

2010 SUMMARY OF SIGNIFICANT ILLINOIS DIVORCE AND FAMILY LAW CASES / 2010 LEGISLATION

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| | |
|--|-------------------------------|
| Property Cases Law | Page 2 of 14 |
| Retirement Benefit Cases. | Page 2 of 14 |
| <i>Culp</i> - Whether QILDRO Conformed to Settlement Agreement. | Page 2 of 14 |
| <i>Karafotas</i> - Effect of MSA on Windfall Profits of Post-Divorce Sale of Seat on the Chicago Mercantile Exchange (CME). | Page 6 of 14 |
| Child Support | Page 7 of 14 |
| Initial and Post-Divorce: Establishing Amount of Child Support | Page 7 of 14 |
| <i>Abrell</i> - Illinois Supreme Court Affirms Appellate Court Re Whether Accrued Sick and Vacation Days are Marital Property. | Page 7 of 14 |
| Support Enforcement | Page 9 of 14 |
| <i>U.S. v. Bell</i> - Deadbeats Parents Punishment Act..... | Page 9 of 14 |
| <i>Heady</i> - Enjoining Other Enforcement Activities Improper Unless Clear Waiver | Page 10 of 14 |
| <i>Stockton</i> - Penalties for Failure to Withhold Support - Two Year Statute of Limitations. | Page 10 of 14 |
| <i>Black v. Bartholomew</i> - Workers' Compensation Award and Withholding of Income for Support. | Page 10 of 14 |
| Paternity | Page 11 of 14 |
| Maintenance Cases | Page 11 of 14 |
| <i>Nord</i> - Permanent Maintenance: Award of Permanent Maintenance of \$17,000 a month affirmed..... | Page 11 of 14 |
| Removal: Parentage / Divorce | Page 11 of 14 |
| Custody | Page 12 of 14 |
| Jurisdiction / Hague | Page 12 of 14 |
| <i>Abbott</i> - Ne Exeat Provision Constitutes Rights of Custody under Article III of the Hague Convention. | Page 12 of 14 |
| Domestic Violence | Page 12 of 14 |
| <i>Holthoff</i> - Neglect Does Not, in itself, Constitute Abuse under the IDVA. | Page 12 of 14 |

| | |
|--|-------------------------------|
| Attorney’s Fees | Page 12 of 14 |
| <i>Pal v. Gudgel</i> – Intervenor Cannot Seek Fees Under Section 508(a). | Page 12 of 14 |
| Evidence Cases | Page 13 of 14 |
| <i>Johnston v. Weil</i> - Mental Health Confidentiality and 604(b) Reports..... | Page 13 of 14 |
| 2010 Legislation | Page 14 of 14 |
| Service by Delivery to a Third-Party Commercial Carrier. | Page 14 of 14 |

Property Cases Law:

Retirement Benefit Cases:

***Culp* - Whether QILDRO Conformed to Settlement Agreement**

[*IRMO Culp*](#), (4th Dist., March 26, 2010)

As part of their settlement agreement, the parties agreed that the former husband's retirement benefits were to be "equally divided as of April 20, 1999, pursuant to a separate [Qualified Illinois Domestic Relations Order (QILDRO)]." Because the husband, Jerry, was not near retirement at the time of the dissolution, the trial court reserved jurisdiction for the entry of a QILDRO at a later date. In 2009, the former wife, Susan, filed a motion for entry of a QILDRO along with a proposed order directing Jerry to sign his consent to the QILDRO. The proposed QILDRO set forth a formula for determining the value of the marital portion of Jerry's pension and dividing it between the parties. The trial court ultimately entered an order directing the former husband to sign his consent. He appealed arguing that the trial court erred in finding Susan's proposed QILDRO conformed to the parties' settlement agreement. The appellate court disagreed with the ex-husband and affirmed the decision of the trial court.

The MSA had provided:

"[Jerry] has certain retirement benefits through [SERS] which are valued at approximately \$84,000 as of April 20, 1999, the date of entry of the [j]udgment of [d]issolution of [m]arriage on grounds. Said retirement benefits shall be equally divided as of April 20, 1999, pursuant to a separate QILDRO to be entered by agreement of the parties or by order of the court."

The appellate court noted that nearly two years then passed during which neither an agreement by the parties nor an order by the trial court divided the pension pursuant to a QILDRO. In June 2001, the court entered a written order stating:

"[t]he entry of a *** [QILDRO] is reserved. [Jerry] shall notify [Susan], in writing, 30 days prior to making any application for retirement or request for retirement benefits" to allow Susan time to file for entry of a QILDRO prior to the commencement of the pension's disbursement."

In the proposed QILDRO, Susan named herself as alternate payee and recipient of 50% of the marital portion of Jerry's monthly retirement benefit, any lump-sum payment upon termination of the benefit, any partial refund becoming payable to Jerry, and any benefits payable to Jerry's beneficiaries upon his death. The QILDRO set forth the following formula for calculating the marital portion of the pension consistent with what is Article 9 of the model QILDRO form, i.e., the model using what is in essence a coverture fraction type approach.

It QILDRO included regular plus permissive service. It included death benefit and it also included the COLA clause, i.e., the ex-wife to share in the post-retirement increases to the extent of her benefits otherwise provided in the QILDRO.

The former husband on appeal argued that the formula used in distributing his SERS pension deviated from the court's September 1999 supplemental order, which Jerry alleged awarded Susan \$42,000--half of the pension's value when he filed his dissolution petition in April 1999.

The trial court's decision stated:

The [o]rder does not specify that [Susan] is to receive \$42,000[], and in the [c]ourt's opinion, if that were the intention of the parties, provision would have been made for the entry of judgment in that amount and a payment schedule. That was clearly not the intention of the parties. If [Susan's] portion were fixed at \$42,000[], there would be no need for a QILDRO. A subsequent [o]rder on January 12, 2001[,] also reserved the entry of the QILDRO.

*** [T]he [SERS pension] was the major asset in the divorce proceeding, and [Jerry] was only 44 years old at the time [the court entered its order of dissolution]. Obviously, retirement was many years away. [Jerry] was to notify [Susan] in writing when he planned to retire so that the QILDRO could be entered.

It would be unconscionable to conclude now that the parties intended for [Susan] to wait untold years to receive her interest in the only major asset from the marriage, if her interest was fixed at \$42,000[] and no more. Such an approach would deny her the benefit of interest on her asset or the benefit of any [cost-of-living adjustment] or other increases in the value of the asset. The parties clearly intended to have a QILDRO entered, with the benefits divided using the customary formulaic approach. This is not a case *** where the parties reached a clear and unambiguous agreement that [Susan] should receive \$42,000[] at some time in the future, with no interest on her asset and no increase in value through the intervening years. There was no such 'bargain[.]' and [Susan] cannot be held to this strained interpretation of the [a]greed [s]upplemental [o]rder."

The court further found Susan's proposed QILDRO conformed to the parties' agreement and ordered Jerry to sign the QILDRO and submit it to the court for entry.

On appeal the ex-husband urged that the parties' agreement unambiguously valued the pension's marital portion at \$84,000 and provided Susan would receive \$42,000, exactly half without any

interest or cost-of-living adjustments, and (2) no language in the agreement indicated the use of the formula set forth in Susan's proposed QILDRO to divide the pension.

The appellate court first reviewed the case law and then commented:

In the case at bar, the trial court opted to reserve jurisdiction as to the division of Jerry's pension until closer to his retirement rather than awarding Susan a lump sum of the pension's value at the time of dissolution. Over 10 years later, the parties now disagree as to the value of Susan's "equal" share.

The appellate court decision will be quoted from at length because of the importance of it to similar cases:

Because the agreement states "[s]aid retirement benefits shall be *equally divided* as of April 20, 1999 [(the dissolution date)]" (emphasis added), Jerry contends the parties intended Susan's share of the marital portion to be \$42,000, exactly half of \$84,000, the pension's value as of the dissolution date.

He further argues the agreement provided no express language permitting Susan interest or cost-of-living adjustments on her share of the pension. **However, limiting Susan's share to \$42,000 would allow Jerry the marital portion's entire growth in value between the date of dissolution and the date of his retirement, thereby rendering the parties' shares of the marital portion unequal.** Accordingly, we find Jerry's interpretation of the agreement unreasonable because the agreement simply states an approximate value of the pension on the date of dissolution and provides Susan receive 50% of the retirement plan pursuant to a QILDRO filed in the future.

The settlement agreement never states Susan shall receive \$42,000. Instead, the settlement agreement lists \$84,000 as an approximate valuation of the pension's value on the dissolution date. The agreement further lists the dissolution date, April 20, 1999, for purposes of ascertaining the duration of the marriage. **Both the approximate value of the pension and the end date of the marriage are set forth to assist in the later assessment and division of the pension's marital portion.** The provision for entry of "a separate QILDRO" further evidences the parties' intent to ascertain the value of and equally divide the marital portion of the pension at a later date.

Jerry's pension is a defined-benefit plan pension. Under a defined-benefit plan, the value of the pension's benefit is determined at retirement based on years of service and final - 13 - salary. See *Richardson*, 381 Ill. App. 3d at 54, 884 N.E.2d at 1253. Each year of service is valued cumulatively: the longer SERS members work, the higher the percentage of their final salary they will collect as their pension. See *Richardson*, 381 Ill. App. 3d at 54, 884 N.E.2d at 1253. Because each year of service contributes to the overall value of the pension, the marital portion of the pension increases in value the longer the pension holder works. Thus, its total value is

unascertainable until the time of retirement, which is often years after the dissolution of marriage.

Essentially, Jerry argues the parties agreed to freeze Susan's share of the pension at the dissolution date. This interpretation of the settlement agreement's plain language fails to award Susan the benefits associated with deferring receipt of her share of the pension until Jerry retires. See *Ramsey*, 339 Ill. App. 3d at 759, 792 N.E.2d at 343-44. **Also, by postponing the division of the pension until it is received, both parties shared the risk Jerry would change jobs or die before retiring, which would reduce the pension substantially or forfeit its benefits completely.** See *Ramsey*, 339 Ill. App. 3d at 759, 792 N.E.2d at 343. **Because Susan and Jerry shared those risks when they agreed to postpone the division of the pension, equity requires they share in the benefits of unforeseen increases in the value of the pension as well.** See *Ramsey*, 339 Ill. App. 3d at 759, 792 N.E.2d at 343.

Susan had no incentive to postpone receipt of a flat rate, lump-sum payment. The only reasonable interpretation of the parties' settlement agreement is the parties knew the marital portion would grow in value during the period between the dissolution of marriage and Jerry's retirement and thus opted to wait to equally divide the pension until its value fully matured and became ascertainable. **Because Jerry's proposed interpretation of the agreement leads to an unfair and unreasonable result, we cannot conclude the parties intended Susan receive half the value of the pension's marital portion at the time of the dissolution.**

The ex-husband argued that the court specifically erred in following the so called *Hunt* formula. The decision stated:

Here, the trial court found the parties intended to divide the marital portion of the pension pursuant to the "customary formulaic approach," as used in Susan's proposed QILDRO. Jerry maintains the court erred in using the *Hunt* formula to determine the value of the marital portion of the pension because at the time of the court's agreed supplemental order in September 1999, QILDROs did not specify the *Hunt* formula for dividing the marital portion of pensions and therefore the parties could not have intended the formula's use.

The ex-husband argued that the trial court should have followed the *Wenc* decision and allowed extrinsic evidence as to the parties' intent because of the potentially ambiguous nature of the settlement agreement. The appellate court noted that:

Unlike the parties' settlement agreement in *Wenc*, the parties' agreement in this case does not contain mysterious sums and a surplusage of ambiguous phrases. Rather, it contains no explicit language directing the trial court how to divide the marital portion of the pension other than to do so "equally." Therefore, this case is dissimilar to *Wenc* and more akin to *Richardson*.

The appellate court then decided:

While the settlement agreement did not expressly enumerate the formula by which to equally divide the pension's marital portion, the parties' intent is evidenced by the fact the parties chose to use the reserved-jurisdiction approach and later entry of a QILDRO and did not use language contrary to the customary formulaic approach set forth in *Hunt*.

Regarding the fact that the *Hunt* formula has become the standard for dividing defined benefit plans using the reserved jurisdiction approach the court commented:

The *Hunt* formula, stated in 1979, is a widely used method for dividing pensions' marital portions under the reserved-jurisdiction approach, especially where the approach applies to defined-benefit plan pensions. See *Richardson*, 381 Ill. App. 3d at 52, 884 N.E.2d at 1251; *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1115, 806 N.E.2d 701, 708 (2004). This was the case at the time of the trial court's supplemental order incorporating the parties' settlement agreement in 1999. The General Assembly's subsequent endorsement of the *Hunt* formula by amending section 1-119 of the Illinois Pension Code to include it within QILDROs addressing the division of governmental pensions' marital portions (see 40 ILCS 5/1-119(n)) further indicates the formula's widespread acceptance.

***Karafotas* - Effect of MSA on Windfall Profits of Post-Divorce Sale of Seat on the Chicago Mercantile Exchange (CME)**

[*IRMO Karafotas*](#), (First Dist., June 18, 2010)

The 2000 marital settlement agreement in the property portion had provided:

“E) Phillips’s [sic] Chicago Mercantile Seats: Except as set forth herein Phillip shall retain his two seats (CME and IMM) on the Chicago Mercantile Exchange as his sole property free and clear of any interest therein by Pamela. Phillip agree[s] that in the event he dies before Pamela then upon his death, the asset known as the IMM International Monetary Market Exchange Membership, division of the CME (hereafter referred to as the IMM membership[]), will be transferred to Pamela. *** In the event th[at] Pamela dies before Phillip, Pamela’s [s] estate shall have no claim to the IMM membership and it shall remain the sole property of Phillip. If Phillip sells the IMM membership during his lifetime, Phillip agrees that he will transfer to Pamela one-half of the net sales proceeds of after taxes and customary sales expenses within thirty days of the receipt of the proceeds. ***

Pamela and Phillip wish to treat the property transfers herein as an economic severance. Upon completion of the property transfers, or entry of a Judgment of Dissolution of Marriage, each parties’ assets, income from the assets and income shall be treated as that person’s separate non-marital property.”

The Agreement concluded:

“Mutual Waiver: Except as to the provisions contained in this Agreement, each of the

parties does forever waive, release, relinquishes [sic] and quit claim to the other all rights of homestead, maintenance and ll other property rights and claims, including claims of tortious acts, which he or she now has or may hereafter have, *** in or to, or against the property of the other party, or his or her estate, whether now owned or hereafter acquired by such party.”

A series of complex transactions resulted in the transformation of CME from a privately held entity into a for-profit public holdings company.

In 2008 the ex-wife filed a motion for summary judgment in which she urged that she was entitled to 50% of the net proceeds from the sale of stock which represented Phillip’s IMM Membership in Old CME. On June 29, 2009, the court entered two orders denying Pamela’s motion for summary judgment. The court found that there was no genuine issue of material fact and that Pamela was not entitled to judgment as a matter of law. The court ruled as a matter of law that no sale had occurred regarding Phillip’s IMM Membership for purposes of the Agreement.

The ex-wife contended on appeal that her motion for summary judgment should have been granted because 40% of the Class A stock which her ex-husband [Phillip] had sold derived from the exchange/conversion of his IMM Membership into stock in CME Holdings. While she acknowledges that Phillip did not sell his entire IMM Membership and that Phillip still retains trading rights under an IMM Membership with the same membership number (No. 602), the ex-wife (Pamela) argued that it ws undeniable that Phillip’s original IMM Membership was exchanged for stock, and the Class A stock which Phillip sold represented a substantial portion of the original IMM Membership in question. She had sought summary judgment in the amount of\$928,077.50.

The appeal involved contract interpretation and there is excellent language in this appeal in this regard. Apt language from the decision states, “The intent of the parties is not to be determined from detached portions of a contract or from any clause standing by itself. *Gallagher*, 226 Ill. 2d at 233.”

The decision by the appellate court was summarized:

We conclude, that pursuant to the Agreement, Phillip is required to pay Pamela 50% of the net-after-tax proceeds he received from the sale of the Class A stock he acquired in exchange for his IMM Membership, amounting to \$928,077.50. Because there are no genuine issues of material fact, Pamela is entitled to judgment in her favor as a matter of law.

Child Support

Initial and Post-Divorce: Establishing Amount of Child Support

***Abrell* - Illinois Supreme Court Affirms Appellate Court Re Whether Accrued Sick and Vacation Days are Marital Property**

[*IRMO Abrell*](#), 386 Ill.App.3d 718, 898 N.E.2d 1163, 325 Ill.Dec. 884 (Fourth Dist., November 19,

2008); [Illinois Supreme Court \(February 4, 2010\)](#).

I had included the 2008 *Abrell* decision because of the Illinois Supreme Court's review of this decision. The trial court determined the net value of certain of the vacation and sick days (through a state employer) in the property division. The appellate court stated:

The categorization of John's accumulated sick and vacation days appears to be one of first impression in Illinois. No statute or previously reported decision in Illinois appears to have addressed the issue.... We have carefully considered the cases cited by appellant and appellee and conclude accumulated sick-leave and vacation days are not marital property. They are not property--they are a substitute for wages when, and if, the employee is unable to perform his duties.

This case also has a good discussion regarding motions for reconsideration.

The Supreme Court stated, "The issue of whether accumulated vacation and sick days are marital or nonmarital property is an issue of first impression in this court."

As the appellate court noted, other jurisdictions are split on the issue of whether vacation and sick days are marital property. Those courts have held that: (1) accrued vacation and sick days are marital property subject to division at the time of dissolution; (2) accrued vacation and sick days are marital property but are subject to distribution when received, not at the time of dissolution; and (3) accrued vacation and sick days are not marital property.

The Supreme Court addressed out of state case law at great length and then quoted with approval the appellate court's reasoning. The Supreme Court concluded:

Although the trial court was able to put a value on those days in its judgment for dissolution, we find that the value assigned to those days was speculative at best. We also find that the reserved jurisdiction approach used by the Grund court could be unnecessarily complicated and difficult to administer, particularly if the parties are many years from retirement. Applying the facts to the holding the High Court stated:

As the appellate court noted, John had no present right to be paid for his sick and vacation days absent retirement or termination of his employment. Further, while John had accrued 115 sick days and 42 vacation days at the time of trial, those days may or may not remain at the time John retires or terminates his employment. If John uses any of the sick or vacation days awarded to him prior to retirement or termination of his employment, John will never collect payment for those days. In that case, the award of the value of those days to John in the property distribution would be illusory. As John has argued, if this court reinstates the trial court's finding that the accumulated vacation and sick days are marital property, John's share of the marital estate will be diminished every time he uses a sick day or vacation day before his retirement or termination, while Jacquie's cash payout will remain the same. Consequently, we find that although John accumulated his vacation and sick days

during his marriage to Jacquie, the accumulation of those days had only a future value that was indeterminate and speculative. For that reason, we find that the accrued vacation and sick days differ from pension plans, stock options and deferred compensation.

Note the limits of *Abrell*:

We agree that when a party has actually received payment for vacation and/or sick days accrued during marriage prior to a judgment for dissolution, the payment for those days is marital property subject to distribution in the marital estate. Under that scenario, the vacation and/or sick days have been converted to cash, the value of which is definite and certain. In this case, however, the accrued days have not been converted to cash, and the value of those days remains uncertain.

Of course *Abrell* provides an incentive for a party not to convert accrued sick or vacation days to cash – if that party has the ability to defer such an election.

Support Enforcement

U.S. v. Bell - Deadbeats Parents Punishment Act

In terms of Federal child support enforcement, first we had the Child Support Recover Act (CSRA) in 1992. The CSRA aimed to deter nonpayment of state ordered support obligations through vigorous prosecution of egregious offenders. While federal prosecution efforts were successful under the CSRA, some law enforcement agencies found that the simple misdemeanor penalties provided for under the Act did not have the force to deter the most serious violators. The problem with enforcement under the CSRA was remedied in 1998 with the passage of the Deadbeat Parents Punishment Act (DPPA) which created two new categories of federal felonies for the most egregious child support violators.

Today, a child support violator can be prosecuted under Federal law if the following facts exist: 1) the violator willfully failed to pay a known child support obligation for a child in another state which has a) remained unpaid for longer than a year or is greater than \$5,000 (misdemeanor), or has b) remained unpaid for longer than two years or is greater than \$10,000 (felony). The alternative is where the violator traveled in interstate or foreign commerce with the intent to evade a support obligation; if such obligation has remained unpaid for a period of one year or longer-or is greater than \$5,000 (felony). See 18 U.S.C. §228.

There is not a great deal of Federal law applying the DPPA. In *United States v. Bell*, 598 F.3d 366 (7th Cir. March 16, 2010), after a federal jury trial, defendant Maurice Bell was convicted of violating the Deadbeat Parents Punishment Act of 1988, 18 U.S.C. §228(a)(3), for failure to pay child support. He was sentenced to two years' imprisonment and ordered to pay restitution of nearly \$84,000. On appeal, the defendant argued that the district court erred in denying his motion to dismiss the indictment on the grounds that it was barred by the five-year statute of limitations. The court of appeals rejected that claim, holding that the defendant's failure to pay child support was a

continuing offense. Accordingly, the prosecution was timely. The court of appeals, however, remanded the cause for a new sentence because the district court erred in applying the “enhancement for a violation of a court order,” which amounted to impermissible double counting in sentencing. The decision noted the split among the Circuits with the second circuit defines double counting differently than the 7th regarding the issue of potential upward adjustments under the sentencing guidelines.

Heady - Enjoining Other Enforcement Activities Improper Unless Clear Waiver

IRMO Heady, (2nd Dist., March 1, 2010) (DuPage County)

The trial court should not have effectively estopped the Illinois Department of Healthcare and Family Services from enforcing a child support arrearage in a case where the trial court's order established a monthly payment on the support arrears. Accordingly, the IDHFS was free to pursue other enforcement remedies – even if the obligor were current in his support payments on the arrearage.

Stockton - Penalties for Failure to Withhold Support - Two Year Statute of Limitations

IRMO Stockton, (2nd Dist., May 28, 2010)

This very complex factual case (including problems with the State Disbursement Unit's manner of record keeping) regarding timing of payments is necessary reading for an in depth knowledge of how the provisions of the Income Withholding for Support Act operate.

The appellate court stated:

The threshold question this case turns on is not whether the distribution in the problematic line should be credited to Rockwell, but whether the information contained in the problematic line indicates that an outstanding payment remains under the 1998 withholding order. It is the answer to this question that dictates the parameters of our statute-of-limitations analysis, and we conclude that no outstanding payment remains under the 1998 withholding order. The Withholding Act does not set forth a statute of limitations for an action to collect an arrearage amount or for an action to collect penalties.

The appellate court first ruled that 735 ILCS 5/12--108 does not apply to penalties under the IWSA – Section 12-108 providing that “[c]hild support judgments, including those arising by operation of law, may be enforced at any time.”

The appellate court ruled that a two year statute of limitations applied. “two years under section 13--202 of the Code (735 ILCS 5/13--202 (West 2006)) (“Actions *** for a statutory penalty *** shall be commenced within 2 years next after the cause of action accrued”). Accordingly, the ex-wife's action was time-barred.

Black v. Bartholomew - Workers’ Compensation Award and Withholding of Income for Support

IDHFS Ex rel. Black v. Bartholomew, ___ Ill.App.3d ___, 920 N.E.2d 542, 336 Ill.Dec. 333 (4th Dist. December 8, 2009).

The court may order a child support arrearage to be paid out of a workers' compensation award despite language in 820 ILCS 305/21 that exempts such payments or awards from judgments. The *Black* court held that §15(d) of the Income Withholding for Support Act, 750 ILCS 28/15(d), controls where as it provides an exception to 820 ILCS 305/21. It defines "income" as any form of periodic payment, including workers' compensation. It , and further states that any other law that limits the exempt income that can be **withheld shall not apply to support judgments**.

Paternity

Maintenance Cases:

Nord - Permanent Maintenance: Award of Permanent Maintenance of \$17,000 a month affirmed

IRMO Nord, (4th Dist., June 28, 2010)

The parties were married in 1972 and accordingly this was a long term marriage case in which the children were adults at the time of trial, the husband was age 57 and the wife was age 58. The husband was a physician practicing in the field of obstetrics and gynecology. The wife (Kathleen) was a high school graduate and ceased working in 1980 to care for the parties' two children, so she had not worked outside the home for nearly 30 years.

The parties reserved the key issue which was that of maintenance. Regarding the \$17,000 monthly permanent maintenance award, the husband contended that (1) his resources were insufficient to pay the maintenance award, (2) \$17,000 per month was not necessary for Kathleen's reasonable expenses, (3) his actual expenses were not considered, (4) Kathleen received the bulk of the marital assets, and (5) \$5,000 per month for 60 months would adequately support Kathleen.

According to the parties' tax returns, the ex-husband's total gross income was \$994,507 in 2002, \$1,162,517 in 2003, \$1,655,786 in 2004, \$1,669,178 in 2005, \$1,576,942 in 2006, and \$898,827 in 2007. In addition, petitioner's exhibits show Daniel's total gross income for 2008 was \$813,031. As a result, his average income for 2002 to 2008 was over \$1 million. Regarding the husband's argument that the court should not have considered capital gains as income, the appellate court noted the trial court's findings that it had concluded that the last two years were the best representation of the husband's income and that it had given the husband the benefit of the doubt in this regard – because these years had no significant capital gains income.

There were also significant property disputes but I believe the key aspect to this decision involves what was essentially a generous maintenance award affirmed on appeal.

Removal: Parentage / Divorce:

Custody

Jurisdiction / Hague

Abbott - Ne Exeat Provision Constitutes Rights of Custody under Article III of the Hague Convention

[*Abbott v. Abbott*](#), U.S. Supreme Court (May 17, 2010)

A key term in dealing with the Hague Convention on Civil Aspects of Child Convention is that the convention requires the return of children only if the person was **habitually a resident** of the country immediately before the action that results in the breach of rights of custody or rights (and likely rights of access.) The issue was whether a party has rights of custody under the Hague by virtue of a *ne exeat* clause (an order preventing exit with the children from the country). *Abbott* held that a parent has a right of custody under the Hague Convention by reason of that parent's *ne exeat* right. A key aspect of the case was not necessary the *ne exeat* order but the fact that under Chilean law provides that "[o]nce the court has decreed" that one of the parents has visitation rights, that parent's "authorization" generally "shall also be required" before the child may be taken out of the country.

Domestic Violence:

Holthoff – Neglect Does Not, in itself, Constitute Abuse under the IDVA

[*IRMO Holthoff*](#), (2nd Dist., January 19, 2010)

Holthoff addresses an issue which arguably also is a matter of first impression in Illinois – whether under the Domestic Violence Act (IDVA), neglect equals abuse. The appellate court ultimately ruled that neglect, itself, does not equal abuse. But the case points out the problems in not providing an adequate record of the proceedings, that is, the transcript of the proceedings. *Holthoff* involved a case where the mother repeatedly was arrested for shoplifting. She did so on several occasions when the children were left in the car. While the order itself appeared mostly premised on apparent findings of neglect, the appellate court ruled that, "These allegations, if proved, certainly rise to the level of physical abuse, defined in section 103(14)(iii) of the Act as "knowing or reckless conduct which creates an immediate risk of physical harm." 750 ILCS 60/103(14)(iii)."

Attorney's Fees:

Pal v. Gudgel – Intervenor Cannot Seek Fees Under Section 508(a)

[*IRMO Pal v. Gudgel*](#), (Fourth Dist., January 27, 2010)

The first issue was a case of first impression – whether an intervenor could seek attorney's fees under Section 508(a) of the IMDMA. For interesting reading, review the facts of the case involving Gudgel. But for the purpose of the body of Illinois case law, I will only address the greater legal issues. The appellate court stated:

In addition to the stated purpose found in section 102(5), the language of section 508(a) is telling of the legislature's intent. While the General Assembly used the term

"party" in section 508(a), the section only refers to two parties. According to section 508(a):

"The court *** may order any party to pay a reasonable amount for his own or *the other party's* *** attorney's fees. Interim attorney's fees *** may be awarded from *the opposing party* ***. At the conclusion of the case, contribution to attorney's fees *** may be awarded from *the opposing party* in accordance with subsection (j) of [s]ection 503." (Emphases added.) 750 ILCS 5/508(a).

The appellate court then stated:

An intervenor is not an "opposing" party in a dissolution action. The spouses are the "opposing" parties. An intervenor is someone who is merely allowed to join an action in order to assert or protect an interest that may be affected by a court's order.

The appellate court then looked to the language for contribution awards per Section 503(j)(2) and pointed out that it specifically referenced awards of contribution to one party from the other party. The appellate court ruled, "As a result, we find the trial court correctly concluded an intervenor is not eligible for attorney fees pursuant to section 508(a) of the Dissolution Act (750 ILCS 5/508(a)).

Next, the appellate court stated, "We need not address whether the trial court erred in finding a court can award an intervenor attorney fees pursuant to section 508(b) of the Dissolution Act (750 ILCS 5/508(b) to affirm the trial court."

Read the specifically concurring opinion. The concurring opinion agreed that an intervenor cannot obtain a fee award under Section 508(a). The concurring opinion disagreed that the majority opinion should have avoided a decision regarding whether under Section 508(b) an intervenor might collect attorney's fees:

They may be, however, recoverable under section 508(b) of the Dissolution Act (750 ILCS 5/508(b) if they are incurred to defend a pleading filed for an improper purpose. See *In re Marriage of Pillot*, 145 Ill. App. 3d 293, 495 N.E.2d 1247 (1986). No such improper purpose was found here.

Evidence Cases:

[*Montes v. Mai*](#), (1st Dist., February 25, 2010)

A chiropractor is a physician for the purpose of taking an evidence deposition.

Johnston v. Weil* - Mental Health Confidentiality and 604(b) Reports

The Illinois Supreme granted the petition for leave to appeal. See:

http://www.state.il.us/court/SupremeCourt/PLA_Ann/2010/032410.pdf (No. 109693)

Johnston v. Weil, Sean McCann, Dorothy B. Johnson, Marta Coblitz, Burton, Hochbert, Karen Pinkert-Lieb, Andrea, Muchin, Debra Dimaggio and Leslie Fineberg, (1st Dist., December 14, 2009)

The specific certified question is:

Whether evaluations, communications, reports and information obtained pursuant to section 750 ILCS 5/604(b) of the Illinois Marriage and Dissolution of Marriage [Act] are confidential under the Mental Health and Developmental Disabilities Confidentiality Act 740 ILCS 110/1 et seq. where the 604(b) professional personnel [sic] to advise the court is a psychiatrist or other mental health professional.

2010 Legislation:

Service by Delivery to a Third-Party Commercial Carrier.

Effective December 29, 2009, Supreme Court Rules 11, 12, 361, 367, 373, 381, and 383 were amended to expressly allow for service by delivery to a third-party commercial carrier such as UPS or Federal Express.

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