Loyola University Chicago Law Journal

Volume 19
Issue 2 *Winter 1988 1986-1987 Illinois Law Survey*

Article 8

1988

Family Law

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I. INTRODUCTION

During this *Survey* period, the appellate courts made the majority of integral decisions pertaining to the domestic relations field. Although the field of family law includes a wide array of substantive areas, this article focuses primarily on cases and legislation pertaining to the dissolution of marriages. Accordingly, the majority of included cases involves efforts by the Illinois courts to interpret and apply the Illinois Marriage and Dissolution of Marriage Act (the "IMDMA"). The Illinois courts continue to grapple, however, with the unforeseen and, probably, unintended consequences of the Illinois Supreme Court's holding in *In re Marriage of Leopondo*.[1] In *Leopondo*, the Illinois Supreme Court held that the dissolution of a marriage and all of its ancillary issues, *i.e.*, maintenance, custody, support, and attorney's fees, constitute a single cause of action. Therefore, these issues are individually unappealable until the trial court resolves all the issues independently. During the *Survey* period, the Illinois Supreme Court specifically upheld the propriety of appealing the bifurcation of a dissolution proceeding pursuant to its decision in *In re Marriage of Leopondo*[2] and section 401(b) of the IMDMA.[3]

The majority of the remaining cases focus on judicial interpretations and applications of specific provisions of the IMDMA. These sections of the IMDMA concern dissolution of marriage;[4] child support-contempt-penalties[5] and modifications;[6] child custody;[7] disposition of property;[8] modification and termination of provisions for maintenance, support, and property disposition;[9] mainte-

1. *See infra* notes 20-37 and accompanying text.
2. 96 Ill. 2d 114, 449 N.E.2d 137 (1983).
3. *See infra* notes 20-37 and accompanying text.
4. *See infra* notes 243-58 and accompanying text.
5. *See infra* notes 38-54 and accompanying text.
6. *See infra* notes 73-90 and accompanying text.
7. *See infra* notes 55-73 and accompanying text.
8. *See infra* notes 91-134 and accompanying text.
9. *See infra* notes 135-82 and accompanying text.

nance;[10] agreements;[11] attorney's fees;[12] support for non-minor children and educational expenses;[13] and visitation.[14] Additionally, the Illinois Supreme Court reconciled section 4-135 ("Benefits-Exempt") of the Illinois Pension Code with section 503(d) of the IMDMA.[15] Finally, the Illinois state legislature enacted, *inter alia*, several pieces of pertinent legislation during the *Survey* period. These include amending section 610,[16] abolishing interspousal tort immunity,[17] expanding the definition of "income,"[18] and enacting legislation pertaining to withholding orders.[19]

II. BIFURCATION

In *In re Marriage of Bogan*,[20] the Illinois Supreme Court held that a party to a divorce action may appeal the propriety of a bifurcated dissolution judgment itself[21] and further, that an appeal of a bifurcated judgment is consistent with the Illinois Supreme Court's holdings in both *In re Marriage of Leopondo*,[22] and in *In re Marriage of Cohn*.[23] In *Bogan*, the wife appealed the trial court's entry of a dissolution judgment, over her timely objection, which reserved for future consideration the issues of maintenance, property division, and attorney's fees.[24] The appellate court ruled that, according to the *Leopondo* decision, the wife could not appeal the bifurcated dissolution judgment because the ancillary issues of maintenance, property division, and attorney's fees had not been resolved.[25]

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10. *See infra* notes 166, 183-89 and accompanying text.
11. *See infra* notes 247-58 and accompanying text.
12. *See infra* notes 191-214 and accompanying text.
13. *See infra* notes 215-33 and accompanying text.
14. *See infra* notes 234-42 and accompanying text.
15. *See infra* notes 91-97 and accompanying text.
16. *See infra* notes 259-60 and accompanying text.
17. *See infra* notes 261-63 and accompanying text.
18. *See infra* notes 263-65 and accompanying text.
19. *See infra* notes 267-68 and accompanying text.
20. 116 Ill. 2d 72, 506 N.E.2d 1243 (1986).
21. *Id.*
22. *Bogan*, 116 Ill. 2d at 76, 506 N.E.2d at 1243; *In re* Marriage of Leopondo, 96 Ill. 2d 114, 449 N.E.2d 137 (1983).
23. *Bogan*, 116 Ill. 2d at 80, 506 N.E.2d at 1246; *In re* Marriage of Cohn, 93 Ill. 2d 190, 443 N.E.2d 541 (1982).
24. *Bogan*, 116 Ill. 2d at 74, 506 N.E.2d at 1243.
25. In *Leopondo*, the Illinois Supreme Court held that a petition for dissolution advances a single claim for an order dissolving the spouse's marriage, and that the remaining issues, such as custody, division of property, and support, are merely ancillary. *Leopondo*, 96 Ill. 2d 114, 449 N.E.2d 137 (1983). Thus, to further the goal of avoiding piecemeal litigation, including appeals, arising out of the same litigation, the court held that appeals of ancillary issues are barred until all the issues involved in the divorce

Accordingly, the Illinois Supreme Court considered two issues in *Bogan*. First, the court considered whether *Leopondo* foreclosed appeals of bifurcated dissolution judgments when appellants solely challenged the propriety of the bifurcation itself and did not dispute the grounds of the divorce.[26] Second, the court considered whether, in this particular instance, the trial court erred by finding that the circumstances warranted the entry of the bifurcated judgment.[27]

Concerning the appealability issue, the *Bogan* court, pursuant to *Leopondo*, held permissible an appeal to decide the sole issue of the propriety of bifurcation.[28] The court rejected the husband's theory that bifurcation appeals vitiated *Leopondo's* goal of avoiding piecemeal litigation.[29] In rejecting this theory, the court ruled that appeals of bifurcated dissolution judgments did not promote piecemeal litigation.[30] The court reasoned that barring a party from appealing a bifurcated dissolution judgment until the resolution of all ancillary issues[31] would result in the objecting party having no appellate review in a case in which the trial court incorrectly ordered the bifurcated judgment.[32]

After determining the propriety of appealing bifurcated dissolution judgments, the *Bogan* Court addressed whether the trial court's bifurcation order was in accord with the Illinois Supreme Court's holding in *Cohn*.[33] Section 401(b) of the IMDMA governs

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action are resolved by the trial court pursuant to Supreme Court Rule 304(a). ILL. S. CT. R. 304(a), ILL. REV. STAT. ch. 110A, para. 304(a) (1985).

26. *Bogan*, 116 Ill. 2d at 74, 506 N.E.2d at 1243.

27. *Id.*

28. *Id.* at 76, 506 N.E.2d at 1244.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (citing *Cohn*, 93 Ill. 2d at 199, 443 N.E.2d at 545). The *Cohn* court held that bifurcated dissolution judgments are only proper under "appropriate circumstances." *Cohn*, 93 Ill. 2d at 199, 443 N.E.2d at 545. In other words, absent a showing of appropriate circumstances, bifurcation should be denied. *Id.*

The *Cohn* court enumerated the appropriate circumstances delineated in the Historical and Practice Notes to § 401(b) of the IMDMA. The following appropriate circumstances are suggested:

> For example, although the court may have personal jurisdiction over the husband so that it could order him to pay child support or maintenance, the court may consider it inappropriate to do so at that time due to the husband's inability to make payments or due to the fact that the court has set aside an adequate fund for the child support pursuant to section 503(d). The court may also reserve such issues when it does not have *in personam* jurisdiction over the respondent. Likewise, if the child is not residing with either party, the question of custody may also be reserved.

bifurcated dissolution judgments.[34] The *Bogan* court held that the appropriate circumstances necessary to justify a bifurcation order need not be exactly one of those enumerated in *Cohn* but rather, of the same type.[35] Applying this test, the court concluded that the circumstances in *Bogan* did not justify a bifurcated dissolution judgment.

Specifically, the court rejected the husband's argument that his inability to perform job-related social functions expected by his employer constituted an appropriate circumstance warranting a bifurcated dissolution judgment.[36] The court reasoned that by permitting the trial court's unlimited discretion in awarding bifurcation judgments, certain inequities could arise.[37] Finally, the *Bogan* court suggested that the section 401(b) requirements, expanded in *Cohn*, will be drawn so narrowly that perhaps no argument could be made outside the statute and *Cohn*.

III. CHILD SUPPORT ENFORCEMENT[38]

The appellate court decisions during the *Survey* period focused

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ILL. ANN. STAT., ch. 40, para. 401(b) Historical and Practice Notes, at 105 (Smith-Hurd Supp. 1987).

34. Section 401(b) of the IMDMA provides as follows:

> Such judgment shall not be entered unless, to the extent it has jurisdiction to do so, the court has considered, approved, reserved or made provision for child custody, the support of any child of the marriage entitled to support, the maintenance of either spouse and the disposition of property. The court may enter a judgment for dissolution which reserves any such issues either upon (i) agreement of the parties, or (ii) motion of either party and a finding by the court that appropriate circumstances exist.

ILL. REV. STAT. ch. 40, para. 401(b) (1985).

35. *Bogan*, 116 Ill. 2d at 80, 506 N.E.2d at 1246.

36. *Id.* at 80-81, 506 N.E.2d at 1246.

37. *Id.* at 80, 506 N.E.2d at 1246. The court noted that the trial court could be put in the undesirable position of deciding marital property rights that have become entangled with the supervening rights of third parties, including subsequent spouses. *Id.* Further, an early dissolution judgment could complicate matters with respect to the rights of a surviving spouse in the event of a supervening death. *Id.* Moreover, other potential problems including the loss of ability to file joint income tax returns. The loss of medical insurance coverage and the loss of marital property treatment for property accumulated during the intervening period between the entry of the dissolution order and the final dissolution of property rights could arise. *Id.*

38. Section 505(a)(1) of the IMDMA prescribes mandatory minimum child support guidelines. The number of children dictate the percentage of the child support obligor's net income that will be fixed as the support obligation. These guidelines have dual ramifications. On the one hand, they tend to make child support awards predictable and uniform. On the other hand, these "minimum" guidelines tend to become the standard. Section 505(a) of the IMDMA provides as follows:

> In a proceeding for dissolution of marriage, legal separation, declaration of invalidity of marriage, a proceeding for child support following dissolution of

on the issue of child support enforcement. In *In re Robertson*,[39] the wife filed a petition to revive a sixteen-year-old judgment against the husband for past due child support. The trial court entered judgment in the amount of approximately one hundred and twenty-five thousand dollars, and the Illinois Appellate Court for First District affirmed.

On appeal to the appellate court, the husband's argument included various jurisdictional challenges to the original decree, such as improper venue, lack of personal jurisdiction, and lack of subject matter jurisdiction. In addition, the husband argued that payments made by his mother's trust to his children satisfied his support obligations.[40] The court first rejected the jurisdictional challenges based on the doctrine of estoppel by remarriage.[41] The court held that once the husband accepted the benefit of remarrying from the divorce decree, he was estopped from raising any jurisdictional challenges.[42]

In response to the husband's contention regarding his mother's trust payments to the children, the court ruled that payments to children by one other than the obligor will satisfy the support obligation only if there is evidence of manifested intention to pay such support obligations by the obligor.[43] Because no such intent existed, the husband was foreclosed from asserting that these trust disbursements constituted his child support payments.

In *Blisset v. Blisset*,[44] the Illinois Appellate Court for the Fourth

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the marriage by a court which lacked personal jurisdiction over the absent spouse or any proceeding authorized under Section 601 of this Act, the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for his support, without regard to marital misconduct.

(1) The Court shall determine the minimum amount of support by using the following guidelines:

Number of Children	Percent of Supporting Party's Net Income
1	20%
2	25%
3	32%
4	40%
5	45%
6 or more	50%

ILL. REV. STAT. ch. 40, para. 505(a) (1985).

39. 151 Ill. App. 3d 214, 503 N.E.2d 1279 (1st Dist. 1986).
40. *Id.* at 224, 502 N.E.2d at 1285-1286.
41. *Id.* at 223, 502 N.E.2d at 1285.
42. *Id.*
43. *Id.* at 224-25, 502 N.E.2d at 1286.
44. 144 Ill. App. 3d 1088, 495 N.E.2d 608 (4th Dist. 1986).

District considered whether equitable estoppel bars future child support payments when the wife agreed to the husband's nonpayment of child support in exchange for the husband's forbearance from the exercise of his visitation rights.[45] In *Blisset*, the court entered a dissolution judgment ordering the husband to pay forty dollars per week in child support. Subsequently, the wife brought a criminal action against her husband for failure to pay the court ordered child support. Thereafter, the parties agreed in writing that the husband would restrict his visitation to specific times in exchange for the wife's dropping of all criminal charges for nonsupport.[46] The parties never brought an action to incorporate this agreement into the dissolution judgment nor to enter an order relieving the husband from his original support obligations.[47] The husband, however, ceased making payments. The wife then brought an action to collect past due child support payments. The trial court denied the wife's claim for delinquent payments, finding that the husband relied on the wife's promise to forego payments "to his detriment when he relinquished his right to exercise unlimited visitation with his children."[48]

The Illinois Appellate Court for the Fourth District disagreed with the trial court. The appellate court held void as against public policy an agreement between ex-spouses relieving the obligor from child support payments in consideration for waiving the right to visitation.[49] The court further held that accrued arrearages during the period in which the husband forgoes child support payments in reliance on his wife's promise were collectable.[50] The court ruled that the determination of the adequacy and amount of child support is the trial court's responsibility, and not that of the parent.[51] If a parent lacks adequate child support, he or she likely will seek financial assistance from the state treasury. Therefore, to allow parents to determine child support obligations could result in a burdensome effect on both the custodians and the State of Illinois.

Although the court rejected the husband's equitable estoppel argument, it indicated that such a defense would be appropriate if the defendant showed prejudice or hardship and injury due to the de-

45. *Id.* at 1090, 495 N.E.2d at 610.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 1092, 495 N.E.2d at 612.
50. *Id.* at 1092, 495 N.E.2d at 610.
51. *Id.*

lay in child support payments.[52] In *Blisset*, however, the court stated that the requirement to pay accumulated support in one payment as opposed to weekly payments did not cause injury sufficient to invoke an equitable estoppel defense.[53]

There is, however, a split in the districts regarding the enforceability of such an agreement. One court has upheld a similar agreement.[54] In light of these discrepancies between the districts, the practicing attorney should be aware that the Illinois Supreme Court likely will have to rule on the propriety and effect of such agreements.

The problems associated with the failure of the noncustodial parent to make support payments are well documented by the media and are painfully obvious to both the custodial parent and to the children involved in these situations. *Blisset* should be upheld when the Illinois Supreme Court rules on this issue. Agreements tying non-payment to the forbearance of visitation rights should be found void as against public policy. As *Blisset* noted, such agreements are selfish on the parts of both the payor and the payee, but unfortunately, it is the children who suffer most. Additionally, in these strained economic times, a noncustodial parent who is unemployed over an extended period could be coerced into such an agreement.

IV. CHILD CUSTODY

The primary focus in child custody determinations is the "best interests of the children."[55] The "no fault" concept of the IMDMA permeates child custody proceedings. For example, section 602(b) instructs the trial court that it "shall not consider the conduct of a present or proposed custodian that does not *affect* his relationship with the child."[56] Rather, to determine custody, trial courts should consider factors enumerated in section 602 of the

52. *Id.* at 1093, 495 N.E.2d at 612.

53. *Id.* at 1094, 495 N.E.2d at 613 (citing Jones v. Meade, 126 Ill. App. 3d 897, 903, 467 N.E.2d 657, 661 (4th Dist. 1984)).

54. In Bartlett v. Bartlett, 70 Ill. App. 3d 661, 389 N.E.2d 15 (3d Dist. 1979), the Third District upheld such an agreement. In *Bartlett*, the wife agreed to forego court ordered child support payments in return for the husband's agreement to forego legal entitlement to visitation rights, and the court precluded the mother from collecting past due payments from the father on the grounds of equitable estoppel. *Id.* at 661-62, 389 N.E.2d at 16-17. The *Bartlett* court however, required the husband to make all prospective support payments. *Id.*

55. Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300 (1952).

56. ILL. REV. STAT. ch. 40, para. 602(b) (1985) (emphasis added).

IMDMA.[57] The significant decisions in the area of child custody tend to arise in joint custody cases when one parent petitions to remove the child from the state.

A. Relevant Factors in Custody Awards[58]

In *In re Marriage of Soraparu*,[59] the father appealed the trial court's decision awarding permanent custody to the mother. The trial court based its decision, in part, on the father's failure to make temporary child support payments. The Illinois Appellate Court for the First District held that delinquency by the obligor in making child support payments is a relevant factor in determining the child's best interests and thus properly may be evaluated by the trial court when awarding custody.[60]

In *In re Marriage of Anderson*,[61] the Illinois Appellate Court for the Second District applied the "best interest" test in the same manner as the First District[62] in determining whether a parent who

57. *See infra* note 58.

58. Section 602 provides as follows:

> Best Interest of Child. (a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
>
> (1) the wishes of the child's 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 interest;
>
> (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.
>
> (b) The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to that child.
>
> (c) The court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well being of their child is in the best interest of the child. However, such presumption shall not be construed as a presumption that an order awarding joint custody is in the best interest of the child.

ILL. REV. STAT. ch. 40, para. 602 (1985).

59. 147 Ill. App. 3d 857, 498 N.E.2d 565 (1st Dist. 1986).

60. *Id.* at 865, 498 N.E.2d at 570.

61. 145 Ill. App. 3d 746, 496 N.E.2d 346 (2d Dist. 1986).

62. The appellate court ruled that a removal petition filed by the residential custodian, when both parents are awarded joint custody, is not to be treated as a petition for modification of custody which requires, *inter alia*, a showing of endangerment to the child. Rather, it should be treated as a removal petition. *In re* Marriage of Bednar, 146 Ill. App. 3d 704, 708, 496 N.E.2d 1149, 1152 (1st Dist. 1986). For a further discussion of *Bednar*, see Murphy & Lane, *Family Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 549, 585 (1986).

has joint custody should be granted permission to remove the children from the state.[63] In *Anderson*, the trial court incorporated into the divorce decree a written separation agreement providing for joint custody. The children resided with the mother during the school year and with their father during the summer. The mother was a nurse and desired to move to Phoenix to pursue a part-time employment opportunity. The trial court denied the mother's removal petition and the appellate court affirmed, holding that part-time employment was an insufficient basis for removal.[64]

In reaching this decision, the court enumerated three factors which trial courts should consider in determining whether the best interests of the children are served by the move.[65] First, the court should consider whether a sensible reason for the move exists. For example, a career or financial advancement of the custodial parent may qualify as a sensible reason for the move.[66] The same opportunity, however, should not be available locally.[67] Second, the court should determine whether the move will benefit the child.[68] The court indicated that an indirect benefit will suffice and may be illustrated by the fact that the custodial parent will be a happier and better adjusted parent.[69] Additionally, consideration should be given to the quality of the children's education, housing, and child care available in the new location.[70] Third, the court should consider whether the removal would prevent "reasonable visitation" by the non-residential parent.[71]

Applying these factors, the *Anderson* court emphasized that local relocation was a preferable alternative. The court stressed that the father took an active role in raising the children pursuant to the joint custody agreement.[72] In view of *Anderson*, parents in joint custody situations would be well advised to take full advantage of the visitation arrangement and pursue an active role in the lives of their children. The more difficult decision for a reviewing court

63. *Anderson*, 145 Ill. App. 3d at 751, 496 N.E.2d at 349.
64. *Id.* at 752, 496 N.E.2d at 350.
65. *Id.* at 751, 496 N.E.2d at 349.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 751, 496 N.E.2d at 348.
72. *Id.* at 752, 496 N.E.2d at 345-49. The *Anderson* court appropriately noted the extensive involvement of the father in the children's lives detailing daily telephone calls, contact with the children's school teachers, and physical custody every other weekend, on holidays, and summer vacation, which also provided for contact with the paternal grandparents and other relatives. *Id.*

will occur in the instance of an active parent, as found in *Anderson*, balanced against the other parent with legitimate career advancement.

B. Modification of Custody within Two Years of the Custody Award

According to section 610(a) of the IMDMA,[73] modification of custody awards within two years should be granted only in emergency situations and after specific findings are made pursuant to the amended statute. In *In re Marriage of Clark*,[74] the appellate court denied the father's petition to modify custody within two years of the award.[75] The court concluded that the father did not present clear and convincing evidence that the child's environment posed any serious danger to the child's physical, moral, or emotional health.[76] Interestingly, the court found that evidence of the child's poor performance in school and the mother's apparent failure to respond to concerns of the school indicated nothing more than "the general aftermath" of divorce.[77] Other than this evidence, the court determined that the child had adjusted to his surroundings and was in no danger as required by section 610.[78]

In *In re Marriage of Zucco*,[79] the mother petitioned to modify the joint custody arrangement under which she had residential cus-

73. The relevant portion of section 610 of the IMDMA reads as follows:

> Modification. (a) Unless by stipulation of the parties, no motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the bases of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.
>
> (b) The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either of both parties having custody and that the modification is necessary to serve the best interest of the child. In the case of joint custody, if the parties agree to a termination of a joint custody arrangement, the court shall so terminate the joint custody and make any modification which is in the child's best interest. The court shall state in its decision specific findings of fact in support of its modification or termination of joint custody if either parent opposes the modification or termination.

P.A. 82-593, 1987 Ill. Laws 525.

74. 149 Ill. App. 3d 613, 500 N.E.2d 1092 (3d Dist. 1986).
75. *Id.* at 616, 500 N.E.2d at 1092.
76. *Id.*
77. *Id.* at 617, 500 N.E.2d at 1094.
78. For content of section 610, *see supra* note 73.
79. 150 Ill. App. 3d 146, 501 N.E.2d 875 (5th Dist. 1986).

tody of the children.[80] The mother sought full custody because of her remarriage and her intention to move to another school district. The trial court denied the mother's petition and acceded to the father's counter-petition for primary physical custody. The trial court partially relied on the testimony and the preference of the six-year-old son in determining custody.[81] Additionally, the trial court based its decision on the fact that the child would receive a religious upbringing with the father and not with the mother.[82]

The Illinois Appellate Court for the Fifth District reversed the lower court's decision primarily for two reasons.[83] First, the appellate court determined that the trial court erred in relying on the preference of the six-year-old son.[84] Although section 602(a) of the IMDMA provides that a child's preference about his custodian are a relevant factor to be considered by the court, those wishes should affect the court's decision only when the child's preference is based upon reasons related to his best interests.[85] In the present case, the child gave no reasons for his preference, either during the court-ordered home study or during the in chambers interview.[86] Second, the court held that the trial court erred by considering whether the child would be afforded a religious upbringing.[87] The court specifically stated that a custody decision based on religion would violate the establishment clause of the first amendment of the United States Constitution.[88] The court, however, stated that "consideration of religion may be proper where a child is shown to have actual religious needs."[89]

The *Zucco* court aptly demonstrated the problems inherent in considering the wishes of pre-adolescent children pursuant to section 602(a) of the IMDMA.[90] Although section 602(a) places no

80. *Id.* at 148-49, 501 N.E.2d at 876.

81. *Id.* at 152, 501 N.E.2d at 878-79. " 'Physical custody' means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." 32A WORDS AND PHRASES 40 (Permanent ed. 1987).

82. *Id.* at 153, 501 N.E.2d at 879-80.

83. *Id.* at 156, 501 N.E.2d at 881.

84. *Id.* at 152, 501 N.E.2d at 879.

85. *Id. See supra* note 58.

86. *Id.* at 153, 501 N.E.2d at 879.

87. *Id.*

88. *Id.* at 154, 501 N.E.2d at 880.

89. *Id.* at 154-155, 501 N.E.2d at 880. A child's religious needs may be proven either through direct testimony from a child sufficiently mature to form an intelligent opinion on the subject or through witnesses. *Id.*

90. For a discussion of section 602(a), see *supra* note 58.

age restriction on the child, it is true, as the court noted, that a pre-adolescent child may base his decision to remain with a parent on factors that are not related to his best interests.

V. PROPERTY

A. Pensions

During the *Survey* period, the Illinois Supreme Court considered whether a fireman's pension fund is marital property subject to apportionment under section 503[91] of the IMDMA.[92] In *In re Marriage of Hacket*, the parties were married for twenty- seven years prior to their divorce and during their marriage, the husband was employed as a fireman. The court affirmed the appellate court's rule 23 order and held that a vested pension[93] is a form of deferred compensation acquired during the years of employment and, thus, is marital property.[94]

The court further determined that this classification of the pension fund as marital property does not conflict with section 4-135[95]

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91. Section 503 of the IMDMA, with certain exceptions listed in 503(a), states:

> (a) For purposes of this act, "marital property" means all property acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital" property:
>
> . . . .
>
> (b) For purposes of distribution of property pursuant to this section, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, including non-marital property transferred into some form of co-ownership between the spouses, is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this section.

ILL. REV. STAT. ch. 40, para. 503(a), (b) (1985).

92. *In re* Marriage of Hacket, 113 Ill. 2d 286, 292, 497 N.E.2d 1152, 1155 (1986).

93. A "vested pension" refers to a pension right that is not subject to condition of forfeiture if the employment relationship terminates in the interim. 44 WORDS AND PHRASES 57 (Permanent ed. 1987).

94. *Hacket*, 113 Ill. 2d at 293, 497 N.E.2d at 1155.

95. Section 4-135 of the Illinois Pension Code, entitled "Benefits-Exempt" provides as follows:

> No portion of the pension fund shall, either before or after its order of distribution to any retired firefighter or his or her beneficiaries, be held, seized, taken subject to, or detained or levied on by virtue of any process, injunction interlocutory or other order or judgment, or any process or proceeding whatever issued by any court of this State, for the payment or satisfaction in whole or in part of any debt, damages, claim, demand or judgment against any firefighter or his or her beneficiaries, but the fund shall be held, secured and distributed for the purposes of pensioning such firefighter and beneficiaries and for no other purposes whatever.

of the Illinois pension code which protects a fireman's pension from creditors.[96] Rather, classifying vested pension rights as marital property provides for a division of the pension benefits between those individuals whom the statute was meant to protect.[97]

After the holding in *Hacket*, there should no longer be any doubt that a spouse's retirement benefits are marital property to the extent that such benefits were earned during the marriage. Although challenges will continue, as evidenced by the argument espoused in *Hacket*, it appears certain that a pension interest will be valued at the date of dissolution.

B. Valuing Professional Corporations

In *In re Marriage of Rubinstein*,[98] the Illinois Appellate Court for the Second District held that a practitioner's goodwill should be considered when determining the value of a professional corporation.[99] The trial court awarded the wife unallocated support in the amount of twenty-eight hundred dollars per month.[100] The trial court did not include the value of the corporate goodwill[101] in determining the worth of Mr. Rubinstein's medical practice.[102] On

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ILL. REV. STAT. ch. 108-1/2, para. 4-135 (1985).

96. *Hacket*, 113 Ill. 2d at 292, 497 N.E.2d at 1155.

97. *Id.*

98. 145 Ill. App. 3d 31, 495 N.E.2d 659 (2d Dist. 1986).

99. *Id.* at 36, 495 N.E.2d at 663. In *Rubinstein*, the parties married at the age of twenty-one and divorced thirteen years later. *Id.* at 32, 495 N.E.2d at 660. When they married each had recently graduated from college with Bachelor's degrees and the husband was about to begin medical school. The wife worked as a high school English teacher in the Chicago public school system. During that period, the parties understood that the wife would support the family while Dr. Rubinstein studied medicine and that, subsequently Mrs. Rubinstein would further her education and career. *Id.*

Dr. Rubinstein pursued his medical training for nine years while his wife taught for ten-and-a-half years. *Id.* at 33, 495 N.E.2d at 660. Mrs. Rubinstein provided the sole source of funds while the husband studied medicine. During the interim, Mrs. Rubinstein attended night school to earn a Master's degree in special education, managed the household, and took care of the general household needs. When the couple's second child was born, Mrs. Rubinstein terminated her employment. At the time of the divorce action, Mrs. Rubinstein was pursuing an MBA and planned on obtaining employment in the business sector, rather than returning to teaching. *Id.* Finally, Mrs. Rubinstein continued to reside in the marital home with the couple's two minor children.

As a medical doctor Mr. Rubinstein specialized in internal medicine. He practiced out of a medical corporation, earning a gross income of $10,313 monthly. In addition, he had a profit sharing account worth approximately $50,000 and a pension plan worth $11,700. *Id.*

100. *Id.* at 34, 495 N.E.2d at 661.

101. Goodwill is defined as "the value of a business or practice that exceeds the combined value of the physical assets." 2 Valuation and Distribution of Marital Property § 23.04[1] (M. Bender ed. 1984).

102. *Rubenstein*, 145 Ill. App. at 35-36, 495 N.E.2d at 662.

appeal, the wife contended the trial court abused its discretion in failing to include the husband's medical practice in the division of the spouse's marital property.[103] Specifically, the wife contended that the goodwill of the husband's professional corporation should be included.[104]

The appellate court analyzed Second and Fifth District decisions concerning whether the value of a professional corporation's goodwill should be considered in appraising its worth.[105] The *Rubenstein* decision ultimately relied on section 503(d)(2),[106] which requires the trial courts to consider, among other things, "the value of the property set apart to each spouse."[107] The court reasoned that ignoring goodwill as a marital asset could result in an undervaluation of the practice and stock of the professional corporation, leading to an inequitable distribution of the marital property in the dissolution judgment.[108]

Furthermore, the *Rubinstein* court held that, although a medical degree is not marital property, the trial court should compensate the spouse whose employment permitted the other spouse to obtain the medical degree.[109] The court stated that the "contributing spouse must receive some form of compensation for the financial effort provided to the student spouse in expectation that the marital unit will prosper in the future particularly where, as here, the

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103. *Id.* at 34-35, 495 N.E.2d at 661.

104. *Id.* at 35, 495 N.E.2d at 662.

105. The Second District, in *In re* Marriage of Leon, 80 Ill. App. 3d 383, 399 N.E.2d 1006 (2d Dist. 1980), dealt with the valuation issue while reviewing the valuation of an insurance business. The *Leon* court adopted the view of a California court and ruled that the goodwill of a business such as a law or medical practice should be classified as marital property. *Id.* at 386, 399 N.E.2d at 1006.

In *In re* Marriage of White, 98 Ill. App. 3d 380, 424 N.E.2d 421 (5th Dist. 1986), the Fifth District appellate court cited *Leon* with approval when considering the issue of valuing a professional corporation. *Id.* at 383, 424 N.E.2d at 424. The *White* court held that goodwill should be considered when appraising the value of a professional corporation. *Id.* at 384, 424 N.E.2d at 421.

106. Section 503(d)(2) of the IMDMA reads as follows:

> In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including the value of the property set apart to each spouse.

ILL. REV. STAT. ch. 40, para. 503(d)(2) (1985).

107. *Id.*

108. *Rubinstein*, 145 Ill. App. 3d at 38-39, 495 N.E.2d at 664.

109. *Id.* Neither party contested the fact that Mrs. Rubinstein supported the family while her husband pursued his medical training. *Id.*

husband filed the suit for divorce so soon after the wife completed her part of the bargain."[110]

C. *Valuing the Goodwill of a Closely-Held Corporation*

In *In re Marriage of White*,[111] the Illinois Appellate Court for the Fifth District approved the "capitalization of excess earnings" method in valuing the goodwill of a dental practice.[112] This method is accomplished by fixing the amount by which the independent professional's adjusted earnings exceed the average earnings of an employee of similar qualifications in the same locale.[113] The court, however, refused to restrict the trial courts to one method of valuation.[114]

With the decisions in *Rubinstein* and *White*, the Second and Fifth Districts have now brought the issue of valuation of goodwill in a personal corporation in line with the First District's decision in *In re Marriage of Kapusta*.[115] The courts' inclusion of goodwill in valuing a professional corporation does not give rise to double consideration to the professional spouse's ability to generate income.[116] In addition, the *Rubinstein* court has found a method of compensating a spouse in the position of Mrs. Rubinstein, while continuing to state that a graduate degree, such as Dr. Rubinstein's medical degree, is not marital property. In effect, the court considered factors which would otherwise indicate a marital asset.

D. *Valuing a Closely-Held Corporation at the Date of Dissolution*

In *In re Marriage of Suarez*,[117] the Illinois Appellate Court for the Second District held that the proper date for valuing marital assets is the date of dissolution.[118] In *Suarez*, the husband appealed

110. *Id.* The court specified three methods of affording compensation: distribution of marital property; a form of maintenance; and monetary awards based on equitable standards. *Id.* Because the wife received no compensation for her financial support to her husband, the court remanded the cause for further consideration. *Id.*

111. 151 Ill. App. 3d 778, 502 N.E.2d 1084 (5th Dist. 1986).

112. *Id.* at 781, 502 N.E.2d at 1086-87.

113. *Id.* at 781, 502 N.E.2d at 1086.

114. *Id.* at 780, 502 N.E.2d at 1086.

115. 141 Ill. App. 3d 1010, 491 N.E.2d 48 (1st Dist. 1986). For further discussion of *Kapusta*, see Murphy & Lane, *Family Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 549, 552 (1986) (where the court approved of the consideration of goodwill in valuing a surgeon's medical practice).

116. *Rubinstein*, 145 Ill. App. 3d at 37, 495 N.E.2d at 663.

117. 148 Ill. App. 3d 849, 499 N.E.2d 642 (2d Dist. 1986).

118. *Id.* at 859, 499 N.E.2d at 648.

the valuation of the family business, claiming that a substantial devaluation occurred between the date of the court's valuation and the dissolution judgment.[119]

The appellate court concurred with the husband, holding that the trial court abused its discretion by refusing to re-examine the business valuation as of the date of dissolution.[120] The court reasoned that evidence of the loss of a major sales account by a closely held corporation should have been presented to the court through a motion to reopen proofs.[121]

E. Transfers as Gifts or Marital Property

In *In re Marriage of Agazim*,[122] the Illinois Appellate Court for the Second District held that income-producing property transferred from a father to his daughter was marital property to be divided upon the dissolution of the daughter's marriage.[123] In *Agazim*, the father transferred an interest in an apartment complex to both of his daughters. The father estimated that the complex would produce annual income between ten and twenty thousand dollars to be shared between the daughters. The children signed articles of agreement and a management agreement. The articles of agreement compelled the daughters to pay the expenses on the property from the rental revenue. Additionally, the daughters agreed to procure insurance and to pay for real estate taxes for all necessary repairs. Further, the daughters could not assign, sell, or transfer the buildings. Despite these limitations, the trial court held that the transfer constituted a gift and classified the building as non-marital property.[124]

The appellate court reversed, treating the apartment complex as marital property, and remanded the action for redistribution of the marital assets.[125] On appeal, the court explained that the IMDMA establishes a rebuttable presumption that all property acquired during a marriage is marital.[126] The court then noted the contrary presumption that a transfer of property from a parent to a child

119. *Id.* at 841, 499 N.E.2d at 643.
120. *Id.* at 862, 499 N.E.2d at 650.
121. *Id.* at 861, 499 N.E.2d at 649-50.
122. 147 Ill. App. 3d 646, 498 N.E.2d 742 (2d Dist. 1986).
123. *Id.* at 652, 498 N.E.2d at 747.
124. *Id.* at 647-52, 498 N.E.2d at 744-47.
125. *Id.* at 652, 498 N.E.2d at 747.
126. *Id.* at 648, 498 N.E.2d at 744. *See also* Hofman v. Hofman, 94 Ill. 2d 205, 216, 446 N.E.2d 499, 502 (1983).

constitutes a gift.[127] The court stated that although transactions subject to these conflicting presumptions leave the trial courts free to resolve whether the property acquired by the exchange is marital,[128] the trial court's classification may be disturbed if it is contrary to the manifest weight of the evidence.[129]

In reviewing the trial court's decision that the transfer constituted a gift, the court reasoned that the donor of a gift must evidence his intent to make such a transfer, which is generally illustrated by an absolute and irretrievable delivery of the property to the donee.[130] The court concluded that because the daughter paid her father consideration for her interest in the building, the father did not manifest the necessary intent.[131] Accordingly, the appellate court classified the property as marital, and subject to disbursement pursuant to section 503.[132] The *Agazim* court also noted the tax returns filed by the parties.[133] Not only had the donor failed to file a gift tax return, but both parties also treated the transaction as a sale on their income tax returns.[134] Accordingly, a well-intentioned parent should be cautioned to be consistent in the manner of giving with respect to both the form and the substance of the transaction.

VI. MAINTENANCE

A. Cohabitation with "Another Person" Pursuant to Section 510(b)[135] of the IMDMA

Pursuant to section 510(b) of the IMDMA, cohabitation with "another person" terminates the obligor's maintenance responsibil-

127. *Agazim*, 148 Ill. App. 3d at 648, 498 N.E.2d at 744. *See also In re* Marriage of Rosen, 126 Ill. App. 3d 766, 772, 467 N.E.2d 962, 966 (1st Dist. 1984).

128. *Agazim*, 148 Ill. App. 3d at 648, 498 N.E.2d at 744.

129. *Id.* at 652, 498 N.E.2d at 747.

130. *Id.* at 648-49, 498 N.E.2d at 744-45.

131. *Id.*

132. *Id.* at 652, 498 N.E.2d at 747; The court noted that the legislative purpose of section 503 was to incorporate the partnership theory of marriage into the treatment of shared property.

133. *Id.* at 651, 498 N.E.2d at 746.

134. *Id.*

135. Section 510(b) of the IMDMA provides

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

ILL. REV. STAT. ch. 40, para. 510(b) (1985) (emphasis added).

ities.[136] In *In re Marriage of Antonich*,[137] the appellate court for the Second District refused to terminate the husband's maintenance obligation after he and his former wife lived together following the dissolution.[138] The court reasoned that both common sense and the plain meaning of the words "another person" mandated a denial of the husband's petition.[139] The court specifically noted that the wife's need for support had not diminished in any way as a result of living with her former husband.[140] Moreover, underlying the section 510(b) prohibition of maintenance if the recipient cohabits with another is the right of the payor spouse to an accounting of funds paid for support.[141] The court concluded that this purpose is not frustrated when the payor resides with his former spouse.[142] Additionally, the court determined that a contrary decision would contravene the public policy of favoring the reconciliation of disrupted marriages.[143]

In *In re Marriage of Reeder*,[144] the husband petitioned the court to terminate his periodic maintenance payments pursuant to section 510(b) of the IMDMA because his former wife was

136. *Id.*

137. 148 Ill. App. 3d 575, 499 N.E.2d 654 (2d Dist. 1986).

138. In *Antonich*, the dissolution judgment incorporated a written separation agreement requiring the husband to pay weekly maintenance. The agreement provided for the termination of maintenance at the end of five years or in the event any provision set forth in section 510 occurred. Following the divorce, the couple resided together for eight months on a connubial basis. After the wife moved out, the husband petitioned the court to terminate his maintenance obligations pursuant to section 510(b) which provides for maintenance termination if the receiver "cohabits with another person on a resident, continuing, conjugal basis." *Antonich*, 148 Ill. App. 3d. at 578-79, 499 N.E.2d at 656-57 (citing ILL. REV. STAT. ch. 40 para. 510(b) (1985)).

139. *Id.* at 578, 499 N.E.2d 655-56.

140. *Id.* at 578, 499 N.E.2d at 656-57.

141. *Id.* at 578, 499 N.E.2d at 657.

142. *Id.* at 578, 499 N.E.2d at 656-57.

143. *Id.* at 587-79, 599 N.E.2d at 657.

144. 145 Ill. App. 3d 1013, 495 N.E.2d 1383 (5th Dist. 1986). In *Reeder*, the husband appealed the trial court's judgment denying his motion to discontinue maintenance payments. *Id.* at 1015, 495 N.E.2d at 1384. At the time of the divorce action, Robert Reeder was a forty-six-year-old employee of a coal company. Kathryn Reeder, forty-three-years-old, worked as a cook. Neither party had a post-high-school education. The couple was married for twenty-five years and had two children and two grandchildren. The trial court found that Robert's earning potential was in excess of thirty-seven thousand dollars per year. Kathryn, on the other hand, was employed at minimum wage. The trial court awarded Kathryn periodic maintenance payments.

Subsequently, the wife moved in with a male divorcee who lived with both his minor son and elderly mother. *Id.* at 1018-19, 495 N.E.2d at 1386. Kathryn lived in the basement while the other three lived upstairs. Kathryn paid a monthly stipend to live in the home. Moreover, she admitted engaging in sexual conduct with this man on a semi-regular basis, but firmly maintained that she always slept alone in the basement.

"cohabitating with another person."[145] The court stated that section 510(b) of the IMDMA does not aspire to control public morals. Rather, the purpose underlying section 510(b) is to cease maintenance payments when the receiving spouse enters into a "husband-wife" relationship, whether legally or in fact.[146] The burden of proving a de facto husband-wife relationship is on the spouse seeking the discontinuation of maintenance.[147] Additionally, the right to maintenance is not terminated simply because the recipient spouse resides with a member of the opposite sex.[148] Focusing on the independent aspects of Kathryn Reeder's life, the court concluded that there was adequate evidence supporting the view that Kathryn's need for support was not substantially affected by her living arrangement and, therefore, a de facto husband-wife relationship did not exist.[149] In *In re Marriage of Tucker*,[150] a separation agreement was incorporated into the dissolution judgment which provided that the husband would pay his ex-spouse maintenance in the amount of twelve hundred dollars per month until she died, remarried, or until he made the one hundred and twenty-first payment, whichever happened first.[151] The husband petitioned the court to terminate his maintenance obligations on the grounds that his ex-wife was "cohabitating with another person" in violation of section 510(b).[152] The trial court dismissed the action, holding that

145. For the content of section 510(b) see *supra* note 135.

146. *Reeder*, 145 Ill. App. 3d at 1017, 495 N.E.2d at 1385.

147. *Id.* The court further stated the existence of such a relationship is a factual question, and the trial court's decision will not be reversed unless contrary to the manifest weight of the evidence. *Id.* Evidence of fornication or sexual conduct between the recipient spouse and the individual with whom she is living is unnecessary to prove cohabitation on a connubial basis under section 510. *Id.* at 1017-18, 495 N.E.2d at 1385-96 (citing *In re* Marriage of Sappington, 106 Ill. 2d 456, 468, 478 N.E.2d 376, 381 (1985)).

148. *Reeder*, 145 Ill. App. 3d at 1018, 495 N.E.2d at 1386.

149. *Id.* at 1021, 495 N.E.2d at 1384. The court indicated that Kathryn and the man with whom she was living maintained separate bank accounts and held no property together, that Kathryn did not make payments toward his mortgage payments and that she reimbursed him for all long distance phone calls. Furthermore, Kathryn used her own utensils and did nearly all of her own cooking. Kathryn possessed her own car which was registered in her own name. Additionally, she did not participate in caring for the man's son or in household duties. Kathryn shopped alone for her own groceries and clothing. Finally, the court noted that there was no evidence that the couple traveled together or that the man contributed monetarily or otherwise to Mrs. Reeder. Taking these circumstances into account, the court ruled that although they may have decided the issue differently because it did not approve of the couple's living arrangement, they would not reverse the trial court's determination that the couple's situation did not constitute a de facto husband-wife relationship. *Id.* at 1021, 495 N.E.2d at 1388.

150. 148 Ill. App. 3d 1097, 500 N.E.2d. 578 (4th Dist. 1986).

151. *Id.* at 1098-99, 500 N.E.2d at 579.

152. *Id.* at 1099, 500 N.E.2d at 579. For content of section 510(b), see *supra* note 135.

the maintenance was in gross[153] and, thus, was not subject to the provisions in 510(b).[154]

The appellate court affirmed the trial court's decision on different grounds.[155] The court ruled that the issue was not whether the maintenance was in gross, but rather, whether the parties intended to have section 510(b) termination provisions apply to the dissolution agreement.[156] The court concluded that the stipulations of the agreement showed that the parties did not expect section 510(b) termination provisions to apply, and, therefore, the terms of the agreement specifically would be enforced.[157]

With the decision in *Tucker*, it appears clear that incorporated settlement agreements will prevail over statutory provisions, provided that the agreements are not against public policy. In deciding the above cases, the appellate courts have given practitioners practical guidance about drafting documents and have given parties practical guidance regarding the maintenance termination provisions of 510(b).

The *Antonich* and *Reeder* decisions make clear that Illinois courts will focus on the spouse's actual need for maintenance when reviewing cohabitation situations. Although parties to these situations may have feared a moralistic judicial approach, these decisions indicate that the economics of the circumstances will be the determinative factor.

B. The Disappearance of Permanent Maintenance in Illinois

The IMDMA sets forth the requirements for maintenance awards compelling the trial court to consider the time necessary to procure satisfactory training or education to empower the spouse seeking maintenance to attain suitable employment.[158] The legislative purpose behind maintenance is to enable the previously dependent spouse to become financially self-reliant.[159] The First and Fifth Districts issued two holdings denying the propriety of permanent maintenance without review. In *In re Marriage of Cal-*

153. " 'Maintenance in Gross'. . . [is] a nonmodifiable sum certain to be received by the former spouse regardless of changes in circumstances." *In re* Marriage of Freeman, 106 Ill. 2d 290, 298, 478 N.E.2d 326, 329 (1985).

154. *Tucker*, 148 Ill. App. 3d at 1098, 500 N.E.2d at 579.

155. *Id.* at 1100, 500 N.E.2d at 580.

156. *Id.*

157. *Id.*

158. ILL. REV. STAT. ch. 40, para. 504(b)(2) (1985). For text of 504(b)(2) *see infra* note 166.

159. *In re* Marriage of Heller, 153 Ill. App. 3d 224, 235, 505 N.E.2d 1294, 1301 (1st Dist. 1987).

laway,[160] the First District held that the IMDMA creates an affirmative obligation on the spouse seeking maintenance to pursue and accept appropriate employment.[161]

In *Callaway*, the parties were married for thirty years and had five children. The husband was forty-five-years-old and earned thirty thousand dollars per year as a business manager at a college in Chicago. The wife was forty-seven-years-old, never had worked outside the home, and had only an eighth grade education. The trial court awarded the wife unreviewable rehabilitative maintenance for five years. The lower court based its decision on the fact that the wife was only forty-seven-years-old, was in good health, and had failed to introduce evidence of her inability to perform work outside the home.[162] Furthermore, the court relied on evidence that the wife rejected employment offers commensurate with her education and experience.[163]

On appeal, the wife contended that the trial court should have awarded her permanent maintenance. The *Callaway* court rejected the wife's argument, and agreed with the trial court that lack of work experience and an eighth grade education were insufficient limitations to support her request for permanent maintenance.[164] The court determined that based on the wife's situation and background, the wife was entitled to an award of maintenance for five years subject to review.[165] The court stated, however, that if the wife failed to make a good faith attempt to secure appropriate employment or declined such employment, the payments should be terminated at the end of five years.[166]

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160. 150 Ill. App. 3d 712, 502 N.E.2d 366 (1st Dist. 1986).
161. *Id.* at 716, 502 N.E.2d at 369-70.
162. *Id.* at 715, 502 N.E.2d at 369.
163. *Id.* at 716, 502 N.E.2d at 369.
164. *Id.*
165. *Id.*
166. *Id.* at 716-17, 502 N.E.2d at 369-70. The court further noted that had testimony regarding an established standard of living been offered at trial a different result may have ensued. *Id.* In *In re* Marriage of Heller, 153 Ill. App. 3d 224, 505 N.E.2d 1294 (1st Dist. 1987) the Appellate Court for the First District held that although the award of maintenance was in accord with section 504 standards, the trial court abused its discretion by awarding permanent maintenance without review. Section 504 of the IMDMA provides as follows:

> (a) In a proceeding for dissolution of marriage, or legal separation or declaration of invalidity of marriage, or a proceeding following the dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse, only if it finds that the spouse seeking maintenance:
>
> (1) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs, and

As *Callaway* aptly demonstrates, the validity of any award of permanent maintenance without review is in serious doubt. Both courts noted the section 504 requirements, primarily focusing on the recipient's affirmative duty to seek suitable employment. Based on these decisions, the courts will seek evidence of absolute unemployability to sustain a permanent award. Mere subsistence employment (as appeared to be the case in *Callaway*) will be insufficient.

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(2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home, or

(3) is otherwise without sufficient income.

(b) The maintenance order shall be in such amounts and for such periods of time as the court deems just, made without regard to marital misconduct and may be in gross or for fixed or indefinite periods of time and the maintenance may be made from the income or property of the other spouse after consideration of all relevant factors including:

(1) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(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;

(4) the duration of the marriage;

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

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and

(7) the tax consequences of the property division upon the respective economic circumstances of the parties.

(c) The court may grant and enforce the payment of such money for equitable maintenance during the pendency of an appeal which is against the party receiving such equitable maintenance, as the court shall deem reasonable and proper.

(d) No maintenance shall accrue during the period in which a party is imprisoned for failure to comply with the court's order for payment of such maintenance.

ILL. REV. STAT. ch. 40, para. 504 (1985). *See also Heller*, 153 Ill. App. 3d at 235, 505 N.E.2d at 1301. Mr. and Mrs. Heller were married for approximately twenty-one years. *Id.* at 227, 505 N.E.2d at 1296. Floyd Heller was fifty-one years old and employed as an associate professor at a local Chicago hospital at the time of the dissolution proceedings. Carole Heller was forty-seven and possessed a Bachelor of Arts degree in elementary education, but had not worked for twenty years. In addition, she had taken several culinary classes during the marriage. At the time of the divorce proceedings, Carole was earning one hundred and five dollars per week through part-time work at a travel agency. The spouses marital property was valued at $886,927.00 and Carole's nonmarital assets totalled $109,136.00. The trial court awarded Carole, *inter alia*, permanent maintenance to terminate at her death.

The appellate court ruled that maintenance for five years subject to review was more appropriate than a permanent award without review. *Id.* The court reasoned that because a party seeking maintenance has the affirmative duty to seek suitable employment, the award should be reviewed in order to reappraise the dependent spouse's ability to become monetarily independent. *Id.*

C. *Modification of Maintenance Awards in Post-Judgment Proceedings*

In a case of first impression, the Illinois Appellate Court for the Fourth District held that when a spouse has not specifically waived or reserved any right to maintenance, it may be awarded pursuant to a post-decree motion.[167] In *In re Marriage of Popovich*, an oral agreement, which included property, visitation, and support provisions, was incorporated into the dissolution judgment. The agreement excluded any maintenance provision.[168] Three years later, the wife petitioned the court for permanent periodic maintenance. The husband moved to dismiss, contending that the trial court had no jurisdiction to award maintenance in a post-decree proceeding. The court disagreed and awarded the wife periodic maintenance in the amount of three hundred dollars per month.[169] The husband appealed, contending both that the trial court lacked jurisdiction, and that because the judgment order included no reservation of maintenance, the wife should be presumed to have waived this right.[170]

The appellate court initiated its analysis by reiterating the general rule that when a dissolution judgment is entered without a maintenance provision, the spouses may not subsequently solicit such an award.[171] The court further stated that an exception to this rule exists when a statute affords such a right.[172] An example of such a statutory exception is a dissolution judgment entered by a trial court that lacks personal jurisdiction over one or both of the spouses.[173] In determining whether the agreement was modifiable, the court relied on section 502(f),[174] which provides for automatic

167. *In re* Marriage of Popovich, 149 Ill. App. 3d 643, 500 N.E.2d 1109 (4th Dist. 1986).

168. *Id.* at 644, 500 N.E.2d at 1110. The only reference to maintenance was a single sentence by the wife's counsel stating that it was not an issue at the time because the wife was employed when the agreement was executed. *Id.* at 645, 500 N.E.2d at 1110.

169. *Id.* at 645, 500 N.E.2d at 1111.

170. *Id.* at 647, 500 N.E.2d at 1112.

171. *Id.* at 646, 300 N.E.2d at 1111.

172. *Id.* (citing ILL. REV. STAT. ch. 40, para. 504(a) (1985)). For content of 504(c) see *supra* note 166.

173. *Id.*

174. Section 502(f) of the IMDMA provides as follows:

> Except for terms concerning the support, custody, or visitation of children, the judgment may expressly preclude or limit modification of terms set forth in the judgment if the agreement so provides. Otherwise, terms of an agreement set forth in the judgment are automatically modified by modification of the judgment.

ILL. REV. STAT. ch. 40, para. 502(f) (1985).

modifications of judgments absent express provisions precluding such action.[175]

After determining the propriety of modification, the court addressed the primary issue of whether the wife waived her right to maintenance by not reserving the issue in the initial dissolution decree.[176] The court held that waiver is a voluntary abdication of a known right and will not be presumed without a clear, unambiguous, and conclusive act.[177] After determining that the wife did not commit any clear, unambiguous act, the court concluded the wife did not waive her right to maintenance and thus was entitled to petition the trial court for maintenance in a post-decree motion.[178]

The *Popovich* court further noted the trend in Illinois is to attempt to supplant ample property settlements in lieu of maintenance.[179] The *Popovich* court rejected this approach in the present case because the dissolution judgment was not clear and unequivocal on the issue of awarding property instead of maintenance.[180] Finally, the court held that the reserved jurisdiction approach applies only in cases in which maintenance awards are subject to re-evaluation.[181] In the present case, the trial court failed to award maintenance to the wife. Accordingly, the reserved jurisdiction approach was inapplicable. Therefore, absent a basis for reserved jurisdiction or waiver, the court upheld the trial court and ruled that the court initially vested with subject matter jurisdiction over the action is the proper forum for the post-judgment motion.[182]

D. The Rejection of "Maintenance in Gross"[183] Awards

In *In re Marriage of Smith*,[184] based on the facts of the case and available alternatives, the Illinois Appellate Court for the Third District held that the trial court abused its discretion by awarding permanent maintenance in gross.[185] In *Smith*, the trial court awarded the wife maintenance in gross of twelve hundred dollars per month for twelve years, and the husband appealed, arguing

175. *Popovich*, 149 Ill. App. 3d at 647, 500 N.E.2d at 1112 (citing ILL. REV. STAT. ch. 49, para. 502(f) (1985)).
176. *Id.*
177. *Id.*
178. *Id.* at 648, 500 N.E.2d at 1112.
179. *Id.* at 647-48, 500 N.E.2d at 1112.
180. *Id.*
181. *Id.* at 648, 500 N.E.2d 1112.
182. *Id.*
183. For a definition of "maintenance in gross" see *supra* note 153.
184. 150 Ill. App. 3d 34, 501 N.E.2d 1323 (3d Dist. 1986).
185. *Id.* at 36-37, 501 N.E.2d at 1324-25.

that the wife should have been awarded periodic maintenance.[186]

The *Smith* court ruled that maintenance in gross is appropriate when an award of periodic maintenance is inappropriate.[187] The *Smith* court concluded that appropriate circumstances did not exist to warrant the gross award.[188] The court stated that gross awards may be proper in cases in which the payor spouse is likely, in the future, to be unable to meet maintenance obligations. Unless such circumstances exist, the trial court should either award the standard form of periodic maintenance or, in the alternative, employ the reserved jurisdiction approach.[189] In dissent, Justice Barry alleged his colleagues "merely . . . substituted their judgment for that of the trial court in reversing the award."[190] Based on *Smith*, there is likely to be a reduction in gross awards because virtually all cases involve uncertainties about future predicaments of spouses.

VII. ATTORNEY'S FEES

In *In re Marriage of Kaplan*,[191] the parties were married for sixteen years and had one minor adopted son at the time of their divorce.[192] The wife was an unemployed travel agent with various health problems who previously earned one thousand dollars per month and whose sole income was the temporary maintenance award to her by the trial court.[193] The trial court ordered the husband to pay seventy-five percent of the wife's attorney's fees as well as those of his minor child and himself. The husband appealed.[194]

On appeal, the husband contended that because of his lack of resources, the trial court abused its discretion in ordering him to pay seventy-five percent of his ex-wife's attorney's fees.[195] The appellate court rejected the husband's argument and affirmed the trial

186. In *Smith*, the husband was a successful dentist facing a potential decline in his practice due to both health problems and the economic community in which he practiced. *Id.* at 36, 501 N.E.2d at 1324. The wife was a certified high-school teacher capable of securing appropriate employment.

187. *Id.* (citing Dmitroca v. Dmitroca, 79 Ill. App. 2d 220, 223 N.E.2d 545 (2d Dist. 1967)).

188. *Id.*

189. *Id.*

190. *Id.* at 37, 501 N.E.2d at 1325 (Barry, J. dissenting).

191. 149 Ill. App. 3d 23, 500 N.E.2d 612 (1st Dist. 1986).

192. *Id.* at 26, 500 N.E.2d at 614-15.

193. *Id.*

194. *Id.* at 28, 500 N.E.2d at 616.

195. *Id.* at 34, 500 N.E.2d at 620. There were several other issues appealed by the husband which are not presently discussed.

court's award of fees.[196] The court reasoned that although the party for whom legal services are performed has the primary obligation of payment,[197] if that party can demonstrate an inability to pay attorney's fees and an ability of the other spouse to do so, the trial court has the discretion to award such fees in the dissolution action.[198] In the present case, the wife's only income was the temporary maintenance award and her only substantial asset was the marital home. The appellate court refused to order her to sell the home because doing so would defeat the lower court's effort at equitable distribution of the marital assets.[199]

In *In re Marriage of Bashwiner*,[200] the Appellate Court for the First District in a consolidated appeal held that it is proper for a spouse to petition the trial court for attorney's fees after the dissolution judgment is entered but while ancillary issues such as a rule to show cause, property disposition, custody, removal, and petitions for injunctive relief are pending before the trial court.[201] In *Bashwiner*, the parties were involved in protracted litigation in which the wife petitioned the court for attorney's fees incurred in defending a motion to vacate and her defense of a temporary restraining order and preliminary injunction. In a post-judgment proceeding, the trial court awarded the wife attorney's fees. The husband contended that by awarding fees, the trial court erred for two reasons. First, the husband argued that the wife did not claim that the attorney's services rendered were reasonable. Additionally, the husband argued that attorney's fees may not be awarded for services rendered in opposition to a motion to a preliminary injunction.

The appellate court reversed the trial court's determination that it subsequently lacked jurisdiction to award attorney's fees because there were other matters relating to the case pending before the trial court.[202] The court held that although the wife could have sought prospective fees for her appeal before prosecuting the appeal, it was beneficial to await the appellate court's decision be-

196. *Id.* at 35, 500 N.E.2d at 620.

197. *Id.* at 34-35, 500 N.E.2d at 620. *See In re* Marriage of Jacobsen, 89 Ill. App. 3d 273, 276, 411 N.E.2d 947, 949 (1st Dist. 1980).

198. *Kaplan*, 149 Ill. App. 3d at 35, 500 N.E.2d at 620. *See In re* Marriage of Owen, 108 Ill. App. 3d 808, 814, 439 N.E.2d 1005, 1010 (1st Dist. 1982).

199. *Kaplan*, 149 Ill. App. 3d at 35, 500 N.E.2d at 620. *See* Kenly v. Kenly, 47 Ill. App. 3d 694, 497, 365 N.E.2d 379, 381 (1st Dist. 1977).

200. 155 Ill. App. 3d 531, 508 N.E.2d 419 (1st Dist. 1987).

201. *Id.* at 538, 508 N.E.2d at 423.

202. *Id.* at 536, 508 N.E.2d at 423. The pending issues included petitions for a rule to show cause and petitions for injunctive relief.

cause the wife then would know the precise amount of incurred fees.[203] The court explained that approaching the issue in this way avoids piecemeal litigation.[204] Thus, the appellate court remanded the cause to the trial court for further consideration. The court further upheld the trial court's award of attorney's fees to the wife for costs incurred in defending the temporary restraining order. The award properly matched the precise amount of damages suffered from the injunctive relief and was thus in accord with section 11-100 of the Code of Civil Procedure.[205]

In *In re Marriage of Baltzer*,[206] the Illinois Appellate Court for the Second District held that attorneys in divorce proceedings are considered "parties in interest" in an action for attorney's fees.[207] In *Baltzer*, the wife's former attorney filed a section 508(c)[208] petition for attorney's fees in Cook County although dissolution proceedings were still pending in DuPage County. The wife filed a motion in the dissolution proceeding in DuPage County for an order striking the fee action of the attorney, or alternatively, for an order requiring the attorney to seek fees in the pending divorce action. The lawyer specially appeared and moved to quash the wife's motion. The trial court denied the lawyer's motion to quash and directed the attorney to dismiss the separate action.[209]

On appeal, the attorney contended he was not a party to the dissolution action and thus was not subject to the jurisdiction of the DuPage County Court.[210] On appeal, the court considered whether the attorney is a real party in interest and thus barred from a separate action for attorney's fees while the divorce action was still pending.[211] The *Baltzer* court explained the purpose of section 508 of the IMDMA is to promote judicial economy by abolishing the necessity for counsel to prosecute a separate action against his client for the collection of fees.[212] The court stated fur-

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203. *Id.*
204. *Id.*
205. *Id.*
206. 150 Ill. App. 3d 890, 502 N.E.2d 459 (2d Dist. 1986).
207. *Id.* at 893, 502 N.E.2d at 462.
208. Section 508(c) of the IMDMA provides as follows:

> The court may order that the award of attorney's fees and costs hereunder shall be paid directly to the attorney, who may enforce such order in his name, or that they be paid to the relevant party. Judgment may be entered and enforcement thereof had accordingly.

ILL. REV. STAT. ch. 40, para. 508(c) (1985).
209. *Baltzer*, 150 Ill. App. 3d at 893, 502 N.E.2d at 461.
210. *Id.*
211. *Id.* at 893, 502 N.E.2d at 462.
212. *Id.* at 895, 502 N.E.2d at 462-63.

ther that efficient administration of justice bars one state court from disregarding pending actions in another state court.[213] Accordingly, the court ruled that an attorney's petition for fees is not a separate and distinct action from the divorce proceedings but, rather, a petition is a part of the original proceedings.

The appellate court held further that the first court to obtain jurisdiction over the divorce action maintains jurisdiction over attorney's fees to the exclusion of all other courts until thirty days after the entry of the final dissolution judgment.[214] The court concluded, therefore, that the former attorney was barred from bringing a separate action for fees in another court. Section 508, however, does not appear to require the attorney to litigate in the court that had original jurisdiction, nor would an argument to promote judicial economy appear to require litigation in that court. Because litigants will likely present this issue in the future, the answer to this question will be forthcoming.

VIII. POST DECREE

In *In re Marriage of Brust*,[215] the Illinois Appellate Court for the Fifth District held that the dissolution judgment that provided for payment by the parties of educational and related expenses not exceeding four years, permitted the son to pursue a wholly unrelated course of study after attaining a two-year associate's degree.[216] The trial court ordered, *inter alia*, the husband to pay two-thirds and the wife one-third of the child's tuition, books, fees, and reasonably necessary living expenses, including the cost of automobile expenses and upkeep for a period not exceeding four years.[217] The son initially obtained a two-year associate's degree in mining technology to which the wife contributed one-third of the incurred expenses.[218] Prior to graduating, the son applied to another school to pursue a two-year degree in heating and refrigeration.[219] In a post-decree motion, the husband petitioned the court for contribution

213. *Id.* at 895, 502 N.E.2d at 463.

214. *Id.* Furthermore, the original trial court has the authority to issue injunctions enjoining attorneys from proceeding in other courts. *Id.* Although the court decided that the initial trial court retains such jurisdiction over pending actions, it specifically stated it would not decide whether section 508 affords the exclusive relief for attorney's fees following the expiration of the trial court's jurisdiction. *Id.* at 896, 502 N.E.2d at 464.

215. 145 Ill. App. 3d 257, 495 N.E.2d 133 (5th Dist. 1986).

216. *Id.* at 261, 495 N.E.2d at 135.

217. *Id.* at 258, 495 N.E.2d at 133.

218. *Id.* at 259, 495 N.E.2d at 134.

219. *Id.*

from his ex-wife for one-third of their son's educational and related expenses for his first year of attending heating and refrigeration school after previously attaining an associate's degree in mining technology, which was financed by both parties. The wife refused to pay because she believed the son attained the degree required by the dissolution judgment which provided the wife was to pay one-third of all educational and related expenses that were "not to exceed four years of such schooling."[220] The trial court held that the mother fulfilled her obligation regarding payment of the child's educational expenses when the son earned his initial two-year associate degree.[221] The trial court treated the son's second degree in heating and refrigeration as a specialization not encompassed within the son's initial degree in mining technology.[222] Finally, the trial court concluded that the four-year term was not a grant; but rather was a limitation. The term was intended to be a cut-off date which required a continuous course of instruction and not a source of income for the child if the child was so inclined to view it that way.[223]

On appeal, the court addressed whether the dissolution judgment intended to provide the child with four years of undergraduate education or merely one degree, the duration of which was limited to four years.[224] The appellate court held that the parties intended to provide an undergraduate college education for their son.[225] The court analogized the situation to one in which a student at a four-year college changes his major midstream.[226] The court reasoned that because a student typically takes four years to complete his undergraduate studies, it is equitable in light of section 513 of the IMDMA[227] for the parties to contribute to the son's expenses incurred in his third year.[228]

Although the husband did not request contribution from his wife for the fourth year of the son's schooling, the court addressed

220. *Id.* at 258, 495 N.E.2d at 133.
221. *Id.* at 259, 495 N.E.2d at 134.
222. *Id.* In support of the son's second degree, the father introduced testimony of the supervisor and chief electrician of a coal company where the son resided and who had input in the hiring of prospective employees who stated that technical training might aid a prospective employee "since mining equipment is heated and air conditioned and in view of the economic difficulties of the coal industry and the competition for jobs there." *Id.* at 259, 495 N.E.2d at 134.
223. *Id.* at 260, 495 N.E.2d at 134.
224. *Id.* at 261, 495 N.E.2d at 135.
225. *Id.* at 262, 495 N.E.2d at 136.
226. *Id.* at 261, 495 N.E.2d at 135.
227. For the content of section 513, see *infra* note 230.
228. *Id.* at 261, 495 N.E.2d at 136.

this issue. The appellate court held that the income earned by the son is relevant and should be considered by the trial court.[229] The court reasoned that section 513[230] mandates that such a grant requires consideration of the son's financial resources.[231] The court specifically stated that portions of the son's income should be devoted to securing his education rather than enhancing his lifestyle.[232] The court further noted that the son was employed full time and attending an out-of-state school with higher tuition than a state school. Consequently, the appellate court remanded the cause to the trial court to calculate how much the son and parents could equitably be required to contribute to his educational expenses.[233]

IX. GRANDPARENTAL VISITATION

Grandparental visitation is governed by section 607(b)[234] of the

229. *Id.*

230. Section 513 of the IMDMA provides as follows:

> The court may award sums of money out of the property and income of either or both parties for the support of the child or children of the parties who have attained majority and are not otherwise emancipated only when such child is mentally or physically disabled; and the application therefor may be made before or after such child had attained majority age. The Court may also make such provision for the education and maintenance of the child or children whether of minor or majority age, out of the property and income of either both of its parents as equity may require, whether application is made therefor before or after such child has, or children have, attained majority age. In making such awards, the court shall consider all relevant factors which shall appear reasonable and necessary, including:
>
> (a) The financial resources of both parents.
>
> (b) The standard of living the child would have enjoyed had the marriage not been dissolved.
>
> (c) The financial resources of the child.

ILL. REV. STAT. ch. 40, para. 513 (1985).

231. *Brust*, 145 Ill. App. 3d at 264, 495 N.E.2d at 135-36.

232. *Id.* at 261, 495 N.E.2d at 136.

233. *Id.*

234. Section 607(b) of the IMDMA provides as follows:

> The court may grant reasonable visitation privileges to a grandparent or great-grandparent of any minor child upon the grandparents' or great-grandparents' petition to the court, with notice to the parties required to be notified under Section 601 of the 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

IMDMA. In *Bush v. Squellati*,[235] the Illinois Appellate Court for the Third District held that, pursuant to section 607(b), grandparental visitation is not authorized in cases in which the parental rights of both biological parents are terminated during the marriage by consent to adoption by other relatives.[236] In *Bush*, the child suffered from cerebral palsy and the natural parents authorized the child's adoption by the child's aunt and uncle. Subsequently, the parents were divorced and the child's maternal grandparents sued the grandmother's sister and brother-in-law for visitation privileges. The trial court granted the grandparents visitation privileges.[237]

On appeal, the court addressed whether the trial court acted within its authority in ordering grandparental visitation.[238] In reversing the trial court, the appellate court reasoned that permitting grandparental visitation under these circumstances could frustrate the legislature's intention of maximizing the pool of potential adoptive parents.[239] The court reasoned that the termination of all parental rights would be conducive toward establishing a stable family environment for the adoptive parents free from unnecessary intrusion.[240]

The dissent in *Bush* stated that the law itself could be read to either support or deny visitation in this situation, but that ultimately a policy decision was involved.[241] Certainly, the majority strictly construed the legislative intent of section 607(b). The majority also stated, however, that even if the grandparents' petition was in accord with the section 607(b) requirements, the court was not convinced that visitation would have been in the child's best interests.[242] This finding may seem harsh, leading some to agree with the dissent, and to ask whether public policy should favor visitation by grandparents in this situation.

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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.

ILL. REV. STAT. ch. 40, para. 607(b) (1985).

235. 154 Ill. App. 3d 727, 506 N.E.2d 972 (5th Dist. 1986).

236. *Id.* at 730, 506 N.E.2d at 974-75.

237. *Id.* at 728, 506 N.E.2d at 973.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 731, 506 N.E.2d at 975 (Heiple, J., dissenting).

242. *Id.*

X. DISSOLUTION

In *Brandon v. Caisse*,[243] the Illinois Appellate Court for the Second District considered whether before the entry of a dissolution judgment the death of a spouse abates a dissolution action. In *Brandon*, a formal written order was entered reciting as a fact that grounds for dissolution were proved. The trial on the various issues lasted four days. The wife died three days after the final arguments were presented. Subsequently, Mr. Brandon moved to dismiss on the grounds that the divorce proceedings abated upon the wife's death. The trial court denied the husband's motion because its previous finding that grounds existed would be construed as a "judgment" for purposes of 401(3).[244] The appellate court reversed and held that unless a dissolution judgment has been entered under section 401(3)[245] of the IMDMA, the death of the spouse abates a dissolution action,[246] regardless of whether the action is ripe for judgment.

In *In re Marriage of Zuidam*,[247] the appellate court held that the husband's purchase of a lottery ticket after the execution of a property agreement was not a circumstance that would render the agreement unconscionable[248] and require it to be set aside.[249] In *Zuidam*, the spouses negotiated a property settlement agreement. The trial court, before final judgment, ordered the agreement to be made part of the judgment and directed the parties and attorneys to sign the judgment. At that point, the parties had partially performed the agreement by dividing the jointly held bank accounts. Pursuant to the trial court's directions, the spouses signed and delivered the judgment, which included the property settlement agreement. Because the presiding judge was on vacation, he did

243. 145 Ill. App. 3d 1070, 496 N.E.2d 755 (2d Dist. 1986).

244. *Id.* at 1071, 496 N.E.2d at 755-56.

245. "The death of a party subsequent to *entry of a judgment for dissolution* but before judgment on reserved issues shall not abate the proceedings." ILL. REV. STAT. ch. 40, para. 401(2)(b) (1985) (emphasis added).

246. *Brandon*, 145 Ill. App. 3d at 1073, 496 N.E.2d at 756.

247. No. 86-2825, slip. op. (1st Dist. October 6, 1987).

248. The *Zuidam* court defined unconscionability as follows:

> The standard of unconscionability is used in commercial law, where its meaning includes protection against onesidedness, oppression, or unfair surprise . . . . If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court . . . . An agreement is not unconscionable where it has been negotiated for several months, both parties were represented by counsel, there was no allegation of fraud, and it was not sufficiently onesided.

Id. at 6.

249. *Id.* at 7-8.

not sign and enter the judgment on that date.[250]

Subsequently, the husband purchased an Illinois lottery ticket with his own cash. The husband won 2.1 million dollars. After learning about his winnings on the news on August 26, 1987, the wife filed an emergency motion to stay the entry of the dissolution judgment on August 27, 1987. The trial court denied the wife's motion and entered the dissolution judgment on August 28, 1987, incorporating the property agreement. The wife appealed this decision.[251]

The court, relying on section 502(b),[252] ruled that the agreements of parties to a divorce action are no longer reviewable with respect to maintenance and property disposition, as long as the terms of the agreement are not unconscionable.[253] The court held the terms not unconscionable, and upheld the property settlement.[254] The court noted that "but for" the judge's absence, the judgment would have been proper and correct in all respects.[255] The parties made a full disclosure of their respective assets prior to the execution of the agreement.[256] Further, the winning lottery ticket was not among the contingent assets in the agreement.[257] The court reasoned that had the agreement been set aside, the public policy of the IMDMA to favor properly negotiated property settlements would be frustrated; and further, an inundation of avoidable litigation could ensue.[258]

As the *Zuidam* decision makes clear, a trial court is without power to amend the terms of a settlement agreement, except those terms relating to children. Consequently, unless the agreement is unconscionable, the parties must abide by their own decisions as reflected in the agreement. The court could find no basis for holding the agreement unconscionable, in the face of free disclosure by the parties and the wife's stipulation that the agreement and judg-

250. *Id.* at 3.
251. *Id.*
252. Section 502(b) of the IMDMA provides as follows:

> The terms of the 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 agreement is unconscionable.

ILL. REV. STAT. ch. 40, para. 502(b) (1985).
253. *Zuidam*, slip. op. at 5-6.
254. *Id.* at 6.
255. *Id.* at 7.
256. *Id.*
257. *Id.*
258. *Id.* at 8.

ment would have been proper and valid had the trial judge not been on vacation.

Practitioners are now apprised that a windfall occurring before entry of the final judgment but following a hearing and a fully executed agreement with stipulations will not serve to set aside the agreement. A different result would likely have arisen, however, if there had been children involved.

XI. LEGISLATION

A. Child Custody-Modification

Public Act 85-746,[259] effective September 23, 1987, provides that a court shall not modify a prior child custody judgment unless it makes certain findings.[260] Prior to this change in the statute, such findings were required only after the expiration of two years after the date of the prior judgment. Other than this change, section 610 of the Illinois Marriage and Dissolution of Marriage Act remains the same.

B. Interspousal Torts

Public Act 85-625,[261] effective January 1, 1988, provides that a husband and wife may sue each other for torts committed during their marriage.[262] Prior to this enactment, one spouse was prohibited from suing the other spouse for torts committed during the marriage except for intentional torts in which one spouse caused physical harm to the other.

C. Support-Withholding Orders

Public Act 85-222,[263] effective August 23, 1987, provides for an expanded definition of income.[264] This amendment to the Public Aid Code now includes as income profit sharing payments, bonuses, vacation pay, insurance proceeds, and lottery prize awards.[265]

Public Act 85-221,[266] effective January 1, 1988, provides that an order for withholding with respect to support must direct a payor

259. 1987 Ill. Legis. Serv. 525 (West).
260. *Id.*
261. 1987 Ill. Legis. Serv. 35 (West).
262. *Id.*
263. 1987 Ill. Legis. Serv. 595 (West).
264. *Id.* at 596.
265. *Id.* at 265.
266. 1987 Ill. Legis. Serv. 558 (West).

to withhold an amount not less than twenty percent until the payment of any delinquency.[267] The Act also now requires that notice be sent if the payor is thirty days late in paying.[268] The same shall now apply to the Uniform Reciprocal Act.

XII. CONCLUSION

The previously discussed *Survey* period decisions leave family law practitioners with a better understanding of the current state of Illinois family law in some areas; and yet somewhat more confused in other areas. For example, the appellate courts, specifically the Third and Fourth Districts, are split on the propriety of agreements between ex-spouses that tie non-payment of maintenance to the forbearance of visitation rights. Furthermore, the First, Second, and Fifth District Appellate Courts have apparently agreed and have held that the independent consideration of goodwill is proper in valuing closely held and professional corporations in dissolution proceedings. Regarding maintenance, the appellate courts are apparently abolishing permanent awards without review. Additionally, the appellate courts appear to be eliminating gross awards absent extenuating circumstances. Finally, in a case of first impression, the Fourth District Appellate Court upheld the awarding of maintenance in a post-decree motion when the petitioning spouse neither waived nor reserved the right to maintenance. The upcoming *Survey* year probably will include decisions both solidifying the current state of the law and reconciling the conflicting appellate districts.

267. *Id.* at 559.
268. *Id.* at 560.