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## FOREWORD

On behalf of Southern Illinois University's School of Law, I am proud to present the thirty-seventh edition of the Hiram H. Lesar Survey of Illinois Law. Since 1987, the SIU Law Journal's Survey of Illinois Law has provided legal practitioners with recent developments, practical guidance, and thoughtful critiques on Illinois law. It is our mission that the 2023 Survey issue meets these goals and provides practitioners with a valuable resource on some of the recent changes in Illinois law. I am very proud of and impressed by our dedicated staff and authors in the completion of a successful Survey of Illinois Law issue. I would like to thank our authors who produced well-written articles that provide a thorough legal analysis on current issues of Illinois law.

I would like to thank, appreciate, and recognize everyone who helped make this issue possible. First, I would like to thank our authors for the time and dedication that was put into each of their respective articles. Without their time and effort - in addition to their professional and personal responsibilities - this Survey of Illinois Law would not be a possibility. Thank you to our article editing staff and staff editors for their time spent developing our articles. I would also like to thank our SIU Law Journal Faculty Advisor, Professor Douglas Lind, for his ongoing guidance and support given to our staff this academic year to help make this entire volume possible. I would also like to thank Cynthia Heisner, for all of her logistical support and problem-solving over the past year. Also, I want to especially thank Mackenzie Lyons, Kayla Ranta, Reyna Herrera, Connor Fitch, Emily Smoot, and Allison Cozart. This issue would not have been possible without their assistance and guidance. Lastly, I would like to thank my successor, Taylor Ingram, for her help in completing the final production steps for this issue.

Callah Wright  
Editor-in-Chief  
Survey of Illinois Law  
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# SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL

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## ARTICLES

### THE ISBA’S RURAL PRACTICE INITIATIVE: ADDRESSING THE PROBLEM OF LEGAL DESERTS IN ILLINOIS

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Wide swaths of Illinois’ rural areas are increasingly being defined as “legal deserts” where there are not enough licensed lawyers to serve the public’s legal needs. In an effort to address this problem, the Illinois State Bar Association (ISBA) created its Rural Practice Initiative (RPI) in 2020. The RPI works to address the legal deserts problem by matching Summer Fellows and Associate Fellows with rural law firms in Illinois and subsidizing their pay. This article provides background on the RPI’s implementation, discusses the first two years of the Initiative, and provides thoughts on future ISBA efforts to address the legal deserts problem.

### 2022 SURVEY OF ILLINOIS LAW: FAMILY LAW

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In 2022, there were significant changes to both family law legislation and case law. Relevant legislative changes include allowing litigants to seek attorney’s fees to retain a lawyer, allowing for temporary relocation, and clarifying when a change in circumstances is “contemplated” for purposes of modifying child support. Illinois courts also adjudicated cases across all areas of family law. These areas ranged from expanding on prior case precedent in areas like property division and allocation of parental responsibilities to establishing new precedent in others, including COVID-19 restrictions and allocation of frozen embryos.

This Article is a continuation of the 2017-2018 and 2019-2021 Surveys of Illinois Family Law with the continued aim of summarizing relevant cases and legislation for Illinois family law attorneys and judges. Relevant family law legislative changes are summarized in Section II, then relevant family law case law summaries are included in Section III, organized by topic area. This Article is designed to help practitioners identify relevant case law and legislation to aid in ongoing cases.

### TIME’S UP: THE EFFECT OF THE CORONAVIRUS PANDEMIC ON THE ILLINOIS SPEEDY TRIAL ACT

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The coronavirus pandemic has devastated multiple facets of everyday life. It is incumbent upon the legal profession to recognize the valuable lessons that can be learned from the pandemic. Legislators, attorneys, and judges must amend the Illinois Speedy Trial statute to prepare for future natural disasters with insight that balances the rights of criminal defendants and the efficient administration of justice.



# THE ISBA’S RURAL PRACTICE INITIATIVE: ADDRESSING THE PROBLEM OF LEGAL DESERTS IN ILLINOIS

By: Timothy A. Slating<sup>1</sup>

## I. INTRODUCTION

Over the past five years, those tracking the ratio of licensed lawyers to the general population throughout the country have begun to identify what are being termed “legal deserts.”<sup>2</sup> These legal deserts exist in every state throughout the nation and are loosely defined as geographic areas where there are not enough licensed lawyers to serve the legal needs of those living and conducting business in that area.<sup>3</sup> Significant problems arise in these places for both the public living in them and also the lawyers practicing there.<sup>4</sup> This article will explore those legal desert problems, discuss the Illinois State Bar Association’s (“ISBA”)<sup>5</sup> Rural Practice Initiative’s efforts to address them, and highlight future efforts the ISBA plans to take to address the problem.

## II. THE LEGAL DESERTS PROBLEM

Legal deserts and the problems they create have been receiving increasing coverage from legal commentators.<sup>6</sup> In its 2020 Profile of the Legal Profession, the American Bar Association (“ABA”) summarized the problem as follows:

... large swaths of the United States have few lawyers or no lawyers. There are more than 3,100 counties and county equivalents in the U.S., and 54 of them have no lawyers. Another 182 have only one or two lawyers. Many are parts of legal deserts – large areas where residents have to travel far to

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<sup>1</sup> Timothy A. Slating, J.D. is the Illinois State Bar Association’s Assistant Executive Director, Communications.

<sup>2</sup> See, e.g., Mark C. Palmer, *The Disappearing Rural Lawyer*, 2CIVILITY (Aug. 27, 2019), <https://www.2civility.org/the-disappearing-rural-lawyer/>.

<sup>3</sup> See generally AM. BAR. ASS’N, ABA PROFILE OF THE LEGAL PROFESSION 2022, at 24 (2022) (hereinafter “ABA Report 2022”).

<sup>4</sup> Wendy Davis, *No Country for Rural Lawyers: Small-town attorneys still find it hard to thrive*, AM. BAR. ASS’N J. (Feb. 1, 2020, 12:00 AM), <https://www.abajournal.com/magazine/article/no-country-for-rural-lawyers>.

<sup>5</sup> With 28,000 members, the ISBA is the largest general bar association in the state of Illinois. Ill. State Bar Ass’n., *About the ISBA*, <https://www.isba.org/about>. (last accessed Mar. 3, 2023).

<sup>6</sup> See, e.g., Palmer, *supra* note 2.

find a lawyer for routine matters like drawing up a will, handling a divorce or disputing a traffic violation.<sup>7</sup>

In a 2022 interview, Illinois Legal Aid Online's Executive Director, Terri Ross, noted that in relation to means-tested legal aid, "[t]here's way more people who qualify for legal aid [in legal deserts], than there are attorneys available to help them."<sup>8</sup>

When looking at the number of in-state practicing lawyers and the ratio of lawyers per 1,000 residents for the State as a whole, Illinois appears to be doing fine in relation to other states.<sup>9</sup> Based on 2019 in-state lawyer registration numbers, Illinois ranks fifth among the states for number of lawyers.<sup>10</sup> As for the ratio of lawyers per 1,000 residents in each state, Illinois ranks sixth with 4.9 lawyers for every 1,000 citizens.<sup>11</sup>

But when you drill down to the county level, several legal deserts throughout Illinois become apparent.<sup>12</sup> While Illinois has roughly 62,720 in-state lawyers, the vast majority are clustered in Chicago and the surrounding collar counties.<sup>13</sup> Nearly three quarters of the States' lawyers (46,345 in total), have their primary office in Cook County.<sup>14</sup> Elsewhere, 4,312 practice in DuPage County, 3,023 in Lake County, 1,139 in Kane County (the collar counties), and 1,137 in Sangamon County (home of Springfield).<sup>15</sup> The remaining 9,787 in-state Illinois lawyers cover the other 97 counties throughout Illinois. Of Illinois' 102 counties, 25 have only 11-20 lawyers; 11 have only 6-10 lawyers; and 6 have less than 5 lawyers.<sup>16</sup> For example, in 2021, Hardin County only had two registered lawyers and Calhoun, Edwards, and Pulaski Counties each had only four registered lawyers.<sup>17</sup> As one might guess, these counties with low lawyer populations are all located in rural parts of the State.<sup>18</sup> To compound the issue, current trends do not show an influx

<sup>7</sup> AM. BAR. ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 2020, at 2 (2020) (hereinafter "ABA Report 2020").

<sup>8</sup> Stephanie Quirk, *Experts Say 'Legal Deserts' Span the Stateline*, WIFR (Jul. 21, 2022, 6:42 PM), <https://www.wifr.com/2022/07/21/experts-say-legal-deserts-span-stateline/>.

<sup>9</sup> ABA Report 2022, at 24.

<sup>10</sup> ABA Report 2020, at 3 (Illinois had 62,720 licensed in-state lawyers in 2019, while New York had 184,662, California had 168,569, Texas had 92,833, and Florida had 79,328).

<sup>11</sup> *Id.* at 3 (New York is number one with a ratio of 9.5, Maryland is second at 6.7, Massachusetts is third with 6.2, Connecticut is fourth with 5.9, and Vermont is fifth with a ratio of 5.8).

<sup>12</sup> *See* ABA Report 2020, at 13.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

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

<sup>17</sup> ATT'Y REGISTRATION AND DISCIPLINARY COMM'N OF ILL., 2021 ANNUAL REPORT, 42 (2021).

<sup>18</sup> U.S. Census Bur., *Quickfacts: Hardin County Illinois* (July 1, 2022), <https://www.census.gov/quickfacts/hardincountyillinois> (indicating the population of Hardin County as 3,597; it is 165 miles from the nearest major metro area); *see also* U.S. Census Bur., *Quickfacts: Calhoun County Illinois* (July 1, 2022), <https://www.census.gov/quickfacts/fact/table/calhouncountyillinois/PST045222> (population of 4,360); U.S. Census Bur., *Quickfacts: Edwards County Illinois* (July 1, 2022),



of new lawyers to these legal deserts.<sup>19</sup> Of Illinois' 102 counties, 52 added fewer than 5 lawyers in the past 5 years.<sup>20</sup> Worse, 16 counties in Illinois have not added any new lawyers in the past 5 years.<sup>21</sup>

These legal deserts throughout rural Illinois result in myriad problems not only for the people who live in them, but also for the lawyers that serve their communities.<sup>22</sup> On the public side, the most significant problem is the lack of access to justice for those in need of legal assistance.<sup>23</sup> For the rule of law to operate and justice to be served, the public must have access to the courts and legal representation.<sup>24</sup> Without enough lawyers to serve the public in a given geographic region, the public is left to either: (1) travel great distances to seek legal representation; (2) represent themselves; or (3) allow their legal needs to go unmet.<sup>25</sup> In 2019, Mark Palmer, Chief Counsel for the Illinois Supreme Court Commission on Professionalism, noted that:

This hardship is clearly reflected in the continuing rise of individuals seeking justice without counsel. In 2015, statistics from the Administrative Office of the Illinois Courts (AOIC) showed that 93 of the 102 counties in Illinois reported that more than 50% of their civil cases had at least one self-represented litigant (SRL). In some case types, that number rose as high as 80%. This was consistent in jurisdictions from all four corners of Illinois.<sup>26</sup>

Of course, these problems are greater in relation to civil matters as a result of public defenders being available in the criminal arena.<sup>27</sup>

The limited number of lawyers practicing in these legal deserts also face great problems.<sup>28</sup> For example, being one of only a few lawyers in a given legal desert necessitates that lawyer being a true general practitioner.<sup>29</sup> That lawyer must be competent to serve all of the community's legal needs, which typically includes having a working understanding of family law, business law, estate planning, tax law, real estate law, tort law, criminal law, traffic

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<https://www.census.gov/quickfacts/fact/table/edwardscountyillinois/PST045222> (population of 6,071); U.S. Census Bur., *Quickfacts: Pulaski County Illinois* (July 1, 2022), <https://www.census.gov/quickfacts/fact/table/pulaskicountyillinois/PST045222> (population of 4,991).

<sup>19</sup> Palmer, *supra* note 2.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Palmer, *supra* note 2.

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

<sup>27</sup> 55 ILL. COMP. STAT. 5/3-4006.

<sup>28</sup> Wendy Davis, *No Country for Rural Lawyers: Small-town attorneys still find it hard to thrive*, AM. BAR. ASS'N J. (Feb. 1, 2020, 12:00 AM), <https://www.abajournal.com/magazine/article/no-country-for-rural-lawyers>.

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

law, and the list goes on.<sup>30</sup> This places an additional burden on rural practitioners to remain abreast of developments in all aspects of the law, not just a few particular practice areas.<sup>31</sup>

Also, as one might guess, having only a small number of lawyers serving a given geographic area results in many conflict-related issues.<sup>32</sup> After practicing in a legal desert for a few years, a lawyer has typically represented enough clients that conflict-related issues abound whenever new legal matters are brought to the lawyer.<sup>33</sup> Not to mention, lawyers in rural areas, like any other resident, develop personal connections with members of the community, creating an additional layer of possible conflicts. To compound the issue, referring these clients out to other lawyers is obviously a huge problem when practicing in a legal desert, which by definition has few other lawyers.<sup>34</sup>

As the foregoing demonstrates, there are more people with legal needs than rural lawyers can represent.<sup>35</sup> As such, legal deserts are a real problem for Illinois. Their existence results in a huge access to justice problem for the public, which in turn negatively impacts the rule of law and the administration of justice.

### III. THE ISBA'S RURAL PRACTICE INITIATIVE

In 2020, then-ISBA President Dennis J. Orsey made addressing the problem of rural legal deserts a top priority.<sup>36</sup> He established the ISBA's Special Committee on Rural Practice Initiative (the "Special Committee") to oversee the Association's efforts, with a broad goal of promoting access to

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<sup>30</sup> Palmer, *supra* note 2 (self-represented litigants are "handling cases involving divorce, custody, child support, guardianship, housing and consumer disputes" in the absence of adequate numbers of lawyers. Presumably any legal counsel would be expected to handle these cases, if any were available).

<sup>31</sup> See *Don't Use a Lawyer Who is a Jack of All Trades*, BRONCHICK & ASSOC., P.C., <https://www.bronchicklaw.com/articles/dont-use-lawyer-jack-trades> (last visited Apr. 11, 2023) (exploring the tough realities of using a general practice lawyer, admitting "they are not really good at anything" and they might not care "if their legal knowledge would serve the client[']s needs or not.>").

<sup>32</sup> ILL. R. PROF. CONDUCT 1.7 (setting out a general prohibition on lawyers taking work which "involves a [] conflict of interest."); ILL. R. PROF. CONDUCT 1.9 (prohibiting lawyers from taking work that is "materially adverse to the interests of former clients.>").

<sup>33</sup> See, e.g., *In re Michael Patrick O'Shea*, ILL. ATT'Y REG. & DISCIPLINARY COMM'N No. 02SH64 (2003) (reporting the discipline of a lawyer in rural Illinois who had previously consulted with various clients about widely ranging matters, which strictly limited his ability to seek new clients in the area).

<sup>34</sup> For certain types of conflicts, another lawyer within the same firm could potentially serve the client without such a conflict if the conflicted lawyer is "screened" from the case. See ILL. R. PROF. CONDUCT 1.10.

<sup>35</sup> Quirk, *supra* note 8.

<sup>36</sup> Ed Finkel, *A Man for This Season*, ILL. BAR J., July 2020, at 20, 21.

justice in Illinois' rural communities.<sup>37</sup> The Special Committee's work began by assessing what other states have done to address the issue.<sup>38</sup> Programs reviewed included the South Dakota Rural Recruitment Program,<sup>39</sup> the Nebraska Rural Law Opportunities Program,<sup>40</sup> the Montana Rural Incubator Project for Lawyers,<sup>41</sup> and the Kansas Rural Law Program.<sup>42</sup> The common denominator amongst all these programs is simple: the best solution to legal deserts is enticing more lawyers to practice in those areas; and that one efficient way to accomplish that is by providing financial incentives to lure recent graduates and law students to practice in rural areas.<sup>43</sup> The underlying notion here is that law students typically incur significant student loan debt, which precludes them from practicing in rural areas where yearly salaries tend to be significantly less than those offered in urban areas.<sup>44</sup> The programs in those other states thus provide financial incentives to make it easier for these students and graduates to take up practice in rural areas, where they will hopefully integrate into the community and continue to practice for years to come.<sup>45</sup>

After reviewing the programs offered in other states to address the problem of legal deserts and after much internal discussion and debate, the Special Committee settled on an approach to further its mission involving

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<sup>37</sup> *Id.*

<sup>38</sup> Dennis J. Orsey, *Introducing the Rural Practice Initiative*, ILL. BAR J., Feb. 2021, at 8. The Special Committee was later converted into a Standing Committee.

<sup>39</sup> *Rural Attorney Recruitment Program*, S.D. UNIFIED JUD. SYS., <https://ujs.sd.gov/Attorneys/RuralRecruitment.aspx> (last visited Apr. 11, 2023).

<sup>40</sup> *Rural Law Opportunities Program*, NEB. COL. L., <https://law.unl.edu/RLOP/> (last visited Feb. 27, 2023).

<sup>41</sup> *Rural Incubator Project for Lawyers*, MON. LEGAL SERV. ASS'N, <https://www.mtlsa.org/rural-incubator-project-for-lawyers/> (last visited Apr. 11, 2023).

<sup>42</sup> *Rural Law Program*, WASHBURN UNIV. SCH. LAW, <https://www.washburnlaw.edu/practical-experience/rural/index.html> (last visited Apr. 11, 2023).

<sup>43</sup> See generally *Rural Practice Initiative*, ILL. STATE BAR ASS'N, <https://www.isba.org/committees/ruralpractice> (last visited Apr. 11, 2023); *Rural Attorney Recruitment Program*, S.D. UNIFIED JUD. SYS., <https://ujs.sd.gov/Attorneys/RuralRecruitment.aspx> (last visited Apr. 11, 2023); *Rural Law Opportunities Program*, NEB. COL. L., <https://law.unl.edu/RLOP/> (last visited Apr. 11, 2023); *Rural Incubator Project for Lawyers*, MON. LEGAL SERV. ASS'N, <https://www.mtlsa.org/rural-incubator-project-for-lawyers/> (last visited Apr. 11, 2023); *Rural Law Program*, WASHBURN UNIV. SCH. LAW, <https://www.washburnlaw.edu/practical-experience/rural/index.html> (last visited Apr. 11, 2023).

<sup>44</sup> See Aaron Burt, *Friday 5: Disadvantages to Being a Rural Attorney*, NWSIDEBAR (Apr. 17, 2015), <https://nwsidebar.wsba.org/2015/04/17/friday-5-disadvantages-rural-attorney/>; Lisa R. Pruitt & Kelly V. Beskin, *Rural California Suffers a Painful Shortage of Lawyers* (Aug. 24, 2020), <https://law.ucdavis.edu/sites/g/files/dgvnsk10866/files/media/documents/dailyjournal.com-Rural-California-suffers-a-painful-shortage-of-lawyers.pdf>.

<sup>45</sup> See e.g., *Rural Practice Initiative*, ILL. STATE BAR ASS'N, <https://www.isba.org/committees/ruralpractice> (last visited Apr. 11, 2023).

two distinct programs: (1) the Rural Practice Associate Fellows Program; and (2) the Rural Practice Summer Fellows Program.<sup>46</sup>

Due to the ongoing nature of the issues to be addressed, in 2021, this Special Committee became the Standing Committee on the Rural Practice Initiative (the “RPI Committee”).<sup>47</sup> The RPI Committee includes ISBA members from throughout Illinois.<sup>48</sup> Its formal mission statement provides that the RPI Committee is intended to:

. . . increase access to attorneys in rural areas of Illinois. In furtherance of this mission, it will identify and implement a viable program to support the establishment of young lawyers in the practice of law in rural parts of the state in need of lawyers. This program may include a clearinghouse to connect young lawyers willing to join or establish a law practice in rural areas with experienced practitioners looking to transition their practice. The Standing Committee will also identify potential sources of funding to support the young lawyers as they join or establish a practice, including potentially support for student debt payments, moving expenses, and the expenses associated with starting a practice.<sup>49</sup>

#### A. The Rural Practice Associate Fellows Program

The Rural Practice Associate Fellows Program (“Associate Fellows Program”) “aims to place graduating law students and recently graduated attorneys as permanent associates with rural practitioners” and “includes a \$5,000 stipend at the beginning of employment, and an additional \$5,000 stipend if the associate is still working for the same firm after one year.”<sup>50</sup> Associate Fellow applicants must submit an application to participate in the Associate Fellows Program and are informed that: (1) assistance will be provided in “identifying quality job placements in rural areas”; (2) associate fellows will receive a \$10,000 “stipend to augment [their] salary”; (3) they “will participate in mentorship programs geared specifically to recent graduates and newer attorneys . . . in rural practice”; (4) they “will be provided numerous opportunities to network and develop meaningful relationships with others in the rural legal and business community, including introductions to good rural clients and other business opportunities”; and (5) they will be provided “[s]upport for learning how to be an attorney in your

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<sup>46</sup> *Rural Practice Fellowship Program*, ILL. STATE BAR ASS’N, <https://www.isba.org/ruralpractice> (last visited Apr. 11, 2023).

<sup>47</sup> Orsey, *supra* note 38, at 8.

<sup>48</sup> *Rural Practice Initiative*, *supra* note 45.

<sup>49</sup> *Id.*

<sup>50</sup> *Application for Rural Practice Fellows*, ILL. STATE BAR ASS’N, <https://www.isba.org/ruralpractice/fellows> (last visited Apr. 11, 2023) (archived at <https://web.archive.org/web/20220126225026/https://www.isba.org/ruralpractice/fellows>).

first job[.]” which will include “CLE, training, and other resources for rural practitioners.”<sup>51</sup> In filling out the application for the Associate Fellows Program, applicants must provide: (1) detailed contact information; (2) their law school and graduation or expected graduation year; (3) the location they would like to be placed (Northern, Central, or Southern Illinois); (4) two professional references with contact information; (5) their resume; (6) their law school transcript; and (7) a writing sample.<sup>52</sup> Applicants must also answer the following questions: (1) “[p]lease explain why you are applying to be an ISBA Rural Practice Fellow (including why you are interested in practicing law in a rural area)”; (2) “[p]lease describe the type of rural practice with which you would like to be placed, including the size of the practice, the practice area(s) in which you are interested, and the type of work you would like to do”; (3) “[p]lease explain any support from the community, the Illinois State Bar Association, or your prospective employer that you would deem necessary to enable you to make a long-term commitment to practicing law in a rural area”; and (4) “[i]f you already have an employment offer with a rural firm, please tell us about it.”<sup>53</sup> Applicants can also choose to provide optional demographic information.<sup>54</sup>

#### B. The Rural Practice Summer Fellows Program

The Rural Practice Summer Fellows Program (“Summer Fellows Program”) “aims to connect law students with rural practitioners” and “includes a \$5,000 fellowship grant and mentoring.”<sup>55</sup> Just as with the Associate Fellows Program, an application must be filled out for participation in the Summer Fellows Program.<sup>56</sup> The application is the same as that used for the Associate Fellows Program and the applicants are advised of the same program benefits described above in Part III.A.<sup>57</sup>

#### C. Law Firm Participation

As the goal of the Associate and Summer Fellows Programs is to place recent graduates and newer attorneys in private-practice settings, an application also exists for law firms seeking to employ an associate fellow.<sup>58</sup> Law firm applicants are advised that they will receive the following benefits

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

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

<sup>55</sup> *Id.*

<sup>56</sup> *Rural Practice Fellowship Program, supra* note 46.

<sup>57</sup> *Application for Rural Practice Fellows, supra* note 50.

<sup>58</sup> *Application for Lawyers & Firms Seeking to Employ a Fellow*, ILL. STATE BAR ASS'N, <https://www.isba.org/ruralpractice/lawyers> (last visited Apr. 11, 2023).

from participating in the program: (1) “[a]ttorneys admitted to practice will receive MCLE credit in connection with the program”; (2) “[a]ssistance in identifying and hiring qualified, prescreened associates”; (3) “[a]ccess to high-quality training and support to help integrate new attorneys into your business; and (4) the ISBA will “[s]ubsidize the salary you can pay so you can attract high-quality employees.”<sup>59</sup> Law firm applicants must also agree to the following requirements and terms:

To be eligible to employ a Fellow through the Rural Practice Fellowship Program, the following requirements must be met:

- Supervising Attorney(s) must:
  - Be registered as active and in good standing on the Illinois ARDC Master Roll of Attorneys and not the subject of an open ethics inquiry or disciplinary action in any state or jurisdiction;
  - Not have ever been suspended or disbarred from the practice of law in any state or jurisdiction;
  - Have been admitted to practice for five years or more; and
  - Participate in all required Rural Practice Fellowship Program training and events.
- Supervising Attorney(s) and all other firm members must:
  - Be active ISBA members or become members of the ISBA to participate in the Rural Practice Fellowship Program; and
  - Provide an Associate Fellow with the opportunity to perform *pro bono* work as defined in Rule 756(f).
- The Firm must:
  - Have valid malpractice insurance coverage that includes the Fellow and maintain that coverage for the duration of the Rural Practice Fellowship Program;
  - For Associate Fellows, provide fulltime work for a minimum of 1 year;
  - For Associate Fellows, offer full time employment to the Associate Fellow pending bar exam results, if applicable; ... and
  - Provide compensation to the Fellow in addition to the stipend paid to the Fellow through the Rural Practice Fellowship Program.

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<sup>59</sup> *Id.*

By applying for this program, you also agree to the following terms:

- The firm is not guaranteed the placement of a summer clerk or permanent associate.
- The firm is expected to use good faith efforts to make at least one offer to a summer clerk or a permanent associate by [two months after the application period closes].
- Fellows will not be employees of the ISBA, and that I will follow all payroll laws, and other laws, including the minimum wage of Illinois.<sup>60</sup>

For firms applying for summer clerks, law firms must also agree to provide fulltime work for a minimum of eight weeks for Summer Fellows.<sup>61</sup>

The attorney filling out the requisite application on behalf of a law firm must provide: (1) detailed contact information; (2) their position within the firm; (3) law school attended; (4) information about their practice areas and those of other lawyers in the firm; (5) the rural county their office is located in (all Illinois counties are eligible for the Fellows Program with the exception of Cook, Will, DuPage, Lake, Sangamon, Macon, St. Clair, Madison, Peoria, Champaign, McLean, and Winnebago);<sup>62</sup> (6) whether they are looking for a law student clerk, an associate attorney, or either; (7) whether they have already made an employment offer to a law clerk or associate; (8) what kinds of tasks they envision the fellow performing; (9) whether they have experience supervising law clerks and/or new associates; (10) the kinds of professional activities in the community in which the fellow will be able to participate; (11) why they are interested in hosting a fellow and what they hope to achieve by participating in the program; and (12) the name of their malpractice insurance carrier.<sup>63</sup>

#### D. Implementation of the Fellows Programs

As of the writing of this article, the inaugural classes of both the Associate and Summer Fellows Programs have completed their Fellowships,

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Firms located in the excluded counties listed above may be considered for the program on an ad hoc basis. If the firm does not have an office in a qualifying rural county but would like to be considered for the Fellowship Program, the law firm may explain (on the application) how the practice qualifies as a rural practice or why it should otherwise be considered for the program. The RPI committee will review the explanation and make a final determination as to whether the firm qualifies for the program or not.

<sup>63</sup> *Id.*

the second class of Summer Fellows completed their Fellowship in August 2022, the second class of Associate Fellows is nearing the end of their Fellowships, and the third class of Fellows was recently announced.<sup>64</sup> What follows is a discussion of how the first two classes of fellows were selected, how the supervising lawyers and law firms were selected, and what employment placements resulted.

### *1. Selection of the Fellows and Law Firms*

All fellow and law firm applicants for both programs are first reviewed by the RPI Committee's Application Review Subcommittee.<sup>65</sup> The first step in the process involves making sure that the applicant meets all technical requirements of the program and thereby qualifies for the program.<sup>66</sup> All qualifying applicants are then reviewed by ISBA staff to geographically match fellow applicants with law firm applicants.<sup>67</sup> Once this matching is complete, law firm applicants are sent the names and application materials for the fellow applicants that match their geographical location, and fellow applicants are sent information about the law firms with which they are geographically matched.<sup>68</sup> The fellow and law firm applicants are then instructed to arrange interviews by a certain date and report to the ISBA whether an employment offer was made and accepted.<sup>69</sup>

Once the ISBA is notified of the successfully accepted employment offers, all of the matches are reviewed by the RPI Committee's Application Review Subcommittee.<sup>70</sup> That subcommittee then makes formal grant recommendations to the full RPI Committee, which selects the final fellows and supervising law firms for each program.<sup>71</sup> In making the ultimate selections, the following criteria are used: (1) encouraging geographic diversity and supporting matches in as many counties as possible; (2) increasing diversity in rural areas; (3) quality of the work experience offered; (4) overall quality of the fellowship application; and (4) the fellow applicant's demonstrated commitment to practicing in a rural area.<sup>72</sup>

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<sup>64</sup> See generally *id.*; Dennis J. Orsey, *Update on the ISBA's Rural Practice Initiative*, ILL. BAR J., May 2021, at 10; Illinois State Bar Association, *Rural Practice Fellowship Program Fellows Announced*, The Bar News (May 17, 2023), <https://www.isba.org/barnews/2023/05/ruralpracticefellowshipprogramfello>.

<sup>65</sup> See generally *Application for Lawyers & Firms Seeking to Employ a Fellow*, *supra* note 58.

<sup>66</sup> See generally *id.*

<sup>67</sup> See generally *id.*

<sup>68</sup> See generally *id.*

<sup>69</sup> See generally *id.*

<sup>70</sup> See generally *id.*

<sup>71</sup> See generally *Application for Lawyers & Firms Seeking to Employ a Fellow*, *supra* note 58.

<sup>72</sup> See generally *id.*



## 2. *The First Year of the Programs*

Both of the Fellows Programs were officially launched in 2021, with an application period from November 30, 2020, through February 12, 2021.<sup>73</sup> In the inaugural year, twenty-eight lawyers and law students applied for the Associate Fellows Program, seventy-six law students applied for the Summer Fellows Program, and two applicants indicated that they would participate in either program.<sup>74</sup> The first year of the programs also saw thirteen firms seeking an Associate Fellow, seventeen seeking a Summer Fellow, and twenty-seven firms seeking either an Associate or Summer Fellow.<sup>75</sup>

Ultimately, four Summer Fellows were selected and ten Associate Fellows were selected.<sup>76</sup> The Summer Fellows, who worked from May through August 2021, were placed with supervising law firms in Byron (Ogle County), Mackinaw (Tazewell County), Mattoon (Coles County), and Columbia (Monroe County) Illinois.<sup>77</sup> The Associate Fellows, who worked from August 2021 through August 2022, were placed with law firms in Genoa (DeKalb County), Belvidere (Boone County), St. Charles (DeKalb County), Morris (Grundy County), Spring Valley (Bureau County), Macomb (McDonough County), Jacksonville (Morgan County), Effingham (Effingham County), and Pinckneyville (Perry County) Illinois.<sup>78</sup> All four of the Summer Fellows completed the program, but only seven of the ten Associate Fellows stayed at their firms for the full year and completed the program.<sup>79</sup>

## 3. *The Second Year of the Programs*

The second year of the program had an application period from November 1, 2021, through February 4, 2022, which resulted in: (1) fifteen applicants for the Associate Fellows Program; (2) thirty-three applicants for the Summer Fellows Program; and (3) two applicants willing to participate in either program.<sup>80</sup> That same year, twenty-three firms applied to receive an Associate Fellow, four firms sought a Summer Fellow, and twenty-eight firms sought either an Associate or Summer Fellow.<sup>81</sup>

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<sup>73</sup> Orsey, *supra* note 64 at 10.

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

<sup>75</sup> *Id.*

<sup>76</sup> *Illinois State Bar Association Announces Rural Practice Fellowship Program Fellows*, ILL. STATE BAR ASS'N. (May 4, 2021), <https://www.isba.org/newscenter/releases/2021/illinoisstatebar-associationannounce>.

<sup>77</sup> *Id.*

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

<sup>79</sup> *See generally Application for Lawyers & Firms Seeking to Employ a Fellow*, *supra* note 58.

<sup>80</sup> *See generally id.*

<sup>81</sup> *See generally id.*

Six Summer Fellows were selected and seven Associate Fellows were selected.<sup>82</sup> The Summer Fellows worked from May through August 2022 and were placed at firms in Mackinaw (Tazewell County), Jerseyville (Jersey County), Sterling (Whiteside County), Stillman (Ogle County), Robinson (Crawford County), and Mattoon (Coles County) Illinois.<sup>83</sup> The seven Associate Fellows, who will be working from August 2022 through August 2023, were placed with two different firms in DeKalb (DeKalb County) and firms in Peru (LaSalle County), Pekin (Tazewell County), Macomb (McDonough County), Galesburg (Knox County), and Mattoon (Coles County) Illinois.<sup>84</sup> All six of the Summer Fellows successfully completed the program, and as of the writing of this article, only one Associate Fellow has withdrawn from the program, while the other six remain working at the firm with which they were matched.<sup>85</sup>

#### IV. FUTURE EFFORTS: THE SPECIAL COMMITTEE ON SERVING LAWYERS IN RURAL PRACTICES

In addition to the RPI, the ISBA is also looking for other ways to address the problems associated with legal deserts.<sup>86</sup> In the spring of 2022, then President Anna Krolikowska appointed the Special Committee on Serving Lawyers in Rural Practices, which ISBA President Rory Weiler continued for the 2022-2023 bar year.<sup>87</sup>

The ISBA's new Special Committee on Serving Lawyers in Rural Practices is currently exploring ways that the ISBA can better provide programs and services to assist with the difficulties facing rural lawyers.<sup>88</sup> Specifically, this Special Committee was created to:

. . . augment the work of the Standing Committee on the Rural Practice Initiative. By definition, the special committee will have a limited time in which to accomplish its charge. The special committee will be asked to focus on examining and making recommendations on how best ISBA can serve the needs of lawyers practicing in rural areas of Illinois. The special committee will, as part of its charge, need to address the segue between the needs of rural practitioners and the Rural Practice Fellowship Program,

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<sup>82</sup> Celeste Antoinette Niemann, *Rural Practice Fellowship Program Fellows Announced*, ILL. STATE BAR ASS'N (May 25, 2022), <https://www.isba.org/barnews/2022/05/ruralpracticefellowshipprogramfello>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See generally *Application for Lawyers & Firms Seeking to Employ a Fellow*, *supra* note 58.

<sup>86</sup> *Special Committee on Serving Lawyers in Rural Practice*, ILL. STATE BAR ASS'N, <https://www.isba.org/committees/servinglawyersinruralpractices> (last visited Apr. 11, 2023).

<sup>87</sup> *Id.*

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

including recommendations of the structure of the Rural Practice Fellowship Program.<sup>89</sup>

In furtherance of this mission, the Special Committee held a Listening Tour throughout Illinois in the fall of 2022.<sup>90</sup> Sessions were held in-person and via Zoom, and rural lawyers throughout the state were invited to attend and share their experiences related to rural practice.<sup>91</sup> Participants were invited to discuss both the positive and negative aspects of rural practice and share suggestions for programs and benefits that might assist them in their practices.<sup>92</sup> After concluding its Listening Tour, the Special Committee circulated a survey involving issues related to rural practitioners.<sup>93</sup> The survey was later made available to all registered lawyers in Illinois.<sup>94</sup>

At the time of writing this article, the Special Committee is sifting through and analyzing the data collected through its Listening Tour and survey.<sup>95</sup> A legislative subcommittee has been established to explore legislative solutions to rural-practice-related issues, a benefits subcommittee has been formed to explore member benefits the ISBA could provide to better assist rural lawyers, and an outreach subcommittee has been formed to explore ways the ISBA and its leaders can better communicate with rural practitioners and vice versa.<sup>96</sup> It is anticipated that a final report will be issued by the Special Committee in 2023 that will report on the findings of the Listening Tour and survey and make rural-practice-related recommendations to the ISBA Board of Governors.<sup>97</sup>

## V. CONCLUSION

As discussed above, the existence of legal deserts results in significant problems for Illinois' citizens, licensed lawyers, and legal system as a whole.<sup>98</sup> While the ISBA's initial efforts to address the problem are not a silver bullet, addressing the problem in incremental ways is clearly a step in the right direction.<sup>99</sup> The ISBA stands ready to work in meaningful ways to ensure that all the citizens of Illinois have access to the courts and competent

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See generally *Application for Lawyers & Firms Seeking to Employ a Fellow*, *supra* note 58.

<sup>93</sup> Timothy A. Slating, *ISBA Survey on Small Town and Rural Practice*, ILL. STATE BAR ASS'N (Dec. 5, 2022), <https://www.isba.org/barnews/2022/12/isbasurveyonsmalltownandruralpracti>.

<sup>94</sup> See generally *Application for Lawyers & Firms Seeking to Employ a Fellow*, *supra* note 58.

<sup>95</sup> See generally *id.*

<sup>96</sup> See generally *id.*

<sup>97</sup> See generally *id.*

<sup>98</sup> See Palmer, *supra* note 2; Finkel, *supra* note 36, at 20, 21.

<sup>99</sup> Issues related to rural practice or "legal deserts" still exist, despite the program having been successful in its first and second years. ABA Report 2022, at 24.

legal representation and, thereby, access to justice.<sup>100</sup> If you would like to financially assist in the ISBA's RPI efforts, donations are now being accepted through the Illinois Bar Foundation, the charitable arm of the ISBA.<sup>101</sup>

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<sup>100</sup> *Rural Practice Initiative*, *supra* note 45.

<sup>101</sup> *Special Projects & Initiatives*, ILL. BAR FOUND., <https://illinoisbarfoundation.org/programs/special-projects-and-initiatives/> (last visited Apr. 11, 2023).

# 2022 SURVEY OF ILLINOIS LAW: FAMILY LAW

Stephanie L. Tang\*

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## I. INTRODUCTION

This survey outlines major legislative changes and case law opinions in Illinois passed and ruled upon in 2022. This survey is an update to the 2019-2021 Survey of Illinois Law: Family Law.<sup>1</sup> 2022 brought additional expansion of the case law interpreting the recent substantial changes to the Illinois Marriage and Dissolution of Marriage Act (IMDMA). Section II of the survey outlines selected legislative changes of interest to family law practitioners and judges. Section III outlines selected case opinions relevant to family law practitioners and judges.

## II. SELECTED LEGISLATIVE CHANGES

### A. Public Act 102-0823: Contemplation in Support Modification

Public Act 102-0823 was passed following a long string of child support modification cases addressing the question of “what was contemplated” when the parties entered into a Judgment for Dissolution of Marriage.<sup>2</sup> To understand the need for this legislation, it is helpful to present a brief background of the case and legislative history. Under Section 510 of the IMDMA, child support may be modified upon a showing of a “substantial change in circumstances.”<sup>3</sup> Public Act 102-0823 was enacted to resolve an issue exacerbated by the courts in modification proceedings determining whether there was a “substantial change” if the circumstances were “contemplated or expected” at the time the parties entered into a final judgment.<sup>4</sup>

Illinois cases from the early 2000’s through 2008 established the precedent that circumstances that were “contemplated or expected” at the time the parties entered into a Judgment for Dissolution of Marriage would

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<sup>1</sup> See Stephanie L. Tang, *2019-2021 Survey of Illinois Law: Family Law*, 46 S. ILL. UNIV. L. J. 631 (2022).

<sup>2</sup> For an in-depth discussion of the history and full list of cases leading up to Public Act 102-0823, see Tang, *supra* note 1, at 639-51.

<sup>3</sup> 750 ILL. COMP. STAT. 5/510(a)(1) (2022).

<sup>4</sup> See *The ‘What Was Contemplated...’ Virus Has Been Eradicated!*, FAM. L. (Ill. State Bar Assoc., Springfield, IL), June 2022 at 7.

not constitute a “substantial change in circumstances” to justify modification.<sup>5</sup> One illustrative case was *In re Marriage of Hughes*. In *Hughes*, the original divorce judgment provided that in addition to paying child support, Husband would pay twelve months of non-modifiable spousal maintenance and twelve payments on Wife’s car.<sup>6</sup> Nine months later, Wife sought to modify Husband’s child support obligation, arguing that the termination of the maintenance and car payments constituted a “substantial change in circumstances.”<sup>7</sup> The appellate court found that because the court contemplated the end of these payments when it entered its original Judgment for Dissolution of Marriage, there was no substantial change in circumstances.<sup>8</sup>

The issue presented in these cases resurfaced in 2019 after it had sat dormant and unargued in appellate case law from 2008 through 2017.<sup>9</sup> The influx of new cases came following the July 1, 2017, statutory changes in the Illinois child support model from the “percentage of income” to the “income shares” model.<sup>10</sup> This meant that courts shifted from only considering a percentage of one parent’s income to considering both parents’ income, as well as their parenting time.<sup>11</sup> This change resulted in some significant drops in child support numbers between the two models.<sup>12</sup> However, because the Act provided its enactment in and of itself was insufficient to constitute a substantial change in circumstances, payor spouses who were paying child support pursuant to a pre-July 1, 2017 Order scurried to find unique arguments to seek modifications.<sup>13</sup> In an attempt to discourage these types of cases, courts extended the “what was contemplated” line of cases to find the parties contemplated various changes in income and employment status at the time the divorce judgment was entered.<sup>14</sup>

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<sup>5</sup> See *In re Marriage of Mulry*, 732 N.E.2d 667, 671-72 (Ill. App. Ct. 2000); *In re Marriage of Hughes*, 751 N.E.2d 23, 26 (Ill. App. Ct. 2001); *In re Marriage of Reynard*, 883 N.E.2d 535, 541-42 (Ill. App. Ct. 2008).

<sup>6</sup> *In re Marriage of Hughes*, 751 N.E.2d 23, 24 (Ill. App. Ct. 2001).

<sup>7</sup> *Id.* at ¶¶ 24-5.

<sup>8</sup> *Id.* at ¶ 26.

<sup>9</sup> Tang, *supra* note 1, at ¶ 845.

<sup>10</sup> Act effective July 1, 2017, Pub. Act. 99-764, 2016 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/505).

<sup>11</sup> 750 ILL. COMP. STAT. 5/505(a)(1.5) (2020).

<sup>12</sup> Ben Coltrin, *What is the Income Shares Model for Determining Child Support?* DIVORCEMAG, <https://www.divorcemag.com/blog/what-is-the-income-shares-model-for-determining-child-support> (Aug. 20, 2022) (detailing how calculations are performed under the “income shares” model; one of its examples includes where the hypothetical support recipient earns 55% of the combined income and is thus assigned 55% of the responsibility).

<sup>13</sup> 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>14</sup> See, e.g., *In re Marriage of Salvatore*, 2019 IL App (2d) 180425, ¶ 24.



The beginning of what many practitioners viewed as an “over-extension” of the contemplation analysis was *In re Marriage of Salvatore*.<sup>15</sup> In *Salvatore*, the original divorce judgment entered prior to July 1, 2017, ordered Husband to pay 32% of his net income for child support.<sup>16</sup> Wife was unemployed at the time the judgment was entered.<sup>17</sup> The parties did not reference the possibility of Wife obtaining new employment within the child support section of the judgment.<sup>18</sup> Husband filed a Petition to Modify Child Support, alleging his income decreased, and Wife had obtained employment was now earning \$45,000 per year, which together constituted a basis on which to change the child support calculation.<sup>19</sup> In rejecting Husband’s argument, the appellate court found the parties had “contemplated” the possibility of Wife obtaining employment, highlighting the following provisions:

1. In the parties’ Marital Settlement Agreement, health insurance section: “If for any reason health insurance is not provided through *either party’s employer*, then [Husband] shall secure health insurance...”<sup>20</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>21</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>22</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>23</sup>

The *Salvatore* ruling generated significant backlash from family law practitioners, as the above provisions were previously considered “boilerplate,” as opposed to language that would prevent any future

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<sup>15</sup> *In re Marriage of Salvatore*, 2019 IL App (2d) 180425, ¶ 12.

<sup>16</sup> *Id.* at ¶ 4.

<sup>17</sup> *Id.* at ¶ 8.

<sup>18</sup> *Id.* at ¶ 5.

<sup>19</sup> *Id.* at ¶ 10.

<sup>20</sup> *Id.* at ¶ 26 (emphasis added).

<sup>21</sup> *In re Marriage of Salvatore*, 2019 IL App (2d) 180425, ¶ 29 (emphasis added).

<sup>22</sup> *Id.* at ¶ 29 (emphasis added).

<sup>23</sup> *Id.* at ¶ 30 (emphasis added).

modification of child support based on Wife obtaining employment.<sup>24</sup> What followed was a string of cases with a similar analysis, muddying the line of what was “reasonably foreseeable” and what the parties actually “contemplated” at the time of divorce when the judgment had seemingly unrelated or tangential references to potential future events.<sup>25</sup>

Governor Pritzker signed Senate Bill 3036 (Public Act 102-0823) into law on May 13, 2022,<sup>26</sup> effective immediately, with the aim to introduce clarification in courts on when they should find parties “contemplated” a change in circumstances when entering into an original divorce decree.<sup>27</sup> Specifically, 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 (including final judgments).<sup>28</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>29</sup> Aside from eliminating the defense of contemplation or foreseeability to a substantial change in circumstances claim, this statutory amendment will also hopefully allow family law attorneys to avoid potential malpractice claims they would have faced where a “contemplated change” was read into seemingly boilerplate form language.<sup>30</sup>

## B. Public Act 102-0831: Public Access to Stalking No Contact Orders

Public Act 102-0831 amends the Stalking No Contact Order Act as it relates public access to petitions for emergency stalking no contact orders.<sup>31</sup> This Act helps protect victims by providing that when a petition for an emergency stalking no contact Order is granted, the petition, order, and file shall not be publicly accessible.<sup>32</sup> Rather, it will only be accessible to the

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<sup>24</sup> Wes Cowell, *Salvatore gums up child support modifications with new ‘what was contemplated?’ analysis*, FAM. L. SECTION COUNCIL NEWSL. (Ill. State Bar. Ass’n, Springfield, Ill.), Apr. 2019, at 4.

<sup>25</sup> See *In re Marriage of Connelly*, 2020 IL App (3d) 180193; *In re Marriage of Solecki*, 2020 IL App (2d) 190381; *In re Marriage of Dea*, 2020 IL App (1st) 190234; *In re Marriage of Dynako*, 2021 IL 126835; *In re Marriage of Durdov*, 2021 IL App (1st) 191811; *In re Marriage of Elmore*, 2021 IL App (1st) 210123-U; *In re Marriage of Yabush*, 2021 IL App (1st) 201136.

<sup>26</sup> Pub. Act 102-823, 2022 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/510).

<sup>27</sup> Blockman, *supra* note 13, at ¶ 1.

<sup>28</sup> Pub. Act 102-823, 2022 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/510).

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

<sup>30</sup> Blockman, *supra* note 13, at ¶ 1.

<sup>31</sup> Pub. Act 102-831, 2022 Ill. Laws § 5 (codified as amended at 740 ILL. COMP. STAT. 21/20, 21/95, 22/202, 22/213, 22/214, 60/217).

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

court, law enforcement, petitioner, victim advocate, counsel of record for either party, and the State’s Attorney for the county until the Order is served on the respondent.<sup>33</sup>

### C. Public Act 102-0685: Repeal of the Parental Notice of Abortion Act

Public Act 102-0685 repealed the 750 ILCS 70/1-70/99 (“Parental Notice of Abortion Act”), as of June 1, 2022.<sup>34</sup> The Act previously prohibited the performance of an abortion on a minor or incompetent person unless an adult family member was given notice 48 hours in advance, with limited exceptions.<sup>35</sup> Governor Pritzker reasoned that repealing the Act was “essential” because it was the most vulnerable pregnant minors who were punished by this law: victims of rape and physical abuse in unsafe homes.<sup>36</sup> This repeal also relieves courts from hearing cases where a party is seeking a “judicial bypass” where a court under the prior Act could bypass the prohibition if it found notification would not be in the best interests of the minor or incompetent person.<sup>37</sup>

### D. Public Act 102-480: Pre-Appearance Interim Fee Petitions

Public Act 102-480 adds another avenue for parties to seek interim attorney’s fees under Section 501 of the Illinois Marriage and Dissolution of Marriage Act.<sup>38</sup> Specifically, the Act codifies the procedure for a litigant seeking interim fees to pay for an initial retainer to retain a particular attorney.<sup>39</sup> The Act requires that a petition filed under this new section include an affidavit from the attorney seeking to be retained that (1) states they have been contacted by the moving party and (2) agree to enter an Appearance.<sup>40</sup> Any fees awarded pursuant to a petition under this section shall be paid directly to the attorney.<sup>41</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> Youth Health & Safety Act, Pub. Act 102-685, 2021 Ill. Laws § 90 (repealing 750 ILCS 70/1-70/99).

<sup>35</sup> 750 ILCS 70/1-70/99 (2020).

<sup>36</sup> Rachel Hinton, *Pritzker signs repeal of Parental Notice of Abortion Act*, SUN TIMES (Dec. 17, 2021), <https://chicago.suntimes.com/politics/2021/12/17/22841847/pritzker-repeal-parental-notice-notification-abortion-act-law-illinois>.

<sup>37</sup> *Parental Notice of Abortion Act (PNA) and the Judicial Bypass Coordination Project*, ACLU ILL., <https://www.aclu-il.org/en/pna> (last visited Jan. 23, 2023) (explaining the judicial bypass option under then existing law).

<sup>38</sup> Pub. Act 102-480, 2021 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/501(c-1)(1.5)).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

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

### E. Public Act 102-143: Temporary Relocation

Effective January 1, 2022, Public Act 102-143 provides that a court may now Order relocation on a temporary basis during the pendency of a divorce action prior to entry of a final allocation judgment between the parties.<sup>42</sup> The temporary relocation procedure mirrors what already existed in Section 609.2 of the Illinois Marriage and Dissolution of Marriage Act.<sup>43</sup>

### F. Public Acts 102-87 and 102-823: Health Insurance & Life Insurance Provisions

Also effective January 1, 2022, Public Act 102-87 added a distinction between an “insurance obligee” and “insurance obligor” for health insurance purposes.<sup>44</sup> Public Act 102-823 added back in the section regarding life insurance to secure child support at the trial court’s discretion.<sup>45</sup> Both bills were still cleaning up issues that arose from Illinois’ switch to calculating child support using the income shares model instead.<sup>46</sup>

## III. SELECTED CASES

### A. Child Support/Maintenance

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

*In re Marriage of Britton* was a case arising in the Circuit Court of Williamson County, addressing multiple support-related issues.<sup>47</sup> In *Britton*, the parties divorced in 2012.<sup>48</sup> Wife subsequently filed a petition to Modify Husband’s Child Support and petition for Attorneys’ Fees, and Husband counter-filed a Petition for Rule to Show Cause.<sup>49</sup> Following a hearing, the trial court entered an Order providing, in relevant part: 1) Husband shall pay fifty percent of Wife’s supplemental health insurance policy for the children and Wife should now maintain health insurance on behalf of the children, 2) educational expenses shall be equally divided between the parties retroactive to August 2019 (four months prior to Wife’s Petitions were filed), 3)

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<sup>42</sup> Pub. Act 102-143, 2021 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/609.2).

<sup>43</sup> *Id.*

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

<sup>45</sup> *Id.*

<sup>46</sup> Pub. Act 102-823, 2022 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/510); Pub. Act 102-87, 2021 Ill. Laws § 5 (codified as amended/ 750 ILL. COMP. STAT. 5/505).

<sup>47</sup> *In re Marriage of Britton*, 2022 IL App (5th) 210065, ¶ 1.

<sup>48</sup> *Id.* at ¶ 3.

<sup>49</sup> *Id.* at ¶ 8.

Husband's gross monthly income should be imputed to \$14,529.<sup>50</sup> Husband appealed.<sup>51</sup>

Husband first argued the court lacked subject matter jurisdiction to Order him to pay half of Wife's supplemental health insurance policy.<sup>52</sup> The appellate court agreed and found this paragraph of the trial court's Order void for lack of subject matter jurisdiction.<sup>53</sup> The appellate court reasoned the parties' Marital Settlement Agreement ordered Husband to "maintain health insurance" and "each party shall be responsible for payment of one-half of all deductibles and expenses."<sup>54</sup> Wife thereafter obtained supplemental health insurance for the children on her new husband's policy.<sup>55</sup> However, none of the pleadings pending before the court at the time the Order was entered requested contribution towards the supplemental health insurance policy, so the court improperly granted this relief.<sup>56</sup>

Second, Husband argued that the trial court erred in ordering Husband to pay retroactive contribution to educational expenses prior to the date Wife filed her petition to modify.<sup>57</sup> The appellate court also agreed with Husband on this point, finding Section 510 of the IMDMA only allows for modification as to installments accruing subsequent to due notice.<sup>58</sup>

Finally, the Husband argued the trial court erred in imputing his income and in its calculation of Husband's income.<sup>59</sup> The appellate court found that the trial court finding Husband's income could be imputed was not against the manifest weight of the evidence.<sup>60</sup> However, the appellate court took issue with the trial court's calculation of Husband's income.<sup>61</sup> Specifically, the court noted Section 505(a)(3.1)(A) of the IMDMA explicitly excludes accelerated depreciation from the calculation of net business income.<sup>62</sup> Under 505, the court must: (1) determine if any amount of the claim depreciation is accelerated depreciation and, if yes, (2) exclude that amount from calculating income for purposes of child support.<sup>63</sup> The appellate court vacated the trial court's finding as to Husband's income and remanded the cause for the trial court to "determine which business deductions were accelerated, remove them from consideration, and then determine from the nonaccelerated

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<sup>50</sup> *Id.* at ¶¶ 1, 35, 61.

<sup>51</sup> *Id.* at ¶ 1.

<sup>52</sup> *Id.* at ¶ 37.

<sup>53</sup> *In re Marriage of Britton*, 2022 IL App (5th) 210065, ¶ 42.

<sup>54</sup> *Id.* at ¶ 40.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at ¶ 52.

<sup>58</sup> *Id.*

<sup>59</sup> *In re Marriage of Britton*, 2022 IL App (5th) 210065, ¶ 55.

<sup>60</sup> *Id.* at ¶ 55.

<sup>61</sup> *Id.* at ¶ 68.

<sup>62</sup> *Id.* at ¶ 59.

<sup>63</sup> *Id.* at ¶ 60.

depreciation which amounts were reasonable and necessary to carry on the business.”<sup>64</sup>

## 2. *In re Marriage of Staszak*

*In re Marriage of Staszak*, among other ancillary issues, supports the idea that even where a court declines to modify a party’s child support obligation due to a change in circumstances, this is not an abuse of discretion to modify that same party’s maintenance obligation.<sup>65</sup> The parties here were married for seventeen years and had two children.<sup>66</sup> They divorced in 2018 when Mother was earning \$69,000 per year and Father was earning \$114,000 per year.<sup>67</sup> Father was ordered to pay both child support and maintenance.<sup>68</sup> Three months after the parties’ divorce, Father filed a Motion to modify and/or abate maintenance and child support after being laid off and living on his severance package of \$38,000.<sup>69</sup> Pursuant to his employer’s records, he was terminated for cause.<sup>70</sup> Father claimed he was fired due to emotional difficulties, not as an attempt to evade his support obligation.<sup>71</sup> The court found Father’s testimony credible, noting that Father took leave from work under Family and Medical Leave Act (FMLA).<sup>72</sup> Eleven months after filing the motion, Father obtained employment, but only earned \$75,000 per year.<sup>73</sup> While he was unemployed, he withdrew a total of \$120,000 from his retirement accounts and children’s college funds.<sup>74</sup>

The trial court found these withdrawals constituted Father’s income for purposes of child support.<sup>75</sup> Father maintained his lifestyle during his unemployment, including dining out, movie subscriptions, and a wine club membership.<sup>76</sup> However, he failed to make any child support or maintenance payments while unemployed.<sup>77</sup> The trial court denied Father’s Motion to Modify Child Support but did abate his maintenance obligation to Mother

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<sup>64</sup> *Id.* at ¶ 68.

<sup>65</sup> *In re Marriage of Staszak*, 2022 IL App (2d) 210427-U, ¶¶ 37-38.

<sup>66</sup> *Id.* at ¶ 4.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at ¶ 5.

<sup>69</sup> *Id.* at ¶ 7.

<sup>70</sup> *Id.* at ¶ 35.

<sup>71</sup> *In re Marriage of Staszak*, 2022 IL App (2d) 210427-U, ¶ 35.

<sup>72</sup> *Id.* at ¶ 35.

<sup>73</sup> *Id.* at ¶ 36.

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

<sup>75</sup> *Id.* at ¶¶ 36-37.

<sup>76</sup> *Id.* at ¶ 36.

<sup>77</sup> *In re Marriage of Staszak*, 2022 IL App (2d) 210427-U, ¶ 36.

during his period of unemployment.<sup>78</sup> Mother appealed, arguing this ruling was inconsistent.<sup>79</sup>

The appellate court affirmed, relying on *In re Marriage of Verhines and Hickey*,<sup>80</sup> which found the duty to pay child support is “more absolute” than the duty to continue paying maintenance.<sup>81</sup> The court cited the *Verhines* court’s guidance that the trial court must take a “holistic view of the obligor’s financial position to determine whether he has the resources to meet his existing obligation without unduly compromising his ability to meet his own needs.”<sup>82</sup> The appellate court noted Father depleted about a third of his retirement savings and withdrew monies to maintain his standard of living.<sup>83</sup>

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

*In re Marriage of Watson* addressed the timeliness of filing a Petition to Extend Reviewable Maintenance.<sup>84</sup> In 2014, Judge Charles D. Johnson entered an Order awarding Wife reviewable maintenance of four thousand dollars a month for thirty-six months.<sup>85</sup> In November 2017, Wife petitioned the court to extend and increase her maintenance, asserting she was disabled and unable to support herself.<sup>86</sup> She further alleged that even though she sought psychiatric treatment for herself, she was unable to obtain employment.<sup>87</sup> In September 2018, Judge Charles W. Smith held an evidentiary hearing on Wife’s Petition.<sup>88</sup> The transcripts from the hearing indicated Wife “spoke out of turn, ignored court directives to only answer the question that was asked, and was warned twice about the use of foul language to describe [Husband].”<sup>89</sup> She also testified she had not worked since 2003 and had let her nursing license lapse, that during the marriage, the parties resided in a 5,500 square foot residence, and that she suffered from post-traumatic stress disorder and depression.<sup>90</sup> Further, her big toe was severely injured when she jumped in front of a train, and her remaining toes will need to be amputated.<sup>91</sup> Accordingly, she is unable to walk for more than a few

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<sup>78</sup> *Id.* at ¶¶ 37-38.

<sup>79</sup> *Id.* at ¶¶ 53-55.

<sup>80</sup> *Id.* at ¶ 55 (citing *In re Marriage of Verhines & Hickey*, 2018 IL App (2d) 171034 ¶ 86).

<sup>81</sup> *Id.* (citing *In re Marriage of Verhines & Hickey*, 2018 IL App (2d) 171034 ¶ 86).

<sup>82</sup> *Id.* (citing *In re Marriage of Verhines & Hickey*, 2018 IL App (2d) 171034, ¶ 82).

<sup>83</sup> *In re Marriage of Staszak*, 2022 IL App (2d) 210427-U, ¶ 55.

<sup>84</sup> *In re Marriage of Watson & Cox*, 2022 IL App (2d) 210137, ¶ 1.

<sup>85</sup> *Id.* at ¶ 7.

<sup>86</sup> *Id.* at ¶ 8.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at ¶ 9.

<sup>89</sup> *Id.*

<sup>90</sup> *In re Marriage of Watson & Cox*, 2022 IL App (2d) 210137, ¶¶ 9-12.

<sup>91</sup> *Id.* at ¶ 12.

minutes.<sup>92</sup> In contrast, Husband's income was \$667,000 and \$751,000 in 2016 and 2017, respectively.<sup>93</sup>

Following the September 2018 hearing, Judge Smith noted the 2014 maintenance Order did not provide reasons for granting maintenance or its duration, nor any guidance as to what factors should be addressed upon review.<sup>94</sup> Nevertheless, Judge Smith granted Wife's petition on September 10, 2018, extending Husband's maintenance obligation another twenty-four months.<sup>95</sup> The court provided in its ruling that maintenance would terminate after twenty-four months unless Wife filed a Petition on or before the termination date.<sup>96</sup> On the record, Husband's counsel clarified with the court that maintenance would terminate "two years from today" (September 10, 2020).<sup>97</sup> In its ruling, the court advised the parties to present "better evidence" at the time of the next review as to whether Wife's disabilities were permanent to the point she would never be able to find work.<sup>98</sup> Specifically, the court outlined its expectation that Wife would be expected to outline any attempts at securing employment at a future review of maintenance.<sup>99</sup>

Despite the court's ruling, Wife did not file a petition to extend maintenance until September 28, 2020.<sup>100</sup> On December 10, 2020, the parties and counsel appeared before Judge Smith for a hearing, asserting the court's maintenance Order was ambiguous, and her filing was timely as it was filed during the month of the Husband's final monthly payment.<sup>101</sup> Husband's counsel argued Wife's petition was untimely as it was filed after the two-year mark had passed.<sup>102</sup> Judge Smith rejected both parties' arguments, finding his prior Order was not ambiguous, but allowed Wife leave to file a new maintenance petition under Section 504 of the IMDMA, finding reviewable maintenance is "always reviewable."<sup>103</sup> However, the December 10 Order did not reflect Judge Smith's allowance to file a new maintenance petition.<sup>104</sup> Regardless, Wife filed an amended petition, and Husband moved to dismiss.<sup>105</sup>

Between the date of Wife filing her amended petition and when it was heard, Judge Ari P. Fisz was assigned to take over Judge Smith's call in the

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at ¶ 15.

<sup>94</sup> *Id.* at ¶ 16.

<sup>95</sup> *Id.* at ¶ 23.

<sup>96</sup> *In re Marriage of Watson & Cox*, 2022 IL App (2d) 210137, ¶ 23.

<sup>97</sup> *Id.* at ¶ 24.

<sup>98</sup> *Id.* at ¶ 23.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at ¶ 26.

<sup>101</sup> *Id.* at ¶ 27.

<sup>102</sup> *In re Marriage of Watson & Cox*, 2022 IL App (2d) 210137, ¶ 27.

<sup>103</sup> *Id.* at ¶ 27.

<sup>104</sup> *Id.* at ¶ 31.

<sup>105</sup> *Id.* at ¶ 28.



Family Division.<sup>106</sup> When the parties appeared before Judge Fisz for hearing on Wife's Amended Petition, neither party provided him with a copy of the December 10, 2020 transcript of the proceedings.<sup>107</sup> Rather, Judge Fisz, seeing no written Order granting Wife leave to file a new maintenance petition, granted Husband's Motion to Dismiss.<sup>108</sup>

The appellate court reversed and remanded, finding the trial court's refusal to allow Wife to pursue her petition was an abuse of discretion.<sup>109</sup> The court found the reassignment of the case to a new judge requires that judge to respect the prior judge's ruling in the same case.<sup>110</sup> Further, the court noted that adhering to an arbitrary filing deadline inequitably placed "form over substance" where Wife had an apparent continued need as a disabled former spouse.<sup>111</sup>

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

In recent years, the appellate case law has trended towards retirement not automatically being considered a substantial change in circumstances for purposes of modifying a payor's support obligation.<sup>112</sup> The unpublished opinion of *In re Marriage of Bartlett* finally provided a case where the court found payor's good faith retirement coupled with analysis of the parties' respective assets, constituted a substantial change in circumstances.<sup>113</sup> In *Bartlett*, the trial court entered a judgment dissolving the parties' marriage in 2008, awarding each party \$894,788.12, and ordering Husband (who was previously earning \$365,000 annually) to pay Wife eight thousand dollars per month in permanent maintenance.<sup>114</sup> In 2009, the trial court reduced the maintenance award to six thousand five hundred dollars per month based on a decrease in Husband's salary.<sup>115</sup> In 2019, Petitioner, now seventy years old, filed a petition to terminate his maintenance due to plans to retire in 2020.<sup>116</sup> The trial court denied the petition, stating that while the petitioner's age and reduced income as an attorney weighed in favor of modification, he was in good health, voluntarily retired, and could keep working as a lawyer and could pay maintenance from his investments.<sup>117</sup>

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<sup>106</sup> *Id.* at ¶ 29.

<sup>107</sup> *Id.* at ¶ 38.

<sup>108</sup> *In re Marriage of Watson & Cox*, 2022 IL App (2d) 210137, ¶ 32.

<sup>109</sup> *Id.* at ¶¶ 44-45.

<sup>110</sup> *Id.* at ¶ 41.

<sup>111</sup> *Id.* at ¶ 44.

<sup>112</sup> See *In re Marriage of Bernay*, 2017 IL App (2d) 160583, ¶ 22; *In re Marriage of Verhines & Hickey*, 2018 IL App (2d) 171034, ¶ 3.

<sup>113</sup> *In re Marriage of Bartlett*, 2022 IL App (1st) 201358-U, ¶ 38.

<sup>114</sup> *Id.* at ¶ 7.

<sup>115</sup> *Id.* at ¶ 9.

<sup>116</sup> *Id.* at ¶ 10.

<sup>117</sup> *Id.* at ¶ 17.

The appellate court reversed and remanded with directions, holding the trial court abused its discretion in finding the Husband failed to prove a substantial change in circumstances.<sup>118</sup> The court reasoned that the evidence presented did not support a finding that Husband retired for the purpose of evading his maintenance obligation.<sup>119</sup> Instead, the court noted Husband already worked past average retirement age, worked long hours in a stressful environment causing his cognitive decline, and already had paid nearly one million dollars in maintenance to his ex-Wife, indicating he had not actively been trying to evade his obligation.<sup>120</sup> Further, Husband's sworn financial affidavits support that at the current rate of maintenance, Husband would liquidate his retirement and be left with less financial resources than Wife.<sup>121</sup> The court found that even though the Husband's job as a lawyer did not require substantial physical labor, it did require a certain level of mental acuity that Husband testified was declining.<sup>122</sup>

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

*In re Marriage of Podolsky* highlighted the importance of providing that maintenance shall be non-modifiable within a parties' Judgment for Dissolution if that is what the parties intended.<sup>123</sup> In *Podolsky*, the parties entered into a Marital Settlement Agreement (MSA) providing Husband was ordered to pay Wife ten thousand dollars a month in permanent maintenance, subject to termination by remarriage, death, or Wife's conjugal, continuing cohabitation.<sup>124</sup> The MSA also provided, "Except as otherwise provided for in Section 502 of the IMDMA, the parties may only amend or modify this Agreement by a written Agreement dated and signed by them."<sup>125</sup> Husband subsequently filed a Motion to Modify Maintenance, based on the COVID-19 pandemic substantially negatively impacting his oil business.<sup>126</sup>

The appellate court reversed and remanded the trial court's finding that maintenance was non-modifiable.<sup>127</sup> Distinguishing the case from both *In re Marriage of Dynako* and *In re Marriage of Schweitzer*, the court found the MSA did not provide that the agreement itself was non-modifiable or that maintenance was non-modifiable.<sup>128</sup> Rather, the language provided that if

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<sup>118</sup> *Id.* at ¶ 46.

<sup>119</sup> *In re Marriage of Bartlett*, 2022 IL App (1st) 201358-U, ¶ 36.

<sup>120</sup> *Id.* at ¶ 36.

<sup>121</sup> *Id.* at ¶ 38.

<sup>122</sup> *Id.* at ¶ 39.

<sup>123</sup> *In re Marriage of Podolosky*, 2022 IL App (5th) 210195-U, ¶ 1, *appeal denied*, 197 N.E.3d 1083 (Ill. 2022).

<sup>124</sup> *Id.* at ¶ 4.

<sup>125</sup> *Id.* at ¶ 7.

<sup>126</sup> *Id.* at ¶ 5.

<sup>127</sup> *Id.* at ¶ 30.

<sup>128</sup> *Id.* at ¶¶ 20-26.

the parties were unable to reach an agreement in writing, the agreement could be modified pursuant to Section 502 of the IMDMA.<sup>129</sup> The court found Section 502(f) specifically allows for modification if there has been a substantial change in circumstances.<sup>130</sup>

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

*In re Marriage of Churchill* came back for a second appeal wherein Husband sought termination based on his ex-Wife's conjugal cohabitation with her boyfriend.<sup>131</sup> On the first appeal, the appellate court affirmed the trial court's decision, finding the ex-Wife was not cohabitating with her boyfriend on a continuing, conjugal basis.<sup>132</sup> The court made this ruling after finding the ex-Wife and her boyfriend were in an exclusive relationship for 8-12 months, the boyfriend did select chores for ex-Wife, the boyfriend helped tutor ex-Wife's children, but 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>133</sup>

On second appeal, the appellate court now found ex-Wife was cohabiting on a continuing, conjugal basis.<sup>134</sup> Unlike the first appeal, now the ex-Wife had been with her boyfriend for three and a half years, the boyfriend spent the majority of his time in his RV near ex-Wife's house, had a monogamous sexual relationship, attended concerts and sporting events together, celebrated holidays and birthdays together, and they integrated many of their personal affairs.<sup>135</sup> Moreover, they had exchanged rings and the boyfriend had mail sent to ex-Wife under his last name.<sup>136</sup>

#### 7. *In re Marriage of Scarp and Rahman*

The appellate court in this case analyzed a "catchall provision" at the end of the parties' Marital Settlement Agreement that provided the agreement was non-modifiable except for "support, custody, and visitation" of the minor children.<sup>137</sup> Husband filed a Motion to Modify Maintenance and Wife

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<sup>129</sup> *In re Marriage of Podolosky*, 2022 IL App (5th) 210195-U, ¶ 23, *appeal denied*, 197 N.E.3d 1083 (Ill. 2022).

<sup>130</sup> *Id.* at ¶ 26.

<sup>131</sup> *In re Marriage of Churchill*, 2022 IL App (3d) 210026, ¶ 3.

<sup>132</sup> *See Tang, supra* note 1, at 659 (discussing the fact-specific analysis that led to the finding of no cohabitation).

<sup>133</sup> *Tang supra* note 1, at ¶ 659.

<sup>134</sup> *In re Marriage of Churchill*, 2022 IL App (3d) 210026, ¶ 1.

<sup>135</sup> *Id.* at ¶ 39 (noting they shared an account at the jewelry store, listed boyfriend's cat under ex-Wife's account at the veterinarian, had boyfriend's vehicle invoices appear on Wife's account, and boyfriend knew the garage code to access ex-Wife's house).

<sup>136</sup> *Id.* at ¶ 42.

<sup>137</sup> *In re Marriage of Scarp & Rahman*, 2022 IL App (1st) 210711, ¶ 3.

opposed based on their catchall provision, arguing the maintenance provision was non-modifiable due to the catchall language at the end of the agreement.<sup>138</sup> The appellate court affirmed the trial court's ruling, finding that the 2016 amendments to Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act,<sup>139</sup> along with the 2021 Illinois Supreme Court case of *In re Marriage of Dynako*,<sup>140</sup> permits parties to enter a catchall provision of non-modifiability that governs the entire agreement.<sup>141</sup> Therefore, the court concluded this provision acted as a bar to modifying maintenance.<sup>142</sup>

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

This unpublished case addressed several issues, many of which were focused on case-specific improper calculations of support due to relied-upon mathematical errors.<sup>143</sup> However, for general takeaways, the case was one of the first in Illinois to discuss the propriety of child support calculation software.<sup>144</sup> Family Law Software is frequently used to calculate maintenance and child support using user-inputted values.<sup>145</sup> On appeal, Wife argued Husband's Family Law Software calculations should be rejected.<sup>146</sup> However, Wife also submitted Family Law Software calculations, which prohibited her from making an argument regarding the calculations due to the rule of acquiescence.<sup>147</sup> Further, the appellate court found the trial court properly used the "individualized tax approach"<sup>148</sup> based on the tax law in effect at the time the calculation was made.<sup>149</sup> The record supports this too, as the Family Law Software calculations, which were submitted by the parties' respective counsel, support using the taxes as of the time the calculation was made, since it contained the current taxes and calculated "the proper 2019 taxes."<sup>150</sup>

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<sup>138</sup> *Id.* at ¶ 4-6.

<sup>139</sup> *Id.* at ¶ 9 (Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act provides as follows: "The parties may provide that maintenance is non-modifiable in amount, duration, or both. If the parties do not provide that maintenance is non-modifiable in amount, duration, or both, then those terms are modifiable upon a substantial change of circumstances.").

<sup>140</sup> *In re Marriage of Dynako*, 2021 IL 126835, ¶ 19.

<sup>141</sup> *In re Marriage of Scarp & Rahman*, 2022 IL App (1st) 210711, ¶ 21.

<sup>142</sup> *Id.* at ¶ 25.

<sup>143</sup> *In re Marriage of Conopeotis*, 2022 IL App (2d) 191099-U, ¶ 109.

<sup>144</sup> *Id.* at ¶ 33 (indicating Family Law Software was "apparently the standard for determining these guidelines in court.").

<sup>145</sup> Stephanie L. Tang, *Child Support Software – Risks and Benefits*, FAM. L. MAG. (Aug 3, 2018), <https://familylawyermagazine.com/articles/child-support-software-risks-benefits/>.

<sup>146</sup> *In re Marriage of Conopeotis*, 2022 IL App (2d) 191099-U, ¶ 61.

<sup>147</sup> *Id.* at ¶ 62.

<sup>148</sup> "Individualized Tax Amount" is defined at 750 ILL. COMP. STAT. 5/505(a)(3)(E).

<sup>149</sup> *In re Marriage of Conopeotis*, 2022 IL App (2d) 191099-U, ¶ 77.

<sup>150</sup> *Id.* at ¶ 79.

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

*In re Marriage of Bostrom* was the first published case addressing a contemplated substantial change in circumstances analysis following the enactment of Public Act 102-0823 earlier in the year.<sup>151</sup> The parties dissolved their marriage in 2012, entering a Marital Settlement Agreement requiring Husband to pay \$1,750 per month to Wife in permanent maintenance.<sup>152</sup> In 2018, Husband filed a Petition to Terminate Maintenance, alleging his retirement at 63 years old and an increase in Wife's income constituted a substantial change in circumstances.<sup>153</sup> At the modification hearing, the evidence supported the following: 1) Wife's income increased from \$65,000 to \$100,000, 2) she was now receiving \$4,209 monthly from Husband's retirement as provided in the Marital Settlement Agreement, 3) Husband's annual income was \$78,468 from his retirement pension, and 4) Husband's new wife inherited \$750,000 and placed it into a joint account.<sup>154</sup> At trial, the court found there was a substantial change in circumstances but refused to terminate maintenance.<sup>155</sup> Instead, the court reduced the maintenance award from \$1,750 per month to \$0.<sup>156</sup>

On appeal, the majority found the trial court erred in considering Wife's additional income from retirement because that was a part of her property settlement.<sup>157</sup> However, they agreed that Wife's increase in income from \$65,000 to \$159,000 was appropriately considered a substantial change in circumstances warranting modification in and of itself.<sup>158</sup> The majority further held the trial court did not abuse its discretion in reducing Wife's maintenance from \$1,750 to \$0 because the type of maintenance she received was contemplated by the Marital Settlement Agreement, which was designed to supplement her employment income to continue her marital lifestyle.<sup>159</sup> The majority found the trial court was correct in focusing only on Wife's ability to maintain her marital lifestyle and in finding Wife was now financially independent enough to enjoy the standard of living she enjoyed during the marriage.<sup>160</sup> Concerningly, this opinion appears to misapply the recent changes adopted into Section 510 of the Illinois Marriage and

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<sup>151</sup> See Section II.A., *supra*.

<sup>152</sup> *In re Marriage of Bostrom*, 2022 IL App (1st) 200967, ¶ 4.

<sup>153</sup> *Id.* at ¶ 8.

<sup>154</sup> *Id.* at ¶ 9.

<sup>155</sup> *Id.* at ¶ 30.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at ¶ 49.

<sup>158</sup> *In re Marriage of Bostrom*, 2022 IL App (1st) 200967, ¶ 47.

<sup>159</sup> *Id.* at ¶ 61.

<sup>160</sup> *Id.*

Dissolution of Marriage Act by Public Act 102-0823 regarding contemplated changes.<sup>161</sup>

The dissent reached the same conclusion as the majority as to Wife's substantial change in circumstances due to an increase in her employment income that it was appropriate to exclude her pension income.<sup>162</sup> However, the dissent found the trial court should not have reduced Wife's maintenance to zero dollars as it failed to consider the \$750,000 Husband received from his new wife's inheritance or the remaining relevant factors under Section 510(a-5) of the Illinois Marriage and Dissolution of Marriage Act.<sup>163</sup> Accordingly, the dissent opined that it would reverse and remand the case for a recalculation of Husband's assets and income.<sup>164</sup>

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

This unpublished opinion provided that a party cannot collaterally attack or modify a child support Order entered twelve years ago where the State wrote the wrong date to terminate support.<sup>165</sup> In 2012, the circuit court entered a "Default Uniform Order for Support," drafted by the Illinois Department of Healthcare and Family Services ("Department"), providing that the obligor's child support obligation would terminate on November 8, 2020, the minor child's eighteenth birthday.<sup>166</sup> This was in contradiction to Section 505(g) of the Illinois Marriage and Dissolution of Marriage Act, which provides a child emancipates upon the latter of the child's eighteenth birthday or graduation from high school.<sup>167</sup> In January 2021, the Department attempted to fix this error via a *nunc pro tunc* correction by filing a petition to continue child support without a showing of a substantial change in circumstances, but the appellate court rejected their argument.<sup>168</sup> The trial court denied the Department's Petition and the appellate court affirmed.<sup>169</sup> The appellate court noted two issues with the Department's request.<sup>170</sup> First, there was nothing in the record that showed the circuit court intended for any date other than November 8, 2020, to be written into the Uniform Order for Support.<sup>171</sup> Second, the termination date of a child support Order was not a

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<sup>161</sup> See Section IL.A., *supra*.

<sup>162</sup> *In re Marriage of Bostrom*, 2022 IL App (1st) 200967, ¶ 66 (Connors, J. dissenting).

<sup>163</sup> *Id.* at ¶ 69.

<sup>164</sup> *Id.* at ¶ 75.

<sup>165</sup> *In re Marriage of Hampton*, 2022 IL App (4th) 210528-U, ¶ 26.

<sup>166</sup> *Id.* at ¶ 8.

<sup>167</sup> 750 ILL. COMP. STAT. ANN. § 5/505(g) (West 2022).

<sup>168</sup> *In re Marriage of Hampton*, 2022 IL App (4th) 210528-U, ¶¶ 9, 20.

<sup>169</sup> *Id.* at ¶¶ 26-27.

<sup>170</sup> *Id.* at ¶ 20.

<sup>171</sup> *Id.* at ¶ 21.

clerical error, but a “deliberate result of judicial reasoning and determination.”<sup>172</sup>

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

In its sixth appeal in the case, the appellate court was now tasked with determining whether the trial court erred in its denial of Wife’s Petition to Extend Maintenance and Petition for Contribution to Attorney’s Fees.<sup>173</sup> Pursuant to the parties’ judgment for dissolution entered in April 2012, Husband was ordered to pay rehabilitative maintenance to Wife for 48 months following the sale of the marital residence.<sup>174</sup> The marital residence was sold in November 2015, and Wife filed a petition to Extend Maintenance and a petition for contribution to attorney’s fees in September 2019.<sup>175</sup> The court ordered Husband to pay Wife temporary maintenance commencing in January 2020.<sup>176</sup> In December 2021, the trial court denied Wife’s petition to extend, terminated temporary maintenance retroactive to January 1, 2021, and ordered that each party was responsible for their own attorney’s fees.<sup>177</sup>

As to Wife’s petition to extend, the appellate court found the original maintenance award was not “fully rehabilitative” in nature as the judgment merely directed the court to consider Wife’s efforts to become self-supporting as a factor amongst the other factors set forth in Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act.<sup>178</sup> Therefore, the trial court applied the wrong standard of review and erred in relying on its conclusion that Wife made no efforts to become self-supporting.<sup>179</sup>

As to Wife’s petition for contribution to attorney’s fees, the appellate court again found the trial court applied the wrong standard of review as the trial court was required to consider the factors set forth in Sections 503(d) and 504(a) of the Illinois Marriage and Dissolution of Marriage Act.<sup>180</sup> The appellate court found there was nothing in the record to indicate the trial court considered these factors and, therefore, abused its discretion in denying Wife’s petition.<sup>181</sup>

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<sup>172</sup> *Id.* at ¶ 22.

<sup>173</sup> *In re Marriage of Chapa*, 2022 IL App (2d) 210772, ¶ 33.

<sup>174</sup> *Id.* at ¶ 1.

<sup>175</sup> *Id.* at ¶¶ 1-2.

<sup>176</sup> *Id.* at ¶ 2.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at ¶ 39.

<sup>179</sup> *In re Marriage of Chapa*, 2022 IL App (2d) 210772, ¶ 44.

<sup>180</sup> *Id.* at ¶¶ 52-54.

<sup>181</sup> *Id.* at ¶ 55.

Finally, the appellate court found that the trial court abused its discretion in retroactively terminating its temporary maintenance award where Husband never specifically requested the retroactive termination.<sup>182</sup>

## 12. *In re Marriage of Burns*

The trial court awarded maintenance to Wife, but deviated downwards from the maintenance guidelines set forth in Section 504 of the Illinois Marriage and Dissolution of Marriage Act without making the requisite statutory findings.<sup>183</sup> On appeal, the appellate court reversed and remanded the case back to the trial court to make specific findings and set forth the value of the assets if the deviation of maintenance was based upon a disproportionate allocation of marital property.<sup>184</sup>

### B. Allocation of Parental Responsibilities

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

Though unpublished, *In re Marriage of Patel* contains a helpful analysis as to what extent a self-represented litigant may be unduly prejudiced where his attorney is granted leave to withdraw as counsel on the date of trial.<sup>185</sup> Mother filed for divorce in 2019, and a guardian ad litem (GAL) was appointed during the pendency of the case.<sup>186</sup> An Order of protection was entered against Father, preventing him from contacting the parties' daughter.<sup>187</sup> Two weeks before trial (July 2021), Father's attorney filed a Motion to Withdraw as his counsel.<sup>188</sup> Father responded by filing a pro se appearance.<sup>189</sup> Two days before the trial, the GAL filed a written report with recommendations for the allocation of parental responsibilities.<sup>190</sup>

On the first day of the trial via Zoom, Father's attorney presented his Motion to Withdraw and Father did not object to the withdrawal.<sup>191</sup> The judge noted that this attorney was Father's eighth attorney, and the case had been set for trial for at least a year.<sup>192</sup> When that attorney came into the case, the judge stated there would be no chance the trial would be continued or that

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<sup>182</sup> *Id.* at ¶ 58.

<sup>183</sup> *In re Marriage of Burns*, 2022 Ill. App. (4th) 210732-U, ¶ 42.

<sup>184</sup> *Id.* at ¶¶ 43-46.

<sup>185</sup> *In re Marriage of Patel*, 2022 IL App (1st) 211000-U, ¶ 1.

<sup>186</sup> *Id.* at ¶ 5.

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

<sup>188</sup> *Id.* at ¶ 6.

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

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

<sup>191</sup> *In re Marriage of Patel*, 2022 IL App (1st) 211000-U, ¶¶ 7-8.

<sup>192</sup> *Id.* at ¶ 9.



the court would allow for the withdrawal.<sup>193</sup> Nevertheless, the judge allowed Father's attorney to withdraw, but one of the attorneys at his firm would be on "standby."<sup>194</sup>

On appeal, Father argued the trial court erred in (1) admitting the GAL report into evidence containing inadmissible hearsay, (2) extending the Order of Protection, (3) extending supervised parenting time, (4) having improper ex parte communication with Mother's attorney, and (5) violating Father's due process by conducting a "binding pretrial."<sup>195</sup>

Regarding the GAL report, Father's testimony at trial supported his familiarity with the events described in the report.<sup>196</sup> Father failed to argue on appeal what additional testimony he may have elicited with preparation or how the preparation may have affected the result of the proceeding.<sup>197</sup> As Father was unable to allege how he suffered prejudice due to the delayed distribution of the report, there was no reversible error in admitting it into evidence.<sup>198</sup>

Father further argued that the trial court erred in overruling his hearsay objection to the GAL's testimony and statements in the report about conversations with his daughter.<sup>199</sup> However, Section 606.5(c) establishes that hearsay statements from a child "relating to any allegations that the child is an abused or neglected child shall be admissible in evidence in a hearing concerning allocation of parental responsibilities."<sup>200</sup> Accordingly, these statements were admissible.<sup>201</sup>

Father next argued the trial court erred in extending the Order of protection without making repeated findings and where there had been no material change in circumstances.<sup>202</sup> However, relying on *Lutz v. Lutz*, the appellate court found that the judge may still extend an Order of Protection absent a material change in circumstances.<sup>203</sup> Similarly, Father argued the trial court failed to make the requisite findings to extend an Order for supervised parenting time.<sup>204</sup> However, the appellate court noted the admission of evidence indicating Father's danger and aggression during parenting time and during his communication with the children.<sup>205</sup>

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

<sup>194</sup> *Id.* at ¶ 10.

<sup>195</sup> *Id.* at ¶¶ 24, 51.

<sup>196</sup> *Id.* at ¶ 32.

<sup>197</sup> *In re Marriage of Patel*, 2022 IL App (1st) 211000-U, ¶ 32.

<sup>198</sup> *Id.* at ¶ 32.

<sup>199</sup> *Id.* at ¶ 34.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at ¶¶ 37-38.

<sup>203</sup> *In re Marriage of Patel*, 2022 IL App (1st) 211000-U, ¶ 38.

<sup>204</sup> *Id.* at ¶ 44.

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

The *ex parte* discussion between the trial court and Mother’s attorney occurred after the court made its ruling on the allocation of parental responsibilities and was about to move forward with discussing financial issues.<sup>206</sup> Father stated he did not understand, so the judge ordered him into a breakout room to discuss it with his “standby counsel.”<sup>207</sup> During this time, there was a brief discussion before a court reporter between the trial court and Mother’s attorney regarding agreements the parties had already reached on financial issues.<sup>208</sup> Father did not object at the time.<sup>209</sup> The appellate court noted Cook County Circuit Court Rule 17.4 allows the court ““in civil cases with the express consent of all parties of record, [for the] judge [to] communicate with fewer than all participants to promote settlement, for the purpose of scheduling or for any other similar purposes.””<sup>210</sup> Accordingly, this discussion did not warrant reversal.<sup>211</sup>

Finally, Father argued he was denied due process relating to the court and attorneys referring to the hearing as a “binding pretrial.”<sup>212</sup> The appellate court found the judge treated the proceedings like a binding arbitration, where Father had a “full and fair opportunity to decide whether to accept the settlement terms to which the parties . . . agreed [to] in their extensive negotiations” and present evidence and cross-examine Mother’s witnesses.<sup>213</sup> Accordingly, there was no violation of Father’s due process rights.<sup>214</sup>

## 2. *In re Marriage of Heddleston*

*In re Marriage of Heddleston* addressed the challenges of entering into a parenting agreement where the parties agree to future parenting time without setting a default schedule.<sup>215</sup> Here, the parties were divorced in Virginia in 2020.<sup>216</sup> Thereafter, Mother moved to Illinois and enrolled the Virginia judgment with the Illinois court, and Father moved to Florida.<sup>217</sup> The parties’ Marital Settlement Agreement (MSA) anticipated the parties’ move and provided if the parties lived more than fifty miles apart from each

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<sup>206</sup> *Id.* at ¶ 47.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at ¶ 49.

<sup>209</sup> *In re Marriage of Patel*, 2022 IL App (1st) 211000-U, ¶ 47.

<sup>210</sup> *Id.* at ¶ 49.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at ¶ 51. Based on the author’s personal knowledge of practicing Family Law in Cook County, a “binding pretrial” is a proceeding wherein the parties appear before the Judge and present their respective positions on contested issues, but agree that the Judge’s recommendations, which typically are not binding in a pretrial conference, are now binding upon both parties.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *In re Marriage of Heddleston*, 2022 IL App (1st) 211014-U, ¶ 5.

<sup>216</sup> *Id.* at ¶ 4.

<sup>217</sup> *Id.*

other, they shall mutually agree on a regular parenting schedule and the non-custodial parent (Father) would typically visit the children one weekend a month.<sup>218</sup>

In January 2021, Father filed a Motion for finding of abuse of allocated parenting time, alleging Mother refused to allow him to exercise one weekend each month with the children, focusing on January 2021.<sup>219</sup> Father alleged Mother refused to make the children available for his desired parenting time in January 2021.<sup>220</sup> The trial court heard arguments, but did not receive evidence on Father's Motion.<sup>221</sup> The court summarily denied Father's Motion, finding the parties never agreed to a particular weekend in January 2021, and therefore, Mother did not commit visitation abuse.<sup>222</sup>

The appellate court affirmed, finding the MSA required both parties to negotiate in good faith.<sup>223</sup> Instead, Father's motion alleged Mother failed to make the children available on the weekends he desired.<sup>224</sup> The appellate court noted that since Father's motion failed to allege facts that could support a finding that Mother negotiated the January 2021 parenting time in bad faith, the court did not err in summarily dismissing it without admitting evidence.<sup>225</sup>

### 3. *In re D.A.*

*In re D.A.* addressed sufficiency of evidence for purposes of finding a child was neglected among proceedings to remove the child from their parents and making them a ward of the state.<sup>226</sup> The appellate court reversed the trial court's determination that the state had proven by a preponderance of the evidence that D.A. was currently neglected because "[his] environment was injurious to his welfare."<sup>227</sup> The state alleged that the minor child tested positive for THC at birth, but this was based only on Mother's admission she used cannabis almost daily.<sup>228</sup> However, the state presented no evidence that D.A. was born with THC in his system, or if there was any, how much.<sup>229</sup> Further, the state conceded THC in the blood is not illegal.<sup>230</sup> Further, the assigned case worker observed no drug paraphernalia or medicine in the

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<sup>218</sup> *Id.* at ¶ 5.

<sup>219</sup> *Id.* at ¶ 6.

<sup>220</sup> *Id.*

<sup>221</sup> *In re Marriage of Heddleston*, 2022 IL App (1stj) 211014-U, ¶ 6.

<sup>222</sup> *Id.* at ¶ 8.

<sup>223</sup> *Id.* at ¶ 16.

<sup>224</sup> *Id.* at ¶ 6.

<sup>225</sup> *Id.* at ¶ 16.

<sup>226</sup> *In re D.A.*, 2022 IL App (2d) 210676, ¶ 1.

<sup>227</sup> *Id.* at ¶¶ 9, 13-15 (citing 705 ILCS 405/2-3(1)(b)).

<sup>228</sup> *Id.* at ¶ 15.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

residence.<sup>231</sup> Finally, the court rejected the state's theory of anticipatory neglect, finding evidence of neglect of one child does not conclusively establish neglect of another child.<sup>232</sup> The court found sufficient time had passed since the prior finding of neglected minors that there was a questionable connection between those minors and D.A.<sup>233</sup>

#### 4. *In re Marriage of Wendy W.*

In this post-decree proceeding, the Mother, who was allocated the majority of parental responsibilities, sought to restrict Father's parenting time based on allegations that Father would continue to interfere with needed mental health services for the child.<sup>234</sup> Father "moved for production of the child's medical, psychiatric, psychological, and school records."<sup>235</sup> Mother objected based on the child's statutory confidentiality privilege.<sup>236</sup> The trial court denied Father's entire production request and certified five questions for permissible interlocutory review.<sup>237</sup>

The appellate court first found the certified questions were overbroad and found judicial economy favored modification of the certified questions.<sup>238</sup> The court found a parent should be entitled to limited information regarding the child's current physical and mental condition, diagnosis and treatment needs, services provided, services needed, and all nonprivileged and nonconfidential school records.<sup>239</sup> However, when a parent is seeking documents beyond this limited information, a trial court may exercise discretion and deny a parent's access to confidential mental health, medical and school records under the Confidentiality Act<sup>240</sup> in a proceeding related to a petition to restrict parenting time filed pursuant to Section 603.10 of the IMDMA.<sup>241</sup> The court noted the following examples as the type of information a trial court may deny to the moving party: "(1) the names, addresses, and telephone numbers of all the child's medical, psychiatric, and psychological service providers; (2) copies of those service providers' written reports; and (3) copies of all correspondence from those service providers."<sup>242</sup>

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<sup>231</sup> *Id.* at ¶ 16.

<sup>232</sup> *In re D.A.*, 2022 IL App (2d) 210676, ¶ 20.

<sup>233</sup> *Id.* at ¶ 21.

<sup>234</sup> *In re Marriage of Wendy W.*, 2022 IL App (1st) 201000, ¶ 1.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at ¶¶ 1-2.

<sup>238</sup> *Id.* at ¶¶ 1-2, 5.

<sup>239</sup> *Id.* at ¶ 38 (referring to 740 ILCS 110/4(a)(3)).

<sup>240</sup> 740 ILL COMP. STAT. 110/1 – 110/17 (2022).

<sup>241</sup> *In re Marriage of Wendy W.*, 2022 IL App (1st) 201000, ¶ 50.

<sup>242</sup> *Id.* at ¶ 38.

Further, the court clarified that no language in the Confidentiality Act makes disclosure of confidential records or communications to Mother (or to the child's representative) a waiver of the child's confidentiality as to the Father.<sup>243</sup> In fact, Mother and the children's representative would be guilty of a Class A misdemeanor by violating the Confidentiality Act if they ignored the minor child's objection and forwarded the confidential records or communications in their possession to Father.<sup>244</sup>

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

The parties in *Trapkus* entered into a final judgment in 2013, allocating the majority of parenting time of the parties' minor children to Mother.<sup>245</sup> In 2014, the circuit court entered an Order requiring Mother to try scheduling all of the children's healthcare appointments for times when both parents could attend by providing Father with three possible available dates ("Three-Appointment Rule").<sup>246</sup> Later that year, the parents entered into an agreed Order requiring the parties to remain at a distance of at least ten feet from each other at all extracurricular and other activities ("ten-foot rule").<sup>247</sup> In 2016, after an evidentiary hearing, Mother was found in indirect civil contempt of court for violating the ten-foot rule on at least two occasions, and the court enjoined Mother from entering Father's property for any reason.<sup>248</sup> In 2018, the parties cross-filed petitions for modification, clarification, enforcement, and adjudication of contempt.<sup>249</sup> Father sought modification of the regular parenting time schedule.<sup>250</sup> Mother sought to change the holiday schedule, and to eliminate the Three-Appointment Rule, ten-foot rule, and prohibition on entering Father's property.<sup>251</sup> The circuit court eliminated the Three-Appointment Rule and allocated decision-making to Mother, eliminated the ten-foot rule, eliminated the rule enjoining Mother from entering Father's property, and modified the parties' holiday parenting schedule.<sup>252</sup> The circuit court denied Father's request for modification of parenting time.<sup>253</sup>

The appellate court held as follows: the circuit court (1) did not err when it denied Father's petition to modify parenting time allocation; (2) erred when

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<sup>243</sup> *Id.* at ¶ 39.

<sup>244</sup> *Id.*

<sup>245</sup> *In re Marriage of Trapkus*, 2022 IL App (3d) 190631, ¶ 3.

<sup>246</sup> *Id.* at ¶ 4.

<sup>247</sup> *Id.* at ¶ 5.

<sup>248</sup> *Id.* at ¶ 6.

<sup>249</sup> *Id.* at ¶¶ 7, 8.

<sup>250</sup> *Id.* at ¶ 7.

<sup>251</sup> *In re Marriage of Trapkus*, 2022 IL App (3d) 190631, ¶ 8.

<sup>252</sup> *Id.* at ¶¶ 14, 15.

<sup>253</sup> *Id.* at ¶ 14.

it modified the parties' holiday parenting time schedule, and (3) erred when it eliminated the Three-Appointment Rule, the ten-foot rule, and the prohibition on Mother entering onto Father's property.<sup>254</sup>

As to Father's petition to modify parenting time allocation, the appellate court found the circuit court applied the correct standard under 750 ILCS 5/610.5(c).<sup>255</sup> The court also held that a child's stated desire to spend more time with one parent or the child's age alone are not sufficient to establish a "substantial change in circumstances" for modification purposes without evidence specific to the parties' children.<sup>256</sup> The court further opined that equal parenting time might not be appropriate where the evidence reveals the parents' substantial animosity and an inability to cooperate.<sup>257</sup>

The appellate court found that because there was no substantial change in circumstances, the only permissible avenue for the circuit court to modify the parties' holiday parenting time schedule would be if the modification was "minor."<sup>258</sup> Finding that the elimination of parenting time for parents on various holidays and providing the children would only see one parent over Christmas and New Year's holidays were not "minor" modifications and therefore made in error.<sup>259</sup>

Finally, addressing the elimination of the parties' parenting "rules," the appellate court found these rules were governed by 750 ILCS 5/603.10 as restrictions to the parties' proximity to each other and decision-making responsibilities.<sup>260</sup> Because the parties failed to prove either that there was a change in circumstances warranting the elimination of the rules or that either party engaged in conduct that the court was previously unaware of that seriously endangered the child, the appellate court found they did not meet the requisite legal standard for modification under 750 ILCS 5/603.10.<sup>261</sup>

## 6. *Sadler v. Pulliam*

Father filed a petition to establish parentage and for the allocation of parental responsibilities.<sup>262</sup> The trial court conducted an extensive bench trial with several witnesses and entered an Order allocating equal parenting time and joint decision-making responsibilities to the parents.<sup>263</sup> The evidence included at trial contained testimony from both parties concerning an incident

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<sup>254</sup> *Id.* at, ¶ 49.

<sup>255</sup> *Id.* at ¶ 34.

<sup>256</sup> *Id.* at ¶¶ 32-33.

<sup>257</sup> *In re Marriage of Trapkus*, 2022 IL App (3d) 190631, ¶ 35.

<sup>258</sup> *Id.* at ¶¶ 39-41 (citing 750 ILL. COMP. STAT. 5/610.5(e)(2)).

<sup>259</sup> *Id.* at ¶ 43.

<sup>260</sup> *Id.* at ¶ 46.

<sup>261</sup> *Id.* at ¶ 48.

<sup>262</sup> *Sadler v. Pulliam*, 2022 IL App (5th) 220213, ¶ 4.

<sup>263</sup> *Id.* at ¶¶ 15-38.

where the child broke their leg during Father's parenting time and Mother's alleged refusal to continue to allow Father to have parenting time after that incident.<sup>264</sup> Conversely, Mother introduced evidence that Father took actions to block her on Facebook while she was pregnant and multiple times where Father returned the child after his parenting time with a soiled diaper.<sup>265</sup> The trial court opined, "[i]t just seems every month there's a new reason for Mr. Sadler not to see his daughter."<sup>266</sup> On appeal, the court considered whether the trial court erred in not explicitly including an analysis of the relevant factors under Sections 602.5 and 602.7 of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) in its written Order.<sup>267</sup>

The court distinguished the case from *In re Marriage of Whitehead*,<sup>268</sup> where the court affirmed the trial court's decision that did not contain a detailed analysis of the Section 602.5 and 602.7 factors.<sup>269</sup> The court reasoned that in *Whitehead*, the court explicitly stated it considered all evidence, including the guardian ad litem's report, wherein the guardian ad litem reviewed each factor extensively.<sup>270</sup> Here, there was no analysis of the factors and there was no GAL report on which to rely.<sup>271</sup> Rather, the trial court merely stated, "based upon all that I've heard, I do believe it is in the best interest of the child to have a meaningful relationship with both parents."<sup>272</sup> Accordingly, the court declined to presume the trial court had properly considered the statutory factors and instead remanded the case back to the trial court with directions to analyze each of the statutory factors.<sup>273</sup> This case is relevant as it indicates that in Illinois, the best practice is for the trial court to include or incorporate written analysis of the statutory factors despite not being explicitly required by the IMDMA.<sup>274</sup>

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

Father filed a petition to modify a prior Order awarding the majority of parenting time to Mother.<sup>275</sup> The trial court entered a directed verdict for Mother, finding Father had not proven a substantial change in circumstances,

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<sup>264</sup> *Id.* at ¶¶ 18-19, 30-32.

<sup>265</sup> *Id.* at ¶¶ 21, 29.

<sup>266</sup> *Id.* at ¶ 37.

<sup>267</sup> *Id.* at ¶ 41.

<sup>268</sup> *Sadler v. Pulliam*, 2022 IL App (5th) 220213, ¶ 43 (citing *In re Marriage of Whitehead*, 2018 IL App (5th) 170380).

<sup>269</sup> *Id.* at ¶ 43.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at ¶ 45.

<sup>272</sup> *Id.* at ¶ 37.

<sup>273</sup> *Id.* at ¶ 46.

<sup>274</sup> See generally *Sadler v. Pulliam*, 2022 IL App (5th) 2210213, ¶ 46.

<sup>275</sup> *In re Marriage of Vickers*, 2022 IL App (5th) 200164, ¶ 1.

and dismissed Father's petition.<sup>276</sup> However, the court also *sua sponte* granted Father one additional overnight every other weekend.<sup>277</sup> The appellate court affirmed in part, agreeing that moving ten miles and enrolling the children in a different school did not constitute a substantial change in circumstances.<sup>278</sup> However, the appellate court reversed the *sua sponte* modification of parenting time, stating it was improper given the finding there was no substantial change in circumstances.<sup>279</sup> The court further noted Mother did not receive any notice of a "minor" modification under Section 610.5(c)(2) of the Illinois Marriage and Dissolution of Marriage Act, and that, regardless, it did not consider one additional overnight every other weekend a "minor" modification.<sup>280</sup>

8. *In re M.B.*

Iva B. married Daniel B. in 2004, and during their marriage, the minor child, M.B., was born.<sup>281</sup> Because M.B. was born during the parties' marriage, Daniel B. was the child's presumed father even though he did not sign a Voluntary Acknowledgment of Paternity.<sup>282</sup> Daniel subsequently died in 2008.<sup>283</sup> In 2018, the State of Illinois filed a petition for adjudication of wardship of M.B., and Iva was found to be an unfit parent, but the court determined it would not be in the child's best interests to terminate her parental rights.<sup>284</sup> In April 2021, the court entered an Order for DNA testing between M.B. and Timothy S., his putative parent.<sup>285</sup> The DNA test came back with a result indicating Timothy was M.B.'s biological father.<sup>286</sup> The State filed a Motion for Summary Judgment on M.B.'s paternity, and Timothy filed a petition to establish paternity.<sup>287</sup>

At the hearing on the motions, Timothy testified that he knew Iva was pregnant with his child in 2006, but assumed she had gone through with an abortion as she represented.<sup>288</sup> He did, however, request a DNA test of M.B. after Daniel died.<sup>289</sup> Based on this testimony, the Circuit Court of Vermillion County found Timothy's delay in filing his petition was not a result of legal

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<sup>276</sup> *Id.* at ¶ 51.

<sup>277</sup> *Id.* at ¶ 43.

<sup>278</sup> *Id.* at ¶ 85.

<sup>279</sup> *Id.* at ¶ 89.

<sup>280</sup> *Id.*

<sup>281</sup> *In re M.B.*, 2022 IL App (5th) 220245, ¶ 1.

<sup>282</sup> *Id.* at ¶ 3.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at ¶ 4.

<sup>285</sup> *Id.* at ¶ 5.

<sup>286</sup> *Id.*

<sup>287</sup> *In re M.B.*, 2022 IL App (5th) 220245, ¶ 4.

<sup>288</sup> *Id.* at ¶ 5.

<sup>289</sup> *Id.*



disability, duress, or fraudulent concealment.<sup>290</sup> Because Timothy failed to file his petition within the two-year statute of limitations mandated by Section 608 of the Illinois Parentage Act, the court dismissed Timothy's petition as time-barred.<sup>291</sup>

However, the court found the State's Motion for Summary Judgment was not time-barred since it was not subject to the same two-year statute of limitations.<sup>292</sup> Thereafter, the court entered a judgment of paternity, finding Timothy S. was M.B.'s biological father and disestablished parentage of his presumed father, Daniel.<sup>293</sup>

Reversing the judgment, the appellate court found the Illinois Parentage Act does not entitle the State to bring a Motion to Disestablish Parentage.<sup>294</sup> Since Daniel was the presumed father of M.B., the only person who would have had standing to file a Motion to Disestablish Daniel's Parentage was Timothy, not the State.<sup>295</sup>

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

The appellate court affirmed the allocation judgment restricting Father's parenting time to supervised visitation.<sup>296</sup> The trial court found the restriction of Father's parenting time to supervised visitation based on its finding that Father's alcohol use seriously endangered the child was supported by credible testimony from Mother and un rebutted testimony by the guardian ad litem.<sup>297</sup> The court further considered testimony regarding Father's mental health difficulties, erratic behavior, hostile treatment of Wife, and testimony of the guardian ad litem.<sup>298</sup>

## C. Property Division

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

During the marriage, Wife's parents gifted unimproved real estate to her solely, including ten acres of land in 1996.<sup>299</sup> Then in 2001, her parents gifted her two additional parcels of land, thirty-five acres and five acres,

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<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at ¶ 6.

<sup>292</sup> *Id.* at ¶ 5.

<sup>293</sup> *In re M.B.*, 2022 IL App (5th) 220245, ¶ 6.

<sup>294</sup> *Id.* at ¶¶ 12-15.

<sup>295</sup> *Id.* at ¶ 15.

<sup>296</sup> *In re Marriage of Palarz*, 2022 IL App (1st) 210618, ¶ 1.

<sup>297</sup> *Id.* at ¶ 19.

<sup>298</sup> *Id.* at ¶ 31.

<sup>299</sup> *In re Marriage of Parker*, 2022 IL App (5th) 210255-U, ¶ 4.

respectively, again to her solely.<sup>300</sup> The parties subsequently built a residence on the ten-acre parcel and assumed a mortgage and home equity line of credit in both of their names on the residence.<sup>301</sup> When Wife filed for divorce, she alleged the parties had entered into a postnuptial agreement wherein they agreed the residence was Wife's non-marital property.<sup>302</sup> Wife filed a Motion for Summary Judgment, alleging the parties entered into a postnuptial agreement after Husband engaged in risky financial dealings, losing thousands of dollars and hiding these losses from Wife.<sup>303</sup> Accordingly, Husband agreed the residence was Wife's non-marital property.<sup>304</sup> However, the postnuptial agreement only attached the deeds to the parcels of real estate gifted by Wife's parents to Wife, not the residence itself.<sup>305</sup> Husband further contested Wife's motion by arguing there was no meeting of the minds and he only saw the signature page of the document rather than the entire document.<sup>306</sup>

After denying Wife's motion, the court held a trial wherein there was extensive testimony regarding the facts and circumstances leading up to and surrounding the execution of the postnuptial agreement, the parcels of property, and the construction and payment of the marital residence.<sup>307</sup> The trial court held the postnuptial agreement was invalid, reasoning that the parties did not include language regarding intent and consideration in the agreement.<sup>308</sup> Moreover, the totality of the evidence showed the parties' intent when entering into the agreement was not clear on its face and "ambiguous at best."<sup>309</sup> The trial court also awarded Wife the marital residence as marital property, but did not address the fact that the residence was built on Wife's non-marital property.<sup>310</sup> Wife appealed.<sup>311</sup>

The two issues on appeal were (1) whether the trial court erred in failing to classify the underlying gifted parcels of land as Wife's non-marital property, and (2) whether the postnuptial agreement was valid.<sup>312</sup> As to issue one, the appellate court found the parcels of land were gifted to Wife, which overcame the marital property presumption by clear and convincing evidence.<sup>313</sup> Accordingly, the trial court erred in classifying them as marital

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<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at ¶ 5.

<sup>303</sup> *Id.* at ¶ 6.

<sup>304</sup> *Id.* at ¶ 5.

<sup>305</sup> *In re Marriage of Parker*, 2022 IL App (5th) 210255-U, ¶ 6.

<sup>306</sup> *Id.* at ¶ 7.

<sup>307</sup> *Id.* at ¶¶ 9-12.

<sup>308</sup> *Id.* at ¶ 16.

<sup>309</sup> *Id.* at ¶ 17.

<sup>310</sup> *Id.* at ¶ 18.

<sup>311</sup> *In re Marriage of Parker*, 2022 IL App (5th) 210255-U, ¶ 20.

<sup>312</sup> *Id.* at ¶ 22.

<sup>313</sup> *Id.* at ¶¶ 24-25.

property.<sup>314</sup> As to issue two, the appellate court agreed the agreement was silent as to any residence constructed upon Wife's non-marital parcels of land.<sup>315</sup> Further, since the residence did not exist when the parcels were gifted, it could not be Wife's non-marital property.<sup>316</sup> Accordingly, the validity of the postnuptial agreement was moot.<sup>317</sup> Nevertheless, the appeals court found the trial court failed to address the commingling of the marital residence and the non-marital parcel of land despite finding the home was built on the property.<sup>318</sup> The trial court further erred in valuing the whole property at \$180,000 without distinguishing between the value of the residence and the value of the land.<sup>319</sup> The appellate court reversed and remanded the case for further proceedings.<sup>320</sup>

## 2. *In re Marriage of Patel*

Pursuant to the parties' Judgment for Dissolution of Marriage, entered in July of 2021, Husband was ordered to pay maintenance and child support to Wife, and was awarded real property in Arlington Heights, Illinois, and one in Carpentersville, Illinois.<sup>321</sup> Following entry of the Judgment, Husband filed a Motion to Reduce or Abate Child Support and listed the Carpentersville property for sale.<sup>322</sup> In response, Wife filed a Motion to Establish a Child Support Trust and an Emergency Motion to Escrow the Sales Proceeds from the Carpentersville Property.<sup>323</sup> As part of her motions, Wife alleged Husband had failed to make any of his obligated support payments for October and November 2021, and owed Wife monies for her share of financial accounts awarded pursuant to the parties' judgment, and that sale of the Carpentersville property was imminent.<sup>324</sup> The trial court denied Wife's first Motion to Escrow and ordered Husband to disclose the property's closing date within twenty-four hours.<sup>325</sup> A few days later, Wife filed a second emergency Motion to Escrow the sales proceeds, noting a date certain for the closing.<sup>326</sup> This time, the court found the motion was an

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<sup>314</sup> *Id.* at ¶ 25.

<sup>315</sup> *Id.* at ¶ 26.

<sup>316</sup> *Id.*

<sup>317</sup> *In re Marriage of Parker*, 2022 IL App (5th) 210255-U, ¶ 26.

<sup>318</sup> *Id.* at ¶ 27.

<sup>319</sup> *Id.* at ¶ 29.

<sup>320</sup> *Id.* at ¶¶ 31-32.

<sup>321</sup> *In re Marriage of Patel*, 2022 IL App (1st) 211650, ¶¶ 6-8.

<sup>322</sup> *Id.* at ¶ 9-10.

<sup>323</sup> *Id.* at ¶¶ 11-12.

<sup>324</sup> *Id.* at ¶ 12.

<sup>325</sup> *Id.* at ¶ 13.

<sup>326</sup> *Id.* at ¶ 14.

emergency and granted Wife's motion, further advising both parties the court would be unavailable for the next two weeks.<sup>327</sup>

On appeal, Husband argued the trial court erred when it (1) issued a prejudgment attachment over his separate property and (2) failed to conduct an evidentiary hearing, made no findings, and did not afford him the opportunity to file a response.<sup>328</sup> The appellate court affirmed, finding that, in granting Wife's motion, the court had merely exercised its equitable power to protect the minor children's right to support from Husband, not that it had issued a prejudgment attachment.<sup>329</sup> In looking at the second issue, the court found that Husband had notice and opportunity to respond to Wife's initial request for escrow and did not suggest any novel arguments he would have made if granted time to file a response.<sup>330</sup> The court also noted that since the trial court judge was unavailable beginning the day after the hearing, any further written arguments would not have been acted upon prior to the closing.<sup>331</sup>

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

*In re Marriage of Grandt* re-emphasizes the need to be specific when drafting Marital Settlement Agreements.<sup>332</sup> In this case, the marital settlement agreement provided Wife a portion of Husband's pension benefit.<sup>333</sup> However, following the entry of the parties' judgment for dissolution of marriage, Husband became disabled, and started receiving disability pension benefits.<sup>334</sup> Wife argued that when Husband retired at fifty years old, the disability benefits converted to retirement benefits.<sup>335</sup> The parties' agreement provided that the pension would be divided "only in the event [the pension] is received by [Husband] if it is paid to him as a pension benefit."<sup>336</sup> Moreover, the agreement provided that Wife would be designated the surviving widow if Husband died before receiving his pension benefits.<sup>337</sup> That is, the survivor benefits were active only if Husband died while not receiving a disability pension.<sup>338</sup>

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<sup>327</sup> *In re Marriage of Patel*, 2022 IL App (1st) 211650, ¶¶ 14-15.

<sup>328</sup> *Id.* at ¶ 20.

<sup>329</sup> *Id.* at ¶ 23.

<sup>330</sup> *Id.* at ¶ 29.

<sup>331</sup> *Id.*

<sup>332</sup> *In re Marriage of Grandt*, 2022 IL App (2d) 210648, ¶19.

<sup>333</sup> *Id.* at ¶ 8.

<sup>334</sup> *Id.* at ¶ 11.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at ¶ 24.

<sup>337</sup> *Id.*

<sup>338</sup> *In re Marriage of Grandt*, 2022 IL App (2d) 210648, ¶ 24.

The appellate court reversed and remanded the case back to the trial court, finding the Marital Settlement Agreement was unambiguous.<sup>339</sup> It was clear the parties agreed to divide Respondent's retirement pension only when he began to receive his retirement pension, the parties did not consider or intend that "pension" would include a disability pension.<sup>340</sup>

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

During the marriage, Husband filed a federal civil rights action against the Village of Oak Park for corruption.<sup>341</sup> Husband came to an agreement with the Village where he agreed to waive and release all claims and pension contributions if the Village made annual distributions beginning on Husband's fiftieth birthday, to continue to be paid upon his death to his "present wife during her lifetime."<sup>342</sup> The parties divorced when the Husband was 43 years old.<sup>343</sup> The appellate court reversed the ruling on appeal, finding Wife did not waive her rights to payments from the Village where the parties' Marital Settlement Agreement provided, "FINANCIAL DIVISION: Each party shall keep any pension, retirement, 401(k) or any other retirement benefit from the employer as each party's own, separate property free of any interest of the other party."<sup>344</sup> Husband was never a pensioner and did not receive retirement benefits from his employer.<sup>345</sup> Rather, he was forced to resign from the Village, receiving a *settlement* not a *retirement* package.<sup>346</sup>

### D. Grandparent Visitation

#### 1. *In re V.S.*

V.S., was a minor child whose mother's parental rights were terminated and whose biological father never established parentage.<sup>347</sup> Mother's cousin, Liisa, and her husband adopted V.S.<sup>348</sup> The paternal grandmother, Leila, subsequently filed for grandparent visitation.<sup>349</sup> Liisa moved to dismiss, alleging Leila failed to sufficiently allege that she unreasonably denied

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<sup>339</sup> *Id.* at ¶¶ 29, 47.

<sup>340</sup> *Id.* at ¶ 27.

<sup>341</sup> *In re Marriage of Kelly*, 2022 IL App (1st) 220241, ¶ 2.

<sup>342</sup> *Id.* at ¶¶ 2-3.

<sup>343</sup> *Id.* at ¶ 4.

<sup>344</sup> *Id.* at ¶ 22.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *In re V.S.*, 2022 IL App (2d) 210667, ¶ 3.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at ¶ 4.

visitation and that V.S. suffered undue harm.<sup>350</sup> Liisa further alleged grandmother failed to satisfy any of the conditions required by Section 602.9 of the IMDMA for grandparent visitation.<sup>351</sup> The trial court dismissed Leila's petition.<sup>352</sup>

The appellate court affirmed the trial court's ruling.<sup>353</sup> In its analysis, the court primarily addressed Leila's argument that she was entitled to relief under her petition as she met the requirements under Section 602.9(c)(1)(E), requiring the child to be born to parents who are not living together, the petitioner is a grandparent, and the parent-child relationship has been legally established.<sup>354</sup> Leila argued that V.S.' biological parents were unmarried and not living together when the child was adopted.<sup>355</sup> Liisa argued Section 602.9(c)(1)(E) referred to her and her husband as V.S.' adoptive parents, and since they were living together, the section was inapplicable.<sup>356</sup> The appellate court disagreed with both parties' arguments, finding instead that considering the structure of the statute and its intended purpose, Section 602.9(c)(1)(E) did not apply where a child has been adopted.<sup>357</sup> Rather, it applies only when a biological parent has unreasonably denied visitation so as to cause harm to a child.<sup>358</sup>

#### E. COVID-19-Related Cases

2022 marked the issuance of a few court opinions that dealt with issues stemming from the COVID-19 pandemic, including self-quarantining, mask-wearing, and the impact of government relief on calculating a party's income.<sup>359</sup>

##### 1. *In re Parentage of J.N. and C.N.*

This unpublished opinion addressed a court's ability to *sua sponte* impose COVID-19 protocols in conjunction with a Parenting Time Order.<sup>360</sup> Here, the parties entered an agreed allocation judgment in September 2019.<sup>361</sup>

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<sup>350</sup> *Id.* at ¶ 5.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at ¶ 7.

<sup>353</sup> *In re V.S.*, 2022 IL App (2d) 210667, ¶ 33.

<sup>354</sup> *Id.* at ¶ 25-26.

<sup>355</sup> *Id.* at ¶ 26.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at ¶ 27.

<sup>358</sup> *Id.* at ¶ 29.

<sup>359</sup> See *In re J.N.*, 2022 IL App (2d) 210562; see also *In re Marriage of Jones*, 2022 IL App (5th) 210104.

<sup>360</sup> *In re J.N.*, 2022 IL App (2d) 210562, ¶ 1.

<sup>361</sup> *Id.* at ¶ 4.

In early 2020, Father flew to Vietnam to attend a funeral.<sup>362</sup> Due to COVID-19 restrictions, he was unable to return until September 2020.<sup>363</sup> In April 2021, Father filed a petition for visitation interference, attempting to resume his parenting time.<sup>364</sup> At hearing, Mother testified she had health concerns relating to Father not wanting to wear a mask, get vaccinated, take a COVID-19 test, or social distance around the children.<sup>365</sup>

The court granted Father's petition for visitation interference and ordered Mother to provide make-up parenting time.<sup>366</sup> Despite not having any petition pending seeking imposition of COVID-19 protocols, the court imposed COVID-19 protocols under Section 608.5(c)(9) of the IMDMA, which provides where a court finds a parent has not complied with a parenting plan, to Order "any other provision that may promote the child's best interests."<sup>367</sup> These protocols included getting tested for COVID-19 or getting vaccinated or in the alternative, wearing a mask during his parenting time.<sup>368</sup> The appellate court reversed the trial court's decision, finding this was a violation of Husband's due process rights, and vacated that portion of the trial court's Order.<sup>369</sup>

## 2. *In re Marriage of Jones*

*In re Marriage of Jones* addressed what a court could properly take judicial notice of following the COVID-19 pandemic and its ability to strike provisions in a parties' agreement as against public policy.<sup>370</sup> A court can take "judicial notice" of indisputable facts or readily verifiable facts that have indisputable accuracy.<sup>371</sup> In *In re Marriage of Jones*, the parties entered into a Judgment for Dissolution of Marriage in 2015, providing Father would pay to Mother \$18,000 per month in child support for three kids and \$8,500 per month in maintenance.<sup>372</sup> In December 2017, Mother filed a Motion to Enforce Peditation, seeking to go to mediation pursuant to the parties' Joint Parenting Order provisions.<sup>373</sup> While that was the only pleading pending before the court, the parties entered into an Agreed Order in December 2018, providing in relevant part:

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<sup>362</sup> *Id.* at ¶ 5.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at ¶¶ 5-6.

<sup>365</sup> *Id.* at ¶ 14.

<sup>366</sup> *In re J.N.*, 2022 IL App (2d) 210562, ¶ 17.

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

<sup>368</sup> *Id.* at ¶ 18.

<sup>369</sup> *Id.* at ¶ 28.

<sup>370</sup> *In re Marriage of Jones*, 2022 IL App (5th) 210104, ¶¶ 12-15.

<sup>371</sup> *Id.* at ¶ 22 (citing *Murdy v. Edgar*, 103 Ill. 2d 384, 394 (1984)).

<sup>372</sup> *Id.* at ¶ 4.

<sup>373</sup> *Id.* at ¶ 6.

Paragraph 3: Father's child support shall be decreased to \$12,000/month.

Paragraph 4: The parties agree neither party will request a further modification of child support unless upon emancipation of a child, Father's loss of employment, or father suffering an accident or similar incident resulting in substantial reduction of his income.

Paragraph 5: If Father chooses to seek a reduction of his child support except as otherwise indicated above, father "agrees that he shall, upon the filing of such petition, pay to Kelly the difference between the original child support award (\$18,000.00) and the agreed reduction contained herein, retro-active to each month of reduced support after the entry of this order."

Paragraph 6: Mother's requirement to contribute \$1,000 per month to each of the children's 529 accounts is reduced to \$500/month.<sup>374</sup>

In May 2020, Father filed an emergency petition to modify child support/maintenance, alleging the COVID-19 pandemic drastically reduced his income as an optical surgeon (elective surgery).<sup>375</sup> Mother cross-filed a petition for rule to show cause, claiming pursuant to Paragraph 5 of their agreement, he owed the six thousand dollars per month difference in child support.<sup>376</sup> Father filed Motion to Dismiss Mother's petition for rule, alleging just Paragraphs 4 and 5 should be stricken as void.<sup>377</sup>

In December 2020, the trial court struck Paragraphs 3 through 6 of the parties' Agreed Order as void, and ordered Father to pay the difference in child support from December 2018 through December 2020.<sup>378</sup>

The trial court found Paragraphs 3 and 6 dealt with modification of child support and were not supported by any pending pleading at the time of the Agreed Order and necessarily related to Paragraphs 4 and 5, so all four paragraphs should be stricken.<sup>379</sup> Father appealed, arguing the trial court erred in holding an evidentiary hearing on his Motion to Dismiss as the court could take judicial notice of the relevant facts, and argued the trial court erred in striking all four paragraphs of the Agreed Order.<sup>380</sup>

The appellate court first found the trial court did not err in holding an evidentiary hearing on Father's Motion to Dismiss.<sup>381</sup> The appellate court clarified the trial court could take judicial notice of the worldwide COVID-19 pandemic and restrictions promulgated by the Governor of Illinois and the

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<sup>374</sup> *Id.* at ¶ 7.

<sup>375</sup> *Id.* at ¶ 8.

<sup>376</sup> *In re Marriage of Jones*, 2022 IL App (5th) 210104, ¶ 9.

<sup>377</sup> *Id.* at ¶ 10.

<sup>378</sup> *Id.* at ¶ 12.

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

<sup>380</sup> *Id.* at ¶ 13.

<sup>381</sup> *Id.* at ¶ 23.



Illinois Department of Health.<sup>382</sup> However, the court could not take judicial notice of a party's (in this case, Father's) alleged reduction of income due to the pandemic and the ensuing restrictions.<sup>383</sup> The appellate court explained this was in part because the United States Department of the Treasury had provided financial assistance to small businesses like Father's via COVID-19 loans pursuant to the Coronavirus Aid, Relief, and Economic Security (CARES) Act and Paycheck Protection Program (PPP).<sup>384</sup> Therefore, Father may have received funds to cover salaries from the government during this period of time.<sup>385</sup>

Next, the appellate court reversed the trial court striking paragraphs 3 and 6 of the parties' Agreed Order after finding 4 and 5 were against public policy.<sup>386</sup> The appellate court found that even though there was no pending pleading regarding modification of child support at the time the Agreed Order was entered, Illinois has a strong public policy of supporting the amicable settlement of disputes, so Paragraphs 3 and 6 were enforceable.<sup>387</sup> Further, Paragraph 3 reduced Father's child support immediately, whereas Paragraphs 4 and 5 dealt with future filings asking for further reductions in child support, so Paragraph 3 by itself was enforceable.<sup>388</sup>

## E. Attorney Fees

### 1. *Grund & Leavitt, P.C. v. Stephenson*

*Grund & Leavitt v. Stephenson* dealt with the enforceability of a "fee enhancement provision" in an attorney's retainer agreement.<sup>389</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.<sup>390</sup> Defendant Stephenson hired Grund & Leavitt ("Grund") to represent him in a divorce proceeding and paid \$3.74 million in attorney's fees during the pendency of the divorce.<sup>391</sup> Grund's retainer agreement contained a "fee enhancement provision", pursuant to which he demanded an additional \$9.75 million in fees at the conclusion of the case,

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<sup>382</sup> *In re Marriage of Jones*, 2022 IL App (5th) 210104, ¶ 22.

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* at ¶ 22.

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

<sup>386</sup> *Id.* at ¶ 39.

<sup>387</sup> *Id.* at ¶ 36.

<sup>388</sup> *In re Marriage of Jones*, 2022 IL App (5th) 210104, ¶ 32.

<sup>389</sup> *Grund & Leavitt v. Stephenson*, 2022 IL App (1st) 210619-U, ¶ 1, 178 N.E.3d 168, 170, *appeal denied*, 159 N.E.3d 937 (Ill. 2020).

<sup>390</sup> *See generally Id.* at ¶ 9.

<sup>391</sup> *Id.* at ¶ 10.

with no explanation as to the calculation of said charge.<sup>392</sup> Grund's enhancement provision provided:

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>393</sup> (Hereinafter, the "Enhancement Provision").

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>394</sup> The trial court granted Stephen's first Motion to Dismiss, finding that considering the "results obtained" when assessing a final bill made it an unethical contingent fee agreement.<sup>395</sup> The appellate court reversed and remanded, directing the trial court on remand 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>396</sup>

On remand, Stephenson again filed a Motion to Dismiss Grund's complaint, arguing (1) the contract was too indefinite to enforce, (2) the contract was unreasonable and unethical under Rule 1.5(a) of the Illinois Rules of Professional Conduct, and (3) failed to plead any facts supporting the application of the Rule 1.5(a) factors to the additional monies requested.<sup>397</sup>

The appellate court affirmed the trial court's second dismissal of Grund's complaint, finding the fee enhancement provision failed due to its indefiniteness.<sup>398</sup> The appellate court noted the fee enhancement provision contained no price term nor any practicable or objective method for determining that price.<sup>399</sup> Rather, Grund was given free rein to unilaterally determine the price after considering the factors under Rule 1.5(a) of the Illinois Rules of Professional Conduct.<sup>400</sup> These factors, the court reasoned,

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<sup>392</sup> *Id.* at ¶ 11.

<sup>393</sup> *Id.* at ¶ 4.

<sup>394</sup> *Id.* at, ¶ 13.

<sup>395</sup> Grund & Leavitt v. Stephenson, 2022 IL App (1st) 210619-U, ¶ 16, 178 N.E.3d 168, 170, *appeal denied*, 159 N.E.3d 937 (Ill. 2020).

<sup>396</sup> *Id.* at ¶ 32.

<sup>397</sup> *Id.* at ¶ 17.

<sup>398</sup> *Id.* at ¶ 31.

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

<sup>400</sup> Illinois Rule of Professional Conduct 1.5(a) provides: (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to

are “inherently subjective” and relate to a field where Stephenson would have no expertise.<sup>401</sup>

## 2. *In re Marriage of Miklowicz*

Ex-Husband filed a complaint with the Elmhurst police department that Ex-Wife was guilty of visitation interference.<sup>402</sup> Although she was charged with unlawful visitation interference, Ex-Wife was ultimately found not guilty.<sup>403</sup> Ex-Wife filed for attorneys’ fees from Ex-Husband pursuant to Sections 508(a)(1) and 508(a)(6) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA).<sup>404</sup> Ex-Husband moved to dismiss Ex-Wife’s Petition for Fees, arguing the criminal prosecution did not fall under Section 508 of the IMDMA.<sup>405</sup>

On appeal, the appellate court found the trial court properly dismissed Ex-Wife’s Petition for Fees.<sup>406</sup> Looking at the plain language of Section 508(a)(1), the court found “proceedings under [the] Act” does not authorize fees from criminal prosecution for violation of a judgment.<sup>407</sup> The appellate court then turned to the language of Section 508(a)(6), which provides attorney’s fees for “[a]ncillary litigation [(1)] incident to, or [(2)] reasonably connected with, a proceeding under [the] Act.”<sup>408</sup> The court noted the criminal prosecution was brought by the State of Illinois against Ex-Wife for unlawful visitation interference, and the State had no involvement in the underlying divorce.<sup>409</sup> The appellate court further distinguished that the criminal prosecution was heard by a different judge in a different court with a higher burden of proof.<sup>410</sup> Therefore, the criminal proceeding was not

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be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. Ill. R. Pro. Conduct 1.5(a) (eff. Jan. 1, 2010).

<sup>401</sup> Grund & Leavitt v. Stephenson, 2022 IL App (1st) 210619-U, ¶ 31, 178 N.E.3d 168, 170, *appeal denied*, 159 N.E.3d 937 (Ill. 2020).

<sup>402</sup> *In re Marriage of Mikowicz*, 2022 IL App (2d) 210713, ¶ 3.

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

<sup>404</sup> *Id.* at ¶ 4.

<sup>405</sup> *Id.* at ¶ 5.

<sup>406</sup> *Id.* at ¶ 18.

<sup>407</sup> *Id.* at ¶ 13.

<sup>408</sup> *In re Marriage of Mikowicz*, 2022 IL App (2d) 210713, ¶ 14.

<sup>409</sup> *Id.* at ¶ 15.

<sup>410</sup> *Id.*

ancillary to the post-dissolution proceedings, so no attorney fees were recoverable under Section 508(a)(6) under these circumstances.<sup>411</sup>

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

Following entry of a Judgment for Dissolution of Marriage, the trial court denied Husband's petition for contribution to attorney's fees pursuant to Section 503(j) of the Illinois Marriage and Dissolution of Marriage Act, seeking fees in the amount of \$194,281 from Wife.<sup>412</sup> In affirming the trial court's denial, the appellate court found the trial court properly considered the factors necessary to assess the reasonableness of a party's attorney's fees, including but not limited to:

[S]ufficiently detailed time records maintained throughout the proceeding... the attorney's skill and standing, the nature of the case, the novelty and/or difficulty of the issues involved, the matter's importance, the degree of responsibility required, the usual and customary charges for similar work, the benefit to the client, and whether there is a reasonable connection between the fees required and the amount involved in the litigation.<sup>413</sup>

The trial court found the attorney's hourly rate doubled the hourly rate of other attorneys in the area, and multiple fee entries were not reasonably connected to the litigation.<sup>414</sup> Accordingly, it was not an abuse of discretion for the court to find the attorney's fees were unreasonable for the area; finding five hundred dollars per hour was unreasonable.<sup>415</sup> Finally, regarding Husband's alleged inability to pay, the appellate court found the trial court did not abuse its discretion in finding Husband failed to meet his burden of proving his inability to pay.<sup>416</sup> The court noted Husband's assets, his awarded share of the marital estate, and monthly maintenance of \$4,100 supported him "living well above his means."<sup>417</sup>

### 4. *Nutter v. Schiller, DuCanto, & Fleck, LLP*

*Nutter* was a Rule 23 decision addressing the intersection between fee petitions in family law litigation and legal malpractice claims.<sup>418</sup> Schiller,

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<sup>411</sup> *Id.* at ¶ 18.

<sup>412</sup> *In re Marriage of Buonincontro*, 2022 IL App (2d) 210380, ¶¶ 7, 12.

<sup>413</sup> *Id.* at ¶¶ 44-45.

<sup>414</sup> *Id.* at ¶ 46.

<sup>415</sup> *Id.* at ¶ 51.

<sup>416</sup> *Id.* at ¶ 55.

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

<sup>418</sup> *Nutter v. Schiller, DuCanto & Fleck, LLP*, 2022 IL App (2d) 210376, ¶ 2.

DuCanto, & Fleck, LLP (“SDF”) filed a final Petition for Attorney’s Fees against their former client, Michael Nutter.<sup>419</sup> Mr. Nutter subsequently filed a legal malpractice action six days before the date set for the hearing on the Petition and sought to continue the hearing.<sup>420</sup> The trial court denied Mr. Nutter’s request for a continuance and granted SDF’s Petition, awarding them the full amount of attorney’s fees they requested.<sup>421</sup> After the hearing, SDF filed a Motion to Dismiss Mr. Nutter’s legal malpractice complaint, alleging it was barred *res judicata* due to the Order entered granting SDF’s Petition.<sup>422</sup> The trial court granted SDF’s Motion to Dismiss.<sup>423</sup> The court reasoned that in Order to dismiss an action barred by *res judicata*, “[a] final judgment must be entered in the prior action.”<sup>424</sup> Here, the prior action was SDF’s Fee Petition, and the final judgment was the Order the court entered awarding SDF’s attorney’s fees.<sup>425</sup> This Order barred litigation of any further issues actually raised or issues that could have been raised concerning legal malpractice during the fee petition proceeding.<sup>426</sup> Because Mr. Nutter “voluntarily introduced [at the fee petition proceedings] the same facts and evidence necessary to sustain [the legal-malpractice] cause of action,” his claim was barred *res judicata*.<sup>427</sup> This opinion suggests it is always best practice for family law attorneys to file fee petitions against former clients who have a balance outstanding so they could potentially get a ruling on them that would bar future malpractice claims *res judicata*. Further, it appears from the timeline set forth in the opinion that Mr. Nutter’s malpractice attorney took more than a month to get his legal malpractice claim on file, despite the impending hearing.<sup>428</sup> Attorneys retained to file any type of lawsuit must be sure to timely file the action in Order to avoid similar *res judicata* problems. In issuing its ruling affirming the trial court’s decision, the appellate court rejected two arguments made at oral argument against barring the legal malpractice claim by *res judicata*. First, even if the court enters an order/judgment awarding attorney’s fees and recognizing the fees as reasonable, the attorney still may have failed to perform an action which would otherwise constitute attorney malpractice.<sup>429</sup> Second, a client may not

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<sup>419</sup> *Id.* at ¶ 6.

<sup>420</sup> *Id.* at ¶ 8.

<sup>421</sup> *Id.* at ¶ 10.

<sup>422</sup> *Id.* at, ¶ 11.

<sup>423</sup> *Id.* at ¶ 12.

<sup>424</sup> Nutter v. Schiller, DuCanto & Fleck, LLP, 2022 IL App (2d) 210376, ¶ 19.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> *Id.* at ¶¶ 7-8.

<sup>429</sup> Oral Argument at 4:56, Nutter v. Schiller, DuCanto & Fleck, LLP, 2022 IL App (2d) 210376 (Sept. 8, 2022), <https://www.illinoiscourts.gov/courts/appellate-court/oral-argument-audio/>.

be aware of the legal malpractice until long after any fee disputes would have been approved through court action.<sup>430</sup>

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

Following a divorce proceeding, Tracy Davis had an outstanding balance of \$383,734 with her former divorce attorneys, Schiller, DuCanto, & Fleck, LLP (“SDF”).<sup>431</sup> SDF obtained a consent judgment for \$325,000 against Ms. Davis, then issued citations to collect against her.<sup>432</sup> The trial court ordered Ms. Davis to turn over real property and a lump sum amount due and owed to her but not yet paid under the parties’ Marital Settlement Agreement incorporated into the parties’ divorce judgment.<sup>433</sup> Ms. Davis appealed.<sup>434</sup> The appellate court affirmed the turnovers, reasoning 735 ILCS 5/2-1402 provides that where a party has an unequivocal right under a Marital Settlement Agreement, a judgment creditor can collect against it and compel the transfer of property.<sup>435</sup>

## G. Motions to Vacate

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

*In re Marriage of Brubaker* addressed the intersection of claims for fraudulent concealment of assets with Motions to Vacate filed under Section 2-1401 of the Illinois Code of Civil Procedure.<sup>436</sup> During the pendency of their divorce, the parties entered an Agreed Order providing that the parties would engage in informal discovery.<sup>437</sup> The parties exchanged comprehensive financial statements.<sup>438</sup> In the real estate section of her disclosure, Wife identified the parties’ marital residence, their second home, and the address of her business.<sup>439</sup> The parties waived formal discovery, and at prove-up, Husband testified he waived his right to seek formal discovery and waived his right to Wife’s disclosed business.<sup>440</sup> Wife testified her answers would be “the same or similar.”<sup>441</sup>

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<sup>430</sup> *Id.* at 25:45.

<sup>431</sup> *In re Marriage of Davis*, 2022 IL App (1st) 210623, ¶ 3.

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

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

<sup>434</sup> *Id.*

<sup>435</sup> *Id.* at ¶¶ 5, 11.

<sup>436</sup> *In re Marriage of Brubaker*, 2022 IL App (2d) 200160, ¶ 1.

<sup>437</sup> *Id.* at ¶ 3.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* at ¶ 5.

<sup>441</sup> *Id.*

Four years later, Husband filed a Motion to Vacate under 735 ILCS 5/2-401, alleging Wife had fraudulently concealed the purchase of a condo she acquired during the marriage through ownership of a single-member Limited Liability Company (LLC) organized for that purchase.<sup>442</sup> The value of the condo, if known at the time of the parties' divorce, was worth about one-third of the parties' marital estate.<sup>443</sup> Wife filed a Motion for Summary Judgment, arguing that under *In re Marriage of Goldsmith*, a party cannot reopen a final judgment for dissolution based upon non-disclosure if the moving party failed to complete discovery.<sup>444</sup> The trial court granted Wife's Motion for Summary Judgment, holding Husband lacked due diligence at the time the case was resolved.<sup>445</sup>

The appellate court reversed, finding the trial court erroneously broadened the application of the *Goldsmith* case.<sup>446</sup> Unlike in *Goldsmith*, where the court did not consider a claim of fraudulent concealment of assets, Husband in the *Brubaker* case explicitly claimed Wife fraudulently concealed the condo purchase.<sup>447</sup> The appellate court noted that Husband's decision to forego formal discovery by itself was not a *per se* lack of diligence.<sup>448</sup> Rather, the trial court was required to conduct an evidentiary hearing to determine unresolved issues of fact.<sup>449</sup> On remand, the appellate court instructed the trial court to conduct a "full evidentiary hearing to allow the trial court to make the necessary findings as to petitioner's diligence in the original action, including whether petitioner knew or reasonably should have known of the condo, whether respondent intentionally misstated or concealed her ownership interest in the condo, and if so, whether [Husband's] reliance on [Wife's] statements was reasonable under the particular facts and circumstances."<sup>450</sup>

## H. Procedural Issues

### 1. *In re Parentage of K.E.*

*In re Parentage of K.E.* dealt with the circumstances under which an evidence deposition may be admitted into evidence and requisite notice for same.<sup>451</sup> Right before Father was supposed to exercise his court-ordered

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<sup>442</sup> *In re Marriage of Brubaker*, 2022 IL App (2d) 200160-U, ¶ 6.

<sup>443</sup> *Id.* at ¶ 8.

<sup>444</sup> *Id.* at ¶ 13.

<sup>445</sup> *Id.* at ¶¶ 14-16.

<sup>446</sup> *Id.* at ¶ 23.

<sup>447</sup> *Id.* at ¶ 28.

<sup>448</sup> *In re Marriage of Brubaker*, 2022 IL App (2d) 200160, ¶ 32.

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

<sup>450</sup> *Id.* at ¶ 44.

<sup>451</sup> *In re Parentage of K.E.*, 2022 IL App (5th) 210236, ¶¶ 29-38.

parenting time, Mother filed an emergency Motion to Stop His Parenting Time, alleging the child was scared of his Father, and asked the court to Order Father to consult with a mental health professional.<sup>452</sup> In support of her motion, Mother attached a report from a licensed clinical psychologist, Dr. Osgood, indicating the child was exhibiting symptoms of Post-Traumatic Stress Disorder from Father previously hitting the child and being mean to him.<sup>453</sup> The court suspended Father's parenting time and appointed both a guardian ad litem (GAL) and an expert under Section 604.10 of the IMDMA, Dr. Althoff.<sup>454</sup> Unfortunately, after Dr. Althoff completed his reports on both parties by September 4, 2017, he passed away on September 17, 2017.<sup>455</sup> Father filed a Motion for Temporary Relief, asserting he had not had overnights with the child, and attached Dr. Althoff's report and indicated the GAL had not submitted a report.<sup>456</sup> The trial court ordered counseling and an incremental increase in parenting time for Father.<sup>457</sup>

Mother then moved to bar Dr. Althoff's report as it was not subject to cross-examination.<sup>458</sup> The trial court appointed Dr. Kosmicki as a new expert, who was permitted to obtain information previously relied upon by Dr. Althoff, including his notes, raw testing, reports, and conclusions.<sup>459</sup> After conducting his investigation, Dr. Kosmicki found neither parent was unfit and that he believed Mother had considerably negatively influenced the child's relationship with Father.<sup>460</sup> The court entered an Order extending Father's parenting time in June 2019.<sup>461</sup> Father's attorney took an evidence deposition of Dr. Kosmicki on October 21, 2019.<sup>462</sup> On the morning of the deposition, Mother's attorney filed to strike it, stating Father's attorney never contacted her to schedule it, which violated local court rules.<sup>463</sup> Despite Mother and her attorney not appearing at the deposition, it moved forward, and Dr. Kosmicki testified as to his and Dr. Osgood's reports.<sup>464</sup> On April 13, 2021, in anticipation of a final trial, both parties filed witness disclosures, but neither identified Dr. Kosmicki as a witness.<sup>465</sup> Nevertheless, Father's attorney filed the October 21, 2019 evidence deposition transcript of Dr.

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<sup>452</sup> *Id.* at ¶ 9.

<sup>453</sup> *Id.* at ¶ 10.

<sup>454</sup> *Id.* at ¶ 13.

<sup>455</sup> *Id.* at ¶ 15.

<sup>456</sup> *Id.* at ¶ 16.

<sup>457</sup> *In re Parentage of K.E.*, 2022 IL App (5th) 210236-U, ¶ 17.

<sup>458</sup> *Id.* at ¶ 18.

<sup>459</sup> *Id.*

<sup>460</sup> *Id.* at ¶ 23.

<sup>461</sup> *Id.* at ¶ 27.

<sup>462</sup> *Id.* at ¶ 29.

<sup>463</sup> *In re Parentage of K.E.*, 2022 IL App (5th) 210236-U, ¶ 30.

<sup>464</sup> *Id.* at ¶¶ 31-32.

<sup>465</sup> *Id.* at ¶ 38.



Kosmicki on April 23, 2021, three days before trial.<sup>466</sup> At trial, the court admitted the evidence deposition over Mother's objection and ultimately increased Father's parenting time, relying in part on Dr. Kosmicki's report.<sup>467</sup>

On appeal, the appellate court first addressed Mother's argument that Father did not provide sufficient notice of the initial evidence deposition.<sup>468</sup> The court found Illinois Supreme Court Rule 206(a) requires that a party desiring to take an oral deposition must serve written notice a "reasonable time" in advance.<sup>469</sup> In determining reasonableness, the appellate court noted that if Dr. Kosmicki had been subpoenaed to testify, he would have had seven days to respond to the subpoena.<sup>470</sup> Based on that timeline, the court found it unreasonable not to allow Mother's attorney the same amount of time to respond to a notice of deposition.<sup>471</sup> Since Father's attorney only gave five days notice, the court held that the trial court erred in admitting the evidence deposition.<sup>472</sup>

The court noted Father's attempts at scheduling the deposition via email with no response from Mother were understandably frustrating, but noted the appropriate relief would have been for Father to invoke relief under Illinois Supreme Court Rules 201(k) and, if necessary, 219 to obtain relief to schedule the deposition.<sup>473</sup> As the court relied upon Dr. Kosmicki's report in making its final ruling, the appellate court reversed and remanded.<sup>474</sup> However, the court did note the extreme toxicity between the parties and, accordingly, on remand, gave detailed instructions for the court to Order an updated 604.10(b) evaluation and detailed instructions on what to include in a case management order.<sup>475</sup>

## 2. *Dartt v. Pegman*

Although *Dartt v. Pegman* was not a family law case, it addressed important issues regarding when responses to an underlying pleading constitute "denials."<sup>476</sup> In this law division case, Plaintiff Dartt was exiting a bar when a belligerent Defendant Pegman viciously attacked him, punching and kicking him until he was unconscious.<sup>477</sup> Dartt sued Pegman for the

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<sup>466</sup> *Id.*

<sup>467</sup> *Id.* at ¶ 44.

<sup>468</sup> *Id.* at ¶ 69.

<sup>469</sup> *In re Parentage of K.E.*, 2022 IL App (5th) 210236-U, ¶ 69.

<sup>470</sup> *Id.*

<sup>471</sup> *Id.*

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

<sup>473</sup> *Id.* at ¶¶ 71-72.

<sup>474</sup> *Id.* at ¶ 74.

<sup>475</sup> *In re Parentage of K.E.*, 2022 IL App (5th) 210236, ¶ 76.

<sup>476</sup> *Dartt v. Pegman*, 2022 IL App (1st) 210633, ¶ 1.

<sup>477</sup> *Id.* at ¶ 3.

assault and battery, and in addition, he sued the two Illinois corporations that owned the bar for negligence.<sup>478</sup> One of the corporations, Prairie Dog, answered the Plaintiff's First Amended Complaint, responding as follows to eighteen allegations: "This defendant lacks sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph (x) and therefore they are denied."<sup>479</sup>

Plaintiff moved for summary judgment, arguing all the allegations in his Complaint should be deemed admitted because Prairie Dog failed to submit an affidavit supporting its claims for lack of knowledge.<sup>480</sup> Prairie Dog argued that because each answer ended in "and therefore are denied," the statements constituted explicit denials of each respective allegation.<sup>481</sup>

The trial court granted Plaintiff's Motion for Summary Judgment, finding that because Prairie Dog failed to attach an affidavit of insufficient knowledge as required by 735 ILCS 5/2-610(b), all the allegations where Prairie Dog alleged insufficient knowledge were deemed admitted.<sup>482</sup> The appellate court reversed, finding the subsequent denial controlled and the claim of insufficient knowledge was surplusage that should be disregarded.<sup>483</sup>

The appellate court noted there should be a two-step process for determining whether there is an explicit admission or denial of a particular allegations.<sup>484</sup> First, if the party responds "admits" or "denies" the allegation, the analysis ends there.<sup>485</sup> If not (i.e., if the response indicates the party "lacks sufficient knowledge"), then the allegation is deemed admitted unless part two is answered in the affirmative.<sup>486</sup> Part two asks if there is a claim that the party lacked sufficient knowledge that was supported by an affidavit.<sup>487</sup> If yes, the allegation is deemed denied. If not, the allegation is deemed admitted.<sup>488</sup>

### 3. *DHFS v. Edwards*

*DHFS v. Edwards* addresses the issue of effectuating substitute service where a Respondent's address frequently changes or Respondent was recently incarcerated.<sup>489</sup> In this case, the Department of Healthcare and Family Services ("Department") filed a Petition to Establish Parentage and

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<sup>478</sup> *Id.* at ¶ 4.

<sup>479</sup> *Id.* at ¶ 5.

<sup>480</sup> *Id.* at ¶ 6.

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

<sup>482</sup> *Dart v. Pegman*, 2022 IL App (1st) 210633, ¶ 7.

<sup>483</sup> *Id.* at ¶ 16.

<sup>484</sup> *Id.* at ¶ 14.

<sup>485</sup> *Id.*

<sup>486</sup> *Id.*

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

<sup>488</sup> *Dart v. Pegman*, 2022 IL App (1st) 210633, ¶ 14.

<sup>489</sup> *DHFS v. Edwards*, 2022 IL App (1st) 210409, ¶ 6.

petition to set child support against Respondent Father in favor of Mother.<sup>490</sup> The Cook County Sheriff certified substitute service of process on Respondent by leaving the Petition and Summons with Respondent's mother at his "usual place of abode" on Lowe Avenue in Riverdale, Illinois ("Lowe residence").<sup>491</sup> The circuit court then held a default hearing without Respondent present and set child support.<sup>492</sup>

Sixteen years later, the Respondent filed a Motion to Quash Service, claiming he had just found out about the child support Order and arguing (1) that the Lowe residence was not his usual place of abode, and (2) the substitute service was per se unreasonable because he was incarcerated at the time of service.<sup>493</sup> He attached his mother's affidavit, which alleged (a) her son never resided with her at the Lowe address, (b) she was unaware of his whereabouts at the time of service, (c) she did not recall receiving any documents, and (d) she likely was not at home at the time of service because she was usually out of the house during the day.<sup>494</sup>

The trial court granted Respondent's Motion to Quash, finding that although the Lowe residence was the Respondent's "usual place of abode," case precedent, particularly the *Sterne* case, required the court to grant Respondent's motion where the Department failed to file a counter-affidavit to Respondent's mother's affidavit.<sup>495</sup>

On appeal, the appellate court reversed and remanded the trial court's ruling as to having their hands tied by the *Sterne* case.<sup>496</sup> The appellate court disagreed with the trial court's reading of *Sterne* and found the lack of counter-affidavits and the process server's testimony were not dispositive because the Department relied on documentary evidence and cross-examination of the Respondent and Mother to discredit the Respondent's assertions regarding his usual place of abode.<sup>497</sup>

#### 4. *In re Marriage of Padilla and Kowalski*

This was the fourth appeal filed under this underlying dissolution of marriage matter.<sup>498</sup>

Since the divorce action commenced, Husband filed at least twelve petitions for substitution of judge, three motions to reconsider denials of the petitions, one Motion to Vacate a denial of one of the petitions, and one

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<sup>490</sup> *Id.* at ¶ 3.

<sup>491</sup> *Id.* at ¶ 4.

<sup>492</sup> *Id.* at ¶ 5.

<sup>493</sup> *Id.* at ¶ 6.

<sup>494</sup> *Id.* at ¶ 8.

<sup>495</sup> DHFS v. Edwards, 2022 IL App (1st) 210409, ¶ 37.

<sup>496</sup> *Id.* at ¶ 56.

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

<sup>498</sup> *In re Marriage of Padilla*, 2022 IL App (1st) 200815, ¶ 3.

Motion to Transfer Venue.<sup>499</sup> On December 16, 2019, the trial court entered a Judgment for Dissolution of Marriage (“Judgment”).<sup>500</sup> On July 8, 2020, Husband filed a Petition for Substitution of Judge, also seeking within that Petition to void the Judgment.<sup>501</sup> The next day, Wife filed an emergency Motion For the Appointment over [Husband]’s estate, arguing Husband had failed to comply with the Judgment for Dissolution and pointed to his outstanding obligations totaling over seventy-seven thousand dollars and a pending federal criminal indictment against Husband for bankruptcy fraud and tax fraud.<sup>502</sup> The trial court granted petitioner’s emergency motion, authorizing the receiver to “take exclusive custody and control of all real and/or personal property in [respondent’s] name, and all real and/or personal property in [respondent’s] possession or control, income and/or payment streams owing to [respondent] from any source.”<sup>503</sup> The court further directed the Cook County sheriff to assist the receiver.<sup>504</sup>

On appeal, Husband argued the trial court lacked subject matter jurisdiction over the case as it had been transferred between a few different judges within the Cook County domestic relations division.<sup>505</sup> The appellate court rejected Husband’s argument, finding that despite the transfers, the matter before the circuit court was “justiciable and does not fall within the original and exclusive jurisdiction of our [supreme] court” and, therefore, within the court’s jurisdiction.<sup>506</sup>

Additionally, Husband argued that the court did not have authority under the IMDMA to appoint a receiver for his estate.<sup>507</sup> The appellate court also rejected this argument, finding though the ability to appoint a receiver was not addressed in the IMDMA, the power to appoint a receiver is part of the court’s inherent equity jurisdiction.<sup>508</sup>

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

In the midst of an extremely contentious proceeding, the Honorable Judge Bernstein said, “I should recuse myself.”<sup>509</sup> Subsequently, on February 22, 2021, Husband’s attorney informed Judge Bernstein that he was planning to file a Petition of Substitution for Judge for Cause.<sup>510</sup> When Joseph Taconi,

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<sup>499</sup> *Id.* at ¶ 4.

<sup>500</sup> *Id.* at ¶ 7.

<sup>501</sup> *Id.* at ¶ 8.

<sup>502</sup> *Id.* at ¶ 9.

<sup>503</sup> *Id.* at ¶ 11.

<sup>504</sup> *In re Marriage of Padilla*, 2022 IL App (1st) 200815, ¶ 11.

<sup>505</sup> *Id.* at ¶¶ 23-24.

<sup>506</sup> *Id.* at ¶ 24.

<sup>507</sup> *Id.* at ¶ 25.

<sup>508</sup> *Id.*

<sup>509</sup> *In re Marriage of Cummings*, 2022 IL App (1st) 211507, ¶ 8.

<sup>510</sup> *Id.* at ¶ 9.

the guardian *ad litem* for the minor child, asked the judge if the previously set trial dates would be stricken, Judge Bernstein responded, “I want every piece of paper on this case out of my chambers.”<sup>511</sup> After the hearing, Judge Bernstein signed a form titled “Order Regarding Substitution of Judge or Recusal.”<sup>512</sup> Although there was a box Judge Bernstein could have checked for “recusal,” she merely checked the box on the form indicating a Petition for Substitution had been filed and was “granted.”<sup>513</sup> The Order further provided that “every pleading and exhibit on [Judge Bernstein’s Calendar] is hereby stricken.”<sup>514</sup>

As this Order appeared to grant Husband’s attorney’s Petition against herself, Wife’s attorney sent an e-mail copying Husband’s attorney and the guardian *ad litem*, seeking clarification.<sup>515</sup> Judge Bernstein entered a subsequent Order titled “Transfer, Assignment, and Reassignment,” now following the proper procedure for a Petition for Substitution of Judge for Cause, transferring the case to the Presiding Judge for hearing on the Petition for Substitution of Judge.<sup>516</sup>

Accordingly, the case was transferred to Judge Johnson for a hearing on the Petition for Substitution of Judge for Cause, wherein Judge Johnson denied the Petition.<sup>517</sup> Judge Bernstein subsequently vacated the Order striking all pleadings off her calendar, held a trial on the underlying divorce, and entered a Judgment for Dissolution of Marriage.<sup>518</sup> Husband, now with a new attorney, filed a Motion to Vacate the Judgment for Dissolution of Marriage, arguing Judge Bernstein had recused herself and, therefore, all subsequent orders entered were void.<sup>519</sup> As Judge Bernstein had retired at the time the Motion to Vacate was filed, Judge Mackoff oversaw the hearing on Husband’s Motion.<sup>520</sup>

Judge Mackoff denied Husband’s Motion to Vacate, finding that although Judge Bernstein stated she “should recuse herself,” the record did not support a finding that she ever actually recused herself.<sup>521</sup> In fact, if she had recused herself, that would have rendered Judge Johnson’s hearing on Husband’s Petition for Substitution of Judge moot.<sup>522</sup> The appellate court agreed with Judge Mackoff’s reasoning, finding that Judge Bernstein never

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<sup>511</sup> *Id.*

<sup>512</sup> *Id.* at ¶ 12.

<sup>513</sup> *Id.*

<sup>514</sup> *Id.*

<sup>515</sup> *In re Marriage of Cummings*, 2022 IL App (1st) 211507, ¶ 12.

<sup>516</sup> *Id.* at ¶ 13.

<sup>517</sup> *Id.* at ¶ 15.

<sup>518</sup> *Id.* at ¶ 18.

<sup>519</sup> *Id.* at ¶ 19.

<sup>520</sup> *Id.*

<sup>521</sup> *In re Marriage of Cummings*, 2022 IL App (1st) 211507, ¶ 20.

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

recused herself and, accordingly, was able to enter a final judgment in the case.<sup>523</sup>

6. *In re Marriage of Harnack and Fanady*

This case returned for a fourth time on appeal, where Husband has spent more than ten years attempting to avoid his obligations to his ex-wife pursuant to the parties' Judgment for Dissolution.<sup>524</sup> Further, Husband had made multiple attempts to "evade the jurisdiction of the court and to defraud this court."<sup>525</sup> Following a hearing on yet another Petition for Adjudication for Indirect Civil Contempt filed by Wife's counsel for Husband's failure to transfer stock shares, or \$10 million, to Wife, the court entered a body attachment.<sup>526</sup> The body attachment ordered the Sheriff to seize Husband, to be released after depositing the necessary stock shares or \$10 million into escrow with the Sheriff.<sup>527</sup> Husband filed a notice of appeal that day.<sup>528</sup> Wife filed an emergency motion seeking to amend the Body Attachment Order because the Sheriff would not execute the Order as written because it could not accept receipt of the stock shares, only a purely monetary amount.<sup>529</sup> The trial court entered an amended Body Attachment Order, which was identical to the original, but provided if Husband was taken into custody, he could be released upon depositing \$10 million into escrow with the Sheriff.<sup>530</sup> Husband filed an amended notice of appeal, appealing the amended Body Attachment Order as well.<sup>531</sup>

The trial court found Husband had the means to comply with the Order, and that failure to do so was willful and contumacious.<sup>532</sup> The appellate court held the trial court's Order was not against the manifest weight of the evidence.<sup>533</sup> The appellate court next affirmed the Body Attachment Order, finding the Body Attachment Order was necessary because Husband was found in contempt, and the hearing took place via Zoom, which had become common during the COVID-19 pandemic.<sup>534</sup> The court stressed that had the hearing occurred prior to the onset of the pandemic, Husband would have been physically present in court, and the court could have committed him to

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<sup>523</sup> *Id.* at ¶ 33.

<sup>524</sup> *In re Marriage of Harnack & Fanady*, 2022 IL App (1st) 210143, ¶ 1.

<sup>525</sup> *Id.* at ¶ 5.

<sup>526</sup> *Id.* at ¶ 34.

<sup>527</sup> *Id.*

<sup>528</sup> *Id.*

<sup>529</sup> *Id.* at ¶ 35.

<sup>530</sup> *In re Marriage of Harnack & Fanady*, 2022 IL App (1st) 210143, ¶ 37.

<sup>531</sup> *Id.* at ¶ 38.

<sup>532</sup> *Id.* at ¶¶ 32-33.

<sup>533</sup> *Id.* at ¶ 56.

<sup>534</sup> *Id.* at ¶ 76.

jail in person.<sup>535</sup> Although Husband did participate in virtual hearings, he consistently refused to disclose his location throughout the ten years the litigation has been pending and has refused to comply with court orders to appear using video.<sup>536</sup> Further, the court found, based on its familiarity with Husband's behavior, that he would ignore any more lenient sanction than incarceration.<sup>537</sup>

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

The author is choosing to include this unpublished case for the limited purpose of highlighting its discussion regarding the proper procedure for Petitions for Rule to Show Cause and Rules to Show Cause.<sup>538</sup> Here, the appellate court reversed the circuit court's contempt finding, holding instead that Husband was not given sufficient notice of the proceeding and, therefore, was deprived of minimal due process when the court entered an Order without him present.<sup>539</sup> Specifically, Wife had filed three Petitions for Rule to Show Cause, one of which the court had not issued at the time of the hearing, or provided that the Rule would issue and hearing would occur *instanter*.<sup>540</sup> Instead, at the hearing, Wife's attorney proceeded with questioning Wife regarding her non-receipt of child support, and the court issued the Rule immediately and entered an Order finding Husband in contempt of court.<sup>541</sup> The appellate court noted the circuit court could not simultaneously issue a Rule to Show Cause against Husband and find him in indirect civil contempt of court, then remanded the proceedings back to the circuit court.<sup>542</sup>

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

Wife argued the trial court erred in (1) granting Husband's motion to bar evidence and strike her testimony regarding her alleged medical condition and (2) ordering her not to speak with her attorney about her trial during a trial recess.<sup>543</sup> The appellate court affirmed.<sup>544</sup> On issue 1, the

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<sup>535</sup> *Id.*

<sup>536</sup> *In re Marriage of Harnack & Fanady*, 2022 IL App (1st) 210143, ¶ 76.

<sup>537</sup> *Id.* at ¶ 59.

<sup>538</sup> *In re Marriage of Krier*, 2022 IL App (3d) 210148-U, ¶¶ 32-33.

<sup>539</sup> *Id.* at ¶ 36.

<sup>540</sup> *Id.* at ¶ 17.

<sup>541</sup> *Id.*

<sup>542</sup> *Id.* at ¶¶ 35-37.

<sup>543</sup> *In re Marriage of Keegan*, 2022 IL App (2d) 190495, ¶ 1. Wife also argued about the denial of her maintenance claim, but that analysis was brief, with the court noting she failed to provide a complete record.

<sup>544</sup> *Id.* at ¶ 1.

appellate court reaffirmed that Rule 219 sanctions are designed to effect discovery rather than punishment on the “party who unreasonably refuses to comply with any provisions of [the supreme] court’s discovery rules.”<sup>545</sup> Here, the court found the trial court’s imposition of sanctions reasonable primarily as an issue of fairness.<sup>546</sup> Because Wife did not sit for her court-ordered deposition or produce any documentation of her alleged medical impairment, any evidence she intended to present at trial could be a surprise and unfairly prejudicial to Husband’s counsel despite his repeated diligence in obtaining this information.<sup>547</sup>

As to the court’s Order prohibiting Wife from discussing her testimony with her attorney during court resources, the appellate court noted the trial recesses were lengthy, with one being almost one hundred days.<sup>548</sup> Again, the appellate court provided clarification that there is no absolute constitutional right to discuss a witness’ testimony with counsel during a court recess, and the court has broad discretion to control witness testimony.<sup>549</sup> Further, the appellate court found Wife was permitted to talk to her counsel on other matters during the recesses so she could still receive counsel’s advice.<sup>550</sup>

## I. Adoption

### 1. *In re Adoption of Konieczny*

In *Konieczny*, Karen and Scott (her new husband) filed a petition to adopt Karen’s adult daughter Ariana, who was of a prior marriage.<sup>551</sup> They did not name Karen’s ex-husband as a party, nor serve him with the adoption petition, but alleged he was an unfit parent and sought termination of his parental rights.<sup>552</sup> The trial court granted the adoption judgment.<sup>553</sup> Ex-Husband filed a Petition to Vacate under 735 ILCS 5/2-1401, only regarding termination of his parental rights, not to vacate the adoption.<sup>554</sup> The trial court denied Ex-Husband’s Petition.<sup>555</sup>

On appeal, the court reversed and vacated the trial court’s judgment terminating Ex-Husband’s parental rights, noting as he had not been served, the court did not have jurisdiction to terminate his parental rights.<sup>556</sup>

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<sup>545</sup> *Id.* at ¶ 38 (quoting *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998)).

<sup>546</sup> *Id.* at ¶ 47.

<sup>547</sup> *Id.* at ¶ 48.

<sup>548</sup> *Id.* at ¶ 56.

<sup>549</sup> *In re Marriage of Keegan*, 2022 IL App (2d) 190495, ¶ 62.

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

<sup>551</sup> *In re Adoption of Konieczny*, 2022 IL App (2d) 210333, ¶ 1.

<sup>552</sup> *Id.*

<sup>553</sup> *Id.*

<sup>554</sup> *Id.*

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

<sup>556</sup> *Id.* at ¶ 15.



## J. Domestic Violence

### 1. *Richardson v. Booker*

Petitioner in *Richardson v. Booker* sought a plenary Order of Protection against Respondent, her ex-boyfriend, based on four incidents of abuse from 2015 to 2021 detailed in her sworn affidavit.<sup>557</sup> The most recent abuse incident in 2021 was the most violent, where Petitioner alleged her boyfriend punched her in the back of the head, choked her, and told her he was going to kill her.<sup>558</sup> The trial court denied the Petitioner's request for a plenary Order of Protection, finding Petitioner's credibility was damaged when her testimony went "substantially beyond" the allegations contained in her affidavit and Petition.<sup>559</sup> The trial court found that it was equally likely either party had started the 2021 incident, and therefore, the Petitioner did not meet her burden of proof.<sup>560</sup> Further, the court found the conduct in question (throwing money at the Petitioner), prior to escalating violence, was aggressive but not violent.<sup>561</sup>

The appellate court reversed on appeal, finding that instead of focusing on the question of who the aggressor was, the trial court should have first made a finding that Petitioner was abused, then address the question of whether Respondent was justified because his use of force was necessary and that his use of force was objectively reasonable.<sup>562</sup> Because Respondent failed to testify that his use of force was necessary, the trial court could not make the requisite finding that his use of force was objectively reasonable, and the trial court should have issued the plenary Order of Protection.<sup>563</sup>

### 2. *Duimovic v. Herrera*

Petitioner filed an emergency petition for an Order of Protection against Respondent, alleging that Respondent raped her and videotaped the rape, then let his friends rape her.<sup>564</sup> The trial court denied the emergency petition based on these facts but continued the case for a hearing on issuance of the plenary Order of Protection.<sup>565</sup> The Respondent's attorney served discovery on the Petitioner for videos and other records, and Petitioner failed to

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<sup>557</sup> *Richardson v. Booker*, 2022 IL App (1st) 211055, ¶ 1.

<sup>558</sup> *Id.* at ¶ 5.

<sup>559</sup> *Id.* at ¶ 1.

<sup>560</sup> *Id.*

<sup>561</sup> *Id.* at ¶ 39.

<sup>562</sup> *Id.* at ¶ 48.

<sup>563</sup> *Richardson v. Booker*, 2022 IL App (1st) 211055, ¶ 60.

<sup>564</sup> *Duimovic v. Herrera*, 2022 IL App (1st) 200887-U, ¶ 4.

<sup>565</sup> *Id.* at ¶ 5.

respond.<sup>566</sup> The trial court entered an Order sanctioning Petitioner and barring her from raising any issues related to the discovery requests, then denied the underlying request for an Order of Protection.<sup>567</sup> Petitioner subsequently appealed but did not provide a record on appeal or file a proper brief, so the trial court's ruling was affirmed.<sup>568</sup>

### 3. *In re Order of Protection of Carrillo and Teran*

Although unpublished, this case provided helpful analysis of the role of judges in Order of Protection proceedings.<sup>569</sup> Plaintiff filed a petition requesting entry of a plenary Order of protection against Respondent.<sup>570</sup> The appellate court first found it appropriate to proceed on the appeal despite the expiration of the Order of protection based on the public interest exception to the mootness doctrine.<sup>571</sup> The court then clarified the scope under which a court is able to question witnesses in an Order of protection proceeding.<sup>572</sup> Specifically, the court cannot advocate for either party but may “clarify ambiguities in [a] witness’s testimony or shed light on material issues.”<sup>573</sup> The appellate court found the trial court stayed within these boundaries, noting in particular that the court at times asked Plaintiff questions where the answers were detrimental to her.<sup>574</sup>

## L. Other Family Law Issues

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

*In re Marriage of Katsap* was a lengthy case addressing several important issues on appeal.<sup>575</sup> The parties in the case were both Russian and married in Israel, but later moved to New York, and had one child born via *in vitro* fertilization as Wife was unable to carry a child to term.<sup>576</sup> The parties had other frozen embryos that were stored in a fertility clinic in Connecticut.<sup>577</sup> Additionally, the parties co-owned a business, Alex Solutions, which sold fire alarms, security systems, and closed-circuit

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<sup>566</sup> *Id.* at ¶ 6.

<sup>567</sup> *Id.*

<sup>568</sup> *Id.* at ¶ 16.

<sup>569</sup> See generally *In re Order of Protection of Carrillo & Teran*, 2022 IL App (1st) 210962-UB.

<sup>570</sup> *In re Order of Protection of Carrillo & Teran*, 2022 IL App (1st) 210962-UB, ¶ 2.

<sup>571</sup> *Id.* at ¶ 13.

<sup>572</sup> *Id.* at ¶ 15.

<sup>573</sup> *Id.* at ¶ 17.

<sup>574</sup> *Id.* at ¶ 21.

<sup>575</sup> See generally *In re Marriage of Katsap*, 2022 IL App (2d) 210706.

<sup>576</sup> *In re Marriage of Katsap*, 2022 IL App (2d) 210706, ¶ 4.

<sup>577</sup> *Id.*

television cameras.<sup>578</sup> In March 2020, Husband moved out of the marital residence, and Wife moved to Naperville, Illinois.<sup>579</sup> Shortly thereafter, Wife moved with the child to Buffalo Grove, Illinois, without notifying Husband.<sup>580</sup> Husband filed a case in New York, asking the New York court to order Wife to return to New York with the minor child.<sup>581</sup> However, when the New York court learned Wife obtained an Order of Protection in Illinois, it relinquished jurisdiction.<sup>582</sup> During the pendency of the case in Illinois, the trial court entered several temporary orders regarding child support, property division, and allocation of parental responsibilities (including ruling against Wife's choice of daycare).<sup>583</sup> Thereafter, Wife filed an emergency motion for substitution of judge, which the trial court denied.<sup>584</sup> Wife filed a petition for declaratory judgment to enforce a "ketubah," a Jewish marriage contract.<sup>585</sup> Husband contested the enforcement of the ketubah and filed a petition for permanent injunction to prevent Wife from using frozen embryos they had stored at a fertility clinic.<sup>586</sup>

The trial court found Wife demonstrated "little or no regard" for "speaking truthfully" and "showed 'little or no regard' for the importance of a father-son relationship," evidenced by her move to Illinois to prevent Husband from having a relationship with their son.<sup>587</sup> The trial court entered several orders pertinent to the appeal.<sup>588</sup> The court granted Husband exclusive possession of the frozen embryos and ordered him to direct the fertility clinic to donate or destroy the embryos.<sup>589</sup> Wife was enjoined from contacting the fertility clinic.<sup>590</sup> Wife was awarded the majority of parenting time with the minor child since Husband still resided in New York, but deviated downward from guideline child support due to the expenses Husband would have to incur to travel to see the child.<sup>591</sup>

The first issue on appeal was whether the trial court erred in denying Wife's emergency Motion for Substitution Of Judge.<sup>592</sup> The appellate court found the trial court's denial was proper as the motion was not timely and the

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<sup>578</sup> *Id.* at ¶ 5.

<sup>579</sup> *Id.* at ¶ 6.

<sup>580</sup> *Id.*

<sup>581</sup> *Id.* at ¶ 7.

<sup>582</sup> *In re Marriage of Katsap*, 2022 IL App (2d) 210706, ¶ 7.

<sup>583</sup> *Id.* at ¶¶ 11, 13-17.

<sup>584</sup> *Id.* at ¶ 12.

<sup>585</sup> *Id.* at ¶ 21.

<sup>586</sup> *Id.* at ¶¶ 22, 27.

<sup>587</sup> *Id.* at ¶ 88.

<sup>588</sup> *In re Marriage of Katsap*, 2022 IL App (2d) 210706, ¶¶ 88-93.

<sup>589</sup> *Id.* at ¶ 90.

<sup>590</sup> *Id.* at ¶ 88.

<sup>591</sup> *Id.* at ¶ 92.

<sup>592</sup> *Id.* at ¶ 99.

trial court had already entered substantive orders, including ruling against Wife's choice in daycare.<sup>593</sup>

In reviewing the trial court's decision regarding daycare, the appellate court noted Wife sought to enroll the child in a daycare that refused to share any information about the child with Husband or the appointed guardian *ad litem* and did not follow the Illinois Department of Public Health mask guidelines during the pandemic.<sup>594</sup> The appellate court found that the determination of daycare fell to the court as there was no agreement between the parties and the court following the recommendation of the guardian *ad litem* for daycare was not against the manifest weight of the evidence.<sup>595</sup>

The next issue was whether the trial court erred in deviating downward from the guidelines when calculating child support.<sup>596</sup> The appellate court vacated and remanded the support award, finding the trial court failed in only focusing on Husband's resources, not the child's resources and needs, the standard of living the child would have enjoyed had the marriage not been dissolved, and the child's physical and emotional condition and his educational needs, as required by Section 505(a)(2) of the Illinois Marriage and Dissolution of Marriage Act.<sup>597</sup>

Next, the appellate court reversed the trial court's ruling that the ketubah entered into by the parties was enforceable.<sup>598</sup> The property provision of the ketubah obligated Husband to pay Wife one million dollars out of any property he now owns or may own in the future.<sup>599</sup> However, the document presented to the trial court was in Hebrew, and no certified translation was offered into evidence.<sup>600</sup> The court noted that even if the translation was reliable, the ketubah would not be enforceable.<sup>601</sup> Because the marital estate was negligible, the one million dollar sum was unconscionable, and the ketubah was unenforceable.<sup>602</sup>

The appellate court devoted the most analysis to the final issue on appeal: the allocation and possession of the frozen embryos.<sup>603</sup> The competing interests identified by the court were Husband's desire not to have additional children with Wife with a financial obligation to support those children and Wife's argument that the frozen embryos were her only possible

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<sup>593</sup> *Id.* at ¶ 103.

<sup>594</sup> *In re Marriage of Katsap*, 2022 IL App (2d) 210706, ¶¶ 124-127.

<sup>595</sup> *Id.* at ¶¶ 125, 127.

<sup>596</sup> *Id.* at ¶ 132.

<sup>597</sup> *Id.* at ¶¶ 133, 135.

<sup>598</sup> *Id.* at ¶ 149.

<sup>599</sup> *Id.* at ¶ 149.

<sup>600</sup> *In re Marriage of Katsap*, 2022 IL App (2d) 210706, ¶ 147.

<sup>601</sup> *Id.* at ¶ 149 (noting the Wife did not seek to enforce provisions regarding Jewish law, but sought to enforce the one million dollar property settlement owed from Husband under the ketubah).

<sup>602</sup> *Id.*

<sup>603</sup> *Id.* at ¶¶ 106-121.

way to have any future children.<sup>604</sup> The trial court found creating the frozen embryos was done for the benefit of the parties' marriage, and Husband's desire to donate the embryos to another couple was closer to the parties' original intent that the child be born to married parents.<sup>605</sup> The appellate court engaged in a comparative analysis of three approaches states have taken when addressing frozen embryo cases: (1) the contractual approach, (2) the contemporaneous mutual consent approach, and (3) the balancing approach.<sup>606</sup> The court noted the unclear testimony at trial regarding a document which Wife alleged Husband signed whereby he agreed Wife or her parents would receive the embryos in the event of divorce.<sup>607</sup> Husband testified he had never seen or signed that document and that it appeared Wife forged his signature.<sup>608</sup> At the appellate oral argument, Wife conceded there was no contractual document governing the disposition of the embryos in the event of divorce.<sup>609</sup> The court followed *Szafranski I*,<sup>610</sup> and *Szafranski II*,<sup>611</sup> the First District case which adopted the balancing test.

The court also applied the factors in the recent Colorado Supreme Court case of *In re Rooks*.<sup>612</sup> The Rooks court outlined factors a court should and should not consider.<sup>613</sup> The court articulated the following factors:

- (1) The intended use of the party seeking to preserve the frozen embryos, with greater weight being placed on the interest of the party seeking to become a genetic parent through implantation of the embryos than that of one who desires to donate the embryos to another couple;
- (2) The demonstrated physical ability or inability of the party seeking to implant the embryos to have biological children through other means;
- (3) The parties' original reasons for pursuing IVF, such as to preserve a spouse's ability to have biological children in the face of fertility-impacting medical treatment, such as chemotherapy;

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<sup>604</sup> *Id.* at ¶ 109.

<sup>605</sup> *Id.* at ¶ 108.

<sup>606</sup> *In re Marriage of Katsap*, 2022 IL App (2d) 210706, ¶ 111 (defining the "contractual approach" as the "court[']s [enforcement of] the parties' unambiguous agreement that has contemplated or encompassed the contingency of divorce" while the "contemporaneous-mutual-consent approach" as where "courts do not enforce earlier agreements between the parties when one or both of them have changed their minds, and with the status quo prevailing unless and until the parties mutually consent," and the "balancing approach" where "in the absence of an enforceable agreement, courts balance the parties' interests in seeking or avoiding procreation.").

<sup>607</sup> *Id.* at ¶ 113.

<sup>608</sup> *Id.*

<sup>609</sup> *Id.*

<sup>610</sup> *Id.* at ¶ 116 (citing *In re Marriage of Szafranski*, 993 N.E.2d 502 (Ill. App. Ct. 2013)).

<sup>611</sup> *Id.* at ¶ 116, 119 (citing *In re Marriage of Szafranski II*, 34 N.E.3d 1132 (Ill. App. Ct. 2015)).

<sup>612</sup> *In re Marriage of Katsap*, 2022 IL App (2d) 210706, ¶ 117 (citing *In re Rooks*, 2018 CO 85, 429 P.3d 579 (Colo. 2018)).

<sup>613</sup> *Id.* (citing *In re Rooks*, 2018 CO 85, ¶¶ 65-70.).

(4) The hardship for the person seeking to avoid becoming a genetic parent, including emotional, financial, or logistical considerations; and

(5) Either spouse's bad faith or attempt to use the embryos as unfair leverage in the divorce proceedings.

[Factors the court should not consider are:]

(1) liming family size based on financial and economic distinctions;

(2) the number of a party's existing children; and

(3) whether a party seeking to use the embryos could instead adopt a child or otherwise parent nonbiological children.<sup>614</sup>

The appellate court reversed the trial court, holding the trial court's findings that the parties wanted a child to be born only to married persons, and the court's conclusion that Wife wanted to have a child out of wedlock were against the manifest weight of the evidence.<sup>615</sup> The court found there was no evidentiary support for this conclusion.<sup>616</sup> Further, the appellate court found the trial court was not in error when it concluded a baby born through surrogacy would have both parents as presumed parent.<sup>617</sup> Pointing to the Gestational Surrogacy Act, the court noted the definition of an "intended parent" requires an intended parent to enter into a gestational surrogacy contract pursuant to which they will be the intended.<sup>618</sup> The court opined that if Husband did not enter into such a contract, he would not be obligated to financially support the child.<sup>619</sup>

In balancing the parties' competing interests and the *Rooks* factors, the appellate court found the frozen embryos should be awarded to Wife due to her inability to produce more eggs, her inability to carry a child to term, and the embryos being the only way Wife could have a biological child.<sup>620</sup> The appellate court concluded Wife's interests outweighed Husband's interest in donating the frozen embryos.<sup>621</sup>

## 2. *In re Marriage of Poulson*

*In re Marriage of Poulson* addresses statutes of limitations for enforcing money judgments.<sup>622</sup> Husband and Wife were divorced in 1995.<sup>623</sup> As part of the divorce judgment, Husband was ordered to pay money to Wife

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<sup>614</sup> *Id.*

<sup>615</sup> *Id.* at ¶ 120.

<sup>616</sup> *Id.*

<sup>617</sup> *Id.*

<sup>618</sup> *In re Marriage of Katsap*, 2022 IL App (2d) 210706, ¶ 120.

<sup>619</sup> *Id.*

<sup>620</sup> *Id.* at ¶ 121.

<sup>621</sup> *Id.*

<sup>622</sup> *In re Marriage of Poulson*, 2022 IL App (1st) 220100, ¶ 6.

<sup>623</sup> *Id.* at ¶ 1.

within thirty days of entry of the judgment.<sup>624</sup> Additionally, the judgment provided that Wife would receive money or sixty percent of the sale proceeds from the marital residence, whichever was greater.<sup>625</sup> In 2021, the now ex-Wife filed a Motion to Enforce the Money Judgment.<sup>626</sup> Ex-Husband filed a Motion To Strike due to the statute of limitations on enforcing judgments.<sup>627</sup> The trial court found that ex-Wife did not receive the money within thirty days of the entry of the judgment, but did receive the proceeds from the marital residence.<sup>628</sup> Both parties appealed.<sup>629</sup>

The appellate court found the trial court erred when it did not dismiss the claim to enforce the money judgment because it was barred by the statute of limitations.<sup>630</sup> The court distinguished between the enforcement of a money judgment versus an injunctive order.<sup>631</sup> Whereas a money judgment is subject to a twenty-year statute of limitations, injunctive provisions are not subject to the same statute of limitations and remain enforceable after twenty years.<sup>632</sup> Since the judgment required the spouses to cooperate to sell the house and allocate the sale proceeds, those provisions were in the nature of an injunctive Order and not a money judgment and not subject to a statute of limitations.<sup>633</sup>

### 3. *Scott v. Haritos*

*Scott v. Haritos* was a relocation case where Mother sought to move out of Illinois after graduating from college.<sup>634</sup> Before the case was filed, Mother had already moved out of Illinois.<sup>635</sup> Father filed a petition for parentage, and the trial court ordered Mother to move back to Illinois with the child.<sup>636</sup> As a result, Mother moved back to Illinois, and Father moved a couple of hours away.<sup>637</sup> The trial court considered all of the factors of Section 609.2 and granted the Mother's petition for relocation.<sup>638</sup>

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<sup>624</sup> *Id.*

<sup>625</sup> *Id.* at ¶ 4.

<sup>626</sup> *Id.* at ¶ 5.

<sup>627</sup> *Id.* at ¶ 6.

<sup>628</sup> *In re Marriage of Poulson*, 2022 IL App (1st) 220100, ¶ 13.

<sup>629</sup> *Id.* at ¶ 14.

<sup>630</sup> *Id.* at ¶ 20.

<sup>631</sup> *Id.* at ¶ 22.

<sup>632</sup> *Id.*

<sup>633</sup> *Id.*

<sup>634</sup> *Scott v. Haritos*, 2022 IL App (1st) 220074.

<sup>635</sup> *Id.* at ¶ 4.

<sup>636</sup> *Id.* at ¶¶ 5, 7.

<sup>637</sup> *Id.* at ¶¶ 6-7.

<sup>638</sup> *Id.* at ¶ 32.

The trial court and the appellate court both appear to put a lot of weight into the Mother's desire to move.<sup>639</sup> In particular, she was a recent college graduate, she wanted a better life for herself and her child, she was moving for better employment opportunities, and she was moving to a safer location.<sup>640</sup> It did not help Father that he complained about the Mother moving, and then he moved hours from the child.<sup>641</sup>

#### 4. *Hoey v. Hoey*

Father filed a two-count complaint against Thompson, who had been appointed as a guardian ad litem (GAL) during the parties' divorce proceedings.<sup>642</sup> During the pendency of the case, Mother filed a verified petition for Order of Protection, seeking to suspend Father's parenting time.<sup>643</sup> At the hearing on Mother's petition, Thompson testified, questioned witnesses, and subsequently filed a Motion to Refer the Child to Counseling.<sup>644</sup> Following the hearing, the trial court entered an Order providing that Father's parenting time would be supervised on a temporary basis.<sup>645</sup> Thompson sent an e-mail on the same day, imposing additional restrictions beyond the court's order, including "choosing the location where visitation would take place, identifying allowable topics of conversation, prohibiting the paternal grandparents from participating in the visits, restricting phone use during visits, and giving the minor the authority to end the visits."<sup>646</sup> Thompson subsequently informed the parties that the court's selected parenting time supervisor was not allowed to supervise anymore and appointed a new supervisor.<sup>647</sup> Father's complaint alleged Thompson's actions violated Rule 3.7 of the Illinois Rules of Professional Conduct, and that Thompson conspired to alienate the minor and deprive him of his parenting time.<sup>648</sup>

In clarifying the scope of a GAL's quasi-judicial immunity, the court distinguished between actions taken in the scope of a GAL's authority versus within the scope of a GAL's appointment.<sup>649</sup> The court found although Thompson's actions exceeded her authority, none of her conduct was outside of her appointment as a GAL.<sup>650</sup> Accordingly, Thompson's immunity

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<sup>639</sup> *Id.* at ¶¶ 44-53.

<sup>640</sup> *Scott v. Haritos*, 2022 IL App (1st) 220074, ¶ 32.

<sup>641</sup> *Id.* at ¶ 33.

<sup>642</sup> *Hoey v. Hoey*, 2022 IL App (5th) 220054-U, ¶ 4.

<sup>643</sup> *Id.* at ¶ 5.

<sup>644</sup> *Id.* at ¶ 6.

<sup>645</sup> *Id.*

<sup>646</sup> *Id.*

<sup>647</sup> *Id.*

<sup>648</sup> *Hoey v. Hoey*, 2022 IL App (5th) 220054-U, ¶ 7.

<sup>649</sup> *Id.* at ¶ 15.

<sup>650</sup> *Id.* at ¶ 17.



extended to actions she performed that exceeded the scope of her authority because these actions were still within the scope of her appointment.<sup>651</sup>

In his dissenting opinion, Justice Barberis rejected the majority's reasoning, finding it effectively grants blanket immunity to GALs for any actions taken in their role.<sup>652</sup> Justice Barberis opined that when the trial court found Thompson exceeded her authority as GAL by (1) participating as a GAL, witness, and attorney in the hearing on Mother's petition for Order of protection and (2) unilaterally changing the terms of the court order, it effectively found Thompson exceeded the scope of her appointment as well.<sup>653</sup> This case leaves open the question of the limits to quasi-judicial immunity for a GAL as long as they are acting under the scope of their appointment.<sup>654</sup>

#### IV. CONCLUSION

As it relates to the cases and legislation summarized herein, there are several key takeaways and practice tips for all Illinois family law practitioners moving forward:

1. When writing a response, if an attorney merely writes they "lack sufficient knowledge" to admit or deny an allegation, then the allegation is deemed admitted unless part two is answered in the affirmative.<sup>655</sup> Part two asks if there is a claim that the party lacked sufficient knowledge that was supported by an affidavit.<sup>656</sup> If yes, the allegation is deemed denied. If not, the allegation is deemed admitted.<sup>657</sup>
2. If you intend for a certain future event to constitute a substantial change of circumstances for a future modification of support, you must draft your Order or agreement to 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>658</sup>
3. Even where a court imposes a filing deadline for an extension of reviewable maintenance, the court may still entertain a petition for maintenance under Section 504 of the IMDMA.<sup>659</sup>

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<sup>651</sup> *Id.* at ¶ 17.

<sup>652</sup> *Id.* at ¶ 24 (Barberis, J., dissenting).

<sup>653</sup> *Id.* at ¶ 26.

<sup>654</sup> See *Hoey v. Hoey*, 2022 IL App (5th) 220054-U, ¶ 26 (Barberis, J., dissenting).

<sup>655</sup> *Dartt v. Pegman*, 2022 IL App (1st) 210633, ¶ 14.

<sup>656</sup> *Id.*

<sup>657</sup> *Id.*

<sup>658</sup> Pub. Act 102-823, 2022 Ill. Laws § 5 (codified as amended at 750 ILL. COMP. STAT. 5/510).

<sup>659</sup> *In re Marriage of Watson*, 2022 IL App (2d) 210137.

4. Ensure court orders accurately reflect all information at the time they are entered and seek immediate clarification from the court if there are omissions or ambiguities.<sup>660</sup>
5. A party's failure to seek full compliance with formal discovery is not in itself a per se lack of due diligence when there is a claim for fraudulent concealment of assets.<sup>661</sup>
6. There is a trend of appellate courts to follow the balancing test to determine contested issues regarding the disposal of frozen embryos.<sup>662</sup>

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<sup>660</sup> *Id.*; *In re Marriage of Cummings*, 2022 IL App (1st) 211507.

<sup>661</sup> *In re Marriage of Brubaker*, 2022 IL App (2d) 200160.

<sup>662</sup> *In re Marriage of Katsap*, 2022 IL App (2d) 210706, ¶ 121.

# TIME'S UP: THE EFFECT OF THE CORONAVIRUS PANDEMIC ON THE ILLINOIS SPEEDY TRIAL ACT

Timothy James Ting\*

The spread of the novel coronavirus has led to a historic pandemic that has affected every facet of life around the globe. While the practical effects of job loss, remote schooling, and economic struggle have been well-documented since the onset of the pandemic,<sup>1</sup> adjudicating criminal cases in a timely manner has proven to be just as unsettling to the justice system. As new variants of the coronavirus continue to emerge in the present day,<sup>2</sup> court systems in each state should reconsider the statutory language of their respective speedy trial acts to avoid future inefficiencies in caseload management and deprivations of defendant rights.<sup>3</sup>

## I. BACKGROUND OF THE ILLINOIS SPEEDY TRIAL ACT

The Sixth Amendment of the United States Constitution establishes that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]”<sup>4</sup> Nevertheless, the United States Supreme Court has noted that “the right to speedy trial is a more vague concept than other procedural

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<sup>1</sup> Alison Aughinbaugh & Donna S. Rothstein, *How did employment change during the COVID-19 pandemic?*, BUREAU OF LAB. STAT. (Jan. 4, 2022), <https://www.bls.gov/opub/btn/volume-11/how-did-employment-change-during-the-covid-19-pandemic.htm>; Cory Turner, *6 things we’ve learned about how the pandemic disrupted learning*, NAT’L PUB. RADIO (June 22, 2022, 12:54 PM), <https://www.npr.org/2022/06/22/1105970186/pandemic-learning-loss-findings>.

<sup>2</sup> *Monitoring Variant Proportions*, CTR. DISEASE CONTROL, <https://covid.cdc.gov/covid-data-tracker/#variant-proportions> (last visited Feb. 22, 2023).

<sup>3</sup> For a discussion of the myriad problems caused by the pandemic’s extension of “speedy trial” deadlines, see Abbe David Lowell, Christopher Man, Lisa Chan, & Leah Room, *Problems With Tolling The Speedy Trial Act During the Pandemic*, LAW360 (May 6, 2020, 3:29 PM), <https://www.law360.com/articles/1270308/problems-with-tolling-the-speedy-trial-act-during-pandemic>.

<sup>4</sup> U.S. CONST. amend. VI.

rights.”<sup>5</sup> Under both the United States and Illinois State Constitutions, the right to a speedy trial “cannot be defined in terms of a precise period of time.”<sup>6</sup> Nevertheless, while the federal and state constitutions do not establish a specific time computation for speedy trial rights, the Illinois legislature enacted a speedy trial time computation of precisely 120 days for incarcerated defendants to ensure judicial efficiency.<sup>7</sup> Thus, a defendant has two distinct speedy trial rights in Illinois: a constitutional right under the state constitution as well as a statutory right pursuant to the Illinois Speedy Trial Act.<sup>8</sup> While the constitutional and statutory provisions pertaining to speedy trial rights are similar, “the rights established by each of them are not necessarily coextensive.”<sup>9</sup> Instead, “when a statutory speedy-trial violation is alleged, ‘the statute operates to prevent the constitutional issue from arising except in cases involving prolonged delay, or novel issues.’”<sup>10</sup>

Generally, incarcerated defendants in Illinois are entitled to a speedy trial within 120 days pursuant to the statute.<sup>11</sup> The speedy trial time computation may be extended for 60 days if: (1) the State has exercised due diligence to obtain material evidence to the case without success, and (2) there are reasonable grounds to believe that such evidence may be obtained at a later date.<sup>12</sup> Should such missing evidence pertain to DNA testing, the State may be granted an extension for up to 120 days if it can satisfy due diligence and reasonable grounds.<sup>13</sup> Other than for extensions based on fitness determinations or by the defendant’s own request, the statute does not provide for another avenue for a trial court or the government to delay the adjudication of a criminal case.<sup>14</sup> Consequently, the Illinois statutory right to speedy trial differs from a constitutional right to a speedy trial because “[p]roof of a violation of the statutory right requires only that the defendant has not been tried within the period set by statute and that defendant has not caused or contributed to the delays.”<sup>15</sup> Moreover, defendants who “rely on the statutory right are not required to show prejudice resulting from the delay in trial or other factors that are part of the burden of establishing a violation of the constitutional right to a speedy trial.”<sup>16</sup>

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<sup>5</sup> *Barker v. Wingo*, 407 U.S. 514, 521 (1972).

<sup>6</sup> *People v. Bazzell*, 369 N.E.2d 48, 49 (Ill. 1977); *see also* U.S. CONST. amends. VI, XIV; ILL. CONST. art. I, § 8.

<sup>7</sup> 725 ILL. COMP. STAT. 5/103-5(a) (2023).

<sup>8</sup> ILL. CONST. art. I, § 8; *Id.*

<sup>9</sup> *People v. Kliner*, 705 N.E.2d 850, 868 (Ill. 1998).

<sup>10</sup> *People v. Staten*, 639 N.E.2d 550, 554-55 (Ill. 1994) (quoting *People v. Stuckey*, 216 N.E.2d 521, 523 (Ill. 1966)).

<sup>11</sup> 725 ILL. COMP. STAT. 5/103-5(a).

<sup>12</sup> *Id.* at (c).

<sup>13</sup> *Id.*

<sup>14</sup> *See id.*

<sup>15</sup> *People v. Staten*, 639 N.E.2d 550, 554 (Ill. 1994).

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

## II. BACKGROUND OF THE CORONAVIRUS IN ILLINOIS

On March 9, 2020, Governor Pritzker declared a state of emergency in response to the coronavirus pandemic.<sup>17</sup> In response to the gubernatorial disaster proclamation, the Illinois Supreme Court issued Emergency Order M.R. 30370 on March 20, 2020.<sup>18</sup> Citing authority pursuant to Article VI, Section 16 of the Illinois Constitution, the Illinois Supreme Court held that “each circuit court may continue trials for the next 60 days and until further order of this Court.”<sup>19</sup> This 60-day delay was attributed to the state of emergency based on the coronavirus and it did not count against the 120-day statutory speedy trial time computation.<sup>20</sup>

Thereafter, on April 3, 2020, the Illinois Supreme Court amended Emergency Order M.R. 30370 and indicated that “the Chief Judges of each circuit may continue trials until further order of this Court.”<sup>21</sup> On April 7, 2020, the Illinois Supreme Court rationalized this indefinite continuance by noting that “continuances occasioned by this Order serve the ends of justice and outweigh the best interest of the public and defendants in a speedy trial.”<sup>22</sup> Consequently, the Illinois Supreme Court held that “such continuances shall be excluded from speedy trial computations” and that statutory time restrictions “shall be tolled until further order of this Court.”<sup>23</sup> This indefinite delay of an incarcerated defendant’s right to adjudication of his/her criminal case within 120 days lasted until October 1, 2021.<sup>24</sup> For approximately 1½ years, the Illinois Supreme Court nullified the provisions of the Speedy Trial Act and many incarcerated defendants languished in their respective jails with no clarity or resolution as to when their cases would proceed to trial.<sup>25</sup>

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<sup>17</sup> ILL. EXEC. DEP., GUBERNATORIAL DISASTER PROCLAMATION (2020).

<sup>18</sup> SUP. CT. ILL., ILLINOIS COURT RESPONSE TO COVID-19 EMERGENCY, M.R. 30370 (2020), <https://www.illinoiscourts.gov/resources/92a281c1-afdf-41c2-a66a-7fd335f21dc2/file>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> SUP. CT. ILL., ILLINOIS COURT RESPONSE TO COVID-19 EMERGENCY, M.R. 30370 (2021), <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/0d953453-4180-42d8-8617-16e59d1ff932/M.R.%2030370%20-%20In%20re:%20Illinois%20Courts%20Response%20to%20COVID-19%20Emergency/Impact%20on%20Trials%20%2006-30-21.pdf>.

<sup>25</sup> Carlos Ballesteros, *In Illinois, you (still) don't have a right to a speedy trial*, INJUSTICE WATCH (June 24, 2021), <https://www.injusticewatch.org/news/courts/2021/speedy-trial-illinois-supreme-court/>.

### III. OVERVIEW OF HISTORIC DELAYS AND NATIONWIDE RESPONSE TO THE PANDEMIC

It is difficult to imagine a more understandable cause for a delay for a trial to be conducted than the coronavirus pandemic. To some extent, various courts have previously dealt with similar unavoidable disasters that necessitated a delay of a defendant's speedy trial. For example, the eruption of a volcano necessitated an appropriate delay of the defendant's trial excluded from his speedy trial time computation in the Ninth Circuit Court of Appeals.<sup>26</sup> Similarly, a federal court in New York allowed for a continuance excluded from time under the Federal Speedy Trial Act after the terrorist attacks of September 11, 2001.<sup>27</sup> A time delay due to the devastating effects of Hurricane Katrina similarly resulted in a delay excluded from the speedy trial computation.<sup>28</sup> The same result occurred when a federal trial court continued a case due to "a paralyzing blizzard."<sup>29</sup>

However, none of these cases dealt with the extensive and enduring nature of the coronavirus pandemic.<sup>30</sup> Case law from various jurisdictions is still being developed regarding the pandemic's impact on a defendant's speedy trial rights.<sup>31</sup> However, most of these jurisdictions share a joint conclusion with a resounding message: delays caused by the coronavirus should not be decided against the government.<sup>32</sup> As it pertains to state jurisdictions: West Virginia, Massachusetts, California, Ohio, Delaware, Virginia, Nebraska, Florida, Vermont, and Indiana have all held that a defendant's speedy trial rights were not violated based on continuances due to the coronavirus pandemic.<sup>33</sup> As the Indiana Court of Appeals noted, "[t]he public health emergency continues. The threat of exposure from any in-court

<sup>26</sup> *Furlow v. United States*, 644 F.2d 764, 768 (9th Cir. 1981).

<sup>27</sup> *See United States v. Correa*, 182 F. Supp. 2d 326, 329 (S.D.N.Y. 2001).

<sup>28</sup> *United States v. Scott*, 245 F. App'x 391, 394 (5th Cir. 2007).

<sup>29</sup> *United States v. Richman*, 600 F.2d 286, 292-94 (1st Cir. 1979).

<sup>30</sup> Of the prior listed incidents, Hurricane Katrina resulted in the longest inexcusable continuance of 70 days which is certainly shorter than the coronavirus' three year-and-counting span. *See United States v. Scott*, 245 F. App'x 391, 394 (5th Cir. 2007).

<sup>31</sup> *See State v. Brown*, 964 N.W.2d 682 (Neb. 2021); *United States v. Pair*, 522 F. Supp. 3d 185 (E.D. Va. 2021).

<sup>32</sup> *See, e.g., State v. Beal*, 179 N.E.3d 754, 760-61 (Ohio Ct. App. 2021); *People v. Mayfield*, 186 N.E.3d 571, 574-75 (Ill. App. 2021).

<sup>33</sup> *State ex rel. Porter v. Farrell*, 858 S.E.2d 897, 908-09 (W. Va. 2021); *State v. Boyer*, 252 A.3d 804, 806 (Vt. 2021); *People v. Turner*, 144 N.Y.S.3d 526 (N.Y. 2021) (citing to executive orders suspending speedy trial rights); *Commonwealth v. Lougee*, 147 N.E.3d 464, 472 (Mass. 2020); *Stanley v. Superior Court of Contra Costa County*, 263 Cal. Rptr. 3d 735, 739-40 (2020); *Smith v. State*, 310 So. 3d 1101, 1104 (Fla. App. 2020); *In re Disqualification of Fleegle*, 163 N.E.3d 609, 612 (Ohio 2020); *State v. Chase*, 964 N.W.2d 254, 260-61, (Neb. 2021); *Blake v. State*, 176 N.E.3d 989, 994 (Ind. App. 2021); *State v. Duonnolo*, 2020 WL 2467077,\*3 (Sup. Ct. Del. 2020) [unpublished opinion but cited in support of accompanying citations]; *Commonwealth v. Vila*, 104 Va. Cir. 389 (2020) [unpublished opinion but cited in support of accompanying citations].

proceeding during these conditions, even when conducted under strict protocols, is high. And any exposures from such proceedings contribute to prolonging the emergency.<sup>34</sup> Similarly, the West Virginia Supreme Court of Appeals reflected on the necessity of delaying speedy trials due to the coronavirus, noting that this pandemic is “a state of judicial emergency” that must be “accompanied by the closure of courts and cancellation of nonessential judicial proceedings, including jury trials.”<sup>35</sup> The Ohio Supreme Court echoed the sentiment, “[d]uring this public-health emergency, a judge's priority must be the health and safety of court employees, trial participants, jurors, and members of the public entering the courthouse.”<sup>36</sup> Both “[a]ttorneys and the public have a right to know what steps a court is taking to keep them safe while the court continues conducting essential business.”<sup>37</sup> From coast to coast, many states in the nation have allowed considerable flexibility for trial courts to utilize their discretion before scheduling trials.<sup>38</sup> Likewise, an extraordinary amount of federal jurisdictions have been inclined to favor the government pertaining to excluding time computations from a defendant's speedy trial period due to delays caused by the coronavirus.<sup>39</sup> As the United States District Court of Kansas recognized, the coronavirus has created “a significant threat to the public health, including trial participants who, were the trial to go forward, could expose themselves to significant health risks.”<sup>40</sup> The Ninth Circuit Court of Appeals agreed, noting that “[t]he global COVID-19 pandemic has proven to be extraordinarily serious and deadly.”<sup>41</sup>

Time and time again, jurisdictions (both federally and nationwide) have generally favored the government in tolling speedy trial time computations

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<sup>34</sup> Blake v. State, 176 N.E.3d 989, 994 (Ind. Ct. App. 2021).

<sup>35</sup> State ex rel Porter v. Farrell, 858 S.E.2d 897, 909 (W. Va. 2021).

<sup>36</sup> In re Disqualification of Fleegle, 163 N.E.3d 609, 612 (Ohio 2020).

<sup>37</sup> *Id.*

<sup>38</sup> See H.B. 21-1309, 73rd Gen. Assemb., 1st Reg. Sess. (Co. 2021).

<sup>39</sup> See United States v. Olsen, 995 F.3d 683, 693 (9th Cir. 2021); United States v. Wimbush, 2021 WL 1811668, at \*6 (D. N.J. May 6, 2021); United States v. Holder, 2021 WL 119571, at \*4 (D. Colo. Jan. 13, 2021); United States v. McRae, 2021 WL 359258, at \*4 (S.D. Ga. Jan. 19, 2021); United States v. Akhavan, 523 F. Supp. 3d 432, 447-49 (S.D.N.Y. 2021); United States v. Kane, 2020 WL 6434792, at \*7 (W.D. Wash. June 9, 2020); United States v. Harris, 460 F. Supp. 3d 973, 981 (E.D. Cal. 2020); United States v. Royce, 2020 WL 7059883, at \*4 (D. Utah Dec. 2, 2020); United States v. Hill, 2021 WL 1063342, at \*5 (D. Utah Mar. 19, 2021); United States v. Carrillo, 2020 WL 6707834, at \*3 (D.N.M. Nov. 16, 2020); United States v. Aguerre, 2020 WL 6487776, at \*4 (D. Utah Nov. 4, 2020); United States v. Reese, 482 F. Supp. 3d 816, 818-820 (D. Minn. 2020); United States v. Kane, 2020 WL 6434792, at \*4-5 (W.D. Wash. June 9, 2020); United States v. Smith, 460 F. Supp. 3d 981, 988 (E.D. Cal. 2020); United States v. Taylor, 2020 WL 7264070, at \*1 (D.D.C. Dec. 10, 2020); United States v. Rubaba, 2020 WL 1446910, at \*2 (D. Kan. Mar. 25, 2020); United States v. Lynch, 2020 WL 1492827, at \*1 (M.D. Ala. Mar. 24, 2020); United States v. Hughes, 2020 WL 1331027, at \*2 (W.D. Wash. Mar. 23, 2020); United States v. Kemprud, 2020 WL 2128585, at \*3 (E.D. Cal. May 5, 2020).

<sup>40</sup> United States v. Rubaba, 2020 WL 1446910, at \*2 (D. Kan. Mar. 25, 2020).

<sup>41</sup> United States v. Olsen, 995 F.3d 683, 687 (9th Cir. 2021).

due to the deadliness of the coronavirus pandemic.<sup>42</sup> Nevertheless, the response is not singular: there have been some jurisdictions which have held that a defendant's speedy trial rights have been violated due to a delay caused by the pandemic.<sup>43</sup> Similar to the indefinite delay of speedy trial time computations in Illinois, the United States District Court for the Central District of California addressed the issue when jury trials were suspended "indefinitely during the coronavirus pandemic[.]"<sup>44</sup> Under federal statute, a defendant's trial must typically "begin within 70 days of the filing of the indictment or the defendant's initial court appearance, whichever is later."<sup>45</sup> The most applicable exception to allowing tolling of this time period would be the "ends of justice" provision, in which a trial cannot be conducted due to impossibility.<sup>46</sup> However, the United States District Court for the Central District of California noted that multiple trials had been conducted by the state government within the Orange County courthouse across the street during the pandemic.<sup>47</sup> Thus, the court reasoned that the defendant's constitutional rights (as well as his federal statutory speedy trial rights) were violated.<sup>48</sup> Nevertheless, while some states and federal jurisdictions have already established the legality of their response to the coronavirus pandemic, the Illinois Supreme Court has yet to make a definitive ruling on the legality of suspending the time computation of the Illinois Speedy Trial Act.<sup>49</sup>

#### IV. SEPARATION OF POWERS? THE AUTHORITY OF THE ILLINOIS SUPREME COURT TO SUSPEND THE SPEEDY TRIAL ACT

The Illinois Constitution establishes that "[g]eneral administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules."<sup>50</sup> However, there is some question as to whether the Illinois Supreme Court had the authority to suspend the statutory time computations of the Illinois Speedy Trial Act with Illinois Supreme Court Emergency Order M.R. 30370.<sup>51</sup>

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<sup>42</sup> See, e.g., *State v. Beal*, 179 N.E.3d 754, 760-61 (Ohio Ct. App. 2021); *People v. Mayfield*, 186 N.E.3d 571, 574-75 (Ill. App. 2021).

<sup>43</sup> *United States v. Pair*, 522 F. Supp. 3d 185 (E.D. Va. 2021).

<sup>44</sup> *United States v. Henning*, 513 F. Supp. 3d 1193, 1197 (C.D. Cal. 2021).

<sup>45</sup> *Id.* at 1203 (citing 18 U.S.C. § 3161(c)(1)).

<sup>46</sup> *Id.* at 1204 (citing 18 U.S.C. § 3161(h)(7)(B)(I)).

<sup>47</sup> *Id.* at 1205.

<sup>48</sup> *Id.* at 1212.

<sup>49</sup> See generally *Ballesteros*, *supra* note 25.

<sup>50</sup> ILL. CONST. art. VI, § 16.

<sup>51</sup> See, e.g., *People v. Mayfield*, 2021 IL App (2d) 200603, ¶ 17 (raising the issue of whether the Ill. Sup. Ct. exceeded its authority in issuing continuance rules).



While the Illinois Supreme Court has established many rules that can impose time limitations, regulation of evidence, and the manner in which proceedings shall be conducted,<sup>52</sup> the pandemic poses a more complex issue than merely procedural housekeeping.<sup>53</sup> It could be argued that Illinois Supreme Court Emergency Order M.R. 30370 violated the Separation of Powers clause of the Illinois Constitution.<sup>54</sup> Article II, Section 1 of the Illinois Constitution provides that the “legislative, executive and judicial branches are separate” and that “[n]o branch shall exercise powers properly belonging to another.”<sup>55</sup> Nevertheless, the Separation of Powers clause “is not intended to achieve a ‘complete divorce’ between the branches of government.”<sup>56</sup> Rather, the Illinois Supreme Court has made it resoundingly clear, “[n]otwithstanding this overlap between the judicial and legislative branches, this court retains primary constitutional authority over court procedure.”<sup>57</sup> Accordingly, “[i]f legislation conflicts with a rule of the judiciary,” the Illinois Supreme Court “has not hesitated to strike down legislative enactments governing judicial procedure.”<sup>58</sup>

Nevertheless, as of January 10, 2023, the Illinois Supreme Court has yet to address the apparent conflict between Illinois Supreme Court Emergency Order M.R. 30370 and the Illinois Speedy Trial Act. However, that question will likely be answered soon. In 2021, the Second District Court of Appeals for Illinois specifically addressed the issue of whether the Illinois Supreme Court had authority to suspend the time computation provisions of the Illinois Speedy Trial Act in *People v. Mayfield*.<sup>59</sup> The *Mayfield* court held that “[t]he scheduling of criminal trials is a matter of procedure within the realm of our supreme court’s primary constitutional authority.”<sup>60</sup> Thus, the *Mayfield* court reasoned that “[t]he court exercised that authority in this case in response to a pandemic that threatened the health and safety of millions of Illinois residents.”<sup>61</sup> Tellingly, the Illinois Supreme Court granted review of the *Mayfield* decision on March 30, 2022 and a ruling has not yet been made as of this time.<sup>62</sup>

Moreover, even the Second District in *Mayfield* conceded that there is at least some Illinois Supreme Court precedent that favors an interpretation

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<sup>52</sup> See Ill. Sup. Ct. R. 604(d) (pertaining to time limitations for filing appeals); Ill. Sup. Ct. R. 415 (pertaining to duties of parties regarding custody and disclosure of evidence); Ill. Sup. Ct. R. 431(b) (pertaining to the method and requirements of *voir dire* selection).

<sup>53</sup> See generally Ballesteros, *supra* note 25.

<sup>54</sup> ILL. CONST. art. II, § 1.

<sup>55</sup> *Id.*

<sup>56</sup> *People v. Peterson*, 2017 IL 120331, ¶ 30.

<sup>57</sup> *Id.* at ¶ 31.

<sup>58</sup> *Kunkel v. Walton*, 689 N.E.2d 1047, 1051 (Ill. 1997).

<sup>59</sup> *People v. Mayfield*, 2021 IL App (2d) 200603, ¶ 15.

<sup>60</sup> *Id.* at ¶ 21.

<sup>61</sup> *Id.*

<sup>62</sup> See *People v. Mayfield*, 2021 IL App (2d) 200603, *appeal allowed*, 187 N.E.3d 695 (Ill. 2022).

that the Illinois Supreme Court overstepped its bounds and violated the separation of powers clause of the Illinois Constitution.<sup>63</sup> In *Newlin v. People*, the Illinois Supreme Court addressed an issue where multiple judges were ill or deceased during the time period in which the defendant was to be tried within the proper time limitation prescribed by statute.<sup>64</sup> The Illinois Supreme Court determined that “an absolute right is conferred upon a person charged with crime and committed to and imprisoned in jail, to be set at liberty unless tried within the time limited by that section, except where the circumstances exist which by the provisions of that statute require the court to hold the person for trial.”<sup>65</sup> Since there was no exemption for illness or death of a member of the judiciary as a listed exemption from time computation, the *Newlin* court held that “the letter and spirit of our statute [citations omitted] require that the defendant be set at liberty unless tried in accordance with its provisions.”<sup>66</sup>

The Second District in *Mayfield* distinguished the Illinois Supreme Court precedent in *Newlin* both factually and legally.<sup>67</sup> Pertaining to the factual distinction between the cases, the *Mayfield* court noted that “[t]he issue in *Newlin*—the illness of particular judges—is in no way comparable to the pandemic that necessitated the entry of the supreme court's orders in this case.”<sup>68</sup> The *Mayfield* court further distinguished the facts of *Newlin* by noting that there “was no apparent reason why a judge from another circuit could not have been assigned to preside over the defendant's trial so that it could have proceeded in the time allowed by law.”<sup>69</sup> Thus, the *Mayfield* court provided its rationale:

There is no comparable solution to the problem of meeting speedy trial deadlines during a deadly pandemic at a time when every county and every court was operating under the same constraints. A reallocation of judicial personnel or judicial resources would not have addressed the health and safety concerns that necessitated the supreme court's orders in this case. The circumstances existing under the *Newlin* case are distinguishable from the exceptional and urgent circumstances here. The circumstances of this case bring to mind Justice Jackson's statement—the United States Constitution should not be transformed into a suicide pact [citations omitted]—which applies in equal force to our state constitution.<sup>70</sup>

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<sup>63</sup> *Id.* at ¶ 19.

<sup>64</sup> *Newlin v. People*, 77 N.E. 529, 529–31 (Ill. 1906).

<sup>65</sup> *Id.* at 530.

<sup>66</sup> *Id.* at 531.

<sup>67</sup> *People v. Mayfield*, 2021 IL App (2d) 200603.

<sup>68</sup> *Id.* at ¶ 24.

<sup>69</sup> *Id.* at ¶ 23.

<sup>70</sup> *Id.* at ¶ 24.

Pertaining to the legal distinction between the cases, the *Mayfield* court noted that “*Newlin* was decided under the Illinois Constitution of 1870, which did not vest the supreme court with ‘general administrative and supervisory authority over all courts’ as does section 16 of article VI of our current state constitution.”<sup>71</sup> Accordingly, the *Mayfield* court determined that “*Newlin's* reasoning also does not appear to reflect the current broad scope of the judicial power, particularly our supreme court's primary constitutional authority over court procedure[.]”<sup>72</sup>

Nevertheless, while the *Mayfield* court provided a thorough factual and legal distinction of the *Newlin* decision, there are still questions that remain regarding the validity of its rationale. First, pertaining to the factual distinctions between *Mayfield* and *Newlin*, the *Mayfield* court heavily relied upon the notion that all court systems in Illinois were affected by the coronavirus.<sup>73</sup> While this fact is certainly true, this fact cannot be conflated with the reality that every county in Illinois – from Cook to Alexander – dealt with courtroom proceedings in vastly different ways.<sup>74</sup> Any practitioner in Illinois who had experience in multiple counties during the zenith of the pandemic can attest: the method of conducting court was unique to each courthouse.<sup>75</sup> In one county, a judge may have still tried cases before jurors with the safety precaution of wearing masks; in another county, a judge may have tried cases with electronic conferencing software; and yet in another county, a judge may have completely suspended trial proceedings.<sup>76</sup>

This lack of consistent administration of justice is the precise reason why the United States District Court for the Central District of California held that a federal defendant's speedy trial rights were violated because multiple trials had been conducted by the state government within a courthouse across the street during the pandemic while the federal courthouse had ceased trials altogether during the same time period.<sup>77</sup> This dearth of uniformity, in turn, created anxiety and confusion among incarcerated defendants across the nation and most particularly in Illinois – where Illinois Supreme Court Emergency Order M.R. 30370 established a holistic and indefinite suspension of the Speedy Trial Act.<sup>78</sup>

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<sup>71</sup> *Id.* at ¶ 25; *see also* ILL. CONST. of 1970, art. VI, § 16.

<sup>72</sup> *Id.*

<sup>73</sup> *People v. Mayfield*, 2021 IL App (2d) 200603.

<sup>74</sup> *See generally* ANDREW W. VAIL ET AL., COVID-19 COMPANION GUIDE TO THE ILLINOIS CIVIL PRACTICE GUIDE (2021).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *United States v. Henning*, 513 F. Supp. 3d 1193, 1205 (C.D. Cal 2021).

<sup>78</sup> SUP. CT. ILL., ILLINOIS COURT RESPONSE TO COVID-19 EMERGENCY, M.R. 30370 (2021), <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/0d953453-4180-42d8-8617-16e59d1ff932/M.R.%2030370%20-%20In%20re:%20Illinois%20Courts%20Response%20to%20COVID-19%20Emergency/Impact%20on%20Trials%20%2006-30-21.pdf>.

Second, pertaining to the legal reasoning of *Mayfield*, there is objectively more weight behind the court's analysis.<sup>79</sup> The Illinois Rules of Evidence establish that a "statutory rule of evidence is effective unless in conflict with a rule or a decision of the Illinois Supreme Court."<sup>80</sup> Likewise, the Illinois Compiled Statutes pertaining to criminal procedure indicates that "[t]hese provisions shall govern the procedure in the courts of Illinois in all criminal proceedings except where provision for a different procedure is specifically provided by law."<sup>81</sup> Moreover, multiple cases have held that the Illinois Supreme Court has the supreme authority to rule on matters of procedure in criminal trials despite a conflicting statutory directive.<sup>82</sup> Thus, Illinois precedent has repeatedly established that the legislature cannot statutorily circumvent the Illinois Supreme Court in executing its constitutional duties.<sup>83</sup> Since the time limitations for a speedy trial in Illinois are ultimately procedural in nature, they belong within the province of the Illinois Supreme Court.<sup>84</sup> It has long been established that the Illinois Supreme Court "retains primary constitutional authority over court procedure."<sup>85</sup> Thus:

With regard to separation of powers violations resulting from conflicts between statutory provisions and court rules, [the Illinois Supreme Court] has indicated that even where a statute, standing alone, does not violate the separation of powers clause, "the legislature is without authority to interfere with 'a product of this court's supervisory and administrative responsibility."<sup>86</sup>

This principle, in turn, leads to the simple but undeniable conclusion: "court rules will supersede inconsistent statutory provisions[.]"<sup>87</sup>

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<sup>79</sup> *People v. Mayfield*, 2021 IL App (2d) 200603.

<sup>80</sup> ILL. R. EVID. 101.

<sup>81</sup> 725 ILL. COMP. STAT. 5/100-2.

<sup>82</sup> See *People v. Joseph*, 495 N.E.2d 501, 505-06 (Ill. 1986) (Illinois Supreme Court Rule 21(b) invalidated a conflicting statutory provision regarding the assignment of post-conviction judges); *People v. Cox*, 412 N.E.2d 541, 545 (Ill. 1980) (Illinois Supreme Court Rule 615(b)(4) invalidated a statute that directly conflicted with sentencing provisions); *People v. Jackson*, 371 N.E.2d 602 (Ill. 1977) (Illinois Supreme Court Rule 234 invalidated a statute that directly conflicted with it pertaining to the authority and method of questioning during *voir dire*).

<sup>83</sup> *People v. Mayfield*, 2021 IL App (2d) 200603, ¶¶ 19-21 (quoting *Kunkel v. Walton*, 689 N.E.2d 1047, 1051 (Ill. 1997)).

<sup>84</sup> *Id.* at ¶ 21.

<sup>85</sup> *Kunkel v. Walton*, 689 N.E.2d 1047, 1051 (Ill. 1997).

<sup>86</sup> *Id.* (quoting *People v. Jackson*, 371 N.E.2d 602, 606 (Ill. 1977)).

<sup>87</sup> *Id.*

## V. RECOMMENDATIONS FOR THE FUTURE OF THE ILLINOIS SPEEDY TRIAL ACT

On March 23, 2023, the Illinois Supreme Court ruled in *Mayfield* that Illinois Supreme Court Emergency Order M.R. 30370 did not violate the Illinois Speedy Trial Act.<sup>88</sup> Nevertheless, both judges and legislators would be wise to not merely rely on the precedent of that case decision.<sup>89</sup> As a practical matter, while the spread of the coronavirus is still rampant and evolving each day, it is highly questionable that Illinois Supreme Court Emergency Order M.R. 30370 was the most efficient and logical method to create uniformity of trial court proceedings across the State of Illinois.<sup>90</sup> After all, Illinois Supreme Court Emergency Order M.R. 30370 simply created an outright suspension of the speedy trial time computations – with no recourse for incarcerated defendants to voice their grievances.<sup>91</sup> A much more prudent alternative would have been for the Illinois Supreme Court to craft a time-tolling exemption based on the coronavirus with specific factors to be reassessed by a trial court every 30 days on record pertaining to the safety and efficiency of conducting a jury trial.<sup>92</sup> A legislatively created addendum of tolling exceptions based on natural disaster to statutory speedy trial time computations also would provide welcome clarity and resolution for judges, defendants, prosecutors, and defense attorneys alike.<sup>93</sup> The federal speedy trial statute contains multiple “ends of justice” provisions that allow for the tolling of the statutory time computation in events of natural disaster such as the coronavirus or other novel questions of fact and law.<sup>94</sup>

During the year of 2023, Illinois legislators have a duty to the citizens of the State to revise the Speedy Trial Act to achieve a reasonable balance of justice between the ongoing health crisis and the statutory time limitations.<sup>95</sup>

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<sup>88</sup> *People v. Mayfield*, 2023 IL 128092, ¶ 3.

<sup>89</sup> Kerry J. Bryson, *People v. Mayfield*, 2023 IL 128092, ILL. STATE BAR ASS'N (March 23, 2023), <https://www.isba.org/barnews/2023/03/quicktakesonillinoisupremecourt01>.

<sup>90</sup> See generally H. Douglas Otto, *Adjusting Work Conditions During the COVID-19 Pandemic: A Survey of Illinois Mental Health Court Staff*, ILL. CRIM. JUST. INFO. AUTH. (Oct. 2, 2020), <https://icjia.illinois.gov/researchhub/articles/adapting-work-conditions-during-the-covid-19-pandemic-a-survey-of-illinois-mental-health-court-staff>.

<sup>91</sup> The order itself provided no such method for challenging an infinitely continuing case.

<sup>92</sup> Under normal, non-pandemic circumstances, courts often evaluate speedy trial questions by four factors. See *Ashburn v. Korte*, 761 F.3d 741 (7th Cir. 2014); *Berry v. State*, 93 P.3d 222 (Wy. 2004).

<sup>93</sup> Some jurisdictions attempted to do this in response to the coronavirus specifically. See H.B. 21-1309, 73rd Gen. Assemb., 1st Reg. Sess. (Co. 2021).

<sup>94</sup> See 18 U.S.C. § 3161(h)(7)(B)(i-iv) (“the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice”).

<sup>95</sup> See *Summary of Amendments to Public Act 101-0652, the Safe-T Act*, THE CIVIC FED'N (Dec. 16, 2022) <https://www.civiced.org/civic-federation/blog/summary-amendments-public-act-101-0652-safe-t-act>.

The harsh truth is this: the coronavirus is not simply going to dissipate.<sup>96</sup> Rather, the virus continues to mutate<sup>97</sup> and predictive statistics indicate that “the yearly probability of occurrence of extreme epidemics can increase up to threefold in the coming decades.”<sup>98</sup> The State of Illinois must do all that it can to provide its citizens with clear expectations regarding the adjudication of criminal cases within its boundaries.<sup>99</sup> Consequently, it is highly recommended that the Illinois Speedy Trial Act be revised with specific provisions to account for the coronavirus and any future disaster with a natural disaster time-tolling exemption.<sup>100</sup> Legislators should work with judges and attorneys to fashion practical solutions to pandemics and a united effort should be made to educate members of the legal profession on electronic conferencing software and its applicability in virtual courtroom proceedings.<sup>101</sup>

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<sup>96</sup> Katherine Dillinger, *WHO says Covid-19 remains a global health emergency, but pandemic is at a 'transition point,'* CNN, <https://www.cnn.com/2023/01/30/health/who-covid-public-health-emergency/index.html> (Jan. 30, 2023).

<sup>97</sup> *Monitoring Variant Proportions*, CTR DISEASE CONTROL & PREV., <https://covid.cdc.gov/covid-data-tracker/#variant-proportions> (last visited Mar. 4, 2023).

<sup>98</sup> Marco Mariani, Gabriel G. Katul, William K. Pan, & Anthony J. Parolari, *Intensity & Frequency of Extreme Novel Epidemics*, PROC. NAT'L ACAD. SCI., Aug. 2021, at 1.

<sup>99</sup> AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 1 (American Bar Ass'n House of Delegates., 3rd ed. 2017).

<sup>100</sup> *Problems With Tolling The Speedy Trial Act During Pandemic*, WINSTON & STRAWN LLP (May 6, 2020) <https://www.winston.com/en/thought-leadership/problems-with-tolling-the-speedy-trial-act-during-pandemic.html>.

<sup>101</sup> Perhaps education this sort would have prevented some unfortunate events during the pandemic. See, e.g., Christina Zdanowicz, *Lawyer tells judge 'I'm not a cat' after a Zoom filter mishap in virtual court hearing*, CNN (Feb. 10, 2021, 12:54 AM), <https://www.cnn.com/2021/02/09/us/cat-filter-lawyer-zoom-court-trnd/index.html>.

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