DO YOU HAVE TO RESPOND
TO YOUR OPPONENT'S MOTION--PROBABLY NOT

In the Domestic Relations Division, after the filing of the dissolution petition, all requests for relief are raised by petition or motion. Indeed, motion practice moves the case from start to finish. An understanding of the rules for responding to a motion is therefore very important.

When the opposition files a petition or motion, say for temporary relief such as for support, parenting time, appointment of a child's representative, etc., is there a requirement that an answer or response be filed? Can the court grant relief by default if no response is made? The answer to both of these questions is no.

The case on point is In Re The Marriage Of Fahy, 208 Ill.App.3d 677, 567 N.E.2d 552 (1st Dist. 1991). The Fahy trial judge granted relief by default for counsel fees as there was no response to the opponent's fee petition, even though counsel for the responding party appeared in court and was ready for argument. The Appellate Court reversed and noted that there was no authority in any of the rules to grant relief by default because the party opposing the petition had failed to file a written response. The court buttressed its opinion by referring to Rule 2.1(d) of the Circuit Court of Cook County relating to motion practice in the Law Division. The rule provides that: "[f]ailure to file a supporting or answering memorandum shall not be deemed to be a waiver of the motion, or a withdrawal of the opposition thereto, but shall be deemed to be a waiver of the right to file the respective memorandum." The Appellate Court found that the Law Division rule should apply to the other divisions of the court, and that under the rule the failure to file a written response to the motion

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does not waive the right to contest the merits of the motion. The Fahy case is cited with approval in another First District opinion handed down last year, Parkway Bank and Trust Company v. Meseljevic, 940 N.E.2d 215, 224, 346 Ill.Dec. 215, 224 (1st Dist. 2010).

The rule preventing default where no response is filed even applies where the motion is supported by affidavit. The general rule, that an affidavit stands as true if not contradicted by a counter-affidavit, does not apply here, but only to motions for summary judgment, for involuntary dismissal or to determine jurisdictional issues. In Re The Marriage Of Dowd, 214 Ill.App.3d 156, 573 N.E.2d 312 (2nd Dist. 1991). But, this is as far as it goes. The failure to respond to a pleading (as opposed to a motion*), such as a dissolution petition, admits the allegations contained in the pleading ("Every allegation, except allegations of damages, not explicitly denied, is admitted." Sec. 5/2-610 of the Illinois Code of Civil Procedure).

These observations are not meant to suggest that divorce practitioners should forego a response when faced with the opponent's motion. To the contrary, it is better practice to file a response so as to highlight all of the favorable issues. In this way, the client will feel better served, courtesy copies can be provided to the judge ahead of time, and there is a better record for appeal.

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* A motion has been defined as a request for the court to rule on an issue during the pendency of a case. On the other hand, a pleading contains a party's claims or defenses and is set forth as a cause of action, counterclaim, defense or reply as set forth in Section 5/2-603 of the Illinois Code of Civil Procedure. In Re The Marriage Of Wolff, 355 Ill.App.3d 403, 822 N.E.2d 596 (2nd Dist. 2005).

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