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Family Law

The newsletter of the Illinois State Bar Association's Section on Family Law

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Chair's column

BY HEATHER HURST

Happy Holidays. I cannot believe it... it is midyear already and the holidays are upon us. It seems like only yesterday that we started the bar year at the Annual Meeting, but we have just conducted our Midyear Meeting at the Palmer House Hilton in Chicago and the year is now half over.

I would like to report that in the past six months, your section council has worked very hard for you and is extremely passionate about the work that is being done and that still is yet to be done before the end of this year. Sometimes, conducting a meeting attended by as many as 50 gifted, quick, and clever family law attorneys (all with differing opinions) is a little bit like trying to herd cats or attempting to nail Jell-O to a tree, but I can say that despite the sometimes chaotic meetings, there is real and meaningful work being accomplished by this council.

In the next six months, we will be conducting several different CLE opportunities, including, the *Family Law*

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'Fee,' fie, foe … fee? Fee awards under 750 ILCS 5/508(a)

BY STEPHANIE CAPPS

Clients cannot sue their former attorneys for fees under 750 ILCS 5/508(a)(3), according to the second district.

In *In re Marriage of Kane*, an attorney who represented a husband in a dissolution of marriage action withdrew from the case, and filed a petition setting final fees and costs against his former client pursuant to 750 ILCS 5/508(c). The trial court awarded the attorney $12,500 in fees, as opposed to the $48,000 he was requesting, and the attorney appealed ("Kane Appeal I").

The main question in Kane Appeal I was whether the trial court abused its discretion in reducing the fees and awarding the former attorney $12,500. The appellate court affirmed the trial court's ruling.

The client then filed a petition for attorney fees in the trial court against his former attorney pursuant to 750 ILCS 5/508(a)(3). The client alleged that he incurred $11,640 in attorney's fees by having to retain another attorney to defend him under Kane Appeal I, and that his former attorney had the ability to pay those fees. The trial court held that the former attorney was indeed a party to the collection of funds.

The client then initiated discovery to prove his former attorney's ability to pay,

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Chair's column

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Update 2019: A French Quarter Festival in New Orleans on April 4th and 5th. Over the two day period there will be a variety of topics related to a broad range of issues in the area of family law, which will both educational and thought-provoking. The faculty is impressive and the topics are complex. It is always both an educational and entertaining experience! Registration is open to ISBA Members only and there are only 150 spots available. As of the last count, more than half the spots were taken, so get your registration in as soon as possible and we look forward to seeing you in New Orleans in April, 2019. Additionally, the council will be reviewing, revising and commenting on new proposed legislation which directly impacts the area of family law, as well as drafting our legislation when required.

As chair of the Family Law Section Council, I want to take this opportunity to wish everyone and their loved ones all the warmth and joy this holiday season has to offer. I look forward to continuing our hard work in the new year. ■

'Fee,' fie, foe … fee? Fee awards under 750 ILCS 5/508(a)

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and the former attorney requested to be held in friendly contempt for purposes of appealing the order, which the court allowed.

The main question in Kane appeal II was whether an attorney is a "party" for purposes of 508(a) fee petitions.

The appellate court reversed the discovery order and vacated the contempt. Kane Appeal II held that because the attorney was not a party to the underlying dissolution action, the former client had no right to seek fees from him under 750 ILCS 5/508(a).

How Does the Kane Appeal I Affect Family Law Practitioners?

First, this decision reminds us that the trial court may reduce fees for an attorney's failure to control the litigiousness of their client, which is sometimes easier said than done. The Domestic Relations Division is, rather unfortunately, the only division in Cook County with seemingly common-sense rules on civility, including litigiousness. The Circuit Court of Cook County Local Rule 13.11(a)(ii) states that, "A lawyer shall cooperate in all phases of litigation that are not contested, reserving debate only for contested issues, in order that cases may be expeditiously resolved without incurring unnecessary expenses." Rule 13.11(a)(v) states that, "A lawyer shall advocate the legitimate interests of his client but shall not exceed the bounds of zealous advocacy."

In Kane Appeal I, the trial court noted the absence of progress in the case even though the attorney billed his client over $85,000 in less than seven months. The records included time reviewing pleadings that were never filed, drafting motions that were never presented, billing over ten hours a day on several days for the case, and exchanging emails with the client almost every day, sometimes more than once a day. The trial court found that though the client was difficult, the attorney did nothing to control the litigation and in fact encouraged the client's behavior by aiding him in filing *pro se* petitions and allowing him to take unreasonable positions. As a result, the trial court reduced the fees to $12,500, and the appellate court affirmed.

In sum, in bringing a fee petition against

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a client, it is important to recognize that behavior deemed inappropriate found in billing entries may not only reduce a potential fee award but may negatively impact an attorney's reputation before the tribunal, among his fellow attorneys, and even worse, the public perception of attorneys which is a disservice to us all.

Another interesting aspect in Kane Appeal I is that the client filed *pro se* petitions while being represented by his attorney. The client filed a *pro se* emergency petition for an order of protection, which was granted, then later vacated, and a second *pro se* emergency petition for an order of protection three months later, which the court denied. The attorney's billing records acknowledged that he had billed the client for reviewing the *pro se* petitions. The client also filed *pro se* exhibits containing his wife's personal information, which caused her to file an emergency motion to impound the exhibits. The attorney's billing records reflected that he billed the client for preparing him for the hearing and testified that he was not available on the hearing date.

Though we can relate to being unavailable for a court date, is it not still the attorney of record's responsibility to make other arrangements for court coverage, rather than encouraging a client to attend a court appearance on a *pro se* basis? This assumption is supported by Cook County Local Rule 13.11(a)(vii), which states: "A lawyer shall be prepared for all court appearances, negotiations, and other incidents of litigation."

Furthermore, allowing or encouraging a represented client to file *pro se* petitions and appear *pro se* at a court hearing imposes an undue burden on the opposing counsel. Rule 4.2 of the Illinois Rules of Professional Responsibility states that a lawyer shall not communicate with a person the lawyer knows to be represented by another lawyer, "unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." If a represented client appears *pro se*, opposing counsel is put in an uncomfortable position and cannot respond or remedy the situation absent seeking authorization from the court or consent from the other attorney.

Should the trial court, or clerk's office, even allow represented clients to file *pro se* petitions? The Missouri Court Western District Special Rules specifically prohibits accepting *pro se* filings by represented parties. Rule 16(a) states, "In any case where a party is represented by counsel, the clerk shall not accept for filing any pro se briefs, pleadings or other papers..."

In sum, practitioners should inform their clients that *pro se* filings are unacceptable, without necessitating an additional rule reminding us of proper procedure.

How Does the Kane Appeal II Affect Family Law Practitioners?

The crux of the trial court's holding and the appellate court's reversal rested in part upon the definition, or lack thereof, of "party" and "opposing party." The trial court held that the former attorney was indeed a party, specifically stating, "[t]hrough [Canulli's] conduct of filing the petition [for final fees and costs], engaging in a day-long hearing, filing a notice of appeal, arguing the appeal and having [the circuit court] affirmed, [he] made [himself] a party to the collection of the funds."

The appellate court disagreed and acknowledged that while an attorney might be a party to the extent that he asserts a claim under section 508(c), the attorney is not an "opposing party" for purposes of contribution under section 508(a).

The Illinois Marriage and Dissolution of Marriage Act ("IMDMA") includes many definitions, yet notably absent is any definition of "party" or "opposing party." The IMDMA uses the phrases: any party, either party, neither party, both parties, and opposing party throughout its various provisions. The legal definition of party has been defined in the context of The Dead Man's Act as "one who has a right to control the proceedings, to pursue a defense, to call and cross-examine witnesses, and to appeal from the decision." This definition fits squarely under the trial court's interpretation of "party."

The appellate court, though, evaluated the factors used to determine the opposing party's ability to pay fees, including the duration of the marriage and the value of property assigned to each spouse. This analysis led the appellate court to find that such factors negate the inference that an attorney was meant to be included as an "opposing party".

In sum, while a spouse that brings an appeal may be responsible for paying fees to his or her former spouse under 508(a), an attorney that brings an appeal will not be responsible for those same fees. Is this equitable, or is this a legal loophole? Food for thought as we enter 2019. ■

1. *In re Marriage of Kane*, 2016 IL App (2d) 150774.
2. *In re Marriage of Kane*, 2018 IL App (2d) 180195 (10/31/2018).
3. *Cowell v. Auction Broadcasting Co*. (S.D. Ill., 2017); *Sakey v. Interstate Dispatch*, 90 N.E. 2d 265, 339 Ill. App. 420 (Ill. App. 1950).

Enforcement of prenuptial agreements following *Kranzler* and *Woodrum*

BY STEPHANIE L. TANG

Introduction

Television shows like *Silicon Valley* and *Shark Tank* have popularized the mainstream idea of a "start-up culture" in today's society. Although these shows often boast some colorful and exaggerated characters, the reality of a drastic uptick in start-ups in the past decade is undeniable. With this increase in start-ups has also come an increase in young professionals' desires to separate and protect their future earnings and property through prenuptial and postnuptial agreements. However, there is a common misconception that just because you enter into a prenuptial or postnuptial agreement, it is automatically enforceable in full in court upon initiation of a divorce proceeding. Two recent Illinois appellate cases, both decided in September 2018, help clarify the criteria courts will consider when determining enforceability of an agreement. This article will discuss them in turn, then provide some tips for practitioners following the guidance as set forth in these cases.

In re Marriage of Woodrum

The decision of *In re Marriage of Woodrum*, 2018 IL App (3d) 170369, thoroughly depicts the process through which a court considers enforceability of a premarital agreement. In this case, both parties executed a premarital agreement on June 13, 2007, and were subsequently married on July 29, 2007. Both parties were represented by counsel according to the agreement, though Wife testified at the enforcement hearing that she did not realize the attorney listed was her attorney, not her husband's. Both parties executed an asset disclosure, but Husband's disclosure failed to list a value of a residence and his business interests. Wife claimed that she never read the agreement prior to signing it, despite having entered into two marital settlement agreements in two previous divorces.

In determining if the agreement was enforceable, the court relied heavily on the plain language of 750 ILCS 10/7 of the Illinois Uniform Premarital Agreement Act. This provision provides that for an agreement to be unenforceable, the challenging party must prove they did not execute the agreement voluntarily, *or* the agreement was unconscionable when executed *and before execution*, that party 1) was not provided a *fair and reasonable* disclosure of assets/financial obligations of the other party; 2) did not execute a written waiver of the disclosure; *and* 3) did not have/reasonably could not have had an *adequate* knowledge of the property/financial obligations of the other party. (Emphasis added.) The court emphasized that "fair and reasonable" does not mean "full and complete" and therefore, just because a party may leave out the value of an asset or fail to disclose an asset, does not automatically mean the agreement is unenforceable. The court further found that Wife lived with Husband for six years prior to entering into the agreement and was familiar with his financial obligations and assets. Finally, the court found that Wife was represented by competent counsel and even if she claimed she never read the agreement prior to signing it, she had the opportunity to do so.

One additional issue that dealt not with enforceability of the agreement per se, but language of the agreement itself, was of whether temporary maintenance was properly awarded by the trial court despite a maintenance waiver by both parties in the agreement. However, in this case, the maintenance provision precluded maintenance "*upon divorce or dissolution of marriage*" without further carveouts for temporary maintenance, maintenance buyouts, or other types of maintenance. The appellate court affirmed the decision of the trial court and found that based on the plain language of the contract, the waiver of maintenance only applied upon entry of Judgment and did not preclude awards of temporary maintenance during the pending proceedings.

In re Marriage of Kranzler

In *In re Marriage of Kranzler*, 2018 IL App (1st) 171169, the First District Appellate Court considered both whether the agreement was unconscionable, as well as whether the trial court had subject matter jurisdiction over the case following Wife filing a motion for voluntary dismissal. In *Kranzler*, the parties were married on the same day they executed the agreement and Wife was pregnant at the time. However, the agreement was circulated for several weeks prior. Both parties were represented by counsel and the final agreement provided that Husband would leave Wife a certain percentage of his net estate depending on how long they were married, as well as an amount certain per month (increasing as they were married for longer). Wife subsequently filed for divorce in 2015 and Husband filed a motion for declaratory judgment. Subsequently, Wife filed a motion for voluntary dismissal of the divorce matter. The trial court found that despite Wife's motion, they still had subject matter jurisdiction over the matter and ultimately found the agreement was not unconscionable and the agreement was not void due to duress at time of execution.

In determining whether the court had subject matter jurisdiction over the case, the court turned to the plain language of 735 ILCS 5/2-701. Specifically, the court looked at whether there was an "actual controversy" and whether the entry of a declaratory judgment would terminate "some part of

that controversy." Assuming the request for declaratory relief meets these requirements, a declaratory judgment could survive as an independent action and could be entered even if a dissolution petition is not granted. The appellate court ultimately found that even though husband's motion for declaratory Judgment was not titled "counterclaim," that did not deprive the circuit court of subject matter jurisdiction.

In making her argument regarding duress of signing the agreement, Wife relied in part on the fact that she faced pressure from her father and her fiancé's father to enter the agreement. However, she did not make any contention that she felt any pressure from her fiancé himself. The court relied on prior case law to find that even if it was to consider threats from the fathers, "threats cannot constitute duress unless they are legally or morally wrong." The court ultimately found that Wife failed to present evidence that the fathers' attempts to convince their children to marry deprived her of her free will when signing the agreement.

Tips for Family Law Practitioners Following *Woodrum* and *Kranzler*

Woodrum and *Kranzler* both set forth specific criteria which a court looks at in terms of enforcing a prenuptial or postnuptial agreement. These criteria can help practitioners and judges in the future when looking at enforceability of an agreement. First, although a written disclosure is not required under the Illinois Uniform Premarital Agreement Act, all practitioners should advise their clients to complete one so it is clear to a court later on what disclosure was made, to help a court determine if there was a "fair and reasonable disclosure" made. Practitioners should also take the time to understand the length and nature of their client's relationship with their fiancé prior to entering into the agreement. As noted above, in *Woodrum*, even though there was no disclosure of the value of the marital residence made, the court found Wife had ample ability to understand the value given that she lived in the residence with Husband for six years prior to entering the agreement and was familiar with the surrounding area and comparable sales. Additionally, for said disclosure, practitioners should encourage a disclosure of income as well as assets, so a court can ascertain the parties' respective financial positions as of date of execution of the agreement. Finally, if a client insists that they do not want to execute a disclosure, encourage them to sign a written waiver of disclosure to memorialize their intent at the time of execution, despite an attorney's advice otherwise.

Next, attorneys should always maintain not only an original, executed copy of a prenuptial agreement, but also any and all notes and fee records related to discussion of the agreement with their client. In *Woodrum*, there was an argument raised by Wife to claim her attorney never reviewed the agreement with her or went over any of the provisions of the agreement. Wife's attorney was able to produce his prior records to indicate he did in fact spend several hours meeting with Wife to explain the agreement and testify as to his process when reviewing an agreement with a client.

As to protecting against an unconscionability argument, it is again important for an attorney to understand their client's knowledge of the other parties' assets and overall familiarity and comfort with the language in the agreement. In *Woodrum*, the court considered that Wife was sophisticated (as she used to be an insurance broker for complex policies) and had been divorced twice before and previously negotiated two marital settlement agreements. Similarly, in *Kranzler*, the court considered the circumstances surrounding the actual execution of the agreement, highlighting that Wife's attorney had proposed revisions to the agreement prior to the signing, indicating she was aware of the terms.

When arguing about the enforceability of an agreement, attorneys who are claiming an agreement is unconscionable or unfair based on failure to disclose certain assets should take affirmative steps to introduce evidence as to the current value of said assets. The *Woodrum* court found Wife failed to meet her burden to prove her Husband's disclosure was not fair or reasonable in part because she failed to introduce any evidence that the assets in question were worth anything presently or had any ascertainable future value.

Finally, based on the court's analysis of the maintenance waivers in *Woodrum*, it is important if your client's intent is to preclude all awards of maintenance, temporary or otherwise, to draft your language carefully to ensure it is clear to a court that all types of maintenance are waived by the parties, not just maintenance upon entry of a final judgment.

Conclusion

Family law practitioners helping individuals draft and negotiate prenuptial agreements must take care to caution their clients regarding enforceability criteria for their prenuptial agreements. Following the guidance set forth by the appellate courts in *Woodrum* and *Kranzler*, practitioners can provide more certainty as to these criteria and help safeguard against future enforceability issues. ■

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1. *In re Marriage of Best*, 228 Ill. 2d 107 (2008); *In re Marriage of Krol*, 2015 IL App (1st) 140976.
2. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002) (citing *Barnes v. Southern Railway Co.*, 116 Ill. 2d 236 (1987) ("The caption of a motion is not controlling; the character of the pleading is determined from its content, not its label").
3. *In re Marriage of Barnes*, 324 Ill. App. 3d 514, 519 (2001).