CHILD SUPPORT 101/102 – STATUTORY AND CASE LAW

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Within the past seven years, the statutory law regarding child support has had the most changes since the adoption of the child support guidelines. This presentation will first will highlight significant changes to §505 of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), and many of the statutory provisions regarding support which are often overlooked.

A. **IMDMA §505 - Child Support**:

1. **General Support Provisions:** Some of the significant portions of §505(a) read as follows (enforcement procedures and certain other portions are generally omitted; emphases are added):

"(A) In a proceeding for dissolution of marriage, legal separation, declaration of invalidity of marriage, a proceeding for child support following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, a proceeding for modification of a previous order for child support under Section 510 of this Act, or any proceeding authorized under Section 501 or 601 of this Act, the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for his support, without regard to marital misconduct. The duty of support owed to a minor child includes the obligation to provide for the reasonable and necessary physical, mental and emotional health needs of the child.

(1) The Court shall determine the minimum amount of support by using the following guidelines:

Number of children	Percent of Supporting Party's Net Income
1	20%
2	28%*(changed in 2003)
3	32%
4	40%
5	45%
6 or more	50%

(2) The above guidelines shall be applied in each case unless the court, after considering evidence presented on all relevant factors, finds a reason for deviating from the guidelines. Relevant factors may include ***.

If the court deviates from the guidelines, the court's finding shall

state the amount of support that would have been required under the guidelines, if determinable. The court shall include the reason or reasons for the variance from the guidelines."

Comment: The court should review any judgment of dissolution of marriage where there is a deviation to make certain that not only are there findings as to the reason for the deviation, ***but also the amount of child support that would have been required under the guidelines, if this is determinable****.*

Also Note: By Federal mandate, each state must review and amend its guidelines every four years. Illinois has been deficient in doing so and it is possible that Illinois will adopt an Income Sharing Model. 33 states have adopted the Income Shares Model. There are only essentially five states following the same model as Illinois – Georgia, Mississippi and Tennessee. 24 of the 50 states base their support calculations on gross. For the breakdown on the current support guidelines in each state see:
http://www.abanet.org/family/familylaw/flqwinter07_childsupport.pdf

"(3) "Net income" is defined as the total of all income from all sources, minus the following deductions:

(a) Federal income tax (**properly calculated** withholding or estimated payments);
(b) State income tax (**properly calculated** withholding or estimated payments);
(c) Social Security (FICA payments);
(d) Mandatory retirement contributions required by law or as a condition of employment;
(e) Union dues;
(f) Dependent **and individual** health/hospitalization insurance premiums;
(g) Prior obligations of support or maintenance actually paid pursuant to a court order;
(h) Expenditures **for repayment of debts** that represent reasonable and necessary expenses for the production of income, medical expenditures necessary to preserve life or health, reasonable expenditures for the benefit of the child and the other parent, exclusive of gifts. The court shall reduce net income in determining the minimum amount of support to be ordered only for the period that such payments are due and shall enter an order containing provisions for its self-executing modification upon termination of such payment period."

Comment: Significant case law addressing these deductions will be discussed below.

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a. **§505(a)(5) – Base Plus Percentage – Allowable if Finding**: "The final order in all cases shall state the support level in dollar amounts. However, if the court finds that the child support amount cannot be expressed exclusively as a dollar amount because all or a portion of the payor's net income is uncertain as to source, time of payment, or amount, the court may order a percentage amount of support in addition to a

specific dollar amount and enter such other orders as may be necessary to determine and enforce, on a timely basis, the applicable support ordered."

Comment: *This legislation may render irrelevant the Supreme Court's IRMO Mitchell decision which addressed void versus voidable percentage orders of support. There has been no case law addressing whether a percentage order without a finding per Section 505(a)(5) [stating that all or a portion of the net income is uncertain as to source, timing or amount] would render the order voidable.*

b. **Note *Ackerley* Decision Re Additional "Bonus" Income**: A 2002 decision which is enclosed addresses the issue of what constitutes additional income (bonuses) for the purpose of payment of support. *IRMO Ackerley,* 333 Ill.App.3d 382, 266 Ill.Dec. 973, 775 N.E.2d 1045 (2d Dist. 2002), serves as a primer on support modification and proper determination of net income (including bonus income). *Ackerley* held that monies received in excess of base pay, but not explicitly characterized as bonus funds were in actuality a bonus. This is worthwhile reading and is a warning for careful drafting in any case where there is a base plus a percentage order of support. Careful drafting will anticipate payment in a means other than a bonus or a commission. Careful drafting could not get around providing stock options in lieu of additional compensation. The question in *Ackerley* was whether the additional income was a bonus as opposed to the ex-husband's contention that it was additional weekly income because he was working harder.

2. §**505(a)(6) – Documents Obtained Via Subpoena Self-Authenticating if Non-Compliance with Discovery Order Plus No Presence at Hearing**:] "If (I) the non-custodial parent was properly served with a request for discovery of financial information relating to the non-custodial parent's ability to provide child support, (ii) the non-custodial parent failed to comply with the request, despite having been ordered to do so by the court, and (iii) the non-custodial parent is not present at the hearing to determine support despite having received proper notice, then any relevant financial information concerning the non-custodial parent's ability to provide child support that was obtained pursuant to subpoena and proper notice shall be admitted into evidence without the need to establish any further foundation for its admission.

3. **§505(a-5) – Contempt Enforcement Proceedings and Notice to Payor**: In an action to enforce an order for support based on the respondent's failure to make support payments as required by the order, notice of proceedings to hold the respondent in contempt for that failure may be served on the respondent by personal service **or by regular mail addressed to the respondent's last known address**. The respondent's last known address **may be determined from records of the clerk of the court, from the Federal Case Registry of Child Support Orders, or by any other reasonable means**."

Section 505(b) now provides in part:

> "In addition to the penalties or punishment that may be imposed under this Section, any person whose conduct constitutes a violation of Section 15 of the Non-Support Punishment Act may be prosecuted under that Act, and a person convicted under that Act may be sentenced in accordance with that Act. The sentence may include but need not be limited to a requirement that the person perform community service under Section 50 of that Act or participate in a work alternative program under Section 50 of that Act. A person may not be required to participate in a work alternative program under Section 50 of that Act if the person is currently participating in a work program pursuant to Section 505.1 of this Act."

4. **Public Act 91-0397: Interest on Unpaid Support**

Since 1999, 750 ILCS 5/505(b) has been amended to provide for mandatory interest when child support is not paid on time. Section 505(b) [immediately prior to Section (c)] reads:

> A support obligation, or any portion of a support obligation, which becomes due and remains unpaid as of the end of each month, excluding the child support that was due for that month to the extent that it was not paid in that month, shall accrue simple interest as set forth in Section 12-109 of the Code of Civil Procedure. An order for support entered or modified on or after January 1, 2006 shall contain a statement that a support obligation required under the order, or any portion of a support obligation required under the order, that becomes due and remains unpaid as of the end of each month, excluding the child support that was due for that month to the extent that it was not paid in that month, shall accrue simple interest as set forth in Section 12-109 of the Code of Civil Procedure. Failure to include the statement in the order for support does not affect the validity of the order or the accrual of interest as provided in this Section.

There are corresponding changes to the provisions of Illinois Public Aid Code, the Non-Support of Spouse and Children Act and Illinois Parentage Act of 1984 (Section 20.7).

The legislation clarified the issue of whether *Finley v. Finley*, 81 Ill.2d 317, 410 N.E.2d 12 (1980) is still good law regarding interest on support arrearages. *IRMO Steinberg*, 302 Ill.App.3d 845, 236 Ill.Dec. 21, 706 N.E.2d 895 (1st Dist., 3d Div. 1998) held that an award of interest from the date child support payments were due is discretionary with the trial court. The payor in *Steinberg* argued that the trial court erred in holding that interest from the date child support was due was mandatory. The appellate court agreed, citing its opinion in *IRMO Kaufman* [299 Ill.App.3d 508, 233 Ill.Dec. 543, 701 N.E.2d 186 (1st Dist., 2d Div. 1998), GDR 98-103], which held that dissolution judgments are treated like judgments in chancery proceedings, to which the Code of Civil Procedure §2-1303, mandating nine percent interest on judgments, does not apply.

5. **Public Act 90-476: "Discovering Hidden Assets" – Piercing the Ownership Veil in "Alter Ego" Type Cases**

Section 505(b) of IMDMA provides:

If there is a unity of interest and ownership sufficient to render no financial separation between a non-custodial parent and another person or persons or business entity, the court may pierce the ownership veil of the person, persons, or business entity to discover assets of the noncustodial parent held in the name of that person, those persons or that business entity. The following circumstances are sufficient to authorize a court to order discovery of the assets of a person, persons, or business entity and to compel the application of any discovered assets toward payment on the judgment for support:

> (1) The non-custodial parent and the person or persons or business entity maintain records together.
>
> (2) The non-custodial parent and the person, persons or business entity fails to maintain an arms length relationship between themselves with regard to any assets.
>
> (3) The non-custodial parent transfers assets to the person, persons or business entity with the intent to perpetrate a fraud on the custodial parent.
>
> With respect to assets which are real property, no order entered under this paragraph shall effect the rights of bona fide purchasers, mortgagees, judgment creditors, or other lien holders who acquire their interest in the property prior to the time a notice of lis pendens pursuant to the Code or Civil Procedure or a copy of the order is placed of record in the office of the recorder of deeds for the county in which the real property is located. 750 ILCS 505(b).

Comment: *Also note that §12-112 of the Code of Civil Procedure was amended in order to effectuate the above provisions. The corresponding provisions of the Illinois Parentage Act of 1984 were also amended (§15(b)(2.5)).*

6. **Lien Provisions as to Overdue Support**

A new provision was added to 505(d), the final sentence of which now reads, "A lien arises by operation of law against the real and personal property of the noncustodial parent for each installment of overdue support owed by the noncustodial parent." 750 ILCS 505(d).

Comment: *This language was necessary to permit the ability to garnish wages automatically pursuant to a notice for income withholding, as discussed below.*

There are also provisions unique to the IDPA's ability to impose liens against "responsible relatives." In *Martinez v. IDPA*, 810 N.E.2d 608, 348 Ill. App.3d 788 (1st Dist., 2004), the Illinois appellate court rule that the provisions of the Illinois Public Aid Code and the Illinois Administrative Code that authorize the IDPA to adjudicate its own lien against jointly owned assets to recover child support obligations did not violate the provisions of the Illinois Constitution. It also ruled financial institutions were not liable for

surrendering a person's accounts in response to a lien or order issued by the IDPA. Section 160.70(g)(2) of the Administrative Code provides:

> "Liens against personal property: A) The Department shall impose liens against personal property of responsible relatives in IV-D cases in accordance with Article X of the Illinois Public Aid Code when the following circumstances exist:
>
> > I) the amount of past-due support is at least $1,000;
> >
> > ii) the responsible relative has an interest in personal property against which a lien may be claimed; and
> >
> > iii) if the personal property to be levied is an account as defined in Section 10-24 of the Illinois Public Aid Code [305 ILCS 5/10-24], the account is valued in the amount of at least $300.
>
> B) The Department shall prepare a Notice of Lien or Levy that shall be provided to the responsible relative, any joint owner of whom the Department has knowledge and location information, and either the financial institution in which the account of the responsible relative is located or the sheriff of the county in which the personal property of the responsible relative is located. ***
>
> > vi) the right of a joint owner to prevent levy upon his or her share of the account or other personal property or to seek a refund of his or her share of the account or other personal property already levied, by requesting, within 15 days after the date of mailing of the Notice of Lien or Levy to the joint owner, a hearing by the Department to determine his or her share of the account or other personal property. A joint owner who is not provided with a Notice of Lien or Levy by the Department may request a hearing by the Department within 45 days after the date of levy of the account or other personal property. ***
>
> H) The Department, upon determining a joint owner's share of the personal property or account, shall release the lien against the personal property or account to the extent of the joint owner's share. If the Department's determination of the joint owner's share occurs after the personal property or account has been levied, the Department shall refund the joint owner's share of the personal property or account."

7. Notification Provisions of 505(f) – First Notification Provision

Section 505(f) of the IMDMA provides**:**

> "(f) **<u>All</u> orders for support**, when entered or modified, shall include a provision requiring the **obligor to notify the court** [and, in cases where the party is receiving child and support services under Article X of the Illinois Public Aid Code, the Illinois Department of Public Aid] within 7 days, (I) of the name and address of any new employer

> of the obligor, (ii) whether the obligor has access to health insurance coverage through the employer or other group coverage and, if so, the policy name and number and the names or persons covered under the policy, and (iii) of any new residential or mailing address or telephone number of the non-custodial parent. In any subsequent action to enforce a support order, upon a sufficient showing that a diligent effort has been made to ascertain the location of the non-custodial parent, service of process or provision of notice necessary in the case may be made at the last known address of the non-custodial parent in any manner expressly provided by the Code of Civil Procedure of this Act, which service shall be sufficient for purposes of due process."

Compare this section with the provisions of Section 505(h) of the IMDMA discussed below.

Comment: These provisions basically require that all orders of support include provisions requiring the child support obligor to notify the court of certain information as to new employment, health insurance information, and residential or mailing address. These are in addition to the notification provisions of the Income Withholding for Support Act. In cases where payments are not made through the SDU, I include language in my marital settlement agreement which is consistent with the above provisions.

8. **Termination of Support Dates Must be Stated and Support Continues to Age 19 if Child Still Attending High School:**

Section 505(g) provides:

> "An order for support shall include a date on which the current support obligation terminates. The termination date shall be no earlier than the date on which the child covered by the order will attain the age of **18. However, if the child will not graduate from high school until after attaining the age of 18, then the termination date shall be no earlier than the earlier of the date on which the child's high school graduation will occur or the date on which the child will attain the age of 19.** The order for support shall state that the termination date does not apply to any arrearage that may remain unpaid on that date. Nothing in this subsection shall be construed to prevent the court from modifying the order or terminating the order in the event the child is otherwise emancipated."

Comments: These new provisions dovetail with the changes made to Section 513 and impact the drafting of marital settlement agreement and orders for support. The provisions of Section 513 relating to post-high school educational expenses previously referred to age 18 as the age upon a party must petition for support under the guise of this section instead of under Section 505. The corresponding provisions of Section 513 state, "The authority under this Section to make provision for educational expenses extends not only to periods of college education or professional or other training after graduation from high school, but also to any period during which the child of the parties is still attending high school, even though he or she attained the age of ***19****."*

The new language is the reference to age 19 as to the presumptive early termination date if a student is still attending high school. Keep in mind, however, this legislation would only effect the termination dates on new orders and may not effect the provisions of previous orders providing different termination dates.

Many court orders ignore the requirement to include a specific date on which child support terminates. The child support order should not merely include language such as "child support terminates may be when the child turns age 18 or graduates from high school, whichever later occurs." The attached form support order provides for a termination of child support on a date certain.

WARNING*:* *IRMO Mulry*, 314 Ill.App.3d 756, 247 Ill.Dec. 612,, 732 N.E.2d 667 (4th Dist., 2000), held that a father was required to pay both child support and post-high school educational expenses when marital settlement agreement stated his obligation for child support would continue "if the child is attending post-secondary education the child's graduation from * * * college * * * or reaching age 23, whichever shall occur first." The opinion stated: "[A]lthough a provision in a dissolution judgment for the payment of a child's college expenses is a term in the nature of child support (citations omitted) it does not foreclose one's obligation to pay support or educational expenses, or both. The parties' separation agreement makes reference to [the ex-husband's] "obligations for support" and his "obligations for each child."

This statutory provision may undo some of the hardship represented by the *IRMO Walker,* decision, 339 Ill.App.3d 743, 791 N.E.2d 674, 274 Ill.Dec. 582 (4th Dist., 2003), GDR 03-74. *Walker* held that where the underlying support order only provided for support while the child was a minor (i.e., through the date of the child's 18th birthday), a post-judgment extension of child support to provide for support for an 18-year old until the child graduates from high school is a modification of support and requires compliance with IMDMA §510(a) (modification requiring a showing of a substantial change of circumstances) and §513(a)(2) (support for non-minor children and educational expenses). Language to note from the decision states, "In short, if the child has attained majority, the trial court must turn to §513 when deciding whether to award support for that 'nonminor child'.'"

Section g-5 reads:

> (g-5) If there is an unpaid arrearage or delinquency (as those terms are defined in the Income Withholding for Support Act) equal to at least one month's support obligation on the termination date stated in the order for support or, if there is no termination date stated in the order, on the date the child attains the age of majority or is otherwise emancipated, the periodic amount required to be paid for current support of that child immediately prior to that date shall automatically continue to be an obligation, not as current support but as periodic payment toward satisfaction of the unpaid arrearage or delinquency. That periodic payment shall be in addition to any periodic payment previously required for satisfaction of the arrearage or delinquency. The total periodic amount to be paid toward satisfaction of the arrearage or delinquency may be enforced and collected by any method provided by law for enforcement and collection of child support, including but not limited to income withholding under the Income Withholding for Support Act. Each order for support entered or modified on or after the effective date of this amendatory Act of the 93rd General Assembly must contain a statement

notifying the parties of the requirements of this subsection. Failure to include the statement in the order for support does not affect the validity of the order or the operation of the provisions of this subsection with regard to the order. This subsection shall not be construed to prevent or affect the establishment or modification of an order for support of a minor child or the establishment or modification of an order for support of a non-minor child or educational expenses under Section 513 of this Act.

9. **IMDMA Sec. 505(h) - Notification of Employment Termination – Second Notification Provision – Includes Recipient:**

Section 505(h) requires written notification as to new employment and termination of employment. The statute provides:

> "(h) An order entered under this Section shall include a provision requiring the obligor to report to the **obligee** and the clerk of the court within 10 days each time the obligor obtains new employment, and each time the obligor's employment is terminated for any reason. The report shall be in writing and shall, in the case of new employment, include the name and address of the new employer. **Failure to report new employment or the termination of current employment, if coupled with nonpayment of support for a period in excess of 60 days, is indirect criminal contempt**. For any obligor arrested for failure to report new employment bond shall be in the amount of the child support that should have been paid during the period of unreported employment. An order entered under this Section **shall** include a provision requiring the **obligor and obligee parents to advise each other of a change in residence within 5 days of the change** except when the court finds that the physical, mental or emotional health of a party or that of a minor child, or both, would be seriously endangered by disclosure of the party's address."

Comment: My marital settlement agreement will contain the provisions set forth above as well as the provisions as to statutory interest. Thus, an additional provision of your MSA should read:

> ***Provisions of MSA Re Support Required:* A support obligation required under the terms of the judgment for dissolution of marriage or any portion of a support obligation that becomes due and remains unpaid for 30 days or more shall accrue simple interest at the rate of 9% per annum. As required by Section 505(f) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), the Husband shall provide written notice to the Clerk of the Court, within 7 days of: (I) of the name and address of any new employer of the payor; (ii) whether the payor has access to health insurance coverage through the employer or other group coverage and, if so, the policy name and number and the names or persons covered under the policy, and (iii) of any new residential or mailing address or telephone number of the non-custodial parent.**
>
> ***In addition, as required by Section 505(h) of the IMDMA, the Husband shall inform the Wife within 10 days each time he obtains new employment, and each time his employment is terminated for any reason. The report shall be in writing and shall, in the case of new employment, include the name and address of the new employer. In addition, both the Husband and the Wife shall be required to***

inform each other of a change of residence within five days of the change.

10. **IMDMA Sec. 505.3 - Third Notification Provision – Further Disclosures Required by Both Parents to Clerk of Court – (State Case Registry):**

Section 505.3 provides:

> "Sec. 505.3. Information to State Case Registry.
>
> (a) In this Section: "Order for support", "obligor", "obligee", and "business day" are defined as set forth in the Income Withholding for Support Act. "State Case Registry" means the State Case Registry established under Section 10-27 of the Illinois Public Aid Code.
>
> (b) **Each** order for support **entered or modified** by the circuit court under this Act **shall** require that the obligor and obligee (I) file with the **clerk** of the circuit court the information required by this Section ... at the time of **entry or modification** of the order for support and (ii) file updated information with the clerk within 5 business days of any change. Failure of the obligor or obligee to file or update the required information shall be punishable as in cases of contempt. The failure shall not prevent the court from entering or modifying the order for support, however.
>
> (c) The **obligor** shall file the following information: the obligor's name, date of birth, social security number, and mailing address. If either the obligor or the obligee receives child support enforcement services from the Illinois Department of Public Aid under Article X of the Illinois Public Aid Code, the obligor shall also file the following information: the obligor's telephone number, driver's license number, and residential address (if different from the obligor's mailing address), and the name, address, and telephone number of the obligor's employer or employers.
>
> (d) The **obligee** shall file the following information: (1) The names of the obligee and the child or children covered by the order for support. (2) The dates of birth of the obligee and the child or children covered by the order for support. (3) The social security numbers of the obligee and the child or children covered by the order for support. (4) The obligee's mailing address."

Comment: We now have three provisions for notification to the clerk – Section 505(f), (h) and 505.3. Unfortunately, the time frames for disclosure are inconsistent and range from five days to ten days. One would believe that the legislature would have opted for some consistency to send a strong message to obligors so that they would have know exactly what was required. It is also curious that the legislature provided for contempt sanctions for failure of both parents to provide their this further information to the clerk.

To summarize these confusing notification statutes:

505(f) requires **payor's** disclosure **to the clerk** within **7 days** of:

The name and address of new employer;

Whether payor has access to health insurance coverage through employment, etc.

Any new residential or mailing address or telephone number.

505(h) requires **payor's** disclosure to both **recipient and the clerk** in writing within **10 days** of:

Each time the payor receives a new job (including the name and address)

Each time the payor's job is terminated;

Failure to report if coupled with non-payment for more than 60 days = indirect **criminal** contempt.

505(h) also requires **both parents** to advise each other to a change in residence within **5 days** (with the domestic violence exceptions).

Section 505.3 requires disclosure of **both parents** to the clerk.

Payor must disclose: Name, date of birth, social security number and mailing address.

Recipient must disclose name, dates of birth and SSNs of the recipient and of the children. The recipient must also disclose her address.

Both are required to provide an update to the clerk within **5 days** of any new information.

B. **Amendments to §505.2 (Health Insurance) and *IRMO Takata*:**

One of the important provisions of the new legislation is the requirement that every support order includes a provision for health insurance coverage of a child. The amendment states:

1. "(b) Whenever the court establishes, modifies or enforces an order for child support..., the court shall include in the order a provision for health insurance care coverage of the child which shall, upon request of the obligee or Public Office, require that any child covered by the order be named as a beneficiary of any health insurance plan that is available to the obligor through an employer or labor union or trade union.

   (d) The dollar amount of the premiums for court-ordered health insurance *** *shall* be considered an additional child support obligation owed by the obligor. Whenever the obligor fails to provide or maintain health insurance pursuant to an order for support, the obligor *shall* be liable to the obligee **for the dollar amount of the premiums which were not paid** and shall **also** be liable for **all medical expenses incurred by the minor child which would have been paid or reimbursed by the health insurance** which the obligor was ordered to provide or maintain. In addition, the obligee may petition the court to modify the order based solely on the obligor's failure to pay the premiums for court-ordered health insurance. ***. 750 ILCS 5/505.2(d) (emphasis added)."

Comment: Assume the child support recipient has the better health insurance policy available through her employer, but requests that the child be named as a beneficiary of a health insurance plan available through the husband's employer, labor union or trade union of the obligor. The child support obligor must then maintain such insurance, but there is no provision in the statute as to which insurance is to be primary and which is to be considered secondary.

A 2002 case addressing the health insurance issue is IRMO Seitzinger, 333 Ill.App.3d 103, 107-08, 775 N.E.2d 282, 286 (Fourth Dist., 2002). In Seitzinger the trial court entered an order requiring the custodial parent to maintain health insurance (presumably because she had the better insurance). The ex-wife appealed contending that her former husband should have been required to pay half the cost of the insurance premiums. Seitzinger stated, "the duty to provide health insurance is an integral part of

a parent's present and future support obligations." The case held that when insurance is available through an employer under 505.2(b) providing health insurance is mandatory on request of the support recipient. Accordingly, the ex-husband was required to contribute half the cost of the health insurance premiums. A quote from the case is interesting. It states, "The joint custody he enjoys with Kimberly means he has joint obligations as well as joint benefits. He is just as responsible for day care and health insurance costs now as when the parties were married."

> *Note the use of the word "obligations." This terminology is important because a parent may be entitled to the dependency exemptions only if he is current in payment of child support or the agreement may refer to support obligations.*

2. ***IRMO Takata* - A Potential Windfall for Custodial Parent**:

IRMO Takata, 304 Ill.App.3d 85, 237 Ill.Dec. 460, 709 N.E.2d 715 (2d Dist. 1999), holds:

> Where a party fails to pay health insurance premiums as required by the underlying judgment, the obligor must pay the custodial parent for all of the cost of the health insurance premiums he failed to pay for the children per §505.2(d) of the IMDMA.

The ex-husband in *Takata* failed to pay the health insurance premiums as required by the original divorce judgment and post-judgment order. The ex-wife then insured the children through Medicaid. The Medicaid coverage was at no cost to the ex-wife.

The ex-wife petitioned for rule to show cause, requesting, in part, an award of the dollar amount of the unpaid insurance premiums pursuant to IMDMA §505.2(d). The trial court found the ex-husband in contempt for failure to pay health insurance, but ordered him to pay only 25% of the unpaid health insurance premiums. The court reasoned this percentage represented the amount of additional child support the ex-wife would have received had the premiums not been deducted from the ex-husband's income in determining his child support obligation. The trial court further reasoned that awarding the ex-wife the full amount of the premiums would result in a "windfall," because the ex-wife paid nothing to have the children covered by Medicaid.

The Second District court reversed the trial court's order that the ex-husband pay the ex-wife only 25% of the health insurance premiums he failed to pay for the children. The appellate court recited the child support statute which provides, "Whenever the obligor fails to provide or maintain health insurance pursuant to an order for support, the obligor *shall* be liable to the obligee for the dollar amount of the premiums which were not paid ***. 750 ILCS 5/505.2(d) (emphasis added)." *Takata* held the use of the word "shall" left the trial court without discretion to award an obligee less than the full dollar amount of the unpaid insurance premiums. It further stated the trial court's discounting of the ex-husband's liability "rewards the ex-husband for shirking his parental court-ordered duties."

C. **Consumer Reporting and Publication of Deadbeat Parents**:

Illinois Public Aid Code (§10-16.4 (305 ILCS 5/10-16.4), the **Illinois Marriage and Dissolution of Marriage Act** (§706.3) and the **Illinois Parentage Act of 1984** (§20.5) all contain corresponding provisions. The Acts first define a "consumer reporting agency" according to §603(f) of the Fair Credit Reporting Act, 15 U.S.C. 1681a(f). §706.3 of the IMDMA and their counterparts now provide:

1. **Consumer Reporting Agency Provisions**: Whenever a court of competent jurisdiction finds that an obligor either owes an arrearage of more than $10,000 **or is delinquent in payment of an amount equal to 3 months' support obligation** pursuant to an order for support, the court **shall** direct the clerk of the court to make information concerning the obligor available to consumer reporting agencies.

2. **"Deadbeat" Parent Publication**: Whenever a court of competent jurisdiction finds that an obligor either owes an arrearage of more than $10,000 or is delinquent in payment of an amount equal to 3 months' support obligation pursuant to an order for support, the court shall direct the clerk of the court to cause the obligor's name and address to be published in a newspaper of general circulation in the area in which the obligor resides. The clerk shall cause the obligor's name and address to be published only after sending to the obligor at the obligor's last known address, by certified mail, return receipt requested, a notice of intent to publish the information. This subsection (c) applies only if the obligor resides in the county in which the clerk of the court holds office. **Public Act 90-673, effective** January 1, 1999.

D. **Amended Legislation re Body Attachments - 505 and 713 - Public Act 91-113**:

Public Act 91-113 amends 750 ILCS 5/713 and provides for service of a notice for body attachment to enforce a support order by regular mail instead of by certified mail with restricted delivery.

As stated above, Section 505(a-5) provides for notice for contempt in support enforcement cases to be mailed to the last known address. There were also amendments made to Section 713(a) regarding body attachment. It provides:

> Notices under this Section shall be served upon the Obligor by any means authorized under subsection (a-5) of Section 505 ~~either (1) by prepaid certified mail with delivery restricted to the Obligor, or (2) by personal service on the Obligor~~.

E. **Public Act 92-203: Enforcement of Support after Child Turns Age 18**:

> The court does not lose the powers of contempt, driver's license suspension, or other child support enforcement mechanisms, including, but not limited to, criminal prosecution as set forth in this Act, upon the emancipation of the minor child or children.

This new statutory provision effectively wipes out the ruling of the appellate court decision in *Fritch v. Fritch*, 224 Ill.App.3d 29, 166 Ill.Dec. 469, 586 N.E.2d 427 (1st Dist., 5th Div. 1991). *Fritch* held that the trial court erred by entering a contempt finding against father as a means to enforce payment of a child support arrearage where children had reached their majority. It held:

> Contempt is not a proper means of enforcing payment of child support arrearages where the children have reached their majority. (*Fox v. Fox* (1978), 56 Ill.App.3d 446, 371 N.E.2d 1254.) Here, defendant's youngest child reached the age of majority before plaintiff filed the instant petition.

II. **Income Withholding for Support Act (IWSA)**:

A. **Background**:

The genesis for the statutory revisions was the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996. §314 of the Act requires states to have statutorily prescribed procedures for mandatory income withholding for support payments subject to enforcement. Additionally, the law requires each state to have the Uniform Interstate Family Support Act in effect as of January 1, 1998. In 1999 the Illinois legislature consolidated the various withholding provisions into one act with nearly identical provisions relating to income withholding for support that were contained in the Public Aid Code, the IMDMA, the Non-Support Act and the Illinois Parentage Act of 1984. Section 706.1 now reads simply, "Orders for support entered under this Act are subject to the Income Withholding for Support Act."

Many requirements of the new legislation can be determined by reviewing the attached forms. The amendments provide that the income withholding notice shall be "in the standard format prescribed by the federal Department of Health and Human Services." (750 ILCS 28/20 (c)(1).

Understandably, the existing Illinois Department of Public Aid Form is directed toward cases in which the child support recipient is also the recipient of public aid. For this reason, I revised the form so it is as consistent with the Federal form and the requirements of Illinois law. See the attached notice/order to withhold income for support.

Illinois law does not require the notice for income withholding to be approved by the judge or by the clerk of the court to make certain that it conforms to the underlying support order. The draft order/notice follows the federal form in that it provides for the court's "authorization." It is anticipated that the court could approve the form notice to verify that it conforms to the support order.

B. **Significant Legislation Addressing Withholding of Support - Public Act 91-212**:

Public Act 91-212 incorporates the changes of Public Act 90-790 into Income Withholding for Support Act.

> "**State Disbursement Unit (SDU)**: Since 10/1/99 the SDU has been collecting and disbursing payments made under court order in **all** cases in which support is paid under the Income Withholding for Support Act."

> "**Information to State Registry**: Within 5 business days the clerk must provide the docket number of all orders setting or modifying support along with information which includes the driver's license for both parents. The parties must report any changes within 5 days and the clerks must report any changes they happen to find out about. (305 ILCS 5/10-10.5)."

C. **General Provisions of Income Withholding for Support**:

1. **Service of Notices**:

As is stated below, the notices are to be served upon the employer, but do not have to be served by personal delivery or certified mail. Instead, they can be served by:

Regular mail,

Certified Mail, return receipt requested;

Fax or "other electronic means;

Personal delivery. (750 ILCS 28/24(g)).

At the time of the service upon the payor, the child support recipient (or the public office) shall serve a copy of a notice upon the obligor by ordinary mail addressed to his or her last known address. The child support recipient is then to file proofs of service upon the payor with the Clerk of the Court. (Sec. 24(g)).

[See legislation requiring notice for income withholding to be filed with proof of service.]

a. **Subsequent Service of Same Notice**:

Any other employer may be served at a subsequent time with the same income withholding notice without further notice. (24(h)).

2. **Delinquencies Versus Arrearages in Support**:

The amendments no longer require the court to determine past-due support before a child support delinquency can be withheld from an obligor's wages. Instead, the amendments merely require a notice of income withholding to be served upon the employer with a copy to the obligor. The notice may include payments on any purported delinquency that are not to be less than 20% of the total of the current child support order plus the payments on any arrearage. The amendments require that every time there is a support obligation, an order for support must be entered. Among the requirements in the support orders is the requirement to state the amount the obligor must pay in the future on any delinquency that might accrue. The payor must immediately withhold (14 days after receipt of notice to withhold). It is now the obligor's duty to object to any withholding within 20 days after service.

Thus, there are new definitions of the terms "arrearage" and "delinquency." An arrearage is now a child support arrearage as determined by the court and incorporated into a court order. A delinquency is not established by the court, but is a payment that remains unpaid after the entry of an order for support.

3. **Withholding Notices Standard Form**:

The current legislation requires that every support order shall:

"Require an income withholding notice to be prepared and served immediately upon any payor

of the obligor by the obligee or public office, **unless a written agreement is reached between and signed by both parties providing for an alternative arrangement, approved and entered into the record by the court, which ensures payment of support**. In that case, the order for support shall provide that an income withholding notice is to be prepared and served only if the obligor becomes delinquent in payment the order for support; and

Contain a dollar amount to be paid until payment in full of any delinquency that accrues after entry of the order for support. The amount for payment of delinquency shall not be less than 20% of the total of the current support amount and the amount to be paid periodically for payment of any arrearage stated in the order for support."

The income withholding notice is required to be in the "standard format prescribed by the federal Department of Health and Human Services." Nevertheless, numerous requirements in the IWSA of what must be provided in notices for income withholding are not exactly in this standard format. Accordingly, the attached form has been revised to correspond as directly as possible to Illinois law.

The IWSA requires the notice, among other things, to:

"Direct any payor or labor union or trade union to enroll each child as a beneficiary of a health insurance plan and withhold or cause to be withheld, if applicable any required premiums; and

Include the date that withholding for current support terminates which shall be the date of termination of the current support termination set forth in the order for support."

4. **Income Withholding After Accrual of Delinquency**:

Whenever an obligor accrues a delinquency in support, the obligee (or public office) may prepare and serve upon the payor an income withholding notice that "contains a computation of the period and total amount of the delinquency as of the date of the notice; and directs the payor to withhold the dollar amount required to be withheld under the order for support for payment of the delinquency." Once again, the obligor must object to the withholding notice within 20 days by filing a petition to contest withholding. The only grounds to contest withholding are a dispute concerning the existence or amount of the delinquency or the identity of the obligor. The clerk is then to notify both the obligor and the obligee of the time and place for the hearing on the petition to contest withholding.

5. **Initiating Withholding Where Court Has Not Required That Income Withholding Take Place Immediately**:

In cases where the court has not required income withholding take place immediately but there was an order for support providing for payments of a delinquency, the child support recipient can still serve a notice for income withholding. In such cases the recipient prepares and serves a notice that states that the parties' written agreement providing an alternative arrangement to immediate withholding no longer

ensures payment of support. The notice must state the reason that the written agreement no longer assures such payment. The obligor may contest this withholding but the grounds are limited to whether the parties' written agreement providing an alternate arrangement to income withholding continues to ensure payment of support. It is not grounds to contest such withholding that the obligor has made all payments due by the date of the petition.

6. **Petitions to Correct Income Withholding Notices**:

One important provision of the legislation allows an obligor to petition the court at any time to correct a term contained in an income withholding notice to "conform to that stated in the underlying order for support for (a) the amount of current support; (b) the amount of the arrearage; (c) the periodic amount for payment of the arrearage; (d) the periodic amount for payment of the delinquency."

7. **Service of Income Withholding Notices if the Support Order Does Not Contain the Income Withholding Provisions as to Delinquencies, etc**:

A significant provision of the new statute is the ability to serve an income withholding notice even in cases where there are existing orders for withholding or there is no order for withholding. §706(I) provides that an income withholding notice may be served on a payor even though the most recent order for support does not contain an income withholding provision with respect to any delinquency and the obligor has accrued a delinquency after entry of the most recent order for support. In this event the obligee prepares and serves a standard income withholding except that the notice contains a periodic amount for the payment of the delinquency equal to 20% of the total of the current support and the amount to be paid periodically for payment of any arrearage stated in the most recent order for support.

8. **Additional Duties of Income Withholding for Support Act**:

While §505 requires the parties to provide certain information to the **court**.

a. **Obligor's Information Duties**:

§45(a) of the Income Withholding for Support Act requires the obligor to provide the following information:

> "Each obligor **(whether or not** income is being withhold) must notify the **obligee**, **any public office** and the **clerk** of the court of any **change of address** within 7 days. (c).

Each obligor **whose income is being withheld** shall notify the **obligee, the public office** and the **clerk** of the court of any **new payor**, within 7 days. (d)"

b. **Obligee's Information Requirements**:

The obligee is required to provide information as to the following:

"An obligee who is receiving income withholding payments under this Act shall notify the payor, if the obligee receives the payments directly from the payor, or the public office or the Clerk of the Circuit Court, as appropriate, of any change of address within 7 days of such change. (a)

An obligee who is a recipient of public aid shall send a copy of any income withholding notice served by the obligee to the Division of Child Support Enforcement of the Illinois Department of Public Aid. (b)"

D. **Amendments to Income Withholding Provisions**: Public Act 90-790, 750 ILCS 5/706.1, contained amendments to the income withholding procedures:

"Defined "business day" as a day on which State offices are open for business.

Requires all income withholding notices to state the date of entry of the order for support and contain the signature of the obligee.

Requires that the proof of service attach a copy of the income withholding notice.

Where notice is issued after a delinquency, it eliminates the requirement to contain a computation of the period and the amount of the delinquency."

III. **Non-Support Punishment Act (NSPA)**:

While it is unethical to direct clients to threaten criminal prosecution for an advantage in civil proceedings, clients should be directed toward the provisions of the Non-Support Punishment Act (NSPA). These provisions can be effective especially when there is an out of state obligor with a large child support arrearage. I will review the criminal provisions because they can be used as an effective means of "self-help."

A. **Criminal Provisions of Non-Support Punishment Act**:

The NSPA generally permits State's Attorneys and Attorney Generals to prosecute for failure to support, except in default orders for support.

Failure to Support Definition: Failure to support is committed when:

1) "A person willfully and without lawful excuse fails to provide for support or maintenance of his spouse in need of support or likewise willfully deserts or refuses to provide for his minor children in need of support and the person has the ability to provide for such support; or *

2) A person willfully fails to pay a court or administrative support order for longer than six months or is more than $5,000 in arrears and the person has the ability to pay; or *

3) A person leaves the state with the intent to evade a court/administrative order which has been unpaid for more than 6 months or has accumulated an arrearage greater than $5,000; **

4) A person willfully fails to pay a court or administrative support order for longer than a year or has accumulated an arrearage greater than $20,000 and the person has the ability to pay. **"

Rebuttable Presumption: There is a rebuttable presumption that the existence of non-default support order provides the ability to pay.

* First time violation is Class A misdemeanor. 2nd violation is class 4 felony.

* Class 4 felony.

B. **Suspension of Driver's Privileges**: Suspension of driver's privileges is an underused vehicle to try to obtain compliance with an arrearage in support. It is addressed in a separate presentation.

IV. **Case Law Interpretations of IMDMA §505(a)(3)**:

A. **Requirement for Proper Net Income Calculations in Each Case**: Case law has held that

it is improper for the court not to consider the effect of the parties' new filing status and the reallocation of the dependency exemptions. Thus, net income calculations are required in virtually every case. The trial court should require each lawyer to present net income calculations in every case where the amount of child support is at issue. A recent case that is excellent reading as to how net income is properly determined is *IRMO Ackerley*. 333 Ill.App.3d 382, 266 Ill.Dec. 973, 775 N.E.2d 1045 (2d Dist. 2002). Because *Ackerley* reads as a primer on the law as to calculation of support in complex cases, I enclose a copy of the bulk of the decision (with the portions addressing contempt and fees eliminated).

In *Ackerley* the trial court ordered payment of a support arrearage of $90,975, set a support obligation of $3,000 per month. By the terms of the marital settlement agreement, the husband had been required to pay a base amount of support plus an amount equal to 25% of any "net bonus as defined by statute" received by him from his employer. The agreement provided, "For verification purposes, father shall provide mother with copies of his W-2 forms or other tax related statements indicating the bonus he has received on or before January 31st of each calendar year for the preceding calendar year." The ex-husband was current in his base support as well as the bonuses through January of 2000.

One issue was whether FICA payments should be deducted in determining the amount owed for the support arrearage. The discussion of this is interesting in part because the bonuses were received at the beginning of the year and there was withholding from the bonus checks due to the FICA contribution. The appellate court rejected this argument noting that the FICA contribution ceases after a certain income level. The case quoted from *IRMO Olson*, 223 Ill.App.3d 636 (1992), "Bimonthly payroll receipts for periods less than a year for a noncustodial parent wit above-average income may not reflect true income because such partial records do not reflect increased income on reaching maximum FICA withholding." The appellate court stated:

> "The mere fortuity that respondent received his bonuses early in January, which often terminated his FICA obligation for the balance of the year and allowed him to collect his base salary free of this tax, should not work to disadvantage petitioner and the children.... In short, we find no error in attributing deductions for dependent health insurance and FICA taxes to respondent's base salary instead of to his bonuses."

Another issue was whether the trial court should have added back his tax refunds into the ex-husband's bonuses. The appellate court noted it was able to use the actual amount of income the ex-husband received as well as the actual tax he paid as shown on his tax returns. *Ackerley* comments that Section 505(a)(3)(a) allows for a deduction of federal income tax as "properly calculated withholding or estimated payments." The appellate court stated:

> "Properly calculated withholding is, by definition, withholding that coincides with actual tax owed on one's gross income. Thus, in calculating respondent's net income, we deducted the actual federal income tax that he paid from the actual total income that he received. An alternate approach employed by some courts is to begin with net income and add back in any refunds, which represent overwithholding. See *In re Marriage of Pylawka*, 277 Ill. App. 3d 728, 733 (1996) ("Thus, if the noncustodial parent overwithholds on his W-2, thereby overpaying his Federal income tax, the amount should be added back to his net

> income for purposes of determining his support obligation under section 505(a) of the Act"). These approaches represent two sides of a single mathematical coin. Because we have the benefit of having respondent's tax returns for past years available, we have chosen to employ the former approach, as it simplifies the calculation. Further, we agree with respondent that the effect of respondent's wife's income on his tax refunds should have been ignored. We note, however, that respondent's wife's income was relatively trivial when compared with respondent's income. Thus, whether one accounts for her income makes little difference to the ultimate determination of the amount of the arrearage."

The *Ackerley* decision also addressed one method to determine the Federal tax attributable to the bonus. It stated:

> "We first determined the amount of federal income tax attributable to a bonus. To do so, we divided the bonus by the total income for the given year. This yielded a ratio of bonus to total income. We then multiplied the total federal income tax for the year by the ratio. This yielded a figure that represented a proportionate share of the tax attributable to the bonus. By attributing a proportionate share of the tax to the bonus, we eliminated the effect of tax bracketing used in the federal income tax system. We believe that eliminating this effect is equitable. Neither party should benefit or be prejudiced by the artifice of considering certain income as falling into a certain bracket. Moreover, in determining appropriate child support, we are not bound by the technicalities of federal income tax law. See *In re Marriage of McGowan*, 265 Ill. App. 3d 976, 979 (1994)."

This decision is a well-reasoned and complex decision. It points to the complex nature of proper support calculations. The appellate court did not base the taxes on the highest marginal tax bracket or on the lowest marginal tax bracket. Instead, it determined the overall effective tax bracket and determined taxes on this basis. For a further discussion of this topic, see the outlines regarding tax calculations in support cases.

B. **Method of Calculating Net Income**: Attached is a worksheet for calculation of net income. This worksheet will let you know what to look for when you analyze net income calculations offered by either party. Some judges use a tax program in chambers to determine net income. An excellent program of this type is FinPlan, (800) 777-2108.

1. **Gross Income**: Determine the gross income.

2. **Adjusted Gross Income**: Determine the adjusted gross income by subtracting adjustments from the gross income. The common adjustments are maintenance payments and certain voluntarily retirement contributions. One key issue is whether you allow maintenance to be an "above the line" deduction (adjustment) in determining the adjusted gross income. Arguments can be made on either side of this issue.

3. **Itemized or Standard Deductions and Exemptions**: From the adjusted gross income, subtract the exemptions and the deductions. For final hearings, assume the tax status following the divorce. Thus, if the child support payor is awarded a residence and you know the amount of itemized deductions, use itemized deductions. If itemized deductions are not known, then use the standard deduction. Use the total number of exemptions that the payor will be entitled to following the divorce. In post-decree proceedings use the actual number of exemptions claimed by the payor.

4. **Federal Tax Rate**: Apply the tax chart to determine the federal tax. See my attached annual Federal tax chart or determine this using a program such as FinPlan. 5. **Social Security Tax**: Determine the social security tax. This is calculated based upon gross employment income with a cap for the FICA component. The health insurance (Medicare) portion does not have a cap. Calculation of net for self-employed individuals is more complicated. Judges should require attorneys to submit net income calculations in each such case.

6. **State Tax**: Next, state tax is calculated upon gross income. $2,000 is deduction per exemption. Another reason to remember to include property taxes paid in FinPlan is that Illinois tax law allows a credit on the property taxes paid for an person's principal residence. Are any children attending private grade school (kindergarten through high school)? If so, do not overlook the credit of up to $500 per family for educational expenses over $250.

7. **Net Income**: Subtract federal, state and FICA from the adjusted gross income. Finally, subtract the deductions allowed per §505 as well as the total child care credit *(discussed below)*.

C. **<u>Health Care Premiums</u>**: *IRMO Stone*, 191 Ill.App.3d 172, 138 Ill.Dec. 547, 547 N.E.2d 714 (4th Dist. 1989), was the first case to hold that the deduction for health and hospitalization insurance premiums is **not** limited to children covered by the support order but includes all premium amounts paid. In *IRMO Davis*, 287 Ill.App.3d 846, 223 Ill.Dec. 166, 679 N.E.2d 110 (5th Dist. 1997), the appellate court held that the trial court erred in not allowed a father a deduction in determining child support for health insurance premiums he paid for himself.

The provision of §505(a)(4) of the Illinois Marriage and Dissolution of Marriage Act, however, differs in its treatment of health care premiums as a deduction in determining net income where the court order provides for health insurance per §505.2(b). This statute appears to limit the deduction to the "portion of the premiums for which the supporting party is responsible in the case of insurance provided through an employer's health insurance plan where the employer pays a portion of the premiums" in determining net income.

D. **<u>Prior Obligations of Support</u>**: The issue here is whether prior obligations of support refers to prior families or prior support orders. This refers to a family that is first in time as compared to another family. *IRMO Zukausky*, 244 Ill.App.3d 614, 184 Ill.Dec. 367, 613 N.E.2d 394 (2d Dist. 1993). *IRMO Potts*, 297 Ill.App.3d 148, 231 Ill.Dec. 692, 696 N.E.2d 1263 (2d Dist. 1998), GDR 98-80. However, a dissent by Justice Cook (in the 2005 *Einstein v. Nijim* decision) attacked the reasoning of the *Potts* case. The Cook dissent stated:

> It has been suggested that the language of section 505(a)(3)(g) allowing the deduction of "[p]rior obligations of support or maintenance actually paid pursuant to a court order" (750 ILCS 5/505(a)(3)(g) (West 2000)) carries forward the rule that a divorced spouse's obligations to the first family must be met before the obligations to the second family can or will be considered. *Potts*, *** I would suggest that use of the term "prior obligations" simply expresses the desire that child support be calculated based on the current situation and not on consideration of future obligations or attempts to predict what may happen in the future.
>
> *Potts*'s statement of the "first family" rule is not supported by the cases it cites. *In re Marriage of Zukausky*, 244 Ill. App. 3d 614, 624, 613 N.E.2d 394, 402 (1993), mentions the rule but goes on to say "[t]he court should not ignore the supporting parent's obligations to a second family and should consider that factor in deciding the appropriate modification award for the first family." *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 63, 410 N.E.2d 441, 444 (1980), involved a petition to modify child support after the petitioner married a woman who had five children. Support of other children may be disregarded where there is no legal or moral obligation to provide it. *In re Marriage of Vucic*, 216 Ill. App. 3d 692, 704, 576 N.E.2d 406, 414 (1991).

A significant recent case where there are children by a previously relationship is *Slagel v. Wessels*, 314 Ill.App.3d 330, 247 Ill.Dec. 765, 732 N.E.2d 720 (4th Dist. 2000). The question in that case is whether the court may deviate downward from the support guidelines in a case where there is a prior support obligation. *Slagel* involved a fact pattern in which the mother's previous husband had died and as a result she had custody of three children by a previous marriage. Therefore, there was no support obligation of the mother. In rejecting a rote application of the guidelines, the opinion stated:

> "The guidelines are a useful method of insuring that child support is set in an amount that is reasonable and necessary. Section 505, however, does not provide comprehensive rules for every conceivable situation. It is recognized that there are times when it will be improper for the trial court to apply the guidelines. For example, in "split custody" cases, where each parent is the custodian of at least one of the parties' children, section 505's guidelines are not necessarily applicable. *In re Marriage of Demattia*, 302 Ill.App.3d 390, 393, 706 N.E.2d 67, 69 (1999). [GDR 99-22]."

The *Slagel* court met the argument that §505 addresses prior child support obligations. The opinion stated:

"One could argue that the legislature dealt with this situation when it provided a deduction from "net income" for "[p]rior obligations of support or maintenance actually paid pursuant to a court order." 750 ILCS 5/505(a)(3)(g) (West 1998). We disagree. Wessels argues that there is no court order here. The "court order" requirement was designed to avoid the situation where the individual owing a duty of child support sought to avoid that obligation by asserting the payment of large amounts to a prior family that may not in fact have been made or that may have been made in excess of the needs of the prior family. There is no doubt that Slagel is the sole support for her three children, and she should be given some consideration for the payments that she is required to make on that account."

Slagel is a case of first impression in Illinois addressing this issue.

E. **Depreciation and Business Expenses**: Subsection 505(a)(5) defines net income as income from all sources minus certain deductions including:

"(h) **Expenditures** for **repayment of debts** that represent **reasonable and necessary expenses for the production of income**... The court shall reduce net income in determining the minimum amount of support to be ordered only for the period that such payments are due and shall enter an order containing provisions for its self-executing modification upon termination of such payment period."

1. **Types of Cases**: Early case law regarding business expenses did not concentrate on the requirement of showing a debt repayment schedule. Cases shortly before the Supreme Court's *Minear* decision dealing with depreciation cases have emphasized this requirement: *IRMO Nelson*, 297 Ill.App.3d 651, 232 Ill.Dec. 654, 698 N.E.2d 1054 (3d Dist. 1998), *IRMO Davis*, 287 Ill.App.3d 846, 223 Ill.Dec. 166, 679 N.E.2d 110 (5th Dist. 1997). However, the Illinois Supreme Court's *IRMO Minear*, 181 Ill. 2d 552, 230 Ill.Dec. 250, 693 N.E.2d 379 (1998), case indicated that the law is less than clear on this subject. The *Minear* ruling was a conservative one because it did not go beyond the issues presented. The *Minear* court sidestepped substantive legal arguments, noting that the husband never explained the basis for the depreciation expense in his financial statement and therefore the *Minear* Court ruled that the husband "failed to present evidence that would, under the rule he proposes, warrant exclusion of that expense." My comment to the *Gitlin on Divorce Report* of the Supreme Court's decision stated:

"The Supreme Court could have easily decided to refuse to take cert on this case. They probably accepted cert knowing that there was a division among the districts and wanting to clear up the issue. Unfortunately, after accepting cert and reviewing the record, they learned that there was nothing to state the nature of the depreciation expense. Being a conservative judiciary, the court did the proper thing and refused to suggest by way of broad dictum that had the expense been justified as reasonable and necessary that the expense would have been allowed."

By way of example, *Nelson* held that the child support payor was not allowed to deduct farm equipment depreciation from his net income because he failed to show the expense was an "expenditure for the repayment of debt." It further held that the child support payor was not allowed to deduct payments toward farm operating loan principal from his net income because allowing the deduction would have permitted the payor use of the same deduction twice.

2. **Quantification**: Attached are two spreadsheets analyzing certain issues according to the relevant factors in the statutory and case law. The first spreadsheet analyzes the depreciation elements of the cases and the significant factors. The second spreadsheet analyzes the business expense cases (non-depreciation cases) and the significant factors.

One opinion, *Gay on Behalf of Gay v. Dunlap*, is divided into two parts because the determination of one expense was remanded to the trial court. The remainder of the expenses were not allowed.

The column regarding "Expense Allowed" refers to those cases in which the expense was ultimately allowed as a deductible reasonable and necessary business expense as an end result. This includes cases where the expense was allowed at the trial court level and the result was affirmed, and cases where the trial court did not allow the expense but there was a reversal.

The taxpayer type is not always clear from the opinion. Where it appears relatively clear, the taxpayer type is set forth. It is clear from the spreadsheet that in most cases the taxpayer is a Schedule C taxpayer. In only one case was the business incorporated: *IRMO Heil*. It is probably not coincidental that this is one of the few cases where at least a portion of the expense was allowed as a reasonable and necessary business expense.

3. **Flowchart re Depreciation Cases**: The *IRMO Davis* case presents what can be illustrated via a flow chart regarding depreciation cases. Note, however, that especially in light of the Illinois Supreme Court's *Minear* case as well as the recent *Worrall* case, it appears that the law is not at all fixed as to whether there is an emphasis on proof of a debt repayment schedule.

   a. **Debt Repayment Schedule**: First determine if there is a debt repayment schedule.

      a. If no ➪ **Generally** non-deductible (but issue not definitely resolved per *Minear*/ *Worrall*)

      b. If yes ➪ Go to step b.

   b. **Reasonable and Necessary for Production of Income**: Determine whether the payor maintains his or her burden of proof of demonstrating

expense was reasonable and necessary expense for production of income. (See *Minear*, *Worrall*, etc.)

1. **Increase in Income**: Did income increase as a result of the expense? If yes, go to step (2). If no, this still may be deductible if extenuating circumstances exist.

   (a) **Extenuating Circumstances**: If there are extenuating circumstances, did the payor have a good faith belief that his income would have increased as a result of the expense?

      i) If no, ⇨ Non-deductible.

      ii) If yes, ⇨ Go to step (2).

2. **Reasonableness**: Did the support payor maintain his or her burden of proof of demonstrating the expenses are reasonable?:

   (a) Straight-line = Reasonable according to *Davis*.

   (b) Non-straight line = Unreasonable: Convert to straight-line depreciation schedule.

The most difficult deduction for the court to handle is expenses for the repayment of debts that represent reasonable and necessary expenses for the production of income. Non-reimbursed business expenses may or may not be deductible, depending upon whether they are reasonable and necessary and whether there is a debt that is being repaid.

In *Gay on Behalf of Gay v. Dunlap*, 279 Ill.App.3d 140, 215 Ill.Dec. 691, 664 N.E.2d 88 (4th Dist. 1996), the appellate court applied a good faith test to business expenses, i.e., whether those expenses were outlaid by a parent with a good-faith belief his or her income would increase as a result, and which actually did act to increase income, or would have done so absent some extenuating circumstances.

There is another argument, however, that business debts should be "limited to extraordinary, large ticket, nonrecurring expenses," based on the language of section 505(a)(3)(h): "The court ... shall enter an order containing provisions for its self-executing modification upon termination of such payment period," as urged by the dissent in *Gay*. The appellate court focused upon a specified repayment schedule in *Posey v. Tate*, 275 Ill.App.3d 822, 212 Ill.Dec. 69, 656 N.E.2d 222 (1st Dist., 6th Div. 1995). The *Posey* court held that the trial court did not abuse its discretion in allowing depreciation on rental properties to be deducted from income for purposes of setting child support, where the payor used a straight-line depreciation method and the expense could be presented in a specified repayment schedule. Contrast *Posey* to *IRMO Cornale*, 199 Ill.App.3d 134, 145 Ill.Dec. 188, 556 N.E.2d 806 (4th Dist. 1990), where the appellate court held that the trial court did not err in refusing to deduct from the support obligor's net income his expenses incurred for a rental property which, although an investment, produced no income.

Student Loans May be Only Partially Deductible: A 2004 case addressing the so called business expense deduction is *Roper v. Johns*, 281 Ill.Dec. 655, 804 N.E.2d 620 (Fifth Dist. 2004), GDR 04-37, in which the Fifth District appellate court found student loans (in this case for law school) may only be partially deductible based upon the rationale of the *IRMO Heil*, 233 Ill. App. 3d 888, 892, 599 N.E.2d 168, 171 (1992) case (hunting lodge expenses only 50% deductible).

The *Roper* court first commented:

> The only such deduction relevant here is the deduction for the repayment of loans for "reasonable and necessary expenses for the production of income." 750 ILCS 5/505(a)(3)(h). This court has recognized that student loans fall within this category. *IRMO Davis,* 287 Ill. App. 3d at 854, 679 N.E.2d at 116. Although we held that the loans at issue in In re Marriage of Davis were deductible in their entirety (see *IRMO Davis*, 287 Ill. App. 3d at 856, 679 N.E.2d at 117), our opinion should not be read as holding that student loan payments will always be completely deductible. Like other debt payments deductible under this provision, student loans must be both reasonable and necessary for the production of income. See *IRMO Davis* , 287 Ill. App. 3d at 853, 679 N.E.2d at 115 ("simply because an expense falls into the category of a debt repayment does not mean that it is necessarily deductible")."

Regarding whether a deduction is an all or nothing proposition, the *Roper* court stated: "Moreover, our examination of the purposes to be served by allowing the deduction in the context of student loan payments convinces us that trial courts must have the flexibility to find that a partial deduction is warranted."

After reviewing the law in other jurisdictions as to the issue, the appellate court stated:

> "With these principles in mind, we next consider whether-and to what extent-the debt Jeff incurred in pursuing his education was reasonable and necessary. Illinois courts have defined "necessary" expenses as " 'those expenses outlaid by a parent with a good-faith belief his or her income would increase as a result, and which actually did act to increase income[] or would have done so absent some extenuating circumstances.' " *IRMO Davis*, 287 Ill. App. 3d at 853, 679 N.E.2d at 115 (quoting *Gay v. Dunlap*, 279 Ill. App. 3d 140, 149, 664 N.E.2d 88, 95 (1996)). We have defined "reasonable" as not immoderate, extreme, or excessive considering the relationship between the amount of the expenditure and the amount by which the parent's income is expected to increase as a result. *IRMO Davis*, 287 Ill. App. 3d at 853, 679 N.E.2d at 115 (citing *Gay*, 279 Ill. App. 3d at 149, 664 N.E.2d at 95)." As to the amount of the partial deduction the appellate court finally reasoned, "In the instant case, Jeff's combination of degrees enhanced his earning capacity and was, therefore, necessary for the production of income. However, we do not believe that the expenditure was reasonable-at least not in its entirety-for two reasons. First, it was entirely possible for Jeff to attain those degrees without incurring such an overwhelming level of debt. He could have found a job using the skills he had acquired with his undergraduate business degree and either attended law school part time while working full time or waited a few years between college and law school so he could pay down some of

his undergraduate loans and save money towards his law school tuition and expenses. Further, he could have applied to law schools with lower tuition. Second, we agree with the trial court that the amount of debt incurred was excessive in relation to the extent to which Jeff's income was enhanced."

<u>Per Diem</u> **<u>Deduction for Business Expenses</u>**:

<u>Crossland</u> **<u>– Rejected Deduction for</u>** ***<u>Per Diem</u>*** **<u>Business Expenses</u>**: *IRMO Crossland*, 307 Ill.App.3d 292, 240 Ill.Dec. 456, 717 N.E.2d 549 (3d Dist. 1999), held the *per diem* expenses allowable federal income tax deduction for unreimbursed business expenses are not deductible in calculating net income for child support purposes. In *Crossland*, the former husband sought a deduction for his business expenses, based on the Internal Revenue Service's $36-per-day allowable income tax deduction for business expenses, rather than an actual expense allowance provided by his employer. The trial court denied the ex-husband's request and the Third District appellate court affirmed.

On appeal, the ex-husband did not argue that his expenses fell within any deduction listed in §505(a)(3)(h) of the Illinois Marriage and Dissolution of Marriage Act. Rather, the ex-husband argued the legislature never contemplated that a supporting parent would have to pay child support on gross receipts reduced only by those deductions listed in §505(a)(3), and he should be able to deduct ordinary and necessary expenses incurred in carrying on his trade. He further argued the IRS's *per diem* allowance was a reasonable estimation of his business expenses, so he should be able to deduct that allowance instead of the actual expenses incurred.

The appellate court did not directly address the ex-husband's argument that §505(a)(3) was not an exhaustive list of deductions for calculating net income for child support. Rather, it held the *per diem* allowance was an inappropriate deduction in calculating net income for child support because at least some portion of the allowance may represent income. Citing a recent workers' compensation case, it held to the extent the *per diem* allowance exceeds actual expenses, the *per diem* allowance is income rather than a reimbursement and is properly considered in calculating child support. The reviewing court further held the Internal Revenue Code's *per diem* allowance had no bearing on the issue of net income for child support. Since the allowance is available only as an itemized deduction, it does not reduce taxable income if the taxpayer does not have enough itemized deductions to surpass the standard deduction.

<u>Worrall</u> **<u>– Allowed Deduction of</u>** ***<u>Per Diem</u>*** **<u>Business Expenses if Actual Amounts Spent Proven</u>**: A recent Illinois appellate court decision addressing the business expense deduction is *IRMO Worrall*, 334 Ill.App.3d 550, 778 N.E.2d 397, 268 Ill.Dec. 411 (2nd Dist. 2002). *Worrall* addressed whether the trial court was correct in determining the father's net income per Section 505 did not include certain *per diem* expenses. The father was a truck driver whose compensation consisted of his base pay plus an amount designated as *per diem*, which was designed to cover expenses for meals and lodging while on the road.

A key ruling by the *Worrall* court was that:

> "The case law cited by the Department illustrates that the supporting parent bears the burden of establishing that a deduction applies, See e.g., *In re Marriage of Minear*, 181 Ill. 2d 552 (1998) (even assuming that depreciation of business assets could be deducted, supporting parent could not take the deduction because no evidence was offered to explain the claimed depreciation expense); *IRMO Nelson*, 297 Ill.App.3d 651 (1998), (party claiming a deduction for depreciation as a reasonable and necessary expense for the production of income was required to show that the expense was the repayment of a debt.)"

The appellate court commented that there is a distinction between income and a recoupment of capital. (Citing *Villanueva v. O'Gara*, 282 Ill.App.3d 147 (1996)). In that case the issue was what portion of the net proceeds from the settlement of a product liability lawsuit were "income" for the purpose of support modification. The holding in the case was that recoupment for disability, disfigurement, pain, suffering and reasonable past and future medical expenses do not equal income for the purpose of paying support.

Worrall stated:

> "It is important to recognize that *Crossland* did not definitively reach the question of whether amounts designated as "*per diem*" should be included in income for purposes of calculating child support. It was unnecessary to do so because no part of the child support obligor's pay was designated as *per diem*. Viewing *Crossland* as a whole, the limited holding of the case is that a parent owing support may not reduce his or her net income by an amount representing *per diem* if his or her employer does not designate any portion of his pay as *"per diem*."

In a decision which was surprisingly liberal (non-strict constructionist), the Second District *Worrall* went on to reject the reasoning of the *Crossland* decision. *Worrall* reasoned:

> "However, under the trial court's rationale, supporting parents earning the same total compensation and incurring the same expenses for meals and lodging might pay different amounts of child support depending on how much of the compensation, if any, is designated a per diem. An over-the-road truck driver who does not receive any compensation designated a per diem would apparently have to the show the applicability of a specific deduction under section 505(a)(3) of the Act (750 ILCS 5/505(a)(3) (West 2000)). This he or she might be unable to do because the only potentially applicable deduction is for "[e]xpenditures for repayment of debts that represent reasonable and necessary expenses for the production of income." (Emphasis added.) 750 ILCS 5/505(a)(3)(h) (West 2000). See Crossland, 307 Ill. App. 3d at 294 (over-the-road trucker "concede[d] that his business travel expenses do not fall within subsection 505(a)(3)(h) of the Act because they do not constitute repayment of debt"). We see no reason why the amount of support a parent pays should depend on notations on his pay stub that are simply designed to obtain advantageous tax treatment. **To permit such a result would exalt form over substance**. We therefore conclude that per diem allowances for travel expenses **generally** constitute income for the purpose of calculating child support. This income,

however, is subject to reduction **to the extent that the child support payer can prove that the per diem was used for actual travel expenses and not for his or her economic gain**. ***"

The decision thus held:

> "We therefore conclude that per diem allowances for travel expenses generally constitute income for the purpose of calculating child support. This income, however, is subject to reduction to the extent that the child support payer can prove that the per diem was used for actual travel expenses and not for his or her economic gain."

The appellate court then remanded the matter for a new hearing directing the trial court to include in the father's income the entire amount of the *per diem* travel allowance received reduced by the amount actually used for travel expenses with the father having the burden of proving the travel expenses. As to the burden of proof, the appellate court commented that, "unless the supporting parent bears the burden of proof, he or she will have no incentive to keep records of expenses for meals and lodging; such records are not necessary for tax purposes but might be useful against the parent in a child support proceeding."

IRMO Tegeler, 365 Ill. App. 3d 448, 848 N.E.2d 173, 302 Ill. Dec. 173 (Second Dist., 2006), is a recent case addressing business expenses and it is the first case to take a liberal view regarding the "debt requirement" language. In Tegeler one of the issues was the income of the ex-husband as a farmer and whether the trial court properly calculated the ex-husband's net income consistent with the provisions of Section 505(a)(3)(h) of the IMDMA – reasonable and necessary business expenses which are for the repayment of debt. The former wife argued that the trial court should not have subtracted the ex-husband's day-to-day operating expenses when determining his net income on an income averaging basis was less than $20,000 annually. The ex-wife claimed that the father presented no evidence that such expenses went toward the repayment of debts or that they represented reasonable and necessary expenses for his income production. Interestingly, the majority sided with the Cook dissent (and partial concurrence) in *Gay v. Dunlop*, 279 Ill. App. 3d 140; 664 N.E.2d 88; 215 Ill. Dec. 691 (1996). In Gay v. Dunlop, the appellate court held that money spent on gas, auto repairs, and insurance premiums, and certain other expenses, should not have been subtracted, because they were not expenses for the repayment of debts. In shades of *Rimkus* the appellate court stated, "We believe that *Gay* is distinguishable from the instant case." The appellate court then quoted from the Cook dissent where he noted that Section 505(a)(3) could be "troublesome" for more traditionally self-employed people:

> "It seems clear there are obvious deductions which are not listed. For example, how is net income calculated for a merchant engaged in the sale of goods? Under section 505(a)(3) the court must begin with the total of the merchant's receipts from sales. Can there be a deduction for cost of goods sold? The only listed deduction which might apply is section 505(a)(3)(h), but that seems overly restrictive. There should be a deduction for cost of goods sold even if the merchant pays cash for them, even if there is no 'repayment of debts,' and even if the expense is a continuing one. I conclude the legislature intended to allow such obvious deductions even without specific language in section 505(a)(3). In the present case, for example, [the father] was not required to include the total commissions he earned

> and was entitled to a credit for the share taken by Coldwell Banker, including amounts it paid for his office expenses." Gay , 279 Ill. App. 3d at 151 (Cook, J., concurring in part and dissenting in part).

The appellate court justified its decision based upon the definition of income per *Rogers II*, defining income as "something that comes in as an increment or addition" as well as other similar definitions. The appellate court then stated, "As respondent's wealth is increased only by his gross farm revenues minus his day-to-day operating expenses, we conclude that the trial court properly adopted respondent's use of this figure as his "income" before subtracting the deductions specifically listed in section 505(a)(3)." The appellate court further justified is decision per the *Worrall* decision also addressing the issue of the definition of income (in the context of the per diem expenses paid to a truck driver.) Finally, the appellate court noted the limits of the *Rogers* decision as to loans and stated, "We believe that, in general, loans should not be considered income... A contrary interpretation that includes loans as income would often create unjust or absurd results...."

Tegeler is a significant case to have in your arsenal – but one to try to avoid. While this case is good law in the Second District it is very difficult to reconcile this case with *Gay*. It tries to point out to Justice Cook's partial dissent in *Gay* in which he points out that while the father was self-employed, his relationship to Coldwell Banker was "similar to an employee." Assume that we are reviewing Schedule C of a personal tax return, i.e., Profit or Loss from Business. My approach has been that based upon *Gay*, the cost of good sold is clearly an allowable deduction. Therefore, *Gay* clearly does not hold that we use the gross receipts figure but instead the starting point may be through taking the "gross income" figure – which is then offset for the expenses. When dealing with a self-employed individual, my other approach has been to disallow any depreciation deduction on line 13 of the tax returns as well as certain other deductions which fall into the realm of the case law such as the expenses for business use of an individuals home, the meals and entertainment expense, etc.

The other advice is to inform the party who has a "sole proprietorship is simply to incorporate (create an S Corp., LLC., etc.) because case law does not seem to apply the same standard when there is a separate entity. The next piece of advice to give such an individual is to ensure that he or she does not "live outside of the business" but is placed on an actual salary from the business – salary where personal items are paid for through the salary and where only business expenses are paid for directly through the business. In this way we avoid the entire issue presented by the questions that this line of cases presents.

F. **<u>Reasonable Expenditures for the Benefit of the Child and the Other Parent</u>**: Common expenses of this type include child care expenses, premiums for life insurance and secondary school tuition expenses.

1. **General Expenses for the Benefit of the Child, Exclusive of Gifts**: A recent case held that money a child support payor spends on a child (exclusive of gifts) should be deductible in determining his net income. *IRMO Davis*, 287 Ill.App.3d 846, 223 Ill.Dec. 166, 679 N.E.2d 110 (5th Dist. 1997).

2. **Child Care Expenses**: In *IRMO Stanley*, 279 Ill.App.3d 1083, 216 Ill.Dec. 890, 666 N.E.2d 340 (4th Dist. 1996), one deduction from gross income was "day care contribution", per *IRMO Serna*, 172 Ill.App.3d 1051, 123 Ill.Dec. 164, 527 N.E.2d 627 (4th Dist. 1988). *Stanley* suggests in *dictum* that a justification for deducting the child care contribution is subparagraph (a)(2)(h) of §505, which authorizes a deduction for "reasonable expenditures for the benefit of the child and the other parent." Child care expenses are certainly reasonable expenses for the benefit of the child and the other parent. The problem is setting child support at a dollar certain while allowing a deduction for child care expenses in determining net.

G. **Income Averaging Cases**:

Perhaps one of the most underused methods of determining income for the purpose of paying either child support or maintenance is an income averaging approach. While there is a significant body of Illinois case law which looks favorably upon averaging income in appropriate cases, many lawyers underuse this device to determine income in cases where the payor's income varies significantly.

Nelson: In *IRMO Nelson*, 297 Ill.App.3d 651, 232 Ill.Dec. 654, 698 N.E.2d 1054 (3d Dist. 1998), the appellate court held that when child support obligor has fluctuating annual income, trial court properly determined child support by averaging obligor's net income over three consecutive years. he appellate court in *Nelson* commented favorably on the *IRMO Freesen* and *IRMO Elies* cases, discussed below. The *Nelson* three year figures were $43,000 in 1996, $74,000 in 1995 and $91,000 in 1994.

Freesen: A similar ruling was regarding income averaging was made in *Freesen*, 275 Ill.App.3d 97, 211 Ill.Dec. 761, 655 N.E.2d 1144 (4th Dist. 1995). The *Freesen* court held that where there are income fluctuations, it is appropriate to consider prior years of income. *Freesen* stated:

> "Income need not fluctuate wildly before it is appropriate for the trial court to consider prior years of income in determining prospective income. We also note that there is no iron-clad rule requiring a trial court to consider only the last three years of income in arriving at net income for child support purposes. At least the three prior years should be used to obtain an accurate income picture. Beyond that, however, it must be left to the discretion of the trial court, as facts will vary in each case. While a court should not base net income findings upon the mere possibility of future financial resources, neither should it rely upon outdated information which no longer reflects prospective income."

At least three prior years of income should be used. It is suggested that *Freesen* represents a trend to consider an income averaging approach, whereas prior case law suggested the use of such an approach should be limited to very unusual circumstances.

Elies: In *Elies*, 248 Ill.App.3d 1052, 188 Ill.Dec. 364, 618 N.E.2d 934 (1st Dist., 6th Div. 1993), the appellate court affirmed an award of child support based upon 3 year averaging where the income

fluctuated significantly and reliability was not disputed.

Schroeder: *IRMO Schroeder*, 215 Ill.App.3d 156, 158 Ill.Dec. 721, 574 N.E.2d 834 (4th Dist. 1991), held that deviations from current reliable current income data require a compelling showing of a definitive pattern of economic reversals. These cases break down as follows:

Carpel: The 1992 case of *In re Marriage of Carpel* also involved income averaging, but that case does not establish clear income averaging guidelines It appeared *Carpel* was a three year averaging award in a case involving a lawyer. *Carpel* stated:

> "In a case such as this, the trial court should consider the supporting parent's previous income when trying to determine his prospective income. However, a court should not base its net income finding on the mere possibility of future financial resources (*Harmon,* 210 Ill. App. 3d at 96, 154 Ill. Dec. at 730, 568 N.E.2d at 951) or on outdated data that no longer reflect prospective income. (*In re Marriage of Schroeder* (1991), 215 Ill. App. 3d 156, 161-62, 158 Ill. Dec. 721, 724-25, 574 N.E.2d 834, 837-38.)"

DiFatta: *IRMO DiFatta*, 306 Ill.App.3d 656, 239 Ill.Dec. 795, 714 N.E.2d 1092 (2d Dist. 1999), presented a new wrinkle regarding the income averaging cases. *DiFatta* held that where child support obligor is paid by the hour and his average hours of employment fluctuate significantly from year to year, a court may average the number of hours worked for the past ten years in determining net income for child support purposes. The *DiFatta* court approved the trial court's income averaging for ten years. That is a long time and sets an Illinois court of review record for the number of years for which a court can income average.

Garrett: A 2003 income averaging case is *IRMO Garrett*. In *Garrett*, the husband was a self-employed physician who earned a net income in 1993 earned a net income of approximately $175,000. In 1999 the former wife filed a petition to increase child support. The trial court in the modification proceedings found that there had been a trend toward growth in the ex-husband's income from the time of the divorce. The ex-husband on appeal argued that the 2000 projected net income figure of $164,836 should have been used in applying the statutory guidelines. The appellate court after approving of the language in *Freesen* that income does not need to wildly fluctuate for the court to income average commented that, "We agree with the trial court's decision to average the net income of the previous three years because the income amounts varied significantly from year to year. Specifically, the court found [the ex-husband's] 1999 net income to be $240,034; his 1999 net income to be $237,897 and his 2000 net income to be $164,836. **Further, considering the fact that the court found the reduction in [the ex-husband's] gross income from 1999 to 2000 (the time this action was pending) atypical and unexplained by [the ex-husband's] testimony, the court would have been justified in excluding the 1999 to 2000 income altogether and substituting 1997's income of $197,497, thereby resulting in an even higher averaged income**." The last sentence of the discussion was dictum but is interesting dictum considering the fact that this is the first Illinois case which addresses the possibility of ignoring the most recent annual income figure in an income averaging approach where it is thought that there may be a degree of income manipulation for the most recent year.

A 2006 income averaging case is *IRMO Hubbs*, 363 Ill. App. 3d 696, 843 N.E.2d 478, 300 Ill. Dec. 220 (Fifth Dist., 2006). *Hubbs* applies income averaging when income from new employment is uncertain and where a certain level of income is imputed based upon a decision to take a job with more speculation as to commissions versus a job with a certain income. The appellate court held that the trial court did not err in imputing to the husband a base gross income of $115,000 (based upon an average of the past three years of his previous employment.) In addition, the husband was required to pay 13% of the gross income above this amount. The husband urged that the trial court erred in imputing income to him based upon his previous employment. On the income averaging issue the appellate court stated:

> Where it is difficult to ascertain the net income of a noncustodial spouse, the circuit court may consider past earnings in determining the noncustodial spouse's net income for purposes of making a child support award. *IRMO Karonis*, 296 Ill. App. 3d 86, 92 (1998). Using an average income for the previous three years of employment is a reasonable method for determining net income where income has fluctuated widely from year to year. *IRMO Nelson.*

What is interesting is that in *Hubbs* there was income averaging based upon a past job in light of the uncertain nature of the income from the current job. In the husband's current job, his ultimate income would be based upon commissions. He received an advance of $7,500 monthly and these advances were loans which would then have to be repaid from commissions. The husband was responsible for all expenses related to the production of his income. The husband urged that the trial court should have determined his net income to be $2,367 per month. The appellate court applied the facts of the case to its decision as follows:

> Mark's income for the previous three years was $133,000, $114,009, and $169,319, respectively. Mark also testified that he had recently rejected a job offer that would have paid him a salary of $120,000 a year. We believe that based on the evidence in this case, the circuit court acted properly in imputing Mark's gross income at $115,000. This figure is slightly below his average income for the previous three years and slightly below a salary that he could have earned had he accepted another position. Although the circuit court could have required Mark to pay a percentage of his net income to Peggy, we believe that it acted properly in determining gross income to be $115,000.

These cases break down as follows:

- ☞ Three year averaging OK even where income does not fluctuate wildly - *Freesen*
- ☞ Three year averaging OK where income fluctuates significantly - *Elies, Nelson* and *Garrett*
- ☞ Six year weighted average improper. - *Schroeder*
- ☞ 10 years averaging **of hours** worked permissible when hours fluctuate significantly. *DiFatta*.
- ☞ Three year averaging does not necessarily have to be the last three years where there is evidence of what some lawyers call "sudden income deficiency syndrome." *Garrett*.

H. **One Time Income and *IRMO Rogers***:

In 2004, I wrote: "Illinois family lawyers should keep a close watch on the Supreme Court's review of the *IRMO Rogers*, 345 Ill.App.3d 77, 280 Ill.Dec. 726, 802 N.E.2d 1247 (1st Dist., 4th Div. 2003) decision as to whether gifts and loans constitute income. *Rogers* (like *Collingbourne*) is now one of the seminal Illinois family law decisions.

The divorced father in *Rogers* earned only $15,000 annually from his teaching position. The trial court set his support obligation at $250 monthly. The mother appealed and argued that the trial court should have determined that his income was substantially higher because the father had received $46,000 in gifts and loans every year of the father's adult life. Including those gifts and loans the mother urged that the father's income was $61,000 not the $15,000 the father claimed. The ex-husband urged that consistent with *In re Marriage of Harmon,* 210 Ill. App. 3d 92, 568 N.E.2d 948, 154 Ill. Dec. 727 (1991) an annual gift of $10,000 should not be considered where there is uncertainty the gift would be received in the future.

The *Rogers* Supreme Court decisions, 213, Ill.2d 129, 820 N.E.2d 286 (2004), represents a water-shed for Illinois divorce lawyers. The Supreme Court noted that the first step in determining net income is to determine the 'total of all income from all sources.' The Supreme Court then stated:

> As the word itself suggests, "income" is simply "something that comes in as an increment or addition ***: a gain or recurrent benefit that is usually measured in money ***: the value of goods and services received by an individual in a given period of time." Webster's Third New International Dictionary 1143 (1986). It has likewise been defined as "[t]he money or other form of payment that one receives, usually periodically, from employment, business, investments, royalties, gifts and the like." Black's Law Dictionary 778 (8th ed. 2004).
>
> Under these definitions, a variety of payments will qualify as "income" for purposes of section 505(a)(3) of the Act that would not be taxable as income under the Internal Revenue Code... Based on the foregoing principles, we conclude, as the appellate court did, that the circuit court was correct to include as part of the father's "income" the annual gifts he received from his parents... They represented a valuable benefit to the father that enhanced his wealth and facilitated his ability to support Dylan.

Regarding the argument that consideration of future receipts of gifts and loans constitutes speculation, the Supreme Court stated:

> Few, if any, sources of income are certain to continue unchanged year in and year out. People can lose their jobs, interest rates can fall, business conditions can wipe out profits and dividends. Accordingly, the relevant focus under section 505 is the parent's economic situation at the time the child support calculations are made by the court. If a parent has received payments that would otherwise qualify as "income" under the statute, nothing in

> the law permits those payments to be excluded from consideration merely because like payments might not be forthcoming in the future. As our appellate court has held, "the Act does not provide for a deduction of nonrecurring income in calculating net income for purposes of child support." *In re Marriage of Hart*, 194 Ill. App. 3d 839, 850 (1990).

The Supreme Court, however, allowed an out when it noted that, "the nonrecurring nature of an income stream is not irrelevant." It then reasoned:

> Recurring or not, the income must be included by the circuit court in the first instance when it computes a parent's "net income" and applies the statutory guidelines for determining the minimum amount of support due under section 505(a)(1) of the Act. If, however, the evidence shows that a parent is unlikely to continue receiving certain payments in the future, the circuit court may consider that fact when determining, under section 505(a)(2) of the Act (750 ILCS 5/505(a)(2) (West 2002)), whether, and to what extent, deviation from the statutory support guidelines is warranted. Moreover, if the payments should stop earlier than anticipated by the court, the parent obligated to provide support based on those payments may seek modification of the support order pursuant to section 510 of the Act

The case law regarding non-recurring income is that the court has discretion whether to consider such income in determining child support. For example, in *IRMO Miller*, 231 Ill.App.3d 481, 172 Ill.Dec. 679, 595 N.E.2d 1349 (3d Dist. 1992), the appellate court held that:

> "While nonrecurring income may properly be included in calculating net income for purposes of child support (*IRMO Hart* (1990), 194 Ill.App.3d 839, 551 N.E.2d 737), this is not an inflexible rule, and the trial court has the discretion to exclude such income. To hold otherwise could lead to absurd results, as where a party's income is artificially inflated by a large capital gain on the sale of a residence. We believe that such determinations are best left to the sound discretion of the trial court."

Regarding the consideration of loans as income, the Supreme Court noted that the most credible testimony was that the father was never required to repay any of the loans given to him each year by his parents. The Court then stated, "That being so, the money the father received from his parents was no less "income" than the gifts they gave him or the salary he received from his teaching job."

Consideration of IRA Distributions: The case law in following *Rogers*, has been less generous in terms of whether income should be considered as non-recurring. An example of a bad case making bad law is the Second District's 2005 *IRMO Lindman*, decision, 824 N.E.2d 1219, 356 Ill.App.3d 462, 291 Ill.Dec. 969 (2d Dist. 2005).

Lindman held that the trial court did not err when it refused to grant petitioner's petition to reduce child

support because he lost his job and was receiving distributions of IRA awarded him in dissolution proceeding, because the distributions from his IRA were properly considered §595 "income," therefore making his net income greater than when support was set. Significant factors in the trial court's award were the fact that the ex-husband lost his job due to alcohol abuse and that at the time of the divorce, he earned approximately $80,000 annually while the two years immediately before filing his petition for modification (2000 and 2001), the ex-husband had a gross income of $160,000 and $100,000, respectively. *Lindman* contains several quotes establishing the comprehensive sweep of what constitutes income for support purposes:

> Consistent with the above understanding, Illinois courts have concluded that, for purposes of calculating child support, net income includes such items as a **lump-sum worker's compensation award** (*In re Marriage of Dodds*, 222 Ill. App. 3d 99 (1991)), **a military allowance** (*In re Marriage of McGowan*, 265 Ill. App. 3d 976 (1994)), an **employee's deferred compensation** (*Posey v. Tate*, 275 Ill. App. 3d 822 (1995)), and even the **proceeds from a firefighter's pension** (*People ex rel. Myers v. Kidd*, 308 Ill. App. 3d 593 (1999)).
>
> We see no reason to distinguish IRA disbursements from these items. Like all of these items, IRA disbursements are a gain that may be measured in monetary form. *Rogers*, slip op. at 5. Moreover, IRA disbursements are monies received from an investment, that is, an investment in an IRA. See Black's Law Dictionary 789 (8th ed. 2004); see also www.investorwords.com/2641/IRA.html (last visited December 22, 2004) (defining an "IRA" as "[a] tax-deferred retirement account for an individual *** with earnings tax-deferred until withdrawals begin"). Thus, given its plain and ordinary meaning, "income" includes IRA disbursements.

Next, the court addressed the ex-husband's other arguments including the argument that the IRA distributions were non-recurring. The *Lindman* appellate court was very clear as to the limitations of the opinion in terms of applying an abuse of discretion standard:

> Thus, consideration of these arguments requires us to determine only whether the circuit court's net income calculations and its resulting refusal to modify petitioner's child support obligation amounted to an abuse of discretion. *In re Marriage of Schacht*, 343 Ill. App. 3d 348, 352 (2003). "A trial court abuses its discretion only when its ruling is ' " 'arbitrary, fanciful or unreasonable' " or " 'where no reasonable man would take the view adopted by the trial court.' " ' [Citations.]" With that in mind, we take petitioner's arguments in turn.

The *Lindman* court next stated:

> To begin with, "the Act does not provide for a deduction of nonrecurring income in calculating net income for purposes of child support." *In re Marriage of Hart*, 194 Ill. App. 3d 839, 850 (1990). Thus, if we were to conclude that such income is, by virtue of its lack of regularity, excluded from the net income calculation, we would read into the plain

> language of the statute limitations and conditions not expressed by the legislature. And there is a further problem with petitioner's theory. It presumes that the net income inquiry is concerned with what a parent's income will be at some time after the child support determination is made. It is not. Rather, the net income inquiry focuses on a parent's income at the time the determination is made. Should that income later change, the Act allows a parent to petition for modification of the support order. 750 ILCS 5/510.. Indeed, that is precisely what petitioner did here. But what the Act does not do is allow the possibility of more or less income in the future to determine whether the parent will pay more or less child support today.

The language in the 2004 Rogers Supreme Court decision is more limited as to the non-recurring income issue. *Lindman* quoted from *Rogers*:

> As the supreme court has said:
>
> > "Few, if any, sources of income are certain to continue unchanged year in and year out. People can lose their jobs, interest rates can fall, business conditions can wipe out profits and dividends. Accordingly, the relevant focus under section 505 is the parent's economic situation at the time the child support calculations are made by the court. If a parent has received payments that would otherwise qualify as 'income' under the statute, nothing in the law permits those payments to be excluded from consideration merely because like payments might not be forthcoming in the future." *Rogers*.

One of the most recent cases addressing non-recurring income in light of *Rogers* is *IRMO Baumgartner,* (1st Dist., 2008). An issue was whether proceeds from the sale of residential property that were used to purchase a new residence were income for child support purposes. The appellate court in *Baumgartner* stated that since the IMDMA does not define "income" it was proper to review the definition of income per *Rogers* as a gain or recurrent benefit, measured in money and as money from employment, business, investments, royalties, gifts and the like. Surprisingly, the appellate court then stated:

> Under section 505(a)(3) and the definition of income cited in Rogers II, we are constrained to agree with Susan that the proceeds from the sale of property such as a residence would qualify as income.

The *Baumgartner* appellate court immediately qualified this statement:

> Nonetheless, we do not agree that the circuit court erred in refusing to include the proceeds in its determination of net income. As a practical matter, it stands to reason that to a certain extent the sale proceeds represent a return on payments made by Craig out of income already accounted for in the determination of his child support obligation.

The appellate court then stated:

> A similar situation [passive income not actually received] occurs where a parent sells his or her residence and uses the proceeds to purchase a new residence. The sale proceeds are not actually available to the parent to spend as income... We cannot say that the proceeds from the sale of residential property can never be considered income for child support purposes. Here, however, the sale of Craig's California residence was necessitated by his employment situation, and the proceeds were utilized to purchase his residence in Illinois where he had obtained employment. Under these circumstances, the circuit court did not err in excluding the proceeds from the sale of Craig's California from his income for child support purposes.

I. **Deviations from the Support Guidelines**:

There are three lines of case law which are commonly addressed in the deviation cases: 1) cases where there is equal or nearly equal parenting time for each party; 2) cases where the payor is in the high income category; 3) cases whether custody of the children is split. The split custody cases will be addressed in my outline regarding rules of thumb in divorce cases.

1. **Deviations In Cases with Extensive Parenting Time**:

A relatively recent case is often cited in support of the proposition the trial court should not consider extensive parenting time to the non-residential parent as a possible deviation factor. *IRMO DeMattia*, 302 Ill.App.3d 390, 235 Ill.Dec. 807, 706 N.E.2d 67 (4th Dist. 1999), GDR 99-22. The *DeMattia* court however, only affirmed the refusal of the trial court to deviate downward from minimum statutory child support guidelines; although father had extensive visitation. The Fourth District court held that the payor was not entitled to automatic child support reduction

The appellate court expressed that it was not making a broad-based rule about downward deviations from the minimum child support guidelines:

> "We do not suggest a trial court could never deviate downward from the guidelines based on the noncustodial parent's extended provision of care for his or her children. We do not seek to discourage noncustodial parents from having substantial contact with their children. The benefit a noncustodial parent receives from having substantial involvement with his or her children cannot be measured by dollars. There should not be an <u>automatic</u> deduction in child support because a noncustodial parent has the opportunity to spend substantial time with the children and fulfill a parental responsibility. Caring for one's own children is not day care nor is it a chore for which to be compensated. Our decision is not a criticism of [the husband] for asking this interesting question, but we decline the invitation to add a new layer of complexity to custody and support decisions. Our decision is limited to the facts in this case." (Emphasis in original)

A case somewhat contrary to *DeMattia* is *IRMO Reppen-Sonneson*, 299 Ill.App.3d 691, 233 Ill.Dec. 885, 701 N.E.2d 1159 (2d Dist. 1998). It held that the trial court not obligated to rely on statutory guidelines where parents equally shared custody of children. Child support by husband to wife below statutory guidelines was affirmed. In *Reppen-Sonneson*, the husband was required to pay 15% of his net income for support of three children. The appellate court stated:

> "The parties agreed to share in the legal and physical custody of their three children. Because both parents share the custody of the children, the trial court was not obligated to rely on the statutory guidelines. In this case, only [the father] was ordered to pay $75 per week in child support. In addition to providing the sole support, [the father] pays the children's health insurance and 75% of any extraordinary medical expenses such as orthodontia. [The father] has just as much responsibility in caring for the children as [the mother]. We do not find that the court abused its discretion."

Child Support to Visiting Parent: In *IRMO Cesaretti*, 203 Ill.App.3d 347, 149 Ill.Dec. 28, 561 N.E.2d 306 (2d Dist. 1990), the court held that where parties share parenting time relatively equally, the trial court did not err in requiring custodial parent to pay child support to non-custodial parent in view of disparity in parties' incomes. In *Cesaretti* the husband urged that once legal and physical custody is placed in one parent, the custodial parent has no obligation to pay support to the non-custodial parent. The appellate court rejected the husband's argument, noting that while the trial court had awarded husband temporary custody, the child nevertheless was to spend approximately equal time with each parent. The appellate court held that given such a custody arrangement, the trial court did not err in ordering the custodial parent to pay child support to the non-custodial parent. The husband testified at trial that he had a yearly gross income of more than $20,000 and that his monthly expenses were approximately $1,000. The wife testified that she earned approximately $7,000 a year and her monthly expenses were more than $2,000. The appellate court noted it is equitable that the parent with the disproportionately greater income should bear the greater share of the costs for support. Thus, the appellate court held that the trial court's award of $75 per week to the non-custodial parent was not in error.

Another "reverse" child support type case is *IRMO Pitts*, 169 Ill.App.3d 200, 119 Ill.Dec. 908, 523 N.E.2d 664 (5th Dist. 1988). Pitts ruled that the non-custodial parent, who has one month of visitation during summer, and who is in financial need, was entitled to child support during visitation. The evidence in *Pitts* showed that the wife was disabled and her only reliable source of income was $527 per month disability pay from the Illinois Teacher's Retirement System. Her parents also gave her $300 per month. The husband earned $2,000 per month from his law practice.

2. **Deviations from the Guidelines in High Income Cases**:

Decision Leading to Change in Law as to Needs -- *Van Kampen*: One Illinois appellate court decision refused to deviate from the child support guidelines despite the high income of the support obligor. In *IDPA ex. Rel. Temple v. Van Kampen*, 243 Ill.App.3d 767, 184 Ill.Dec. 6, 612 N.E.2d 882 (3d Dist. 1993), the third appellate court district held that because the needs of the child were not a statutory consideration in Section 505 of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), the trial court did not err in refusing to deviate from the guidelines. In reaction to the *Temple* case, in 1995 the

Illinois legislation amended the IMDMA to provide that the needs of the children were a statutory consideration per Section 505(a)(2)(a). This section now provides that in determining whether to deviate from the support guidelines the trial court must consider "the financial resources **and needs** of the child." Previously, the guidelines had merely provided that the court in deviation from the guidelines should consider only the financial **resources** of the child. (See *Gitlin on Divorce*: Section 10-3(I)(4)) for a discussion of the legislative history behind this amendment.) Illinois case law addressing deviations from the support guidelines in high income cases will be briefly reviewed:

In Re Keon C.: The Fourth District appellate court addressed a case involving a very high wage earner and a substantial deviation from the support guidelines. See, *In Re Keon C.*, 344 Ill. App. 3d 1137, 279 Ill.Dec. 674, 800 N.E.2d 1257 (4th Dist. 2003). *In Re Keon C.* held it was not error to set child support at $8,000 monthly which was an amount significantly below the guidelines, but far in excess of the shown needs when in 2001 the father earned $1.4 million, in 2002 his increased 10% to 20% and beginning November of 2003 he would begin earnings $4.5 million annually. The parties had calculated the father's net income in 2001 and the mother urged that guideline support at the time would have been $13,946 monthly. The father urged his guideline support would have been $12,905 monthly. The appellate court also affirmed the result despite the argument it may result in a windfall to the child by another relationship living with the mother. Additionally, the appellate court approved the requirement of the father to pay 100% of non-covered medical expenses despite the significant support award as well as 100% of the mother's attorney's fees.

Garrett: *IRMO Garrett*, 336 Ill.App.3d 1018, 271 Ill.Dec. 521, 785 N.E.2d 172 (5th Dist. 2003), followed the guidelines despite the fact the payor's income was substantial. A significant quote from *Garrett* stated:

> "Harry complains that the child support is a windfall to Elizabeth and that in its award the trial court should have considered the personal finances of Elizabeth. According to Harry, Elizabeth has elected to live so frugally that only a portion of the child support is actually spent. Harry believes that Elizabeth has effectively circumvented the intent of the child support order and basically converted these funds intended for the children into spousal maintenance. There is no evidence, however, in the record to support the proposition that Elizabeth has in any way misappropriated child support money for her own use. The court will not engage in gross speculation in that regard. The fact that Elizabeth has placed money in savings to provide for future uncertainties is commendable. Responsible adults do not spend every penny available to them. This court does not want to instruct that unless a custodial parent spends the allotted child support money within the month it is received, the court will deem the excess unnecessary."

The trial court set support at $3,507 monthly while the needs of the mother's household (with no financial contribution on her behalf) were $3,422. The appellate court then stated, "We are aware that the amount paid in child support currently exceeds the monthly expenses for the entire household, but a child's entitlement to a level of support is not limited to his or her 'shown needs'."

Ackerley: *IRMO Ackerley* 333 Ill.App.3d 382, 266 Ill.Dec. 973, 775 N.E.2d 1045 (2d Dist. 2002),

was a recent Illinois appellate court case addressing the issue of deviating from the support guidelines in high income cases. In *Ackerley* there was a duty to support only one child. The appellate court noted the financial resources of the ex-husband were more than ample to meet his needs. It also noted it was "inferrable" that his son would have enjoyed a high standard of living had the marriage not dissolved. Finally, it noted the financial resources of the ex-wife were much smaller than that of her ex-husband. The decision rejected the husband's argument that his frugal lifestyle should be a reason for a greater deviation from the guidelines:

> "Respondent complains that the amount of child support set by the trial court constitutes approximately 90% of petitioner's stated monthly expenses. We first note that, assuming respondent is correct, the needs of the petitioner and her son are but two factors a court is directed to consider as part of a multipart, totality-of-the-circumstances test. Other factors, as set forth in the preceding paragraph, militate for a significant award. See 750 ILCS 5/505(a)(2) (West 2000). Second, it is inferrable that, if the marriage had not dissolved, petitioner's son would have been enjoying a higher standard of living. Had he been enjoying the same standard of living while residing with petitioner, it is apparent that the family's monthly expenses would have been higher. A support award need not be limited to the shown needs of the child. *In re Marriage of Lee*, 246 Ill. App. 3d 628, 643 (1993).
>
> Respondent also poses the related question of "how many pagers, cell phones and cars does one child need?" We will not assume that petitioner will spend all of the child support money on luxuries or frivolities. In an incongruous fashion, respondent asks that we make this assumption about petitioner but complains bitterly because the trial court characterized his lifestyle as luxurious. *** Respondent relies on *In re Marriage of Bush*, 191 Ill. App. 3d 249, 261 (1989), for the proposition that courts are "not required to equate large incomes with lavish life-styles." We have no quarrel with this proposition. However, that a court is not required to draw such an inference says nothing regarding whether a court may do so. Moreover, whether respondent leads a frugal lifestyle is only pertinent to half the inquiry set forth in section 505(a)(2)(e), which focuses on both the needs and resources of the noncustodial parent. 750 ILCS 5/505(a)(2)(e) (West 2000). Even if respondent's needs are few, his resources are considerable. In sum, assuming a frugal lifestyle for respondent is not sufficient to tip the balance in respondent's favor such that the trial court abused its discretion in setting child support."

What was noteworthy of this decision is the fact that the support award was $3,000 per month which was based upon an income of $167,000 per year at the time of trial. The trial court set the support, however, at an amount certain and did not require payment of bonuses or other income for support.

Singleteary: In *IRMO Singleteary*, 293 Ill.App.3d 25, 227 Ill.Dec. 598, 687 N.E.2d 1080 (1st Dist., 1997), the father's income very substantially increased following the divorce. In *Singleteary*, where the father's **gross** income increased from $90,000 to **$300,000 per year**. Similarly, Plaintiff's gross income for 2000 is approximately $263,000. The marital settlement agreement in *Singleteary* provided the father would pay $864 per month, or 20% of his net income (whichever was greater), for child support for one child. The *Singleteary* appellate court found that the trial court properly modified child support for one

child from $864 per month to $2,000 per month, despite it being substantially below the child support guideline amount, because the appellate court held that $2,000 per month was adequate to maintain the child's lifestyle. *Singleteary* stated:

> "Where the individual incomes of both parents are more than sufficient to provide for the reasonable needs of the parties' children, the court is justified in setting a figure below the guideline amount. In determining the child support obligation of a high-income parent, the court must balance competing concerns. On the one hand, child support awards are not intended to be windfalls. On the other hand, the court must consider the standard of living the children would have enjoyed absent parental separation and dissolution."

In affirming the trial court's award of $2,000 per month for child support the appellate court reasoned that this amounted to more than twice the amount of the original child support award. *Singleteary* also ruled that the child's "shown needs and lifestyle to which he is accustomed can be adequately maintained on a total award of $2,000 per month."

Perry: *In Re Perry*, 260 Ill.App.3d 374, 198 Ill.Dec. 227, 632 N.E.2d 286 (1st Dist. 1994) held that the trial court must consider the needs of the child in setting child support. The father in *Perry* urged that sufficient evidence was presented to the trial court for deviating from the support guidelines. The appellate court made no ruling on this contention since the case had to be remanded to the trial court to make express findings in support of the deviation. The appellate court noted that in remand the trial court should consider, among other things: 1) the fact that the mother sought 100% of the chid's expenses from the father; and 2) the argument that when the noncustodial parent's income is high, there is justification in deviating from guideline support. The *Perry* court cited *Marriage of Scafuri*, 203 Ill.App.3d 385, 149 Ill.Dec. 124, 561 N.E.2d 402 (1990); and *Marriage of Lee*, 246 Ill.App.3d 628, 186 Ill.Dec. 257, 615 N.E.2d 1314 (4th Dist. 1993) which are discussed below.

Scafuri: In *Scafuri*, 149 Ill.Dec.124, 561 N.E.2d 402 (2d Dist. 1990), the trial court awarded child support award of $10,000 per month according to the statutory guidelines. The appellate court reversed and without remanding ordered child support of $6,000 per month -- 19% of the payor's net income (three were three minor children). The *Scafuri* court ruled: (1) The child support guidelines of Section 505 of the IMDMA: "shift the burden of presenting evidence to the parent who is asking the court to deviate from the guidelines in setting a child support award;" (2) "When dealing with above-average incomes, the specific facts of each case become more critical in determining whether the guidelines should be adhered to."

Lee: The trial court in *Lee,* 246 Ill.App.3d 628, 186 Ill.Dec. 257, 615 N.E.2d 1314 (4th Dist. 1993), deviated from the support guidelines and ordered payment of support at $3,000 monthly for one child, noting that the amount was "more than adequate" to support the child. The husband appealed urging that there should have been a greater deviation and the appellate court affirmed the trial court's award. In *Lee*, the husband's net income from 1988 through 1991 ranged from **$234,000** ($19,500 per month) **to $324,400** ($27,000 per month). These two sums, respectively, would have produced monthly child support of $3,900 and $5,400. The trial court awarded a child support figure "somewhat under the statutory guidelines". If we assume that the husband's net income was a midway point between these two

figures ($280,000 per year or $23,000 monthly), then **the trial court's child support award that was affirmed was approximately 13% of the husband's net income**.

Graham v. Adams: The 1993 Fourth District case of *Graham v. Adams,* 239 Ill.App.3d 643, 181 Ill.Dec. 541, 608 N.E.2d 614 (4th Dist. 1993), involved a deviation from the support guidelines where the father had a net income in a range lower than the above cases -- $8,000 per month (approximately **$96,000 per year**). According to the statutory guidelines the required child support would be $1,600 per month for one chid. The trial court, however, set child support at $400 per month. The Illinois Department of Public Aid appealed and the appellate court affirmed the trial court. The appellate court stated:

> "As this court has recently noted, "the support schedules contained in the statute have less utility as the net income of the parties increases because the schedules are premised upon percentages related to average child-rearing expenses." [Citation omitted.] In cases such as the present, where the parties both have above-average incomes, the specific facts govern whether the court should adhere to the guidelines. [Citation omitted.] Child support is not intended to provide children with an extravagant lifestyle but is designed to insure adequate support payments for the upbringing of the children." [Citation omitted.]

Thus, *Graham* affirmed an award of child support which was 5% of the payor's net income rather than 20% of his net income.

Bush: *IRMO Bush v. Turner*, 191 Ill.App.3d 249, 138 Ill.Dec. 423, 547 N.E.2d 590 (4th Dist. 1989), ruled that it was an abuse of discretion for the trial court to order child support equal to 20% of the husband's net income **where the husband's net annual income was $150,000 per year** ($12,500 per month). The trial court had ordered husband to pay $800 child support per month to wife but also ordered the husband to pay into a trust account for the child's benefit an amount equal to approximately 20% of his net income less the amount of the $800 per month cash payment to wife. In reversing the trial court's award, the *Bush* court calculated that husband would pay child support of approximately $30,000 per year. The court noted there was no evidence that the child's needs were not being met and that the record of typical expenditures for the child tended to support an award of child support close to $800 per month. Thus, the *Bush* court held that the trial court's overall award of 20% of the husband's net income was excessive and constituted an abuse of discretion. The appellate court instructed the trial court in setting an appropriate amount of child support to take into account the lifestyle the child would have enjoyed absent the dissolution, but cautioned the court against ordering too great an amount of support for this reason:

> "Despite the requirement that a court consider a child's station in life, the courts are not required to automatically open the door to a windfall for children where one or more parents have larger incomes. A larger income does not necessarily trigger an extravagant lifestyle or the accumulation of a trust fund. . .. We are not required to equate large incomes with lavish lifestyles. "

Summary as to Deviation Cases:

Singleteary:

- The gross income of the husband $300,000.
- $15,322 per month net income.
- Guideline support would have been $3,066.40.
- $2,000 per month support was affirmed which was 13% of the husband's net income rather than 20%.

Scafuri:

- There were three children.
- $10,000 monthly per guidelines was the result of trial court's decision
- $6,000 per appellate court = 19% of net income rather than 32%.

Lee:

- Net income from 1988 through 1991 ranged from $234,000 ($19,500 per month) to $324,400 ($27,000 per month).
- Range of support per guidelines: $3,900 and $5,400
- Order $3,000 and husband appealed.
- Based upon an average of these two figures ($280,000 per year or $23,000 monthly), the trial award was 13% of the husband's net income rather than 25% of his net income.

Graham:

- Net Income $8,000 monthly.
- Guideline Support would have been $1,800.
- Trial court's award of $400 per month affirmed.

Ackerley:

- Base gross income was a $167,000 per year at time of trial.
- Child support award of $3,000 per month for one child.
- Guideline support would have been $5,510 per month but trial court found it would be a windfall.
- Court did not order payment of support on bonuses.

The above cases indicate that where there is a high wage earner, there should be a deviation from the child support guidelines. Illinois law is essentially provides that the amount of support is a reasonable accommodation between two competing interests: the ability of the non-custodial parent to pay (if he has high wages) as against the needs of the non-custodial parent.

V. **Social Security Benefits and Adoption Subsidies as a Credit towards a Support Obligation**:

In 2004, the Illinois appellate court addressed an issue of first impression: whether the court should grant a credit for an adoption subsidy for three children (the parties had five minor children). See *IRMO Newberry,* 346 Ill.App.3d 526, 282 Ill.Dec. 21, 805 N.E.2d 640 (3d Dist. 2004). In that case the mother had received from the state of Iowa a credit of approximately $1,450 per month for support of the three adopted children. The trial court had first noted the line of cases illustrated by *IRMO Henry*, 156 Ill.2d 541 (1993) held that social security benefits may satisfy the obligor's support obligation. The court noted the payment from Iowa was "somewhere between a gratuitous and an earned benefit," but that without question it was a benefit generated by the parties willingness to adopt the children and the purpose was to help support them. The appellate court ruled:

> "In our opinion, the circuit court's treatment of the Iowa adoption subsidies properly recognized them as resources of the children available for their support. *See Strandberg*, 664 N.W.2d 887. Considering that the amount of the parties' net income is approximately equal, and the amount of the subsidies paid for three of the children is proportionately greater than their share of an unallocated 45% of David's income, we cannot say that the court erred in granting credit against David's support obligation. The $804.40-per-month award determined by reducing the percentage of David's net income to be paid for child support appears to blend the children's needs with what is fair and what is workable. See In re Marriage of Rogers , 283 Ill. App. 3d 719, 670 N.E.2d 1154 (1996) (citing *Lemon v. Kurtzman*, 411 U.S. 192, 36 L. Ed. 2d 151, 93 S. Ct. 1463 (1973)). We conclude that the court did not err in its treatment of the adoption subsidies."

Regarding credits for social security benefits, the leading case cited above is the Illinois Supreme Court *IRMO Henry*, 156 Ill.2d 541, 190 Ill.Dec. 773, 622 N.E.2d 803 (1993) decision. There the Supreme Court held that during the period disability payments were made to the children, the father satisfied his child support obligation. An exception to this rule (other than the issue of maintenance arrearages per *IRMO Schrimpf*) is *IDPA ex rel. Pinkston v. Pinkston*, 325 Ill.App.3d 212, 259 Ill.Dec. 114, 757 N.E.2d 977 (2d Dist. 2001), which ruled that when a child receives Social Security benefits that exceed the father's child support obligation, the excess cannot be applied to a child support arrearage that accrued before the father's disability. For a more complete discussion of this topic, please see Section 10-3(s) and section 17-1(s)(1) of *Gitlin on Divorce: A Guide to Illinois Matrimonial Law*.

VI. **Consideration of Income Tax Refunds, Dependency Exemptions and the Child Care Credit**:

A. ***Pylawka* – Case Arguably Requiring Maintenance to be Considered as Adjustment in Determining Net Income**:

The law is clear that if an individual files his or her incomes tax returns so as to receive a refund (over-withholding), that the income tax refunds may be considered as income and added back to the individual's net income. A relatively recent case requiring consideration of the income tax refund is *IRMO Teri Eileen Breittenfeldt*, 362 Ill. App. 3d 668; 840 N.E.2d 694; 298 Ill. Dec. 581 (Fourth Dist. 2005). This case cites *Pylawka* and states, "as petitioner points out, in 2003, respondent overwithheld federal and state taxes, resulting in a refund of $3,545 from federal taxes and $312 from state taxes, and this amount is added back into respondent's net income."

In light of *IRMO Pylawka* (2d Dist. 1996), it may be urged that the fact that maintenance is a deduction to the maintenance payor should be considered in determining an appropriate amount of child support. *Pylawka* seems to hold that in proceedings to modify child support, tax refund attributable to maintenance payments made to former wife should be considered in determining a party's net income.

It is urged that the essence of *Pylawka*, however, was that the trial court erred when it determined child support on the basis of income tax withholding and did not necessarily require that maintenance be allowed as an "above the line" adjustment in determining net income. For the sake of simplicity, keep in mind that to the extent that maintenance is allowed as an adjustment in determining net income, this increases the net income.

What are the arguments in that child support should be determined after allowing a deduction for maintenance? The recipient could argue Illinois case law (*Pylawka, Ackerley, and Breittenfeldt*) requires net income to be determined based upon the taxes that will actually be paid. Clearly, the payor will have a high net income (considered alone) when the payor pays maintenance. Thus, in such cases it is more likely the payor will receive a substantial refund if the payor uses appropriate withholding. The arguments the payor would make, however, are that providing that maintenance is a deduction in determining the net income would result in a number of unsound complications in Illinois family law cases and, therefore, such a deduction should not be allowed. One example of such a deduction would be the fact that maintenance will often end within a relatively short period of time from the judgment. Thus, if maintenance were allowed as a deduction, the payor would want a provision in the settlement agreement which would provide that upon the termination of maintenance, child support would in fact decrease. However, the recipient could argue the potential for an increase in income may offset the loss of the maintenance deduction. Even if the court reserves the ability to modify support downward based upon this potential change in circumstances (even as a matter de novo — without showing a substantial change in circumstances) there still is the issue of the cost-effectiveness of going to court to modify support in this instance.

Another public policy argument that the payor could make is that the maintenance rules of thumb, etc., must already consider the deductibility of maintenance and there may be a potential for a sort of double

consideration of this deduction. The bottom-line is that Illinois family lawyers should be aware that in determining income for the purpose of support the maintenance deduction is a critical one to consider — especially in those cases with a substantial maintenance award.

B. **Dependency Exemptions**:

The general rule under the Internal Revenue Code is that the custodian of the children is entitled to take the children as dependent exemptions. However, if the custodian agrees that the non-custodial parent may take the children as exemptions and agrees to sign Internal Revenue Service Form 8332 so stating, the non-custodial parent is entitled to claim the children.

There is no issue under Illinois law that the trial court has the power to order the custodial parent to sign a waiver that he or she will not claim the child as a dependency exemption. The trial court also has the power to allocate the dependency exemptions in post decree matters. See *IRMO Van Ooteghem*, 187 Ill.App.3d 696, 135 Ill.Dec. 331, 534 N.E.2d 899 (3d Dist. 1989). In *McCloud*, 197 Ill.App.3d 95, 143 Ill.Dec. 305, 554 N.E.2d 240 (3d Dist. 1989), the Third District held it was error to award the exemptions to the parent providing support absent circumstances warranting the transfer to him. The Fifth District in *IRMO Rogliano*, 198 Ill.App.3d 404, 144 Ill.Dec. 595, 555 N.E.2d 1114 (5th Dist. 1990), held that the trial court should allocate the exemption based upon which parent will contribute the majority of the support for the child. See also *IRMO Clabault*, 249 Ill.App.3d 641, 188 Ill.Dec. 799, 619 N.E.2d 163 (2d Dist. 1993).

More recent case law has begun to fine tune this issue in cases where it is a close call as to which parent is contributing the majority of the support for the children. *IRMO Moore*, 307 Ill.App.3d 1041, 241 Ill.Dec. 465, 719 N.E.2d 326 (5th Dist. 1999), involved post-divorce proceedings in which the ex-husband claimed the children's expenses were $1,520 per month and his child support amounted to 51.9% of those expenses. He argued the party paying the majority of the children's expenses is entitled to the dependency exemptions, citing three cases. *Claubult, Fowler (197 Ill.App.3d 95, 143 Ill.Dec. 305, 554 N.E.2d 240 (3d Dist. 1990)) and Rogliano*. The ex-wife agreed with the ex-husband's reading of the cases he cited, but argued that he did not provide a majority of the children's support because the children's expenses were more than $1,520 per month.

The *Moore* court held the allocation of dependency tax exemptions is an element of a support award. As such it is a topic over which a trial court has "considerable discretion." *Moore* commented that although *Rogliano* held that in allocating exemptions the court should consider which parent will provide the majority of the child's support, and although *Clabault* affirmed an award of all exemptions to the parent providing more than 51% of the children's support, these holdings did not require an award of all tax exemptions to the parent paying the majority of the children's support. The *Moore* court stated that because the children's expenses were found to be more than $5,120 per month, the ex-husband was not paying more than 51% of the children's support, rendering the *Rogliano* and *Clabault* holdings inapplicable. The appellate court found no abuse of discretion in dividing the tax exemptions between the two parents who each paid approximately half of the expenses for the children.

Any judgment of dissolution of marriage should specify that the parties shall execute such I.R.S. forms as are required to effect the allocation of the dependency exemptions. While Illinois case law seems to hold that the trial court should allocate the dependency exemption based upon which parent will contribute the **majority** of child support, this would make no sense in cases where the child support payor is in the highest income tax brackets because of the phase-out of the exemption at the high income end. The court should take a practical approach in these cases, allocating the exemptions to each party based upon who would take the greater economic benefit from them.

A case which was similar to the *Moore* holding is *Stockton v. Oldenburg*, 305 Ill.App.3d 897, 238 Ill.Dec. 1013, 713 N.E.2d 259 (4th Dist. 1999). The trial court apparently found the parties equally contributed to the rearing of the child, and awarded each party the tax exemption in alternate years. The appellate court stated that this was neither an abuse of discretion nor against the manifest weight of the evidence.

Finally, *IDPA Ex Rel. Schmid v. Williams*, 36 Ill.App.3d 553, 271 Ill.Dec. 198, 784 N.E.2d 416 (4th Dist., 2003), GDR 03-23, addressed the issue of whether in a post-decree case the actual number of exemptions claimed must be used for child support purposes. This may be at issue because often the payor will have remarried and then have the benefit of being able to claim exemptions for children by the current marriage. The argument is that the exemptions are awarded due to increased costs of raising the children.

Schmid v. Williams ruled that when calculating net income, the court should examine the obligor's exemption withholding status at the time modification is sought, rather than at the time of the original judgment. Note, however, this case should be considered in conjunction with case law requiring consideration of the tax impact of a potential new spouse – which may be quite difficult to determine. For example, potential new spouse's income will often place an individual in a higher tax bracket thus largely or entirely offsetting the impact of gaining additional dependency exemptions.

C. **Child Care Credit**: See outline of Dennis Casty

VII. **Failure to Withhold / Pay Over Income for Support**:

See separate detailed outline.

IX. **Other Case Law Re Support Enforcement**:

A. **Burden of Proof Re Payments is on Payor after Court Takes Judicial Notice of Existence of Support Obligation**:

A recent case addressing enforcement of support is the Second District's *IRMO Smith* decision. 347 Ill.App.3d 395, 282 Ill.Dec. 430, 806 N.E.2d 727 (Second Dist., 2004). What was interesting was the ex-wife's testimony was based upon "guesstimates" of the arrearage. The discussion regarding the burden of proof is significant in that it correctly places the burden on the payor when it states, "In this case,

Sharon's reference to the dissolution judgment and child support orders established the existence of William's support obligation. William, then, bore the burden of proving that he paid the obligation. Admitting that neither party presented compelling evidence on the issue of payment, the court found that William failed to meet his burden of proof. We conclude that the court's finding is not against the manifest weight of the evidence."

B. **Support Paid Directly Rather Than Through SDU – A Warning**:

IRMO Paredes, No. 1-05-1525 (1st Dist., February 16, 2007) presents a warning to Illinois lawyers and to child support payors in any case where the mother may have been on public aid. The *Paredes* court ruled that the trial court erred when it gave the father, the obligor, credit for the support payments paid to the mother, 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 §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 seminar 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 Borland*, 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 creates 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 remarkably suggests:

> 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 states – good luck.

X. <u>**Imputing Income**</u>:

Often, courts are faced with the issue of a child support payor who terminates his (or her) employment. Historically, case law in Illinois has stressed the issue of whether the termination of employment was made in bad faith, i.e., in an effort to avoid a child support obligation. However, several recent cases has addressed the issue that more often occurs -- where an individual quits a job to take another job with potentially better long term prospects which at first pays substantially less than the previous job. The significant Illinois decision regarding this issue is *IRMO Sweet*, 316 Ill.App.3d 101, 249 Ill.Dec. 212, 735 N.E.2d 1037 (2nd Dist. 2000), GDR 00-88. *Sweet* imputed income in modification proceedings where a payor started his own business and voluntarily left his employment with an exterminating business. While this court commented that the termination was in bad faith, the focus on this case was on whether an individual could remain self-employed at a lower rate of income. One of the key factors is which party has the burden of proof. The *Sweet* decision commented upon this and stated:

> A party seeking to decrease his or her child support obligation based on a voluntary change in employment must demonstrate that the action was taken in good faith and not to evade financial responsibility to his or her children. *In re Marriage of Maczko*, 263 Ill. App. 3d 991, 994 (1992); *Mitteer*, 241 Ill. App. 3d at 227. Absent good faith, the voluntary termination of employment does not warrant an abatement of child support. *In re Marriage of Dall*, 212 Ill. App. 3d 85, 95-96 (1991).

Then the *Sweet* court made the comment, "Rather, if a court finds that a party is not making a good-faith effort to earn sufficient income, the court may set or continue that party's support obligation at a higher level appropriate to the party's skills and experience." In *Sweet* the husband earned a net income of $15,000 per year prior to his termination of employment and then earned less each year while self-employed. Therefore, the facts of *Sweet* should be kept in consideration in a case where it is urged that the court should impute income to a self-employed individual. The court then stated, "While a party's desire to remain self-employed is not insignificant, the above cases show that the interests of the other spouse and the children may sometimes take precedence."

IRMO Adams, 284 Ill.Dec. 124, 809 N.E.2d 246 (3d Dist. 2004) also addressed imputed income. The husband argued that the trial court erred in setting child support while he was unemployed because after he voluntarily quit his job he sought and obtained a higher paying job. The appellate court stated:

> It is well established that courts have the authority to compel parties to pay child support at a level commensurate with their earning potential. Sweet . A court may impute additional income to a noncustodial parent who is voluntarily underemployed. *Sweet*.
>
> In this case, Steven voluntarily terminated his employment in Washington D.C. because he had better career prospects in Germany. As shown by his testimony, Steven was confident that he would make more money in Germany. Therefore, it appears that he received a benefit from setting child support based on his prior income, which was lower than his expected future income. In any event, we find that the trial court did not exceed its authority in setting child support based on Steven's prior income because he was voluntarily unemployed and his prior income reflected his earning potential.

In *IRMO Hubbs*, 363 Ill. App. 3d 696, 843 N.E.2d 478, 300 Ill. Dec. 220 (Fifth Dist., 2006), as discussed above, the new development in Illinois case law imputes income based upon the previous job without stressing the bad faith termination of previous employment where the father rejected a job offer and had uncertain current income because his pay was based upon commissions. The *Hubbs* court held that the trial court did not err in imputing to the husband a base gross income of $115,000 (based upon an average of the past three years of his previous employment.) In addition, the husband was required to pay 13% of the gross income above this amount. The husband urged that the trial court erred in imputing income to him based upon his previous employment.

What is interesting is that in *Hubbs* there was income averaging based upon a past job in light of the uncertain nature of the income from the current job. In the husband's current job, his ultimate income would be based upon commissions. He received an advance of $7,500 monthly and these advances were loans which would then have to be repaid from commissions. The husband was responsible for all expenses related to the production of his income. The husband urged that the trial court should have determined his net income to be $2,367 per month. The appellate court applied the facts of the case to its decision as follows:

> Mark's income for the previous three years was $133,000, $114,009, and $169,319, respectively. Mark also testified that he had recently rejected a job offer that would have paid him a salary of $120,000 a year. We believe that based on the evidence in this case, the circuit court acted properly in imputing Mark's gross income at $115,000. This figure is slightly below his average income for the previous three years and slightly below a salary that he could have earned had he accepted another position. Although the circuit court could have required Mark to pay a percentage of his net income to Peggy, we believe that it acted properly in determining gross income to be $115,000.

IRMO Tegeler, 365 Ill. App. 3d 448, 848 N.E.2d 173, 302 Ill. Dec. 173 (Second Dist., 2006), the ex-wife argued that bank records showed that respondent spent an average of $72,000 per year from 2002 through 2004 on personal items, ski trips, restaurants, and cash withdrawals and that he never explained how his checking account was funded. The appellate court stated:

> Respondent partially explained the source of funding for his checking account. However, to the extent that respondent's personal spending exceeded his "net income" of $50,000 to $70,000 per year, we agree that the source of such money is unexplained and should be considered as an additional resource for child support. In arriving at our conclusion, we emphasize that respondent testified that his checking account was funded solely from farming proceeds and not, for example, from loans. We also note that the unexplained funds do not appear to have been carried over from prior years' savings; according to bank statements in the record, respondent's checking account had a balance of $844.25 on January 15, 2002. Of course, any checks that correspond to the deductions allowed in section 505(a)(3) or to documented expenditures for the farm should not be included as unexplained resources, because they have already been taken into account in calculating respondent's net income.

A recent imputed income case is *IRMO Sanfratello*, (1st Dist., July 27, 2009) discussing the large unexplained cash available to the husband (likely from his pizza businesses):

> In the absence of credible evidence from Michael regarding his net income, Judge Brewer imputed a $130,000 annual net income to Michael, based on the uncontested evidence that Michael had a steady flow of cash available to him. Michael now contends the support award is not reasonable under the circumstances because the $130,000 figure was "random, or a mystery." We disagree with Michael's characterization of Judge Brewer's calculations.

Gosney is the only reversal of an Illinois trial court's imputation of income within the past decade. *IRMO Gosney*, (October 13, 2009). The appellate decision will be quoted at length regarding the three reasons that it reversed the trial court:

> First, this is not a case in which the noncustodial parent was voluntarily unemployed. In Adams, the payor father quit his job and moved to Germany to live with his girlfriend without first obtaining employment. The court imputed income based on findings that the father was voluntarily unemployed and his prior income reflected his earning potential. *Adams*, 348 Ill. App. 3d at 344.
>
> Here, the trial court found that Gregory was involuntarily unemployed, and the evidence supports that conclusion. Gregory testified that he was forced out of the company by Dearborn's unfair and oppressive negotiation tactics and was asked to leave the firm when he failed to agree to the terms. Gregory was terminated and, within months, found another position in the financial management industry. He did not willingly decide to leave his job and then remain unemployed.
>
> Second, **nothing in the record suggests an attempt to evade a support obligation**. In Sweet, the court imputed income to the noncustodial parent, noting that the payor's self-employment produced little income, and he either misrepresented his income or willfully refused to support his children. The reviewing court concluded that without a good-faith effort to satisfy his support obligation, additional income was properly imputed based on the payor's earning potential. *Sweet*, 316 Ill. App. 3d at 107-08. In this case, immediately after Gregory lost his job, he began searching for new employment. Once those efforts proved fruitless, he started his own investment company in an attempt to quickly generate income. When self-employment was unsuccessful, he joined his wife's financial firm and utilized his training and expertise to earn a living. Gregory never neglected to pay child support under the 2004 order. He faithfully honored his obligation to support his children, **even increasing his payments on his own accord in 2006 when his income substantially increased**. He was not attempting to evade his support obligation.
>
> Third, **there is no evidence of an unreasonable failure to take advantage of an employment opportunity**. In *Hubbs*, the appellate court upheld an imputed income of

$115,000 because the noncustodial parent's income for the previous three years was $133,000, $114,000, and $169,319 and he recently rejected a job that would have paid him $120,000 per year. *Hubbs*, 363 Ill. App. 3d at 706-07.

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