

# 2019-2021 SURVEY OF ILLINOIS LAW: FAMILY LAW

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## I. INTRODUCTION

Following significant legislative changes to the Illinois Marriage and Dissolution of Marriage Act (“IMDMA”) in 2016,<sup>1</sup> and subsequent changes to the IMDMA’s child support and maintenance portions in 2017<sup>2</sup> and 2019,<sup>3</sup> respectively, 2019 to 2021 saw several legislative “clean-up” bills, and multiple new case law trends arising from applying these changes.

This Survey Article is an update to the *2017-2018 Survey of Family Law*,<sup>4</sup> and again seeks to assist family law practitioners and judges keep abreast of the most significant recent legislative changes and case law related to family law. These legislative changes are summarized in Section II, followed by summaries of select family law-related cases from 2019 to 2021 in Section III. This Article selectively reviews statutes and cases that highlight several of the current legislative and case law trends during this time period.

## II. SELECTED LEGISLATIVE CHANGES

This section focuses on legislative changes that have passed since 2019. Notably, the *2017-2018 Survey of Family Law* contains a lengthy discussion of amendments to the Illinois maintenance statute, 750 ILCS 5/504, which was passed in 2018 and became effective on January 1, 2019.<sup>5</sup> During 2019 to 2021, there were no major legislative changes to the IMDMA or the Illinois Parentage Act. This section will briefly discuss some drafting tips for divorce agreements arising since enactment of these statutory changes to maintenance, as well as some “clean-up” legislation enacted from 2019 to 2021.

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<sup>1</sup> 750 ILL. COMP. STAT. 5/.

<sup>2</sup> *Id.* at 5/505.

<sup>3</sup> *Id.* at 5/504.

<sup>4</sup> Stephanie L. Tang, *2017-2018 Survey of Illinois Law: Family Law*, 43 S. ILL. UNIV. L. J. 845 (2019).

<sup>5</sup> *Id.*

### A. Drafting Tips for Family Law Practitioners and Judges in the Wake of the January 1, 2019, Amendments to 750 ILCS 5/504

In the statutory review section of the *2017-2018 Survey of Family Law*, this author discussed the changes to taxability of maintenance orders which became effective January 1, 2019, such that maintenance orders entered after that date are no longer deductible by the payor nor taxable to the payee spouse.<sup>6</sup> In addition to this change in taxation, the 2017 Tax Cuts and Jobs Act<sup>7</sup> also provided that parties who were under maintenance orders entered before January 1, 2019 could choose whether the change in taxability would apply if their maintenance orders were modified after January 1, 2019.<sup>8</sup> It is important for attorneys negotiating orders to modify maintenance that were entered pre-January 1, 2019, to let their clients know about this choice.<sup>9</sup> Moreover, attorneys and judges in these situations should consider drafting express language in the modified orders, providing that the parties clearly stipulate that the payment of maintenance shall retain—or not retain—its taxable nature for state and federal income tax purposes.<sup>10</sup> By adding this safeguard language, attorneys can prevent either party from seeking to vacate an order modifying maintenance by claiming they were unaware of their choice to also change taxability of maintenance.<sup>11</sup>

### B. Protective Order Act Modifications

Between 2019-2021, a string of relatively minor amendments was passed regarding protection for domestic violence victims,<sup>12</sup> summarized below.

#### 1. Public Act 101-138

Public Act 101-138 modified Section 110-10 of the Illinois Code of Criminal Procedure to provide that if a defendant is unable to post a bail bond, courts have the discretion to impose a no contact provision between the defendant and the victim that will be enforceable as long as the defendant remains in custody.<sup>13</sup>

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<sup>6</sup> *Id.* at 858.

<sup>7</sup> Tax Cuts and Jobs Act, Pub. L. 115-97, § 11051(a) 131 Stat. 2054, 2089 (2017).

<sup>8</sup> Tang, *supra* note 4, at 857.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Rory T. Weiler, *Beware! Drafting Tips for Post-Jan. 1, 2019 Maintenance Modification Orders*, FAM. L. SECTION COUNCIL NEWSL. (IL. STATE BAR ASS'N., SPRINGFIELD, ILL.), June 2019, at 1, 3.

<sup>12</sup> 725 ILL. COMP. STAT. 5/110-10 (2019); 750 ILL. COMP. STAT. 36/209 (2019); 740 ILL. COMP. STAT. 21/20 (2019); 10 ILL. COMP. STAT. 5/20-3 (2021); 740 ILL. COMP. STAT. 21/60 (2019).

<sup>13</sup> Pub. Act 101-138, 2020 Ill. Laws § 5 (amending 725 ILL. COMP. STAT. 5/110-10(h)).

## 2. *Public Act 101-211*

Public Act 101-211 added protection for cases filed under the Uniform Child-Custody Jurisdiction and Enforcement Act (“UCCJEA”).<sup>14</sup> Specifically, the Act provides that if a filing party alleges in its pleading or affidavit that disclosing its address would lead to a potential risk of abuse or harm to that party, or family member of that party, then the address does not have to be included.<sup>15</sup> Importantly, the party is also not required to provide the address of a domestic violence safe house or address that was changed due to a protective order.<sup>16</sup>

## 3. *Public Act 101-255*

Public Act 101-255 was passed in part to address the issue of respondents being tipped off that a person attended court to seek an *ex parte* emergency stalking no contact order, or an *ex parte* emergency order of protection, and thereafter evading service when the sheriff comes to the door.<sup>17</sup> As amended, the Stalking No Contact Order Act<sup>18</sup> now provides that when a petitioner files either of the preceding *ex parte* orders, that petition will not become publicly available until it is served on respondent.<sup>19</sup> Accordingly, for litigants seeking counsel after they obtain an *ex parte* order, they should ensure they retain a copy of the original petition and order as their attorney will not be able to view or retrieve it from the courthouse until it is served. This will help any attorney, who subsequently appears in the case, prepare for a hearing on extending the emergency relief.

## 4. *Public Act 101-508*

Public Act 101-508 amends the Stalking No Contact Order Act,<sup>20</sup> Civil No Contact Order Act,<sup>21</sup> and the Illinois Domestic Violence Act of 1986.<sup>22</sup> Specifically, all three acts were amended to provide that if a stalking no contact order, civil no contact order, or order of protection is entered on an emergency basis on a court holiday or in the evening, the court shall immediately file a certified copy of the order with the sheriff, or the law

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<sup>14</sup> 750 ILL. COMP. STAT. 36/209 (2019).

<sup>15</sup> *Id.* at 36/209(f).

<sup>16</sup> *Id.*

<sup>17</sup> Stalking No Contact Order Act, Pub. Act 101-255, 2020 Ill. Laws § 5 (amending 740 ILL. COMP. STAT. 21/20).

<sup>18</sup> 740 ILL. COMP. STAT. 21/1 *et seq.* (2010).

<sup>19</sup> *Id.* at 21/20(a-5), 21/95(a-5).

<sup>20</sup> *Id.* at 21/1 *et seq.* (2010).

<sup>21</sup> 40 ILL. COMP. STAT. 22/101 *et seq.* (2004).

<sup>22</sup> 750 ILL. COMP. STAT. 60/101 *et seq.* (1986).

enforcement official charged with maintaining Department of State Police records as opposed to the following day.<sup>23</sup>

### C. Confidentiality of Court-Ordered Counseling

Public Act 102-0349 addressed the increasing concern amongst Guardians ad Litem and Child Representatives regarding the confidentiality of court-ordered therapy in court proceedings.<sup>24</sup> Both Guardians ad Litem and Child Representatives are appointed to investigate the best interests of the children, which is done through interviews with the children, home visits, and interviews with both parents.<sup>25</sup> The primary difference is that unlike a guardian ad litem, the child representative cannot be called as a witness to testify.<sup>26</sup>

It is helpful to examine the background of Section 607.6 of the IMDMA to understand these legislative changes. Counseling was previously addressed in Section 608(f) of the IMDMA, which provided: “All counseling sessions shall be confidential. The communications in counseling shall not be used in any manner in litigation nor relied upon by any expert appointed by the court or retained by any party.”<sup>27</sup> In 2016, with the overhaul of the IMDMA, Section 608(f) was repealed, leaving no comparable confidentiality provision from 2016-2017.<sup>28</sup>

In 2017, Section 607.6 of the IMDMA was enacted, restating the prior language of Section 608(f).<sup>29</sup> However, the statute was unclear about whether Guardians ad Litem and Child Representatives were considered “experts.”<sup>30</sup> Regardless, in practice, this provision has imposed an overly broad restriction on custody experts appointed under Section 604.10 of the IMDMA.<sup>31</sup> It also infringed on the authority and access of Guardians ad Litem and Child Representatives because it meant that counseling sessions would be inaccessible to these individuals, and would not be admissible for any purpose (on the merits or for impeachment) in court.<sup>32</sup> Effectively, if a Guardian ad Litem, Child Representative, or custody expert appointed

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<sup>23</sup> 740 ILL. COMP. STAT. 21/95(c)(3) (2021).

<sup>24</sup> Pub. Act 102-349, 2021 Ill. Laws § 5 (amending 750 ILL. COMP. STAT. 5/607.6).

<sup>25</sup> *Child Representative/Guardian Ad Litem*, CIR. CT. OF COOK CNTY., <https://www.cookcountycourt.org/ABOUT-THE-COURT/County-Department/Domestic-Relations-Division/Child-Rep-Guardian-Ad-Litem-GAL#2971440-what-is-a-child-representative> (last visited July 7, 2022).

<sup>26</sup> *Id.*

<sup>27</sup> 750 ILL. COMP. STAT. 5/608(f) (repealed by Pub. Act 099-90, 2016 Ill. Laws § 5-20).

<sup>28</sup> Lisa Giese & Melissa Marin, *Navigating Section 607.6 of the IMDMA: The Use of Counseling Communications in Litigation*, DUPAGE CNTY. BAR ASS’N. BRIEF, at 20 (2019).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 28.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

pursuant to 750 ILCS 5/604.10 considered any communications with a counselor in making recommendations or written reports to the court, it could be a basis for disqualification.<sup>33</sup>

On top of this broad restriction, the plain language of Section 607.6 also directly conflicted with Illinois Supreme Court Rule 907, which provides, in pertinent part:

**(b) Every child representative, attorney for a minor child and guardian *ad litem* shall have the right to interview his or her client(s) without any limitation or impediment. Upon appointment of a child representative, attorney for the child or guardian *ad litem*, the trial court shall enter an order to allow access to the child and all relevant documents.**<sup>34</sup>

Moreover, Sections 602.5 and 602.7 of the IMDMA provided that the court should consider “the mental and physical health of all individuals involved” in determining what was in the best interests of the children.<sup>35</sup> This language directly conflicted with Section 607.6, thereby impeding an attorney’s ability to fully advocate on behalf of their clients.

Section 607.6 of the IMDMA, as previously drafted, precluded a large part of this mental health analysis.<sup>36</sup> Moreover, the previous version of Section 607.6 contradicted with the provisions of the Mental Health and Developmental Disabilities Confidentiality Act (“Disabilities Confidentiality Act”).<sup>37</sup> Specifically, the Disabilities Confidentiality Act provides that Guardians ad Litem are permitted to access counseling records, even if the children are over twelve years old and have not consented.<sup>38</sup>

Based on the foregoing inconsistencies, the Illinois legislature passed an amendment to Section 607.6 in 2021,<sup>39</sup> such that it now provides, in pertinent part: “Counseling ordered under this Section is subject to the Mental Health and Developmental Disabilities Confidentiality Act and the federal Health Insurance Portability and Accountability Act of 1996.”<sup>40</sup> This amendment clarifies the intersection between the IMDMA and the aforementioned acts, and affords Guardians ad litem and Child Representatives the ability to use information given by a therapist in family court proceedings after the necessary releases are executed.<sup>41</sup>

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<sup>33</sup> Law Offices of Schlesinger and Strauss, LLC, *Guardians Ad Litem Beware*, LAKE CNTY. BAR ASS’N. at 1, 4 (Apr. 2018), <https://illinois-family-lawyer.com/wp-content/uploads/2018/04/Guardian-Ad-Litem-Beware-.pdf>.

<sup>34</sup> ILL. SUP. CT. R. 907(b).

<sup>35</sup> 750 ILL. COMP. STAT. 5/602.5(c)(3), 5/602.7(b)(7) (2021).

<sup>36</sup> *Id.* at 5/607.6(d) (amended by Pub. Act 102-349, 2021 Ill. Laws § 5).

<sup>37</sup> 740 ILL. COMP. STAT. 110/1 *et seq.* (2022).

<sup>38</sup> *Id.* at 110/4(a)(5).

<sup>39</sup> 750 ILL. COMP. STAT. 5/607.6(d) (2021).

<sup>40</sup> *Id.* at 5/607.6(d).

<sup>41</sup> *Id.*

#### D. Child-Support-Related Amendments

The other group of amendments made between 2019 and 2021 related to child support.

##### 1. *Public Act 101-0336*

Public Act 101-0336 applied to individuals who previously had their driver's license suspended once for failure to pay child support.<sup>42</sup> Previously, 625 ILCS 5/7-704 provided that if an individual already had his license suspended once, then a second order of non-payment was entered against the obligor; if the obligor failed to comply with the second order, the Secretary of State was required to again suspend the obligor's driver's license until the obligor was fully compliant with the second non-payment order.<sup>43</sup> Public Act 101-0336 adds an alternative option: the obligor may arrange for payment of the arrearages and any current support obligation "in a manner satisfactory to the court."<sup>44</sup> This allows obligors who may not have the financial ability to come current on all support obligations to retain the ability to drive to work, so long as a court-negotiated payment plan is in place.

##### 2. *Public Act 101-0461*

Public Act 101-0461 amended the Illinois Public Aid Code as it related to job searches.<sup>45</sup> First, it amended the code to provide that, for public aid recipients who are required to comply with a service plan developed by the Illinois Department of Children and Family Services ("DCFS"), certain activities specified in the service plan shall count as an approvable job search activity under Temporary Assistance for Needy Families ("TANF") employment, education, and training programs; the Supplemental Nutrition Assistance Program ("SNAP") Employment and Training Program; and any job search, training, and work programs authorized under Article IX of the code.<sup>46</sup> The specified activities include participation in substance abuse treatment, drug testing, parenting classes, anger management, domestic violence counseling, and evaluations.<sup>47</sup>

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<sup>42</sup> Stay of Driver's License Suspension for Child Support Arrearage Law, Pub. Act 101-336, 2019 Ill. Laws § 10 (codified as amended at 625 ILL. COMP. STAT. 5/7-704).

<sup>43</sup> 625 ILL. COMP. STAT. 5/7-704(b) (2019).

<sup>44</sup> *Id.*

<sup>45</sup> Children and Young Adult Mental Health Crisis Act, Pub. Act 101-461, 2020 Ill. Laws § 40 (codified as amended at 305 ILL. COMP. STAT. 5/9-6).

<sup>46</sup> 305 ILL. COMP. STAT. 5/9-6 (2022).

<sup>47</sup> *Id.*

### 3. *Public Act 102-0087*

Public Act 102-0087 amends provisions in Section 505.2 of the IMDMA regarding health insurance coverage for children.<sup>48</sup> Specifically, the legislation removes prior contradictions between Sections 505 and 505.2 of the IMDMA resulting from the amendments to Section 505 in July 2017.<sup>49</sup> Section 505(a) of the IMDMA, as amended, now requires both parties to share the cost of the child's health insurance in proportion to their respective net incomes.<sup>50</sup> This legislation conforms the language of Section 505.2 to reflect the new structure of shared responsibility and adds the definitions of "insurance obligor" and "insurance obligee" to make a distinction between party designations for support and insurance purposes.<sup>51</sup>

## E. Temporary Orders Regarding Relocation

### 1. *Public Act 102-0143*

Public Act 102-0143 addressed the lack of language in the IMDMA governing temporary orders for relocation.<sup>52</sup> Prior to its enactment, there was no statutory relief available for litigants seeking to relocate with a child during the pendency of their divorce proceedings. Public Act 102-0143 added Section 603.5(a-5) to the IMDMA, which granted courts the discretion to order relocation on a temporary basis if it is within the child's best interests.<sup>53</sup> The Act specifically provides that the relocation shall not prejudice either parent in the allocation of parental responsibilities contained in the final allocation judgment.<sup>54</sup>

## III. SELECTED CASE LAW UPDATES

In 2016, the Illinois legislature adopted Public Act 099-0090, which amended the majority of the IMDMA, effective January 1, 2016.<sup>55</sup> There were two major subsequent amendments to the IMDMA. First, as elaborated further below, the child support statute was modified effective July 1, 2017, from using the Percentage of Income model to using the Income Shares

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<sup>48</sup> Pub. Act 102-87, 2022 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/505.2).

<sup>49</sup> Pub. Act 099-764, 2017 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/505).

<sup>50</sup> 750 ILL. COMP. STAT. 5/505(a)(4) (2022).

<sup>51</sup> *Id.* at 5/505.2 (2022).

<sup>52</sup> Pub. Act 102-143, 2022 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/603.5).

<sup>53</sup> 750 ILL. COMP. STAT. 5/603.5(a-5).

<sup>54</sup> *Id.*

<sup>55</sup> Pub. Act 99-90, 2016 Ill. Laws §§ 5-15 (codified as amended at 750 ILL. COMP. STAT. 5/101 *et seq.*).



model.<sup>56</sup> Additionally, as set forth above, the formula for calculating the amount of maintenance was amended in 2019,<sup>57</sup> after a statutory change amended the income cap for maintenance guidelines and eliminating the former cliffs for duration of maintenance in 2018.<sup>58</sup>

Finally, on November 20, 2020, the Illinois Supreme Court amended Illinois Supreme Court Rule 23(e) to allow litigants to cite to unpublished opinions from the Illinois Appellate court for persuasive purposes, effective January 1, 2021.<sup>59</sup> Accordingly, for purposes of this Article, the author will outline several relevant unpublished cases issued after January 1, 2021.<sup>60</sup>

#### A. The Spread of the “What Was Contemplated? Virus”

##### 1. Background of “What was Contemplated?” Cases

There is a line of cases issued since the amendments to 750 ILCS 5/505 that are referred to as the “what was contemplated?” cases.<sup>61</sup> These cases have similar fact patterns: there was a support order or judgment entered prior to July 1, 2017, under which one party was obligated to pay child support based on a percentage of its income.<sup>62</sup> After entry of the support judgment, 750 ILCS 5/505 was amended from utilizing the Percentage of Income Model<sup>63</sup> to employing the Income<sup>64</sup> As a result of this amendment, the payor spouse would substantially benefit from a reduction in support under the new model, so the payor spouse often filed a Motion to Modify the child support, alleging there was a “substantial change in circumstances” warranting modification<sup>65</sup>

To understand the spread of the “what was contemplated” case law, this section will first review cases that were decided prior to the enactment of the Income Shares model in Illinois. Prior to July 1, 2017, the three primary “contemplation” cases from Illinois jurisprudence relied upon by the

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<sup>56</sup> Pub. Act 99-764, 2017 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/505).

<sup>57</sup> Pub. Act 100-923, 2019 Ill. Laws § 10 (amended at 750 ILL. COMP. STAT. 5/504).

<sup>58</sup> Pub. Act 100-520, 2018 Ill. Laws § 15 (amended at 750 ILL. COMP. STAT. 5/504).

<sup>59</sup> ILL. SUP. CT. R. 23(e).

<sup>60</sup> For purposes of these case summaries, the author has chosen to generally refer to the parties as “Mother/Father” or “Husband/Wife” for the reader’s ease. Names of the parties in each case can be obtained in the respective opinions.

<sup>61</sup> See generally Judge Arnold F. Blockman, (ret.), *The ‘What Was Contemplated...’ Virus is Spreading – It is Time to Mitigate!*, FAM. L. SECTION COUNCIL NEWSL. (ILL. STATE BAR. ASS’N, SPRINGFIELD, ILL.), Dec. 2020, at 1.

<sup>62</sup> *Id.*

<sup>63</sup> Contemplating only a percentage of the payor’s income. *Child Support Guideline Models*, NAT’L. CONF. OF STATE LEGISLATURES (July 10, 2020), <https://www.ncsl.org/research/human-services/guideline-models-by-state.aspx>.

<sup>64</sup> *Id.*

<sup>65</sup> To receive a modification under the IMDMA, 750 ILL. COMP. STAT. 5/510 requires the petitioning party to prove a “substantial change in circumstances” has occurred. 750 ILL. COMP. STAT. 5/510.

subsequent decisions were: *In re Marriage of Mulry*,<sup>66</sup> *In re Marriage of Hughes*,<sup>67</sup> and *In re Marriage of Reynard*.<sup>68</sup> This section will then provide necessary legislative background to the 2017 shift in child support, explore cases following the legislative changes to 750 ILCS 5/505, and conclude with a summary of the recently passed Senate Bill 3036,<sup>69</sup> which directly addresses the problem stemming from this line of cases.

## 2. *In re Marriage of Mulry*

In *Mulry*, the parties entered into a Marital Settlement Agreement (“MSA”) that contained two provisions relating to child support: (1) Husband was to pay child support to Wife until the child “attain[ed] full emancipation as defined in Article VII of this agreement” and (2) Husband would pay 80% of the child’s college expenses.<sup>70</sup> Importantly, Article VII of the parties’ agreement defined emancipation as “... if the child is attending post-secondary education, the child’s graduation from college... or reaching age 23...”<sup>71</sup> Once the child turned eighteen and enrolled in college, pursuant to the language of the agreement, Husband started paying both child support and a percentage of the child’s college expenses.<sup>72</sup> Husband filed a Motion for Clarification and/or Modification, claiming his intent was to only pay for child support post-high school or college expenses, but not both.<sup>73</sup>

The Fourth District Appellate Court affirmed the denial of Husband’s Motion and found the language was clear and did not require clarification.<sup>74</sup> The court reasoned that

... the parents’ present circumstances are the same as contemplated when they entered into the separation agreement and the same as existed at the last time of the last modification. [Husband] argues that his payment of college expenses creates a substantial change in circumstances, but the agreement entered into by [Husband] and [Wife] ‘freely and voluntarily’ provided for this very occurrence.<sup>75</sup>

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<sup>66</sup> *In re Marriage of Mulry*, 732 N.E.2d 667 (Ill. App. Ct. 2000).

<sup>67</sup> *In re Marriage of Hughes*, 751 N.E.2d 23 (Ill. App. Ct. 2001).

<sup>68</sup> *In re Marriage of Reynard*, 883 N.E.2d 535 (Ill. App. Ct. 2008).

<sup>69</sup> Pub. Act 102-823, 2022 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/510).

<sup>70</sup> *Mulry*, 732 N.E.2d at 669.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 669-70.

<sup>73</sup> *Id.* at 670.

<sup>74</sup> *Id.* at 671.

<sup>75</sup> *Id.* at 671-2.

Effectively, the court held Husband could not receive a modification or clarification of the support order when the error laid with his failure to read the agreement carefully.<sup>76</sup>

### 3. *In re Marriage of Hughes*

In *Hughes*, the parties' original Judgment provided that Husband would pay \$1,113 per month in child support, along with non-modifiable rehabilitative maintenance for twelve months, and twelve monthly payments on a car awarded to Wife. Nine months later, Wife filed a petition to modify and increase Husband's child support based on the additional expendable income he had available after finishing payment of the spousal maintenance and car payments. Wife argued Husband's increase in expendable income constituted a substantial change in circumstances.<sup>77</sup> The Second District Appellate Court reversed the trial court's ruling, increasing Husband's child support obligation.<sup>78</sup> The court reasoned that there was no substantial change in circumstances because the termination of both the Husband's fixed term maintenance and car payments were "contemplated and expected by the court" when the court entered the parties' divorce judgment.<sup>79</sup>

### 4. *In re Marriage of Reynard*

The *Reynard* court also considered whether there was a substantial change in circumstances following the termination of payments ordered pursuant to a parties' divorce judgment.<sup>80</sup> In *Reynard*, the trial court ordered Husband to pay maintenance to Wife and to continue paying for his child's college expenses.<sup>81</sup> At the time the original award of maintenance was made, the child was a sophomore in college.<sup>82</sup> Aligned with the analysis set forth in *Mulry* and *Hughes*, the appellate court found there was no substantial change in circumstances where the trial court was aware that Husband's college payment obligation would terminate and that the college payment order had "played out as the court anticipated."<sup>83</sup> The court relied partly on the fact that due to the entry of the original support order, which excluded the mortgage on Husband's home, he was forced to take out an additional \$68,000 in debt partially due to loans taken for his child's college education.<sup>84</sup>

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<sup>76</sup> *Mulry*, 732 N.E.2d 667.

<sup>77</sup> *Hughes*, 751 N.E.2d at 24-5.

<sup>78</sup> *Id.* at 27.

<sup>79</sup> *Id.* at 26.

<sup>80</sup> *Reynard*, 883 N.E.2d at 536-7.

<sup>81</sup> *Id.* at 539.

<sup>82</sup> *Id.* at 537.

<sup>83</sup> *Id.* at 541-2; *see also Mulry*, 732 N.E.2d 667; *see also Hughes*, 751 N.E.2d 23.

<sup>84</sup> *Reynard*, 883 N.E.2d at 538.

Notably, *Mulry*, *Hughes*, and *Reynard* reflect a small and infrequently cited line of case law prior to July 1, 2017, and consequently, the “what was contemplated” analysis was dormant from 2008 to 2017.<sup>85</sup>

#### 5. July 1, 2017 Statutory Changes

Crucial legislation breathing life back into the “what was contemplated” line of cases was the passage of Public Act 99-764, modifying Section 505 of the Illinois Marriage and Dissolution of Marriage Act.<sup>86</sup> The general framework of the Act was to shift the calculation of child support from exclusively being based on a percentage of one parent’s income, to instead being based upon the parents’ combined income and respective overnight parenting time.<sup>87</sup> If a non-custodial parent exercises more than 146 overnights a year, the parent’s support obligation drops substantially.<sup>88</sup> Unfortunately, this potentially drastic decrease in child support has incentivized payor spouses to seek modifications to their support obligations pursuant to a pre-July 1, 2017 order.<sup>89</sup> Notably, the Act specifically provides that its enactment in and of itself “does not constitute a substantial change in circumstances warranting modification.”<sup>90</sup> Thus, these payor spouses would need to base their modification motions on a basis outside of change in the legislature itself.

#### 6. *In re Marriage of Salvatore*

In *In re Marriage of Salvatore*, three children were born to the parties.<sup>91</sup> The original Marital Settlement Agreement (“MSA”) provided that Husband would pay 32% of his net income for child support under the prior-existing child support statute in Illinois.<sup>92</sup> Wife was unemployed at the time the judgment was entered.<sup>93</sup> Although the parties referenced the possibility of Wife obtaining future employment in the MSA, this possibility was not referenced in the “Child Support” section of the agreement.<sup>94</sup>

Husband filed a Petition to Modify Child Support alleging his reduction in income constituted a substantial change in circumstances.<sup>95</sup> The Petition

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<sup>85</sup> Blockman, *supra* note 61, at 3.

<sup>86</sup> 750 ILL. COMP. STAT. 5/505.

<sup>87</sup> Tang, *supra* note 4, at 846.

<sup>88</sup> *Id.* at 853.

<sup>89</sup> Blockman, *supra* note 61, at 3.

<sup>90</sup> 750 ILL. COMP. STAT. 5/510.

<sup>91</sup> *In re Marriage of Salvatore*, 2019 IL App (2d) 180425 at ¶ 3.

<sup>92</sup> *Id.* at ¶ 4.

<sup>93</sup> *Id.* at ¶ 8.

<sup>94</sup> *Id.* at ¶ 5.

<sup>95</sup> *Id.* at ¶ 6.

also noted that Wife had obtained new employment with an income of \$45,000 per year, but originally did not list this as a “substantial change in circumstances.”<sup>96</sup> Husband later amended his Petition to conform with the proofs.<sup>97</sup>

In finding that the parties had “contemplated” the possibility of Wife obtaining employment, the court specifically highlighted the following:

1. In the parties’ MSA health insurance section: “If for any reason health insurance is not provided through *either party’s employer*, then [Husband] shall secure health insurance...”<sup>98</sup>
2. In the parties’ Joint Parenting Agreement, the parties agreed to keep each other informed of “*their places of employment* and the phone numbers of their places of employment.”<sup>99</sup>
3. In the parties’ Joint Parenting Agreement, the parties agreed they would “cooperate in scheduling make-up parenting time in the event a party’s parenting time gets canceled for reasons *beyond his or her control and other than for work related cancellations*.”<sup>100</sup>
4. In addition to the highlighted language, before the parties reached an agreement setting temporary child support, Husband filed a Motion to compel Wife to seek employment, alleging she was “voluntarily unemployed.”<sup>101</sup>

This case has stirred up much turmoil amongst Illinois practitioners as the language relied upon by the court to show a “contemplation” of Wife obtaining employment was previously considered “boilerplate” and its existence in an agreement could be nothing more than practitioners merely copying and pasting language from a prior agreement without realizing its potentially damaging consequences.<sup>102</sup> The *Salvatore* decision’s dicta muddies this ruling further, noting that even if the court were to skip the contemplation analysis, Husband’s argument for modification would still fail because Wife’s increase in income (\$41,000) was miniscule compared to Husband’s total income (\$400,000); further, all three children primarily

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<sup>96</sup> *Salvatore*, 2019 IL App (2d) 180425.

<sup>97</sup> *Id.* at ¶ 10.

<sup>98</sup> *Id.* at ¶ 26.

<sup>99</sup> *Id.* at ¶ 29.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at ¶ 30.

<sup>102</sup> Wes Cowell, *Salvatore Gums Up Child Support Modifications with New ‘What Was Contemplated?’ Analysis*, FAM. L. SECTION NEWSL. (ILL. STATE BAR ASS’N., SPRINGFIELD, ILL.), Apr. 2019, at 1, 4.

resided with Wife, so there was still no substantial change in circumstances.<sup>103</sup>

### 7. *In re Marriage of Connelly*

In *Connelly*, the parties entered into a Judgment for Dissolution of Marriage (the “Judgment”) awarding joint custody, with Wife as the primary custodial parent.<sup>104</sup> In the Judgment, Husband was ordered to pay 28% of his net income for child support.<sup>105</sup> In May 2016, the parties agreed to an increase of parenting time.<sup>106</sup> However, Husband waited until October 2017, after the switch in the statutory model, to file a Motion to Modify his child support obligation.<sup>107</sup> In his Motion, Husband had three arguments that a substantial change in circumstances had occurred: (1) his salary increased by \$10,000; (2) Wife’s income increased by 50%; and (3) Husband’s parenting time increased from 32% to 45% of the year.<sup>108</sup>

The appellate court found there was no substantial change in circumstances for the following reasons: (1) Husband’s \$10,000 increase in income was not a change because the parties had included a true-up provision for any income earned over his \$100,000 base salary at the time of the agreement; (2) the increase in Wife’s income was primarily from dividends received from an inheritance that both parties were aware of at the time of the agreement; and (3) Husband’s increase in parenting time was not a substantial change because Husband failed to show that the additional costs for caring for his children were “excessive or uncommon” as required by the statute.<sup>109</sup>

### 8. *In re Marriage of Solecki*

In *Solecki*, the parties divorced and entered into an MSA in January 2015.<sup>110</sup> The MSA ordered Husband to pay \$4,700 per month, which was 32% of his net income at the time.<sup>111</sup> The MSA also contained a “true-up” provision, ordering the parties to true-up on an annual basis to ensure

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<sup>103</sup> *Salvatore*, 2019 IL App (2d) 180425 at ¶ 34.

<sup>104</sup> *In re Marriage of Connelly*, 2020 IL App (3d) 180193 at ¶ 1.

<sup>105</sup> *Id.* at ¶ 4.

<sup>106</sup> *Id.* at ¶ 5.

<sup>107</sup> *Id.* at ¶ 6.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at ¶¶ 25-7.

<sup>110</sup> *In re Marriage of Solecki*, 2020 IL App (2d) 190381 at ¶ 1.

<sup>111</sup> *Id.* at ¶ 5.

Husband paid 32% of his actual net income annually.<sup>112</sup> The parties agreed to use a definition of net income that deviated from the statute.<sup>113</sup>

In September 2017, Husband filed a Motion to Modify his child support obligation based on an alleged substantial change in circumstances.<sup>114</sup> Namely, he argued that Wife opened a massage studio with potential income of \$50,000 annually, while he had decreased his workload.<sup>115</sup> He further asked the court to conduct true-up calculations for 2015, 2016, and 2017, and requested that the court apply all relevant deductions under Section 505(a)(3) of the IMDMA.<sup>116</sup> The trial court agreed with Husband and granted his Motion, finding there was a substantial change in circumstances.<sup>117</sup>

However, the court found that the true-up provisions negotiated and incorporated into the parties' MSA failed to include all of the statutory deductions allowable under Section 505 for determining net income, which "would result in a windfall for Wife."<sup>118</sup> The trial court reasoned that the true-up provisions failed to include deductions for federal, state, FICA, or Medicare taxes, which should have been deducted in calculating Husband's net income.<sup>119</sup> In calculating amounts owed by Husband for 2015-2017, the trial court reduced Husband's W-2 and business income by his "federal and state income taxes, social security contributions, health insurance premiums, and maintenance."<sup>120</sup> The trial court then decided to deviate upward from the statutory child support from \$3,452 per month to \$4,000 per month, and eliminated the true-up provisions altogether moving forward.<sup>121</sup>

On appeal, Wife argued that the trial court erred in prospectively striking the true-up provisions, and also erred in not applying the deductions as negotiated by the parties and incorporated into their MSA retroactively.<sup>122</sup> Wife contended that parties' plain intent for the specific definition of "net income" within the MSA regarding true-up provisions was to exclude the other deductions otherwise contained in Section 505(a)(3) for determining Husband's net income.<sup>123</sup> She further disputed there had been a substantial

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at ¶ 11; see also Stephanie L. Tang, *Case Study: In re Marriage of Solecki – Examining its Rulings and Potential Consequences*, YOUNG L. DIV. COUNCIL NEWSL. (ILL. STATE BAR ASS'N., SPRINGFIELD ILL.), Sept. 2020, at 1, 5.

<sup>115</sup> *Solecki*, 2020 IL App (2d) 190381 at ¶ 12.

<sup>116</sup> *Id.* at ¶ 14.

<sup>117</sup> *Id.* at ¶ 36.

<sup>118</sup> *Id.* at ¶ 34.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at ¶ 35.

<sup>121</sup> *Solecki*, 2020 IL App (2d) 190381 at ¶ 37.

<sup>122</sup> *Id.* at ¶ 42.

<sup>123</sup> *Id.* at ¶ 57.

change in circumstances since entry of the Judgment for Dissolution of Marriage.<sup>124</sup>

Regarding the true-up provisions, the appellate court reasoned that resolution of the issue hinged upon interpretation of the MSA to ascertain the parties' intent and to determine the MSA's compliance with Section 505 of the IMDMA.<sup>125</sup> For both of these *de novo* analyses, the appellate court looked at the language of the statute and the MSA, given their plain and ordinary meaning.<sup>126</sup> Relying on the Illinois Supreme Court's decision in *In re Marriage of McGrath*, the appellate court explained that although a trial court may deviate from the amount of support the guidelines generate, a trial court does not have the authority to deviate from the measure of net income to which the guidelines apply.<sup>127</sup> Based on its reading of the statute, the court found that the only basis for deviation permitted in Section 505 is in the amount of child support, but not in how "net income" is calculated.<sup>128</sup> The court held that although the parties in *Solecki* agreed to an alternative definition of "net income," this was not permissible or valid.<sup>129</sup> Citing *Fisher*, the court quoted, "it is well settled that it is the *court's responsibility*, not the parties' responsibility, to determine the adequacy and amount of child support."<sup>130</sup>

As to the substantial change in circumstances, the court noted that neither party had contemplated the possibility that the appellate court would affirm the trial court's elimination of the true-up provisions in their entirety.<sup>131</sup> The court also observed that such was in and of itself a substantial change in circumstances warranting a potential modification of child support.<sup>132</sup>

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<sup>124</sup> *Id.* at ¶ 42.

<sup>125</sup> *Id.* at ¶ 51.

<sup>126</sup> *Id.*

<sup>127</sup> *Solecki*, 2020 IL App (2d) 190381 at ¶¶ 53-54 (relying on *In re Marriage of McGrath*, 2012 IL App (2d) 112792 at ¶ 10).

<sup>128</sup> Notably, 750 ILL. COMP. STAT. 5/505 was amended on July 1, 2017, and now allows a court to deviate from the child support guidelines if the "application would be inequitable, unjust, or inappropriate." 750 ILL. COMP. STAT. 5/505(a)(3.4) (2017). 750 ILL. COMP. STAT. 5/505(a)(3)(E)(I) as amended does also now allow for the parties to agree on a different computation method specifically for an "individualized tax amount" to reach a party's net income, but still allows a court to reject this computation for good cause. Further, 750 ILL. COMP. STAT. 5/505(a)(3.1) as amended as it relates to "business income" does not expressly allow parties to deviate from the added definition of "net business income."

<sup>129</sup> *Solecki*, 2020 IL App (2d) 190381 at ¶ 63.

<sup>130</sup> *Id.* (citing *In re Marriage of Fisher*, 2018 IL App (2d) 170384 at ¶ 25).

<sup>131</sup> *Id.* at ¶ 74.

<sup>132</sup> *Id.*



### 9. *In re Marriage of Dea*

*In re Marriage of Dea* presented a “what was contemplated” question as it related to a prior maintenance award.<sup>133</sup> Specifically, in *Dea*, the court entered a divorce judgment awarding Husband \$1,600 per month in maintenance after finding that he could not support himself in the future after he was diagnosed with multiple sclerosis.<sup>134</sup> Five years later, Husband filed a motion to modify maintenance, alleging his medical condition had now worsened and he had no ability to work, his retirement account balance had dropped substantially, and his income had decreased.<sup>135</sup> The appellate court affirmed, noting that at the time the original judgment was entered, Husband was already unable to work due to his medical diagnosis and the court had already been made aware his diagnosis would slowly worsen over time.<sup>136</sup>

### 10. *In re Marriage of Dynako*

Although *In re Marriage of Dynako* did not expressly follow the “what was contemplated” analysis, it provided an important takeaway for cases as it related to language contained in an MSA.<sup>137</sup> In *Dynako*, the parties entered into an MSA which provided that Husband would pay Wife maintenance, and that “[s]aid maintenance payments shall be non-modifiable pursuant to Section 502(f) of the IMDMA.”<sup>138</sup> Despite this language, Husband attempted to file a Motion to Modify Maintenance, alleging the language was not dispositive as to modifiability of maintenance because it did not specifically provide whether the non-modifiability applied to amount, duration, or both.<sup>139</sup> The First District Appellate Court and subsequently, the Supreme Court of Illinois, affirmed the trial court’s denial of Husband’s motion, finding that the language of the MSA clearly indicated maintenance would be nonmodifiable as to both amount and duration.<sup>140</sup> Practitioners and judges intending for maintenance to only be nonmodifiable as to either amount or duration should look to *In re Marriage of Dynako* for guidance, as this case demonstrates why this information should be specified in the original drafting.<sup>141</sup>

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<sup>133</sup> See *In re Marriage of Dea*, 2013 IL App (1st) 122213.

<sup>134</sup> *Id.* at ¶¶ 3, 5, 7.

<sup>135</sup> *Id.* at ¶ 8.

<sup>136</sup> *Id.* at ¶ 20.

<sup>137</sup> See *In re Marriage of Dynako*, 2021 IL 126835; see also *In re Marriage of Dynako*, 2020 IL App (1st) 192116.

<sup>138</sup> *Dynako*, 2020 IL App (1st) 192116 at ¶ 5.

<sup>139</sup> *Id.* at ¶ 10.

<sup>140</sup> *Id.* at ¶ 34; see also *Dynako*, 2021 IL 126835 at ¶¶ 20-22.

<sup>141</sup> See *Dynako*, 2021 IL 126835; see also *Dynako*, 2020 IL App (1st) 192116.

### 11. *In re Marriage of Durdov*

*In re Marriage of Durdov* added another layer of complication for practitioners in Chicago, as it was the first of the “what was contemplated” line of cases decided by the First District Appellate Court.<sup>142</sup> In *Durdov*, at the time the parties entered into a Joint Parenting Agreement and MSA, Husband was employed full time and Wife was employed part time.<sup>143</sup> Husband was ordered to pay non-modifiable maintenance in the amount of \$3,196 per month for four years and \$975 per month in the fifth year.<sup>144</sup> These numbers were calculated based on an annual imputed income of \$20,000 to Wife and \$211,000 to Husband.<sup>145</sup> Husband further agreed to pay 28% of his net income for child support.<sup>146</sup> In Husband’s Motion to Modify, the Husband alleged Wife obtained a full-time job, which was a substantial change in circumstances.<sup>147</sup> The trial court granted Husband’s Motion, reducing his child support obligation from \$2,776 per month to \$1,567 per month.<sup>148</sup> On appeal, the appellate court reversed the trial court’s decision.<sup>149</sup> The court noted that there was a pre-trial order requiring Wife to seek career counseling, and that proved the parties contemplated that Wife would obtain full-time employment.<sup>150</sup> The court explained that the existence of these orders evidenced the parties’ mutual understanding that Wife may expand her employment beyond part-time status.<sup>151</sup>

### 12. *In re Marriage of Elmore*

The unpublished opinion of *In re Marriage of Elmore* capped off 2021 with another “contemplation” case.<sup>152</sup> In *Elmore*, the parties entered into a Judgment for Dissolution of Marriage incorporating an MSA in April 2015 following a twenty-nine-year marriage.<sup>153</sup> The MSA ordered Husband to pay maintenance of \$6,923 bi-weekly in the first year based on the parties’ “... intent of and agreement ... that their respective incomes shall be equalized.”<sup>154</sup> Following exchange of their tax returns, they agreed to true-

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<sup>142</sup> Blockman, *supra* note 61.

<sup>143</sup> *In re Marriage of Durdov*, 2021 IL App (1st) 191811 at ¶ 4.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at ¶ 6.

<sup>148</sup> *Durdov*, 2021 IL App (1st) 191811 at ¶ 13.

<sup>149</sup> *Id.* at ¶ 1.

<sup>150</sup> *Id.* at ¶ 27.

<sup>151</sup> *Id.* at ¶ 3.

<sup>152</sup> *In re Marriage of Elmore*, 2021 IL App (1st) 210123-U.

<sup>153</sup> *Id.* at ¶ 4.

<sup>154</sup> *Id.*

up annually to equalize their respective gross annual incomes.<sup>155</sup> The MSA further provided that Husband's maintenance obligation would be reviewable five years after the date of entry of the parties' Judgment if Wife filed a Petition to Extend; and provided only a "substantial change in circumstances of the parties should warrant a modification and/or limitation to the continuation of reviewable maintenance for [Wife]."<sup>156</sup> Notably, the MSA provided that Wife was already employed "at her full capacity" and was "under no obligation to seek further education or retraining as a condition to continued maintenance."<sup>157</sup>

On the date the parties entered into their MSA, both of their attorneys and the court acknowledged that "substantial change in circumstances" was not the statutory standard for reviewable maintenance.<sup>158</sup> Rather, the court typically considers the factors under Section 504 of the IMDMA, including a payee spouse's future earning potential and ability to obtain further income.<sup>159</sup> However, the court noted that the "substantial change in circumstances" standard was enforceable because it was agreed to by the parties and was not unconscionable, even though it was not the correct legal standard.<sup>160</sup>

On December 9, 2019, Wife filed a Petition to Extend Husband's Maintenance, alleging there had been no substantial change in circumstances that would warrant limiting or discontinuing her maintenance obligation.<sup>161</sup> Husband argued a substantial change had occurred because, Wife was in a better financial position because of his maintenance payments to her, and he had developed some medical issues.<sup>162</sup> The parties stipulated that their respective incomes had increased each year since entry of the Judgment for Dissolution of Marriage.<sup>163</sup>

In affirming the trial court's decision granting Wife's Petition, the appellate court agreed that the plain language of the parties' MSA stated Wife's maintenance would continue unless one of the delineated termination factors occurred (Wife's remarriage, cohabitation, or death) or there was a substantial change in circumstances.<sup>164</sup> Relying on *Salvatore*,<sup>165</sup> the appellate court noted the parties had already contemplated any future increases in either of their incomes when they entered into the MSA by providing that

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at ¶ 5.

<sup>157</sup> *Id.* at ¶ 5.

<sup>158</sup> *Elmore*, 2021 IL App (1st) 210123-U at ¶ 7.

<sup>159</sup> *Id.* at ¶ 14.

<sup>160</sup> *Id.* at ¶ 7.

<sup>161</sup> *Id.* at ¶ 8.

<sup>162</sup> *Id.* at ¶ 13.

<sup>163</sup> *Id.* at ¶ 14.

<sup>164</sup> *Elmore*, 2021 IL App (1st) 210123-U at ¶¶ 2, 5.

<sup>165</sup> *See Salvatore*, 2019 IL App (2d) 180425 at ¶ 24.

they would equalize their incomes on an annual basis through a true-up.<sup>166</sup> Moreover, the court opined that the change in the parties' respective incomes was "not so vast that the parties could not have reasonably contemplated or expected [them]."<sup>167</sup>

### 13. *In re Marriage of Yabush*

*In re Marriage of Yabush* is the most recent published case to be decided in the line of "what was contemplated" cases, at the time of this article.<sup>168</sup> *Yabush* establishes when a circumstance was not contemplated at the time the original Judgment for Dissolution of Marriage was entered despite the existence of a true-up provision.<sup>169</sup> In *Yabush*, the original Judgment was entered based on Husband earning \$138,000 per year and Wife earning \$85,000 per year.<sup>170</sup> The Judgment ordered Husband to pay child support on 28% of his net base pay, plus "28% of the net income from any bonuses or commissions he receives."<sup>171</sup> In analyzing the request for modification, the court distinguished the language in the parties' Judgment from the true-up provisions in *In re Marriage of Durdov* and *In re Marriage of Connelly*.<sup>172</sup> The court highlighted that the true-up provisions in *Durdov* and *Connelly* were more "expensive," providing that the payor would pay 28% of any additional income.<sup>173</sup> In contrast, in *Yabush*, the court found the parties' original Judgment for Dissolution of Marriage, as drafted, only contemplated that Husband's income may fluctuate due to his work as a salesman, thereby affecting his bonus and commission income.<sup>174</sup> The clear language of the Judgment did not extend to contemplate Husband starting his own company and his income increasing sixteen-fold.<sup>175</sup>

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<sup>166</sup> *Elmore*, 2021 IL App (1st) 210123-U at ¶ 21.

<sup>167</sup> *Id.* at ¶ 22.

<sup>168</sup> *In re Marriage of Yabush*, 2021 IL App (1st) 201136.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at ¶¶ 1, 2 (emphasis added).

<sup>171</sup> *Id.* at ¶ 5 (emphasis added).

<sup>172</sup> *Connelly*, 2020 IL App (3d) 180193 at ¶ 1.

<sup>173</sup> *Yabush*, 2021 IL App (1st) 201136 at ¶ 15 (citing *Durdov*, 2021 IL App (1st) 191811 at ¶ 28 (provision required supporting party to pay "an amount equal to twenty-eight percent (28%) of any additional net income received from any other source including but not limited to bonuses, commissions, compensation for consulting projects, and other forms of income); *Connelly*, 2020 IL App (3d) 180193 at ¶ 4 (provision required supporting party to pay "28% of the 'net of any future performance bonus, commission, or additional income over [his] current annual base gross income of \$100,000'").

<sup>174</sup> *Yabush*, 2021 IL App (1st) 201136 at ¶ 42.

<sup>175</sup> *Id.* at ¶ 37.

#### 14. Legislative Change to 750 ILCS 5/510

Although slightly outside the scope of this survey article, it is important to note there was a recent legislative “fix” following the string of cases discussed in this section. At the end of 2021, the Illinois State Bar Association Family Law Section Council drafted proposed legislation to clarify when a court should consider “what was contemplated” at the time the parties entered into a Judgment for Dissolution.<sup>176</sup> This legislation was introduced to the Illinois Senate as Senate Bill 3036 on January 5, 2022, and was signed into law by Governor Pritzker on May 13, 2022.<sup>177</sup> The bill provides that foreseeability or contemplation of a change by the parties shall not be a factor or defense in arguing that a substantial change in circumstances has occurred unless the event was expressly specified in the court’s order.<sup>178</sup> Further, the legislation places the burden on the drafter as it provides that the order or agreement must explicitly delineate whether the occurrence of an event will or will not constitute a substantial change in circumstances to warrant modification of the order.<sup>179</sup> This includes future changes in employment status, as well as substantial increases or decreases in employment, particularly where the parties’ agreement contains a “true-up” provision.<sup>180</sup>

#### B. Determination of Income for Support Cases

The amendments to Section 505 of the IMDMA, effective July 1, 2017,<sup>181</sup> and Section 504 of the IMDMA, effective January 1, 2019,<sup>182</sup> opened several new questions regarding how courts should define “income” when calculating maintenance and child support. The following case summaries outline recent considerations in determining income for support purposes arising from these statutory amendments.

##### 1. *In re Marriage of Benyon*

*In re Marriage of Benyon* addressed the inclusion of the Social Security Disability Insurance (“SSDI”) dependent benefit as a party’s income for purposes of calculating support.<sup>183</sup> The *Benyon* court entered a Judgment for

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<sup>176</sup> Pub. Act 102-823, 2022 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/510).

<sup>177</sup> *Illinois Senate Bill 3036*, LEGISCAN, <https://legiscan.com/IL/bill/SB3036/2021> (last visited Sept. 6, 2022).

<sup>178</sup> Pub. Act 102-823, 2022 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/510).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> 750 ILL. COMP. STAT. 5/505.

<sup>182</sup> *Id.* at 5/504.

<sup>183</sup> *In re Marriage of Benyon*, 2019 IL App (3d) 180364 at ¶ 1.

Dissolution of Marriage on January 30, 2018.<sup>184</sup> At the time the judgment was entered, the parties' child was entitled to an SSDI benefit based on Husband's disability.<sup>185</sup> However, instead of including the SSDI benefit as part of Husband's gross income, the court ordered that the benefit be deposited into a joint account to be used for the child's "excess expenses," including child care expenses, tuition and other educational expenses, medical expenses, and extracurricular activities.<sup>186</sup> Any remaining benefit was saved for the child's benefit.<sup>187</sup>

On appeal, the appellate court reversed, finding there was no statutory authority to allow the trial court to order that the SSDI benefit be put into an account for the child's future needs.<sup>188</sup> The appellate court noted the benefit was received as a result of Husband's earnings, and it was intended for the child's current support.<sup>189</sup> Indeed, the clear language of 750 ILCS 5/505(a)(3)(A), as amended, required the court to include the SSDI dependent benefit in the benefit-generating parent's gross income for support calculations.<sup>190</sup>

## 2. *In re Marriage of Lugge*

*In re Marriage of Lugge* considered whether the trial court properly considered interest income received by Wife and retained earnings in Husband's business as income to each, respectively.<sup>191</sup> As to Wife's income, the appellate court found the trial court did not abuse its discretion when it applied a reduced rate of return of 6.5% to her \$950,000 in cash assets to calculate her interest income.<sup>192</sup> The court found that the reduced rate of return allowed Wife to pay outstanding debts, despite evidence showing that the interest income on the assets was actually 9.93%.<sup>193</sup> Similarly, the court considered \$27,791 in qualified and unqualified dividends from Husband's investments as income to him as well.<sup>194</sup> Relying on *In re Marriage of Rogers*,<sup>195</sup> the court noted that including interest and dividend income was appropriately considered as "income" for support purposes and was defined as income from all sources.<sup>196</sup>

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<sup>184</sup> *Id.* at ¶ 3.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Benyon*, 2019 IL App (3d) 180364 at ¶ 8.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *In re Marriage of Lugge*, 2020 IL App (5th) 190046 at ¶¶ 4, 11, 14, 17-20.

<sup>192</sup> *Id.* at ¶ 17.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at ¶ 18.

<sup>195</sup> *In re Marriage of Rogers*, 820 N.E.2d 386, 390 (Ill. 2004).

<sup>196</sup> *Lugge*, 2020 IL App (5th) 190046 at ¶ 11.

As to Husband's business income, the court rejected Wife's argument that cash retained by Husband's business should be imputed to him.<sup>197</sup> The appellate court again found the trial court did not abuse its discretion by determining that the retained earnings may be necessary to "secure its continued existence and appropriate capitalization to meet ongoing business necessities."<sup>198</sup> This analysis reaffirmed that whether retained earnings should be classified as "income" to a majority shareholder for support purposes is a case-by-case, fact specific analysis.<sup>199</sup> Here, the trial court found Husband's testimony credible that his business required cash reserves to acquire lower bonding rates for large commercial projects and to help the company meet its weekly payroll.

### 3. *In re Marriage of Dahm-Schell*

*In re Marriage of Dahm-Schell* addressed the question of whether mandatory distributions or withdrawals taken from an inherited individual retirement account (IRA) containing money that was never imputed against the recipient for purposes of maintenance and child support constituted "income" to the recipient.<sup>200</sup> Specifically, Husband inherited \$615,000 from his mother who died during the dissolution of marriage proceeding.<sup>201</sup> The majority of the inherited monies were held in two IRAs.<sup>202</sup> Due to federal law, Husband was required to take distributions of \$10,731 annually from said IRAs.<sup>203</sup> When entering its judgment, the court only included Husband's dividend earnings from these IRAs in his income for calculating his support obligations.<sup>204</sup> It specifically excluded Husband's mandatory distributions.<sup>205</sup>

In analyzing the issues, the Supreme Court of Illinois first emphasized that the definition of "income" under the IMDMA is broadly construed as "income from all sources."<sup>206</sup> The court next rejected Husband's argument that these distributions were double counted against him, noting Husband never earned or contributed to the inherited IRAs, so any distributions he received from the accounts were additional increases in his wealth that facilitated his ability to support a child.<sup>207</sup> Based on the foregoing, the Supreme Court of Illinois affirmed the appellate court's ruling reversing the

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<sup>197</sup> *Id.* at ¶ 18.

<sup>198</sup> *Id.* (citing *In re Marriage of Moorthy*, 2015 IL App (1st) 132077 at ¶ 64).

<sup>199</sup> *Id.* at ¶¶ 18, 20.

<sup>200</sup> *In re Marriage of Dahm-Schell*, 2021 IL 126802 at ¶ 1.

<sup>201</sup> *Id.* at ¶ 5.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at ¶ 12.

<sup>204</sup> *Id.* at ¶ 13.

<sup>205</sup> *Id.*

<sup>206</sup> *Dahm-Schell*, 2021 IL 126802 at ¶ 17.

<sup>207</sup> *Id.* at ¶ 52 (citing *In re Marriage of Mayfield*, 2013 IL 114655).

trial court, finding that the trial court should have included the mandatory IRA distributions as Husband's income.<sup>208</sup>

#### 4. *In re Marriage of Ash and Matschke*

*In re Marriage of Ash and Matschke* emphasized that determining sources of income still requires a case-by-case factual analysis despite the broad definition of income under Section 505 of the IMDMA.<sup>209</sup> Specific to the question of what constitutes income, Husband filed a Motion to Modify both his child support and maintenance obligations, noting Wife borrowed money from her parents which should be considered her income for purposes of calculating support.<sup>210</sup> At the hearing, Wife testified that for the money borrowed from her parents, she executes promissory notes from time to time and kept a running tally of how much she owed to them despite not making payments to return funds borrowed.<sup>211</sup> Further, the court stressed that the monies borrowed would be correctly classified as a loan if it "directly increase[d]" Wife's wealth and required repayment.<sup>212</sup> However, the court found that the borrowed monies merely made up the shortfall that was otherwise needed to meet her monthly expenses and therefore were properly excluded from wife's income for purposes of calculating support.<sup>213</sup>

#### 5. *In re Marriage of Gabriel*

*In re Marriage of Gabriel* reaffirmed precedent discussing when employing an "income averaging" approach is appropriate.<sup>214</sup> In *Gabriel*, the trial court relied on an average of Husband's 2016 and 2017 income after concluding his income was difficult to ascertain due to his "lack of credibility and failure to disclose all his sources of income."<sup>215</sup> Specifically, the trial court found Husband's 2017 W-2 income dropped by nearly half compared to his 2016 W-2 income "without explanation."<sup>216</sup> Husband argued this was not a "fluctuation" but merely a "decline" and the court should have also considered his 2018 income if it did average his incomes.<sup>217</sup> However, the appellate court noted it did not appear Husband introduced his 2018 income

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<sup>208</sup> *Id.* at ¶ 68.

<sup>209</sup> *In re Marriage of Ash & Matschke*, 2021 IL App (1st) 200901.

<sup>210</sup> *Id.* at ¶ 16.

<sup>211</sup> *Id.* at ¶ 22.

<sup>212</sup> *Id.* at ¶ 14.

<sup>213</sup> *Id.* at ¶ 9.

<sup>214</sup> *In re Marriage of Gabriel*, 2020 IL App (1st) 182710.

<sup>215</sup> *Id.* at ¶ 40.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at ¶ 41.



into evidence at trial.<sup>218</sup> Under these circumstances, the appellate court determined it was not an abuse of discretion for the trial court to employ an income averaging approach.<sup>219</sup>

#### 6. *In re Marriage of Osseck*

Following the discussion of true-up provisions generally above, the court in *In re Marriage of Osseck* interestingly still advocates for use of a true-up provision when one party has a fluctuating income.<sup>220</sup> In *Osseck*, Husband's income was variable and commission based.<sup>221</sup> Since the parties' dissolution of marriage, his income declined from \$811,218 to \$766,000 in 2018 and \$688,000 in 2019.<sup>222</sup> However, because there was a lack of clarity in Husband's testimony as to what his future income would be, the court ordered Husband to pay a straight percentage certain of his gross income.<sup>223</sup> The appellate court affirmed the trial court's finding that there was a substantial change in circumstances, but reversed the modification of Husband's maintenance, finding that the court improperly limited the scope of testimony and did not consider all relevant factors under Sections 504 and 510 of the IMDMA.<sup>224</sup>

Importantly, for the purposes of calculating a party's income, the appellate court reprimanded the trial court's use of a percentage-based order to account for fluctuations in Husband's income.<sup>225</sup> The appellate court analyzed that percentage-based orders may impede the legislature's intent that the parties must prove a substantial change in circumstances prior to modification and may allow a trial court to escape its duties to consider statutory factors and subsequently, result in unjust maintenance payments.<sup>226</sup> The court gave the example of when a payor's income substantially decreases to the point the amount paid no longer meets the payee's needs.<sup>227</sup> Instead, the court suggested the "better approach" would be to bifurcate the award into a guaranteed dollar amount plus an additional percentage amount (effectively, a true-up provision).<sup>228</sup> However, as outlined above, this approach may still result in a windfall annual payment if the payor's income increases substantially.

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at ¶ 42.

<sup>220</sup> *In re Marriage of Osseck*, 2021 IL App (2d) 200268 at ¶ 73.

<sup>221</sup> *Id.* at ¶ 11.

<sup>222</sup> *Id.* at ¶¶ 14, 28.

<sup>223</sup> *Id.* at ¶ 28.

<sup>224</sup> *Id.* at ¶ 2.

<sup>225</sup> *Osseck*, 2021 IL App (2d) 200268 at ¶ 72.

<sup>226</sup> *Id.* at ¶ 71.

<sup>227</sup> *Id.* at ¶ 72.

<sup>228</sup> *Id.* at ¶ 73.

### 7. *In re Marriage of Thompson*

*In re Marriage of Thompson* addressed issues regarding calculation of both spouse's income for purposes of calculating support.<sup>229</sup> In *Thompson*, Wife was the primary breadwinner, earning \$214,000 per year as a product manager for a software company.<sup>230</sup> Thompson Reuters purchased Wife's software company shortly before the trial on the underlying divorce and added to her compensation structure that she may be eligible for a discretionary bonus every year.<sup>231</sup> However, at trial, the court did not include any consideration of bonus income in calculating maintenance.<sup>232</sup> The appellate court affirmed, noting the purpose of maintenance is to maintain both spouses' standard of living enjoyed "during the marriage."<sup>233</sup> As Wife had never received a bonus during the marriage, the appellate court found there was no abuse of discretion.<sup>234</sup>

Husband was ordered to obtain gainful employment and began working part-time as a deli delivery driver earning \$9,600 per year.<sup>235</sup> However, at trial, Husband testified that he took a test designed to attribute a value to services a stay-at-home parent provides on an annual basis and the test found the value of his services was \$20,000 more than Wife's entire gross annual income at the time.<sup>236</sup> Based on this statement and his admission that he earned a "large hourly rate" from his part-time job, the appellate court affirmed the trial court's ruling imputing an income of \$40,000 to Husband.<sup>237</sup>

### 8. *In re Marriage of Sinha*

In addition to amending the child support statute from a percentage of income model to the income shares model, Public Act 99-764 also codified the concept of imputation of income into Section 505 of the IMDMA.<sup>238</sup> Specifically, Section 505(a)(3.2) now provides, "If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income."<sup>239</sup> The Act goes on to cite several factors for determining potential income, including the obligor's "work history,

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<sup>229</sup> *In re Marriage of Thompson*, 2021 IL App (1st) 192555-U at ¶ 1.

<sup>230</sup> *Id.* and ¶ 4.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at ¶ 40.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Thompson*, 2021 IL App (1st) 192555-U at ¶ 5.

<sup>236</sup> *Id.* at ¶ 18.

<sup>237</sup> *Id.* at ¶ 41.

<sup>238</sup> Pub. Act 99-764, 2017 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/505).

<sup>239</sup> 750 ILL. COMP. STAT. 5/505(a)(3.2).

occupational qualifications, prevailing job opportunities, the ownership by a parent of a substantial non-income producing asset, and earnings levels in the community.”<sup>240</sup> This amendment in practice has led to the increased hiring of occupational experts and subpoenas to employers for personnel files to determine circumstances surrounding a party’s termination to determine if imputing income is appropriate.<sup>241</sup>

However, *In re Marriage of Sinha* asserts that there are still limitations to imputing income to a party.<sup>242</sup> In *Sinha*, Husband testified that during the marriage, he ran three businesses: an Amazon store and two eBay stores, which he ran by purchasing items in cash and reselling them.<sup>243</sup> He testified that he had a medical degree from India but could not pass the United States board examinations after multiple attempts.<sup>244</sup> At trial, the court imputed \$125,000 as and for Husband’s income based on his income in 2015.<sup>245</sup> However, on appeal, the appellate court noted there was no evidence presented that Husband could actually obtain a job earning \$125,000 a year.<sup>246</sup> The appellate court found the trial court merely “relied on speculation” rather than evidence of Husband’s current job opportunities.<sup>247</sup> This ruling highlighted that courts cannot merely rely on evidence that no longer reflects future income and where their spouse was involuntarily terminated, a litigant seeking to impute income must present evidence that there is a job with the same salary available.<sup>248</sup>

### C. Limiting Circumstances of Cohabitation

#### 1. Cohabitation After *Herrin* and *Miller*

Section 510 of the IMDMA provides that unless otherwise agreed to by the parties, a payor spouse’s maintenance obligation shall terminate if the recipient spouse begins cohabiting with another individual on a resident, continuing conjugal basis.<sup>249</sup> Once maintenance is terminated, it cannot be reinstated, even if the payor spouse’s new relationship ends.<sup>250</sup> Illinois case law jurisprudence regarding cohabitation has evolved substantially over the

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<sup>240</sup> *Id.*

<sup>241</sup> Tang, *supra* note 4, at 849.

<sup>242</sup> *In re Marriage of Sinha*, 2021 IL App (2d) 191129 at ¶¶ 40-47.

<sup>243</sup> *Id.* at ¶ 18.

<sup>244</sup> *Id.* at ¶ 45.

<sup>245</sup> *Id.* at ¶ 44.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Sinha*, 2021 IL App (2d) 191129 at ¶ 43.

<sup>249</sup> 750 ILL. COMP. STAT. 5/510 (2021).

<sup>250</sup> Jordan Rosenberg, Shana Vitek, & James Quigley, *Can I Date Without Losing My Maintenance?*, FAM. L. NEWSL. (ISBA), June 2020, at 1.

past ten years.<sup>251</sup> Two cases that primarily govern analysis of subsequent opinions are *In re Marriage of Herrin*<sup>252</sup> and *In re Marriage of Miller*.<sup>253</sup> *Herrin* first established the six-factor test used to examine whether a finding of conjugal cohabitation was appropriate.<sup>254</sup> Specifically, the court looked at: (1) the length of the relationship; (2) the amount of time spent together; (3) the nature of activities engaged in; (4) the interrelation of personal affairs (including finances); (5) whether they vacation together; and (6) whether they spend holidays together.<sup>255</sup> While courts still use the factors articulated in *Herrin* to guide their analysis, the test itself has been widely criticized for creating a much broader evidentiary standard for terminating maintenance than the legislature intended.<sup>256</sup> *In re Marriage of Miller* placed the *Herrin* test in the narrower context of, when considering the totality of the circumstances, whether the relationship arises to the level of a “*de facto* marriage.”<sup>257</sup> Subsequent cases have followed a hybrid of *Herrin* and *Miller*, still engaging in a fact-specific analysis on a case-by-case basis.<sup>258</sup>

Critics of the cohabitation doctrine point to two primary concerns.<sup>259</sup> First, that it inherently presumes that “marriage” can be defined by a set of objective parameters, such as the articulated *Herrin* test factors.<sup>260</sup> Second, the test defines marriage by objective measures (i.e., whether the couple has a joint bank account) rather than virtues.<sup>261</sup> Critics argue that the maintenance recipient’s new partner is likely receiving a financial benefit from sharing monies received as maintenance. This presumes collective trust that if the partner allows the spouse to not engage in activities contained on the list (i.e., by not moving in together, not commingling finances, not posting photos on social media together), they trust that the recipient spouse will share the monies with them.<sup>262</sup>

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<sup>251</sup> See Tang, *supra* note 4, at 863 (exploring Illinois jurisprudence surrounding cohabitation as a terminating factor for spousal maintenance).

<sup>252</sup> *In re Marriage of Herrin*, 634 N.E.2d 1168, 1171 (Ill. App. Ct. 1994).

<sup>253</sup> *In re Marriage of Miller*, 2015 Ill. App (2d) 140530.

<sup>254</sup> *Herrin*, 634 N.E.2d at 1171.

<sup>255</sup> *Id.* at 1171.

<sup>256</sup> Leon I. Finkel & Katelyn A. Blanchard, *Dating, Maintenance, and Miller*, 104 ILL. B.J. 34, 35 (2016).

<sup>257</sup> *Miller*, 2015 Ill. App (2d) 140530.

<sup>258</sup> See, e.g., *In re Marriage of Walther*, 2018 IL App (3d) 170289 (finding a party that spent holidays and vacations together and shared a bedroom was evidence of cohabitation).

<sup>259</sup> Justin Haber & Michael Haber, *Dating Without Losing Maintenance: A Counterpoint*, FAM. L. NEWSL. (ISBA), July 2020, at 1, <https://www.isba.org/sections/familylaw/newsletter/2020/08/datingwithoutlosingmaintenanceacoun>.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

## 2. *In re Marriage of Churchill*

The ruling in *In re Marriage of Churchill* saw the appellate court return to a finding that there was no cohabitation based on a fact-specific analysis. In *Churchill*, ex-Wife and her boyfriend were in an exclusive relationship for eight to twelve months; kept belongings at each other's residence; and spent several nights per month together.<sup>263</sup> Further, the boyfriend did some chores for ex-Wife, including taking out the garbage and mowing the lawn.<sup>264</sup> He also helped tutor her child in Spanish and helped with homework.<sup>265</sup> However, they did not have a key or full access to each other's residences, kept separate residences, and did not commingle finances with each other.<sup>266</sup> The appellate court affirmed the decision of the trial court and found the Wife was not cohabitating with her boyfriend on a resident, conjugal, continuing basis.<sup>267</sup> Separately, the appellate court found it was appropriate for the trial court to award permanent maintenance to Wife where her job prospects were limited and would not be sufficient to maintain her lifestyle during the marriage.<sup>268</sup> The court noted that the Wife was a homemaker during the parties' seventeen-year marriage at Husband's request and that Husband historically earned over \$500,000 a year from his business.<sup>269</sup>

## 3. *In re Marriage of Aspan*

*In re Marriage of Aspan* finally provided a ruling where the appellate court affirmed a trial court's finding of a *de facto* husband and wife relationship, and therefore, termination of maintenance based on conjugal cohabitation was not against the manifest weight of the evidence.<sup>270</sup> Relying again on a fact-specific analysis applying the six-factor *Herrin* test, the appellate court first highlighted Wife moved into a mobile home where her boyfriend lived full time.<sup>271</sup> Her boyfriend bought her a car and subsequently, purchased a new residence titled in his name only.<sup>272</sup> However, Wife immediately moved into this new residence with her boyfriend and the residence was purchased using funds from an account held jointly in Wife and her boyfriend's name, with right of survivorship.<sup>273</sup> Her

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<sup>263</sup> *In re Marriage of Churchill*, 2019 IL App (3d) 180208 at ¶ 18.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at ¶ 5.

<sup>266</sup> *Id.* at ¶ 18.

<sup>267</sup> *Id.* at ¶ 1.

<sup>268</sup> *Id.* at ¶ 27.

<sup>269</sup> *Churchill*, 2019 IL App (3d) 180208.

<sup>270</sup> *In re Marriage of Aspan*, 2021 IL App (3d) 190144.

<sup>271</sup> *Id.* at ¶ 16.

<sup>272</sup> *Id.* at ¶ 5.

<sup>273</sup> *Id.* at ¶ 8.

four dogs also lived at her boyfriend's house, she slept there every night, and they shared household chores for the residence.<sup>274</sup> She also paid for household bills and work for the house.<sup>275</sup> Finally, Wife and her boyfriend's families regularly interacted with each other and went on vacations together, with Wife posting on her social media, often referring to her boyfriend's granddaughters as her own grandchildren.<sup>276</sup> The court noted that although there was no direct evidence of a sexual relationship between Wife and her boyfriend, that was not required for a finding of conjugal cohabitation in light of the remaining factors.<sup>277</sup>

#### D. Relocation

##### 1. *In re Marriage of Fatkin*

The Supreme Court of Illinois underscored the importance of deferring to a trial court's credibility determinations in *In re Marriage of Fatkin*.<sup>278</sup> In *Fatkin*, the trial court entered a final custody judgment awarding the parties joint custody, with primary physical custody to Father.<sup>279</sup> Two years later, Father filed a notice of intent to relocate to Virginia.<sup>280</sup> After a three-day hearing where the judge conducted an in-camera interview with the parties' twelve-year-old son, the court granted Father's petition.<sup>281</sup> On appeal, the appellate court reversed the trial court's decision.<sup>282</sup> However, the Supreme Court of Illinois reinstated the trial court's decision.<sup>283</sup>

In its analysis, the Supreme Court of Illinois focused largely on deference to a trial court's credibility and factual determinations, even going so far as to say they were "in no place to second-guess" said determinations.<sup>284</sup> The court noted the trial court's opinion detailed all eleven statutory factors in a thirteen-page, single-spaced order and all facts it considered for and against each factor after conducting a three-day hearing and *in camera* interview.<sup>285</sup> Accordingly, the trial court's ruling was not against the manifest weight of the evidence.<sup>286</sup>

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<sup>274</sup> *Id.* at ¶ 16.

<sup>275</sup> *Id.* at ¶ 17.

<sup>276</sup> *Aspan*, 2021 IL App (3d) 190144 at ¶ 9.

<sup>277</sup> *Id.* at ¶ 19.

<sup>278</sup> *In re Marriage of Fatkin*, 2019 IL 123602.

<sup>279</sup> *Id.* at ¶ 4.

<sup>280</sup> *Id.* at ¶ 5.

<sup>281</sup> *Id.* at ¶ 6.

<sup>282</sup> *Id.* at ¶ 21.

<sup>283</sup> *Id.* at ¶ 38.

<sup>284</sup> *Fatkin*, 2019 IL 123602 at ¶ 34.

<sup>285</sup> *Id.* at ¶ 18.

<sup>286</sup> *Id.* at ¶ 21.

## 2. *In re Marriage of Kimberly R.*

*In re Marriage of Kimberly R.* addressed a Mother's request to relocate to Tennessee with the parties' seven-year-old autistic child.<sup>287</sup> Separately, Mother had another child who was fifteen years old.<sup>288</sup> By agreement, Father had supervised parenting time at the sole discretion of the supervising therapist, and Mother was named primary residential parent with sole parental responsibilities.<sup>289</sup> Several months later, Father petitioned to modify his parenting time and Mother petitioned to relocate.<sup>290</sup>

Mother argued that: her parents planned to move to Tennessee too; she planned to open up a Mathnasium there; there was a better school for their autistic child; Mother was granted leave to move with her older daughter and that her older daughter could attend a magnet school in Tennessee; and Father could have parenting time in Tennessee.<sup>291</sup> Mother further argued that Father refused to acknowledge that their child had autism; that a "routine" was important for autistic children; that a relationship with Father's family was unacceptable because they did not believe their child was autistic; and that their child could not be in the car longer than fifteen minutes or would have a meltdown.<sup>292</sup> At the same time, Mother testified that she would bring the child back to Illinois for visits every other month even though the drive would be between eight and nine hours and they would likely have to drive halfway then stay at a hotel.<sup>293</sup>

Father argued Mother and Mother's dad imposed limitations on his parenting time, for example: restrictions on hugs and kisses; no pictures; shortened visits from two to one and one-half hours; would not let Father take the child to his home; would not let him drive the child; that she would not allow the child to attend family gatherings until his family acknowledged the child's autism; that he saw no autistic diagnostic reports until these divorce proceedings; that relocation would further impair his relationship; and that the move would disrupt his routine.<sup>294</sup> Father completed all of the therapist's recommendations including an anger management program and parenting education on autism.<sup>295</sup> Still, Mother would not allow reintroduction of the child to Father.<sup>296</sup>

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<sup>287</sup> *In re Marriage of Kimberly R.*, 2021 IL App (1st) 201405 at ¶ 19.

<sup>288</sup> *Id.* at ¶ 4.

<sup>289</sup> *Id.* at ¶ 6.

<sup>290</sup> *Id.* at ¶ 9.

<sup>291</sup> *Id.* at ¶ 10.

<sup>292</sup> *Id.* at ¶ 30.

<sup>293</sup> *Kimberly R.*, 2021 IL App (1st) 201405 at ¶ 30.

<sup>294</sup> *Id.* at ¶ 22.

<sup>295</sup> *Id.* at ¶ 23.

<sup>296</sup> *Id.* at ¶ 23.

Following a two-day hearing, the trial court issued a twenty-two page written order, finding five factors did not weigh in favor or against either party, six factors weighed in favor of Father, and zero in favor of Mother.<sup>297</sup> Specifically, the court found the move would cause significant disruption to the child's schedule, each parties' extended family resided in Illinois, and it was doubtful based on Mother's past behavior that a reasonable allocation of parenting time for Father would occur.<sup>298</sup> The appellate court affirmed, remarking that Mother's primary motivation for seeking relocation was so that her older child (not born to the parties) could attend a magnet school.<sup>299</sup>

#### E. Division of Property

##### 1. *In re Marriage of Louise Zamudio f/k/a Louise Ochoa v. Frank Ochoa Jr.*

In this case, the parties were divorced after a sixteen-year marriage.<sup>300</sup> Husband earned forty-eight months of "permissive military service credit" prior to the marriage, which was derived from his active duty military service.<sup>301</sup> However, he purchased the credit during the marriage with marital funds to "enhance" (increase) his State Retirement System Pension annuity.<sup>302</sup> The trial court found the "enhancement" was not marital property, but ordered Husband to reimburse Wife for her marital share of the funds used to purchase the enhancement.<sup>303</sup> The appellate court reversed and remanded the case back to the trial court for an equitable distribution of the marital value of the pension.<sup>304</sup> The appellate court noted that unlike *In re Marriage of Ramsey*,<sup>305</sup> the Husband received fifty-six annuity payments during the marriage and the pension enhancement is derivative of the right to receive a pension in the first place.<sup>306</sup> This is distinguishable from instances where the enhancement was not derivative, where the enhanced portion is directly attributable to a party's non-marital contributions.<sup>307</sup> Accordingly, to the extent a pension benefit is marital, the enhancement of value obtained during the marriage is also marital subject to allocation.<sup>308</sup>

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<sup>297</sup> *Id.* at ¶ 111.

<sup>298</sup> *Id.* at ¶ 111.

<sup>299</sup> *Kimberly R.*, 2021 IL App (1st) 201405 at ¶ 82.

<sup>300</sup> *In re Marriage of Zamudio*, 2019 IL App (3d) 160537 at ¶ 1.

<sup>301</sup> *Id.* at ¶ 19.

<sup>302</sup> *Id.* at ¶ 19.

<sup>303</sup> *Id.* at ¶ 28.

<sup>304</sup> *Id.* at ¶ 21.

<sup>305</sup> *See In re Marriage of Ramsey*, 339 Ill. App. 3d 752 (5th Dist. 2003) (providing that courts must determine whether a pension enhancement is derivative of the holder's right to receive a pension to find whether said benefit is marital property).

<sup>306</sup> *Zamudio*, 2019 IL App (3d) 160537 at ¶ 9.

<sup>307</sup> *Id.* at ¶ 22.

<sup>308</sup> *Id.* at ¶ 30.



## 2. *In re Marriage of Shulga*

*In re Marriage of Shulga* also dealt with issues surrounding allocation of a pension, specifically, death benefits.<sup>309</sup> In *Shulga*, Wife 1 and Husband were divorced after a twenty-five-year marriage.<sup>310</sup> The parties' MSA awarded Wife 1 50% of the marital portion of Husband's firefighter pension via a Qualified Illinois Domestic Relations Order ("QILDRO").<sup>311</sup> The trial court retained jurisdiction for the purpose of amending the judgment to the extent necessary to satisfy the award after death of both parties.<sup>312</sup> After being diagnosed with non-Hodgkin's lymphoma, Husband applied for disability pension benefits from his firefighter fund in July 2016 (which were awarded in May 2017).<sup>313</sup> He subsequently married Wife 2 in August 2016.<sup>314</sup> In October 2016, the trial court entered a QILDRO, which was silent on allocation of death benefits, but provided Husband had to designate Wife 1 as beneficiary and was prohibited from "choosing a form of payment of the retirement benefit that has the effect of diminishing the amount of the payment to which the alternate payee is entitled."<sup>315</sup> Husband died on May 11, 2017, and Wife 2 started receiving 100% of Ronald's pension death benefits as his surviving spouse (\$9,169/month), which Wife 1 received none.<sup>316</sup>

After Husband's death, Wife 1 filed a third-party complaint against Wife 2, alleging that Wife 2 was unjustly enriched due to receiving a pension as the surviving spouse of a disabled firefighter (Husband) under the Illinois Pension Code.<sup>317</sup> Wife 2 argued that the benefits she received were "disability benefits", not "retirement benefits" but did not argue Wife 1 waived her claim to Ronald's disability benefits.<sup>318</sup> Wife 1 sought the imposition of a constructive trust for the death benefits, which the circuit court granted, awarding 50% of the gross benefits to Wife 2.<sup>319</sup>

The appellate court looked at whether the "disability benefits" were an "income replacement" or a "substitute for Husband's retirement pension."<sup>320</sup> The court noted Ronald was already eligible for retirement pay when he was awarded disability benefits, but due to his illness, he could not work.<sup>321</sup> He

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<sup>309</sup> *In re Marriage of Shulga*, 2019 IL App (1st) 182028.

<sup>310</sup> *Id.* at ¶¶ 3-4.

<sup>311</sup> *Id.* at ¶¶ 4, 6.

<sup>312</sup> *Id.* at ¶ 4.

<sup>313</sup> *Id.* at ¶¶ 5, 7.

<sup>314</sup> *Id.* at ¶ 6.

<sup>315</sup> *Shulga*, 2019 IL App (1st) 182028 at ¶ 6.

<sup>316</sup> *Id.* at ¶¶ 7, 8.

<sup>317</sup> *Id.* at ¶ 9.

<sup>318</sup> *Id.* at ¶ 12.

<sup>319</sup> *Id.* at ¶¶ 9, 15.

<sup>320</sup> *Id.* at ¶¶ 25-26.

<sup>321</sup> *Shulga*, 2019 IL App (1st) 182028 at ¶ 27.

instead chose to seek disability payments instead of retirement benefits, so his disability pension was at minimum, the same amount he would receive as a retirement benefit.<sup>322</sup> Therefore, the appellate court affirmed the trial court's creation of the constructive trust.<sup>323</sup>

#### F. Attorneys' Fees

##### 1. *In re Marriage of Keaton*

In *Keaton*, in addition to representing himself pro se, Husband retained a divorce firm with a \$2,500 retainer to serve as additional counsel.<sup>324</sup> The retainer provided this amount could only be exceeded if the parties executed an additional writing.<sup>325</sup> Nevertheless, following entry of the final Judgment, Husband's divorce counsel filed a petition to set final fees against Husband seeking \$33,422, which was granted.<sup>326</sup> Husband asserted two arguments on appeal.<sup>327</sup> First, that his divorce counsel failed to comply with Section 508(c)(2) of the IMDMA's filing requirement by failing to attach a copy of the engagement agreement.<sup>328</sup> The appellate court rejected this argument, finding this requirement was satisfied through affidavit of the reasonableness of the attorney's rates and necessity of services rendered, paired with quoted provisions of the agreement.<sup>329</sup> Moreover, the appellate court found that amending the petition to add the missing exhibit cured the petition of the defect while not prejudicing Husband as he executed the agreement and the amended pleading was served over a week before the scheduled hearing.<sup>330</sup> As to Husband's second argument that he never executed a further writing agreeing to incur fees over and above the \$2,500 retainer, Husband failed to provide a record on appeal for the court's consideration.<sup>331</sup> Therefore, the appellate court noted the presumption was that the trial court was aware of Husband and counsel's intent to exceed the initial retainer.<sup>332</sup> In fact, the appellate court noted that there were multiple interim fee awards in agreed orders that Husband did not object to.<sup>333</sup>

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<sup>322</sup> *Id.* at ¶ 27.

<sup>323</sup> *Id.* at ¶ 30.

<sup>324</sup> *In re Marriage of Keaton*, 2019 IL App (2d) 180285 at ¶ 3.

<sup>325</sup> *Id.* at ¶ 3.

<sup>326</sup> *Id.* at ¶ 4.

<sup>327</sup> *Id.* at ¶ 4.

<sup>328</sup> *Id.* at ¶ 4.

<sup>329</sup> *Id.* at ¶¶ 5-6.

<sup>330</sup> *Keaton*, 2019 IL App (2d) 180285 at ¶ 11.

<sup>331</sup> *Id.* at ¶ 14.

<sup>332</sup> *Id.* at ¶ 16.

<sup>333</sup> *Id.* at ¶ 16.

## 2. *In re Marriage Pavlovich*

The issue at hand in *In re Marriage of Pavlovich* was whether Section 508 of the IMDMA requires a written agreement between an attorney and a client as a prerequisite to recover attorney's fees.<sup>334</sup> The appellate court answered this question in the affirmative.<sup>335</sup> In *Pavlovich*, it was undisputed that no written agreement between the attorney and client existed.<sup>336</sup> However, the attorney still attempted to file a Petition for Final Attorney's Fees against their former client, arguing that the doctrine of *quantum meruit* permitted fee recovery under the circumstances.<sup>337</sup> The appellate court found that the *quantum meruit* doctrine only applies for legal services that fall outside the terms of an otherwise existing written agreement.<sup>338</sup> This ruling emphasizes to attorneys the importance of making sure there is a written and signed agreement prior to moving forward with legal services.

## 3. *In re Marriage of Davis*

*In re Marriage of Davis*, the court considered the issue of contribution to fees as a sanction.<sup>339</sup> In *Davis*, Husband represented himself *pro se* and filed countless frivolous motions during the proceeding.<sup>340</sup> He also repeatedly refused to comply with discovery.<sup>341</sup> Wife filed a Petition for Contribution to Fees against Husband under Section 508(b) of the IMDMA, which was granted by the trial court.<sup>342</sup> Husband appealed, arguing that the court improperly failed to consider his ability to pay.<sup>343</sup> The appellate court affirmed the trial court's ruling as to fees, finding the trial court's decision was akin to an imposition of sanctions under Section 508(b) and therefore did not require a finding that Husband was able to pay.<sup>344</sup>

## 4. *In re Marriage of Keller*

*In re Marriage of Keller* addressed whether an interim fee award survives the dismissal of a case.<sup>345</sup> In *Keller*, Wife filed a petition seeking

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<sup>334</sup> *In re Marriage of Pavlovich*, 2019 IL App (1st) 180783 at ¶ 16.

<sup>335</sup> *Id.* at ¶ 35.

<sup>336</sup> *Id.* at ¶ 18.

<sup>337</sup> *Id.* at ¶ 3.

<sup>338</sup> *Id.* at ¶ 24.

<sup>339</sup> *In re Marriage of Davis*, 2019 IL App (3d) 170389 at ¶ 23.

<sup>340</sup> *Id.* at ¶ 7.

<sup>341</sup> *Id.* at ¶ 9.

<sup>342</sup> *Id.* at ¶¶ 11-12.

<sup>343</sup> *Id.* at ¶ 21.

<sup>344</sup> *Id.* at ¶ 23.

<sup>345</sup> *In re Marriage of Keller*, 2020 IL App (2d) 180960 at ¶ 14.

interim and prospective attorney's fees and costs, which was granted, awarding her attorney \$7,500, to be paid within thirty days.<sup>346</sup> Husband did not comply.<sup>347</sup> Wife thereafter filed a Petition for Contribution to Fees and to hold Husband in indirect civil contempt for failure to pay.<sup>348</sup> Wife and Husband subsequently jointly filed a Motion for Voluntary Dismissal of the underlying Petition for Dissolution of Marriage.<sup>349</sup> The trial court granted the Motion for Voluntary Dismissal, but ruled that the interim fee award survived the dismissal.<sup>350</sup> The appellate court rejected Husband's argument that the interim fee order was temporary and therefore terminated upon dismissal of the case.<sup>351</sup> The appellate court reasoned the interim fee award had been converted to a judgment under Section 508 of the IMDMA prior to dismissal of the case, and therefore survived the dismissal of the case.<sup>352</sup>

##### 5. *Grund & Leavitt v. Stephenson*

*Grund & Leavitt v. Stephenson* addressed the enforceability of an "enhancement provision" as part of an engagement agreement.<sup>353</sup> An "enhancement provision" in an engagement agreement allows a law firm to charge additional fees at the end of a case above and beyond time charged for work completed. In August 2015, Stephenson paid a \$100,000 retainer to retain Grund & Leavitt ("G&L") as his attorneys in a divorce proceeding.<sup>354</sup> The relevant part of the retainer contract stated,

Upon final resolution of the case, G&L shall tender a final bill to you, such final bill taking into account various factors, in addition to the hourly rates, as delineated in the Illinois Rules of Professional Conduct . . . as being relevant considerations to be included in arriving at a fair and reasonable charge.<sup>355</sup> (Hereinafter, "Enhancement Provision").

In September 2017, the divorce case concluded with Stephenson paying a total of \$3.74 million in legal fees plus costs.<sup>356</sup> Pursuant to the Enhancement Provision, G&L contacted Stephenson to determine a "fair and

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<sup>346</sup> *Id.* at ¶ 5.

<sup>347</sup> *Id.* at ¶ 5.

<sup>348</sup> *Id.* at ¶ 5.

<sup>349</sup> *Id.* at ¶ 7.

<sup>350</sup> *Id.* at ¶ 8.

<sup>351</sup> *Keller*, 2020 IL App (2d) 180960 at ¶ 19.

<sup>352</sup> *Id.* at ¶ 18.

<sup>353</sup> *Grund & Leavitt v. Stephenson*, 2020 IL App (1st) 191074 at ¶ 1, *appeal denied*, 159 N.E.3d 937 (Ill. 2020).

<sup>354</sup> *Id.* at ¶ 4.

<sup>355</sup> *Id.* at ¶ 4.

<sup>356</sup> *Id.* at ¶¶ 5-6.

reasonable” final bill.<sup>357</sup> When they were unable to reach an agreement, G&L filed suit in the law division of the Cook County Circuit Court seeking an additional \$9.75 million, merely stating “pursuant to Retainer Engagement Agreement.”<sup>358</sup>

Stephenson filed a Motion to Dismiss, arguing the Enhancement Provision was unenforceable because it did not provide a definite and certain price for the final bill, it gave G&L the unfettered ability to charge any fee it wanted, and failed to allege facts as to how the requested bonus was warranted.<sup>359</sup> G&L argued the Enhancement Provision allowed for reasonable additional monies taking into consideration various factors under the Illinois Rules of Professional Conduct.<sup>360</sup>

The trial court granted Stephenson’s Motion to Dismiss, finding that the final bill was at least partially contingent on the outcome of the divorce proceeding, and contingent fees are expressly prohibited in divorce cases.<sup>361</sup> Additionally, the “results obtained” factor was already considered in G&L’s high \$750/hour hourly rate.<sup>362</sup>

The appellate court reversed and remanded the trial court’s ruling, finding that the court should have considered the parties’ agreement expressed in a written contract for a final bill while giving proper consideration to relevant factors including results achieved, to determine whether G&L was entitled to any additional fees beyond the hourly rates.<sup>363</sup> The court reasoned that considering the “results obtained” when assessing a final bill did not automatically render the agreement one seeking a contingent fee.<sup>364</sup> In its directive, the court ordered the trial court to consider factors of the contract including “specification of a key term, method of determining that key term, and the reasonableness and enforceability of the final bill given the factors it is to consider and [defendant’s] payment of significant hourly bills based on those factors.”<sup>365</sup>

## 6. *In re Marriage of Crecos*

*In re Marriage of Crecos* was a ruling by the Supreme Court of Illinois following multiple appeals in the same case (*Crecos I*<sup>366</sup> and *Crecos II*<sup>367</sup>),

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<sup>357</sup> *Id.* at ¶ 7.

<sup>358</sup> *Id.* at ¶ 6.

<sup>359</sup> *Stephenson*, 2020 IL App (1st) 191074 at ¶ 6.

<sup>360</sup> *Id.* at ¶ 7.

<sup>361</sup> *Id.* at ¶ 9.

<sup>362</sup> *Id.* at ¶ 10.

<sup>363</sup> *Id.* at ¶¶ 31, 35.

<sup>364</sup> *Id.* at ¶ 32.

<sup>365</sup> *Stephenson*, 2020 IL App (1st) 191074.

<sup>366</sup> *In re Marriage of Crecos*, 2012 IL App (1st) 102158-U.

<sup>367</sup> *Id.*

both which were decided in Wife's favor. Wife then filed petitions under Section 508(a)(3.1) of the IMDMA, seeking attorney's fees and costs associated with both appeals.<sup>368</sup> The trial court ordered Husband to pay Wife's attorney's fees of \$32,952 for *Crecos I* and \$89,465 for *Crecos II*.<sup>369</sup> Husband appealed.<sup>370</sup>

Despite containing Illinois Supreme Court Rule 304(a)'s language that the orders were final,<sup>371</sup> the appellate court found the orders Husband sought to appeal were: (1) not final and appealable;<sup>372</sup> and (2) "inextricably intertwined with the property issues that remained partially unresolved" following the two appeals.<sup>373</sup>

The Supreme Court of Illinois reversed the holding of the appellate court.<sup>374</sup> It held the fees awarded from *Crecos I* and *Crecos II* were already fully adjudicated, so no additional fees would be incurred in connection with those two appeals.<sup>375</sup> Accordingly, the fees awarded were not temporary in nature and the order was final and appealable.<sup>376</sup> The Court further clarified that unrelated post-dissolution matters constitute separate claims, not actions, and therefore, "a final order disposing of one of several claims may not be appealed without the Rule 304(a) finding."<sup>377</sup>

## G. GAL Immunity

### 1. *Nichols v. Fahrenkamp*

*Nichols v. Fahrenkamp* did not directly concern a family law issue<sup>378</sup>, but its ruling affected the treatment of GALs in family law cases.<sup>379</sup> In *Nichols*, an attorney was appointed as GAL for the settlement of a minor's for injuries suffered in a motor vehicle accident.<sup>380</sup> Eight years following the settlement, the minor sued her mother, the court-appointed guardian of the minor's estate, alleging her mother had used nearly \$80,000 of the settlement funds for her own benefit.<sup>381</sup> The plaintiff subsequently sued the GAL for

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<sup>368</sup> *Id.* at ¶ 4.

<sup>369</sup> *Id.* at ¶ 5.

<sup>370</sup> *Id.* at ¶ 5.

<sup>371</sup> *Id.*

<sup>372</sup> *Crecos*, 2012 IL App (1st) 102158-U.

<sup>373</sup> *Id.* at ¶ 9.

<sup>374</sup> *Id.* at ¶ 49.

<sup>375</sup> *Id.* at ¶ 17.

<sup>376</sup> *Id.* at ¶ 17.

<sup>377</sup> *Id.* at ¶ 45 (emphasis added).

<sup>378</sup> *Nichols v. Fahrenkamp*, 2019 IL 123990 at ¶ 3.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

“failing to adequately monitor and audit her mother’s requested expenditures”.<sup>382</sup>

The court held that GALs are protected by quasi-judicial immunity for negligence during the time they are appointed.<sup>383</sup> The GAL’s quasi-immunity was limited to their role in making recommendations to the court regarding plaintiff’s best interests.<sup>384</sup> In *dicta*, the court urged the circuit court judges to specify the GAL’s role in the order of appointment and encouraged a review of the IMDMA to ensure consistent usage of the phrase “guardian ad litem” to prevent future confusion regarding quasi-judicial immunity.<sup>385</sup>

## H. Constitutionality and the IMDMA

### 1. *Yakich v. Aulds/In re Marriage of Budorick*

*Yakich*, addressed the constitutionality of Section 513 of the IMDMA.<sup>386</sup> Illinois is one of the minority of states where courts may require parents undergoing a divorce to contribute to their child’s college educational expenses, including tuition, housing, and living expenses.<sup>387</sup> The first constitutional challenge to Section 513 occurred in the case, *Kujawinski v. Kujawinski*, where the Supreme Court of Illinois addressed whether divorced parents were being treated differently under the law than non-divorced parents.<sup>388</sup> The court found that imposing an obligation to contribute to college expenses was reasonably related to the legitimate legislative purpose of mitigating potential harm to spouses and their children caused by divorce.<sup>389</sup> The court reasoned that children of divorced parents may face more challenges and financial hardship than children of married parents.<sup>390</sup>

In *Yakich*, the Father made a similar constitutionality argument in a parentage action that Section 513 violated his equal protection rights by treating unmarried parents differently than those married parents.<sup>391</sup> However, citing the longstanding *Kujawinski* precedent, the Supreme Court of Illinois found the trial court committed serious error by not applying this

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<sup>382</sup> *Id.* at ¶ 5.

<sup>383</sup> *Id.* at ¶ 49.

<sup>384</sup> *Fahrenkamp*, 2019 IL 123990 at ¶ 49.

<sup>385</sup> *Id.*

<sup>386</sup> *Yakich v. Aulds*, 2019 IL 123667.

<sup>387</sup> Shannon Luschen, *Accepted: The Constitutionality of Section 513 of the IMDMA*, CHI. BAR ASS’N, (Mar. 23, 2021) <https://cbaatthebar.chicagobar.org/2021/03/23/accepted-the-constitutionality-of-section-513-of-the-imdma/>.

<sup>388</sup> *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 578 (Ill. 1978).

<sup>389</sup> *Id.* at 579.

<sup>390</sup> *Id.*

<sup>391</sup> *Yakich*, 2019 IL 123667 at ¶ 13.

precedent “regardless of the impact of any societal evolution that may have occurred” since 1978.<sup>392</sup>

The precedent set in *Yakich* was subsequently followed by the First District Appellate Court in *In re Marriage of Budorick*.<sup>393</sup> In *Budorick*, the Father argued that Section 513 of the IMDMA was unconstitutional, because it unjustly imposed an additional obligation for unmarried parents in dissolution proceedings and there were societal changes that necessitated overturning precedent.<sup>394</sup> The court again rejected this argument, citing to the *Kujawinski* and *Yakich*.<sup>395</sup>

## 2. *Alden v. Gardner*

*Alden v. Gardner* was brought before the Seventh Circuit Court of Appeals challenging the validity of Sections 501 and 802 of the IMDMA.<sup>396</sup> The parties finalized their divorce in 2009, which granted them shared custody of their two children.<sup>397</sup> In 2012, Mother filed a petition alleging Father was trying to alienate the children.<sup>398</sup> The court appointed a psychologist, Dr. Mary Gardner, to evaluate Father. Dr. Gardner determined that Father was employing “severe alienation tactics.”<sup>399</sup> She recommended that the court supervise Father’s visitation and grant full custody to Mother.<sup>400</sup> The trial court adopted Dr. Gardner’s recommendations, ordered supervised visitation for Father, and terminated Father’s custody.<sup>401</sup> Father’s attempts to lift the supervision were unsuccessful after Dr. Gardner’s additional evaluations found there was no substantial change in circumstances.<sup>402</sup> Father then attempted to circumvent the state court’s decision by filing an action against Dr. Gardner in federal court, challenging the validity of Sections 501 and 802 of the IMDMA to permit a state court to modify or terminate custody on “a showing that one parent endangers a child’s physical, mental, moral, or emotional health.”<sup>403</sup>

The Seventh Circuit held Father lacked standing because he failed to show any of his alleged injuries were “traceable to Dr. Gardner as opposed to the independent action of the state judiciary.”<sup>404</sup> Moreover, Father failed

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<sup>392</sup> *Id.* at ¶ 13.

<sup>393</sup> *In re Marriage of Budorick*, 2020 IL App (1st) 190994 at ¶ 86.

<sup>394</sup> *Id.* at ¶ 86.

<sup>395</sup> *Id.*

<sup>396</sup> *E.A. v. Gardner*, 929 F.3d 922, 924 (7th Cir. 2019).

<sup>397</sup> *Id.* at 923.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* at 923.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Gardner*, 929 F.3d at 923-24.

<sup>403</sup> *Id.* at 924.

<sup>404</sup> *Id.*



to show that winning the case in federal court would change his custody arrangements.<sup>405</sup> Accordingly, Father could have brought his constitutional challenges in state court.<sup>406</sup> Based on this analysis, the court reprimanded Father, a lawyer himself, for his *pro se* representation in an abusive litigation.<sup>407</sup> The Seventh Circuit gave fourteen days to show cause why the court should not order him to reimburse Dr. Gardner's legal expenses or impose other sanctions and send a copy of its opinion to state and federal bodies with authority over conduct of the bar to determine whether Father's "misuse of the legal process calls into question his fitness to practice law."<sup>408</sup>

## I. Orders of Protection

### 1. *Landmann v. Landmann*

In *Landmann*, the court entered a plenary order of protection, ordering the Father to stay five hundred feet away from the Mother and her four minor children for one year.<sup>409</sup> In its oral record, the court merely stated it "heard the evidence [and] considered the credibility of the witnesses."<sup>410</sup> Using a written preprinted plenary order of protection form, the court had determined that the Father "abuse[d] the [Mother] and/or the children," that his actions would likely cause irreparable harm and continued abuse, and it was necessary to grant the requested relief to protect the Mother.<sup>411</sup>

The appellate court reversed and vacated the plenary order of protection based on the trial court's failure to meet the requirements under Section 214(c)(3) of the Illinois Domestic Violence Act.<sup>412</sup> Specifically, the appellate court found that merely using the preprinted court form was not sufficient to meet the statutory requirements, as the trial court made no other written or oral findings regarding factors considered when granting the plenary order of protection.<sup>413</sup> *Landmann* serves as a warning to practitioners when submitting proposed orders of protection to the court; go beyond the preprinted forms to ensure the requisite findings are contained therein.

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<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at 925.

<sup>407</sup> *Id.* at 926.

<sup>408</sup> *Gardner*, 929 F.3d at 926.

<sup>409</sup> *Landmann v. Landmann*, 2019 IL App (5th) 180137 at ¶ 1.

<sup>410</sup> *Id.* at ¶ 18.

<sup>411</sup> *Id.* at ¶¶ 7, 17.

<sup>412</sup> *Id.* at ¶¶ 19-20.

<sup>413</sup> *Id.* at ¶ 18-19.

## 2. *People v. Nelson*

In *Nelson*, Mother filed for and was granted an Order of Protection against the father, Nelson.<sup>414</sup> The Order of Protection prohibited Nelson from sending mail to Mother.<sup>415</sup> Nelson was subsequently convicted of violating the Order of Protection after sending letters addressed to his daughter at Mother's home.<sup>416</sup> The appellate court held that even though the letters were addressed to Nelson's daughter, it was clear Nelson sent the letters as a means to communicate with Mother because Nelson's daughter was too young to read the letters and the letters' substance included requests for photos of their daughter, allegations regarding Mother's alleged drug use, a pamphlet on sexually transmitted diseases, and questions regarding his paternity of his daughter.<sup>417</sup>

The Second District Appellate court found it was proper for the trial court to bar testimony from two attorneys who allegedly told Nelson that sending letters to his daughter would not violate the Order of Protection.<sup>418</sup> Although a formal offer of proof for the record on appeal was never made, the court still found this testimony was irrelevant because Nelson knowingly violated the terms of the Order of Protection.<sup>419</sup>

## 3. *In re Marriage of Evans*

The primary takeaway of the unpublished opinion of *In re Marriage of Evans* is when there is an uncontested divorce prove-up hearing and a party subsequently files for an emergency order of protection, any history of abuse occurring before entry of the final judgment is not barred *res judicata*.<sup>420</sup> In *Evans*, the parties entered into a final divorce judgment in April 2019.<sup>421</sup> In July 2020, Mother filed a Petition for Order of Protection, *pro se*, after their daycare provider discovered bruises on the child and reported them to DCFS.<sup>422</sup> At the hearing, the court entered a ninety-day plenary order of protection.<sup>423</sup> On appeal, Father argued that the part of Mother's argument for the Plenary Order of Protection hinged upon establishing he had a history

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<sup>414</sup> *People v. Nelson*, 2019 IL App (2d) 161097 at ¶ 3.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* at ¶¶ 5, 12.

<sup>417</sup> *Id.*

<sup>418</sup> *Id.* at ¶ 1.

<sup>419</sup> *Id.* at ¶ 10.

<sup>420</sup> *In re Marriage of Evans*, 2021 IL App (5th) 200426-U at ¶¶ 43-52.

<sup>421</sup> *Id.* at ¶ 4.

<sup>422</sup> *Id.* at ¶ 5-6.

<sup>423</sup> *Id.* at ¶ 2.

of incidents prior to April 2019, should have been barred *res judicata* or collateral estoppel.<sup>424</sup>

The appellate court affirmed the trial court's decision, disagreeing with Father's *res judicata* argument.<sup>425</sup> The court held that the order of protection and entry of an uncontested divorce judgment were not based on the same operative facts.<sup>426</sup> Further, the court opined that *res judicata* "does not prohibit the circuit court from protecting [a minor] from intimidation of a dependent... merely because some facts that establish the need for the protection occurred prior to the parents' uncontested divorce."<sup>427</sup> In rejecting Father's collateral estoppel argument, the court reasoned there had not been an adjudication of abuse claims in the uncontested divorce prove-up so a decision on alleged abuse was not necessary for the judgment in the first litigation.<sup>428</sup>

#### 4. *Steven W. v. Meeli W.*

In *Steven W. v. Meeli W.*, the court considered what constitutes "harassment" under the Illinois Domestic Violence Act. The parties were married in Estonia and had one child born there.<sup>429</sup> The couple moved to the United States three years later and had a second child.<sup>430</sup> The parties traveled to and from Estonia on several occasions.<sup>431</sup> In January of 2020, while in Estonia, there was a disagreement about whether the children would return to the United States.<sup>432</sup> Father returned to the United States and filed petitions for an emergency order of protection and allocation of parental responsibilities.<sup>433</sup> Father claimed the Mother and her parents physically prevented him from packing the children's bags, hid the children's passports, and subsequently impeded his contact with the children.<sup>434</sup>

The trial court found that the Mother was improperly concealing the children and issued the emergency order of protection directing Mother to return the children to the court's jurisdiction.<sup>435</sup> After Mother failed to appear at the hearing, the trial court found Mother improperly removed the children, thereby constituting "harassment" under the Illinois Domestic Violence

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<sup>424</sup> *Id.* at ¶ 34.

<sup>425</sup> *Id.* at ¶ 50.

<sup>426</sup> *Evans*, 2021 IL App (5th) 200426-U at ¶ 51.

<sup>427</sup> *Id.* at ¶ 49.

<sup>428</sup> *Id.* at ¶ 55.

<sup>429</sup> *Steven W. v. Meeli W.*, 2021 IL (2d) 200652 at ¶ 3.

<sup>430</sup> *Id.*

<sup>431</sup> *Id.* at ¶ 4.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Id.* at ¶ 6.

<sup>435</sup> *Meeli W.*, 2021 IL (2d) 200652 at ¶ 13.

Act.<sup>436</sup> Thus, Mother abused Father by improperly removing the children.<sup>437</sup> Accordingly, the court issued a plenary order of protection.<sup>438</sup>

The appellate court reversed, finding Father failed to show abuse under the Illinois Domestic Violence Act, and therefore, the trial court erred in issuing the plenary order of protection.<sup>439</sup> The court reasoned that even if Mother's conduct had amounted to an improper removal, that is not in and of itself harassment.<sup>440</sup> Further, because her conduct did not constitute harassment, there was no rebuttable presumption of emotional distress.<sup>441</sup>

## J. Stepparent Visitation

### 1. *Sharpe v. Westmoreland*

The Supreme Court of Illinois confirmed partners in a civil union have standing to petition for parenting time in *Sharpe v. Westmoreland*.<sup>442</sup> In the case, Father and Mother were married and had a child.<sup>443</sup> In January 2013, the couple divorced and the court entered a Joint Parenting Agreement, ordering the parties to share custody of the minor child, A.S.<sup>444</sup> In November 2013, Father entered into a civil union and A.S. started having parenting time with both Father and his partner.<sup>445</sup> In January 2017, Father passed away and Mother stopped allowing Father's partner to see A.S.<sup>446</sup> Father's partner filed petitions in court seeking allocation of parenting time for A.S.<sup>447</sup>

Mother requested certification of the following questions: (1) whether a party to a civil union has standing to request visitation with her deceased partner's child, as the child's stepparent; and (2) whether that party has standing to request parental responsibilities.<sup>448</sup> The appellate court held that such a party has no standing regarding either question, and the Supreme Court of Illinois granted leave to appeal.<sup>449</sup>

The Supreme Court of Illinois reversed and remanded the ruling of the appellate court.<sup>450</sup> The court first emphasized that the Illinois Religious

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<sup>436</sup> *Id.* at ¶ 31.

<sup>437</sup> *Id.*

<sup>438</sup> *Id.* at ¶ 32.

<sup>439</sup> *Id.* at ¶ 34.

<sup>440</sup> *Id.* at ¶ 46.

<sup>441</sup> *Meeli W.*, 2021 IL (2d) 200652 at ¶ 50.

<sup>442</sup> *Sharpe v. Westmoreland*, 2020 IL 124863 at ¶ 3.

<sup>443</sup> *Id.* at ¶ 3.

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> *Westmoreland*, 2020 IL 124863 at ¶ 3.

<sup>448</sup> *Id.* at ¶ 4.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.* at ¶ 22.

Freedom Protection and Civil Union Act (“Civil Union Act”) should be liberally construed and is inclusive of situations like the facts of this case.<sup>451</sup> Furthermore, because civil union partners are on equal ground with spouses of a marriage, the court reasoned that civil union partners should fit under the definition of “stepparent” under the IMDMA.<sup>452</sup>

The court distinguished *Sharpe* from *In re Parentage of Scarlett Z.-D.*, where the parent seeking allocation of parental responsibilities was engaged to the parent, but not yet in a state-sanctioned form of a committed relationship.<sup>453</sup> In *Scarlett*, the court specifically deferred to the legislature to make any change that expanded the standing requirements under the IMDMA.<sup>454</sup> However, the *Sharpe* court pointed out that standing should be granted only to partners who entered into formalized state-sanctioned relationships, emphasizing that the purpose of the Civil Union Act was intended “to create an alternative to marriage that [was otherwise] equal in all respects.”<sup>455</sup> Any other exceptions or relationships not falling under this purview should still be addressed at the legislative level.<sup>456</sup>

## K. Parentage

### 1. *In re Parentage of D.S.*

*In re Parentage of D.S.* dealt with the issue of consent and parenting time under the Illinois Parentage Act.<sup>457</sup> Section 622 of the Parentage Act prohibits allocating parental responsibilities to a man fathering a child through sexual assault or sexual abuse or who is found by clear and convincing evidence at a fact-finding hearing, to have committed an act of non-consensual penetration at conception.<sup>458</sup>

In December 2017, Mother gave birth to D.S. at age sixteen when Father was nineteen.<sup>459</sup> In September 2018, Father filed a petition to establish parentage and for allocation of parental responsibilities.<sup>460</sup> During this time, D.S. went to live with Father and his parents.<sup>461</sup> Mother alleged that when Father filed his petition, he stopped letting her see the child.<sup>462</sup>

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<sup>451</sup> *Id.* at ¶ 7.

<sup>452</sup> *Id.* at ¶ 14.

<sup>453</sup> *Westmoreland*, 2020 IL 124863 at ¶ 17 (citing *In re Scarlett Z.-D.*, 2015 IL 117904 at ¶ 42).

<sup>454</sup> *Scarlett Z.-D.*, 2015 IL 117904 at ¶ 42.

<sup>455</sup> *Westmoreland*, 2020 IL 124863 at ¶ 14.

<sup>456</sup> *Id.*

<sup>457</sup> *In re D.S.*, 2021 IL App (1st) 192257.

<sup>458</sup> 750 ILL. COMP. STAT. 46/622 (2017).

<sup>459</sup> *D.S.*, 2021 IL App (1st) 192257 at ¶ 3.

<sup>460</sup> *Id.* at ¶ 4.

<sup>461</sup> *Id.* at ¶ 6.

<sup>462</sup> *Id.*

In December 2018, DCFS issued a safety plan naming Father as custodial parent and identifying Mother as violent and out of control, ordering that she be permitted to exercise parenting time only on a supervised basis.<sup>463</sup>

In January 2019, Mother filed a motion to strike Father's petition under Section 622(f) of the Parentage Act, arguing parental responsibilities for Father should be prohibited because D.S. was conceived by non-consensual sexual relations and she did not consent to Father's parenting time.<sup>464</sup> In February 2019, Father filed a response confirming the parties' respective ages at time the child was conceived, but argued Mother consented to the exercise of his parental rights.<sup>465</sup> In October 2019, the court dismissed Father's petition with prejudice and Father subsequently appealed.<sup>466</sup>

The trial court concluded that Mother established by clear and convincing evidence that Father had "committed an act of non-consensual sexual penetration for his conduct in fathering that child' due to Mother's age at the time D.S. was conceived, rendering her 'incapable of giving consent'" to sex.<sup>467</sup> The trial court's order was limited to the application of "consent" as it related to sexual penetration, as opposed to parenting time.<sup>468</sup> The appellate court affirmed, noting Mother's lack of consent was presumed due to Mother's age, and the only way she could have consented to parenting time is by filing an affirmative petition, which she did not do.<sup>469</sup> This means, unlike other allocation of parental responsibilities hearings, Section 622 proceedings are not governed by the best interests of the child.<sup>470</sup>

## 2. UCCJEA Jurisdiction: *Camberos v. Palacios*

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) outlines requirements for a court to establish the "home state" of a child in a custody proceeding.<sup>471</sup> This establishes the court in which the custody proceeding should be brought and subsequently enforced.<sup>472</sup> Generally, the "home state" is defined as the state in which the child has lived for at least six months prior to commencement of a proceeding.<sup>473</sup> In *Camberos v. Palacios*, Mother gave birth to the parties' child in

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<sup>463</sup> *Id.* at ¶¶ 7, 10.

<sup>464</sup> *D.S.*, 2021 IL App (1st) 192257 at ¶ 8.

<sup>465</sup> *Id.* at ¶ 9.

<sup>466</sup> *Id.* at ¶ 16.

<sup>467</sup> *Id.* at ¶ 16.

<sup>468</sup> *Id.* at ¶ 33.

<sup>469</sup> *Id.* at ¶¶ 32, 36, 49.

<sup>470</sup> *D.S.*, 2021 IL App (1st) 192257 at ¶ 37.

<sup>471</sup> Patricia M. Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, U.S. DEPT. OF JUSTICE, <https://www.ojp.gov/pdffiles1/ojdp/189181.pdf>.

<sup>472</sup> *Id.*

<sup>473</sup> *Id.*

Washington.<sup>474</sup> A Washington court entered a Uniform Support Petition and determined Father's paternity.<sup>475</sup> Four months later, Father filed a petition in an Illinois court to establish parental responsibilities but it was dismissed for lack of jurisdiction.<sup>476</sup> More than one and a half years later, the Washington court entered a parenting plan allocating parenting time and decision-making responsibilities to both parties.<sup>477</sup> Approximately seven months later, Father filed a petition in Washington to modify the parenting plan.<sup>478</sup> Before that petition was resolved, Father filed a second petition to modify the parenting plan in the Illinois court.<sup>479</sup> The Illinois court communicated with the Washington court and dismissed the petition, explaining that Washington, not Illinois, was the child's home state.<sup>480</sup> One month later, the Washington court dismissed Father's petition to modify the parenting plan.<sup>481</sup> The court also found the proper home state was now Utah as Mother and the child had moved there.<sup>482</sup> Father did not appeal either order.<sup>483</sup>

Instead, a few months later when it was time to switch parenting time, Father refused to return D.S. back to Mother, using COVID-19 lockdowns as an excuse.<sup>484</sup> After six months of physical custody, Father filed a petition in Illinois to modify the custody arrangement.<sup>485</sup> Mother cross-filed an emergency petition in Utah, seeking immediate enforcement of the existing parenting time orders.<sup>486</sup> The Utah court enrolled and registered the Washington parenting plan and issued a temporary restraining order requiring Father to return the child.<sup>487</sup> Mother filed a motion to dismiss Father's petition in Illinois.<sup>488</sup>

At trial, the Illinois court found Utah to be D.S.' home state and dismissed the Illinois petition.<sup>489</sup> Father appealed, arguing that Washington lost jurisdiction once Mother moved out of Washington, and that Utah had never gained custody under the UCCJEA because the child did not reside

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<sup>474</sup> Camberos v. Palacios, 2021 IL App (2d) 210078 at ¶ 3.

<sup>475</sup> *Id.*

<sup>476</sup> *Id.* at ¶ 4.

<sup>477</sup> *Id.* at ¶ 5.

<sup>478</sup> *Id.* at ¶ 6.

<sup>479</sup> *Id.*

<sup>480</sup> *Palacios*, 2021 IL App (2d) 210078 at ¶ 7.

<sup>481</sup> *Id.*

<sup>482</sup> *Id.*

<sup>483</sup> *Id.* at ¶ 8.

<sup>484</sup> *Id.* at ¶ 9.

<sup>485</sup> *Id.* at ¶ 10.

<sup>486</sup> *Palacios*, 2021 IL App (2d) 210078 at ¶ 11.

<sup>487</sup> *Id.*

<sup>488</sup> *Id.* at ¶ 13.

<sup>489</sup> *Id.*

there for six consecutive months.<sup>490</sup> Thus, his rationale was since neither Washington nor Utah had jurisdiction, Illinois did.<sup>491</sup>

The appellate court found that Father failed to appeal the Washington court's order finding that Utah had jurisdiction.<sup>492</sup> As a result, he was collaterally estopped from arguing in Illinois that Utah is not the home state.<sup>493</sup> Father had already filed a petition to modify custody in Washington when he filed his same petition in Illinois.<sup>494</sup> The Washington court conducted a hearing and found that Utah was the child's home state.<sup>495</sup> The final order dismissed his petition to allow the case to continue in Utah.<sup>496</sup> The petition to modify custody filed in Illinois less than one year later was essentially identical to the Washington one.<sup>497</sup> The Washington order was a final judgment on the merits and Illinois must honor that order.<sup>498</sup> Notably, the appellate court reprimanded Father for trying to reach the six-month jurisdictional requirement under the UCCJEA by refusing to comply with court orders and called his behavior "unjustifiable and reprehensible."<sup>499</sup>

#### L. Other Issues in Family Law

##### *1. Admission of Out-of-Court Statement Regarding Abuse: In re A.S.*

*In re A.S.* was an adjudication of wardship proceeding but provides an important evidentiary practice tip for family law practitioners.<sup>500</sup> Specifically, it discussed the admissibility of out-of-court statements by minors. The State filed a petition requesting that fourteen-year-old A.S. be adjudicated a ward of the court due to abuse by his Mother.<sup>501</sup> The State's petition alleged that A.S. was neglected due to an injurious environment and abused with a substantial risk of physical injury under the Juvenile Court Act.<sup>502</sup> After an adjudicatory hearing, the juvenile court entered an order finding it in A.S.' best interests to be adjudicated a ward of the court.<sup>503</sup>

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<sup>490</sup> *Id.* at ¶ 15.

<sup>491</sup> *Id.*

<sup>492</sup> *Palacios*, 2021 IL App (2d) 210078 at ¶ 19.

<sup>493</sup> *Id.* at ¶ 20.

<sup>494</sup> *Id.* at ¶ 21.

<sup>495</sup> *Id.*

<sup>496</sup> *Id.*

<sup>497</sup> *Id.*

<sup>498</sup> *Palacios*, 2021 IL App (2d) 210078.

<sup>499</sup> *Id.* ¶ 22.

<sup>500</sup> *In re A.S.*, 2020 IL App (1st) 200560 at ¶ 22.

<sup>501</sup> *Id.* at ¶ 1.

<sup>502</sup> *Id.* at ¶ 3.

<sup>503</sup> *Id.* at ¶ 20.



On appeal, one issue was the admissibility of an out-of-court statement by A.S. to a DCFS investigator regarding an abuse incident.<sup>504</sup> The appellate court found this statement was properly admitted by the juvenile court.<sup>505</sup> The court reasoned that a minor's out-of-court statements relating to allegations of abuse or neglect are admissible at an adjudicatory hearing if the minor is subject to cross-examination or if the occurrence is corroborated by other evidence.<sup>506</sup> Here, the incident was corroborated by medical records indicating that Mother had been brought to the emergency room by police for "violent and aggressive behavior at home."<sup>507</sup> Such statements explaining the reason for Mother's hospital visit were admissible under the hearsay exception allowing out-of-court statements made for purposes of a medical diagnosis or treatment.<sup>508</sup>

## 2. *In re Parentage of Ervin C.-R.*

In *In re Parentage of Ervin C.-R.*, Mother filed a petition to establish the parentage of her son.<sup>509</sup> In addition to seeking to establish parentage, she also sought an order enabling her son, who was born in Guatemala, to apply for "Special Immigrant Juvenile" ("SIJ") status.<sup>510</sup> SIJ status enables a qualifying minor to petition the United States Citizenship and Immigration Services ("USCIS") to become a lawful permanent resident.<sup>511</sup>

The trial court found that the child had been abandoned by his Father and granted Mother sole decision-making responsibilities and parenting time.<sup>512</sup> However, the trial court declined to issue an order enabling the son to apply for SIJ status, finding he was not a "dependent of the court," and therefore could not be deemed "abandoned" while under the care of his mother.<sup>513</sup>

The appellate court reversed, noting that for purposes of the SIJ predicate findings, a child may be considered a "dependent" of the court when the court is required to make a judicial determination about the child's custody and care, and a child may be considered abused,

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<sup>504</sup> *Id.* at ¶ 32.

<sup>505</sup> *Id.*

<sup>506</sup> A.S., 2020 IL App (1st) 200560 at ¶ 32 (citing *In re An.W.*, 2014 IL App (3d) 130526 at ¶ 61).

<sup>507</sup> *Id.* at ¶ 33.

<sup>508</sup> *Id.* at ¶ 27.

<sup>509</sup> *In re Parentage of Ervin C.-R.*, 2020 IL App (2d) 200236 at ¶ 1.

<sup>510</sup> *Id.* at ¶¶ 1, 4.

<sup>511</sup> *Id.* at ¶ 12.

<sup>512</sup> *Id.* at ¶ 1.

<sup>513</sup> *Id.* at ¶ 8.

neglected, or abandoned when only one parent has abused, neglected, or abandoned the child.<sup>514</sup>

Following this case, the Illinois Legislature added Section 603.11 to the IMDMA, allowing a domestic relations court to make a finding a child qualifies for Special Immigrant Juvenile Status.<sup>515</sup>

### 3. *Waiver of Transcript Fees: In re Marriage of Main*

*In re Marriage of Main* answers the question of whether self-represented litigants found to be indigent by the trial court qualify for a waiver of court transcript fees.<sup>516</sup> In *Main*, the self-represented litigant requested transcripts free of charge in anticipation of an appeal after a six-day trial.<sup>517</sup> The appellate court certified the question and answered in the affirmative, finding indigent self-represented litigants are entitled to a waiver of fees for transcripts the trial court deems necessary for the civil action, including an appeal.<sup>518</sup>

### 4. *Service of Process: Municipal Trust and Savings Bank v. Moriarty*

Although *Municipal Trust and Savings Bank v. Moriarty* did not address a family law issue, it did address important nuances in Section 2-202(a) of the Illinois Code of Civil Procedure.<sup>519</sup> In *Moriarty*, the initial Complaint was filed in Kankakee County.<sup>520</sup> A licensed process server then served the Defendant in Cook County.<sup>521</sup> Plaintiff did not file a motion for appointment of a process server and the circuit court did not make such an appointment.<sup>522</sup> The Defendant never filed an Answer to the Complaint, so the Plaintiff filed a Motion for Entry of Default Judgment, alleging service had been effectuated on Defendant.<sup>523</sup> The circuit court entered the judgment for foreclosure and the appellate court affirmed.<sup>524</sup>

The Supreme Court of Illinois reversed. It reasoned that service was not proper where a party within Cook County was not served by a special

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<sup>514</sup> *Id.* at ¶¶ 14, 16, 18.

<sup>515</sup> Pub. Act. 101-121, 2020 Ill. Laws § 10 (codified as amended at 750 ILL. COMP. STAT. 5/603.11).

<sup>516</sup> *In re Marriage of Main*, 2020 IL App (2d) 200131 at ¶¶ 3-4; 735 ILL. COMP. STAT. 5/5-105.

<sup>517</sup> *Main*, 2020 IL App (2d) 200131 at ¶ 1.

<sup>518</sup> *Id.* at ¶ 47.

<sup>519</sup> 735 ILL. COMP. STAT. 5/2-202(a) (2021); *Mun. Tr. & Sav. Bank v. Moriarty*, 2021 IL 126290 at ¶ 1.

<sup>520</sup> *Moriarty*, 2021 IL 126290 at ¶ 3.

<sup>521</sup> *Id.* at ¶ 4.

<sup>522</sup> *Id.*

<sup>523</sup> *Id.* at ¶¶ 4-5.

<sup>524</sup> *Id.* at ¶¶ 10-11.

process server in a case that was filed outside of Cook County.<sup>525</sup> Relevantly, Section 2-202 required process shall be served by a sheriff or appointed process server for counties, such as Cook County, with a population of over 2,000,000.<sup>526</sup> The court clarified “Section 2-202 is concerned with where process is served on a defendant,” not where the complaint is filed.<sup>527</sup>

#### 5. *Service of Process: In re Marriage of Basil*

*In re Marriage of Basil* clarifies a common service issue that arises in family law proceedings where the petitioner files a Petition for Dissolution of Marriage but then an incident occurs requiring an Emergency Order of Protection before respondent is served with the initial Petition.<sup>528</sup> In *Basil*, when the court granted Wife’s request for an Order of Protection, it issued a Summons for service.<sup>529</sup> In accordance with the Summons, the sheriff attempted to serve both the Petition for Dissolution of Marriage and the Emergency Order of Protection on Husband.<sup>530</sup> When the sheriff was unsuccessful, the court granted Wife’s motion to appoint a special process server, who served both documents.<sup>531</sup> After Husband failed to respond, the court entered a default Judgment for Dissolution of Marriage.<sup>532</sup> Over two years after the entry of the judgment, Husband attempted to file a motion to quash service of process, arguing service was improper as the form used was incorrect.<sup>533</sup> The appellate court affirmed entry of the default judgment, highlighting that Illinois Supreme Court Rule 101 provides summons should be construed liberally and “the use of the wrong form of summons shall not affect the jurisdiction of this court.”<sup>534</sup>

#### 6. *Hague Convention: In re the Parentage of M.V.U.*

In *In re Parentage of M.V.U.*, Mother filed a parentage action and during the pendency of the action, Father filed a petition to return his daughter to Mexico under the Hague Convention, and UCCJEA.<sup>535</sup> The state

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<sup>525</sup> *Id.* at ¶ 21.

<sup>526</sup> *Moriarty*, 2021 IL 126290 at ¶¶ 21, 28.

<sup>527</sup> *Id.* at ¶ 22 (citing *U.S. Bank Nat’l Ass’n v. Rahman*, 2016 IL App (2d) 150040, ¶¶ 33-34).

<sup>528</sup> *In re Marriage of Basil*, 2021 IL App (1st) 200258-U at ¶¶ 7-9.

<sup>529</sup> *Id.* at ¶ 10.

<sup>530</sup> *Id.* at ¶ 11.

<sup>531</sup> *Id.* at ¶ 12.

<sup>532</sup> *Id.* at ¶ 14.

<sup>533</sup> *Id.* at ¶ 18.

<sup>534</sup> *Basil*, 2021 IL App (1st) 200258-U at ¶¶ 27-28 (quoting ILL. SUP. CT. R. 101(g)).

<sup>535</sup> *In re Parentage of M.V.U.*, 2020 IL App (1st) 191762 at ¶ 6.

parentage action was stayed while the litigation proceeded on the Hague petition.<sup>536</sup> Mother and M.V.U. were dual citizens of Mexico and the United States, while Father was a citizen of Mexico.<sup>537</sup> The court found that M.V.U. was born in Mexico and Mother removed her to Chicago three months prior to the filing of her parentage action.<sup>538</sup>

Mother filed a response and three affirmative defenses, including the grave risk exception under Article 13(b).<sup>539</sup> The “grave risk exception” provides protection for parents alleging that returning a child would “expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>540</sup> Mother alleged Father was “verbally, emotionally and physically abusive toward her while they were living together in Mexico... [and] alleged three specific allegations of abuse.”<sup>541</sup> She attached affidavits from her family members supporting these allegations.<sup>542</sup> Father denied all of her allegations and moved for judgment on the pleadings.<sup>543</sup>

The trial court concluded that although Father’s petition met the *prima facie* requirements for a wrongful removal determination, Mother proved by clear and convincing evidence that she was justified in doing so because M.V.U. was at grave risk of harm.<sup>544</sup> The trial court determined that Mother and her sister were highly credible, while Father was not.<sup>545</sup> The court highlighted that it found credible testimony that Father had choked Mother while she was holding M.V.U. and made repeated threats on her life.<sup>546</sup> The appellate court affirmed, substantially deferring to the trial court’s credibility determinations.<sup>547</sup>

### 7. Unconscionability of Postnuptial Agreements: *In re Marriage of Prill*

The parties in *In re Marriage of Prill* were married in 1994 and throughout the parties’ marriage, Husband was the primary breadwinner while Wife primarily stayed at home caring for the parties’ children.<sup>548</sup> In

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<sup>536</sup> *Id.*

<sup>537</sup> *Id.* at ¶ 4.

<sup>538</sup> *Id.*

<sup>539</sup> *Id.* at ¶ 7; Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89.

<sup>540</sup> Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89.

<sup>541</sup> *M.V.U.*, 2020 IL App (1st) 191762.

<sup>542</sup> *Id.* at ¶ 8.

<sup>543</sup> *Id.* at ¶¶ 12-3.

<sup>544</sup> *Id.* at ¶ 15.

<sup>545</sup> *Id.* at ¶¶ 26, 44.

<sup>546</sup> *Id.* at ¶¶ 27, 46.

<sup>547</sup> *M.V.U.*, 2020 IL App (1st) 191762 at ¶ 48.

<sup>548</sup> *In re Marriage of Prill*, 2021 IL App (1st) 200516 at ¶ 3.

June 2017, Wife informed Husband she wanted a divorce.<sup>549</sup> In September 2017, the parties executed a postnuptial agreement and parenting agreement drafted by Husband's counsel.<sup>550</sup> The postnuptial agreement provided, in relevant part, that both parties would waive maintenance, Husband would pay a \$240,000 settlement to Wife, for allocation of children's expenses, marital assets, and debts.<sup>551</sup> The parties did not attach any asset valuations nor any descriptions of debts, mortgages, or liens encumbering said assets.<sup>552</sup> In November 2017, Wife filed a Petition for Dissolution of Marriage, in part alleging the postnuptial agreement was procedurally and substantively unconscionable.<sup>553</sup>

When arguing the postnuptial agreement was unenforceable, Wife testified Husband threatened to kick her out of their shared residence; alienated her children from her; dissuaded her from hiring independent counsel; and called her parents during the negotiation to get her to agree.<sup>554</sup> Wife consulted with two attorneys but was told that Husband would no longer agree if she attempted to make any material changes.<sup>555</sup>

After hearing and reviewing written closing arguments, the trial court found the postnuptial agreement was enforceable.<sup>556</sup> The court found that though Wife's attorney advised her not to sign the agreement, she did so anyway.<sup>557</sup> Even if the agreement was "not fair," that did not mean it was unconscionable.<sup>558</sup>

The appellate court reviewed the ruling *de novo* on grounds of both procedural and substantive unconscionability, affirming the trial court's decision.<sup>559</sup> As to procedural unconscionability, the court reasoned the evidence showed Wife consulted with an attorney who advised her not to sign the agreement, but she signed anyway, clearly showing she wanted out of the marriage.<sup>560</sup> As to substantive unconscionability, the appellate court found the record lacked evidence of what Husband's stock options' value was, nor did Wife seek a valuation.<sup>561</sup> The appellate court found Wife received approximately 28% of the marital estate's value, excluding consideration of stock options.<sup>562</sup>

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<sup>549</sup> *Id.*

<sup>550</sup> *Id.*

<sup>551</sup> *Id.* at ¶ 4.

<sup>552</sup> *Id.* at ¶ 5.

<sup>553</sup> *Id.* at ¶ 6.

<sup>554</sup> *Prill*, 2021 IL App (1st) 200516 at ¶ 9.

<sup>555</sup> *Id.*

<sup>556</sup> *Id.* at ¶ 11.

<sup>557</sup> *Id.*

<sup>558</sup> *Id.* at ¶ 11.

<sup>559</sup> *Id.* at ¶¶ 14-15.

<sup>560</sup> *Prill*, 2021 IL App (1st) 200516 at ¶¶ 21-3.

<sup>561</sup> *Id.* at ¶ 32.

<sup>562</sup> *Id.* at ¶ 26.

In a dissent longer than the majority opinion, Justice Hyman warned that if the majority's ruling was left to stand, "sets a precedent imperiling the prospects of an equitable postnuptial agreement for the financially insecure spouse."<sup>563</sup> Justice Hyman argued that "typical factors", such as duress, fraud, interference with a party's ability to secure meaningful legal advice, inconspicuous contact terms, and unequal bargaining power, weighed in favor of the agreement being found unconscionable, but opined that these factors were not sufficient to assess unconscionability for a postnuptial agreement.<sup>564</sup> Justice Hyman proposed a ten-factor test:

1. A meaningful opportunity to retain independent counsel;
2. Threats regarding children, marital assets, and prolonged litigation in the absence of agreement;
3. Duress, fraud, overreaching, misrepresentation, deception, or non-disclosure of material facts;
4. Disparity in earning power;
5. Control over finances;
6. Full and accurate disclosure by each party of liabilities and assets;
7. Each party's understanding of and free agreement to the terms;
8. Length of marriage;
9. Physical or emotional abuse; and
10. Disparity in allocation of marital assets and debt.<sup>565</sup>

In applying his ten factors, Justice Hyman found the agreement was "both procedurally and substantively unconscionable."<sup>566</sup>

#### *8. Enforcement of I-864 Affidavit Obligations: In re Marriage of Bychina*

*In re Marriage of Bychina* is the first case published by an Illinois appellate court regarding enforcement of an I-864 Affidavit of Support in a domestic relations case.<sup>567</sup> In *Bychina*, the Husband, a U.S. citizen, signed a Form I-864 Affidavit of Support, under Section 213A of the Immigration and Nationality Act, through which he promised to support Wife at an income level of at least 125% of the federal poverty level.<sup>568</sup> The Form I-864 is a form signed by an American citizen spouse agreeing to sponsor their

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<sup>563</sup> *Id.* at ¶ 38 (Hyman, J., dissenting).

<sup>564</sup> *Id.* at ¶ 68 (Hyman, J., dissenting).

<sup>565</sup> *Id.* (Hyman, J., dissenting).

<sup>566</sup> *Prill*, 2021 IL App (1st) 200516 at ¶ 69 (Hyman, J., dissenting).

<sup>567</sup> Russell D. Knight & Stephanie L. Tang, *Enforcing an I-864 Affidavit in an Illinois Divorce*, ILL. STATE BAR ASS'N: FAM. LAW, July 2021, at 1; *In re Marriage of Bychina*, 2021 IL App (2d) 200303.

<sup>568</sup> *Bychina*, 2021 IL App (2d) 200303 at ¶ 5.

immigrant spouse at an income level of at least 125% of the federal poverty level so they do not become reliant on government aid once they arrive to the United States.<sup>569</sup> Wife subsequently filed Petition for Dissolution, including a count for a breach of federal contract regarding the I-864 Affidavit seeking to enforce the Husband's obligation.<sup>570</sup> At trial, the court *sua sponte* declined to rule on the merits of the breach of contract claim and directed the Wife to seek relief in federal court.<sup>571</sup>

The appellate court reversed and remanded, rejecting the trial court's cited reasons as to why it declined to litigate Wife's breach of contract claim.<sup>572</sup> First, the appellate court reasoned that Husband's obligations under the I-864 Affidavit were separate from any obligations he may have under Illinois divorce law and may be enforced in a state divorce action, through specific performance of the contract, by an order for spousal support under state law, or a combination.<sup>573</sup> Second, relying on cases from California and Ohio, the court noted state courts have jurisdiction to hear claims seeking to enforce Form I-864 Affidavits.<sup>574</sup>

Here, the Wife requested that the state court adjudicate the issue.<sup>575</sup> Further, the state trial court's ruling of only allowing adjudication in federal court would effectively require Wife to undergo additional delays and legal fees to file a separate claim, which was against the spirit of judicial economy.<sup>576</sup> Finally, the court did not identify any remedies that would be available at federal court level that were not available at state court level.<sup>577</sup> The *Bychina* decision opens the door to litigate federal breach of contract claims for I-864 Affidavits on the state court level.

#### IV. CONCLUSION

As evidenced by the legislation and case law summaries above, both the legislature and courts have faced issues seeking to clarify and apply the amendments made following the overhaul of the IMDMA in 2016,<sup>578</sup> and subsequent changes to the child support and maintenance portions of the IMDMA therein in 2017<sup>579</sup> and 2019,<sup>580</sup> respectively. These changes

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<sup>569</sup> Russell D. Knight & Stephanie L. Tang, *I Do Solemnly Sponsor*, 109(9) ILL. BAR J. (Sept. 2021).

<sup>570</sup> *Bychina*, 2021 IL App (2d) 200303 at ¶ 9.

<sup>571</sup> *Id.* at ¶ 36.

<sup>572</sup> *Id.* at ¶ 9.

<sup>573</sup> *Id.* at ¶ 37.

<sup>574</sup> *Id.* at ¶ 38.

<sup>575</sup> *Id.*

<sup>576</sup> *Bychina*, 2021 IL App (2d) 200303.

<sup>577</sup> *Id.* at ¶ 39.

<sup>578</sup> Pub. Act 99-90, 2016 Ill. Laws §§ 5-15 (codified as amended at 750 ILL. COMP. STAT. 5/101 *et seq.*).

<sup>579</sup> Pub. Act 99-764, 2017 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/505).

<sup>580</sup> Pub. Act 100-923, 2019 Ill. Laws § 10 (amended at 750 ILL. COMP. STAT. 5/504).

highlight the importance for family law practitioners and judges to regularly read new cases and statutory changes to best advocate for clients and enter judgments that will withstand appellate review. As it relates to the cases summarized herein, the author would like to sum up several key takeaways and practice tips for all Illinois family law practitioners moving forward:

1. If you are including a “true-up provision” within your Marital Settlement Agreement, clearly delineate what changes in income, employment status, and other situations are expressly contemplated by the parties.<sup>581</sup>
2. When determining whether monies may be considered as a party’s income for calculating support, consider whether the monies were recurring and whether they increase the party’s wealth.<sup>582</sup>
3. For clients considering filing an action to terminate maintenance based on conjugal cohabitation, direct them to the six-factor *Herrin* test in the context of determining whether the recipient spouse is in a *de facto* marriage with their new significant other.<sup>583</sup>
4. For a client seeking to relocate with their child, take the time to allege facts specific to each of the statutory factors set forth in Section 609.2 of the IMDMA.<sup>584</sup>
5. Regarding attorney fees proceedings, make sure you have an executed written fee agreement with your client, and carefully explain to them any unusual provisions within the agreement, including any enhancement provisions or terms under which you may incur additional attorney fees.<sup>585</sup>
6. Advise clients that so far, challenges to the constitutionality of Sections 513 of the IMDMA regarding contribution to college expenses and Sections 501 and 802 of the IMDMA regarding modification of custody have so far been unsuccessful in the specific contexts addressed by the courts.<sup>586</sup>
7. For litigants seeking Orders of Protection, they must go beyond merely checking boxes on the form orders provided by the county court and must be aware that a respondent may be in violation of an order even if they try to circumvent it by communicating indirectly with the petitioner by means of a third party.<sup>587</sup> Further, even if litigants

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<sup>581</sup> See *Durdov*, 2021 IL App (1st) 191811; *Connelly*, 2020 IL App. (3d) 180193; *contra Yabush*, 2021 Ill. App. (1st) 201136.

<sup>582</sup> See *Dahm-Schell*, 2021 IL 126802; *Ash & Matschke*, 2021 IL 200901.

<sup>583</sup> See *Churchill*, 2019 IL App (3d) 180208; *Aspan*, 2021 IL App (3d) 190144.

<sup>584</sup> See *Fatkin*, 2019 IL 123602; *Kimberly R.*, 2021 IL App (1st) 201405.

<sup>585</sup> See *Keaton*, 2019 IL App (2d) 180285; *Pavlovich*, 2019 IL App (1st) 180783; *Stephenson*, 2020 IL App (1st) 191074.

<sup>586</sup> *Yakich*, 2019 IL 123667; *Budorick*, 2020 IL App. (1st) 190994; *Gardner*, 929 F.3d 922.

<sup>587</sup> *Landmann*, 2019 IL App (5th) 180137; *Nelson*, 2019 IL App (2d) 161097.



suffered abuse prior to entry of a Judgment for Dissolution of Marriage, such abuse may still be properly pled within their Petition for Order of Protection.<sup>588</sup>

8. Advise clients that partners in a civil union may still have standing to petition for parenting time under the IMDMA.<sup>589</sup>

Incorporating these tips, as well as addressing the other cases as applicable, into practice will assist practitioners moving forward address the recent case law and more effectively advocate on behalf of their clients.

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<sup>588</sup> *Evans*, 2021 IL App (5th) 200426-U.

<sup>589</sup> *Westmoreland*, 2020 IL 124863.

