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FAMILY LAW: PRELIMINARY CONSIDERATIONS IN DISSOLUTION ACTIONS (IICLE®, 2023)

This 2023 handbook revises and replaces the 2020 edition of the same title.

This handbook provides an extensive analysis of many of the crucial factors an attorney must consider in deciding whether to take a case in the family law area and guides the attorney through the steps in opening the case if he or she chooses to do so. For an analysis of the issues the lawyer will face later in such a case, the reader may consult the following volumes from IICLE®:

FAMILY LAW: DISSOLUTION OF MARRIAGE COURT PROCEEDINGS

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FAMILY LAW: PROPERTY AND FINANCIAL ASPECTS OF DISSOLUTION ACTIONS

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FAMILY LAW: PRELIMINARY CONSIDERATIONS IN DISSOLUTION ACTIONS

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Table of Contents

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1 Practical and Ethical Considerations

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I. INTRODUCTION

A. [1.1] Scope of Chapter

The purpose of this chapter is to help the matrimonial lawyer determine and evaluate the client's legal problems and the scope of the issues during the initial contact with the client.

The lawyer must determine whether the nature of the client's grievances makes reconciliation unlikely. If so, a dissolution, legal separation, or declaration of invalidity of marriages and civil unions are some of the remedies potentially available under the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq*. However, if there seems to be hope for the marriage, a praecipe for a dissolution of marriage or legal separation followed by reconciliation procedures may sometimes be appropriate. See 750 ILCS 5/411. At this point, on the statute's face, this does not apply to civil unions, but this is a question for the Illinois Supreme Court or the legislature. Same-sex couples can be legally married in Illinois since the repeal of 750 ILCS 5/213.1, effective June 1, 2014. As such, same-sex couples who are legally married are treated the same as heterosexual couples for purposes of the IMDMA.

This chapter discusses those situations in which it may be in the client's and/or the family's best interests to suggest intervention by a professional counselor or psychologist. It discusses the practical situations that may arise, as well as some suggestions as to how to work with the client. Additionally, this chapter provides suggestions as to how to gather necessary factual information. This chapter provides suggested checklists covering property, expenses, child support, and maintenance in the information gathering process.

This chapter also discusses the ethical problems that may arise during the case, suggests procedures to follow when the other spouse refuses to hire a lawyer, and explores factors to consider in negotiations with the client's spouse directly or through counsel.

B. [1.2] Accepting a Domestic Relations Case

The legal assistant or receptionist should handle the first contact with a prospective client if the prospective client makes initial contact via telephone, e-mail, Facebook, LinkedIn, or the lawyer's website. The assistant should set up the intake appointment for the prospective client, but not give out legal advice. If the lawyer has the initial contact with prospective client directly, he or she should never discuss the facts of the specific case or give any advice during the initial contact.

The lawyer will often find that the individual with whom he or she communicated will not show up for the scheduled appointment. Unfortunately, there are individuals who will contact every competent matrimonial attorney for the sole purpose of claiming that that lawyer has a conflict if the caller's spouse seeks to retain the lawyer in question after the individual contacted the lawyer. It then can become a dispute between the individual and the lawyer as to what was discussed during the communication.

Another reason to avoid giving any initial advice is that such advice, even gratuitously given and without full opportunity to explore the facts, might become the basis for a malpractice lawsuit against the lawyer.

Additionally, it is critically important that even before the assistant schedules an intake or consultation appointment, the assistant first runs a "conflicts check." The lawyer must make sure that he or she has not previously represented the spouse of the client in another matter. If the lawyer has represented the spouse, even in an unrelated matter, he or she must be cautious in accepting a case against a former client. If a judge is called on to rule on a motion to bar the attorney from representing the client, the judge must determine three things. First, the judge "must make a factual reconstruction of the scope of the prior legal representation." *See Schwartz v. Cortelloni,* 177 Ill.2d 166, 685 N.E.2d 871, 877 – 878, 226 Ill.Dec. 416 (1997), adopting the reasoning of *La Salle National Bank v. County of Lake,* 703 F.2d 252, 255 – 256 (7th Cir. 1983). Second, the judge "must determine whether it is reasonable to infer that the confidential information allegedly given [by the objector] would have been given to a lawyer representing a client in those matters." *Id*. Third, the judge must determine "whether the information [provided] is relevant to the issues raised in the litigation pending against the former client." *Id*.

The attorney's assistant should advise the prospective client the amount of, or basis for, the consultation fee. The lawyer should consider not offering free consultations because he or she is still held to the same ethical standards in free consultations as if the lawyer had been compensated for his or her time. Pursuant to 750 ILCS 5/508, attorneys and their clients should be aware of their respective rights and responsibilities concerning fees and costs and other significant aspects of the attorney-client relationship. See discussion in §1.5 below and Chapter 2 of this handbook.

C. Trying for Reconciliation

1. [1.3] Lawyer's Approach

The first task of the attorney is to acquire all possible information from the client about the client's marital situation. The manner in which the attorney begins the informational interview will vary with the client, but often the simplest questions are the most effective in starting the flow of information needed. For example, "What seems to be the problem?" "What do you believe to be wrong with your marriage?" "What does your spouse say is wrong with the marriage?"

The checklist set out in §1.6 below is one way of gathering the facts. Counsel should have a working familiarity with the areas of inquiry set forth therein and use the checklist as a guide in determining what still needs to be discussed. Once the attorney has gone through this exploration, the possibility of reconciliation or its hopelessness may become apparent.

Counsel should always be knowledgeable about remedies for the client other than dissolution, legal separation, or declaration of invalidity. If support is an issue, cases can be referred to the state's attorney's office for criminal charges if either spouse is refusing to support the other spouse or children, or other legal remedies can be pursued on behalf of the client such as referral to the Illinois Department of Healthcare and Family Services for collection of delinquent child support. See, *e.g.,* the Non-Support Punishment Act, 750 ILCS 16/1, *et seq.;* the Family Financial Responsibility Law, 625 ILCS 5/7-701, *et seq.* (suspension of driving privileges); the Income Withholding for Support Act, 750 ILCS 28/1, *et seq.;* the Rights of Married Persons Act, 750 ILCS 65/0.01*, et seq.*

In both dissolution and legal separation proceedings, formal judicial proceedings can be suspended, and the parties can try to reconcile without waiver of the legal rights they held before the reconciliation attempt. Some judicial districts have established court conciliation services that offer professional counseling and mediation. However, the court, upon good cause shown, may prohibit conciliation, mediation, or any other process that requires the parties to meet and confer without counsel. 750 ILCS 5/404.

2. [1.4] Reference to Conciliation Agency

If the client feels there is still some hope of saving the marriage if only the proper skilled assistance can be had, a professional counselor, a psychologist, and sometimes a psychiatrist are called for. If both parties want to save their marriage, it is the lawyer's duty not to interfere with the efforts of the parties to do so and to offer such assistance as is reasonable. A lawyer can call on community agencies for marriage counseling assistance. If the lawyer doubts the sincerity or good faith of an opposing party and there is property to protect, the lawyer has a duty to discuss with the client the need to take additional steps to protect the client's interest.

II. INTERVIEWING THE CLIENT

A. Method

1. [1.5] Schedule Appointment

At the time of scheduling the appointment, the assistant should clearly advise the prospective client the amount of the charge, if any, for the initial consultation.

The attorney should consider the prospective client's personality in the initial meeting so that he or she can establish a good rapport with the client and have strong and open lines of communication. A few general questions to establish why the client is there often are all that is needed to begin a conversation and determine what communication style works best with the particular client.

Counsel should allot sufficient time for the appointment to ensure the client is not rushed. Thirty to sixty minutes for an initial consultation with the client is normally sufficient, although some may take longer depending on the complexity of the issues involved.

Before going into the specific facts of the domestic relations situation, the lawyer should ensure that another attorney has not already been retained. If another attorney has been retained, counsel should urge the client to stay with his or her current lawyer. Counsel should explain the financial consequences that are likely to arise by shifting to a second lawyer — namely, that the client will have to pay the subsequent counsel's retainer fee and, in effect, will be paying a second attorney to duplicate many of the efforts already performed by the present counsel. Counsel should never belittle, ridicule, or criticize the other lawyer. Such comments often return to the maker in an undesired and unprofessional form. In general, the client who has consulted numerous other lawyers in a divorce case is one to avoid.

The lawyer should obtain the information suggested in §1.6 below that seems pertinent, and then simple questions as to the marital problems should follow. At that point, the lawyer should have determined the nature and scope of the relevant issues and be ready to lead the conversation.

The interview checklist should help the lawyer in determining which of the previously discussed available remedies are appropriate for the client's situation. The client will want to know what the total fee will be, and the attorney should be ready to explain how the fees will be determined. The lawyer should never dodge the question of fees and should instead explain the fee structure in detail.

To facilitate the lawyer's analysis and explanation of fees, it is extremely important that the attorney be familiar with the provisions of §508 of the IMDMA. See 750 ILCS 5/508. Section 508 attempts to deal comprehensively with issues such as a party's responsibility for his or her own fees; the potential responsibility for the other party's attorneys' fees and costs; awards of interim fees and costs that enable all parties in the matrimonial action to have fair and effective representation; the right to contribution from the opposing party for attorneys' fees and costs incurred in the proceedings; an attorney's right to pursue fees from a client or former client under the IMDMA or in an independent proceeding; and the necessity of, and guidelines for, a written engagement agreement between the attorney and the client.

The portion of §508 dealing with "written engagement agreement[s]" helps establish boundaries for the attorney-client relationship in proceedings under the IMDMA by delineating the rights and responsibilities of both the attorney and the client concerning such subjects as fees, ethics, and the attorney's duty to keep the client informed. See 750 ILCS 5/508(f).

In the first interview, counsel should obtain and write down all necessary information for the appropriate handling of the client's case. This information also may be needed for counsel's own future protection and as proof of the basis for the attorneys' fee charged the client. It also may be proof, at some future stage of the proceedings, of what the client told the attorney. This can become important when the client becomes reconciled with his or her spouse and then later blames the lawyer for filing the proceeding, claiming that the lawyer advised the client against reconciliation.

2. [1.6] Interview Checklist of Lawyer

This interview checklist is set forth to help open the door for a wide exploration of the subject material and to avoid the many pitfalls and omissions that can occur from a failure to acquire all pertinent information. It is important for the lawyer to try to gauge all the issues that may come up in a case as this will guide the lawyer in creating a roadmap of the case, including what future pleadings need to be filed, what discovery to issue, etc.

The checklist is a tool for the guidance of the lawyer but is not a substitution for counsel's own analysis of the particular case. It is important to attempt to acquire as much information as is reasonable considering the client's emotional state and physical condition and to schedule follow-up appointments to acquire information as needed. Many of these questions may never need to be asked. Their relevance or irrelevance should become apparent during the interview.

NOTE: See S.Ct. Rules 15 and 138 as to what information can and cannot be disclosed in pleadings and exhibits, such as social security numbers and personal identity information.

I. Statistics

A. Client's name

Client's pronouns | Social security no.

Address | Phone

E-mail addresses

Social media sites used (*e.g.,* Facebook, Twitter, etc.)

Person's user name(s)

Does other spouse have access?

Business address | Phone

Length of residence in | County | State

Name of employer
(if employed)

Address

Hours of employment | Type of work

How long employed

Earnings per month | Gross | Net

Client's maiden name

Does client wish to resume maiden name?

Birthdate | Birthplace

Religion | Age

B. Name of spouse

Spouse's pronouns | Social security no.

Address | Phone

E-mail addresses

Social media sites used (*e.g.,* Facebook, Twitter, etc.)

Person's username(s)

Does client have access?

Business address | Phone

Length of residence in | County | State

Name of employer (if employed)

Address | Phone

Hours of employment | Type of work

How long employed

Earnings per month | Gross | Net

Spouse's maiden name

Birthdate | Birthplace

Religion | Age

C. Employment benefits | Client | Spouse

Commission or bonus

Deductions

Expense account

Stock interest

Profit sharing

Pension

Deferred compensation

Name of company

Address

How long on job

Type of business

Previous employer

D. Date of marriage

Date of separation

E. Children of the marriage

Names	Ages	Birthdates
Any mental or physical handicaps		
School attended		

F. Previous marriages

1a.	Client: To whom	Where	When
	How terminated	Where	When
	Children of previous marriage		
	Name	Age	
	Residence		
	Client's obligation to support		
	Source and amount of support		
1b.	Spouse: To whom	Where	When
	How terminated	Where	When
	Children of previous marriage		
	Name	Age	

Residence

Spouse's obligation to support

Source and amount of support

NOTE: It is important to determine whether the marriage the client wishes to terminate is a valid marriage. Many a lawyer has been surprised to learn of the existence of a previous undissolved marriage after the case has begun. *See In re Marriage of May,* 286 Ill.App.3d 1060, 678 N.E.2d 71, 73, 222 Ill.Dec. 664 (3d Dist. 1997), in which the court held that, under §212(b) of the IMDMA, 750 ILCS 5/212(b), a bigamous marriage is ratified by the parties' cohabitation after removal of the impediment (*e.g.,* by dissolution of the prior marriage) regardless of whether the parties have knowledge that the impediment has been removed. When there are previous marriages or civil unions, the lawyer should check for any final divorce or dissolution judgments and dissolutions of civil unions of both spouses. *See also In re Marriage of Simmons,* 355 Ill.App.3d 942, 825 N.E.2d 303, 313, 292 Ill.Dec. 47 (1st Dist. 2005), holding that incomplete gender reassignment surgery rendered the same-sex marriage of the respondent, a woman, and the petitioner, a transgender male, invalid and affirming the trial court's award of custody of the parties' child to the respondent and terminating the petitioner's parental rights. The legal significance of *Simmons* is unclear now that Illinois recognizes civil unions and same-sex marriages. See the Illinois Religious Freedom Protection and Civil Union Act (Civil Union Act), 750 ILCS 75/1, *et seq.,* the Religious Freedom and Marriage Fairness Act, 750 ILCS 80/10, and the repeal of 750 ILCS 5/213.1 (the former prohibition of same-sex marriage), effective June 1, 2014. *See also In re Marriage of Andrew,* 2023 IL App (1st) 221039, ¶62, explaining that "whether a verified history of sexual misconduct or grooming by a spouse might be sufficient basis to invalidate a marriage under section 301(1) of the Act" remains an open legal question.

2. Maintenance, spousal support, or property settlement payments from previous marriage or civil union received by client or spouse

   Client — How much
   (details)

   Client's spouse — How much
   (details)

3. Maintenance payments given up or lost by client or spouse upon entering into this marriage or civil union

   Client — How much
   (details)

   Client's spouse — How much
   (details)

G. Educational background

1.	Client	High school	College/Vocational	Post-college
2.	Spouse	High school	College/Vocational	Post-college

H. Health

1. Client:

   Last examination Present medical condition

   Doctor's name and address

2. Spouse

   Last examination Present medical condition

   Doctor's name and address

3. Is client or spouse pregnant?

   If so, what is the projected date of delivery?

   If so, is there any issue as to paternity?

NOTE: *See In re Marriage of Skelton,* 352 Ill.App.3d 348, 851 N.E.2d 1176, 1179, 287 Ill.Dec. 373 (5th Dist. 2004), in which the court held that, because there is currently no statutory authorization, Illinois state courts do not recognize an unborn child as a child for purposes of the marital dissolution statutes and that the courts, therefore, lack subject-matter jurisdiction over an unborn child in the context of future child custody matters or other marital dissolution issues. *See also Fleckles v. Diamond,* 2015 Ill.App.2d 141229, ¶51, 35 N.E.3d 176, 393 Ill.Dec. 784, explaining that Illinois state courts do not recognize an unborn child for purposes of making allocation of parental responsibility decisions "[b]ecause the UCCJEA does not apply to unborn children and because the statute is the exclusive jurisdictional basis for making a child-custody decision." However, a proceeding to establish parenting may be commenced, but not concluded, before the birth of the child but are limited to the following actions: (a) service of process; (b) taking of depositions; and (c) collection of specimens for genetic testing. 750 ILCS 46/612.

II. Background and Reason for Dissolution, Legal Separation, or Declaration of Invalidity of Marriage

A. Background

Does client love spouse? Is love returned?

Beginning of trouble in marriage When?

How?

Previous separations: When?

Why?

Complaints against spouse:

Money management

Infidelity (adultery)

Bad temper

Excessive drinking

Drug abuse

Gambling addiction

Pornography addiction

Sexual problems

Physical abuse

Mental abuse

Interspousal torts or domestic violence committed

What?

When?

NOTE: Counsel should refer the client to a lawyer skilled in the representation of personal injury if torts or domestic violence has occurred. *See Feltmeier v. Feltmeier,* 333 Ill.App.3d 1167, 777 N.E.2d 1032, 268 Ill.Dec. 109 (5th Dist. 2002), *aff'd,* 207 Ill.2d 263 (2003).

Does spouse want a dissolution, declaration of invalidity of marriage or civil union, or legal separation?

Does spouse know client seeks a dissolution, declaration of invalidity of marriage or civil union, or legal separation?

Does spouse complain about client?

What are complaints?

Has client discussed problems with doctor/psychiatrist?

minister/priest/rabbi? social worker?

family service agency? family/friends?

Any other steps client has taken

May attorney have permission to consult with person providing assistance?

Does client want to save the marriage/civil union?

Does spouse?

What are client's future plans?

B. Pleadings for dissolution of a marriage/civil union, declaration of invalidity of marriage/civil union, or legal separation of marriage and the requirements of each. See 750 ILCS 5/401, 5/402, 5/403; 75/1*, et seq*.

C. Irreconcilable differences (six-month separation?)

III. Parental Responsibilities and Parental Time with Child

NOTE: The term "child" will be used in all instances in this section when referencing a child or multiple children of the parties.

A. Is there any question as to the identity of the biological parents of the child?

Basis for question

Position client wishes to take with regard to this issue

B. With whom is the child now?

Has there been any previous court order with regard to the child?

If this is a same-sex civil union or same-sex marriage, how was the child of the couple conceived and has the nonbiological parent adopted the child? See 750 ILCS 46/204, regarding presumption of parentage; 750 ILCS 45/703, regarding parentage of a child conceived by assisted reproduction. *See also In re J.M.,* 2023 IL App (4th) 220537, holding that the assisted reproduction statute (Article 7 of the Parentage Act) governs the issue of paternity for a child conceived by artificial insemination. In *In re J.M.,* the Fourth District Court of Appeals held that "pursuant to section 702 of the assisted-reproduction statute, a donor is not a parent" and found that under §703(d) of the assisted-reproduction statute, because the parties did not enter into a written agreement, parentage of the child shall be based on the intent of the parties at the time of donation. 2023 IL App (4th) 220537 at ¶33.

C. What plans does client have for the future of the child?

Does client anticipate that the spouse will contest the division of parenting time and/or parental responsibilities?

D. Is the spouse able and willing to care for the child?

To help client with the child?

E. Has the child been told about client's plans?

Reaction of the child?

F. What is the preference and attitude of the child?

G. What are the plans for the division of parenting time?

Where? When? Holidays? Vacations?

H. What are the attitudes of client and spouse on child discipline?

I. What are the spouse's preferences regarding the division of parenting time and/or parental responsibilities?

J. Does the child have handicaps or special requirements? Are there any developmental issues?

Emotional Physical Educational (including an Individualized Education plan (IEP))

Name of person providing assistance

K. Name of the child's doctor

Address Telephone

L. May attorney consult with the doctor?

M. Does the child have any special financial needs?

Will client have to work to help meet needs?

How will needs be met?

N. Have client and spouse made any plans for joint determination of the child's future needs?

Medical Dental Education Extracurricular Activities

O. Explain the required mediation process if there is no agreement by the parties on the division of parenting time and/or parental responsibilities, plus mandatory attendance at parenting classes in person or, in certain circumstances, online. See S.Ct. Rule 900, *et seq.*

NOTE: The Civil Union Act did not incorporate §§600 – 611 of the IMDMA, so for some time it was unclear whether these sections apply to dissolution of civil union proceedings. 750 ILCS 5/600 – 5/611. *See Sharpe v. Westmoreland,* 2019 IL App (5th) 170321, 126 N.E.3d 690, 430 Ill.Dec. 602. However, in 2020, the Illinois Supreme Court had an opportunity to address this open question when it heard *Sharpe* on appeal. The Illinois Supreme Court overturned the Fifth District Court of Appeal's decision and held that a stepparent who is in a civil union with the child's biological parent has standing to petition a court for visitation and allocation of parental responsibilities under the IMDMA. *Sharpe v. Westmoreland,* 2020 IL 124863, ¶16, 181 N.E.3d 673, 450 Ill.Dec. 321 (holding "a civilly united partner is a 'step-parent' as defined in the Dissolution Act"). Importantly, the court's holding did not alter the well-settled Illinois law that a biological parent can contest a party's standing to seek visitation or parental responsibilities based on common-law theories of equitable parent, de facto parent, and in loco parentis because Illinois law does not recognize those theories as a basis for custody or visitation. *Id.* (explaining that "[a]n important distinguishing factor between our analysis in this case and the relevant analysis in *In re Parentage of Scarlett* . . . is that [here the parties] entered into a state-sanctioned form of a committed relationship—which the legislature created and deemed equivalent in all respects to a marriage"), citing *In re Parentage of Scarlett Z.-D.,* 2015 IL 117904, 28 N.E.3d 776, 390 Ill.Dec. 123.

IV. Property

NOTE: The business affairs of the parties may be so involved or so unknown to the client that an accountant hired on behalf of the client may be required to examine books, records, and tax returns relating to assets, liabilities, income, and disbursements to give the client and the court an accurate picture of the parties' financial condition. If counsel advises this procedure, counsel should state it in the petition and the prayer.

A. Classification of property

1. Individual property (nonmarital)

Refer to property descriptions in IV B, Marital property, below to record types and values of nonmarital property.

a. Acquired before marriage

How When Initial value

Increase in value during marriage

Income from property

Where was income deposited during marriage

How property titled

NOTE: In *In re Marriage of Klose,* 2023 IL App (1st) 192253, the First District Court of Appeals affirmed the trial court's decision when it found that a home the husband owned prior to the parties' marriage and that he subsequently created a land trust for with his wife named as beneficiary was a marital asset.

b. Acquired after marriage

How When Initial value

Increase in value during marriage

Income from property

Where was income deposited during marriage

How property titled

c. Can funds be traced if necessary?

2. Was there an antenuptial/prenuptial agreement determining classification of property?

a. Upon divorce

b. Upon death

c. Location of agreement

d. Conditions under which antenuptial agreement was established

e. Was each party represented?

f. By whom?

3. Any property set aside for children?

a. Uniform Gift to Children (Illinois Uniform Transfer to Minors Act, 760 ILCS 20/1, *et seq.*)

b. Educational IRAs/529 Plans

c. Life insurance

d. Trusts set up for child

B. Marital property

1. Financial accounts

a. Joint checking

Institution Balance

b. Joint savings

Institution Balance

c. Individual checking

Name on account

Institution Balance

d. Individual savings

Name on account

Institution Balance

NOTE: *See In re Marriage of Henke,* 313 Ill.App.3d 159, 728 N.E.2d 1137, 245 Ill.Dec. 780 (2d Dist. 2000), which held that a checking account established by the husband prior to the marriage and on which he was the only signatory was marital property when the funds in the account were commingled with marital funds and used throughout the 16-year marriage to pay family and household expenses. *See also In re Marriage of Mouschovias,* 359 Ill.App.3d 348, 831 N.E.2d

1222, 1227, 294 Ill.Dec. 897 (3d Dist. 2005) (citing *In re Marriage of Henke* and reasoning that "[a] party should not be allowed to defeat the fundamental concept that all property acquired during the marriage is marital property by opening a checking account in his name and placing a meager amount in that account before the marriage, then depositing all his paychecks into the account after the marriage") *See also In re Marriage of Crook,* 211 Ill.2d 437, 813 N.E.2d 198, 286 Ill.Dec. 141 (2004), in which the Illinois Supreme Court found that, when a couple lived on a farm owned by the wife and she withdrew funds from a joint checking account to pay off a loan for the construction of a machine shed on the farm, it was not necessary to reimburse the marital estate for the monies withdrawn because the marital estate was already compensated by its use of the property during the marriage.

2. Real estate

   a. Marital home: Address

      Occupied now by

      Purchase price $ Purchase date

      Down payment $ Source

      Mortgage holder

      Present balance $ Monthly payments $

      Additions, improvements Costs $

      Present market value $ Tax basis $

      Real estate taxes $ Insurance $

      How title held

      Legal description

   b. Other: Address

      Annual income $ Expenses $ Net $

      Purchase price $ Purchase date

      Down payment $ Source

      Mortgage holder

Present balance $ Monthly payments $

Additions, improvements Costs $

Present market value $ Tax basis $

Real estate taxes $ Insurance $

How title held

Legal description

NOTE: *See In re Marriage of Johns,* 311 Ill.App.3d 699, 724 N.E.2d 1045, 1049, 244 Ill.Dec. 157 (2d Dist. 2000), finding that the trial court erred in awarding the wife property she owned before the marriage but later placed in joint tenancy with the husband, because the presumption of a gift to the marriage was not overcome. *See McBride v. McBride,* 2013 IL App (1st) 112255, ¶26, 990 N.E.2d 1184, 371 Ill.Dec. 806 (explaining that whether "presumption of gift is overcome" depends on factors such as "making of improvements, payment of taxes and mortgages, occupancy of the property as a home or business, and the extent of control of the property"), citing *In re Marriage of Johns,* 311 Ill.App.3d 699, 703, 724 N.E.2d 1045, 244 Ill.Dec. 157 (2d Dist. 2000).

3. Business interests

Type of business How held

When acquired Source of investment

Value $ Annual net income

NOTE: *See In re Marriage of Blunda,* 299 Ill.App.3d 855, 702 N.E.2d 993, 998 – 999, 234 Ill.Dec. 339 (2d Dist. 1998), holding that the wife's execution of a personal guarantee on a loan for her nonmarital business did not transmute the business into marital property when the loan was repaid by the business and no marital assets were expended. *See also In re Marriage of Romano,* 2012 Ill.App.2d 091339, 968 N.E.2d 115, 360 Ill.Dec. 36 (2d Dist. 2012), holding that trusts the husband established during the marriage were his separate nonmarital property because the husband used proceeds from the sale of nonmarital business entities to fund the trusts.

4. Securities

a. Stocks:

Company

Date of purchase Price $

How held Current value $ Income $

Pledged as security?

How?

Stock options — Vesting schedule

b. Bonds:

Company

Date of purchase Date of maturity

How held Face amount $

Pledged as security?

How?

Market value $ Interest $

5. Automobiles

Year Make Model Title

Where is vehicle?

Date of purchase Cost $ Estimated current value $

Encumbrances Balance due $ Monthly payments $

Pledged as security for any other obligation?

How?

6. Insurance

a. Life insurance

Company Policy number

Insured Beneficiary

Revocable or irrevocable

Type Annual premiums $

Face value $ Cash surrender value $

b. Health and accident insurance

Company Policy number

Coverage

Premium $ Monthly/annually

NOTE: Pursuant to 750 ILCS 5/505.2, the court may impose on a party the duty to provide health insurance coverage for his or her children.

7. Retirement or other employee benefit funds/annuities

Client (vested/unvested) Spouse (vested/unvested)

Name of pension fund, annuity, IRA

Address of pension fund, annuity company, IRA institution

Defined contribution

Defined benefit

Approximate value $

Beneficiary

NOTE: See 750 ILCS 5/503(b)(2). In addition, the Illinois Supreme Court held in *In re Marriage of Mueller,* 2015 IL 117876, ¶22, 34 N.E.3d 538, 393 Ill.Dec. 337, that social security benefits may not be divided directly or used as a basis for offset during state dissolution proceedings and, therefore, the husband's social security benefits could not be considered as an offset against his share of the wife's pension. If one of the spouses only paid into a state pension and not social security, then see the social security windfall elimination provision, which states that the spouse who only paid into the state pension system cannot qualify for the full amount of a spouse's award from social security. See also 42 U.S.C. §415(a)(7). *But see, e.g., In re Marriage of Wojcik,* 362 Ill.App.3d 144, 838 N.E.2d 282, 297 Ill.Dec. 795 (2d Dist. 2005), citing 750 ILCS 5/504(a)(10) as authority for courts to consider social security benefits as sources of income when awarding maintenance.

8. Furniture and appliances

Number and type of rooms

Original cost of furniture $

Indebtedness $ Creditor

Monthly payments $ Replacement cost $

9. Jewelry Furs Paintings

10. Personal injury and worker's compensation claims

    a. When occurred?

    b. Status

    c. Judgment, awards, or settlement

    d. Attorneys involved

NOTE: *See In re Marriage of DeRossett,* 173 Ill.2d 416, 671 N.E.2d 654, 656, 219 Ill.Dec. 487 (1996), holding that a spouse's worker's compensation award from a claim arising during marriage constitutes marital property under the IMDMA. *See also In re Marriage of Oden,* 394 Ill.App.3d 392, 917 N.E.2d 13, 18, 334 Ill.Dec. 416 (4th Dist. 2009) (holding that personal injury awards from claims arising during marriage is marital property under IMDMA.)

11. Other assets

    Type When acquired

    Value $ How title held

12. Debts

    Creditor's name

    Who incurred debt?

    Reason for debt

    Original balance

    Current balance

    How debt is paid?

        Marital accounts

        Who is responsible to see debt is paid?

    Any assets pledged as security?

Does client have financial ability to pay debts?

During case

After judgment

Does spouse have financial ability to pay debts?

During case

After judgment

Should the client be referred to a bankruptcy attorney?

13. Income tax return

Are copies available? (If copies are not available, the client, as joint taxpayer, can obtain photocopies from the IRS for a nominal fee.) See IRS Forms 4506 and 4506-T.

Type of most recent tax return joint/separate

Income reported $

Estimated tax for current year $

Payment on estimated tax $

Any change in income since last return?

(If the couple intends to file separate returns during pendency of the suit, allocation of estimated tax payments should be considered.)

14. General information

Does client or spouse have a safe-deposit box?

Client — Where Contents

Spouse — Where Contents

Will spouse attempt to hide property in event of divorce proceedings?

Any property in hands of third parties?

What?

Who is third party?

Value?

Has client made a will? Where located?

How is estate distributed?

Has spouse made a will? Where located?

How is estate distributed?

V. Client's Budget

NOTE: To obtain an award of support and maintenance for the client and the children in excess of, or less than, that provided for by statute, the lawyer must assemble and present to the court all pertinent information. The factors set forth in 750 ILCS 5/504 and 5/505 should be scrutinized by counsel in determining the needs and resources of the client and the children of the marriage. The following items will help the lawyer substantiate the amount requested for maintenance and/or child support. See 750 ILCS 5/504 for maintenance guidelines, and 750 ILCS 5/505 for shared income child support guidelines.

In all divorce and family law cases that involve financial issues, parties must complete and tender to the opposing party a financial affidavit, signed under oath and under penalties of perjury. Under 750 ILCS 5/501, a party to a proceeding under the IMDMA can petition the court for "temporary relief" including, but not limited to "temporary maintenance or temporary support of a child of the marriage entitled to support." In support of the petition, the petitioning party must submit "an affidavit as to the factual basis for the relief requested." 750 ILCS 5/501(a)(1). Under 750 ILCS 5/501, parties are to use the Illinois Supreme Court approved statewide Financial Affidavit form. Parties are to submit "documentary evidence" in support of their financial affidavits, "including, but not limited to, income tax returns, pay stubs, and banking statements." *Id*. Attorneys should consult local court rules for county-specific rules regarding time requirements, duties to update, and repercussions for failure to comply with court rules related to financial affidavits. See, *e.g.,* Illinois Rule Cook County Circuit Court Rule 13.3.1; Illinois Rule Circuit Court DuPage County 15.05; Illinois Rule Circuit Court Lake County 4-3.02. Effective January 1, 2016, the IMDMA was revised to include the following provision:

> **If a party intentionally or recklessly files an inaccurate or misleading financial affidavit, the Court shall impose significant penalties and sanctions including, but not limited to, costs and attorney's fees.** 750 ILCS 5/501.

Once the attorney has been retained, the attorney should inform the client about financial affidavit requirements. The attorney should instruct the client to begin completing the Illinois approved form and compiling his or her last two calendar years of federal and state income tax returns, together with all W-2s, 1099s, and other forms as well as copies of his or her five most recent paycheck

stubs and copies of his or her last two years of bank statements for all checking, savings, money market, and/or CD accounts. It is best practice to begin working with clients on this process as soon as possible to ensure that clients are able to obtain financial relief expeditiously. It is also important that this document be detailed and accurate, and it may take substantial time to complete.

A. Income

The amendments to 750 ILCS 5/504(b-3) provide that "gross income" shall have the same meaning for maintenance calculations as it has for child support calculations; 750 ILCS 5/505(a)(3)(A) and 750 ILCS 5/505(a)(3)(B) respectively set forth the definitions of "gross income" and "net income."

NOTE: *See In re Marriage of McGowan,* 265 Ill.App.3d 976, 638 N.E.2d 695, 698, 202 Ill.Dec. 827 (1st Dist. 1994) (in which appellate court held that father's military allowances that were beyond base pay were to be included in his income for purposes of determining child support obligations); *In re Marriage of Klomps,* 286 Ill.App.3d 710, 676 N.E.2d 686, 688, 221 Ill.Dec. 883 (5th Dist. 1997) (in which appellate court held that father's military pension constituted income for purposes of determining child support obligation); *Illinois Department of Public Aid ex rel. Jennings v. White,* 286 Ill.App.3d 213, 675 N.E.2d 985, 986, 221 Ill.Dec. 561 (3d Dist. 1997) (holding that father's personal injury settlement under Federal Employer's Liability Act was income for child support purposes). In *In re Marriage of Minear,* 181 Ill.2d 552, 693 N.E.2d 379, 382, 230 Ill.Dec. 250 (1998), the Illinois Supreme Court held that the husband-father, who operated a gasoline service station, could not deduct business depreciation expenses from his net income for purposes of determining child support and maintenance. In *In re Marriage of Worrall,* 334 Ill.App.3d 550, 778 N.E.2d 397, 401, 268 Ill.Dec. 411 (2d Dist. 2002), the court found that the entire amount of the per diem travel allowance the father received could be reduced by the amount actually used for travel expenses with the father having the burden of proof; however, the remainder was to be included in his income in the determination of his child support obligation. *But see In re Marriage of Davis,* 287 Ill.App.3d 846, 679 N.E.2d 110, 116, 223 Ill.Dec. 166 (5th Dist. 1997), in which the court found that the noncustodial father's repayment of student loans for the benefit of his daughter was deductible from his gross income in determining net income for child support. *But see In re Marriage of Shores,* 2014 IL App (2d) 130151, ¶1, 11 N.E.3d 35, 381 Ill.Dec. 672, in which the court ruled that a work-performance bonus was income when the bonus was received rather than when it was earned.

1. Marital income

Earnings by client		Earnings by spouse	
Gross	Net	Gross	Net

2. Nonmarital income

Client		Spouse	
Gross	Net	Gross	Net

3. Children's income

Sources

Gross Net

NOTE: In *Jacobson v. Department of Public Aid,* 171 Ill.2d 314, 664 N.E.2d 1024, 1026, 216 Ill.Dec. 96 (1996), the Illinois Supreme Court held that §10-2 of the Illinois Public Aid Code, 305 ILCS 5/1-1, *et seq.,* violated constitutional equal protection by requiring parents to reimburse the Department of Public Aid for Aid to Families with Dependent Children (AFDC) payments made to 18- to 20-year-old children living within their home, while not imposing the reimbursement requirement on parents whose 18- to 20-year-old children live outside the home.

If the client has sufficient income from salary or separate property to meet his or her needs, the client may not be successful in a request for maintenance and/or attorneys' fees. 750 ILCS 5/504, 5/508.

B. Client's monthly expenses

1. Household operation

a. Rent/Mortgage payments $

Insurance (1/12) $

Property taxes (1/12) $

b. Utilities

Fuel and electrical $

Water $

Telephones $

Garbage $

c. Repairs, service calls $

d. Installment payments on furniture, etc. $

e. Replacement costs $

f. Cleaning and laundry $

g. Food $

Total $

NOTE: If the client has had to move in with relatives or friends to survive, the above should be figured as if the client were living independently, as well as a second set of calculations as to what the client's actual expenses are while living with relatives or friends.

2. Children

   (Expenses in addition to household operation)

   a. Clothing $

   b. School lunches, milk $

   c. Medical and dental care

      Doctor $

      Dentist $

      Special $

   d. Allowances $

   e. Lessons, tutoring $

   f. Recreation, summer camp $

   g. Childcare $

      Total $

3. Personal expenses of client

   a. Clothing $

   b. Medical and dental care $

   c. Cosmetics, beauty care $

   d. Drugs, glasses, etc. $

   e. Allowances for miscellaneous $

   f. Recreation $

   g. Educational, cultural $

h. Dues in clubs, etc. $

i. Costs of employment (dues, uniforms, etc.) $

j. Vacations $

k. Other $

Total $

4. Transportation

a. Public $

b. Automotive $

Gas and oil $

Repairs, maintenance $

Installment payments $

Insurance (1/12) $

License (1/12) $

Parking $

5. Income taxes if income is not from salary $

a. Federal $

b. State $

Total $

6. Insurance

a. Life insurance $

b. Health and accident $

c. Other $

Total $

7. Miscellaneous expenses

   a. Payments on personal loans $

   b. Newspapers, periodicals $

   c. Pets $

   d. Other $

   Total $

C. Recapitulation

Household operation $

Children $

Personal expenses of client $

Transportation $

Income taxes $

Insurance $

Miscellaneous $

Client's total monthly expenses $

D. Marital debts

Reason for debt

	Balance	Payments
1. Creditor		
2. Creditor		
3. Creditor		
Total		

E. Nonmarital debts

Reason for debt

Balance Payments

1. Creditor

2. Creditor

3. Creditor

Total

3. [1.7] Checklist for Lawyer's Evaluation

The checklist is a tool for the guidance of the lawyer but is not a substitution for counsel's own analysis of the particular case. This basic evaluation checklist gives the lawyer some important preliminary information to help assess the scope of the case.

Evaluation Checklist

A. Reconciliation or dissolution

1. Does client want a dissolution? yes/no/undecided

2. Are client's best interests served by attempting a reconciliation?

3. What steps, if any, can be taken toward effecting reconciliation?

   a. Marriage counselor

   b. Religious leader

   c. Psychologist or psychiatrist

4. Is a reconciliation likely?

5. Does matter require any prompt action to protect client's interests during any reconciliation attempt?

B. Preliminary proceedings

NOTE: Under 750 ILCS 5/501, a party to a proceeding under the IMDMA may move for temporary maintenance or child support and/or a temporary order (a) restraining any person from transferring, encumbering, concealing, or otherwise disposing of assets; (b) enjoining a party from removing a

child from the jurisdiction of the court; (c) enjoining a party from striking or interfering with the personal liberty of the other party or of any child; or (d) providing other appropriate temporary or injunctive relief. *See, e.g., In re Marriage of Hartney,* 355 Ill.App.3d 1088, 825 N.E.2d 759, 761, 292 Ill.Dec. 171 (2d Dist. 2005), in which the court reversed the trial court's dismissal of a wife's petition for injunctive relief seeking to prevent her husband from liquidating and dissipating marital assets. In addition, interim attorneys' fees and costs may be summarily awarded pursuant to §§501 and 508 on the basis of one or more affidavits after the court considers the relevant statutory factors. See 750 ILCS 5/501, 5/508.

1. Are immediate protective orders and/or a request for exclusive possession of the property necessary? (See the Illinois Domestic Violence Act of 1986, 750 ILCS 60/101, *et seq.,* the IMDMA, and the Code of Criminal Procedure). Inquire about the client's safety indirectly or directly. For example, ask questions like: "How does your partner treat you?" "Do you feel safe in your relationship?" "Are you afraid of your partner?" "Do you feel you are in danger?" See Stanford Medicine, Domestic Abuse: Screening: How to Ask, https://domesticabuse.stanford.edu/screening/how.html.

   Persons Property

2. Preliminary motion for temporary relief re:

   a. Temporary maintenance and/or child support

   b. Temporary allocation of parental responsibilities: parenting time and decision-making

   c. Attorneys' fees and costs (See 750 ILCS 5/501(c-1) and 5/508 regarding awards of interim attorneys' fees and costs.)

   d. Is a receiver to manage property during pendency of proceedings needed?

   e. Appointment of accountant and fee

   f. Restraining orders against:

      Dissipation of property

      Entering premises Prohibiting abuse

      Removing children from state

   g. Payment of accrued debts

   h. Exclusive Possession of the property

C. Petition

1. Did client authorize filing a petition? When?

2. Prayer

a. Dissolution, legal separation, or declaration of invalidity of marriage

b. Support under income shares

Temporary child support/permanent child support

Amount per Family Law Software calculations

c. Allocation of parental responsibilities

Parenting time

Decision-making

d. Temporary maintenance/permanent maintenance

Amount

e. Division of property

All Equitable

What major items does client want?

f. Restraining order

Preliminary injunction Permanent injunction

g. Receiver

h. Attorneys' fees and costs

i. Payment of accrued debts

j. Payment of income tax; hold-harmless clause

k. Accountant and fees

D. Property settlement agreement

1. Is an agreement desirable?

2. Has client given all necessary information?

E. Agreement as to parental responsibilities and parenting time

1. Can parties make amicable arrangements for children?

2. Should parenting time be specific?

F. Financial arrangements with client

1. Established fee $

2. Received on account of fee $ Date

3. Received on account of costs $ Date

4. Arrangements for balance

G. Next interview

1. Scheduled for

2. Should any persons giving assistance to client be consulted before next interview? If so, always disclose to client who will be consulted.

H. Remarks:

B. [1.8] Advice to Client

After securing the information the attorney deems necessary or appropriate to understand the client's situation, the lawyer should be ready to explain the advantages and disadvantages of the various types of legal action or reconciliation.

1. [1.9] In General

The question is not necessarily whether the client should proceed with a legal action. The lawyer should provide advice regarding pursuing dissolution, legal separation, declaration of invalidity of marriage, pursuing conciliation, etc. The lawyer should have determined what, if any, reasons exist for the action sought by the client and the likelihood of the client or the opponent obtaining the desired judgment.

2. [1.10] Parental Responsibilities and Parenting Time; Can the Child Be Relocated from the Hometown of the Parties

Once a proceeding for dissolution, legal separation, or invalidity is instituted in Illinois, the court exercises complete control over the issues dealing with the minors if the jurisdiction requirements of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), 750 ILCS 36/101, *et seq.,* are met. All issues of parental responsibilities, parenting time, and the relocation of minor children from the parties' hometown are discretionary with the trial court. This discretion exists under dissolution, separation, invalidity, or modification proceedings or, in the absence of these, an allocation proceeding. 750 ILCS 5/601.2.

The primary standards for issues dealing with the children are (a) whether the court has jurisdiction to decide the issue and (b) if so, what is in the best interests of the children. To reach these determinations, the court will consider the jurisdictional requirements of the UCCJEA and whether the court can exercise jurisdiction. The following factors will be considered by the court in making a decision: (a) the wishes of the parents and child as to the parental responsibilities and parenting time of the child; (b) the interrelationship of the child with parents, siblings, or others who may significantly affect the child's best interests; (c) the child's adjustment to home, school, and community; (d) the mental and physical health of all involved; (e) the existence or threat of physical violence or ongoing abuse in the home; (f) the willingness and ability of each parent to encourage a close and continuing relationship between the other parent and the child; (g) whether one of the parents is a sex offender; and (h) the terms of a parent's military family care plan that a parent must complete before deployment if a parent is a member of the U.S. armed forces who is being deployed. 750 ILCS 5/602.7(b-17).

If shared or split parental responsibilities and/or parenting time is to be considered, see 750 ILCS 5/602.3, 5/602.5, and 5/602.7.

In *Szafranski v. Dunston,* 2013 IL App (1st) 122975, 993 N.E.2d 502, 373 Ill.Dec. 196, a case of first impression, the trial court awarded pre-embryos to the mother after the couple separated. The appellate court ruled that the resolution for the dispute over pre-embryos was to honor the parties' mutually expressed intent set forth in prior agreements, and the case was remanded for review under the contract approach. *Id*.

Adopted May 24, 2023, Illinois Supreme Court Rule 909 allows circuit courts across Illinois to adopt their own rules allowing for the appointment of "parenting coordinators" in prejudgment and postjudgment divorce and family law cases. S.Ct. Rule 909. Unlike a guardian ad litem appointed by a court, a parenting coordinator is expressly prohibited from "mak[ing] recommendations as to: (1) allocation of parental responsibilities for decision making." *Id.* Instead, the position seeks to fill a unique need for assisting "coparents engaged in high-conflict coparenting." S.Ct. Rule 909(b). Parenting coordinators will primarily work on behalf of courts to assist coparents in resolving minor disagreements, such as matters related to their parenting plans. *Id.*

Rarely will a court deny or substantially restrict parenting time of one parent unless it can be established by a preponderance of the evidence that the best interests of the child require the denial

or restriction of the parent's parenting time. See 750 ILCS 5/602.7, 5/603.10. This has been difficult to establish. "To restrict visitation rights the court must find that the child's physical, mental, moral or emotional health is endangered. . . . The endangerment standard is an onerous one." [Citations omitted.]. *In re Marriage of Hanson,* 112 Ill.App.3d 564, 445 N.E.2d 912, 915, 68 Ill.Dec. 268 (5th Dist. 1983). *See In re Marriage of Dunn,* 155 Ill.App.3d 247, 508 N.E.2d 250, 256, 108 Ill.Dec. 89 (4th Dist. 1987), which held that a trial court's decision to terminate visitation rights of a father on the grounds of alleged sexual abuse was against the manifest weight of the evidence in light of contradictory testimony presented by the father. *But see In re Marriage of Ashby,* 193 Ill.App.3d 366, 549 N.E.2d 923, 930, 140 Ill.Dec. 272 (5th Dist. 1990), in which the termination of the father's visitation rights was upheld based on a determination that the father had sexually abused his two-year-old daughter during his visitation, thereby seriously endangering the child's physical, moral, mental, or emotional health, and *In re Marriage of Fields,* 283 Ill.App.3d 894, 671 N.E.2d 85, 92 – 93, 219 Ill.Dec. 420 (4th Dist. 1996), holding that although the trial court did not err in requiring the custodial mother to prove that unrestricted visitation with the father, who was accused of sexually abusing one of his children, would seriously endanger the children, the court improperly applied the serious-endangerment standard in determining whether the father should undergo counseling, since counseling is not a restriction on visitation.

It should be noted, however, that the reluctance of courts to restrict the visitation rights of parents does not extend to grandparent visitation. In *Schweigert v. Schweigert,* 201 Ill.2d 42, 772 N.E.2d 229, 265 Ill.Dec. 191 (2002), the Illinois Supreme Court held that §607(b) of the IMDMA allowing grandparent visitation privileges over the objection of a parent is facially unconstitutional since it interferes with the constitutional right of parents to make decisions concerning the care, custody, and control of their children without unwarranted state intrusion. 750 ILCS 5/607 has been repealed effective January 1, 2016. See 750 ILCS 5/602.9 for the latest statute dealing with grandparent visitation. *See also Wickham v. Byrne,* 199 Ill.2d 309, 769 N.E.2d 1, 8, 263 Ill.Dec. 799 (2002) (holding statute allowing grandparent visitation unconstitutional because it violates Due Process Clause of Fourteenth Amendment). *See also In re V.S.,* 2022 IL App (2d) 210667, 186 N.E.3d 1125, 453 Ill.Dec. 91, finding that §602.9(c)(1)(E) of the grandparent visitation statute does not apply in the adoption context but holding that as long as a grandparent can demonstrate he or she satisfies one of the conditions listed in §§602.9(c)(1)(A) through 602.9(c)(1)(D) with respect to either the adoptive parents or biological parents, a grandparent may petition a court for visitation under 750 ILCS 5/602.9.

In cases of abuse of parenting time, there is an expedited procedure for enforcement of court-ordered parenting time. Abuse of parenting time occurs when a parent willfully and without justification interferes with or denies the other parent parenting time or a parent exercises parenting time in a manner that is harmful to the child or the child's parent. See 720 ILCS 5/607.5 for possible penalties for violations of parenting time orders, including suspension of driving privileges, probation, imprisonment, and fines.

Before a minor child who is under the protection of the court because of dissolution, separation, or invalidity proceedings can be relocated, the parent must apply to the court to be allowed to relocate the minor. 750 ILCS 5/609.2. This section provides the court with the authority to allow the relocation under such bond or security requirements as the court deems reasonable to ensure the return of the minor child upon order of the court.

Until 2003, removal was not specifically addressed by the Parentage Act. *See Fisher v. Waldrop,* 221 Ill.2d 102, 849 N.E.2d 334, 302 Ill.Dec. 542 (2006). However, the legislature amended the Act to address relocation, incorporating 750 ILCS 5/609 with respect to initial judgments and the modification of judgments. 750 ILCS 5/609 was repealed effective January 1, 2016, and replaced with 750 ILCS 5/609.2. The Parentage Act requires the custodial parent seeking relocation to petition the court for leave to do so. See 750 ILCS 46/808 incorporating the requirements of 750 ILCS 5/609.2. The custodial parent must meet the burden of showing that relocation is in the child's best interests, regardless of whether the noncustodial parent would or has sought to enjoin relocation.

750 ILCS 5/602.7(d) allows "a parent who is deployed or who has orders to be deployed as a member of the United States Armed Forces to designate a person known to the child to exercise reasonable substitute visitation on behalf of the deployed parent, if the court determines that substitute visitation is in the best interests of the child."

3. [1.11] Support and Maintenance

Temporary maintenance, court costs, and attorneys' fees are provided for in 750 ILCS 5/501, 5/504, and 5/508, while temporary parental responsibilities and parenting time of children and provisions for their temporary support and maintenance are contained in 5/501 and 5/603.5.

Pursuant to 750 ILCS 5/504(a), the court shall first make a finding as to whether a maintenance award is appropriate, after consideration of all relevant factors including:

(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance as well as all financial obligations imposed on the parties as a result of the dissolution of marriage;

(2) the needs of each party;

(3) the realistic present and future earning capacity of each party;

(4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;

(5) any impairment of the realistic present or future earning capacity of the party against whom maintenance is sought;

(6) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment;

(6.1) the effect of any parental responsibility arrangements and its effect on a party's ability to seek or maintain employment;

(7) the standard of living established during the marriage;

(8) the duration of the marriage;

(9) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and the needs of each of the parties;

(10) all sources of public and private income including, without limitation, disability and retirement income;

(11) the tax consequences to each party;

(12) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;

(13) any valid agreement of the parties; and

(14) any other factor that the court expressly finds to be just and equitable.

If the court determines maintenance is appropriate and the combined gross incomes of the parties is $500,000 or less, then the court is to apply the guidelines set out in 504(b-1):

(b-1) Amount and duration of maintenance. Unless the court finds that a maintenance award is appropriate, it shall bar maintenance as to the party seeking maintenance regardless of the length of the marriage at the time the action was commenced. Only if the court finds that a maintenance award is appropriate, the court shall order guideline maintenance in accordance with paragraph (1) or non-guideline maintenance in accordance with paragraph (2) of this subsection (b-1). If the application of guideline maintenance results in a combined maintenance and child support obligation that exceeds 50% of the payor's net income, the court may determine non-guideline maintenance in accordance with paragraph (2) of this subsection (b-1), non-guideline child support in accordance with paragraph (3.4) of subsection (a) of Section 505, or both.

(1) Maintenance award in accordance with guidelines. If the combined gross annual income of the parties is less than $500,000 and the payor has no obligation to pay child support or maintenance or both from a prior relationship, maintenance payable after the date the parties' marriage is dissolved shall be in accordance with subparagraphs (A) and (B) of this paragraph (1), unless the court makes a finding that the application of the guidelines would be inappropriate.

(A) The amount of maintenance under this paragraph (1) shall be calculated by taking 33 1/3% of the payor's net annual income minus 25% of the payee's net annual income. The amount calculated as maintenance, however, when added to the net income of the payee, shall not result in the payee receiving an amount that is in excess of 40% of the combined net income of the parties.

(A-1) Modification of maintenance orders entered before January 1, 2019 that are and continue to be eligible for inclusion in the gross income of the payee for federal income tax purposes and deductible by the payor shall be calculated by taking 30% of the payor's gross annual income minus 20% of the payee's gross annual income, unless both parties expressly provide otherwise in the modification order. The amount calculated as maintenance, however, when added to the gross income of the payee, may not result in the payee receiving an amount that is in excess of 40% of the combined gross income of the parties.

(B) The duration of an award under this paragraph (1) shall be calculated by multiplying the length of the marriage at the time the action was commenced by whichever of the following factors applies: less than 5 years (.20); 5 years or more but less than 6 years (.24); 6 years or more but less than 7 years (.28); 7 years or more but less than 8 years (.32); 8 years or more but less than 9 years (.36); 9 years or more but less than 10 years (.40); 10 years or more but less than 11 years (.44); 11 years or more but less than 12 years (.48); 12 years or more but less than 13 years (.52); 13 years or more but less than 14 years (.56); 14 years or more but less than 15 years (.60); 15 years or more but less than 16 years (.64); 16 years or more but less than 17 years (.68); 17 years or more but less than 18 years (.72); 18 years or more but less than 19 years (.76); 19 years or more but less than 20 years (.80). For a marriage of 20 or more years, the court, in its discretion, shall order maintenance for a period equal to the length of the marriage or for an indefinite term.

(1.5) In the discretion of the court, any term of temporary maintenance paid by court order under Section 501 may be a corresponding credit to the duration of maintenance set forth in subparagraph (b-1)(1)(B).

(2) Maintenance award not in accordance with guidelines. Any non-guidelines award of maintenance shall be made after the court's consideration of all relevant factors set forth in subsection (a) of this Section.

(b-2) Findings. In each case involving the issue of maintenance, the court shall make specific findings of fact, as follows:

(1) the court shall state its reasoning for awarding or not awarding maintenance and shall include references to each relevant factor set forth in subsection (a) of this Section;

(2) if the court deviates from applicable guidelines under paragraph (1) of subsection (b-1), it shall state in its findings the amount of maintenance (if determinable) or duration that would have been required under the guidelines and the reasoning for any variance from the guidelines; and

(3) the court shall state whether the maintenance is fixed-term, indefinite, reviewable, or reserved by the court.

(b-3) Gross income. For purposes of this Section, the term "gross income" means all income from all sources, within the scope of that phrase in Section 505 of this Act, except maintenance payments in the pending proceedings shall not be included.

(b-3.5) Net income. As used in this Section, "net income" has the meaning provided in Section 505 of this Act, except maintenance payments in the pending proceedings shall not be included.

(b-4) Modification of maintenance orders entered before January 1, 2019. For any order for maintenance or unallocated maintenance and child support entered before January 1, 2019 that is modified after December 31, 2018, payments thereunder shall continue to retain the same tax treatment for federal income tax purposes unless both parties expressly agree otherwise and the agreement is included in the modification order.

(b-4.5) Maintenance designation.

(1) Fixed-term maintenance. If a court grants maintenance for a fixed term, the court shall designate the termination of the period during which this maintenance is to be paid. Maintenance is barred after the end of the period during which fixed-term maintenance is to be paid.

(2) Indefinite maintenance. If a court grants maintenance for an indefinite term, the court shall not designate a termination date. Indefinite maintenance shall continue until modification or termination under Section 510.

(3) Reviewable maintenance. If a court grants maintenance for a specific term with a review, the court shall designate the period of the specific term and state that the maintenance is reviewable. Upon review, the court shall make a finding in accordance with subdivision (b-8) of this Section, unless the maintenance is modified or terminated under Section 510.

(b-5) Interest on maintenance. Any maintenance obligation including any unallocated maintenance and child support obligation, or any portion of any support obligation, that becomes due and remains unpaid shall accrue simple interest as set forth in Section 505 of this Act.

750 ILCS 5/504(b-5) and 5/504(b-7) were added January 1, 2006, providing that any maintenance obligation (including unallocated maintenance and child support) that becomes due and remains unpaid shall accrue simple interest at a rate of nine percent per annum. See 735 ILCS 5/12-109, 5/2-1303. See also 750 ILCS 5/505(b), regarding the accrual of interest on unpaid child support obligations.

If the circumstances of the parties change sufficiently from the time the court originally awarded temporary or permanent maintenance, parental responsibility and parenting time, and

support for the minor children, the court may change these as the needs of the children and parties dictate. 750 ILCS 5/510, 5/610.5. Furthermore, an order for child support may be modified without the necessity of showing a substantial change in circumstances under certain limited conditions. See 750 ILCS 5/510(a)(2).

A trial court may order a parent with the majority of parental time to pay child support to the other parent when warranted by the circumstances and the best interest of the child. *In re Marriage of Turk,* 2014 IL 116730, 12 N.E.3d 40, 382 Ill.Dec. 40.

4. [1.12] Temporary Maintenance and Attorneys' Fees

Either spouse may move for temporary maintenance under 750 ILCS 5/501 and/or for an award of interim attorneys' fees and costs pursuant to §§501 and 508 of the IMDMA. A request for temporary maintenance must be accompanied by an affidavit setting forth the factual basis for the relief sought, using the factors enumerated in IMDMA §504.

Unless "good cause" is shown, a proceeding for interim attorneys' fees and costs is summary and non-evidentiary in nature. A petition seeking such relief must be supported by one or more affidavits delineating the relevant statutory factors to be considered by the court. See 750 ILCS 5/501(c-1)(1), 5/508(a). Any assessment of an interim award is to be without prejudice to any final allocation and without prejudice as to any claim or right of the parties or counsel of record at the time of the award. Any interim fee award shall be deemed to be an advance from the marital estate of the party to whom the interim fee award was made. 750 ILCS 5/501(c-1)(2).

An advanced payment retainer is also subject to disgorgement and can be turned over following a petition for interim attorneys' fees. *In re Marriage of Earlywine,* 2013 IL 114779, ¶29, 996 N.E.2d 642, 374 Ill.Dec. 947. Since the Illinois Supreme Court's decision in 2013, the court has had an opportunity to clarify its holding in *Earlywine* and further consider which fees previously paid to an attorney may be subject to disgorgement under the IMDMA. *See In re Goesel,* 2017 IL 122046, 102 N.E.3d 230, 421 Ill.Dec. 949. In *Goesel,* the Illinois Supreme Court distinguished the facts of *Earlywine,* which unlike *Goesel,* contained "no argument or discussion . . . about what portion of the retainer had been earned." 2017 IL 122046 at ¶18. The court considered the approaches of two district courts that had previously considered "the precise issue of whether earned fees are subject to disgorgement." 2017 IL 122046 at ¶19. Ultimately, the Illinois Supreme Court agreed with the approach and reasoning of the First District Appellate Court in *In re Altman,* 2019 IL App (1st) 143076, 59 N.E.3d 914, 406 Ill.Dec. 136, and rejected the approach of the Second District Court of Appeal in *Goesel, supra.* In adopting the approach of the First District Court of Appeals, the Illinois Supreme Court held that "[a]bsent such an explanation from the legislature, we hold that fees that have been earned by an attorney are not subject to disgorgement." 2017 IL 122046 at ¶35. The *Goesel* court called for the legislature to clarify "what it means by 'available funds' and explain whether this includes fees that the attorney has earned, whether attorneys who are no longer in the case may also be ordered to disgorge fees, and whether it is a defense to disgorgement that the attorney no longer has the money." *Id*. Notably, since the *Goesel* decision calling on the Illinois legislature to clarify its intent behind 750 ILCS 5/501(c-1)(3), the Illinois legislature has not made any such substantive revisions to the statute.

5. [1.13] Indefinite Maintenance

For information regarding indefinite maintenance, see amended 750 ILCS 5/504 set forth in §1.11 above. Note that, under 750 ILCS 5/504(b-1)(1)(B), guidelines on the duration of maintenance are set forth, which are to be based on the length of the marriage. The statute provides that under appropriate circumstances the court can deviate from these guidelines; however, just as the child support guidelines set forth in 750 ILCS 5/505 have become difficult to convince a judge to deviate from, the same will happen with the guidelines set forth in 750 ILCS 5/504(a). Consequently, any marriage over 20 years is a prima facia case for indefinite maintenance.

750 ILCS 5/504 provides for maintenance, 750 ILCS 5/503 provides for a settlement in lieu of maintenance, and 750 ILCS 5/510 provides for a modification of the judgment incorporating the maintenance award. Under these provisions, the court has broad discretion to order either spouse to pay maintenance and support on proper evidence. Payments may be made monthly for an indefinite period, or the court may order either party to convey real or personal property in gross or by installments over a definite period as settlement in lieu of maintenance. If the circumstances of a particular case require it, the court may order either party to give security for the performance of the maintenance payments as ordered by the court as well as the completion of a property award or settlement. 750 ILCS 5/706.2.

If the party who is to receive support is a recipient of Illinois public aid, the court may direct the party paying support to make the payments directly to the appropriate department. 750 ILCS 5/704.

Unless there has been an express waiver or judicial finding that maintenance is to be denied, the court retains continuing jurisdiction for purposes of maintenance. It may grant maintenance, even after judgment in the initial court proceedings, or may amend or terminate maintenance. What action the court will take will depend on the evidence presented and whether the court has appropriate jurisdiction over the parties. 750 ILCS 5/504, 5/510.

If a change of the original maintenance order is sought, the petitioning party must establish by competent evidence a change of circumstances of either party. 750 ILCS 5/510.

If the party directed to pay support refuses, the party who is to receive support may apply for contempt sanctions as well as for the imposition of a payroll withholding order. 750 ILCS 5/706.1. In addition, the court may order suspension of the offending party's Illinois driving privileges until he or she is in compliance with an order of support. 750 ILCS 5/505. If the court should see fit to imprison the nonpaying party, no additional maintenance or support money accrues while the nonpaying party is imprisoned. 750 ILCS 5/504(d). See the Family Financial Responsibility Law, 625 ILCS 5/7-701, *et seq.;* the Non-Support Punishment Act, 750 ILCS 16/1, *et seq.;* and the Income Withholding for Support Act, 750 ILCS 28/1, *et seq.*

NOTE: 750 ILCS 5/507 (payment of maintenance or support to court), §705 (support payments; receiving and disbursing agents), and §709 (mandatory child support payments to clerk) no longer impose any filing, payment transmittal, and notification requirements on circuit clerks who have been notified by the Department of Healthcare and Family Services that a person is receiving child

support enforcement services from the Department. 750 ILCS 46/814 provides that the Department may provide notice to parties to a support action that the Department is providing child support enforcement services, and such notice thereafter entitles the Department to subsequent notice of any further proceedings in the case.

Unless otherwise agreed by the parties in a written separation agreement set forth in a judgment or otherwise approved by the court, upon the remarriage of the spouse receiving permanent maintenance, the death of either party, or cohabitation by the receiving spouse with another person on a continuing conjugal basis, the obligation of the paying spouse terminates as to all future payments. However, maintenance payments accrued before these events must still be made. 750 ILCS 5/510(c).

The parties may agree, pursuant to 750 ILCS 5/502(f), that maintenance payments are not to be modified by the court or the parties in the future. However, the Illinois Supreme Court ruled that this ability to restrict the power of the courts to modify maintenance under §502(f) applies only to dissolution proceedings and not to legal separation proceedings. *In re Marriage of Sutton,* 136 Ill.2d 441, 557 N.E.2d 869, 145 Ill.Dec. 890 (1990).

III. [1.14] DISCHARGE AND SUBSTITUTION OF ATTORNEYS

The client has the right to change attorneys at will. Pursuant to the provisions of §508 of the IMDMA, the written engagement agreement between the attorney and client must have appended to it a verbatim copy of the "Statement of Client's Rights and Responsibilities" set forth in §508(f). 750 ILCS 5/508(f). Under the terms thereof, in the event of an attorney's discharge by the client or withdrawal from representation, the attorney must, within 30 days, turn over to the substituting counsel, or to the client, all original documents and exhibits, together with complete copies of all pleadings and discovery. 750 ILCS 5/508(f)(3).

Section 508(f)(6) provides that the counsel-client relationship is regulated by the Illinois Rules of Professional Conduct (RPC), and any dispute shall be reviewed under the terms of those rules.

Under §508, the court may order the opposite party to pay the former client's attorneys' fees and costs directly to the attorney on behalf of the client. The attorney can enforce such order in his or her own name. Final hearings for fees and costs against an attorney's own client pursuant to a petition for setting the final fees and costs of either counsel or a client are governed by §508(c).

Counsel may also pursue an award and judgment against a former client for legal fees and costs in an independent proceeding under the circumstances specified in 750 ILCS 5/508(e). This section codified the Supreme Court's decision in *Nottage v. Jeka,* 172 Ill.2d 386, 667 N.E.2d 91, 94, 217 Ill.Dec. 298 (1996), which permitted an attorney's common-law contract action against a former client and held that §508(a) of the IMDMA "supplements whatever other remedies an attorney might have in obtaining fees from a client." *But see In re Marriage of Lucht,* 299 Ill.App.3d 541, 701 N.E.2d 267, 233 Ill.Dec. 624 (1st Dist. 1998), holding that an attorney may not file a petition under the IMDMA for attorneys' fees in a divorce action after the case has been voluntarily dismissed, even when the petition is filed within 30 days of the dismissal.

NOTE: In 2006, 750 ILCS 5/508(e) was revised to remove the statutory requirement that independent proceedings for fees be filed within one year and to make plain that the statute of limitations for breach of contract applies to such actions.

IV. ATTORNEY REPRESENTATION

A. [1.15] Limited Representation

An attorney normally enters an appearance for the entire case but now may enter his or her appearance for a limited purpose/scope. See S.Ct. Rule 13(c)(6), Limited Scope Appearance. To enter his or her appearance for a limited scope the attorney must use the form provided in Article I Forms Appendix.

To withdraw his or her limited scope appearance, the attorney must follow the procedure set out in S.Ct. Rule 13(c)(7).

B. [1.16] Dual Representation and Conflict of Interest

It must be made clear from the onset that the attorney will represent only one party and will give only that party the benefit of counsel's professional ability. Parties will often say they have agreed on all issues and need only one lawyer to represent them. However, regardless of how amiable the parties are, the lawyer can fully protect only one party's interest. First, domestic relations cases are extremely fluid, and the parties can easily change their positions. Second, many agreements between the parties are the product of guilt related to matters the parties may not have discussed with the lawyer; therefore, the true reason for the agreement is different from what the lawyer was led to believe and thus subject to change based on the emotional response of the particular moment. Finally, each party should have independent professional attention through the many problems generated by a dissolution or legal separation, regardless of how amiable it is.

A different area of concern arises if the attorney ever represented one or both of the parties in the past. Once an attorney has represented either or both of the parties, the attorney may be barred from representing one of them when the attorney acquired confidential information that could now be used against the previous client. See §1.2 above.

For example, a law firm was disqualified to represent a wife after one of the attorneys had an initial consultation first with the husband. The firm was further denied fees in representation of the wife as the whole contract was void ab initio because it violated RPC 1.9. *See, e.g., In re Marriage of Newton,* 2011 IL App (1st) 090683, 955 N.E.2d 572, 353 Ill.Dec. 105.

1. [1.17] Rules of Professional Conduct

Under RPC 1.7, the lawyer who undertakes to represent multiple clients in a single matter must explain the implications of the common representation and the advantages and risks involved.

If representing a client will be directly adverse to the interests of another client or may be materially limited by the lawyer's responsibilities to another client or a third person, the lawyer shall not represent that client without reasonably believing that the representation will not adversely affect the relationship with the first client and both clients consent. *Id.* This is a less onerous standard than the former Rule 5-105 of the Code of Professional Responsibility, which required a lawyer to decline employment likely to affect the exercise of independent professional judgment adversely unless it was "obvious" that the attorney could represent both interests adequately. A lawyer cannot appear in court representing both sides. After entering into negotiation proceedings attempting to represent both sides, the lawyer may find himself or herself in a position in which he or she is not permitted to represent either side.

NOTE: Effective July 1, 2023, pursuant to the amended RPC 1.5, a lawyer may not include provisions in the engagement letters providing for nonrefundable fees or nonrefundable retainers. Now, under RPC 1.5, "Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees is prohibited." See RPC 1.5 for additional amendments addressing issues related to compensation.

2. [1.18] When Spouse Will Not Hire Lawyer

While a lawyer is no longer under a duty to make full disclosure to an unrepresented spouse, under RPC 4.3, the lawyer must make "reasonable efforts" to make the unrepresented person understand that the lawyer is an advocate for the client and not a disinterested bystander. Counsel should take steps to preserve proof of those efforts.

3. [1.19] Unrepresented Spouse — Procedure and Formal Agreement

Whenever the unrepresented spouse is present, the lawyer, with the unrepresented spouse's consent, should record the conversations with the unrepresented spouse to demonstrate that the refusal to have representation is knowingly and willingly made by the unrepresented spouse. The recording should state that the lawyer does not represent the spouse and should set forth in detail the factual situation. If possible, the lawyer should reduce the agreement to writing and have it signed by the unrepresented spouse. The record should show clearly that the spouse agreed to the recording of the interview and negotiations. An example of such an agreement follows:

This Agreement has been negotiated and prepared by [attorney**], the attorney for [**client**], who advised and informed [**unrepresented spouse**] that the attorney acted solely as counsel for [**client**] and does not advise or represent [**unrepresented spouse**] in this Settlement. [**Attorney**] has advised [**unrepresented spouse**] to secure counsel to represent [**him**] [**her**] in this matter, but [**unrepresented spouse**] refused to do so. [**Unrepresented spouse**] granted [**attorney**] permission to record that conversation. [**Unrepresented spouse**] has carefully read this agreement, fully understands its terms, and willingly signs it.**

_____
/s/

C. [1.20] Contacting Other Spouse Initially

It is neither unethical nor improper for the attorney to contact the spouse who is not yet represented by counsel if the lawyer has been authorized to take that action by the client.

1. [1.21] Procedure

The attorney should send a simple letter advising the other party that the spouse has consulted the attorney about their marital difficulties and requesting that the other party contact an attorney to represent him or her. The letter should then suggest that the two attorneys could arrange for a conference to explore the possibilities of arriving at a satisfactory solution before any court action. It is important to send such a letter even if the client is certain the spouse will not get a lawyer.

2. [1.22] First Interview with Opponent or Attorney

The attorney should interview the spouse of the client in a professional and courteous manner and have another person present to act as a witness to what occurred. The attorney should state that the attorney is talking to the opposing spouse to determine whether a reconciliation is likely. This presupposes that this is an action the client wants taken.

If it appears that no reconciliation is likely, the possibilities of settlement, agreement on money matters, and custody should be fully explored. Counsel should present the spouse with the client's statement relative to earnings, property, etc., and reduce the entire interview to writing as quickly as possible, either during the interview or immediately thereafter.

It is imperative that the attorney maintain objectivity and avoid arguments and heated exchanges with the spouse. The purpose of talking with the spouse should be to gather information and not to fuel the already emotional situation that exists between the client and the spouse.

If the first contact is with the spouse's attorney, the approach is similar, with the goal of gathering information rather than initiating the preliminaries for a heated battle. Domestic relations cases offer more than sufficient opportunities for fighting, and it is the wise attorney who is able to control things so that counsel expends emotional energy only when necessary.

V. [1.23] PRACTICAL CONSIDERATIONS REGARDING AGREEMENTS — FACTORS IN NEGOTIATION

Negotiations for settlement should be foremost in the lawyer's mind, and the attorney should never hesitate to suggest them. The theory that the first lawyer to suggest negotiations is representing a weak position is inane. The attorney should be concerned with properly representing the client, and that can best be done by starting the flow of information as soon as possible.

A. [1.24] Incentives for Trying To Negotiate Settlement

No lawyer has a crystal ball to look into the future, and all cases can take an unsuspected turn during the course of litigation. This uncertainty does not mean that the lawyer should be afraid of litigation, but counsel should be realistic with the client as to why a settlement may be a better way of controlling the outcome. Settlement may be particularly desirable if children are involved.

The federal income tax situation and the effect of the judgment on the client and the children must be considered. The remaining spendable income to both parties can be seriously affected by an improperly drawn or improperly negotiated settlement.

Establishing the client's needs and wants as well as the client's minimum position is a prerequisite for beginning negotiations. Once these are established, the lawyer knows the parameters within which to negotiate. The lawyer should also consider preparing a marital balance sheet as this will assist in determining the scope of the marital and nonmarital estates, what each party may be receiving in the settlement, and if there are any remaining valuation issues.

B. [1.25] Preparation — The Keynote to Success

Thorough preparation through gathering facts and researching and understanding the law is imperative for the lawyer before starting negotiations. With a solid base on which to begin negotiations, counsel will be in a much better position to discuss the situation with the opposing lawyer and to convince the opposing lawyer of the appropriateness of counsel's position in the matter.

When the client seems to be in a big hurry, the attorney should be wary, learn the reasons for the rush, and proceed accordingly.

C. [1.26] Factors for Attorney To Consider in Negotiation

For a settlement to be enforceable in the long run, it must be fair to both sides. If it causes too great a burden on a spouse's future financial ability and earnings, the client may find that the settlement is worthless. The opposite is also true; if the attorney does not negotiate a sufficient settlement for the client, the attorney may be the one in difficulty.

On occasion, while representing a client in a domestic relations case, the attorney will be confronted with a client who is more interested in bloodletting than in the financial arrangements the attorney can work out for the client. The attorney should take a firm stand from the start with this client that it is not the attorney's job to "get even" with the client's spouse for whatever difficulties the client had during the marriage. The attorney's job is to protect the client's interests. If the attorney cannot do this because the client refuses to accept counsel's recommendations, the attorney should withdraw from the case for the peace of mind of counsel and the client.

In any negotiation, the decision of whether to accept the outcome always rests with the client. The attorney can make recommendations, but the client, who must live with the final settlement, is the one who has the final decision. The attorney-client relationship is one of trust and confidence.

The attorney must never force a client to accept a proposed settlement, although it is certainly within the realm of the attorney's responsibility to state to the client what, in the attorney's opinion, the client would receive in a contested matter before a court and how the settlement compares favorably to that.

During negotiations it may be beneficial for the lawyers, with their respective clients, to meet and discuss the situation collectively. It is important that the lawyers maintain control and not allow the situation to become so emotional that nothing is accomplished. When a settlement conference has lasted too long or when irritation or annoyance has begun to develop, it is time to adjourn until a time when the parties and the attorneys are more relaxed. Counsel should always keep the door open for negotiation and never refuse to continue to discuss the problem at a later time because clients often change their positions as the date of trial approaches.

VI. ATTORNEY'S DUTIES AFTER JUDGMENT

A. [1.27] Judgment — Recording and Service

A judgment for dissolution or legal separation is not a lien on real estate until it has been recorded in the county where the real estate is situated. A certificate of entry of the judgment must be signed by the judge and filed with the recorder of the county where the real estate is located. 735 ILCS 5/12-101, *et seq.*

NOTE: In *In re Marriage of King,* 336 Ill.App.3d 83, 783 N.E.2d 115, 270 Ill.Dec. 540 (1st Dist. 2002), *aff'd,* 208 Ill.2d 332 (2003), the appellate court upheld the trial court's grant of a motion to vacate the sheriff's sale of a divorced man's home to pay his attorneys' fees. The court found that the attorneys never created a valid lien against the home because the attorney recorded the court's interlocutory order awarding attorneys' fees rather than the final and appealable dissolution judgment. The court held that the applicable statute requires that the final judgment must be recorded to establish the lien against the real estate located within the county.

If the judgment orders the transfer of one party's interest in real estate to the other, then a deed must be prepared to accomplish that transfer and, after properly signed, recorded in the appropriate county.

If the judgment provides for the division of pension benefits, then an appropriate qualified domestic relations order (QDRO or QILDRO) must be prepared, approved by the parties, approved by the court, and registered with and accepted by the appropriate plan administrator. The better practice is to have the appropriate plan administrator approve the QDRO or QILDRO before a judgment is entered and then submit the QDRO or QILDRO to the judge for approval at the time the judgment is submitted.

If the judgment provides for the division of vehicles, then the appropriate title should be signed by the transferring party and given to the person retaining possession of the vehicle. The party receiving the vehicle title must then forward it to the Illinois Secretary of State in order for the title document to be changed.

B. Advice and Assistance to Client

1. [1.28] Eligibility To Remarry

In Illinois, there is no limitation on the time in which the parties may remarry after entry of judgment for dissolution. Marriage on the same date is inadvisable because there is no way of determining whether the parties were married before or after the hour of the judgment, since, as a matter of law, the date of judgment means the entire day.

The dissolution judgment does not go into effect until it is actually signed by the judge, and it must be explained to the client that the judgment for dissolution often is not signed on the day of the court hearing. It is good practice to advise the client not to remarry until the 30-day period after judgment, in which an appeal could be filed, has passed.

It has been held that the court has no jurisdiction in Illinois to embody in the judgment an injunctional order against remarriage. *People v. Prouty,* 262 Ill. 218, 104 N.E. 387 (1914).

If the statutes of another state prohibit remarriage within a certain time, that prohibition is ineffective in Illinois provided the judgment is final and valid in the state granting the judgment. The party is free to remarry in Illinois.

2. [1.29] Client's Will, Retirement Accounts and Life Insurance After Judgment for Dissolution or Declaration of Invalidity of Marriage

Clients should be warned that their wills are revoked upon dissolution or declaration of invalidity of marriage as far as any benefit to a surviving ex-spouse is concerned. The remainder of the will is unaffected, but any devise to the spouse or any appointment of the spouse as executor, trustee, or guardian is nullified by the judgment. The client, therefore, should be instructed that he or she must immediately make a new will to correct the provisions that have now become null and void. There may be occasions when the client would still prefer that the ex-spouse be the guardian or trustee for the children's account. If this is so, the will should still be redrafted to reinstate the necessary provisions.

Counsel should advise clients to contact their life insurance company and retirement plans to remove the spouse as beneficiary and to name new beneficiaries to receive the life insurance proceeds and retirement plan. On January 1, 2019, 750 ILCS 5/503(b)(5)(1), *et seq.,* went into effect, terminating spousal designations of life insurance policies. In some situations with ERISA-qualified retirement plans (see Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. No. 93-406, 88 Stat. 829), the beneficiary designation will trump the language in the party's judgment, making it important to change the beneficiary designation postjudgment.

3. [1.30] Income Tax Return After Judgment

After a judgment for dissolution or declaration of invalidity of marriage, no joint income tax return can be filed for that year. If a judgment is entered on December 30, the parties are not entitled

to file a joint income tax return even though they were married for all but one day of the year. This is something the attorney should keep in mind when negotiating. If it would be to the client's advantage to file a joint tax return for a particular period, it is wise to consider whether the matter should be set off until after January 1 of the following year.

4. [1.31] Enforcement of Judgment for Dissolution

Regardless of whether the attorney has been paid or is likely to be paid, there is a duty under the local rules of court of some circuits to take the necessary steps to enforce the judgment for dissolution in the first instance of nonpayment or default.

5. [1.32] Police Protection if Client Fears Violence

During the pendency of a suit, a temporary injunction can be obtained to restrain one of the parties from committing violence on the other. When the final judgment is entered, the injunction can be made permanent, although this is unusual. The client should be adequately informed with a copy of the injunction and instructed on how to contact the police should that become necessary. See also the Illinois Domestic Violence Act of 1986, 750 ILCS 60/101, *et seq.*

VII. [1.33] WHAT TO AVOID IN DOMESTIC RELATIONS CASES

In domestic relations cases, counsel should observe the following precautions:

a. Do not make any promises or guarantees that are beyond your control. Assure the client only that you will do your best, but nothing more.

b. Do not be a party to the entry of an unrealistic or unconscionable order with which the spouse will be unable to comply. This will be a great disservice to all parties concerned. Remember that as an attorney, you are an officer of the court and have certain responsibilities and obligations to assist in the preparation of orders and agreements that are fair and equitable. A harsh and unjust order may cause the party to flee from the jurisdiction of the court.

c. Do not be greedy about the fee. Some lawyers treat each case as a one-shot deal, feeling that they never will see the client again. This is a poor attitude. Clients talk. Lawyers' reputations are affected by clients' opinions expressed to others.

d. Do not be cold, unsympathetic, or impatient in dealings with the client. Remember that the client is under tremendous emotional stress and strain and is desperately looking for sympathy and understanding as well as for guidance and advice.

e. Do not take a domestic case if there is any possible conflict of interest as a result of prior dealings with either party.

f. Do not try to build yourself up by tearing down opposing counsel. Such tactics serve no useful purpose. Do the job in an efficient manner without any fanfare, and most clients will appreciate the effort.

g. Do not brag about "connections" you have and the judges you know. This is in poor taste, meaningless, and unethical.

h. Do not get emotionally involved in the matter. This would be a great disservice to you as well as to the litigants.

i. Do not attempt to handle a matrimonial matter that might be too complicated, too involved, or beyond your capabilities. If, for example, there is a custody question of which you are uncertain, research the law and then consult the experts. Tell the client that a specialist will be called in. Check the advance sheets and the reports for someone in the area who has tried such a case. You will usually find ready advice and a willing cocounsel (if the client consents).

VIII. [1.34] BOUNDS OF ADVOCACY — STANDARDS OF CONDUCT

The practice of matrimonial law is in many ways different from other areas of practice. Quality lawyering skills are required in all areas of the practice of law; however, few other areas have the underlying emotion that is inherent in domestic relations cases, with their resultant financial issues and/or judicial intervention into the parent-child relationship.

The underlying emotions evoked in domestic relations cases can and frequently do transfer to the lawyers representing the parties. Perhaps it is the result of wanting to do as lawyers what the parties were unable to do as spouses — make things work the way we want them to.

Whatever the reason, the process, in far too many cases, deteriorates into a war instead of achieving the resolution of underlying marital issues.

In an attempt to improve the practice of matrimonial law, the American Academy of Matrimonial Lawyers has published a booklet entitled *Bounds of Advocacy — Goals for Family Lawyers*. See https://aaml.org. By considering the well-thought-out rules of conduct discussed therein, attorneys will make a contribution to the improvement of the practice of matrimonial law.

2 Attorneys' Fees

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I. Attorney-Client Relationship

A. Forming Relationship
   1. [2.1] Engagement Agreements
   2. [2.2] Maintaining Time Records
      a. [2.3] Who Should Maintain Time Records
      b. [2.4] Details of Writing Time Records
         (1) [2.5] Specificity of time records
         (2) [2.6] Explicit description of conferences
         (3) [2.7] Scrutiny of "revising documents"
         (4) [2.8] Scrutiny of "reviewing documents"
         (5) [2.9] Fees pertaining to cocounsel or substitute counsel
         (6) [2.10] Routine and administrative matters
         (7) [2.11] Duplicative time
      c. [2.12] Contemporaneous Time Records
   3. [2.13] Respecting Fiduciary Duty to Client
      a. [2.14] Burden of Proof as to Financial Matters
      b. [2.15] Consequences of Breach of Fiduciary Duty
   4. [2.16] Obtaining Security for Fees

B. Termination of Relationship
   1. [2.17] Client's Right To Discharge Attorney
   2. [2.18] Attorney's Right To Withdraw from Case

II. Trial Court's Jurisdiction To Award Fees

A. Expiration and Termination of Trial Court's Jurisdiction
   1. [2.19] Normal Expiration of Jurisdiction
      a. [2.20] Deadline for Filing Petition for Award of Fees from Client
      b. [2.21] Deadline for Filing Petition for Contribution from Client's Spouse
      c. Exceptions to Normal Expiration of Jurisdiction
         (1) [2.22] Trial court may retain its jurisdiction by "reserving jurisdiction"
         (2) [2.23] Trial court may regain its jurisdiction if party waives right to object to court's jurisdiction
         (3) [2.24] Trial court retains jurisdiction to award interim fees for appeal if notice of appeal is filed
   2. Termination of Jurisdiction by Acts of Parties
      a. [2.25] Dismissal
      b. [2.26] Voluntary Dismissal
      c. [2.27] Death of Party
      d. [2.28] Remarriage
      e. [2.29] Waiver

B. [2.30] Limited Reacquisition of Jurisdiction After Appeal

I. ATTORNEY-CLIENT RELATIONSHIP

A. Forming Relationship

1. [2.1] Engagement Agreements

Even if it appears that your client will be unable to pay your fees, you should make sure that he or she has a binding legal obligation to do so (*i.e.,* a written engagement agreement) because normally you cannot obtain contribution from your client's spouse if your own client is not obligated to pay. *In re Marriage of Magnuson,* 156 Ill.App.3d 691, 510 N.E.2d 437, 444, 109 Ill.Dec. 569 (2d Dist.), *appeal denied,* 116 Ill.2d 556 (1987); *In re Marriage of Jacobson,* 89 Ill.App.3d 273, 411 N.E.2d 947, 950, 44 Ill.Dec. 581 (1st Dist. 1980); *Gasperini v. Gasperini,* 57 Ill.App.3d 578, 373 N.E.2d 576, 582, 15 Ill.Dec. 230 (1st Dist. 1978). Even if you think your client's spouse will be required to pay, you might be forced to collect from your own client. Many things can happen while a dissolution proceeding is pending: the case may be voluntarily dismissed, your client might win the lottery or receive an inheritance, or your client's spouse might become destitute or die.

Under §508(c) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq.,* if the underlying case was filed on or after June 1, 1997, you cannot file a petition for an award of attorneys' fees against your own client unless you have a written engagement agreement with the Statement of Client's Rights and Responsibilities, as provided in §508(f) of the IMDMA. If you do not have such an agreement, you must file an independent lawsuit (unless the underlying case was filed prior to June 1, 1997). By the same token, without a §508(f) engagement agreement, a client seeking a judicial determination of the amount of the fees owed would also have to file an independent lawsuit against you. 750 ILCS 5/508(c)(2). For a discussion of filing a petition for fees against a client, see §§2.159 – 2.171 below. For a discussion of filing a separate lawsuit against a client, see §§2.172 – 2.179 below.

A written engagement agreement helps resolve disputes about the rights and obligations of the attorney and the client. *In re Marriage of Angiuli,* 134 Ill.App.3d 417, 480 N.E.2d 513, 519, 89 Ill.Dec. 328 (2d Dist. 1985). When the attorney and the client have an express contract for compensation, it will control the issue in the absence of unconscionability or other contractual impropriety. *People v. Kinion,* 97 Ill.2d 322, 454 N.E.2d 625, 73 Ill.Dec. 528 (1983). Any written retainer agreement should clearly define the kind of retainer being paid (whether an engagement, security, or advanced payment retainer). If the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer. See ABA Comment [5], MRPC 1.5.

An advance retainer (one that becomes the attorney's property immediately upon the agreement of the attorney and the client), also referred to as a special purpose retainer, is largely inappropriate for use in the family law setting. Additionally, unearned portions of both advance and general retainers can be ordered to be disgorged. *In re Marriage of Goesel,* 2017 IL 122046, 102 N.E.3d 230, 421 Ill.Dec. 949 (fees that have been earned by attorney are not subject to disgorgement); *In re Marriage of Earlywine,* 2012 IL App (2d) 110730, 972 N.E.2d 1248, 362 Ill.Dec. 215 (pre-*Goesel* holding that advance payment retainers are subject to disgorgement).

2. [2.2] Maintaining Time Records

The amount of reasonably necessary time an attorney spends on a case is the most important factor to be considered by a court in adjudicating a petition for attorneys' fees. *In re Marriage of Powers,* 252 Ill.App.3d 506, 624 N.E.2d 390, 392, 191 Ill.Dec. 541 (2d Dist. 1993); *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1019, 150 Ill.Dec. 207 (1st Dist. 1990).

Thus, the manner in which an attorney keeps his or her time records may ultimately be the most important factor in determining the amount of the fees he or she is awarded, especially at the commencement of the representation. Waiting until you file a petition for your fees to consider your time records may result in the denial of your request for the fees.

a. [2.3] Who Should Maintain Time Records

Lawyers, as well as paralegals, should maintain time records. Law clerks will normally fall within the statutory definition of "paralegal."

b. [2.4] Details of Writing Time Records

Numerous courts have considered the details of maintaining time records. Sections 2.5 – 2.11 below review the various types of time entries that have been upheld, those that have been disallowed, and general guidelines for maintaining proper time records.

(1) [2.5] Specificity of time records

Time records should specifically itemize the services performed, who performed each task, and the time devoted to each task. *In re Marriage of Shinn,* 313 Ill.App.3d 317, 729 N.E.2d 546, 551, 246 Ill.Dec. 173 (4th Dist. 2000); *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 427 – 428, 115 Ill.Dec. 899 (1st Dist. 1987). In order to meet this requirement, time records should be specific. General, vague descriptions of work performed are unacceptable. If the time records contain phrases such as "file review," "court appearance," or "research," they will probably be disallowed because without specific explanation of what work was done, the court may be unable to determine why the work performed was reasonably necessary. 518 N.E.2d at 428 – 429. General statements such as "conference with client" are more likely to be disallowed due to a lack of showing reasonableness or necessity. Similarly, entries for "office conferences," for example, must include the date, the participants, and the description of the matter discussed. 518 N.E.2d at 430 – 431.

Furthermore, the description of each task should have a corresponding time allowance. When all of the services performed in the same day are grouped together without a breakdown of the time spent on each individual task, the courts regularly disallow the entire group. Likewise, if all time for the same type of service (*e.g.,* "research") is lumped into one total time entry, the court will deny the request for those fees. *In re Marriage of Collins,* 154 Ill.App.3d 655, 506 N.E.2d 1000, 1003, 107 Ill.Dec. 109 (2d Dist. 1987); *Kaiser, supra,* 518 N.E.2d at 430. Under "research," each issue researched and its relationship to the case should be described. *But see In re Marriage of Nesbitt,* 377 Ill.App.3d 649, 879 N.E.2d 445, 454, 316 Ill.Dec. 378 (1st Dist. 2007), in which the court stated:

> **[**A**]lthough the trial court was unable to "tell with precision whether all of the work performed by [**the wife's attorneys**] was reasonable" based on the "bundled" billing records, it was not required to make such a finding prior to ordering contribution. See [***In re Marriage of Hasabnis,*** 322 Ill.App.3d 582, 749 N.E.2d 448, 460, 225 Ill.Dec. 347 (1st Dist. 2001); ***In re Marriage of Broday,*** 256 Ill.App.3d 699, 628 N.E.2d 790, 797 – 798, 195 Ill.Dec. 326 (1st Dist. 1993); *Kaiser, supra,* 518 N.E.2d at 430**]. . . . [**T**]he trial court had a "detailed understanding of what work was done and why" and applied the knowledge it gained to order a reduced contribution award.**

Most courts are strict. For example, in a fee petition hearing for a division of the attorneys' fees, the attorney's testimony that she spent "approximately" four to five hours per day on research during a four-day period was struck as insufficiently specific. *Susan E. Loggans & Associates v. Estate of Magid,* 226 Ill.App.3d 147, 589 N.E.2d 603, 609, 168 Ill.Dec. 203 (1st Dist. 1992).

The court in *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1023, 150 Ill.Dec. 207 (1st Dist. 1990), explained the reason why courts are so strict:

> **[**I**]t is incumbent upon the attorney to keep detailed time records during the course of the representation. . . . The trial court should not be overly burdened with the task of piecing together fragments of evidence in order to determine what fees are due. An attorney's failure to maintain accurate records is rightfully a factor weighing against the possibility of total recovery of claimed fees. [**Citation omitted.**]**

If you have been vague in describing your services, perhaps you could cite *In re Marriage of Powers,* 252 Ill.App.3d 506, 624 N.E.2d 390, 393, 191 Ill.Dec. 541 (2d Dist. 1993), in which the court held that time slips were not impermissibly vague or general for purposes of awarding attorneys' fees under §508 of the IMDMA, 750 ILCS 5/508, when, with references to appellate work, they contained such notations as "work on appeal, read cases, did outline," "prepare brief, review cases, modifications, review other brief," and "research, draft of brief," and in each instance the time spent was noted. In spite of this case, which is an anomaly, the better practice is to be as specific as possible on time entries.

(2) [2.6] Explicit description of conferences

When recording the time spent on telephone conversations or other conferences with clients, opposing counsel, your staff, or witnesses, specify the subject matter of the conversation and all those who were parties to the conversation. General statements such as "conference with client" are likely to be disallowed by the court because they do not make a showing as to why the time spent was reasonably necessary. *In re Marriage of Yakin,* 107 Ill.App.3d 1103, 436 N.E.2d 573, 586, 62 Ill.Dec. 547 (1st Dist. 1982); *In re Marriage of Brophy,* 96 Ill.App.3d 1108, 421 N.E.2d 1308, 1317, 52 Ill.Dec. 236 (1st Dist. 1981). If you have a client who is constantly pestering you, it may also be a good idea to indicate who initiated the call (*e.g.,* "call to client," "return call to client," or "call from client"). You will then be able to testify that the client initiated all the calls. (This idea may backfire, however, if the client is contending that you did not keep him or her apprised of the status of the case.)

In addition, "attorneys should work independently, without the incessant 'conferring' that so often forms a major part of many fee petitions. While some intraoffice conferences may be necessary, no more than one attorney may charge for it unless an explanation of each attorney's participation is given." *In re Chicago Lutheran Hospital Ass'n,* 89 B.R. 719, 736 (Bankr. N.D.Ill. 1988), quoting *In re Pettibone Corp.,* 74 B.R. 293, 303 (Bankr. N.D.Ill. 1987). However, "there is a difference between duplication and coordination of services." *Chicago Lutheran Hospital, supra,* 89 B.R. at 736. *See also In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 1284 – 1285, 111 Ill.Dec. 639 (1st Dist. 1987).

(3) [2.7] Scrutiny of "revising documents"

Entries such as "revising," "redrafting," and "correcting" documents are insufficient unless the time entry indicates an explanation as to why the revisions or redrafts were necessary. The court in *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 430 – 431, 115 Ill.Dec. 899 (1st Dist. 1987), denied requests made for fees attributed to revising, redrafting, and correcting documents and pleadings because the attorneys failed to establish the reasonableness or necessity of the time spent. In many situations, an attorney's description of his or her time may indicate that he or she is revising a document when in fact he or she is really still drafting the document. In such situations, you might want to include this time as part of your entry for drafting the document; in the alternative, you should include an explanation in your time record that details the reason for the revision or redraft.

(4) [2.8] Scrutiny of "reviewing documents"

The average letter takes less than one minute to read. If you review it and take no action with regard to it, you might feel justified in charging one-tenth of an hour for the time you spent on it. However, if you receive 100 such letters or other documents during the course of a case, you will have billed your client ten hours for what in fact took you one hour and forty minutes. At an hourly rate of $250, that is the difference between $2,500 and $417.

On the other hand, if you review a letter on one day and spend two minutes dictating a letter in response on another day, are you justified in charging one-tenth of an hour on each day?

Reviewing documents is one area of the practice of law in which lawyers may, knowingly or unknowingly, overcharge clients. In *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 430, 115 Ill.Dec. 899 (1st Dist. 1987), the trial court substantially reduced the amount of fees requested. The appellate court affirmed, noting, among other things, that "of the total 330 hours listed, it appears that at least 40 hours were billed for review and organization of file documents." *Id.*

(5) [2.9] Fees pertaining to cocounsel or substitute counsel

Fees incurred for a conference between original counsel on the one hand and additional or substitute counsel on the other hand are not properly charged to the other party. Fees incurred by a new counsel for "getting up to speed" are also not properly charged to the other party. It would be

unfair to require a party to pay the fees of additional or substitute counsel because his or her spouse changed or added attorneys. *Gasperini v. Gasperini,* 57 Ill.App.3d 578, 373 N.E.2d 576, 580, 15 Ill.Dec. 230 (1st Dist. 1978). However, there is no prohibition against billing your own client for these services.

(6) [2.10] Routine and administrative matters

Paragraph 5 of the Statement of Client's Rights and Responsibilities, 750 ILCS 5/508(f), states, "The client will not be billed for time spent to explain or correct a billing statement."

An attorney normally is not allowed to charge for travel time in excess of that generally incurred by attorneys in the area of the court in which the case is pending.

In *Gasperini v. Gasperini,* 57 Ill.App.3d 578, 373 N.E.2d 576, 581, 15 Ill.Dec. 230 (1st Dist. 1978), the court disallowed time spent responding to a bar association complaint. The First District has also precluded attorneys from recovering for time charged for "waiting" for their cases to be called, "tax advice," and "telephone calls." *In re Marriage of Rossi,* 113 Ill.App.3d 55, 446 N.E.2d 1198, 1204, 68 Ill.Dec. 801 (1st Dist. 1983).

Firm expenses (generally referred to as "costs") for which a client will be charged must be reasonable. See Comment 1, RPC 1.5(a). A lawyer may seek reimbursement for the cost of services performed in-house (*e.g.,* copying) or for other expenses incurred in-house (*e.g.,* telephone charges) either by charging a reasonable amount to which the client has agreed to in advance or by charging an amount that reasonably reflects the costs incurred the lawyer. *Id.*

PRACTICE POINTER

✓ The Illinois Bar Association has made advisory opinions on professional conduct involving fees and expenses, including that an attorney may charge clients for computerized legal research expenses under a formula reflecting the attorney's actual costs (Illinois State Bar Association Advisory Opinion on Professional Conduct No. 58-09 (1958)), and under certain circumstances, invoicing a client for a secretary's overtime work is professionally proper (ISBA Advisory Op. No. 91-06 (1991)).

(7) [2.11] Duplicative time

Any work that is duplicative should not be compensated because it is "unnecessary." *In re Marriage of Kosterka,* 174 Ill.App.3d 954, 529 N.E.2d 12, 16, 124 Ill.Dec. 295 (2d Dist. 1988), *appeal denied,* 124 Ill.2d 555 (1989); *In re Marriage of Siddens,* 225 Ill.App.3d 496, 588 N.E.2d 321, 326, 167 Ill.Dec. 680 (5th Dist. 1992).

For example, an attorney cannot bill a client for the cost of preparing a second complaint when the first one was defective. *Hawkins VMR Joint Venture v. Rowbec, Inc.,* 835 F.Supp. 1091, 1093 (N.D.Ill. 1993).

On the other hand, in *Harris Trust & Savings Bank v. American National Bank & Trust Company of Chicago,* 230 Ill.App.3d 591, 594 N.E.2d 1308, 1314 – 1315, 171 Ill.Dec. 788 (1st Dist. 1992), the court found that a 12-minute conference between the attorney and his supervising partner for review of a court hearing memorandum did not involve unreasonable duplication of attorney services and, therefore, the fees for the time spent were allowed.

When there are multiple attorneys working on the same case, "reasonableness" depends on whether the services billed were for coordination of services or mere duplication of effort. *In re Chicago Lutheran Hospital Ass'n,* 89 B.R. 719, 735, 739 (Bankr. N.D.Ill. 1988). Charging fees for "incessant 'conferring' " on issues and for court appearances by nonparticipating counsel is not proper unless a specific reason exists as to why more than one attorney is required. 89 B.R. at 736, quoting *In re Pettibone Corp.,* 74 B.R. 293, 303 (Bankr. N.D.Ill. 1987). *See also In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 1284 – 1285, 111 Ill.Dec. 639 (1st Dist. 1987).

If you have done work that seems duplicative, try to explain why it was necessary or consider including it in your bill without charging for it.

c. [2.12] Contemporaneous Time Records

When the First District decided *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 430, 115 Ill.Dec. 899 (1st Dist. 1987), it held that a reconstructed time record was "more a product of conjecture by the attorneys preparing it as to the time *probably* expended on a particular service rather than an accurate computation of the time *actually* expended thereon." [Emphasis in original.] The effect of this ruling was to mandate that time records be kept contemporaneously.

This requirement was relaxed by *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1022 – 1023, 150 Ill.Dec. 207 (1st Dist. 1990):

> **The preference that time records be kept contemporaneously with the performance of tasks is based on the rationale that the closer in time that the record is made, the more likely it is to be accurate. The failure to maintain contemporaneous records of the time spent rendering services greatly increases the difficulty in determining a proper fee. . . . However, estimates can properly be considered by the court . . . although they are clearly more susceptible to error, and thus more suspect than more properly maintained time records. . . . Nonetheless, *it is permissible for an attorney to reconstruct his hours from whatever information is available: date books, office records, court documents, etc. . . . Moreover, proof of time spent can be evidenced not only by time records of the attorney, but also by oral testimony of persons rendering services. . . .***
>
> **. . . Deficiencies in documentation warrant reduction rather than denial of fees. . . .**
>
> *** * ***
>
> **By our discussion here we intend no relaxation of the requirement that an attorney maintain contemporaneous and detailed time records. In fact, because the time**

> **element is so important it is incumbent upon the attorney to keep detailed time records during the course of the representation. . . . The trial court should not be overly burdened with the task of piecing together fragments of evidence in order to determine what fees are due. An attorney's failure to maintain accurate records is rightfully a factor weighing against the possibility of total recovery of claimed fees. [**Emphasis added.**] [**Citations omitted.**]**

The requirement was further relaxed in *Muller v. Jones,* 243 Ill.App.3d 711, 613 N.E.2d 271, 275, 184 Ill.Dec. 244 (4th Dist. 1993), in which the court held that an attorney seeking to recover fees from a client is not required to keep

> **notations in a timekeeping system contemporaneous with the work being performed. . . . An attorney may construct an accurate record based on telephone bills and logs, correspondence and other file documents, and the recollection of the attorney and his employees, although greater accuracy is generally ensured by a contemporaneous record of events. However, the attorney seeking to recover fees must provide sufficient specificity of the nature of the work on any given date that the trial court can ascertain therefrom the necessity of the work to the client's legal matter and the reasonableness of the time expended and the fee charged therefor.**

In *In re Marriage of Shinn,* 313 Ill.App.3d 317, 729 N.E.2d 546, 551, 246 Ill.Dec. 173 (4th Dist. 2000), the court held that "while contemporaneous records generally ensure greater accuracy, the attorney need not keep detailed time records contemporaneously with the litigation if the attorney presents sufficient evidence to allow the trial court to determine a reasonable fee for [the attorney's] services."

Regardless of the above, the courts prefer contemporaneous time records due to their greater reliability since reconstructed time records are more susceptible to error.

3. [2.13] Respecting Fiduciary Duty to Client

The court in *In re Marriage of Pagano,* 154 Ill.2d 174, 607 N.E.2d 1242, 1247, 180 Ill.Dec. 729 (1992), held:

> **A fiduciary relationship exists as a matter of law between an attorney and client . . . and all transactions between them are subject to the closest scrutiny. . . . "Before the attorney undertakes the business of the client, he may contract with reference to his services, because no confidential relation then exists and the parties deal with each other at arm's length. The same is true in regard to dealings which take place after the relation has been dissolved. . . . But the law watches with unusual jealousy over all transactions between the parties, which occur while the relation exists." [**Citations omitted.**] Quoting *Elmore v. Johnson,* 143 Ill. 513, 32 N.E. 413, 416 (1892).**

"All transactions" would include an engagement agreement that is modified during the relationship.

"Among the fiduciary duties imposed upon an attorney are those of fidelity, honesty, and good faith in both the discharge of contractual obligations to, and professional dealings with, a client." *Kling v. Landry,* 292 Ill.App.3d 329, 686 N.E.2d 33, 39, 226 Ill.Dec. 684 (2d Dist. 1997); *Doe v. Roe,* 289 Ill.App.3d 116, 681 N.E.2d 640, 645, 224 Ill.Dec. 325 (1st Dist.), *appeal denied,* 174 Ill.2d 558 (1997). For example, an attorney's failure to seek contribution from the client's spouse because of personal reasons can constitute a breach of fiduciary duty. *Doe, supra.*

Representing a client improperly due to a conflict of interest will be considered a breach, and no fees will be awarded for the attorney's work. *In re Marriage of Newton,* 2011 IL App (1st) 090683, 955 N.E.2d 572, 353 Ill.Dec. 105.

a. [2.14] Burden of Proof as to Financial Matters

The Illinois Supreme Court, in *In re Marriage of Pagano,* 154 Ill.2d 174, 607 N.E.2d 1242, 1247 – 1248, 180 Ill.Dec. 729 (1992), discussed the burden of proof when a fiduciary relationship exists:

> **[**W**]hen an attorney, once retained, enters into a transaction with a client, it is presumed that the attorney exercised undue influence. . . . It then becomes incumbent upon the attorney to rebut this presumption by a showing of clear and convincing evidence. . . . We specifically reject [**the**] argument that the presumption of undue influence should not be applied when the subject matter of such an agreement involves the attorney's fees. Indeed, the client is in many ways in *greater* need of protection in such a case, as an unscrupulous attorney may unfairly use the extra leverage gained by the client's dependency. This is particularly so in the dissolution context where the attorney often has intimate knowledge of his client's financial and emotional condition so as to be able to gauge exactly how big a fee the client is likely to agree to accept before being willing to hazard the extra costs, delays and uncertainties of switching counsel.**
>
> **The presumption of undue influence applied to agreements between attorneys and their clients is not conclusive, however, and may be rebutted by the attorney. This court has looked to several factors in determining whether such a presumption is overcome, including whether: (1) the attorney made a full and frank disclosure of all relevant information; (2) the client's agreement was based on adequate consideration[;] and (3) the client had independent advice before completing the transaction. . . . Other Illinois decisions have applied slightly different factors, including whether: (1) the agreement was offered by the lawyer with unquestionable good faith and with complete disclosure, (2) the client entered into the agreement with a full understanding of all facts and their legal importance, and (3) the client's decision was free from undue influence and was fair. . . .**
>
> *** * ***
>
> **. . . [**T**]he failure of an attorney to counsel a client to seek independent legal advice does not, by itself, mean that there has been undue influence. . . .**

> **Nor do we believe that [**the attorney's**] attempt to secure prospective fees breached a fiduciary duty to [**the client**]. In the appropriate circumstance the request for payment of fees reasonably expected to be earned by an attorney is completely proper. [**Emphasis in original.**] [**Citations omitted.**]**

b. [2.15] Consequences of Breach of Fiduciary Duty

The breach of fiduciary duty is not a tort; rather, it is governed by the substantive laws of agency, contracts, and equity. *Doe v. Roe,* 289 Ill.App.3d 116, 681 N.E.2d 640, 649, 224 Ill.Dec. 325 (1st Dist.), *appeal denied,* 174 Ill.2d 558 (1997). "The breach of fiduciary duty by an attorney gives rise to an action on behalf of the client for proximately resulting damages." *Kling v. Landry,* 292 Ill.App.3d 329, 686 N.E.2d 33, 39, 226 Ill.Dec. 684 (2d Dist. 1997). "Resulting damages" may even include damages for mental distress. *Doe, supra,* 681 N.E.2d at 645, 650 – 651.

Generally, claims by clients against their attorneys alleging breach of fiduciary duty are deemed duplicative of attorney malpractice claims. *Neade v. Portes,* 193 Ill.2d 433, 739 N.E.2d 496, 250 Ill.Dec. 733 (2000); *Calhoun v. Rane,* 234 Ill.App.3d 90, 599 N.E.2d 1318, 175 Ill.Dec. 304 (1st Dist. 1992). Such claims are governed by Illinois' malpractice statute, 735 ILCS 5/2-1115, which applies to both legal and medical malpractice. *Brush v. Gilsdorf,* 335 Ill.App.3d 356, 783 N.E.2d 77, 270 Ill.Dec. 502 (3d Dist. 2002). Under the malpractice statute, punitive damages are not recoverable. 735 ILCS 5/2-1115. The basic test in determining whether an attorney's breach of his or her fiduciary duty to the client has been subsumed by the malpractice statute is whether the breach of fiduciary obligations arose out of the attorney's negligent representation of the client. *Brush, supra; Owens v. McDermott, Will & Emery,* 316 Ill.App.3d 340, 736 N.E.2d 145, 249 Ill.Dec. 303 (1st Dist. 2000).

While the malpractice statute precludes punitive damages for an attorney's breach of his or her fiduciary duties towards a client, it does not preclude damages for defrauding a client.

4. [2.16] Obtaining Security for Fees

In other areas of the law, an attorney is allowed to enter into an agreement with a client for a lien on the client's property. *See, e.g., In re Brass Kettle Restaurant, Inc.,* 790 F.2d 574, 575 (7th Cir. 1986), in which the Seventh Circuit explained "equitable liens."

However, in domestic relations cases, §508(d) of the IMDMA requires that this sort of agreement must first be approved by the court:

> **No consent security arrangement between a client and a counsel of record, pursuant to which assets of a client are collateralized to secure payment of legal fees or costs, is permissible unless approved in advance by the court as being reasonable under the circumstances.** 750 ILCS 5/508(d).

See also paragraph 5 of the Statement of Client's Rights and Responsibilities, which states, "The counsel may enter into a consensual security arrangement with the client whereby assets of the client are pledged to secure payment of legal fees or costs, but only if the counsel first obtains approval of the Court." 750 ILCS 5/508(f).

Although the statute does not set forth a procedure for obtaining approval, it is advisable to have everything finalized so that once the court gives approval, everything is ready to go, and you do not have to worry about your client changing his or her mind. Therefore, prior to obtaining court approval, first prepare the documentation (such as a promissory note and a mortgage). The documentation should contain a provision that states, "This is subject to the approval of the Circuit Court." The client (and, if appropriate, the attorney) should sign the documents. The attorney should then file a petition for approval of security for fees with the court. The documents should be attached to the petition.

Upon approval by the court, the documents may be filed with the appropriate governmental agency (such as the Secretary of State or the county recorder's office). With regard to possessory liens, the attorney should then take possession of the collateral.

Note that the last sentence of §508(d) refers to the "assets of a client." 750 ILCS 5/508(d). When an attorney receives a deposit for fees and costs that have not yet been earned, he or she has a possessory security interest in that money. Thus, once the case is filed, he or she technically needs advance approval by the court in order to accept such a deposit. Thus, remedial legislation is needed to make it clear that the above-quoted language in §§508(d) and 508(f) applies only to nonmonetary assets.

B. Termination of Relationship

1. [2.17] Client's Right To Discharge Attorney

The right of a client to discharge an attorney is an implied term of all agreements between a client and the attorney. If a client terminates an attorney's services on a pending case, then the attorney should file a motion to withdraw. Rule 1.16(a)(3) of the Illinois Rules of Professional Conduct of 2010 (RPC); *In re Smith,* 168 Ill.2d 269, 659 N.E.2d 896, 907, 213 Ill.Dec. 550 (1995). An attorney remains the attorney of record until allowed to withdraw by the court. Supreme Court Rules 13(c)(2), 13(c)(3). *See also Heiden v. Ottinger,* 245 Ill.App.3d 612, 616 N.E.2d 1005, 1009, 186 Ill.Dec. 563 (2d Dist. 1993).

2. [2.18] Attorney's Right To Withdraw from Case

Before the adoption of the Illinois Rules of Professional Conduct of 2010, an attorney could not always withdraw because of the client's failure to pay a fee. RPC 1.16 sets forth the situations in which an attorney *may* withdraw from representation and *must* withdraw from representation. One basis for permissive withdrawal is if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." RPC 1.16(b)(5). *See also Leoris & Cohen, P.C. v. McNiece,* 226 Ill.App.3d 591, 589 N.E.2d 1060, 1064 – 1065, 168 Ill.Dec. 660 (2d Dist. 1992). In order to withdraw, an attorney must obtain leave of court pursuant to S.Ct. Rules 13(c)(2) and 13(c)(3).

II. TRIAL COURT'S JURISDICTION TO AWARD FEES

A. Expiration and Termination of Trial Court's Jurisdiction

1. [2.19] Normal Expiration of Jurisdiction

Different statutes control depending on whether you are seeking an award against your own client or seeking contribution from your client's spouse. However, under either statute, the commencement of the time period in which to file an appeal may begin with the entry of a final order. The Third District Appellate Court has held that "so long as the trial court otherwise has jurisdiction over the case, either party may petition for contribution." *Macaluso v. Macaluso,* 334 Ill.App.3d 1043, 779 N.E.2d 250, 252, 268 Ill.Dec. 636 (3d Dist. 2002).

a. [2.20] Deadline for Filing Petition for Award of Fees from Client

Section 508(c) of the IMDMA provides:

> **Final hearings for attorney's fees and costs against an attorney's own client, pursuant to a Petition for Setting Final Fees and Costs of either a counsel or a client, shall be governed by the following:**
>
> *** * ***
>
> **(5) A petition (or a praecipe for fee hearing without the petition) shall be filed no later than the end of the period in which it is permissible to file a motion pursuant to Section 2-1203 of the Code of Civil Procedure [**735 ILCS 5/2-1203**]. A praecipe for fee hearing shall be dismissed if a Petition for Setting Final Fees and Costs is not filed within 60 days after the filing of the praecipe. . . . Each of the foregoing deadlines for the filing of a praecipe or a petition shall be:**
>
> **(A) tolled if a motion is filed under Section 2-1203 of the Code of Civil Procedure, in which instance a petition (or a praecipe) shall be filed no later than 30 days following disposition of all Section 2-1203 motions; or**
>
> **(B) tolled if a notice of appeal is filed, in which instance a petition (or praecipe) shall be filed no later than 30 days following the date jurisdiction on the issue appealed is returned to the trial court.**
>
> **If a praecipe has been timely filed, then by timely filed written stipulation between counsel and client (or former client), the deadline for the filing of a petition may be extended for a period of up to one year.** 750 ILCS 5/508(c).

In other words, a petition for fees against your own client normally must be filed within 30 days after entry of the judgment of dissolution unless you file a praecipe within that 30-day period, in which case you have 60 days from the filing of the praecipe. Section 508(c)(5) was amended in 2010 to provide specifically for the tolling of the deadlines when a motion under 735 ILCS 5/2-1203 or a notice of appeal is filed and to provide for a stipulated extension of time after the timely filing of a praecipe.

b. [2.21] Deadline for Filing Petition for Contribution from Client's Spouse

Prior to the 1997 amendments to the IMDMA, trial courts generally lost their jurisdiction to award fees for work done in the dissolution proceeding 30 days after entry of a final order. However, §503(j)(1) of the IMDMA states, "A petition for contribution, if not filed before the final hearing on other issues between the parties, shall be filed no later than 14 days *after the closing of proofs* in the final hearing or within such other period as the court orders." [Emphasis added.] 750 ILCS 5/503(j)(1). Moreover, "[a]fter proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be heard and decided." 750 ILCS 5/503(j).

Thus, if proofs have closed, you must file your petition for contribution within 14 days or before judgment is entered, whichever comes first. If you have not filed your petition for contribution prior to the trial in the underlying case, the safest approach is to ask the judge for time to file it so that a judgment is not entered before you file your petition. Note that the 2015 amendments to §503(j) by P.A. 99-90 (eff. Jan. 1, 2016) limit the filing deadline of a petition for contribution to not later than 14 days after the closing of proofs, down from the previous 30-day allowance. As such, requesting additional time to file is best practice so as to avoid missing the 14-day deadline.

c. Exceptions to Normal Expiration of Jurisdiction

(1) [2.22] Trial court may retain its jurisdiction by "reserving jurisdiction"

In certain circumstances, such as when the issue of attorneys' fees is reserved in the final order or judgment, the trial court retains jurisdiction to decide the issue beyond the 30-day limitation (or 14-day limitation in the case of petitions for contribution filed pursuant to 750 ILCS 5/503(j)). *In re Marriage of Ruchala,* 208 Ill.App.3d 971, 567 N.E.2d 725, 728, 153 Ill.Dec. 767 (2d Dist. 1991); *In re Marriage of Burton,* 203 Ill.App.3d 890, 561 N.E.2d 180, 181, 148 Ill.Dec. 874 (5th Dist. 1990). However, note that if the issue the trial court reserves is an attorney's petition for fees against his or her own client, it does not affect the appealability or enforceability of any judgment or other adjudication in the underlying proceeding. See 750 ILCS 5/508(c)(2). *In re Marriage of Baniak,* 2011 IL App (1st) 092017, 957 N.E.2d 469, 354 Ill.Dec. 153, states that it is not the jurisdiction of the court that ceases after 30 days. Rather, the 30-day deadline to file for attorneys' fees against a client is a procedural deadline that is waived if the issue is not raised at trial.

(2) [2.23] Trial court may regain its jurisdiction if party waives right to object to court's jurisdiction

"Lack of jurisdiction of the parties or by passage of time may be waived." *In re Marriage of Ransom,* 102 Ill.App.3d 38, 429 N.E.2d 594, 597, 57 Ill.Dec. 696 (2d Dist. 1981) (attorney filed petition against own client 72 days after judgment of dissolution entered); *In re Marriage of Reczek,* 95 Ill.App.3d 220, 420 N.E.2d 161, 162, 50 Ill.Dec. 844 (2d Dist. 1981) (attorney discharged and filed petition against client 35 days after case was dismissed).

To avoid the application of the doctrine of waiver, a party must file an appearance that contests the court's jurisdiction to hear the matter. See 735 ILCS 5/2-301(b).

(3) [2.24] Trial court retains jurisdiction to award interim fees for appeal if notice of appeal is filed

A trial court loses jurisdiction to award fees relating to a final order 30 days after entry of a final order. Under S.Ct. Rule 303, a notice of appeal of a final order of dissolution must be filed within 30 days after the order is entered. If fewer than 30 days have passed since the entry of the final order but a notice of appeal has been filed, does the trial court retain jurisdiction to award fees? In *In re Marriage of Talty,* 166 Ill.2d 232, 652 N.E.2d 330, 335, 209 Ill.Dec. 790 (1995), the Illinois Supreme Court implicitly held that even after a notice of appeal has been filed, a trial court retains jurisdiction to award prospective fees on appeal.

2. Termination of Jurisdiction by Acts of Parties

a. [2.25] Dismissal

The First District has held that "so long as a [750 ILCS 5/508] petition is filed while an underlying action is pending or within 30 days from a dismissal of the underlying action, the trial court has jurisdiction to hear, decide and rule on the 508 petition." *Nottage v. Jeka,* 274 Ill.App.3d 235, 653 N.E.2d 803, 808, 210 Ill.Dec. 608 (1st Dist. 1995), *rev'd on other grounds,* 172 Ill.2d 386 (1996). However, the Second District held otherwise in *In re Marriage of Birt,* 159 Ill.App.3d 281, 512 N.E.2d 390, 393, 111 Ill.Dec. 274 (2d Dist.), *appeal denied,* 117 Ill.2d 542 (1987). The Second District explained its position in *In re Marriage of Reczek,* 95 Ill.App.3d 220, 420 N.E.2d 161, 162, 50 Ill.Dec. 844 (2d Dist. 1981):

> **The reasoning is: the authority to award fees is based on Section 508(a). . . ; Section 508 was enacted to insure that disparate financial resources of spouses would not result in undue advantage to the more affluent parties; and to keep the dissolution suit alive merely to benefit an attorney attempting to collect his fees, which he could assert in a separate action at law, would be contrary to the spirit of the act which favors the settlement of the dispute.**

See also Lee v. Lee, 302 Ill.App.3d 607, 707 N.E.2d 67, 70, 236 Ill.Dec. 222 (1st Dist. 1998).

Nevertheless, even the Second District's rule against fee petitions after a dismissal has an exception. The law holds that a party has a right to settle a dissolution case without his or her attorney's consent. *Heiden v. Ottinger,* 245 Ill.App.3d 612, 616 N.E.2d 1005, 1010, 186 Ill.Dec. 563 (2d Dist. 1993). Moreover, if the parties enter into a settlement agreement in good faith, according to which each party agrees to pay his or her own attorneys' fees and then dismiss the proceeding, there is a good argument that the court lacks jurisdiction to award fees. On the other hand, if the parties' actions are motivated by a conspiracy to "stiff" one of the attorneys, a court retains jurisdiction to award fees to the attorney. 616 N.E.2d at 1010 – 1011.

b. [2.26] Voluntary Dismissal

An attorney may not file a petition for attorneys' fees in a dissolution action after the case has been voluntarily dismissed, even if the petition is filed within 30 days of the dismissal. *In re*

Marriage of Lucht, 299 Ill.App.3d 541, 701 N.E.2d 267, 268, 233 Ill.Dec. 624 (1st Dist. 1998). *But see In re Marriage of Keller,* 2020 IL App (2d) 180960, 156 N.E.3d 1078, 441 Ill.Dec. 329 (trial court order awarding husband and wife's joint voluntary motion to dismiss their respective petitions for dissolution did not extinguish a previously entered attorney fee award, nor did award place impermissible condition on parties' right to dismiss); *In re Marriage of Streur,* 2014 IL App (1st) 131721-U (holding it is well-established that voluntary dismissal of post-decree petition does not discharge court of jurisdiction to adjudicate request for fees incurred as result of proceeding initiated by petitioner). Illinois has long recognized a policy of preserving the marital relationship. *Watson v. Watson,* 335 Ill.App. 637, 82 N.E.2d 671 (1st Dist. 1948). At times, the policy has been invoked at a cost to other legal interests. *See, e.g., In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 150 Ill.Dec. 207 (1st Dist. 1990) (attorney may not recover on contingency-fee agreement because interest of preserving marriage outweighs possible unjust enrichment concerns). This policy encourages the resolution of marital disagreements through means other than litigation and helps couples to disentangle from litigation once they have decided not to divorce. The relevant Rules of Professional Conduct do not preclude a contract for a contingent fee for legal representation in connection with the recovery of postjudgment balances due under support, alimony, or other financial orders since such contracts do not implicate the same policy concerns as charging a contingent fee when payment is contingent on the securing of a divorce or on the amount of alimony or support or property settlement to be obtained. See Comment [10], RPC 1.6.

c. [2.27] Death of Party

When a party dies, the trial court loses jurisdiction over the dissolution case, but the court maintains jurisdiction to hear and decide a petition for attorneys' fees for the work performed prior to the individual's death, even though the petition was not filed until after the party's death. *In re Marriage of Dague,* 136 Ill.App.3d 297, 483 N.E.2d 322, 324, 91 Ill.Dec. 40 (1st Dist. 1985). However, the court may not enter an order regarding attorneys' fees incurred subsequent to the party's death. *Brandon v. Caisse,* 172 Ill.App.3d 841, 527 N.E.2d 118, 120 – 121, 122 Ill.Dec. 746 (2d Dist. 1988). If you spent time on the case after the party's death, you should consider filing a claim in the decedent's probate estate. *See, e.g., Stacke v. Bates,* 225 Ill.App.3d 1050, 589 N.E.2d 195, 168 Ill.Dec. 81 (2d Dist. 1992).

d. [2.28] Remarriage

Occasionally, while a postjudgment matter is pending, the parties remarry each other. Thus, the trial court loses jurisdiction over the pending matter, except a pending petition for attorneys' fees. *In re Marriage of Conway,* 139 Ill.App.3d 1062, 487 N.E.2d 1240, 1243, 94 Ill.Dec. 363 (5th Dist. 1986). The appellate court in *Conway* did not address whether a trial court would have jurisdiction to hear a petition for fees that had not been filed until after the parties remarried, but because it based its holding on *In re Marriage of Dague,* 136 Ill.App.3d 297, 483 N.E.2d 322, 324, 91 Ill.Dec. 40 (1st Dist. 1985) (see §2.27 above), it seems that the trial court would retain such jurisdiction.

e. [2.29] Waiver

For a discussion of the doctrine of waiver of jurisdiction, see §2.23 above.

B. [2.30] Limited Reacquisition of Jurisdiction After Appeal

After an appeal, the decision of the appellate court is transmitted to the trial court, revesting jurisdiction in the trial court. "The trial court may thereafter only do those things which are directed in the mandate and has no authority to act beyond its dictates." *Brandon v. Caisse,* 172 Ill.App.3d 841, 527 N.E.2d 118, 120, 122 Ill.Dec. 746 (2d Dist. 1988). However, a trial court may award attorneys' fees for work done on the appeal. *In re Marriage of Bashwiner,* 155 Ill.App.3d 531, 508 N.E.2d 419, 423, 108 Ill.Dec. 258 (1st Dist. 1987); *Sidwell v. Sidwell,* 102 Ill.App.3d 56, 429 N.E.2d 539, 543, 57 Ill.Dec. 641 (4th Dist. 1981).

In *In re Marriage of Ahmad,* 198 Ill.App.3d 15, 555 N.E.2d 439, 144 Ill.Dec. 320 (2d Dist. 1990), the trial court entered an order dissolving the parties' marriage and awarding them joint custody of their son. The husband appealed, but the appellate court affirmed. The wife then timely filed a petition for attorneys' fees for the defense of the appeal and for other matters, and the court entered an award in her favor. The husband appealed this award. The appellate court then ruled that, after an appeal, a trial court has jurisdiction to award only fees relating to the appeal or any order entered within 30 days prior to the filing of the petition.

III. [2.31] SEEKING 750 ILCS 5/508(b) SANCTIONS AGAINST CLIENT'S SPOUSE FOR VIOLATION OF COURT ORDER

If your client's spouse violates a court order, you may file a petition to enforce the court order pursuant to §508(b) of the IMDMA, 750 ILCS 5/508(b). If you file such a petition, your professional obligation to represent your client competently and zealously may require you to request an award of attorneys' fees. *Fletcher v. Fletcher,* 227 Ill.App.3d 194, 591 N.E.2d 91, 95, 169 Ill.Dec. 211 (4th Dist. 1992).

Although an award of attorneys' fees is authorized in some contempt proceedings pursuant to other laws, it is outside the scope of this chapter. *See In re Marriage of Tatham,* 293 Ill.App.3d 471, 688 N.E.2d 864, 228 Ill.Dec. 166 (5th Dist. 1997).

Section 508(a) of the IMDMA states, "Awards may be made in connection with . . . [t]he enforcement or modification of any order or judgment under this Act." 750 ILCS 5/508(a).

Section 508(b) provides:

> **In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party. If non-compliance is with respect to a discovery order, the non-compliance is presumptively without compelling cause or justification, and the presumption may only be rebutted by clear and convincing evidence. If at any time a court finds that a hearing under this Act was precipitated or conducted for any improper purpose, the**

> **court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly. Improper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation.** 750 ILCS 5/508(b).

"[T]he legislature intended [§508(b)] to serve as a sanction against parties in marital cases who willfully disobey court orders." *In re Marriage of Young,* 200 Ill.App.3d 226, 559 N.E.2d 178, 181, 147 Ill.Dec. 178 (4th Dist. 1990).

A. [2.32] Recoverable Fees Incurred in Other Courts

The petitioning party is eligible for an award of fees even if the fees were incurred in another court as long as the enforcement action was brought in good faith. *In re Marriage of Kent,* 267 Ill.App.3d 142, 640 N.E.2d 973, 974 – 975, 203 Ill.Dec. 823 (2d Dist. 1994) (holding that trial court had jurisdiction under IMDMA to award attorneys' fees incurred in bankruptcy proceeding).

B. [2.33] Petitioning Party's Burden

Section 508(b) of the IMDMA, 750 ILCS 5/508(b), authorizes an award of fees for legal action taken to enforce a court order. See §§2.58 – 2.67 below for the format of a petition for fees. As stated in §2.66 below, your petition should allege that the responding party failed to comply with a court order. "At the hearing, the burden is on the petitioner to show a violation of a court order has occurred." *In re Marriage of LaTour,* 241 Ill.App.3d 500, 608 N.E.2d 1339, 1345, 181 Ill.Dec. 865 (4th Dist. 1993).

Note that if you are proceeding under §508(b), you do not have to prove ability or inability to pay. *In re Marriage of McCoy,* 272 Ill.App.3d 125, 650 N.E.2d 3, 7, 208 Ill.Dec. 732 (4th Dist. 1995); *In re Marriage of Sanda,* 245 Ill.App.3d 314, 612 N.E.2d 1346, 1349, 184 Ill.Dec. 186 (2d Dist. 1993); *In re Marriage of Cierny,* 187 Ill.App.3d 334, 543 N.E.2d 201, 211, 134 Ill.Dec. 918 (1st Dist. 1989).

C. [2.34] Responding Party's Burden

After the petitioning party's burden is met, the responding party has the burden to produce evidence of his or her cause or justification for his or her failure to comply with the court order (*In re Marriage of Baggett,* 281 Ill.App.3d 34, 666 N.E.2d 850, 854, 217 Ill.Dec. 181 (5th Dist. 1996); *In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 416, 238 Ill.Dec. 689 (5th Dist. 1999) (noncompliant party required to demonstrate compelling cause or justification); *In re Marriage of Sanda,* 245 Ill.App.3d 314, 612 N.E.2d 1346, 1350, 184 Ill.Dec. 186 (2d Dist. 1993)); and the evidence must be "compelling" (*see In re Marriage of Schurtz,* 382 Ill.App.3d 1123, 891 N.E.2d 415, 418 – 419, 322 Ill.Dec. 400 (3d Dist. 2008) (finding that husband "had a good faith argument that he was not required to pay [the wife] any portion of his disability payments based on a narrow reading of the marital settlement agreement"), quoting 750 ILCS 5/508(b)). If the order is a discovery order, the responding party must show compelling cause or justification by clear and convincing evidence. Cf. S.Ct. Rule 219.

D. [2.35] Relevant Time Frame

The courts look to the date on which the petition was filed. Thus, if on that date the spouse was without compelling cause or justification for being in violation of the court order, the petitioning party is entitled to an award of fees for bringing the petition notwithstanding the fact that the responding party has brought himself or herself into substantial compliance with the order. *In re Marriage of Fowler,* 197 Ill.App.3d 95, 554 N.E.2d 240, 241 – 242, 143 Ill.Dec. 305 (3d Dist. 1989).

E. Decision by Court

1. [2.36] Other Sufficient Findings

Prior to the 1997 amendments to the IMDMA, the courts held that "a finding of 'willful' delinquency in making payments required by a trial court order is the equivalent of finding that the failure to comply is 'without cause or justification.' " *In re Marriage of Dieter,* 271 Ill.App.3d 181, 648 N.E.2d 304, 312, 207 Ill.Dec. 848 (1st Dist. 1995). So, too, was a finding that the spouse "willfully and contumaciously violated the provisions of the order." *In re Marriage of Young,* 200 Ill.App.3d 226, 559 N.E.2d 178, 181, 147 Ill.Dec. 178 (4th Dist. 1990). The 1997 amendments make it clear that the focus is not on whether the spouse violated the court order willfully, intentionally, or deliberately but rather on his or her cause or justification for doing so. If he or she acted with compelling cause or justification, then the court should not enter an award of attorneys' fees against him or her.

Also, prior to the 1997 amendments, the courts held that "[b]ecause the primary prerequisite to any contempt finding is wilful, contumacious conduct, it therefore follows that a contempt order carries with it an implicit finding that failure to make child support payments [is] without cause or justification." *In re Marriage of Betts,* 155 Ill.App.3d 85, 507 N.E.2d 912, 926, 107 Ill.Dec. 759 (4th Dist. 1987). *See also In re Marriage of Cierny,* 187 Ill.App.3d 334, 543 N.E.2d 201, 211, 134 Ill.Dec. 918 (1st Dist. 1989); *In re Marriage of Charous,* 368 Ill.App.3d 99, 855 N.E.2d 953, 305 Ill.Dec. 437 (2d Dist. 2006); *In re Marriage of Deike,* 381 Ill.App.3d 620, 887 N.E.2d 628, 640, 320 Ill.Dec. 484 (4th Dist. 2008) ("[b]ecause finding a party in contempt for failing to comply with a court order implies a finding the failure to comply was without cause or justification . . . an award of attorney fees is mandatory by statute"); *In re Marriage of Weddigen,* 2015 IL App (4th) 150044, ¶41, 42 N.E.3d 488, 397 Ill.Dec. 573 (party's unilateral reduction of support absent court order is alone sufficient to establish "without cause or justification" leading to award of fees under 750 ILCS 5/508(b)). If the courts were to adopt the standard of not holding a party in contempt for failure to comply with a court order if he or she shows compelling cause or justification for his or her failure, then a finding of contempt would carry with it an implicit finding that failure to comply with the court order was without compelling cause or justification. However, if in contempt hearings the courts focus only on whether the spouse violated the court order willfully, intentionally, or deliberately and disregard the issue of whether his or her cause or justification for doing so is compelling, then a finding of contempt will not carry with it an implicit finding that failure to comply with the court order was without compelling cause or justification. To be on the safe side, if you are seeking a finding of contempt against your client's spouse, you should also request a finding that the violation of the order was without compelling cause or justification.

Note, however, that in order to recover attorneys' fees under §508(b) of the IMDMA, a finding of contempt is not necessary. *In re Marriage of Davis,* 292 Ill.App.3d 802, 686 N.E.2d 395, 226 Ill.Dec. 765 (4th Dist. 1997); *In re Marriage of Baggett,* 281 Ill.App.3d 34, 666 N.E.2d 850, 854, 217 Ill.Dec. 181 (5th Dist. 1996); *Dieter, supra.* On the other hand, "a finding of no contempt is not always a finding of cause or justification." (*In re Marriage of Roach,* 245 Ill.App.3d 742, 615 N.E.2d 30, 34, 185 Ill.Dec. 735 (4th Dist. 1993)), nor should it be regarded as a finding of compelling cause or justification either. *See also In re Marriage of Berto,* 344 Ill.App.3d 705, 800 N.E.2d 550, 279 Ill.Dec. 482 (2d Dist. 2003).

If the court does find a party to be in contempt, §508(b) makes an award of reasonable fees mandatory without consideration of either party's ability to pay (*see, e.g., In re Marriage of Davis,* 2019 IL App (3d) 170389, ¶23, 144 N.E.3d 658, 437 Ill.Dec. 546) because a finding of willful, contumacious conduct is implicit in a finding of contempt. *In re Marriage of Putzler,* 2013 IL App (2d) 120551, 985 N.E. 2d 602, 368 Ill.Dec. 795. *See also In re Marriage of Agers,* 2013 IL App (5th) 120375, 991 N.E.2d 944, 372 Ill.Dec. 454 (finding that it was mandatory for former wife to pay attorneys' fees to former husband when she was held in contempt for violating visitation order).

2. [2.37] Reasonable Fees

Fees awarded under §508(b) of the IMDMA, 750 ILCS 5/508(b), must still be "reasonable." *In re Marriage of Baggett,* 281 Ill.App.3d 34, 666 N.E.2d 850, 854, 217 Ill.Dec. 181 (5th Dist. 1996).

Gratuitous legal services are still subject to a §508(b) petition for fees provided the fees are paid to the attorney rather than the party in that they represent both a sanction and compensation for the services expended on the petitioning party's behalf. *In re Marriage of Putzler,* 2013 IL App (2d) 120551, 985 N.E. 2d 602, 368 Ill.Dec. 795.

IV. [2.38] SEEKING INTERIM OR FINAL AWARD OF CONTRIBUTION IN DISSOLUTION CASE

There are two distinct situations in which you may want to obtain a judgment for attorneys' fees and costs: (a) when you are seeking payment from your own client; and (b) when you are seeking contribution from your client's spouse. Section 508 of the IMDMA, 750 ILCS 5/508, provides a mechanism for both. *Lee v. Lee,* 302 Ill.App.3d 607, 707 N.E.2d 67, 70, 236 Ill.Dec. 222 (1st Dist. 1998); *Nottage v. Jeka,* 172 Ill.2d 386, 667 N.E.2d 91, 217 Ill.Dec. 298 (1996). In addition, when you are seeking payment from your own client, you may file an independent action. *In re Marriage of Cantrell,* 314 Ill.App.3d 623, 732 N.E.2d 797, 247 Ill.Dec. 742 (2d Dist. 2000).

Sections 2.39 – 2.120 below discuss the ways you can obtain an award of contribution against your client's spouse. Sections 2.159 – 2.179 below discuss the ways you can obtain an award against your own client.

A. [2.39] In General

"Attorney fees are generally the responsibility of the party who incurred the fees." *In re Marriage of Hasabnis,* 322 Ill.App.3d 582, 749 N.E.2d 448, 461, 255 Ill.Dec. 347 (1st Dist. 2001). *See also In re Marriage of Suriano,* 324 Ill.App.3d 839, 756 N.E.2d 382, 258 Ill.Dec. 400 (1st Dist. 2001); *In re Marriage of DeLarco,* 313 Ill.App.3d 107, 728 N.E.2d 1278, 1285, 245 Ill.Dec. 921 (2d Dist. 2000); *Hupe v. Hupe,* 305 Ill.App.3d 118, 711 N.E.2d 789, 238 Ill.Dec. 402 (3d Dist. 1999); *In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 414, 238 Ill.Dec. 689 (5th Dist. 1999); *Lee v. Lee,* 302 Ill.App.3d 607, 707 N.E.2d 67, 70, 236 Ill.Dec. 222 (1st Dist. 1998); *In re Marriage of Davis,* 292 Ill.App.3d 802, 686 N.E.2d 395, 402, 226 Ill.Dec. 765 (4th Dist. 1997); *In re Marriage of Stufflebeam,* 283 Ill.App.3d 923, 671 N.E.2d 55, 60, 219 Ill.Dec. 390 (3d Dist. 1996); *Posey v. Tate,* 275 Ill.App.3d 822, 656 N.E.2d 222, 227, 212 Ill.Dec. 69 (1st Dist. 1995). However, a party can file a petition for contribution for an order directing his or her spouse to pay some or all of his or her fees. A court will grant the petition if the fees are reasonable and if the petitioning party can financially justify why the spouse should pay his or her fee (proving the inability/ability elements).

There is no requirement that a spouse seek contribution. However, if a client wants contribution but the attorney fails to seek it, this failure could constitute malpractice. *Doe v. Roe,* 289 Ill.App.3d 116, 681 N.E.2d 640, 645 – 646, 224 Ill.Dec. 325 (1st Dist.), *appeal denied,* 174 Ill.2d 558 (1997). Hopefully, at the final hearing on the dissolution, the court will ask whether your client waives the right to contribution. If your client waives it, then there is no problem. However, if the court fails to inquire on this issue, then you should announce it. Note that a judgment for contribution or waiver of the right to contribution is necessary if you intend to file a petition under §508(c) of the IMDMA for fees against your own client. See 750 ILCS 5/508(c)(2).

An award of fees is classified as either an interim award (for fees already incurred and/or for prospective fees, determined on a non-evidentiary, summary basis) or a final award of fees. An attorney might file such a petition during any domestic relations matter, such as a dissolution proceeding, a postjudgment matter, an appeal, etc.

What is the reason for requiring one spouse to pay the other spouse's fees and costs? "Few can afford the expense of divorce without incurring debt, which must be paid by someone." *In re Marriage of McCoy,* 272 Ill.App.3d 125, 650 N.E.2d 3, 7, 208 Ill.Dec. 732 (4th Dist. 1995). In one sense, a marriage is like a partnership, and the cost involved in dissolving the partnership is an item that is normally paid by the partnership. *See, e.g., In re Marriage of Wentink,* 132 Ill.App.3d 71, 476 N.E.2d 1109, 1112, 87 Ill.Dec. 117 (1st Dist. 1984) ("the distribution of marital property should be treated as nearly as possible like the distribution of assets incident to the dissolution of a [business] partnership"), quoting Marshall J. Auerbach and Albert E. Jenner, Jr., Historical and Practice Notes, S.H.A. (1980), c. 40, ¶503. See also 750 ILCS 5/501(c-1)(2) ("all . . . payments by each party to counsel . . . shall be deemed to have been advances from the parties' marital estate"). Thus, it appears that payment of reasonable fees does not constitute dissipation of the marital estate. This is further emphasized by *DeLarco, supra,* in which the court held that the husband did not dissipate marital funds when he used the funds to pay his attorney and expert fees. Because the court ordered the husband to pay some of the wife's fees, the court had already compensated the wife for the husband's use of marital funds.

However,

> **[t]he primary purpose of section 508 is to give the court the authority in a dissolution proceeding to equalize the relative positions of the parties before it, "diminishing any advantage one spouse may have over the other in the presentation of a case due to a disparity in their respective financial resources." (Ill.Ann.Stat., ch. 40, par. 508, Historical & Practice Notes, at 635 (Smith-Hurd 1980).).** *In re Marriage of Pagano,* 154 Ill.2d 174, 607 N.E.2d 1242, 1246, 180 Ill.Dec. 729 (1992).

See also Lee, supra. "Dissolution of marriage cases should not be decided by the fact that one party has better access to funds and legal help than the other." *McCoy, supra,* 650 N.E.2d at 6. Shifting of fees helps "mitigate the potential harm to the spouses and their children caused by the process of an action brought under [the IMDMA]." 750 ILCS 5/102(4). The purpose is "to enable the petitioning party to participate adequately in the litigation" (750 ILCS 5/501(c-1)(3)) and to achieve "substantial parity" between the parties' access to funds for litigation in prejudgment proceedings (750 ILCS 5/102(8)). It is "to allow a spouse to contest the dissolution on an equal footing so that concerns about incurring large attorney fees will not coerce a litigant into conceding meritorious claims." *In re Marriage of Walters,* 238 Ill.App.3d 1086, 604 N.E.2d 432, 443, 178 Ill.Dec. 176 (2d Dist. 1992).

B. [2.40] Who Has Standing

Either spouse has standing to file a petition for contribution. If a client wants to waive contribution, may his or her attorney file a petition for contribution? Various courts have held that an attorney does have standing to file the petition in his or her own name. *Lee v. Lee,* 302 Ill.App.3d 607, 707 N.E.2d 67, 70, 236 Ill.Dec. 222 (1st Dist. 1998); *Cantwell v. Reinhart,* 244 Ill.App.3d 199, 614 N.E.2d 174, 176 – 177, 185 Ill.Dec. 40 (1st Dist. 1993); *In re Marriage of Pagano,* 154 Ill.2d 174, 607 N.E.2d 1242, 180 Ill.Dec. 729 (1992).

In addition, the IMDMA gives an attorney standing to enforce an award:

> **The court may order that the award of attorney's fees and costs . . . shall be paid directly to the attorney, who may enforce the order in his or her name, or that it shall be paid to the appropriate party. Judgment may be entered and enforcement had accordingly.** 750 ILCS 5/508(a).

Caselaw prior to the 1997 amendments was the same.

Thus, it appears that when an attorney is owed a fee by a client, he or she may file a petition for contribution even if the client waives contribution. An attorney may want to consider this action if he or she doubts the client's ability to pay the fee, particularly when he or she suspects a nefarious purpose. For example, in *Heiden v. Ottinger,* 245 Ill.App.3d 612, 616 N.E.2d 1005, 1011, 186 Ill.Dec. 563 (2d Dist. 1993), the attorney's own client waived contribution in a conspiracy with her husband to "stiff" the attorney.

However, if an attorney proceeds without the client's involvement, he or she still bears the burden of proof on all pertinent issues, including the client's financial inability to pay the fee. *In re Marriage of Kriegsman,* 218 Ill.App.3d 909, 578 N.E.2d 1186, 1191, 161 Ill.Dec. 540 (1st Dist. 1991).

C. [2.41] Time for Filing Petition for Attorneys' Fees and Costs

A petition for fees and costs during the dissolution proceeding may be filed any time after the petition for dissolution is filed and before the court's jurisdiction expires or terminates. For a discussion of interim fees on appeal, see §§2.144 – 2.158 below. For a discussion of the termination of the court's jurisdiction, see §§2.19 – 2.29 above.

D. [2.42] Petition for Interim Fees and Costs During Dissolution Proceedings

An attorney of record is entitled to file a petition for "interim fees" or can wait until the end of the representation of the client and file a petition for "final fees". He or she may also do both. 750 ILCS 5/508(a). The terms "petition for interim fees" and "petition for final fees" refer to the sequence of the petition for the fees and not to the stage of the case. Thus, an attorney who withdraws or is discharged must file a petition for final fees even though the underlying case is a long way from trial.

Sections 2.43 – 2.51 below deal only with obtaining an award of interim fees against your client's spouse. For a discussion of obtaining an award of final fees against your client's spouse, see §§2.52 – 2.120 below. For a discussion of obtaining an award of interim or final fees against your own client, see §2.161 below.

Section 508(a) of the IMDMA states, "Interim attorney's fees and costs may be awarded from the opposing party, in a pre-judgment dissolution proceeding in accordance with subsection (c-1) of Section 501." Sections 501(c-1) and 501(d) provide for an award of interim past and future fees. Section 501(c-1) was added by the 1997 amendments and further amended in 2010 to distinguish only prejudgment dissolution proceedings as non-evidentiary and summary in nature. Section 501(c-1) was again amended in 2015 to require a responsive pleading to include costs the responding party has incurred and whether they remain outstanding and to provide for a standardized form order as designated by the Illinois Supreme Court. Section 501(d) was not changed by the amendments.

In *In re Marriage of Beyer,* 324 Ill.App.3d 305, 753 N.E.2d 1032, 1035 – 1036, 257 Ill.Dec. 406 (1st Dist. 2001), the court granted the wife's fee petition pursuant to §501(c-1) in a post-decree proceeding. The husband appealed, arguing that §501(c-1) applies only to pre-dissolution proceedings and §508(a) applies to post-decree proceedings. *Id.* The appellate court affirmed, finding that interim fees, which are a form of temporary relief, are allowed in "all proceedings" under the IMDMA. 753 N.E.2d at 1039. *See also In re Marriage of Oleksy,* 337 Ill.App.3d 946, 787 N.E.2d 312, 316, 272 Ill.Dec. 497 (1st Dist. 2003). However, effective with the 2010 amendments to §501(c-1), postjudgment awards of interim fees are determined pursuant to §508(a), which then directs to the factors delineated in subsections (3), (4), and (5) of §503(j). A petition for interim fees under §508(a) requires an affidavit as to the factual basis for the relief requested.

Moreover, pre-dissolution and post-dissolution interim fees are not appealable. *Oleksy, supra* (appellate court dismissed portion of appeal relating to award of interim fees because underlying order was not final and, therefore, not appealable). *See also In re Marriage of Arjmand,* 2017 IL App (2d) 160631, 74 N.E.3d 1140, 412 Ill.Dec. 217 (holding that award of interim attorneys' fees is temporary in nature, subject to adjustment at close of proofs, and, thus, is not appealable); *In re Marriage of Rosenbaum-Golden,* 381 Ill.App.3d 65, 884 N.E.2d 1272, 1281, 319 Ill.Dec. 27 (1st Dist. 2008) (appellate court affirmed trial court's decision and found respondent was properly ordered to pay interim attorneys' fees court classified as "a portion of the funds to which she is already entitled under the Premarital Agreement's requirement that the parties divide marital property equally, in the form of a payment to her attorneys rather than to her directly").

1. [2.43] Summary of 750 ILCS 5/501(c-1)

Interim fees can be awarded for fees already incurred or for prospective fees. To request interim fees, the petitioning party should file a petition, supported by affidavits of the attorney, the petitioning party, his or her expert witnesses, and other persons with relevant information. To oppose the request, the responding party must file a responsive pleading. Per the 2015 amendments to §501(c-1), a responsive pleading must include costs incurred, and whether they are paid or unpaid. 750 ILCS 5/501(c-1)(1). However, nothing in §501 or the IMDMA as a whole requires the court to "equalize" attorneys' fees between the parties. *In re Marriage of Liszka,* 2016 IL App (3d) 150238, ¶60, 77 N.E.3d 1000, 413 Ill.Dec. 193, quoting *In re Marriage of DeLarco,* 313 Ill.App.3d 107, 728 N.E.2d 1278, 1285, 245 Ill.Dec.921 (2d Dist. 2000). A hearing on a petition for interim fees in a pre-decree proceeding is non-evidentiary (unless good cause is shown). At the hearing, the court should consider the factors set forth in §§501(c-1)(1)(A) through 501(c-1)(1)(I) of the IMDMA, to the extent applicable. 750 ILCS 5/501(c)(1). To award interim fees, the court must make a finding that the petitioning party does not have the financial ability to pay all of his or her own fees and that the responding party has the financial ability to pay not only his or her own fees but also all or a portion of the petitioning party's fees. The amount of the award must be sufficient to enable the petitioning party to participate adequately in the litigation. The 2015 amendments require an order awarding interim and prospective attorneys' fees pursuant to §501(c-1) to be in a standardized form as designated by the Illinois Supreme Court.

An interim award may be subsequently modified; §501(c-1)(2) creates a presumption that attorneys' fees awarded will be treated as advances from the marital estate, though the trial court may order otherwise. *Liszka, supra,* 2016 IL App (3d) 150238 at ¶60. In *In re Marriage of Tetzlaff,* 304 Ill.App.3d 1030, 711 N.E.2d 346, 352, 238 Ill.Dec. 243 (1st Dist. 1999), a court order directing the wife's former counsel to deposit into an escrow account a portion of the interim fees the attorney had been awarded from the husband could not be appealed on an interlocutory basis under the rule allowing interlocutory appeals from injunctions. The order directing the escrow deposit of a portion of the fees was merely a modification of the previous interim fee award, and the applicable statute rendered the interim fees subject to remittance after notice at any time and to review at the end of the case. *See also In re Marriage of King,* 336 Ill.App.3d 83, 783 N.E.2d 115, 119, 270 Ill.Dec. 540 (2002) (interim award of fees is not final order and cannot be independently appealed; it must be considered part of overall dissolution proceeding), *aff'd,* 208 Ill.2d 332 (2003).

2. [2.44] For Prospective Attorneys' Fees and Costs

Unlike prospective fees on appeal, there is little caselaw on the issue of prospective attorneys' fees and costs while a case is pending, perhaps because an interim order might be subsequently modified anyway, so there is no reason to appeal it. It is not a final order, so permission to appeal is required, and if an appeal were to be taken, the issue might be rendered moot by the time the appeal is heard. *See, e.g., In re Marriage of Landfield,* 118 Ill.2d 229, 514 N.E.2d 1005, 113 Ill.Dec. 93 (1987).

However, there is at least one case in which the appellate court affirmed an award of prospective fees while the dissolution case was pending. *In re Marriage of Edelberg,* 105 Ill.App.3d 407, 434 N.E.2d 440, 443, 61 Ill.Dec. 287 (1st Dist. 1982).

Additionally, in *In re Marriage of Heindl,* 2014 IL App (2d) 130198, 11 N.E.3d 851, 381 Ill.Dec. 915, the court declined to grant interim attorneys' fees to a pro se litigant when the petitioner failed to present an affidavit from an attorney reflecting that he or she would be willing to undertake representation upon receipt of a specified retainer. As a general matter, pro se litigants are not entitled to attorneys' fees compensating them for time spent representing themselves. *See In re Marriage of Pickering,* 2016 IL App (2d) 150898, 49 N.E.3d 1016, 401 Ill.Dec. 314 (reversing trial court's award of lost wages representing time pro se wife spent preparing and arguing her contempt petition).

3. For Incurred Attorneys' Fees and Costs

a. [2.45] In General

Even prior to the 1997 amendments, the courts recognized that §508 of the IMDMA, 750 ILCS 5/508, authorized a court to award interim attorneys' fees and costs that had already been incurred. *In re Marriage of Justema,* 95 Ill.App.3d 483, 420 N.E.2d 796, 799, 51 Ill.Dec. 382 (2d Dist. 1981). However, the amount of the fees required substantiation. *In re Marriage of Edelberg,* 105 Ill.App.3d 407, 434 N.E.2d 440, 442 – 443, 61 Ill.Dec. 287 (1st Dist. 1982).

b. [2.46] For Attorneys Who Have Withdrawn or Been Discharged

As stated in §2.42 above, when an attorney has withdrawn or is discharged while the case is still pending, his or her petition — whether against his or her own client or the client's spouse — is one for final fees. However, the attorney should file his or her petition immediately. If the court delays the hearing on the petition until the time of trial in the underlying case, the attorney should request the court to enter an order that directs all parties to respond to the petition in a timely manner and directs the trial attorneys to give him or her advance notice of the trial date.

In the alternative, an attorney could wait 90 days after his or her withdrawal and file an independent lawsuit against the client pursuant to §508(e) of the IMDMA, 750 ILCS 5/508(e). Although the attorney cannot name the client's spouse as a defendant in the lawsuit, the client could implead the spouse. See §2.174 below.

4. [2.47] Components of Petition for Interim Fees and Costs

As with a final fee request, the party seeking interim fees must file a petition setting forth the basis of the request. *In re Marriage of Greenberg,* 102 Ill.App.3d 938, 429 N.E.2d 1334, 1338, 58 Ill.Dec. 1 (1st Dist. 1981). For pre-dissolution proceedings, your petition should include the factors set forth in §501(c-1)(1) of the IMDMA, 750 ILCS 5/501(c-1)(1), that a court must consider in assessing a request for an interim award. These factors are similar to those used in final fee petitions.

In addition to the petition, you should file an affidavit signed by your client that contains the information pertaining to these factors; a signed affidavit that contains specific legal services that you have performed and that you anticipate will be necessary, as well as the fees that have been incurred and the fees that are anticipated; an affidavit signed by each expert witness that details his or her services and fees; and an affidavit of any other person with relevant information. If you fail to file these affidavits, your petition may be denied. Additionally, affidavits that are outdated may result in your petition being denied. *In re Marriage of Radzik,* 2011 IL App (2d) 100374, 955 N.E.2d 591, 353 Ill.Dec.124. *See also In re Marriage of Heindl,* 2014 IL App (2d) 130198, 11 N.E.3d 851, 381 Ill.Dec. 915 (trial court did not err in declining to award interim fees when petitioner did not attach required affidavits or other nontestimonial support to her petitions and, therefore, did not meet her burden of proving that she was entitled to relief requested). In postjudgment proceedings, an affidavit as to the factual basis for the relief requested is mandatory pursuant to §508(a). For a more thorough discussion of the components of a fee petition, see §§2.58 – 2.67 below.

5. [2.48] Responsive Pleadings

Any responsive pleadings must set forth the amount paid (including deposits) by or on behalf of the responding party to his or her attorney, including payments from third parties, such as parents, that are used to pay the deposit or subsequent fees for your client. Because there is a possibility that the court may require that some of the money be transferred to the other spouse, the parents should be apprised of that possibility before they make the payment. After being so apprised, they may prefer to lend the money (with proper loan documentation) so that the loan might be deemed to be a marital debt, thereby enhancing their chances of being repaid. In addition, if you disagree with the necessity of your opponent's proposed legal services, your response should so indicate. For a more thorough discussion of opposing fee petitions, see §§2.121 – 2.122 below.

6. [2.49] Hearing on Petition for Interim Fees and Costs

The IMDMA provides that, except for good cause shown, an interim fee hearing in a prejudgment dissolution proceeding shall be non-evidentiary and summary in nature. 750 ILCS 5/501(c-1)(1). (Although the IMDMA uses the word "nonevidentiary," evidence is submitted, but it is in the form of affidavits, requests for judicial notice, etc. *Id.* Thus, a more accurate term would be "non-testimonial.") Although a court will hear arguments of counsel, it normally will base its ruling on the evidence presented in the petition and the affidavits. However, if you can show good cause (*e.g.,* a bona fide dispute about the ability/inability factor, rates, etc.), the court may hold a full evidentiary hearing. All interim fee hearings, whether pre-decree under §501(c-1)(1) or post-decree under §508(a), shall be scheduled expeditiously by the court.

Conducting an evidentiary hearing on an interim fee petition in a pre-decree dissolution of marriage case is the exception, not the rule. In *In re Marriage of Levinson,* 2013 IL App (1st) 121696, ¶33 n.4, 989 N.E.2d 1177, 371 Ill.Dec. 249, good cause was not shown despite the complex nature of the marital property in part because of the time that would be needed to prepare and present evidence about the character and value of the property, and the court had already received over 154 pages of supporting documents.

"The party seeking an award for prospective attorney fees must show that he or she cannot afford to pay and that the other spouse can afford to do so." *In re Marriage of Norris,* 252 Ill.App.3d 230, 625 N.E.2d 6, 12, 192 Ill.Dec. 46 (1st Dist. 1992), *appeal denied,* 151 Ill.2d 566 (1993). A finding of financial inability is not limited to destitute circumstances. *See generally In re Marriage of Heroy,* 2017 IL 120205, ¶19, 89 N.E.3d 296, 417 Ill.Dec. 648, citing *Kaufman v. Kaufman,* 22 Ill.App.3d 1045, 318 N.E.2d 282, 286 (1st Dist. 1974). Rather, a party is financially unable to pay his or her attorneys' fees when doing so "would strip that party of [his or] her means of support or undermine [his or] her financial stability." *In re Marriage of Schneider,* 214 Ill.2d 152, 824 N.E.2d 177, 190, 291 Ill.Dec 601 (2005), citing *In re Marriage of Puls,* 268 Ill.App.3d 882, 645 N.E.2d 525, 530, 206 Ill.Dec. 520 (1st Dist. 1994). *See also In re Marriage of Sadovsky,* 2019 IL App (3d) 180204, 145 N.E.3d 649, 438 Ill.Dec. 113 (holding that petitioning wife did not establish that divesting capital assets to pay her attorneys' fees would undermine her financial stability).

7. [2.50] Decision by Court

In assessing a request for prejudgment interim fees, the court shall consider the factors set forth in §501(c-1)(1) of the IMDMA. 750 ILCS 5/501(c-1)(1). Note that in a request for interim fees in a postjudgment matter, §508(a) applies, but a review and at least partial incorporation of the relevant §501(c-1)(1) factors will be helpful.

Section 501(c-1)(3) also requires the court to make "findings that the party from whom attorney's fees and costs are sought has the financial ability to pay reasonable amounts and that the party seeking attorney's fees and costs lacks sufficient *access* to assets or income to pay reasonable amounts." [Emphasis added.] 750 ILCS 5/501(c-1)(3). *See also In re Marriage of Altman,* 2016 IL App (1st) 143076, ¶19, 59 N.E.3d 914, 406 Ill.Dec. 136 ("where one spouse has access to assets that enable that party to pay an attorney and the other does not, section 501(c-1) operates to effect 'the legislature's goal to level the playing field' "), quoting *In re Marriage of Beyer,* 324 Ill.App.3d 305, 753 N.E.2d 1032, 1041, 257 Ill.Dec. 406 (1st Dist. 2001).

If the court finds that neither party has the ability to pay additional funds or has access to additional funds, the court must divide the deposits that one or both attorneys receive between the attorneys in a manner that achieves "substantial parity" between the parties. 750 ILCS 5/501(c-1)(3). The court may order an attorney who has received a deposit to transfer part of it to opposing counsel. If you suspect that such an allocation is a possibility, you should require a higher deposit than normal. Marital and nonmarital property may be considered for the purpose of disgorgement of attorneys' fees. *In re Marriage of Earlywine,* 2013 IL 114779, 996 N.E.2d 642, 374 Ill.Dec. 947. *See also In re Marriage of Nash,* 2012 IL App (1st) 113724, 979 N.E.2d 406, 365 Ill.Dec. 802. *But see Altman, supra* (holding that spouse may not be ordered to liquidate individual

retirement account to satisfy interim fee award). Also, courts have the authority to award attorneys' fees in excess of the petitioned amount in order to level the playing field to allow the parties to significantly participate in the remaining litigation. *In re Marriage of Patel,* 2013 IL App (1st) 122882, 998 N.E.2d 579, 376 Ill.Dec. 37.

However, if your hourly rate is considerably higher than your opponent's hourly rate, you should argue that dividing the fees evenly between the parties would not achieve substantial parity of time because your opponent would be able to put in more time with the same amount of money.

8. [2.51] Effect of Interim Fee Award

Section 501(c-1)(2) of the IMDMA, provides, "Any assessment of an interim award (including one pursuant to an agreed order) shall be without prejudice to any final allocation and without prejudice as to any claim or right of either party or any counsel of record at the time of the award." 750 ILCS 5/501(c-1)(2). Any interim awards that result in an overpayment shall be returned to the party or to a successor attorney. *In re Marriage of Tetzlaff,* 304 Ill.App.3d 1030, 711 N.E.2d 346, 352, 238 Ill.Dec. 243 (1st Dist. 1999); *In re Marriage of Reidy,* 2018 IL App (1st) 170054, ¶40, 117 N.E.3d 454, 427 Ill.Dec. 69.

Moreover, an award of prejudgment interim fees shall be deemed to be an advance from the parties' marital estate unless otherwise ordered. 750 ILCS 5/501(c-1)(2). As such, this subsection only creates a presumption that attorneys' fees will be treated as advances; the trial court has discretion to order otherwise. *See, e.g., In re Marriage of Liszka,* 2016 IL App (3d) 150238, ¶¶60 – 62, 77 N.E.3d 1000, 413 Ill.Dec. 193 (holding that trial court did not err in declining to treat wife's attorneys' fees as advances against marital estate). The appellate court in *In re Marriage of Heroy,* 385 Ill.App.3d 640, 895 N.E.2d 1025, 324 Ill.Dec. 310 (1st Dist. 2008), remanded for the trial court to determine the portion of marital debt incurred by the wife and to appropriately credit the husband. As amended in 2010 and further amended in 2015, §503(d)(1) directs the court to consider "any decrease [to the marital estate] attributable to an advance from the parties' marital estate under subsection (c-1)(2) of Section 501" when dividing marital property.

Section 501(d) of the IMDMA provides that an interim award is without prejudice to the rights of the parties at subsequent hearings, may be revoked or modified before final judgment, and terminates when the final judgment is entered or when the proceeding is dismissed. 750 ILCS 5/501(d).

E. Petition for Final Fees and Costs in Dissolution Proceedings

1. [2.52] Court's Authority To Award Fees and Costs

Section 508(a) of the IMDMA as amended in 2015 provides:

The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party's costs and attorney's fees. Interim attorney's fees and costs may be awarded from the opposing party, in a pre-judgment dissolution

proceeding in accordance with subsection (c-1) of Section 501 and in any other proceeding under this subsection. At the conclusion of any pre-judgment dissolution proceeding under this subsection, contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503 and in any other proceeding under this subsection. Fees and costs may be awarded in any proceeding to counsel from a former client in accordance with subsection (c) of this Section. Awards may be made in connection with the following:

(1) The maintenance or defense of any proceeding under this Act.

(2) The enforcement or modification of any order or judgment under this Act.

(3) The defense of an appeal of any order or judgment under this Act, including the defense of appeals of post-judgment orders.

(3.1) The prosecution of any claim on appeal (if the prosecuting party has substantially prevailed).

(4) The maintenance or defense of a petition brought under Section 2-1401 of the Code of Civil Procedure [735 ILCS 5/2-1401**] seeking relief from a final order or judgment under this Act. Fees incurred with respect to motions under Section 2-1401 of the Code of Civil Procedure may be granted only to the party who substantially prevails.**

(5) The costs and legal services of an attorney rendered in preparation of the commencement of the proceeding brought under this Act.

(6) Ancillary litigation incident to, or reasonably connected with, a proceeding under this Act.

(7) Costs and attorney's fees incurred in an action under the Hague Convention on the Civil Aspects of International Child Abduction.

All petitions for or relating to interim fees and costs under this subsection shall be accompanied by an affidavit as to the factual basis for the relief requested and all hearings relative to any such petition shall be scheduled expeditiously by the court. All provisions for contribution under this subsection shall also be subject to paragraphs (3), (4), and (5) of subsection (j) of Section 503.

The court may order that the award of attorney's fees and costs (including an interim or contribution award) shall be paid directly to the attorney, who may enforce the order in his or her name, or that it shall be paid to the appropriate party. Judgment may be entered and enforcement had accordingly. Except as otherwise provided in subdivision (e)(1) of this Section, subsection (c) of this Section is exclusive as to the right of any counsel (or former counsel) of record to petition a court for an award and judgment for final fees and costs during the pendency of a proceeding under this Act. 750 ILCS 5/508(a).

Only with respect to the prosecution of an appeal, attorneys' fees are specifically tailored to individual claims, and the party must substantially prevail in the appellate court before the court may consider ordering the opposing party to pay for his or her attorneys' fees under §508(a). *In re Marriage of Murphy,* 203 Ill.2d 212, 786 N.E.2d 132, 137, 271 Ill.Dec. 874 (2003).

Section 503(j) of the IMDMA provides:

After proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be heard and decided, in accordance with the following provisions:

(1) A petition for contribution, if not filed before the final hearing on other issues between the parties, shall be filed no later than 14 days after the closing of proofs in the final hearing or within such other period as the court orders.

(2) Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504.

(3) The filing of a petition for contribution shall not be deemed to constitute a waiver of the attorney-client privilege between the petitioning party and current or former counsel; and such a waiver shall not constitute a prerequisite to a hearing for contribution. If either party's presentation on contribution, however, includes evidence within the scope of the attorney-client privilege, the disclosure or disclosures shall be narrowly construed and shall not be deemed by the court to constitute a general waiver of the privilege as to matters beyond the scope of the presentation.

(4) No finding on which a contribution award is based or denied shall be asserted against counsel or former counsel for purposes of any hearing under subsection (c) or (e) of Section 508.

(5) A contribution award (payable to either the petitioning party or the party's counsel, or jointly, as the court determines) may be in the form of either a set dollar amount or a percentage of fees and costs (or a portion of fees and costs) to be subsequently agreed upon by the petitioning party and counsel or, alternatively, thereafter determined in a hearing pursuant to subsection (c) of Section 508 or previously or thereafter determined in an independent proceeding under subsection (e) of Section 508.

(6) The changes to this Section 503 made by this amendatory Act of 1996 apply to cases pending on or after June 1, 1997, except as otherwise provided in Section 508. 750 ILCS 5/503(j).

2. [2.53] Summary of 750 ILCS 5/503(j)

A pre-decree petition for contribution may be filed prior to the final hearing, but it must be filed no later than 14 days after close of the proofs in the final hearing unless the court orders otherwise. 750 ILCS 5/503(j). Thus, you may be required to file your petition prior to the entry of a final order.

A petition for contribution must be heard after proofs have closed on all other issues unless the parties stipulate to hear the petition for contribution in conjunction with the final hearing. A court must consider the factors set forth in §503(d) of the IMDMA and, if maintenance has been awarded, §504(a). *See, e.g., In re Marriage of Anderson,* 2015 IL App (3d) 140257, 49 N.E.3d 410, 401 Ill.Dec. 22 (appellate court rejected necessity of demonstrating client's inability to pay as prerequisite for contribution award under §503(j) and instead directed courts to factors included in §§503(d) and 504(a)).

A reasonableness hearing is not required under §503(j). *In re Marriage of Hasabnis,* 322 Ill.App.3d 582, 749 N.E.2d 448, 255 Ill.Dec. 347 (1st Dist. 2001). Critically examining the reasonableness of a party's attorneys' fees contradicts the goal of §503(j), which is to "avoid conflicts of interest between [a party and his or] her attorney and to preserve the lawyer-client privilege." 749 N.E.2d at 460.

3. [2.54] Time for Filing Petition for Fees and Costs

A petition for fees and costs must be filed no later than 14 days after the closing of the proofs in the final hearing unless otherwise ordered by the court. 750 ILCS 5/503(j)(1). Once a judgment is entered in a dissolution or legal separation action, the court loses the jurisdiction to consider a pending contribution petition. Contribution petitions must be decided after proofs have closed in the final hearing, but before judgment is entered (as soon as the final amount of fees can be calculated, but while the trial court can still include in its discretion all of the financial matters that have arisen). *In re Marriage of Cozzi-DiGiovanni,* 2014 IL App (1st) 130109, 14 N.E.3d 729, 383 Ill.Dec. 446.

Section 503(j) does not apply to post-decree petitions for contribution of attorneys' fees. *Blum v. Koster,* 235 Ill.2d 21, 919 N.E.2d 333, 335 Ill.Dec. 614 (2009). Rather, §508 of the IMDMA governs attorneys' fees in post-decree dissolution proceedings. "The phrase 'all other issues,' in §503(j) refers to bifurcated contested trials, when the grounds are tried first and 'other remaining issues' are either settled or tried separately." 919 N.E.2d at 348.

4. [2.55] No Existing Agreement Between Parties

Before you file a petition for an award of attorneys' fees, make sure that your client has not already entered into an agreement with his or her spouse. If there is a clear and unequivocal agreement between the parties that each will pay his or her own fees, it will be upheld by the court, notwithstanding §508 of the IMDMA, 750 ILCS 5/508. *In re Marriage of Kessler,* 110 Ill.App.3d 61, 441 N.E.2d 1221, 1230, 65 Ill.Dec. 707 (1st Dist. 1982). However, in *Lee v. Lee,* 302 Ill.App.3d 607, 707 N.E.2d 67, 70, 236 Ill.Dec. 222 (1st Dist. 1998), the court subsequently held that the

spouses' marital settlement agreement, under which they agreed that each would be responsible for his or her own attorneys' fees, did not deprive former counsel of their statutory right to seek an award of fees from the husband, nor did it waive former counsel's entitlement to a hearing on that issue. See 750 ILCS 5/508(a), 5/508(c). In addition, the right to attorneys' fees belongs to the attorney and not the client, therefore a marital settlement agreement purporting to allocate attorneys' fees generally will not extinguish the spouse's former attorney's right to pursue an award of fees from the other spouse. *In re Marriage of Cozzi-DiGiovanni,* 2014 IL App (1st) 130109, 14 N.E.3d 729, 383 Ill.Dec. 446. Further, if the parties enter into a settlement with the intent to prevent the attorney from collecting his or her fees, the court will declare the agreement void. *Heiden v. Ottinger,* 245 Ill.App.3d 612, 616 N.E.2d 1005, 1011, 186 Ill.Dec. 563 (2d Dist. 1993).

As a matter of Illinois public policy, a marital settlement agreement or other postnuptial agreement cannot predetermine attorneys' fees to a prevailing party in matters related to the best interests of children. *In re Marriage of Linta,* 2014 IL App (2d) 130862, 18 N.E.3d 566, 385 Ill.Dec. 305. Further, an attorney fee-shifting ban in a premarital agreement violates public policy and is unenforceable as to fees incurred for child-related issues, including custody and support, because it could discourage parents from pursuing litigation in their children's best interests. *In re Marriage of Heinrich,* 2014 IL App (2d) 121333, 7 N.E.3d 889, 380 Ill.Dec. 26. However, a fee-shifting provision in a marital settlement agreement is permissible and will be strictly construed. *In re Marriage of O'Malley,* 2016 IL App (1st) 151118, ¶¶60 – 61, 64 N.E.3d 729, 407 Ill.Dec. 930, citing *Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC,* 403 Ill.App.3d 234, N.E.2d 780, 798, 341 Ill.Dec. 883 (1st Dist. 2010). In *O'Malley,* the appellate court upheld a fee-shifting provision for the award of attorneys' fees despite it, in effect, awarding fees to the "losing" party of the proceedings. Due to the contractual nature of the provision, it was strictly construed and thus enforced.

5. Filing of Required Documents

a. [2.56] Written Petition for Fees

In the past, courts have occasionally awarded fees even though the petitioning party did not file a written petition. However, §503(j)(1) of the IMDMA, 750 ILCS 5/503(j)(1), requires the filing of a written petition for fees.

"[T]he burden is on the party seeking the fees to produce detailed facts and computations upon which the claim for fees is predicated." *In re Marriage of Agostinelli,* 250 Ill.App.3d 492, 620 N.E.2d 1215, 1222, 189 Ill.Dec. 898 (1st Dist. 1993). *See also In re Marriage of Shinn,* 313 Ill.App.3d 317, 729 N.E.2d 546, 551, 246 Ill.Dec. 173 (4th Dist. 2000). To meet this burden, the documentation should be sufficient for the court to award the fees requested. Moreover, if the responding party does not request a hearing, it might be possible to obtain a fee award based solely on the submitted fee petitions and affidavits. See §2.71 below.

However, if you find yourself in court and do not have proper documentation, there is some authority for the proposition that you can use oral testimony as to the services you rendered. *In re Marriage of Pagano,* 154 Ill.2d 174, 607 N.E.2d 1242, 1249, 180 Ill.Dec. 729 (1992); *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1023, 150 Ill.Dec. 207 (1st Dist. 1990).

b. [2.57] Affidavits

See the discussion in §2.47 above regarding the affidavit that should accompany a fee petition.

c. [2.58] Necessary Components of Fee Petition

Sections 2.59 – 2.67 below comprise a list of the components that should be incorporated into an attorneys' fees petition.

(1) [2.59] Allege statutory authority

A petition for attorneys' fees should contain a statement that your fee petition is brought pursuant to §508(a) or §508(b) of the IMDMA, 750 ILCS 5/508.

(2) [2.60] Establish qualifications of attorneys and expert witnesses

The attorneys' fees petition should include a statement setting forth the qualifications of the attorneys for whom compensation is being sought. *In re Marriage of Blinderman,* 283 Ill.App.3d 26, 669 N.E.2d 687, 692, 218 Ill.Dec. 544 (1st Dist. 1996). This statement may be attached in the form of curriculum vitae or resumes or may be within the body of the petition. Since a court may decide the issue of attorneys' fees on the pleadings alone, this information aids the court in considering the skill and standing of the attorneys. When requesting reimbursement for amounts paid to expert witnesses, the petition should describe their qualifications, the reason they were needed, and the work they performed.

(3) [2.61] Set forth amount requested

An attorneys' fees petition should set forth the total amount requested. *In re Marriage of Blinderman,* 283 Ill.App.3d 26, 669 N.E.2d 687, 692, 218 Ill.Dec. 544 (1st Dist. 1996).

(4) [2.62] Set forth hourly rates

"A petition for [attorneys'] fees must specify . . . the hourly rate charged." *In re Marriage of Winton,* 216 Ill.App.3d 1084, 576 N.E.2d 856, 862, 159 Ill.Dec. 933 (2d Dist. 1991). In other words, the petition should include the different rates for office and court time as well as the hourly rates of any principals, associates, and/or paralegals who have worked on the file. *Donnelley v. Donnelley,* 80 Ill.App.3d 597, 400 N.E.2d 56, 59, 35 Ill.Dec. 919 (1st Dist. 1980).

(5) [2.63] Itemize services performed and costs incurred

It is established that a party requesting attorneys' fees must do more than merely ask for the fees. The party must present the trial court with a detailed record containing the computations of the fees, who performed the services for which the fees are sought, the time spent representing the client, and the hourly rate charged. *See Sampson v. Miglin,* 279 Ill.App.3d 270, 664 N.E.2d 281, 288, 215 Ill.Dec. 884 (1st Dist. 1996). "A petition for fees must specify the services performed, by whom they were performed, [and] the time expended on the services listed." *In re Marriage of*

Winton, 216 Ill.App.3d 1084, 576 N.E.2d 856, 862, 159 Ill.Dec. 933 (2d Dist. 1991). *See also In re Marriage of Shinn,* 313 Ill.App.3d 317, 729 N.E.2d 546, 551, 246 Ill.Dec. 173 (4th Dist. 2000). You should also show the time spent on each task; do not cumulate your time on multiple tasks into a single entry for each day. *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 430, 115 Ill.Dec. 899 (1st Dist. 1987). Copies of your individual time slips or any other detailed records of time spent that meet the required standards of specificity should be attached. Date books and time sheets are the types of records that may be used to support the claim. As a general rule, summaries and copies of bills are insufficient to meet the specificity standard if they contain only vague statements of time spent. 518 N.E.2d at 429.

In addition to attorneys' fees, an award of costs can be requested, including the fees of expert witnesses. *In re Marriage of Blinderman,* 283 Ill.App.3d 26, 669 N.E.2d 687, 692, 218 Ill.Dec. 544 (1st Dist. 1996). However, you must establish that the fees were reasonable. *Winton, supra,* 576 N.E.2d at 861 – 862.

(6) [2.64] Allege reasonable necessity of services and reasonableness of fees

An attorneys' fees petition should allege that the services performed were reasonably necessary and that the fee requested is reasonable. *In re Marriage of Blinderman,* 283 Ill.App.3d 26, 669 N.E.2d 687, 692, 218 Ill.Dec. 544 (1st Dist. 1996).

(7) [2.65] Allege client's obligation to pay fees

An attorney should allege and establish that the client is ultimately responsible for the fees even though he or she may be seeking contribution from the client's spouse. The general rule is that if a client is not obligated to pay the fees to his or her own attorney, then he or she cannot obtain contribution from his or her spouse for those fees. *In re Marriage of Magnuson,* 156 Ill.App.3d 691, 510 N.E.2d 437, 444, 109 Ill.Dec. 569 (2d Dist.), *appeal denied,* 116 Ill.2d 556 (1987); *In re Marriage of Jacobson,* 89 Ill.App.3d 273, 411 N.E.2d 947, 950, 44 Ill.Dec. 581 (1st Dist. 1980); *Gasperini v. Gasperini,* 57 Ill.App.3d 578, 373 N.E.2d 576, 582, 15 Ill.Dec. 230 (1st Dist. 1978). However, in a case in which the client has been represented pro bono by a legal service agency and has no obligation to pay fees, the court may require the client's spouse to pay a reasonable amount as fees. *In re Marriage of Brockett,* 130 Ill.App.3d 499, 474 N.E.2d 754, 756, 85 Ill.Dec. 794 (5th Dist. 1984); *In re Marriage of Pick,* 167 Ill.App.3d 294, 521 N.E.2d 121, 127, 118 Ill.Dec. 53 (2d Dist.), *appeal denied,* 121 Ill.2d 586 (1988). *See also Verbaere v. Life Investors Insurance Company of America,* 226 Ill.App.3d 289, 589 N.E.2d 753, 168 Ill.Dec. 353 (1st Dist. 1992). Moreover, requiring a spouse to pay the fees of a client's pro bono attorney has been upheld outside of Illinois. *In re Marriage of Swink,* 807 P.2d 1245, 1248 (Colo.App. 1991).

(8) [2.66] Allege petitioning party's inability and responding party's ability to pay (or failure to comply with court order)

If the petition is brought pursuant to §508(a) of the IMDMA, 750 ILCS 5/508(a), it should allege that the petitioning party has an "inability" to pay his or her own fees and that the responding party has the "ability" to pay all of (or a portion of) the fees. For a more thorough discussion, see §§2.73 – 2.87 below and §2.49 above.

If the petition is brought pursuant to §508(b), it should allege that the responding party failed to comply with the court's order. For a more thorough discussion, see §§2.31 – 2.37 above.

(9) [2.67] Verify petition

S.Ct. Rule 137 requires, among other things, that the attorney sign the petition. In addition, it is important for the client to verify the petition in case the trial court relies solely on the petition in determining the fee issue.

d. [2.68] No Waiver of Attorney-Client Privilege

Section 503(j)(3) of the IMDMA provides, "The filing of a petition for contribution shall not be deemed to constitute a waiver of the attorney-client privilege between the petitioning party and current or former counsel." 750 ILCS 5/503(j)(3). This provision allows an attorney to disclose privileged information without it constituting a permanent waiver.

6. [2.69] Responding Party's Response and Hearing Request

Upon receipt of a petition, the responding party may attend on the initial hearing date and request (a) time to file a response, (b) time to conduct discovery, and (c) a full evidentiary hearing. The responding party should then file a verified response with affidavits (*e.g.,* an affidavit of the responding party setting forth his or her inability to pay the petitioning party's fees). Unlike a petition for interim fees, the statute does not require the responding attorney to disclose how much money he or she has received.

7. Trial on Final Fee Petition

a. [2.70] Time for Trial

Section 503(j) of the IMDMA, 750 ILCS 5/503(j), requires that the hearing on contribution for attorneys' fees and costs should be held after the proofs have closed in the final hearing on all other issues but before judgment is entered. However, the parties may stipulate to try the issue of fees and costs in conjunction with the other issues.

Note that the hearing on contribution must take place (or be waived) before a hearing to determine the amount the client owes to his or her own attorney. 750 ILCS 5/508(c)(2). This provision was enacted so that the attorney could argue zealously for a maximum amount of contribution without having to breach attorney-client confidentiality as to why his or her fees were so high. For a more thorough discussion, see §2.163 below.

Prior to the 1997 amendments to the IMDMA, the courts also held a hearing on the other issues before the hearing on contribution: "Thus, our statutory scheme requires the trial court to consider the property received by each party [and] their respective incomes and financial obligations *before* allocating responsibility for payment of attorneys' fees." [Emphasis added.] *In re Marriage of Ferkel,* 260 Ill.App.3d 33, 632 N.E.2d 1133, 1139, 198 Ill.Dec. 522 (5th Dist. 1994), quoting *In re Marriage of Derning,* 117 Ill.App.3d 620, 453 N.E.2d 90, 94, 72 Ill.Dec. 785 (2d Dist. 1983). *See*

also In re Marriage of Krivi, 283 Ill.App.3d 772, 670 N.E.2d 1162, 1168, 219 Ill.Dec. 274 (5th Dist. 1996); *In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 414, 238 Ill.Dec. 689 (5th Dist. 1999) (when determining award of attorneys' fees in marital dissolution action, allocation of assets and liabilities, maintenance, and relative earning abilities of parties should be considered).

However, it was permissible for a court to require that the petition on fees be filed and the hearing be held prior to the disposition of the property and maintenance/child support issues. *In re Marriage of Thornton,* 138 Ill.App.3d 906, 486 N.E.2d 1288, 1294, 93 Ill.Dec. 453 (1st Dist. 1985).

Which issue is heard first may depend on the facts of each case. In some cases, it makes sense for the court first to determine the amount of the fees it will award because it is a marital debt that must be apportioned. In other cases, it makes sense first to determine whether there is a basis for shifting all or a portion of the fees. In any event, it is important that the court not enter a judgment on any issue until it has made a determination on all issues because "the allocation of attorney fees . . . is dependent upon and integrally related to decisions regarding property, maintenance and child support." *Derning, supra,* 453 N.E.2d at 94.

b. [2.71] Possibility of Full Evidentiary Hearing

Section 508(a) of the IMDMA, 750 ILCS 5/508(a), provides that the court may order the payment of fees "after due notice *and hearing.*" [Emphasis added.] Ideally, when a party files a petition for attorneys' fees, all courts will set an initial hearing on the petition and require the petitioning party to serve due notice on the responding party. The notice requirements set forth in the Code of Civil Procedure and local rules should be followed. "Due notice" requires more than a few hours' notice on the day of the hearing. *Ingrassia v. Ingrassia,* 156 Ill.App.3d 483, 509 N.E.2d 729, 743, 109 Ill.Dec. 68 (2d Dist.), *reh'g denied,* 116 Ill.2d 555 (1987). If the responding party attends the initial hearing, he or she should be given (1) time to file a response, (2) time to conduct discovery, and (3) a full evidentiary hearing, if he or she so requests.

Several cases have held that if "the trial court had heard evidence of the parties' financial situation during trial, it was not error for the court to fail to hold a separate hearing on the subject of fees." *In re Marriage of Duerr,* 250 Ill.App.3d 232, 621 N.E.2d 120, 126, 190 Ill.Dec. 251 (1st Dist.), *appeal denied,* 152 Ill.2d 557 (1993). However, in order for the court to enter an award of contribution, the petitioning party must establish that

1. there is a financial justification for requiring the spouse to pay the fees (*e.g.,* the petitioning party does not have the ability to pay them and the responding party has the ability to pay them);

2. the legal services rendered were reasonably necessary; and

3. the amount of the fees is reasonable.

Thus, the parties' financial situation is only one of the issues that needs to be determined before the court can enter an award of contribution. Thus, cases like *Duerr, supra,* are not well reasoned. In *In re Marriage of Brackett,* 309 Ill.App.3d 329, 722 N.E.2d 287, 242 Ill.Dec. 798 (2d Dist. 1999), the court determined that a court must hear, through testimony or otherwise, additional proofs after the close of proofs on all other issues before entering judgment.

In addition, a hearing is necessary so that the parties have an opportunity to produce evidence and provide oral arguments as to why it is or is not equitable to require the responding party to pay all or a portion of the petitioning party's fees and costs. *Id.* (court must hear, through testimony or otherwise, additional proofs after close of proofs on all other issues before entering judgment). Although a trial court may have general knowledge about the parties' respective financial situations, due process requires that a party be given the opportunity (by way of cross-examination and oral argument) to persuade the judge on the righteousness of his or her position. *Lee v. Lee,* 302 Ill.App.3d 607, 707 N.E.2d 67, 71, 236 Ill.Dec. 222 (1st Dist. 1998). When attorneys' fees are contested, the court must conduct a hearing on that issue. While typically it is a spouse who requests a hearing, the court in *Lee* asserted that an attorney, when faced with an opposition to his or her fee petition by the other spouse, should not be precluded from presenting evidence in support of the petition. *Id.*

The petitioning party has the burden of proving certain facts, such as his or her inability to pay his or her fees, the responding party's ability to pay them, the reasonable necessity of the services performed, the reasonableness of the fees, etc. If the petitioning party fails to meet his or her burden of proof by presenting sufficient evidence on each of the issues, the court cannot award the fees, even if the responding party fails to object. *See, e.g., In re Marriage of Douglas,* 195 Ill.App.3d 1053, 552 N.E.2d 1346, 1350 – 1351, 142 Ill.Dec. 605 (5th Dist. 1990). *See also In re Marriage of Pagano,* 154 Ill.2d 174, 607 N.E.2d 1242, 1249, 180 Ill.Dec. 729 (1992); *In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 414, 238 Ill.Dec. 689 (5th Dist. 1999).

However, if the responding party waives the right to a hearing or does not request one, several courts have held that it is not necessary for the court to hold one. *Hupe v. Hupe,* 305 Ill.App.3d 118, 711 N.E.2d 789, 795, 238 Ill.Dec. 402 (3d Dist. 1999); *In re Marriage of McHenry,* 292 Ill.App.3d 634, 686 N.E.2d 670, 226 Ill.Dec. 887 (1st Dist. 1997); *In re Marriage of Blazis,* 261 Ill.App.3d 855, 634 N.E.2d 1295, 1305, 199 Ill.Dec. 941 (4th Dist. 1994); *In re Marriage of Rushing,* 258 Ill.App.3d 1057, 628 N.E.2d 245, 251, 194 Ill.Dec. 748 (1st Dist. 1993), *appeal denied,* 155 Ill.2d 576 (1994); *Pagano, supra,* 607 N.E.2d at 1247. Nevertheless, a trial court must satisfy itself that the services were reasonably necessary and that the fees are reasonable.

c. [2.72] Order of Proof

As with most trials, the moving party in an attorneys' fees contribution petition must establish a prima facie case, and the opposing party has an opportunity to present rebuttal evidence.

d. [2.73] Proving Entitlement to Contribution

Section 508(a) of the IMDMA as amended in 2010 states, "At the conclusion of any pre-judgment dissolution proceeding under this subsection, contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503 and in any other proceeding under this subsection." 750 ILCS 5/508(a). Section 503(j)(2) states, "Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504." The criteria for division of marital property under §503 are set forth in §503(d); the criteria for an award of maintenance under §504 are set forth in §504(a).

The 1997 amendments to the IMDMA seem to have added a number of factors the courts are required to consider when awarding fees. However, in reality, the courts were already considering most of these factors. As the appellate court stated in 1991,

> **[**m**]uch of the case law comments upon the necessity of showing that the party seeking payment of fees lacks the ability to pay his or her own fees and that his or her spouse has the ability to pay the fees. This is an overstatement and oversimplification of the actual case holdings. The case law compares the relative abilities of the parties, plus other factors.** *In re Marriage of Carr,* 221 Ill.App.3d 609, 582 N.E.2d 752, 753, 164 Ill.Dec. 189 (5th Dist. 1991), quoting 2 H. Joseph Gitlin, GITLIN ON DIVORCE, p. 509 (1991).

Thus, the 1997 amendments on this issue should be primarily regarded as a codification of prior caselaw. Furthermore, this chapter assumes that the legislature did not intend the 1997 amendments to effect a drastic change in one spouse's entitlement to contribution or the other spouse's liability to pay contribution.

(1) [2.74] Proving element of financial justification

Historically, in reaching a decision on contribution, the courts have referred to the inability of one party to pay his or her fees and the ability of the other party to pay all or a portion of them. Over the years, however, the courts have come to consider numerous other factors in reaching this decision. These factors were codified in the 1997 amendments to the IMDMA. The IMDMA directs the court in pre-dissolution proceedings to consider the factors set forth in §503(d) and, if maintenance has been awarded, the factors set forth in §504(a), including "any other factor that the court expressly finds to be just and equitable." 750 ILCS 5/503(j), 5/504(a).

Thus, it is no longer appropriate in pre-dissolution proceedings to seek contribution solely by referring to the "inability" of the client to pay his or her fees and the "ability" of the client's spouse to pay them. It is important for lawyers and judges to abandon this antiquated terminology and adopt more descriptive terminology. A better way to put it is that a party must establish a financial justification for contribution.

(2) [2.75] Types of evidence that may be used

In reaching a decision on contribution, the court may rely on evidence it hears at the fee hearing or look back to the record of the trial proceedings. *In re Marriage of Alshouse,* 255 Ill.App.3d 960, 627 N.E.2d 731, 735, 194 Ill.Dec. 394 (3d Dist.), *appeal denied,* 156 Ill.2d 555 (1994); *In re Marriage of Weinberg,* 125 Ill.App.3d 904, 466 N.E.2d 925, 935, 81 Ill.Dec. 123 (1st Dist. 1984); *Hupe v. Hupe,* 305 Ill.App.3d 118, 711 N.E.2d 789, 795, 238 Ill.Dec. 402 (3d Dist. 1999) (court may base decision on financial conditions of parties as evidenced by record when party does not request hearing on ability to pay); *In re Marriage of Anderson,* 2015 IL App (3d) 140257, ¶22, 49 N.E.3d 410, 401 Ill.Dec. 22 (local rules may require financial affidavit to be submitted contemporaneously with hearing to determine contributing spouse's financial circumstances).

(3) Who qualifies for award of contribution

(a) [2.76] In general

The spouse seeking contribution for attorneys' fees does not need to be destitute. *In re Marriage of Hasabnis,* 322 Ill.App.3d 582, 749 N.E.2d 448, 461, 255 Ill.Dec. 347 (1st Dist. 2001); *In re Marriage of Broday,* 256 Ill.App.3d 699, 628 N.E.2d 790, 797, 195 Ill.Dec. 326 (1st Dist. 1993). In the past, the courts have discussed this concept in terms of whether the petitioning party has an "inability" to pay his or her own attorneys' fees. *In re Marriage of Minear,* 181 Ill.2d 552, 693 N.E.2d 379, 383, 230 Ill.Dec. 250 (1998). "Merely showing that the other spouse has a greater ability to pay attorney fees is not sufficient." *In re Marriage of Sparagowski,* 232 Ill.App.3d 257, 596 N.E.2d 210, 211, 172 Ill.Dec. 931 (3d Dist. 1992). A party must demonstrate his or her inability independent of the other party's ability. *In re Marriage of Hacker,* 239 Ill.App.3d 658, 606 N.E.2d 648, 655, 179 Ill.Dec. 816 (4th Dist. 1992), *appeal denied,* 151 Ill.2d 563 (1993); *In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 414, 238 Ill.Dec. 689 (5th Dist. 1999) (party seeking award of attorneys' fees in marital dissolution action must show inability to pay fees and ability of other party to do so); *In re Marriage of Suriano,* 324 Ill.App.3d 839, 756 N.E.2d 382, 258 Ill.Dec. 400 (1st Dist. 2001) (same).

However, whether a party is able to pay his or her own fees has little to do with whether a court will award contribution. For example, the courts have stated that a petitioning party can be awarded contribution

1. even if he or she has sufficient assets or income to pay his or her own fees, as long as there is a gross disparity between his or her income and the spouse's income (*In re Marriage of Carpel,* 232 Ill.App.3d 806, 597 N.E.2d 847, 866, 173 Ill.Dec. 873 (4th Dist.), *appeal denied,* 147 Ill.2d 625 (1992); *In re Marriage of Vance,* 2016 IL App (3d) 150717, 57 N.E.3d 795, 405 Ill.Dec. 110));

2. even if his or her present income exceeds his or her present expenses (*In re Marriage of McCoy,* 272 Ill.App.3d 125, 650 N.E.2d 3, 7, 208 Ill.Dec. 732 (4th Dist. 1995));

3. even if he or she has received a substantial portion of the marital estate (*Donnelley v. Donnelley,* 80 Ill.App.3d 597, 400 N.E.2d 56, 58 – 60, 35 Ill.Dec. 919 (1st Dist. 1980) (wife received $950,000 in marital assets, yet husband was still ordered to pay majority of attorneys' fees); *In re Marriage of Landfield,* 209 Ill.App.3d 678, 567 N.E.2d 1061, 153 Ill.Dec. 834 (1st Dist. 1991) (wife received marital assets of $800,000 and $3,000 per month maintenance, yet husband was ordered to pay $100,000 towards wife's attorneys' fees)); or

4. even if he or she is able to support himself or herself but not in the lifestyle to which he or she was accustomed during the marriage (*In re Marriage of Frey,* 258 Ill.App.3d 442, 630 N.E.2d 466, 473, 196 Ill.Dec. 531 (5th Dist. 1994); *In re Marriage of Ferkel,* 260 Ill.App.3d 33, 632 N.E.2d 1133, 1139, 198 Ill.Dec. 522 (5th Dist. 1994)). (Section 503(d) of the IMDMA has no provision for allowing a court to consider a party's lifestyle in determining whether to award fees and costs; however, §503(j) provides that if maintenance is awarded, the court may consider the factors in §504(a), one of which is "the standard of living established during the marriage.")

"Attorney fee awards have been upheld where the party seeking the award has had a regular income or salary, a savings account, stocks, securities or other liquid assets, or real estate." *Broday, supra,* 628 N.E.2d at 797. *But see In re Marriage of Sadovsky,* 2019 IL App (3d) 180204, 145 N.E.3d 649, 438 Ill.Dec. 113 (when husband and wife had $1.9 million and $1.6 million in assets respectively, trial court did not abuse its discretion in declining to award wife contribution when she did not establish that paying her attorneys' fees by liquidating her assets would undermine her financial stability).

On the other hand, the courts have denied contribution to a party by finding that he or she had the ability to pay even though it might require pain or sacrifice. *In re Marriage of Krivi,* 283 Ill.App.3d 772, 670 N.E.2d 1162, 1169, 219 Ill.Dec. 274 (5th Dist. 1996); *McCoy, supra; McGuire, supra* (court denied contribution to wife even though she would experience economic sacrifices because both parties were in weak financial situation). *See also In re Marriage of Shen,* 2015 IL App (1st) 130733, 35 N.E.3d 1178, 394 Ill.Dec. 209 (holding that trial court acted within its discretion in denying wife's petition for contribution when neither party had ability to pay).

(b) [2.77] Factors pertaining to petitioning party's entitlement to contribution

Under the 1997 amendments, §503(j) of the IMDMA, 750 ILCS 5/503(j), directs the court to consider the factors in §503(d) and, if maintenance has been awarded, those in §504(a). The following is a reorganization of those factors:

Primary factors. The primary factors affecting the court's decision to award contribution are

1. each spouse's current or prospective net income (750 ILCS 5/503(d)(8), 5/503(d)(11), 5/504(a)(1), 5/504(a)(3)) as affected by the following:

    a. the occupation, vocational skills, and employability of each spouse (750 ILCS 5/503(d)(8), 5/504(a)(9));

    b. whether a spouse with primary parental responsibility must continue as a homemaker rather than work (750 ILCS 5/503(d)(9), 5/504(a)(4));

    c. whether a spouse has ongoing financial obligations arising from a prior marriage (750 ILCS 5/503(d)(6));

    d. whether a spouse has other ongoing financial obligations (750 ILCS 5/503(d)(8));

    e. whether a spouse's age has an effect on his or her current or prospective net income (750 ILCS 5/503(d)(8), 5/504(a)(9));

    f. whether a spouse's health has an effect on his or her current or prospective net income (750 ILCS 5/503(d)(8), 5/504(a)(9));

    g. whether a spouse has special needs that affect his or her current or prospective net income (750 ILCS 5/503(d)(8), 5/504(a)(9));

h. whether a spouse's parental responsibilities have an effect on his or her current or prospective net income (750 ILCS 5/503(d)(9), 5/504(a)(6.1));

i. whether there is maintenance from one spouse to the other (750 ILCS 5/503(d)(10));

j. the likelihood that each spouse will acquire future income (750 ILCS 5/503(d)(11)); and

k. the effect that taxes have on each spouse's net income (750 ILCS 5/503(d)(12), 5/504(a)(11)); and

2. a spouse's misconduct, including

a. dissipation of the marital and nonmarital property (750 ILCS 5/503(d)(2)); and

b. other acts of misconduct (750 ILCS 5/504(a)(14)).

Secondary factors. The following secondary factors will have an effect on the court's decision to award contribution only if there is something extraordinary about them:

1. each spouse's contribution to the marital and nonmarital property (750 ILCS 5/503(d)(1));

2. the contribution of a spouse as a homemaker (*Id.*);

3. the contribution of one spouse to the other spouse's education and career (750 ILCS 5/504(a)(12));

4. the net worth of each spouse (750 ILCS 5/503(d)(3), 5/503(d)(5), 5/503(d)(6), 5/503(d)(8), 5/504(a)(1));

5. the likelihood that each spouse will acquire future assets (750 ILCS 5/503(d)(11));

6. the duration of the marriage (750 ILCS 5/503(d)(4), 5/504(a)(8));

7. an prenuptial or postnuptial agreement (750 ILCS 5/503(d)(7));

8. any other agreement between the parties (750 ILCS 5/504(a)(13));

9. the standard of living established during the marriage (750 ILCS 5/504(a)(7)); and

10. any other factor the court expressly finds to be just and equitable (750 ILCS 5/504(a)(14)).

(i) Income

(aa) [2.78] Current income

It appears that the most important factor that courts have considered is each party's income. *In re Marriage of Krivi,* 283 Ill.App.3d 772, 670 N.E.2d 1162, 1168 – 1170, 219 Ill.Dec. 274 (5th Dist. 1996); *In re Marriage of Uehlein,* 265 Ill.App.3d 1080, 638 N.E.2d 706, 715, 202 Ill.Dec. 838 (1st Dist. 1994); 750 ILCS 5/503(d)(8), 5/504(a)(1).

Some courts have referred to a party's net income, but others have referred to a party's gross income, take-home pay, salary, or earnings. Thus, it is difficult to draw conclusions as to the effect that the parties' income has on a court's decision to award contribution. It would be easier to analyze and compare the cases if, in their presentation of evidence, attorneys always used the parties' gross income figures (including alimony and child support receipts) and claimed deductions from gross income (including alimony and child support payments) to arrive at alleged "net income" figures. Then the courts in their opinions could present their findings of fact as to the parties' gross income figures and the deductions they have allowed to reach net income figures. In contribution awards, the courts should then refer to the parties' net incomes (as they have determined them to be) rather than "take-home pay," "salary," "earnings," or some other figure, making it easier for the caselaw to provide value (as precedent) on the income issue. Nothing in the IMDMA requires the trial court to "equalize" fees in a contribution hearing, and the court may consider the disparity between the parties' incomes and education, and the parties' agreement on childcare. *In re Marriage of Lonvick,* 2013 IL App (2d) 120865, 995 N.E.2d 1007, 374 Ill.Dec. 510.

In determining a spouse's net income, a court may disregard the fact that a spouse is spending money on someone with whom he or she cohabitats. *In re Marriage of Klein,* 231 Ill.App.3d 901, 596 N.E.2d 1214, 1217, 173 Ill.Dec. 335 (4th Dist. 1992). Further, when child support is paid to a party seeking a contribution to attorneys' fees, the amount paid in support may be properly excluded from the petitioning party's income, as such sums are for the support of the children and not for the payment of fees. *In re Marriage of Hill,* 2015 IL App (2d) 140345, 48 N.E.3d 1100, 400 Ill.Dec. 660.

Note that the statutory formula set forth in §505(a)(3) of the IMDMA, 750 ILCS 5/505(a)(3), for determining net income for purposes of child support payments does not apply in determining a spouse's net income for purposes of awarding attorneys' fees. *Krivi, supra,* 670 N.E.2d at 1169 – 1170.

(bb) [2.79] Employment (earning capacity)

When considering the "inability" issue, the courts have considered whether the parties are employed. *In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 238 Ill.Dec. 689 (5th Dist. 1999); *In re Marriage of Orlando,* 218 Ill.App.3d 312, 577 N.E.2d 1334, 1343, 160 Ill.Dec. 763 (1st Dist. 1991); *In re Marriage of Jacobson,* 89 Ill.App.3d 273, 411 N.E.2d 947, 949, 44 Ill.Dec. 581 (1st Dist. 1980); 750 ILCS 5/503(d)(8), 5/504(a)(3).

The inability of a spouse to work is evidence in support of his or her inability to pay attorneys' fees. This inability to work can be the result of a disability or health problems (*In re Marriage of Krane,* 288 Ill.App.3d 608, 681 N.E.2d 609, 614, 616, 224 Ill.Dec. 294 (1st Dist. 1997); *In re Marriage of Brent,* 263 Ill.App.3d 916, 635 N.E.2d 1382, 1385, 200 Ill.Dec. 799 (4th Dist. 1994); *In re Marriage of Ferkel,* 260 Ill.App.3d 33, 632 N.E.2d 1133, 198 Ill.Dec. 522 (5th Dist. 1994); *In re Marriage of Hillebrand,* 258 Ill.App.3d 835, 630 N.E.2d 518, 196 Ill.Dec. 583 (5th Dist. 1994); *In re Marriage of Kaplan,* 149 Ill.App.3d 23, 500 N.E.2d 612, 615, 102 Ill.Dec. 719 (1st Dist. 1986); *In re Marriage of Ribordy,* 128 Ill.App.3d 1073, 471 N.E.2d 1029, 1031, 84 Ill.Dec. 263 (3d Dist. 1984)) or simply because the spouse is unable to find suitable employment.

Even if a spouse is employed, a court may require the other party to pay some of his or her attorneys' fees if his or her future employment prospects are uncertain. *In re Marriage of Pahlke,* 154 Ill.App.3d 256, 507 N.E.2d 71, 107 Ill.Dec. 407 (1st Dist.), *appeal denied,* 116 Ill.2d 556 (1987); *In re Marriage of Theeke,* 105 Ill.App.3d 119, 433 N.E.2d 1311, 1317, 60 Ill.Dec. 944 (1st Dist. 1981).

Some courts have considered only the fact that a spouse was unemployed and did not mention whether the unemployment was by choice or by necessity. *In re Marriage of Auriemma,* 271 Ill.App.3d 68, 648 N.E.2d 118, 122, 207 Ill.Dec. 662 (1st Dist. 1994), *appeal denied,* 163 Ill.2d 548 (1995); *In re Marriage of LaTour,* 241 Ill.App.3d 500, 608 N.E.2d 1339, 1344, 181 Ill.Dec. 865 (4th Dist. 1993); *In re Marriage of Pagano,* 154 Ill.2d 174, 607 N.E.2d 1242, 1250, 180 Ill.Dec. 729 (1992).

If a spouse is able to find employment but instead chooses to work as a homemaker in order to care for his or her children, then the court should not hold that against the spouse. *In re Marriage of Hassiepen,* 269 Ill.App.3d 559, 646 N.E.2d 1348, 1356, 207 Ill.Dec. 261 (4th Dist. 1995); *In re Marriage of Morse,* 240 Ill.App.3d 296, 607 N.E.2d 632, 644, 180 Ill.Dec. 563 (2d Dist. 1993); 750 ILCS 5/503(d)(1), 5/504(a)(4). *Cf. Pagano, supra.*

If the client's spouse is unable to pay the client's attorneys' fees because he or she is unwilling to work a reasonable number of hours, a court may still require the spouse to pay the fees. *In re Marriage of Parker,* 252 Ill.App.3d 1015, 625 N.E.2d 237, 242, 192 Ill.Dec. 277 (1st Dist. 1993).

On the other hand, if a party is working several jobs, the court takes that into consideration in determining whether his or her spouse should pay his or her fees. *In re Marriage of McCoy,* 272 Ill.App.3d 125, 650 N.E.2d 3, 7, 208 Ill.Dec. 732 (4th Dist. 1995). *See also In re Marriage of Magnuson,* 128 Ill.App.3d 130, 470 N.E.2d 9, 10, 83 Ill.Dec. 254 (3d Dist. 1984) (wife with custody of two minor children worked two part-time jobs to make ends meet).

(cc) [2.80] Age and health

Sections 503(d)(8) and 504(a)(9) of the IMDMA, 750 ILCS 5/503(d)(8) and 5/504(a)(9), require a court to consider the parties' age and health, presumably because they may have an effect on a party's current or prospective income. *See In re Marriage of Ferkel,* 260 Ill.App.3d 33, 632 N.E.2d 1133, 1135, 1139, 198 Ill.Dec. 522 (5th Dist. 1994) (husband was 60 years old and in poor health, whereas wife was only 44 and in good health); *In re Marriage of Pahlke,* 154 Ill.App.3d

256, 507 N.E.2d 71, 76, 107 Ill.Dec. 407 (1st Dist.) (wife suffered from mental illness, making her economic future uncertain), *appeal denied,* 116 Ill.2d 556 (1987); *In re Marriage of Ribordy,* 128 Ill.App.3d 1073, 471 N.E.2d 1029, 1031, 1033, 84 Ill.Dec. 263 (3d Dist. 1984) (wife had recurring emotional difficulties requiring numerous and lengthy hospitalizations, whereas husband was in good health).

(dd) [2.81] Effect of payment of fees on client's means of support and economic stability

Sometimes, the courts consider whether the petitioning party's payment of his or her attorneys' fees would strip the spouse's means of support or undermine the economic stability of the spouse incurring the debt. *See, e.g., In re Marriage of Suriano,* 324 Ill.App.3d 839, 756 N.E.2d 382, 393, 258 Ill.Dec. 400 (1st Dist. 2001); *In re Marriage of Cantrell,* 314 Ill.App.3d 623, 732 N.E.2d 797, 803, 247 Ill.Dec. 742 (2d Dist. 2000); *In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 415, 238 Ill.Dec. 689 (5th Dist. 1999); *In re Marriage of Minear,* 287 Ill.App.3d 1073, 679 N.E.2d 856, 865, 223 Ill.Dec. 405 (4th Dist. 1997), *aff'd,* 181 Ill.2d 552 (1998); *In re Marriage of Carpenter,* 286 Ill.App.3d 969, 677 N.E.2d 463, 469, 222 Ill.Dec. 260 (5th Dist. 1997); *In re Marriage of Uehlein,* 265 Ill.App.3d 1080, 638 N.E.2d 706, 715, 202 Ill.Dec. 838 (1st Dist. 1994); *In re Marriage of Sadovsky,* 2019 IL App (3d) 180204, 145 N.E.3d 649, 438 Ill.Dec. 113.

When the courts use the phrase "strip [him] [her] of [his] [her] means of support," they mean that although a spouse has sufficient money to pay attorneys' fees, the spouse could do so only by neglecting other needs, such as food, clothing, housing, etc. When the courts use the phrase "undermine [his] [her] economic stability," they mean that although a spouse has sufficient money to pay attorneys' fees, the spouse's financial situation would become unstable if he or she did so. For example, the party might not have enough of a financial "cushion" to pay an unforeseen expense. Note that courts may order a partial contribution when the petitioning party has the ability to pay some, but not all, of his or her outstanding fees. *In re Marriage of Pratt,* 2014 IL App (1st) 130465, 17 N.E.3d 678, 384 Ill.Dec. 696.

(ee) [2.82] Prospective income

The courts may consider a party's prospective as well as his or her current income in awarding attorneys' fees. *In re Marriage of Hasabnis,* 322 Ill.App.3d 582, 749 N.E.2d 448, 461, 255 Ill.Dec. 347 (1st Dist. 2001); *In re Marriage of Krivi,* 283 Ill.App.3d 772, 670 N.E.2d 1162, 219 Ill.Dec. 274 (5th Dist. 1996).

A party may not currently have enough income to pay his or her own fees but might soon have sufficient income to do so. *In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 415, 238 Ill.Dec. 689 (5th Dist. 1999) (if client's earning potential is likely to improve, court not likely to award fees). Thus, another important factor courts consider is a party's prospective income, sometimes referred to as "earning ability." *In re Marriage of Head,* 273 Ill.App.3d 404, 652 N.E.2d 1246, 1252, 210 Ill.Dec. 270 (1st Dist. 1995); *In re Marriage of Ribordy,* 128 Ill.App.3d 1073, 471 N.E.2d 1029, 1031, 84 Ill.Dec. 263 (3d Dist. 1984); 750 ILCS 5/503(d)(11).

Prospective income also comes into play when one spouse cannot afford to pay his or her spouse's fees in one lump sum. Courts have found that a spouse's prospective income gave him or her the ability to pay the fees in installments over time. *In re Marriage of Davis,* 292 Ill.App.3d 802, 686 N.E.2d 395, 226 Ill.Dec. 765 (4th Dist. 1997); *In re Marriage of McCoy,* 272 Ill.App.3d 125, 650 N.E.2d 3, 7, 208 Ill.Dec. 732 (4th Dist. 1995).

(ii) [2.83] Parties' net worth

In reaching a decision on contribution, the courts sometimes consider each party's net worth. *In re Marriage of Hillebrand,* 258 Ill.App.3d 835, 630 N.E.2d 518, 522, 196 Ill.Dec. 583 (5th Dist. 1994); *In re Marriage of Walters,* 238 Ill.App.3d 1086, 604 N.E.2d 432, 444, 178 Ill.Dec. 176 (2d Dist. 1992). However, the courts place little weight on this factor. For example, the courts have been reluctant to require a petitioning party to sell or borrow against his or her assets to pay his or her fees — at least when the responding party has sufficient current or future income to pay them. This rationale was stated in *In re Marriage of Simmons,* 87 Ill.App.3d 651, 409 N.E.2d 321, 329, 42 Ill.Dec. 706 (1st Dist. 1980):

> **Mrs. Simmons has the ability to pay the entire amount of her fees out of her bank accounts and stock. However, as the [**IMDMA**] suggests, we have taken the income from these assets into account in determining the extent to which she is able to meet her own needs. If her assets are depleted by requiring her to use them to pay the entire amount of her fees instead of only a portion, she obviously will be less able to provide for her own needs. To meet her needs, we would then have to increase the monthly maintenance to be provided by the respondent. In view of the approach to maintenance we have taken in this case, petitioner would simply be trading investment income for maintenance, more or less dollar for dollar, and this would be contrary to the [**IMDMA's**] goal of relying as little as possible on maintenance.**

The following cases illustrate the courts' reluctance to require a party to pay the party's fees from his or her assets:

a. *In re Marriage of Cantrell,* 314 Ill.App.3d 623, 732 N.E.2d 797, 247 Ill.Dec. 742 (2d Dist. 2000) (not necessary that fee-seeking spouse be destitute; sufficient that payment would exhaust spouse's estate, strip spouse's means of support, or undermine spouse's economic stability);

b. *In re Marriage of Davis,* 292 Ill.App.3d 802, 686 N.E.2d 395, 403, 226 Ill.Dec. 765 (4th Dist. 1997) ("one spouse should not be required to invade capital to pay fees the other spouse could pay from current income");

c. *In re Marriage of Minear,* 287 Ill.App.3d 1073, 679 N.E.2d 856, 865, 223 Ill.Dec. 405 (4th Dist. 1997) ("the fee-seeking spouse is not required to divest himself of capital assets before requesting fees"), *aff'd,* 181 Ill.2d 552 (1998) (*see also In re Marriage of Morse,* 240 Ill.App.3d 296, 607 N.E.2d 632, 644, 180 Ill.Dec. 563 (2d Dist. 1993); *In re Marriage of Marthens,* 215 Ill.App.3d 590, 575 N.E.2d 3, 9, 159 Ill.Dec. 3 (3d Dist. 1991));

d. *In re Marriage of Head,* 273 Ill.App.3d 404, 652 N.E.2d 1246, 1252, 210 Ill.Dec. 270 (1st Dist. 1995) (not necessary for petitioning spouse to deplete principal in order to pay own fees);

e. *In re Marriage of Pearson,* 236 Ill.App.3d 337, 603 N.E.2d 720, 732, 177 Ill.Dec. 650 (1st Dist. 1992) (not necessary for petitioning spouse to liquidate assets to pay own fees);

f. *In re Marriage of Landfield,* 209 Ill.App.3d 678, 567 N.E.2d 1061, 1076, 153 Ill.Dec. 834 (1st Dist. 1991) (not necessary for petitioning spouse to deplete savings);

g. *In re Marriage of Zummo,* 167 Ill.App.3d 566, 521 N.E.2d 621, 625, 118 Ill.Dec. 339 (4th Dist. 1988) (not necessary for petitioning spouse to refinance asset received in dissolution action in order to pay attorneys' fees);

h. *In re Marriage of Rossi,* 113 Ill.App.3d 55, 446 N.E.2d 1198, 1203, 68 Ill.Dec. 801 (1st Dist. 1983) (if party were required to withdraw from liquid assets in order to pay fees, it could defeat court's proposed equitable distribution of property); and

i. *In re Marriage of Radzik,* 2011 IL App (2d) 100374, 955 N.E.2d 591, 353 Ill.Dec.124 (retirement accounts are exempt from being liquidated to pay for attorneys' fees).

On the other hand, even if the responding party has a greater net worth than the petitioning party, the court will not order him or her to pay the spouse's fees if it would require him or her to liquidate or borrow against assets. *In re Marriage of Krivi,* 283 Ill.App.3d 772, 670 N.E.2d 1162, 1170 – 1171, 219 Ill.Dec. 274 (5th Dist. 1996). However, when a party has assets that, upon liquidating, would be sufficient to pay his or her own attorneys' fees without undermining his or her financial stability, a court may be hesitant to award a contribution. *In re Marriage of Sadovsky,* 2019 IL App (3d) 180204, 145 N.E.3d 649, 438 Ill.Dec. 113.

(iii) [2.84] Either party's payment of own legal fees

An additional factor that courts have considered relative to contribution is whether each party has paid his or her own legal fees. If a client has paid some of his or her own legal fees, that fact may militate against him or her in seeking contribution from the spouse. *In re Marriage of Pagano,* 154 Ill.2d 174, 607 N.E.2d 1242, 1250, 180 Ill.Dec. 729 (1992). If the client still owes fees but the client's spouse has paid his or her legal fees, that fact may help the client obtain an award of contribution. *In re Marriage of Vest,* 208 Ill.App.3d 325, 567 N.E.2d 47, 51, 153 Ill.Dec. 332 (5th Dist. 1991).

Considering simply whether a spouse has paid his or her own fees is inappropriate unless the court also considers the source of the funds (*In re Marriage of Davis,* 292 Ill.App.3d 802, 686 N.E.2d 395, 226 Ill.Dec. 765 (4th Dist. 1997)) and the overall ability of the party to support himself or herself. Moreover, if paying one's own fees has a negative impact on one's petition (or opposition to a petition) for contribution, the client will have an incentive not to pay his or her own attorneys' fees.

(4) [2.85] Noneconomic factors courts consider

Section 503(d) of the IMDMA, 750 ILCS 5/503(d), has no provision for allowing a court to consider a party's misconduct in determining whether to award fees and costs. However, §503(j) provides that if maintenance is awarded, a court may consider the factors in §504(a), which include "any other factor that the court expressly finds to be just and equitable."

Prior to the 1997 amendments to the IMDMA, the courts frequently considered a party's misconduct. "In determining whether to award attorney fees, the trial court may consider a party's misconduct." *In re Marriage of Hale,* 278 Ill.App.3d 53, 662 N.E.2d 180, 184, 214 Ill.Dec. 826 (3d Dist. 1996), citing *In re Marriage of Cotton,* 103 Ill.2d 346, 469 N.E.2d 1077, 83 Ill.Dec. 143 (1984). *See also In re Marriage of Patel,* 2013 IL App (1st) 112571, 993 N.E.2d 1062, 373 Ill.Dec. 503 (finding that it was proper for trial court to consider wife's conduct in failing to comply with discovery, making false allegations, and violating court orders when awarding contributory fees to husband despite fact that husband was able to pay fees).

"Misconduct" includes

a. concealment of assets and income (*Hale, supra*);

b. litigiousness (*In re Marriage of McCoy,* 272 Ill.App.3d 125, 650 N.E.2d 3, 7, 208 Ill.Dec. 732 (4th Dist. 1995); *In re Marriage of Auriemma,* 271 Ill.App.3d 68, 648 N.E.2d 118, 122, 207 Ill.Dec. 662 (1st Dist. 1994), *appeal denied,* 163 Ill.2d 548 (1995));

c. engaging in a frivolous course of conduct (*In re Marriage of Walters,* 238 Ill.App.3d 1086, 604 N.E.2d 432, 443, 178 Ill.Dec. 176 (2d Dist. 1992));

d. delay and evasiveness in disclosing financial information (*In re Marriage of Bradley,* 2011 IL App (4th) 110392, 961 N.E.2d 980, 356 Ill.Dec. 591; *In re Marriage of Hassiepen,* 269 Ill.App.3d 559, 646 N.E.2d 1348, 1357, 207 Ill.Dec. 261 (4th Dist. 1995); *In re Marriage of Brand,* 123 Ill.App.3d 1047, 463 N.E.2d 1037, 1039, 79 Ill.Dec. 483 (4th Dist. 1984));

e. dissipation or concealment of assets and providing false accountings to the court (*In re Marriage of Uehlein,* 265 Ill.App.3d 1080, 638 N.E.2d 706, 715, 202 Ill.Dec. 838 (1st Dist. 1994); *In re Marriage of Smith,* 128 Ill.App.3d 1017, 471 N.E.2d 1008, 1017, 84 Ill.Dec. 242 (2d Dist. 1984));

f. illegal wiretaps (*Auriemma, supra*);

g. refusing to compromise (*Walters, supra*); and

h. a sham transfer of property (*In re Marriage of Pahlke,* 154 Ill.App.3d 256, 507 N.E.2d 71, 77, 107 Ill.Dec. 407 (1st Dist.), *appeal denied,* 116 Ill.2d 556 (1987)).

The "unnecessary increase in the cost of litigation" can also be a relevant factor for the court to consider in determining a contribution to attorneys' fees. *In re Marriage of Haken,* 394

Ill.App.3d 155, 914 N.E.2d 739, 744, 333 Ill.Dec. 320 (4th Dist. 2009). In *Haken,* the court found that the trial court's finding that the husband "committed improper conduct in that he needlessly increased the costs of litigation by hiring [two doctors] and paying them outrageous sums of money for their testimony and by then settling the case without using their testimony" was a proper factor for the court to consider in its discretion to fashion an award of attorneys' fees under §508(a). 914 N.E.2d at 745. *See also Miller v. Miller,* 84 Ill.App.3d 931, 405 N.E.2d 1099, 1105, 40 Ill.Dec. 7 (1st Dist. 1980) (court should not consider husband's vexatious behavior when deciding fee issues).

(5) Establishing that responding party should be required to pay petitioning party's fees

(a) [2.86] In general

Once it has been demonstrated that the client's net income is insufficient to pay his or her own attorneys' fees, it must also be established that the spouse has sufficient net income to pay them. Attention should be paid to the factors mentioned in §503(d) of the IMDMA and, if maintenance has been awarded, in §504(a). 750 ILCS 5/503(d), 5/504(a). Any evidence on issues that demonstrate a financial justification for why the client's spouse should pay the client's fees should be introduced.

(b) [2.87] Evidentiary considerations

If the client's spouse is properly requested to produce evidence regarding his or her financial condition but refuses to do so, he or she can be estopped from contending that you have failed to prove his or her ability to pay. *In re Marriage of Blinderman,* 283 Ill.App.3d 26, 669 N.E.2d 687, 692, 218 Ill.Dec. 544 (1st Dist. 1996); *In re Marriage of Walters,* 238 Ill.App.3d 1086, 604 N.E.2d 432, 444, 178 Ill.Dec. 176 (2d Dist. 1992). However, given the requirement to exchange financial affidavits per §501(a)(1) and local court rules, as well as the threat of sanctions for failure to comply under S.Ct. Rule 219, there will likely be sufficient evidence to demonstrate the client's spouse's finances, or at least grounds to request the same.

Moreover, if the client's spouse submits documents to support his or her contention that he or she is unable to pay your fees but then invokes the Fifth Amendment privilege against self-incrimination and refuses to answer questions about the documents, the documents can be excluded. *In re Marriage of Hassiepen,* 269 Ill.App.3d 559, 646 N.E.2d 1348, 1355, 207 Ill.Dec. 261 (4th Dist. 1995).

e. [2.88] Factors in Determining Amount of Fees To Be Awarded

Section 508(a) of the IMDMA, 750 ILCS 5/508(a), allows the court to award a "reasonable amount" for fees and costs. *See also In re Marriage of Hasabnis,* 322 Ill.App.3d 582, 749 N.E.2d 448, 459, 255 Ill.Dec. 347 (1st Dist. 2001); *In re Marriage of DeLarco,* 313 Ill.App.3d 107, 728 N.E.2d 1278, 1285, 245 Ill.Dec. 921 (2d Dist. 2000). Thus, once you establish the financially equitable justification for why the responding party should pay all or a portion of your fees, you must then establish that your fees and costs are reasonable. *Hasabnis, supra; In re Marriage of Krivi,* 283 Ill.App.3d 772, 670 N.E.2d 1162, 1168, 219 Ill.Dec. 274 (5th Dist. 1996); *In re Marriage of Broday,* 256 Ill.App.3d 699, 628 N.E.2d 790, 797, 195 Ill.Dec. 326 (1st Dist. 1993). "No party

should be required to pay more than the reasonable value of the legal services rendered simply because he has the ability to do so." *Vendredi v. Vendredi,* 230 Ill.App.3d 1061, 598 N.E.2d 961, 968, 174 Ill.Dec. 329 (1st Dist. 1992). "The attorney fees allowed should be fair to both the party required to pay and to the attorney requesting them." *In re Marriage of Girrulat,* 219 Ill.App.3d 164, 578 N.E.2d 1380, 1385, 161 Ill.Dec. 734 (5th Dist. 1991). *See also In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1019, 150 Ill.Dec. 207 (1st Dist. 1990).

The requirement that the fees be reasonable means that the fees cannot be "excessive." An excessive fee includes billing for wasting time, inefficiency, repetition of work, and double-charging for the same task. *In re Marriage of Uehlein,* 265 Ill.App.3d 1080, 638 N.E.2d 706, 715, 202 Ill.Dec. 838 (1st Dist. 1994). "[A] court of review will not hesitate to reduce the fees awarded if they are unreasonably high." *In re Marriage of Benevento,* 118 Ill.App.3d 16, 454 N.E.2d 766, 769, 73 Ill.Dec. 669 (1st Dist. 1983). *But see Murillo v. City of Chicago,* 2016 IL App (1st) 143002, ¶¶32 – 35, 61 N.E.3d 152, 406 Ill.Dec. 548, a case not decided under the IMDMA, in which the appellate court held that courts cannot arbitrarily reduce billed time and required any reduction to be explained.

In reaching the determination of what constitutes reasonable fees and costs, the courts consider several factors, some of which are set forth in RPC 1.5(a):

> **(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:**
>
> **(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
>
> **(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
>
> **(3) the fee customarily charged in the locality for similar legal services;**
>
> **(4) the amount involved and the results obtained;**
>
> **(5) the time limitations imposed by the client or by the circumstances;**
>
> **(6) the nature and length of the professional relationship with the client;**
>
> **(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and**
>
> **(8) whether the fee is fixed or contingent.**

Numerous courts have referred to these factors, and some have listed additional factors. For example, in *In re Marriage of Blinderman,* 283 Ill.App.3d 26, 669 N.E.2d 687, 691, 218 Ill.Dec. 544 (1st Dist. 1996), the court mentioned as additional factors the nature of the controversy, the

significance or importance of the subject matter, and the degree of responsibility involved. Although the above-listed factors are considered in determining the reasonableness of attorneys' fees, the ultimate basis on which the court may award contribution are those factors set forth in §503(d) (and §504(a) if maintenance is awarded). *In re Marriage of Johnson,* 2016 IL App (5th) 140479, 47 N.E.3d 1061, 400 Ill.Dec. 96. In *Johnson,* the appellate court reversed and remanded the trial court's denial of an award for contribution when the trial court based its decision on its disapproval of the petitioning spouse's attorney's conduct rather than the statutory factors. 2016 IL App (5th) 140479 at ¶114.

A reasonableness hearing is not required under §503(j) of the IMDMA. Critically examining the reasonableness of a party's attorneys' fees contradicts the goal of §503(j), which is to "avoid conflicts of interest between [a party and his or] her attorney and to preserve the lawyer-client privilege." *Hasabnis, supra,* 749 N.E.2d at 460.

(1) [2.89] Time required to perform legal services

"The most important of these factors [in determining what constitutes reasonable attorneys' fees] is the amount of time necessarily spent on the case." *In re Marriage of Powers,* 252 Ill.App.3d 506, 624 N.E.2d 390, 392, 191 Ill.Dec. 541 (2d Dist. 1993); *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1019, 150 Ill.Dec. 207 (1st Dist. 1990). It should be given the same weight as, or greater weight than, the other factors. *In re Marriage of Zummo,* 167 Ill.App.3d 566, 521 N.E.2d 621, 625, 118 Ill.Dec. 339 (4th Dist. 1988).

Under §508 of the IMDMA, 750 ILCS 5/508, an attorney will not be compensated for all the time he or she spent on the case but only for "work [that] was reasonably required or necessary for the proper performance of legal services in the particular case." *In re Marriage of McFarlane,* 160 Ill.App.3d 721, 513 N.E.2d 1146, 1151, 112 Ill.Dec. 537 (2d Dist. 1987). *See also Fletcher v. Fletcher,* 227 Ill.App.3d 194, 591 N.E.2d 91, 93, 169 Ill.Dec. 211 (4th Dist. 1992); *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 427, 115 Ill.Dec. 899 (1st Dist. 1987); *In re Marriage of Hirsch,* 135 Ill.App.3d 945, 482 N.E.2d 625, 633, 90 Ill.Dec. 646 (1st Dist. 1985).

> **The test for determining the reasonableness of attorney fees incurred in a matter must be whether a reasonable attorney, based on the totality of the facts and circumstances known and available to him, should have performed the legal services at the time the services were performed in order to discharge his ethical obligations under the Illinois Code of Professional Responsibility.** *Harris Trust & Savings Bank v. American National Bank & Trust Company of Chicago,* 230 Ill.App.3d 591, 594 N.E.2d 1308, 1314, 171 Ill.Dec. 788 (1st Dist. 1992).

"In the event the court finds the hours claimed are the result of unnecessary, duplicative work efforts, it must reduce the excessive hours claimed." *In re Marriage of Rossi,* 113 Ill.App.3d 55, 446 N.E.2d 1198, 1204, 68 Ill.Dec. 801 (1st Dist. 1983).

If the issues were highly contested and, as a result, the attorney spent a large amount of time on a case, the courts will consider these factors in determining whether the time spent was justified.

In re Marriage of O'Brien, 235 Ill.App.3d 520, 601 N.E.2d 1227, 1232, 176 Ill.Dec. 529 (1st Dist. 1992); *In re Marriage of Kaplan,* 149 Ill.App.3d 23, 500 N.E.2d 612, 621, 102 Ill.Dec. 719 (1st Dist. 1986); *In re Marriage of Theeke,* 105 Ill.App.3d 119, 433 N.E.2d 1311, 1317, 60 Ill.Dec. 944 (1st Dist. 1981). If your client was unreasonably contesting issues, then the court is less likely to require his or her spouse to pay the fees incurred with regard to those issues. On the other hand, if the client's spouse was unreasonably contesting issues, then the court is more likely to order the spouse to pay contribution for your fees. *In re Marriage of Auriemma,* 271 Ill.App.3d 68, 648 N.E.2d 118, 122, 207 Ill.Dec. 662 (1st Dist. 1994), *appeal denied,* 163 Ill.2d 548 (1995). *See also In re Marriage of Haken,* 394 Ill.App.3d 155, 914 N.E.2d 739, 333 Ill.Dec. 320 (4th Dist. 2009) (husband needlessly increased cost of litigation).

Preparation of the petition for contribution and preparation for the hearing on the petition are compensable. 750 ILCS 5/508(a)(5); *Powers, supra.* However, the preparation and service of an attorney lien (after the attorney was discharged by the client) was not for the benefit of the client, and the client, therefore, was not required to pay for the services. Since an attorney performs these services for his or her own benefit, the client should not be responsible for the payment of that fee. *Muller v. Jones,* 243 Ill.App.3d 711, 613 N.E.2d 271, 275, 184 Ill.Dec. 244 (4th Dist. 1993).

(2) Evidentiary considerations

(a) [2.90] Burden of proof

"[T]he party seeking an award of attorney fees bears the burden of presenting sufficient evidence establishing that the fees are reasonable." *In re Marriage of Freesen,* 275 Ill.App.3d 97, 655 N.E.2d 1144, 1151, 211 Ill.Dec. 761 (4th Dist. 1995), citing *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 427 – 428, 115 Ill.Dec. 899 (1st 1987). *See also In re Marriage of Shinn,* 313 Ill.App.3d 317, 729 N.E.2d 546, 551, 246 Ill.Dec. 173 (4th Dist. 2000); *Olsen v. Staniak,* 260 Ill.App.3d 856, 632 N.E.2d 168, 176, 198 Ill.Dec. 109 (1st Dist. 1994).

(b) [2.91] Submitting engagement agreement into evidence

The petitioning party should also offer any written engagement agreement that exists between the attorney and the client. While an engagement agreement is not conclusive on the issue of the reasonableness of the fees, it is probative. *Fletcher v. Fletcher,* 227 Ill.App.3d 194, 591 N.E.2d 91, 93, 169 Ill.Dec. 211 (4th Dist. 1992). Cf. 750 ILCS 5/508(c)(3).

(c) Proving time spent

(i) [2.92] Detailed time records

The court in *In re Marriage of Freesen,* 275 Ill.App.3d 97, 655 N.E.2d 1144, 1151, 211 Ill.Dec. 761 (4th Dist. 1995), stated:

> **More must be presented than merely a compilation of hours multiplied by a fixed hourly rate, or bills issued to the client. A request for fees must be supported by information specifying the services performed, by whom performed, time expended thereon, and hourly rate charged. For this purpose, it is incumbent upon a party seeking fees to present detailed records containing these facts.**

See also In re Marriage of Shinn, 313 Ill.App.3d 317, 729 N.E.2d 546, 552, 246 Ill.Dec. 173 (4th Dist. 2000), quoting *Kruse v. Kuntz,* 288 Ill.App.3d 431, 683 N.E.2d 1185, 1188, 225 Ill.Dec. 522 (4th Dist. 1996); *Berdex International, Inc. v. Milfico Prepared Foods, Inc.,* 258 Ill.App.3d 738, 630 N.E.2d 998, 1001, 196 Ill.Dec. 833 (1st Dist. 1994).

> **A spouse seeking a reimbursement of fees, however, must present sufficient evidence from which the trial court can render a decision as to the reasonableness of the fees requested. . . . The sufficiency of the evidence depends on whether the petitioner presents "detailed records maintained during the course of the litigation concerning facts and computations upon which the charges are predicated.". . . The absence of specificity with regard to task and time precludes a finding of reasonableness by the trial court. [**Citations omitted.**]** *In re Marriage of Broday,* 256 Ill.App.3d 699, 628 N.E.2d 790, 797, 195 Ill.Dec. 326 (1st Dist. 1993), quoting *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 427 – 428, 115 Ill.Dec. 899 (1st 1987).

The court in *In re Marriage of Konchar,* 312 Ill.App.3d 441, 727 N.E.2d 671, 674, 245 Ill.Dec. 224 (2d Dist. 2000), *abrogated on other grounds by Blum v. Koster,* 235 Ill.2d 21, 919 N.E.2d 333, 335 Ill.Dec. 614 (2009), stated:

> **It is well settled that a party requesting attorney fees must do more than merely ask for attorney fees. Specifically, the party requesting attorney fees must present the trial court with a detailed record containing the computations for fees, who performed the services for which fees are sought, the time spent representing the client, and the hourly rate charged.**

If the record keeping is inadequate and the petition reflects wasted time, inefficiency, repetition of work, and double-charging of time, then the court will reduce the award. *In re Marriage of Uehlein,* 265 Ill.App.3d 1080, 638 N.E.2d 706, 715, 202 Ill.Dec. 838 (1st Dist. 1994).

(ii) [2.93] Contemporaneous time records

For a discussion about the importance of contemporaneously kept time records, see §2.12 above.

(d) [2.94] Attorney-client privilege

In *LaHood v. Couri,* 236 Ill.App.3d 641, 603 N.E.2d 1165, 1171, 177 Ill.Dec. 791 (3d Dist. 1992), the plaintiff refused, under claim of privilege, to produce for opposing counsel detailed records on which the fees and costs were predicated. The plaintiff's offer to produce them for an inspection in camera by the court was not sufficient. Because the plaintiff refused to produce them to opposing counsel, the court held that he failed to produce sufficient evidence to support the claim for fees.

Normally, when you disclose information that is privileged under the attorney-client privilege, it will constitute a permanent waiver of the privilege as to that information. However, §503(j)(3) of the IMDMA states, "The filing of a petition for contribution shall not be deemed to constitute a waiver of the attorney-client privilege between the petitioning party and current or former counsel." 750 ILCS 5/503(j)(3).

(e) [2.95] Refreshing recollection

The court may properly allow an attorney to use a document prepared by an associate to refresh his or her recollection as to the amount of time he or she spent on various projects during litigation. *Susan E. Loggans & Associates v. Estate of Magid,* 226 Ill.App.3d 147, 589 N.E.2d 603, 608 – 609, 168 Ill.Dec. 203 (1st Dist. 1992).

(f) [2.96] Best-evidence rule

In *In re Marriage of Collins,* 154 Ill.App.3d 655, 506 N.E.2d 1000, 1002 – 1003, 107 Ill.Dec. 109 (2d Dist. 1987), a lawyer filed a petition against his client and her former husband for fees. At trial, the attorney attempted to testify and use a summary of his firm's time. An objection was made to the testimony and the summary on the ground that the best evidence rule required the original time records, not a summary of them or testimony about them. The trial court sustained the objection. The appellate court reversed, holding that the time spent on a case exists independently of any documents on which it is recorded. Thus, it cannot be said that records of services performed are better than testimony about them or a summary of them.

In *In re Marriage of DeLarco,* 313 Ill.App.3d 107, 728 N.E.2d 1278, 1287, 245 Ill.Dec. 921 (2d Dist. 2000), the court held that in the case of computer-stored records, in which the records sought to be admitted are summaries of original documents, such as the time slips in this case, the original documents must be in court or made available to the opposing party, and the party seeking the admission of the summaries must be able to provide the testimony of a competent witness or witnesses who have seen the original documents and can testify to the facts contained therein.

(g) [2.97] Questioning by judge

In *Olsen v. Staniak,* 260 Ill.App.3d 856, 632 N.E.2d 168, 175, 198 Ill.Dec. 109 (1st Dist. 1994), the court held:

> **A trial court may question a witness to determine the relevancy or materiality of proffered evidence or to clarify the issues or facts presented at the trial. . . . The court has the discretion to examine a witness, provided that in conducting such an examination the court does not become an advocate. [**Citations omitted.**]**

In particular, in a fee petition hearing, a court may question the attorney about time slips. *In re Marriage of Powers,* 252 Ill.App.3d 506, 624 N.E.2d 390, 394, 191 Ill.Dec. 541 (2d Dist. 1993).

(h) [2.98] Opinion of attorney

"It has been the rule in this State for many years that the courts are not bound by the opinions of attorneys as to what constitutes reasonable attorneys' fees." *Golstein v. Handley,* 390 Ill. 118, 60 N.E.2d 851, 854 (1945). *See also In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1024, 150 Ill.Dec. 207 (1st Dist. 1990).

(i) [2.99] Judge's knowledge and experience

In addition to any evidence of reasonableness proffered by the petitioner, the trial judge may also rely on his or her own knowledge and experience. *In re Marriage of McHenry,* 292 Ill.App.3d 634, 686 N.E.2d 670, 226 Ill.Dec. 887 (1st Dist. 1997); *In re Marriage of Sanda,* 245 Ill.App.3d 314, 612 N.E.2d 1346, 1349, 184 Ill.Dec. 186 (2d Dist. 1993).

(j) [2.100] Reliance on pleadings and affidavits on file

In determining a reasonable fee, the trial judge may rely on pleadings and affidavits on file. *In re Marriage of Sanda,* 245 Ill.App.3d 314, 612 N.E.2d 1346, 1349, 184 Ill.Dec. 186 (2d Dist. 1993).

(3) [2.101] Quality of services provided

A court should consider the quality of services provided when determining what constitutes a reasonable fee. *In re Marriage of Powers,* 252 Ill.App.3d 506, 624 N.E.2d 390, 393, 191 Ill.Dec. 541 (2d Dist. 1993); *In re Marriage of Walters,* 238 Ill.App.3d 1086, 604 N.E.2d 432, 443, 178 Ill.Dec. 176 (2d Dist. 1992). The quality is to be distinguished from the "results obtained" factor in that an attorney may have rendered high-quality services even though the results obtained were not outstanding.

(4) Results obtained or value of services

(a) [2.102] In general

The positive or negative results of the attorney's effort are factors to be considered in determining a reasonable fee. *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1020 – 1021, 150 Ill.Dec. 207 (1st Dist. 1990). If the court fails to consider them, the appellate court may remand the case. *In re Marriage of Heller,* 153 Ill.App.3d 224, 505 N.E.2d 1294, 1302, 106 Ill.Dec. 503 (1st Dist. 1987).

However, "[t]here is no prohibition against awarding attorney fees to an unsuccessful litigant, although the good faith of the litigants is to be considered." *In re Marriage of Pylawka,* 277 Ill.App.3d 728, 661 N.E.2d 505, 510, 214 Ill.Dec. 651 (2d Dist. 1996). *See also In re Marriage of Broday,* 256 Ill.App.3d 699, 628 N.E.2d 790, 797, 195 Ill.Dec. 326 (1st Dist. 1993).

The fact that the attorney obtained a greater property distribution at trial than that suggested by the client as a settlement offer weighed in favor of granting the fees requested in *Serritella v. Plotkin,* 89 Ill.App.3d 739, 412 N.E.2d 7, 8, 44 Ill.Dec. 931 (3d Dist. 1980).

Conversely, when a disabled wife received no greater benefit from protracted litigation than she would have received in the settlement proposal that had been offered by her husband and, in fact, lost the opportunity to earn substantial interest, the court considered that to be a factor in reducing the fees. *In re Marriage of Hirsch,* 135 Ill.App.3d 945, 482 N.E.2d 625, 634 – 635, 90 Ill.Dec. 646 (1st Dist. 1985).

Since "benefits obtained" is one of the factors courts consider in ruling on a petition for attorneys' fees, some have claimed that the arrangement is thus transformed into a contingent-fee agreement. However, in *Malec, supra,* the court held that consideration of the results obtained, by itself, does not convert the fee in a dissolution case to a contingent fee.

(b) [2.103] Evidentiary considerations

The burden of proof is on the attorney to establish the value of his or her services, and an appropriate fee consists of reasonable charges for reasonable services. *In re Marriage of Shinn,* 313 Ill.App.3d 317, 729 N.E.2d 546, 551, 246 Ill.Dec. 173 (4th Dist. 2000).

"The trial court may accept or reject the testimony of the petitioning attorney as to the value of the legal services performed. The court may also rely on its own knowledge and experience in determining the value of the services rendered." *In re Marriage of Walters,* 238 Ill.App.3d 1086, 604 N.E.2d 432, 443, 178 Ill.Dec. 176 (2d Dist. 1992).

(5) [2.104] Novelty of issues

If a case presents a novel issue, the courts accept the fact that an attorney may spend more time on the case than in an ordinary case.

A case was considered "novel" when there was an issue of whether, in a paternity case, the standard of living that a child would have enjoyed had he lived with the father should factor into the support order. *Ivanyi v. Granoff,* 171 Ill.App.3d 411, 526 N.E.2d 189, 201, 122 Ill.Dec. 49 (2d Dist. 1988).

In *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1019 – 1020, 150 Ill.Dec. 207 (1st Dist. 1990), the trial court concluded that the visitation and custody matters did not involve novel or difficult issues. The appellate court agreed.

In *In re Marriage of Hirsch,* 135 Ill.App.3d 945, 482 N.E.2d 625, 633 – 635, 90 Ill.Dec. 646 (1st Dist. 1985), the husband filed a petition for dissolution. During most of the proceedings, the wife was represented by a guardian ad litem. The attorneys for the guardian of the estate filed a petition for $39,831 in fees, but they had done little work. The trial court awarded them $30,519 in fees. However, the appellate court reduced the fees to $7,500, noting, among other things, that the issues were not novel.

In *In re Marriage of Dulyn,* 89 Ill.App.3d 304, 411 N.E.2d 988, 996, 44 Ill.Dec. 622 (1st Dist. 1980), the husband filed a complaint for dissolution. The trial court ordered the husband to pay $5,000 as a fee to the wife's attorney, and he appealed. The appellate court noted that the issues in the case were not novel, even though a variety of motions were filed as to custody and visitation, and reduced the fee to $4,000.

(6) [2.105] Importance of subject matter

The importance of the subject matter, especially from a family law standpoint, should also be considered. *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1019, 150 Ill.Dec. 207 (1st Dist. 1990). This factor concerns the contribution a case can make to the domestic relations body of law.

In *In re Marriage of McFarlane,* 160 Ill.App.3d 721, 513 N.E.2d 1146, 1151, 112 Ill.Dec. 537 (2d Dist. 1987), the husband petitioned for termination or modification of support payments. The trial court ruled in favor of the wife on the support issue but awarded her only $7,500 of the $20,000 fee she requested. The trial court noted, among other things, that "the importance of the subject matter from the perspective of family law was not particularly acute." *Id.* The appellate court affirmed.

In re Marriage of Kruse, 92 Ill.App.3d 335, 416 N.E.2d 40, 41, 48 Ill.Dec. 145 (1st Dist. 1980), involved a simple divorce case in which each spouse wanted custody of the children. After two days of trial, the parties reconciled. The husband was ordered to pay $12,000 in fees to the wife's attorneys, and he appealed. The appellate court noted that the case did not present any significant questions to justify the fees awarded and accordingly reduced the fees to $7,000.

(7) [2.106] Difficulty/complexity of issues

The difficulty of the issues in the case should be taken into consideration in determining a reasonable fee. RPC 1.5(a)(1); *Nottage v. Jeka,* 172 Ill.2d 386, 667 N.E.2d 91, 95 – 96, 217 Ill.Dec. 298 (1996). Not only do legally complex issues fall under this heading, but factually complex cases also qualify.

The action in *In re Marriage of Landfield,* 209 Ill.App.3d 678, 567 N.E.2d 1061, 1077, 153 Ill.Dec. 834 (1st Dist. 1991), lasted over 10 years and involved the division of $2.5 million in property. The trial court judge noted that the case was complex and difficult and awarded $200,541 in fees to the wife's attorneys.

A paternity case was deemed to be complex when the mother's attorney had to figure out the father's complicated tax return, which had been prepared by a "genius" accountant. *Ivanyi v. Granoff,* 171 Ill.App.3d 411, 526 N.E.2d 189, 200 – 201, 122 Ill.Dec. 49 (2d Dist. 1988).

In *Serritella v. Plotkin,* 89 Ill.App.3d 739, 412 N.E.2d 7, 44 Ill.Dec. 931 (3d Dist. 1980), the appellate court concluded that the issues were difficult and complex because the marriage had lasted for 15 years and because there were issues of child custody, property distribution, tax ramifications, and a new IMDMA.

On the other hand, *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1019, 150 Ill.Dec. 207 (1st Dist. 1990), involved heavily contested issues of visitation and custody. However, since the attorney was "a seasoned matrimonial law attorney with experience in contested and uncontested cases," the appellate court concluded that the issues were not difficult. *Id.*

In re Marriage of Kaplan, 149 Ill.App.3d 23, 500 N.E.2d 612, 621, 102 Ill.Dec. 719 (1st Dist. 1986), involved a dissolution of marriage with highly contested issues of custody, property maintenance, and fees. However, the trial court found that the issues were not unusually complex, and the appellate court agreed.

Complexity or difficulty merely justifies the actual time the attorney spent. If a court finds that a case is complex, it cannot increase the fee simply by applying a multiplier to the hours charged. *Bellow v. Bellow,* 94 Ill.App.3d 361, 419 N.E.2d 924, 50 Ill.Dec. 656 (1st Dist. 1981).

(8) [2.107] Preclusion of attorney's other employment

If the case precludes an attorney from accepting other cases, the court may consider that factor in determining a reasonable fee. *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 150 Ill.Dec. 207 (1st Dist. 1990). In *Malec,* the attorney was precluded from taking on other cases due to the extensive time required by his client. The appellate court held that the lost business should be considered in determining the reasonableness of the fees counsel requested. *Id*.

(9) [2.108] Comparison of fees requested with usual and customary charges

In determining a reasonable fee, a court should also consider "the fee customarily charged in the locality for similar legal services." RPC 1.5(a)(3). *See also Nottage v. Jeka,* 172 Ill.2d 386, 667 N.E.2d 91, 95 – 96, 217 Ill.Dec. 298 (1996).

(a) [2.109] Locality

The inquiry should be the usual and customary charges in the jurisdiction where the case is pending, not where the attorney's office is located. *In re Marriage of Girrulat,* 219 Ill.App.3d 164, 578 N.E.2d 1380, 1384 – 1385, 161 Ill.Dec. 734 (5th Dist. 1991); *In re Marriage of Angiuli,* 134 Ill.App.3d 417, 480 N.E.2d 513, 519, 89 Ill.Dec. 328 (2d Dist. 1985).

(b) [2.110] Rates for court time and non-court time

For a discussion regarding rates for court time and non-court time, see §2.62 above.

(10) [2.111] Comparison of fees requested with amount at stake (value of case)

In determining a reasonable fee, a court should also consider "the amount involved" in the case. RPC 1.5(a)(4). *See also Nottage v. Jeka,* 172 Ill.2d 386, 667 N.E.2d 91, 95 – 96, 217 Ill.Dec. 298 (1996). There must be a reasonable connection between the fees requested and the amount being litigated. *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 115 Ill.Dec. 899 (1st Dist. 1987).

In *Gasperini v. Gasperini,* 57 Ill.App.3d 578, 373 N.E.2d 576, 579, 15 Ill.Dec. 230 (1st Dist. 1978), the case involved only $24,000 in marital assets; thus, fees of $21,000 were not justified. In *In re Marriage of Rushing,* 258 Ill.App.3d 1057, 628 N.E.2d 245, 248, 194 Ill.Dec. 748 (1st Dist. 1993), *appeal denied,* 155 Ill.2d 576 (1994), a case involving enforcement and modification of

maintenance that resulted in a judgment of $24,900 for past maintenance and a reduction from $1,700 to $900 per month for future maintenance, the former wife's attorney requested $35,634, and the former husband's attorney requested $37,750. The trial court judge "commented about the 'outrageous' fees that were generated by both sides. He thought that the attorney fees had gone 'amuck' and that the amount of money in controversy was dwarfed by the overall attorney fees." 628 N.E.2d at 251. Accordingly, he ordered the former husband to pay only $4,000 of the former wife's fees. The appellate court affirmed.

(11) [2.112] Attorney's experience, reputation, and ability

The skill and standing of the attorney must be considered in determining a reasonable fee. *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1019, 150 Ill.Dec. 207 (1st Dist. 1990). When assessing the applicability of this factor, the court may take into account whether the attorney has extensive experience in domestic relations matters. *In re Marriage of Theeke,* 105 Ill.App.3d 119, 433 N.E.2d 1311, 1317, 60 Ill.Dec. 944 (1st Dist. 1981). However, in certain cases litigation skills may be more important than domestic relations experience. *In re Marriage of Kaplan,* 149 Ill.App.3d 23, 500 N.E.2d 612, 621, 102 Ill.Dec. 719 (1st Dist. 1986).

"Factors such as the . . . skill of the attorney will become evident during proceedings, and no independent proofs need be made concerning such factors." *In re Marriage of Sanda,* 245 Ill.App.3d 314, 612 N.E.2d 1346, 1349, 184 Ill.Dec. 186 (2d Dist. 1993).

"A court may take judicial notice of matters of common knowledge, or of facts which, while not generally known, are easily verifiable." *Harris Trust & Savings Bank v. American National Bank & Trust Company of Chicago,* 230 Ill.App.3d 591, 594 N.E.2d 1308, 1313, 171 Ill.Dec. 788 (1st Dist. 1992). When reviewing a petition for attorneys' fees, the trial court in *Harris Trust* improperly took judicial notice that a particular law firm was well regarded. While it may be true that the particular law firm was well regarded, it is not a matter on which judicial notice can be taken. "The trial court, however, may base its determination of the skill and standing of the attorney performing legal services on personal observations of the attorney in the underlying matter and its experience with other attorneys of the law firm." *Id.*

(12) [2.113] Degree of professionalism

The degree of professionalism involved in the handling of the case must also be considered in determining a reasonable fee. *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1019, 150 Ill.Dec. 207 (1st Dist. 1990). For example, in *Serritella v. Plotkin,* 89 Ill.App.3d 739, 412 N.E.2d 7, 8, 44 Ill.Dec. 931 (3d Dist. 1980), the court awarded the requested attorneys' fees after considering that through the attorneys' efforts, the case proceeded swiftly to trial and the attorneys maintained a professional relationship despite the acrimonious relationship of the clients.

(13) [2.114] Effect on attorney's welfare and nerves

Another factor a court has considered in determining reasonable fees is the effect a case has had on an attorney's "general welfare and nerves." *In re Marriage of Wiley,* 199 Ill.App.3d 223, 556 N.E.2d 788, 793, 795, 145 Ill.Dec. 170 (4th Dist. 1990). In *Wiley,* the petitioning attorney

presented his itemized fee petition to the court. In addition to the hourly fee incurred, the attorney added an extra $1,500 for the effect the case had on his "general welfare and nerves" because of the extreme agitation and unusual nature of the case. *Id.* The attorney presented opinion witness testimony to support this claim. The trial court awarded the attorney this extra fee, and the appellate court affirmed.

This decision is questionable for the following reasons:

a. A court cannot require a responding party to pay more than the petitioning party is obligated to pay. When an attorney decides to practice divorce law, he or she is involving himself or herself in a highly stressful area of the law, and the compensation for that stress should be reflected in his or her hourly rate. If an attorney attempted to obtain a bonus from his or her own client for the effect that the case had on his or her general welfare and nerves, he or she would probably not be successful. For a court to impose such a fee on a responding party is like awarding punitive damages, which are not permitted in dissolution cases.

b. Enhancements are generally not allowed in dissolution cases. In a Rule 23 opinion, the appellate court in *Grund & Leavitt, P.C. v. Stephenson,* 2022 IL App (1st) 210619-U, affirmed the trial court's decision that ultimately dismissed counsel's complaint seeking enforcement of a fee enhancement provision because the provision contained no price term or method for determining that price and instead left the discretion to Grund to decide what enhanced fee to charge. As the terms were deemed "open-ended," the appellate court ultimately found that no meeting of the minds had taken place so as to have formed a valid contract providing for any enhanced fee. *Id.*

(14) [2.115] Other factors

Factors the courts have mentioned in dicta but that were not at issue in any cases include the time limitations, the nature and length of the attorney-client relationship, and the type of fee (fixed or contingent).

f. [2.116] Need for Expert Witness

On some issues in a hearing on a fee petition, an expert witness is necessary; on other issues, one is not necessary. Note that the petitioning attorney may serve as his or her own expert witness. *In re Marriage of Salata,* 221 Ill.App.3d 336, 581 N.E.2d 873, 875 – 876, 163 Ill.Dec. 719 (2d Dist. 1991). *See also Johns v. Klecan,* 198 Ill.App.3d 1013, 556 N.E.2d 689, 696, 145 Ill.Dec. 71 (1st Dist. 1990).

(1) [2.117] Reasonableness of fees

An expert witness is necessary on the issue of the reasonableness of the attorney's fee. *In re Marriage of Salata,* 221 Ill.App.3d 336, 581 N.E.2d 873, 875 – 876, 163 Ill.Dec. 719 (2d Dist. 1991).

(2) [2.118] Other issues

The following are issues in a hearing on a fee petition on which an expert witness is helpful but not necessary:

a. the nature of the controversy (*In re Marriage of Sanda,* 245 Ill.App.3d 314, 612 N.E.2d 1346, 1349, 184 Ill.Dec. 186 (2d Dist. 1993));

b. the skill of the attorney (*id.*);

c. the time required to complete particular activities (*Olsen v. Staniak,* 260 Ill.App.3d 856, 632 N.E.2d 168, 176, 198 Ill.Dec. 109 (1st Dist. 1994)); and

d. the value of the legal services performed (*In re Marriage of Walters,* 238 Ill.App.3d 1086, 604 N.E.2d 432, 443, 178 Ill.Dec. 176 (2d Dist. 1992); *Verbaere v. Life Investors Insurance Company of America,* 226 Ill.App.3d 289, 589 N.E.2d 753, 759, 168 Ill.Dec. 353 (1st Dist. 1992)).

In addition, the courts have also mentioned that expert witnesses have testified on the following issues:

a. the petitioning attorney's reputation in the community;

b. whether the case required a high degree of skill on the part of the attorney;

c. whether the case involved complicated issues;

d. whether the case involved a unique issue; and

e. the usual and customary charges for such cases. *See In re Marriage of Yakin,* 107 Ill.App.3d 1103, 436 N.E.2d 573, 583 – 584, 62 Ill.Dec. 547 (1st Dist. 1982); *In re Marriage of Angiuli,* 134 Ill.App.3d 417, 480 N.E.2d 513, 517, 89 Ill.Dec. 328 (2d Dist. 1985).

Some courts have stated that the trial court may rely on its own knowledge and experience in determining the value of the services rendered. Even though an expert witness is not required on most issues, it may be wise to have one, particularly when the trial court judge has not been on the bench long.

(3) [2.119] Choice of expert witness

Of utmost importance is the attorney's choice of an expert witness. An expert witness should be someone with extensive domestic relations law experience and preferably someone who has been previously qualified as an expert witness. Once retained, the expert witness should become familiar enough with the case to formulate an opinion regarding the various pertinent factors. The witness should be allowed to review the files and have access to the attorneys and staff who worked on the case. The more the witness knows about the case, the more effective he or she will be.

(4) [2.120] Disclosure of expert witness

S.Ct. Rule 213(f) requires that "[u]pon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial" and distinguishes among "lay witnesses," "independent expert witnesses," and "controlled expert witnesses." In a fee petition setting, this will require disclosure of the petitioning attorney if he or she intends to testify on any of the issues mentioned in §§2.117 and 2.118 above. Accordingly, if your opposing counsel serves an interrogatory on you pursuant to S.Ct. Rule 213, you should disclose yourself and any other expert witness you intend to call, as well as the other information required by S.Ct. Rule 213(f). Otherwise, the trial court may bar your testimony and that of your outside expert witness. *In re Marriage of Gorsich,* 208 Ill.App.3d 852, 567 N.E.2d 601, 603, 153 Ill.Dec. 643 (2d Dist. 1991). *See also In re Marriage of Yelton,* 286 Ill.App.3d 436, 676 N.E.2d 993, 222 Ill.Dec. 29 (1st Dist. 1997).

In determining whether to allow or exclude expert testimony because of a discovery rule violation, the trial court may consider the following factors: (a) surprise to the adverse party; (b) the prejudicial effect of the testimony; (c) the nature of the testimony; (d) the diligence of the adverse party; (e) the timely objection to the testimony; and (f) the good faith of the party calling the witness. *Barth v. Reagan,* 139 Ill.2d 399, 564 N.E.2d 1196, 1206, 151 Ill.Dec. 534 (1990).

V. OPPOSING PETITION FOR FINAL AWARD OF CONTRIBUTION IN DISSOLUTION CASE

A. [2.121] Timely and Proper Objections to Petitioning Party's Evidence

If the party petitioning for contribution fails to prove each essential element of his or her case, it is not necessary to make an objection. *In re Marriage of Douglas,* 195 Ill.App.3d 1053, 552 N.E.2d 1346, 1350 – 1351, 142 Ill.Dec. 605 (5th Dist. 1990). However, if the petitioning party attempts to use improper evidence to prove his or her case, a timely and proper objection must be made, or it will be construed as a waiver. A waiver by an attorney is binding on the client, absent a showing that it was unreasonable, the result of fraud, or a violation of public policy. *In re Marriage of McHenry,* 292 Ill.App.3d 634, 686 N.E.2d 670, 226 Ill.Dec. 887 (1st Dist. 1997).

The appellate courts have repeatedly refused to consider an appeal on an issue because they considered the issue to be waived in the trial court. The following are examples of cases in which the issue of waiver was addressed:

1. In *In re Marriage of Blinderman,* 283 Ill.App.3d 26, 669 N.E.2d 687, 691, 218 Ill.Dec. 544 (1st Dist. 1996), the petitioner had an opinion witness testify at trial. The respondent failed to object to his qualification but raised the issue on appeal. The appellate court held that the respondent had waived this issue.

2. In *In re Marriage of Florence,* 260 Ill.App.3d 116, 632 N.E.2d 681, 687, 198 Ill.Dec. 351 (4th Dist.), *appeal denied,* 157 Ill.2d 498 (1994), the party claimed on appeal that the evidence was insufficiently specific for the trial court to award fees. However, the appellate court held that the appellant waived this objection because he could have cross-examined the attorney if he wanted more specificity.

3. On appeal, the respondent in *In re Marriage of LaTour,* 241 Ill.App.3d 500, 608 N.E.2d 1339, 1344, 181 Ill.Dec. 865 (4th Dist. 1993), objected to the reasonableness and necessity of the fees. Because he failed to object at trial, the appellate court held that he waived his objection.

4. The petitioner in *In re Marriage of Walters,* 238 Ill.App.3d 1086, 604 N.E.2d 432, 444, 178 Ill.Dec. 176 (2d Dist. 1992), wanted to call the respondent as an adverse witness, but the respondent was absent from the fee hearing. The petitioner objected to the respondent's absence. The appellate court held that the petitioner waived his right to examine the respondent because he failed to serve a S.Ct. Rule 237(b) notice to appear.

5. In *In re Marriage of Osborn,* 206 Ill.App.3d 588, 564 N.E.2d 1325, 1334, 151 Ill.Dec. 663 (5th Dist. 1990), the attorney submitted an itemized bill after the fee hearing at the request of the court. On appeal, the defendant objected to this procedure. The appellate court held that the defendant had the opportunity to recall the attorney after he submitted the bill. When the defendant elected not to recall the attorney as a witness, he waived any objection he may have had on the issue.

6. The defendant in *Ivanyi v. Granoff,* 171 Ill.App.3d 411, 526 N.E.2d 189, 199, 122 Ill.Dec. 49 (2d Dist. 1988), objected to the fees the trial court awarded for work performed by the associates and staff of the plaintiff's attorney because they were not present to be cross-examined. The appellate court held that the defendant waived his objection because he did not seek to call them as witnesses.

7. In *In re Marriage of Zummo,* 167 Ill.App.3d 566, 521 N.E.2d 621, 625 – 626, 118 Ill.Dec. 339 (4th Dist. 1988), the party did not object to the number of hours submitted in the petition for attorneys' fees and did not produce any responsive evidence that related to the reasonableness of the fees during the hearing. In the appellate court, the party claimed the fees were excessive. Because he had failed to object to the evidence in the trial court or present any of his own, the appellate court could rely only on the evidence at the fee hearing and, accordingly, upheld the award.

B. [2.122] Unsuccessful Arguments

Many "creative" arguments have been offered to oppose claims for attorneys' fees. Among those rejected by the appellate courts are the following.

In *Lackey & Lackey, P.C. v. Prior,* 228 Ill.App.3d 397, 591 N.E.2d 998, 169 Ill.Dec. 494 (5th Dist. 1992), the clients argued that the attorneys in their law firm were not entitled to recover legal fees when, during the period that the fees were incurred, the attorneys had a conflict of interest that had a detrimental effect on the clients. The appellate court held that even if the attorneys did have a conflict of interest, the clients were required to allege that the conflict caused the law firm to breach its contractual obligations to the clients. Since the clients had not made that allegation, the attorneys would be allowed to recover their fees.

In *In re Marriage of Waltrip,* 216 Ill.App.3d 776, 576 N.E.2d 399, 402 – 403, 159 Ill.Dec. 730 (2d Dist. 1991), the husband argued that his attorneys' fees were unreasonable because the wife's attorney billed fewer hours than did the husband's attorney. The appellate court found that the reason for the disparity in fees was that the wife cooperated with her attorney whereas the husband was uncooperative, thus requiring more time to be spent.

In *In re Marriage of Collins,* 154 Ill.App.3d 655, 506 N.E.2d 1000, 1003, 107 Ill.Dec. 109 (2d Dist. 1987), a lawyer filed a petition against his client and her former husband for fees. At trial, the attorney attempted to testify and use a summary of his firm's time. An objection was made to the testimony and the summary on the ground that the best evidence rule required the original time records, not a summary of them or testimony about them. The trial court sustained the objection. The appellate court reversed, holding that the time spent on a case exists independently of any documents on which it is recorded. Thus, it cannot be said that records of services performed are better than testimony about them or a summary of them.

In *In re Marriage of Hirsch,* 135 Ill.App.3d 945, 482 N.E.2d 625, 632 – 633, 90 Ill.Dec. 646 (1st Dist. 1985), the wife, who had a disability, had cases pending in both the domestic relations and probate divisions. The husband argued that the wife's attorneys' fees in the dissolution proceeding should be decided by the probate court (where they would have been paid out of the wife's estate). The appellate court held that a trial court has the authority to award fees under the IMDMA when presented with a proper petition.

In *In re Marriage of Yakin,* 107 Ill.App.3d 1103, 436 N.E.2d 573, 583, 62 Ill.Dec. 547 (1st Dist. 1982), a husband claimed that he should not be obligated to pay his wife's attorneys' fees because the dissolution actually benefited her. The appellate court noted that the wife did receive an equitable distribution of the marital assets, but that did not excuse him from having to pay her fees. *See also Ivanyi v. Granoff,* 171 Ill.App.3d 411, 526 N.E.2d 189, 201, 122 Ill.Dec. 49 (2d Dist. 1988).

VI. DECISION BY COURT ON PETITION FOR FINAL AWARD OF CONTRIBUTION IN DISSOLUTION CASE

A. [2.123] Trial Court's Broad Discretion

Once all the evidence is submitted, the court will render its decision. *In re Marriage of DeLarco,* 313 Ill.App.3d 107, 728 N.E.2d 1278, 1283, 245 Ill.Dec. 921 (2d Dist. 2000); *In re Marriage of Shinn,* 313 Ill.App.3d 317, 729 N.E.2d 546, 551, 246 Ill.Dec. 173 (4th Dist. 2000); *In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 414, 238 Ill.Dec. 689 (5th Dist. 1999); *Hupe v. Hupe,* 305 Ill.App.3d 118, 711 N.E.2d 789, 238 Ill.Dec. 402 (3d Dist. 1999). The Illinois Supreme Court stated, "The awarding of attorney fees and the proportion to be paid are within the sound discretion of the trial court and will not be disturbed on appeal, absent an abuse of discretion." *In re Marriage of Minear,* 181 Ill.2d 552, 693 N.E.2d 379, 383, 230 Ill.Dec. 250 (1998), quoting *In re Marriage of Bussey,* 108 Ill.2d 286, 483 N.E.2d 1229, 1235, 91 Ill.Dec. 594 (1985). *See also In re Marriage of Hasabnis,* 322 Ill.App.3d 582, 749 N.E.2d 448, 461, 255 Ill.Dec. 347 (1st Dist. 2001).

The trial court has broad discretion to rely on the pleadings, affidavits on file, and its own experience. *In re Marriage of McHenry,* 292 Ill.App.3d 634, 686 N.E.2d 670, 226 Ill.Dec. 887 (1st Dist. 1997); *In re Marriage of Sanda,* 245 Ill.App.3d 314, 612 N.E.2d 1346, 1349, 184 Ill.Dec. 186 (2d Dist. 1993).

1. [2.124] Court's Discretion as to Financial Justification Element

In determining the financial justification issue,

> **[**t**]he trial court [**may look**] to the reality of the parties' relative financial condition. It [**is**] not bound to follow certain accounting practices. The court must use its judgment to decide the issues based on the *real economic situation of the parties* and not on accounting principles or practices that might be relevant in a tax or business situation. [**Emphasis added.**]** *In re Marriage of Plotz,* 229 Ill.App.3d 389, 594 N.E.2d 366, 369, 171 Ill.Dec. 514 (3d Dist. 1992).

2. [2.125] Court's Discretion as to Amount of Fees

In *Kruse v. Kuntz,* 288 Ill.App.3d 431, 683 N.E.2d 1185, 1188, 225 Ill.Dec. 522 (4th Dist. 1996), the court found that

> [t]**o justify a fee, more must be presented than a mere compilation of hours multiplied by a fixed hourly rate or bills issued to the client, since this type of data, without more, does not provide the court with sufficient information as to their reasonableness — a matter that cannot be determined on the basis of conjecture or on the opinion or conclusions of the attorney seeking fees. Rather, the petition for fees must specify the services performed, by whom they were performed, the time expended thereon and the hourly rate charged therefor."**

See also In re Marriage of Shinn, 313 Ill.App.3d 317, 729 N.E.2d 546, 552, 246 Ill.Dec. 173 (4th Dist. 2000).

In determining the reasonableness of a fee, the court should consider all the factors discussed in §2.88 above and determine what weight or value to assign to each factor. It can then adjust the fee upward or downward. *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1020, 150 Ill.Dec. 207 (1st Dist. 1990). However, it appears that a court may not enhance a fee to an amount in excess of the figure that would be the result of multiplying all of an attorney's hours by his or her hourly rate.

> **It has been the rule in this State for many years that the courts are not bound by the opinions of attorneys as to what constitutes reasonable attorneys' fees. The courts are responsible to litigants for the use of their own knowledge of the value of services rendered, and should and will take into consideration such knowledge.** *Golstein v. Handley,* 390 Ill. 118, 60 N.E.2d 851, 854 (1945).

"The trial court is not required to accept the attorney's opinion of what is a reasonable fee. . . . It may rely on its own knowledge which it has acquired in the discharge of professional duties to value legal services rendered." [Citation omitted.] *Malec, supra,* 562 N.E.2d at 1024.

"The trial court may accept or reject the testimony of the petitioning attorney as to the value of the legal services performed. The court may also rely on its own knowledge and experience in determining the value of the services rendered." *In re Marriage of Walters,* 238 Ill.App.3d 1086, 604 N.E.2d 432, 443, 178 Ill.Dec. 176 (2d Dist. 1992).

If neither party has the financial ability to pay his or her own attorneys' fees, some courts have reduced the amount of the fees to be paid even though the services were reasonably necessary and the fees were reasonable. *In re Marriage of Cabaj,* 118 Ill.App.3d 789, 455 N.E.2d 822, 826, 74 Ill.Dec. 393 (1st Dist. 1983); *In re Marriage of Rossi,* 113 Ill.App.3d 55, 446 N.E.2d 1198, 1204, 68 Ill.Dec. 801 (1st Dist. 1983); *In re Marriage of Theeke,* 105 Ill.App.3d 119, 433 N.E.2d 1311, 1317, 60 Ill.Dec. 944 (1st Dist. 1981). However, in *In re Marriage of Shen,* 2015 IL App (1st) 130733, 35 N.E.3d 1178, 394 Ill.Dec. 209, the trial court found that neither party had the ability to pay the fees for which the wife sought contribution. The appellate court found no abuse of discretion and affirmed the trial court's order denying contribution and requiring the wife to pay her own fees.

Conversely, in *Nottage v. Jeka,* 172 Ill.2d 386, 667 N.E.2d 91, 217 Ill.Dec. 298 (1996), the Illinois Supreme Court questioned the relevance of considering a party's ability to pay his or her own fees when an attorney is seeking fees against his or her own client. The court quoted *In re Marriage of Ransom,* 102 Ill.App.3d 38, 429 N.E.2d 594, 597, 57 Ill.Dec. 696 (2d Dist. 1981), in which the court held, "Regardless of the respective financial circumstances of the spouses, an attorney is still entitled to seek payment for his services from his own client and the legislature in providing this procedure did not intend that it be conditioned upon the financial abilities of the parties." 667 N.E.2d at 96.

The approach taken in *Ransom* is the approach that is more consistent with (a) the principle that each party has the primary obligation to pay his or her own attorneys' fees (see §2.39 above) and (b) the fact that the courts have no authority to reduce the amount owed merely because a party cannot afford to pay the amount. If a client contracts with an attorney for legal services and the attorney's fee is reasonable and necessary, the court should not reduce the amount a client is obligated to pay his or her own attorney.

Thus, when neither party has the present financial ability to pay the other party's attorneys' fees, the court's only authority is to deny contribution (*see, e.g., In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 415, 238 Ill.Dec. 689 (5th Dist. 1999); *In re Marriage of Krivi,* 283 Ill.App.3d 772, 670 N.E.2d 1162, 1171, 219 Ill.Dec. 274 (5th Dist. 1996); *In re Marriage of Hensley,* 210 Ill.App.3d 1043, 569 N.E.2d 1097, 1104, 155 Ill.Dec. 486 (4th Dist. 1991); *Shen, supra*) or order it in installment payments (*In re Marriage of McCoy,* 272 Ill.App.3d 125, 650 N.E.2d 3, 7, 208 Ill.Dec. 732 (4th Dist. 1995)). However, courts have no authority to reduce the amount of fees a party owes to his or her own attorney unless there is a finding that the services were not reasonably necessary or that the fees were excessive.

B. [2.126] Abuse of Trial Court's Discretion

For a discussion of decisions by trial courts that constituted an abuse of discretion, see §§2.185 – 2.189 below.

C. [2.127] Petitioning Party Establishing Inability To Pay Own Fees and Ability of Responding Party To Pay Some or All of Them

The appellate courts have reviewed many cases in which the petitioning party alleged his or her inability to pay fees. The courts found that a petitioning party had an inability to pay some or all of his or her own fees

1. when the petitioner waived any claim that the trial court was required to enter any findings under §508(b) of the IMDMA, 750 ILCS 5/508(b);

2. when the settlement agreement stated that the trial court found the attorneys' fees reasonable and necessarily incurred; and

3. when the petitioner was ordered to pay her own attorneys' fees, the trial court's ruling that the respondent be responsible for the entire remaining balance of the petitioner's attorneys' fees was reversed and remanded to determine an appropriate contribution amount. *In re Marriage of Pond,* 379 Ill.App.3d 982, 885 N.E.2d 453, 319 Ill.Dec. 182 (2d Dist. 2008).

When the wife submitted an exhibit setting forth her monthly income and expenses, there was no error in the circuit court's holding that the wife had an inability to pay and that the husband had an ability to pay attorneys' fees. *In re Marriage of Alexander,* 368 Ill.App.3d 192, 857 N.E.2d 766, 306 Ill.Dec. 367 (5th Dist. 2006).

When the wife would be compelled to invade her assets and clearly undermine her economic stability and the husband's marital and nonmarital estate was large and produced income, the trial court's award of fees to the wife was not an abuse of discretion. *In re Marriage of Hasabnis,* 322 Ill.App.3d 582, 749 N.E.2d 448, 461, 255 Ill.Dec. 347 (1st Dist. 2001).

When the wife had an annual income of $17,500 and the husband had an annual income of $270,000, the trial court ordered the husband to pay her attorneys' fees of $4,500. The court reasoned that if the wife were to pay the $4,500 fees, it would invade her financial assets, further exhaust her estate, and clearly undermine her economic stability. *In re Marriage of Cantrell,* 314 Ill.App.3d 623, 732 N.E.2d 797, 247 Ill.Dec. 742 (2d Dist. 2000).

When the wife had a gross monthly income of $1,903 and the husband had a gross monthly income of $11,625, the trial court ordered the husband to reimburse the wife for her payment of fees of $7,423.66 in 60 installments of $123.72 per month. *In re Marriage of Davis,* 292 Ill.App.3d 802, 686 N.E.2d 395, 398, 402 – 403, 226 Ill.Dec. 765 (4th Dist. 1997).

When the wife had a gross monthly income of $1,124 and the husband had a gross monthly income (after paying maintenance) of $1,626, the trial court ordered the husband to pay the wife's attorneys' fees of $8,000. The appellate court affirmed in part and reversed in part. *In re Marriage of Krane,* 288 Ill.App.3d 608, 681 N.E.2d 609, 617, 224 Ill.Dec. 294 (1st Dist. 1997).

When the wife had an annual income of $12,000 and the husband had an annual income of $40,000 – 50,000, the trial court declined the wife's request that the husband pay her attorneys' fees of $3,534. The appellate court reversed. *In re Marriage of Carpenter,* 286 Ill.App.3d 969, 677 N.E.2d 463, 469, 222 Ill.Dec. 260 (5th Dist. 1997).

When the wife received a majority of assets in the dissolution proceeding but the husband was in a better position to acquire future income and assets, the trial court found that the wife was unable to pay her own fees and ordered the husband to be responsible for them. The appellate court affirmed. *In re Marriage of Orlando,* 218 Ill.App.3d 312, 577 N.E.2d 1334, 160 Ill.Dec. 763 (1st Dist. 1991).

When the wife received $800,000 in marital assets in the dissolution proceeding plus $3,000 per month in maintenance, the trial court found that the wife did not have the ability to pay all of her fees. The appellate court affirmed. *In re Marriage of Landfield,* 209 Ill.App.3d 678, 567 N.E.2d 1061, 153 Ill.Dec. 834 (1st Dist. 1991).

When the wife received 72 percent of the marital assets in addition to $3,300 per month in child support, the trial court found that the wife was unable to pay her own fees. The appellate court affirmed. *In re Marriage of Osborn,* 206 Ill.App.3d 588, 564 N.E.2d 1325, 151 Ill.Dec. 663 (5th Dist. 1990).

Although the wife's income, including child support, exceeded her monthly expenses, the trial court found that the wife did not have the ability to pay her attorneys' fees incurred because the husband's actual support payments were sporadic. When support payments were not made, the expenses of the wife and child exceeded the wife's income. The appellate court affirmed. *In re Marriage of Ziemer,* 189 Ill.App.3d 966, 546 N.E.2d 229, 137 Ill.Dec. 475 (4th Dist. 1989).

When the wife had only $3,000 in a bank account and no job and her maintenance had just been terminated in a postjudgment proceeding, the trial court denied her petition for contribution. However, the appellate court found that she was unable to pay her fees and reversed. *In re Marriage of McGory,* 185 Ill.App.3d 517, 541 N.E.2d 801, 133 Ill.Dec. 590 (3d Dist. 1989).

When the wife had already tapped nonmarital assets to pay attorneys' fees and the husband had not and the husband had control over finances and significantly higher income, the trial court awarded interim fees to the wife. The appellate court affirmed. *In re Marriage of Levinson,* 2013 IL App (1st) 121696, 989 N.E.2d 1177, 371 Ill.Dec. 249.

When the husband made approximately $12,000 per month and the wife made little money outside of support and had substantial medical costs, the trial court ordered the husband to pay the wife's attorneys' fees of $43,180.50. The appellate court affirmed, rejecting the notion that there is a simple formula to compare financial situations and basing its decision on the various statutory factors. *In re Marriage of Sobieski,* 2013 IL App (2d) 111146, 984 N.E.2d 163, 368 Ill.Dec. 438.

When a large disparity in former spouses' attorneys' fees existed ($182,000 for the wife and $95,000 for the husband), the court did not preclude contribution from the husband when the

husband's lower fees were attributed to his attorneys taking a less aggressive and more cost-conscious approach toward litigation than the wife's attorney, even though the wife was awarded maintenance, child support, and a disproportionate share of the marital estate. *In re Marriage of Micheli,* 2014 IL App (2d) 121245, 15 N.E.3d 512, 383 Ill.Dec. 734.

D. [2.128] Petitioning Party Failing To Establish Inability To Pay Own Fees

In the following cases, the courts have found that the petitioning party had the ability to pay his or her own fees.

When the wife had failed to comply with discovery orders and orders for depositions (*i.e.,* she engaged in actions "designed to delay and harass" husband), the wife had prolonged the case and, therefore, caused the petitioner additional expenses. *In re Marriage of Samardzija,* 365 Ill.App.3d 702, 850 N.E.2d 880, 887, 303 Ill.Dec. 75 (3d Dist. 2006). Additionally, the husband had contributed $3,500 towards the wife's attorneys' fees, and the income tax return of $22,000 was equally divided between the parties for the purpose of paying attorneys' fees. Therefore, the court held that the wife was responsible for her own attorneys' fees.

In *In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 415, 238 Ill.Dec. 689 (5th Dist. 1999), the wife was capable of generating significant income and had done so in the past under the same health conditions as presently prevailed, the parties' earning capacities were roughly identical, and the husband had been awarded the greater share of marital debt. The court reasoned that a party cannot satisfy the burden of showing an inability to pay attorneys' fees merely by showing that the court awarded him or her maintenance or a greater portion of marital property.

When the wife had net income of $730.80 per month, the trial court found that she had an inability to pay all of her own fees and ordered her husband to pay half of them, but the appellate court reversed. *In re Marriage of Riech,* 208 Ill.App.3d 301, 566 N.E.2d 826, 152 Ill.Dec. 949 (4th Dist. 1991).

In *In re Marriage of Zells,* 197 Ill.App.3d 232, 554 N.E.2d 289, 143 Ill.Dec. 354 (1st Dist. 1990), *aff'd in part, rev'd in part,* 143 Ill.2d 251 (1991), the wife was 46 years old and had no significant work experience and only one year of college. She received about the same amount of property as her husband and was receiving $250 per week in maintenance. Her husband was an attorney. Nevertheless, the trial court found that the wife could become self-supporting and ordered her to pay $42,000 of the $50,000 attorneys' fees she incurred. The appellate court affirmed.

The trial court in *In re Marriage of Piccione,* 158 Ill.App.3d 955, 511 N.E.2d 1157, 110 Ill.Dec. 837 (2d Dist. 1987), found that a wife who had earned $28,000 per year, had an interest in a $100,000 townhome, owned three vehicles, and had a bank account of $1,000 had the ability to pay her own fees. The appellate court affirmed.

In *In re Marriage of Ryan,* 138 Ill.App.3d 1077, 487 N.E.2d 61, 93 Ill.Dec. 617 (1st Dist. 1985), the wife had gross income of $19,000 per year, was awarded a $32,550 secured promissory note, and had no substantial debt. The trial court ordered the husband to pay $2,500 of the wife's fees. The appellate court reversed, holding that the wife failed to prove her inability to pay her own fees.

In *In re Marriage of Schinelli,* 406 Ill.App.3d 991, 942 N.E.2d 682, 347 Ill.Dec. 479 (2d Dist. 2011), the wife had gross income of $110,000 per year, while the husband had income of $120,000 per year after taking maintenance into account. The trial court ordered the husband to pay $15,000 of the wife's attorneys' fees, but the appellate court reversed, stating that awarding attorneys' fees when there was a substantial similarity in incomes without a showing of inability to pay was an abuse of discretion.

E. [2.129] Specific Findings Not Required by Trial Court

Normally, there is no requirement that the trial court make specific findings regarding fee awards. *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1015, 150 Ill.Dec. 207 (1st Dist. 1990); *Sostak v. Sostak,* 113 Ill.App.3d 954, 447 N.E.2d 1345, 1350, 69 Ill.Dec. 658 (2d Dist. 1983). Even if the trial court fails to specify that it relied on the requisite factors, the appellate court will presume that it did so, absent some other evidence. *In re Marriage of Pitulla,* 202 Ill.App.3d 103, 559 N.E.2d 819, 829, 147 Ill.Dec. 479 (1990), *appeal after remand,* 256 Ill.App.3d 84 (1st Dist. 1993), *appeal denied,* 155 Ill.2d 575 (1994).

Although review by the trial court of individual time entries is not mandated, the appellate courts have commented favorably when the trial court did perform this function. *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 430, 115 Ill.Dec. 899 (1st Dist. 1987).

On the other hand, when the trial court did not specifically indicate which fees it struck but merely halved the fee requested, the appellate court remanded to the lower court for a ruling on each billing entry, consistent with the *Kaiser* guidelines. *Fitzgerald v. Lake Shore Animal Hospital, Inc.,* 183 Ill.App.3d 655, 539 N.E.2d 311, 315 – 316, 132 Ill.Dec. 1 (1st Dist. 1989).

The exception to the general rule concerning specific findings occurs in proceedings brought under §508(b) of the IMDMA, 750 ILCS 5/508(b). The trial court must make a specific finding without compelling cause or justification to trigger the mandatory nature of the fee award. *In re Marriage of Young,* 200 Ill.App.3d 226, 559 N.E.2d 178, 181, 147 Ill.Dec. 178 (4th Dist. 1990).

F. Res Judicata

1. [2.130] Definition

The court in *Torcasso v. Standard Outdoor Sales, Inc.,* 157 Ill.2d 484, 626 N.E.2d 225, 228, 193 Ill.Dec. 192 (1993), defined "res judicata" as follows:

> **Under the doctrine of *res judicata,* a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. . . . Where there is identity of parties, subject matter, and cause of action, the doctrine of *res judicata* extends not only to every matter that was actually determined in the prior suit but to every other matter that might have been raised and determined in it. . . . A cause of action consists of a single**

> **group of facts giving the plaintiff a right to seek redress for a wrongful act or omission of the defendant. . . . Although a single group of operative facts may give rise to the assertion of more than one kind of relief or more than one theory of recovery, assertions of different kinds or theories of relief arising out of a single group of operative facts constitute but a single cause of action. [**Citations omitted.**]**

See also Weisman v. Schiller, Ducanto & Fleck, 314 Ill.App.3d 577, 733 N.E.2d 818, 248 Ill.Dec. 143 (1st Dist. 2000).

In summary, three elements must be present: "(1) a final judgment rendered by a court of competent jurisdiction; (2) an identity of parties; and (3) an identity of causes of action." *Bennett v. Gordon,* 282 Ill.App.3d 378, 668 N.E.2d 109, 112, 217 Ill.Dec. 924 (1st Dist. 1996). As to the third factor, "[i]f the same facts are essential to maintain both proceedings or the same evidence is necessary to sustain the two, there is identity between the causes of action asserted." *Torcasso, supra,* 626 N.E.2d at 228. *See also Weisman, supra*.

2. [2.131] Application of Doctrine

In *Weisman v. Schiller, Ducanto & Fleck,* 314 Ill.App.3d 577, 733 N.E.2d 818, 248 Ill.Dec. 143 (1st Dist. 2000), a former client brought a legal malpractice action against the attorney who had represented her in a marital dissolution action in which the attorney failed to perform adequate discovery that would have revealed the husband's net worth of $4.5 million. The attorney moved to dismiss on the basis that the action was barred under the doctrine of res judicata by final resolution of his fee petition under the IMDMA, in connection with which the client had asserted an affirmative defense of negligence. The court held that only the reasonableness of the fee was at issue in the fee petition case. Therefore, res judicata did not bar the client from asserting her legal malpractice claim on appeal.

In *Bennett v. Gordon,* 282 Ill.App.3d 378, 668 N.E.2d 109, 217 Ill.Dec. 924 (1st Dist. 1996), the attorney requested an award of fees against his client. The client opposed the petition on the grounds that the attorney had failed to conduct discovery and had failed to take action to have assets transferred to the client. The court awarded the fees to the attorney. The client then sued the attorney for legal malpractice. The court held that the doctrine of res judicata barred the client from asserting several claims in a legal malpractice suit when her opposition to the attorneys' fees petition raised substantially similar issues. *See also Tebbens v. Levin & Conde,* 2018 IL App (1st) 170777, ¶32, 107 N.E.3d 263, 423 Ill.Dec. 892 (holding that litigant cannot bring malpractice claim alleging same core facts previously addressed in fee petition), citing *Bennett, supra,* 668 N.E.2d at 112 – 113.

In *Cantwell v. Reinhart,* 244 Ill.App.3d 199, 614 N.E.2d 174, 185 Ill.Dec. 40 (1st Dist. 1993), the attorney, on behalf of the wife, filed a petition for attorneys' fees against the husband. The husband was ordered to pay $1,000 to the wife. Six years later, the attorney filed a two-count complaint in the law division seeking fees for representing the wife in the dissolution proceeding. The first count was against the wife, while the second count was against the wife and her former spouse. The sole issue on appeal was whether the attorney was precluded from bringing an action to recover attorneys' fees against the former client under the doctrine of res judicata when a

judgment was entered on this issue in a prior action brought by the wife against the husband. The attorney argued that because the hearing under §508 of the IMDMA, 750 ILCS 5/508, was brought on behalf of the wife against her former spouse, there was no identity between the parties. The court disagreed on the ground that it is well established that the attorneys for the litigants in a dissolution proceeding are considered as parties in interest in an action for attorneys' fees to the extent that while such fees are generally awarded to the client, they properly "belong" to the attorney. 614 N.E.2d at 176. For these reasons, the appellate court upheld the trial court's order dismissing the case as to both the wife and her former husband.

G. [2.132] Collateral Estoppel

One is estopped from relitigating an issue in a second case between the same parties when the prior finding or verdict was based on it. *LaHood v. Couri,* 236 Ill.App.3d 641, 603 N.E.2d 1165, 1168, 177 Ill.Dec. 791 (3d Dist. 1992). This is true even if the first court acted in excess of its authority. *In re Marriage of Mitchell,* 181 Ill.2d 169, 692 N.E.2d 281, 229 Ill.Dec. 508 (1998).

VII. [2.133] SEEKING INTERIM OR FINAL AWARD OF CONTRIBUTION IN POSTJUDGMENT MATTERS

After the 2010 amendments to §§501(c-1) and 508(a) of the IMDMA, petitions for interim fees in postjudgment are governed by §508(a), 750 ILCS 5/508(a). However, see §§2.42 – 2.51 above for a discussion of issues and distinctions between the two sections. In general, all postjudgment petitions must be accompanied by an affidavit as to the factual basis for the relief requested pursuant to §508(a). Sections 2.134 – 2.138 below discuss petitions for final fees in postjudgment matters.

A. [2.134] Petitions To Vacate Judgment

The IMDMA specifically provides that awards of fees may be made in connection with "[t]he maintenance or defense of a petition brought under Section 2-1401 of the Code of Civil Procedure [735 ILCS 5/2-1401] seeking relief from a final order or judgment under this Act." 750 ILCS 5/508(a)(4). There are two instances in which a §2-1401 petition might be brought: (1) when a client might file the motion against his or her former spouse to vacate the underlying judgment; or (2) when a client might file the motion against his or her former attorney to vacate a judgment for attorneys' fees.

In *In re Marriage of Parker,* 216 Ill.App.3d 672, 575 N.E.2d 938, 159 Ill.Dec. 131 (2d Dist. 1991), the wife filed a motion pursuant to §2-1401 of the Code of Civil Procedure to vacate the settlement agreement that had been entered in the underlying case. The trial court found that the agreement was unconscionable and vacated it. The wife argued that §508(b) of the IMDMA applied to these proceedings and that, therefore, she was entitled to mandatory attorneys' fees. The court disagreed, holding that §508(b) applies to proceedings to enforce a judgment, not proceedings to vacate a judgment. Since §2-1401 motions are provided for by §508(a)(4) of the IMDMA, the petition for fees must be made under §508(a).

Prior to 2015, an award of attorneys' fees was available to "a party seeking to vacate a divorce settlement agreement . . . if she proceeds in good faith, even if she is unsuccessful." *In re Marriage of Broday,* 256 Ill.App.3d 699, 628 N.E.2d 790, 797, 195 Ill.Dec. 326 (1st Dist. 1993). However, the 2015 amendments to §508(a)(4) require that fees be awarded only to the party who "substantially prevails" in the §2-1401 action. In *In re Marriage of Benjamin,* 2017 IL App (1st) 161862, ¶¶29 – 32, 82 N.E.3d 867, 415 Ill.Dec. 663, the appellate court found that the trial court did not abuse its discretion in awarding fees pursuant to §508(a)(4) to the wife who prevailed against a §2-1401 petition filed by the husband when the court also found the husband's petition to have been filed in bad faith.

B. [2.135] Petitions To Modify Judgment

Frequently, parties desire to modify a judgment as to allocation of parental responsibility, visitation, child support, removal of children, etc. The IMDMA specifically provides that awards of fees may be made in connection with "[t]he enforcement or modification of any order or judgment under this Act." 750 ILCS 5/508(a)(2).

"[I]n a proceeding to modify a dissolution judgment, the court may order one party to pay some or all of the attorney fees and costs necessarily incurred by the other." *In re Marriage of Pihaly,* 258 Ill.App.3d 851, 627 N.E.2d 1297, 1302, 194 Ill.Dec. 655 (2d Dist. 1994). This includes fees incurred in connection with litigation "reasonably connected" to an order entered under the IMDMA. 750 ILCS 5/508(a)(6). In *Crouch v. Smick,* 2016 IL App (5th) 150222, 55 N.E.3d 199, 404 Ill.Dec. 103, the court found that petitions to terminate parental rights and for adoption ultimately constituted a modification of visitation rights and awarded fees pursuant to §508(a)(6) upon determining the proceedings to be ancillary litigation reasonably related to the dissolution matter.

1. [2.136] Waiver of Hearing

As in dissolution proceedings, a party who waives the right to a hearing cannot appeal the award of fees. *In re Marriage of Rushing,* 258 Ill.App.3d 1057, 628 N.E.2d 245, 251, 194 Ill.Dec. 748 (1st Dist. 1993), *appeal denied,* 155 Ill.2d 576 (1994).

2. [2.137] Proving Factors

The issues in a hearing for fees pertaining to the modification of a judgment are similar to those in a dissolution proceeding. *See, e.g., In re Marriage of Goldberg,* 282 Ill.App.3d 997, 668 N.E.2d 1104, 1107 – 1108, 218 Ill.Dec. 272 (1st Dist. 1996). See §§2.73 – 2.87 above for a discussion of those issues.

In the following cases, the courts addressed the financial ability and inability to pay factors with regard to modifications of judgments.

In *In re Marriage of Frasco,* 265 Ill.App.3d 171, 638 N.E.2d 655, 202 Ill.Dec. 787 (4th Dist.), *appeal denied,* 158 Ill.2d 551 (1994), the former husband filed a petition to terminate maintenance. The trial court ordered the former husband to pay the former wife's fees of $10,433, a portion of

which was for enforcement of an order under §508(b) of the IMDMA, 750 ILCS 5/508(b), and the remainder of which was for contribution. The appellate court affirmed the award. As to the contribution portion of the award, the appellate court noted that the former wife's sole income was $643 per month in social security benefits, and the former husband's annual income was in excess of $130,000.

In *In re Marriage of LaTour,* 241 Ill.App.3d 500, 608 N.E.2d 1339, 181 Ill.Dec. 865 (4th Dist. 1993), the former husband petitioned to modify visitation. The trial court ordered the former husband to pay the former wife's fees of $350. The appellate court reversed on the ground that the former wife failed to prove her inability and the former husband's ability to pay the fees.

In *In re Marriage of Sparagowski,* 232 Ill.App.3d 257, 596 N.E.2d 210, 172 Ill.Dec. 931 (3d Dist. 1992), the former wife filed a petition to increase the amount of child support. The trial court ordered the former husband to pay the former wife's fees of $1,643.95. The appellate court reversed on the ground that the former wife failed to prove her inability to pay the fees.

In *In re Marriage of Ziemer,* 189 Ill.App.3d 966, 546 N.E.2d 229, 137 Ill.Dec. 475 (4th Dist. 1989), the former husband argued that the trial court should have included the income of his former wife's new spouse in determining whether she was financially able to pay her fees. The appellate court disagreed and affirmed the trial court's decision.

In *In re Marriage of Bean,* 181 Ill.App.3d 671, 537 N.E.2d 342, 130 Ill.Dec. 275 (5th Dist. 1989), the former wife filed a petition to increase the amount of child support. The trial court denied the former wife's petition to require the former husband to pay her fees, which were in excess of $1,100. The appellate court affirmed on the ground that the former wife failed to prove her inability to pay the fees.

In *In re Marriage of Streur,* 2011 IL App (1st) 082326, 955 N.E.2d 497, 353 Ill.Dec. 30, the former wife filed for a modification and retroactive award of child support. The trial court ordered the husband to pay $127,000 in attorneys' fees. The appellate court affirmed the ruling because the amount being paid in support to the former wife was equal to her expenses, thus proving an inability to pay.

In the modification cases listed below, the courts addressed factors other than the ability/inability factor that they consider with regard to attorneys' fees.

When the wife's bad conduct precipitated the husband's request for modification of custody, it would be improper for the court to require the husband to pay the wife's fees even if the ability/inability test was met. *In re Marriage of Cotton,* 103 Ill.2d 346, 469 N.E.2d 1077, 1085, 83 Ill.Dec. 143 (1984).

When a party attempts to modify a judgment in clear contravention of the judgment and the other party in no way precipitated the initiation of the proceeding, the Second District found the trial court erred in awarding fees to the former. *Simmons v. Simmons,* 77 Ill.App.3d 740, 396 N.E.2d 631, 634, 33 Ill.Dec. 242 (2d Dist. 1979).

When the parties had signed a marital settlement agreement, applying a penalty clause that required the former wife to pay attorneys' fees for the former husband when motions to increase maintenance were unsuccessful was not an abuse of discretion. *In re Marriage of S.D.,* 2012 IL App (1st) 101876, 980 N.E.2d 1151, 366 Ill.Dec. 792.

In the following cases, the courts addressed the issues of the reasonable necessity of legal services and the reasonableness of fees with regard to modifications of judgments.

In *In re Marriage of Freesen,* 275 Ill.App.3d 97, 655 N.E.2d 1144, 1151, 211 Ill.Dec. 761 (4th Dist. 1995), the former wife petitioned for an increase in child support and an award of fees. The attorneys testified only as to the number of hours they spent and their hourly rate. The trial court denied the request, and the appellate court affirmed, holding that the attorneys were required to submit evidence as to reasonableness, etc.

In *In re Marriage of Rushing,* 258 Ill.App.3d 1057, 628 N.E.2d 245, 194 Ill.Dec. 748 (1st Dist. 1993), *appeal denied,* 155 Ill.2d 576 (1994), a case involving enforcement and modification of maintenance resulting in a judgment of $24,900 for past maintenance and a reduction from $1,700 to $900 per month for future maintenance, the former wife's attorney requested $35,634, and the former husband's attorney requested $37,750. The trial court judge "commented about the 'outrageous' fees that were generated by both sides. The judge thought that the attorney fees had gone 'amuck' and that the amount of money in controversy was dwarfed by the overall attorney fees." 628 N.E.2d at 251. Accordingly, he ordered the former husband to pay only $4,000 of the former wife's fees. The appellate court affirmed.

In *In re Marriage of McFarlane,* 160 Ill.App.3d 721, 513 N.E.2d 1146, 112 Ill.Dec. 537 (2d Dist. 1987), the husband petitioned for termination or modification of support payments. The trial court ruled in favor of the wife on the support issue but awarded the wife only $7,500 of the $20,000 fees that she requested. The appellate court affirmed the reduction in fees, noting that "the nature of the controversy was not particularly complicated." 513 N.E.2d at 1151.

In *In re Marriage of Bolte,* 2012 IL App (3d) 110791, 975 N.E.2d 1257, 363 Ill.Dec. 948, the former husband filed a petition to modify maintenance upon retiring, and the former wife filed a counterpetition for attorneys' fees. The trial court awarded one half of the fees to the former wife due to the wife's numerous amended complaints with only slight changes and pursuing discovery in areas it deemed "nonmeritorious." 2012 IL App (3d) 110791 at ¶33. The appellate court reversed and remanded because both sides filed large numbers of complaints and the pursuit of discovery was imperative to review maintenance and attorneys' fees.

C. [2.138] Petitions To Enforce Order or Judgment

For a discussion of petitions to enforce an order or judgment, see §§2.31 – 2.37 above. *See also In re Marriage of Aleshire,* 273 Ill.App.3d 81, 652 N.E.2d 383, 209 Ill.Dec. 843 (3d Dist. 1995).

VIII. [2.139] SEEKING FEES FROM OTHER PARENT IN PATERNITY CASES

After the 2010 amendments to §§501(c-1) and 508(a) of the IMDMA, petitions for interim fees in paternity cases are governed by §508(a), 750 ILCS 5/508(a). However, see §§2.42 – 2.51 above for a discussion of issues and distinctions between the two sections. In general, all interim fee petitions in paternity cases must be accompanied by an affidavit as to the factual basis for the relief requested pursuant to §508(a). Sections 2.140 – 2.143 below discuss petitions for final fees in paternity cases.

Section 809(a) of the Parentage Act of 2015 (Parentage Act of 2015), 750 ILCS 46/101, *et seq.,* provides in part:

> **Except as otherwise provided in this Act, the court may order, in accordance with the *relevant factors* specified in Section 508 of the Illinois Marriage and Dissolution of Marriage Act, reasonable fees of counsel, experts, and other costs of the action, pre-trial proceedings, post-judgment proceedings to enforce or modify the judgment, and the appeal or the defense of an appeal of the judgment to be paid by the parties. [**Emphasis added.**]** 750 ILCS 46/809(a).

"[T]he Parentage Act authorizes the trial court to order respondent to pay some or all of petitioner's attorney fees and costs after considering the factors specified in section 508 of the [IMDMA]." *In re Parentage of Janssen,* 292 Ill.App.3d 219, 685 N.E.2d 16, 20, 226 Ill.Dec. 202 (4th Dist. 1997). *See also Ivanyi v. Granoff,* 171 Ill.App.3d 411, 526 N.E.2d 189, 198 – 199, 122 Ill.Dec. 49 (2d Dist. 1988); *In re J.W.,* 2017 IL App (2d) 160554, 77 N.E.3d 734, 413 Ill.Dec. 129. In *In re Stella,* 353 Ill.App.3d 415, 818 N.E.2d 824, 288 Ill.Dec. 889 (1st Dist. 2004), the court found that interim attorneys' fees can be awarded under the Parentage Act and that those interim attorneys' fees can be awarded using the method's factors and procedures set forth in §§501(c-1)(1), 501(c-1)(2), and 501(c-1)(3) of the IMDMA without considering disgorgement. However, the trial court may not order disgorgement of interim fees in a Parentage Act proceeding. *In re Stella,* 339 Ill.App.3d 610, 791 N.E.2d 187, 191, 274 Ill.Dec. 391 (1st Dist. 2003) (related case). However, payment cannot be ordered to be made by the Department of Healthcare and Family Services in cases in which the Department is providing child support enforcement services. 750 ILCS 46/806.

In a paternity case, a parent may elect to pursue remedies through the Office of the State's Attorney. However, a parent is not required to choose this avenue; the parent may elect to retain private counsel in order to prosecute a paternity case. A parent who elects the private counsel route is not barred from seeking fees from the child's other parent simply because the parent did not allow the Office of the State's Attorney to bring the lawsuit. *Milligan v. Cange,* 200 Ill.App.3d 284, 558 N.E.2d 630, 635, 146 Ill.Dec. 667 (4th Dist. 1990); *Ivanyi, supra.*

A. [2.140] Proving Factors

The issues in a hearing for fees pertaining to a paternity case are similar to the ones in a dissolution proceeding. *See, e.g., In re Parentage of Janssen,* 292 Ill.App.3d 219, 685 N.E.2d 16, 226 Ill.Dec. 202 (4th Dist. 1997). See §§2.73 – 2.87 above for a discussion of those issues.

In *Janssen,* which addressed the factor of financial ability/inability to pay with regard to paternity cases, the mother's gross monthly income was $1,100, whereas the father's net annual income was in excess of $205,000. Even though the mother had assets of significant value, the trial court ordered the father to pay the mother's fees of $28,306.46 and costs of $32,506.46. The appellate court affirmed.

In *Jiles v. Spratt,* 195 Ill.App.3d 354, 552 N.E.2d 371, 142 Ill.Dec. 21 (4th Dist. 1990), the court ordered the father to pay the mother's fees of $1,929.76, even though his affidavit showed that he had a net income of $77.39 per month.

In *Pacheco v. Silva,* 194 Ill.App.3d 620, 551 N.E.2d 316, 141 Ill.Dec. 323 (1st Dist. 1990), the mother earned $23,000 per year, and the father's gross income was nearly $300,000. The court ordered the father to "pay $2,000 as his share of [the mother's] attorney fees and that [he] pay $287.40 as one-half of [the mother's] court costs." 551 N.E.2d at 317. The father appealed, contending that the mother failed to prove her inability to pay all of her fees. The appellate court affirmed.

In *In re Parentage of Rocca,* 2013 IL App (2d) 121147, 1 N.E.3d 1281, 377 Ill.Dec. 394, taking judicial notice of an entire file was not sufficient to inform the courts as to the alleged father's financial circumstances and ability, if any, to pay the attorneys' fees judgment.

In *In re Custody of C.C.,* 2013 IL App (3d) 120342, 1 N.E.3d 1238, 377 Ill.Dec. 351, the trial court erred in ordering the alleged father to pay one third of the mother's attorneys' fees following the alleged father's motion to intervene when the court did not make specific findings that the alleged father had the ability to pay the mother's attorneys' fees and the record did not suggest he had the requisite ability to pay.

The following cases illustrate that the courts consider factors other than the ability/inability factor when assessing a request for attorneys' fees in a paternity case.

In *Carnes v. Dressen,* 215 Ill.App.3d 166, 574 N.E.2d 845, 158 Ill.Dec. 732 (4th Dist. 1991), the mother requested an award of $3,275.63 in attorneys' fees. The mother's gross monthly income was $1,737, with expenses of $1,858 per month. The father's gross monthly income was $2,442, with expenses of $1,571 per month. The trial court denied the mother's request. The appellate court reversed on the ground that (1) the father's "financial resources are superior" to the mother's and (2) the father engaged in misconduct by contesting paternity even after the first blood test results. 574 N.E.2d at 849.

In *Ivanyi v. Granoff,* 171 Ill.App.3d 411, 526 N.E.2d 189, 122 Ill.Dec. 49 (2d Dist. 1988), the court discussed the factors to be considered in determining the reasonableness of the amount of the fees requested. In that case, the trial court ordered the father to pay the mother's fees of $11,103. On appeal, the father challenged the proof of the fees, the reasonable necessity of the services performed, the lack of responsibility shown by the mother's attorney, and the benefit to the mother. The appellate court affirmed.

In *In re J.W.,* 2017 IL App (2d) 160554, 77 N.E.3d 734, 413 Ill.Dec. 129, the trial court dismissed the mother's third motion for interim fees due to the mother actually seeking a contribution to her final fees and the lack of written engagement agreement between the mother and her attorney. On appeal, the court found that a written engagement agreement was a prerequisite only to seeking fees under §508(c) from an attorney's own client and was not applicable to contribution proceedings. The court ultimately remanded the proceedings to the trial court to conduct a hearing pursuant to §§508(a) and 503(j) of the IMDMA, 750 ILCS 5/508(a) and 5/503(j).

In *In re Parentage of F.R.,* 2023 IL App (1st) 220216-U, ¶10 (Rule 23), the appellate court upheld the trial court's award of fees to the father from the mother, agreeing with trial court's assessment that the mother "needlessly increased the cost of litigation." *See In re Marriage of Patel & Sines-Patel,* 2013 IL App (1st) 112571, ¶117, 993 N.E.2d 1062, 373 Ill.Dec. 503 ("Unnecessarily increasing the cost of litigation is a relevant factor in both the division of property and the allocation of attorney fees."). *See also In re Marriage of Haken,* 394 Ill.App.3d 155, 914 N.E.2d 739, 333 Ill.Dec. 328 (4th Dist. 2009).

In *People ex rel. West v. Herrendorf,* 187 Ill.App.3d 777, 543 N.E.2d 824, 135 Ill.Dec. 256 (1st Dist. 1989), a putative father was named as defendant in paternity action but was later excluded through paternity blood test; he moved for award of fees and costs against mother and her counsel. The appellate court ultimately determined the defendant was not entitled to sanctions or costs because prior to receiving the results of the paternity test, it was a question of fact as to whether defendant was the child's natural father, and accordingly the case could not be considered a frivolous lawsuit for purposes of an award of fees and/or sanctions. *Id*.

B. [2.141] Fees for Enforcement of Child Support Order

Section 809(a) of the Parentage Act of 2015 specifically provides for an award of fees to enforce or modify a judgment. 750 ILCS 46/809(a). The appellate court has also referred to §508(b) of the IMDMA, 750 ILCS 5/508(b), in child support enforcement proceedings even though the prior Parentage Act of 1984 did not expressly direct the court to do so. To reach the conclusion that the same analysis should apply to child support enforcement proceedings as to dissolution enforcement proceedings, the appellate court looked to the close and ongoing relationship between the two Acts. *Davis v. Sprague,* 186 Ill.App.3d 249, 541 N.E.2d 831, 833, 133 Ill.Dec. 620 (4th Dist. 1989).

C. [2.142] Fees To Prosecute or Defend Appeal of Paternity Judgment

Section 809(a) of the Parentage Act of 2015 specifically provides for an award of fees for the appeal or the defense of an appeal of the judgment. 750 ILCS 46/809(a).

D. [2.143] Award May Be in Attorney's Name

Finally, the award of attorneys' fees can be in the attorney's own name. 750 ILCS 5/508(a). Caselaw prior to the 1997 amendments to the IMDMA was the same. *Heiden v. Ottinger,* 245 Ill.App.3d 612, 616 N.E.2d 1005, 186 Ill.Dec. 563 (2d Dist. 1993). *See also In re J.W.,* 2017 IL App (2d) 160554, ¶41, 77 N.E.3d 734, 413 Ill.Dec. 129 ("Attorney fees, while awarded to the client, actually belong to the attorney."), citing *In re Parentage of Rocca,* 408 Ill.App.3d 956, 946 N.E.2d 1003, 1014, 348 Ill.Dec. 507 (2d Dist. 2011).

IX. [2.144] SEEKING INTERIM OR FINAL AWARD OF CONTRIBUTION FOR APPEALS

The first paragraph of §508(a) of the IMDMA authorizes a court to make an interim or final award of attorneys' fees to a party. Section 508(a) further provides in pertinent part:

> **Awards may be made in connection with the following:**
>
> *** * ***
>
> **(3) The defense of an appeal of any order or judgment under this Act, including the defense of appeals of post-judgment orders.**
>
> **(3.1) The prosecution of any claim on appeal (if the prosecuting party has substantially prevailed).** 750 ILCS 5/508(a).

A. For Prospective Fees and Costs

1. [2.145] Prospective Fees and Costs To Defend Appeal

After the 2010 amendments to §§501(c-1) and 508(a) of the IMDMA, petitions for interim fees and costs during an appeal are governed by §508(a), 750 ILCS 5/508(a). However, see §§2.42 – 2.51 above for a discussion of issues and distinctions between the two sections.

a. [2.146] Jurisdiction of Trial Court To Make Award

For a discussion of a trial court's jurisdiction to make an award of fees and costs, see §§2.19 – 2.30 above.

b. [2.147] Effect of Cross-Appeal

If an appellee files a cross-appeal, he or she is still allowed to obtain an award of prospective fees, but only for the defense of the appeal. *In re Marriage of Talty,* 166 Ill.2d 232, 652 N.E.2d 330, 334 – 335, 209 Ill.Dec. 790 (1995). *Cf. In re Marriage of Wentink,* 132 Ill.App.3d 71, 476 N.E.2d 1109, 1116, 87 Ill.Dec. 117 (1st Dist. 1984). See §2.154 below. Furthermore, §508(a)(3) of the IMDMA, 750 ILCS 5/508(a)(3), permits the court to award the appellee fees in defending the appeal "regardless of the outcome of the appeal." *In re Marriage of Pick,* 167 Ill.App.3d 294, 521 N.E.2d 121, 128, 118 Ill.Dec. 53 (2d Dist. 1988), quoting Marshall J. Auerbach and Albert E. Jenner, Jr., Historical and Practice Notes, S.H.A. (1980), c. 40, ¶508.

c. Procedure for Obtaining Prospective Fees

(1) [2.148] Filing of petition

The procedure for obtaining an award of prospective fees to defend an appeal is similar to the procedure for obtaining prospective fees during the dissolution proceeding. All petitions for interim

fees and costs relating to an appeal must be accompanied by an affidavit as to the factual basis for the relief requested pursuant to §508(a) of the IMDMA, 750 ILCS 5/508(a). Such a request for fees incurred — or to be incurred — in defense of an appeal must be addressed to the trial court. Indeed, the appellate court in *In re Marriage of Baylor,* 324 Ill.App.3d 213, 753 N.E.2d 1264, 257 Ill.Dec. 638 (4th Dist. 2001), held that it lacked jurisdiction to award appellate fees and that such a request was properly addressed to the trial court.

"The party seeking an award of prospective attorney fees should request fees in a specific amount and present evidence in support of the need and propriety of that amount of fees." *In re Marriage of Krane,* 288 Ill.App.3d 608, 681 N.E.2d 609, 617, 224 Ill.Dec. 294 (1st Dist. 1997). If the request is merely for a "contribution" toward fees for the appeal, the request will probably be denied. *In re Marriage of Giammerino,* 94 Ill.App.3d 1058, 419 N.E.2d 598, 600, 50 Ill.Dec. 490 (1st Dist. 1981).

(2) [2.149] Hearing on petition

Section 508(a) of the IMDMA provides that hearings relative to any interim fee and cost petition "shall be scheduled expeditiously by the court." 750 ILCS 5/508(a).

(3) [2.150] Proving factors

The factors the petitioner must prove for prospective fees pertaining to the defense of an appeal are similar to the ones pertaining to a petition for final fees in a dissolution proceeding. See §§2.73 – 2.87 above for a list of those factors.

(a) [2.151] Financial justification for award

The Fifth District has held that the decision of the trial court judge may be based on the evidence in the underlying case. *In re Marriage of Pittman,* 213 Ill.App.3d 60, 571 N.E.2d 1196, 1198, 157 Ill.Dec. 177 (5th Dist. 1991). However, the First District pointed out that even if there had been an adequate basis for the trial court to award final fees at the conclusion of the trial in the underlying case, the trial court in ruling on a petition for prospective fees on appeal did not necessarily have the right to assume that the parties' financial condition remained the same. *In re Marriage of Jacobson,* 89 Ill.App.3d 273, 411 N.E.2d 947, 950, 44 Ill.Dec. 581 (1st Dist. 1980). Certainly, if the party being asked to pay fees alleges a change in the financial circumstances of either or both parties since the conclusion of the underlying case, the court should receive evidence supporting such an assertion. *In re Marriage of Allcock,* 113 Ill.App.3d 121, 446 N.E.2d 871, 872 – 873, 68 Ill.Dec. 700 (3d Dist. 1983).

(b) [2.152] Proving reasonable necessity of services and reasonableness of fees

Generally, a party must prove that he or she ultimately has an obligation to pay the fees requested. *In re Marriage of Jacobson,* 89 Ill.App.3d 273, 411 N.E.2d 947, 950, 44 Ill.Dec. 581 (1st Dist. 1980); *Gasperini v. Gasperini,* 57 Ill.App.3d 578, 373 N.E.2d 576, 582, 15 Ill.Dec. 230 (1st Dist. 1978). However, in at least one case, the Second District held that although an attorney told the client the appeal was "on him," this statement was insufficient to defeat the prospective

attorneys' fees petition; the court felt that this statement did not mean that the fees were not unnecessarily incurred and that, in any event, the statement was not made to the party from whom the fees were requested. *In re Marriage of Pick,* 167 Ill.App.3d 294, 521 N.E.2d 121, 126 – 127, 118 Ill.Dec. 53 (2d Dist.), *appeal denied,* 121 Ill.2d 586 (1988).

(4) [2.153] Decision by court

The courts have held that awards of prospective fees to defend an appeal "are to be made cautiously and only upon a viable evidentiary basis." *In re Marriage of Brent,* 263 Ill.App.3d 916, 635 N.E.2d 1382, 1391, 200 Ill.Dec. 799 (4th Dist. 1994), citing *In re Marriage of Norris,* 252 Ill.App.3d 230, 625 N.E.2d 6, 12, 192 Ill.Dec. 46 (1st Dist. 1992), *appeal denied,* 151 Ill.2d 566 (1993), and *In re Marriage of Pittman,* 213 Ill.App.3d 60, 571 N.E.2d 1196, 1197, 157 Ill.Dec. 177 (5th Dist. 1991).

Moreover, "[t]he determination of whether to award prospective attorney fees rests within the sound discretion of the trial court." *Brent, supra,* 635 N.E.2d at 1391, citing *Norris, supra,* 625 N.E.2d at 12.

See §§2.185 – 2.189 below regarding abuse of discretion.

2. [2.154] Prospective Fees and Costs To Prosecute Appeal

The IMDMA authorizes a court to make an award of fees and costs to a party in connection with the prosecution of any claim on appeal but only if the prosecuting party has "substantially prevailed." 750 ILCS 5/508(a)(3.1). Thus, prospective fees to prosecute an appeal are not allowed for the following reasons:

a. Because it is impossible for a court to find that a party substantially prevailed until after the appeal is complete, a court is not authorized to award prospective fees for prosecuting an appeal.

b. Fee-shifting provisions are strictly construed. *Brezinsky v. Chervinko,* 192 Ill.App.3d 124, 548 N.E.2d 588, 590, 139 Ill.Dec. 203 (1st Dist. 1989).

c. The legislature does not want to encourage appeals.

B. For Final Fees and Costs After Completion of Appeal

1. Final Fees and Costs for Defending Appeal

a. [2.155] In General

After an appeal is completed, the IMDMA authorizes a court to award attorneys' fees that a party incurred in defending the appeal. 750 ILCS 5/508(a)(3). *See In re Marriage of Powers,* 252 Ill.App.3d 506, 624 N.E.2d 390, 392, 191 Ill.Dec. 541 (2d Dist. 1993). These petitions should be filed in the trial court, not the appellate court (*In re Marriage of Davis,* 292 Ill.App.3d 802, 686 N.E.2d 395, 226 Ill.Dec. 765 (4th Dist. 1997)) and must be made within 30 days after the entry of

the appellate court's final order (750 ILCS 5/508(c)(5)). However, a party may not at this time recover fees for services that were previously rendered in the underlying action. *In re Marriage of Ahmad,* 198 Ill.App.3d 15, 555 N.E.2d 439, 441 – 442, 144 Ill.Dec. 320 (2d Dist. 1990). The issue of who prevailed in the appeal is irrelevant to the award of fees for defending an appeal. *In re Marriage of Schinelli,* 406 Ill.App.3d 991, 942 N.E.2d 682, 347 Ill.Dec. 479.

In *In re Marriage of Kane,* 2018 IL App (2d) 180195, 127 N.E.3d 673, 431 Ill.Dec. 140, a novel case, the appellate court held that an attorney's former client is not entitled to recover fees incurred defending against the attorney's appeal of the trial court's award of fees owed to the attorney by the former client. The basis of the court's opinion was that the attorney was not a party to the dissolution action, and thus the client had no statutory right to seek fees under §508(a).

b. [2.156] Proving Factors

The factors the petitioner must prove for final fees pertaining to the defense of an appeal are similar to the ones pertaining to a dissolution proceeding. See §§2.73 – 2.87 above for a list of those factors.

2. Final Fees and Costs for Prosecuting Appeal

a. [2.157] In General

As noted in §2.154 above, the IMDMA authorizes a court to make a final award of attorneys' fees to a party in connection with the prosecution of any claim on appeal but only if the prosecuting party has "substantially prevailed." 750 ILCS 5/508(a)(3.1). Thus, when the party prosecuting the appeal succeeds in reversing the trial court's decision, he or she is entitled to an award of fees. Parties that have not substantially prevailed on appeals are not entitled to attorneys' fees under the statute. *In re Marriage of Virdi,* 2014 IL App (3d) 130561, 13 N.E.3d 333, 382 Ill.Dec. 920.

Interpreting 750 ILCS 5/508(a)(3.1), the Illinois Supreme Court has held that when multiple claims were appealed, the successful appellant was permitted to recover only the fees incurred in bringing those claims that substantially prevailed on appeal, not the fees incurred in the entire appeal. *In re Marriage of Murphy,* 203 Ill.2d 212, 786 N.E.2d 132, 271 Ill.Dec. 874 (2003).

The rationale for awarding fees to a successful appellant is that a successful appeal corrects an erroneous and unjust result. *In re Marriage of Pick,* 167 Ill.App.3d 294, 521 N.E.2d 121, 128, 118 Ill.Dec. 53 (2d Dist.), *appeal denied,* 121 Ill.2d 586 (1988).

b. [2.158] Proving Factors

The factors the petitioner must prove for final fees pertaining to the prosecution of an appeal are similar to the ones pertaining to a dissolution proceeding. See §§2.73 – 2.87 above for a discussion of those factors.

X. [2.159] SEEKING AWARD OF FEES AGAINST YOUR OWN CLIENT

"Regardless of the respective financial circumstances of the spouses, an attorney is still entitled to seek payment for his services from his own client." *Nottage v. Jeka,* 172 Ill.2d 386, 667 N.E.2d 91, 96, 217 Ill.Dec. 298 (1996), *In re Marriage of Ransom,* 102 Ill.App.3d 38, 429 N.E.2d 594, 597, 57 Ill.Dec. 696 (2d Dist. 1981). See also 750 ILCS 5/508(e), as amended by P.A. 94-1016 (eff. July 7, 2006) to change the limitations period for independent action from one year to ten years (see §2.172 below); *Haber v. Reifsteck,* 359 Ill.App.3d 867, 835 N.E.2d 187, 189, 296 Ill.Dec. 332 (2d Dist. 2005); *In re Marriage of McCoy,* 272 Ill.App.3d 125, 650 N.E.2d 3, 7, 208 Ill.Dec. 732 (4th Dist. 1995).

If a client owes a fee to an attorney, the judicial system provides three avenues for the attorney to recover that fee:

a. The attorney and the client may enter into a consent judgment. 750 ILCS 5/508(d).

b. The attorney may file a petition for fees. 750 ILCS 5/508(c).

c. The attorney may file an independent lawsuit. 750 ILCS 5/508(e).

Before the adoption of §508 of the IMDMA, an attorney's only course of action to collect a fee from a client was through a separate lawsuit. *In re Marriage of Baltzer,* 150 Ill.App.3d 890, 502 N.E.2d 459, 462, 104 Ill.Dec. 196 (2d Dist. 1986). The enactment of §508 was "intended to promote judicial economy by obviating the need for an attorney to sue his own client in separate proceedings." *In re Marriage of Pagano,* 154 Ill.2d 174, 607 N.E.2d 1242, 1246, 180 Ill.Dec. 729 (1992). Section 508 of the IMDMA did not entirely eliminate the option of an independent lawsuit, but it put restrictions on it. *Myers v. Brantley,* 204 Ill.App.3d 832, 562 N.E.2d 355, 356 – 357, 149 Ill.Dec. 891 (4th Dist. 1990).

Note that "[a] claim for fees, whether made under section 508 or in a separate common law action, as here, must satisfy certain professional standards. Rule 1.5 of the Illinois Rules of Professional Conduct requires that a fee for legal services be reasonable, and the rule specifies standards relevant to that determination." *Nottage, supra,* 667 N.E.2d at 95 – 96.

One distinction between a §508 petition and an independent lawsuit is the right to a jury trial. In an independent lawsuit, there is a right to a jury trial. *Leahy Realty Corp. v. American Snack Foods Corp.,* 253 Ill.App.3d 233, 625 N.E.2d 956, 968, 192 Ill.Dec. 801 (2d Dist. 1993). *Cf. Boatmen's Bank of Mt. Vernon v. Dowell,* 208 Ill.App.3d 994, 567 N.E.2d 739, 745, 153 Ill.Dec. 781 (5th Dist. 1991). However, under a §508 petition, there is no right to a jury trial. See 750 ILCS 5/503. When a jury trial is sought in connection with a breach-of-contract claim against an attorney for overbilling, the issue may be seen as a "straightforward attorney-fee issue" and thus not subject to a jury trial when there is an existing §508 petition pending. *Schmidt v. Gaynor,* 2019 IL App (2d) 180426, ¶19, 138 N.E.3d 868, 435 Ill.Dec. 254.

A disadvantage of an independent lawsuit is that it can be brought only against the client, whereas a petition under §508 may be brought against the client, the client's spouse, or both. However, the client may implead the ex-spouse in the independent proceedings.

In *In re Marriage of Cozzi-DiGiovanni,* 2014 IL App (1st) 130109, 14 N.E.3d 729, 383 Ill.Dec. 446, the husband's former attorney filed a petition against the wife seeking contribution for attorneys' fees and costs owed by the husband to the attorney. The court noted that §508(c) applied only to final hearings for attorneys' fees and costs against one's *own client,* and instead applied §§508(a) and 503(j) because the husband's former attorney was seeking fees that had been incurred during a pre-decree dissolution proceeding and filed his petition prior to the entry of final judgment.

A. [2.160] Consent Judgments Under 750 ILCS 5/508(d)

Section 508(d) of the IMDMA provides:

> **A consent judgment, in favor of a current counsel of record against his or her own client for a specific amount in a marital settlement agreement, dissolution judgment, or any other instrument involving the other litigant, is prohibited. A consent judgment between client and counsel, however, is permissible if it is entered pursuant to a verified petition for entry of consent judgment, supported by an affidavit of the counsel of record that includes the counsel's representation that the client has been provided an itemization of the billing or billings to the client, detailing hourly costs, time spent, and tasks performed, and by an affidavit of the client acknowledging receipt of that documentation, awareness of the right to a hearing, the right to be represented by counsel (other than counsel to whom the consent judgment is in favor), and the right to be present at the time of presentation of the petition, and agreement to the terms of the judgment. The petition may be filed at any time during which it is permissible for counsel of record to file a petition (or a praecipe) for a final fee hearing, except that no such petition for entry of consent judgment may be filed before adjudication (or waiver) of the client's right to contribution under subsection (j) of Section 503 or filed after the filing of a petition (or a praecipe) by counsel of record for a fee hearing under subsection (c) if the petition (or praecipe) remains pending. No consent security arrangement between a client and a counsel of record, pursuant to which assets of a client are collateralized to secure payment of legal fees or costs, is permissible unless approved in advance by the court as being reasonable under the circumstances.** 750 ILCS 5/508(d).

Section 508(d) authorizes the court to enter a consent judgment awarding fees and costs in favor of the attorney and against the client. There are two limitations: (1) the consent judgment cannot be part of a document involving the client's spouse; and (2) the petition cannot be filed until after the client has either received an adjudication or waived the right to contribution from his or her spouse. However, if the adjudication or waiver has occurred, the procedure is to file

1. a verified petition for entry of a consent judgment supported by an affidavit of the counsel of record that includes the counsel's representations that the client has been provided an itemization of the billings, detailed hourly costs, time spent, and tasks performed; and

2. an affidavit signed by the client acknowledging receipt of this documentation; awareness of the rights to a hearing, to independent counsel, and to be present at the time of the presentation of the petition; and his or her agreement to the terms of the judgment.

B. [2.161] Petitions for Interim Fees Under 750 ILCS 5/508(a)

While an attorney is representing a client, if he or she wants to be paid by the client, the attorney normally requests that the client pay him or her. However, may an attorney seek an interim award of fees (either for prospective fees or for services already rendered) against his or her own client?

The only language that would support such a position is the first sentence of §508(a) of the IMDMA, which provides: "The court *from time to time,* after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for *his own* or the other party's costs and attorney's fees." [Emphasis added.] 750 ILCS 5/508(a).

However, one of the goals of the 1997 amendments, as codified in §508(c), was to minimize adversarial relationships between an attorney and his or her own client over fee issues. Although §508(c) applies only to petitions for final fees, it requires an attorney to withdraw from representing a client before he or she can obtain a fee award. The same rule should apply if the attorney wants an interim fee award against his or her own client, but there is no other support for allowing an attorney to withdraw in order to seek an interim fee award and then resume the representation. To clarify the situation, the first sentence of §508(a) should be revised to read: "After due notice and hearing, the court may order any party to pay a reasonable amount for the other party's interim or final costs and attorney's fees, after considering the financial resources of the parties, or for his own attorney's final costs and fees."

If counsel has withdrawn or been discharged by the client, the petition is one for final fees even though the underlying case is still pending. See §2.42 above.

C. [2.162] Petitions for Final Fees Under 750 ILCS 5/508(c)

The provisions of §508(c)(3) of the IMDMA pertaining to written engagement agreements apply to cases filed after June 1, 1997. See 750 ILCS 5/508(g)(1).

1. [2.163] Summary of 750 ILCS 5/508(c)

In order to proceed under §508(c) of the IMDMA, 750 ILCS 5/508(c), the following requirements must be met:

a. A hearing as to contribution must be waived or completed (with judgment entered). Under prior law, an attorney, in order to maximize his or her fee award, might have to disclose confidential information to justify the time he or she spent on a case. For example, the attorney might have to disclose that the client was acting unreasonably on a particular issue. Because the 1997 amendments to the IMDMA require that the fee hearing between the attorney and the client take place after the hearing on contribution, the attorney will be able to keep such information confidential during the hearing on contribution.

b. If the underlying case was filed after June 1, 1997, the attorney and client must have a written engagement agreement that contains the "verbatim" Statement of Client's Rights and Responsibilities required by §508(f). If you do not have such an agreement, then you must file an independent lawsuit. The purpose of this provision is to encourage the use of written engagement agreements because of the belief that written engagement agreements minimize fee disputes.

c. The attorney must have either withdrawn or filed a motion to withdraw. Under prior law, the attorney's request for fees against his or her client put the attorney in an actual or potential conflict of interest with the client. *In re Marriage of Pitulla,* 141 Ill.App.3d 956, 491 N.E.2d 90, 93, 96 Ill.Dec. 276 (1986), *appeal after remand,* 202 Ill.App.3d 103 (1990), *appeal after remand,* 256 Ill.App.3d 84 (1st Dist. 1993), *appeal denied,* 155 Ill.2d 575 (1994). This provision attempts to eliminate the conflict of interest problem.

d. The attorney and client must first submit their dispute to mediation, arbitration, or another approved alternative dispute resolution procedure. In all counties other than Cook County, if either the attorney or the client elects to opt out of this requirement, the requirement is excused. However, in Cook County, the requirement must be followed unless both the attorney and the client elect to opt out. A client may forfeit the argument by failing to raise the §508(c) issue of alternative dispute resolution in his or her response to the attorney's petition for fees. *In re Marriage of Wei & Liu,* 2023 IL App (1st) 1221371-U.

2. [2.164] Time for Filing Petition

The petition (or praecipe) must be filed within the time limit for filing a motion pursuant to §2-1203 of the Code of Civil Procedure (normally within 30 days after entry of final judgment). 735 ILCS 5/2-1203. If you file a praecipe instead of a petition, you have an additional 60 days (after the date of filing the praecipe) to file your petition. The purpose of the praecipe provision is to give the attorney and the client additional time to resolve the fee issue and, if they are unable to do so, to give the attorney additional time to prepare and file the fee petition.

By the 2010 amendment to 750 ILCS 5/508(c), each of the above deadlines is tolled if a motion is filed under §2-1203 of the Code of Civil Procedure, in which instance a petition (or a praecipe) shall be filed no later than 30 days following disposition of all §2-1203 motions, or if a notice of appeal is filed, in which instance a petition (or praecipe) shall be filed no later than 30 days following the date jurisdiction on the issue appealed is returned to the trial court. 750 ILCS 5/508(c)(5). Further, if a praecipe has been timely filed, the deadline for filing of a petition may be extended for a period of up to one year by timely filing a written stipulation between the attorney and client (or former client)

However, if the attorney voluntarily or involuntarily withdraws from a case prior to its conclusion, it is advisable to file the petition for attorneys' fees immediately after entry of the order granting leave to withdraw in order to avoid the possibility that the court's jurisdiction to hear the fee petition will be terminated. See §§2.25 – 2.29 above.

3. [2.165] Procedure for Petitioning Party

The attorney (or client) must file a petition that seeks adjudication of all unresolved claims for the attorneys' fees and costs. The notice of motion will set forth an initial hearing date.

The petitioning party must file an affidavit, and if the case was filed after June 1, 1997, he or she must attach the written engagement agreement.

Notice must be given in accordance with S.Ct. Rules 11 and 12. *See also In re Marriage of Bennett,* 131 Ill.App.3d 1050, 476 N.E.2d 1297, 1300 – 1301, 87 Ill.Dec. 305 (2d Dist. 1985).

4. [2.166] Procedure for Responding Party

Upon receipt of a petition, the responding party may attend on the initial hearing date and request (a) time to file a response, (b) time to conduct discovery, and (c) a full evidentiary hearing.

If a party files a petition for setting final fees and costs against his or her attorney, the attorney does not have an automatic right to a substitution of judge. 750 ILCS 5/508(c)(5).

5. [2.167] Hearing and Decision

The IMDMA provides that, after the alternative dispute resolution procedure is complied with, "a final hearing . . . shall be expeditiously set and completed." 750 ILCS 5/508(c)(4).

The factors a court considers in determining the reasonable necessity of the services and the reasonableness of the fees are similar to those in a contribution hearing. *See, e.g., In re Marriage of Campbell,* 261 Ill.App.3d 483, 633 N.E.2d 797, 802, 199 Ill.Dec. 1 (1st Dist. 1993); *In re Marriage of Waltrip,* 216 Ill.App.3d 776, 576 N.E.2d 399, 404, 159 Ill.Dec. 730 (2d Dist. 1991); *In re Marriage of Collins,* 154 Ill.App.3d 655, 506 N.E.2d 1000, 1003, 107 Ill.Dec. 109 (2d Dist. 1987); *In re Marriage of Heller,* 153 Ill.App.3d 224, 505 N.E.2d 1294, 1302, 106 Ill.Dec. 503 (1st Dist. 1987). See §§2.88 – 2.115 above for a discussion of those factors. In addition to the cases cited in those sections, the court in *In re Marriage of Auriemma,* 271 Ill.App.3d 68, 648 N.E.2d 118, 122, 207 Ill.Dec. 662 (1st Dist. 1994), *appeal denied,* 163 Ill.2d 548 (1995), stated that an attorney's fee may be reduced if the attorney fails to control the litigiousness of the client. On the other hand, if a client causes the attorney to devote a large amount of time to a simple case because of numerous scheduled and unscheduled appointments, the attorney should be compensated for his or her time. *Serritella v. Plotkin,* 89 Ill.App.3d 739, 412 N.E.2d 7, 8, 44 Ill.Dec. 931 (3d Dist. 1980).

a. [2.168] Burden of Proof

The burden of proof is on the attorney to demonstrate the reasonableness and necessity of fees and the value of the service provided. *In re Marriage of Kane,* 2016 IL App (2d) 150774, 76 N.E.3d 20, 412 Ill.Dec. 580. Keep in mind that this discussion assumes that there is a written engagement agreement that, in conformity with §508(c)(2) of the IMDMA, contains the Statement of Client's Rights and Responsibilities required under 750 ILCS 5/508(f). In order to comply with the requirements of §508(c), an attorney seeking fees from a former client must attach the written engagement agreement to the petition. *In re Marriage of Keaton*, 2019 IL App (2d) 180285, 124 N.E.3d 1146, 429 Ill.Dec. 636. Otherwise, one cannot proceed under §508(c).

Section 508(c)(3) provides:

> ***The determination*** **of reasonable attorney's fees and costs either under this subsection (c), whether initiated by a counsel or a client, or in an independent proceeding for**

services within the scope of subdivisions (1) through (5) of subsection (a), ***is within the sound discretion of the trial court.*** **The court shall first consider the written engagement agreement and, if the court finds that the former client and the filing counsel, pursuant to their written engagement agreement, entered into a contract which meets applicable requirements of court rules and addresses all material terms, then the contract shall be enforceable in accordance with its terms, subject to the further requirements of this subdivision (c)(3). Before ordering enforcement, however, the court shall consider the performance pursuant to the contract.** ***Any amount awarded by the court must be found to be fair compensation for the services,*** **pursuant to the contract, that the court finds were** ***reasonable and necessary.*** **Quantum meruit principles shall govern any award for legal services performed that is not based on the terms of the written engagement agreement (except that, if a court expressly finds in a particular case that aggregate billings to a client were unconscionably excessive, the court in its discretion may reduce the award otherwise determined appropriate or deny fees altogether). [**Emphasis added.**]** 750 ILCS 5/508(c)(3).

Paragraph 5 of the Statement of Client's Rights and Responsibilities provides in part:

The counsel will prepare and provide the client with an itemized billing statement detailing hourly rates (and/or other criteria), time spent, tasks performed, and costs incurred on a regular basis, at least quarterly. The client should review each billing statement promptly and address any objection or error in a timely manner. The client will not be billed for time spent to explain or correct a billing statement. If an appropriately detailed written estimate is submitted to a client as to future costs for a counsel's representation or a portion of the contemplated services (i.e., relative to specific steps recommended by the counsel in the estimate) and, without objection from the client, the counsel then performs the contemplated services, all such services are presumptively reasonable and necessary, as well as to be deemed pursuant to the client's direction. [Emphasis added.**]** 750 ILCS 5/508(f).

The italics and underlining have been used to illustrate a point. The last quoted sentence of paragraph 5 of the Statement clearly creates a presumption when there is a written estimate as to *future* services, but the strength of that language is noticeably absent as to the fee for other services rendered by an attorney. The underlined language of these two sections appears to indicate an intention by the legislature to create a presumption, but the italicized language in §508(c)(3) backs away from a presumption and makes the decision discretionary as under prior law. For example, if the attorney sends out monthly billing statements but the client does not object to them in a timely manner, the attorney can *argue* that the client should be estopped from contesting them at the fee hearing, but the attorney could have made that argument without the 1997 amendments to §508.

Consider this example: Assume that the engagement agreement states that the attorney is to receive $500 per hour and the attorney sends out perfectly itemized monthly bills. Assume further that the attorney spends five hours on a motion or deposition that the judge subsequently decides was unsuccessful and unnecessary. There appears to be nothing in these two sections that would prevent or hinder a judge from denying compensation for the five-hour project and reducing the lawyer's fees on all other services to $250 per hour.

b. [2.169] No Collateral Estoppel

Section 503(j)(4) of the IMDMA provides, "No finding on which a contribution award is based or denied shall be asserted against counsel or former counsel for purposes of any hearing under subsection (c) [concerning final fees from an attorneys' own client] or (e) [concerning independent proceedings for an award of fees from an attorney's own client] of Section 508." 750 ILCS 5/503(j)(4).

c. [2.170] Waiver of Attorney-Client Privilege

"A party waives a claim of [attorney-client] privilege by relying on a legal claim or defense, the truthful resolution of which required the examination of confidential attorney-client communications." *SPSS, Inc. v. Carnahan-Walsh,* 267 Ill.App.3d 586, 641 N.E.2d 984, 988, 204 Ill.Dec. 554 (1st Dist. 1994).

d. [2.171] Measure of "Damages"

The measure of "damages" the courts use technically depends on whether the attorney saw the underlying case to a conclusion. If so, the standard for measuring fees is essentially the same standard as that used in determining the reasonableness of fees in a contribution setting under §503(j) of the IMDMA, 750 ILCS 5/503(j). See §§2.88 – 2.115 above. If the attorney withdrew or was discharged prior to the conclusion of the case, the measure of the fees is quantum meruit. See §2.178 below; *In re Marriage of Reczek,* 95 Ill.App.3d 220, 420 N.E.2d 161, 163, 50 Ill.Dec. 844 (2d Dist. 1981). *See also In re Marriage of Gorsich,* 208 Ill.App.3d 852, 567 N.E.2d 601, 604, 153 Ill.Dec. 643 (2d Dist. 1991).

In cases decided prior to the 1997 amendments to the IMDMA, the courts recognized a client's seemingly absolute right to challenge the fees charged by his or her own attorney:

> **[**A**] client is permitted to prove that his or her attorney's fee is excessive or otherwise unreasonable even though he or she assented to a fixed attorney's fee. Although attorneys should be free to adjust their fees to whatever the legal marketplace will bear, the public is entitled to protection to the extent that an attorney's fee must be reasonable.** *In re Marriage of Pitulla,* 141 Ill.App.3d 956, 491 N.E.2d 90, 94, 96 Ill.Dec. 276 (1986), *appeal after remand,* 202 Ill.App.3d 103 (1990), *appeal after remand,* 256 Ill.App.3d 84 (1st Dist. 1993), *appeal denied,* 155 Ill.2d 575 (1994).

The client has a right to challenge the fees even if he or she has previously paid a deposit or bills. *In re Marriage of Angiuli,* 134 Ill.App.3d 417, 480 N.E.2d 513, 518, 89 Ill.Dec. 328 (2d Dist. 1985). A client may also challenge the amount of the fees even though he or she signed a settlement agreement as to the amount and acknowledged the amount in open court. *In re Marriage of Bennett,* 131 Ill.App.3d 1050, 476 N.E.2d 1297, 1299 – 1300, 87 Ill.Dec. 305 (2d Dist. 1985).

However, how the courts interpret amended §508(c)(3) of the IMDMA and paragraph 5 of the Statement of Client's Rights and Responsibilities may limit a client's right to challenge the fees charged by his or her own attorney.

D. [2.172] Filing Independent Lawsuit

In 1996, the Illinois Supreme Court held that §508 of the IMDMA, 750 ILCS 5/508, did not prevent an attorney from filing an independent lawsuit for fees. *Nottage v. Jeka,* 172 Ill.2d 386, 667 N.E.2d 91, 93 – 94, 217 Ill.Dec. 298 (1996). Section 508(e) was enacted to codify the ruling in *Nottage,* as well as to add some restrictions on the right to file an independent lawsuit. In *Haber v. Reifsteck,* 359 Ill.App.3d 867, 835 N.E.2d 187, 296 Ill.Dec. 332 (2d Dist. 2005), the court confirmed that the former one-year limitation in §508(e)(2) applied, and not the general limitation for contracts. In response to *Haber,* §508(e) of the IMDMA was amended in 2006 to change the limitations period for an independent action to ten years, which is the statute of limitations for a breach of contract. See 735 ILCS 5/13-206.

1. [2.173] Summary of 750 ILCS 5/508(e)

The pertinent time frames in which to file an independent lawsuit for fees against a former client under §508 of the IMDMA, 750 ILCS 5/508, are as follows:

a. If the underlying dissolution-related proceeding is still pending, the attorney must wait 90 days after receiving an order granting him or her leave to withdraw. 750 ILCS 5/(e)(1). If the underlying dissolution-related proceeding is no longer pending, the attorney must follow the following time limits:

1. If a praecipe for fees has been filed, the attorney may not file an independent lawsuit at least until the expiration of the 60-day period. 750 ILCS 5/(e)(2). Moreover, if a petition for fees is filed within the 60-day period, the attorney must seek fees under §508 of the IMDMA, 750 ILCS 5/508, and cannot seek fees in an independent lawsuit.

2. If a praecipe for fees is not filed, the attorney may file an independent lawsuit upon the expiration of 30 days after the entry of the judgment in the underlying action. 750 ILCS 5/(e).

b. The statute of limitations is the same as for other breach-of-contract actions. *Id.* For an oral contract, the lawsuit must be filed within five years after the deadline for filing a §508(c) petition for fees (ten years for a written contract). 735 ILCS 5/13-205, 5/13-206.

If a client terminates a contingent-fee agreement, the attorney does not have to wait until the contingency (*i.e.,* recovery) occurs before filing suit. The attorney is entitled to a judgment for fees even if the client has not yet recovered in the underlying lawsuit. *In re Estate of Callahan,* 144 Ill.2d 32, 578 N.E.2d 985, 988, 161 Ill.Dec. 339 (1991). Thus, the attorney could enforce the judgment even if the client recovered nothing in the underlying lawsuit. If you are considering substituting as attorney on a contingent-fee case, you should consider advising your client about the nature of his or her liability to the original attorney.

2. [2.174] Right of Responding Party To Implead Spouse

If the dissolution-related action is still pending, the defendant-client may file a third-party complaint against his or her spouse. If the attorney were to recover a judgment, the judgment would

be joint and several against both spouses. If, prior to the entry of the judgment in the independent lawsuit, the judge in the dissolution case has imposed a percentage allocation between the parties as to the fees and costs, the judge in the independent action must apply the percentage allocation and enter a judgment against each spouse for the appropriate amount.

3. [2.175] Other Considerations

Section 503(j)(4) of the IMDMA provides, "No finding on which a contribution award is based or denied shall be asserted against counsel or former counsel for purposes of any hearing under subsection (c) or (e) of Section 508." 750 ILCS 5/503(j)(4). However, if a petition pursuant to §508(c) has already been filed, the doctrine of res judicata may bar counsel from filing an independent action. *Cantwell v. Reinhart,* 244 Ill.App.3d 199, 614 N.E.2d 174, 176, 185 Ill.Dec. 40 (1st Dist. 1993). Similarly, when a petition under §508(c) is pending, a breach-of-contract claim by a former client attacking the reasonableness of an attorney's fee will be dismissed as duplicative. *Schmidt v. Gaynor,* 2019 IL App (2d) 180426, 138 N.E.3d 868, 435 Ill.Dec. 254.

The attorney-client privilege is normally waived in a fee dispute. *SPSS, Inc. v. Carnahan-Walsh,* 267 Ill.App.3d 586, 641 N.E.2d 984, 988, 204 Ill.Dec. 554 (1st Dist. 1994). In addition, attorneys who represent themselves in an action are not entitled to recover their own attorneys' fees. *In re Marriage of Tantiwongse,* 371 Ill.App.3d 1161, 863 N.E.2d 1188, 309 Ill.Dec. 291 (3d Dist. 2007).

4. Actions in Quasi-Contract

a. [2.176] Quantum Meruit

"*Quantum meruit* is a legal remedy, which is included under the umbrella of quasi-contract, the general category of claims for the redress of unjust enrichment." *In re Estate of Callahan,* 188 Ill.App.3d 323, 544 N.E.2d 112, 115, 135 Ill.Dec. 755 (3d Dist. 1989), *rev'd in part,* 144 Ill.2d 32, 578 N.E.2d 985, 161 Ill.Dec. 339 (1991).

Quantum meruit is "founded on the implied promise of the recipient of services or material to pay for something which he has received that is of value to him." *Ashton v. Cook County,* 384 Ill. 287, 51 N.E.2d 161, 167 (1943). "The recipient would be unjustly enriched if he were able to retain the services without paying for them." *Callahan, supra,* 578 N.E.2d at 988.

There are four situations in which an attorney may have to use a quantum meruit theory of recovery:

1. when he or she is discharged by the client (*In re Smith,* 168 Ill.2d 269, 659 N.E.2d 896, 907, 213 Ill.Dec. 550 (1995); *Wegner v. Arnold,* 305 Ill.App.3d 689, 713 N.E.2d 247, 250, 238 Ill.Dec. 1001 (2d Dist. 1999));

2. when he or she withdraws (*Kannewurf v. Johns,* 260 Ill.App.3d 66, 632 N.E.2d 711, 717, 198 Ill.Dec. 381 (5th Dist. 1994); *In re Marriage of Tetzlaff,* 304 Ill.App.3d 1030, 711 N.E.2d 346, 352, 238 Ill.Dec. 243 (1st Dist. 1999));

3. when he or she performs services that are not based on the terms of a written engagement agreement (see 750 ILCS 5/508(c)(3)); or

4. when he or she does not have an express (oral or written) agreement for fees (applicable when (a) one party performs a service that benefits another; (b) the benefiting party accepts the benefit; and (c) the circumstances indicate that the service was not intended to be gratuitous (*Village of Clarendon Hills v. Mulder,* 278 Ill.App.3d 727, 663 N.E.2d 435, 441 – 442, 215 Ill.Dec. 424 (2d Dist. 1996); *In re Estate of Etherton,* 284 Ill.App.3d 64, 671 N.E.2d 364, 367, 219 Ill.Dec. 450 (4th Dist. 1996))), although the failure to have an express agreement for fees may be a violation of RPC 1.5 (*Partee v. Compton,* 273 Ill.App.3d 721, 653 N.E.2d 454, 456, 210 Ill.Dec. 549 (5th Dist. 1995) (in such violation, "the harm is not to defendants, but it is to the administration of justice and society at large because of the breach of the Code of Professional Responsibility")).

However, recovery may not be had under a quantum meruit theory if the attorney has an express contract for the unpaid services and has not withdrawn or been discharged (*Hapaniewski v. Rustin,* 179 Ill.App.3d 951, 535 N.E.2d 24, 26, 128 Ill.Dec. 810 (1st Dist. 1989)) because counsel has performed his or her part of the contract; thus, recovery would be based on a contract claim.

Further, when there is an absence of an engagement agreement, an attorney may not recover fees pursuant to §508 under the theory of quantum meruit, except in the limited provision provided by §508(c)(3). *In re Marriage of Pavlovich,* 2019 IL App (1st) 180783, 131 N.E.3d 1217, 433 Ill.Dec. 372. In *Pavlovich,* the court held that "the language of section 508 is abundantly clear: a written agreement between the party and the attorney is required" prior to the award of attorneys' fees against an attorney's former client. 2019 IL App (1st) 180783 at ¶23. Further, the court clarified that although §508(c)(3) permits recovery of fees under the theory of quantum meruit, the fees recoverable are only "those for legal services performed outside the written contract." 2019 IL App (1st) 180783 at ¶24. Absent an engagement agreement, an attorney with a common-law quantum meruit claim must file an action independent of the IMDMA.

(1) [2.177] Burden of proof in quantum meruit cases

Unlike a petition under §508(c) of the IMDMA, 750 ILCS 5/508(c), in a quantum meruit case "[t]he burden of proving the reasonable value of the services performed clearly rests with the attorney, who is required to submit evidence to the trial court from which it can make a reasoned decision in accordance with applicable law." *Lossman v. Lossman,* 274 Ill.App.3d 1, 653 N.E.2d 1280, 1285, 210 Ill.Dec. 818 (2d Dist. 1995). *See also In re Estate of Callahan,* 144 Ill.2d 32, 578 N.E.2d 985, 990, 161 Ill.Dec. 339 (1991); *In re Marriage of Malec,* 205 Ill.App.3d 273, 562 N.E.2d 1010, 1022, 150 Ill.Dec. 207 (1st Dist. 1990).

(2) [2.178] Measure of fees

The standard for measuring fees under a quantum meruit analysis is essentially the same standard as that used in determining the reasonableness of fees under §508 of the IMDMA, 750 ILCS 5/508, and RPC 1.5.

To properly determine the reasonable value of an attorney's services, the following factors should be considered:

> **"the skill and standing of the attorney employed, the nature of the case and the difficulty of the questions at issue, the amount and importance of the subject matter, the degree of responsibility involved in the management of the case, the time and labor required, the usual and customary fee in the community, and the benefit resulting to the client."** *In re Estate of Callahan,* 144 Ill.2d 32, 578 N.E.2d 985, 990, 161 Ill.Dec. 339 (1991), quoting *Mireles v. Indiana Harbor Belt R.R.,* 154 Ill.App.3d 547, 507 N.E.2d 129, 132, 107 Ill.Dec. 465 (1st Dist. 1987).

See also Wegner v. Arnold, 305 Ill.App.3d 689, 713 N.E.2d 247, 250, 238 Ill.Dec. 1001 (2d Dist. 1999); *Anderson v. Anchor Organization for Health Maintenance,* 274 Ill.App.3d 1001, 654 N.E.2d 675, 681 – 682, 211 Ill.Dec. 213 (1st Dist. 1995); *Simon v. Auler,* 155 Ill.App.3d 1000, 508 N.E.2d 1102, 1104, 108 Ill.Dec. 525 (4th Dist.), *appeal denied,* 116 Ill.2d 576 (1987).

b. [2.179] Account Stated

Frequently, in lawsuits for fees, attorneys add an "account stated" cause of action. Although this might be appropriate for an attorney who handles numerous cases for the same client, such as a collection attorney, it is rarely appropriate in a domestic relations context, as shown by the following definition:

> **An account stated is an "agreement between parties who have had previous transactions that the account representing these transactions is true, so that the balance is correct, together with a promise which may be express or by implication for payment of the balance.". . . Assent to an account stated may be shown by payment or part payment of the balance. . . . However, where the business relationship is of attorney and client, and the attorney sues for his fee, a statement of account is not conclusive upon the client, who is always permitted to prove that the charges are excessive or otherwise unreasonable and unwarranted. [**Citations omitted.**]** *In re Marriage of Angiuli,* 134 Ill.App.3d 417, 480 N.E.2d 513, 518, 89 Ill.Dec. 328 (2d Dist. 1985), quoting *Soft Water Service, Inc. v. M. Suson Enterprises, Inc.,* 39 Ill.App.3d 1035, 351 N.E.2d 264, 268 (1st Dist. 1976).

"[I]n an action by an attorney for fees, mere allegations of an account stated are insufficient to allege liability of the client, and the burden is always on the attorney to show any agreement he has made with a client is fair and reasonable." *Yowell v. Ringer,* 217 Ill.App.3d 353, 577 N.E.2d 468, 474, 160 Ill.Dec. 338 (2d Dist. 1991).

In most cases, a domestic relations attorney should consider leaving an "account stated" cause of action out of the complaint for fees.

XI. DEFENDING AGAINST PETITION OR INDEPENDENT LAWSUIT FILED BY CLIENT

A. [2.180] Petition for Setting Final Fees and Costs

Section 508(c) of the IMDMA, 750 ILCS 5/508(c), permits a client to file a petition for setting final fees and costs against his or her own attorney. Normally, this action is similar to a declaratory relief action, by which the client is seeking a judicial determination (1) as to the amount owed or (2) as to the amount allegedly overpaid to the attorney. A client also has a right to file a praecipe, which allows an additional 60 days to file a petition.

For a discussion of the limitations in using this procedure, see §2.162 above.

When an attorney receives a petition for setting final fees and costs from a client, he or she must promptly file a motion to withdraw. If the client and the attorney agree, however, a hearing on the motion for leave to withdraw may be deferred until completion of any alternative dispute resolution procedure under §508(c)(4).

B. [2.181] Independent Lawsuit

A client may also file an independent lawsuit against his or her own attorney. Aside from a malpractice action, this is normally one that seeks declaratory relief (1) as to the amount owed or (2) as to the amount allegedly overpaid to the attorney. In *Simon v. Auler,* 155 Ill.App.3d 1000, 508 N.E.2d 1102, 108 Ill.Dec. 525 (4th Dist.), *appeal denied,* 116 Ill.2d 576 (1987), a client filed a lawsuit to obtain a refund of part of a $5,000 deposit she had paid an attorney to represent her in a dissolution action that became unnecessary because the parties reconciled. The appellate court stated:

> **A client who has executed a retainer contract and paid a substantial retainer fee to an attorney must be able to recover a portion of the retainer fee upon discharging the attorney after he has performed only a small amount of work. A contrary holding would seriously infringe upon the client's right to discharge the attorney at will and unjustly penalize the client for exercising that right. Permitting a previously retained attorney who has been discharged to keep a large sum of money in exchange for a small amount of work raises a question of excessive fees.** 508 N.E.2d at 1104.

This language was quoted with approval in *In re Smith,* 168 Ill.2d 269, 659 N.E.2d 896, 907, 213 Ill.Dec. 550 (1995).

XII. APPELLATE REVIEW OF FEE AWARDS

A. [2.182] Only Final Orders Appealable

Only final judgments may be appealed. "A judgment is final for appeal purposes 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." *In re Marriage of Verdung,* 126 Ill.2d 542, 535 N.E.2d 818, 823, 129 Ill.Dec. 53 (1989). *See In re Marriage of Crecos,* 2021 IL 126192, 183 N.E.3d 67, 451 Ill.Dec. 21 (appellate court has subject matter jurisdiction over appeal of post-dissolution attorney fee award). "[T]he trial court retains jurisdiction in a case until it has disposed of all matters before the court." *In re Marriage of Petraitis,* 263 Ill.App.3d 1022, 636 N.E.2d 691, 702, 201 Ill.Dec. 259 (1st Dist. 1993), quoting *Armour & Co. v. Mid-America Protein, Inc.,* 37 Ill.App.3d 75, 344 N.E.2d 639, 640 (3d Dist. 1976). In particular, if the court reserves an integral issue for later decision, the judgment is not final. *In re Marriage of Ruchala,* 208 Ill.App.3d 971, 567 N.E.2d 725, 728, 153 Ill.Dec. 767 (2d Dist. 1991); *In re Marriage of Burton,* 203 Ill.App.3d 890, 561 N.E.2d 180, 181, 148 Ill.Dec. 874 (5th Dist. 1990).

In most cases, a party may appeal an issue, pursuant to S.Ct. Rule 304(a), "if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." In a dissolution case, however, issues such as property disposition and support are ancillary to the dissolution aspect of the case. Thus, they are not separate claims and, therefore, not appealable prior to the entry of an order dissolving the marriage, except as provided by S.Ct. Rule 306. *See, e.g., In re Marriage of King,* 336 Ill.App.3d 83, 783 N.E.2d 115, 119, 270 Ill.Dec. 540 (1st Dist. 2002) (interim award of fees not final order and cannot independently be appealed; must be considered part of overall dissolution proceeding), *aff'd,* 208 Ill.2d 332 (2003). But see S.Ct. Rule 306(b), 2010, and 2016 amendments where judgments concerning custody or allocation of parental responsibilities under the IMDMA or Illinois Parentage Act of 2015 were among the few claims specifically treated as a distinct claim (separate and apart from any underlying dissolution of marriage claim), rendering them appealable without a special finding.

When a party appeals an order of contempt for violating an interim fees order, the order of contempt is a final order and appealable even if the interim fees are themselves interlocutory. *In re Marriage of Levinson,* 2013 IL App (1st) 121696, 989 N.E.2d 1177, 371 Ill.Dec. 249.

B. [2.183] Time To File Appeal

The normal deadline for appeal is 30 days after the judgment is entered. S.Ct. Rule 303(a)(1).

Section 508(c)(2) of the IMDMA provides, "A pending but undetermined Petition for Setting Final Fees and Costs shall not affect appealability of any judgment or other adjudication in the original proceeding." 750 ILCS 5/508(c)(2). This provision allows the parties to proceed with an appeal even though an attorney's petition for fees against his or her own client is still pending in the trial court.

As orders to pay attorneys' fees are compulsory, satisfaction of a monetary judgment does not ban appeal of the judgment. *In re Marriage of Sobieski,* 2013 IL App (2d) 111146, 984 N.E.2d 163, 368 Ill.Dec. 438.

C. [2.184] Appellant's Responsibilities

The court in *In re Marriage of Grauer,* 153 Ill.App.3d 125, 505 N.E.2d 1131, 1133 – 1134, 106 Ill.Dec. 340 (1st Dist. 1987), held:

> **Illinois law requires a party seeking to have his case reviewed on appeal to present a full and complete record to the court for its consideration. . . . Where the record does not show all the evidence considered by the trial court, the court of review will presume that the evidence supported the ruling below. . . . This court cannot and will not decide in favor of [**an appellant**] on the alleged abuse of discretion in the absence of his [**or her**] showing in the record facts that would support such a conclusion. [**Citations omitted.**]**

D. [2.185] Abuse of Discretion Standard

An appellate court will not reverse a trial court's award of a fee unless the trial court committed an abuse of discretion. *In re Marriage of Bussey,* 108 Ill.2d 286, 483 N.E.2d 1229, 91 Ill.Dec. 594 (1985). In fact, "[a]ll reasonable presumptions are in favor of the action of the trial court, and absent an affirmative showing to the contrary, the reviewing court will assume that the trial court understood and applied the law correctly." *In re Marriage of Walters,* 238 Ill.App.3d 1086, 604 N.E.2d 432, 445, 178 Ill.Dec. 176 (2d Dist. 1992). "[A] court of review will not substitute its judgment for that of the trial court," and "the question before this court is not how we might have determined the issue." *In re Marriage of Plotz,* 229 Ill.App.3d 389, 594 N.E.2d 366, 369, 171 Ill.Dec. 514 (3d Dist. 1992). *See In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 417, 238 Ill.Dec. 689 (5th Dist. 1999).

Notwithstanding these statements, appellate courts on several occasions have chosen to reevaluate the evidence and reached a different conclusion.

1. [2.186] What Constitutes Abuse of Discretion

"[T]he question is whether the trial court acted arbitrarily, without using conscientious judgment, or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law." *In re Marriage of Alshouse,* 255 Ill.App.3d 960, 627 N.E.2d 731, 735, 194 Ill.Dec. 394 (3d Dist.), *appeal denied,* 156 Ill.2d 555 (1994). *See also In re Marriage of Plotz,* 229 Ill.App.3d 389, 594 N.E.2d 366, 369, 171 Ill.Dec. 514 (3d Dist. 1992). In *In re Marriage of Sevon,* 117 Ill.App.3d 313, 453 N.E.2d 866, 870, 73 Ill.Dec. 41 (1st Dist. 1983), the court, quoting *In re Marriage of Lee,* 78 Ill.App.3d 1123, 398 N.E.2d 126, 129, 34 Ill.Dec. 451 (1st Dist. 1979), stated:

> **This is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. It would seem that if reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.**

2. Examples of Abuse of Discretion

a. [2.187] Financial Justification Element

In the cases listed below, the appellate courts held that the trial court judges abused their discretion with regard to the financial justification element.

In *In re Marriage of Schinelli,* 406 Ill.App.3d 991, 942 N.E.2d 682, 347 Ill.Dec.479 (2d Dist 2011), the trial court awarded the wife $15,000 after remand of an appeal by the husband. Upon consideration of the wife's salary combined with her maintenance award as compared to the husband's salary as reduced by his maintenance obligation, the appellate court reversed the fee award upon finding that the parties' financial circumstances were substantially similar.

In *In re Marriage of Krane,* 288 Ill.App.3d 608, 681 N.E.2d 609, 614, 224 Ill.Dec. 294 (1st Dist. 1997), the trial court awarded the wife prospective fees as follows: "one-third of any costs incurred in any appellate court proceedings." The appellate court reversed, holding that "the trial court entered an award that was indefinite and not based on the need and propriety of a particular amount of fees." 681 N.E.2d at 617.

In *In re Marriage of Carpenter,* 286 Ill.App.3d 969, 677 N.E.2d 463, 222 Ill.Dec. 260 (5th Dist. 1997), the wife had annual income of $12,000, and the husband had annual income of $40,000 – $50,000. The trial court denied the wife's request that the husband pay her attorneys' fees of $3,534. The appellate court reversed.

In *In re Marriage of Krivi,* 283 Ill.App.3d 772, 670 N.E.2d 1162, 219 Ill.Dec. 274 (5th Dist. 1996), the trial court ordered the husband to pay $19,088.19 of the wife's $27,175.92 attorneys' fees. The appellate court reversed, noting that the wife failed to prove her inability to pay her own fees and the husband's ability to pay them.

In *In re Marriage of LaTour,* 241 Ill.App.3d 500, 608 N.E.2d 1339, 181 Ill.Dec. 865 (4th Dist. 1993), the former husband filed a petition to enforce visitation. The trial court ordered the former husband to pay $350 of the former wife's attorneys' fees. The appellate court reversed on the ground that the former wife failed to prove her inability to pay the fees and the former husband's ability.

In *In re Marriage of Aleshire,* 273 Ill.App.3d 81, 652 N.E.2d 383, 209 Ill.Dec. 843 (3d Dist. 1995), the parties filed cross-petitions to enforce visitation. The trial court found that both parties violated a court order and thus ordered the former husband to pay 40 percent of the former wife's legal fees pursuant to 750 ILCS 5/508(b). The appellate court found that the former wife did not violate the court order, so it held that the former husband must pay all of the former wife's fees.

In *In re Marriage of Hillebrand,* 258 Ill.App.3d 835, 630 N.E.2d 518, 196 Ill.Dec. 583 (5th Dist. 1994), the former wife filed a petition for educational and maintenance expenses of the parties' 18-year-old daughter. The trial court ordered each party to pay his or her own fees. The appellate court reversed, ordering the former husband to pay the former wife's fees of $841.25. The court noted that the former wife was unemployed and received social security benefits of $257 per month, while the former husband had gross annual earnings in excess of $34,000.

In *In re Marriage of Ferkel,* 260 Ill.App.3d 33, 632 N.E.2d 1133, 198 Ill.Dec. 522 (5th Dist. 1994), the trial court ordered that $575 of the husband's attorneys' fees and $675 of the wife's attorneys' fees should be paid from the proceeds of the sale of the marital residence (*i.e.,* the husband would have to pay $50 of the wife's fees). The appellate court reversed on the ground that the wife had $379 per month in disposable income whereas the husband could not even pay his living expenses.

In *In re Custody of C.C.,* 2013 IL App (3d) 120342, 1 N.E.3d 1238, 377 Ill.Dec. 351, the trial court erred in ordering the alleged father to pay one third of the mother's attorneys' fees following the alleged father's motion to intervene when the court did not make specific findings that alleged the father had the ability to pay the mother's attorneys' fees and the record did not suggest he had the requisite ability to pay.

In *In re Marriage of Cozzi-DiGiovanni,* 2014 IL App (1st) 130109, 14 N.E.3d 729, 383 Ill.Dec. 446, the husband's former attorney filed a petition against the wife seeking contribution for attorneys' fees and costs owed by the husband to the attorney. The court noted that "[w]here . . . attorney fees are contested, the court must conduct a hearing on the issue to allow the attorney to present evidence in support of the petition, including evidence of the opposing spouse's ability to pay." 2014 IL App (1st) 130109 at ¶50.

b. [2.188] Amount of Fees Awarded

In the cases listed below, the appellate courts held that the trial court

In *In re Marriage of Heller,* 153 Ill.App.3d 224, 505 N.E.2d 1294, 106 Ill.Dec. 503 (1st Dist. 1987), the trial court failed to consider the lack of benefit to the client.

In *In re Marriage of Girrulat,* 219 Ill.App.3d 164, 578 N.E.2d 1380, 161 Ill.Dec. 734 (5th Dist. 1991), and *In re Marriage of Morse,* 143 Ill.App.3d 849, 493 N.E.2d 1088, 98 Ill.Dec. 67 (5th Dist. 1986), the trial court failed to consider the usual and customary charges in that county.

In *In re Marriage of Thornton,* 138 Ill.App.3d 906, 486 N.E.2d 1288, 93 Ill.Dec. 453 (1st Dist. 1985), the trial court did not allow a party to contest the amount of her own attorneys' fees, and the fees, if granted, could undermine her financial stability.

Likewise, an appellate court will increase fees and costs when warranted. *In re Marriage of Lefler,* 185 Ill.App.3d 677, 542 N.E.2d 1, 134 Ill.Dec. 1 (1st Dist. 1988). It is the duty of the appellate court to review the fairness, accuracy, and reasonableness of the fees in light of its knowledge and experience. *Gasperini v. Gasperini,* 57 Ill.App.3d 578, 373 N.E.2d 576, 582, 15 Ill.Dec. 230 (1st Dist. 1978).

In *In re Marriage of Heinrich,* 2014 IL App (2d) 121333, 7 N.E.3d 889, 380 Ill.Dec. 26, the trial court abused its discretion in finding that a premarital agreement was valid, in terms of attorneys' fees, when an attorney-fee-shifting ban as to child-related issues violated Illinois public policy.

c. [2.189] 750 ILCS 5/508(b) Petition for Fees Incurred To Enforce Court Order

In the cases listed below, the appellate courts held that the trial court judges abused their discretion with regard to a petition under §508(b) of the IMDMA, 750 ILCS 5/508(b), for fees incurred to enforce a court order:

In *In re Marriage of Baggett,* 281 Ill.App.3d 34, 666 N.E.2d 850, 854, 217 Ill.Dec. 181 (5th Dist. 1996), *In re Marriage of Roach,* 245 Ill.App.3d 742, 615 N.E.2d 30, 34, 185 Ill.Dec. 735 (4th Dist. 1993), *In re Marriage of Fowler,* 197 Ill.App.3d 95, 554 N.E.2d 240, 241 – 242, 143 Ill.Dec. 305 (3d Dist. 1989), and *In re Marriage of Berto,* 344 Ill.App.3d 705, 800 N.E.2d 550, 279 Ill.Dec. 482 (2d Dist. 2003), it was an abuse of discretion when the court failed to award fees for a violation of a court order because there was no evidence of the responding spouse's cause or justification.

In *In re Marriage of Young,* 200 Ill.App.3d 226, 559 N.E.2d 178, 181, 147 Ill.Dec. 178 (4th Dist. 1990), a remand was warranted when the court failed to make a finding that the failure to obey the court order was without cause or justification.

In *In re Marriage of Stanley,* 133 Ill.App.3d 963, 479 N.E.2d 1152, 1160, 89 Ill.Dec. 146 (4th Dist. 1985), a remand was warranted when the court failed to distinguish which portion of the fees awarded was pursuant to §508(b).

E. [2.190] Waiver of Issues Prior to Appeal

Issues not raised in the trial court will generally be considered waived on appeal. *In re Marriage of Walters,* 238 Ill.App.3d 1086, 604 N.E.2d 432, 445, 178 Ill.Dec. 176 (2d Dist. 1992). However, "[t]he rule of waiver is a limitation on the parties and not on the courts, and a reviewing court may ignore the waiver rule in order to achieve a just result." *In re Marriage of Bennett,* 131 Ill.App.3d 1050, 476 N.E.2d 1297, 1301, 87 Ill.Dec. 305 (2d Dist. 1985). *See also In re Marriage of Pagano,* 181 Ill.App.3d 547, 537 N.E.2d 398, 130 Ill.Dec. 331 (2d Dist. 1989); *In re Marriage of Baniak,* 2011 IL App (1st) 092017, 957 N.E.2d 469, 354 Ill.Dec. 153.

3 Pleadings Under the Illinois Marriage and Dissolution of Marriage Act

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4. [3.60] Discussion of Sample Petition and Alternative Allegations
   a. [3.61] Caption
   b. [3.62] Preamble
   c. [3.63] Individual Allegations
      (1) [3.64] Allegation 1: personal jurisdiction
      (2) [3.65] Allegations 2 – 4: subject-matter jurisdiction — marriage and grounds
      (3) [3.66] Allegations 5 – 6: information about the parties
      (4) [3.67] Allegation 7: information about the children
      (5) [3.68] Allegation 8: allocation of parental responsibilities
      (6) [3.69] Allegation 9: marital property
         (a) [3.70] Filing creates vested property rights
         (b) [3.71] Statutory definition of "marital property"
         (c) [3.72] Alternative marital property allegations
      (7) [3.73] Allegation 10: nonmarital property
      (8) [3.74] Allegation 11: marital debts
      (9) [3.75] Allegation 12: prior arrangements
      (10) [3.76] Allegations 13 – 14: child support
      (11) [3.77] Allegations 15 – 16: maintenance
      (12) [3.78] Allegations 17 – 20: attorneys' fees
      (13) [3.79] Miscellaneous additional allegations
         (a) [3.80] Appointment of an attorney, representative, or guardian ad litem for the children
         (b) [3.81] Exclusive possession of the marital residence
         (c) [3.82] Resuming a former name
         (d) [3.83] Visitation by certain nonparents
         (e) [3.84] Dissipation
         (f) [3.85] Sample notice for affirmative claim of dissipation
   d. [3.86] Prayer or Request for Relief
   e. [3.87] Attorney Identification
   f. [3.88] Signature and Verification
5. [3.89] Documents To File with the Petition
   a. [3.90] Certificate of Dissolution
   b. [3.91] Domestic Relations Cover Sheet
   c. [3.92] Application, Affidavit, and Order for Waiver of Court Fees
   d. [3.93] Sample Motion Seeking Waiver of Requirement To Disclose Address
   e. [3.94] Sample Affidavit with Respect to Disclosure of Address
   f. [3.95] Sample Order Waiving Disclosure of Address

I. SCOPE OF CHAPTER

A. [3.1] Coverage

This chapter focuses on the pleadings that can and/or should be filed in order to start the proceedings for dissolving a marriage or obtaining a legal separation as well as the responsive pleadings that can and/or should be filed if one of these proceedings has been initiated against the client. In addition to a general overview of pleading strategy and considerations, the content and format of the following pleadings are covered in detail:

1. praecipe for summons;

2. summons;

3. petition for dissolution of marriage;

4. bill of particulars;

5. response to petition for dissolution of marriage;

6. counterpetition for dissolution of marriage; and

7. petition for legal separation.

The petition for declaration of invalidity is not covered in detail in this chapter; however, Chapter 4 of this handbook is separately devoted to that topic and related issues.

This chapter also addresses the other types of documents or forms that must be filed at the initial pleading stage, such as appearances, summonses, county department of public health statistical data sheets, and so forth. The time and manner for filing some of these documents vary from county to county, so an attorney should check with the clerk of the court regarding local rules and practice. Finally, sample judgments of dissolution of marriage and for legal separation — documents attorneys frequently prepare — are also included. See §§3.116 and 3.124 below. The judgments contain findings that all the essential elements of the cause of action and all the relevant factual premises have been proved to the court's legal satisfaction. Drafting and reviewing sample judgments is thus a good check to ensure that all the essential elements and facts of the cause of action in the petition have been pleaded.

Carefully drafted pleadings are one of the most underrated tools of a divorce lawyer. Generally, initial petitions are considered routine, and many practitioners use the same form for each case. Such pleading by rote can result in damaging allegations or admissions, such as pleading the stock allegation that the "parties acquired various items of marital property" when the actual posture in the case is that there is no marital property because a premarital agreement precludes it. Using stock forms also can result in false allegations within a pleading, such as a statement that the parties have been separated for the requisite statutory period when they have not.

Thoughtful and aggressive pleading, on the other hand, can force helpful admissions from opposing counsel, ferret out issues, set the tone of the case, and communicate counsel's level of professionalism.

PRACTICE POINTER

✓ The time to think about the potential issues in a case is before you file your pleading. You should make strategic and tactical decisions at the earliest stages of your case; this chapter also discusses some ethical and advocacy decisions you should make when drafting pleadings.

While forms are included in this chapter, drafting pleadings is not a matter of simply filling in the blanks. The included forms are suggestions only and contain only the basic elements of the requisite pleadings.

PRACTICE POINTER

✓ You must familiarize yourself with the law and the facts of your case and adapt the forms to your situation.

Note, however, that in a few instances, which are mentioned herein, the form of pleadings is mandated by court rule.

In most jurisdictions, attorneys, as well as litigants, must sign pleadings verifying the representations contained therein. Thus, careful review of both the facts and the law are an ethical and practical necessity.

B. [3.2] Caveat: The Law Changes

The area of pleading continues to evolve, and family law continues to undergo change, including changes in the residence requirement, the types of causes of action, the relief available, and even the captions of the cases. As in any other type of litigation, practitioners must check the statutory references or other law on which they rely to make sure that no changes have been made that affect what is being planned or done for the client. Even if counsel makes an error that is not fatal to the case, careless pleading reflects adversely on competence and professionalism to client, judge, and opposing counsel.

II. PLANNING THE PLEADINGS

A. [3.3] Purpose of Pleadings

Pleadings shall be liberally construed with a view to doing substantial justice between the parties. 735 ILCS 5/2-603(c).

The primary statutory requirement in Illinois is that pleadings be "plain and concise." 735 ILCS 5/2-603(a). The underlying purposes of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq.,* which are also important in this context, are consistent with that general mandate:

This Act shall be liberally construed and applied to promote its underlying purposes, which are to:

(1) provide adequate procedures for the solemnization and registration of marriage;

(2) strengthen and preserve the integrity of marriage and safeguard family relationships;

(3) promote the amicable settlement of disputes that have arisen between parties to a marriage;

(4) mitigate the potential harm to spouses and their children caused by the process of an action brought under this Act, and protect children from exposure to conflict and violence;

(5) ensure predictable decision-making for the care of children and for the allocation of parenting time and other parental responsibilities, and avoid prolonged uncertainty by expeditiously resolving issues involving children;

(6) recognize the right of children to a healthy relationship with parents, and the responsibility of parents to ensure such a relationship;

(7) acknowledge that the determination of children's best interests, and the allocation of parenting time and significant decision-making responsibilities, are among the paramount responsibilities of our system of justice, and to that end:

(A) recognize children's right to a strong and healthy relationship with parents, and parents' concomitant right and responsibility to create and maintain such relationships;

(B) recognize that, in the absence of domestic violence or any other factor that the court expressly finds to be relevant, proximity to, and frequent contact with, both parents promotes healthy development of children;

(C) facilitate parental planning and agreement about the children's upbringing and allocation of parenting time and other parental responsibilities;

(D) continue existing parent-child relationships, and secure the maximum involvement and cooperation of parents regarding the physical, mental, moral, and emotional well-being of the children during and after the litigation; and

(E) promote or order parents to participate in programs designed to educate parents to:

(i) minimize or eliminate rancor and the detrimental effect of litigation in any proceeding involving children; and

(ii) facilitate the maximum cooperation of parents in raising their children;

(8) make reasonable provision for support during and after an underlying dissolution of marriage, legal separation, parentage, or parental responsibility allocation action, including provision for timely advances of interim fees and costs to all attorneys, experts, and opinion witnesses including guardians ad litem and children's representatives, to achieve substantial parity in parties' access to funds for pre-judgment litigation costs in an action for dissolution of marriage or legal separation;

(9) eliminate the consideration of marital misconduct in the adjudication of rights and duties incident to dissolution of marriage, legal separation and declaration of invalidity of marriage; and

(10) make provision for the preservation and conservation of marital assets during the litigation. 750 ILCS 5/102.

To maximize the effectiveness of pleadings and to make them plain and concise, counsel should think about what pleadings are and why they are used. Although this seems so basic that it hardly needs highlighting, too often attorneys fail to consider these concepts and thus lose opportunities for effective and creative advocacy.

The pleadings start and define the scope of the lawsuit and the claims against the other party; they also define the relief sought. They state the basis for the court's jurisdiction over the parties and the subject matter and identify for the court all the elements of the cause of action. The pleadings also identify issues and inform opposing counsel of the factual basis for the client's claims.

Keeping these purposes in mind should enable the practitioner to make good formalistic and substantive decisions about the content of the pleadings and good linguistic decisions about the most effective and efficient way to tell the client's story.

B. [3.4] Formal Requirements

In addition to the substantive content of pleadings, which forms the bulk of the material covered by this chapter, the practitioner must also be aware of certain requirements of form specified by statute — primarily the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.* Counsel should also consult local rules as these sometimes contain additional prescriptions regarding form. This chapter does not deal with local variants or additions, and most of the examples are based on the practice in Cook County.

Although matters of form frequently seem arbitrary, they simplify the reader's task by ensuring that certain key elements of the pleading are always included in specific ways or places. Because judges anticipate that pleadings usually are designed a certain way, it is best to conform to the anticipated style. Pleadings also appear more professional if they follow a logical progression rather than a hopscotch approach to the facts. Finally, it can also be more efficient if the same basic format is used consistently.

The Code of Civil Procedure governs most matters of pleading and form even under the IMDMA (see 750 ILCS 5/105), but there are two exceptions:

1. The latter statute expressly requires that the initial pleading in a suit for dissolution, invalidity, legal separation, or any other proceedings brought under it be designated a "petition" and that the responsive pleading be designated a "response." 750 ILCS 5/105(c).

2. It specifies that the caption of a proceeding shall be "In re the Marriage of _____ and _____." 750 ILCS 5/105(b).

Cf. 735 ILCS 5/2-602. The "and" rather than the more traditional "versus" used in the dissolution caption is intended to minimize acrimony and is in keeping with another development in this area: unlike judgments awarded in other courts, the judgment of dissolution of marriage is awarded to both parties (750 ILCS 5/413(d)) despite the fact that the petitioner continues to have the burden of proving the allegations of the petition. The dual award was designed to eliminate the possibility of, if not the need for, a win on the record. Practitioners may disagree, but substance does not seem to have followed form in this instance because the level of acrimony has not been appreciably reduced by this linguistic change.

C. [3.5] Parties' Titles

The difference between pleadings under the IMDMA and general pleadings under the Code of Civil Procedure has created a special nomenclature problem. Although the IMDMA specifies the titles of the initial pleadings (see §3.4 above), it does not specify the titles of the original parties. Are they "petitioner" and "respondent" or "plaintiff" and "defendant"? When 750 ILCS 5/105(c) was first added to the IMDMA, most practitioners switched from the traditional denominations ("plaintiff" and "defendant") to calling the parties "petitioner" and "respondent." See Marshall J. Auerbach and Albert E. Jenner, Jr., Historical and Practice Notes, S.H.A. (1980), c. 40, ¶105. That usage led to significant confusion, especially when parties designated by one title in the original

petition were on the other side in a later petition. An attempt was therefore made to correct the situation by re-designating the parties "plaintiff" and "defendant" throughout the IMDMA. For some reason, this change was made only in 750 ILCS 5/104 (venue for dissolution proceedings), which since 1982 has specified that "[t]he proceedings shall be had in the county where the *plaintiff* or *defendant* resides." [Emphasis added.] Unfortunately, the change to "plaintiff" and "defendant" was not carried through the rest of the IMDMA. See, *e.g.,* 750 ILCS 5/402(b) (venue provision on legal separation refers to "petitioner" and "respondent").

Neither the IMDMA nor the Code of Civil Procedure specifies or prescribes the appropriate title to use, and the internal statutory use, as illustrated, is inconsistent. Cook County Circuit Court Rule, pt. 13 uses the terms "petitioner" and "respondent" in dissolution proceedings. When possible, it may be best to use the parties' names to make the pleadings easier to read and to avoid confusion.

D. [3.6] Verification or Certification

750 ILCS 5/403(a) requires that any petition that initiates proceedings must be verified. 735 ILCS 5/2-605 specifies that responses or replies to verified pleadings must themselves be verified. See also 735 ILCS 5/1-109; Illinois Supreme Court Rule 137. 735 ILCS 5/1-109 states that whenever the Code of Civil Procedure requires verification (this is done under oath with a notary), certification (an assertion of truth under penalty of perjury) is acceptable. The statute specifies that the certification, which does not require a notary, must be in substantially the following form:

> **Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.** *Id.*

S.Ct. Rule 137 requires attorneys or unrepresented parties to sign pleadings, motions, and other papers. Rule 137 specifically provides that the signature constitutes a certificate by the attorney or signing party that

> **to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.**

Sanctions, including an award of reasonable expenses incurred because of the filing of a pleading, motion, or other paper in violation of the rule may be imposed.

Both a sample verification and a sample certification are provided in §3.59 below.

E. [3.7] Statutory Sources

The IMDMA specifies the basic elements of a cause of action for

1. legal separation (750 ILCS 5/402);

2. invalidity of marriage (750 ILCS 5/301);

3. dissolution of marriage (750 ILCS 5/401);

4. allocation of parental responsibilities (750 ILCS 5/602.5, 5/602.7); and

5. temporary relief (750 ILCS 5/501).

In addition to the IMDMA, there are several other statutes that govern the form and content of pleadings involving divorce and custody issues, including the Illinois Code of Civil Procedure (see 750 ILCS 5/105) and the concomitant Illinois Supreme Court Rules.

In addition to these statutes, a number of other statutes may affect the relief counsel is seeking or provide additional avenues for relief or entirely new causes of action even beyond the matrimonial law context. Practitioners need to be aware of these other statutes and consult them to be certain that all available causes of action are alleged and that they have done so properly and completely. Otherwise, there is a risk of having the pleading stricken or dismissed for failure to state a claim on which relief can be granted. 735 ILCS 5/2-612, 5/2-619. Among the other statutes to consult are the following:

1. Adoption Act, 750 ILCS 50/0.01, *et seq.;*

2. Illinois Domestic Violence Act of 1986 (IDVA), 750 ILCS 60/101, *et seq.;*

3. Illinois Parentage Act of 2015, 750 ILCS 46/101, *et seq.;*

4. Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), 750 ILCS 36/101, *et seq.;*

5. Uniform Interstate Family Support Act (UIFSA), 750 ILCS 22/101, *et seq.;*

6. Article XI of the Code of Civil Procedure, 735 ILCS 5/11-101, *et seq.;* and

7. Gender Violence Act, 740 ILCS 82/1, *et seq.*

This chapter deals primarily with the requirements imposed by the IMDMA, the Code of Civil Procedure, and Illinois Supreme Court Rules. In several cases, including custody/parental responsibilities and domestic violence, more than one statute governs the necessary or possible

range of pleadings. Readers should consult the other statutes and the other chapters in this handbook if the problems or issues under consideration involve points covered by those other statutes or chapters.

F. [3.8] Insufficient Pleadings

735 ILCS 5/2-612 focuses on insufficient pleadings. If pleadings are inadequate in either substance or form, the court may order the pleader to make the necessary revisions sua sponte or based on a motion of the opponent addressed to the particular inadequacy (735 ILCS 5/2-612(a)); if no one objects to the defects or inadequacies, the defects are deemed waived and the suit proceeds (735 ILCS 5/2-612(c)). Although a faulty or defective pleading may be curable, mistakes cost the client time and money and are embarrassing for the attorney. The better practice is to plan the pleading carefully and draft it the way both the attorney and client want it the first time around. See also the discussion of amendments to pleadings at §3.28 below.

G. [3.9] Involuntary Dismissal

735 ILCS 5/2-619 lists specific flaws that cause a pleading to be subject to involuntary dismissal. Some of the enumerated flaws deal with matters of form, some with substance. A pleading is subject to involuntary dismissal on the following grounds:

> **(1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.**
>
> **(2) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.**
>
> **(3) That there is another action pending between the same parties for the same cause.**
>
> **(4) That the cause of action is barred by a prior judgment.**
>
> **(5) That the action was not commenced within the time limited by law.**
>
> **(6) That the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.**
>
> **(7) That the claim asserted is unenforceable under the provisions of the Statute of Frauds.**
>
> **(8) That the claim asserted against defendant is unenforceable because of his or her minority or other disability.**
>
> **(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.** 735 ILCS 5/2-619(a).

In planning pleadings, practitioners should consider these potential defects that would allow opposing counsel to raise these claims against the client.

III. PRE-PLEADING STRATEGY

A. [3.10] Strategic Factors

Before actually writing pleadings, and in addition to the factual investigation mandated by S.Ct. Rule 137 and 735 ILCS 5/1-109 discussed in §3.6 above, counsel must make strategic decisions based on the client's circumstances and particular needs. Decisions must be made concerning

1. what type of action to bring (*e.g.,* invalidity, separation, or dissolution);

2. where counsel may (jurisdiction) or can (venue) bring the action;

3. whom to include as parties (sometimes parties other than the spouses are essential; sometimes they are merely helpful);

4. whether to file a counterpetition if counsel represents the defendant;

5. whether to plead some or all available affirmative defenses;

6. regardless of the side represented, how specific and detailed counsel is going to be with the facts of any pleadings that cast aspersions on the opposing side;

7. how detailed counsel is going to be about the items and character of the property owned by the parties; and

8. whether to include requests for temporary relief (*e.g.,* maintenance or child support) or an injunction regarding property in the main petition or in separate motions or pleadings.

The important thing to remember about these strategic decisions is that within the bounds defined by the IMDMA and by S.Ct. Rule 137 with respect to fair and forthright pleading, counsel is free to handle these issues in different ways.

B. Fact/Notice Pleading

1. [3.11] Degree of Detail

As a general rule, in Illinois, as in other jurisdictions, the distinction between "fact pleading" and "notice pleading" as a matter of legal prescription has been largely eroded. In fact, the two primary statements in the Code of Civil Procedure about pleading say only that pleadings are to be "plain and concise" (735 ILCS 5/2-603(a)) and "[n]o pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet" (735 ILCS 5/2-612(b)).

2. [3.12] Inconsistent Pleading

735 ILCS 5/2-613(b) further clarifies that pleadings may be inconsistent both factually and legally, so it is clearly possible to include every conceivable claim or fact in the pleading. If counsel decides to use a "kitchen sink" approach to pleading, however, it should be as the result of strategy, not as a substitute for it. The statutory mandates about notice pleading and inconsistent pleading simply give the practitioner flexibility to plan and draft pleadings thoughtfully.

3. [3.13] Constraints

The constraints that counsel should be considering at this juncture include such factors as

a. the current status of the parties' relationship (degree of communication and cooperation);

b. the likelihood that the relationship will continue as it is or change during the case or after it is closed;

c. the need for the parties to maintain an ongoing relationship (*e.g.,* because of children or entangled property interests);

d. the emotional state and needs of the client and of the client's spouse;

e. the amount of time, energy, and money that the client has and/or wants to expend on this particular dispute or issue;

f. the need to preserve certain issues even though the client offers assurances that he or she and the spouse are in agreement on them;

g. the client's desire for an aggressive posture early in the lawsuit;

h. the possibility of admissions on crucial points based on pleadings; and

i. the danger of revealing too much of counsel's hand too soon by over-pleading the case.

C. [3.14] Type of Action

In many cases, clients who are petitioners believe they know what type of relief they want or need. Nevertheless, sometimes there are strategic and tax reasons for seeking only a legal separation rather than a total dissolution. Counsel should be aware of these reasons and discuss them with the client before plunging into preparation and filing the pleadings. (The substantive issues raised by each type of pleading are discussed below.) Each client's particular needs and situation also dictate whether counsel can or should seek additional or temporary relief such as temporary maintenance, child support, protective orders, injunctions against dissipation or transfers of property, exclusive possession of the marital residence, and so forth. See 750 ILCS 5/501 for the temporary relief provisions. These kinds of relief can be sought either in the main petition or by separate motion.

D. Venue

1. [3.15] Dissolution

Venue is not jurisdictional (750 ILCS 5/104), so arguably it is possible to file suit in any county. Although §104 specifies that the proceedings "shall be had" in the county in which one of the parties resides, parties frequently bring suit in other counties. However, pursuant to statutory amendments effective January 1, 2016, when an action is filed in a county in which neither party resides, the petitioner is required to file with the initial pleading a written motion disclosing that the forum is not the proper venue, and seeking a waiver of the §104 requirements. Said motion is to be set for hearing and ruled on before any other issue. This "mandatory disclosure" requirement was enacted to curtail the practice of litigants filing in a venue solely for convenience (*e.g.,* in a county closer to work or to the lawyer's office). See generally 735 ILCS 5/2-101 through 5/2-108 regarding venue.

a. [3.16] Forum Shopping

In *In re Marriage of Jones*, 104 Ill.App.3d 490, 432 N.E.2d 1113, 1116, 60 Ill.Dec. 214 (1st Dist. 1982), the appellate court sua sponte raised the issue of venue and criticized the parties for forum shopping:

> **We find misplaced the parties' reliance on their failure to object to improper venue as authority for this action to be brought in the circuit court of Cook County, rather than in the circuit court of DuPage County, which county is where both parties presently reside. We are not aware of any experience in the family law area or authority that demonstrates that the legislature intended the unlimited filing of such actions in any court in the State without any nexus whatsoever and without the necessity of any application to fix a substitute venue. We are not convinced that the statute mandates such a narrow construction or restricted view allowing the parties to ignore the venue requirements and proceed to disregard the clear direction of the statute. This posture permits the parties to forum shop and possibly may add to the burden of crowded court calendars and enforcement problems of support orders.**
>
> **We reject the contention that section 104 is meaningless and that the legislative direction as to venue may be ignored upon the parties' election or that the trial court is without authority to transfer an action to an appropriate county. . . By its terms, section 104 governs venue and it is reasonable to assume that the legislature did not intend to confer upon the parties . . . the unfettered right to select any forum. [**Citations omitted.**]**

See also In re Marriage of Sales, 106 Ill.App.3d 378, 436 N.E.2d 23, 24, 62 Ill.Dec. 441 (1st Dist. 1982), which suggests that when venue is improper, the party should seek an order waiving the venue requirement.

b. [3.17] Objections to Venue

Objections to venue must be raised at the time the defendant's response and appearance are due. 750 ILCS 5/104. Under the ruling of *In re Marriage of Jones,* 104 Ill.App.3d 490, 432 N.E.2d 1113, 60 Ill.Dec. 214 (1982), *appeal after remand,* 187 Ill.App.3d 206 (1st Dist. 1989), the parties' mutual failure to object to an inappropriate forum may not be enough to establish an appropriate forum. The best practice may be that suggested by *Jones* — obtain a court order allowing the case to proceed in a county of otherwise inappropriate venue so that this issue is not raised sua sponte at an inappropriate or inconvenient time. In *In re Marriage of Pleasant,* 256 Ill.App.3d 742, 628 N.E.2d 633, 195 Ill.Dec. 169 (1st Dist. 1993), the appellate court held that since venue orders are nonfinal, and nonappealable orders are a step in the procedural process, the issue of a change of venue was not waived even though the issue was not raised in the notice of appeal. A motion for forum non conveniens must be filed by a party no later than 90 days after the last day allowed for the filing of a party's answer. S.Ct. Rule 187.

2. [3.18] Separation

Note that the venue provisions are different for a proceeding for legal separation. 750 ILCS 5/402(b) specifies that the proceeding shall be brought in the circuit court of the county in which the petitioner or respondent resides or where the parties last resided together as husband and wife. While venue may be proper in a venue where the parties last resided together, even if neither party remains in that county, the attorney should exercise discretion in filing an action in a county that may have substantial travel requirements for the attorney's client and local experts. That said, the expansion of virtual court appearances may alleviate some of those burdens.

E. Parties

1. [3.19] Traditional Parties

Technically, the IMDMA allows the parties to file jointly for a dissolution or legal separation, although it is rarely done. 750 ILCS 5/403(b) ("Either or *both* parties to the marriage may initiate the proceeding." [Emphasis added.]). This provision is consistent with 750 ILCS 5/413(d), which specifies that the judgment is awarded to both parties. The Historical and Practice Notes clarify that this provision was intended to allow parties to preserve settlements reached before a petition is filed. Marshall J. Auerbach and Albert E. Jenner, Jr., Historical and Practice Notes, S.H.A. (1980), c. 40, ¶403(b). Note, however, that even if the parties file a joint petition, one attorney may not represent both parties, consistent with the strictures of Illinois Rule of Professional Conduct 1.7.

2. [3.20] Additional Parties

In addition to the spouses, who are obviously necessary parties in domestic relations cases, it may be helpful or necessary to add other parties, such as (a) creditors of the couple or of one of the spouses; (b) the plan administrator of any retirement plans in which the spouses have an interest or even the plan itself (§502(d)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. No. 93-406, 88 Stat. 829, clarifies that a retirement plan or employee benefit plan is a separate legal entity); (c) trustees of property in which one of the parties has an interest; or (d) a

corporation or business entity in which one of the parties may have an interest. While it is not usually necessary to join other parties, counsel must do so in order to bind these third parties with respect to injunctive or monetary relief, if counsel wants to discharge the client on a debt or have it assumed by a third party, or if counsel wants to transfer stock or partnership interests that may have transfer restrictions. 735 ILCS 5/2-401, *et seq.* Third parties are able to sue the client on marital obligations unless they are bound or foreclosed from doing so by a judgment in a case in which they were parties. Similarly, business entities can refuse to make requisite transfers unless they are bound by such a judgment. Joining additional third parties should also be considered if counsel suspects dissipation of assets involving these parties or believes there has been a fraudulent or voluntary transfer of property disregarding the client's rights or interest. The court has the power to add such parties either on the motion of one of the parties or on its own motion. 750 ILCS 5/403(d); Marshall J. Auerbach and Albert E. Jenner, Jr., Historical and Practice Notes, S.H.A. (1980), c. 40, ¶403(d).

3. [3.21] Competency

Parties must also be competent to sue or be sued; if they are not, the petition can be dismissed. 735 ILCS 5/2-619(a)(2). Incompetence can arise from being a minor or from a mental, physical, or legal disability. If parties are not competent, a guardian ad litem (GAL) or a guardian of the person or of the estate may be the appropriate entity to pursue the suit. *Payton v. Payne,* 90 Ill.App.3d 892, 414 N.E.2d 33, 36 – 37, 46 Ill.Dec. 311 (1st Dist. 1980) (guardian has standing to bring petition for declaration of invalidity). Note that the competency of parties for a declaration of invalidity or for a dissolution are separate issues with separate standards. 750 ILCS 5/301 sets the standards for a declaration of invalidity of the underlying marriage, while a determination of competency is the purview of Probate Court.

Until 2012, Illinois law held that a guardian did not have standing to bring a suit to dissolve a marriage. Specifically*, In re Marriage of Drews,* 115 Ill.2d 201, 503 N.E.2d 339, 341, 104 Ill.Dec. 782 (1986), *appeal dismissed, cert. denied,* 107 S.Ct. 3222 (1987), *later proceeding,* 179 Ill.App.3d 110 (1st Dist. 1989), held that under Illinois law a plenary guardian does not have standing to bring a suit to dissolve the ward's marriage. *Drews* found that the decision to sue for a dissolution of marriage was too personal for the guardian to make on behalf of the ward. *Drews* was criticized as overemphasizing the grounds for dissolution and the sanctity of marriage instead of focusing on the reality that a judgment dissolving a marriage might protect the disabled or incompetent person by allocating property and/or maintenance to that person based on need. *Drews* seemed to overlook the problem that if a disabled person is unable to obtain a divorce, an unscrupulous spouse could deal with marital property to the detriment of the disabled spouse.

In *Karbin v. Karbin,* 2012 IL 112815, 977 N.E. 2d 154, 364 Ill.Dec. 665, the Illinois Supreme Court considered the criticism of *Drews* and overruled the holding. The court held that the rule espoused in *Drews* "is no longer consistent with current Illinois policy on divorce as reflected in the Illinois Marriage and Dissolution of Marriage Act." 2012 IL 112815 at ¶43. The court further determined that if it were to reaffirm *Drews,* it would be allowing the law to unfairly treat incompetent spouses, leaving them at the complete mercy of the competent spouse without consideration of their best interests. 2012 IL 112815 at ¶45 ("This situation stands in direct

contravention of the policy of our state, which provides that once a person is found to be 'disabled' under our Probate Act, he or she is viewed as '"a favored person in the eyes of the law" and is entitled to vigilant protection.'"), quoting *In re Mark W.,* 228 Ill.2d 365, 888 N.E.2d 15, 21, 320 Ill.Dec. 798 (2008).

When dealing with a situation involving a confirmed or possibly incompetent party, counsel needs to be particularly alert to these issues and structure the pleadings accordingly.

The appointment of an estate guardian is insufficient in and of itself to prohibit a ward's bringing an action for dissolution of marriage because the finding of disability to manage one's estate or finances is a different and more rigorous test of mental capacity than the determining of competency to enter into or to dissolve a marriage. *In re Marriage of Kutchins,* 136 Ill.App.3d 45, 482 N.E.2d 1005, 90 Ill.Dec. 722 (1985), *appeal denied,* 117 Ill.2d 544 (1987).

Note that *Drews, supra,* does not preclude the institution of proceedings to declare a marriage invalid. The authority of a guardian to institute an action for invalidity of marriage has long been recognized. *See Pyott v. Pyott,* 191 Ill. 280, 61 N.E. 88 (1901).

4. [3.22] Other Party-Related Issues and Death of a Party

735 ILCS 5/2-401 through 5/2-413 deal with party-related issues (designation, joinder and nonjoinder, misnomer, subrogation, intervention, interpleader, and unknown parties) and clarify the mechanisms for adding or deleting parties. See also S.Ct. Rule 131(c), which clarifies that regardless of how many parties are named or involved in a lawsuit, the caption (except on the initial pleading) needs to name only one plaintiff and one defendant. Counsel should use the designation "et al." to indicate that there are additional parties.

The death of a party while the divorce action is pending and before entry of judgment of dissolution of marriage abates the proceeding and deprives the court of jurisdiction to hear or rule on any outstanding issues. *In re Marriage of Ignatius,* 338 Ill.App.3d 652, 788 N.E.2d 794, 273 Ill.Dec. 203 (2d Dist. 2003); *Brandon v. Caisse,* 145 Ill.App.3d 1070, 496 N.E.2d 755, 756, 99 Ill.Dec. 894 (1986), *later proceeding,* 172 Ill.App.3d 841 (2d Dist. 1988). *See In re Marriage of Black,* 155 Ill.App.3d 52, 507 N.E.2d 943, 107 Ill.Dec. 790 (3d Dist. 1987), in which the court refused to substitute as a party the administrators for the husband's estate on the grounds that the action had abated because of the husband's death after a hearing determining grounds existed but before the entry of a judgment. See also 750 ILCS 5/401(b), which provides that "[t]he death of a party subsequent to entry of a judgment for dissolution but before judgment on reserved issues shall not abate the proceedings," and *In re Estate of Banks,* 258 Ill.App.3d 529, 629 N.E.2d 1223, 196 Ill.Dec. 379 (5th Dist. 1994), in which the court ruled that Illinois was the state of the husband and wife's domicile at the time of the husband's death for purposes of determining which state's laws would determine the validity of the marriage for inheritance purposes. The marriage occurred in Arkansas, and at the time, the husband was still married to another woman.

F. [3.23] Grounds

By amendment effective January 1, 2016, all fault-based grounds for dissolution of marriage are abolished in Illinois, and the only grounds for divorce are the no-fault grounds of "irreconcilable

differences." Specifically, parties can obtain a divorce if the court finds that "irreconcilable differences have caused the irretrievable breakdown of the marriage" and "efforts at reconciliation have failed or that future attempts at reconciliation would be impracticable and not in the best interests of the family." 750 ILCS 5/401(a). If the parties have lived "separate and apart" for a period of at least six months immediately preceding the entry of the judgment of dissolution of marriage, there is an irrebuttable presumption that the requirement of irreconcilable differences has been met. 750 ILCS 5/401(a-5). See §3.57 below for further discussion regarding the "separate and apart" presumption.

G. Counterpetition

1. [3.24] Defendant's Posture

As a defendant, the practitioner must decide whether to file a counterpetition. See 735 ILCS 5/2-614 (general civil counterclaims). The client may want to file a counterpetition simply for the psychological satisfaction of "setting the record straight" or for the purpose of seeking different or temporary monetary relief. Counterpetitions are generally filed to ensure that the plaintiff does not voluntarily dismiss the case after it has been filed, as he or she may do under 735 ILCS 5/2-1009. In the matrimonial context, both sides frequently want a court to dissolve the marriage and decide the allocation of parental responsibilities, property, and maintenance issues. In some cases, the defendant may want this relief even more than the plaintiff, particularly if the matter has been litigated for some time at considerable cost. Unless there is a counterpetition on file, the plaintiff may, until the hearing, dismiss the petition and cause of action voluntarily. *Id.; In re Marriage of Hanlon,* 83 Ill.App.3d 629, 404 N.E.2d 873, 875, 39 Ill.Dec. 282 (1980), *appeal after remand,* 116 Ill.App.3d 157 (1st Dist. 1983). Voluntary dismissal leaves the defendant back at square one in terms of timing unless a counterpetition is on file. *In re Marriage of Mostow,* 95 Ill.App.3d 915, 420 N.E.2d 731, 733, 51 Ill.Dec. 317 (1st Dist. 1981).

2. [3.25] Plaintiff's Posture

As a plaintiff, counsel must file a reply to any counterclaim or affirmative matters raised by the defendant in the response. If counsel does not do so, the law deems that counsel has admitted those facts. 735 ILCS 5/2-610(b). This is distinct from a reply, to which a response is not required; rather, any additional affirmative matters are deemed denied by the other party. S.Ct. Rule 136(b) (no additional responsive pleadings are necessary after reply unless court so orders and any new matter in a reply or subsequent pleading shall be taken as denied). If the defendant's counterpetition raises issues that cause counsel to rethink the pleading strategy, the pleadings can be amended accordingly by leave of court. 735 ILCS 5/2-616. See discussion at §3.28 below.

H. Degree of Detail

1. [3.26] Property

Counsel must make choices about the degree of detail with respect to allegations about marital and nonmarital property (750 ILCS 5/503 defines these terms). Initially, the client may not be familiar either with all the property at issue or with the appropriate characterization (marital or

nonmarital) of that property. Frequently, counsel needs to have discovery before a position can be formalized on these issues; therefore, counsel should be careful not to admit anything or overstate the position before all the facts are obtained. Consistent with ethical obligations under S.Ct. Rule 137 and 735 ILCS 5/1-109, counsel may want to use somewhat generic allegations, thereby leaving room for later clarification. Once counsel has alleged that a specific item of property is marital, and therefore subject to equitable distribution, it may be difficult, if not impossible, to change the characterization of that property to the client's nonmarital property. Similarly, once it is alleged that some item of property is the spouse's nonmarital property, it is difficult to draw that property back into the marital estate.

But see In re Marriage of Osborn, 206 Ill.App.3d 588, 564 N.E.2d 1325, 1328, 151 Ill.Dec. 663 (5th Dist. 1990), *appeal denied,* 137 Ill.2d 666 (1991), which states that while verified pleadings are part of the record even after an amendment and bind the pleader, 735 ILCS 5/2-605 refers only to admissions of fact and not of law. It would seem that the marital or nonmarital nature of property is a legal conclusion and theoretically may not need a response. If faced with a troublesome allegation, perhaps the best approach is to state that it is a legal conclusion not requiring a response. However, despite the fact that an allegation in a petition for dissolution of marriage may be a legal conclusion, pleadings in dissolution of marriage cases tend to be conclusory, and the respondent generally answers them.

Publicity about property and income is a factor. The Historical and Practice Notes to §403(a)(5) note and approve this sensitivity. Marshall J. Auerbach and Albert E. Jenner, Jr., Historical and Practice Notes, S.H.A. (1980), c. 40, ¶403(a)(5). If counsel believes that the parties will be able to work out the details of a dissolution in a marital settlement agreement, consideration might be given to providing less detail in the initial petitions. Counsel may wish to make only general allegations so that there is room to develop the facts as the case progresses. Alternatively, one reason for having detail is that the more detail there is, the clearer and more useful any admissions in the responsive pleadings will be. A detailed and truthful petition may be difficult for opposing counsel to respond to without making admissions that eliminate controversy and therefore also eliminate the possibility of negotiating on certain issues. As the initial pleader, the wise practitioner wants to create that type of situation, if possible.

2. [3.27] Effect on Admissions

Whether counsel represents the plaintiff or the defendant, guidance should be taken from 735 ILCS 5/2-610, which states in part:

> **(a) Every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates.**
>
> **(b) Every allegation, except allegations of damages, not explicitly denied is admitted, unless the party states in his or her pleading that he or she has no knowledge thereof sufficient to form a belief, and attaches an affidavit of the truth of the statement of want of knowledge, or unless the party has had no opportunity to deny.**
>
> **(c) Denials must not be evasive, but must fairly answer the substance of the allegation denied.**

This section clarifies the relationship between and among allegations, explicit admissions, explicit denials, and tacit admissions.

PRACTICE POINTER

✓ In structuring pleadings for the plaintiff or the defendant, remember that each allegation not denied is admitted.

As the attorney for the plaintiff, counsel wants to draft the allegations in the pleadings so that as many admissions as possible can be obtained, which both simplifies the trial burden and perhaps strengthens the settlement posture. As the attorney for the defendant, on the other hand, counsel should be certain to address all the facts in the petition so that facts are not admitted inadvertently by failing to deny them specifically. But see §3.104 below (discussion of nonadmission of legal conclusions and failures to respond to legal conclusions).

NOTE: *In re Marriage of Fahy,* 208 Ill.App.3d 677, 567 N.E.2d 552, 556, 153 Ill.Dec. 594 (1st Dist. 1991), held that a party cannot be defaulted and have judgment entered against it on the pleadings for failure to file a response to a motion or pleading when that party appears in court on the hearing date for a motion or petition.

I. [3.28] Amending Pleadings

As the strategy is planned, practitioners should keep in mind the power to amend the pleadings. 735 ILCS 5/2-616 specifies that amendments on "just and reasonable terms" may be allowed any time before final judgment. *Murphy v. Murphy,* 31 Ill.App.3d 321, 334 N.E.2d 779, 792 (1st Dist. 1975); *Rank v. Rank,* 107 Ill.App.2d 339, 246 N.E.2d 12, 14 (2d Dist. 1969). *See also In re Marriage of Peoples,* 96 Ill.App.3d 94, 420 N.E.2d 1072, 1074, 51 Ill.Dec. 514 (5th Dist. 1981) (discussing need to obtain leave of court to file amended pleading). The explicit purpose of this section is to enable parties to sustain their claims or defenses (735 ILCS 5/2-616(a)), which means it is possible to change, add, or delete parties, grounds, supporting facts, and so forth. It is even possible to amend the pleadings by oral motion at the time of prove-up to make them conform to the actual proof. 735 ILCS 5/2-616(c). *See Roth v. Roth,* 101 Ill.App.2d 286, 243 N.E.2d 718, 720 – 721 (1st Dist. 1968) (citing *McKinney v. Nathan,* 1 Ill.App.2d 536, 117 N.E.2d 886, 889 (1954)), *rev'd on other grounds,* 45 Ill.2d 19 (1970).

When an initial pleading is verified (typically by certification), as in a dissolution proceeding, it remains part of the record even when an amended pleading is filed, and admissions of fact bind the pleader even after the amended pleading is filed. *Knauerhaze v. Nelson,* 361 Ill.App.3d 538, 836 N.E.2d 640, 296 Ill.Dec. 889 (1st Dist. 2005); *American National Bank & Trust Company of Chicago v. Erickson,* 115 Ill.App.3d 1026, 452 N.E.2d 3, 6, 72 Ill.Dec. 71 (1st Dist. 1983); *Yarc v. American Hospital Supply Corp.,* 17 Ill.App.3d 667, 307 N.E.2d 749, 752 (2d Dist. 1974).

J. [3.29] Other Strategy Issues

There are several other factors that affect pleading strategy: (1) language, style, and linguistic conventions; (2) issues of form as opposed to substance; (3) careful reading and adaptation; and (4) factors affecting timing. These factors are discussed in §§3.30 – 3.38 below.

1. [3.30] Language and Style

Although matters of style are typically personal and idiosyncratic, it is better to use simple, straightforward, everyday English rather than stilted, copied, or thoughtlessly recited jargon. Pleadings must communicate their stories effectively, and unusual or jargon-laden language and excessive verbiage hinder rather than promote communication. Many attorneys, for example, typically begin their pleadings "Now comes Jack Jones . . ." The "now comes" is linguistic filler; it serves no purpose, and no one any longer attributes any meaning to it. Such boilerplate language excels at encouraging bouts of glazed eyes. Judges and opposing counsel are humans first and foremost, and simple language is best for delivering points effectively.

PRACTICE POINTER

✓ For effective and persuasive pleadings, (a) use the active voice, (b) use simple words, (c) use only words you know and understand, and (d) avoid unnecessary or useless filler words like "thereinabove," "herein," and "whereas."

2. [3.31] Form

Apart from the relatively few matters of form that are prescribed by statute, practitioners have a lot of leeway to let the substance dictate their presentation. Contrary to popular belief, the IMDMA does not prescribe particular language or formulations; it simply specifies the content of a valid petition. 750 ILCS 5/403. For example, the IMDMA does not specify in which order the various allegations regarding children, property, support, and so forth must be presented. Counsel can, therefore, use the minimalist form requirements to advantage to emphasize or de-emphasize certain aspects of the substantive case. Similarly, local conventions, rather than the IMDMA or the Code of Civil Procedure, dictate many formulations and even page arrangements, and counsel should be aware of and sensitive to which ones are a matter of convention that can be controlled advantageously, and which ones are a matter of local rule that do not allow deviation.

The Code of Civil Procedure specifies that each claim or cause of action is to be separately designated and numbered, meaning that counsel should use counts to segregate the claims. 735 ILCS 5/2-613(a), 5/2-603(b). But cf. S.Ct. Rule 135. Each count is a separate, discrete cause of action. Thus, if seeking either a legal separation or a dissolution of marriage in the same pleading, counsel should outline the basis for and request each type of relief in a separate count. If seeking temporary or injunctive relief, counsel should do so in a separate count. In the family law context, however, this rule about separate counts is not ironclad, in part because claims for equitable relief

need not be separated into separate counts but can be pleaded as a single cause of action. S.Ct. Rule 135. The rules also provide a mechanism to save repetition if there are multiple counts: counsel may incorporate by reference later in the same pleading or in later pleadings any previously pleaded facts. S.Ct. Rule 134. This is especially important if the local circuit court has pleading page limits.

In drafting pleadings, counsel can exercise control over the arrangement of individual paragraphs so that the information in the pleadings is conveyed in a logical and orderly fashion. Sometimes counsel may need to use a few longer paragraphs and sometimes many shorter ones. It is largely a function of personal style and preference. To make responses easier and more orderly and to facilitate the use of word-processing systems, the pleadings in this chapter use many short paragraphs, each one containing only one or two closely related facts.

3. [3.32] Careful Reading and Adaptation

Sometimes busy or inexperienced attorneys copy forms or pleadings from books or from other attorneys without carefully reading them and adapting them to their own client's situation. Although it may seem expedient, pleading this way can later lead to higher costs because the attorney has to spend time and energy undoing the effects of a thoughtless or inappropriate pleading, to say nothing of the consequences if sanctions are sought under S.Ct. Rule 137. In the same vein, attorneys should learn to be diligent and methodical when drafting their answers or replies to be certain that every allegation and fact contained in the earlier pleading is adequately covered and answered. Parties are bound by their allegations, and defendants are deemed to have admitted the facts they fail to deny. 735 ILCS 5/2-610. S.Ct. Rule 136(a) (denials of entire paragraphs are allowed if done in good faith), S.Ct. Rule 136(b) (affirmative matters in the reply and later pleadings are deemed denied without additional pleading unless court orders responsive pleading). See §3.27 above.

4. [3.33] Factors Affecting Timing

When should a petition under the IMDMA be filed? S.Ct. Rules 181 and 182 specify the timing of the filing of pleadings: all the provisions for filing documents relate to the date of the original filing. Unlike most other civil cases in which the original filing date is controlled by the pertinent statute of limitation (*e.g.,* 735 ILCS 5/13-101, *et seq.*), there appears to be no limitation on the time for the filing of a petition for dissolution of marriage or for legal separation. A few factors, however, may affect the filing time in this context — residence, advanced age or ill health, allocation of parental responsibilities, and property issues. See §§3.34 – 3.37 below.

a. [3.34] Residence

750 ILCS 5/401(a) specifies that one of the parties (not necessarily both) must be a resident of Illinois when the petition is filed or must have been stationed in Illinois while a member of the armed services. In addition, the residency or military presence of one party must have been maintained either for 90 days immediately preceding the filing of the action or for 90 days immediately preceding the making of the finding regarding residence. *Id.* The residence issue is a factor if the party who wants a divorce is considering moving either to or from Illinois. Unlike previous versions of the statute, the current version of the IMDMA provides that the residency requirement may be met in a variety of ways.

b. [3.35] Age/Health

If one of the parties is old or ill, bear in mind that if one of the parties dies before a final judgment of dissolution of marriage is entered, a dissolution proceeding abates, and the court loses jurisdiction. 750 ILCS 5/401(b) ("The death of a party subsequent to entry of a judgment for dissolution but before judgment on reserved issues shall not abate the proceedings."). *In re Marriage of Black,* 155 Ill.App.3d 52, 507 N.E.2d 943, 944, 107 Ill.Dec. 790 (3d Dist. 1987) (dissolution proceedings abated). See §3.22 above.

c. [3.36] Allocation of Parental Responsibilities

When the allocation of parental responsibilities is an issue and counsel wants to plead a case under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), 750 ILCS 36/101, *et seq.,* as well as the IMDMA (typically done when interstate custody is or could be an issue), the action needs to be filed within six months of the time the child left or was taken from the state to allow the court to take jurisdiction under 750 ILCS 36/201(a)(1) (other jurisdictional grounds for the UCCJEA, which have different time limits, require more elaborate and detailed proof). Section 206 of the UCCJEA requires that a court decline jurisdiction when a custody proceeding is pending in another state that is exercising jurisdiction in conformity with the UCCJEA. *See In re Marriage of Alexander,* 252 Ill.App.3d 70, 623 N.E.2d 921, 191 Ill.Dec. 331 (4th Dist. 1993) (discussing significant contacts with Illinois for court to accept child custody jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA)) (still applicable under UCCJEA). *See also In re Marriage of Richardson,* 255 Ill.App.3d 1099, 625 N.E.2d 1122, 193 Ill.Dec. 1 (3d Dist. 1993) (discussing determination of whether child "lived" in particular state for purposes of determining child's home state under UCCJA) (still applicable under UCCJEA).

d. [3.37] Property

Another factor that enters into the decision regarding the time of filing is the special spousal property right dissolution of marriage creates.

> **Each spouse has a species of common ownership in the marital property which vests at the time dissolution proceedings are commenced and continues only during the pendency of the action.** 750 ILCS 5/503(e).

PRACTICE POINTER

✓ If you want spousal property rights to vest, file sooner rather than later. If you want such rights to vest as late as possible (all other things being equal), file later and at least preserve the argument that the property at issue was not marital until the filing date and thus avoid or mitigate any arguments that your client dissipated or dealt inappropriately with marital assets.

But see In re Marriage of Smith, 128 Ill.App.3d 1017, 471 N.E.2d 1008, 1011 – 1012, 84 Ill.Dec. 242 (2d Dist. 1984) (prefiling dissipation). *See In re Marriage of O'Neill,* 138 Ill.2d 487, 563 N.E.2d 494, 150 Ill.Dec. 607 (1990).

e. [3.38] Timing of Petition for Invalidity

Unlike a petition for dissolution of marriage, there is a limitation on the time for filing a petition for declaring a marriage invalid. 750 ILCS 5/302 specifies the relevant limitations periods for the various grounds of invalidity. See also Chapter 4 of this handbook for a thorough treatment of invalidity issues. Other than this specific limitation, counsel has more freedom to consider the appropriate time for filing petitions and lawsuits under the IMDMA than under most other statutes. This freedom can be used effectively to plan the best time for filing.

IV. FILING ISSUES

A. [3.39] Rules

In addition to considerations of strategy, form, language, and timing, counsel also needs to be aware of the filing rules and conventions in the pertinent locale. The best and most carefully thought-out pleading is useless if not properly filed with the court. Counsel also needs to check with the local court clerk to see whether there are any particular local rules, forms, or conventions that must be followed in addition to the filing requirements specified in S.Ct. Rules 101 – 104 and 735 ILCS 5/2-201 through 5/2-213. To properly initiate the lawsuit, for example, the plaintiff must file not only the petition itself and the attached verification or certification (735 ILCS 5/1-109, 5/2-605) but also a summons so that notice of the lawsuit can be legally and formally given to the defendant. 750 ILCS 5/411; 735 ILCS 5/2-201; S.Ct. Rules 101 – 103. In Cook County, the plaintiff must also file the State of Illinois Certificate of Dissolution, Invalidity of Marriage or Legal Separation (Form VR 700 (rev. 2017)) at the time the petition is filed. This form is supplied by the court clerk's office. Other counties vary the timing for filing this document. 750 ILCS 5/707. See §§3.89 – 90 below. In addition, the plaintiff and respondent must both be prepared to pay a filing fee should they file an appearance and counterclaim, as applicable. As of July 1, 2017, all documents in civil cases must be electronically filed with the clerk of court using an electronic filing system. S.Ct. Rule 9(a).

PRACTICE POINTERS

- ✓ Unless specifically exempted from electronic filing pursuant to S.Ct. Rule 9(c), familiarize yourself with the Odyssey eFileIL system or have a paralegal to do so for you.
- ✓ Because not all clerks of court accept personal checks, you should confirm the local practice before you head off to Odyssey eFileIL for filing.

B. [3.40] Filing Checklist

When filing the petition, the following must be included:

1. the petition itself, including any documents incorporated by reference (such as legal descriptions of the marital residence, prenuptial agreements, parenting plans, etc.);

2. a verification or certification attesting to the truthfulness of the allegations in the petition;

3. a summons addressed to each named defendant;

4. any filing fees;

5. money to pay the sheriff's service fees (unless other arrangements have been made for service of the summons);

6. in Cook County, the completed certificate of dissolution for the Illinois Department of Public Health Office of Vital Records; and

7. in Cook County, a completed domestic relations cover sheet (see §3.91 below).

V. [3.41] ACTUAL DRAFTING

Having made all the strategic decisions discussed in §§3.10 — 3.38 above, counsel should be ready to draft the pleadings. Counsel can begin either with a praecipe for summons or with a petition for dissolution of marriage. (The substance of the petition for invalidity is discussed in detail in Chapter 4 of this handbook.) What should those various pleadings actually look like? What should they contain? Sections 3.42 – 3.132 below contain some sample drafts (or information about obtaining forms) plus commentary about preparation, contents, filing, and service on the other side.

A. [3.42] Dissolution Action Stay

In an effort to maintain the status quo of the parties until the entry of a judgment of dissolution of marriage, the Illinois legislature enacted the dissolution action stay statute, 750 ILCS 5/501.1. Under prior law, an aggrieved party had the burden of filing an action and establishing the elements of the cause of action. The dissolution action stay as originally enacted automatically applied to all dissolution of marriage proceedings filed after January 1, 1993, but was not retroactive.

The current statute reads as follows:

> **(a) Upon service of a summons and petition or praecipe filed under the Illinois Marriage and Dissolution of Marriage Act or upon the filing of the respondent's appearance in the proceeding, whichever first occurs, a dissolution action stay shall be in effect against both parties, without bond or further notice, until a final judgement is entered, the proceeding is dismissed, or until further order of the court:**

(1) restraining both parties from physically abusing, harassing, intimidating, striking, or interfering with the personal liberty of the other party or the minor children of either party; and

(2) restraining both parties from concealing a minor child of either party from the child's other parent.

The restraint provided in this subsection (a) does not operate to make unavailable any of the remedies provided in the Illinois Domestic Violence Act of 1986.

(b) (Blank).

(c) (Blank).

(d) (Blank).

(e) In a proceeding filed under this Act, the summons shall provide notice of the entry of the automatic dissolution action stay in a form as required by applicable rules. 750 ILCS 5/501.1.

In *Messenger v. Edgar,* 157 Ill.2d 162, 623 N.E.2d 310, 191 Ill.Dec. 65 (1993), the constitutionality of IMDMA §501.1(a)(1) was challenged on the basis of denial of due process because it constituted special legislation and because parties to a dissolution were prohibited from entering into and complying with contracts involving their property. The trial court held that the challenged portion of the section was unconstitutional. The Illinois Supreme Court affirmed the trial court and ruled that §501.1(a)(1) violated substantive due process. The court reasoned the section was excessively broad and affected property that could not be considered a marital asset and thus was not a rational means of accomplishing the legislative purpose. The restraints against abuse and removing a minor child from the State of Illinois or concealing a child remained valid, and the January 1, 2016, amendments reflected this. However, effective January 1, 2017, the dissolution action stay against removing any minor child of the parties from the state without the other party's consent was deleted from §501.1(a)(2). See §501(a)(2)(ii), which allows a party to move for a restraining order or preliminary injunction enjoining a party from removing a child from the court's jurisdiction for more than 14 days.

B. [3.43] Praecipe for Summons

Counsel can begin the action for dissolution of marriage or legal separation by filing a praecipe for summons, a petition, or both. 750 ILCS 5/411. The filing of a praecipe commences an action. *Abbott v. Abbott,* 52 Ill.App.3d 728, 367 N.E.2d 1073, 10 Ill.Dec. 464 (3d Dist. 1977).

After a praecipe is filed, a petition for dissolution of marriage or legal separation must be filed within six months. 750 ILCS 5/411(a). 750 ILCS 5/411(d) states that cases in which no petition is filed with the praecipe may be dismissed unless a petition for dissolution of marriage or legal separation is filed within six months after the commencement of the action, or if a good cause extension is granted by a court.

After filing a praecipe, the petitioner must serve the other party with a copy of it within two days. 750 ILCS 5/411(b). The summons must recite that suit was commenced when the praecipe was filed and state that the respondent has 30 days to respond to the petition after it is filed. *Id.*

The filing of a praecipe constitutes the commencement of an action that serves as grounds for involuntary dismissal under subsection (a)(3) of §2-619 of the Code of Civil Procedure of a subsequently filed petition for dissolution of marriage or legal separate in another county. 750 ILCS 5/411(e).

The praecipe is not commonly used. It is a court form that contains the caption of the case and asks that a summons be issued to the defendant (hence it cannot be used in cases in which service is or will be by publication). It contains no allegations, no grounds, and no requests for relief. Form CCDR 0003 (rev. Mar. 3, 2021) is the Cook County form for the Praecipe for Summons. It is available at www.cookcountyclerkofcourt.org. The completed praecipe is attached to the summons (S.Ct. Rule 104), and the completed documents are then filed with the clerk. After counsel has filed the documents, they can be served on the defendant(s).

The reasons for using a praecipe are relatively few:

1. It allows counsel to start the proceedings even if counsel does not yet have all of the relevant facts needed to prepare a verified petition.

2. It allows counsel to establish venue (assuming counsel filed in an appropriate county (see 750 ILCS 5/104, 5/402(b)) and — because it is quick to prepare — it may help win a race to the courthouse when venue is important.

3. Because it contains so little information, it allows counsel to keep many details out of the public record and to keep negotiations more fluid.

C. [3.44] Summons

In Cook County, there is a preprinted summons form, which must be used. The summons must contain the information shown, including the caption of the case, the time when and place where a responsive pleading is due, an indication of its legal effect, and the official seal of the clerk.

750 ILCS 5/501.1(e) requires the summons to provide notice of the entry of the automatic dissolution action stay in the form required by the applicable rules. It is important to use the most recent summons form, including the reverse side, on which §501.1 appears. Form CCDR 0001 (rev. Sept. 9, 2021) is the Cook County form for summons. It is available at www.cookcountyclerkofcourt.org.

1. [3.45] Preparation of the Summons

750 ILCS 5/410 specifies that process, practice, and proceedings under the IMDMA must be as provided in other civil cases. Thus, regardless of whether a praecipe or a petition is used, counsel needs to prepare a summons.

> **Every action, unless otherwise expressly provided by statute, shall be commenced by the filing of a complaint. The clerk shall issue summons upon request of the plaintiff.** 735 ILCS 5/2-201(a).

The summons is a simple form, generally supplied by the clerk's office. See S.Ct. Rule 101. See also §3.44 above. Counsel simply completes the blanks as indicated on the court-supplied form. If there may be difficulties serving the defendant, both the home and work address should be provided so the server, if need be, can try both places. A copy of the pleading (praecipe or verified petition), file-stamped by the clerk, needs to be attached to the summons form before serving it or having it served. See 735 ILCS 5/2-201 through 5/2-213; S.Ct. Rule 101 – 104. If additional defendants are named, a separate, stamped summons must be served on each one. S.Ct. Rule 103(c). To be effective, the return of the summons (the affidavit of the service showing when, where, and on whom it was served) must be filed after service has been completed. S.Ct. Rule 102(d); 735 ILCS 5/2-202(a).

PRACTICE POINTER

✓ If you represent the petitioner, it is your responsibility to confirm that the return of summons has been filed, which becomes essential when you want to do a prove-up based on default.

The defendant's filing an appearance submitting to the court's jurisdiction obviates the need to verify the server's return of service.

2. [3.46] Service of the Summons

Five types of service are possible: (a) voluntary acceptance, (b) counter service, (c) service by special process server, (d) sheriff's service, and (e) service by publication. See S.Ct. Rule 102; 735 ILCS 5/2-202 through 5/2-208; §§3.47 – 3.51 below. Service is important because it starts the time running for the defendant to file an appearance and/or response. S.Ct. Rule 181.

a. [3.47] Voluntary Acceptance

The defendant or the defendant's attorney may choose to file a voluntary appearance without service by either the sheriff or a special process server. In such cases, the petition is generally delivered or mailed to the defendant or the attorney, who must then file a voluntary appearance to give the court jurisdiction.

b. [3.48] Counter Service

The defendant may also choose to accept service at the sheriff's office (counter service) to avoid the expense and embarrassment of having the sheriff come to the home or workplace to provide formal service. This method of service obviously depends on the defendant's cooperation.

c. [3.49] Special Process Server

It is also possible to have a special process server serve the summons. 735 ILCS 5/2-202. In counties with fewer than two million persons, no special appointment is required. *Id.* In larger counties, such as Cook County, the court must appoint a special process server for the case. To obtain the court's permission to use such a special server, counsel must present a motion for appointment of a special process server (see §3.54 below) and obtain an order appointing such a person to serve the summons (see §3.55 below). Before these papers can be prepared, counsel needs to retain an entity or person that does this type of work and obtain the name or names of the persons likely to be sent to serve this particular summons. These names and the agency-employer's name and address are then inserted into the motion and draft order.

d. [3.50] Sheriff's Service

It is also possible to have the sheriff in the county where the defendant lives serve the summons and attached papers. The sheriff can assess both a basic charge and a mileage fee. 735 ILCS 5/2-202(d). If the summons is not served within 30 days of the day it was issued, it ceases to be effective. S.Ct. Rule 102(b). An alias or duplicate summons may be issued. S.Ct. Rule 103(a); 735 ILCS 5/2-201(b).

e. [3.51] Publication

A defendant can be served by publication. 735 ILCS 5/2-206; 750 ILCS 5/410. Section 410 of the IMDMA specifies that process, practice, and proceedings must be the same under the IMDMA as in other civil cases except that, in the IMDMA context, service by publication in a county with fewer than two million inhabitants must be in a local newspaper. See 735 ILCS 5/2-206 and 5/2-207 for publication service generally. See also Robert W. Cook, *Jurisdiction in Dissolution of Marriage Cases,* 77 Ill.B.J. 266 (1989), for a discussion of limitations on relief in cases in which service has been by publication.

If the petitioner has leave to file a dissolution action as a pauper suit, then costs of publication may be waived.

Form CCDR 0024 (rev. Dec. 1, 2020) is the Cook County form for the Order for Publication and Waiver of Publication Fee. It is available at www.cookcountyclerkofcourt.org.

f. [3.52] Long-Arm Service

735 ILCS 5/2-209 specifies the acts that create long-arm jurisdiction over someone who lives outside Illinois, and §2-209(a)(5) specifies that "[w]ith respect to actions of dissolution of marriage, declaration of invalidity of marriage and legal separation, the maintenance in this State of a matrimonial domicile at the time this cause of action arose or the commission in this State of any act giving rise to the cause of action" is sufficient to give the state jurisdiction. Service of process on such a person can be by personal service outside (or inside) the state or by publication. 735 ILCS 5/2-208. See Robert W. Cook, *Jurisdiction in Dissolution of Marriage Cases,* 77 Ill.B.J. 266 (1989).

3. Pleadings for Special Process Server

a. [3.53] Legal Basis

735 ILCS 5/2-202 provides for private persons to be allowed to serve process. The relevant portion of the statute states, "The court may, in its discretion *upon motion*, order service to be made by a private person over 18 years of age and not a party to the action. . . . If served . . . by a private person the return shall be by affidavit." [Emphasis added.] In *County of Lake v. X-Po Security Police Service, Inc.,* 27 Ill.App.3d 750, 327 N.E.2d 96, 99 (2d Dist. 1975), the court said that service of process by a private individual is invalid if that person has not been appointed by the court. It is not clear from the statute what degree of detail counsel must allege in the motion for a private process server. However, the more reasons given for needing faster service than that provided by the sheriff, the more compelling the motion is.

PRACTICE POINTER

✓ Note, however, that in Cook County, Form MSA 902, Motion for Appointment of Special Process Server (rev. June 2021) must be used, which alleges only that "[t]he appointment of a special process server will facilitate the administration of justice." The authors' experience suggests that such motions are routinely granted in Cook County.

b. [3.54] Sample Motion for Appointment of Special Process Server

[Caption**]**

MOTION FOR APPOINTMENT OF SPECIAL PROCESS SERVER

The petitioner, [name**], by [**his**] [**her**] attorneys, [**name**], pursuant to §2-202 of the Illinois Code of Civil Procedure, asks this court for an order appointing [**name of individual or name of agency and name and address of employer**] as special process server in this case. As the basis for [**his**] [**her**] motion, [**petitioner's name**] states:**

1. [He**] [**She**] has filed a Verified Petition for Dissolution of Marriage seeking injunctive relief [**and alleging, among other things, that she reasonably fears that her husband, the respondent, John Smith, will continue to damage or dissipate the parties' joint property**].**

[or**]**

1. [He**] [**She**] has filed a Verified Petition for Order of Protection alleging, among other things, that [**she reasonably fears that her husband, the respondent, John Smith, will continue to physically abuse her**].**

[or**]**

1. If [petitioner**]'s spouse is not promptly served, the dangers referred to in [**his**] [**her**] Petition for Dissolution of Marriage and Petition for Order of Protection may increase.**

[or**]**

1. [Petitioner**]'s spouse had previously agreed to accept counter service but has recently refused to accept service.**

[or**]**

1. [any other reason justifying expedited service**]**

[and**]**

2. [Process server**] is a private person over 18 years old and not a party to this lawsuit.**

[or**]**

2. [Process server's agency**] employs only persons over age 18 to serve process.**

[and**]**

3. Neither [process server's agency**] nor any of its employees is a party to this action.**

WHEREFORE, [petitioner's name**] asks this court to enter an order appointing _____ [**of _____**] as special process server in this case.**

_____
Petitioner/Attorney

[attorney information**]**

In addition, there is a form for Cook County, Form MSA 902, Motion for Appointment of Special Process Server (rev. June 2021). It is available at www.cookcountyclerkofcourt.org.

c. [3.55] Sample Order Appointing Special Process Server

Counsel must prepare the following order and give one copy, after the judge has entered it, to the process server.

[Caption]

ORDER APPOINTING SPECIAL PROCESS SERVER

IT IS HEREBY ORDERED that [name**], an individual over 18 years of age and not a party to this cause, is appointed to make service of process in this cause and to file an affidavit of proof of service with the Clerk of the Circuit Court immediately thereafter.**

DATE: **ENTER:**

_____

JUDGE

Prepared by:

[attorney information]

D. Petition for Dissolution of Marriage

1. [3.56] Statutory Basis

750 ILCS 5/403(a) specifies that the petition for dissolution of marriage must "minimally" contain the following items:

> **(1) the age, occupation and residence of each party and his length of residence in this State;**
>
> **(2) the date of the marriage and the place at which it was registered;**
>
> **(2.5) whether a petition for dissolution of marriage is pending in any other county or state;**
>
> **(3) that the jurisdictional requirements of subsection (a) of Section 401 have been met and that irreconcilable differences have caused the irretrievable breakdown of the marriage;**
>
> **(4) the names, ages and addresses of all living children of the marriage and whether a spouse is pregnant;**
>
> **(5) any arrangements as to support, allocation of parental responsibilities of the children, and maintenance of a spouse; and**
>
> **(6) the relief sought.**

Moreover, S.Ct. Rule 902 specifies in pertinent part:

> **(a) Complaint or Petition. The initial complaint or petition in a child custody or allocation of parental responsibilities proceeding shall state (1) whether the child involved is the subject of any other child custody or allocation of parental responsibilities proceeding pending before another division of the circuit court, or another court or administrative body of Illinois or of any other state, an Indian tribe, or a foreign country and (2) whether any order affecting the custody, allocation of parental responsibilities, visitation, or parenting time of the child has been entered by the circuit court or any of its divisions, or by another court or administrative body of Illinois or of any other state, an Indian tribe, or a foreign country. If any child custody or allocation of parental responsibilities proceeding is pending with respect to the child, or any order has been entered with respect to the custody, allocation of parental responsibilities, visitation, or parenting time of the child, the initial complaint or petition shall identify the tribunal involved and the parties to the action.**

The sample petition in §3.57 below contains the relevant allegations required by the statute.

S.Ct. Rule 138 limits the extent of personal identifying information that may be included in court filings. Rule 138 provides:

> **Rule 138. Personal Identity Information**
>
> **(a) Applicability.**
>
> **(1) In civil cases, personal identity information shall not be included in documents or exhibits filed with the court except as provided in paragraph (c).**
>
> **(2) This rule does not apply to cases filed confidentially and not available for public inspection.**
>
> **(b) Personal identity information, for purposes of this rule, is defined as follows:**
>
> **(1) Social Security and individual taxpayer-identification numbers;**
>
> **(2) driver's license numbers;**
>
> **(3) financial account numbers; and**
>
> **(4) debit and credit card numbers.**
>
> **A court may order other types of information redacted or filed confidentially, consistent with the purpose and procedures of this rule.**

(c) A redacted filing of personal identity information for the public record is permissible and shall only include:

(1) the last four digits of the Social Security or individual taxpayer-identification number;

(2) the last four digits of the driver's license number;

(3) the last four digits of the financial account number; and

(4) the last four digits of the debit and credit card number.

When the filing of personal identity information is required by law, ordered by the court, or otherwise necessary to effect disposition of a matter, the party shall file a "Notice of Confidential Information Within Court Filing" prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article II Forms Appendix. This document shall contain the personal identity information in issue, and shall be impounded by the clerk immediately upon filing. Thereafter, the document and any attachments thereto shall remain impounded and be maintained as confidential, except as provided in paragraph (d) or as the court may order.

After the initial impounded filing of the personal identity information, subsequent documents filed in the case shall include only redacted personal identity information with appropriate reference to the impounded document containing the personal identity information.

If any of the impounded personal identity information in the initial filing subsequently requires amendment or updating, the responsible party shall file the amended or additional information by filing a separate "Notice of Confidential Information Within Court Filing" form.

(d) The information provided with the "Notice of Confidential Information Within Court Filing" shall be available to the parties, to the court, and to the clerk in performance of any requirement provided by law, including the transfer of such information to appropriate justice partners, such as the sheriff, guardian *ad litem*, and the State Disbursement Unit (SDU), the Secretary of State or other governmental agencies, and legal aid agencies or bar association *pro bono* groups. In addition, the clerk, the parties, and the parties' attorneys may prepare and provide copies of documents without redaction to financial institutions and other entities or persons which require such documents.

(e) Neither the court nor the clerk is required to review documents or exhibits for compliance with this rule. If the clerk becomes aware of any noncompliance, the clerk may call it to the court's attention. The court, however, shall not require the clerk to review documents or exhibits for compliance with this rule.

(f)(1) If a document or exhibit is filed containing personal identity information, a party or any other person whose information has been filed may move that the court order redaction and confidential filing as provided in paragraph (b). The motion shall be impounded, and the clerk shall remove the document or exhibit containing the personal identity information from public access pending the court's ruling on the substance of the motion. A motion requesting redaction of a document in the court file shall have attached a copy of the redacted version of the document. If the court allows the motion, the clerk shall retain the unredacted copy under impoundment and the redacted copy shall become part of the court record.

(2) If the court finds the inclusion of personal identity information in violation of this rule was willful, the court may award the prevailing party reasonable expenses, including attorney fees and court costs.

(g) This rule does not require any clerk or judicial officer to redact personal identity information from the court record except as provided in this rule.

It is often the practice to include the birthdates of the parties or the parties' children, as well as the names of the minor children, in the petition for dissolution of marriage. While not required by Rule 138, for privacy purposes, counsel might choose to only state the age of the parties and/or the parties' children or include only the month and year of birth. Further, counsel might choose to state only the initials of the parties' minor children.

2. Examples of Petitions

a. [3.57] Sample Petition for Dissolution of Marriage

The following sample petition for dissolution of marriage is based on the parties' having lived separate and apart for six months, and on the fact that irreconcilable differences have led to the irretrievable breakdown of their marriage. 750 ILCS 5/401(a-5). The sample petition below assumes that "Mary and John" have two minor children and a moderate amount of property and that both were employed during at least part of their marriage. For changes that would be made if the parties' situation is different from Mary's and John's and for variations based on different strategic approaches, see the discussion following the sample petition in §§3.61 – 3.103 below.

IN THE CIRCUIT COURT OF _____ COUNTY, ILLINOIS

IN RE THE MARRIAGE OF	**)**	
	)	
MARY SMITH,	**)**	
	)	
Petitioner	**)**	
	)	
and	**)**	**No. __ D____**
	)	**[**This number is stamped in by the
JOHN SMITH,	**)**	clerk when the petition is filed.**]**
	)	
Respondent.	**)**	

VERIFIED PETITION FOR DISSOLUTION OF MARRIAGE

Petitioner, Mary Smith (Mary), individually and by her attorneys, [attorneys' names**], pursuant to the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/401, *et seq.*, asks this court to dissolve her marriage to respondent, John Smith (John). In support of her petition, she alleges:**

1. This court has jurisdiction over the parties:

(a) Mary resides at [address**] in the County of [**county name**], Illinois, and she has resided in the State of Illinois since [**date**]; and**

(b) John resides at [address**] in the County of [**county name**], Illinois, and he has resided in the State of Illinois since [**date**].**

2. This court has jurisdiction over the subject matter of this dispute.

3. Upon information and belief, no petition for dissolution of marriage is pending in any other county or state.

4. Mary and John were married on [date**], at [**address**], and their marriage was registered in [**county name**] County, [**state**].**

5. Mary and John have lived separate and apart for six months, and irreconcilable differences have caused the irretrievable breakdown of Mary and John's marriage. Past attempts at reconciliation have failed, and future attempts at reconciliation would be impracticable and not in the best interests of the family.

6. Mary, who is [number**] years old, is employed as [**employment title**].**

7. John, who is [number**] years old, is employed as [**employment title**].**

8. Mary and John have two minor children born during their marriage. The children's names are [names**], and they are currently age [**number**] and age [**number**] (collectively, the "minor children"). Both minor children reside with Mary Smith, their mother, at [**address**] as they have for at least the past six months. Mary is not now pregnant.**

9. Mary is a fit and proper person to be allocated parental responsibilities for the minor children, and it is in the children's best interests that she be allocated sole decision-making responsibilities.

[or**]**

9. Both parties are fit and proper persons to be allocated parental responsibilities for the minor children. Mary believes that it is in the minor children's best interests that decision-making responsibilities be allocated to Mary and John jointly, assuming that they can agree on a joint parenting plan. If they are unable to agree on a joint parenting plan, then Mary should be allocated sole decision-making responsibilities.

[or**]**

9. Both parties are fit and proper persons to be allocated parental responsibilities for the children. Mary believes that it is in the minor children's best interests that decision-making responsibilities be allocated to Mary and John jointly.

10. There are no other parental responsibility proceedings pending before another division of the circuit court or another court of another state, and there are no other orders affecting parental decision-making or parenting time of the minor children entered by any other court.

11. During their marriage, Mary and John have acquired substantial marital property, including but not limited to the following:

(a) The marital residence, commonly known as [address**], which is held in joint title by Mary and John;**

(b) A [year and make**] automobile, which is held in joint title by Mary and John;**

(c) Various bank accounts, money market funds, and certificates of deposit, including but not limited to the following: [list items**];**

(d) Retirement benefits that Mary and John have with their respective employers or former employers, including but not limited to the following: [list items**];**

(e) Stocks and bonds, including but not limited to the following: [list items**];**

(f) Various life insurance policies, including but not limited to the following: [list items**]; and**

(g) Various items of clothing, furniture, and household furnishings.

12. Mary has several items of nonmarital property, including but not limited to the following: [list items**].**

13. Mary and John have various marital debts, including but not limited to the following: [list items**].**

14. Mary and John have made no arrangements for the support, parental responsibilities, or parenting time of their two children, nor have they arranged for spousal maintenance.

15. Mary and the two minor children lack sufficient financial resources to provide for their reasonable needs, including expenses related to the minor children's education, commensurate with the standard of living that the parties' children would have enjoyed if the marriage had not been dissolved.

16. John is gainfully employed and earning a substantial income. He is, therefore, well able to provide for child support and expenses related to the education of the parties' children.

17. Mary lacks both sufficient property, including her contemplated share of the marital property to be allocated to her, and sufficient income to provide for her reasonable needs commensurate with the standard of living established during the marriage.

18. John is gainfully employed and earning a substantial income. He is, therefore, well able to provide for maintenance to Mary in accordance with her needs and commensurate with the standard of living established during the marriage.

19. Mary has had to retain an attorney to represent her in this case and has incurred and will incur reasonable and necessary attorneys' fees and costs to pursue it.

20. Mary lacks sufficient financial resources to pay her own costs and attorneys' fees in this case.

21. John has sufficient resources and income to pay the costs and attorneys' fees that Mary necessarily incurs in this action.

22. John has sufficient resources and income to pay his own attorneys' fees and costs in this case.

WHEREFORE, Petitioner, Mary Smith, asks this court to:

A. Enter a judgment of dissolution of marriage in favor of both parties dissolving their marriage;

B. Award Mary temporary and permanent decision-making responsibilities for the parties' two children, [names**], and make such other provisions regarding parenting and parenting time as it determines is appropriate;**

[or**]**

B. Award temporary and permanent decision-making responsibilities for the minor children to the parties jointly, contingent on their ability to agree on a joint parenting plan; in the alternative, if they are unable to agree on a joint parenting plan, award Mary sole decision-making responsibilities for the children;

[or**]**

B. Award temporary and permanent decision-making responsibilities for the minor children to the parties jointly;

C. Order John to pay to Mary fair and reasonable support for the parties' minor children, including but not limited to temporary support;

D. Order John to pay for the post-high school educational expenses and support for the children of the parties;

E. Award Mary fair and reasonable temporary and permanent maintenance;

F. Award Mary as her own property all of her nonmarital property;

G. Award Mary and John each an equitable portion of their marital property;

H. Order that John be barred from past, present, or future maintenance from Mary;

I. Order John to pay Mary's attorneys' fees and costs to Mary's attorneys and that judgment be entered in favor of Mary's attorneys;

J. Order that John be barred from an award of attorneys' fees and costs;

K. Make such other orders as may be just in reference to the debts of the parties; and

L. Grant such other relief as it deems appropriate and equitable.

_____
Petitioner

_____
Attorney

[attorney identification**]**

b. [3.58] Joint Petition for Simplified Dissolution of Marriage

If the parties choose to file jointly and meet the requirements set forth in 750 ILCS 5/452, they may use the joint petition for simplified dissolution of marriage.

Form CCDR 0019 (rev. Dec. 1, 2020) is the Cook County form for the Joint Petition for Simplified Dissolution of Marriage. It is available at www.cookcountyclerkofcourt.org.

3. [3.59] Sample Certification and Verification

The petition for dissolution of marriage must be verified. 750 ILCS 5/403(a). 735 ILCS 5/1-109 provides that whenever a pleading or document must be verified (which involves a notary), it can instead be certified (sworn to under penalty of perjury). See also §3.6 above. The following sample thus provides both acceptable alternatives:

CERTIFICATION

Under penalties as provided by law pursuant to §1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this [name of pleading or document**] are true and correct, except as to matters therein stated to be upon information and belief and as to such matters the undersigned certifies as aforesaid that he or she verily believes the same to be true.**

_____
[Petitioner's name**]**

[attorney information**]**

[or**]**

VERIFICATION

Petitioner, [petitioner's name**], being first duly sworn, states under oath that [**he**] [**she**] has personal knowledge of the facts and statements alleged in the foregoing [**name of pleading or document**] and that they are true and correct, except for those stated to be upon information and belief, and those [**he**] [**she**] believes to be true and correct.**

_____
[Petitioner's name**]**

Subscribed and sworn to before me this ____ day of _____, 20__.

_____
Notary Public

My commission expires: _____, 20__

[attorney information**]**

4. [3.60] Discussion of Sample Petition and Alternative Allegations

The sample petition in §3.57 above presents the basic outline for a petition for dissolution of marriage. It can be tailored to meet any of the factual circumstances included in the statute. 750 ILCS 5/401, 5/403. The discussion in §§3.61 – 3.86 below outlines the ways in which counsel would modify the petition for various circumstances.

a. [3.61] Caption

The caption specifies the court and the division in which the proceeding is filed. It names the parties and aligns them as petitioner and respondent, and it includes the title of the pleading. Note that 750 ILCS 5/403(b) allows either or both parties to initiate a dissolution proceeding. If the latter is the case, the pleading should be entitled "joint petition for dissolution of marriage." While the statute theoretically provides for a joint petition, it is not common practice.

If additional defendants are named, the petition for dissolution is the only pleading (apart from the summons) on which all the names actually appear. Thereafter, the terms "first petitioner," "first respondent," and "et al." are used. S.Ct. Rule 131(c). The case number, which is added by the clerk when the petition or praecipe is filed originally, must be used on all successive pleadings. In Cook County, the attorney/firm number must also appear on the first page of each pleading filed with the clerk. Attorney numbers can be obtained through the clerk's office.

b. [3.62] Preamble

The preamble specifies who the petitioner is, who the attorney is, what statutory provision the pleading is based on, and what the petitioner is asking the court to do. Since both the attorney and

the client are responsible for and must sign the allegations in the pleading, counsel needs to include both the client's and the attorney's names. In Cook County, all motions and petitions must state with particularity the statute or authority they rely on for the relief sought. Cook County Circuit Court Local Rule 13.4(a)(i)(c).

PRACTICE POINTER

✓ Note that the authors have dropped the "Now comes" predicate to the preamble as a useless holdover from a more formalistic era. See §3.60 above.

c. [3.63] Individual Allegations

As modifications are made to conform a sample to the client's particular situation, counsel should keep in mind the minimum statutory requirements specified in 750 ILCS 5/403 (quoted in §3.56 above).

The sample petition does not follow the order of the statute in terms of required allegations because establishing the court's jurisdiction over the parties and the subject matter should be the first order of business in any pleading, including one for dissolution of marriage.

(1) [3.64] Allegation 1: personal jurisdiction

Paragraph 1 of the sample petition outlines the basis for personal jurisdiction. 750 ILCS 5/401(a). Note that only one of the parties must meet the residency requirement specified by that section and that the 90-day residency requirement relates either to the time of filing or to the time judgment is entered. *Davis v. Davis,* 638 F.Supp. 862, 865 (N.D.Ill. 1986). Specifically, that section provides:

> **The court shall enter a judgment of dissolution of marriage when at the time the action was commenced one of the spouses was a resident of this State or was stationed in this State while a member of the armed services, and the residence or military presence had been maintained for 90 days next preceding the commencement of the action or the making of the finding:**
>
> **Irreconcilable differences have caused the irretrievable breakdown of the marriage and the court determines that efforts at reconciliation have failed or that future attempts at reconciliation would be impracticable and not in the best interests of the family.** 750 ILCS 5/401(a).

When making these allegations of residency, counsel should remember that the allegations may have consequences beyond the divorce context. Some federal and state income tax issues or immigration issues, for example, turn on a person's residency. For a definition of "residence" under the IMDMA, *see In re Marriage of Passiales,* 144 Ill.App.3d 629, 494 N.E.2d 541, 546 – 547, 98 Ill.Dec. 419 (1st Dist. 1986); *In re Marriage of Weiss,* 87 Ill.App.3d 643, 409 N.E.2d 329, 333, 42 Ill.Dec. 714 (1980), *appeal after remand,* 129 Ill.App.3d 166 (1st Dist. 1984).

Various alternatives to the allegations of personal jurisdiction contained in the sample petition could be used. For example, if both parties live in Illinois but not at the same address, the following might be alleged:

1. This court has jurisdiction over the parties:

(a) Mary resides at [address**] in the County of [**name of county**], Illinois, and she has resided in the State of Illinois since approximately [**date**]; and**

(b) John resides at [address**] in the County of [**name of county**], Illinois, and he has resided in the State of Illinois since approximately [**date**].**

If the parties still live together, the allegation could read:

1. This court has jurisdiction over the parties: Mary and John reside at [address**] in the County of [**name of county**], Illinois, and have resided in Illinois since approximately [**date**].**

If only one of the parties lives in Illinois, the allegation could read:

1. This court has jurisdiction over the parties:

(a) Mary resides at [address**] in the County of [**name of county**], Illinois, and she has resided in Illinois since approximately [**date**]; and**

(b) John resides at [address**].**

(2) [3.65] Allegations 2 – 4: subject-matter jurisdiction — marriage and grounds

Allegation 2 of the sample petition states that the court has jurisdiction over the subject matter, and allegations 3 and 4 establish the essential facts that underlie allegation 2. Subject-matter jurisdiction includes both the fact of a marriage between the parties and the grounds on which the parties are seeking a dissolution. 750 ILCS 5/403(a)(2), 5/403(a)(3), 5/401(a).

Marriage. In alleging the existence of a marriage between the parties, the county where their marriage was registered must be included. 750 ILCS 5/403(a)(2).

Grounds. Effective January 1, 2016, the ten fault-based grounds for dissolution of marriage previously contained in §401 were abolished. Now, the no-fault grounds of irreconcilable differences are the only grounds available to seek a divorce in Illinois. Parties can obtain a divorce if the court finds that "[i]rreconcilable differences have caused the irretrievable breakdown of the marriage" and "efforts at reconciliation have failed or future attempts at reconciliation would be impracticable and not in the best interests of the family." 750 ILCS 5/401(a).

If the parties live separate and apart for a continuous period of not less than 6 months immediately preceding the entry of the judgment dissolving the marriage, there is an irrebuttable presumption that the requirement of irreconcilable differences has been met. 750 ILCS 5/401(a-5).

Previously, parties to a divorce action were required to live separate and apart for two years in order to obtain a dissolution of marriage on the grounds of irreconcilable differences, unless the parties agreed by written stipulation to waive the two-year requirement, in which case they were able to obtain a dissolution after living separate and apart for six months. The amended statute, effective January 1, 2016, removed the two-year requirement, and rests on the six-month period required for a presumption of irreconcilable differences. Living "separate and apart" is not defined in the statute, However, courts have generally agreed that the "separate and apart" requirement is satisfied when spouses have not cohabited for the requisite period of six months, even though they have continued to reside in the same household. *See, e.g., In re Marriage of Kenik,* 181 Ill.App.3d 266, 536 N.E.2d 982, 129 Ill.Dec. 932 (1st Dist. 1989); *In re Marriage of Tomlins,* 2013 IL App (3d) 120099, 983 N.E.2d 118, 367 Ill.Dec. 964 (3d.Dist. 2013).

(3) [3.66] Allegations 5 – 6: information about the parties

Paragraphs 5 and 6 of the sample petition in §3.57 above track 750 ILCS 5/403(a)(1) regarding the age and occupation of the parties. Although §403(a)(1) requires nothing further, these particular allegations can be expanded to include references to facts that support some of the later allegations or requests for relief. For example, the allegations can include the salary earned by either or both parties, a point that is particularly appropriate when the parties' earnings are disparate and counsel represents the poorer spouse. These allegations can also be expanded to begin laying the foundation for the maintenance allegation that counsel will make later in the petition (*e.g.,* when one of the parties is unemployed or is employed solely as a homemaker). Counsel could, for example, allege the gross income of the potential obligor, upon information and belief, to elicit an admission on that issue. Depending on whether counsel is representing the unemployed homemaker spouse or the employed spouse or significant wage earner, counsel can allege facts relevant to the need for maintenance. For example, if representing the unemployed spouse, counsel might detail the number of years the spouse has been a homemaker, the number of years employed (if any), the spouse's lack of current education, the number of children raised (even if emancipated), and so forth. Counsel may also want to allege the need for additional education and time to find appropriate employment or other facts bearing on the need for rehabilitative maintenance.

PRACTICE POINTER

✓ If you are representing the employed spouse and you are anticipating a request for maintenance that you intend to dispute, you can allege that the unemployed spouse is able-bodied, well-educated, and capable of gainful employment in order to lay the foundation for minimal rehabilitative maintenance.

Since these allegations must be either admitted or denied under oath in the responsive pleading (735 ILCS 5/2-610), they can help to ferret out the opposing counsel's position on some of these difficult issues and perhaps obtain valuable admissions.

When representing an employed spouse, counsel may still want to keep open the possibility of seeking maintenance for possible use both in negotiations and at trial if the case is not settled. If

the spouse has sufficient income to be self-supporting without maintenance, however, this can be a pleading problem because of the requirements of S.Ct. Rule 137. One way around that difficulty is to plead truthfully that maintenance may not be necessary if the pleader is awarded contemplated or sufficient marital property.

Various alternative pleadings about the parties could be used. For example, when counsel wants a simple pleading, age and occupation only may be alleged:

5. Mary, who is [number**] years old, is employed as [**type of employment**].**

6. John, who is [number**] years old, is employed as [**type of employment**].**

When the petitioner is and has been a homemaker, and the respondent has a high income or financial security, counsel might allege:

5. Mary, who is [number**] years old, has not been employed outside the home since before her marriage to John [**30 years ago**]; she contributed her efforts during that period to [**keeping the family home and raising the couple's two children**].**

6. John, who is [number**] years old, has [**a Master's degree in Business Administration from Illinois State University and a Ph.D. from Indiana University**]; he is employed as a [**senior executive at XYZ**], earning not only a substantial salary in excess of [**dollar amount for the current year**] but also [**bonuses and perquisites**].**

When the petitioner, who has been primarily a homemaker, recently has obtained a new job and the respondent has a great deal of financial security, counsel could allege:

5. Mary, who is [number**] years old, has been a homemaker for [**the last 15 years**] but has recently sought employment outside the home, working as [**type of employment**] earning a salary of [**dollar amount**]. This salary is insufficient to meet her reasonable needs.**

6. John, who is [number**] years old, has [**a Master's degree in Business Administration from Illinois State University and a Ph.D. from Indiana University]; he is employed as a [**senior executive at XYZ**], earning not only a substantial salary in excess of [**dollar amount for the current year**] but also [**bonuses and perquisites**].**

When the petitioner is the wage earner who wants to highlight the respondent's employability, counsel might allege:

5. Mary, who is [number**] years old, is trained as a [**type of employment**]; she is healthy, and although currently unemployed, she is capable of gainful employment.**

When the petitioner is a homemaker who needs rehabilitative maintenance for education, counsel could allege:

5. Mary, who is [number**] years old, has been a homemaker for the last [**number of years**] and needs additional education and nominal rehabilitative maintenance to enable her to find appropriate employment.**

When the petitioner has been a homemaker, counsel might allege:

5. Mary, who is [number**] years old, is and has been for the last [**number of years**] employed solely as a homemaker.**

When the petitioner has his or her own income but not enough unless he or she also gets property (a way of reserving maintenance yet remaining truthful about the parties' respective abilities to support themselves), counsel could allege:

5. Mary, who is [number**] years old, is currently employed. If the court awards sufficient marital property to her [**or awards her an equitable portion of marital property**], she is capable of maintaining herself [**if her employment is maintained**].**

Note that each of these allegations or variations of them can be used for either party and in any pleading that requires this type of information.

(4) [3.67] Allegation 7: information about the children

Names/legal addresses. The statute requires that the names, addresses, and ages of all living children of the marriage be specified in the initial pleading. 750 ILCS 5/403(a)(4). Although the statute does not confine this requirement to minor or unemancipated children, the general practice is to limit the listing of addresses to minor or unemancipated children. If custody is an issue, for a thorough treatment of custody issues, see FAMILY LAW: CHILD-RELATED ISSUES IN DISSOLUTION ACTIONS (IICLE®, 2022).

Confidentiality issues. If for some reason counsel does not wish to reveal a child's address (*e.g.,* when there is a history or allegation of abuse by the respondent), a motion may be filed under 750 ILCS 5/708 to keep the petitioner's and/or child's address confidential despite the contrary statutory requirement. Such a motion should be coupled with an affidavit outlining the facts showing that the physical, mental, or emotional health of a party or minor child would be seriously endangered if the address were revealed. *Id.* See §§3.93 – 3.95 below. The motion is usually heard on an ex parte basis and is usually based just on the affidavit, not on a hearing.

Relation to child support. Allegations regarding children anticipate the allegations needed for designating or requesting child support. If representing an unemployed homemaker, for example, counsel may wish to stress the client's involvement with and commitment to family. If there are children who have died, counsel might include them as well, even though not required to do so by the statute, to show the nonworking spouse's contribution to raising the family and to the marriage. The same rationale applies if there are emancipated children. The working spouse may also want to allege additional facts to show how much financial support he or she has already paid for the children. If any of the children are disabled, counsel may wish to include that information here as a predicate for either regular child support or post-majority support under 750 ILCS 5/513. Similarly, if post-majority children are in college, that information is helpful here as a predicate for a request for contributions for college expenses under §513.

Emancipation. Emancipation is another issue with respect to allegations about children. Children who are over the age of 18 are typically considered emancipated. See the Emancipation of Minors Act, 750 ILCS 30/1, *et seq.* See also 755 ILCS 5/11-1, which defines 18 as the legal age for adults. Courts may award sums of money out of the property and income of either or both parties for children who have attained majority and are not otherwise emancipated only when these children are mentally or physically disabled. 750 ILCS 5/513. Section 513 authorizes making provision for the education and maintenance of a child not only during periods of college education or professional or other training after graduation from high school but also during any period of high school attendance after attaining the age of 19. Although age 18 is typically considered emancipated, 750 ILCS 5/505 provides that child support must be paid for any child under the age of 18 and any child under the age of 19 who is still in high school.

Pregnancy. The statute also requires that counsel specify whether a spouse is pregnant. 750 ILCS 5/403(a)(4). Counsel should allege whether the client or the other spouse is pregnant upon information and belief. Although it may seem unnecessary, one should still plead pregnancy or lack thereof no matter the age of the particular spouse.

Adopted children. The statute does not require that counsel distinguish between the children who were born to the parties and children who were adopted by the parties, nor does any relief available under the IMDMA or other statutes turn on this distinction. Nevertheless, this distinction has been a common practice in pleading in Illinois despite the lack of foundation in the statute. In fact, 760 ILCS 30/1 specifies that for purposes of determining property rights, adopted children are treated the same as natural children. Counsel may want to think twice before alleging that children are adopted when in fact the statute does not require such an allegation since such children may see the parent's petition for dissolution in the public record and from it learn for the first time that they are adopted.

If there are no children, counsel might allege the following:

7. The parties have no children, and Mary is not now pregnant.

If the parties have only emancipated children, counsel could allege:

7. The parties have [number**] adult, emancipated children: [**list names and ages**].**

If the parties have several minor children, counsel might allege:

7. Mary and John have [number**] minor children born during their marriage. The children's names, ages, and dates of birth are [**list ages and dates of birth**]. [**Both children reside with Mary, their mother**], at [**address**], as they have for at least [**the past six months**]. Mary is not now pregnant.**

(5) [3.68] Allegation 8: allocation of parental responsibilities

The 2016 amendments to the IMDMA included a substantial rewriting and reorganization of Article VI. Previously, Article VI used the terms "custody" and "visitation." This nomenclature has

been removed from the statute and replaced with the terms "parental responsibilities" and "parenting time." Similarly, while the statute previously referred to "custody judgments" and "parenting agreements," 750 ILCS 5/600 replaces those terms with "allocation judgment" and "parenting plan," respectively. Counsel should refer to §600 for a comprehensive list of definitions applicable under the amended Article VI.

750 ILCS 5/600 sets forth the following definitions:

(d) "Parental responsibilities" means both parenting time and significant decision-making responsibilities with respect to a child.

(e) "Parenting time" means the time during which a parent is responsible for exercising caretaking functions and non-significant decision-making responsibilities with respect to a child."

750 ILCS 5/602.5 provides:

(b) . . . The court shall allocate to one or both of the parents the significant decision-making responsibility for each significant issue affecting the child. Those significant issues shall include, without limitation, the following:

(1) Education, including the choice of schools and tutors.

(2) Health, including all decisions relating to the medical, dental, and psychological needs of the child and to the treatments arising or resulting from those needs.

(3) Religion, subject to the following provisions:

(A) The court shall allocate decision-making responsibility for the child's religious upbringing in accordance with any express or implied agreement between the parents.

(B) The court shall consider evidence of the parents' past conduct as to the child's religious upbringing in allocating decision-making responsibilities consistent with demonstrated past conduct in the absence of an express or implied agreement between the parents.

(C) The court shall not allocate any aspect of the child's religious upbringing if it determines that the parents do not or did not have an express or implied agreement for such religious upbringing or that there is insufficient evidence to demonstrate a course of conduct regarding the child's religious upbringing that could serve as a basis for any such order.

(4) Extracurricular activities.

In this way, the revamped statute allows courts to allocate decision-making responsibilities for particular issues, for example, such that one parent could be allocated decision-making responsibilities for medical and educational issues, while the other is allocated decision-making responsibilities for religion and extracurricular issues. Alternatively, a court might order that the parents share joint decision-making responsibilities for all significant issues.

In alleging issues of parental responsibilities for both decision-making and parenting time, it is important to remember that the statutory standard is "the best interest of the child." 750 ILCS 5/602.5, 602.7. Parental responsibilities issues are dealt with in Part VI of the IMDMA and in the Uniform Child-Custody Jurisdiction and Enforcement Act, which is expressly cross-referenced by 750 ILCS 5/601.2. Parental responsibilities proceedings can be brought either in conjunction with the proceedings under the IMDMA or as an entirely separate proceeding. *Id.* See FAMILY LAW: CHILD-RELATED ISSUES IN DISSOLUTION ACTIONS (IICLE®, 2022) for a thorough treatment of custody issues.

The sample petition in §3.57 above contains an allegation seeking sole decision-making responsibilities for one of the parents. If the parties want joint decision-making responsibilities, counsel could allege:

8. Mary and John are both fit and proper persons to be allocated parental responsibilities for the minor children, and it is in the children's best interests that they be allocated joint decision-making responsibility.

If the plaintiff seeks sole decision-making responsibilities because the other parent is allegedly unfit, counsel might allege:

8. Although Mary is a fit and proper person to be allocated decision-making responsibilities for the minor children, John is not such a fit and proper person, and it is therefore in the children's best interests that Mary be allocated sole decision-making responsibilities. It is also in the children's best interests that John's rights to parenting time be restricted.

If the plaintiff seeks sole decision-making responsibilities but does not want to allege specifically that the other parent is unfit (which is not necessary to obtain sole decision-making) or that it is not in the children's best interests to let the other parent have either sole or joint decision-making, counsel could allege:

8. Mary is a fit and proper person to be allocated parental responsibilities for the minor children, and it is in the children's best interests that she be given sole decision-making responsibilities.

If the case does or can involve interstate custody issues, counsel should also include the allegations required by the UCCJEA:

(a) Subject to any other law providing for the confidentiality of procedures, addresses, and other identifying information, in a child-custody proceeding, each party, in its

first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(1) has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child-custody determination, if any;

(2) knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding; and

(3) knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

(b) If the information required by subsection (a) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(c) If the declaration as to any of the items described in subsection (a)(1) through (3) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(d) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

(e) (Blank).

(f) If a party states in the pleading or the affidavit that disclosure of an address would risk abuse or harm to the party or a family member, the address may be omitted from documents filed with the court. A party is not required to include in the pleading or affidavit a domestic violence safe house address or an address changed as a result of a protective order. 750 ILCS 36/209.

(6) [3.69] Allegation 9: marital property

The IMDMA does not require the recitation or enumeration of marital property. *Stewart v. Stewart,* 79 Ill.App.3d 1125, 398 N.E.2d 1199, 1201, 35 Ill.Dec. 249 (1st Dist. 1979). The

Historical and Practice Notes to 750 ILCS 5/403(a)(5) clarify that this is based on the parties' right to keep property and property arrangements private rather than spread them on the public record. Marshall J. Auerbach and Albert E. Jenner, Jr., Historical and Practice Notes, S.H.A. (1980), c. 40, ¶403(a)(5). Although the court may not enter a judgment of dissolution of marriage until it has considered and provided for (or reserved) the disposition of property, the statute does not require that the petition include allegations about these issues. Nevertheless, allegations about marital property are typically included, although the degree of detail varies greatly and depends on the information available at the time of drafting the pleading and on the degree of detail desired to be made a matter of record. Counsel must allege property-related facts and issues in order to include property issues in the prayer for relief and in order to give the court the power to decide such issues. See also §3.26 above regarding the notion that allegations of marital or nonmarital property may be legal conclusions that do not require responsive pleading.

(a) [3.70] Filing creates vested property rights

Filing a petition for dissolution of marriage or a praecipe for summons triggers a special event with respect to marital property: at filing time, each spouse's rights in the common ownership of the marital property vest.

> **(e) Each spouse has a species of common ownership in the marital property which vests at the time dissolution proceedings are commenced and continues only during the pendency of the action. Any such interest in marital property shall not encumber that property so as to restrict its transfer, assignment or conveyance by the title holder unless such title holder is specifically enjoined from making such transfer, assignment or conveyance.** 750 ILCS 5/503(e).

In drafting the pleadings, counsel should keep this common ownership concept in mind. In addition, if counsel wants the restrictions on transfer, assignment, or conveyance to which the statute refers before the entry of the final judgment of dissolution, counsel must specifically allege grounds and request temporary relief. 750 ILCS 5/501 outlines the requirements for such injunctive relief, which reaches not only property but also parental responsibilities, protection, and maintenance issues. Counsel must be precise and detailed about the property for which an injunction is sought, or the court does not grant that relief. Requests for temporary relief also require affidavits. 750 ILCS 5/501(a)(2).

(b) [3.71] Statutory definition of "marital property"

Counsel should also know how 750 ILCS 5/503(e) defines "marital property" so that, within appropriate limits of ethical advocacy, the client's entitlement to as large a share of the marital property as possible can be asserted.

PRACTICE POINTER

✓ When in doubt, you should try to allege that as much property as reasonably possible is your client's nonmarital property upon information and belief and as much of the spouse's property as reasonably possible is marital property, keeping in mind that once you have categorized property, it is difficult to change that categorization.

The IMDMA defines "marital property" to include all property acquired by either spouse subsequent to the marriage, except

(1) property acquired by gift, legacy or descent or property acquired in exchange for such property;

(2) property acquired in exchange for property acquired before the marriage;

(3) property acquired by a spouse after a judgment of legal separation;

(4) property excluded by valid agreement of the parties, including a premarital agreement or postnuptial agreement;

(5) any judgment or property obtained by judgment awarded to a spouse from the other spouse except, however, when a spouse is required to sue the other spouse in order to obtain insurance coverage or otherwise recover from a third party and the recovery is directly related to amounts advanced by the marital estate, the judgment shall be considered marital property;

(6) property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics;

(6.5) all property acquired by a spouse by the sole use of non-marital property as collateral for a loan that then is used to acquire property during the marriage; to the extent that the marital estate repays any portion of the loan, it shall be considered a contribution from the marital estate to the non-marital estate subject to reimbursement;

(7) the increase in value of non-marital property, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and

(8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse. 750 ILCS 5/503(a).

The enumerated exceptions are classified as "non-marital." *Id.* The statute also establishes presumptions about property classifications (§503(b)), specifies how to treat "commingled" property (§503(c)), and specifies the factors the court must use in ultimately allocating the property (§503(d)). Counsel should note and be guided by these factors while pleading the property issues in the case.

If counsel knows the details about the acquisition of the property, it may be desirable to specify them in the allegations. Unlike legal conclusions, factual allegations supporting a claim relating to the nonmarital or marital character of property are binding. Properly pleading these allegations and eliciting appropriate admissions may eliminate controversy on these issues at an early stage in the case. Unless counsel is seeking temporary injunctive relief, the degree of detail is really a matter of judgment and available information at that juncture. At early pleading stages, the client is frequently unsure and imprecise (and sometimes even incorrect) about the details regarding property. Counsel should not provide more detail than needed to satisfy the various strategic priorities.

(c) [3.72] Alternative marital property allegations

If the client has only nominal marital property and does not wish to itemize it in the pleadings, counsel could allege:

9. During their marriage, Mary and John have acquired nominal marital property, including but not limited to [furnishings and household goods for their two-bedroom condominium, personal effects, and two automobiles**].**

If the client has substantial marital property and wishes to be as precise as possible, counsel might allege:

9. During their marriage, Mary and John have acquired substantial marital property, including but not limited to the following:

(a) The marital residence, located at [address**], which is held in joint title by Mary and John. The marital residence is legally described on Exhibit A, which is attached to and incorporated in this petition. The marital residence is encumbered with a mortgage having a principal balance of approximately [**dollar amount**] as of the date of the filing of this petition;**

(b) A vacation home located at [address**] [**may add title, legal description, and/or mortgage, if you choose**];**

(c) [Number**] automobiles, a [**make and year for each automobile**], which are held in joint title by Mary and John. The [**specific auto**] is subject to a lien with a balance of approximately [**dollar amount**] as of the date of the filing of this petition;**

(d) Various bank and savings accounts, including but not limited to accounts at the following banks:

Institution and Account Number	**Approximate Principal Balance as of [**date**]**	**Name on Account**
	[add details**]**	

(e) Numerous stocks and bonds, including but not limited to the following:

Name/ Type	**Account Number**	**Approximate Value as of [**date**]**	**Title**
	[add details**]**		

(f) Retirement benefits, including IRAs and employer-sponsored retirement and incentive bonus plans:

Type of Account	**Balance as of [**date**]**	**Sponsor**	**Title (Participant)**
	[add details**]**		

(g) Various life insurance policies:

Issuer/Policy Number/Type	**Life Insured**	**Beneficiaries**	**Face/Cash Amount**
	[add details**]**		

Counsel should keep in mind, however, that the petition for dissolution of marriage is a matter of public record. Counsel should not disclose full account numbers and may choose not to disclose account balances to protect the client's privacy.

(7) [3.73] Allegation 10: nonmarital property

The IMDMA, although it creates a presumption that property acquired during the marriage is marital property, also specifies nine types of property that are nonmarital property. 750 ILCS 5/503(a)(1) – 503(a)(8). Since the statute further requires that "the court shall assign each spouse's non-marital property to that spouse" (750 ILCS 5/503(d)), it may be in the client's best interest to be as specific and as inclusive as possible about items of his or her nonmarital property. Conversely, it is in the client's best interests to concede as little nonmarital property to the other spouse as is reasonable under the circumstances. If the details are known about how the nonmarital property was acquired, counsel may want to specify those details in the allegations (*e.g.,* whether the property was acquired before or during the marriage and whether it was acquired by inheritance, by gift, by agreement, etc.). If the property was acquired by agreement, counsel should incorporate the agreement by reference and attach it to the pleadings. 735 ILCS 5/2-606.

If contending that there is no marital property because of a prenuptial agreement that provided that the partner would acquire no marital property, counsel should allege the existence of the agreement and, if it is in writing, attach it to the pleadings.

Approaches to allegations on nonmarital property vary. Counsel may simply allege that the client has various items of nonmarital property in order to keep the situation fluid as discovery develops. On the other hand, counsel may wish to specify property as nonmarital so that the other side must consider either admitting or denying that allegation.

If some nonmarital property was acquired before and some during the marriage, counsel might allege:

10. Before the marriage, Mary acquired certain items of nonmarital property, including but not limited to the following:

[add details**]**

[and/or**]**

During the marriage, Mary acquired certain items of nonmarital property, including but not limited to the following:

[add details**]**

If counsel does not know when the nonmarital property was acquired or does not wish to designate whether the property was acquired before or after the marriage, it could be alleged:

10. Mary has certain nonmarital property, including but not limited to the following:

[add details**]**

If the parties had a premarital agreement regarding property, counsel may want to allege:

10. The parties entered into a valid premarital agreement, dated [date**], respecting their property [**and support**] rights as well as other rights and obligations. The premarital agreement provides that all property acquired by each party shall be each respective party's nonmarital property.**

If the property was acquired by identifiable method, counsel could allege:

10. Mary owns a [vacation home**] in [**state**], acquired on [**date**] by [**inheritance from her maternal grandparents**].**

(8) [3.74] Allegation 11: marital debts

Since outstanding debts affect the size of the marital estate and the parties' financial circumstances, debts should be dealt with in the judgment of dissolution of marriage. They should therefore be included in the petition. As with allegations about property, counsel can be either specific or general, depending on the strategy.

A specific, detailed allegation of debts could be structured as follows:

11. During their marriage, Mary and John amassed various currently unpaid marital debts:

Creditor	**Account Number**	**Balance as of [**date**]**
_____	_____	_____
_____	_____	_____
_____	_____	_____

A general allegation of debts could state:

11. During their marriage, Mary and John have acquired various marital debts that remain outstanding.

An allegation regarding debts to be assigned to one party could state:

11. During the marriage of the parties, John incurred numerous debts unrelated to marital purposes. John incurred these debts without the knowledge or consent of Mary. These debts include but are not limited to:

[add details**]**

(9) [3.75] Allegation 12: prior arrangements

Allegation 14 of the sample petition in §3.57 above asserts that there were no prior arrangements with respect to any of the issues listed in the statute. 750 ILCS 5/403(a)(5). If there are any arrangements regarding support, parental responsibilities, and parenting time of the children or maintenance of the spouse, they should be alleged. The scope of the term "arrangements" is unclear. If the parties have informally arranged for support and parenting time or have been acting in some pattern regarding these areas, is that an arrangement? If the arrangement is beneficial to the client, counsel may allege it to alert or bind the other side to it and force an admission. Alleging it, however, may highlight the arrangement to opposing counsel and possibly jeopardize it, so consult with the client about the certainty and durability of any such prior arrangement. If the arrangement has been reduced to writing, counsel should refer to the writing in the allegation and attach it to the pleading. 735 ILCS 5/2-606. Some attorneys omit this allegation entirely when there are no prior arrangements. If there are no prior arrangements, the following may be used:

12. Mary and John have made no arrangements for the support, parental responsibilities, or parenting time of their [number**] children, nor have they arranged for maintenance.**

If there is a temporary written support/maintenance arrangement, counsel might allege:

12. John is currently paying Mary [dollar amount**] per month as temporary unallocated maintenance and support. This arrangement is set down in a letter John wrote to Mary on [**date**], a copy of which is attached and incorporated here by reference.**

If there is a temporary oral arrangement, counsel could allege:

12. In accordance with an oral agreement reached between Mary and John on or about [date**], Mary has temporary decision-making responsibilities of their [**number**] children and John has parenting-time rights and obligations [**every other weekend**].**

(10) [3.76] Allegations 13 – 14: child support

750 ILCS 5/505 specifies the requirements, factors, and statutory guidelines for child support. Section 505 of the IMDMA was significantly amended effective July 1, 2017. These amendments replaced the former percentage child support guidelines with the income-sharing model currently set forth in the statute. Unlike the prior guidelines, which focused only on the income of the non-custodial parent, the income-sharing system allocates the expenses of the child (or children) based on both parents' incomes, as well as the allocation of parenting time.

Section 505 provides:

> **The Illinois Department of Healthcare and Family Services shall adopt rules establishing child support guidelines which include worksheets to aid in the calculation of the child support obligations and a schedule of basic child support obligations that reflects the percentage of combined net income that parents living in the same household in this State ordinarily spend on their child.** 750 ILCS 5/505(a)(1).

See the support obligation worksheet available on the Illinois Department of Healthcare and Family Services (DHFS) website, https://hfs.illinois.gov.

Section 505 also provides the method for computation of child support under the income-sharing model:

> **(1.5) Computation of basic child support obligation. The court shall compute the basic child support obligation by taking the following steps:**
>
> **(A) determine each parent's monthly net income;**
>
> **(B) add the parents' monthly net incomes together to determine the combined monthly net income of the parents;**

(C) select the corresponding appropriate amount from the schedule of basic child support obligations based on the parties' combined monthly net income and number of children of the parties; and

(D) calculate each parent's percentage share of the basic child support obligation.

Although a monetary obligation is computed for each parent as child support, the receiving parent's share is not payable to the other parent and is presumed to be spent directly on the child. 750 ILCS 5/505(a)(1.5).

There is a rebuttable presumption that the amount of the child support obligation that would result from the application of the child support guidelines is the correct amount of child support. 750 ILCS 5/505(a)(3.3). Guideline needs not apply, however, if the court finds, in writing, that an application of the guidelines would be "inequitable, unjust, or inappropriate." 750 ILCS 5/505(a)(3.4). If the court deviates from the statutory guidelines, the court is required to find that a deviation from the guidelines is appropriate after considering the best interests of the child and other relevant factors including, but not limited to

(A) the financial resources and needs of the child;

(B) the financial resources and needs of the parents;

(C) the standard of living the child would have enjoyed had the marriage or civil union not been dissolved; and

(D) the physical and emotional condition of the child and his or her educational needs. 750 ILCS 5/505(a)(2).

NOTE: The standard for awarding child support is different from that for awarding maintenance. See 750 ILCS 5/504(a). Children are not limited to the standard of living established during the marriage; the court may consider the standard of living a child would have enjoyed had the marriage not been dissolved. 750 ILCS 5/505(a)(2)(c).

If the petitioner is seeking child support from the wage-earning respondent, counsel could allege:

13. Mary and the [number**] minor children lack sufficient financial resources to provide for the reasonable needs of the parties' children, commensurate with the standard of living that the parties' children would have enjoyed if the marriage were not dissolved.**

14. John is gainfully employed and earning [a substantial income**] [**a gross annual income in excess of specific dollar amount**]. He is therefore well able to provide for child support and to contribute to the children's expenses in accordance with the statutory guidelines delineated in 750 ILCS 5/505.**

If both parents are wage earners, counsel might allege:

13. Mary and John are both employed and have sufficient financial resources that both should contribute to the support of the parties' children in accordance with the statutory guidelines delineated in 750 ILCS 5/505.

If both parents work but the respondent earns substantially more, counsel could allege:

13. Mary and the [two**] minor children lack sufficient financial resources to provide for the reasonable needs of the parties' children commensurate with the standard of living that the parties' children would have enjoyed if the marriage were not dissolved.**

14. John is currently employed and earning a substantial income well in excess of that earned or earnable by Mary. He is therefore well able to pay child support and contribute to the children's expenses.

If the maintenance and child support are to be paid to the court, counsel might add:

14b. [Name of party from whom support is sought**] should be ordered to pay all child support payments and maintenance payments to the Clerk of the Circuit Court.**

NOTE: Payment through the clerk's office is addressed under 750 ILCS 5/709 – 5/712. See also FAMILY LAW: CHILD-RELATED ISSUES IN DISSOLUTION ACTIONS (IICLE®, 2022).

Finally, if representing the greater wage earner, counsel may want to simply omit any allegations regarding child support or ability to pay.

(11) [3.77] Allegations 15 – 16: maintenance

Maintenance is covered by 750 ILCS 5/504:

> **(a) Entitlement to maintenance. In a proceeding for dissolution of marriage, legal separation, declaration of invalidity of marriage, or dissolution of a civil union, a proceeding for maintenance following a legal separation or dissolution of the marriage or civil union by a court which lacked personal jurisdiction over the absent spouse, a proceeding for modification of a previous order for maintenance under Section 510 of this Act, or any proceeding authorized under Section 501 of this Act, the court may grant a maintenance award for either spouse in amounts and for periods of time as the court deems just, without regard to marital misconduct, and the maintenance may be paid from the income or property of the other spouse. The court shall first make a finding as to whether a maintenance award is appropriate, after consideration of all relevant factors, including:**
>
> > **(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance as well as all financial obligations imposed on the parties as a result of the dissolution of marriage;**

(2) the needs of each party;

(3) the realistic present and future earning capacity of each party;

(4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having foregone or delayed education, training, employment, or career opportunities due to the marriage;

(5) any impairment of the realistic present or future earning capacity of the party against whom maintenance is sought;

(6) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment;

(6.1) the effect of any parental responsibility arrangements and its effect on a party's ability to seek or maintain employment;

(7) the standard of living established during the marriage;

(8) the duration of the marriage;

(9) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(10) all sources of public and private income including, without limitation, disability and retirement income;

(11) the tax consequences to each party ;

(12) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;

(13) any valid agreement of the parties; and

(14) any other factor that the court expressly finds to be just and equitable.

The allegations regarding maintenance may highlight as many of these factors as counsel deems appropriate to the particular situation; however, it is not required that all of them be addressed.

Effective January 1, 2015, §504 was substantially amended to introduce statutory maintenance guidelines. Both the amount and duration of maintenance are determined by applying the guidelines in all cases where the combined gross income of the parties is less than $500,000 and no multiple family situation exists, unless the court finds that the application of the guidelines would be inappropriate:

(b-1) Amount and duration of maintenance. Unless the court finds that a maintenance award is appropriate, it shall bar maintenance as to the party seeking maintenance regardless of the length of the marriage at the time the action was commenced. Only if the court finds that a maintenance award is appropriate, the court shall order guideline maintenance in accordance with paragraph (1) or non-guideline maintenance in accordance with paragraph (2) of this subsection (b-1). If the application of guideline maintenance results in a combined maintenance and child support obligation that exceeds 50% of the payor's net income, the court may determine non-guideline maintenance in accordance with paragraph (2) of this subsection (b-1), non-guideline child support in accordance with paragraph (3.4) of subsection (a) of Section 505, or both.

(1) Maintenance award in accordance with guidelines. If the combined gross annual income of the parties is less than $500,000 and the payor has no obligation to pay child support or maintenance or both from a prior relationship, maintenance payable after the date the parties' marriage is dissolved shall be in accordance with subparagraphs (A) and (B) of this paragraph (1), unless the court makes a finding that the application of the guidelines would be inappropriate.

(A) The amount of maintenance under this paragraph (1) shall be calculated by taking 33 1/3% of the payor's net annual income minus 25% of the payee's net annual income. The amount calculated as maintenance, however, when added to the net income of the payee, shall not result in the payee receiving an amount that is in excess of 40% of the combined net income of the parties.

(A-1) Modification of maintenance orders entered before January 1, 2019 that are and continue to be eligible for inclusion in the gross income of the payee for federal income tax purposes and deductible by the payor shall be calculated by taking 30% of the payor's gross annual income minus 20% of the payee's gross annual income, unless both parties expressly provide otherwise in the modification order. The amount calculated as maintenance, however, when added to the gross income of the payee, may not result in the payee receiving an amount that is in excess of 40% of the combined gross income of the parties.

(B) The duration of an award under this paragraph (1) shall be calculated by multiplying the length of the marriage at the time the action was commenced by whichever of the following factors applies: less than 5 years (.20); 5 years or more but less than 6 years (.24); 6 years or more but less than 7 years (.28); 7 years or more but less than 8 years (.32); 8 years or more but less than 9 years (.36); 9 years or more but less than 10 years (.40); 10 years or more but less than 11 years (.44); 11 years or more but less than 12 years (.48); 12 years or more but less than 13 years (.52); 13 years or more but less than 14 years (.56); 14 years or more but less than 15 years (.60); 15 years or more but less than 16 years (.64); 16 years or more but less than 17 years (.68); 17 years or

> **more but less than 18 years (.72); 18 years or more but less than 19 years (.76); 19 years or more but less than 20 years (.80). For a marriage of 20 or more years, the court, in its discretion, shall order maintenance for a period equal to the length of the marriage or for an indefinite term.**
>
> **(1.5) In the discretion of the court, any term of temporary maintenance paid by court order under Section 501 may be a corresponding credit to the duration of maintenance set forth in subparagraph (b-1)(1)(B).**
>
> **(2) Maintenance award not in accordance with guidelines. Any non-guidelines award of maintenance shall be made after the court's consideration of all relevant factors set forth in subsection (a) of this Section.**

§504 requires the court to make the following specific findings regarding maintenance:

> **(b-2) Findings. In each case involving the issue of maintenance, the court shall make specific findings of fact, as follows:**
>
> **(1) the court shall state its reasoning for awarding or not awarding maintenance and shall include references to each relevant factor set forth in subsection (a) of this Section;**
>
> **(2) if the court deviates from applicable guidelines under paragraph (1) of subsection (b-1), it shall state in its findings the amount of maintenance (if determinable) or duration that would have been required under the guidelines and the reasoning for any variance from the guidelines; and**
>
> **(3) the court shall state whether the maintenance is fixed-term, indefinite, reviewable, or reserved by the court.** 750 ILCS 5/504(b-2)

Effective January 1, 2019, §504 was again amended in order to address the change to the Internal Revenue Code making maintenance no longer deductible by the payor and includible in the taxable income of the payee. Accordingly, any maintenance payments pursuant to a divorce or separation agreement entered on January 1, 2019, or after are not deductible by the payor and are not includible in the taxable income of the payee. See, however,

> **[**f**]or any order for maintenance or unallocated maintenance and child support entered before January 1, 2019 that is modified after December 31, 2018, payments thereunder shall continue to retain the same tax treatment for federal income tax purposes unless both parties expressly agree otherwise and the agreement is included in the modification order.** 750 ILCS 5/504(b-4).

If the petitioner is the employed spouse filing against the unemployed spouse and wants to minimize the maintenance requirements, counsel could allege:

15. Mary has a college degree, is able-bodied, and is well capable of maintaining herself and obtaining employment to support herself.

[or**]**

15. Mary is employed and is well able to support herself.

If the petitioner is minimally employed and the spouses' incomes are quite disparate, counsel might allege:

15. Mary has been employed [for the last six months**] as a [**part-time salesclerk**] and lacks sufficient income or advancement opportunity to support herself in a style commensurate with the standard of living established during the marriage.**

16. John is employed as an executive earning a substantial income and is well able to contribute to Mary's support.

If the petitioner foresees that the property distribution, if equitable, will provide adequately for maintenance, counsel could allege:

15. Based on the contemplated equitable allocation of the marital property, Mary and John will each have enough income and financial resources to be self-supporting, and neither will need support from the other.

If the parties have been living separate and apart and have been financially independent of each other, counsel might allege:

15. Mary and John have lived separate and apart since approximately [date**]. Each being employed, they have been self-supporting and will continue to be so in the foreseeable future. Neither needs support from the other.**

If the parties have been living separate and apart and have been financially independent of each other and should remain so, counsel could allege:

15. Mary and John have lived separate and apart since approximately [date**]. Each being employed, they have been self-supporting and will continue to be so in the foreseeable future. Neither needs support from the other, and each should be barred from seeking support or maintenance from the other.**

(12) [3.78] Allegations 17 – 20: attorneys' fees

Attorneys' fees, for which sample allegations are provided in Paragraphs 20 through 22 of the sample petition in §3.57 above, are provided for in 750 ILCS 5/508. For a thorough discussion of §508, see Chapter 2 of this handbook.

The touchstone regarding attorneys' fees is the "financial resources of the parties," so the allegations must address that issue. While general allegations such as those appearing in §§3.79 – 3.85 below frequently appear in pleadings, many courts require much more specific allegations in a fee petition, such as the amount of time spent in and out of court, the nature of the service, and the billing rates of all individuals rendering services. *See Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 115 Ill.Dec. 899 (1st Dist. 1987); *Mars v. Priester,* 205 Ill.App.3d 1060, 563 N.E.2d 977, 150 Ill.Dec. 850 (1st Dist. 1990), *appeal denied,* 137 Ill.2d 665 (1991). Counsel should keep in mind when drafting the petition that "[t]he primary obligation for payment of attorney fees rests upon the party for whom the services are rendered." *In re Marriage of Adams,* 348 Ill.App.3d 340, 809 N.E.2d 246, 249, 284 Ill.Dec. 124 (3d Dist. 2004).

If both parties should pay their own fees, counsel could allege:

17. Mary and John are each employed, and each has sufficient salary and income and financial resources to pay his or her own attorneys' fees and costs.

If the petitioner's ability to pay his or her own fees depends on property distribution and the respondent can pay his or her own fees, counsel might allege, for example:

17. Mary is employed and earning a small salary. That salary, coupled with the contemplated equitable division of the marital property, should be sufficient to allow her to pay her own attorneys' fees and costs.

18. John is employed as [an executive**] earning in excess of [**dollar amount**] and will be able to pay his own attorneys' fees and costs.**

If the petitioner's ability to pay his or her own fees depends on the property distribution, counsel could allege:

17. Unless there is an equitable division and award of the marital property, including liquid assets, Mary will be unable to pay by herself the attorneys' fees and costs she necessarily had to incur in these proceedings.

(13) [3.79] Miscellaneous additional allegations

In addition to the allegations and alternative allegations stated in §§3.63 – 3.78 above, which deal with most of the basic elements of a simple petition for dissolution of marriage, counsel may also include allegations about such things as the appointment of an attorney for the children, dissipation of marital or nonmarital assets, partition of real estate, exclusive possession of the marital residence, return to a maiden name, visitation by non-parents, and any other facts or issues that are relevant to the dissolution. 750 ILCS 5/403(a) specifies only the minimum facts that must be alleged in order for the court to grant dissolution. If there are other issues that are pertinent to the client's particular situation, the statute clearly does not limit the right to allege these as well, and counsel certainly needs to do so if seeking relief with respect to these additional issues.

PRACTICE POINTER

✓ You may be as creative and inclusive as you feel you need to be to represent your client's interests adequately.

Counsel may seek temporary relief for maintenance, child support, parental responsibilities, enjoining the use of property, or myriad other things. Counsel may use the petition itself or separate pleadings. Sections 3.80 – 3.85 below give some sample alternative allegations that might be used regardless of whether counsel seeks relief in the petition or in separate pleadings.

(a) [3.80] Appointment of an attorney, representative, or guardian ad litem for the children

Mary and John have a dispute over parental responsibilities, and the children's interests may not be adequately protected unless they are represented separately by an attorney, and this court should appoint one for them.

[or**]**

Mary and John have a dispute over child support, and the children's interests may not be adequately protected unless they are represented separately by an attorney, and this court should appoint one for them.

750 ILCS 5/506 allows the court to appoint an attorney to serve as an attorney for the children, the children's guardian ad litem, or the children's representative. The attorney for the children provides independent legal counsel for the children; the GAL makes recommendations based on the children's best interests; and the children's representative advocates the best interests of the children, considering the wishes of the children without being bound by these wishes. *Id.* See also 735 ILCS 5/2-502. The costs for this appointment can be paid by either or both parents or from the children's estates, pursuant to order of court. Therefore, if the client feels strongly about the appropriate source for such fees, counsel should draft the allegation accordingly. Counsel must also keep in mind that this appointment is an expensive proposition, and it may not be in the best interests of the children to use their resources that way. Practitioners should use this section and the powers it gives cautiously when the circumstances of a particular case warrant it. The appointment of an attorney for the child, child representative, or GAL is not covered in detail in this chapter. Chapter 2 of FAMILY LAW: CHILD-RELATED ISSUES IN DISSOLUTION ACTIONS (IICLE®, 2022) is separately devoted to the issue.

(b) [3.81] Exclusive possession of the marital residence

If one of the parties has moved out but continues to come back, counsel might want to allege:

On or about [date**], John removed his property from the marital residence, but he continues to come back and enter the former marital residence without any just reasons or**

cause and without any warning to Mary, and he continues to physically and mentally abuse her [by yelling and screaming and by threatening her with physical abuse**]. The physical and mental well-being of Mary and the children are jeopardized by John's occupancy of the marital residence.**

If the defendant is abusive but is still living in the residence, counsel could allege:

John is being physically and mentally abusive to Mary [and the children**]. John's abusive physical and mental actions include the following: [**add details**]. The physical and mental well-being of Mary [**and the children**] is jeopardized by John's continued occupancy of the marital residence during the pendency of these proceedings.**

750 ILCS 5/501 allows the court to grant temporary injunctive relief to the parties. Note that pursuant to §501(d), the court's order on temporary relief does not prejudice the rights of the parties with respect to permanent relief. Note also that the order automatically terminates when a final judgment is entered or when the petition is dismissed. 750 ILCS 5/501(d)(3). If seeking such relief to continue beyond the entry of final judgment, counsel must be sure to include the necessary allegation and include the request as part of the request for relief in the petition. The remedy of exclusive possession is expressly provided in 750 ILCS 5/501(c-2):

> **Allocation of use of marital residence. Where there is on file a verified complaint or verified petition seeking temporary eviction from the marital residence, the court may, during the pendency of the proceeding, only in cases where the physical or mental well-being of either spouse or his or her children is jeopardized by occupancy of the marital residence by both spouses, and only upon due notice and full hearing, unless waived by the court on good cause shown, enter orders granting the exclusive possession of the marital residence to either spouse, by eviction from, or restoration of, the marital residence, until the final determination of the cause pursuant to the factors listed in Section 602.7 of this Act. No such order shall in any manner affect any estate in homestead property of either party. In entering orders under this subsection (c-2), the court shall balance hardships to the parties.**

This relief is also available pursuant to the Illinois Domestic Violence Act of 1986, which provides for an order of protection upon a showing of abuse. Pursuant to such an order, the court may grant exclusive possession of the marital residence, but in granting it, the court must balance the hardships of the parties in awarding exclusive possession. The tests for awarding exclusive possession under the IDVA and §501(c-2) of the IMDMA differ substantially, and counsel should review and consider each of them in seeking this relief.

(c) [3.82] Resuming a former name

If the wife wants to resume her maiden name, counsel might allege:

Mary's maiden name is Mary Alice Jones, and she wants to resume that name when the judgment of dissolution is entered.

If she wants to resume a former name that is not her maiden name, counsel could allege:

Mary's former name was Mary Brown, and she wants to resume that name when the judgment of dissolution is entered.

If the spouse whose surname is that of the children's seeks an order that, regardless of what the other spouse does with his or her surname, he or she wants the children's names to stay the same as they currently are, counsel might allege:

Mary's [maiden**] [**former**] name is Mary Jones, and she may seek leave of court to resume that name. It is in the children's best interests that their surname remains Smith. [**Mary should be enjoined from changing their surnames on any documents or in usage.**]**

750 ILCS 5/413(c) gives the court the power to restore the wife's maiden or former name at her request. Typically, what the wife does with her name does not matter to the other spouse, but equally typically parties can feel quite strongly about the children's surname. If such an allegation is used, counsel should be sure to include a comparable request for relief in the relief portion of the petition and in the judgment.

NOTE: Some of the allegations set forth in the third alternative allegation are legal conclusions and may not require a specific denial or admission. If seeking injunctive relief against Mary's actions regarding the name, counsel needs to comply with 735 ILCS 5/11-101, *et seq.*

(d) [3.83] Visitation by certain nonparents

Visitation rights for nonparents in Illinois (formerly referred to under the Act as "grandparent visitation rights") have changed since 2002. The Illinois Supreme Court held that 750 ILCS 5/607(b)(1) and 5/607(b)(3) were facially unconstitutional. *Wickham v. Byrne,* 199 Ill.2d 309, 769 N.E.2d 1, 263 Ill.Dec. 799 (2002). The court later held that *Wickham* concluded that §607(b) is facially unconstitutional in its entirety. *Schweigert v. Schweigert,* 201 Ill.2d 42, 772 N.E.2d 229, 265 Ill.Dec. 191 (2002). Furthermore, the U.S. Supreme Court concluded that nonparental visitation statutes may violate the Due Process Clause of the U.S. Constitution by infringing on the fundamental right of parents to make child-rearing decisions. *See Troxel v. Granville,* 530 U.S. 57, 147 L.Ed.2d 49, 120 S.Ct. 2054 (2000). Effective January 1, 2019, 750 ILCS 5/602.9 governs visitation rights for nonparents.

(e) [3.84] Dissipation

Although 750 ILCS 5/503(d)(2) lists dissipation as a factor that a court may examine in allocating marital property between parties, it is not clear whether it must be specifically alleged that the other spouse dissipated marital assets in order to preserve the issue. If it is believed that the other party may have dissipated marital property, the safer course is to include such an allegation in the petition for dissolution of marriage. For example:

Without Mary's knowledge or consent, John dissipated marital assets. The dissipation occurred after the marriage was irretrievably broken.

If the client does not possess sufficient information or belief about dissipation at the time of the filing of the petition for dissolution of marriage or if the other spouse dissipates assets during the pendency of the proceedings, counsel should be sure to check the box on the pretrial memorandum form or the client's right to raise the issue at trial may be waived. *See Zito v. Zito,* 196 Ill.App.3d 1031, 554 N.E.2d 541, 143 Ill.Dec. 606 (1st Dist. 1990) (failure to file pretrial memorandum including claim of dissipation and to raise issue of dissipation in trial court constitutes waiver); *In re Marriage of Meadow,* 256 Ill.App.3d 115, 628 N.E.2d 702, 195 Ill.Dec. 238 (1st Dist. 1993) (general and vague statements that allegedly dissipated funds were spent on marital expenses or to pay bills were found to be inadequate to avoid finding of dissipation). *See also In re Marriage of Davis,* 215 Ill.App.3d 763, 576 N.E.2d 44, 159 Ill.Dec. 375 (1st Dist.), *appeal denied,* 141 Ill.2d 538 (1991); *In re Marriage of Hagshenas,* 234 Ill.App.3d 178, 600 N.E.2d 437, 175 Ill.Dec. 506 (2d Dist. 1992) (argument that spouse dissipated amount invested in corporation and loaned to another corporation waived for failure to cite authority in support of argument), *appeal denied,* 148 Ill.2d 642 (1993).

Not only may an allegation of dissipation be included in the petition for dissolution of marriage or may the appropriate box be checked on the pretrial memorandum form, but a party may also file a separate notice for a dissipation claim.

NOTE: Effective January 1, 2016, the IMDMA was amended regarding notices of dissipation. Specifically, §503(2) now provides, among the factors the court shall consider in dividing the marital property, that

> **(2) the dissipation by each party of the marital property, provided that a party's claim of dissipation is subject to the following conditions:**
>
> > **(i) a notice of intent to claim dissipation shall be given no later than 60 days before trial or 30 days after discovery closes, whichever is later;**
> >
> > **(ii) the notice of intent to claim dissipation shall contain, at a minimum, a date or period of time during which the marriage began undergoing an irretrievable breakdown, an identification of the property dissipated, and a date or period of time during which the dissipation occurred;**
> >
> > **(iii) a certificate or service of the notice of intent to claim dissipation shall be filed with the clerk of the court and be served pursuant to applicable rules;**
> >
> > **(iv) no dissipation shall be deemed to have occurred prior to 3 years after the party claiming dissipation knew or should have known of the dissipation, but in no event prior to 5 years before the filing of the petition for dissolution of marriage.** 750 ILCS 5/503(d)(2).

(f) [3.85] Sample notice for affirmative claim of dissipation

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — DOMESTIC RELATIONS DIVISION

IN RE: THE MARRIAGE OF	)	
	)	
MARY SMITH,	)	
	)	
Petitioner	)	
	)	**NO. ____ D ____**
and	)	
	)	
JOHN SMITH,	)	
	)	
Respondent.	)	
	)	

NOTICE FOR AFFIRMATIVE CLAIM OF DISSIPATION

The respondent, John Smith, by and through his attorneys, [attorneys' names**], pursuant to the applicable provisions of the Illinois Code of Civil Procedure and Supreme Court Rules, in support of his notice for affirmative claim of dissipation states as follows:**

1. The petitioner, Mary Smith, filed a petition for dissolution of marriage, which remains pending and undetermined.

2. The marriage began undergoing an irretrievable breakdown in [list date or period of time during which marriage began undergoing breakdown**].**

3. Attached hereto is a preliminary report issued by one of John's experts, [name of expert**], indicating a dissipation figure by Mary of at least [**$ ____ **], although [**name of expert**] indicates that the figure could increase upon receipt of additional documents.**

4. It is apparent that Mary has incurred numerous credit card debts, written checks, and expended cash over a period of time after the marriage was irretrievably broken down.

5. These debts were incurred by Mary for nonmarital purposes, including but not limited to [expenditures for her boyfriend and her boyfriend's children**].**

6 These debts were incurred over the following period of time: [list date or period of time during which dissipation occurred**].**

7. John's allegations that Mary is guilty of dissipation as a result of incurring these obligations raises the dissipation issue before this court affirmatively.

WHEREFORE, the Respondent, John Smith, respectfully requests that:

A. This court enter an order charging the Petitioner with dissipation in the amount of [$ ___]; and

B. This court enter an order granting such other relief as it deems just and equitable.

Respectfully Submitted,

_____
JOHN SMITH

By: _____
[attorney]

[attorney identification**]**

VERIFICATION

Under penalties as provided by law pursuant to §1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this notice for affirmative claim of dissipation are true and correct, except as to matters therein stated to be upon information and belief, and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

_____
JOHN SMITH

d. [3.86] Prayer or Request for Relief

The prayer or request for relief, which is required by 750 ILCS 5/403(a)(6), should specify, point by point, all the things counsel wants the court to order, including (1) the dissolution itself; (2) arrangements with respect to property, parental responsibilities, and support; (3) child educational expenses; (4) maintenance; and (5) any other relief. Note that 735 ILCS 5/2-617 states that seeking the wrong remedy is not fatal. See also 735 ILCS 5/2-616 regarding the amendment of pleadings. Counsel should be sure to include not only all the affirmative relief being sought but also all the injunctive relief requested in the petition (*e.g.,* barring the other spouse from maintenance, requiring execution of documents, name changes, withholding orders, etc.).

Possible alternative requests for relief include:

WHEREFORE, Petitioner, _____, asks this court to:

A. Enter a judgment of dissolution of marriage in favor of Mary and John dissolving their marriage;

B. Award Mary the temporary and permanent decision-making responsibilities for their children;

[or**]**

B. Award Mary and John temporary and permanent joint decision-making responsibilities for their children;

[or**]**

B. Award John sole temporary and permanent decision-making responsibilities for their children but grant Mary liberal and reasonable parenting time;

[or**]**

B. Award John and Mary temporary and permanent joint decision-making responsibilities for their children and order them to review their written joint parenting plan on an annual basis and file it with the court;

C. Award [Mary**] [**John**] fair and reasonable temporary and permanent maintenance;**

[or**]**

C. Bar [Mary**] [**John**] [**each party**] from past, present, or future maintenance;**

D. Award [Mary**] [**John**] fair and reasonable temporary and permanent child support for the parties' minor children;**

[or**]**

D. Order each party to pay child support on an equitable basis considering all relevant factors;

E. Award a portion of the income and property of both parties for the educational expenses of the parties' children after the children have attained majority;

F. Award [Mary**] [**John**] as [**her**] [**his**] own property all of [**her**] [**his**] non-marital property;**

G. Award to each party an equitable portion of the marital property of the parties;

H. Require John to pay Mary's attorneys' fees and costs to her attorney and enter judgment in favor of her attorney;

[or**]**

H. Bar [Mary**] [**John**] [**each party**] from seeking attorneys' fees against the other party;**

I. Make any other order as may be just in reference to the debts of the parties; and

J. Grant any other relief as the Court deems appropriate and equitable.

e. [3.87] Attorney Identification

S.Ct. Rule 131(d) requires:

> **All documents filed or served in any cause by an attorney upon another party shall bear the attorney's name, business address, e-mail address, and telephone number. The attorney must designate a primary e-mail address and may designate no more than two secondary e-mail addresses.**

This information is typically provided, as shown in the sample petition in §3.57 above, at the end of the pleading. S.Ct. Rule 137 further requires that the individual attorney also actually sign the pleading. In addition, Cook County and some other counties also require that the attorney number be added. Finally, although not statutorily required, it is also appropriate to add the date somewhere on each document since when documents are undated, as is frequently the case, it becomes difficult to put them into chronological order and to know whether they were filed. It is, therefore, a better practice to date every document and include the date in the identifying information on the last page where it is easy to find.

PRACTICE POINTER

✓ Given the uncertain nature of court rulings, always include "Grant any other relief as the Court deems appropriate and equitable" as a critical catchall that will cover any extra relief granted to you by the court.

f. [3.88] Signature and Verification

Both the client and the attorney should sign the last page of the pleading. In addition, the client should sign a separate verification or certification. Section 3.59 above provides the necessary verification or certification required by 750 ILCS 5/403(a), which specifies that the petition for dissolution or legal separation must be verified. 735 ILCS 5/1-109 allows a certification to take the place of the verification. See §3.6 above. The major difference between the certification and the verification is that the latter requires a notary seal. Otherwise, both types of sworn statements assert that the allegations are true. The statute actually specifies the precise language to use in the certification, and the sample in this chapter tracks it. 735 ILCS 5/1-109. In addition, S.Ct. Rule 137 requires that the pleadings as well as all other papers filed with the court must be signed by the attorney to certify

1. that the attorney has read the paper;

2. that it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

3. that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

5. [3.89] Documents To File with the Petition

At the time the petition for dissolution is filed, counsel also must file the verification (sample in §3.59 above; discussed in §3.88 above), the summons (discussed at §§3.44 – 3.55 above), the filing fee, the Domestic Relations Cover Sheet (in Cook County; see §3.91 below), and the certificate of dissolution (see §3.90 below).

a. [3.90] Certificate of Dissolution

750 ILCS 5/707 requires:

> **A certificate of each dissolution of marriage or declaration of invalidity of marriage ordered in this State shall be filed with the Illinois Department of Public Health on a form furnished by such Department. . . . This form shall be prepared by the person filing the petition for dissolution of marriage or declaration of invalidity of marriage and shall be presented to the judge of the court for his inspection prior to entry of the final order.**

Form VR 700 is the Cook County form for the Certificate of Dissolution, Invalidity of Marriage or Legal Separation. It is available at www.cookcountyclerkofcourt.org. It requires statistical information beyond that required by the petition for dissolution. Note that the parties' social security numbers no longer are needed on the form. In Cook County, the certificate of dissolution must be filed at the time the petition for dissolution is filed. In other Illinois counties, this practice varies. Technically, the statute requires that it be presented at the time of the entry of the final order.

Counsel should be cautious to comply with Illinois S.Ct. Rule 138 and exclude personal identity information, as discussed in §3.56 above.

b. [3.91] Domestic Relations Cover Sheet

In Cook County, a Domestic Relations Cover Sheet, Form CCDR 0601 (rev. Dec. 1, 2020), must accompany the initial pleading in all actions. The information provided on the cover sheet is for administrative purposes and is not to be introduced into evidence. It is available at www.cookcountyclerkofcourt.org.

c. [3.92] Application, Affidavit, and Order for Waiver of Court Fees

Pursuant to S.Ct. Rule 298 and 735 ILCS 5/5-105, either party may request a waiver of fees, costs, and charges on the basis that he or she is an indigent person. If the court grants this order, the applicant may be ordered to pay all or a portion of the waived fees or costs from a settlement or judgment resulting from the action.

Form WAP 603, Application for Waiver of Court Fees (rev. Sept. 1, 2019), is the Cook County form to apply for a waiver. It is available at www.cookcountyclerkofcourt.org.

d. [3.93] Sample Motion Seeking Waiver of Requirement To Disclose Address

[Caption**]**

MOTION SEEKING WAIVER OF REQUIREMENT TO DISCLOSE ADDRESS

The petitioner, Mary Smith (Mary), by her attorneys, [attorneys' names**], pursuant to §708 of the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/708, asks this court to enter an order waiving any requirement under that Act or otherwise to identify her street address [**or the street address of the two minor children whose names are given in her petition for dissolution of marriage**]. In support of her motion, Mary states as follows:**

1. Section 708 of the Illinois Marriage and Dissolution of Marriage Act gives the court the power to waive any requirement to identify a street address for any purpose if the court finds that the physical, mental, or emotional health of a party or of a minor child, or both, would be seriously endangered by a disclosure of the parties' address.

2. Mary [has filed**] [**is about to file**] a proceeding under the Illinois Marriage and Dissolution of Marriage Act, which proceeding [**is pending**] [**will be pending**] before this court. The pleading to begin that proceeding would otherwise require the inclusion of [**that address**] [**those addresses**].**

3. As specified in the affidavit of Mary, attached and incorporated herein by reference, the physical, mental, or emotional health of Mary [and her minor children**] would be seriously endangered by disclosure of [**her street address**] [**their street addresses**].**

_____
Petitioner

_____
Attorney

[attorney information**]**

e. [3.94] Sample Affidavit with Respect to Disclosure of Address

[Caption]

AFFIDAVIT WITH RESPECT TO DISCLOSURE OF ADDRESS

The undersigned on oath states as follows:

1. She is the petitioner in the above-captioned proceeding under the Illinois Marriage and Dissolution of Marriage Act, which she [has filed**] [**is about to file**] with the court.**

2. She asks that this court waive any requirement under the Illinois Marriage and Dissolution of Marriage Act or otherwise that she disclose her street address [or the street address of her minor children**].**

3. The disclosure of that street address [or those street addresses**] would seriously endanger her physical, mental, or emotional health [**as well as that of her minor children**] because**

[state reasons]

The undersigned has read the above affidavit and swears that it is true in substance and in fact.

_____
Petitioner

Date: _____

[notarization]

[attorney information]

f. [3.95] Sample Order Waiving Disclosure of Address

[Caption]

ORDER WAIVING DISCLOSURE OF STREET ADDRESS

This cause came to be heard on the motion of the petitioner, Mary Smith, for an order waiving any requirement pursuant to the Illinois Marriage and Dissolution of Marriage Act or otherwise to identify her street address [or the street address of her minor children**].**

The court, having been advised of the premises and having considered all the evidence presented to it, finds that the physical, mental, or emotional health of Mary Smith [and/or her minor children**] would be seriously endangered by disclosure of [**her street address**] [**their street addresses**].**

IT IS THEREFORE ORDERED THAT:

The motion seeking waiver of any requirement to disclose street addresses is hereby granted, and the petitioner shall not be required to disclose her street address [or the street address of her children**] under the Illinois Marriage and Dissolution of Marriage Act or otherwise.**

ENTER:

_____

Judge

Date: _____

Prepared by:

[attorney information**]**

E. [3.96] Documents/Pleadings Responsive to Petition

The initial petition in many ways sets the tone and provides the structure for related pleadings, whether they are filed concurrently with the petition (*e.g.,* a motion for temporary or injunctive relief, a motion for a protective order, or a motion regarding waiver of a certain pleading requirement such as disclosing addresses) or filed in response thereto (*e.g.,* a bill of particulars, a response, or a counterpetition). If counsel pleads great detail in the initial pleading, it necessarily compels the other party to deal with that detail. If counsel uses a minimalist pleading style, however, the other party can either follow suit or signal a difference in strategy by demanding details. Given in §§3.97 – 3.114 below are samples and discussions of the major responsive pleadings.

1. [3.97] Bill of Particulars

A sample demand for bill of particulars and responsive bill are given in §§3.98 and 3.99 below. Sections 3.100 – 102 below discuss the legal basis for such relief.

a. [3.98] Sample Demand for Bill of Particulars

[Caption**]**

DEMAND FOR BILL OF PARTICULARS

TO: [Petitioner or petitioner's attorney**]**

PLEASE TAKE NOTICE that the respondent, John Smith, hereby demands that you file and serve on the undersigned, the attorney for the respondent, a bill of particulars of the allegations contained in the petition in the above-captioned case, which shall (1) identify each

item of nonmarital property alleged to be the petitioner's nonmarital property in paragraph [no./letter**] of the verified petition for dissolution of marriage and (2) state the basis on which the petitioner alleges that the property is nonmarital.**

DATED:

JOHN SMITH

By: _____
Attorney

[attorney information**]**

b. [3.99] Sample Bill of Particulars

[Caption**]**

BILL OF PARTICULARS

Mary Smith, by her attorneys, [names**], responds to respondent's request for a bill of particulars as follows:**

1. With respect to the allegation that she has various nonmarital property, Mary alleges that the following items of property are her nonmarital property:

[add list of property**]**

2. With respect to the bases for each item of property being her nonmarital property she alleges as follows:

[add basis for each item (*e.g.,* "She received the stock by gift from her maternal grandparents.")**]**

MARY SMITH

By: _____
Attorney

[attorney information**]**

c. [3.100] Legal Basis

750 ILCS 5/403(a)(3) provides that counsel may demand a bill of particulars regarding allegations in the petition if they are not sufficiently detailed to allow response. 735 ILCS 5/2-607 governs the context and timing of the demand and the bill of particulars. It provides the following:

(a) Within the time a party is to respond to a pleading, that party may, if allegations are so wanting in details that the responding party should be entitled to a bill of

particulars, file and serve a notice demanding it. The notice shall point out specifically the defects complained of or the details desired. The pleader shall have 28 days to file and serve the bill of particulars, and the party who requested the bill shall have 28 days to plead after being served with the bill.

(b) If the pleader does not file and serve a bill of particulars within 28 days of the demand, or if the bill of particulars delivered is insufficient, the court may, on motion and in its discretion, strike the pleading, allow further time to furnish the bill of particulars or require a more particular bill to be filed and served.

(c) If a bill of particulars, in an action based on a contract, contains the statement of items of indebtedness and is verified by oath, the items thereof are admitted except in so far as the opposite party files an affidavit specifically denying them, and as to each item denied states the facts upon which the denial is based, unless the affidavit is excused by the court.

(d) If the party on whom a demand for a bill of particulars has been made believes that the party demanding it is not entitled to the particulars asked for, he or she may move the court that the demand be denied or modified. *Id.*

d. [3.101] Timing

A demand for a bill of particulars should be made during the time period allowed for a response. 735 ILCS 5/2-607(a). After demand, the pleader has 28 days to file and serve a bill of particulars. The party that requested the bill has 28 days to plead after being served with the bill. *Id.* If the timing requirements are not met, the court has discretion to extend the time for filing. 735 ILCS 5/2-607(b).

e. [3.102] Comparable Relief by Motion

Counsel should also be aware that similar relief is available under 735 ILCS 5/2-615 and 5/2-612. Section 2-615(a) deals with motions with respect to pleadings and clarifies that counsel can make a motion "that a pleading be made more definite and certain in a specified particular." Section 2-612(a) gives the court the power to order "a fuller or more particular statement" if a pleading is insufficient in substance or in form. Counsel can thus use either the motion tactic or the bill of particulars to obtain additional details.

In the marital law arena, these devices for additional detail are typically used to require specificity regarding property (both itemization and characterization as nonmarital or marital) or for details necessary to support injunctive relief. Note that the statutes allow counsel to be specific about the type and the amount of detail sought. 750 ILCS 5/403(a)(3); 735 ILCS 5/2-607(a), 5/2-615(a).

2. Response

a. [3.103] Sample Response to Petition for Dissolution of Marriage

The response must be filed together with the appearance form (see §§3.108 – 3.109 below) in the time prescribed by the statute. S.Ct. Rule 181, 101(c), 101(d). See also 735 ILCS 5/2-301. A sample response follows:

[Caption]

VERIFIED RESPONSE TO PETITION FOR DISSOLUTION OF MARRIAGE

John Smith, the respondent, by his attorneys, [names**], responds to the petition for dissolution of marriage as follows:**

1. John [admits**] [**denies**] the allegations of paragraph 1 of the petition.**

2. John [admits**] [**denies**] the allegations of paragraph 2 of the petition.**

3. John [admits**] [**denies**] the allegations of paragraph 3 of the petition.**

4. John [admits**] [**denies**] the allegations of paragraph 4 of the petition.**

5. John [admits**] [**denies**] the allegations of paragraph 5 of the petition.**

6. John [admits**] [**denies**] the allegations of paragraph 6 of the petition.**

7. John lacks sufficient knowledge to form a belief as to the allegations of paragraph 7 of the petition; therefore, he denies them.

Further, the respondent, John Smith, states:

1. John lacks sufficient financial resources to pay his attorneys' fees and costs for the defense of this action. Mary is gainfully employed and well able to pay for his attorneys' fees and costs as well as her own.

2. John lacks sufficient property, including a contemplated award of marital property, and income to maintain himself and needs temporary and permanent maintenance for himself and for support of the parties' children. Mary is employed and is able to pay temporary and permanent maintenance to John.

3. John is a fit and proper person to be allocated parental responsibilities for the parties' children, and it is in their best interests that he be awarded sole decision-making responsibilities.

4. John has the following nonmarital property:

[list property**]**

WHEREFORE, the respondent, John Smith, asks this court to:

A. Dismiss the petitioner's Petition for Dissolution of Marriage with prejudice without costs or attorneys' fees;

B. Award the respondent costs and attorneys' fees incurred herein;

C. Award other relief as this court deems just.

_____
JOHN SMITH, Respondent

_____
Attorney

[attorney information**]**

NOTE: This document must be verified. 750 ILCS 5/403(a); 735 ILCS 5/2-605(a). See §3.59 above.

b. [3.104] Admissions/Denials

In the response, the respondent must either admit or deny every factual allegation in the petition. He or she need not, however, respond to assertions of law. *Schulz v. Schulz,* 38 Ill.App.2d 445, 187 N.E.2d 540 (2d Dist. 1963) (abst.). 735 ILCS 5/2-610 governs the content of responses. It states the following:

> **(a) Every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates.**
>
> **(b) Every allegation, except allegations of damages, not explicitly denied is admitted, unless the party states in his or her pleading that he or she has no knowledge thereof sufficient to form a belief, and attaches an affidavit of the truth of the statement of want of knowledge, or unless the party has had no opportunity to deny.**
>
> **(c) Denials must not be evasive, but must fairly answer the substance of the allegation denied.**

All allegations in a petition not specifically denied are admitted by operation of law. *Id.;* S.Ct. Rule 136(a) ("If a pleader can in good faith deny all the allegations in a paragraph of the opposing party's pleading, or all the allegations in the paragraph that are not specifically admitted, he may do so without paraphrasing or separately describing each allegation denied.") See §§3.26 and 3.27 above for a discussion of responding to legal conclusions.

Counsel must read the allegations of any petition carefully to be sure that each part of each allegation is addressed appropriately in the response and to be sure that there is no inadvertent admission to more of any allegation than intended. *Breuer v. Breuer,* 4 Ill.App.3d 179, 280 N.E.2d 518, 521 (1st Dist. 1972) (denial of daughter's residence deemed insufficient, so allegation was admitted in child support arrearage case). Counsel should also note that untruthful denials may lead to sanctions. S.Ct. Rule 137. Responses to petitions are due within 30 days after service of summons. S.Ct. Rule 181. If the allegations are not specific enough to allow a responsive pleading, counsel can request a bill of particulars (see §§3.97 – 3.102 above) on a motion under 735 ILCS 5/2-612 and 5/2-615 for more specificity. 750 ILCS 5/403(a); 735 ILCS 5/2-607.

A respondent who does not have sufficient knowledge to respond to an allegation must state that he or she has no knowledge sufficient to form a belief as to that allegation. *Marion v. Estate of Wegrzyn,* 93 Ill.App.2d 205, 236 N.E.2d 328, 330 (1st Dist. 1968). *See also Doran v. Doran,* 7 Ill.App.3d 614, 287 N.E.2d 731, 733 (2d Dist. 1972); *Hecht v. Hecht,* 49 Ill.App.3d 334, 364 N.E.2d 330, 333, 7 Ill.Dec. 169 (1st Dist. 1977) (failure to deny lack of provocation admits there was none). The statute requires that allegations of insufficient knowledge be supported by affidavit, which is dealt with in the verification or certification. See §§3.59 and 3.88 above.

Pleadings sometimes state the following: "The defendant neither admits nor denies the allegations but demands strict proof thereof." This language is unsupported by any Illinois statute or regulation. Such a response is probably equivalent to an admission because it is not a denial as required by statute. 735 ILCS 5/2-610. Illinois caselaw supports such a result. *See Sawko v. Dominion Plaza One Condo Association No. 1-A,* 218 Ill.App.3d 521, 578 N.E.2d 621, 626, 161 Ill.Dec. 263 (2d Dist. 1991) (statement that party "neither admits nor denies [an allegation], but demands strict proof thereof" deemed to be admission). Moreover, the demand for "strict proof" is simply silly. It is elementary that the plaintiff must prove his or her allegations if they form elements of his or her cause of action.

c. [3.105] Affirmative Allegations

The defendant may raise general affirmative defenses, including those specified in 735 ILCS 5/2-619 (*e.g.,* the plaintiff's incompetence, another action pending, or prior judgment). The defendant may also allege new facts in the response or may add affirmative statements that deal with issues not raised (*e.g.,* a premarital agreement). The plaintiff must reply to these affirmative allegations, or they will be deemed admitted. 735 ILCS 5/2-610; S.Ct. Rule 136. *But see In re Marriage of Osborn,* 206 Ill.App.3d 588, 564 N.E.2d 1325, 151 Ill.Dec. 663 (5th Dist. 1990), *appeal denied,* 137 Ill.2d 666 (1991), regarding lack of duty to respond to legal conclusions.

With the abolishment of fault-based grounds for divorce in this state, prior defenses to a divorce action such as "recrimination" or "condonation" are no longer relevant to the no-fault grounds of irreconcilable differences.

d. [3.106] Request for Relief

In responding to a petition for dissolution of marriage, counsel may decide to have the petition dismissed or denied outright in its entirety. Sometimes, however, counsel might not object to some

of the relief being granted, such as grounds, but might object to other requests for relief and allegations, such as those for maintenance and support or parental responsibilities. Counsel can agree to the request for a judgment of dissolution of marriage but seek different relief on other issues. The responses and prayer for relief should be in accord. Counsel can also seek a denial or dismissal of the petition but seek similar but more favorable relief in a counterpetition. See §§3.112 – 3.114 below.

3. [3.107] Reply

If the response raises new, affirmative matters, the petitioner must file a reply. 735 ILCS 5/2-602. This is equally true for matters raised in a separate counterclaim or counterpetition. *McKeon v. McKeon,* 4 Ill.App.2d 515, 124 N.E.2d 564, 567 (1st Dist. 1955) (failure to file answer to counterclaim admits facts pleaded in it). S.Ct. Rule 136(b) (affirmative matters raised in reply or later pleadings are deemed denied without additional filings unless the court orders responsive filing). Finally, counsel should be aware that he or she must also file a response or reply, as appropriate, to new matters raised for the first time in any amended pleading. *First Federal Savings & Loan Association of Chicago v. American National Bank & Trust Company of Chicago,* 100 Ill.App.2d 460, 241 N.E.2d 615, 619 (1st Dist. 1968). The form of the reply would be similar to that of the response (see §3.103 above).

4. Appearance

a. [3.108] General Appearance

The summons that is served on the defendant specifies the time within which the defendant must file an appearance. S.Ct. Rule 101(b). If the defendant is represented by an attorney, the appearance is filed and signed by the attorney. A defendant who is appearing pro se must file a pro se appearance. If a pro se defendant later hires an attorney, that attorney must file an additional appearance. In either case, the requisite filing fee must accompany the first appearance form, and the form must be given to all parties of record. Form CCDR 0004 (rev. April 22, 2021) is the Cook County form for appearance. It is available at www.cookcountyclerkofcourt.org.

b. [3.109] District Transfer Form

If a petitioner files a case before a suburban district and the respondent wants to transfer the case to the Daley Center, the respondent must file a District Transfer Form simultaneously with the filing of the appearance. Form CCDR 0050 (rev. Dec. 1, 2020) is the Cook County form for the District Transfer Form. It is available at www.cookcountyclerkofcourt.org.

c. [3.110] Objections to Jurisdiction over the Person

A party who chooses to contest the court's jurisdiction over the person must file a motion to dismiss or a motion to quash service of process in accordance with 735 ILCS 5/2-301. A party who files any pleadings addressing affirmative or substantive matters that go to the heart of the petition other than jurisdiction or who proceeds on matters other than challenges to jurisdiction has waived the right to challenge the court's jurisdiction.

d. [3.111] No Appearance

In cases in which the defendant cannot be found or refuses to file an appearance, the affidavit of return on the summons becomes critical if the plaintiff wants to obtain a default judgment against the defendant. Counsel needs the proof of service/return at the time of trial to show that service was made and that the lack of an appearance is therefore a voluntary act by the defendant.

5. Counterpetition

a. [3.112] Sample Counterpetition for Dissolution of Marriage

The sample counterpetition given below is the counterpetition filed in response to the sample petition for dissolution of marriage in §3.57 above, and the same facts (children, parental responsibilities, etc.) apply.

[Caption**]**

VERIFIED COUNTERPETITION FOR DISSOLUTION OF MARRIAGE

Respondent and Counterpetitioner John Smith (John), individually and by his attorneys, [names**], asks this court to dissolve his marriage to petitioner, Mary Smith (Mary). In support of his counterpetition for dissolution, he states:**

1. This court has jurisdiction over the parties:

(a) John lives at [address**] in the County of [**county name**], Illinois, and he has resided in the State of Illinois since [**date**]; and**

(b) Mary resides at [address**] in the County of [**county name**], Illinois, and she has resided in the State of Illinois since [**date**].**

2. This court has jurisdiction over the subject matter of this dispute.

3. John and Mary were married on [date**] at [**location**], and their marriage was registered in [**name**] County.**

4. John and Mary have lived separate and apart for six months, and irreconcilable differences have caused the irretrievable breakdown of their marriage. Past attempts at reconciliation have failed, and future attempts at reconciliation would be impracticable and not in the best interests of the family.

5. John, who is [number**] years old, is employed as [**employment title**].**

6. Mary, who is [number**] years old, is employed as [**employment title**].**

7. John and Mary have [number**] minor children born of their marriage. The children's names, ages, and dates of birth are**

[list names, ages, dates of birth**]**

[Both**] [**All**] children reside with Mary Smith, their mother, at [**address**] as they have for at least [**the past six months**]. Upon information and belief, Mary is not now pregnant.**

8. John and Mary are fit and proper persons to be allocated parental responsibilities for their minor children, and it is in the children's best interests that they be allocated joint decision-making responsibilities for the children.

9. During their marriage, John and Mary have acquired marital property including but not limited to the following:

(a) The marital residence, commonly known as [description**], held jointly by John and Mary. The marital residence is legally described on Exhibit A, which is attached to and incorporated in this petition. The marital residence is encumbered with a mortgage having a principal balance of approximately [**dollar amount**] as of the date of the filing of this petition;**

(b) A [year and make**] automobile, titled in both names, and subject to a lien with a balance of approximately [**dollar amount**] as of the date of the filing of this petition;**

(c) Various bank accounts, money market funds, and certificates of deposit, including but not limited to the following:

[add details**]**

(d) Retirement benefits that John and Mary have with their respective or former employers, including but not limited to the following:

[add details**]**

(e) Stocks and bonds, including but not limited to the following:

[add details**]**

(f) Various life insurance policies:

[add details**]**

(g) Various items of clothing, furniture, and household furnishings.

10. John has several items of nonmarital property, including but not limited to the following:

[add details]

11. John and Mary have various marital debts, including but not limited to the following:

[add details]

12. John and Mary have made no arrangements for the support, parental responsibilities, and parenting time of their [number] **minor children, nor have they arranged for spousal maintenance.**

13. Mary and the [number] **minor children have sufficient financial resources, including Mary's income and her share of the contemplated apportionment of the marital property, to provide for the reasonable needs of the parties' children, including expenses related to the children's education, commensurate with the standard of living that the parties' children would have enjoyed if the marriage had not been dissolved.**

14. Mary is gainfully employed and earning sufficient income. She is therefore able to contribute to child support and expenses related to the education of the parties' children.

15. Mary is gainfully employed and earning sufficient income. With her employment income and her share of the contemplated apportionment of the marital property, she is able to provide for herself in accordance with her needs and commensurate with the standard of living established during the marriage.

16. John and Mary each have sufficient resources and income to pay their own costs and attorneys' fees.

WHEREFORE, Respondent and Counterpetitioner, John Smith, asks this court to:

A. Enter a judgment of dissolution of marriage in favor of both parties dissolving their marriage;

B. Award to John and Mary temporary and permanent joint parental responsibilities for the parties' children and make such other provisions regarding parenting as it deems appropriate;

C. Award to John as his own property all of his nonmarital property;

D. Award to John and Mary an equitable portion of their marital property;

E. Order that Mary be barred from past, present, or future maintenance from John;

F. Order that each party pay his or her own attorneys' fees and costs;

G. Make such other order as may be just in reference to the debts of the parties; and

H. Grant such other relief as it deems appropriate and equitable.

_____
Petitioner

_____
Attorney

[attorney identification**]**

NOTE: This document must be verified (750 ILCS 5/403(a)) and should be accompanied by a certification or verification. See §3.59 above.

b. [3.113] Discussion of Counterpetition

The filing of a counterpetition is governed by 735 ILCS 5/2-608, which specifies:

(a) Any claim by one or more defendants against one or more plaintiffs, or against one or more codefendants, whether in the nature of setoff, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross claim in any action, and when so pleaded shall be called a counterclaim.

(b) The counterclaim shall be a part of the answer, and shall be designated as a counterclaim. Service of process on parties already before the court is not necessary.

(c) Every counterclaim shall be pleaded in the same manner and with the same particularity as a complaint, and shall be complete in itself, but allegations set forth in other parts of the answer may be incorporated by specific reference instead of being repeated.

(d) An answer to a counterclaim and pleadings subsequent thereto shall be filed as in the case of a complaint and with like designation and effect.

As the statute clarifies, counsel can file a counterpetition with the response as a matter of right. Once the time for filing responses has passed, however, a counterpetition can be filed only upon leave of court. 735 ILCS 5/2-609. See §3.114 below for a sample motion for leave to file a counterpetition. Beyond the psychological impact on the client of not being strictly on the defensive, there are strategic reasons to consider filing a counterpetition for dissolution of marriage.

PRACTICE POINTER

✓ One of the primary uses of a counterpetition is to prevent the original petitioner from voluntarily dismissing the whole cause pursuant to 735 ILCS 5/2-1009 at some point when doing so serves his or her interest but not your client's. For example, a plaintiff who lives in another state may want to dismiss his or her Illinois petition in order to refile for divorce in a foreign jurisdiction that is less favorable to or more burdensome for your client; a counterpetition does foreclose him or her from doing that.

Voluntary dismissal of the entire case is not possible if a counterpetition is on file. 735 ILCS 5/2-1009(d). Having or getting a counterpetition on file thus keeps the dissolution proceedings in place but shifts the burden of proceeding with the case to the respondent-counterpetitioner.

The choices regarding allegations and strategy for a counterpetition are the same as those for a petition for dissolution of marriage discussed at §§3.63 – 3.85 above.

c. [3.114] Sample Motion for Leave To File Counterpetition

[Caption]

MOTION FOR LEAVE TO FILE A COUNTERPETITION

John Smith (John), by his attorneys, [names**], pursuant to §2-609 of the Illinois Code of Civil Procedure, asks this court for leave to file a counterpetition for dissolution of marriage. In support of his position, John states as follows:**

1. His wife, Mary Smith (Mary), filed a petition for dissolution of marriage on [date**], resulting in the instant case.**

2. On [date**], Mary's counsel informed John's counsel that Mary was going to be moving to dismiss her petition for dissolution of marriage.**

[and/or]

3. Irreconcilable differences have arisen causing the irretrievable breakdown of John's marriage to Mary. Efforts at reconciliation have failed, and future attempts at reconciliation would be impracticable and not in the best interests of the family.

WHEREFORE, John Smith asks this court to grant him leave to file his counterpetition instanter.

JOHN SMITH, Respondent-Counterpetitioner

_____

Attorney

[attorney information]

6. [3.115] Service

Illinois S.Ct. Rule 11 dictates the manner of serving papers other than process and complaint. Rule 11 provides:

Rule 11. Manner of Serving Documents Other Than Process and Complaint on Parties Not in Default in the Trial and Reviewing Courts

(a) On Whom Made. If a party is represented by an attorney of record, service shall be made upon the attorney. Otherwise service shall be made upon the party.

(b) E-mail Address. An attorney must include on the appearance and on all pleadings filed in court an e-mail address to which documents and notices will be served in conformance with Rule 131(d). A self-represented litigant who has an e-mail address must also include the e-mail address on the appearance and on all pleadings filed in court to which documents and notices will be served in conformance with Rule 131(d).

(c) Method. Unless otherwise specified by rule or order of court, documents shall be served electronically.

(1) Electronic service may be made

(i) through an approved electronic filing service provider (EFSP) or

(ii) to the e-mail address(es) identified by the party's appearance in the matter.

If service is made by e-mail, the documents may be transmitted via attachment or by providing a link within the body of the e-mail that will allow the party to download the document.

(2) If a self-represented party does not have an e-mail address, or if service other than electronic service is specified by rule or order of court, or if extraordinary circumstances prevent timely electronic service in a particular instance, service of documents may be made by one of the following alternative methods:

(i) *Personal Service.* Delivering the document to the attorney or party personally;

(ii) *Delivery to Attorney's Office or Self-Represented Party's Residence.* Delivery of the document to an authorized person at the attorney's office or in a reasonable receptacle or location at or within the attorney's office. If a party is not represented by counsel, by leaving the document at the party's residence with a family member of the age of 13 years or older;

(iii) *United States Mail.* Depositing the document in a United States post office or post office box, enclosed in an envelope to the party's address, as identified by the party's appearance in the matter, with postage fully prepaid; or

(iv) *Third-Party Commercial Carrier.* Delivery of the document through a third-party commercial carrier or courier, to the party's address, as identified by the party's appearance in the matter, with delivery charge fully prepaid.

(d) Multiple Parties or Attorneys. In cases in which there are two or more plaintiffs or defendants who appear by different attorneys, service of all documents shall be made on the attorney for each of the parties. When more than one attorney appears for a party, service upon one of them is sufficient.

(e) Notice of E-mail Rejection. If a party serving a document via e-mail receives a rejection message or similar notification suggesting that transmission was not successful, the party serving the document shall make a good-faith effort to alert the intended recipient of a potential transmission problem and take reasonable steps to ensure actual service of the document.

(f) Limited Scope Appearance. After an attorney files a Notice of Limited Scope Appearance in accordance with Rule 13(c)(6), service of all documents shall be made on both the attorney and the party represented on a limited scope basis until: (1) the court enters an order allowing the attorney to withdraw under Rule 13(c) or (2) the attorney's representation automatically terminates under Rule 13(c)(7)(ii).

F. Judgment of Dissolution of Marriage

1. [3.116] Sample Judgment of Dissolution of Marriage

[Caption]

JUDGMENT OF DISSOLUTION OF MARRIAGE

This cause came before the court by stipulation of the parties as an uncontested hearing on Mary Smith's Verified Petition for Dissolution of Marriage. The respondent has filed a Response. The petitioner, Mary Smith (Mary), appeared in open court in person and by her

attorneys, [names**], and the respondent, John Smith (John), appeared in open court in person and by his attorneys, [**names**]. The court heard the evidence, a transcript of which [**has been**] [**will be**] duly filed. The court, being fully advised of the premises, finds as follows:**

1. This court has jurisdiction over the parties:

(a) Both the petitioner and the respondent were residents of Illinois at the time the action was commenced, and both have maintained that residence for at least 90 days next preceding the making of this finding; and

(b) The respondent has filed an appearance and a response.

2. This court has jurisdiction over the subject matter.

3. The parties were married on [date**], at [**location**], and their marriage is registered in [**name**] County.**

4. Mary and John have lived separate and apart for six months, and irreconcilable differences have caused the irretrievable breakdown of the marriage. Efforts at reconciliation have failed, and future attempts at reconciliation would be neither practical nor in the best interests of the family.

5. Mary and John have [number**] children, namely [**list names and ages**]. Mary is not now pregnant.**

6. Mary is [number**] years old and is employed as [**job title**]. John is [**number**] and is employed as [**job title**].**

7. Mary needs maintenance, and John is able to pay reasonable maintenance to Mary.

8. Mary needs a contribution of child support from John to support the parties' minor children. The parties have agreed to reasonable provisions with respect to the support of their [number**] minor children, and the sum they have agreed to [**conforms to**] [**exceeds**] the statutory guidelines.**

PRACTICE POINTER

✓ The child support may deviate from the guidelines, or the parties may not be able to agree on whether it does or not. If the support deviates from the statutory guidelines mandating the applicable percentage of net income, the judgment should make findings about why the deviation is appropriate. Examples of reasons for deviation include the payment of certain expenses directly, the amount of income of the nonpaying spouse, and the actual expenses of the child.

---

9. Mary is a fit and proper person to be allocated parental responsibilities for the parties' minor children, and it is in their best interests that Mary be awarded sole parental decision-making responsibilities.

[or**]**

9. Mary and John are fit and proper persons to be allocated parental responsibilities for the parties' minor children, and it is in their best interests that the parties share joint parental decision-making responsibilities.

10. Mary and John have entered into a written Marital Settlement Agreement (Agreement). The Agreement has been presented to this court for its consideration and is in words and figures as follows:

PRACTICE POINTER

✓ The marital settlement agreement may be physically inserted here; alternatively, it may be appended as an exhibit or incorporated by reference only pursuant to 750 ILCS 5/502(d). The agreement may also be kept separate from the judgment and merely incorporated into the judgement by reference only for purposes of confidentiality, but counsel then must be sure that the judgment of record contains all the essential rulings. Incorporation by reference is discretionary, so be prepared to argue why the intimate financial details of the settlement agreement need to be excluded from the public record. Common bases may include protecting the confidentiality of pending real estate transactions, disclosure of high-profile investment portfolios, and a myriad of other reasons.

[or**]**

10. Mary and John have entered into a written Marital Settlement Agreement (Agreement). The Agreement has been presented to this court for its consideration and is hereby incorporated into the Judgment by reference only pursuant to 750 ILCS 5/502(d).

11. The court has considered the economic circumstances of the parties and other relevant evidence and finds that the Agreement is fair and equitable, was freely and voluntarily entered into by both Mary and John, is not unconscionable, and is approved by this court.

WHEREFORE, IT IS ORDERED THAT:

A. The Petition for Dissolution of Marriage is granted. The bonds of matrimony between Mary and John are hereby dissolved, and the parties are awarded a judgment of dissolution of marriage.

B. Except as otherwise provided in this Judgment and the incorporated Agreement, each of the parties is forever barred and foreclosed from maintenance, homestead, and any and all other rights, claims, or demands whatsoever in and to the property of the other previously owned, now owned, or hereafter acquired, including but not limited to dower, homestead, and marital and nonmarital property.

C. The Agreement is incorporated into and made a part of this Judgment.

[or**]**

C. The Agreement is incorporated into the Judgment by reference only pursuant to 750 ILCS 5/502(d).

D. Mary is awarded sole parental decision-making responsibilities for the parties' minor children, [list names**].**

[or**]**

D. Mary and John are awarded joint parental decision-making responsibilities for the parties' minor children, [list names**].**

E. The terms of the Agreement shall not be modified by judicial action unless both Mary and John concur in writing, except as these terms bear on child support, parental responsibilities, or parenting time.

F. Mary and John shall execute, carry out, and perform all of the terms of the Agreement and of this Judgment.

G. Mary is given leave to resume her [maiden name**] [**former name**] of [**name**].**

H. This court shall, and it does, reserve jurisdiction of the subject matter of this cause and of the parties to the cause for the purpose of enforcing the terms of this Judgment and of the Agreement incorporated within it.

[or**]**

H. This court shall, and it does, reserve jurisdiction of the subject matter of this cause and of the parties to the cause for the purpose of enforcing the terms of this Judgment and of the Agreement incorporated herein and for enforcing and entering a qualified domestic relations order.

ENTER:

_____
JUDGE

DATED: _____

APPROVED:

_____
Mary Smith

By: _____
Attorneys for Petitioner

_____
John Smith

By: _____
Attorneys for Respondent

[attorney information**]**

2. Discussion of Judgment of Dissolution

a. [3.117] In General

In the interest of space, the sample judgment contains only findings based on the fact pattern used in the sample petition for dissolution of marriage for the example of Mary and John Smith (see §3.57 above). Obviously, many variations are possible regarding the residence of the parties, the children, personal information about the parties, awards of parental decision-making responsibilities and maintenance, and so forth. No attempt has been made to cover all variables. Counsel must tailor the judgment to the appropriate facts. Some alternative findings are suggested in §§3.118 – 3.122 below for various substantive areas of the judgment.

b. [3.118] Finding 7: Maintenance

The sample judgment in §3.116 above is based on an uncontested hearing in which the parties proved up a marital settlement agreement. In such a circumstance, the court may not need to make specific findings about whether the maintenance the parties agreed to is reasonable, whether the respondent is able to pay maintenance, or whether there are other issues that would have to be addressed if the judgment were based on a contested hearing. 750 ILCS 5/502(b) provides that

terms of an agreement, except those relating to support, parental responsibilities, and parenting time of children, are binding on a court unless it finds that the agreement is unconscionable; therefore, specific findings regarding maintenance are probably not necessary. Whether the court makes specific findings to support the award of maintenance when a marital settlement agreement is being incorporated into a judgment may be a matter of advocacy and personal preference. If counsel wants the court to make findings on these issues beyond an approval of the marital settlement agreement, it may be necessary to put in proof on these issues beyond the traditional prove-up. If no maintenance is going to be provided to one or both parties, it seems a safer course to have the court find that no maintenance is necessary as support for the mutual bar to maintenance that is then included in the judgment.

When neither party needs maintenance, the finding could state:

7. Each party is able to maintain himself or herself without maintenance from the other, and each is therefore forever barred from seeking maintenance from the other, from this court, or any other court in the future.

When one party needs maintenance as agreed and the other is barred, the finding might state:

7. Mary needs the maintenance the parties have agreed to in their Agreement to provide for her reasonable support, and John is able to pay such maintenance.

c. [3.119] Finding 8: Child Support

If a judgment is based on an incorporated marital settlement agreement, it may not be necessary for the court to make specific findings about whether child support is reasonable and necessary because the court is approving such an award and incorporating it into its judgment. In view of the statutory mandate of 750 ILCS 5/505 that the court may order either party to pay an amount of reasonable and necessary child support and shall determine minimum support by using guidelines, the judgment of the court should address whether the support is in accordance with the guidelines. It should make findings supporting a deviation from them if the support does not meet the minimum statutory amount. 750 ILCS 5/505(a)(2). Adherence to this rule or the amount of detail in the finding does not appear to be uniform. See §3.131 below for a sample detailed finding of compliance with the statutory guidelines of 750 ILCS 5/505.

Also note that 750 ILCS 28/20 provides for an order for withholding to take effect immediately unless a written agreement is reached by both parties providing for an alternative security arrangement for the support. If counsel is entering into such an arrangement, it may be part of the judgment or other written agreement. While other provisions relating to the dissolution of marriage, such as maintenance, may be binding on a court, provisions relating to child support, parental responsibilities, and parenting time, even if they are provided for in an agreement, are not binding on the court, which remains free to make alternative awards in its discretion. 750 ILCS 5/502(b).

Consistent with the mandate of 750 ILCS 5/505, courts are beginning to ask about conforming to the guidelines and to make specific findings regarding child support even if the parties have agreed to a figure. If findings regarding child support are to be included when there is a marital

settlement agreement, it is unclear how detailed they must be, although some reference to the statutory guidelines is appropriate. It is clear, however, that if the amount of child support to which the parties agreed is less than the statutory guidelines, the court must make express findings on the record for allowing that agreement to stand. 750 ILCS 5/505(a)(2). The sample judgment in §3.116 above contains skeletal findings and does not mention any economic details. For more detail, counsel should track the wording of 750 ILCS 5/505.

d. [3.120] Finding 9: Allocation of Parental Responsibilities

The sample judgment in §3.116 above assumes that the parties have agreed on an allocation of parental responsibilities and that that parenting plan is to be presented to the court for approval, incorporation, and a finding that it is not unconscionable. The sample judgment makes a finding that Mary is a fit and proper person to be allocated sole decision-making responsibilities and that the award is in the children's best interests. In agreement situations, sometimes the court merely finds that the parenting plan is in the children's best interests and makes no specific findings of fitness. It seems the better course would be to make such a finding. Again, the amount of evidence that must be addressed at prove-up to support such a finding is open to question.

Alternative findings regarding parental responsibilities are as follows:

9. Both parties are fit and proper persons to be allocated parental responsibilities for the parties' minor children, and it is in the children's best interests that the parties share joint parental decision-making responsibilities.

[or**]**

9. The parties are allocated joint parental responsibilities for the minor children, and the provisions of the marital settlement agreement regarding decision-making and parenting time shall be considered to be a joint parenting plan.

e. [3.121] Finding 10: Agreement of the Parties

750 ILCS 5/502(a) provides that, upon good cause shown and approval by the court, the parties may enter into a written or oral agreement containing provisions for disposition of property owned by either of them, maintenance of either of them, and support, parental responsibilities, and parenting time of their children. The sample judgment in §3.116 above contemplates a written marital settlement agreement, but the sample can be amended to incorporate an oral agreement. Unless the agreement provides to the contrary, the terms of the agreement shall be set forth in the judgment.

If the agreement provides that it must not be set forth in the judgment, the judgment must identify the agreement and state that the court has heard and approved its terms. 750 ILCS 5/502(d). To preserve private financial and other information, parties frequently do not wish their marital settlement agreement to be set forth specifically in the judgment, which is a matter of public record.

If the agreement is set forth in the judgment, it is enforceable as a judgment and as a contract. 750 ILCS 5/502(e).

f. [3.122] Finding 11: Not Unconscionable

The court must specifically find that the oral or written agreement of the parties is not unconscionable. 750 ILCS 5/502(b). If the court finds that the agreement is unconscionable, it may request that the parties submit a revised agreement or, upon hearing, may order a different disposition of property, maintenance, child support, and other matters consistent with its perception of conscionability under the attendant circumstances. 750 ILCS 5/502(c).

g. [3.123] Relief Granted

Any judicial relief sought should be provided for in the relief portion of the judgment. If counsel wishes to bar either party from maintenance, the party should be barred here. If there is a lump-sum maintenance award or set maintenance in the agreement, it is prudent in the relief granted to bar the recipient from any other award. Allocations of parental responsibilities should be made here as well, but it may be sufficient to rely on the incorporation of the marital settlement agreement for this purpose. Incorporation of the agreement's other provisions regarding maintenance and property also may be sufficient since it is part of the judgment.

If counsel wants the agreement to be non-modifiable, the agreement as well as the judgment must provide that the agreement or terms of the agreement are non-modifiable. Otherwise, the agreement is automatically modified by any modification of the judgment. 750 ILCS 5/502(f). Obviously, if the agreement and judgment are to be modifiable, no provision for modifiability should or need be made. Note that child support and allocations of parental responsibility are always modifiable as a matter of public policy, no matter what the judgment or marital settlement agreement may provide.

A party may resume a former name by judgment (750 ILCS 5/413(c)), which should be provided for in the relief portion of the judgment as it may not necessarily be included in an agreement. Frequently, resumption of a former name is granted based only on oral proofs at the prove-up.

Although it seems obvious, when the agreement is incorporated into a judgment, the parties to the agreement should be ordered in the relief portion of the judgment to perform its terms. 750 ILCS 5/502(d).

Alternative relief in which each party is barred from maintenance might state:

B. Each of the parties is barred from seeking or receiving past, present, or future maintenance from the other.

Alternative relief in which maintenance is barred except for agreement provisions and the other party is barred from seeking maintenance in the future could read:

B. Mary is awarded maintenance as provided for in the Agreement, and John is barred from seeking or receiving past, present, and future maintenance from Mary.

Alternative relief for physical incorporation or incorporation by reference of a marital settlement agreement might state:

C. The Agreement between the parties, dated [date**], is made a part of, but not merged into or specifically set forth in, this judgment of dissolution of marriage; all of the provisions of the Agreement are expressly ratified, confirmed, approved, and adopted as the order of this court to the same extent and with the same force and effect as if its provisions were set forth verbatim in this paragraph. Notwithstanding the adoption of the Agreement by the court, the Agreement shall continue to have independent legal significance outside the ambit of this judgment and shall be subject to enforcement by either party as in the case of any other contract or agreement.**

G. Legal Separation

1. [3.124] Sample Petition for Legal Separation

[Caption]

VERIFIED PETITION FOR LEGAL SEPARATION

Petitioner Mary Smith (Mary), individually and by her attorneys, [names**], pursuant to Sections 402 and 403 of the Illinois Marriage and Dissolution of Marriage Act, asks this court to declare her legally separated from the respondent John Smith (John). In support of her petition, Mary alleges:**

1. This court has jurisdiction over the parties:

(a) Mary resides at [address**] in the County of [**name**], Illinois, and she has resided in the State of Illinois since [**date**]; and**

(b) John resides at [address**] in the County of [**name**], Illinois, and he has resided in the State of Illinois since [**date**].**

2. This court has jurisdiction over the subject matter of this dispute.

3. Mary and John were married on [date**], at [**location**], and their marriage was registered in [**name**] County.**

4. Mary and John have lived separate and apart continuously since [date**].**

5. Mary, who is [number**] years old, is employed as [**job title**].**

6. John, who is [number**] years old, is employed as [**job title**].**

7. Mary and John have [number**] minor children born of their marriage. The children's names, ages, and dates of birth are [**list names, ages, and dates of birth**]. [**Both**] [**All**] minor children reside with Mary, their mother, at [**address**] as they have for [**at least the past six months**]. Mary is not now pregnant.**

8. Mary is a fit and proper person to be allocated parental responsibilities for the minor children, and it is in the children's best interests that she be allocated sole decision-making responsibilities for the children.

9. Mary and the [number**] minor children lack sufficient financial resources to provide for the reasonable needs of the parties' children, including expenses related to the children's education.**

10. John is gainfully employed and earning substantial income. He is therefore well able to provide for child support and for expenses related to the education of the parties' children.

11. Mary lacks both sufficient property and sufficient income to provide for her reasonable needs.

12. John is gainfully employed and earning substantial income. He is therefore well able to provide for maintenance to Mary in accordance with her needs.

13. Mary lacks sufficient financial resources to pay her own costs and attorneys' fees in this case.

14. John has sufficient resources and income to pay the costs and attorneys' fees necessarily incurred by Mary in the action and his own.

WHEREFORE, Petitioner, Mary Smith, asks this court to:

A. Enter a judgment for legal separation;

B. Award Mary sole parental decision-making responsibilities for the parties' minor children and make any other provisions regarding parenting as it determines is appropriate;

C. Award Mary fair and reasonable child support for the parties' minor children;

D. Award Mary fair and reasonable maintenance;

E. Order that John be barred from maintenance from Mary;

F. Order John to pay Mary's attorneys' fees and costs to Mary's attorney and that judgment be entered in favor of Mary's attorney; and

G. Grant such other relief as it deems appropriate and equitable.

_____
Petitioner

_____
Petitioner's Attorney

[attorney information**]**

NOTE: This document must be verified (750 ILCS 5/403(a)) and should be accompanied by an appropriate certification or verification. See §3.59 above.

2. Discussion of Petition for Legal Separation

a. [3.125] In General

Alternative allegations about parental responsibilities, maintenance, and attorneys' fees as suggested in the sample petition can be tailored to the relief of legal separation. Unlike a petition for dissolution of marriage, the statute providing for legal separation does not specify the minimal allegations. 750 ILCS 5/402. It also does not state the jurisdictional residency requirements, although it does deal with venue. 750 ILCS 5/402(b). Legal separation proceedings probably have the same jurisdictional requirements as dissolution of marriage proceedings because 750 ILCS 5/402(b) provides that "[c]ommencement of the action . . . shall be the same as in actions for dissolution of marriage."

If the parties have a written separation agreement, as is sometimes the case before a legal separation is sought, it should probably be referred to in the petition and attached to it.

b. [3.126] Legal Basis

750 ILCS 5/402 governs the award of a legal separation and provides:

(a) Any person living separate and apart from his or her spouse may have a remedy for reasonable support and maintenance while they so live apart.

(b) Such action shall be brought in the circuit court of the county in which the petitioner or respondent resides or in which the parties last resided together as husband and wife. Commencement of the action, temporary relief and trials shall be the same as in actions for dissolution of marriage, except that temporary relief in an action for legal separation shall be limited to the relief set forth in subdivision (a)(1) and items (ii), (iii), and (iv) of subdivision (a)(2) of Section 501. If the court deems it appropriate to enter a judgment for legal separation, the court shall consider the applicable factors in Section 504 in awarding maintenance. If the court deems it appropriate to enter a judgment for legal separation, the court may approve a

property settlement agreement that the parties have requested the court to incorporate into the judgment, subject to the following provisions:

(1) the court may not value or allocate property in the absence of such an agreement;

(2) the court may disapprove such an agreement only if it finds that the agreement is unconscionable; and

(3) such an agreement is final and non-modifiable.

(c) A proceeding or judgment for legal separation shall not bar either party from instituting an action for dissolution of marriage, and if the party so moving has met the requirements of Section 401, a judgment of dissolution shall be granted. Absent an agreement set forth in a separation agreement that provides for non-modifiable permanent maintenance, if a party to a judgment for legal separation files an action for dissolution of marriage, the issues of temporary and permanent maintenance shall be decided de novo.

c. [3.127] Difference Between Dissolution and Separation

The basic difference between a judgment for legal separation and a judgment of dissolution of marriage is that a dissolution ends the marriage while a legal separation continues the marriage but changes the relationship. The main purpose of a legal separation is usually to secure maintenance that is enforceable by a court while the parties are separated. In addition, legal separations were once used so the unemployed spouse would continue to be covered under the employed spouse's insurance, but legislation such as the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 82, regarding the continuation of this coverage has largely mooted that use. Obviously, legal separation is a vehicle that can be used to determine the support rights of parties if they do not want to end their marriage.

While before July 1, 1982, a petitioner who wanted a legal separation had to prove a ground for dissolution of marriage even to be granted a separation, this requirement was eliminated by P.A. 82-716 (eff. July 1, 1982), and all that now needs to be proved is that the parties are living separate and apart. 750 ILCS 5/402(a). The petitioner may receive reasonable support or maintenance while living apart from his or her spouse, and that is a primary reason for pursuing this remedy. A proceeding or a judgment for legal separation is not a bar to either party's instituting an action for dissolution of marriage. 750 ILCS 5/402(c).

d. [3.128] Relief

The relief allowed in a judgment for legal separation is limited. Besides maintenance and child support, the petitioner in a legal separation action may also obtain the same types of temporary relief as in a dissolution of marriage action. 750 ILCS 5/402(b), 5/501. Generally, the court may not adjudicate marital and nonmarital property rights, which it must do in a proceeding for dissolution of marriage or for declaration of invalidity of marriage. 750 ILCS 5/503(c). Prior to the

enactment of the IMDMA, an exception to the rule prohibiting adjudication of marital property rights existed in separate maintenance actions when the parties themselves joined issue on the property and introduced evidence about it. *Decker v. Decker,* 279 Ill. 300, 116 N.E. 688 (1917); *Anderson v. Anderson,* 28 Ill.App.3d 1029, 329 N.E.2d 523 (1st Dist. 1975).

The result appears to be the same under current law, but some have argued that the court has no authority to award marital property since the existence of marital property is not triggered until the filing of a petition for dissolution of marriage. 750 ILCS 5/503(e). This theory was specifically rejected in *In re Marriage of Leff,* 148 Ill.App.3d 792, 499 N.E.2d 1042, 1046 – 1048, 102 Ill.Dec. 262 (2d Dist. 1986), *appeal denied,* 113 Ill.2d 576 (1987). In *Leff,* the wife had filed a counterpetition for legal separation in response to her husband's petition for dissolution. The petition for legal separation was granted. The wife had participated in an evidentiary hearing without any objection to the court's jurisdiction regarding property distribution and had offered affirmative evidence regarding her ownership of the marital home and the manner of acquisition. During closing arguments, the wife submitted a proposed distribution of property. Under such circumstances the court found it had jurisdiction to allocate property. 499 N.E.2d at 1046.

e. [3.129] Response to Legal Separation

The strategies and law that apply to a petition for dissolution of marriage apply equally and with similar effect to a response to legal separation. See §§3.103 – 3.106 above.

f. [3.130] Counterpetition to Legal Separation

The strategy and law that apply to a counterpetition for dissolution of marriage apply equally and with similar effect to a counterpetition for legal separation. See §§3.112 – 3.114 above.

3. [3.131] Sample Judgment for Legal Separation

[Caption**]**

JUDGMENT FOR LEGAL SEPARATION

This cause came before the court for a hearing on Mary Smith's Verified Petition for Legal Separation. The respondent has filed a Response. The petitioner, Mary Smith (Mary), appeared in open court in person and by her attorney, [name**], and the respondent, John Smith (John), appeared in open court in person and by his attorney, [**name**]. The court heard the evidence, a transcript of which [**has been**] [**will be**] duly filed. The court, being fully advised of the premises, finds as follows:**

1. This court has jurisdiction over the parties:

(a) Both Mary and John were residents of Illinois at the time the action was commenced, and both have maintained that residence for at least 90 days next preceding the making of this finding; and

(b) John has filed an appearance and a response.

2. This court has jurisdiction over the subject matter.

3. Mary and John were married on [date**], at [**location**], and their marriage is registered in [**name**] County.**

4. At the time this action was commenced, Mary and John were living separate and apart without Mary's fault, and they have remained so until the date of this judgment for legal separation.

5. Mary and John have [number**] children, namely [**list names and ages**]. Mary is not now pregnant.**

6. Mary is [number**] years old and is unemployed. John is [**number**] years old and is employed as [**job title**].**

7. Mary is a fit and proper person to be allocated parental responsibilities for the parties' [number**] minor children, and it is in the children's best interests that Mary be allocated sole parental decision-making responsibilities.**

8. Mary needs reasonable maintenance from John, and this reasonable maintenance is in the amount of [dollar amount**]. Mary also needs reasonable and necessary child support.**

9. John is possessed of sufficient income and assets to pay maintenance to Mary, as well as reasonable and necessary child support.

WHEREFORE, IT IS ORDERED THAT:

A. The Petition for Judgment for Legal Separation is granted.

B. John is required to pay Mary on the first day of each month the sum of [dollar amount**] per month as maintenance.**

C. Mary is awarded sole parental decision-making responsibilities for the parties' [number**] minor children.**

D. John is required to pay Mary [dollar amount**] per month as child support for [**both**] [**all**] their minor children, which is consistent with the statutory guidelines provided for in §505 of the Illinois Marriage and Dissolution of Marriage Act.**

E. The parties shall perform all of the terms of this judgment.

F. This court shall, and it does, reserve jurisdiction of the subject matter of this cause and of the parties for the purpose of enforcing the terms of this judgment.

ENTER:

_____
JUDGE

DATED: _____

[firm name of petitioner's attorney**]**
Attorneys for Petitioner

By: _____

[Firm name of respondent's attorney**]**
Attorneys for Respondent

By: _____

4. [3.132] Discussion of Judgment for Legal Separation

The requirements for what must be contained in a judgment for legal separation are less clear than those for a judgment of dissolution of marriage. No jurisdictional requirements are specified in the statute, but 750 ILCS 5/402(b) provides that "[c]ommencement of the action . . . shall be the same as in actions for dissolution of marriage." One may assume jurisdictional requirements are included as well, although it is not entirely clear. For the sample judgment in §3.131 above, the 90-day rule is adopted. The facts generally support the residence of one party for 90 days before filing or judgment regardless.

The court must find that the parties were living separate and apart, and that the separation has been maintained because the court can grant this relief only while the parties live apart. 750 ILCS 5/402. If the parties were not apart when the action was filed but are apart at the time of judgment, a legal separation remedy is probably available, but this is not entirely clear.

If the parties have agreed to allow the court to adjudicate the distribution of marital and nonmarital property or by their actions they have joined that issue and proceeded to present evidence on it, the court may award relief regarding property. *In re Marriage of Leff,* 148 Ill.App.3d 792, 499 N.E.2d 1042, 102 Ill.Dec. 262 (2d Dist. 1986), *appeal denied,* 113 Ill.2d 576 (1987). The request for relief and findings in the judgment should be amended accordingly.

The findings regarding income in the sample petition in §3.131 above track the statutory requirements to support an award of child support based on the guidelines in 750 ILCS 5/505. Relevant financial considerations that have caused the court to deviate from the guidelines should be specified if that is the case. See the discussion of findings regarding child support in dissolution proceedings at §§3.89 – 3.90 above.

Since 750 ILCS 5/402(b) provides that "[c]ommencement of the action, temporary relief and trials shall be the same as in actions for dissolution of marriage," relief such as exclusive possession of the marital residence and injunctive relief should also be available in a proceeding for legal separation. Counsel must tailor relief and judgment to the circumstances.

4 Declaration of Invalidity of Marriage

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I. Introduction

A. [4.1] Scope of Chapter
B. Distinctions
    1. [4.2] Between Declaration of Invalidity of Marriage and Dissolution of Marriage
    2. Between Prohibited and Voidable Marriages
        a. [4.3] Prohibited Marriages
        b. [4.4] Voidable Marriages
        c. [4.5] Importance of Distinction Between Prohibited (Void) and Voidable Marriages
C. Choosing Between Declaration of Invalidity of Marriage and Dissolution of Marriage When Either Is Possible
    1. Advantages — Legal and Practical
        a. [4.6] Dissolution
        b. [4.7] Declaration of Invalidity
    2. Disadvantages — Legal and Practical
        a. [4.8] Dissolution
        b. [4.9] Declaration of Invalidity
D. [4.10] Income Tax Consequences of Declaration of Invalidity
E. [4.11] Legitimacy of Children

II. Basic Considerations

A. [4.12] Jurisdiction, Venue, and Service of Process
B. [4.13] Effect of Judgment
C. Defenses
    1. [4.14] Prohibited (Void) Marriages
    2. [4.15] Voidable Marriages
    3. [4.16] Nature of Defenses
        a. [4.17] Denying and Disproving Facts
        b. [4.18] Ratification, Estoppel, and Laches
        c. [4.19] In Pari Delicto
        d. [4.20] Unclean Hands
D. [4.21] Rules on Court Hearing
    1. [4.22] Contested Cases
    2. [4.23] Uncontested Cases
    3. [4.24] Burden of Proof

III. Petition for Declaration of Invalidity of Marriage

IV. Judgment

I. INTRODUCTION

A. [4.1] Scope of Chapter

The purpose of this chapter is twofold. First, it sets forth, analyzes, and explains particularly its effect on the old common-law action of annulment, Part III, entitled "Declaration of Invalidity of Marriage," of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq.,* which became law in Illinois on October 1, 1977. This is accomplished also by examining portions of Part II, entitled "Marriage." Second, this chapter examines the legal and practical distinctions between an action for declaration of invalidity and a formal dissolution proceeding, formerly known as divorce.

Prior to October 1, 1977, Illinois was without any statutory provisions pertaining to annulment. The entire action was founded on common-law principles as construed by the judiciary. With the passage of the IMDMA, the entire body of common law has been replaced by a statute that exclusively governs the grounds and procedure for annulment proceedings, now called an "action for declaration of invalidity of marriage."

The statute was derived from three principal sources — (1) the Uniform Marriage and Divorce Act, directly and with various changes; (2) direct codification of well-established common-law rules previously followed in Illinois; and (3) principles newly adopted by the drafters of the IMDMA and the Illinois legislature.

B. Distinctions

1. [4.2] Between Declaration of Invalidity of Marriage and Dissolution of Marriage

A declaration of invalidity of marriage proceeding is an action to obtain a judicial ruling that a valid marriage never took place due to some defect existing at the time the marriage ceremony occurred and that the marriage, in fact, is not legally valid and does not legally exist.

A dissolution proceeding is an action to sever a valid marriage for legal reasons (known as "grounds for dissolution") that occur after a valid marriage is entered into.

2. Between Prohibited and Voidable Marriages

a. [4.3] Prohibited Marriages

Prohibited or void marriages, even though entered into with all procedural regularity, produce no marital status. Prohibited marriages have been codified into 750 ILCS 5/212, and a prohibited marriage is a nullity from the beginning. Either party can have it so declared.

A judicial declaration that a marriage is void publicizes that fact, but legally it is not necessary to do so. However, certain practical considerations make it prudent to have the marital status declared a nullity in order to avoid subsequent disputes over inheritance and legal ownership of property. These and other areas otherwise might be difficult to prove or disprove if witnesses die

or evidence is lost. *Williams v. McKeene,* 193 Ill.App. 615 (3d Dist. 1915); *Jardine v. Jardine,* 291 Ill.App. 152, 9 N.E.2d 645 (1st Dist. 1937); Warren W. Kriebel, Jr., *Grounds and Defenses in Divorce, Annulment, and Separate Maintenance,* 1949 U.Ill.L.F. 581, 591. However, if no marriage ceremony ever took place, there is no marriage to be declared invalid. *O'Brien v. Eustice,* 298 Ill.App. 510, 19 N.E.2d 137 (1st Dist. 1939).

Another area of concern before the passage of the IMDMA was the legitimacy of children, but 750 ILCS 5/212(c) specifically provides that "[c]hildren born or adopted of a prohibited or common law marriage are the lawful children of the parties." See also 750 ILCS 5/303.

Section 212 prohibits bigamous marriages; marriages between an ancestor and a descendent or between siblings, whether by half or whole blood or by adoption; marriages between an uncle and niece, between an uncle and a nephew, between an aunt and nephew, or between an aunt and a niece, whether the relationship is by half or whole blood; and marriages between cousins of the first degree. However, a marriage between first cousins 50 years of age or older is not prohibited. A marriage as set forth in §212 may in fact become a valid marriage if the parties to this prohibited marriage cohabit after removal of the impediment. The marriage is considered valid as of the date of the removal of the impediment, and no formal steps need be taken to re-solemnize the marriage. *In re Estate of Schisler,* 81 Ill.App.3d 280, 401 N.E.2d 301, 36 Ill.Dec. 620 (3d Dist. 1980). *See also Estate of Whyte v. Whyte,* 244 Ill.App.3d 746, 614 N.E.2d 372, 185 Ill.Dec. 238 (1st Dist. 1993); *In re Estate of Banks,* 258 Ill.App.3d 529, 629 N.E.2d 1223, 196 Ill.Dec. 379 (5th Dist. 1994).

Effective June 1, 2014, the ban against same-sex marriages was terminated. See the Religious Freedom and Marriage Fairness Act, 750 ILCS 80/1, *et seq.* Illinois recognizes same-sex marriages and civil unions from different states. See 750 ILCS 75/60.

IMDMA §214 declares all common-law marriages contracted in Illinois after June 30, 1905, invalid; however, children of a common-law marriage are legitimate. 750 ILCS 5/214, 5/212(c).

Even though Illinois law does not permit common-law marriages, when parties reside in another state at the time of contracting a common-law marriage that is valid in that state, the marriage will be considered valid upon their removal to Illinois. *In re Marriage of Mosher,* 243 Ill.App.3d 97, 612 N.E.2d 838, 183 Ill.Dec. 911 (3d Dist. 1993).

IMDMA §216 addresses marriages entered into in violation of the Uniform Marriage Evasion Act and declares such marriages void:

> **That if any person residing and intending to continue to reside in this state and who is a person with a disability or prohibited from contracting marriage under the laws of this state, shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state.** 750 ILCS 5/216.

Section 216 prevents parties from forum shopping when they cannot contract a valid marriage in Illinois and applies only to marriages that are set forth in §212(a) as void in Illinois. The section does not specifically apply to marriages not prohibited under §212 that were validly contracted in a state having different formal requisites for marriages than those in Illinois. *See Boysen v. Boysen,* 301 Ill.App. 573, 23 N.E.2d 231 (1st Dist. 1939), and *Kattany v. Kattany,* 16 Ill.App.2d 148, 147 N.E.2d 436 (1st Dist. 1957) (abst.), which concluded that, when parties are married in a foreign state solely for the purpose of entering into a marriage that is prohibited in Illinois, with the intention of returning to Illinois immediately after the conclusion of the marriage ceremony, that marriage is void.

Section 217 of the IMDMA states:

> **No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void.** 750 ILCS 5/217.

Section 217 also prevents forum shopping for marriages and prevents marriages in Illinois by nonresidents when the marriages would have been void in their home states.

Finally, §218 provides:

> **Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself by requiring affidavits or otherwise that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.** 750 ILCS 5/218.

Before the repeal of former Ill.Rev.Stat. (1963), c. 89, ¶2, on May 28, 1965, marriages entered into by persons who were insane, mentally ill, or mentally incompetent were absolutely void. Now, each case must stand on its own, and proof of this ground depends on a party's lack of capacity to consent as a result of his or her condition. In order to void a marriage between such persons, it is necessary to prove lack of mental capacity at the time the marriage was entered into. *Larson v. Larson,* 42 Ill.App.2d 467, 192 N.E.2d 594 (2d Dist. 1963); *In re Marriage of Kutchins,* 136 Ill.App.3d 45, 482 N.E.2d 1005, 90 Ill.Dec. 722 (2d Dist. 1985); *O'Brien, supra. See also In re Estate of McDonald,* 2022 IL 126956, 201 N.E.3d 1125, 460 Ill.Dec. 652 (validity of parties' marriage was governed by provisions of Probate Act, setting out process whereby guardian could obtain ability to consent to ward's marriage, rather than provision of IMDMA setting out standard for capacity to consent to marriage).

b. [4.4] Voidable Marriages

A voidable marriage, the subject of Part III of the IMDMA, 750 ILCS 5/301 – 5/306, is one that is subject to being declared invalid for some legal defect existing at the time it was contracted. Such a marriage is valid (not void) for all purposes until a judicial declaration of invalidity is obtained by one of the persons permitted to bring a proceeding to set it aside. The declaration of invalidity proceeding must be brought within the time prescribed under §302 and must be predicated on the grounds set forth in §301 before a void judgment can be entered.

Marriages that are voidable and subject to being declared invalid are marriages that were

1. entered into by one or more parties who lacked "capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of the influence of alcohol, drugs or other incapacitating substances" (750 ILCS 5/301(1));

2. entered into "by force or duress or by fraud involving the essentials of marriage" (*id.*);

3. entered into when either one of the parties lacked "the physical capacity to consummate the marriage by sexual intercourse and at the time the marriage was solemnized the other party did not know of the incapacity" (750 ILCS 5/301(2));

4. entered into when a party to the marriage "was aged 16 or 17 years and did not have the consent of his parents or guardian or judicial approval" pursuant to IMDMA §208 (750 ILCS 5/301(3)); or

5. prohibited pursuant to IMDMA §212(a) (750 ILCS 5/301(4)).

The first ground under §301, listed above, is similar to former Ill.Rev.Stat. (1975), c. 89, ¶6, which prohibited the issuance of a marriage license to a party who was an "imbecile" or "insane" or who was under the influence of any intoxicating liquor or drug at the time of making the application for marriage license. The ground regarding inducement into a marriage by force, duress, or fraud involving the essentials of marriage was a direct codification of existing caselaw. *Short v. Short,* 265 Ill.App. 133 (3d Dist. 1932); *Louis v. Louis,* 124 Ill.App.2d 325, 260 N.E.2d 469 (1st Dist. 1970). One must be careful to note that only fraud involving the essentials of the marriage or proof of fraud that goes to the essence of the marriage relationship will invalidate the marriage. *Hill v. Hill,* 79 Ill.App.3d 809, 398 N.E.2d 1048, 35 Ill.Dec. 98 (1st Dist. 1979); *Wolfe v. Wolfe,* 76 Ill.2d 92, 389 N.E.2d 1143, 27 Ill.Dec. 735 (1979); *Louis, supra; Arndt v. Arndt,* 336 Ill.App. 65, 82 N.E.2d 908 (1st Dist. 1948). Proof of fraud as to the health, wealth, religion, or background of one of the parties is not grounds for declaring a marriage invalid. *Hull v. Hull,* 191 Ill.App. 307 (2d Dist. 1915); *Beckley v. Beckley,* 115 Ill.App. 27 (3d Dist. 1904); *Bielby v. Bielby,* 333 Ill. 478, 165 N.E. 231 (1929); *Lyon v. Lyon,* 230 Ill. 366, 82 N.E. 850 (1907).

Before the IMDMA was enacted, impotency alone was not a ground for declaring a marriage invalid. *See Linneman v. Linneman,* 1 Ill.App.2d 48, 116 N.E.2d 182 (1st Dist. 1953), in which impotency was fraudulently misrepresented to the other party. For example, under prior law, the fact that the husband could not consummate the marriage would not be grounds for annulment. However, if the husband represented to the wife that he had the physical capacity to consummate the marriage, knowing that he did not, that misrepresentation would, in fact, be grounds for declaring the marriage invalid as a fraudulent misrepresentation going to the essentials of the marriage. Under the IMDMA, fraudulent misrepresentation is not necessary, and grounds for declaring the marriage invalid will exist if one party lacked the physical capacity to consummate the marriage and, at the time the marriage was solemnized, the other party did not know of the incapacity.

750 ILCS 5/301(3) also marks a change in previously existing Illinois law under which parental consent was not mandatory for underaged parties and lack thereof was not a ground for annulment. *Reifschneider v. Reifschneider,* 241 Ill. 92, 89 N.E. 255 (1909); *Buszin v. McKibbin,* 254 Ill.App. 519 (1st Dist. 1929); *Walker v. Walker,* 316 Ill.App. 251, 44 N.E.2d 937 (4th Dist. 1942). Under the IMDMA, lack of consent by the parents or guardian or lack of judicial approval are grounds for declaring the marriage invalid, and it may be so declared if an action is commenced by the proper party within the proper period of time.

While the issue rarely arises in the practice of matrimonial law, when considering the spectrum of voidable marriages, an attorney should be aware of the possibility that a party may be considered a "putative spouse" for purposes of obtaining the legal rights of a spouse. A husband's concealment of his previous marriages did not amount to fraud going to the essentials of the parties' marriage contract and, thus, marriage was not invalid; the husband made no representations regarding the number of his previous marriages, and, thus, there were no representations made by the husband on which the wife could rely. *In re Marriage of Igene,* 2015 IL App (1st) 140344, ¶¶16 – 17, 35 N.E.3d 1125, 394 Ill.Dec. 156.

Section 305 of the IMDMA defines "putative spouse" as follows:

> **Any person, having gone through a marriage ceremony, who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintena following termination of his status, whether or not the marriage is prohibited, under Section 212, or declared invalid, under Section 301. If there is a legal spouse or other putative spouse, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance and support rights among the claimants as appropriate in the circumstances and in the interests of justice. This Section shall not apply to common law marriages contracted in the State after June 30, 1905.** 750 ILCS 5/305.

The purpose of §305 is to provide a remedy for those persons who have celebrated a marriage ceremony and cohabited with each other and who in good faith believe themselves married but who for other reasons would be denied the right of marriage. *Hewitt v. Hewitt,* 77 Ill.2d 49, 394 N.E.2d 1204, 31 Ill.Dec. 827 (1979). This issue typically arises when one party is not aware that the other party is not legally divorced. Section 305 confers putative spouse status on only those who are not legally married. *In re Marriage of May,* 286 Ill.App.3d 1060, 678 N.E.2d 71, 222 Ill.Dec. 664 (3d Dist. 1997).

The rights of a putative spouse include, among others, the rights of maintenance and inheritance. *Estate of Whyte v. Whyte,* 244 Ill.App.3d 746, 614 N.E.2d 372, 185 Ill.Dec. 238 (1st Dist. 1993). The primary inquiry in determining rights under this section is consideration that the putative spouse had the requisite good-faith belief in the validity of the marriage. *Id.* Thus, the court considers the subjective attitude as well as the knowledge of the putative spouse and limits that

spouse's rights to the period in which he or she was unaware of the invalidity of the marriage. *Id.* The status of putative spouse is terminated when the putative spouse no longer has a good-faith belief in the validity of the marriage. *Daniels v. Retirement Board of Policeman's Annuity & Benefit Fund,* 106 Ill.App.3d 412, 435 N.E.2d 1276, 62 Ill.Dec. 304 (1st Dist. 1982).

c. [4.5] Importance of Distinction Between Prohibited (Void) and Voidable Marriages

If a marriage is prohibited, it cannot be validated by ratification or estoppel. There is no defense that can be interposed to a void marriage. *In re Estate of Parker,* 17 Ill.App.2d 281, 149 N.E.2d 503 (1st Dist. 1958) (abst.); *Long v. Long,* 15 Ill.App.2d 276, 145 N.E.2d 509 (2d Dist. 1957); *Hunt v. Hunt,* 252 Ill.App. 490 (1st Dist. 1929). The parties to a marriage prohibited under 750 ILCS 5/212 cannot validate that marriage by ratification or estoppel but can do so only by cohabiting after the removal of the impediment as set forth in §212(b). However, the defense of ratification, estoppel, in pari delicto, or laches may be raised in response to a petition for declaration of invalidity of marriage of a voidable marriage. *Morrison v. Morrison,* 241 Ill.App. 359 (4th Dist. 1926).

If a marriage is void, a court is without jurisdiction to order temporary support, attorneys' fees, or costs. *Jardine v. Jardine,* 291 Ill.App. 152, 9 N.E.2d 645 (1st Dist. 1937).

If the marriage is void, there is no privilege of communication between spouses, but communications between spouses of voidable marriages are privileged until the marriage is legally invalidated.

In Illinois, a void marriage is void for all purposes (*Sutton v. Leib,* 199 F.2d 163 (7th Cir. 1952)), and no judicial proceeding or decree is required to establish its invalidity. A void marriage may be shown in any court between any parties, either in the lifetime of the parties or at any time not to exceed three years following the death of the first party to die (750 ILCS 5/302(c)), whereas a voidable marriage is treated as valid until it is declared invalid by legal action.

The power to invalidate a marriage requires jurisdiction of the marriage res, and this jurisdiction depends on the domicile of at least one of the parties. The circuit court has jurisdiction of an action to invalidate a marriage, and the rules with respect to jurisdiction over the persons are the same in general as those applied in a dissolution proceeding. Section 302 of the IMDMA dictates which persons are empowered with the right to commence an action for declaration of invalidity of marriage and the prescribed time limits in which the action must be brought in order to set forth a good cause of action. Under the common-law right of annulment, the right of action accrues immediately upon the discovery of the invalidating fact or circumstances. *Matthes v. Matthes,* 198 Ill.App. 515 (1st Dist. 1916). The persons who were allowed to maintain an annulment action under the old law were

1. parties to the purported marriage;

2. parents of the parties to the purported marriage;

3. the conservator of a feeble-minded person; and

4. a state's attorney when the purported marriage was between "lunatics" or "idiots" and the particular circumstances of the case required that the public be protected.

In contrast, under the IMDMA, the following persons are allowed to bring an action for declaration of invalidity of marriage

1. If the alleged grounds for invalidity are those set forth in §301(1), either the party or the legal representative of the party who lacked capacity to consent may bring the action no later than 90 days after the petitioning party obtains knowledge of the described condition. 750 ILCS 5/302(a)(1).

2. If the alleged grounds for invalidity are those set forth in §301(2), the action may be brought by either party no later than one year after the petitioning party obtains knowledge of the described condition. 750 ILCS 5/302(a)(2).

3. If the alleged grounds for invalidity are those set forth in §301(3), the action may be brought by the underaged party or that party's parent or guardian before the underaged party reaches the age at which he or she could have married without needing to satisfy the omitted requirement. 750 ILCS 5/302(a)(3). If the petitioning party attains this age before bringing the action, then a ratification of the marriage takes place, and it can no longer be declared invalid by that party.

4. If the alleged grounds for the invalid marriage are those set forth in §301(1), §301(2), or §301(3), then in no event may a petition be sought after the death of either party to the marriage. 750 ILCS 5/302(b). However, *see Quick v. Quick,* 213 Ill.App.3d 97, 571 N.E.2d 1206, 157 Ill.Dec. 187 (5th Dist. 1991), in which the plaintiff married the defendant while suffering from lung cancer and brain metastases, which caused the plaintiff to lapse into a coma 16 days after the marriage ceremony. A guardian for the plaintiff filed an action to declare the marriage invalid, alleging lack of capacity and fraud. The plaintiff died before an evidentiary hearing occurred. The court stated that "because we believe it is logical under the present circumstances to allow the invalidity action to survive the plaintiff's death, we construe the word 'sought' to mean that if the invalidity action is initiated prior to the decedent's death, it will survive." 571 N.E.2d at 1209.

5. If the marriage is prohibited and, therefore, invalid under §301(4), then a declaration of invalidity may be sought "by either party, the legal spouse in case of a bigamous marriage, the State's Attorney or a child of either party, at any time not to exceed 3 years following the death of the first party to die." 750 ILCS 5/302(c).

The court in *In re Estate of Crockett,* 312 Ill.App.3d 1167, 728 N.E.2d 765, 768, 245 Ill.Dec. 683 (5th Dist. 2000), specifically stated that Illinois does not permit marriage by proxy. Consequently, such a marriage is void ab initio; therefore, its validity is subject to attack in any proceeding in which the question of its validity arises, including actions in probate after the death of the incompetent party. *But see Banagly v. Baggiani,* 2014 IL App (1st) 123760, ¶140, 20 N.E.3d 42, 386 Ill.Dec. 181, in which a proxy marriage was recognized as valid in a wrongful death action because the marriage was contracted in another jurisdiction, and it was not contrary to Illinois public policy.

C. Choosing Between Declaration of Invalidity of Marriage and Dissolution of Marriage When Either Is Possible

1. Advantages — Legal and Practical

a. [4.6] Dissolution

1. Permits maintenance to be awarded. *But see In re Marriage of Toole,* 273 Ill.App.3d 607, 653 N.E.2d 456, 210 Ill.Dec. 551 (2d Dist. 1995) (wife not entitled to maintenance). *Toole* was distinguished in *In re Marriage of Sunday,* 354 Ill.App.3d 184, 820 N.E.2d 636, 289 Ill.Dec. 860 (2d Dist. 2004), in which the court held that the length of the new relationship is a proxy to help determine whether the new relationship is in fact a substitute for the marital relationship so that maintenance should be terminated. In determining whether a conjugal relationship may be found, the court will consider whether the spouse and the third party shared meals, bank accounts, household chores, and credit accounts. However, if these shared elements of a relationship are not established, the court will find that no such relationship exists.

2. Property rights can be adjudicated.

3. The allocation of parental responsibilities and parenting time are essential rights that are established.

b. [4.7] Declaration of Invalidity

1. Permits remarriage of persons of Catholic faith.

2. Psychological advantage of going into a new marriage as if it were a first marriage prevents stigma of being divorced.

3. Possible reinstatement of maintenance payments from prior marriage that were terminated upon remarriage. *See In re Marriage of Harris,* 203 Ill.App.3d 241, 560 N.E.2d 1138, 148 Ill.Dec. 541 (1st Dist. 1990). *But see In re Marriage of Kolb,* 99 Ill.App.3d 895, 425 N.E.2d 1301, 55 Ill.Dec. 128 (1st Dist. 1981); *Thomas v. Thomas,* 111 Ill.App.3d 1032, 444 N.E.2d 826, 67 Ill.Dec. 590 (4th Dist. 1983).

4. Revival of social security benefits if a void marriage is annulled. *Holland v. Ribicoff,* 219 F.Supp. 274 (D.Or. 1962).

2. Disadvantages — Legal and Practical

a. [4.8] Dissolution

If parties are of the Catholic faith, they are not permitted to remarry during the lifetime of the divorced spouse. (However, this is becoming less important as people's attitudes toward religion become more liberal.)

b. [4.9] Declaration of Invalidity

1. No maintenance, attorneys' fees, court costs, or homestead rights can be awarded or reserved unless the judgment for declaration of invalidity of marriage is made nonretroactive and takes effect on the date of declaration and not on the date of the marriage.

2. Proof of declaration of invalidity is sometimes not clear.

In Illinois, maintenance that is being paid to a divorced wife who later remarries and thereafter has the second marriage annulled is not revived if the second marriage was voidable (*Linneman v. Linneman,* 1 Ill.App.2d 48, 116 N.E.2d 182 (1st Dist. 1953)), but maintenance is revived if the declaration of invalidity is predicated on a void marriage (*Sutton v. Leib,* 199 F.2d 163 (7th Cir. 1952)).

For an interesting distinction of views, *see Lehmann v. Lehmann,* 225 Ill.App. 513 (1st Dist. 1922). This case had to decide whether the term "remarriage" referred to a ceremony of marriage or a status of marriage. The court held that the words used in the agreement were intended by the parties to refer to the ceremony or act of marriage as distinguished from the status or relation of marriage and denied the ex-wife the right to have alimony resumed from her former husband upon the annulment of her marriage. *See also In re Marriage of Kolb,* 99 Ill.App.3d 895, 425 N.E.2d 1301, 55 Ill.Dec. 128 (1st Dist. 1981). For an opposite result in a case that was decided on its peculiar factual difference, *see Thomas v. Thomas,* 111 Ill.App.3d 1032, 444 N.E.2d 826, 67 Ill.Dec. 590 (4th Dist. 1983).

D. [4.10] Income Tax Consequences of Declaration of Invalidity

A voidable marriage is deemed valid until set aside by a judgment of declaration of invalidity. However, during its duration, the parties to the marriage may file a joint income tax return, and a subsequent declaration of invalidity of the marriage will not invalidate a joint return.

If a marriage is void, no joint tax return may be filed. *See Gersten v. Commissioner,* 267 F.2d 195 (9th Cir. 1959); *Boyter v. Commissioner,* 74 T.C. 989, 994 (1980); *Shackelford v. Commissioner,* 70 T.C.M. (CCH) 945 (1995); *Barr v. Commissioner,* 10 T.C. 1288 (1948). A taxpayer cannot claim an exemption for the alleged second spouse because the relationship is an unlawful one.

A child born to a voidable or prohibited marriage is considered legitimate, and either party to the marriage may claim the child as an exemption on his or her federal income tax return if that party can prove that he or she contributed the requisite amount of support during the taxable year.

E. [4.11] Legitimacy of Children

Section 303 of the IMDMA, defining the legitimacy of children, states:

> **Legitimacy of Children. Children born or adopted of a marriage declared invalid are the lawful children of the parties. Children whose parents marry after their birth are the lawful children of the parties.** 750 ILCS 5/303.

II. BASIC CONSIDERATIONS

A. [4.12] Jurisdiction, Venue, and Service of Process

The power to declare a marriage invalid requires jurisdiction of the marriage res, and this jurisdiction depends on the domicile of at least one of the parties. 750 ILCS 5/306 states that "[a]ctions for declaration of invalidity of marriage shall be commenced as in other civil cases." This section did not change the existing law, since the original common-law action of annulment was a civil proceeding governed by the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.,* and the Illinois Supreme Court Rules. The circuit court has jurisdiction of an action to declare a marriage invalid, and the rules with respect to jurisdiction are in general the same as applied to a dissolution proceeding.

Venue in civil cases is determined under 735 ILCS 5/2-101, which provides in part:

> **Except as otherwise provided in this Act, every action must be commenced (1) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him or her and not solely for the purpose of fixing venue in that county, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose.**

However, 750 ILCS 5/104 provides:

> **The proceedings shall be had in the county where the plaintiff or defendant resides, except as otherwise provided herein, but process may be directed to any county in the State. Objection to venue is barred if not made within such time as the defendant's response is due. In no event shall venue be deemed jurisdictional.**

Therefore, in contradiction to 735 ILCS 5/2-101, which sets forth the rules of venue in other civil cases, when dealing with a petition for declaration of invalidity of marriage or a petition for dissolution of marriage, the proceeding shall be had in the county where either the petitioner or the respondent resides. Service of process may be directed to any county in the state. Improper venue is not a jurisdictional defect. The only result of such a finding is the transfer of the proceeding to the proper county. If neither party requests the transfer of the proceeding to the proper county, then "it is incumbent upon the parties to timely advise the court that the forum selected is not one of proper venue and, having apprised the court of this, to attempt to secure an appropriate order . . . allowing a waiver of improper venue." *In re Marriage of Jones,* 104 Ill.App.3d 490, 432 N.E.2d 1113, 1117, 60 Ill.Dec. 214 (1st Dist. 1982). *See also In re Marriage of Sales,* 106 Ill.App.3d 378, 436 N.E.2d 23, 62 Ill.Dec. 441 (1st Dist. 1982); 750 ILCS 5/104.

Service on a defendant can be by personal service, either in the state or out of the state. 735 ILCS 5/2-208(a) provides:

> **Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication.**

735 ILCS 5/2-209, commonly known as the "long-arm" statute, provides:

> **(a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person . . . to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:**
>
> *** * ***
>
> **(5) With respect to actions of dissolution of marriage, declaration of invalidity of marriage and legal separation, the maintenance in this State of a matrimonial domicile at the time this cause of action arose or the commission in this State of any act giving rise to the cause of action.**

Service by publication can be made in a declaration of invalidity proceeding as in any other civil action. See 735 ILCS 5/2-206.

B. [4.13] Effect of Judgment

One of the most substantial changes made by the passage of the IMDMA is 750 ILCS 5/304, entitled "Retroactivity." Before the passage of this section, a decree of annulment established the status of the litigants by declaring the marriage null and void. When the court entered its decree, the marriage was void ab initio, from the time the attempted marriage was entered into and not from the day of the entry of the decree, as would be in the case of a dissolution action. A decree of annulment ended those property rights normally acquired in a marriage, such as homestead and rights of inheritance. In an annulment proceeding, no property rights were specifically awarded or denied, and homestead did not attach since that right depended on a valid marriage. The court had no statutory or common-law power to award homestead to either party. However, even before the passage of §304, the trend of the courts was toward the position that all rights of the parties should be decided in an action brought before the court, including the property rights of parties in an annulment action. In *Kirkland v. Kirkland,* 38 Ill.App.2d 280, 186 N.E.2d 794 (1st Dist. 1962), it was decided that an annulment decree ascertained only that there had been no valid marriage between the parties but did not affect the property rights of the parties and that the issue of property rights must be decided separately.

750 ILCS 5/304 states:

> **Unless the court finds, after a consideration of all relevant circumstances, including the effect of a retroactive judgment on third parties, that the interests of justice would be served by making the judgment not retroactive, it shall declare the marriage invalid as of the date of the marriage. The provisions of this Act relating to property rights of the spouses, maintenance, support of children, and allocation of parental responsibilities on dissolution of marriage are applicable to non-retroactive judgments of invalidity of marriage only.**

Thus, the court now has the discretionary power of declaring the marriage void ab initio from the time of its purported entry or making or declaring the marriage invalid as of the date of the judgment of declaration of invalidity of marriage. This gives the court the latitude needed to decide whether property rights or support should be determined in a declaration of invalidity proceeding based on the equities of the parties presented before it according to the rules set forth in Part IV of the IMDMA, 750 ILCS 5/401, *et seq.* However, *see Daniels v. Retirement Board of Policeman's Annuity & Benefit Fund,* 106 Ill.App.3d 412, 435 N.E.2d 1276, 62 Ill.Dec. 304 (1st Dist. 1982) (putative spouse not entitled to deceased police officer's annuity when she knew decedent was not divorced from his first wife while living with putative spouse at time of his death); *Estate of Whyte v. Whyte,* 244 Ill.App.3d 746, 614 N.E.2d 372, 185 Ill.Dec. 238 (1st Dist. 1993). *See also In re Marriage of Belluomini,* 104 Ill.App.3d 301, 432 N.E.2d 958, 60 Ill.Dec. 59 (1st Dist. 1982), in which the appellate court reversed a three-year-old annulment judgment and remanded with a mandate restricting the trial court to entry of judgment dissolving the marriage with an effective date of the filing of the appellate court opinion in the matter, thereby entitling the petitioner to maintenance and child support as of the date measured by the difference between what she actually received from the respondent thereafter and the amount she should have received under the terms of the dissolution.

C. Defenses

1. [4.14] Prohibited (Void) Marriages

There is no defense to a void marriage. However, a respondent can deny the facts alleged in the petitioner's claim for declaration for invalidity and, by disproving those facts, can prevent the judgment from being entered, *e.g.,* the respondent can prove that (a) the parties did not leave the state for the purpose of avoiding the laws of Illinois; (b) the respondent was legally divorced from a previous spouse and, therefore, not guilty of bigamy; or (c) the common-law marriage that the petitioner alleges occurred in Illinois really had its roots and beginnings in a state that permitted common-law marriages, and the relationship continued thereafter in Illinois when the parties moved into this state. A void marriage implies that no marriage ever took place, not even a questionable or colorable marriage. Although legally there is nothing to dissolve, as a practical matter, it is best to obtain a legal ruling that the marriage is void in order to avoid future disputes that may arise as to property rights and inheritance rights, especially if one of the parties to the void marriage dies and the heirs of the survivor then have to do battle with the heirs of the deceased. It is well known that in these cases evidence can be lost, witnesses can die, and the minds of living witnesses can become dulled or confused by the passage of time. *See Williams v. McKeene,* 193 Ill.App. 615 (3d Dist. 1915); *Jardine v. Jardine,* 291 Ill.App. 152, 9 N.E.2d 645 (1st Dist. 1937).

2. [4.15] Voidable Marriages

A prima facie marriage exists until it is proven to be defective for some act committed by the petitioner or respondent immediately before the marriage ceremony or at the time that the marriage was celebrated. Examples of factors include the practice of fraud, duress, or coercion; lack of consent; or the age of the parties at the time of marriage. The marriage, although voidable, will stand as a valid one until a judgment of declaration of invalidity of marriage is entered; therefore, a respondent can put forth a defense in an effort to persuade the court that the petitioner is not entitled to a declaration of invalidity.

3. [4.16] Nature of Defenses

Part III of the IMDMA, 750 ILCS 5/301, *et seq.,* does not specifically contain any sections enumerating or establishing defenses to an action for declaration of invalidity, but §302, which deals with who can commence the action and when, suggests that certain defenses can be maintained.

Factors such as the length of the marriage, the birth of offspring, the length of the party's cohabitation after discovery of the fraud, and the possibility of reconciliation are relevant to determination of the materiality of the fraud alleged in an action for annulment of marriage based on fraudulent representations. *Wolfe v. Wolfe,* 76 Ill.2d 92, 389 N.E.2d 1143, 27 Ill.Dec. 735 (1979).

a. [4.17] Denying and Disproving Facts

The respondent may deny or disprove facts relied on by the petitioner to show invalidity of a marriage, *e.g.,* showing that the petitioner and respondent were both of legal age at the time their marriage occurred or that no fraud, duress, or coercion was practiced by one party on the other. Under the IMDMA, proof of the nonexistence of the facts alleged in any cause of action would be grounds for denial of the relief prayed for in that complaint.

b. [4.18] Ratification, Estoppel, and Laches

Due to the fact that most of the statutory limitation periods set forth in 750 ILCS 5/302(a)(1) – 5/302(a)(3) are relatively short, there is less of a chance for the defense of laches to be successfully raised than there was under the old common law. Under the old law, there was no set period of time before which a party had to bring a cause of action. Accordingly, the court had to interpret each case on its own merits to determine whether, under the circumstances of that case, too much time had elapsed before the commencement of the lawsuit. Now, with the statutory periods being fixed under the IMDMA, if the suit is not commenced within the required period of time, it cannot be successfully maintained. Since an action based on fraud, force, duress, or lack of capacity to consent must be filed within 90 days of petitioner's obtaining knowledge of the described condition (750 ILCS 5/302(a)(1)), there will be few situations in which a party will be able to delay and still file in a timely suit. Thus, after the expiration of 90 days, the defense of laches need not be raised, and a motion to strike and dismiss will suffice. *Morrison v. Morrison,* 241 Ill.App. 359 (4th Dist. 1926). The same result would occur if the grounds in the action were based under §301(3) regarding the ages of the parties. Because a suit to declare the marriage invalid must be brought before the underaged spouse reaches the legal age of 18, any delay amounting to laches would probably result in an untimely suit. The old law of ratification by which the marriage would be affirmed by the underaged spouse is replaced by the automatic bar to the bringing of the suit after the underaged party reaches the legal majority of 18 years of age. *Long v. Long,* 15 Ill.App.2d 276, 145 N.E.2d 509 (2d Dist. 1957); 750 ILCS 5/301(3). The law regarding laches and ratification as it applies to bigamous or incestuous marriages has remained the same, as these defenses were never applicable to an annulment action based on either of these two grounds. *Arado v. Arado,* 281 Ill. 123, 117 N.E. 816 (1917).

c. [4.19] In Pari Delicto

The defense of in pari delicto can be pleaded when neither party really intended to consent to a marriage but merely intended to enter into a sham marriage for the purpose of legitimizing a child. The original intent may have been to dissolve the marriage immediately, but the couple continued to live together for a time after the ceremony. Another example occurs when the parties enter into a marriage while under the influence of liquor and, after realizing what occurred, nevertheless cohabit for a considerable time thereafter. In these situations, the fact that both parties were equally guilty at the time they were married will not relieve them of the responsibility of the marriage. They are estopped by their ratification of the marriage due to the passage of time. In addition, they would probably be barred under the time limits of 750 ILCS 5/302. However, if both parties go through a ceremony knowing that one of the parties is unable to marry because of a prior undissolved marriage, their marriage is void. Even though the parties are in pari delicto, the marriage will be annulled and declared invalid. *Szlauzis v. Szlauzis,* 255 Ill. 314, 99 N.E. 640 (1912).

d. [4.20] Unclean Hands

The equitable defense of unclean hands applies to the IMDMA equally as under the old common law. Because all of the limitation periods under 750 ILCS 5/302 begin to run as of the date the petitioner obtains knowledge of a party's lack of capacity to consent, inability to consummate the marriage, fraud, duress, force, or prior knowledge on the part of the petitioner may serve to bar a suit for declaration of invalidity of the marriage. The suit may be barred not because the petitioner was guilty of inequitable behavior on his or her own part but because the suit may be untimely as a result of the petitioner's knowledge with no action being taken. *Szlauzis v. Szlauzis,* 255 Ill. 314, 99 N.E. 640 (1912). It appears that a party bringing an action under §301(1), §301(2), or §301(4) of the IMDMA may be entitled to a judgment for declaration of invalidity of marriage even though the party procured the marriage through fraud, force, or duress. As with laches and ratification, the defense of unclean hands is not a viable defense in a suit to annul a bigamous or incestuous marriage. *Jardine v. Jardine,* 291 Ill.App. 152, 9 N.E.2d 645 (1st Dist. 1937).

D. [4.21] Rules on Court Hearing

Before the enactment of the IMDMA, there was no statute on annulment, nor was there a special procedure followed by trial courts in annulment actions, but the trial was governed by the rules set forth in the Code of Civil Procedure and the Uniform Rules of the Circuit Court. 750 ILCS 5/105(a) now states that "[t]he provisions of the Civil Practice Law shall apply to all proceedings under this Act, except as otherwise provided in this Act."

1. [4.22] Contested Cases

Pursuant to 750 ILCS 5/103, there are no longer any trials by jury in actions for a declaration of invalidity. Therefore, all proceedings to declare a marriage invalid will be heard by the trial judge. All other aspects of a contested case will follow the Code of Civil Procedure and the rules of the circuit court.

The IMDMA provides for certain cosmetic changes in the proceedings over prior law, and these changes apply to an action for annulment. The changes are as follows:

a. "Annulment" is now known as "declaration of invalidity of marriage."

b. The "plaintiff" is known as the "petitioner."

c. The "defendant" is known as the "respondent."

d. The initial pleading is a "petition for declaration of invalidity of marriage" as opposed to a "complaint for annulment."

e. The respective responsive pleading is a "response to petition for declaration of invalidity of marriage" as opposed to an "answer to complaint for annulment."

2. [4.23] Uncontested Cases

As in cases of uncontested dissolutions, the petitioner, even though the case is uncontested by the respondent, is required to plead and testify to the grounds under which the invalidity lies as well as the requisite jurisdictional requirements and that the petitioner was free of fault.

3. [4.24] Burden of Proof

The burden is on the petitioner to prove the invalidity of the marriage. In the case of conflicting marriages of the same spouse, the presumption of validity operates in favor of the second marriage because of the presumption of innocence and the presumption that a person will not knowingly commit bigamy. *In re Estate of Dedmore,* 257 Ill.App. 519 (2d Dist. 1930); *Stein v. Stein,* 66 Ill.App. 526 (1st Dist. 1896).

Only relevant, competent, and material evidence is admissible in actions to declare a marriage invalid. *Ertel v. Ertel,* 313 Ill.App. 326, 40 N.E.2d 85 (3d Dist. 1942).

III. PETITION FOR DECLARATION OF INVALIDITY OF MARRIAGE

A. [4.25] In General

A declaration of invalidity action is like any other chancery proceeding and is subject to the Supreme Court Rules and the Code of Civil Procedure. The petition for declaration of invalidity must allege certain essentials, such as the residence of the petitioner, facts of the purported marriage, and the ground or grounds relied on for seeking a declaration of invalidity.

As with any other cause of action, the respondent may file an appearance and response to the petition and may file a counterpetition. The response may be a categorical denial of the petitioner's charges or the assertion of an affirmative defense. For example, if the petitioner's suit is based on nonage, the respondent can admit that the petitioner was underage at the time of marriage but can

raise as an affirmative defense that, upon reaching legal age, the petitioner ratified the marriage by continuing to live with the respondent as a spouse thereafter. All other rules of pleading of the Code of Civil Procedure are applicable, such as a request for a bill of particulars, leave to amend pleadings, motions to strike or dismiss, and the rules of discovery and deposition.

B. [4.26] Title of Court

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

IN THE CIRCUIT COURT OF _____ COUNTY, ILLINOIS
COUNTY DEPARTMENT
CHANCERY — MATRIMONIAL DIVISION

COMMENT: An action for a declaration of invalidity can be brought in the county where the petitioner resides, in the county where the respondent resides, or, if the respondent is a nonresident, in any county in the state. 750 ILCS 5/104; 735 ILCS 5/2-101. Should both of the parties file actions in different counties within a short period of time, the county in which the first suit was filed would have prior jurisdiction regardless of which party was served with summons first. The venue is not jurisdictional, and any objection to improper venue must be raised by the objecting party within the time that party's response is due. *But see In re Marriage of Jones,* 104 Ill.App.3d 490, 432 N.E.2d 1113, 60 Ill.Dec. 214 (1st Dist. 1982). It is incumbent on the parties to timely advise the court that the forum is not one of proper venue and to seek an appropriate order allowing waiver of the improper venue.

C. [4.27] Title of Document

PETITION FOR DECLARATION OF
INVALIDITY OF MARRIAGE

D. [4.28] Title of Cause and Introduction

IN RE THE MARRIAGE OF:

_____,

[a minor**] [**an incompetent**],**

By [guardian**] [**guardian ad litem**] [**state's attorney**] [**next friend**],**

Petitioner,

and

_____,

[a minor**] [**an incompetent**],**

Respondent.

COMMENT: **Void marriage.** Either party, the legal spouse in case of a bigamous marriage, the state's attorney, or a child of either party may bring an action to have the marriage declared invalid, and the fact that either spouse or both spouses have violated the so-called "clean-hands doctrine" and are at fault for bringing about the void marriage does not act as a bar to such an action. *Jardine v. Jardine,* 291 Ill.App. 152, 9 N.E.2d 645 (1st Dist. 1937); *Szlauzis v. Szlauzis,* 255 Ill. 314, 99 N.E. 640 (1912). Such an action may be brought by any of the above-mentioned parties at any time not to exceed three years following the death of the first party to die. 750 ILCS 5/302(c).

Voidable marriage. If the grounds for invalidity are based on lack of capacity to consent or on force, duress, or fraud involving the essentials of the marriage, either party or the legal representative of the party who lacked capacity to consent may bring the action no later than 90 days after the petitioner obtained knowledge of the described condition. An exception to this limitation was cited in *In re Marriage of Davis,* 217 Ill.App.3d 273, 576 N.E.2d 972, 160 Ill.Dec. 18 (5th Dist. 1991), in which the initial guardian of the incompetent was his wife. The court found that, due to the wife's conflict of interest, the statute of limitations began to run on the date when a separate guardian was appointed, and the statute of limitations did not serve as a bar to the second guardian's filing for a declaration of invalidity of the marriage. If the ground for invalidity is lack of physical capacity to consummate the marriage, either party may bring the action no later than one year after the petitioner obtained knowledge of the described condition. If the ground for invalidity is based on the age of the parties and not parental, guardian, or judicial consent, the action may be brought by the underaged party or his or her parent or guardian before the time the underaged party reaches the age at which he or she could have married without needing to satisfy the requirement. Section 302(a)(1) of the IMDMA has provided a marked change in the law in this area in that, under the old common law of annulment, only the defrauded party had a right to bring an action to annul the marriage and that person must have ceased to live with the other party upon

discovering the fraud. Under the IMDMA, either party has a right to bring the action as long as it is no later than 90 days after the petitioner obtains knowledge of the described condition. Therefore, under the IMDMA, it appears that even the party guilty of committing the fraud may bring the action to have the marriage declared invalid.

E. Allegation: Status of Petitioner Who Is Not a Party to Marriage

1. [4.29] If Petitioner Is a Minor

[Name**], a minor of the age of [**number**], and by [**name**], [**a parent or next friend**] [**a duly appointed guardian or guardian ad litem**], as petitioner, in support of [**his**] [**her**] Petition for Declaration of Invalidity of Marriage, states unto this Court as follows:**

2. [4.30] If Petitioner Is Incompetent

[Name**], an incompetent, so declared by court order, by [**name**], a conservator, duly appointed as petitioner, in support of [**his**] [**her**] Petition for Declaration of Invalidity of Marriage, states unto this Court as follows:**

3. [4.31] If Party Who Should Be Petitioner Is Deceased

[Name**], [**administrator or executor of the estate**] [**heir**] of [**name**], deceased, in support of [**his**] [**her**] petition for Declaration of Invalidity of Marriage, states unto this Court as follows:**

COMMENT: Because a minor or incompetent cannot sue in his or her own name, when the petitioner or respondent is a minor or is mentally incompetent, a suit must be brought by a parent, next friend, or duly appointed guardian ad litem, the guardian being appointed by the court in which the action is pending.

The question of which state law shall be used to determine whether grounds exist for declaring a marriage invalid was not changed by the enactment of the IMDMA. Under Illinois common law, the right to have a marriage annulled was determined by the law of the state in which the marriage was contracted. *People v. Shaw,* 259 Ill. 544, 102 N.E. 1031 (1913); *Ertel v. Ertel,* 313 Ill.App. 326, 40 N.E.2d 85 (3d Dist. 1942); *Linneman v. Linneman,* 1 Ill.App.2d 48, 116 N.E.2d 182 (1st Dist. 1953). *See also Lyon v. Lyon,* 230 Ill. 366, 82 N.E. 850 (1907), in which a marriage in New York was declared invalid as a result of fraud but Illinois law was used to determine whether fraud existed. The only time that the prevailing law of the state in which the marriage was contracted will not be used to determine whether the marriage is invalid is when the parties contracted their marriage in a particular state after they forum shopped in order to avoid the marriage laws of the state of their domicile. In this instance, the marriage would be void if it is void under the laws of the state of the domicile of the parties. *Whelan v. Whelan,* 346 Ill.App. 445, 105 N.E.2d 314 (2d Dist. 1952) (abst.).

In setting out a cause of action for a declaration of invalidity, a petitioner must first allege that a ceremony occurred and then allege the facts as to why the ceremony was defective. Failure to plead a marriage ceremony, even if only a pretended ceremony, would leave nothing for the court to declare invalid.

F. Date and Place of Marriage

1. [4.32] If Marriage Is Voidable

That petitioner and respondent intermarried on the [number**] day of [**month**], [**date**], at [**location**], said marriage being registered at [**location**].**

2. [4.33] If Marriage Is Prohibited

That petitioner and respondent participated in a pretended marriage ceremony on the [number**] day of [**month**], [**year**], at [**location**], said pretended marriage being registered at [**location**].**

G. Grounds

1. [4.34] Allegation: Consanguinity of the Parties

That the parties entered into a marriage in Illinois and are related within the degrees prohibited by §212(a)(4) of the IMDMA, in that the parties [are cousins of the first degree by virtue of their fathers being brothers, and the marriage is void**].**

COMMENT: The allegation setting forth the degree of relationship between the parties should follow 750 ILCS 5/212(a)(2), 5/212(a)(3), or 5/212(a)(4) and should state the exact relationship between the parties and the foundation for that relationship — specifically, why the parties are related in that degree.

2. [4.35] Allegation: Former Spouse Living (Bigamous Marriage)

That at the time petitioner and respondent participated in a pretended marriage ceremony, respondent had another spouse living by the name of [name**], to whom respondent was legally married on the [**number**] day of [**month**], [**year**], at [**location**]; that the marriage to [**name**] was never dissolved by a Judgment for Dissolution of Marriage nor declared invalid by a Judgment for Declaration of Invalidity of Marriage by any Court, that it still exists and is in full legal effect and binding on respondent and respondent's spouse, and that, as a result, petitioner's marriage to respondent is void.**

COMMENT: Once it has been established that a marriage is bigamous, the marriage is absolutely void, and there is no defense to such an action for a declaration of invalidity. An action to declare a bigamous marriage invalid can be brought by either party to the void marriage or by the legal spouse in case of a bigamous marriage, naming both the bigamist and his or her other spouse as parties respondent. However, in the case of conflicting marriages of the same spouse, a presumption of validity operates in favor of the second marriage. *In re Estate of Dedmore,* 257 Ill.App. 519 (2d Dist. 1930). The burden of proving the invalidity of the second marriage is on the party asserting it. *Winter v. Dibble,* 251 Ill. 200, 95 N.E. 1093 (1911). While the law regards the marriage relation jealously and makes reasonable assumptions in its favor, it has no special regard for second marriages in preference to first marriages, and the validity of a second marriage is presumed only

because of the presumption of innocence, *i.e.,* that a person will not commit bigamy. When a second marriage is proved, a strong presumption in its favor is raised, and that presumption is not overcome by mere proof of a prior marriage (*Schmisseur v. Beatrie,* 147 Ill. 210, 35 N.E. 525 (1893)) and by proof that one of the parties had not obtained a divorce (*In re Estate of Panico,* 268 Ill.App. 585 (1st Dist. 1932)). In the absence of evidence to the contrary, a first marriage, such as a ceremonial marriage, will be presumed to have been terminated by death or divorce before the time of the second marriage by one of the parties, and the burden of adducing evidence to the contrary is on the party attacking the second marriage even though the attacking party is thereby required to prove a negative fact. *Winter, supra; Dedmore, supra;* 26 I.L.P. *Marriages* §29 (2002).

In *Baer v. De Berry,* 31 Ill.App.2d 86, 175 N.E.2d 673 (1st Dist. 1961), it was stated that an unsuccessful search of divorce records in several states has probative value on the question of marital status when there are conflicting marriages, but it is not sufficient to overcome the presumption against bigamy.

3. [4.36] Allegation: Under Age of Legal Consent

That at the time of the purported marriage, petitioner was [number**] years of age, having been born on the [**number**] day [**month**], [**year**]; Respondent was [**number**] years of age, having been born on the [**number**] day [**month**], [**year**]; that the laws of the State of [**state name**], where the marriage was performed, provided [**cite the state requirements**], and as a result, the marriage between the parties is voidable.**

4. [4.37] Allegation: Unsound Mind — Influence of Intoxicant or Narcotic

That at the time of the marriage and for some time before it, respondent was and continues to be of unsound mind so as to be incapable of understanding and consenting to the contract of marriage. That upon obtaining knowledge of this condition, petitioner ceased to cohabit with respondent and has brought this Petition within the prescribed time limits set forth in §302(a)(1) of the IMDMA and has been living separate and apart from the respondent ever since.

[or**]**

That at the time of the marriage, [petitioner**] [**respondent**] was under the influence of [**intoxicating liquors**] [**a narcotic drug**] and was incapable of understanding and consenting to the contract of marriage.**

COMMENT: When either party of a marriage is of unsound mind at the time the marriage is contracted or either party is under the influence of intoxicating liquors or narcotic drugs, the marriage is voidable and can be declared invalid.

In Illinois, prior to July 1, 1965, Ill.Rev.Stat. (1963), c. 89, ¶2, provided that no "insane" or "mentally ill person" or "idiot" was capable of contracting marriage. However, under the IMDMA, proof of this ground now falls under 750 ILCS 5/301(1) and depends on the party's lack of capacity to consent as a result of his or her condition. *Larson v. Larson,* 42 Ill.App.2d 467, 192 N.E.2d 594 (2d Dist. 1963); *In re Marriage of Kutchins,* 136 Ill.App.3d 45, 482 N.E.2d 1005, 90 Ill.Dec. 722 (2d Dist. 1985); *O'Brien v. Eustice,* 298 Ill.App. 510, 19 N.E.2d 137 (1st Dist. 1939).

A person must be capable of understanding the marriage relationship to enter into a valid marriage, but the same mental alertness needed to transact business is not needed to contract a marriage. *Flynn v. Troesch,* 373 Ill. 275, 26 N.E.2d 91 (1940); *Pape v. Byrd,* 145 Ill.2d 13, 582 N.E.2d 164, 163 Ill.Dec. 898 (1991). In Illinois, a mere weakness of intellect is not sufficient to invalidate a marriage if the parties are capable of comprehending and understanding the subject of the contract, its nature, and its consequences. *Hagenson v. Hagenson,* 258 Ill. 197, 101 N.E. 606 (1913).

Each case involving lack of mental capacity must be judged on its own special facts. In *Orchardson v. Cofield,* 171 Ill. 14, 49 N.E. 197 (1897), an annulment case, it was stated that the question is whether the alleged insane person acted rationally regarding the particular marriage in dispute and not whether his or her conduct was wise but whether he or she proceeded with a sane mind with respect to the thing done. *But see In re Driskell,* 197 Ill.App.3d 836, 555 N.E.2d 428, 144 Ill.Dec. 309 (4th Dist. 1990), *aff'd in part, rev'd in part sub nom. by Pape, supra; In re Estate of McDonald,* 2022 IL 126956, 201 N.E.3d 1125, 460 Ill.Dec. 652.

In *Davis v. Tickell,* 230 Ill.App. 285, 287 (4th Dist. 1923), the court said that the judgment of a probate court in "adjudging a person insane and appointing a guardian is not conclusive of such person's incapacity to contract a valid marriage." In *Pyott v. Pyott,* 191 Ill. 280, 61 N.E. 88 (1901), the court stated that, although mental defects or aberrations acquired after marriage are not grounds for annulment, the mental incapacity of a person at the time of the ceremony constitutes a ground for annulment.

Proof of lack of mental capacity to enter into a marriage must be clear and definite to justify an annulment. *Larson, supra.* In that case, the petitioner was unable to prove that at the time the marriage took place the respondent did not have sufficient mental capacity to understand the nature, effect, duties, and obligations of the marriage contract. *See Driskell, supra. See also Pape, supra*.

A marriage contracted during a lucid interval is valid and cannot be declared invalid on the grounds of unsound mind. *Briggs v. Briggs,* 160 Cal.App.2d 312, 325 P.2d 219 (Cal.App. 1958).

The right to declare a marriage invalid is lost if the party of unsound mind regains his or her reason and then freely cohabits with his or her spouse as husband and wife. In such a case, a ratification is said to have occurred.

5. [4.38] Allegation: Fraud

When representation(s) are made:

That respondent at the time of the pretended marriage represented to petitioner that [document representations**]. The representations were untrue, and in fact [**provide details**]; respondent at the time of the marriage knew that the representations were untrue. Respondent made the representations with the intent to induce petitioner to consent to marriage. Petitioner at the time of the marriage believed the representations to be true and in reliance thereon consented to the marriage.**

Concealment of essential fact:

That respondent at the time of the marriage concealed from petitioner that [state essential facts concealed**].**

[or**]**

That respondent at the time of the marriage knew that [state essential facts concealed**] and did not disclose these facts to petitioner. Respondent concealed the facts with the intent to induce petitioner to consent to the marriage. Petitioner at the time of the marriage was ignorant of the previously stated facts concealed from petitioner by respondent and would never have consented to the marriage knowing the facts so concealed.**

If consent to a marriage was obtained by fraud, the marriage is voidable at the election of either party if the action is brought no later than 90 days after the petitioner obtains knowledge of the described condition.

Facts as to fraudulent representations (not conclusions of law) must be pled in order to be relied on as a ground for a declaration of invalidity.

Under Illinois common law, when there was no statute for annulment, there were no designated statutory grounds or elements constituting those grounds necessary to be pled to make a prima facie case of fraud. The IMDMA, which provided Illinois with a statute on declaration of invalidity, still contains no specific statutory language as to what grounds or elements are necessary to be pled. The only guidelines set forth in the statute are contained in 750 ILCS 5/301(1), which apply when "a party was induced to enter into a marriage by force or duress or by fraud *involving the essentials of marriage.*" [Emphasis added.] Thus, defining the term "involving the essentials of marriage" must be accomplished by using previous caselaw decisions. However, there are numerous acceptable principles regarding this area.

A misrepresentation, in order to constitute a fraud that can make a marriage invalid, must be of some existing fact, as a legal or physical impediment to the marriage, and not a promise as to future conduct. *Bielby v. Bielby,* 333 Ill. 478, 165 N.E. 231 (1929); *In re Marriage of Naguit,* 104 Ill.App.3d 709, 433 N.E.2d 296, 60 Ill.Dec. 499 (5th Dist. 1982).

Fraudulent misrepresentations as to one's birth, social position, fortune, character, social standing, personal qualities, good health, and temperament are not enough for a declaration of invalidity in Illinois. *Bielby, supra; Hull v. Hull,* 191 Ill.App. 307 (2d Dist. 1915); *Lyon v. Lyon,* 230 Ill. 366, 82 N.E. 850 (1907); *Beckley v. Beckley,* 115 Ill.App. 27 (3d Dist. 1904).

Fraudulent representations and concealment that would be grounds for a declaration of invalidity in Illinois include

a. willful concealment of the pendency of an indictment against the respondent for the crime of forgery and his or her guilt as evidenced by a plea of guilty (*Vachata v. Vachata,* 58 Ill.App.2d 78, 207 N.E.2d 129 (5th Dist. 1965) (abst.));

b. refusal to have children (*Maslow v. Maslow,* 117 Cal.App.2d 237, 255 P.2d 65 (1953); *Maslow* has been abrogated by *Liodas v. Sahadi,* 19 Cal.3d 278, 562 P.2d 316, 137 Cal.Rptr. 635 (1977)); and

c. false representations relating to pregnancy, *e.g.,* when a minor female induces a petitioner to marry her, stating that the child with which she is pregnant is his, and the respondent in reliance on that statement enters into the marriage and later learns that the child is not his, he can have the marriage annulled if he can prove that fact (*Arndt v. Arndt,* 336 Ill.App. 65, 82 N.E.2d 908 (1st Dist. 1948)).

An Illinois court distinguished *Arndt* and stated that a woman's fraudulent representation of pregnancy that induces a man to marry her is not grounds for annulment. *Hill v. Hill,* 79 Ill.App.3d 809, 398 N.E.2d 1048, 35 Ill.Dec. 98 (1st Dist. 1979). In *Hill,* the wife induced the husband to marry her by knowingly misrepresenting to him that she was pregnant with his child. The court said that in an action for annulment, unlike an action for rescission of a contract, a party's proof of false representation and reliance is not sufficient.

The courts have decided that the factors a – c above constitute misrepresentations that go directly to the essence of the marriage as set forth in *Louis v. Louis,* 124 Ill.App.2d 325, 260 N.E.2d 469 (1st Dist. 1970). This case involved a suit for annulment based on the wife's charges that the husband fraudulently represented before their marriage that he wanted children and was willing to consummate the marriage, which he thereafter refused to do. The court held that these representations were sufficient to sustain an annulment based on fraud even though the misrepresentations were an unwillingness to do a future act rather than a present fact. In handing down *Louis,* Illinois finally followed the majority view of other states.

In the absence of extraordinary circumstances, misrepresentations as to religion are not grounds to declare a marriage invalid in Illinois. If the complaining party brought an action to declare the marriage invalid on the grounds that he or she would not have married had he or she known the respondent's true religion, the case would be dismissed, and the marriage upheld. In *Wolfe v. Wolfe,* 76 Ill.2d 92, 389 N.E.2d 1143, 27 Ill.Dec. 735 (1979), the Illinois Supreme Court granted the husband an annulment based on his countercomplaint for annulment against his wife. The case was tried before an advisory jury and predicated under the old common law of annulment. In this case, the wife fraudulently misrepresented to her fiancé, the plaintiff, that her former husband was deceased and that she was a widow when, in fact, he was alive and she was divorced from him. The husband claimed that his religious beliefs would have prevented him from marrying a divorced woman while her former husband was still alive and that, had he known the truth, the marriage would never have been performed. The court held that fraudulent misrepresentations affecting religious convictions are a legally sufficient basis on which an annulment may be predicated if, based on circumstances surrounding each case, the misrepresentation does, in fact, go to the essence of the marriage relationship and to the essentials of the marriage. In this case, the court held that, because of the husband's deep religious belief and the fact that his faith was a foundation on which he built his life and conducted his everyday affairs, his religious commitment was such that a misrepresentation made to him by his wife went directly to the essentials of the marriage. The case does not alter the basic rule regarding misrepresentations as to disbelief, but holds that under the proper circumstances such a misrepresentation could be grounds for declaration of invalidity of marriage in Illinois.

When the facts set out in an action to invalidate a marriage performed in another state are based on the grounds of fraud, the facts of fraud must be determined by the law of the forum. However, the Illinois courts will take jurisdiction of a declaration of invalidity action if the parties are domiciled in Illinois and will apply the law of the place where the marriage was performed.

6. [4.39] Allegation: Force and Duress

That on [date**], at [**location**], a pretended marriage was entered into by petitioner because of the following threats and acts of duress performed on petitioner by respondent: [**list and describe**]. That said pretended marriage was entered into without the real, free, and voluntary consent of petitioner and against petitioner's will. That petitioner has not cohabited with respondent since the purported ceremony and that the purported marriage was never ratified.**

COMMENT: A party whose consent to the marriage was obtained by force and duress may have the marriage declared invalid unless that party fails to bring an action to declare the marriage invalid within the time prescribed in 750 ILCS 5/302(a)(1) — 90 days from the date knowledge was obtained of the described condition. Such a marriage is voidable, not void.

To obtain a declaration of invalidity based on force and duress, the petitioner must prove that the coercion, duress, or force practiced on him or her was unlawful and influenced the petitioner into entering the marriage. The coercion, duress, or force must also be proved to have been brought to bear by the respondent or with the respondent's procurement or connivance. *Short v. Short,* 265 Ill.App. 133 (3d Dist. 1932); *Schwartz v. Schwartz,* 29 Ill.App. 516 (4th Dist. 1888); *Diez v. Diez,* 73 Ill.App.2d 442, 219 N.E.2d 67 (4th Dist. 1966) (abst.). *Diez* has been overruled by *In re Driskell,* 197 Ill.App.3d 836, 555 N.E.2d 428, 144 Ill.Dec. 309 (4th Dist. 1990), *aff'd in part, rev'd in part sub nom. by Pape v. Byrd,* 145 Ill.2d 13, 582 N.E.2d 164, 163 Ill.Dec. 898 (1991).

If the petitioner has been arrested on the respondent's complaint charging him with being the father of her child and the petitioner marries the respondent in order to be released from arrest and from the charge of paternity, which was not made by the respondent maliciously or without probable cause, the petitioner cannot have the marriage annulled on the grounds of duress. *Smith v. Saum,* 324 Ill.App. 299, 58 N.E.2d 248 (1st Dist. 1944). However, in the illustration above, if the petitioner married the respondent because of unlawful arrest or detention or threats made in connection therewith or if the respondent maliciously prosecuted the petitioner without probable cause, the petitioner can have the marriage declared invalid. *Short, supra.*

Although coercion, force, and duress vitiate a marriage and are grounds for invalidity, defining the elements that constitute these three grounds for invalidity is often difficult. Elements such as age, mental attitude, physical power, and alleged actions of force used must be considered in determining whether coercion, force, and duress have in fact been practiced. *O'Brien v. Eustice,* 298 Ill.App. 510, 19 N.E.2d 137 (1st Dist. 1939).

7. [4.40] Allegation: Physical Incapacity

That, at the time of the pretended marriage, respondent was physically incapable of entering into the marriage state in that [describe physical problems**] and that the physical incapacity continues and appears to be incurable; that respondent fraudulently concealed knowledge of these facts from petitioner.**

COMMENT: Before the passage of the IMDMA, impotency alone was not a ground for annulment but only a statutory ground for divorce. *Linneman v. Linneman,* 1 Ill.App.2d 48, 116 N.E.2d 182 (1st Dist. 1953). However, fraudulent misrepresentation of one party's physical capacity to have sex, made to the other party, probably would invalidate a marriage. The majority view in other jurisdictions has held that physical incapacity or inability to consummate a marriage by sexual intercourse is a ground for annulment. *Millar v. Millar,* 175 Cal. 797, 167 P. 394 (1917); *Mirizio v. Mirizio,* 242 N.Y. 74, 150 N.E. 605 (1926).

However, 750 ILCS 5/301(2) states that the court shall enter its judgment declaring the invalidity of a marriage if:

> **a party lacks the physical capacity to consummate the marriage by sexual intercourse and at the time the marriage was solemnized the other party did not know of the incapacity.**

This subsection altered the existing Illinois law and brought Illinois into conformity with the majority view of sister jurisdictions. Under §301(2), fraudulent misrepresentation by the party not being able to consummate the marriage is no longer necessary for a declaration of invalidity; all that must be shown by the petitioner is the physical incapacity of the other spouse.

The IMDMA is silent as to whether psychogenic impotence due to mental and not physical causes is grounds for invalidity in Illinois, but the authors would take the position that the factors listed in §301(2) are all that need be shown by the moving party. The reason the opposing spouse lacked the physical capacity does not seem to be a factor, whether the incapacity was a result of physical or psychogenic infirmities, and this interpretation would be consistent with *Louis v. Louis,* 124 Ill.App.2d 325, 260 N.E.2d 469 (1st Dist. 1970). Other jurisdictions have decided this question and have held that psychogenic impotence is ground for annulment. *Rickards v. Rickards,* 53 Del. 134, 166 A.2d 425 (1960).

Pursuant to §302(2), either party may initiate a proceeding for a declaration of invalidity when the grounds are physical incapacity as long as the cause of action is brought no later than one year after the petitioner obtains knowledge of the described condition. This alters the earlier law under which only the injured party could bring the action if that party did not ratify the marriage by continuing to cohabit after learning of the impotency.

8. [4.41] Allegation: Intoxication

That on the [number**] day of [**month**], [**year**], petitioner and respondent drank alcoholic and intoxicating liquors that caused petitioner to become so intoxicated as to deprive**

petitioner of reason and the exercise of [his**] [**her**] powers of free will and consent; that while petitioner was in this condition, a pretended marriage occurred at approximately [**time**] on the [**number**] day of [**month**], [**year**], at [**location**], and upon becoming sober, petitioner, on learning what occurred, refused to ratify the marriage and has been living separate and apart from respondent since that time.**

COMMENT: If a party at the time of the marriage is so intoxicated as to be deprived of reason, the marriage may be invalidated. The marriage is voidable and not void; therefore, a proceeding must be brought to invalidate the marriage within the prescribed time limits of 750 ILCS 5/302(a)(1). If such a proceeding is not brought, the marriage is deemed ratified and cannot be later declared invalid.

9. [4.42] Allegation: Denial of Ratification

Before the enactment of the IMDMA, a plaintiff filing a complaint for annulment was prudent to include an allegation regarding the denial of his or her ratification of the alleged defective marriage. Although ratification of an otherwise voidable marriage was an affirmative defense and failure to plead non-ratification of cohabitation after discovery of the invalidating fact would not subject the complaint to being stricken, good pleading practice dictated that the complaint still include an allegation as to the lack of cohabitation after the discovery of the defect. Even though the statutory limitation periods under the IMDMA are of relatively short duration, it is still important that the moving party allege a denial of ratification in order to prevent the respondent from invoking the affirmative defense of ratification or laches. Even though the periods of time in which to bring the suit are short, there could exist a set of circumstances under which the moving party learned of the fact within a short period of time after the marriage ceremony but did not bring the invalidity proceeding until a long period of time thereafter. Should the petitioner learn of the defect immediately after the marriage but not bring the suit for a period of ten or eleven months thereafter, the affirmative defense of ratification could be raised. Therefore, the petitioner would be wise to include the allegation in his or her petition that, even though the defect was learned of, no ratification took place and that the suit was brought in a timely fashion.

Examples of specific pleadings of no ratification follow:

That petitioner has not voluntarily cohabited with respondent subsequent to petitioner's knowledge of the grounds for invalidity and did not and has not ratified the pretended or purported marriage.

[or**]**

That petitioner discovered respondent's fraud on or about the [number**] day of [**month**], [**year**], and since that time has not freely, or at all, ratified the purported or pretended marriage with respondent and has not lived with respondent in a relationship of husband and wife since obtaining knowledge of said fraud.**

Whether the respondent can overcome the petitioner's denial of ratification depends on the full knowledge of the facts and the length of time of free cohabitation as well as on the question of

when the spouse had full knowledge of the facts. As stated above, this is much more difficult under the IMDMA due to the short statutory periods for bringing the suit. Under the old common law, when there were no statutory periods of limitation, the defense of ratification was much more prevalent due to the fact that the parties could cohabit indefinitely without bringing the cause of action and, during that time, there would be more factors for the court to consider in determining whether laches or ratification should be invoked.

Ratification cannot occur if a marriage is absolutely void, *e.g.,* in the case of a marriage between first cousins in Illinois. *Arado v. Arado,* 281 Ill. 123, 117 N.E. 816 (1917).

10. [4.43] Allegation: Children

That no children were born to or adopted by the parties as a result of the marriage and that petitioner is not now pregnant.

[or**]**

That there are [number**] children, namely [**list**], of the pretended marriage.**

COMMENT: At common law, the child of a void marriage was illegitimate, while under §18 of the former Marriage Act, a child born of a marriage later declared void or voidable was legitimate. However, under 750 ILCS 5/212(c), "[c]hildren born or adopted of a prohibited or common law marriage are the lawful children of the parties," and under 750 ILCS 5/303, "[c]hildren born or adopted of a marriage declared invalid are the lawful children of the parties. Children whose parents marry after their birth are the lawful children of the parties." Thus, children born to a marriage prohibited under §212 or declared invalid pursuant to §301 are now deemed legitimate by the IMDMA without the necessity of any further affirmative action by either of the parties to the marriage or by the children.

Under common law, the chancery court had jurisdiction to enter an order for the care and custody of a minor child of the parties in an annulment suit as well as for the noncustodial parent's right to visitation. This order was discretionary and depended on the welfare of the child rather than the desires or the interests of the parties. *Cardenas v. Cardenas,* 12 Ill.App.2d 497, 140 N.E.2d 377 (1st Dist. 1956). This discretion in the chancery court has now been usurped by 750 ILCS 5/304, which states in part, "The provisions of this Act relating to property rights of the spouses, maintenance, support of children, and allocation of parental responsibilities on dissolution of marriage are applicable to non-retroactive judgments of invalidity of marriage only."

Thus, §304 does not alter the authority of a court in an action for declaration of invalidity to order child support payments and allocate parental responsibilities when the judgment is made nonretroactive. However, if the judgment is made retroactive ab initio, from the date the marriage took place, the court is without authority to order child support or allocate parental responsibilities. Interpreting this section, the authors feel that, when there are minor children born to or adopted by the parties as a result of their pretended marriage, a trial court would be obliged to enter a nonretroactive judgment as to the date of the marriage so that child support, the allocation of parental responsibilities, and other rights could be properly adjudicated. If the court found that the

judgment for invalidity should be retroactive to the date of the marriage ceremony, then the court would at the same time be denying itself the jurisdiction to order child support and allocate parental responsibilities, leaving these two issues unresolved. Because a trial court has the obligation of resolving all issues properly before it, it would seem that a judgment for invalidity of a marriage in which minor children are involved would always be made nonretroactive.

11. [4.44] Allegation: Allocation of Parental Responsibilities

That petitioner is a fit and proper person to have the sole care, custody, control, and education of the minor children born of the marriage, namely, [name**] and [**name**].**

COMMENT: See ILLINOIS FAMILY LAW: CHILD-RELATED ISSUES IN DISSOLUTION ACTIONS (IICLE®, 2022) for a historical and statutory discussion of the allocation of parental responsibilities. In determining the question of the allocation of parental responsibilities in a declaration of invalidity action, the same provisions as to the best interests of the child as provided in a dissolution action are controlling, to wit 750 ILCS 5/601.2, *et seq.*

12. [4.45] Allegation: Child Support

That petitioner does not have sufficient funds with which to adequately maintain and support [name**] and [**name**], the minor children born of the marriage to petitioner and respondent.**

That respondent is strong and able-bodied, employed as a [job title**], earning a salary of approximately $[**amount**] per [**year, hour, etc.**], and is well able to pay a suitable amount for the support of the children born of the parties.**

COMMENT: The same economic considerations and rules of thumb that the court uses to determine the amount of child support in a dissolution proceeding are applicable in a declaration of invalidity action. See 750 ILCS 5/505(a)(1) – 505(a)(5).

13. [4.46] Allegation: Marital Property

That during their purported marriage, the parties acquired the following items of marital property: [list items**].**

COMMENT: The most dramatic change made by the enactment of the IMDMA, in the authors' opinion, was the incorporation of 750 ILCS 5/305. This section is quoted and discussed in §4.4 above. The inclusion of this section in the IMDMA gives to a putative spouse in a declaration of invalidity proceeding the same rights as a spouse in a dissolution proceeding. Under former law, a putative spouse had no right to share in the estate of the other party and had no right to maintenance after an annulment. Now, however, a person who has gone through a marriage ceremony and has cohabited with another in the good-faith belief that they were married to each other acquires all the rights of a legal spouse for the period in which the putative spouse had no knowledge of the defect of the marriage. These rights would include rights of inheritance, rights to division of "marital property" under 750 ILCS 5/503, and rights to maintenance after the termination of the cohabitation of marriage.

When determining whether a putative spouse is entitled to any maintenance or entitled to an interest in any of the property acquired by the parties during their purported marriage, the court would follow the same provision contained in §503. Once a putative spouse learned that he or she was no longer legally married, all rights to property and support would be terminated as of that date, somewhat analogous to the date of separation in a dissolution proceeding. As in the latter, the court would have to consider the equities between the parties as of the date knowledge was obtained by the putative spouse, regardless of when the action to declare the marriage invalid was actually filed.

If there is a conflict between the rights of a putative spouse and a legal spouse, the court is directed to apportion the property, maintenance, and support among all the claimants as appropriate in the circumstances and in the interest of justice. The rights acquired by the putative spouse do not have priority over the rights of the legal spouse or those rights acquired by another putative spouse or spouses. By way of example, the putative spouse and the legal spouse may each have inheritance rights to the marital property or the husband's property attributable to the period of their respective marriages. *See In re Marriage of Flores,* 96 Ill.App.3d 279, 421 N.E.2d 393, 51 Ill.Dec. 885 (1st Dist. 1981).

If the moving party cohabits with another to whom he or she is not legally married and this cohabitation is not in good faith, in that the moving party had knowledge that he or she was not legally married, no marital rights would be acquired by that party regardless of the length of cohabitation. This did not change prior Illinois law, nor does §305 authorize the acquisition of marital rights by a party who merely cohabits without any intent to be married, without any belief that the parties were in fact married, or without having gone through a marriage ceremony. Thus, the elements contained in the section must be strictly adhered to for a putative spouse to acquire rights under it. *See also Hewitt v. Hewitt,* 77 Ill.2d 49, 394 N.E.2d 1204, 31 Ill.Dec. 827 (1979); *Daniels v. Retirement Board of Policeman's Annuity & Benefit Fund,* 106 Ill.App.3d 412, 435 N.E.2d 1276, 62 Ill.Dec. 304 (1st Dist. 1982); *Blumenthal v. Brewer,* 2016 IL 118781, 69 N.E.3d 834, 410 Ill.Dec. 289; *In re Marriage of Allen,* 2016 IL App (1st) 151620, 62 N.E.3d 312, 407 Ill.Dec. 67.

14. [4.47] Allegation: Restoration of Former Name

That petitioner's [maiden name**] [**former name**] was [**name**].**

COMMENT: When a marriage is declared invalid, either because it is void or voidable, parties revert to their former status and automatically resume their former names, notwithstanding the fact that no specific request is made in the petition for declaration of invalidity for the restoration of a maiden or former name.

Under the old statute, Ill.Rev.Stat. (1963), c. 40, ¶17, upon the granting of a divorce, the court had the discretion and right to allow the wife to resume the use of her maiden name or the name of any former husband. In *Reinken v. Reinken,* 351 Ill. 409, 184 N.E. 639 (1933), and *In re Westerman's Will,* 401 Ill. 489, 82 N.E.2d 474 (1948), *superseded by statute as stated in In re Marriage of Dorks,* 98 Ill.App.3d 1046, 425 N.E.2d 49, 54 Ill.Dec. 537 (4th Dist. 1981), it was stated that after a decree of divorce a wife may resume her maiden name, even though permission

to do so is not given in the divorce decree, when her so doing does not interfere with the rights of others. The IMDMA does not have a provision specifically codifying that part of c. 40, ¶17, of the old Act; therefore, *Reinken* and *Westerman* would be controlling and allow the wife to use her maiden name or former married name without specifically so requesting in the judgment for dissolution of marriage.

H. Prayer

1. [4.48] Introduction

WHEREFORE, petitioner [requests**] [**prays**] as follows:**

A.

B.

2. [4.49] Prayer: Declaration of Invalidity of Marriage

When a marriage is voidable:

That the marriage of petitioner and respondent be declared invalid and that a Judgment for Declaration of Invalidity of Marriage be entered, declaring said marriage invalid ab initio and retroactive to the date of the marriage.

[or**]**

That the marriage of petitioner and respondent be declared invalid and that a Judgment for Declaration of Invalidity of Marriage be entered, said Judgment being nonretroactive and being effective as of the date of the entry of this Judgment.

That this Court appoint a guardian ad litem for respondent [when appropriate**].**

COMMENT: Use "declaring said marriage invalid as of the date of this Judgment" when requesting child support.

When a marriage is void:

That the purported marriage of petitioner and respondent be declared null and void.

3. [4.50] Prayer: Allocation of Parental Responsibilities

That petitioner have the temporary and permanent care, custody, control, and education of the [number**] minor children born to petitioner and respondent, namely, [**name**], now [**number**] years old, born [**date**] [**list all children**].**

COMMENT: As discussed in §4.43 above, the court has jurisdiction to enter an order regarding the allocation of parental responsibilities and support of the minor child or children if the judgment entered is nonretroactive.

4. [4.51] Prayer: Child Support

That respondent be ordered to pay to petitioner a reasonable sum as and for the temporary and permanent child support for [name**] and [**name**], minor children born to the parties.**

COMMENT: See the comment at §4.43 above.

5. [4.52] Prayer: Distribution of Marital Property

That the parties be awarded and assigned their division of marital property in just proportions.

6. [4.53] Prayer: Restoration of Name

That petitioner be permitted to resume the use of [her maiden name of**] [**the name of her former husband**] [**state name to be resumed**].**

7. [4.54] Prayer: General Relief

That petitioner have any other and further relief as to this Court seems equitable and just.

I. [4.55] Date, Signature, and Verification

_____
[Plaintiff**]**

VERIFICATION

STATE OF ILLINOIS)
) ss.
COUNTY OF)

[Name**], being first duly sworn on oath, deposes and says that the contents of the preceding Petition are true (except as to matters alleged to be on information and belief as those he believes to be true).**

_____

SUBSCRIBED AND SWORN TO BEFORE ME THIS __ DAY OF _____, 20__.

_____
NOTARY PUBLIC

IV. JUDGMENT

A. [4.56] Basic Form of Judgment

[Caption]

This cause coming on to be heard on petitioner's Petition for Declaration of Invalidity of Marriage and [respondent's Response thereto**] [**it appearing that respondent was served by publication or by personal service as provided by law and failed to appear and/or respond and was defaulted**], and the Court having heard the evidence and witnesses in open Court, and a certificate of evidence being filed [**if local law requires a transcript to be filed**], the Court, being fully advised in the premises, finds as follows:**

1. That the Court has jurisdiction of the subject matter and of the parties to this case.

2. That on the [number**] day of [**month**], [**year**], at [**location**], the parties went through a marriage ceremony.**

3. That [state findings as to grounds for declaration of invalidity**].**

4. That said marriage is [void**] [**voidable**].**

5. That petitioner has not committed any acts of ratification and has at all times repudiated the marriage upon learning of its defectiveness.

6. That there were no children born to the parties.

[or]

6. That there were children born to the parties, whose names and ages are [list**], who are legitimate under Illinois law.**

It is therefore ordered, adjudged, and decreed:

a. That the marriage between petitioner, [name**], and respondent, [**name**], be declared invalid and dissolved as if a ceremony had never been entered into and that a Judgment for Declaration of Invalidity of Marriage be entered herein, said Judgment being [**retroactive**] [**nonretroactive**].**

b. That [respondent**] [**petitioner**] shall transfer to [**petitioner**] [**respondent**] the following described property:**

c. That the children of the parties, namely, [name**] and [**name**], are legitimate, that the sole care, control, and education of said children shall be awarded to petitioner, and that respondent shall have the following rights of visitation:**

d. That respondent shall pay to petitioner as and for child support of the minor children the sum of $[amount**] per week [**per child**] commencing [**with the entry of this Judgment for Declaration of Invalidity of Marriage**] [**on _____, 20__**].**

e. That [petitioner**] [**respondent**] shall pay to [**respondent**] [**petitioner**] the sum of $[**amount**] per [**time period**] as and for maintenance and support of [**respondent**] [**petitioner**].**

ENTER:

_____
JUDGE

COMMENT: Counsel is reminded to make an original and at least four copies of the judgment so that, after the original is filed with the court, each attorney has two copies (one for each attorney's file and one for each client).

B. [4.57] Judgment Upholding Marriage and Denying Declaration of Invalidity

[Caption]

This matter having been reached on the regular contested trial calendar and heard on petitioner's Petition for Declaration of Invalidity of Marriage and respondent's Response thereto, the parties appearing in open court, and the Court having heard the testimony of witnesses, examined the documentary evidence, heard the arguments of the attorneys for the respective parties, and being fully informed, it is hereby ordered, adjudged, and decreed that the marriage between petitioner, [name**], and respondent, [**name**], is declared valid and is hereby affirmed.**

ENTER:

_____
JUDGE

5 Divorce Against the Absent Spouse

DEREK J. BRADFORD
Bradford & Gordon, LLC
Chicago

I. Jurisdiction

A. [5.1] In Personam vs. In Rem Jurisdiction
B. [5.2] Prerequisites for Jurisdiction To Grant a Judgment
   1. [5.3] Residency
   2. [5.4] Grounds
   3. [5.5] Proper Service of Summons
      a. [5.6] Personal Service
      b. [5.7] Constructive/Substituted Service
      c. [5.8] Service by Special Order of the Court
      d. [5.9] Service by Publication
         (1) [5.10] Statutory requirements
         (2) [5.11] In rem jurisdiction
         (3) [5.12] Due inquiry
C. [5.13] Due Process and the Illinois Long-Arm Statute — Limits on the Exercise of the Courts' Jurisdiction
D. [5.14] Objections to Jurisdiction over the Person
E. Effect of Jurisdiction on Various Issues
   1. [5.15] Obtaining and Modifying Maintenance Awards and Decrees
   2. [5.16] Property Distribution
   3. Child Support
      a. [5.17] In General
      b. Specific Illinois and Federal Statutes
         (1) Illinois statutes
            (a) [5.18] Illinois Marriage and Dissolution of Marriage Act
            (b) [5.19] Uniform Interstate Family Support Act
            (c) [5.20] Other Illinois statutes
         (2) [5.21] Federal statutes
            (a) [5.22] Full Faith and Credit for Child Support Orders Act
            (b) [5.23] Other federal statutes
   4. [5.24] Awards of Attorneys' Fees
   5. [5.25] Awards of Educational Expenses
   6. [5.26] Child Custody
   7. [5.27] Foreign Country Orders vs. Illinois Orders on Custody
   8. [5.28] Partition

II. [5.29] Limitations on the Jurisdiction of the Courts To Proceed

A. [5.30] Default Judgments
B. [5.31] Parental Kidnaping Prevention Act and Uniform Child-Custody Jurisdiction and Enforcement Act

IV. [5.67] Federal Legislation Relative to Collection of Child Support and Maintenance

A. [5.68] Federal Parent Locator Service
B. [5.69] Garnishment of Federal Compensation
   1. [5.70] Implementing Regulations
   2. [5.71] Federal Limitations
C. [5.72] Tax Intercepts
D. [5.73] Allotments from Pay for Support Owed by Uniformed Services Members on Active Duty

V. [5.74] Services Provided to Private Counsel and Their Clients by the State of Illinois

I. JURISDICTION

A. [5.1] In Personam vs. In Rem Jurisdiction

The two kinds of jurisdiction required for a court to enter orders subject to full faith and credit are in rem or subject-matter jurisdiction and in personam or personal jurisdiction.

1. In rem or subject-matter jurisdiction is the court's authority to enforce orders relating to the specific nature of the case. This type of jurisdiction is generally governed by (a) Articles IV, §§3 and 9; V, §6; and VI, §§3 – 9 of the Illinois Constitution; (b) 735 ILCS 5/1-101, *et seq.;* and (c) Supreme Court Rules 301 – 308 (for dissolution of marriage purposes, subject-matter jurisdiction is set forth at 750 ILCS 5/401(a), which merely requires that one of the spouses must be a resident of the state of Illinois (see §5.3 below)); and

2. In personam or personal jurisdiction is the court's ability to enforce orders against a particular person and is governed by (a) 735 ILCS 5/2-209 and 5/2-301; (b) 750 ILCS 36/201, *et seq.;* and (c) S.Ct. Rule 201(*l*).

In personam jurisdiction confers on the court the ability to enter valid orders and is therefore required before the court may enter orders granting child support, maintenance, injunctive relief, allocation of parental responsibilities, property division, or requiring the defendant to pay money such as attorneys' fees. *In re Marriage of Passiales,* 144 Ill.App.3d 629, 494 N.E.2d 541, 548, 98 Ill.Dec. 419 (1st Dist. 1986).

It is essential to the validity of a judgment requiring in personam jurisdiction that the court have both subject-matter jurisdiction and in personam jurisdiction. *Christiansen v. Saylor,* 297 Ill.App.3d 719, 697 N.E.2d 1188, 232 Ill.Dec. 258 (2d Dist. 1998). A party over whom a court failed to acquire jurisdiction may, at any time, attack and vacate, either directly or collaterally, a judgment the court entered against the party. *Id.* See also Robert W. Cook, *Jurisdiction in Dissolution of Marriage Cases,* 77 Ill.B.J. 266 (1989).

However, the authority to dissolve the marriage is considered a "quasi in rem proceeding," meaning personal jurisdiction over the defendant is not required. The court may lack personal jurisdiction over the defendant, but may still have the authority to dissolve the marriage if other issues requiring personal jurisdiction over the defendant are reserved. *In re Marriage of Parks,* 122 Ill.App.3d 905, 461 N.E.2d 681, 78 Ill.Dec. 97 (2d Dist. 1984).

Generally, the authority to grant a judgment for dissolution of marriage is entirely statutory in origin and nature. The court's authority is limited by the legislative grants contained in the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq.,* and the court must act within the statutory authority granted and may not rely on its general equity powers or the unlimited jurisdiction conferred on the court by the 1970 Illinois Constitution. *In re Marriage of Cohn,* 94 Ill.App.3d 732, 419 N.E.2d 729, 50 Ill.Dec. 621 (2d Dist. 1981), *aff'd,* 93 Ill.2d 190 (1982); *In re Marriage of Garrison,* 99 Ill.App.3d 717, 425 N.E.2d 518, 54 Ill.Dec. 653 (2d Dist. 1981); *In re Marriage of Rifkin,* 114 Ill.App.3d 555, 449 N.E.2d 173, 70 Ill.Dec. 229 (1st Dist. 1983).

Like a dissolution action, an action for legal separation is outside the court's general equitable powers, and the jurisdiction to hear and determine these causes of action is set by statutory limits. *Galvin v. Galvin,* 72 Ill.2d 113, 378 N.E.2d 510, 19 Ill.Dec. 9 (1978). The jurisdictional requirements for a legal separation action are set forth at 750 ILCS 5/402 and 5/403 and require that the action be brought in the county in which the respondent resides or in which the parties last resided together as spouses. If the respondent cannot be found within the state, the action may be brought in the county in which the petitioner resides. Counsel should be aware that the parties, by their conduct or their pleadings within the context of the litigation, may empower the court to adjudicate property rights even if the ultimate judgment is in the form of a legal separation. *In re Marriage of Leff,* 148 Ill.App.3d 792, 499 N.E.2d 1042, 102 Ill.Dec. 262 (2d Dist. 1986); *Boyd v. Boyd,* 58 Ill.App.2d 1, 207 N.E.2d 350 (5th Dist. 1965); *In re Marriage of Rhodes,* 326 Ill.App.3d 386, 760 N.E.2d 592, 260 Ill.Dec. 175 (2d Dist. 2001). Subject-matter jurisdiction cannot be conferred on the trial court by the consent of the parties. *Chrastka v. Chrastka,* 2 Ill.App.3d 722, 277 N.E.2d 729 (2d Dist. 1971).

A petition for legal separation must allege residence so as to satisfy the venue requirement relating to jurisdiction under IMDMA §402. *Briney v. Briney,* 223 Ill.App. 119 (1st Dist. 1921). The omission of a venue allegation, however, is not necessarily fatal as it may be supplied by amendment before decree upon remand to the trial court, and transfer rather than dismissal is the disposition provided by statute when the jurisdictional defect can be removed. *Chrastka, supra,* 277 N.E.2d at 731.

Counsel may challenge the jurisdiction of the trial court in a separate maintenance action. 735 ILCS 5/2-301; *Hirsh v. Hirsh,* 81 Ill.App.2d 354, 225 N.E.2d 42 (2d Dist. 1967); *Powers v. Powers,* 46 Ill.App.2d 57, 196 N.E.2d 731 (1st Dist. 1964). But see §5.14 below. A spouse can invoke the jurisdiction of the court in a separate maintenance action without being a resident of the county in which the action is commenced if the other spouse is a resident of that county. *Garrison v. Garrison,* 107 Ill.App.2d 311, 246 N.E.2d 9 (2d Dist. 1969).

A party asserting in personam jurisdiction over the opposing party has the burden to establish such jurisdiction when it is challenged by a preponderance of the evidence. *Finnegan v. Les Pourvoiries Fortier, Inc.,* 205 Ill.App.3d 17, 562 N.E.2d 989, 150 Ill.Dec. 186 (1st Dist. 1990).

If the court has in rem jurisdiction but lacks in personam jurisdiction over the defendant, it should not grant the defendant's motion to quash service, as the granting of that motion would destroy the court's exercise of its in rem jurisdiction as well as its in personam jurisdiction. *In re Marriage of Brown,* 154 Ill.App.3d 179, 506 N.E.2d 727, 106 Ill.Dec. 927 (4th Dist. 1987).

In *In re Marriage of Snider,* 305 Ill.App.3d 697, 712 N.E.2d 947, 238 Ill.Dec. 843 (2d Dist. 1999), the appellate court held that a trial court properly ruled that a party could not generally appear in an in rem grounds proceeding without waiving a special and limited appearance and objection to in personam jurisdiction as to remaining issues. Any action that recognizes the case as being in court amounts to an entry of a general appearance unless the action is taken solely to object to jurisdiction. But see 735 ILCS 5/2-301, as discussed in §5.14 below.

The general constitutional standard for determining whether a state can enter a binding judgment against a nonresident under the principles of due process is whether a defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Kulko v. Superior Court of California,* 436 U.S. 84, 56 L.Ed.2d 132, 98 S.Ct. 1690, 1696 – 1697 (1978). The court must look to some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state. 98 S.Ct. at 1698. The critical focus in any jurisdictional analysis must be the interrelationship among the parties, the forum state, and the nature of the litigation.

In dissolution of marriage cases, the standard is modified. A trial court's jurisdiction to grant a dissolution of marriage is not to be tested by the minimum contact standard of *Kulko, supra*. In *International Shoe Co. v. State of Washington, Office of Unemployment Compensation & Placement,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), and *Williams v. State of North Carolina,* 317 U.S. 287, 87 L.Ed. 279, 63 S.Ct. 207 (1942), the U.S. Supreme Court established that due process does not require a state court to have in personam jurisdiction over an individual litigant in order to adjudicate the status of one of its residents. Thus, a state may grant a dissolution to a resident or determine parental rights of resident children even if the state does not have significant minimum contacts with the out-of-state spouse or parent.

The United States Supreme Court adopted the "divisible divorce doctrine" in *Estin v. Estin,* 334 U.S. 541, 92 L.Ed. 1561, 68 S.Ct. 1213, 1218 (1948). The divisible-divorce doctrine recognizes the trial court's ability to grant a divorce to one domiciled in the state even when it lacks in personam jurisdiction over the absent spouse. The divisible-divorce doctrine does not give jurisdiction to the trial court to adjudicate the incidents of marriage, such as maintenance, child support, and payment of attorneys' fees and costs.

B. [5.2] Prerequisites for Jurisdiction To Grant a Judgment

There are two jurisdictional requirements that must be met under the IMDMA. The first is the necessity of establishing residency (750 ILCS 5/401(a)), and the second is establishing grounds for the dissolution or separate maintenance (750 ILCS 5/403(a)(3)) or for the declaration of invalidity of marriage (750 ILCS 5/301). Proper service of summons is also required.

1. [5.3] Residency

The word "residence" when used in relation to a divorce proceeding, refers to a place intended to serve as a person's permanent home. *Garrison v. Garrison,* 107 Ill.App.2d 311, 246 N.E.2d 9 (2d Dist. 1969). The starting points for any analysis are 735 ILCS 5/2-209(a)(5) and 750 ILCS 5/401. A person may have more than one residence but can have only one domicile. *Berlingieri v. Berlingieri,* 372 Ill. 60, 22 N.E.2d 675 (1939). To establish residency, one must establish physical presence in the location coupled with an intention of remaining in that location. *Hughes v. Illinois Public Aid Commission,* 2 Ill.2d 374, 118 N.E.2d 14 (1954). The establishment of residence requires a union of act and intention. *Morning v. Morning,* 9 Ill.App.3d 555, 291 N.E.2d 875 (5th Dist. 1973). Residency of either party satisfies the jurisdictional requirement under the IMDMA. 750 ILCS 5/401; *Garrison, supra.* The jurisdictional residency requirement does not require the party bringing the action to remain in the state for the entire 90-day period as long as the party does not acquire a new domicile. *Cohn v. Cohn,* 327 Ill.App. 22, 63 N.E.2d 618 (4th Dist. 1945).

The residency requirement may be proved by the parties' pleadings or by in-court testimony. *In re Marriage of Weiss,* 87 Ill.App.3d 643, 409 N.E.2d 329, 42 Ill.Dec. 714 (1st Dist. 1980). The court need not make a specific finding of residency as a jurisdictional prerequisite to a valid order; a general finding that the court has jurisdiction over the person and the subject matter is sufficient. *In re Marriage of Parks,* 122 Ill.App.3d 905, 461 N.E.2d 681, 78 Ill.Dec. 97 (2d Dist. 1984).

PRACTICE POINTER

✓ As a matter of good practice, insert a specific finding in the order dissolving the marriage that the residency requirement has been satisfied and that the court has jurisdiction over the persons, subject matter, and jurisdiction to make the custody determination set forth in the judgment.

The court has jurisdiction to enter temporary relief if a spouse maintains a residence or a military presence in Illinois at the commencement of the action even if that residence has not been for a full 90-day period. *In re Marriage of Mates,* 156 Ill.App.3d 26, 508 N.E.2d 1181, 108 Ill.Dec. 604 (2d Dist. 1987).

United Bank of Loves Park v. Dohm, 115 Ill.App.3d 286, 450 N.E.2d 974, 71 Ill.Dec. 286 (2d Dist. 1983), addressed the perplexing question of how to determine a defendant's "usual place of abode" when the defendant maintains more than one residence, finding that the court must consider on a case-by-case basis whether substituted service at any chosen dwelling place is reasonably likely to provide the respondent with actual notice of the proceedings.

2. [5.4] Grounds

In *Wilson v. Smart,* 324 Ill. 276, 155 N.E. 288, 291 (1927), the Illinois Supreme Court stated:

> **Divorce proceedings are, however, in some aspects purely in personam, while in others they are clearly in rem. . . . In the strict sense of the term, a proceeding in rem is one which is taken directly against property, or one which is brought to enforce a right in the thing itself. The distinguishing characteristic of judgments in rem is that they operate directly upon the property, and are binding upon all persons, in so far as their interests in the property are concerned. [**Citations omitted.**]**

735 ILCS 5/2-209 (the Illinois long-arm statute) provides that an Illinois court may maintain jurisdiction over a person who is not a resident or citizen of the state. Section 2-209(a)(5) states:

> **With respect to actions of dissolution of marriage, declaration of invalidity of marriage and legal separation, the maintenance in this State of a matrimonial domicile at the time this cause of action arose or the commission in this State of any act giving rise to the cause of action [**is sufficient for the court to acquire jurisdiction**].**

735 ILCS 5/2-208 and 5/2-209 set forth the acts that submit an individual to personal jurisdiction in the Illinois courts. The court has personal jurisdiction over a natural person who has been served with summons and petition if the natural person was present within the state when served (735 ILCS 5/2-209(b)(1)), or is a mature person domiciled or a resident within this state when the cause of action arose, the action was commenced, or process served (735 ILCS 5/2-209(b)(2)).

The court may have jurisdiction over an individual who has been served outside the State of Illinois if the person has committed an act that submits him or her to the jurisdiction of the Illinois courts. 735 ILCS 5/2-209(a) provides:

> **Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:**
>
> *** * ***
>
> **(3) The ownership, use, or possession of any real estate situated in this State;**
>
> *** * ***
>
> **(5) With respect to actions of dissolution of marriage, declaration of invalidity of marriage and legal separation, the maintenance in this State of a matrimonial domicile at the time this cause of action arose or the commission in this State of any act giving rise to the cause of action;**
>
> **(6) With respect to actions brought under the Illinois Parentage Act of 1984, as now or hereafter amended, or under the Illinois Parentage Act of 2015 on and after the effective date of that Act, the performance of an act of sexual intercourse within this State during the possible period of conception;**
>
> *** * ***
>
> **(8) The performance of sexual intercourse within this State which is claimed to have resulted in the conception of a child who resides in this State;**
>
> **(9) The failure to support a child, spouse or former spouse who has continued to reside in this State since the person either formerly resided with them in this State or directed them to reside in this State;**
>
> *** * ***
>
> **(13) The ownership of an interest in any trust administered within this State.**

Personal service of summons may be made on any party outside the state. If it is made on a citizen or resident of this state or on a person who has submitted to the jurisdiction of the courts of this state, it has the force and effect of personal service of summons within the state; otherwise, it has the force and effect of service by publication. 735 ILCS 5/2-209(d), 5/2-209(e); 735 ILCS 5/2-208; *Kotlisky v. Kotlisky,* 195 Ill.App.3d 725, 552 N.E.2d 1206, 142 Ill.Dec. 465 (1st Dist. 1990).

In *Hawes v. Hawes,* 130 Ill.App.2d 546, 263 N.E.2d 625 (2d Dist. 1970), the appellate court stated that when the wife maintained no marital domicile in Illinois, never resided or committed an act within the state, and failed to follow her husband into Illinois, she did not have sufficient contact with the state to subject her to personal jurisdiction of the Illinois courts. However, the trial court could grant the divorce decree as it had in rem jurisdiction to affect the status of the parties and to grant the dissolution but could not make orders relating to custody or maintenance.

The court in *Haymond v. Haymond,* 60 Ill.App.3d 969, 377 N.E.2d 563, 18 Ill.Dec. 274 (2d Dist. 1978), stated that the pendency of an out-of-court divorce action does not automatically deprive the trial court of jurisdiction over the case. *Haymond* further held that the maintenance of a marital domicile in Illinois during four and one-half years of the six and one-half years that the parties were married and cohabited as spouses constituted a "substantial course of activity in the State" within the meaning of the due-process requirements for exercise of in personam jurisdiction over the parties. 377 N.E.2d at 568.

3. [5.5] Proper Service of Summons

Proper service of summons is a prerequisite to obtaining jurisdiction over a party. If the summons has not been properly served, any order the court enters against the respondent is void, regardless of whether the person had actual knowledge of the proceedings. *Sarkissian v. Chicago Board of Education,* 201 Ill.2d 95, 776 N.E.2d 195, 267 Ill.Dec. 58 (2002).

When a husband and wife were married in Illinois and established a matrimonial domicile in Illinois, acts of physical cruelty alleged as grounds for the divorce occurred in Illinois, and the husband was personally served with process in a foreign country, the Illinois court had personal jurisdiction over the husband to maintain a divorce action. *Farah v. Farah,* 25 Ill.App.3d 481, 323 N.E.2d 361 (1st Dist. 1975).

PRACTICE POINTER

✓ Always verify that the summons has been served within 30 days of issuance by the clerk before filing the return of service, as summons served more than 30 days after issuance are void and may require an alias summons be issued.

a. [5.6] Personal Service

Jurisdiction over a person cannot be had by serving a notice; a court acquires jurisdiction over a person only after proper service of a summons, except in those cases in which the respondent voluntarily appears or is permitted to intervene. *Augsburg v. Frank's Car Wash, Inc.,* 103 Ill.App.3d 329, 431 N.E.2d 58, 59 Ill.Dec. 39 (2d Dist. 1982).

A general appearance waives an objection that there was an irregularity or defect with respect to process or notice or that process was void and also waives defects in service of process or notice or in their return. *Konchar v. Knox,* 7 Ill.App.2d 437, 129 N.E.2d 615 (1st Dist. 1955) (abst.). If there is no personal service on a respondent in a dissolution case and no appearance or pleadings are filed by the respondent, the trial court is without jurisdiction to enter a personal order against the respondent for the payment of maintenance, child support, attorneys' fees, or court costs. *Mowrey v. Mowrey,* 328 Ill.App. 92, 65 N.E.2d 234 (1st Dist. 1946).

In regard to which of two Illinois circuit courts having concurrent jurisdiction has jurisdiction over a particular controversy, the filing of the complaint is the beginning of suit and therefore gives the court in which the complaint was first filed jurisdiction. It is not necessary to the acquisition of exclusive jurisdiction of a controversy that the court also obtain jurisdiction over the person of the defendant by service of process. *Berkshire Life Ins. Co. v. Jackson Realty & Management Corp.,* 328 Ill.App. 318, 65 N.E.2d 578 (1st Dist. 1946) (abst.).

The affidavit of service should be considered prima facie evidence that process was properly served, and it should not be set aside unless the return has been impeached by clear and satisfactory evidence. *In re Jafree,* 93 Ill.2d 450, 444 N.E.2d 143, 67 Ill.Dec. 104 (1982).

735 ILCS 5/2-208 governs personal service outside the state. Section 2-208(a) provides:

> **Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication.**

735 ILCS 5/2-209(b) states that a court may exercise jurisdiction in any action arising within or without the state against any person who

> **(1) [**i**]s a natural person present within this State when served;**
>
> **(2) [**i**]s a natural person domiciled or resident within this State when the cause of action arose, the action was commenced, or process was served.**

735 ILCS 5/2-209(d) provides that

> **[**s**]ervice of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.**

Once a court acquires in personam jurisdiction over the defendant, orders of the court are then entitled to full faith and credit in foreign jurisdictions.

Personal service on the defendant husband was sufficient to allow the court to acquire in personam jurisdiction over a Tennessee resident who was served in Illinois while he was in Illinois to celebrate his parents' 50th wedding anniversary. *In re Marriage of Pridemore,* 146 Ill.App.3d 990, 497 N.E.2d 818, 100 Ill.Dec. 640 (4th Dist. 1986).

In *Geiermann v. Geiermann,* 12 Ill.App.2d 484, 139 N.E.2d 838 (1st Dist. 1957) (abst.), there was an attempt to serve summons on the wife, a nonresident of Illinois, but the summons was returned "not found." An attorney not employed by the wife but assuming to act solely under authorization by her mother to secure funds from the husband for the wife's support entered an appearance on the wife's behalf. However, the court lacked jurisdiction under these circumstances, and any decree entered upon default was void.

Parties to a lawsuit under common law are privileged from arrest while attending court or going to or from court, but they have no immunity from service of civil process. *Jones v. Jones,* 40 Ill.App.2d 217, 189 N.E.2d 33 (1st Dist. 1963).

Courts do not favor those individuals who seek to evade or impede the service of process. *Edward Hines Lumber Co. v. Smith,* 29 Ill.App.2d 35, 172 N.E.2d 429 (2d Dist. 1961).

An insane person or a person under a mental disability cannot enter an appearance or waive service of process. *Behrensmeyer v. Kreitz,* 135 Ill. 591, 26 N.E. 704 (1891).

The Illinois Legislature, in enacting 735 ILCS 5/2-208 and 5/2-209, intended to assert long-arm jurisdiction to the extent permitted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Lindley v. St. Louis-San Francisco Ry.,* 407 F.2d. 639 (7th Cir. 1968).

b. [5.7] Constructive/Substituted Service

Under 735 ILCS 5/2-203(a), service of summons on an individual defendant must be made by (1) leaving a copy with the defendant personally or (2) leaving a copy at the defendant's usual place of abode with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons, provided the officer or other person making service also sends a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode. The underlying consideration in determining "usual place of abode" for service of summons is whether substituted service at a chosen dwelling place is reasonably likely to provide the respondent with actual notice of the proceedings. *United Bank of Loves Park v. Dohm,* 115 Ill.App.3d 286, 450 N.E.2d 974, 71 Ill.Dec. 286 (2d Dist. 1983).

When personal jurisdiction is based on constructive service under 735 ILCS 5/2-203(a), strict compliance with every requirement of the statute must be shown. *ITT Thorp Corp. v. Hitesman,* 115 Ill.App.3d 202, 450 N.E.2d 11, 70 Ill.Dec. 798 (3d Dist. 1983).

Nibco, Inc. v. Johnson, 98 Ill.2d 166, 456 N.E.2d 120, 124, 74 Ill.Dec. 618 (1983), should be consulted for a good discussion as to whether substituted personal service on the defendant was actually made on a "member of the defendant's household."

A statement on return of service that a "copy of the summons was mailed to the defendant at the above address" was sufficient to comply with the statutory requirement that the officer "send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode" when effecting substituted service under 735 ILCS 5/2-203(a)(2). *Alvarez v. Feiler,* 174 Ill.App.3d 320, 528 N.E.2d 354, 356 – 357, 123 Ill.Dec. 809 (1st Dist.), *appeal denied,* 123 Ill.2d 555 (1988).

735 ILCS 5/2-203(b) requires that the officer or other person making the return of service of summons must, in the certificate or in a record filed and maintained in the sheriff's office or in the affidavit, "(1) identify as to sex, race, and approximate age the defendant or other person with whom the summons was left and (2) state the place where (whenever possible in terms of an exact street address) and the date and time of the day when the summons was left with the defendant or other person."

The portion of the sheriff's return stating that substituted service was made at the defendant's "usual place of abode" may be attacked by affidavit, and if there is no counteraffidavit contradicting it, an affidavit attacking service is taken as true. *Four Lakes Management & Development Co. v. Brown,* 129 Ill.App.3d 680, 472 N.E.2d 1199, 84 Ill.Dec. 803 (2d Dist. 1984). In the case of substituted personal service, the return of the officer is not to be set aside merely on uncorroborated testimony of the person on whom process has been served but only on clear and satisfactory evidence. *Alvarez, supra*.

When a deputy who made substituted personal service testified in support of the recitals in his return and the movant offered in rebuttal only bare assertions contained in an affidavit that the person served was not a member of her household, the weight to be given to the assertions in the affidavit and to the testimony of the deputy were particularly within the province of the trial court. *Nibco, supra,* 456 N.E.2d at 124.

When the deputy sheriff who served summons on the defendant's wife testified that he did not tell the defendant's wife of the summons and did not recall having mailed the defendant a copy of the summons, service of the summons was properly quashed and the default judgment properly set aside. *Tomaszewski v. George,* 1 Ill.App.2d 22, 116 N.E.2d 88 (1st Dist. 1953).

A defendant on whom process was served by substituted service and against whom an ex parte order of default was entered may properly challenge jurisdiction of the court and the order of default by filing an appearance and a motion to quash service of process, along with a supporting affidavit. *Prudential Property & Casualty Insurance Co. v. Dickerson,* 202 Ill.App.3d 180, 559 N.E.2d 854, 147 Ill.Dec. 514 (1st Dist. 1990).

An affidavit of service should be considered prima facia evidence that process was properly served; it should not be set aside unless the return has been impeached by clear and satisfactory evidence. A person's mere testimony that he or she was not served with a summons is insufficient to overcome the presumption of service. *Pineschi v. Rock River Water Reclamation District,* 346 Ill.App.3d 719, 805 N.E.2d 1241, 282 Ill.Dec. 224 (2d Dist. 2004).

Unlike personal service, no presumption of validity of service arises from serving a member of the defendant's family at his or her usual place of abode; moreover, when the return is challenged by affidavit and there is no counteraffidavit, the return itself is not even evidence, and absent testimony by the deputy or process server, the affidavit may be taken as true and the purported service of summons quashed. *Sterne v. Forrest,* 145 Ill.App.3d 268, 495 N.E.2d 1304, 99 Ill.Dec. 569 (2d Dist. 1986). However, a counteraffidavit or testimony from the person who executed service on a family member may not be necessary if the usual place of abode may be proven by other evidence (for example, via documentary evidence and/or cross examination of the party whose usual place of abode is at issue). *Department of Healthcare and Family Services ex rel. Sanders v. Edwards,* 2022 IL App (1st) 210409, 201 N.E.3d 75, 460 Ill.Dec. 417.

Nothing under §2-203 requires that the person serving the summons and the person mailing a copy of the same must be the same person. *Mid-America Federal Savings & Loan Ass'n v. Kosiewicz,* 170 Ill.App.3d 316, 524 N.E.2d 663, 120 Ill.Dec. 633 (2d Dist. 1988).

The meaning of the word "family" must be construed broadly in relation to the general purpose of the provisions regarding substituted service. *Sanchez v. Randall,* 31 Ill.App.2d 41, 175 N.E.2d 645 (1st Dist. 1961). A sufficiently permanent relationship existed between the defendant and his female companion in residing together at the same address to allow her to be included within the term "family." *Fredman Bros. Furniture Co. v. Stambaugh,* 50 Ill.App.3d 595, 367 N.E.2d 135, 9 Ill.Dec. 701 (3d Dist. 1977).

An interesting twist on the law is found in *Freund Equipment, Inc. v. Fox,* 301 Ill.App.3d 163, 703 N.E.2d 542, 234 Ill.Dec. 681 (2d Dist. 1998), wherein the defendant contended the method of service that was employed (placing the summons and complaint inside the defendant's door) did not constitute personal service. The court found §5/2-203(a)(1) of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.,* states that service may be effected on an individual by leaving a copy of the summons with the defendant personally. The court noted, however, contrary to the defendant's assertion, no requirement exists that the process server must place the papers physically in the defendant's hand. The court cited the case of *Hatmaker v. Hatmaker,* 337 Ill.App. 175, 85 N.E.2d 345, 347 – 348 (1st Dist. 1949), in which the court found the service was effective when the deputy went to the defendant's hotel room, the defendant refused to open the door, and the deputy identified himself, indicating he had a summons for the defendant. When the defendant refused to answer, the deputy slid the summons and complaint under the door. The Seventh Circuit Court of Appeals, in *Currier v. Baldridge,* 914 F.2d. 993, 995 (7th Cir. 1990), concluded that Illinois was among the states that accepted the "general method" of placing the papers in the general vicinity of the person to be served and announcing the nature of the papers, especially when the defendant evidences unwillingness to accept service.

c. [5.8] Service by Special Order of the Court

735 ILCS 5/2-203.1 provides that if service on an individual defendant is impractical under 735 ILCS 5/2-203(a)(1) and 5/2-203(a)(2), the plaintiff may move, without notice, that the court enter an order directing a comparable method of service. The motion must be accompanied by an affidavit stating the nature and extent of the investigation made to determine the whereabouts of

the defendant and the reasons why service is impractical under §§2-203(a)(1) and 2-203(a)(2), including a specific statement showing that a diligent inquiry as to the location of the individual defendant was made and reasonable efforts to make service have been unsuccessful. The court may order service to be made in any manner consistent with due process.

The statute that provides for service by special order of court is not unconstitutionally vague; it does not grant unfettered discretion to public officials but sets forth strict guidelines that the judiciary must follow in order for there to be service by special order of court. *Schmitt v. Schmitt,* 165 F.Supp.2d 789 (N.D.Ill. 2001).

PRACTICE POINTER

✓ A Motion for Special Process Server pursuant to 735 ILCS 5/2-203.1 is a pro-forma motion and will generally be granted without any argument or delay. The presenter of the motion should be prepared to enter an order allowing for the service of summons by special process server contemporaneously with presentation of the motion.

d. [5.9] Service by Publication

In *Markham v. Markham,* 50 Ill.App.3d 1061, 365 N.E.2d 308, 311, 8 Ill.Dec. 70 (3d Dist. 1977), the court set forth the steps that must be completed to obtain service by publication: (1) an affidavit executed and filed by the plaintiff or the plaintiff's attorney, (2) due inquiry made as to the defendant's residence, (3) publication in a newspaper of general circulation in the county wherein the action is pending, and (4) notices sent to the defendant's last known address.

For general forms of an affidavit for service by publication and a notice by publication, see CIVIL PRACTICE: OPENING THE CASE, §§8.69, 8.70 (IICLE®, 2023).

(1) [5.10] Statutory requirements

Service by publication is governed by 735 ILCS 5/2-206 and 5/207. Section 2-206 provides that in any action affecting property or status within the jurisdiction of the court, when personal service cannot be effected, service may be made by publication and a mailed notice sent to the respondent within ten days of publication.

PRACTICE POINTER

✓ Great care should be taken to follow all the statutory requirements for service by publication and the caselaw interpretations of them in order for jurisdiction to properly attach. A failure to comply with the statutory requirements results in a judgment subject to being attacked and vacated as void. *Mercantile All-In-One Loans, Inc. v. Menna,* 63 Ill.App.3d 931, 380 N.E.2d 944, 20 Ill.Dec. 735 (1st Dist. 1978). See also 750 ILCS 5/412, relating to service by publication.

735 ILCS 5/2-206(a) provides that when the plaintiff or his or her attorney files (at the office of the clerk of the court in which the action is pending) an affidavit (a) showing that the defendant resides or has gone out of the state, on due inquiry cannot be found, or is concealed within the state, so that process cannot be served on him or her; and (b) stating the place of residence of the defendant, if known, or that upon diligent inquiry his or her place of residence cannot be ascertained, the clerk then must cause publication to be made in some newspaper published in the county in which the action is pending. If there is no newspaper published in that county, then the publication must be in a newspaper published in an adjoining county in the state having a circulation in the county in which the action is pending. The publication must contain notice of the pendency of the action, the title of the court, the title of the case showing the names of the first-named plaintiff and the first-named defendant, the number of the case, the names of the parties to be served by publication, and the date on or after which default may be entered against such parties. The clerk also, within ten days of the first publication of the notice, must send a copy of the notice by mail, addressed to each defendant whose place of residence is stated in the affidavit. The certificate of the clerk that he or she has sent the copy pursuant to this section is evidence that he or she has done so.

PRACTICE POINTER

✓ Practice may vary from county to county, and it would be prudent not to rely solely on the clerk's office to handle the mailing to the defendant and the certificate. Instead, personally follow through to verify that the mailing of a copy of the publication notice to the defendant has been done and the clerk's certification is in the court file.

After the affidavit has been filed, the necessity for publication arises. The statutory requirements for publication after the filing of the affidavit are as follows:

a. The publication must be in a newspaper.

b. The publication must begin after the filing of the complaint but at least 30 days before the return date set in the summons if one has been issued. In any event, no default can be taken earlier than 30 days after the date of first publication.

c. The notice must be published at least once each week for three successive weeks.

d. The publication must contain "notice of the pendency of the action," the title of the court, the title of the case showing the names of the petitioner and the respondent, the number of the case, the name of the party to be served by the publication, and the date on or after which a default may be entered. 735 ILCS 5/2-206.

If proof of publication of summons is offered by way of a certificate of the publisher, it must conform to the statutory requirements. *Haywood v. Collins,* 60 Ill. 328 (1871). A certificate of publication of summons that failed to state the last day on which the publication was made was not in compliance with the law and was not a valid proof of publication. *Hemingway v. City of Chicago,*

60 Ill. 324 (1871). A certificate of the publisher that failed to show that a notice was published once each week for four successive weeks (as previously was required) but merely recited four publications, giving dates of the first and the last publications, was insufficient. *Tobin v. Brooks,* 113 Ill.App. 79 (2d Dist. 1903). A certificate of publication that fails to state that the newspaper is one of general circulation in the county is insufficient.

735 ILCS 5/2-207 governs the period in which publication must be made when using §2-206 of the Illinois Code of Civil Procedure. Section 2-207 states (a) that the notice must be published at least once in each week for three successive weeks and (b) that no default is to be taken against any defendant who was not served with a summons or a copy of the complaint and who is not appearing unless the first publication is at least 30 days prior to the time when the default or other proceeding is sought to be taken.

In the case of *Forest v. Forest,* 9 Ill.App.3d 111, 291 N.E.2d 880 (5th Dist. 1993), the husband filed an affidavit of nonresidency concerning his wife. Thereafter, constructive service was made by publication. Subsequent to the constructive service by publication, the husband obtained a decree of dissolution by default. The trial court properly granted the wife's subsequent motion to vacate the decree of dissolution because, during the period prior to the filing of the affidavit of nonresidency by the husband, he had actual knowledge of the wife's whereabouts and that she did, in fact, reside in the state. The court did not have jurisdiction to enter the divorce decree because of the failure to strictly comply with the requirements of the statute.

(2) [5.11] In rem jurisdiction

When the jurisdiction acquired is in rem, the courts can adjudicate only rights in real or personal property located within the state or the status of a resident. The courts cannot enter valid judgments or orders, including injunctive orders, other than in relationship to the property or status of a party when the court has acquired only in rem jurisdiction. The court's judgment is res judicata as to the property or status located within the state, and a respondent may not relitigate here or in a sister state the in rem issue adjudicated pursuant to proper service by publication and mailed notice. *But see In re Marriage of Hoover,* 314 Ill.App.3d 707, 732 N.E.2d 145, 247 Ill.Dec. 429 (4th Dist. 2000), in which a judgment of dissolution by default was entered. Among the provisions of the judgment, the wife was granted various assets, the husband was ordered to pay various liabilities, and the wife was further given a judgment against the husband for a property settlement. The appellate court stated that before a circuit court can enter binding orders relating to property, it must have personal jurisdiction over the parties. 732 N.E.2d at 146, citing *In re Marriage of Brown,* 154 Ill.App.3d 179, 506 N.E.2d 727, 731, 106 Ill.Dec. 927 (4th Dist. 1987).

In order to properly acquire in rem jurisdiction when service has been made by publication, the first thing that must be done is the filing of the affidavit as called for by 735 ILCS 5/2-206. The statute does not address whether the affidavit must be based on the knowledge of the affiant or whether it can be based on information and belief. The more prudent practice would be to base the affidavit on the actual knowledge of the affiant. An affidavit for publication by the complainant stating that "non-residence of the complainant is stated only on information and belief" is not sufficient. *Vanpelt v. Robinson,* 114 Ill. 435, 2 N.E. 491, 492 (1885).

The statute is also silent as to who may be the affiant, but presumably, the affiant should be the one who has made the due inquiry. The affidavit should set forth the facts showing how the inquiry was conducted in order to insulate the judgment against any future judicial attacks, either within or without this state. If the affidavit is premised on the fact that the defendant's place of residence cannot be ascertained, the reasons why the residence cannot be ascertained and the facts concerning the attempts to locate the residence should be set forth. The affidavit should be drawn carefully, as the filing of a false affidavit not only prevents jurisdiction from attaching (*Forest v. Forest,* 9 Ill.App.3d 111, 291 N.E.2d 880 (5th Dist. 1973)) but also may subject the party and/or counsel to sanctions of S.Ct. Rule 137 for the filing of false pleadings.

735 ILCS 5/2-206 must be interpreted within the constitutional context afforded by the U.S. Supreme Court's decisions relating to in rem jurisdiction. *Shaffer v. Heitner,* 433 U.S. 186, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977). The exercise of in rem jurisdiction, as well as in personam jurisdiction, has to be evaluated in accordance with the "minimum contacts" test laid down in *International Shoe Co. v. State of Washington, Office of Unemployment Compensation & Placement,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). In *Boddie v. Connecticut,* 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971), the Supreme Court held that cost of publication must be waived in a divorce action when a poor person must resort to publication. *See also Accord King v. King,* 21 Ill.App.3d 1062, 316 N.E.2d 555 (4th Dist. 1974).

(3) [5.12] Due inquiry

Service by publication may be made on an in-state defendant on the grounds that the defendant "on due inquiry cannot be found, or is concealed within this State." 735 ILCS 5/2-206(a). "Due inquiry" means honest effort, and the plaintiff's lack of information as to the defendant's residence or location does not justify service by publication unless the plaintiff has made a good-faith, diligent inquiry into locating the defendant. *First Federal Savings & Loan Association of Chicago v. Brown,* 74 Ill.App.3d 901, 393 N.E.2d 574, 30 Ill.Dec. 538 (1st Dist. 1979); *Markham v. Markham,* 50 Ill.App.3d 1061, 365 N.E.2d 308, 8 Ill.Dec. 70 (3d Dist. 1977). In *City of Chicago v. Leakas,* 6 Ill.App.3d 20, 284 N.E.2d 449, 455 (1st Dist. 1972), the court stated that the attempt to locate the defendant must be a "well-directed effort."

In *Hartung v. Hartung,* 8 Ill.App. 156 (3d Dist. 1880), the court found that the wife, who had brought suit against the husband, an out-of-state resident, to obtain support and maintenance, was required to make inquiries of neighbors and others who would probably be informed as to where her husband resided or could be found. Also, if in these inquiries she learned that on leaving the state he had gone to certain places, she would be required to make inquiries in the new locations in order to satisfy the "due inquiry" requirement of the statute.

Once an affidavit of due inquiry has been made, if it is challenged by the defendant, it becomes incumbent on the plaintiff to successfully refute the conclusory nature of the challenges or to produce evidence showing that, in fact, the plaintiff had made due inquiry to locate the defendant so that process could be served. *Bell Federal Savings & Loan Ass'n v. Horton,* 59 Ill.App.3d 923, 376 N.E.2d 1029, 17 Ill.Dec. 700 (5th Dist. 1978).

An affidavit merely stating that the defendant's " 'place of residence is unknown,' and omit[ting] the further necessary averment 'that upon diligent inquiry his place of residence can not be ascertained' " is insufficient, and jurisdiction will not attach. *Malaer v. Damron,* 31 Ill.App. 572, 574 (4th Dist. 1889), quoting *Hartung, supra,* 8 Ill.App. at 158.

If the defendant is not a resident of the state, it is not necessary to say that process cannot be served; the provision of the statute for stating that process cannot be served on the defendant relates only to people purposely concealed within the state or to those who upon due inquiry cannot be located within the state. *Albrecht v. Hittle,* 248 Ill. 72, 93 N.E. 351 (1910).

C. [5.13] Due Process and the Illinois Long-Arm Statute — Limits on the Exercise of the Courts' Jurisdiction

The due-process requirements of the United States Constitution serve three purposes: (1) to ensure that defendants will have notice of proceedings, (2) to protect defendants from litigation in distant forums, and (3) to ensure the orderly administration of the law. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 62 L.Ed.2d 490, 100 S.Ct. 559 (1980).

The granting of a dissolution is not within the inherent equitable powers of the court but is a result of the court's exercise of legislatively granted powers; this legislation, in conjunction with the constitutional requirements of due process, prescribes and limits the court's exercise of power in a dissolution case. *Thomas v. Thomas,* 250 Ill. 354, 95 N.E. 345 (1911). In *In re Marriage of Schlam,* 271 Ill.App.3d 788, 648 N.E.2d 345, 207 Ill.Dec. 889 (2d Dist. 1995), the appellate court held that subject-matter jurisdiction refers to whether the trial court has the power to hear the type of case before it, while personal jurisdiction refers to whether the court has acquired the ability to apply its subject-matter jurisdiction to an individual.

The practitioner in the matrimonial area dealing with issues relating to the absent spouse should be mindful of several Supreme Court cases:

- In *Burnham v. Superior Court of California, County of Marin,* 495 U.S. 604, 109 L.Ed.2d 631, 110 S.Ct. 2105 (1990), the Court held that personal service in a divorce action on a nonresident defendant who was temporarily in a state was sufficient to obtain personal jurisdiction over the defendant. In its ruling, the Court stated that the minimum-contacts test established by *International Shoe Co. v. State of Washington, Office of Unemployment Compensation & Placement,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), and its progeny need not be applied.

- *Burnham, supra,* should be compared with *Kulko v. Superior Court of California,* 436 U.S. 84, 56 L.Ed.2d 132, 98 S.Ct. 1690 (1978). In *Kulko,* the Court held that Ezra Kulko, a nonresident of California whose ex-wife and children lived in California, could not be subjected to personal jurisdiction in California without meeting the minimum-contacts test. The difference between *Kulko* and *Burnham* is that Burnham had the misfortune of being served while standing on California soil, while Kulko was served in New York.

- Illinois statutes specifically provide that the court acquires jurisdiction if the defendant is served with process within the geographical boundaries of Illinois. *See In re Marriage of Schuham,* 120 Ill.App.3d 339, 458 N.E.2d 559, 76 Ill.Dec. 159 (1st Dist. 1983), which addresses the issues of in personam jurisdiction, minimum contacts, and due process.

735 ILCS 5/2-209(a)(5) provides that a person submits to the jurisdiction of the courts of this state with respect to actions for dissolution of marriage, legal separation, divorce, and declaration of invalidity of marriage when there has been the maintenance of a matrimonial domicile in this state. In *Hawes v. Hawes,* 130 Ill.App.2d 546, 263 N.E.2d 625 (2d Dist. 1970), the court stated that it did not have jurisdiction over the person of the respondent because the respondent never resided in Illinois, there was no matrimonial domicile in Illinois, and no acts giving rise to the cause of action were committed in Illinois.

A party submits to jurisdiction if the party and spouse maintained a matrimonial domicile in Illinois at the time the cause of action arose or if the party committed in Illinois any act giving rise to the cause of action. For example, in *Nickas v. Nickas,* 113 N.H. 261, 306 A.2d 51 (1973), a New Hampshire resident had married an Illinois resident in Illinois and the parties had lived as spouses in Illinois for a period of time. When the New Hampshire resident deserted his Illinois residency and left his wife in Illinois without support, Illinois' long-arm jurisdiction could be constitutionally exercised so as to allow for the acquisition of in personam jurisdiction over the New Hampshire resident. *See also Haymond v. Haymond,* 60 Ill.App.3d 969, 377 N.E.2d 563, 18 Ill.Dec. 274 (2d Dist. 1978); *Farah v. Farah,* 25 Ill.App.3d 481, 323 N.E.2d 361 (1st Dist. 1975); 735 ILCS 5/2-209(a)(6), 5/2-209(a)(8), 5/2-209(a)(9), 2-209(a)(13); Uniform Interstate Family Support Act (UIFSA), 750 ILCS 22/101, *et seq*.

Flint v. Court Appointed Special Advocates of DuPage County, Inc., 285 Ill.App.3d 152, 674 N.E.2d 831, 221 Ill.Dec. 38 (2d Dist. 1996), held that standards of federal due process for exercise of personal jurisdiction over nonresident defendants delineate the outer limit beyond which the state may not go to acquire jurisdiction over nonresidents. Illinois' due-process standard guarantees that jurisdiction is to be asserted over a nonresident defendant only when it is fair, just, and reasonable to require the defendant to defend a proceeding in this state, considering the quality and nature of the defendant's acts that occur in Illinois or that affect an interest located in Illinois.

In *People ex rel. Black v. Neby,* 265 Ill.App.3d 203, 638 N.E.2d 276, 202 Ill.Dec. 630 (4th Dist. 1994), the appellate court held that sexual intercourse within Illinois was sufficient conduct within the state to confer in personam jurisdiction over the defendant under the provisions of the Illinois long-arm statute as set forth at 735 ILCS 5/2-209(a)(6) or 5/2-209(a)(8) based on actions where a child was conceived in this state and that the due-process requirements of the Constitution were met.

In *In re Marriage of Cody,* 264 Ill.App.3d 160, 636 N.E.2d 1114, 201 Ill.Dec. 682 (5th Dist. 1994), the court held that for the purposes of the long-arm statute, in personam jurisdiction was not acquired over an out-of-state father who allowed the mother who had custody of the children to move to Illinois without complaining of the move or seeking the return of the children to the home state even if the father continued to support the children in Illinois. The trial court held that the father's failure to object to the mother's move from Washington to Illinois and the father's failure to instigate the children's return to Washington constituted a tortious act. On appeal, the father argued that he did not commit a tortious act, nor did he have sufficient contacts with Illinois so as to be subject to in personam jurisdiction. The appellate court, reversing the trial court, agreed with the father's argument. The trial court distinguished *In re Marriage of Highsmith,* 111 Ill.2d 69, 488 N.E.2d 1000, 94 Ill.Dec. 753 (1986), in which it was held that the act of sending children of whom

one had custody into a forum state and giving custody to another located in the forum state without providing for their support was tortious conduct and sufficient to create in personam jurisdiction under 735 ILCS 5/2-209(a)(2). In *Cody,* the mother had custody of the children, and the father continued to support the children; therefore, he did not breach any duty to them. But see 735 ILCS5/2-209(a)(9).

In *Boyer v. Boyer,* 57 Ill.App.3d 555, 373 N.E.2d 441, 15 Ill.Dec. 95 (5th Dist.), *aff'd in part, rev'd in part on other grounds,* 73 Ill.2d 331 (1978), the court held that Illinois has a significant interest in seeing that husbands pay maintenance and child support to Illinois residents since the state may bear the burden of providing for the welfare of the wife and children if the husband's obligations to pay are not met. The court further held that under 735 ILCS 5/2-209(a)(9), a nonresident husband's failure to pay maintenance and child support to an in-state resident constitutes sufficient "minimum contacts" with the state on which to predicate in personam jurisdiction to collect back maintenance and child support.

In *Duncan v. Duncan,* 94 Ill.App.3d 868, 419 N.E.2d 700, 50 Ill.Dec. 592 (3d Dist. 1981), the court was faced with a postjudgment action to enforce a Virginia dissolution decree. The court held that the Illinois courts could not exercise in personam jurisdiction over the nonresident, non-domiciliary former husband and father of minor children who were domiciled in this state because the quality and nature of the husband's activities in Illinois were not such that it would be reasonable and fair to require him to conduct his defense here, and the husband did not derive any commercial or personal benefit from the presence of his ex-wife and children in this state; thus, the father did not have minimum contacts with the state necessary to satisfy the due-process requirements of the Fourteenth Amendment.

In *L.B. Foster Co. v. Railroad Service, Inc.,* 734 F.Supp. 818 (N.D.Ill. 1990), the federal district court stated that 735 ILCS 5/2-209(c) was intended to make the long-arm jurisdiction coextensive with the Due Process Clause of the U.S. Constitution. In *Robb Container Corp. v. Sho-Me Co.,* 566 F.Supp. 1143 (N.D.Ill. 1983), the court stated that even if the proposed exercise of personal jurisdiction meets the U.S. constitutional requirements of due process, it may not be authorized under the stricter statutory requirements of 735 ILCS 5/2-209. The fact that the defendant's acts fall within the terms of the long-arm statute does not necessarily mean that exercise of jurisdiction over the defendant is proper; exercise of jurisdiction must be consistent with due process. *People ex rel. Mangold v. Flieger,* 106 Ill.2d 546, 478 N.E.2d 1366, 88 Ill.Dec. 640 (1985).

The standards set forth in the Illinois long-arm statute are not identical to the minimum-contacts test of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution; thus, construction and application of the long-arm statute does not depend entirely on Illinois decisions determining in what circumstances due process would permit long-arm jurisdiction. *Financial Management Services, Inc. v. Sibilsky & Sibilsky, Inc.,* 130 Ill.App.3d 826, 474 N.E.2d 1297, 86 Ill.Dec. 100 (1st Dist. 1985). 735 ILCS 5/2-209(c) as amended in 1989 reads, "A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." The amendment raises the issue of whether the Illinois courts will interpret the statute to be coextensive with the limits of the federal due-process minimum-contacts test or whether it will have a different connotation. Cases that have touched on this issue

are *Hrubec v. National Railroad Passenger Corp.,* 778 F.Supp. 1431 (N.D.Ill. 1991), *rev'd on other grounds,* 981 F.2d 962 (7th Cir. 1992); *Sidley & Austin v. Hill,* 763 F.Supp. 366 (N.D.Ill. 1991); *Stuart-James Co. v. Rossini,* 736 F.Supp. 800 (N.D.Ill. 1990); and *Ideal Insurance Agency, Inc. v. Shipyard Marine, Inc.,* 213 Ill.App.3d 675, 572 N.E.2d 353, 157 Ill.Dec. 284 (2d Dist. 1991).

See also §§5.17 – 5.23 below for matters relating to enforcement or modification of child support and allocation of parental responsibilities.

In *In re Marriage of Weishaupt,* 160 Ill.App.3d 563, 514 N.E.2d 788, 113 Ill.Dec. 6 (4th Dist. 1987), the parties were divorced in Illinois, and several years later, the ex-wife petitioned for child support. The ex-husband, who was located in Tennessee, was personally served with process and objected to Illinois' exercise of personal jurisdiction over him. The court held that the Illinois long-arm provisions for jurisdiction in domestic matters extended to those proceedings incident to a dissolution. The appellate court held that the purpose of the long-arm statute was to provide a means for asserting personal jurisdiction over a nonresident defendant "within the fullest extent permissible" under federal due-process requirements. 514 N.E.2d at 790. The court noted that the determination as to whether the statutory mandates of long-arm jurisdiction had been fulfilled is a question of fact for the trial court to determine. The court found, under 735 ILCS 5/2-209, which provides for jurisdiction over a nonresident defendant in dissolution cases, that the long-arm statute logically extends to those proceedings incident to the dissolution of marriage.

In *Schuham, supra,* the parties were divorced in Missouri, and thereafter the mother moved to Chicago with the children. While in Cook County, the mother filed a petition to register the Missouri divorce decree and to increase child support. The appellate court ruled that, before an Illinois court can impose on a defendant an affirmative obligation to pay money, it must first possess and assert jurisdiction over his or her person. The court noted that judgments ordering support of children upon dissolution of marriage, as well as modification of existing support judgments, constitute such personal obligations necessitating in personam jurisdiction. Personal jurisdiction for the purpose of child support requires of the obligor more substantial connections with the forum state than the mere presence in the forum of the obligor's children. The long-arm statute does not extend to impose personal jurisdiction over a noncustodial parent not domiciled in Illinois when the parent's only contact with Illinois is the presence in this state of his or her children and ex-spouse.

Schuham should be contrasted with *Highsmith, supra.* In *Highsmith,* the parties were divorced in California. The former husband was awarded custody of their child. Eleven years later, he sent the child to live with his ex-wife in Illinois. The former wife registered the California judgment of dissolution and sought modification of the California judgment to require the husband to pay child support to her. The Supreme Court found that, under the Illinois long-arm statute, the failure to support a child would in fact be a tortious act that would confer long-arm jurisdiction on the court to enforce a support obligation against the absent parent.

D. [5.14] Objections to Jurisdiction over the Person

735 ILCS 5/2-301, relating to challenges to the court's exercise of personal jurisdiction over an individual, was extensively rewritten by P.A. 91-145 (eff. Jan. 1, 2000), making caselaw that predated the amendment of questionable validity. Section 2-301(a) now allows a defendant to file

a motion objecting to personal jurisdiction via a motion to dismiss or a motion to quash service of process. Section 2-301 eliminated the special appearance. A party may object to personal jurisdiction by motion to dismiss filed before a responsive pleading or a motion (other than motions ruling on extensions of time or motions filed pursuant to certain limited statutes set forth in 735 ILCS 5/2-301(a-6)). Filing a responsive pleading or motion, other than motions for extensions of time, constitutes waiver of objection to personal jurisdiction over the party. *KSAC Corp. v. Recycle Free, Inc.,* 364 Ill.App.3d 593, 846 N.E.2d 1021, 301 Ill.Dec. 418 (2d Dist. 2006).

PRACTICE POINTER

✓ 735 ILCS 5/2-619.1 states, in relevant part, as follows:

> **Motions with respect to pleadings under Section 2-615, motions for involuntary dismissal or other relief under Section 2-619, and motions for summary judgment under Section 2-1005 may be filed together as a single motion in any combination. A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of Sections 2-615, 2-619, or 2-1005. Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based.**

When using a combined motion, be sure to identify the combined motion in the manner set forth at 735 ILCS 5/2-619.1.

Unless the facts that constitute the basis for the objection are apparent from the papers already on file in the case, the motion must be supported by an affidavit setting forth those facts. 735 ILCS 5/2-301(a). Section 2-301(a-6) provides that if the objecting party files any other pleading or a motion prior to the filing of a motion in compliance with §2-301(a), that party waives all objections to the court's jurisdiction over the party's person unless the motion is (1) for an extension of time to answer or otherwise appear or (2) filed under 735 ILCS 5/2-1301 (regarding default judgments), 735 ILCS 5/2-1401 (regarding relief from judgments), or 735 ILCS 5/2-1401.1 (regarding relief from default judgments involving military personnel). Section 2-301(b) states that in disposing of the motion the court must consider all matters apparent from the papers on file in the case, affidavits submitted by any party, and any evidence adduced on contested issues of fact. Section 2-301(c) states, "Error in ruling against the objecting party on the objection is waived by the party's taking part in further proceedings unless the objection is on the ground that the party is not amenable to process issued by a court of this State."

When a cause of action can be divided into in rem and in personam actions (*e.g.,* a divorce and matters related to it), a party may appear and contest the in personam jurisdiction of the court even if the court possesses in rem jurisdiction. *Davis v. Davis,* 9 Ill.App.3d 922, 293 N.E.2d 399 (1st Dist. 1973). In *In re Marriage of Hoover,* 314 Ill.App.3d 707, 732 N.E.2d 145, 247 Ill.Dec. 429 (4th Dist. 2000), the wife filed a petition for dissolution of marriage, which was granted following the entry of a judgment by default. The parties' various assets and liabilities were divided, and a property judgment was entered in favor of the wife. Thereafter, the wife filed a citation seeking to enforce and collect the judgment that she had obtained. The court held that the husband's

postjudgment general appearance in response to the wife's citation proceeding did not waive his objection to personal jurisdiction. The court held that under amended §2-301 it was no longer necessary to file a special limited appearance by a motion to quash service of process. Objection to jurisdiction over the person may be made by a motion to dismiss. The motion must be filed prior to the filing of a responsive pleading or certain other motions, but it may be made singly or included with others in a combined motion. In *Hoover,* the wife argued that the husband's general appearance in the postjudgment proceeding was retroactive and therefore constituted a general appearance in the underlying proceeding. The appellate court disagreed, noting that a party over whom a court has failed to acquire in personam jurisdiction may, at any time, either directly or collaterally, attack or seek to vacate a judgment the court had entered against the party. Before a court order can bind a person and make the person personally liable to have to pay a property judgment or responsible for debts of the marriage or pay support, the court must have in personam jurisdiction over the person. See also Keith H. Beyler, *The Death of Special Appearances,* 88 Ill.B.J. 30 (2000).

Personal jurisdiction is acquired either by service of summons or by a general appearance and is derived from actions of the person sought to be bound. *In re Marriage of Gorman,* 284 Ill.App.3d 171, 671 N.E.2d 819, 219 Ill.Dec. 652 (1st Dist. 1996). In *Gorman,* the court found that it had personal jurisdiction in a dissolution action over a wife who had signed and returned forms necessary to the proceeding, including a pro se entry of appearance, even though the pro se appearance actually submitted to the court was signed by the husband's attorney without the wife's authorization. The court held that the wife's signing of the appearance evidenced her attempt to adopt and enter such appearance, which was not affected by the attorney's inappropriate conduct in submitting a substituted form.

The court, in *In re Custody of Rose,* 281 Ill.,App.3d 423, 666 N.E.2d 1228, 217 Ill.Dec. 290 (2d Dist. 1996), held that a father's action in filing his petition for custody of his child constituted a voluntary consent to the court's jurisdiction and waived his objection that the court lacked personal jurisdiction over him. The court found that, by bringing his own petition for custody, the father was not merely exercising his right to be heard on the issue of custody but was seeking the protection of Illinois law, and the father needed only to defend the mother's petition for custody successfully in order to be entitled to some level of custody himself by default.

E. Effect of Jurisdiction on Various Issues

1. [5.15] Obtaining and Modifying Maintenance Awards and Decrees

Maintenance is a creature of statute and arises out of the marriage relationship. *Savich v. Savich,* 12 Ill.2d 454, 147 N.E.2d 85 (1957); *Riddlesbarger v. Riddlesbarger,* 341 Ill.App. 107, 93 N.E.2d 380 (1st Dist. 1950). The courts are not accorded an inherent or equitable power to award maintenance. *Pressney v. Pressney,* 339 Ill.App. 371, 90 N.E.2d 119 (1st Dist. 1950). A court order to pay maintenance is an in personam action requiring personal jurisdiction over the obligor. *Hawes v. Hawes,* 130 Ill.App.2d 546, 263 N.E.2d 625 (2d Dist. 1970). Absent personal jurisdiction over the party from whom payment is sought, the court is without the ability to enter a valid order for maintenance. *Failing v. Failing,* 4 Ill.2d 11, 122 N.E.2d 167 (1954).

When a court acquires in personam jurisdiction over the obligor, it is not necessary that the obligor have property in the state from which the maintenance can be paid. However, some courts have found a lack of in personam jurisdiction over the obligor does not preclude an award for maintenance if the obligor has ownership of property within the state from which maintenance could be paid. *Billingsley v. Billingsley,* 285 Ala. 239, 231 So.2d 111 (1970); *Dackman v. Dackman,* 252 Md. 331, 250 A.2d 60 (1969), *overruled by Eastgate Associates v. Apper,* 276 Md. 698, 350 A.2d 661 (1976).

Section 511(b) of the IMDMA, 750 ILCS 5/511(b), relating to modification or enforcement of the judgment of another judicial circuit of this state, and §511(c), relating to modification or enforcement of judgments of other states, require service by summons in order to obtain in personam jurisdiction, even if the court in which the judgment was originally entered had obtained in personam jurisdiction. Service by registered mail does not suffice. *In re Marriage of Hostetler,* 124 Ill.App.3d 31, 463 N.E.2d 955, 79 Ill.Dec. 401 (1st Dist. 1984); *Boyer v. Boyer,* 73 Ill.2d 331, 383 N.E.2d 223, 22 Ill.Dec. 747 (1978); *In re Marriage of Highsmith,* 111 Ill.2d 69, 488 N.E.2d 1000, 94 Ill.Dec. 753 (1986).

The circuit court may exercise jurisdiction in cases involving enforcement or modification of out-of-state divorce decrees when the decrees are registered as statutorily required. *Coons v. Wilder,* 93 Ill.App.3d 127, 416 N.E.2d 785, 48 Ill.Dec. 512 (2d Dist. 1981).

Section 511(a) of the IMDMA permits notice to be served by mail. It has been held that the requirements for notice by mail under S.Ct. Rule 105 are not applicable to initiate postjudgment proceedings for modification and that compliance with Rule 11, which permits notice by regular mail, and Rule 104 suffice. *In re Marriage of Ponsart,* 118 Ill.App.3d 664, 455 N.E.2d 271, 74 Ill.Dec. 241 (1st Dist. 1983); *Wait v. Wait,* 158 Ill.App.3d 271, 510 N.E.2d 600, 109 Ill.Dec. 732 (4th Dist. 1987).

IMDMA §511 is merely a procedural section, and compliance with its terms is not required to vest the court with subject-matter jurisdiction. *In re Marriage of Bussey,* 108 Ill.2d 286, 483 N.E.2d 1229, 91 Ill.Dec. 594 (1985).

In order for a court to have jurisdiction of the subject matter and of the parties in a dispute regarding child support in a postjudgment action, it is necessary that a petition for modification of the divorce decree regarding support be filed and that notice of the petition be served in accordance with the rules. *Ottwell v. Ottwell,* 167 Ill.App.3d 901, 522 N.E.2d 328, 118 Ill.Dec. 873 (5th Dist. 1988). In *Ottwell,* there was no petition to modify, and the appellate court held that the order entered modifying the support was void for lack of subject-matter jurisdiction. Under IMDMA §511(c), the circuit court acquires subject-matter jurisdiction upon the filing of the petition accompanied by a certified copy of the foreign decree. *In re Marriage of Bussey,* 128 Ill.App.3d 730, 471 N.E.2d 563, 84 Ill.Dec. 34 (4th Dist. 1984), *aff'd,* 108 Ill.2d 286 (1985).

Under the IMDMA, the court has subject-matter jurisdiction to award maintenance in a proceeding for dissolution of marriage, legal separation, or declaration of invalidity of marriage. 750 ILCS 5/504(a). This statute also provides that there is subject-matter jurisdiction to award maintenance in a proceeding for maintenance following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse once in personam jurisdiction is acquired over the obligor spouse.

A judgment for dissolution awarding maintenance is not binding against a nonresident respondent who is notified of the proceeding constructively by publication but who does not appear or plead. *Ragen v. Ragen,* 4 Ill.App.2d 445, 124 N.E.2d 628 (1st Dist. 1954); *Kelley v. Kelley,* 233 Ill.App. 203 (1st Dist. 1924), *rev'd on other grounds,* 317 Ill. 104 (1925).

When a wife maintained no matrimonial domicile or residence in the state, never resided or committed any act within the state, and failed to follow her husband into Illinois, the court did not have in personam jurisdiction so as to be able to enter an order barring her from obtaining any maintenance. *Hawes, supra.*

When a wife had never been in Nevada, the state entered a divorce decree that made no provision for her support. She had not filed an appearance or requested any relief or any other pleading in Nevada, and the six-month period after which the Nevada divorce decree would become final and not subject to modification under Nevada law had not yet elapsed. The full-faith-and-credit doctrine did not preclude the wife from maintaining an action in Illinois for maintenance. *Fulwider v. Fulwider,* 8 Ill.App.3d 581, 290 N.E.2d 264 (4th Dist. 1972).

See the discussion of *Kulko v. Superior Court of California,* 436 U.S. 84, 56 L.Ed.2d 132, 98 S.Ct. 1690 (1978), in §5.13 above, for an example of how the Due Process Clause made applicable to the states by the Fourteenth Amendment operates as a limitation on the jurisdiction of the state courts to enter judgments affecting rights or interests of nonresident defendants.

When Illinois registers a foreign decree awarding maintenance, the party seeking enforcement is entitled to have the decree enforced and collected in Illinois according to the Illinois Code of Civil Procedure even though it may not be the same as in the foreign jurisdiction that rendered the decree. *Reinhard v. Reinhard,* 19 Ill.App.2d 223, 153 N.E.2d 285 (1st Dist. 1958) (abst.).

A decree of maintenance entered in a foreign state is enforceable in Illinois under the full-faith-and-credit doctrine, but the decree sought to be enforced must be a final decree and not subject to collateral attack on the basis of lack of jurisdiction. *Paulin v. Paulin,* 195 Ill.App. 350 (1st Dist. 1915). An action brought to enforce a final order of a court pertaining to maintenance or attorneys' fees is not an original proceeding, and the jurisdiction initially acquired extends to any subsequent proceedings taken to enforce that final order. *People ex rel. Kazubowski v. Ray,* 48 Ill.2d 413, 272 N.E.2d 225 (1971).

A foreign judgment shall be afforded full faith and credit when authenticated in accordance with a Congressional Act or Illinois statue. Uniform Enforcement of Foreign Judgments Act (UEFJA), 735 ILCS 5/12-650, *et seq.* The court extended the UEFJA to apply to judgments obtained in foreign countries. 735 ILCS 5/12-652(a). *See also Pinilla v. Harza Engineering Co.,* 324 Ill.App.3d 803, 755 N.E.2d 23, 26 n.3, 257 Ill.Dec. 921 (1st Dist. 2001).

In *In re Marriage of Hochleutner,* 260 Ill.App.3d 684, 633 N.E.2d 164, 198 Ill.Dec. 702 (2d Dist. 1994), the appellate court affirmed the trial court's award of maintenance to the wife when she had not filed a response to the husband's petition for dissolution and the husband had proceeded to try the issue of maintenance during the course of the hearing without objection. The court held that the failure of the wife to file a response to the petition for dissolution of marriage did not

prohibit the trial court from awarding her maintenance when the husband had asked the court to bar the wife from receiving maintenance and had allowed the issue of maintenance to be litigated during the course of the proceeding and did not object to it. The court stated, "While we have found no recent case with similar facts, we resolve this appeal on the basis of well-established principles." 633 N.E.2d at 168. These principles are "that an issue [that] was not formally raised by the pleadings" may be placed before the court "by the conduct of the parties or by the introduction of evidence on the issue." *Id.* The court went on to state that the failure of the wife to request maintenance by a responsive pleading did not divest the court of jurisdiction to award maintenance when the husband in his petition sought to bar the wife from receiving an award of maintenance.

In *McClellan v. McClellan,* 125 Ill.App.2d 477, 261 N.E.2d 216 (4th Dist. 1970), the court held that when the original divorce decree was rendered on an in rem basis, jurisdiction for modification as to maintenance could be obtained only by service of summons because a judgment for payment of maintenance is in personam.

In *Ragen, supra,* the appellate court held that a judgment awarding maintenance against a nonresident defendant, who was notified of the dissolution proceeding by publication and who did not appear, was not binding. The case went on to note, however, that the property of a nonresident defendant that is located within the state may be subject to payment of maintenance in a publication action. (It is important to remember that 750 ILCS 5/504(a) provides that maintenance may be paid from the income or property of the other spouse.) In *Kohl v. Montgomery,* 373 Ill. 200, 25 N.E.2d 826 (1940), the court held that when service was had on the defendant by publication, a decree that ordered the defendant's interest in land that was located within the state of Illinois to be vested in the plaintiff would not operate to transfer the defendant's interest in the land to the plaintiff. The decree merely operated as a holding that the wife was in equity entitled to ownership of the interest to which the husband held legal title.

In *Kazubowski, supra,* civil contempt proceedings brought to enforce final orders of the court entered with respect to maintenance, attorneys' fees, and interest in divorce proceedings were held to be logical extensions of the original divorce proceeding and not an original complaint, and jurisdiction invoked to make divorce and property settlement decrees effective was held to extend to any subsequent proceedings taken to enforce such final decrees. See also 750 ILCS 22/601 – 22/614 (support provisions of Uniform Interstate Family Support Act).

The practitioner should also consult the provisions of the UIFSA. The Act contains a means of establishing and enforcing child support and spousal support orders. As it relates to establishing or enforcing a spousal support order, jurisdiction is controlled by 750 ILCS 22/201, which states in a proceeding to establish or enforce a support order, a tribunal of this state may exercise personal jurisdiction over a nonresident individual if (a) the individual is personally served with notice within this state; (b) the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest of personal jurisdiction; and (c) there is any other basis consistent with the constitution of this state and the United States for the exercise of personal jurisdiction. 750 ILCS 22/202 provides a means to receive evidence from another state or obtain discovery through a tribunal of another state with respect to a nonresident over whom this state has acquired personal jurisdiction. 750 ILCS 22/605 grants this state continuing exclusive jurisdiction to modify support orders that have been issued

by this state. 750 ILCS 22/401 deals with petitions to establish a support order when the state is the responding state and no prior support orders have been entered. 750 ILCS 22/501 – 22/507 deal with the enforcement of orders for support from another state without registering the same in Illinois. 750 ILCS 22/601 – 22/608 deal with procedures for registration, enforcement, and modification of support orders. The provisions of the UIFSA may provide another method for establishment, enforcement, and modification of spousal support orders.

2. [5.16] Property Distribution

Service of process on a nonresident defendant in a proceeding against or concerning specific property of the defendant within the court's jurisdiction enables the court to render a judgment that is binding on the property. *Killebrew v. Killebrew,* 398 Ill. 432, 75 N.E.2d 855 (1947).

When a nonresident husband was served by publication in a separate maintenance action, the court could proceed in rem against the status of the parties, and the husband's property within the state could be applied to meet his support obligations. *Schneider v. Schneider,* 312 Ill.App. 59, 37 N.E.2d 911 (1st Dist. 1941). *See also Ragen v. Ragen,* 4 Ill.App.2d 445, 124 N.E.2d 628 (1st Dist. 1954). In *In re Marriage of Hoover,* 314 Ill.App.3d 707, 732 N.E.2d 145, 146, 247 Ill.Dec. 429 (4th Dist. 2000), the court, citing *In re Marriage of Brown,* 154 Ill.App.3d 179, 506 N.E.2d 727, 731, 106 Ill.Dec. 927 (4th Dist. 1987), stated that before a circuit court can enter binding orders relating to property, it must have personal jurisdiction over the parties.

In re Marriage of Adamson, 308 Ill.App.3d 759, 721 N.E.2d 166, 242 Ill.Dec. 198 (2d Dist. 1999), presents an interesting jurisdictional issue. In *Adamson,* the court entered a judgment for dissolution in 1992; the parties agreed to modify various property provisions of the judgment for dissolution in 1996; and the wife filed an order requiring the husband to show cause why he should not be held in contempt for failure to make maintenance payments in 1997. The husband subsequently filed a bankruptcy petition. In 1998, the trial court found the husband in contempt and ordered him incarcerated in a work-release program until he paid a purge amount of approximately $9,000. He then filed a motion under 735 ILCS 5/2-1301 asking the court to vacate all orders entered after the date of his filing of his bankruptcy petition, claiming that the automatic stay provisions of the Bankruptcy Code prohibited any further action against him and that the obligation that the wife was seeking to enforce in the contempt proceeding was in the nature of a property settlement that had been discharged. In response, the wife argued that the husband could not use a §2-1301 motion to challenge orders that were entered more than 30 days prior to his motion to vacate.

The *Adamson* court, citing *Bank of Matteson v. Brown,* 283 Ill.App.3d 599, 669 N.E.2d 1351, 218 Ill.Dec. 825 (1st Dist. 1996), noted that a void judgment may be attacked at any time without any showing of diligence or meritorious defense. The *Adamson* court further stated that the court should be liberal and recognize a motion to vacate as a collateral attack on a judgment even if it is mislabeled. The court noted that the lack of subject-matter jurisdiction can be raised at any time and may be raised for the first time on appeal. *See In re Marriage of Jerome,* 255 Ill.App.3d 374, 625 N.E.2d 1195, 193 Ill.Dec. 74 (5th Dist. 1994). The *Adamson* court stated that a judgment entered by a court lacking subject-matter jurisdiction is a nullity and may be attacked at any time in any proceeding. The court went on to state that when a court lacks subject-matter jurisdiction, that jurisdiction cannot be conferred by stipulation, consent, or waiver. *City of Marseilles v. Radke,* 287 Ill.App.3d 757, 679 N.E.2d 125, 223 Ill.Dec. 181 (3d Dist. 1997).

On appeal, the husband argued that the trial court had jurisdiction to enter the original judgment for dissolution but argued that the court lost jurisdiction to modify the judgment after 30 days and that the parties' action in modifying the decree in 1996, some four years after its rendition, was without effect. The wife argued that the trial court retained jurisdiction to modify the judgment incident to its powers to enforce the judgment and, alternatively, that the parties revested the trial court with jurisdiction when they agreed to modify the judgment in 1996.

The appellate court in *Adamson, supra,* decided the case based on the fact that both the husband and the wife had agreed to the order of modification in 1996, some four years after the decree. The court stated:

> **Generally, a trial court loses jurisdiction in a dissolution action 30 days after it enters a final order. *In re Marriage of Schauberger,* 253 Ill.App.3d 595, 599, 191 Ill.Dec. 675, 624 N.E.2d 863 (1993). However, a trial court retains jurisdiction to enforce its order past 30 days when the judgment orders or contemplates further performance by the parties. *Anest v. Bailey,* 265 Ill.App.3d 58, 66, 202 Ill.Dec. 473, 637 N.E.2d 1209 (1994). In a dissolution action the trial court retains extraordinary continuing jurisdiction not applicable to civil cases generally. See *In re Marriage of Wonderlick,* 259 Ill.App.3d 692, 694, 197 Ill.Dec. 669, 631 N.E.2d 891 (1994). However, a trial court's jurisdiction to enforce a dissolution judgment does not include the jurisdiction "to engraft new obligations onto the judgment." *In re Marriage of Hubbard,* 215 Ill.App.3d 113, 117, 158 Ill.Dec. 747, 574 N.E.2d 860 (1991); see also *In re Marriage of Himmel,* 285 Ill.App.3d 145, 151, 220 Ill.Dec. 719, 673 N.E.2d 1140 (1996) (holding that section 502 of the Illinois Marriage and Dissolution of Marriage Act . . . does not supersede the usual two-year limitations period of [**735 ILCS 5/2-1401**]. [**Citation omitted.**] 721 N.E.2d at 172.

The *Adamson* court further found that, under the revestment doctrine, litigants may revest a court that has general jurisdiction over the matter with both personal and subject-matter jurisdiction over a particular issue after the 30-day period following final judgment. 721 N.E.2d at 174, citing *People v. Kaeding,* 98 Ill.2d 237, 456 N.E.2d 11, 74 Ill.Dec. 509 (1983). The court stated that revestment applies when the parties actively participate without objection in proceedings that are inconsistent with the merits of the prior judgment. A party's conduct is inconsistent with a prior order if the conduct reasonably can be construed as an indication that the parties do not view the prior order as final and binding. 721 N.E.2d at 174, citing *Kandalepas v. Economou,* 269 Ill.App.3d 245, 645 N.E.2d 543, 206 Ill.Dec. 538 (1st Dist. 1994).

Finally, the *Adamson* court concluded that under Article VI, §9, of the Illinois Constitution, the circuit courts are courts of general jurisdiction that may adjudicate any justiciable matter. 721 N.E.2d at 174.

The circuit court was without jurisdiction of an action maintained by a wife who had been divorced in a foreign state to enjoin her husband from disposing of assets. *Hawkins v. Hawkins,* 288 Ill.App. 623, 6 N.E.2d 509 (1st Dist. 1937) (abst.). *Hawkins* should be contrasted with the decision by the First District in *In re Marriage of Kosmond,* 357 Ill.App.3d 972, 830 N.E.2d 596, 294 Ill.Dec. 184 (1st Dist. 2005). In *Kosmond,* the husband filed for a dissolution of marriage, after

which the wife moved to Germany and made wire transfers of a substantial amount of marital funds to a bank account in her name in a German bank. The husband filed an emergency petition for a temporary restraining order and preliminary injunction seeking to freeze the assets in the wife's German bank account and to add the German bank as a third-party respondent. The German bank was served by service on its branches in Chicago and Germany. The trial court determined it had personal jurisdiction to restrain the German bank from certain activities. On appeal, the bank argued that the circuit court lacked jurisdiction to freeze assets held in its German branch. The bank conceded the court had personal jurisdiction over all of the parties but claimed the circuit court lacked jurisdiction to freeze the wife's bank accounts located in Germany since the accounts were not within the confines of the state of Illinois.

In deciding the case, the *Kosmond* court noted that in personam jurisdiction pertains to the authority of the court to litigate in reference to a particular defendant and to determine the rights and duties of that defendant. The alternative to in personam jurisdiction is in rem or quasi in rem jurisdiction. These forms are concerned with the relationship between the defendant and the state with respect to specific property held by the defendant. 830 N.E.2d at 599. The appellate court went on to state that in rem or quasi in rem jurisdiction represents an alternative to in personam jurisdiction. Jurisdiction based on property most typically is invoked when one or more of the defendants or persons with potential claims to the property are nonresidents or jurisdiction over their person cannot be secured in the foreign state. A court may exercise control over assets outside its jurisdiction through an injunction if (a) the equitable order is incidental to the claim being brought and (b) the court has in personam jurisdiction over all of the interested parties. 830 N.E.2d at 600. The appellate court found that the circuit court properly exercised in personam jurisdiction over all interested parties. The court found that a court obtains personal jurisdiction over a party once service has been effectuated or the party enters a general appearance. The court further found that the German bank did business within Illinois, maintaining an office in Chicago. Under 735 ILCS 5/2-209(b)(4), a court may exercise jurisdiction over any corporation doing business within Illinois. 830 N.E.2d at 599 – 600.

In conclusion, the appellate court in *Kosmond* held that since the trial court had in personam jurisdiction over all the parties and the freeze order was incidental to the husband's petition for dissolution, the circuit court had authority to issue the temporary restraining order and preliminary injunction. The court held that relief decreed by the trial court may be achieved by acting directly on the parties, who are within the court's in personam jurisdiction regardless of the location of the property. The court went on to note that §102(8) of the IMDMA, 750 ILCS 5/102(8), establishes the policy of this state to provide for the preservation and conservation of assets. 830 N.E.2d at 600. The court further noted that IMDMA §501(a)(2)(i) provides that either party may move for a temporary restraining order or preliminary injunction restraining any person from transferring, encumbering, concealing, or otherwise disposing of any property. *Id.* The court concluded that the IMDMA provides broad injunctive authority that supports enjoining, not only the parties from dissipating assets, but third parties holding property of the parties. This is because the order of the circuit court binds all assets of the parties held in any branch of the bank under 735 ILCS 5/11-101, which provides that every order granting an injunction and every restraining order is binding only on the parties to the action, their officers, agents, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. *Id.*

In *Sidwell v. Sidwell,* 132 Ill.App.2d 1055, 271 N.E.2d 115 (4th Dist. 1971), the court found that a wife could maintain an action for adjudication of property rights and maintenance and attorneys' fees when marital status had been determined by a valid ex parte foreign decree, but the foreign court was without personal jurisdiction to determine issues of property, support, or attorneys' fees.

Killebrew, supra, presents an interesting case. The wife obtained a judgment of dissolution in Illinois against her husband, a nonresident residing in the state of Minnesota. The divorce proceeded by way of publication, and the husband did not appear. The decree granted the divorce and also ordered the nonresident husband to convey to the resident wife certain lands and to pay her a certain sum of money. The husband challenged Illinois' jurisdiction to order him to pay spousal support. The court stated the law was well settled that in personam jurisdiction is required before a divorce decree can order alimony to be paid by a nonresident who was notified of the divorce proceeding by publication. The court went on to state that divorce proceedings are in some aspects in personam and in other aspects in rem. *See Wilson v. Smart,* 324 Ill. 276, 155 N.E. 288 (1927). The court noted that the distinguishing characteristics of a judgment in rem are that it operates directly on property and is binding on all persons insofar as their interest in the property is concerned (*Austin v. Royal League,* 316 Ill. 188, 147 N.E. 106 (1925)); therefore, constructive service of process on a nonresident defendant in a proceeding against or concerning specific property of the defendant within the court's jurisdiction enables the court to render a decree that is binding on said property.

In *In re Marriage of Hostetler,* 124 Ill.App.3d 31, 463 N.E.2d 955, 79 Ill.Dec. 401 (1st Dist. 1984), a circuit court in one county dissolved the parties' marriage. Four years later, the wife filed a petition for modification of the divorce decree in another county. The trial court sent notice of a hearing on the wife's petition to the husband at his California residence. Thereafter, the trial court entered an order modifying the divorce decree by increasing the amount of child support payments thereunder. When the wife sought to have the child support arrearage converted to a money judgment, the husband objected, claiming the trial court lacked personal jurisdiction over him. The appellate court agreed, finding that jurisdiction over a person cannot be had by serving him or her with a notice; a court acquires jurisdiction over a person only after proper service of summons. There is, of course, an exception to this rule when the defendant voluntarily appears or is permitted to intervene in the proceeding. Without personal jurisdiction, the court, though vested with subject-matter jurisdiction, is without power to impose personal obligations such as the payment of money.

3. Child Support

a. [5.17] In General

Sections 505(a-5) and 713 of the IMDMA provide that, in an action to enforce an order for support based on the respondent's failure to make support payments as required by an order of support, notice of proceedings to hold the respondent in contempt for failure to make the payments may be served on the respondent by personal service or by regular mail addressed to the respondent's last known address. 750 ILCS 5/505(a-5), 5/713. The respondent's last known address may be determined from the records of the clerk of the court or from the Federal Case Registry of Child Support Orders or by any other reasonable means. 750 ILCS 5/505.3, 5/507.1. When the obligor has failed to appear in court pursuant to an order of the court and after due notice thereof, the court may enter an order of body attachment. 750 ILCS 5/713.

Section 505(a) of the IMDMA provides:

> **In a proceeding for dissolution of marriage, legal separation, declaration of invalidity of marriage, or dissolution of a civil union, a proceeding for child support following a legal separation or dissolution of the marriage or civil union by a court that lacked personal jurisdiction over the absent spouse . . . the court may order either or both parents owing a duty of support to a child of the marriage or civil union to pay an amount reasonable and necessary for support.** 750 ILCS 5/505(a).

Judgments ordering or modifying child support constitute affirmative obligations requiring in personam jurisdiction over the person against whom they are imposed. *In re Buchanio,* 262 Ill.App.3d 910, 635 N.E.2d 980, 200 Ill.Dec. 641 (1st Dist. 1994).

A judgment for dissolution requiring the payment of child support is in personam, and the court must have personal service over the payor. *Gleiser v. Gleiser,* 402 Ill. 343, 83 N.E.2d 693 (1949). See, however, 735 ILCS 5/2-209(a)(9). A court lacking in personam jurisdiction over the payor must reserve the issue of child support as a matter of law; however, when personal jurisdiction over both parties exists, the court holds discretionary authority to not make any award at that time. *In re Marriage of Petersen,* 2011 IL 110984, 955 N.E.2d 1131, 353 Ill.Dec. 320 (2011).

In *Skilling v. Skilling,* 104 Ill.App.3d 213, 432 N.E.2d 881, 59 Ill.Dec. 937 (1st Dist. 1982), the former wife's petition for child support was a recognizable action in equity over which the circuit court had subject-matter jurisdiction notwithstanding the existence of the IMDMA and the fact that the parties were divorced in England.

If jurisdiction of the respondent has been secured by publication and the proceeding is in rem, the court may enter a judgment for dissolution, but it must reserve the question of child support until such time as personal service is obtained on the payor. Regardless of whether the question of child support is reserved, postjudgment relief for the child support may be sought at any time upon in personam jurisdiction's being acquired over the payor. *Jones v. Jones,* 40 Ill.App.2d 217, 189 N.E.2d 33 (1st Dist. 1963).

The fact that the original judgment for dissolution was silent regarding the issue of child support does not mean that a support order cannot be entered when personal jurisdiction over the payor is obtained. *In re Marriage of Cuberly,* 135 Ill.App.3d 55, 481 N.E.2d 830, 90 Ill.Dec. 30 (5th Dist. 1985).

When the court in the original divorce proceeding reserved the question of child support, an order requiring the former husband to reimburse his wife a sum of money for funds spent for child care from the payment of retroactive child support was valid despite the fact that the time from the original decree to the date of the order setting the support obligation was 15 years, and the court did not obtain personal jurisdiction over him until the time of the hearing on the issue of the amount of retroactive support. *Gill v. Gill,* 8 Ill.App.3d 625, 290 N.E.2d 897 (1st Dist. 1972), *aff'd,* 56 Ill.2d 139 (1973).

In *In re Marriage of Mullins,* 135 Ill.App.3d 279, 481 N.E.2d 322, 89 Ill.Dec. 771 (4th Dist. 1985), a judgment purporting to register a Scottish decree of divorce was void because the circuit court lacked subject-matter jurisdiction to register the judgment; registration enforcement of a judgment of a foreign country in a matrimonial matter was determined not to be a justiciable matter; there was no cause of action to do so at common law; and no statute had been created at that time.

PRACTICE POINTER

✓ Be aware that in those cases in which the court has declared in personam jurisdiction over the payor but has reserved the issue of child support, there may be a retroactive equitable child support award. *Nerini v. Nerini,* 140 Ill.App.3d 848, 488 N.E.2d 1379, 95 Ill.Dec. 36 (2d Dist. 1986); *Conner v. Watkins,* 158 Ill.App.3d 759, 511 N.E.2d 200, 110 Ill.Dec. 365 (4th Dist. 1987).

When the respondent husband filed a petition to vacate a default judgment entered in favor of his wife after notice by publication on the grounds that the court had no jurisdiction over his person, the court was not deprived of the ability to proceed to hearing on the petition for child support when the petition for support was served on the husband together with summons and notice of hearing. *Jones, supra.*

While there are no reported cases yet, it appears that in order to impose a duty on an unemployed person to seek employment under IMDMA §505.1 or to procure health insurance for the benefit of the minor children under §505.2, the court would have to have in personam jurisdiction. See also 42 U.S.C. §1396g-1; 29 U.S.C. §§1167 – 1169.

In *In re Estate of Hart,* 287 Ill.App. 176, 4 N.E.2d 759 (1st Dist. 1936), the defendant's distributive share of estate assets located in Illinois was sufficient property on which to base an in rem action to impress the assets with the lien for payment of the support obligation and service on the defendant by way of publication was proper.

A trial court has jurisdiction to consider future child support needs in a dissolution of marriage proceeding and is not required to expressly retain jurisdiction in order to preside over such a proceeding subsequent to the entry of the judgment for dissolution. *In re Marriage of Falat,* 201 Ill.App.3d 320, 559 N.E.2d 33, 147 Ill.Dec. 33 (1st Dist. 1990).

The trial court has jurisdiction to enter orders modifying provisions of a judgment for dissolution to provide for continuing child support for a child with a disability after the child's attainment of the age of majority. *In re Marriage of Winters,* 160 Ill.App.3d 277, 512 N.E.2d 1371, 111 Ill.Dec. 734 (2d Dist. 1987); 750 ILCS 5/513, 5/505(a), 5/102(5).

Illinois courts are not required to give full faith and credit to foreign orders that prospectively reduce the obligor's child support obligation under an Illinois judgment for dissolution when the recipient spouse was not present in the foreign jurisdiction and the foreign jurisdiction did not have in personam jurisdiction over the recipient. *In re Marriage of Gifford,* 152 Ill.App.3d 422, 504 N.E.2d 812, 105 Ill.Dec. 527 (1st Dist. 1987), *aff'd in part, rev'd in part on other grounds,* 122 Ill.2d 34 (1988).

Johnson v. Johnson, 264 Ill.App.3d 662, 636 N.E.2d 1013, 201 Ill.Dec. 581 (1st Dist. 1994), involved a situation in which the parties were divorced in Illinois. At the time of the divorce, the father was unemployed, and the trial court reserved the issue of child support. Thereafter, the mother filed a petition pursuant to the former Uniform Reciprocal Enforcement of Support Act (URESA) in a Georgia court seeking reimbursement for child support provided by the State of Georgia. The appellate court noted that the purpose of URESA was to enable dependents in one state to enforce a duty of support owed by a person residing in another state. The court found that URESA created no duty of support itself but simply provided a means to enforce a duty of support as it may exist under the laws of the responding state. Ordinarily, under URESA, an actual support order is being enforced. In *Johnson,* there was no actual support order, but it was argued that the father had a separate, common-law duty to support his children and that that duty could be enforced under URESA. Johnson directly conflicts with *Nerini, supra,* and *Conner, supra.*

A parent's duty to support a child is not defeated by the custodial parent's removal of the child from the jurisdiction. *Hurt v. Hurt,* 351 Ill.App. 427, 115 N.E.2d 638 (1st Dist. 1953).

The obligation to support minor children does not survive the obligor's death, absent a contract or agreement to the contrary. *Cooper v. Cooper's Estate,* 350 Ill.App. 37, 111 N.E.2d 564 (2d Dist. 1953); *Kramp v. Kramp,* 2 Ill.App.2d 17, 117 N.E.2d 859 (3d Dist. 1954).

The Uniform Interstate Family Support Act also provides an effective means for establishing, enforcing, or modifying a child support order. A "child support order" is defined at 750 ILCS 22/102. 750 ILCS 22/201 provides the basis for jurisdiction over a nonresident and states that in a proceeding to establish or enforce a support order or to determine parentage, an Illinois tribunal may exercise personal jurisdiction over a nonresident individual if (1) the individual is personally served with notice within Illinois; (2) the individual submits to Illinois jurisdiction by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction; (3) the individual resides with the child in Illinois; (4) the individual resides in Illinois and provided prenatal expenses or support for the child; (5) the child resides in Illinois as the result of the acts or directives of the individual; (6) the individual engaged in sexual intercourse in Illinois, and the child may have been conceived by that act of intercourse; or (7) there is any other basis consistent with the Illinois Constitution and the U.S. Constitution for the exercise of personal jurisdiction. Section 201 may be used only for the purpose of establishing or enforcing a support order and not to modify a support order. Actions to modify child support orders, under the UIFSA, are governed by 750 ILCS 22/611 and 22/615. Sections 205 through 211 set forth the procedures relating to the court's continuing exclusive jurisdiction to enforce or modify child support orders. 750 ILCS 22/205 – 211. Section 401 establishes procedures for establishment of a support order. 750 ILCS 22/401. Sections 501 through 507 establish the method for enforcement of orders of another state without registration. Sections 601 through 615 establish methods for registration, enforcement, and modification of support orders. 750 ILCS 22/601 – 615. See §5.19 below for a more detailed discussion.

Attorneys also should be aware of the full faith and credit given to child support orders. See 28 U.S.C. §1738B and the Expedited Child Support Act of 1990, 750 ILCS 25/1, *et seq*.

In *Mattmuller v. Mattmuller,* 336 Ill.App.3d 984, 785 N.E.2d 196, 271 Ill.Dec. 545 (5th Dist. 2003), the court held that a former husband who resided out of state waived his argument that 28 U.S.C. §1738B barred the Illinois court from ruling on the former wife's petition to modify a child support order under an Indiana dissolution decree when the husband did not raise the argument in his initial objection to jurisdiction but instead raised it for the first time in his motion to reconsider the trial court's order. The court further noted that the requirements of 28 U.S.C. §1738B are not jurisdictional to the court. The court held that the express congressional intent behind full faith and credit for child support was an interpretation that would allow state courts to assume jurisdiction if the issuing state declined what otherwise would have been proper jurisdiction. The appellate court held that to hold otherwise would result in allowing no court to hear a party's legitimate case. In interpreting federal statutes, the Illinois appellate courts must presume that Congress did not intend absurd results. The court, in summary, held that Illinois had jurisdiction to rule on the former wife's petition to modify the child support imposed under an Indiana dissolution decree even though the UIFSA requires trial courts to recognize the continuing and exclusive jurisdiction of a tribunal of another state that has issued a child support order pursuant to a law substantially similar to the UIFSA when the issuing court had declined to exercise jurisdiction even though that declination of jurisdiction was improper. *Mattmuller* makes for interesting reading given the fact that after the action was filed and evidence heard the wife and children moved to the State of Wisconsin.

The court in *In re Marriage of Hartman,* 305 Ill.App.3d 338, 712 N.E.2d 367, 238 Ill.Dec. 645 (2d Dist. 1999), held that a trial court had authority to exercise its contempt powers to require the husband to comply with a child support order even though the Illinois Department of Public Aid (now the Illinois Department of Healthcare and Family Services (DHFS)) had filed a petition under the UIFSA seeking enforcement of an obligation originally issued by the courts in Florida. The court further held that the Full Faith and Credit Clause of the U.S. Constitution did not prohibit the Illinois court from recalculating arrearage amounts and that the doctrine of res judicata did not bar relitigation of arrearage issues. The court held that the UIFSA creates a mechanism that facilitates the reciprocal enforcement or modification of a child support award. The court further held that while the Illinois Department of Public Aid had authority to initiate a foreign proceeding to enforce an Illinois child support award, that fact did not mean that the Illinois courts lost jurisdiction over a child support matter that was originally adjudicated in Illinois. The Illinois court may retain continuing exclusive jurisdiction in regard to that order; therefore, enforcement by contempt was appropriate.

b. Specific Illinois and Federal Statutes

(1) Illinois statutes

(a) [5.18] Illinois Marriage and Dissolution of Marriage Act

Sections of the IMDMA particularly relevant to the topic of child support include the following:

1. 750 ILCS 5/505(a)(4.5) relating to an order for child support by a court that lacked personal jurisdiction over the obligor at the time of the order;

2. 750 ILCS 5/505(b) relating to suspension of a driver's license if child support is more than 90 days past due;

3. 750 ILCS 5/505(d) relating to child support being a series of judgments against the obligor;

4. 750 ILCS 5/505.1 regarding an order to seek employment;

5. 750 ILCS 5/505.3 regarding the state case registry;

6. 750 ILCS 5/509 relating to relief based on noncompliance of the other party with an order for child support;

7. 750 ILCS 5/510(a) regarding modification of child support;

8. 750 ILCS 5/513 regarding payment of expenses for support and education for nonminor children from the income or property of the obligor;

9. 750 ILCS 5/505(a)(5) regarding situations in which net income cannot be determined;

10. 750 ILCS 5/505(a)(6) regarding the ability to introduce subpoenaed financial information when discovery is not complied with;

11. 750 ILCS 5/505(i) regarding enforcement after emancipation;

12. 750 ILCS 5/706.1 regarding withholding of income to secure payment of support; and

13. 750 ILCS 5/713 on attachment of the obligor.

P.A. 97-1029 (eff. Jan. 1, 2013) amended the Illinois Public Aid Code (305 ILCS 5/10-10), the IMDMA (750 ILCS 5/505(b)), and the Non-Support Punishment Act (750 ILCS 16/20(d-5)) to state that if a parent who is found guilty of contempt for failure to comply with an order to pay support is a person who conducts a business or is self-employed, the court, in addition to other penalties provided by law, may order that the parent do one or more of the following: (1) provide to the court monthly financial statements showing income and expenses from the business or self-employment; (2) seek employment and report periodically to the court with a diary, listing, or other memorandum of his or her employment search efforts; or (3) report to the Illinois Department of Employment Security for job search services to find employment that will be subject to withholding for child support.

750 ILCS 5/505(a) provides that the court, in its discretion, in addition to setting child support pursuant to the guidelines and other statutory factors, may order either or both parents owing a duty of support to a child of the marriage to contribute to the following expenses if determined by the court to be reasonable: (1) health needs not covered by insurance; (2) childcare; (3) education; and (4) extracurricular activities.

P.A. 97-186 (eff. July 22, 2011) amended the Public Aid Code (305 ILCS 5/10-8.1, 5/10-10, 5/10-11, 5/10-17.1, 5/10-25.5), the IMDMA (750 ILCS 5/505), and the Non-Support Punishment Act (750 ILCS 16/20) to add language creating a lien against the real and personal property of a child support obligor owing overdue support. The amended language states that the lien is created

notwithstanding any other state or local law to the contrary. The language exempts the child support lien from anti-alienation provisions contained in other Illinois laws, such as the Worker's Compensation Act's anti-alienation provision. It also permits the Illinois Department of Healthcare and Family Services' Division of Child Support Services to certify to the U.S. Department of Health and Human Services the existence of a child support arrearage for the purpose of denial, revocation, restriction, or limitation of passports for a child support obligor and allows the Division to seek penalties against an obligor's passport for nonpayment of child support as provided by federal law. 305 ILCS 5/10-17.14.

(b) [5.19] Uniform Interstate Family Support Act

The Uniform Interstate Family Support Act (UIFSA), 750 ILCS 22/100, *et seq.*, was passed in order to supplant the provisions of the Uniform Reciprocal Enforcement of Support Act, which was not adopted in Illinois, and the Former Revised Uniform Reciprocal Enforcement of Support Act, 750 ILCS 20/1, *et seq.* The UIFSA creates a mechanism that facilitates the reciprocal establishment, enforcement, or modification of child support or spousal support awards entered in the states that have adopted it. Under the UIFSA, the Department of Healthcare and Family Services may file a petition seeking enforcement of a child support award with the appropriate support agency in another state, which in turn may file an enforcement action in its own courts. In *In re Marriage of Hartman,* 305 Ill.App.3d 338, 712 N.E.2d 367, 238 Ill.Dec. 645 (2d Dist. 1999), the court held that Illinois retains jurisdiction over child support issues notwithstanding a proceeding under the UIFSA. The court held that while Illinois may initiate a foreign proceeding under the UIFSA, the Act also provides that the state court that originally entered a child support award retains continuing, exclusive jurisdiction in regard to that order. This ruling is in harmony with §505(b) of the IMDMA, 750 ILCS 5/505(b), which allows a trial court to use its contempt powers to ensure compliance with its support orders, as well as the common law, pursuant to which a trial court generally retains jurisdiction to enforce its own orders.

The appellate court in *Hartman* further found that the trial court had authority to exercise contempt powers to require the obligor to comply with the original support order even though a support enforcement action was filed in a foreign jurisdiction on behalf of the Illinois Department of Public Aid (now the DHFS) under the UIFSA against the obligor, who was delinquent in his support payments and had taken up residence in Florida. The court found that the Illinois trial court that entered the original support order retained exclusive, continuing jurisdiction over its orders when the obligee and the child continued to reside in Illinois. The court found that there was no evidence of an agreement between the parties transferring jurisdiction and that the Florida order was not a modification of the underlying order, so the Illinois court retained jurisdiction to process the contempt action.

The appellate court in *Hartman* found that even if the Florida order under the UIFSA had modified the Illinois child support order, Illinois would have retained jurisdiction to enter orders relating to the original support order. Under §205(c) of the UIFSA, although the court that initially issues a child support order may lose jurisdiction over that order if another court modifies it, the issuing state retains jurisdiction to enforce the order as to amounts accruing before the modification, to enforce non-modifiable aspects of the order, and to provide other appropriate relief for violations occurring before the effective date of the modification. Therefore, even if the Florida court order had modified the Illinois order, the Illinois court properly could have entered appropriate orders compelling the respondent to pay the arrears accruing prior to the modification.

The court went on to state that the Constitution requires that each state give full faith and credit to the judicial orders of every other state. See U.S.CONST. art. IV, §1.

The appellate court found that when the Illinois trial court enforcing its child support order against an obligor explicitly acknowledged the existence of a support order entered by a Florida court under the UIFSA and ordered the obligor to continue making payments as ordered by the Florida court, the Illinois court gave full faith and credit to the Florida order. Further, the Full Faith and Credit Clause was not offended by the Illinois court's order recalculating the arrearage and ordering additional payments toward that arrearage because the Illinois court retained jurisdiction over the order under UIFSA §205(a) and had authority to exercise contempt powers to enforce its order under IMDMA §505.

The appellate court rejected the obligor's argument that he was unfairly subjected to simultaneous jurisdiction of two competing courts because UIFSA §104 expressly provides that the remedies are cumulative and do not affect the availability of remedies under other law.

The appellate court further found that res judicata did not prevent the Illinois court from recalculating child support arrearage amounts and a repayment schedule as neither the claims and issues nor the parties in the two actions were identical.

UIFSA §201 addresses the basis for personal jurisdiction of a nonresident. It provides that in a proceeding to establish, enforce, or modify a support order or to determine parentage, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if

(1) the individual is personally served with notice within this State;

(2) the individual submits to the jurisdiction of this State by consent in a record, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;

(3) the individual resided with the child in this State;

(4) the individual resided in this State and provided prenatal expenses or support for the child;

(5) the child resides in this State as a result of the acts or directives of the individual;

(6) the individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse;

(7) the individual asserted parentage of a child in the putative father registry maintained in this State by the Illinois Department of Children and Family Services; or

(8) there is any other basis consistent with the constitutions of this State and the United States for the exercise of personal jurisdiction. 750 ILCS 22/201.

Section 202 provides for the duration of personal jurisdiction. Section 203 establishes a procedure for exercising jurisdiction over nonresidents, and §§204 – 206 provide the procedural framework for proceedings involving two or more states. Sections 207 – 211 deal with the issue of recognizing multiple support orders from competing jurisdictions.

Sections 301 – 320 establish the framework for initiating a matter under the UIFSA, the duties and powers of the responding tribunal, and how discovery is handled. Of particular interest is §317, dealing with communication between the tribunals, allowing the tribunal of this state to communicate with a tribunal of another state in writing, by telephone, or by other means to obtain information concerning the laws of that state; the legal effects of a judgment, decree, or order of that tribunal; and the status of proceedings in the other state.

Section 401 sets out a procedure to establish a support order.

Sections 501 – 507 deal with enforcement of orders of another state without registration.

Sections 609 – 614 deal with the registration and modification of child support orders. Section 611 provides that after a child support order issued in another state has been registered in Illinois, the Illinois court may modify that order only if §613 does not apply and if, after notice and hearing, it finds that

(1) the following requirements are met:

(A) neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state;

(B) a petitioner who is a nonresident of this State seeks modification; and

(C) the respondent is subject to the personal jurisdiction of the tribunal of this State; or

(2) this State is the residence of the child, or a party who is an individual is subject to the personal jurisdiction of the tribunal of this State, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this State to modify the support order and assume continuing, exclusive jurisdiction. 750 ILCS 22/611.

Section 701 discusses support proceedings under the Convention. Sections 801 and 802 establish procedures by which the Governor of Illinois may demand that the governor of another state surrender an individual found in that state who is charged criminally in Illinois with having failed to provide for the support of an obligee.

In *Vailas v. Vailas,* 406 Ill.App.3d 32, 939 N.E.2d 565, 345 Ill.Dec. 722 (1st Dist. 2010), the issue of under what circumstances the circuit court had jurisdiction to modify a foreign child support order as it relates to a respondent who was personally served within Illinois was raised. The parties were married in Illinois and resided in the state of Illinois for approximately ten years

before moving to Texas. The parties were divorced in 2007. In 2009, the mother filed a petition in the circuit court of Illinois to register the Texas court's final decree of divorce as a foreign judgment. The petition did not state the statutory basis for the registration and did not indicate whether the petitioner sought to register the judgment for the purpose of enforcement or modification. Several months later, the petitioner filed a petition to modify the child support order from Texas. The father was personally served while he was in Illinois visiting the parties' son. Thereafter, the father filed a motion to dismiss the petition to modify the support order for lack of jurisdiction under 735 ILCS 5/2-209, arguing that the circuit court lacked both personal and subject-matter jurisdiction under the Illinois version of the UIFSA.

The appellate court noted that personal jurisdiction under 750 ILCS 22/201 applies to actions to establish or enforce a support order. The court noted that the bases of personal jurisdiction are similar to those for civil actions in general. See 735 ILCS 5/2-209(b)(1). The appellate court found there was no dispute that the circuit court would be able to assert personal jurisdiction over the father in order to establish or enforce a support order. However, this was not the case presented as this was an action to modify an existing order of a foreign state.

The appellate court noted the UIFSA treats jurisdiction of an action to modify an order that is already in existence differently than an action to establish or enforce an existing order. The Act specifically states that the UIFSA may not be used to acquire personal jurisdiction for a tribunal to modify a child support of another state, unless the requirements of the Act are met.

The appellate court went on to note that, in an action to modify a support order of a foreign state, not only must the courts of this state have personal jurisdiction over the obligor, but the requirements for modification of a foreign state support order as set forth at 750 ILCS 22/201(b) and 22/611 also must be met.

The appellate court noted that, under 750 ILCS 22/611(a), a previously issued child support order may be modified only if, after notice and hearing, the circuit court finds that one of two sets of conditions is met:

1. The order may be modified if

    a. neither the child, nor the petitioner who is an individual, nor the respondent reside in the issuing state;

    b. a petitioner, who is a nonresident of the state, seeks modification; and

    c. the respondent is subject to the personal jurisdiction of the Illinois tribunal.

2. The order may be modified if

    a. Illinois is the state of residence of the child; or

    b. a party who is an individual is subject to the personal jurisdiction of the Illinois tribunal and all of the parties who are individuals have filed consents and a record in the issuing tribunal for an Illinois tribunal to modify the support order and assume continuing exclusive jurisdiction.

The petitioner's argument that the fact the respondent was personally served in Illinois, and therefore subject to the jurisdiction of the courts of this state, fails. While personal service of the respondent while he was present in the state would have been sufficient for jurisdiction to enforce or establish a support order, it was not sufficient to modify. The appellate court noted that the drafters of the Illinois version of the UIFSA elected to limit personal and subject-matter jurisdiction in modification cases to something less than was permissible under the Due Process Clause of the Fourteenth Amendment.

The appellate court concluded that when a party seeks to modify a child support order of a foreign tribunal, which foreign tribunal's order has been registered in the state of Illinois, not only must the court have personal jurisdiction over the obligor, but also the requirements for modification of a foreign tribunal's support order must be met.

In *In re Marriage of Edelman,* 2015 IL App (2d) 140847, 38 N.E.3d 50, 395 Ill.Dec. 173, the appellate court distinguished the case at issue from *Vailas, supra*. In *Edelman,* the parties were divorced and lived with their two minor children in Connecticut. In 2003, a year after the entry of the judgment, the petitioner moved to Illinois with the minor children, and subsequently, in 2008, the respondent also moved to Illinois. In 2010, the petitioner sought to enroll the Connecticut judgment in order to modify and/or enforce the judgment in Lake County, Illinois, and she also filed a petition for rule to show cause for failure to pay child support and uncovered medical expenses. The respondent filed a motion to compel the petitioner to cooperate in having the children participate in the respondent's remarriage ceremony. That same day, the trial court entered an agreed order, granting the petitioner's petition to enroll the Connecticut judgment in Lake County and finding the respondent in indirect civil contempt for failure to pay child support and uncovered medical expenses.

After the enrollment of the Connecticut judgment and finding of contempt, the respondent moved to Florida. In 2011, the court entered an order finding that the respondent had purged himself of contempt. In 2013, the petitioner filed another petition for rule for failure to pay child support and uncovered medical expenses. The respondent filed a response and a petition to decrease his child support, and the petitioner filed a petition to increase the respondent's child support.

The trial court found that it had both personal jurisdiction over the parties and subject-matter jurisdiction to address their disputes involving the Connecticut judgment. Additionally, the trial court found that it had authority under the UIFSA to modify the child support provisions of the Connecticut judgment, which the respondent disputed. The respondent argued that because he no longer resided in Illinois, §611(a) of UIFSA governed the ability of Illinois courts to modify the Connecticut judgment, and the requirements of that section were not met.

The appellate court rejected the respondent's argument, stating that, unlike *Vailas, supra,* both parties resided in Illinois when the foreign child support order was enrolled for modification purposes and thus §613 — not §611 — applied. Further, there was no dispute that the trial court had personal jurisdiction over the respondent, who filed a general appearance in the case while he was still an Illinois resident.

In the unpublished decision *Spicer v. Spicer,* 2012 IL App (1st) 103261-U, the ex-wife filed a petition in Illinois to modify a child support order that had been entered in Louisiana. The ex-husband appealed the increase in child support that was ordered and the requirements that he contribute to the children's college expenses and pay half of the medical and dental bills not covered by insurance. When he did not comply with the order as modified in Illinois, he was found in indirect civil and criminal contempt, and he appealed. The appellate court found the trial court lacked personal jurisdiction over him. The court was without jurisdiction to award forms of support that were not available under Louisiana law, and the order of contempt was void for lack of jurisdiction as one cannot be found guilty of contempt for violating a void order. The court noted that the Illinois Supreme Court has expressly stated that a judgment entered by a court without jurisdiction of the parties is void and may be attacked at any time, either directly or collaterally. 2012 IL App (1st) 103261-U at ¶12, citing *Sarkissian v. Chicago Board of Education,* 201 Ill.2d 95, 776 N.E.2d 195, 202, 267 Ill.Dec. 58 (2002).

Spicer dealt with the issue of personal jurisdiction governed in part by §201 of the UIFSA. One of the bases through which an Illinois court can acquire jurisdiction over a nonresident is if the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction. In *Spicer,* it was undisputed that the ex-husband entered a general appearance and filed several responsive pleadings to the petitioner's motions for increased child support, college support, and medical support. However, this was insufficient to establish personal jurisdiction as §201(b) of the UIFSA states the bases of personal jurisdiction set forth in §201(a), or in any other law of this state, may not be used to acquire personal jurisdiction for a tribunal of this state to modify a child support order of another state, unless the requirements of §611 or §615 of the UIFSA are met.

As cited in *Spicer, supra,* §611 of the UIFSA, entitled "Modification of Child-Support Order of Another State," sets forth several bases under which an Illinois tribunal may modify a foreign child support order that has been registered in Illinois. Under §611, a tribunal of this state, on a petition to modify a child support order issued by another state that is registered in this state, after notice and hearing may modify the foreign jurisdiction's order if all of the parties or individuals have filed consents in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing exclusive jurisdiction over future child support orders. 750 ILCS 22/611(a)(2).

Also cited in *Spicer,* §615 of the UIFSA refers to modification of a child support order entered in a foreign country or political subdivision.

The *Spicer* court noted that the problem was that there were no written consents filed in the issuing state showing that the parties had no objection to the courts of Illinois modifying the support order and assuming continuing exclusive jurisdiction.

The appellate court in *Spicer* went on to note that the intent of the drafters of §201(b) was to codify the principle that jurisdiction over a nonresident in modification cases did not depend on the usual basis of personal jurisdiction. 2012 IL App (1st) 103261-U at ¶11, citing *Vailas, supra*. To that end, the statute prescribes additional conduct — *i.e.,* written consent — that is required in order to invoke personal jurisdiction in a modification case. The appellate court noted that participating in proceedings is not the equivalent of written consent.

The goal of the UIFSA is to provide a system whereby only one child support order is in effect at any one time. And when the written consent requirement of §611 is neither satisfied nor waived, the court lacks jurisdiction to modify a support order of a foreign court. 2012 IL App (1st) 103261-U at ¶¶18 – 19.

In the unpublished decision *In re Marriage of Parrick,* No. 5-10-0283, 2011 WL 10501220 (5th Dist. Apr. 7, 2011) (text available in Westlaw), the court entered a judgment for dissolution in 1997 dissolving the marriage of the parties. The judgment entered an order for child support subsequent to the dissolution. Both parties had moved from Illinois to Ohio. In 2010, the ex-wife filed a second rule to show cause for contempt against the ex-husband for indirect civil contempt. The ex-husband moved to dismiss, alleging Ohio had exclusive jurisdiction over the case. The Illinois court found it still had jurisdiction and denied the ex-husband's motion to dismiss the contempt petition, rejecting the husband's argument that, pursuant to §207 of the UIFSA, Ohio was the exclusive jurisdiction. The court noted that §207 aims to cure the problem of conflicting support orders entered by multiple courts and provides for the exercise of continuing exclusive jurisdiction by one tribunal over support orders. 2011 WL 10501220 at *3, citing *Child Support Enforcement Division of Alaska v. Brenckle,* 424 Mass. 214, 675 N.E.2d 390 (1997). The court further noted that §207 provides, however, that as long as a controlling child support order has not been modified by a tribunal of another state that has assumed jurisdiction pursuant to the UIFSA, the tribunal that issued the order has continuing jurisdiction to enforce the order and to request that another state enforce it as well. The court noted that, while the UIFSA contemplates that only one tribunal will have continuing exclusive jurisdiction to modify a child support order, more than one tribunal can have continuing jurisdiction to enforce the order.

(c) [5.20] Other Illinois statutes

In addition to the IMDMA and the Uniform Interstate Family Support Act discussed in §§5.18 and 5.19 above, a number of other Illinois statutes affect child support.

Expedited Child Support Act of 1990. The Expedited Child Support Act of 1990 allows for the creation of an expedited child support system in any one or more counties for actions to establish parentage and to modify and enforce child support obligations. The system must be available to all participants in the federal IV-D Program established by Title IV, Part D, of the Social Security Act, 42 U.S.C. §301, *et seq.* (see 42 U.S.C. §651, *et seq.*), and may be made available to all persons regardless of participation in the IV-D Program, in accordance with the Act. To implement the system, the chief judge of any circuit must develop and submit to the Supreme Court a plan for the creation of such a system. It is therefore necessary to check the local rules of each circuit to determine whether the circuit has implemented the provisions of this Act.

As far as jurisdiction over the absent spouse goes, §7 of the ECSA provides that, except as otherwise provided in this section, the service of notice to commence an action under the Act may be made by regular mail. The notice must be sent to the last known address of the obligor. Parentage actions, actions for establishment of child support orders involving parties who are married and living separately, and any other proceeding in which no court has yet acquired jurisdiction over the subject matter must be commenced as provided in the Code of Civil Procedure and the Supreme Court Rules. The notice or summons indicates the date set for hearing.

Illinois Domestic Violence Act of 1986. Section 214(b)(12) of the Illinois Domestic Violence Act of 1986 (IDVA), 750 ILCS 60/101, *et seq.,* gives the court the power to establish child support as part of an order of protection.

Income Withholding for Support Act. The Income Withholding for Support Act, 750 ILCS 28/1, *et seq.,* is a necessary piece of legislation for practitioners seeking to enforce support obligations against the absent spouse.

> **Purpose; intent. This Act consolidates into a single new Act the lengthy and nearly identical provisions relating to income withholding for support that were formerly contained in Section 10-16.2 of the Illinois Public Aid Code, Section 706.1 of the Illinois Marriage and Dissolution of Marriage Act, Section 4.1 of the [**former**] Non-Support of Spouse and Children Act, and Section 20 of the Illinois Parentage Act of 1984. . . . This Act is intended as a continuation of the consolidated provisions, and the consolidation is not intended to make any substantive change in the law nor to affect any order issued under any of the consolidated provisions.** 750 ILCS 28/5.

The Act's provisions regarding consumer reporting and publication of information concerning "deadbeat" parents should be considered in terms of their interface with the Fair Credit Reporting Act, 15 U.S.C. §1681a(f), and 750 ILCS 5/706.3.

Juvenile Court Act of 1987. The Juvenile Court Act of 1987, 705 ILCS 405/1-1, *et seq.,* provides that the juvenile court is bound not by the standards of IMDMA §§505 and 502 but by the standards of §9.1 of the Children and Family Services Act, 20 ILCS 505/1, *et seq.,* in setting child support payments. See 705 ILCS 405/2-23(5), 405/3-24(5), 405/4-21(5), 405/5-710(5).

Non-Support Punishment Act. Just when family law practitioners thought they would be able to safely avoid criminal court, along came P.A. 91-613 (eff. Oct. 1, 1999), which repealed the Non-Support of Spouse and Children Act, formerly found at 750 ILCS 15/1, *et seq.,* and established the Non-Support Punishment Act, 750 ILCS 16/1, *et seq.,* which provides for prosecution by a state's attorney. A person found guilty of a first offense is subject to punishment for a Class A misdemeanor; a person convicted of a second or subsequent offense is guilty of a Class 4 felony. 750 ILCS 16/15(b). The Act defines the offense of "failure to support," creating ways in which the offense can be committed based on the length of the nonpayment, the dollar amount of the arrearage existing, or fleeing the state. 750 ILCS 16/15(a). The Act allows for a temporary support order to be entered as a condition of bond and directs that, when a fine is imposed, it may be directed by the court to be paid in whole or in part to the spouse, former spouse, or, if the support is for a child or children, the custodial parent. It further provides community service penalties of not less than 30 nor more than 120 hours per month. The Act further provides that if a person is placed on court supervision, that supervision is conditioned on the performance of community service. 750 ILCS 16/50. The Act allows the court to order the person to seek employment and report periodically to the court with a diary listing the efforts at acquisition of work. 750 ILCS 16/60.

The Non-Support Punishment Act has an impact on anyone who must have a license in order to practice a profession or craft. If an applicant or licensee acknowledges a delinquency in support payments or states in an application that a delinquency does not exist and a delinquency is later discovered, the licensing agency takes disciplinary action against the person. 750 ILCS 16/50(d).

Section 50 of the Non-Support Punishment Act also provides for the suspension of an obligor's driver's license subject to the provisions of §7-702.1 of the Illinois Vehicle Code, 625 ILCS 5/1-100, *et seq.* Section 7-702.1 allows an individual who has had a driver's license suspended for nonpayment of support to obtain a court-ordered, family-support driver's license or enter into the equivalent of an installment contract to take care of payment of the arrearage and retain the driver's license.

Unemployment Insurance Act. Section 1801.1 of the Unemployment Insurance Act, 820 ILCS 405/100, *et seq.,* establishes a directory of newly hired employees known as the Illinois New Hires Directory (see https://ides.illinois.gov/employer-resources/taxes-reporting/new-hires.html) and specifies the information that employers must file with the Illinois Department of Employment Security. 820 ILCS 405/1801.1 provides that employers "may voluntarily file the address to which the employer wants income withholding orders to be mailed."

P.A. 90-476 (eff. Jan. 1, 1998) amended both the IMDMA and the former Illinois Parentage Act of 1984 to allow piercing the ownership veil in the case of a noncustodial parent. The amendment requires a unity of interest and ownership that, if established, allows the court to discover assets of the noncustodial parent held in the names of other persons or businesses. Three criteria must be met before the court may order discovery and attachment of the assets of the other person or entity:

1. The noncustodial parent and the other person or entity must maintain records together.

2. They must fail to maintain an arm's-length relationship between themselves with regard to any asset.

3. The noncustodial parent must have transferred assets to the other person or entity with the intent to perpetrate a fraud on the custodial parent. See 750 ILCS 5/505(b), 45/15(c). See also 735 ILCS 5/12-112.

P.A. 93-116 (eff. July 10, 2003) amended the Illinois Public Aid Code, 305 ILCS 5/1-1, *et seq.* (see 305 ILCS 5/10-3.3) and added to the IMDMA (750 ILCS 5/714), the Non-Support Punishment Act (750 ILCS 16/33), and the former Illinois Parentage Act of 1984 (750 ILCS 45/14.5) provisions regarding information needed to locate putative fathers and noncustodial parents. 750 ILCS 5/714, which is substantially the same as the provisions added to the other acts, provides:

> **(a) Upon request by a public office, employers, labor unions, and telephone companies shall provide location information concerning putative fathers and noncustodial parents for the purpose of establishing a child's paternity or establishing, enforcing, or modifying a child support obligation. The term "public office" is defined as set forth in the Income Withholding for Support Act. In this Section, "location information" means information about (i) the physical whereabouts of a putative father or noncustodial parent, (ii) the employer of the putative father or noncustodial parent, or (iii) the salary, wages, and other compensation paid and the health insurance coverage provided to the putative father or noncustodial parent by the employer of the putative father or noncustodial parent or by a labor union of which**

the putative father or noncustodial parent is a member. An employer, labor union, or telephone company shall respond to the request of the public office within 15 days after receiving the request. Any employer, labor union, or telephone company that willfully fails to fully respond within the 15-day period shall be subject to a penalty of $100 for each day that the response is not provided to the public office after the 15-day period has expired. The penalty may be collected in a civil action, which may be brought against the employer, labor union, or telephone company in favor of the public office.

(b) Upon being served with a subpoena (including an administrative subpoena as authorized by law), a utility company or cable television company must provide location information to a public office for the purpose of establishing a child's paternity or establishing, enforcing, or modifying a child support obligation.

(c) Notwithstanding the provisions of any other State or local law to the contrary, an employer, labor union, telephone company, utility company, or cable television company shall not be liable to any person for disclosure of location information under the requirements of this Section, except for willful and wanton misconduct.

P.A. 93-736 (eff. July 14, 2004) amended the

1. Illinois Banking Act, 205 ILCS 5/1, *et seq.* (205 ILCS 5/48.4);

2. Savings Bank Act, 205 ILCS 205/1001, *et seq.* (205 ILCS 205/7007);

3. Illinois Credit Union Act, 205 ILCS 305/1, *et seq.* (205 ILCS 305/43.1);

4. Foreign Banking Office Act, 205 ILCS 645/1, *et seq.* (205 ILCS 645/20); and

5. Illinois Public Aid Code (305 ILCS 5/10-16.7).

This amendment provided that an obligor may have his or her bank funds debited periodically for the amount of child support he or she is required to pay in actions initiated by the Illinois Department of Healthcare and Family Services to enforce a child support debit from individuals who do not qualify for income withholding.

P.A. 93-835 (eff. July 29, 2004) amended §917 of the Illinois Income Tax Act, 35 ILCS 5/101, *et seq.,* to provide that the DHFS, the Illinois Attorney General's Office, and state's attorneys of the respective counties may obtain information from income tax returns that otherwise would be confidential to assist in the collection of child support. Regarding contempt, pursuant to IMDMA §505(a-5), in an action to enforce an order for support based on the respondent's failure to make support payments that are required by the order, notice of proceedings to hold the respondent in contempt for that failure may be served on the respondent by personal service or by regular mail addressed to the respondent's last known address. The respondent's last known address may be determined from records of the clerk of the court, from the Federal Case Registry of Child Support Orders, or by any other reasonable means.

Contempt orders and other penalties for nonpayment of support do not end upon the child's emancipation. IMDMA §505(i) states the court does not lose the powers of contempt, driver's license suspension, or other child support enforcement mechanisms, including but not limited to criminal prosecution as set forth in §15 of the Non-Support Punishment Act. The Non-Support Punishment Act provides that a person convicted under the Act for nonpayment of support may be sentenced in accordance with the Act. The sentence may include, but need not be limited to, a requirement that the person perform community service or participate in a work alternative program. 750 ILCS 16/50. A person may not be required to participate in a work alternative program under §50 if the person is currently participating in a work program pursuant to §505.1 of the IMDMA. Section 505.1 enables the court to order an obligor to seek employment and report periodically to the court with a job diary listing efforts to find employment.

750 ILCS 5/505(a)(4.5) provides that, in a proceeding for child support following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse and in which the court is requiring payment of support for the periods before the date an order for current support is entered, there is a rebuttable presumption that the supporting party's net income for the prior period was the same as his or her net income at the time the order for current support is entered.

750 ILCS 5/505(a)(6) provides that if the obligor was properly served with a request for discovery of financial information relating to the obligor's ability to provide child support, the obligor failed to comply with the request despite having been ordered to do so by the court, and the obligor is not present at the hearing to determine support despite having received proper notice, then any relevant financial information concerning the obligor's ability to provide child support that was obtained pursuant to subpoena and proper notice is admitted into evidence without the need to establish any further foundation for its admission.

750 ILCS 5/505(i) provides that the court does not lose the power of contempt, driver's license suspension, or other child support enforcement mechanisms, including but not limited to criminal prosecutions as set forth in this Act, upon the emancipation of the minor child.

In *Crank v. Crank,* 374 Ill.App.3d 1115, 871 N.E.2d 962, 313 Ill.Dec. 235 (3d Dist. 2007), the issue was raised as to which of several competing statutes controlled the ability to collect child support arrearages after the obligation for support had terminated. The husband argued that §4 of the Illinois Wage Assignment Act, 740 ILCS 170/.01, *et seq.,* limited the amount of arrearages that could be collected to 15 percent. The appellate court held that the correct statute to apply was the Income Withholding for Support Act. The court noted that Illinois law placed high limitations on what can be withheld to satisfy support obligations in conformity with the federal law. 15 U.S.C. §1601, *et seq.;* 750 ILCS 28/35(c). The court went on to note that Illinois has adopted the limits set forth in the federal statute and that, depending on the factual circumstances, the amount that can be garnished can range from 50 to 60 percent of the weekly earnings.

(2) [5.21] Federal statutes

42 U.S.C.A. §407(a) bars state courts from diverting supplemental security income (SSI) payments for child support obligations when SSI is the recipient's sole source of income. *Department of Public Aid ex rel. Lozada v. Rivera,* 324 Ill.App.3d 476, 755 N.E.2d 548, 258 Ill.Dec. 165 (2d Dist. 2001).

(a) [5.22] Full Faith and Credit for Child Support Orders Act

The Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. §1738B, requires full faith and credit for child support orders. Just as the provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), 750 ILCS 36/101, *et seq.,* conflicted with the Parental Kidnaping Prevention Act of 1980 (PKPA), Pub.L. No. 96-611, §§6 – 10, 94 Stat. 3568 (see §5.26 below), it would appear that full faith and credit for child support orders under the FFCCSOA and the provisions of the Uniform Interstate Family Support Act, as discussed in §§5.18 and 5.19 above, may conflict. Under the Supremacy Clause, in the event of any conflict, the provisions of the FFCCSOA control, as federal law will prevail over a conflicting state law. These two statutory schemes need to be read in conjunction with one another when attempting to modify the orders of another state relating to child support.

Mattmuller v. Mattmuller, 336 Ill.App.3d 984, 785 N.E.2d 196, 271 Ill.Dec. 545 (5th Dist. 2003), provided an opportunity for one Illinois appellate court to review how the FFCCSOA would be applied in Illinois. Congress determined, the court noted, that the Uniform Reciprocal Enforcement of Support Act was not having its desired effect because it was spawning excessive relitigation of child support cases and the establishment of conflicting orders that led to confusion, waste of judicial resources, disrespect for the court, and a diminution of public confidence in the law. Thus, Congress deemed it necessary to revisit the area of child support. As a result, in 1994, Congress enacted the FFCCSOA to counteract this problem. The following were among the stated Congressional purposes in adopting the Act:

1. to facilitate the enforcement of support orders among the states;

2. to discourage continuing interstate controversies over child support in the interest of greater financial security for the children for whom the support is ordered;

3. to avoid jurisdictional conflict among state courts in the establishment of child support orders; and

4. to establish national standards under which the courts of various states could determine their jurisdiction regarding issues of child support and the effect to be given by each state to child support orders issued by the courts of other states. 785 N.E.2d at 200.

As a federal statute, the FFCCSOA preempts all similar state laws pursuant to the Supremacy Clause of the U.S. Constitution. The definitional sections adopted by Congress in the FFCCSOA are similar to the definitions adopted in the PKPA. The core concept essential to understanding the FFCCSOA is "continuing, exclusive jurisdiction," which in essence provides that a court that originates a child support order has continuing, exclusive jurisdiction over the order as long as the state is the child's home state or the residence of any party unless the court of another state has modified the child support order in accordance with the Act. Various state courts have addressed the issue of "continuing, exclusive jurisdiction" and have interpreted the phrase to mean that a court cannot modify a child support order merely because such an order has been registered in the state.

In order for a court to have continuing, exclusive jurisdiction under the FFCCSOA, the order must have been entered by a court that had subject-matter and personal jurisdiction over the parties and the parties must have had notice and an opportunity to be heard. 28 U.S.C. §1738B(c). The FFCCSOA further defines a "child support order" as a "judgment, decree, or order of a court requiring the payment of child support," including a temporary order or a modification of an initial order. 28 U.S.C. §1738B(b)(5).

Babcock v. Martinez, 368 Ill.App.3d 130, 857 N.E.2d 911, 306 Ill.Dec. 512 (4th Dist. 2006), involved a multi-jurisdictional dispute. In *Babcock,* the state of Kansas had a child support order that directed a father to pay a set monthly fee for child support. The order, however, did not supersede the original Illinois judgment of dissolution that ordered the father to pay a percentage of his net income every month as child support. Because the record did not indicate that the Kansas order specifically nullified the original Illinois support order, the mother was entitled to recover child support arrearages based on the Illinois child support order. However, despite that ruling, the mother was equitably estopped from seeking past-due child support from the father under the original order because she accepted monthly child support payments for 17 years under the terms of the Kansas order. The case discusses the application of the Revised Uniform Reciprocal Enforcement of Support Enforcement Act but not the provisions of the FFCCSOA, which may be the controlling statute that should have been applied.

(b) [5.23] Other federal statutes

In addition to the Full Faith and Credit for Child Support Orders Act discussed in §5.22 above, other federal statutes have an impact on child support.

Under 26 U.S.C. §402(e)(1)(A) and 29 U.S.C. §1056(d)(3), a qualified domestic relations order (QDRO) can be used to access a 401(k) plan for the purpose of collecting unpaid child support or maintenance. When the QDRO is served, the trustee or administrator must withdraw the money and pay it over to the obligee as support. The amount of money that is taken out is treated as ordinary income to the obligor in the year in which the money is withdrawn. The money withdrawn from the 401(k) plan generally is not treated as income to the obligee.

In *In re Marriage of Takata,* 383 Ill.App.3d 782, 890 N.E.2d 688, 321 Ill.Dec. 966 (3d Dist. 2008), the former wife obtained a judgment against her former spouse for a child support arrearage. Thereafter, she attempted to collect said judgment against the husband's IRA account, which was owned by the ex-husband's current wife. The Third District Appellate Court determined the IRA account was reachable for satisfaction of the judgment against the ex-husband because the husband's new wife had not filed a request for an exemption hearing under 735 ILCS 5/2-1402(c). The court reasoned that, even if the ex-husband's current spouse had asserted an exemption, the exemption would have been overcome by the Illinois Income Withholding for Support Act, which provides an exception to exemptions from attempts to collect judgments for child support. 750 ILCS 28/15(d). The appellate court determined that the ex-husband had an actual interest in the IRA held in his current wife's name as it was the ex-husband and his current wife's marital property. Further, the current wife did not present evidence that the IRA was nonmarital in nature. The court determined that the IRA was marital property, and that the ex-husband had a legal interest in the same. Based on this determination, the appellate court concluded it was appropriate for the IRA to be subject to turnover to the ex-wife to satisfy the back-due child support judgment.

PRACTICE POINTER

✓ When serving the QDRO, make sure the plan administrator or trustee is advised that the income taxes are to be assessed and that the Form 1099 is directed to the participant. See www.irs.gov/Forms-&-Pubs (case sensitive). Additionally, QDROs may only be used to access qualified plans under the Employee Retirement Income Security Act of 1974, Pub.L. No. 93-406, 88 Stat. 829. In order to invade a nonqualified plan, an order of court and a letter of direction will generally suffice.

18 U.S.C. §228(a) makes it an offense for a person (1) to willfully fail to pay a support obligation with respect to a child who resides in another state if the obligation has remained unpaid for a period longer than one year or is greater than $5,000; (2) to travel in interstate or foreign commerce with the intent to evade a support obligation if the obligation has remained unpaid for a period longer than one year or is greater than $5,000; or (3) to willfully fail to pay a support obligation with respect to a child who resides in another state if the obligation has remained unpaid for a period longer than two years or is greater than $10,000. Section 228 further provides that a "support obligation" means any amount determined under a court order or an order of an administrative process pursuant to the law of a state or of a Native American tribe to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living. 18 U.S.C. §228(f)(3). In the event of a conviction, the court must order restitution in an amount equal to the total unpaid support obligation as it exists at the time of sentencing. 18 U.S.C. §228(d). It should be noted that 18 U.S.C. §228(b) was held unconstitutional as it relates to the mandatory rebuttable presumption established within the statute by *U.S. v. Pillor,* 387 F.Supp.2d 1053 (2005).

4. [5.24] Awards of Attorneys' Fees

The court has jurisdiction to entertain a petition for fees under the IMDMA. An attorney who seeks fees from a client with the client's consent must file

a. a verified petition for entry of a consent judgment with a copy of the written contract with client;

b. an attorney's affidavit incorporating a detailed itemized billing;

c. a client affidavit; and

d. a proposed consent judgment with the client's signed approval. 750 ILCS 5/508(d).

An attorney who seeks fees from a client without the client's consent first must file a motion to withdraw as counsel with proper notice to the client or have summons served if the court does not already have jurisdiction over the client. 750 ILCS 5/508(c)(1), 5/508(c)(2).

An attorney may also seek either interim or final fees from the opposing party. See 750 ILCS 5/508(a), 5/501(c-1), 5/503(j); 735 ILCS 5/2-1401. Counsel may also seek fees from the opposing party for costs incurred in the enforcement or modification of any order, defending or prosecuting an appeal, or undertaking ancillary litigation. See 750 ILCS 5/508(a)(2) – 5/508(a)(3.1), 5/508(a)(6), 5/508(b).

In order for an attorney to proceed against the client or the other spouse for fees, notice of the petition must be served in accordance with Illinois Supreme Court Rules 11, 12, 104, or 105. When personal service is required, the attorney's failure to file proof of service or produce a registered mail receipt defeats the attorney's claim for fees. *Ingrassia v. Ingrassia,* 156 Ill.App.3d 483, 509 N.E.2d 729, 109 Ill.Dec. 68 (2d Dist. 1987).

A circuit court retains jurisdiction to hear issues of attorneys' fees and enter allowances for them in spite of the fact that the death or remarriage of one of the parties resulted in an abatement of the dissolution proceeding. *Conway v. Department of Public Aid,* 139 Ill.App.3d 1062, 487 N.E.2d 1240, 94 Ill.Dec. 363 (5th Dist. 1986); *In re Marriage of Dague,* 136 Ill.App.3d 297, 483 N.E.2d 322, 91 Ill.Dec. 40 (1st Dist. 1985).

Brandon v. Caisse, 172 Ill.App.3d 841, 527 N.E.2d 118, 122 Ill.Dec. 746 (2d Dist. 1988), and *In re Marriage of Baltzer,* 150 Ill.App.3d 890, 502 N.E.2d 459, 104 Ill.Dec. 196 (2d Dist. 1986), should be consulted regarding the issue as to whether the court retains jurisdiction to rule on a fee petition after a dissolution proceeding has been abated by the death of one of the parties. However, Illinois courts have been divided on the issue. The court in *Brandon* held that the wife's death abated the cause of action for the dissolution of marriage, including jurisdiction to award attorneys' fees. 527 N.E.2d at 120. On the contrary, the court in *In re Marriage of Baltzer* held that a trial court will retain jurisdiction over a former attorney seeking to resolve a fee petition, even after a dissolution proceeding has abated with the death of one of the parties, and that the application for attorneys' fees and costs have to be made in a pending dissolution proceeding rather than being brought as a new action in another court. 502 N.E.2d at 463.

The court in *In re Marriage of Drews,* 179 Ill.App.3d 110, 534 N.E.2d 411, 128 Ill.Dec. 229 (1st Dist. 1989), held that the trial court retained ancillary jurisdiction to adjudicate an attorneys' fees petition during the pendency of an appeal. This was contrary to *In re Marriage of Pease,* 106 Ill.App.3d 617, 435 N.E.2d 1361, 62 Ill.Dec. 389 (2d Dist. 1982).

The court in *In re Marriage of Lucht,* 299 Ill.App.3d 541, 701 N.E.2d 267, 233 Ill.Dec. 624 (1st Dist. 1998), held that based on public policy, a proceeding brought under 750 ILCS 5/508 against one's own client may not be heard after the case is dismissed, even if the petition for fees is filed within 30 days of the order.

Cases decided after the P.A. 89-712 (eff. June 1, 1997) amendment to 750 ILCS 5/508(a) that provide worthwhile instruction include *In re Marriage of McGuire,* 305 Ill.App.3d 474, 712 N.E.2d 411, 238 Ill.Dec. 689 (5th Dist. 1999); *In re Marriage of Brackett,* 309 Ill.App.3d 329, 722 N.E.2d 287, 242 Ill.Dec. 798 (2d Dist. 1999); *In re Marriage of DeLarco,* 313 Ill.App.3d 107, 728 N.E.2d 1278, 245 Ill.Dec. 921 (2d Dist. 2000); and *In re Marriage of Blum,* 377 Ill.App.3d 509, 879 N.E.2d 940, 316 Ill.Dec. 552 (2d Dist. 2007), *aff'd in part, rev'd in part,* 235 Ill.2d 21 (2009). The *Blum*

court held that the time limits of 750 ILCS 5/503(j)(1) do not apply to petitions for contribution to attorneys' fees in postjudgment proceedings. Rather, in conformity with the language of §508(a), such petitions are timely if filed at the conclusion of the case, *i.e.,* within 30 days after the date on which the judgment is entered. This was later affirmed by the Illinois Supreme Court. *Blum v. Koster,* 235 Ill.2d 21, 919 N.E.2d 333, 335 Ill.Dec. 614 (2009).

Engel v. Loyfman, 383 Ill.App.3d 191, 890 N.E.2d 633, 321 Ill.Dec. 911 (1st Dist. 2008), presented the issue of whether 750 ILCS 5/508(e)(1) imposed a 90-day waiting period that was jurisdictional. The plaintiff filed a posttrial motion under §2-1401 of the Code of Civil Procedure, 735 ILCS 5/2-1401, and was subsequently advised by his client to withdraw the same. Counsel did so and subsequently withdrew from the case. Ten days after his withdrawal, he filed suit against his former client for fees. The trial court held that 750 ILCS 5/508(e)(1) was a jurisdictional impediment to counsel's right to sue. The appellate court reversed, finding that the statute's 90-day waiting period was a mere procedural limitation, as opposed to a jurisdictional impediment.

5. [5.25] Awards of Educational Expenses

Before the enactment of 750 ILCS 5/513, caselaw held that the court had jurisdiction to enter support orders for the education and maintenance of a child or children out of the property or income of either or both of the parents and that such an order could be entered after the child or children reached majority as the court still continued to retain jurisdiction. *Gaddis v. Gaddis,* 20 Ill.App.3d 267, 314 N.E.2d 627 (5th Dist. 1974). In *In re Marriage of Winters,* 160 Ill.App.3d 277, 512 N.E.2d 1371, 111 Ill.Dec. 734 (2d Dist. 1987), the court held that the trial court has jurisdiction to enter orders modifying provisions of a judgment for dissolution to provide for continuing child support for a child with a disability after the child's attainment of the age of majority. *Accord In re Marriage of Holderrieth,* 181 Ill.App.3d 199, 536 N.E.2d 946, 129 Ill.Dec. 896 (1st Dist. 1989).

IMDMA §513 states that the court may make such provisions for the education and maintenance of the child or children, whether of minor or majority age, out of the property and income of either or both parents as equity may require. Because the statute allows the obligation to be satisfied out of property, only in rem jurisdiction would be required over the property if located in Illinois. If an attempt to apply income is made, in personam jurisdiction would likely be required by the court.

6. [5.26] Child Custody

Section 601.2 of the IMDMA addresses jurisdictional issues as they relate to custody and visitation. However, the provisions set forth in §601.2 cannot be read in a vacuum, and the practitioner must consider the impact of the Uniform Child-Custody Jurisdiction and Enforcement Act and the Parental Kidnaping Prevention Act of 1980, which act as limitations on the exercise of jurisdiction by the courts of this state. 750 ILCS 36/201, *et seq.;* 28 U.S.C. §1738A.

The provisions for determining whether an initial child custody determination may properly be made in Illinois are set forth in the UCCJEA. 750 ILCS 36/201, *et seq*. Section 202 provides for exclusive, continuing jurisdiction in the State of Illinois. Section 203 provides for jurisdiction to

modify the determination of another state. Section 204 allows for temporary emergency jurisdiction. Section 206 provides for simultaneous proceedings. Section 207 allows an Illinois court to decline jurisdiction if it finds that Illinois is an inconvenient forum. Finally, §208 allows for jurisdiction to be declined by reason of the conduct of a party.

Child custody determinations are enforced under UCCJEA §§301 – 303. Section 304 provides for temporary visitation when Illinois does not have jurisdiction to modify a child custody determination. Section 305 allows for registration of a child custody determination of another state. Section 306 provides for enforcement of registered child custody determinations, and §308 provides for expedited enforcement of child custody determinations. Section 311 provides for a warrant to take physical custody of a child. Section 313 provides for recognition and enforcement of orders issued by another state.

Section 601.2 of the IMDMA provides for the commencement of a proceeding for allocation of parental responsibilities by a parent by filing a petition for divorce, legal separation, or declaration of invalidity of marriage. Illinois law also makes provisions for filing of a proceeding for allocation of parental responsibilities by a person other than a parent by filing a petition for allocation of parental responsibilities but only if the child is not in the physical custody of a parent. 750 ILCS 5/601.2(b)(3). In *Horgan v. Romans,* 366 Ill.App.3d 180, 851 N.E.2d 209, 303 Ill.Dec. 311 (1st Dist. 2006), after the parties were divorced, the mother moved to New York, and the father filed an application for modification of visitation in Illinois. The mother filed a motion to decline jurisdiction and transfer adjudication of visitation issues to the state of New York. The circuit court declined to exercise jurisdiction, and the father appealed.

The appellate court held that the parties' removal and visitation order contained a binding forum-selection clause establishing Illinois as the jurisdiction where future issues relating to matters of visitation would be decided. On appeal, the husband argued that the state of Illinois must retain exclusive jurisdiction over these issues pursuant to §202 of the UCCJEA, as the removal and visitation order that was agreed on by the parties at the time the wife removed the children to the state of New York contained a forum-selection clause requiring that jurisdiction remain within the state of Illinois. The wife opposed the adjudication of visitation modification in Illinois, claiming that Illinois was an inconvenient forum under the provisions of §207 of the UCCJEA. The trial court found the balance of factors enumerated in the inconvenient-forum provision of the UCCJEA weighed in favor of New York as a more appropriate forum for determining the visitation issues.

The leading case on standing when a child is not in the physical custody of the parent is *In re Custody of Peterson,* 112 Ill.2d 48, 491 N.E.2d 1150, 96 Ill.Dec. 690 (1986). The determination that a person other than a parent who seeks to obtain custody under the former 750 ILCS 5/601 does not have standing is not a final and appealable order without an Illinois Supreme Court Rule 304(a) finding. *In re D.J.E.,* 319 Ill.App.3d 489, 744 N.E.2d 1286, 253 Ill.Dec. 222 (2d Dist. 2001). In terms of whether a child is in the physical custody of a parent, or the parent has relinquished custody of the child, two factually similar but conflicting cases should be reviewed. In *In re Marriage of Feig,* 296 Ill.App.3d 405, 694 N.E.2d 654, 230 Ill.Dec. 685 (3d Dist. 1998), the court found that a parent had relinquished physical custody, and therefore the nonparents had standing to intervene, while in *In re Marriage of Rudsell,* 291 Ill.App.3d 626, 684 N.E.2d 421, 225 Ill.Dec. 736 (4th Dist. 1997), the court held that the determination that a parent does not have physical

custody of a child does not turn on possession, but requires that the parent has voluntarily and indefinitely relinquished custody of the child. The court further stated that voluntary relinquishment of physical custody should be considered in light of "(1) who was responsible for the care and welfare of the child . . . ; (2) the manner in which physical possession of a child was acquired; and (3) the nature and duration of the possession." 684 N.E.2d at 425.

In order for a third party to have standing to seek custody over a parent, it is necessary that both parents be out of the picture. *Franklin v. DeVriendt,* 288 Ill.App.3d 651, 681 N.E.2d 578, 224 Ill.Dec. 263 (1st Dist. 1997). On the issue of whether exercise of visitation by a parent is sufficient to defeat a third party's claim for custody of a child, examine the conflicting cases of *In re Parentage of Unborn Child Brumfield,* 284 Ill.App.3d 950, 673 N.E.2d 461, 220 Ill.Dec. 549 (4th Dist. 1996), and *In re Marriage of Brownfield,* 283 Ill.App.3d 728, 670 N.E.2d 1198, 219 Ill.Dec. 310 (4th Dist. 1996).

P.A. 99-90 (eff. Jan. 1, 2016), repealed 750 ILCS 5/601, and replaced it with 750 ILCS 5/601.2. Since 750 ILCS 5/601.2 was added, a handful of cases have called into question the issue of "standing" for purposes of commencing a proceeding for allocation of parental responsibilities by a person who is not the child's parent. In *Young v. Herman,* 2018 IL App (4th) 170001, ¶40, 92 N.E.3d 1070, 419 Ill.Dec. 361, quoting 750 ILCS 5/601.2, the appellate court noted that a person who is not a parent or stepparent of a child may commence a proceeding for allocation of parental responsibilities for that child by filing a petition, but only if the child "is not in the physical custody of one of his or her parents." The appellate court goes on to state that the "standing" requirement of §601.2 is distinct from the doctrine of standing, which "assures that issues are raised only by those parties with a real interest in the outcome of the controversy." 2018 IL App (4th) 170001 at ¶45, quoting *Glisson v. City of Marion,* 188 Ill.2d. 211, 720 N.E.2d 1034, 1040, 242 Ill.Dec. 79 (1999). In *Pamela L. v. Kendra U.,* 2021 IL App (2d) 200716-U, the court determined that the parents had relinquished physical custody of the child to the grandparents, giving them standing to seek decision-making responsibility for and parenting time with the grandchild. On the other hand, the court in *In re Custody of K.N.L.,* 2019 IL App (5th) 190082, 131 N.E.3d 130, 433 Ill.Dec. 91, the court determined that the determination that a parent does not have physical custody of a child does not turn on possession, and the third-parties in this case did not show that the parent had voluntarily and indefinitely relinquished physical custody of the minor child. Similarly, the court in *Vail v. Brown,* 2018 IL App (5th) 180394-U, vacated an order that was contrary to §601.2(b)(3) after finding that the court did not have standing. While it is referred to as "standing," the burden to prove the requirement lies with the petitioner to show that the child is not in the physical custody of one of his or her parents. The limitation is properly understood as an element that must be pleaded and proved by a nonparent petitioner seeking an allocation of parental responsibilities.

Practitioners should also consider other vehicles for obtaining custody of a child, including the Illinois Parentage Act of 2015, the Illinois Domestic Violence Act of 1986, and the Juvenile Court Act of 1987.

It is only after the satisfaction of the jurisdictional prerequisites that the courts proceed to consider the best interests of a minor child in a petition to modify a child custody determination. *In re Marriage of Gargus,* 97 Ill.App.3d 598, 423 N.E.2d 193, 53 Ill.Dec. 1 (1st Dist. 1981).

When a cause of action for dissolution has abated by the death of one of the parties, there is no longer an appropriate forum in existence for litigants to seek a judicial resolution of custody of the child of the deceased parent. *Milenkovic v. Milenkovic,* 93 Ill.App.3d 204, 416 N.E.2d 1140, 48 Ill.Dec. 618 (1st Dist. 1981).

The Parental Kidnaping Prevention Act specifically denies concurrent jurisdiction to two competing courts seeking to adjudicate the custody determination issue and requires that there be only one proceeding. 28 U.S.C. §1738A. The Full Faith and Credit for Child Support Orders Act specifically states the reasons why there cannot be concurrent jurisdiction between two competing states. 28 U.S.C. §1738A(c). In accordance with the statutory mandates of the Act, the Supremacy Clause of the U.S. Constitution, and subsequent caselaw interpretations (*e.g., Thompson v. Thompson,* 484 U.S. 174, 98 L.Ed.2d 512, 108 S.Ct. 513 (1988)), once a state acquires jurisdiction consistent with the provisions of the PKPA, no other state may exercise concurrent jurisdiction over the disputed custody issues. Therefore, the beginning point in any analysis of a competing custody claim is the PKPA, which prohibits the exercise of concurrent jurisdiction. The Supremacy Clause ensures that the Act does prevail in the event of any conflict with the Illinois version of the UCCJEA or the UCCJEA as adopted in any other jurisdiction.

For a more exhaustive discussion on the matter, see Chapter 2, *Allocation of Parental Time and Responsibilities,* by Joy M. Feinberg and Jennifer S. Tier, FAMILY LAW: CHILD-RELATED ISSUES IN DISSOLUTION ACTIONS (IICLE®, 2022).

In *In re Joseph V.D.,* 373 Ill.App.3d 559, 868 N.E.2d 1076, 311 Ill.Dec. 415 (2d Dist. 2007), the mother filed an action in Kane County in July 2005 for temporary custody. The father filed a motion to dismiss the petition for lack of subject-matter jurisdiction pursuant to UCCJEA, claiming jurisdiction over the matter belonged in Nevada because a custody proceeding had been pending in Nevada since 1999. In November 2005, the Illinois trial court entered an order denying the motion to dismiss. The record contained no indication of any conference between the trial court in Illinois and the Nevada trial court regarding the case. In December 2005, the state of Nevada entered a child support order. The Illinois court disregarded the Nevada order and entered a child support order ordering the husband to pay the wife child support. On appeal, the appellate court found that the Illinois trial court's order was void in that the December 2005 order entered in Nevada was entitled to full faith and credit and that Illinois lacked personal jurisdiction over the husband. Section 206(a) of the UCCJEA states that a court of this state may not exercise jurisdiction under the UCCJEA if at the time of the commencement of the proceeding, a proceeding concerning custody of the child is being commenced in a court of another state having jurisdiction substantially in conformity with the UCCJEA. The appellate court went on to note that 750 ILCS 36/206(b) requires that if the court determines a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with the Act, the Illinois court must stay its proceedings and communicate with the courts of the other state. The appellate court found no record of communication between the Illinois trial court and the Nevada trial court in conformance with the requirements of 750 ILCS 36/110 and reversed and remanded the proceedings.

P.A. 96-676 (eff. Jan. 1, 2010) modified the provisions of §602 of the IMDMA by prohibiting a court from (a) considering military deployment of a present or proposed custodian in a determination of the best interests of a child and (b) permanently modifying a custody judgment when an active duty military member is deployed.

PRACTICE POINTER

✓ A practitioner should be aware of the effects of S.Ct. Rule 900, *et seq.,* on allocation of parental responsibilities proceedings as it relates to actions wherein there may be an action pending in juvenile court concerning the child, as well as in the family court. The two judges should confer at the outset as, under Rule 903, whenever possible and appropriate, all allocation of parental responsibilities proceedings relating to an individual child are to be conducted by a single judge. Each judicial circuit court must adopt a rule or order providing for assignment and coordination of allocation of parental responsibility proceedings.

P.A. 97-1047 (eff. Aug. 21, 2012) amended the Illinois Vehicle Code to provide that the General Assembly finds the state has a compelling interest in ensuring that those individuals with responsibilities involving minor children, pursuant to visitation orders, demonstrate responsibility (625 ILCS 5/7-701) and provide that the Secretary of State shall suspend the driver's license issued to a person upon receiving an authenticated document as provided for in §7-703 of the Motor Vehicle Code (625 ILCS 5/7-703) that the person has been adjudicated as having engaged in visitation abuse and that the court has ordered that the person's driving privileges be suspended (625 ILCS 5/7-702(d)). The person's driver's license shall be suspended until such time as the Secretary of State receives authenticated documentation that the court has determined there has been sufficient compliance for a sufficient period of time with the court's order concerning visitation and the full driving privileges shall be reinstated. The court shall report this information to the Secretary of State on forms prescribed by the Secretary of State. *Id.*

7. [5.27] Foreign Country Orders vs. Illinois Orders on Custody

In *Kijowska v. Haines,* 463 F.3d 583 (7th Cir. 2006), the mother (a citizen of Poland) petitioned, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (Hague Convention), and the International Child Abduction Remedies Act (ICARA), Pub.L. No. 100-300, 102 Stat. 437, codified at 22 U.S.C. §9001, *et seq.,* for return of a minor child allegedly wrongfully removed and retained by the father in the United States. The Seventh Circuit stated that ICARA, implementing the Hague Convention, entitles a person whose child has been wrongfully removed to the United States to petition a federal court to order the child returned. 22 U.S.C. §9003. The court further stated the Hague Convention is aimed at parties to custody battles who remove the child from the child's domicile to a country whose courts the removing parent thinks are more likely to side with that parent. To prevent this variety of forum shopping, the Hague Convention requires a determination as to whether the removal of the child was wrongful under the laws of the country which was the child's habitual place of residence.

Section 201(a) of the Uniform Child-Custody Jurisdiction and Enforcement Act provides that a court has jurisdiction to make an initial child custody determination only under four enumerated circumstances:

a. This state is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six months before the commencement of the proceeding, and the child was absent from this state, but a parent or person acting as a parent continues to live in the state.

b. A court of another state does not have jurisdiction under item a above, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under §207 or §208, and

1. the child and at least one of the child's parents or a person acting as a parent have a significant connection with this state other than mere physical presence; and

2. substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

c. All courts having jurisdiction under item a or item b have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under §207 or §208.

d. No court of any state would have jurisdiction under the criteria specified in items a, b, or c.

Section 36/305(a) of the UCCJEA provides (a) that a child custody determination issued by a court of another state may be registered in Illinois and (b) that any person who is contesting the registration may request a hearing.

In *In re Sophia G.L.,* 229 Ill.2d 143, 890 N.E.2d 470, 321 Ill.Dec. 748 (2008), the maternal grandfather and step-grandmother's petition to intervene in a paternity proceeding was allowed. The grandparents filed a petition to register a child custody determination from the state of Indiana, which order found them to be the child's de facto custodians and awarded them temporary legal and physical care of the children. The putative father filed a contest to the petition for registration of the child custody determination. In September 2006, a hearing was conducted on the grandparents' petition in Indiana to register their Indiana order in the state of Illinois. The grandparents argued that the Illinois trial court erred when it denied their petition to register the Indiana trial court's child custody determination.

Section 305(d) of the UCCJEA provides that, following the hearing, the circuit court is to confirm a registered order as an order of the Illinois courts unless the person contesting registration establishes one of three factors. The statute requires that a person seeking to contest the validity of a registered order must request a hearing within 20 days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that (a) the issuing court did not have jurisdiction under Article II of the Act; (b) the child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under Article II; or (c) the person contesting registration was entitled to notice in the proceeding before the court that issued the order for which registration is sought, but notice was not given in accordance with the standards of §108. In *Sophia G.L., supra,* the Illinois court, on appeal, found that the party resisting the registration had not proven one of the three enumerated factors under UCCJEA §305.

In *Altamiranda Vale v. Avila,* 538 Fed.3d 581 (7th Cir. 2008), the court was asked to review the propriety of an order denying a stay order that directed the children be returned to the petitioner pending her appeal under the provisions of the Hague Convention. The court determined the petitioner's removal of children from Venezuela to Illinois violated the respondent's "rights of custody" under Venezuelan law and thereby violated the Hague Convention as implemented by ICARA. This was based on the grounds that Venezuela was the children's habitual residence prior to their removal and, since the father had custody rights under Venezuelan divorce decree by virtue of "doctrine of patria potestas," this afforded the father rights relating to the care of the person of the child, and the "doctrine of ne exeat" afforded the father the right to determine that the children's place of residence would remain in Venezuela. 538 Fed.3d at 586.

In *In re Marriage of Akula,* 404 Ill.App.3d 350, 935 N.E.2d 1070, 343 Ill.Dec. 842 (1st Dist. 2010), the parties were divorced in Illinois in 2002. The divorce decree awarded sole custody of the child to the mother, and the father was granted visitation. In June 2009, the Illinois court entered an order memorializing plans for the couple and the child to travel to India. The wife returned to Illinois on a temporary basis, and, while she was gone, the husband filed a petition in India requesting custody of the child. The case went through a review of the provisions of the UCCJEA and whether the Illinois court or the Indian court had jurisdiction. The finding of the family court in India was that the parents and child were "now ordinarily residing" in India, which necessarily implied that they did not presently reside in Illinois. 935 N.E.2d at 1075. Thus, the Indian family court acted in substantial conformity with jurisdictional requirements of UCCJEA Act such that Illinois, which had made initial child custody determination, lost exclusive continuing jurisdiction over determination. The UCCJEA intended that exclusive, continuing jurisdiction ceased when the court determined that the child, parents, and all persons acting as parents physically left the decree state to live elsewhere.

Koch v. Koch, 450 F.3d. 703 (7th Cir. 2006), involved a German mother who filed a petition under the Hague Convention and ICARA against an American father seeking return of the parties' children to Germany. ICARA, implementing the Hague Convention, entitles a person whose child has been abducted to the United States to petition the federal courts for return of the child. 22 U.S.C. §9003. At issue was the habitual residence of the children at the time their father removed them to the United States and whether their prompt return to Germany was required under the Hague Convention and ICARA. The court held that Germany was the habitual residence of the children at the time the father removed them to the United States, and their prompt return to Germany was required so that an appropriate court of law there could determine the parties' respective custody and access rights.

In *Abbott v. Abbott,* 560 U.S. 1, 176 L.Ed.2d 789, 130 S.Ct. 1983 (2010), pursuant to ICARA, which implements the Hague Convention, the father sought to have his son returned to Chile from the United States, where the child had been taken by his mother. Chilean courts had granted the mother daily care and control of the child and had awarded visitation rights to the father. Under Chilean law, the father had a right to consent before the mother could take the child out of Chile. The mother took the child from Chile to Texas, where she filed for divorce. The Supreme Court held that the joint right to decide the child's country of residence was a right of custody within the meaning of the Hague Convention, as the right to consent to removal gave the father the right to determine the child's place of residence by ensuring the child could not live outside Chile and also

gave the father rights relating to the care of the child. The Supreme Court held that to interpret the Hague Convention as not providing a return remedy for children wrongfully removed from another country would run counter to the Convention's purpose of deterring parents from seeking a friendlier forum for deciding custody disputes. The case held that the habitual residence of the child was in Chile and the father had a "right of custody" protected under the Hague Convention. Pursuant to ICARA, a person whose child has been removed from his or her custody (sole or joint) to the United States may petition in federal or state court for the return of the child. The court noted that the Hague Convention was adopted in response to the problem of international child abductions during domestic disputes. The Convention seeks to discourage abduction by parents who either having lost or expecting to lose a custody battle move children to a country whose courts are more likely to side with that parent. To prevent such an unsavory form of forum shopping, a child that has been wrongfully removed or retained in violation of a right of custody must be properly returned to the child's country of habitual residence unless certain narrow exceptions are shown to apply. ICARA and the Hague Convention empower courts to determine only rights under the Convention and not the merits of any underlying child custody claims. See also Hague Convention, art. 19.

Barzilay v. Barzilay, 600 F.3d 912 (8th Cir. 2010), provides a good explanation for the general practitioner of the workings of the Hague Convention. The centerpiece of the Hague Convention is that it bases jurisdiction for making a custody determination on the habitual residence of a child. In *Barzilay,* the parents were both Israeli citizens who were married in Israel. The oldest of their three children was born in Israel. The father and mother moved to Missouri from the Netherlands. The younger two children of the parties were born in Missouri. The mother and children had resided in Missouri for five years preceding the action in Missouri.

The Eighth Circuit Court of Appeals held that the issue of habitual residence under the Hague Convention raises mixed questions of law and fact. The court noted the Hague Convention seeks to deter abductions by depriving an abductor of any practical or judicial consequences. It accomplished this goal not by establishing any substantive law of custody, but rather by acting as a forum-selection mechanism operating on the principle that the child's country of habitual residence is the best place to decide questions of custody. The purpose of the proceeding under the Hague Convention is not to establish or enforce custody rights, but only to provide for a reasoned determination of where jurisdiction over a custody dispute is properly placed.

The court noted the first step in determining a child's habitual residence is to discern when the alleged wrongful removal or retention took place. Factors relevant to determination of habitual residence include the settled purpose of the move to the new country from the child's perspective, parental intent regarding the move, the change in geography, the passage of time, and the acclimatization of the child to the new country. *Barzilay* is very detailed and is an excellent source of information for an attorney faced with cases under the Hague Convention dealing with habitual residence.

In *Norinder v. Fuentes,* 657 F.3d 526 (7th Cir. 2011), the mother, under the guise of a two-week vacation to Texas, traveled to Texas from Sweden. On the day she was to return, she advised the father of her intent to remain in the United States. The child in question had been born in Texas, but five months after the birth of the child, the family moved to Sweden, and the parties and the

child lived in Sweden until the mother's trip to Texas. The mother argued the child would be subjected to grave risk if the child were to be returned to Sweden. The court found that the father's distant history of drug and alcohol abuse did not establish the harm that would be necessary to keep the child in the United States.

In *Uzoh v. Uzoh,* No. 11-cv-09124, 2012 WL 1565345 (N.D.Ill. May 2, 2012), a father petitioned for an order returning his children to the United Kingdom pursuant to the Hague Convention. The court noted that the initial burden was on the father to establish by a preponderance of the evidence that his children were wrongfully removed or retained within the meaning of the Convention. 2012 WL 1565345 at *4, citing 42 U.S.C. §11603(e)(1)(A) (now 22 U.S.C. §9003). To establish wrongful removal or retention, the father had to show his children were habitual residents of the United Kingdom immediately before the breach of his custody rights under the laws of England and that his custody rights were being exercised or would have been exercised were it not for the unlawful removal or retention of his children. The court held that if a petitioner meets the burden, the respondent may establish one of the exceptions to the return of the children available under the Hague Convention and ICARA. *Id.,* citing 42 U.S.C. §11603(e)(2) (now 22 U.S.C. §9003).

The court further noted that the birth of children in this country does not automatically render the children habitual residents of the United States. The actions and intent of the parents before the birth of the children would have to be considered in answering that question.

8. [5.28] Partition

The general right to partition is limited by the provisions of the IMDMA, in particular §503, which requires the court to consider various statutory factors when dividing property, including the desirability of awarding the home or the right to live in it for a reasonable period to the custodial parent, either individually as part of a maintenance award or for the use and benefit of the parties' minor children.

P.A. 99-90 (eff. Jan. 1, 2016) repealed 750 ILCS 5/514 and 750 ILCS 5/515, which noted the jurisdictional requirement for partition is the same as for an action for dissolution of marriage and requires that a partition action be filed in the county in which the real estate is located.

II. [5.29] LIMITATIONS ON THE JURISDICTION OF THE COURTS TO PROCEED

Article VI, §9, of the Illinois Constitution provides: "Circuit Courts shall have original jurisdiction of all justiciable matters." ILL.CONST. art. 6, §9.

Additionally, the IMDMA provides that the circuit court is to enter judgments in cases of dissolution. See 750 ILCS 5/401, *et seq.* Thus, there is no question that the Illinois courts have jurisdiction in dissolution matters and in proceedings ancillary to those matters. However, Illinois courts cannot issue an injunction precluding a person from obtaining a valid divorce in another state. *Bonate v. Bonate,* 78 Ill.App.3d 164, 397 N.E.2d 88, 33 Ill.Dec. 755 (1st Dist. 1979).

A. [5.30] Default Judgments

The court may enter a judgment against any party, including a default judgment, for want of appearance or as a result of the failure to plead. The court may, in either case, require proof of the allegations of the pleadings on which relief is sought. 735 ILCS 5/2-1301.

Upon entry of a default order, notice of said order shall be immediately given to any party who has appeared. 735 ILCS 5/2-1302.

Upon default of the respondent, the IMDMA requires a hearing in open court to determine whether proper notice has been satisfied. No judgment entering a dissolution of marriage, legal separation, or declaration of invalidity of marriage shall be entered against a defaulting spouse unless all proper means to provide notice have been satisfied. 750 ILCS 5/405.

In the event that the court is not satisfied that notice of the action was received by the respondent, additional notice shall be required. *In re Marriage of Sheber,* 121 Ill.App.3d 328, 459 N.E.2d 1056, 76 Ill.Dec. 921 (1st Dist. 1984).

When the trial court was informed that the wife was unaware that the petition was set for hearing, notice should have been required prior to the entry of the dissolution of marriage judgment despite the husband and wife living together. *In re Marriage of Jackson,* 259 Ill.App.3d 538, 631 N.E.2d 848, 197 Ill.Dec. 626 (4th Dist. 1994).

A default judgment may be vacated upon a showing that substantial justice is not being done between the litigants, and based on the facts of the case, it is reasonable to compel the non-defaulting party to go to trial on the merits. *In re Marriage of Kopec,* 106 Ill.App.3d 1060, 436 N.E.2d 684, 62 Ill.Dec. 658 (1st Dist. 1982). The reviewing court need not determine, as a matter of law, that the trial court abused its discretion; it needs only to resolve the question of whether justice has been served. *Id*.

PRACTICE POINTER

✓ An attorney attempting to obtain a default judgment for a client should follow the following procedure:

1. File and serve a Motion for Default Judgment.

2. Present the motion and obtain order for default. The order for default should also set a default prove-up date.

3. Send notice of default order to all parties.

4. Prepare default judgment while being mindful of restrictions for adjudication of issues by way of default.

5. Appear with client for default prove-up and enter default judgment.

B. [5.31] Parental Kidnaping Prevention Act and Uniform Child-Custody Jurisdiction and Enforcement Act

Two statutes, the Parental Kidnaping Prevention Act and the Uniform Child-Custody Jurisdiction and Enforcement Act, provide for and limit the exercise of jurisdiction in child custody cases involving out-of-state residents. 28 U.S.C.A §1738A; 750 ILCS 36/108.

Under Article VI, Clause II, of the United States Constitution, the PKPA, as an act of Congress, is the "supreme Law of the Land." Thus, the judges of every state are bound by it, and the federal statute takes precedence over any conflicting state statute.

Different considerations apply under the PKPA when custody is an issue, depending on whether the action is an initial custody determination or a proceeding to modify a prior custody determination.

For cases dealing with international application of the UCCJEA's predecessor, the Uniform Child Custody Jurisdiction Act, *see In re Custody of Rose,* 281 Ill.App.3d 423, 666 N.E.2d 1228, 217 Ill.Dec. 290 (2d Dist. 1996), and *Kulekowskis v. DiLeonardi,* 941 F.Supp. 741 (N.D.Ill. 1996), *rev'd, DiSilva v. DiLeonardi,* 125 F.3d 1110 (7th Cir. 1997). See also FAMILY LAW: CHILD-RELATED ISSUES IN DISSOLUTION ACTIONS (IICLE®, 2022).

C. [5.32] Servicemembers Civil Relief Act of 2003

Another limitation on the authority of the courts to adjudicate, modify, or enforce dissolution matters is the Servicemembers Civil Relief Act (SCRA), ch. 888, as amended by Pub.L. No. 108-189, §1, 117 Stat. 2835 (2003) (codified at 50 U.S.C. §3901, *et seq.*) which was passed in 2003 as a complete revision of the former Soldiers' and Sailors' Civil Relief Act (SSCRA). It extends many of the protections of the former Act but also adds new provisions.

The SCRA applies to those members of the military who are on active duty, including members of the National Guard and the Reserves. Specifically, the SCRA extends protection to National Guard members "under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days . . . for purposes of responding to a national emergency declared by the President and supported by Federal funds." 50 U.S.C. §3911(2)(A)(ii). The SCRA expands a servicemember's right to request a stay of proceedings to include administrative hearings. Further, it applies to any level of proceedings, including appeals. *See Johnson v. Burken,* 930 F.2d 1202 (7th Cir. 1991).

An application for an additional stay may be made at the time of the original request or later. If the court refuses to grant an additional stay, the court then must appoint counsel to represent the servicemember in the action or proceeding. 50 U.S.C. §3932(d).

The SCRA states that an application for a stay does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense, including a defense relating to lack of personal jurisdiction. 50 U.S.C §3932(c).

A default may not be taken against a servicemember until after the court appoints an attorney to represent the defendant. If the attorney appointed is unable to locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember. 50 U.S.C. §3931(b)(2).

If a default decree is entered against a servicemember, regardless of whether the trial court has complied with the provisions of the SCRA, the Act allows a servicemember who has not received notice of the proceeding to move to reopen a default judgment. 50 U.S.C. §3931(g). The default judgment must have been entered at a time when the member was on active duty in the military service or within 60 days thereafter, and the servicemember must apply for reopening of the judgment while on active duty or within 90 days thereafter. *Id.* To prevail on the motion to vacate the default decree, the servicemember must prove that, at the time the judgment was entered, he or she was prejudiced in the ability to defend due to military service and must be able to demonstrate a meritorious claim or legal defense to the initial proceeding. *Id.*

For more information on the SCRA, see the following resources by retired Army Reserve JAG Colonel Mark E. Sullivan: *Get to know the new Servicemembers' Civil Relief Act,* 65 Iowa Law., No. 12, 13 (Dec. 2005); *A Judge's Guide to the Servicemembers Civil Relief Act* (reviewed in ABA Section of Family Law e-Newsletter, www.nclamp.gov/media/425665/jdg-guide.pdf; and THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES (3d ed. 2019).

1. [5.33] Purpose

The Servicemembers Civil Relief Act states the Act's purposes:

> **(1) to provide for, strengthen, and expedite the national defense through protection extended by this Act . . . to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and**
>
> **(2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.** 50 U.S.C. §3902.

2. [5.34] Definitions

Section 3911 of the Servicemembers Civil Relief Act contains a number of important definitions.

The term "servicemember" is defined as "a member of the uniformed services, as that term is defined in section 101(a)(5) of Title 10," which includes "the armed forces," a "commissioned officer of the National Oceanic and Atmospheric Administration," and a "commissioned officer of the Public Health Service." 50 U.S.C. §3911. See 10 U.S.C. §101(a)(5).

The term "military service" means —

(A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard —

(i) active duty, as defined in section 101(d)(1) of Title 10, and

(ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days . . . for purposes of responding to a national emergency declared by the President and supported by Federal funds;

(B) in the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service; and

(C) any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause. 50 U.S.C. §3911(2).

The terms "active duty" and "active service" are further defined in 10 U.S.C. §101.

(1) The term "active duty" means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.

*** * ***

(3) The term "active service" means service on active duty or full-time National Guard duty. 10 U.S.C. §101(d).

It was held under the predecessor to the SCRA that one called to active duty from the organized Naval Reserves was protected by the Soldiers' and Sailors' Civil Relief Act. *Bowles v. Dixie Cab Ass'n,* 113 F.Supp. 324 (D.D.C. 1953). However, a member of the Marine Corps Reserves not shown to be on "active duty in the reserves" was held not protected by the SSCRA (*Betha v. Martin,* 188 F.Supp. 133, 134 (E.D.Pa. 1960)), nor did the SSCRA protect retired military personnel not on active duty (*Lang v. Lang,* 176 Misc. 213, 25 N.Y.S.2d 775 (1941)). Local National Guard training, conducted by state officials but with a federal paycheck, did not qualify as federal service on active duty within the meaning of SSCRA in *Bowen v. United States,* 49 Fed.Cl. 673 (2001), *aff'd,* 292 F.3d 1383 (Fed.Cir. 2002).

Section 3911(9) was added in 2004 to clarify the term "judgment":

The term "judgment" means any judgment, decree, order, or ruling, final or temporary.

3. [5.35] Territorial Application

Section 3912 of the SCRA deals with the jurisdiction of the Act. It provides:

This chapter applies to —

(1) the United States;

(2) each of the States, including the political subdivisions thereof; and

(3) all territory subject to the jurisdiction of the United States. 50 U.S.C. §3912(a).

4. [5.36] Special Provisions

The Servicemembers Civil Relief Act provides protection to persons who are secondarily liable on the obligations of service personnel. 50 U.S.C. §3913. *See United States v. Carolina Casualty Insurance Co.,* 237 F.2d 451 (7th Cir. 1956) (surety); *United States v. Jeffries,* 140 F.2d 745 (7th Cir. 1944) (criminal bond).

Section 3914 of the SCRA extends the benefits of the SCRA to citizens serving with forces of war allies. Sections 3915 and 3916 require the Secretary to notify servicemembers and their dependents of the protections available under this Act. Section 3917 extends the benefits of the SCRA to persons ordered to report for induction or Reserves ordered to report for military service.

5. [5.37] Default Judgments Against Military Servicemembers

Section 3931 of the Servicemembers Civil Relief Act deals with the entry of default judgments in any civil action or proceeding against persons in military service. 50 U.S.C. §3931. It provides that before the entry of a default judgment, the plaintiff must file an affidavit "stating whether or not the defendant is in military service and showing necessary facts to support the affidavit." 50 U.S.C. §3931(b)(1)(A).

Section 3931(b)(1)(B) of the SCRA provides that if the plaintiff is unable to determine whether the defendant is in military service, the plaintiff must file an affidavit "stating that the plaintiff is unable to determine whether or not the defendant is in military service."

Besides protecting service personnel by appointing counsel, the court is given further discretionary power under §3931(b)(3) of the SCRA to require posting of an indemnity bond before entry on any default if the court is unable to determine whether the defendant is in the service. The section further authorizes entry of other orders that the court finds necessary to protect a defendant under the Act:

> **If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court. If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. The bond shall remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable Federal or State law or regulation or under any applicable ordinance of a political subdivision of a State. The court may issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this Act.** 50 U.S.C. §3931(b)(3).

Section 3931(a) of the SCRA makes clear that the protections of this section apply to any civil action or proceeding in which the defendant does not make an appearance.

Section 3931(h) of SCRA provides that "[i]f a court vacates, sets aside, or reverses a default judgment against a servicemember and the vacating, setting aside, or reversing is because of a provision of this chapter, that action shall not impair a right or title acquired by a bona fide purchaser for value under the default judgment."

6. Stays in Proceedings Involving Service Personnel

a. [5.38] In General

Perhaps as important as the appointment of counsel provided for in §3931(b) of the Servicemembers Civil Relief Act are the provisions for staying proceedings found in §§3931 and 3932. Section 3931(d) states:

> **In an action covered by this section in which the defendant is in military service, the court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that —**
>
> > **(1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or**
> >
> > **(2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.** 50 U.S.C. §3931(d).

Section 3932(b) provides:

> **(1) Authority for stay**
>
> **At any stage before final judgment in a civil action or proceeding in which a servicemember . . . is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.**

(2) Conditions for stay.

An application for a stay under paragraph (1) shall include the following:

(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.

(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter. 50 U.S.C. §3932(b).

It should be noted that the stay is mandatory upon an application made by the servicemember if the conditions are met.

After the Iowa Supreme Court ruled that a stay should not have been allowed in a child custody modification that was sought due to an assignment to active duty in *In re Marriage of Grantham,* 698 N.W.2d 140 (Iowa 2005), Congress amended former §522(a) in January 2008 (Pub.L. 110-181, Div. A, Title V, §584(b), 122 Stat. 128) to clarify that "[t]his section applies to any civil action or proceeding, including any child custody proceeding."

b. [5.39] Considerations in Granting a Stay

In seeking or opposing a stay under the Servicemembers Civil Relief Act, the following considerations that were germane under the predecessor law (the Soldiers' and Sailors' Civil Relief Act) may be relevant in giving guidance as to how the court interprets the SCRA:

1. Is a parent seeking support without funds to provide food, clothing, and shelter for children? *Slove v. Strohm,* 94 Ill.App.2d 129, 236 N.E.2d 326 (1st Dist. 1968). *See also Kelley v. Kelley,* 38 N.Y.S.2d 344 (1942).

2. Is the person in the service in control of money or property that is being dissipated? *Boone v. Lightner,* 319 U.S. 561, 87 L.Ed. 1587, 63 S.Ct. 1223 (1943).

3. Was the person in the service represented throughout the proceedings by retained counsel? *Nurse v. Portis,* 36 Ohio App.3d 60, 520 N.E.2d 1372 (1987).

4. In a child support matter, does the trial court have before it the necessary information to determine the level of child support? *Id.*

5. Has the person in the service instituted the proceedings as the plaintiff? *Orrick v. Orrick,* 269 S.W.2d 153 (Mo.App. 1954).

6. Has the person in the service, after initiating the action, sought the stay only when counter-relief is sought? *Id.*

7. Has the defendant in the service filed a general appearance, filed an answer, taken depositions, or filed affidavits? *Boone, supra.*

8. Is the defendant in the service an attorney? *Id.*

9. Has the person in the service shown an inability to get leave? *Palo v. Palo,* 299 N.W.2d 577 (S.D. 1980); *Hackman v. Postel,* 675 F.Supp. 1132 (N.D.Ill. 1988).

10. Is the person in the service out of the country or nearby? *Antioch Co. v. Scrapbook Borders, Inc.,* 210 F.R.D. 645 (D.Minn. 2002); *Boone, supra.*

11. Is the party against whom the stay is being sought also a member of the armed services? *Palo, supra.*

12. Has the person in the service been late in seeking a stay? *Id*.

13. When the plaintiff has made arrangements to obtain military leave, what efforts has the defendant in the service made to appear? *State of Louisiana v. Simmons,* 521 So.2d 749 (2d Cir. 1988); *Palo, supra.*

14. When the person in the service has been granted a reasonable stay and that stay has expired, has a further stay been sought? *In re Marriage of Artis-Wergin,* 151 Wis.2d 445, 444 N.W.2d 750 (1989).

15. If the person in the service has retained counsel and that counsel withdrew, what efforts have been made over what period of time to obtain new counsel? *Boone, supra.*

16. How many stays have been obtained in the proceedings? *Simmons, supra.*

17. What discovery has the defendant done? Has an effort been made to supply the defendant's testimony? *Id.; Dalenberg v. City of Waynesboro,* 221 F.Supp.2d 1380 (S.D.Ga. 2002); *Comer v. City of Palm Bay, Florida,* 265 F.3d 1186 (11th Cir. 2001).

18. How many months have elapsed since the defendant has answered? *Comer, supra.*

19. Is the physical presence of the person in the service necessary for a full and fair defense? *Continental Illinois Nat. Bank & Trust Co. v. University of Notre Dame du Lac,* 394 Ill. 584, 69 N.E.2d 301 (1946).

20. Has the person in the service filed an independent action in another jurisdiction seeking similar relief and disclosed this fact to the court? *Luckes v. Luckes,* 245 Minn. 141, 71 N.W.2d 850 (1955).

21. Given the speed of modern transportation, is a stay required? If so, how long a stay? *Id.*

22. Has the person in the service had adequate notice and sufficient time and opportunity to appear and defend? *Roqueplot v. Roqueplot,* 88 Ill.App.3d 59, 410 N.E.2d 441, 43 Ill.Dec. 441 (2d Dist. 1980); *Boone, supra*.

23. Has the person in the service complied with the requirements necessary to invoke the stay provisions? *In re Marriage of Bradley,* 282 Kan. 1, 137 P.3d 1030 (2006).

24. Are there codefendants, and can the case against them be severed and still preserve the rights of the servicemember? *Marin v. Rolfe,* 207 Ark. 1072, 184 S.W.2d 70 (1944).

In *Gross v. Harrell,* 132 Ill.App.3d 839, 477 N.E.2d 753, 754, 87 Ill.Dec. 627 (3d Dist. 1985), in affirming a stay when the defendant voluntarily reenlisted and accepted assignment in Korea after a mistrial was declared, the court considered other factors that could be considered in granting or refusing to grant a stay:

1. the plaintiff's interest in trying the case before memories fade or witnesses die or disappear; and

2. the fact of voluntary reenlistment during the pendency when the defendant knew the case would soon be set for retrial.

In balancing the need for a stay against the need for the plaintiff to proceed, the court must closely read the affidavits presented. Conclusory affidavits are not favored. *Allen v. Howard,* 185 Ga.App. 758, 365 S.E.2d 546, 547 (1988).

Moreover, the court may "attach significance not only to what the affiants said but also as to what they failed to say as to facts within their knowledge." *Luckes, supra,* 71 N.W.2d at 854.

Once a state court has exercised its discretion in granting or denying a stay, that decision is not subject to review or stay by a federal district court. 28 U.S.C. §2283. *See also Shatswell v. Shatswell,* 758 F.Supp. 662 (D.Kan. 1991); *Scheidegg v. Department of Air Force of United States,* 715 F.Supp. 11 (D.N.H. 1989).

In *In re Marriage of Linn,* 260 Ill.App.3d 698, 632 N.E.2d 1109, 198 Ill.Dec. 498 (2d Dist. 1994), the court stated that, under the former SSCRA, a court presiding over a suit in which a person in the military service is a party is required, upon application of that person, to stay the action unless the court finds that that person's ability to prosecute or defend the suit is not materially affected by reason of the military service.

In *Rutherford v. Bentz,* 345 Ill.App. 532, 104 N.E.2d 343 (3d Dist. 1952), the court stated that a telegram by a defendant to the circuit judge stating that he was in the military service and requesting that his rights under the former SSCRA be protected did not constitute a general appearance since the communication was to the judge as an individual and not to the court. The court further held that the defendant was entitled to a continuance and that he was not bound by the acts of the guardian ad litem appointed to represent him.

In *In re Marriage of Brazas,* 278 Ill.App.3d 1, 662 N.E.2d 559, 214 Ill.Dec. 993 (2d Dist. 1996), the court stated that while under the former SSCRA the trial court has discretion as to whether to grant a stay or continuance in an action involving a person in military service, the person's absence when his or her rights or liabilities are being adjudged is usually prima facie prejudicial.

In summary, every case presents its own set of factors that the court must consider in granting or denying a stay. The goal in every case should be substantial justice between the parties.

c. [5.40] Duration of the Stay

The court under §3935 of the Servicemembers Civil Relief Act can stay a proceeding for the "period of military service and 90 days thereafter, or for any part of that period." The section provides:

> **A stay of an action, proceeding, attachment, or execution made pursuant to the provisions of this chapter by a court may be ordered for the period of military service and 90 days thereafter, or for any part of that period. The court may set the terms and amounts for such installment payments as is considered reasonable by the court.** 50 U.S.C.§3935(a).

The appellate court in *Slove v. Strohm,* 94 Ill.App.2d 129, 236 N.E.2d 326, 328 (1st Dist. 1968), sustained the trial court in a paternity action when the trial court refused to grant an extended stay, stating:

> **While we recognize that the purpose of the [**former**] Soldiers' and Sailors' Civil Relief Act is to permit members of the armed forces to devote their full attention to the defense of the country (50 U.S.C. Sec. 510), this Act may not be used as a sword against persons with legitimate claims against servicemen. Some balancing between the rights of the respective parties must be arrived at.**
>
> **In the instant case, the plaintiff gave birth to a child approximately two months after the proceedings were initiated. She alleged that she was without funds and was unable to care for the child. A determination under the Paternity Act as to who had the obligation to provide support for the child was necessary at the earliest possible time. Of course, defendant's absence was prejudicial to his case. However, he made no effort to assist the court in determining when this matter could be disposed of. We therefore feel the trial judge was not incorrect when he denied the petition for a stay of the proceedings.**
>
> **. . . The nature of the action is an important consideration in weighing the need to proceed with the trial as opposed to the serviceman's request for delay.**

As a general rule, motions for temporary or emergency relief, especially when children are going without food or assets are being dissipated, may require denial of the stay or the granting of a stay of shorter duration. The court must consider all the facts pertaining to each case when setting the length of the stay.

PRACTICE POINTER

✓ Practitioners representing active duty military personnel and their families should also be aware of several Illinois statutes that grant active duty personnel certain rights and protections under Illinois law. See 20 ILCS 405/405-272 (telephone service); 65 ILCS 5/11-117-12.2 (no stoppage of gas or electricity); 735 ILCS 5/9-107.10 (forcible entry and detainers); 815 ILCS 633/1 (cell phones); 815 ILCS 205/4.05 (limit on interest rates); 815 ILCS 636/37 (terms of lease).

III. [5.41] ADMINISTRATIVE AND LEGAL PROCEEDINGS AGAINST PERSONS IN THE ARMED FORCES PERTAINING TO SUPPORT, MAINTENANCE, PATERNITY, CUSTODY, AND VISITATION

While the Servicemembers Civil Relief Act (see §§5.32 – 5.40 above) may complicate actions against a member of the military, Army, Coast Guard, Navy, and Air Force regulations make the job much easier. These regulations are discussed in §§5.42 – 5.66 below.

A. [5.42] Army

The regulations relative to family support, custody, and paternity involving Army personnel are spelled out in Army Regulation (AR) 608-99, Family Support, Child Custody, and Paternity (Oct. 29, 2003), https://armypubs.army.mil/epubs/dr_pubs/dr_a/arn30639-ar_608-99-000-web-1.pdf. The Judge Advocate General is the proponent of the Regulation and has the authority to approve exceptions to it that are consistent with controlling law and other regulations. See AR 608-99, p. i. The Judge Advocate General may delegate the authority to approve exceptions in writing to a division chief in the Office of The Judge Advocate General with the grade of Colonel. *Id.*

NOTE: 32 C.F.R. §584, which set out the Army regulations on family support, custody, and paternity was removed effective November 12, 2019. See 84 Fed.Reg. 60,916 (Nov. 12, 2019). However, AR 608-99 set out the requirements as discussed in §§5.43 – 5.53 below.

1. Responsibilities

a. [5.43] Army Commanders

Army Regulation 608-99 ¶1-7c provides:

> **Commanders and their staffs have a responsibility, when consistent with other military requirements, to ensure that any action or nonaction on their part does not encourage or facilitate violations of court orders or this regulation or avoidance of a judicial resolution of issues relating to paternity, child custody, or support by soldiers and family members.**

Battalion commanders are required to

1. monitor compliance with this regulation and actions taken in response to inquiries under this regulation;

2. respond to all requests for assistance from government officials based on court orders and all other inquiries received under the Regulation;

3. establish procedures to ensure compliance;

4. ensure that subordinate commanders and soldiers are thoroughly familiar with the provisions of the Regulation;

5. counsel soldiers and take other actions as appropriate;

6. sign replies to inquiries pertaining to soldiers involved in repeated or continuing violations;

7. determine, when requested to do so by a soldier under their command, whether a specific provision releases the soldier from a requirement of the Regulation;

8. forward, with recommendation, to the Special Court-Martial Convening Authority any request by a soldier to be released from a specific provision of the Regulation when the stated basis for release is not contained in ¶2-14 of the Regulation; and

9. take other enforcement actions as appropriate. AR 608-99 ¶¶1-4(f), 3-3(a), 3-8(c).

Company commanders must

1. respond to all requests for assistance from government officials based on court orders and all other inquiries received under the Regulation;

2. ensure that soldiers are thoroughly familiar with the Regulation;

3. establish procedures to ensure compliance with the Regulation;

4. counsel soldiers and take other actions as appropriate;

5. sign replies to inquiries (except those routed to superior commanders) pertaining to soldiers involved in repeated or continuing violations;

6. forward, with recommendation, to the battalion commander any request by a soldier to be released from a specific provision of the Regulation when the stated basis for release is not contained in ¶2-14 of the Regulation; and

7. take other actions, as appropriate, in enforcing the provisions of the Regulation. AR 608-99 ¶3-1b.

In general, inquiries under the Regulation are to be directed to the company commander of the individual involved. However, inquiries regarding repeated or continuing violations are to be directed to the battalion commander for appropriate action. AR 608-99 ¶3-1b.

Commanders are required by the Regulation to take appropriate actions against soldiers who fail to comply with the Regulation or lawful orders issued under it. The actions they may take include, but are not limited to, counseling, admonition, putting a memorandum of reprimand in the soldier's file, barring the soldier's reenlistment, administrative separation, nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §801, *et seq.,* or court-martial. *Id.;* AR 608-99 ¶3-8c.

PRACTICE POINTER

✓ The threat of court-martial for failing to obey lawful orders, for making false claims (or denials), for conduct unbecoming an officer, or for dishonorable failure to pay debts that brings discredit on the armed forces is a powerful weapon to obtain support or compliance with lawful court orders.

Violations of the financial support requirements of ¶2-5 or the child custody provisions of ¶2-11 of the Regulation may be charged as violations of Article 92 of the UCMJ. AR 608-99 ¶3-8d. Failure to obey lawful orders issued by commissioned or noncommissioned officers under AR 608-99 may be charged as violations of Article 90, Article 91, or Article 92 of the UCMJ. *Id.*

In reply to an inquiry about a child custody, visitation, or related matter, a company or battalion commander will fully investigate the issue and provide complete and accurate information in a timely manner. AR 608-99 ¶3-6a. The information must include a statement as to whether the soldier admits that he or she, or someone acting on the soldier's behalf, has physical custody of the child in question. AR 608-99 ¶3-6b(1). The commander must check any denial of physical custody by the soldier against other sources of information, such as the soldier's military records, government family housing records, and supervisors and friends. AR 608-99 ¶3-6a(1). If the commander determines that the soldier or someone acting on the soldier's behalf does not have physical custody, the commander so informs the person making the inquiry. AR 608-99 ¶3-6c(2).

If the soldier or someone acting on the soldier's behalf does have physical custody of the child in question, the commander must provide a statement as to the soldier's intention regarding the request to give up physical custody or to grant visitation. AR 608-99 ¶3-6b(3). If the soldier has no legal right to physical custody, the commander orders the soldier to comply with the Regulation and advises the person making the inquiry that the soldier has been ordered to return the child to the lawful custodian. AR 608-99 ¶3-68(3)(a). Regardless of the soldier's response to the order, the commander may take appropriate action against the soldier for violating the Regulation. AR 608-99 ¶3-6b.

According to ¶3-6a(4) of AR 608-99, "[c]ommanders will not take physical custody of a child, and they will not order a soldier to give up physical custody of a child to anyone other than the child's lawful custodian."

Regarding visitation, ¶3-7c of AR 608-99 provides that "[a] soldier who is the lawful custodian of a child should not be ordered to comply with a provision granting visitation to a noncustodial parent. Obtaining relief in such matters should be left to the courts."

b. [5.44] Army Personnel

Paragraph 1-7a of Army Regulation 608-99 states that the Army

> **recognizes the transient nature of military duty. This regulation, however, prohibits the use of a Soldier's military status or assignment to deny financial support to Family members or to evade court orders on financial support, child custody and visitation, paternity, and related matters.**

Paragraph 1-7b states:

> **Soldiers are required to manage their personal affairs in a manner that does not bring discredit upon themselves or the U.S. Army. This responsibility includes —**
>
> **(1) Maintaining reasonable contact with family members so that their financial needs and welfare do not become official matters of concern for the Army. . . .**
>
> **(2) Conducting themselves in an honorable manner with regard to parental commitments and responsibilities. . . .**
>
> **(3) Providing adequate financial support to family members. . . .**
>
> **(4) Complying with all court or child support enforcement agency (CSEA) orders.**
> **[**Citations omitted.**]**

The specific obligations of soldiers with regard to financial support, child custody, visitation, and paternity inquiries are spelled out in Chapter 2 of AR 608-99. Paragraph 2-4a provides that "[s]oldiers will comply with the financial support provisions of all state court or CSEA orders," and ¶2-10b provides that "[s]oldiers will comply with the provisions of all applicable court orders, laws, and treaties regarding child custody and visitation, and related matters, regardless of the age of the children concerned."

2. [5.45] Release of Information; Privacy

What is released varies from case to case and must balance the Army's needs, the soldier's right to privacy, and the public policy favoring support of family members. Information generally released to family members, their attorneys, courts, etc., even without the soldier's consent includes:

> **Name, rank, date of rank, gross salary, present and past duty assignments, future assignments that are officially established, office or duty telephone number, source of commission, promotion sequence number, awards and decorations, military and**

civilian educational level, and duty status at any given time. AR 25-22 ¶7-1c(2), The Army Privacy and Civil Liberties Program, https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN38442-AR_25-22-001-WEB-2.pdf.

3. [5.46] Family Support Obligations

Paragraph 2-1a of Army Regulation 608-99 recognizes that soldiers often are separated from their families and that they must plan for the financial support of their families during these periods. Paragraph 2-1c provides:

> **Soldiers are expected to keep reasonable contact with family members . . . to minimize the total number of inquiries to their commanders and other Army officials on financial support, child custody and visitation, paternity, and related matters. Within the parameters of the law, soldiers will, whenever possible, resolve all such matters so that these personal problems do not become official matters of concern for their commanders or other Army officials. When this is not possible, soldiers should promptly seek legal advice from an attorney providing legal assistance or from a civilian lawyer in private practice.**

Paragraph 2-3 details the soldier's obligation to provide financial support to family members under a financial support agreement. Since "[i]t is not the Army's policy to become involved in disputes over the terms or enforcement of oral financial support agreements," the Army does not interfere when an oral agreement exists and is being followed. AR 608-99 ¶2-3a. When a dispute concerning an oral agreement arises, the Army requires compliance only with the provisions of its Regulation. *Id.*

If the parties have signed a written agreement that specifies an amount of support, that agreement controls the soldier's duty to support in the absence of a court order or a subsequent signed written agreement. AR 608-99 ¶2-3b. If the written agreement is silent as to the amount of support, then, as a temporary expedient, the financial support requirements of ¶2-6 apply. AR 608-99 ¶2-3b(1). If after a written financial support agreement is signed a court grants a divorce to the parties signing the agreement, the financial support agreement is not enforced unless the agreement has been approved, ratified, or otherwise incorporated into the divorce decree or unless by its specific language the agreement continues beyond the divorce. AR 608-99 ¶2-3b(3). Otherwise, a soldier is not required to provide financial support to a former spouse or to provide support to his or her children beyond the amount required in ¶2-6 absent a court order. *Id.*

If a court order sets support, it is the duty of the soldier to comply. AR 608-99 ¶2-4. Failure to comply with a financial support order may be the basis for a lawful order from a commander to comply. *Id.*

Paragraph 2-5a, dealing with punitive provisions regarding financial support, provides:

> **Soldiers will not violate any of the following:**
>
> **(1) The financial support provision of a state court or CSEA order, or a foreign court order enforceable under paragraph 2-4b.**

(2) The financial support provision of a written financial support agreement in the absence of a court order.

(3) The financial support requirements of paragraph 2-6 in the absence of a written financial support agreement or a court order containing a financial support provision.

Paragraph 1-7d of AR 608-99 states that the Army's policies regarding financial support, child custody and visitation, paternity, and related matters "are solely intended as interim measures until pertinent issues are resolved in court or settled by agreement among the parties involved."

A battalion commander may release a soldier from the Regulation's requirements if the court that issued a financial support order "clearly was without jurisdiction to do so" and the soldier has been complying with the financial support provisions of another court order, a written support agreement, or ¶2-6 of the Regulation. AR 608-99 ¶2-13a and 2-14b(1).

The battalion commander may also release a soldier from the regulatory requirement under ¶2-6 to provide financial support to his or her spouse if the monthly pay of the spouse is equal to or greater than the monthly military pay of the soldier and the soldier is not receiving basic allowance for quarters at the "with dependents" rate solely on the basis of financial support to the spouse. AR 608-99 ¶2-14b(3). See §5.52 below. However, that does not relieve the soldier of the obligation to support the children of that or any other relationship. AR 608-99 ¶2-14.

A soldier may also be released from the Regulation's requirements by the battalion commander if

a. a judicial proceeding concerning the marriage has been initiated, the court has personal jurisdiction over the soldier and spouse and the authority to order financial support, the court has issued one or more orders and no order contains a financial support provision, there is no written financial support agreement, and the soldier is not receiving basic allowance for quarters at the "with dependents" rate based solely on the financial support of the family members concerned;

b. the soldier has been the victim of a substantial instance of physical abuse;

c. the supported family member is in jail; and

d. the supported child is in custody of another who is not the lawful custodian. AR 608-99 ¶¶2-14d.

Paragraph 3-4a(1) requires the company or battalion commander to inquire into the matter and consult a Staff Judge Advocate (SJA) when a soldier denies being under a duty to support. When the soldier admits the obligation and contends that support is in fact being provided, the commander has an obligation to have the soldier provide proof of payments. AR 608-99 ¶3-4a(2). When the commander suspects that the soldier has violated a custody or visitation order, the commander also inquires and consults the SJA and advises the soldier of the suspected offense and of the rights to remain silent and to counsel. AR 608-99 ¶3-4.

Under ¶2-9a, the soldier may pay in cash or by check, money order, electronic fund transfer, voluntary or involuntary allotment, or garnishment. Payments made on behalf of the spouse to third persons, such as rent or utility payments, are credited as long as the spouse has given written approval. AR 608-99 ¶2-9e.

4. [5.47] Support Arrearages

It is a violation of ¶2-5c of Army Regulation 608-99 for a soldier to fall into arrears regarding financial support. Punishment is based on failure to provide financial support when due, not failure to pay arrearages. In all cases, soldiers should be encouraged, but not ordered, to pay arrearages.

Paragraph 1-8 of AR 608-99 provides:

> **Personnel subject to the [**Uniform Code of Military Justice**] who fail to comply with paragraph 2-5 [**regarding financial support**] or 2-11 [**regarding child custody**] are subject to punishment under the UCMJ as well as to adverse administrative action and other adverse action authorized by applicable sections of the United States Code or Federal regulations. Paragraphs 2-5 and 2-11 are fully effective at all times, and a violation of either paragraph is separately punishable as a violation of a lawful general regulation under Article 92, UCMJ, even in the absence of a prior complaint from a Family member or counseling by a commander. These paragraphs and other provisions of this regulation may also be the basis for a commissioned, warrant, or noncommissioned officer to issue a lawful order to a Soldier.**

Family members may enforce court orders requiring financial support from soldiers through garnishment or involuntary allotment. AR 608-99 ¶1-10.

5. [5.48] Garnishment

42 U.S.C. §659(a) allows the garnishment of military pay and provides that

> **moneys . . . due from, or payable by, the United States . . . to any individual, including members of the Armed Forces of the United States, shall be subject . . . to withholding in accordance with State law . . . and to any other legal process brought . . . to enforce the legal obligation of the individual to provide child support or alimony.**

42 U.S.C. §659(i)(2) defines "child support" and states that it can include attorneys' fees, interest, and costs when expressly made recoverable by the court order. "Alimony" and "legal process" are also defined. *Id.*

Generally, pursuant to 15 U.S.C. §1673(b)(2), garnishments for child support and alimony are limited as follows:

a. 50 percent of disposable pay for that week when the soldier is supporting a spouse or dependent who is not the subject of the support order;

b. 60 percent of disposable pay for that week when the soldier is not supporting such a spouse or dependent child; and

c. an additional 5 percent in each of the above cases if the payments are more than 12 weeks overdue.

However, if state law provides for more restrictive limits, it governs. Under Illinois law, the garnishment exemptions do not apply to limit child support maintenance orders. 750 ILCS 5/505. *But see Commonwealth Edison v. Denson,* 144 Ill.App.3d 383, 494 N.E.2d 1186, 98 Ill.Dec. 859 (3d Dist. 1986).

NOTE: In order to implement a garnishment or wage attachment against any member of the military or any civilian employee of the Department of Defense, an income withholding order or similar process must be served on Defense Finance and Accounting Service (DFAS) Garnishment Operations at the following address:

Defense Finance and Accounting Service
Cleveland DFAS-HGA/CL
P.O. Box 998002
Cleveland, OH 44199-8002

The toll-free customer service number for the Income Withholding Section is 888-332-7411, and the hours are 8:00 a.m. to 5:00 p.m. Eastern Time, Monday – Friday. For more information, see the DFAS website, www.dfas.mil/garnishment.html.

PRACTICE POINTER

✓ When submitting correspondence to the Garnishment Operations Directorate, the soldier's social security number must be included on all documents. Also, the return mailing address must be included on the correspondence itself, not just on the mailing envelope.

6. [5.49] Involuntary Allotments

42 U.S.C. §665(a)(1) permits involuntary allotments from pay and allowances of soldiers on active duty as child, or child and spousal, support

> **when [**the servicemember**] has failed to make periodic payments under a support order that meets the criteria specified in [**15 U.S.C. §1673(b)(1)(A)**] and the resulting delinquency in such payments is in a total amount equal to the support payable for two months or longer. Failure to make such payments shall be established by notice from an authorized person . . . to the designated official in the appropriate uniformed service.**

42 U.S.C. §665(b) provides:

> **For purposes of this section the term "authorized person" with respect to any member of the uniformed services means —**
>
> > **(1) any agent or attorney of a State having in effect a plan approved under this part who has the duty or authority under such plan to seek to recover any amounts owed by such member as child or child and spousal support . . . and**
> >
> > **(2) the court which has authority to issue an order against such member for the support and maintenance of a child, or any agent of such court.**

The notice required under 42 U.S.C. §665 must contain the name and address of the person to whom the allotment is payable. The amount of the allotment is the amount needed to comply with the support order.

7. [5.50] Custody

Paragraph 2-11a of Army Regulation 608-99 provides:

> **A soldier relative who is aware that another person is a lawful custodian of an unmarried child under the age of 14 years will not wrongfully —**
>
> > **(1) Abduct, take, entice, or carry the child away from the lawful custodian.**
> >
> > **(2) Withhold, detain, or conceal the child from the lawful custodian.**

A "soldier relative" is defined as "a soldier who is the parent, stepparent, grandparent, brother, sister, uncle, aunt, or one who has at some time in the past been the lawful custodian of the child." AR 608-99 ¶2-11c. The fact that joint legal custody of a child has been awarded to both parents by a court does not preclude violation of ¶2-11 by a soldier who is not authorized to have physical custody of that child by a court order or who is authorized only visitation with that child by a court order. AR 608-99 ¶2-11b. It is, however, a defense to a violation of ¶2-11 that the soldier at the time of the offense was authorized to have physical custody of the child to the exclusion of others pursuant to a valid court order. AR 608-99 ¶2-11d.

8. [5.51] Paternity

Paragraph 3-5 of Army Regulation 608-99 deals with parentage inquiries.

Under ¶3-5b(1), a soldier who is the subject of an inquiry alleging parentage is advised of the inquiry by the commander, advised of his or her legal and moral obligations, if any, and referred to an attorney for legal assistance if he or she has questions about his or her legal rights.

9. [5.52] Basic Allowance for Housing

37 U.S.C. §403 provides that military members who have family members and who are entitled to basic pay are entitled to a "basic allowance for housing" (BAH). There is one rate for members with dependents and another for those without dependents. Members who are not otherwise authorized a BAH and who pay child support are entitled to a BAH differential as long as the child support is more than the rate of the differential. 37 U.S.C. §403(n).

The BAH "with dependents" allowance is not authorized when the member or supported family is residing in government family quarters. 37 U.S.C. §403(e).

If two military members have one or more common dependents and are not married to each other and one of them pays child support to the other, the total amount of the BAH paid to the two members may not exceed the amount of the BAH to which each would otherwise be entitled. 37 U.S.C. §403(n).

NOTE: For more information, see the Defense Travel Management Office website, www.travel.dod.mil. See also AR 608-99 ¶¶1-9, 2-6, 2-7, 2-9, 3-6, and Appendix B.

10. [5.53] Medical, Hospital, and Prescription Coverages

The spouse and children may also be entitled to medical care, hospital care, and prescription drug coverage. To get these, they need to register with the Defense Enrollment Eligibility Reporting System (DEERS) and obtain identification cards. With the identification card, the above benefits are free at Army medical clinics. However, even if there is no Army medical clinic handy, the military cost-share medical coverage, TRICARE, may be used with civilian healthcare providers.

For more information on obtaining medical coverages, see www.tricare.mil.

B. [5.54] Navy and Marines

In the Navy and Marine Corps, support of family members is governed by NAVAL MILITARY PERSONNEL MANUAL §1754-030 (MILPERSMAN), https://www.mynavyhr.navy.mil/portals/55/reference/milpersman/1000/1700morale/1754-030.pdf, and Chapter 15 of the MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION (LEGADMINMAN), www.marines.mil/portals/59/publications/mco%20p5800_16a%20ch%201-6%20pt%202.pdf, issued under Marine Corps Order P5800.6A Ch. 3.

1. Responsibilities

a. [5.55] Naval and Marine Commanders

MILPERSMAN §1754-030 states that upon receiving a complaint, the commanding officer interviews the member and provides information on Navy policy. The member is advised that in the absence of an agreement or court order, the Naval support guide is applicable and that there is

a legal and moral obligation to support. The officer also informs the member of their rights in the matter and cautions that the member may become ineligible to reenlist and that there may be administrative or disciplinary actions taken. Justifiable complaints of nonsupport and insufficient support are bases for separation from the service. MILPERSMAN §1754-030, Item 11b.

In the case of the Marines, a "commanding officer" who receives a complaint of inadequate support is to meet with the Marine within ten working days, inform the Marine of the nature of the complaint, encourage the Marine to consult with a legal assistance attorney, and, after the Marine has had an opportunity to consult with counsel, "determine the content of an order or warning, if any, to be given to the Marine to foster compliance with this chapter." LEGADMINMAN ¶¶15003.1, 15003.2. "Commanding officer" is defined as "a Special Court Martial Convening Authority or higher." LEGADMINMAN ¶15001.1.

b. [5.56] Naval and Marine Personnel

MILPERSMAN §1754-030, Item 1, provides:

> **(1) Policy. The Navy will not be a haven for personnel who disregard or evade their obligations to their legal family members. All Service members must provide adequate and continuous support for their lawful family members and comply fully with the provisions of separation agreements and valid court orders.°.°.°.**
>
> **(2) Sufficient Support. Every person has an inherent natural and moral, as well as a legal obligation, to support his or her legal family members.**

The section cautions that failure to support may be a criminal offense but advises that what constitutes "adequate and reasonably sufficient support" is a matter for a civilian court of competent jurisdiction. *Id.* A failure to comply that brings discredit on the Navy can result in "administrative or disciplinary action, which may include the initiation of court-martial proceedings, and may ultimately lead to separation from the Naval Service." *Id.*

MILPERSMAN §1754-030, Item 5a, recognizes that most states require a person to provide spousal support. It further states that the Navy recognizes four exceptions to that duty: (1) exemption by court order; (2) relinquishment by the spouse; (3) mutual agreement by the parties; or (4) waiver granted by the Director, Dependency Claims, Naval Military Pay Operations, a division of the Defense Finance and Accounting Service. *Id.*

MILPERSMAN §1754-030, Item 5b, makes clear that there is no waiver of the duty to support one's children. It is not affected by "desertion without cause, physical abuse, or for infidelity on the part of the spouse." *Id.* See also MILPERSMAN §1754-030, Item 7.

MILPERSMAN §1754-030, Item 7, also points out that there is a duty to support even if a judgment makes no mention of child support. The Navy realizes that the civil court may have lacked jurisdiction or may have been unaware of the child. *Id.*

In the case of the Marines, LEGADMINMAN ¶15001.1 provides:

> **The Marine Corps will not serve as a haven for personnel who fail to provide adequate and continuous support to their family members. Marines shall comply fully with the provisions of separation agreements and court orders addressing the support of family members. Absent such agreements or court orders, and conditioned upon a complaint of nonsupport to a commanding officer, the support standards set forth in this chapter shall be enforced.**

LEGADMINMAN ¶15002.1 provides that Marines will not violate (1) the financial dependent support provisions of a court order, (2) the financial support provisions of a written financial support agreement, or (3) the interim financial support standards of ¶15004 of the LEGADMINMAN and orders issued thereunder by a commanding officer.

2. [5.57] Support Guidelines

MILPERSMAN §1754-030, Item 3, state that the Navy does not and cannot act as a court to adjudicate support.

It is "desired" that the amount of support be established by "mutual agreement between the parties" or by court order. MILPERSMAN §1754-030, Item 3. MILPERSMAN §1754-030, Item 10, cautions courts and attorneys to be specific in the amount ordered for spousal and child support. The Navy does not construe ambiguous decrees and does not attempt to break down the basic allowance for quarters with respect to how much would be applicable for a spouse or child. They are instead construed as being silent regarding the amount of support.

In the absence of a mutual agreement or court order, the Navy has set up a support scale that may be used as a guide until a mutual agreement is reached or a court order is obtained. MILPERSMAN §1754-030, Item 4. The regulations specifically state that the support scale is not intended to be used as a basis for any judicial proceeding. MILPERSMAN §1754-030, Item 4a.

According to MILPERSMAN §1754-030, ITEM 4A, the support scale for Navy members is as follows:

For spouse only	1/3 gross pay
For spouse and one minor child	1/2 gross pay
For spouse and two or more children	3/5 gross pay
For one minor child	1/6 gross pay
For two minor children	1/4 gross pay
For three or more children	1/3 gross pay

"Gross pay" is defined to include basic pay and basic allowance for housing. However, it does not include hazardous duty pay, sea or foreign duty pay, incentive pay, or basic allowance for subsistence. MILPERSMAN §1754-030, Item 4a.

In the case of the Marine Corps, LEGADMINMAN ¶15001.2 states that

> **[p]referably, the amount of support to be provided to family members should be established by a written agreement between the parties, or be adjudicated in the civilian courts. Nevertheless, because family support issues are closely aligned with readiness, morale, discipline, and the reputation of the service, mandatory interim financial support standards are needed.**

These standards, which are to be used in the absence of a court order or written agreement, are set forth in LEGADMINMAN ¶15004. Paragraph 15004 provides that interim support per supported family member must be the greater of the fixed amount reflected in the center column of the following chart or the prorated share of whatever basic allowance for housing or overseas housing allowance to which the Marine is currently entitled shown in the right column of the chart.

Total Number of Family Members Entitled to Support	Minimum Amount of Monthly Support per Requesting Family Member	Share of Monthly BAH/OHA per Requesting Family Member
1	$350	1/2
2	$286	1/3
3	$233	1/4
4	$200	1/5
5	$174	1/6
6 or more	$152	1/7 or etc.

Under no circumstances is the total amount of support required to exceed one third of the Marine's gross military pay. "Gross military pay" is defined as "the total of all military pay and allowances before taxes or any other deductions." *Id.* In addition, the interim financial support standards set out in LEGADMINMAN ¶15004 apply only to a Marine's spouse and minor biological or adopted children and not to stepchildren or other Department of Defense-recognized dependents. LEGADMINMAN ¶15001.5. Modification of the interim financial support standards for cause (*e.g.,* the spouse's gross pay exceeding the Marine's gross pay, the Marine providing interim financial support for an uninterrupted period of 12 months or longer, the Marine having been a victim of a substantiated instance of abuse by the spouse seeking support, or the Marine paying sizeable regular and recurring obligations of the family members requesting support) are governed by ¶15005.

3. [5.58] Garnishment

For Navy personnel, MILPERSMAN §1754-030, Item 9, warns that noncompliance with a court order may result in garnishment under 42 U.S.C. §659.

According to 42 U.S.C. §659

> **moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding .°.°. by a State agency administering a program under a State plan approved under this part or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony.** 42 U.S.C. §659(a).

4. [5.59] Paternity

Paternity complaints are the subject of LEGADMINMAN ¶15003.3.

5. [5.60] Basic Allowance for Housing

The right to the basic allowance for housing on behalf of dependents is of statutory origin. MILPERSMAN §1754-030, Item 6a. MILPERSMAN §1754-030, Item 6b, provides that no member is to be denied the right to submit a claim for a basic allowance for housing and that no command is to refuse to forward the application. MILPERSMAN §1754-030, Item 6a, makes clear that even if BAH is not available to personnel with dependents, members are still expected to comply with court orders that adjudge alimony payments.

C. [5.61] Air Force

Air Force policy regarding delinquent financial obligations and processing claims is spelled out in Air Force Instruction (AFI) 36-2906, Personal Financial Responsibility (May 13, 2021), available at https://static.e-publishing.af.mil/production/1/af_a1/publication/dafi36-2906/dafi36-2906.pdf. AFI 36-2906 includes as an attachment a fact sheet on garnishment of pay and statutory allotments against military pay for child support and alimony obligations.

1. [5.62] Responsibilities

AFI 36-2906 ¶2.7.1 requires that military members "[p]ay their just financial obligations in a proper and timely manner." AFI 36-2906 ¶4.1 states that military members will "provide financial support to a spouse or child or any other dependent," and "comply with the financial support provisions of a court order or written support agreement."

2. [5.63] Garnishment

AFI 36-2906 ¶2.8.1 provides that Defense Finance and Accounting Service will:

> **Refers RegAF, AFR, Air National Guard, retired members and creditors seeking assistance with garnishments, statutory allotments for child and spousal support, or**

involuntary allotments for civil debts to the following: Garnishment Law Directorate-HGA, PO Box 998002, Cleveland, OH 44199-8002; online at https://www.dfas.mil/garnishment/customerservice/; or via phone at the following toll free number: 1-888-332-7411.

3. [5.64] Allotments

AFI 36-2906 ¶A2.3 deals with statutory allotments. An active duty member's pay and allowances are subject to a mandatory allotment to satisfy child support (or child and spousal support) if the payments are at least two months in arrears. AFI 36-2906 ¶A2.3.2.

A2.3.2. . . . The allotment is initiated by furnishing the Defense Finance and Accounting Service Center a written notice from a court or state agency administering the child support program under Title IV-D of the Social Security Act. . . . The notice is signed by an authorized official and contains the following information:

A2.3.2.1. A statement that the person signing the request is an agent or attorney of a state that has a Title IV-D plan with authority under the plan to collect money owed by a military member as child support or child support and alimony. The request may also be signed by an agent of the court issuing the order.

A2.3.2.2. The statement includes the military member's full name, Social Security Number, the dates that the current support terminates for each child, and the exact name and address of the allotment payee. The statement also shows the total amount of the allotment to be taken and specifies the amount to be paid each month for current support and the arrearage.

A2.3.2.3. The statement is supported by a recently certified copy of the original court order awarding support and a court order which specifies the amount of the arrears and those payments made to liquidate such arrears. *Id.*

A2.3.3. Allotments cannot exceed 50 percent of a member's pay and allowances if the member is supporting a second family. If the member is not supporting a second family, the allotment may not exceed 60 percent. The percentage may be increased by 5 percent if the arrearage is 12 weeks or more. *Id.*

The member has 30 days to cure an arrearage or submit evidence that the arrearage is an error once notified or the Defense Finance and Accounting Service implements the allotment. AFI 36-2906 ¶A2.3.4.

4. [5.65] Paternity

Paternity claims are governed by Air Force Instruction 36-2906 ¶3.3. Allegations of paternity against an active duty member are transmitted to the member through his commander. AFI 36-2906

¶3.3. If the paternity is denied, the commander informs the claimant of that fact and advises that the Air Force does not have the authority to adjudicate paternity claims. AFI 36-2906 ¶3.3.2. If paternity is acknowledged, the commander advises the member of his financial support obligations and refers the member to various sources for guidance. AFI 36-2906 ¶3.3.3.

D. [5.66] Coast Guard

Under 42 U.S.C. §665(a)(1), an allotment may be taken from the pay and allowances of a Coast Guard member on active duty who is delinquent in meeting an obligation for child support or child and spousal support in an amount equal to the support payable for two months or longer. The regulations governing garnishment of pay of Coast Guard personnel are found at 33 C.F.R. pt. 54. 33 C.F.R. §54.07 provides that notice and all accompanying documentation must be sent to:

Commanding Officer
Coast Guard Human Resources Service and Information Center
Federal Building
444 S.E. Quincy St.
Topeka, KS 66683-3591
785-339-3595
Fax: 785-339-3788

IV. [5.67] FEDERAL LEGISLATION RELATIVE TO COLLECTION OF CHILD SUPPORT AND MAINTENANCE

Congress has addressed the growing problem of collecting child support and maintenance from the absent parent. The legislation it has produced includes several important federal statutes concerning:

a. the Federal Parent Locator Service (see §5.68 below);

b. enforcement of an individual's legal obligations to provide child support or make alimony payments (garnishment);

c. collection of past-due support from federal tax refunds (tax intercepts); and

d. mandatory allotments from pay for child and spousal support owed by members of the uniformed services on active duty.

A. [5.68] Federal Parent Locator Service

42 U.S.C. §653 provides for the establishment and conduct of the Federal Parent Locator Service, which is to be used to obtain and transmit to authorized persons information useful in enforcing parental obligations. Under §653, the Federal Parent Locator Service is available to enforce support. In addition, under 42 U.S.C. §663(a), the Federal Parent Locator Service

> **shall be made available to each State for the purpose of determining the whereabouts of any parent or child when such information is to be used to locate such parent or child for the purpose of —**
>
> > **(1) enforcing any State or Federal law with respect to the unlawful taking or restraint of a child; or**
> >
> > **(2) making or enforcing a child custody or visitation determination.**

42 U.S.C. §663(a)(2)(A) provides:

> **Information as to the most recent address and place of employment of any parent or child shall be provided under this section.**

B. [5.69] Garnishment of Federal Compensation

In order to allow wage-withholding orders to be effective against the United States and its agencies, Congress passed 42 U.S.C. §659, which provides in §659(a) as follows:

> **Notwithstanding any other provision of law (including section 407 of this title and section 5301 of Title 38), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia . . . to any individual, including members of the Armed Forces of the United States, shall be subject . . . to withholding in accordance with State law . . . and to any other legal process brought . . . to enforce the legal obligation of the individual to provide child support or alimony.**

42 U.S.C. §659(f)(2) immunizes the employee who answers the process from civil and/or criminal liability. 42 U.S.C. §659(c)(2) directs the person responding to do so "within 30 days" and to give notice to the person who is to have money withheld. 42 U.S.C. §659(e) makes clear that the government does not have to change its pay cycles to comply with the wage-withholding order.

One of the questions that vexes the practitioner most often is whether social security benefits are subject to wage-withholding orders to recover child support or alimony. The simple answer is "yes," if the social security benefit (whether retirement or disability) is based on "remuneration for employment." 42 U.S.C. §659(a). The answer is "no" if it is supplemental security income (SSI). 42 U.S.C. §659 and 5 C.F.R. pt. 581, discussed in §5.70 below, make it clear that the wage-withholding order is valid as to social security retirement or disability benefits based on "remuneration for employment," and Appendix A to 5 C.F.R. pt. 581 tells where to serve the order. Additionally, it has been held that a bank account into which social security disability payments (based on remuneration) have been deposited may be garnished to recover past-due alimony payments. *Mariche v. Mariche,* 243 Kan. 547, 758 P.2d 745 (1988).

On the other hand, because SSI is not based on remuneration for employment, it is not subject to a wage-withholding order or subsequent garnishment after deposit in a bank account. *Tennessee*

Department of Human Services ex rel. Young v. Young, 802 S.W.2d 594 (Tenn. 1990). This decision appears to be well thought out, but there is contrary authority for the proposition that once in a bank account, even SSI is subject to garnishment. *Adams v. Adams,* 149 So.3d 1093 (Ala. 2014).

PRACTICE POINTER

✓ The Income Withholding for Support Act, 750 ILCS 28/15(d), for purposes of wage-withholding orders, defines "income" broadly enough to include SSI; however, when *Young, supra,* is considered, the author would not anticipate a different holding from the Illinois appellate courts.

1. [5.70] Implementing Regulations

The regulations that govern garnishments on departments and agencies of the executive branch of the U.S. government for child support and alimony are found at 5 C.F.R. pt. 581.

5 C.F.R. §581.101 indicates that the purpose of the regulation is to implement 42 U.S.C. §659 within the executive branch.

5 C.F.R. §581.102 is the definitional section. It defines "executive branch," "governmental entity" (to include civilian and military), "private person," "child support," "alimony," "legal process," "legal obligation," "obligor," "remuneration for employment," "party," and "individual obligee."

5 C.F.R. §581.103 is a detailed listing of what money is subject to garnishment. 5 C.F.R. §581.104 lists money not subject to garnishment, and 5 C.F.R. §581.105 lists exclusions in determining "moneys due from, or payable by, the United States" to any individual.

5 C.F.R. §581.201 deals with designated agents within the various departments for service of garnishment; they are comprehensively listed in Appendix A to §581. 5 C.F.R. §581.201(c) makes it clear that U.S. attorneys are not considered appropriate agents to accept garnishments.

5 C.F.R. §581.202 deals with the manner of service of process.

5 C.F.R. §581.203 lists the information minimally required to allow the garnishment to be effective.

5 C.F.R. §581.402 lists the maximum sums that can be garnished for child support and alimony and implements 15 U.S.C. §1673(b)(2). In general, these are the rules:

a. If the employee is supporting only one spouse and children, the maximum sum is 60 percent and an additional 5 percent on arrears of more than 12 weeks.

b. If the employee is supporting a second spouse and children, the maximum is 50 percent for the spouse and children for whose benefit the wage-withholding order is entered and an additional 5 percent on arrears of more than 12 weeks.

2. [5.71] Federal Limitations

15 U.S.C. §1673 places federal limits on what may be garnished. Section 1673(b)(2) deals specifically with garnishments for child support and for maintenance and provides the following:

> **The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed —**
>
> > **(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and**
> >
> > **(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;**
>
> **except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.**

15 U.S.C. §1672 defines "earnings," "disposable earnings," and "garnishment." Section 1674 prohibits an employer from firing for a first garnishment.

Under 15 U.S.C. §1673(a), a creditor normally is limited to garnishing 25 percent of the disposable income of the wage earner except in cases of child support or alimony as set forth in §1673(b)(2).

If a creditor is already garnishing 25 percent of the disposable income when a child support wage-withholding order for 25 percent of the disposable income is served, which takes priority? The Income Withholding for Support Act answers:

> **Withholding of income under this Act shall be made without regard to any prior or subsequent garnishments, attachments, wage assignments, or any other claims of creditors.** 750 ILCS 28/35(c).

The same section also states what is to be done if more than one wage-withholding order for support or for support and maintenance is served on the same employer relating to the same obligor. *Id.*

On the other hand, once a child support or child support and maintenance wage-withholding order is in effect, any other creditor is blocked from garnishing to the extent that the support wage-withholding order uses up all or part of the 25 percent of the disposable income. Accordingly, if a wage-withholding order is in effect and is taking 25 percent (for two children) of the obligor's disposable income, all other creditors are blocked from garnishing that person's wages. *Commonwealth Edison v. Denson,* 144 Ill.App.3d 383, 494 N.E.2d 1186, 98 Ill.Dec. 859 (3d Dist. 1986). As stated above, the same is true even if the child support wage-withholding order is served after the other garnishment is lodged.

C. [5.72] Tax Intercepts

42 U.S.C. §664 deals with collection of past-due support from federal income tax refunds. Section 664(a)(1) provides:

> **Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State . . . the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary . . . finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, shall concurrently send notice to such individual that the withholding has been made . . . and shall pay such amount to the State agency . . . for distribution.**

The Secretary also notifies the filer of any joint return of the steps "which such other person may take in order to secure his or her proper share of the refund." 42 U.S.C. §664(a)(2)(A).

D. [5.73] Allotments from Pay for Support Owed by Uniformed Services Members on Active Duty

42 U.S.C. §665 deals with mandatory allotments for child and spousal support owed by members of the uniformed services on active duty. A mandatory allotment in essence is an assignment of wages. Section 665(a)(1) provides:

> **In any case in which child support payments or child and spousal support payments are owed by a member of one of the uniformed services . . . on active duty, such member shall be required to make allotments from his pay and allowances . . . as payment of such support, when he has failed to make periodic payments under a support order . . . and the resulting delinquency in such payments is in a total amount equal to the support payable for two months or longer.**

Allotments are initiated when an "authorized person" sends notice to the "designated official." The amounts withheld cannot exceed the amount permitted by 15 U.S.C. §1673. 42 U.S.C. §665(a)(1).

"Authorized person" includes "(1) any agent . . . of a State having in effect a plan approved . . . who has the duty or authority under such plan to seek to recover any amounts owed by such member as child or child and spousal support" and "(2) the court which has authority to issue an order against such member for the support and maintenance of a child, or any agent of such court." 42 U.S.C. §665(b). 42 U.S.C. § 665(c) requires implementing regulations to be issued by each branch of the military.

As a court can designate its own agent, presumably a judge can order an attorney for a claimant to give notice of the arrearage and demand initiation of an allotment. However, it should be noted that the mandatory allotment procedure is an alternative remedy to the issuance and service of a wage-withholding order under 42 U.S.C. §659.

V. [5.74] SERVICES PROVIDED TO PRIVATE COUNSEL AND THEIR CLIENTS BY THE STATE OF ILLINOIS

The Illinois Department of Healthcare and Family Services, Division of Child Support Enforcement, can provide valuable aid to private attorneys and litigants — even if the latter are not public aid recipients. DHFS can provide aid in

a. locating a parent who is responsible for the support of a child;

b. establishing parentage;

c. establishing child support orders; and

d. enforcing child support orders.

The two most valuable services provided are

a. the use of the Federal Parent Locator Service (see §5.68 above) and available state systems; and

b. state and federal tax intercepts to collect child support and maintenance arrearages (see §5.72 above).

These services are available to (a) those who receive AFDC (Aid to Families with Dependent Children) cash and medical assistance, (b) those who receive only AFDC medical assistance, and (c) those who receive no AFDC cash or medical assistance but who care for a child and need help in getting a support order or enforcing a support order.

The private attorney simply makes an appointment for the client with the appropriate local DHFS office. The client has the interview and answers the requisite questions, and the services are provided. Once an absent parent is found, the private attorney can then proceed as usual.

For questions about the services available, visit Illinois Child Support Services website, www.illinois.gov/hfs/childsupport/pages/default.aspx; call the Child Support Customer Service Call Center at 800-447-4278; or go to the appropriate regional child support office of DHFS (list available at www.illinois.gov/hfs/childsupport/parents/pages/offices.aspx).

6 Discovery

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I. INTRODUCTION

A. [6.1] Scope of Chapter

Divorce litigation is both a unique area of the law with particular strategic and tactical concerns of its own and one of the many areas of civil litigation in which discovery is governed by the Rules of the Illinois Supreme Court. This chapter is not intended as a guide to discovery in all forms of civil litigation; it is presumed that the reader is generally familiar with the Supreme Court Rules and the types of discovery. A more generalized discussion of discovery in civil litigation can be found within CIVIL DISCOVERY PRACTICE (IICLE®, 2021).

This chapter is intended to focus on discovery as conducted in divorce litigation. However, all divorce litigation is not alike; divorce cases range from simple cases involving no children, no maintenance, and few, if any, assets to cases involving millions of dollars of assets and hotly contested parenting issues between litigants with substantial financial resources. Discovery methods that are appropriate in the larger cases may be overkill in the smaller cases, while the limited discovery sometimes conducted in the smaller cases will be woefully inadequate in the larger cases. This chapter outlines discovery generally used in divorce cases, but each lawyer must exercise professional judgment to determine the appropriate scope and level of discovery to be conducted in a particular divorce case, taking into consideration both ethical requirements (*e.g.,* Rule 3.4(d) of the Illinois Rules of Professional Conduct) and local civility rules (*e.g.,* Rule 13.11 of the Rules of the Circuit Court of Cook County).

B. [6.2] Purposes of Discovery

Discovery serves several purposes in divorce litigation. On a basic, straightforward level, it serves to inform counsel and the client about factual information necessary to evaluate the case, such as the nature of the income and assets of the other spouse. Second, discovery is a trial preparation tool used, for example, to identify lay witnesses, independent expert witnesses, and controlled expert witnesses together with the nature of their testimony.

Discovery in divorce litigation can also be useful on a third level. Divorce is often an emotional and very personal process, unlike some other forms of litigation. Discovery can be properly used to bring pressure on a party to settle either the entire litigation or a portion thereof, and it also can be abused to harass a party into settling the litigation. By way of example (and the examples are limited only by the imagination), deposition subpoenas (or the prospect that they will be issued and served) directed to other members of the family (parents, siblings, etc.) or to employers, supervisors, business colleagues, customers, etc., may serve to provide useful information and also may be considered as harassment by the party on the receiving end of the subpoenas. Based on the facts in the case, these subpoenas will be clearly proper at times and clearly abusive at others. Many times, the subpoenas will be neither clearly proper nor clearly abusive and will fall into that gray area familiar to practicing divorce lawyers.

C. [6.3] *Goldsmith* — The Standard of Due Diligence and Discovery

In 2011, the appellate court issued a ruling that announced a much stricter standard for the assessment of due diligence in terms of litigation brought under §2-1401 of the Code of Civil

Procedure, 735 ILCS 5/2-1401, the vehicle by which a judgment of dissolution of marriage may be vacated. In *In re Marriage of Goldsmith,* 2011 IL App (1st) 093448, ¶47, 962 N.E.2d 517, 356 Ill.Dec. 832, the appellate court, in a pronouncement that may be viewed as dicta, stated:

> **While we have rejected the petitioner's contentions that she had a meritorious claim over each of the purportedly undisclosed assets, which is fatal to her petition, we elect to address the petitioner's claim that she acted with legal due diligence based on her reliance on the representation and warranty in the [**marital settlement agreement**] and the respondent's unsigned affidavit. We do so to make clear that the petitioner's contention of legal diligence based on reliance, in lieu of formal discovery, is without support in Illinois law. When a divorce party elects to forego formal discovery in favor of accepting a representation and warranty of full and complete disclosure, the party does so at his or her own peril. We emphasize that this case does not present a question of fraudulent concealment of assets, as the trial court found below.**

In *Goldsmith,* a former wife brought a petition against her former husband pursuant to §2-1401 seeking to vacate the judgment of dissolution of marriage, which incorporated a marital settlement agreement. The former wife claimed that her ex-husband failed to disclose over $2 million worth of assets at the time the agreement was entered and the case was proved up. The former husband made representations in both the marital settlement agreement and at the prove-up that he had made a full disclosure of his assets. The parties did not engage in discovery. According to the former wife, she did not become aware of the nearly $2 million worth of assets held by her former husband until 2004, a year after the judgment for dissolution of marriage was entered. The trial court determined that the assets at issue were nonmarital, so she had no meritorious claim to them, and her §2-1401 petitions failed as a result. More important, though, was the court's discussion regarding the former wife's failure to engage in sufficient discovery. According to *Goldsmith,* "the proceeding is not intended to give the litigant a new opportunity to do that which should have been done in an earlier proceeding or to relieve the litigant of the consequences of her mistake or negligence." 2011 IL App (1st) 093448 at ¶14, quoting *In re Marriage of Himmel,* 285 Ill.App.3d 145, 673 N.E.2d 1140, 1143, 220 Ill.Dec. 719 (2d Dist. 1996). *Goldsmith* has been followed by *In re Marriage of Lyman,* 2015 IL App (1st) 132832, 27 N.E.3d 126, 389 Ill.Dec. 634 and *In re Marriage of Onishi-Chong & Chong,* 2020 IL App (2d) 180824, 153 N.E.3d 1071, 440 Ill.Dec. 495.

D. [6.4] Filing of Discovery

Supreme Court Rule 201(m) governs filing materials with the clerk of the circuit court. Rule 201(m) provides that "no discovery may be filed with the clerk of the circuit court except by order of court or when authorized by Supreme Court Rule." Additionally, local rules shall not require the filing of discovery. Instead, any party serving discovery shall file a certificate of service of discovery document and service of discovery shall be made in a manner provided for service of documents in S.Ct. Rule 11. The Rule is ambiguous as to whether certificate of service must be filed only upon the service of discovery requests or also upon the service of discovery responses. The safer practice is to file a certificate of service for both.

Rule 201(m) was amended in 2012 to eliminate the filing of discovery absent leave of court. Per the Committee Comments, Rule 201(m) is intended to minimize any invasion of privacy that a litigant may have by filing discovery in the public court record.

E. [6.5] Local Rules

Many circuit courts throughout the state have local rules that regulate discovery practice. It is beyond the scope of this chapter to collect and discuss the local rules throughout the state; lawyers should review the rules in the jurisdictions where they are practicing.

Section 6.33 below provides a listing of the websites of judicial circuits. Many of these sites have links to the circuit's local rules and often local forms specific to that circuit.

II. [6.6] FINANCIAL AFFIDAVITS

Financial affidavits, sometimes referred to as mandatory financial disclosures, are a well-established concept in divorce law discovery procedure. The goal of the financial affidavit is to provide both sides with a capsulized version of the financial aspects of a case at its onset and immediately preceding any hearing relative to financials. In Illinois, the Supreme Court promulgated the Financial Affidavit (Family & Divorce Cases) Form in September 2016, and it has since been updated. The form itself provides that it is "approved by the Illinois Supreme Court and is required to be used in all Illinois Circuit Courts." The financial affidavit form and accompanying pages to include additional information can be found at www.illinoiscourts.gov/forms/approved-forms/forms-approved-forms-circuit-court/financial-affidavit.

Cook County Circuit Court Rules 13.3.1 and 13.3.2 govern financial affidavits in Cook County domestic relations proceedings. The petitioner is required to provide a financial affidavit, along with supporting financial documents, to the respondent no later than 30 days after service of the initial pleading. Whereas the respondent is required to provide a financial affidavit and supporting financial documents within 30 days after filing an appearance. Both parties are required to update their financial affidavits within 7 days prior to any hearing when further relief is sought and a material change in circumstances has occurred.

It is important to note that under Rule 13.3.1(e), a party must serve a completed financial affidavit to the other party before seeking any discovery pursuant to S.Ct. Rule 201. To the extent that this places an undue burden on a party (*e.g.,* a spouse with no access to income or expense records or other required information), compliance with this rule may be excused by the court upon request.

PRACTICE POINTER

✓ As soon as possible, counsel should have a new divorce client provide income and expense documents (Cook County requires copies of the party's last two tax returns, most recent pay stub that shows year-to-date earnings, and records of any additional year-to-date

income) and complete a draft financial affidavit. Not only are the documents and financial affidavit necessary to move forward with the case and obtain discovery from the other party, the documents and financial affidavit will also help counsel obtain an organized summary of the client's financial affairs and help the client by requiring early identification and organization of relevant information in the client's possession or control.

DuPage, Lake, Kane, DeKalb, and Kendall Counties all have similar rules for financial affidavits. See Eighteenth Judicial Circuit Court Rule 15.05(a) (DuPage County); Nineteenth Judicial Circuit Court Rule 4-3.02(b)(4) (Lake County); Sixteenth Judicial Circuit Court Rule 14.11(c) (Kane County); and Twenty-Third Judicial Circuit Rule 6.45(f) (DeKalb County and Kendall County). All of the aforementioned counties require the parties to serve their financial affidavits before issuing discovery requests. The rules for each circuit in Illinois are listed in §6.33 below. As noted in §6.5 above, prior to engaging in litigation in a particular county, it is important to review the court's local rules to determine the timing of serving the financial affidavit, the required supporting financial documents, and how often the financial affidavit must be updated throughout the case.

PRACTICE POINTER

✓ Counsel should strategize at the onset of the case what issues will need to be addressed when completing a financial affidavit. It is also important to develop an accurate depiction of the financial position that is the last peaceable status quo or that most accurately reflects average monthly expenses or income for the client during the marriage. Moreover, if the client does not have access to financial information for the entire family, it may make sense initially to present only the expenses of your client and not those of the entire family until discovery is complete. If the expenses of the client are complicated, using footnotes can help both counsel and the court understand how the expenses were calculated. Additionally, in the event counsel lacks certain financial information or is waiting for additional financial information, counsel should label the disclosure statement "preliminary" and later supplement the missing information.

III. INTERROGATORIES

A. [6.7] Use of Interrogatories

Interrogatories are a simple and inexpensive method of discovery. By the same token, they have limited use because the answers are often carefully crafted by lawyers to avoid providing any useful information. Interrogatories serve certain limited purposes.

Interrogatories are best for obtaining specific factual information, such as the identification of specific assets and liabilities, *e.g.,* account numbers at specific financial institutions. If local circuit court rules do not mandate the disclosure of this information, interrogatories are a must for obtaining it at the outset of a case. Also, the answers may identify, limit, or crystallize certain issues in the case, particularly answers reflecting whether a party has fraudulently conveyed property, has dissipated assets, or is in any way incapacitated or limited in the ability to earn income.

NOTE: Practitioners should be prepared to update their client's answers to interrogatories when circumstances change.

Interrogatories are also essential for the identification of trial and expert witnesses. The Supreme Court Rules provide for complete disclosure of trial witnesses upon written interrogatories. See S.Ct. Rules 213, 218.

All of the above-described factual information is included in the standard matrimonial interrogatories.

B. [6.8] Standard Matrimonial Interrogatories

Pursuant to S.Ct. Rule 213(j), which authorizes the Supreme Court to approve standard forms of interrogatories in certain classes of cases, the Supreme Court has adopted standard matrimonial interrogatories. While interrogatories are limited to 30 (including subparts) pursuant to Rule 213(c), an exception is made for the standard form interrogatories.

The standard form matrimonial interrogatories, as approved by the Supreme Court, are included in the Article II Form Appendix. Contained in the standard form matrimonial interrogatories are questions regarding factual financial information and witnesses. In most cases, the standard for matrimonial interrogatories should be sufficient. However, caution should be exercised rather than blindly using the standard form interrogatories. For example, the standard form interrogatories limit the request for information to a certain time period (the preceding three years), and in certain litigation, information dating back more than three years is relevant and discoverable.

While it is the experience of the authors that sanctions other than an order that the interrogatories be answered are uncommon for the failure to timely answer interrogatories, precedent exists for much more serious sanctions. In *Payne v. Payne,* 31 Ill.App.2d 141, 175 N.E.2d 614 (1st Dist. 1961), a party's pleadings were stricken, and an order of default was entered against the wife for failing to answer interrogatories. The case proceeded to prove-up by default on the husband's counterpetition for divorce.

C. [6.9] Trial Witness Interrogatories

Interrogatories seeking information about trial witnesses are the most important of all interrogatories. While these interrogatories are included in the standard form matrimonial interrogatories, a separate trial witness interrogatory should always be used, even if counsel elects to forego the standard interrogatories.

S.Ct. Rule 213 requires strict compliance, and such compliance is mandatory. *See Sullivan v. Edward Hospital,* 209 Ill.2d 100, 806 N.E.2d 645, 652, 282 Ill.Dec. 348 (2004) ("Where a party fails to comply with the provisions of Rule 213, a court should not hesitate sanctioning the party, as Rule 213 demands strict compliance."), quoting *Firstar Bank of Illinois v. Peirce,* 306 Ill.App.3d 525, 714 N.E.2d 116, 120, 239 Ill.Dec. 558 (1st Dist. 1999). A party that does not comply with Rule 213 faces the possibility of the court (1) striking the testimony of the undisclosed witness or opinion, (2) barring an undisclosed witness from testifying, (3) barring a witness from testifying

about an undisclosed opinion, or (4) dismissing the entire action with prejudice. *See Gonzalez v. Nissan North America, Inc.,* 369 Ill.App.3d 460, 860 N.E.2d 386, 307 Ill.Dec. 732 (1st Dist. 2006). To avoid sanctioning, a party should disclose with specificity all opinions that it expects to elicit on direct examination. *See Heriford v. Moore,* 377 Ill.App.3d 849, 883 N.E.2d 81, 85, 318 Ill.Dec. 247 (4th Dist. 2007) ("The court noted those disclosures must be specific and that allowing either side to ignore Rule 213's plain language would defeat the rule's purpose and encourage 'tactical gamesmanship.'"), quoting *Sullivan, supra,* 806 N.E.2d at 652.

The duty to supplement the answers to all interrogatories is crucial with regard to trial and expert witness interrogatories. S.Ct. Rule 213(i) provides:

> **A party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party.**

D. [6.10] Responding and Objecting to Interrogatories

S.Ct. Rule 213(d) provides that, within 28 days of service, a party shall provide either a sworn answer or an objection to the interrogatories propounded. It is the burden of the party propounding the interrogatories to bring a motion seeking adjudication of any written objections. Proper objections to interrogatories may include, without limitation, that the interrogatory

1. exceeds the 30 interrogatories permitted;

2. is irrelevant to subject matter;

3. intends to annoy, embarrass, or oppress;

4. creates unnecessary burden or expense on the answering party;

5. is not calculated to lead to the discovery of relevant information;

6. seeks information equally available to both parties;

7. seeks information protected from disclosure because it is privileged and/or work product; and

8. is vague, ambiguous, and/or unintelligible.

One often overlooked method of answering an interrogatory is the option to produce documents, as set forth in Rule 213(e). Particularly when the interrogatory seeks the identification of bank or other accounts maintained by the respondent, the option of producing the account statements may be the simplest way to respond to the interrogatory, especially when the statements need to be produced in any event pursuant to a request for the production of documents.

IV. [6.11] REQUESTS FOR PRODUCTION OF DOCUMENTS AND OTHER TANGIBLE THINGS

Obtaining financial records is an important form of discovery. Bank records, credit card statements, retirement account records, and other such records are necessary for a divorce lawyer to determine the nature and extent of the marital estate, the marital and nonmarital character of property, the lifestyle maintained by the parties during the marriage, and other financial information that may be relevant pursuant to statute.

Records can be obtained either from a party pursuant to a request for the production of documents under S.Ct. Rule 214 or from a nonparty pursuant to a subpoena for records served pursuant to a notice of deposition under S.Ct. Rule 204(a)(4).

In addition, some counties may require a party to turn over income documents with the financial affidavit, without the need for a request by the adverse party. The practitioner may want to confirm the veracity of information and the earlier withdrawal or transfer of funds prior to receiving the financial affidavit by following up with other discovery tools such as a request for production of documents or subpoenas for records pursuant to Rule 204.

A. [6.12] Production from Parties

The production of documents from a party is governed primarily by S.Ct. Rule 214. The process to obtain documents from a party is as follows:

1. A written request is served requesting the production of records or other tangible items and requiring production within 28 days.

2. A party is required to produce not only all documents and other tangible items but also all "retrievable information in computer storage." S.Ct. Rule 201(b)(1). Moreover, as a result of our ever-increasing reliance on technology in our daily lives, subsection (b)(4) was added to Rule 201 in 2014 and provides the following definition of "electronically stored information" for purposes of discovery:

> **(4) *Electronically Stored Information.* ("ESI") shall include any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium from which electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.**

In addition, subsection (c)(3) of Rule 201 was added to address the production of materials when the burden of producing them outweighs the benefits. Subsection (c)(3) requires that discovery requests for electronically stored information be proportional and states:

> **When making an order under this Section, the court may determine whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.**

In 2014, subsection (b) of Rule 214 was amended in response to the new definition of "electronically stored information" contained in Rule 201 regarding the form in which electronically stored information is to be produced. Specifically, Rule 214(b) states:

> **With regard to electronically stored information as defined in Rule 201(b)(4), if a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.**

3. The responding party must produce the documents or object within 28 days. The records must be produced either in the manner in which they are kept in the usual course of business or organized and labeled to correspond with the categories in the request.

4. The responding party is obligated to produce an affidavit stating that the production is complete in accordance with the request.

5. The responding party has a duty to seasonably supplement any prior response to the production with documents that subsequently come into the party's possession or control or become known to the party. Thus, in divorce litigation, once it has been requested that a party produce all banking and credit card statements, that party has a duty to produce additional statements as they are received during the course of the litigation.

6. Upon written objection, it is the burden of the party seeking production to file a motion asking the court to order production or resolve any objections to discovery.

7. A common misconception is that Rule 214 requires the responding party to prepare a written response. No such requirement is found in the language of the rule or the caselaw. In the authors' experience, some judges nevertheless require the preparation of a written response.

Parties are required to produce all documents within their possession and control. In divorce litigation, it is not uncommon for a party's records to be in the physical possession of some other person, such as an accountant or lawyer. A party is required to produce documents within the possession of a third party if the party maintains control over those documents. *See Central National Bank in Chicago v. Baime,* 112 Ill.App.3d 664, 445 N.E.2d 1179, 1183, 68 Ill.Dec. 326 (1st Dist. 1982) ("A party may be required to produce documents which are in the possession of third parties, where he has custody or control of those documents.").

While much of the discussion of Rule 214 concerns the production of documents, the rule also applies to the production of other tangible items and to the entry on real estate for inspection purposes. Parenting litigation often includes video or audio recordings, and the careful lawyer will seek their production. Since often the largest asset in a typical divorce case is the equity in the marital residence, an appraisal of the residence is often used. Rule 214 provides the mechanism for a party to obtain access to real estate for appraisal purposes.

Included in §6.34 below is a sample form of a request for the production of documents that includes both the form of the request and a sample rider for documents typically sought from the other spouse in divorce litigation.

PRACTICE POINTER

✓ Counsel should Bates label all documents produced. Bates labeling saves time, eliminates unproductive arguments about whether a document was produced, and cuts down on the ability to manipulate or tamper with documents. Today, electronic Bates labeling programs are inexpensive. More advanced programs are available that allow users to not only Bates label documents, but also create databases that incorporate all the documents and provide quick and efficient searches saving valuable time and expense.

B. [6.13] Production from Nonparties

Documents may be obtained from a nonparty through the service of a subpoena requesting the discovery deposition of the nonparty, with the subpoena specifically providing that attendance at the deposition will be excused if the requested records are produced. A notice of deposition must be served on all parties. The procedure is set forth in S.Ct. Rule 204(a)(4), which provides:

> **The notice, order or stipulation to take a deposition may specify that the appearance of the deponent is excused, and that no deposition will be taken, if copies of specified documents or tangible things are served on the party or attorney requesting the same by a date certain. That party or attorney shall serve all requesting parties of record at least three days prior to the scheduled deposition, with true and complete copies of all documents, and shall make available for inspection tangible things, or other materials furnished, and shall file a certificate of compliance with the court. Unless otherwise ordered or agreed, reasonable charges by the deponent for production in accordance with this procedure shall be paid by the party requesting the same, and all other parties shall pay reasonable copying and delivery charges for materials they receive. A copy of any subpoena issued in connection with such a deposition shall be attached to the notice and immediately filed with the court, not less than 14 days prior to the scheduled deposition. The use of this procedure shall not bar the taking of any person's deposition or limit the scope of same.**

In order for the court to compel a nonparty to produce records, a subpoena must be properly served on the nonparty pursuant to Rule 204(a)(2). The required witness fee must be tendered with the subpoena; the current fee is $20 for each day's attendance plus 20 cents per mile. 705 ILCS 35/4.3. While Rule 204(a)(2) provides that witnesses must respond to any subpoena of which they have actual knowledge, unless a subpoena is personally served, care must be taken in order to be in a position to prove that the subpoena was served. Rule 204(a)(2) helps, providing in part:

> **Service of a subpoena by mail may be proved prima facie by a return receipt showing delivery to the deponent or his authorized agent by certified or registered mail at least seven days before the date on which appearance is required and an affidavit showing that the mailing was prepaid and was addressed to the deponent, *restricted delivery,* return receipt requested, showing to whom, date and address of delivery, with a check or money order for the fee and mileage enclosed. [**Emphasis added.**]**

On January 1, 2011, the Illinois Rules of Evidence became effective. Ill.R.Evid. 902 provides items of evidence that are deemed self-authenticating, meaning extrinsic evidence, such as the live testimony of a witness, is not necessary to establish authentication of the item of evidence. Ill.R.Evid. 902(11), entitled "Certified Records of Regularly Conducted Activity," is especially important in the context of subpoenas for records to nonparties (*e.g.,* financial institutions). It provides that extrinsic evidence is not required with respect to

> **[**t**]he original or a duplicate of a record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written certification of its custodian or other qualified person that the record**
>
> > **(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;**
> >
> > **(B) was kept in the course of the regularly conducted activity; and**
> >
> > **(C) was made by the regularly conducted activity as a regular practice.**
>
> **The word "certification" as used in this subsection means with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a record maintained or located in a foreign country, a written declaration signed in a country which, if falsely made, would subject the maker to criminal penalty under the laws of the country. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.**

Thus, in order to avoid having to call a live witness to testify to the authenticity of a document, counsel should include with all subpoenas to nonparties for documents a blank affidavit that satisfies the requirements of Ill.R.Evid. 902(11). Included in §6.37 below is a sample affidavit that counsel should consider including with all nonparty subpoenas.

PRACTICE POINTER

✓ Counsel should spend the extra money for either personal service or the additional postage to send the subpoena by certified mail, restricted delivery, in order to take advantage of the presumption of service as set forth in Rule 204(a)(2). Additionally, when time is of the essence, counsel may seek the deponent's appearance pursuant to Rule 204(a)(1) and ask the deponent to produce documents and confirm their authenticity at the same time to circumvent the 14-day notice requirement of Rule 204(a)(4).

One problem frequently encountered in divorce litigation is the production of records by nonparties not located in Illinois. While there is always the option of filing an action in another

state to obtain records, often that expense is prohibited in divorce litigation. Many jurisdictions outside of Illinois have local rules that address this situation. It is important to check with the local rules of the jurisdiction in which the nonparty is located. Many jurisdictions provide a specific process for issuing a foreign subpoena to a nonparty in their jurisdiction that may not require filing an action in that jurisdiction.

In 2015, Illinois adopted the Uniform Interstate Depositions and Discovery Act, 735 ILCS 35/1 *et seq.,* which provides a standardized method of taking depositions and obtaining discovery from out-of-state individuals and entities. Before requesting out-of-state discovery, a party must obtain a subpoena from the state court where the case is pending. Once issued, the party must present the foreign subpoena to the person or entity from whom discovery is sought. Thereafter, the clerk shall issue a local subpoena for service to the person or entity to whom discovery is sought. It is important to note that the subpoena must comply with all state rules and statutes regarding discovery. The procedure for issuing foreign subpoenas is set forth in S.Ct. Rule 17, which provides in relevant part:

> **To request issuance of a subpoena pursuant to the Uniform Interstate Depositions and Discovery Act, a person shall submit to a clerk of the circuit court in the county in which discovery is sought to be conducted the following:**
>
> **(1) a foreign subpoena:**
>
> **(2) an attestation form fully completed under penalty of perjury in the form authorized by the Supreme Court and found in the Article I Forms Appendix;**
>
> **(3) any other documentation required by local circuit court rule; and**
>
> **(4) any other document required by the Uniform Interstate Depositions and Discovery Act.**

Accordingly, any request for a subpoena pursuant to the Uniform Interstate Depositions and Discovery Act must comply with Rule 17. As of March 17, 2023, Illinois Cook County Motion Judges Exhibit A further requires all requests for foreign subpoenas to be filed in the Law Division.

A credit card company that maintains its offices in South Dakota, Delaware, or some other distant state refusing to provide copies of the credit card statements of one spouse upon service of a subpoena by the other spouse's counsel is a typical example of such a situation. A form letter is sent in response to the subpoena, taking the position that the credit card company is headquartered in South Dakota and would be pleased to respond to a subpoena issued by a South Dakota court but will not respond to the Illinois subpoena.

PRACTICE POINTER

✓ The authors have had some success in compelling a credit card company to respond to a subpoena by taking the simple step of obtaining a list of the substantial number of lawsuits

the credit card company has filed in Cook County to collect on credit card debts. Counsel may easily access this information from the Clerk of the Circuit Court of Cook County website, www.cookcountyclerkofcourt.org. The credit card company often withdraws its objection to compliance with the subpoena before the court's ruling on a petition for rule to show cause against the institution.

One common and necessary form of discovery to a nonparty is a subpoena for records directed to a spouse's employer, seeking records of earnings, retirement benefits, health benefits, etc. Included in §6.35 below is a sample form of a rider to an employer requesting the production of records.

A second common form of discovery to a nonparty particular to post-decree cases is a subpoena for records (or for deposition) directed to the current spouse of a party. Often, obtaining financial records from a party alone will not provide the court with an accurate picture of the party's expenses or lifestyle. *In re Marriage of Drysch,* 314 Ill.App.3d 640, 732 N.E.2d 125, 247 Ill.Dec. 409 (2d Dist. 2000), and *Street v. Street,* 325 Ill.App.3d 108, 756 N.E.2d 887, 258 Ill.Dec. 613 (3d Dist. 2001), both college contribution cases, support the evolving concept that the income and assets of a party's current spouse are discoverable to the extent that the income and assets are available to be used or are used to contribute to the expenses of the party, leading to the party having greater financial resources than otherwise would appear. *See also In re M.M.,* 2015 IL App (2d) 140772, 29 N.E.3d 1197, 390 Ill.Dec.927 and *In re Marriage of Cianchetti,* 351 Ill.App.3d 832, 815 N.E.2d 17, 286 Ill.Dec. 807 (3d Dist. 2004), which additionally support the relevance of a new spouse's income and assets in determining a party's available resources for college expenses.

A court will not allow production from a nonparty unless the procedures set forth in the Supreme Court Rules are followed. In *In re Marriage of Riemann,* 217 Ill.App.3d 270, 576 N.E.2d 944, 159 Ill.Dec. 1021 (5th Dist. 1991), counsel for one of the parties served a subpoena duces tecum on a financial institution, purporting to require the institution to produce records at the lawyer's office for discovery purposes. No notice of deposition was served. The court quashed the subpoena, holding that the party needed to comply with Rule 204(a).

For purposes of both parenting litigation and support/division of property issues, it may be necessary to subpoena the medical records of a party. To implement the requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub.L. No. 104-191, 110 Stat. 1936, the U.S. Department of Health and Human Services has issued final regulations entitled "Standards for Privacy of Individually Identifiable Health Information," commonly known as the "Privacy Rule." See 45 C.F.R. pts. 160, 164. The Privacy Rule sets forth the standards for the use and disclosure of an individual's health information. The final compliance date for all covered entities was July 2005.

To obtain an individual's health records without his or her consent, a certain procedure must be followed to ensure that the provider being asked to release the records will be in compliance with the Privacy Rule. It appears that the fastest way to obtain the records is either to obtain an agreed qualified protective order from opposing counsel or, if that is not possible, to make a request to the court for the protective order. Section 6.36 below provides a sample form of a qualified

protective order for use in obtaining health records. There is a way to ensure compliance without the protective order, but it is more complicated and open for interpretation as to whether all compliance elements have been met. 45 C.F.R. §164.512(e)(1) provides the standard for compliance.

Obtaining medical records can become a bit more complicated if the records being sought are from a drug or alcohol treatment facility. In that case, in addition to the HIPAA Privacy Rule, 42 C.F.R. pt. 2 applies in almost all instances. These regulations provide increased privacy provisions to "ensure that a patient receiving treatment for a substance use disorder . . . is not made more vulnerable by reason of the availability of their patient record than an individual with a substance use disorder who does not seek treatment." 42 C.F.R. §2.2(b)(2).

42 C.F.R. §2.64 provides the procedures and criteria for orders authorizing disclosures for noncriminal purposes. Section 2.64 is important and should be followed closely to ensure entry of a valid court order to obtain the records. It includes details regarding the (1) application (it must use a fictitious name, such as "John Doe," to refer to the patient and may not contain any patient-identifying information without consent); (2) notice; (3) review of evidence (any oral argument or hearing on the application must take place in the judge's chambers or in some manner that ensures that the patient-identifying information is not disclosed to anyone other than the parties, the patient, and the record holder); (4) criteria for entry of the order (the court must make specific findings about the availability of the evidence and that the public interest and need for disclosure outweigh any injury to the patient); and (5) contents of the order.

The process of obtaining the medical records of a client's minor child is a bit less onerous, but counsel should still be cognizant of the relevant federal and state laws. Pursuant to HIPAA, a parent, guardian, or other person acting in loco parentis with legal authority to make healthcare decisions on behalf of an unemancipated minor is deemed to be the minor child's personal representative. A person deemed to be the personal representative of a minor child may obtain access to or permit the release of the minor child's medical records subject to the extent of access permissible by state law. Such records include but are not limited to the medical history, bedside notes, charts, pictures, and plates kept in connection with the treatment of the minor child. 735 ILCS 5/8-2001.

Counsel should keep in mind that even if an order is entered by the court allowing for the disclosure of the protected records, this court order only allows the record holder to disclose. A subpoena still must be issued to demand compliance. 42 C.F.R. §2.61(a).

PRACTICE POINTER

- ✓ The authors have found that many medical providers incorrectly apply the law and deny valid requests for production. Counsel should be aware of the current laws and stay cognizant of amendments to HIPAA, the Privacy Rule, and any related state laws regulating the disclosure of medical information.

V. [6.14] MENTAL AND PHYSICAL EXAMINATIONS OF PARTIES

Mental and physical examinations play a significant part in divorce litigation. In parenting litigation, evaluations by psychiatrists and psychologists often are pivotal, while the physical condition of a party can be a major issue in litigation regarding maintenance and property division.

S.Ct. Rule 215(a) is still the appropriate rule to use to obtain a mental or physical examination of a party when there is no custody or visitation issue involved. Whereas, if the examination sought pertains to parenting, then §604.10 of the IMDMA is the most common provision used by one party, or the court, to obtain a mental examination. 750 ILCS 5/604.10.

A. [6.15] Practice and Procedure Under §604.10 of the Illinois Marriage and Dissolution of Marriage Act

Section 604.10(b) of the IMDMA permits the court to appoint its own professional to determine the child's best interests. 750 ILCS 5/604.10(b). Whereas S604.10(c) of the IMDMA permits a party to retain his or her own professional. 750 ILCS 5/604.10(c). Section 604.10(c) somewhat tracks the language of S.Ct. Rule 215(a), but it does not follow it exactly. First, it has a much more limited application in that it names the particular circumstances in which the statute may be applied, *i.e.,* either a proceeding to allocate parental responsibilities or a proceeding seeking relocation of a child. By allowing evaluations to take place whenever these issues are at hand, §604.10(c) appears to remove the barrier of showing that any party's mental condition is in question. This is in reaction to *In re Marriage of Divelbiss,* 308 Ill.App.3d 198, 719 N.E.2d 375, 241 Ill.Dec. 514 (2d Dist. 1999), a DuPage County case in which the trial judge refused to allow a litigant's Rule 215(a) expert to perform a custody evaluation. Second, the evaluation is not necessarily to examine the mental condition of any one party but rather a general evaluation of any and all parties necessary to ascertain the child's best interests.

It should be noted that IMDMA §604.10(c) provides: "The evaluation may be in place of or in addition to any advice given to the court by a professional under subsection (b)." 750 ILCS 5/604.10(c). Further, "[t]he court may seek the advice of any professional, whether or not regularly employed by the court." 750 ILCS 5/604.10(b). When presented with contested issues relating to parenting, the court will regularly seek the advice of a professional and order an examination to take place pursuant to §604.10(b). Often, the court will not allow any §604.10(c) evaluation to be initiated until after the §604.10(b) evaluation is complete.

Finally, counsel should make it clear to clients that communications made to a §§604.10(b) and 604.10(c) evaluator are not protected under the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1, *et seq. See Johnston v. Weil,* 396 Ill.App.3d 781, 920 N.E.2d 494, 500 – 501, 336 Ill.Dec. 285 (1st Dist. 2009) (holding that §604(b) evaluations are not privileged under Act as relationships between §604(b) evaluator and parties interviewed do not rise to level of therapeutic relationship).

B. [6.16] Practice and Procedure Under Supreme Court Rule 215(a)

A mental or physical examination may be had as follows:

> **In any action in which the physical or mental condition of a party or of a person in the party's custody or legal control is in controversy, the court, upon notice and on motion made within a reasonable time before the trial, may order such party to submit to a physical or mental examination.** S.Ct. Rule 215(a).

The party shall suggest the examiner and identify the specialty or discipline of the examiner. The court has the discretion to reject the specific examiner selected and choose another examiner suggested by the party.

The examiner appointed under Rule 215(a) must provide, within 21 days of the completion of the examination (unless extended by the court), a written report to counsel for both parties setting forth findings, test results, diagnosis, and conclusions. If the report is not timely delivered, neither the report, the examiner's testimony, nor any of the underlying test results or findings are admissible in evidence unless offered by the party who was examined. See S.Ct. Rule 215(c).

One common use for obtaining a mental or physical examination of a party relative to economic issues occurs when a party asserts that, due to some mental or physical condition, he or she is unable to work and, therefore, is seeking maintenance or a disproportionate share of the marital estate from the other party. Having put his or her mental or physical condition at issue, the party is subject to an examination under Rule 215(a).

Due to IMDMA §604.10, the use of Rule 215(a) to obtain a mental examination of a party relative to parenting issues has been greatly reduced, if not eliminated. However, Rule 215(a) is still necessary and can be used to obtain a mental or physical evaluation of a party on other issues. A number of provisions of the IMDMA have the potential of raising issues surrounding the mental and physical health of the parties or their minor children, including those dealing with property division (750 ILCS 5/503), maintenance (750 ILCS 5/504), and child support (750 ILCS 5/505):

1. In dividing the marital estate, the court is to consider "the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties." 750 ILCS 5/503(d)(8).

2. In awarding maintenance, the court is to consider "the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and the needs of each of the parties." 750 ILCS 5/504(a)(9).

3. In determining whether to deviate from the child support guidelines, the court is to consider "additional expenses incurred for a child subject to the child support order who has special medical, physical, or developmental needs." 750 ILCS 5/505(a)(3.4)(B).

Rule 215(a) is not limited to mental health and physical examinations. Rule 215(a) may be used to obtain drug testing of a party suspected of substance abuse. However, in all matters in which a

party is seeking an evaluation of the other party pursuant to Rule 215(a), "good cause" must be proven, and it is in the court's "broad discretion" to determine what qualifies as good cause. *Thompson v. Palos Community Hospital,* 254 Ill.App.3d 836, 627 N.E.2d 239, 242 – 243, 194 Ill.Dec. 123 (1st Dist. 1993).

VI. DEPOSITIONS

A. [6.17] Purpose of Depositions

Discovery depositions can be the most valuable form of discovery. They are also the most expensive, with the client incurring the cost of the attorneys' fees necessary to prepare for and take the deposition and the court reporting expenses for the attendance at and transcription of the deposition.

From a practical standpoint, discovery depositions give a lawyer a chance to hear the testimony of a witness before trial, to assess the credibility and demeanor of that witness, and to "freeze" the testimony of that witness on certain key issues. The discovery depositions of the parties to divorce litigation, when both parties and their counsel are present, often provide a forum for an off-the-record discussion of the issues in the case and at times turn into settlement conferences.

S.Ct. Rule 212(a) lists the uses for a discovery deposition:

> **(1) for the purpose of impeaching the testimony of the deponent as a witness in the same manner and to the same extent as any inconsistent statement made by a witness;**
>
> **(2) as a former statement, pursuant to Illinois Rule of Evidence 801(d)(2);**
>
> **(3) if otherwise admissible as an exception to the hearsay rule;**
>
> **(4) for any purpose for which an affidavit may be used; or**
>
> **(5) upon reasonable notice to all parties, as evidence at trial or hearing against a party who appeared at the deposition or was given proper notice thereof, if the court finds that the deponent is not a controlled expert witness, the deponent's evidence deposition has not been taken, and the deponent is unable to attend or testify because of death or infirmity, and if the court, based on its sound discretion, further finds such evidence at trial or hearing will do substantial justice between or among the parties.**

B. [6.18] Setting Up Depositions

Whether a discovery deposition is that of a party or of a nonparty, a notice of deposition shall be served on all parties to the case. S.Ct. Rule 206(a). For a party, a notice of deposition is all that is needed to compel appearance and the production of any documents or tangible things set forth in the notice. S.Ct. Rule 204(a)(3). The usual practice is to attach a rider to the notice of deposition setting forth the documents to be produced.

For a nonparty, appearance can be either voluntary or by subpoena. The problem with a voluntary appearance is that the lawyer taking the deposition then lacks control over the witness; if the witness does not show up, counsel can be obligated for the expenses of the other parties (S.Ct. Rule 209(b)), while if the witness does show up but either refuses to produce documents or becomes uncooperative in some other way, counsel lacks the authority to have the court sanction the witness. The best practice with a cooperative witness is to schedule a deposition by agreement and advise the witness that a subpoena is being sent as a formality.

The service of subpoenas and provision of the witness fee to a nonparty are the same as discussed in §6.13 above.

Under S.Ct. Rule 203, a deposition shall be taken in the county where the deponent resides, is employed, or transacts business in person. The petitioner can be made to appear for a deposition in the county where the case is pending. A strict reading of Rule 203 is that the court lacks the authority to order a nonparty to appear in any other county than as set forth above.

One special situation is the discovery deposition of "nonparty physicians being deposed in their professional capacity." S.Ct. Rule 204(c). Such a deposition can be taken only by the consent of the parties and the witness or upon order of the court. A party is obligated to pay the physician a reasonable fee for the time spent testifying at the deposition; unless the physician was retained by a party for the purpose of rendering an opinion at trial (or unless otherwise ordered by the court), "the fee shall be paid by the party at whose instance the deposition is taken." *Id.* If the deposition meets the *Vicencio* criteria for being necessarily used at trial (see below), the cost of the transcript, but not any appearance fee, also may be a recoverable cost. *DiCosola v. Bowman,* 342 Ill.App.3d 530, 794 N.E.2d 875, 276 Ill.Dec. 625 (1st Dist. 2003), *overruled on other grounds by Peach v. McGovern,* 2019 IL 123156, 129 N.E.3d 1249, 432 Ill.Dec. 706.

A deposition may be audio-visually recorded, in addition to the traditional method used by court reporters. S.Ct. Rule 206(a)(2). Rules for conducting a video deposition are set forth in S.Ct. Rule 206(g). While the cost of audio-visually recording a deposition should always be taken into consideration, the Supreme Court in *Vicencio v. Lincoln-Way Builders, Inc.,* 204 Ill.2d 295, 789 N.E.2d 290, 273 Ill.Dec. 390 (2003), ruled that costs awarded to the prevailing party may include the expense of audio-visually recording the deposition if that deposition was necessarily used at trial. Both subparts of the test are important to being awarded costs: (1) the deposition must be used at trial, and (2) its use must be necessary. As a result, the general rule is that the costs associated with discovery depositions are not recoverable as they are not used at trial. Counsel should keep in mind that the cost of audio-visually recording evidence depositions may not be recoverable. In *Moline v. Vyas,* 373 Ill.App.3d 1098, 870 N.E.2d 431, 312 Ill.Dec. 366 (3d Dist. 2007), when the defendant elected to both audio-visually record and have a stenographer transcribe an evidence deposition, the court allowed only the court reporter's fee to be awarded as costs, stating that whether to audio-visually record an evidence deposition in lieu of reading from a transcript was pure trial strategy and that it was an abuse of discretion to allow both the stenographer's fee and the videographer's fee as costs.

However, a litigant who chooses to audio-visually record a deposition must select a person not financially interested to do the recording. "Financially interested" persons appear to include all

employees of the attorney taking the deposition. In *In re Marriage of Zuberbier,* 309 Ill.App.3d 386, 722 N.E.2d 323, 326, 242 Ill.Dec. 834 (2d Dist. 1999), the trial court barred the secretary of the petitioner's counsel from videotaping the depositions of several witnesses. The appellate court affirmed, stating in dicta that even if the attorney could show that the secretary's compensation would have been unaffected by the outcome of the case, the appearance of partiality itself would undermine the public's confidence in the proceedings.

In some cases, taking a traditional deposition may be impractical and not cost efficient. S.Ct. Rule 206(h) provides an alternative to the traditional deposition — remote electronic means depositions. S.Ct. Rule 206(h) previously required a party seeking to take a deposition by electronic means to either stipulate in writing with the other party or parties or to procure an order from the court. However, in 2011, Rule 206(h) was amended, and now any party may take a deposition by electronic means, subject to the right to object, as long as the party states in the notice "the specific electronic means to be used for the deposition."

Under S.Ct. Rule 218, the court is mandated to hold a case management conference within 182 days after the case is filed. At that conference, the court can impose limitations on discovery, including the number and duration of depositions. S.Ct. Rule 218(a)(5)(i). If the subject has not been addressed previously, the conference is usually a convenient time to present a motion to the court asking that the three-hour time limit under Rule 206(d) be modified for certain witnesses.

C. [6.19] Conducting Depositions

Discovery depositions are limited to three hours, except by stipulation of all parties or upon order of the court upon a showing of good cause. S.Ct. Rule 206(d). Unlike other areas in which there are multiple parties, divorce litigation is usually limited to two parties, so there is less controversy about dividing up the three hours among counsel. The three-hour limit is usually too short for the discovery deposition of a party when the case raises issues relating to parenting and economics. A motion should be brought before the deposition asking that the three-hour limit be extended for those depositions if the parties cannot agree.

The nature of the objections to be made at a discovery deposition is also limited by the rules in an attempt to prevent abusive behavior by counsel, such as coaching through objections. In order to eliminate speaking objections at discovery depositions, S.Ct. Rule 206(c)(3) provides: "Objections at depositions shall be concise, stating the exact legal nature of the objection."

If counsel persists in violating this rule after being warned on the record, if counsel engages in other improper tactics, or if the witness is uncooperative, thought should be given to suspending the deposition and seeking relief from the court. Similarly, if the lawyer conducting the deposition strays too far from any permitted area of questioning or otherwise engages in improper conduct, relief should be sought from the court. The method of seeking relief from the court is found in S.Ct. Rule 206(e), which provides, in relevant part:

> **At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in any manner that unreasonably annoys, embarrasses, or oppresses the deponent or**

> **party, the court may order that the examination cease forthwith or may limit the scope and manner of taking the examination. . . . Upon the demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to present a motion for an order.**

The concept of the attorney certifying a question no longer exists in the rules and has not for many years. No special action needs to be taken by the attorney during the deposition to later move the court to compel an answer to a question that was not answered during the deposition. However, a reasonable discussion between counsel during the deposition regarding the propriety of a question, held pursuant to S.Ct. Rule 201(k), often makes the lawyers consider the soundness of their respective positions and may lead to a compromise during the course of the deposition.

After the deposition is concluded, the deponent will be given an opportunity to review the transcript and make changes under S.Ct. Rule 207(a). However, the nature of the changes that a deponent may make is limited. Currently, the deponent may make only changes based on reporting or transcription errors.

The 1995 amendments to Rule 207, which revised the rule to allow changes based only on reporter error, have spurred discussion in legal circles. Among the articles discussing the effects of the rule change is Robert S. Minetz, *The Quandary Facing Deponents Who Err at Deposition,* 88 Ill.B.J. 276 (2000), in which Minetz discusses the inconsistencies of the rule with other similar facets of trial practice (*e.g.,* a trial witness is free to correct mistakes made while on the stand) and potential trial preparation and presentation problems associated with the rule as it currently stands.

VII. REQUESTS FOR ADMISSION

A. [6.20] Purpose of Requests for Admission

Under S.Ct. Rule 216, a party can serve on any other party a written request for the admission of the truth of any fact or the genuineness of any document. While the scope of a request is limited only by the imagination of the trial lawyer, the most common use of requests for admission in divorce litigation is to obtain the admission of documents without the need for calling a witness at trial to establish a foundation for the document. For example, a trial lawyer who plans on offering bank records into evidence at trial can establish the authenticity of the records and lay a foundation that the records are business documents by a request for admission served on the opposing party, rather than by calling a witness from the bank. In addition, as discussed in §6.13 above, this can also be achieved through Ill.R.Evid. 902.

B. Practice

1. [6.21] Timeliness of Filing

Under the plain meaning of S.Ct. Rule 216, a party served with a request for admission must either answer or object within 28 days or the matters in the request are deemed admitted. However, the courts seem reluctant to enforce Rule 216 as written. S.Ct. Rule 183 expressly provides: "The

court, for good cause shown on motion after notice to the opposite party, may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited period, either before or after the expiration of the time." As a result, and not surprisingly, most courts will allow a party to serve a late response to a request to admit under certain circumstances. *See Smoot v. Knott,* 200 Ill.App.3d 1082, 558 N.E.2d 794, 146 Ill.Dec. 831 (5th Dist. 1990), *abrogated on other grounds by Bright v. Dickle,* 166 Ill.2d 204, 652 N.E.2d 275, 209 Ill.Dec. 735 (1995), for an exhaustive survey of the law across the state with regard to whether a court has discretion to allow a late response to a request for admission. However, it should be noted that in *Bright,* the Supreme Court specifically stated that the *Smoot* court's rationale in allowing service of a late response was flawed. It is not enough that the propounding party is not prejudiced by late service. The responding party has the burden of showing good cause as to why the response is late.

Beyond that, the courts have refused to enforce Rule 216 under other circumstances. In *Deboe v. Flick,* 172 Ill.App.3d 673, 526 N.E.2d 913, 122 Ill.Dec. 520 (5th Dist. 1988), with an unclear record from the trial court, the appellate court refused to consider facts that were admitted through a request for admission because the request was not timely brought to the attention of the trial court and because the party that served the request introduced evidence at trial on the facts deemed to be admitted and so waived its right to rely on the admitted facts. In *LaSalle National Bank of Chicago v. Akande,* 235 Ill.App.3d 53, 600 N.E.2d 1238, 175 Ill.Dec. 780 (2d Dist. 1992), the party served with a request for admission simply wrote a letter to the other party stating that it was not responding to the request for admission. No objection was filed with the trial court. Nonetheless, the appellate court held that the trial court erred in not allowing a late response to the request for admission.

In *Vision Point of Sale, Inc. v. Haas,* 226 Ill.2d 334, 875 N.E.2d 1065, 314 Ill.Dec. 778 (2007), the Supreme Court again examined the issue of appropriate considerations for determining whether good cause exists under Rule 183 for the grant of an extension of time to file a response to a request for admission of facts. The court held that a circuit court may not take into consideration facts and circumstances that go beyond the reason for noncompliance, reaffirming the *Bright* court's holding that Rule 183 specifically makes good cause a prerequisite to relief and that the burden of establishing good cause rests on the party seeking relief under Rule 183. The Supreme Court additionally held that circuit courts may consider all objective, relevant evidence presented by the delinquent party with respect to why there is good cause for its failure to comply, including evidence with respect to whether the party's original delinquency was caused by mistake, inadvertence, or attorney neglect. However, the circuit court may not engage in an open-ended inquiry that considers conduct unrelated to the causes of the party's original noncompliance.

2. [6.22] Purpose and Scope of Requests

In 1998, the Supreme Court reexamined the purpose and scope of requests to admit facts in *P.R.S. International, Inc. v. Shred Pax Corp.,* 184 Ill.2d 224, 703 N.E.2d 71, 234 Ill.Dec. 459 (1998). The defendant served a set of requests for admission on the plaintiff; however, the plaintiff failed to deny or object to the requests within 28 days. Based on the nonresponse, the requests were deemed admitted. Thereafter, the defendant moved for and was granted summary judgment in the case.

After reversal by the appellate court, the Supreme Court granted the defendant leave to appeal. In this landmark decision, the Supreme Court drew clearer boundaries as to what can and cannot be asked in a request to admit. In accordance with *P.R.S.,* a litigant may ask the opponent to admit so-called "ultimate facts" that lead the trier of fact to infer an element of a case, but a litigant may not ask an opponent to admit a legal conclusion. Even if the party receiving a request to admit never responds to it, a request that asked for a legal conclusion still will not be deemed admitted. 703 N.E.2d at 77.

For example, a proper request to admit may state, "In 1998, Mrs. Smith spent $20,000 of the assets from a joint account on a Rolex watch for her boyfriend." An improper request would state, "In 1998, Mrs. Smith dissipated the marital estate in the amount of $20,000." The first request seeks an ultimate fact in proving dissipation, but the second seeks to admit the legal conclusion of dissipation itself.

3. [6.23] Form of Requests

The number of requests a party may serve on another party is limited to 30. See S.Ct. Rule 216(f). However, a party may serve a greater number of requests if the number is agreed to by the parties or ordered by the court for good cause shown. Furthermore, it is important to note that each subpart counts as a separate request.

Pursuant to a 2010 amendment to S.Ct. Rule 216 that added subsection (g), a party wishing to use requests must prepare and serve separately a paper that contains only the requests and the documents required for genuine document requests and must put the following warning on the paper in a prominent place on the first page in 12-point or larger boldface type:

> **WARNING: If you fail to serve the response required by Rule 216 within 28 days after you are served with this document, all the facts set forth in the requests will be deemed true and all the documents described in the requests will be deemed genuine.**

PRACTICE POINTER

✓ Do not hesitate to use requests for admission. Moreover, call the request for admission to the attention of the court at an early stage, either at the outset of the trial or, preferably, at a pretrial conference. Make a record, by statements before a court reporter or in a written court order, that the request for admission has been filed, that certain facts were not denied, and that you intend to rely on those admissions at the time of trial.

VIII. [6.24] OBJECTIONS TO DISCOVERY

This chapter cannot catalogue all of the potential objections to discovery. In this regard, divorce litigation is no different than any other type of civil litigation, and all of the usual objections apply:

a. The scope of discovery is broad. A party "may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party." S.Ct. Rule 201(b)(1).

b. Matters subject to a valid privilege are not subject to discovery, whether the privilege is attorney-client (S.Ct. Rule 201(b)(2); *Hayes v. Burlington Northern & Santa Fe Ry.,* 323 Ill.App.3d 474, 752 N.E.2d 470, 256 Ill.Dec. 590 (1st Dist. 2001)), work product (S.Ct. Rule 201(b)(2); *Consolidation Coal Co. v. Bucyrus-Erie Co.,* 89 Ill.2d 103, 432 N.E.2d 250, 59 Ill.Dec. 666 (1982)), or otherwise. However, Rule 201(n) provides that a party asserting that matters are not subject to disclosure because of a privilege is required to produce an index of the documents claimed to be privileged.

c. In 2012, subsection (p) was added to S.Ct. Rule 201, which provides the appropriate procedure that all parties must follow in the event that information claimed to be privileged is inadvertently produced through the discovery process. Rule 201(p) provides:

> **(p) Asserting Privilege or Work Product Following Discovery Disclosure. If information inadvertently produced in discovery is subject to a claim of privilege or of work-product protection, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, each receiving party must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the receiving party disclosed the information to third parties before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must also preserve the information until the claim is resolved.**

d. Discovery from consultants is limited. A "consultant" is a person who has been retained or specifically employed in anticipation of litigation or preparation for trial but who will not be called to testify at trial. The identity, opinions, and work product of a consultant are discoverable only under exceptional circumstances, as set forth in Rule 201(b)(3).

e. Rule 201(k) provides that the attorneys responsible for the trial of the case must engage in personal consultation before bringing a discovery motion and that a statement regarding the attempt must be included in any discovery motion. In *In re Marriage of Lai,* 253 Ill.App.3d 111, 625 N.E.2d 330, 192 Ill.Dec. 370 (1st Dist. 1993), the court strictly enforced the consultation provision of Rule 201(k), noting that a letter sent requesting discovery compliance was not enough.

A. [6.25] Protective Order

The proper method for seeking a court order regulating discovery is to request a protective order under S.Ct. Rule 201(c)(1), which provides:

> **The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.**

Thus, for example, a party served with a notice of deposition seeking depositions that the party wants to quash should seek a protective order.

Another common reason to request a protective order is to maintain the confidentiality of records produced in discovery. Often records requested of third parties pursuant to S.Ct. Rule 214 are not only relevant to the contested issues of the case, but also sensitive and confidential by nature (*e.g.,* ownership and operating records of a corporation that is owned in whole or in part by one of the parties). Entering a protective order before production of the requested records will ensure that the business records are protected from dissemination after their use in the litigation.

Finally, to obtain a party's health records, a qualified protective order must be entered before a subpoena may be served on the entity that holds the records. See §6.13 above for more details.

B. [6.26] Mental Health Privilege

Divorce litigation frequently involves parties and/or their children who have undergone some form of therapy and thus frequently involves discovery requests directed at their therapists. Disclosure of information by therapists is governed by the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1, *et seq*.

Lawyers confronted with a claim of privilege, or those seeking to avoid production of mental health records, should read the Act carefully. The following is a brief summary:

1. All records maintained by a therapist are confidential and shall not be disclosed except pursuant to the Act. 740 ILCS 110/3(a).

2. The following persons are entitled to inspect the records of a recipient under 740 ILCS 110/4(a):

   a. the parent or guardian of a recipient who is less than 12 years old (The consent of only one parent is required. *In re Marriage of Kerman,* 253 Ill.App.3d 492, 624 N.E.2d 870, 191 Ill.Dec. 682 (2d Dist. 1993).);

   b. a recipient who is 12 years old or older;

   c. the parent or guardian of a recipient who is more than 12 but less than 18 years old, if the recipient is informed and does not object or if the therapist does not find compelling reasons for denying access (A parent or guardian who is denied access by the recipient or the therapist may petition the court for access.);

   d. the guardian of a recipient who is 18 years or older;

   e. a court-appointed guardian ad litem or attorney who represents a minor 12 years of age or older, provided that the court has entered an order allowing release of the records;

   f. an agent appointed under a recipient's power of attorney for healthcare or for property, when the power of attorney authorizes access;

g. an attorney-in-fact appointed under the Mental Health Treatment Preference Declaration Act, 755 ILCS 43/1, *et seq.;* and

h. any person in whose care and custody the recipient has been placed pursuant to §3-811 of the Mental Health and Developmental Disabilities Code, 405 ILCS 5/1-100, *et seq.*

3. A consent for the release of records must be in the form specified in 740 ILCS 110/5.

PRACTICE POINTER

✓ The statutory form should be followed precisely; it seems that every therapist has a lawyer review the consent form prepared by divorce counsel. If possible, use a form provided by the therapist. (Therapists are probably gun-shy due to *Renzi v. Morrison,* 249 Ill.App.3d 5, 618 N.E.2d 794, 188 Ill.Dec. 224 (1st Dist. 1993), in which the court allowed a patient to seek damages from her therapist because the therapist violated the Act in testifying for the patient's husband in a temporary custody proceeding.)

4. In a civil proceeding, records may be disclosed after an in-camera inspection by the court if the recipient introduces his or her mental condition or any aspect of the services received as an issue in the case. "However, for purposes of [the Mental Health and Developmental Disabilities Confidentiality] Act, in any action brought or defended under the [IMDMA], mental condition shall not be deemed to be introduced merely by making such claim and shall be deemed to be introduced only if the recipient or a witness on his behalf first testifies concerning the record or communication." 740 ILCS 110/10(a)(1).

If the mental health records contain records regarding more than one party (*e.g.,* records from a couple's therapist), it is not enough to have the consent of one party. Counsel must obtain the consent of all parties involved before the therapist will release the records. See Deanne Morgan, *How To Subpoena Mental Health Records,* 42 Fam.L., No. 5, 1 (May 1999).

If there is no consent, then counsel must obtain an order from the judge allowing disclosure of the records or the issuance of a subpoena. Before an order for disclosure may be issued, notice of the requested disclosure and an opportunity to object in court must be given to both the recipient and the mental healthcare provider. 740 ILCS 110/10(d). When serving a subpoena on the therapist, counsel should remember to attach a copy of the court order in order to comply with the Act. *Id.* Additionally, pursuant to the Act, all subpoenas duces tecum must contain the following language:

> **"No person shall comply with a subpoena for mental health records or communications pursuant to Section 10 of the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/10, unless the subpoena is accompanied by a written order that authorizes the issuance of the subpoena and the disclosure of records or communications or by the written consent under Section 5 of that Act of the person whose records are being sought."** *Id.*

When the mental health records of a minor child may be relevant to a proceeding involving parenting issues, written consent of only one parent is required for the mental health records of a child below the age of 12 to be subject to disclosure. *See In re Marriage of Troy S.,* 319 Ill.App.3d 61, 745 N.E.2d 109, 112, 253 Ill.Dec. 335 (3d Dist. 2001). Moreover, it is important to note that the Mental Health and Developmental Disabilities Confidentiality Act makes no distinction between a custodial and noncustodial parent. Thus, a noncustodial parent has a right to obtain access to the mental health records of his or her minor child under the age of 12. *See Dymek v. Nyquist,* 128 Ill.App.3d 859, 469 N.E.2d 659, 663 – 664, 83 Ill.Dec. 52 (1st Dist. 1984).

Finally, it should be noted that the Act only applies to therapeutic relationships. Thus, in a situation in which a mental health professional is appointed as an independent professional to perform a custody evaluation, pursuant to §604.10 of the IMDMA in which (discussed above in §6.14), the Act does not apply to communications and records obtained during the evaluation, and these are subject to disclosure. *See Johnston v. Weil,* 241 Ill.2d 169, 946 N.E.2d 329, 339, 349 Ill.Dec. 135 (2011).

C. [6.27] Supreme Court Rules 237(b) and 237(c)

S.Ct. Rule 237(b) provides that upon service of a notice, a party must appear in court for trial and produce requested documents. Under this rule, the only documents that can be required are those previously produced in discovery. A party cannot be compelled, through Rule 237(b), to produce records for a hearing if the records were not previously produced in discovery.

S.Ct. Rule 237(c) provides:

> **In a domestic relations case, the appearance at an expedited hearing of a party who has been served with process or appeared may be required by serving the party with a notice designating the party who is required to appear. The notice may also require the production at the hearing of the original documents or tangible things relevant to the issues to be addressed at the hearing. If the party is a nonresident of the county, the court may order any terms and conditions in connection with his or her appearance at the hearing that are just, including payment of his or her reasonable expenses. Upon a failure to comply with the notice, the court may enter any order that is just, including any sanction or remedy provided for in Rule 219(c) that may be appropriate.**

Rule 237(c) applies specifically to expedited hearings in domestic relations cases. Service of a notice pursuant to the rule will not only compel the appearance of a party at a hearing but may also require the party to produce at the hearing the original documents and tangible things relevant to the issues to be addressed at the hearing, regardless of whether these documents or things were previously produced in discovery. The Committee Comments to Rule 237(c), issued upon its adoption on February 1, 2005, provide: "Because of the important issues decided in expedited hearings in domestic relations cases, including temporary family support, temporary child custody, and temporary restraining orders, a trial court should have the benefit of the attendance of individuals and production of documents and tangible things on an expedited basis."

IX. [6.28] ENFORCING DISCOVERY REQUESTS AND OBTAINING SANCTIONS — SUPREME COURT RULE 219

For the most part, S.Ct. Rule 219 provides the rules for the enforcement of discovery and the imposition of sanctions for the failure to comply with discovery. Different processes are employed with regard to parties and nonparties, and different steps are taken to initially enforce discovery and to seek sanctions for failure to comply.

A. [6.29] Enforcement of Discovery Against Parties

S.Ct. Rule 219(a) makes provisions for the enforcement of discovery against parties. If a party fails to comply with regard to interrogatories, requests for production, and depositions, the appropriate remedy is to file a motion seeking an order compelling the party to comply with discovery. However, any motion to compel must include a statement that Rule 201(k) has been complied with. Rule 201(k) provides:

> **The parties shall facilitate discovery under these rules and shall make reasonable attempts to resolve differences over discovery. Every motion with respect to discovery shall incorporate a statement that counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord or that opposing counsel made himself or herself unavailable for personal consultation or was unreasonable in attempts to resolve differences.**

According to the Committee Comments to Rule 201(k) issued on June 1, 1995, the requirement that trial counsel engage in consultation was added because of the concern that junior lawyers not responsible for the case were unnecessarily perpetuating discovery disputes.

Attorneys' fees for bringing a motion to compel discovery are recoverable. If the court finds that the position taken by either party with respect to the discovery "was without substantial justification," the court "shall" require the offending party, the party's attorney, or both to pay the reasonable attorneys' fees incurred by the aggrieved party with regard to the motion to compel. S.Ct. Rule 219(a).

B. [6.30] Sanctions Against Parties for Failure To Comply with Discovery

S.Ct. Rule 219(c) provides the trial judge with broad discretion to impose sanctions for the failure of a party to comply with discovery. Obviously, the appropriate sanction will depend on the nature of the discovery violation and the time when the violation is discovered.

For example, if a party simply refuses to produce any documents in response to a request for production, sanctions should be fashioned to compel compliance and to punish the offending party. On the other hand, if a party failed to produce a document and is attempting to introduce that document into evidence at trial, an appropriate remedy might be to bar admission of that document into evidence and testimony relative thereto.

In relevant part, S. Ct. Rule 219(c) provides that if a party, or a person acting at the instance of or in collusion with a party, unreasonably fails to comply with discovery or any discovery order, the court may impose the following sanctions:

> **(i) That further proceedings be stayed until the order or rule is complied with;**
>
> **(ii) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;**
>
> **(iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;**
>
> **(iv) That a witness be barred from testifying concerning that issue;**
>
> **(v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice;**
>
> **(vi) That any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue; or**
>
> **(vii) That in cases where a money judgment is entered against a party subject to sanctions under this subparagraph, order the offending party to pay interest at the rate provided by law for judgments for any period of pretrial delay attributable to the offending party's conduct.**

S.Ct. Rule 219(c) also provides for the imposition of monetary sanctions for a violation of the discovery rules:

> **In lieu of or in addition to the foregoing, the court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is willful, a monetary penalty.**

Trial courts are given broad discretion in fashioning sanctions against parties for failure to comply with discovery. For example, in *Enterprise Recovery Systems, Inc. v. Salmeron,* 401 Ill.App.3d 65, 927 N.E.2d 852, 858, 340 Ill.Dec. 113 (1st Dist. 2010), the appellate court affirmed the trial court's ruling that barred a party from presenting any evidence in the defense or support of its counterclaim. The appellate court held that such a sanction was appropriate when counsel for the party had repeatedly and without explanation failed to respond to discovery requests despite court order to do so and had failed to appear for hearings scheduled by the trial court.

However, the appellate courts recognize that sanctions for failure to comply with the discovery rules should be proportionate to the degree in which the party failed to comply. In *In re Marriage of Booher,* 313 Ill.App.3d 356, 728 N.E.2d 1230, 245 Ill.Dec. 873 (4th Dist. 2000), the appellate

court reversed the trial court's ruling that a party be barred from presenting any evidence at trial for failure to produce a pretrial affidavit. The court held that the preclusion of all evidence was too stringent a penalty when custody and visitation were involved, and the vast majority of other discovery requests had been complied with. The court held that a more appropriate sanction would have been to bar the litigant from testifying beyond what had been produced previously prior to trial.

The appellate courts also have upheld discovery sanctions that barred the introduction of financial evidence not previously provided in response to timely served discovery requests (*In re Marriage of Barnett,* 344 Ill.App.3d 1150, 802 N.E.2d 279, 280 Ill.Dec. 354 (4th Dist. 2003)) and the extreme sanctions of striking the respondent's answer to the pending petition for dissolution of marriage, barring the respondent from presenting any evidence at the division of property trial, and allowing the trial itself to proceed as a default prove-up (*In re Marriage of Vancura,* 356 Ill.App.3d 200, 825 N.E.2d 345, 292 Ill.Dec. 89 (2d Dist. 2005)).

Attorneys have been sanctioned directly for discovery noncompliance. The appellate courts upheld monetary sanctions against attorneys for failure to produce documents that were in their possession in *In re Marriage of Davis,* 261 Ill.App.3d 617, 633 N.E.2d 911, 199 Ill.Dec. 115 (1st Dist. 1994), and *In re Marriage of Brack,* 149 Ill.App.3d 777, 500 N.E.2d 59, 102 Ill.Dec. 437 (3d Dist. 1986). *See also Savitch v. Allman,* 25 Ill.App.3d 864, 323 N.E.2d 435 (3d Dist. 1975) (monetary sanctions imposed on attorney for unreasonable failure to answer interrogatories).

Similarly, the appellate court has upheld a sanction against an attorney for bringing motions to compel discovery when that discovery had already been produced. *In re Marriage of LaRocque,* 2018 IL App (2d) 160973, ¶117, 107 N.E.3d 349, 424 Ill.Dec. 36.

One indirect method of obtaining a sanction for discovery misconduct is through the award of attorneys' fees under §508 of the IMDMA, 750 ILCS 5/508. One factor courts have taken into account in determining whether to allocate to a party a portion of the attorneys' fees incurred by the other party is whether the attorneys' fees were caused by the misconduct of the party. *See In re Marriage of Auriemma,* 271 Ill.App.3d 68, 648 N.E.2d 118, 207 Ill.Dec. 662 (1st Dist. 1994). One component of the fee petition can be a showing that a portion of the fees was incurred as a result of discovery noncompliance by the other party.

C. [6.31] Enforcement of Discovery and Discovery Sanctions Against Nonparties

A petition for rule to show cause seeking contempt remedies is the appropriate method both for enforcing a discovery request and for imposing sanctions against a nonparty for refusal to comply with a subpoena for discovery. In relevant part, S.Ct. Rule 219(c) provides:

> **When appropriate, the court may, by contempt proceedings, compel obedience by any party or person to any subpoena issued or order entered under these rules.**

Supreme Court Rule 204(d) provides specific criteria that must be met before a court may order body attachment against a nonparty who has failed to comply with a subpoena. Supreme Court Rule 204(d) provides:

(1) An order of body attachment upon a nonparty for noncompliance with a discovery order or subpoena shall not issue without proof of personal service of the rule to show cause or order of contempt upon the nonparty.

(2) The service of the rule to show cause or order of contempt upon the nonparty, except when the rule or order is initiated by the court, shall include a copy of the petition for rule and the discovery order or subpoena which is the basis for the petition for rule.

(3) The service of the rule to show cause or order of contempt upon the nonparty shall be made in the same manner as service of summons provided for under sections 2-202, 2-203(a)(1) and 2-203.1 of the Code of Civil Procedure.

D. [6.32] Appellate Review

As a general rule, discovery rulings by the trial court are interlocutory orders that are not subject to immediate appellate review. A discovery order may be tested by an immediate appeal of a contempt sanction for failure to comply with the discovery order. A contempt sanction is immediately appealable, and the party held in contempt may raise the validity of the underlying discovery order. *See, e.g., In re Marriage of Rosenbaum-Golden,* 381 Ill.App.3d 65, 884 N.E.2d 1272, 1288, 319 Ill.Dec. 27 (1st Dist. 2008) ("exposing oneself 'to a finding of contempt is an appropriate method of testing the validity of a court order' "), quoting *In re Marriage of Beyer,* 324 Ill.App.3d 305, 753 N.E.2d 1032, 1046, 257 Ill.Dec. 406 (1st Dist. 2001); *Almgren v. Rush-Presbyterian-St. Luke's Medical Center,* 162 Ill.2d 205, 642 N.E.2d 1264, 205 Ill.Dec. 147 (1994); *People ex rel. Scott v. Silverstein,* 87 Ill.2d 167, 429 N.E.2d 483, 57 Ill.Dec. 585 (1981).

X. APPENDIX

A. [6.33] Local Websites/Disclosure Rules

The easiest and quickest way to find local court rules and forms is to look at the website of the relevant county. Many of the circuit and county websites include local court rules and forms that are applicable to numerous counties located within the same circuit. The following is a table of local financial affidavit rules throughout Illinois:

Circuit	Website	Local Rule
Cook	www.cookcountycourt.org	13.3.1
First	www.firstcircuitil.org	none
Second	www.illinoissecondcircuit.info	21
Third	www.madisoncountyil.gov/departments/circuit_court/index.php	2.05
Fourth	www.fourthcircuitil.com	8-3
Fifth	www.vercounty.org/judicial	VIII(C)
Sixth	www.sixthcircuitcourt.com	7.1(b)
Seventh	www.sangamoncountycircuitclerk.org	304(3)
Eighth	www.co.adams.il.us/home	7.1(d)
Ninth	www.9thjudicial.org	5.20A
Tenth	www.10thcircuitcourtil.org	42
Eleventh	www.mcleancountyil.gov/81/circuit-court	156(A)(1)
Twelfth	www.willcountycourts.com	8.04
Thirteenth	lasallecounty.com	8.06
Fourteenth	www.rockislandcountyil.gov/165/local-court-rules-forms	Part 9(A)(b)
Fifteenth	www.15thjudicialcircuit.com	8.1(a)
Sixteenth	www.illinois16thjudicialcircuit.org	14.11
Seventeenth	www.illinois17th.com	14.02
Eighteenth	www.dupageco.org/courts	15.05
Nineteenth	19thcircuitcourt.state.il.us/default.aspx	4-3.02
Twentieth	www.co.st-clair.il.us	8.02
Twenty-First	courts.k3county.net	6.2
Twenty-Second	www.mchenrycountyil.gov/county-government/courts	11.02

B. [6.34] Sample Form of Request for Production of Documents

IN THE CIRCUIT COURT OF [COUNTY NAME**] COUNTY, ILLINOIS**
[COUNTY DEPARTMENT, DOMESTIC RELATIONS DIVISION**]**

IN RE THE MARRIAGE OF	)	
	)	
_____,	)	
	)	**No. [**case number**]**
v.	)	
	)	
_____.	)	

REQUEST FOR PRODUCTION OF DOCUMENTS
FOR INSPECTION AND COPYING
(SUPREME COURT RULE 214)

YOU ARE HEREBY REQUESTED under Supreme Court Rule 214 to produce the documents described in the Rider attached hereto. The documents described herein shall be produced at the offices of [firm name**], on or before 28 days from the date of mailing of this request.**

The documents described herein are currently in the possession, custody, or control of [Respondent name**] (Respondent), are not privileged, and are relevant to the subject matter of this action or reasonably calculated to lead to discovery of admissible evidence in this action.**

You are required under Supreme Court Rule 214 to seasonably supplement any response to the extent that documents, objects, or tangible things subsequently come into Respondent's possession or control or become known to Respondent. You are also hereby required to furnish an Affidavit stating whether production is complete in accordance with the request.

_____

By: _____
One of [his**] [**her**] attorneys**

CERTIFICATE OF DELIVERY (PERSONALLY, BY FACSIMILE, OR BY MAIL)

The undersigned hereby certifies under penalties of perjury as provided by law pursuant to 735 ILCS 5/1-109 that the above notice and any attached pleadings were ( ) personally delivered; ( ) sent by facsimile transmission to [name**]; or ( ) placed in the U.S. Mail properly addressed, with first class postage prepaid, to the parties at the addresses set forth above [**at**] [**before**] 4:00 p.m. on [**date**].**

_____
Signature

_____
Print Name

RIDER

IN RE THE MARRIAGE OF _____

1. True, correct, and complete copies, as filed, of the Respondent's federal income tax returns and state income tax returns, together with all schedules and attachments filed or prepared, from [date**], through the date of production.**

2. Records of all income received by the Respondent from [date**], through the date of production.**

3. True, correct, and complete copies of any and all U.S. and state corporate income tax returns and U.S. and state partnership income tax returns for entities in which the Respondent has or had any stock ownership or partnership interest or participation at any time from [date**], through the date of production.**

4. True, correct, and complete copies of all personal financial statements of the Respondent reflecting any period of time on or after [date**].**

5. True, correct, and complete copies of all loan applications and credit applications from [date**], through the date of production, made either individually by the Respondent, jointly with others, and/or on behalf of any partnership interest, together with all net worth and/or financial statements submitted in conjunction therewith.**

6. True, correct, and complete copies of all gift tax returns prepared by, for, or with respect to the Respondent, whether as donor or donee, from [date**], through the date of production.**

7. True, correct, and complete copies of all amended tax returns for all income tax returns requested in this Rider.

8. All audit reports issued by the IRS for any tax returns made reference to in this Rider. These include but are not limited to Income Tax Examination Changes Forms (4549-A), Explanation of Items Forms (886-A), Statement — Income Tax Changes (5278), and schedules issued by the IRS.

9. All canceled checks, deposit slips, debit and credit memos, withdrawal slips or memoranda, wire transfer documentation, check registers, bank statements, and bank reconciliations for any and all bank or other depository accounts, with any banks or other institutions holding money or assets, foreign or domestic, whether in the nature of checking, savings, or money market funds, wholly or partly in the name of the Respondent or over which the Respondent has or had any right of withdrawal or check-signing power from [date**], through the date of production. If any accounts are savings accounts, then the Respondent is to produce all savings account passbooks. In the event any accounts are certificates of deposit, then the Respondent is to produce certificates of deposit, if any.**

10. With respect to all corporations and partnerships (domestic or foreign) in which the Respondent has or had any interest from [date**], through the date of production, copies of any financial statements (including balance sheets, profit and loss statements, and interim statements) reflecting the position of the company or operations with respect thereto at any time since [**date**], through the date of production and any and all statements from brokerage or clearing accounts from [**date**], through the date of production.**

11. Any and all employment contracts to which the Respondent has been a party within the past five years.

12. All statements relating to employee benefits, including but not limited to any pension or profit-sharing plans in which the Respondent is or was a participant from [date**], through the date of production.**

13. All deferred compensation agreements between the Respondent and [his**] [**her**] employer, corporation, or partnership and/or between the Respondent and any other persons or entities that presently exist or that existed from [**date**], through the date of production.**

14. All documents pertaining to any retirement plans, including but not limited to IRA accounts, Keogh plans, 401(k) plans, and pension and profit-sharing plans in which the Respondent is a participant, including but not limited to the summary plan description, the last three years' benefits reports, the last three years' summary annual reports filed with the IRS, the retirement plan itself, and the annual reports for the last three years.

15. True, correct, and complete copies of U.S. 5500 forms, together with all schedules and attachments, filed by or on behalf of the Respondent from [date**], through the date of production for any plans in which the Respondent is a participant.**

16. Copies of any trust agreements or declarations of trust and all amendments thereto in existence at any time from [date**], through the date of production wherein the Respondent is a beneficiary, grantor, trustee, or party to the agreement or declaration.**

17. Any and all trust agreements, preincorporation agreements, partnership agreements, or joint venture agreements by virtue of which the Respondent wholly or partially has an interest in any real estate, business, enterprise, or real estate venture.

18. Copies of any prospectus and offering statements prepared by or with respect to any entity with which the Respondent has been involved after [date**].**

19. All questionnaires completed by the Respondent or for the Petitioner to qualify as a purchaser of a limited partnership interest submitted to a selling agent or general partner, including but not limited to information obtained to satisfy Regulation D of the Securities Act of 1933, since [date**].**

20. All expense reports and summaries of expenses that have been paid on behalf of the Respondent or reimbursed to the Respondent by any of the corporations or partnerships in which the Respondent has been an employee or has had an equity interest or affiliation from [date**], through the date of production.**

21. All stock redemption agreements or buy-sell agreements to which the Respondent is or was a party that were in effect at any time from [date**], through the date of production.**

22. All stock redemption agreements or buy-sell agreements in which a corporation in which the Respondent has or had an interest is a party that were in effect at any time from [date**], through the date of production.**

23. All stock certificates for any shares of stock that are wholly or partially in the Respondent's name or in the name of a trustee or nominee for the Respondent's benefit, in whole or in part.

24. All stock options or notices for options not yet exercised, granted to, or held by the Respondent or issued by a corporation in which the Respondent is a shareholder.

25. All options to purchase or sell any property executed by the Respondent or granted the Respondent since [date**], through the date of production, as optionor and/or optionee, either individually or with another or others.**

26. All bonds, debentures, warrants, mutual fund shares, and options to purchase any of the aforementioned that stand wholly or partly in the Respondent's name or in the name of any other person or entity for the benefit of the Respondent.

27. All commercial paper owned by the Respondent, wholly or partly in [his**] [**her**] name or in the name of a trustee or nominee for [**his**] [**her**] direct or indirect benefit.**

28. All obligations of the U.S. Government, or any political subdivision of the U.S. Government, any states of the United States, or any municipalities of the United States or their subdivisions in which the Respondent has or had an interest, individually or with another or others, from [date**], through the date of production.**

29. With respect to all brokerage accounts in which the Respondent has had any interest or over which the Respondent has had any power of direction or control, all account agreements, all nominee agreements, all periodic statements, all confirmations, and all transaction slips, along with documents sufficient to identify the owner of each such account from [date**], through the date of production. These accounts include stocks, mutual funds, bonds, cash accounts, margin accounts, option accounts, commodities, and investment accounts of every kind.**

30. Any and all documents relating to the purchase, ownership, or sale of real estate, including deeds, title reports, title insurance policies, closing statements, real estate sales contracts, real estate tax bills, surveys, mortgages, mortgage amortization schedules, statements from any mortgagee indicating the outstanding loan balance, leases, operating statements showing income and expenses, appraisals or market studies, and other writings relating to the title, value, and liens or encumbrances affecting real estate in which the Respondent has had any ownership interest, legal or beneficial, from [date**], through the date of production.**

31. With respect to any motor vessel, any and all bills of sale, any documents reflecting ownership thereof regardless of date, any documents reflecting any actual or potential attempt to sell the vessel, and any documents reflecting work done on the vessel or storage thereof.

32. Documents relative to the ownership of any automobiles owned by the Respondent or that have been operated by the Respondent, including the title, bill of sale, loan documentation, and leasing agreement for the period from [date**], through the date of production.**

33. All evidences of money and property received by the Respondent by inheritance or gift, including but not limited to copies of distribution receipts in probate signed by the Respondent or others on the Respondent's behalf, and all evidences pertaining to the values thereof at the time of the receipt and all evidences pertaining to the current values.

34. With respect to all life insurance policies in which the Respondent has had an interest from [date**], through the date of production or that insure or insured the life of the Respondent or the Petitioner, copies of all such policies, copies of the most recent statements from the issuer of each such policy reflecting any loans and present cash value, and documents sufficient to identify any loans or other transactions subsequent to the date of the statements.**

35. All policies of health insurance, health maintenance organizations (HMOs), contracts, summary descriptions of medical benefits provided by an employer or a health insurance company, premium notices and proof of payment of current premiums, and medical identification cards for any health insurance, HMO, or similar items providing medical insurance coverage or service for the Respondent, the Respondent's spouse, and/or dependent children that is or was in effect from [date**], through the date of production.**

36. All appraisals and insurance policies and/or riders referring or relating to all jewelry, paintings, antiques, furniture, and art objects in which the Respondent claims an ownership interest either individually or with others, from [date**], through the date of production.**

37. All evidences of indebtedness reflecting debts owed by the Respondent or owed to the Respondent from [date**], through the date of production. This includes copies of all outstanding bills and documents reflecting any and all outstanding obligations, including but not limited to notes, mortgages, loan agreements, and the like.**

38. All documents related to any profit or loss, income or expense, or asset or liability of the Respondent at any time within the last three years.

39. All monthly statements, as well as purchaser's receipts, for any credit card accounts under which the Respondent made purchases from [date**], through the date of production.**

40. Copies of all of the Respondent's Last Wills and Testaments and any Codicils thereto that were in effect at any time from [date**], through the date of production.**

41. The Last Will and Testament, Inventory, and Final Account filed with the court for any estate of which the Respondent was a beneficiary and copies of all federal estate tax returns and state inheritance tax returns that contain information pertaining to the property inherited by the Respondent.

42. Copies of all Forms 4789, Currency Transaction Reports, filed with the Internal Revenue Service reflecting transactions by the Respondent during the past five years.

43. Any and all writings, documents, reports, correspondence, memoranda, photographs, films, audio- or video-recordings, titles, canceled checks, credit card statements, invoices, bills of sale, photographs, charts, graphs, summaries, or other tangible or demonstrative evidence that support any of the Respondent's contentions with respect to this cause.

44. Any and all statements of witnesses with respect to this cause.

45. Any and all diaries, calendars, memoranda, notes, telephone logs, correspondence, or the like that reflect occurrences related in any way to the Petitioner or involving the Petitioner.

46. Any and all other documents not previously produced relating to the ownership or value of any property in which the Respondent claims any ownership interest.

47. Any and all financial budgets, forecasts, projections, or other similar documents that have been prepared by or on behalf of Respondent from [date**], through the date of production.**

48. With respect to any lawsuit to which the Respondent or any business entity with which the Respondent has been associated has been a party at any time within the past five years, documents sufficient to identify such lawsuit, copies of all pleadings therein, and any and all settlement agreements or memoranda thereof.

49. All documents relied on, in any way, in the preparation of [Petitioner's**] [**Respondent's**] Financial Affidavit, including but not limited to banking records, utilities statements, summaries, receipts, bank statements, canceled checks, check registers, and credit card statements.**

50. All documents evidencing monies paid by Respondent on Respondent's behalf as and for legal fees and costs in this matter, including but not limited to canceled checks, check registers, banking records, receipts, bank statements, and credit card statements.

51. An affidavit sworn to by the Respondent stating that production made by the Respondent pursuant to this Notice and Rider is complete in accordance with the Request.

C. [6.35] Sample Form of Rider to Subpoena Requesting Documents from Employer

RIDER

IN RE THE MARRIAGE OF _____
SUBPOENA RIDER TO _____

1. True and correct copies of all contracts relating to employing [name**], executed from [**date**], to date, including but not limited to employment contracts, commission agreements, and noncompetition agreements.**

2. Any and all documents or records reflecting income paid to [name**], income that [**name**] had or has the right to receive, and all documents relating to taxes withheld from such income, all for the period [**date**], to date, including but not limited to W-2s, W-4s, 1099s, payroll ledgers, and journals.**

3. True and correct copies of any and all expense reports or summaries of expenses paid on behalf of [name**] or reimbursed to [**name**] for the period [**date**], to date.**

4. True and correct copies of any and all documents relating to deferred compensation that [name**] is or has been entitled to receive from [**date**], to date, including but not limited to deferred compensation agreements, statements of deferred compensation accrued, paid or payable, or any nonqualified compensation, including but not limited to summary plan descriptions, correspondence, computer printouts and memoranda.**

5. True and correct copies of any and all documents relating to benefit plans available to [name**], including but not limited to**

a. retirement plans;

b. bonus plans;

c. incentive plans;

d. savings plans;

e. stock option plans;

f. investment plans;

g. restricted stock plans;

h. pension plans;

i. life insurance benefits; and

j. medical and dental insurance plans

including statements of benefits accrued, summary plan descriptions, employee benefits booklets, correspondence, and memoranda.

6. Any and all documents or other records reflecting benefits available to [name**] other than those benefit plans specified in paragraph 5 above, including but not limited to the provision of an automobile or residence, payment or reimbursement of costs of club memberships, medical and dental expenses, charge statements, and purchase/expense receipts.**

7. Any and all records of [name**]'s acquisition of any interest in _____, including but not limited to records of issuance of stock certificates, stock options, purchase agreements, partnership agreements, buy-sell agreements, joint venture agreements, assignments, correspondence, and memoranda.**

8. Any and all documents relating to loans to or from [name**] or on which [**name**] is surety, guarantor, or cosignor, for the period [**date**], to date, including but not limited to promissory notes, security agreements, mortgages, assignments of beneficial interest, statements, canceled checks, ledgers, correspondence, and memoranda.**

9. Any and all canceled checks paid to [name**] during the period [**date**], to date.**

10. Any and all documents that evidence the date _____ commenced employment with [employer**].**

11. Any and all documents that evidence bonuses received by [name**], including but not limited to pay stubs.**

12. All statements relating to any employee benefits, including but not limited to any credit union accounts, including monthly statements, records of deposits, and/or withdrawals of which [name**] is or was a participant from [**date**], to date.**

13. Any and all documents reflecting [name**]'s employment history, including but not limited to the most recent résumé of [**name**].**

D. [6.36] Sample Form of Qualified Protective Order

[Caption]

QUALIFIED PROTECTIVE ORDER

This matter having come to be heard on the Motion of the [Petitioner**] [**Respondent**], [**name**], for the Entry of a Qualified Protective Order, due notice hereof having been given, and the Court being fully advised in the premises:**

IT IS HEREBY ORDERED as follows:

1. The current parties (and their attorneys) and any future parties (and their attorneys) to the above-captioned matter are hereby authorized to receive, subpoena, and transmit "protected health information" (also referred to herein as "PHI") pertaining to [name**] to the extent and subject to the conditions outlined herein.**

2. For the purposes of this Qualified Protective Order, "PHI" or "protected health information" shall have the same scope and definition as set forth in 45 C.F.R. §§160.103 and 164.501. Without limiting the generality of the foregoing, "PHI" includes but is not limited to health information, including demographic information, relating to (a) the past, present, or future physical or mental condition of an individual; (b) the provision of care to an individual; or (c) the payment for care provided to an individual that identifies the individual or that reasonably could be expected to identify the individual.

3. All "covered entities" (as defined by 45 C.F.R. §160.103) are hereby authorized to disclose PHI pertaining to [name**] to all attorneys now of record in this matter or who may become of record in the future of this litigation.**

4. The parties and their attorneys shall be permitted to use the PHI of [name**] in any manner that is reasonably connected with the above-captioned litigation. This includes but is not limited to disclosure to the parties, their attorneys of record, the attorneys' firms (*i.e.,* attorneys, support staff, agents, and consultants), experts, consultants, court personnel, court reporters, copy services, and other entities involved in the litigation process.**

5. At the conclusion of the litigation as to any party (which shall be defined as (a) the point at which final orders disposing of the entire case as to any party have been entered or (b) the time at which all trial or appellate proceedings have been exhausted as to any party), that party and any person or entity in possession of PHI received from that party pursuant to paragraph 4 of this order shall destroy any and all copies of PHI pertaining to [name**] except that (a) the party that is no longer in the litigation may retain PHI generated by him, her, or it and (b) the remaining parties in the litigation and persons or entities receiving PHI from those parties pursuant to paragraph 4 of this order may retain PHI in their possession.**

6. This order shall not control or limit the use of PHI pertaining to [name**] if it comes into the possession of any party or any party's attorney from a source other than a "covered entity" (as that term is defined in 45 C.F.R. §160.103).**

7. Nothing in this order authorizes counsel to obtain medical records or information through means other than formal discovery requests, subpoenas, depositions, or attorney-client communications or pursuant to a patient authorization. Likewise, nothing in this order relieves any party from complying with the requirements of the Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1, *et seq.,* the Illinois AIDS Confidentiality Act, 410 ILCS 305/1, *et seq.,* or state and federal law that protects certain drug and alcohol records (20 ILCS 301/30-5; 42 U.S.C. §290dd-2; 42 C.F.R. pt. 2).

_____, 20__

ENTER:

_____
Judge Judge's No.

E. [6.37] Sample Form Affidavit To Include with All Nonparty Subpoenas for Records

COMPLIANCE WITH SUBPOENA

The attached subpoena, by Illinois law, requires you and/or your organization to produce records on or before [date**], at the offices of [**law firm of requesting attorney**], attorney for [**name**].**

DEPONENT: **[**name of entity**]**
Customer Service
Attn: Keeper of the Records
[address**]**

Your actual appearance will be waived if the requested documents are mailed, by certified or registered mail, or delivered to our offices prior to that date and you inform us so by that date.

Please sign and date this form and return it to us with your records and a copy of this subpoena.

Affidavit of Compliance

The undersigned certifies under penalties of perjury as provided by law pursuant to the Illinois Code of Civil Procedure, 735 ILCS 5/1-109, that the statements checked below are true and correct.

Check one:

_____ After making a diligent search of all the records in our possession or control, I certify that the only records we have on the above are submitted herewith in response to this subpoena.

_____ After making a diligent search of any and all records, I certify there are no records or opinion reports to provide in response to this subpoena.

Check one:

_____ I am the Custodian of Records for [name of entity**], and I have personal knowledge of the record-keeping procedures of [**name of entity**] and the manner of creation for all records produced responsive to this subpoena.**

_____ I am an employee of [name of entity**], and I have personal knowledge of the record-keeping procedures of [**name of entity**] and the manner of creation for all records produced responsive to this subpoena.**

_____ I have no personal knowledge of the record-keeping procedures of [name of entity**] and the manner of creation for all records produced responsive to this subpoena.**

Check all that apply:

_____ The records produced in response to this subpoena were kept in the course of the regularly conducted activity of [name of entity**].**

_____ The records produced in response to this subpoena were made by the regularly conducted activity as a regular practice of [name of entity**].**

_____ The records produced in response to this subpoena were made at or near the time of the occurrences set forth by, or from information transmitted by, a person with knowledge of the matters set forth within the records.

Date: [date**]**

Position: _____

Name: _____ _____
(Print) (Signature)

7 Client Management and Education

KAREN PINKERT-LIEB
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Chicago, Lake Forest, and Wheaton

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I. [7.1] INTRODUCTION

A family law practitioner is generally not a trained social worker, psychologist, or psychiatrist. Despite this, family lawyers are faced with issues that intermesh both financial and emotional turmoil, leaving the lawyer, client, and the presentation of the client's case imbued with sensitivity.

Because of the emotionality involved, a client may benefit from the use of a mental health professional to assist him or her in gaining a more balanced and healthier perspective on the situation. Unfortunately, when children are involved, there is always the possibility that a client will get lost in his or her own agenda. The family lawyer should avoid a focus of "good" versus "evil," "right" versus "wrong," or self-validation. Such a focus is a potential liability for a client and should not be supported by the practitioner. While the Illinois Rules of Professional Conduct of 2010 (RPC) require "zealous" advocacy (see Preamble [8]), pursuing the client's agenda recklessly may result in harm to the client and his or her family. This may subject the practitioner to later criticism, fee disputes, and questions concerning his or her professional integrity and competency. While the client has ultimate decision-making authority, the practitioner's job is to provide professional guidance, advice, and representation— not to be a puppet.

In order to provide adequate balance, the practitioner needs to understand the interplay between fact and perceptions. Dissolution of marriage is a defining event in anyone's life. If taken lightly, representation in such matters can be hazardous for everyone involved. If taken on responsibly, the representation can result in positive implications for the client, his or her family, and future generations.

Guiding the client through one of the most important decision-making processes he or she will undertake is an important responsibility. For this reason, this chapter does not emphasize caselaw or statutory authority but rather focuses on the client relationship. Family law practitioners may agree or disagree with the authors' perspective.

II. INITIAL CLIENT CONFERENCE

A. [7.2] Background

The initial meeting with a prospective client is an opportunity to investigate case history, objectives, and motivations. Expectations should be determined, and the client should be prepared for what can realistically be accomplished within the legal system. The process is a learning experience for both the practitioner and the prospective client. The lawyer is learning about the client, the client's case, and whether the client is one with whom the practitioner desires to work. The client is learning about the law, the process, and the practitioner.

The practitioner must be mindful that the initial meeting with the prospective client and the communications that led up to the initial consultation may create professional responsibility and obligations under the Illinois Rules of Professional Conduct.

B. [7.3] Law

Anyone who has been involved in the domestic relations practice for any extended period of time knows that the laws frequently change. In 2016 through 2019, there were substantial substantive and procedural changes to the law on the state level as well as changes that resulted from amendments of certain federal laws (the Internal Revenue Code in particular). Terms and concepts that were commonplace fixtures in the law have been replaced, modified, or removed. For example, the terms "custody" and "visitation" were replaced by "parental responsibilities," which includes allocation of decision-making rights and parenting time; other major changes include the elimination of any grounds for dissolution of marriage other than irreconcilable differences, maintenance guidelines, and the income share approach to child support. In addition, at any point in any given year there are bills pending that could create both minor and major changes in the law. Clients need to be aware that there is information online or from nonlawyers that is just wrong or no longer applicable.

Since clients are often given conflicting advice from a myriad of well-meaning but misinformed sources, careful explanation of the relevant statutes and caselaw can occur during the initial conference. Backup materials such as a summary of the Illinois dissolution laws and reference materials authored by the practitioner or by third-party sources, such as the American Bar Association, the American Academy of Matrimonial Lawyers, and the Illinois State Bar Association can also be accessed. There are many such publications available from third-party sources that are excellent resources to corroborate the attorney's advice. For some clients, this provides valuable guidance. Others may be unable to assimilate the information. The amount of educational materials disbursed is dependent on the client's personality and business acumen. Some clients will be receptive to only a small amount of information initially and may be given additional materials as the case develops.

The client should be advised that the information he or she is being provided is merely a general overview and that the application of the law is not black or white, but rather gray. The facts that unfold as the case develops, the framing of the issues by both sides, and the inherent discretion of the court ultimately provide the framework for how the laws apply to the facts of the case and the strategy employed to address the issues.

C. [7.4] Process

Clients often seek cut-and-dried answers as well as guarantees of outcomes. The current state of the law in the domestic relations area does not allow for certainty. For example, while there are "guidelines" for maintenance or child support, there are exceptions and avenues to create non-guideline awards. If a practitioner has reliable financial information based on which guideline support can be calculated, it is reasonable and often advisable to inform a client what these amounts would be *if* the guidelines are used. Beyond this, any effort to suggest certainty as to the resolution of the ultimate issues can backfire. The practitioner can end up with a dissatisfied client and a tarnished reputation. Conservatism is better than creating unrealistic expectations. A good client is a well-prepared and realistic one.

The client needs to understand there are three basic variables at play that can have great influence on the cost, duration, and ultimate outcome of any case: how the parties conduct themselves; the attorneys and their conduct; and the judge and how he or she will handle the case and his or her predispositions. The goal is for the client to understand that there are variables that make it difficult if not impossible to accurately predict outcomes, time frames, and ultimate costs. The nature of the process and the dynamics create risk that needs to be appreciated and factored into decision-making. The typical variables and issues creating the uncertainty are discussed in §§7.5 – 7.7 below.

1. [7.5] The Parties

The practitioner should have a discussion or discussions with the client to educate the client that his or her behavior and/or the behavior of the other party can have positive or negative effects on the case and its resolution. Sometimes, parties, as a result of their emotions or poor advice from their family, friends, or attorneys, escalate issues that are not necessary (*e.g.,* closing bank accounts or credit cards, changing locks on the residence, etc.). When such actions are taken by the other spouse, a natural response is to retaliate. It is the practitioner's responsibility to explain the effects of certain actions. The fact that one party decides to conduct himself or herself in a hostile or inappropriate manner does not require the other spouse to respond in a similarly hostile and inappropriate manner. The client who rises above and resists the impulses to reciprocate often finds himself or herself being viewed more favorably by the court. If the parties allow the litigation to deteriorate because of their behavior, they are almost guaranteeing a long-drawn-out and expensive litigation experience.

2. [7.6] The Attorneys

The practitioner often will know the other spouse's counsel and his or her predispositions or tendencies. For example, some attorneys are litigation-oriented, while others tend to avoid litigation. This type of information and knowledge can be useful in understanding the dynamic of the case as it unfolds. The practitioner can use this information in guiding the client through the process and informing the client what can be expected during the process. A more difficult question can be to what extent opinions of the other attorney and his or her predispositions should be shared directly with the client. Even though clients are advised that the communications with their counsel are confidential, sometimes they disclose information to their spouse intentionally or accidentally. If a practitioner conveys opinions or information about the other counsel that may be perceived as negative or unflattering to his or her client, the disclosure of this information can result in the litigation becoming even more contentious. It is better practice to be circumspect in sharing opinions about the opposition. When information is shared, the information should be factually accurate.

3. [7.7] The Judge

Some clients are under the impression that the judge merely follows the law, which is clear, unambiguous, and therefore black and white. Based on these assumptions, either combined or taken separately, the client may have expectations that there is a high degree of predictability. While this may be partially true in smaller venues where family law matters are heard by relatively few judges, in other venues the predictability of the process is impossible for a variety of reasons, including the judge.

The client needs to understand early on that judges are human beings. They are influenced by their own backgrounds, life experiences, and events that may be occurring in their lives. There may be societal or political issues that influence either decision-making or the manner in which decisions are made. The client should also be told that judicial assignments may change.

The first issue that can be discussed with the client is whether there are multiple options on where the case may be filed and what judges might be involved. The client needs to understand that when the parties are separated and as a result live in separate counties, the case can be heard in the county in which either party resides. These options and the implications as to who may hear the case and any differences that might exist in how a case is handled in a particular county needs to be discussed. If a particular county may be more advantageous, it may be a reason to file quickly to at least create a presumption that venue is proper in that county based on the residence of one of the parties. When there is a real or perceived significant difference between how a case might be treated in different counties, the practitioner needs to discuss this and whether the other spouse might be incentivized to file in a particular place if he or she learns that his or her spouse is considering a dissolution. Moreover, if a state other than Illinois may have jurisdiction to adjudicate a divorce action, the practitioner should discuss with the client the pros and cons of filing in another jurisdiction. This may include consultation with a practitioner in other potential jurisdictions to obtain information about domestic relations laws in that state.

Assuming the venue and jurisdiction are determined or known, the client needs to understand that the judge initially assigned may not be the person who eventually hears the case for many reasons, including the following:

Substitution as of right. Obviously, the client does not necessarily get to choose the judge, but he or she has the right to decide who will not hear the case if the proper procedures are followed. 735 ILCS 5/2-1001. The client needs to understand that he or she has the right to exclude a judge from hearing the case if he or she makes the election "before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case." *In re Marriage of Peterson,* 319 Ill.App.3d 325, 744 N.E.2d 877, 887, 253 Ill.Dec. 144 (1st Dist. 2001), quoting 735 ILCS 5/2-1001(a)(2). In addition, while a court may not have formally ruled on a substantive issue, the right to substitute may also be lost "if the movant had an opportunity to test the waters and form an opinion as to the court's reaction to his claim." 744 N.E.2d at 887. *See also In re Marriage of Kozloff,* 101 Ill.2d 526, 463 N.E.2d 719, 721 – 722, 79 Ill.Dec. 165 (1984).

Therefore, it is best practice, if a determination is made that a substitution would be preferred, to make the change as early in the process as possible. This issue can be problematic when there is an instance in which emergency ex parte relief is sought early on — even before service (an injunction or order of protection). The client seeking this relief has just caused a ruling to be made, thereby eliminating his or her right to have the case moved. Therefore, the decision must be made before relief is sought. In an instance in which the opposition has gone into court ex parte, there is still a right to substitute if the request is made immediately after the client has appeared and before any other actions are taken by the court. *In re Marriage of Paclik,* 371 Ill.App.3d 890, 864 N.E.2d 274, 278, 309 Ill.Dec. 408 (5th Dist. 2007).

The client must appreciate that while upon the initial filing of the matter a particular judge assignment may appear to be favorable, the opposition also has the right to substitute. If this is a concern, a discussion can take place about whether to try to force some substantive ruling or interaction with the court that can lend itself to an argument that the right to substitute is lost.

Substitution for cause. To the extent a judge can be proven to be biased against a client, there may be a right to substitution for cause. The issue that frequently arises is that, after the court has made a ruling that the client perceives to be adverse or even when the court makes findings in ruling on an issue that a client was not truthful or lacked credibility, the client claims the judge is biased so that the judge should be removed. A judge is not subject to substitution for cause because he or she ruled against a client or chose not to believe a client. A client asserting prejudice or bias as a result of adverse rulings needs to understand there is no right to substitute for cause. To succeed, a client needs to understand that he or she must "present evidence of personal bias stemming from an extrajudicial source and evidence of prejudicial trial conduct." *In re Marriage of O'Brien,* 393 Ill.App.3d 364, 912 N.E.2d 729, 738, 332 Ill.Dec. 242 (2d Dist. 2009), quoting *In re Estate of Hoellen,* 367 Ill.App.3d 240, 854 N.E.2d 774, 783, 305 Ill.Dec. 182 (1st Dist. 2006).

The client needs to appreciate that trying to prove cause is extremely difficult and if the client fails, the judge who will hear the case has been challenged as being prejudiced. While the judge may profess that he or she is not affected by such a challenge, it is difficult to imagine that there will be no residual effect, and the client now may lose confidence in his or her ability to proceed. Having this conversation with the client reinforces the reality that, while well intentioned, judges are human beings and they make mistakes. A judge not agreeing with a client's position does not rise anywhere near the level of bias or prejudice necessary for removal.

When a situation exists in which a judge should have recused himself or herself under the Illinois Code of Judicial Conduct, the client may seek to have the judge recuse himself or herself under the statute for cause. *O'Brien, supra,* 912 N.E.2 at 739 – 740.

Retirement, court reorganizations, and reassignments. The client should also be advised that just because a judge is involved with the case and has made substantive rulings, this does not guarantee that he or she will be the judge who will hear any remaining issues. There are instances in which a judge is reassigned to other calls, retires, or for some other reason becomes unavailable to continue to hear a case. While unfortunate and potentially costly (*e.g.,* to get another judge up to speed), these are events are beyond anyone's control.

D. [7.8] Guidelines

For decades "guidelines" have existed. Initially, these were in the form of child support guidelines, which were necessitated by the federal government's focus on the need to have some minimum standards.

One of the trends in the law has been to increase the use of guidelines under the rationale of the need for consistency within the state for support issues. In Illinois, maintenance guidelines have been enacted and revised several times. Beyond the issue of support, there have been attempts to create "presumptions," another form of guidelines, for other nonfinancial issues such as a presumption for an equal division of parenting time. These issues have thus far failed.

Guidelines are not absolute. Built into the guidelines are upper limits on the application of the guidelines and provisions allowing for discretionary deviation from the guidelines. The practitioner needs to explain these concepts and, when there is reliable data for the calculations, provide the client with what these guidelines would allow if applied. The practitioner also should walk the client through the deviation process.

E. [7.9] The Client's "Truth"/Limitations

If a matter will be litigated, on either temporary or ultimate issues, the client must understand the limitations of the process. A dissolution of marriage trial is not about who is right or wrong, bad or good, etc. A client's desire for validation, to vilify his or her spouse, or to "win" may detract from and impair the presentation of his or her case. These client expectations may be overt or covert, masked by other issues. It is important for the family law practitioner to spend time with the client, sometimes repeatedly, to make sure he or she understands the process and its limits.

At some point in the process, issues of fault arise. This usually occurs early on in the process and frequently in the initial interview. The client should be informed that a party's misconduct may not be considered by the court in determining the issues. Despite this prohibition, issues arise that deal with misconduct (*e.g.,* domestic violence, injunctions based on inappropriate conduct, dissipation, conduct that adversely affects the child and the relationships between the child and the parents or significant others, etc.). The client needs to understand this distinction — preventing future harm as opposed to a remedy for past behaviors.

When the focus of the client is geared more toward proving that the other spouse is "wrong" or a "bad person," he or she may lose sight of the real issues that the judge will need to decide. The credibility of testimony relevant to issues in the case is a proper focus for the practitioner, and the "overt" statements from a client that indicate he or she feels there is a need to show that the other spouse is lying, a bad person, etc., are relatively easy for the practitioner to deal with.

The "covert" phenomenon occurs not when a client demands that the focus be on why the other person is wrong or guilty of misconduct, but rather when the client keeps returning to these issues under the guise of not understanding the idea that this misconduct may not be considered by the court in reaching financial or child-related decisions.

In either event, once the family law practitioner determines the client is overly focused on validation and/or vindication, it is incumbent on the practitioner to educate the client about the real-world limitations inherent in litigation. Such a discussion can include the following:

The client's truth may not be the court's truth. When a client says and truly believes that "X" has occurred and his or her spouse disagrees contending "Y" occurred, and assuming the controversy relates to the issues before the court, the client must be prepared to accept that the judge may not find the facts consistent with the client's version of the events. In these instances, the court may agree with the opposing spouse or make findings that are not in accordance with either version. The client must understand that the facts for purposes of the court's rulings are the judge's truth (his or her determination of the truth). Judges are human; they make mistakes, and their decision-making may be influenced by factors, life experiences, and other matters not shared by the client.

Even if documents or other evidence are perceived to favor the client's truth, the judge can disagree. He or she is processing the information differently from the client, and, as a result, the findings — the judge's truth — may be different. Moreover, a client's "evidence" supporting his or her truth may be inadmissible at a trial and therefore never seen or considered by the court.

The client needs to know there may be ways to thereafter convince the judge of errors in his or her truth (*e.g.,* a motion to reconsider (735 ILCS 5/2-1203) or appeal). Even with these tools, the client should be told that once a judge has made his or her findings, he or she may frequently try to protect the findings and may not be receptive to arguments or interpreting evidence inconsistently.

Judicial ambivalence/conflict avoidance. In some circumstances, a judge may make general findings, including references to having considered the credibility of the parties, with no more detail. The client must understand that generally a court does not have to make any specific findings unless required by statute. Therefore, a generalized statement by the court that it considered the credibility of the parties and other witnesses may lead to a client trying to project findings as to truthfulness based on the results, *i.e.,* the actual ruling. With no findings, such an analysis is impossible.

Another phenomenon is the judge making a statement to the effect that there were "credibility issues" with both parties. Such dual credibility findings do not mean the witnesses or parties are being deliberately untruthful; rather, credibility issues also arise if someone is being evasive, less than forthcoming, or confrontational with the opposing attorney or even the court. In certain circumstances, these dual findings can be the judge avoiding empowering a party by making favorable credibility findings. Such empowerment may lead the party in whose favor the findings were made to become more litigious under the belief that he or she now has an advantage going forward. In other instances, the judge may make such findings to project neutrality.

Limited implications of credibility findings. When a court makes a credibility finding that is adverse to one of the parties, it will not necessarily translate to the other party getting what he or she believes he or she is entitled to. Credibility is but a single factor that a judge can consider in resolving the factual presentations and arguments of counsel concerning the issues in dispute. It sometimes occurs that a party is deemed to have issues of credibility, yet the court still makes findings and determinations that are favorable to that party. If other evidence submitted favors the less credible party's position, the effect of credibility issues may be neutralized. When a party through conduct creates credibility issues for himself or herself and the other party responds in kind, any benefit is lost and the judge concludes both clients have credibility issues. This may in turn require additional corroboration of the client's factual presentations.

Spending time with the client to ensure he or she understands the limitations of litigation will help the client focus and prioritize the issues. A client who better understands the limits of the system will avoid spending time and resources on issues that will not result in any substantive benefit.

F. [7.10] Status Quo

In most situations, clients should be advised to maintain the status quo and not to terminate support, close bank accounts, or cancel credit cards when filing for dissolution or being served with

a petition. Any unilateral and dramatic disruption may be frowned on by the court and may result in an unnecessary escalation of the litigation. Likewise, the client should be advised of the ramifications of unwarranted preemptive action such as an ex parte request for injunctive relief or an order of protection. In many cases, when the entitlement to the requested relief may be questionable, such actions serve only to spin a case out of control.

If the practitioner is faced with a factual situation in which preemptive measures are necessary, the failure to act may be dangerous. For example, the presence of ongoing domestic violence against a client or a child mandates swift action. Action may also be required when a client's spouse dramatically increases spending, denies access to funds, depletes marital assets, or incurs debt. In such scenarios, it is the client's spouse who is attempting to alter the status quo for his or her perceived financial benefit.

Another unfortunate scenario occurs when a case begins and one of the parties is unable to maintain the status quo — for example, a client who has historically been the breadwinner loses his or her job or his or her income-earning ability becomes impaired as a result of external forces. The client should be counseled to reflect on how the family would have handled such an event in the absence of marital discord.

In the past, it was not uncommon for the income-possessed spouse to assert, shortly before or during the dissolution process, that the family's economic situation (employment, business, income, etc.) had deteriorated so that he or she was now unable to afford to maintain the standard of living. Judges traditionally looked at these allegations with a healthy degree of skepticism. It is important for the practitioner to recognize the possibility that the family economics may have changed. Sometimes, the financially dependent spouse is reluctant to admit that there is less income or assets to divide. The client may believe that his or her spouse is manipulating the finances to conform to the spouse's own interests. Deteriorating finances must be explored with the client as a potential reality.

When representing a party who is undergoing an economic reversal (*e.g.,* the loss or a job, decreased earnings, etc.), it is important to gather as much corroborating information as possible and share this information as quickly as possible. Protective orders may be needed to prevent the other spouse from contacting an employer to avoid his or her making things worse. Any delay in providing this information is sometimes viewed with skepticism.

G. [7.11] Children

Despite the dramatic changes in the law whereby the concepts of "custody" and "visitation" have been replaced by the concepts of "parental responsibilities" and "parenting time," most clients still refer to custody and visitation. It is helpful to explain to the client early on the philosophy of the change in concepts, which puts the focus not on a title but on actual responsibilities and caretaking functions. The statutory factors set out in 750 ILCS 5/602.7, especially the most recent 24 months of historical caregiving, are important issues to discuss with the client. The emphasis should be not on a child as an item to be won or lost, but rather on how to move forward promoting the greatest amount of stability for the child.

As much as possible, children should be shielded from the litigation and discord. The client should be cautioned against discussing the case with the children, criticizing the other parent in the presence of the children, or using the children to transmit messages to the other spouse or as a source of information about the other spouse. Despite personal animosity, communication with the other parent should also be encouraged and facilitated when it can be achieved productively. One of the factors in the court's determination of the parental responsibilities arrangement is the willingness and ability of each of the parents to facilitate and encourage a close and continuing relationship between the children and the other parent. 750 ILCS 5/602.5(c)(11).

The practitioner should advise the client of the process employed in the particular locale for issues involving parental responsibilities. For example, in most if not all circuits, the parties are required to attend a parenting education class when there are minor children and parental responsibilities/parenting issues. It is best to inform the client of this requirement up front and instruct the client to immediately schedule and attend this program. If child-related disputes exist, mediation is typically mandatory. If the case is not settled as a result of mediation, a guardian ad litem (GAL), child representative, or attorney for the child could be appointed. 750 ILCS 5/506. An evaluation could also be required. 750 ILCS 5/604.10. As the process evolves, the proceedings may involve the participation of the children.

The client should be made aware of the emotional and financial ramifications of parental responsibilities litigation, as well as the possibility of strain on his or her relationship with the children. Further, even after a long and invasive process, there is the distinct possibility that things will not turn out as they should, and a just result is not guaranteed.

It is not uncommon for the parties to be starting the dissolution process without their children's knowledge. Many times, the parties continue to reside in the marital home together during the proceedings. The practitioner should inquire as to whether the children know about the problems between the parties or the impending dissolution. If the children do not know, it is advisable to explore how "telling the children" should be accomplished. It is best practice to suggest that the client and his or her spouse consult with a counselor to seek guidance as to the best method of discussing the matter with the children given the family dynamics. Alternatively, the practitioner may suggest that the parties sit down together with the children and explain the situation. Too much information is not appropriate. The overall theme that is usually recommended as a message for parents to convey is "We are having problems. We may get divorced. This is not your fault. We will always be a family."

The practitioner should be mindful that third parties can also have a toxic effect on cases, particularly when parenting issues are present. A party who permits any person to speak negatively about the other parent in the presence of the children is harming his or her own case. If a client refuses to follow advice and is conducting himself or herself in a fashion that will negatively impact the children or undermine his or her own case, the practitioner should consider withdrawing from the client's representation.

H. [7.12] Emotional Support

It is helpful for the family law practitioner to encourage clients who are struggling emotionally with the breakup of the family to seek emotional support during the process. Frequently, a client

may benefit from one of the many therapeutic resources available, including psychologists or support groups, as well as numerous books and publications focused on the issues arising from the dissolution of marriage. The practitioner should inform clients that seeking therapy will not adversely impact the court's rulings on child-related issues. The practitioner may provide a list of recommended literature as well as the names and telephone numbers of support groups, therapists, and coaches.

In many cases, clients rely on family and friends, who may fuel the emotional flames. These individuals, while perhaps well intentioned, tend to be biased, do not know the law, and create even greater dysfunction. This almost always makes the case more difficult. Any emotional support that impedes the practitioner's functioning must be scrutinized carefully. Well-intentioned individuals frequently create an unrealistic client.

I. [7.13] Fees

The practitioner must clarify the client's expectations concerning attorneys' fees and costs. Clients generally underestimate all the services the practitioner must render to represent their interests properly and how long it will take to complete specific tasks. The practitioner should address the matters of billing, responsibility for fees, interim fee awards, fee shifting, and the effect on marital property. A client's understanding of these issues may aid his or her appreciation of the cost-to-benefit ratio of pursuing certain claims down the road. From the inception of the case, the client should be advised that some fees will be under the control of the client while others will not. The costs of actions the client requests of the practitioner (offensive fees) are within his or her control. Other fees are generated as a result of the conduct of the opposition (defensive fees) or as a result of the court itself.

At the initial interview, or early in the case, it is important to explain which services will be billed to the client. The practitioner's time costs the client money. Phone calls, e-mails, letters, notes, and even the retrieval of long messages may be billed. It is advisable to have clients maintain a list of questions to maximize the efficiency and productivity of phone calls and meetings.

The client early on in the process must be apprised that the payment of fees and costs by each party is presumed, with certain exceptions, to be an advance against his or her share of the marital estate. When a client insists on the other person writing the check for his or her fees, the client should understand that the drafter of the check is meaningless when both parties have substantial access to funds.

III. [7.14] INITIAL PLEADINGS

When meeting with a potential client whose spouse has filed or is about to file a petition for dissolution of marriage, it is important to explain the standard allegations. General allegations such as requests for parental responsibilities, parenting time, support, etc., may be pleaded simply to preserve claims. Boilerplate allegations should not be misconstrued as a personal attack.

Unless there is an issue of venue or personal jurisdiction, the practitioner should advise the client that the service of process is necessary and should not be avoided. The practitioner should advise the client to accept the papers graciously and immediately contact the practitioner.

In Chapter 3 of this handbook, there is a discussion of the initial pleading requirements in dissolution of marriage actions. Consequently, the focus of this section is not the pleadings but the process. Frequently, the initial pleading controls the tone and progress of the case through its resolution. Every case has its own dynamics. In many high-conflict dissolution of marriage situations, the conflict is precipitated by the allegations of the initial pleadings. In other situations, it may be wise to use the pleading process to call out such conduct in hopes that this will cause the conduct to cease. At the very least, this highlights the issue to the court early on. These issues must be considered carefully before the initial filing in order to control the tenor of the litigation.

This is not to suggest that the practitioner should hesitate in seeking appropriate relief for his or her client. In some cases (*e.g.,* domestic abuse or strategic financial deprivation), aggressive actions are unavoidable. Other instances of aggressive behavior by a client's spouse such as closing all the bank accounts, transferring funds, closing credit card accounts, etc., should be responded to aggressively and immediately. Some practitioners, however, file cases with questionable and incendiary allegations in an attempt to obtain a temporary restraining order or an order of protection for perceived tactical advantages. These circumstances create situations in which the clients are immediately placed in extreme conflict. Any chance of an amicable and efficient resolution is jeopardized.

In dealing with an aggrieved spouse, it is best to counsel the client to distinguish the desire for vengeance from the best interests of the family. Professional sensitivity should prevail when dealing with the initial allegations. For example, assume that one of the spouses is engaging in dissipation as a result of an extramarital relationship. Focusing all of the attention on the extramarital relationship as opposed to the dissipation creates unwarranted acrimony.

When the opposing party has engaged in financial irregularities, spousal abuse, or, in the worst-case scenario, some form of child abuse, the gloves come off, and the litigation commences. Nonetheless, the client should be reminded that the process is not about punishment and that it undoubtedly will have a great emotional and financial toll on the family. A client whose expectations for retribution are excessively high can lead to an out-of-control lawsuit. While some practitioners pander to these situations, the result is generally dissatisfaction and can create professional complaints.

Illinois, unlike many other jurisdictions, is a fact-pleading (as opposed to notice-pleading) jurisdiction. *Anderson v. Vanden Dorpel,* 172 Ill.2d 399, 667 N.E.2d 1296, 1300, 217 Ill.Dec. 720 (1996). However, the requirement of pleading facts does not equate to pleading evidence. *Zeitz v. Village of Glenview,* 227 Ill.App.3d 891, 592 N.E.2d 384, 387, 169 Ill.Dec. 897 (1st Dist. 1992). The requirements of fact pleading are satisfied if the pleading reasonably informs the opposition of the nature of the claim. *In re Marriage of Weaver,* 228 Ill.App.3d 609, 592 N.E.2d 643, 650, 170 Ill.Dec. 207 (4th Dist. 1992). The Code of Civil Procedure requires that pleadings "contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply." 735 ILCS 5/2-603(a).

Given the above, the consideration becomes how many of the facts to include in the initial pleadings. 750 ILCS 5/403 contains the minimum requirements to render a petition for dissolution legally sufficient. For example, one must plead jurisdiction, grounds, and some details in order for the opposition to know the nature of the relief sought. Pleading too many details may have a backlash effect creating heightened animosity between the parties and aggressiveness by the opposition. Consider the following:

EXAMPLE: Assume that one of the issues is parental responsibilities, and there is an issue as to the opposition's substance abuse. Do these details *need* to be specified? The answer is "no." An allegation as to the spouse's lack of fitness for decision-making or parenting time is sufficient, as well as perhaps a generalized allegation that the spouse's physical, mental, or emotional health detrimentally affects his or her relationship with the children. If an issue is made as to the lack of specificity, the pleading can always be amended. The person contesting the sufficiency of any allegations must consider whether he or she wants such specificity made part of the record.

EXAMPLE: Assume that one of the issues is support for a spouse and/or his or her children. Does the initial pleading need to specify the adjusted gross incomes of the parties as reflected on their tax returns? The answer is "no." The fact that the opposition has the ability to pay is generally sufficient.

In the early stages of a case, providing too much specific factual information in the initial filings, in addition to possibly fueling hostility, gives the opponent free discovery and is ill advised in that not all information is known or the disclosure of the information may not be accurate or complete. Also, the pleadings are part of the public record. While the client might desire the "record" to be an emotional outlet, privacy considerations must be acknowledged and discussed.

In light of changes in the law allowing hearings on issues such as temporary support or interim fees to be summary in nature, it is important to provide specific and accurate information as to financial resources (*i.e.,* income, cash flow, assets, liabilities, access to financial resources, etc.) supported by affidavits. Some jurisdictions (*e.g.,* DuPage County) have local rules setting page limits for motions, which may require the filing of separate affidavits with exhibits. If specific personal financial information is to be filed, a protective order may be appropriate to keep such information private.

This is not to say that detailed information is always inappropriate. In jurisdictions where court time is extremely limited, well-written and detailed factual pleadings give certain issues more influence with the trier of fact. Some jurisdictions encourage, if not require, that the court receive courtesy copies of pleadings. This is particularly important when hearings may be summary and non-evidentiary. The practitioner and the client should balance potentially inflammatory and public effects of the disclosures against the benefits that may result in focusing the trier of fact's attention on the issues.

In cases in which generalized allegations are made, sometimes a decision needs to be made whether to file a demand for a bill of particulars. See 735 ILCS 5/2-607. The practitioner requesting this specificity must balance the possibility that the request will lead to even more inflammatory allegations against the free discovery concerning the issues advanced in the underlying complaint.

(Note that there are issues as to whether a bill of particular relates only to an underlying pleading (the petition for dissolution of marriage or a counter-petition) as opposed to a motion (*i.e.,* a petition/motion for temporary relief).) In responding to such a request, the practitioner needs to evaluate whether the request is appropriate (735 ILCS 5/2-607(d)) and, if it is, how many facts are really necessary to advance the requests for relief. Unfortunately, practitioners sometimes make these requests without all of the information, only to find themselves with prejudicial detailed factual responses that are now part of the public record. The decision to make such a request and the level of response should be weighed carefully.

IV. DISCOVERY AND THE CLIENT

A. [7.15] Self-Help

A proactive client can be a great assistance in gathering information and saving potential fees. As early as the first meeting, the client should be presented with a list of readily available materials to assemble (bank and investment records, credit card records, tax returns, business records, personal financial statements, medical insurance policies, homeowners' insurance policies, appraisals, deeds, diaries, calendars, school and psychiatric records, correspondence, cards, etc.). All such documents, including e-mails in some jurisdictions, can be admissible with the proper foundation.

If the parties file joint tax returns, the accountant, as a fiduciary, should tender these returns to a client at his or her request. Copies of the returns are also available from the IRS with only one party's signature. If the parties have joint bank accounts, credit card accounts, loans, etc., the client can obtain the information directly and/or have these documents submitted to counsel at his or her written direction. The client who is the participant in the retirement plan may wish to write to the administrator of any such plan requesting the plan documents as well as sample qualified domestic relations orders. When a client declines to participate in a project requested of him or her, the client should be made aware that there will be a charge for the lawyer or the lawyer's staff doing it.

In light of the mandatory disclosure requirement (see §7.17 below), client involvement and the gathering of whatever financial information is available starts early in the case — beginning with a discussion of the requirements in the initial interview.

B. [7.16] Voluntary Production

As a proactive practitioner, one generally knows what documentation is going to be requested of the client. Therefore, it is a good idea to have the documentation assembled, copied, and prepared to voluntarily produce to opposing counsel at the earliest opportunity in order to avoid the costly and time-consuming discovery process. Disputes regarding document production waste time and money. The client should be advised that the courts err on the side of production as opposed to nondisclosure.

C. [7.17] Mandatory Disclosure

Illinois requires mandatory disclosures in the form of a financial affidavit with supporting documents. 750 ILCS 5/501(a)(1). The statute provides for sanctions if a party "intentionally or recklessly files an inaccurate or misleading financial affidavit." *Id.* The statute refers to filing of such affidavits, yet these documents are not to be included in the court file. This is poor wording; however, there exists an issue based on the plain language of the statute that could prevent a court from sanctioning a party if the document is not filed. A creative lawyer then could easily argue that (1) Illinois Supreme Court Rule 219 could be used to level the same sanction and (2) the language in the form promulgated by the Illinois Supreme Court provides: "IMPORTANT: (1) If you intentionally or recklessly enter inaccurate or misleading information on this form, you may face significant penalties and sanctions, including costs and attorney's fees."

It is critical that the client be active in the creation of these documents, including the calculation of the expenses. Ultimately, if the matter is not heard in a summary manner, the client will have to explain at trial the calculations and how he or she arrived at particular numbers. The client should allow the attorney ample time to scrutinize these disclosures to determine potential weaknesses. For example, if the client is not aware of the value of a specific asset, a "guesstimate" can be dangerous and may be used against the client if he or she later attempts to adopt a different value. The practitioner should instruct the client to retain supporting documentation for each value attributed, which can be tendered as an exhibit to the disclosure form. The income and expense portions of the form often constitute the basis of a maintenance/child support award and should be monitored carefully. Again, every figure should be supported with appropriate documentation when possible. With estimates, documents or memoranda should be maintained showing how each number was calculated so that, at the very least, the practitioner can later refresh the client's recollection as to how the number was arrived at if necessary.

Proceedings for temporary support and interim fees can be summary proceedings, and it is incumbent on the party seeking an evidentiary hearing to request the hearing and the basis for the request for an evidentiary hearing. Judges tend to like summary proceedings, so the practitioner has to discuss the merits with the client and then make whatever motions may be appropriate.

It is also important to note that discovery is prohibited in many jurisdictions by local rule until the client's financial disclosure is tendered. Therefore, the absence of the information can be critical. A motion to allow access to financial information or for permission to initiate discovery or limited discovery necessary to create the financial affidavit is possible; however, if granted, this will cause some degree of additional delay.

It is increasingly more common to see motions seeking to maintain the status quo until trial can occur. These motions, like a motion seeking temporary support, should contain sufficient facts to be developed with the client for the relief requested. The dispute may be limited to establishing the status quo.

When the client has no access to financial information but is in need of support, it may be necessary to estimate expenses in order to substantiate a claim. Any estimates must be well

grounded in fact, and the client must be able to explain how he or she arrived at the estimate. The disclosure should expressly state that the financial affidavit is preliminary, that estimates have been used in lieu of actual figures because of lack of access to information, and that the expenses will be updated as complete financial records are actually produced.

D. [7.18] Depositions

Pursuant to S.Ct. Rule 206(d), absent good cause shown, depositions are limited to three hours in duration. Before taking a deposition, the practitioner must adequately define the important issues so as not to waste time. The practitioner may be well advised to wait to take depositions until the end of the discovery process in order to focus on those issues that are critical for the case. In some cases, however, there may be a tactical advantage to taking a deposition early in order to preserve the testimony of a witness who may become less cooperative over time. When good admissions can be obtained, an early deposition may produce a benefit.

In preparing the client for his or her deposition, the practitioner should inform the client of what questions are likely to be asked, how he or she should comport himself or herself, and how to limit voluntary answers, etc. Since television is most clients' main source of information on trials, the prospect of testifying can be intimidating and frightening. The best method to put even the most experienced client at ease is good preparation. One approach is role-playing, which will familiarize the client with the format of the deposition or trial and educate the client on the proper techniques for answering questions. There are also excellent deposition preparation videos available for purchase through organizations like the American Bar Association. If there are depositions that take place prior to the client's, it is good practice to have the client attend these depositions. Watching a live deposition is frequently a great educational tool for the client. The practitioner should advise the client that only the parties, counsel, and the deponent are permitted at a deposition and that even parents and siblings who may have attended court or otherwise been involved in the litigation may not attend.

The client should be advised that opposing counsel is not his or her ally. Any deposition is an adversarial process. In its purest and most appropriate form, it is a discovery process for obtaining and testing information, positions, and theories. Depositions can also be a tool of harassment. The client must understand the gravity of this process so that he or she does not make avoidable mistakes. The client should be instructed to avoid estimating and volunteering information and to reflect on a question before answering it. The client should also be advised that he or she has the absolute right to consult with his or her attorney privately during the course of the deposition. Some opponents, in an effort to intimidate the deponent, will create an issue as to "coaching." This should be explained to the client beforehand so that his or her confidence is not undermined by such tactics.

E. [7.19] Client Participation

Keeping the client apprised of the status of the litigation by sending copies of letters, e-mails, pleadings, and orders informs the client that the practitioner is working diligently on his or her behalf and mitigates surprise when the client receives a bill for services rendered. A client may also appreciate the opportunity to review documents received during the discovery process to learn the relative strengths and weaknesses of the case. When the practitioner is preparing to take the

opposition's deposition, the client can also be an excellent resource for education on areas that otherwise may have been overlooked. On the other hand, an emotional client may request inquiries into areas that are not germane to the ultimate issues. The client needs to understand the time limitations and the focus of the critical points. When the depositions are taken toward the end of the case, the client tends to be better focused because the issues have crystallized.

As noted in §7.18 above, if there are depositions prior to the client's deposition, it is beneficial for the client to attend these to view and gain a greater appreciation for the process. It can be beneficial to observe how others handle themselves during depositions both positively and negatively.

F. [7.20] Limiting Issues

As a result of motion practice and discovery, including requests for admission of facts and genuineness of documents, the practitioner should focus on limiting the issues to those areas in which he or she has the greatest potential. The client should be apprised as to which issues are of marginal potential value so that he or she may make a conscious choice to limit the scope and direction of litigation.

G. [7.21] Recording Conversations

With the prevalence of smartphones and other technologies, practitioners are often confronted with clients who are using their cell phones to record conversations with their spouses, spouses who are recording the clients, or both spouses following and taking videos of each other. There are also instances in which recording devices are installed to surreptitiously record communications. Often, these types of cases are high-conflict situations involving parental responsibilities issues. When encountering these circumstances, the practitioner needs to discuss with the client the legalities and illegalities of this type of conduct.

In 2014, the Illinois Supreme Court struck down the law that prohibited recording conversations without first obtaining consent from all parties. The seemingly outdated law was not meant to stop people from using personal recording devices, now found standard on almost all cellular phones, to record activities such as public arguments or fans yelling at a sporting event. In *People v. Melongo,* 2014 IL 114852, ¶¶6 –7, 6 N.E.3d 120, 397 Ill.Dec. 43, a woman was convicted of eavesdropping after she became disgruntled in her attempts to get a transcript corrected and decided to record her telephone conversations with a court reporter's supervisor. Ultimately, the court found that the statutory provision criminalizing this behavior was unconstitutional on its face as it "burdens substantially more speech than is necessary to serve a legitimate state interest in protecting conversational privacy." 2014 IL 114852 at ¶31.

Effective December 30, 2014, the legislature amended the eavesdropping statutes, 720 ILCS 5/14-1, *et seq.,* to be less strict while still providing protections for private conversations. The standard in Illinois requires the consent of every party to a *private* conversation or, more specifically, requires the consent of all parties who have a "reasonable expectation" of privacy. 720 ILCS 5/14-1(d), 5/14-2. The federal law, which requires the consent of one party to a conversation, still stands. 18 U.S.C. §2511(2)(c).

The practitioner should have discussions with the client if these situations arise as to the effects of this behavior and the ramifications. Recording another person openly (when the other person knows that there is recording) is not illegal (*e.g.,* turning on a recording device and advising the other party during an argument that he or she is being recorded). Anytime there is recording, it tends to heighten conflict as well as distort the reality of the situation — both parties may be acting abnormally. The client needs to understand that this often creates more problems rather than solving them.

If the recording of conversations is done without the other party's knowledge or consent and that party has some expectation of privacy, the act of recording is a violation of the criminal statutes. The client, claiming to try to protect himself or herself or the children via the recording, is in fact committing a crime. The client needs to appreciate this and that the lawyer cannot ethically condone or encourage a client to continue to commit a crime. This imposes potential disclosure obligations under the ethical rules on the lawyer.

Video recording without sound is not the recording of a conversation; rather, it is a recording of an event.

H. [7.22] Social Media

As social media websites become increasingly popular, so does their importance in litigation. The client should therefore be alerted to the dangers of inappropriate postings and how social media may be requested through the use of discovery. Despite little authority addressing the issue, most courts have allowed the discovery of relevant information posted to Facebook and other social media websites. Beth C. Boggs and Misty L. Edwards, *Does What Happens on Facebook Stay on Facebook? Discovery, Admissibility, Ethics, and Social Media,* 98 Ill.B.J. 366 (2010).

The practitioner should be aware of the various paths for discovering social media content. For instance, serving a subpoena to the provider itself, such as Facebook, is probably not the best way to get access to social media posts. The federal Stored Communications Act, Pub.L. No. 99-508, Title II, §201[a], 100 Stat. 1860 (1986), bars attorneys in civil cases from acquiring social media content directly from providers. 18 U.S.C. §2701. The best way to obtain this information is to subpoena the user directly, as the provider will typically release the content to that person. As with any piece of discovery, the user's attorney should review the information to make sure it is relevant to the matter being litigated before turning it over to opposing counsel. Ed Finkel, *Building Your Case with Social Media Evidence,* 102 Ill.B.J. 276, 278 (2014).

The practitioner should advise the client about the potential pitfalls of posting pictures of the parties' children on social media during a divorce proceeding and advise the client that many judges do not condone this practice and may prohibit it if the issue is brought to the attention of the court.

V. [7.23] TEMPORARY HEARINGS

Temporary hearings are frequently overlooked and underemphasized in the resolution of a case. See 750 ILCS 5/501, *et seq.* For most clients, this will be the first real experience with the judicial

process. The results of such hearings can frame the expectations of the client. The practitioner must be mindful to choose his or her battles carefully. Since these hearings frequently take place early in the case, the emotions and expectations of the litigants are high, and a perceived "win" or "loss" can have an impact on the client's future decision-making process. While the practitioner might find the issues routine, the client perceives them as defining moments in how he or she will live.

Whether to apply for temporary relief is a critical decision. It is always preferable to be on the offensive. An emotional client, however, is not in the best position to determine which issues require court intervention. If a client has realistic expectations, temporary hearing results will fortify the client's case. Unrealistic expectations will cause even a success to be viewed as a failure.

The practitioner should guide the client into making appropriate decisions so that risky issues can be avoided. It is important to stress that the audience (*i.e.,* the judge) is potentially affected by each and every court appearance. Presenting a marginal issue may distract from the important issues. The client and the practitioner should advance only those battles that will further the successful conclusion of the litigation.

The ultimate decision-maker, along with the judge, is the client. The client needs to understand the issue of "judicial discretion." The judge is required to make judgment calls when parties are in disagreement. Temporary issues, therefore, provide the first opportunity to attempt to sway a judge in the decision-making process. Over time, an experienced judge tends to trust practitioners who have left positive impressions. Conversely, judges tend to be more critical of clients whose representation is less professional. While the law is supposedly blind, it is not ignorant. The practitioner cannot take lightly how his or her representation may impact future results for future clients.

Changes in Illinois law allow and encourage the court to deal with these issues on a summary, non-evidentiary basis. An evidentiary hearing may be requested if the court decides to hold a hearing "to determine whether and why there is a disparity between a party's sworn affidavit and the supporting documentation" or "upon a showing of good cause." 750 ILCS 5/501(a). If there is going to be a summary proceeding, it is incumbent on the practitioner to provide the court with sufficient information, including the client's affidavit, financial affidavit, tax returns, and "other relevant documentation." *Id.* The practitioner and the client must develop the necessary information and formulate a detailed affidavit containing the information necessary to advance the client's position. The client needs to understand that whatever is written in the affidavit is in lieu of his or her testimony and will be used both in the temporary hearings and in the case itself (*i.e.,* depositions, trial, etc.). It is critical that the information be as factually accurate as possible.

Preparation of both the client and the case is the key to successful presentations in court. A well-prepared client usually brings results commensurate with the practitioner's expectations. The worst-case scenario will occur if the client expects an obvious solution, and the court determines otherwise. The best-case scenario occurs when the client understands the range of results, with the court's decision falling within or exceeding that range. The client should be cautioned that time constraints on the practitioner's case force him or her to get to the point and move forward. If the client insists on presenting ancillary issues, the summary/evidentiary hearing may be unfocused, which will not yield the optional result.

If there is going to be an evidentiary hearing, the client should be taken through a preparatory direct and cross-examination in order to create realistic expectations. It is important to advise the client on the demeanor necessary to give a favorable impression to the court. This includes instructions to the client on how to react to evidence presented by the opposition.

One of the most common issues at temporary hearings is temporary maintenance or child support. The practitioner is cautioned not to proceed too quickly if his or her client is not prepared. The financial affidavit and the supporting documents need to contain the detailed analysis and justification of expenses. If a client seeking support overestimates (typically expenses of the financially dependent spouse) or understates (typically cash flow/income for the financial provider), a judicial finding of inflated expenses or underestimated cash flow/income could have long-reaching implications on the ultimate resolution of the matter. It is advisable to have the client keep a detailed record of how he or she calculated each expense and his or the cash flow/income so that he or she may refer back to the calculation to justify the positions asserted.

Many judges are of the opinion that financial affidavits are inherently biased. The spouse seeking support may overstate his or her expenses, particularly with non-reoccurring items. The person from whom support is sought may underestimate income. The payor of support who overstates expenses may inadvertently support the lifestyle, and therefore the level of support, being requested. A payor who understates expenses may commit himself or herself to additional funds available for support that are not. The practitioner is well advised to review all of this with the client and question his or her expense or cash flow/income calculations, with the focus being the accuracy of the information and the ability of the client to justify the figures listed.

Temporary hearings may also be used as a free source of discovery. The practitioner is wise to have a court reporter present for no other reason than to preserve representations or testimony. Testimony at an evidentiary hearing is proper not only for impeachment but also for substantive evidence. Statements to the court from an attorney representing that party may also be judicial admissions. *Gaston* v. *Founders Insurance Co.,* 365 Ill.App.3d 303, 847 N.E.2d 523, 536, 301 Ill.Dec. 513 (1st Dist. 2006). The client needs to understand the benefit of gathering this information during the proceedings so that he or she appreciates the practitioner's actions.

A judge will sometimes conduct a pretrial conference either prior to or instead of a hearing to facilitate resolution of an issue without the time and expense of preparing for and attending a hearing. The practitioner should explain to a client the differences between a pretrial conference and a hearing. This includes that the judge will generally conduct a pretrial conference outside the parties' presence and that the judge's recommendations are not rulings that go in a court order. This means that a party is also entitled to a hearing if he or she believes that a judge may rule differently after hearing the evidence. A party should understand, however, that a judge's ruling at a hearing is often (but not always) the same as his or her pretrial recommendation and a party should consider the cost and the "optics" of asking a judge for a hearing after the judge makes a recommendation.

VI. [7.24] ALTERNATIVE DISPUTE RESOLUTION

There is an increasing trend toward various forms of alternative dispute resolution (ADR) procedures from clients who are hoping to avoid the cost — both emotional and financial — of litigation. The intent of §§7.25 – 7.28 below is to alert the practitioner to some of the costs and benefits of these alternatives to traditional litigation.

The courts are empowered to order parties to attend mediation for both financial and nonfinancial issues. Prior law allowed for court-ordered mediation only of disputes involving parental responsibilities, visitation, and removal of minor children from the State of Illinois.

There are additional dispute resolution procedures in which the parties can elect to participate. Therefore, discussions are necessary to ensure the client is aware of the process, the options, and the benefits and detriments of the process. As early as the initial consultation, the practitioner should discuss with the client the various models of ADR, including collaborative law, cooperative methodologies, mediation, and attorney-assisted mediation. In other jurisdictions, binding arbitration has also been approved and used in family law disputes. *See In re Marriage of Golden,* 2012 IL App (2d) 120513, 974 N.E.2d 927, 363 Ill.Dec. 130 (provision requiring arbitration of child-related matters deemed enforceable). An agreement achieved by clients with the assistance of their counsel is likely to be more comprehensive than a judgment received after a trial. Further, agreements have been shown to better stand the test of time than court-imposed judgments, resulting in less post-decree litigation. Accordingly, in appropriate circumstances, ADR is a powerful mechanism for the efficient resolution of a dissolution case. Indeed, in many jurisdictions mediation is mandatory with respect to parental responsibilities and visitation. In virtually all types of ADR paradigms, the lawyer continues to be involved in some capacity.

A. [7.25] Collaborative Law

Collaborative law is an interdisciplinary process using attorneys who are specially trained in the collaborative process, as well as behavioral experts, financial planners, and "divorce coaches," who strive to effectively address the clients' emotional, parental, and financial needs while working through their legal problems. This is one of the fastest growing areas of the law in the family law arena. The basic premise is to encourage attorneys, clients, and neutral parties to work in a dynamic that promotes cooperation, communication, and compromise with the goal of reaching an agreement in a less adversarial environment. From the outset, the collaborative relationship is formalized by a written agreement that is executed by both the parties and their counsel. One of the key elements in a pure collaborative process is that the attorneys are required to withdraw from the case if the collaboration does not result in an agreement and may not represent the client in any litigation. Indeed, the work product that is created as a result of the collaborative process may not be used in litigation should the collaborative process fail.

The collaborative process has become popular among many clients since it provides a disincentive for attorneys to fuel disagreements with the prospect of larger fees. Many divorcing individuals who elect collaborative law as opposed to a more traditional approach do so in order to achieve a faster and less costly result. However, when the parties are not equally knowledgeable concerning the financial issues, or when a party is not acting in good faith, collaborative procedures

can be as costly and time consuming as litigation, if not more so. The lack of good faith or hidden agendas can result in the failure of the collaborative process after the expenditure of substantial funds. Clients are then required to hire new counsel and experts, pay for these individuals to acquire or assimilate the same information, and expend additional sums to conclude the matter through negotiations or litigation.

By its nature, the collaborative process occurs prior to any legal action being filed. Because of this, there is no ability to compel full and complete disclosure through court process. In Illinois, the reliance on the other party's voluntary disclosures, even if not entirely forthcoming, will not be a basis to vacate a judgment when formal discovery is waived, as it is during the collaborative process. This can be dangerous when a spouse is intentionally hiding material information. In addition, many attorneys who are traditionally trained also practice collaborative law. While many skilled practitioners are adept at switching methods of representation, others find it difficult to make the transition between "advocate" and "collaborator." If both parties' attorneys are not truly committed to the spirit of the collaboration, the process may be unsuccessful.

B. [7.26] Cooperative Law

Cooperative law is an offshoot of collaborative law. The primary differences between cooperative and collaborative law are that the attorneys are not at this time required to undergo specialized training to participate in cooperative cases, nor do they have to remove themselves from representing a party in any subsequent litigation should the cooperative process fail. As in collaborative cases, the attorneys and the clients commit to cooperation and communication with the goal of facilitating the resolution of the legal issues and avoiding costly and protracted litigation. Often there is no filing in court and no formal discovery propounded. This process is highly dependent on the good faith of the clients and their attorneys, cooperation, and full disclosure to try to achieve an amicable resolution.

Because the attorneys are not required to remove themselves from representation if an agreement is not achieved, additional resources may not have to be used in hiring new counsel and experts and bringing them up to speed in the event the cooperative process fails. Also, if a legal action is pending, time is not lost since the clients and the lawyers may move right into court to resolve issues.

C. [7.27] Mediation

Mediation is another popular method of alternative dispute resolution. This process involves the parties and a mediator — a neutral, who acts to facilitate the resolution of disputes between the parties. In many jurisdictions, mediation is mandatory for parental responsibilities and other child-related issues. Mediation of financial issues is usually voluntary.

In a traditional mediation situation, the attorneys do not meet with the mediator or participate in the mediation session directly. The attorneys participate indirectly by preparing the clients for the process and advising the clients during the process (either during or between mediation sessions). The attorney is critical in the preparation process as it is the role of the attorney to assemble and digest all necessary discovery, whether formal or informal, and to adequately prepare

the client to negotiate before commencing mediation. The attorney also should inform the client of the issues that should be included in discussions, the law as it applies to the issues in dispute, and the range of possible outcomes in the event the issues were taken before the court. Last, the attorney should prepare the client beforehand as to the dynamics of the mediation process, the positions the other side is likely to maintain, strategies for negotiation, and the client's bottom line at which point mediation will be terminated.

Mediation is not typically binding. Even if there is an agreement reported by the mediator, a client could reconsider or identify issues he or she did not take into account during the mediation process. It is not uncommon, even when there is an agreement, for new issues to arise during the process of drafting the agreement. Occasionally, clients must return to mediation to work through additional issues that have come to light during attorney review. On occasion, mediated agreements become unraveled before they become binding through court approval.

A mediation agreement, like any other contract, is binding only on those who sign it, and those who sign must have the authority to do so. Pursuant to Cook County Circuit Court Rule 13.4, an agreement regarding child-related issues is binding if it is in writing, signed by the parties, and approved by the court. An agreement on other issues is binding if it is in writing and signed by the parties (or contained in an oral agreement stated in the record) and if the court does not find the agreement unconscionable. *Id.* More frequently than not, mediators prepare a memorandum of understanding acknowledging the terms of the agreements made by the parties. The parties should understand that this memorandum is nonbinding unless signed.

The client should be cautioned as to the possible consequences of mediation. Mediation is a privileged process — what is discussed in mediation is not admissible in any subsequent proceedings absent truly extraordinary circumstances. If an agreement has been reached, the mediator is permitted to disclose the terms of the agreement. Otherwise, the mediator is precluded from disclosing any communications made during the mediation process. To some extent, however, this privilege is illusory. During mediation, a client may alert his or her spouse to weaknesses in the client's case, thereby providing the opponent an opportunity to strengthen his or her case. Naturally, information garnered by a party during a mediation session is shared with his or her attorney, who is typically standing in the wings. The end result is that information is obtained that could be used strategically to the detriment of the disclosing client.

The client also needs to understand the dynamics of mediation. The mediator is simply attempting to facilitate the decision-making process. Unfortunately, when one party is intractable as to his or her position, the mediator may focus on the more flexible party. In these situations, one of the participants may sacrifice a position for no apparent gain. The practitioner is well advised to develop a mediation strategy with the client that balances the client's priorities against what can likely be achieved through litigation. Successful mediation strategy involves being flexible in resolving issues and being armed with alternative scenarios to accomplish one's objectives.

A client will be unable to effectively mediate financial issues if he or she is unaware of the nature and extent of the family assets, liabilities, income, and expenses. The client should be conversant with the disclosure form and comfortable in relying on it during the mediation session. If questions exist concerning full disclosure, accuracy, or the like, mediation may be premature. To

the extent that valuations are necessary, the practitioner should work with the client to select a joint or independent appraiser to appraise businesses, real estate, defined-contribution plans, etc. Without valuations, the client in mediation could be taking on significant risk, and the practitioner could ultimately be blamed.

A client who has been dominated and controlled by his or her spouse is not a good candidate for mediation without an attorney's direct assistance. The controlling spouse will see mediation as a means to continue the control and try to create a process through which his or her agenda may in essence be imposed on his or her spouse because of the spouse's emotional dependence.

Last, the practitioner should continue to counsel the client throughout the mediation process. It is a good idea to request copies of draft agreements during the process in order to point out errors and omissions to be brought back to the mediator. Failure to do so may result in an incomplete or unsatisfactory agreement.

D. [7.28] Attorney-Assisted Mediation

In attorney-assisted mediation, the attorneys are present in the mediation sessions. The participation level can vary based on the wishes of the clients and the mediator. Depending on the personalities, involving lawyers directly in the process may create a more adversarial atmosphere. The participating attorneys and the clients must be committed to compromise and collaboration, as in the models discussed in §§7.25 – 7.27 above. The attorney-assisted mediation model gives the attorneys the forum to achieve creative solutions that cannot be achieved through the litigation process.

When the estate, income, and related issues are well defined, the focus is on alternatives for resolution as opposed to positioning or arguments as to facts. This saves time and legal expenses and avoids the uncertainty incident to the traditional process. Like the other alternative dispute resolution approaches, however, attorney-assisted mediation is not particularly well suited to those cases in which there are fundamental disputes as to values or income. In attorney-assisted mediation, however, the competing experts can participate directly in the mediation in an attempt to arrive at a compromise or at least a narrow range of outcomes. When experts are involved, having the mediator familiar with the various issues, such as business valuation methodology, can be beneficial.

Unfortunately, despite the fact that the process is "confidential" or "privileged," the fact that the attorney and his or her client may gain insights into the other side's vulnerabilities and willingness to make concessions is a fundamental part of mediation that cannot be avoided.

This process of attorney-assisted mediation can be beneficial for individuals who have a sincere desire to resolve differences efficiently and amicably. The premise of mediation is that both parties are motivated to reach agreements and are flexible in their approach to issues. There are some situations in which there is expressed "good faith," but the agenda is contrary, *e.g.,* mediation is used to delay or as a means to avoid disclosure. As with traditional mediation, a client who has been dominated and controlled by his or her spouse may not be a good candidate for attorney-assisted mediation as the controlling spouse will see mediation as a means to continue control and

to create a process through which his or her agenda may be imposed on his or her spouse because of the spouse's emotional dependence. The presence of the attorney in the process may mitigate this danger; however, it can also be used by the controlling spouse as a means to drive a wedge between the client and his or her attorney.

The key considerations for the practitioner when contemplating attorney-assisted mediation are whether the clients and the attorneys are equipped emotionally and with sufficient information to make a meaningful decision. A skilled mediator will be flexible in the process and sensitive to the dynamic of the parties, the attorneys, and the nature of the case. In many cases, the process will evolve based on the subtleties. Unlike traditional litigation, successful attorney-assisted mediation is, by its very nature, client driven as the attorney is secondary, providing support and advice to the client. It may be difficult for some attorneys to check their egos at the door and take a backseat to their client, but it is well worth the effort as this method combines many of the best aspects of all the ADR models.

As noted in §7.27 above, a court can order mediation on any matter within a domestic relations case at its discretion without acquiring the consent of the parties and over the objection of a party. With only a few exceptions, the court has discretion whether to require mediation on financial issues, discovery disputes, and other domestic relations issues. Mediation is still mandatory, however, for the initial determination and modification of parental responsibilities, visitation, and parenting time, as well as the removal or relocation of children.

VII. [7.29] CONFIDENTIAL COURT-ORDERED COUNSELING FOR A CHILD

An amendment to the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/101, *et seq.,* by P.A. 99-763 (eff. Jan. 1, 2017), requires that court-ordered counseling be confidential, which means it cannot be used by the parties, a child representative, a parental responsibilities evaluator, etc. 750 ILCS 5/607.6. This statue provides in pertinent part as follows:

> **(a) The court may order individual counseling for the child, family counseling for one or more of the parties and the child, or parental education for one or more of the parties, if it finds one or more of the following:**
>
> **(1) both parents or all parties agree to the order;**
>
> **(2) the child's physical health is endangered or that the child's emotional development is impaired;**
>
> **(3) abuse of allocated parenting time under Section 607.5 has occurred; or**
>
> **(4) one or both of the parties have violated the allocation judgment with regard to conduct affecting or in the presence of the child.**
>
> *** * ***

(d) Counseling ordered under this Section is subject to the Mental Health and Developmental Disabilities Confidentiality Act and the Federal Health Insurance Portability and Accountability Act of 1996. *Id.*

This provision makes all court-ordered counseling sessions confidential, and whether parties can alter or modify this by agreement is arguable. In addition, the information obtained through counseling is frequently relied on by the court and its appointed professionals because a child's mental and emotional health are required factors to be considered in cases in which parental responsibilities or parenting time are issues. See 750 ILCS 5/602.5, 5/602.7.

VIII. [7.30] PARENTAL RESPONSIBILITIES EVALUATIONS

In cases involving parental responsibilities, visitation, removal, and other child-related issues, the client needs to be advised early on that there may be an evaluation with recommendations to the court in accordance with 750 ILCS 5/604.10(b) or 5/604.10(c). Section 604.10(c) was enacted following the appellate court decision in *In re Marriage of Divelbiss,* 308 Ill.App.3d 198, 719 N.E.2d 375, 241 Ill.Dec. 514 (2d Dist. 1999). Under prior practice, a litigant dissatisfied with the recommendations, process, or conclusions of the court's witness (former 750 ILCS 5/604) applied for his or her own professional evaluation under the authority of S.Ct. Rule 215(a). In *Divelbiss,* the trial court determined, and the appellate court affirmed, that Rule 215(a) did not authorize the same type of evaluation for child parental responsibilities and related issues as provided for in §604. The client needs to understand the difference in these appointments. Section 604 allows the court to appoint a professional to investigate, evaluate, and provide opinions and recommendations as to the determination of child parental responsibilities and related issues. These appointees are usually mental health professionals who are trained to provide greater insight into the children's best interests. The client must recognize these appointments to be exactly what they are — powerful and influential extensions of the court. Great weight is frequently placed on these evaluations because the results are allegedly independent and unbiased.

All the judicial appointments can dramatically add to the complexity and cost of litigation.

Because of the potential impact of these appointments, the lawyer and the client should assess the effect of these appointments on the litigation. This assessment should include the merits of the client's case, the client's spouse's position, and the potential results. The practitioner needs to explore each client's parenting skills and historic roles and what the best result would be for the children. Frequently, spouses find themselves in turmoil on issues unrelated to children that can color or distort the client's decisions on child-related issues. The practitioner should help the client focus on what is truly best for the children.

The client should be prepared and focused on the issues the evaluator will likely deem critical. The focus should be on the children, not the spouse. Evaluators are not interested in spouse bashing; indeed, such attempts may backfire. The client needs to separate those issues that deal with the children from those problems with the spouse that are unrelated to the children. Instructing the client to focus each and every statement from the child's perspective will allow the client to focus

on real issues. Instead of a parent-focused response such as "my husband is a slob," a child-focused response could be an expression of concern for the children's potential physical environment. The same information will be presented from a more relevant direction. It is the practitioner's obligation to provide the client with the tools to voice his or her concerns in an appropriate manner.

Experienced evaluators expect the "he said, she said" dichotomy. If the client focuses on the relevant issues, the evaluator can get through the minutia to the real issues. The client's problems with his or her spouse may have little relevance to the evaluator and are more appropriately dealt with in therapy. 750 ILCS 5/602.5(e) provides that the conduct of a parent that does not affect his or her relationship with a child is not a relevant consideration for the court. The faster the client understands these parameters, the greater focus he or she may have.

The client also needs to be cautioned that what is discussed with the evaluator is not privileged and may find its way into the evaluator's report. In order to provide a good impression, a client may try to be helpful and compliant, but the evaluator is not the client's advocate, and this may inadvertently work against both the client and the children's interests. Clients should be cautioned against disclosing discussions with their counsel to the evaluator. This is a waiver of the attorney-client privilege. Evaluators typically request access to medical records and mental health records when applicable. Consent forms are often tendered to the client for signature. These consents waive the physician-patient privilege (735 ILCS 5/8-802) as well as the mental health privilege pursuant to §10 of the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1, *et seq.* It may not be in the client's interests to waive these privileges. It is incumbent on the practitioner to discuss these forms with the client and to explain their ramifications. When these records could be problematic for the client's case, the practitioner may need to review these records in advance of the evaluation so that an intelligent decision can be made about their release. Further, clients frequently provide the evaluator with diaries, notes, or journals. The practitioner should review these materials carefully before submission for information that is unfavorable to the client or that can be taken out of context. The client needs to be prepared to address any questionable content. In addition, the client must be informed that his or her spouse will eventually have access to this information.

The client should be instructed to avoid what is sometimes referred to as "minimization" or "overstating." "Minimization" is marginalizing the importance and role of the other parent in the lives of the children. This type of reporting might lead to the conclusion that the client will not foster an ongoing relationship with the other parent. "Overstating" is the maximization of one's own role, which may not correspond with reality and, again, creates an adverse inference from the evaluator.

The practitioner should warn the client against "spouse bashing." Spouse bashing is a nonproductive phenomenon that is present in many parental responsibilities cases. Every client has strengths and weaknesses in parenting. A client who acknowledges the spouse's strengths has more credibility with the evaluator. A parent who acknowledges and appreciates his or her own shortcomings will be viewed as self-aware. In a family in which one of the spouses works, he or she should admit to a heavy work schedule. Similarly, creating a scene after learning of a spouse's marital misconduct is completely understandable. These examples may impress the evaluator that the client is credible as well as an accurate reporter of the facts, lending credibility to his or her

subjective observations. A client rationally and realistically acknowledging historical roles, even if the role is something like "the good provider," can build credibility with the evaluator. A prepared client understands that continued dysfunctional dynamics can be a detriment to his or her ultimate goals.

The practitioner also needs to understand what the evaluation process entails. While each case has potentially unique facets, an evaluator typically uses the same process. If the practitioner does not know a particular evaluator, the practitioner should seek advice from his or her colleagues who have had experience with the evaluator. In cases in which a particular judge may have a favorite evaluator, the practitioner should seek the advice of other lawyers as to the possible evaluators before one is appointed. Some jurisdictions have specific prohibitions against the practitioner having direct contact with the evaluator once the appointment is made. If the practitioner knows who the likely appointee may be, the practitioner may elect to contact the evaluator prior to the appointment and request information about the process the evaluator typically uses. Some evaluators will disclose this freely because they want the parties to understand the process. In some jurisdictions, the methodology or limits on costs are defined by local rules. The practitioner should read the rules as well as prior reports of a particular evaluator in advance. This can be done if the practitioner is in a firm in which prior reports were issued or by inquiring of other practitioners. The practitioner should also do a search of the appellate court decisions in which the evaluator's name appears to gain a perspective as to prior positions asserted and to identify prior cases. Finally, it is useful to search prior publications the evaluator has authored or coauthored. These publications may provide valuable insight and can provide tools for preparing the client.

The client should also be prepared for the possibility of psychological testing. Such testing may reveal that a client is guarded or defensive. This is common and to be expected. Preparing the client for the testing puts him or her more at ease. With such tests as the Minnesota Multiphasic Personality Inventory (MMPI), part of the test (validity scales) will measure whether the client is answering questions defensively, guardedly, and/or honestly. Similar questions will be interspersed throughout the test to ensure consistency. The client should not attempt to outthink the test. If there is concern over how a client will fare in psychological testing, there is nothing that prohibits a consultant from administering the probable tests. The results are almost always privileged except when it is impractical for the party seeking discovery to obtain facts or opinions on the same subject matter by other means. S.Ct. Rule 201(b)(3). However, if pretests are done, the client should be prepared for a question from the evaluator as to whether he or she has ever had such testing. Further, taking a particular test repeatedly may invalidate the results. Use of a consulting expert should be considered, and a consultant used only when there is serious concern over a client's potential adverse reaction to the testing.

Following each appointment with the evaluator, the client should review with the practitioner the allegations raised by the opposing party and how they were addressed. If possible, the practitioner should provide guidance about dealing with the allegations beforehand. Many evaluators will confront a spouse with both the relevant and irrelevant allegations regarding the other spouse in order to (a) assess the truthfulness of the information being provided and the credibility of the respective spouses and (b) ascertain how the spouse deals with potentially stressful and critical allegations. Few parties are blameless in the disintegration of the marital relationship. Unfortunately, denial, anger, and resentment sometimes cloud judgment. The issue is not necessarily the alleged event but how the client manages the event in a realistic and child-focused direction.

It is a good idea for the practitioner to remain involved throughout the evaluation process. In most cases in which discovery is ongoing, the opposition's allegations during the evaluation process are an information-gathering tool and a preview of what is likely to be presented to the court. Following each session, the client should immediately record what was discussed, the other spouse's allegations, and how he or she responded. This document can be privileged in the form of a letter to the attorney or can be notes, which the client may use to refresh his or her recollection. However, the practitioner must be cautioned that clients are not necessarily the best reporters when dealing with highly personal and emotional issues. The perceptions of a client are necessarily filtered through his or her emotional and psychological framework.

The client should be advised that an evaluation may involve the children themselves. For children under the age of three, there may be observations of the parent and child together. With young children, the evaluator is looking at how the child separates from the primary caregiver and how the child interacts with each parent, both verbally and nonverbally. Children ages three through five are often good sources of information for the evaluator since, depending on their developmental levels, they have no concept of protecting the parents.

Older children, however, can reflect the positions of the parents. It is common for the evaluator to interview these children by asking similar questions at different interviews. The evaluator may be looking for divergent answers based on which parent accompanied the child to the interview. The focus here is on whether the child is being influenced.

The dynamic of the children's participation in an evaluation needs to be explained to the client. Older children will question why they are seeing the evaluator. The amount of information provided should be filtered. One answer might be "She is trying to help Mom and Dad." The answer should never be "She is going to recommend whether you should live with me or [other spouse], so you need to tell her you want to live me and not [other spouse]." The client needs to keep it simple and never prepare a child for the substance of the interview. Coaching the child can and usually will come back to haunt the parent who engages in such ill-advised behavior. Following any interviews, a parent should never question or interrogate the child. If the child voluntarily brings up an issue, the parent should not use this as an excuse to follow up or probe for additional information. If the evaluator suspects a child has been prepared or interrogated following an interview, it can be taken as a clear sign of a parent's focus on himself or herself and a commensurate disregard for both the child and the other parent. In these cases, the offending parent is criticized, and an adverse inference can result.

The evaluation, while not determinative, may be critical evidence creating an empowered spouse (the spouse who is deemed favored in the evaluation) and a perceived underdog. Most evaluations contain both positives and negatives for each spouse in terms of strengths and weaknesses. The client should be prepared for these eventualities. The evaluation becomes a learning tool to see how an unrelated third party views the family dynamics. In certain cases, the evaluation is a reality check and molds future decision-making for the client.

Under no circumstances should the client be advised that the case is "won" or "over" as a result of the evaluation. Litigation by its nature is inherently uncertain. The disadvantaged spouse may request a second opinion or may attempt to show that the evaluator relied on critical information

that is erroneous or not well founded. A spouse could have deceived the evaluator. While all of this is possible, the client needs to appreciate and understand the potential influence of the recommendations. If a second opinion is approved by the court, the client should be advised about the court's possible view of the selected evaluator. This requires the practitioner to investigate and determine any predisposition by the court. Does the court merely view that individual as a "hired gun"? The practitioner is advised to attempt to select a professional whom the court has previously appointed and respects in order to avoid a judicial predisposition against the appointment.

If the original evaluator is truly in error, a second opinion should be explored. If a professional is appointed to render a second opinion, the client should be prepared to accept that a second evaluation may agree with the first evaluation. A client may assume erroneously that the second evaluator will be sympathetic to his or her position. The preparation for a second opinion is identical to the initial preparation except that an additional factor now exists, which is why the first recommendation was in error. For the spouse with a favorable recommendation, there is an additional focus on why the initial evaluator was correct, which requires providing additional corroborative information supporting the recommendation.

A client who is ill-prepared for the evaluation process is at an extreme disadvantage compared to the well-prepared spouse. Because of the potentially critical effect the evaluation can have in the litigation and the lives of the client's children, the practitioner and the client cannot afford to take the process lightly.

IX. [7.31] GUARDIAN AD LITEM/ATTORNEY FOR THE CHILD/CHILD REPRESENTATIVE

The child representative remains a powerful influence in a parental responsibilities case, as does a GAL, because of the court's tendency to rely so heavily on the purported objective "party" to the litigation. It is important for a client to understand the differences between the three types of representatives for children and their corresponding duties and limitations. The client should be advised that nothing he or she says to the representative is confidential and that, at least in the case of the child representative and attorney, he or she will not be privy to any statements made by the child.

Before a client submits documents to the child representative, GAL, or attorney for the child, it is good practice to review the information. This is particularly true of letters, notes, e-mails, and the like that are subjective (a spouse's recitation of the parenting history) as opposed to objective materials (grade reports, children's medical records, etc.). If these subjective documents are later found to be unreliable because the client's perception or memory was inaccurate, it can undermine his or her credibility.

While all three representatives are working on behalf of the best interests of the child, their responsibilities and duties vary. Attorneys for the child provide independent counsel and legal advice *to children* in the same manner they would for adult clients. 750 ILCS 5/506(a)(1). A GAL's role is more to advise and give recommendations *to the court.* 750 ILCS 5/506(a)(2). GALs become familiar with the case by investigating and interviewing the parties involved, and they may be called

as a witness by the court for cross-examination of their reports. *Id.* Finally, the primary role of the child representative is *advocacy.* 750 ILCS 5/506(a)(3). Like an attorney, a child representative will participate in the litigation process, and like a GAL, a child representative will become familiar with the case through investigating and interviewing the parties. *Id.* Child representatives do not create reports or recommendations for the court, and they are not called as witnesses. Instead, they provide legal arguments rooted in evidence for the best interests of the child based on their judgment and not necessarily the express wishes of the child. *Id.*

X. [7.32] PARENTING COORDINATORS

Another more recent alternative dispute resolution process is parenting coordination. S.Ct. Rule 909. Parenting coordination is a good option for clients who co-parent in contested cases — whether it is divorce or post-decree — and there is a parenting plan in place. Coordinators are licensed professionals assigned by the court who help with the decision-making and communication aspect of parenting. *Id.* The goal is to preserve the child-parent relationship. *Id.* It can also be a way to keep litigation costs down because it prevents parents from having to relitigate the same issues and resolves new disputes faster. *Id.*

A coordinator might be appointed by the court in cases involving domestic partner violence, coercive control, or when parents have consistently failed to cooperate with existing plans and mediation has been unsuccessful. S.Ct. Rule 909(c). If a court finds a coordinator is in the best interests of the child, it will likely after the entry of a parenting plan appoint one to help facilitate implementation. *Id.* Their main role is to monitor, mediate, and make recommendations for executing the parenting plan without conflict. S.Ct. Rule 909(e). Once the coordinator is assigned, parents must comply with his or her recommendations unless the court deems the recommendations not to be in the children's best interests or to be outside the scope of the parenting coordinator's duties. S.Ct. Rule 909(d).

XI. [7.33] NEGOTIATIONS

The majority of dissolution of marriage actions are settled by negotiation. Managing client expectations is the key to successful negotiation. In many cases, initial client meetings reveal unrealistic expectations on the client's part. It is the obligation of the practitioner to educate the client concerning his or her expectations. To create a reality-based client, the practitioner needs to educate the client on the legal and practical variables. The final result will depend on the client's frame of reference, knowledge, and decision-making process.

The legal variables concern the application of the law to the facts. In most instances, the client is a layperson with little if any real knowledge of the law. The initial frame of reference may come from friends or family members who were involved in their own dissolutions. The client should understand that each case has unique facts and interplay among various issues. Dissolution of marriage cases should never be treated with a "cookie-cutter" approach. Early in the case, the practitioner should establish a professional relationship so that the practitioner's advice will supersede the experience of extraneous relations. A client who does not listen to his or her attorney's advice is usually a client who should be avoided. If something goes wrong, it will always be perceived to be the lawyer's fault.

The practitioner must advise the client that there are no guarantees regarding parental responsibilities, the extent of parenting time or visitation, removal, support, property classification, property valuation, property division, and attorneys' fees either in amount or contribution and the like. Promises or even qualified statements are best avoided. A seasoned practitioner can provide, at best, a wide range of possibilities in the initial period of representation. The process requires constant reevaluation of these ranges. Even on the eve of trial, if the case gets that far, few certainties exist, although the range of possibilities will become more defined. This needs to be explained and reinforced to the client. For example, a favorable ruling in a temporary hearing may create future expectations. The client needs to be advised that such "victory" can be elusive and lost in a final disposition.

Depending on the issues presented, the practitioner should explain the implications of the various statutes in detail. The client should understand that the court determinations are almost always discretionary and therefore inherently uncertain. As the case develops and information and positions become clearer, the practitioner and the client need to revisit how the law may or may not apply to these decisions.

The variables in negotiations typically include the clients themselves, their expectations and predispositions, the attorneys and their level of functioning and predispositions, the ultimate trier of fact and his or her predispositions, and finally the tolerance of the clients both financially and emotionally to engage in the process. When one or both spouses have unrealistic expectations, the process may be long and arduous. When one or both attorneys have a tendency to be obstreperous, the same result can occur. When one or both clients are either extremely confrontational and/or seek vindication, the case can be extremely litigious. When the clients cannot afford the litigation, the clients and the attorneys should explore more practical considerations.

The stage of the case in which the negotiations occur may determine how much the practitioner needs to educate and manage the client. In the early stages of the case, it is frequently impossible for the practitioner to predict and advise regarding the merits of a settlement. If the client wishes to settle without the benefit of adequate discovery, the pitfalls of such an approach must be emphasized, preferably in writing. In parental responsibilities cases, it is unknown how the parties will interact in the future. A quick settlement giving both parents decision-making or parental responsibilities could result in one of the parents creating a post-decree nightmare. From the financial side, information may be far from complete, and representations may not be well grounded in reality. In these situations, the practitioner needs to predicate any settlement on the client's desires as opposed to the practitioner's due diligence. In these early stages, some clients presume that the spouse is negotiating fairly and honestly. The practitioner should advise the client that the spouse's motives may be the opposite.

In the middle stages of the case when discovery is in process but not completed, the practitioner may have a better understanding of family dynamics and/or finances and be able to provide better guidance. The appropriate analysis is "risk versus reward." What are the risks of going forward (cost, the accelerated family dysfunction, etc.) compared to a range of results based on incomplete information? The client should be provided with ranges of results, with the clear understanding that these ranges are based on quasi-educated guesses.

Late in the case, possibly on the eve of trial, the ranges become better defined, and likely outcomes can be better predicted. The same risk-benefit analysis can be employed, and when the negotiations enter the probable range, settlement is advised to avoid uncertainty. The maxim in negotiation is client participation. Whatever the results are will have a direct impact on the client and his or her family for years. Client goal-setting is of maximum importance. This involves counseling the client on his or her priorities, which may change during the course of the process. As a client becomes more realistic in his or her expectations, participates in the discovery process, and learns of the court's recommendations, goals will change and hopefully be achieved.

The client should understand that in order to avoid litigation, there must be compromise during the negotiation process. It is a rare client who gets everything he or she wants. By establishing, refining, and prioritizing goals, the client is in a much better position to evaluate proposals and counterproposals.

XII. TRIAL

A. [7.34] Preparation

It is important to begin with the end in mind. Trial preparation should begin even before filing the first pleading in the case. To the extent possible, the issues should be identified in the first several meetings with the client and refined throughout the discovery process. Early on in the representation, the client should be instructed as to the relevancy of certain facts in order to alleviate too much information and minutia. Whether a party has been aggrieved a decade earlier or a parent has had an occasional lapse of judgment is not particularly relevant and should not be the focus of attention. The attorney should assist the client in focusing exclusively on those areas that dovetail with what the court is going to be asked to conclude.

B. [7.35] Direct Examination

Testifying effectively is not second nature to most people. Witness credibility depends as much on demeanor as on the content of the testimony. The practitioner should work with the client to develop a comfortable style and effective pace. In developing the testimony, important matters should be stressed in detail, while unimportant matters should get minimal focus. The practitioner and the client should determine in advance what the critical portion of the client's testimony is going to be, get to it quickly, and develop it. The client should be taught to elicit sensory images so that the judge can relive the important events through his or her imagination.

While it may be helpful to a client to have an outline of subject matters that will be addressed during direct examination, a list of questions and answers should not be provided. The scripted direct examination not only sounds rehearsed, but also can become chaotic when objections are lodged or the order of the questions changes. The direct examination should be practiced with the client so that the practitioner has prior knowledge of the client's answers on the stand. The goal is to avoid an unfocused client going off on a tangent.

The client should be instructed as to the dynamics of the process. As the examination evolves, the client could be faced with an unexpected question and should not try to anticipate what it is the practitioner is attempting to elicit. The client needs to be instructed that if he or she does not understand the question, he or she should so indicate even to his or her own attorney. If a document is being referred to that the client is uncertain of, he or she should request to review the document in order to refresh his or her recollection. A "scripted" client may find himself or herself lost. A prepared client will be able to move through the process with a certain degree of fluidity and cohesiveness so that his or her position is understood.

C. [7.36] Cross-Examination

What many practitioners frequently overlook is the demeanor of the client during the adverse and/or cross-examination of the client's spouse. Good judges not only listen to the client's testimony, but also evaluate the client's demeanor during the opposition's testimony. A client who is out of control, frequently scribbling messages and making faces, hand gestures, and the like, may lead to an adverse reaction by the judiciary. A client who is controlled and who is able to respond neutrally is preferred.

With respect to the client's cross-examination, in most instances more information is generally disfavored. To the extent a client can answer a question simply "yes" or "no," the client should be advised to do so. A client who rambles on to inject his or her thoughts or self-serving statements beyond the questions generally hurts his or her credibility. To the extent the client is required to make an unfavorable admission, it is much easier to make the admission and move forward, leaving the practitioner to rehabilitate the client on redirect. Fighting with the opposition normally results in negative consequences. Getting the client on and off the stand with limited damage as a result of limited testimony is normally prudent. Cross-examination is not the time for the client to feel he or she can destroy the opposition.

XIII. [7.37] CONCLUSION

A well-prepared client is, generally speaking, a good client. One of the best ways to achieve this goal is for the attorney to manage client expectations and for the client to actively participate in the process and understand the uncertainties he or she faces. A well-prepared client is easier to manage throughout the case and typically will be satisfied with the attorney despite the turmoil in the client's life. This satisfaction means future referrals; therefore, everyone wins.

Index

References in this index are to section number.