reviewing court has no jurisdiction to consider issues not specified in the notice of appeal.

*In re Parentage of D.S., Stewart v. Mahoon*, 2023 WL 4032373 (Ill. App. 1st Dist.), June 15, 2023\*

Father filed a motion seeking an order transferring venue of the case from Cook County to Peoria County. The trial court entered an order transferring the case and taking the matter off call in Cook County. Father appealed that order for reasons not so clear in the opinion. However, the appellate court dismissed the appeal for lack of appellate jurisdiction, finding that the transfer of venue order did not ascertain or fix absolutely the right of any party to the action. Further, the order did not include a finding pursuant to Supreme Court Rule 306 granting Father leave to appeal.

*In re Marriage of Frisz*, 2023 WL 6940290 (Ill. App. 1st Dist.), October 20, 2023\*

Husband appealed the trial court's order denying his request to order Wife to return alleged overpayment of his retirement funds by plan administrator. Husband contended that the plan administrator inadvertently overpaid Wife by including post-decree contributions in the calculation. Husband had filed two appeals. His first appeal, *Frisz I*, was denied for lack of jurisdiction as the appellate court found it premature due to Wife's pending Rule 137 motion which it believed was still pending when it issued its ruling. The appellate court, in *Frisz I*, was unaware that the final order was issued on Wife's Rule 137 motion after Husband filed his notice of appeal. Husband failed to supplement the record with the trial court's final order.

On March 17, 2023, Husband filed his second appeal within seven days of the ruling on *Frisz I*. The appellate court denied Husband's second appeal for lack of jurisdiction, this time because the final orders that Husband sought the appellate court's review of were over a year old; they were entered on November 22, 2021, and March 18, 2022, respectively.

The appellate court stated that upon his receipt of the appellate court's ruling in *Frisz I*, Husband should have filed a petition for rehearing and supplemented the record with the trial court's final order on Wife's Rule 137 motion. It would have remedied the premature nature of his first appeal.

In filing a new appeal, Husband was essentially trying to appeal orders that were over a year old and nothing in the appellate rules allow such a tardy review. The appellate court lacked jurisdiction for Husband's second appeal.

*In re Marriage of Sokolski*, 2023 WL 7130643 (Ill. App. 1st Dist.), October 30, 2023\*

Mother filed a motion alleging that Father failed to return the children following his court-ordered parenting time. Mother was seeking the children to be returned to her possession. At the court date upon presentment for hearing on Mother's motion, the Court entered an order of continuance which also provided that the children would temporarily reside with Father subject to video calls with Mother, and also appointed a Guardian ad Litem ("GAL"). Thereafter, Father filed his motion to modify the parental allocation alleging that the children were being abused at Mother's house as well as being molested by Mother's son from another relationship. Mother then filed a motion to vacate the initial order transferring possession of the children, claiming the court lacked jurisdiction to do so where the only pleading pending before the court at that time was her motion seeking the return of the children. Mother also claimed that she was not prepared to argue any such modification at that date as the issue was not properly before the court. Mother's motion to vacate was denied as the trial court found that it had jurisdiction to enter the order temporarily transferring possession of the children because the order was necessary to protect the best interest of the children after hearing Father's representations of abuse in open court. Mother appealed the initial order transferring possession of the children, the order appointing the GAL, and the order denying her motion to vacate.

The appellate court declined to hear the appeal, finding that it lacked jurisdiction as the order transferring possession and the order appointing the GAL were temporary and not final orders or judgments from which an appeal may be taken. Furthermore, Mother did not request leave to appeal an interlocutory order under Rule 306.

*Girard v. Girard*, 2023 WL 8895929 (Ill.App. 1 Dist.), December 26, 2023\*

The parties' Joint Parenting Agreement and Custody Judgment for their twin daughters was entered in 2015. The parties agreed to modifications of the allocation of parenting time and residential parent for the children during the next few years; at the time of this litigation, the twins were living primarily with Father and his new wife, Marissa, the third-party appellant.

Mother filed a petition for a parenting coordinator, alleging that Father made unilateral decisions for the children. The other substantive issues in the post decree litigation were family therapy, abuse of parenting time, and the impermissible unilateral decision-making. Mother filed a motion to join Father's new wife, Marissa, as a third party, on the basis that she was inserting herself into the children's lives as a parent, and the court joined Marissa in the case.

Mother filed an emergency petition for temporary restraining order and other relief, which is the catalyst for the appeal. The children were posting on social media information about the litigation and commented that they were going to the media. The trial court granted Mother's petition in part and ordered the deletion of social media postings and prohibited any further posting. Father and Marissa were ordered to oversee the deletion of the posts and instruct the children not to communicate or be interviewed by any media.

Father and Marissa challenged the trial court's order mandating that they oversee the deletion of the children's social media posts and prohibiting any future posts and appealed under Rule 307(a)(1) that confers jurisdiction on appellate courts on orders granting injunctions which usually require a party to do or not do something.

The appellate court held that they did not have jurisdiction as the order in question was not an appealable interlocutory order. The interlocutory order in question on appeal must address the substance of the cause of action; the form of the order itself will not designate it an appealable order. The order must adjudicate substantive issues related to the litigation for it to be reviewable by the appellate court. Here, the injunctive order in question did not address any of the substantive issues in the case: family therapy, abuse of parenting time, and decision-making. An order that is administrative or ministerial to regulate the parties' behavior as the matter progresses is not substantive and is not subject to appellate review. Here, the injunctive order assigned temporary instructions, "rules of the road" for the parties while navigating the litigation. The order here set terms and conditions on the custody requirements of a parent and stepparent. It was ministerial and did not adjudicate any substantive issues involved in the litigation.

*In re Marriage of Joseph Tener and Veronica Walter*, 2023 WL 8525531 (Ill.App. 1 Dist.), December 9, 2023\*

Husband filed for dissolution of the parties' marriage in October 2014. Between 2016 and 2018, three different attorneys filed an Appearance on behalf of Wife which were all later withdrawn. Wife then filed a *pro se* Appearance. Husband sought a mental evaluation

\*Unpublished/Rule 23(e)(1) decision.

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of Wife which was ordered. Dr. Louis Kraus conducted a mental health examination and determined that Wife was delusional, extremely paranoid, and severely disabled. As a result, the court, *sua sponte*, appointed a guardian ad litem (GAL) to represent Wife's interests. The court further ordered the GAL to initiate guardianship proceedings on behalf of Wife, which was done. Wife attempted to hire independent counsel in the divorce case, but the court continued the dissolution proceedings until the probate court made a ruling on guardianship. The guardian ad litem filed a fee petition for both her own fees as well as the fees and costs incurred by the probate attorneys the guardian ad litem had hired to prosecute the guardianship matter. The fees were granted. Wife appealed, arguing that the court violated her due process rights and had no legal authority to appoint the guardian ad litem. Wife claimed that the order appointing the guardian ad litem was therefore void.

The appellate court found that the GAL appointment order was not void and the fee orders on appeal were not final and appealable because an award of interim attorneys' fees is strictly temporary in nature, and therefore, dismissed the appeal. The appellate court held that when a court has jurisdiction over a subject matter and the parties, an order is not void, but rather voidable, if there has been an error or impropriety in the issuing court's determination of the law. Here, the alleged lack of statutory authority in appointing a GAL did not deprive the trial court of jurisdiction. The appellate court lacked the authority to review the initial GAL appointment order as a voidable order because Wife did not appeal that order. However, the appellate court agreed with the GAL that the trial court had inherent authority to appoint the GAL in the dissolution proceedings, as a disabled person is viewed as a favored person in the eyes of the law and is entitled to vigilant protection.

## **ARREARAGE**

*In re Marriage of Bonzani*, 2023 WL 6939258 (Ill. App. 3rd Dist.), October 20, 2023\*

Pursuant to the parties' Marital Settlement Agreement ("MSA"), which was incorporated within their judgment in 2012, Husband was to pay unallocated support to Wife and Wife received a one-half equitable ownership interest in Husband's share of Tinley Woods Surgery Center and United Urology Centers, LLC. The MSA further provided that Husband should maintain his interest in both practices and should be construed as trustee, holding Wife's one-half interest for her benefit in a trust and should not transfer, encumber, or otherwise hypothecate Wife's equitable interest without her express written approval or order of Court. In 2014, the parties agreed to modify their judgment to reduce Husband's support obligation, to require Husband to pay \$1,000 per month toward a \$25,000 judgment in favor of Wife, to require Husband to pay off or transfer credit cards in Wife's name, to require Husband to provide proof of life insurance, to require Husband to remit half of all dividends received from certain business entities and to remit half of all gross income received from contract work. In 2015, Wife filed two multi-count petitions for rule to show cause and for indirect civil contempt, which were set for hearing in April 2016, and the court took the matter under advisement. In May 2016, Husband pled guilty in a criminal case and was placed on 24 months' conditional discharge. Two days later, Wife filed a motion informing the court that Husband posted a \$10,000 bond in the criminal case and asked that the balance of Husband's bond be turned over to Wife in partial satisfaction of Husband's support arrears. In May 2016, the

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trial court found Husband in indirect civil contempt on several counts of Wife's petitions, such as failure to pay support, failure to pay child-related expenses, failure to provide proof of life insurance, failure to use dividends to satisfy arrears, and failure to pay off or transfer credit cards in Wife's name. The trial court sentenced Husband to an indeterminate jail term subject to purge, stayed the mittimus pending setting of purge, and ordered Husband to submit a completed financial disclosure and suggested payment plan as a partial purge. During the July 2016 hearing to determine the arrears and set the purge, Wife's counsel provided the court with calculations of the arrears. Husband's counsel did not provide his own calculations. The court entered a judgment against Husband in the amount provided by Wife's counsel and ordered that the balance of Husband's bond be turned over to Wife. Wife then filed an emergency section 508(b) petition requesting attorney's fees. Three days later, Husband filed for chapter 7 bankruptcy. Husband's bankruptcy petition listed Wife's counsel as a creditor with a right to an incurred debt. In 2017, Wife filed three proofs of claim against Husband in bankruptcy court: \$15,000 for her 50% equitable interest in Husband's share of Tinley Woods, an unspecified amount for her 50% equitable interest in Husband's share of United Urology, and \$74,534.82 for the support arrearage set in July 2016. Wife was awarded \$93,385.77, fully satisfying the arrearage judgment, and 27.23% of her other two claims. The trustee did not remit any payment in relation to Husband's claimed debt for Wife's attorney's fees sought in her withdrawn 508(b) petition. In 2018, Wife filed a petition to determine non-dischargeability of debt under sections 523(a)(5) and (a)(15) of the United States Bankruptcy Code. The trial court ultimately ordered in January 2022 that Husband owed \$82,907.71 to resolve the court's prior contempt findings, which included statutory interest. The trial court further granted Wife leave to file a 508(b) fee petition and acknowledged Husband's outstanding claim for credit of his bond refund and his share of the one dividend check received by wife toward the judgment amount. Husband appealed, arguing that the trial court erred in calculating the updated arrearage amount, setting the purge, and granting Wife leave to file a 508(b) fee petition.

The appellate court affirmed in part, vacated in part, and remanded for recalculation of arrears. The appellate court held that despite the trial court's January 2022 order providing that the \$82,907.71 resolved the issues from the 2016 orders, the January 2022 order went beyond the scope of the 2016 orders and improperly included sums that were not due at that time. The appellate court held that Wife's business interest claims in the bankruptcy court were not in the nature of debts because they were claims for equitable interests, and the question of dischargeability did not apply to them. The appellate court held that the bankruptcy disbursement alone could not have completely satisfied the arrearage judgment of \$74,534.82, as the interest of same is not dischargeable under the Code because the underlying debt (support arrears) is nondischargeable. The appellate court vacated the January 2022 order and remanded the trial court to recalculate the amount owed accordingly, and to reflect Husband's outstanding claims for credit. The appellate court held that Husband's argument against the purge provision ordering him to pay a lump sum from his retirement is moot, as he already satisfied same. Husband lastly argued that because he won the race to the bankruptcy courthouse, any section 508(b) fees were discharged in bankruptcy. The appellate court rejected that argument, holding that attorney fees incurred in the enforcement of a support obligation are nondischargeable. The appellate court ruled that Wife's 508(b) fee petition may not include fees incurred in efforts to recover the value of her equitable interests in Tinley Woods and United Urology, but only reasonable fees related to the enforcement of a support obligation.

## ATTORNEY FEES

*In re Marriage of Peklo*, 2023 WL 2017401 (Ill. App. 2d Dist.), February 15, 2023\*

Husband filed a motion to reduce his maintenance. Wife's motion for directed finding was granted after a hearing on Husband's motion. Wife then filed a petition for contribution to attorney's fees pursuant to Section 508(a) of the Illinois Marriage and Dissolution of Marriage Act. The trial court admitted documents evidencing that the parties had similar financial assets but that Husband's income each month was approximately \$1,000 more than Wife's each month. The trial court referenced Wife's complete success on the underlying motion and ordered Husband to contribute to Wife's fees, noting that, based on the history of the case, including Husband's filing of a motion to reconsider that he did not pursue, the fees Wife incurred were reasonable and necessary. Husband appealed, claiming that the trial court erred in awarding fees based on success in the litigation and failed to find that Wife had an inability to pay her own fees.

The appellate court affirmed trial court's decision, finding that court did not abuse its discretion and that it performed a proper analysis of the fee award by examining each party's financial ability to pay fees. The trial court then, properly, took the next step to determine if the fees were reasonable and necessary, which the court determined was so as evidenced by Wife's success. The appellate court noted that Husband cited the applicable legal principles but was incorrect in asserting the trial court did not apply same properly.

*In re Marriage of Hyman*, 2023 WL 3221091 (Ill. App. 2d Dist.), May 3, 2023\*

The parties were married for 28 years, and at the time of the divorce, their children were all emancipated. Wife earned \$100,000 annual gross income as the director of operations for a Jewish adult school, and Husband earned more than \$750,000 annual gross income as the chief medical officer of Advocate Sherman Hospital and owner of a medical malpractice consulting practice. The parties' settlement agreement provided that Husband would pay maintenance to Wife based on a formula designed to equalize their gross incomes. The settlement agreement further provided that the parties would contribute to their children's college expenses "to the best of their financial ability" and would evenly split the youngest child's college expenses. Three years after the divorce, Husband suffered a ventricular tachycardia which ultimately led to him being terminated in June 2020, but was paid through the end of 2020. In September 2020, Husband filed a motion seeking to modify his maintenance obligation as well as his obligation to contribute to the children's college expenses. At the time of the hearing, Husband was receiving disability payments from three private insurance companies and the Social Security disability program. Husband testified as to the termination dates of the three private policies. The trial court found that there had been a substantial change in circumstances and reduced his maintenance obligation (following a post-trial motion filed by Wife, the trial court clarified that the reduction would take effect in January 2021, rather than in September 2020, when the motion to modify was filed). Husband sought to have the trial court rule on further reductions in the future as his disability income terminated. The trial court declined to, so stating that the parties' future financial situations were unknown. The college expenses that remained owed included \$7,500 to be paid for the youngest child's loan and another loan of \$14,000. At the time of the hearing, Husband's net worth was \$148,381 and Wife's was \$1.8 million. The evidence showed that Husband's current wife gifted him a \$60,000 boat, that Husband paid \$6,000 for the down payment of a boat lift, and that Husband paid \$79,000 to pay down his credit card bills. The trial court denied

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Husband's request to modify his obligation with respect to the children's college expenses, holding that the facts established that Husband had the ability to meet his obligations. Further, Husband was ordered to contribute \$30,567.94 to Wife's attorney's fees in connection with three petitions for rule to show cause filed by Wife as a result of Husband's failure to pay her court-ordered monies. Husband appealed.

The appellate court affirmed, rejecting Husband's argument that the trial court was to consider the statutory factors set forth in Section 504 of the IMDMA when setting the amount of the modified maintenance in addition to when determining whether there had been a change in circumstances. Husband's argument had no merit as Section 504 specifically directs the trial court to apply the statutory guidelines unless it makes an express finding that that would be inappropriate. Here, the trial court found that the guidelines were appropriate; therefore, no further analysis was required. The appellate court further held that the trial court acted properly in declining to determine Husband's future maintenance obligation as maintenance determinations require the trial court to consider numerous factors besides just the incomes of each party. The appellate court also affirmed the ruling regarding Husband's obligation to contribute to the children's college expenses noting that he still received more than \$300,000 in after-tax income per year, he was able to make significant payments to debt and a down payment just before trial, and the amount of his obligation totaled approximately only \$14,000. The appellate court further held that the evidence supported the trial court's determination that, regardless of Husband's injury and disability, he was still able to comply with the court's orders and affirmed the trial court's award of fees pursuant to Section 508(b) of the IMDMA.

*In re Marriage of Wei and Liu*, 2023 WL 3563206 (Ill. App. 1st Dist.), May 19, 2023\*

The trial court ordered Husband to pay \$3,400 to his former attorney and Husband appealed and argued that the trial court incorrectly ruled on his lawyer's fee petition without referring the dispute to mediation or arbitration which he argued is required under Section 508(c)(4). Husband had filed a response to his former lawyer's fee petition and had not raised Section 508(c)(4) in his response. The appellate court found that in failing to do so, Husband waived his right to mediation or arbitration, as an argument not raised in the trial court and presented for the first time on appeal is waived. The appellate court further noted that Husband had opted out of the procedures in 508(c)(4) citing the trial court's written order that stated that Husband agreed to waive his right to a contribution hearing and mediation of attorney's' fees and costs relating to the fee petition.

*Teymour v. Mostafa*, 2023 WL 3947939 (Ill. App. 1st Dist.), June 12, 2023\*

The parties dissolved their 23-year marriage in 2006. In 2013, Wife filed a petition to extend and increase maintenance and to issue a rule to show cause as to why Husband should not be held in contempt for failing to comply with his insurance obligations, and also seeking attorney fees. Husband sought the abatement or reduction of his maintenance obligation. In 2014, both parties filed motions for discovery sanctions for the other's failure to comply with discovery requests.

The trial court extended Husband's maintenance obligation for three years, finding that the parties' MSA provided that Husband's maintenance payments could not be terminated unless Wife earned more than \$50,000. The trial court also found that Wife made a good faith attempt to increase her income. The trial court found Husband to be in indirect civil contempt regarding his insurance obligations and granted Wife leave to file a petition for attorney fees pursuant to section

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508(b) of the Illinois Marriage and Dissolution of Marriage Act. The trial court also granted Wife's motion for sanctions pursuant to Supreme Court Rule 219 due to Husband's untimely and incomplete responses to discovery requests, and as a result, the trial court found it appropriate for Husband to pay Wife's attorney fees related to seeking Husband's compliance with discovery. The trial court denied Husband's motion for sanctions. In 2015, Wife filed a petition for attorney fees pursuant to section 508(b) following the finding of contempt, as well as pursuant to section 508(a), claiming that Husband had the resources to pay her fees, and she did not. Thereafter, Husband filed a motion to reconsider, to which the trial court denied. In 2018, Wife filed a second petition to review and extend maintenance, and Husband asked the court to modify his life insurance obligation. The trial court granted Wife's request to continue maintenance for 36 months, but denied her request for indefinite maintenance, again concluding that Wife's maintenance could not be modified unless she earned more than \$50,000. The trial court denied Husband's assertion that the \$50,000 threshold only applied to the initial seven-year period of maintenance. The trial court reduced Husband's life insurance obligation. The trial court awarded Wife attorney fees pursuant to sections 508(a) and 508(b). Husband appealed.

The appellate court reversed the trial court's contempt finding and affirmed the remaining orders in all other respects. First, the appellate court found that the trial court properly interpreted the MSA's maintenance provisions and continued Wife's maintenance as the terms of the MSA clearly indicated that the \$50,000 threshold would continue to apply after the initial seven-year period. The appellate court emphasized that in reviewing maintenance, the trial court must consider the factors in section 504(a) and 510(a-5) of the Act to determine whether maintenance should be continued, modified, or terminated. The appellate court found that the trial court did not abuse its discretion in continuing Wife's maintenance and properly evaluated the relevant factors.

The appellate court further found that the record indicated that Husband could have complied with Wife's reasonable discovery requests, thus the Rule 219 sanctions were appropriate.

Separately, Husband argued that the election of remedies doctrine barred Wife's contempt action because the MSA specified other remedies for the failure to comply with Husband's insurance obligations. Wife argued that Husband forfeited reliance on the election of remedies doctrine because he raised it in his motion to reconsider. The appellate court found that while Husband's argument was forfeited, it also found that the trial court did not identify a means for Husband to purge himself of contempt and reversed the contempt finding accordingly. However, the appellate court stated that it did not follow that the section 508(b) attorney fees awarded to Wife in conjunction with the contempt finding must also be reversed. The appellate court held that the trial court properly found that Husband lacked compelling cause or justification for his noncompliance, and thus the 508(b) fees were appropriate. The appellate court also affirmed the 508(a) attorney fees awarded to Wife, noting the discrepancy in the parties' incomes, and the presumption that the trial court knew the law and applied it appropriately, absent an affirmative showing to the contrary. The appellate court stated that there was no authority provided that requires the trial court to make express findings regarding the numerous factors to be considered when awarding 508(a) attorney fees as suggested by Husband.

See also, ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME, *In re Marriage of Kopecky*, 2023 WL 3198817 (Ill. App. 4th Dist.), May 2, 2023\*

See also MAINTENANCE, *In re Marriage of Sessions*, 2023 WL 1860964 (Ill. App. 5th Dist.), February 9, 2023\*

See also ALLOCATION OF PARENTAL RESPONSIBILITIES PARENTING TIME, *In re D.R.B.*, 2023 WL 2733475 (Ill. App. 1st Dist.), March 31, 2023

See also, Child Support, *In re Marriage of Christos*, 2023 WL 2422239 (Ill. App. 1st Dist.), March 9, 2023\*

See also, ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME, *In re Marriage of Knabb*, 2023 WL 4695937 (Ill. App. 1st Dist.), July 24, 2023\*

See also, CLASSIFICATION OF ASSETS, *In re Marriage of Kattner*, 2023 WL 5430740 (Ill. App. 1st Dist.), August 23, 2023\*

See also, ARREARAGE, BANKRUPTCY, *In re Marriage of Bonzani*, 2023 WL 6939258 (Ill. App. 3rd Dist.), October 20, 2023\*

See also, ALLOCATION OF PROPERTY, *In re Marriage of Almodovar*, 2023 WL 7489949 (Ill. App. 2d Dist.), November 13, 2023\*

## **BANKRUPTCY**

See also, ARREARAGE, ATTORNEY'S FEES, *In re Marriage of Bonzani*, 2023 WL 6939258 (Ill. App. 3rd Dist.), October 20, 2023\*

## **BUSINESS RECORDS**

*In re Marriage of Carty*, 2023 WL 3862047 (Ill. App. 2d Dist.), June 7, 2023\*

Wife petitioned for adjudication of indirect criminal contempt against Husband, alleging that he violated a provision of the JDOM that required him to provide results of breath tests measuring his BAC during times when he was with the parties' children. At trial, the trial court admitted a report of Husband's breath test results into evidence and determined that Husband had failed to provide breath results on certain dates, and further found him in indirect criminal contempt of court. Husband was sentenced to two days in jail and ordered to pay a \$400 fine. Husband appealed, arguing that the trial court erred in admitting the breath test results into evidence, and finding him guilty of indirect criminal contempt.

The appellate court affirmed. Husband argued that the trial court erred in admitting the breath test results because he was not provided sufficient notice of the report and that the report lacked adequate foundation as to its admissibility or accuracy, in violation of Supreme Court Rules 902(11) and 803(7). The appellate court found that Wife sought to admit the report pursuant to

Rule 803(6) regarding business records and Rule 902(11). Accordingly, the appellate court found that the report was properly admitted, and that Husband had sufficient notice.

The appellate court rejected Husband's argument that the evidence was insufficient to sustain the finding of indirect criminal contempt, noting that Wife successfully proved that Husband willfully violated a valid and clear court order.

## **CHILD REPRESENTATIVE**

See also, MODIFICATION OF ALLOCAITON OF PARENTAL RESPONSIBILITES, PARENTING TIME, *In re Marriage of Mendoza*, 2023 WL 2681873 (Ill. App. 1st Dist.), March 29, 2023\*

## **CHILD SUPPORT**

*In re Marriage of Christos*, 2023 WL 2422239 (Ill. App. 1st Dist.), March 9, 2023\*

Two children were born to the parties as a result of their marriage. A judgment for dissolution of marriage was entered in February 2006, incorporating a Marital Settlement Agreement ("MSA") and Joint Parenting Agreement. The Joint Parenting Agreement provided that the parties would have joint custody, with Mother having primary residential custody. Father was obligated to pay Mother monthly child support on his income from his primary employment, plus 28% of any net income he received from additional employment (moonlighting), less any deductions as set forth in section 505(a)(3) of the Act. The MSA further provided a provision requiring each party to contribute to their children's college expenses commensurate with his/her respective ability to do so at the time each child is ready to attend college. On January 29, 2020, Father filed a motion to modify child support and for contribution toward college expenses. Mother filed two petitions for rule to show cause. The trial court held that because a minor child moved in with Father, and Father received no financial contribution from Mother, there was a substantial change in circumstances necessitating a modification of child support. The trial court modified child support retroactive to June 1, 2020, and determined that Father was entitled to a credit for the overpaid child support. The trial court further held that Wife's claim for child support arrearage was barred by the doctrine of equitable estoppel, and in addition that her 14-year delay in seeking to collect purported child support arrearage was unreasonable, prejudicial to Father, and barred by the equitable doctrine of *laches*. Regarding Father's motion to modify contribution toward college expenses, the trial court found that the parties had not reached an agreement to equally divide the costs of the child's attendance at college. The court held that Father had a substantially greater ability to contribute to daughter's college costs than Mother, retroactively allocating 80% of the college expenses to Father. The trial court further held that Father had certain moonlighting income from which he owed Mother child support but found that his failure to pay those amounts was not willful because he presented compelling cause and justification for his failure to make the payments. The trial court found that Father owed

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Mother support arrears for years 2006 through 2020, plus interest, but it was offset by the credit Father received for his overpayment of child support. Mother appealed, and Father cross appealed.

The appellate court held that the trial court erred in finding that Mother's claim for child support arrearage was barred by *laches* and equitable estoppel. The appellate court noted that *laches* is an equitable affirmative defense that bars recovery by a litigant whose unreasonable delay in bringing an action prejudices the opposing party. A party asserting a *laches* defense must show, by a preponderance of the evidence, that 1) the plaintiff failed to exercise due diligence in bringing the action and 2) they suffered prejudice as a result of the delay. Here, the appellate court found that Father failed to show any prejudice, and thus the trial court erred in finding that Mother's claim for child support arrearage was barred by *laches*. The trial court also erred in determining that Mother was barred by equitable estoppel, again, because Father was not prejudiced.

The appellate court also ruled that the trial court abused its discretion when it determined that the additional income could not be considered in calculating his child support obligation in connection with the term "moonlighting". Moonlighting is defined as the practice of working at a second job after the hours of a regular job. The appellate court noted that the statute makes no distinction between income derived from moonlighting employment, additional employment, or primary employment. Accordingly, Father's additional income should have been considered in calculating his child support obligation.

The appellate court further ruled that the trial court properly calculated the downward modification of child support retroactive to June 2020 and the trial court was proper in relying on Section 505(a)(2) when calculating Father's child support. The appellate court found that modifying child support to the date of notice provided by the moving party, explaining that section 510(a) provides a trial court may modify child support payments only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification. Additionally, the appellate court ruled that the parties did not have an agreement to equally share the child's college costs. The appellate court reasoned that the evidence provided did not satisfy that the elements of a contract pertaining to college costs were entered into, and that the allocation of college costs was appropriate in light of the parties' ability to pay.

*In re Marriage of Huffman*, 2023 WL 3995684 (Ill. App. 4th Dist.), June 14, 2023\*

Following trial, Wife was awarded primary parenting time and Husband was ordered to pay child support and maintenance. Husband filed a motion to reconsider. Thereafter, parenting time was modified temporarily to a week on/week off schedule and a GAL was appointed. However, child support was not modified. The GAL reported to the court that Husband was able to provide "enticing entertainment" for the child as he had a financial advantage since he was not paying the court-ordered support payments. The GAL did

not make any specific recommendations as to parenting time. The trial court reduced Husband's child support obligation by approximately \$100.00 per month.

Approximately two months later, both parties filed separate motions to modify the parenting time schedule. Following further investigation, the GAL recommended that Husband be awarded majority of the parenting time and recommended counseling for Wife and child. The court awarded Husband majority time and reserved the issue of child support. Thereafter, Husband filed a petition for child support. Evidence of each party's incomes was produced at the hearing. Wife further testified to Husband's abusive nature and the fact that she left the residence prior to the divorce as a last resort and struggled to become self-supporting. Wife voluntarily was not exercising her parenting time at the time of the hearing on support because Husband had alienated her from the child to the extent that she did not believe parenting time with the child was healthy for either her or the child. Wife also requested approximately \$5,000 for the support she believed she was owed prior to the previous reservation of child support. The trial court denied both party's requests but failed to include factual findings regarding what child support should be pursuant to the guidelines. Husband appealed, claiming that the trial court showed personal bias to him and failed to find a proper basis for deviating from the guidelines.

The appellate court vacated the order and remanded the case. While the appellate court stated that the record did not support Husband's claim of bias, the trial court did fail to specifically connect its factual findings to its determination that child support was not warranted as required by Section 505 of the Illinois Marriage and Dissolution of Marriage Act.

*In re Marriage of Musiejuk*, 2023 WL 5321314 (Ill. App. 1st Dist.), August 18, 2023\*

Husband agreed to pay Wife child support as set forth in their settlement agreement. Wife filed a petition for rule to show cause for failure to pay support. Husband sought a modification and/or abatement of his support obligation due to unemployment. The trial court ultimately set Husband's arrearage, reduced Husband's support, and ordered Husband to contribute to college costs.

Husband appealed, claiming that the trial court did not properly enforce the parties' settlement agreement. However, Husband failed to produce a transcript from the hearing and failed to set forth a fully developed and reasoned analysis to support his argument on review. In the absence of such, the appellate court presumed the trial court's order was in conformity with law and supported by the facts. The appellate court further noted that trial courts are vested with the authority to modify child support provisions set forth in a settlement agreement. The trial court's orders were affirmed.

*In re Marriage of Qureshi and Asif*, 2023 WL 6144468 (Ill. App. 5th Dist.), September 20, 2023\*

The parties had two children and were separated for many years prior to the entry of their judgment for dissolution of marriage. Husband, who was self-represented, repeatedly failed to appear in court despite being provided with proper notice. Husband also attempted to have the Judge substituted for cause on at least three occasions. Each motion for substitution was denied, and Husband sent emails to various employees at the courthouse and clerk's office advising that he would no longer appear in the courtroom or participate in the proceedings. Trial was held and Husband did not appear. Husband's maintenance and child support obligations were set based on an average of Husband's income for the prior three years and Wife's current income. The trial court also found that Husband had transferred substantial amounts of funds to third parties, and therefore, allocated all bank accounts and retirement accounts to Wife. The trial court also found Husband in contempt of court for failing to provide documentation regarding the transfers he made and for failing to maintain a job diary. The trial court further found Husband in contempt as a result of the various offensive and insulting emails he sent to the employees of the court. Husband appealed, claiming the trial court did not consider certain evidence when granting the relief.

The appellate court affirmed because Husband waived his right to assert the arguments when he voluntarily chose not to attend the trial and present his evidence and arguments to the trial court. Furthermore, Husband failed to provide an adequate record of the proceedings to the trial court. As such, it was presumed that the trial court acted in conformity with the law and with a sufficient factual basis for its findings.

*In re Marriage of Jones*, 2023 WL 7161770 (Ill. App. 2d Dist.), October 31, 2023\*

The trial court entered a judgment for dissolution of marriage in December 2015. Under the child support section, the judgment set base child support based on 40% of Husband's net income with a deduction for life insurance payments. The judgment further provided that Husband would pay 27.1% of additional income received over his base gross annual income for so long as there was a duty to support four minor children and said percentage of additional support would be adjusted upon the emancipation of each child as defined within the judgment. Child support for each child would be terminated upon the latter of the child's 18<sup>th</sup> birthday or upon completion of high school, but in no event after the child's 19<sup>th</sup> birthday. The judgment further defined emancipation as the marriage of a minor child, the death of a minor child, the legal emancipation of a minor child, the minor child having a permanent residence away from the permanent residence of either party, entry into the Armed Forces, or the child engaging in full-time employment.

In January 2018, Husband filed his motion to modify support, arguing that there were several substantial changes in circumstances, namely: recent stock sales by Husband, Wife's increased income, minor children's changing needs, Wife's employment of a new au pair, increased insurance costs, and Husband's recent remarriage. The trial court held that there were no proven substantial changes in circumstances warranting modification. In March 2020, Husband filed a petition to reduce child support, which was amended a few days later. Husband sought a reduction in support because of a child's upcoming emancipation, termination of the aforementioned au pair's services as provided for in the judgment, an allocation of college expenses between the parties, and an elimination of certain payments intended to cover the children's extracurricular

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activities or additional expenses. The parties came to an agreement resolving all pending issues aside from the calculation of the child support based upon the child's emancipation. Husband argued that the child's emancipation was a change in circumstances that warranted modifying child support under the income-shares model. The trial court held that the children's emancipations were expected and considered in the parties' MSA, and no other substantial changes in circumstances existed that warranted grounds to modify child support under the income-shares model. However, the trial court did modify child support to 32% of Husband's net income considering there were only three minor children remaining, and reduced Husband's additional support obligation to 22% of additional income over his base gross salary from any source. The court applied said modifications retroactively to May 1, 2021. Husband appealed, arguing that the trial court erred in finding that the child's emancipation did not constitute a substantial change in circumstances warranting the application of the income-shares model and in calculating Husband's new support obligations.

The appellate court affirmed. The appellate court reiterated that an event cannot be deemed a substantial change in circumstance when it was contemplated by the parties and the court at the time a judgment was entered. Here, the emancipation of the children was thoroughly covered by the parties' Judgment, and as such, the child's emancipation was not a substantial change in circumstances. The appellate court further held that the trial court did not modify the judgment due to a substantial change in circumstances, but rather adhered to the judgment's language concerning the effects of emancipation, adjusting Husband's child support as required by the judgment. As such, the appellate court also affirmed the trial court's calculation of Husband's base and additional support payments. The appellate court additionally affirmed the trial court's language pertaining to various types of additional income in its August 2021 order for additional support purposes, stating that as the judgment did not limit the definition of additional income for additional support purposes, the trial court's August 2021 order further defining what is considered additional income, was not an error. Lastly, the appellate court held that Husband's argument against the retroactive date for his modified support obligations was meritless, and thus the appellate court affirmed the trial court's ruling.

See also, ATTORNEY'S FEES, *In re Marriage of Wei and Liu*, 2023 WL 3563235 (Ill. App. 1st Dist.), May 19, 2023\*

See also, ALLOCATION OF COLLEGE COSTS, *In re Marriage of Christos*, 2023 WL 2422239 (Ill. App. 1st Dist.), March 9, 2023\*

See also, ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME, *In re Marriage of Knabb*, 2023 WL 4695937 (Ill. App. 1st Dist.), July 24, 2023\*

See also, FOREIGN JUDGMENTS, *In re A.H.*, 2023 WL 5281637 (Ill. App. 1st Dist.), August 17, 2023

## **CHILD SUPPORT**

*In re Marriage of Garnhart*, 2023 WL 9017833 (Ill.App. 4 Dist.), December 28, 2023\*

Wife appealed multiple provisions of the trial court's judgment. During the trial, both parties testified to each party keeping their respective retirement accounts. Thereafter, Wife, in her closing argument, sought half of one of Husband's retirement accounts. The trial court ordered that each party retain the retirement accounts in his/her individual names. On Wife's motion to reconsider, the trial court upheld the division finding that, even if there was no stipulation to the division, it was equitable based on the facts of the case. The appellate court affirmed, finding that Wife failed to address the court's explanation about the allocation being equitable even if no stipulation was made.

Each party submitted different valuations for the marital residence, and the trial court took an average of the two and then allocated Husband a greater share of the equity as he had been solely making all mortgage payments and because Wife was awarded her cat breeding business as well as another rental business. On her motion to reconsider, Wife asked the court to utilize an appraisal that was conducted after trial. The trial court declined. The appellate court affirmed, finding that the trial court was presented with limited evidence as to the value of the house at trial and Wife failed to address the court's finding that the division of the equity was equitable based on the entire division of the marital estate.

During the dissolution proceedings, a piece of real property (which was originally Wife's premarital property that was transferred into joint title during the marriage) was sold and the proceeds utilized to pay the guardian ad litem (GAL). The trial court held that the GAL fee payment should be apportioned equally between the parties. The appellate court affirmed because Wife failed to present evidence that the piece of property should be treated as her nonmarital property.

With respect to the child support award, the trial court made certain findings regarding each parties' incomes. For Husband, his income from his employment as a teacher was utilized. Husband did testify that he had received a line of credit from his parents to help pay his attorney's fees, and Wife did not ask for same to be included in his income. Therefore, said loan was not included in Husband's income. The trial court imputed income to Wife after finding that she was "woefully underemployed". During the marriage, Wife was also employed as a teacher, but following the parties' separation, she ceased teaching and only earned income as a part-time accountant and through the operation of her cat breeding business. The trial court found that Wife's income was one-fourth of what it was during the marriage. The appellate court affirmed, holding that, based on the evidence presented, the trial court could reasonably find that nothing was preventing Wife from obtaining the level of income imputed to her.

Separately, the trial court awarded management responsibilities of the children's college savings accounts to Husband but ordered that no withdrawals be made without written consent or court order. The appellate court affirmed, holding that it could not say that the trial court's decision was unreasonable given that Wife had to consent to withdrawals.

## CHILDREN'S ACCOUNTS

Chanen v. Chanen, 2023 WL 4837695 (Ill. App. 1st Dist.), July 28, 2023\*

The parties' Marital Settlement Agreement ("MSA") included a provision that the accounts titled in the children's names would be held for the payment of the children's college expenses prior to either party being obligated to contribute. One of the accounts included a Vanguard 500 Index account which was held as custodian by Husband. Following the entry of the judgment for dissolution of marriage, Husband solely paid the taxes associated with the income generated from the Vanguard account. The MSA was silent as to who was responsible for payment of same but did include a provision that each party would be solely responsible for the debts in his/her sole name. Husband sought Wife's agreement for him to be reimbursed from the Vanguard account which continued to hold funds sufficient to pay for the remaining college expenses that were expected to be incurred. Wife objected, claiming that since the account was in his name, Husband should be responsible for the tax liability. Husband filed a motion for reimbursement. Wife's motion to dismiss was denied.

The trial court rejected her contention that because the account was titled in Husband's name, he should pay the liability as she failed to acknowledge that the funds were not Husband's but rather were held for the benefit of the children. The trial court found that a constructive trust had been created by the MSA. The trial court further rejected Wife's argument that Husband should be barred from seeking relief by *res judicata* as a previous court order dealing with child support included a provision that all financial issues were resolved and that as of the date of the order, each party agreed that "neither will have a claim against the other for financial issues arising under the terms of the Judgment that predate this order." The trial court's basis was that its decision to allow Husband to reimburse himself from the Vanguard account did not require Wife to contribute to a debt that was not incurred by her. Wife appealed.

The appellate court affirmed, holding that based on a review of the MSA in its entirety, including the provision that neither party would have an obligation to pay "any expenses" related to the children's college education until the funds in the children's accounts were exhausted, the parties did not intend for Husband to be solely responsible for the payment of taxes associated with the income growth. The appellate court held that "any expenses" includes the income tax on the earnings in the children's educational accounts. The appellate court rejected Wife's argument that the trial court improperly modified the MSA, finding that the trial court merely interpreted the MSA by implying a reasonable missing term, consistent with the principles of contract interpretation. Further, Wife was not required to pay any additional debts or obligations as a result of the trial court's ruling. In addition, the parties essentially created a constructive trust by having Husband maintain the accounts for the benefit of the children. Therefore, the appellate court held the trial court's finding that it would be inequitable for Husband to be solely and personally responsible for the taxes was reasonable.

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The appellate court further held that *res judicata* did not apply because Husband's motion seeking to assign the tax liability was not the same cause of action that was addressed in the previous court order regarding child support.

## **CLASSIFICATION OF ASSETS**

*In re Marriage of Branson and Jorgenson*, 2023 WL 3544311 (Ill. App. 4th Dist.), May 16, 2023\*

During the parties' three-year marriage, they entered into a rent-to-own agreement for a mobile home and plot of land which is where they lived as their primary residence. Wife had used non-marital funds to make the down payment, but Husband testified that there was no agreement that Wife would be reimbursed if the home was sold. Following the parties' separation, Wife lived in the home and paid the monthly payments. Wife also opened three cryptocurrency accounts during the marriage. Wife alleged that she used non-marital funds to open the accounts, but she failed to produce any documentary evidence to support her contention. Husband testified that the parties shared a joint bank account and that a camper and two vehicles were also purchased during the marriage. The trial court awarded each party a vehicle and ordered an equal division of the value of the home, the cryptocurrency and bank accounts, and the camper. Wife's motion to reconsider and then subsequent motion for Rule 137 sanctions were both denied. Wife appealed.

Husband initially challenged the appellate court's jurisdiction as more than 30 days had lapsed since the trial court's judgment. However, Wife's motion for sanctions served to toll that time period. The appellate court held that the judgment was not final and appealable while the Rule 137 claim remained pending as there was no 304(a) finding at the trial court level. Further, the appellate court affirmed the trial court's property classification, holding that the evidence presented showed that the property distributed was all acquired during the marriage and Wife failed to trace her alleged non-marital contributions by clear and convincing evidence or otherwise show that the contributions were not intended to be gifts to the marriage.

*In re Marriage of Kattner*, 2023 WL 5430740 (Ill. App. 1st Dist.), August 23, 2023\*

Husband raised seven claims of error on appeal.

Prior to the filing of the divorce case, the parties entered into an agreement for support and the division of assets which they referred to as their "kitchen table agreement" ("KTA"). The trial court found the KTA unconscionable because it gave an extra \$275,000 to Wife and took away substantial rights to maintenance, was vague and wanton. The appellate court found the KTA to essentially be a postnuptial agreement. The law favors amicable settlement of property rights in divorce cases and the validity of postnuptial agreements is presumed. The appellate court reversed and found the KTA not substantively unconscionable. The court's unconscionability analysis focused on the parties' relative economic positions immediately following the making of a postnuptial agreement. Although the parties' economic situations immediately after signing the KTA were not equal, the KTA did not cause the inequality – the imbalance existed years before the KTA due to the parties' earning capacity. No term of the KTA was unduly one-sided

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or harsh. Further, Illinois law does not specifically require financial disclosures in postnuptial agreements.

In addition to the KTA, Wife had signed a “Renunciation and Disclaimer of Property” (“RDP”) prepared by Husband’s lawyer to disclaim the right to certain property as set forth in the KTA, but it only addressed property Husband was getting. The RDP did not reference the KTA at all. The trial court found the RDP unenforceable due to lack of consideration. The appellate court agreed that the RDP lacked consideration and had no mutual disclaimer of property rights; Wife received nothing and only Wife signed it.

The appellate court held the trial court erred in classifying a condo as Wife’s non-marital property when there was a stipulation by the parties that it was marital. The trial court was bound by the parties’ stipulation.

Both parties’ 401k accounts were started prior to the marriage. The trial court classified Wife’s 401k account as non-marital and Husband’s as marital. The appellate court reversed the trial court’s classification of Wife’s 401k account. The trial court reached opposite conclusions for each account even though they were essentially the same. The appellate court held the 401k accounts became marital property through contributions from the parties’ salaries during the marriage. The appellate court upheld the trial court’s award of 60/40 distribution of marital estate in Wife’s favor.

In this case, there were two judgments for dissolution of marriage because the parties bifurcated their divorce. For tax reasons, they were divorced in December of 2018, but proceeded to trial thereafter. Both judgments had provisions for contribution to Wife’s attorney fees. The December 2018 judgment capped Husband’s contribution at \$50,000. Husband paid the \$50,000. Thereafter, the trial court awarded Wife additional fees in the amount of \$143,031.41. The appellate court found that the original \$50,000 award created a property right to Wife and the court lacked jurisdiction to modify that later when it ordered Husband to pay additional fees. Therefore, the additional fee award was reversed.

*In re Marriage of Bess*, 2023 WL 5718604 (Ill. App. 2d Dist.), September 5, 2023

Husband appealed the trial court’s classification of his investment account as marital property, and Wife appealed the trial court’s classification of an interest in a corporation and a piece of real estate both acquired during the marriage as Husband’s non-marital property.

A party claiming property is non-marital must be able to trace the sources of deposits by clear and convincing evidence. The appellate court affirmed the trial court’s determination that the investment account was marital because Husband used marital property for collateral and funds to acquire more stock during the marriage. For over 23 years, marital funds were used to buy stock and acted as collateral in the investment account. The account commingled non-marital stock with marital stock. The trial court was not able to determine which stock originated from the original non-marital investment because

Husband used all the stock as leverage to purchase more stock. The stocks and funds were so hopelessly commingled that Husband lost ability to trace any theoretical non-marital portion.

The appellate court further affirmed the classification of the business interest and real estate as nonmarital because Husband presented evidence establishing that the business was opened prior to the marriage. The interest did not transmute to marital property as a result of two name changes during the marriage.

*In re Marriage of Horlbeck*, 2023 WL 5748559 (Ill. App. 2d Dist.), September 6, 2023\*

During the parties' marriage, they purchased their marital residence and a vacation home. At some point during the marriage, the deeds were transferred into Wife's sole name. Husband testified that the transfers were made for estate planning purposes. The parties also opened and operated multiple businesses during the marriage. Husband filed for bankruptcy seeking to discharge debt associated with the businesses and incurred substantial attorneys' fees in doing so. During the dissolution proceedings, Wife claimed that the real property was her non-marital property that Husband gifted to her when the titles were transferred. She claimed that her argument was supported by the fact that Husband did not list the properties within his bankruptcy petition. Husband argued that the instructions on the bankruptcy petition and the advice of his attorney were that he should not list property titled solely in his Wife's name and for which he had a marital interest. Wife asserted that the trial court should apply judicial estoppel and bar Husband from maintaining his position that the properties were marital.

The trial court found both properties to be marital and found the legal fees incurred by Husband in the bankruptcy proceeding to be a marital debt to be paid from the proceeds of the sale of the marital residence. Wife appealed.

The appellate court affirmed, finding that Wife failed to meet her burden to prove that the properties were gifted to her. The appellate court further affirmed the trial court's decision not to apply judicial estoppel because Wife failed to prove that Husband intended to deceive or mislead the bankruptcy court as required for finding of judicial estoppel. Specifically, in order for judicial estoppel to be applied to bar a claim, the trial court must find that the party to be estopped has "(1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) succeeded in the first proceeding and received some benefit." Further, the trial court must then exercise its discretion in determining whether to apply judicial estoppel by considering numerous factors such as whether there was intent to deceive or mislead as opposed to the prior position having been the result of inadvertence or mistake. Here, Husband testified that the bankruptcy trustee was aware of the real property and never indicated that Husband did anything improper. Wife also failed to produce any evidence or argument as to why the legal bill should not be considered a marital debt; therefore, the trial court's allocation of the debt was not against the manifest weight of the evidence.

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The parties were married in 2010, separated in 2018, and Husband filed a petition for dissolution of marriage in 2019. During and after the marriage, Husband was employed at his family's company. During the marriage, Husband kept several separate accounts, including an escrow account maintained by his attorney and a checking account into which he deposited residual checks from an ownership interest in a company that predated his marriage. The escrow account contained proceeds from the sale of the family's company, in which he held part ownership by gift. Husband also owned two boats, one of which he purchased with the funds from the escrow account and he alleged that it was nonmarital. Husband also bought a trailer with funds from the escrow account. The parties owned four dogs. The parties also purchased a camper, with the down payment from funds in a joint account, and the rest was paid off with funds from Husband's escrow account. Once the parties separated, Husband purchased a new residence with funds from his escrow account. Wife argued that the four dogs, Husband's residence, boat, and trailer were marital property. After considering the factors set forth in section 503 of the Act, the trial court classified the camper, trailer, boats, and Husband's new residence as marital property. The trial court awarded Husband the boats and his new residence, and awarded Wife the trailer and camper. The court also awarded the parties two dogs each. The trial court held that Husband failed to overcome the presumption that the properties were marital. Husband filed a motion to reconsider, arguing that he should have been awarded three of the dogs, and that the trial court mischaracterized the aforementioned assets as marital because they were purchased through his escrow account. Husband argued that the trailer and camper were nonmarital but agree that Wife should have received the trailer. The trial court denied Husband's motion to reconsider, and Husband appealed.

The appellate court affirmed. First, the appellate court held that Husband waived his argument pertaining to Wife's award of one of the dogs, the classification of the boat, the classification of Husband's new residence, and the trailer. Specifically, the appellate court found that Husband failed to timely object and include such issues within his motion to reconsider, arguing only that the classification of certain assets were incorrect and not necessarily seeking a redistribution of assets. Thus, the only issue reserved for appeal was the concern of the characterization of the camper. The appellate court emphasized that Section 503 of the Act creates a rebuttable presumption that all property acquired during the marriage and before dissolution is presumed to be marital property. Such presumption may be rebutted by showing through clear and convincing evidence that property was acquired through a method listed in section 503(a) of the Act, such as that the property obtained after marriage was acquired in exchange for property acquired by gift. A party fails to overcome the presumption that an asset is marital if he or she cannot trace the entire purchase price of the asset to a non-marital source, even if the property is only in one person's name. Here, based on the record, the appellate court could not say that the trial court erred in finding that Husband failed to demonstrate by clear and convincing evidence that the camper was non-marital, where the downpayment for same was made through a joint account, the additional funds could not be traced, the appellate

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court was unaware of any case that supports the position that marital property becomes non-marital through one of the joint owners' unilateral financial contributions, and the camper was not acquired by a spouse by the sole use of non-marital property. Husband further argued that, regardless of the classification of the camper, the trial court erred in awarding the camper to Wife. The trial court considered the factors in Section 503(d) and awarded the camper to Wife accordingly. The appellate court held that the trial court did not abuse its discretion by awarding the camper to Wife. Lastly, Husband argued that in the alternative, he should have been reimbursed for his non-marital contributions to pay off the camper pursuant to section 503(c)(2)(A) of the Act. However, the appellate court held that under that subsection, reimbursement, if any, goes to the estate, not to a spouse. The appellate court found that there was insufficient evidence to trace such contributions toward the camper, and as such, the trial court did not abuse its discretion in not awarding reimbursement.

*Barclay v. Barclay*, 2023 WL 6622122 (Ill. App. 1st Dist.), September 29, 2023\*

The parties were married in 2006. The parties agreed that Husband would be the primary wage earner and Wife would be the homemaker and social host for Husband's work associates and clients. The parties initially separated in 2014 and signed a separation agreement, and Wife moved to Texas. A month later, the parties reconciled, Wife moved back to Illinois, and went back to school to study nursing. In 2017, while Wife was still in school, she filed for divorce and again moved back to Texas. In February 2020, the parties conducted an oral prove-up with a purportedly agreed division of assets. The court set a date in March 2020 for the entry of the Judgment. Husband untimely objected to the proposed distribution of assets and refused to sign an agreed judgment of dissolution. In June 2020, Wife filed a motion to enforce the oral prove-up conducted in February 2020. Husband responded that the proposed distribution of assets was inequitable and requested that the court split the marital estate. The trial court set the matter for trial in December 2020. The relevant assets in dispute were a \$600,000 trust Husband set up for his children from his prior marriage, a \$150,000 Charles Schwab account, \$72,000 Husband gave to a friend, a Transamerica life insurance policy, and \$10,000 he paid his son for a motorcycle. In January 2021, the trial court entered an order dividing the parties' estates. The trial court found that Husband did not disclose the Trust, Schwab account, and the \$72,000 being held by his friend, which the trial court determined were all marital property subject to division. Husband argued that the Trust and Schwab accounts were funded from money he inherited, but could not trace same, and the funds were deposited into a joint account, thus Husband did not overcome the presumption that the funds were marital property. The trial court also classified the life insurance policy as marital property, as the policy documents evidenced that the inception date was during the marriage and the premiums for the policy were paid for with marital funds during the marriage. Lastly, Husband paid \$10,000 to his son to purchase a motorcycle which was later totaled. Husband received \$8,500 in insurance proceeds as a result of the motorcycle accident. The trial court determined that the insurance proceeds were marital property. The trial court awarded Wife 50% of the Schwab account, the funds transferred to Husband's friend, the life insurance policy, the Trust, and the amount Husband transferred to his son. The trial court also awarded Wife attorney's fees. Husband filed a motion to reconsider, which was denied. Husband appealed, arguing that the trial court erred in determining the Trust, Schwab account, and life insurance policy were part of the marital estate, and if those assets were marital, he was entitled to reimbursement for the non-marital portion. Husband further argued that the court erred in

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charging him with dissipation of assets and erred in requiring that he contribute to Wife's attorney's fees.

The appellate court affirmed with one modification. Pertaining to Husband's contention that the Schwab and Trust account were funded with his inherited money, the appellate court held that Husband did not initially disclose the substantial assets to the court, nor did he provide documentation establishing the receipt of the inheritance and its placement into the accounts, that the accounts were opened during the parties' marriage, and that the funds were placed into a joint account. Thus, the appellate court held that the trial court's findings that the Trust and Schwab account were marital property were not against the manifest weight of the evidence. Regarding Husband's life insurance policy, he provided no evidence that the life insurance policy was opened prior to the parties' marriage. To the contrary, Husband provided documentation showing the initial policy dates were during the marriage. Thus, the trial court's determination that the life insurance policy was marital property was not against the manifest weight of the evidence. Additionally, Husband claimed that the trial court made a finding of dissipation pertaining to the \$10,000 used to buy a motorcycle, \$72,000 transferred to his friend, HELOC loan, and his 401(k). As for the motorcycle funds, the appellate court held that the trial court accidentally misstated that Wife was awarded 50% of the purchase price of the motorcycle, but meant to award 50% of the insurance proceeds. The appellate court modified the judgment accordingly. Pertaining to the remainder of the "dissipated assets", the appellate court emphasized that the trial court did not make findings of dissipation, but rather allocated marital assets and debts. Lastly, regarding attorney's fees, the appellate court found that the award of attorney's fees to Wife was an appropriate award following the granting of Wife's petition for rule to show cause, and as such, affirmed same.

*Neis v. Neis*, 2023 WL 6811132 (Ill. App. 1st Dist.), October 16, 2023\*

The parties were married in 1968. In July 2017, Wife filed a petition for dissolution of marriage. Wife was 68 years old and a homemaker, and Husband was 71 years old and employed as an attorney at the time. In December 2017, the trial court entered an order awarding Wife \$9,000 per month in temporary maintenance and reserved the issue of retroactive maintenance for trial. In September 2019, the trial court reduced maintenance to \$4,600 per month and allowed Husband to withdraw funds from his retirement accounts to the extent necessary to satisfy the maintenance obligation up to \$120,000. In November 2019, the trial court vacated the September order and authorized Husband to withdraw \$350,000 in retirement funds. Between March 2018 and February 2021, Wife filed seven petitions for rule to show cause for Husband's failure to pay maintenance. In March 2021, Husband filed a petition to terminate his maintenance obligation due to his retirement and precarious health. Wife's eighth and ninth petitions for rule were filed in August and September 2021. The trial began in October 2021. Wife testified that she opened various brokerage accounts during the marriage and that she opened a Northern Trust brokerage account during the marriage with inherited funds from her parents. A 2014 statement from Northern Trust indicated that the account had a value of \$120,825.33 on January 1, 2014, and was made up entirely of fixed income security. Wife could not remember the source of the assets, and therefore did not challenge the trial court's classification of the 2014 balance as marital. Wife was able to present evidence that she transferred \$1,952,893.98 of inheritance funds to the Northern Trust account. The trial court held that any value in the account above the nonmarital contribution of \$1,952,893.98 was marital property and awarded the entire account to Wife. The trial court also granted Husband's petition to terminate temporary maintenance retroactive to

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October 2021, and ordered Husband to pay maintenance owed for June through October 2021. The trial held that Husband did not willfully violate the temporary maintenance orders and denied Wife's eighth and ninth contempt petitions. On appeal, Husband argued that the trial court erred in classifying \$1,952,893.98 of the Northern Trust account funds as non-marital and failed to designate a marital source for his retroactive maintenance obligation to Wife. Husband argued that Wife's inheritance contributions transmuted into marital property upon being deposited into the Northern Trust account. Wife challenged the trial court's determination that maintenance was to be distributed from marital assets.

The appellate court affirmed and remanded with one instruction. The appellate court held that because Wife could not identify the exact date the Northern Trust account was opened or the source of the initial \$120,000 in said account, the trial court properly classified the initial amount as marital property. As for the non-marital portion of said account, Wife was able to sufficiently trace the inheritance funds, and as such, the trial court's determination that Wife's inheritance funds in the amount of \$1,952,893.98 was non-marital and not transmuted into marital property was not against the manifest weight of the evidence. The appellate court did agree with Husband that the trial court's order requiring Husband to pay retroactive maintenance was unclear regarding the source from which said payment was to be made. Therefore, the appellate court remanded that issue to the trial court for clarification regarding the source of the payment of the retroactive maintenance.

*Schiffbauer v. Schiffbauer*, 2023 WL 7295134 (Ill. App. 3rd Dist.), November 3, 2023\*

The parties were married in 1983. Three children were born as a result. Wife filed for divorce in March 2014. At trial, the parties stipulated to the marital or nonmarital characterization of most property except for a few assets, most importantly a 160-acre property, which Wife argued was her nonmarital property, and a 120-acre property, which Husband argued was his nonmarital property. Wife also claimed Husband dissipated marital funds by paying their son for farming marital property, by selling farm equipment to their son for less than its value, and by trading in marital farm equipment to buy new equipment with their son. Wife had a 12% interest in a company established by her parents and stood to inherit a greater interest and was a beneficiary of her brother's trust. Husband also stood to inherit from his parents.

Wife stated that the 160-acre property was acquired during the marriage by exchanging farmland she had been gifted by her grandparents and was titled in her name. Wife sold the gift property for \$210,000 and purchased the 160-acre property for \$336,000. The parties funded the difference through a mortgage. The parties' son farmed said property and marital monies were used to pay the associated expenses. Husband purchased the 120-acre property prior to the marriage. The first mortgage payment for same was made during the parties' marriage, and the promissory note for the purchase of said property was rewritten in both parties' names. The trial court held that Wife had a larger share of nonmarital assets and stood to inherit more than Husband. The trial court further determined that Husband's income was dependent on the amount of property that he could farm without having to pay rent, while Wife would receive income from working as a nurse as well as rent from farmland.

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The trial court ultimately awarded Husband a larger share of the marital estate accordingly and noted that it was doing so in lieu of awarding the maintenance requested by Husband. The trial court held that the 160-acre property was Wife's nonmarital property because she overcame the presumption by clear and convincing evidence that she exchanged her nonmarital property for the 160-acre property and the property was obtained through the sole use of nonmarital property as collateral for the loan, and the property was titled solely in her name. The trial court awarded the 120-acre property to Husband as his nonmarital property, as he purchased it before the marriage. The trial court further held that payment to the parties' son for farming was not dissipation as the parties had discussed the matter, the son shared in the debts from the farming operations, and there was no evidence that the son was paid an excessive amount, or that his labor was not necessary. The trial court actually found that their son's contributions benefited the parties. However, the trial court did find dissipation relating to the sale of the farm equipment to their son, and to compensate Wife, the trial court assigned the installment contract between Husband and their son to Wife. Both parties filed motions to reconsider. In its order, the trial court noted that it had allocated the net marital assets of 69.13% to Husband and 30.87% to Wife and that there was no basis to reconsider. The trial court's only modification was making Husband responsible for collecting the installments from their son and paying same to Wife each year, regardless of whether the son paid Husband. Both parties appealed.

The appellate court affirmed in part, reversed in part, and remanded. Husband first argued that the trial court's determination that the 160-acre property was Wife's nonmarital property was against the manifest weight of the evidence, claiming that Wife did not exchange her nonmarital property for the 160-acre property because the nonmarital property only satisfied a portion of the cost, and the marriage satisfied the rest through a loan, and it did not fall under the exception for property acquired by the sole use of nonmarital property as collateral for a loan. The appellate court agreed, holding that although Wife provided nonmarital property in partial exchange for the property, it was not sufficient to pay the entire purchase price, and they had to obtain a loan. The appellate court found that Wife failed to establish that the entire purchase price was funded through a nonmarital source. Therefore, the appellate court held that the 160-acre property could not be considered nonmarital, and as such, it could not be said that nonmarital property was used as collateral for the loan, finding that the trial court's determination otherwise was against the manifest weight of the evidence. The appellate court ruled that it was not a situation where marital property was being contributed to a nonmarital property such that the nonmarital property should retain its identity, but rather it was a situation where marital and nonmarital property are comingled into newly acquired marital property.

Next, Wife argued that consistency required a finding that the 120-acre property was marital because marital funds were used to pay the mortgage. The appellate court disagreed, as Husband purchased the property prior to the marriage, and the marital funds lost their identity when they were used to pay the mortgage on a nonmarital property. Wife also argued that the court erred by finding that Husband did not dissipate marital assets when paying son for his farming work, claiming that Husband unilaterally brought the son into the farming operation after the marriage had broken down and

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continued the son's involvement after Wife objected. Wife claimed that involving their son denied the marriage of 50% of the income Husband would have otherwise made. The appellate court emphasized that dissipation is the use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time when the marriage was undergoing an irreconcilable breakdown, and intent is one factor the court may consider when determining whether dissipation had occurred. The appellate court found that there was no dispute where the funds went, that the son did the work, and that he was paid commensurate with that work. The appellate court found that the trial court's determination that such payments were not dissipation was not against the manifest weight of the evidence.

Lastly, Wife argued that the trial court erred by ordering that her dissipation award for the sale of farm equipment be paid to her by Husband annually, when the installment payments were due from their son, claiming the arrangement would result in the parties continuing to be involved with each other. The appellate court emphasized that the trial court should look to sever the ties between the parties and to not prolong the relationship between the parties unnecessarily. The appellate court found that while a share of marital property may be paid in periodic payments to prevent hardship, there was no such specific finding of hardship here justifying the dissipation amount to be paid over 15 years. As such, the appellate court instructed the trial court to reexamine the method by which Husband was to pay the dissipation amount awarded to Wife for the sale of the farm equipment.

In re Marriage of Renea and Rapp, 2023 WL 8371061 (Ill.App. 5 Dist.), December 4, 2023\*

Husband appealed the trial court's judgment, arguing that the trial court erred in finding that a valid and enforceable settlement agreement existed between the parties. The trial court had entered a judgment dissolving the parties' marriage and reserved jurisdiction to determine all remaining issues, including allocation of property. Months later, the trial court held a settlement conference with the parties and both counsels, and then on the date the case was set for trial, the court instead conducted a second settlement conference with only the attorneys present. The record, indicating that an agreement had been reached, stated that the "parties need to clear proposed settlement with bankruptcy attorney." A month later, the court entered a supplemental judgment for dissolution of marriage that addressed the remaining issues, including the division of marital and nonmarital assets. At such time, the court also terminated the trust it had established for support and deemed commingled assets in the trust had been transmuted to marital property.

Husband first argued that there was no valid enforceable settlement agreement. The appellate court found that the record supported a finding that the settlement agreement incorporated within the supplemental judgment for dissolution of marriage was the product of court supervised settlement negotiations and the court had noted that the written supplemental judgment reflected the agreement of the parties. The appellate court found that, in absence of a record otherwise, the appellate court would presume that the

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order entered by the trial court was in conformity with the law. Since the judge possessed personal knowledge of the settlement discussions, having been privy to and present in the settlement conferences, the appellate court decided it was appropriate to defer to the trial judge's opinion and determination that an agreement had been reached.

Husband next argued the trial court erred in its finding that nonmarital property had been transmuted to marital property. During the proceedings, the trial court ordered that marital and Husband's nonmarital property be used to establish a child support trust. The appellate court reversed the trial court's finding that the balance of the trust was transmuted marital property. Husband had been ordered to commingle his nonmarital property and there was no evidence he intended to gift his nonmarital assets or commingle them as part of the marital estate.

See also ATTORNEYS FEES, *In re Marriage of Wei and Liu*, 2023 WL 3563235 (Ill. App. 1st Dist.), May 19, 2023\*

See also, ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME, *In re Marriage of Hussain and Ali*, 2023 WL 7319416 (Ill. App. 2d Dist.), November 7, 2023\*

## **COHABITATION**

*In re Marriage of Edson*, 2023 WL 4067174 (Ill. App. 1st Dist.), June 20, 2023\*\*

Husband was ordered to pay monthly maintenance to Wife for a period of 20 years. Approximately four years after entry of the Marital Settlement Agreement, Husband filed to terminate his maintenance obligation, alleging that Wife was cohabitating with another party on a continuing conjugal basis constituting a *de facto* marriage. The trial court held a two-day bench trial and ultimately determined that Husband had failed to meet his burden of establishing that Wife was cohabitating with another person in a resident, conjugal, and continuing relationship. Husband had alleged that Wife and her significant other attended family functions together, spent overnights together, travelled and vacationed together, spent holidays together with their families, shared meals together at Wife's residence, held themselves out as a couple on social media, and even listed the significant other as a family member on an obituary. The trial court held that while Husband established that Wife was involved in an intimate dating relationship, he failed to establish by a preponderance of the evidence that she was in a *de facto* marriage. The trial court found that the relationship lacked "the depth of commitment necessary" to find a *de facto* marriage as the two had completely and consistently maintained separate households and finances. Husband appealed, arguing that the trial court's ruling was against the manifest weight of the evidence.

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The appellate court affirmed. In determining whether a party is engaged in a resident, continuing conjugal relationship pursuant to section 510(c) of the Illinois Marriage and Dissolution of Marriage Act, the party moving to terminate maintenance must show that the recipient is in a *de facto* relationship with a third party, or cohabitating with a third party. If the moving party meets their burden, the maintenance recipient must then demonstrate that he or she is not engaged in that type of relationship. The appellate court emphasized that the 6-factor *Herrin* test is not the official test to find a *de facto* marriage, but rather the trial court needs to consider the totality of the circumstances, most importantly the financial implications of the relationship, further highlighting that Illinois no longer requires proof of sexual conduct. The appellate court noted that the parties both agreed the 6-factor *Herrin* test was properly utilized by the trial court. The parties' disagreement came from the weight given to each factor in the trial court's ultimate determination. The appellate court reviewed the record and the trial court's detailed findings, and ultimately found that the trial court's conclusion was not against the manifest weight of the evidence in consideration of the totality of the circumstances.

## **COLLATERAL ATTACK DOCTRINE**

*Pace-Arquilla v. Arquilla*, 2023 WL 2644180 (Ill. App. 1st Dist.), March 27, 2023\*

During their divorce proceedings, the parties submitted some issues to arbitration and the final arbitration award, including maintenance for Wife, was incorporated into the final judgment for dissolution.

Two years later, Wife sued Husband for fraud, alleging that he provided false information about his income in arbitration resulting in a lower maintenance award. She asked for damages equal to the amount she would have been awarded for maintenance had the correct income information been disclosed. Husband moved to dismiss, contending that it was barred by the collateral attack doctrine. The trial court agreed and concluded that, although Wife disclaimed that she was seeking to modify the maintenance award, her complaint essentially was seeking a modification to the maintenance. The trial court dismissed the complaint. Wife filed a motion to reconsider and asked for dismissal without prejudice and for leave to amend. The trial court denied the motion, explaining the dismissal was involuntary and precluded amendments to the complaint. Wife appealed.

On appeal, Wife contended the collateral attack doctrine does not apply when arbitration preceded entry of the final judgment and the trial court erred in denying her leave to amend her complaint.

The appellate court affirmed, holding that a collateral attack on a judgment is one that seeks to vacate the judgment in a separate, independent proceeding. The Illinois Supreme Court explained that a judgment is not open to contradiction or impeachment in a collateral proceeding once a court of competent jurisdiction renders it.

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The appellate court found that pursuant to the collateral attack doctrine, a final judgment may only be challenged through direct appeal or procedure allowed by statute and remains binding on the parties until it is reversed through such a procedure. Wife's requested relief would modify the judgment for dissolution of marriage. The appellate court suggested many alternatives that Wife could have pursued for relief but did not pursue. The facts supported that the doctrine was applicable and therefore, Wife's complaint was barred. Further, this precluded amending the complaint.

## **COLLEGE EXPENSES**

*In re Marriage of Lewin*, 2023 WL 6321435 (Ill. App. 4th Dist.), September 28, 2023\*

In August 2016, the trial court entered a judgment for dissolution of marriage which incorporated the parties' Marital Settlement Agreement ("MSA"). At the time, the parties' children were 16 and 14 years old. The MSA provided, in relevant part, that the children's college funds and irrevocable trusts should remain as the children's property and were allocated for the payment of their post-high school educational expenses. The MSA further provided that any funds available after payment of all college expenses upon graduation from undergraduate education should be awarded to each respective child, free and clear of any claim of the other child of the parties. However, the MSA further provided that, if either child does not attend college or withdraws from college or does not continue as a full-time student in good standing, the funds allocated for that child should be allocated to the other child's post-high school education expenses. The MSA additionally provided that, to the extent the other child does not require the additional funds for their education, then the children shall divide those remaining funds equally. Each party expressly waived the right to assert a claim for any of the funds in the above-named children's college funds or their trust funds.

In March 2021, Husband filed a petition related to the children's post-high school educational expenses, alleging that Wife refused to equally contribute to the children's post-high school educational expenses with funds from the 529 accounts Wife controlled. In June 2021, the trial court entered a written order, ordering the parties to contribute equally to the children's post-high school expenses with funds from the 529 accounts, and referred to the accounts as the "parent's 529 accounts". The Order stated that any provisions of the MSA not in contradiction of the order remained in full force and effect.

In July 2022, Father filed a contempt petition alleging that Mother refused daughter's request to transfer the 529 account Mother controlled for daughter's benefit to daughter following daughter's graduation from college. Father further alleged that Wife planned on retaining the 529 funds. During the hearing, Wife admitted to withdrawing funds from the 529 account and putting it into an account for herself and her new spouse's daughter. In August 2022, the trial court entered an order requiring Wife to place the funds withdrawn from the 529 account into her counsel's trust and to provide an accounting for the 529 funds. Wife filed a motion to reconsider. In October 2022, Husband filed a second contempt petition, alleging Wife refused to place the funds into her counsel's trust and refused to provide an accounting. The trial court continuously precluded Wife from presenting evidence about the children's irrevocable trusts during these proceedings, finding that it was not relevant. In October 2022, the court again found Wife in violation of the August 2022 order and ordered her to tender a check to Husband's counsel with the withdrawn 529 funds to be placed in counsel's trust. Wife filed a notice of compliance with same. In November 2022, the trial court entered an order rejecting Wife's claim that she had a right to the funds in the 529

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accounts she controlled and held her in contempt. The trial court ordered the funds held in counsel's trust to be distributed to the children's 529 accounts established in their own names and allowed Husband's counsel to file a petition for attorney's fees. The trial court awarded Husband attorney's fees, and also ordered Wife to transfer the 529 account into their son's name. Wife appealed, arguing that the trial court erred by refusing to admit evidence of the children's trust accounts, rejecting her claim that she had a right to the funds in the 529 accounts she controlled, holding her in contempt, and requiring her to pay Husband's attorney's fees and transfer the remaining 529 account to her son.

The appellate court affirmed. First, pertaining to the admittance of evidence, after review of the record, the appellate court found that the trial court's determination of relevant evidence was not an abuse of discretion, as Wife provided no legal basis amounting to an abuse of discretion, and the trial court had discretion in determining what evidence is relevant. Regarding Wife's claim that she had a right to the funds in the 529 accounts she controlled, the appellate court held that after its *de novo* review, the trial court properly rejected Wife's claim. The appellate court held that the MSA makes clear the parties agreed to expressly waive the right to assert a claim for any of the funds in the accounts designated for the payment of the children's post-high school education expenses, regardless of whether the accounts were the property of the parties or the children. The appellate court also held that the trial court properly held Wife in indirect civil contempt, as Wife's actions were in direct violation of the parties' MSA by withdrawing and retaining the funds from the 529 accounts she controlled. The appellate court also affirmed the award of attorney's fees, as Wife did not identify the specific fees from the itemized billing which she believed she should not be required to pay, which was her burden. As for Wife's claim that the trial court erred by requiring her to transfer to her son the 529 account she controlled for his benefit, the appellate court found that her claim does not satisfy the requirements of Rule 341(h)(7), such that she did not support her contention with citation to authority and failed to consider the fact the trial court had evidence indicating she improperly withdrew and retained funds from the account she controlled for her son.

*In re Marriage of Moran*, 2023 WL 7017755 (Ill. App. 3rd Dist.), October 25, 2023\*

The parties' Marital Settlement Agreement provided that each party would contribute to college expenses based on their ability to pay. Husband filed a petition to allocate college expenses. Husband earned \$400,000 annually as a doctor. Wife's gross annual income was \$74,880 and had been much lower due to an inability to work while undergoing treatments for breast cancer. Husband had significantly more assets and retirement savings than Wife.

The children lived with Wife during school breaks, and she paid their expenses. She also sent the children cash for expenses while they were at college.

The trial court ruled that Wife contributed an appropriate amount to the children's college expenses in the form of living expenses during their breaks and the cash. The appellate court affirmed and found that the trial court properly evaluated Wife's ability to pay and correctly determined she did not have the financial means to contribute more than the \$300 per month she was sending to the children.

The court should not order a party to pay more for educational expenses than he or she can afford. When a parent has limited financial resources, it is proper for the trial court to order the parent to contribute only a small amount.

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See also, MAINTENANCE, *In re Marriage of Kilby*, 2023 WL 2595738 (Ill. App. 3rd Dist.), March 22, 2023\*

See also, ATTORNEY'S FEES, *In re Marriage of Hyman*, 2023 WL 3221091 (Ill. App. 2d Dist.), May 3, 2023\*

## CONTEMPT

*In re Marriage of Mehic*, 2023 WL 2062609 (Ill. App. 1st Dist.), February 17, 2023\*

Wife petitioned for dissolution of marriage. Husband was served with notice but chose not to participate. Trial court entered a default judgment of dissolution, uniform order for child support and judgment for allocation of parental responsibilities. After Husband failed to pay child support, Wife filed contempt petition for rule to show cause. Trial court found Husband in indirect civil contempt and committed him to jail until he purged his support delinquency. Husband appealed in that the trial court lacked personal jurisdiction to adjudicate contempt as he was never served with the contempt petition or the order. Further, the trial court abused its discretion in entering the order on Wife's contempt petition.

Appellate court found Husband waived formal service of Wife's contempt petition as he voluntarily appeared and participated in the indirect civil contempt proceedings. As such, personal jurisdiction attached to Husband in the contempt proceedings. Further, the appellate court found that Husband failed to provide a complete record on appeal, and it is presumed the trial court acted in conformity with the law and had a factual basis for its findings. Therefore, judgment of the trial court was affirmed.

*In re Marriage of Nguyen*, 2023 WL 2681872 (Ill. App. 1st Dist.), March 29, 2023\*

Pursuant to the parties' settlement agreement, Husband remained custodian of the children's UTMA accounts. The parties agreed that Husband would tender statements to Wife, that prior written agreement was needed to change investments or investment strategy, that Husband be removed as custodian upon the children turning 21, and disbursements would only be made by agreement to fund the children's college educations. The agreement provided that failure to abide by the aforementioned provisions would require Husband to transfer custodianship to Wife. Wife filed a motion to enforce judgment claiming that Husband had not properly provided her with statements, had unilaterally changed several investments and had unilaterally withdrawn funds from two of the accounts. Husband admitted to making the investment changes and withdrawing the funds but claimed that his actions were proper as the changes were prudent investment decisions and the withdrawals were made to pay the taxes associated with the accounts. Husband argued, *inter alia*, that the provisions in the settlement agreement were unenforceable as they violated public policy by restricting Husband's rights as the custodian of the accounts.

The trial court disagreed with Husband and ordered him to transfer the accounts to Wife as custodian, noting that Husband was represented by "excellent counsel" when he entered into the agreement which he did voluntarily. Husband's motion to reconsider was denied. Husband did not transfer custodianship. Wife filed a petition for rule to show cause. The trial court ordered Husband again to turn over the accounts and set a \$500 a day fine for each day that passed until he complied. Husband appealed claiming the trial court erred in finding him in contempt.

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The appellate court affirmed, specifically noting that Husband did not dispute that he violated the court's order directing him to transfer custodianship of the accounts. Further, Husband provided no legitimate justification for his lack of compliance.

*In re Parentage of K.N.T., Golliday v. Thompson Sr.*, 2023 WL 4543053 (Ill. App. 1st Dist.), July 14, 2023\*

Father's child support obligation was set in 1991. In 1999, Father was found in contempt for failure to pay and judgment was set in favor of Mother for the past due arrearage. Father was ordered to continue paying his base support and a monthly amount toward the arrearage. In 2018, Father was found in contempt a second time for failing to pay the support as ordered in 1999. At that time, he owed \$129,181.83. However, the trial court made adjustments in "an effort to come to an affordable, realistic, and accountable payment plan" and set the amount at \$65,000. Father was ordered to pay it off at \$300 per month. On appeal, that order was affirmed. Later that year, Father filed a motion to modify the arrearage payment due to physical disability and unemployment. In 2020, Father sought leave to file an amended motion to modify because of the Covid-19 pandemic. In March 2021, the monthly payment amount was reduced to \$100 for a period of time to enable Father to secure a loan. Later that year, the amount was permanently reduced to \$100 a month. In 2022, Mother filed another contempt petition as Father did not pay the \$300 monthly payment or the \$100 monthly payment since the entry of the 2018 and 2021 orders. Father was found in contempt for violating both orders despite Father's reasons and explanations for his nonpayment. Father appealed.

The appellate court affirmed. No transcript from the hearing or bystander's report was provided to the appellate court; therefore, the court was to presume that the trial court's rulings were proper. Father argued that the trial court determined that he did not have the ability to comply with the orders when it reduced his monthly payment to \$100 a month. The appellate court held that, while the trial court modified the payment going forward from that date, it made no finding regarding his ability to pay prior to the entry of the modification and it did not make the modification retroactive. To the contrary, when the trial court found Father in contempt, it specifically made the finding that he did have the ability to pay the \$300 a month until it was reduced. As such, the record on appeal did not support Father's contentions.

*In re Marriage of Otero*, 2023 WL 5748549 (Ill. App. 1st Dist.), September 6, 2023\*

The parties' Marital Settlement Agreement (MSA) provided that Husband would pay Wife modifiable and terminable permanent guideline maintenance, and that the parties would each receive 50% of the payment from Husband's pension benefits. Husband retired at age 57, less than a year after the parties entered into their MSA, and subsequently began receiving pension payments. Approximately a week after retiring, Husband filed a motion to modify maintenance. Husband continued to pay maintenance until the pension benefit

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payments began and then he ceased making payments. One month later, Wife filed a petition for indirect civil contempt because of Husband's failure to pay maintenance. Husband asserted in his response that if his motion to modify maintenance had been heard in a timely fashion, he would only be responsible for paying 50% of his pension benefits to Wife, and stated that, due to his retirement, he was unable to cover his own personal and household expenses while paying Wife 50% of his pension and maintenance. During the evidentiary hearing, Husband testified generally of his expenses and assets. Wife then filed a petition for attorney's fees. The trial court entered an order stating in part that Husband's retirement was voluntary and he had the capacity and ability to continue working, that Husband's monthly gross income decreased approximately \$6,000 as a result of his voluntary retirement, that Husband's voluntary retirement and decrease in income was not in and of itself a basis for modifying maintenance, but because Wife's income substantially increased with her receipt of the pension benefits, there was a substantial change in circumstances warranting a modification of maintenance. The trial court further ruled that with Wife's new income, and even using Husband's prior income from when he was working, Husband would not have an obligation to pay maintenance, and further found that Husband was not willful or contumacious in his failure to pay maintenance after his retirement and upon the parties' receipt of retirement benefits. Thus, the trial court granted Husband's motion to modify maintenance, setting his maintenance obligation to \$0, retroactive to when he began receiving pension payments. The trial court further denied Wife's petition for contempt and for attorneys' fees. Wife appealed, primarily arguing that the trial court erred by granting Husband's motion to modify maintenance, or in the alternative, by modifying the maintenance to \$0, and that the trial court erred in denying her request for attorneys' fees and her petition for contempt.

The appellate court reversed and remanded to the trial court to reevaluate Husband's motion to modify maintenance with pension income treated as a marital asset rather than income, to determine the amount of past due maintenance, to enter a contempt finding with a purge, and to determine the amount of section 508(b) attorney fees to be paid to Wife. The appellate court first held that the parties' MSA contemplated Husband's retirement, so his retirement could not be considered a substantial change in circumstances. Additionally, the trial court, citing *Bostrum*, held that because the MSA distributed Husband's pension, the trial court abused its discretion by treating receipt of that property as a change in Wife's income. The appellate court upheld the trial court's findings that Husband's early retirement was voluntary, as he did not provide any medical evidence showing he was unable to continue working, and that he retired shortly after the MSA was entered. As such, the appellate court held that it was not an abuse of discretion for the trial court to have ruled that Husband's voluntary retirement was not a basis for the modification of maintenance. The appellate court further found, after review of the record, that Husband could have and should have paid his maintenance obligation, stating that choosing to engage in self-help and ceasing payments because he was confident that the court would grant his motion to modify was both willful and contumacious. Accordingly, the appellate court held that the trial court's refusal to find Husband in indirect civil contempt was against the manifest weight of the evidence.

Consequently, the appellate court held that Wife should be awarded section 508(b) attorneys' fees but declined to award fees under other sections or impose sanctions.

See also, ATTORNEY FEES, *Teymour v. Mostafa*, 2023 WL 3947939 (Ill. App. 1st Dist.), June 12, 2023\*

See also, BUSINESS RECORDS, *In re Marriage of Carty*, 2023 WL 3862047 (Ill. App. 2d Dist.), June 7, 2023\*

See also, INVALIDATION OF MARRIAGE, *In re Marriage of Andrew*, 2023 WL 4036605 (Ill. App. 1st Dist.), June 16, 2023\*\*

See also, ENROLLMENT OF FOREIGN JUDGMENT, *In re Marriage of Soman and Cwik*, 2023 WL 6293832 (Ill. App. 1st Dist.), September 27, 2023\*

See also, ARREARAGE, BANKRUPTCY, *In re Marriage of Bonzani*, 2023 WL 6939258 (Ill. App. 3rd Dist.), October 20, 2023\*

## **CREDIBILITY OF WITNESSES**

*In re Marriage of Mansoor and Mohammed*, 2023 WL 4533908 (Ill. App. 3rd Dist.), July 13, 2023\*

Wife petitioned to remove her personal belongings from the marital residence and/or for a temporary restraining order and attached an inventory of the belongings she had left behind at the marital residence. The trial court granted Wife's petition by agreement of the parties. Wife then moved for an inventory of the marital residence for discovery purposes, which was also granted by agreement. During the trial, the only dispute was the value of Wife's nonmarital property, where Wife testified that she left personal property at the marital residence, most relevant her jewelry acquired before the marriage. The trial court admitted pictures of said property into evidence. The items at issue were a gold necklace and earring set gifted to Wife by her cousin, gold bangles gifted to Wife by her relatives, a necklace and earrings gifted to Wife by her aunt and uncle, a set of six gold bangles purchased by her parents for \$2,000, a pendant necklace and matching earrings gifted by Wife's cousin, a family heirloom pearl necklace and matching earrings gifted by her parents, and jewelry gifted by Husband for the wedding. Wife testified that Husband told her he spent \$60,000 on the wedding jewelry. Husband testified that whatever items he saw he packed up for Wife, and further testified that he only spent \$20,000 on Wife's engagement jewelry, and that the wedding jewelry was costume jewelry in the amount of \$400. The trial court ultimately ordered Husband to reimburse Wife \$30,000 for the cost of the items unless he returned the items she left behind within 30 days. Husband moved to reconsider, because he was not present in court for the ruling due to a family death. The trial court denied the motion, and husband appealed, arguing that the trial court erred in valuing the jewelry at \$30,000, made inappropriate credibility determinations, and lacked sufficient competent evidence to determine the value of the jewelry.

\*Unpublished/Rule 23(e)(1) decision.

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The appellate court vacated and remanded. First, as to credibility determinations, the appellate court found that the review of the record did not support a finding that the trial court erred in its assessment of the parties' credibility at trial. As to the value of the property, the appellate court did find that the trial court's valuation of the missing nonmarital jewelry was against the manifest weight of the evidence. The appellate court stated that it is the obligation of the parties to present the court with sufficient evidence of the value of the property, and the court shall employ a fair market value standard in determining the value of assets. The appellate court ultimately found that the trial court's finding regarding the jewelry's value was not supported by sufficient evidence. The appellate court noted that where a party has had a sufficient opportunity to introduce evidence but offers none, that party should not benefit on review from its omission. Here, neither party presented sufficient evidence as to the value of Wife's jewelry, as there were no expert appraisals, receipts, or any other evidence for the court to base its valuation. Therefore, the appellate court found that the trial court's order requiring Husband to reimburse Wife \$30,000 was against the manifest weight of the evidence. The appellate court remanded for the parties to provide evidence of the value of the missing jewelry.

## **DEFENSE OF LACHES/DISESTABLISHMENT/DETERMINATION OF PATERNITY**

*In re J.M.*, 2023 WL 2061266 (Ill. App. 4th Dist.), February 17, 2023

During proceedings to adjudicate an abused minor as neglected, the Guardian ad Litem ("GAL") filed a disestablishment petition seeking to rebut the presumption that Respondent was minor's parent. As Respondent was married to minor's biological mother, trial court denied the petition and the GAL appealed. GAL contended that the court's prior adjudication of the biological father as the minor's legal parent precluded the finding that the Respondent was minor's parent.

The appellate court held that the trial court's denial was appealable as it was an order entered in a guardianship proceeding that determined rights of the party. Additionally, the record supported that under the assisted reproduction statute, the Respondent was the minor's intended parent.

Further, because the State failed to raise the affirmative defense of *laches* against the GAL's disestablishment petition, it therefore forfeited the laches argument on appeal. Finally, the appellate court found DNA test results confirming the identity of the minor's "biological and legal" father to be consistent with public policy that a child has only two parents. The evidence supports the trial court's determination that the parties intended the biological father be a donor and the Respondent and the minor's biological mother to be the parents of the minor. Therefore, the trial court's order was appropriately affirmed.

## **DISCOVERY**

*In re Marriage of Yearman*, 2023 WL 5199473 (Ill. App. 3rd Dist.), August 14, 2023\*

Both parties were pro se at the time of the trial. Husband appealed the trial court's discovery orders, forcing him to proceed to bench trial without first forcing Wife to comply

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with his discovery requests. The appellate court found that the record of proceedings showed that the trial court addressed Husband's requests for relief regarding Wife's compliance with discovery and made rulings throughout the proceedings. Rather than imposing sanctions for non-compliance, the trial court moved the case along by questioning the parties directly about the issues in dispute, such as asking Wife if she owned land in Mexico, if she had additional bank accounts, and about Wife's fertility procedures, and ordered Wife to comply and produce certain documents. The appellate court found the trial court took a fair and reasonable approach to resolving the discovery issues and noted the parties were self-represented and did not know how to proceed. The appellate court also noted that much of the uncertainty with discovery was caused by Husband's lack of knowledge about procedure and that Husband was not prejudiced by trial court's decision not to impose Supreme Court Rule 219(c) sanctions against Wife.

Husband appealed the trial court's award of temporary and permanent maintenance to Wife based on her failure to comply with discovery, and that Wife had cash seized by the DEA that should have been included in her income. The appellate court found that the failure to provide corroborating documents in support of Wife's Financial Affidavit did not defeat a maintenance claim but required the trial court to assess credibility. There was no record of the proceeding for temporary maintenance, so the appellate court had to presume conformity with the law. The trial court awarded maintenance based on the disparity of incomes and work histories, which were not disputed at trial. The record showed that the trial court followed the statutory guidelines in making its decision on maintenance.

During the litigation, a paternity test revealed Husband was not the biological father of the child. Husband tried to claim his support of the child as dissipation. The trial court found the expenses were incurred while Husband was enjoying a parent/child relationship. The appellate court upheld the decision that money paid for the child's expenses was not dissipation.

## **DISCOVERY SANCTIONS**

*In re Marriage of Bernstein*, 2023 WL 2964395 (Ill. App. 2d Dist.), April 14, 2023\*

In May 2014, the Court entered a Judgment for Dissolution of Marriage, which incorporated the parties' Marital Settlement Agreement ("MSA"). Pursuant to the MSA, Husband was obligated to pay maintenance to Wife in the amount of \$1,750 per month for a duration of 75 months. The maintenance was non-modifiable as to duration. Husband was also obligated to pay Wife 20% of any additional income above \$150,000, minus the additional child support, up to a total of \$350,000, within 14 days of receipt. The MSA included that if Husband earned more than \$350,000, that would constitute a substantial change in circumstances for purposes of filing a Petition for Modification. In 2017, Husband filed a petition to modify and abate child support, to which Wife responded with a counter-petition to modify maintenance. Wife claimed that a reduction in child support would constitute a substantial change in circumstances supporting a motion to modify maintenance. The trial court ultimately held that there was a substantial change in circumstances warranting an increase in maintenance. The modification was retroactive and

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the trial court set the maintenance arrearage at \$73,399.<sup>14</sup> Wife also filed a petition for sanctions against Husband under Supreme Court Rule 219(d) for improperly obtaining bank statements and for failure to comply with discovery. Wife's petition for sanctions was granted after the trial court found that Husband violated discovery rules by going through Wife's garbage to retrieve bank statements, and for Husband's counsel's lack of candor to the court when issuing the relevant subpoena for same. Husband appealed, alleging that the trial court misapplied the law in retroactively modifying maintenance, resulting in an abuse of discretion; the trial court abused its discretion in imposing Rule 219(d) sanctions against him; and that the trial court's decisions to prohibit Husband from using as exhibits, or testifying at any hearing, or using any documents or records he obtained as a result of his ordinance violations were not based upon reasonable criteria.

The appellate court affirmed. The appellate court noted that it is the appellant's obligation to provide a sufficiently complete record, and he failed to do so. As such, the appellate court was without basis to find that the court abused its discretion in retroactively modifying maintenance or in issuing Rule 219(d) sanctions. However, given the limited record provided to the appellate court, the appellate court nonetheless found that it was clear the trial court found a substantial change in circumstances justifying a modification of maintenance. The appellate court emphasized that any doubts which might arise from the incompleteness of the record would be resolved against the appellant. The appellate court further held that because Husband failed to support his arguments as to the court's imposition of sanctions with adequate citations to the record, his arguments to the point are forfeited. However, forfeiture aside, the appellate court found that even if Husband accompanied his arguments with adequate citations, they would be without merit. Husband argued that the sanctions were improper because Wife's garbage was not entitled to Fourth Amendment protections and relief; Husband's conduct was not subject to sanctions pursuant to Rule 219(d); and the court's sanctions were not based on reasonable criteria. The appellate court held that the Fourth Amendment argument failed, as the trial court never based the imposition of sanctions upon a Fourth Amendment analysis. Furthermore, the appellate court held that the other arguments failed, as it was clear that the trial court based the imposition of sanctions on the fact that Husband's counsel concealed the existence of the partial statements, misleading the court as to the basis behind the issuance of the Capital One subpoena, and because Husband retrieved financial documents from Wife's garbage in violation of a Highland Park ordinance. Lastly, the appellate court held that it was proper for the trial court to prohibit the improperly obtained discovery from being admitted into evidence. The appellate court explained that Rule 219(c) allows for improperly obtained discovery to be suppressed.

*In re Marriage of Davis*, 2023 WL 2890026 (Ill. App. 5th Dist.), April 10, 2023\*

Pursuant to the parties' judgment for dissolution of marriage, Husband was ordered to pay Wife \$350.00 per week for maintenance. Husband filed a petition to modify or terminate maintenance a little more than a year after the entry of the judgment, alleging that he had retired from his job and his earning capacity was impaired. Wife denied Husband's allegations contending he was in better physical condition than he was representing and he was misrepresenting his capabilities in an attempt to intentionally and fraudulently avoid paying maintenance.

From August 2019 through November 2021, Wife attempted to compel Husband's discovery compliance through various motions and petitions. Wife filed to dismiss Husband's petition to modify and sought sanctions for Husband's failure to comply with discovery. However, Husband

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cited that the delay in complying with discovery was due to his attorney and not his own fault. On November 16, 2021, the trial court held a hearing on the discovery issues. The court acknowledged that Husband's counsel was busy; however, the delay in discovery exceeded what was appropriate. They found it to be substantial, dilatory, and egregious and therefore, the trial court granted Wife's petition dismissing Husband's motion to modify and also granting sanctions. The trial court granted one hour of attorney's fees. Husband appealed.

On appeal, Husband contended: (1) the trial court entered the discovery sanction *sua sponte*, thereby violating his constitutional due process rights; (2) the court's order for sanctions lacked specificity required under Illinois Supreme Court Rule 219(c); (3) the court abused its discretion by entering sanctions as a result of his counsel's conduct and (4) the court abused its discretion in finding his discovery conduct as sanctionable.

The appellate court found Husband's first argument lacking as the trial court's order was in response to a motion filed by the Wife, specifically seeking the relief the court provided. Further, Husband failed to cite any authority for this argument.

As to the second argument, the record established that the trial court did not violate Rule 219(c). Rule 219(c) requires that when a sanction is imposed under this section, the judge shall set forth with specificity the reasons and basis for any sanction so imposed either in the judgment order or in a separate written order. The record established that the court cited the discovery violations to be substantial, dilatory, and egregious and therefore, this argument was also unconvincing.

As to the third and fourth arguments, the appellate court held that the decision to impose a particular sanction under Rule 219(c) is within the court's discretion and only a clear abuse of discretion justifies a reversal. Here, the record established that the court did not abuse its discretion in ordering sanctions, where after two years of discovery proceedings, severe sanctions were warranted for Husband's conduct.

See also, MAINTENANCE, *In re Marriage of Kilby*, 2023 WL 2595738 (Ill. App. 3rd Dist.), March 22, 2023\*

## **DISMISSAL**

*Arteaga v. Simpson*, 2023 WL 2755662 (Ill. App. 4th Dist.), April 3, 2023\*

Wife filed a petition seeking contribution to the child's college expenses in 2019. The parties then engaged in discovery and appeared in court regularly through February 2021. At a court date in February 2021, the docket reflected that the parties agreed to reset the court date by agreement. No further action was taken on the case until March 2022 when Husband filed his motion to dismiss pursuant to the Ninth Judicial Circuit's Local Court Rule 3.35 which provided as follows: "In any civil case in which no service, setting, trial, or other action of the court has been requested or obtained of record within twelve months of the last filing or court action, the case may be dismissed for want of prosecution, except probate which is governed by Part 9.40." Husband alleged that he had yet to be provided with information regarding the child's academic records and living and medical expenses and argued that he was prejudiced as a result.

The trial court granted Husband's motion to dismiss agreeing that Husband had been prejudiced as a result of Wife's intent to parcel out the expenses long after they were incurred (at the time of

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the hearing, the child had already completed her undergraduate studies) and Wife's failure to provide a valid reason for why there was no action taken in a year's time. Wife's motion to reconsider was denied and she appealed.

The appellate court reversed and remanded, specifically pointing to Sections 513(d) and (f) of the IMDMA and finding that nothing in the IMDMA provides any basis to conclude a parent who has yet to be ordered to contribute to the college expenses has a substantive right to information about the nonminor child's academic records and living and medical expenses. Thus, the absence of said information does not, by itself, establish prejudice and therefore, the trial court's ruling was based upon an erroneous view of the law.

*In re Marriage of Landgren*, 2023 WL 3644996 (Ill. App. 2d Dist.), May 24, 2023\*

During the marriage, the parties acquired an interest in a company. Pursuant to the parties' settlement agreement, Husband was to hold Wife's interest in the company as a constructive trustee for Wife. The agreement provided additional terms regarding Wife's ability to direct Husband to take any steps with regards to her interest (i.e., purchase of another member's interest, sale of her interest, participation in capital events, etc.). The agreement also directed Husband to provide copies of all documentation received in connection with the interest in the company to Wife as well as to notify Wife if any demands for information were made to Husband. The agreement also set forth each parties' representations and warranties as to their disclosure of property interests and liabilities as well as each party's waivers for formal discovery. A few years after the divorce, the company was acquired and new stock was issued to the parties, and upon review of certain documents by the parties' accountants, it was learned that the initial interest in the company was almost double than what Husband disclosed prior to the dissolution. Wife filed a motion for an accounting and to compel disclosure as well as a motion to distribute and allocate undisclosed assets. Husband sought to dismiss both motions pursuant to 2-619 of the Code of Civil Procedure citing the discovery waivers in the settlement agreement. The trial court granted the motion to dismiss, holding that Wife's attempt to seek discovery predating the dissolution was akin to a 2-1401 motion seeking relief from a judgment. When denying Wife's motion to reconsider, the trial court stated that Wife could have conducted discovery prior to entry of the judgment. Wife appealed. Wife also filed a motion to amend her initial complaint to add two counts. However, the trial court declined to rule on the motion to amend while the appeal was pending. That ruling was appealed, and the two appeals were consolidated.

The appellate court reversed determining that the settlement agreement created an express trust; the requirements for which include "(1) intent of the parties to create a trust, which may be shown by a declaration of trust by the settlor or by circumstances which show that the settlor intended to create a trust; (2) a definite subject matter or trust property; (3) ascertainable beneficiaries; (4) a trustee; (5) specifications of a trust purpose and how the trust is to be performed; and (6) delivery of the trust property to the trustee." All of the requirements were met by the parties' agreement that, *inter alia*, Husband would hold Wife's interest as trustee for her benefit subject to certain notification and direction provisions. Therefore, Husband owed Wife a fiduciary duty, and as such, as a beneficiary of the trust, Wife had the right to demand an accounting from Husband, the trustee. Without the ability to enforce the right of a beneficiary to seek an accounting, one could be left with no adequate remedy at law as a result of a trustee's breach of his fiduciary duties. Therefore, the discovery waiver in the settlement agreement could not serve to prevent Wife, as the beneficiary, from seeking an accounting which is seen as a remedy in this context. The appellate court further noted that Husband's interpretation of the discovery waiver provision would

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result in a waiver of discovery in perpetuity. Here, much of the documentation Wife was seeking involved the period after the dissolution of the marriage. The appellate court also held that the dismissal of Wife's motion for distribution was in error as the accounting may have led Wife to facts that would have allowed her to prevail. Therefore, the trial court's rulings were reversed, and the case was remanded for further proceedings.

*Illinois Department of Healthcare and Family Services, Hull v. Robinson*, 2023 WL 5815829 (Ill. App. 4th Dist.), September 8, 2023\*

Respondent signed a Voluntary Acknowledgment of Paternity (VAP) in Iowa based on Petitioner's representation that he was the father of the child. Two years later both parties signed a denial of paternity and two years after that, a DNA test revealed that the Respondent was not the father. Three years later, the Illinois Department of Healthcare and Family Services filed a suit against Respondent for child support.

Respondent filed a 2-619 motion to dismiss and then a complaint to establish non-paternity. The trial court granted Respondent's motion to dismiss, and the appellate court reversed and remanded.

A VAP (or voluntary paternity affidavit (VPA) in Iowa) legally establishes a parent-child relationship in both Iowa and Illinois and has the full force and effect of a judicial determination of parentage and can serve as the basis for child support. A VAP is equivalent to an adjudication of parent-child relationship and confers upon the acknowledged father all the rights and duties of a parent. In either Iowa or Illinois, a VAP can only be undone in two ways. It can be rescinded within 60 days of signing, or challenged in a court proceeding where it must be proved the VAP was signed by the father based upon fraud, duress, or material mistake. DNA cannot negate a VAP. A man who signs a VAP can be held accountable for child support even when the child's mother acknowledged that he is not the father and DNA tests confirm that denial.

A 2-619 motion to dismiss requires an affirmative matter outside of the complaint that bars or defeats the cause of action. Respondent's assertion that he signed the VAP based on misrepresentations of the Petitioner is a fact issue. Fraudulent misrepresentation is not easily proved as an affirmative matter in a 2-619 motion; the motion to dismiss should have been denied. Here, the DNA test did not defeat the cause of action. Proving fraud was also required.

## **DISTRIBUTION OF ASSETS**

*In re Marriage of Klose*, 2023 WL 2723256 (Ill. App. 1st Dist.), March 31, 2023

The trial court awarded each party 50% of the marital estate after trial. Husband appealed, and Wife filed a motion to clarify (regarding the issue of predistributions because Husband unilaterally withdrew and utilized 401(k) funds during the litigation). The trial court granted Wife's motion to clarify and modified the judgment more than thirty days after entry by awarding Wife additional

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funds from the marital estate to account for Husband's 401(k) withdrawal. Husband then filed an additional appeal, and the appeals were consolidated.

The appellate court found that the trial court's findings were not against the manifest weight of the evidence and there was not an abuse of discretion in awarding the parties each 50% of marital estate (including the re-distribution of the assets to account for the previous retirement account withdrawal by Husband). The appellate court also found that the trial court did not err in modifying the parties' judgment after 30 days of entry of same. Husband argued Wife's petition to clarify was actually a petition to modify the divorce judgment and the court lacked jurisdiction to do so as more than 30 days had passed. However, the appellate court held found that Wife sought to enforce the equal division of the marital estate, which should have included 50% of the funds Husband withdrew during the divorce proceedings and the court expressly retained jurisdiction to enforce the terms of the judgment, including the 50/50 property division.

Husband's appeal also involved the trial court's classification of marital and non-marital property as well. Husband had gifted non-marital property to Wife in creating a land trust during the marriage. Husband argued he never intended to gift the marital residence, which he owned prior to the marriage, to Wife when the land trusts were created and that the trusts were solely for estate and tax planning purposes. The estate planner testified that Husband understood he was gifting property to Wife especially since he attempted to remove Wife as beneficiary when the marriage began to deteriorate. Husband also lacked documentary evidence regarding financial accounts he claimed stemmed from a non-marital source; and therefore, Husband was unable to prevail in his claims that some accounts and the marital residence were his non-marital property.

The appellate court affirmed that Husband did not satisfy the clear and convincing standard and failed to meet his burden to prove the investments accounts fell within one of the enumerated exceptions to the presumption of marital property set forth in Section 503 of the IMDMA.

Finally, Husband argued he should receive more than 50% of marital property because he had made a greater contribution to the accumulation of marital property than Wife as he was the primary income earner. The appellate court rejected his argument and stated that Wife meaningfully contributed to the parties' household during their 27-year marriage and raised their child.

See also MAINTENANCE, *In re Marriage of Sessions*, 2023 WL 1860964 (Ill. App. 5th Dist.), February 9, 2023\*

See also, CLASSIFICATION OF ASSETS, *In re Marriage of Phalen*, 2023 WL 6249100 (Ill. App. 3rd Dist.), September 26, 2023\*

## **DISSIPATION**

*In re Marriage of Majewski*, 2023 WL 2261272 (Ill. App. 2d Dist.), February 28, 2023\*

The parties were divorced on July 29, 2019, following trial. Wife appealed the parties' judgment for dissolution of marriage, specifically the allocation of property, the decision to bar her dissipation claims as untimely, and barring her from seeking maintenance from

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Husband . She contended that the trial court misapplied section 503 in finding the notice untimely and misapplied section 504 in barring maintenance. Additionally, she argued the trial court abused its discretion in failing to value and allocate certain marital assets.

The appellate court found that the trial court did not err in barring Wife's dissipation claims as her notice of intent to claim dissipation was filed untimely as trial had already commenced. Here, the notice was served a mere two days prior to the start of the trial, failing to leave Husband a reasonably fair time to respond.

However, the appellate court found that the trial court's decision to permanently bar Wife from receiving maintenance was against the manifest weight of the evidence as it misapprehended whether the parties had entered into any agreement regarding maintenance. Because the trial court relied on a non-existent agreement between the parties regarding maintenance, the trial court failed to follow the mandated application of section 504. Finally, the appellate court held that the trial court abused its discretion by failing to allocate certain tools and business accounts between the parties. However, the trial court did not err in failing to allocate several businesses amongst the parties as the record contained no evidence that Husband held any interest in the businesses at the time of trial. Therefore, the decision of the trial court was affirmed in part, reversed in part, and remanded so that the trial court could engage in a consideration of maintenance compliant with section 504 and equitably allocate the parties marital assets.

See also, DISCOVERY, *In re Marriage of Yearman*, 2023 WL 5199473 (Ill. App. 3rd Dist.), August 14, 2023\*

See also, CLASSIFICATION OF ASSETS, *Barclay v. Barclay*, 2023 WL 6622122 (Ill. App. 1st Dist.), September 29, 2023\*

See also, CLASSIFICATION OF ASSETS, *Schiffbauer v. Schiffbauer*, 2023 WL 7295134 (Ill. App. 3rd Dist.), November 3, 2023\*

## **ENFORCING MSA AND JUDGMENT OF DISSOLUTION**

*In re Marriage of Dave*, 2023 WL 333718 (Ill. App. 5th Dist.), January 20, 2023\*

Husband appealed order denying his motion for reconsideration and granting Wife's motion to enforce parties' settlement agreement and judgment of dissolution of marriage. He contended that the trial court erred in incorporating the parties' oral settlement agreement into the judgment of dissolution despite his objections prior to the entry of the judgment. Further, he argued that the trial court erred by entering the judgment of dissolution that added terms that were not included in the parties' oral settlement agreement. However, the appellate court found that Husband's motion for reconsideration readdressed the arguments he previously presented in his original objection and therefore the denial of the reconsideration was affirmed. As such, the appellate court only addressed the trial court's findings appealed by Husband.

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Husband contended that the property settlement could not be concluded by an oral settlement because of the parties' substantial financial assets and the length of the marriage. Husband also claimed that he diligently challenged the oral settlement prior to the entry of the judgment of dissolution. However, these arguments cannot be considered on appeal as they were never presented to the trial court. Finally, Husband argued that the trial court erred by enforcing the oral settlement agreement when the terms were vague, as the settlement was hastily conceived and remarkably lacking in detail, such as the oral argument failed to address how the parties would divide the personal property or debts and failed to specify which retirement assets, cash, and investments were subject to 60/40 division.

Appellate court found that the record does not support Husband's claims and as such the trial court's determination that the oral agreement was not vague was not against the manifest weight of the evidence. However, the oral agreement does not address personal property, and therefore, the inclusion of the language related to the division of personal property was unsupported by the record and against the manifest weight of the evidence. Accordingly, this language of the judgment was vacated and remanded to the trial court to determine whether settlement of the issue was reached, and if not, then to provide the parties the opportunity to address distribution of personal property at the time of the execution of oral settlement. Additionally, the appellate court found Husband's appeal to be frivolous and therefore warranting sanctions.

## **ENFORCEMENT**

*In re Marriage of Warner*, 2023 WL 7996648 (Ill. App. 4th Dist.), November 17, 2023\*

Husband filed for divorce in 2012 to dissolve the parties' 15-year marriage. Pursuant to the parties' Judgment entered in 2015, Wife was awarded an 80-acre tract of land and was required to sell or refinance the land in a timely manner, and to pay Husband his equitable share of the equity by December 2015. Wife filed a motion to reconsider or clarify the judgment in 2016. The trial court entered an order in October 2016 as a result, modifying the distribution of the land proceeds. In June 2017, Wife filed a motion to compel cooperation with the real estate sales contract seeking an order approving the sale of the entire land to the current lessees and compelling Husband to execute the necessary documentation. The sale would result in Husband receiving less proceeds than he was entitled to pursuant to the judgment and preceding orders.

In September 2017, the trial court entered an order granting Wife's motion and ordered Husband to attend the closing and convey his ownership interest in the property to the buyers. In December 2017, Husband filed his own motion to compel cooperation for sale of real estate, where he alleged that the property still had not been sold to the buyers, and that Husband received a higher offer from a second buyer. Husband asked the trial court to enter an order requiring Wife to cooperate with the sale of the land to the second buyer to maximize the value. In January 2018, the trial court granted Husband's motion and ordered Wife to sell the land to the second buyer. Wife filed a motion to enforce the original judgment, claiming that the trial court improperly modified the judgment by ordering the sale of the land to the second buyer. The trial court denied Wife's motion, which was later affirmed by the Third District Appellate Court. The appellate court held

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that the trial court was enforcing the judgment, not modifying it. Wife continued to challenge the sale of the land to the second buyer, and as a result, the trial court entered further orders concerning the sale of the land to the second buyer. Wife then filed another motion to enforce the judgment of dissolution of marriage, alleging that the trial court's post-appeal orders directing the sale to the second buyer improperly modified the original judgment and such orders should be vacated. The trial court again denied Wife's motion. Wife appealed, again, arguing that the trial court erred in denying her motion because the trial court lacked jurisdiction to order a sale of the marital property that was contrary to the terms of the original judgment, incorrectly applied the law of the case doctrine to enforce a real estate contract for specific performances, and misapplied the declaratory judgment statute by incorporating an unopposed declaratory judgment order into the divorce case. Lastly, Wife also argued that her due process rights were violated.

The appellate court affirmed. First, the appellate court emphasized that while the trial court loses jurisdiction to amend a judgment after 30 days from entry, it retains indefinite jurisdiction to enforce the judgment, and there is a distinction between enforcement and modification. Wife argued that the trial court's orders after the entry of the original judgment unreasonably delayed the sale of the property by thwarting her sale that was compliant with the judgment and by ordering the sale of the property to the second buyer instead. The law of case doctrine bars re-litigation of an issue previously decided in the same case and encompasses the court's explicit decisions and those issues decided by necessary implication. Further, when an appellate court decides a question of law, that decision is binding upon the trial court on remand and the appellate court in a subsequent appeal. Here, the Third District decided the trial court's post judgment orders directing the sale of the property to the second buyer which constituted the trial court's enforcement of the judgment as opposed to a modification. As for Wife's other claims, the appellate court did not address further, finding that any other claims Wife made on appeal were mere contentions without citation to authority.

*Lynch v. Zummo*, 2023 WL 7297201 (Ill. App. 1st Dist.), November 6, 2023\*

Wife filed for divorce in 2019. The matter was set for trial to commence in June 2021. In May 2021, without the involvement of counsel, the parties jointly executed a settlement agreement. Said agreement stated that the parties had agreed to certain issues and included a total of 14 listed items that the parties agreed upon, including the division of assets and debts, maintenance, and child support, and the parties' intent to execute a parental allocation agreement. The agreement specifically provided that the agreement was intended to resolve all the issues regarding the division of marital assets, debts, and the parenting agreement, and that the parties agreed that the terms would be incorporated into a marital settlement agreement, and the marital settlement agreement was to be incorporated into an agreed court order. The support obligation provisions provided that support would be established using the Illinois statutory calculations, and if counsel could not agree, the matter would be submitted to the court for resolution.

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The parties also executed a parenting plan in June 2021. The parties ultimately did not reach an agreement regarding Husband's maintenance obligation. After the agreement was signed, Husband requested that a cap be applied to the amount of support that would come from any bonus income he received. Wife disagreed and stated that they were bound to the agreement which did not mention a cap, and that Husband personally acknowledged that the agreement was a complete and final agreement. Wife filed a motion for declaratory judgment seeking a declaration from the trial court that the agreement was valid, enforceable, and binding upon the parties, as well as the judgment for dissolution of marriage consistent with the terms of the agreement. In turn, Husband moved to strike and dismiss Wife's motion, arguing that a declaratory judgment could not be used to have the court add or modify terms of the agreement or convert it to a judgment for dissolution of marriage. Husband further argued that Wife was asking the court to define bonus income in the manner that she preferred when the language in the agreement did not provide for any definition of the term. Additionally, Husband argued that the trial court could not enter the requested declaratory judgment because it would not terminate the dissolution proceedings since the parties would still have to submit dispute over support to the court. The trial court denied Husband's motion to strike or dismiss and granted Wife's motion for declaratory judgment.

The trial court found that the parties voluntarily entered into the agreement with the intent to incorporate its terms into the marital settlement agreement. The trial court also found that the terms of the agreement were detailed, clear, and unambiguous, and that the parties acknowledged that the agreement was valid and enforceable. The trial court ordered the parties to incorporate the agreement into a marital settlement agreement and present it to the court at the prove-up. At the prove-up hearing, Wife asked the court to enter her draft of the marital settlement agreement. Wife agreed to strike some of the provisions that were in the marital settlement agreement that were not in the original agreement if Husband, who did appear or submit any objections to the provisions, did not agree. Husband's counsel objected to the entry of any judgment that deviated from the original agreement. The trial court found that the draft judgment was reasonable and not unconscionable and that it conformed to the Agreement, and in turn entered a judgment for dissolution of marriage that omitted the provisions of Wife's draft judgment that she agreed to strike. Husband appealed, arguing that the trial court erred in denying his motion to dismiss and erred in granting Wife's motion for declaratory judgment because Wife failed to allege sufficient facts showing she was entitled to her requested relief. Husband also argued that the trial court erred in entering a judgment for dissolution of marriage that materially deviated from the agreement, violated the Act regarding support, and contained several ambiguous terms.

The appellate court affirmed. The appellate court first held that they would not review the denial of a motion to dismiss because any error made in such order merges into the final judgment, and the appeal is taken from that final judgment. As such, the appellate court analyzed the final judgment. The appellate court stated that the courts have found settlement agreements to be enforceable in situations comparable to those that Husband claimed existed here. Specifically, Husband admitted to the trial court that the parties both

entered into the agreement and that it was valid and binding. The appellate court was not persuaded that the Judgment materially deviated from the agreement, violated the Act regarding support, or contained ambiguous terms. The appellate court noted that Husband had every opportunity to object to the terms and that he agreed to any unambiguous terms in the agreement as well as the statutory calculation method regarding support. The appellate court held that the agreement included clear, detailed, and binding provisions. A court may not modify a contract by inserting new terms to which the parties did not agree. Upon review of the record, the appellate court held that the trial court did not modify the agreement, and any slight deviation in language did not constitute a modification.

See also, COLLEGE EXPENSES, *In re Marriage of Lewin*, 2023 WL 6321435 (Ill. App. 4th Dist.), September 28, 2023\*

## **ENROLLMENT OF FOREIGN JUDGMENT**

*In re Marriage of Soman and Cwik*, 2023 WL 6293832 (Ill. App. 1st Dist.), September 27, 2023\*

The parties were divorced in 2009 in Ohio and moved to Illinois thereafter. The parties engaged in continuous post-decree litigation in Ohio regarding modifications to parenting time and support arrearages (that arose to felony criminal nonsupport), and the Ohio court explicitly retained and exercised its continuing jurisdiction. Over the course of ten years, Husband made several attempts to enroll the Ohio Judgment in Illinois and all attempts were denied. Wife alleged that Husband was attempting to forum shop. Prior to the instant appeal, Husband had filed two prior appeals seeking for the appellate court to reverse the trial court's denial of his petitions to enroll. This appeal stems from Husband's fifth attempt to enroll the judgment. The Ohio court retained jurisdiction because the Illinois court would not manifest intent to exercise jurisdiction. The trial court had previously issued multiple orders enjoining Husband from filing any further pleadings without leave of court and without paying the outstanding judgment against him for attorney's fees and interest. Husband was declared a vexatious litigator in the Ohio and Illinois courts and held in contempt for filing without court approval. The trial court further awarded Wife attorney's fees as a result. Husband appealed.

The appellate court held that it could not find that Husband's fifth petition to enroll would have cured the defects of the prior petitions. It is never an abuse of discretion to deny leave to amend when the proposed amendment would be futile. Husband's argument was futile. Even if Illinois had jurisdiction under the UCCJEA, the court may decline to exercise if it determines that it is an inconvenient forum and a court of another state is a more appropriate forum.

The trial court's reasons for declining jurisdiction could be ascertained from the record on Husband's motion to reconsider as no visitation issues existed because one child emancipated and the other was nearly so and because Husband's petitions had to do

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with monies owed per Ohio support orders. The Illinois court should not be asked to recalculate monies that the Ohio court determined Husband owed. Furthermore, Husband was engaged in both civil and criminal proceedings in Ohio. The appellate court declined to find that it was an abuse of the trial court's discretion to determine that Ohio was the more appropriate forum under these facts.

The appellate court rejected Husband's argument that the trial court did not have jurisdiction to award attorney's fees since it denied his request to enroll the foreign judgment. The appellate court affirmed trial court's finding that Husband's conduct was harassing, and his filings were for an improper purpose. The contempt finding was also affirmed. The trial court had the opportunity to observe the parties directly and was aware of the long history of litigation.

## **EVIDENCE**

See also, ALLOCATION OF MARITAL ASSETS, *In re Marriage of Leitzen*, 2023 WL 3316884 (Ill. App. 4th Dist.), May 9, 2023\*

## **FOREIGN JUDGMENTS**

*In re A.H.*, 2023 WL 5281637 (Ill. App. 1st Dist.), August 17, 2023

The parties' triplet children were born in Thailand. Mother filed suit against Father in Thailand in December 2010, and the Thailand court adjudicated Father as the biological father of the triplets based on a DNA test and ordered him to pay \$1,500 per month in child support for the triplets. Father failed to pay said child support. In 2011, Mother sought recognition, enforcement, and modification of the child support order entered by the court in Thailand against Father. Mother and the triplets were now residing in the United Kingdom with Mother's current husband. Father resided in Illinois. In 2013, the trial court enrolled the Thailand judgment under the principles of comity. In 2017, Mother filed a motion seeking to increase child support, an injunction directing Father to execute the paperwork for the triplets to be recognized as US citizens, an order requiring Father to pay Mother's attorneys' fees, and an order registering the Thailand judgment. Father moved to dismiss the petition, arguing that the trial court lacked statutory authority to modify the Thailand judgment pursuant to section 615 of the Uniform Interstate Family Support Act. Ultimately, the trial court enforced and modified the judgment, and entered orders requiring Father to pay \$76,000 in child support arrears per the Thailand judgment, \$4.5 million into trusts for prospective modified child support, \$2 million in retroactive modified child support, over \$2 million in attorney fees and costs, and \$50,000 in sanctions pursuant to Supreme Court Rule 137.

Father appealed, arguing that the trial court lacked statutory authority to modify the Thailand judgment, erred by applying the pre-July 1, 2017 Illinois child support laws, abused its discretion by barring the testimony of Father's immigration expert, abused its discretion by modifying the child support award in the Thailand judgment and making the modified child support retroactive with interest and creating child support trusts, abused its discretion by adopting the terms of the trust agreements, failed to give Father credit for child support payments and overfunded the child support trusts, erred in awarding attorney's fees, and abused its discretion by ordering him to pay \$50,000 in sanctions.

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The appellate court affirmed in part, reversed in part, vacated in part, and remanded for further proceedings.

First, the appellate court found that under the common law principles of comity, the trial court had jurisdiction to modify the Thailand support order and enforce it by calculating the arrears. The appellate court held that sections 603 and 615 of the Uniform Interstate Family Support Act, which Father relied on, did not deprive the trial court of authority to modify or enforce the Thailand judgment.

Second, the appellate court held that because Mother filed her petition to modify the child support terms set forth in the 2011 Thailand judgment, the trial court appropriately applied the pre-July 1, 2017, child support guidelines in consideration of section 801 of the Parentage Act.

Third, the appellate court found that Father's immigration expert's testimony was relevant to the matters at hand, however the appellate court determined that any error as a result was harmless.

Fourth, the appellate court held that the record demonstrated a substantial change in circumstances which justified a modification of Father's child support obligation, and that the amount of the award was neither an abuse of discretion nor against the manifest weight of the evidence.

Fifth, the appellate court held that the trial court did not abuse its discretion in making the modified support amount retroactive.

Sixth, the appellate court found that the interest on the arrearage of modified child support was statutory interest, and there was no error.

Seventh, the appellate court found that the creation of the child support trusts pursuant to section 503(g) of the Illinois Marriage and Dissolution of Marriage Act was necessary, in the best interests of the children, did not require a finding of contempt, and was appropriate.

Eighth, the appellate court found that the trial court had authority to adopt Thailand law for the duration of Father's child support obligation where the age of majority is 20.

Ninth, the appellate court rejected Father's arguments against the provisions of the trust, except for the provision requiring that if Father died before the termination of the trusts, any remaining funds upon Father's death were to be distributed to his heirs at law. The appellate court vacated that provision and remanded to the trial court to provide that if Father died before the trusts terminated, any funds remaining upon termination are to be paid to his estate.

Tenth, the appellate court agreed with Father that he was entitled to a credit for prospective modified child support payments that were made after the 2018 support judgment and before the section 503(g) trusts were funded with \$4.5 million, and that the trial court overfunded the trusts by \$500,000. The appellate court reversed that order and remanded the trial court to determine the correct credit and proper amount to fund the trusts.

Eleventh, the appellate court held that the award of attorneys' fees was appropriate, and Father failed to argue that the amount of the fees was excessive.

Twelfth, and lastly, the appellate court found that the trial court considered facts that were not a basis for an award of sanctions pursuant to Rule 137, but the appellate court had no way of knowing the weight that the trial court gave to said facts, so the appellate court vacated the sanctions awarded and remanded to the trial court to rule on the motion for Rule 137 sanctions, taking into consideration only those matters for which a sanction might be imposed under the rule.

## **FRAUDULENT CONCEALMENT**

*Anderson v. Sullivan Taylor & Gumina, P.C.*, 2023 WL 4288345 (Ill. App. 1st Dist.), June 30, 2023\*

In 2021, Plaintiff filed a complaint against her former attorneys for malpractice, alleging that in 2011 when the Judgment for Dissolution of Marriage was entered, the attorneys told Plaintiff that she would be eligible to receive death benefits from her former spouse. Plaintiff alleged that, in reliance on her attorney's advice that she would receive death benefits, Plaintiff waived other financial benefits. In March 2020, Plaintiff was informed that she was ineligible to receive death benefits. Plaintiff contacted her attorneys thereafter. Plaintiff alleged that during the divorce proceedings, her attorneys told her that they would file a Qualified Domestic Relation Order (QDRO) once the settlement agreement was entered to give effect to the provision entitling her to a death benefit from the pension fund. In 2020, upon learning that she was ineligible to receive the death benefits, Plaintiff alleged that she asked her attorneys about the QDRO and whether the Pension Code precluded her from receiving a death benefit, to which Plaintiff alleges that her attorneys told her the purpose of the QDRO was to override the Pension Code so that she could receive the death benefits. In March 2020, Defendant sent Plaintiff a QDRO to sign so that he could file it with the court. Defendant filed the QDRO in June 2020, nearly 9 years after the settlement agreement was entered. In August 2020, the pension plan administrator informed Plaintiff that she did not qualify for the death benefits. Plaintiff alleged that contrary to her attorney's advice, she never could have received a death benefit from the pension, and she would have then taken a different position in the divorce case, but for the Defendants' negligent advice. Plaintiff's complaint sought to recover the losses she sustained due to Defendant's negligent legal representation and claimed that the Defendants should be estopped from asserting a limitation-period defense and that the Defendants fraudulently concealed their professional negligence from her so that she would not discover the erroneous advice. The trial court dismissed her initial complaint without prejudice. Plaintiff then filed an amended complaint. The trial court dismissed Plaintiff's amended complaint with prejudice, holding that the six-year statute of repose for claims against attorneys barred Plaintiff's claim. Plaintiff appealed the trial court's dismissal of the operative complaint.

The appellate court reversed the dismissal of the complaint as being time barred due to fraudulent concealment and remanded the case. The appellate court ultimately found that Plaintiff pled facts that demonstrated that the Defendants fraudulently concealed their negligence from Plaintiff, thereby tolling the statute of repose. The appellate court explained that a statute of repose begins to run when a specific event occurs, regardless

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of whether an action has accrued. The appellate court stated that the statute of repose begins to run on the date on which the act or omission in the provision of professional services occurred. The appellate court further explained that the six-year statute of repose for claims against attorneys begins to run as soon as the event creating the malpractice occurs. The statute of repose terminates the possibility of liability for an attorney regardless of the Plaintiff's knowledge concerning his or her cause of action. In this case, the appellate court found that the statute of repose began when the Marital Settlement Agreement was approved and entered by the trial court. The appellate court explained that the alleged negligence was complete at the time the Marital Settlement Agreement was entered, where Plaintiff relied on the allegedly negligent advice and fixed her legal rights in accordance with said advice, thus Plaintiff's malpractice claim is barred by the statute of repose. The Plaintiff also argued that the Defendants were equitably estopped from raising the statute of repose. The appellate court held that Plaintiff's claim of equitable estoppel failed because one of the elements of equitable estoppel was not present, as the Plaintiff did not allege that Defendants knew about the erroneous advice, nor did she allege that Defendants prevented her from forgoing or delaying filing her suit. Lastly, Plaintiff argued that the Defendants fraudulently concealed their negligence and the existence of her claim for legal malpractice. The appellate court explained that fraudulent concealment was grounds for tolling statutes of repose, including the statute of repose for legal malpractice, stating that a statute of repose can be tolled if a Plaintiff does not discover the claim due to fraudulent concealment on the part of the Defendant. The appellate court stated that if a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled, the action may commence at any time within five years after the person entitled discovers that she has such cause of action. In order to toll the statute of repose on the basis of fraudulent concealment when the Defendant stands in the position of a fiduciary to the Plaintiff, a Plaintiff may successfully proceed on the claim of fraudulent concealment when the attorney fails to fulfill his duty to disclose material facts concerning the existence of a cause of action. The appellate court found that, taking the Plaintiff's allegations as true, the Plaintiff pled sufficient facts to go forward on a claim that fraudulent concealment tolled the statute of repose, and was entitled to go forward on her claim for legal malpractice.

## **GRANDPARENT VISITATION**

*In re Marriage of Clar and Daidone*, 2023 WL 3269672 (Ill. App. 5th Dist.), May 5, 2023\*

The parties had one child during the marriage. Mother filed for divorce on March 4, 2020. In May 2020, Mother was admitted to a substance abuse facility and Father was awarded temporary custody on a full-time basis. Shortly thereafter, Wife checked herself out of the facility and her whereabouts became unknown. An order was entered that month allowing for maternal grandparents to have visitation with the child. In September 2020, the grandparents filed a motion to enforce the order granting them visitation. In December 2020, Father sought to modify that same order. Maternal grandparents filed a formal petition for grandparent visitation in December 2020, claiming that Mother's whereabouts had been unknown since August 2020. Father argued that maternal grandparents had been in communication with Mother and had not reported her missing to the police since said communication. The grandparents testified that between May and

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August 2020, they had limited communication with Mother causing them to contact the police and report her missing in August 2020. However, shortly thereafter, they regained contact with Mother and had met with her to attempt to have her admitted into a rehabilitation center, but she ran away from the facility. From then until the time of the hearing, while grandparents had phone communication with Mother, her whereabouts were unknown. The trial court granted the grandparents' motion. Father appealed claiming that the grandparents lacked standing and failed to establish that he had unreasonably denied visitation.

The appellate court reversed recognizing that the grandparent visitation provision of the IMDMA is a "significant interference" to a parent's fundamental liberty interests as first recognized by the Supreme Court in *Troxel v. Granville*. Therefore, the standing requirements set forth in Section 602.9 of the IMDMA are to be strictly construed. The statute is clear that, in order for a parent to be considered "missing," that parent's whereabouts must be unknown for at least 90 days and a report must be made to a law enforcement agency." The appellate court interpreted this to mean that the statute requires that the report be made after the parent's whereabouts become unknown for the last time and before the filing of a petition seeking grandparent visitation. Here, the grandparents met with Mother following the report made to the police and a subsequent report was not made after her whereabouts became unknown again. Therefore, they lacked standing to seek grandparent visitation.

## **GUARDIAN AD LITEM**

See also, APPELLATE JURISDICTION, *In re Marriage of Joseph Tener and Veronica Walter*, 2023 WL 8525531 (Ill.App. 1 Dist.), December 9, 2023\*

## **HEARSAY EVIDENCE**

*Maloney v. Galatte*, 2023 WL 3002477 (Ill. App. 3rd Dist.), April 19, 2023\*

In August 2022, Petitioner filed a pro se emergency petition for a no contact order against the Respondent pursuant to the Stalking No Contact Order Act. Petitioner alleged that the parties had volunteered at a local food pantry, where Respondent micromanaged her. Petitioner specifically alleged that Respondent followed Petitioner to her vehicle after a confrontation at the food pantry. Accordingly, the Petitioner fired the Respondent from his position at the food pantry. The Petitioner further alleged that while she was out with friends, the Respondent arrived at Petitioner's residence and informed her son and husband that Respondent was having the Petitioner and her house watched, and that the Respondent wanted an apology from the Petitioner. The trial court entered an emergency order prohibiting the Respondent from stalking and having any contact with Petitioner. The trial court held a hearing, where alleged hearsay evidence was admitted, over Respondent's counsel's objections. The trial court ultimately found that the Petitioner's testimony was credible, and the Respondent's testimony was not, the Respondent's visit to Petitioner's residence met the definition of stalking, and ultimately extended the order for two years. The Respondent appealed, contending that the trial court erred in allowing Petitioner to present hearsay testimony regarding what Respondent said to Petitioner's husband at her residence while she was not present, especially as neither the husband nor the son were present at the hearing.

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The appellate court vacated the order. The appellate court held that any conversation between Respondent and Petitioner's husband constituted hearsay, especially as neither Petitioner's husband nor son were at the hearing to testify to the conversation, and Petitioner was not present for the conversation. Furthermore, the trial court stated that it based its ruling on said hearsay statements. The appellate court emphasized that stalking no contact order proceedings are governed by the rules of civil procedure and that the Supreme Court and local court rules shall apply. The appellate court found no provision that allowed for the hearsay evidence Petitioner provided during the hearing. For the Petitioner to prevail on her petition for a plenary order, she was required to prove by a preponderance of the evidence that the Respondent was stalking her. The appellate court found that the evidence did not establish that on at least two occasions the Respondent engaged in any action that would constitute stalking, and the trial court's decision to grant the plenary stalking no contact order was contrary to the manifest weight of the evidence.

## **INCOME**

See also, ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME, *In re Marriage of Hussain and Ali*, 2023 WL 7319416 (Ill. App. 2d Dist.), November 7, 2023\*

## **INVALIDATION OF MARRIAGE**

*In re Marriage of Andrew*, 2023 WL 4036605 (Ill. App. 1st Dist.), June 16, 2023\*\*

Following a 20-year marriage, the parties divorce was finalized in 2014. The parties' judgment incorporated a marital settlement agreement ("MSA"), in which Husband agreed to pay maintenance at a rate of \$20,000 a month. The MSA provided that the maintenance was non-modifiable as to amount and duration except as provided for within the agreement. The MSA set forth six termination events but did not include any terms regarding modification.

In 2020, Wife filed a petition for rule as Husband had ceased paying maintenance. Husband filed a separate petition to invalidate the marriage and then a motion to terminate his maintenance obligation. Husband claimed that, because he began his relationship with Wife while he was a 16-year-old student of Wife's, he had been under her dominance and control when they first married. Therefore, Husband alleged that the marriage was invalid and void. The parties continued their relationship after Husband reached majority and were married when Husband was 25 years old. Husband testified that he was not aware that he was under Wife's dominance and control until he had a breakthrough in therapy and claimed that he was still under Wife's dominance and control throughout the marriage and when he signed the Marital Settlement Agreement. Thereafter, he ceased paying the maintenance. Wife filed a motion to dismiss the petition to invalidate pursuant to both 2-615 and 2-619 of the Code of Civil Procedure. Wife argued that Husband was barred by *res judicata* as the judgment specifically found that the marriage had been valid. Further, as the parties were divorced, Wife argued that there was no marriage to invalidate. The trial court granted Wife's motion to dismiss holding that the marriage was dissolved and therefore, there was no marriage to invalidate. Wife also filed a motion to

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dismiss Husband's motion to terminate his maintenance obligation because Husband claimed that his therapeutic breakthrough constituted a substantial change in circumstances which was not one of the six termination events set forth in the MSA. Husband asserted that because he was under Wife's dominance and control when he signed the MSA, the MSA was void. However, Husband did not ask the court to vacate the entire judgment. The court granted Wife's motion to dismiss. Wife then filed an amended petition for rule to show cause, seeking payment of the past due maintenance. The trial court found Husband in contempt of court and ordered him to pay the past due maintenance and Wife's attorney's fees. Husband appealed.

The appellate court affirmed the trial court's ruling to dismiss Husband's petition to invalidate the marriage but on different grounds. The appellate court held that the petition was rightfully dismissed due the statute of limitations which required Husband to bring the petition to invalidate the marriage within 90 days of gaining knowledge of the alleged condition that deprived him of capacity at the time of marriage. Despite Husband's claim that he was under Wife's dominance and control beyond the dissolution, the documents evidenced otherwise – that Husband was a successful professional who filed the petition for divorce and participated in settlement negotiations while represented by counsel. Also, he ultimately signed the settlement agreement which included language that the marriage was lawful and that he was acting of his own free will when he entered into the contract. Husband failed to plead facts alleging how Wife's dominance and control could have persisted during and beyond the dissolution proceedings, such as allegations of a mental health diagnosis, or repressed memory, or how the dominance and control actually manifested in Husband's life. Because the appellate court affirmed on this basis, the question of *res judicata* was not addressed on appeal.

The appellate court further affirmed the trial court's ruling dismissing Husband's motion to terminate maintenance as the MSA listed the only methods by which maintenance could have been terminated or modified, and a substantial change in circumstances was not included on that list. Husband's argument on appeal that he was under Wife's dominance and control failed because his motion to terminate did not include a request that the MSA be invalidated, and therefore, said argument was waived on appeal. Husband also argued that the trial court erred by not letting him testify regarding Wife's sexual assault during the hearing on her petition for rule. The appellate court found that the proffered testimony would not have had an effect on whether or not he was in contempt of court. Case law provides that to avoid contempt, the delinquent spouse must "prove that he neither has money now with which to pay, nor has he wrongfully disposed of money or assets with which he might have paid." Excuses or explanations for a party's choice not to comply with a court order are irrelevant.

## **LEGAL MALPRACTICE**

See also, FRAUDULENT CONCEALMENT, *Anderson v. Sullivan Taylor & Gumina, P.C.*, 2023 WL 4288345 (Ill. App. 1st Dist.), June 30, 2023\*

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## JUDICIAL ESTOPPEL

See also, CLASSIFICATION OF ASSETS, *In re Marriage of Horlbeck*, 2023 WL 5748559 (Ill. App. 2d Dist.), September 6, 2023\*

## JURISDICTION

*In re Marriage of Frisz*, 2023 WL 2445386 (Ill. App. 1st Dist.), March 10, 2023\*

As part of the parties' Marital Settlement Agreement, Wife was to receive a percentage share of Husband's thrift savings plan retirement account. The plan administrator of Husband's account transferred money to Wife pursuant to a QDRO. Husband believed that Wife received an overpayment and brought a combined petition for an adjudication of indirect civil contempt and motion to enforce prior court orders, as well as a motion for post judgment relief, essentially seeking the court enforce its judgment for a dissolution of marriage and the QDRO order by requiring Wife to return the alleged overpayment. The court denied all relief and Husband filed exhibits for the record that Wife sought to strike as an improper attempt to supplement the record. Wife believed Husband's filing was frivolous and moved for sanctions under Illinois Supreme Court Rule 137. While Wife's motion for sanctions was pending, Husband filed a notice of appeal. Husband contends that when the trial court determined that his thrift savings plan administrator did not overpay Wife, it erroneously interpreted the parties' marital settlement agreement and its own QDRO, contrary to the plain language of both and the Illinois Marriage and Dissolution of Marriage Act. The appellate court held that because there is a pending Rule 137 motion for sanctions in the trial court, it lacked jurisdiction to entertain the merits of Husband's appeal.

*In re Marriage of Krilich*, 2023 WL 2360845 (Ill. App. 1st Dist.), March 6, 2023

The parties' judgment for dissolution of marriage, entered in 1985, required both parties to leave approximately fifty percent of their respective estates to children or grandchildren of the marriage. In 2020, Husband executed a will that allegedly failed to comply with the terms of the judgment. After Husband's death in 2021, his children brought a petition to enforce the judgment against the representatives of Husband's estate, collectively the Respondents. The Respondents moved to dismiss for lack of jurisdiction, stating that Husband was domiciled in Florida at the time of his death, he owned no Illinois real estate, and Respondents themselves had no contacts with Illinois that would subject them to personal jurisdiction. The trial court denied the motion, and leave was granted for Respondents to file an interlocutory appeal pursuant to Illinois Supreme Court Rule 306(a)(3).

The appellate court affirmed, noting that it is an elementary principle of law that a court is vested with the inherent power to enforce its orders. The appellate court further held that when a domestic relations order has been entered, the trial court retains jurisdiction to enforce its order, and one who accepts a benefit of a divorce decree is estopped from

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challenging the jurisdiction of the court over either the person or the subject matter. The appellate court ruled that it is undisputed that the trial court had jurisdiction over the original dissolution action in 1985, and thus it retains jurisdiction to enforce its judgment. The appellate court denied Respondent's argument that the Husband's children cannot enforce the judgment against the Respondents because the Respondents are not parties to the judgment. The appellate court explained that the Respondents are not being sued as individuals, but rather in their capacity as representatives of Husband's estate. A representative steps into the shoes of the decedent, and an action on a claim against a decedent which arose in his lifetime lies against the administrator in his representative capacity.

*In re Marriage of Matt*, 2023 WL 2447248 (Ill. App. 1st Dist.), March 10, 2023\*

Pursuant to the parties' parenting plan, the parties shared joint decision-making authority and equal parenting time. Following the entry of the divorce, the parties engaged in several years of post-decree litigation in which both parents sought to limit the other parent's decision-making responsibilities and parenting time. The post-decree litigation resulted in the trial court entering a "temporary order" restricting Mother's parenting time. At the time of entry of the temporary order, the trial court continued other matters for future hearing. Mother appealed the temporary order.

The appellate court dismissed the appeal for lack of jurisdiction as the order at issue did "not dispose of the rights of the parties either on the entire controversy or on a separate definite part thereof." Not only was the order at issue titled "temporary" but the order specifically provided that Father's motion seeking restrictions was granted on a "temporary basis." Further, Mother failed to petition the trial court for leave to appeal an interlocutory order pursuant to Rule 306; therefore, that Rule did not confer appellate jurisdiction.

*The Department of Healthcare and Family Services ex rel. Carolyn Whitaker, Petitioner-Appellee, v. Michael Oliver Jr., Respondent-Appellant.*, 2023 WL 3035202 (Ill. App. 5th Dist.), April 21, 2023\*

Father was incarcerated at the time Petitioner filed a complaint for child support on behalf of Mother and against Father. The summons for the complaint was served by substitute service on Father's mother. The trial court entered a default judgment ordering Father to pay child support to Mother for their two children. Approximately eight years later, Father filed pleadings in the trial court asserting that service of process was defective, and the court therefore lacked personal jurisdiction over him when it entered the default judgment. The trial court ultimately denied his motions, finding that Father had notice of the hearings, despite being incarcerated. Father appealed, alleging that his mother's apartment was not his usual place of abode, thus service was defective and did not confer jurisdiction on the court.

The appellate court affirmed, ultimately finding that *res judicata* barred Father's claim of improper service, and the court obtained personal jurisdiction over Father because process was properly

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served at an address where it was reasonably likely to give him actual notice of the proceedings under all relevant circumstances. The appellate court explained that the doctrine of *res judicata* applies where a court of competent jurisdiction has rendered a final decision on the merits of a cause of action and bars any subsequent litigation of the same cause of action between the same parties or their privies. *Res judicata* applies if a court of competent jurisdiction has rendered a final judgment on the merits, the cause of action in each case is identical, and the parties or their privies are likewise identical. The appellate court found that all three elements were met here. Regarding service, the appellate court explained that there is no hard and fast definition of usual place of abode, and the primary consideration is whether service at a specific location is reasonably likely to provide actual notice of the proceedings. Here, Father acknowledged receiving mail at his mother's residence, and he provided that address to the Department of Healthcare and Family Services when he signed a voluntary acknowledgment of paternity. Thus, the trial court's determination that the address was sufficient for substitute service was proper.

See also, ADMISSION OF EVIDENCE, ALLOCATINO OF PARENTAL RESPONSIBILTIES, PARENTING TIME, *In re Marriage of Turner*, 2023 WL 2344360 (Ill. App. 3rd Dist.), March 3, 2023\*

## **MAINTENANCE**

*In re Marriage of Lenahan and Simko*, 2023 WL 2009242 (Ill. App. 2d Dist.), February 15, 2023\*

Marital Settlement Agreement awarded Wife 60 months of reviewable maintenance. Wife filed motion to extend maintenance, which the trial court granted at a slightly reduced rate for a little less than four more years. Husband appealed the extension of maintenance and asked the matter be remanded to the trial court on the issue of reimbursement of the additional maintenance he paid. Appellate court reversed the maintenance extension and did not remand to the trial court on reimbursement. Husband filed motion to compel reimbursement of maintenance in the trial court. Wife filed motion to dismiss citing lack of jurisdiction. Trial court denied Wife's motion. After hearing, Wife was ordered to reimburse Husband. Wife appealed.

Appellate court held that trial court has jurisdiction to consider Husband's motion to compel reimbursement of maintenance because its jurisdiction stems from the judgment for dissolution of marriage and the Marital Settlement Agreement, which both expressly state that the trial court retains jurisdiction to enforce; ultimately Husband was seeking to enforce the terms of the 60-month maintenance provision.

Wife was barred from raising defense of *res judicata* and her argument that the appellate court order reversing the extension of maintenance was a final judgment on the issue of maintenance because she failed to raise the defense in the trial court.

Appellate court rejected wife's argument that her due process rights were violated because she was not given an opportunity to present evidence on the issue of the tax consequences of the maintenance payments. Wife failed to cite any authority on this argument in her brief and thus waived her due process argument. However, the appellate court noted that Wife had opportunity to present evidence related to the tax consequences and did not do so.

\*Unpublished/Rule 23(e)(1) decision.

\*\* Not released for publication in the permanent law reports.

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*In re Marriage of Sessions*, 2023 WL 1860964 (Ill. App. 5th Dist.), February 9, 2023\*

Husband filed a motion to reconsider a dissolution order judgment, arguing that he should be awarded maintenance and reimbursement for attorney fees as he had no income; that his parenting time should be increased; that due to his anxiety he was unable to present adequate evidence at prior hearings; and that as he made payments on the Dodge Ram welding truck, it should have been considered nonmarital property. Trial court granted his motion in part, finding that the truck was his separate property; however, with respect to the remaining aspects, denied the motion. Husband appealed.

On appeal, Husband raised six issues: (1) trial court's decision was against the manifest weight of the evidence, (2) trial court erred in allocating parenting time, (3) trial court erred in classifying the Dodge Ram truck as marital property, (4) trial court erred in distribution of marital property, (5) trial court erred by not appointing him an attorney as he is "mentally challenged" and (6) trial court erred in denying him attorney fees for the attorney that briefly represented him in the proceedings as well as another case he alleged was related to the divorce.

The appellate court found that the denial of the maintenance was not against the manifest weight of the evidence. Husband failed to provide evidence that medical issues impaired his present or future earning capacity. The appellate court also found that the allocation of parenting time was agreed to by both parties and was in the best interest of the minor children. Further, the classification of certain property as marital was not against the manifest weight of the evidence. The appellate court also found that the distribution of the marital property was not an abuse of the trial court's discretion. Moreover, the record reflects that the trial court did not have any reason to be concerned that Husband might be unable to represent himself due to mental incapacity and as such did not err in not appointing him counsel. Finally, trial court did not abuse its discretion in denying Husband attorney fees and ordering each party responsible for their own attorney fees and costs. Although Husband's only source of income was his student loans, Wife used all her income to pay household expenses for herself and the minor children, including the costs of the children's counseling. Husband has never contributed to the children's expenses nor paid any child support. Furthermore, at the time of the hearing the parties had more debts than assets. Accordingly, the judgment of the trial court was affirmed.

*In re Marriage of Salvetiu*, 2023 WL 2499095 (Ill. App. 1st Dist.), March 14, 2023\*

The trial court awarded Wife maintenance for a period of 164 months. Husband appealed claiming that the trial court lacked jurisdiction to award maintenance where Wife did not file a motion seeking maintenance and that the trial court failed to consider the statutory factors.

The appellate court affirmed. Although Wife never filed a separate motion, she did include a general prayer for relief and the appellate court noted that "Illinois courts have long recognized that a court's judgment may be upheld if there was a general prayer for relief and the judgment was supported by the evidence." The appellate court further noted that awarding maintenance is within the statutory bounds of relief a court may grant within dissolution of marriage proceedings. Further, as Husband failed to provide a proper

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record on appeal, the appellate court must presume that an evidentiary hearing occurred and that the court properly considered the statutory factors in making the maintenance award.

*In re Marriage of Kilby*, 2023 WL 2595738 (Ill. App. 3rd Dist.), March 22, 2023\*

Pursuant to the parties' judgment for dissolution of marriage, Husband was ordered to pay maintenance to Wife in the amount of \$8,223.79 per month and said obligation would be retroactive, to pay 50% of the child's college expenses, and contribute \$7,935.00 to Wife's attorney's fees as a result of his repeated failure to comply with discovery. Husband appealed.

Husband argued that the trial court erred by refusing to deduct legitimate business expenses from his income, resulting in an inflated income, and that the three-year income averaging mechanism the court used to determine maintenance was not appropriate for this case. Additionally, Husband claimed that his available cash flow had decreased because of the divorce and therefore, the parties' son was in a better position to pay his own college expenses. Husband further claimed that Wife was also in a better position to pay her own attorney's fees. Finally, he argued the court abused its discretion in denying his motion to reopen evidence by not allowing his accountant expert to testify.

In calculating Husband's 2017, 2018, and 2019 income, the trial court adopted Wife's income chart presented as demonstrative evidence finding his income to be \$268,902.61 in 2017, \$368,895.63 in 2018, and \$478,313.67 in 2019. On appeal, Husband argued these amounts were erroneously inflated by including business expenses that should have been deducted.

As to the matter of calculating maintenance, Husband asserted that specific items were erroneously attributed to his income from the tax years 2017 through 2019. Secondly, he claimed the court misinterpreted Section 505 of the IMDMA in determining whether to include nonaccelerated depreciation and by including it, abused its discretion. Lastly, he conceded the three-year income averaging mechanism might be appropriate, however, it failed to accurately reflect his current and future income and therefore, was an abuse of the court's discretion.

The appellate court found that Section 505 does not require the trial court to deduct nonaccelerated depreciation when determining net business income and while it can be deducted the deduction is dependent on the court determining in its discretion that the nonaccelerated depreciation is a necessary expense for the business. The record reflected that Husband failed to convince the court that the business qualifies for this deduction, and therefore, the trial court did not err in exercising its discretion by refusing to deduct the nonaccelerated depreciation from Husband's income. Regarding Husband's challenge to the maintenance amount, the propriety of a maintenance award was within the discretion of the trial court and would not be disturbed absent an abuse of discretion. The record reflected that Wife was documented as a W-2 employee of the farm, however, the parties' testimonies reflected that this was done to avoid taxation and Wife did not actually receive income. Additionally, the rents paid by the farm were based on factors other than business purposes and were not a necessary business expense. Therefore, the court did not err in refusing to deduct these amounts from Husband's income.

Additionally, the appellate court explained that past income was an appropriate consideration where future and current income remained uncertain. Further, Illinois precedent suggested that the three-year averaging serves to further the ascertainment of a party's accurate net income in

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situations of substantial income variance. Here, due to the significant variance in Husband's annual income, the trial court appropriately applied the three-year income average to determine his net income.

Furthermore, the trial court did not abuse its discretion in ordering Husband to pay 50% of the child's college expenses pursuant to Section 513 of the IMDMA. Additionally, the award of attorney's fees was deemed appropriate as the husband repeatedly failed to comply with discovery, thus warranting the sanction in the amount of attorney's fees incurred as a result. The trial court did not abuse its discretion in denying Husband's motion to reopen proofs as Husband failed to prove that he would be presenting any new evidence and the additional expert testimony was allowed earlier and he failed to provide it at trial.

Therefore, the trial court's decision was affirmed.

*In re Marriage of Stine*, 2023 WL 3596186 (Ill. App. 4th Dist.), May 23, 2023\*\*

The parties, who had been married for 16 years, had a profoundly disabled child, suffering from a unique form of cerebral palsy. The child also suffered from epilepsy, seizures, paralytic scoliosis, chronic back pain, gastrointestinal problems, and severe anxiety and depression. At the time of the trial, the child was 18 and the parties had been separated for more than 10 years and the child was primarily cared for by Wife. Wife testified that she had not been employed in approximately seven years because of the time and effort devoted to caring for the child. The evidence showed that the child required one to seven medical appointments each week which would occur in Springfield, Illinois, and St. Louis, Missouri. Wife also had to administer medications and utilize specialized equipment. Furthermore, Wife spent between 7 and 15 hours per week completing paperwork related to the child's medical services, needed equipment, and benefits. The child was approved for more hours of nursing assistance than she actually received due to staffing shortages. The child was also eligible to live in a nursing home with governmental assistance, but both parties testified that they did not believe the child would receive as good care as she would remaining in Wife's care. The trial court entered a 19-page memorandum opinion finding that Wife was unable to work. Therefore, the trial court declined to impute income to Wife and awarded her maintenance. Husband appealed.

The appellate court affirmed, holding that based on the evidence presented, the trial court could reasonably find Wife was unable to obtain an income-paying job because of the time and effort expended to care for the child.

*In re Marriage of Carbone*, 2023 WL 5604155 (Ill. App.4th Dist.), August 29, 2023\*\*

Husband appealed trial court's award of maintenance. During the marriage, Husband earned over \$380,000 and Wife earned \$90,000 and they maintained a somewhat frugal lifestyle that enabled them to acquire savings and live debt-free.

A spouse is entitled to maintain a reasonable approximation of the standard of living established during the marriage. Where one spouse has a grossly disparate earning potential, financial self-sufficiency (which is just one of a number of factors the court should consider) might not be required. A former spouse is not required to lower the

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standard of living if the payor spouse has sufficient assets to meet his needs and the needs of his former spouse.

Wife's financial affidavit showed a deficit and Husband's had a \$16,145.72 surplus. Wife should not be required to tap into her assets to meet her monthly obligations.

The appellate court rejected Husband's argument that Wife's income and assets made her financially independent. The record was clear that for Wife to maintain a standard of living that included the ability to accumulate savings and live debt-free, she needed support from Husband.

*In re Marriage of Cherry*, 2023 WL 6993099 (Ill. App. 4th Dist.), October 23, 2023\*

Husband filed a motion to modify maintenance to reduce or terminate his monthly payment due to his reduced income; he had a leg injury he claimed prevented him from resuming work as a union ironworker. Husband chose to retire rather than seek disability benefits. The trial court found Husband's retirement was not in good faith and denied his motion and the appellate court affirmed.

Husband argued his injury and subsequent retirement as well as Wife's employment constituted a substantial change of circumstances warranting a downward modification. The trial court denied Husband's motion, finding there had been a substantial change of circumstances but that a modification was not warranted based on the evidence, statutory factors, and credibility of the witnesses. The trial court found Husband not credible. The trial court found Wife had made good faith efforts to obtain employment and that she was unable to meet her needs; Husband was able to meet his needs, as he lived with his new wife, and she paid the expenses.

Husband tried to argue that the Marital Settlement Agreement should be interpreted that Wife obtaining employment automatically necessitates a modification of maintenance. The court rejected this and agreed with the trial court that Wife's employment simply constitutes a substantial change in circumstances, but that Husband would still need to show that the statutory factors favored a modification. Here, the statutory factors did not support a modification. There is no automatic modification based simply on Wife's employment. Husband attempted to utilize this argument on appeal but did not at trial and the appellate court found that he forfeited the issue, and even though they chose to address this issue on the merits, it was in fact waived by Husband.

The appellate court found the trial court did not err in its consideration of the requisite statutory factors.

*In re Marriage of Portegys*, 2023 WL 7183553 (Ill. App. 3rd Dist.), November 1, 2023\*

The parties had been married 24 years at the time the dissolution matter was filed. The parties agreed that Husband would pay permanent maintenance to Wife in the amount of \$2,100.00 per month. At the time of the divorce, Husband was earning \$85,000.00 annual gross income and Wife received social security disability benefits totaling \$9,600.00 annually. Approximately 17 years later, Husband sought to terminate his maintenance based on his retirement. The parties entered an agreed order denying the motion but reducing the monthly maintenance amount to \$984.00. Four years later, Husband filed a second motion seeking to terminate his maintenance

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obligation, alleging that Wife was living in an assisted living facility after having relinquished her assets to the facility. Husband also claimed that Wife was receiving Medicaid to aid in payments to the facility. Husband requested that the court appoint a fact-finding agent to investigate Wife's situation; said request was denied. Wife claimed she still required the maintenance to pay for her expenses. Both parties agreed that Wife's medical condition prevented her from obtaining employment. Whereas, at the time of hearing, Husband had gone back to work and had increased his income. After an analysis of the factors set forth in Section 510 of the IMDMA, the trial court held that the totality of circumstances weighed against a finding of a substantial change in circumstances to support Husband's petition. Husband appealed, claiming that the analysis was incorrect and that the trial court's refusal to appoint a fact-finding agent was a reversible error.

The appellate court affirmed, holding that the trial court did not abuse its discretion in its analysis of the statutory factors and denial of Husband's motion. The appellate court noted that Husband failed to present credible evidence regarding the alleged government benefits Wife was receiving and that the duration of maintenance payments had not yet reached the duration of the marriage. Furthermore, the trial court's denial of the request to appoint a fact-finding agent was proper as it was Husband's burden to establish a change in circumstances and the responsibility fell on him to discover the facts that supported his petition. The appellate court noted that Husband chose not to request the documents from Wife or her counsel or to call her as a witness at the hearing.

*In re Marriage of Tenhouse*, 2023 WL 6386567 (Ill. App. 4th Dist.), October 2, 2023\*

Wife was awarded "lifetime maintenance" in 2019. In 2020, Husband filed to terminate maintenance due to his retirement. Husband retired and both parties began receiving pension payments from Husband's pension. The trial court granted Husband's petition to terminate maintenance. The appellate court affirmed.

A primary function of maintenance is to limit income disparities between parties to a divorce. Wife was incorrect in her argument that retirement distributions from marital property should never serve as a substitute for maintenance.

The trial court concluded that Husband's retirement was made in good faith and was not made for the purpose of avoiding his maintenance obligation. The crucial consideration was whether the change was preempted by a desire to evade financial responsibility.

The trial court was in the best position to observe testimony and credibility.

The trial court implied that Wife could make up the difference between the maintenance and the lesser monthly pension benefit by seeking part-time employment.

The proper consideration is not whether the change in circumstances was brought about by the payor but whether any change in employment status of either party had been made in good faith. The trial court found Husband's change in employment was made in good faith.

Husband testified he had always planned to retire in his fifties due to the mental stress of the job. Husband's retirement coincided with the children living on their own and made sense to the trial court, and the appellate court deferred and affirmed, so here a "lifetime" maintenance award lasted one year.

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*In re Marriage of McDowell*, 2023 WL 7222064 (Ill. App, 2d Dist.), November 2, 2023\*

Pursuant to the parties' judgment, Husband was ordered to pay permanent maintenance of \$3,000 per month. Said maintenance was based on Husband's annual gross income of \$120,000 earned as a dentist. Approximately nine years later, Husband sought to terminate and/or modify his obligation. At the time, he was 68 years old and alleged that his income had substantially decreased as his patients were dying or retiring and moving away. Additionally, Husband argued that his expenses had increased. However, the evidence showed that Husband had various financial accounts totaling more than \$400,000 and was also expecting to receive an inheritance of approximately \$570,000 to \$600,000. The trial court held that Husband could still meet his maintenance obligation, and that Wife was still in need of maintenance. The trial court noted that Husband's assets could earn significant income from which he could also draw to meet his obligation. Husband appealed.

The appellate court affirmed finding that the trial court properly weighed the factors set forth in both Section 504 and 510 of the Illinois Marriage and Dissolution of Marriage Act, and therefore did not abuse its discretion. The appellate court further noted that the trial court could take judicial notice of the fair earning powers of money or invested capital over a certain period.

*In re Marriage of Bonzani*, 2023 WL 8281889, (Ill.App. 3 Dist.), November 30, 2023\*

The parties had an approximate 9-year long marriage. The judgment required Husband to pay unallocated support to equalize the parties' base incomes. Said support payments were to continue until a date certain in 2018 and was subject to review upon proper petition and notice filed by Wife. The judgment held that if Wife did not file said proper petition prior to a date certain in 2018, that support would be barred thereafter. Support was subject to modification or termination as provided under Section 510 of the IMDMA. In June 2014, the trial court entered an order modifying the judgment, replacing Husband's support obligation with fixed child support and maintenance payments. The new maintenance obligation was determined to be non-modifiable as to amount but not duration, and non-terminable, but maintenance was subject to review as provided for in the existing judgment. The 2014 order stated that all other terms not modified by the order should remain in full force and effect. In September 2018, Wife filed a petition to extend her maintenance payments on a permanent basis. In January 2019, Husband petitioned to terminate, abate, and/or reduce his maintenance obligation due to a substantial change in circumstances as a result of bouts of unemployment and underemployment, and alleged that Wife failed to take reasonable steps to become self-supporting. The trial court granted Wife's petition to extend her maintenance indefinitely. Husband appealed, arguing that the trial court erred in declining to review the monthly maintenance amount in awarding permanent maintenance without considering Wife's efforts to become financially independent.

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The appellate court reversed in part and affirmed in part. First, the appellate court did not agree with Wife's argument that under the 2014 order, the new maintenance was not subject to modification under any other circumstances. Specifically, the 2014 order incorporated the terms of the judgment not modified within the order, including the provisions that stated maintenance was modifiable in accordance with Section 510 of the IMDMA. The appellate court emphasized that the non-modifiability provision of the 2014 order did not have a time limit, and that it remained reviewable as set forth in the initial judgment. The appellate court therefore reversed and remanded the trial court to review the maintenance amount consistent with section 504(b-1)(1)(A) of the IMDMA. As for permanent maintenance, Husband's argument revolved around Wife not rehabilitating herself and becoming self-sufficient. The appellate court noted that neither the judgment nor the 2014 order stated a rehabilitative nature to Wife's maintenance. The appellate court also found that Husband did not support his claim with sufficient evidence or legal authority. Therefore, the appellate court affirmed the award of permanent maintenance.

*In re Marriage of Goldner*, 2023 WL 8711763 (Ill.App. 1 Dist.), December 18, 2023\*

Wife appealed the trial court's modification of Husband's maintenance obligation due to his retirement. Wife was originally awarded \$25,000 per month for maintenance. Husband stopped paying while the matter was pending. The circuit court chose to reduce the maintenance amount rather than terminate. Whether a spouse may rely on retirement as a change of circumstances to justify a modification depends on the circumstances of each case and relevant factors include age, health, motives, timing, and ability to pay support after retirement and former spouse's ability to provide for herself. Here, Husband was 72 and had a heart condition. Once the court determines there has been a substantial change in circumstances, the court may but is not required to modify a maintenance award. The court must then weigh the original factors for maintenance found in Section 504(a). Here, the circuit court also found that Wife's needs were sufficiently met by Husband's property settlement payments alone (he was making payments to Wife for her interest in the business). However, Husband still had the ability to pay spousal maintenance due to his various assets and his maintenance was only reduced.

Wife also argued that the business's retained earnings should be imputable as income to Husband for support calculations. The appellate court found that the trial court did not err in declining to impute retained earnings to Husband's income for maintenance calculations where it found Husband's expert's testimony credible in explaining the business's capital retentions and operational needs as the purposes of the retained earnings, and found it was not to manipulate or conceal his business income.

Husband had no justification to stop paying Wife the original amount of maintenance while his petition was pending. The appellate court reversed the trial court's refusal to require the Husband to pay interest on the modified maintenance and held that Husband owed statutory interest on his withheld maintenance and remanded to the circuit court to

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determine if the amount should be calculated based upon the original higher maintenance award or the lower modified amount.

*In re Marriage of Larsen*, 2023 WL 9009077 (Ill.App. 1 Dist.), December 29, 2023\*\*

Alleging cohabitation, Husband filed a petition to terminate Wife's maintenance which was defined in the Marital Settlement Agreement as 120 months of nonmodifiable "lifetime indefinite maintenance", and provided that after 120 months Husband was allowed to petition to modify his maintenance obligation based on the following conditions: (1) death; (2) the date of Wife's possible remarriage; or (3) Wife's cohabitation with another person on a resident, continuing, and conjugal basis. Wife's motion for directed finding was granted and Husband appealed. The appellate court affirmed the trial court's decision.

A motion for directed finding pursuant to section 2-110 of the Code of Civil Procedure involves a two-pronged test: first, the court must determine, as a matter of law, whether Husband had presented a *prima facie* case on his petition, meaning he had to present some evidence on every element essential to his case. If the court found that Husband did not do so, then the motion for directed finding would be granted; if the court found that Husband did meet his *prima facie* burden then the court moves to the second prong of analysis which is a consideration of the totality of the evidence presented, including evidence favorable to Wife. The standard of review of the appellate court depends upon which prong the trial court made its ruling on. Here, the trial court assessed the motion under the second prong and the standard of review was manifest weight of the evidence.

The determination of whether an ex-spouse is cohabitating with a new partner on a resident, continuing, and conjugal basis involves an analysis of facts that would indicate that the ex-spouse receiving maintenance has entered into a *de facto* marriage. The key difference between an intimate dating relationship and a resident, continuing, and conjugal relationship is whether the parties have become financially intertwined.

The court utilized the six-factor *Herrin* test to assess whether Wife was cohabitating. The court analyzed the following factors: the length of the relationship; the amount of time spent together; the nature of activities engaged in, such as socializing, chores, meals, holidays, travel, entertaining as a couple, repairs, free access to each other's residences; and the interrelation of personal affairs, such as commingling finances, maintaining separate households, and sharing joint property.

The appellate court analyzed and summarized the case law and specific facts that did or did not indicate cohabitation. Here, the couple did not have a day-to-day existence and essentially operated as two separate households with shared time between them. The court found that 40 overnights over the course of a few years was not excessive. Husband's investigator testified that he did not believe the couple spent more than 50% of their time together based on his surveillance of the couple during a three- or four-month period. Therefore, Wife did not cohabit.

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See also, CLASSIFICATION OF ASSETS, *Neis v. Neis*, 2023 WL 6811132 (Ill. App. 1st Dist.), October 16, 2023\*

See also, DISCOVERY, *In re Marriage of Yearman*, 2023 WL 5199473 (Ill. App. 3rd Dist.), August 14, 2023\*

See also, INVALIDATION OF MARRIAGE, *In re Marriage of Andrew*, 2023 WL 4036605 (Ill. App. 1st Dist.), June 16, 2023\*\*

See also PROPERTY, *In re Marriage of English*, 2023 WL 356193 (Ill. App. 5th Dist.), January 23, 2023\*

See also, ALLOCATION OF MARITAL ASSETS, *In re Marriage of Leitzen*, 2023 WL 3316884 (Ill. App. 4th Dist.), May 9, 2023\*

See also, ATTORNEY'S FEES, *In re Marriage of Hyman*, 2023 WL 3221091 (Ill. App. 2d Dist.), May 3, 2023\*

See also, CHILD SUPPORT, *In re Marriage of Afira Qureshi and Muhammad Asif*, 2023 WL 6144468 (Ill. App. 5th Dist.), September 20, 2023\*

See also, ALLOCATION OF PROPERTY, *In re Marriage of Almodovar*, 2023 WL 7489949 (Ill. App. 2d Dist.), November 13, 2023\*

See also, ALLOCATION OF PROPERTY, *In re Marriage of Grant*, 2023 WL 7295195 (Ill. App. 5th Dist.), November 3, 2023\*

See also, VALUATION OF PROPERTY, *In re Marriage of Bornhofen*, 2023 WL 8780194, (Ill.App. 1 Dist.), December 19, 2023\*

## **MODIFICATION OF ALLOCATION OF PARENTAL RESPONSIBILITIES, PARENTING TIME**

*In re Marriage of Barnett*, 2023 WL 21691 (Ill. App. 2d Dist.), January 3, 2023\*

Mother appealed trial court's order granting in part Father's petition to modify parental decision-making responsibility and parenting time. She contended that the trial court's finding of a substantial change in circumstances warranting modification was against the manifest weight of

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the evidence. Further, she argued trial court erred in finding that the modification was necessary to serve the minor child's best interests.

Appellate court found that the trial court's finding of a substantial change in circumstance was not against the weight of the evidence, as it was supported by the record. Additionally, the trial court's determination that modification would serve the minor child's best interest was not against the manifest weight of the evidence as it was based primarily on the finding of instability in the minor child's life. The minor child was with Mother and had moved around multiple times as Mother went through multiple romantic relationships. Further, the appellate court found no abuse of discretion and that the trial court did not err in denying Father's motion for sole parental decision-making or in granting Father's motion to modify parenting time and designate him the residential parent for school purposes.

*In re Marriage of Kelly*, 2023 WL 371234 (Ill. App. 3rd Dist.), January 23, 2023\*

Parties were divorced in 2017. Trial court entered a judgment for dissolution and a parenting allocation judgment awarding custody of parties' two children to Mother and no parenting time to Father. In 2020, trial court entered an agreed order allowing Father to have parenting time. In 2021, Mother filed a petition to restrict Father's parenting time, after which Father filed a petition for relocation and modification of decision-making and parenting time. In 2022, after conducting a hearing on the petitions, trial court entered an agreed order transferring custody of the parties' children to Father. Mother filed a motion to vacate the order, which the trial court denied. Mother appealed, contending she was under duress when she agreed to the order, and that trial court lacked authority to enter the order, as Father's petition was improper.

Appellate court found that the trial court did not abuse its discretion in its denial of Mother's motion to vacate the agreed order to transfer the custody of the children to Father, as Mother failed to present credible evidence of being under duress when the order was entered. Therefore, trial court's denial of Mother's motion to vacate was affirmed.

*In re Marriage of Tate and Mack-Tate*, 2023 WL 2017403 (Ill. App. 2d Dist.), February 15, 2023\*

Mother appealed trial court order allowing parties' minor child to attend school in Washington, D.C. and reside with his paternal grandmother during the school year. She contends that the trial court exceeded its authority in allowing the minor to enroll in Washington, D.C. high school which effectively reallocated and terminated her significant decision-making authority for the minor's education. Trial court found that it was in the child's best interest for the child to attend the Washington, D.C. high school as it provided him an advantageous academic opportunity and his grandmother could provide appropriate housing, transportation, and supervision.

Appellate court found trial court's decision that the child attending the high school in Washington, D.C. and residing with his paternal grandmother was in his best interests and not against the manifest weight of the evidence. Therefore, the decision of trial court was affirmed.

*Johnnie C. v. Tanishia Y.*, 2023 WL 1881935 (Ill. App. 3rd Dist.), February 10, 2023\*

Father petitioned for allocation of parental responsibilities seeking visitation with parties' minor child. During the parties' interviews with the GAL, it was revealed Father had paranoid schizophrenia and expressed a sexual interest in underaged girls. The GAL recommended he

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undergo mental health and sex offender evaluations and treatment prior to being allowed visitation with the minor child. Based on the GAL report, trial court denied the petition. Father filed a subsequent motion seeking visitation, contending he was accused of a crime he did not commit. Trial court denied the motion as Father was incarcerated on pending burglary and assault charges and as a result could not be present for the proceedings. Father appealed.

On appeal, Father contended trial court erred in denying his requests for parenting time based on his arrests and detentions interfering with reunification efforts with the minor child. Appellate court found Father failed to prove that a change of circumstances occurred that warranted a modification of the parental responsibilities. Therefore, trial court's denials of Father's requests for parenting time were affirmed.

*In re Former Marriage of Jones*, 2023 WL 2625862 (Ill. App. 1st Dist.), March 24, 2023\*

The parties shared joint decision-making for the child's education, healthcare, religious upbringing and participation in extracurricular activities. Mother wanted the child to receive the Covid-19 vaccine and Father did not. Mediation was unsuccessful. Mother filed a motion with the court seeking for the ability to have the child vaccinated. At the hearing, only Mother and Father testified. Mother testified that the child had missed in-person learning on seven days as a result of his exposure to others testing positive for Covid-19, that he missed certain activities, and that she (a dentist) was concerned for her patients as well as her parents as a result of the child not being vaccinated. Wife produced various documents pulled from the CDC's website, the FDA's website and the Illinois Department of Public Health's website. The trial court took judicial notice of the documents and entered them into evidence. The documents all recommended that children over five be vaccinated. After Mother's case in chief, the trial court denied Father's motion for a directed verdict. Father testified that the child did well while learning remote, that he was able to go on family trips, attend jiu-jitsu lessons, participate in Boys Scouts, go on a school field trip and have sleepovers with friends. Father was concerned with how fast the vaccine was produced and rolled out as well as the potential side effects, including myocarditis. Father also produced documents from various government websites, including the CDC's website titled "Vaccine Adverse Event Reporting Systems." Ultimately, the trial court opined that it appeared that both parties had the child's best interest at heart but that, after considering all the factors and evidence, it was in the child's best interest to receive the vaccine. The trial court modified the parties' judgment such that Mother had sole decision-making as to the limited issue of the child being vaccinated and receiving any boosters. Father appealed.

Father argued that the trial court's ruling was against the manifest weight of the evidence. The appellate court disagreed, holding that the trial court could modify an allocation judgment if a substantial change in circumstances has occurred and the modification is necessary to serve the child's best interests. The trial court specifically stated that it was applying Section 610.5 of the IMDMA and that it considered the factors set forth in the statute. Nothing requires the trial court to make explicit findings as to each factor or even to refer to every factor. The appellate court noted that it may affirm the trial court's ruling if there is any basis in the record to support the findings. The trial court also found that there was no dispute that the pandemic was the substantial change in circumstances needed to modify a parenting plan. Father failed to produce any evidence supporting that the trial court did not properly apply the statute. Therefore, the appellate court affirmed the trial court's ruling.

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Father further argued that the trial court erred in taking judicial notice of the information produced by Mother from the government websites. The appellate court held, consistent with prior law, that information on government websites is sufficiently reliable such that the court may take judicial notice of the information. Additionally, the trial court has broad discretion regarding the admission of evidence.

Father also argued that the trial court erred in denying his motion for directed verdict. The appellate court noted that the decision to deny the motion was merged into the final judgment after a hearing on the merits and therefore, was not subject to review.

*In re Marriage of Mendoza*, 2023 WL 2681873 (Ill. App. 1st Dist.), March 29, 2023\*

The trial court conducted an evidentiary hearing and granted Mother's petition to modify a parenting arrangement. Father appealed, arguing the trial court erred by relying on recommendations in a position statement submitted by the child's representative and that the trial court committed reversible error allowing admission of hearsay statements; Husband also argued that the modification was against the manifest weight of the evidence. The appellate court affirmed the trial court's decision.

Father argued that the trial court's reliance on the child representative's position statement violated Section 506(a)(3) of the IMDMA which provides that the child representative shall offer evidence supported by legal arguments and shall not render an opinion, recommendation or report to the court and shall not be called as a witness. Father argued that the child representative's issuance of a position statement violated the statute. The appellate court stated that the position statement consisted of the results of her investigation and constituted evidence-based legal argument and not merely her personal opinion.

Father also argued that he was prejudiced by hearsay statements made by Mother during the trial that consisted of Mother's testimony regarding what the DCFS caseworker relayed to her during the investigation. Mother testified that the caseworker came to her home and informed her about a report filed against her. However, the trial court had already received and reviewed the DCFS reports. The appellate court held that Mother's testimony regarding her communications with the DCFS caseworker was limited testimony that would not warrant a reversal as it was not "damning" or "highly prejudicial."

Finally, the appellate court found that the trial court's decision to modify the parenting time schedule and allocate a majority of time to Mother was not an abuse of discretion or against the manifest weight of the evidence as the record reflected that the circuit court expressly considered the factors delineated in Section 602.7 of the IMDMA in evaluating the best interest of the children.

*In re Marriage of Strezo*, 2023 WL 2644193 (Ill. App. 3rd Dist.), March 27, 2023\*

The parties divorced in 2016, and a Judgment for Dissolution of Marriage and Final Parenting Plan and Judgment were entered by agreement. The parenting plan was subsequently modified by agreement in 2018 and again in 2020. In 2021, Husband filed a motion to modify the parenting plan, as well as a motion to enforce or clarify the parenting plan. Husband was seeking to modify the holiday schedule to be consistent with the parenting time the parties had been exercising for the holidays, the transportation provision such that the parties shared driving responsibilities, and to modify the right of first refusal provision. Husband was also seeking to clarify whether or not

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the children would spend the night with a parent allocated holiday parenting time the night before the holiday. Husband alleged that the parties had been doing so leading up to the filing of his motion. Wife disagreed with Husband's recitation of how the two had been exercising parenting time in the past. The trial court ultimately denied Husband's motion to modify and clarified the parenting plan by deleting the holiday overnight provision which conflicted with the holiday schedule provision. Husband appealed, contending that the trial court erred in denying the motion to modify and deleting the provision. Specifically, Husband alleged that it was an error to deny the motion to modify because he had established that the parties had reached a new agreement and that there had been a substantial change in circumstances. Husband also alleged that it was error to strike a provision in the parenting plan because the parties had been consistently following said provision.

The appellate court affirmed. In order for a trial court to grant a motion to modify parenting time, the movant must prove that the modification was necessary to serve the children's best interests, and either a substantial change in circumstances had occurred or the modification reflected the actual arrangement under which the child had been receiving care, without parental objection, for the six months preceding the filing of the petition for modification. Husband failed to present evidence or even argue that any of the changes to the parenting plan he proposed were in the best interests of the children, that there was a substantial change in circumstances, or that the proposed changes were in operation for the preceding six months. Regarding the striking of a provision, the appellate court found that the deleted provision clearly conflicted with another provision, causing confusion, and there was no evidence that the parties had consistently followed the stricken provision, and thus it was necessary to strike same.

*In re Parentage of C.H.P.*, 2023 WL 3002479 (Ill. App. 4th Dist.), April 19, 2023\*

The parties' Allocation Judgment, entered on July 8, 2020 in Ohio, allocated the parties equal parenting time and joint decision making responsibilities. In December 2021, both parties filed petitions to modify the parenting plan. Mother argued modification was warranted for significant changes in circumstances resulting from Father moving to Indiana, Mother moving to Illinois, and the child starting kindergarten. She requested that she be allocated a majority of the parenting time. Father sought to hold Mother in indirect civil contempt for denying him equal parenting time since August 14, 2021, and enrolling the child in kindergarten in Illinois without his agreement. He also sought that he be allocated a majority of the parenting time and he sought leave to enroll the child in school in Indiana. After trial, the court found both parties to be very balanced and both capable of providing a safe and nurturing environment for C.H.P. and had it not been for the geographical distance, the 50/50 parenting plan would have succeeded. The Court considered the factors set forth in Section 602.7. After careful consideration, the trial court found that it was in the best interest of the child to grant Mother's petition and deny Father's petition. In denying Father's petition, the trial court entered an order finding Father failed to prove Mother's act of enrolling child in school was contemptuous, and when child was returned to Mother, he was six years old and subject to compulsory school attendance in Illinois.

Father appealed contending that granting Mother a majority of the parenting time and enrolling the child in school in Illinois was against the manifest weight of the evidence. He also appealed the trial court's denial of his petition to hold Mother in indirect civil contempt.

On appeal, Father argued the following: (1) the trial court erred in using December 3, 2021, as the start date of considering the third factor set forth in Section 602.7; (2) the court erred in denying

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his contempt petition; and (3) granting Mother's petition and denying his petition was against the manifest weight of the evidence.

The appellate court found that Father's first argument lacked any authority and failed to demonstrate that the custody determination was against the manifest weight of the evidence. The difference in dates would not have resulted in a different outcome. As to the matter of the contempt petition, the record does not reflect that Mother willfully and contumaciously violated the allocation judgment and this finding was not against the manifest weight of the evidence. Further, the appellate court found the trial court appropriately considered the relevant statutory factors in its determination of the child's best interests. Therefore, the trial court's judgment was affirmed.

*In re Marriage of Valus*, 2023 WL 3319331 (Ill. App. 3rd Dist.), May 9, 2023\*

The parties' allocation judgment provided for joint decision-making responsibilities for the minor children. Father filed a petition to modify the allocation judgment seeking to have the minor children receive school-required vaccinations. Mother filed a petition to modify, seeking to reduce Father's parenting time. All issues were settled in a pretrial conference except the vaccination issue which was decided after an evidentiary hearing. Mother contested vaccinations based on religious reasons. The Guardian ad litem (GAL) testified that he believed vaccinations were needed. Mother did not present any evidence as to why she changed her position on vaccinations since the oldest child had received vaccinations. The trial court found it was in the children's best interest to receive the school required vaccinations and noted that the older child had been vaccinated before entry of the allocation judgment which awarded the parties joint decision making on medical matters.

Mother argued that the trial court's ruling constituted an injunction since decision-making was not changed, it was just ordered that the children should receive vaccinations, and that Father did not satisfy the statutory and procedural requirements for an injunction. The appellate court rejected this argument and found the trial court made a slight modification to the allocation judgment, and did not enter an injunctive order.

The appellate court found that the trial court's granting of Father's petition to modify was well supported by the evidence, and that Mother stopping the vaccinations without Father's knowledge or discussing it with him was a change in circumstances, and that the modification to require vaccines was in the children's best interest. The appellate court further affirmed the trial court's denial of Mother's motion for directed finding at the hearing after reviewing the evidence presented in Father's case-in-chief.

The appellate court also affirmed the trial court's denial of Mother's request for a rehearing. Mother argued the GAL's testimony that vaccines were in the children's best interest was inadmissible because it was based on the GAL's review of medical journals that were not admitted into evidence. Mother did not object when the GAL testified at the hearing. The appellate court found that the GAL's testimony was properly admitted. The fact that the medical journals that the GAL reviewed were not admitted into evidence went to the weight to be given to the GAL's testimony and not to its admissibility. The trial court also had specified later that it did not need to give any weight to the medical aspects of the GAL's testimony because Mother did not raise any argument at the hearing regarding adverse effects of the vaccines.

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*In re Marriage of Trend*, 2023 WL 5092821 (Ill. App. 3rd Dist.), August 8, 2023\*

Pursuant to the parties' judgment, Mother was awarded majority parenting time and the parties shared decision-making. Following post decree proceedings, Father sought and obtained an order of protection against Mother which provided him with physical custody of the children. Thereafter, an agreed order was submitted providing Mother with supervised parenting time. The agreed order did not address decision-making responsibilities. Father and Mother both filed additional motions, including Mother's motion for a final order on parental responsibilities as Father contended that, with the change in physical custody, he was also awarded sole decision-making responsibilities. The trial court agreed with Father and entered an order providing Father with sole decision-making responsibilities based on the previous agreed order granting Father physical custody. Mother appealed.

The appellate court reversed, finding that the parties' marital settlement agreement provided for joint legal custody of the children which included the joint authority to make major decisions on behalf of the children, and the agreed order setting forth the supervised parenting time could not be reasonably construed as modifying the terms of the settlement agreement. The case was remanded for further proceedings.

*In re Marriage of Bastian*, 2023 WL 5103984 (Ill. App. 3rd Dist.), August 9, 2023\*

Father filed a petition to modify his parenting time and Mother filed a motion to dismiss. The trial court denied Mother's motion and increased Father's parenting time. The appellate court affirmed trial court's rulings.

Trial court found the children's increased activities were a substantial change in circumstances. The trial court found it was in the children's best interest to spend more time with Father and awarded some, but not all the time, that Father requested.

The appellate court found the trial court's denial of Mother's 2-615 motion to dismiss appropriate as Father did set forth in his petition to modify that a change of circumstances occurred and that a modification was in the children's best interest.

The trial court's finding that the child's extracurricular activities were increasing and affected Father's alone time with the children was not against the manifest weight of the evidence.

*In re Marriage of Hinnen*, 2023 WL 3787339 (Ill. App. 2d Dist.), June 2, 2023\*

Father filed a petition seeking to change residential custody of the minor child who had autism and significant behavioral issues including violent outbursts. A few months before Father filed his petition, the parties had litigated Mother's petition to relocate, which was granted. Father filed his petition and alleged a substantial change of circumstances, claiming that Mother moved, did not provide her address, failed to provide the child with

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health care and an education, and that the child's behavior had deteriorated in Mother's care. Father also alleged alienation. Father had his sister, a board-certified mental health nurse practitioner, testify as an expert witness about what she described as Mother's "psychopathology" which she testified she had personally observed over the years and during Father's video visits with the child.

The trial court found no substantial change of circumstances and denied Father's motion. The court noted that further deterioration of the parties' relationship was all that had changed. The court discounted the sister/nurse's testimony because she did not conduct a formal evaluation.

The appellate court deferred to the trial court's assessment of Mother's credibility. Mother discounted many of Father's allegations. The appellate court noted it was clear that both parties were combative and blamed each other and that both parties had not followed the Allocation Judgment.

The appellate court also affirmed the trial court's denial of Father's motion for a psychological evaluation of Mother finding that Father failed to tie Mother's behavior to his conclusory and speculative allegations, made by his sister, the nurse, concerning Mother's psychological health and that it was reasonable for the trial court to discount the allegations in its assessment for the need of an evaluation.

*In re Matter of Billy Meyers and Jocelin Robledo*, 2023 WL 5608931 (Ill. App. 3rd Dist.), August 30, 2023\*

Per the parties' agreed parenting plan, they shared joint decision-making responsibilities for the child, and Mother's current address was to be utilized for purposes of school enrollment. Father filed a motion alleging that the parties were unable to reach an agreement as to where to register the child for fifth grade. Father wanted the child to attend a private Catholic school and offered to be solely responsible for the cost. Mother wanted the child to continue in the public school in her district. Due to the Covid-19 pandemic, the only data available for the public school to be compared to was class size. Mother argued that Father was seeking a modification. Father argued that it was not a modification because the child could still utilize Mother's address for school enrollment purposes if the child attended the private school. The trial court believed the private school to be the superior opportunity and ordered that Father could enroll the child in the private school. The trial court stated that this was a decision the parties could not agree on and not a modification. Mother appealed.

The appellate court reversed, finding that the trial court did, in fact, modify the parenting plan, noting that the parenting plan did not specify whether the child would attend public or private school. Therefore, when the trial court entered an order allowing Father to enroll the child in private school and directed Father to pay for the costs of said education, the trial court modified the plan. The trial court failed to make any findings consistent with Section 610.5 of the Illinois Marriage and Dissolution of Marriage Act and there was no

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indication that the child was struggling and needed a change. Thus, the trial court's order was against the manifest weight of the evidence.

*In re Marriage of Taylor S. Petitioner-Appellee, and Cameron S. Respondent-Appellant*, 2023 WL 6294151 (Ill. App. 4th Dist.), September 27, 2023\*

The trial court approved a parenting time schedule in 2021 which provided flexibility for Husband's parenting time to allow Husband to exercise additional parenting time and to ensure that the child could spend time with the child's half-sibling, Husband's child from another relationship. In 2022, Husband filed a motion to modify parenting time pursuant to section 610.5(e) of the Act, alleging that a modification was necessary because the parties exercised a parenting-time schedule that deviated from the court-approved parenting time plan. Husband specifically stated that since July 2022, the parties began exercising equal parenting time on a week-on, week-off basis. Husband argued that the court could modify a parenting plan without a showing of substantial change in circumstances if the modification was in the child's best interest and the modification reflected the actual arrangement under which the child had been receiving care, without parental objection, for the six months preceding the filing of the petition for modification.

Wife filed a motion to dismiss, which was granted by the trial court, but Husband was granted leave to file an amended motion to modify. Husband then filed his amended motion to modify, alleging, inter alia, that from August 2021 to September 2022, the parents exercised equal parenting time on a week-to-week schedule, and that the parents agreed with the entry of the parenting plan that they would exercise equal parenting time on a week-to-week basis. Wife moved to dismiss again, to which the trial court granted, finding that there had not been a substantial change in circumstances since the entry of the parenting plan. The trial court specified that the order was final and appealable with no just cause to delay its enforcement. Husband appealed.

Wife moved to dismiss the appeal for lack of jurisdiction, stating that the trial court's order was not final because it was not dismissed with prejudice. The appellate court denied the motion to dismiss, finding that it did have jurisdiction. On appeal, Husband argued that the trial court erred in dismissing his petition to modify parenting time because there was a substantial change in circumstances and it was in the child's best interest to modify the parenting plan, and that pursuant to 610.5(e) of the Act, the court could modify the parenting plan without a showing of changed circumstances where the modification reflected the actual arrangement under which the child had been receiving care, without parental objection, for the six months preceding the filing of the petition for modification.

The appellate court affirmed. After consideration of the factors in section 610.5 and review of the record, the appellate court found that Husband failed to allege facts sufficient to show a substantial change in circumstances. Furthermore, the appellate court held that the parties' parenting plan already allowed for alternative parenting time to consider Husband's parenting schedule with his son from another relationship and contemplated overall flexibility. Additionally, the appellate court held that Husband did not make specific

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allegations concerning the best interest of the child. The appellate court also found that the parties exercising week-to-week parenting time from August 2021 to September 2022 was insufficient to warrant a modification of the plan that reflected an actual arrangement under which the child had been receiving care, without parental objection, for the six months preceding the filing of the petition for modification, as the time frame was not the six months immediately preceding the filing of his petition, which was not until December 2022, and then his amended motion in March 2023. The appellate court confirmed that the time frame to justify modification under that section of the Act required that the parenting arrangement take place during the six months immediately preceding the filing of the petition to modify, which was not the case here.

*In re Marriage of Johnson and Gorrill*, 2023 WL 8599353 (Ill.App. 2 Dist.), December 12, 2023\*

The parties were married in 2013. One child was born to the parties. Husband filed his petition for dissolution of marriage in 2018. The parties entered into an agreed parenting plan, which awarded the parties joint decision-making authority in all areas except that Wife would be solely responsible for decisions relating to the child's education and health. The parties agreed that they would share all information and records pertaining to the child. Wife was designated as the primary residential parent, and the parties had approximately equal parenting time. Wife moved to modify the parenting plan to reflect the parties' course of conduct, and subsequently filed an amended motion, alleging that Husband was only sporadically exercising his weeknight parenting time and was not exercising his weekend parenting time.

Wife's motion to modify was denied, where the trial court held that Wife failed to show a significant change in circumstances, since Husband was exercising his parenting time at the time of the hearing. The trial court further stated that it did not hear any evidence indicating that reducing Husband's parenting time would be in the child's best interests. Wife again filed another motion to modify the parenting plan, alleging that the child attending school and Husband's refusal to transport him to school, was a substantial change in circumstances that warranted modification. Wife further alleged that the parties had informally amended the parenting time a few months prior to her filing the motion. Husband agreed that a substantial change in circumstances existed because Wife moved to a new city, which made transporting the child more difficult, but asserted that it would not be in the child's best interest to reduce his parenting time. Husband then filed his own motion to modify parenting time and decision making, claiming that Wife essentially failed to coparent and was neglecting her role as primary parent for various reasons. A guardian ad litem (GAL) was appointed and issued her recommendations to modify the parenting schedule and found that it was not in the child's best interest to reallocate any of the decision-making responsibility to Husband due to the parties' inability to coparent, and the child was well adjusted in his community and school and was mentally and physically healthy. When making its determination pertaining to the modification of parenting time and decision-making, the trial court acknowledged that it considered the law, existing

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parenting plan, testimony, exhibits, and the GAL's report. The trial court held that the parties now living an hour away from each other did not constitute a substantial change in circumstances because the relocation of the parties was anticipated. However, the trial court found that the child starting school constituted a substantial change in circumstances, especially considering that the parties had been exercising their own schedule due to that fact. The trial court did not modify the allocation of decision-making authority but modified the parenting schedule. Wife moved to reconsider, and Husband filed a notice of appeal while Wife's motion was still pending. Wife's motion to reconsider was denied, and the appeal followed.

The appellate court affirmed. Husband essentially argued that the trial court erred by reallocating 24 of his overnights, refusing to modify the decision-making authority, and finding that a substantial change in circumstances occurred regarding parenting time. The appellate court held that given the child was now four years older and the parenting plan did not contemplate a parenting plan schedule for the child after he began school, and considering the parties' own admissions that they changed the parenting schedule informally once the child began school and the current schedule was hindered, the trial court's decision to modify the parenting schedule was not against the manifest weight of the evidence. The appellate court further held that the trial court's determination of the best interests of the child was supported by the evidence. Overall, the appellate court found that the trial court properly assessed the GAL's report, testimony, and evidence.

See also, ATTORNEY'S FEES, *In re D.R.B.*, 2023 WL 2733475 (Ill. App. 1st Dist.), March 31, 2023\*

## **MODIFICATION OF MAINTENANCE AND CHILD SUPPORT**

*In re Marriage of Oswald*, 2023 WL 2534805 (Ill. App. 3rd Dist.), March 16, 2023\*

At the time of the divorce, Wife earned approximately \$18,000 annually and Husband earned approximately \$145,000 annually. The trial court awarded Wife maintenance and child support. The support obligations were modified by agreement three years later after Wife's income had increased to \$50,000 annually. Three years later, Husband filed a motion to modify his maintenance and child support obligations, alleging that his income was expected to decrease and that Wife's income had substantially increased. The trial court found that Wife's income had increased to over \$200,000 as a realtor, and modified Husband's maintenance obligation to \$0 and set child support based on the statutory guidelines. Wife appealed claiming that the trial court made calculation errors and that maintenance should not have been set at zero. Wife claimed that the trial court should have reduced her income by her \$43,000 in business expenses.

The appellate court affirmed, holding that even if the trial court had reduced Wife's income by her alleged expenses, she still would have exceeded the 40% cap set forth in 750

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ILCS 5/504 and the maintenance award would be \$0. The appellate court further noted that the trial court properly analyzed the statutory factors, including the parties' income and assets, expenses of the children, the parties' earning capacities, any impairment on future earnings, and the standard of living established during the marriage, in making its determination. As such, the trial court did not abuse its discretion.

*In re Marriage of Watson*, 2023 WL 4122076 (Ill. App. 4th Dist.), June 21, 2023\*

In 2017, the trial court entered a temporary order that required Husband to pay child and spousal support. Husband filed a petition to modify the temporary support in 2018, alleging that he had been terminated from his employment. Wife filed a motion to modify, claiming she involuntarily lost her employment. In April 2020, Husband filed his second petition to modify support, again alleging that he was terminated from his employment. In September 2020, after three separate hearings, the trial court entered a JDOM, which ordered Husband to pay Wife maintenance of \$276.83 per month for a period of 24 years and 4 months. The trial court indicated that it considered the relevant statutory factors pertaining to child support and maintenance and ordered Husband to pay support arrearage accordingly from the time of the initial temporary support order. Wife filed a motion to reconsider, asserting that the trial court's JDOM contained mathematical errors and computations that were not a correct reflection of the statutory calculation for maintenance, which included the calculations for the adjusted amount. Husband filed a motion to reconsider the award of arrearage for maintenance and child support, arguing that at the time of the final hearing, his two petitions to modify were pending. The trial court granted Wife's motion, denied Husband's motion, and ordered Husband to pay Wife maintenance of \$249.60 per week for a period of 24 years and 4 months, along with the support arrearage. Husband appealed, arguing that the trial court erred in granting Wife's motion to reconsider and in calculating the support arrearage without consideration for his petitions to modify.

The appellate court affirmed. Husband argued that the trial court improperly calculated the amount of support arrearage without considering his reduced income and petitions to modify, while also asserting that the trial court accurately acknowledged the reduction in his income when ruling upon the new amount for maintenance. The appellate court held that upon review of the record on appeal, there was no indication that Husband ever noticed his motions to modify for a hearing or otherwise requested a ruling on them, ultimately abandoning them. Accordingly, the appellate court held that the trial court did not err when not considering Husband's two motions to modify, and the arrearage calculations were proper. Husband further argued that the trial court erred when it granted Wife's motion to reconsider because there was no basis for doing so and improperly requested relief based upon newly discovered evidence. The appellate court noted that the purpose of a section 2-1203 motion to reconsider is to bring to a trial court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law. The appellate court held that the trial court specifically noted Wife's calculations were generally conceded by Husband, and Husband denied the appellate court the opportunity to review the grounds for his allegations by failing to include in the record on appeal a transcript of the hearing during which evidence and argument were presented to the trial court. Accordingly, the appellate court affirmed.

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See also, DISCOVERY SANCTIONS, *In re Marriage of Bernstein*, 2023 WL 2964395 (Ill. App. 2d Dist.), April 14, 2023\*

See also, ATTORNEY FEES, *Teymour v. Mostafa*, 2023 WL 3947939 (Ill. App. 1st Dist.), June 12, 2023\*

See also, CONTEMPT, *In re Marriage of Otero*, 2023 WL 5748549 (Ill. App. 1st Dist.), September 6, 2023\*

## **MOTION TO VACATE JUDGMENT FOR DISSOLUTION OF MARRIAGE**

*In re Marriage of Kaiser*, 2023 WL 2733518 (Ill. App. 3rd Dist.), March 31, 2023\*

Wife filed a Section 2-1301 motion to vacate the parties' Judgment for Dissolution of Marriage incorporating their Marital Settlement Agreement ("MSA") alleging that husband's fraudulently concealed a life insurance policy. The trial court denied Wife's motion, and she appealed. The appellate court affirmed, noting that the parties exchanged financial affidavits, which did include disclosure of some life insurance policies (including the one in question at least initially) and they also filed an amended joint memoranda which did not include the life insurance policies. The parties reached an agreement and a prove-up hearing only on the terms of the agreement that took place. The prove-up to enter the written Judgment for Dissolution of Marriage was set for a later date and then postponed indefinitely due to the COVID-19 pandemic. A month later, the attorneys appeared on an emergency motion for entry of Judgment as Husband was on life support and dying. Wife's counsel did not agree to entry of Judgment as he could not reach Wife. The court entered the Judgment over Wife's counsel's objection and Husband died two days later. Twenty-nine days later, Wife's new attorney filed a motion to vacate Judgment pursuant to Section 2-1301 claiming that she did not know Husband was on his death bed when the parties reached an agreement that Husband would pay Wife "permanent maintenance." Wife argued that the maintenance part of the agreement had nominal meaning as it was entered two days before Husband died and that the intervening events made the settlement agreement unconscionable. Wife then filed an amended motion to vacate based on her discovery that Husband had a life insurance policy for which he had changed the beneficiary to the parties' daughter.

In order to succeed on a motion to vacate to achieve substantial justice, the court must still consider several factors including: movant's diligence or lack thereof, the existence of a meritorious defense, the severity of penalty resulting from the order sought to be vacated and the relative hardships on the parties from granting or denying the motion to vacate. The court will set aside a marital settlement agreement only if it is shown that the agreement was procured through coercion, duress or fraud or if contrary to any rule of law, public policy or is unconscionable. The standard of review on appeal is abuse of discretion. The appellate court found that since Husband's financial affidavits listed the life insurance policy, Wife cannot argue that Husband tried to conceal it. The appellate court also focused on the fact that Wife testified at the prove-up hearing on the terms of the agreement, that she was not coerced and thought the agreement equitable.

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*In re Marriage of Plancon*, 2023 WL 9017885 (Ill.App. 1 Dist.), December 29, 2023\*

The Marital Settlement Agreement assigned Wife 100% of Husband's employee retirement fund which she then chose to take as a cash-out rather than a pension. The cash-out value was more than the estimated value. Husband sought a reformation of the Marital Settlement Agreement under section 2-1401 of the Code of Civil Procedure, arguing mutual mistake. The trial court entered an order reforming the Marital Settlement Agreement. Wife appealed.

The appellate court reversed, finding that Husband did not prove that the information regarding the cash-out value was newly discovered nor that the information could not reasonably have been discovered at the time of or prior to the entry of the judgment. Wife's cash-out option was always a feature of the plan, it was nothing new or unexpected. Husband was a 15-year participant in the plan and he could have known through the exercise of reasonable diligence.

## **ORDER OF PROTECTION**

*Lasaker v. Klamczynski*, 2023 WL 2566034 (Ill. App. 2d Dist.), March 17, 2023\*

The trial court entered a plenary order of protection after an evidentiary hearing, at which photographs of injuries were admitted into evidence. Petitioner testified that Respondent pushed her which caused her to fall and seriously injure her foot and ankle. Respondent appealed arguing that the finding of abuse was against the manifest weight of the evidence. The appellate court upheld the trial court's finding. Both parties alleged the other was abusive and Respondent admitted to pushing Petitioner but alleged that he acted in self-defense. The appellate court stated that Respondent's statement of facts in his appellate brief contained many inaccuracies and lacked proper citations to the record. The evidence presented on whether Respondent acted in self-defense was conflicting. The appellate court could not say the trial court's finding of abuse was against the manifest weight of the evidence.

*Shawwna S. W. v. Eric D. W.*, 2023 WL 2605413 (Ill. App. 4th Dist.), March 21, 2023\*

In November 2021, the trial court entered an emergency order of protection under the Illinois Domestic Violence Act naming Father and the minors as the protected party against Mother. The order of protection prohibited Mother from contacting Father or their children. The order was granted following an incident where Mother's erratic behavior resulted in her being transported to a local hospital for a mental-health evaluation. In August 2022, the trial court denied Father's request for a plenary order of protection. The trial court held that no abuse occurred, and Mother's behavior stemmed from a medical condition that had since been treated. Father appealed, contending that the trial court erred in determining that Mother's conduct was not abuse, harassment, or intimidation of a dependent under the Act. Father also argued that the trial court erred in considering nonresponsive or hearsay evidence and by relying on irrelevant personal experience.

The appellate court affirmed, holding that trial court's determination that there was not abuse, and that Mother's conduct was caused by a medical issue that had since been treated was not against

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the manifest weight of the evidence. The appellate court ruled that Father forfeited his arguments concerning nonresponsive or hearsay evidence and reliance on personal experience, as he failed to provide any legal argument or citation to authority for his arguments in his brief.

*Sherwin v. Roberts*, 2023 WL 2967711 (Ill. App. 4th Dist.), April 14, 2023\*

Father filed a petition for order of protection on behalf of his minor child against Mother. After hearing, the trial court entered a three-month interim order of protection and Mother appealed. The appellate court vacated the order of protection on the basis that it was not supported by the evidence at the hearing and the petitioner did not meet his burden of proof. The appellate court concluded that none of Father's allegations had evidentiary support. Father had no first-hand knowledge of any of the events in his petition and he also failed to present any testimony from a witness with personal knowledge of any of the events. The appellate court states that "[a]llegations are merely allegations; they are not evidence." Verified allegations do not constitute evidence except by way of admission of the adverse party.

The appellate court stated that a petition based on "harassment" requires that the conduct cause emotional distress and there was no evidence that the child was distressed by the alleged harassment, which was the allegation that Mother's arrest in presence of the child was harassment. The appellate court admonished Father for improperly utilizing the Domestic Violence Act to litigate custody issues. Furthermore, the appellate court held that a court can only issue an order of protection for "neglect" for a "high-risk adult with disabilities." So, Father could not use neglect to get an order of protection on behalf of the child.

*Botero v. Roque*, 2023 WL 3720886 (Ill. App. 1st Dist.), May 30, 2023\*

Wife filed a petition for dissolution of marriage in June 2020. In August 2020, the trial court granted Wife an emergency order of protection against Husband, granting her exclusive possession of the marital residence. At the September 2020 hearing on Wife's petition for a plenary order of protection, the trial court entered a two-year plenary order of protection. In August 2022, Wife filed a motion seeking to extend the plenary order of protection. At the conclusion of the hearing, the trial court extended the plenary order of protection for an additional two years. The trial court based its ruling on the allegations in the previous order of protection, on the testimony that Wife was still fearful of Husband, and the recent case of *Richardson and Booker*, claiming it must consider the past findings of abuse when considering the petition for extension. Husband appealed, arguing that the trial court erred in extending the plenary order of protection because Wife failed to establish good cause, and the mere passage of time, particularly in view of his compliance with the initial plenary order, did not constitute good cause for extending the order.

The appellate court reversed and vacated the trial court's judgment extending the plenary order of protection. The appellate court explained that section 214(a) of the Domestic Violence Act ("DVA") provides that the extension of prior orders of protection shall be in accordance with the DVA. Section 220(e) makes it clear that where the motion to extend is contested, the findings in the original order cannot be the sole basis for extending the order, and an extension may be granted upon good cause shown. The appellate court found that the trial court's reliance on *Richardson and Booker* was misplaced, where that case pertained to whether the petitioner established sufficient evidence warranting granting an initial plenary order of protection, whereas the issue in this case was whether the petitioner established good cause to extend a plenary order that was already in place. The appellate court ultimately held that Wife did not establish good

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cause by a preponderance of the evidence to extend the plenary order, and the trial court's decision to extend the plenary order based on past findings of abuse was against the manifest weight of the evidence.

*Petz v. Petz*, 2023 WL 3676887 (Ill. App. 4th Dist.), May 26, 2023\*

Petitioner filed a petition for an emergency order of protection against Respondent alleging numerous incidents of abuse, including Respondent making an online profile pretending to be the Petitioner to scam people for money. The petition further alleged that one of the men that Respondent had attempted to scam showed up to Petitioner's work looking for her, causing Petitioner to fear for her safety. The trial court granted the emergency order of protection, which also listed the parties' children as protected parties. The trial court conducted a hearing on Petitioner's request for a plenary order of protection, ultimately granting a plenary order of protection which also listed the children as protected parties. However, Respondent was permitted to resume visitation with the children. Respondent appealed, raising the issues of whether there was a basis for the entry of the emergency order of protection, whether he received adequate notice of it, whether the petition alleged acts sufficient to support the plenary relief awarded to Petitioner, and whether sufficient evidence was presented at the hearing to justify the entry of a plenary order of protection.

The appellate court affirmed. Because the emergency order expired and was replaced by the plenary order of protection, the appellate court deemed any issues pertaining to the emergency order moot, and thus did not address any issues of the emergency order or the notice of same. As for the plenary order, the appellate court explained that the DVA defines abuse as both physical abuse and harassment. The DVA further defines harassment to include knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances, and which causes emotional distress to the Petitioner. The appellate court found that Petitioner's petition sufficiently alleged both physical abuse and infliction of emotional abuse as a result of the fraudulent scheme that disclosed Petitioner's personal information. The appellate court held that the latter was alleged to be the result of intentional acts by Respondent, which caused Petitioner to be upset and alarmed, further stating that intentional acts which cause someone to be worried, anxious, or uncomfortable constitute harassment under the statute. The offending conduct need not involve any overt act of violence. Lastly, the appellate court held that the record on appeal contained no report of proceedings from the hearing to allow the appellate court to review the sufficiency of the evidence presented, and in the absence of a sufficiently complete record of the proceedings below to support a claim of error, it was presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis.

*Gibson v. Runkle*, 2023 WL 5609043 (Ill. App. 5th Dist.), August 30, 2023\*

Petitioner's petition for order of protection alleged a detailed incident of severe physical abuse. The trial court granted a plenary order of protection, and Respondent filed an appeal. At the plenary hearing, testimony of the incident included some inconsistencies and additions compared to the written petition. The appellate court stated that inconsistencies in statements and/or testimony taken at different times are not unusual and go to the weight to be given to the testimony by the trial court, but they do not destroy the credibility of the witness.

The appellate court upheld the trial court's finding that Petitioner's testimony taken in its entirety was sufficient to demonstrate that abuse was more likely than not.

The appellate court also rejected the Respondent's argument that the trial court failed to consider his evidence, including his exhibits and his witnesses' testimony. At most, Respondent's witnesses cast question on the timeline of events but none of his witnesses established that the Respondent could not have inflicted the alleged abuse.

Finally, the Respondent argued that the trial court did not make findings required by the Domestic Violence Act because it failed to make oral findings at the conclusion of the hearing and there was a missing word in the written plenary order. At the conclusion of the hearing, the trial court took the matter under advisement and later issued the plenary order which included a finding that the circuit court had considered all the statutory factors. The trial court, using the form for the plenary order of protection, had checked the box indicating that it had made oral findings. The trial court was only required to make findings in an official record or in writing. In this case, the written order was forthcoming, and it was not necessary to make oral findings as well.

*In re Marriage of Bryant*, 2023 WL 4079523 (Ill. App.1st Dist.), June 20, 2023\*

Wife filed a petition for an order of protection in conjunction with the pending dissolution of marriage. The emergency order of protection was entered and extended on six occasions. Hearing on the plenary was to occur at the divorce trial. At a pretrial conference, Husband made threatening statements and told the trial judge to f\*\*\* off. He was found in direct civil contempt and ordered to turn himself in, which he did not do. Husband also failed to appear in person at the trial. The court granted a plenary order of protection after hearing Wife's testimony.

Husband appealed the entry of the plenary order of protection by arguing that the events that took place do not qualify as warranting an order of protection as he was seeking to enforce his parenting time because Wife refused to comply with the parenting time order. The appellate court rejected Husband's argument and noted that had he appeared at the trial, he could have testified and presented evidence as to his version of events and cross-examined the Petitioner and made appropriate arguments. The trial court's finding that Wife had been abused by Husband was not contrary to the manifest weight of the evidence. The appellate court cited the testimony that Husband had come to Wife's workplace and threatened her. The trial judge found Wife credible in her testimony and added that he had witnessed the respondent's aggressive behavior firsthand at the pretrial conference.

Husband also argued that the trial court blocked a thorough GAL investigation. Husband's petition for the appointment of a GAL had been granted, but the GAL that was appointed failed to appear. Husband did not notify the court or pursue a different GAL.

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The trial court did not abuse its discretion in failing to appoint a GAL *sua sponte*. It was Husband's duty to seek another GAL.

Husband was barred from making certain arguments for the first time on appeal as he did not raise any of them to the trial court. Husband failed to argue to the trial court that he should have been given seven days to review evidence tendered by Wife, that he had not been given adequate time prior to trial to review the evidence, that his failure to appear in person was based on a misunderstanding, or that he was prejudiced by his inability to request a continuance of the trial via Zoom. Husband did not file a motion to vacate. Arguments that are never presented to the trial court are forfeited and may not be made for the first time on appeal.

*Watkins v. Watkins*, 2023 WL 5500862 (Ill. App. 4th Dist.), August 25, 2023\*

The parties were initially involved in a marriage dissolution proceeding in Morgan County, Illinois. In July 2021, the trial court entered an agreed order allocating parenting time for the parties' two minor children. In February 2022, Wife filed a separate petition for an emergency order of protection in Morgan County for her and the children against Husband. Said petition was pending during the events at issue in the appeal. In January 2023, Wife filed another petition for an order of protection against Husband for her and the children in Morgan County, which the trial court dismissed on February 3, 2023, finding the allegations were insufficient to grant relief. On February 3, 2023, after Wife's petition for an order of protection was dismissed in Morgan County, Wife filed the petition for an emergency order of protection in Scott County, Illinois, a neighboring county. The Scott County trial court entered an emergency order of protection on behalf of Wife and the children against Husband. Three days later, Husband filed a motion to dismiss the petition, or alternatively, to vacate the emergency order and transfer the case to Morgan County, arguing that the issues of child custody and parenting time should be decided in the dissolution proceedings in Morgan County. The Scott County trial court denied Husband's motion to dismiss. Husband filed another motion under section 2-619(a)(3) of the Code of Civil Procedure, alleging that there was a pending petition for an order of protection in Morgan County. After a hearing on Husband's second motion to dismiss in Scott County in March 2023, the trial court in Scott County entered a plenary order of protection set to expire on May 31, 2023, and reserved the issue of parenting time. Husband appealed, arguing that the court erred in denying his motion to dismiss under 2-619(a)(3), the trial court deprived him of his right to a fair and impartial hearing, the court's decision granting the plenary order of protection was against the manifest weight of the evidence, and the court erred by reserving the issue of his parenting time.

The appellate court reversed the Scott County trial court's judgment granting an order of protection and vacated the order. First, the appellate court noted, that even though the order of protection was expired and potentially moot, this case satisfied the public interest mootness exception, thus the appellate court applied the exception and addressed the merits of the appeal+. The appellate court stated that section 2-619(a)(3) does not require an automatic dismissal even when the same cause and same parties' requirements are met. In deciding whether to grant a motion to dismiss under that section, the court should have considered the factors set forth in *Kellerman*. The appellate court found that the Scott County trial court did not mention the *Kellerman* factors when weighing whether to grant the motion to dismiss, nor did it provide any real reasoning for denying the motion to dismiss based on the pending action in Morgan County. The appellate court held that the Scott County's denial of the motion to dismiss undermined the

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purpose of section 2-619(a)(3) to prevent duplicative litigation and abused its discretion by doing so. The appellate court further held that the record showed Wife was allowed to continue filing petitions in multiple counties until she obtained an order of protection, and that doing so was not the proper procedure for resolving child custody or visitation issues and was a form of forum shopping. The appellate court did not address the remainder of Husband's arguments seeking reversal because it reversed based on the trial court's failure to grant Husband's motion to dismiss the petition under section 2-619(a)(3).

*A.A. v. Nita A.*, 2023 WL 8103459 (Ill. App. 1st Dist.), November 22, 2023\*\*

In October 2021, adult child filed a petition for an order of protection against Mother. Child alleged that from 2014 through 2021, Mother harassed and abused child because child is transgender. Specifically, child testified that Mother followed child to college in another state, monitored child's e-mails and texts, sent several messages to child to make child's phone continuously buzz if child did not answer, sent offensive and harassing messages to child causing child stress, depression, and anxiety, stalked child wherever they went or moved, and did not comply with child's multiple requests to stop contacting child. Child did testify that for brief periods of time between 2014 and 2021, Mother provided financial assistance and occasional housing for child. Child testified that, without an order of protection, Mother would continue to harass child. The trial court issued a plenary order of protection that ordered Mother to stay away from and not threaten or abuse the child for 6 months, describing Mother's messages to the child as hurtful, judgmental, and mean; and explained that any reasonable person would feel harassed by Mother's messages. The trial court further held that the child occasionally communicating with, living with, and accepting financial support from Mother did not negate the abuse that occurred. The trial court issued a six-month order of protection as opposed to a two-year order because the strongest evidence of abuse was from 2014 and it was possible that Mother could have a loving relationship with the child in the future.

Mother filed a motion to vacate or reconsider the order of protection, arguing that the general five-year statute of limitations for civil claims barred the child's allegations of abuse that occurred in 2014 and 2015, the child voluntarily maintained contact with Mother and relied upon her for financial support, the order of protection was a severe penalty that did not achieve substantial justice, and the child did not establish by a preponderance of the evidence that Mother abused the child.

The trial court denied Mother's motion, finding that the general civil five-year statute of limitations did not apply to the child's petition and the court properly considered evidence of abuse that occurred more than five years before the child filed the petition. The trial court also rejected Mother's argument that the child invited communication and accepted financial support from Mother, finding that the child could not be penalized on that basis. Additionally, the trial court rejected Mother's claim that the order of protection was a severe penalty, as she had not been charged criminally and the order of protection was unlikely to cause further negative consequences for Mother. Lastly, the trial court reiterated that child met their burden of proof. Mother appealed, arguing that the trial court lacked jurisdiction to hear the child's petition for an order of protection, the statute of

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limitations barred the child's petition, the trial court improperly admitted Mother's messages to the child, and the trial court's decision to grant an order of protection was against the manifest weight of the evidence.

The appellate court affirmed. First, the appellate court emphasized that the Act provides that any person abused by a family or household member may file a petition for an order of protection. The appellate court further explained that abuse under the Act includes harassment, which is knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances, would cause a reasonable person emotional distress, and does cause emotional distress to the petitioner. The child argued that the appeal is moot because the order of protection had already expired, arguing that the appellate court thus lacked jurisdiction to hear the appeal. While the appellate court held that generally an appeal that challenges an order of protection that has expired is moot, the matter was heard pursuant to the public interest exception to the mootness doctrine. The appellate court found that protecting transgender individuals from abuse by family matters is a matter of public interest, and it is likely that transgender individuals will face abuse from family members in the future. Furthermore, the appellate court held that there appeared to be no reported appellate decisions that address how the Act applies to transgender victims of domestic abuse, so it was necessary to provide guidance as to how courts should apply the Act in cases where transgender individuals are found to be victims of harassment.

Mother also challenged jurisdiction, stating that she did not live in Illinois, and the abuse occurred primarily in California and New Jersey. The appellate court held that as Mother was served in open court and her attorney filed an appearance, the trial court had personal jurisdiction over her. Furthermore, the appellate court held that the Domestic Violence Act does not place limitation on abuse outside of Illinois. As for the statute of limitations, the appellate court found that the Domestic Violence Act does not include a five-year statute of limitation. Nonetheless, such argument was forfeited anyway, as Mother did not raise the issue in the initial proceedings. As for the trial court's admission of text messages, Mother contends that the messages should not have been entered because the child failed to authenticate and lay proper foundation for them and because the messages from 2014 and 2015 were too remote in time to warrant admission. Upon review of the record, the appellate court held that child sufficiently authenticated and laid the proper foundation for the messages in accordance with the rules of evidence, and the age of the text messages did not prohibit them from being entered, as they were relevant to the issue. Lastly, Mother argued that the trial court's decision to grant the order of protection was against the manifest weight of the evidence because she could not be blamed for being worried and concerned about the child, and that the child voluntarily initiated contact with her and accepted financial support from her. The appellate court rejected such claims outright, reiterating that her actions constituted harassment. The appellate court further emphasized that merely because one adult gave another adult financial support does not absolve the adult with more resources from violating the Act.

*Bujdoso v. Lenington*, 2023 WL 7996645 (Ill. App. 1st Dist.), November 17, 2023\*

Respondent appealed the entry of a plenary order of protection, arguing that the parties were not in a dating relationship and therefore the Domestic Violence Act did not apply. The Act protects persons from abuse by a family or household member, which includes persons who have or have had a dating relationship. Casual acquaintanceship in business or social contexts does not constitute a dating relationship. Respondent argued that the parties had one date.

The appellate court affirmed the trial court's finding of a dating relationship. The trial court found the parties went on three dates and engaged in many electronic communications. The current online nature of romantic relationships made those communications almost as significant as the parties' in-person dates in assessing whether there was a serious courtship. Today, the court can look at all the parties' communications to ascertain whether they had a dating relationship. Here the parties communicated for nearly three months via text message, Facebook Messenger and telephone and the Respondent expressed a desire to have a romantic rather than a professional relationship with the Petitioner. The parties had a reciprocal interest that constitutes a "serious courtship" under the Domestic Violence Act. The appellate court affirmed.

*Rodneca Skinner v. Messiag Yusef*, 2023 WL 8455465 (Ill.App. 5 Dist.), December 6, 2023\*

The parties ended their relationship and Respondent vacated their shared apartment advising Petitioner that he would be moving to Texas. A few days later, Respondent began sending Petitioner messages on multiple different social media platforms as well as to her cell phone. Petitioner asked him to cease his behavior and blocked his number. He then began calling and messaging her from other phone numbers. He also contacted her family members and called her place of employment multiple times. He then showed up at 4:30 in the morning at the apartment. Petitioner sought and obtained an emergency order of protection. At the hearing on the plenary order of protection, Respondent admitted to the alleged behavior and testified that it was a miscommunication issue and that the two had previously been communicating without issue. The trial court was not persuaded and entered a plenary order of protection, granting Petitioner exclusive possession of the apartment. Respondent appealed, arguing that the trial court failed to find that he was a true threat to Petitioner.

The appellate court affirmed finding that Respondent's behavior fell within the definition of harassment as defined by the Domestic Violence Act ("DVA") and that the DVA does not require a finding that Respondent is a "true threat". The appellate court further affirmed the exclusive possession award as Respondent had already moved to Texas, and therefore, the burden to him was outweighed by the burden to Petitioner should she be required to leave the residence.

See also, APPELLATE JURISDICTION, *In re N.N.*, 2023 WL 2564594 (Ill. App. 1st Dist.), March 17, 2023\*

## **PARENTAL COUNSELING**

See also, ATTORNEY'S FEES, *In re D.R.B.*, 2023 WL 2733475 (Ill. App. 1st Dist.), March 31, 2023\*

## **PARENTAL RESTRICTIONS**

*In re Marriage of Goldin and Morganstein*, 2023 WL 7986361 (Ill. App. 1st Dist.), November 17, 2023\*

This case involved ten years of contentious litigation and multiple appeals. Mother was awarded sole custody of the parties' only child. Mother filed a motion to limit Father's overnight parenting time and Father filed a motion to increase his parenting time. The court appointed an expert to evaluate the parties and child, pursuant to 604.10(b). After a four-day trial, the trial court found that Father's relationship with the child was significantly impairing the child's emotional development. The trial court suspended his routine overnight parenting time and reduced the parties' non-consecutive weeks of summer vacation from three to two weeks.

The 604.10(b) expert, Dr. Jaffe, testified that Father's behavior included cursing at the child, yelling in his face, leaving him home alone, failing to provide him with healthy food, forcing him to eat all the food on his plate, comparing him to other boys who were better at sports, commenting on the child's weight, and criticizing Mother. The circumstances did not rise to serious endangerment, but they significantly impaired the child's emotional development. Dr. Jaffe recommended increasing Father's accessibility to the child each week while suspending overnights. The Guardian ad Litem agreed that Father's overnight parenting time should be suspended and subject to review at a later date.

Father first argued the trial court's orders should be vacated because of lack of subject matter jurisdiction because the matter had been transferred to a different calendar. The transfer of a matter from one calendar to another is a matter of administrative convenience for the trial court that is not at all the equivalent of a recusal or disqualification. Such a transfer has no impact on the court's jurisdiction. The court's general orders recognize that judges can hear and decide matters in cases that are not assigned to them.

The appellate court affirmed the trial court's modification of Father's parenting time, nothing that modifications of parenting time require analysis and consideration of the factors set forth in Section 602.7 of the Illinois Marriage and Dissolution of Marriage Act. Whereas adjustments to parenting time made pursuant to Section 603.10 involve a two-step process. First, the trial court must make factual determinations that the preponderance of the evidence demonstrates that the parent has engaged in the conduct in question. Second, the court must then exercise its discretion in selecting the

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appropriate restrictions to provide for the child's safety and welfare. The trial court heard four days of evidence which included testimony of the parties, the GAL, and the expert. The trial court's decision to rely on Dr. Jaffe's testimony was appropriate and the court rejected Father's argument that Dr. Jaffe was not neutral. The appellate court deferred to the trial court's determination of credibility of the witnesses.

*In re Marriage of Hipes and Lozano*, 2023 WL 8254621 (Ill.App. 1st Dist.), November 29, 2023\*

The parties were married in 2010 and had one child. Wife filed for divorce in August 2020. The contention on appeal concerns only Husband's restricted parenting time. Most importantly here, during the trial, there was compelling and undisputed testimony that Husband had drinking problems on and off beginning in 2014 and continuing on and off thereafter. Husband's drinking resulted in physical and verbal abuse, DUI's, and hospital visits, leaving the child upset and anxious when child was around Husband. Husband's drinking occurred mostly at night. While Husband attempted to attend AA and rehab throughout the parties' marriage, he would historically begin drinking again. At the time of trial, Husband alleged that he was, and had been, sober for several months. The trial court ordered Husband to take daily breathalyzer tests, as well as tests before his parenting time, which seemed to improve the child's mental wellbeing. Husband objected to providing proof of his attendance at AA meetings and requested that no further alcohol related restrictions be imposed on his parenting time. Husband had either missed, submitted late, or submitted positive breathalyzer tests several times during the proceedings. The trial court entered a judgment for allocation of parenting time in 2023. The trial court found that Mother was a very credible witness and that her concerns about whether Husband was sober were valid and plausible. The trial court further found that Husband misplaced his anger toward Wife to the child, and he was not credible, noting his resistance to cooperate with the breathalyzer requirements and provide proof of AA attendance.

As such, the trial court allocated Husband's parenting time as one evening per week during the school year, and one afternoon and evening during the summer, plus alternating weekends. When placing further restrictions on Husband's parenting time, the trial court reviewed and considered each factor set forth in Sections 602.7 and 603.10 of the Illinois Marriage and Dissolution of Marriage Act, and found that by a preponderance of the evidence, Husband seriously endangered the child's mental, moral, physical, and emotional health due to his long struggle with alcoholism. Thus, the trial court placed Soberlink breathalyzer restrictions on Husband for two years, along with one year of counseling, to assure that Husband was maintaining his sobriety. Any positive or missed tests or failure to provide proof of attendance at counseling would result in the suspension of Husband's parenting time. Husband appealed, challenging the trial court's restrictions on his parenting time, arguing that the trial court failed to apply the best interest standard set forth in Section 602.7 when imposing restrictions, and the trial court erred in finding that his conduct seriously endangered the child, rendering the restrictions on his parenting time unnecessary.

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The appellate court affirmed. First, the appellate court emphasized that Section 602.7 applied to the allocation of parenting time, while Section 603.10 applied to restrictions on parenting time, which Husband confused in his appeal. Husband did not challenge the trial court's allocation of parenting time, but rather the restrictions placed requiring him to submit to Soberlink tests and attend counseling. Upon review of the record, the appellate court found that the trial court explicitly considered each factor set forth in Sections 602.7 and 603.10 appropriately. For the reasons set forth by the trial court, the appellate court held that the restrictions were appropriate and not disruptive to his parenting time.

## PROPERTY

*In re Marriage of English*, 2023 WL 356193 (Ill. App. 5th Dist.), January 23, 2023\*

During marriage, Husband's father conveyed an eight-acre parcel of land to Husband and Wife as joint tenants with a right of survivorship, and the parties began building a home on the property. Wife later filed a petition for dissolution of marriage, alleging that four children were born to the parties and that none were adopted, and requested custody and child support for two minor children. Husband's response to the petition indicated that only one child was born to the parties, three were adopted, and only one was still a minor. At the final hearing, trial court determined that there were three remaining issues: child support, maintenance, and the property that was conveyed by Husband's father. There was conflicting testimony regarding whether the parties purchased the property from Husband's father or whether it was a gift to the parties together as Husband and Wife. Trial court ultimately held that the land was marital property because it was conveyed to the parties as Husband and Wife. Trial court also required Husband to pay Wife maintenance, and Wife to pay Husband child support. In setting support, trial court imputed income to Wife as a result of Husband's argument that she was voluntarily underemployed. Husband appealed.

On appeal, Husband first argued that the trial court erred by accepting and proceeding on a petition for dissolution in which Wife made inaccurate statements, namely by alleging that four children were born to the parties, no children were adopted, and two children were minors. The appellate court held that any inaccuracies in the petition had no legal significance, and Wife accurately testified only one child was born to the parties and three were adopted. Furthermore, as Wife was never awarded custody or child support of the parties' second youngest child, the mistake of alleging there were two minor children had no impact on any issues resolved by the trial court. Husband next argued that trial court abused its discretion in awarding Wife maintenance. Appellate court held that in consideration of the factors set forth in Section 504 of the Act, the length of the marriage, and even after imputing income to Wife, an award of maintenance was appropriate.

Husband also argued that maintenance was inappropriate because Wife was already maintaining the very low standard of living established during the marriage, as she was living in a camper as they had done during the majority of their marriage. The appellate court noted that there is more to the standard of living established during the marriage than living in a specific building and looked to the parties' income. Lastly, Husband argued the trial court erred in finding the property conveyed from his father to be marital property. Appellate court held that property acquired during the marriage is presumed to be marital property, and a transfer of property from a parent to a

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child is presumed to be a gift. However, where property is subject to both presumptions, the presumptions cancel each other out, and the trial court is free to determine the issue of whether the asset is marital or nonmarital without resort to either presumption, and any doubts concerning the character of property are to be resolved in favor of finding it to be marital. While the property was a gift because it was conveyed to Husband and Wife in joint tenancy, the property was marital. Even if it were a gift to Husband alone, the parties living on the property for over six years and using marital funds to pay for its upkeep is sufficient to transmute the property into a marital asset.

## **PROPERTY DIVISION**

*In re Marriage of Morris-Foland and Foland*, 2023 WL 2327186 (Ill. App. 5th Dist.), March 2, 2023\*

During the marriage, the parties purchased land and built a house. The parties were married for 26 years at the time the petition for dissolution was filed. The parties had no children. Husband's income, including his pension and military disability benefits, were the parties' primary source of funds. Husband also received a \$72,000 inheritance during the marriage, and Wife received an \$8,000 inheritance. Wife testified that she designed the home and was primarily responsible for maintaining the home. Husband argued that because his financial contributions to the marriage were substantially more than Wife's, he should receive a disproportionate share of the marital property. The trial court disagreed, awarded the Wife maintenance and 50% of the equity in the home. Husband appealed.

The appellate court affirmed holding the trial court did not abuse its discretion in applying 750 ILCS 5/503. The appellate court noted that, while Husband was correct in that a party's disproportionate financial contributions can be a factor in determining whether to grant a disproportionate share of the property, he failed to consider that part of the intent of section 503 is to "recognize and compensate the homemaker as an equal partner." Husband contended that because the parties did not have children, this factor should not be given much weight. However, the evidence showed that Wife did all of the housework, most of the cooking, and paid the bills, all while also working outside of the home. The appellate court also found that many of the other factors set forth in section 503 supported the trial court's decision.

## **PETITION FOR DISSOLUTION OF MARRIAGE**

See also; PROPERTY, MAINTENANCE, *In re Marriage of English*, 2023 WL 356193 (Ill. App. 5th Dist.), January 23, 2023\*

## **PETITION TO VACATE AGREED ORDER**

*In re G.F. and L.F., Minors, Szeremeta v. Foster*, 2023 WL 2605403 (Ill. App. 1st Dist.), March 22, 2023\*

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The parties entered into an agreed order restricting Father's parenting time until he completed therapy. Father filed a petition to vacate pursuant to Section 2-1401 of the Code of Civil Procedure one year later; the trial court denied the petition and the appellate court affirmed. The agreed order restricted Father's parenting time until, *inter alia*, he completed therapy to the court's satisfaction and his parenting time would be revisited subject to the recommendations of the therapists. The agreed order also provided that Father would undergo a mental health evaluation. Both parties waived the protections set forth in Section 607.6 of the IMDMA to the extent there was an agreement to submit the therapist's recommendations to the parties and court. Section 607.6 authorizes the court to order counseling provided that the counseling sessions shall be confidential and communications made during counseling could not be used in litigation. Respondent argued that the parties' waiver of confidentiality in the agreed order violated Section 607.6. He argued he need not exercise due diligence because the agreed order is void. The court denied Father's motion due to *res judicata* – Father should have included the issue in his motion to reconsider which only addressed attorney's fees. The trial court did not address the issue of whether the agreed order was void and they dismissed Father's petition.

Father argued he did not need to satisfy the due diligence requirements of Section 2-1401 because he challenged the agreed order based on voidness. Section 2-1401 petitions based on voidness need not allege a meritorious defense or due diligence and the two-year limitation period does not apply. A Section 2-1401 petition seeking to vacate a void judgment raises a purely legal issue and the standard of review is *de novo*. The appellate court noted that the judgment in question is an agreed order which is not an adjudication of the parties' rights but rather a record of their private contractual agreement. Only the absence of jurisdiction will render a circuit court's judgment reducing a parties' agreement to an order void.

## **POSTNUPTIAL AGREEMENT**

See also, CLASSIFICATION OF ASSETS, *In re Marriage of Kattner*, 2023 WL 5430740 (Ill. App. 1st Dist.), August 23, 2023\*

## **PRENUPTIAL AGREEMENT**

*In re Marriage of Amyette*, 2023 WL 5160000 (Ill. App. 3rd Dist., 2023), August 11, 2023\*\*

The parties signed a pre-nuptial agreement three days before they got married. Said agreement contained several provisions related to real and personal property owned by each party prior to the marriage. One provision stated that the parties waived any claim to maintenance in the event of a divorce. The agreement also contained two exhibits that listed each of the parties' property. Husband filed a motion for declaratory ruling in 2019 asking the trial court to find that the agreement was valid and enforceable. The trial court ultimately determined that the agreement was valid regarding the listed assets of the parties, except for one piece of real estate. The trial court considered the factors in section 504 and determined that the hardship exception applied to the parties' waiver of maintenance and awarded indefinite maintenance to Wife. Husband appealed.

The appellate court affirmed in part, reversed in part, and remanded in part. Husband argued that the trial court erred when it ruled that the undue hardship provision of the Act applied to preclude

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the enforcement of the agreement's prohibition on maintenance awards. The appellate court found that there was sufficient evidence that Wife's circumstances at the time of the divorce were not reasonably foreseeable at the time the parties executed the pre-nuptial agreement. The appellate court held that the trial court's determination that undue hardship precluded a denial of maintenance was supported by the manifest weight of the evidence. The appellate court ruled that absent a proper argument supporting a claim that the trial court's undue hardship determination was against the manifest weight of the evidence, there was no basis on which the appellate court could find that the trial court's determination was erroneous, thus the finding of undue hardship was affirmed.

Husband further argued that the trial court erred in its calculations for the amount and duration of maintenance because the trial court improperly took into account expenses of Wife that were no longer being paid. The appellate court agreed and remanded to the trial court to recalculate maintenance.

Lastly, Husband argued that the trial court erred when it refused to enforce the agreement's designation of the East Moline house as Husband's nonmarital property and instead found that the parties owned it as tenants in common. The appellate court stated that the agreement listed the East Moline house as Husband's nonmarital property, no statutory invalidity applied, and thus the designation should have been as Husband's nonmarital property and Wife should not have received the additional award of equity from the house. Thus, the appellate court reversed and remanded to the trial court to litigate the issue of whether Wife was due to receive section 503(c)(2)(A) reimbursements for any contributions she made beyond her initial contribution.

## **PRIVATE RIGHT OF ACTION**

See also, ABSOLUTE LITIGATION PRIVILEGE, *Goodman v. Goodman*, 2023 WL 3608963 (Ill. App. 2d Dist.), May 24, 2023

## **REFORMATION OF JUDGMENT**

*In re Marriage of Battaglia*, 2023 WL 2605398 (Ill. App. 1st Dist.), March 22, 2023\*

The parties entered into a Marital Settlement Agreement ("MSA") in May 2021. Wife filed a motion to modify the MSA in July 2021, requesting a typographical error be corrected. Wife claimed that a creditor's name was incorrect in the MSA. Husband's attorney argued that any ambiguities in the MSA should be construed against Wife, and that her Motion was improper. The trial court found that the error in the MSA was a mutual mistake, and granted Wife's motion to modify, fixing the error in the creditor's name. Husband appealed, arguing that the hearing on Wife's Motion was fatally flawed because the court did not understand the procedural requirements of a motion to modify a judgment as well as the standard of proof.

The appellate court affirmed, finding that the trial court did not err in reforming the MSA that had attributed a marital debt to the wrong creditor. The appellate court held that an evidentiary hearing to modify a MSA is not unprecedented. The appellate court further emphasized that Husband failed to allege how the hearing was inadequate, or complain about his inability to present evidence at the hearing or the general inadequacy of the hearing, thus, his claim of error was

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forfeited. The appellate court held that by construing the MSA as a whole and considering the parties' intentions when entering into the MSA, it was clear the creditor's name was an error.

*In re Marriage of Herring*, 2023 WL 4582808 (Ill. App. 2d Dist.), July 18, 2023\*

Husband filed a petition for reformation of the Marital Settlement Agreement based on a mutual mistake under Section 2-1401 of the Code of Civil Procedure regarding the division of funds held in college savings accounts for the children. The Marital Settlement Agreement stated the parties were obligated to pay the children's college expenses pursuant to Section 513 of the Illinois Marriage and Dissolution of Marriage Act. Section 513 limits the obligation based on, *inter alia*, grades and age. The parties' children dropped out of college and Husband wanted to be allocated a portion of the unused college funds. The MSA did not provide that remaining funds would be disbursed to the parties, but stated the college funds should be maintained for the benefit of the children.

Husband argued that the failure to specify that remaining college funds would be allocated per the property settlement was a mutual mistake. He pointed to the balance sheet which listed all property dividing it 35/65. However, the balance sheet did not list the college funds in the list of marital property; the college funds were listed under children's accounts. Wife argued the college funds were a resource for the children regardless of their age or GPA. Wife wanted funds preserved for the children and not disbursed to the parties. Wife prevailed on a 2-615 motion to dismiss. The appellate court affirmed the trial court's dismissal because Husband failed to state a cause of action and allege sufficient facts to show the parties had an agreement to disburse the college funds per the property agreement in the MSA once the children were 23 years old.

## RELEASE OF CLAIMS

*Malek v. Chuhak & Tecson, P.C.*, 2023 WL 6333967 (Ill. App. 1st Dist.), September 29, 2023\*\*

Wife filed suit against former Husband's attorneys claiming they aided him in committing fraud by allegedly backdating certain documents to justify a substantial transfer of money from Husband to his mother in Lebanon. Wife conducted discovery during the dissolution proceedings and received records regarding the above in December 2015. However, Wife claimed she was not aware of the transfer and pertinent facts until October 2017, when an attorney provided her with a memorandum detailing same. Wife filed suit against Husband's attorneys in September 2019, but withdrew the complaint. She filed a similar complaint two years later which was dismissed as untimely in April 2022. An amended judgment for dissolution of marriage was entered in March 2022. Wife filed an appeal of the dismissal of her complaint, claiming that she did not know of and could not have known of the defendant's wrongful conduct until October 2017. Wife asserted that this was a factual question that should not have been denied on a dismissal.

The appellate court affirmed, noting that the Code of Civil Procedure provides that litigants must bring an action against attorneys for damages within two years from the time the person bringing

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the action knew or reasonably should have known of the injury for which damages were sought. Further, per the discovery rule, plaintiffs must exercise reasonable diligence in investigating their potential claims. In this case, Wife was on “inquiry notice” of the alleged injury and wrongful conduct of defendant at least in December 2014, when her attorney filed a motion on her behalf alleging a scheme devised by Husband to deplete the marital estate. Although, at that time, Wife may not have known of defendant’s involvement, she was made aware that she was injured. And therefore, the statute of limitations began to run at that time. Furthermore, Wife received documents supporting the contention that the attorneys had been involved, in response to her discovery requests in December 2015.

Additionally, within the settlement agreement incorporated within the parties’ judgment for dissolution of marriage, was a provision labeled “covenant not to sue” in which Wife relinquished, released, waived and released any and all claims against Husband and his former attorneys (the named defendants). The appellate court interpreted the clause as both a covenant not to sue and a release.

Therefore, Wife’s complaint against the defendants was time-barred and released.

## **RELOCATION**

*In re Marriage of Mardi*, 2023 WL 2386506 (Ill. App. 4th Dist.), March 7, 2023\*

Wife filed a Notice of Intended Relocation in conjunction with her Petition for Dissolution of Marriage. The trial court granted Wife sole decision making and majority parenting time and authorized her relocation to Utah. The appellate court affirmed the trial court’s rulings on relocation, parenting time and decision making but vacated and remanded the trial court’s ruling on child support and maintenance because those issues had been reserved at the evidentiary hearing.

The appellate court noted that the trial court considered all statutory factors listed in 602.5 and 602.7 and 609.2. The trial court was in the best position to judge credibility and determine the needs of the child and there is a strong and compelling presumption in favor of the result reached by the trial court. The trial court’s order would not be reversed unless the court’s findings were against the manifest weight of the evidence. The appellate court also found that there need not be an Allocation Judgment to proceed under 609.2. Further, the appellate court found that a petition to relocate may be filed in conjunction with a Petition for Dissolution of Marriage.

*Burmood v. Anderson*, 2023 WL 5159844 (Ill. App. 2d Dist.), August 10, 2023

Both parties grew up in Galesburg, Illinois, but eventually Mother moved to Naperville, Illinois, and Father moved to Aurora, Illinois. The parties had a child together in 2019. The trial court entered a judgment providing that the child would primarily reside with Mother. In 2021, Mother filed a petition to relocate to Galesburg with the child, alleging that the relocation would allow her to move into a single-family residence in a great neighborhood with a top elementary school versus her current one-bedroom apartment. Mother claimed that the cost of living was less

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expensive in Galesburg. Mother also stated that Father was in arrearage on his child support and daycare expenses obligations. Lastly, Mother claimed that the relocation would be in the child's best interest because the child would be closer to both her maternal and paternal grandparents and would be able to attend a Catholic school that several of her cousins were already attending. Mother also had another child with another party, both of whom lived in Galesburg, so the minor in question would be able to see her sibling more frequently.

Father filed a petition for a temporary restraining order and a preliminary injunction seeking to prevent Mother from relocating with the child to Galesburg, claiming that relocation would negatively impact his parenting time with the child. Father had previously filed an Order of Protection and a DCFS claim against the father of Mother's other child, and told Mother that he did not care if she moved to Galesburg as long as his daughter was not around the father of Mother's other child. Guardian ad litem (GAL) was appointed in the matter. The trial court held a hearing on the matter, considered the parties' testimonies, and took judicial notice of the child support and daycare arrearage. The trial court ultimately denied Mother's petition to relocate, stating it had considered all the statutory factors set forth in section 609.2(g) of the Illinois Marriage and Dissolution of Marriage Act and found that most of the factors weighed against or strongly against relocation. Mother appealed, arguing that the trial court's decision denying her petition to relocate with the child was against the manifest weight of the evidence.

The appellate court reversed and remanded. The appellate court noted that a court must make its determination for relocation based on the best interests of the child and should consider the factors in 609.2(g) when making such a determination. After review of the factors, the appellate court found that the evidence indicated that Mother's move to Galesburg would enhance her financial position and allow her to receive more assistance from her extended family, which was significant due to Father's failure to pay child support. The appellate court further held that while it would be easier for Father to maintain a relationship with the child in Naperville, that factor did not outweigh the other considerations indicating that the child's life would be improved if she moved to Galesburg, especially when the trial court determined that a reasonable visitation schedule could be made if relocation was approved. The appellate court held that overall, the majority of the statutory factors showed that relocation would have a positive impact on the child, and that the negative impact on Father was limited. After consideration of the record and the trial court's findings based on the statutory and other relevant factors, the appellate court concluded that the trial court's decision to deny the petition to relocate was against the manifest weight of the evidence, thus remanding to the trial court to grant the petition for relocation and to establish a new parenting time schedule.

*In re Marriage of Kenney v. Strang*, 2023 WL 4079513 (Ill. App. 1st Dist.), June 20, 2023\*

The parties were married shortly after Wife became pregnant with their twins. At the time, Husband was a licensed attorney in Illinois working in Chicago, he owned property in Chicago, and his immediate family was in the area. Wife was working and living temporarily in Texas, but also maintained a home in Colorado, which she had owned for at least a decade, and her immediate family lived in Colorado. The parties split their time between Illinois and Colorado during the pregnancy and marriage. The twins were born in Chicago, and the parties agreed to renovate the Chicago property for the twins. When the twins turned 4 months old, Wife began traveling with them frequently and regularly between Chicago and Colorado. The twins remained with Wife for a vast majority of the time and Wife was their primary caretaker. In 2018, Wife took

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the twins to Colorado and did not return to Chicago. Husband filed a petition for dissolution of marriage in Illinois, as well as an emergency motion for the return of the minor children to their home state, wherein he claimed Illinois was the children's home state. Wife filed a petition for dissolution of marriage in Colorado, and subsequently moved to dismiss Husband's petition for dissolution of marriage in Illinois for lack of personal jurisdiction. The trial court denied Wife's motion to dismiss, and Illinois found under the long arm statute that it had jurisdiction over Wife. To determine whether the court had jurisdiction over the twins, the court looked to the UCCJEA, and ultimately determined that Illinois was the twin's home state. Thereafter, Wife filed a petition to relocate with minor children and entry of a parenting plan and/or allocation order. After a lengthy and detailed trial, and application of the factors in 602.5(c) pertaining to decision making, 602.7(b) pertaining to parenting time, and 609.2(g), the trial court ultimately granted Wife sole decision making, granted Wife majority parenting time, and granted Wife's petition for relocation. Husband appealed, arguing that the trial court erred in failing to regard the instant case as a relocation matter pursuant to section 609.2 of the Act and that it impermissibly shifted the burden of proof to him, and that even if that were not the case, the trial court erred in weighing the evidence at trial in granting Wife's petition to relocate.

The appellate court affirmed, finding that the burden was always with Wife, that the trial court properly considered the case as a relocation matter, and Husband failed to adequately demonstrate that the trial court impermissibly shifted the burden to him. The appellate court further found that the trial court's finding that the twin's primary residence had always been with Wife was proper and supported by the evidence. Such finding did not ignore or violate the trial court's prior order that the twin's home state was Illinois under the UCCJEA for jurisdiction purposes because the term "home state" as defined by the UCCJEA and the term "primary residence" as defined by the IMDMA are two different legal concepts.

The appellate court found it appropriate for the trial court to consider the concept the expert used that the children had lived in Colorado "all of their conscious lives" and noted that the relocation statute allows the court to also consider "any other relevant factor bearing on the children's best interests." The appellate court held that the trial court's findings were proper and supported by the evidence.

*In re Marriage of Erickson*, 2023 WL 6811019 (Ill. App. 3rd Dist.), October 16, 2023\*

The parties had equal parenting time and Father was designated as the primary residential parent for the purposes of school registration should the children switch to public school. Wife filed a petition to modify parenting time and to relocate 90 minutes away.

The adjudication of a relocation petition requires a best interest determination, and the lower court will not be reversed unless the decision is clearly against the manifest weight of the evidence, and it appears that a manifest injustice has occurred.

The trial court denied the relocation because it saw "no viable way to maintain an equal or substantially equal parenting time schedule" given the distance between Husband's home and Wife's new home.

Section 602.9(g) sets forth 11 factors the court shall consider in a relocation determination. Here, the trial court mistakenly analyzed the 11 factors with the lens of keeping the current equal

parenting plan the same. It found that the distance in keeping an equal parenting schedule was not in the children's best interest. The appellate court found that the trial court's analysis should have been on whether the relocation was in the children's best interests because clearly the equal schedule could not be maintained with Mother's move. The court reversed and remanded to allow the trial court to evaluate the statutory factors considering the children's best interests based on the evidence already presented.

## **RES JUDICATA**

See also, JURISDICTION, *The Department of Healthcare and Family Services ex rel. Carolyn Whitaker, Petitioner-Appellee, v. Michael Oliver Jr., Respondent-Appellant.*, 2023 WL 3035202 (Ill. App. 5th Dist.), April 21, 2023\*

See also, CHILDREN'S ACCOUNTS, *Chanen v. Chanen*, 2023 WL 4837695 (Ill. App. 1st Dist.), July 28, 2023\*

## **RESTRICTION OF PARENTING TIME**

*In re Marriage of Keigher*, 2023 WL 7017752 (Ill. App. 1st Dist.), October 25, 2023\*

The parties had four minor children during the marriage. The three boys had all been diagnosed with ADHD and the parties' daughter had Down syndrome. Father refused to allow the boys to receive medication for their ADHD despite growing behavioral problems (taping the younger boy to a doorknob, tying up a younger family member and pointing an airsoft gun at his head while threatening to kill him, etc.). Father marginalized Mother by criticizing her decisions in the presence of the children such that the two older children had no respect for Mother who could not control them. Father would also say things like the children needed to pray for their mother and that she was crazy.

A Guardian ad Litem was appointed. A 604.10(b) evaluator and Father's 604.10(c) expert were also appointed to conduct evaluations of the family. All three experts had determined that Father's actions had caused Mother to be alienated from the older boys. However, the 604.10(c) expert opined that the family dynamics had been in place for many years during the marriage. Said expert thought the parties should focus on the two older children's high school education and recommended that they should live primarily with Father who would be able to better manage the two boys to refocus and prioritize their performance at school, while allowing them to spend weekend and fun time with Mother. He further believed that the two younger children should reside primarily with Mother based on their ages and continued need for nurturing. The 604.10(b) evaluator had found that Husband had a consistent theme in his communications which was anger towards Mother and noted that Husband was dismissive of the older boys' bullying of their younger sibling. Said expert was concerned about the children having some serious dysfunction because of Father's behavior/actions/communications, which included violating court orders and using the boys to access the marital residence despite Mother being awarded exclusive possession. The trial court found Father's behavior to be a serious endangerment to the children, awarded Mother sole decision-making responsibilities, and provided for a stepped-up parenting time arrangement for Father, which initially started with supervised parenting time. Father appealed.

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The appellate court affirmed, noting that even if the alienation had its roots in the preexisting family dynamics, Father was not absolved from his role in encouraging it. The appellate court held that the trial court's finding of serious endangerment was not against the manifest weight of the evidence and the restrictions set in place as a result were not an abuse of discretion.

*In re Marriage of Lindell*, 2023 WL 8713618 (Ill.App. 2 Dist.), December 19, 2023\*\*

The parties were married for eight years and had three children. Husband believed that Wife was using drugs, had an eating disorder, and needed mental health treatment, and brought his concerns to the parties' shared employer, which was a hospital. Wife was required to take a leave of absence and undergo a neuropsychological evaluation. The results of same indicated Wife suffered from depression and anxiety with a history of ADHD. It was recommended that Wife attend a program for eating disorders. During the dissolution proceedings, Dr. Amabile was appointed to conduct a custody evaluation pursuant to Section 604.10(b) of the IMDMA. Wife was also ordered to submit to a hair follicle test; the results of which indicated Wife was a severe alcoholic who consumed substantial amounts of alcohol daily. Both Dr. Amabile and the court-appointed guardian ad litem noted that Wife has misused/abused alcohol, opiates, sleeping medications, and benzodiazepines to cope with her depression, anxiety, insomnia, eating disorder, and postpartum depression. Both professionals recommended that Husband have sole decision-making responsibilities and be designated the primary residential parent. The court ordered same, as well as supervised visitation for Wife after finding that she engaged in conduct that endangered the children, as required by statute. Wife filed a motion to reconsider, alleging that the restrictions on her parenting time were a result of an "unlawful conspiracy" between Husband's attorneys, the guardian ad litem, Dr. Amabile, and the owner of the lab who conducted the hair testing. Said motion was filed without any supporting documentation. In denying the motion, the trial court found that the motion did not address anything that related to a misapplication of the law, change in law, or newly discovered evidence, as required by the Code of Civil Procedure. Wife appealed.

The appellate court affirmed, noting that the record on appeal did not contain a transcript of the trial or any of the exhibits the court referenced in its judgment. Thus, the appellate court was required to presume that the trial court correctly rejected Wife's claims and properly allocated parental responsibilities and parenting time based on the evidence presented at trial. On appeal, Wife provided no explanation for why the allegations set forth in her motion to reconsider was not presented at trial, and the documents being presented at the appellate court predated the trial and should have been presented by Wife at that time.

Husband sought sanctions for Wife's frivolous appeal which were granted after the appellate court concluded that the appeal would not have been brought in good faith by a reasonable, prudent attorney.

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*In re Parentage of K.K., Kidwell v. Bryant*, 2023 WL 8599345 (Ill.App. 2 Dist.), December 12, 2023\*

By agreement, Father was allocated alternate weekend visitation with the parties' minor child, which was to be supervised by Father's parents. A DCFS case was opened after allegations were made that Father had inappropriately touched the daughter during an overnight visit wherein he slept in the child's bedroom while his parents slept in their bedroom. Mother alleged that the child was emotionally upset and stopped allowing Father to visit with the child. The results of the DCFS investigation were unfounded.

Father then filed a motion for make-up parenting time, and Mother filed a petition to suspend parenting time. Father then filed a motion to enforce visitation and then a motion for reconciliation counseling. A guardian ad litem (GAL) was appointed. Initially, the trial court suspended Father's parenting time until the GAL could investigate and report to the court. Both parties retained experts pursuant to Section 604.10(c) of the IMDMA. From December 2018, until his motion for reconciliation counseling was finally denied in June of 2023, there were multiple orders appointing counselors and halting reunification therapy pending the child's individual therapy.

In his appeal, Father argued that the trial court erred in denying his motion for reconciliation counseling because it applied the wrong standard pursuant to Section 607.6(a) of the IMDMA and that the trial court failed to conduct a hearing and make requisite findings pursuant to section 603.10(b) of the IMDMA in denying his motion for hearing or to resume parenting time.

Father argued that the trial court suspended his parenting time in December 2018, without a hearing and that Section 603.10(b) of the IMDMA required a hearing before restricting his parenting time. The trial court did not conduct a hearing when it, *sua sponte*, suspended Father's parenting time, pending the guardian ad litem's investigation. The appellate court found the trial court erred in failing to conduct a hearing before suspending Father's parenting time. In fact, the trial court denied Father's subsequent request for a hearing and stated that Father waived his right to a hearing in entering the agreed order for the appointment of the guardian ad litem in December 2018. The trial court erred again in October of 2020, by denying Father's motion for hearing or, in the alternative, resumption of parenting time.

The appellate court stated that there was a total disconnect in the various judges who presided over the four years of litigation, and their understanding of what was going on at each step in the litigation. The trial court improperly suspended Father's parenting time without a hearing and there was no progress toward the resumption of parenting time, just a culture of continuances. Father's parenting time had been suspended without explanation or hearing for nearly five years. The appellate court remanded back to the trial court for hearing, or in the alternative, resumption of parenting time. The issue of the denial of Father's motion for reconciliation counseling was reserved.

## **RETROACTIVE CHILD SUPPORT**

See also, ATTORNEY'S FEES, MODIFICATION OF PARENTING RESPONSIBILITIES, PARENTING TIME, PARENTAL COUNSELING, *In re D.R.B.*, 2023 WL 2733475 (Ill. App. 1st Dist.), March 31, 2023\*

## **SANCTIONS**

See also, ATTORNEY FEES, *Teymour v. Mostafa*, 2023 WL 3947939 (Ill. App. 1st Dist.), June 12, 2023\*

See also, CONTEMPT, *In re Marriage of Otero*, 2023 WL 5748549 (Ill. App. 1st Dist.), September 6, 2023\*

See also, RESTRICTIONS ON PARENTING TIME, *In re Marriage of Lindell*, 2023 WL 8713618 (Ill.App. 2 Dist.), December 19, 2023\*\*

## **SERVICE**

See also, JURISDICTION, RES JUDICATA, *The Department of Healthcare and Family Services ex rel. Carolyn Whitaker, Petitioner-Appellee, v. Michael Oliver Jr., Respondent-Appellant.*, 2023 WL 3035202 (Ill. App. 5th Dist.), April 21, 2023\*

## **STALKING NO CONTACT ORDER**

*Ahmad v. Qattoum*, 2023 WL 2808114 (Ill. App. 4th Dist.), April 5, 2023\*

In December 2020, the trial court granted Petitioner's emergency petition for a stalking no contact order against Respondent as a result of Respondent and his wife's numerous harassing calls and messages. Petitioner's friend was granted an emergency stalking no contact order against Respondent's wife. The trial court conducted contemporaneous plenary hearings in Petitioner's and his friend's case. At the conclusion of the hearings, the court granted Petitioner's friend a plenary stalking no contact order against Respondent's wife, and included Petitioner as a protected party. However, the trial court denied Petitioner's request for a plenary stalking no contact order against Respondent, stating that there was not sufficient evidence to prove that Respondent, and not his wife, was involved in the harassing incidents, but that it was clear that Respondent's wife was involved. Petitioner had only produced messages that he proved were from Respondent relative to Respondent reaching out to Petitioner in an attempt to resolve their differences. Petitioner also produced logs of numerous calls and messages from unknown or blocked numbers and could not prove that they were from Respondent. Petitioner appealed, alleging that the trial court erred in denying his petition for a plenary stalking no contact order against Respondent. Respondent argued that the trial court's decision was against the manifest weight of the evidence and inconsistent with its decision to grant his friend's plenary stalking no contact order against Respondent's wife.

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The appellate court affirmed, finding that there was no agency relationship established between Petitioner and his friend, and thus the accountability statute was not triggered, and the ruling in his case did not have to be the same as the ruling in his friend's case. Further, the appellate court found that Petitioner failed to provide sufficient evidence that Respondent committed conduct that would warrant a plenary stalking no contact order.

See also, HEARSAY EVIDENCE, *Maloney v. Galatte*, 2023 WL 3002477 (Ill. App. 3rd Dist., 2023), April 19, 2023\*

## **STATUTE OF LIMITATIONS**

*In re Marriage of Parmenter and Jones*, 2023 WL 2204473 (Ill. App. 4th Dist.), February 24, 2023\*

The trial court entered a judgment for dissolution of marriage on March 11, 2010. The judgment incorporated the parties' settlement agreement and joint parenting agreement. Thereafter, the parties engaged in 12 years of contentious litigation as Husband filed numerous pleadings, including petitions for visitation, to modify visitation and child support, and for rules to show cause. On January 21, 2022, Husband filed his Motion to Vacate. Ten days later he filed his second Motion to Vacate seeking to vacate 1) his initial Appearance and Consent filed at the time of the filing of Wife's Petition for Dissolution of Marriage; 2) August 26, 2010, child support order; and 3) the judgment for dissolution of marriage. Wife filed a Motion to Dismiss pursuant to both 2-615 and 2-619 claiming that it was untimely and barred by section 510(a) of the Act. The trial court agreed with Wife that the two-year statute of limitation applied and dismissed Husband's Motion to Vacate. Husband appealed the dismissal, contending that the statute of limitation cannot be applied as the orders were obtained fraudulently and therefore must be void, claiming he did not receive notice of proceedings, and that Wife made changes to the judgement before it was entered.

Appellate court affirmed, finding that Husband fully participated in 12 years of litigation as an active litigant after he voluntarily submitted himself to the Court's jurisdiction.

See also, RELEASE OF CLAIMS, *Malek v. Chuhak & Tecson, P.C.*, 2023 WL 6333967 (Ill. App. 1st Dist.), September 29, 2023\*\*

## **STATUTE OF LIMITATIONS FOR ADULT CHILD TO FILE UNDER PARENTAGE ACT**

*In re Parentage of Miller v. Guy*, 2023 WL 2439893 (Ill. App. 1st Dist.) March 10, 2023

Petitioner, age 59, filed a petition to establish paternity against his biological father, Respondent, age 83. The trial court granted Respondent's motion to dismiss and found that the Illinois Parentage Act of 2015, which provides that a proceeding to adjudicate the parentage of a child may be commenced at any time by the child as applied to the Respondent was unconstitutional under the Illinois due process clause. It was noted that the Parentage Act had been revised twice (in 1984 and in 2015) since Petitioner's birth.

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The appellate court found that the 2015 Parentage Act expressly authorizes the suit. The 2015 Act states that a parentage proceeding may be commenced at any time even after the child becomes an adult, if initiated by the child, or an earlier proceeding to adjudicate parentage has been dismissed based on the application of a statute of limitations then in effect.

The appellate court rejected the Respondent's argument that the statute of limitations in the Parentage Act of 1984 created a vested interest in the expiration of Petitioner's paternity claim and that the 2015 Act deprived him of that interest and was therefore unconstitutional as applied to him. The appellate court found that it was not necessary to reach the constitutional question because Petitioner did not have a right to sue under the 1984 Act which barred an adult child from filing suit if brought later than age 23. In 1984, Petitioner was already 25 years old and the savings clause in the 1984 Act was not a guarantee as other provisions had to be complied with. Although under the 1984 savings clause there was the possibility of an equitable extension, that was not a guarantee. No rights or vested interests are conferred by a mere possibility. Defendant was barred from relying on the possibility of an equitable extension of the 2-year statute of limitations and could not argue that a vested right to be free from suit was created. In order to argue that due process has been violated, a party must establish a definitive property interest or right and the Respondent failed to do so.

## **STATUTE OF LIMITATIONS FOR MALPRACTICE CLAIM**

*Jones v. Law Offices of Jeffrey Leving, Ltd.*, 2023 WL 2237479 (Ill. App. 1st Dist.), February 27, 2023\*

Respondent represented Petitioner in a child support arrearage case filed by Petitioner's former spouse. Petitioner was initially ordered to pay \$6,954.37 for child support arrearage after the hearing. However, ex-wife's motion to reconsider was granted and Petitioner was ordered to pay an additional sum of \$52,661.33.

Petitioner filed a legal malpractice action against Respondent. In his malpractice suit, Petitioner claims that the attorney from Leving's office failed to put into evidence proof of the child support payments he did pay and also charged unreasonable and excessive attorney's fees. Respondent filed a Motion to Strike and Dismiss and argued that Petitioner's lawsuit was barred by the statute of limitations under which claims against attorneys for professional negligence must be brought "within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." Respondent argued that Petitioner knew or should have known of Leving's alleged negligence when the trial court granted ex-wife's motion to reconsider. Petitioner did not file his original complaint until more than two years after the motion to reconsider was granted. Petitioner argued that he did not become reasonably aware of the claim for legal malpractice until he received a legal opinion from a subsequent attorney. Petitioner also argued that the statute of limitations was extended under the

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fraudulent concealment statute which extends the limitations period to five years if a defendant fraudulently conceals the cause of action. The trial court granted Respondent's motion to dismiss based on the statute of limitations. Petitioner appealed.

The appellate court affirmed the trial court's determination that the granting of the motion to reconsider and judgment for an additional \$52,661.37 did not toll the statute of limitations. At that time, Petitioner should have been reasonably aware of the attorney's mistakes, thus there was no concealment. Likewise, Petitioner became aware of any excessive billing at the time the relationship broke down. The order granting the motion to reconsider explicitly stated that Petitioner's child support liability was being increased because he had not met his burden and failed to submit evidence of prior payments. This effectively put Petitioner on notice that he had not obtained effective representation from Leving, despite having paid tens of thousands of dollars in legal fees.

## **STATUTE OF REPOSE**

See also, *FRAUDULENT CONCEALMENT Anderson v. Sullivan Taylor & Gumina, P.C.*, 2023 WL 4288345 (Ill. App. 1st Dist.), June 30, 2023\*

## **STATUTORY INTEREST**

*In re Marriage of Reynolds*, 2023 WL 2733513 (Ill. App. 1st Dist.), March 31, 2023\*

Following extensive post decree litigation, judgment was entered against Husband in the amount of \$35,000 for Wife's attorney's fees. Said amount was agreed upon by the parties to resolve Wife's petition for fees pursuant to Section 508(b) of the IMDMA. Husband was to pay \$1,700 per month until paid in full. If Husband was late in his payments, a penalty of \$33,798.92 kicked in. The agreed order was silent as to whether or not interest would accrue. Upon Husband's final payment, Wife demanded he pay interest in the amount of \$3,151.84. Husband refused, and Wife filed a motion for entry of judgment for the interest amount and also sought payment of the penalty. Wife also filed a petition for rule to show cause as to why Husband should not be held in contempt for his failure to pay the interest and penalty.

The trial court denied the petition for rule to show cause and held that Husband had not violated the agreed order. The trial court further awarded Wife interest on the judgment. Wife appealed arguing that the trial court erred when it found that Husband did not breach the agreed order.

The appellate court affirmed holding that the agreement was completely silent about interest and that courts should not add language or matters to a contract about which the instrument is silent. Husband did not appeal the interest award and that issue was not addressed on appeal.

## **SUPPORT**

*Kunsemiller v. Kunsemiller*, 2023 WL 5274664 (Ill. App. 5th Dist.), August 16, 2023\*

At the time of the entry of the parties' judgment for dissolution of marriage in 2014, there were three minor children. The judgment awarded Wife permanent maintenance and

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statutory child support, and also required Husband to provide health insurance for the children and be responsible for 75% of the children's out of pocket expenses. Wife filed a motion for a new trial or to reconsider. Husband also filed a post-trial motion/motion to reconsider. The trial court modified child support and maintenance retroactively to the date of the hearing on the motions. Wife filed her notice of appeal, and the appellate court affirmed. In 2016, Wife filed a motion to modify child support and maintenance, arguing a substantial change in circumstances. Husband filed a cross motion to modify support. In 2018, Wife filed a petition for nonminor support. The trial court entered a motion modifying child support and maintenance. The court also required Husband to make Wife the beneficiary on his life insurance policy for so long as he had a support obligation and denied Wife's request for attorneys' fees. Husband filed a motion to set aside/vacate the order, which the trial court granted because Husband's counsel at the time did not properly present Husband's case and left him in the hallway during the proceedings. The trial court then entered an order granting Wife interim attorneys' fees. In 2020, the trial court entered an order on the motions to modify support, setting the modification retroactive and calculating arrearage, and denying Wife's motion for nonminor support and her request for attorneys' fees. Wife filed a motion to reconsider, and Husband filed a motion for clarification and reconsideration. The trial court denied both motions for reconsideration. Wife appealed, and Husband cross appealed.

The appellate court affirmed. The appellate court found that the trial court did not err in vacating the May 2019 order. It did not abuse its discretion in calculating the income of the parties, denying the award of nonminor education expenses, denying Wife's request for additional attorneys' fees, and did not err in denying an award of sanctions against Wife. Specifically, the appellate court found that the trial court had authority to vacate the May 2019 order, and doing so did substantial justice between the parties. Additionally, the appellate court found that the trial court made clear in its order that neither party was credible as to reporting their income and could not say that the court abused its discretion in coming to its determination of the parties' incomes. Further, the appellate court held that, as required by section 513 of the IMDMA, there was not sufficient evidence to justify an award of nonminor support where there was no evidence presented as to the financial resources of their eldest daughter or her academic performance.

Additionally, the appellate court affirmed the trial court's denial of Wife's request for additional attorney's fees pursuant to Section 508(a) of the IMDMA. The trial court noted that, while Wife may have had difficulty paying her fees, Husband was not in a position to contribute to her fees, and that both parties had been living beyond their financial means. Vacating the prior order for fees did not serve to establish that the denial of further fees is an abuse of discretion as Wife suggested.

Furthermore, while it was undisputed that Wife destroyed relevant financial records during the pendency of the litigation, the trial court specifically stated that it did not rely on the parties' testimony or personally prepared documents in determining incomes for support. Therefore, the trial court's decision was not affected by the lack of the destroyed financial

documents, and thus, the appellate court affirmed the trial court's denial of Husband's request for Supreme Court Rule 219 sanctions.

## **TEMPORARY RELIEF**

*In re Marriage of Gabrys*, 2023 WL 8103001 (Ill. App. 1st Dist.), November 22, 2023\*\*

The parties were married 34 years. At the time of the commencement of the divorce action, Wife was residing in Illinois in the marital residence and Husband was residing in a rental property. Husband earned a substantial income from his interest in various businesses. Wife was unemployed. During the pendency of the case, Husband moved to Florida and Wife traveled to Poland. While in Poland, Wife failed to attend her deposition and failed to attend court for the hearing on Husband's petition seeking for the marital residence to be sold pursuant to Section 501 of the Illinois Marriage and Dissolution of Marriage Act. The trial court ordered that the home be sold. Wife filed a motion to reconsider. The trial court denied the motion to reconsider and ordered that the sale of the home proceed immediately. Wife appealed, arguing that there was no legitimate reason to have the home sold on a temporary basis. Husband argued that it should be sold because Wife was in Poland.

The appellate court, agreeing with Wife, reversed, noting that while Section 501 authorizes the sale of an asset during the pendency of a dissolution matter, it is only appropriate in extraordinary circumstances, where such a sale is required to otherwise maintain the status quo prior to the final dissolution. In this case, the immediate sale of the marital residence was wholly unnecessary as it did not maintain the status quo but rather constituted a permanent injunction without adequate justification. The appellate court further elaborated that the trial court should not use Section 501 to unnecessarily adjudicate the rights of the parties prior to the entry of the final judgment.

## **UNDISCLOSED ASSETS**

*In re Marriage of Hyman*, 2023 WL 2198807 (Ill. App. 2d Dist.), February 24, 2023

The parties' Marital Settlement Agreement ("MSA") awarded Husband his business at an "unknown value" and included a clause providing that undisclosed assets would be divided equally between the parties if discovered after the divorce. Husband received stock options as the sole compensation for work done by his business prior to entry of the Judgment for Dissolution of Marriage. Husband never provided information regarding the consulting work done by his business or the stock options. Wife issued discovery requests, but Husband never complied. Wife did not seek compliance because the case settled. The options were in Husband's name, not his business' name. Wife filed a post-judgment petition seeking an equal division of the undisclosed options pursuant to the clause in the Marital Settlement Agreement.

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The trial court granted Wife's petition and found the options were not contemplated at the time the MSA was drafted because no one other than Husband knew of their existence. The trial court noted that at the prove up hearing Husband was asked if he was aware of anything he had not disclosed. Husband tried to argue the options were part of the value of the business and that Wife failed to act with due diligence in discovery. The appellate court found the plain language of the MSA required that Wife receive 50% of the asset. The appellate court found Husband's arguments to be unpersuasive as assets were in his name, he failed to disclose them, and the MSA specifically assigned undisclosed assets.

## **UNIFORM CHILD CUSTODY JURISDICTION**

*Lafferty v. Zachary-Hyden*, 2023 WL 7489962 (Ill. App. 3rd Dist.), November 13, 2023\*

Mother filed a parentage case in Illinois, seeking to allocate all decision-making responsibilities and parenting time to her. Father filed a motion seeking for the case to be transferred to Kentucky where he had already previously initiated a case. Mother's testimony conflicted with various dates set forth in her petition regarding where she and the child had resided. Father testified that, although the child was born in Ohio, both parties resided in Kentucky at the time of the child's birth. The evidence showed that both parties had moved from Kentucky to Ohio and then back to Kentucky. Mother also resided in California and Chicago prior to the filing of the case. Father testified that Mother had been the victim of domestic violence which the child witnessed. Following the domestic violence, Father testified that Mother moved in with his mother in Kentucky and he and Mother shared parenting time. Then, one day, Mother, instead of taking the child to school, took the child to Kankakee, Illinois, and refused to return her to Kentucky. The trial court ordered that Kentucky was the child's home state and that Illinois lacked jurisdiction. The trial court further ordered that the child be returned to Kentucky. Mother appealed.

The appellate court affirmed, finding that the evidence was not sufficient to establish that Illinois was the child's home state. The appellate court pointed out that it was Mother's burden to prove that Illinois had jurisdiction, and she failed to do so, and she also failed to explain the discrepancies in her dates and the alleged overlapping periods of where she claimed the child resided.

## **VACATUR**

*In re Marriage of Faul*, 2023 WL 2945165 (Ill. App. 2d Dist.), April 13, 2023\*

The parties' Marital Settlement Agreement ("MSA") set forth specific provisions regarding the two homes which were to be sold. The judgment was entered in 2016. The MSA provided that Husband would receive "from the net sale proceeds of the first to sell of either the marital residence or the Michigan residence the amount of thirty thousand dollars (\$30,000) in exchange for his waiver of maintenance." The MSA further provided that if the Michigan residence sold first, Husband would receive \$115,000 prior to the equal division of the remaining net proceeds. If the

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marital residence sold first, Husband would receive \$42,500 prior to the equal division of the remaining net proceeds and then \$72,500 from the proceeds from the sale of the Michigan residence prior to the remaining proceeds being divided equally between the parties.

In summary, the MSA provided that Husband was to receive \$145,000 “prior to the equal division” of proceeds to effectuate an equitable division of the estate. However, the payments did not strictly track the language of the MSA. Husband received \$72,500 from the sale of the marital residence in June 2017. When the Michigan residence sold in June 2020, Husband demanded that Wife pay the remaining \$72,500 from her portion of the proceeds rather than the first \$72,500. Wife declined, and Husband filed a petition pursuant to Section 2-1401 of the Civil Practice Act, claiming a mutual mistake of fact. Wife filed a motion to dismiss, alleging that there was no mutual mistake of fact and Husband failed to timely file his petition which was filed approximately three and a half years after the entry of the judgment. The trial court granted the motion to dismiss. Husband appealed.

The appellate court affirmed. Husband had argued that the limitation period set forth in 2-1401 should be tolled until the date the Michigan property sold because Wife’s payment to him after the sale of the marital residence “‘was of such character as to prevent inquiry, elude investigation, and mislead [him,]’ which in turn caused him to ‘refrain[] from commencing the instant action within’” the two-year limitations period. Because he fell outside the limitations period, Husband was required to plead within the 2-1401 petition either “legal disability, duress, or fraudulent concealment.” Husband did not do so, and therefore the trial court’s dismissal was proper.

## **VACATING DEFAULT JUDGMENT**

*In re Marriage of Parmar v. Rai*, 2023 WL 3676884 (Ill. App. 1st Dist.), May 26, 2023\*

The parties engaged in significant pre-decree litigation including a 604.10(b) evaluation before they moved to California together and attempted to reconcile. During this time, the case was put on the court’s reconciliation calendar. Thereafter, Husband’s attorney withdrew, and Husband was granted 21 days to file his appearance or secure new counsel, which he did not do. Wife filed a motion for default and the day the case was set for default prove up, Husband emailed the court and Wife’s attorney. The trial court entered Wife’s proposed default Judgment allocating parental responsibilities, setting child support and allocating the property (\$3,000,000 to Husband and \$1,000,000 to Wife) and attorney’s fees. The trial court denied Husband’s motion to vacate, and the appellate court affirmed. Husband alleged he was disadvantaged because Wife was awarded sole decision-making and he was awarded less parenting time than recommended in the 604.10(b) report. The record indicated that the trial court considered whether substantial justice occurred between the parties in the context of entering the default judgment. The appellate court held that the trial court did not abuse its discretion in denying Husband’s motion to vacate where the trial court’s judgment provided substantial justice between the parties.

## **VALUATION OF PROPERTY AND MARITAL ASSETS**

*In re Marriage of Bornhofen*, 2023 WL 8780194, (Ill.App. 1 Dist.), December 19, 2023\*

The parties engaged in a trial, relevant to this appeal, over the valuation of the parties’ two marital businesses, the division of marital assets and liabilities, and maintenance.

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The trial court entered a judgment for dissolution of marriage in July 2022. The trial court heard testimony of both parties' business valuation experts and employees of the marital businesses, and reviewed exhibits. The trial court made express findings concerning the credibility of the witnesses and the weight of testimony. The trial court further stated that it reviewed statutory authority and applicable case law prior to making its findings and orders.

The trial court awarded Wife reviewable maintenance with an option to petition to extend maintenance at that time. The trial court awarded Husband 100% of one of the marital businesses at the fair market value determined by the trial court, ordering Husband to buy out Wife's interest at 50% of said value. The trial court valued the second marital business at \$0. Thereafter, the court divided the marital estate equally. Wife appealed, arguing that the trial court's valuation of the one marital business was an abuse of discretion because the valuation represents only one year of cash earnings. Wife further argued that the trial court's maintenance award was an abuse of discretion, contending that the award was unfair.

The appellate court affirmed. The appellate first held that the trial court's valuation of the business was not an abuse of discretion, where it based the value on recognized principles of law and competent evidence of value, and its determination of the value was supported by evidence. The trial court used the cash flow approach when valuing the business, which is a recognized principle of law. The appellate court further stated that the trial court also determined each and every factor of section 503 of the IMDMA as outlined in Revenue Ruling 59-60. As to maintenance, the appellate court held that the trial court considered all factors of section 504 of the IMDMA, and a deviation from the guidelines was appropriate, as the parties' combined gross annual incomes were over \$500,000. The trial court believed that Wife had the ability to obtain full-time employment within the five-year review period, thus justifying the court's income imputation and five-year reviewable maintenance period.

See also, CREDIBILITY OF WITNESSES, *In re Marriage of Mansoor and Mohammed*, 2023 WL 4533908 (Ill. App. 3rd Dist.), July 13, 2023\*

See also, ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME, ALLOCATION OF DEBT, *In re Marriage of Morgan L. and Gregory L.*, 2023 WL 6891576 (Ill. App. 5th Dist.), October 19, 2023\*

See also, ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME, *In re Marriage of Hussain and Ali*, 2023 WL 7319416 (Ill. App. 2d Dist.), November 7, 2023\*

See also, CHILD SUPPORT, *In re Marriage of Garnhart*, 2023 WL 9017833 (Ill.App. 4 Dist.), December 28, 2023\*

\*Unpublished/Rule 23(e)(1) decision.

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## **VOLUNTARY ACKNOWLEDGEMENT OF PATERNITY (“VAP”)**

See also, DISMISSAL, *Illinois Department of Healthcare and Family Services, Hull v. Robinson*, 2023 WL 5815829 (Ill. App. 4th Dist.), September 8, 2023