

**2007 SUMMARY OF SIGNIFICANT ILLINOIS DIVORCE  
AND FAMILY LAW CASES / 2007 LEGISLATION**

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## **2007 Case Law Regarding Paternity Issues:**

### ***Jordan - Paternity / Fraud in the Inducement of a Contract and Mutual Mistake of Fact:***

[Jordan v. Knafel](#), No. 1-06-2398 (First Dist., 2007).

In the original *Jordan v. Knafel* decision, 355 Ill. App. 3d 534, 542, 823 N.E.2d 1113, 1121 (2005), the First District appellate court reversed the circuit court's dismissal of the counterclaim filed by Ms Knafel, holding that taking the pleadings as alleged, "the agreement could be construed as a good-faith settlement of her paternity claim with a confidentiality provision which is not violative of public policy." *Jordan*, 355 Ill. App. 3d at 542, 823 N.E.2d at 1121. That case also reversed the dismissal of Jordan's complaint and stated that the overall record, including the counter-claim, established an "actual controversy." On remand, Jordan filed a verified amended complaint for declaratory judgment and injunctive relief, and a motion for summary judgment on Knafel's counterclaims. The motion alleged that any agreement was unenforceable because it was either fraudulently induced or was based on a mutual mistake of fact as to the paternity of Knafel's child. In support, Jordan attached the affidavit of a physician as to genetics testing which had excluded Jordan as the father. Knafel argued that Jordan's actual paternity was irrelevant to the enforceability of her alleged settlement agreement. Knafel filed a supporting affidavit indicating that she believed in good faith that Jordan was the father. After a hearing the trial court granted Jordan's motion for summary judgment on the counterclaim, finding that "as a result of Knafel's fraudulent misrepresentation to Jordan that he was the child's father or, alternatively, as a result of a mutual mistake of fact, the alleged settlement contract is voidable and is therefore unenforceable against Jordan." The trial court also granted Jordan's motion for summary judgment on his amended motion for declaratory judgment. Knafel appealed and the appellate court affirmed. The appellate court stated:

Jordan maintains that, based upon the uncontroverted evidence that he is not the father of Knafel's child, her statement to him at the time of the alleged settlement that "she was pregnant with his child" is a fraudulent misrepresentation as a matter of law which makes the contract voidable, permitting rescission [an equitable remedy.]

Jordan's claim for rescission of a contract was thus based on the affirmative defense of fraud in the inducement. Fraud in the inducement of a contract is a defense that renders the contract voidable at the election of the injured party. The standards for fraud are to establish that the representation (here, that Jordan was the father) was: (1) one of material fact; (2) made for the purpose of inducing the other party to act; (3) known to be false by the maker, or not actually believed by him on reasonable grounds to be true, but reasonably believed to be true by the other party; and (4) was relied upon by the other party to his detriment. The appellate court applies these principles to the case and found that there had been fraud in the inducement. The appellate court also ruled that alternatively that there was a mutual mistake of fact.

### **Parentage and Divorce Interplay:**

[IRMO Mannix and Sheetz](#), 374 Ill. App. 3d 76, 869 N.E.2d 795, 311 Ill. Dec. 782 (First Dist., 2007).

This case involves the issue of child born after the divorce, but conceived during the marriage. The judicial admissions in this case were significant. As a result the appellate court held that the trial court did not err in determining the ex-husband to be the father of the child born after the divorce.

### **Parentage – Effect of Failure to Register with Putative Father Registry on Ability to Bring Parentage Proceedings:**

[J.S.A. v. M.H.](#), 224 Ill. 2d 182, 863 N.E.2d 236, 309 Ill. Dec. 6 (2007).

The appellate court erred when it concluded that it lacked jurisdiction to hear an appeal from the dismissal of a Parentage Act complaint, filed by man alleging that he was the father of child, because he failed to register with Putative Father Registry. It further erred when it affirmed the order by the trial court denying the purported father's motion to intervene in the adoption for lack of standing.

Section 12.1 of Adoption Act, requiring fathers to register with Putative Father Registry within 30 days of a child's birth, does not supercede provisions of Section 7 of Parentage Act. Those provisions give the person claiming to be father the right to file a petition to establish a parent and child relationship, and affords him an opportunity to defeat the presumed father by presenting clear and convincing evidence.

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### **Affidavits Versus Certification:**

[IRMO Manhoff](#), 880 N.E.2d 627, 377 Ill.App.3d 671, 316 Ill.Dec. 891 (First Dist., 2007), [GDR 08-8](#)

*Manhoff* presents an issue Illinois lawyers face when trying to be overly technical. The case addresses the the affidavit requirement and whether a certification constitutes an affidavit. The appellate court noted that in 1984, the Code was amended to allow pleadings to be verified by certification. The appellate court cited *Betts* for indicating that this provision of the Code, Section 109, have been incorporated into the Illinois Marriage and Dissolution of Marriage Act. *Manhoff* ruled that a verification was sufficient consistent with the provisions of the Code even though by local rule affidavits were required.

**Post-Marital Agreements - Appellate Court Reverses Trial Court / Consideration may be promise not to go forward with divorce proceedings:**

[IRMO Tabassum](#), 377 Ill. App. 3d 761, 881 N.E.2d 396, 317 Ill. Dec. 228 (Second Dist., 2007), [GDR 08-07](#).

In *Tabassum* a June 2004 post-marital agreement was entered into after the husband had an affair. The agreement recited the infidelity and then recited the agreement to consider certain real estate to be the wife's non-marital property in the event of a divorce. The wife filed divorce proceedings in November 2004. At the time the parties were married for four years. The trial court found, considering the parties' testimony and credibility, that the agreement was invalid because it lacked consideration and was otherwise unconscionable.

**Consideration for the Postmarital Agreement:** The trial court stated that the only consideration for the post-marital agreement was the promise to remain married. The trial court then stated, "While the promise to marry may supply consideration in a pre-nuptial agreement, this 'agreement to remain married' is nothing more than past consideration." Regarding the unconscionability aspect the trial court noted the implicit threat of the mother not to return from Canada where she had taken their child before execution of the agreement. Finally, the trial court further found the agreement to be completely lacking in financial disclosures and substantively unconscionable for that reason. The Second District appellate court stated, "Courts in other states have similarly held that there is valid consideration where an injured spouse receives something of value in exchange for her dismissal of a divorce suit and resumption of marital relations, because in dismissing the suit, the injured spouse is taking an action not compelled by law." The appellate court noted that in the out of state cases the fact pattern was that the parties in the other cases had already separated and divorce proceedings had already been commenced. However, the *Tabassum* court reasoned that forbearance of bringing a legal action, even for a limited period of time, is a recognized form of consideration. As to this issue, the appellate court used the standard rule of construction of agreements without a specific time for performance, i.e., a reasonable time period is implied. The appellate court stated:

The [wife] waited over five months from the time the parties signed the postmarital agreement to the time she filed for dissolution. During that time, petitioner arranged for the parties to attend marital and sex counseling and took other steps to try to save the marriage. However, respondent admittedly still had contact with Meyada, the woman with whom he had an affair, and he unilaterally decided to send Mehmood a \$5,000 check. According to petitioner, respondent also became verbally abusive and no longer tried to make the marriage work. Under these circumstances, a finding that petitioner did not forbear filing for a dissolution for a reasonable amount of time is against the manifest weight of the evidence. Therefore, we agree with petitioner that her forbearance of filing for a dissolution was consideration supporting the postmarital agreement.

**Request to Admit and Potential Waiver:** The appellate court noted testimony brought on cross-examination can still waive the right to rely on admissions in a request to admit.

**Whether the Agreement Was Unconscionable:** The appellate court noted that the court can make a ruling based upon procedural or substantive unconscionability, or a combination of the two. The appellate court stated that the implicit threat not to return to Illinois was more akin to a finding of duress rather than one of procedural unconscionability, and the appellate court used the manifest weight standard to review the duress issue. The appellate court ruled that a finding of unconscionability based upon duress was against the manifest weight of the evidence based upon the facts of the case. In so ruling the appellate court noted the husband's testimony that he was represented by counsel, that there were changes to the draft agreement, that he hired the same firm initially to represent him in the divorce proceedings, and that the wife had returned to Illinois for two days before execution of the agreement. Next, the appellate court reviewed the issue of whether the lack of financial disclosures rose to the level of unconscionability. The appellate court noted the language in the Uniform Premarital Agreement Act regarding financial disclosures and stated, "We question whether financial disclosures are required in postmarital reconciliation agreements." However, the appellate court stated, "the lack of such disclosures would not invalidate the agreement here, because the postmarital agreement states that the parties were sufficiently aware of each other's assets and liabilities and expressly waived any right to further disclosure of assets and liabilities and because respondent, against whom the agreement is sought to be enforced, admitted that he did not subsequently learn anything new about petitioner's assets." The appellate court concluded by remanding the case to the trial court to give the post-nuptial agreement effect.

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## **2007 Case Law Involving Estate Issues:**

### **Waivers of Beneficiary Rights and QDROs:**

[Kennedy v. Plan Administrator for Dupont](#), 497 F.3d 426, 41 Employee Benefits Cas. (BNA) 1588 (Fifth Circuit Ct of Appeals, 2007).

In *Kennedy v. Plan Administrator for Dupont Savings and Investment Plan et al.*, the Fifth Circuit Appeals Court addressed what should occur in a case where the former husband had signed a beneficiary designation form during the marriage naming his then wife as the beneficiary of certain retirement benefits (valued at approximately \$400,000), but where the divorce decree provided that the former wife was divested of all rights and any other rights that she may have in the plan. The decedent never executed any documents replacing or removing his ex-wife as a beneficiary under the Plan. The Fifth Circuit Court of Appeals ruled that the former wife of a deceased plan member was entitled to collect plan benefits under the plan. It stated that though the ex-wife gave up her rights to his pension or benefits through the divorce, a QDRO

failed to address plan benefits, making them vulnerable to ERISA anti-alienation provisions. The argument made by the ex-husband's estate is that there is a relatively long line of cases following what they referred to as the federal common law approach, that is, that a waiver is valid according to federal law if it is explicit, voluntary and made in good faith. See, e.g., *Brandon*, 18 F.3d at 1322-24 (holding a decedent's ex-wife, who was the named beneficiary of an ERISA governed life-insurance plan, was not entitled to the proceeds of the plan because she waived them through a divorce decree). The Fifth Circuit court ruled that the cases referenced, however, were not on point because they involved ERISA governed life insurance plans, i.e., welfare plans under ERISA. The Fifth Circuit court reasoned that, "In the marital-dissolution context, the QDRO provisions supply the sole exception to the anti-alienation provision; they exempt a state domestic-relations order determined to be a QDRO, under the standards set forth in ERISA." Next the question was whether the divorce decree constituted a QDRO. To this the *Kennedy* court stated, "To qualify as a QDRO, a divorce decree must "clearly specif[y]" the identity of any beneficiary, the particular plans affected, and the exact manner of calculating benefits." 29 U.S.C. Section 1056(d)(3)(c).

**Estate Issues / Life Insurance Policy:**

[Allton v. Hintzsche](#), 373 Ill. App. 3d 708, 870 N.E.2d 436, 312 Ill. Dec. 371 (Third Dist., 2007).

This case involved a 3-½ year marriage where the parties had two children. The 2004 divorce decree contained the following language:

Each party shall maintain a life insurance policy upon his or her life, such that upon the death of said party, each child of the parties shall be entitled to receive death benefits, in an amount of not less than \$50,000.00 per child. Each party shall be obligated to maintain said policies so long as the parties have an obligation to support the children or contribute to their post-secondary education. Neither party shall cause liens to be secured against said benefits, which would diminish the aforesaid proceeds to a child of the parties. Following the execution hereto, each party agrees to obtain and keep said policies in full force and effect and to designate the children of the parties as the sole irrevocable beneficiaries under said policies. Each party shall provide the other with proof of the existence, terms and provisions of said policies within 30 days of the entry of a Judgment herein and thereafter annually provide proof that said policies have been maintained.

In another section of the MSA, it provided:

Each of the parties, his or her heirs, executors and administrators, in accordance with the terms hereof, upon the demand of the other party, will execute any and all instruments and documents as may be designated herein or as may be reasonably

necessary to make effective the provisions of this agreement and release his or her respective interests in any property, real or personal belonging to or awarded to the other. It is the intention of the parties that this Agreement shall constitute a complete adjustment of the property rights of the parties hereto and that each party will perform all subsidiary acts to accomplish same.

The MSA did not specifically mention the ex-husband's life insurance. Less than six months after the divorce, the former husband died in an automobile accident. The former wife claimed that the insurance proceeds should be paid to her rather than the children. The administrator of the estate filed a petition to enforce the divorce decree and to reform the beneficiary designation. In the petition, the administrator stated that State Farm Insurance Company requested a court order directing the payment of the proceeds of the deceased's life insurance policy because the former wife was claiming that the proceeds should be paid to her despite the Agreement's provisions.

The trial court denied the administrator's petition and summarily ordered the insurance company to pay the proceeds to the wife.

On appeal the administrator urged that the fact that the former husband did not change beneficiaries on the life insurance policy should not affect the rights of the children, who were the intended beneficiaries, as evidenced by the MSA provisions quoted above. The ex-wife, however, argued that the trial court correctly found that the agreement did not require the ex-husband to name the children as beneficiaries of his existing life insurance policy because the agreement did not name that policy.

The appellate court case contains a good summary of the law that applies in these cases. A divorce decree does not affect the rights of the divorced wife as beneficiary of the husband's life insurance policy. However, the rights of the divorced wife could be affected if a MSA specifically includes a termination of the beneficiary's interest. Accordingly, if pursuant to a divorce decree, the parties agree to change the beneficiaries on a life insurance policy but do not do so, equity will require that the proceeds be paid to the person(s) who should have been named as beneficiaries. The appellate court reviewed de novo the interpretation of the MSA to determine if it is ambiguous. The appellate court stated:

We find that the Agreement's language is ambiguous because it is susceptible to two different, yet equally plausible, interpretations. On the one hand, the provision can be read to require Guy to maintain the insurance policy he possessed at the time of the divorce and name the children as the beneficiaries of that policy. Alternatively, the provision can be read to require Guy to obtain an entirely new insurance policy for the benefit of his children.

Accordingly, the *Allton* court ruled that the trial court erred and remanded the case so that parol evidence could be introduced to attempt to determine the intent of the parties.

### **Constructive Trusts / Laches / Probate:**

[In the Estate of Ronnie Beckhart](#), 371 Ill. App. 3d 1165, 864 N.E.2d 1002, 309 Ill. Dec. 761 (Third Dist., 2007).

In the underlying marital settlement agreement in this case, there was a provision which stated, “[b]oth parties shall name [their son, Ryan Beckhart] as a direct or indirect beneficiary on any life insurance policies provided to them at no cost from the employer.” In this case the ex-husband had previously named his estate as the beneficiary of the policy and the ex-husband never changed the policy. The ex-husband then died without a will – intestate. The insurance company paid the proceeds of the life insurance to his estate. The value of the life insurance was \$25,000. The former wife’s attorney brought a motion seeking to impose a constructive trust, alleging that the respondent had been improperly using the proceeds from the life insurance policy for estate expenses. The Estate defended on the grounds of laches urging that the motion for constructive trust was not filed until one year after the insurance policy proceeds were distributed, and that the delay prejudiced the estate because the proceeds were used for estate expenses.

The appellate court ruled that the circuit court erred when it dismissed, based on laches, the claim of the decedent's minor son, filed by his mother, seeking to impose the constructive trust. In this case, the mother filed a claim with the estate within a month of its opening. Although she did not amend to allege constructive trust until one year after the estate opened, the minor cannot be charged with laches. Further, the statute of limitations for constructive trust is five years. Finally, the administrator was required to sequester the proceeds for minor as soon as she learned of the claim and was not allowed to use the insurance proceeds for estate expenses.

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### **2007 Illinois Case Law Re Attorney’s Fees:**

#### **Timing Requirements of Contribution Statute Apply Only to Initial Divorce Cases:**

[IRMO Blum](#), No. 2-06-0235 (Second Dist., October 17, 2007 - modified opinion November 20, 2007) (Lake County).

In *Blum* the appellate court held that the timing requirements of Section 503(j)(1) of the IMDMA apply only to pre-decree, not post-decree, petitions. *Blum* presents a well reasoned analysis of the 1997 amendments to the attorney fees statute and timing requirements of the contribution statute.

## Attorney's Fees / Standards in Contribution Petitions:

[IRMO Nesbitt](#), 377 Ill. App. 3d 649, 879 N.E.2d 445, 316 Ill. Dec. 378 (First Dist., 2007)

This case involves Schiller, DuCanto and Fleck's (SDF) fee contribution petition seeking \$1.109M in fees (\$227,000 being previously paid). Following the initial filing, wife's counsel filed two supplemental fee petitions seeking for a four month period of an additional \$111,784 and for a three month period of \$228,779. One of the factors in this case was that in the SDF billing statements there is a listing of tasks during a day and a listing of the total time per day, but not a breakdown per task. The SDF policy is that the employee may aggregate the time for all of the work on a given day. It was noted that while some associates itemize their time that this is eliminated when billing records are sent to the client. David Hopkins of SDF conceded that the charges for litigation were "overwhelmingly high when compared to [Lisa's] share of the marital estate" but explained the unique circumstances and complexities of the case. A lawyer for the first law firm representing the husband testified that the husband "was very angry at Lisa because he had been thrown out of his house." The husband terminated his relationship with his firm because they were "not aggressive enough in representing Mr. Nesbitt." That firm filed an action to recover their fees and the husband filed a lawsuit against the lawyer individually and against his firm. The ex-husband conceded that he wrote in a settlement proposal at the beginning of the case, "If Lisa chooses not to come to a reasonable agreement as set forth below, we can simply go to court and have a full, blown out litigation slash war." In previous years the husband's gross income had been over \$1M, but in 2004 it was approximately \$400,000. The husband had an interest in three businesses and received a yearly salary. The trial court ultimately ordered Bruce to contribute \$700,000 to Lisa's attorney fees because "Bruce holds a financial position far superior to [Lisa's] and is well able to help defray her fees, and because the Court believes that Bruce protracted the litigation out of sheer vindictiveness." There were appeals and cross-appeals and the appellate court generally affirmed the trial court's decision. The critical discussion on appeal addressed the bundled services of SDF and stated:

Though not explicitly required by Section 503(j), we have found that contribution awards under that Section must be reasonable. *Hasabnis*, 322 Ill. App. 3d at 596 ("Section 503(j) does not expressly require the award of fees be reasonable, but since we cannot envision a grant of legislative authority that tells judges to be unreasonable, we read the statute as incorporating a reasonability requirement".) Bruce, relying primarily on our holding in *Hasabnis*, argues on appeal that "the trial court's finding—that it is impossible to tell with precision whether all the work performed was reasonable—should have resulted in a denial of all of the fees requested in [Lisa's] contribution petition," because such a finding is necessary to award contribution under Section 503(j) of the Act. We disagree.

The appellate court stated that *Hasabnis* did not require the necessity of fees, but did require the fees to be reasonable. The court cited this case for the proposition that, "While a trial court may review the petitioning party's billing records, it is not required to do so" although it recognized

that *DeLarco*, 313 Ill. App. 3d 107 (2000), had held that the trial court ‘must,’ in making an award of fees pursuant to a contribution petition, ‘consider whether the attorney fees charged by the petitioning party’s attorney are reasonable.’”

Next, in a important distinction, the appellate court pointed out that Sections 2-619 and 2-615 of the Code apply only to pleadings and that the motions for sanctions filed in the case were not pleadings.

#### **Attorney's Fees / Divorce/ Collection:**

*IRMO Tantiwongse*, 371 Ill. App. 3d 1161, 863 N.E.2d 1188, 309 Ill. Dec. 291 (Third Dist., 2007).

Although the trial court did not err when it accepted the stipulation between counsel and his former divorce client setting forth the amount of fees which she owed him, it was error for it to allow the attorney to collect fees for collection. Attorneys, representing themselves, are not entitled to fees for collecting attorney's fees despite any provision in the client engagement agreement. Of note is the fact that the former counsel sought to enforce the provision for payment of interest on those fees and the trial court denied this request. The appellate court stated:

It is against public policy to allow an attorney to represent himself and charge for professional services in his own cause. (Citations omitted). Thus, attorneys who represent themselves in an action are not entitled to recover their own attorney fees.

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#### **2007 Case Law Regarding Grandparent Visitation in Illinois:**

##### **Grandparent Visitation Rights:**

*Flynn v. Henkel*, 880 N.E.2d 166, 227 Ill.2d 176, 316 Ill.Dec. 688 (Illinois Supreme Court 2007)

In *Flynn v. Henkel* the Illinois Supreme court reversed the rulings of the trial and the appellate court. The Supreme Court ruled that the trial court's unsupported pronouncement that the grandparent met her burden of overcoming the presumption in favor of the mother's decision to deny visitation with the minor child was against the manifest weight of the evidence. The Court reasoned that neither the denial of grandparent visitation nor depriving the child of the opportunity to know his grandparents, who love him and who did not undermine his parents, as sufficient to rebut the presumption of Section 607(a-5)(3).

**Grandparent Visitation – Supreme Court Determines that Non-Constitutional Issues Must First be Addressed:**

[Mulay v. Mulay](#), 225 Ill. 2d 601, 870 N.E.2d 328, 312 Ill. Dec. 263 (2007)

The Illinois Supreme Court agreed with the Attorney General's argument that the trial court improperly ruled on the constitutionality of the statute when nonconstitutional grounds were available as to the statute governing grandparent visitation, i.e., Section 607(a-5) of the Illinois Marriage and Dissolution of Marriage Act. The critical language of the case stated:

In neither *Lulay* nor in *Wickham* did this court ever indicate that the burden imposed on parental rights by litigation over these issues was so great that the mere filing of a visitation petition was forbidden. Indeed, in each case this court conducted a full analysis despite the significant interference with parental rights caused by the extensive litigation. *Wickham*, 199 Ill. 2d at 314-22; *Lulay*, 193 Ill. 2d at 476-80. Finally, there is no hint in either case that our long-standing guideline that constitutional questions are considered only when the case cannot be disposed of on alternative grounds is inapplicable in nonparental visitation cases. We reject the mother's contention that the application of that guideline in this case impermissibly interferes with her parental rights... Here, the trial court prematurely examined the constitutional question raised in the mother's Section 2-619 motion to dismiss before resolving the nonconstitutional issue in her Section 2-615 motion.

The motion to dismiss under Section 2-615 of the Code urged that the petition was facially insufficient as a matter of law for failing to allege facts to support the allegations.

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**2007 Case Law Regarding Removal:**

**Removal – Second District Takes Restrictive Stance on Removal in Affirming Trial Court:**

[IRMO Matchen](#), 367 Ill. App. 3d 695, 855 N.E.2d 202, 305 Ill. Dec. 311 (Second Dist., 2007) (McHenry County) – Judge Feetterer

The mother appealed from the order of Judge Michael Feetterer denying her petition for leave to remove the parties' two minor children from Illinois to Wisconsin. On appeal, the mother argued that the trial court findings were against the manifest weight of the evidence. The appellate court affirmed the decision of the trial court. In this case, the mother was engaged to an individual who after working 22 years in Hoffman Estates, retired to 88 acres of land in the Wisconsin Dells area that are held in a trust for him and his brother. The land has been in his family since 1955. The mother was engaged, but had not yet married her prospective new husband – pending the

results of the removal hearing. The mother was a house cleaner who worked fifteen hours weekly and had a relatively nominal gross income (under \$8,000 annually). The mother further testified that she currently rented a "run-down, three-story home, one block from Highway 120 in McHenry." She testified that there is constant traffic in front of her house and to other problems with the rental property and location. There was also significant testimony as to the advantages of the proposed new property in Wisconsin: 88 acres, quiet neighborhood, three bedroom house, pond, etc. There were extended families in both locations. Questions of the wife's fiancé as to the possibility of moving back to Illinois included the following:

A: Well I would have to say where I live now it's been a 30 year dream and I have been working on this very hard for the second half of my life to develop what I have. It would be an extremely difficult decision. It would be hard. I suppose if I had to -- I can't sell the property because it's in a trust. It can't be divided or sold so certainly I would like to reside somewhere in a rural area. I pretty much had my fill of the city.

Q: Would there be any place in Illinois that you would consider living?

A: More likely it would be back in the farmlands again south. I enjoy the south."

The fiancé testified that if removal were not granted that he did not intend to break off his relationship. However, he stated that the financial assistance he provided would be difficult to maintain if removal were not granted. The mother proposed that the father have an extra week in the summer. The mother also proposed that in lieu of the one evening per week that the father could have three day weekends if such a weekend occurred when he had the children. In addition, she proposed that the father could have an additional hour for Sunday drop-off time (to 7:00 p.m.) She proposed meeting the father half way for pick up and drop off for the 1.5 hour trip each way. The father objected to the loss of 52 weekday visits. Both children testified in camera that they did not want to move to Wisconsin. The court found that it was unclear that the move would enhance the general quality of life for the children because of their strong ties to family, friends and the McHenry community.

The court found that, "while [respondent's] proposed visitation schedule appears reasonable at first blush, the court will not make Jeffrey and Jessica change schools, leave their friends and much of their family, sit in a car for six hours every other weekend in order to see their father, and eliminate their time with their father during the week, simply because Mr. Mayer chooses not to move if he can avoid it." The court further found that the negative aspects of the children's current living situation in McHenry exist, in large part, due to the mother's decision to work only 15 hours per week. (She testified that she had not looked for other work in the past two years).

Of significance the appellate court agreed with the trial court's finding that the:

... respondent's proposed schedule was reasonable only "at first blush." This conclusion is supported by the record. For example, making up for the loss of weekday visitation by offering petitioner time with the children on three-day weekends initially appears reasonable. But, upon closer examination, it appears respondent offers those weekends only if they happen to fall on petitioner's already-scheduled weekends. This would do essentially nothing to offset the 52 lost weekdays per year. Also at first blush, offering petitioner alternating spring breaks appears reasonable, but, upon closer examination, it is clear that he is already entitled to alternating spring breaks pursuant to the dissolution judgment.

The appellate court commented that the father exercised his parenting time "religiously." The dissent by Justice Bowman should be noted.

### **Removal – Impact of Side Agreement Allowing Removal:**

[IRMO Boehmer](#), 371 Ill. App. 3d 1154, 864 N.E.2d 327, 309 Ill. Dec. 461 (Second Dist., 2007) (Lake County).

The trial court erred when it entered a post-divorce order incorporating the earlier side agreement between the parties ("without court approval or participation") allowing for the removal of the minor child to Louisiana. In this case the side agreement was notarized. The side agreement also provided for explicit visitation and for items such as payment of transportation expenses. The father in this case filed a petition seeking to enjoin the mother from removing the child from Illinois. The appellate court ruled that the trial court erred when it failed to make an independent determination as to the child's best interest. It stated that the Father's current protest refuted any assumption of best interests that could be drawn from the agreement. The appellate court noted that the, "plain language of Section 502 [of the IMDMA] states only that parties' agreements regarding custody, visitation, and support are not binding on the court." In somewhat dangerous language the court stated, "Thus, while the court is not bound to accept parties' agreements concerning custody, visitation, and support, the plain language of Section 502 does not prohibit the court from accepting agreements as to these matters without further inquiry." The appellate court stated that the court was not **required** to make an independent determination of best interest before entry of the agreement as the court's order.

Next, however, the father urged that despite the parties' agreement, Section 609 of the IMDMA required the trial court to hear evidence as to his daughter's best interests. The appellate court articulated the issue as to "whether, in a post-decree environment, Section 609 required the trial court to independently consider factors concerning Caylee's best interests prior to entering as an order the parties' agreement to removal." The appellate court then stated, "Similar to the *Ayers* court's analysis of Section 602, we do not believe that Section 609 necessarily requires an independent examination of factors concerning best interests when the parties agree regarding the removal of a child." The limited nature of the opinion was clear, however, when the appellate

court ruled, “That being said, the facts presented in this case do not concern an uncontested agreement.” The key quote from the case stated:

Section 609 places on the party seeking removal the burden of proving that removal is in the best interests of the child. Although as discussed above, parental agreement generally indicates that removal is in the child's best interests, in this case respondent's argument that removal was not in Caylee's best interests refuted any assumption of best interests that could be drawn from the agreement. A parental agreement symbolizes the child's best interests precisely because both parents affirmatively support the decision.

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### **2007 Case Law Regarding Visitation and Custody:**

#### **Visitation in a Non-Hague Country:**

[IRMO Saheb](#), 880 N.E.2d 537, 377 Ill.App.3d 615, 316 Ill.Dec. 801 (First Dist., 2007)

This case is of interest because of the international parenting issues at play. On appeal, the father asked the First District court to reverse that portion of the modified joint parenting order which granted visitation in the UAE in part because the UAE is not a party to the Hague Convention on the Civil Aspects of International Child Abduction (Hague) and thus would not enforce an American court order. The case contains a good discussion of the standard visitation versus restricted visitation in Section 607(a) and (c) of the IMDMA, and cited previously case law for the proposition that eliminating a standard aspect of visitation requires a finding of serious endangerment. The appellate court stated:

In the case at bar, the trial court granted visitation in the home of the noncustodial parent, which would certainly be standard, but for the fact that it occurs in the UAE. While visitation in the noncustodial home is “standard,” regular visitation in a foreign country 24 hours away by plane is not. Although Section 607(c) protects “the standard aspects of visitation,” it does not protect “unusual rights.” Thus, the serious endangerment standard of Section 607(c) does not apply to the case at bar. The issue in the case at bar is whether the trial court abused its broad discretion in fashioning the terms of visitation pursuant to Section 607(a).

After a good discussion of the Hague Convention the appellate court stated:

The father claims that since the UAE is not a Hague signatory, he will have no legal recourse if the mother refuses to return the child from a visit to the UAE. However, contrary to the father’s claim, he was able to obtain some legal recourse in the UAE. A court in the UAE issued an order on March 17, 2005, at the father’s request in order to prevent the child from traveling to Iraq; and then apparently at

the father's request, the UAE court cancelled the ban on May 16, 2005, to allow the child to travel back to Chicago.

The appellate court concluded, "In light of the fact that the father was able to obtain some legal recourse in the UAE and the fact that the mother returned the daughter to the United States from the UAE, this court cannot find that the trial court abused its discretion in permitting visitation in the UAE."

This case also contains a discussion of the role of the GAL. At the pretrial conference the guardian ad litem, recommended that the trial court permit visitation in the UAE even though the UAE was not a party to the Hague Convention and that the court set a cash bond to guarantee the child's return. The appellate court stated:

One issue on appeal for the father was that he urged that the trial court erred by granting visitation in the UAE without first obtaining testimony or a written report from the guardian ad litem. In support of his claim that the removal statute governs, the father asserts in his appellate brief that "the parties treated visitation overseas as removal of Basma to the United Arab Emirates" and that the "guardian ad litem made his recommendation based upon the removal statute."

It is here that it is important that the GAL in fact make any recommendation consistent with the applicable law. The case then stated:

The father claims that the trial court erred when it failed to obtain testimony or a written report from the court-appointed guardian ad litem and deprived the father of the opportunity to cross-examine the guardian ad litem. In lieu of a written report or testimony, the guardian ad litem provided an oral report to the trial court, which included a recommendation that the trial court permit visitation in the UAE.

Section 506 of the Dissolution Act states that a "guardian shall testify or submit a written report to the court regarding his or her recommendations." 750 ILCS 5/506(a)(2). Section 506 also provides that the "guardian ad litem may be called as a witness for purposes of cross-examination regarding the guardian ad litem's report or recommendations." 750 ILCS 5/506(a)(2). The Illinois Supreme Court has held that a trial court's denial of a party's request to cross-examine a guardian ad litem is a denial of procedural due process. *Bates*, 212 Ill. 2d at 514. This due process violation is subject to harmless error analysis. *Bates*, 212 Ill. 2d at 515.

In the case at bar, the guardian ad litem presented his recommendations in an oral report to the court during a pretrial conference with counsel present. The father did not claim in his appellate brief that he objected at the pretrial conference to the oral report or that he made a request at that time for testimony, cross-examination

or a report in writing. Apparently for the first time on appeal, the father claimed that the guardian's oral report surprised him and precluded his ability to prepare adequately for trial. He failed to cite to any place in the record where he made these claims to the trial court. *Bates*, 212 Ill. 2d at 517 (a party must provide citations to the relevant pages in the record); 210 Ill. 2d R.341(h)(7) (appellant is required to submit a brief with citation to "the pages of the record relied on").

The appellate court dismissed the arguments because it ruled that the father had waived consideration of these issues on appeal by failing to object. However, the appellate court went on to state somewhat instructively:

In addition, the lack of cross-examination of the guardian ad litem did not violate the father's right to due process. As noted before, a due process violation occurs when a trial court denies a party's request to cross-examine a guardian ad litem. *Bates*, 212 Ill. 2d at 514. However, the *Bates* decision, which the father cites, is not on point. In *Bates*, the party requested the opportunity to examine the Guardian ad litem; by contrast, in the case at bar, the father never made such a request. *Bates*, 212 Ill. 2d at 514. Thus, no due process violation occurred.

**Custody – Father's Actions Shortly After the Trial Warranted Change of Custody Determination from Joint to Sole to Mother:**

[IRMO Carrillo](#), 372 Ill. App. 3d 803, 867 N.E.2d 70, 310 Ill. Dec. 757 (First Dist. 2007).

Following a trial, the trial court entered a joint custody order. After entry of the order, the father filed a motion to reopen proofs to allow him to question the child representative and left rambling harassing messages for the mother. The court then reconsidered the order of joint custody and awarded sole custody to the mother. The appellate court affirmed the trial court's decision noting that the court was following the recommendation of the custody evaluator that joint custody would only be in the children's best interests if the father allowed the war with the mother to end. Because the father had not, modification was warranted and father lost joint custody. The appellate court stated, "The court did not abuse its discretion by reconsidering the November order in light of Carlos's subsequent actions."

**Standing to Seek Custody:**

[IRMO Casey](#), 373 Ill. App. 3d 347, 867 N.E.2d 555, 310 Ill. Dec. 864 (Fifth Dist., 2007).

The trial court erred in determining that James did not have standing to seek custody of a child born prior to the marriage. One child was born prior to the marriage (being born on June 2003).

The parties were married in May 2004 and another child was born following the marriage (the second child (S.C.) being born in July 2005).

In April 2006, James filed a petition for custody and alleged he had physical custody of the minor child born during the marriage and the ex-wife had custody of the child born prior to the marriage. Prior to the hearing on temporary custody, the mother filed a response admitting parentage of the two children. At hearing on James' emergency petition for custody, the court granted James temporary custody of both minor children – including the child born prior to the marriage.

The mother countered by alleging that the husband was not the father to the child born after the marriage. Paternity tests were ordered and indicated that James was not the biological father of the second child (S.C.). After hearing evidence on the mother's petition to reconsider based upon the parentage tests, the trial court entered an order on January 8, 2007, which granted the mother's motion, finding that it could not address the best interests of the child because James did not have standing. James appealed. The appellate court reviewed the presumption of paternity in Section 5 of the IPA of 1984. The key quote stated:

However, the appellate court has held that standing to seek relief under the Dissolution Act is based on the status of the party seeking relief at the time the relief is sought. *In re Marriage of Roberts*, 271 Ill. App. 3d 972, 981-82 (1995); *In re Marriage of Slayton*, 277 Ill. App. 3d 574, 578-79 (1996). In this case, the presumption that James was the father of S.C. had not been rebutted by DNA testing at the time James filed his petition for dissolution and sought the custody of S.C. Accordingly, he was a parent under Section 601(b)(1) of the Dissolution Act (750 ILCS 5/601(b)(1) (West 2004)), which conferred standing on him by virtue of his filing the petition.

The appellate court appeared to recognize the limited nature of its decision in light of the superior right doctrine. It stated:

We wish to reiterate that we are reversing the circuit court's order on the standing issue only. On remand, the circuit court will have to determine the best interests of S.C. pursuant to Section 602 of the Dissolution Act (750 ILCS 5/602 (West 2004)). In so doing, the circuit court will need to factor in the superior-rights doctrine as it is set forth as follows by the Illinois Supreme Court...because James is no longer presumed to be the father of S.C., in addition to showing that it is in S.C.'s best interests that he have custody, he will have to demonstrate good cause or reason to overcome the presumption that a parent has a superior right to custody.

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**2007/2008 Case Law Re Maintenance:**

### **Not Permissible for Trial Court To Require Life Insurance to Secure Maintenance:**

[IRMO Ellinger](#), 882 N.E.2d 692, 378 Ill.App.3d 497, 317 Ill.Dec. 812 (3<sup>rd</sup> Dist., 2008)

In this case the husband contended that the trial court erred by requiring him to designate his wife as the beneficiary of his life insurance policy as security for his maintenance obligation. The trial court commented that it believed that the use of life insurance to secure maintenance payments was analogous to the use of life insurance to secure child support payments. The appellate court disagreed and stated that while Section 510(c) of the IMDMA states that generally “the obligation to pay future maintenance is terminated upon the death of either party,” section 510(d) provides that “child support the obligation to pay future maintenance is terminated upon the death of either party.” The appellate court also noted the provisions for there to be a child support trust per section 503(g) of the IMDMA for child support but there is no corresponding provisions for a 503(g) trust to enforce an obligation to pay maintenance. Authors Comment: Perhaps there should be an amendment to the IMDMA allowing for the ability to provide a maintenance trust. Finally, the appellate court noted:

Furthermore, as the court observed in *In re Marriage of Clarke*, 125 Ill. App. 3d 432, 465 N.E.2d 975 (1984), when the Act was enacted, it replaced earlier legislation that gave a trial court discretion to designate life insurance as security for maintenance obligations. The omission of such a provision in the Act showed the intent of the legislature to change the law in this regard.

Accordingly, the appellate court held that as a matter of law the trial court erred by stating that it had discretion to require the husband to maintain a life insurance policy as security for his maintenance obligation. Regarding case law from other jurisdictions that was cited by the wife’s appellate counsel, the appellate court noted that these cases were based upon statutory schemes in other states that provided authority to require life insurance as security for maintenance obligations. The appellate court then stated that because its ruling may have disturbed the trial court’s original equitable distribution, on remand the court may reconsider the distribution of those factors that may affect the financial future of the parties.

### **Maintenance Termination and Conjugal Cohabitation:**

[IRMO Thornton](#), 373 Ill. App. 3d 200, 867 N.E.2d 102, 310 Ill. Dec. 789 (Third Dist., 2007).

This case represents a remarkable “about-face” by the Third District Illinois appellate court – in an opinion I had previously criticized. In this case the ex-wife appealed the trial court’s order granting the oral request of her former spouse to terminate his obligation to pay maintenance. The appellate court stated:

In the original opinion issued in this appeal, we affirmed the trial court on all three issues. *In re Marriage of Thornton*, No. 3--05--0722 (August 9, 2006). We now

vacate that Opinion and, for the reasons that follow, we reaffirm our decision in *Snow*, reverse the trial court's order finding the obligation to pay maintenance had abated, and remand the matter for consideration of respondent's requests for extended, increased and permanent maintenance and petitioner's responsibility of compliance with the other debts and obligations he had pursuant to the judgment of dissolution and its included marital settlement agreement.

In *Thornton* the ex-wife had testified that she had allowed the petitioner's brother to move in "out of the goodness of her heart" because "he did not have a place to stay [and] was in essence, homeless." She testified that the brother stayed and slept in the basement and that they led separate lives. She denied that there was at any time any romance or conjugal relationship between them. The appellate court stated in a significant decision:

The instant case does, however, directly raise the issue of whether a spouse who has been ordered by the court to pay maintenance can cease such payments unilaterally without benefit of a petition and a determination that there had, in fact, been "conjugal cohabitation." We believe, contrary to the decision in *Gray*, that such unilateral action is contrary to the Illinois Marriage and Dissolution of Marriage Act and flies in the face of extensive and long-standing family case law.

The appellate court explained:

That is, Section 510(a) allows modification only as to installments accruing after the due notice provided by the filing of a motion. By contrast, Section 510(c) provides that the obligation to make future maintenance payments is automatically terminated when one of these three particular events occurs. See 750 ILCS 5/510(c) (West 2002). Logic compels us to conclude that Section 510(c) creates an exception to Section 510(a)'s limitation of relief to installments after the filing of the motion or petition, but does not establish an exemption from the obligation to file a petition in order to conform the court's order to present circumstances... It can thus be seen that any modification or enforcement of the judgment of dissolution entered in the State of Illinois must be initiated by the filing of a petition and notice.

The appellate court in this case noted the six factors as recited in several cases including the 2006 *Susan* decision. It noted that there was no evidence as to any of these factors and consequently, no evidence that there ever was a de facto husband and wife relationship. The appellate court found no evidence of a resident, continuing conjugal relationship.

The next question was the timeliness of the ex-wife's petition because the underlying MSA (incorporated into the divorce judgment) was one in which the ex-husband was ordered in March 2001 to maintenance of \$275 per month 30 months (through to September 2003). In 2004, the ex-wife filed a petition alleging a complete failure to pay any of the maintenance payments and seeking payment of the previously required past maintenance and extended, increased permanent

maintenance. At hearing, the court found the arrearage and the ex-husband apparently made an oral motion to find that maintenance terminated by operation of law due to a conjugal relationship. The appellate court noted that therefore there was no petition to invoke the court's power to consider termination of maintenance on the basis of conjugal cohabitation.

As to the filing after the 30 month period, the critical language of the underlying MSA had stated, "The maintenance shall be reviewed at the end of this period, to determine whether it should continue and, if so, to what extent." Because of this language, the appellate court found that the trial court had jurisdiction to consider the ex-wife's petition for permanent maintenance.

**Unallocated Maintenance Provision Providing for Reviewable Unallocated Maintenance After Time Certain Did Not Place Burden on Obligor / Contested Maintenance Awards are Always Modifiable**

[IRMO Blum](#), No. 2-06-0235 (Second Dist., October 17, 2007 - modified opinion of November 20, 2007) (Lake County).

**Maintenance:** In *Blum*, commencing April 1, 2000, the wife received unallocated maintenance of \$5,000 monthly "per month for a total of 61 consecutive months." The MSA provided, "Judy's right to receive maintenance and Steven's obligation to pay maintenance after April 30, 2005 is reviewable. Maintenance shall not terminate without a court order." In January 2005, the Husband filed a petition to terminate maintenance after April 30, 2007 urging that he was paying \$55,000 per year in and for college expenses and that his wife was an attorney who should be able to support herself. Prior to trial, the ex-husband moved to "reset" his maintenance obligation and the trial court pending hearing made several changes to the amount of maintenance. The ex-husband's maintenance payments had increased as a result of yearly increases in his bonuses from \$94,834 in 2000 to \$103,335 in 2004.

The ex-husband's income increased from \$282,000 in 2000 to \$330,000 in 2004. The ex-husband stipulated that he had the ability to pay maintenance to his ex-wife. After the divorce, the ex-wife sought to develop a practice in immigration law. Between 2000 and 2004, she represented nine clients working two days per week. She testified that she worked independently for other attorneys doing generally "scut work." From 2000 to 2005, Judy did not make a profit in her law practice. Finally in May of 2005, she closed her downtown office and opened a small office in Northbrook. She testified that she started working 30 to 35 hours a week and had five new clients since opening her office. This case involved vocational experts for both the ex-husband and the ex-wife. The decision makes interesting reading regarding the income generating capacity of the ex-wife.

The trial court entered an order providing that the ex-husband was to pay maintenance of \$3,500 per month for three additional years without review. The court's order stated, "This order is non-modifiable as to the duration and amount and cannot be changed if there is a change in circumstances nor is it subject to any review by this court." The order provided that the ex-wife

was to share in the ex-husband's year end bonus for 2005 only. The appellate court commented that the average of the maintenance payments per year had been \$8,600 monthly. On appeal, the ex-wife urged, in part, that the trial court erred in reducing her maintenance payments and by making the payments non-modifiable. The appellate court reversed the trial court.

The appellate court first noted that in *Golden* the appellate court had held that in a general maintenance review the moving party does not bear the burden of proving a substantial change in circumstances. On appeal, the ex-wife urged that her former husband bore this burden based upon the language in the agreement and specifically referring to the use of the word "reviewable." The appellate court stated:

We must reject the interpretation advanced by Judy, as it would indeed eliminate the 61-month period from the contract.... The MSA, while not a model of unambiguous drafting, clearly provides that: (1) Judy would receive unallocated support and maintenance of \$5,000 per month (plus a percentage of Steven's various bonuses) for 61 months; (2) after the end of that period, maintenance would be reviewable; and (3) the monthly payments and share of bonuses would continue until the occurrence of one of six specified events. Judy seeks to read these provisions to mean that the 61-month period is irrelevant, and that either during or after this period maintenance could not be modified unless one of the six factors were shown. We cannot accept this interpretation, as it makes the parties' identification of the 61-month period meaningless.

Next, the appellate court reviewed the maintenance award in terms of whether the trial court abused its discretion. The appellate court commented, "Although the trial court did not find that Judy's efforts were not reasonable, the court's comments show that it viewed Judy's efforts negatively, describing Judy's 25-to-30-hour-per-week schedule as "less than part-time" and her efforts overall as 'minimal at best'." The appellate court disagreed. The *Blum* court stated that the ex-wife's standard of living declined substantially since the divorce. The appellate court noted that since the divorce the ex-husband's assets and income had increased – even taking into account the amounts he was spending on college for his boys. The appellate court remanded the case for a new determination of a maintenance award, retroactive to the May 1, 2005 consistent with its decision.

The *Blum* court next ruled that pursuant to Section 502(f), only the parties to a marital settlement agreement may make a maintenance obligation non-modifiable and that pursuant to Section 510(a-5), all awards of maintenance are otherwise modifiable. Regarding the argument that the award was maintenance in gross, the appellate court noted that this is only an option for the court in initial divorce decrees. Finally, the decision has language that could be used by the prospective maintenance recipient regarding the requirement for a review in quoting from cases such as *Selinger*. Nevertheless, the ultimate ruling of the appellate court in this regard was more of a double negative, i.e, that on remand without agreement the trial court cannot make an award of maintenance non-modifiable. The appellate court did not state that the trial court would err if it failed to set a review.

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**2007 Illinois Case Law Involving Property:**

**Property - Allocation of Retirement Benefits:**

[IRMO Manker](#), 375 Ill. App. 3d 465, 874 N.E.2d 880, 314 Ill. Dec. 515 (Fourth Dist., 2007).

**Retirement Benefits:** The trial court erred when it reserved the entire issue of the allocation of both the husband's and wife's teachers' retirement system pension benefits. In *Manker*, the wife's pension benefits were not in pay status while the husband's benefits were in pay status. The appellate court stated:

By reserving jurisdiction over both parties' pensions, the trial court created an undesirable situation in which this dissolution proceeding would linger for years before apportionment applied.

The court then stated:

The trial court did provide for the method of apportionment of Robin's and Patricia's pensions. The court would divide Robin's pension by the QILDRO requiring 50% of the then-current and future benefits, including post dissolution increases, to be paid to Patricia. The court would also divide Patricia's pension by the QILDRO in accordance with the proportionality rule set forth in *Wisniewski*. *Wisniewski*, 286 Ill. App. 3d at 240-43, 675 N.E.2d at 1366-68. However, the fact that Patricia's pension had not yet matured did not prevent the court from being able to apply the formula to equitably divide Robin's pension. The trial court heard expert testimony regarding the present value and projected future value of her pension. The court could choose to offset that value now and perhaps modify the judgment if the pay out is larger or smaller than the expert's projections when Patricia's pension matures and goes into pay status.

While I agree with the decision entirely, the exception is the last statement, i.e., that the court could "perhaps modify the judgment if the pay out is larger or smaller than the expert's projections when Patricia's pension matures and goes into pay status." Property settlements are generally non-modifiable and accordingly, I would emphasize the use of the word "perhaps."

**Dissipation:** The finding regarding dissipation was not an abuse of discretion. The trial court made it clear that it believed the husband's testimony that he paid money to his paramour to compensate her for rent based on the cost of comparable rentals, and it accepted his testimony that he used withdrawals from accounts to pay living expenses.

**Fees:** The trial court's order requiring the that husband to pay a portion of wife's unpaid

attorney's fees in light of its express intention to allocate the marital property equally was not erroneous, because the husband has already paid the majority of his fees with marital funds.

### **Property - Retained Earnings:**

[IRMO Joynt](#), 375 Ill. App. 3d 817, 874 N.E.2d 916, 314 Ill. Dec. 551 (Third Dist., 2007).

This case contains an excellent summary of the law regarding whether retained earnings should be classified as marital property. It states:

Whether retained earnings should be classified as marital property is an issue of first impression in Illinois. As noted by both parties, however, other states have generally held that retained earnings are nonmarital. Those jurisdictions have reached that conclusion based on the evaluation of two primary factors: (1) the nature and extent of the stock holdings, i.e., is a majority of the stock held by a single shareholder spouse with the power to distribute the retained earnings; and (2) to what extent are retained earnings considered in the value of the corporation. See 1 H. Gitlin, *Gitlin on Divorce* Section 8-13(j), at 8-172.2 (3rd ed. 2007).

The appellate court in *Joynt* ruled that the trial court did not err when it characterized the retained earnings in the husband's closely held S corporation as non-marital property where he owned only 33% of shares of the corporation and did not control distribution of dividends. The court also based its finding on the totality of the husband's control, including significant distributions to officers in recent years and a buyout agreement between the husband and his father.

### **Property - Reimbursement of Marital Contributions to Non-Marital Estate:**

[IRMO Ford](#), 879 N.E.2d 335, 377 Ill.App.3d 181, 316 Ill.Dec. 268 (Second Dist., 2007)

One of the critical questions in *Ford* was whether the trial court erred in requiring the husband to reimburse the marital estate for monies spent on his premarital home. The husband cited *Snow* for the proposition that generally there is not reimbursement for interest payments and for the fact that there may be compensation to the marital estate due to the benefit of living in the non-marital residence during the marriage. In this case, the mortgage balance was \$56,000 when the parties married and the mortgage was paid off during the marriage. The trial court ordered reimbursement of \$20,000. Regarding the argument that the \$20,000 represented fair compensation for the use of the non-marital property, the appellate court stated: "The argument is unconvincing. The parties were married from January 2, 1994, through August 18, 2006--a period of 151 months. The award of \$20,000 divided by 151 months equals compensation of about \$132 per month. The value of the home to the marital estate was undoubtedly greater than that amount. This amount is clearly inadequate, and the trial court's decision was against the manifest weight of the evidence." The appellate court concluded that the use of the marital home

fully compensated the marital estate for its contribution and that the marital estate was not entitled to reimbursement.

The next issue was reimbursements on two rental properties. The trial court concluded that the marital estate contributed approximately \$144,000 to the mortgages, representing 11 years of mortgage payments. The court awarded the wife \$73,000. The husband had testified that he paid over \$50,000 of funds from his Magic Carpet Service account. The appellate court stated, "However, Dennis commingled the rent payments with marital property by depositing the rent in the Magic Carpet Service account, so the rent payments were transmuted into marital property. Because there was no evidence as to the amount of rent deposited into the Magic Carpet Service account, the rent payments are not retraceable by clear and convincing evidence. Accordingly, the appellate court found that the non-marital estate was not entitled to reimbursement for the contribution for rent. Accordingly, the husband's testimony established a contribution of \$50,000 from the marital estate to his non-marital estate while his wife's testimony was evidence of a \$57,000 contribution by the marital estate to the rental properties. In a statement reflecting the potential direction of future case law regarding reimbursement as to the issue of the distinction between interest and principal reduction, the appellate court ruled:

Dennis argues that the marital estate is not entitled to reimbursement because the record does not show what portion of the payments were for principal and what portion were for interest. As noted, *Snow* holds that there is no right of reimbursement for interest payments. *Snow*, 277 Ill. App. 3d at 650. We note that *Snow* cites no authority for the proposition that contributions of interest should be treated differently from contributions of principal. Furthermore, our research indicates no other Illinois case that stands for this proposition. We additionally note that in *Crook*, our supreme court cited *Snow* favorably for the proposition that "a marital estate is not entitled to reimbursement for mortgage payments toward nonmarital property when the marital estate has already been compensated for its contributions by use of the property during marriage." *Crook*, 211 Ill. 2d at 454. However, *Crook* made no reference to the *Snow* court's holding that there is no right of reimbursement for interest payments. As we can ascertain no basis for this part of the *Snow* court's holding, we decline to follow it.

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**Substitution of Judge / Orders of Protection:**

[IRMO Paclik](#), 371 Ill. App. 3d 890, 864 N.E.2d 274, 309 Ill. Dec. 408 (Fifth Dist., 2007).

The Respondent in domestic violence proceedings, who also had temporary custody in the companion dissolution of marriage action, was entitled to substitute judges from the judge who granted the emergency order of protection. This is a mainstream issue that often arises in McHenry County. The appellate court held that denial of motion was error and that accordingly the plenary order entered thereafter was void. Further, because there was a judge already

assigned to the divorce case, involving issues of custody and visitation, SCR 903 required that the OP judge, at least, inquire of the chief judge whether the case should be transferred to the judge hearing the divorce.

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**Post Divorce / Educational Expenses – Failure to Even Identify Child’s School on Obligation to Pay:**

[IRMO Thomsen](#), 371 Ill. App. 3d 236, 872 N.E.2d 1, 313 Ill. Dec. 241 (Second Dist., 2007).

In this case, one of the issues was that of payment of post-high school educational expenses. The trial court ordered the petitioner to provide to respondent Kiersten's college transcripts and report cards to prove that the daughter had over 12 credit hours of schooling and a passing average. The order stated that these documents may be redacted to delete any information identifying the school, over the father’s objection. The order further stated that it was in Kiersten's best interest that she should not be obligated to sign consents to release school information and that "she shall not be obligated to provide the same." It is noteworthy that on appeal, the Defendant did not provide a transcript, a bystander's report, or an agreed statement of facts of the underlying hearing. In part, the father urged that in interpreting Section 513(a) of the IMDMA, the trial court erred because the language of the IMDMA requires that the name of the college be disclosed. The father further urged that the trial court improperly applied the best interests standard in redacting the name of the college. Additionally, the father argued that the trial court erred in not failing to consider his lack of a relationship with his daughter. The appellate court stated:

However, respondent has not provided this court with a record of the August 2 hearing, and therefore respondent has failed to submit a complete record to this court.... Rule 323, like the other supreme court rules governing appeals, is not a mere suggestion... As a consequence, when a report of proceedings, or a substitute, is essential to resolving an appeal and the appellant has failed to provide this court with such a record, we must presume that the trial court followed the law and had a sufficient factual basis for its ruling.

The appellate court then stated:

We have nothing to shed light on the court's reasons for excising the name of the college... Without a record of the August 2 proceedings, we have no reason to conclude that the trial court did not properly base its judgment on the law and the evidence.

In the most significant ruling, the appellate court stated:

The only issue under this category that merits our complete review is respondent's

assertion that, because the language of Section 513(a)(2) of the Act entitles him to "the child's academic transcripts," then the name of the college must be included in the transcripts and must therefore be disclosed. Because this involves the interpretation of a statute, it is a question of law, and the lack of a complete record does not bar our review, as it is de novo.

The key language reviewed was the specific language of Section 513(a)(2) which provides:

If educational expenses are ordered payable, each parent and the child shall sign any consents necessary for the educational institution to provide the supporting parent with access to the child's academic transcripts, records, and grade reports. The consents shall not apply to any non-academic records." 750 ILCS 5/513(a)(2).

In language which calls out the limitations in the statute, the appellate court stated:

Although respondent interprets the language "academic transcripts" to mean that the name of the college must be revealed, we find no such intention in the statute. The statute does not provide that parents are entitled to receive any and all documents from a college that a child is attending; access is allowed only to the child's academic transcripts, records, and grade reports. Non-academic records are specifically exempted. Thus, we cannot hold that Section 513(a)(2) mandates that the name of a college must be disclosed to a parent.

Finally, the court addressed the fact that the decision was narrowly decided in light of the failure to file even a bystanders report, etc.

Having determined that there is no mandate, we are left with respondent's argument that the trial court abused its discretion in failing to order that the name of the college be released for reasons other than Section 513(a)(2). We have previously found this contention waived as not properly preserved and presented to this court for review.

For a summary of laws regarding post-high school educational expenses see:

<http://www.abanet.org/family/familylaw/FLQchildsupport06.pdf>

According to this chart, there are only sixteen other states where there can be a court imposed obligation to pay post-high school educational expenses. This decision calls for the importance of allowing evidence as to the lack of relationship with the father and the child and expanding the language in terms of the mandated disclosures per Section 513.

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**2007 Illinois Case Law Regarding Child Support:**

**MSA Provision Against Public Policy Because of Improper Financial Penalty if Mother Sought Primary Residential Custody**

[IRMO Rife](#), 878 N.E.2d 775, 376 Ill.App.3d 1050, 316 Ill.Dec. 53 (2<sup>nd</sup> Dist., 2007)

In this case, the parties agreed to joint physical custody. There was a clause in the settlement agreement which provided that if the mother sought to modify custody she would lose the \$260K IRA that had been placed in her name and against which she would have been allowed to withdraw \$1,900 monthly for support to be reduced to \$1,390 when there was one minor child. Any money that was unused in the IRA was to revert to the father. The father filed various petitions seeking, in essence, primary residential custody and the mother responded by affirmatively alleging that it was in the best interest of the children that the mother be awarded their primary care. The father then brought a petition for declaratory judgment asserting that the mother's affirmatively sought relief should result in her forfeiting her interest in the IRA. The appellate court denied the motion for declaratory relief and the appellate court affirmed the appellate court – but on other grounds: the appellate court found the agreement to be one that was against public policy and therefore void. This case also contains an excellent discussion regarding declaratory judgments and the standard of review.

**Child Support Enforcement – \$100 Per Day Penalty for Failure to Withhold or Pay Over Determined to be Constitutional:** [See Gunnar J. Gitlin's separate outline regarding the Illinois Supreme Court's Miller decision.](#)

**Child Support – Support Paid to Mother Rather than Through Clerk of the Court:**

[IRMO Paredes](#), 371 Ill. App. 3d 647, 863 N.E.2d 788, 309 Ill. Dec. 156 (First Dist., 2007)

The trial court erred when it gave the father, obligor, credit for the support payments paid to custodian, rather than making payments through the Clerk for use of HFS (formerly IDPA). By receiving public assistance, the custodian assigned her child support obligation to the Department to the extent of assistance that she received. The appellate court noted that the support order specifically required that obligor make payments through the Clerk and that there was specific testimony at the prove-up as to payments through the clerk of the court and as to the knowledge of the then husband as to his wife's being on public aid: "So, any payments are going to be made through the clerk of the circuit court and end up going to public aid, you understand that..." However, of further note was the testimony that, "In response to a letter from HFS, he went to a child support office and showed "them" receipts indicating he had made payments directly to Maria. According to Jose, "they" looked at the receipts and told Jose things were fine. Jose left the meeting and continued to pay support directly to Maria."

The trial court in this matter found, "as a matter of law, that any payments made directly from Jose Paredes to Maria Paredes and never credited by [the Department] (as shown in the

Certified Accounting) are child support payments within the meaning of the [Illinois Marriage and the Judgment for Dissolution of Marriage].”

In its analysis, the appellate court first reviewed the provisions of Section 10-1 of the Illinois Public Aid Code (305 ILCS 5/10-1) which provide that “by accepting financial aid” a spouse or a parent or other person having custody is deemed to have made an assignment to the Department of all rights to support up to the amount of the financial aid provided. The appellate court then stated that, “Under the plain language of Section 10-1, during that time, Maria automatically assigned to the Department her rights to receive child support payments to the extent she received public aid, **and Jose was obligated to make those child support payments to the Department.** (Emphasis added).” The appellate court then ruled that, “Accordingly, we agree with the Department that Jose’s payments to Maria cannot be counted against the debt he owes the Department and that the circuit court’s determination to the contrary is in error.” Second, the appellate court noted that modification of support is an exclusively judicial function, citing *Blisset* (the seminal 1998 Illinois Supreme Court decision) and *Jungkans*, 364 Ill. App. 3d 582, 847 N.E.2d 141, 301 Ill. Dec. 482 (Second Dist., 2006). Keep in mind, however, that *Jungkans* would appear to be a decision which would be cited as much in the father’s favor than the mother. (This was the decision in which the Second District court held that the trial court erred when it held that it lacked authority to consider former husband’s defense of equitable estoppel to child support collection proceeding which asserted that former wife was equitably estopped from collecting child support that accrued, over nine years, after one of two children of the parties went to live with former husband and he, with agreement of former wife, reduced child support he was paying in half.)

The appellate court next reasoned that the non-judicial agreement between the parties for direct payments is unenforceable and void, and therefore, the original arrangement in the judgment for divorce remained in effect. Unfortunately, while this reasoning simply does not make sense where actual payments are made for child support to the support recipient. The nature of the somewhat strained reasoning of the opinion of the inapt citations to *IRMO Dwan* (holding that the trial court properly refused to give father a credit toward child support arrearage for payments made to third parties) and *IRMO Bjorklund*, 88 Ill. App. 3d 576, 580 (1980) (holding that it was error for the trial court to allow a set-off against the arrearages for the amount paid directly by respondent paid directly to his adult children).

Next, the appellate court cited the Department’s appellate arguments that the trial court’s ruling was contrary to public policy because it would thwart the Department’s ability to effectively collect support. It urged that the decision would create an incentive for parties who owe the Department not to pay through the clerk’s office. The Department argued that the trial court’s decision frustrates the ability of the Department to effectively monitor the payment of support because tracing individual private payments is simply cost-prohibitive. The appellate court stated:

The Department’s arguments regarding public policy are well-taken. Viewed in conjunction with our determinations above, the public policy considerations

presented by the Department support our decision to reverse the circuit court's judgment.

What is striking is the last portion of the decision which states:

We are mindful of Jose's arguments that the true party in error in this case is Maria and that it would "violate fundamental principles of justice, equity and good conscience" to make him "pay money twice [while Maria is] able to keep \$13,505 over what she was entitled to receive without any obligation of her making repayment to the State.

The appellate court then states:

Nevertheless, we emphasize that our decision in this appeal does not foreclose or limit Jose's ability to file a private action against Maria under a theory of, for example, contribution, indemnification, or unjust enrichment, to recover the \$13,505 he paid directly to her and which she did not report to the Department.

To this the author suggests – good luck!

An case showing that Illinois is not in the mainstream as to this decision is the Tennessee appellate court case of [Smith v. Smith](#) (Tenn App. Ct., 2007). That case addressed the issue of "whether an obligor parent may be credited with child support payments made in the form of checks made payable to the child under circumstances in which the obligee parent receives the checks, endorses them, deposits them, and exercises control over the proceeds." The case stated, "Under the second, more conservative approach, the obligor parent is given credit for payments made directly to the child only under specific circumstances that would result in an injustice if credit were not given... we hold that a trial court may give credit for such payments only under specific circumstances that would create an injustice if credit were not given."

### **Child Support - Pure Percentage Orders:**

[IRMO Duggan](#), 877 N.E.2d 1140, 376 Ill.App.3d 725, 315 Ill.Dec. 811 (Second Dist., 2007)

*Duggan* contains a good discussion regarding the retroactivity of legislation that should be reviewed in appropriate cases. Here the discussion was the retroactivity of the supreme court amendments to Rule 303(a), which govern the time for filing an appeal. The case contains an excellent discussion of the case law regarding the finality of orders for the purposes of appeals.

The Illinois Second District opinion of [IRMO Duggan](#) creates significant questions if you are considering drafting a pure percentage order of child support. In *Duggan*, the ex-husband argued that the trial court erred in refusing to amend the 2005 child support order to state the support due as a dollar amount rather than (or in addition to) a percentage. The appellate court commented:

This argument is correct, as Section 505(a)(5) of the Illinois Marriage and Dissolution of Marriage Act expressly requires that "[t]he final order in all cases shall state the support level in dollar amounts," although a court may insert a percentage in addition to the dollar amount if it finds that the correct child support cannot be stated exclusively as a dollar amount because the payor's income is "uncertain as to source, time of payment, or amount."

In *Duggan* the appellate court stated that the trial court erred in refusing to "amend or vacate" the order on the basis that it was an agreed order. Regarding the argument that the ex-wife would be disadvantaged, the appellate court stated, "An appropriate dollar amount can be calculated by using the income averaging method."

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### **2007 Legislation:**

#### **SB0454**

8/23/07: Public Act [95-374](#)

SEC. 503(g) Trusts: Expands 503(g) trusts in family-law cases to specifically authorize them for expenses incurred for the 'physical and mental health' of a minor. Current law authorizes these trusts for support, maintenance, education and general welfare of any minor.

#### **SB 1035**

10/23/07: Public Act [95-0685](#)

### **Illinois Public Aid Code Amendments:**

Sec. 10-9.5 (new). Access to records. In any hearing, case, appeal, or other matter arising out of the provisions concerning the determination and enforcement of the support responsibility of relatives, an obligor or obligee, or their legal representatives, shall be entitled to review any case records in the possession of the Illinois Department of Healthcare and Family Services, the State Disbursement Unit, or a circuit clerk with regard to that obligor or obligee that are able to prove any matter relevant to the hearing, case, appeal, or other matter if access to the record or portion of the record is authorized by 42 U.S.C. 654.

Sec. 10-17.6. Certification of ~~Past Due Support~~ Information to Licensing Agencies. The Illinois Department may provide by rule for certification to any State licensing agency of (i) the failure of responsible relatives to comply with subpoenas or warrants relating to paternity or child support proceedings and (ii) past due support owed by responsible relatives under a support order entered by a court or administrative body of this or any other State on behalf of resident or non-resident

persons receiving child support enforcement services under Title IV, Part D of the Social Security Act. The rule shall provide for notice to and an opportunity to be heard by each responsible relative affected and any final administrative decision rendered by the Department shall be reviewed only under and in accordance with the Administrative Review Law. (Source: P.A. 87-412.)

Sec. 10-17.13 (new). Vehicle immobilization and impoundment. The Illinois Department may provide by rule for certification to municipalities of past due support owed by responsible relatives under a support order entered by a court or administrative body of this or any other State on behalf of resident or non-resident persons. The purpose of certification shall be to effect collection of past due support by immobilization and impoundment of vehicles registered to responsible relatives pursuant to ordinances established by such municipalities under Section 11-1430 of the Illinois Vehicle Code.

The rule shall provide for notice to and an opportunity to be heard by each responsible relative affected, and any final administrative decision rendered by the Department shall be reviewed only under and in accordance with the Administrative Review Law. A responsible relative may avoid certification to a municipality for vehicle immobilization or arrange for discontinuance of vehicle immobilization and impoundment already engaged by payment of past due support or by entering into a plan for payment of past and current child support obligations in a manner satisfactory to the Illinois Department.

#### **Amendments to the Illinois Vehicle Code Amendments:**

625 ILCS 5/6-103

The Secretary of State shall not issue, renew, or allow the retention of any driver's license nor issue any permit under this Code: \*\*\*

14.5. To any person certified by the Illinois Department of Healthcare and Family Services as being 90 days or more delinquent in payment of support under an order of support entered by a court or administrative body of this or any other State, subject to the requirements and procedures of Article VII of Chapter 7 of this Code regarding those certifications;

625 ILCS 5/7-100 [Definitions]

**Administrative order of support.** An order for the support of dependent children issued by an administrative body of this or any other State.

**Court order of support.** A judgment order for the support of dependent children issued by a court of this State, including a judgment of dissolution of marriage. With regard to a certification by the Department of Healthcare and Family Services under subsection (c) of Section 7-702, the term "court order of support" shall include an order of support entered by a court of this or any other State.

625 ILCS 5/7-702 [Suspension of driver's license for failure to comply with order to pay child support.]

(C) The Secretary of State shall suspend a driver's license upon certification by the Illinois Department of Healthcare and Family Services, in a manner and form prescribed by the Illinois Secretary of State, that the person licensed is 90 days or more delinquent in payment of support under an order of support issued by a court or administrative body of this or any other State. The Secretary of State may reinstate the person's driver's license if notified by the Department of Healthcare and Family Services that the person has paid the support delinquency in full or has arranged for payment of the delinquency and current support obligation in a manner satisfactory to the Department of Healthcare and Family Services.

625 ILCS 5/7-704 [Suspension to continue until compliance with court order of support.]

(C) Section 7-704.1, and not this Section, governs the duration of a driver's license suspension if the suspension occurs as the result of a certification by the Illinois Department of Healthcare and Family Services under subsection (c) of Section 7-702.

(625 ILCS 5/7-704.1 new)

Sec. 7-704.1. Duration of driver's license suspension upon certification of Department of Healthcare and Family Services.

(a) When a suspension of a driver's license occurs as the result of a certification by the Illinois Department of Healthcare and Family Services under subsection (c) of Section 7-702, the suspension shall remain in effect until the Secretary of State receives notification from the Department that the person whose license was suspended has paid the support delinquency in full or has arranged for payment of the delinquency and current support obligation in a manner satisfactory to the Department.

(b) Whenever, after one suspension of an individual's driver's license based on certification of the Department of Healthcare and Family Services, another certification is received from the Department of Healthcare and Family Services, the Secretary shall again suspend the driver's license of that individual and that suspension shall not be removed unless the obligor is in full compliance with the order of support and has made full payment on all arrearages

(625 ILCS 5/7-705)

Sec. 7-705. Notice. The Secretary of State, prior to suspending a driver's license under this Chapter, shall serve written notice upon an obligor that the individual's driver's license will be suspended in 60 days from the date on the notice unless (i) the obligor satisfies the court order of support and the circuit clerk notifies the Secretary of State of this compliance or (ii) if the Illinois Department of Healthcare and Family Services has made a certification to the Secretary of State under subsection (c) of Section 7-702, the Department notifies the Secretary of State that the person licensed has paid the support delinquency in full or has arranged for payment of the delinquency and current support obligation in a manner satisfactory to the Department.

(625 ILCS 5/7-706) Administrative Hearing

There are corresponding provisions. The existing law has provided that if a request for an administrative hearing is made before the effective date of the suspension, then the suspension is stayed until a hearing decision is entered. The scope of the administrative hearing is limited.

(a) Whether the driver is the person who owes a duty to make payments under the court or administrative order of support.

(b) Whether (i) the authenticated document of a court order of support indicates that the obligor is 90 days or more delinquent or has been adjudicated in arrears in an amount equal to 90 days obligation or more and has been found in contempt of court for failure to pay child support or (ii) the certification of the Illinois Department of Healthcare and Family Services under subsection (c) or Section 7-702 indicates that the person is 90 days or more delinquent in payment of support under an order of support issued by a court or administrative body of this or any other State.

(c) Whether (i) a superseding authenticated document of any court order of support has been entered or (ii) the Illinois Department of Healthcare and Family Services, in a superseding notification, has informed the Secretary of State that the person certified under subsection (c) of Section 7-702 has paid the support delinquency in full or has arranged for payment of the delinquency and current support obligation in a manner satisfactory to the Department.

(625 ILCS 5/7-707)

Sec. 7-707. Payment of reinstatement fee. When a person ~~an obligor~~ receives notice from the Secretary of State that the suspension of driving privileges has been terminated based upon (i) receipt of notification from the circuit clerk of the person's compliance as obligor with a court order of support or (ii) receipt of notification from the Illinois Department of Healthcare and Family Services that the person whose driving privileges were terminated has paid the delinquency in full or has arranged for payment of the delinquency and the current support obligation in a manner satisfactory to the Department (in a case in which the person's driving privileges were suspended upon a certification by the Department under subsection (c) of Section 7-702), the obligor shall pay a \$70 reinstatement fee to the Secretary of State as set forth in Section 6-118 of this Code. \*\*\*

(625 ILCS 5/11-1430 new)

Sec. 11-1430. Vehicle immobilization and impoundment upon certification of the Department of Healthcare and Family Services. Any municipality may provide by ordinance for a program of vehicle immobilization and impoundment in cases in which the Department of Healthcare and Family Services has certified to the municipality under Section 10-17.13 of the Illinois Public Aid Code that the registered owner of a vehicle owes past due support. The program shall provide for immobilization of any eligible vehicle upon the public way by presence of a restraint in a manner to prevent operation of the vehicle and for subsequent towing and impoundment of such vehicle solely upon the certification of past due support by

the Department of Healthcare and Family Services. Further process, hearings, or redetermination of the past due support by the municipality shall not be required under the ordinance. The ordinance shall provide that the municipality may terminate immobilization and impoundment of the vehicle if the registered owner has arranged for payment of past and current support obligations in a manner satisfactory to the Department of Healthcare and Family Services.

**Severance Pay:** A small but critical portion of this package of legislation includes severance pay under definition of income as being “any form of periodic payment to an individual, regardless of source” pay under IWSA - 750 ILCS 28/15.

[SB 68](#)

Status - 9/11/07: Public Act [95-601](#).

Adoption – - Senate Bill 68 amends the Adoption Act to make two changes. (1) Clarifies that children are entitled to inheritance rights and all other available benefits of adopted children if their adoptive parents die before the adoption is completed as long as the court has jurisdiction over the parties. (2) Allows DCFS to provide financial assistance for the gap between when the child's adoptive parents die and completion of a new adoption by another adoptive parent. Passed both chambers.

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