Loyola University Chicago Law Journal

Volume 20
Issue 2 *Winter 1989 1987-1988 Illinois Law Survey*

Article 8

1989

Family Law

Rhonda L. Kerns
Assoc., John B. Hirsch, Chicago, IL

David Alan Payne

Family Law

*Rhonda L. Kerns**
*and David Alan Payne***

TABLE OF CONTENTS

I. INTRODUCTION

During the *Survey* year,[1] the Illinois Supreme Court's decisions in the area of family law focused on the interpretation and application of the Illinois Marriage and Dissolution of Marriage Act ("IMDMA").[2] The supreme court resolved a conflict between the appellate courts on the issue of extrajudicial modification of child support.[3] The court also addressed the issues of service of summons on a minor,[4] removal of a child to another state,[5] the standards of proof required in an action to terminate parental rights,[6] anticipatory repudiation of pension settlements,[7] prospective attor-

* Associate, John B. Hirsch, Chicago, Illinois; B.A., 1980, DePaul University; M.A., 1982, DePaul University; J.D., 1985, Loyola University of Chicago.

** B.A., 1987, University of Chicago; J.D. candidate, 1990, Loyola University of Chicago.

1. The *Survey* year encompasses July 1, 1987, through July 1, 1988. This year's *Survey* focuses on supreme court decisions and limits the treatment of appellate court decisions to two cases that signify especially important developments in the field of family law.

2. ILL. REV. STAT. ch. 40, paras. 101-802 (1987).

3. *See infra* notes 14-38 and accompanying text.

4. *See infra* notes 85-99 and accompanying text.

5. *See infra* notes 69-84 and accompanying text.

6. *See infra* notes 100-13 and accompanying text.

7. *See infra* notes 114-29 and accompanying text.

ney's fees,[8] grandparental visitation,[9] and choice of forum in an interspousal tort action.[10] Additionally, the court interpreted and applied the anti-supersession clause of the Michigan Uniform Reciprocal Enforcement of Support Act ("URESA") to resolve an issue of modification of child support.[11] During the *Survey* year, Illinois appellate courts made important decisions regarding the freedom to contract in the context of an antenuptial agreement[12] and regarding the IMDMA on the issue of the standing of a child to enforce a child support decree.[13]

II. CHILD SUPPORT

A. Modification of Child Support

In *Blisset v. Blisset*,[14] the Illinois Supreme Court addressed the issue of modification of child support by an extrajudicial agreement between the parents.[15] The supreme court held that courts generally are not bound by such extrajudicial agreements.[16] The court further held that reliance on extrajudicial agreements does not rise to the level of reasonableness or detriment necessary to sustain a plea of equitable estoppel[17] or laches.[18] To enforce such agree-

8. *See infra* notes 163-70 and accompanying text.
9. *See infra* notes 144-52 and accompanying text.
10. *See infra* notes 153-62 and accompanying text.
11. *See infra* notes 39-54 and accompanying text.
12. *See infra* notes 130-42 and accompanying text.
13. *See infra* notes 55-67 and accompanying text.
14. 123 Ill. 2d 161, 526 N.E.2d 125 (1988). *See* Blisset v. Blisset, 144 Ill. App. 3d 1088, 495 N.E.2d 608 (4th Dist. 1986), and Pekala & Katz, *Family Law*, 19 LOY. U. CHI. L.J. 489, 494-96 (1988), for discussion of *Blisset* at the appellate court level.
15. *Blisset*, 123 Ill. 2d at 167, 526 N.E.2d at 127.
16. *Id.* The court cited ILL. REV. STAT. ch. 40, para. 502(b) (1987). Section 502(b) provides:

> The terms of the separation agreement, except those providing for the support, custody and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion or on request of the court, that the separation agreement is unconscionable.

Id.
17. *Blisset*, 123 Ill. 2d at 169, 526 N.E.2d at 128. Equitable estoppel is "[t]he doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had." BLACK'S LAW DICTIONARY 280 (5th ed. 1979).
18. *Blisset*, 123 Ill. 2d at 170, 526 N.E.2d at 129. Laches is defined as:

> [N]eglect to assert right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity. The neglect for an unreasonable and unexplained length of time under circumstances permitting to do what in law should have been done.

BLACK'S LAW DICTIONARY 787 (5th ed. 1979).

ments, the court noted, "would circumvent and undermine a court's role in the establishment and modification of a child support obligation."[19]

Allen and Barbara Blisset were divorced in 1975.[20] Marital property was apportioned and Barbara was awarded custody of the two children, subject to "reasonable" visitation by Allen.[21] In March 1976, Allen successfully petitioned the court to define a specific visitation schedule.[22] Subsequently, in June 1977, Allen agreed to relinquish his visitation rights in consideration of Barbara's agreement to waive delinquent and prospective child support.[23] For the next five years, Allen did not pay child support and did not visit his children. Allen and Barbara did not communicate with each other until September 1982, when Allen began visiting his children, apparently with Barbara's permission.[24] In March 1984, Barbara filed a petition for delinquent child support and an increase in the amount to be paid in the future.[25]

Barbara contended that Allen had not paid the whole amount of the child support that had accrued prior to June 1977, and that he had not paid any support since that time.[26] She further argued that Allen's income had significantly increased and that his child support obligations should be consonantly modified.[27]

Allen argued that he had paid $2,080 of the child support that had accrued prior to June 1977.[28] Further, he asserted that Barbara should be equitably estopped from collecting arrearages, despite the lack of an enforceable agreement.[29] He also contended that the doctrine of laches barred Barbara from seeking relief.[30]

The court noted that neither the language of the IMDMA nor the traditional judicial function of protecting the children's interests provides binding force to extrajudicial modifications of child

19. *Blisset*, 123 Ill. 2d at 170, 526 N.E.2d at 129.
20. *Id.* at 164, 526 N.E.2d at 126.
21. *Id.*
22. *Id.* at 165, 526 N.E.2d at 126.
23. *Id.*
24. *Id.* at 166, 526 N.E.2d at 127.
25. *Id.* at 165, 526 N.E.2d at 126.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 168, 526 N.E.2d at 128. Allen argued that the court had recognized the doctrine of equitable estoppel in the past and that his reliance on the agreement fulfilled the criteria for equitable estoppel. *Id.*
30. *Id.* at 170, 526 N.E.2d at 129. Allen argued that the doctrine of laches applied because his wife had not instituted suit for relief in the seven years that payments were not made. *Id.*

support.[31] The parents' self-interest renders them unable to act objectively and in the child's best interest.[32] Extrajudicial agreements, therefore, would circumvent the judicial protection of a child's best interest.[33]

The court further found that Allen was on notice that he could not bargain away his visitation rights, and therefore his reliance on his agreement to give up those rights was unreasonable.[34] The court stated that if it allowed the forfeiture of visitation or the failure to anticipate enforcement of support payments to constitute a detriment that would be sufficient to support an equitable remedy, then the court's attempt to respect the best interests of the child would be frustrated.[35] Therefore, Barbara was not barred from bringing suit to collect child support arrearages.[36] The case was remanded to the circuit court for the calculation of arrearages.[37]

In *Blisset*, the supreme court resolved a split of opinion between the appellate districts on the issue of the enforceability of extrajudicial agreements to modify child support. Prior to *Blisset*, the Third District had left open the possibility of equitable remedies.[38] In *Blisset*, however, the court reserved to itself the role of arbiter of the child's best interest.

In *In re Marriage of Gifford*,[39] the Illinois Supreme Court addressed the issue of the modification of an Illinois child support order by another state. The court was required to interpret and apply the anti-supersession clause of the Uniform Reciprocal En-

31. *Id.* at 167, 526 N.E.2d at 127-28.

32. *Id.* at 167, 526 N.E.2d at 128. The court stated that "[p]arents may not bargain away their children's interests" because they might try to turn their children's rights to their own benefit. *Id.* Therefore, parents must establish to the satisfaction of the court that any agreements affecting a child's rights are consistent with the best interests of the child. *Id.* at 168, 526 N.E.2d at 128.

33. *Id.* at 167, 526 N.E.2d at 128.

34. *Id.* at 169, 526 N.E. 2d at 128-29. Allen's equitable estoppel and laches arguments failed because during the 1984 proceedings, he had been advised by the State's Attorney that he could not give up his visitation rights. *Id.* Thus, his reliance on an agreement resting on the forfeiture of his visitation rights was unreasonable and could not fulfill the doctrinal requirements for reasonable detrimental reliance. *Id.* The court cited Finley v. Finley, 81 Ill. 2d 317, 410 N.E.2d 12 (1980), in reference to the issue of laches. In *Finley*, the court stated that "a spouse is not injured because he is forced to pay the accumulated support in one lump sum as opposed to weekly payments as ordered." *Id.* at 330, 410 N.E.2d at 23.

35. *Blisset*, 123 Ill. 2d at 169-70, 526 N.E.2d at 128-29. The court reasoned that such liberalities would allow parents "to look past the best interests of the child." *Id.*

36. *Id.* at 170, 526 N.E.2d at 129.

37. *Id.* at 173, 526 N.E.2d at 130.

38. *See* Bartlett v. Bartlett, 70 Ill. App. 3d 661, 389 N.E.2d 15 (3d Dist. 1979).

39. 122 Ill. 2d 34, 521 N.E.2d 929 (1988).

forcement of Support Act ("URESA").[40] The court held that the Michigan order of support did not modify the Illinois divorce decree.[41] Rather, under URESA, it provided an additional and separate means to enforce child support obligations.[42] Therefore, full faith and credit could be given to Michigan law by entitling the obligor to a credit on the original support order for the amounts paid under the additional order.[43]

Janice and Robert Gifford were married in Michigan in 1973, divorced in Illinois in 1982.[44] Subsequently, Robert moved to Michigan and stopped making child support payments.[45] In July 1982, Janice filed a URESA petition in Cook County, Illinois, to compel payment of child support.[46] Ultimately, the petition was forwarded to the Circuit Court of Berrien County, Michigan, which found that Robert could not meet his duty of child support and prospectively lowered his obligations.[47]

Janice argued that the Michigan support order modified the Illinois order in violation of the plain language of the anti-supersession clause.[48] Robert, on the other hand, argued that the clause only prohibited an order that modified *vested arrearages* and not one that prospectively modified support.[49] Janice responded that there was nothing in the language of the clause that limited its application to vested arrearages and, therefore, the clause should apply to prospective orders as well.[50]

The court agreed that there was nothing in the plain language of the clause that limits its application to vested arrearages.[51] Moreover, the court held that the Michigan order did not constitute a

40. URESA is a model code that has been enacted in one form or another in most states. Its purpose is to provide out-of-state enforcement of support orders. The Michigan anti-supersession clause applied by the court states:

> Any order of support issued by a court of this state when acting as a responding state shall not supersede any previous order of support issued in a divorce or separate maintenance action, but the amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both.

MICH. COMP. LAWS ANN. § 780.171 (West 1982).

41. *Gifford*, 122 Ill. 2d at 39, 521 N.E.2d at 931.
42. *Id.*
43. *Id.*
44. *Id.* at 35, 521 N.E.2d at 929.
45. *Id.*
46. *Id.*
47. *Id.* at 36, 521 N.E.2d at 930.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*

modification of the original order, but rather provided an additional means for its enforcement.[52] Therefore, Robert was obligated to pay arrearages and any future amounts accruing under the Illinois order.[53] He was, however, entitled to be credited for any amount paid under the Michigan order.[54]

The *Gifford* case reaffirmed a fundamental principle of full faith and credit: an obligor cannot escape his or her obligations by simply moving to another state. The *Gifford* decision, however, is perhaps not so much an indication that the court is committed to the reaffirmation of basic principles, as it is a sign that the court's time is wasted in responding to hornbook-style questions of law.

B. Standing of a Child to Enforce Support

In *Miller v. Miller*,[55] the Illinois Appellate Court for the First District adopted a contract formula to determine whether or not a child has standing as a third party beneficiary to enforce a child support agreement.[56] The court held that circumstances may exist in which a child's interests need to be protected from the conflicting interests of the parents.[57]

---

52. *Id.* at 38-39, 521 N.E.2d at 931. The court relied on the language of the Michigan URESA statute, which states: "remedies herein provided are *in addition and not in substitution* for any other remedies". MICH. COMP. LAWS ANN. § 780.154 (West 1982) (emphasis added). The court also noted that its decision was in accord with every jurisdiction that had considered this issue. *See* Westberry v. Reynolds, 134 Ariz. 29, 653 P.2d 379 (1982); *In re* Marriage of Popenhager, 99 Cal. App. 3d 514, 160 Cal. Rptr. 379 (1979); Ray v. Ray, 247 Ga. 467, 277 S.E.2d 495 (1981); Despain v. Despain, 78 Idaho 185, 300 P.2d 500 (1956); D.L.M. v. V.E.M., 438 N.E.2d 1023 (Ind. App. 1982); Hamilton v. Hamilton, 476 S.W.2d 197 (Ky. App. 1972); Howard v. Howard, 191 So. 2d 528 (Miss. 1966); Campbell v. Jenne, 172 Mont. 219, 563 P.2d 574 (1977); Peot v. Peot, 92 Nev. 388, 551 P.2d 242 (1976); Lanum v. Lanum, 92 A.D.2d 912, 460 N.Y.S.2d 344 (1983); Thompson v. Thompson 366 N.W.2d 845 (S.D. 1985); Nissen v. Miller, 642 S.W.2d 428 (Tenn. App. 1982); Oglesby v. Oglesby, 29 Utah 2d 419, 510 P.2d 1106 (1973); Jaramillo v. Jaramillo, 27 Wash. App. 391, 618 P.2d 528 (1980).

53. *Gifford*, 122 Ill. 2d at 38-39, 521 N.E.2d at 931.

54. *Id.* at 40, 521 N.E.2d at 931. Because the Michigan order only provides an additional means of enforcement of the Illinois order, the court reasoned that amounts paid under the Michigan order are properly identified as amounts due under the Illinois order. *Id.*

55. 163 Ill. App. 3d 602, 516 N.E.2d 837 (1st Dist. 1987).

56. *Id.* at 616, 516 N.E.2d at 847.

57. *Id.* at 606, 516 N.E.2d at 840. The court relied on a provision of the IMDMA which states that:

> The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody and visitation. The court shall enter an order for costs, fees and disbursements in favor of the child's attorney. The order shall be made against either or both parents, or against the child's separate estate.

ILL. REV. STAT. ch. 40, para. 506 (1987).

As part of their divorce agreement, Martha and Glenn Miller entered into a property settlement that included a promise by Glenn that he would pay for his son's college expenses.[58] Approximately ten years later, just before the child's eighteenth birthday, the parents entered into a second agreement wherein Martha waived all future claims for alimony and child support in consideration for $11,500 paid to her by Glenn.[59] Additionally, she agreed not to seek enforcement of the original settlement on her son's behalf.[60] Nevertheless, the child sued his father for enforcement of the original agreement in 1984, after incurring close to $20,000 in costs for college tuition, books, and supplies.[61] The father sought to block the suit by arguing that his son had no standing to sue on the original settlement because he was not a party to the proceedings.[62]

The court adopted a three-part contract test to determine the son's standing to sue as a third-party beneficiary.[63] First, the court found that the original agreement embodied a clear intent by the parents to benefit their son.[64] Second, payment of college tuition and expenses benefitted their son directly.[65] Third, the son clearly relied on the agreement when he matriculated.[66] Accordingly, the son was a third-party beneficiary to the original divorce agreement and had standing to sue under the original order.[67]

Despite the supposed clarity and utility of the test used in *Miller*, the *Miller* decision was heavily fact-based. The holding was shaped as much by the equities of the case as by logic. The *Miller* decision is significant for recognizing that third-party beneficiary

58. *Miller*, 163 Ill. App. 3d at 603, 516 N.E.2d at 838. The 1968 agreement provided in part that "Glenn E. Miller shall pay for the expenses including the college tuition incident to the attendance in college by the child of the parties, Ward Anthony [Miller], even though he may have attained the age of majority . . . ." *Id.*

59. *Id.* at 603-04, 516 N.E.2d at 839.

60. *Id.* The 1979 agreement stated that: "Wife agrees that after WARD MILLER reaches the age of majority on May 25, 1979, she will not seek to enforce, on his behalf, any of his rights under the court order of January 17, 1968, and the oral Property Settlement Agreement between the parties." *Id.* at 604, 516 N.E.2d at 839.

61. *Id.* at 611, 516 N.E.2d at 844.

62. *Id.* at 609, 516 N.E.2d at 842.

63. *Id.* at 612, 516 N.E.2d at 844.

64. *Id.*

65. *Id.*

66. *Id.* at 613, 516 N.E.2d at 845.

67. *Id.* at 617, 516 N.E.2d at 847. *See also* Carson Pirie Scott & Co. v. Parrett 346 Ill. 252, 257-58, 178 N.E. 498, 501 (1931) ("[t]he rule is settled in this state that, if a contract be entered into for a direct benefit of a third person not a party thereto, such third person may sue for breach thereof").

rules can apply between parents and children in the context of divorce.

III. CHILD CUSTODY[68]

A. Removal of a Child to Another State

In *In re Marriage of Eckert*,[69] the supreme court reaffirmed the long-standing principle that the benefit to the child is the most important consideration in determining whether to allow the custodial parent to remove a child to another state.[70] The parent seeking to remove the child has the burden of proving that the removal would be in the child's best interest.[71]

Carol and Mark Eckert were divorced on December 18, 1983.[72] Custody of their minor son, Matthew, was awarded to Carol, with certain visitation rights reserved for Mark.[73] In May 1985, Carol filed for permission to remove Matthew to Arizona.[74] After her successful appeal of the trial court's denial of her petition, the supreme court granted her husband leave to appeal.[75]

Carol set forth various arguments to show that the move was in the best interests of her children. First, she argued that she had been offered a teaching position in Arizona.[76] Moreover, Arizona's climate would be beneficial to her son from a previous marriage because the child was asthmatic.[77]

Her husband responded that neither circumstance directly or necessarily benefitted their son Matthew.[78] He argued that, in fact, the move would injure the parent/child relationship between his son and himself; therefore, the move would be detrimental to the child's best interest.[79]

The supreme court held that section 609 of the IMDMA re-

68. Section 602(a) of IMDMA provides the unifying principle behind all child custody cases: "The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors . . . ." ILL. REV. STAT. ch. 40, para. 602(a) (1987).

69. 119 Ill. 2d 316, 518 N.E.2d 1041 (1988).

70. *Id.* at 325, 518 N.E.2d at 1044.

71. *Id.* at 330, 518 N.E.2d at 1047.

72. *Id.* at 319, 518 N.E.2d at 1042.

73. *Id.*

74. *Id.* at 320, 518 N.E.2d at 1042.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

quires a strict standard of proof of benefit to the child.[80] The court criticized the appellate court for applying a standard that merely required "a sensible reason" for the removal.[81] The court went on to state that the move, in itself, would be neutral with respect to the child.[82] Nonetheless, contact with the father, with whom he enjoyed an exceptionally good relationship, and the extended family, were definitely positive benefits to the child.[83] Consequently, the court denied the petition for removal.[84]

Thus, in *Eckert*, the Illinois Supreme Court corrected the movement, apparent in some appellate court decisions, toward liberal allowances of removal petitions that are a serious detriment to the other parent's relationship with the child.

B. Termination of Parental Rights

In *In re Pronger*,[85] the supreme court held that section 4-3 of the Juvenile Court Act[86] did not require personal service of summons

80. *Id.* at 324, 518 N.E.2d at 1044. *See* ILL. REV. STAT. ch. 40, para. 609 (1987). Section 609, which was revised, effective January 1, 1988, provides as follows:

> (a) The court may grant leave, before or after judgment, to any party having custody of any minor child or children to remove such child or children from Illinois whenever such approval is in the best interests of such child or children. The burden of proving that such removal is in the best interests of such child or children is on the party seeking the removal. When such removal is permitted, the court may require the party removing such child or children from Illinois to give reasonable security guaranteeing the return of such children.
>
> (b) Before a minor child is temporarily removed from Illinois, the parent responsible for the removal shall inform the other parent, or the other parent's attorney, of the address and telephone number where the child may be reached during the period of temporary removal, and the date on which the child shall return to Illinois.
>
> The State of Illinois retains jurisdiction when the minor child is absent from the State pursuant to this subsection.

Id.

81. *Eckert*, 119 Ill. 2d at 326, 518 N.E.2d at 1045.

82. *Id.* at 323, 518 N.E.2d at 1043. The trial court relied on the fact that the mother may have desired the relocation only as a way of interfering with visitation and enhancing her relationship with a doctor that she had been dating. *Id.* The court noted that no evidence was introduced to show how the move would benefit the asthmatic son. *Id.*

83. *Id.* The court recognized that despite his varying work schedule, the father had never missed a visitation with his son. *Id.* Several witnesses testified that he was caring, conscientious, and loving. *Id.* Further, a court-appointed psychiatrist testified that the relationship between the father and son contributed to the son's continued well-being and adjustment. *Id.*

84. *Id.* at 331, 518 N.E.2d at 1047.

85. 118 Ill. 2d 512, 517 N.E.2d 1076 (1987).

86. Specifically, the statute provided:

> (1) When a petition is filed, the clerk of the court shall issue a summons with a copy of the petition attached. The summons shall be directed to the minor and to each person named as a respondent in the petition. If in the petition the

upon minors in cases of juvenile neglect when the substantive rights of the child are not endangered.[87]

Between 1983 and 1985, fifteen custody hearings were held to question the fitness of Elizabeth Green (also known as Michelle Pronger) to act as custodial parent of her son, Gabriel Pronger.[88] The summons was not served on the child until the termination proceedings that led to this appeal.[89]

Green argued that section 4-3 of the Juvenile Court Act required personal summons on her son and that a failure to provide such service deprived the trial court of jurisdiction to terminate her parental rights.[90] The appellate court vacated the termination order[91] and the State appealed.[92]

The supreme court reversed the appellate court.[93] The court noted that the language of section 4-3 had been amended since the proceedings in which the child was not personally served.[94] In fact, section 4-3 no longer required personal service on the child.[95] The court stated that the legislature intended the statute to apply retroactively.[96] Further, the amendment affected only procedural rights that the court found were typically applied retroactively.[97]

---

name of any respondent is alleged to be unknown, he shall be designated as respondent under the style of 'All whom it may Concern'.

ILL. REV. STAT. ch. 37, para. 704-3 (1979). This section was amended by the New Juvenile Court Act of 1987, which provides that "[w]hen a petition is filed, the clerk of the court shall issue a summons with a copy of the petition attached. The summons shall be directed to the minor's legal guardian or custodian and to each person named as a respondent in the petition." ILL. REV. STAT. ch. 37, para. 802-15 (1987).

87. *Pronger*, 118 Ill. 2d at 525, 517 N.E.2d at 1081.

88. *Id.* at 518, 517 N.E.2d at 1078.

89. *Id.*

90. *Id.* Green relied on two appellate court cases in which the failure to give notice to minors as known respondents in juvenile proceedings deprived the trial court of jurisdiction. *See In re* Crouch, 131 Ill. App. 3d 694, 476 N.E.2d 69 (4th Dist. 1985); *In re* Day, 138 Ill. App. 3d 783, 486 N.E.2d 307 (4th Dist. 1985).

91. *Pronger*, 118 Ill. 2d at 515, 517 N.E.2d at 1076.

92. *Id.*

93. *Id.* at 527, 517 N.E.2d at 1082.

94. *Id.*

95. *Id.*

96. *Id.* The court concluded that the legislature amended section 4-3 as a response to the decision in *In re* Day, 138 Ill. App. 3d 783, 486 N.E.2d 307 (4th Dist. 1985). In *Day*, the court held that the failure to give personal notice to a child deprived the trial court of jurisdiction over the child. *Id.* at 786, 486 N.E.2d at 309. Because "[t]he legislature clearly felt that the *Day* court had misinterpreted Section 4-3[,] . . . it sought to correct the error so that its goal of protecting children would not be defeated." *Pronger*, 118 Ill. 2d at 521, 517 N.E.2d at 1079.

97. *Pronger*, 118 Ill. 2d at 522, 517 N.E.2d at 1080. The court cited Ogdon v. Gianakos, 415 Ill. 591, 114 N.E.2d 686 (1953), in which service of process on a defendant who could not be located was allowed by retroactively applying section 20a of the Motor

Even if the court ruled that the trial court did not have jurisdiction, hearings would be reinstituted under the amendment and service would be made in the same manner as in the previous proceedings.[98] Therefore, the court held that the amendment to section 4-3 applied to the case at bar and that the trial court's order could not be vacated for lack of jurisdiction.[99]

In *In re Enis*,[100] the supreme court held that termination of parental rights is governed by section 704-6(1) of the Juvenile Court Act, which requires that allegations be proven by "clear and convincing" evidence.[101] The Adoption Act standard applied by the trial court, which required proof by a "preponderance of the evidence," was, therefore, inconsistent with the principles of due process.[102]

The Enis' child, Sabrina, was made a ward of the court after a series of proceedings in the spring of 1982.[103] In December of the same year, Sabrina was returned to her parents.[104] By March 1983, however, the State petitioned to terminate the Enis' parental rights, alleging that the child had suffered continual physical abuse.[105]

The parents argued that due process requires proof of unfitness by "clear and convincing evidence" and not a "preponderance of

---

Vehicle Act, which provided for substitute service on the Secretary of State. The court stated that "the manner of service of process is merely a step in obtaining jurisdiction of a person after he has been made a party to a suit. It is therefore a matter of practice or procedure and not a matter of substantive law." *Pronger*, 118 Ill. 2d at 522, 517 N.E.2d at 1080.

98. *Pronger*, 118 Ill. 2d at 522, 517 N.E.2d at 1080.

99. *Id.* at 525, 517 N.E.2d at 1081. The court also reviewed the trial court's conclusion that Elizabeth Green was an unfit parent under section 1 of the Adoption Act, ILL. REV. STAT. ch. 40, para. 1501 (1987). It found that "overwhelming evidence of respondent's bizarre and delusional beliefs and behavior" existed in the record to make apparent that the trial court's finding was supported by clear and convincing evidence. *Pronger*, 118 Ill. 2d at 526, 517 N.E.2d at 1080.

100. 121 Ill. 2d 124, 520 N.E.2d 362 (1988).

101. *Id.* at 133, 520 N.E.2d at 367.

102. *Id.* The Adoption Act states in pertinent part:

> . . . .
>
> D. 'Unfit person' means any person whom the court shall find to be unfit to have a child sought to be adopted, the grounds of such unfitness being any one of the following:
>
> . . .
>
> (f) Two or more findings of physical abuse to any children under Section 4-8 of the Juvenile Court Act, or a criminal conviction resulting from the death of any child by physical child abuse; or a finding of physical child abuse resulting from the death of any child under Section 4-8 of the Juvenile Court Act; . . . .

ILL. REV. STAT. ch. 40, para. 1501(D)(f) (1987).

103. *Enis*, 121 Ill. 2d at 126, 520 N.E.2d at 363.

104. *Id.*

105. *Id.* at 127, 520 N.E.2d at 364.

the evidence."[106] A termination order could not be based on prior findings of abuse that applied a "preponderance of evidence" standard.[107] Therefore, they argued, the appellate court erred in not vacating the trial court's termination order.[108] The State asserted that the pertinent sections of the Adoption Act were intended to base termination on a clear and convincing *pattern* of improper conduct by the parent.[109]

The court rejected the State's argument, pointing out that the trial court had relied on a "preponderance of the evidence" standard.[110] Further, the court noted that nothing in the Act requires courts to review such prior determinations to make sure that allegations could be proven by "clear and convincing evidence."[111] Because the Adoption Act authorized termination of parental rights based on an improper standard of proof, it did not afford due process.[112] Therefore, the appellate court erred in failing to strike allegations predicated on the prior fitness hearings.[113]

IV. PROPERTY AND MAINTENANCE

The supreme court in *In re Marriage of Olsen*[114] held that cash disbursements of pension plans that have been apportioned between the parties to a divorce settlement must be paid to both parties at the time of disbursement.[115]

In an amicable settlement, the benefits of the husband's pension

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 132, 520 N.E.2d at 366. The State contended that such a "pattern" could be shown by a finding that the child had been abused on two previous occasions as defined by the Juvenile Court Act. *Id.* These two occasions can establish "clear and convincing" evidence of abuse and the unfitness of the parent. *Id.*
110. *Id.* at 134, 520 N.E.2d at 367. The supreme court quoted from the trial court's decision in which the trial court stated that a preponderance of evidence established the Enis' intractability and unfitness. *Id.*
111. *Id.*
112. *Id.* The court relied on Santosky v. Kramer, 455 U.S. 745 (1982), in which the United States Supreme Court considered the constitutionality of a New York statute that permitted the termination of parental rights by a preponderance of the evidence standard. *Id.* In holding that the statute was unconstitutional, the Court noted that standards of proof allocate risks of error; therefore, where fundamental rights such as parental rights are at stake, higher standards of proof are necessary to guarantee that such rights are not infringed. *Id.* at 746. The Court stated that "before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Id.* at 747-48.
113. *Enis*, 121 Ill. 2d at 134, 520 N.E.2d at 367.
114. 124 Ill. 2d 19, 528 N.E.2d 684 (1988).
115. *Id.* at 28, 528 N.E.2d at 688.

stock plan were divided equally between the parties; the intention being to provide for the parties' old age.[116] The plan contemplated payment upon the husband's retirement and expressly provided for defeasance of the wife's interest upon her remarriage, but it was silent regarding her death.[117] After the stock shares in the pension fund split, the husband redeemed the shares and received a cash disbursement.[118] The husband did not transfer any portion of the cash to his wife.[119] It was not until after her death that her estate discovered that the husband had redeemed the shares. Thus, the estate brought suit to compel distribution of the wife's share of the pension.[120]

The wife's estate claimed that some portion of the pension was to be shared with her estate as marital assets.[121] The payment, it argued, should have been made when the husband redeemed his shares.[122] The husband responded that the early realization of cash was not contemplated under the settlement and, therefore, that he was not in breach of the agreement.[123]

The court stated that the husband's failure to relinquish one-half of the proceeds of the pension fund upon early realization did not constitute anticipatory repudiation of the settlement because the settlement agreement provided that payment would be made upon his retirement.[124] It found that the husband intended to perform the contract based on his understanding that the payment was due upon his retirement.[125]

---

116. *Id.* at 26-27, 528 N.E.2d at 687-88.

117. *Id.* at 23, 528 N.E.2d at 686.

118. *Id.*

119. *Id.*

120. *Id.* at 21, 528 N.E.2d at 685.

121. *Id.*

122. *Id.* The complaint alleged that the husband breached the settlement agreement "by converting all of his then existing shares in the pension stock plan to cash, withdrawing the proceeds of said conversion, and failing and refusing to deliver any portion thereof to Plaintiff." *Id.*

123. *Id.* at 21-22, 528 N.E.2d at 685. The court noted that the settlement agreement provided that:

> *[A]t the time defendant retires* he shall deliver to the plaintiff one-half of the 559.39 to be her sole property provided in the event plaintiff remarries prior to the retirement of respondent she waives all claims as to her one-half share of the 559.39 shares of stock.

Id. at 22, 528 N.E.2d at 686 (emphasis added).

124. *Id.* at 24, 528 N.E.2d at 686. The court noted that the doctrine of anticipatory repudiation requires a clear manifestation of an intention not to perform that will completely defeat the purpose of the contract. *Id.* Because the husband stated his intention to perform at the time of his retirement, and no evidence was put forward to the contrary, no clear intent to defeat the settlement could be found. *Id.*

125. *Id.* at 25, 528 N.E.2d at 687.

Consequently, the court held that the language of the settlement as a whole and the intent of the parties should be examined to determine the apportionment of the funds.[126] The court found that the intent of the parties was to divide the *realization* of the pension stock for the financial security of both parties.[127] Therefore, upon the early realization, the pension should have been divided.[128] The occurrence of the stock split meant that the wife was still entitled to one-half of the value of the stocks accumulated during the marriage, valued as of the date of disbursement.[129]

From a practical perspective, the *Olsen* decision demonstrates the wisdom of circumspection and careful drafting, and the value of an agreement that comprehends every reasonable circumstance that is liable to arise. The court's decision, after all, was logical. It probably represented what the parties would have wanted if they had considered the possibility at the time of their divorce; yet, it cost an expensive trip to the supreme court.

In *Warren v. Warren*,[130] the Illinois Appellate Court for the Fifth District addressed the issues of the validity and enforceability of an antenuptial agreement in which both parties waived all rights to each other's property, maintenance, and attorney's fees in the event of a dissolution of their marriage.[131] Marvin and Marcia Warren had lived together for more than three years prior to the execution of their antenuptial agreement.[132] The agreement, which Marcia signed without seeking the advice of independent counsel, set forth the approximate net worth of each party.[133] Although the agreement described Marvin's assets in general terms, it failed to list his interest in certain oil properties and drilling equipment.[134]

126. *Id.* The court asserted that "a court may properly disregard even unambiguous language when it is clear that the parties meant something different from what was said." *Id.* at 26, 528 N.E.2d at 687 (quoting United Airlines, Inc. v. City of Chicago, 116 Ill. 2d 311, 318-19, 507 N.E.2d 858, 861 (1987)). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 202 comment c (1981); A. FARNSWORTH, CONTRACTS § 710, at 492-93 (1982).

127. *Olsen*, 124 Ill. 2d at 27, 528 N.E.2d at 688.

128. *Id.*

129. *Id.* at 27-28, 528 N.E.2d at 688.

130. 169 Ill. App. 3d 226, 523 N.E.2d 680 (5th Dist. 1988).

131. In Illinois, these issues were first addressed in Eule v. Eule, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1st Dist. 1974), and *In re* Marriage of Burgess, 123 Ill. App. 3d 487, 462 N.E.2d 203 (3d Dist. 1984). The issue of exchanging such a waiver for a fixed monetary payment was first addressed in Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1st Dist. 1972).

132. *Warren*, 169 Ill. App. 3d at 228, 523 N.E.2d at 681.

133. Marvin's approximate net worth was $7,000,000 and Marcia's approximate net worth was $70,000. *Id.*

134. *Id.* at 230, 523 N.E.2d at 681-82.

During the parties' cohabitation and marriage, Marvin supported Marcia's children from her previous marriage, paid off her mortgage, paid for her eldest son's college education, bought vehicles for Marcia and her son, and purchased a $350,000 house in his name.[135] Prior to their marriage, Marcia quit her job, at Marvin's insistence, and she remained unemployed throughout their five-year marriage.[136]

The appellate court agreed with the trial court's findings that Marcia entered into the agreement with full knowledge because she had ample opportunity to obtain legal advice, the agreement was explained to her by Marvin's attorney before she signed it, and she had sufficient personal experience in the business world to understand the significance of what she was doing.[137] There was no fraud, duress, or coercion involved in the execution of the agreement.[138] The appellate court also stated that the trial court reasonably could have found that Marcia's voluntary unemployment at the time of the marriage could make her lack of future employability foreseeable.[139] Although her net worth had been reduced to approximately $32,000 at the time of the dissolution, her assets were sufficient to keep her "from sinking into an imminent condition of penury."[140]

The court recognized that an antenuptial agreement is valid and enforceable if it is entered into with full knowledge and without fraud, duress, or coercion, if it is fair and reasonable in its terms, and if an unforeseen condition of penury is not created as a result of a party's lack of property or employability.[141] The court found, however, that the total waiver of Marcia's rights to maintenance and attorney's fees was not fair and reasonable in light of her relative financial circumstances.[142]

Essentially, the court recognized that Marcia Warren's financial

135. *Id.* at 230, 523 N.E.2d at 682.
136. *Id.* at 232, 523 N.E.2d at 682-83.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 230, 523 N.E.2d at 683.
141. *Id.* at 233, 523 N.E.2d at 683 (citing *In re* Marriage of Burgess, 138 Ill. App. 3d 13, 485 N.E.2d 504 (3d Dist. 1985); Eule v. Eule, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1st Dist. 1974); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1st Dist. 1972)).
142. *Id.* at 235, 523 N.E.2d at 684. The facts in *Warren* were distinguishable from those in *In re* Marriage of Burgess because Mrs. Burgess had assets worth $412,000 and annual investment income in excess of $38,000. *Burgess*, 138 Ill. App. 3d at 15, 485 N.E.2d at 505. Consequently, the waiver of maintenance and property in *Burgess* was fair and reasonable in light of Mrs. Burgess' circumstances, but could not be held so in Mrs. Warren's case.

expectations had risen with her marriage. The *Warren* decision demonstrates that there are limitations upon a person's freedom to contract in the context of antenuptial agreements. Obligations must be discharged fairly and reasonably to have an agreement which waives or limits maintenance enforced.

V. MISCELLANEOUS CASES[143]

In *Bush v. Squellati*,[144] the Illinois Supreme Court reiterated the policies of strictly construing statutes that are in derogation of the common law and of limiting the court's involvement in family relationships. When addressing the issue of grandparental visitation, the court held that it could not order visitation privileges for biological grandparents where the parents consented to the child's adoption prior to the dissolution of their marriage.[145]

In 1984, the child of a failing marriage was adopted by his great-aunt and great-uncle.[146] Subsequently, the parents were divorced. The maternal grandparents requested visitation rights in 1985.[147] The grandparents argued that section 607(b) of the IMDMA permitted visitation rights to grandparents in adoption situations.[148]

The court did not accept the grandparents' argument, noting that section 607(b) provides for grandparental visitation when one

143. The cases that follow are included in this *Survey* either because they reiterate familiar Illinois judicial policy or because the issues in the cases have become moot because of changes in legislation. They are included in the interest of completeness.

144. 122 Ill. 2d 153, 522 N.E.2d 1225 (1988).

145. *Id.* at 162, 522 N.E.2d at 1229.

146. *Id.* at 155, 522 N.E.2d at 1226.

147. *Id.*

148. *Id.* *See* ILL. REV. STAT. ch. 40, para. 607(b) (1987), which provides:

> (b) The court may grant reasonable visitation privileges to a grandparent or great-grandparent of any minor child upon the grandparent's or great-grandparent's petition to the court, with notice to the parties required to be notified under Section 601 of this Act, if the court determines that it is in the best interests and welfare of the child and may issue any necessary orders to enforce such visitation privileges. Further, the court, pursuant to this subsection, may grant reasonable visitation privileges to a grandparent or great-grandparent whose child has died where the court determines that it is in the best interests and welfare of the child; moreover, the adoption of the minor child by the spouse of the child's surviving parent shall not preclude consideration by the court as to whether granting visitation privileges to such grandparents or great-grandparents is in the best interests and welfare of the child. Further, adoption of the minor by the spouse of a legal parent after termination of the parental rights of the other parent does not preclude granting visitation privileges to a grandparent or great-grandparent under this subparagraph (b); however, the court may impose restrictions upon such visitation privileges in order to prevent contact between the minor and the parent whose parental rights have been terminated.

Id.

or both of the parents have been lost or in the case of a dissolution proceeding.[149] The court pointed out that in the case at bar, however, the adoption of the child took place prior to the parent's divorce.[150] Because section 607(b) was silent on this situation, and because it was a statute in derogation of the common law, the court declined to apply it.[151] Therefore, the grandparents were denied standing to request visitation rights.[152] The decision in *Bush v. Squellati* continues the Illinois courts' insistence upon narrow and strict construction of grandparental visitation rights under section 607(b), thereby reiterating the principle that courts should limit their involvement in personal family relationships.

In *Nelson v. Hix*,[153] the supreme court addressed the issue of choice of forum in an interspousal tort action. Marjorie and Frank Nelson, who were domiciliaries of Canada, were involved in an automobile collision in Illinois.[154] When Marjorie Nelson filed suit against the driver of the other car in Illinois, she included a negligence count against her husband.[155]

Mrs. Nelson argued that the law of the married couple's domicile applies in tort actions.[156] Mr. Nelson responded that the tort occurred in Illinois and that Illinois law provided for interspousal immunity in tort actions occurring within the state.[157] Therefore, he argued that the interspousal tort immunity barred the suit against him.[158]

The court held that the law of a couple's domicile governs the right to maintain a tort action and not the law of the place where

149. *Bush*, 122 Ill. 2d at 157, 522 N.E.2d at 1226-27.

150. *Id.* at 161, 522 N.E.2d at 1229.

151. *Id.*

152. *Id.*

153. 122 Ill. 2d 343, 522 N.E.2d 1214 (1988).

154. *Id.* at 344, 522 N.E.2d at 1214.

155. *Id.*

156. *Id.* at 346, 522 N.E.2d at 1215.

157. *Id.* *See* ILL. REV. STAT. ch. 40, para. 1001 (1987). Since *Nelson* went to trial, however, section 1001 has been amended to allow interspousal tort suits, thereby making the conflict in *Nelson* moot. The earlier language stated as follows: "A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; provided, that neither husband nor wife may sue the other for a tort to the person committed during coverture . . . ." ILL. REV. STAT. ch. 40, para. 1001 (1985).

This section was amended, effective January 1, 1988, to state as follows: "A husband or wife may sue the other for a tort committed during the marriage." ILL. REV. STAT. ch. 40, para. 1001 (1987).

158. *Nelson*, 122 Ill. 2d at 344, 522 N.E.2d at 1215.

the tort occurred.[159] It pointed out that the domiciliary state's interest in preserving the marriage and regulating family relationships outweighed Illinois' interest in protecting the expectations of insurance carriers.[160] Comity permits courts to disallow foreign laws that are contrary to public policy, but a positive showing of such contrariness is necessary.[161] There was no such showing in *Nelson*.[162]

The particular issues in *Nelson* have been rendered moot by the change in section 1001. The *Nelson* decision, however, places Illinois clearly in line with the majority of decisions being developed in the area of conflict-of-laws.

A final case that has been rendered moot by a change in an Illinois statute is *In re Marriage of Landfield*.[163] In that case, the supreme court held that the propriety of awarding prospective attorney's fees is moot after the attorney's services are rendered.[164] The court acknowledged that an issue becomes moot when its out-

---

159. *Id.* at 353, 522 N.E.2d at 1219. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971), which states:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in Section 6.

Id. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS provides several factors for the court to consider when confronted with choice-of-law problems. For example, section 6 lists the following factors:

. . . .

> (2)(a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

160. *Nelson*, 122 Ill. 2d at 351, 522 N.E.2d at 1218. The court stated that the Illinois insurance policy purchased by the Nelsons did not provide that claims were to be decided under Illinois law. In fact, carriers are on notice by the mobile nature of the automobile that the vehicle may be driven to jurisdictions that prohibit interspousal tort suits. *Id.*

161. *Id.*

162. *Id.*

163. 118 Ill. 2d 229, 514 N.E.2d 1005 (1987).

164. *Id.* at 232, 514 N.E.2d at 1006. Section 508 of the Marriage and Dissolution of Marriage Act was amended, effective January 1, 1988, to make the issue in this case moot. That section states:

> (a) The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order either spouse to pay a reasonable amount for his own costs and attorney's fees and for the costs and attorney's fees necessarily incurred or, for the purpose of enabling a party lack-

come cannot substantively affect either party.[165]

Although this case was filed in 1978, the parties did not receive a binding hearing until 1987.[166] At that time, the judge ordered respondent to pay petitioner's prospective attorney's fees.[167] By the time the appeal from this order reached the supreme court, the services for which the prospective fees were awarded had been performed.[168] The issue, therefore, was moot and the merits of the case were not addressed.[169] Thus, the appeal was dismissed.[170]

VI. CONCLUSION

During the *Survey* year, Illinois courts contributed to the steady development of the law as it relates to the family by taking a new look at basic questions involving rights and responsibilities between parents and children in the areas of support, termination of parental rights, removal of a child to other states, and a child's standing to enforce payment of his college education expenses. Illinois also fell into line with the majority of states by recognizing that the law of a couple's domicile should apply in determining whether a tort suit may be maintained between the parties, and by abolishing interspousal tort immunity by statute. This steady growth by re-examining the law will, hopefully, continue into the next decade.

---

ing sufficient financial resources to obtain or retain legal representation, *expected to be incurred* by the other spouse . . . .

ILL. REV. STAT. ch. 40, para. 508(a) (1987) (emphasis added).

165. *Landfield*, 118 Ill. 2d at 233, 514 N.E.2d at 1006.

166. *Id.* at 231, 514 N.E.2d at 1005.

167. *Id.*

168. *Id.* at 232, 514 N.E.2d at 1006.

169. *Id.* at 233, 514 N.E.2d at 1006.

170. *Id.*