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ILLINOIS FAMILY LAW REPORT

The monthly guide to what's new and important.

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IN THIS ISSUE

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ARTICLE OF THE MONTH

COURT'S AUTHORITY TO BAN COUNSEL FROM CONFERRING WITH CLIENT DURING TESTIMONY

By Jay A. Frank

Frequently, opposing counsel will ask the Court to instruct the witness not to discuss his testimony with his counsel during a break in the trial. Does the Court have authority to do so in a family law case?

The answer is yes, the Court has the authority and the discretion to prevent conversation between counsel and his client in these circumstances. The key here is the distinction between criminal and civil cases. In a criminal case, the client has a Sixth Amendment right to confer with his attorney at any stage of the proceeding. To prevent the client from this sort of access to his counsel is most likely reversible error. The Sixth Amendment is so fundamental in a criminal case that reversible error occurs even without the necessity of showing any prejudice.

However, in a civil case, such as a family law case, it's a very different story. The Sixth Amendment right to coun-

sel is not applied. Thus, the Court can prohibit conversation between counsel and his client. The seminal case is *Stocker Hinge Mfg. Co. v. Darnel Industries, Inc.*, 61 Ill.App.3d 636, 377 N.E.2d 1125 (1st Dist. 1978). In this First District case, the Court spells out its authority to prevent discussions between counsel and his client during the course of a trial. The opinion makes it clear that the court has discretion to enter such an order, but that the discretion is not unlimited. If actual prejudice can be shown, then the Court should decline to issue such an order.

Two subsequent cases, both from the Second District, uphold *Stocker Hinge*:

Commonwealth Edison Co. v. Danekas, 104 Ill.App.3d 907, 433 N.E.2d 736 (2nd Dist. 1982), and *Hill v. Ben Franklin Sav. & Loan Ass'n.*, 177 Ill.App.3d 51, 531 N.E.2d 1089 (2nd Dist. 1988).

Take note that the Court is not required to issue an order preventing discussions of this nature, as all the cases refer to the Court's authority as being discretionary. But, if you ask for the ban to be applied, you have solid authority on your side.

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▶ ATTORNEY FEES

Third District Rejects the necessity of proving a Spouse's inability to Pay as a Prerequisite to a Contribution Award.

IN RE MARRIAGE OF GREGORY W. ANDERSON, Petitioner-Appellee, and MARY J. ANDERSON, respondent. (MICHAEL D. CANULLI, Appellant). December 17, 2015, Ill.App.Ct. 3rd District, No. 3-14-0257, 2015 IL App (3d) 140257, Dinah L. Archambeault, trial judge.

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Attorney Michael Canulli filed a motion for contribution against Gregory to recover attorney fees incurred by Gregory's former wife, Mary, who Canulli represented for a two-year period during Gregory and Mary's dissolution proceedings. A hearing took place on the petition, and after Canulli presented his case, Gregory moved for a directed verdict. The trial court granted Gregory's motion and dismissed Canulli's petition for contribution. The appellate court reversed and remanded.

1.) During the pendency of the proceedings, Mary filed several motions for attorney fees and was awarded fees from the marital assets, as was Gregory. Mary discharged Canulli in February 2010. Gregory filed bankruptcy. Mary, too, filed bankruptcy during the pendency of the proceedings. Canulli filed a petition for contribution seeking to recover Mary's attorney fees from Gregory, who did not discharge Canulli's contribution claim in his bankruptcy.

2.) On March 9, 2011, the trial court entered the judgment of dissolution, which incorporated Gregory and Mary's marital settlement agreement. The agreement allocated all the attorney fees owed to Canulli to Mary, stating she was "solely responsible" for them and waiving any contribution from Gregory "for payment of the same." The marital settlement agreement also provided that Mary execute a quit claim deed to Gregory waiving her interest in the office condominium as "an equalization and reallocation of attorney's fees paid" to Canulli. Gregory was awarded the parties' business and ordered to pay maintenance of 7.5% of its adjusted gross revenues. The parties divided their personal property, and each received half of their retirement and bank accounts. Gregory was provided the parties' two vehicles, with payment to Mary for one.

3.) Mary's bankruptcy was finalized in August 2011 and discharged the attorney fees she owed Canulli.

4.) The trial court determined that although Canulli offered some evidence that Mary could not pay her fees, he did not offer any evidence regarding her expenses and failed to establish her inability to pay. The trial court dismissed Canulli's petition.

5.) A trial court may order either party to pay the reasonable attorney fees of his spouse. Section 508(a) directs that contribution to attorney fees may be ordered from an opposing party in accord with section 503(j).

6.) In deciding the petition for contribution, the trial court must consider the factors for property distribution set forth in section 503 and 504. In determining an award of attorney fees, the trial court considers the relative financial circumstances of the parties, including the allocation of assets and liabilities, maintenance and the parties' relative earning abilities.

7.) Section 503(j) of the Act requires that the contribution petition be heard and decided "before judgment is entered."

8.) Canulli's petition was timely filed. He filed the petition for contribution prior to the hearing on the judgment of dissolution. Section 508(a) allows for pre- and post-judgment hearings for fee petitions. Section

503(j)(1) provides that a fee petition may be filed within 30 days after proofs have closed in a dissolution action. Therefore the trial court may hear and determine a contribution petition after the judgment of dissolution has been entered.

9.) Canulli claimed that the trial court erred in failing to require Mary to submit a financial disclosure and that Mary's financial affidavit was necessary for him to establish her inability to pay.

10.) Mary's financial affidavit was not necessary at this juncture in the proceedings. Mary's attorney fee debt was discharged by the bankruptcy court. The discharge prevented Canulli and the trial court from seeking any portion of the debt payment from Mary. Because Mary could not be held liable to pay the attorney fees, Mary's financial affidavit was irrelevant to the disposition of the fee petition.

11.) Many decisions have required the attorney seeking contribution to show the non-client's ability to pay as well as his or her own client's inability to pay. In contrast, in *In re Marriage of Haken*, the reviewing court rejected the necessity of demonstrating an inability to pay in response to the moving party's argument that it was a requirement for a contribution petition. The *Haken* court reasoned that section 508(a) was discretionary and based on the factors set forth in sections 503(d) and 504(a). The requirement that a party demonstrate the other party's inability to pay when seeking fees through a contribution petition is not included in those factors.

The Third District court here found the *Haken* court persuasive and adopted its rationale. *Haken* incorporates the statutory amendments designed to "level the playing field" in dissolution proceedings.

12.) In determining a fee petition, a trial court should consider the parties' relative financial circumstances as directed by the statutory factors in sections 503(d) and 504(a). This approach is aligned with the statutory goals and better allows attorneys the opportunity to recoup at least a portion of their fees when the client declares bankruptcy, as Mary did.

13.) The dissent suggested that Gregory's obligation to pay Canulli's fees may have been discharged or somehow implicated by his bankruptcy filing. While Gregory sought to discharge any obligation to contribute toward Mary's attorneys fees, that discharge was not allowed by the bankruptcy court. There was simply no bar, either by waiver or bankruptcy, to Canulli seeking contribution from Gregory for his unpaid fees as suggested by the dissent.

14.) Canulli made a sufficient showing that Mary did not have the ability to pay the balance due on his fees. Therefore, Gregory's financial affidavit was the relevant document for the trial court to examine.

15.) The trial court can only reach a valid determination of a fee petition when it has current information on which to base its decision. The provisions in the local rules concerning the parties' financial disclosures mandate the parties provide information on their financial circumstances under oath and serve them within three days of the hearing.

16.) The proper timeframe for disclosure of the parties' financial circumstances to determine a contribution petition is the time of the hearing on the petition, not the date of dissolution as established by the trial court.

17.) The availability of current financial information is the appropriate means for a trial court to reach an informed decision on the parties' ability or inability to contribute to the other parties' attorney fees. The trial court's denial of Canulli's petition for contribution was against the manifest weight of the evidence. The trial court reached its conclusion based on an incorrect timeframe to consider the parties' financial circumstance and without Gregory's current financial information.

JUSTICE McDADE, dissented:

> "Gregory had no legal responsibility for Canulli's fees, and the only way he could be required to pay them is if he is obligated pursuant to section 508(a) to do so. This conclusion raises two questions: First, as a threshold issue, does Mary's bankruptcy discharge constitute a legal bar to Gregory's possible obligation to contribute to Canulli's fees; and second, if the discharge does not constitute a bar to Canulli's recovery from Gregory, can the statutory requirements for imposing those fees on Gregory be satisfied?
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> "A major issue in a contribution action such as this one is whether the client's quashed obligation to pay the discharged debt can be imposed upon the former spouse...I would conclude that it cannot."
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> * * *
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> "I would agree with Gregory and find that Mary's discharge of Canulli's bills in her bankruptcy action is a complete bar to Canulli's claim for contribution."

Wife's Attorney Must Disgorge $60,000 of Earned Fees. Interim Fee Award Affirmed.

IN RE MARRIAGE OF MICHAEL SQUIRE, Petitioner-Appellee, and CATHERINE D. SQUIRE, Respondent. (The Stogsdill Law Firm, P.C., Appellant). December 16, 2015, Ill.App.Ct. 2nd District, No. 2-15-0271, 2015 IL App (2d) 150271, Neal W. Cerne, trial judge.

The Stogsdill Law Firm, representing Catherine, appealed the trial court's order requiring it to pay $60,000 to the attorneys for Michael pursuant to the "leveling of the playing field" provisions of the Dissolution Act. 750 ILCS 5/501(c-1). Stogsdill contended that (1) this provision did not apply to an earned retainer, (2) the trial court's order finding that the payment was necessary to level the playing field was against the manifest weight of the evidence, and (3) the reviewing court should vacate the contempt finding.

The appellate court vacated the contempt finding but otherwise affirmed.

1.) The parties had few assets but significant debts. Although Michael earned a six-figure income, his monthly expenses, which included debt-service payments from the parties' bankruptcy, exceeded his monthly income. He had paid his attorneys $2,500 and had no additional funds with which to pay them. By the time of the hearing on the contribution petition, he owed his attorneys approximately $53,000.

2.) Catherine was unemployed. However, she had borrowed approximately $130,000 from her mother to pay her attorneys. Approximately $10,000 of that amount went to her previous attorney. The rest was paid to Stogsdill as a retainer.

3.) Stogsdill argued strenuously that it had already earned the retainer and deposited the money in its general account. Thus, it contended, it could not be required to disgorge fees that were already its property. The trial court granted the interim-fee petition. It found that the parties had not been overly litigious, but that they were not "financially secure." Thus, although Michael earned a "reasonable salary," his net income was insufficient to meet his obligations and basic living expenses. On the other hand, Catherine could borrow money from her mother to pay her attorneys. The trial court ordered Stogsdill to pay Michael's counsel $60,000 within 14 days.

4.) The appellate court had jurisdiction. Stogsdill appealed from an order finding it in contempt of court and imposing a sanction. Such an order is final and appealable.

5.) Contrary to Michael's representation, the trial court did not enter a final dissolution judgment. Rather than carrying forward the interim order as the final order on the issue of contribution to attorney fees, the dissolution order expressly reserved the issue of a final apportionment of attorney fees pending the outcome of this appeal. Far from finally deciding the issue and precluding an appeal as Michael seemed to suggest, the trial court's order reserved the issue to await a decision. Thus, reversing the interim fee order would provide Stogsdill with relief.

6.) The trial court did not err in ordering Stogsdill to disgorge a portion of its retainer. Stogsdill contended that the trial court could not require it to disgorge.

7.) Ownership of an advance-payment retainer passes to the lawyer immediately upon payment and, accordingly, the funds must be deposited into the lawyer's general account rather than the client's trust account, due to the prohibition against commingling funds. An advance-payment retainer was subject to disgorgement in *Earlywine*, 2013 IL 114779.

8.) Stogsdill suggested that an advance-payment retainer, although approved by the supreme court, is essentially an accounting device to shield the funds from the client's creditors, whereas here Stogsdill had earned its retainer by performing legal services.

9.) *Earlywine* did not intend to limit its holding to advance-payment retainers. Moreover, accepting Stogsdill's position would completely frustrate the purpose of the statute. The "advantaged spouse" and his or her attorney could effectively block access to funds for the other spouse by the way they categorized their retainer agreement.

10.) Moreover, the attorney representing the advantaged spouse would have a strong incentive to earn the fees at an early stage of the litigation. The attorney could file voluminous pleadings and motions early in the case, thus "earning" the retainer, while leaving the other spouse to respond to a mountain of paperwork with little chance of obtaining resources to do so properly.

11.) The term "available" as used in the statute simply means that the funds exist somewhere.

12.) It does not matter that the source of the funds is a relative rather than the marital estate.

► CHILDREN

Trial Court Correctly Applied Best Interests Standard in Deciding Father's Request for Additional Visitation after the Original Orders had Restricted Visitation.

IN RE MARRIAGE OF BETSY M., Petitioner-Appellee, and JOHN M., Respondent-Appellant. December 17, 2015, Ill.App.Ct. 1st District, No. 1-15-1358, 2015 IL App (1st) 151358, David Haracz, trial judge.

The custody judgment gave Betsy sole custody of the parties' three minor children and provided restricted visitation for John. At the time of the judgment and after, John was being treated for depression and anxiety issues and had a strained and limited relationship with the children. The children did not desire increased visitation. John filed a Motion to Increase And/Or Modify Parenting Time, including overnights. The trial court granted the motion in part by increasing John's hours of visitation from one hour to three hours every other week, and denied the motion in part by ordering that all other parenting agreements as laid out in the October 29, 2013 order remain the same. John appealed. The appellate court affirmed.

1.) The appellate court had jurisdiction to hear John's appeal because it was an order which modified custody of the minor children. The orders could also be appealed pursuant to Illinois Supreme Court Rule 304(b)(6).

2.) Because the trial court did not restrict John's visitation rights but rather expanded his visitation rights, the appropriate standard for the trial court to consider was the best interests of the child standard. 750 ILCS 5/607(c). John cited several cases for the proposition that the serious endangerment standard should apply. However, all the cases he cited involved either: (1) a request to limit a parent's visitation rights, and/or (2) a trial court order that restricts a parent's visitation rights. Neither of those facts were present here. Neither party

requested a limitation or restriction of any kind in John's visitation with his children, and the trial court did not restrict or limit John's visitation rights beyond what the parties had already agreed. In fact, the trial court increased John's visitation from one hour every other week to three hours every other week.

3.) A best interest determination is heavily fact dependant; it cannot be reduced to a simple bright line test, but rather must be made on a case-by-case basis, depending on the circumstances of each situation. There is a strong presumption in favor of a trial court's ruling because it had the opportunity to observe the parents and the children and evaluate their temperaments, personalities and capabilities.

4.) John had sought increased visitation in the form of 12 hours of visitation on alternating Saturdays and Sundays and, thereafter, alternate weekend visitation from Friday after school until Sunday at 5:00 p.m. Dr. Palen, who was appointed for the sole purpose of evaluating whether an increase in John's visitation was in the children's best interests, concluded that such an increase was not in the children's best interests. It is within the trial court's discretion to rely on and consider the recommendations of an expert appointed pursuant to section 604(b).

Sole Custody Award to Mother, Upheld.

See *David H.B.*, page 7.

Vested Restricted Stock Should be Counted as Income for Child Support Purposes. Dissent Filed.

IN RE MARRIAGE OF TAMMY SCHLEI, Petitioner-Appellant, and MARK SCHLEI, Respondent-Appellee. December 10, 2015, Ill.App.Ct. 3rd District, No. 3-14-0592, 2015 IL App (3d) 140592, David Garcia, trial judge.

Tammy appealed from a trial court judgment making modifications to Mark's child support obligations.

1.) The parties divorced in Michigan in 2007. The parties shared joint legal custody of their three minor children. Tammy was designated as the minors' primary residential custodian. Mark was ordered to pay child support in accordance with Michigan law. He was also ordered to pay spousal support to Tammy for 10 years, because Tammy was a homemaker and unemployed at the time of the divorce.

2.) Tammy relocated to Colorado. Mark relocated to Pennsylvania then Illinois. The parties engaged in extensive post-decree litigation. The Illinois trial court deviated from the child support guidelines and set child support at 15% ($2,483), a downward deviation from the usual 28%, of Mark's net income. The trial court stated that it granted the deviation after consideration of the financial needs of the children, the financial resources of both parties, and the standard of living that the children enjoyed while living in Michigan. Tammy's request for retroactive modification of child support was denied. The trial court also ordered Mark to pay 15% of the gross of any bonus.

3.) The child support order should have been retroactive to February 10, 2012. The Michigan court order of April 11, 2012, stated that all decisions would be retroactive to February 10, 2012. The Michigan court had jurisdiction when that order was entered, and the order was registered. Under section 603(c) of the Act, the trial court was to enforce, but not modify, the Michigan order. Thus, the order requiring Mark to pay child support in the amount of $2,483 per month was retroactive to February 10, 2012.

4.) The trial court found that any income that Mark received from his long-term stock compensation would be excluded as income for child support purposes except for the shares he sold and converted to cash. Tammy contended that this was in error, arguing that the restricted stock should be included as income under section 505(a)(3) when vested.

5.) Illinois courts have defined income as a gain or a profit, or an increment or an addition. Withdrawals from self-funded IRAs, proceeds from a reverse stock split, and speculative income do not constitute income under section 505(a)(3).

6.) The entire amount of Mark's long-term stock compensation should not have been excluded as income. Since Mark was no longer employed with the same company, all of his restricted stock units had either vested or been forfeited. The restricted stock units that had vested should be considered as income for child support purposes.

7.) Section 505(a)(2.5) of the Dissolution Act provides that the trial court, in its discretion in setting child support, may order either or both parents to pay the children's uncovered healthcare expenses.

8.) It was within the trial court's discretion to order the parent with more financial resources to pay the children's medical expenses. Mark earned three times more than Tammy, but he was also still paying her spousal support. Considering the ordered child support, both parties had income that roughly equaled their expenses. In light of the child support and spousal support, it would have been fair to equally split the healthcare costs, but the trial court's finding that it would be a windfall to Tammy to increase child support and make Mark pay 50% of the uncovered healthcare costs was not an abuse of discretion.

9.) JUSTICE HOLDRIDGE, concurred in part and dissented in part.

> "I disagree with the majority's conclusion that (Mark's) vested restricted stock units (RSUs) should be treated as "income" for child support purposes under the IMDMA. I would affirm the trial court's ruling that Mark's RSUs should be excluded from his income for child support purposes unless and until they are sold and converted to cash..."
>
> "The father's vested RSUs do not generate "income" that is actually or constructively received by the father (i.e., they do not result in a monetary

benefit in a form that is available to spend) until they are sold and converted into cash proceeds...Cases wherein stock options or shares have been treated as income for child support purposes typically involve shares that have been sold or distributed."

Father Wins Sole Custody from Mother. Mother engaged in Conduct of Manipulation and Alienation.

IN RE: MARRIAGE OF ERICA N. SCHREACKE, Petitioner-Appellant, v. SHAWN W. SCHREACKE, Respondent-Appellee. December 24, 2015, Ill.App.Ct. 4th District, No. 4-15-0493, 2015 IL App (4th) 150493-U, Mark A. Drummond, trial judge. Rule 23.

The trial court ruled that the father's petition for change of custody had been proved by clear and convincing evidence. Joint custody was terminated and Shawn was granted sole custody. The trial court noted that the parties had been in and out of court since the dissolution agreement was entered. The trial court stated that it had never seen "this level of animosity, this level of manipulation, and this level of alienation" in a dissolution of marriage case. There was a "total failure *** on the mother's side to show a willingness and ability to facilitate a close and continuing relationship between the other parent and the child." The trial court stated further that "[t]he father is not perfect *** but the court's concerns of the father pale in significance to the court's concerns for the mother."

The trial court relied on the following additional facts: (1) Erica's desire for custody was tainted by her desire to "get back at" Shawn; (2) the desires of the children had been manipulated by Erica; (3) Erica enlisted her father to interfere with the joint custody arrangement; (4) the trial court had concerns about Erica's mental health; (5) Erica's "total failure" to facilitate a relationship between the children and Shawn; and (6) at times Erica's finding the proceedings funny.

The trial court also summarized the contents of DCFS reports. On three occasions, DCFS investigated allegations that Shawn abused Em. S. and El. S. Two of the investigations were declared unfounded by DCFS, while one resulted in an indicated finding. The trial court explained that Erica and her father interfered with the DCFS investigations. The trial court found that "[t]he children do absolutely fine when they are not under the influence of their mother, and that when they're with [Shawn], everything goes fine until they're reminded of the controversy."

The trial court later entered a written order finding that Shawn had proved his petition for change of custody by clear and convincing evidence. The trial court terminated joint custody and awarded Shawn permanent custody, subject to Erica's reasonable visitation.

1.) The trial court's order memorialized the parties' stipulation to have the DCFS reports admitted as substantive evidence. Erica argued that the word "consider" was vague and that the only reasonable interpretation of the order was that it granted limited *in camera* review of the DCFS reports. This argument was utterly without merit. Erica also contended that such a stipulation would violate public policy because section 10 requires live testimony from the makers of the DCFS reports. 325 ILCS 5/10 (West 2014). But the parties' decision to stipulate to admitting the DCFS reports as substantive evidence also functioned as a stipulation that the requirements of section 10 need not be complied with. That stipulation was not against public policy.

2.) The trial court explained its decision to deny the section 604.5 evaluation by stating in its March 2015 written order that the children had been through enough evaluations and that it was not in their best interest to be evaluated again. In addition, the trial court asserted that it did not need an additional opinion from a health professional to make its decision on the ultimate issue of whether custody should be changed. The trial court's decision was reasonable and rational. In reaching its decision, the court considered the harmful effect another evaluation would have on the children, balanced against the benefit a section 604.5 evaluation would provide the court in reaching its decision. The trial court also gave weight to the opinion of the GAL and offered to reconsider its decision should the GAL so request.

3.) Shawn met his burden to modify custody pursuant to Section 610(b). Shawn pointed out the following evidence: Erica (1) called the police when Shawn entered Erica's driveway to facilitate visitation; (2) desired to move the children to Oklahoma; (3) interfered with visitation, causing the children to miss a planned vacation with Shawn; and (4) made unfounded reports to DCFS, claiming that Shawn had abused the children. Shawn also cited the following additional facts in support of the trial court's ruling: the trial court (1) found that Erica's desire for custody was "tainted by her desire to somehow get back at the father;" (2) found that Erica had demonstrated an inability to parent by enlisting her father to interfere in the joint custody arrangement; (3) found that Erica's employment situation was unstable; and (4) had concerns about the mental health of Erica.

4.) Erica argued that the trial court's decision was against the manifest weight of the evidence because (1) one of the DCFS investigations against Shawn resulted in an indicated finding; (2) no professional opinion was introduced to support the claim that Erica was alienating the children from Shawn; (3) the children expressed a preference for being placed with Erica; (4) the children were thriving in the custody of Erica; and (5) Shawn prevented Erica from having phone contact with the children. Erica's arguments were not persuasive.

The trial court considered the DCFS reports and found that Erica and her father had interfered in the investigations. In addition, the court determined that it did not need a professional opinion to conclude that Erica had been alienating the children from Shawn. The trial court found further that, although the children expressed a preference to be placed with Erica, Erica