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**IN THIS ISSUE**



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ARTICLE OF THE MONTH

## IS CO-MINGLING IN A RETIREMENT ACCOUNT DIFFERENT

By Jay A. Frank

We all know the general rule that co-mingling non-marital funds with marital funds, so that the non-marital funds lose their identity, generally results in all of the funds becoming marital in nature. Is the result the same if the account in which the co-mingling takes place is a retirement account? A strong argument can

be made that the result is not the same.

A common factual situation presents a retirement account that was started and funded prior to the marriage, and is then rolled over into a marital retirement account. The funds from prior to the marriage become indistinguishable from the funds contributed during the marriage in the marital account. Do the non-marital funds retain their character? This is likely the case.

The decision in the case of *In Re the Marriage of Dhillion*, 2014 IL App (3d) 130653 (2014), 20 NE 3d 1272 (3rd Dist. 2014) is instructive. The husband added non-marital retirement funds to a marital retirement account. Further marital retirement funds were even contributed to the account thereafter. The husband was able to provide evidence of the amount of the non-marital funds rolled over. The Court held that the contributed funds remained non-marital in nature.

The following cases, in addition to *Dhillion*, are supportive of the proposition that the contributed non-marital funds, which can no longer be identified, still retain their non-marital character:

*In Re the Marriage of Raad*, 301 Ill. App. 3d 683, 704 NE 2d 964 (2nd dist 1998)

*In Re the Marriage of Weiler*, 258 Ill. App. 3d 454, 629 NE 2d 1216 (5th dist 1994)

*In Re the Marriage of Davis*, 215 Ill. App. 3d 763, 576 NE 2d 44 (1st dist 1991)

Consistent with this case law, the dissolution statute was amended in 2016 and provides that the following is non-marital property: "Property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics;" Section 503 (a) (6).

While there may have been several purposes for this amendment, it certainly underscores the decisions in the cases cited above.

It will be important for the client to have account statements or other similar documentation to establish the date and the amount of the contributed non-marital funds. Documents going back a number of years can be hard to come by, so the search should start early in the case.

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## ► ADOPTION

**Father was not denied effective assistance of counsel in Parental Termination case.**

*IN RE I.W., a Minor (The People of the State of Illinois, Petitioner-Appellee, v. Danial W., Respondent-Appellant).* February 21, 2018, Ill.App.Ct. 4th District, NO. 4-17-0656, 2018 IL App (4th) 170656, Kevin P. Fitzgerald, trial judge.

Danial appealed the termination of his parental rights to I.W., born February 8, 2016. He argued (1) the finding of parental unfitness was against the manifest weight of the evidence and (2) he was denied effective assistance by counsel. The appellate court affirmed.

1.) Danial was an "unfit person" within the meaning of section 1(D)(p) of the Adoption Act. Osgood, a clinical psychologist, administered an intelligence test and found that Danial had a full-scale intelligence quotient of 67, which, for his age group, was in the 1 percentile of the population. There was also evidence of a concurrent "impairment in adaptive behavior."

Finding him to be an "unfit person" under section 1(D)(p), was not against the manifest weight of the evidence.

2.) In a proceeding to terminate their parental rights, parents have a statutory right to counsel. 705 ILCS 405/1-5(1) (West 2016). Recognizing parents' right to counsel would be an empty gesture without a corresponding expectation that counsel render effective assistance. Therefore, parents have the statutory right to effective assistance by counsel.

3.) To adjudicate a parent's claim that he or she received ineffective assistance in a proceeding to terminate his or her parental rights, courts apply the criteria in *Strickland v. Washington*, 466 U.S. 668 (1984).

R.G., 165 Ill. App. 3d at 127. Those criteria are twofold: (1) representation that fell below an objective standard of reasonableness and (2) a reasonable probability that the result of the proceeding would have been different but for the objectively unreasonable representation.

4.) Was it objectively unreasonable of counsel to refrain from inquiring further when Osgood testified it was unnecessary for a client to be literate to undergo intelligence testing? An affirmative answer to that question depended on two conditions: (1) intelligence testing was, in fact, valid only if the client was literate and (2) there was reason to suppose that, under further cross-examination, Osgood would have so admitted. The record did not appear to lend support to either of those conditions. Consequently, it was not objectively unreasonable of counsel to refrain from inquiring further when Osgood denied that being literate was a prerequisite to undergoing intelligence testing.

5.) Danial claimed that his trial court counsel, Patton, was in a *per se* conflict of interest in that on May 16, 2016, she represented him in a shelter-care hearing and subsequently, on June 21, 2016, represented the mother in a hearing.

6.) "[W]hile multiple attorneys from the public defender's office may substitute to represent the *same* client, the same attorney may not during the proceedings appear on behalf of *different* clients." (Emphases in original.) *In re Darius G.*, 406 Ill. App. 3d 727, 738, 941 N.E.2d 192, 201 (2010).

7.) *Darius G.* was distinguishable because on June 21, 2016, in the present case, Patton appeared on behalf of a colleague in the public defender's office solely to request a continuance. She did not appear on behalf of the mother. Patton stated, on the record, that she was appearing on her colleague's behalf, and she assured the trial court she had given the mother no legal advice. Danial's claim of a *per se* conflict of interest was rejected.

JUSTICE DeARMOND, specially concurred:

> "While I agree with the conclusion because of the extremely high hurdle of overcoming the manifest weight of the evidence standard, I strongly disagree with the way in which the finding of unfitness was obtained. This case began with a clear understanding by all parties involved regarding the parents' developmental and/or cognitive delays. Trial courts and the State should pay special attention to these cases to ensure the Department of Children and Family Services (DCFS) has made reasonable accommodations in providing services to aid parents in family reunification, as the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. §§ 12101 to 12213 (2012)) and section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701 to 794 (2012)) demand, which simply was not done in this case."

## ► AGREEMENTS

**Court construes Prenuptial Agreement drafted by Attorney Wife.**

*IN RE MARRIAGE OF SAMUEL E. BALL, Petitioner-Appellee, and CHRISTINE ANN TAKATA, Respondent-Appellant.* March 27, 2018, Ill.App.Ct. 3rd District, No. 3-17-0138, 2018 IL App (3d) 170138-U, David A. Brown, trial judge. Rule 23.

In December 2014, Samuel and Christine married. The marriage was dissolved in August 2016. Prior to the marriage, Samuel and Christine entered into a prenuptial agreement, which was drafted by Christine, a practicing attorney, to reflect the mutually-agreed intent of the parties. It provided, *inter alia*, that Samuel would list and sell his home, move into Christine's residence, and, while sharing her residence, pay a *pro rata* share of 80% of the couple's living expenses. It also recited that maintenance for either party was prohibited in the event of separation or divorce. In May 2015, Samuel sued for divorce. Christine responded seeking temporary maintenance for living expenses, medical expenses, and attorney fees. At trial, Christine requested that the trial court require Samuel to pay $5000 of her credit card debts, $8000 in medical expenses, $14,000 in living expenses at $1000 a month, attorney fees, and that portion of Samuel's 401(k) that he earned during the marriage.

The trial court ruled that Christine was not entitled to living expenses or attorney fees but awarded her $8000 in uncovered medical expenses and 50% of the marital portion of Samuel's 401(k). The court further held that Christine was not entitled to maintenance. Christine filed a motion to reconsider, and after further consideration, the trial court modified its decision by determining that the parties were responsible for their own medical expenses and eliminating the $8000 medical expense award to Christine. It upheld its denial of living expenses and maintenance. Christine appealed. The appellate court affirmed.

1.) Christine alleged that under Samuel's guidance while skiing he led her into an accident and she had become disabled and that, subsequently, he abandoned her, refused to communicate with her, and filed for divorce less than three months after their honeymoon.

2.) Christine argued that Samuel breached paragraph 7(d) of his contractual agreement when he failed to communicate with Christine about recalculating their *pro rata* adjusted gross incomes when her income changed as a result of her leg injury. Therefore, she was entitled to $4281 in living expenses from March 2015 to August 2015. Also, Christine alleged that Samuel breached his contractual agreement when he failed to list and sell his house pursuant to paragraph 7(c), and therefore, she claimed that she was entitled to $9270 in living expenses from August 2015 to August 2016.

3.) The rules of contracts govern prenuptial agreements. *Landes v. Landes*, 268 Ill. 11, 20 (1915).

4.) The trial court, along with both parties, recognized the prenuptial agreement as a valid and enforceable contract. Furthermore, Samuel did breach the prenuptial agreement because, at the least, he did not list his residence for sale before May 1, 2015. However, Christine was precluded from receiving living expenses as damages under the prenuptial agreement. The provision on which Christine relied for damages was the *pro rata* amount stated in paragraph 7(d). Looking at the plain language in the agreement, because the date when both parties resided in Christine's residence never occurred, the *pro rata* amount provision was never triggered. Because Christine had not asked the reviewing court to award any other damages flowing from the breach and the agreement did not make any provisions for other damages, Christine failed to state an adequate claim of damages caused by Samuel's breach.

5.) The existence of the order of protection, along with other evidence of the breakdown of the marriage, demonstrated a good faith basis for Samuel's decision not to sell the only house available for him to live in or to recalculate his *pro rata* share when it was fairly certain he would never live in Christine's residence. Moreover, one of the claims underlying the order of protection was that Samuel was harassing Christine about finances. It would be nearly impossible for Samuel to discuss recalculating the *pro rata* amounts without running the risk of being accused of violating the protective order. Denying Christine living expenses was not against the manifest weight of the evidence.

6.) The parties' prenuptial agreement made reference to the elimination of maintenance in the recitals. Recitals are preliminary in nature and are generally not binding on the parties or an effective part of their agreement unless referred to in the operative portion of their agreement. Here, the parties' maintenance provision was not referenced in the operative portion of the agreement. The maintenance provision was not binding on the parties, and therefore, section 7(b) of the Prenuptial Act was not applicable in this case.

7.) The trial court correctly reasoned that, based on the evidence, the parties never established a standard of living together during the marriage and determined that maintenance was not necessary. The parties lived separately throughout their short-term marriage and continued to manage their own debts and assets separately. Although Christine's income did change in 2015, it was not the result of standard of living during the marriage but due to the outcome of an unforeseen skiing injury. The denial of retroactive temporary maintenance was affirmed.

8.) Christine alleged that the trial court improperly denied her the opportunity to testify at trial about her inability to swim following the accident. Christine asserted that her testimony would have assisted her argument of undue hardship. But section 7(b), which required a showing of undue hardship, was not applicable to this case. Moreover, the purpose for which Christine sought to admit her testimony was irrelevant to the trial court's determination of maintenance under section 504(a).

**Annual bonus Provision Encompassed various Incentive Awards.**

*IN RE MARRIAGE OF DAWN BERGSCHNEIDER n/k/a Dawn Barr, Petitioner-Appellee and Cross-Appellant, and ALAN BERGSCHNEIDER, Respondent-Appellant and Cross-Appellee.* March 2, 2018, Ill.App.Ct. 2nd District, No. 2-16-1028, 2018 IL App (2d) 161028-U, Linda E. Davenport, trial judge. Rule 23.

Dawn filed a post-decree contempt action, seeking additional child support under the parties' marital settlement agreement (MSA) based on Alan's bonus income.

Alan petitioned for contribution to college expenses and moved to modify child support. Following a hearing, the trial court found Alan in indirect civil contempt for failing to pay the bonus child support during 2012, 2013, and 2014 and ordered him to pay

Dawn $184,541 after apportioning credits for Dawn's contributions to college expenses. Both parties appealed. The appellate court affirmed in part, reversed in part, and remanded.

1.) The MSA contained a provision addressing bonus child support:

> In the event that [Alan] shall receive an annual bonus for work and effort performed in his employment, [Alan] shall pay to [Dawn] within seven (7) days of his receipt thereof, forty percent (40%) or the statutory guideline amount applicable of the net amount received as bonus child support. The net amount shall be determined as provided by law in Section 505 of the Illinois Marriage and Dissolution of Marriage Act.

2.) The focus of this appeal was Alan's compensation from Coleman, where he worked from late 2007/early 2008 through 2014. Coleman's compensation plans reflected that named executive officers' (Alan was ultimately Coleman's CFO) total compensation package consisted of four components: (1) salary; (2) annual bonus; (3) long-term incentives, consisting of performance-based cash awards, options, and performance-based restricted stock unites (RSUs); and (4) limited perquisites and other personal and retirement benefits through the company's 401(k) plan.

3.) The RSU award agreement between Coleman and Alan awarded Alan 26,625 RSU's, with each RSU equivalent to one share of stock.

Alan also received from Coleman a non-qualified stock option (NQO) award. The NQO agreement, which incorporated the Long Term Incentive Plan (LTIP), provided that the LTIP committee selected Alan to receive an NQO of 15,000 covered shares with an exercise price of $4.42 per share. Coleman eventually merged with a company called Southwire.

4.) The trial court, ultimately, did not order Alan to pay additional child support for 2009 and 2010, finding that the evidence was unclear as to the discrepancy between his W-2 Medicare wages and his base salary. Dawn challenged this finding in her cross-appeal.

Alan's base salary in 2011 was $224,000, and he did not receive a bonus that year. He did receive compensation in the form of vested RSUs, about $87,188 of income, of which he received 1/3 in cash and 2/3 in stock. The RSUs, Alan stated, were not part of the annual bonus program, nor were they related to performance, and he could not sell the stock. Alan's W-2 wages were $342,954.24, which included $224,000 in base salary, $87,188 in the stock vesting, 401(k) plan matching contributions, and pre-tax medical. None of this, in his view, was bonus income. Box 12CV on the W-2, showing $58,125, represented that value of the shares that he could sell.

5.) Alan denied that the LTIP was an annual bonus program. Rather, it "was a restricted stock program given to officers of the company to create a management team that had an ownership interest in an entity which would be viewed favorably from external investor standpoint that management[']s interests were aligned with those investors[']] interests." Alan testified that the vesting was not tied to his annual work performance and that the LTIP did not take the place of the bonus structure outlined in his original offer letter. He continued to be eligible to participate in the bonus pool. After the LTIP became part of his compensation package, he received bonuses.

When the RSU's vested, he explained, the shares were put into an account for his benefit; they were not monetized, i.e., sold. At this point, he incurred taxable income. The cash component was designed to partially offset that tax that was due upon receipt of the shares. Alan was not able to sell the shares because it would have been frowned upon. It was important that the management team have ownership in the company. The stock price hit the first trigger point in 2011, and shares were credited to Alan's account. It reached the second and third stock trigger prices in 2013. By this time, Alan was an officer of Coleman and, by virtue of his inside information, he could not "trade in the market constantly." The vesting events, according to Alan, were not annual bonuses. Alan continued to have annual reviews to determine his eligibility for bonuses. The RSUs were not discussed at his reviews.

6.) Alan testified that the NQO agreement was not part of his annual bonus contemplated in his offer letter, and he continued to be eligible to receive annual bonuses. Nor was the NQO an annual incentive program. The first tranche vested in 2012, but Alan was not able to exercise his stock options, because "we held onto them." The second tranche vested in 2013. Alan could not exercise his options because he was an officer of the company at this time (AVP and CFO) and had inside information.

7.) In 2012, Alan earned a base salary of $224,039 and he received a $50,000 bonus. Alan conceded that he did not pay Dawn a portion of his $50,000 2012 bonus because Dawn "ha[d] a habit of spending money on things other than the kids consistently." Now, however, he was prepared to tender that payment. The stock component of his compensation was

not an annual bonus for work performed, nor was the stock dividend or the Taxable Fringe Benefit (TFB). One-third of his stock options vested in 2012, but he was not able to exercise them.

8.) Dawn testified that she was employed as a landscape designer, earning $27.50 per hour. She remarried and had a three-year-old daughter, but her husband did not work full time. She had not been able to provide the children with the lifestyle they had during the parties' marriage. Dawn believed that, had she received greater child support, she would have been able to provide the parties' children with more things and experiences.

9.) The trial court addressed Alan's argument that the only income to be included for bonus child support was his annual bonus paid in 2012, not the other monies paid to him. The trial court found Alan's argument "specious." Further, the trial court determined that the stock Alan was awarded resulted from his work and effort. The trial court disagreed that the term "annual bonus" in the MSA meant only a payment labeled as a bonus. The trial court included the stock, stock dividend, miscellaneous, and bonus components of Alan's income to bonus child support, finding that all were the result of Alan's work and effort through his employment.

Dawn could have petitioned to modify child support and she would have been entitled to receive additional monies. However, she did not do so. Therefore, the trial court determined it would not remedy Dawn's failure to seek the court's assistance by awarding her child support from Alan's base income, but it would only apply the bonus income. The trial court also noted that it would not reward Alan by finding a downward deviation was required simply because he never petitioned for such. Alan owed $268,891.16 in back due child support through August 31, 2016. The trial court further credited Alan for one-third of college expenses. The trial court later reconsidered and modified its prior ruling as to college contribution.

10.) As to Alan's arguments, the reviewing court found that the addition of the modifier "annual," did not render unambiguous the ambiguous term "bonus," because "bonus," with or without the preceding modifier "annual," was commonly utilized to mean the same thing, much as the terms "salary" and "annual salary" are commonly used interchangeably. It could, in certain circumstances have the narrower meaning that Alan advanced, *i.e.*, that it constituted income that regularly results in annual compensation, but it remains that the term is ambiguous. *See In re Marriage of Minkin*, 218 Cal. Rptr. 3d 407, 416 (Cal. Ct. App. 2017) (one plain and ordinary meaning of annual bonus is any compensation in addition to one's base salary, and another such meaning is "a discretionary payment based on performance").

11.) Similarly, the phrase "for work and effort performed in his employment," which modified "annual bonus," was also, ambiguous because it had several reasonable plain and ordinary meanings. When the phrase was combined with "annual bonus," one plain and ordinary meaning was a broad and, frankly, superfluous reference to anything received while employed, and another such meaning was the narrower one Alan advanced: that it was compensation resulting from Alan's actual work and effort in his employment, *i.e.,* any individual-performance-based bonus award. The phrase did not necessarily limit the annual bonus to income that was directly tied to Alan's individual performance at work or specifically attributable to him. The phrase was ambiguous.

12.) Having determined that the "annual bonus" provision was ambiguous, the reviewing court next examined the parol evidence to adduce its meaning.

The trial court rejected as "specious" Alan's narrow interpretation of the MSA provision and noted that, at the time of a 2008 agreed order, Alan could have sought to exclude the incentive compensation from the bonus child support provision, but did not do so. The evidence supported a finding that all of Alan's compensation, including not only that explicitly labeled as a bonus, but also awards that were not labeled as such (i.e., the incentive awards under the LTIP and the compensation he received pursuant to the change in control), fell under the MSA's bonus child support provision.

13.) A reasonable interpretation was that the bonus child support provision was intended to include all compensation that Alan received. When it was drafted, Alan received from Sears a base salary and occasional bonuses. Thus, the provision was written to include all forms of compensation that he received at the time of dissolution. Alan never returned to court seeking to exclude specific forms of compensation.

14.) The parties entered into the MSA in 2004. At that time, Alan worked for Sears, earning about $130,000 per year and receiving "sporadic" (according to Alan's testimony) annual cash bonuses. Since the bonuses from Sears were only "sporadic" Alan's interpretation that the term "annual" strictly meant payments that actually occur regularly every year was inconsistent.

15.) The various awards Alan received that were tied to his company's stock price were also for work and effort he performed in his employment. First, the LTIP, which was the umbrella program under which the disputed compensation awards were made, was introduced, according to Coleman's filing with the SEC, "to provide incentives to our executives to increase our long-term performance" and "motivate our officers to return value to stockholders through future appreciation of our stock" and encourage them "to focus energies on long-term corporate performance. The vesting requirements are designed to encourage retention of our officers." This language clearly reflected that awards under the LTIP (i.e., cash incentive awards, stock options, and RSUs) were tied to motivating key employees to perform at their highest level in order to benefit the company over the long term. Thus, they were awarded for work and effort Alan performed in his employment.

16.) Alan received the change-in-control payments as reward for his continued employment with Coleman at the time of the merger. They reasonably constituted bonus compensation for his work and effort in his employment. The fact that the change in control was not a recurring (e.g., annual) event was of no import, where the MSA's bonus child support provision essentially referred to any compensation Alan received over his base salary.

17.) The trial court's decision to not grant additional child support when there was a discrepancy as to income was not unreasonable. To the extent Dawn sought a remand for the re-opening of proofs, this request was forfeited for failure to raise it before the trial court. *Danada Square, LLC v. KFC National Management Co.,* 392 Ill. App. 3d 598, 610 (2009).

18.) The appellate court agreed with Dawn the trial court erred with regard to year 2011. Dawn sought inclusion into the bonus child support calculation of the cash Alan received upon the vesting of the first tranche of RSUs that year. Alan received shares and cash, but did not sell the shares. The receipt of shares was, however, a taxable event, and Alan received the cash portion to offset the taxable event. His gross pay that year was $342,954. The trial court's treatment of this cash in 2011 was inconsistent with its treatment of the subsequent vesting events in 2013, where it included the cash portion as part of Alan's bonus calculation. This was remanded for correction.

## ▶ APPEALS

**Wife's Appeals Dismissed as Untimely.**

*IN RE MARRIAGE OF LINDA L. BESCI, Petitioner-Appellant, and FRANK J. BESCI, Respondent-Appellee.* March 15, 2018, Ill.App.Ct. 2nd District, Nos. 2-17-0118 & 2-17-0217 cons., 2018 IL App (2d) 170118-U, Charles W. Smith, trial judge. Rule 23.

Linda appealed the denial of her petition to vacate a judgment for dissolution of marriage under section 2-1401 of the Code of Civil Procedure, contending that her settlement agreement with Frank was unconscionable. She also appealed from an order requiring her to pay her attorney $30,962.50 in fees related to the underlying case. The appellate court dismissed both appeals for lack of jurisdiction.

1.) Generally, appellate jurisdiction is limited to reviewing appeals from final judgments. *In re Marriage of Verdung*, 126 Ill. 2d 542, 553 (1989). A judgment is final for purposes of appeal if it determines the litigation on the merits or some definite part thereof so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment. Illinois Supreme Court Rule 304(a) provides that, if multiple claims are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all claims only if the trial court makes an express written finding that there is no just reason to delay enforcement or appeal, or both. Without a Rule 304(a) finding, a final order disposing of fewer than all claims is not appealable and does not become appealable until all of the claims are resolved.

2.) Although a section 2-1401 petition is nominally filed in the same action as the judgment it challenges, it is actually a new and separate action. *In re Marriage of Buck*, 318 Ill. App. 3d 489, 493 (2000). Here, although the January 12, 2017, order finally resolved Linda's section 2-1401 petition, Frank filed a timely petition for contribution in that action. Thus, because the trial court did not attach a Rule 304(a) finding to that order, Frank's petition rendered that order unappealable until the resolution of the remaining claims in the action.

3.) Linda can timely file a notice of appeal upon the resolution of the pending claims in this matter or upon the entry of a Rule 304(a) finding. However, if the pending claims have been resolved and the time to file a new notice of appeal has expired, Illinois Supreme Court Rule 303(a)(2) (eff. July 1, 2017)

allows Linda to establish the effectiveness of the present notice of appeal. She may do so by filing a motion to establish jurisdiction and to supplement the record in order to show appellate jurisdiction.

4.) Under the Dissolution Act, irrespective of a Petition for Setting Final Fees and Costs being heard in conjunction with an original proceeding under the Act, the relief requested under a Petition for Setting Final Fees and Costs constitutes a distinct cause of action. 750 ILCS 5/508(c)(2) (West 2016). To vest the appellate court with jurisdiction a party must file a notice of appeal within 30 days after entry of the judgment appealed from, or within 30 days after entry of an order disposing of a timely post-[judgment] motion. However, the motion must be "directed against the judgment." Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017).

5.) Here, the trial court entered the fee award on January 20, 2017. Although Linda moved to quash citations related to the enforcement of that judgment, that motion was not "directed against the judgment." Thus, the motion did not extend Linda's time to appeal, and her notice of appeal, filed on March 20, 2017, was late. Accordingly, the appeal was dismissed for lack of jurisdiction.

**Post-Petition Contempt Proceeding was not Final, Appeal Dismissed for lack of Appellate Jurisdiction. Order denying the Motion to vacate Plenary Order of Protection, Affirmed.**

*IN RE MARRIAGE OF JAIME SANCHEZ, Petitioner-Appellant, and MARTHA SANCHEZ-ORTEGA, Respondent (Illinois Department of Healthcare and Family Services, Intervenor-Appellee).* March 23, 2018, Ill.App.Ct. First District, No. 1-17-1075, 2018 IL App (1st) 171075, Raul Vega, trial judge.

Jaime appealed *pro se* from two post-dissolution orders: one that denied a motion to vacate a plenary order of protection entered against him and a second that denied his motion to reconsider the denial of a motion to abate child support payments. His former spouse, Martha, did not participate in the appeal. Intervenor-appellee, the Illinois Department of Healthcare and Family Services (Department), was a party to this appeal only as it related to the child support issues.

The appeal from the order denying the motion to reconsider the denial of the motion to abate child support payments was dismissed for lack of appellate jurisdiction, and the order denying the motion to vacate the plenary order of protection was affirmed.

1.) During the divorce proceedings, an order of protection was entered against Jaime, which protected Martha and the children, and that order remained in effect for the pendency of the initial divorce action.

2.) On April 5, 2017, the trial court denied "with prejudice" Jaime's motion to vacate the February 22, 2017, order, which had denied his motion to abate his child support obligations. The order stated: "This is a final and appealable order." On May 1, 2017, Jaime filed a notice of appeal from that specific order only.

On April 12, 2017, the trial court held a hearing on Jaime's November 10, 2016, motion to vacate the plenary order of protection and entered an order denying the motion "with prejudice." As to the contempt matter, the trial court entered a separate order updating the amounts that Jaime then owed in child support and scheduled the matter for a follow-up hearing on May 24, 2017.

3.) On May 4, 2017, Jaime filed an amended notice of appeal, which added the April 12, 2017, order to his appeal. Following the filing of Jaime's amended notice of appeal, the trial court held a hearing on the status of the contempt. The matter was then continued to June 28, 2017. The record did not indicate what happened on that date, or whether the contempt matter had been finally resolved.

4.) The Department was a party to this appeal, but only as to Jaime's appeal from the order denying his motion to vacate the denial of his motion to abate his child support. The Department expressed concern as to whether there was jurisdiction to review that order, in that the contempt proceeding against Jaime was still pending below at the time Jaime filed an appeal from that order.

5.) Appellate jurisdiction is limited to review of final judgments unless an order falls within a statutory or supreme court exception. In order to be considered final, an order must dispose of the rights of the parties, either upon the entire controversy or some definite and separate part of it.

However, a final order is not necessarily immediately appealable. Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) provides:

> "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforce-

ment or appeal or both. *** In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties."

6.) Thus, prior to the resolution of all claims with respect to all parties, any order entered in a case, even if final as to any one party or claim, is not appealable unless the order contains a finding that there is no just reason to delay enforcement or appeal, in compliance with Rule 304(a). The orders that were the subject of this appeal did not include a Rule 304(a) finding.

7.) On January 11, 2017, the trial court found Jaime to be in indirect civil contempt. However, a contempt order is not final or appealable until the party in contempt has been sanctioned or committed. Here, when Jaime filed his original notice of appeal from the order denying his motion to reconsider the denial of the motion to abate and amended notice of appeal, he had neither been sanctioned nor committed with respect to the finding of contempt. Thus, the post-dissolution contempt proceeding was not final or appealable before the notices of appeal were filed.

8.) In conformity with *In re Marriage of Teymour*, 2017 IL App (1st) 161091, the reviewing court here found it had no jurisdiction to consider the order denying the motion to reconsider the denial of Jaime's motion to abate child support payments, as that order was not accompanied by the requisite Rule 304(a) finding. While the order did state "[t]his is a final and appealable order," that language was not sufficient to support appellate jurisdiction under Rule 304(a).

9.) Jaime's appeal from the denial of his motion to reconsider the denial of his motion to abate was dismissed for lack of appellate jurisdiction.

10.) Moreover, dismissal was appropriate for yet other reasons. Jaime's briefs did not cite the record on appeal and did not present coherent arguments with supporting authority as to any error in the court's decisions with regard to the abatement matter, as required by subsections (h)(4)(ii), (h)(6) and (7) of Illinois Supreme Court Rule 341 (eff. Nov. 1, 2017).

11.) The appellate court then turned to Jaime's appeal from the denial of his motion to vacate the plenary order of protection. It again considered whether there was appellate jurisdiction over this order in light of the fact that the contempt proceedings were pending below at the time the appeal was filed.

12.) Illinois Supreme Court Rule 307(a)(1) allows an appeal from an interlocutory order "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." An order of protection is injunctive in substance. A motion to vacate a protective order is considered one seeking to dissolve or modify an injunction. Therefore, even if the post-dissolution order denying Jaime's motion to vacate the plenary order of protection was interlocutory, in that the contempt proceeding remained pending below, it was appealable under Rule 307(a)(1). Jaime filed a notice of appeal within 30 days of the denial of his motion to vacate and therefore there was appellate jurisdiction to review that order under Rule 307(a)(1).

13.) Jaime did not present a sufficient record for the reviewing court to determine whether the court abused its discretion in denying the motion to vacate the plenary order of protection. The reviewing court was without the evidence and arguments that were considered by the trial court in reaching its decisions. Therefore it affirmed the denial of the motion to vacate the plenary order of protection.

14.) Jaime proceeded *pro se* on this appeal, but was nevertheless required to meet all procedural requirements.

## ► CHILDREN

**Annual Bonus Provision encompassed Various Incentive Awards.**

See *Bergschneider*, page 40.

**Trial Court's Final Parenting Plan, Affirmed. Mother with Flexible Work Schedule had Advantage but the Factors balanced in a Tie. 8 hour Right of First Refusal was not Error.**

*IN RE MARRIAGE OF WILLIAM DANIEL WHITEHEAD, Petitioner-Appellant, and STEPHANIE NEWCOMB-WHITEHEAD, Respondent-Appellee.* March 8, 2018. Ill.App.Ct. 5th District, No. 5-17-0380, 2018 IL App (5th) 170380, James R. Williamson, trial judge.

William appealed from a portion of a final parenting plan and judgment. The issues raised in this appeal were as follows: (1) did the trial court err in allocating parenting time by not including an analysis of the factors in section 602.7 of the Dissolution Act, (2) did the trial court err in entering the parenting time schedule, (3) did the trial court err in ordering an

eight-hour right of first refusal rather than a four-hour right of first refusal when substitute child care was necessary, and (4) did the trial court err in denying William's motion to reconsider regarding child support? The appellate court affirmed.

1.) The parties were married on June 17, 2006. Three children were born during the marriage, D.W. (born October 5, 2007), A.W. (born June 9, 2010), and G.W. (born March 3, 2012). The parties separated on February 6, 2015. William filed his petition for dissolution on March 26, 2015.

2.) William was an emergency room nurse and worked shifts. His schedule changed over the course of these proceedings. Stephanie was an administrative assistant at a counseling center. Her work schedule was flexible. William earned more than twice what Stephanie earned.

3.) The GAL interviewed the parties and the children on two occasions. He found both parties to be good parents and the children to be happy and well adjusted. In his report, he specifically stated, "In addressing the best interest of the children and the allocation of parenting time pursuant to 750 ILCS 5/602.7, all seventeen factors will be addressed below." He then went on to address each of the 17 factors and analyzed each factor with respect to the instant case.

4.) In its ruling, the trial court specifically stated: "All evidence, including the guardian *ad litem's* report and addendum to same, statutory and case law applicable, and the written closing arguments of counsel have been considered."

5.) The final parenting plan and judgment was entered by the trial court on June 19, 2017. It specifically provided for parenting time during the school year and summer. The final parenting plan also stated that "each [party] shall have the right of first refusal to parenting time with the children when the other parent is unable to exercise his or her parenting time for a period in excess of eight (8) hours."

6.) William contended the trial court failed to consider the statutory factors listed in section 602.7(b) when allocating parenting time between the parties. The appellate court was unconvinced.

7.) Section 602.7 of the Act requires a court to allocate parenting time in accordance with the best interest of the child. In allocating parenting time, the court shall consider all relevant factors, including the listed factors and any other factor that the court expressly finds to be relevant.

8.) A petitioner's mere assertion that the trial court did not consider the statutory factors is insufficient to overcome the presumption that the trial court knew and followed the law.

9.) The GAL, specifically utilized the listed factors of section 602.7(b) in addressing the best interest of the children and the allocation of parenting time. The GAL went into great detail and analyzed each of the 17 factors. After addressing all the factors, the GAL concluded that both parties loved their children and had the children's best interests in mind.

10.) In its March 15, 2017, letter to the parties' attorneys, the trial court stated it considered all the evidence, including the GAL's report. As a result, the trial court was aware of the 17 factors to be considered pursuant to section 602.7(b). Given the fact that the trial court specifically stated it considered "all evidence" including the GAL's report, which analyzed all of the factors in depth, there was a presumption that the trial court properly considered all statutory factors.

11.) William contended when the facts of this case were analyzed in light of the factors of section 602.7(b) it was apparent the trial court's order as to the parenting time schedule was not in the best interest of the children. The appellate court disagreed.

12.) The biggest advantage probably went to Stephanie due to her flexible work schedule. But the reality here was that the factors amounted to basically a tie, with none of the factors greatly favoring one party over the other. The trial court's order reflected this balance by allowing both parties a substantial amount of parenting time. Under these circumstances, the trial court entered a parenting time order that was in the best interests of the children.

13.) The trial court did not err in entering a right of first refusal provision that took effect only if either parent could not exercise their parenting time for a period of eight hours. William contended it was not in the best interest of the children to have an 8 hour requirement because Stephanie, who had a flexible work schedule, could adjust her work schedule to work for 7 hours and 55 minutes just to interfere with William's ability to see the children while she was at work. William asked for a right of first refusal that would take effect when either parent could not exercise his or her parenting time for a period of four hours or more.

Section 602.3(a) of the Dissolution Act provides: "(a) If the court awards parenting time to both parents under Section 602.7 or 602.8, the court may consider, consistent with the best interests of the child as defined in Section 602.7, whether to award to one or

both of the parties the right of first refusal to provide child care for the minor child or children during the other parent's normal parenting time, unless the need for child care is attributable to an emergency." Section 602.3(b) of the Act provides " 'right of first refusal' means that if a party intends to leave the minor child or children with a substitute child-care provider for a significant period of time, that party must first offer the other party an opportunity to personally care for the minor child or children."

14.) An eight-hour right of first refusal as opposed to a four-hour right of first refusal appeared reasonable under the facts and circumstances of this case. William's argument was based on nothing more than conjecture and speculation. While there were some incidents early after the parties' separation that indicated some problems working in the children's best interest, both had since shown the ability to resolve issues more amicably. However, a four-hour right of first refusal could require the parties to contact each other more than necessary and potentially lead to greater conflict. The reviewing court could not say the trial court's decision to grant an eight-hour, rather than a four-hour, right of first refusal when substitute care was required was against the manifest weight of the evidence.

15.) A motion to reconsider draws a trial court's attention to newly discovered evidence that was unavailable at the time of the first hearing, changes in the law, or errors in the previous application of existing law to the facts of the case.

Public Act 99-764 (eff. July 1, 2017) changed section 505 of the Act (750 ILCS 5/505) to make Illinois an "income shares" model. The trial court's initial ruling made via letter was entered on March 15, 2017, and the judgment order for final disposition was entered on June 19, 2017. Thus, the trial court's rulings with regard to child support were made under the law applicable at the time. Because the trial court applied the law that was in effect at the time of its ruling, the trial court did not abuse its discretion in denying William's motion to reconsider.



## ▶ CIVIL PRACTICE

**Husband's Child Support Arrearage Reduced on Basis of Equitable Estoppel. Drafted Agreed Order was never Entered but both Parties Relied on it.**

*IN RE MARRIAGE OF CORTNIE M. HODGES, Petitioner-Appellant, and TODD HODGES, Respondent-Appellee.* March 22, 2018, Ill.App.Ct. 5th District, No. 5-17-0164, 2018 IL App (5th) 170164-U, William J. Becker, trial judge. Rule 23.

Cortnie appealed from an order which reduced Todd's child support arrearage on the basis of *equitable estoppel*. The issue on appeal was whether the trial court erred in applying the principles of *equitable estoppel* to the facts and circumstances of this case. The appellate court affirmed.

1.) Sometime in 2008, Cortnie admitted she verbally agreed to accept Todd's payment of $165 per week in child support rather than the $788 per month originally ordered. According to Cortnie, she made the concession only so Todd could catch up on his arrearage. In 2010, Cortnie hand wrote a letter to Todd and included spreadsheets showing her accounting of Todd's child support payments made directly to her in 2007, 2008, 2009, and 2010. The spreadsheets indicated weekly payments of $165 per week by Todd to Cortnie. The spreadsheets further indicated that there were times when Todd fell behind, but he would eventually catch up. Cortnie admitted she generated the accounting sheets.

2.) The trial court found Cortnie's explanations about why she accepted $165 per week confusing and determined that: (1) *equitable estoppel* should apply to payments made from December 1, 2006, to September 30, 2014, in that the amount of support during that time should be $165 per week, or $715 per month; (2) Todd should pay child support in the amount of $788 per month from October 1, 2014, until May 31, 2017; and (3) the arrearage as of March 31, 2017, was $5770, which included the statutory 9% interest on any amount not paid when due. Cortnie appealed from that order.

Todd's child support obligation ended in May 2017, after the parties' youngest child graduated from high school.

3.) *Equitable estoppel* exists where a party, by his or her own statements or conduct, induces a second party to rely, to his or her detriment, on the statements or conduct of the first party. *In re Marriage of Smith,* 347 Ill. App. 3d 395, 399 (2004). The party who

asserts estoppel must have relied upon the other party's acts or representations and not have any knowledge or convenient means of knowing the facts, and such reliance must have been reasonable.

4.) The general rule is that courts have the exclusive authority to modify child support and are not bound by the parties' agreements concerning child support. *Blisset v. Blisset, 123* Ill. 2d 161, 167 (1988). In *Blisset*, our supreme court held an agreement to waive child support in exchange for a waiver of visitation rights was not enforceable because the parties did not seek court approval of their agreement. In this case, there was no waiver of child support in exchange for a waiver of visitation rights. There was an agreed order that received judicial approval at least from Todd's perspective.

5.) In 2006, an assistant attorney general drafted a uniform order of support, showing an alleged arrearage of $8400 as of November 15, 2006, and a notation stating Cortnie was waiving interest. The child support payment line was filled in with the number $330, along with an arrearage payment of $50, and stated that both payments were to be paid every other week beginning on December 1, 2006. The parties disagreed with how the meeting ended, but Todd testified the assistant attorney general told him and Cortnie they could leave and she would get the order signed by the judge. The uniform order was never entered.

Cortnie insisted the trial court improperly considered and admitted hearsay evidence of statements made by the assistant attorney general. Cortnie asserted that all of these statements should be stricken, and without the statements of the assistant attorney general, Todd had no statements upon which he could rely to show that his child support obligation decreased, making *equitable estoppel* inapplicable.

6.) An out-of-court statement offered to prove its effect on the listener's mind or to show why the listener later acted as he or she did is not hearsay and is admissible. Here, the assistant attorney general's statements were not inadmissible hearsay because they were not offered to prove the truth of the matter asserted, but to explain why Todd acted as he did in making payments of $165 per week. The statements were relevant to show what Todd believed occurred at the November 15, 2006, hearing.

7.) Even though the uniform order of support drafted by the assistant attorney general at the November 15, 2006, hearing was never entered, there was no doubt that both parties relied upon it. For example, Cortnie used the negotiations that took place that day to collect an arrearage that was never adjudicated. Cortnie specifically testified she used the $8400 arrearage calculated for the draft uniform support order in filing a lien against Todd's real estate. Cortnie's attorney added interest, plus an additional month of child support to that amount in arriving at the lien amount. Todd satisfied the lien by obtaining a home equity loan in August of 2008 and paid a lump sum of $10,446.

After the lien was released, Cortnie continued to accept $165 per week as provided for in the uniform draft order ($330 bi-weekly equals $165 per week). Cortnie's spreadsheets, dating back to 2007, were clear and convincing evidence of the fact that the parties reached an agreement whereby Todd would pay $165 per week in child support rather than $788 per month.

8.) In reliance on Cortnie's acquiescence and acceptance of $165 per week, Todd took no further action to obtain a modification of his child support obligation, believing the modification had already been approved by the court. By accepting Todd's payment of $165 per week, Cortnie induced Todd to rely, to his detriment, on the assumption that he was satisfying his child support obligation. It is not practical to say that a person is not damaged when after relying on an agreement with his former spouse he uses money that would otherwise be applied to court-ordered support to pay for other obligations only to learn years later that his reliance on the agreement was misplaced. That was especially true here where Todd was forced to increase his home equity loan by almost $10,500 in order to satisfy the lien placed on his home by Cortnie's private attorney in 2006.

9.) The issue was not whether the trial court made a specific finding, but whether its final determination was supported by the evidence. All the elements of estoppel were met here.

## ► FAMILY & FIDUCIARY RELATIONSHIPS

**Forgery of Family Member's Name on Insurance Check Supported Punitive Damage Award.**

*SUZETTE R. MOOK and RACHEL M. TRAVELSTEAD, as Independent Executor of the Estate of Jeremy S. Travelstead, Plaintiffs-Appellants, v. ROBIN R. JOHNSON and JAMY C. JOHNSON, Defendants-Appellees.* March 27, 2018 No. 3-17-0229, 2018 IL App (3d) 170229, Michael D. Kramer, trial judge.

Suzette R. Mook and Rachel M. Travelstead, as independent executor of the estate of Jeremy S. Travelstead, filed suit against defendants, Robin R. Johnson and Jamy C. Johnson, alleging that defendants committed fraud by fraudulently concealing the surrender of a life insurance policy. As a result of surrendering the policy, the insurance company issued a check payable to the seven co-owners of the policy in the amount of $612,542.81. After forging at least one of the plaintiffs' signatures and cashing the check, defendants unevenly distributed the funds, keeping $317,440.93 for themselves while distributing $295,101.88 to the other five beneficiaries under the policy. Following a trial, the jury returned a verdict in favor of both plaintiffs and against each defendant awarding both compensatory and punitive damages. Specifically, the jury awarded (1) Mook a total of $44,960.56 in compensatory damages ($22,480.28 against each defendant) and $254,491.44 in punitive damages ($127,519.72 against each defendant) and (2) Jeremy's estate a total of $65,508.56 in compensatory damages ($32,754.28 against each defendant) and $254,491.44 in punitive damages ($127,519.72 against each defendant).

Thereafter, the trial court remitted Mook's and Jeremy's estate's punitive damage awards to $20,000 and $10,000 respectively. Plaintiffs appealed. The appellate court reversed and remanded with directions.

1.) The trial court granted the remittur and pointed to what it considered circumstantial evidence that June Lackey forged Mook's signature and that Robin was simply "honoring her mother's wishes" by surrendering the policy and distributing the funds as she did. The trial court then opined that the punitive damages awarded by the jury were "especially excessive" because (1) a conviction for forgery carries a possible maximum fine of only $25,000 and (2) plaintiffs' attorney only sought punitive damages in an amount double to the amount of compensatory damages.

2.) In granting defendants' motion for remittitur and reducing the punitive damages in this case, the trial court essentially reweighed the evidence and then, based on its assessment of the facts, including some irrelevant facts not of record, determined that the punitive damages awarded were excessive.

3.) Reasonable jurors could conclude that the conversion in this case actually started in August 1999, when Jamy sold the policy to his in-laws and received a large commission. Defendants began their quest to commit fraud by concealment against their family members when, as early as October 21, 2002, they attempted to restrict all information pertaining to the policy from the other five owners by asserting that Robin was the "main owner" of the policy and that all billings, information, and questions should be directed to her or Jamy. Approximately 4½ years later, Robin attempted to surrender the policy on her own despite knowing that all policy owners were required to sign the surrender form. After her attempt to surrender was denied, she obtained Jeremy's permission to sign his signature on the surrender form under what the jury could have found to be false pretenses, i.e., by telling Jeremy that his grandmother wanted to surrender the policy. Next, Robin submitted the surrender form knowing that Mook's signature had been forged. Finally, after negotiating the policy proceeds check with Mook's and Jeremy's forged signatures, defendants distributed more than half of the proceeds to themselves and their son and paid off the mortgage on their house, despite the fact that there were five other owners on the policy. Defendants distributed nothing to Mook until she confronted Robin, after which Robin gave her a check for $45,000. In addition, while the jury determined plaintiffs' compensatory damages based on the actual surrender value of the policy, it had evidence before it that had the policy been in effect at the time of June's death, each owner would have received approximately $434,000. Thus, the jury clearly could have found defendants' conduct reprehensible enough and the need for deterrence sufficient to warrant the punitive damages it awarded.

4.) The punitive damages awarded by the jury were only 5.66 times the amount of Mook's compensatory damages and 3.88 times the amount of Jeremy's estate's compensatory damages. Defendants cited no authority in which a reviewing court reduced punitive damages which were single-digit multipliers on a motion for remittitur. It appeared that punitive damage awards in single-digit multipliers generally comport with due process.

5.) Moreover, the trial court considered facts not in evidence in support of its decision to grant the remittitur in this case. Specifically, the trial court considered evidence that it heard during previous proceedings but which were deemed inadmissible at trial, including, for example, the fact that the State declined to prosecute defendants criminally or that Robin was merely following her mother's wishes. This was clearly error.

## ► JUVENILE

**Before parent loses his Superior Right to Custody, the trial court must show that parent was unfit, unable, or unwilling to care for child under section 2-27(1).**

*IN RE M.T., a Minor (The People of the State of Illinois, Petitioner-Appellee, v. Malcolm T., Respondent-Appellant).* March 21, 2018, Ill.App.Ct. 3rd District, No. 3-17-0009, 2018 IL App (3d) 170009, Kirk D. Schoenbein, trial judge.

The State filed a juvenile petition against M.T.'s mother and father claiming that M.T. was neglected. The trial court adjudicated M.T. neglected, determining that the mother contributed to the injurious environment but Malcolm did not. At the dispositional hearing, the court determined that M.T.'s mother was unfit and that Malcom was fit. However, the court adjudicated M.T. a ward of the court and appointed the Department of Children and Family Services (DCFS) as guardian with the right to place. Malcolm appealed, arguing that the appointment was improper. The appellate court vacated the trial court's dispositional order and remanded for a new dispositional hearing.

1.) Malcolm contended that awarding DCFS guardianship with the right to place committed the child to DCFS and that section 2-27(1) of the Juvenile Act requires the court to make a finding of unfitness before such commitment occurs.

2.) Malcolm cited *In re M.M.*, 2016 IL 119932, to support his argument that the court must find him unfit before it grants guardianship to DCFS pursuant to section 2-27(1). In *M.M.*, our supreme court concluded that section 2-27(1) "does not authorize placing a ward of the court with a third party absent a finding of parental unfitness, inability, or unwillingness to care for the minor."

3.) The trial court granted DCFS guardianship with the right to place. There is no case law or statutory definition that addresses the meaning of "right to place." The Act defines "[g]uardianship of the person" as "the duty and authority to act in the best interests of the minor, subject to residual parental rights and responsibilities, to make important decisions in matters having a permanent effect on the life and development of the minor and to be concerned with his or her general welfare. It includes but is not necessarily limited to: * * *(c) *the rights and responsibilities of legal custody* except where legal custody has been vested in another person or agency." (Emphases added.) 705 ILCS 405/1-3(8)(c) (West 2016).

4.) Legal custody is vested by court order. See 705 ILCS 405/1-3(9) (West 2016) (" 'Legal custody' means *the relationship created by an order of court* in the best interests of the minor which imposes on the custodian the responsibility of physical possession of the minor and the duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, except as these are limited by residual parental rights and responsibilities and the rights and responsibilities of the guardian of the person, if any." (Emphasis added.)).

5.) Here, the trial court did not grant legal custody to either party, and therefore, DCFS had the rights and responsibilities of legal custody of M.T. Before Malcolm lost his superior right to custody, the trial court had to show that he was unfit, unable, or unwilling to care for M.T. under section 2-27(1). Instead, the court found respondent fit and appointed DCFS as guardian and, essentially, custodian of M.T. The trial court never made a determination that Malcolm was unable or unwilling to care for M.T. The trial court abused its discretion when it appointed DCFS as guardian with the right to place.

## ► MAINTENANCE

**Maintenance and Living Expenses denied to Attorney Wife after Short-term Marriage.**

See *Ball*, page 39.

**Wife Awarded $1,200 in monthly Maintenance for 45 months and Properly Disregards Statutory Formula where Husband had no Income but Wife Needed Support.**

*IN RE MARRIAGE OF GAYLE L. MATTINGLY, Petitioner-Appellee, and TIMOTHY F. MATTINGLY, Respondent-Appellant.* March 15, 2018, Ill.App.Ct. 3rd District, No. 3-17-0617, 2018 IL App (3d) 170617-U, Sheldon R. Sobol, trial judge. Rule 23.

This appeal concerned the trial court's maintenance award that it entered during dissolution proceedings between Gayle and Timothy. Timothy argued that the trial court erred by ordering him to pay Gayle monthly maintenance. He also claimed that the court erred in calculating the amount of maintenance. The appellate court affirmed.

1.) The parties married in 2006. In May 2016,

Gayle filed a petition for dissolution of marriage due to irreconcilable differences. They had no children during the marriage.

2.) In deciding whether to award Gayle maintenance, the court analyzed the factors set forth in section 504(a) of the Dissolution Act. The value of Timothy's nonmarital assets and share of marital property approximately doubled the value of Gayle's. Although Timothy received no income in retirement, he had significant "but not unlimited" assets. On the other hand, Gayle left a higher paying job at Timothy's request, then took a lower paying job in poor health at age 60 "to exist." Gayle's age and health significantly diminished her future earning capacity. If her health deteriorated or she became unable to work, she had to rely on her IRA and any maintenance award to support her lifestyle. Since the parties separated, Gayle relied on regular withdrawals from her IRA to pay her monthly expenses that she could not cover with her compensation from her new job.

3.) Section 504(b-1)(1)(B) established 45 months as the statutory duration of maintenance for a 9.5-year marriage. Because Timothy was retired, there existed no income stream from which to apply the formula provided in Section 504(b)(1)(A). The trial court deviated from the standard maintenance formula pursuant to section 504(b-2)(2). The trial court found that "due to her age and health [Gayle] will need assistance and assets to pay for present healthcare and medical expenses as well as to assist in undertake [sic] the cost of her housing." The trial court ordered Timothy to pay Gayle $1200 in monthly maintenance for 45 months.

4.) Timothy's argument primarily relied on the discrepancy between his income ($0) and Gayle's (approximately $45,000 per year). Timothy pointed out that the standard maintenance calculation set forth in section 504(b-1) required Gayle to pay Timothy maintenance—her income was $45,000 per year while he received no regular income during retirement.

5.) This argument ignored the purpose of maintenance—to enable a spouse who incurs individual disadvantages during the marriage partnership to maintain a similar standard of living after divorce. Timothy contributed more money to the parties' standard of living during their marriage, both before and after he retired. Gayle retired from a higher paying job at Timothy's request in October 2015. Six months later, Timothy moved to Michigan to live with his paramour. Timothy lived rent-free and maintained a similar standard of living as he did during the marriage. On the other hand, Gayle's standard of living decreased substantially; she had to reenter the work force at a lower salary to make ends meet. Timothy's retirement and lack of steady income did not automatically excuse him from maintenance.

6.) The amount of maintenance in this case was indeterminable; the trial court was not required to state it under section 504(b-2)(2). The trial court concluded that section 504(a)'s factors favored awarding maintenance to Gayle, not Timothy. Because Gayle worked and Timothy did not, the standard maintenance calculation could only result in Timothy receiving maintenance—it was irrelevant to the determination.

7.) The trial court's order recognized the lack of Timothy's "income stream from which to apply the formula provided in Section 540(b)(1)(A)." In other words, the court found that Gayle should receive maintenance, and then recognized that it must deviate from the standard formula due to Timothy's lack of income. These findings satisfied section 504(b-2)(2).

8.) Although the trial court must consider all the relevant statutory factors, it need not make specific findings as to how it determined the amount of maintenance. *In re Marriage of Nord*, 402 Ill. App. 3d at 293. The benchmark for determining the amount of maintenance is the recipient's reasonable needs in light of his or her standard of living established during the marriage. Regardless of how the court determined the $1200 monthly maintenance figure, it was not unreasonable.

**Husband Fails in his bid to classify as Nonmarital Property the value of his existing Clients Prior to the Marriage. Trial Court properly calculated Income for Child Support and Maintenance.**

*IN RE MARRIAGE OF JAMES J. McATEE, Petitioner-Appellee, and ROCHELLE L. McATEE, Respondent-Appellant.* March 6, 2018, Ill.App.Ct. 4th District, No. 4-17-0235, 2018 IL App (4th) 170235-U, James R. Coryell, trial judge. Rule 23.

James argued the trial court erred in (1) the calculation of his income, (2) the award of maintenance and child support, and (3) the division of marital property. The appellate court affirmed.

1.) In June 1996, James and Rochelle were married in Decatur, Illinois. Three children were born during the marriage, including Ke. M., born in 1997;

Ka. M., born in 2002; and G.M., born in 2006. At the time of filing, James was 51 years old and employed by McAtee Financial Services (McAtee Financial). Rochelle was 45 years old and a homemaker.

2.) James testified an accountant valued the business at $638,600. Based on his 2012 federal income tax return, James stated his business income for that year was $493,000. His business income for 2013 was $395,841 and $490,861 for 2014. In 2015, James' business income was only $34,624. The lower amount stemmed from activity in 2014, when he was investigated by the Illinois Secretary of State concerning charges incurred on a large volume of variable annuity sales and bookkeeping errors related thereto.

3.) The parties lived in a 6000-square-foot, five-bedroom home valued at $615,000. The monthly mortgage payment on the home was $4700, with 5 years left on a 10-year mortgage at a 2.5% fixed interest rate. The parties owned property in Mt. Zion, Illinois, valued at $450,000; property valued at $35,000 in Kentucky, which they agreed to sell; and five acres in Mt. Zion, valued at $65,000.

Every year, the parties traveled to Cancun for a week, which cost approximately $6000 to $7000. The family would also make annual trips to Florida at a cost of $2000 to $3000. The McAtees were members of the Decatur County Club, although James testified he cancelled his membership. Rochelle continued to maintain her country club membership and listed her monthly living expenses as over $12,000. She sought child support and maintenance totaling $17,000 per month.

4.) The trial court stated the issues of maintenance and child support gave it "a great deal of concern." James "earned a great deal of money" in previous years and the parties had a "comfortable lifestyle." However, the amount of assets managed by James had dropped by 38%, and it was impossible to determine whether the drop was permanent or if James was regaining business. The court averaged the incomes from 2013 ($359,658) and 2014 ($455,983) and deducted 10% "to make up for any lost income" and found gross income totaled $30,170 per month. The court ordered James to pay $6000 per month in maintenance and $6767.50 per month in child support. James was ordered to pay $10,000 per academic year for Ke. M.'s college expenses, with Rochelle and Ke. M. responsible for the balance. The court also ordered James to maintain a $500,000 life-insurance policy to provide for maintenance and child support.

5.) James argued error as he only had business income of $45,313 in 2015. From January to April 2016, he stated he had approximately $170,000 in gross income and his monthly expenses averaged $26,545. Thus, he projected his business income for 2016 would be $68,860.

6.) A trial court may average a payor spouse's income over several years, especially in cases where a support-paying parent's income fluctuates significantly. *In re Marriage of Freesen*, 275 Ill. App. 3d 97, 103, 655 N.E.2d 1144, 1148 (1995) While a court should not base net income findings upon the mere possibility of future financial resources, neither should it rely upon outdated information which no longer reflects prospective income.

7.) James earned a substantial income as a financial advisor, and the years 2013 and 2014 provided the trial court with reliable income figures, as opposed to year 2015 when James' income dropped due to the investigation and suspension. The 2016 income was unclear and noted it was impossible to determine whether James' reduction in income was permanent or if it would recover to previous levels. The court directed the parties to exchange 2016 income tax returns on or before June 1, 2017, and future income tax returns by June 1 during subsequent years. Thus, the income utilized in figuring child support and maintenance was subject to modification should the circumstances so require.

8.) The trial court required James to pay $6000 per month in maintenance. Maintenance issues are presented in a great number of factual situations and resist a simple analysis. Here, the court utilized the best figures available in determining James' gross income for purposes of the maintenance award. Moreover, the trial court was well aware of the parties' lavish lifestyle during the marriage and Rochelle's alleged financial needs. In reviewing Rochelle's affidavit, the trial court's statement that "[t]his is hardly a Spartan existence with $800.00 per month in clothing for herself and $500.00 for grooming" indicated it took the pertinent facts into consideration when fashioning a maintenance award.

Given the amount of income James had earned and was capable of earning, along with the parties' lifestyle during the marriage, Rochelle's monthly living expenses were reasonable.

9.) The trial court ordered James to pay $6767.60 per month in child support. James argued the trial court did not offset its determination of gross income for any health insurance being paid by him. James did not raise this issue in his motion for reconsideration,

thereby depriving the court of an opportunity to consider the alleged error. James did not provide sufficient evidence to support his claim as to the amount of health insurance he paid for himself or the children. Considering the standard of review that would require to find no reasonable person could agree with the trial court's position, he failed to demonstrate how the evidence presented was sufficient. There was no abuse of discretion.

10.) In finding McAtee Financial constituted marital property, the trial court stated James' testimony concerning his business associates was "somewhat vague." Rochelle was "very specific" that the breakup of the business association occurred after their marriage. The trial court also noted the evidence showed James and Burnett acquired real estate in December 1996. The trial court went on to state:

> "The business in the present form began operating during the marriage. There is no evidence of which clients [James] had prior to the marriage. There is no evidence that these clients were not retained in part by the effort of [Rochelle] in entertaining and also maintaining a presence in the community that helped attract new clients and retain existing clients."

The trial court found that the original clients and those acquired after the parties' marriage were so commingled as to prevent any division.

11.) McAtee Financial was formed after the parties' June 1996 marriage, and thus it was presumed to be marital property. While James may have brought over some clients he had prior to the marriage, he failed to present evidence identifying who and how many were acquired before the marriage. He also failed to identify how they had been specifically segregated from the marital estate. "Once marital and nonmarital funds are commingled and lose their identity through acquisition of a newly created asset during the marriage, the asset is marital." *In re Marriage of Davis*, 215 Ill. App. 3d 763, 769, 576 N.E.2d 44, 48 (1991). James bought new accounts from Conrad in January 2008 and Palmer in 2010 with the use of marital funds, and the accounts became a part of McAtee Financial. Any of James' premarital accounts had been commingled with the post-marital accounts such that a separation was impossible.

12.) James failed to provide clear and convincing evidence tracing the source or date of acquisition of clients he contended were acquired before the marriage to support his claim.

▶ PROPERTY

**Husband Fails in bid to Classify Value of Existing Clients prior to Marriage as Nonmarital Property.**

See *McAtee*, page 51.

## INDEXES

**NOTE: Consult the 4–year index for 1978–1981, and the Cumulative Index in the December 1982–2017 issues for ALL Illinois Appellate and Supreme Court opinions and many Rule 23 orders entered since the adoption of the IMDMA.**

### 2018 CUMULATIVE INDEX OF CASES REVIEWED

## TOPICAL SUMMARY INDEX

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