FAMILY LAW

ILLINOIS STATE BAR ASSOCIATION®

FAMILY LAW TOOLKIT 2023 EDITION

Presented by the Illinois State Bar Association Family Law Section Council



CONTRIBUTORS

Margaret Bennett
Hon. Arnold Blockman (ret.)
Nancy Chausow Shafer
Lisa Nyuli
Jessica Patchik
David Schaffer
Stephanie Tang
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Relevant Statutes and Supreme Court Rules Regarding Parenting Time and Responsibilities

By Lisa Nyuli

Allocation of parental responsibilities—decision making (750 ILCS 5/602.5)

Four major areas:

- Education—including choice of schools and tutors;
- Health—including decisions relating to medical, dental, and psychological needs and treatment;
- Religion; and
- Extracurricular activities.

Court to consider:

1. The wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to decision-making;
2. The child's adjustment to his or her home, school, and community;
3. The mental and physical health of all individuals involved;
4. The ability of the parents to cooperate to make decisions, or the level of conflict between the parties that may affect their ability to share decision making;
5. The level of each parent's participation in past significant decision-making with respect to the child;
6. Any prior agreement or course of conduct between the parents relating to decision-making with respect to the child;
7. The wishes of the parents;
8. The child's needs;
9. The distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangement;
10. Whether a restriction on decision-making is appropriate under section 603.10;
11. The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;
12. The physical violence or threat of physical violence by the child's parent directed against the child;
13. The occurrence of abuse against the child or other member of the child's household;
14. Whether one of the parents is a sex offender, and if so, the exact nature of the offense and what, if any, treatment in which the parent has successfully participated; and
15. Any other factor that the court expressly finds to be relevant.

Allocation of parental responsibilities—parenting time (750 ILCS 5/602.7)

Unless parties agree in writing and plan approved by court, court shall allocate parenting time for both parents. Court to consider:

1. The wishes of each parent seeking parenting time;
2. The wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to parenting time;
3. The amount of time each parent spent performing caretaking functions with respect to the child in the 24 months preceding the filing of any petition for allocation of parental responsibilities or, if the child is under two years of age, since the child's birth;
4. Any prior agreement or course of conduct between the parents relating to caretaking functions with respect to the child;
5. The interaction and interrelationship of the child with his or her parents and siblings and with any other person who may significantly affect the child's best interests;
6. The child's adjustment to his or her home, school, and community;
7. The mental and physical health of all individuals involved;
8. The child's needs;
9. The distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangement;
10. Whether a restriction on parenting time is appropriate;
11. The physical violence or threat of physical violence by the child's parent directed against the child or other member of the child's household;
12. The willingness and ability of each parent to place the needs of the child ahead of his or her own needs;
13. The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;
14. The occurrence of abuse against the child or other member of the child's household;

15. Whether one of the parents is a convicted sex offender or lives with a convicted sex offender and, if so, the exact nature of the offense and what if any treatment the offender has successfully participated in; the parties are entitled to a hearing on the issues raised in this paragraph (15);
16. 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 united states armed forces who is being deployed; and
17. Any other factor that the court expressly finds to be relevant.

750 ILCS 5/506(a)

1. Attorney for child:
   - Same duties as any attorney/client relationship;
   - Has confidential relationship with child;
   - Cannot testify;
   - Can file pleadings, investigate; and
   - Can call witnesses and offer argument at trial.

2. Guardian *ad litem* (GAL):
   - **Shall** investigate the facts of the case and interview the child and the parties;
   - **Shall** testify or submit a written report to the court regarding recommendations in accordance with the best interest of the child; and
   - **May** be call as a witness for purposes of cross examination regarding the report or recommendations.

3. Child representative:
   - **Shall** meet with the child and the parties and investigate the facts of the case;
   - **Shall** possess all the powers of investigation as does a gal;
   - **Shall** advocate what the child representative finds to be in the best interests of the child after reviewing the facts and circumstances of the case;
   - **Shall** consider, but not be bound by the expressed wishes of the child;
   - **Shall** have the same authority and obligation to participate in the litigation as does an attorney for a party;
   - **Shall not** render an opinion, recommendation or report to the court;
   - **Shall not** be called as a witness;
   - **Shall** offer evidence-based legal arguments; and
   - **Shall not** disclose confidential communications made by the child.

Supreme Court Rule 907(c). As soon as practicable, **shall** interview the child, or if the child is too young to be interviewed, observe the child; and **shall** take whatever reasonable steps are necessary to obtain all the information pertaining to issues affecting the child.

Supreme Court Rule 907(b). Shall have the right to interview his or her client without any limitation or impediment. Upon appointment, **the trial court shall** enter an order to allow access to the child, and all relevant documents

Supreme Court Rule 907(d). Shall make appropriate recommendations to the parties in order to serve the best interests of the child. **Shall** determine whether a settlement of the custody/allocation dispute can be achieved by agreement and shall attempt to resolve the disputes by an agreement to the extent feasible.



Distinction between the child representative and the guardian *ad litem*

As a child representative:

- You have a **CONFIDENTIAL RELATIONSHIP** with your client.
- You are to evaluate facts and the circumstances of the case and you are to advocate for the "best interests" of the child:
  - The wishes of the child may not coincide with the best interests of the child [NOTE: You may state the wishes of the child but you are not bound to them].
- You are to investigate the facts: Conduct interviews of collaterals.
- You are not to be called as a witness. **You cannot testify.**
- You do not file a written report.
- You do participate in pretrial conferences/settlement conferences, advocating for what you consider to be in the child's best interests.
- You are to encourage settlement. You are charged with the obligation of promoting resolution.
- You are an attorney who may file pleadings, issues subpoenas and cross-examine witnesses.

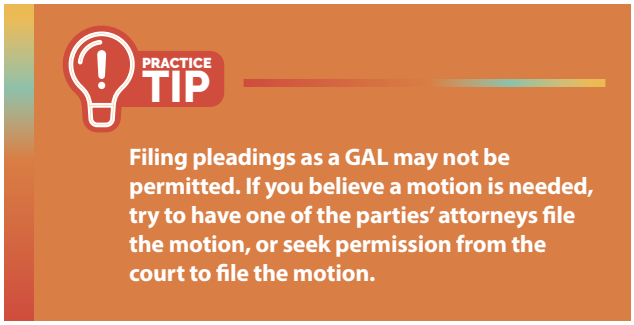
As guardian *ad litem*:

- You are charged with interviewing and observing the child.
- Communications with the child are **NOT CONFIDENTIAL.**
- You are to investigate the facts: Conduct interviews of collaterals.
- You owe your primary duty to the court and not the child as you are a witness to the court.
- You are reporting on the statements given by the

child, the information or statements of collaterals gathered during your investigation, your review of reports or records, and, if charged by the court, making a recommendation as to your opinion as to the best interests of the child.
- You may be called to testify at trial as a witness or you are to file a report.

Duties of both GAL and child representative

- Interview the child and the parties.
- Investigate the facts by interviewing collaterals, including family members, teachers, child care providers, other relevant parties.
- Obtain necessary documents as needed, including school reports, information regarding any medical needs of the child, any special circumstances of the child.
- Consider, but not be bound by, the wishes of the child.
- Attempt to have the parties reach agreement as to the parenting disputes.
- Make appropriate recommendations to the parties to encourage/facilitate agreement.

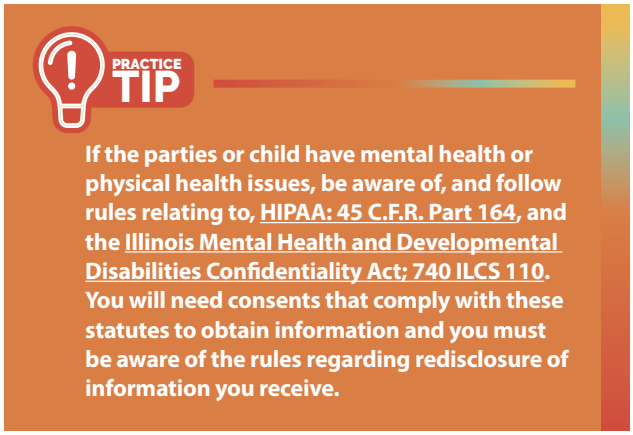


Interviewing the child

Initially explain confidentiality as child representative or no confidentiality if GAL.

When talking to the child:

- Avoid direct questioning.
- Have child describe interests.
- Talk about friends and school—grades and favorite subjects.
- Have the child describe each parent's home and who resides there.
- Who does the cooking, homework, cares when sick.
- Have the child describe family members.
- Ask the child what they enjoy with each parent, or to describe things each parent does well.
- Find out if there are things that scare the child and ask why.
- Ask the child what they would change in the current circumstances and why.
- Recognize the limitations of the child's memory.
- If there are specific allegations of things the child did, or saw, discuss them, and recognize the limits of the child's memory.



Ethical rules for a child representative, GAL and attorney for the child

- Supreme Court Rule 907 provides that all ethical rules governing attorneys in professional practice apply.
- Watch for conflicts of interest—cannot act as mediator and GAL/attorney for child/child representative.
- See *IRMO Petrik*, 973 N.E.2d 474 (2d Dist. 2012).

Guardian *ad litem*/child's representative fees

1) Statutory Authority (750 ILCS 5/506(b))
    a. Retainer
    b. Costs, fees, and disbursements
2) Procedural Requirements
    a. Every 90 days file detailed invoice with the Court + copies to parties
    b. Court to review and approve fees
        i. Must be reasonable and necessary;
        ii. Order approving shall require payment;
        iii. Sources of payment;
        iv. Not following procedure is not fatal, but a factor for the court to consider in approving fees. See *In re Tumminaro*, 2013 IL App (2d) 120287.
3) Sections 501 and 508 of Illinois Marriage and Dissolution of Marriage Act apply to fees and costs for attorneys appointed under section 506
    a. Court to consider (*In re Marriage of Soraparu*, 147 Ill. App. 3d 857, 864 (1986)):
        i. Difficulty of questions raised;
        ii. The degree of responsibility involve from a management perspective;
        iii. Time and labor required;
        iv. What is usual and customary charge in the community? (Does your court encourage/require reduced hourly rate?)

v. Does your court require pro bono GAL service?

b. Court to also consider (*McClelland v. McClelland*, 231 Ill. App. 3d 214, 228 (1992)):
   i. Parties' financial resources;
   ii. Relative ability to pay.

c. Court may also consider (*Gibson v. Barton*, 118 Ill. App. 3d 576, 583 (1983)):
   i. Which party necessitated the appointment?
   ii. And make that party bear the greater part, if not all, of the GAL's expenses.

4) GAL & child rep fees are nondischargeable in bankruptcy (section 523(a)(5) of the Bankruptcy Code).
   a. "Debts owed to a guardian *ad litem* in a child custody proceedings (sic) can be said to relate just as directly to the support of the child as attorney's fees incurred by the parents in a child custody proceeding" *In re Ramirez*, 2000 WL 356314 (Bankr. N.D. Ill. 2000);
   b. "[S]upport is more than paying a child's bills and also encompasses the issue of custody." *Kecinska v. Wypych*, 2016 IL App (1st) 153667-U;
   c. The automatic stay does apply—cannot collect while bankruptcy is ongoing.

Parenting plan (750 ILCS 5/602.10)

1. Within 120 days of service or filing of any petition for allocation of parenting time or responsibilities, parties must file a written plan either jointly or separately.
2. If parties cannot agree on a parenting plan or need assistance formulating or modifying a parenting plan, the court to order mediation for the parties.
3. Parenting plan **MUST BE**:
   a. in writing and
   b. signed by both parents.
   c. Parenting plan **SHALL CONTAIN**:
      i. Allocation of significant decision-making responsibilities.
      ii. Provisions for living arrangements for the child and each parent's parenting time.
      iii. A mediation provision unless one parenting has all significant decision-making responsibility.
      iv. Each parent's right to access all records relating to the child: school, medical, dental, mental health, extracurriculars, schedules.
      v. A designation of parenting with **majority of parenting time** for purposes of section 606.10—other state and federal statutes that require a designation of "custody" or a "custodian." Designation does not affect parenting rights and responsibilities under the parenting plan. For purposes of the School Cody only, parent with the majority of parenting time is considered to have "legal custody."
      vi. Child's residential address for school enrollment purposes only.
      vii. Each parent's residential address, phone number, place of employment, employment address, and employment phone number.
      viii. Provisions requiring 60 day notice if parent changing residential address.
      ix. Provisions requiring parenting to notify the other of emergencies, health care, travel plans, or significant child-related issues.
      x. Transportation arrangements.
      xi. Communication arrangements.
      xii. Provisions in case of relocation of a parent.
      xiii. Provisions for modification of the parenting plan.
      xiv. Provisions for the exercise of the right of first refusal. **NOTE**: The court can determine whether to award either parent the right of first refusal under section 602.3.

Restrictions of parenting responsibilities (750 ILCS 5/603.10)

1. Court must find a parent engaged in conduct that:
   a. Seriously endangered the child's mental, moral, or physical health; or
   b. Significantly impaired the child's emotional development,
   c. By a preponderance of the evidence,
   d. After a hearing.
2. Restrictions include:
   a. Reduction, elimination or other adjustment of parent's decision-making or parenting time;
   b. Supervision;
   c. Requiring exchange of child through an intermediary or in a protected setting;
   d. Restraining a parent's communication with the child;
   e. Requiring a parent to abstain from possessing or consuming alcohol or non-prescribed drugs while exercising parenting time and within a specified time period before parenting time;
   f. Restricting the presence of specific persons during parenting time;
   g. Requiring a parent to complete a treatment program for perpetrators of abuse, for drug or alcohol abuse or other behavior;

Modification of parenting responsibilities (750 ILCS 5/610.5)

1. No motion to modify an order allocating decision-making responsibilities, not including parenting time, may be made earlier than 2 years after its date, unless:
   a. Court permits;
   b. Based on affidavits that there is reason to believe the child's present environment may seriously endanger the child's mental, moral, or physical health or significantly impair the child's emotional development.
2. Parenting time may be modified at any time upon a showing of changed circumstances that necessitate modification for the best interests of the child. No serious endangerment needed.
3. Court must find substantial change in circumstances by a preponderance of the evidence.

Resources for lawyers and parents

For communication. talkingparents.com. This app provides free messaging between parents and keeps track of the time and date of the messages. If parents want a transcript of the communication, there is a fee.

For messaging, keeping a joint calendar, keeping an expense log and a mobile app. ourfamilywizard.com. For an annual fee (currently $110 per parent), OFW keeps track of messages, calendars, expenses, payments, and creates reports for parents, lawyers, judges and GALs. No additional fee to obtain transcripts or reports.

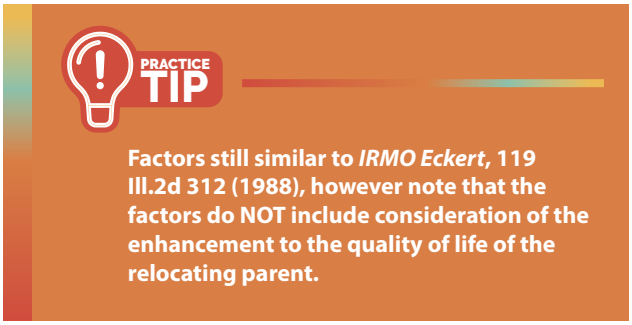
For creating a calendar. custodyxchange.com. For a monthly or annual fee, parents or attorneys can create visual parenting schedules on a calendar, prepare graphs and use the site to help create different possible scenarios.

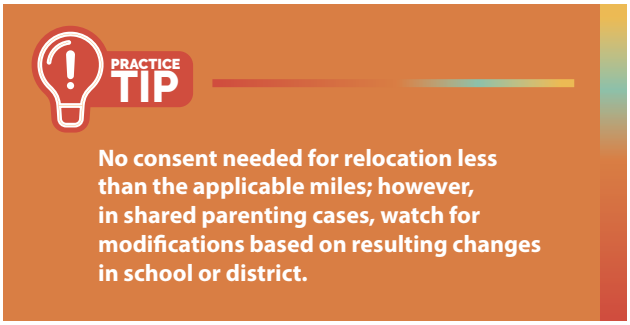
Relocation (750 ILCS 5/609.2)

1. This Section is applicable when a parent who has been allocated a majority of parenting time, or either parent who has been allocated equal parenting time seeks to relocate with a child.
2. "Relocation" is defined in Section 600(g) as: A change in residence from the child's current primary residence to a new residence:
   a. If currently in Cook, DuPage, Kane, Lake, McHenry, or Will County, to a new residence more than 25 miles from the current residence;
   b. If currently in any other country not listed above, to a new residence more than 50 miles from the current residence; or
   c. If currently in any county in Illinois, to a residence outside of the borders of the State of Illinois that is more than 25 miles from the current residence. Any subsequent move from the new primary residence outside of Illinois greater than 25 miles from the child's original primary residence must be in compliance with this Section.
3. Distance is measured by an "internet mapping service."
4. A parent intending relocation must provide a written notice to the other parent and file it with the clerk of the circuit court
5. Notice of Relocation must:
   a. Be in writing;
   b. Give at least 60 days before the relocation unless notice is impracticable, then at the earliest possible date;
   c. Must have the intended date of relocation;
   d. Must have the address of the parent's new address, if known; and
   e. Must have the length of the relocation if not indefinite or permanent.
6. If nonrelocating parent signs the notice and the relocating parent files the signed notice with the court, relocation is permitted without further court action.
7. If agreed upon relocation, the court shall modify the parenting plan to accommodate the relocation, if modification is in the child's best interests.
8. If the nonrelocating parenting objects to the relocation, fails to sign the notice or parents cannot agree on a modification of the parenting plan, the relocating parent must file a petition with the court seeking permission to relocate.
9. When a petition to relocate is filed, the court shall modify the parenting time in accordance with the child's best interests. Factors to be considered are:
   a. the circumstances and reasons for the intended move;
   b. the reasons, if any, why a parent is objecting to the relocation;
   c. the history and quality of each parent's relationship with the child, including whether a parent has substantially failed or refused to exercise the parenting responsibilities allocated to that parent under the parenting plan;
   d. The educational opportunities for the child at the current and new locations;

e. The presence or absence of extended family at the current and new locations;
f. The anticipated impact of the relocation on the child;
g. Whether the court will be able to fashion a reasonable allocation of parenting responsibilities between all parents if the relocation occurs;
h. The wishes of the child;
i. Possible arrangements for the exercise of parental responsibilities appropriate to the parents' resources and circumstances and developmental level of the child;
j. Minimization of the impairment to a parent-child relationship caused by the relocation; and
k. Any other relevant factors bearing on the best interests of the child.

10. A parent's relocation constitutes a substantial change in circumstances for purposes of Section 610.5 (modification of allocation of parental responsibilities).
11. Failure to comply with notice requirements may be considered by the court.
    a. Relocating parent may be acting in bad faith.
    b. Court may award attorney's fees and costs.
12. Burden of proof is on the parent seeking relocation.
13. Illinois continues to be the home state of the child under Section 202(c) of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).





SAMPLE NOTICE

IN THE CIRCUIT COURT FOR THE ____ JUDICIAL CIRCUIT
_____ COUNTY, ILLINOIS

JANE DOE,	)	
Petitioner,	)	
and	)	Gen. No.:
JOHN DOE,	)	
Respondent.	)	

NOTICE OF INTENT TO RELOCATE

1. I intend to relocate to _____[address]_____ on ___[date]____, with the minor child(ren), which is more than sixty (60) days from today.
2. My current address is _____.
3. My new address is _____ miles from my current address.
4. I intend to relocate to the above address permanently (or for the time frame if not permanently.)

Date: _____ _____

JANE DOE

CONSENT TO RELOCATE

I, JOHN DOE, do hereby consent to the relocation of the minor child(ren) as set forth above in the Notice of Intent to Relocate.

Date:_____ _____

JOHN DOE

The Uniform Child Custody Jurisdiction and Enforcement Act

By David N. Schaffer

The Uniform Child Custody Jurisdiction and Enforcment Act (UCCJEA) is a very powerful statute. It may seem daunting and ominous at first blush. Like riding a bike, once mastered you will appreciate its power. This section is meant as a "quick set-up guide" to get you up and running. It is NOT, however, a substitute for reading the entire statute. By "owning" the statute, you are way ahead of the game.

NOTE: Illinois is one of a few states that have eliminated the word "custody" in its statutes. Other than in the UCCJEA section, you will not find the word "custody" in any Illinois family law statutes. In place of "custody," Illinois has adopted an allocation of parental rights and responsibilities scheme. Nonetheless, the UCCJEA fully applies to allocation of parental rights proceedings in Illinois as if they were "custody" proceedings.

Going forward, statute language is in regular type. Commentary is in italics. This guide will direct you to the key parts of the statute. Also, there are no underlined and/or bolded sections in the actual statute. I have added such emphasis for this section.

The UCCJEA is divided into 4 sections:

Article 1. General Provisions (§§ 36/101-36/112)
Article 2. Jurisdiction (§§ 36/201-36/210)
Article 3. Enforcement (§§ 36/301-36/317)
Article 4. Miscellaneous Provisions (§§ 36/401-36/405)

Definitions (750 ILCS 36/102)

(7) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(8) "Initial determination" means the first child-custody determination concerning a particular child.

(11) "Modification" means a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

A period of temporary absence is dependent on the circumstances and could be for the duration of, say, the family's temporary relocation to another state or country for a work assignment, with the understanding that they will return to their original residence when completed.

It is important to be cognizant of the time one parent takes the kids to see family members in another state "just to "get away for a while" especially during stress in the marriage. Then once they are away for six months, they file for custody in the other state.

Once they are away for six months, they file for custody in the other state claiming it to be the child's new home state. Sure, arguments can be made that it was a temporary absence, but it's more efficient to be pro-active.

If the relationship between the parents is breaking down and it seems the parent who took the children to "visit" plans to stay longer than six months, the other parent should strongly consider filing an initial child-custody determination proceeding here before six months have passed. ***A married parent need not file dissolution of marriage proceedings in order to file initial child-custody determination proceedings.***

Information to be submitted to court (750 ILCS 36/209)

(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.

The UCCJEA information is mandatory whenever initial child related proceedings are commenced, even if they are part of a petition for dissolution of marriage. Nonetheless, more often than not, it is missing from the petition. Impress your client by calling out the other side on this. The information can either be presented within the verified petition or a stand-alone Affidavit attached to the petition as an Exhibit.

Appearance and limited immunity (750 ILCS 36/109)

(a) A party to a child-custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child-custody determination, is not subject to personal jurisdiction in this State for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in the proceeding.

International application of Act (750 ILCS 36/105)

(a) A court of this State shall treat a foreign country as if it were a state of the United States for the purpose of applying Articles 1 and 2.

(b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this Act must be recognized and enforced under Article 3.

(c) A court of this State need not apply this Act if the child custody law of a foreign country violates fundamental principles of human rights.

Yes. You use the UCCJEA to register a child-custody determination from another country. For example, if a foreign custody decree says a child is to be returned to the foreign country, you register that decree locally for enforcement. The courts then have a lot of tools for that enforcement, including contempt.

Initial child-custody jurisdiction (750 ILCS 36/201)

(a) Except as otherwise provided in Section 204 [750 ILCS 36/204], a court of this State has jurisdiction to make an initial child-custody determination only if:

(1) 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 is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) a court of another state does not have jurisdiction under paragraph (1), 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 Section 207 or 208 [750 ILCS 36/207 or 750 ILCS 36/208], and:

(A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

(B) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) all courts having jurisdiction under paragraph (1) or (2) 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 Section 207 or 208 [750 ILCS 36/207 or 750 ILCS 36/208]; or

(4) no court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).

This is the heart of the UCCJEA. Six months is a "magic number" or "bright line." Or is it?

McCormick v. Robertson, 2015 IL 118230

"As a preliminary matter, we note that this statute, by its terms, applies only to proceedings involving the initial determination of child custody. Although child custody was certainly an important component of the proceeding brought by McCormick in the circuit court of Champaign County, equally important was McCormick's desire to obtain legal confirmation that he was L.M.'s father pursuant to the Parentage Act. Champaign County was unquestionably an appropriate forum for that determination. No possible basis exists for challenging the authority of the circuit court of Champaign County to rule on that aspect of the case. To the extent that the court's subsequent order invalidated its initial parentage determination and dismissed McCormick's parentage claim, it was clearly erroneous, and the appellate court properly set it aside.

"The appellate court also acted properly when it set aside the circuit court's judgment invalidating, on voidness grounds, its prior ruling regarding child custody and incorporating the parties' joint parenting agreement. The circuit court's conclusion that the earlier order was void was based exclusively on its conclusion that McCormick's claim did not meet the requirements specified by section 201 of the UCCJEA (750 ILCS 36/201 (West 2010)). The appellate court did not dispute that McCormick's claim failed to meet the statutory criteria with respect to initial child-custody determinations. As it properly recognized, however, the circuit court's decision to proceed notwithstanding those deficiencies may have been error, but it was not beyond the circuit court's jurisdiction." *McCormick v. Robertson*, 2015 IL 118230, ¶¶ 25-26.

At first blush, the McCormick case may seem to gut the power and jurisdictional mandates of the UCCJEA. It does not. The lesson of McCormick *is that UCCJEA objections to the court's jurisdiction to hear an initial child custody case must first be made at the trial level. In other words, "you snooze, you lose."*

Inconvenient forum (750 ILCS 36/207)

(a) A court of this State which has jurisdiction under this Act to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(2) the length of time the child has resided outside this State;

(3) the distance between the court in this State and the court in the state that would assume jurisdiction;

(4) the relative financial circumstances of the parties;

(5) any agreement of the parties as to which state should assume jurisdiction;

(6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) the familiarity of the court of each state with the facts and issues in the pending litigation.

Simultaneous proceedings (750ILCS 36/206)

(a) Except as otherwise provided in Section 204, a court of this State may not exercise its jurisdiction under this Article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this Act, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this State is a more convenient forum under Section 207 [750 ILCS 36/207].

(b) Except as otherwise provided in Section 204 [750 ILCS 36/204], a court of this State, before hearing a child-custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 209 [750 ILCS 36/209]. If the court determines that a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this Act, the court of this State shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this Act does not determine that the court of this State is a more appropriate forum, the court of this State shall dismiss the proceeding.

(c) In a proceeding to modify a child-custody determination, a court of this State shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child-custody determination has been commenced in another state, the court may:

(1) stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

(2) enjoin the parties from continuing with the proceeding for enforcement; or
(3) proceed with the modification under conditions it considers appropriate.

Temporary emergency jurisdiction (750 ILCS 36/204)

(a) A court of this State has temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.
(b) … a child-custody determination made under this Section remains in effect until an order is obtained from a court of a state having jurisdiction under Sections 201 through 203 [750 ILCS 36/201 through 750 ILCS 36/203]. If a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Sections 201 through 203 [750 ILCS 36/201 through 750 ILCS 36/203], a child-custody determination made under this Section becomes a final determination, if it so provides and this State becomes the home state of the child.
(c) If there is a previous child-custody determination that is entitled to be enforced under this Act, or a child-custody proceeding has been commenced in a court of a state having jurisdiction under Sections 201 through 203 [750 ILCS 36/201 through 750 ILCS 36/203], any order issued by a court of this State under this Section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under Sections 201 through 203 [750 ILCS 36/201 through 750 ILCS 36/203]. The order issued in this State remains in effect until an order is obtained from the other state within the period specified or the period expires.

Temporary means temporary. Remind the court if need be.

Notice; opportunity to be heard; joinder (750 ILCS 36/205)

(a) Before a child-custody determination is made under this Act, notice and an opportunity to be heard in accordance with the standards of Section 108 [750 ILCS 36/108] must be given to all persons entitled to notice under the law of this State as in child-custody proceedings between residents of this State, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.

Notice to persons outside state (750 ILCS 36/108)

(a) Notice required for the exercise of jurisdiction when a person is outside this State may be given in a manner prescribed by the law of this State for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.
(b) Proof of service may be made in the manner prescribed by the law of this State or by the law of the state in which the service is made.
(c) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

Notice of a custody proceeding is not as strict as serving a Summons on someone in a lawsuit. A party could get notice by an email, with copies of the notice of motion and pleading. In such a case it would be prudent to get some type of reply email acknowledging receipt of the notice. Or, e.g., FedEx delivery. The key is that that party is actually made aware of the custody proceedings. This is helpful when notice needs to be given to a parent in a foreign country. Many times, it can take many months to "formally" serve a party in a foreign country. The downside is that if formal procedure is not followed to serve a party in that foreign country, it is very possible the foreign country will then not recognize the Illinois child custody determination. Therefore formal procedure should be followed if the child is in that foreign county when commencing proceedings here. International service is beyond the scope of this Chapter. Seek the assistance of an international family lawyer, like this author. See http://www.iafl.com.

Registration of child-custody determination (750 ILCS 36/305)

(a) A child-custody determination issued by a court of another state may be registered in this State, with or without a simultaneous request for enforcement, by sending to the circuit court in this State:
  (1) a letter or other document requesting registration;
  (2) two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and
  (3) except as otherwise provided in Section 209 [750 ILCS 36/209], the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child-custody determination sought to be registered.
(b) On receipt of the documents required by subsection (a), the registering court shall:
  (1) cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and
  (2) serve notice upon the persons named pursuant to subsection (a)(3) and provide them with

an opportunity to contest the registration in accordance with this Section.

(c) The notice required by subsection (b)(2) must state that:
  (1) a registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this State;
  (2) a hearing to contest the validity of the registered determination must be requested within 20 days after service of notice; and
  (3) failure to contest the registration will result in confirmation of the child-custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(d) 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:
  (1) the issuing court did not have jurisdiction under Article 2;
  (2) the child-custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under Article 2; or
  (3) the person contesting registration was entitled to notice, but notice was not given in accordance with the standards of Section 108 [750 ILCS 36/108], in the proceedings before the court that issued the order for which registration is sought.

(e) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person requesting registration and all persons served must be notified of the confirmation.

(f) Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

These are strict and unforgiving procedural steps—especially for the timing of objection to the registration. You may find some judges believe that the court has to approve the registration before it is valid. They don't. The judgment is registered absent timely, successful objection.

Simultaneous proceedings (750 ILCS 36/307)

If a proceeding for enforcement under this Article is commenced in a court of this State and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under Article 2, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

Enforcement of registered determination (750 ILCS 36/306)

(a) A court of this State may grant any relief normally available under the law of this State to enforce a registered child-custody determination made by a court of another state.

(b) A court of this State shall recognize and enforce, but may not modify, except in accordance with Article 2, a registered child-custody determination of a court of another state.

Jurisdiction to modify determination (750 ILCS 36/203)

Except as otherwise provided in Section 204 [750 ILCS 36/204], Temporary Emergency Jurisdiction, a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under Section 201(a)(1) or (2) [750 ILCS 36/201] and:

(1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under Section 202 [750 ILCS 36/202] or that a court of this State would be a more convenient forum under Section 207 [750 ILCS 36/207]; or

(2) a court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

Basically, once a court obtains original jurisdiction of a custody matter, it never loses it unless it consents to give it up or no party is living in that court's state anymore.

If you understand the information above, and read the entire statute, you will have more knowledge about the UCCJEA than many lawyers and judges have. Use your knowledge to help the court make the right decision. Best of luck. P.S. Feel free to contact David Schaffer if need be as you navigate the UCCJEA.

Illinois Spousal Maintenance

By Nancy Chausow Shafer & Margaret Bennett

750 ILCS 5/504 and 5/510(a-5)

In Illinois, we have statutory guidelines for maintenance amount and duration. However, the first analysis is whether an award of maintenance is appropriate. The court must consider the factors set out in the statute to make this determination.

Per the statute

… The court shall first determine 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 nonmarital 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 or any parental responsibility arrangements and its effect on the party seeking 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 of the property division upon the respective economic circumstances of the parties;
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.

After review of the factors, if the court determines maintenance is not appropriate, it shall enter an order barring maintenance.

If a determination is made that maintenance is appropriate, then the court shall apply the statutory guideline for amount and duration of maintenance or determine nonguideline maintenance. The guidelines are found at 750 ILCS 5/504(b-1). Maintenance guidelines apply, unless the court determines a deviation is appropriate.

Maintenance shall be accordance with the guidelines unless the court makes a finding that the application of the guidelines would be inappropriate. Guidelines do not apply in situations when the combined gross income of the parties is more than $500,000 or if the payor has an obligation to pay child support or maintenance or both from a prior relationship. Any nonguidelines award of maintenance shall be made after the court's consideration of all relevant factors listed above. if the court deviates from otherwise applicable guidelines 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.

750 ILCS 5/504(b-1)(1)(A): The amount of maintenance shall be calculated by taking 33 percent of the payor's net income minus 25 percent of the payee's net income if the maintenance is started after 12/31/2018. This formula is used when the maintenance is not tax deductible to the payor or includible in the recipient's income for tax purposes.

The formula remains 30 percent of the payor's gross income minus 20 percent of the payee's gross income if the maintenance is a modification of a prior order and taxable to recipient and deductible to the payor.

The amount calculated as maintenance, however, when added to the income (gross or net depending on tax deductibility) of the payee, may not result in the payee receiving an amount that is in excess of 40 percent of the combined gross income of the parties unless the court specifically deviates from guidelines. This is often referred to as a "hard cap." When the maintenance result in your financial software shows a smaller than anticipated amount of maintenance, this provision is usually the culprit.

If the amount of guideline maintenance and child support combined exceeds 50 percent of the payor's net income, the Court may deviate from guidelines for maintenance or child support or both. This is often referred to as a "soft cap" as it is permissive and not mandatory.

Duration of maintenance originally provided in the statute was calculated by multiplying the length of the marriage at the time the action was commenced by whichever of the following factors applies:

- 5 years or less (.20);
- more than 5 years but less than 10 years (.40);
- 10 years or more but less than 15 years (.60);
- 15 years or more but less than 20 years (.80).

For a marriage of 20 or more years, the court, in its discretion, shall order either permanent maintenance or maintenance for a period equal to the length of the marriage.

Since 1/1/2018 the statutory maintenance duration changed. The current maintenance duration guidelines are as follows:

The duration of an award under this paragraph 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.

Credit for temporary maintenance paid during the divorce case. In the discretion of the court, any term of temporary maintenance paid by court order may be a corresponding credit to the duration of maintenance.

Unallocated maintenance. Unless the parties otherwise agree, the court may not order unallocated maintenance and child support in any dissolution judgment or in any postdissolution order. In its discretion, the court may order unallocated maintenance and child support in any pre-dissolution temporary order. With the repeal of the tax deductibility of alimony the utility of unallocated maintenance and support is diminished and there is rarely any useful reason to use that method.

Character of the maintenance ordered. The court may order any of these three types of maintenance regardless of the duration of the marriage:

1. Fixed-term maintenance: If a court grants maintenance for a fixed period the court may also designate the termination of the period during which this maintenance is to be paid as a "permanent termination." The effect of this designation is that maintenance is barred after the ending date of the period during which maintenance is to be paid.
2. Indefinite Maintenance (formerly called permanent maintenance): In addition to the ability of the court to order indefinite maintenance regardless of duration of the marriage, for marriages over 20 years the maintenance duration may be ordered as indefinite.
3. Reviewable maintenance: When not specified as indefinite or terminating, maintenance will be reviewable. Upon review of any previously ordered maintenance award, the court may extend maintenance for further review, extend maintenance for a fixed nonmodifiable term, extend maintenance for an indefinite term, or permanently terminate maintenance.

Maintenance secured by life insurance. An award ordered by a court upon entry of a dissolution judgment or upon entry of an award of maintenance following a reservation of maintenance in a dissolution judgment may be reasonably secured, in whole or in part, by life insurance on the payor's life on terms as to which the parties agree, or, if they do not agree, on such terms determined by the court.

Modification. The provisions of any judgment respecting maintenance or support may be modified only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification.

750 ILCS 510(a-5): An order for maintenance may be modified or terminated only upon a showing of a substantial change in circumstances. In all such proceedings, as well as in proceedings in which maintenance is being reviewed, the court shall consider the applicable factors set forth in subsection (a) of Section 504 [listed above] and the following factors:

1. Any change in the employment status of either party and whether the change has been made in good faith;
2. The efforts, if any, made by the party receiving maintenance to become self-supporting, and the reasonableness of the efforts where they are appropriate;
3. Any impairment of the present and future earning capacity of either party;
4. The tax consequences of the maintenance payments upon the respective economic circumstances of the parties;
5. The duration of the maintenance payments previ-

ously paid (and remaining to be paid) relative to the length of the marriage;
6. The property, including retirement benefits, awarded to each party under the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage and the present status of the property;
7. The increase or decrease in each party's income since the prior judgment or order from which a review, modification, or termination is being sought;
8. The property acquired and currently owned by each party after the entry of the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage; and
9. Any other factor that the court expressly finds to be just and equitable.

Termination of maintenance. Unless otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court, the obligation to pay future maintenance is terminated upon the death of either party, or the remarriage of the party receiving maintenance, or if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis.

A payor's obligation to pay maintenance or unallocated maintenance terminates by operation of law on the date the recipient remarries or the date the court finds cohabitation began. The payor is entitled to reimbursement for all maintenance paid from that date forward.

A party receiving maintenance must advise the payor of his or her intention to marry at least 30 days before the remarriage, unless the decision is made within this time period. In that event, he or she must notify the other party within 72 hours of getting married.



1. Encourage the court to first determine whether maintenance is appropriate before looking at the guidelines for amount or duration.
2. Remember that maintenance counts as income for the recipient for purposes of child support, and a corresponding deduction from income for the payor.
3. Remember the guidelines are just that, guidelines, and focus on the factors for deviation from guidelines if appropriate. We can and should still argue persuasively for deviations when appropriate.
4. A buyout of maintenance is still often a good negotiation tool, but with nontaxable/deductible maintenance the only variable is the discount (interest) rate.
5. Use Family Law Software [www.familylawsoftware.com] to compute guidelines for amount and duration simply and easily.

Illinois Child Support and Maintenance Calculation Guide

By Nancy Chausow Shafer & Margaret Bennett

Information needed to calculate child support

1. Income of each parent, from paystubs, W-2s, tax returns or other sources.
2. Tax method determination and tax deductions for Federal, State, Social Security and Medicare.
3. Itemized Tax deduction information, including mortgage interest and real estate tax payments, which can be discerned from tax returns as well as statements from those sources.
4. Adjustments to income for spousal maintenance and support of children from other relationships.
5. Parenting plan to determine the number of overnights.
6. Add-On obligations for the children's health insurance, childcare, unreimbursed health care and extracurricular and school expenses.

Practice tips

Don't focus only on the end support result number. Income shares calculations are based on numerous variables. If you are not using the same variables as the other parent or the Court, the results will be different. This may or may not be "wrong" as deciding on the variables may be a matter of interpretation and not always clear cut.

Variables include:

a. Income: make sure you are each using the same income numbers for both parties.

i. Income under the statute is "all income from all sources."

ii. When using a W-2, you want to use Box 5, Medicare Wages (not Box 1, Taxable Income or Box 3, Social Security Wages). Sometimes all three have the same number, but if there are company benefits or plans pre-tax (like retirement or health insurance) or if a highly compensated employee, they will be different. Also check a year-end paystub, if possible. There are often additional income items that are not required to be reflected in the W2.

iii. This includes income from investments such as bank account interest and stock dividends, rental real estate, side businesses, and the like.

iv. Sometimes determining true economic income is very complex and subject to many different interpretations.

v. Business income add backs:

1. The accelerated component of depreciation and any business expenses determined either judicially or administratively to be inappropriate or excessive shall be excluded from the total of ordinary and necessary business expenses to be deducted in the determination of net business income from gross business income.
2. Any item of reimbursement or in-kind payment received by a parent from a business, including, but not limited to, a company car, reimbursed meals, free housing, or a housing allowance, shall be counted as income if not otherwise included in the recipient's gross income, if the item is significant in amount and reduces personal expenses.

b. Deductions from income: Support and Maintenance are both based on Net Income. Net income is gross income minus allowed deductions, primarily federal and state income taxes, Social Security and Medicare deductions.

i. Are you using the same tax filing status for the parties? Filing status cannot be granted or allocated but is the result of certain facts and events in a person's life which allow him/her to select the appropriate tax filing status. Some filing statuses result in lower or higher taxes, which raise or lower the net income for each party. Available statuses include:

1. Married Filing Joint: You must be married on Dec 31 to file Jointly
2. Married Filing Separately: If one partner files Separately, and itemizes deductions, the other partner must also itemize deductions and is not allowed to take the standard deduction. This can result in higher taxes if they have few or no itemized deductions to take.
3. Head of Household: You must have a child residing with you for more than 50 percent of the overnights in the year. If the parents have a 50/50 parenting time allocation, the ability to file as Head of Household (HOH) may be determined by the IRS to be only available to the higher earning parent (IRS tiebreaker rules). Generally, HOH is a more advantageous filing status and results in lower taxes.

A. Note, lower taxes mean higher Net Income, which could result in higher child support and/or maintenance obligations.

4. Single: You must not be married on Dec 31 of the relevant tax year to file as Single.

c. Tax Method: The statute provides for two distinct methods for determining appropriate taxes to be deduction from gross income to arrive at Net Income.

i. Standardized Tax method: This method uses a Gross to Net Income table to determine the appropriate amount of taxes to be deducted from gross income.

1. The Gross to Net table is published by the Illinois Department of Healthcare and Family Services (HFS).
2. The Gross to Net table goes up to $48,824.99 per month gross income (approximately $585,000 gross per year), even though the Schedule of Basic Support Obligation (BCSO) extends to $30,000 per month <u>combined net</u> income. If one party's income is higher than that, you cannot use the Gross to Net table for that party.
3. The Gross to Net table includes the Social Security deduction (often referenced as FICA on paystubs). If a party is not paying FICA, you cannot use the Gross to Net table for that party.
4. The Gross to Net table, as a matter of HFS policy, does not include tax credits, including refundable credits such as the Earned Income Credit, Child Tax Credit, Child Care Tax Credit, or higher education credits. These tax credit could result in a party having more income annually than reflected in their paystubs or W-2.

ii. Individualized Tax method: This method relies on the Court and the parties having adequate information about a parent's tax items, including deductions and credits in addition to all income items.

1. The HFS worksheet, publicly available on their website, uses only the Gross to Net table and does not compute the Individualized Tax method, although you can compute net income and enter that amount in the appropriate lines in lieu of gross income.
2. Computing net income requires some assumptions and analysis of anticipated tax items, these may not be exactly the same as the prior year amounts.
3. An available, for purchase software program uses the anticipated actual taxes as the default tax method for support computations in the program, but also allows you to see the Gross to Net table results as an alternative.

d. Overnights: the number of overnights attributed to each parent will impact the allocation of the Basic Child Support Obligation (BCSO).

i. 145 overnights or less for the nonmajority time parent [220 overnights or more for the majority time parent]:

1. This is less than 40 percent of the overnights [146=40 percent]
2. the resulting child support amount does not consider any shared parenting adjustment;
3. there is no difference for different numbers of overnights under 145.

ii. 146 overnights or more for the nonmajority time parent [219 overnights or less for the majority time parent]:

1. The BCSO is multiplied by 1.5 to compute the Shared Physical Care Support Obligation (ShPCSO), which is then allocated between the parties.
   There are 4 steps to this computation:
   A. The BCSO is multiplied by 1.5 (150 percent) to get the ShPCSO.
   B. The ShPCSO is allocated between the parents in the same percentages of their net incomes to their combined net income.
   C. That amount [(BSCO * 1.5) * percent of combined net income] is then multiplied by the percentage of overnights of the other parent.
   D. The resulting child support amounts for each parent are then netted, with the parent having higher support amount paying the difference to the parent with the lower support amount.
      I. This can result in the majority time parent paying child support to the nonmajority time parent.

iii. The statute refers to average number of overnights.

1. In IL, we count only overnights, not total time or number of hours spent with the children.
   A. If the actual parenting time schedule overnights are impacted by work schedules or other actors preventing a parent from exercising overnights while still spending a majority of the children's time, for example, a parent could seek a deviation from the statutory guidelines.
2. If more than one child, and differing numbers of overnights in the parenting time schedule for each child, so long as the same majority time parent for all the

children, the statute directs us to average the number of overnights.

3. If Parent A has 146 overnights for Child1, and 130 overnights for Child2, the computation will average those two overnight numbers and this will not be a Shared Physical Care (ShPCSO) child support amount, but a BCSO computation.

iv. If the children have different parenting time schedules which result in each parent having majority time [183 or more overnights] of one or more children, this results in application of a Split Physical Care Support Obligation (SpPCSO).

1. SpPCSO computations look at each parent's household individually to determine the number of children in each household.
2. The BCSO amount for each parent (the foundation of the support computation) is determined by the number of children in that household, not the overall number of children.
3. The SpPCSO is determined by computing the child support obligation BCSO and/or ShPCSO for each household, and then netting the two support amounts, with the parent having the higher support obligations paying the other parent the difference between the two separate support obligations.

e. Adjustments to net income: The statute provides certain limited allowable adjustments (deductions) from net income for support and maintenance purposes.

i. Maintenance: For child support, the payment of maintenance (alimony) by one parent is a deduction from gross income for purposes of computing net income.

1. This applies to payments of maintenance to the other parent in the child support calculation, as well as payments of maintenance to prior spouses.
2. Depending on the maintenance computation, including changes in maintenance amount due to changes in net income or other assumptions, the maintenance deduction may not be the same in different calculations.
3. Maintenance ordered after 12/31/2018 is nontaxable pursuant to Federal law, and therefore those maintenance payments are deducted directly from after tax income to arrive at Net Income for child support purposes.
4. Maintenance ordered before 1/1/2019, even if modified after that date, can continue to be taxable to the recipient and tax-deductible to the payor. Tax deductible maintenance is subtracted from or added to gross income before computation of the taxes for each parent.

ii. Multi-family adjustment: When a parent has children from other relationships, the support paid for those children is permitted to be deducted from after tax income for computation of Net Income for child support.

1. For a parent paying a child support order for another child, there will be a deduction from net income in the amount of the support order actually paid.

Checklist

What to Provide to the Court

1) Financial Affidavit: The statewide Financial Affidavit form is prescribed by the Illinois Supreme Court found at https://courts.illinois.gov/Forms/approved/divorce/Financial_Affidavit_Approved.pdf.

2) Supporting documentation: The financial affidavit shall be supported by documentary evidence including, but not limited to, income tax returns, pay stubs, and banking statements.

a. The precise documents and time periods for supporting documentation is not specified in the statute but are set by local court rules in most circuits.

3) Order of Support:

a. https://courts.illinois.gov/Forms/approved/divorce/Divorce_with_Children_Order.pdf;
b. Several counties have their own Order for Support forms, but every county is required to accept the approved Supreme Court forms.

4) Support Information Sheet:

a. https://courts.illinois.gov/Forms/approved/divorce/Divorce_with_Children_Support_Info_Sheet.pdf.

5) Income Withholding for Support notice:

a. https://courts.illinois.gov/Forms/approved/divorce/Divorce_with_Children_IWO_Illinois.pdf.

6) Any other supporting documentation to request an adjustment or deviation from the guidelines.

2. For a parent supporting a child from another relationship, not court ordered, there will be a deduction from net income in the **LESSER** of:
   A. The actual financial support being paid OR
   B. 75 percent of the amount child support would have been,
      i. had it been ordered
      ii. computed based on the one parent's income alone
3. **Tip 1**. If no amount of financial support being paid is entered into the software, that leads to a zero adjustment since it is less than the 75 percent of the computed calculated child support amount for that child
4. **Tip 2.** The deduction is for financial suport actually paid and must be requested by that parent.
5. **Tip 3**. A level of proof should be provided that the financial support for that child is actually being paid.

f. Unemployment or underemployment: If there is insufficient work history to determine employment potential and probable earnings level, there shall be a rebuttable presumption that the parent's potential income is 75 percent of the most recent U.S. Department of Health and Human Services Federal Poverty Guidelines for a family of one person.

i. Minimum child support obligation. There is a rebuttable presumption that a minimum child support obligation of $40 per month, per child, will be entered for an obligor who has actual or imputed gross income at or less than 75 percent of the most recent United States Department of Health and Human Services Federal Poverty Guidelines for a family of one person, with a maximum total child support obligation for that obligor of $120 per month to be divided equally among all of the obligor's children.

ii. Zero dollar child support order. For parents with no gross income, who receive only means-tested assistance, or who cannot work due to a medically proven disability, incarceration, or institutionalization, there is a rebuttable presumption that the $40 per month minimum support order is inapplicable and a zero dollar order shall be entered.

g. Income in excess of the schedule of basic child support obligation. A court may use its discretion to determine child support if the combined adjusted net income of the parties exceeds the highest level of the schedule of basic child support obligation, except that the basic child support obligation shall not be less than the highest level of combined net income set forth in the schedule of basic child support obligation.

i. An available software program offers an optional computation based on an extrapolation of child support for incomes above the table.

ii. Extrapolation in the software uses the difference between the support amounts at the highest income level of the Schedule of Basic Support Obligation and the level immediately lower and adds that same difference for each additional $1,000 of income.
   1. Extrapolation is not yet approved or endorsed by any court.
   2. Note the amount of the BCSO at the lowest combined net income numbers on the Schedule of BCSO is about 34 percent of combined net income, while at the highest income amounts result in a BCSO of about 7 percent of combined net income.
      A. Therefore, the incremental increases in child support due to extrapolation in the software for additional income are very small dollar amounts.

h. **Add-On obligations**: the statute provides for obligations in addition to the BCSO to be allocated between the parents.

i. These additional obligations fall into four categories:
   1. Health Insurance premiums for the child(ren);
   2. Child Care expenses;
   3. Uninsured or unreimbursed health care expenses for the child(ren);
   4. Extracurricular and school expenses for the child(ren).

ii. The allocation of expenses in the first 2 categories are specifically defined in the statute.
   1. The allocation unless otherwise agreed, will be in the percentages of combined net income used in the child support computation.
   2. This allocation does not include the payment and receipt of the child support

Common Terms

CSO: Child Support Obligation
BCSO: Basic Child Support Obligation
ShPCSO: Shared Physical Care Support Obligation
SpPCSO: Split Physical Care Support Obligation

itself in the percentages of combined net income.

iii. The allocation of expenses in the second two categories is not specifically defined in the statute.

1. This allows parents, or the Court in absence of agreement, to determine the allocation of these two categories of expenses.

A. Generally, the allocation of these expenses falls into three options, although the parents are free to agree to any other disposition:

I. The statutory allocation in the same percentages of combined net income for child support computation;

II. Equally between the parents;

III. Allocation in the percentages of combined net income including the payment and receipt of child support.

i. Guideline what-if scenarios

i. An available software program has a page which allows multiple user generated scenarios to be displayed side by side. This allows the components of the child support calculation to be varied and instantly view results for each scenario on one page.

ii. This page is very useful for entering different variables for child support and spousal maintenance calculations to determine the most appropriate result.

Spousal maintenance: Guidelines for spousal maintenance apply only if the Court first determines maintenance is appropriate based on the statutory factors or by agreement.

a. Order after 1/1/2019: Spousal maintenance is not tax deductible to the payor, and not includible in the taxable income of the recipient.

i. Spousal maintenance is based on net income of each party.

ii. Net Income for spousal maintenance is computed the same manner as for child support.

iii. The formula for the amount of spousal maintenance is One-Third (1/3) of the net income of the payor minus One-Quarter (1/4) of the net income of the recipient.

iv. Recipient's own income plus the proposed maintenance should not exceed 40 percent of the combined net income of the parties. Maintenance is reduced to provide Recipient does not receive more than 40 percent of the combined net income.

b. Original order prior to 12/31/2018 modified after 1/1/2019: maintenance remains tax deductible to the payer and includible in the taxable income of recipient, unless the parties opt to use nontaxable maintenance.

Illinois statutes and rules applicable to the calculation of child support

750 ILCS 5/505 Child Support
750 ILCS 5/504 Spousal Maintenance
750 ILCS 5/510 Modification of Child Support and Maintenance
735 ILCS 5/101*et.seq.* Civil Procedure
Illinois Supreme Court Approved Forms:
http://www.illinoiscourts.gov/Forms/approved/Circuit.asp

i. Spousal maintenance is based on the gross incomes of the parties.

ii. The formula for the amount of taxable maintenance is 30 percent of payer's gross income minus 20 percent of the gross income of recipient.

iii. Recipient's own income plus the proposed maintenance should not exceed 40 percent of the combined gross income of the parties. Maintenance is reduced to provide the Recipient does not receive more than 40 percent of the combined gross income.

c. Spousal maintenance duration guidelines: Spousal maintenance duration is based on the length of the marriage.

i. 0-5 years of marriage: 20 percent of the length of the marriage (i.e. 5 years of marriage equals 1 year of maintenance)

ii. 5-19 years of marriage: an additional 0.4 percent per year up to 80 percent of the length of the marriage (i.e. 19 years of marriage equals 16 years of maintenance)

iii. 20 or more years of marriage: 100 percent of the length of the marriage or indefinite.

d. Spousal maintenance types: The court is required to define the type of maintenance being awarded. In settled cases, the marital settlement agreement should specify.

i. There are three types of maintenance specified in the statute; indefinite, reviewable and fixed term

Modification of child support and maintenance:

a. Maintenance can be made nonmodifiable by agreement. Child support can never be nonmodifiable.

b. Modification of child support and maintenance can be requested upon a substantial change of circumstances.

   i. Substantial change of circumstances is not defined further in the statute.
   ii. Any substantial change could be the basis for a modification.

c. Modification of child support can be requested without a substantial change upon a showing of a difference of at least 20 percent but not less than $10 between the amount of the existing support order and the amount which would be applicable under the guidelines.
d. A maintenance review is not a modification and does not require a showing of substantial change of circumstance.
e. Maintenance modification and maintenance review both involve analysis of eight (8) factors found in 750 ILCS 5/510(a-5) in addition to the original fourteen (14) factors found in 750 ILCS 5/504(a).
f. Changes in the statute, without any other change, are not a substantial change for purposes of modification of child support and maintenance.

Educational Expenses for Nonminor Child (750 ILCS 5/513)

By Lisa Nyuli

Scope of the statute

Applies to:

- Divorcing or divorced parties.
- Unmarried parties (where a court is involved) (*Rawles v. Hartman*, 172 Ill. App. 3d 931, 933 (2d Dist. 1988).)

Does not apply to:

- Married parties (where a court is not involved).
- Unmarried parties (where a court is not involved).

What are the parties and child required to do under 750 ILCS 5/513 to receive contribution?

- Sign any necessary consents for the educational institution to provide the supporting party with access to academic transcripts, records, grade reports.
- Child is required to maintain a cumulative "C" grade point average except in the event of illness or other good cause shown.

When does a party's obligation terminate?

- Yes:
  - when the child fails to maintain a cumulative "C" grade point average;
  - when the child turns 23 years old;
  - when the child receives a baccalaureate decree; or
  - when the child marries.
- No
  - if the child enlists in the U.S. Armed Forces;
  - if the child is incarcerated; or
  - if the child becomes pregnant.

What should a petition for college expenses include?

- Any relevant language of the parenting agreement/marital settlement agreement/judgment for dissolution of marriage.
- What years the child will attend the school.
- Estimated cost of attendance (including tuition, room & board, textbooks, additional expenses).
- Estimated living expenses during times of recess (food, utilities, transportation).
- Estimated medical/dental expenses, if known.
- If the child is already is enrolled, whether they are on track to maintain a "C" grade point average.
- Any relevant "cap amount" (*i.e.*, the tuition/room & board amounts for University of Illinois Urbana-Champaign).
- Whether one party has already advanced funds towards any portion of the tuition.
- Income/asset information of both parties.
- Any future financial resources of both parties to meet their needs.
- Allegations regarding the standard of living the child would have enjoyed had the marriage not been dissolved.
- The financial resources of the child.
- Whether the child applied for/received scholarship/aid monies.
- Request for contribution to college applications (up to five), standardized college entrance examinations (up to two), standardized college entrance examination preparatory course (one).
- To whom you are requesting the funds be paid (to the child, to either party, directly to the educational institution, through a trust to the educational institution).
- Whether there are any existing 529 plans or other accounts for the child's postsecondary education (any postjudgment contribution made by a party to such an account is considered that party's contribution).

"Shall" vs. "Reserve"

- If your agreement provides the parties "**shall**" contribute to expenses pursuant to 750 ILCS 5/513, then even if a party files for college expenses when the child is a junior in college, the party can seek retroactive contribution.
- If your agreement provides contribution to college expenses is "**reserved**," this limits the party's ability to seek retroactive contribution.

Recommended Documents for Hearing

- Petition and response.
- Financial affidavits and supporting documents
- Copies of any invoices issued by the university/college (if none, a list of estimated expenses).
- Copies of any scholarship letters/applications for financial aid
- Documentation of the relevant "cap" costs for the University of Illinois Urbana-Champaign (as applicable).
- Supporting documents for any reasonable living expenses during periods of school recess.

Prepare the following information for hearing

- Employment/income of both parties.
- Assets of both parties.
- School attending/intended to attend.
- Tuition/room & board/other expenses for the school.
- Explanation of reasonable anticipated expenses during periods of school recess .
- Any scholarships/aid applied for.

Defending against a petition for college expenses

- Constitutional Argument: Equal Protection—applicable caselaw:
- *Kujawinski v. Kujawinski*, 71 Ill. 2d 563 (1978);
- *Yakich v. Aulds*, 2019 IL 123667.
- Child had not applied for any aid/scholarships.
- Party being asked to contribute does not have sufficient income/assets.
- Child is not maintaining a "C" GPA.

A Simple Guide to the Equitable Division of Property and Debt in Five Easy Steps

By Hon. Arnold F. Blockman (ret.)

Step one: Classify all property and debts as either marital or non-marital

The statute. 750 ILCS 5/503(a) defines marital and nonmarital property. Simply stated, marital property is all property and debts acquired or incurred by either spouse subsequent to the marriage. Simply stated, nonmarital property is all property acquired by gift or descent, property acquired in exchange for such property, property acquired after a judgment of legal separation, and property excluded by agreement of the parties.

Helpful case. The court may not dispose of property in a dissolution proceeding without classifying the property as either martial or non-marital. *In re Marriage of Didier*, 318 Ill. App. 3d 253 (1st Dist. 2000).

Tip 1. The court under section 503(a) must make specific findings as to its classification of assets as marital vs. nonmarital.

Tip 2. Note that section 503(a)(6) specifically excludes retirement plans from the definition of nonmarital property noting that such plans may "have both marital and non-marital characteristics."

Tip 3. Don't forget the presumption of marital property under 503(b)(1). That section concludes by noting that "the presumption of marital property is overcome by showing through clear and convincing evidence that the property falls within the exclusions for non-marital property or was done for estate or tax planning purposes or for other reasons that establish that a transfer between spouses was not intended to be a gift."

Step two: Pick a valuation date

The statute. Section 503(f) gives the court discretion to establish a date for the valuation of marital and nonmarital property and marital and non-marital debt for the purposes of equitable division as "the date of trial or such other date as agreed upon by the parties, or ordered by the court, within its discretion …." See also section 403(e) which provides, "The Court has the discretion to use the date of trial or such other date as agreed upon by the parties, or ordered by the court within its discretion, for purpose of determining the value of assets or property." There is also a similar provision in section 503(k).

Tip. The amendments to 503(f), 403(c), and 503(k) in the 2016 rewrite of the Dissolution Act overruled *In re Marriage of Mathis*, 2012 IL 113496, which held that in a bifurcated proceeding where a grounds judgment has been entered, the date of valuation is the date of the grounds judgment even if property issues are decided at a much later date. You are comfortable in assuming that now the date of trial is the date the court hears all property division issues regardless of whether the court has previously entered a bifurcated grounds judgment.

Step three: Value the marital and nonmarital property and debt

The statute. Section 503(a) requires the court to make specific findings as to the value of the marital and non-marital property and debt. Section 503(k) states that all marital and non-marital property shall be valued using a "fair market value" standard.

Tip 1. Be sure to present to the court a listing of all marital and non-marital property and debt. "It is the parties' obligation to present the court with sufficient evidence of the value of property." *In re Marriage of Smith*, 114 Ill. App. 3d 47 (1st Dist.1983).

Tip 2. Expert opinion or information from financial institutions or credit card companies could obviously be used to value assets and existing debt. Don't forget that many assets can be simply valued by your own client. A lay person that owns real estate can generally with proper foundation give an opinion as to its value. *American Nat. Bk. & Tr. Co. v. City of North Chicago*, 155 Ill. App. 3d 920 (1st Dist. 1987). See also *Dept. of Transportation v. Harper*, 64 Ill. App. 3d 732 (5th Dist. 1978). These cases have been cited for a similar proposition in dissolution proceedings. Likewise, a lay person can also give an opinion as to the value of most items of personal property in everyday use, including a car, with a sufficient foundation of familiarity with the property, actual knowledge of its value, and the basis of the knowledge. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75 (2006).

Step four: Make a proposal and argument equitably dividing the marital property and debt and setting off the nonmarital property and debt

The statute. Section 503(d) states that the court shall first set off each spouse's nonmarital property to that spouse. The statute goes on to state that the court shall then equitably divide the marital property "without regard to marital misconduct." The statute then lists relevant factors in making an equitable division, specifically each spouse's contribution to the acquisition, preservation or

increase or decrease in the value of martial and nonmarital property, any marital dissipation by a party, the value of the property assigned to each spouse, the duration of the marriage, the relevant economic circumstances of each spouse when the property division becomes effective, any obligations arising from a prior marriage of either party, any prenuptial or postnuptial agreement, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each party, the custodial provisions for any children, whether the division is in lieu of or in addition to maintenance, the reasonable opportunity of each spouse for future acquisition of capital assets and income, and the tax consequences of the property division.

Helpful cases. A division of property does not have to be equal. *In re Marriage of Zwart*, 245 Ill. App. 3d 567 (2d Dist. 1993); *In re Marriage of Heroy*, 385 Ill. App. 3d 640 (1st Dist. 2008), appeal denied 231 Ill. 2d 632 (2009) (affirming an award of 55 percent of a $8.7 million marital estate to wife and 45 percent to husband); and *In re Marriage of Walker*, 386 Ill. App. 3d 640 (1st Dist. 2008) (no abuse of discretion in trial court division of marital property of 59.7 percent to wife and 40.3 percent to husband).

Another helpful case. When there is conflicting evidence of value, the court may select a valuation between opposing values, as long as there is evidence in the record supporting the value. *In re Marriage of Cutler*, 334 Ill. App. 3d 731 (5th Dist. 2002).

Tip 1. Don't forget the contribution to the marital estate by a party homemaker and caretaker. See *In re Marriage of Charles*, 284 Ill. App. 3d 339 (4th Dist. 1996) (wife was entitled to a larger share of the marital estate because she was the primary homemaker and primary caretaker for two minor children).

Tip 2. It is always good practice to present in writing to the court prior to the hearing your proposal and argument as to the equitable division. Be sure to list the specific property and debt each party is receiving, along with a value for each, the gross and net effect of the distribution as to each party, and the percentage of marital property awarded to each, along with the exact amount of nonmarital property set off to each. The most irritating thing for a trial judge is for a party to simply present no written material and suggest that the court divide all marital property and debt equitably! Also be sure to support your proposed allocation by specific references to each relevant statutory factor for the equitable division of property and debt.

Tip 3. The concept of property acquired in contemplation of marriage was substantially impacted by additional language added to section 503(a) by the 2016 rewrite that, "Property acquired prior to the marriage that would otherwise be non-marital property shall not be deemed to be marital property ***solely*** because the property was acquired in contemplation of marriage." (emphasis added).

Tip 4. Don't forget to take a serious look at asserting a dissipation claim. Such claims are almost a matter of course in most contested property cases, particularly when there has been a lengthy time from the filing to the final property disposition with no bifurcated grounds judgment entered. Keep in mind that under the present 503(d)(2) there is a notice requirement, and there can be no dissipation prior to three years from when a party knew or should have known about the dissipation and in no event prior to five years before filing the petition. The best definition of dissipation is contained in *In re Marriage of O'Neill*, 138 Ill. 2d 487 (1990). An interesting recent case is *In re Marriage of Scheneeweis*, 2016 IL App (2d) 140147 (a $900,000 loss incurred by husband while day trading online when marriage was broken down was dissipation). A close analysis of potential dissipation claims could substantially help your client obtain a better property division or settlement. See Blockman, "Dissipation: Thinking Outside The Box," ISBA Family Law Section Newsletter, vol. 60, no. 11, June 2017. In the article the writer concludes as follows:

> This type of outside the box analysis of potential dissipation claims would warrant an evaluation and analysis of such a claim whenever there are, when the marriage is breaking down, numerous cash withdrawals or checks written for cash, loss of property due to foreclosure or execution of a security lien, a business that becomes substantially less profitable, substantial religious organization contributions, costs incurred in defending frivolous abuse allegations as to parenting issues, destruction of marital property, expenditures on non-marital property, and any case where substantial losses have been incurred, particularly prior investments decisions…other issues in asserting the claim can then be discussed with the client. These issues include, but not limited to, upsetting the family law judge, the increased costs and fees to be incurred in asserting the claim, the necessity of obtaining expert testimony in asserting the claim, and the danger of the other party asserting a request for additional final contributions to attorney's fees and costs if you are not successful in your dissipation claim.

Tip 5. Social Security benefits may not be equitably divided or used as a basis for an offset in equitably dividing property. *In re Marriage of Crook*, 211 Ill. 2d 437 (2004).

Tip 6. It is important to put in your written submission and argument to the court as to equitable division the exact statutory factors that support your position in that now trial judges must make specific "… factual findings supporting its property award."

Tip 7. Except for engagement rings, always be suspicious about claims of alleged gifts between spouses. *In re Marriage of Barnett*, 344 Ill. App. 3d 1150 (4th Dist. 2003), appeal denied, 209 Ill. 2d 575 (2004). Likewise, be equally suspicious about claims of alleged loans between parents

and adult children. See *In re Marriage of Blunda*, 299 Ill. App. 3d 855 (2d Dist. 1998).

Tip 8. Don't fall into the defined-benefit pension valuation trap. Although it is possible, and perhaps appropriate in a few cases, to specifically value a defined benefit pension using an immediate offset approach, the best way and most inexpensive way (because no expert is needed) is under a "reserved jurisdiction approach." Under this approach the court awards the nonemployee spouse (by way of a qualified domestic relations order) a percentage of the employee spouse's portion of the marital interest (generally one-half) "if and when" the pension becomes payable. The two lead cases regarding the universal acceptance of this approach are *In re Marriage of Hunt*, 78 Ill. App. 3d 653 (1st Dist. 1979) and *In re Marriage of Wisniewski*, 286 Ill. App. 3d 236 (4th Dist. 1997).

Tip 9. Try to avoid at all costs the confusing concepts of comingling and reimbursement. If you are forced to deal with these issues note the amended 503(c)(2)(B) under the 2016 rewrite that provides that "When a spouse contributes personal effort to non-marital property, it shall be deemed a contribution from the marital estate, which shall receive reimbursement for the efforts if the efforts are significant and result in substantial appreciation to the non-marital property except that if the marital estate reasonably has been compensated for his or her efforts, it shall not be deemed a contribution to the marital estate and there shall be no reimbursement to the marital estate." The "except for …" language was added in the 2016 rewrite to make the statute consistent with existing caselaw. *In re Marriage of Perlmutter*, 225 Ill. App. 3d 362 (2d Dist. 1992), appeal denied, 146 Ill. 2d 650 (1992), cert. denied, 507 U.S. 1006 (1993); *In re Marriage of Snow*, 277 Ill. App. 3d 642 (4th Dist. 1996); and *In re Marriage of Crook*, 211 Ill. 2d 437 (2004).

Tip 10. The settlement of a personal injury accident claim during the marriage, and the settlement of a workers' compensation claim that accrued during the marriage is marital property. *In re Marriage of Pace*, 278 Ill. App. 3d 932 (1st Dist. 1996), appeal denied, 169 Ill. 2d 570 (1996); *In re Marriage of Oden*, 394 Ill. App. 3d 392 (4th Dist. 2009); and *In re Marriage of DeRossett*, 173 Ill. 2d 416 (1996).

Recent equitable division cases. In order to show the court that you are a good legal scholar it might be impressive to cite to the court the most current cases on division of property, although all the cases noted above remain good law. You might consider, if applicable, the following cases: *In re Marriage of Stuhr*, 2016 IL App (1st) 152370 (husband's evidence was not sufficient to overcome presumption of marital property for six accounts opened during the marriage); *In re Marriage of James and Wynkoop*, 2018 IL App (2d) 170627 (husband did not show by clear and convincing evidence that real estate purchased in his name for a non-marital business was for tax planning reasons and the real estate was properly classified as marital by trial court); *In re Marriage of Johnson*, 2016 IL App (5th) 140479 (trial court equitable property division was reversed based on a number of valuation mistakes by trial judge, including considering reports not admitted into evidence and disregarding the parties' own admissions); and *In re Marriage of Hamilton*, 2019 IL App (5th) 170295 (equitable division of property and debt does not necessarily mean equal distribution and trial court was affirmed in ordering two pieces of real property sold and the proceeds divided equally when neither party presented competent evidence of the value of the properties).

Step five: Pray for a good settlement offer or a good decision by the court!

Tip. If you choose not to pray or are not a spiritual person, at least keep your fingers crossed knowing that by following this simple five step approach you are doing the best possible professional job for your client and knowing that the family court trial judge will appreciate your logical and comprehensive analysis which will make his or her job a lot easier in light of the findings that each family court judge must now make after a contested equitable property and debt hearing. Good luck!

Discovery, Trial Preparation, and Organization

By Stephanie L. Tang & Elizabeth Felt Wakeman

Discovery: Requests for Production of Documents and Interrogatories

Definitions

Notice to produce pursuant to Illinois Supreme Court Rule 214. This is a formal written request for documents/statements from an opposing party. The opposing party has 28 days to respond to your request and has a duty to seasonably supplement a prior response to the extent documents, objects or other tangible items come into that party's possession or control or become known to that party.

Illinois Supreme Court Rule 213 matrimonial interrogatories. These are written questions propounded on an opposing party. The opposing party has 28 days to respond. Illinois limits the number of interrogatories to 30, including subparts unless otherwise agreed by the parties or if granted leave of court.

Things to consider

- **Check your local rules!** Certain counties have specific rules limiting discovery further. (*e.g.* DuPage County Rule 7.01, Kankakee County Rule 4.2) Counties also restrict timing of issuing formal discovery to after Financial Affidavits have been exchanged. (*e.g.* Cook County Rule 13.3.1(e)).
- In addition to local rules, Supreme Court Rule 201 provides that discovery may not be issued until the defendant has appeared *or is required to appear*. This is important if records are to be obtained by subpoena and a respondent is refusing to participate in the litigation.
- There is no required sequence of discovery and one party's efforts to obtain discovery may not impede another party's efforts to conduct discovery.
- **Read the requests carefully.** It is easy for lawyers to skim through discovery requests and miss an obscure request embedded into the request. Take the time to look for said requests so you do not miss your opportunity to object.
- **Answering discovery:** When answering discovery, review and comply with Supreme Court Rule 201:
  1) Expressly states, "Full Disclosure Required."
  2) Privilege and Work Product explained.
  3) Definition of Consultant and limitations on disclosure of the identity and opinions of a consultant.
  4) Electronically Stored Information.
  5) 201(n) Privilege. If you are asserting privilege, you must describe the nature of the documents, communications, or things not produced and the exact privilege that applies.

Note: Supreme Court Rule 201 also identifies methods to control or prevent abuse:

- protective orders—particularly useful in maintaining confidentiality;
- supervision of discovery by the court; and
- proportionality.

Unique Requests

Standard discovery requests do not necessarily include requests for increasingly common methods of money storage and transfers online.

Consider:

- **Requesting information on online/app-based money transfers/virtual currency.** Consider adding to the definitions section "Virtual Currency": "Any medium of exchange that operates like a currency to some but does not have all of the attributes of legal tender, whether or not that medium of exchange is recognized as legal tender."
- **Requesting specific to online transfers/virtual currency**. True and complete copies of any and all documentation evidencing the use of any electronic currency or virtual money, whether foreign or domestic use, including but not limited to Venmo, PayPal, Square, Dwolla, Revolut, and any digital- or cryptocurrency (including but not limited to Bitcoin, Ethereum, Ripple, Litecoin, Dash, Digital and Cash, NEM, Ethereum Classic, Monero, Zcash, Decred, Decentralized Credit, PIVX, Private Instant Verified Transactions), which shall include any cryptocurrency held on exchanges such as Coinbase, Kraken, IO, Poloniex, or the like. Such documentation shall include, but not be limited to, ledgers, journals, logs, receipts, invoices, transaction history, statements, annual summaries, bitcoin address, the private key or seed transaction information, public addresses used to transact in virtual currency, communications related to the purchase of equipment or software used to mine virtual currency, input/source of funds used for purchase, amount, and output and a screenshot/transaction history of any online or app-based monetary account.

- **Requesting social media account/posts information**. Copies of any and all social media posts, photos, and/or videos made by either party regarding either party, child, domestic violence, of which he/she plans to use as evidence in this matter.
- **If you are requesting photos** to be used at trial, ask for the original JPG of the photo for metadata purposes.
- **Always asking your client for any unusual assets** they know about (foreign accounts or real estate, airline miles, etc.).
- **In cases where allocation of parental responsibilities is at issue**, seeking leave of court to serve allocation of parental responsibilities interrogatories (see example attached). Consider any specific circumstances of the parties (*e.g.* relocation interrogatories).

Proof of Service

While discovery requests and responses are not to be filed with the court, Proof of Service of the requests and the answers is important and often overlooked.

Discovery requests and temporary relief

Once you receive responses to your requests, consider what steps you may want to consider taking to get some temporary relief for your client (*e.g.* temporary maintenance/child support).

Timing

Unless otherwise agreed/provided for in a trial order, Rule 218(c) provides all discovery must be completed no later than 60 days before the anticipated start of trial.

Business valuation discovery

- Additional discovery will likely be needed with a motion unless agreed upon by the parties.
- Confer with the business valuation expert for what they will need. They will likely be able to provide a detailed list.
- Compare attorneys' business interrogatories and request for documents to that of the expert. A combination of both is superior as it combines trial strategy with the business valuation analysis.
- Requests to admit fact can be particularly helpful to confirm specific data to avoid the necessity of extra corporate witnesses at trial.

Tips for enforcement

Rule 201(k) letter and conference
Before filing a Motion to Compel Discovery in court, you will need to try to resolve your disputes regarding requested discovery through a 201(k) conference with the opposing party/attorney. Depending on the extent of the disputes, a letter and phone call is typically sufficient.

Motion to compel discovery production
Once you have satisfied your requirements under Illinois Supreme Court Rule 201(k), you can file a Motion in court.

Motion for discovery sanctions pursuant to Illinois Supreme Court Rule 219(c)
Rule 219(c) provides that courts may impose certain sanctions on a party for failure to comply with discovery. These include monetary penalties and barring discovery/testimony at trial.

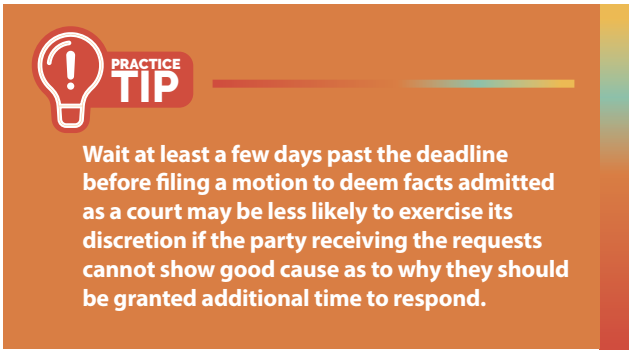
Petition for indirect civil contempt
If the delay becomes egregious, this is often an effective way to obtain responses within a short and precise time frame.

Requests for sanctions or for a finding of contempt are very useful if a substantially incomplete response is provided. Be aware that some parties and practitioners will simply send something knowing it is not complete. There is variation between judges as to whether a further 201(k) is necessary, but it is suggested that you err on the side of caution and conduct that conference in order to obtain complete responses promptly with as little cost to your client.

Requests to Admit Facts or the Genuineness of Documents Pursuant to Illinois Supreme Court Rule 216

What is a request for admission of fact or of genuineness of documents?

- A **request for admission of fact** requires the other party to admit or deny the facts contained in the Request within 28 days or the fact will be deemed admitted.
- **Effect of admission**: The admitted fact can be presented to the court at the commencement of trial or hearing. It can only be used the proceeding for which it was issued.
- A **request for admission of genuineness of documents** can be used as a tool to admit/deny genuineness of certain documents if served with copies of the documents. The documents which are the subject of the Request must be attached unless they have already been provided. Best practice is to always attach the documents for clarity if used at trial.
- The Rule 216 Request whether it is a Request for Admission of Fact or Genuineness of Documents must include a warning 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."**
  - **ALERT ALL OF YOUR STAFF TO THE NECESSITY OF WATCHING FOR THE WARNING and the due date.**
  - Diary/calendar the due date with a reminder 2 weeks in advance.
  - Do not delay in getting the Request to your client.
  - Document steps taken to follow up to obtain the response from the client.
- **Purpose:** These requests allow parties to establish material facts without the necessity of formal proof at trial to save both parties the time and expense of calling witnesses to authenticate documents.
- **Notice:** All parties entitled to notice must be served so be sure to include a GAL or Child Representative.
- Limit of **30 requests** unless good cause shown or otherwise granted leave of court.
- Make each request as simple and direct as possible to avoid any ambiguity.
- **Discretion of court:** The court still has discretion to allow the party who receives the requests to file a response after the 28-day deadline. *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334 (2007).



Requirements for Admission/Denial

• **Sworn statement** (see 735 ILCS 5/1-109). A notarized signature is not sufficient) denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters; or

• A written objection on the ground that some or all of the requested admissions are privileged or irrelevant or the request is otherwise improper in whole or in part. The un-objected portion shall still be answered within the designated period.

• The responding party must make reasonable efforts to secure answers to requests to admit from persons and document within the party's reasonable control. *Singer v. Treat*, 145 Ill. App. 3d 585 (1986).

Improper Uses for Requests to Admit

- Requested admissions are privileged.
- Requested admissions are irrelevant.
- Requests for Legal Conclusions: "For purposes of determining whether a party has properly requested admission of a fact, question of whether an action was taken, an event occurred, or a consequence resulted is one of fact, and even if the admission of that fact plainly requires the fact finder to conclude that a party breached a contract or was negligent as a matter of law, a request for that admission is proper and the failure to respond to it is binding." *Hubeny v. Chairse*, 305 Ill. App. 1038 (1999).

Subpoenas for Records Pursuant to Illinois Supreme Court Rule 204(a)(4)

What is a subpoena for records? A request to compel respondent to produce relevant records that may specify that the appearance of the deponent is excused that that no deposition will be taken if copies of the specified records/ tangible items are served on the party requesting them by a certain date. The requested documents/items must be served on the requesting parties at least 3 days prior to the scheduled deposition. Subpoenas must be issued no less than 14 days prior to the scheduled deposition.

Things to consider

- **If there is no Registered Agent in Illinois**, you may have to issue an out-of-state subpoena. Check local rules of where the organization is registered.
- **When to Issue:**
  - If you know the other party is unlikely to comply with formal discovery, you may want to consider issuing subpoenas earlier depending on whether your client has the financial means. Depending on the pending issues, you may want to issue a subpoena earlier. For example, if a party is seeking to modify child support based on loss of employment, it may be prudent to move forward with issuing a subpoena to that party's employer for records related to the loss of employment/ performance evaluations sooner than later.
  - If you have reason to believe the documents produced or answers provided by the other party are false or incomplete.
- **Scope of rider**. What time period do you want the requested statements? Are there any other documents that this entity can provide that may be relevant? (Applications to open/close accounts, transfer money, loan documents, safety deposit box log records, copies of checks.)
- **Requirements for service.** Payment of fee and mileage, showing that the deponent has "actual knowledge" (return receipt signed). It is a good idea to call the entity you are subpoenaing prior to issuing the subpoena to confirm you have the correct address. Again, check your local court rules! Lake County, for example, requires any subpoena must include specific wording on the subpoena itself, including in bold-face, "DO NOT FORWARD MATERIALS BEFORE DATE STATED ON SUBPOENA." (Lake County Rule 2-2.10. Some counties have local rules that require subpoena responses to be provided only to the court clerk.)
- **Interplay of other statute.** Example: Therapy Records. Generally, release of records to parents/their attorneys is governed by 740 ILCS 110/ *et seq*. (the Illinois Mental Health and Developmental Disabilities Act). If a child is under the age of 12, parents do not need a child's consent to release records. If a child is 12 or older but under 18, a therapist may release the records to a parent if the child is informed and does not object or if the therapist does not find there are compelling reasons for denying access. If a parent is denied access, a party may petition the court for access.

  If a child is under 12, if your client gets the records, he can consent to give them to you. If the child is 12 or over and consents to give his/her parent access, the child must also consent to the records being disclosed to the attorney. If the therapist releases the records, the therapist must also consent to release them to the attorney.

  However, to issue a subpoena to a therapist requires that the mental health services recipient must put his or her mental condition in evidence by testifying about it. 740 ILCS 110/10(a)(1*)*. The records may only be disclosed after a court finds "after in camera examination of testimony or other evidence, that it is 1) relevant, probative, not unduly prejudicial or inflammatory, and otherwise clearly admissible; 2) that other satisfactory evidence is demonstrably unsatisfactory as evidence of the facts sought to be established by such evidence; and 3) disclosure is more important to the interests of substantial justice than protection from injury to the therapist-recipient relationship or to the recipient or other whom disclosure is likely to harm."

Further, 740 ILCS 110 provides that no party shall serve a subpoena under the Act unless it is accompanied by a **written order** issued by a judge, authorizing the disclosure of the records or the issuance of the subpoena. Note that prescription records may fall under this Act as well.

Notice to Appear Pursuant to Illinois Supreme Court Rule 237

What is a notice to appear? A notice to appear requires a party to appear at a hearing or trial and bring documents to said hearing or trial. This can be used when a client failed to produce documents critical for a hearing/trial.

Things to consider:

- You can't use a 237 Notice for documents in place of a 214 Notice to Produce. All material requested in a 237 Notice must have been previously requested via Rule 214.
- Serve the Notice to Appear with sufficient time prior to the hearing/trial.
- Due to hearing and trial dates being continued, include in the 237 Notice to appear both the original hearing date and for all dates the hearing is set by court order. This eliminates the need to issue the Notice repetitively.
- If the receiving party is a nonresident of the county, the court may order the issuing party to pay reasonable expenses associated with the appearance.

Discovery Depositions Pursuant to Illinois Supreme Court Rule 206

What is a discovery deposition and how does it differ from an evidence deposition?

- **Discovery Depositions** typically may only be used for impeachment purposes or as an admission by a party opponent, not as substantive evidence.
- **Evidence Depositions** may be introduced at trial as substantive evidence.

Tips for Depositions

Timing. As depositions are limited to three hours unless stipulated by the parties or extended by the Court, take depositions after you have reviewed relevant discovery from the other party to best narrow the central issues in your case. Serve the notice with sufficient time prior to trial in the event the witness has a conflict and needs to reschedule.

Requirements for Notice. 1) Time and Place of Deposition, 2) Name/Address of Deponent.

- See Supreme Court Rule 203 for location: where the deponent resides, is employed or does business or if the plaintiff, the county of the proceeding.
- If you are intending to video record the deposition, which certainly makes impeachment at trial more impressive, you must include that intention clearly in the notice.
- If you are taking an evidence deposition, you must include that in the notice.
    - If an evidence deposition is set for more than 21 days before trial, the other party has the right to take a discovery deposition in advance. This does not apply within 21 days of trial.
- **Rider to notice for deposition:** Attach a rider which requests any and all documents you need from the deponent.
- **Permissible objections**: The available objections are limited in a deposition to: asked and answered, harassment, privilege, form of the question, or calling for a legal conclusion.
- **Enforcement**. If the deponent refuses to appear for deposition, the party requesting the deposition may move the court for a rule to show cause and order of contempt against the deponent.
- **Interplay of other statutes/supreme court rules**. Back to the above example, you must have a written order permitting the issuance of a subpoena for deposition to a child's therapist. Further, IL S. Ct. Rule 204 provides that "discovery depositions of non-party physicians being deposed in their professional capacity may be taken only with the agreement of the parties and the subsequent consent of the deponent or under a subpoena issued upon order of court." Moreover, HIPAA requires that subpoenas for medical records/to a medical provider be accompanied by a qualified protective order and written authorization from the patient/proof of proper notice.

Trial Stipulations

Purpose. To limit facts that are stipulated to by both parties to avoid unnecessary testimony/time on agreed upon issues.

Common topics to consider for proposed stipulations for family law matters:

- Grounds for Dissolution.
- Date and County of Marriage.

- Age, address, employment, and incomes (if easily ascertainable) of the parties.
- Children's names/ages/dates of birth.
- Maintenance.
- Information regarding marital residence (address, fair market value, current mortgage).
- Vehicle Information (year, make, model, fair market value, current amount owed).
- Information/current balances of assets/liabilities of the parties.
- foundation/admissibility as to exhibits (financial account statements, photographs, titles, electronic correspondence between the parties (including talking parents, texts, e-mails, our Family Wizard messages).
- Any agreements regarding allocation of parental responsibilities, including:
  - decision-making (education, medical, extra-curricular activities, religion);
  - parenting time (regular and holiday);
  - right of first refusal;
  - mediation; and
  - designation of custodial parent.

Trial Preparation & Organization

Assembling Trial Notebooks

What is a Trial Notebook? A **trial notebook** acts as a blueprint for future litigation and should be compiled and supplemented during the pendency of a case. It can be created in either paper or electronic form.

What to Include:
From the pendency of the case:
- pleadings (for a case with many pleadings/orders, consider creating an index);
- orders—particularly those addressing payments subject to reallocation, contempt or requests to admit facts/facts deemed admitted;
- discovery requests and responses;
- relevant proofs/notices of service;
- deposition summaries/abstracts/transcripts;
- requests to admit and responses;
- notices to appear.

Pretrial documents/disclosures:
- exhibit list;
- witness list;
- expert CVs/reports;
- motions *in limine;*
- demonstrative or summary charts, diagrams (see Illinois Rules Of Evidence 1006).

For trial itself:
- opening/closing outlines;
- direct/cross examination outlines;
- list of common foundation/objections (see attached);
- relevant legal research/caselaw.

Organizing Exhibits

Basics of organization
- By issue, chronologically (consider looking at the order of the statutory factors);
- By witness.

Things to consider
- **Order of witnesses.**
- Preferences and standing orders of judges**:** Check with the judge's clerk and judge regarding their preferences for exhibits (electronic copies, Bates stamping).

Summary exhibits
- **Illinois Rule of Evidence 1006:** Allows the contents of voluminous writings, recordings, or photographs that cannot conveniently be examined in court to be presented in the form of a chart, summary, or calculation. The originals or duplicates shall be made available for examination or copying, or both, by other parties at a reasonable time and place.
- Must be based upon admissible evidence.
- Failure to make copies of the underlying documents for summary exhibits available may result in exclusion of the summary exhibit.

Public records as evidence. Requirements under Illinois Supreme Court Rule 216.

A party intending to use them may prepare a copy of them and present the copy of same with notice and said copy shall be admissible in evidence as admitted facts if

otherwise admissible, unless its inaccuracy is pointed out under oath by the adverse party in an affidavit filed and served within 28 days after service of notice.

Motions *in Limine*.

A **motion *in limine*** is a written pretrial motion where a judge may enter a ruling regarding the ability to exclude/admissibility of certain evidence/testimony.

Common bases for motions *in limine*:

- Irrelevant, or even if relevant, unfairly prejudicial;
- Discovery/exhibits not properly disclosed (after deadline, not in compliance with local court rules or Illinois Supreme Court Rules);
- Witnesses not properly disclosed;
- To exclude witnesses other than the parties.

Considerations for motions *in limine*

- Order should clearly specify the evidence excluded/admissible at trial. Consider preparing an appendix to attach to the Order specifying the evidence that is excluded/admitted pursuant to the court ruling.
- If a party violates an order excluding evidence, a court may sanction the offending attorney for the violation.

Opening statements

A very brief summary of what you believe the evidence will show. This is not a time for argument, but can provide a road map to the court of what is expected. Balance the interest in the road map against how much you want to detail your plan to your opponent.

Begin to prepare this after the first meeting with a client and reference particular exhibits and witnesses as they are produced and disclosed during discovery.

Witness Disclosures/Strategy

Types of witnesses

- **Lay Witnesses**. An ordinary person who testifies based upon their personal knowledge/life experience. (*e.g.* the parties). The disclosure must identify the subjects on which the witness will testify.
- **Independent Experts**. Not the party, the party's current employee, or the party's retained expert (*e.g.* 604.10 custody evaluator). For disclosure, the party must disclose the subjects on which the expert will testify and the opinions the party expects to elicit.
- **Controlled Experts.** The party, the party's current employee, or the party's retained expert (*e.g.* retained appraiser). Under Illinois Supreme Court Rule 208, each party, unless manifest injustice would result, bear the expense of all fees charged by his/her controlled expert witness. For a controlled expert, need to disclose:
    - The subject matter on which the witness will testify;
    - The conclusions and opinions of the witness and the basis thereto;
    - The qualifications of the witness; (C.V.); and
    - Any reports by the witness about the case.

A party may elaborate on a properly disclosed opinion, but the testimony must be encompassed by the original opinion. *Becht v. Balac*, 317 Ill. App. 3d 1026 (2000).

Motions to call witnesses out of order pursuant to Illinois Supreme Court Rule 233

Illinois Supreme Court Rule 233 governs the order of stages at trial/examination of witnesses. In the event that a trial is proceeding against a *pro se* litigant, consider filing a motion to call witnesses out of order to account for availabilities of expert and lay witnesses.

Considerations for selecting witnesses

- What valuations/appraisals do you need for assets that have a value that is difficult to ascertain? (businesses, artwork, real estate)?
- For lay witnesses, what will the witness be able to add that is not duplicitous to other lay witnesses? (For trials regarding allocation of parental responsibilities, who were witnesses to specific incidents regarding the minor children? Who had significant interactions with the children?)

Guardian *Ad Litem* vs. Child Representative Testimony

Guardian *ad litems* (GALs) may testify in court and issue a final report that include a recommendation regarding the child's schedule/decision-making responsibilities. GALs have no confidentiality with the child and may be cross examined after rendering a best interests opinion. As a witness, the GAL may testify to the GAL's personal observations and offer opinions concerning what is in the best interests of the child based on his/her investigation.

Some case law suggests a GAL may testify as to hearsay when it is in the best interests of the child. See *In re Marriage of Wycoff*, 266 Ill. App. 3d 408 (4th Dist. 1994). Recent cases suggest that a GAL may be barred if they relied upon therapists' records. This is very fact specific, but an area where attorneys and GALs must exercise extreme caution.

Child Representatives do not issue a report, but can conduct litigation as an attorney direct/cross examining witnesses at trial. Child representatives have a confidential relationship with the minor child and cannot be called as a witness at trial. The child representative shall offer "evidence-based legal arguments."

Rebuttal experts

Caselaw suggests a party may argue for the admission of a rebuttal expert report based on a party's need to "explain, repel, contradict, or disprove" new evidence introduced by the opposing party. *Flanagan v. Redondo*, 231 Ill. App. 956 (1st Dist. 1991).

Closing arguments

- Very often, these are written, but you should be prepared to orally present at the immediate conclusion of the evidence. As a result, advance preparation is critical.
- Should address each statutory factor for each issue very clearly and concisely.
- Should explain what each exhibit and witness you presented proved.
- Should include case law to support your legal argument.
- Write to be persuasive and not just factually summarizing.
- Begin to prepare this after the first meeting with a client and reference particular exhibits and witnesses as they are produced and disclosed during discovery.

Top 30 Evidentiary Issues in Family Law Cases

By Hon. Arnold F. Blockman (ret.)

1) Out of court statements of children to parents or lay persons

a. Statements of children expressing custodial preferences are admissible in a custody dispute for the limited purpose of showing the minor's then existing state of mind. *In re Marriage of Deckard*, 246 Ill. App. 3d 427, 431 (4th Dist. 1993); *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 416 (4th Dist. 1994)
b. Illinois Rules of Evidence 803(3).

2) Parent's testimony as to reasons for wanting custody

A parent's testimony regarding why he or she should be granted custody is permissible. *In re Marriage of Arcaute*, 261 Ill. App. 3d 263 (3d Dist. 1994).

3) Out of court statements of children as to abuse or neglect in a custody case

a. Out of court statements by children as to abuse or neglect in a custody case are admissible substantively by statute under 750 ILCS 5/606.5 of the Dissolution Act. *In re Marriage of Gilbert*, 355 Ill. App. 3d 104 (4th Dist. 2004); *In re Daria W*, 317 Ill. App. 3d 194 (3d Dist. 2000). 606.5(c) concludes by stating that "no such statement, however, if uncorroborated and not subject to cross-examination, shall be sufficient in and of itself to support a finding of abuse and neglect."
b. Such statements are also admissible, in a more restrictive fashion, under 735 ILCS 5/8-2601 of the Code of Civil Procedure. Also see a similar provision in the Domestic Violence Act, 750 ILCS 60/101, and the Juvenile Court Act, 750 ILCS 405/2-18(4)(c).

4) In court statements of a witnesses's mental or emotional state

a. A lay witness may testify to his or her own mental state for the limited purpose of showing state of mind. *People v. Keefe*, 209 Ill. App. 3d 744 (1st Dist. 1991).
b. Illinois Rules of Evidence 803(3).

5) Impeachment by evidence of conviction of crime

a. A witnesses's credibility may be attacked by evidence that a witness has been convicted of a felony or a misdemeanor involving dishonesty or false statement as long as the Court determines that the probative value of the evidence of the crime is not substantially outweighed by the danger of unfair prejudice. *People v. Montgomery*, 47 Ill. 2d 510 (1971).
b. Illinois Rules of Evidence 609(a).

6) Lay opinion regarding the value of personal property

a. A lay witness may give an opinion as to the present value of personal property, but the witnesses' familiarity with the value of the property must be affirmatively established. *State Farm v. Best in the W. Foods* 282 Ill. App. 3d 470 (1st Dist. 1996). In *Kim v. Mercedes-BMW,* 353 Ill. App. 3d 444 (1st Dist. 2004) the Court rejected the concept that all lay owners of personal property are "presumed" to know the value of said property. A lay witness, in order to give a value opinion, must establish an appropriate foundation by establishing, at a minimum, familiarity with the property, actual knowledge of the value of the property, and the basis of the knowledge of that value. In *Razor v. Hyundai Motor America,* 222 Ill. 2d 75 (2006) the Court held that a lay witness should be permitted to give her opinion as to the value of personal property (a vehicle) if she has sufficient personal knowledge of the property and its value. See also *Rose v. Mercedes-Benz U.S.A LLC.,* 378 Ill. App. 3d 615 (1st Dist. 2007).
b. Illinois Rules of Evidence 701.

7) Lay opinion as to the value of real estate

a. A sufficient foundation for a lay opinion as to the value of real estate must include familiarity with the property in question and knowledge of real estate values in the vicinity. *Village of Lake Villa v. Stakovich*, 211 Ill. 2d 106 (2004). Owning property in the area or vicinity can satisfy the requirement of value knowledge. *Illinois Dept. of Public Works v. Oberlander,* 42 Ill. 2d 410 (1969). Ownership of real estate usually indicates knowledge of the price paid for land, income generated from it, potential issues with the property, and is sufficient to give a lay person a reasonable idea of value. *American Natl. Bank & Trust Co. v. City of North Chicago*, 155 Ill. App. 3d 920 (1st Dist. 1987).
b. Illinois Rules of Evidence 701.

8) Lay opinion as to intoxication of the other party

a. A lay person may properly give an opinion that the other party was intoxicated as long as it is based on personal observation and experience. *People v. Robinson,* 368 Ill. App. 3d 963 (1st Dist. 2006).
b. Illinois Rules of Evidence 701.

9) Expert opinion as to the value of real estate

a. An individual possessing expert qualifications as to real estate valuation should be treated as an expert witness and not as a lay opinion witness. Hence, comparable sales may be reasonably relied upon by a real estate appraiser expert in arriving at the basis of his or her opinion. *City of Chicago v. Anthony*, 136 Ill. 2d 169 (1990); *Wilson v. Clark,* 84 Ill. 2d 186 (1984).
b. Illinois Rules of Evidence 702, 703 and 704.

10) Expert opinion based upon out of court reasonably relied upon information

a. An expert may give an opinion based upon out of court information reasonably relied upon in the expert's field. "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." *Wilson v. Clark*, 85 Ill. 2d 186 (1981). Reasonably relied upon facts or data constitutes substantive evidence only if otherwise admitted into evidence. *City of Chicago v. Anthony*, 136 Ill. 2d 169 (1990). Such facts or data not admitted into evidence by the Court may be considered solely as a basis for expert opinion and not as substantive evidence. *City of Chicago v. Anthony*, 136 Ill. 2d 169 (1990).
b. Illinois Rules of Evidence 703.

11) Opinion testimony of guardian *ad litem* (GAL) in custody case based on out of court admissible and inadmissible evidence at trial

The GAL may give an opinion regarding who should be awarded custody based upon hearsay information, including the preference of the child and other information obtained out of court. A GAL is the "eyes and ears" of the Court. *In re Marriage of Wycoff*, 266 Ill. App. 3d 408 (4th Dist. 1994) and 750 ILCS 5/506 (a)(2). The GAL protects the "best interest" of the child and can review and consider information regarding the child that is both admissible and inadmissible in Court. *In re Marriage of Karonis*, 296 Ill. App. 3d 86 (2d Dist. 1998).

12) Opinion testimony of lay witness as to an unfounded DCFS investigation

… Not withstanding any other provisions of law to the contrary, an unfounded report shall not be admissible in any judicial or administrative proceeding or action. 325 ILCS 5/7.14.

13) Cumulative evidence, undue delay and unfair prejudice evidence

a. Evidence that would otherwise meet the standard for relevancy may be excluded under certain circumstances. The circumstances may consist of unfair prejudice, confusion of the issues, undue delay, waste of time and the needless presentation of cumulative evidence. *Gill v. Foster* 157 Ill. 2d 304 (1993); *First Midwest Tr. Co. v. Rogers*, 296 Ill. App. 3d 416 (1st Dist. 1998). The admission of cumulative evidence is within the sound discretion of the trial court. *Dellon v. Evanston Hosp.* 199 Ill. 2d 483 (2002); *Hubbard v. Sherman Hosp.*, 292 Ill. App. 3d 148 (1st Dist. 1997). It is also within the trial court's discretion to limit the number of expert witnesses. *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483 (2002); *Yassin v. Certified Grocers of Illinois,* 150 Ill. App. 3d 1052 (1st Dist. 1986); *Moore v. Anchor Org. for Health Maint.*, 284 Ill. App. 3d 874 (1st Dist. 1996); *Cetera v. DiFlippo*, 404 Ill. App. 3d 20 (1st Dist. 2010). "Relevant evidence may be excluded if its prejudicial effect substantially outweighs its probative value." *People v. Baynes*, 88 Ill. 2d 225 (1981). A finding on the record of the balancing test in Rule 403 is encouraged but not required. *In re Commitment of Hooker,* 2012 IL App (2d) 101007. A failure to conduct the balancing test under Rule 403 may result in a reversal. *People v. Johnson*, 406 Ill. App. 3d 805 (1st Dist. 2010).
b. Illinois Rules of Evidence 401, 403.

14) Statements made by parties during settlement discussions

a. Historically, admissions made by a party during settlement discussions were not excluded. *Khatib v. McDonald,* 87 Ill. App. 3d 1087 (1st Dist. 1980); *Niehuss v. Merrill Lynch*, 143 Ill. App. 3d 444 (1st Dist. 1986); *Skonberg v. OwensCorning Fiberglas Corp.*, 215 Ill. App. 3d 735, 745 (1st Dist. 1991). Illinois Rule of Evidence 408 (a)(2) now makes such admissions in settlement discussions inadmissible, along with the settlement discussions. The old case law was considered a trap for the unwary and an impediment to settlements. Graham, Handbook of Illinois Evidence, sec. 408.1, p. 349 (2019 ed.). Rule 408(b) does not require the exclusion of any evidence otherwise discoverable merely because it was presented in the course of settlement negotiations. *Control Solutions LLC v. ELECSYS,* 2014 IL App (2d) 120251.
b. Illinois Rules of Evidence 408.

15) Statements or admissions made by parties during mediation

a. Statements made in mediation are not subject to discovery and are not admissible in evidence in any family law proceeding by statute. 710 ILCS 35/4. This statutory provision is similar to section 4 of the Uniform Mediation Act, 7A, Part II, Uniform Laws Annotated (master ed.). The obvious objective is the public policy of encouraging parties to talk freely in order to resolve their disputes.
b. Illinois Rules of Evidence 101.

16) Foundation testimony for business records

a. Business records are admitted as an exception to the hearsay prohibition if made at or near the time and if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business to prepare such a record as long as the record was made by a person within the business or with knowledge of information transmitted by a person within the business with knowledge of the acts or events. Illinois Rules of Evidence 803(6). This rule is consistent with Supreme Court Rule 236 (which excludes police accident reports as a business record but permits hospital and medical records to be admissible in civil proceedings as a business record). All circumstances of the writing or record, including the lack of personal knowledge of the entrant or maker, goes to weight and not to the admissibility of the document. *Pieski v. Warchol Constr. Co.,* 111 Ill. App. 3d 641 (1st Dist. 1982); *Babcock v. Martinez* 368 Ill. App. 3d 130, 145-46 (4th Dist. 2006). The modern trend is quite liberal as to the admission of business records as business becomes more complicated and transactions so diffused that no person can identify any particular operation. *Birch v. Drummer Twp.,* 139 Ill. App. 3d 397 (1st Dist. 1985). A person testifying as to the routine producing accuracy must be testifying to the procedures of the business. Hence, a person simply receiving a document from a business could not lay a sufficient foundation for admitting the document as a business record of the issuing business. *APA v. National Bank of Commerce,* 374 Ill. App. 3d 1082 (1st Dist. 2007). A sufficient foundation for admitting records of regularly conducted business activity could be established by testimony of the custodian of the record or another qualified person familiar with the business and its mode of operation. *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400 (1st Dist. 2005). The record must be made at or near the time of the event recorded as liberally interpreted. *Talusek v. Illinois Cent. Gulf R.R.CO.*, 225 Ill. App. 3d 72 (1st Dist. 1993). See generally Graham, Handbook of Illinois Evidence, sec. 803.6, pp. 1051-71 (2019 ed.)
b. Illinois Rules of Evidence 803(6).

17) Foundation testimony for business records and public records by certification

a. Illinois Rules of Evidence 803(6) and 803(8) provide that a proper foundation for both business records and public records may consist of a certification that complies with Illinois Rules of Evidence 902(11). That section provides that the original or a duplicate of a public or business record would be admissible if accompanied by a written certification by the custodial or other qualified person that the record was made at or near the time of the occurrence by or from information transmitted by a person with knowledge, the document was kept in the course of the regularly conducted activities, and the document was made by the regularly conducted activity as a regular practice. There is also a notice requirement and availability of inspection of the document requirement.
b. Illinois Rules of Evidence 803(6), 803(8), and 902(11).

18) Testimony of lay witnesses as to who should be awarded custody

a. Attorneys frequently ask the parties, grandparents, or friends who should be awarded custody. Assuming a proper foundation has been established for such a lay opinion under Illinois Rules of Evidence 701, the opinion could either be allowed by the Court as a proper lay opinion or excluded as not being helpful to the Court under the express language of 701.
b. Illinois Rules of Evidence 701.

19) Foundation for computer generated records

a. A sufficient foundation for computer generated or created records is that the electronic computer equipment is recognized as standard, the particular computer produces an accurate record when properly employed or operated, the computer equipment operated properly at the time, the entries were made in the regular course of business at or reasonably near the event by someone possessing personal knowledge, unless the Court determines the sources of information, method or time of preparation lack trustworthiness. *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760 (4th Dist. 2002); *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380. See generally Graham, Handbook of Illinois Evidence, sec. 901.9, p. 1274 (2019 ed.). The recent amendment to the Illinois Rules of Evidence 902 added a subparagraph (12) and (13) to permit a certification process for computer generated records similar to

that required for business records under 901(11). The amendments make electronically stored information self authenticating and should ease the burden and expense of authenticating computer generated evidence.

b. Illinois Rules of Evidence 901(9), 803(6), 901, 902(12)(13)

20) Foundation for faxed documents

a. A proper foundation for a faxed document is that the documents received accurately reflect the documents faxed or the documents faxed were accurately received and that the machines employed to send or receive the fax are capable of producing an accurate reproduction when properly employed and that the machines were properly employed. *People v. Hagan*, 145 Ill. 2d 287 (1991); *Parkway Bank & Trust Co. v. Korzen,* 2013 IL App (1st) 130380; see generally Graham, Handbook of Illinois Evidence, sec. 901.9, p. 1275 (2019 ed.).

b. Illinois Rules of Evidence 901(9).

21) Foundation for emails and text messages

a. A sufficient foundation for an email is through traditional common law methods such as the reply doctrine, distinctive characteristics, chain of custody, or a process system similar to the foundation for faxed documents. *People v. Downin*, 357 Ill. App. 3d 193 (3d Dist. 2005). A similar foundation is required for text messages. *People v. Chromik*, 408 Ill. App. 3d 1028 (3d Dist. 2011); *People v. Watkins*, 2015 IL App (3d) 120882. See generally Graham, Handbook of Illinois Evidence, sec. 901.9, pp. 1275-76 (2019 ed.)

b. Illinois Rules of Evidence 901(9).

22) Foundation for electronically stored social media information

a. Some courts have analyzed social media evidence under the traditional rules related to hard copies. In *Complete Conference Coordinators Inc. v. Kumon N. Am. Inc.,* 394 Ill. App. 3d 105, 109 (2d Dist. 2009) it was noted that emails could be authenticated "through conventional, widely accepted and common means." The party seeking to admit the email does not need to show that the IP address from which the email was sent was connected to the sender. Illinois Rules of Evidence 901(b)(4) illustrates that where a documents' contents, in conjunction with other circumstances, reflect distinctive characteristics, the authenticity requirement is satisfied. *People v. Diomedes*, 2014 IL App (2d) 121080. In *People v. Chromik*, 408 Ill. App. 3d 1028, 1046-48 (3d Dist. 2011) it was stated that a transcript of a text message could be authenticated with direct or circumstantial evidence showing that the transcript is what it purports to be. In *People v. Kent*, 2017 IL App (2d) 140917 the court discussed in detail the authentication and foundation requirement for a Facebook post and applied a strict approach of requiring an expert or social media representative. It is suggested that most family law judges would follow a more relaxed standard simply determining if there is sufficient evidence to support a finding under Rule 901 that the social media site or posting is what the proponent claims. Such evidence could be through traditional common-law methods such as the reply doctrine, distinctive characteristics, chain of custody, or any of the methods noted in Rule 901. The issue will be in state of flex until a rule of evidence is specifically formulated dealing with social media issues. See Graham, Handbook of Illinois Evidence, sec. 901.9, p.1276 (2019 ed.); McCann, "Tips For Authenticating Social Media Evidence," 100 Illinois Bar Journal 482 (Sept. 2012); and Zimmerman, "*People v. Kent*, The New Standard For Authenticating Social Media Evidence," 106 Illinois Bar Journal 26 (Apr. 2018).

b. Illinois Rules of Evidence 901(b)(9) and 901(b)(4).

23) Out of court statements to police officers advising of incident

a. In *People v. Simms*, 143 Ill. 2d 154 (1991) the court stated that a police officer may recount the steps taken in the investigation of a crime scene, including information received from a police dispatch. Such investigatory hearsay is considered not as hearsay but only for the limited purpose of showing why the police officer arrived at the scene or acted as he or she did. Such background testimony has been frequently criticized. *People v. Jura*, 352 Ill. App. 3d 1080 (1st Dist. 2004); *In re Jovan A.,* 2014 IL App (1st) 103835. See generally Graham, Handbook of Illinois Evidence, sec. 801.5, pp. 925, 926 (2019 ed.)

b. Illinois Rules of Evidence 801(c).

24) Expert opinion of parental alienation syndrome

a. .If an expert offers a custody opinion based upon a diagnosis of or a finding of "parental alienation syndrome," a *Frye* hearing may be required to determine if the opinion is based upon "a new or novel scientific methodology or principle … sufficiently established to have gained general acceptance in the particular field in which it belongs." In *In re Marriage of Bates*, 212 Ill. 2d 489 (2004) the court avoided deciding if parental alienation syndrome met the *Frye* requirement by finding that the trial court did not rely upon the PAS opinion of Dr. Gardner. In most cases no Frye hearing will be needed because most custody experts do not make a diagnosis or

finding of PAS, but simply find certain alienating factors exist on the part of one parent.

b. Illinois Rules of Evidence 702.

25) Foundation for past recollection recorded

a. A memorandum, record or document is admissible as an exception to the hearsay rule if the proponent can show that the witness once had personal knowledge, *Barker v. Eagle Ford Ctrs, Inc.*, 261 Ill. App. 3d 1068 (2d Dist. 1994), that the memorandum was made or adopted by the witness when fresh in her memory, *People v. Speed*, 315 Ill. App. 3d 511 (4th Dist. 2000), and that the witness currently has an insufficient recollection to testify fully and accurately and that the record or memorandum fails to refresh the current recollection. *People v. Beasley*, 307 Ill. App. 3d 200 (1st Dist. 1999). See generally Graham, Handbook of Illinois Evidence, sec. 803.5, pp. 1047-1050 (2019 ed.)

b. Illinois Rules of Evidence 803(5).

26) Foundation for present recollection refreshed

a. A witness may refresh her memory by referring to a document while testifying when she is unable to testify to relevant facts. *People v. Nickson*, 58 Ill. App. 3d 470 (1st Dist. 1978). The document itself does not need to be admissible in evidence. *People v. Van Dyk*, 40 Ill. App. 3d 275 (1st Dist. 1976). The document need not have been prepared by the witness. *Northern Ill. Gas Co. v. Dr. Vito Constr.*, 214 Ill. App. 3d 203 (1st Dist. 1991). See generally Graham, Handbook of Illinois Evidence, sec. 612.1, pp. 695-698 (2019 ed.)

b. Illinois Rules of Evidence 612.

27) Foundation for photographs or video

a. A sufficient foundation for photographs or video is the testimony of any person with personal knowledge of the image that at a relevant time the photograph or video is a fair and accurate representation of the object at the time. *People v. Glisson*, 359 Ill. App. 3d 962 (5th Dist. 2005). The presence of the photographer is not required, but the witness must have personal knowledge of what is depicted. *People v. Holman*, 103 Ill. 2d 133 (1984). Remoteness of time or changed conditions alone did not impact foundation as long as the trier of fact is not misled. *Procknow v. El Paso Golf Club Inc.*, 253 Ill. App. 3d 387 (4th Dist. 1993).

b. Illinois Rules of Evidence 1001 (2).

28) Impeachment of a party's own witness

a. A party may impeach his own witness by a prior inconsistent statement only upon a "showing of affirmative damage." Illinois Rules of Evidence 607. A party may, however, impeach his own witness by other modes of impeachment, including a prior conviction, *People v. Collins*, 106 Ill. 2d 237 (1985) or by virtue of bias, interest or improper motive. *People v. Williams*, 147 Ill. 2d 173 (1991).

b. Illinois Rules of Evidence 607.

29) Impeachment: collateral v. noncollateral matters

Any permissible impeachable matter may be explored on cross examination. *People v. Jackson*, 391 Ill. App. 3d 11 (1st Dist. 2009). However, if the matter is considered collateral, the cross-examiner must accept the answer given by the witness. *People v. Morgan*, 142 Ill. 2d 410 (1991). If the matter is not collateral, extrinsic evidence may be introduced disputing the facts asserted in the examiner's question. *People v. Steptore*, 51 Ill. 2d 208 (1972). Matters pertaining to the credibility of a witness, such as bias, interest, corruption, coercion, prior convictions, lack of personal knowledge, are not collateral and may be contradicted by other testimony. *Herget Nat. Bk. of Pekin v. Johnson*, 21 Ill. App. 3d 1024 (3d Dist. 1974).

30) Good-faith basis for impeachment

A good-faith basis is required on the part of the examining party as to the truth of matters contained in leading questions of a witness on cross examination. *People v. Sanchez*, 240 Ill. App. 3d 533 (1st Dist. 1992). This concept also requires good faith in laying the foundation for impeachment, with the intent and ability to follow it up in the event of a denial. *Kahtib v. McDonald,* 87 Ill. App. 3d 1087 (1st Dist. 1980).

How to Determine (and Undo) Parentage According to the Illinois Parentage Act of 2015 (750 ILCS 46)

By Jessica Patchik

Ways to establish parentage are set forth in Section 201 of the Parentage Act:

- adoption (See the Adoption Act, 750 ILCS 50/0.01 *et seq*.)
- surrogacy (See the Gestational Surrogacy Act, 750 ILCS 47/1 *et seq*.)
- giving birth
- marital presumption (section 204(a))

Marital presumption

A person is presumed to be a parent of a child born:

- during a marriage, civil union, or other substantially similar relationship;
- within 300 days after the marriage, civil union, or substantially similar relationship ended; or
- prior to the parties marrying, provided the parent is listed on the child's birth certificate.

Note: An "attempted" marriage, civil union, or similar relationship counts; surrogacy is excluded.

Can the presumption be undone?

Section 205 (a) and (b) allow a *mother, child, or presumed parent* can seek to declare the nonexistence of the parent-child relationship by:

- filing a verified complaint;
- within two years after the party knew or should have known of relevant facts (not beyond child's 18th birthday.
- (Burden = clear and convincing evidence.)

Section 205(c) and (d) allow a *man* whose parentage was adjudicated based upon the Section 204 presumptions to seek to declare the nonexistence of the parent-child relationship by:

- filing a verified complaint based upon DNA tests excluding him as the father;
- within two years of actual knowledge of relevant facts (not beyond child's 18th birthday);
- excludes times when mother or child refused to submit to DNA testing.
- (If DNA is admissible under section 614, the paternity adjudication, and orders regarding allocation of parental responsibilities, parenting time, and future payments of support *may* be vacated.)

Voluntary Acknowledgment Article 3

What is a Voluntary Acknowledgement?

- Form prescribed by the Illinois Department of Healthcare and Family Services.
- Must be signed and witnessed as set forth in section 302.
- Is effective the date it is filed with the Illinois Department of Healthcare and Family Services (section 304(C)).
- May be signed prior to birth of child (section 304(b)).
- May be signed by a minor (section 304(d)).
- May be executed when there is another presumed parent, however must be accompanied by a Denial of Parentage (section 303).
- Pursuant to section 305 **is equivalent to an adjudication of parentage, has the full force and effect of a judgment, and is the basis to seek support.**
- Cannot be ratified by the court.
- Is **NOT** gender neutral.

Note: Voluntary acknowledgements of another state must be given full faith and credit per section 311.

Think fast: Section 307 allows for a written recission of a voluntary acknowledgement to be filed with the Illinois Department of Healthcare and Family Services within **60 days** of its effective date, or the date of filing of a proceeding relating to the child in which a signatory is a party, whichever occurs earlier.

Can the voluntary acknowledgement be undone?

- Section 309 allows challenge *only on the basis of fraud, duress, or material mistake of fact.*
- Verified complaint must be filed within two years of

the effective date of the acknowledgement, excluding periods during which party challenging is under legal disability or duress, or the grounds for relief are fraudulently concealed.
- Must be filed in the county where a proceeding relating to the child is pending. If no action is pending must be filed in the county where the child resides.
- Challenging party bears the burden of proof (clear and convincing evidence).

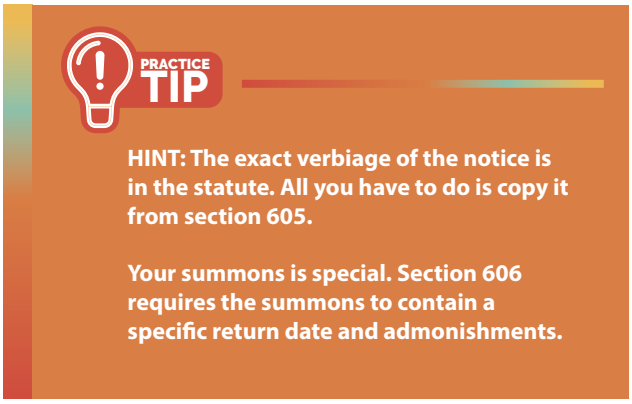
Adjudication
Article 6

Pursuant to Section 602, a verified complaint can be filed by:
- Child;
- Mother;
- pregnant woman;
- man or woman presumed or alleging self to be parent;
- support enforcement or other governmental agency authorized by law
- person or public agency with physical possession or allocation of responsibilities;
- Department of Healthcare and Family Services;
- adoption agency; and
- representative of deceased, incapacitated, or minor person.

Section 603 requires personal jurisdiction of a party to adjudicate their parentage.

Section 604 states venue to seek parentage is proper in any county where a *party* resides, but for allocation of parental responsibilities venue is proper where *child* resides.

If there is a presumed parent other than the parent alleged in the petition, a notice to presumed parent must be served (like a summons) or sent by circuit court clerk to last known address, supported by affidavit.





Know your limitations

- Section 607 allows a child with no presumed, acknowledged, or adjudicated parent to seek relief at any time (even after emancipation). Anyone else with standing can seek relief at any time through child's emancipation.
- Section 608 allows an alleged father to seek a determination of parentage for a child with a presumed parent within two years he knew or should have known of relevant facts.
- Section 609 allows a party seeking an adjudication of parentage of a child with an acknowledged or adjudicated parent to seek relief within two years of the acknowledgment or adjudication.
- If you want a head start, section 612 allows commencement of a proceeding to adjudicate paternity before a child is born (but you cannot conclude until after the birth).

So, you've been served with a petition to adjudicate parentage

You can either:
- Ask for DNA (see sidebar, Article 4: Genetic Testing, on next page);
- Admit paternity in accordance with section 616; or
- Do nothing and be defaulted in accordance with section 620.

Can the adjudication be undone?

Section 1401 is always available.

Article 4: Genetic Testing

- The court shall order the mother, child and alleged father to submit to DNA testing upon the request of a party (if you refuse to submit, the court can default you).
- Testing must be conducted by an expert. Section 402 contains specific requirements.
- Results must be in a certified written report with chain of custody affidavit and must be mailed to all parties. Proof of service MUST be filed with the court.
- A party may challenge authenticity by filing a motion within 28 days of receipt of the report. If not challenged, report is admissible at trial without foundation.
- Alleged father is presumed to be the biological father if the "combined paternity index" is at least 1,000 to 1 and the probability of paternity is 99.9 percent.
- Cost is usually attributed to party requesting but can be apportioned.
- If a man is unavailable (as defined in the statute) his parents, siblings, other children and their mothers, and other relatives can be tested (fatherless draw).
- Motherless draw is authorized under section 615.

Indirect Civil Contempt

By Stephanie Tang

I. Indirect vs. direct contempt
   a. Direct Contempt: Occurs in the presence of a judge. Purpose is to maintain order in the courtroom.
      i. Ex: outbursts during court proceedings or disobeying a judge's order to execute a deed of assignment.
   b. Indirect contempt: outside of court; requires additional extrinsic evidence.

II. Civil contempt vs. criminal contempt vs. visitation abuse
   a. Purpose of civil contempt: compel the contemnor to perform a specific act/comply with an order. The contemnor must be able to purge himself of contempt.
      i. Ex: nonpayment of child support can be purged by paying the amount owed and any interest.
   b. Purpose of criminal contempt: punish past misconduct
      i. Ex: communicating with jurors to try to influence the outcome of litigation.
   c. Purpose of visitation abuse: punish noncompliance with allocated parenting time.
      i. Can seek additional requirements including attendance of
   d. Citing references: *750 ILCS 5/607.5; Knoll v. Coyne,* 2016 IL App (1st) 152494; *In re Marriage of Betts*, 155 Ill. App. 3d 85 (4th Dist. 1987).

III. Recommended documents for hearing
   a. Original judgment/order not complied with
      i. Check that your order is clear, specific and unambiguous on the duties and responsibilities of the alleged violator.
      ii. Check that your enforcement action is not barred by a statute of limitations or other time limitation.
      iii. Check that the court you are seeking to file in has jurisdiction to enforce. (If you are seeking to both enforce and modify a prior judgment/order, check jurisdictional requirements for enforcement AND modification.)
   b. Proof of attempts to obtain compliance
   c. Proof of noncompliance
      i. For children's expenses, receipts of expenses, proof of payment.

IV. Direct examination points
   a. What Order/Judgment has not been complied with?
   b. What efforts have been made to obtain compliance?
   c. Has there been partial compliance?
   d. What is your requested relief?
      i. Request that a rule be issued
      ii. Requested purge
      iii. Request for attorney fees and costs.

V. Cross-examination points
   a. If their compliance is contingent on the moving party performing an action, has that action been performed? (ex: if a party's requirement to contribute to children's expenses requires that the other party submit receipts/proof of payment).
   b. Communications between the parties/ counsels to seek compliance.
   c. Did respondent know of the alleged non-compliance? Should he have reasonably known?
   d. If using a defense of poverty, what are the party's current assets? Attempts made to obtain money?

VI. Contents of a petition for indirect civil contempt:
   a. Titling: petition for rule to show cause (a petition for indirect criminal contempt should be titled as a "petition for adjudication of criminal contempt" as the contemnor has a right not to testify).
   b. Terms of relevant court order/judgment alleged to have been violated.
   c. The conduct that constitutes a willful violation of the order.
   d. If relevant, any amounts owed, paid, total arrearages, and any associated interest.
   e. Any attempts to seek compliance with the order/judgment.
   f. Verification by the moving party.
   g. Relief to request:
      i. Issuance of rule to show cause
      ii. Request for attorney fees

VII. Defenses to petition for indirect civil contempt
   a. Respondent was unable to comply with order.
   b. Order requires Respondent to commit an illegal act.
   c. Respondent did not know of the alleged noncompliance and could not reasonably have known.
   d. Petitioner did not perform necessary steps to allow Respondent to comply with order.
   e. Invalidity of order of contempt (lack of jurisdiction).

VIII. Burden Shifting: *In re Marriage of Betts*
   a. The moving party must first make a *prima facie* case of contempt.
   b. The burden then shifts to the respondent to show cause as to why he should not be held in contempt. Contemnor may present evidence that his noncompliance was not willful and contumacious.
   c. Guilt must be established by a preponderance of the evidence.

IX. The opposing party was found in contempt. Now what?
   a. Contents of order:
      i. Fill out both the rule to show cause and indirect civil contempt order.
      ii. Specific findings of fact regarding noncompliance.
      iii. Purge: "keys to his cell." How can the respondent purge himself of the contempt?
      iv. Return to court for status of compliance, if applicable.
   b. Filing a Petition for Attorney Fees pursuant to 750 ILCS 5/508(b).
      i. Requires finding that the party's failure to comply was without compelling cause or justification.
      ii. If the noncompliance is with a discovery order, there is a rebuttable presumption the failure to comply was without compelling cause or justification.
   c. Issue a body attachment/order of commitment.
      i. Have as much information as you can about the Respondent for the body attachment order (DOB, SSN, weight/height, race, distinguishing marks/features, last known home address, last known work address).
      ii. Set cash bond amount.

X. Check your Local Rules!
   a. Cook County Rule 13.8: requires a moving party to attach a copy of the judgment/order alleged to have been violated or present it to the court.
   b. Kane County Rule 14.06: requires that all rules be returnable not less than 14 days and no more than 30 days from date of issuance.
   c. Lake County Rule 10-1.03: notice of contempt hearing requires inclusion of specific words: **"YOUR FAILURE TO APPEAR AT THIS HEARING MAY RESULT IN YOUR ARREST."**

Attorney Fees

By Stephanie Tang

Recommended documents to prepare for hearing

- Engagement agreement signed by client and attorney.
- Redacted copies of bills (Note: You should redact the portions of the bills that could waive the attorney/client privilege).
- Unredacted copies of bills (for the judge's *in camera* inspection).
- Summary of fees requested (*i.e.*, if you are seeking separate counts for contribution to attorney fees).
- Affidavits attached to fee petition including qualifications and hourly rate.

Direct examination questions for parties requesting fees/costs

- The attorney's qualifications/experience.
- The attorney's length of time in practice.
- The attorney's hourly rate (in-court and office).
- Board certifications/special recognitions or achievements.
- Qualifications of other attorneys who worked on the case.
- Qualifications of legal assistants/role of legal assistants
    - How is legal assistant's work reviewed?
- Case-specific factors/issues:
    - novelty/difficulty of questions involved and the skills/labor requisite to perform the legal service properly;
    - nature/length of the professional relationship with the client; and
    - discovery noncompliance?/Other delays by opposing party?
- Reasonableness and necessity of requested fees.
- Fees customarily charged in the area for similar legal services.
- Specifics as to fees:
    - when the fees were incurred;
    - amount incurred to date;
    - amount paid by client;
    - Amount due and owing;
    - hours charged; and
    - if asking for interim/prospective fees, amount anticipated.
- Questions related to each party's respective incomes and assets/access to funds.

Cross-examination points

- Reasonableness/necessity of attorney fees:
    - Duplicate billing
    - Bundled/vague billing?
    - Internal meetings/conferences?
    - Unreasonable increase of attorney fees/costs?
    - Did attorney bring records to the hearing?
    - Have there been unnecessary hearings/ discovery?
    - Has there been unreasonable resistance to discovery?
    - Any other unnecessary delays?
    - Skill/standing of the attorney?
    - Nature of the case?
    - Novelty of the issues?
    - Customary charges for comparable services?
    - Benefit to the client?
    - Was there a reasonable connection between fees sought and amount involved in the litigation?
- Are your fees substantially less? Why?
    - If you and your opposing counsel don't charge close to the same billing rate, have attorney explain why his/her fees are so much higher than yours.
    - Try to show the fees have been caused by the opposing party, not your client.
- Does the other party have a greater ability to pay?
- If requesting appellate attorney fees:
    - What is the attorney's appellate experience?
    - Research/work necessary for appeal.

A petition for attorney fees should generally contain:

- When your law firm was retained by the client (incorporate copy of engagement agreement).
- How much the client has paid to the law firm.
- How much the client owes to the law firm.
- Types of services performed.
- Who performed the services.
- Time expended.
- Hourly rate charged.
- Affidavits of each attorney who worked on the case indicating their respective hourly rates, prior legal experience and background, whether the rates are usual and customary, and asserting the fees incurred are reasonable and necessary and directly incurred for the litigation.
- What amount of fees you anticipate to incur and for what purpose.
- Resources of the respective parties (why your client has an inability to pay and the opposing party has the ability to pay said fees).

PRACTICE TIP

PRACTICE TIP RE: "BUNDLED" BILLING: It is best practice to itemize and detail out your billing on your invoices in real time so that in the event you are called to defend it/testify as to it, you can explain it to the court. In the event you bundle your billing, be prepared to provide the court with an explanation of what work was done in a particular time period and why, particularly if the court is not already familiar with the procedural history of your case. For discussion on this issue, see *In re Marriage of Nesbitt*, 377 Ill. App. 3d 649 (2007).

A response to petition for attorney fees should contain:

- The amount of each retainer or other payment or payments, or both, previously paid to the responding party's counsel by or on behalf of the responding party.
- Costs incurred, and shall indicate whether the costs are paid or unpaid.

750 ILCS 5/501(c-1)

Purpose. Awarding interim/prospective attorney fees and costs in favor of petitioning party's counsel, for reasonable fees and costs either incurred or to be incurred ("leveling the playing field"). The Illinois Supreme Court has held attorney fees already earned are not subject to disgorgement. *In re Marriage of Goesel*, 2017 IL 122046; *In re Marriage of Altman*, 2016 IL App (1st) 143076.

Who are you asking for fees from? The opposing party/attorney.

What to expect in court. A nonevidentiary, summary hearing, any relief granted shall be without prejudice, subject to reallocation. (**Note**: If the court lacks evidence based on the pleadings/affidavits presented, good cause may be shown to warrant an evidentiary hearing. *In re Marriage of Radzik*, 2011 IL App (2d) 100374). If granted, the court will enter a Form Order labeled "Interim Fee Award Order." Any award shall be deemed an advance against party's share of the marital estate unless otherwise ordered.

PRACTICE TIP

Since **predecree interim fees** are determined during a non-evidentiary hearing, you'll want to review both parties' Financial Affidavits and be able to summarize income, assets, and cash flow of both parties for the Judge, as well as what fees and costs have been paid by your client to date, and the amount outstanding, as well as an additional amount you are asking for as and for prospective attorney fees and costs. Be sure to review the other statutory factors as they apply to your case as well.

Factors considered:

1) the income and property of each party, including alleged marital property within the sole control of one party and alleged non-marital property within access to a party;
2) the needs of each party;
3) the realistic earning capacity of each party;
4) any impairment to present earning capacity of either party, including age and physical and emotional health;
5) the standard of living established during the marriage;
6) the degree of complexity of the issues, including allocation of parental responsibility, valuation or division (or both) of closely held businesses, and tax planning, as well as reasonable needs for expert investigations or expert witnesses, or both;
7) each party's access to relevant information;
8) the amount of the payment or payments made or reasonably expected to be made to the attorney for the other party; and
9) any other factor that the court expressly finds to be just and equitable.

750 ILCS 5/503(j)

Purpose. Contribution to attorney fees.

Who are you seeking fees from? The opposing party.

Factors (set forth in 750 ILCS 5/503(d)):

1. Each party's contribution to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including:
    a. any decrease attributable to an advance from the parties' marital estate under subsection (c-1)(2) of section 501;
    b. the contribution of a spouse as a homemaker or to the family unit; and
    c. whether the contribution is after the commencement of a proceeding for dissolution of marriage or declaration of invalidity of marriage.
2. The dissipation by each party of the marital property, provided that a party's claim of dissipation is subject to the following conditions:
    a. 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;
    b. 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;
    c. 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;
    d. 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.
3. The value of the property assigned to each spouse.
4. The duration of the marriage.
5. The relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having the primary residence of the children.
6. Any obligations and rights arising from a prior marriage of either party.
7. Any prenuptial or postnuptial agreement of the parties.
8. The age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties.
9. The custodial provisions for any children.
10. Whether the apportionment is in lieu of or in addition to maintenance.
11. The reasonable opportunity of each spouse for future acquisition of capital assets and income.
12. The tax consequences of the property division upon the respective economic circumstances of the parties.

Note: If maintenance is awarded, also look at the factors under 750 ILCS 5/504.

Timing. Must be filed before a final hearing on other issues or no later than 14 days after closing of proofs. Shall be heard and decided 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 stipulate) and before judgment is entered.

Relief. Fee award may either be a set dollar amount or a percentage of fees/costs.



If substantial attorney fees were incurred as a result of the opposing party's unnecessary delays/litigiousness/bad faith actions, consider highlighting your billing statements or creating a separate spreadsheet summarizing all of the fees incurred due to these actions. This will help the judge efficiently review your invoices and demonstrate your basis for contribution.

750 ILCS 5/508(a)

Purpose. Overarching statute, clarifies that a court may award attorney fees in connection with:

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 postjudgment orders.
4. The prosecution of any claim on appeal (if the prosecuting party has substantially prevailed).
5. The maintenance or defense of a petition brought under section 2-1401 of the Code of Civil Procedure 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.

6. The costs and legal services of an attorney rendered in preparation of the commencement of the proceeding brought under this Act.
7. Ancillary litigation incident to, or reasonably connected with, a proceeding under this Act.
8. Costs and attorney fees incurred in an action under the Hague Convention on the Civil Aspects of International Child Abduction.

Interim attorney fees in postdecree proceedings. A petition for temporary attorney fees may be heard on a nonevidentiary, summary basis. (Contrast to section 501(c-1) that provides interim fee proceedings in predecree cases *shall* be nonevidentiary and summary except "for good cause shown."

Contents of fee award order:

1. Amount of Judgment
2. Who the fee award is payable to (to the attorney or directly to a party).

750 ILCS 5/508(b)

Purpose. Payment of attorney fees due to failure to comply with order/judgment or where the court finds a hearing was percipitated or conducted for any improper purpose.

Who are you seeking fees from? The opposing party, specifically, for failure to comply with court orders.

Relevant statutory language. "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 fees of the prevailing party."

Presumptions. If noncompliance is with respect to a discovery order, the non-compliance is presumptively without compelling cause or justification and can only be rebutted by clear and convincing evidence.

750 ILCS 5/508(c)

Purpose. Payment of final attorney fees and costs.

Who are you seeking fees from? Your former client.

Prerequisites for filing a petition for setting final fees and costs:

1. Filing counsel has been granted leave to withdraw as counsel of record or has filed a motion to withdraw.
2. Counsel and client entered into an engagement agreement at the time the client retained counsel (or reasonably soon thereafter).
3. Written engagement agreement is attached to an affidavit of counsel that is filed with the petition or with the counsel's response to a client's petition that appends the "Statement of Client's Rights and Responsibilities" as required by 750 ILCS 5/508(f).
4. Judgment in any contribution hearing on behalf of a client has already been entered or the right to a contribution hearing has previously been waived.
5. The Petition seeks adjudication of all unresolved claims for fees/costs between the counsel and client.
6. The attorney fees must be reasonable and necessary.
7. Must be filed no later than the end of the period permissible under 735 ILCS 5/2-1203.
8. Cannot have a final hearing unless the issue of fees/costs is submitted to mediation or other court-approved alternative dispute resolution, unless:
    a. In a circuit court where the county has a population over 1 million if both client and counsel both affirmatively opt out of the procedure;
    b. In any other circuit court, ADR is only mandatory if neither the client nor counsel affirmatively opts out of the procedure.

Attorney fees as sanctions

750 ILCS 5/501(a). Allows a court to order a party to pay the other's attorney fees if that party "intentionally or recklessly files an inaccurate or misleading financial affidavit."

Illinois Supreme Court Rule 137. The signature of an attorney or litigant certifies that the pleading, motion or other document is well-grounded in fact, warranted by existing law, or a good faith-argument for the extension, modification, or reversal of existing law, and not interposed for any improper purpose (such as harassment, delay, to increase cost). "If a pleading, motion, or other document is signed in violation of this rule …" the court may impose an appropriate sanction including a reasonable attorney fee.

Illinois Supreme Court Rule 219(a). If a court finds refusal/failure to comply with discovery requests was without substantial justification, it shall order the noncomplying party to pay the reasonable expenses incurred in obtaining the order, including reasonable attorney fees.

Illinois Supreme Court Rule 219(b). If a party serves a sworn denial in response to a request to admit fact/genuineness of documents and the other party thereafter proves the genuineness of the document/truth of the fact, "[u]nless the Court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the Order [for fees] shall be made."

Additional Resources

Illinois Department of Healthcare and Family Services Child Support Estimator
https://cscwebext.hfs.illinois.gov/CscWebEx/app/csc?execution=e1s1

Family Law Software
familylawsoftware.com/il/
Provides features such as:

- Automatic completion of the Supreme Court-approved financial affidavit based upon the data entered in the software.
- Several enhancements to the Supreme Court form, including in-line footnotes and section notes, redacting or blocking identity information, inserting non-marital property designations, dates of valuation, and more.
- Autofill for both the Cook County and the statewide orders for support as well as the Statewide Support information sheet.
- Autofill for the Statewide Income Withholding notice.

Illinois Supreme Court forms for family law
illinoiscourts.gov/Forms/approved/divorce/divorce.asp

Federal student aid information
studentaid.gov/h/apply-for-aid/fafsa

Methods for Determing Holidays

New Year's Day
Observed on January 1st.

Martin Luther King's Day
Observed on the third Monday in January.

Valentine's Day
Observed on February 14th.

Washington's Birthday (President's Day)
Washington's Birthday (President's Day) Observed on the third Monday in February. (Actual date: February 22nd). Although often referred to as President's Day, this holiday is designated as "Washington's Birthday" pursuant to Title 5 Section 6103(a) of the United States Code. Note: February 22 is Washington's Birthday.

Ash Wednesday
Fans 46 days prior to Easter Sunday.

St. Patrick's Day
March 17th of each year.

Palm Sunday
The Sunday immediately before Easter Sunday.

Passover
Date varies and is determined based upon the Jewish Calendar.

Good Friday
The Friday immediately before Easter Sunday.

Easter
Easter is the Sunday after the Paschal Full Moon. The Paschal Full Moon may occur from March 21 through April 18, inclusive. Therefore, the date of Easter is from March 22nd though April 25th, inclusive. The date of the Paschal Full Moon may differ from the date of the actual full moon.

Mother's Day
Observed on the second Sunday in May.

Memorial Day
Observed on the last Monday in May.

Father's Day
Observed on the third Sunday in June.

Independence Day
July 4th of each year.

Labor Day
Observed on the first Monday in September.

Rosh Hashanah
Date varies and is determined based upon the Jewish calendar.

YomKippur
Date varies and is determined based upon the Jewish calendar.

Columbus Day
Observed on the second Monday in October.

Veteran's Day
November 11th each year.

Thanksgiving Day
Observed on the fourth Thursday in November.

Hanukkah
Date varies and is determined based upon the Jewish calendar.

Christmas Day
December 25th of each year.

Note on Federal Holidays: *Federal Statute (5 U.S.C. 6103) establishes the following public holidays for Federal Employees: New Year's Day; Birthday of Martin Luther King, Jr.; Washington's Birthday; Memorial Day; Independence Day; Labor Day; Columbus Day; Veteran's Day; Thanksgiving Day; Christmas Day.*

Calendar

2023

January

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Federal holidays 2023

Jan 1	New Year's Day
Jan 2	New Year's Day (obs.)
Jan 16	Martin Luther King Day
Feb 20	Presidents' Day
May 29	Memorial Day
Jun 19	Juneteenth
Jul 4	Independence Day
Sep 4	Labor Day
Oct 9	Columbus Day
Nov 10	Veterans Day (obs.)
Nov 11	Veterans Day
Nov 23	Thanksgiving Day
Dec 25	Christmas Day

Calendarpedia
Your source for calendars

2024

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Jan 15	Martin Luther King Day
Feb 19	Presidents' Day
May 27	Memorial Day
Jun 19	Juneteenth
Jul 4	Independence Day
Sep 2	Labor Day
Oct 14	Columbus Day
Nov 11	Veterans Day
Nov 28	Thanksgiving Day
Dec 25	Christmas Day

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2025

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