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Better Civil Practice in Dissolution of Marriage Litigation

*Sanjay T. Taylor**

I. INTRODUCTION

The course of litigation will test a lawyer's knowledge of procedural law as much as the substantive law governing the case. Dissolution of marriage litigation is no exception. Yet, in seeking to enforce substantive rights under the law of dissolution, many practitioners fail to observe certain elementary aspects of procedural law. Trial judges, for their part, often overlook procedural shortcomings. Whether viewed from the perspective of a domestic relations practitioner or trial judge, any temporary gain that may be had by relaxing procedural rules is greatly outweighed by the adverse effect it will have on the administration of justice in the long term. Informed by the Illinois Marriage and Dissolution of Marriage Act (Marriage Act),¹ Article II of the Illinois Code of Civil Procedure (Code),² also known as the Civil Practice Law (CPL), and the Illinois Supreme Court Rules (Supreme Court Rules or Rules), this Article draws attention to procedural customs and practices in domestic relations cases that are at odds with well-established procedural law and suggests changes in the way certain key aspects of dissolution of marriage cases are litigated. This Article argues that adopting its recommendations would harmonize procedure

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1. 750 ILL. COMP. STAT. 5/101 to 5/802 (2006).

2. 735 ILL. COMP. STAT. 5/1-101 to 5/22-105 (2006).

between dissolution of marriage and other civil actions, to the great benefit of the courts, domestic relations bar, and, ultimately the parties involved.³

“Nothing is more critical to the judicial function than the administration of justice without delay. Central to discharging this function, the judiciary must be unimpeded in considering and rendering judgments on matters before it.”⁴ Procedural law provides the means by which substantive rights are determined in a just, orderly, expeditious, and inexpensive manner.⁵ Moreover, “[p]rocedural regularity promotes the competence of the courts and their reputation for fairness.”⁶ Thus, competent representation requires a strong working knowledge of procedural law; the lawyer who fails to comply with procedural law does his client, and the court, a disservice.

Part II of this Article begins with a background illustration and discussion of the importance of procedural law and the appropriate relationship between procedure and substance.⁷ Next, Part III discusses the many ways in which basic Illinois procedural rules are misapplied in dissolution of marriage cases.⁸ The problem areas and procedures discussed are (A) temporary and pre-judgment relief;⁹ (B) dissipation;¹⁰ (C) the duty to seasonably update discovery;¹¹ (D) publication notice;¹² (E) contesting personal jurisdiction;¹³ (F) dismissal for want of prosecution and voluntary dismissal;¹⁴ (G) attorney withdrawal;¹⁵ (H)

3. This Article advocates the principle of trans-substantivity, or the application of the same procedural rules regardless of the type of case. An excellent review of the rise, legislative and court-imposed limitations, defense, and future of trans-substantivity in civil procedure is David Markus, *The Past, Present, and Future of Trans-Substantivity in American Civil Procedure*, DEPAUL L. REV. (forthcoming).

4. *O'Connell v. St. Francis Hosp.*, 492 N.E.2d 1322, 1326 (Ill. 1986) (citations omitted).

5. *See Dorin v. Occidental Life Ins. Co. of California*, 270 N.E.2d 515, 518 (Ill. App. Ct. 1971) (explaining that the Civil Practice Act was designed to provide procedure whereby substantive rights could be determined with minimum of delay, technicality, and expense). *Cf. FED. R. CIV. P. 1* (providing that rules should be “construed and administered to secure the just, speedy, and inexpensive determination of every action”).

6. Martha L. Minow, *Politics and Procedure*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 79, 82 (David Kairys ed., 3d ed. 1998).

7. *See infra* Part II.

8. *See infra* Part III.

9. *See infra* Part III.A.

10. *See infra* Part III.B.

11. *See infra* Part III.C.

12. *See infra* Part III.D.

13. *See infra* Part III.E.

14. *See infra* Part III.F.

15. *See infra* Part III.G.

parallel proceedings;¹⁶ (I) defaults, default judgments, and ex parte judgments;¹⁷ (J) inappropriate questioning of one's client at a prove-up hearing;¹⁸ (K) declaratory judgments;¹⁹ (L) the privilege against self-incrimination;²⁰ and (M) contempt.²¹ Finally, Part IV concludes by briefly summarizing these suggestions and revisiting the importance of the proper balance between procedure and substance.²²

II. BACKGROUND: PROCEDURE LAW AS AN AID TO SUBSTANTIVE JUSTICE

Procedural rules of justice play an integral role in American jurisprudence. Accordingly, this Part begins with an illustration of the significance of rules of procedure in American history. It then analyzes the proper relationship between procedural law and substantive law in general American jurisprudence. Finally, this Part analyzes the procedure-substance balance under the Code and Illinois Supreme Court Rules.²³

A striking example of the importance of procedural law in the administration of justice is seen in *Walker v. City of Birmingham*,²⁴ a case that grew out of Martin Luther King, Jr.'s 1963 march against racial segregation. King's colleagues were told in no uncertain terms by Birmingham Public Safety Commissioner, Eugene "Bull" Connor, a self-proclaimed white supremacist who vowed to resist racial integration,²⁵ that the city would not issue a permit for King's group to march.²⁶ A state court judge granted the city's ex parte request to enjoin the defendants from marching on Good Friday and Easter Sunday.²⁷ Thirty-six hours later, on Good Friday, King, Ralph Abernathy, and sixty others marched.²⁸ After the arrests, King's attorneys sought to dissolve the injunction as unconstitutional while the

16. See *infra* Part III.H.

17. See *infra* Part III.I.

18. See *infra* Part III.J.

19. See *infra* Part III.K.

20. See *infra* Part III.L.

21. See *infra* Part III.M.

22. See *infra* Part IV.

23. See *infra* Part II.

24. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

25. *Id.* at 326 n.1 (Brennan, J., joined by Warren and Fortas, JJ., dissenting) (citing CONGRESSIONAL QUARTERLY SERV., CONGRESS AND THE NATION 1945-1964: A REVIEW OF GOVERNMENT AND POLITICS IN THE POSTWAR YEARS 1604 (Thomas N. Schroth ed., 1965)).

26. Minow, *supra* note 6, at 81.

27. *Walker*, 388 U.S. at 309.

28. Minow, *supra* note 6, at 81.

city sought to hold King in contempt of court.²⁹ The state court found the marchers in contempt of court and refused to consider the constitutional question.³⁰ The United States Supreme Court upheld the contempt finding under the collateral bar rule, a procedural rule that prohibits a person from raising a substantive challenge to a court order if he disobeys the order before bringing the challenge to court.³¹ The Court affirmed the criminal contempt convictions under the collateral bar rule, even though (a) there was no practical hope of obtaining relief in the state court,³² and (b) the Court later struck down the local ordinance underlying the state court's injunction, deeming it a patent violation of the First Amendment's rights of assembly and free speech.³³ Thus, the Court upheld a procedural requirement in the face of compelling substantive injustice.³⁴

A number of theories have been advanced to explain the relationship between procedural and substantive law. *Walker* illustrates the view that procedure should not bend, even if only to temporarily accommodate a grave substantive injustice.³⁵ This view appeared to be the principle governing untimely responses to requests to admit under Illinois Supreme Court Rule 216,³⁶ that is, until the Illinois Supreme

29. *Id.*

30. *Walker*, 388 U.S. at 311-12.

31. *Id.* at 315-22.

32. Minow, *supra* note 6, at 81.

33. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 159 (1969) (holding that the ordinance denied or abridged "the right of assembly and opportunities for the communication of thought").

34. King served his sentence in solitary confinement where, in response to a request by eight white local clergymen calling for an end to the demonstrations, sent his American classic "Letter from A Birmingham Jail," explaining his decision to violate the injunction without first seeking relief from the court. King wrote: "I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law." Martin Luther King, Jr., *Letter from A Birmingham Jail* (1963), *reprinted in* A. J. Muste Mem'l Inst. Essay Series, No. 1, Martin Luther King Jr. 13, 21 (1981). On a more practical level, King was frustrated that his ongoing efforts to build a national movement of nonviolent protest against racial segregation were constantly being stymied by delays occasioned in the courts. In this case, the Good Friday and Easter Sunday marches bore great significance to King because Bull Connor's government was to be replaced the following Monday. Minow, *supra* note 6, at 94 nn.4-5. Perhaps attuned to public perception, the Supreme Court supported its decision by pointing to a criminal contempt conviction affirmed by a lower federal appeals court under the collateral bar rule where the defendant, invoking his rights under the First Amendment, attempted to organize an effort "to run Negroes out of the school," without first attempting to challenge the court order prohibiting him from interfering with the desegregation of the public school. *Walker*, 388 U.S. at 320-21 n.16.

35. Minow, *supra* note 6, at 82.

36. ILL. SUP. CT. R. 216(c) ("Each of the matters of fact and genuineness of each document of

Court's recent decision in *Vision Point of Sale, Inc. v. Haas*.³⁷ Another theory posits that procedure and substance cannot be separated and that efforts to distinguish them fail. For example, in *Walker*, by not permitting King to take the law into his own hands, the Court expressed its commitment to social order. Whether social order reflects a procedural or substantive value is difficult to answer.³⁸ Perhaps it is both. A third theory is that procedure stands as the servant of justice, so that procedural rules should not stand in the way of just results in particular circumstances.³⁹

Illinois adheres to this last view. Section 1-106 provides that the Code is to be liberally construed so that controversies may be determined according to the substantive rights of the parties.⁴⁰ The Code was crafted "to simplify pleadings and to promote justice, rather than to set up artificial rules of practice," and the trend of the court has long been to construe liberally the rules of practice "to the end that form shall be inferior to substance."⁴¹ Still, the consequences of a failure to comply with procedural law can be severe. For example, even after

which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper.").

37. In *Vision Point of Sale, Inc. v. Haas*, the court tempered the procedural harshness of Supreme Court Rule 216 by holding that in determining whether good cause exists under Supreme Court Rule 183 to grant an extension of time for an unintentional failure to comply with the time limit to respond to a request to admit, a court may consider mistake, inadvertence, or attorney neglect. *Vision Point of Sale, Inc. v. Haas*, 875 N.E.2d 1065, 1078-79 (Ill. 2007). Before *Vision Point of Sale*, courts held that mistake, inadvertence, or attorney neglect did not constitute good cause, with the result that the judicially admitted facts would often form the basis of summary judgment against the non-responding party. See, e.g., *Robertson v. Sky Chefs, Inc.*, 799 N.E.2d 852, 857-58 (Ill. App. Ct. 2003) (affirming summary judgment granted against plaintiff who failed to respond to request to admit that complaint's allegations of negligent acts or omissions arising out of automobile accident were not true); *Glasco v. Marony*, 808 N.E.2d 1107, 1109-12 (Ill. App. Ct. 2004) (summary judgment in favor of defendant where plaintiff failed to respond to request to admit); *Robbins v. Allstate Ins. Co.*, 841 N.E.2d 22, 24-27 (Ill. App. Ct. 2005) (granting summary judgment in favor of defendant after plaintiff mistakenly filed inconsistent typewritten and handwritten responses and responses were not under oath). In overruling this line of cases, the *Vision Point of Sale* court stated: "We note that there is a broad overall policy goal of resolving cases on the merits rather than on technicalities, and that the . . . line of appellate court cases run directly counter to this principle." *Vision Point of Sale*, 875 N.E.2d at 1077-78 (citations omitted).

38. Minow, *supra* note 6, at 90.

39. *Id.* at 86.

40. 735 ILL. COMP. STAT. 5/1-106 (2006).

41. *Cunningham v. City of Sullivan*, 147 N.E.2d 200, 203 (Ill. App. Ct. 1958). See also *Dorin v. Occidental Life Ins. Co. of California*, 270 N.E.2d 515, 518-19 (Ill. App. Ct. 1971).

Vision Point of Sale, absent good cause shown for an extension of time under Supreme Court Rule 183, a failure to timely respond to a request to admit facts within twenty-eight days will result in judicial admissions under rule 216,⁴² quite possibly forming the basis for summary judgment against the non-responding party. Repeated failures to comply with discovery or certain pre-trial orders may lead to last resort or litigation-ending sanctions of dismissal or judgment by default under rule 219(c) or under the court's inherent authority to control its docket.⁴³ Further, summary judgment may be entered in favor of a defendant when the plaintiff's expert's rule 191 affidavit is stricken because the documents that the affiant used in reaching his opinion are not attached, as required by the rule.⁴⁴ Thus, procedural rules continue to play an essential role in Illinois, and misapplication and misunderstanding of these rules can be the deciding factor in a case, regardless of the underlying facts. Accordingly, the next Part examines one of the most procedurally problematic areas of Illinois litigation, dissolution of marriage cases.

III. MISAPPLICATION OF PROCEDURAL LAW IN DISSOLUTION OF MARRIAGE CASES

The CPL, or Article II of the Code, applies to all proceedings under the Marriage Act, unless it provides otherwise.⁴⁵ While the CPL may

42. See *In re* Marriage of Holthaus, 899 N.E.2d 355, 360 (Ill. App. Ct. 2008) (because good cause was not shown for an extension of time under Supreme Court Rule 183, the trial court did not err in striking the response to request to admit facts supporting dissipation charge filed two days late).

43. ILL. SUP. CT. R. 219(c). See also *Sander v. Dow Chem. Co.*, 651 N.E.2d 1071, 1082–83 (Ill. 1995) (finding that violations of four separate court orders setting deadline for filing amended complaint, among other violations, justified dismissal of plaintiff's products liability action); 612 N. Michigan Ave. Bldg. Corp. v. Factsystem, Inc., 370 N.E.2d 236, 241 (Ill. App. Ct. 1977) (holding that unreasonable and repeated non-compliance with rules of discovery displayed deliberate defiance of court's authority and warranted sanction of defaulting defendant on liability).

44. See *Robidoux v. Oliphant*, 755 N.E.2d 987, 991 (Ill. 2002) (denying plaintiff's request to file supplemental materials after summary judgment entered).

45. 750 ILL. COMP. STAT. 5/105 (2006). See also *In re* Marriage of Best, 886 N.E.2d 939, 944 (Ill. 2008) (finding that by incorporating the Civil Practice Law, the legislature expressly provided for declaratory judgments under section 2-701 of the Code in dissolution cases). Section 410 of the Marriage Act provides that "[t]he process, practice and proceedings under this Act shall be the same as in other civil cases, except as otherwise provided by this Act, or by any law or rule of court . . ." 750 ILL. COMP. STAT. 5/410 (2006). See *In re* Marriage of Betts, 526 N.E.2d 1138, 1140 (Ill. App. Ct. 1988) (explaining that verification by certification under section 1-109 of the Code applies to post-dissolution pleadings by virtue of sections 105(a) and 410 of Marriage Act); *In re* Marriage of Manhoff, 880 N.E.2d 627, 630–31 (Ill. App. Ct. 2007) (holding the same, but not citing section 410 of Marriage Act). Thus, beyond the CPL, other provisions of the Code may apply to dissolution actions. However, aside from the verification by certification

not have been written with the unique aspects of dissolution of marriage cases in mind, it still provides an adequate and effective means to enforce substantive rights under the law of dissolution. Yet, certain aspects of dissolution litigation, by convention or otherwise, tend to proceed outside the parameters of the CPL. However, common practice is not determinative of the proper construction of a statute.⁴⁶ Procedural rules are not “aspirational” or mere “suggestions”; rather, “[t]hey have the force of law, and the presumption must be that they will be obeyed and enforced as written.”⁴⁷ This Part discusses thirteen common mistakes, misunderstandings, and misapplications of procedural law in Illinois dissolution of marriage cases.

A. *Temporary and Other Pre-Judgment Relief*

Perhaps no aspect of a dissolution of marriage case is more prone to procedural error than temporary or other pre-judgment relief litigation. Courts and practitioners consistently confuse motions for temporary and pre-judgment relief with pleadings. Accordingly, Section A.1 outlines why such requests should be treated as motions and examines the implications of parties’ and courts’ failure to do so.⁴⁸ Section A.2 then recommends an appropriate procedure for addressing requests for temporary and pre-judgment relief.⁴⁹

1. *Motions Mistaken for Pleadings*

Once a petition for dissolution of marriage has been filed, it may be necessary for one or both parties to seek temporary relief from the court, such as temporary child custody, child support, visitation, or maintenance. The variety of other pre-judgment relief that a party may seek runs the gamut. To name just a few, a party may seek exclusive possession of the marital residence, to compel discovery, an evaluation

provision in Article I of the Code, no other Articles in the Code have been interpreted to apply to a dissolution action by virtue of section 410 of the Marriage Act.

46. *Best*, 886 N.E.2d at 945.

47. *Rodriguez v. Sheriff’s Merit Comm’n of Kane County*, 843 N.E.2d 379, 385 (Ill. 2006). *See Elkins v. Superior Court of Contra Costa County*, 163 P.3d 160, 168–78 (Cal. 2007) (determining that local procedural rule providing for written declaration of party in lieu of live direct testimony at trial in family law case constitutes hearsay, improperly expands procedural rule authorizing use of declarations in certain pre-trial matters of a preliminary or ancillary nature only, and improperly deviates from traditional concept of a trial as an oral examination of a witness in presence of a trier of fact.). In *Elkins v. Superior Court of Contra Costa County*, the California Supreme Court stressed that a trial in a family law matter is no less subject to rules of procedure and evidence than any other type of case, even where local procedure at issue promotes judicial efficiency. *Id.*

48. *See infra* Part III.A.1.

49. *See infra* Part III.A.2.

of a child's best interests by a professional, or exclusion of evidence *in limine*. In other civil cases, the party seeking pre-judgment relief files a motion. But in a dissolution case, the petition is the device of choice. Although the use of the petition does not necessarily contravene procedural law,⁵⁰ error occurs when practitioners and courts treat the petition as a pleading rather than a motion. This failure to treat the request for relief as a motion reveals a great deal of confusion among domestic relations practitioners about the difference between a pleading and a motion. Such confusion leads to improper pleadings and motions, excessive pleading and motion practice, increased costs, congested courts, and poor records on appeal; all of which stand in the way of prompt and effective administration of justice.

A motion "is an application to the court for a ruling or an order in a pending case."⁵¹ On the other hand, "[a] pleading . . . consists of a party's formal allegations of his claims or defenses."⁵² The three categories of pleadings authorized under Illinois law are the complaint, answer, and reply.⁵³ A petition generally serves as a pleading when it is used to commence an action. For example, the petition for dissolution of marriage, like a complaint in other civil cases, constitutes the initial pleading and serves to frame the issues in a dissolution case.⁵⁴

50. See *People ex rel. Woodward v. Bd. of Educ. of Cmty. High Sch. Dist. 408*, 140 N.E.2d 22, 24 (Ill. 1923) ("A petition is a written application requesting the granting of some benefit or privilege, the performance of some duty or doing some desired act."); *Halter v. Schoreck*, 216 N.E.2d 278, 281 (Ill. App. Ct. 1966) ("The principal difference between motions and petitions lies in the fact that motions, though usually made in writing, may sometimes be made orally, while a petition is always in writing."). This distinction is not important here, however, because almost all requests for temporary or other pre-judgment relief are in writing. What is important to observe is that while a petition may describe both a pleading and motion, a pleading and motion are not synonymous. See *infra* note 55.

51. *In re Marriage of Sutherland*, 622 N.E.2d 105, 107 (Ill. App. Ct. 1993). See also *William J. Templeton Co. v. Liberty Mut. Ins. Co.*, 735 N.E.2d 669, 677 (Ill. App. Ct. 2000) (citing *Sutherland*); *In re Marriage of Wolff*, 822 N.E.2d 596, 601 (Ill. App. Ct. 2005) (citing *Sutherland* and finding that a section 2-1203 motion to reconsider was not a pleading).

52. *Wolff*, 822 N.E.2d at 601-02; *Sutherland*, 622 N.E.2d at 107. See also 735 ILL. COMP. STAT. 5/2-603 (2006) ("All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply.").

53. 735 ILL. COMP. STAT. 5/2-602 (2006); 3 RICHARD A. MICHAEL, ILLINOIS PRACTICE – CIVIL PROCEDURE BEFORE TRIAL § 23.2 (1989). Included in these three categories are the affirmative defense, reply, counterclaim, third party complaint, and supplemental pleading. 735 ILL. COMP. STAT. 5/2-603 (2006); 735 ILL. COMP. STAT. 2-608 (2006); 735 ILL. COMP. STAT. 2-609 (2006). See also *In re Marriage of Saffren*, 852 N.E.2d 302, 309 (Ill. App. Ct. 2006) (including a third party complaint); *Strader v. Bd. of Educ.*, 115 N.E.2d 539, 546 (Ill. App. Ct. 1953) (finding a proposed intervening petition is a pleading similar in nature to complaint or answer).

54. See 750 ILL. COMP. STAT. 5/105(c) (2006) ("The initial pleading in all proceedings under this Act shall be denominated a petition. A responsive pleading shall be denominated a

Likewise, a subsequent related proceeding, such as a petition to modify any aspect of a judgment for dissolution of marriage filed more than thirty days after entry of the judgment, is considered a pleading.⁵⁵ A motion and a pleading, however, are not synonymous.⁵⁶

The plain language of the Marriage Act makes it apparent that a request for temporary or other pre-judgment relief in a pending case is a motion. Section 501 of the Marriage Act provides that either party may “move” for temporary maintenance or support, temporary restraining order or preliminary injunction, or other temporary relief,⁵⁷ and that a response may be filed within twenty-one days after service of the notice of “motion.”⁵⁸ Likewise, section 603 of the Marriage Act provides that either party may “move” for temporary custody.⁵⁹

Statutory language notwithstanding, a request for temporary or other pre-judgment relief cannot be understood as a pleading because it does not perform a pleading’s essential function. The essential function of a

response.”); 750 ILL. COMP. STAT. 5/452 (2006) (providing for a joint petition for simplified dissolution); *Ligon v. Williams*, 637 N.E.2d 633, 637–38 (Ill. App. Ct. 1994) (addressing the purpose of pleadings in a custody action). The pleading requirements for a dissolution petition are minimal and, other than “any arrangements as to support, custody and visitation of the children and maintenance of a spouse,” 750 ILL. COMP. STAT. 5/403(a) (2006), nothing further is required to be pled with respect to issues that may or are likely to arise in the dissolution of marriage action. Nothing, of course, prohibits a petitioner from alleging additional facts in a dissolution petition that may bear on a need for temporary relief. The responsive pleading is designated a response, not an answer as in other civil cases. 750 ILL. COMP. STAT. 5/105(c) (2006). All other pleadings under the Marriage Act are denominated as provided in the CPL. *Id.*

55. See *Sutherland*, 622 N.E.2d at 107–08 (finding that the wife’s petition for increased child support filed more than 30 days after entry of dissolution judgment was a pleading rather than a motion). Cf. *Okumura v. Nisei Bowlum, Inc.*, 357 N.E.2d 187, 189 (Ill. App. Ct. 1976) (finding that a petition to vacate judgment under section 2-1401 of the Code was a pleading).

56. See *supra* note 50 (discussing the differences between motions and pleadings). See also *Wolff*, 822 N.E.2d at 601–02 (holding that a motion to dismiss under section 2-619 of the Code, which applies only to dismissal of pleadings, may not be used to attack a motion to reconsider because motion to reconsider is not a pleading); *Sutherland*, 622 N.E.2d at 108 (finding the same, except that a motion to dismiss under section 2-615 of the Code incorrectly employed to attack motion to reconsider); *William J. Templeman Co.*, 735 N.E.2d at 677–78 (explaining that a motion for Rule 137 sanctions is not a pleading). See also *Patrick v. Burgess-Norton Mfg. Co.*, 349 N.E.2d 52, 53 (Ill. 1976) (treating petition to vacate judgment filed within 30 days of its entry as motion rather than a pleading); 735 ILL. COMP. STAT. 5/2-301 (2006) (stating that if responding party files responsive pleading or motion prior to filing a motion objecting to jurisdiction over person, that party waives all objections to the court’s jurisdiction over the party’s person). Compare 735 ILL. COMP. STAT. 5/2-603 (2006) (“All pleadings shall contain a plain and concise statement of the pleader’s case of action, counterclaim, defense, or reply.”), with 735 ILL. COMP. STAT. 5/2-620 (2006) (“The form and content of motions . . . and all other matters of procedure relative thereto, shall be according to rules.”).

57. 750 ILL. COMP. STAT. 5/501(a) (2006).

58. 750 ILL. COMP. STAT. 5/501(c) (2006).

59. 750 ILL. COMP. STAT. 5/603 (2006).

pleading is to present claims, but a request for temporary or other pre-judgment relief does not present a claim. A dissolution petition may present numerous issues, such as child custody, child support, visitation, property division, maintenance, or even grounds for dissolution, but it presents only one claim—dissolution of marriage.⁶⁰ The issues that the court must decide during the course of a dissolution action are considered ancillary issues within the dissolution claim.⁶¹ No relief is available on any issue if the trial court declines to grant the dissolution petition.⁶² Because a request for temporary or other pre-judgment relief in a pending case does not give rise to a separate claim, any order granting such relief is not final and appealable.⁶³

Finally, pertinent legislative history supports the assertion that temporary and pre-judgment relief requests should be treated as motions rather than pleadings. Considering that one of the prime moving forces behind the passage of the Civil Practice Act in 1933 was to substantially

60. *In re Marriage of Leopando*, 449 N.E.2d 137, 140 (Ill. 1983). See *In re Marriage of Manns*, 538 N.E.2d 707, 711–12 (Ill. App. Ct. 1991) (finding that respondent's petition for reimbursement for one-half of parties' estimated joint income tax was not a counterclaim for purposes of petitioner's motion for voluntary dismissal, but rather was at most a preliminary matter). Cf. *In re Marriage of Best*, 859 N.E.2d 173, 180–81 (Ill. App. Ct. 2006) (determining that because a request for declaratory judgment presents a separate claim, the proper method to add a cause of action for declaratory judgment in a pending dissolution case is to seek leave to file an amended pleading, not file a motion for declaratory judgment), *aff'd in part and rev'd in part on other grounds*, 886 N.E.2d 939 (Ill. 2008). On the other hand, multiple post-dissolution petitions raise multiple claims for relief. See *In re Marriage of Duggan*, 877 N.E.2d 1140, 1149 (Ill. App. Ct. 2007) (finding that post-dissolution petitions to modify support and visitation raised new claims in dissolution action). Moreover, even a post-dissolution petition for contempt presents a separate claim for relief for purposes of Supreme Court Rule 304(a). *In re Marriage of Gutman*, 2008 Ill. LEXIS 1430, at *4–6 (Ill. Nov. 20, 2008), *reh'g denied* 2009 Ill. LEXIS 98 (Ill. Jan. 26, 2009) (resolving intense appellate jurisdiction debate where one panel of the Appellate Court, Second District, improperly overruled another). Thus, in the absence of a Supreme Court Rule 304(a) finding, a party may not appeal a final judgment as to one post-dissolution petition while another is pending. *Id.*

61. *Leopando*, 449 N.E.2d at 140.

62. *Id.* See *In re Marriage of Best*, 886 N.E.2d 939, 942–43 (Ill. 2008) (noting that no relief is available on issues such as custody, property disposition, or support if the trial court declines to grant the dissolution petition).

63. *In re Marriage of Dunseth*, 633 N.E.2d 82, 91 (Ill. App. Ct. 1994) (holding that a temporary maintenance order was not appealable). Moreover, because a temporary order is not a final judgment, a finding under Supreme Court Rule 304(a) that there is no just reason to delay the enforcement or appeal of the order is a procedural nullity. See *In re Marriage of Ryan*, 544 N.E.2d 454, 455 (Ill. App. Ct. 1989). There are limited exceptions to the general rule that interlocutory orders are not immediately appealable. By way of illustration only, orders granting or denying injunctive relief, appointing or refusing to appoint a receiver, terminating parental rights, and vacating or modifying a judgment under section 2-1401 of the CPL, are immediately appealable under Supreme Court Rules 307 and 304(b). A declaratory judgment in a pending dissolution of marriage action is also immediately appealable with a finding that there is no just reason for delaying appeal under Supreme Court Rule 304(a).

reduce the number of permissible pleadings in Illinois,⁶⁴ any doubts should be resolved in favor of characterizing the petition for temporary or other pre-judgment relief as a motion. In sum, once the dissolution petition and response have been filed, the parties are at issue and the pleading stage of the litigation is generally concluded.⁶⁵ Thereafter, temporary or other pre-judgment relief should be sought by motion, unless specifically authorized elsewhere in the CPL.⁶⁶

Of course, one might question whether viewing the petition for temporary relief as a motion rather than a pleading itself exalts form over substance. This is not, however, merely an academic exercise. Procedural norms and conventions followed by parties responding to petitions for temporary relief are likewise fraught with error. Thus, what may be viewed as an isolated or harmless error has a cascade effect, further undermining the salutary purposes of procedural law.

The initial error in treating a request for temporary or pre-judgment relief as a pleading rather than a motion opens the door to procedurally improper responses that are both ineffective and time-consuming. When the court fails to enforce procedural law, the party responding to a petition for temporary relief typically files either a motion to strike or dismiss the petition or answers the petition. The motion to strike or dismiss may delay the proceeding if the court permits separate briefing and hearing on the motion to strike or dismiss the petition and the underlying petition itself. When a party responds to the petition with an answer, she generally admits, denies, or states a want of knowledge of each averment in the petition, just as she would respond to the allegations in the initial dissolution petition, presumably to avoid admitting material facts. On a practical level, this does little to assist the court in identifying the factual and/or legal issues raised by the petition for temporary relief. Moreover, the answer will often include one or more erroneously labeled “affirmative defenses,” which do not

64. See MICHAEL, *supra* note 53, § 23.1.

65. A party may amend his pleading and add a new claim against a new party under section 2-616(a) of the CPL. 735 ILL. COMP. STAT. 5/2-616(a) (2006). However, an amended pleading adding new parties filed without leave of court is a nullity. See *First Robinson Sav. & Loan v. Ledo Constr. Co.*, 569 N.E.2d 304, 307 (Ill. App. Ct. 1991) (“An amended pleading that adds additional parties filed without leave of court is a nullity.”); *Callaghan Paving, Inc. v. Keeneyville Constr. Co.*, 557 N.E.2d 228, 229 (Ill. App. Ct. 1990) (“A plaintiff can only amend a complaint to add a claim against a new party with leave of court. An amended complaint adding additional parties without leave of court is a nullity.”). *But see* *Ganci v. Blauvelt*, 690 N.E.2d 649, 654 (Ill. App. Ct. 1998) (explaining that leave of court to bring in an additional party is not a necessary requirement for a court to have jurisdiction over the proceeding against the additional party).

66. See 735 ILL. COMP. STAT. 5/2-701 (2006) (authorizing filing of pleading or petition seeking declaratory relief). See *infra* note 186.

give color to the opposing party's claim, and then assert new matters by which the apparent right is defeated.⁶⁷ Rather, they are usually further denials of the allegations in the petition for temporary relief.

The procedural rules relating to pleadings and motions are different. A party may respond to a pleading with an answer, admitting, denying, or stating a want of knowledge of the allegations in the pleading,⁶⁸ or a motion attacking the pleading.⁶⁹ Other less common options are the bill of particulars⁷⁰ and motion for summary judgment.⁷¹ A motion, on the other hand, is not subject to attack by another motion.⁷² Because a petition for temporary relief in a pending case is a motion, the ubiquitous motion to strike or dismiss is a nullity. The failure to respond to a pleading admits the allegations in the pleading,⁷³ but a failure to respond to a motion in writing does not admit facts asserted in the motion.⁷⁴ That is the case even where the motion for temporary relief is supported by affidavit and the responding party fails to file a counter-affidavit.⁷⁵ Finally, because there is no provision in the Code to

67. See *Korando v. Uniroyal Goodrich Tire Co.*, 637 N.E.2d 1020, 1024–25 (Ill. 1994) (stating that because proximate cause is an element of plaintiff's negligence claim, the defendant was not required to plead lack of proximate cause as affirmative defense).

68. See 735 ILL. COMP. STAT. 5/2-610(a) (2006).

69. See 735 ILL. COMP. STAT. 5/2-615 (2006) (“[A]ll objections to pleadings shall be raised by motion [which] . . . shall point out specifically the defects complained of . . .”); 735 ILL. COMP. STAT. 5/2-619 (2006) (allowing involuntary dismissal based on affirmative matters).

70. See 735 ILL. COMP. STAT. 5/2-607 (2006) (allowing a responding party to file a bill of particulars if the complaint is wanting details).

71. 735 ILL. COMP. STAT. 5/2-1005 (2006) (explaining that a defendant may move for summary judgment “at any time”).

72. See, e.g., *In re Marriage of Wolff*, 822 N.E.2d 596, 601 (Ill. App. Ct. 2005) (explaining that a motion to dismiss under section 2-619 of the Code may not be used to attack a motion to reconsider under section 2-1203 of the Code); *Marriage of Sutherland*, 622 N.E.2d 105, 108 (Ill. App. Ct. 1993) (reiterating *Wolff*, adding that the motion to dismiss under section 2-615 of the Code incorrectly employed to attack motion to reconsider); *Marriage of Nesbitt*, 879 N.E.2d 445, 455 (Ill. App. Ct. 2007) (explaining that a Rule 137 motion for sanctions is not a pleading subject to attack under sections 2-615 or 2-619 of the Code). See also Anthony Longo, *Motions Attacking Motions: A Plea to End the Violence*, TRIAL BRIEFS (Ill. St. Bar Assoc., Civ. Prac. & Proc. Sec.), Mar. 2008, at 3–4. Cf. *In re Guardianship of Jordan M. C.-M.*, 814 N.E.2d 232, 235 (Ill. App. Ct. 2004) (stating that a motion under section 2-619 of the Code may only be used to attack a pleading, not an order).

73. See 735 ILL. COMP. STAT. 5/2-610 (2006) (“Every allegation, except allegations of damages, not explicitly denied, is admitted”); *In re Marriage of Sreenan*, 402 N.E.2d 348, 351 (Ill. App. Ct. 1980) (“[W]here a plaintiff fails to reply to new matter contained in a defendant's affirmative defense, the truth of the new matter is deemed to have been admitted.”)

74. See *In re Marriage of Fahy*, 567 N.E.2d 552, 557 (Ill. App. Ct. 1991) (the failure to file a written response to a motion does not waive the right to contest merits of the motion but merely the right to file a response to the motion).

75. Cf. *In re Marriage of Dowd*, 573 N.E.2d 312, 313 (Ill. App. Ct. 1991) (stating the rule that well-alleged facts within an affidavit must be taken as true when not contradicted by a counter-

respond to a motion with a pleading, the responding party may not plead an affirmative defense. Thus, when practitioners and courts treat temporary and pre-judgment relief petitions as pleadings, they open the door to a flood of null, inappropriate, and time-consuming responses.

2. The Proper Procedure for Temporary and Pre-Judgment Relief Requests

Practitioners and courts should treat requests for temporary and pre-judgment relief as motions rather than pleadings. While the prevalence of temporary relief is almost unique to domestic relations cases, neither this nor any of the other distinguishing characteristics of a domestic relations case render the CPL and its treatment of pre-judgment requests for relief as motions incompatible or ineffective.

The procedure advocated here is consistent with injunctive relief practice under Article XI of the Code,⁷⁶ which historically served as the basis for statutory divorce procedure.⁷⁷ Typically, a party seeking injunctive relief in a pending chancery case will file a motion for a temporary restraining order (which is often combined with a motion for preliminary injunction), supported by an affidavit and a memorandum

affidavit typically applies, by virtue of Supreme Court Rule 191(a), only to affidavits in proceedings under Code of Civil Procedure sections 2-1005 (summary judgment), 2-619 (involuntary dismissal based on certain defects or defenses) and 2-301(b) (objection to jurisdiction over person)); *In re Marriage of Weaver*, 592 N.E.2d 643, 650–51 (Ill. App. Ct. 1992) (describing the facts stated in respondent's affidavit in support of his motion to dismiss as a factually insufficient petition to modify custody not deemed admitted when petitioner failed to file a counter-affidavit because a motion to dismiss based on insufficient pleadings is equivalent to a section 2-615 motion, which is not subject to Rule 191); *In re Marriage of Gary*, 894 N.E.2d 809, 813, 816 (Ill. App. Ct. 2008) (stating that, although the trial court "acted precipitously in finding Sarah 'in default' and refusing to conduct an evidentiary hearing" when Sarah failed to file a verified response to her husband's motion for injunctive relief, the injunction was upheld because Sarah only challenged the legal basis of her husband's motion, not its factual basis). That is not to say that one should not respond in writing to a motion for temporary relief, especially where it contains material facts in dispute. To be sure, competent and effective representation compels a written response, supported by affidavit when material facts are in dispute.

76. *Cf. In re Marriage of Pick*, 458 N.E.2d 33, 37 (Ill. App. Ct. 1983) (explaining that section 501 of Marriage Act and Article XI of the Code should be "construed together as though they were one statute"). See 735 ILL. COMP. STAT. 5/11-101 (2006) (stating that temporary restraining orders cannot be granted without notice to the adverse party, unless there is immediate risk of injury or loss); 735 ILL. COMP. STAT. 5/11-102 (2006) (stating that there cannot be a preliminary injunction without previous notice of the time and place of the application provided to the adverse party).

77. See H. JOSEPH GITLIN, *GITLIN ON DIVORCE: A GUIDE TO ILLINOIS MATRIMONIAL LAW* ch. 5-1(d), (3d ed. 2007) (discussing pleadings and the necessity of verifying certain types of pleadings).

of law.⁷⁸ The respondent will file a memorandum of law in opposition to the motion, supported by affidavit, if necessary.⁷⁹ If the motion does not present a sufficient factual basis, then the court will not order injunctive relief.⁸⁰ An evidentiary hearing on a motion for a preliminary injunction is generally required when a dispute of material fact exists.⁸¹

Likewise, a request for temporary or other pre-judgment relief in a dissolution of marriage case should be brought by motion, and if necessary, supported by affidavit or verification by certification.⁸² The non-moving party should file a response memorandum explaining why the moving party is not entitled to the relief she seeks (including any affirmative matters defeating the request for temporary relief), supported by affidavit if necessary. If the court determines that disputed issues of material fact exist, an evidentiary hearing may be required in advance of trial.⁸³ Even if the lawyer fails to challenge his opponent's procedural failings, the court is well-advised to *sua sponte* require adherence to the CPL and other applicable rules of procedure. In so doing, the court will put an end to many of the unnecessary, and indeed legally improper, practices that have become mainstays of temporary relief litigation, and, in the course, strengthen its own ability to decide pre-trial issues in a just, orderly and expeditious manner.⁸⁴

78. Cf. Hon. Richard A. Siebel (ret'd.), *Injunctions*, in CHANCERY AND SPECIAL REMEDIES 2004, §§ 16.37–.40 (Ill. Inst. for Continuing Legal Educ. 2004, supp. 2006) (when a case has not been commenced yet, the typical practice is to file a verified complaint, a motion for injunctive relief, and a supporting memorandum of law).

79. Cf. *id.*

80. See *In re Marriage of Grauer*, 479 N.E.2d 982, 986–87 (Ill. App. Ct. 1985) (stating that a motion for a temporary restraining order must demonstrate that the movant will suffer immediate and irreparable injury absent injunctive relief).

81. See *Office Electronics, Inc. v. Adell*, 593 N.E.2d 732, 735–36 (Ill. App. Ct. 1992).

82. See 735 ILL. COMP. STAT. 5/1-109 (2006) (describing the verification by certification process required to validate filed documents).

83. Of course, it is ultimately incumbent on the moving party to request an evidentiary hearing. Otherwise, the issue may be waived. Cf. *In re Marriage of Shedbalkar*, 419 N.E.2d 409, 412 (Ill. App. Ct. 1981) (“The simple answer to petitioner’s complaint that she was deprived of an evidentiary hearing on the issue of property, maintenance and support is that she did not request one.”)

84. See *J.S.A. v. M.H.*, 863 N.E.2d 236, 244–45 (Ill. 2007) (“[T]he trial court possesses the inherent authority to control its own docket and the course of litigation, including the authority to prevent undue delay in the disposition of cases caused by abuse of litigation process.”).

B. Dissipation

Dissipation is one of the factors to be considered when dividing marital property under section 503(d) of the Marriage Act.⁸⁵ It arises when marital property is improperly used for the sole benefit of one spouse, for a purpose unrelated to the marriage, at a time when the marriage is undergoing an irretrievable breakdown.⁸⁶ Two commonly misunderstood procedural aspects of a dissipation charge are (1) whether the party seeking a finding of dissipation is required to notify the other with a “Notice of Claim of Dissipation,” or similar paper in advance of trial, and (2) which party bears the initial burden of proof at trial. This Section begins with a brief introduction to the concept of dissipation and then discusses the common procedural misunderstandings surrounding the prosecution and defense of a dissipation charge.

The concept of dissipation is premised on waste.⁸⁷ Generally, extraordinary expenses that clearly do not further common marital interests are considered dissipation, while legitimate living expenses after the irreconcilable breakdown of the marriage are not.⁸⁸ A party charged with dissipation has the burden of proving by clear and convincing evidence that he or she did not dissipate the assets at issue.⁸⁹ General and vague statements that funds were spent on marital expenses or bills are inadequate to avoid a finding of dissipation.⁹⁰ However, the burden does not shift to the party charged with dissipation until the proponent of the claim makes a preliminary showing or, in other words, a *prima facie* case for dissipation.⁹¹

85. 750 ILL. COMP. STAT. 5/503(d) (2006) (describing dissipation of marital and non-marital property as a relevant factor in dividing property in just proportions).

86. See, e.g., *In re Marriage of O’Neill*, 563 N.E.2d 494, 498 (Ill. 1990); *In re Marriage of Holthaus*, 899 N.E.2d 355, 359 (Ill. App. Ct. 2008).

87. See *In re Marriage of Miller*, 796 N.E.2d 135, 141 (Ill. App. Ct. 2003) (there is no dissipation unless the erring spouse diminishes the marital estate’s value).

88. *In re Marriage of Hagshenas*, 600 N.E.2d 437, 449 (Ill. App. Ct. 1992) (“The issue is not whether the spending is consistent with that engaged in prior to the breakdown but, rather, whether such spending was for the sole benefit of one of the spouses for a purpose unrelated to the marriage.”); *In re Marriage of Zweig*, 798 N.E.2d 1223, 1229 (Ill. App. Ct. 2003) (observing that credit card receipts, bank statements, and bills are kinds of documents that may be used to examine propriety of use of marital funds).

89. See, e.g., *Marriage of Bush*, 567 N.E.2d 1078, 1082 (Ill. App. Ct. 1991).

90. See *In re Marriage of Hubbs*, 843 N.E.2d 478, 483 (Ill. App. Ct. 2006).

91. See, e.g., *In re Marriage of Jerome*, 625 N.E.2d 1195, 1210 (Ill. App. Ct. 1994) (“Clearly, once petitioner established that respondent had obtained exclusive control over the savings, the burden shifted to respondent to show by clear and convincing evidence specifically how the funds were spent.”); *In re Marriage of Murphy*, 631 N.E.2d 893, 895 (Ill. App. Ct. 1994) (“Once a *prima facie* case of dissipation is made, the party charged with dissipation must establish by clear

Many practitioners take the position that a dissipation claim may only be prosecuted if the proponent has filed a notice identifying with particularity expenditures constituting dissipation. However, the Marriage Act, CPL, and Supreme Court Rules do not provide for such notice. Moreover, although there is no prohibition against it, dissipation is not required to be pled in the dissolution petition.⁹² Rather, as the model matrimonial interrogatories under Supreme Court Rule 213 demonstrate, it is incumbent upon counsel to conduct discovery with respect to dissipation that may be charged against his client. If a party is served with discovery bearing on any charge of dissipation, then, of course, he is required to answer accordingly. But nothing is required beyond that. No law of procedure imposes a higher disclosure obligation for dissipation than any of the other financial issues in a dissolution case. Should a party forego discovery, the opposing party is not prohibited from pursuing a dissipation claim even if he did not provide notice of it to the other side.⁹³

*Zito v. Zito*⁹⁴ is often cited for the proposition that one must serve a notice of claim of dissipation on his opponent. But a close examination of the case fails to bear this out. In *Zito*, the court held that the husband waived his dissipation claim against his wife when he failed to (a) argue the matter at trial, and (b) comply with an order to file a pre-trial memorandum pursuant to Cook County Circuit Court Rule 13.4(h)(iv), which would have required him to disclose whether he was charging dissipation. Although a party may be required to disclose the basis of his dissipation charge pursuant to a discovery request or local court rule, *Zito* did not impose any additional disclosure obligation on the party charging dissipation.

Another not uncommon issue is determining what burden the proponent of the dissipation charge bears at trial. Some practitioners take the position that once a "Notice of Claim of Dissipation" is served on the other party, they are relieved of their obligation to present prima facie evidence of dissipation at trial. Under this approach, the mere filing of the notice is sufficient to establish a prima facie case of

and convincing evidence how the funds were spent.").

92. See 750 ILL. COMP. STAT. 5/403(a) (2006) (omitting dissipation from the minimal pleading requirements).

93. Cf. *In re Marriage of Henke*, 728 N.E.2d 1137, 1151 (Ill. App. Ct. 2000) (affirming trial court's *sua sponte* finding of dissipation where, although husband was not given notice that dissipation would be charged, he had the opportunity to present evidence of how funds at issue were spent); *In re Marriage of Vancura*, 825 N.E.2d 345, 351-52 (Ill. App. Ct. 2005) (reiterating the finding in *Henke*).

94. *Zito v. Zito*, 554 N.E.2d 541 (Ill. App. Ct. 1990).

dissipation and the responding party bears the initial burden at trial to rebut the charge by clear and convincing evidence. However, no rule of law supports this theory. The burden shifts to the party charged with dissipation only after the party charging dissipation makes a prima facie case.⁹⁵ Otherwise, even a baseless or speculative charge of dissipation would shift the burden to the party charged to refute the allegations.⁹⁶ It would be an extraordinary rule of law that would relieve the party charging dissipation from presenting any evidence simply on the basis of a paper filed prior to trial. A prima facie case of dissipation is not made of matters presented outside of trial; rather, it is made when the party prosecuting the charge introduces evidence at trial that, when viewed in the aspect most favorable to the burdened party, is sufficient to enable the trier of fact reasonably to find the issue for that party.⁹⁷ Failure to satisfy the burden of production requires a decision by the court as a matter of law on the particular issue adverse to the burdened party.⁹⁸ Thus, the party prosecuting a charge of dissipation who fails to present any evidence at trial, but rather relies on a pre-trial notice of dissipation, fails to make a prima facie case of dissipation, requiring the court to make a finding against that party.

In sum, while the procedures regarding a charge of dissipation are often misunderstood by practitioners, a fair and close reading of case law, the Marriage Act, CPL, and the Supreme Court Rules make the following clear: (1) unless a discovery request or local court rules requires disclosure of the basis of the dissipation charge, a “Notice of Claim of Dissipation” or similar paper is not required to charge dissipation; and (2) the party charging dissipation bears the initial

95. See *supra* note 91 and accompanying text.

96. Cf. *In re Marriage of Hazel*, 579 N.E.2d 1265, 1267 (Ill. App. Ct. 1991) (“To require every expense and economic decision to be explained by clear and specific evidence, without requiring some demonstration that a threshold has been crossed, adds an unnecessary and wasteful burden of time and expense. . . . The legislature did not intend to make the courts auditors for every marriage that fails.” (citation omitted)); *In re Marriage of Manker*, 874 N.E.2d 880, 890 (Ill. App. Ct. 2007) (“[O]nce a prima facie case for dissipation has been made, the burden shifts to the party charged with dissipation”); *In re Marriage of Weiler*, 629 N.E.2d 1216, 1222–23 (Ill. App. Ct. 1994) (“[O]nce it has been established that one party has liquidated marital assets, the party charged with dissipation must establish by clear and specific evidence how the funds were spent; general and vague statements . . . are inadequate to avoid a finding of dissipation.”). See also *Jerome*, 625 N.E.2d at 1210 (stating that vague comments that funds were spent on marital needs are not enough to avoid a finding of dissipation).

97. See generally MICHAEL H. GRAHAM, CLEARY AND GRAHAM’S HANDBOOK OF ILLINOIS EVIDENCE § 301.4 (8th ed. 2004) (discussing that the burden of producing evidence is satisfied with evidence suggesting that the trier of fact could find that each element is probably true).

98. *Id.*

burden of production to present prima facie evidence of dissipation at trial.

C. *Duty to Seasonably Update Discovery*

The duty to seasonably update and amend discovery answers or responses is often misunderstood and misused by practitioners in dissolution of marriage cases. Supreme Court Rule 213(i) imposes upon a party “a duty to seasonably supplement or amend any prior answer or response when new or additional information subsequently becomes known to that party.”⁹⁹ Despite the obviously proper purpose of this rule, counsel will sometimes, under the guise of a seasonable update, answer discovery or otherwise produce evidence on the eve of trial which should have been disclosed well in advance of trial in response to interrogatories or document production requests. Rule 213(i) is not intended to give the recalcitrant litigant a safe harbor to produce evidence in an untimely manner. This Section examines the limited scope of Rule 213(i).

In a recent case, *White v. Garlock Sealing Technologies, LLC*,¹⁰⁰ the court granted the plaintiff a new trial when the defendant failed to disclose, pursuant to Rule 213(i), that its controlled expert had formed a new opinion which had not previously been disclosed, even though the new opinion was not elicited in the defendant’s direct examination but was only offered on cross-examination by the plaintiff. In so holding, the court stated that the plaintiff “had an absolute right to conduct her cross-examination of Dr. Smith [defendant’s expert] in the confidence that she knew all of his pertinent opinions regarding the case. Garlock [defendant] had the duty under Rule 213(i) to make that right a reality.”¹⁰¹

The limited purpose of Rule 213(i) is analogous to the limited purpose of Rule 237(b), which provides that a party may serve on another party a notice to produce at trial original documents or other tangible things previously produced during discovery. Just as Rule 237(b) may not be used by the non-diligent litigant to seek discovery for the first time,¹⁰² so too Rule 213(i) may not be used by the non-diligent

99. ILL. SUP. CT. R. 213.

100. *White v. Garlock Sealing Technologies, LLC*, 869 N.E.2d 244 (Ill. App. Ct. 2007).

101. *Id.* at 258.

102. *See Campen v. Executive House Hotel, Inc.*, 434 N.E.2d 511, 521 (Ill. App. Ct. 1982) (stating that pre-trial discovery should have been used). An exception to this rule exists for expedited hearings in domestic relations cases. Because of the important issues that must be decided on an expedited basis, such as temporary custody and support, the trial court should have the benefit of the attendance of individuals and production of documents and tangible things. ILL.

litigant to answer discovery for the first time. Thus, a party who without justification fails to respond, or does not completely respond, to matrimonial interrogatories or requests to produce documents during discovery cannot invoke Rule 213(i) as a defense to a motion to bar evidence disclosed on the eve of trial that should have been disclosed earlier. Exclusion of such evidence at trial is usually well within a trial court's discretion.

On a related note, it is not unusual for counsel to seek a continuance on the day, or eve, of trial because the opposing party has not complied with discovery requests or even discovery orders entered months before trial. Although the court has discretion to continue a trial date, the trial of a case shall not be delayed to permit discovery unless due diligence is shown.¹⁰³ In these circumstances, the court should inquire about what steps the moving party took to seek compliance since he issued discovery or the court entered a discovery order. If the moving party has failed to invoke the tools available to him under the CPL to enforce his rights, then the court generally should not continue the trial date. Of course, evidence that should have been produced in discovery but was not will likely be barred at trial. Ultimately, Rule 213(i) addresses only genuine seasonable updates and amendments. Further, a request for a trial continuance to permit discovery is appropriate only in exceptional circumstances. Both courts and counsel should respect these narrow provisions of procedural law.

D. Publication Notice

Notice by publication is another misused and, indeed, sometimes abused, procedural tool in dissolution of marriage cases. While a court may obtain *in rem* jurisdiction over the status of a marriage based on publication notice to a respondent, not surprisingly, respondents very rarely appear in the action following publication notice. Too often, however, the petitioner seeks default judgment without having performed the statutorily required due diligence in attempting to locate the respondent. These cases deserve closer attention from the courts because the federal Due Process Clause¹⁰⁴ mandates a mode of service reasonably calculated to apprise the respondent of the claim against him, and where a judgment is entered against a respondent based on

SUP. CT. R. 237.

103. See ILL. SUP. CT. R. 201; ILL. SUP. CT. R. 231; *Yassin v. Certified Grocers of Illinois, Inc.*, 502 N.E.2d 315, 326–27 (Ill. App. Ct. 1986) (“It is within the trial court’s discretion to weigh the equities and make the final determination with respect to discovery orders.”).

104. U.S. CONST. amend. XIV § 1.

publication notice but the petitioner has not exercised sufficient diligence to locate the respondent, the judgment will be subject to being vacated.

Every defendant in an action filed against her in Illinois is entitled to receive the best possible notice of the pending suit, and it is only where personal service of summons cannot be had that substituted or constructive service may be permitted.¹⁰⁵ Jurisdiction acquired by means of publication is only allowed in certain limited cases and only when the statutory requirements for such service are strictly followed.¹⁰⁶ Section 2-206(a) of the CPL governs service by publication and requires that the plaintiff file an affidavit stating that the defendant "resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him or her."¹⁰⁷ Additionally, the affidavit must state that "the place of residence of the defendant, if known or that upon diligent inquiry his or her place of residence cannot be ascertained."¹⁰⁸ Therefore, plaintiffs are required to exercise due diligence and due inquiry when resorting to service by publication.¹⁰⁹ A defendant can challenge a plaintiff's affidavit by filing an affidavit showing that he could have been found had the plaintiff made a due inquiry.¹¹⁰ Once the defendant has filed such an affidavit, the plaintiff must produce evidence establishing due inquiry.¹¹¹

The phrases "on due inquiry" and "upon diligent inquiry" are not included in the statute as "*pro forma* or useless phrases requiring mere perfunctory performance, but, on the contrary, require an honest and well-directed effort to ascertain the whereabouts of a defendant by inquiry as full as circumstances permit."¹¹² While diligence or due inquiry in ascertaining a defendant's residence is governed by the circumstances of each case,¹¹³ where the plaintiff's efforts to comply

105. *Bell Fed. Sav. & Loan Ass'n. v. Horton*, 376 N.E.2d 1029, 1032 (Ill. App. Ct. 1978) (questioning whether the plaintiff was justified in using alternative notice means).

106. *Id.*

107. 735 ILL. COMP. STAT. 5/2-206(a) (2006).

108. *Id.*

109. *See Home State Sav. Ass'n. v. Powell*, 392 N.E.2d 598, 599 (Ill. App. Ct. 1979) ("Due inquiry and diligence are statutory prerequisites for service by publication.").

110. *See Household Finance Corp. v. Volpert*, 592 N.E.2d 98, 99 (Ill. App. Ct. 1992).

111. *See First Bank & Trust Co. v. King*, 726 N.E.2d 621, 623 (Ill. App. Ct. 2000).

112. *Bank of New York v. Unknown Heirs & Legatees*, 860 N.E.2d 1113, 1117-18 (Ill. App. Ct. 2006) (noting that the plaintiff could have easily inquired of defendant's siblings before resorting to publication service).

113. *City of Chicago v. Logan*, 205 N.E.2d 795, 797 (Ill. App. Ct. 1965).

with the statutory requirements have been “casual, routine, or spiritless, service by publication is not justified.”¹¹⁴

Further, section 405 of the Marriage Act provides:

[I]n no case of default shall the court grant a dissolution of marriage. . . unless the judge is satisfied that all proper means have been taken to notify the respondent of the pendency of the suit. Whenever the judge is satisfied that the interests of the respondent require it, the court may order such additional notice as may be required.¹¹⁵

For example, where the parties were living together and the respondent was not aware of the prove-up hearing for a default judgment, the court should have ordered the petitioner to provide notice to the respondent.¹¹⁶ For purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act, notice to persons outside Illinois “must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.”¹¹⁷

Where the petitioner does not know where the respondent resides, due inquiry may require him to make inquiries of the respondent’s neighbors and attempt to ascertain the respondent’s place of employment.¹¹⁸ Due inquiry may also require checking employment records and court records to locate a respondent.¹¹⁹ The failure to send notice to the defendant’s last known address divests a court of personal jurisdiction of a defendant.¹²⁰ However, the petitioner is not required to

114. *Bank of N.Y.*, 860 N.E.2d at 1118.

115. 750 ILL. COMP. STAT. 5/405 (2006).

116. *In re Marriage of Jackson*, 631 N.E.2d 848, 850–52 (Ill. App. Ct. 1994). Specially concurring, Justice Cook stated that section 405 of the Marriage Act has its greatest effect in cases terminating the status of marriage which are commenced by service by publication. *Id.* at 852 (Cook, J., concurring). A party served with summons, as was the case in *Jackson*, has notice of the pendency of the suit and neither the court nor petitioner is required to give notice of a hearing to a party who has not filed an answer or appearance. *Id.* Once a court acquires jurisdiction, it is the duty of the litigant to follow the progress of the case. *Id.*

117. 750 ILL. COMP. STAT. 36/108(a) (2006); see also *In re Sophia G.L.*, 890 N.E.2d 470, 483–86 (Ill. 2008) (declining to register Indiana court’s child-custody judgment in Illinois court where father, whose paternity was established during pendency of Indiana proceeding, was not given notice of Indiana proceeding as required under section 205 of UCCJEA).

118. See *Bell Fed. Sav. & Loan Ass’n v. Horton*, 376 N.E.2d 1029, 1033 (Ill. App. Ct. 1978) (stating that something more than lack of knowledge or information regarding the defendant is required before publication is appropriate); see also *Hartung v. Hartung*, 8 Ill. App. 156, 159 (3d Dist. 1881) (requiring the petitioner to “make inquiries of her neighbors and others, who would probably be informed as to where her husband resided or could be found”).

119. See *First Federal Savings & Loan Ass’n of Chi. v. Brown*, 393 N.E.2d 574, 578 (Ill. App. Ct. 1979).

120. See *In re Marriage of Wilson*, 502 N.E.2d 447, 449 (Ill. App. Ct. 1986) (quoting *Markham v. Markham*, 365 N.E.2d 308, 312 (Ill. App. Ct. 1977) (“[E]ven if the defendant was not then living at such address it is not unreasonable to assume that his mail might have been sent on to a forwarding address.”)).

“make a tour of foreign States to verify information as to the residence of defendants, in order that he may be able to state in his affidavit, on personal knowledge, the residence of such defendants.”¹²¹

One might argue that simply dissolving a marriage causes little to no harm because many important financial issues are necessarily reserved in an *in rem* proceeding.¹²² But the dissolution judgment in an *in rem* proceeding still has substantial impact upon a respondent apart from the marriage dissolution itself. For example, a court may, and usually does, in the case of a petitioner with possession of a minor child of the parties, make a custody award.¹²³ Further, dissolution can have a substantial negative impact on a respondent’s immigration status.¹²⁴ Thus, whether a petitioner has exercised diligence in attempting to locate the respondent before resorting to publication notice is no small matter. Counsel should be prepared to elicit testimony on what efforts his client made to locate the respondent, including efforts to contact immediate family, other relatives, friends, and/or co-workers of the respondent, as well as older children of the parties. An internet and telephone directory search may also be an effective means to locate a respondent.

At the same time, the court should consider individual circumstances of the case. For example, a history of physical violence or a pending order of protection may excuse petitioner from attempting to make personal contact with the petitioner to determine his whereabouts. Even then, however, the respondent’s whereabouts may be determined through trusted third parties or electronic databases. Moreover, because Supreme Court Rule 137 requires counsel to make a reasonable inquiry

121. *Pennington v. Pennington*, 326 N.E.2d 431, 435 (Ill. App. Ct. 1975) (quoting *McEvelly v. Brownfield*, 101 N.E.2d 229, 230 (Ill. 1913)).

122. When the court exercises *in rem* jurisdiction over the status of the marriage, it may dissolve the marriage, determine custody and visitation rights, and make disposition as to real and personal property located in Illinois. *Wilson v. Smart*, 155 N.E.2d 288, 291 (Ill. 1927). However, in order to enter a child support or maintenance order against a respondent, the court must have in personam jurisdiction over the respondent. *See In re Marriage of Brown*, 506 N.E.2d 727, 729 (Ill. App. Ct. 1987).

123. *See* 750 ILL. COMP. STAT. 36/201(c) (2006) (Uniform Child-Custody Jurisdiction and Enforcement Act provides that physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination); *In re Marriage of Schuham*, 458 N.E.2d 559, 563 (Ill. App. Ct. 1983) (explaining that the custody status of a child may be decided *quasi in rem*). But in no instance should the court enter a joint custody order when the respondent is in default. *See In re Marriage of Jackson*, 631 N.E.2d 848, 851 (Ill. App. Ct. 1994).

124. Since 1986, lawful permanent residence obtained by an alien spouse or son or daughter on the basis of a marriage entered into less than two years earlier is granted conditionally. 8 U.S.C. § 1186a(a)(1) (2000). The Immigration and Naturalization Service may terminate an alien’s conditional residence status within the two-year period if the marriage is terminated, other than by the death of a spouse. 8 U.S.C. § 1186a(b)(1)(A)(ii) (2000).

into the basis of papers filed with the court,¹²⁵ counsel may not blindly accept his client's statement that "I don't know where he is and don't want anything to do with him," when his client has made no effort to locate the respondent.¹²⁶

Experience teaches that when the due diligence and inquiry requirements are enforced, fewer default *in rem* judgments are entered pursuant to publication notice. Thus, courts and practitioners must become better informed of the antecedent duties attendant to publication by notice, and those requirements should be strictly enforced.

E. Contesting Personal Jurisdiction

The procedure for contesting personal jurisdiction continues to be one of the most misunderstood aspects of Illinois civil procedure. Effective January 2000, the CPL underwent one of its most significant changes since it was enacted, eliminating the use of the "special appearance" to contest personal jurisdiction. Although it has been more than eight years since this revision, a small minority of domestic relations practitioners still cling to the special and limited appearance when contesting personal jurisdiction. Even more still do not appreciate the substantial change in law on waiver of the personal jurisdiction defense.

KSAC Corp. v. Recycle Free, Inc.,¹²⁷ a case that should be required reading for all litigators, is illustrative of this lack of understanding. *KSAC Corp.* addressed whether a defendant waives his jurisdictional defense if he files an appearance, jury demand, and response to a request to admit facts before filing a motion seeking dismissal based on lack of personal jurisdiction and a forum selection clause in a contract. Deciding that the defendant did not waive its jurisdiction defense, the court observed that four significant changes were made to section 2-301 of the Code,¹²⁸ the statute governing personal jurisdiction challenges. First, although the concept of the appearance remains intact after the 2000 revisions, the special appearance no longer exists, a fact that

125. *Chicago Title & Trust Co. v. Anderson*, 532 N.E.2d 595, 602-03 (Ill. App. Ct. 1988) (imposing Rule 137 sanctions on an attorney who failed to (a) perform an objective assessment of evidence supporting his client's denial that he was in default under terms of his mortgage, and (b) advise the court and opposing counsel once he became aware that his client was in default).

126. *Bell Federal Savings & Loan Ass'n v. Horton*, 376 N.E.2d 1029, 1033 (Ill. App. Ct. 1978) (stating that "something more than mere want of knowledge and lack of information concerning the defendant" must be shown to justify publication notice).

127. *KSAC Corp. v. Recycle Free, Inc.*, 846 N.E.2d 1021 (Ill. App. Ct. 2006).

128. 735 ILL. COMP. STAT. 5/2-301 (2006).

“seems to have gone unnoticed by some courts.”¹²⁹ Second, the special appearance having been eliminated, the statute no longer provides that any other appearance is a “general appearance,” which would have amounted to a waiver of a personal jurisdiction challenge under prior law.¹³⁰ Third, a defendant may combine a jurisdictional challenge with another defense in the same motion, again something that would have amounted to a general appearance and, thus, a waiver of the jurisdictional defense, under prior law.¹³¹ Finally, the waiver provision of the statute is much narrower than prior law.

The court concluded that, by filing an appearance and jury demand and participating in discovery, the defendant did not waive its personal jurisdiction defense because the plain language of section 2-301(a-5) of the Code provides for waiver only if the defendant files a pleading or motion (except a motion for extension of time to answer or otherwise appear) before filing a motion challenging personal jurisdiction.¹³² Because an appearance, jury demand and response to discovery are neither pleadings nor motions, the defendant did not waive its jurisdictional defense.¹³³ Although personal jurisdiction challenges are relatively infrequent in domestic relations cases, the law in this area has changed dramatically, to the substantial benefit of the courts and bar.

F. Dismissal for Want of Prosecution and Voluntary Dismissal

Like other civil cases, a dissolution of marriage action may be dismissed for want of prosecution,¹³⁴ or voluntarily dismissed under section 2-1009 of the Code.¹³⁵ However, unlike most civil actions, a

129. *KSAC Corp.*, 846 N.E.2d at 1023.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* On a related note, the First and Second District Appellate Courts have split on the reach of a post-judgment waiver of a personal jurisdiction defense. Compare *C.T.A.S.S. & U. Fed. Credit Union v. Johnson*, 891 N.E.2d 558, 561 (Ill. App. Ct. 2008) (plaintiff's waiver of personal jurisdiction defense by filing motion to vacate sheriff's sale before motion to vacate judgment for lack of jurisdiction operates prospectively only), with *GMB Financial Group, Inc. v. Marzano*, 899 N.E.2d 298 (Ill. App. Ct. 2008) (plaintiff's waiver of personal jurisdiction defense by filing motion to vacate sheriff's sale before motion to vacate judgment for lack of jurisdiction operates both prospectively and retroactively).

134. A plaintiff's failure to take any action as ordered by the trial court evidences a want of prosecution by that party, and a trial court may dismiss a suit for the failure of the complainant to prosecute it with due diligence. *Bejda v. SGL Indus., Inc.*, 412 N.E.2d 464, 467 (Ill. 1980). However, a dismissal for want of prosecution is error unless the party has been guilty of inexcusable delay in prosecuting the suit. *In re Marriage of Hanlon*, 404 N.E.2d 873, 875-76 (Ill. App. Ct. 1980).

135. Section 2-1009 of the Code provides that the plaintiff may at any time before trial or

dissolution action is not subject to a limitations period.¹³⁶ The effect of this distinction on a petitioner's ability to re-file after a dismissal for want of prosecution or voluntary dismissal is understandably the subject of confusion among practitioners. Confusion also exists about how the absence of a limitations period impacts the petitioner's ability to appeal or attack such an order under sections 2-1301 and 2-1401 of the Code. Accordingly, this Section addresses the nature and implications of this distinction in dissolution of marriage cases.

Section 13-217 of the Code, otherwise known as the savings statute, provides in pertinent part that when an action is voluntarily dismissed or dismissed for want of prosecution the plaintiff "may commence a new action within one year or within the remaining period of limitation, whichever is greater."¹³⁷ The savings statute only authorizes one re-filing of an action for which the statute of limitations has lapsed.¹³⁸ However, the savings statute does not apply to a dissolution of marriage action. Article XIII of the Code, where the savings statute is found, is not expressly applicable to dissolution proceedings; rather the Marriage Act provides that the "Civil Practice Law," or Article II of the Code,¹³⁹

hearing begins dismiss his action as to any defendant, without prejudice, and, after trial or hearing begins, dismiss his action only on terms set by court upon a stipulation of the parties or on motion specifying the ground for dismissal. 735 ILL. COMP. STAT. 5/2-1009 (2006). A temporary relief hearing under the Marriage Act is not a trial or hearing for purposes of the statute. See *In re Marriage of Mostow*, 420 N.E.2d 731, 733 (Ill. App. Ct. 1981) (holding that no trial or hearing had begun for purposes of the voluntary dismissal statute even though the court granted temporary maintenance and support following a four-day evidentiary hearing); *In re Marriage of Fine*, 452 N.E.2d 691, 693 (Ill. App. Ct. 1983) (affirming order of voluntary dismissal over respondent's objection that hearing had begun when court denied the petitioner's motions for temporary maintenance and preliminary injunction). But see *Basinski v. Basinski*, 156 N.E.2d 225, 227-28 (Ill. App. Ct. 1959) (hearing commenced where court-appointed master heard evidence on, among other things, temporary alimony, temporary injunction, and chattel mortgage foreclosure).

136. Unlike an action for declaration of invalidity of marriage, which must be commenced within the time periods established in section 302 of the Marriage Act, see 750 ILL. COMP. STAT. 5/302 (2006), the Marriage Act contains no time limit within which to commence a dissolution of marriage action. See 750 ILL. COMP. STAT. 5/101 (2006). Further, the five-year statute of limitations for "all civil actions not otherwise provided for" in section 13-205 of the Code arguably does not apply because it is contained in Article XIII of the Code. 735 ILL. COMP. STAT. 5/13-205 (2006). Only the CPL, or Article II of the Code, expressly applies to dissolution proceedings. 750 ILL. COMP. STAT. 5/105(a) (2006). Cf. *Carlin v. Carlin*, 65 Ill. App. 160, 166 (Ill. App. Ct. 1896) (noting that there was no statute of limitations for divorce actions).

137. 735 ILL. COMP. STAT. 5/13-217 (2006).

138. See *Gendek v. Jehangir*, 518 N.E.2d 1051, 1053 (Ill. 1988) ("A contrary interpretation would foster abuse of the judicial system by allowing a nondiligent plaintiff to circumvent (through repeated filings and dismissals of substantially identical claims) the otherwise applicable statute of limitations.").

139. 735 ILL. COMP. STAT. 5/1-101(b) (2006).

applies to all proceedings under the Marriage Act.¹⁴⁰ Moreover, the time limit for re-filing under the savings statute could not sensibly apply to a dissolution action because it is not subject to a statute of limitations. Thus, unlike the plaintiff in a time-limited action, a petitioner in a dissolution action should have an absolute right to re-file against the same party and to re-allege the same cause of action at any time.¹⁴¹

Perhaps the more interesting question is whether, like a plaintiff in a time-limited action, a petitioner in a dissolution case is limited to one re-filing after a dismissal for want of prosecution or voluntary dismissal. Unlike time-limited actions, the savings statute, from where the one re-filing rule derives,¹⁴² does not apply to a dissolution action. Moreover, because a dissolution action is not time limited, it may not be necessary to limit to one the number of re-filings in a dissolution case in order to prevent abusive repeated filings and dismissals of substantially identical claims. Further, the public policy of Illinois to promote reconciliation and family unity¹⁴³ would be served by permitting more than one re-filing. But even if the petitioner is limited to one re-filing based on the same facts following a dismissal for want of prosecution or voluntary dismissal, presumably he may later file a dissolution action based on different facts. Thus, a petitioner should be able to bring a third

140. 750 ILL. COMP. STAT. 5/105(a) (2006).

141. *Cf. People ex rel. Redd v. Mulholland*, 481 N.E.2d 307, 309 (Ill. App. Ct. 1985) (paternity action may be re-filed more than one year after it was voluntarily dismissed because the two year statute of limitations was held unconstitutional, and, thus, the court found that there was "no limitation period for the filing of a paternity complaint during the minority of the child at issue"). In *In re Marriage of Semonchik*, 733 N.E.2d 811, 816 (Ill. App. Ct. 2000), the court held that under the savings statute, instead of challenging the trial court's denial of his motion to vacate the order voluntarily dismissing his post-dissolution petition to modify support, the ex-husband had the right to file another motion to modify support. The court reached the correct result, but its reasoning was unpersuasive. *See id.* The court did not explain how the savings statute could apply to a post-dissolution proceeding which is not time-limited. In any event, the court's determination in this regard is likely dicta because nothing in the court's opinion indicates that the ex-wife even challenged the ex-husband's ability to refile. *See id.*

142. *See Gendek*, 518 N.E.2d at 1053 ("Therefore, we find that plaintiffs are entitled to only one re-filing of a cause of action pursuant to the saving provision of section 13-217 of the Code of Civil Procedure after taking a voluntary dismissal of their original causes of action." (citation omitted)).

143. *See* 750 ILL. COMP. STAT. 5/102 (2006) (one purpose of the Marriage Act is to strengthen and preserve integrity of marriage and safeguard family relationships); 750 ILL. COMP. STAT. 5/404(a) (2006) (authorizing courts to order conciliation conference). *Cf. In re Marriage of Lucht*, 701 N.E.2d 267, 269 (Ill. App. Ct. 1998) (policy of preserving marital relationship has at times "been invoked at a cost to other legal interests" (citing *In re Marriage of Malec*, 562 N.E.2d 1010 (Ill. App. Ct. 1990))); *In re Fisher*, 153 N.E.2d 832, 840 (Ill. 1958) (against public policy for attorney to take assignment of alimony or enter into contingent fee agreements in dissolution cases because it would tend to encourage dissolution rather than reconciliation).

dissolution petition if, after the last dismissal, irreconcilable differences continue to exist or different grounds for dissolution arise.¹⁴⁴

Where the petitioner is not ready for trial, it is not unusual for him to voluntarily dismiss his case (or even allow the case to be dismissed for want of prosecution). In addition, a petitioner seeking to avoid discovery may also voluntarily dismiss his case.¹⁴⁵ To avoid being left with no recourse, it is not uncommon for the respondent to file a cross-petition for dissolution of marriage. Beyond that, respondent may have recourse against the petitioner who voluntarily dismisses his case to avoid discovery under Supreme Court Rule 219(e).¹⁴⁶ First, in addition to paying the respondent's costs under section 2-1009(a) of the Code, the petitioner, upon a finding of misconduct or unreasonable compliance with a court order under Supreme Court Rule 219(e), will also be required to pay the respondent's "reasonable expenses incurred in defending the action including but not limited to discovery expenses, opinion witness fees, reproduction costs, travel expenses, postage, and phone charges."¹⁴⁷ Second, if the petitioner refiles, Rule 219(e) "requires the court to consider the prior litigation in determining what discovery will be permitted, and what witnesses and evidence may be barred."¹⁴⁸ Thus, although the right to take a voluntary dismissal remains unchanged, adverse consequences may flow where the exercise of that right is deemed an abusive practice.

A plaintiff in a time-limited action may not appeal from or attack an order dismissing a case for want of prosecution. Supreme Court Rule 301 provides that "[e]very final judgment of a circuit court in a civil case is appealable as of right."¹⁴⁹ A final judgment is "a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of parties in the lawsuit."¹⁵⁰

144. In *In re Marriage of Manns*, 583 N.E.2d 707, 712 (Ill. App. Ct. 1991), the respondent, appealing to the "inequities of the situation," argued that "unlike other civil actions, an action for dissolution of marriage can be brought as long as a marriage continues and that the respondent is, therefore, on a treadmill, subject to indefinite dismissals under section 2-1009 and indefinite refilings." However, the court did not address the argument because the petitioner had only dismissed her case once. *Id.*

145. Although Supreme Court Rule 219(e) states "[a] part[y] shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing [a] lawsuit," ILL. SUP. CT. R. 219(e), it does not restrict a party's right to voluntarily dismiss his action under section 2-1009 of the Code; rather, it "alters the consequences of taking a voluntary dismissal." *Morrison v. Wagner*, 729 N.E.2d 486, 488-89 (Ill. 2000).

146. ILL. SUP. CT. R. 219(e).

147. *Morrison*, 729 N.E.2d at 488-89 (quoting ILL. SUP. CT. R. 219(e)).

148. *Id.* at 489 (citing ILL. SUP. CT. R. 219(e)).

149. ILL. SUP. CT. R. 301.

150. *Flores v. Dugan*, 435 N.E.2d 480, 482 (Ill. 1982) (citing *Towns v. Yellow Cab Co.*, 382

In other words, "a judgment is final if it determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment."¹⁵¹ A dismissal for want of prosecution in a time-limited action is not a final and appealable order under Supreme Court Rule 301 because any prejudice the plaintiff may suffer as a result of the trial court's abuse of discretion in dismissing the case is easily remedied by the plaintiff exercising her absolute right to re-file the action against the same party and to re-allege the same cause of action under the savings statute.¹⁵² In lieu of re-filing the action, the plaintiff may, within the time period available for re-filing under the savings statute, move to vacate the order dismissing the case for want of prosecution.¹⁵³ Further, because a dismissal for want of prosecution is not a final order, the thirty-day and two-year limitation periods to attack a judgment under sections 2-1301 and 2-1401 of the Code, respectively, have no immediate application.¹⁵⁴ Rather, a dismissal for want of prosecution becomes final and appealable after the limitation period for re-filing under the savings statute expires.¹⁵⁵ Thus, a dismissal for want of prosecution is interlocutory as long as the option to re-file is still available to the plaintiff.¹⁵⁶ After that, a dismissal for want of prosecution becomes final, giving the party against whom the order was entered up to thirty days under section 2-1301 of the Code and up to two years under section 2-1401 of the Code, to move to vacate the dismissal order.¹⁵⁷

Whether a dismissal for want of prosecution in a dissolution case is a final and appealable order has not been addressed by an appellate court.

N.E.2d 1217 (Ill. 1978); 49 C.J.S. *Judgments* § 5 (1947)).

151. *Flores*, 435 N.E.2d at 482 (citing *People ex rel. Scott v. Silverstein*, 429 N.E.2d 483 (Ill. 1981); *Vill. of Niles v. Szczesny*, 147 N.E.2d 371 (Ill. 1958)).

152. *Id.* (citing *Aranda v. Hobart Mfg. Corp.*, 363 N.E.2d 796 (Ill. 1977); *Franzese v. Trinko*, 361 N.E.2d 585 (Ill. 1977)); *Kahle v. John Deere Co.*, 472 N.E.2d 787, 788 (Ill. 1984). Illinois follows a distinct minority view in this regard; the majority of jurisdictions in the United States have held that a dismissal of a case without prejudice or with leave to re-file is an appealable final order because it ends the litigation as far as the trial court is concerned. *Wold v. Bull Valley Mgmt. Co., Inc.*, 449 N.E.2d 112, 114 (Ill. 1983) (Simon, J., dissenting).

153. *Progressive Universal Ins. Co. v. Hallman*, 770 N.E.2d 717, 719-20 (Ill. App. Ct. 2002).

154. *See id.* at 719 (trial court could not have treated plaintiff's motion to vacate a dismissal for want of prosecution as a petition under section 2-1401 of the Code because it would be theoretically inconsistent with notion that dismissal for want of prosecution remains interlocutory during period available for re-filing under savings statute).

155. *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 693 N.E.2d 338, 344 (Ill. 1998).

156. *Sunderland ex rel. Poell v. Portes*, 753 N.E.2d 1251, 1258 (Ill. App. Ct. 2001) (citing *S.C. Vaughan Oil Co.*, 693 N.E.2d at 344).

157. *See S.C. Vaughan Oil Co.*, 693 N.E.2d at 344 (noting that after the re-filing period expires, the judgment becomes final).

Like plaintiffs in time-limited actions, a petitioner in a dissolution action has the same re-filing remedy for a trial court's abuse of discretion in dismissing a case. However, unlike a time-limited action, a dismissal for want of prosecution in a dissolution case will never become final because the petitioner has an unlimited amount of time to re-file. Thus, a dismissal for want of prosecution in a dissolution action is likely to always remain an interlocutory order. On the other hand, where repeated dismissals for want of prosecution rise to the level of an abusive practice by a petitioner and the court bars him from re-filing, then the order would be considered final.¹⁵⁸

Finally, although the plaintiff in a time limited action has the option to re-file under the savings statute, a voluntary dismissal order under section 2-1009 of the Code is considered final and appealable.¹⁵⁹ If the defendant is not permitted to appeal a voluntary dismissal, he may be prejudiced because he can never seek review of a trial court's decision that no trial or hearing had commenced, and that the plaintiff was entitled to a voluntary dismissal without prejudice.¹⁶⁰ Moreover, the prejudice that the defendant may suffer cannot be remedied in a re-filed action because it is a separate cause of action and the judge hearing it has no jurisdiction to review the propriety of the dismissal of the earlier case by another judge.¹⁶¹ Applied to a dissolution action, this rationale may likewise support a respondent's ability to appeal an order of voluntary dismissal.¹⁶²

158. *Cf.* Flores v. Dugan, 435 N.E.2d 480, 485 (Ill. 1982) (Simon, J., dissenting) (citing Pettigrove v. Parro Const. Corp., 194 N.E.2d 521 (Ill. App. Ct. 1963); Liberty Mut. Ins. Co. v. Congress Mich. Auto Park, Inc., 154 N.E.2d 298 (Ill. App. Ct. 1958)) (before the savings statute was amended in 1967, a dismissal for want of prosecution was considered a final and appealable order).

159. *See* Kahle v. John Deere Co., 472 N.E.2d 787, 788-89 (Ill. 1984).

160. *Id.* at 789.

161. *Id.* However, a voluntary dismissal order cannot be appealed by a plaintiff because he requested the order. *Id.* By the same token, a plaintiff is not permitted to use section 2-1401 of the Code to vacate the same unappealable order entered at his insistence. *See* Koffski v. Vill. of N. Barrington, 609 N.E.2d 364, 370 (Ill. App. Ct. 1993). *But cf.* *In re* Marriage of Semonchik, 733 N.E.2d 811, 816-17 (Ill. App. Ct. 2000) (because voluntary dismissal order is final and appealable, ex-husband lost right to appeal when more than thirty days lapsed after the court denied his motion to vacate voluntary dismissal order entered at his insistence). Nevertheless, section 2-1203 of the Code gives the trial court jurisdiction to hear a motion to vacate an order of dismissal and reinstate a case that was voluntarily dismissed by the plaintiff pursuant to a settlement agreement where the defendant allegedly failed to comply with the terms of the settlement. Ripplinger v. Quigley, 597 N.E.2d 260, 265 (Ill. App. Ct. 1992).

162. *Cf.* *In re* Marriage of Barmak, 657 N.E.2d 730, 732 (Ill. App. Ct. 1995) (dismissing as untimely a Supreme Court Rule 137 petition for sanctions filed more than thirty days after ex-wife voluntarily dismissed her post-decree petition for fees to defend against ex-husband's petition for contribution to college expenses of the parties' child).

In sum, the rules relating to the re-filing of a dissolution action following a voluntary dismissal or dismissal for want of prosecution are different from other civil cases because a dissolution action is not time-limited and the savings statute is not applicable. The ability to appeal from a dismissal for want of prosecution in a dissolution action likewise differs from other civil actions. On the other hand, there may be occasion when a respondent may appeal from a voluntary dismissal in a dissolution action just as a defendant in other civil actions.

G. Attorney Withdrawal on the Eve of or During Trial

It is not uncommon for an attorney to seek to withdraw in a dissolution of marriage case; indeed, it is far more common than in other civil cases. More significant, however, is the incidence of attorneys seeking to withdraw in dissolution actions on the eve of or even during trial. Whatever the cause, withdrawal of counsel at a late stage in dissolution proceedings presents substantial difficulties, not only for the client, but also for the other parties, opposing counsel, the court, and for the administration of justice generally. As a result, courts will carefully scrutinize such requests. Counsel who treats the request to withdraw on the eve of or during trial as a routine matter does himself and the court a tremendous disservice. This Section discusses the few cases involving an attorney's request to withdraw on the eve of or during trial, including how a court should address the attorney's representation that ethical obligations require his withdrawal. It suggests that, when considering contested motions to withdraw, courts adopt the *in camera* approach used in cases involving the crime-fraud exception to the attorney-client privilege.

Illinois Supreme Court Rule 13 provides that an attorney's motion to withdraw "may be denied by the court if the granting of it would delay the trial of the case, or would otherwise be inequitable."¹⁶³ Rule 13(c)(3) gives courts "the option of denying an attorney's motion to withdraw only if the granting of the motion would improperly delay the trial or would otherwise be inequitable."¹⁶⁴ Rule 13 does not permit a court "to deny a motion to withdraw for other reasons."¹⁶⁵ Thus, as the Illinois Appellate Court has stated, "an attorney may end the attorney-client relationship with or without cause so long as the client is not left

163. ILL. SUP. CT. R. 13(c)(3).

164. *In re J.D. & M.G.*, 772 N.E.2d 927, 935 (Ill. App. Ct. 2002) (citing *In re Rose Lee Ann L.*, 718 N.E.2d 623 (Ill. App. Ct. 1999)) (internal quotation marks omitted).

165. *In re Rose Lee Ann L.*, 718 N.E.2d at 627.

in a position where he is prejudiced.”¹⁶⁶ A client’s failure to pay attorney’s fees is ordinarily not a sufficient basis for the attorney’s withdrawal after trial has begun.¹⁶⁷

There are only a few cases addressing an attorney’s motion to withdraw during or on the eve of trial, or a motion to withdraw that has been contested by the client. In *In re J.D.*,¹⁶⁸ the court affirmed the denial of an attorney’s motion to withdraw in the middle of trial. In this termination of parental rights case, after the court issued its oral ruling finding the respondent to be an unfit parent, the respondent attacked the minor children’s foster mothers. The court entered an order of protection against the respondent and continued the matter for a hearing to determine the best interests of the minor children. The respondent’s attorney moved to withdraw, arguing that the Illinois Rules of Professional Conduct (Illinois Rules) required her to withdraw because she could be called as a witness either on behalf of, or against, her client, in a criminal proceeding arising out of the attack. The court held that the respondent’s attorney was not ethically required to withdraw because Illinois Rules 3.7(a) and (b) only prohibit an attorney from acting as both an advocate and witness on behalf of a client in the same proceeding. If the respondent’s attorney was called as a witness to testify, it would be in a separate criminal proceeding, not the child protection proceeding.¹⁶⁹

In *In re Rose Lee Ann L.*,¹⁷⁰ the public guardian was permitted to withdraw as counsel for the parents of a minor child in an action for adjudication of wardship of the child by the state. The court held that the attorney was required to withdraw under Rule 1.2(a) of the Illinois Code of Professional Conduct when he could not abide by his client’s decisions concerning the objective of the representation. The public guardian stated that he had difficulty representing his clients, themselves wards of the state, because he doubted that they were fit to be the parents of the minor child.¹⁷¹

Finally, in *People v. Howard*, the court held that a trial court did not abuse its discretion by granting an attorney representing a criminal

166. *Id.* (citing *Herbster v. N. Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986)).

167. *Cf. People ex rel. Burris v. Maraviglia*, 636 N.E.2d 717, 722–23 (Ill. App. Ct. 1993) (denying attorney’s motion to withdraw filed after close of proofs on ground that client had not paid his bill for legal services).

168. *In re J.D. & M.G.*, 772 N.E.2d at 936.

169. *See id.* at 935–36.

170. *In re Rose Lee Ann L.*, 718 N.E.2d at 628.

171. *Id.* at 626.

defendant leave to withdraw prior to trial over the defendant's objection where the attorney expressed a strong desire to be released from his obligation.¹⁷² The court stated that whatever his reasons, the attorney's insistence on withdrawal raised legitimate concerns about his inclination and ability to effectively represent the defendant. In addition, the court observed that the trial court's independent obligation to maintain the integrity and fairness of the defendant's criminal trial was at stake, which was served by allowing the attorney to withdraw. At the same time, the court stated that although Illinois Rule 1.16 is binding on the attorney, "it is not binding authority on the trial court."¹⁷³ Finally, the court noted that "while the Rules of Professional Conduct certainly may inform a trial court's decision to permit an attorney to withdraw, the court must have independent binding authority for its decision."¹⁷⁴

But the commentary to Rule 1.16 of the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules), upon which Illinois Rule 1.16 is modeled,¹⁷⁵ states:

[C]ourt approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.¹⁷⁶

Although the Illinois Supreme Court did not adopt the comments to the ABA Model Rules, it has looked to the comments when construing identical or substantially similar provisions of the Illinois Rules.¹⁷⁷ No Illinois court has addressed the apparent conflict between *Howard* and the comment to the ABA Model Rule regarding the deference that the court must give an attorney's representation that ethical obligations require his withdrawal.

172. *People v. Howard*, 876 N.E.2d 36, 53 (Ill. App. Ct. 2007).

173. *Id.* at 50.

174. *Id.*

175. *Schwartz v. Cortelloni*, 685 N.E.2d 871, 878 (Ill. 1997).

176. MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 3 (2002).

177. *See id.*; *In re Smith*, 659 N.E.2d 896, 902 (Ill. 1995) (referencing the commentary to the ABA Model Rules).

Even if an attorney's representation that the Illinois Rules preclude him from continuing to represent his client is entitled to deference, difficulty may still arise if the client claims that the attorney's representation that ethical obligations require his withdrawal is pretextual because confidential attorney-client communications will necessarily be implicated. An example is when the breakdown in the attorney-client relationship is based on non-payment of attorney's fees. One way to protect privileged communications between the attorney and client may be for the court to conduct an *ex parte*, *in camera* proceeding in which the communications that form the basis of the attorney's request to withdraw may be disclosed to the court.¹⁷⁸ Such a proceeding would have to be conducted before another judge,¹⁷⁹ and would protect the privileged communications and allow the attorney to explain to the court why he was required to withdraw under the Illinois Rules. Of course, if a client seeks or obtains services of an attorney in furtherance of criminal or fraudulent activity, if an attorney has information that his client is about to commit an act that would result in death or serious bodily injury to another person, or if an attorney knows that his client intends to commit any other crime, then the attorney may, and in some instances must, disclose such information.¹⁸⁰ In addition, an attorney is permitted to testify to communications after his client testifies to his version thereof.¹⁸¹

A request to withdraw on the eve of or during trial should not be treated as a routine matter. The court and the parties in the case have a substantial interest in bringing the litigation to a just conclusion. While the court usually gives deference to an attorney's representation that differences have caused his relationship with his client to break down, counsel should not expect the same deference when he seeks to withdraw on the eve of or during trial. Moreover, he should be prepared to offer, in a hearing carefully structured to protect the interests of all parties and counsel, more by way of explanation than simply the familiar and nondescript "breakdown" in attorney-client relationship.

178. Cf. *In re Marriage of Decker*, 606 N.E.2d 1094, 1106-07 (Ill. 1992) (adopting the *in camera* approach as a sensible solution to the problem of establishing the crime-fraud exception to attorney-client privilege).

179. See *id.* at 1107 ("[I]t would be prudent, where possible, to have another trial judge conduct the *in camera* inspection once the initial threshold has been met and the court had determined that an *in camera* inspection is proper.").

180. *Id.* at 1101-02 (discussing the attorney-client privilege and Illinois Rule 1.6).

181. See *Turner v. Black*, 166 N.E.2d 588, 595 (Ill. 1960) (stating that a person protected by the attorney-client privilege may waive that privilege through voluntary testimony regarding issues otherwise guarded by the privilege).

H. *Parallel Proceedings*

The limited circumstances in which an Illinois court will enjoin a petitioner from pursuing her dissolution of marriage action in an out-of-state court should be understood by all courts and domestic relations practitioners. The pendency of a dissolution action in another state does not necessarily mean that a court in Illinois will enjoin the petitioner in the foreign action from prosecuting the case there. An injunction to restrain a party from prosecuting an out-of-state action is appropriate "only when prosecution of the foreign action would result in fraud or gross wrong or oppression, or when a clear equity is presented which requires such restraint to prevent a manifest wrong or injustice."¹⁸² This standard applies regardless of whether the foreign action is filed before or after the Illinois action.¹⁸³ The fact that a subsequent action may be "vexatious and harassing is but a consideration in the overriding standard of analysis, as opposed to the standard in and of itself."¹⁸⁴ The Illinois Supreme Court explains "what constitutes a wrong and injustice requiring the court's interposition depends upon the particular facts of the case."¹⁸⁵ On the other hand, an injunction against the prosecution of another action in Illinois may be granted merely if it appears likely to cause interference with the progress of the original action.¹⁸⁶

There is a "strong policy against enjoining the prosecution of a foreign action merely because of inconvenience or simultaneous, duplicative litigation, or where a litigant simply wishes to avail himself of more favorable law."¹⁸⁷ Moreover, "the expense of defending [an action in another state] do[es] not constitute a manifest wrong or injustice adequate to justify an injunction."¹⁸⁸ "[A] party possesses a general right 'to press his action in any jurisdiction which he may see fit and in as many of them as he chooses . . .'"¹⁸⁹ The Illinois Supreme Court has stated that a "court of equity will not interfere with that right unless such a prosecution results in fraud, gross wrong or oppression."¹⁹⁰

182. *Pfaff v. Chrysler Corp.*, 610 N.E.2d 51, 58 (Ill. 1992) (citing *Royal League v. Kanavagh*, 84 N.E. 178 (Ill. 1908)).

183. *Id.*

184. *Id.*

185. *Id.* at 61 (citing *Catherwood v. Hokanson*, 201 Ill. App. 462, 465 (App. Ct. 1916)).

186. *In re Marriage of Gary*, 894 N.E.2d 809, 817 (Ill. App. Ct. 2008).

187. *Pfaff*, 610 N.E.2d at 62.

188. *Id.* at 69 (citing *James v. Grand Trunk W. R.R. Co.*, 152 N.E.2d 858 (Ill. 1958); *Wells v. Wells*, 343 N.E.2d 215 (Ill. App. Ct. 1976)).

189. *Id.* at 65 (quoting *Illinois Life Ins. Co. v. Prentiss*, 115 N.E. 554, 556 (Ill. 1917)).

190. *Id.* (citing *Prentiss*, 115 N.E. at 556); *see also Halmos v. Safecard Services, Inc.*, 650

A few reported cases have upheld orders enjoining respondents in dissolution proceedings in Illinois from prosecuting dissolution petitions in other states. In those cases, however, both parties were residents of Illinois and the respondent was seeking to establish, or had established, colorable residence elsewhere, for the purpose of obtaining a dissolution of marriage in circumvention of the laws of Illinois. Such conduct, according to the courts, “would result in fraud or gross wrong upon a citizen of this State.”¹⁹¹ Thus, courts have restrained residents of Illinois from fraudulently applying to a foreign jurisdiction where their residency is merely pretended for the purpose of procuring a dissolution.¹⁹² On the other hand, an injunction should not issue in local proceedings against a former resident who has established a bona fide residence in another state.¹⁹³

Illinois courts apply a heightened standard in enjoining the maintenance of related lawsuits in other states due to concerns of comity.¹⁹⁴ However, where a litigant seeks to enjoin a later-filed action in another Illinois court, courts have split over whether the movant must satisfy the elements of a typical injunction.¹⁹⁵ Most recently, the court held that the maintenance of a later-filed action may be enjoined where (a) either the parties and legal issues involved are the same, or the issues involved in the later-filed action are of the type that can and ordinarily should be disposed of in the course of the original action, and (b) there does not appear to be any proper purpose for the maintenance of the later-filed action.¹⁹⁶

An injunction against a party will not always lie when he has commenced a parallel proceeding. The standard that applies depends on whether the parallel proceeding is pending in Illinois or another state.

N.E.2d 555 (Ill. App. Ct. 1995) (reversing order enjoining the defendant in an Illinois action from prosecuting the action in Wyoming where there was no evidence of fraud, gross wrong, or oppression; expense, inconvenience, and prospect of duplicative litigation was not sufficient to justify injunction).

191. See *Kleinschmidt v. Kleinschmidt*, 99 N.E.2d 623, 627 (Ill. App. Ct. 1951) (quoting *Kahn v. Kahn*, 59 N.E.2d 874 (Ill. App. Ct. 1945); *Russell v. Russell*, 70 N.E.2d 70 (Ill. App. Ct. 1946)).

192. *Kleinschmidt*, 99 N.E.2d at 628 (citing *Usen v. Usen*, 13 A.2d 738, 745 (Me. 1940); *McDonald v. McDonald*, 52 N.Y.S.2d 385, 385 (1944)).

193. *Id.*

194. Compare *In re Marriage of Gary*, 894 N.E.2d 809, 817 (Ill. App. Ct. 2008) (reversing order enjoining wife from prosecuting potential action in another state where husband failed to make any showing that it would result in a fraud, gross wrong, or oppression), with *In re Marriage of Elliott*, 638 N.E.2d 1172, 1173 (Ill. App. Ct. 1994) (“Courts use the same standards for preliminarily enjoining legal actions as for other preliminary injunctions.”).

195. *Gary*, 894 N.E.2d at 812–13.

196. *Id.*

In the case of a parallel proceeding in another state, counsel seeking to enjoin the proceeding is required to establish that it will result in fraud, gross wrong or oppression. On the other hand, the prosecution of a parallel proceeding in Illinois should be enjoined if it interferes with the progress of the original action and there does not appear to be any proper purpose for its prosecution.

I. Defaults, Default Judgments, and Ex Parte Judgments

The terms “default,” “default judgment,” and “ex parte judgment” are often used interchangeably by practitioners. However, each is a term of art with a distinct meaning and legal effect. This Section dispels common misconceptions by analyzing the significance and distinct function of each term.

An order of default, sometimes referred to simply as a default, is an interlocutory order that precludes the defaulting party from making any additional defenses to liability but in itself determines no rights or remedies.¹⁹⁷ An order of default is not a final judgment or an interlocutory order appealable as of right because it does not dispose of the case and determine the rights of the parties.¹⁹⁸ The court may, in its discretion, vacate an order of default at any time, so long as it is done before the final order or judgment is entered.¹⁹⁹ Because an order of default is not a final judgment or order, it is not, as some practitioners mistakenly believe, subject to the thirty-day or two-year limitation period for attack under sections 2-1301 and 2-1401 of the Code, respectively.²⁰⁰

The difference between a default judgment and ex parte judgment was explained in *In re Marriage of Drewitch*.²⁰¹ There, the petitioner appealed the trial court’s denial of her motion to vacate what both parties characterized as a default judgment. This dissolution action went on for eight years because the petitioner repeatedly terminated her lawyers and requested extensions of time. After the petitioner repeatedly failed to appear in court and countless continuances were granted at her request, the trial court entered judgment on the

197. *Fidelity Nat’l Title Ins. Co. of N.Y. v. Westhaven Props. P’ship*, 898 N.E.2d 1051, 1067 (Ill. App. Ct. 2007).

198. *Id.*

199. 735 ILL. COMP. STAT. 5/2-1301(e) (2006).

200. Some practitioners are also under the mistaken impression that an order of default must be vacated before a party may move to vacate a default judgment. Because section 2-1301(e) of the Code only authorizes the court to set aside a default “before final order or judgment,” 735 ILL. COMP. STAT. 5/2-1301(e) (2006), the judgment must be vacated first.

201. 636 N.E.2d 1052, 1057 (Ill. App. Ct. 1994).

respondent's counter-petition. The petitioner moved to vacate within thirty days, but the trial court denied the petitioner's motion. The court held that, despite the trial court's characterization of the judgment as one by default, it was actually an *ex parte* judgment. Citing section 2-1301(d), which provides that "judgment by default may be entered for want of appearance, or for failure to plead," the court stated that the failure of a party to appear for trial generally does not justify the imposition of a default. When a party files an appearance and an answer but fails to appear at trial, the other party must prove his case and cannot simply obtain judgment by default.²⁰² Failure to proceed in this manner constitutes reversible error.²⁰³

For purposes of a dissolution prove-up hearing, the appropriate disposition in the vast majority of cases where a respondent does not appear and plead will be a default judgment. In those instances where a respondent files an appearance and answer to the petition but fails to appear for trial, the appropriate disposition will be an *ex parte* judgment. Nevertheless, a mistake in terminology will not invalidate the judgment.²⁰⁴

Notably, although a respondent who fails to file an appearance and response to a dissolution petition or fails to appear at trial waives his defenses, the court is not required to enter judgment on terms requested by the petitioner. The court may require proof of the allegations of the pleadings (hence, the "prove-up" hearing) before entry of a default judgment.²⁰⁵ Moreover, a court should not enter a facially unconscionable judgment for dissolution by default or in an *ex parte* proceeding.²⁰⁶

202. See 4 RICHARD A. MICHAEL, ILLINOIS PRACTICE – CIVIL PROCEDURE BEFORE TRIAL § 42.4 (1989).

203. Ryan v. Bening, 383 N.E.2d 681, 683–84 (Ill. App. Ct. 1978).

204. See Teitelbaum v. Reliable Welding Co., 435 N.E.2d 852, 858 (Ill. App. Ct. 1982).

205. 735 ILL. COMP. STAT. 5/2-1301(d) (2006).

206. Cf. *In re* Marriage of Hochleutner, 633 N.E.2d 164, 168 (Ill. App. Ct. 1994) (wife's failure to file response to dissolution petition did not divest court of statutory jurisdiction to award her maintenance where husband placed maintenance at issue by asking court to bar maintenance in his petition and failed to object to an evidentiary proceeding on the issue); 750 ILL. COMP. STAT. 5/502(b), (c) (2006) ("The terms of an agreement, except those providing for custody and visitation, are binding on court unless it finds . . . that the agreement is unconscionable," in which case court may request parties to submit a revised agreement or, upon hearing, make orders for disposition of property, maintenance, child support, and other matters.). See also *In re* Marriage of Lorenzi, 405 N.E.2d 507, 511–12 (Ill. App. Ct. 1980) (ex-wife who did not appear at prove-up hearing entitled to hearing on her petition to vacate judgment based on her claim that she did not agree to judgment, the terms of agreement were unjust, and that the agreement was effectuated by a fraud on her).

A clear understanding of the difference between a default, default judgment, and ex parte judgment is important, especially in domestic relations cases where respondents often fail to participate. A default bars the defaulted party from presenting a defense but it does not otherwise determine the rights of the parties. A default judgment and ex parte judgment finally determine the rights of the parties, the difference being whether the party against whom the judgment was entered participated in the proceeding and what type of hearing was held prior to entry of judgment. In order to avoid any question about the effect of the order, counsel is well advised to employ correct nomenclature.

J. "Are You Happy With My Services?"

In what may be unique to dissolution of marriage cases, during the course of a prove-up hearing on a marital settlement agreement, counsel will frequently ask his client whether the client is happy with his professional services. This question, however, is ill-advised as it treads a line of professional conduct and, in any event, will likely not aid the attorney in a later malpractice claim brought by a former client.

Rule 1.7(b) of the Illinois Rules states: "A lawyer shall not represent a client if the representation of that client may be materially limited by the . . . lawyer's own interests, unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after disclosure."²⁰⁷ If the "are you happy with my services" question is relevant only to the defense of a prospective legal malpractice lawsuit by the client against the attorney, then the attorney's representation of his client at that point may have become materially limited by his own interest in attempting to foreclose or otherwise discredit the prospective malpractice action, in violation of Illinois Rule 1.7(b).

Even if Illinois Rule 1.7(b) is not implicated, it is unlikely that an affirmative response to this question will aid the attorney defending against a former client's legal malpractice action. In a recent case, an attorney's former client testified at a dissolution prove-up hearing that he entered into the settlement agreement freely and voluntarily, that no one forced him into settlement, and that he was pleased with his attorney's service. Nevertheless, the former client was not judicially estopped from testifying at a subsequent legal malpractice trial against his attorney that he did not receive the benefit of proper legal advice or that his attorney coerced him into signing the settlement agreement.²⁰⁸

207. ILL. RULES OF PROF'L CONDUCT R. 1.7(b) (1990).

208. *Mungo v. Taylor*, 355 F.3d 969, 981–82 (7th Cir. 2004). *See also Wolfe v. Wolf*, 874

Thus, the peculiar “are you happy with my services?” question often asked during the prove-up hearing on a marital settlement is both imprudent and ineffective. Practitioners should consider their motivations before asking it.

K. Declaratory Judgment

Dissolution of marriage cases raise particular uncertainties regarding declaratory judgments. Recently, the Illinois Supreme Court resolved whether a declaration may be sought in a pending dissolution of marriage action in *In re Marriage of Best*. This Section discusses the *Best* case and its implications. Further, this Section illuminates the proper procedure for pleading and resolving requests for declaratory judgment.

In *In re Marriage of Best*, the Illinois Supreme Court addressed whether a party may seek a declaration on the validity and construction of a premarital agreement. The petitioner husband filed a dissolution of marriage action and, later, a motion for declaratory judgment on the premarital agreement. The trial court ruled that the agreement was valid and enforceable, but the appellate court reversed the declaratory judgment order *sua sponte*, holding that the requirements of the declaratory judgment statute had not been met because the order was entered prior to a final dissolution order and, therefore, failed to satisfy the “termination-of-controversy” requirement of the statute. The plain language of the declaratory judgment statute has two prongs: (1) there must be an actual controversy, and (2) entry of a declaratory judgment must terminate “some part” of the controversy.²⁰⁹ Finding that the second statutory requirement was met, the Illinois Supreme Court reversed and held that, once the court construes the parties’ premarital agreement, “no question of whether the agreement’s provisions provide the controlling authority over the parties’ dissolution rights will remain.”²¹⁰ The Supreme Court also noted that its holding follows trial

N.E.2d 582, 587 (Ill. App. Ct. 2007) (finding that client’s testimony at dissolution proceeding that she understood and agreed to terms of the marital settlement agreement was not totally inconsistent with her legal malpractice complaint against attorney, and thus, she was not judicially estopped from bringing malpractice action where she alleged that her testimony was based on misrepresentations made to her by attorney and that she would not have agreed to settlement had attorney conducted meaningful discovery and informed her she was eligible for maintenance and interim attorneys’ fees).

209. 735 ILL. COMP. STAT. 5/2-701(a) (2006); *In re Marriage of Best*, 886 N.E.2d 939, 944 (Ill. 2008).

210. *Best*, 886 N.E.2d at 944.

courts' common practice of entering declaratory judgments in dissolution cases before entering an order dissolving the marriage.

At its core, *Best* is more about procedural law than substantive law. Since the Illinois Supreme Court's holding in *In re Marriage of Leopando*,²¹¹ courts have operated on the rule that, in actions under the Marriage Act, a petition for dissolution presents a single claim, and issues such as custody, maintenance, and property division are ancillary to the single claim presented in the dissolution proceeding. In reaching its conclusion in *Best*,²¹² the Illinois Supreme Court distinguished its holding in *Leopando*, finding that a request for declaratory judgment regarding the validity and construction of a premarital agreement raised a claim separate from the pending dissolution claim. While the husband's dissolution claim fell under the Marriage Act, the Uniform Premarital Agreement Act and declaratory judgment statute controlled the dispute over the premarital agreement. Thus, the request for a declaration regarding the premarital agreement was a discrete claim that could be decided prior to the resolution of the dissolution claim.

As a separate claim, a party seeking a declaration should do so in a pleading, rather than a motion. The Supreme Court did not specifically address this question, but because it affirmed the appellate court's determination that a declaratory judgment represents a separate claim, attorneys should follow the appellate court's observation that a declaratory judgment claim should be asserted in a pleading.²¹³ Once a declaratory judgment claim has been pled, cross-motions for summary judgment are best suited to resolve the dispute if there are no genuine issues of material fact regarding the premarital agreement.²¹⁴ On the other hand, an evidentiary hearing may be required when the validity of the premarital agreement is contested based on duress, inadequate legal representation, incomplete or misleading disclosure, or where some other dispute of material fact exists. The declaratory judgment statute is a valuable tool, and its maximum utility will be enjoyed by counsel who has a clear understanding of its nature and scope.

211. 449 N.E.2d 137, 140 (Ill. 1983).

212. 886 N.E.2d at 942-43.

213. *In re Marriage of Best*, 859 N.E.2d 173, 181 (Ill. App. Ct. 2006) (because a declaratory judgment is a separate claim, the proper method to add a cause of action for declaratory judgment in a pending dissolution case was to seek leave to file an amended pleading, not file a motion for declaratory judgment), *aff'd in part and rev'd in part on other grounds*, 886 N.E.2d 939 (Ill. 2008). See also 735 ILL. COMP. STAT. 5/2-701(a) (2006) (providing that declaratory judgment may be sought by means of a pleading or petition).

214. See, e.g., *In re Marriage of Barnes*, 755 N.E.2d 522, 526-27 (Ill. App. Ct. 2001).

L. Self-Incrimination

The Fifth Amendment privilege against self-incrimination is particularly important in the dissolution of marriage context because parties to dissolution proceedings frequently testify about conduct that would likely subject them to criminal liability. This Section examines how the privilege against self-incrimination applies to civil dissolution cases, and recommends that practitioners and their clients carefully predetermine when to invoke the privilege.

The Fifth Amendment to the United States Constitution, which applies to the states through the Due Process Clause of the Fourteenth Amendment, provides that no person shall be compelled in any criminal case to be a witness against himself.²¹⁵ The privilege is generally not automatically invoked, meaning that if one “desires the protection of the privilege, he must claim it or he will not be considered to have been ‘compelled’ within the meaning of the Amendment.”²¹⁶ A party may claim the Fifth Amendment privilege in a civil proceeding, but the court must determine the propriety of the invocation of the privilege under the circumstances of each case.²¹⁷ “In making that determination the court should not be skeptical; instead, the court should be aware that ‘in the deviousness of crime and its detection, incrimination may be approached and achieved by obscure and unlikely lines of inquiry.’”²¹⁸ If a party’s answer cannot possibly have a tendency to incriminate him, then he will not be able to invoke the privilege.²¹⁹ Beyond testimony, other evidence may be privileged from disclosure under the Fifth Amendment because it may tend to incriminate a party.²²⁰

Unlike a criminal proceeding, the court in a civil case may draw a negative inference or conclusion from a party’s failure to testify under the Fifth Amendment.²²¹ However, a court need not strike all of a party’s testimony because he at one point invokes the Fifth Amendment

215. U.S. CONST. amend. V; *Malloy v. Hogan*, 378 U.S. 1, 5–6 (1964).

216. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984).

217. *People ex rel. v. Mathis v. Brown*, 358 N.E.2d 1160, 1163 (Ill. App. Ct. 1976).

218. *Id.* (quoting *People v. Burkert*, 131 N.E.2d 495, 501 (Ill. 1955)).

219. *Id.* See also *In re Marriage of Roney*, 773 N.E.2d 213, 216 (Ill. App. Ct. 2002) (testimony of assistant state’s attorney that a criminal prosecution was unlikely was not enough to preclude husband from invoking privilege against self-incrimination).

220. *Roney*, 773 N.E.2d at 216 (determining that a husband may not be compelled to turn over tapes of telephone conversations of his wife that he illegally tape recorded because they constituted incriminating testimonial communications protected by the Fifth Amendment privilege).

221. *Shea v. Civil Serv. Comm’n*, 586 N.E.2d 512, 515 (Ill. App. Ct. 1991).

privilege against self-incrimination.²²² In certain instances, dismissal of a party's action may be appropriate where he attempts to use the Fifth Amendment privilege both as a shield of protection and a sword of attack."²²³ For example, where a wife and husband each filed a petition for sanctions against the other, and the wife invoked her Fifth Amendment privilege against self-incrimination in a discovery deposition and during a hearing on the husband's sanction petition, dismissal of the wife's sanction petition against the husband was appropriate.²²⁴

Parties to dissolution proceedings often testify about conduct that could subject them to criminal liability. Whether the client is asked about illegal drug use, failing to report income to the government for tax purposes, or any other matter that may tend to incriminate him, competent representation requires counsel to discuss with his client in advance of a deposition or trial whether the Fifth Amendment protection should be invoked. There may be valid reason for the client to answer questions that may incriminate him, such as the improbability of a criminal prosecution coupled with the negative inference the court may draw if the client invokes the privilege, but if counsel fails to discuss the option of invoking the privilege with his client and the client's testimony in the dissolution action leads to his criminal prosecution, counsel may be subject to disciplinary action. Accordingly, domestic relations practitioners should be fully versed in the Fifth Amendment privilege in the civil context and should be certain to discuss relevant self-incrimination issues with their clients.

M. Contempt

Many domestic relations practitioners are not sufficiently versed in the law of contempt, especially the differences between civil and criminal contempt. Different constitutional and procedural rights attach to the respondent in criminal, as opposed to civil, contempt proceedings, and a failure to follow the law strictly in this regard will undoubtedly result in the reversal of a contempt finding. This Section discusses and defines these distinctions. It attempts to clarify procedural issues in

222. See *In re Marriage of DeGironemo*, 565 N.E.2d 189, 193-96 (Ill. App. Ct. 1990) (determining that husband's assertion of Fifth Amendment privilege against self-incrimination, when asked about genuineness of his wife's signature on joint tax return submitted to bank along with loan application, did not have significant bearing on proceeding where husband admitted that he lied about his income to bank).

223. See *In re Marriage of Hartian*, 526 N.E.2d 1104, 1113 (Ill. App. Ct. 1988) (quoting *Galante v. Steel City Nat'l Bank* 384 N.E.2d 57, 62 (Ill. App. Ct. 1978)).

224. *Id.*

contempt proceedings over which there is significant confusion, including the nature and effect of a rule to show cause, and which party bears the burden of proof at a contempt hearing once a rule to show cause has issued.

Before invoking the court's inherent or statutory contempt authority, counsel must fully investigate the facts, determine what relief his client seeks, and carefully follow the law to ensure that any contempt order will not be overturned on constitutional or procedural grounds. Whether prosecuting or defending a contempt proceeding, counsel should be thoroughly familiar with Justice Steigmann's seminal opinion on the law of contempt in *In re Marriage of Betts*,²²⁵ in which he illuminates the differences between civil and criminal, and direct and indirect, contempt.

According to *Betts*, the primary distinction between civil and criminal contempt is the purpose for which the penalty is imposed.²²⁶ If the sanction serves to coerce the contemnor to comply with an order or affirmatively perform a certain act, the contempt is civil in nature. In that case, the contemnor must be able to purge himself of contempt by abiding by the court order. If the penalty is incarceration, the contemnor must hold the proverbial "keys to his jail cell," enabling him to end his incarceration by compliance.²²⁷ Civil contempt penalties are prospective in nature in that they seek to force compliance in the future.²²⁸ Additionally, the type of conduct sought to be coerced by civil contempt penalties often benefits the opposing party. If the purpose of the sanction is to punish past misconduct, on the other hand, the contempt is criminal.²²⁹ The conduct punished by criminal contempt includes disrespectful, deceitful, and disobedient acts that disturb judicial proceedings. The most common examples of punishable conduct are a disruptive outburst by a litigant or spectator or statements made in open court suggesting that the judge is guilty of criminal conduct.²³⁰ Criminal contempt sanctions are retrospective in that they seek to punish conduct committed by the contemnor in the past.²³¹

Direct contempt consists of contemptuous conduct in the presence of the judge. The most common example of direct contempt is an outburst

225. 558 N.E.2d 404 (Ill. App. Ct. 1990).

226. *Id.* at 415.

227. *In re Marriage of Logston*, 469 N.E.2d 167, 177 (Ill. 1984).

228. *Betts*, 558 N.E.2d at 415.

229. *Id.* at 416 (stating that the purposes of criminal contempt are "retribution, deterrence, and vindication of the norms of socially acceptable conduct").

230. *Id.*

231. *Id.* at 417.

during court proceedings. Direct contempt can also be civil in nature, as is the case where a party willfully refuses to perform acts in open court in compliance with previously entered court orders.²³² Indirect contempt includes contemptuous conduct occurring outside the presence of the court such that the judge does not have personal knowledge of the conduct and cannot take judicial notice of the facts giving rise to the contempt proceedings.²³³ The most common example of indirect contempt in a dissolution case is failure to comply with a child support or maintenance order.²³⁴

To sustain a finding of civil contempt, the petitioner must establish that the respondent failed to comply with a court order, such as an order for child support or maintenance, at which point the burden shifts to the respondent to show that his non-compliance was not willful.²³⁵ To sustain a finding of criminal contempt for the violation of a court order, the petitioner must prove both the existence of a court order and a willful violation of that order.²³⁶ Unlike a civil contempt petition, a criminal contempt proceeding is separate and independent of the original action.²³⁷

Oftentimes, an examination of the petition for rule to show cause reveals that any sanction the court may order will not have a coercive effect but rather only a punitive effect, making it, in essence, criminal contempt.²³⁸ If so, the respondent enjoys certain constitutional protections, including, but not limited to, the presumption of innocence, the right against self-incrimination, the right to be proven guilty beyond a reasonable doubt, and the right to appointed counsel if he is indigent. Because the respondent enjoys the right not to testify and presumption of innocence, an order that the respondent show cause is an impermissible shifting of the burden of proof in a criminal contempt proceeding.²³⁹ Thus, an indirect criminal contempt proceeding should be styled a "petition for adjudication of criminal contempt."²⁴⁰

232. *Id.* at 418.

233. *Id.*

234. *Id.* at 419.

235. *In re Marriage of Logston*, 469 N.E.2d 167, 175 (Ill. 1984).

236. *People v. Totten*, 514 N.E.2d 959, 965 (Ill. 1987).

237. *Bray v. United States*, 423 U.S. 75, 76 (1975); *People v. Budzynski*, 775 N.E.2d 275, 280 (Ill. App. Ct. 2002).

238. *Cf. Helm v. Thomas*, 839 N.E.2d 1142, 1145 (Ill. App. Ct. 2005) (reversing contempt to punish respondent for an act which could not be undone where court did not accord respondent necessary criminal procedural rights).

239. *See People v. Ramsell*, 640 N.E.2d 975, 978 (Ill. App. Ct. 1994) (requiring respondent in indirect criminal contempt proceeding to show cause constitutes reversible error).

240. *In re Marriage of Betts*, 558 N.E.2d 404, 425 (Ill. App. Ct. 1990).

Moreover, if a respondent testifies at a hearing where only civil contempt has been alleged, she may not then be found in criminal contempt, even if her testimony would clearly support a criminal contempt finding.²⁴¹ However, if appropriate procedural steps are followed, a contemnor may be found in both criminal and civil contempt for the same act.²⁴² On the other hand, where the respondent is not afforded criminal procedural rights and is not given the opportunity to purge himself of contempt, neither civil nor criminal contempt will stand.²⁴³

Another issue that arises with some frequency in contempt proceedings is whether the order that forms the basis for the contempt is sufficiently certain and specific in its direction. To support a finding of contempt, the order must be "so specific and clear as to be susceptible to only one interpretation."²⁴⁴ It must not only be capable of reasonable interpretation, but that interpretation must be to the exclusion of other reasonable interpretations; in other words, it must be unambiguous.²⁴⁵ Thus, where the order provided that both parents would "share equally the costs of special activities in which the minor child is a participant and to which both parents have agreed," listing as examples summer camp, music lessons, and religious school, and further providing that consent would not be unreasonably withheld by either parent, the order was not sufficiently specific to support a contempt finding against the ex-husband for failing to pay one half of certain expenses relating to the child's activities because the order did not specify what activities the ex-husband was supposed to contribute to or when withholding approval would be unreasonable.²⁴⁶ A contempt finding will not lie where the visitation order is not specific as to time, date, and place.²⁴⁷ Nor will contempt lie where a respondent has been ordered to pay money to the petitioner, but the order does not indicate the date by which respondent is to pay petitioner.

Significant confusion exists regarding the nature and effect of a rule to show cause. Some practitioners take the position that the court must conduct a hearing before issuing a rule to show cause against a

241. Cf. *In re Marriage of Marcisz*, 357 N.E.2d 477, 479 (Ill. 1976) (finding contempt criminal where husband violated divorce decree).

242. *Betts*, 558 N.E.2d at 425.

243. *In re Marriage of Gibbs*, 645 N.E.2d 507, 515 (Ill. App. Ct. 1995).

244. *O'Leary v. Allphin*, 356 N.E.2d 551, 558 (Ill. 1976).

245. *In re Marriage of Baumgartner*, 890 N.E.2d 1256, 1277 (Ill. App. Ct. 2008) (quoting *O'Grady v. Cook County Sheriff's Merit Bd.*, 561 N.E.2d 1226, 1229 (Ill. App. Ct. 1990)).

246. *In re Marriage of Steinberg*, 706 N.E.2d 895, 898, 904 (Ill. App. Ct. 1998).

247. *Hess v. Hess*, 409 N.E.2d 497, 501 (Ill. App. Ct. 1980).

respondent to explain why he should not be held in civil contempt. However, when a court issues a rule to show cause, it does not make a finding that a court order has been violated.²⁴⁸ Rather, the issuance of the rule is part of the process of notifying the alleged contemnor of the charges against him, including the time and place of the hearing.²⁴⁹ For that reason, one commentator argues that the court need not conduct a hearing on whether a rule should issue and, further, that no practical purpose would be served by such a preliminary hearing because it is relatively easy to establish a prima facie case of contempt.²⁵⁰ In the vast majority of cases, the court will enter a rule without a hearing, but where a question exists about whether the petition establishes a prima facie case of contempt, the court “may instead set the petition itself for hearing.”²⁵¹ If the court issues a rule without conducting a preliminary hearing, then a motion for directed finding following the petitioner’s case in chief, where the court considers the credibility of the witnesses and the weight and quality of the evidence,²⁵² is appropriate to weed out unmeritorious contempt claims.

There is also confusion over which party bears the burden of proof at a contempt hearing when a rule to show cause has issued. Common practice is that once the rule issues, the burden of proof shifts to the respondent to show cause why he should not be held in contempt, relieving the petitioner of the burden of making a prima facie case at the contempt hearing. This argument was rejected in *In re Marriage of LaTour*.²⁵³ Thus, regardless of whether a rule to show cause has issued, the petitioner in a civil contempt proceeding bears the initial burden of proof to show that the respondent has violated a court order. Once this showing has been made, the burden shifts to the alleged civil contemnor to show the violation was not willful.²⁵⁴

A dissolution of marriage case may bring out the worst in the parties, even conduct rising to the level of contempt. One of the most effective tools in a court’s arsenal is its contempt power. Courts, quite

248. *In re Marriage of LaTour*, 608 N.E.2d 1339, 1345–46 (Ill. App. Ct. 1993).

249. *Id.*

250. H. JOSEPH GITLIN, GITLIN ON DIVORCE: A GUIDE TO MATRIMONIAL LAW § 18-4(a), (Matthew Bender & Co., Inc. 3d ed. 2005) (citing *LaTour*, 608 N.E.2d at 1339).

251. ILL. SUP. CT. R. 296.

252. See 735 ILL. COMP. STAT. 5/2-1110 (2006).

253. 608 N.E.2d at 1346 (rule to show cause is not a finding of a violation of a court order but rather the method by which the court brings the parties before it for hearing and mere allegation in petition for rule to show cause is insufficient to establish, by a preponderance of the evidence, that a court order has been violated).

254. *In re Marriage of Cummings*, 584 N.E.2d 900, 904 (Ill. App. Ct. 1991).

appropriately, exercise this power cautiously and prudently. Often, what may be designated civil contempt is, upon close examination, a grievance about the respondent's past conduct that cannot be undone. In that case, the matter is a likely criminal contempt and the respondent enjoys the same constitutional protections as other defendants in criminal proceedings. A failure to strictly comply with the law in cases of criminal contempt will almost always result in a reversal on appeal. When appropriately utilized, civil contempt is highly effective in forcing the recalcitrant litigant to comply with a court order. Even then, however, a failure to afford the civil contemnor his minimal procedural rights will be grounds for reversal. In either criminal or civil contempt, the court order forming the basis of the contempt must be unambiguous. Although a court has the authority to conduct a hearing on whether a rule to show cause should issue against the respondent, the court will usually issue the rule on the basis of the verified petition. However, the rule to show cause does not operate to shift the initial burden to the respondent at the contempt hearing. A strong understanding of the basic principles of contempt and how contempt is prosecuted and defended will empower the domestic relations practitioner to competently and effectively represent his client.

IV. CONCLUSION

Dissolution of marriage litigation is unique in many respects. Unlike a tort or breach of contract action, which focuses on events and conduct of parties prior to the commencement of the action, the inquiry in a dissolution of marriage action is not so time-limited. Because parties to a dissolution action must continue to live their lives, the facts remain fluid and what parties do after the dissolution action is commenced is often just as important as what they did before the action was commenced. This is especially the case when there are children of the marriage. Further, unlike a tort or breach of contract action, it is not uncommon for the court to conduct an evidentiary hearing on temporary issues in a dissolution action before trial. These and other differences, however, as substantial as they undoubtedly are, generally have not necessitated special procedural rules. Rather, the legislature and supreme court have appropriately applied the CPL to dissolution of marriage cases. Hence, many of the novel procedural schemes employed in domestic relations cases are without legal basis and should be strongly discouraged. Better civil practice in domestic relations cases invokes procedure followed in other civil cases. Practitioners and judges should insist on stricter application of the CPL to domestic relations proceedings.

Three years before the United States Supreme Court employed an arguably rigid concept of procedural law to affirm the contempt convictions of civil rights protestors led by Dr. King in *Walker v. City of Birmingham*, the Illinois Appellate Court looked to a treatise on English legal history to explore the relationship between substantive and procedural law:

“One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves.”²⁵⁵

The relationship between substantive and procedural law has never been easy, especially in dissolution of marriage cases. Unlike the values reflected in *Walker*, in Illinois, procedure often bends in light of substantive concerns. Nevertheless, certain procedural norms and conventions employed in dissolution cases are so at odds with procedural law that the only way to explain their subsistence is to disregard procedural law, a proposition that even Dr. King’s defenders would have undoubtedly rejected. A dissolution case has a number of distinguishing characteristics, but they are well within grasp of Illinois procedural statutes and rules of court. The suggestions in this article attempt to draw an appropriate and healthy balance between substantive and procedural law and, if adopted by domestic relations practitioners and judges, will significantly assist the court in determining the parties’ substantive rights in a just, orderly, and expeditious manner.

255. *Kita v. Young Men’s Christian Assoc. of Metro. Chicago*, 198 N.E.2d 174, 176 (Ill. App. Ct. 1964) (quoting 2 WILLIAM S. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 251 (3d ed. 1945)).