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I. INTRODUCTION

During the *Survey* year, the Illinois courts addressed various issues in the field of family law. The supreme court limited the legal rights of an unborn fetus,[1] defined the scope of a court's power to assert personal jurisdiction[2] and interpreted the rights of a natural

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1. *See infra* notes 14-32 and accompanying text.
2. *See infra* notes 33-53 and accompanying text.

father under the Adoption Act.[3] The appellate courts interpreted the Illinois Marriage and Dissolution of Marriage Act[4] regarding child custody,[5] no-fault divorce,[6] dissipation of marital assets[7] and homemaker contribution.[8] The appellate courts defined good faith standards in granting maintenance,[9] as well as the scope of maintenance jurisdiction.[10] In addition, the Illinois appellate courts considered the propriety of attorney-client agreements for fees.[11] Finally, statutory amendments introduced a hearsay provision for out-of-court statements made by children[12] and introduced mandatory wage deductions for people owing maintenance or child support.[13]

II. FETAL RIGHTS

In *Stallman v. Youngquist*,[14] the Illinois Supreme Court refused to recognize a cause of action by a child against its mother for negligent infliction of prenatal injuries.[15] In *Stallman*, the plaintiff brought suit, by her father, for prenatal injuries allegedly inflicted by her mother.[16] The plaintiff asserted that because the law recognizes the right of a fetus to bring a negligence action against third parties for prenatal injuries, she should be permitted to bring this action for negligence against her mother.[17] In response, the defendant argued that public policy considerations urged against imposing civil liability on a woman simply because she became pregnant.[18] Additionally, the defendant argued that the suit was

3. ILL. REV. STAT. ch. 40, para. 1501-1529 (1987). *See infra* notes 54-72 and accompanying text.

4. ILL. REV. STAT. ch. 40, para. 501 (1987) [hereinafter "IMDMA"].

5. *See infra* notes 73-101 and accompanying text.

6. *See infra* notes 102-16 and accompanying text.

7. *See infra* notes 117-26 and accompanying text.

8. *See infra* notes 127-41 and accompanying text.

9. *See infra* notes 142-53 and accompanying text.

10. *See infra* notes 154-67 and accompanying text.

11. *See infra* notes 168-93 and accompanying text.

12. *See infra* notes 194-97 and accompanying text.

13. *See infra* notes 198-99 and accompanying text.

14. 125 Ill. 2d 267, 531 N.E.2d 355 (1988).

15. *Id.* at 268, 531 N.E.2d at 355. *See also infra* Bingle and Meyer, *Torts*, 21 LOY. CHI. L.J. 661, 672 (1990).

16. *Id.* The plaintiff alleged that she sustained serious and permanent injury when her mother was involved in an automobile accident. At the time, the mother was five months pregnant. The plaintiff also named the other driver, Youngquist, as a defendant. Youngquist was not a party to this appeal. *Id.*

17. *Id.* at 274, 531 N.E.2d at 358. *See* Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (recognizing a cause of action for injuries sustained by a fetus as a result of a third party's tortious acts).

18. 125 Ill. 2d at 269, 531 N.E.2d at 355.

prohibited by the parent-child tort immunity doctrine.[19] The circuit court granted the defendant's motion to dismiss, but the appellate court reversed and remanded the case for consideration of whether the parent-child immunity doctrine applied in this case.[20] On remand, the circuit court granted the defendant's motion for summary judgment, finding the parent-child immunity applicable. The plaintiff again appealed and the appellate court reversed.[21]

The supreme court reversed the appellate court and refused to recognize a cause of action by a fetus against its mother for negligence.[22] Noting that this was an issue of first impression, the court began its analysis with a review of tort liability for prenatal negligence as it relates to third party defendants; it acknowledged that the law permits a fetus, later born alive, to sue a third party for negligence.[23] The court, however, declined to extend the fetus' right to sue to allow suit against the mother.

After criticizing the law of another jurisdiction that allowed a negligence action by an unborn fetus against its mother,[24] the court

19. *Id.* at 268, 531 N.E.2d at 356. Parental immunity disallows actions between a parent and his or her minor child for personal torts, whether they are intentional or negligent in character. W. KEETON, PROSSER AND KEETON ON TORTS, at 904 (5th ed. 1984).

20. 125 Ill. 2d at 268, 531 N.E.2d at 356. The appellate court held that the plaintiff should be allowed to prove that the mother's actions occurred outside the familial relationship and therefore were not covered by parent-child immunity. Stallman v. Youngquist, 129 Ill. App. 3d 859, 862-65, 473 N.E.2d 400, 402-05 (1st Dist. 1984) ("Stallman I").

21. Stallman v. Youngquist, 152 Ill. App. 3d 683, 504 N.E.2d 920 (1st Dist. 1987) ("Stallman II"). The *Stallman II* court found that "a child's mother bears the same liability for negligent conduct, resulting in prenatal injuries, as would a third person." *Id.* at 694, 504 N.E.2d at 927 (citing Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1981)). *See infra* note 24 (for discussion of *Grodin*).

22. *Stallman*, 125 Ill. 2d at 270, 531 N.E.2d at 356.

23. *Id.* at 271-75, 531 N.E.2d at 356-58. Prior to 1946, no court recognized a cause of action in tort for prenatal injuries to a fetus. Dietrich v. Northampton, 138 Mass. 14, 17 (1884) (any demonstrated injury to the fetus can be recovered by the mother); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900) (a child is a part of the mother, thus, it is the mother, not the fetus, who is actually injured). Illinois first recognized a cause of action for injuries inflicted by a third party's negligence upon a viable fetus subsequently born alive in Rodriguez v. Patti, 415 Ill. 496, 114 N.E.2d 721 (1953). *See also* Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973) (recognizing a wrongful death action for a stillborn child who sustained injuries due to third party negligence); Amann v. Faidy 415 Ill. 422, 114 N.E.2d 412 (1953) (recognizing a wrongful death cause of action for a viable fetus who was injured by a negligent third party). Although the courts initially required that the fetus be viable at the time of injury, this requirement has since been abandoned. Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

24. Grodin v. Grodin, 102 Mich. App. 396, 400, 301 N.W.2d 869, 870 (1980) (holding that a child's mother bears the same liability for negligence to her fetus as would a third party). The Illinois Supreme Court found *Grodin* unpersuasive because the case

focused on the public policy implications of such a cause of action.[25] Although other jurisdictions have adopted the theory that a fetus has a "legal right to begin life with a sound mind and body,"[26] the Illinois Supreme Court rejected this theory, stating that essentially, it makes a pregnant woman "the guarantor of the mind and body of her child at birth."[27] The court further reasoned that if a woman had a legal duty to guarantee her child's mental and physical health, the judiciary would have to define a reasonable standard of conduct for all women.[28] Because the circumstances of each woman's pregnancy vary tremendously, a single standard of conduct would be impractical and impossible to create.[29]

Additionally, the court stated that holding a mother liable for unintentional injuries to her fetus would subject all the decisions she makes while pregnant to State scrutiny; this scrutiny would undoubtedly infringe upon the mother's right to privacy and bodily autonomy.[30] Finally, the court determined that although public policy favors healthy newborns, "[t]he way to effectuate the birth of healthy babies is not . . . through after-the-fact civil liability in tort for individual mothers, but rather through before-the-fact education . . . about prenatal development."[31] Therefore, the court

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was based on a partial nullification of the prenatal immunity doctrine and did not directly address the question of whether a new cause of action should be created at all. In doing so, the *Grodin* court treated pregnant women as strangers to their developing fetuses without first addressing "any of the profound implications which would result from such a legal fiction." *Stallman*, 125 Ill. 2d at 274-75, 531 N.E.2d at 358.

25. *Id.* at 275-80, 531 N.E.2d at 358-61.

26. *See* Evans v. Olson, 550 P.2d 924, 927 (Okla. 1976); Womack v. Buckhorn, 384 Mich. 718, 725, 187 N.W.2d 218, 222 (1971); Smith v. Brennan, 31 N.J. 353, 364-65, 157 A.2d 497, 503 (1960). The recognition of a fetus's right to begin life in a sound condition emphasizes that it is not just the mother who is harmed by tortious acts, but also the fetus, and that each should have a separate cause of action against third parties. *Stallman*, 125 Ill. 2d at 275, 531 N.E.2d at 358-59.

27. *Id.* at 276, 531 N.E.2d at 359. The court stated that although many people feel that a woman has a moral duty to avoid anything that may harm the fetus, the imposition of a legal duty would impose too great a risk of liability upon a pregnant woman. *Id.* The court reasoned that "[a]ny action which negatively impacted on fetal development would be a breach of the pregnant woman's duty to her developing fetus [thus making] [m]other and child . . . legal adversaries from the moment of conception until birth." *Id.*

28. *Id.* at 278, 531 N.E.2d at 360.

29. *Id.* at 279, 531 N.E.2d at 360. The court recited a litany of factors impacting upon a woman's pregnancy including age, socio-economic background, education and access to health care. *Id.*

30. *Id.* The court stated that if a legal duty on the part of a mother to the fetus is to be recognized, "the decision must come from the legislature only after thorough investigation, study and debate." *Id.* at 280, 531 N.E.2d at 361.

31. *Id.* at 280, 531 N.E.2d at 361.

declined to recognize a fetus' right to pursue a cause of action against its mother for unintentional infliction of prenatal injuries.[32]

In the past fifty years, Illinois courts have expanded an unborn fetus's right to pursue causes of action against third parties. In *Stallman*, the court refused to go one step further and allow such a cause of action against the child's own mother for her negligence during the pregnancy. The opinion relied heavily on the argument that placing such burdensome restrictions on pregnant women would reduce the number of women choosing to become pregnant and, thus, be against the public policy promoting parenthood and the family. Although the court suggested that the legislature may in the future create a cause of action for a fetus against its mother, this suggestion was less a call for legislative action than an indication that the court will not use judicial review to restrict a woman's personal freedom with respect to her pregnancy.

III. PERSONAL JURISDICTION

In *In re Marriage of Verdung*,[33] the Illinois Supreme Court defined circumstances in which the circuit court has jurisdiction over a person prior to entry of a general appearance or service of process in a dissolution of marriage action.[34] The dispute in *Verdung* arose when Christine Riis, Philip Verdung's first wife, sought payments past due under their divorce decree.[35] The circuit court ordered that the residence, owned as joint tenants by Philip and his second wife JoAnn, be sold to satisfy the judgment entered earlier against Philip.[36] Christine sold the house and filed a motion to distribute the money.[37] At the hearing on this motion, JoAnn asserted a one-half interest in the proceeds.[38] Because the court was not certain as to whether the earlier court order granting Christine a lien in the property terminated JoAnn's interest, the court split

32. *Id.* Because the court dismissed the case for failure to state a cause of action, it never reached the parental immunity issue. *Id.* at 271, 531 N.E.2d at 355.

33. 126 Ill. 2d 542, 535 N.E.2d 818 (1989).

34. *Id.* at 547, 535 N.E.2d at 820.

35. *Id.* at 545, 535 N.E.2d at 819.

36. *Id.*

37. *Id.* at 545-46, 535 N.E.2d at 820.

38. *Id.* The circuit court previously had found that JoAnn did not possess full ownership of the property because Philip's conveyance of his interests in the property constituted a fraudulent attempt to keep Christine from being able to claim the property. Despite this earlier judgment, JoAnn claimed that she retained a half interest in the property and therefore was entitled to half of the proceeds of the sale. *Id.* at 545-46, 535 N.E.2d at 819.

the proceeds and awarded one-half to both Christine and JoAnn.[39] Christine appealed.[40]

On appeal, Christine argued that the circuit court had personal jurisdiction over JoAnn[41] and that the court's order creating the lien in favor of Christine was binding on JoAnn.[42] In response, JoAnn contended that the court did not have jurisdiction over her at the time the order was entered and therefore lacked the power to terminate her interest.[43] The appellate court ruled that the circuit court did have *in personam* jurisdiction over JoAnn; therefore, its order terminated JoAnn's interest in the property.[44]

On appeal, the supreme court first reviewed the ways in which a court may acquire personal jurisdiction over a litigant.[45] Although service of process or a general appearance usually creates jurisdiction,[46] personal jurisdiction also may be asserted over a party who has participated in the case or has received benefits therefrom.[47] After examining the facts at hand, the court held that JoAnn's participation in the early proceedings sufficiently invoked personal jurisdiction over her.[48] Because the circuit court had proper

39. *Id.* at 546-47, 535 N.E.2d at 819-20.

40. *Id.* at 546, 535 N.E.2d at 820.

41. *Id.* at 547, 535 N.E.2d at 820. Although JoAnn had neither filed a general appearance nor been served with process, the appellate court found proper *in personam* jurisdiction by virtue of her active participation in the lawsuit. *In re* Marriage of Verdung, 162 Ill. App. 3d 374, 387, 515 N.E.2d 454, 463 (2nd Dist. 1987).

42. 126 Ill. 2d 542 at 547, 535 N.E.2d at 820.

43. *Id.* In the alternative, she argued that the circuit court's order was unclear and not intended to terminate her interest in the property. *Id.* at 555, 535 N.E.2d at 823.

44. 162 Ill. App. 3d at 387, 515 N.E.2d at 463.

45. 126 Ill. 2d at 546-47, 535 N.E.2d at 820.

46. *See* State Bank v. Thill, 113 Ill. 2d 294, 308, 497 N.E.2d 1156, 1161 (1986) (personal jurisdiction acquired through the party's general appearance or by service of process).

47. *Verdung*, 126 Ill. 2d at 548, 535 N.E.2d at 820. The court cited Lord v. Hubert, 12 Ill. 2d 83, 87, 145 N.E.2d 77, 80 (1957), in which the court held that a person's actions may suffice to invoke personal jurisdiction, even if the person has been neither named as a party nor served with process as directed by statute. Also cited by the court was O'Connell v. Pharmaco, Inc., 143 Ill. App. 3d 1061, 1069, 493 N.E.2d 1175, 1181 (4th Dist. 1986), in which the court found personal jurisdiction because the defendant, who was not served or named as a party "had notice of the proceedings, failed to limit his appearance in the trial court, actively participated and directed the litigation and requested affirmative relief from the court when it became apparent that plaintiffs sought to discover assets of the judgment debtor which he held."

48. *Verdung*, 126 Ill. 2d at 549-52, 535 N.E.2d at 821. The court found that JoAnn was served with pleadings, was present at hearings, and on the trial court's own motion, was added as a party defendant for the purpose of having her appear and testify. *Id.* at 549-50, 535 N.E.2d at 822. Furthermore, JoAnn asserted her interest in the litigation by holding numerous conversations and meetings with the attorney who litigated her husband's case. *Id.* at 551, 535 N.E.2d at 822. Based on these facts, the court concluded

jurisdiction, the order creating the lien was enforceable against JoAnn.[49]

The supreme court next considered whether the court's order terminated JoAnn's interest in the property thereby barring her from collaterally attacking this order.[50] The court noted that it was unclear even to the circuit court whether the earlier orders were intended to extinguish JoAnn's interest.[51] In light of this ambiguity, the court agreed with the circuit court and ruled that the prior orders did not terminate her interest. The court also held that these orders were not final and appealable until the court-ordered sale and distribution of the proceeds.[52] Because JoAnn timely filed her appeal with respect to the sale and distribution order, the court determined that she preserved her right to a one-half interest in the proceeds. The court then affirmed the trial court's award of half the proceeds to JoAnn.[53]

Although courts have eased the strict requirements of personal jurisdiction, the *Verdung* court utilized exceptionally broad standards of personal jurisdiction to extend the court's jurisdiction to a non-party in a divorce case. Requiring that the court have personal jurisdiction over parties ensures that defendants will have a fair chance to be heard. When defendants directly participate in litigation, they do not need this protection. This case should act as a warning to litigants in a post-decree divorce setting that if they actively participate in the litigation process and seek benefits from the court, their behavior may be construed as a submission to the court's jurisdiction.

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that JoAnn had participated sufficiently in the proceedings to justify the court's jurisdiction over her. *Id.*

49. *Id.*

50. *Id.* at 552, 535 N.E.2d at 823.

51. The uncertainty regarding the orders' effect stemmed in part from the fact that at the time the orders were entered, both parties presumed that sale of the property would generate sufficient proceeds to satisfy the amount owing to Christine. Only when the property's sale produced less money than initially expected did the issue arise as to the viability of JoAnn's interest. Because the viability of JoAnn's interest was irrelevant at the time the court entered its disputed orders, the circuit court never clarified the order's effect on that interest. *Id.* at 555, 535 N.E.2d at 823-24.

52. *Id.* at 555, 535 N.E.2d at 824. *See* King City Fed. Sav. and Loan Ass'n v. Ison, 80 Ill. App. 3d 900, 400 N.E.2d 562 (5th Dist. 1980) (court must make finding of no just reason for delay of enforcement or appeal under Supreme Court Rule 304(a), otherwise a foreclosure judgment is not appealable until an order is entered directing a sale and distribution).

53. 126 Ill. 2d at 556, 535 N.E.2d at 824-25.

IV. ADOPTION

In *In re Adoption of Scraggs*,[54] the Illinois Supreme Court held that under certain circumstances, a natural father may be barred from seeing his child pending the child's adoption, if such relief is in the child's best interest.[55] In *Scraggs*, the Burdens filed a petition to adopt their nephew, Thomas Scraggs.[56] The Burdens also sought a preliminary injunction to prohibit the father from contacting his son until a hearing could be held to terminate his rights as a natural father.[57] Following a full hearing on the preliminary injunction motion,[58] the court granted an injunction prohibiting visitation by Dwight while the adoption was pending.[59] The appellate court affirmed, believing the injunction necessary to preserve the "status quo" until the adoption proceedings were completed.[60]

On appeal, the supreme court first noted that, although injunctive relief is not granted expressly under the Adoption Act,[61] it may "nevertheless be available if it is germane to the distinct purpose of the Adoption Act."[62] The Act's primary consideration is the child's best interest and welfare.[63] Thus, in situations that require an injunction to protect the child, such relief may be

54. 125 Ill. 2d 382, 532 N.E.2d 244 (1988).

55. *Id.* at 387, 532 N.E.2d at 246.

56. *Id.* at 384, 532 N.E.2d at 245. Thomas' mother, Linda, received custody of Thomas following her divorce from Dwight Scraggs, Thomas' father. *Id.* Since 1979, Thomas had been in the permanent custody of the Burdens. *Id.* During this time, Dwight who resided in West Virginia visited Thomas only once and had not spoken to or contacted his son from 1980 to 1987. *Id.* at 386, 532 N.E.2d at 246.

57. *Id.* at 384-85, 532 N.E.2d at 245.

58. Evidence at the hearing established that Dwight had paid only $150 in child support over approximately nine years, had not visited Thomas since 1980, nor had he sent any cards, letters, or gifts. *Id.* at 386, 532 N.E.2d at 245-46. Thomas, who was ten years old at the time of the hearing, testified that he did not want to see his dad. Thomas said he was hurt that Dwight never called and that he was afraid Dwight would take him away from his family. *Id.*

59. *Id.* The trial court stated that the child's age and the length of separation necessitated granting the injunction because irreparable harm may be caused to the child. *Id.*

60. The issuance of the injunction was unpublished pursuant to Illinois Supreme Court Rule 23. *Scraggs*, 125 Ill. 2d at 384, 532 N.E.2d at 245.

61. ILL. REV. STAT. ch. 40, para. 1524 (1985). Section 20 of the Adoption Act states that the Civil Practice Law applies to all proceedings under the Act. Although the appellate court found the language of section 20 to provide express authority for an injunction, the supreme court noted that section 20 referred only to the Civil Practice Law, section 2 of the Code of Civil Procedure, and not the entire Code of Civil Procedure. Because the Civil Practice Law does not contain the injunction provision, such relief is arguably unavailable in Adoption Act proceedings. *Scraggs*, 125 Ill. 2d at 387, 532 N.E.2d at 246.

62. *Id.* at 387, 532 N.E.2d at 246.

63. *See* Lingwall v. Hoener, 108 Ill. 2d 206, 213, 483 N.E.2d 512, 516 (1985) (modern domestic relations law focuses primarily on the child's best interest and welfare).

granted.[64] The court recognized that an injunction is an extraordinary remedy to be used only in emergency situations when serious harm would result if it were not granted.[65] The court held that in the case at hand, no irreparable harm would result by allowing visitation.[66] Dwight did not threaten violence or give any indication that he intended to abscond with the child, and he posed no threat to the child's mental health or well-being.[67]

In addition, such an injunction disregarded the natural father's interests.[68] The court stated that Dwight had two bases to support his visitation right until adjudicated unfit. First, under the divorce decree, Dwight retained reasonable visitation rights.[69] Second, as the natural father, Dwight had the right to his child's company.[70] The court stated that neither of these rights should be abrogated, absent exigent circumstances, until the court held a hearing to determine Dwight's fitness as a father.[71] Because the court did not find facts sufficient to show a likelihood of irreparable harm or other exigent circumstances, the court dissolved the injunction.[72]

Scraggs demonstrates the importance placed on parental rights by the Illinois courts. Despite the father's extended failure to contact or support his child, and the likelihood that he would lose his parental rights at the adoption hearing, the court nonetheless held that until the father had his day in court with a full hearing, the

64. 125 Ill. 2d at 387, 532 N.E.2d at 246. The court hypothesized that "there may be threats of physical harm to the child if he is uncooperative with either the natural parent or adopting parents, or there may be a risk that the child will be abducted if visitation were allowed." *Id.*

65. *Id.* (citing Buzz Barton & Assocs., Inc. v. Giannone, 108 Ill. 2d 373, 386, 483 N.E.2d 1271, 1277 (1985)). Under Illinois law, a "plaintiff must establish the following factors before an injunction will be granted: (1) that he possesses a clearly ascertainable right in need of protection; (2) that he will suffer irreparable harm without the injunction; (3) that there is no adequate remedy at law for his injury; and (4) that he is likely to be successful on the merits of his action." *Id.* at 387, 483 N.E.2d at 1277-78.

66. *Scraggs*, 125 Ill. 2d at 389, 532 N.E.2d at 247.

67. *Id.*

68. *Id.* at 388-89, 532 N.E.2d at 247.

69. *Id.* at 389, 532 N.E.2d at 247. The court stated that although it was unclear whether Dwight actively exercised his visitation right from 1980 to 1987, he did attempt to re-establish his relationship with his son, and he filed an appropriate petition for rule to show cause when he was denied visitation. *Id.*

70. *Id.* at 389, 532 N.E.2d at 247. The court noted that "[c]ertainly, the overriding interest in any adoption proceeding is that of the child . . . [h]owever, there must be an appraisal of the effect of the adoption on the natural parent whose relationship is sought to be terminated." *Id.* The court stated that in granting the preliminary injunction, the lower courts unfairly and prematurely terminated Dwight's natural visitation rights without giving fair consideration to his parental interests. *Id.*

71. *Id.*

72. *Id.* at 389-90, 532 N.E.2d at 247-48.

court would not reduce his parental rights absent a showing of serious harm to the child. This case thus shows that although the child's best interests are always considered, something near irreparable harm must be shown before a parent's right to the society of a child will be terminated by injunction.

V. CHILD CUSTODY

In *In re Lutgen*,[73] the Illinois Appellate Court for the Second District upheld the trial court's grant of custody to the father even though he had been found guilty of manslaughter for the death of his wife, Carol Lutgen.[74] On December 21, 1984, after an extended and violent altercation with his wife, James Lutgen strangled his wife to death.[75] Although James was initially charged with murder, the charge was reduced to manslaughter based upon the discovery of certain mitigating factors.[76] Upon James' arrest, Carol's brother and sister-in-law, the Tranels, sought custody of the two Lutgen children.[77] James agreed to the Tranels' petition for custody, and the children moved in with the Tranels.[78] Upon his release from prison in early 1986,[79] James was granted visitation rights. In May 1987, he filed a petition for custody. The Tranels filed a counter-petition.[80]

After a number of witnesses testified for both parties[81] and an *in*

73. 177 Ill. App. 3d 954, 532 N.E.2d 976 (2d Dist. 1988).

74. *Id.* at 972, 532 N.E.2d at 987.

75. *Id.* at 957-58, 532 N.E.2d at 978. The altercation allegedly began when Carol refused to allow James to take their two children, Tracey and Dana, out for the evening. Carol purportedly began choking James. James then grabbed her and choked her. The two struggled for several minutes until finally James choked Carol to death. *Id.* at 958, 532 N.E.2d at 978. It was uncertain how much of the fight between the parents the two children saw. Testimony revealed that both were present when the fight began but ran to get help at some point during the altercation. *Id.*

76. *Id.* at 958, 532 N.E.2d at 978. The Lutgens had been undergoing marital problems and James had suspected for some time that his wife was having an affair. On the day of the murder, James alleged that he had seen his wife kissing another man. *Id.* at 957, 532 N.E.2d at 977.

77. *Id.*

78. *Id.*

79. *Id.* James served thirteen months out of a four-year sentence. *Id.*

80. *Id.*

81. *Id.* at 958-65, 532 N.E.2d at 978-84. Nine witnesses testified for the Tranels including the Tranels themselves. In general, the witnesses testified that they suspected James of abusing or neglecting both his wife and children. *Id.* at 958-61, 532 N.E.2d at 978-80. Six witnesses including James testified in support of James' petition for custody. These witnesses testified as to James good character and love for his children. *Id.* at 961-65, 532 N.E.2d at 980-82. The deposition testimony of the therapist who counseled the children and the psychiatrist who evaluated both the children and James was also admit-

camera interview with the children individually,[82] the trial court granted James' petition for custody.[83] The Tranels appealed, claiming the trial court's decision was against the manifest weight of the evidence because James was unfit to have custody and the order was not in the children's best interests.[84]

With respect to their contention regarding the fitness of James for custody, the Tranels relied on *In re Abdullah*,[85] a case in which the Illinois Supreme Court held a father unfit as a result of his conviction for his wife's murder.[86] The appellate court held that *Abdullah* did not dictate the result in *Lutgen* because the cases were factually distinguishable.[87] Unlike the father in *Abdullah*, James pleaded guilty to voluntary manslaughter, not murder. Furthermore, none of the aggravating circumstances indicative of depravity in *Abdullah* were present in the instant case.[88] The court

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ted into evidence. Neither the therapist nor the psychiatrist made a solid recommendation as to the children's most beneficial placement. *Id.* at 965-67, 532 N.E.2d at 983-84.

82. *Id.* Both Lutgen children stated that they wanted to live with James because the Tranels did not treat them fairly. *Id.* Later, after James had testified, one of the Lutgen children requested a second interview with the judge and told him that she now wished to remain living with the Tranels. *Id.* at 965, 532 N.E.2d at 982. The child admitted, however, that it was more important to her not to be separated from her sister than it was to be placed with the Tranels. *Id.*

83. *Id.* at 967, 532 N.E.2d at 984. The trial court also granted the Tranels visitation rights. *Id.*

84. *Id.* at 968, 532 N.E.2d at 985.

85. 85 Ill. 2d 300, 423 N.E.2d 915 (1981). The Tranels also cited *In re* James M., 65 Cal. App. 3d 254, 135 Cal. Rptr. 222 (1976), in which a father, convicted of second degree murder for his wife's death, was allowed to retain custody of his children. Although the court granted the father custody, the court suggested that custody would be inappropriate if the murder of the mother occurred in the child's presence. *Id.* at 266, 135 Cal. Rptr. at 229. The *Lutgen* court dismissed the Tranels' argument by pointing out that the language on which they relied was merely dicta and that the case held "there may be felonies that, without more, would prove a person unfit to have the custody of his or her children, such crimes that show the depravity of the person. . . . However . . . second degree murder is not one of them." *Lutgen*, 177 Ill. App. 3d at 969, 532 N.E.2d 985-86.

86. *Id.* In *Abdullah*, the father had been sentenced to sixty years in prison for the brutal murder of his ex-wife. The supreme court held that the father was unfit based upon depravity because: (1) the father was convicted of murder; (2) the victim was the child's mother; and (3) the murder was accompanied by exceptionally brutal and heinous behavior. 85 Ill. 2d at 306-07, 423 N.E.2d at 918. The court denied the father custody of the child. *Id.* at 311, 423 N.E.2d at 920.

87. *Lutgen*, 177 Ill. App. 3d at 969, 532 N.E.2d at 985. The court first noted that the two cases involved two different laws. The IMDMA governed *Lutgen*, whereas *Abdullah* was decided under the Adoption Act's stricter standard. *Id.* A finding of unfitness under the Adoption Act requires that the parent lose, not only child custody, but also all residual parental rights. Thus, it is a more difficult standard to reach than unfitness under the IMDMA, wherein a parent may lose custody but retain rights to the child, subservient to those of the custodial parent. *Id.*

88. *Id.* In *Abdullah*, the murder was characterized by "exceptionally brutal and hei-

also noted that James received the minimum sentence for his crime and was released at the end of thirteen months. Finally, the appellate court found significant the trial court's determination that James was a "fit and proper person for the custody of the children and that it was in the best interests of the children that they be placed with James."[89] In light of these findings, the court held that James was a fit and proper person to have the care, custody and control of his children.[90]

The appellate court next addressed the Tranels' contention that, even if James were "fit," the award of custody was not in the the children's best interests. Under the IMDMA,[91] a court must consider six factors to determine the child's best interests for the purposes of awarding custody.[92] The trial court has broad discretion in applying these factors and must evaluate them in light of the children's needs.[93]

In reviewing the facts of this case in terms of the six IMDMA factors, the appellate court ruled that the first five factors weighed in favor of granting custody to James.[94] The court stated that James, as the sole surviving parent, wanted custody, and the chil-

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nous behavior demonstrating wanton cruelty." *Abdullah*, 85 Ill. 2d at 307, 423 N.E.2d at 918. In contrast, the *Lutgen* court attributed the death of Carol Lutgen to "tragic circumstances" rather than the depravity of James. *Lutgen*, 177 Ill. App. 3d at 970, 532 N.E.2d at 986.

89. *Id.* at 969, 532 N.E.2d at 985. The court also ruled that the evidence failed to support any allegations that James was an abusive parent. As further support for its decision, the court stated that neither the legislature nor Illinois case law declares that the killing of one parent by the other in children's presence is, in itself, sufficient to deprive that parent of custody on the basis of fitness. *See infra* note 98 and accompanying text.

90. *Id.*

91. ILL. REV. STAT. ch. 40, para. 602 (1987).

92. *Id.* Section 602 provides that the court should consider the following factors:

> (1) the wishes of the child's parent or parents, as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> (4) the child's adjustment to his home, school, and community;
> (5) the mental and physical health of all individuals involved; and
> (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person but witnessed by the child.

Id.

93. *Lutgen*, 177 Ill. App. 3d at 971, 532 N.E.2d at 986. *See In re* Marriage of Siegel, 123 Ill. App. 3d 710, 715, 463 N.E.2d 773, 778 (1st Dist. 1984) (trial court is in a better position to evaluate witness credibility and needs of the children).

94. 177 Ill. App. 3d at 971, 532 N.E.2d at 987. *See supra* at note 92 (list of relevant factors).

dren wished to live with him.[95] In addition, the children did not want to be separated from each other. The court also determined that despite the Tranels' best efforts to provide for the children, Tracy and Dana felt that they were treated differently compared to the Tranels' other children. Finally, none of the psychological testing argued against granting James custody.[96]

The court acknowledged that the sixth factor, regarding physical violence by the potential guardian, was a "very sensitive issue" because in this case the children's own father killed their mother.[97] This fact, however, did not require depriving the father of custody.[98] The court stated that the legislature identified six factors to determine custody, only one of which involved physical violence by the custodial parent.[99] The court reasoned that had the legislature wanted the sixth factor to be determinative of custody, it would have been explicit.[100] Because the legislature placed no greater weight on physical violence by the custodial parent than on any other factor, the court declined to reverse the grant of custody based solely on James' conviction for voluntary manslaughter of his wife. The court held that ample evidence supported the trial court's decision and therefore affirmed its grant of custody of the children to their father.[101]

In *Lutgen*, the court approached a very serious issue in a dangerously cold and detached manner. There were many grounds on which the court could have reversed the trial court if it had chosen to do so. A valid argument could be made that the father's violent crime impacted on more that just the sixth factor in section 602 of the IMDMA. For example factor three, the interrelation of the child to his parent, was undoubtedly affected by the violence as evidenced by the children's anger with their father. The violence also impacted on factor four, the child's adjustment to his home, as evidenced by the younger child's hesitation about living with her father. At the very least, the case should have been remanded for a more thorough investigation of the issues. The social worker should have been allowed to make a complete evaluation of the two households for purposes of rendering an opinion. In addition, due to the crime's violent nature, the court should have asked for ex-

95. *Id.*
96. *Id.*
97. *Id.* at 971-72, 532 N.E.2d at 987.
98. *Id.* at 972, 532 N.E.2d at 987.
99. *Id.*
100. *Id.*
101. *Id.*

pert advise as to whether the father's criminal conduct could be dangerous to the children before placing them in his care.

VI. NO-FAULT DIVORCE

The Illinois Appellate Court for the First District held, in *In re Marriage of Kenik*,[102] that the "separate and apart" clause of the Illinois Marriage and Dissolution of Marriage Act[103] did not require separate residences for parties seeking a divorce if all other marital relations had ended.[104]

In 1985, both Dennis and Irene Kenik filed petitions to dissolve their marriage.[105] The Keniks continued to live together in the same house until August or September of 1986.[106] In 1987, Irene petitioned for entry of a bifurcated judgment.[107] Dennis moved to strike Irene's petition for bifurcation of judgment for failure to state a cause of action.[108] The circuit court denied Dennis' motion and granted the bifurcated judgment of dissolution of marriage.[109] On appeal, Dennis contended that the circuit court erred in granting the judgment because the couple did not live physically "separate and apart" for two continuous years as required under section 401(a)(2) of the IMDMA.[110]

The court noted that the "separate and apart" clause's legislative history indicated that the drafters intended an expansive reading of

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102. 181 Ill. App. 3d 266, 536 N.E.2d 982 (1st Dist. 1989).

103. ILL. REV. STAT. ch. 40, para. 401(a)(2) (1989). The no-fault divorce provision of section 401 permits a court to dissolve a marriage if it finds:

> (2) That the spouses have lived separate and apart for a continuous period in excess of 2 years and irreconcilable differences have caused the irretrievable breakdown of the marriage . . . .

Id.

104. *Kenik*, 181 Ill. App. 3d at 274, 536 N.E.2d at 985-87.

105. *Id.* at 269, 536 N.E.2d at 983.

106. *Id.* at 272, 536 N.E.2d at 985.

107. *Id.* at 269, 536 N.E.2d at 983. A bifurcated judgment of dissolution is one that grants the dissolution but reserves ruling on other issues. ILL. REV. STAT. ch. 40, para. 401(b) (1987).

108. *Id.* at 269, 536 N.E.2d at 984. Dennis also petitioned for a substitution of judges, fearing that he would not get a fair and impartial hearing on the dissolution. The trial court denied both motions. *Id.* at 270, 536 N.E.2d at 984.

109. *Id.*

110. *Id.* at 272, 536 N.E.2d at 985. Dennis raised several other issues on appeal including whether the circuit court erred: (1) in failing to grant his motion to change venue; (2) in failing to follow its own rules and general orders pertaining to assignment of cases; and (3) in granting a bifurcated judgment under inappropriate circumstances. The appellate court held that the lower court did not commit reversible error by denying a change in venue, assigning a case to itself, or bifurcating the judgment of dissolution of marriage. *Id.* at 269-72, 536 N.E.2d at 984-85.

the provision.[111] Accordingly, the trial court has broad discretion in determining whether the parties lived "separate and apart."[112] The appellate court also noted that the no-fault divorce provisions of section 401(a)(2) predicate dissolution of marriage on the finding of an "irretrievable breakdown" of marital relations due to "irreconcilable differences."[113] The court reasoned that such a breakdown and such differences could be realized even though the parties were not physically separated.[114] Although Dennis and Irene shared the same house for several months after their divorce petitions were filed, the court found that they in fact lived "separate and apart";[115] therefore, it affirmed the lower court's grant of bifurcated judgment of dissolution.[116]

Prior to *Kenik*, confusion abounded regarding whether, under the no-fault statute, separate and apart meant the establishment of actual separate residences or the secession of marital relations. A literal reading of the statute prevented litigants from obtaining a no-fault divorce when they lacked financial ability to establish separate households or could not do so for other reasons. The *Kenik* court's conclusion thus prevents the clause from being used as an impediment to obtaining a divorce. Although this is the first case to address the issue in Illinois, it is consistent with decisions in states with similar no-fault statutes.

VII. PROPERTY

A. Dissipation of Marital Assets

In *In re Marriage of Calisoff*,[117] the Illinois Appellate Court for the First District held that the trial court erred in finding that the respondent, Charles Calisoff, had dissipated marital assets.[118] In

111. *Id.* at 273, 536 N.E.2d at 986 (citing 83rd Ill. Gen. Assem., Senate Proceedings, at 60 (November 3, 1983)).

112. *See In re* Marriage of Uhls, 549 S.W.2d 107 (Mo. App. 1977) (couple that filed for divorce, had separate bedrooms and did not share meals lived "separate and apart" because the clause meant separate lives, not separate roofs).

113. *See* ILL. REV. STAT. ch. 40, para. 401 (a)(2) (1989).

114. *Kenik*, 181 Ill. App. 3d at 274, 536 N.E.2d at 987.

115. *Id.* at 274, 536 N.E.2d at 986. According to the testimony presented at trial, Dennis and Irene had "ended all marital relations." *Id.* They used separate bedrooms, and did not meaningfully communicate with each other. Additionally, Dennis did not contribute money to the household, and each party was responsible for his or her individual expenses. *Id.*

116. *Id.* at 278, 536 N.E.2d at 989.

117. 176 Ill. App. 3d 721, 531 N.E.2d 810 (1st Dist. 1988).

118. *Id.* at 728, 531 N.E.2d at 814. Dissipation occurs when one spouse uses marital assets for personal gain, unrelated to the marriage, at a time when the marriage is dissolving. *See* ILL. ANN. STAT. ch. 40, para. 503(d)(1), Supp. to Hist. & Prac. Notes, at 57

reversing the trial court, the appellate court held that the trial court improperly applied the theory of dissipation by failing to consider whether the funds in question were used for a marital purpose.[119] The appellate court ruled that the respondent provided clear and specific evidence that the money was not spent on extra-marital interests or purposes unrelated to the marriage.[120]

According to Charles' testimony, a $54,000 marital savings plan was used to satisfy his income tax obligations, household bills and office expenses. Charles also testified that a tax lien arose on the marital home because he was unable to pay his income tax obligations.[121] Charles also provided extensive proof regarding how he used his income from his law practice and money from accounts created prior to the separation to satisfy both business and family expenses.[122] In light of this evidence, the appellate court held that Charles had not dissipated marital assets and remanded the case for a more equitable distribution of the marital property and debts to the parties.[123]

Recent years have witnessed a surge of popularity in the dissipation claims in divorce cases. The courts have contributed to the

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(Smith-Hurd Supp. 1984-85) (defining dissipation of marital assets). Believing that Charles had misused the marital assets, the trial court awarded Sherry Calisoff $132,000 and the marital home; it awarded Charles $37,390 and ordered him to assume $63,000 in marital debts. Charles contested this division of the property, arguing that he had not used any marital assets for extra-marital purposes. *Id.* at 724-25, 531 N.E.2d at 813-14.

119. *Id.* The court also held that the trial court abused its discretion in: (1) distributing the marital property and debts between the parties; (2) awarding maintenance to Sherry; (3) ordering Charles to pay 100% of his children's college expenses; and (4) ordering Charles to pay 75% of the attorney fees. *Id.* at 724-732, 531 N.E.2d at 813-18.

120. *Calisoff*, 176 Ill. App. 3d at 726-27, 531 N.E.2d at 815. Dissipation of marital assets generally must be shown by clear and specific evidence demonstrating that the money was used for extra-marital purposes. *See In re* Marriage of Smith, 128 Ill. App. 3d 1017, 471 N.E.2d 1008 (2d Dist. 1984); *In re* Marriage of Smith, 114 Ill. App. 3d 47, 448 N.E.2d 545 (1st Dist. 1983); *In re* Marriage of Greenberg, 102 Ill. App. 3d 938, 429 N.E.2d 1334 (1st Dist. 1981).

121. *Id.* Relying on *In re* Marriage of Siegel, 123 Ill. App. 3d 710, 463 N.E.2d 773 (1st Dist. 1984), Sherry argued that allowing a tax lien to attach to the marital property constituted dissipation. In *Siegel*, the court held that marital assets were dissipated when the spouse deliberately allowed the marital home to go into foreclosure. *Id.* at 719, 463 N.E.2d at 781. The *Calisoff* court distinguished *Siegel* by noting that, unlike the spouse in *Siegel*, Charles did not have the financial ability to pay his income taxes and therefore was not acting deliberately. *Calisoff*, 176 Ill. App. 3d at 727, 531 N.E.2d at 814.

122. *Id.* at 727-28, 531 N.E.2d at 814-15.

123. *Id.* at 732, 531 N.E.2d at 814. In dissent, Judge Quinlan disagreed with the majority's conclusion that Charles did not dissipate marital assets. *Id.* at 732, 531 N.E.2d at 818 (Quinlan, J., dissenting). He viewed the evidence presented by Charles insubstantial and largely self-serving. *Id.* at 733, 531 N.E.2d at 818-19. He also agreed with the trial court's distribution of the marital assets and its award of maintenance and attorney's fees to Sherry Calisoff. *Id.* at 735-37, 531 N.E.2d at 819-21.

surge by handing down inconsistent rulings that often favored the party alleging dissipation. The inconsistencies fall mainly in the following three areas: (1) identifying the time at which the breakdown of the marriage began;[124] (2) identifying the types of expenditures that qualify as dissipation;[125] and (3) qualifying the degree of proof required to defeat the claim.[126] *Calisoff* falls within the last category and represents a liberal attitude regarding the degree of proof required to dispel a dissipation claim. The husband's proof that he did not spend marital money on non-marital expenses consisted only of his own testimony, tax returns and check registers, as opposed to a specific accounting requiring cancelled checks, paid bills and receipts. This case should be relied on with caution as other jurisdictions may not adhere to its holding. More importantly, the case illustrates the need for the Illinois Supreme Court to set a uniform standard for dealing with dissipation claims.

B. Homemaker Contribution

In *In re Marriage of Tatham*,[127] the Illinois Appellate Court for the Fifth District held that a spouse's contribution to the marital estate as a homemaker is not a separate marital asset but simply one factor to be considered when dividing marital property.[128] Accordingly, the court reversed the trial court's award of $16,200 to the wife as compensation for her homemaker contribution.[129]

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124. *See In re* Marriage of O'Neill, 185 Ill. App. 3d 566, 541 N.E.2d 828 (4th Dist. 1989) (husband, who while happily married used marital funds to pay his attorney's fees regarding a rape charge, dissipated marital funds because dissipation was not limited to conduct during an irreconcilable breakdown).

125. *See In re* Marriage of Petrovich, 154 Ill. App. 3d 881, 507 N.E.2d 207 (2d Dist. 1987) (money lost on bad investments was a dissipation of marital assets).

126. *See In re* Marriage of Partyka, 158 Ill. App. 3d 545, 511 N.E.2d 676 (1st Dist. 1987) (husband's testimony of specific expenditures, which ended up totalling more than he was accused of dissipating, were vague, and therefore insufficient to dispel the dissipation claim).

127. 173 Ill. App. 3d 1072, 527 N.E.2d 1351 (5th Dist. 1988).

128. *Tatham*, 173 Ill. App. 3d at 1085, 527 N.E.2d at 1358. Under section 503(d)(1) of the IMDMA,

> [I]n a proceeding for dissolution of marriage. . . [the court] shall divide the marital property . . . in just proportions considering all relevant factors including (1) the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse as a homemaker or to the family unit.

ILL. REV. STAT. ch. 40, para. 503(d)(1) (1987).

129. *Tatham*, 173 Ill. App. 3d at 1085-86, 527 N.E.2d at 1359. The husband also claimed that the circuit court erred: (1) in holding that his personal efforts and improvements to the non-marital farm were contributions to the marital estate; (2) in labeling certain personal property located on the farm as marital property; and (3) in ordering

During their marriage, Jonathan and Jane Tatham lived on a farm Jonathan inherited from his father.[130] Jonathan managed the farm and Jane worked in the stables located on the property.[131] The couple had one daughter; two children from Jonathan's previous marriage also lived with the couple.[132] According to Jane's testimony during the dissolution hearing, she paid fifty percent of the family's expenses out of her earnings[133] and made a valuable homemaker contribution.[134] In contradiction to Jane's testimony, Jonathan testified that because Jane often worked late at the stables, he frequently took care of the children at night and the following morning.[135] Jonathan's testimony also revealed that the couple traveled nearly every other weekend to various horse events. During these weekend trips, the couple stayed in hotels and ate out at restaurants, thereby avoiding the need for Jane to care for the children. Based upon the evidence presented, the trial court awarded Jane $16,200 for her contribution as a homemaker.[136]

On appeal, the court first noted that under the IMDMA, the "purpose of the homemaker contribution [is] to acknowledge the *unquantifiable* domestic contribution of a spouse and to provide economic credit in the distribution of property."[137] The court further stated that the homemaker contribution is but one of eleven factors to be considered when determining marital property distribution and should not be treated as a separate marital asset.[138] In light of these facts, the appellate court held that the trial court exceeded the authority and purpose of section 503(d)(1) in arbi-

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him to pay $750 per month child support for the couple's minor daughter. *Id.* at 1077, 527 N.E.2d at 1353. In addition, the wife cross-appealed claiming she was entitled to an award of maintenance, and all or part of her attorney's fees. *Id.*

130. *Id.* at 1078, 527 N.E.2d at 1355-57. The appellate court affirmed the lower court's finding that the farm was non-marital property. *Id.* at 1080, 527 N.E.2d at 1355.

131. *Id.* at 1083, 527 N.E.2d at 1357.

132. *Id.* at 1084, 527 N.E.2d at 1357.

133. *Id.* at 1083, 527 N.E.2d at 1357.

134. *Id.* More specifically, she had cooked, cleaned, and cared for Jonathan's children in addition to caring for their own daughter. She also claimed that she had renovated and redecorated the marital home. She conceded, however, that when the volume of business increased at the stables, the parties hired domestic help to come in and clean once a week. She also admitted that Jonathan's children had helped with the household chores. *Id.* at 1083-84, 527 N.E.2d at 1357-58.

135. *Id.* at 1084, 527 N.E.2d at 1358.

136. *Id.*

137. *Id.* at 1085, 527 N.E.2d at 1358 (emphasis in original). *See* ILL. ANN. STAT. ch. 40, para. 503, Historical and Practice Notes, at 470 (Smith-Hurd 1980).

138. *Id.* The eleven factors are set forth in ILL. REV. STAT. ch. 40, para. 503(d)(1) - (11) (1987).

trarily assigning a monetary value to Jane's homemaker contribution.[139] Additionally, under Illinois law, when both parties have worked outside the home, the one seeking homemaker compensation must demonstrate a greater contribution to the home than that of the other.[140] Because Jane failed to demonstrate that she made a greater contribution to the home than Jonathan, the appellate court held that the trial court erred in awarding her homemaker compensation.[141]

When the IMDMA was first enacted, uncertainty existed as to the application of the homemaker contribution provision. Although not necessarily less important than a pecuniary contribution, the homemaker contribution should not be weighted more heavily than the other ten factors listed in the IMDMA. In sum, a homemaker contribution should not be treated as a separate marital asset like a business or professional practice.

VIII. MAINTENANCE

A. Good Faith Effort Toward Financial Independence

The Illinois Appellate Court for the Third District, in *In re Marriage of Courtright*,[142] clarified what constitutes a good faith effort to find employment for purposes of section 504(b) of the IMDMA.[143] In *Courtright*, the court ordered John Courtright to

139. *Tatham*, 173 Ill. App. 3d at 1085, 527 N.E.2d at 1358. The court held that the trial court did not base its award on any "reasonable and objective" criteria but merely chose an amount at random. The court stated that affirmance of such an arbitrary award would create a "troublesome precedent." *Id.*

140. *See In re* Marriage of Banach, 140 Ill. App. 3d 327, 336, 489 N.E.2d 363, 369 (2d Dist. 1986) (holding "[w]here . . . one spouse wants additional credit for his or her contributions as a homemaker, that spouse must show that she or he made a greater contribution as homemaker than did the other").

141. *Tatham*, 173 Ill. App. 3d at 1085-86, 527 N.E.2d at 1366. The appellate court also held that the trial court has discretion to determine the character and value of marital or non-marital property and to determine appropriate child support, maintenance and attorney's fees. Because the evidence failed to support an abuse of discretion finding, the appellate court affirmed the trial court's finding with respect to each of these issues. *Id.* at 1086, 527 N.E.2d at 1366.

142. 185 Ill. App. 3d 74, 540 N.E.2d 1027 (3rd Dist. 1989).

143. ILL. REV. STAT. ch. 40, para. 504(b) (1987 & West Supp. 1989). Maintenance should be in such amounts and for such periods of time as the court deems just after considering:

> (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently . . . ;
>
> (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (3) the standard of living established during the marriage;

pay his wife $1,100 per month in maintenance, following the dissolution of their twenty-nine year marriage.[144] The maintenance award was made reviewable, and after two years, the trial court reduced the amount of maintenance to $600 per month for the first year and $350 per month for the second year. The court based its decision on its finding that Marie failed to make a good faith effort to become self-sufficient.[145]

On appeal, Marie argued that the trial court's decision was against the manifest weight of the evidence and an abuse of discretion.[146] John cross-appealed, arguing that Marie failed to demonstrate a good faith effort to support herself and, therefore, maintenance should be terminated.[147]

In reversing the trial court, the appellate court held that Marie had made substantial efforts to find employment and should not be punished for her lack of success.[148] The appellate court emphasized that although section 504(b) of the IMDMA requires the spouse to take steps to become financially independent, a certain amount of time may be necessary to achieve this goal.[149] More-

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(4) the duration of the marriage;

(5) the age and the physical and emotional condition of both parties;

Id. Section 504 affirmatively obligates the spouse receiving maintenance to seek the training and skills necessary to become financially self-sufficient. Failure to make a good faith effort to become self-sufficient may result in the reduction or termination of maintenance payments. *Courtright*, 185 Ill. App. 3d at 77, 540 N.E.2d at 1029 (citing *In re* Marriage of McNeeley, 177 Ill. App. 3d 320, 453 N.E.2d 748 (1st Dist. 1983)).

144. *Id.* at 75, 540 N.E.2d at 1029. Pursuant to this dissolution, Marie received property worth $484,766 while John received $243,000 in assets. John was a physician with a yearly income of approximately $100,000 during the last few years of the marriage. Marie had no annual income and had not worked for twenty-eight years. *Id.*

145. *Id.* Marie claimed that arthritis and other health problems precluded her from obtaining a position in which she had to stand all day. In addition, she had had little success in obtaining secretarial and clerical work. The trial court found that, despite her efforts to obtain work, Marie had not proven good faith because she never sought to get a teaching certificate to allow her to teach and she had not sold the marital home. *Id.* at 75-76, 540 N.E.2d at 1029.

146. *Id.* at 76, 540 N.E.2d at 1029.

147. *Id.*

148. *Id.* at 78, 540 N.E.2d at 1029. The appellate court further disagreed with the trial court's statement that Marie should have obtained her teaching certificate. The appellate court viewed this failure as "a conscious decision on her part not to teach." *Id.* at 77, 540 N.E.2d at 1029. The court further found that Marie's failure to sell the marital home did not demonstrate lack of good faith. Altough she received many offers, the highest offer was well below the court-determined value. Her attempt to secure the highest realistic price for her home was not bad faith. *Id.* at 78, 540 N.E.2d at 1029. *See also In re* Marriage of Weinberg, 125 Ill. App. 3d 904, 466 N.E.2d 925 (1st Dist. 1984) (spouse is not required to sell her assets or impair her capital in order to support herself).

149. *Id.* at 77, 540 N.E.2d at 1029 (citing *In re* Marriage of Carney, 122 Ill. App. 3d 705, 462 N.E.2d 596 (1st Dist. 1984); *In re* Marriage of Ingrassia, 140 Ill. App. 3d 826, 489 N.E.2d 386 (2d Dist. 1986)).

over, the appellate court recognized that financial independence did not mean merely the ability to meet minimum or basic needs, but rather, entailed the ability to afford the standard of living enjoyed during the marriage.[150] Because she had been out of the work force for twenty-eight years and was precluded for health reasons from jobs which required her to stand for long periods of time,[151] the court found Marie's lack of success in obtaining employment understandable.[152] Accordingly, the court vacated the order reducing Marie's maintenance award and reinstated the prior award of $1,100 per month for two years.[153]

When the IMDMA was first enacted, the courts generally ruled that women had an affirmative duty to strive for financial independence after a divorce. The courts were therefore reluctant to award maintenance. Since that time, the courts have become more liberal in awarding maintenance. Although there is still an affirmative duty to become independent, courts will not force a woman to accept unwanted employment. *Courtright* also indicates that courts may be even more lenient with women who have been out of the work force for a long time.

B. Jurisdiction Over Rehabilitative Maintenance

In *Rice v. Rice*,[154] the Illinois Appellate Court for the Fifth District held that a circuit court loses the subject matter jurisdiction to hear a petition for extension of a rehabilitative maintenance[155] award, if the petition is filed after the term for maintenance has expired and the award has been satisfied.[156] At the time the couple dissolved their marriage in 1983, Margaret Rice lacked any means to support herself.[157] Accordingly, the court awarded her rehabilitative maintenance.[158]

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150. *Id.*

151. *Id.*

152. *Id.* at 77-78, 540 N.E.2d at 1030. The court cautioned, however, that if Marie failed to find permanent employment or sell her property after two more years, John would not have to support her indefinitely. *Id.* at 78, 540 N.E.2d at 1030.

153. *Id.* at 79, 540 N.E.2d at 1030.

154. 173 Ill. App. 3d 1098, 528 N.E.2d 14 (5th Dist. 1988).

155. Section 504(b)(2) of the IMDMA describes rehabilitative maintenance as an amount of money needed to enable a formerly dependent spouse to acquire sufficient education or training to permit him to find employment. The amount and duration of the maintenance depends upon the facts of each case. ILL. REV. STAT. ch. 40, para. 504(b)(2) (1981).

156. *Rice*, 173 Ill. App. 3d at 1103, 528 N.E.2d at 17.

157. *Id.* at 1099, 528 N.E.2d at 15.

158. *Id.* Specifically, she received rehabilitative maintenance of $1,000 per month, for a period of forty-two months, subject to further order of the court. *Id.*

Less than one year after the divorce, the husband sought modification of the award, claiming that a reduction in his income demonstrated a substantial change in the circumstances.[159] Pursuant to the petition, the court entered an order reducing the maintenance to $500 per month.[160] Margaret did not appeal this order but instead filed a petition to reinstate maintenance at $1,000 per month.[161] The trial court denied her petition and the maintenance remained $500 per month. When Margaret filed a second petition to modify the maintenance award, the circuit court held that it was without jurisdiction to hear the case because the forty-two month maintenance period had expired, and the court had not reserved jurisdiction to review the award at the end of this period.[162]

The appellate court agreed that the trial court lacked jurisdiction to hear Margaret's petition.[163] The court relied on section 510(a) of the IMDMA,[164] which states that the court may only modify prospective maintenance payments after a motion for modification is filed.[165] Here, the husband's obligation to pay ended when the forty-two month period expired; therefore, no further maintenance payments could be subject to modification.[166] Because the trial court had not reserved jurisdiction to review the award after the expiration date, the court held that the circuit court was without jurisdiction to consider Margaret's petition for modification.[167]

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159. *Id.* at 1100, 528 N.E.2d at 16. A maintenance award will be reduced upon a showing of a substantial change in circumstances. ILL. REV. STAT. ch. 40, para. 510(a) (1987).

160. 173 Ill. App. 3d at 1100, 528 N.E.2d at 16.

161. *Id.*

162. *Id.* at 1101, 528 N.E.2d at 17. Margaret argued that the trial court erred by ruling that it lacked jurisdiction because Illinois public policy favors flexibility in monitoring rehabilitative maintenance. *Id.* She argued that this public policy controlled the question of jurisdiction. The appellate court recognized that Margaret was attempting to use the jurisdiction issue to challenge the court's initial award of a maintenance award with an automatic termination date. *Id.* The appellate court declined to review the merits of the court's award, stating that Margaret had waived the right to challenge the award by failing to appeal from that court order. *Id.*

163. *Id.* at 1103, 528 N.E.2d at 17.

164. ILL. REV. STAT. ch. 40, para. 510(a) (1987 & West Supp. 1989). The statute provides in part:

> (a) Except as otherwise provided . . . the provisions of any judgment respecting maintenance or support may be modified only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification and only upon a showing of a substantial change in circumstances.

Id.

165. 173 Ill. App. 3d at 1103, 528 N.E.2d at 17.

166. *Id.*

167. *Id.*

According to the Historical and Practice Notes to section 504(b), a court may extend a limited maintenance award provided there is no express language in the judgment precluding extensions. In order to obtain such an entension, however, a proper motion must be filed with the court. *Rice* makes it clear that unless the petition for extension of limited maintenance is filed before the term of the award expires, the court will lose its jurisdiction to extend the award.

IX. ATTORNEY'S FEES

In *In re Marriage of Pagano*,[168] the Illinois Appellate Court for the Second District held that an attorney must show by clear and convincing evidence that a fee agreement particularly beneficial to the attorney is fair and free from undue influence in order to rebut the presumption that such an agreement is fraudulent.[169] In *Pagano*, the dispute over fees arose in connection with Janet Pagano's 1987 divorce. During the course of representation, Pagano signed two agreed orders in which she consented to pay her attorneys, Rinella & Rinella, $20,000 and $30,000 in fees, respectively.[170] The court entered judgment pursuant to the orders.

When Pagano failed to pay her attorneys, they withdrew as counsel and subsequently petitioned the court for enforcement of the two agreed orders and an additional $37,000 in fees.[171] At the hearing on the petition for attorneys' fees, the trial court ruled that an award of additional fees was precluded by the $30,000 order.[172] Pagano subsequently filed a petition to vacate the $20,000 and $30,000 orders, alleging that she had been coerced and misled into agreeing to the orders.[173] The attorneys moved to strike the petition on the ground that Pagano failed to exercise due diligence in presenting her motion to vacate.[174] The trial court granted the mo-

168. 181 Ill. App. 3d 547, 537 N.E.2d 398 (2nd Dist. 1989).

169. *Id.* at 558, 537 N.E.2d at 405.

170. *Id.* at 550-51, 537 N.E.2d at 400. Both agreed orders specified that Pagano knowingly waived her right to a hearing on the issue of fees as provided by section 508 of the IMDMA. *Id.* Under section 508, a wife is entitled to a hearing to determine whether her husband should pay all or a portion of her attorney's fees. ILL. REV. STAT. ch. 40, para. 508 (1987).

171. 181 Ill. App. 3d at 551, 537 N.E.2d at 400.

172. *Id.* at 552, 537 N.E.2d at 401.

173. *Id.* at 553, 537 N.E.2d at 401-02.

174. *Id.* at 553, 537 N.E.2d at 402. Section 2-1401 allows relief to be granted "from final orders and judgments, after 30 days from the entry thereof . . . as provided in [this] Section . . ." ILL. REV. STAT. ch. 110, para. 2-1401 (1983). The attorneys argued that Pagano's motion to vacate was not timely because it was brought more than thirty days after the entry of the agreed orders. *Pagano*, 181 Ill. App. 3d at 553, 537 N.E.2d at 402.

tion to strike and denied Pagano's motion to vacate.

On appeal, Pagano contended: (1) that the trial court lacked subject matter jurisdiction to enter the orders because a petition for attorneys' fees must be filed before a party can waive his right to a hearing on the matter; and (2) that the trial court improperly denied her section 2-1401 petition without an evidentiary hearing.[175]

In reviewing Pagano's first contention, the court found that the trial court's jurisdiction is not contingent upon the filing of a petition for attorneys' fees.[176] As a procedural matter, however, the petition is required under section 508 of the IMDMA.[177] The court acknowledged that because of the unique situation created by a fee petition under section 508,[178] the statute's procedural safeguards must be satisfied.[179] A petition for attorneys' fees and an itemized billing must be filed with the court before entry of an agreed order.[180] Thus, although the trial court had proper jurisdiction to enter judgment upon the agreed orders, the judgment was invalid because the attorneys failed to satisfy the procedural prerequisite of filing a petition for fees.[181]

With respect to Pagano's second contention, the appellate court held that the trial court erred in denying her section 2-1401 petition.[182] Under Illinois law, a section 2-1401 petition must show the

175. *Id.* at 555, 537 N.E.2d at 403. Pagano further alleged that the attorney breached a fiduciary duty owed her. She claimed that she had signed the $20,000 order because she had been assured that it was a normal procedure and that she should not worry about paying the fees because her husband would be required to pay them due to his superior financial ability. *Id.* at 553, 537 N.E.2d at 401. Similarly, she claimed that she had signed the $30,000 order because, shortly before trial, the attorney had threatened that he would not represent her if she refused to sign. Pagano further argued that she had never signed a retainer agreement, the attorney's hourly rates had never been disclosed to her and she never received any itemized statements. *Id.* at 553, 537 N.E.2d at 402. Pagano also argued that the attorney lacked standing to enter the fee orders because he was not a party to the dissolution. *Id.* at 555, 537 N.E.2d at 403. The appellate court rejected the argument because in a dissolution proceeding, an attorney is considered a party for the limited purpose of seeking fees. *Id.*

176. *Id.* at 554, 537 N.E.2d at 402.

177. *Id.* at 554, 537 N.E.2d at 402-03.

178. *Id.* at 554-55, 537 N.E.2d at 403. Section 508 offers attorneys a way to secure fees without suing their clients. In creating this remedy, section 508 essentially places the attorney and his client in adversary positions and, in effect, deprives the client of adequate representation. *Id.* (citing *In re* Marriage of Pitulla, 141 Ill. App. 3d 956, 491 N.E.2d 90 (1st Dist. 1986)).

179. *Id.* at 555, 537 N.E.2d at 403.

180. *Id.* These two safeguards ensure that the trial court has sufficient information to determine the fairness of the fees. *Id.*

181. *Id.* The court did not reverse the orders on this particular error, however, because under section 2-1401, a procedural error is not adequate grounds for vacating a judgment. *Id.*

182. *Id.* at 559, 537 N.E.2d at 405. The court considered this contention in conjunc-

existence of due diligence and a meritorious defense.[183] The court ruled that although Pagano's petition did not allege expressly that she acted with due diligence, the record supported such a finding.[184] The court reasoned that Pagano could not have been expected to take action against the attorney "while still under the attorney's guidance."[185] Pagano's diligence, therefore, could only be assessed following the attorney-client relationship's termination.[186] Viewed in this light, the court found that Pagano had acted diligently.[187]

The court next considered whether Pagano alleged a meritorious defense.[188] Pagano contended that the fiduciary duty owed to her by her attorneys precluded the attorneys from entering an agreed order for attorneys' fees. Because of the trust relationship existing between an attorney and his client, all transactions between the attorney and client, including agreements for fees, are closely scrutinized by the court.[189] Furthermore, when the attorney benefits from the transaction, "it is presumed that the attorney exercised undue influence,"[190] and the attorney must show by clear and convincing evidence that the fee agreement was fair and equitable and did not result from undue influence.[191] Applying these principles

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tion with Pagano's allegation that her attorney breached his fiduciary duty to her in entering the agreed orders for attorney's fees. *Id.* at 556, 537 N.E.2d at 403.

183. *Id.* at 556, 537 N.E.2d at 403 (citing Smith v. Airoom, Inc., 114 Ill. 2d 209, 499 N.E.2d 1381 (1986)).

184. *Id.* at 557, 537 N.E.2d at 404.

185. *Id.* at 556, 537 N.E.2d at 404. The court reasoned that one cannot expect an attorney to advise his client to "act swiftly against him." *Id.*

186. *Id.* at 556-57, 537 N.E.2d at 405. *See* Chastain v. Chastain, 149 Ill. App. 3d 579, 582, 500 N.E.2d 998, 1000 (3rd Dist. 1986) (filing 2-1401 petition within approximately three months satisfied due diligence requirements when petitioner changed attorneys before filing the petition); Hiram Walker Distrib. Co. v. Williams, 99 Ill. App. 3d 878, 881, 426 N.E.2d 8, 10 (1st Dist. 1981) (due diligence is not required of petitioner when attorney acted in unconscionable manner).

187. *Pagano*, 181 Ill. App. 3d at 557, 537 N.E.2d at 404. The court stated that, even in the absence of due diligence, a hearing should have been granted under the 2-1401 petition because due diligence is not required when a party abuses court processes to gain an unconscionable advantage. *Id.* at 558, 537 N.E.2d at 404-5. The record indicated that the attorney had an unconscionable advantage because he obtained $50,000 in judgment though he only earned $37,034.15. *Id.*

188. *Id.* at 558, 537 N.E.2d at 405-06.

189. *Id.* at 556, 537 N.E.2d at 404.

190. *Id.* at 558, 537 N.E.2d at 405 (citing Klaskin v. Klepak, 126 Ill. 2d 376, 386, 534 N.E.2d 971, 976 (1989); *In re* Marriage of Bennet, 131 Ill. App. 3d 1050, 1056, 476 N.E.2d 1297, 1302 (2d Dist. 1985)).

191. *Id.* The appellate court explained that an attorney is not prohibited from entering agreements with his client as long as such dealings are fair, open and honest. *Id.* at 559, 537 N.E.2d at 405. *See In re* Saladino, 71 Ill. 2d 263, 270, 375 N.E.2d 102, 108 (1978).

to the facts at hand, the appellate court concluded that Pagano alleged sufficient facts to demonstrate a meritorious defense.[192] Consequently, the court held that the trial court erred in denying Pagano's request for a hearing under section 2-1401.[193]

As evidenced by *Pagano*, the courts are highly suspect of fee arrangements between attorneys and their clients, and they will often stretch the limits of the Illinois Code of Civil Procedure to relieve clients of their obligations under such agreements, so that they may obtain a full hearing on fees under IMDMA section 508. Although attorneys are entitled to be paid, the client is dependant on the attorney to be his legal advocate, not his adversary. *Pagano* exemplifies a clear trend in Illinois to protect divorce litigants from the exertion of undue influence by their attorneys in fee controversies.

X. LEGISLATION

A. Out-of-Court Statements by Children

Sexual abuse claims are common in divorce cases in which parents seek to limit visitation rights. As a result, legislation relating to out-of-court statements made by children recently have been incorporated into the Illinois Supreme Court Rules.

Rule 901[194] defines when out-of-court statements made by young children, describing acts of child abuse or unlawful sexual acts, are admissible in court. In addition, Rule 901 identifies the precau-

192. 181 Ill. App. 3d at 559, 537 N.E.2d at 406. The court found that just before petitioner's trial, the attorney told her that she had to sign the order or he would not represent her. Because this fact would have prevented the fee order from being entered and was unknown by the trial judge at the time, it represented a defense to the validity of the fee order. In addition, the attorney's fee petition indicated that he was only entitled to approximately $37,000; thus, the orders totaling $50,000 were improper. *Id.*

193. *Id.*

194. Section 1 provides:

> (a) An out-of-court statement make by a child under the age of 13 describing any act of child abuse or any conduct involving an unlawful sexual act performed in the presence of, with, by, or on the declarant child, or testimony by such of an out-of-court statement made by such child that he or she complained of such acts to another, is admissible in any civil proceeding, if: (1) the court conducts a hearing outside the presence of the jury and finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and (2) the child either: (i) testifies at the proceeding; or (ii) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.
>
> (b) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given to the statement and that, in making its determination, it shall consider

tions a court must take to ensure the reliability of the child's previous statement. The court must conduct a hearing outside the presence of the jury to determine if the time, content, and circumstances of the statement indicate reliability.[195] In order for the out-of-court statement to be admitted, the child must testify to it at the proceeding, or the child must be unavailable to testify in which case corroborative evidence of the act must be offered.[196] If the statement is admitted into evidence, then the court must instruct the jury that they may determine the statement's credibility, taking into account the child's age and maturity. Finally, the Rule instructs that reasonable notice of the statement must be given to the adverse party.[197]

The Rule's purpose is to create a hearsay exception for out-of-court statements by children and to provide safeguards for ensuring reliability. It is pertinent to practitioners in the domestic relations field because allegations of child abuse increasingly have been used in divorce proceedings, and it is very often important to let these statements into evidence.

B. Automatically Entered Wage Deduction

Under an amendment to the IMDMA,[198] trial courts are required to enter an order of withholding for obligations for child support and maintenance regardless of whether the obligor has

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the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.

(c) The proponent of the statement shall give the adverse party reasonable notice of an intention to offer the statement and the particulars of the statement.

ILL. REV. STAT. ch. 110A, para. 901 (1988) (effective Jan. 1, 1989).

195. The court may inquire whether the statement was made right after the incident or for the first time at trial. The court should examine the content of the statement to see if the language is too sophisticated to be the child's words, or whether it is too vague to be considered truth. The court should also look at where and under what circumstances the statement was made. ILL. REV. STAT. ch. 110A, para. 901 at § 1(a).

196. Examples of corroborative evidence may be a medical or psychiatric examination, a report by a child abuse agency, physical evidence of abuse, or another witness. ILL. REV. STAT. ch. 110A, para. 901 at § 1(c).

197. *Id.*

198. Paragraph 706-1(B)(1) provides:

On or after January I, 1989, the court shall require the order for withholding to take effect immediately, unless a written agreement is reached between both parties providing for an alternative arrangement, approved by the court, which insures parment of support. In that case, the court shall enter the order for withholding which will not take effect unless the obligor becomes delinquent in paying the order for support. Application of the provisions of this paragraph is subject to the discretion of the court in all cases wherein an order for support is entered prior to January 1, 1989.

ILL. REV. STAT. ch. 40, para. 706-1(B)(1) (1987 & West Supp. 1989).

missed a payment.[199] Under the prior law, an obligor had to fall behind in payments before the courts could enter an order for withholding. The amendment seeks to remedy the inadequacy of the prior law and provide a more effective means of insuring child support payments.

Under Illinois law, the parties may choose an alternative arrangement for automatic withholding as long as the arrangement is approved by the court and insures payment of support. It will be interesting to see in the future what kinds of agreements the courts approved and disapprove. The provision will undoubtedly spur litigation regarding the types of arrangements that will ensure payment and be acceptable.

XI. CONCLUSION

During the *Survey* year, Illinois courts contributed to the steady development of the law as it relates to the family by deciding cases of first impression in the areas of fetal rights and personal jurisdiction. They also redefined old standards in the areas of marital property division and maintenance. This steady redefinition of the law and examination of new problems should continue into the next decade.

199. For a concise discussion of the amended section and its impact on litigation, see Gitlan, *Wage Deductions Allowed Without Arrearages*, Chicago Daily Law Bulletin, Jan. 5, 1989, at 2, col. 3.