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Family Law

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

Chair column

BY MATTHEW A. KIRSH

I am writing this column while basking in the afterglow of the Cubs' Wild Card playoff victory. Anyone who has spent any amount of time with me knows that I have devoted way too much of my time rooting for a historically terrible baseball club. Today, though, I am pleased to be able to share my thoughts about how studying the 2015 Cubs can make us better lawyers. Let's take a look at the lineup.

Theo Epstein: Long range thinker. Believe in the plan. Have a goals and a game plan for every case.

Jake Arrieta: Steely-eyed confidence. A mastery of his craft achieved only after years of tireless work. Even with the goofy beard, the sight of him inflicts a feeling of hopelessness in his opponents. We should all strive to be like Jake.

Continued on next page

Recent Illinois cases regarding income and child support

BY EMILY A. ALEISA, STAFF ATTORNEY AND HON. TIMOTHY J. MCJOYNT, 18TH JUDICIAL CIRCUIT COURT

Over the past few years, Illinois courts have made several important decisions regarding the Illinois Marriage and Dissolution of Marriage Act (the Act), many of which offer guidance on calculating income and modifying child support obligations.

Calculating Income

Many recent decisions have created some new guidelines for calculating "income" under the Act. For example, the Illinois Supreme Court determined that money regularly withdrawn by a father from his savings account in order to support himself during unemployment was not "net income" for purposes of calculating his child support obligation. *In re Marriage of McGrath*, 2012 IL 112792, 970 N.E.2d 12. The court noted that the money already belonged to the account's owner, and withdrawing it did not represent a gain or benefit to the owner. Accordingly, the court concluded that money that a person withdraws from a savings account simply does not fit into any statutory definition for income.

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Kyle Schwarber: Just because the kid looks like a linebacker does not mean he can't hit like Babe Ruth. Never underestimate your opponent.

Starlin Castro: From rookie sensation to All Star to the bench to a resurrection as a second baseman. Starlin was down, but he never gave up. That kind of perseverance can win cases.

Kris Bryant: He is handsome. Being well-groomed and well-dressed is an important part of any lawyer's courtroom presence.

Pedro Strop: Straighten out the cap, for crying out loud. A little swagger never hurts, though, especially if you can back it up. An air of confidence can do wonders with your own client and opposing counsel.

Addison Russell: Nothing fancy. Solid fundamentals. Always prepared. If he was a lawyer he would know the rules of evidence and always be up on the latest case law.

Anthony Rizzo: A professional's professional. Respects the game and the people that play the game. Lawyers need to treat each other respectfully and respect the court.

Jon Lester: Experience. There is no substitute.

Fernando Rodney: He . . . Never mind. I can only take this thing so far.

I am going to take a little time off from the busy practice of law and watch some baseball. I hope you do, too. Go Cubs! ■

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Along the same lines, the Second District determined that a discretionary work-performance bonus is not considered income under the Act until it is received. *In re Marriage of Shores*, 2014 IL App (2d) 130151, 11 N.E.3d 35. The court in *Shores* found that when a parent does not have a contractual right to the bonus, it doesn't matter when the bonus is *earned*, but when it is *received*. Until it is received, the bonus is merely speculative and cannot be considered in calculating income under the Act.

Similarly, money received by an ex-husband from the post-marriage dissolution sale of certain shares of stock that the ex-husband owned prior to the dissolution did not constitute income for purposes of child support calculation. *In re Marriage of Marsh*, 2013 IL App (2d) 130423, 3 N.E.3d 389. In that case, the ex-husband did not realize any gain or profit by simply converting stock to cash, and the ex-husband in fact sold stock at a loss.

On the other hand, the Illinois Supreme Court found that an ex-husband's lump-sum workers' compensation settlement *was* income for child support purposes. *Mayfield v. Mayfield*, 2013 IL 114655, 989 N.E.2d 601. The ex-husband argued that contributions from his lump-sum, lifetime award should be prorated according to number of years his child would be a minor. However, the court found that the ex-wife was entitled to the standard statutory contribution from the entire lump sum unless the ex-husband presented evidence to support a deviation, which he failed to do.

The First District approached a similar question the same way in *In re Marriage of Pratt*, 2014 IL App (1st) 130465, ¶ 5, 17 N.E.3d 678, 681. In that case, the court allowed the use of dividend income when determining a former husband's income for child support purposes. The appellate court held that the trial court set the child support obligation pursuant to the child support guidelines, which were presumed to be correct. If the former husband sought a deviation, he was required to request it, which he did not do. Moreover, the provision in the parties' marital settlement agreement which provided that "all restricted stock and stock options awarded to [former husband] or [former wife] as an award of his/her share of the marital estate shall not be deemed income for child support purposes," was against public policy and was void.

The Second District also recently clarified that a parent may deduct health insurance premiums for dependents without regard to whether the premium increased for adding the child to the plan. *In re Aaliyah L.H.*, 2013 IL App (2d) 120414, ¶ 16, 1 N.E.3d 80, 83. In *Aaliyah*, the court noted that the Act does not indicate that the deduction can be taken *only if* the premium increases for adding the child at issue to the plan. Rather, a parent is statutorily entitled to deduct health insurance premiums from gross income for purposes of calculating his child support obligation, even when he incurs no additional cost in adding the subject child.

In 2012, the Third District addressed unallocated support obligations in *In re Marriage of Kincaid*, 2012 IL App (3d) 110511, ¶ 26, 972 N.E.2d 1218, 1223. The appellate court noted that "unallocated support" is considered maintenance for federal income tax purposes. In reality, however, unallocated support is maintenance *and* child support. Therefore, trial courts are required to consider a parent's net income before increasing his unallocated support obligation.

As matter of first impression, the First District found that the trial court properly determined that an ex-husband's proportionate share of the retained earnings from his majority-owned subchapter S corporation should not be imputed to him for purposes of calculating his support obligation in child support modification case. *In re Marriage of Moorthy & Arjuna*, 2015 IL App (1st) 132077, 29 N.E.3d 604. The court emphasized that the ex-husband owed a duty to the company and the minority shareholder before paying himself dividends, and there was no evidence he was manipulating his income to avoid his support obligations.

Finally, in *In re M.M*, the Second District acknowledged that trial courts may consider a new spouse's income for the purposes of awarding child support. 2015 IL App (2d) 140772, 29 N.E.3d 1197. However, a new spouse's income is only one factor in considering a parent's financial status. In that case, it was improper to impute the new spouse's income to the mother for the purpose of allocating educational expenses where she did not have a joint account with her new spouse or access to any of his accounts.

Evaluating Child Support Obligations

In recent years, Illinois courts have also handed down notable decisions regarding modifications to child support obligations. First, in *In re Marriage of Razzano*, the Third District held that the language of the parties' settlement agreement dictated whether the court should use child support guidelines or education expenses guidelines in considering a modification. 2012 IL App (3d) 110608, 980 N.E.2d 206. In that case, even though the requested modification related to the child's post-secondary education, the settlement agreement evinced the parties' intent to satisfy all education expense obligations in the context of ex-husband's *child support payment*. Therefore, the court applied the statutory guidelines regarding child support obligations, rather than guidelines for secondary education expenses.

In the same vein, in *In re Marriage of Koenig*, the Second District noted that where the parties' settlement agreement affirmatively assigned responsibility to both parents for college and postgraduate expenses, any order regarding contribution under the agreement would not "adjust, change or alter" the obligation as set forth in the settlement agreement's plain language. 2012 IL App (2d) 110503, ¶ 17, 969 N.E.2d 462, 467.

Additionally, the Third District also examined a case involving a parent's duty to demonstrate a substantial change when asking to modify child support. *In re Marriage of Saracco*, 2014 IL App (3d) 130741, ¶ 20, 22 N.E.3d 489, 495. The court found that a mother's strained relationship with her son, his performance in college, and his decision not to get a job while still a student did not constitute a substantial change in circumstances such to modify the mother's obligation to help pay for college expenses.

Finally, the Illinois Supreme Court handed down a reminder that courts may

order custodial parents to pay child support to noncustodial parents where circumstances and the best interest of the child warrant it. *In re Marriage of Turk*, 2014 IL 116730, 12 N.E.3d 40. The court noted that statutory provisions directed solely to noncustodial parents simply address the heightened difficulties in insuring that noncustodial parents fulfill their child support obligations, and in no way suggest that the obligation to pay child support may never be extended to custodial parents. ■

The times they are a changin': The new IMDMA and Parentage Acts

BY RORY T. WEILER

In July, 2015, the legal landscape for Family Law Practitioners in Illinois changed dramatically when Governor Bruce Rauner signed into law Public Act 99-0085, the Illinois Parentage Act of 2015, and Public Act 99-0090, a major rewrite of the Illinois Marriage and Dissolution of Marriage Act. Both these acts take effect on January 1, 2016, and each, in its own way, constitutes the most significant piece of family law legislation in decades.

In fact, for most family law practitioners today, they weren't even practicing law when the IMDMA first took effect on October 1, 1977. Indeed, many of our younger colleagues weren't even born, when this change to the way divorces were handled came into being. Similarly, the Illinois Parentage Act of 1984, a sea change in the then existing law when adopted, has been in effect for decades without significant change.

Both Acts contain sweeping changes in substantive law, and also in the procedural practices for those of us dealing with families in distress. Both Acts share a common goal of shifting the focus of litigation involving children to the children themselves, a controversial, if not unique approach that is only now gaining momentum across the country. The final products were the work of countless volunteer hours freely and generously given by Family Law Practitioners across the state, and the advice and counsel of numerous representatives from organizations representing non-legal disciplines. In a true example of Tacitus' oft paraphrased quote from 98 AD, these success of these pieces of legislation had many parents.

This article will focus particularly on alerting practitioners to some of the the changes to the IMDMA that are going to dramatically change the landscape of the divorce practice. The actual changes themselves are too numerous to cover in a single article, and in fact, the legislation itself consists of approximately 200 pages of revisions, some major, some minor and nuanced. There is literally no substitute for sitting down with the entire Act, and referring to it repeatedly as it takes effect, for nearly every aspect of the day to day divorce practice is affected.

So how did we get here? The process commenced back in May of 2008, when the Illinois House adopted House Resolution 1101, which acknowledged the need for a major review/revision of the IMDMA, since it had been thirty years since its adoption back in 1977. The House resolution recognized the significant societal and cultural changes that had occurred in 30 years, and the fact that the legislature itself had implemented numerous changes to the IMDMA over that thirty year period without any overall statutory scheme to doing so.

HR 1101 created the "Family Law Study Committee," with 12 original members, and to which body numerous additional individuals were added to gain input and insight from various disciplines and interest groups. The Committee was originally intended to present its' report to the House in December of 2008, but ultimately was extended until it finally delivered a proposed bill in May of 2012. That bill became HB 1452, and it would have several incarnations and take literally another three years of work by former FLSC members, *ad hoc* committees from the Illinois State and Chicago Bar Associations, and other groups before becoming law.

Any article describing the legislative process for what ultimately became known as SB 57, passing both houses of the Illinois legislature in May of 2015, would be remiss if the considerable efforts of the two legislative sponsors, Representative Kelly Burke and Senator John Mulroe were not mentioned. Rep. Burke and Sen. Mulroe worked tirelessly with numerous individuals and groups to assemble a bill that could withstand the scrutiny and criticism a project of this magnitude garners. Without their considerable individual efforts, PA 99-0090 would not exist. Additional credit is due Jim Covington and Larry Suffredin, the legislative liaisons for the ISBA and

Chicago Bar Association who also worked long and hard to obtain a successful legislative result.

What has been achieved? The most notable aspect of final result, in the author's estimation, is the culmination of an over ten year process to completely revise and revamp how children involved in a legal dispute between their parents are treated. The new IMDMA has a "child centric" approach to parenting rights and responsibilities that has been long overdue. Gone now, forever, are the terms custody and visitation, archaic and often pejorative descriptions that tended to have parents focusing on themselves and their own wants and desires instead of their children's needs and best interests.

Section 600 of the IMDMA has been completely revised to reflect an "allocation" of parental rights and responsibilities that the parties are required to focus on. New Section 602.10 requires the parties to an action to file a parenting plan with the Court, either jointly or individually if they cannot agree, within 120 days of the filing of the action. This time period can be extended by the Court for "good cause shown," but the clear mandate of the law is to put the burden on the parties, and by extension, their attorneys, to focus immediately on resolution of the issues relating to the children.

In addition to the many new factors that are to be considered in developing a parenting plan for filing, Section 600 (g) defines the new concept of "relocation," which takes the place of removal. Relocation is defined differently for those living in Cook, DuPage, Kane, Lake, McHenry and Will counties than it is for those in the rest of the state. Generally, speaking, "relocation" means any move within the State more than 25 miles away from the child's current residence in those counties, or to a location within the State more than 50 miles from the child's residence in the rest of the State. Both provisions are subject to a new provision that provides that a relocation outside of the State within 25 miles of the child's existing residence is authorized.

Many new, and some old, sections of the IMDMA can be found in the new Act, and a thorough reading of all of the provisions, including the 15 factors that Section 610.2 requires to be incorporated or contemplated by every parenting plan is a must for all Family Lawyers. There is no doubt that this piece of legislation is going to create an entirely new approach to dealing with children in Family Law litigation, and an entire article or articles can, and probably will be published on this particular topic alone.

That, however, is not the purpose of this Article. Although the most significant change to the Family Law Practice is the new Section 600 provisions, there are many more changes coming starting with the elimination, effective January 1, 2016 of all so-called "heart balm" actions. Actions for Alienation of Affections, Breach of Promise to Marry, and Criminal Conversation based upon acts occurring after January 1, 2016 are all abolished.

Grounds for dissolution, as such, are also eliminated effective January 1, 2016. The new Act retains as the only basis for dissolution that irreconcilable differences have caused the irretrievable breakdown of the marriage, and that past attempts at reconciliation have failed and future attempts at reconciliation would be impracticable and not in the best interest of the family. It also provides that if the parties have lived separate and apart for a continuous period in excess of six months prior to the entry of a judgment for dissolution, an *irrebutable* presumption that the requirement of irreconcilable differences has been met. Grounds, as an issue, are effectively, if not entirely eliminated.

Many procedural changes have been implemented by the new Act concerning venue, pleadings and the type and manner of temporary relief that can be obtained. In matters related to actions for Legal Separation, significant changes to the availability of previously authorized temporary relief are made. The conduct of hearings under Section 501 is also significantly modified, and a provision to mandate the use of a new state wide comprehensive financial statements is included. New Section 501 effectively renders all temporary support hearings summary in nature, as interim fee petitions are now considered. Since temporary relief is a significant issue in almost every divorce case, a careful reading of the changes made is necessary.

Probably one of the more popular changes made from a practitioner's viewpoint was to Section 413(a). It now requires the Court to enter a Judgment for Dissolution, Legal Separation or Declaration of Invalidity "within 60 days of the closing of proofs." The section also provides that the Court can extend entry of Judgment for an additional thirty days if the Court enters and order specifying "good cause as to why the Court needs an additional thirty days," for entry. This latter provision requires that the 90 day total period is to include a hearing on any request for contribution to fees made pursuant to Section 503(j). Sadly, there are no consequences if the Court doesn't follow the statutory mandate, but nevertheless, the requirement is there.

Recently, the advent of the statutory maintenance guidelines created a great deal of confusion as to which actions the maintenance guidelines actually applied. Much to the chagrin of many, the new Act leaves the maintenance guidelines intact and in full force and effect. Section 801 of the new Act sets forth with some well received specificity the actions to which the new Act will provide. Section 801(a) of the new Act states it will apply to all actions commenced after its effective date (January 1, 2016), and Section 801(b) applies the new Act to actions pending on or after January 1, 2016 in which a judgment has not yet been entered. Section 801(c) establishes that the new Act will apply to all actions for modification commenced on or after the effective date.

As noted above, this legislation is the most sweeping change to the divorce practice in nearly 40 years. The savvy practitioner will get out in front of the changes by reading the new Act thoroughly, and attending one or more of the many seminars analyzing and dissecting the new Act already being offered throughout the state. As Grace Slick famously noted: "It's a new dawn." ■

Upcoming CLE programs

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November

Tuesday, 11/03/15- Teleseminar— Indemnification & Hold Harmless Agreements in Business & Real Estate.

Wednesday, 11/04/15- Teleseminar—Estate & Income Tax Planning Issues in Divorce.

Thursday, 11/05/15- ISBA Regional Office—Hot Topics in Criminal Law in Illinois- 2015. Presented by the ISBA Criminal Justice Section Council. 9:00 am-5:00 pm.

Thursday, 11/05/15- Teleseminar—2015 Religion in the Workplace: Discrimination & Accommodation Update.

Friday, 11/06/15- Teleseminar—Ethics & Tribunals: Communicating With the Courts & Government Agencies.

Tuesday, 11/10/15- Teleseminar— Advanced Planning for Like-Kind Exchanges of Real Estate, Part 1.

Wednesday, 11/11/15- Teleseminar— Advanced Planning for Like-Kind Exchanges of Real Estate, Part 2.

Tuesday, 11/10/15- Webinar— Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1-2.

Thursday, 11/12/15- Webinar— Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1-2.

Thursday, 11/12/15- Teleseminar— Settlement Agreements in Estate & Probate Disputes.

Friday, 11/13/2015- CRO—Preparation and Trial of Cases Involving Governmental Entities, Medical Malpractice, Construction and Transportation Accidents [working title]. Presented by the ISBA Civil Practice Section Council. 8:50 am - 1:15 pm.

Tuesday, 11/17/15- Teleseminar—Role of Trust Protectors & Trust Advisers in Estate Planning.

Wednesday, 11/18/15- Webinar— Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1-2.

Wednesday, 11/18/15- Teleseminar— Choice of Entity for Nonprofits & Obtaining Tax Exempt Status

Wednesday, 11/18/15- CRO, STUDIO WEBCAST—Mediation: Different Tribunals—Different Challenges. Presented by the Labor and Employment Section Council. 2:00-4:00 pm.

Thursday, 11/19/15- Teleseminar— Preferred Returns, Preferences & Anti-Dilution Mechanisms in Business & Real Estate.

Friday, 11/20/15- Teleseminar—Ethics, Remote Networks, the Cloud, Smartphones & Working from Anywhere

Friday, 11/20—Lindner Conference Center, Lombard, IL—Real Estate Law Update- 2015. Presented by the ISBA Real Estate Law Section Council. 8:30 am – 4:30 pm.

December

Tuesday, 12/01/15- Teleseminar—Ethics in Claims and Settlements.

Wednesday, 12/02/15- Teleseminar— Drafting Trust Distribution Clauses: Health, Education & Maintenance.

Thursday, 12/03/15- Teleseminar—Tax Traps in Business Formations.

Friday, 12/04/15- CRO and LIVE WEBCAST (am, pm, or full day webcast sessions). Get Ready—It's Coming: Major Changes to Family Law Effective January 1, 2016. Presented by the ISBA Family Law Section Council. 8:15-5:15 pm (am webcast 8:15-1:00; pm webcast 1:45-5:15). ■

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